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Article

IN DEFENSE OF THE INJURED[1]: HOW TRAUMA-INFORMED CRIMINAL DEFENSE CAN REFORM SENTENCING

By Miriam S. Gohara[2]

[1] The title of this article is inspired by Dr. John Rich's adoption of psychiatrist Dr. Sandra Bloom's observation that many of the young African-American men that their medical practice in Philadelphia treats for physical and emotional effects of violence have been pathologized and punished, but never recognized as wounded and in need of healing. Doctors Rich and Bloom invite a reconsideration of these young men as being neither sick nor bad, but injured. *See* JOHN A. RICH, WRONG PLACE, WRONG TIME: TRAUMA AND VIOLENCE IN THE LIVES OF YOUNG BLACK MEN 66 (2009). Dr. Rich writes that regarding the young men as injured "does not relieve them of their responsibility [for their own perpetuation of violence]; we merely recognize all the poverty and loss and violence and hopelessness that made them see the world as they do. *It implies that all of us bear responsibility for understanding why they got injured and how to prevent it from happening again.*" *Id.* (emphasis added).

[2] Clinical Associate Professor of Law, Yale Law School. Many thanks to Taylor Henley for her substantial research assistance with this piece and to Jean-Paul Jacquet, Miriam Becker-Cohen, Kate Logue, Mark Birhanu, and Bertolain Elysee, for their research assistance as well. I am also indebted to my colleagues at Yale Law School who provided me with insightful feedback, especially Fiona Doherty, James Forman, Jr., Heather Gerken, Douglas Kysar, Tracey Meares, Jean Koh Peters, Claire Priest, Judith Resnik, Kate Stith, Michael Wishnie, and Gideon Yaffe.

I. INTRODUCTION

Justice O'Connor's oft-cited concurrence in *California v. Brown* declared that, "Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[3] That principle has guided the Supreme Court's holdings that hardships including poverty, neglect, and exposure to violence are centrally relevant to capital and juvenile life without parole sentencing. In those contexts, when the harshest sentences available to adults and children, respectively, are at stake, defense advocates have persuaded the Court that serious adversity in their clients' backgrounds differentiated them from those who deserved the ultimate penalties. In capital cases, the Court has therefore held that defense lawyers are constitutionally obligated to investigate such adversity.[4] Yet, the Court has never recognized a constitutional obligation of noncapital attorneys to investigate adult clients' backgrounds for the barest sentencing mitigation, even in cases where defendants face life without the possibility of parole.[5] This article presents reasons why noncapital defense lawyers should do just that and builds on my prior writing explaining why individualized mitigation sentencing should not be reserved for capital defendants.[6] First, the same moral obligation that the Supreme Court has recognized in its capital jurisprudence warrants sentences less than death for defendants who have suffered extreme lifetime adversity applies with equal force to noncapital defendants. Second, within our current sentencing framework, defense advocacy is the mechanism for bringing forth evidence supporting sentencing discounts, or leniency, for the societal injuries that defendants have experienced before they have victimized others. Third, in the years since the Court decided its seminal cases recognizing that serious, overwhelming adversity—trauma—is relevant to culpability, science has vindicated that intuition.

Yet, in the vast majority of criminal cases—the ones in which the death penalty or juvenile life without parole are not at stake—evidence of a defendant's exposure to trauma remains legally irrelevant. Trauma, of course, presents in many forms and may be triggered by many events. For this argument, the focus is primarily on the complex trauma that results from repeated exposure to or victimization by violence, often coupled with severe environmental deprivation associated with endemic poverty. As research on

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[3] 479 U.S. 538, 545 (1987). Notably, Justice O'Connor in no way limited her pronouncement to capital defendants and, in fact, recognized that this principle has "long been reflected in Anglo-American jurisprudence." *See* Penry v. Lynaugh, 492 U.S. 302, 319 (1989); Abdul-Kabir v. Quarterman, 550 U.S. 233, 251-52 (2007); *see also* Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48 (2010).

[4] *See* Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

[5] *See* Harmelin v. Michigan, 501 U.S. 956, 994-95 (1991).

[6] Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 44, 46-47, 65 (2013).

this kind of trauma now demonstrates, the disjuncture between capital and noncapital sentencing has become vanishingly defensible, particularly because the quality and extent of trauma in noncapital cases is often indistinguishable from that in capital or juvenile life without parole cases. The aim of this article is to operationalize an argument I pioneered that best practices in capital mitigation ought to be applied to noncapital sentencing. Specifically, this article proposes that defense lawyers need to create records in a breadth and depth of noncapital cases explaining why trauma is relevant to their clients' punishments so that courts will begin to change their approaches to sentencing.

Questions remain about whether, hypothetically, mitigation of a certain sort—in this inquiry, trauma—should result in a blanket discount when the vast majority of defendants may suffer that category of harms.[7] For example, if a lawyer can show that her client has suffered sexual abuse, should the sentencing court automatically deduct five years from his minimum sentence? If he has only been beaten, should the deduction be two years? I decline to prescribe this approach because moral responsibility ought to be evaluated in degrees.[8] Moreover, the particular relationships between lifetime adversities and human frailties and their impact on an individual will be infinitely varied. This is why a discount in punishment on account of various traumatic exposures must be individualized and account for the fact that severe deprivations impair defendants' moral capacities and abilities to abide by the law.[9]

This piece proposes immediate mechanisms, within existing sentencing regimes, for bringing to light the relevance and practical impacts of extreme adversity to defendants' actions and sentencing deserts. It also describes reasons why, in particular, people with multiple adversities that arise from unchecked social harms deserve sentencing leniency. Legislative and policy interventions could be a sweeping and welcome means of achieving the ends proposed here. However, if history is a guide, those interventions will most likely follow litigation records demonstrating the legitimacy and efficacy of

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[7] Relatedly, why not advocate an across-the-board discount instead of individualized consideration of mitigation? One reason is that individual circumstances may warrant varying degrees of leniency, even if advocacy succeeds in lowering baseline minimum sentences. In other words, even if legislation requires a five-year discount for sexual abuse, that might not fully account for the mitigating force of an individual defendant's history. In addition, depersonalized noncapital sentencing is the current norm, one that has fueled unprecedented incarceration rates. Robust mitigation presentations, as opposed to parole-style checklists identifying factors in a person's background, at a minimum provide a sentencer the opportunity to consider a nuanced explication of the interrelated factors shaping the defendant's behavior and why the mitigation is relevant to proportionate punishment. Finally, sentencing reforms hewed toward uniformity have not historically benefitted the disadvantaged, whose improved sentencing outcomes are a primary goal of the proposals here. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 266-67, 287 (1993); *see id.* n. 398 (citing sources); MICHAEL TONRY, SENTENCING FRAGMENTS 137 (2016); *see id.* at 153-54.

[8] *See* Emad H. Atiq & Erin L. Miller, *What Constitutes "Consideration" of Mitigating Evidence?*, 45-1 AM. J. CRIM. L. 167, 184 (2018).

[9] *See id.* at 21-22.

sentencing leniency on the basis of trauma.[10] The hard work of making that record remains ahead, and defense attorneys have the imperative to operationalize it. This article explains why.

A. Case Examples

Consider the cases of two of my clients. In the first client's capital case, his trial lawyer had a constitutional obligation to present evidence of his traumatic childhood but failed to do so, and an appellate court vacated the resulting death sentence on that basis. In the second client's noncapital case, the defense team had no constitutional obligation to present evidence of his traumatic background but nevertheless did so, securing a better outcome at their client's sentencing than the years of prison time for which he was eligible.

My first client was convicted of capital murder based on an offense he committed when he was nineteen years old. His father had brutalized him throughout his childhood, beginning when he was four. Among other inflictions, my client's father "whipped" him several times a week with both ends of a belt until the father was too exhausted to continue. He also routinely attacked my client's mother in front of him and his siblings, once forcing her onto all fours and threatening to decapitate her with a machete in front of their children. On another occasion, my client witnessed his father throw his two-year-old brother against a wall with such force that the toddler, whose infraction was ingesting his father's stash of marijuana, remained mute for several ensuing years.

The second client stood accused at sixteen of adult felony robbery of cell phones and cash from other teenagers. He had been removed at the age of one from his mentally ill and cognitively impaired mother's custody to that of his grandmother. Social service records showed that his grandmother's paramour raped him when he was a toddler. In later years, his grandmother was found guilty of educational neglect, and he was removed from her home, which commenced a period during which he moved through at least ten foster care placements.

He faced years of prison time for the robbery. Had he been represented, as most defendants are, by lawyers untrained to investigate trauma, my second

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[10] Innocence and racial profiling litigation, for example, have been the driving forces behind policy changes in those areas. *See, e.g.*, 34 U.S.C. § 40727 (West 2017), the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program (passed after high-profile DNA exoneration of Mr. Bloodsworth); FLA. STAT. ANN. §§ 961.01-961.07 (2008), passed in response to litigation by an exoneree and permitting compensation to the wrongfully convicted; Annie Cheng, *New Laws Reduce Wrongful Convictions and Address State Compensation*, USA TODAY (Jun. 27, 2017), https://www.usatoday.com/story/news/2017/06/27/new-laws-reduce-wrongful-convictions-and-address-state-compensation/428290001/; Benjamin Mueller, *New York Police Dept. Agrees to Curb Stop-and-Frisk Tactics*, N.Y. TIMES (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/nyregion/new-york-police-dept-stop-and-frisk.html?_r=0 (describing reform of NYPD stop-and-frisk police practices pursuant to a settlement of racial profiling litigation); *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html.

client would likely have been sentenced to prison without any exploration of the formative experiences fundamental to his life's trajectory. Thanks to his defense team, which included attorneys at an innovative public defender's office working with clinical law students, this client avoided a maximum term of seven years in prison when the court sentenced him to a twelve-month therapeutic program. The law students investigated his social history and uncovered the crucial records. They explained how the client's trauma and low cognition made him susceptible to dominant boys who goaded him into robbing others.[11] They thereby persuaded the court to grant him "youthful offender" status, ensuring that this offense would not mark him with a felony record. They also secured a non-prison sentence that offered him a chance at rehabilitation instead of incarceration. The defense team's work demonstrates how trauma-informed sentencing representation works effectively: they identified the sources of the client's trauma; they described how the traumatic exposure impacted the client's behavior; and they explained why his impaired behavior meant that he deserved more lenient punishment.

B. Why Defense Lawyers, Why Trauma?

In previous work, I have interrogated the puzzle of American sentencing practice and doctrine that insists on the relevance of social history in capital proceedings and yet permits its routine disregard in nearly all noncapital cases. Put another way, just as trauma mitigation has been instrumental in reducing the imposition of death sentences, introducing and explaining trauma mitigation ought to be instrumental in ameliorating noncapital sentences. I have considered and rejected justifications for this disparity, examined the professional and cultural practices that produced it, and proposed a path for noncapital defense lawyers to align their sentencing practices with those of capital defenders.[12] This article builds on the argument that defense lawyers ought to present evidence of their clients' social histories in sentencing proceedings, with a particular and more probative focus on the impact of trauma's relationship to behavior that diminishes blameworthiness. It deepens the exploration with examples, discusses why this is a critical moment to move past antiquated sentencing practices, and describes the social science behind trauma as a theory of mitigation.

Reasons to concentrate on the mitigating relevance of trauma are manifold. First, many people convicted of crime, including those convicted of the most violent offenses, have been exposed to trauma.[13] Forty percent of

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[11] *See* Ashley Loughan & Robert Perna, *Neurocognitive Impacts for Children of Poverty and Neglect*, AMERICAN PSYCHOLOGICAL ASSOCIATION (July 2012), https://apa.org/pi/families/resources/newsletter/2012/07/neurocognitive-impacts.aspx.

[12] *See, e.g.*, Gohara, *supra* note 6.

[13] *See, e.g.*, Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 930-31 (2008); *see id.* at 927; Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 573 (1995); James E. Reavis, *Adverse Childhood Experiences and Adult Criminality: How Long Must We Live before We Possess Our Own Lives?*, PERM. J., Vol. 17, No. 2, Spring 2013, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3662280/.

youths in the United States have been exposed to family violence by the time they reach adolescence. However, by some estimates, up to 75% of incarcerated men and women have experienced interpersonal violence, abuse, or childhood neglect.[14] Statistics show that prisoners report rates of victimization by prior abuse up to twice that of the general population, and justice-involved youth experience chronic trauma at rates triple those of youth in the general population.[15] Women are often criminalized for behavior correlated with their own sexual victimization.[16] Besides family violence, millions of people are exposed to community violence annually, which is also a well-known risk factor for future commission of violence and incarceration.[17]

Second, exposure to violence has been well documented to damage the very behavioral domains that are centrally relevant to an assessment of a person's blameworthiness.[18] This principle is firmly established in social science and child welfare circles and has been central to Supreme Court capital and juvenile jurisprudence. Yet, it has by and large eluded noncapital adult criminal defense practice, as though the adverse impacts of early lifetime exposure to violence vanish when a child reaches the age of eighteen.[19] To the contrary, social science establishes the enduring impact of trauma and provides practical underpinning to the theoretical consideration of why adversity should matter at sentencing. Capital and juvenile jurisprudence has established that certain penalties require an individualized consideration to establish whether those punishments are impermissible, or ought to be discounted, for people with certain characteristics.[20] Drawing on this

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[14] *See* Robert L. Listenbee, Jr., et al., REPORT OF THE ATTORNEY GENERAL'S TASKFORCE ON CHILDREN EXPOSED TO VIOLENCE 107 (2012), http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf; Laurie Whitten, *Addressing Trauma Among Incarcerated People, National Institute of Corrections*, NATIONAL INSTITUTE OF CORRECTIONS, http://community.nicic.gov/blogs/mentalhealth/archive/2012/10/05/addressing-trauma-among-incarcerated-people.aspx.

[15] *See* Whitten, *supra* note 14; Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 654 (2016); Listenbee, Jr., *supra* note 14, at 141 A poignant example of the excruciating toll that neighborhood gun violence takes on families can be found in a recent article describing a project in which parents of young people killed by firearms have compiled an online yearbook, akin to a school yearbook, with photos and stories describing their lost children. *See* Noah Remnick, *Yearbook Project Collects Stories of Children Killed in Shootings*, N.Y. TIMES (June 19, 2016), https://www.nytimes.com/2016/06/20/nyregion/yearbook-project-collects-stories-of-children-killed-in-shootings.html.

[16] *See* Rebecca Epstein & Thalia Gonzalez, *Gender and Trauma, Somatic Interventions for Girls in Juvenile Justice: Implications for Policy and Practice*, GEORGETOWN LAW CENTER ON POVERTY AND INEQUALITY 15 (2017), http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/gender-and-trauma.pdf; SUSAN BURTON & CARI LYNN, BECOMING MS. BURTON: FROM PRISON TO RECOVERY TO LEADING THE FIGHT FOR INCARCERATED WOMEN 46, 107 (2017) (citing sources).

[17] Listenbee, Jr., et al., *supra* note 14, at 141-42.

[18] *See* JAMES GARBARINO, ET AL., CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE 10 (1992).

[19] *See* Reavis, *supra* note 13, at 44-48; *see* JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 35 (2015) (reporting some survivors of homicide victims as describing their "worst spells of grief [taking place] two, or five, or twenty years after the murder").

[20] *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104 (1982); Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005); Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48 (2010).

principle, and as I describe in Section II, noncapital sentencing hearings should permit evidence that exposure to trauma is one of those characteristics. Philosophically, this is because trauma is often the result of conditions that flourish as a direct result of social policies that divest the persons harmed of influence over the framework within which they are being punished. Practically, it is because complex trauma impacts behavior in ways that the law already recognizes diminish sentencing liability.

In addition to examining theoretical questions, this article is prescriptive, because advocacy and a persuasive public record drive doctrinal and policy change. Certainly, judges and legislators should heed the strong link between traumatic victimization and criminal offending. However, until defense lawyers, the actors in the justice system with the ethical imperative to argue for leniency, present convincing evidence, jurists and lawmakers are likely to remain uninformed about the myriad practical ways in which trauma influences behavior relevant to culpability. Defense lawyers must advance the arguments, including moral ones, necessary to correct the misalignment that permits courts to view trauma as centrally relevant to capital and juvenile life without parole sentencing but irrelevant to all other punishment.[21] Defense lawyers who provide trauma-informed representation will accomplish additional sentencing goals. They will present courts with a basis for proportionate sentences as well as penalties that will enhance public safety by addressing the root causes of serious crime.[22]

C. Additional Tenets

Two additional tenets of my argument bear mentioning. The first tenet is that mitigation is never an excuse for crime. Mitigation is sentencing information that explains a person's life in context before he is punished. Nothing in the call for increased awareness of trauma's salience in mitigation negates the fact that in some cases, long prison sentences are going to be appropriate penalties. Another concern is that emphasis on defendants' damaged backgrounds might be an attempt to diminish or distract from the very real harms they have caused to victims of their criminal offenses.[23] This

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[21] *See* TONRY, *supra* note 7, at 208; *see also* Kate Stith & Jose Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1252 (1997) ("We take as an established truth of our constitutional order that the criminal justice system exists not only to protect society in a reasonably efficient and humane way, but also to defend, affirm, and, when necessary, clarify the moral principles embodied in our laws.").

[22] *See* ALLIANCE FOR SAFETY & JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF CRIME VICTIMS' VIEWS ON SAFETY AND JUSTICE 21, 28 (2016) (reporting that 52% of over 800 crime victims surveyed believe that prison makes people more likely to commit crimes and prefer, by a margin of seven-to-one, investment in social services and programs that prevent crime).

[23] Another concern is that more individualized sentencing will encourage the proliferation of victim impact statements at routine sentencings. However, even absent robust mitigation presentations, victims are permitted and even encouraged to make impact statements in noncapital cases. They do so daily in state and federal courts around the country. Douglas E. Beloo, *Constitutional Implications of Crime Victims As Participants*, 88 CORNELL L. REV. 282, 286, 299 (2003); Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 615 (2009); Kevin T. Wolff & Monica K. Miller, *Victim and Execution Impact Statements What Judges Should Know About Case Law and Psychological Research?*, 92 JUDICATURE 148, 150 (2009).

article suggests the opposite: explaining how defendants' own victimization has influenced their behavior will provide context that may be illuminating to some crime victims. It will also interrupt the cycle of violence by pointing to the need for meaningful treatment to prevent traumatized defendants from harming again. In fact, as described later in the article, victims' advocacy groups themselves are beginning to propose treatment-based sentencing alternatives to prison.

However, the argument for presenting trauma history in even the most difficult cases is twofold. It is about making sure sentencers view defendants' actions in context of their own victimization, to the extent that that is relevant in any given case. Of course, the fact of a defendant's own abuse history is not alone mitigating, and it is his or her advocate's job to unearth and describe the mitigating behavioral impact of the defendant's victimization. Presenting a client's trauma history and explaining its salience is also about uncovering why people committed terrible offenses, in an effort to provide them with meaningful help while they are incapacitated so that when they are released they are better, not worse off, than when they went into prison. In this vein, and as I explain in later sections, rehabilitation of injured people is essential to public safety.

The first aim fits squarely within the longstanding principles of American criminal jurisprudence. One such principle is that moral retributive punishment must be proportionate. A second is that proportionality requires an accounting of both the circumstances of the offense and the culpability of the offender.[24] Proportionate retribution applies to trauma-informed sentencing because trauma in the lives of many defendants results from circumstances intimately tied to economic and social deprivations that raise profound questions about the moral obligations of our social compact with the most vulnerable.[25] More tangibly, exposure to trauma impacts defendants' behavior in ways relevant to their blameworthiness. Trauma conditions responses that impair defendants' decision-making and judgment, and thereby diminishes their culpability. Another aim of trauma-informed representation is identifying the root causes of criminogenic behavior in order to provide people with ameliorative treatment. This fits within the rehabilitative ideal of

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[24] *See* Stith & Cabranes, *supra* note 21, at 78-79; Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 73 (2005); *see also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF THE LAW 25 (1968); Lockyer v. Andrade, 538 U.S. 63, 71 (2003) (citing Solem v. Helm, 463 U.S. 277 (1983) and Harmelin v. Michigan, 501 U.S. 957 (1991)); *see id.* at 72 ("A gross disproportionality principle is applicable to a term of years.").

[25] For example, quality educational opportunities and access to the political process are both essential to exerting control over one's community and environment. Yet, throughout the United States, pockets of multilayered disenfranchisement persist and deprive their residents of basic social entitlements crucial to living a minimally successful life. *See, e.g.*, Nikole Hannah-Jones, *The Problem We All Live With*, THIS AMERICAN LIFE (Jul. 31, 2015), https://www.thisamericanlife.org/radio-archives/episode/562/the-problem-we-all-live-with (describing the recalcitrance of school segregation in Missouri); Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 18 (Univ. Miami Legal Studies Research Paper No. 17-16, 2017), https://ssrn.com/abstract=2962041) (describing interlocking banking and federal housing policies that shut African Americans out of prosperous residential housing and skilled labor markets); David Dante Troutt, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality and Law*, 5, 6, http://ssrn.com/abstract=2948001.

punishment and also enhances public safety. One challenge to my proposal, though, is that the retributive and rehabilitative penal goals may be in tension with each other.[26] For example, the more damaged a person is by trauma, the less culpable he may be under retributive theory (if his advocate is able to explain mitigating behavioral consequences of his trauma). On the other hand, the more traumatized the individual is, the less amenable to treatment a judge might perceive him to be under rehabilitative theory. Even severely traumatized people benefit substantially from treatment.[27] However, defense lawyers delivering trauma-informed representation may therefore find reconciling the two strategies in a single representation challenging.

At the same time, the threshold investigation of trauma is necessary under any valid theory of punishment, as even incapacitation requires proportionality for its just implementation.[28] However, without meaningful defense investigation and advocacy, no one in the justice system will learn the degree to which trauma is mitigating and relevant to imposition of individual penalties. In addition, as a utilitarian matter, justice systems should direct as many resources as possible to minimizing the risk that punishment will damage a defendant and the risk that he will reoffend after serving his sentence. One scholar has suggested that if proportionate retributive punishment of a person with diminished capacity to obey the law is insufficient to protect public safety, then this creates incentive for policymakers to allocate resources toward mental health programs or other noncriminal alternatives that meet both goals.[29]

A second major tenet of my argument is that urging defense lawyers to investigate trauma by no means requires throwing open prison doors. Rather, it reminds defense attorneys of their existing professional obligations to look for and present any information likely to obtain a favorable outcome at their clients' sentencings and highlights trauma as a fruitful source of mitigation. It follows that as advocates adopt trauma-informed practices, courts will consider trauma's salience to criminal behavior. They may then begin to view routine criminal offenses in new light. That change of perspective may in turn lead judges to seek additional and varied sentencing options for traumatized people, many of whom may never have had access to mental health services. After all, if traumatized defendants are left untreated, they may pose a greater threat to public safety than if they are provided meaningful therapeutic interventions. Accordingly, as defense lawyers routinize trauma-informed sentencing practices, individual defendants, their families, their neighborhoods, and the communities we mutually inhabit will reap the benefits of more just punishment and safer streets.

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[26] *See* Frase, *supra* note 24, at 75-76.

[27] *See, e.g.*, CHRISTINE A. COURTOIS & JULIAN D. FORD, TREATMENT OF COMPLEX TRAUMA: A SEQUENCED, RELATIONSHIP-BASED APPROACH Part II (2013).

[28] *See* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 59-62 (1974) (discussing parsimony in prison sentences).

[29] *See* Frase, *supra* note 24, at 81.

D. Why Now?

The current political turning point surrounding punishment is ripe for trauma-informed defense.[30] In fact, today's bipartisan reckoning aimed at correcting America's decades-long over-reliance on incarceration will remain inadequate at best, or completely ineffective at worst, unless reformers come to terms with the principal causes of violent crime.[31] One factor to consider is that people who are victims of or witnesses to physical harm themselves are at far greater risk of harming others (than are those without such exposure).[32] Relentless focus on non-violent drug offenses distracts from the violent-crime sentencing that fuels mass incarceration.[33] Further, no serious effort to reverse decades of over-punishment will succeed until resources are directed to treating the factors underlying the household and community violence that destroys so many families and neighborhoods. Similarly, reversing overreliance on incarceration will require establishing means of treatment and support for traumatized people, even after—perhaps especially when they are implicated in crime themselves.[34]

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[30] *See* TONRY, *supra* note 7, at vii; Matt Ford, *Can Bipartisanship End Mass Incarceration?*, THE ATLANTIC (Feb. 25, 2015), https://www.theatlantic.com/politics/archive/2015/02/can-bipartisanship-end-mass-incarceration/386012/.

[31] Even though the United States Attorney General has announced a commitment to cracking down on violent crime, state sentencing reform efforts continue their momentum. *See* Laura Jarrett, *Jeff Sessions Pledges Crackdown on Violent Crime*, CNN (Feb. 28, 2017) http://www.cnn.com/2017/02/28/politics/jeff-sessions-violent-crime-attorney-general/index.html; Richard A. Oppel Jr., *States Trim Penalties and Prison Rolls, Even as Sessions Gets Tough*, N.Y. TIMES (May 18, 2017), https://www.nytimes.com/2017/05/18/us/states-prisons-crime-sentences-jeff-sessions.html?_r=1; *see also Louisiana's Big Step on Justice Reform*, N.Y. TIMES (July 19, 2017), https://www.nytimes.com/2017/07/19/opinion/louisiana-justice-prison-reform.html (describing Louisiana's criminal justice reform legislation as a rebuke of Attorney General Sessions's tough-on-crime approach).

[32] *See* Ford, *supra* note 30; TONRY, *supra* note 7, at vii; Reavis, *supra* note 13, at 44-48; Elizabeth Gudrais, *The Prison Problem*, HARVARD MAGAZINE (March-April 2013), http://harvardmagazine.com/2013/03/the-prison-problem; *see also* BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA 170 (2014) (noting that seventy percent of California prisoners spent time in foster care as children).

[33] *See* E. Ann Carson, *Prisoners in 2014*, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS 1 (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf ("Violent offenders made up 54% of the state male prison population at yearend 2013[]"); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 46-49 (2012); TONRY, *supra* note 7, at 206; JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 3, 5-6 (2017) ("In reality, only about 16 percent of state prisoners are serving time on drug charges—and very few of them, perhaps only around 5 or 6 percent of that group, are both low level and nonviolent. At the same time, more than half of all people in state prisons have been convicted of a violent crime. A strategy based on decriminalizing drugs will thus disappoint—and disappoint significantly. Yet we see little to no efforts to reform the treatment of people convicted of violent crimes."); *see also id.* at 11-12 ("[A]lmost all the people who actually serve long sentences have been convicted of serious violent crimes. To make significant cuts to state prisons, states need to be willing to move past reforms aimed at the minor offender and focus much more on the (far more politically tricky) people convicted of violent offenses.").

[34] *cf.* THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, REMARKS BY THE PRESIDENT AT THE NAACP CONFERENCE, July 14, 2015 (noting the human and fiscal cost of America's high incarceration rate and describing bipartisan efforts to reduce prison populations in state and federal prisons, yet asserting that violent criminals belong behind bars, even though "they may have had terrible things happen to them in their lives").

For the first time in a generation, reconsiderations of punishment invite changes in the sentencing habits that have driven prison growth. When punishment accounts for trauma, the justice system will have a sound basis upon which to fashion penalties that are more proportionate, in that they heed Justice O'Connor's long-recognized principle. Penalties will also be more effective insofar as they meet the treatment needs of traumatized people to enhance their chances of abstaining from future crime.

Skilled defense work can build this foundation by prying open a window into defendants' adverse life circumstances and highlighting interventions that both prevent harms from recurring for any individual and stop him from revisiting them on others in his community.[35] Defense attorneys need to be at the vanguard of encouraging that redirection of resources by bringing to light in noncapital cases the relevance of their clients' injuries to their criminal involvement.[36] Over time, this work has the power to illuminate roots of serious crime and justify a new punishment paradigm that privileges healing and treatment in order to break the cycle of harm.

This article proceeds in six more parts: first, a review of a number of sources of trauma as well as basic social science establishing how trauma impacts behavior that is centrally salient to culpability; second, a description of policy and doctrinal developments pertaining to the consideration of trauma in noncapital cases; third, an explanation of defense lawyers' professional obligations to investigate and explain the import of trauma in their clients' lives; fourth, a practical primer to trauma-informed defense work; fifth, a description of capital and juvenile life without parole precedent on which defense attorneys should draw in fashioning routine trauma-informed practices; and sixth, a conclusion discussing resources, consequences, and the future of punishment.

II. WHY TRAUMA MATTERS

Constitutional precedent, discussed in later sections, requires that juries or judges consider exposure to violence, childhood abuse and neglect, and even combat trauma in capital and certain juvenile sentencing proceedings. This mandate turns out to be not simply a charitable, Dickensian notion but is empirically well-founded.[37] Social and behavioral science provide sound bases for deepening and expanding consideration of trauma in determinations of punishment.[38] For example, in considering just sentencing of youth, the Supreme Court recognized in *Miller v. Alabama* that "immaturity, impetuosity, and failure to appreciate risks and consequences" are all

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[35] *See* RICH, *supra* note 1, at 200 (endorsing an approach to trauma treatment that addresses the underlying causes of entrenched social problems).

[36] *See* TONRY, *supra* note 7, at 202.

[37] *See* Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 82 (2012).

[38] *See* Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 857 (2008); *see* Buckingham, *supra* note 15, at 683.

"incompetencies" that warrant individualized punishment.[39] The maturation pattern of the brain, a factor the Supreme Court considered carefully in deciding the juvenile life without parole and capital cases, continues into young adulthood.[40] Therefore, advocates seeking to relate the reasoning of *Miller* and *Graham* to young adult clients who exhibit trauma-related impairments may have an avenue to do so. They might argue that, to the extent that immaturity and prospects for rehabilitation matter to proportionate sentencing, which they plainly do in the Supreme Court's juvenile cases, they should also matter to the sentencing of young adults whose exposure to trauma has impaired their behavior akin to the neurological immaturity central to the Court's reasoning in *Miller* and *Graham*.[41]

Moreover, as discussed below, traumatic experiences alter neurodevelopment.[42] Science shows that many traumatized adults exhibit an array of the very same incompetencies *Miller* enumerated, a fact implicit in capital cases.[43] However, noncapital prisoners have also been exposed to trauma at high rates. For example, in one study, 56% of incarcerated men reported experiencing childhood physical trauma and one-quarter reported being abandoned in childhood.[44] This is no coincidence; decades of scientific research suggest that the effects of trauma can offer persuasive explanations for behavior that brings people into contact with the law.[45]

Finally, a number of philosophical arguments may justify why trauma should mitigate punishment.[46] My arguments are principally pragmatic and empirical. They hinge on the regard we owe to the least advantaged among us, whose deprivations and disenfranchisement arise from—and exacerbate—

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[39] 132 S. Ct. 2455, 2468 (2012). Individuals of course experience the effects of traumatic exposure differently, and many are resilient or fortunate enough to have protective caregivers, community institutions, or resources that help counterbalance trauma's harms. Nevertheless, these symptoms are well-documented and common responses to traumatic stress that warrant consideration when a person is being criminally punished.

[40] Miller v. Alabama, 132 S. Ct. 2455, 2464-65 (2012) (citing Graham v. Florida, 560 U.S. 48, 68 (2010) and Roper v. Simmons, 543 U.S. 551, 569-70 (2005)); *see also* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, ANN. REV. CLIN. PSYCHOL. 5:43-73, 70 (2009).

[41] *Miller*, 132 S. Ct. at 2465-66.

[42] *See* Terrie E. Moffitt, *Childhood Exposure to Violence and Lifelong Health: Clinical Intervention Science and Stress Biology Research Join Forces*, DEVELOPMENT AND PSYCHOPATHY: A VISION REALIZED, Vol. 25, Issue 4, Pt. 2, 1619-1634, Fall 2013, *available at* https://www.cambridge.org/core/journals/development-and-psychopathology/article/div-classtitlechildhood-exposure-to-violence-and-lifelong-health-clinical-intervention-science-and-stress-biology-research-join-forcesdiv/442B69091A66564F2E2A083111 2388B8.

[43] *See* Wayland, *supra* note 13, at 927 ("There is an enormous body of literature from multiple fields—epidemiology, psychology, psychiatry, developmental psychopathology, and neuroscience—that clarifies the process by which exposure to psychological trauma leads to a host of devastating psychological and behavioral consequences—including violence—through multiple common pathways.").

[44] *See* Nancy Wolff & Jing Shi, *Childhood and Adult Trauma Experiences of Incarcerated Persons and Their Relationship to Adult Behavioral Health Problems and Treatment*, INT. J. ENVIRON. RES. MENTAL HEALTH, 1909 (May 2012), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3386595/.

[45] Haney, *supra* note 38, at 881.

[46] *See, e.g.*, GARY WATSON, RESPONSIBILITY AND THE LIMITS OF EVIL: VARIATIONS ON A STRAWSONIAN THEME, RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY (Ferdinand Schoeman ed., 1987), *reprinted in* GARY WATSON, AGENCY AND ANSWERABILITY: SELECTED ESSAYS (2004).

the harms described here.[47] They are impoverished and, by design, deprived of basic educational and social services essential to providing the means to shape their circumstances and the legal order governing their lives.[48] Yet the law punishes them for behavior explicable by, indeed arising from, their wretched social conditions.[49] This article's aim is to help expand the lens of culpability by explaining trauma's mitigating force. Effective trauma-informed defense will locate a client's wrongdoing within the social context that harmed him, failed to protect him, and left him with little political or legal recourse over his punishment. It will also make a record demonstrating why a society that fails to afford its constituents basic protection and necessities for a minimally decent life loses moral authority to impose maximum punishment.[50]

A. A Brief History of Traumatology

"Trauma" derives from the Greek for "wound" and is the emotional state that results from experiencing a threat to life or physical wellbeing that overwhelms an individual's ability to cope. Trauma may also result from witnessing, or becoming aware of, an event or events that involve serious threat to others.[51] As described below, trauma sculpts neurology in ways that impact behavior. Many traumatized people cycle between "fight or flight" responses and numbing or shutting down when overwhelmed by stimuli. Psychological symptoms of trauma also include overreactions to perceived threats, anxiety, depression, emotional detachment, and even heightened risk of psychosis.[52]

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[47] For many, disenfranchisement arises directly from criminal justice involvement: 5.8 million Americans and one in thirteen African Americans are barred from voting because of a felony conviction. Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT (2016), http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.

[48] *See, e.g.*, Hannah-Jones, *supra* note 25; Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014) (detailing origins of redlining policies that defined and perpetuated racial and socioeconomic residential segregation), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/; GIDEON YAFFE, THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY (forthcoming, Oxford University Press); Troutt, *supra* note 25, at 63. An empirical study has found that exposure to violent crime during adolescence diminishes participation in political organizations, social capital essential to realization of political, economic, and social goals. *See* Ugo Troiano, *Does Experiencing Violent Crimes Matter for Social Capital and Political Behavior?* 9-11 (Dec. 31, 2017) (unpublished manuscript), https://ssrn.com/abstract=3094946.

[49] *See* Troutt, *supra* note 25, at 11 (describing how poverty elevates the risk of childhood exposure to events like sexual abuse or death of a loved one and how lack of access to therapeutic services means fewer resources to cope with post-traumatic behavioral consequences).

[50] *See* Atiq & Miller, *supra* note 8, at 180 (citing Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. VALUE INQUIRY 391, 393 (2009)).

[51] *See* THE NATIONAL CHILD TRAUMATIC STRESS NETWORK, TRAUMA IN THE LIVES OF GANG-INVOLVED YOUTH: TIPS FOR VOLUNTEERS AND COMMUNITY ORGANIZATIONS 2 (2009); Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 364, n.12 (2016) (citing *Trauma*, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/topics/trauma).

[52] *See Review: Role of Childhood Trauma in Increasing Psychosis Risk*, NEWS MEDICAL LIFE SCIENCES (May 30, 2017), http://www.news-medical.net/news/20170530/Review-Role-of-childhood-trauma-in-increasing-psychosis-risk.aspx. There is some debate whether low cognition in children exposed to extreme adversity is a symptom of trauma, or a risk factor. *Cf.* Michelle Bosquet Enlow, et al., *Interpersonal Trauma Exposure and Cognitive Development in Children to Age 8 Years: A Longitudinal Study*, J. EPIDEMIOLOGICAL COMMUNITY HEALTH 1008 (2012),

In the words of Dr. Bessel Van Der Kolk, trauma is not an event limited to a person's past. Rather, it is the imprint that an overwhelming adverse experience leaves on one's mind, brain, and body, and it results in tangible impairments in how people manage and survive daily life.[53]

Some of the earliest scholars of psychiatry and neurology recognized that trauma is at the root of a great deal of emotional disturbance and may cause persistent mental pathology.[54] During World War I, physicians began attributing unusual psychological symptoms appearing among a number of British soldiers to "shell shock" resulting from their exposure to combat violence. The medical treatment of veterans exhibiting symptoms of what psychiatrists came to call Post-Traumatic Stress Disorder (PTSD) continued through the Second World War, but by and large the study of trauma remained dormant thereafter until physicians began treating veterans returning from the Vietnam War, which occasioned something of a renaissance in the awareness and study of trauma.[55] During the 1980s and 1990s, scientific and popular self-help literature further expanded on the understanding of trauma in the contexts of sexual assault, rape, and domestic violence.

In the 1990s, medical doctors Vincent Felitti and Robert Anda conducted a groundbreaking study of the lifetime impacts of trauma. The Adverse Childhood Experiences (ACE) study compiled data on the effects of childhood exposure to a range of adverse events on 17,421 HMO patients. Doctors Felitti and Anda presented the patients with ten questions about whether they had experienced enumerated ACEs, including verbal and physical maltreatment, sexual contact with an adult, witnessing violence against their mothers, and having parents addicted to drugs or alcohol. Each affirmative answer was worth a point, and each participant would be assigned an ACE score of zero to ten, based on her responses.[56] Their results showed that of the two-thirds of respondents who reported an ACE, 87 percent scored two or more. The researchers also noticed a "dose response," meaning that the more ACEs a patient reported, the greater the toll that persisted into the patient's adult life.[57] That damage included employment difficulties, chronic depression, suicide attempts, addiction, smoking, obesity, unintended pregnancies, and other health problems in rates that increased substantially in

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http://jech.bmj.com/content/66/11/1005.full.pdf+html; Andrea Danese, et al. *The Origins of Cognitive Deficits in Victimized Children: Implications for Neuroscientists and Clinicians*, 174 AM. J. PSYCHIATRY 349 (2017) (concluding that low cognition is a risk factor for victimization rather than a result of traumatic exposure).

[53] *See* VAN DER KOLK, *supra* note 32, at 21.

[54] For a comprehensive history of traumatology, *see id.* at 145-49, 179, 183-91.

[55] *See* Jeffrey Lewis Wicand, Jr., *Continuing Combat at Home: How Judges and Attorneys Can Improve Their Handling of Combat Veterans With PTSD In Criminal Courts*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 227, 233-34 (2012).

[56] *The Ace Score*, ADVERSE CHILDHOOD EXPERIENCES STUDY, http://acestudy.org/the-ace-score.html.

[57] About Behavioral Risk Factor Surveillance System ACE Data, Centers for Disease Control and Prevention (last visited Feb. 5, 2018), https://www.cdc.gov/violenceprevention/acestudy/ace_brfss.html; V. Felitti, et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED., 245-58 (1998).

correlation to the patients' ACE scores. Moreover, among the survey's respondents, who were "mostly white, middle class, middle aged, well educated, and financially secure enough to have good medical insurance," only one-third reported zero ACEs, leading Dr. Anda to conclude that child maltreatment is "the gravest and most costly public health issue" in the United States.[58]

Since the 1990s, advances in neuroscience have allowed trauma researchers to learn through neuroimaging that overwhelming adversity alters the physiology of the brain. As described more fully below, trauma fundamentally changes neurobiology, causing psychological symptoms and social maladaptations.[59]

Of important note, the effects of trauma are by no means limited to PTSD. In fact, exclusive focus on this diagnosis will miss other profound effects of trauma on people whose symptoms, though debilitating, may fall short of the disorder's clinical definition.[60] Complex trauma, for example, is the developmental consequence and emotional dysregulation resulting from childhood exposure to multiple or prolonged traumatic events.[61] For this reason, this article discusses the significance of trauma symptoms and associated behavioral effects rather than focusing on PTSD as a requirement of sentencing mitigation.

The next section details the compound injuries that often afflict criminal defendants, especially people living in depleted communities. The injuries they survive in their homes and in the public spaces in which they forge their lives enhance their risk of breaking the law.[62]

B. Geneses of Trauma

The central concern of this article is the trauma resulting from repeated exposure to violence. For traumatized youth, the idea of traditionally safe havens at home, school, and in their neighborhoods is destroyed. Instead, the impulse to survive endemic violence dictates nearly every aspect of their lives.[63] Scientific evidence such as the ACE study demonstrates that adults who survive early lifetime brutality remain yoked to their formative experiences. After all, their early years are ones in which "the family and home environment . . . from which [they] cannot usually extricate

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[58] VAN DER KOLK, *supra* note 32, at 147, 150.

[59] *See* Terrie E. Moffitt, *Childhood Exposure to Violence and Lifelong Health: Clinical Intervention Science and Stress Biology Research Join Forces*, 25 DEV. & PSYCHOPATHY: A VISION REALIZED, 1619-1634 (2013), *available at* https://www.cambridge.org/core/journals/development-and-psychopathology/article/div-classtitlechildhood-exposure-to-violence-and-lifelong-health-clinical-intervention-science-and-stress-biology-research-join-forcesdiv/442B69091A66564F2E2A0831112388B8.

[60] *See* COURTOIS & FORD, *supra* note 27, at ix.

[61] *Types of Traumatic Stress*, NAT'L CHILDHOOD TRAUMATIC STRESS NETWORK, http://www.nctsn.org/trauma-types.

[62] *See* Buckingham, *supra* note 15, at 654, n.75.

[63] GARBARINO, ET AL., *supra* note 18, at 83.

[themselves]—no matter how brutal or dysfunctional" inflict enduring injury.[64]

Moreover, for countless criminal defendants, their traumatic exposures take place not only at home—or in many cases, not at home at all—but in communities riddled by violence and bankrupted of resources and social services.[65] African-American youth are nearly three times as likely, and Latino youth are two times as likely, as white children to witness a shooting, bombing, or riot.[66] Black and Latino children are more than seven times more likely to lose a person close to them to murder than are white children.[67] Witnessing assaults, robberies, shootings, and homicides scars children, hampers their social development, and puts them at risk of committing violence themselves. Put another way, for many, living in particular zip codes equates with inescapable trauma, and advocates ought to explain that trap's mitigating force: a defendant's neighborhood is both evidence of his exposure to violence and his experience of loss, and it is proof of his disenfranchisement.[68] Therefore, any comprehensive explanation of the social context of criminality must account for the role of community environments in introducing and encouraging behavior that offends the law.[69] Even children who do not witness violence suffer the detriments of living in violent communities when they cannot play outside, or "when they must sleep on the floor to be out of range of random bullets coming through the windows of their home."[70]

In addition, contact with the justice system itself is traumatic. Detained youth suffer the stress of separation from their families and may be subjected to shackling, strip-searches, or solitary confinement.[71] Prisoners of all ages also face physical, sexual, and psychological abuse by correctional officers or other prisoners.[72] Competent defense sentencing advocacy must account for such institutional harm and explain its mitigating force, especially because courts and prosecutors invariably count prior criminal and imprisonment

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[64] Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012). The ACE study showed that "the impact of trauma pervaded these patients' adult lives." VAN DER KOLK, *supra* note 32, at 148.

[65] *See* GARBARINO, ET AL., *supra* note 18, at 49 ("In dangerous inner-city neighborhoods, violence is an almost daily occurrence. . . [T]he longer the violence continues, the fewer sources of support children [living in those neighborhoods] have to draw on. All this is compounded in inner-city environments by poverty, family disruption, and community disintegration."); *see id.* at 50.

[66] *See* John Rich, et al., *Healing the Hurt: Trauma-Informed Approaches to the Health of Boys and Men of Color*, DREXEL SCH. PUB. HEALTH & DREXEL U. C. MED. 25 (Oct. 2009), http://www.unnaturalcauses.org/assets/uploads/file/HealingtheHurt-Trauma-Rich%20et%20al.pdf.

[67] *Id.*

[68] *See* Troutt, *supra* note 25, at 6, 11-12; Alfieri, *supra* note 23, at 23-24.

[69] *See* Haney, *supra* note 38, at 863.

[70] GARBARINO, ET AL., *supra* note 18, at 51.

[71] *See* Jessica Feierman & Lauren Fine, *Trauma and Resilience: A New Look at Legal Advocacy for Youth in the Juvenile Justice and Child Welfare Systems*, JUVENILE LAW CENTER 27 (April 2014).

[72] *See* Allen J. Beck, et al., *Sexual Victimization in Prisons and Jails Reported By Inmates*, BUREAU OF JUSTICE STATISTICS (May 2013), https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf; *see* Jing Shi & Nancy Wolff, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. CORRECTIONAL HEALTH CARE 58 (2009); *see also Callous and Cruel: Use of Force Against Inmates with Mental Disabilities in U.S. Jails and Prison*, HUMAN RIGHTS WATCH (May 2015), https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and.

history as a reason for harsher punishment. Without explanation of how those previous justice contacts have contributed to a client's trauma-related symptoms and behaviors, punishment will compound harm the justice system inflicted in the first place.

Of course, for far too many people, interactions with law enforcement are degrading and brutal. A collective trauma in the aftermath of police killings of civilians hovers in many African-American communities, compounded in recent years many times over.[73] For example, a textbook case of trauma-associated numbing is evident in the remarkable calm Diamond Reynolds displayed in the aftermath of her boyfriend, Philando Castile's, July 2016 shooting death during a routine police traffic stop. Ms. Reynolds was driving the car that her four-year-old daughter and Mr. Castile were riding in when an officer shot and killed him. Ms. Reynolds maintained the presence of mind to film the encounter, and Mr. Castile's death, on her phone and broadcast it live on Facebook. She did so all while responding politely to the officer who had just fired shots into her companion, and as her preschooler looked on and offered her mother words of consolation. Ms. Reynolds later delivered cogent, composed remarks during a press conference. Trauma experts have described her response in the immediate aftermath of the events as typical of trauma-related dissociation.[74]

Some crime victims in violent communities find that law enforcement criminalizes them rather than redressing their injuries.[75] When meaningful police protection is absent, people often substitute self-help organizations, vigilantism, or a complicated code of street justice as a means of maintaining social order.[76] Poverty exacerbates the dangers of violent communities with its own panoply of risks: substandard housing, poor medical care, inadequate schools, malnutrition, family disruption, and the endemic stress underlying a good deal of domestic violence.[77]

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[73] *See* Claudia Rankine, *The Black Condition Is One of Mourning*, N.Y. TIMES MAG., June 22, 2015 ("I asked another friend what it's like being the mother of a black son. 'The condition of black life is one of mourning,' she said bluntly. . . . [T]here really is no mode of empathy that can replicate the daily strain of knowing that as a black person you can be killed for simply being black: no hands in your pockets, no playing music, no sudden movements, no driving your car, no walking at night, no walking in the day, no turning onto this street, no entering this building, no standing your ground, no standing here, no standing there, no talking back, no playing with toy guns, no living while black.").

[74] *See* Danielle Paquette, *'This Is the Brain on Horror': The Incredible Calm of Diamond 'Lavish' Reynolds*, WASH. POST, July 7, 2016.

[75] VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 57 (2011); *id.* at 76-78 (describing a young man's near-fatal stabbing and subsequent police interrogation and branding him a gang member after the assault, despite the lack of any evidence before he became a stabbing victim that he was affiliated with a gang); *see id.* at 121.

[76] *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 9 (2016); *see also* LEOVY, *supra* note 19, at 41; Paul Schwartzman, *In a City Poisoned by Violence, Can One Man—Or Even 300—Make a Difference?*, WASH. POST, July 21, 2015 (describing a Baltimore-based African-American men's self-help organization's efforts to protect black neighborhoods against street violence and homicide).

[77] The relationship between family disruption and community violence is complicated. As Dr. John Rich has observed, "Fragmentation of urban families, while often attributed to lack of responsibility on the part of the father, may have significant roots in trauma itself. We know that traumatized people can find it difficult to connect to loved ones and to feel. We also know that in the setting of poverty and lack of opportunity young men may find it difficult to fulfill their responsibilities, even if they desire to do so."

The indifference to the toll violence exacts on poor, usually black or brown, communities aggravates trauma. Individuals and neighborhoods are at once under-protected and over-surveilled, while being choked of resources to ameliorate the damage wrought by years of violence.[78] For example, white families who suffer extreme adversity are more likely to receive private mental health care, while families of color, particularly those with lower incomes, are more likely to be referred to public agencies such as criminal or child welfare departments, which, as noted, often compound harm.[79] On the other side of the coin, Author Jill Leovy has reported that very few of the murders of young African-American men in South Central Los Angeles that she covered as a reporter for the Los Angeles Times were reported in the media, and "[e]ven when cases got some public attention, the tilt often seemed off. Gangs were a big topic, but atrocity, trauma, and lifelong sorrow were not part of the public's vocabulary about . . . [the] violence."[80] Homicides also represent only a small fraction of the pervasive violence plaguing many black and Latino communities.[81] For every person killed, several more survive stabbings or gunshots maimed, disfigured, or permanently disabled. Yet, even fewer of those workaday lesser crimes are reported in the media, investigated, or ever solved.[82]

Such willful neglect, heaped atop contempt used to diminish some murder victims' standing as less than "innocent," inspires some marginalized young people to transgress the law. Some do so as a form of resistance to a legal system that criminalizes but fails to protect them. Others do so as a means of self- and community protection, or in search of a semblance of dignity and authority.[83] As one group of social scientists has written, "A brother who is shot in a gang shoot-out does not command the same community regard as a brother who is shot in a war."[84] And yet the consequences for survivors and witnesses may be indistinguishable from trauma symptoms that combat triggers.[85]

RICH, *supra* note 1, at xiv. Moreover, parents' concerns about neighborhood violence can contribute to punitive parenting; anxious parents impose harsh discipline on their own children in desperate attempts to keep them safe. *See* TA-NEHISI COATES, BETWEEN THE WORLD AND ME 16-17 (2015).

[78] *See* LEOVY, *supra* note 19, at 252 ("Take a bunch of teenage boys from the whitest, safest suburb in America and plunk them down in a place where their friends are murdered and they are constantly attacked and threatened. Signal that no one cares, and fail to solve murders. Limit their options for escape. Then see what happens."); COATES, *supra* note 77, at 84-85.

[79] *See* Feierman & Fine, *supra* note 71, at 5.

[80] LEOVY, *supra* note 19, at 37.

[81] *See* Sarah Stillman, *Black Wounds Matter*, NEW YORKER, Oct. 15, 2015.

[82] LEOVY, *supra* note 19, at 49.

[83] RIOS, *supra* note 75, at xv, 39, 59, 104.

[84] GARBARINO, ET AL., *supra* note 18, at 125; *see also* RICH, *supra* note 1, at 7 ("Unless a group of black men had been shot or violence had spilled out into the street and injured someone else (generally assumed to be innocent), the shooting of a young black male was not news.").

[85] *See* GARBARINO, ET AL., *supra* note 18, at 44, 47 (reporting Chicago statistics of school-aged children who had witnessed or been victims of violence). Violent crime in certain Chicago neighborhoods continues to dominate daily experience, some twenty-four years after Garbarino, et al. analogized it to a combat zone. *See* Monica Davey, *A Weekend In Chicago*, N.Y. TIMES, June 4, 2016 (describing "a level of violence that has become the terrifying norm" in primarily black and Latino neighborhoods in Chicago's South and West sides); *see also* Ford Fessenden & Haeyoun Park, *Chicago's Murder Problem*, N.Y. TIMES, May 27, 2016; LEOVY, *supra* note 19, at 90 (describing residents of Watts as perceiving themselves to be

The foregoing was only a sample of conditions that traumatize countless ordinary people. Recounting trauma histories faithful to the experiences of individuals will depend on the thorough defense work recommended in the following sections.

C. Effects of Trauma

Regardless of its source, trauma impacts behavior. Understanding how is critical to defense lawyers' effective advocacy on behalf of injured clients. The manifestations of trauma often provide context and explanation for why they broke the law.

Beginning in the 1960s, psychological literature explicitly linked childhood exposure to trauma and adult criminal behavior, a correlation that social scientists today accept as axiomatic.[86] For example, boys who witness domestic violence are at a sevenfold increased risk of abusing their own partners.[87] In addition, approximately one-third to one-half of severely traumatized people develop addictions to drugs or alcohol.[88] Child sexual abuse is strongly associated with sexual violence in adulthood.[89] Exposure to community violence inspires some young people to join social organizations that they believe will protect them, or to adopt a persona of bravado and ready employ of violence.[90] In fact, gang-involved youth experience PTSD at more than twice the rate of other young people.[91] Dr. John Rich has described some of the young, mostly African-American inner-city patients he treats as associating with gangs as a way "to try to build an identity and to keep from vanishing into invisibility."[92] Others, already conditioned into compliance by a lifetime of abuse, simply accede to the orders of domineering peers.[93]

Moreover, children who grow up in chronically violent communities often suffer from symptoms that disrupt their learning and limit their futures: difficulty concentrating because of insomnia and intrusive thoughts; memory impairment; anxious attachment with caregivers; aggressive play mimicking observed behaviors; desperate efforts to protect themselves; adopting tough exteriors to mask their fears; seemingly heedless behavior resulting from their own experiences of hurt and loss; and severe constriction in activities that

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in a war zone, gang members calling themselves "soldiers," and a protest banner labeling the neighborhood "Little Baghdad"). Of course, a great deal of violence never comes to the attention of law enforcement, the press, or health care providers at all. Therefore, violence in any community is bound to be underreported.

[86] Haney, *supra* note 38, at 856-57.

[87] J.R. Kolko, et al., *Children Who Witness Domestic Violence: A Review of Empirical Literature*, 11 J. INTERPERSONAL VIOLENCE 281-93 (1996).

[88] *See* VAN DER KOLK, *supra* note 32, at 329.

[89] *See* Wolff & Shi, *supra* note 44, at 1910; *see also* Kennedy v. Louisiana, 554 U.S. 407, 435 (2008).

[90] *See* GARBARINO, ET AL., *supra* note 18, at 65, 66; RIOS, *supra* note 75, at 54-55.

[91] *See* NAT'L CHILD TRAUMATIC STRESS NETWORK, TRAUMA IN THE LIVES OF GANG-INVOLVED YOUTH: TIPS FOR VOLUNTEERS AND COMMUNITY ORGANIZATIONS 2 (2009). The Diagnostic and Statistical Manual Fifth Edition (DSM V) bases diagnosis of PTSD on eight criteria. *See* T. Allen Gore, *Posttraumatic Stress Disorder Clinical Presentation* (Updated Nov. 6, 2015), http://emedicine.medscape.com/article/288154-clinical.

[92] RICH, *supra* note 1, at 66; *see id.* at 203; *see also* RIOS, *supra* note 75, at ix.

[93] *See* LEOVY, *supra* note 19, at 96; *see id.* at 181-82.

foster exploration, creativity, and learning for fear of re-experiencing traumatic events.[94] Later, many of these children, after years of being frightened to death and fighting for survival in abusive homes and dangerous streets, grow into adults who develop fatalism, "a narrow horizon of possibilities," and a foreshortened sense of their own futures.[95]

In addition to these social maladaptations, trauma affects human behavior by altering neuroanatomy. Experience sculpts the brain. Neural wiring is the substrate of psychology and behavior.[96] Neuroscientists have demonstrated that trauma alters the brain's pathways that govern: cognition; judgment; impulse control; empathetic understanding; regulation of emotions; perception of threat; ability to differentiate past, present, and future; and the filtering of information.[97] Early lifetime exposure to trauma activates the brain's stress response in ways that affect brain development and the interaction of neural synapses.[98] The resulting neuropsychiatric vulnerabilities lead to enhanced risk for development of a host of symptoms.[99]

The behavioral impacts of trauma generally fall into two broad categories: hypervigilance (a heightened state of awareness) and dissociation (numbing and detachment).[100] The following are hallmarks of trauma.

1. Hypervigilance and Impaired Judgment

When traumatized people perceive threats, their emotional brains take the reins and supersede their executive functions.[101] Repeated exposure to trauma causes the normal human stress response to become a person's default mode of functioning. The "fight or flight" reaction that is adaptive when someone is actually in danger becomes detrimental to wellbeing when it becomes overactive and eclipses judgment in unwarranted situations.[102] The clinical term for this phenomenon is "hypervigilance." In lay terms, this means that many traumatized people are wired for survival and likely to erupt at the

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[94] *See* GARBARINO, ET AL., *supra* note 18, at 56.

[95] *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000); RICH, *supra* note 1, at 67.

[96] *See* Denise C. Park & Chih-Mao Huang, *Culture Wires the Brain: A Cognitive Neuroscience Perspective*, 5 PERSPECT. PSYCHOL. SCI., Summer 2010, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3409833/ ("There is a wealth of evidence that experiences sculpt both brain and behavior. Recent work in cognitive neuroscience has provided clear evidence that sustained experience changes neural structures."); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, ANN. REV. CLIN. PSYCHOL. 47, 53 (2009).

[97] *See* VAN DER KOLK, *supra* note 32, at 58-63, 68-70.

[98] *See* Michael B. De Bellis & Abigail Zisk, *The Biological Effects of Childhood Trauma*, 23 CHILD ADOLESCENT PSYCHIATRIC CLINICS N. AM. 185-222 (Winter 2014), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3968319/.

[99] *See id.*

[100] *See Effects of Complex Trauma*, NAT'L CHILD TRAUMATIC STRESS NETWORK, http://www.nctsn.org/trauma-types/complex-trauma/effects-of-complex-trauma.

[101] *See* J. Douglas Bremner, *Traumatic Stress: Effects on the Brain*, 8 DIALOGUES IN CLINICAL NEUROSCIENCE 449 (2006), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3181836/pdf/DialoguesClinNeurosci-8-445.pdf.

[102] *See Effects of Complex Trauma*, *supra* note 100.

slightest perceived threat.[103] A traumatized person's intense focus on survival also diminishes his ability to think past the present moment, control impulses, or delay gratification.[104]

2. Numbing

On the other end of the spectrum from hypervigilance is another hallmark of trauma: numbing. Traumatized people often seek escape from the overwhelming realities of their experiences by detaching physically or psychologically.[105] Victims of traumatic events dissociate (detach from their own physical sensations or feel disembodied), "blank out," or depersonalize—a clinical term for going numb—in order to cope. This detachment can also cause a traumatized person to lose awareness of his own sensations or surroundings, and to fail to protect himself. Dissociation thus results in high rates of revictimization. In fact, victims of violent crime are four times as likely to experience repeat victimization, which increases the risk of harming others.[106] As is true with other trauma symptoms, numbing alone is not mitigating, and in fact, people may lack empathy for myriad reasons that may or may not be mitigating. This is why the advocate's role is, again, critical. The advocate must describe the events that have caused the client's emotional distancing and explain why the client's desensitized affect should not count against him, but rather is a symptomatic reaction to horrible events, and why it should ameliorate his sentence.

3. Difficulty Regulating Emotions and Interpreting Stimuli

Traumatized people expend extraordinary efforts maintaining control and fighting for survival. Trauma also interferes with the brain's gatekeeping functions and ability to filter information, which in turn impairs attention, concentration, and capacity for learning.[107] This hyperarousal may leave them easily distracted at work or at school.[108] It disrupts emotional regulation and the ability to attune to social cues in interpersonal exchanges. It hampers the skills necessary to evaluate and respond appropriately to disagreements.[109] This explains why people who live with violence at home or in their

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[103] Jonathan E. Sherin, *Post-Traumatic Stress Disorder: The Neurobiological Impact of Psychological Trauma*, 13 DIALOGUES IN CLINICAL NEUROSCIENCE 263-278 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3182008/; Danielle Sered, *Young Men of Color and the Other Side of Harm*, Vera Institute of Justice 4 (Dec. 2014), http://www.vera.org/sites/default/files/resources/downloads/young-men-color-disparities-responses-violence.pdf.

[104] Listenbee, Jr., *supra* note 14, at 171.

[105] *See* Buckingham, *supra* note 15, at 675; *see also* RICH, *supra* note 1, at 92-97, 101 (describing the numbness of a young man whose cousin was murdered as suffering "broken" emotions akin to a broken leg, such that love and fear were replaced by emptiness and anger).

[106] *See* ALLIANCE FOR SAFETY & JUSTICE, *supra* note 22, at 7; *see also* COURTOIS & FORD, *supra* note 27, at 4.

[107] *See* VAN DER KOLK, *supra* note 32, at 70.

[108] *See Effects of Complex Trauma*, *supra* note 100.

[109] Listenbee, Jr., *supra* note 14, at 172.

communities have difficulty succeeding in school, which is fundamental to the direction of one's life course.[110] In addition, emotional dysregulation causes some traumatized people to substitute external regulations such as drugs, alcohol, or capitulation to the bidding of others.[111]

Trauma symptoms are frequently misinterpreted as aggression or irritability or labeled as a conduct disorder or antisocial personality disorder (ASPD).[112] Absent a social context explaining antisocial behavior as the result of victimization or other exposure to violence, prosecutors or probation officers often point to these diagnoses as aggravating evidence supporting enhanced punishments.[113] Yet conduct disorders and ASPD are behavioral labels; without consideration of their underlying causes' mitigating force, they may be used to support harsher sentences without justification and without attention to the efficacy of treatment in ameliorating symptoms.[114] Here again, the role of the defense team is critical to explaining why symptoms resulting from traumatic exposure are normal responses to dismal social conditions. These conditions might warrant leniency, particularly given the question of who and what engineered and perpetuate the triggering social context.

4. Difficulty Interpreting Experience

Traumatized people often experience disrupted memories such that past events continue to gnaw at them in the present, and of course, for many, traumatic events are not really in their pasts. The neurological changes wrought by traumatic experiences interfere with people's abilities to interpret and navigate their present experiences. This leaves them on edge, distracted, and saddled with imminent doom, even when they are in no objective danger.[115]

Substance abuse often accompanies this panoply of trauma symptoms which, when layered over the other difficulties, puts people at significant risk of making poor decisions or violating the law.[116]

D. Case Examples

The following vignettes describe how trauma's constellation of symptoms plays out in three criminal justice scenarios.[117]

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[110] *See* GARBARINO, ET AL., *supra* note 18, at 59-60; MASSACHUSETTS ADVOCATES FOR CHILDREN, HELPING TRAUMATIZED CHILDREN LEARN: A REPORT AND POLICY AGENDA 21-41 (2005).

[111] Richard G. Dudley, Jr., *Childhood Trauma and Its Effects: Implications for Police*, NEW PERSP. POLICING BULL. (U.S. Dep't of Just., Nat'l Inst. of Just.), 2015, at 8.

[112] *See* Feierman & Fine, *supra* note 71, at 9.

[113] *See* Wayland, *supra* note 13, at 947.

[114] *See* Epstein & Gonzalez, *supra* note 14, at 18; Feierman & Fine, *supra* note 71, at 5. .

[115] *See* Bremmer, *supra* note 101.

[116] *See* Wolff & Shi, *supra* note 44, at 1910.

[117] The first vignette is hypothetical; the second is based on an actual case in which I have changed some facts.

1. Hypervigilance and Inability to Interpret Social Cues

Symptoms of trauma are likely to manifest in the many instances in which a young man has witnessed friends or family members killed or injured by gun violence and has grown up in a home in which his parents were terrified for his survival. They therefore subjected him to corporal punishment and other harsh methods of discipline in efforts to keep him safe and off the streets. This young man has been mugged in his neighborhood and forced to walk past debilitated drug addicts who hassle him along his way to work. He has become hypervigilant and suffers from a hair-trigger response to any person he believes threatens his physical or emotional integrity. He has started carrying an unlicensed gun for protection. He has used marijuana to cope with his overwhelming anxiety and cocaine to energize him after nights of insomnia. He overreacts when his buddy throws a playful punch while they blow off steam in a bar, which then escalates into a serious fight. This scenario might well result in the young man's arrest for felony assault, drug possession, and illegal possession of a gun. These are serious charges indeed, but ones that, when viewed against the backdrop of the young man's entire life, might make him less blameworthy than someone who commits such acts in the absence of this explicative social history. Explanation of that social history would demonstrate why he is more in need of treatment than incarceration.

2. Impaired Judgment, Dissociation

The impaired decision-making and (often misinterpreted) depersonalization that result from trauma are evident in the case of a young man convicted of an armed attempted robbery and shooting of a storeowner. This example also illustrates how traumatized people who dissociate are at risk of enhanced penalties for their perceived lack of empathy or appropriate emotional affect.[118] The defendant in this case had lived a life marked by chronic trauma—a violence-riddled housing project; addicted, neglectful, parents; and extreme poverty. He had also survived a freak accident. He had been a talented athlete until he and some friends jumped onto a commuter train. The train caught his leg in the gap while pulling out of the station. Witnesses to the incident described the young man's leg muscles and skin pulling off of his shinbone and his foot being torn from his ankle. Friends accompanying him put the young man's foot into a bucket and took it to the hospital in the hopes that it could be reattached. Instead, the injuries resulted in a partial amputation of his leg.

The train accident ended this defendant's athletic career and also prevented him from performing his role as the man in his family. He had been the protector of his younger siblings, who were living with him and their crack-addicted mother in a large city's notoriously violent public housing

[118] *See* Wayland, *supra* note 13, at 947; *see also* Stuart L. Lustig, *Symptoms of Trauma Among Asylum Applicants: Don't Be Fooled*, 31 HASTINGS INT'L & COMP. L. REV. 725, 729-30 (2008).

project. This defendant's disability left him especially vulnerable in his chaotic neighborhood. In fact, shortly after the train accident, someone assaulted him in the head with a brick. He subsequently obtained a gun to protect himself. Some months later, after managing mobility on an ill-fitting prosthesis, this young man learned of a costlier but possibly more effective prosthesis and hatched a plan to commit a robbery in order to afford it. During the attempted robbery of a convenience store, the store's proprietor brandished a gun; the defendant panicked and fired shots, injuring the storeowner.

Post-conviction review of this defendant's sentencing demonstrated that his defense lawyer, untrained to recognize symptoms of trauma and their effects on behavior, believed that he had no basis for arguing for mental-health mitigation. The lawyer's misapprehension arose in part because of hospital records from the train accident in which medical notes described the young man as matter-of-fact and emotionless in the days following the loss of his leg. Had this defendant's attorney been trauma-informed, he could have hired an expert to explain that this psychic numbing is a textbook trauma symptom, as were the defendant's hypervigilance, impaired judgment, and hair-trigger response during the robbery. Trauma-informed advocacy might have helped this defendant avoid an unnecessarily lengthy prison sentence. It might have helped the court fashion penalties that sanctioned the defendant appropriately while providing him with mental health treatment, physical rehabilitation, employment training for work he could perform despite his injury, and reentry placement into safe, affordable housing with assistance for people with disabilities.

The Supreme Court has recognized that judicial consideration of traits such as "immaturity, recklessness, and impetuosity," as well as "heedless risk-taking," and increased vulnerability to "negative influences and outside pressures" is crucial to the imposition of proportionate punishment.[119] Such traits are characteristic of trauma, the effects of which remain salient, impactful, and—if left untreated—perpetual well after an abused child, or one trapped in a violence-torn community, passes the age of majority. In any just sentencing system, people standing punishment should be represented by advocates skilled in explaining these truths.

As the next section describes, however, by law and in practice, courts sentence the vast majority of defendants without any consideration of trauma's demonstrable effects on their behavior.

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[119] *See* Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016) (quoting Miller v. Alabama, 132 S. Ct. 2455 (2012), internal quotation marks omitted).

III. LIMITS ON CONSIDERATION OF TRAUMA IN NONCAPITAL SENTENCING

A. Evolution of De Jure Sentencing Exclusion of Disadvantaged Background

Many noncapital defendants have trauma histories as extensive as those of capital defendants. Yet, beginning in the 1970s, many state and federal jurisdictions jettisoned a longstanding individualized approach to noncapital sentencing. They instead substituted sentencing guidelines, determinate sentencing, and three-strikes laws that brooked little opportunity for consideration of the defendant's life circumstances once conviction of a particular offense had attached.[120] To this day, evidence of childhood trauma is not ordinarily relevant in determining whether a federal sentence warrants downward departure or variance from the applicable Guidelines range.[121]

Before 1975, most American jurisdictions featured indeterminate sentencing regimes that permitted courts to consider the circumstances, backgrounds, and psychological characteristics that were believed to have contributed to defendants' criminality. Judges had the discretion to fashion penalties that enhanced defendants' prospects for rehabilitation.[122] However, as Professor Kate Stith and her co-author Steve Y. Koh have recounted, concerns about inconsistency and judicial bias, as well as the politicization of crime policy, paved the way for the federal and state sentencing reforms of the late 1970s and early 1980s. During those years, determinate sentencing, whose stated aims were consistency, fairness, and transparency, gained momentum.[123] A period in which most American jurisdictions enacted some combination of mandatory minimum sentences, truth-in-sentencing, three-strikes, and other determinate sentencing laws followed.[124] In the federal system, as well as in some states, sentencing reform thereby evolved. Modest proposals that were intended to reduce bias by implementing guidelines but that still included a wide range of factors related to the offender and the offense, and that discouraged incarceration, gave way to adoption of

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[120] *See* Stith & Koh, *supra* note 7, at 225-27; Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, NAT'L CONF. OF ST. LEGISLATURES 4, 8 (June 2015), http://www.ncsl.org/documents/cj/sentencing.pdf; *see also* TONRY, *supra* note 7, at 75 (describing the enactment of determinate sentencing statutes by states receiving federal prison construction funds under the Violent Crime Control and Law Enforcement Act of 1994).

[121] U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (U.S. SENTENCING COMM'N 2010); *see also* OFFICE OF GENERAL COUNSEL, U.S. SENTENCING COMM'N, DEPARTURE AND VARIANCE PRIMER 31 (2013), http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Departure_and_Variance.pdf.

[122] TONRY, *supra* note 7, at 51.

[123] *See* Stith & Cabranes, *supra* note 21, at 1253-54, 1265. Without a doubt, the American approach to indeterminate sentencing included features that posed significant risk to defendants, principally virtually unchecked judicial and correctional discretion and nearly non-existent burdens of proving evidence relied on for imposition of a particular sentence, such that "sentences [were] often based at least in part on inaccurate information." TONRY, *supra* note 7, at 55. Reliance on offenders' criminal histories, including conduct for which they have never been convicted, in calculating sentences is also a vestige of the indeterminate era that persisted under the Guidelines and tends to result in longer sentences. *See id.* at 57-58, 62-63, 70, 73.

[124] TONRY, *supra* note 7, at 73.

determinate sentencing that eliminated virtually any consideration of a defendant's life history in imposition of even the most stringent punishment.[125]

An example from the Federal Sentencing Guidelines exemplifies the by-design exclusion of social history from noncapital sentencing during the determinate era: judges considering downward departures from the Guidelines are forbidden from considering "lack of guidance as a youth and disadvantaged upbringing" in sentencing.[126] In other words, although the federal sentencing statute calls for regard of "the nature and circumstances of the offense and the history and characteristics of the defendant," the Sentencing Commission affirmatively excludes consideration of social disadvantage and resultant mental and emotional conditions.[127]

The Guidelines' ostensible effort at eliminating sentencing disparities between defendants with more advantaged and less advantaged backgrounds thereby predictably redounded to the detriment of the less fortunate and accelerated the rise in incarceration.[128] If a sentencing policy's aim is reduction of bias favoring social advantage, then eliminating consideration of a defendant's socioeconomic status so that a wealthier defendant gains no benefit from that happenstance at sentencing may be rational. However, it defies explanation how barring consideration of the effects of poverty or other social disadvantage, factors often at the heart of why people break the law, evens the field for poor defendants. In the end, efforts at leveling sentencing have, instead, produced a body of law that diminishes consideration of background necessary for complete assessments of defendants' blameworthiness. It has also deprived courts of information about factors that might help them order penalties that rehabilitate individuals and protect public safety by addressing the conditions underlying their offenses. The net result has been exponential growth of American incarceration.[129]

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[125] *See* Stith & Koh, *supra* note 7, at 250-51. "Tough on crime" politics were by no means the exclusive province of conservatives. Liberal politicians dating back to the 1960s conflated anti-poverty programs with carceral ones as a reaction to the civil rights movement and related urban unrest. *See* HINTON, *supra* note 76, at 8, 11.

[126] TONRY, *supra* note 7, at 155; Stith & Cabranes, *supra* note 21, at 1258 ("[E]ven in the extraordinary case, personal background information about the defendant is never required for the sentencing decision, because departure from the Guidelines is itself never required."); *see id.* at 1263; *see also id.* at n. 141 and accompanying text; U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 (U.S. SENTENCING COMM'N 1995).

[127] 18 U.S.C. § 3553(a)(1) (2012); OFFICE OF GENERAL COUNSEL, U.S. SENTENCING COMM'N, DEPARTURE AND VARIANCE PRIMER 13 (2013), http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Departure_and_Variance.pdf (citing U.S. SENTENCING GUIDELINES MANUAL § 5H1.2 (U.S. SENTENCING COMM'N 2010) as providing that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted").

[128] *See* Stith & Koh, *supra* note 7, at 266-67, 287; *id.* at n. 398 (citing sources); Stith & Cabranes, *supra* note 21, at 1276; *id.* at n. 141 and accompanying text; TONRY, *supra* note 7, at 137, 153-54.

[129] Michael Tonry, *Sentencing In America, 1975-2025*, U. MINN. L. SCH. LEGAL STUD. RES. PAPER SERIES, Research Paper No. 13-44, at *3 (June 2013) (noting that after the ascent of determinate sentencing, "[t]he combined incarceration rate for federal, state, and local facilities quintupled to more than 750 per 100,000 in 2007"); John F. Pfaff, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 1 (2017).

Before the Supreme Court decided *United States v. Booker*,[130] making the Federal Sentencing Guidelines discretionary rather than mandatory, defendants relied on U.S.S.G. § 5K2 to argue for downward departures based on mitigating circumstances not accounted for in the Guidelines. The inclusion of § 5K2 was based on recognition that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision."[131] However, the provision generally required a showing that the mitigation presented was extraordinary and outside the "heartland" of conduct the Guidelines prescribed for certain offenses.[132] Yet, as the following discussion shows, courts have declined to consider even extreme and brutal abuse to be mitigating in noncapital cases.

B. De Facto Exclusions of Trauma Evidence in Sentencing

This history of sentencing guidelines explains why courts considering noncapital cases involving defendants who have survived even severe and repeated traumatic experiences historically have discounted their trauma histories when considering departures from the Sentencing Guidelines.[133] In fact, some courts affirming sentences imposed without consideration of lifetime adversity have cited the fact that too many people who stand before them convicted of crime have suffered such harms. They have reasoned that the ubiquity of disadvantage in defendants' lives provides little basis for differentiation among them.[134] In one court's explanation:

> Childhood abuse and neglect are often present in the lives of criminals. They always affect their mental and emotional condition. We simply cannot agree, therefore, that these are the kinds of considerations which warrant substantial reductions in guidelines sentences. . . .[135]

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[130] 543 U.S. 320 (2003) ("In extreme circumstances, a court may depart downward where extreme childhood abuse caused mental and emotional conditions that contributed to the commission of the offense.").

[131] U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 background (U.S. SENTENCING COMM'N 2012) (internal citations omitted); *see also* Brian Porto, *Construction and Application of U.S.S.G. § 5H1.3, Concerning Mental and Emotional Conditions as Ground for Sentencing Departure*, 34 A.L.R. Fed.2d 457, at *2 (2009); *see also* Stith & Cabranes, *supra* note 21, at 1277-78.

[132] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2002) (describing the Commission's intent that the sentencing courts treat each guideline as carving out a "heartland" or typical cases embodying the conduct that each guideline prescribes); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 background (U.S. SENTENCING COMM'N 2012).

[133] As discussed, *infra*, in cases where defense lawyers have challenged the Guidelines' exclusion of evidence of trauma and made a strong record of "extraordinary" abuse, courts have considered evidence of trauma in downward departures. Moreover, selection bias in the sampling of cases is inevitable because, by definition, the only cases that will be appealed are those in which defense lawyers have made a record challenging sentencing guidelines' application. There is no way to document the untold hundreds of cases in which no such defense advocacy accompanied sentencing, as has been the norm.

[134] *See* United States v. Deigert, 916 F.2d 916, 918-19 (4th Cir. 1990); United States v. Vela, 927 F.2d 197, 200 (5th Cir. 1991).

[135] *Vela*, 927 F.2d at 199 (internal quotation marks and citations omitted).

As this case and others demonstrate, even in noncapital sentencing in which the defendant's trauma rises to the level routinely considered centrally mitigating in capital cases, courts have declined to depart from the Guidelines sentences.[136]

For instance, in *United States v. Pullen*, Pullen was convicted of armed robbery, and the district court refused to grant a downward sentencing departure based on extraordinary childhood abuse,[137] notwithstanding the following:

> The defendant's father was a drunkard and a gambler. He beat his wife and children and threatened them with guns and knives. When the defendant was five years old, his father abused him sexually over a period of several months. [Later, when the defendant was an adolescent living with his father after his parents' divorce,] [t]he two would go out drinking together and once after a bout of drinking his father raped him. He ran away. His troubles with the law escalated.[138]

Pullen's lawyer presented a mental health expert who opined that Pullen's history of abuse resulted in mental disorders that "[were] causative of" his criminal activity, because they "reduce[d] his impulse and behavioral controls and impair[ed] his ability to think and act clearly."[139] Still, the Court of Appeals affirmed the district court's exclusion of this social history and adherence to the Guidelines sentence.[140]

Even more remarkably, the court concluded that Pullen had not demonstrated that his abuse was so exceptional that he deserved leniency among robbers. Among other reasons, the court cited: a concern that if evidence of a defendant's "miserable family history" were to become a permissible basis for leniency, this would "resurrect" the pre-Guidelines era of discretionary sentencing; "[j]ust as in capital cases . . . defense lawyers in run-of-the-mill federal criminal cases would hire [experts] to comb the defendant's personal and family history for evidence of adversity," which would in turn lead the government to counter with its own experts, which would leave judges with space to "defend any departure, upward or downward, from the sentencing guidelines[.]" The court acknowledged that such a system might be an improvement over the one required by the Guidelines, but one the Sentencing Reform Act prohibited.[141] The court's opinion rings of the concern that exposure to trauma at the root of a great deal of serious crime implicates a fundamental reconsideration of the means and

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[136] State courts have followed a similar approach. *See* Garcia v. State, 2004 N.D. 81, ¶19, 678 N.W.2d 568; State v. McClellan, 2009 WI App. 56, 317 Wis.2d 732, 768 N.W.2d 63; Commonwealth v. Okoro, 471 Mass. 51, 54 (2015).

[137] *See* United States v. Pullen, 89 F.3d 368, 371-72 (7th Cir. 1996).

[138] *See id.* at 369.

[139] *See id.* at 369-70.

[140] *See id.*

[141] *See id.* at 371- 372.

ends of criminal sentencing. Such reconsideration might gain a foothold should judges and policymakers overcome their fears of too much justice.[142]

Perversely, the sacrifice of individualized sentencing has failed to yield the ideal of consistency and fairness. Instead, the exclusion of social history from sentencing consideration has hindered courts from learning the reasons that people break the law. It has prevented consideration of sound bases for proportionate punishment and opportunities for rehabilitation, while still producing disparate outcomes in numerous cases.[143] Rather than seeing the pervasiveness of trauma in case after case as an opportunity to identify and treat a factor underlying many offenses, courts, constrained by guidelines and determinate sentences, have explicitly disavowed its consideration.

A per curiam opinion from Wisconsin, a state with a "truth-in-sentencing" regime and advisory guidelines, exemplifies the point.[144] In 2009, the state Court of Appeals affirmed denial of Tocara D. McClellan's post-conviction motion.[145] McClellan, who pled guilty to one count of armed robbery by use of force, "as party to the crime," had argued that his trial lawyer was ineffective for failing to present mitigation at his sentencing.[146] At twenty-one, McClellan and three others broke into the home of two women.[147] During the robbery, McClellan put a gun in the mouth of one woman, pistol-whipped her sixteen-year-old son, and threatened to shoot her eight-year-old niece.[148] At sentencing, the trial court expressed confusion as to why McClellan, whose record included only minor juvenile infractions, would be involved in such a violent offense.[149] McClellan's defense lawyer called the crime "very uncharacteristic" of his client, who in turn told the court that he had no explanation for his actions, that his parents had done a "dang good job" with him, and that he "just did something [he] shouldn't have done."[150] McClellan also said that he was very sorry and that he did not plan for anyone to get hurt.[151] The court considered evidence of McClellan's having attended "special classes" in school and receiving social security benefits for a learning disability along with his lack of significant prior criminal history, and

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[142] *See* McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

[143] *Cf. Pullen*, 89 F.3d at 371-72, with United States v. Walter, 256 F.3d 891, 895 (9th Cir. 2001); United States v. Lopez, 938 F.2d 1293, 1298 (D.C. Cir. 1991); United States v. Ayers, 971 F. Supp. 1197, 1200 (N.D. Ill. 1997); United States v. Ramirez, No. 98 Cr. 927, 2000 U.S. Dist. LEXIS 7518, at *5 (S.D.N.Y. June 12, 2000). This inconsistency persists even now that pursuant to *United States v. Booker*, 543 U.S. 220 (2003), the Guidelines are advisory rather than mandatory. *See* United States v. Brady, 417 F.3d 326, 333-34 (2nd Cir. 2005); United States v. Holtz, 226 Fed. App'x. 854, 861-62 (10th Cir. 2007); *see also* Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 65 (2012) (discussing inconsistency in federal sentencing's treatment of various mental health conditions).

[144] *See* Wis. Stat. § 973.01.

[145] *See* State v. McClellan, 2009 WI App 56, ¶21, 317 Wis. 2d 732, 768 N.W.2d 63.

[146] *See id.* at ¶2.

[147] *See* Offender Detail, Tocara D McClellan, WIS. DEP'T OF CORRECTIONS, http://offender.doc.state.wi.us/lop/searchbasic.do (search last name field McClellan, first name field Tocara) (listing Tocara McClellan's birth year as 1982).

[148] *McClellan*, 2009 WI App at ¶2.

[149] *Id.* at ¶3.

[150] *Id.*

[151] *Id.*

sentenced him to twelve years of prison and eight years of supervised release.[152]

In post-conviction, McClellan presented evidence that, beginning when he was ten years old, a family friend, George Geres, repeatedly fondled him.[153] The abuse escalated to rape when McClellan was fourteen, in exchange for which Geres provided McClellan with "drugs, alcohol, and employment."[154] McClellan also reported that his mother, herself a heavy drug user who allowed Geres to sell drugs from her home, ignored her son's pleas for help, and refused to let his uncle intervene to protect him.[155] McClellan explained in post-conviction that he had not divulged this information to the sentencing court, his defense lawyer, or the author of his pre-sentence investigation report (PSI) because he was afraid Geres would retaliate against his mother, and because he wanted to avoid embarrassing family members attending his sentencing.[156] The trial court nevertheless denied McClellan's post-conviction motion. The court reasoned that it was McClellan's decision to withhold relevant information, rather than his attorney's failure to investigate, and that such an investigation unlikely would have been fruitful in any event, because McClellan's mother and Geres could not have been expected to corroborate his account.[157]

Such judicial findings would have been in clear violation of the Constitution had McClellan's been a capital case.[158] In explicit reliance on the fact that it was not, the Court of Appeals affirmed McClellan's sentence and distinguished the Supreme Court's seminal capital mitigation case, *Wiggins v. Smith*, and the professional norms applicable to capital cases.[159] The court reasoned that there is no professional requirement that defense lawyers conduct "their own investigation, hire private investigators, gather records, interview family members, hire experts when necessary and ask clients difficult questions designed to elicit information."[160] The court went on to fault McClellan for representing that he had a good upbringing and failing to reveal, in order to avoid embarrassing his family and to protect his mother, his history of abuse to his lawyer, the trial court, or the author of the PSI.[161] The court further concluded that even if McClellan's lawyer had erred, his mistakes would not have been prejudicial, because McClellan had failed to show that his background might have reduced his culpability for his role in

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[152] *Id.*

[153] *Id.* at ¶5

[154] *Id.*

[155] *Id.* at ¶6.

[156] *Id.*

[157] *Id.* at ¶7.

[158] *See* Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

[159] *See Smith*, 539 U.S. 510; *McClellan*, 2009 WI App at ¶13-14, 21.

[160] *See McClellan*, 2009 WI App 56 at ¶713. The court also declined to establish such a professional obligation. *See id.* Under *Strickland v. Washington*, 466 U.S. 668 (1984), a post-conviction petitioner alleging ineffective assistance of prior counsel must establish his previous lawyers' deficient performance as well as prejudice, or a reasonable probability of a different result had trial counsel not committed the claimed errors.

[161] *See McClellan*, 2009 WI App at ¶15.

the robbery. Rather, McClellan's history of sexual abuse was discounted as bearing no direct nexus to the offense.[162] Finally, the court held against McClellan his expert's proffer of evidence that he suffered from post-traumatic stress disorder as a result of the abuse and concluded that such evidence of "untreated issues" might have instead been considered aggravating and warranted a longer prison sentence.[163]

The courts' disregard of McClellan's evidence of sexual abuse, gross parental neglect, and resultant mental health consequences is emblematic of several problems with the state of noncapital sentencing. First, this case highlights the urgent imperative for noncapital defense lawyers to improve their own practices. They must evolve professional standards to meet the needs of traumatized clients and catch up to what social scientists and lawyers in other specialties such as juvenile representation have known for years about trauma's impact on brain and behavior. Second, it underscores how trauma-informed representation would replace the notion that clients, uneducated in the law and victims of severe adversity, are responsible for understanding the relevance of their most private and shameful experiences to their criminal cases.[164] Third, it demonstrates the need to educate lawyers, who must in turn advocate before prosecutors, probation officers, and courts, about the specific mitigating relevance of trauma. Actors in the justice system need to learn how exposure to violence affects behaviors essential to any fair consideration of moral culpability. Finally, *McClellan* establishes why defense attorneys must show courts that treatment for trauma can be effective, its impacts are tractable, and just and effective penalties should include rehabilitation.[165]

As *McClellan* illustrates, the causes of trauma's detrimental impacts are often the result of life circumstances over which people who subsequently break the law had no control.[166] Defense attorneys must, therefore, in case after case, present evidence explaining how those experiences mitigate their clients' blameworthiness. They need to argue for penalties that will rehabilitate and treat the underlying reasons their clients caused harm.[167] The following sections describe the work that quality trauma-informed defense entails. When done well, such representation will demonstrate to judges and other actors in the justice system that many of the people standing before them have been forced to organize their lives around a logic of survival. That logic governs the way they behave and explains events that bring them into contact

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[162] *See id.* at ¶18.

[163] *See id.* at ¶19.

[164] *See* COURTOIS & FORD, *supra* note 27, at 23; *see also* Jessica Chaudhary, *Memory and Its Implications for Asylum Decisions*, 6 J. HEALTH & BIOMEDICAL L. 37, 40 (2010).

[165] *See* VAN DER KOLK, *supra* note 32, at 38 (discussing the rehabilitative potential of people who have suffered the symptoms of trauma).

[166] Of course, nearly everyone experiences serious emotional distress as a result of unexpected events at some point in life. Research shows, however, that harms inflicted intentionally by other people, particularly caretakers, are more psychologically complex than trauma resulting from natural disasters or accidents. Exposure to trauma resulting from abuse and neglect produces long-lasting, but treatable, effects that often explain why people later violate the law. *See* COURTOIS & FORD, *supra* note 27, at 3.

[167] *See also* Brockton Hunter & Ryan Else, *Echoes of War: Part One: Combat Trauma and Criminal Behavior by Veterans*, 37 CHAMPION 18, 20-21 (August 2013).

with the law.[168] Defense lawyers have the power to present that to courts deciding their clients' futures. The next sections describe why and how defense attorneys should go about providing trauma-informed sentencing representation.

IV. DEFENSE LAWYERS' OBLIGATION OF TRAUMA-INFORMED SENTENCING ADVOCACY

United States v. Booker, *Miller v. Alabama*, and other sentencing and policy reforms discussed here signal a resurgence of individualized punishment that accounts for adversity in the defendant's background.[169] Defense attorneys must now adapt their representation to the renaissance of judicial discretion. They need to establish the role that social history mitigation, particularly the effects of trauma, ought to play in the imposition of individualized sentences.

This article urges defense lawyers to pick up this mantle for two principal reasons. First, they have the immediate power to evolve their practices. Second, they are the actors in the justice system with the primary incentive and professional obligation to ensure that their clients' sentencing proceedings are based on an accurate record of all the circumstances that ought to factor into proportionate punishment or weigh in favor of rehabilitation.[170] Relevant professional guidelines make clear that defense lawyers are obligated to investigate independently and present any circumstances of their clients' lives that support mitigated punishment. They are also required to advocate for the least restrictive penalty possible and to push for appropriate treatment programs as part of whatever sentence is imposed.[171]

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[168] RICH, *supra* note 1, at 201.

[169] *See* Betsy Wilson & Amanda Myers, *Feature: Accepting Miller's Invitation: Conducting A Capital-Style Mitigation Investigation In Juvenile-Life-Without-Parole Cases*, 39 CHAMPION 42 (2015); Heather Renwick, et al., *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence*, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH (March 2015), http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf; Hugh M. Mundy, *It's Not Just For Death Cases Anymore: How Capital Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Noncapital Criminal Defense Clinics*, 50 CAL. W. L. REV. 31, 33-34 (2013).

[170] In federal sentencing, probation officers have also played a substantial role in determining terms of punishment. *See* Stith & Cabranes, *supra* note 21, at 1249. Before the Guidelines, probation reports included personal history and circumstances of the defendant. *See id.* Post-*Booker*, that information is again salient to probation departments' sentencing recommendations. However, as the professional guidelines for defense lawyers make clear, the defense remains obligated to ensure that probation reports are accurate and complete, which means providing social history mitigation to probation officers. *See* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION STANDARDS: DEFENSE FUNCTION Standard 4-8.3(a), (d), (e), (g) (February 2015), http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html.

[171] The relevant ABA standards establish a duty to investigate all relevant facts, to present all reasonably available mitigation, and to suggest alternatives to incarceration after exploring employment, educational, and other community programs; if a prison sentence is imposed, defense counsel has a duty to seek the court's recommendation of a place of confinement that includes appropriate treatment and counseling. *See* American Bar Association, Criminal Justice Section Standards, *supra* note 170.

Practitioners in other professional disciplines, as well as lawyers who represent children, adult victims of domestic violence, immigrants, and veterans, have all recognized the import of trauma-informed practices; yet, criminal defense attorneys have developed no such universal, trauma-informed professional norms or standards of representation.[172] As I suggest in earlier work, likely reasons that defense lawyers have lagged behind other professionals in this area include: some defense lawyers' misconception that the prevalence of plea bargaining renders social history mitigation irrelevant, a wrong-headed notion if ever there was one; lack of resources, time, or expertise in mitigation investigation; courts' and practitioners' narrow adherence to the Supreme Court's "death is different" jurisprudence; and atrophied defense sentencing skills that lay dormant during decades of the Guidelines and determinate sentencing era in which courts adhered to directives to exclude evidence of adversity from sentencing consideration.[173]

However, given the frequency with which criminal defendants have themselves been victims of or witnesses to traumatic events, criminal defense lawyers ought to instead stand at the forefront of trauma-informed representation practices. This is particularly essential in light of the long-standing substitution, in many communities, of the criminal justice system for effective delivery of mental health services.[174] Yet, in the absence of a doctrinal imperative, noncapital defense lawyers must seize the initiative themselves to develop trauma-informed practices. Those that blaze the trail will provide models for colleagues to follow suit.

As importantly, the bench needs examples of thorough social history mitigation in order for judges to apprehend the powerful and often overlooked factors, such as abusive homes and violence-torn neighborhoods, that explain many defendants' offenses. As I have described previously, if the trajectory

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[172] *See* Mundy, *supra* note 169, at 53-54; *cf.* Eva J. Klain & Amanda R. White, *Implementing Trauma-Informed Practices in Child Welfare*, ABA CENTER ON CHILDREN AND LAW 9 (Nov. 2013); *see, e.g.*, Jason M. Lang, et al., *Advancing Trauma-Informed Systems for Children*, IMPACT (Sept. 2015); MASSACHUSETTS ADVOCATES FOR CHILDREN, *supra* note 110; *see* Krisztina Szabo, et al., *Advocate's and Attorney's Tool for Developing a Survivor's Story: Trauma Informed Approach* (National Immigrant Women's Advocacy Project, American University, Washington College of Law 2013), http://iwp.legalmomentum.org/cultural-competency/trauma-informed-care/Advocates-and-Attorneys-Tool.pdf; *see also* Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 67-73 (Oct. 2012); Hunter & Else, *supra* note 167; Brockton Hunter & Ryan Else, *Echoes of War: Part Two: Legal Strategies for Defending the Combat Veteran in Criminal Court*, 37 CHAMPION 14 (2013); *see* Katz & Haldar, *supra* note 51, at 361, 363, 370. Some noncapital defense lawyers have recognized and written about the salience of trauma on their clients' behavior and encouraged their colleagues to incorporate relevant investigation into their sentencing practices. *See* James Tibensky, *Feature: Interviewing for Noncapital Mitigation*, 38 CHAMPION 30 (2014).

[173] *See* Gohara, *supra* note 6, at 70-81, 83.

[174] *See* KiDeuk Kim, et al., *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System*, URBAN INSTITUTE 1 (2015), file:///C:/Users/msg52/Article/Sources/Taylor%20Sources/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf (noting that severe mental illness affects nearly one-quarter of the United States correctional population, including people in prisons, jails, and on probation); *see also* Sarah Varney, *By the Numbers: Mental Illness Behind Bars*, PBS (2014), http://www.pbs.org/newshour/updates/numbers-mental-illness-behind-bars/ (reporting that in state prisons, 73 percent of women and 55 percent of men have at least one mental health problem; in federal prisons, 61 percent of women and 44 percent of men do; and in local jails, 75 percent of women and 63 percent of men do).

of capital and juvenile life without parole case law is any indication, only after some attorneys evolve their practices will professional norms evolve across jurisdictions and will doctrinal imperative follow.[175]

In fact, a sample of noncapital Guidelines-era federal cases demonstrates that even in a sentencing framework in which evidence of life adversity is meant to be excluded, occasional defense presentation of trauma has, at a minimum, forced consideration of a defendant's history of victimization or exposure to violence. In some cases, such defense demonstrations have provided defendants their only chance at persuading courts to depart from determinate sentences.[176] In one federal case, the court of appeals vacated the defendant, B. Roe's, Guidelines sentence for bank robbery based on evidence, including expert testimony, concerning the impact of her mother's boyfriend's abuse: beating her savagely with belts, extension cords, and coat hangers, sometimes daily; routinely raping and sodomizing her; beating her into submission if she resisted; and on at least one occasion forcing her to lie on the basement stairs naked while he urinated in her mouth.[177] At twelve, she ran away from home and lived on the streets. An acquaintance then took her to Las Vegas, where she was forced to work as a prostitute, and she was abused by a series of boyfriends and pimps for fifteen years. One expert report described her as "virtually a mindless puppet."[178] Because of the detailed presentation of Ms. Roe's social history, corroborated by expert reports, the court of appeals possessed a record on which to view her offense in the context of her whole life. On that basis, it ordered the district court to reconsider her sentence in light of the psychological impact of her history of extraordinary childhood abuse and neglect.[179]

Attorneys representing veterans in federal proceedings have also in some cases persuaded courts to consider combat trauma a reason to depart downward from the Guidelines.[180] In this context, capital case advocacy in the wake of *Porter v. McCollum*, a death penalty case in which the defendant was a veteran, discussed in detail *infra*, explicitly influenced the Sentencing Commission. After the Supreme Court decided *Porter*, the Sentencing Commission amended the Guidelines to permit consideration of military service at sentencing, when historically, such service was considered "not ordinarily relevant."[181]

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[175] In both the capital and juvenile life without parole context, litigation of individual cases has forced courts to address the sentencing standards and inclusion of relevant information that will satisfy the Eighth Amendment. *See* Gohara, *supra* note 6, at 51-52, 54 (describing the evolution of capital mitigation practice in the wake of Supreme Court Eighth Amendment decisions and citing sources); see also, *e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2465 (2013); Graham v. Florida 560 U.S. 48, 53 (2010).

[176] *See e.g.*, United States v. Roe, 938 F.2d 1293, 1298 (D.C. Cir. 1991); : United States v. Ayers, 971 F. Supp. 1197, 1198-99 (N.D. Ill. 1997); United States v. Nowicki, 252 F. Supp. 2d 1242, 1247-48 (D. N.M. 2003); United States v. Johnson, No. 05-CR-80, 2005 U.S. Dist. LEXIS 15742, at *2 (E.D. Wis. July 25, 2005).

[177] United States v. Roe, 976 F.2d 1216, 1218 (9th Cir. 1992).

[178] *Id.*

[179] *Id*

[180] *See* Wieand, *supra* note 55, at 251-52.

[181] *Id.* at 255-56, 262-63.

If defense lawyers had failed in *Roe* and the other cited cases to buck the strictures on judicial consideration of their clients' trauma, their clients would have stood little chance of receiving sentences proportionate to their blameworthiness. Their sentencing judges would never have learned of circumstances that explained the defendants' misdeeds or been provided an opportunity to consider punishment effective at treating the factors underlying their offenses.

Today, there is new momentum for noncapital sentencing mitigation in the wake of *Booker*, *Miller*, and *Graham*. These precedents unquestionably permit more room for courts to consider a defendant's social history in sentencing than has been available under the mandatory and determinate sentencing era of the last forty years.[182] In fact, the Supreme Court has announced in strong noncapital dicta that "possession of the fullest information possible concerning the defendant's life and characteristics" is part of a "uniform and constant" federal sentencing principle that "the punishment should fit the offender and not merely the crime," and therefore treat "every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[183] Yet, the vestiges of the determinate era's actuarial approach to sentencing practice, and decades of the "death is different" doctrine, remain abundantly evident, both in defense practices and in courts' constricted view of textbook mitigation.[184]

The brief contextual history of guidelines and determinate sentencing in this article explains why defense lawyers may have shelved noncapital mitigation practice for several decades and why reinvigorating that practice now operationalizes the underlying moral purpose of discounting punishment for people who have suffered the sorts of trauma described herein. However, in order for defense lawyers to realize their potential to fundamentally shift the punishment paradigm, they will need to provide trauma-informed sentencing advocacy in a wide range of cases, over time and across jurisdictions. There is good reason to do so. No one should be blamed for the accident of birth that lands him in a brutal household or crime-ridden neighborhood. Defense lawyers are obligated to explain why and how those circumstances harm their clients and why sentencers should calibrate their penalties accordingly.[185] The next section describes how they might go about this work.

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[182] *See* United States v. Booker, 543 U.S. 220 (2003); *see also* Lawrence, *supra* note 120, at 8-9; Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, VERA INSTITUTE OF JUSTICE: CENTER FOR SENTENCING AND CORRECTIONS (Feb. 2014), http://vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v2b.pdf; *but see* TONRY, supra note 7, at 75-76.

[183] Pepper v. United States, 562 U.S. 476, 480, 487-88 (2011) (internal quotation marks and citations omitted).

[184] Gohara, *supra* note 6, at 81-84.

[185] Social history mitigation, including documenting and describing the effects of trauma, can provide a powerful explanation but never an excuse for criminal conduct. *See* RICH, *supra* note 1, at 198, 199.

V. WHAT TRAUMA-INFORMED SENTENCING REPRESENTATION SHOULD LOOK LIKE

A. Resources

The recommendations that follow will require resources and funding that are often scarce for attorneys who defend the indigent. For this reason, adequately funded public defender offices accustomed to delivering high-quality, holistic representation and staffed with mitigation specialists will most likely be the first to forge routine trauma-informed defense work.[186] Public defender offices seeking to develop such work might borrow from the playbooks of immigration, child welfare, domestic violence, and veterans' advocates. Many face the same resource constraints that public defenders do and yet have managed to grow trauma-informed practices.

As trauma-informed sentencing representation gains traction, courts and probation departments will come to expect that a complete sentencing profile should include exploration of a defendant's trauma history. That profile should include explanation of trauma's impact on the defendant's behavior as well as recommendations for treatment that might best rehabilitate him while adequately protecting the public. As these expectations set in, judges and policymakers ought to be more amenable to individual attorneys' and indigent defense offices' requests for additional resources to support trauma-informed sentencing mitigation work. Should defense advocacy result in a doctrinal imperative, as it has in capital and juvenile life without parole cases, mandatory provision of mitigation resources for adult noncapital sentencing will follow.[187]

Law school clinics also present excellent prospects for pioneering best trauma-informed defense sentencing practices because many are better resourced than typical indigent defense offices. The experienced attorneys who lead law school clinics are also dedicated to teaching future lawyers how to provide the best possible representation to their clients.[188] Further, law schools are training grounds for future judges, prosecutors, and policymakers. This positions them well to develop and disseminate training materials and convene gatherings to share their research and practical knowledge of cutting-edge sentencing practice with members of the bench and bar. Finally, universities are home to social scientists, mental health experts, social workers, and cultural historians. This milieu uniquely situates law school clinics to assemble the interdisciplinary teams essential to quality mitigation

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[186] *See* Gohara, *supra* note 6, at 72-73.

[187] *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68 (1985) (holding that capital defendants are entitled to funding for expert assistance in sentencing proceedings).

[188] *See* Mundy, *supra* note 169, at 62-70 (describing opportunities to discover social justice and develop cross-cultural awareness); Katz & Haldar, *supra* note 51, at 373-81 (describing benefits of teaching social justice principles and client-centered lawyering).

practices and to build a knowledge bank that will encourage the ongoing study of lives behind America's prison swell.[189]

B. Practice Primer

Defense lawyers preparing to investigate their clients' trauma histories will in most cases need to pursue the "holy trinity" of mitigation: collection of records; in-person, one-on-one witness interviews with a range of people familiar with their clients' life experiences; and expert assistance.[190] Witness interviews and life history records should reinforce and corroborate the information garnered from one another. Experts should tie the details together into a cohesive explanation for the impact of traumatic adversity on a client's functioning and behavior. By the same token, mental health evaluations are only as good as the social history undergirding them.[191] For this reason, teams that include mitigation specialists working alongside attorneys are best equipped to gather as complete a social history as possible. Defense advocates must also recognize that trauma symptoms and related behavioral impairments often defy tidy diagnoses.[192] Rather, they are a complex, dynamic group of factors that distort people's reactions and impair their judgment.

Defense attorneys and law students learning to provide trauma-informed sentencing representation will also need to gain and marshal specialized expertise in communicating effectively with traumatized clients. In many cases, trauma symptoms seriously hamper clients' abilities to assist with their own defenses. For example, common trauma symptoms may lead some defendants to be less than forthcoming about their backgrounds or might impair their memories. Their attorneys will need to be trained in how to elicit relevant information while minimizing the risks of re-traumatizing them.[193] This is all the more reason that gathering social history from a diverse set of sources, rather than relying exclusively on the client's own account, is critically important to competent sentencing representation.

In addition, defense lawyers must become aware of the ways in which trauma impacts defendants' experiences of the justice system: their clients may be mistrustful of them; they may encounter difficulty assessing risks and benefits of case-related decisions; they may be disengaged and dissociative;

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[189] *See* Gohara, *supra* note 6, at 73 (citing sources). In fact, Yale School of Medicine's Child Study Center has pioneered a program to increase police awareness of children exposed to violence and other trauma and to increase clinical services available to families that have survived traumatic events. *See* Dudley, *supra* note 108, at 14 (with these new programs, "they will be more invested in and better able to develop and institute police practices that take this serious mental health problem into consideration.").

[190] Wayland, *supra* note 13, at 939.

[191] *See* Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 964, 974-75 (2008) (explaining that "it is never appropriate to expect a mental health expert to deliver a comprehensive mental health assessment of the client until the life history investigation is complete").

[192] *See* VAN DER KOLK, *supra* note 32, at 144-45.

[193] *See* Chaudhary, *supra* note 164, at 61.

they may have trouble staying focused or accurately recalling events.[194] All of these are textbook symptoms of trauma.[195] Moreover, the imbalance of power inherent in attorney-client relationships may trigger clients who have survived particular types of trauma, such as domestic partner or childhood abuse.[196] For these reasons and others, lawyers seeking to gain the experience necessary to improve their representation of traumatized clients will need to learn what mental health and social service providers can teach them about effective communication with traumatized people. This includes, whenever possible, working on teams with mitigation specialists and mental health experts capable of gathering clients' life stories while meeting their legal and interpersonal needs.[197]

Attorneys, law students, mitigation specialists, and other defense team members committing themselves to presenting their clients' adversities will also need to learn how to protect themselves from the effects of vicarious trauma, or "burnout." This self-protection is essential to maintaining the stamina and capacity necessary to work effectively on behalf of traumatized clients.[198] Clinical professors teaching law students to investigate and describe clients' trauma histories must, in addition, remain mindful that students themselves may carry backgrounds of serious adversity. They should teach their students to consider ways in which their own histories might impact their work on behalf of clients with similar experiences.[199] Scholars and practitioners have written a good deal about the signs and symptoms of vicarious trauma and prescribed concrete strategies for combatting it, crucial information that any attorney intending to deliver trauma-informed representation should heed.[200]

Moreover, judges have well-founded concern about protecting public safety. This means that effective noncapital sentencing representation of traumatized clients will need to persuade courts that the people awaiting sentencing are amenable to treatment, that treatment ameliorates the adverse behavioral manifestations of trauma, and that mental health or rehabilitation

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[194] *See* Lustig, *supra* note 118, at 729-30; Chaudhary, *supra* note 164, at 40-41, 44; Wieand, *supra* note 55, at 270-71.

[195] *See* Katz & Haldar, *supra* note 51, at 385-87; *see id.* at 387 (discussing symptoms of trauma).

[196] *See* Wayland, *supra* note 13, at 949 (explaining that the imbalance of power "can trigger profound emotional responses that often reflect the devastating interpersonal sequelae of chronic and untreated child maltreatment").

[197] *See* VAN DER KOLK, *supra* note 32, at 140-41.

[198] *See* JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 468 (3d ed. 2007) (describing addressing vicarious trauma as "an ethical imperative" and warning that "lawyers owe it to their clients to contain and address the damage that may be caused by intimate connection with their clients' lives").

[199] *See* Katz & Haldar, *supra* note 51, at 392-93.

[200] *See* Peters, *supra* note 198, at §§ 9-3, 9-4; Katz & Haldar, *supra* note 51, at 392-93; *see, e.g.*, Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L. J. 163 (2007). Unfortunately, recognizing the impact of vicarious trauma is another area in which attorneys lag behind professionals in other disciplines such as mental health, social work, and education. *See, e.g.*, Jason M. Newell & Gordon A. MacNeil, *Professional Burnout, Vicarious Trauma, Secondary Traumatic Stress, and Compassion Fatigue: A Review of Theoretical Terms, Risk Factors, and Preventive Methods for Clinicians and Researchers*, 6 Best Practices in Mental Health (July 2010). As a result, little scholarship aimed at lawyers addresses the issue.

programs may in many cases present viable alternatives to incarceration. At the very least, treatment programs ought to be part of any punishment, including prison or jail time, aimed at reducing a traumatized person's risk of recidivism.[201] Otherwise, penal institutions are likely only to compound trauma.[202] Prisons and juvenile detention centers are, after all, all too often their own hotbeds of violence, and in the absence of meaningful educational programs and mental health treatment, it is not unusual for confined people to fill their time with less constructive pursuits. Yet, treatment is demonstrably effective in alleviating the behavioral and mental health consequences of trauma, and the earlier the interventions are deployed, the better the chances that people who have survived harrowing life experiences will escape the cycle of harm.[203]

Finally, effective noncapital sentencing mitigation work must demonstrate prospects for rehabilitation. For this reason, capital mitigation, with its emphasis on why a defendant should spend his life in prison as opposed to being executed, will by definition serve as an incomplete model. This implicates the tension between proportionate retributive sentencing and rehabilitative sentencing discussed, *supra*. In other words, in capital sentencing, the more severely traumatized a client is, the more likely a skilled attorney can persuade a jury to spare his life, because the alternative is usually life behind bars. In noncapital sentencing, evidence of trauma will need to be tempered with realistic treatment prospects that convince a judge that a person can be sentenced proportionally to his culpability without endangering public safety. With that said, the past thirty years of capital defense practice has evolved a sophisticated factual and doctrinal record on which noncapital lawyers may build, as their trauma-informed advocacy begins to shape a new sentencing era. The ensuing section describes that record.

VI. Supreme Court Precedent Concerning Childhood Adversity's Relevance to Sentencing

The following case summaries demonstrate the power of detailed individual stories in mitigating even the most serious offenses. The case summaries also illustrate the evolution of the Supreme Court's understanding of trauma. The Court's opinions have become more textured with detail and interwoven with social science as the body of precedent has built over time, providing a powerful roadmap showing how thorough defense advocacy progresses law. Finally, the capital cases stand as formidable precedent for

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[201] Michael T. Baglivio, et al., *The Prevalence of Adverse Childhood Experiences on the Lives of Juvenile Offenders*, OJJDP Journal of Juvenile Justice 11 (Spring 2014).

[202] John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, Vera Institute for Justice 20 (June 2006), http://www.vera.org/sites/default/files/resources/downloads/Confronting Confinement.pdf; Wolff & Shi, *supra* note 44, at 1909; *see* Haney, *supra* note 38, at 859, 860-61.

[203] *See, e.g.*, Van Der Kolk, *supra* note 32, at Part V: Paths to Recovery (several chapters describing various treatments and modalities for ameliorating the effects of trauma in adults and youth); *id.* at 356-58 (describing interventions that work to heal the effects of trauma); Rich, *supra* note 1, at 199-201 (describing trauma interventions based on the injury paradigm and grounded in social justice).

advocates seeking to expand the consideration of trauma histories in other criminal cases, as they have successfully done in the juvenile life without parole context, also briefly summarized below.

A. Case Examples

Beginning with *Eddings v. Oklahoma* in 1982, and later in a trio of watershed cases in the 2000s, *Williams v. Taylor*, *Wiggins v. Smith*, and *Rompilla v. Beard*, the Supreme Court held that death-sentenced petitioners' traumatic backgrounds were bases for mercy that their sentencers were constitutionally obligated to consider. In each case, skilled defense teams assembled the detailed record of adversity each petitioner suffered.

In *Eddings v. Oklahoma*, the Court solidified the principle that, in capital cases, courts must consider any relevant mitigating evidence.[204] Monty Lee Eddings had been convicted of a murder committed when he was sixteen years old.[205] The Court considered evidence of Eddings's "troubled youth" relevant, specifically that: Eddings had "been raised without proper guidance"; his parents had divorced when he was five years old; and he had lived with his mother until he was fourteen "without rules or supervision."[206] There was "suggestion that Eddings' mother was an alcoholic and possibly a prostitute."[207] By the time Eddings was fourteen and could "no longer be controlled," his mother sent him to live with his father whose attempts at discipline "gave way to physical punishment" described as "excessive," including striking him with a strap or something like it.[208] Testimony showed that Eddings was emotionally disturbed generally, as well as at the time of the crime, and that his mental and emotional development was "at a level several years below his age."[209] A psychiatrist also testified that Eddings could be rehabilitated by intensive therapy over 15-20 years, and, if treated, "would no longer pose a serious threat to society."[210]

The Court held that "the background and mental and emotional development of a youthful defendant [must] be duly considered in sentencing."[211] The Court noted, in particular, the relevance of child abuse and its mental and emotional impact: "[T]here can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant."[212] Eddings had been "deprived of the care, concern, and paternal attention that children deserve . . . raised in a neglectful, sometimes even violent, family background."[213] As a

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[204] Eddings v. Oklahoma, 455 U.S. 104 (1982); *see, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978) (establishing that all mitigation must be admissible at capital sentencing).

[205] *Eddings*, 455 U.S. at 115.

[206] *Id.* at 107.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* at 107-08.

[211] *Id.* at 116.

[212] *Id.* at 115.

[213] *Id.* at 116.

result, Eddings' "mental and emotional development were at a level several years below his chronological age," and he suffered from "severe emotional disturbance."[214] The Court's engagement with Monty Lee Eddings's traumatic social history and related psychological evidence in judgment of his moral culpability laid the foundation for scores of capital and juvenile cases hence.

In the early 2000s, a trio of Supreme Court capital cases dove more deeply into the relevance of childhood maltreatment to moral culpability: *Williams v. Taylor*[215]; *Wiggins v. Smith*[216]; and *Rompilla v. Beard*.[217] In each, the Court overturned the petitioner's death sentence for his trial lawyer's failure, in violation of the Sixth Amendment, to present evidence of brutal childhood abuse. The indelible details with which the Court recounted these petitioners' early years marked an explication of the injuries that was deeper than that of the foundational capital mitigation cases' general descriptions of "troubled youth."[218]

In the first of the three Sixth Amendment cases, *Williams v. Taylor*, social service records documented that Terry Williams's life began with parents who had been imprisoned for criminally neglecting him and his siblings.[219] His father severely and repeatedly beat him.[220] He had lived in a child welfare bureau's custody while his parents were in prison, including a stint in an abusive foster home.[221] The Court's opinion included a notorious footnote citing Williams's social services records' describing the following:

> The home was a complete wreck . . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash . . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them . . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey.[222]

Williams was later found to be borderline intellectually disabled and failed to advance in school past a sixth-grade level.[223]

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[214] *Id.* at 115-16.
[215] Williams v. Taylor, 529 U.S. 362 (2000).
[216] Wiggins v. Smith, 539 U.S. 510 (2003).
[217] Rompilla v. Beard, 545 U.S. 374 (2005).
[218] *See* Gohara, *supra* note 6, at 52.
[219] *Williams*, 529 U.S. at 395.
[220] *Id.*
[221] *Id.*
[222] *Id.* at 395 n. 19.
[223] *Id.* at 396.

In the second of the three cases, *Wiggins v. Smith*, Kevin Wiggins's "excruciating life history"[224] began with his mother, a "chronic alcoholic" who "frequently left [him] and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage."[225] Mrs. Wiggins "beat[] the children for breaking into the kitchen, which she often kept locked."[226] She also had sex "while her children slept in the same bed," and once forced Wiggins's hand against a hot stove, an injury requiring hospitalization.[227] When Wiggins was six, the state placed him in foster care. There, his first and second foster mothers abused him physically, and his second foster father repeatedly molested and raped him.[228] In another home, his foster mother's sons gang-raped him on more than one occasion.[229] At sixteen, Kevin Wiggins ran away from foster care, and was at times homeless.[230] He was also later sexually abused by his Job Corps supervisor.[231]

And in the third of the cases, *Rompilla v. Beard*, Ronald Rompilla's parents were "both severe alcoholics who drank constantly," including while his mother was pregnant with him.[232] His father had a "vicious temper" and frequently beat Rompilla's mother, "leaving her bruised and black-eyed."[233] His parents "fought violently," and his mother stabbed his father on at least one occasion.[234] Rompilla's father also beat him "with his hands, fists, leather straps, belts and sticks."[235] Yelling and verbal abuse replaced "expressions of parental love, affection or approval,"[236] and "[a]ll of the children lived in terror."[237] Rompilla's father locked him and his brother in a "small wire mesh dog pen that was filthy and excrement filled."[238] The children were isolated, forbidden from visiting other children or speaking to anyone on the phone.[239] The Rompillas lived in a house with no indoor plumbing; Ronald slept in an attic with no heat; and "the children were not given clothes and attended school in rags."[240] Later testing found that Rompilla suffered from organic brain damage and "an extreme mental disturbance" that impaired several of his cognitive functions.[241]

Additional Supreme Court cases illustrate the salience of traumatic life history in capital sentencing. *Porter v. McCollum* (2009) established an important guideline for consideration of trauma at sentencing in that it faulted

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[224] Wiggins v. Smith, 539 U.S. 510, 537 (2003).
[225] *Id.* at 516-517.
[226] *Id.* at 517.
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] Rompilla v. Beard, 545 U.S. 374, 391-92 (2005) (internal quotation marks omitted).
[233] *Id.* at 392 (internal quotation marks omitted).
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*

the lower courts for discounting that evidence because Porter was 54 years old by the time of the offense. In doing so, the Court recognized that the effects of trauma reverberate throughout a lifetime.[242] In addition, the Court concluded that even the potentially unhelpful fact that Porter went AWOL more than once during his military service in no way diminished his mitigation, and was, in fact, consistent with the "intense stress and mental and emotional toll" of combat.[243] This recognition, too, evinces a nuanced view of mitigation as complicated, imperfect, and requiring careful engagement with the details of personal adversity.[244]

Porter had suffered a "horrible family life," as well as military trauma including active combat in two "of the most critical . . . and horrific" battles of the Korean War, in which his company "sustained the heaviest losses of any troops in the battle, with more than 50% casualties" as well as "mortar, artillery, machine gun, and every other kind of fire you can imagine."[245] Porter himself was wounded twice.[246] Evidence also showed that he suffered from mental impairment.[247]

One more Supreme Court capital case opinion is noteworthy for its painstaking catalogue of a capital defendant's depraved upbringing and its explicit consideration of trauma's psychic and behavioral toll: Justice Sotomayor's ten-page dissent from denial of certiorari in *Hodge v. Kentucky*.[248] Benny Lee Hodge suffered what the Kentucky Supreme Court called a "most severe and unimaginable level of physical and mental abuse."[249] The beatings began in utero when Hodge's father beat his mother while she was pregnant with him; he later continued to beat her when Hodge was born, even while she held him, an infant, in her arms.[250] As a youngster, Hodge escaped his mother's next husband by living with step-relatives, "bootleggers who ran a brothel."[251] His stepfather, Billy Joe, controlled what little money the family had and left them in abject poverty. He beat and raped Hodge's mother, once so severely that she miscarried. He pointed a gun at her and threatened to kill her. "All of this abuse occurred while Hodge and his sisters could see or hear . . . [and] following many beatings, [the children] thought their mother was dead."[252] Billy Joe also molested at least one of Hodge's sisters and often beat Hodge with a belt, leaving imprints of the buckle on his body.[253] Hodge was "kicked, thrown against walls, and punched. Billy Joe once made Hodge watch while he brutally killed Hodge's

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[242] Porter v. McCollum, 558 U.S. 30, 37, 43 (2009).
[243] *Id.* at 43-44.
[244] *Id.* at 44.
[245] *Id.* at 30, 31, 35, 34, 41 (internal quotation marks omitted).
[246] *Id.* at 34-35.
[247] *Id.* at 40-41.
[248] *See* Hodge v. Kentucky, 133 S. Ct. 506 (2012).
[249] *Id.* at 506 (quoting Hodge v. Commonwealth, No. 2009-SC-000791-MR, 2011 WL 3805960, at *14 (Ky. Aug. 25, 2011)) (internal quotation marks omitted).
[250] *Id.* at 507.
[251] *Id.*
[252] *Id.*
[253] *Id.*

dog. Another time, Billy Joe rubbed Hodge's nose in his own feces."[254] Hodge, who had been an average student before Billy Joe entered his family, began stealing around age twelve, commencing years in and out of detention, where he was further subjected to routine physical and verbal abuse.[255] Psychologists who testified in Hodge's post-conviction hearing, and whose opinions the state court credited, explained the damage with which Hodge's extraordinarily violent upbringing stained his development: it left him hypervigilant, in a "constant state of anxiety"; it "taught him that the world was a hostile place," where he could count on no one else to protect him, "not his family and not society." He suffered from PTSD and "turned to drugs and alcohol to numb his feelings."[256]

Williams, Wiggins, Rompilla, Porter, and Hodge, all brutalized children, each grew into men who committed horrific murders.[257] Yet the Supreme Court recognized the inescapable salience of their troubled histories to their sentencers' assessments of their moral culpability. The relevance of trauma to sentencing is ripe for extension to noncapital cases, beyond juvenile life without parole, where attorneys have already skillfully demonstrated the applicability of the capital doctrine's logic to juvenile sentences. In *Graham v. Florida*[258] and *Miller v. Alabama*,[259] each petitioner's social history and particular life circumstances, including trauma, played a central role in the Court's assessment of his blameworthiness.[260] For example, Evan Miller's "stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result and had tried to kill himself four times, the first of which when he should have been in kindergarten."[261] In considering the petitioners' life circumstances in these cases, the Court was clear that children's lack of control over their home environments, combined with their immaturity, require individualized

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[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *See* Williams v. Taylor, 529 U.S. 362, 367-68 (2000) (describing Williams as having murdered a man with a mattock and robbing him of three dollars; he had previously confessed to beating an elderly woman into a vegetative state and had been implicated in a number of other robberies, arsons, and assaults); *see also* Wiggins v. Smith, 539 U.S. 510, 514 (2003) (describing Wiggins's offense as drowning a seventy-seven-year-old woman in her bathtub and ransacking her apartment); Rompilla v. Beard, 545 U.S. 374, 397 (2005) (Kennedy, J., dissenting) (describing Rompilla's victim as having been stabbed sixteen times around the neck and head, beaten with a blunt object, and his face gashed, possibly with broken bottles, and then having his body set on fire); Porter v. McCollum, 558 U.S. 30, 31 (2009) (describing Porter's conviction for two counts of first-degree murder of his former girlfriend and her boyfriend after threatening and stalking her); Hodge v. Commonwealth, No. 2009-SC-000791-MR, 2011 WL 3805960, at *14 (Ky. Aug. 25, 2011) (describing Hodge and his accomplices' "not just brutal and vicious but calculated and exceedingly cold-hearted" crime in which they gained entry to the home of a doctor using the ruse that they were FBI investigating fraud by a business partner, stealing $2 million dollars from a safe, strangling the doctor with an electrical cord until he lost consciousness while his college-age daughter was stabbed repeatedly and with such force that the final knife-thrust went all the way through her body).

[258] 560 U.S. 48 (2010) (holding that mandatory life without parole sentences for juvenile crimes other than homicide violate the Eighth Amendment).

[259] 132 S. Ct. 2455 (2012) (holding that mandatory life without parole sentences for juveniles who commit homicides violate the Eighth Amendment).

[260] *See* Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012); Graham v. Florida, 560 U.S. 48, 53 (2010).

[261] *Miller*, 132 S .Ct. at 2469.

sentencing hearings and consideration of social history before life without parole may be imposed on a juvenile defendant.[262]

The opinions in these cases and others actualize Justice O'Connor's principle that people maltreated as children who break the law are not to be judged by the same standards as defendants whose lives are unmarred by such adversity. The cases recognize that childhood trauma may produce lasting developmental and behavioral deficits central to culpability, even where crimes involve the most serious offenses. The capital and juvenile life without parole case law also stands as a beacon of how defense practice changes sentencing doctrine. They serve as a model for skilled defense lawyers to adopt trauma-informed practice on behalf of clients convicted of less serious crimes.

VII. CONSEQUENCES, RECOMMENDATIONS, AND THE FUTURE OF PUNISHMENT

Defense lawyers are in the best positions to drive sentencing change at this pivotal moment reconsidering the morality and efficacy of American punishment. In addition to developing a robust, accurate account of a client's social history and putting that history into consideration in individual cases, defense lawyers presenting sentencing evidence of their clients' exposure to trauma will achieve several other aims. They will explain how trauma tangibly and empirically damages behavioral domains relevant to culpability and just punishment.[263] They will show courts that dismissing defendants' exposure to violence as ubiquitous or not extraordinary is unscientific and unjustifiable under any valid penal theory.[264] They will expose actors in the criminal justice system to a principle that social scientists have accepted for decades: that in order to stem the tide of violent crime, policymakers will need to strengthen social services and bolster institutions meeting the needs of people who have suffered, and are at risk of suffering, the ravages of home and community violence.[265] They will establish that clients' injuries can be treated to prevent recidivism. Trauma-informed representation will demonstrate the need to redistribute resources toward institutions and methods that prevent and heal, rather than compound, the long-term injuries

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[262] *See id.* at 2468.

[263] *See* James Tibensky, *Feature: Interviewing for Noncapital Mitigation*, 38 CHAMPION 30 (2014) (describing lack of self-control, difficulty dealing with adversity, dissociation, "fight or flight" response, and inability to express normal emotions as hallmarks of trauma).

[264] *See Miller*, 132 S. Ct. at 2465 (discussing various rationales of punishment and outlawing mandatory life without parole for juveniles in part because it fails to account for disadvantaged upbringing); Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 77-82 (2012) (discussing retributive and consequentialist theories of punishment and explaining why the effects of abuse and violence is relevant to both).

[265] Haney, *supra* note 38, at 869 ("[T]he relationship between childhood physical abuse and subsequent adult violent behavior has been extremely well-documented, and has given rise to the phrase 'cycle of violence' in the academic literature.").

and harmful behaviors that often result from traumatic exposure to violence.[266]

A number of good-faith objections to trauma-informed defense advocacy deserve consideration, and I propose counters to them in the following paragraph. They include concerns such as that of the *McClellan* court that noncapital cases will require the resources heretofore reserved for capital proceedings.[267] Another criticism is that fact-finding in noncapital sentencing will require intensive examination of facts and scientific principles with which courts are not ordinarily familiar. Moreover, how will judges be able to tell whether offenses are really the results of trauma warranting mitigated sentences, or simply bad acts requiring harsher punishment? Finally, even if someone deserves an ameliorated penalty because trauma-induced impairments conditioned his criminal behavior, how will courts ensure public safety?

There can be no question that defense advocacy that forces examination of trauma's role in culpability will be resource-intensive. However, criminal sentencing already exacts high fiscal and human tolls. Except, as it is practiced today, it is also bereft of the moral basis for legitimate punishment. Criminal sentencing is often grossly disproportionate to a defendant's true culpability, lacking as it is routine examination of the defendant's life circumstances.[268] Given the bipartisan recognition that sentencing reform is overdue, trauma-informed representation is one approach to redistributing resources away from long prison terms and toward prevention and treatment of social conditions that are empirically proven to cause crime.

In addition, until this point, widespread criminal prosecution and lopsided defense advocacy has resulted in cheap, easy conviction and too-often uncontested sentencing.[269] More robust adversarial sentencing defense will slow the conveyor belt of justice by reducing arrests, diverting more cases to non-criminal disposition, and mitigating plea agreements. Moreover, as courts are repeatedly confronted with evidence of defendants' trauma histories, judges will learn more about trauma's impacts. Over time, they will require less intensive training and education as they develop their own relevant expertise. In addition, testifying experts need not be deployed in every case. Rather, the interdisciplinary team defense approach requires only that defense attorneys consult mental health experts to ensure that they are able to present a persuasive argument in each case. Testifying experts or written reports may be reserved for cases in which they are necessary to explain the complex behavioral impacts of trauma—ones that are not always proximately "causal" in the context of a criminal offense. I address public-safety concerns in the following sections.

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[266] *See* Wieand, *supra* note 55, at 255-56.

[267] *See* State v. McClellan, 2009 WI App 56, ¶13-14, 21, 317 Wis.2d 732, 768 N.W.2d 63.

[268] *See* Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC, Parts II and VI (October 2015).

[269] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 84 (2010).

Of course, explanation of the need for trauma-informed defense work provokes the question, "What next?" The following recommendations for change are within immediate reach, but also look ahead, with the expectation that if the modest reforms take hold, a fundamental paradigmatic shift in sentencing will develop.

A. Recommendations

First, defense lawyers should develop and implement training programs on how to recognize the signs and symptoms of trauma and how to interview their clients and social history witnesses about the sources of trauma and its impact on their clients' lives.

Second, all defense lawyers need to learn the tools that capital defense teams have developed to perform well-documented, scientifically corroborated mitigation. In order to perform this work effectively, public defender offices and court-appointed attorney programs should employ mitigation specialists and provide resources to hire trauma experts and other mental health experts when necessary. Relatedly, departments of public health, social work, psychology, and related disciplines should create and expand education and training of students on how to assist legal teams in integrating trauma-based symptoms into their work. Such programs will broaden the pool of experts trained to work on interdisciplinary teams providing trauma-informed representation to people charged with crimes.

Third, state and local criminal justice agencies should dedicate resources to training police and correctional officers in how to respond to crime with sensitivity to the effects of trauma on both victims and alleged perpetrators.[270]

Fourth, legislators should foster the establishment of trauma-informed law enforcement agencies, schools, and detention centers. They should expand funding for mental health centers and community-based rehabilitation programs designed to provide trauma survivors with evidence-based treatments to alleviate their symptoms and help them live law-abiding lives.

Fifth, local, state, and federal prisons should implement trauma assessment and treatment of prisoners in their custody throughout their time in confinement and should provide necessary training for correctional staff and mental health care providers.

Last, judges, prosecutors, and probation officers should also receive training in recognizing the myriad sources of trauma and its impact on physiology and behavior. They then ought to begin accounting for it meaningfully in charging decisions, plea negotiations, sentencing recommendations, and judgments imposed.

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[270] *See* Dudley, *supra* note 111, at 10-14.

B. Implications for Sentencing Reform

Beyond these immediate interventions, defense lawyers' well-supported arguments about what resources would benefit their clients while enhancing public safety can serve as a catalyst for more fundamental social change.

For example, for decades, policies have turned away from rehabilitative programs in favor of penalties emphasizing "just deserts." This has caused courts to prioritize punishment over treatment that might heal criminogenic social problems.[271] Even when judges do seek community institutions to assist defendants with supportive transitions to law-abiding behavior, they are often frustrated by a lack of available options to assist defendants with education, employment, mentoring, or counseling.[272] In addition, a national survey of crime victims' views on crime and punishment shows that they prefer, by a margin of two-to-one, that the criminal justice system focus more on rehabilitation than on punishment.[273] They also prefer increased investment in mental health treatment over increased investment in prisons and jails, by a margin of seven-to-one.[274] Yet, for the past forty years, prisons have been default repositories for injured people who hurt others. They are ill-equipped to either ameliorate the underlying social conditions that breed violence or to treat its individual consequences effectively. Investing resources into mental health and social interventions for people in the criminal justice system has transformative potential to present courts with viable alternatives to incarceration that will both rehabilitate people and enhance public safety. Moreover, there can be no end to mass incarceration without effective community treatment resources for people who are currently being sent to prison.[275]

Defense lawyering that includes detailed social history will also provide a record of insight into missed opportunities for interventions that might have provided support to traumatized defendants well before they broke the law. For example, the experiences of many defendants will demonstrate that schools, which should be mainstays for traumatized children, have become punitive institutions that too often exacerbate injury and truncate opportunity.[276] The same can be said for community centers that either exclude young people with criminal records or are so closely linked to law

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[271] *See* Michael Tonry, *Community Punishment in a Rational Society* 6 (Minnesota Legal Studies Research Paper No. 17-05, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920845.

[272] *See* STANFORD LAW SCHOOL THREE STRIKES PROJECT, WHEN DID PRISONS BECOME ACCEPTABLE MENTAL HEALTH CARE FACILITIES? 16 (2014), http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/632655/doc/slspublic/Report_v12.pdf.

[273] ALLIANCE FOR SAFETY & JUSTICE, *supra* note 22, at 15.

[274] *Id.* at 19.

[275] *See* Tonry, *supra* note 271, at 2 ("The United States cannot avoid continued mass incarceration unless use of community punishments increases enormously for people who otherwise would be (and now are) sentenced to confinement.").

[276] *See* HINTON, *supra* note 76, at 238-40 (describing the ascent of zero-tolerance school policies and rise in expulsions in urban public schools and surveillance of school-age black youth as a "gateway to surveillance of their families as police departments increasingly partnered with social services").

enforcement that they serve as extensions of the carceral state.[277] Defense teams can point out the need for refashioning schools and community centers as places where vulnerable youth can learn crucial life skills, including how to manage conflict or how to navigate their lives productively while living with symptoms of trauma.[278] Investing funds in programs such as community schools that provide health care, nutritional, academic, and other social resources to families of school-aged children will also go a long way toward providing the economic and family support that many traumatized people need to lead successful, law-abiding lives.[279]

Finally, competent sentencing representation that identifies the sources of injury to traumatized clients will bring into view widely-tolerated social factors that breed crime and counsel resolution of cases that heals rather than compounds harm.[280] In other words, trauma-informed defense representation has the power to widen the lens of culpability and at the same time encourage

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[277] *See id.* at 99 (describing the creation of Youth Service Bureaus under the Johnson administration's "War on Crime," which channeled "youth who had not committed any crime at all but were seen as susceptible to delinquency into community-based crime control agencies" staffed largely by law enforcement officers).

[278] *See* Feierman & Fine, *supra* note 71, at 5 (highlighting racial disparities in the types of places that provide trauma-informed treatment to youth, and recommending that treatment and skills-building take place in private or community settings outside of the juvenile justice system, which often does more harm than good); *see also id.* (explaining how police officers, not community action workers, emerged as the government's chief representatives in low-income black urban communities as the "War on Poverty" and "War on Crime" merged).

[279] *See* David L. Kirp, *To Teach a Child to Read, First Give Him Glasses*, N.Y. TIMES (Aug. 6, 2016), https://www.nytimes.com/2016/08/07/opinion/sunday/to-teach-a-child-to-read-first-give-him-glasses.html (describing community schools in New York City); James Redford & Karen Pritzker, *Teaching Traumatized Kids*, THE ATLANTIC (July 7, 2016), https://www.theatlantic.com/education/archive/2016/07/teaching-traumatized-kids/490214/ (describing trauma-informed school programs' efficacy in reducing the number of serious disciplinary issues and in-school violence; one school that had adopted "trauma-informed practices . . . saw a fivefold increase in graduation rates, a threefold increase in students headed to college, 75 percent fewer fights, and 90 percent fewer suspensions"; a study of a different school system's trauma-informed school programs showed "a 49 percent decline in suspensions, and a 42 percent decline in serious behavioral incidents . . . [and] 98 percent of students with significant behavioral and emotional challenges now have a plan in place for services and supports"); *see also* HINTON, *supra* note 76, at 99 (2016) (describing the advent of entwinement between social service agencies and crime control); *id.* at 101, 103 (tracing the history of evolution of anti-poverty programs of the 1960s into community centers often directed by law enforcement officials and charged with "operat[ing] as an umbrella for Great Society programs . . . to provide a range of services for black urban youth").

Hinton writes that creation of the federal Office of Juvenile Justice and Delinquency Prevention provided the federal government an opportunity to address crime and violence among young people by "confronting related problems in urban public school systems, public housing, and low-income neighborhoods," but the federal government instead shifted its approach to delinquency in a punitive direction by "empowering law enforcement authorities to intervene in public institutions serving youth in segregated urban communities." HINTON, *supra* note 76, at 227. *See also id.* at 244-46 (describing a successful alternative to incarceration program in Denver that remained independent of the formal criminal justice system and provided job training and classroom instruction to "hardcore delinquent[]" youth and "chronic offenders" who were allowed to live at home while receiving services designed to prevent recidivism).

[280] *See* RICH, *supra* note 1, at 66 (explaining that seeing young men who might have acted violently after themselves witnessing or falling victim to violence requires "that all of us bear responsibility for understanding why they got injured and how to prevent it from happening again"); *see also* VAN DER KOLK, *supra* note 32, at 350 ("[A]s long as we continue to live in denial and treat only trauma while ignoring its origins, we are bound to fail . . . Poverty, unemployment, inferior schools, social isolation, widespread availability of guns, and substandard housing all are breeding grounds for trauma.").

courts to stigmatize less and empathize more with people who break the law. This could be the paradigmatic foundation of refashioning punishment.

C. Innovative Models

Criminal justice programs aimed at stemming the cycle of trauma are beginning to gain traction. Organizations such as Common Justice and Crime Survivors for Safety and Justice explicitly base their work on the premise that survivors of trauma are at greater risk of being violent themselves.[281] They offer and advocate for alternatives to incarceration for victims who later commit acts of violence.[282] Crime Survivors for Safety and Justice, for example, has created networks of crime survivors in states and local communities that advocate for legislative reforms to redirect money from prisons into mental health programs, drug treatment, and victims' services.[283] The organization also advocates the creation of trauma centers in neighborhoods with high crime rates.[284] Common Justice offers an alternative to incarceration and a victim service program for both perpetrators and victims of serious violent felonies. This initiative is modeling ways to heal trauma in the criminal justice context by providing intensive treatment to both crime survivors and offenders.[285] These examples of criminal justice reform are replicable and are based on an implicit understanding among many who themselves or whose loved ones have broken the law: the line between victim and perpetrator is all too often fluid, ever-changing, and cyclical.[286]

In addition, around the country, veterans' courts are establishing a trauma-treatment paradigm in criminal proceedings.[287] In veterans' courts, defendants with a history of military service are provided integrated alcohol, drug, and mental health treatment as well as access to primary health care,

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[281] *See* Sarah Stillman, *Black Wounds Matter*, NEW YORKER (Oct. 15, 2015), https://www.newyorker.com/news/daily-comment/black-wounds-matter (describing the organizations and their work).

[282] *Id.* ("[W]e must adjust our shared understanding of crime demographics to account for the fact that those most routinely portrayed as perpetrators are often at equal or greater risk of being victims.").

[283] *See* CRIME SURVIVORS FOR SAFETY & JUSTICE (last visited Feb. 25, 2018), https://cssj.org/.

[284] Funding is available to support this work. *See id.* (describing Congressional allotment of $1.6 billion in new funds to be deployed to local organizations serving survivors of crime).

[285] *See Common Justice*, VERA INSTITUTE OF JUSTICE (last visited Feb. 5, 2018), https://www.vera.org/research/steve-aos-presentation-using-evidence-based-public-policy-to-reduce-incarceration-crime-and-criminal-justice-costs (explaining that the Common Justice program provides the harmed and responsible parties with an opportunity to engage in a facilitated dialogue and to agree upon appropriate sanctions, such as apologies and commitments to attend rehabilitative programming).

[286] *See* Danielle Sered, *Young Men of Color and the Other Side of Harm*, VERA INSTITUTE OF JUSTICE 1-2, 4 (Dec. 2014), http://www.vera.org/sites/default/files/resources/downloads/young-men-color-disparities-responses-violence.pdf ("There is no evidence suggesting that the same disparities that exist when young men of color are defendants disappear when they are victims.").

[287] *See* Tiffany Cartwright, *"To Care For Him Who Shall Have Borne the Battle": The Recent Development of Veterans Treatment Courts In America*, 22 STAN. L. & POL'Y REV. 295, 303-04 (2011) (describing how specialized veterans' treatment courts address "the underlying problem at the root of [veterans'] criminal activity": combat trauma).

housing, education, employment, and family counseling programs.[288] Veteran-defendants are also paired with volunteer peer mentors who assist them with life skills, accessing social services, and maintaining sobriety while helping them remain accountable to the treatment court.[289] However, most veterans' courts are limited to non-violent defendants and therefore serve as an imperfect model for meaningful trauma-based criminal justice interventions. Nevertheless, their emphasis on wraparound social services and intensive interpersonal support are worth examining closely as regular criminal courts begin to consider trauma-informed approaches to sentencing.[290]

Adopting nuanced, empirically-based models of how to prevent harm through programs such as those described here offers hope for more effective and just sentencing than the revolving prison doors that have dominated the last forty years of American punishment.[291]

D. Conclusion

In an ode to urban trauma, the poet and lyricist Tupac Shakur, rhymed the following:

> *...I'm tryin' to make a dollar out of fifteen cents*
> *It's hard to be legit and still pay your rent*
> *And in the end it seems I'm headin' for tha pen*
> *I try and find my friends, but they're blowin' in the wind*
> *Last night my buddy lost his whole family*
> *It's gonna take the man in me to conquer this insanity*
> *It seems tha rain'll never let up*
> *I try to keep my head up, and still keep from getting' wet up*
> *You know it's funny when it rains it pours*
> *They got money for wars, but can't feed the poor*
> *Said it ain't no hope for the youth and the truth is*
> *It ain't no hope for tha future*
> *And then they wonder why we crazy*
> *I blame my mother, for turning my brother into a crack baby*
> *We ain't meant to survive, 'cause it's a setup*

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[288] *Id.* at 307 (noting that this "continuum of rehabilitation services" plays an essential role in the success of a veterans' treatment court by enabling veteran-defendants to be diverted from traditional adjudication and sentencing paradigms and into treatment programs).

[289] *Id.* at 304 ("[M]ost veterans courts have a mentoring program that pairs each participant with a volunteer mentor who comes from a similar background. The mentoring program is the most direct response to the observation that veterans respond better to treatment when they work with other veterans.").

[290] *Id.* at 309 (describing veterans' courts' general limitation to non-violent defendants).

[291] National statistics on recidivism show that over 75% of people who leave prison are rearrested within five years of their release. *See Recidivism*, NAT'L INSTITUTE OF JUSTICE, http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx (last visited Feb. 5, 2018) (citing a Bureau of Justice Statistics study, which tracked 404,638 prisoners in 30 states after their release in 2005, and found that about three-fourths of the released prisoners were rearrested by 2010).

And even though you're fed up
Huh, ya got to keep your head up....[292]

These lyrics reflect the foreboding and hopelessness that many of the young people of color who disproportionately populate our prisons and jails lived with in 1993 when the song was written and continue to live with today. The poetry evokes poverty, fatalism, and loss of loved ones—to murder, mental illness, and addiction. The verse captures a fundamental belief that, at bottom, these young people are "not meant to survive."[293] It is about conditions allowed to flourish in poor black and brown neighborhoods that would be unthinkable anywhere else, and the devastation those conditions visit on individual men and women, girls, and boys. It is about the havoc violence wreaks in their communities.

Shakur's poem might have rung hollow to his audience absent his mention of another all-too-common experience of many poor black and Latino men: the intuition that he was "headin' for tha pen."[294] Shakur gave voice to what so many know all too well: poverty, lack of opportunity, and violent loss pave the way to prison. A majority of locked-up people have experienced this potpourri of harms, intensified by the pernicious overlay of deprivation, disenfranchisement, and racial discrimination.[295] The song suggests that the link between trauma and incarceration is obvious to the people who live with both. Yet, the actors in the justice system responsible for defending and judging those people when they transgress the law have mostly been blind to it. This article is about noncapital defense lawyers' responsibility to make that link clear, to explain to courts how their clients' adversities have narrowed their opportunities and distorted their choices, how their trauma has fundamentally altered their wiring and impacted their behavior, and to urge sentencers to reshape punishment in its light.

Capital defense lawyers are constitutionally obligated to perform this work. Their noncapital counterparts are not, which means that absent an individual defense attorney's own instinct and initiative, the vast majority of people behind bars are locked up without anyone in the justice system knowing a thing about the context in which they broke the law, a backdrop all too often marked by their own victimization at home or on the streets.

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[292] Darryl Anderson, et al., *Keep Ya Head Up* (1993), https://play.google.com/music/preview/Tifjep6dmrenof7nemoxhen4uda?lyrics=1&utm_source=google&utm_medium=search&utm_campaign=lyrics&pcampaignid=kp-lyrics.

[293] Shakur himself was murdered on September 7, 1996, at the age of 25, in a drive-by shooting. Kevin Powell, *Tupac Shakur: 1971-1996*, ROLLING STONE (Oct. 31, 1996), http://www.rollingstone.com/music/news/tupac-shakur-1971-1996-19961031.

[294] *See* HINTON, *supra* note 76, at 5 ("Black Americans and Latinos together constitute 59 percent of the nation's prisoners, even though they make up roughly a quarter of the entire U.S. population. . . . Odds are 50-50 that young, black urban males are in jail, in a cell in one of the 1,821 state and federal prisons across the United States, or on probation or parole.").

[295] *See* Wayland, *supra* note 13, at 961 ("The trauma literature demonstrates that men, young people, minorities, and people of lower socioeconomic status are among those at highest risk for exposure to traumatic experiences. People who are at risk for cumulative traumatic exposure include people traumatized as children and people who are disenfranchised by virtue of race and class.").

Dr. John Rich has eloquently described the mutual benefits of a treatment and service-based approach to the root causes of violence:

> [W]e must focus on *their* safety: the very people we have blamed for making the community unsafe. We are only as safe as they are. The same safety that we desire, they desire. If we believe that locking them up, brutalizing them in the homes where they live, in the streets where they walk, in hospitals where they seek care, will make us safer, we are sorely mistaken. But if we see our fates and our community as directly tied to them, then we will fight the free flow of firearms, oppose more brutal policing, advocate for greater opportunities for meaningful work, and engage them as full partners in both understanding and addressing the problems that grip the communities in which they live.[296]

Put simply, for both just and pragmatic reasons, when a person stands punished, by a legal system over which he has no influence, the fact that he experienced overwhelming adversity arising from social conditions over which he had no control should affect the way that he is judged. Defense attorneys are in the best position to amplify this principle and bring it to the fore by learning about and persuading courts of the powerful salience of trauma in their clients' lives.

In case after case, defense lawyers can and ought to advocate for sentences that heal their injured clients. They must make persuasive arguments locating their clients' actions in the cipher of impoverished, brutal homes and neighborhoods over which they had no choice of occupation, mitigating their blameworthiness, and explaining what treatments they need to heal. Then, the urgent imperative for social investment will become clear, and a new dawn of rehabilitation, compassion, and mutual safety will gain a chance to take hold.[297]

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[296] RICH, *supra* note 1, at 201.

[297] *See* HINTON, *supra* note 76, at 340 ("Barring fundamental redistributive changes at the national level, the cycle of racial marginalization, socioeconomic isolation, and imprisonment is ever more likely to repeat itself."); Sered, *supra* note 282, at 4 ("Attention is increasingly being paid to the disparities [young men of color] experience, as well as to a variety of barriers to economic advancement, educational attainment, and positive health outcomes. Woven throughout this attention is a concern about the disproportionate involvement of young men of color in the criminal justice system as those responsible for crime. Still missing, however, is recognition that these young men are also disproportionately victims of crime and violence."); Listenbee, Jr., *supra* note 14, at 174 ("The system must recognize the heavy burdens that most young offenders carry and help them move into a healthy and productive adulthood by providing services that address the damage done by exposure to violence.").

Article

THE IDEA OF "THE CRIMINAL JUSTICE SYSTEM"

Sara Mayeux[1*]

Abstract

The phrase "the criminal justice system" is ubiquitous in discussions of criminal law, policy, and punishment in the United States—so ubiquitous that, at least in colloquial use, almost no one thinks to question the phrase. However, this way of describing and thinking about police, courts, jails, and prisons, as a holistic "system," became pervasive only in the 1960s. This essay contextualizes the idea of "the criminal justice system" within the longer history of systems theories more generally, drawing on recent scholarship in intellectual history and the history of science. The essay then recounts how that longer history converged, in 1967, with the career of a young engineer working for President Johnson's Crime Commission, whose contributions to the influential report The Challenge of Crime in a Free Society launched the modern and now commonplace idea of "the criminal justice system." Throughout, the essay reflects upon the assumptions and premises that go along with thinking about any complex phenomenon as a "system" and asks whether, in the age of mass incarceration, it is perhaps time to discard the idea, or at least to reflect more carefully upon its uses and limitations.

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"The Body is a System or Constitution: So is a Tree: So is every Machine."
— Joseph Butler (1726)

"'What are some of the possible or likely consequences of thinking of the body as a complex system?' … 'The first consequence might be described as the paradox of feeling responsible for everything and powerless at the same time, a kind of empowered powerlessness.' … Feeling responsible for everything and powerless at the same time is also a good description, I think, of the emotional state induced by citizenship in this country."
— Eula Biss, *On Immunity* (2014)

Some question the wording. Activists refer instead to "the criminal *punishment* system," believing that "justice" has little to do with American courts and prisons.[2] Lawyers prefer to put themselves in the center—"the criminal *legal* system"—while academics strive for more concise variations—simply "the criminal system."[3] Scholars debate what exactly the "system" encompasses, positing more or less expansive lists of its component parts.[4] In recent years pundits have typed and tweeted countless manifestos about what "the criminal justice system" is and isn't good for.[5] Advocates have drafted blueprints for "a better criminal justice system."[6] Scholars have divided "the criminal justice system" into sub-systems ("the court system," "the prison system") and charted that system's interactions with other systems ("the immigration system," "the welfare system," "the public school system") and explored the ways in which these systems are themselves sub-systems of that larger "governance system" that is our country.[7]

At least in colloquial use, however, few question the premise that there is, in fact, some "system." In virtually every formulation, what remains constant are the words "the" (implying holism) and, most importantly, "system" (implying structure, relations and parts and wholes, inputs and outputs, flows and processes, functions and objectives, and most importantly, dynamic equilibrium). It is thus taken nearly universally for granted that in the United States there exists something called "the criminal

[2] *See* Victoria Law, "8 ways to support protests against the criminal punishment system," Waging Nonviolence, December 12, 2014, https://wagingnonviolence.org/feature/8-ways-support-protests-criminal-punishment-system-cant-get-street/ (emphasis added).

[3] *See, e.g.*, THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoffs, eds., 2017) (using "the criminal system" throughout).

[4] *See, e.g., id.* at 10-11 (suggesting the inclusion of "seemingly civil phenomena" such as civil contempt, welfare and immigration policy, and school disciplinary rules).

[5] *E.g.* Chris Hayes (@chrislhayes), TWITTER (June 16, 2017, 1:10 PM), https://twitter.com/chrislhayes/status/875807908113416192 ("The criminal justice system - for a million reasons – is not going to transform policing or hold it accountable").

[6] The Sentencing Project, *Building a Better Criminal Justice System: 25 Experts Envision the Next 25 Years of Reform* (March 21, 2012),http://www.sentencingproject.org/wp-content/uploads/2016/01/To-Build-a-Better-Criminal-Justice-System.pdf.

[7] *E.g.* THE NEW CRIMINAL JUSTICE THINKING, *supra* note 3, at 4 (arguing that "criminal justice" is both "a socio-political system" within American society and a "governance system in its own right").

justice system,"[8] a unitary, integrated set of component institutions, processes, and actors that interact with one another through various relational structures and processes in order to collectively perform (or fail to perform) some function or set of functions in society and that we can therefore study, map, seek to understand, manipulate, and seek to improve in systemic ways. This "system" encompasses tens of thousands of functionally related, though formally distinct, entities of an almost impossibly wide-ranging set of sizes, scales, aims, and types. From the Tangipahoa Parish Jail in Ponchatoula, Louisiana, to the Los Angeles Port Police in Southern California, to the Criminal Investigation department of the Internal Revenue Service in Washington, D.C., all are part of "the system," intaking "inputs" ranging from a Minneapolis carpool dad's turn-signal violation to the question of whether the President of the United States obstructed justice and processing them into "outputs," ranging from an anonymous Seattle street person's soon-forgotten two-day stay in the county lockup after a bout of public intoxication to the German corporation Deutsche Bank's negotiated penalty of $7.2 billion after a bout of fraudulent dealings in mortgage-backed securities that helped to crash the world economy.[9]

However, a developing scholarly conversation has begun to examine more critically both the phrase "criminal justice system" and its associated concepts and assumptions.[10] This essay, which is intended to be exploratory and reflective, seeks to contribute to this conversation in two ways.

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[8] Every episode of *Law & Order*, the popular crime procedural that ran from 1990 to 2010 and continues to air in syndication, begins with the narrator's intonation: "In the criminal justice system, the people are represented by two separate yet equally important groups: The police, who investigate crime, and the district attorneys, who prosecute the offenders." *Law & Order: Seasons 1-20* (NBC television broadcast Sep. 13, 1990-May. 24, 2010).

[9] Jan-Henrik Foerster & Yalman Onaran, Deutsche Bank to Settle U.S. Mortgage Probe for $7.2 Billion, Bloomberg, December 23, 2016, https://www.bloomberg.com/news/articles/2016-12-23/deutsche-bank-to-settle-u-s-mortgage-probe-for-7-2-billion.

[10] *E.g.* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (arguing that "criminal justice system" is a "misnomer," since the term encompasses multiple largely separate systems); Bernard Harcourt, *The Systems Fallacy: From Operations Research to Contemporary Cost-Benefit Analysis: The Perils of Systems Analysis, Past and Present* (April 7, 2014), available at https://ssrn.com/abstract=3062867 (tracing the rise of the "criminal justice system" metaphor since the 1960s, arguing that the metaphor has the negative consequence "of masking the political nature" of judicial decision-making in criminal law and procedure, and arguing that this illustrates the flaws in systems analysis in policymaking more generally); Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 558 (2015) (observing that the "criminal justice system" is "not a system at all"); Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice,"* OHIO STATE J. CRIM. LAW, forthcoming, available at https://ssrn.com/abstract=3086452 (discussing recent scholarship troubling the boundaries of both the "criminal justice system" and the concept of "criminal justice" more generally).

There were also earlier dissenters from the dominant "criminal justice system" framework, although their criticisms did not make much of a dent in colloquial understandings. The criminologist George Kelling, for example, sharply criticized policymakers' uncritical belief in something called the "criminal justice system" in a 1991 article that covers some of the same history and makes some similar points as this essay, although from a very different perspective; Kelling offered his critique of the "system" metaphor in the course of making a policy argument for increased policing reoriented around crime prevention and order maintenance. George L. Kelling, *Crime and Metaphor: Toward a New Concept of Policing*, CITY JOURNAL (Autumn 1991), https://www.city-journal.org/html/crime-and-metaphor-toward-new-concept-policing-12733.html. I thank Malcolm Feeley for pointing me to

First, the essay contextualizes the idea of "the criminal justice system" within recent scholarship in intellectual history and the history of science. In one sense, the "systemic" way of talking and thinking about police, prosecutors, courts, jails, and prisons is only about 50 years old. Jstor, the digital archive of academic publications, contains in its database 2,600 scholarly journals across 75 disciplines.[11] Searching this database for articles with the phrase "the criminal justice system" anywhere in their text yields 21,416 results. When these are arranged chronologically, the first "hit" appears in 1929, followed by two articles per decade the 1940s and '50s—and then, beginning in the 1960s, an ever-quickening proliferation. In other words, out of the 20,000 or so scholarly articles referring to "the criminal justice system," more than 99.99% were published after 1960.[12] In another sense, however, these 1960s developments had very deep roots, representing one culmination of a longer trajectory of systems thinking dating back to the Enlightenment. As used in midcentury American thought, the word "system" connoted a complex of conceptual assumptions that had developed first in the natural sciences and then migrated into the social sciences and policymaking. This essay recounts that more general history and how it converged, in 1967, with the career of a young systems engineer to launch the now ubiquitous idea of "the criminal justice system."

The idea of "the criminal justice system" emerged at the conflux of two intellectual streams: first, the general tendency in modern, post-Enlightenment societies to describe social and political institutions with metaphors (though perhaps they are not just metaphors) borrowed from the natural sciences, and thus, to identify "systems" at work in human societies just as the natural world contains a multiplicity of complex "systems" (the solar system, the circulatory system); and second, the more specific versions of "systems theory" and related structuralisms that gradually overtook all of the social sciences in the United States in the first half of the twentieth century. By the 1950s and '60s, versions of systems thinking constituted the mainstream of research and thought across economics, sociology, political

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Kelling's criticism of the term. For another early critique of the term, *see* Alvin W. Cohn, *Training in the Criminal Justice Nonsystem*, 38 FED. PROBATION 32 (1974).

There is also more general literature on the scholarly utility of conceptualizing law and legal institutions as "complex adaptive systems," drawing from complexity science. For an introduction, *see generally* J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191 (2015). Scholars have also debated the utility of particular variants of systems theory for criminal justice specifically. For instance, for an argument that Niklas Luhmann's systems theory can illuminate certain dimensions of American criminal justice, *see* Hadar Aviram, *Taking the Constitution Seriously? Three Approaches to Law's Competence in Addressing Authority and Professionalism*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 3, at 155–67. This essay takes no position on the utility of the most current versions of systems analysis or complexity science for present-day scholarly analysis of criminal justice, but rather is intended to reflect upon the concept of "the criminal justice system," shaped by the state of systems thought as of the 1960s, as an artifact of a particular moment in twentieth-century intellectual and cultural history that has had enduring influence on judicial and popular conceptions.

[11] JSTOR, https://about.jstor.org (last visited Nov 20, 2017).

[12] These statistics are based on the author's own JSTOR searches. Searching Google's Ngrams database of published books yields a similar timeline, although these results should be interpreted as merely suggestive, given the limitations of the database. Bernard Harcourt finds a similar trend in his quantitative analysis of the use of "criminal justice system" in federal and state judicial opinions. Harcourt, *supra* note 10, at 3–4.

science, anthropology, psychology, linguistics, and related disciplines and subfields, and had migrated into the vocabulary of everyday life. The defining faith of this "age of system," to borrow the phrase of intellectual historian Hunter Heyck, was that literally anything could be usefully described as a "system"—a complex hierarchy of component parts existing in relation to one another and in rough equilibrium, which took in inputs and yielded outputs across its interfaces with other systems and subsystems—and therefore charted, diagrammed, modeled, understood, and ultimately, controlled.[13] It is hardly surprising, then, that the phrase "the criminal justice system" spread wildly in the late 1960s when it was introduced to a generation of lawyers, policymakers, jurists, and social scientists that had already learned, from high school science classes, university reading groups, policy schools, MBA programs, foundation grant proposals, military exercises, church sermons, and corporate memos, to think about everything—themselves, their societies, their communities, the institutions they worked for and helped to shape, their world—as one grand system of systems.

Synthesizing insights from recent historical scholarship on the general concept of "systems" and extending those insights into the criminal justice realm, this essay situates the idea of "the criminal justice system" within this broader genealogy of systems theory. It is not my claim that everyone who uses the now commonplace phrase "criminal justice system" means to import with that nomination the assumptions of systems theory in a theoretically rigorous way or even a theoretically aware way. Already by the 1970s some academics had begun to express frustration about the proliferation of vague references to "the criminal justice system" that were not grounded in any way in formal systems theory. Much less is it my claim that the phrase's colloquial ubiquity implies (or is even intended to imply) that the system it identifies is actually managed according to the coordinated and rationalized methods of operations researchers or computer scientists. Precisely the opposite: One of the key progenitors of the phrase "the criminal justice system"—the engineering-trained criminologist Al Blumstein; about whom, more later—laments the fact that in his view, criminal justice remains among "the most primitive of social systems" in the use of quantitative modeling and formal planning techniques.[14] I do think, however—drawing on the insights of scholars working at the nexus of cultural history, intellectual history, and history of science—that in a loose sense, thinking and talking about anything as a "system" does carry along certain broad assumptions that, in this essay, I want to explicate and critique. In fact, it may well be that colloquial uses of the word "system" are *more* likely to carry along crude or poorly thought-through assumptions than the more formally rigorous usage of systems approaches by social scientists and

[13] HUNTER HEYCK, AGE OF SYSTEM: UNDERSTANDING THE DEVELOPMENT OF MODERN SOCIAL SCIENCE (2015).

[14] Alfred Blumstein, *An OR Missionary's Visits to the Criminal Justice System*, 55 OPERATIONS RESEARCH 14, 14 (2007).

engineers. Metaphors, in the words of economist Deirdre McCloskey, "think for us."[15]

Second, the essay reflects upon the particular limitations and uses of the "system" framework for understanding (or critiquing) the current crisis of mass incarceration, drawing upon the growing historical literature on that crisis. For this purpose, what is most notable about systems metaphors and systems theories alike is that they are essentially ahistorical modes of description. They posit "systems" as self-regulating, through various governing mechanisms and feedback loops; as tending to maintain equilibrium over time; and as always working towards some systemic function or goal. Once mapped and understood, systems can be modified – they can be made more efficient, or more accurate—but only within some outer set of limits or bounds inherent in the function or nature of the system. Generally, systems cannot simply be gotten rid of; if they are destroyed or stop working then they die, and the larger systems of which they are a part may die. Another notable feature of systems is that they are abstract. Every example of a particular type of system is isomorphic to, and interchangeable with, every other example. A veterinarian who has studied the circulatory system can apply that abstract model to the ailments of any particular cat. The idea of a system, in sum, connotes something that is by its nature somewhat generic, dynamic only within a broadly stable structure or equilibrium rather than transforming dramatically over time, and thus, susceptible to description in ahistorical terms.

Meanwhile, the entire thrust of recent scholarship on police, courts, jails, and prisons in the United States is precisely to call into question whether these institutions have any stable function or structure that can be understood abstractly, independently of cultural context and the country's particular history of slavery, conquest, racial segregation, and widening class inequality. In recent years social scientists, historians, and legal scholars alike have generated a proliferating body of studies emphasizing the many ways in which what we call "the criminal justice system" is not particularly systemic at all, in the sense that it has been produced by specific and local histories and individuals; that its component and purportedly analogous parts often do not resemble or act like each other (every unhappy police department is unhappy in its own way); that it has not lately existed in a state of equilibrium, but rather experienced a dramatic rupture beginning in the late 1970s that yielded massive growth in the prison population, as well as any number of qualitative transformations; and that history—the humanistic study of contingent change over time—provides the epistemological and methodological frameworks best suited for understanding this rupture and its legacies.[16] Not surprisingly, then, much of

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[15] DANIEL T. RODGERS, AGE OF FRACTURE 47 (2011) (citing [DEIRDRE] N. MCCLOSKEY, THE RHETORIC OF ECONOMICS (1974)). *See also* DONALD MACKENZIE, AN ENGINE, NOT A CAMERA: HOW FINANCIAL MODELS SHAPE MARKETS (2008). For an extended discussion of "criminal justice system" in particular as a metaphor, *see* Kelling, supra note 10. Kelling criticized the metaphor from a law-and-order perspective, arguing that its widespread acceptance was causing the United States to "los[e] the battle against crime."

[16] *See* infra, Section IV.

this new scholarship also features circumlocutions around the phrase "criminal justice system," as historians and historically oriented social scientists attempt to smooth the awkward fit between the assumptions embedded in the colloquial phrase "system" and the observed reality of discontinuity, disequilibrium, locally specific and historically contingent motivations, and change over time—change for the worse in the past and, one hopes, change for the better in the future.[17] Whatever the capacity of the most sophisticated forms of systems theory to account for contingency, and whatever the utility in a narrow technical sense of importing systems analysis into criminal justice policymaking, it seems clear that the looser vernacular "systems talk" that dominates discussions of criminal justice in the United States is not a good fit for the concerns and imperatives that are currently motivating those discussions. Accordingly, perhaps (unless we are actually operations researchers or management scientists) we should discard the idea of "the criminal justice system" as one of many relics of the 1960s "age of system," understanding it not as a generic compound noun but as a culturally specific phrase born of a particular moment, like "the American way of life" or Henry Clay's "American system." "The criminal justice system" would then remain interesting to study historically, for the insights it reveals about the larger worldview that produced it, and perhaps for the effects that it continues to have, but no longer useful as a current analytical category.

The essay begins by briefly tracing the etymology of "system" and the Enlightenment origins of the idea that human societies could be observed and analyzed like natural or mechanical phenomena. Part II of the essay then sketches a portrait of the post-World War II "age of system," in which variants of systems theory and structuralism came to dominate research and thought across all of the major social science disciplines in the United States. This section is based largely on secondary reading in recent works in intellectual history and the history of science. Especially illuminating for my purposes were Hunter Heyck's *Age of System* and Joel Isaac's *Working Knowledge*.[18] Part III shows how, within this larger cultural milieu of systems, police, courts, jails, and prisons all came together in the 1960s in the minds of policymakers and lawyers to form something increasingly called "the criminal justice system." The widely read 1967 federal commission report, *The Challenge of Crime in a Free Society*, provides an illustrative example of how thoroughly this kind of thinking had permeated policymaking by the late 1960s—but more than a representative illustration, it also merits attention for its influential role in popularizing the phrase

[17] *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 2 (2016). Hinton refers to "America's carceral state: the police, sheriffs, and marshals responsible for law enforcement; the judges, prosecutors, and defense lawyers that facilitate the judicial process; and the prison officials and probation and parole officers charged with handling convicted felons." Despite avoiding the term, her tripartite division is essentially the standard model of "the criminal justice system" from the 1960s.

[18] HEYCK, supra note 13; JOEL ISAAC, WORKING KNOWLEDGE: MAKING THE HUMAN SCIENCES FROM PARSONS TO KUHN (2012).

"criminal justice system" and catalyzing its widespread adoption.[19] Part IV skips ahead to the present moment, summarizing how "mass incarceration" has come to be identified as a pressing policy problem and even, in some accounts, a crisis for American democracy writ large. The growing body of historical scholarship that seeks to understand the origins and causes of mass incarceration has generated insights that are, thus far, at least in tension with, if not wholly inconsistent with, the idea of treating the institutions and phenomena under study as a singular, holistic system. Thus, the essay concludes where it began, by asking whether the idea of "the criminal justice system" has outlived its usefulness and should be replaced with (or complemented by) new conceptual frameworks for thinking and talking about the engines and apparatuses of policing and punishment within American society.

The essay does not seek to eliminate the phrase "the criminal justice system"—obviously, and if only because such a quest would inevitably prove futile. Language after all cannot be policed, not even language referring to police. Presumably the phrase has some utility, or people think it does, or it would not be ubiquitous. The essay does, however, seek to historicize the concept of systemicity embedded within the phrase and thereby to encourage more attention to, and reflection upon, the ways in which reflexive invocations of "the criminal justice system" may hinder rather than facilitate thoughtful discussion of the wide range of topics generally subsumed under that terminological umbrella. There are other ways besides the framework of systems to think and talk about the realms of the social, the legal, and the political—ways that might for many purposes be better suited to our present moment and to the urgent needs for decriminalization, decarceration, and police accountability.

I.

Like reason, liberty, and dictionaries, "system" was a fruit of the Enlightenment.[20] Between the sixteenth and eighteenth centuries, variants of the word appeared in the modern European languages to connote some type of "organized whole."[21] The French *sisteme*, derived from the Latin *systema*, originally referred to a musical scale or series of notes. In English, the word came into common use to describe anatomical groupings of organs or body parts (as in "the nervous systeme," which appeared as early as 1669); arrangements of celestial objects (John Locke wrote about the "system of our Sun"); and organized enterprises (Thomas Hobbes, in the *Leviathan*, defined "any numbers of men joyned in one Interest, or one Businesse" as

[19] Pres. Comm'n on Law Enforcement & the Admin. of Justice, The Challenge of Crime in a Free Society (1967), NCJ 000042, available at https://www.ncjrs.gov/pdffiles1/nij/42.pdf.

[20] *See generally* CLIFFORD SISKIN, SYSTEM: THE SHAPING OF MODERN KNOWLEDGE (2016) (tracing the history of "system" as a genre for generating and organizing knowledge about the world, beginning in the Enlightenment period).

[21] This paragraph draws upon, and all quotes in this paragraph derive from, the Oxford English Dictionary entry for "system." *System Definition*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/system (last visited Nov. 20, 2017). For a fascinating and more comprehensive history of "system" understood as a literary genre, *see* Siskin, *supra* note 20.

"Systemes"). In a generic sense, the word "system" is still used to refer to groupings of things or parts (a "built-in sound system," the "interstate highway system"). Across the natural and applied sciences, one encounters geological systems, weather systems, and of course, computer systems. But from the start there was often also a thicker implication within the word "system," a suggestion that the group in question was bound together not only by happenstance or some practical purpose but also because of some divine or cosmological ordination. A writer in 1891 described Christianity as "a system of individuals united together in a great co-operative society whose binding cord is love." As early as 1726, the idea was in circulation—as expressed here by the English preacher Joseph Butler—that anything natural or artificial could equally be thought of as a "system," and thus that systemicity itself might constitute some deep connective tissue weaving together all of creation: "The Body is a System or Constitution: So is a Tree: So is every Machine."[22]

Fully elaborating grand unified theories of how exactly bodies, trees, and machines resembled one another would later preoccupy the twentieth-century systems theorists. But the great insight of the proto-social scientists of the Enlightenment was to transform human societies and polities into phenomena that could be observed, studied, and understood through the methods of science, just like natural phenomena. As Bacon proposed to master the laws of nature, so Montesquieu, Adam Smith, Condorcet, Herder, and Hume sought to master the laws of modern society, the better to chart its future.[23] As intellectual historian Dorothy Ross explains, the development of "social science" constituted one intellectual response to the "discovery of modernity"—that is, "the discovery that history was a realm of human construction." Within historical time, the scientific mastery of "society" would light the path toward that great modern desideratum, "progress": a future world more rational, rich, and happy than today's.[24]

In the United States, by the late nineteenth century, the study of society had largely moved into the universities and begun to fracture into increasingly professionalized "disciplines." The breakneck urbanization of the Gilded Age spurred the growth of sociology and its cousin criminology, both devoted in their origins to the empirical analysis of urban misery in all its forms.[25] Yet the toilers in these fields generally did not define as an object of inquiry "the criminal justice system" as a whole. The word and concept of "system" were certainly available to nineteenth- and early-twentieth-century thought, but the component parts of what would later get assembled into a single system—jails, courts, penitentiaries, the

[22] "System" also took on a somewhat different sense—"system" as a set of beliefs or an ideological plan for how things should be, regardless of whether they actually are (Henry Clay's "American system," "the capitalist system"). In American culture we often hear endorsements of "the free enterprise system" or, in law, "the adversary system." These usages do not exactly refer to an organized whole, though, but more to an ideal method or philosophy among alternatives that may or may not describe actual practice.

[23] *See* DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 5-7 (1991).

[24] *Id.* at 3, 7-8.

[25] *See generally* Mariana Valverde, "Miserology": A New Look at the History of Criminology, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 3.

emerging phenomena of district attorney's offices and police departments—remained more commonly understood and discussed separately.[26]

The idea of the criminal justice system, in the modern sense, first began to percolate in the 1920s and '30s, in the interwar proliferation of "crime surveys." Between 1900 and 1925, homicide rates had doubled, tripled, or even quadrupled in a number of fast-growing American cities.[27] Prohibition further fueled the resultant hysteria, driving the liquor trade underground and generating all of the spectacular violence typical of black markets. It was the era of Al Capone, gangster movies, and "Keystone Kops" who appeared no match for the increasingly business-like forces of organized crime.[28] The generalized fear of crime blended with a more specific set of anxieties about the new phenomenon of the massive metropolis, as the industrial cities of the North and Midwest filled with migrants fleeing the Jim Crow South and the steppes and farms of Eastern and Southern Europe. Fears about violence blended with racialized fantasias about the urban underclass to generate a potent brew of reform energies fixated on "the problem of crime."[29] For urban reformers, imposing order upon the violent metropolis constituted the most pressing governance crisis of the day, and many pinned the blame for disorder, at least in part, on the courts. As historian Jeffrey Adler summarizes the popular view: "Criminals seemed more vicious than ever. Unable to respond to the crisis, the American legal system appeared weak and ineffective."[30]

Thus did a generation of social scientists and reformers come to train their sights upon the nation's courts, police departments, jails, and prisons—what Herbert Hoover referred to, in the first presidential inaugural to emphasize crime policy, as "our system of criminal justice."[31] If the previous generation of progressive reformers had sought to "socialize" the law—to make the courts more therapeutic and responsive to social conditions—now the pendulum swung back. Experiments in rehabilitation were derided as soft-headed. The goal now was to make what was often described as "the criminal justice machinery" more "efficient" at apprehending, charging, trying, and convicting "criminals."[32] The resultant wave of crime surveys and commission reports constituted the first

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[26] "System" was used to nominate these components, as in Beaumont and Tocqueville's famous study of "the penitentiary system." GUSTAVE DE BEAUMONT, ET. AL., ON THE PENITENTIARY SYSTEM IN THE UNITED STATES ; WITH AN APPENDIX ON PENAL COLONIES AND ALSO STATISTICAL NOTES (1833). For an example of a nineteenth-century text making pervasive use of "system" in the educational context ("school system," "our present system of public schools"), *see* A. A. Hodge, *Religion in the Public Schools*, 3 NEW PRINCETON REV. 28 (1887).

[27] Jeffrey Adler, *Less Crime, More Punishment: Violence, Race, and Criminal Justice in Early Twentieth-Century America*, 102 J. AM. HIST. 34, 36 (2014).

[28] *See generally* DAVID E. RUTH, INVENTING THE PUBLIC ENEMY: THE GANGSTER IN AMERICAN CULTURE, 1918-1934 (1996).

[29] On the 1920s as the first "war on crime," *see* MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 281-312 (2003).

[30] Adler, *supra* note 27, at 36.

[31] Herbert Hoover, *Inaugural Address. March 4, 1929*, The American Presidency Project, http://www.presidency.ucsb.edu/ws/?pid=21804 (last visited Febraury 22, 2018).

[32] Adler, *supra* note 27, at 36-37; *see also* WILLRICH, supra note 29, at 281-312.

significant attempts to study *as a whole* all of the component steps along the way from arrest to incarceration, and how they all related to one another.[33]

Still, the interwar crime surveys never quite added up to a systemic model integrating all of the different parts. A leading example of the genre, the *Illinois Crime Survey*, used not the language of system but mechanical metaphors apt for the industrial age, taking as its subject the "machinery of justice." It was organized around separate chapters on each component of that machinery—felonies, the Supreme Court, the felony trial courts, the juries, the prosecutor, the police, the coroner, and so on—but never quite combined them all into one stereoscopic picture.[34]

Nevertheless many of the individual reports' conclusions, and even the structure of their analysis, hinted at systemic thinking. E.W. Hinton's chapter on "The Trial Courts, in Felony Cases," for instance, tabulated statistics on "all felony prosecutions in the year 1926" in Cook County (Chicago), nineteen other Illinois counties (both urban and rural), and, for comparison, the city of Milwaukee.[35] Hinton presented the data sequentially, giving the reader the impression of an assembly-line conveyor belt. At the start of the process, a large number of arrests were placed upon the belt, but at each subsequent step, more and more cases fell off. By the end, only a small number remained for final processing into convictions.[36] Comparing Chicago's figures with Milwaukee's, Hinton worried that Chicago was "turning loose an undue number."[37] The centerpiece of Hinton's report was the table of all of his data: hundreds of tiny black numbers and annotations, all bunched together in tight little boxes and rows.

In 1931, the federal government's Wickersham Commission, charged by the Hoover Administration with conducting a nationwide study of Prohibition, produced a similarly wide-ranging body of work synthesizing data and observations about the criminal justice "machinery" around the country.[38] Together the reports constituted essentially an attempt to model the "system" though again, not yet framed in quite those terms. Thus in the 1970s, a criminologist steeped in the age of system could look back on the Wickersham Commission's fourteen volumes as "rather disconnected," although they contained "invaluable" information.[39]

Prior to the 1960s, then, there was not much systematic analysis of what only later came to be called "the criminal justice system." Criminologists

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[33] These efforts built upon the early statistics-gathering efforts of nineteenth-century penal reformers. *See* CAROLYN STRANGE, DISCRETIONARY JUSTICE: PARDON AND PAROLE IN NEW YORK FROM THE REVOLUTION TO THE DEPRESSION 73-75 (2016).

[34] Ill. Ass'n for Crim. Justice, Illinois Crime Survey (1929), available at https://homicide.northwestern.edu/pubs/icc/.

[35] *Id.* at 202.

[36] *See id.* at 204-16. First, "a number of cases failed to survive the preliminary examination" (204); then, at the grand jury stage, "a further substantial elimination took place" (205); and so on.

[37] *Id.* at 216.

[38] U.S. Nat'l Comm'n on Law Observance & Enforcement, U.S. Wickersham Commission Reports (1931). Volumes included "Report on Police," "Report on Prosecution," "Report on the Causes of Crime," and "Progress Report on the the Study of the Federal Courts."

[39] Samuel Walker, *Reexamining the President's Crime Commission:* The Challenge of Crime in a Free Society *after Ten Years*, 24 CRIME & DELINQUENCY 1, 10, (1978).

focused their research on the causes of crime—social circumstances, psychology, individual pathologies –not the institutional mechanisms through which criminal charges were processed and certainly not systematic quantitative analysis or mathematical modeling of those mechanisms.[40] Reformers and legal scholars attempted in the 1920s and '30s to collect empirical data on policing, courts, jails, and prisons, but presented these component parts as "machinery," not "systems."

II.

"System" would permanently combine with "criminal justice" only in 1967, at the height of the Cold War explosion in federal, foundation, and university investment in the social sciences.[41] Buoyed by this infusion of resources, the Cold War imperative to develop unified theories of human behavior (the better to spread democracy), and at least within the victorious United States, post-World War II confidence in human ingenuity and enterprise, midcentury social scientists revived the old Enlightenment idea that human societies could be mastered and steered toward progress through the methods of science.

In these years the concept of "system" and more generally an interest in parts, wholes, structures, and functions—the conviction that there existed underlying bedrock realities beneath surface symbols and particularities, which could be modeled abstractly and thus manipulated and compared across "cases"—overtook or at least gained a strong foothold in virtually every social science or "human science" discipline, including sociology, anthropology, political science, economics, psychology, and linguistics, while also spawning and fueling the growth of new fields literally devoted to the study of systems such as operations research, management science, and cybernetics.[42] The "systems theory" of the sociologist Talcott Parsons epitomized the trend. Any realm of society could be described as a "system," Parsons suggested in *Economy and Society*, "exchang[ing] inputs and outputs over its boundaries with its situation."[43]

Within each discipline, leading lights churned out field-defining works analyzing their object of study in these terms: not only *The Social System*, by Parsons (1951), but also *The Political System*, by David Easton (1953), and *How the Soviet System Works*, by Raymond Bauer, Alex Inkeles, and Clyde Kluckhohn (1956). The anthropologist A.F.C. Wallace spoke of cultures as "culture systems" and developed a theory of "cultural-system

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[40] Michael D. Maltz, Operations Research in Studying Crime and Justice: Its History and Accomplishments, in HANDBOOKS IN OPERATIONS RESEARCH AND MANAGEMENT SCIENCE 206-07 (S.M. Pollock et al., eds., vol. 6 1994).

[41] *See generally* HEYCK, *supra* note 13, at 51-80; ISAAC, *supra* note 18, at 158-90; AUDRA J. WOLFE, COMPETING WITH THE SOVIETS: SCIENCE, TECHNOLOGY, AND THE STATE IN COLD WAR AMERICA (2013).

[42] HEYCK, *supra* note 13, at 1.

[43] TALCOTT PARSONS & NEIL J. SMELSER, ECONOMY AND SOCIETY: A STUDY IN THE INTEGRATION OF ECONOMIC AND SOCIAL THEORY 310 (1956). On Parsons, *see* HEYCK, *supra* note 13, at 115; ISAAC, *supra* note 18, at 160-63.

innovation."[44] This mode of thinking also built on earlier developments in the study of industrial management. In their 1939 study of an assembly line, *Management and the Worker*, Roethlisberger and Dickson had described every industrial organization as a "social system" and the task of "human resources" as maintaining equilibrium of that system.[45] In a quantitative analysis of articles published in the flagship journals of the major social science disciplines—anthropology, economics, political science, psychology, and sociology—Heyck shows that while only 7 percent of articles employed the concepts of "system, structure, function, [and] modeling" in 1930, that figure was over 60 percent by 1970.[46]

Social scientists were explicit about borrowing this mode of thought from the natural and physical sciences, to whose cultural authority, objectivity, and empirical rigor they aspired for their own disciplines. By the 1920s, relativity theory and other developments had shifted the emphasis across the physical sciences away from static or "mechanical models" towards viewing matter in terms of "activity or process."[47] Alfred North Whitehead, in 1926, defined "science" as the study of "organisms," and indeed, the study of parts and wholes, organization and process soon became the organizing framework of cell biology, physiology, biochemistry, and physical chemistry.[48] The physicist J. Willard Gibbs, in 1917, introduced the idea that matter and energy together constituted "physicochemical systems." Paul Samuelson, the inventor of modern macroeconomics, dedicated to Gibbs his path-breaking book *Foundations of Economic Analysis*, which famously described "the economy as a thermodynamic system."[49]

Gibbs also influenced the Harvard biochemist L. J. Henderson, who developed the view of blood as a physicochemical system maintaining its own equilibrium and in turn contributing to the overall stability of the larger system, the body, of which it was a part.[50] As early as 1918, Henderson proposed that "the characteristics of the organization of living things" were "not peculiar to such organisms." The tendency "to speak of the organization of society is more than a figure of speech," he suggested, given "the similarity of regulatory processes and of the conditions of stability in the two instances."[51] Over time, Henderson developed a fascination with "the apparent orderliness of certain systems," expanding his domain beyond blood to encompass "the organization, the organism, the universe, and

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[44] HEYCK, *supra* note 13, at 118.

[45] ISAAC, *supra* note 18, at 91.

[46] HEYCK, *supra* note 13, at 2.

[47] John Parascandola, *Organismic and Holistic Concepts in the Thought of L. J. Henderson*, 4 J. HIST. BIOLOGY 63, 64 (1971).

[48] *See generally* ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD (1926).

[49] HEYCK, *supra* note 13, at 35. Samuelson recalled that as a Harvard graduate student, "it was my good luck that Harvard's E.B. Wilson, only protégé of thermodynamicist Willard Gibbs, provided essential hints that helped in the development of revealed preference and the anticipation of the inequalities techniques in post-1945 economics programming." William A. Barnett, *An Interview with Paul A. Samuelson*, 8 MACROECONOMIC DYNAMICS 519, 530 (2004).

[50] Parascandola, *supra* note 47, at 97-102.

[51] *Id.* at 102 (quoting L.J. HENDERSON, MECHANISM FROM THE STANDPOINT OF PSYCHICAL SCIENCE, 575 (1918)).

society."[52] Building on this interest, Henderson became an acolyte of the Italian economist Vilfredo Pareto, whose *Trattato di Sociologia Generale* presented society itself as a system of mutually dependent variables tending toward equilibrium. In the 1930s, Henderson formed a study group at Harvard to read and discuss Pareto's *Trattato*, many of whose members, including Talcott Parsons, became key progenitors of systems thinking.[53]

Of course, each systems-oriented field had its own parameters and definitions. But, in a very broad sense, describing the world as a system necessarily reflected certain shared premises.[54] First, of course, was simply the premise that *everything* could be described and understood as a system. There was nothing in the human or natural realm that could not in some way be understood as a complex of individual components related to one another (functionally, if not formally or officially) in some type of hierarchy, whether it be the individual cell, the individual frog, an individual person, a family, a Fortune 500 corporation, a nation, the international community of nations, an individual bank, the collection of banks within a country ("the financial system"), and so on. And all of these systems shared common features and tendencies. The study of cells could illuminate the management of business organizations, and vice versa, not simply as a source of illustrative analogies but because the same laws of organized systems applied universally across all types and scales of systems. The entire world and everything in it was a system of interlocking systems, big and small, systems within individuals and systems that connected individuals, systems within systems within systems. This was, in the words of the anthropologist A.J.C. Wallace, a "holistic view of society as an organism integrated from cell to nation," such that "events in one subsystem are information to other subsystems."[55]

Systems thinking was also broadly functionalist. In operations researcher C. West Churchman's description, all organizations, whether "companies, groups of parties in a machine, the functional elements of the human body," had some "external goal" toward which they were working. By adjusting to feedback, they adapted to their environments in order to better work toward their goals.[56] Systems theory grew alongside, and intertwined with, the various disciplinary turns to structural-functionalism (in sociology), or structuralism (in anthropology, psychology, philosophy, linguistics), which posited that institutions and entities within human societies developed in order to serve particular collective "functions" or needs. Since behavior always reflected function, any system component

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[52] *Id.* at 63.

[53] ISAAC, *supra* note 18, at 63-91; *see generally* Parascandola, *supra* note 47.

[54] *See* HEYCK, *supra* note 13, at 10. The ensuing discussion largely draws upon Heyck, *id.* at 10-12, although I have not fully reproduced his list (nor reproduced its exact grouping of features) but highlighted those dimensions of systems thinking most relevant to my discussion in this essay of "the criminal justice system."

[55] *Id.* at 119 (quoting ANTHONY WALLACE, *Revitalization Movements*, 58 AA 2, 264-81, 280 (1956)).

[56] *Id.* at 105 (quoting C.W. CHURCHMAN, INTRODUCTION TO OPERATIONS RESEARCH, 4,6 (1957)).

could be known and measured purely by observing its behavior, which is to say, its effects upon other components of the system.[57]

Perhaps the most important feature of systems, however, was self-regulation. Systems tended by definition to contain internal mechanisms of control and feedback that enabled them to maintain dynamic equilibrium.[58] Like the concept of "system" generally, this idea was imported into the social sciences from earlier findings in the natural and physical sciences. In his studies of blood, the Harvard biochemist L. J. Henderson had described "the tendency of systems towards a state of dynamic equilibrium" as "a law or basic fact of nature," equivalent to the laws of thermodynamics.[59] "No characteristic of organisms is more certain than survival," he wrote. "Living things do in fact persist over long periods of time as physico-chemical systems which remain approximately in a stationary state."[60] Later, through his reading of Pareto, Henderson refined his definition of equilibrium as applied to social phenomena. "If a small modification of the state of a system is imposed upon it," he explained, "a reaction will take place and this will tend to restore the original state, very slightly modified by the experience."[61] In his sociology lectures, Henderson inculcated students with his conviction that the concept of equilibrium "applies not only in the fields of pathology and sociology but very generally in the description of almost all kinds of phenomena and processes." For Henderson the tendency of systems to maintain equilibrium was the most basic law of all, "one of the most general aspects of our experience" and "one of the commonest aspects of things and events."[62]

Systems, then, might change, but not in a revolutionary or disruptive way—always in a self-regulating way. Systems moved through time not randomly or chaotically (or even contingently) but through the carrying-out of cyclical, repeated operations and algorithms that could, like structure, be modeled, understood, and predicted. "Hence," writes Heyck, "the widespread fascination" among midcentury social scientists "with descriptions of processes rather than states, with production systems, courses of action, strategies (sequences of moves), algorithms, heuristics, feedback paths, flowcharts, and decision trees."[63] (See also, one might note, the fascination among midcentury jurists with "legal process" and "due process" and "political process."[64]) Systems tended to adapt to their

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[57] *See id.* at 34-35 (describing the various turns to structuralism).

[58] *See* ISAAC, *supra* note 18, at 86-91; *see generally* CYNTHIA RUSSETT, THE CONCEPT OF EQUILIBRIUM IN AMERICAN SOCIAL THOUGHT (1966).

[59] Parascandola, *supra* note 47, at 100.

[60] *Id.* at 101 (quoting L.J. HENDERSON, BLOOD: A STUDY IN GENERAL PHYSIOLOGY, 15-16 (1928)).

[61] L. J. HENDERSON, PARETO'S GENERAL SOCIOLOGY 46 (1935). Henderson proselytized Pareto's ideas and the concept of equilibrium generally throughout the Harvard faculty, "giv[ing] greater impetus to diffusion of equilibrium concepts among American social scientists than any other single individual." RUSSETT, *supra* note 58, at 117.

[62] ISAAC, *supra* note 18, at 86-87 (quoting Henderson's lectures).

[63] HEYCK, *supra* note 13, at 36.

[64] *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994).

environments, changing as needed in response to environmental changes in order to continue humming along and serving their purpose. The anthropologist A.J.C. Wallace described "cultural systems" as equally tending toward equilibrium: If, he posited, "[a] human society" could be "regarded as a definite kind of organism, then "[a] corollary of the organismic analogy is the principle of homeostasis: that a society will work, by means of coordinated actions (including 'cultural' actions) by all or some of its parts, to preserve its own integrity by maintaining a minimally fluctuating, life-supporting matrix for its individual members, and will under stress, take emergency measures to preserve the constancy of the matrix."[65]

Together, this set of premises implied an understanding of social science in which the goal of the research enterprise was to develop models of the structure of systems, so that the systems under study could be better understood, predicted, and, ultimately, controlled or directed.[66] To model a system is necessarily to reduce, to simplify, to abstract. That, after all, is the point of models, which are not useful if they replicate the entirety of whatever is being modeled. While models can take many forms (metaphors, pictures, concepts, mathematical equations, three-dimensional miniatures), in practice, the enterprise of midcentury modeling often translated into diagrams: visual representations that sought to communicate the underlying structure of systems in a simple and easily reproducible, manipulable way. Talcott Parsons and Edward Shils, of Harvard's Department of Social Relations, became especially fixated on diagrams as strategies for concretizing their theories and, along the way, demonstrating to patrons and administrators the scientific character of their work.[67] But they were hardly alone. Flipping through midcentury textbooks and journals reveals a cornucopia of boxes and arrows, tables, flowcharts, organizational pyramids, decision trees, matrices—the whole repertoire of diagrams that have now become standard apparatuses of scholarly, policy, and business communication.[68] Trees occupied pride of place, because they could capture the complexity and hierarchy of systems while also allowing for the incorporation of growth or expansion (new branches, for instance) over time. Heyck catalogs "the proliferation of tree structures in midcentury science: organization charts, ... decision trees in decision theory, treelike mappings of strategies in game theory," flowcharts, "semantic trees, fractal trees, genetic trees, evolutionary trees, descriptions of the nervous system as having a treelike structure, and, of course, the myriad trees in computing."[69]

"System," then, implied a relative disinterest in local specificity (except as raw data for building larger theories), and also a relative emphasis on the synchronic and the static over the diachronic and the dynamic. An interest in how systems adjusted and calibrated to maintain steady-state equilibrium did not lend itself easily to the historicist view of human societies as

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[65] HEYCK, *supra* note 13, at 118-19 (quoting WALLACE, REVITALIZATION MOVEMENTS, 264-81, 280).

[66] HEYCK, *supra* note 13, at 18.

[67] ISAAC, *supra* note 18, at 185-86.

[68] *See* HEYCK, *supra* note 13, at 12.

[69] *Id.* at 11-12.

undergoing qualitative change over time and even, occasionally, revolutionary rupture: like a surfer engulfed by a wave, a society might find itself submerged in overwhelming waters and come out somehow different on the other side. L. J. Henderson, in his sociology lectures, drew no distinction between extremely mundane examples of equilibrium (a flame that flickers in the wind but returns to "its original form"; an infant regaining weight after an illness) and world-historical tragedies. According to Henderson, "within a decade the traces of the earthquake and fire in San Francisco could hardly be seen, or the devastation of the war of 1914-1918 along the battlefront in Northern France," and these were simply additional examples of "equilibrium" no less than candles and infants.[70] The notion, of course, that France had simply restored itself to equilibrium after 1918 would shock any historian. But in the systems view, what mattered was that the grass had grown over the trenches. Clearly, this was also not a view of the world that left much room for cultural difference. Henderson inspired at Harvard the proliferation of "case studies"—historical or anthropological investigations into thirteenth-century English villages, Irish farm communities, Navajo reservations, Boston's North End. As intellectual historian Joel Isaac writes of these studies, they all framed their subjects not as unique or consequential in themselves but as exemplary instances of "the general phenomenon of social order."[71]

None of this is to suggest that systems thinkers lacked any awareness of change—after all, their goal in modeling systems was to enable the better management of systems, and thus to spur change in the direction of greater efficiency. And if a person or a frog could be a system, then sometimes systems died. However, to explain how homeostatic systems might change necessarily required elaborate theorizing, and the theories always remained somewhat unsatisfactory. Whether Wallace with his revitalization theory in anthropology or the economist Walt Rostow with his stages of modernization, mid-century social scientists struggled to develop models of how under very particular conditions, systems otherwise existing in a state of self-regulating equilibrium could suddenly escape stasis and transform.[72] Indicating the difficulty of escaping the logic of system, such theories tended to presuppose some overarching logic or process that would drive change, and thus history itself became a system governed by processes and law-like relationships between component parts, all of which could be modeled.[73]

This was not, then, a totally static or cyclical view of history. After all, systems thinkers were modern liberals—they were not premodern Christians living in eschatological time or Marxists awaiting the revolution—and thus,

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[70] ISAAC, *supra* note 18, at 87 (quoting Henderson's lectures).

[71] *Id.* at 89-91 (quote from 88).

[72] On theories of modernization and change, *see generally* HEYCK, *supra* note 13, at 143-58. Heyck notes that Rostow developed his modernization theory partly in reaction to the Parsons/Shils view of society, which he considered too static. *See also, generally*, NILS GILMAN, MANDARINS OF THE FUTURE: MODERNIZATION THEORY IN COLD WAR AMERICA (2004).

[73] *See* HEYCK, *supra* note 13, at 123.

they necessarily conceived of history in terms of change. But they were not historicist in the way of modern historians, who increasingly over the twentieth century came to understand change to reflect human agency and choices—choices understood in the moral sense, as the product of conscientious reflection and the exercise of the will, and not simply as responses to stimuli.[74] Whatever the epistemological limitations of the historicist model of change, its utility lies in its flexibility: since it does not posit universal laws but only contingent responses to particular situations, by definition there is no particular situation that cannot be accommodated within its regard. In contrast, when systems theorists developed theories of change, there always remained some residual "fuzziness" as to the core question of how exactly transitions occurred.[75]

That systems thinking eventually migrated into criminal law and penal policy should hardly have been surprising. It would have been more surprising had it *not* done so. Between 1955 and 1975, the "system" worldview was so mainstream across so many academic fields that anyone of the growing numbers of Americans who attended college in that period would have been exposed in one way or another, and probably in multiple ways, to this mode of thinking.[76] Perhaps they encountered systems in the functional sociology of Talcott Parsons, the economics textbook of Paul Samuelson, the "systems approach" that dominated the new fields of operations research and management science, or the looser way that these concepts trickled into articles, textbooks, and lectures on a wide range of subjects. As Heyck writes, the "systems" approach, "the set of assumptions it encompassed and the exemplary work it produced," became "the ideas, ideals, and methods" of those who led "the War on Poverty at home and a war in Vietnam abroad; of those who trained new elites in schools of business and public administration; of those who wrote the basic textbooks from which a generation learned how the economy, society, polity, and even the mind worked; and of those who wrote the position papers, books, and magazine articles that helped set the terms of public discourse in an era of mass media, think tanks, and issue networks."[77]

Moreover, while the tent of system may have fit awkwardly over some of its objects, it was not any great conceptual stretch to refer to police, courts, jails, and prisons as a "system," particularly by the 1960s. After all, these local components really were related to one another—they communicated, they shared data, they were nodes between which police cars and sheriff's vans literally traveled—and more so than ever before. In the 1830s, it would not have made intuitive sense to talk about the nation's scattered and highly localized jails, constables, and courts as a "system" because they did not have formal or functional relationships with one

[74] For a provocative critique of this dimension of historicism as practiced by twentieth-century professional historians, *see* Walter Johnson, *On Agency*, 37 J. SOCIAL HIST. 113 (2003).

[75] HEYCK, *supra* note 13, at 154.

[76] *See id.* at 2.

[77] *Id.* at 200; *see also* Harcourt, supra note 10, at 35 (noting that systems analysis affected criminal law and procedure both directly and indirectly, because it was simply "in the air in the 1960s").

another.[78] Over time, as law became codified—systemizing doctrine and procedures both within states but also across, as precedent now traveled in the technology of "case reporters" across jurisdictions—courts became more integrated with one another. As career police and prosecutors replaced part-time amateurs and states developed ever-more complex penal bureaucracies, every part of the process became "professionalized," and professionals, as they are wont to do, formed communities of pedagogy and practice that transcended their local institutional homes.

Most importantly, in the twentieth century, the United States Supreme Court—first haltingly in the 1920s and '30s and then more dramatically in the 1960s—began to elaborate constitutional doctrines of criminal procedure that established new rules for every local and state court and police department, on top of whatever local and state rules they already had.[79] For the first time, then, it made some sense to imagine a hierarchical system with invisible structures and lines of communication connecting the Supreme Court in Washington, D.C., with any given local sheriff in far-flung Maine or California. At the same time, the federal government, through initiatives like the Law Enforcement Assistance Act, began on a much greater scale than ever before to offer funding and training programs to local police and prosecutors—but also to request newly comprehensive forms of reporting and data in return.[80] Through law, policy, practice, and culture, the nation's myriad law enforcement institutions came to be connected with one another in ever-more elaborate and cross-cutting functional relationships, though not by any official chain of command.[81] Precisely because these relationships of communication and direction were never (or rarely) formalized as official relationships of command and control, they lurked beneath the surface of legal texts and doctrines and needed to be excavated and modeled before they could be fully understood. They were, in that sense, the perfect objects for the sort of structuralist-functionalist study that systems thinking perfected.

But there is another and more intriguing sense in which systems thinking lent itself well to criminal justice by the late 1960s. Since the mid-1920s—and enduring into the 1970s—the incarceration rate in the United States had remained remarkably stable, hovering around 110 prisoners per

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[78] *See, e.g.*, LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH (2009) (reconstructing the localized nature of courts and punishment in the antebellum Carolinas).

[79] *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000). Illuminating contemporary discussions of the trend include A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 250 (1968); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

[80] *See* MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (1980); Elizabeth Hinton, *"A War within Our Own Boundaries": Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 J. AM. HIST. 100 (2015).

[81] On the implications of these developments for federalism, *see* Sara Mayeux & Karen Tani, *Federalism Anew*, 56 AM. J. LEGAL HIST. 128 (2016).

100,000 population.[82] Beneath the vicissitudes of "crime waves" and the popular fixation on especially gruesome but unrepresentative murders, there seemed to be some capacity latent within the courts and prisons to keep the overall complex humming along in a relatively steady state. Al Blumstein later described this finding in the exact terms of dynamic equilibrium, positing "a homeostatic process whereby the system could become tougher when crime rates went down … and ease up when crime rates went up (by means such as offering earlier release on parole or increasing the rate of probation or other community-based sanctions as an alternative to incarceration)."[83] On the basis of this finding, Blumstein and his colleague Jacqueline Cohen published a famous paper proposing a unified "theory of the stability of punishment."[84]

And it was true that anyone familiar with prison administration through the 1970s could easily understand the field as yet another example of the general pattern—self-regulating homeostasis achieved through adjustment to feedback—that scientists had by then observed in organisms and social systems of all kinds. In California, for example, it was widely known that the "Adult Authority"—the state's corrections agency, including its parole board—wielded ultimate control over the length of prison terms actually served, regardless of judges' sentencing decisions.[85] When the prisons threatened to become overcrowded, then parole was granted more liberally. Exploiting these feedback mechanisms, Ronald Reagan—though later famously "tough-on-crime" as president—presided as governor of California over a 34% *decrease* in the state's incarceration rate.[86] Reagan's policy of encouraging the early release of prisoners (in his case, in order to save money) could be understood as a fairly straightforward example of the phenomenon of homeostasis (or dynamic equilibrium) described in the "age of system" by operations researchers, management scientists, and anthropologists alike, the process the anthropologist Wallace described when he wrote that systems tend, when "under stress, [to] take emergency measures to preserve the constancy of the matrix."[87]

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[82] Alfred Blumstein & Jacqueline Cohen, *A Theory of the Stability of Punishment*, 64 J. CRIM. L. & CRIMINOLOGY 198, 201 (1973).

[83] Blumstein, *supra* note 14, at 19.

[84] Blumstein & Cohen, *supra* note 82.

[85] For an account of the Adult Authority's "almost awesome freedom from legislative or judicial control" prior to late 1970s reforms, *see* Sheldon L. Messinger & Phillip E. Johnson, California's Determinate Sentencing Statute: History and Issues, in Determinate Sentencing: Reform or Regression?: Proceedings of the Special Conference on Determinate Sentencing, June 2-3, 1977, Boalt Hall School of Law, University of California, Berkeley (GPO, 1978).

[86] Rina Palta, *Prison Overcrowding: What would Reagan do?*, KALW (October 4, 2010), http://blog.sfgate.com/kalw/2010/10/04/prison-overcrowding-what-would-reagan-do/.

[87] HEYCK, *supra* note 13, at 118-19 (quoting WALLACE, REVITALIZATION MOVEMENTS, 264-81, 280).

III.

> "Everyone's heard of the 'criminal justice system,' and I think that's a term that's fairly attributable to Al."
> — Daniel Nagin (2016)[88]

Given the cultural context—the structure, as it were—it may have been overdetermined that someone would bring together crime, punishment, and system.[89] As it happened, Al Blumstein would play the major role in doing so, although only the larger cultural context can explain why his model of "the criminal justice system" so readily traveled out of the pages of a federal government report into the everyday vernacular of ordinary Americans. The occasion for Blumstein's intervention was the 1967 report *The Challenge of Crime in a Free Society*, produced by a blue-ribbon commission appointed in 1965 by President Lyndon Johnson. The resultant report constituted both paragon and apotheosis of "criminal justice system" thinking in "systems" terms. In its reliance on federal patronage, its wide-ranging personnel from the overlapping worlds of academia, government, and foundations, and even its very framing—in terms of the distinctive problems of "a free society"—this report also constituted both paragon and apotheosis of the Cold War approach to policymaking generally. There was in those years a widespread anxiety about the need to develop distinctively democratic or "free" solutions to the problems of social disorder in order to distinguish the United States from the gulags and enforced conformity of the Soviet bloc.[90]

Johnson appointed his National Commission on Law Enforcement and Administration in July 1965, partly in response to Barry Goldwater's demagoguery, during the 1964 campaign, on the issue of law and order, which—although Johnson had defeated Goldwater handily—the Democratic Party would spend the next thirty years seeking to co-opt.[91] Johnson also genuinely worried about what he and many Americans viewed as a rising tide of disorder in American cities—epitomized by the 1964 Harlem riots and later, in 1965, by the Watts uprising. For these reasons Johnson announced a federal "War on Crime" to complement (though as it happened, eventually to supplant) his marquee War on Poverty.[92] The commission, charged with developing a national strategy for responding to the problem of crime and proposing congressional legislation, constituted the War on Crime's first foray. After eighteen months, "three national conferences,"

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[88] Carnegie-Mellon University, *Honoring Al Blumstein's Contributions to Public Policy* (press release), March 26, 2016, http://heinz51.rssing.com/chan-12336548/all_p11.html.

[89] Walker, *supra* note 39, at 10-11, observed how the "growing popularity of 'systems analysis'" combined with Johnsonian liberalism's emphasis on federal action together determined *The Challenge of Crime*'s nationwide, systemic framing.

[90] *See* JAMIE COHEN-COLE, THE OPEN MIND: COLD WAR POLITICS AND THE SCIENCES OF HUMAN NATURE (2014).

[91] Though it overstates the argument, NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2015), offers a useful synthesis of how successive Democratic administrations sought to co-opt the issue of "law and order."

[92] *See generally* HINTON, *supra* note 17.

"five national surveys," "hundreds of meetings," and interviews with "tens of thousands of persons," all involving "19 commissioners, 63 staff members, 175 consultants, and hundreds of advisers," the final 340-page report was published, making 200 recommendations spanning "the operations of police, schools, prosecutors, employment agencies, defenders, social workers, prisons, housing authorities, and probation and parole officers." Implementing these recommendations, according to the Commission, might yield "a safer and more just society."[93]

The Challenge of Crime in a Free Society made an immediate splash and has had an enduring influence on what it christened as "the criminal justice system." Released as a trade paperback with over 100,000 copies printed, the report was featured in a 90-minute special on NBC's *Meet the Press*, covered in a special issue of the American Academy of Political Science's flagship journal, endorsed by the American Bar Association, and widely assigned in college courses.[94] Milwaukee police chief Ed Flynn recalls that reading the document as a college student "opened my eyes up to the critical importance of police in a democratic society."[95] From endorsing federal funding for local police to introducing the emergency phone number 911, the Crime Commission's recommendations, as historian Elizabeth Hinton notes, "continue to shape Americans' interactions with law enforcement" to this day.[96] The report also receives continued attention from jurists and scholars, who have developed a tradition of commemorating the report with decennial "anniversary" conferences.[97]

The report also had a more immediate intellectual and cultural effect, however: it popularized the phrase—and the concept—of "the criminal justice system."[98] (It also fueled further study of that system: by defining "criminal justice" as a distinct systemic phenomenon that could be studied as such, the report helped foster the proliferation of bachelor's, associate's, and graduate degree programs in "criminal justice" or "law enforcement."[99])

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[93] Challenge of Crime, *supra* note 19, at v.

[94] Henry S. Ruth, Jr., *To Dust Shall Ye Return?*, 43 NOTRE DAME L. REV. 811, 830-31 (1967); Walker, *supra* note 39, at 4; Warren Lehman, *Crime, the Public, and the Crime Commission: A Critical Review of* The Challenge of Crime in a Free Society, 66 MICH. L. REV. 1487, 1538 n.184 (1968). On the report's publication and reception, see generally HINTON, *supra* note 17, at 100-06.

[95] Erik Gunn, *How Milwaukee Went Soft on Crime*, POLITICO (November 10, 2014), http://www.politico.com/magazine/story/2014/11/milwaukee-soft-on-crime-112740. Flynn writes at greater length about the report in Edward A. Flynn, Miranda *and the Evolution of Policing*, 10 HARV. L. & POL'Y REV. 101 (2016). On the report's influence, *see also* Daniel Bergner, *Is Stop and Frisk Worth It?*, THE ATLANTIC (April 2014), https://www.theatlantic.com/magazine/archive/2014/04/is-stop-and-frisk-worth-it/358644/ (listing Challenge of Crime among "three documents" that illuminate "modern American thinking about the role of the police"). The report is also discussed as a model in the Obama Administration's Twenty-first Century Policing Task Force report.

[96] HINTON, *supra* note 17, at 81.

[97] *See* Symposium, *The Challenge of Crime in a Free Society: Looking Back Looking Forward*, June 19-21, 1997, https://www.ncjrs.gov/pdffiles1/nij/170029.pdf; Press Release, Symposium 2017: The Challenge of Crime in a Free Society: 50 Years Later, March 27, 2017, http://www.gwlr.org/symposium-2017-the-challenge-of-crime-in-a-free-society-50-years-later/.

[98] *See* Cheryl Corley, *President Johnson's Crime Report, 50 Years Later*, NPR (October 6, 2017), http://www.npr.org/2017/10/06/542487124/president-johnson-s-crime-commission-report-50-years-later (quoting Blumstein's assessment that one effect of the report "was a movement toward thinking of the criminal justice system as a system").

[99] *See* Walker, *supra* note 39, at 11.

Whether because of their elite educations or military experience, the blue-ribbon commissioners were almost certainly familiar with variants of "systems" thinking. Chaired by attorney general Nicholas Katzenbach, the commission included such luminaries as Yale University president Kingman Brewster, Jr. (Harvard Law graduate and Navy veteran); the future Watergate prosecutor Leon Jaworski; former Attorney General and future Secretary of State William P. Rogers (Cornell law graduate and Navy veteran); the future Supreme Court Justice Lewis Powell (Air Force veteran and ardent champion of "the American free enterprise system"); New York City Mayor Robert Wagner (an alumnus of Harvard Business School, ground zero of "systems" approaches to management, and of Yale Law School, and an Army veteran); and the Columbia law professor Herbert Wechsler. The commission's dozens of professional staffers, who were younger and often fresh from graduate school, would have been even more thoroughly steeped in systems. Directed by Harvard Law professor (and future dean) James Vorenberg, the staff brought on as consultants or advisers a long list of rising stars in the legal academy including Anthony Amsterdam, Sanford Kadish, Herbert Packer, and Lloyd Weinreb. As associate director, Vorenberg hired Lloyd Ohlin, whose "opportunity theory" of juvenile delinquency had broadly influenced initiatives both within the Kennedy administration and at the powerful Ford Foundation.[100]

However, it was the young engineer hired to oversee technical work and data analysis for the Commission—Al Blumstein—who formed the decisive link, bringing to the Commission not merely a loose zeitgeisty systems mindset but formal training in the systems science of operations research. After completing his bachelor's degree in engineering physics, Blumstein had earned a PhD in 1960 from Cornell's then-new program in operations research and joined the Institute for Defense Analyses, one of the many federally funded research and development agencies established at the nexus of military and civilian investment during World War II and the early Cold War. From there, he was hired as full-time director of the Crime Commission's Science and Technology Task Force.[101] From this fortuitous beginning, Blumstein went on to an illustrious career in criminology as a professor at Carnegie Mellon, becoming in 2007 one of the first Americans ever to win the field's most prestigious international award, the Stockholm Prize.[102] At the time he joined the Commission, however, Blumstein—in his own words—"knew nothing" about criminal justice. He brought to the task his "analytic skills and the system perspective—as well as the ignorance and naiveté that characterized the legendary boy who asked about the 'emperor's clothes.'"[103] To round out his team, he set about recruiting a number of other

[100] HINTON, *supra* note 17, at 82-83.

[101] This biography is drawn from Nancy Ritter, ed., *Al Blumstein: 40 Years of Contributions to Criminal Justice*, NIJ JOURNAL, no. 257, 2007, NCJ 218260, available at https://www.ncjrs.gov/pdffiles1/nij/jr000257d.pdf.

[102] The Stockholm Prize in Criminology, Prize recipients 2007, STOCKHOLM UNIVERSITY, http://www.su.se/english/about/prizes-awards/the-stockholm-prize-in-criminology/prize-winners/prize-recipients-2007-1.95254.

[103] Blumstein, *supra* note 14, at 14.

scientifically trained staffers: a Berkeley graduate student in nuclear physics; an operations-research specialist from IBM; and Richard Larson, a recent MIT graduate in electrical engineering.[104] Larson, just 22 years old, "was wet behind the ears—with virtually no professional experience in applying operations research to crime." He fondly recalled how Blumstein, through patient mentorship, taught him "how to think" and "how to structure problems" using the cutting-edge science of operations research."[105]

Thanks to Blumstein, *The Challenge of Crime in a Free Society* became permeated with a systemic view of its object of study. The phrase "the criminal justice system" (or its variant, "the system of criminal justice") appeared throughout the text, which also featured a dedicated section entitled "America's System of Criminal Justice."[106] Blumstein had not coined the phrase—it had already begun to appear in legal scholarship—but he infused it with substantive weight by taking a rigorous, theoretically informed systems-science approach to the material. In line with the Johnson Administration's preferred framing of crime as a national crisis requiring a federal response, he also influentially modeled the system as a singular, holistic national entity—"*the* criminal justice system"—in contrast to other scholars around the same time, who sometimes wrote instead of each jurisdiction having "*a* criminal justice system."[107] A representative review praised the published report for bringing together for the first time "the entire spectrum of crime prevention, law enforcement, dispensation of justice, and corrections as one system . . ." Although the concept of "interdependence" of these institutions was "not new, the impact of the decision-making process by one segment of this continuum on another has perhaps never before been so well highlighted."[108]

Blumstein and his team contributed to *The Challenge of Crime* not only the terminology of system, but also the report's famous centerpiece: an elaborate flowchart attempting to diagram, in the abstract, all the component parts of "the criminal justice system" and how they related to one another. Decades later, Blumstein recalled with pride how his team had "created the first flow diagram I know of for the whole CJS."[109] One reviewer praised the published volume specifically because of this diagram. Unlike the dry Wickersham Report of thirty years before, *The Challenge of Crime* featured a "refreshing" style and "genuine reader appeal" because it was "profusely illustrated with dramatic photographs and uncomplicated graphic charts and diagrams."[110] Blumstein's flowchart quickly became a staple of criminology textbooks, and the federal Department of Justice still produces and

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[104] *Id.*

[105] Ritter, *supra* note 101.

[106] A separate section concerned "The Juvenile Justice System."

[107] *E.g.*, DALLIN OAKS & WARREN LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT (1968) (a study of indigent defense in Chicago).

[108] Ben S. Meeker, *Review of Government Reports and Public Documents*, 42 SOC. SERV. REV. 290, 290 (1968).

[109] Blumstein, *supra* note 14, at 15.

[110] Meeker, *supra note* 108, at 290.

distributes an updated version.[111] The chart divided the criminal justice system into "a series of stages, with flow among them described by branching ratios (the percentage of the flow in each stage that flows to each subsequent stage), resources (individual orders in the system or physical resources like courtrooms or jail cells), workloads associated with resource consumption at each stage, and unit costs associated with the resources at each stage."[112] As a well-trained systems thinker, Blumstein had hoped to "build in a feedback capability" into the model, although that proved difficult given the limitations of the available data.[113]

The flowchart built on the insight that had structured reports in the "crime commission" genre since the *Illinois Crime Survey*: the courts do not spend equal time and effort on every case brought to them but operate instead like a filter, taking a large number of arrests on the front end and translating an ever-smaller number of those arrests into charges, trials, convictions, and ultimately, prisoners on the back end. Blumstein's flowchart reproduced this basic timeline but translated it into graphic form, mapping "the criminal justice system" as a funnel-like structure proceeding from left to right. At the left, in the beginning, was the label "crime": the essential input of the system. "Crime" then flowed through a structured sequence of filtering mechanisms, with some amount of it falling out or branching off at each stage: first the police, who investigated, arrested, and booked; then the courts, where cases proceeded along through initial appearance, preliminary hearings, arraignment, trial or plea, sentencing, and appeals; and finally corrections, where cases ended up in probation, prison, or parole, flowing "out of system" only at the very right-hand end of the chart. At each stage, some subset of the input dropped out of the chart altogether: crimes that went unreported or undetected, police reports that did not lead to prosecution, charges that were filed but later dismissed, trials that ended in acquittal, convictions reversed on appeal.

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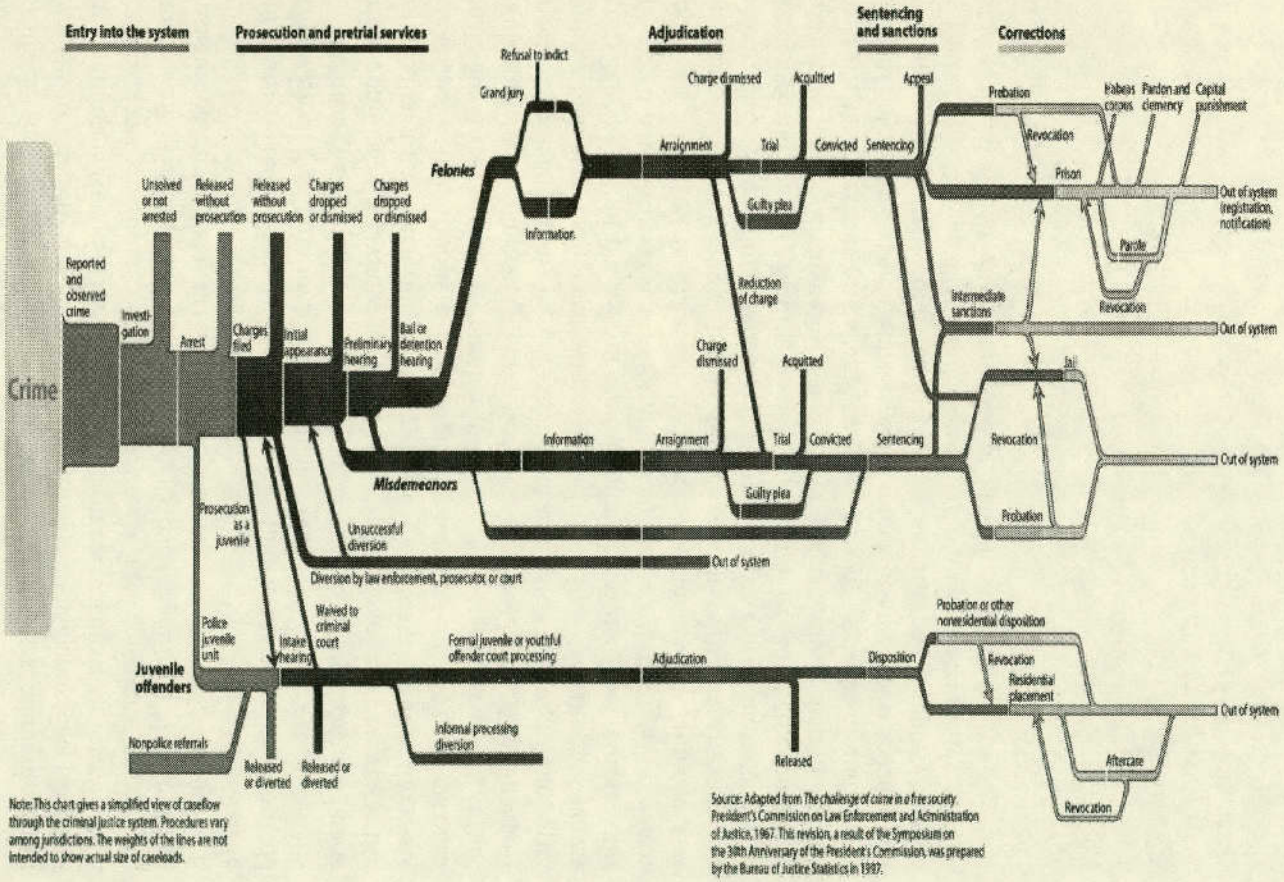
[111] Bureau of Justice Statistics, *Criminal Justice System Flowchart*, *available at* https://www.bjs.gov/content/largechart.cfm.

[112] Blumstein, *supra note* 14, at 15.

[113] *Id.*; Ritter, *supra* note 101.

What is the sequence of events in the criminal justice system?



Note: This chart gives a simplified view of caseflow through the criminal justice system. Procedures vary among jurisdictions. The weights of the lines are not intended to show actual size of caseloads.

Source: Adapted from *The challenge of crime in a free society*. President's Commission on Law Enforcement and Administration of Justice, 1967. This revision, a result of the Symposium on the 30th Anniversary of the President's Commission, was prepared by the Bureau of Justice Statistics in 1997.

Structuring the chart in this way—framing the system as built around the input of "crime"—did not lend itself to visualizing inputs that were not actually "crimes," such as false reports, cases of mistaken identity, or vindictive prosecutions of the innocent. Clearly these constituted some part of the mass of dismissed charges or overturned convictions, and in that sense they were depicted implicitly within the chart, but they did not have their own concrete form within the structure. Much less did the flowchart enable any easy visualization (or deconstruction) of how the category of "crime" itself was constructed through the complex interaction of moral intuition, positive legislation, and cultural panic, or how policing decisions themselves shaped the discovery (and the available amount) of crime for the system to process. "Crime" was where the chart began, a category of inputs from somewhere out there in society that, for the system's purposes, could be taken as given.

Nor could the flowchart easily accommodate what was obvious to everyone at the time—the way that every stage of the criminal process was permeated with race and class—since, officially, race and class played no part in the courts' and prisons' decision-trees. The Crime Commission, in conducting its fieldwork, developed a special interest in the urban "ghettoes," observing more than 200 urban police chiefs at work and consulting with 2,200 urban police departments.[114] From its origins through its execution, the Crime Commission was shot through with the assumption that what politicians called "the crime problem" was, in large part, the problem of managing urban, African-American youth. Internally, the commissioners heatedly debated these dimensions of their research and some commissioners questioned sections of early draft reports that fixated on African-Americans as the paradigmatic "felons."[115] There was no place in an abstract flowchart for those kinds of conversations or questions.

The fetish for diagrams reflected a broader tendency in midcentury social science, premised as it was upon the notion of a "universal man" whose interactions and institutions could be modeled abstractly. Cold War psychology defined the ideal personality as the "open mind," the fully autonomous, rational, and self-contained individual thinker, and thus viewed any type of prejudice—but also most forms of group identity or "ethnocentrism"—as symptomatic of cognitive deficits.[116] If this worldview represented an improvement over earlier biological and eugenicist discourses premised on inherent racial differences, it nevertheless made it difficult to incorporate into one's models the racial categories that, in everyday life, remained quite salient even for the most open-minded individuals—in part because of the political and cultural durability of those earlier, more essentializing discourses.[117] By the late 1960s, virtually everyone in the United States understood the discourse of "crime" as

[114] HINTON, *supra* note 17, at 84.
[115] *Id.* at 85.
[116] COHEN-COLE, *supra* note 90, at 1-2, 43.
[117] *See* HEYCK, *supra* note 13, at 3.

inextricably bound up with the American experience of race. And yet, in the signature diagram that became textbook knowledge for generations of "criminal justice" students and police officers, there was no place for cultural specificity or particularity of that kind.

The flowchart at the center of *The Challenge of Crime* constituted a near-perfect exemplar of midcentury systems thought. C. West Churchman, in his foundational textbook on operations research, had praised the use of diagrams "to bring together, from various fields of research, knowledge about organizations." "The model . . . is a representation of the system under study, a representation which lends itself to use in predicting the effect on the system's effectiveness of possible changes in the system."[118] Perhaps Blumstein had read Churchman's textbook, but if not, he had certainly read something like it in his graduate studies. Precisely echoing Churchman, Blumstein described his flowchart as "helpful for studying policy changes" and modeling how adjustment throughout the system might affect judicial caseloads and prison populations. But more importantly, in Blumstein's view, "use of the model got people to think about the components as part of an interacting system. For the first time, there was an emphasis on systemwide planning."[119] In subsequent decades this faith in "systemwide planning" came to dominate federal criminal justice policy. The Law Enforcement Assistance Administration, for instance, conditioned federal grants upon the development by state criminal justice agencies of "comprehensive plans" for their criminal justice systems as a whole.[120]

Viewed up close, however, *The Challenge of Crime* betrayed some pulling at the seams, some hints at the tensions of applying this totalizing systems approach. Understandably given his training, Blumstein never considered whether the criminal justice system was anything other than a system—after all, from the perspective of an operations researcher, anything can be described as a system—but he and his team quickly recognized that the institutions they were being asked to study were in fact "quite different from most of the kinds of systems we were familiar with. Even though actions by one part can have an impact on the others, there is no 'system manager.' In particular, the courts, which are a central part of this system, are intended to be independent and to act as a control on the other parts—to constrain them but not to manage them."[121] As another operations researcher later wrote, those attempting to model "the criminal justice system" in the United States always had to confront the puzzle "that there was no system. The separation of powers in governments at all levels . . . also meant that the police paid little attention to the courts, which paid little attention to the correctional system, which paid little attention to the police." The first task

[118] HOYOK, *supra* note 13, at 185 (quoting C.W. CHURCHMAN, INTRODUCTION TO OPERATIONS RESEARCH (1957)).

[119] Blumstein, *supra* note 14, at 15.

[120] FEELEY & SARAT, *supra* note 80, at 66 (describing the LEAA as animated by the notion that the criminal justice system was insufficiently coordinated, a notion "captured in frequent reference to such terms as 'system,' 'integrated analysis,' 'coordination, cooperation and combination of efforts,' and 'long-range'").

[121] Blumstein, *supra* note 14, at 15.

of Blumstein's task force "was to describe the system, or as it was often called, the 'non-system,' in sufficient detail to permit decision-makers to see how problems in one part of the system affected the rest of the system."[122]

The final text of the report retains stray traces of the analysts' puzzlement. "The system of criminal justice America uses," the report allowed, is in fact "not a monolithic, or even a consistent, system. It was not designed or built in one piece at one time," but consisted of a "philosophic core" surrounded by "layer upon layer of institutions and procedures, some carefully constructed and some improvised, some inspired by principle and some by expediency." Some of these layers were old (trial by jury), others were new (juvenile courts, professional police). In truth, there was no single "criminal justice system" because "[e]very village, town, county, city, and State has its own criminal justice system, and there is a Federal one as well," and although they all "operate somewhat alike" they are not "precisely alike."[123] The overall thrust of the report, nevertheless, was to confirm and reify the existence of something called "the criminal justice system," with its tripartite division into "the police, the courts, and corrections," as depicted in Blumstein's famous chart. These three parts were constantly interacting with one another, such that "reforming or reorganizing any part or procedure of the system changes other parts or procedures." Thus, any "study of the system must begin by examining it as a whole." Nothing occurring in the system was random or chaotic or contingent—the system "is not a hodgepodge of random actions"—but "rather a continuum—an orderly progression of events" consisting of a sequence of "decision points" that could be mapped and understood.[124]

The Challenge of Crime in a Free Society was only the most prominent and influential in a long line of attempts to model the criminal justice system in such a way as to enable the prediction of crime rates and to model how changes in one area of the system would affect others (for instance, how increasing the number of police officers would alter the workload of prosecutors, and so on).[125] Also in 1967, a New York state agency developed "a six-foot-long foldout figure entitled 'The criminal justice process for adult felonies,'" with the goal of using this model as the basis for "a state-wide computerized information system" that would collect and disseminate criminal justice data and, ultimately enable "decisions [to] be made on a more rational basis."[126] In part, these efforts reflected the Cold War moment. They combined the dream of prediction, the great dream of both nineteenth-century criminology and midcentury systems theory, with atomic faith in the power of technology to alleviate endemic social ills (precisely because technology was now powerful enough to end the world

[122] Maltz, *supra* note 40, at 208.
[123] Challenge of Crime, *supra* note 18, at 7.
[124] *Id.*
[125] For a more comprehensive account of systems analysis in post-1960s criminology and criminal jurisprudence that draws on some of the same examples and sources as this section, *see* Harcourt, *supra* note 10, at Part III.
[126] Maltz, *supra* note 40, at 208-09.

altogether; what couldn't it do?).[127] But they also resulted more specifically from the proliferation in policymaking circles of trained "systems analysts," often with military experience. Having "developed command-and-control systems for the military," this new cadre of criminologists "felt that the same techniques could be brought to bear on solving the crime problem."[128] In a telling illustration of the overlap, one of the first beneficiaries of Johnson's Office of Law Enforcement Assistance (the predecessor to the LEAA) was Blumstein's old employer, the Institute of Defense Analyses, which in 1966 received a grant to apply recent military advances to urban policing.[129]

Blumstein later described himself and his task force as "missionaries" into the world of criminal justice, bringing with them the "OR techniques of quantitative modeling, system perspective, and planning."[130] Forty years later, a colleague could observe, "Everyone's heard of the 'criminal justice system,' and I think that's a term that's fairly attributable to Al. He was the first person to conceive of it as a system, and put forth a model of it as such."[131] After the Crime Commission shut down, Blumstein carried on with what became his lifelong project of systemizing criminal justice. The Science and Technology Task Force published its own report, which launched "the modern era of applying operations research to problems of crime and justice."[132] In a series of articles, Blumstein translated his work for the Commission into an agenda for "a systems approach to the study of crime and criminal justice" and, over the course of his career, essentially carried out that agenda, developing complex mathematical models and statistical techniques for measuring recidivism (the better to understand feedback loops within the system), predicting criminal careers, and assessing changes in the incarceration rate.[133] Blumstein's ongoing research continues to yield celebrated insights.

The Crime Commission's legacy overall is more ambivalent. In retrospect, the report reads as an awkward conglomeration, reflecting the liberal politics of many of the commissioners (and their Johnson Administration sponsors) but also their efforts to appease what they perceived as the conservative orientation of law enforcement, policymaking circles, and increasingly, the general public.[134] The report begins with an ominous, Goldwater-esque panorama of an America cowering under spiraling levels of "crime," suffering through a crisis that threatens "the health of the Nation" and renders every American "a victim."[135] In many of the report's individual sections, crime is attributed not to cultural deficit or

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[127] *See id.* at 209 (connecting this optimism about criminal justice with the moon landing).

[128] *Id.*

[129] HINTON, *supra* note 17, at 89-90.

[130] Blumstein, *supra* note 14, at 14.

[131] Press release, Carnegie-Mellon, *supra* note 93.

[132] Maltz, *supra* note 40, at 207.

[133] *E.g.*, ALFRED BLUMSTEIN, A SYSTEMS APPROACH (1967); Alfred Blumstein & Jacquelin Larson, *Models of a Total Criminal Justice System*, 17 OPERATIONS RESEARCH 2 (1969). *See generally* Ritter, *supra* note 106 (summarizing Blumstein's career).

[134] HINTON, *supra* note 17, at 101-03.

[135] Challenge of Crime, *supra* note 18, at 1.

individual immorality but to the "root causes" long familiar from progressive criminology—urban blight, economic inequality. And yet, the long list of policy recommendations proposes not social investment or expanding the welfare state, but rather increased policing. Attorney general Ramsey Clark explained that, "since the social causes of crime cannot be removed very quickly, it is necessary to proceed [first] with a program of criminal justice."[136] It was a testament to how successfully the report had been stripped of War on Poverty trappings that William F. Buckley found much within its pages to praise.[137]

The resultant recommendations formed what became a permanent template for U.S. criminal justice policy: the preservation of nominal local and state control, but now with an overlay of federal coordination of research and data collection and generous federal grants for local and state police, courts, and prisons.[138] *The Challenge of Crime*'s call for "a comprehensive, systems orientation toward criminal justice," steered at the federal level and governed by "a national strategy to reduce crime," quickly spurred congressional action in the form of the Safe Streets Act of 1968, which institutionalized the previously temporary Law Enforcement Assistance Administration to disburse federal grants to local and state criminal justice agencies.[139] The LEAA was phased out in 1974, but components of its role survived in other agencies of the reorganized Department of Justice. Thus the basic governance framework introduced by *The Challenge of Crime* has largely survived even as federal investment in anti-poverty and social programs has stagnated or declined, rendering police and jails "the primary public programs in many low-income communities across the United States."[140]

LEAA funded a wide variety of projects related to courts, jails, and prisons.[141] But it is now best remembered (and often criticized) for pouring funds into local police departments. Although it largely failed at inspiring the state-level systematic planning that its architects hoped for, LEAA "immediately became a vast pork barrel for local police departments," who ever since have depended upon federal largesse for some portion of their budgets.[142] As Elizabeth Hinton has traced, states used LEAA block grants "to increase surveillance and patrols in already-targeted black urban neighborhoods," to acquire "military-grade weapons" for police, and to cultivate "a climate of surveillance and intimidation" in inner cities that frequently erupted into "street warfare between police and residents."[143] The

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[136] HINTON, *supra* note 17, at 103 (citing Milton, Eisenhower et al., *To Establish Justice. To Insure Domestic Tranquility. Final Report on the National Commission on the Causes and Prevention of Violence* (Washington, DC: U.S. Government Printing Office, 1969)).

[137] *Id.* at 104.

[138] On this pattern of "federalism in practice" as a feature of modern U.S. governance *see generally* Mayeux & Tani, *supra* note 87.

[139] Walker, *supra* note 39, at 11.

[140] HINTON, *supra* note 17, at 4.

[141] *See* FEELEY & SARAT, *supra* note 86, at 52-53, 56-57.

[142] Walker, *supra* note 39, at 11.

[143] HINTON, *supra* note 17, at 109-10.

result was to empower police against an ever-more powerless urban poor, establishing the long-simmering dynamic that finally exploded in Ferguson, Missouri, in 2013. One might say the result was to stress the system beyond its capacity to adapt.

IV.

In retrospect, what is most striking about *The Challenge of Crime in a Free Society* is how quickly the premises underlying its systemic perspective became obsolete, and how influential it nevertheless remained—as reflected in the near-immediate uptake of the term "the criminal justice system." Within a few years of its publication, the Great Society optimism that produced it had crashed on the shoals of Vietnam, Watergate, and oil-crisis malaise. Across every field of human inquiry, the "age of system" began to fissure and crumble into what the intellectual historian Daniel Rodgers has christened our current "age of fracture."[144] In the thought-worlds of every field, societies, structures, systems, and macroeconomies melted away, revealing only so many disconnected individual agents, rational actors, performative identities, and freely made choices. The connective tissue of all those midcentury flowcharts had, perhaps, been nothing but lines on a page.

And yet, "the criminal justice system" lumbered on, burrowing its way into the language and becoming simply the default shorthand that lawyers, jurists, legal scholars, pundits, and even ordinary people used when they wanted to talk about—well, what? Some combination of entities and actors having something to do with law enforcement. New York federal judge Constance Baker Motley, essentially restating the diagram at the heart of *The Challenge of Crime*, gave a speech dividing "our criminal justice system" into its "various stages."[145] Supreme Court justices debated whether "the entire Texas criminal justice system" could or could not be described as infected with arbitrary bias.[146] Blumstein's flowchart acquired a life of its own, such that scholars could quip that "the now-famous diagram . . . has apparently been reproduced in every textbook published since 1967."[147] In this way the diagram came to structure how participants in the system themselves understood the processes that the chart was purportedly only modeling.

In a ten-year retrospective on *The Challenge of Crime*, criminologist Samuel Walker reported that the volume was already outdated, having fallen out of step with "the most important developments with respect to crime and public thinking about criminal justice."[148] While the report itself had already diagnosed a crisis of out-of-control crime, reported crime rates had only risen further in the intervening years, further fueling public concern and the

[144] RODGERS, *supra* note 15.

[145] Constance Baker Motley, *Law and Order and the Criminal Justice System*, 64 J. CRIM. L. & CRIMINOLOGY 259, 260 (1974).

[146] Jurek v. Texas, 428 U.S. 262, 274 (1976).

[147] Walker, *supra* note 39, at 10.

[148] *Id.* at 4.

salience of crime as an issue for electoral politics. Moreover, a general "disillusionment and cynicism" had now set in "about the workings of the American criminal justice system" and in particular, about the capacity of prisons.[149] Reflecting an essentially liberal faith in the welfare state even as it advocated for intensified policing, *The Challenge of Crime* had in many places betrayed remarkable optimism in the power of education, rehabilitation, and treatment programs. By 1977, "the commission's optimism" had come to be "regarded by those in criminal justice as almost a bad joke" because the very idea of rehabilitation no longer seemed possible—as encapsulated in the criminologist Robert Martinson's famous conclusion about prison treatment programs: "Nothing works."[150] Essentially this new malaise about prisons constituted one iteration of the larger sensibility of the 1970s: the very idea that government could productively shape human behavior in any way was under assault from all sides.[151] Nevertheless, Walker did not at the time identify the report's "system" perspective as, itself, also an artifact of its fleeting moment in time. In fact he praised the report, despite the ways in which it was now obsolete, for having generated "increased awareness of the criminal justice system as a system."[152]

By 1980 it was clear that the notion of "system," insofar as it implied equilibrium, no longer (if it ever had) adequately captured the practices of crime and punishment in the United States. Blumstein's "theory of stability of punishment" almost immediately disproved itself. "Shortly after publication of the 'stability' paper," he later recalled, "we saw a major regime change" as incarceration rates began to grow 6-8% per year beginning in the late 1970s. By the 2000s, the United States had "become the world leader in incarceration rate" with a rate of about 490 per 100,000, "more than four times the previously stable rate that had prevailed for over 50 years."[153] Blumstein had always predicted a minor spike in prison rates as the "baby boom" generation made its way through their twenties and thirties—"a 'pig in the python' phenomenon"—but assumed that the system would thereafter return to equilibrium.[154] In retrospect, he laconically concluded, "we grossly underestimated the magnitude of that growth because we did not anticipate the later politicization of punishment policy."[155] The theory that "a society operated much like a thermostat, increasing or decreasing the punishment rate to keep it within the threshold limits of a set point," no longer fit the data.[156] Blumstein himself, with his engineer's sensitivity to the system's inputs and outputs, recognized this

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[149] *Id.*

[150] *Id.* at 8-9; *see, e.g.*, Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 PUBLIC INTEREST 22, 48 (1974).

[151] *See generally* JULILLY KOHLER-HAUSSMANN, GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA (2017).

[152] Walker, *supra* note 39, at 10.

[153] Blumstein, *supra* note 14, at 19.

[154] Blumstein, supra note 14, at 15.

[155] *Id.*; *see also* Maltz, *supra* note 40, at 239.

[156] Maltz, *supra* note 40, at 239.

dynamic quite early, warning in the 1980s that prison growth was "out of control."[157] In 1992, as President of the American Society of Criminology, he worried that "the criminal justice system is behaving irrationally by any criterion," and urged policymakers to abandon "fear and punitiveness."[158]

If prison growth rendered it untenable to speak of the criminal justice system as homeostatic, it also called into question whether the system could meaningfully be charted in purely abstract, procedural terms, as a system that simply processed "crime" inputs into sentencing "outputs." By the 1990s, it seemed to many observers that the system was no longer serving a pure criminal adjudication function, but was, in practice, serving some other function instead—the maintenance of racial hierarchy, say, or the widening of class inequality.[159] Marc Mauer's seminal report, *Race to Incarcerate*, synthesized data revealing the shockingly disproportionate effects of prison growth upon African-Americans and other minority groups.[160] In 2010 Michelle Alexander's runaway bestseller popularized into conventional wisdom the narrative that policymakers, since the 1980s, had repurposed criminal justice into a "new Jim Crow."[161] Marxisants within sociology departments, meanwhile, proffered the theory that global capital needed America's metastasizing prisons as warehouses for the displaced urban proletariat and other surplus laborers left jobless by deindustrialization.[162] These were structural-functionalist theories of a kind, but again not posited on the premise (or hope) of equilibrium. Simplified variants of all these theories soon migrated into mainstream punditry and, by the 2010s, the conviction that the United States had entered a historically unprecedented crisis of "mass incarceration" constituted the mainstream view among both academics and growing numbers of the general public.[163]

While the first generation of studies of mass incarceration tended to sound in political science or sociology, the central problem was how to explain why punishment had *changed* so dramatically, and thus it was only a matter of time before historians stepped in. Blumstein himself offered a convincing start towards an explanation for prison growth, in his eminently systems-thinking terms: "The regime change was brought about by transfer of control by the CJS (which made internal decisions about incarceration to maintain the homeostatic process) to the political system," because crime had transformed into a major issue in electoral politics.[164] But that left open

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[157] Alfred Blumstein, *Prison Populations: A System Out of Control?*, 10 CRIME & JUSTICE 231 (1988).

[158] Alfred Blumstein, *Making Rationality Relevant--The American Society of Criminology Presidential Address*, 31 CRIMINOLOGY 1, 2, 11 (1993).

[159] Lofstrom Magnus & Steven Raphael, Crime, the Criminal Justice System, and Socioeconomic Inequality 21-23 (IZA, DP No. 1982, March 2016), http://ftp.iza.org/dp9812.pdf.

[160] MARC MAUER, RACE TO INCARCERATE (The New Press rev. ed. 2006).

[161] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, (2010).

[162] *E.g.*, LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009); *cf.* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007).

[163] *See, e.g.*, Adam Gopnik, *The Caging of America*, THE NEW YORKER, (Jan. 30, 2012) http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america (providing a leading example of the ideas' diffusion out of academia into popular media).

[164] Blumstein, *supra* note 14, at 19.

the deeper questions of what generated the "transfer of control" to begin with, and why "the political system," once placed in control, responded in the punitive way that it did. In search of answers to these questions, the historian Heather Ann Thompson issued a call to arms in 2010 urging *historical* study of mass incarceration as one of the most important post-World War II developments.[165] In the years since, historians have rushed to meet this call with an ever-multiplying bibliography of local and national studies on policing, criminal law, crime policy, and punishment, based in painstaking slogs through government archives, court records, and microfilm reels around the country.[166]

Although the specific causal explanations vary and will no doubt continue to be debated, what unites this new historical project on mass incarceration is how far its participants depart from the assumptions of the "age of system." To explain American crime and punishment this literature emphasizes individual agency, contingency and indeterminacy, transformative change over time, local specificity, and the distinctive regional legacies of slavery, conquest, and racial segregation, rather than abstract flows of inputs and outputs or repetitive law-like processes.[167] The question, then, is whether it remains useful to talk of "the criminal justice system" in a world where neither contemporary data nor historical scholarship supports the assumption that law enforcement institutions together constitute an abstract structure performing a clearly defined set of social functions in dynamic equilibrium. "While there is no guarantee that we will in fact see substantial institutional change in the size and nature of the carceral state," writes Jonathan Simon in a perceptive reading of the field, "the emerging historiography of mass incarceration has been shaped by the very possibility of that change and has lessons that could be crucial in strengthening the growing movement for reform."[168]

Of course, systems thinking and modeling have enormous utility. They arose in the modern world precisely because they enable the organization of information and data about the sprawling bureaucracies characteristic of the modern world, which would otherwise be difficult to grasp in totality.[169] Systems thinking also enables researchers to move beyond distracting particulars or emotions. In Blumstein's view, the "systems perspective" was especially useful in the field of criminal justice "because of the strong ideological perspectives that pervade" discussions of crime and punishment. Operations researchers, with "their analytical skills and system perspectives

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[165] Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 706 (2010).

[166] *See* Jonathan Simon, *Is Mass Incarceration History?*, 95 TEX. L. REV. 1077, 1077–78 n.2 (2017) (collecting citations). A useful introduction to this burgeoning field are the articles collected in the special issue of the *Journal of American History*, "Historians and the Carceral State," published in June 2015.

[167] *See, e.g.*, KELLY LYTLE-HERNANDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965 (2017) (emphasizing legacy of conquest); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010) (emphasizing legacy of slavery).

[168] Simon, *supra* note 167, at 1078.

[169] HEYCK, *supra* note 13, at 3–4, 13–14.

and without being constrained by the traditional presumptions," could cut through ideology and bring to the field "new insights, new questions, and new challenges."[170] These are all sound arguments in favor of social scientists and engineers lending their expertise to policymaking. But it is a separate question whether, in a broader cultural sense, it remains useful to think and talk colloquially of crime and punishment in terms of a system. After all, the benefits of systems thinking—its abstraction, its lack of emotion—are also its downsides.

We should also reflect upon what it does to participants to think of themselves as components of a "system." Writing in 1977, Samuel Walker generally praised *The Challenge of Crime* for its systemic perspective. But in a footnote, he hazarded one tentative critique—a critique that has since become prophetic. "The systems approach," he noted, "inevitably focused attention on the crime control functions" of police agencies, by locating them firmly within something called a "criminal justice system" whose function is the reduction of crime rates. "Yet, research on the police . . . has convincingly demonstrated that the police spend only about 20% of their time on criminal matters; their primary role is that of a social service agency. Thus, systems thinking contributes to the distorted role image of the police."[171] Public defenders, meanwhile, have often described the psychic dislocation caused by representing individual clients yet also feeling in some sense implicated, often against their will, in the orderly functioning of "the system."[172]

The idea of "the criminal justice system" may have its most pernicious effect upon appellate judges, including the justices of the Supreme Court.[173] The original flowchart, in *Challenge of Crime*, lodged appellate judges upstream in a continuous flow that connected them with every downstream decision of every ordinary police officer patrolling the streets and making arrests. Combined with the Warren Court's "criminal procedure revolution," this imagined connection implicated constitutional doctrine in the imperative of crime control and caused appellate judges to worry, with every exegesis upon the Fourth Amendment, about whether their words would have a negative "feedback loop" causing someone, somewhere to become victimized by crime. This framing has now become pervasive in constitutional doctrine. By selecting criminal cases at random from any recent docket, one can encounter Supreme Court justices writing about the need to balance the "social costs" of enforcing the Fourth Amendment

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[170] Blumstein, *supra* note 14, at 22.

[171] Walker, *supra* note 39, at 11 n.24; *see also* Kelling, *supra* note 10 (arguing that the "system" metaphor caused police to focus on maximizing the number of "crimes" for the system to process, rather than maintaining orderly streets).

[172] *See, e.g.*, Maura Ewing, *A Replacement for Overworked Public Defenders?*, THE ATLANTIC, (July 5, 2017), https://www.theatlantic.com/politics/archive/2017/07/a-replacement-for-overworked-public-defenders/532476/ (quoting public defender's complaint that "[p]eople think that we work for the system").

[173] For an interesting reading of *Miranda v. Arizona*, as well as a number of subsequent Supreme Court decisions, as essentially operating from the premises of systems analysis, *see* Harcourt, supra note 10, at 39–45.

against the "benefits" and to weigh "law enforcement interests" against the interests of individuals.[174]

The implication of framing criminal procedure questions in this way is that criminal procedure questions are also, at least in some attenuated sense, questions about the amount of "crime" that should be tolerated in the service of other values. Because crime, police, and judges are all connected in one grand system, criminal procedure rules are assumed to have some hydraulic connection to crime rates, implying that they should only be enforced when and if the "costs" of vindicating the Constitution are worth the uptick in mayhem. Judges, then, when deciding questions of criminal procedure, understand themselves to also in some sense be making judgments about how much "crime" is worth trading for other values such as privacy, due process, limited government, individual autonomy, and so on. This framing stems from multiple intellectual and cultural roots, to be sure,[175] but among the most important such roots is the tendency since the 1960s to conceptualize appellate judges and police as all component parts of some singular common system.[176] If appellate judges actually had access to complete and accurate information about this system, and could therefore be confident that feedback would flow frictionlessly between them and the police departments that they worry about regulating, then this approach might make sense. But not even the most heroic systems modelers claim that we have achieved anything near that level of pristine insight into "the criminal justice system." Systems, as any systems theorist would happily remind the Supreme Court, are models, not reality. Judges who make decisions on the basis (even subconsciously) of some imagined responsibility to the police, mediated through the imagined systemic effects of their rulings, are likely to estimate those effects wrongly and to err in one direction or another.

There is also a sense in which thinking about something as an all-encompassing system can induce feelings of stasis or paralysis for those within or affected by it, even if the system itself does not actually appear particularly homeostatic. As Elizabeth Hinton observes, the flurry of federal funding and research into "the criminal justice system" that began during the Johnson Administration has tended over time to reinforce the idea with which it began: the idea that the problems of cities, of urban poverty, of racial tensions, and so on are all derivative problems of "the criminal justice

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[174] Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) (Thomas, J.); Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016) (Alito, J.). In contrast, the earliest Fourth Amendment decisions tended to emphasize not cost-benefit tradeoffs, but the danger that using illegally obtained evidence to secure convictions would undermine the government's legitimacy. This theme persisted into the early 1960s, but has steadily faded from emphasis in Fourth Amendment jurisprudence. *See, e.g.*, *Weeks v. United States*, 232 U.S. 383, 393 (1914) (stating that efforts to punish the guilty should not "be aided by the sacrifice of ... great principles"); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (emphasizing the importance of government integrity and adherence to the rule of law).

[175] *See generally* Sarah A. Seo, *Antinomies and the Automobile: A New Approach to Criminal Justice Histories*, 38 LAW & SOCIAL INQUIRY 1020 (2013) (tracing the history of the idea that criminal justice is best understood through the paradigm of tradeoffs between liberty and security).

[176] On this tendency as reflected in jurisprudence, *see* Harcourt, *supra* note 10, at 39–45.

system."[177] "By consistently reinforcing the urgency of the crime issue," Hinton writes, "the new data and the new policies together became a self-perpetuating force that deeply shaped domestic policy and encouraged the continual flow of law enforcement resources into low-income African American communities" even as other types of government investment retreated.[178] In this way, post-1960s criminal justice research "extended a long tradition of racially biased understandings of crime," dating to the Progressive Era, in which the tendentious use of statistics entrenched cultural associations between blackness and criminality and "rationalized the expansion of the American prison system."[179] Intended to help produce a society more fair and just, federally sponsored empirical research on "crime" often fell instead into the hands of police administrators (and their scholarly supporters) who deployed constructed linkages between low-income neighborhoods and criminality to justify further policing and surveillance of those very neighborhoods. But the underlying data was always messier, more flawed, and more incomplete than those who wielded it in the service of surveillance allowed; for one thing, police tended to rely heavily on arrest figures, which do not necessarily correlate with the level of crime as adjudicated by courts. Moreover, reported crime rates are skewed toward street crime, which is easiest to measure; there is no reliable way of quantifying the real-world incidence of white-collar crime since its prosecution is almost entirely a function of its detection.[180] Even within the Nixon administration, one official worried that the new models of computer-generated policing relying on data "without court tested evidence or proof . . . could amount to computerized harassment."[181]

V.

"The criminal justice system" is one of the most enduring legacies of the now-past "age of system." Since the mid-1970s social scientists have fixated less on systems and structure than on networks, chaos, spontaneity, and flexibility.[182] There are, in other words, concepts and frameworks other than the concept of system that can be productively used to describe and understand complex human behavior and institutions. Still, as Hunter Heyck recognizes in his illuminating study, the vision of "system" gained such influence, in its heyday, partly because of its enormous "power and reach."[183] In our present era, cynical about universal laws and mistrustful of bureaucracies, we tend to distrust "organized intervention in the world"

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[177] *See generally* HINTON, *supra* note 17.

[178] *Id.* at 18.

[179] *Id.*; *see also* KHALIL G. MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2011) (providing Progressive Era antecedents).

[180] *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 613–14 (2005) (noting the difficulty of measuring the real-world incidence of corporate crime).

[181] HINTON, *supra* note 17, at 22-24 (quoting official).

[182] HEYCK, *supra* note 13, at 17, 68.

[183] *Id.* at 203.

altogether.[184] Sounding similar themes, historian Daniel Rodgers describes our "age of fracture" as an era of general dislocation, lacking the stability once provided by the conviction that each individual was firmly lodged within grand structures and by the concomitant sense of mutual obligation to others within those structures. Today "choice and flux are imagined to prevail everywhere" and "history itself" seems "increasingly malleable, flexible, and porous."[185] It is hard, at this unstable moment, to recover what seemed so possible about the dreams of progress that animated Bacon's theorizing and Kennedy's rocketships. But perhaps, for the dismantling of mass incarceration, less system and a bit more openness to historical malleability is what is needed.

[184] *Id.* at 204.
[185] Rodgers, *supra* note 15, at 12.

Article

DISENTANGLING DISPARITY: EXPLORING RACIALLY DISPARATE EFFECT AND TREATMENT IN CAPITAL CHARGING

Sherod Thaxton*

One hundred and thirty years ago, in Yick Wo v. Hopkins, *the U.S. Supreme Court ruled that racially discriminatory enforcement of facially-neutral laws violated defendants' equal protection rights. Since then, a voluminous body of research has documented persistent and unjustified racial disparities in charging and sentencing. Yet not a single claimant has prevailed in a race-based discriminatory prosecution action in federal court since* Yick Wo. *This seeming conflict—widespread evidence of racial discrimination coupled with claimants' inability to satisfy the Courts' evidentiary thresholds to prevail on the discriminatory prosecution claim—can be attributed to deep disagreements among the Supreme Court Justices over a uniform and workable evidentiary standard for social scientific evidence of discrimination. Although the Court has increasingly signaled its willingness to rely on statistical evidence to demonstrate racial discrimination, the majority of Justices have simultaneously found such evidence lacking in particular cases* and *failed to specify what types of evidence would be sufficient. Recently, members of the Court most skeptical of statistical evidence of discrimination have emphasized that claimants must show racial differences in outcomes are* connected *to racial differences in process, and not merely that there was an opportunity for discriminatory decision-making.*

This article contributes to the understanding of discriminatory prosecutorial charging behavior by carefully disentangling the racial disparity into two separate components: the part that is explained by racial differences in case characteristics predictive of the charging decision (disparate effect) and the part explained by the racial differences in prosecutors' behavioral response to those characteristics (disparate treatment). By way of illustration, I apply the analytical approach to data on capital charging decisions in Georgia. I discover that between 60%-80% of the race-of-victim gap in capital charging behavior in Georgia is attributable to disparate treatment. I further show how prosecutors' differential treatment of specific case characteristics based on the victim's

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race contributes to the overall racial disparity, thereby providing a more granular analysis of discriminatory decision-making than previously available. I conclude by discussing the legal implications of my findings in light of the Court's governing equal protection and anti-discrimination jurisprudence.

> "As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases. . . . The sentences for even major crimes are ordinarily reduced when the victim is a Negro."
> –Justice William J. Brennan, *McCleskey v. Kemp* (1987), quoting Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944)

INTRODUCTION

Empirically oriented legal scholars and social scientists have developed a voluminous literature documenting racial disparities in sentencing at both the state and federal levels.[1] With very few exceptions, these studies demonstrate the persistence of racial disparities across time, place, and offense type, even after accounting for a wide range of nonracial factors purported to influence sentencing.[2] Of course, judges' and jurors' sentencing decisions come at the tail end of the adjudicative process, and earlier discretionary choices by legal actors—primarily prosecutors—also influence final outcomes.[3] As a consequence, there has been increased emphasis on, and scrutiny of, prosecutorial decision-making because prosecutors are generally less constrained by the law—and their choices are less visible to the public—than judges and juries.[4] The adjudicative process begins with the charging decision, and not only does research suggest that racial disparities are strongest at this stage, but also that racial disparities are not rectified during sentencing.[5] Furthermore, studies that focus exclusively on

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[1] For reviews of the extant literature, *see, e.g.*, Todd Sorensen et al., *Race and Gender Differences Under Federal Sentencing Guidelines*, 102 AM. ECON. REV. 256 (2012) (federal non-capital sentencing); Barbara O'Brien et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C. L. REV. 1997 (2016) (state-level capital sentencing); Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL. L. REV. 1615 (2004) (federal capital sentencing); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145 (2001) (state-level non-capital sentencing).

[2] African American and Latino/Hispanic defendants receive more severe sentences than their Caucasian counterparts for the same criminal conduct and with similar criminal backgrounds. Sorensen et al., *supra* note 1. Defendants, irrespective of race/ethnicity, charged with committing crimes against Caucasians also receive harsher punishments than defendants charged with committing crimes against non-Caucasians. O'Brien et al., *supra* note 1.

[3] I do not mean to suggest that unexplained racial disparities first emerge in the adjudicative process. In fact, there is a substantial research literature documenting racial discrimination in the investigative process. *See, e.g.*, Civ. Rts. Div., U.S. Dep't of Just., *Pattern and Practice Police Reform Work: 1994-Present* (Gov't Printing Office 2017) (discovering widespread patterns and practices of racially biased policing); Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 821–22 (2007) (discovering that minority group members were disproportionately stopped by police, relative to their levels of crime participation, but less likely to be arrested, suggesting that standards were more relaxed for stopping minority group members).

[4] *See, e.g.*, Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (describing the immense, and often unreviewable, power of prosecutors); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223 (2006) (distinguishing between coercive and non-coercive plea bargaining and arguing that defendants "have a moral right that prosecutors do not make plea proposals in weak cases, that prosecutors' plea proposals do not include unfair trial sentences, and that prosecutors do not overcharge.").

[5] M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1343 (2014) (attributing a significant portion of racial disparities in sentencing to racial disparities in charging that are not attenuated through the adjudicative process). A recent study of policing behavior in homicide cases also suggests that racial disparities in policing are not ameliorated in the post-investigative stages. Nick Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion*, 7 RACE & JUST. 1, 13–17 (2016) (reporting evidence of the interrelationship between racial bias in policing and prosecution for potentially capital cases).

sentencing and ignore earlier discretionary choices, which are vulnerable to racially discriminatory practices, tend to mask racial disparities.[6]

Any abuse of discretion by prosecutors creates serious cause for concern, but unjustified racial disparities in charging decisions in the capital punishment context is especially alarming. "One of the enduring arguments in Supreme Court death penalty jurisprudence is that the death penalty is 'qualitatively different' from all other punishments in ways that require extraordinary procedural protection against error."[7] And the omnipresent influence of impermissible racial considerations on the administration of capital punishment has figured prominently in the Court's decisions. In fact, the case credited with "launching one hundred years of federalism"[8] involved an African American defendant who, *inter alia*, challenged the legality of his death sentence (from state court) under the Due Process and Equal Protection Clauses of the U.S. Constitution because of overt racism at the pretrial, trial, and appellate stages.[9] The vast majority of statistically sophisticated studies examining capital charging have discovered that race still exerts an impact: all else equal, African American defendants are more likely to be charged with the death penalty than Caucasian defendants *and* defendants of any race charged with killing Caucasian victims are significantly more likely to face a capital charge than defendants charged with killing non-Caucasian victims.[10]

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[6] *See, e.g.*, U.S. Gov't Accountability Office, *Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities*, GGD-90-57 (Gov't Printing Office 1990) 4 (remarking that "discretion exercised early in the process may have the effect of concealing [masking] race effects if analysis is limited only to the later stages").

In what some scholars have labeled the "black premium," African American arrestees – when compared to similarly situated Caucasian arrestees—are much more likely to: be charged with a felony; face a mandatory minimum sentence; denied pre-trial release; denied release on their own recognizance; serve their pre-trial detention in prisons (rather than jails); and be charged higher bond amounts when granted bail. Rehavi & Starr, *supra* note 5, at 1323–36, 1350; Cassia C. Spohn et al., *The Impact of Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175 (1987); John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, 29 JUST. Q. 41, 53–64 (2012).

[7] Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. OF CRIM. L. 117, 117 (2004). *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) ("Death is a unique punishment...[it] is in a class by itself."); Ring v. Arizona, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (noting that the Constitution "requires States to apply special procedural safeguards when they seek the death penalty").

[8] MARK CURRIDEN & LEROY PHILLIPS JR., CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM (1999); *accord* Rachel F. Moran, *Race, Representation, and Remembering*, 49 UCLA L. REV. 1513, 1514 (2002).

[9] United States v. Shipp, 203 U.S. 563, 572–73 (1906) (announcing the Supreme Court's authority to review state criminal court decisions).

[10] *See* Part III. Prosecutors routinely use a capital charge as a bargaining chip in order to compel defendants to waive their trial rights and agree to a sentence of life imprisonment, even when the prosecutor does not believe the defendant's crime merits the death sentence or the evidence against the defendant is weak. Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475 (2013) (summarizing the empirical research on prosecutors' use of the death penalty as leverage in plea negotiations); *see also* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2097–98 (2000). The use of capital punishment in this fashion is associated with higher reversals of convictions, more wrongful convictions, and greater economic waste. Thaxton, *supra*; Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004); James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L. 315 (2002) [hereinafter Liebman, *Opting for Real Death Penalty Reform*].

These two troublesome processes—racially discriminatory charging *and* legal errors resulting from the overly aggressive use of capital charging—potentially contribute to the situation where non-

Despite near consensus in the scholarly literature about the persistence of racial disparities in the criminal justice system, judges, attorneys, legislators, and the general public continue to debate whether these racial disparities in criminal justice outcomes are primarily a function of differential criminal culpability (disparate effect)[11] or discriminatory legal decision-making (disparate treatment). Defendants have raised claims of racially discriminatory capital charging practices, referred to as selective prosecution, in federal court, as violative of their rights to equal protection under the law as guaranteed by the Fifth and Fourteenth Amendments, and have relied on statistical evidence to support their assertions.[12] The Supreme Court has uniformly rejected these claims,[13] underscoring a very troubling fact about the Court's selective prosecution jurisprudence: the Court has not ruled in favor of a defendant raising a selective prosecution claim based on racial discrimination in over 130 years.[14] In 1886, in *Yick Wo v. Hopkins*,[15] the Court ruled for the first time that racially biased enforcement of a facially neutral law violated the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo* was also the last time a race-based selective

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Caucasian defendants who are sentenced to death for killing Caucasian victims are significantly more likely to have their cases reversed during appellate proceedings (direct and collateral review) for serious legal error compared to other defendant/victim combinations, even after taking into account a wide range of factors relevant to defendant culpability. Alberto Alesina & Eliana La Ferrara, *A Test of Racial Bias in Capital Sentencing*, 104 AM. ECON. REV. 3397, 3397 (2014).

Results from an analysis of capital charging decisions at the federal level were equally disquieting: over a twenty-year period, 80% of capitally charged defendants who were either acquitted of the capital offense or found innocent were African American or Latino/Hispanic. McNally, *supra* note 1.

[11] "Disparate effect" is a legal term of art, and as such, it has multiple meanings. For the purposes of this article, I define disparate effect as the distributional consequences of a policy or practice; therefore, it is simply an empirical claim. As I explain below, my definition is analogous to an "endowment effect" in the economics literature, *see infra,* note 209. My definition of disparate effect is distinct from two other common understandings of the term found in constitutional and anti-discrimination law litigation and scholarship. The first meaning pertains to the adverse effect of a policy or practice that falls disproportionately on a racial group when the policy lacks substantial justification and there is an alternative to the policy or practice that would be comparably effective without creating the racial disparity (also labelled *disparate impact* or *adverse impact*). The second meaning relates to the disproportionate application of a legal sanction to members of a protected class (e.g., racial group) compared to similarly situated individuals (also referred to as *discriminatory effect/impact*). Wayte v. United States, 470 U.S. 598 (1985).

[12] *See* Part II.A; Weinberger v. Wiesenfeld, 420 U.S. 636, 638 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

[13] *E.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987); United States v. Bass, 536 U.S. 862 (2002).

[14] Kristin E. Kruse, *Proving Discriminatory Intent in Selective Prosecution Challenges-An Alternative Approach to* United States v. Armstrong, 58 SMU L. REV. 1523, 1535 (2005).

[15] Yick Wo v. Hopkins, 118 U.S. 356 (1886). The City of San Francisco enacted an ordinance requiring all laundries in wooden buildings to hold a permit issued by the city's Board of Supervisors. The Board refused to issue permits to owners of Chinese descent. As a result, Yick Wo and Wo Lee, both of Chinese descent, continued to operate laundries in wooden buildings without a permit. Yick Wo and Lee were initially fined for violating the ordinance, but ultimately imprisoned after refusing to pay the fine. They appealed their convictions on the grounds that the ordinance was enforced in a racially discriminatory manner in violation of the Equal Protection Clause. The Court ruled that, despite the impartial wording of the ordinance, its biased enforcement was unconstitutional. *Yick Wo* is, perhaps, more notable for the Court's ruling that the Equal Protection Clause applied to non-citizens than its implications for discriminatory prosecution claims. *See, e.g.*, HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 63 (2007).

prosecution claim was successfully argued before the Court.[16] This fact is especially mystifying given the weight of social scientific evidence of unjustified systemic racial disparities not only in prosecutorial charging decisions, but in virtually all aspects of criminal justice legal decision-making that has emerged in the aftermath of *Yick Wo*.[17]

The ineffectiveness of this body of research in racial discrimination litigation in the criminal context can be primarily attributed to the Court's anti-discrimination jurisprudence which has simultaneously failed to specify the type of statistical evidence necessary to support an inference of discrimination *and* increasingly suggested that, in order to be successful with statistical evidence, claimants must show how systemic racial bias leads to racial disparities, and not merely that there was an opportunity for discriminatory decision-making.[18] In other words, the Court has emphasized that claimants must do a better job of demonstrating the manner in which racial discrimination influences decision-making, while at the same time neglecting to provide guidance to judges and litigants as to what kinds of circumstantial evidence would be demonstrative of a constitutional violation.[19] The purpose of this article is to not only answer the Court's

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[16] Kruse, *supra* note 14, at 1535.

[17] *See* Part III. Less than twenty years after the Court issued its ruling in *Yick Wo*, the first rigorous social scientific investigation of racial disparities in criminal sentencing was spearheaded by Atlanta University's *Atlanta Sociological Laboratory* under the direction of sociologist William Edward Burghardt ("W.E.B.") Du Bois. 9 SOME NOTES ON NEGRO CRIME, PARTICULARLY IN GEORGIA (William Edward Burghardt Du Bois ed., 1904). Du Bois and colleagues discovered inequities in both the length of sentences and assignment to the convict-lease system between African Americans and Caucasians convicted of criminal conduct.

Scholars began building upon Du Bois and colleagues' work beginning in the 1920s, and while the scope and methodological rigor of these studies varied considerably, a pattern pertaining to the defendant's race, the victim's race, and the interaction between them immediately emerged: (1) African American defendants received longer sentences than Caucasian defendants for similar offenses; (2) defendants, irrespective of their race, charged with crimes against Caucasian victims received more severe charges and harsher sentences; and (3) discrimination against African American defendants was most pronounced when accused of committing crimes against Caucasians—most notably for capital offenses. *See, e.g.*, Thorsten Sellin, *The Negro Criminal: A Statistical Note*, 140 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 52 (1928); Guy B. Johnson, *The Negro and Crime*, 217 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 93 (1941); Harold Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOC. FORCES 369 (1949). Nearly a century later, these particular racial dynamics have remained remarkably durable. *See* Part III.

[18] McCleskey v. Kemp, 481 U.S. at 312 (statistical evidence must identify the source of the disparity, rather than simply indicate that a discrepancy appears correlated with race); *see generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011) (merely proving that the discretionary system has produced a racial or sexual disparity is insufficient for a plaintiff to prevail).

[19] Chief Justice William Rehnquist, for example, explained "it should not [be] an insuperable task to prove that persons of other races [are] being treated differently [by prosecutors]," but believed the defendants' evidence showing that every single prosecution for that same crime over the past five years involved African Americans was insufficient to warrant the federal trial court's motion granting the defendants access to the prosecution's files. United States v. Armstrong, 517 U.S. 456, 470 (1996). The defendants sought specific information from the prosecution that would allow them to meet the Court's burden of racially differential treatment: (1) a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) the identity of the race of the defendants in those cases, (3) the levels of law enforcement were involved in the investigations of those cases, and (4) explanations of the criteria for deciding to prosecute those defendants federally rather than allow the state to handle those cases. Absent the requested information, it seems highly implausible that the defendants could make the requisite showing for the underlying selective prosecution claim. Yet the evidence that the U.S. Attorney's office in question had only pursued federal charges against African Americans over a five year time span was remarkably similar to the evidence the Court found persuasive in cases involving racial discrimination in the selection of the jury venire. Castaneda v. Partida, 430 U.S. 482 (1977) (ruling

clarion call—that is, carefully demonstrating how racially differential treatment produces a racially disparate outcome—but also bring attention to some peculiarities of the current doctrine that have made it unduly burdensome on claimants to prevail in selective prosecution actions for well over a century.

The primary contribution of this article pertains to the *operationalization* of systemic discriminatory treatment,[20] subjecting prosecutorial decision-making in the capital charging process to a more granular analysis that is directly responsive to several of the Supreme Court's prior concerns about the use of statistical analyses of capital charging-and-sentencing behavior to provide evidence of racially disparate treatment. The statistical models described in this Article provide a template for the investigation of discriminatory charging dynamics in capital *and* non-capital cases. Concretely, my analytical approach carefully separates an observed racial disparity in capital charging into two components. The first component pertains to differences in the distribution of aggravating and mitigating evidence across Caucasian-victim and African American-victim cases and is analogous to a disparate effect (as defined in this Article).[21] The second component captures the differences in the returns on that aggravating and mitigating evidence; in other words, differences in prosecutors' behavioral responses to that evidence. This latter component is a measure of discriminatory treatment. Under this analytical framework, the discriminatory treatment component does not purport to directly capture racial animus on the part of the decision-maker, although such effects may be highly probative of such animus and support an inference that it exists.[22] This article is the first to apply the analytical approach to capital charging decisions, and decision-making in the capital punishment process, more generally.

Prior research has yet to sufficiently disentangle the sources of racial differences in capital charging at a descriptive level, even though such differences have been explored by legal scholars and social scientists for more than 70 years.[23] This shortcoming may partly stem from the fact that

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that evidence of the gross underrepresentation of Mexican Americans on the grand jury that convicted the defendant was unconstitutional).

[20] Operationalization is "the transformation of an abstract, theoretical concept into something concrete, observable, and measurable in an empirical research project." OXFORD DICTIONARY OF SOCIOLOGY 464 (John Scott & Gordon Marshall eds., 3d ed. 2005). This entails the development of specific research procedures that will result in empirical observations representing the previous defined concepts. *See* Part IV.

[21] *See supra* note 11.

[22] Daniel R. Taber et al., *Oaxaca-Blinder Decomposition of Disparities in Adolescent Obesity: Deconstructing Both Race and Gender Differences*, 24 OBESITY 719, 725 (2016) (explaining that the analytical framework I employ "explores potential [causal] mechanisms in more detail than conventional analysis").

The magnitude of the effect strengthens an inference of a causal link between the race/ethnicity and the charging decision, irrespective of racial animus, after accounting for other plausible explanations. Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring) (explaining that the distinction between disparate effect and disparate treatment may be immaterial depending on the size of the racial disparity). *See also* Part II.B.

[23] *See* Part III.

scholars have been primarily concerned with measuring overall differences in criminal justice outcomes between racial groups that remain after taking into account a wide range of legally relevant variables.[24] Under this approach, racial discrimination is said to exist because no other valid explanation accounts for the observed differences.[25] These studies have been helpful in highlighting the fact that purely legal justifications fail to explain why, in the aggregate, members of certain groups are routinely subject to harsher punishments than others, net of the actual social harm they cause. Yet judges, lawyers, legislators, and scholars still lack an understanding of how prosecutors differentially assess legally relevant (and legally suspect) factors across different racial groups—that is, how prosecutors' evaluations of seemingly objective criteria may *shift* based upon race. Put differently, this existing scholarship has failed to inform the legal community about the potential ways in which race modifies the impact of legally relevant (and legally suspect) factors on legal behavior, independent of the distribution of these characteristics across the various racial groups.[26] My analytical approach provides a more nuanced understanding of racially disparate treatment, which is especially necessary in light of the Supreme Court's sparse case law that has failed to articulate a uniform and workable evidentiary standard for statistical evidence of discrimination.[27]

Part I explores the differing conceptualizations of race-based discrimination present in the U.S. Supreme Court's constitutional and statutory anti-discrimination jurisprudence, describing and evaluating the rationales for these differing conceptions—both theoretical and practical—as well as the critiques of those rationales.[28] The Court has blurred the line between these seemingly opposing notions of discrimination, raising important questions about the appropriateness of various types of evidence in particular contexts, the standards governing its applications, and the Court's competency in assessing such evidence. Part II describes both the

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[24] Todd E. Elder et al., *Unexplained Gaps and Oaxaca–Blinder Decompositions*, 17 LABOUR ECON. 284, 285 (2010).

[25] DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

[26] As noted earlier, merely relying on statistics of systemic disparities without explaining the story that the statistical representation is telling appears unlikely to be sufficient for a successful claim to courts, or even a compelling argument to legislators. Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 477 (2011) (discussing the Supreme Court case, *Wal-Mart v. Dukes*, and the heightened evidentiary standard required by the Court compared to prior systemic disparate treatment cases).

[27] McCleskey v. Kemp, 481 U.S. 279, 349 (1987) (Blackmun, J., dissenting) ("In analyzing an equal protection claim, a court must first determine the nature of the claim and the responsibilities of the state actors involved to determine what showing is required for the establishment of a prima facie case."); *accord* Kruse, *supra* note 14 (discussing case law pertaining to discriminatory prosecution claims).

[28] Analyzing the constitutional and statutory frameworks, collectively, is warranted because the Court has explained that its "cases discussing constitutional principles provide helpful guidance in [the] statutory context" when disparate treatment is alleged. Ricci v. DeStefano, 557 U.S. 557, 582 (2009) (discussing petitioners' statutory claim under both the disparate-treatment prohibition of Title VII and the Equal Protection Clause of the Fourteenth Amendment). *See also* Civ. Rts. Div., U.S. Dep't of Just., *Title VI Legal Manual* (2017) 3 (noting that the elements of a statutory claim of discriminatory intent "derive from and are similar to the analysis of cases decided under the Fourteenth Amendment's Equal Protection Clause"); Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95, 104 (2014) (describing the convergence of the statutory and constitutional interpretations of disparate treatment).

Court's embrace and skepticism of statistical evidence of intentional discrimination over the past forty years. The Court's sharply divided opinions and uneven approach to statistical evidence has failed to provide workable standards for lower courts to apply. Part III discusses and assesses the empirical social scientific literature on capital charging dynamics over the past quarter-century. This literature has almost unequivocally identified racial disparities in charging decisions based on the victim's race and the combination of the defendant's and victim's race, but the analytical frameworks utilized in these studies have impaired the ability of analysts to ask and answer questions that now appear to be of central interest to courts and legislators—namely, how are racial differences in outcomes *connected* to racial differences in process? I explain, both mathematically and in plain English, how prior studies have measured racial discrimination, their specific findings, and why their methodologies prevent addressing more fundamental questions that often lie at the heart of courts' inquiries. Part IV presents a set of statistical tools—again, both mathematically and in plain English—capable of disentangling disparate effect from disparate treatment in capital charging.[29] After discussing the statistical model, I describe an originally compiled dataset of capital charging decisions from Georgia over an eight-year period to which I apply the aforementioned analytical approach. Part V explains the results of the statistical analyses. My findings make it unequivocally clear that race still very much matters for capital charging decisions. I find that 60%-80% of the race-of-victim gap in capital charging behavior in Georgia is attributable to disparate treatment. In addition to the overall disparate treatment effect, I demonstrate how much the racially differential treatment of *specific case characteristics* contributes to the race-of-victim gap in capital charging. This aspect of my analysis demonstrates how unjustified racial differences in *process* directly contribute to racial differences in *outcomes*, and is thereby directly responsive to several Supreme Court Justices' heightened evidentiary standard for statistical evidence of discrimination. Part VI discusses the legal implications of my findings for discriminatory prosecution claims and examines the durability of the results in the presence of potential uncertainty about the underlying statistical model and measurement of key variables.

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[29] I adapt methodological insights from sociology and labor economics to explain which factors account for the race-of-victim gap in death-noticing among death-eligible defendants. These models have been used for several decades to examine race- and gender-based discrimination in hiring, wages, and promotion. Evelyn M. Kitagawa, *Components of a Difference Between Two Rates*, 50 J. AM. STAT. ASS'N 1168 (1955) (sociology); Otis Dudley Duncan, *Inheritance of Poverty or Inheritance of Race*, *in* ON UNDERSTANDING POVERTY: PERSP. FROM THE SOC. SCI. 85 (Daniel P. Moynihan ed., 1969) (sociology); Alan S. Blinder, *Wage Discrimination: Reduced Form and Structural Estimates*, 8 J. HUM. RESOURCES 436 (1973) (economics); Ronald Oaxaca, *Male-Female Wage Differentials in Urban Labor Markets*, 14 INT'L ECON. REV. 696 (1973) (economics). More recently, this approach has been applied to racial disparities in criminal justice outcomes such as prison/drug treatment commitments and sentence length. John MacDonald et al., *Decomposing Racial Disparities in Prison and Drug Treatment Commitments for Criminal Offenders in California*, 43 J. LEGAL STUD. 155 (2014); Todd Andrew Sorensen et al., *Do You Receive a Lighter Prison Sentence Because You Are a Woman or a White? An Economic Analysis of the Federal Criminal Sentencing Guidelines*, 14 B.E. J. OF ECON. ANALYSIS & POL'Y 1 (2013).

I. CONCEPTUALIZING DISCRIMINATION

There is disagreement, among *both* jurists and social scientists, over the centrality of intentional bias in explanations of racial discrimination,[30] although the debate appears to be most contentious in the legal context rather than in the scientific one.[31] According to a sizable number of judges and legal analysts, discrimination results from actions intentionally designed to favor or disfavor another individual (or collection of individuals) because of race.[32] Well known examples in the adjudicative context are the *de jure*[33] or *de facto*[34] exclusions of otherwise eligible African Americans and Latinos/Hispanics from serving on juries. This view of discrimination, commonly referred to as discriminatory intent/motive, focuses on the racial animus residing in the decision-maker(s).[35] Discriminatory intent is understood to imply more than a mere awareness of the distributive consequences that correlate with race/ethnicity—it requires that race/ethnicity is a motivating factor.[36] A detailed legal analysis of the discriminatory intent doctrine in the context of prosecutorial decision-making is provided elsewhere,[37] but it suffices to say that the primary

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[30] Clearly, anti-discrimination law, both constitutional and statutory, extends to more classifications than race. Although there is considerable overlap between the constitutional and statutory classifications, the definitions are not completely congruous. This article focuses, primarily, on race-based discrimination, but many (if not all) of the arguments would be applicable to other classifications.

[31] *See, e.g.*, Orley Ashenfelter & Ronald Oaxaca, *The Economics of Discrimination: Economists Enter the Courtroom*, 77 AM. ECON. REV. 321, 322 (1987) (noting that discriminatory motives are of central importance to many jurists, but motivations are irrelevant to determining the existence of discrimination for most economists); Barbara F. Reskin, *Including Mechanisms in Our Models of Ascriptive Inequality*, 68 AM. SOC. REV. 1, 4 (2003) (describing several fundamental limitations of motive-based explanations by sociologists for racial and gender inequality).

[32] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1988) (emphasizing that intentional consideration of race, whether for malicious or benign motives, is subject to the most careful judicial scrutiny); George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2313 (2005) (remarking that dispute over whether purposeful discrimination is necessary to establish a claim of racial discrimination turns on what individuals believe anti-discrimination law is meant to achieve).

[33] Strauder v. West Virginia, 100 U.S. 303 (1880); Neal v. Delaware, 103 U.S. 370 (1881).

[34] Norris v. Alabama, 294 U.S. 587 (1935) (de facto exclusion of African Americans from the venire panel); Batson v. Kentucky, 476 U.S. 79 (1986) (racially discriminatory use of peremptory challenges to remove African American jurors); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (racially discriminatory use of peremptory strikes in civil cases); Hernandez v. New York, 500 U.S. 352 (1991) (racially discriminatory use of peremptory challenges to remove Hispanic/Latino jurors); Castaneda v. Partida, 430 U.S. 482 (1977) (de facto exclusion of Hispanics/Latinos from the venire panel). This logic was extended to defense counsel's use of racially motivated peremptory challenges in Georgia v. McCollum, 505 U.S. 42 (1992).

[35] Washington v. Davis, 426 U.S. 229 (1976). Courts and scholars have used the terms discriminatory, disparate, and adverse interchangeably. They have also used the terms intent and purpose interchangeably. *See supra* note 11.

[36] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (explaining that the Equal Protection Clause is violated only when laws are passed because of, not merely in spite of, their adverse effects upon an identifiable group); *accord* Wayte v. United States, 470 U.S. 598, 610 (1985).

Justice Clarence Thomas, for example, has recently called for a repudiation of the view that Congress intended to authorize claims of racial discrimination not based on intentional racial animus when it enacted Title VII of the Civil Rights Acts of 1964. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2411 (2015) (Thomas, J., dissenting).

[37] *See* Part II.

justification articulated for this doctrine is its utility as a limiting principle.[38] According to this perspective, because much government action harbors some risk of discrimination, it may be unmanageable to compensate for all such risks.[39] In adopting the discriminatory intent conceptualization of discrimination in certain contexts, the U.S. Supreme Court announced several reasons that "the invidious quality of the law claimed to be racially discriminatory must ultimately be traced to racially discriminatory purpose."[40] The concerns most significant to the Court appeared to be institutional—namely, separation of powers and federalism. The Court explained that, because many facially neutral policies impact vulnerable racial groups, the evidence of *scienter* is required in order to avoid improperly expanding the scope of the judiciary's power at the expense of Congress and state legislatures.[41] The scienter requirement invokes both process (intent) and outcome (effect) in the determination of whether constitutionally or statutorily impermissible discrimination had occurred,[42] and therefore makes the decision-maker's purpose to discriminate the fulcrum of the inquiry.[43] In Justice Antonin Scalia's view, for example, the magnitude of an unjustified racial disparity is irrelevant to its (un)constitutionality when the cause of the racial disparity is "the unconscious operation of irrational sympathies and antipathies[.]"[44]

Yet a growing number of jurists, legal scholars, and social scientists have underscored the limited relevance of racial animus in explaining discrimination, and instead have espoused the social-scientific view: the presence of unexplained/unjustified differences in outcomes in aggregate data as evidence of discrimination.[45] While acknowledging that legal and

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[38] *Davis*, 426 U.S. at 239 ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. [...] [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

[39] Edward K. Cheng, *Constitutional Risks to Equal Protection in the Criminal Justice System (Note)*, 114 HARV. L. REV. 2098, 2102 (2001) (recognizing traditional equal protection doctrine focuses on particularized harms, but neglects subtler systemic risks).

[40] *Davis*, 426 U.S. at 240.

[41] *Id.* at 248.

[42] Some statutory-based causes of action do not require proof of disparate treatment, only disparate impact. The statutory standard requiring proof of discriminatory treatment is significantly more demanding. *Id.* at 239; Rutherglen, *supra* note 32, at 2313–23.

[43] *Davis*, 426 U.S. at 240.

[44] Memorandum from Antonin Scalia, To the Conference Re: No. 84-6811, *McCleskey v. Kemp* [Thurgood Marshall Papers] (Jan. 6, 1987); *but see* McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (Powell, J.) (noting that the magnitude of the racial disparity is an important component of proof of a constitutional violation under the Equal Protection Clause), *accord id.* at 352–53 (Blackmun, J., dissenting); *Washington v. Davis*, 426 U.S. at 254 (Stevens, J., concurring) (same).

[45] United States v. Tuitt, 68 F. Supp. 2d 4, 10 (D. Mass. 1999) (noting that holding defendants to actual knowledge of a discriminatory choice on the part of a prosecutor would make the equal protection standard for discovery and the underlying selective prosecution claim impossible to satisfy); Ashenfelter & Oaxaca, *supra* note 31, at 322 (most economists believe that evidence of discriminatory motives is irrelevant to determining the existence of discrimination). *See also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (Ginsburg, J., dissenting) (explaining that gender discrimination was the only plausible explanation for gender disparities in pay and promotion after the statistical models took into account a long list factors relevant to the discretionary process).

scientific definitions of proof are not the same, these scholars highlight that "the inevitable progress of scientific research raises important questions about the role of scientific advancements in the evolution of legal standards and doctrines."[46] Legal scholar Noah Zatz, for example, has argued that it is inappropriate to focus on individualized, nonstatistical evidence of discrimination because "causal processes are typically too complex and the evidentiary uncertainties too great to show persuasively why any one person's . . . race played a significant role somewhere along the way."[47] Another commentator characterized the Court's equal protection jurisprudence as endorsing a "cramped view of constitutional harm [that] forces courts to examine only individual cases, which cannot reveal or redress patterns of racial discrimination [because] considered in isolation, nearly all decisions can be rationalized using permissible explanations. . . . It is only when these decisions are considered in the aggregate that patterns may emerge that indicate the presence of impermissible discrimination."[48] Social scientists have offered similar critiques. Sociologist Barbara Reskin, emphasized that "theories about actors' motives guide the search for the explanation [of race and gender disparities] . . .[however,] the product of this approach is not explanation, but never-ending and unprofitable debate over the role of unobserved motives."[49] In other words, the focus should shift from uncovering evidence of discriminatory purpose to carefully assessing whether alternative explanations (i.e., rival hypotheses) explain the observed racial disparity.[50] This framework does not presuppose scienter, but retains the requirement of a causal connection between race and racial disparity.[51] This causal attribution tells us that something is to be expected; however, it is silent as to *why* something occurred.[52] The best that can be expected is a careful process of elimination in which circumstantial evidence is used to remove the usual non-discriminatory reasons for the observed disparity, leaving the inference that the real reason was

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[46] ANGELO N. ANCHETA, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW 14 (2006). *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (ruling the death penalty for juveniles unconstitutional, in part, because of growing scientific evidence of juvenile's cognitive limitations vis-a-vis adults); Graham v. Florida, 560 U.S. 48 (2010) (abolishing life without the possibility of parole for juveniles for similar reasons as in *Roper v. Simmons*).

[47] Noah Zatz, *Disparate Impact and the Unity of Equality Law*, 96 B.U. L. REV. (forthcoming, 2017); *accord* Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221, 230 (2012) ("[I]iring decisions are influenced by a complex range of factors, conscious racial attitudes being only one.").

[48] Cheng, *supra* note 39, at 2103-04; *accord* Selmi, *supra* note 26 (aggregated statistics might reveal patterns that would not be evident by focusing on individual cases).

[49] Reskin, *supra* note 31, at 15.

[50] David C. Baldus & James W.L. Cole, *Quantitative Proof of Intentional Discrimination*, 1 EVALUATION Q. 51, 56–77 (1977); *See also* Zatz, *supra* note 47 ("Inferring disparate treatment from the observed disparity requires eliminating [] alternative explanations.").

[51] Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1470 (2004) (arguing that a causal connection between race and the outcome of interest has always animated antidiscrimination law); RICHARD A. BERK, REGRESSION ANALYSIS: A CONSTRUCTIVE CRITIQUE 211 (2003) (noting that a causal link between race and legal decision-making does not require racial animus on the part of the decision-maker).

[52] ERNEST NAGEL, THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION 26–27 (1979).

discrimination.[53] In the words of linguist Benjamin Whorf, "the WHY of understanding may remain for a long time mysterious but the HOW . . .of understanding . . .is discoverable."[54]

For the lawyers and scholars subscribing to the social-scientific view of discrimination, the misalignment between the function equal protection/anti-discrimination law purportedly serves[55] and the extant standards of proof for these causes of action becomes especially apparent when examining the evidence from social scientists' field experiments on employment discrimination. Despite strong evidence of differential treatment, employers remain adamant that race does not affect their decision to hire and maintain that they simply select the best available candidate.[56] Yet when these same employers are "asked to step back from their own hiring process to think about race differences more generally, [they are] surprisingly willing to express strong opinions about the characteristics and attributes they perceive among different groups of workers."[57] The majority of employers, when "considering Black men independent of their own workplace, characterize this group according to three common tropes: as lazy or having a poor work ethic; threatening or criminal; or possessing an inappropriate style of demeanor."[58] Even in situations when "employers seem genuinely interested in evaluating the qualifications of a given candidate [their] evaluations themselves appear to be influenced by race [because they] perceive real-skill or experience differences among applicants despite the fact that the [applicants] resumes were designed to convey identical qualifications."[59] More flexible, inclusive standards are used to evaluate Caucasian applicants than in the case of minority applicants, and this "suggests that even the evaluation of 'objective' information can be affected by underlying racial considerations."[60] This "shifting standards" phenomenon is "less consistent with a model of traditional prejudice than with a more contingent and subtle conceptualization of racial attitudes"[61] that is attributable to "a high level of

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[53] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 fn.44 (1977); NAT'L RESEARCH COUNCIL, MEASURING RACIAL DISCRIMINATION 141–42 (Rebecca M. Blank et al. eds., 2004).

[54] Benjamin Lee Whorf, *Languages and Logic*, *in* LANGUAGE, THOUGHT, & REALITY: SELECTED WRITINGS 233, 239 (John B. Carroll ed., 1964) (capitalization in original).

Political scientists Donald Green, Shang Ha, and John Bullock underscored that "even when causal relationships are firmly established, demonstrating the mediating pathways is far more difficult—practically and conceptually—than is usually supposed. . . .[T]he impatience often express[ed] with studies that fail to explain why an effect obtains [is unwarranted]. . . .Just as it took more than a century to discover why limes cure scurvy, it may take decades to figure out the mechanisms that account for the causal relationships observed in social science." Donald P. Green et al., *Enough Already about "Black Box" Experiments: Studying Mediation Is More Difficult than Most Scholars Suppose*, 628 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 200, 202 (2010).

[55] Rutherglen, *supra* note 32, at 2313.

[56] Pager & Western, *supra* note 47, at 229.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 230.

[60] *Id.*

[61] *Id.* at 231.

generalized anxiety or discomfort with Blacks than can shape decision-making."[62]

Notwithstanding this growing evidence of the evolving character of racial bias in modern society,[63] the racial animus conception of legally actionable racial discrimination remains the dominant view in constitutional law, as well as much of statutory anti-discrimination law;[64] however, the social-scientific view of discrimination has made considerable headway in courts, proceeding through an "accretion of decisions that have placed more and more reliance on [statistical] methods in the determination of whether there is evidence of discrimination."[65] Nearly forty years ago, in *International Brotherhood of Teamsters v. United States*, the Court famously remarked, "[O]ur cases make it unmistakably clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue."[66] As a corollary, the Courts' increasing willingness to consider statistical evidence to infer intentional discrimination has blurred the lines between these seemingly opposing schools of thought—racial animus versus causation—raising important questions about the appropriateness of social scientific evidence in particular contexts, the standards governing its applications, and the Court's competency in assessing such evidence.[67] The next section provides a brief discussion of the Court's seemingly tenuous embrace of statistical evidence of discrimination cases and the challenges litigants have encountered when presenting such evidence to the Court, particularly in the criminal context.

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[62] *Id.* I argue that the shifting standards phenomena is also present in the capital charging context, and I employ an analytical approach capable of quantifying the degree of this race-based differential assessment. *See infra* Parts III.B and IV.A. *See also*, Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 351-53 (2000) (reporting that Caucasian jurors were significantly more likely to undervalue, disregard, and even improperly use mitigation evidence in cases involving African American defendants as opposed to Caucasian defendants when imposing a death sentence); Joseph Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury* 33 CONN. L. REV. 1, 5 (2000) (arguing that jurors are more likely to be distrusting of witnesses of another race).

[63] *See generally* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 8 (2003) (arguing that overt resentment or hostility towards racial minorities is largely irrelevant to racially discriminatory behavior in the modern era).

[64] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2411 (2015) (recognizing important limits on causes of action resulting from alleged non-intentional discrimination in order to guard against abuse).

[65] Ashenfelter & Oaxaca, *supra* note 31, at 322; Douglas Laycock, *Statistical Proof and Theories of Discrimination*, 49 LAW & CONTEMP. PROBS. 97, 99 (1986) ("When properly used, multiple regression can measure the impact of all factors suspected to contribute to differences in employment history, and can show how much of the difference is due to each cause.").

[66] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (quoting Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 [1974]) (internal quotation marks omitted); *see, e.g.*, Kruse, *supra* note 14, at 1540 ("The use of statistics in proving discrimination has a long history, and dates back to the 1970s in employment discrimination cases.").

[67] *See supra* note 84.

II. LITIGATING DISCRIMINATION

A. Inferring Intentional Discrimination from Statistical Evidence

Writing for the majority in *Washington v. Davis*, Justice White explained that "invidious discriminatory purpose may often be inferred from the totality of relevant facts . . . [and] discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[68] Early cases that considered statistical evidence of discrimination, however, "neither offered sophisticated statistical analyses or a deep discussion of the theory for why statistics can prove intent."[69] Evidence of discriminatory treatment consisted of differences in raw percentages and whether the magnitude was substantial.[70] For example, in *Castaneda v. Partida*,[71] a criminal defendant alleged systematic exclusion of Latinos from the venire panel and provided statistics of their serious underrepresentation over an extended period of time.[72] The Court deemed that the raw statistics, coupled with a selection process susceptible to abuse, were sufficient to support a *prima facie* case of intentional discrimination that violated the Equal Protection Clause. Over the next decade, the Court became receptive to more complex and sophisticated statistical methods to establish evidence of discrimination—namely the popular statistical technique of multiple regression modeling.[73] Multiple regression is capable of simultaneously measuring the impact of all factors suspected to contribute to group differences in an outcome.[74] Although the statistical models presented to the Court failed to include all plausible variables that could plausibly account for the observed racial and gender disparities,[75] the Court repeatedly reasoned that such models are still probative and capable of proving a plaintiff's case.[76] Because the governing standard of proof for discrimination claims is *preponderance of evidence*, the Court has explained that a statistical model could permit a court to "fairly [] conclude that it [was] more likely than not that impermissible discrimination [existed] [and] the plaintiff [was] entitled to prevail."[77]

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[68] Washington v. Davis, 426 U.S. 229, 242 (1976).

[69] Selmi, *supra* note 26, at 487.

[70] *Id.*

[71] Castaneda v. Partida, 430 U.S. 482, 482 (1977).

[72] The applicable jurisdiction was 79% Latino, yet the venire panels during the time in which the grand jury that indicted Mr. Partida were only 45% Latino (and only 39% Latino over an eleven-year period).

[73] Bazemore v. Friday, 478 U.S. 385, 400 (1986).

[74] Barbara A. Norris, *Multiple Regression Analysis in Title VII Cases: A Structural Approach to Attacks of "Missing Factors" and "Pre-Act Discrimination,"* 49 LAW & CONTEMP. PROBS. 63, 66 (1986) ("Because multiple regression statistics have the technical capacity to identify discriminatory influences from among the combined effects of a set of factors acting simultaneously, they have powerful and useful potential in [discrimination] litigation.").

[75] *See* Part V.

[76] *Bazemore* 478 U.S. at 400.

[77] *Id.*

Recently, in *Wal-Mart Stores, Inc. v. Dukes*,[78] the Court reaffirmed the important role of statistical evidence in proving discrimination.[79] Although the majority and the dissenting opinions in the case differed as to whether the statistical evidence of gender disparities presented by the plaintiffs established a *prima facie* case of a pattern or practice of discrimination, neither side challenged the general utility of using statistics in claims alleging systemic intentional discrimination. The dissenting opinion, written by Justice Ruth Bader Ginsburg and joined by three other Justices, provided a detailed discussion of the multiple regression statistical models presented by the plaintiffs and how these models revealed gender disparities in pay and promotion after taking into account factors such as job performance, tenure, and store location.[80] As one scholar has noted, "the methods now presented to the courts look remarkably similar to the kinds of studies that once appeared in [economics] journals."[81]

The primary appeal of multiple regression modeling is its ability to provide answers to "what if" questions, such as "what is the likelihood that a defendant's case would have been noticed for the death penalty if the victim was Caucasian rather than African American?" Multiple regression-based evidence of the statistical pattern of discrimination is also an efficient means of aggregating individual decisions, even if each individual discriminatory decision could be identified, because doing so would be time consuming and cost prohibitive.[82] The more accurately the statistical model is able to approximate reality by including the key determinants of the outcome of interest, the stronger the *prima facie* case of intentional discrimination.[83] This does not imply, however, that courts have been equally receptive to statistical evidence of discrimination across all contexts, even when the data under investigation are very detailed and the statistical models account for a wide range of non-discriminatory rival hypotheses. For example, some members of the Supreme Court have demanded "exceptionally clear proof" to infer racial discrimination from statistical evidence that would, essentially, allow for the identification of an abuse of discretion in a specific instance.[84] Under this standard, which other members of the Court have described as an unwarranted departure from its basic equal protection

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[78] 564 U.S. 338 (2011).

[79] *Id.* at 356–57 (acknowledging that statistical evidence can be probative of discriminatory treatment when the correct comparison groups are identified).

[80] *Id.* at 372 (Ginsburg, J., joined by Breyer, Sotomayor, & Kagan, JJ., dissenting) (agreeing with the trial court that the statistical results were sufficient to raise an inference of gender discrimination.).

An equally comprehensive of evaluation of statistical evidence of systemic disparate effect and disparate treatment in the capital punishment charging-and-sentencing process was conducted nearly twenty-five years earlier in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

[81] Ashenfelter & Oaxaca, *supra* note 31, at 323.

[82] Selmi, *supra* note 26, at 508.

[83] *See* NAT'L RESEARCH COUNCIL, *supra* note 53, at 142.

[84] *Cf. McCleskey*, 481 U.S. at 292 (Powell, J.) (an equal protection claim requires a defendant to prove the decision-makers in his [sic] case acted with discriminatory purpose), *with id.* at 352 (Brennan, J., dissenting) (defendants can satisfy the discriminatory intent prong with a multiple regression analysis of aggregate data that takes into account a large number of relevant factors).

framework,[85] statistical evidence would likely be of dubious value unless the statistical disparity was so stark that intentional discrimination was the only remaining reasonable inference.[86]

To the extent that courts deem statistical models an appropriate, and even sometimes a necessary, component of a claimant's allegation of discrimination in particular contexts, there remains the key question of when particular models will be considered probative by courts. To the dismay of scores of litigants, the answer to this central question has remained especially elusive because the Supreme Court has neglected to provide workable standards. On occasions when the Court has addressed the issue, its routinely sharply-divided opinions have been incapable of announcing a coherent approach by which statistical evidence shall be assessed.[87] Statistical evidence of discrimination is now commonplace for cases populating the federal dockets, so the need for a transparent framework is unavoidable. Sociologist Arthur Stinchcombe famously remarked that it is "prefer[able] to be wrong than misunderstood [because] being misunderstood shows sloppy theoretical work."[88] The lack of clarity boils down to a refusal to discuss certain critical questions that must be answered in order for the doctrine and the theory that underlies it to be intelligible.[89] This jurisprudential sloppiness has left plaintiffs, attorneys, and judges with insufficient guidance to effectively litigate and resolve discrimination claims.[90] Admittedly, anti-discrimination law is not unique in terms of the existence and persistence of ambiguous legal standards. But the lack of clarity is especially troublesome in the anti-discrimination context because, as a practical matter, only circumstantial evidence is available to prove discriminatory intent and this circumstantial evidence is inherently difficult to verify.[91] This is especially true when the plaintiff is also a criminal defendant alleging an equal protection violation based on the prosecution's discriminatory charging practices. These claimants lack access to internal documents necessary to elucidate the foundation upon which the charging

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[85] *McCleskey*, 481 U.S. at 348 (Brennan, J., dissenting) ("the [majority] relies on the very fact that this is a case involving capital punishment to apply a lesser standard of scrutiny under the Equal Protection Clause.").

[86] Baldus & Cole, *supra* note 50, at 56 (explaining that statistical evidence provides indirect proof of intentional discrimination).

[87] Kruse, *supra* note 14, at 1548.

[88] ARTHUR L. STINCHCOMBE, CONSTRUCTING SOCIAL THEORIES 6 (1968); *accord* 4 FRANCIS BACON, THE WORKS OF FRANCIS BACON, 210 (1875) ("Truth more readily emerges from error than from confusion.").

[89] Bruce H. Mayhew, *Structuralism versus Individualism, Part II: Ideological and Other Obfuscations*, 59 SOC. FORCES 627, 629 (1981).

[90] Kruse, *supra* note 14, at 1548. *See also* United States v. Thorpe, 471 F.3d 652, 658 (6th Cir. 2006) (noting the Supreme Court's failure to provide a standard for the discriminatory intent prong in discriminatory prosecution cases); United States v. Tuitt, 68 F. Supp. 2d 4, 10 (D. Mass. 1999) (same).

[91] Kruse, *supra* note 14, at 1526-28 ("So long as the prosecutor has probable cause to prosecute, based on the elements of the offense set forth in the statute, the decision to prosecute is solely within the discretion of the prosecutor [and] [p]rosecutors are capable of finding a violation in almost anyone."); Ashenfelter & Oaxaca, *supra* note 31, at 322 ("It is not hard to see that the appearance of disparate treatment is easy for an employer to eliminate without making any change in behavior at all. Differential hiring or pay scales may be supported by simply asserting that all hiring and pay is determined by merit, and merit is determined by employee supervisors.").

decision rested and permit the claimant, when applicable, to argue that such non-racial assertions are pretextual. And unlike many employment discrimination cases, a criminal defendant often lacks any contact with prosecutors and their staff that could lead to the discovery of non-statistical corroborative evidence, such as racially offensive remarks and other behaviors indicative of racial animus. Consequently, statistics are often the only avenue through which a claimant can prove clandestine and covert discrimination.[92]

Complicating matters is the fact that some members of the Court have emphasized the necessity of non-statistical corroborative evidence in all but the most extreme circumstances,[93] but have declined to offer any general guidance about the character of acceptable evidence (e.g., scope and intensity). And to date, only in the rare case of palpable racism have defendants been deemed by lower federal courts to have established "some evidence" of discriminatory intent in criminal charging.[94] In *United States v. Jones*, the Sixth Circuit granted an African American plaintiff's motion for discovery in a selective prosecution case after the plaintiff presented evidence that his arresting police officers wore T-shirts emblazoned with inappropriate images of the defendant and his wife, as well as mailed the defendant racially insulting postcards after the arrest.[95] The plaintiff also presented evidence showing that no other similarly situated defendants had been referred for federal prosecution in the preceding five years. In another case, *United States v. Gordon*, the Eleventh Circuit ruled in favor of an African American plaintiff's discovery request from the prosecution after the plaintiff provided evidence that similarly situated Caucasian defendants had not been prosecuted *and* the prosecutor told an intern that the

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[92] Washington v. Davis, 426 U.S. 229, 253–54 (1976) (Stevens, J., concurring) ("It is unrealistic [] to require the victim of alleged discrimination to uncover the actual subjective intent of the decision-maker."); Gross v. FBL Fin. Services, Inc., 557 U.S. 167, 190 (2009) (Breyer, J., dissenting) (explaining that causal attribution is particularly difficult when assessing non-physical causal forces, such as motives).

[93] In his concurring opinion in *Washington v. Davis*, Justice Stevens remarked that evidence of discriminatory effect, alone, would be sufficient for an equal protection challenge if the disproportionate impact was drastic. *Davis*, 426 U.S. at 254. Justice Stevens cited two cases supporting his assertion: *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Whereas *Yick Wo* was decided on equal protection grounds, *Gomillion* was decided under the Fifteenth Amendment. The Alabama legislature re-drew the electoral district boundaries from a region with a square shape to a twenty-eight sided figure in order to exclude all African Americans from the city limits of Tuskegee. The plaintiffs presented their claim on both Fourteenth (equal protection) and Fifteenth Amendment grounds. Justice Charles Whittaker, concurring in judgement, argued that the case should have been decided on equal protection grounds. Both the equal protection and the Fifteenth Amendment arguments address infringements of rights based on racial classifications, but the Fifteenth Amendment is specific to voting. Justice Whittaker believed the Fifteenth Amendment claim was inapplicable because the re-districting scheme did not deprive African Americans the right to vote, rather it was "an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment."*Gomillion*, 364 U.S. at 349.

In the statutory context, the Court also emphasized the importance of non-statistical evidence to substantiate the statistical evidence. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (discussing the relevance of anecdotal evidence of gender bias and sexism, in additional to statistical results, in a gender discrimination claim concerning pay and promotion).

[94] James Babikian, *Cleaving the Gordian Knot: Implicit Bias, Selective Prosecution, and Charging Guidelines [Note]*, 42 AM. J. CRIM. L. 139, 152 (2015).

[95] United States v. Jones, 159 F.3d 969, 975–77 (6th Cir. 1998).

investigation of the plaintiffs had been "brought on by the arrogance on the part of blacks in [the jurisdiction]."[96] In both of these cases, however, the courts did not rule on the adequacy of the underlying constitutional violation; they only decided that the plaintiffs presented enough evidence of discriminatory intent to prove a "colorable entitlement" to a claim of a constitutional violation that warranted the discovery of government documents relating to the decision whether to file charges against similarly situated defendants.[97] The Eleventh Circuit explained that the prosecutors racially discriminatory statement "standing alone would not be enough, but assumes significance in light of other evidence suggesting a [racially biased] pattern of Government activity in [] cases that were prosecuted."[98]

Extensive statistical evidence of racially disparate capital charging decisions was presented to the Court in the landmark case, *McCleskey v. Kemp*,[99] yet the implications of *McCleskey* for the use of statistical models of discrimination is quite ambiguous. The defendant, Warren McCleskey, an African American, presented evidence from a comprehensive examination of capital charging and sentencing practices in Georgia. The study revealed, *inter alia*, the odds a prosecutor sought the death penalty against a defendant accused of killing a Caucasian victim was 3.1 times greater than a defendant accused of killing an African American victim, all else equal.[100] The Court, by the slimmest of margins, five-to-four, rejected Mr. McCleskey's claim. The Court accepted the statistical evidence as valid, but held that the evidence was incapable of showing that race was a motivating factor in Mr. McCleskey's specific case.[101] The majority's refusal to accept the statistical evidence as sufficient to warrant relief was in stark contrast to its earlier decisions involving the adequacy of statistical evidence in jury selection and employment discrimination.[102] Dissenting in *McCleskey*, Justice Blackmun noted that the statistical evidence presented in the case would have satisfied

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[96] United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987).

[97] *E.g.*, *id.* ("The evidence submitted indicates that [the plaintiff] has sufficiently established the essential elements of the selective prosecution test to prove a 'colorable entitlement' to the defense [and the defendant] is entitled to discovery of the relevant government documents.").

[98] *Id.* In other words, even in light of apparent "smoking gun" evidence of racial motive, courts require further inquiry into the "concurrence of elements" of a discriminatory treatment claim--in essence, the plaintiff is required to prove that the elements of the violation happened at the same time of the cause of the harm. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 15 (7th ed. 2015) (describing the concurrence of elements requirement for establishing criminal liability).

[99] 481 U.S. 279 (1987).

[100] Mr. McCleskey's statistical evidence also revealed that the odds of receiving a death sentence at trial were 4.3 higher in Caucasian victim cases compared to non-Caucasian victim cases, all else equal. *Id.*

[101] *Id.* at 287. *See also* Part V.

[102] *McCleskey v. Kemp*, 481 U.S. 279, 347–48 (Blackmun, J., dissenting) (noting that the majority improperly watered down the equal protection doctrine in the capital context). *Cf.* Marc Price Wolf, *Proving Race Discrimination in Criminal Cases Using Statistical Evidence (Note)*, 4 HASTINGS RACE & POVERTY L. J. 395, 396 (2006) (noting that the Supreme Court has uncritically adopted the conclusions of social science studies in death penalty cases not dealing with race, such as the juvenile death penalty and intellectual disability).

even the most "crippling" burden of proof for an equal protection violation that the Court erected and, wisely, rescinded a year before *McCleskey*.[103]

The implications of the Court's holding in *McCleskey* for selective prosecution actions remain unclear because the majority opinion focused on Mr. McCleskey's racially discriminatory death sentencing claim, and the inherent problems in identifying racially biased actors when there are multiple decision points with different actors. The Court's ruling did not specifically address the selective prosecution claim, although Mr. McCleskey's statistical evidence appeared most probative for this question given the Court's prior rulings on prosecutorial misconduct—a point emphasized by Justice Blackmun in his dissent.[104] Even assuming that the majority was correct in rejecting the claim pertaining to racially discriminatory capital sentencing, Mr. McCleskey would have still been entitled to relief had he prevailed on the selective prosecution claim. This distinction is far from trivial because there was considerable disagreement between the majority and the dissent as to whether the statistical evidence of racially disparate charging and racially disparate sentencing should be evaluated according to different standards.[105] Interestingly, post-*McCleskey*, two of the justices who rejected Mr. McCleskey's claims appeared to offer recantations. Justice Lewis Powell authored the majority opinion in *McCleskey*, but would subsequently remark that he had an extremely limited understanding of statistical analysis and regretted his decision in that case after he retired from the Court.[106] Nearly fifteen years after the ruling, Justice Sandra Day O'Connor, who also joined the majority in *McCleskey*, openly stated that she had serious concerns as to whether the death penalty was being administered fairly.[107]

The year following Justice O'Connor's public statement expressing doubts about the even-handed administration of the death penalty, the Court decided *United States v. Bass,* a case in which it was presented nationwide statistics of federal prosecutors' death penalty charging decisions that suggested Africans Americans were being targeted for capital prosecutions in the Eastern District of Michigan.[108] Specifically, the evidence revealed that none of the 17 defendants charged with the death penalty in the Eastern District of Michigan were Caucasian (14 were African American and 3 were

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[103] *McCleskey*, 481 U.S. at 364 (arguing that Mr. McCleskey's evidence would have satisfied the exceedingly difficult standard for proving racially discriminatory jury selection developed in *Swain v. Alabama* and overruled in *Batson v. Kentucky*).

[104] *Id.* at 350 (Blackmun, J., dissenting) (noting that Mr. McCleskey's evidence of racial bias in capital charging decisions was especially strong, but the majority purposefully ignored this claim and focused on other decision points).

[105] *Cf. id.* at 293 (Powell, J.) (recognizing that the Court has accepted the use of statistics as proof of intent to discriminate in limited contexts, such as the venire pool and employment discrimination and has permitted a finding of a constitutional violation even when the statistical pattern of discrimination is extreme), *with id.* at 350 (Blackmun, J., dissenting) (noting the majority's mischaracterization of the defendant's selective prosecution claim to "distinguish [the] claim from the venire and employment cases, which have long accepted statistical evidence and has provided an easily applicable framework for review").

[106] JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY (1994).

[107] Brian Bakst, *O'Connor Questions Death Penalty*, ASSOCIATED PRESS, Jul. 2, 2001.

[108] United States v. Bass, 536 U.S. 862 (2002).

Latino/Hispanic), but Caucasians comprised nearly 20% of capital prosecutions nationally and African Americans only comprised 48%. The Court rejected Mr. Bass' use of raw statistics, reasoning that he was unable to show discriminatory effect—that is, he failed to provide evidence that charges were not brought against similarly situated Caucasian defendants. The perplexing aspect of the Court's *per curiam* opinion, besides its brevity,[109] was that Mr. Bass was merely requesting information from the prosecution about its charging practices so he could identify similarly situated defendants. The lower federal appellate court had granted Mr. Bass' request to obtain discovery from the Department of Justice, reasoning that the evidence Mr. Bass presented to the court satisfied the less-stringent standard for access to the prosecution's files in order to more fully develop an equal protection violation claim (i.e., "some evidence…of discriminatory effect and discriminatory intent").[110] The federal appellate court acknowledged that the statistical evidence, standing on its own, would be insufficient to support a *prima facie* case of selective prosecution to merit dismissal of the capital charge. The Supreme Court's seemingly cursory opinion omitted any careful articulation of what a credible showing entailed that could provide guidance to lower courts, while at the same time providing tacit confirmation that statistical evidence could be sufficient to justify, at minimum, the defendant's discovery request.[111]

But even in the absence of court-defined standards for proving intentional discrimination with statistical evidence, careful attention must be given to the validity of the statistical results because courts have rejected statistical evidence of intentional discrimination based on either the perceived inaccuracy of the statistical models or on the merits of the legal claim.[112] The probative value of any statistical technique is highly dependent on the plausibility of the assumptions underlying the model.[113] When rejecting statistical evidence of discrimination, courts commonly highlight two potential shortcomings of the underlying statistical models: (1) the low predictive power of statistical models in determining the outcome *and* (2) the potential correlation between unobserved factors and the race of the victim (or defendant).[114] To be sure, a careful inquiry into the adequacy of the statistical model is indispensable, but as I explain below, these criticisms are often misplaced and courts may be overly cautious when evaluating

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[109] The opinion was 532 words and included a single footnote. *Id.* at 862–64.

[110] United States v. Bass, 266 F.3d 532, 536 (6th Cir. 2001). *Cf.* United States v. Armstrong, 517 U.S. 456, 481 (1996) (Stevens, J., dissenting) ("I thought it was agreed that defendants do not need to prepare sophisticated statistical studies in order to receive mere discovery in [selective prosecution] cases like this one.").

[111] *Bass*, 536 U.S. at 862 (per curiam) (assuming, but not deciding, that national statistics of capital charging decisions could be sufficient for a discovery request).

[112] *Cf.* McCleskey v. Kemp, 481 U.S. 279, 279 80 (1987) (accepting the validity of Mr. McCleskey's statistical results, but rejecting the underlying constitutional claim) *with* McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984) (rejecting the validity of Mr. McCleskey's statistical results).

[113] BERK, *supra* note 51 (discussing the assumptions underlying regression-based statistical models and the consequences of violating those assumptions).

[114] Ashenfelter & Oaxaca, *supra* note 31, at 323; Baldus & Cole, *supra* note 50, at 76.

statistical evidence, leading them to inappropriately reject extremely probative statistical evidence of intentional discrimination. In Part VI, I specifically address the possible influence of the aforementioned shortcomings of statistical models of discrimination on the results presented in this Article.

B. Evaluating Statistical Models of Discrimination

The first critique, the low-predictive power of statistical models, is related to the under-determinacy of the statistical model. By construction, the statistical model assumes that there remain some unmeasured factors that influence the outcome of interest after taking into account the effects of the included factors in the model, as well some degree of randomness in the data. This is commonly referred to as "residual error." A concern associated with large residual error is the inability of the statistical model to adequately capture the underlying process that generated the outcomes. If a statistical model fails to fit the data particularly well (based on measures that emphasize predictability), critics contend that the model inadequately approximates the discretionary process, and thus is of limited utility.[115] Courts have held that "the explanatory power of a model is a factor that may legitimately be considered [when] deciding whether the model may be relied upon,"[116] but they have generally avoided "establishing a particular predictive capacity as a *sine qua non* for a model to pass muster."[117] In *McCleskey*, the trial court reasoned that "the validity of the model depends upon a showing that it predicts the variations in the dependent variable to some substantial degree,"[118] although what qualifies as "substantial" remains elusive. There is no consensus in the scientific community as to what qualifies as the minimally acceptable predictive capacity of a statistical model.[119] The probative value of a statistical model will largely depend on the comprehensiveness of the relevant explanatory variables included in the model. A model with low predictive power may still establish a *prima facie* case of discrimination when the model incorporates "information central to understanding the causal relationships at issue."[120]

The second objection, which is related to the first critique, centers on the possible influence of omitted variables on any statistical measure of racial discrimination. This is commonly known as the *unconfoundedness assumption*. When there are omitted factors in determining the outcome of interest (e.g., wages or charging decisions), there are no guarantees that these factors are uncorrelated with the race of the plaintiff, defendant, or

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[115] *See, e.g.*, Stephen P. Klein et al., *Race and the Decision to Seek the Death Penalty in Federal Cases* (RAND 2006) (discussing differing interpretations of models with low predictive power).

[116] Griffin v. Bd. of Regents of Regency Univ., 795 F.2d 1281, 1292 (7th Cir. 1986).

[117] *Id.* at 1291–92

[118] McCleskey v. Zant, 580 F. Supp. 338, 351 (N.D. Ga. 1984).

[119] JEFFREY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 43–43 (2d ed. 2003).

[120] Valentino v. U. S. Postal Serv., 674 F.2d 56, 71 (D.C. Cir. 1982).

victim.[121] When an omitted factor is related to both the status characteristic of interest (e.g., race) and the outcome of interest, the statistical association between the status characteristic and the outcome may simply be an artifact of its association with the omitted factor.[122] And even in the event that the inclusion of the omitted variable in the statistical model does not render the relationship between the status characteristic and the outcome null and void, the omitted variable's inclusion in the model may substantially attenuate the effect of the status characteristic on the outcome.[123]

Social scientists have readily acknowledged these potential shortcomings, but emphasize that the methodological rigor of any particular study, which primarily pertains to how well the model approximates the underlying discretionary process that generated the alleged racial disparity, must be judged on a case-by-case basis, and "[social scientists] will be more or less convinced by the findings of a particular non-experimental study according to how well it is done[.]"[124] The more convinced the trier-of-fact is that members of the defendant's racial group and the individuals who are not in the defendant's racial group are similarly situated, the stronger the claim of intentional discrimination.[125] With respect to specific criticisms articulated, *supra*, social scientists have offered several responses. The common rejoinder to the first critique—i.e., the under-determinacy of the statistical models—is the recognition that all models, by definition, are "wrong" because they are simplifications of a more complex process.[126] The goal of scientific explanation is to supply a useful approximation of reality that is illuminating and useful.[127] As psychologist Stephen Klein and colleagues have noted, "[f]ew systems as complex as the criminal justice system lend themselves to high-accuracy statistical modeling."[128] Statistician George E. P. Box famously remarked, "just as the ability to devise simple but evocative models is the signature of the great scientist, so over-elaboration [] is often the mark of mediocrity."[129] Sociologist Guillermina Jasso has explained, "the goal is to develop a [model] that is at once simple and fruitful, that is, with a minimum number of postulates and a maximum number of predictions."[130] The important question is not whether the model predicts the data perfectly—the answer to that question is clearly (and unequivocally) "no." Rather, the key inquiry is whether, based on the existing research literature and the litigants' plausible arguments, the model includes the essential features hypothesized to govern the discretionary

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[121] Ashenfelter & Oaxaca, *supra* note 31, at 323.
[122] BERK, *supra* note 51, at 81–101.
[123] *Id.* at 13.
[124] Ashenfelter & Oaxaca, *supra* note 31, at 324.
[125] Baldus & Cole, *supra* note 50, at 63.
[126] George E.P. Box, *Science and Statistics*, 71 J. AM. STAT. ASS'N 791, 792 (1976).
[127] *Id.*
[128] Klein et al., *supra* note 115, at 40.
[129] Box, *supra* note 126, at 792; Donald Black, *The Epistemology of Pure Sociology*, 20 L. & SOC. INQUIRY 829, 838 (1995) (remarking that "science loves simplicity and despises generality").
[130] Guillermina Jasso, *Principles of Theoretical Analysis*, 6 SOC. THEORY 1, 1 (1988).

process to permit reasonable inferences based on the model.[131] Indeed, the view that the under-determinacy of statistical models does not automatically preclude employing the model in anti-discrimination cases has been has been expressly recognized by the Court on numerous occasions.[132]

The second objection to statistical evidence of discrimination—omitted variable bias—has been levied so frequently by critics that it may be deemed the "lowest hanging fruit" of methodological scrutiny of models of legal behavior because as previously explained, by definition, theoretically relevant variables are omitted from statistical models.[133] Nearly all social scientists acknowledge, at the outset, that omitted variable bias is possible,[134] but they also emphasize that the actual critique implies its own underlying theory of the interrelationships between the observed and unobserved factors of interest. Researchers need not control for every conceivable variable possibly influencing the outcome of interest.[135] The excluded variables must satisfy four conditions: (1) correlation with the key explanatory variable of interest (e.g., race or gender); (2) causal effect on the outcome variable (e.g., plea-bargaining decision); (3) not proxied by any other variable or combination of variables already included in the model; and (4) not caused by the explanatory variable of interest (e.g., race or gender).[136] If any one of these four conditions is absent, then controlling for the omitted variable is unnecessary when examining the causal impact of the key variable of interest.[137] And even when omitted variables satisfy these conditions, the impact of the excluded of the variable(s) on the statistical measure of discrimination is far from obvious. For example, research has repeatedly revealed that, in the death penalty context, evidence of racial disparities can be *stronger or weaker* when the statistical models expressly

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[131] Baldus & Cole, *supra* note 50, at 76 (assessing a model requires, inter alia, an examination of whether the data fit the model adequately).

[132] *See generally* Castaneda v. Partida, 430 U.S. 482 (1977); Bazemore v. Friday, 478 U.S. 385 (1986) (a statistical model may help prove discrimination even though it does not incorporate every conceivable relevant variable).

[133] Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 78 (2002).

[134] Ashenfelter & Oaxaca, *supra* note 31, at 322.

[135] Epstein & King, *supra* note 133, at 78.

[136] *Id.*; BERK, *supra* note 51, at 81. The fourth condition is often overlooked by critics of statistical models of discrimination. If the omitted variable is, itself, influenced by the status characteristic (e.g., race or gender), then the controlling for the omitted variable actually removes some of the true or total effect of the status characteristic because part of the effect of the status characteristic operates through its influence on the omitted variable. GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 78 (1994) ("By holding constant something that is itself affected by the causal variable[s] of interest, one removes precisely the effect one is attempting to study.").

There are methods available to identify the total effect of a status characteristic on an outcome variable by uncovering both its direct and indirect effects, but these methods rely on additional model assumptions that can be difficult to justify in many situations. Green et al., *supra* note 54. It should be obvious that many of the variables included in models of discrimination are susceptible to this critique. Common practice in the research literature is to acknowledge this fact yet treat these intermediate variables as being exogenously determined (i.e., not determined by race). *See* D. James Greiner & Donald B. Rubin, *Causal Effects of Perceived Immutable Characteristics*, 93 REV. OF ECON. & STAT. 775 (2011).

[137] Epstein & King, *supra* note 133, at 78.

take into account more variables that could account for the observed relationship between race and the discretionary decision.[138]

A recent evaluation of the use of statistical models in employment discrimination cases by economists Joni Hersch and Blair Druhan Bullock note that criticism of multiple regression models is overblown and violation of the underlying assumptions of these models typically have very little influence on the overall results, yet courts routinely decide in favor of the defendants in cases when these common criticisms are raised.[139] Accordingly, the authors underscore the severe consequences of courts giving undue weight to these critiques when they lack merit.[140] It is often the case that all a defendant can show is that, after multiple-regression analyses have accounted for plausible non-racial explanations, disparities still remains.[141] But "parties [attempting to refute an allegation of intentional discrimination] must do more than speculate about possible flaws to invalidate statistical evidence. The key question is whether the omission of potentially explanatory factors creates sufficient doubt in a study's accuracy to warrant the denial of all relief."[142]

In the landmark case *Washington v. Davis*, Justice John Paul Stevens noted that "[N]ormally the actor is presumed to have intended the natural consequences of his deeds. [...] The line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as [one] might assume. [...] [A] constitutional issue does not arise every time some disproportionate impact is shown [but] when the disproportion is [] dramatic [] it really does not matter whether the standard is phrased in terms of purpose or effect."[143] As a result, advocates of statistical evidence of discrimination opine that the task of the courts is to determine whether the possibility of prejudice influencing legal decision-making is so high as to render that particular process constitutionally unacceptable.[144] Indeed, the Court's early equal protection cases emphasized that systematic discrimination in the enforcement of laws violates the equal protection clause when coupled with the absence of rules to adequately

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[138] David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003) (noting that studies examining the influence of race on capital punishment decision-making tended to find stronger effects when they included a wider range of explanatory variables); *see also* Kevin Lang & Michael Manove, *Education and Labor Market Discrimination*, 101 AM. ECON. REV. 1467, 1492 (2011) (explaining that failing to control for educational attainment, which is highly correlated with race/ethnicity, led to an underestimation the impact of discrimination in wages by 66%).

[139] Joni Hersch & Blair Druhan Bullock, *The Use and Misuse of Econometric Evidence in Employment Discrimination Cases*, 71 WASH. & LEE L. REV. 2365 (2014).

[140] *Id.*

[141] Cheng, *supra* note 39, at 2098.

[142] *Id.* at 2103.

[143] Washington v. Davis, 426 U.S. 229, 254 (1976) (concurring opinion) (internal citations omitted).

[144] McCleskey v. Kemp, 481 U.S. 279, 364 (1987) (Blackmun, J., dissenting) ("The issue is whether the constitutional guarantee of equal protection limits the discretion in the [criminal justice] system."); Memorandum from Scalia, *supra* note 44 ("The task in *McCleskey* was to determine whether the possibility for racial prejudice influencing legal decision-making had become so high that Georgia's system for inflicting capital punishment was constitutionally unacceptable.").

guide or control the exercise of discretion.[145] And, in fact, the legislative history for the Fourteenth Amendment reveals that the framers specifically intended for it to prohibit the unequal enforcement of the states' *criminal laws* based on racial distinctions.[146]

Statistical models of discrimination, when used correctly, are able to provide important insights into potentially discriminatory decision-making. Over the last four decades, courts have repeatedly engaged with quantitative data and statistical models when determining whether a claimant's constitutionally- or statutorily-based violation was meritorious. Many of the earlier concerns pertaining to the use of statistical evidence have subsided in the face of significant advances in statistical methodology and the rules of statistical inference developed to specifically address those concerns.[147] The statistics literature is now replete with tools designed to assist scholars with carefully examining the sensitively of statistical evidence of discrimination to violations of assumptions of the statistical models.[148] Some scholars have even argued that we may now be at a point where courts have become overly cautious of statistical evidence discrimination in light of widespread agreement in the scientific community over appropriate levels of methodological rigor, as well as the emergence and persistence of patterns of legally illegitimate racial disparities—especially in the criminal justice context. In the following section, I describe and evaluate the empirical literature on racial discrimination in capital charging decision-making over the past quarter-century. As noted, *supra*, social scientific inquiry into the influence of race on capital charging dates back much further than twenty-five years, but the recent scholarship is the most methodological sophisticated. The U.S. Government Accountability Office conducted a detailed review of pre-1990 empirical research on capital charging and sentencing,[149] and the results of those earlier studies are consistent with the more recent research I discuss and critique.

III. EMPIRICAL SCHOLARSHIP

The continuity in racial disparities in capital sentencing, in light of intense and sustained attention to its sources and consequences, shares stark similarity to racial disparities in the employment context.[150] Race may exert

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[145] Yick Wo v. Hopkins, 118 U.S. 356, 372–74 (1886) (highlighting that nothing in the challenged municipal ordinance guided or controlled the discretionary authority); *accord* Castaneda v. Partida, 430 U.S. 482, 494, 500 (1977) (emphasizing that statistical evidence of disparate impact, coupled with a selection/enforcement scheme that is susceptible to abuse, is adequate for an equal protection challenge).

[146] *McCleskey*, 481 U.S. at 346 (Blackmun, J., dissenting) ("[T]he legislative history of the Fourteenth Amendment reminds us that discriminatory enforcement of States' criminal laws was a matter of great concern for the drafters.").

[147] *See, e.g.*, Daniel E. Ho & Donald B. Rubin, *Credible Causal Inference for Empirical Legal Studies*, 7 ANN. REV. OF L. & SOC. SCI. 17 (2011).

[148] I utilize these tools to examine the robustness of my statistical results in Part VI.

[149] U.S. Gov't Accountability Office, *supra* note 6.

[150] Labor economist Pedro Carneiro and colleagues have explained: "In spite of 40 years of civil rights and affirmative action policy, substantial gaps remain in the market wages of African American males and females compared to white males and females." Pedro Carneiro et al., *Labor Market Discrimination and Racial Differences in Premarket Factors*, 48 J. L. & ECON. 1, 1 (2005).

an influence on decision-making in the capital charging-and-sentencing process at nearly every stage: prosecutor's decision to charge a defendant with capital murder; grand jury's decision to indict a defendant for capital murder; prosecutor's decision to seek the death penalty; prosecutor's use of peremptory challenges; prosecutor's willingness to offer a favorable plea deal; prosecutor's decision to advance the case to the penalty phase; jury's decision to impose a death sentence; and governor's (or pardon board's) decision to grant clemency.[151] Several of these decision stages require collective decision-making (e.g., grand and petit juries), so it may be difficult to identify conscious or unconscious racial bias, or a particular pattern or practice, responsible for the racially disparate result;[152] yet the vast majority of these decisions are controlled by the prosecutor, and often with very little oversight or constraints on these discretionary decisions.[153] As explained, *supra*, racial bias in earlier decision stages, such as charging, are unlikely to be rectified during sentencing.[154]

A. Quantifying Racial Discrimination in Capital Charging

Over the past twenty-five years, there have been at least a dozen statistical analyses of capital charging decisions. This research literature pales in comparison to the number of studies examining the discretionary choices of actors in the capital punishment process *after* a death notice has been already filed—namely, capital sentencing.[155] Scholars have primarily focused on post-capital charge decision-making because they lack adequate information on the population of defendants at risk for a capital charge. Information on potentially capital cases can be extremely difficult to obtain because of many local law enforcement agencies' sub-optimal record-

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[151] Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUS. L. REV. 131, 149 (2012) (describing the various stages at which racial bias can influence legal decision-making in the death penalty system); Gregg v. Georgia, 428 U.S. 153 (1976) (noting that improper considerations, such as race, may theoretically impact the decision-making at various points throughout the capital adjudication process, but deciding a constitutionally permissible death penalty statute need not address all of the stages); *McCleskey*, 481 U.S. 279 (same).

There is not much cause for concern about racial disparities in pre-trial release and bail determinations for individuals who may potentially face the death penalty because most jurisdictions either prohibit pretrial release for alleged murders or require that bail be set at the very top of the bail schedule. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 3, 6 (2007); BRIAN A. REAVES & JACOB PEREZ, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS, 1992, at 2 (1994).

[152] *See McCleskey*, 481 U.S. 279 (discussing the difficulty in determining the source of discrimination when a collective is responsible for making the decision).

[153] Liebman, *Opting for Real Death Penalty Reform*, *supra* note 10; *McCleskey*, 481 U.S. at 350 (Blackmun, J., dissenting) (referring to the prosecutor as the "quintessential state actor in a criminal justice proceeding").

[154] *See supra* notes 5 & 6 and accompanying text.

[155] *See, e.g.*, U.S. Gov't Accountability Office, *supra* note 6 (conducting a review of 28 empirical studies of the death penalty process and concluding that over 80% of the studies reported a race of victim effect for charging and/or sentencing).

keeping practices.[156] As noted, *supra*, the examination of charging dynamics is extremely important because it not only provides valuable insights about the "front-end" of the process, but it is also key to properly understanding down-stream legal error. Studies conducted in California, Colorado, Connecticut, Georgia, Kentucky, Maryland, Missouri, North Carolina, and South Carolina all reveal racial disparities in capital charging decisions, based on the race of the victim, the offender/victim racial combination, or both.

The vast majority of these studies report a measure of racial discrimination referred to as an *odds ratio* (*OR*).[157] The odds ratio for a race-of-victim effect represents the odds that a prosecutor will file a death penalty notice against a defendant accused of killing a Caucasian victim, compared to the odds the prosecutor will file the death penalty against a defendant accused of killing a non-Caucasian victim, holding constant other factors relevant to the charging decision. This statistic is often used as a measure of discriminatory effect.[158] The formula is $OR = [P_W \div (1 - P_W)] \div [P_B \div (1 - P_B)]$, where P_W is the probability a death penalty eligible defendant charged with killing a Caucasian victim is noticed for the death penalty and P_B is the probability that a death-eligible defendant charged with killing an African American victim is noticed for the death penalty. By way of example, assume that $P_W = .5$ and $P_B = .3$. The odds ratio is $[(.5 \div .5) \div (.3 \div .7)]$ or 2.33. In other words, the *odds* of receiving a death notice are 2.33 times larger (or 133% more likely) if the victim is Caucasian than if the victim is African American. Alternatively, one might inquire about the relative odds of *not* receiving a death notice based on the victim's race. One simply reverses the numerator and denominator for both odds calculations and the odds ratio becomes $[(.5 \div .5) \div (.7 \div .3)]$ or .428. This translates to a death eligible defendant accused of killing of a Caucasian victim having odds roughly 57% lower of *not* receiving a death notice than a similarly situated defendant accused of killing an African American victim.[159]

The odds ratios for Caucasian-victim cases compared to African American-victim cases—or African American-defendant/Caucasian-victim compared to African American-defendant/African American-victim cases—reported in the statistical studies of capital charging decisions, range from

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[156] James A. Fox, *Missing Data Problems in the SHR: Imputing Offender and Relationship Characteristics*, 8 HOMICIDE STUD. 214 (2004) (describing problems with official homicide data kept by local law enforcement agencies across the country); *accord* Wendy C. Regoeczi & Marc Riedel, *The Application of Missing Data Estimation Models to the Problem of Unknown Victim/Offender Relationships in Homicide Cases*, 19 J. QUANTITATIVE CRIMINOLOGY 155 (2003).

[157] RONET BACHMAN & RAYMOND PATERNOSTER, STATISTICAL METHODS FOR CRIMINOLOGY AND CRIMINAL JUSTICE 574 (1997).

[158] As explained *supra*, note 11, the Article distinguishes "disparate effect" from "discriminatory effect."

[159] Judges and attorneys often misinterpret odds ratios as risk ratios (*RR*), but the two are distinct. Both statistics describe the likelihood that an event will occur, but they measure this likelihood on difference scales somewhat akin to measuring temperature in terms of Fahrenheit versus Celsius. Risk ratios capture relative differences in probabilities, not odds. For this reason, risk ratios are often referred to as *relative risks*. *See* John M. Conley & David W. Peterson, *Science of Gatekeeping: The Federal Judicial Center's New Reference Manual on Scientific Evidence*, 74 N.C. L. REV. 1183, 1219 (1996).

1.26 (Kentucky)[160] to 5.66 (Durham County, North Carolina).[161] In between these jurisdictions, researchers discovered odds ratios of 1.48 (Los Angeles County, California),[162] 2.0 (Maryland),[163] 2.21 (federal government),[164] 2.3 (Connecticut),[165] 2.38 (Missouri),[166] 2.64 (North Carolina),[167] 2.78 (Los Angeles County, California),[168] 3.0 (South Carolina),[169] 3.1 (Georgia),[170] 4.2 (Colorado),[171] and 5.0 (San Joaquin County, California) (mean = 3.03; std. dev. = 1.3).[172] The studies significantly varied in terms of the number of cases comprising their sample (N = 120 to N = 4,929; mean = 1,574; std. dev = 1,706), the years investigated (from as early as 1969 to as late as 2010), the number of years covered (from 5 years to 35 years; mean = 13.8; std. dev. 9.6), the jurisdictional scope (from a single county to the entire nation), and the breadth of relevant non-racial variables accounted for in the statistical models (ranging from less than five non-racial controls to over 200);[173] nonetheless, the studies report striking consistency as it pertains to the effect of the victim's race on capital charging.

It is important to emphasize that the odds ratios reported above represent the *adjusted* racial gap in capital charging. In other words, the odds ratio is a measure of the magnitude of the difference in the odds of a death penalty notice between racial groups, holding constant other factors included the model; therefore, the aforementioned studies explicitly take into account rival non-racial explanations for the observed racial gap. As noted, *supra*, the race-of-victim effect is a simple measure of the residual

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[160] Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 AM. J. OF CRIM. JUST. 17 (1996).

[161] Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15 MICH. J. OF RACE & L. 135 (2009).

[162] Robert E. Weiss et al., *Death Penalty Charging in Los Angeles County: An Illustrative Data Analysis Using Skeptical Priors*, 28 SOC. METHODS & RES. 91 (1999).

[163] Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 U. OF MD. L. J. OF RACE, RELIGION, GENDER & CLASS 1 (2004).

[164] U.S. Dep't of Just., *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review*, 14 FED. SENT'G REP. 40 (2001); Memorandum from David C. Baldus, To the Honorable Russell D. Feingold: Re DOJ Report on the Federal Death Penalty System (Jun. 11, 2001).

[165] John J. Donohue, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637 (2014).

[166] Jon R. Sorensen & Donald H. Wallace, *Prosecutorial Discretion in Seeking Death: An Analysis of Racial Disparity in the Pretrial Stages of Case Processing in a Midwestern County*, 16 JUST. Q. 559 (1999).

[167] O'Brien et al., *supra* note 1.

[168] Nick Petersen, *Cumulative Racial and Ethnic Inequalities in Potentially Capital Cases*, CRIM. JUST. REV. 9 (forthcoming, 2017).

[169] Michael J. Songer & Issac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006).

[170] BALDUS ET AL., *supra* note 25.

[171] Meg Beardsley et al., *Disquieting Discretion: Race, Geography and the Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENV. U. L. REV. 15 (2015); Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069 (2013).

[172] Catherine Y. Lee, *Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California*, 35 J. CRIM. JUST. 17 (2007).

[173] The mean and standard deviation for the number of statistical controls is not reported because the studies differ in how controls are reported and counted, so precise comparisons are precluded.

gap in death charging behavior, and can be interpreted as a measure of discriminatory effect.[174] The standard approach when investigation capital charging dynamics is to specify a logistic regression model positing that the probability of receiving a death notice is a function of set of explanatory variables:

$$log_e\left(\frac{P(N)}{1-P(N)}\right) = \beta_0 + \beta_k X_k + \beta_2 CV, \quad (1)$$

where $P(N)$ is the probability that a death notice is filed, X_k is a vector of k explanatory variables, CV is an binary variable that indicates whether the victim is Caucasian, β_k (*beta*) is a vector of k regression coefficients, $log_e\left(\frac{P(N)}{1-P(N)}\right)$, is the natural logarithm of the odds that a death notice is filed, conditional on the explanatory variables, X *and* CV.[175] The vector of explanatory variables typically includes a wide range of aggravating and mitigating evidence relevant to the crime and the defendant's background. The inverse natural logarithm (the anti-logarithm) of the coefficient for CV, e^{β_2}, is the odds ratio reported in the aforementioned studies.

The intuitive appeal of this framework is that it provides a single measure of the unexplained racial gap based on systemic disparate treatment.[176] The model is formulated to take into account factors purported to drive the death-noticing calculus, so it performs the function of assessing rival hypotheses. Greater confidence in the inferences of discrimination drawn from these models is achieved when the analyst includes a wide of variables that could potential explain the race gap—that is, variables that are likely correlated with race and the likelihood of a receiving a death notice.[177] As mentioned, *supra*, a model need not take into account every conceivable variable, but the inclusion of key explanatory variables should be guided by both doctrine and the extant empirical literature.[178] Despite its intuitive appeal, the model specification suffers from two significant shortcomings that potentially undermine our ability to better understanding racial disparities: (1) the assumption of homogenous treatment effects and (2) the inability to unpack the observable behavioral dynamics responsible for the generating the racial gap. These two shortcomings are discussed below.

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[174] *See supra* note 158

[175] J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 49 (1997).

[176] Elder et al., *supra* note 24.

[177] *See* Part II.B.

[178] *See* Part I. McCleskey v. Kemp, 481 U.S. 279, 328 (1987) (Brennan, J., dissenting) ("[A] multiple-regression analysis need not include every conceivable variable to establish a party's case, as long as it includes those variables that account for the major factors that are likely to influence decisions."); *accord* Bazemore v. Friday, 478 U.S. 385, 400 (1986) ("[I]t is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case. A plaintiff...need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.").

B. *Persistent Pitfalls of Models of Racial Discrimination in Capital Charging*

1. *Homogenous Effects*

The standard statistical model employed to examine discrimination in capital charging-and-sentencing rests on the questionable assumption that the case factors have the same influence (i.e., coefficients) across both groups of cases—i.e., homogenous effects.[179] The group indicator variable, *CV*, captures the differences in the average value of the outcome variable, $log_e\left(\frac{P(N)}{1-P(N)}\right)$ (i.e., the log odds of a death notice), after holding the effects of other variables in the model constant, but it says nothing about the potential heterogeneous effects of the non-racial explanatory variables across the groups. The regression coefficients, β_k, in these analyses represent a weighted average of the effects across the groups, but will fail to capture the true effects for either group when those effects differ.[180] And as a consequence, the model that investigates the groups together (i.e., the pooled model) may misrepresent *both* the size of the racial disparity[181] *and* the predictability of charging-behavior for each group based on relevant non-racial variables.[182] Prior work on inconsistency and irrationality in capital charging behavior has revealed that relevant aggravation and mitigation evidence does a much better job of explaining prosecutorial decision-making when the victim is Caucasian than when the victim is African American.[183] Differences in predictability likely stem from the fact that the decision-making process for one group is more idiosyncratic than the other, and this can be interpreted as the level of rationality governing the process is dependent on the victim's race.[184] Properly analyzing racially-heterogeneous effects not only provides better measures of the effects of the explanatory variables across racial groups, but also improves the overall predictive power of the statistical model—an important concern of many courts evaluating statistical evidence.[185] The implausibility of the homogenous effects assumption is underscored by both qualitative[186] and

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[179] Elder et al., *supra* note 24.

[180] *Id.*

[181] For example, David Baldus and his colleagues discovered that the effect of the victim's race in the capital charging-and-sentencing process was not uniform across the spectrum of homicide cases. Racial disparities were strongest in the mid-range of cases—i.e., cases that were *neither* the least aggravated *nor* the most aggravated, but somewhere in the middle. BALDUS ET AL., *supra* note 25, at 145, 154.

[182] DON HEDEKER & ROBERT D. GIBBONS, LONGITUDINAL DATA ANALYSIS 158, 195–96 (2006) (emphasizing the importance of looking beyond regression coefficients when comparing groups and determining whether groups differ in terms of the degree of unexplained variation).

[183] Sherod Thaxton, *Disciplining Death: Assessing and Ameliorating Arbitrariness in Capital Charging*, 49 ARIZ. ST. L.J. 137, 179–80 (2017) (reporting that models of capital charging behavior have different predictive power depending on the race of the victim). *See also* Part VI.C.

[184] Thaxton, *supra* note 183.

[185] *See* Part II.B.

[186] *See supra* notes 59–61 and accompanying text.

quantitative[187] studies of racial discrimination in the employment context that has discovered that impact of job qualifications on hiring and wages systematically varies across racial groups.

The homogenous effects assumption can be relaxed by permitting the group variable to condition (i.e., moderate) the impact of one or more explanatory variables, but the model becomes difficult to estimate and interpret when the group variable is believed to condition the effect of more than a couple of explanatory variables because the number of regression coefficients, β_k, becomes too large. For example, if the group variable, such as whether the case involved a Caucasian victim (CV), is believed to condition the impact of four explanatory variables, then four additional parameters must be estimated in the model that represent the interaction among these factors, as well as the five "main effects":

$$\begin{aligned} log_e\left(\frac{P(N)}{1-P(N)}\right) &= \beta_0 + \beta_1 X_1 + \beta_2 X_2 + \beta_3 X_3 + \beta_4 X_4 \\ &\quad + \beta_5 CV + \beta_6 (X_1 \times CV) + \beta_7 (X_2 \times CV) \\ &\quad + \beta_8 (X_3 \times CV) + \beta_9 (X_4 \times CV), \end{aligned} \tag{2}$$

where $\beta_k X_k$ and $\beta_5 CV$ and the main effects, and $\beta_k (X_k \times CV)$ are the interaction effects that capture the differences in the impact of the nonracial explanatory variables across cases with Caucasian victims and non-Caucasian victims. So, for example, if we assume that X_1 is a variable representing whether the defendant had a monetary motive for the homicide (assume the case involves a single offender), then β_1 is the impact of a monetary motive on the odds of the prosecutor filing a notice of intent to seek the death penalty and $\beta_5 CV$ is the effect of the presence of a Caucasian victim in the case (assume the case involves a single victim), holding the other variables constant. $\beta_6 (X_1 \times CV)$ represents the *difference in the effect* of β_1 (monetary motive) on the log odds of a death penalty notice being field when the case involves a Caucasian victim compared to when the case involves a non-Caucasian victim. In other words, β_6 does not have an independent effect on the log odds of the prosecutor filing a death penalty notice, rather it must be combined with the β_1 to determine the effect of β_1 on Caucasian-victim cases: $(\beta_1 + \beta_6 CV)$. If the victim in the case is non-Caucasian, $CV = 0$, then the effect of monetary motive is $(\beta_1 + \beta_6 CV) = (\beta_1 + [\beta_6 \times 0]) = \beta_1$.

The central problem with estimating the aforementioned model is that the new parameters included in the model to capture effect heterogeneity rely on the inclusion of variables that are the product terms of the nonracial explanatory variables and the group variable: $\beta_k (X_k \times CV)$. These newly included variables are highly correlated with their constituent variables, thus

[187] Roland G. Fryer et al., *Racial Disparities in Job Finding and Offered Wages*, 56 J. L. & ECON. 633, 635 (2013) (reporting that one-third of the black-white wage gap is attributable to differential treatment); *accord* Lang & Manove, *supra* note 138, at 1490. *See also* Lynch & Haney, *supra* note 62 at 351 (utilizing a mock juror design and discovering that Caucasian jurors differentially assess mitigation evidence according to the race of the victim when deciding to impose the death penalty).

making it extremely difficult, and sometimes impossible, to estimate the separate effects of each variable.[188] Rather than estimating a statistical model with interactive effects between the victim's race and the nonracial variables, a more sensible approach is to estimate separate models for each race-of-victim group. This approach minimizes the collinearity problem and is feasible when each group is sufficiently large to accommodate a wide range of relevant cases characteristics.

An additional advantage of estimating the models separately for African American- and Caucasian-victim cases has to do with the interpretation of the race-of-victim effect when the model assumes that the race-of-victim influences the impact of multiple case characteristics in the model. In the previous example, $\beta_5 CV$ is interpreted as the effect of the case having a Caucasian victim on the odds of a capital charge when $X_1 = 0$; that is, when the defendant did *not* have a monetary motive: $(\beta_5 + [\beta_6 \times 0]) = \beta_5$. When β_5 is also interacted with the three other variables in the model (X_2, X_3, X_4), the race-of-victim effect is interpreted as the effect of having a Caucasian victim on the probability of a death penalty notice when *all* of those other variables are "zero": $X_1 = X_2 = X_3 = X_4 = 0$. In some situations, the interpretation will be straightforward because a "zero" value on the variable has substantive meaning (e.g., a binary variable representing the presence or absence of a case characteristic); however, in other situations, a "zero" value for a variable will lack any substantive meaning.[189] In either case, the race-of-victim is, itself, a conditional effect rather than the average effect of the variable across the range of other variables in the model.

Another important, yet often overlooked, shortcoming with the aforementioned statistical model is that it does not take into account the fact that race-of-victim differences in case characteristics (data) and differences in the effects of those characteristics (parameters) may occur simultaneously—that is, these components can influence the racial gap in capital charging *jointly* rather than independently. In other words, the influence of race-of-victim differences in case characteristics and treatment of those characteristics on capital charging is greater than their simple summation. The analytical approach that I advocate in this Article explicitly takes this possibility into account.[190]

A key advantage of the heterogeneous effects approach is that one can observe how prosecutors differentially treat the various non-racial case characteristics based on the victim's race. But the approach, standing alone, cannot reveal how much of the racial disparity in capital charging is attributable to differential treatment and how much is attributable to the fact that the groups, on average, differ in terms of those relevant non-racial case

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[188] JOHN FOX, APPLIED REGRESSION ANALYSIS, LINEAR MODELS, AND RELATED METHODS 22, 425 (1997).

[189] A popular approach is to subtract the average value of each variable from itself, so the "zero" represents the average value of the variable. LEONA S. AIKEN & STEPHEN G. WEST, MULTIPLE REGRESSION: TESTING AND INTERPRETING INTERACTIONS (1991).

[190] *See* Part IV.A.

characteristics. It may still be the case that, even if Caucasian-victim and African American-victim cases were treated similarly by prosecutors, a substantial racial disparity would remain because, on average, the nonracial characteristics of those cases—relating to aggravation and mitigation—substantially differ. This highlights the other limitation of existing research on capital charging dynamics which I describe in more detail below.

2. The "Black Box" of Disparities

The second significant shortcoming of prior scholarship examining death penalty charging-and-sentencing dynamics has been its inability to empirically unpack the observed racial gaps in a manner most useful for litigation and legal reform. The Court's recent decisions suggest that a more nuanced and targeted analysis of system-wide disparities may be required in order for claimants to prevail.[191] As noted, *supra*, scholars are now suggesting that the Court's current systemic discrimination framework requires plaintiffs to provide deeper meaning to observed patterns.[192] In other words, claimants must both explain how a system is vulnerable to discriminatory practices *and* how the discrimination has influenced actual decision-making. Generally speaking, motive-based theories of racial discrimination cannot be empirically tested; however, as sociologist Barbara Reskins has argued, "explanation requires including the specific processes that link groups' ascribed characteristics to variable outcomes [and] redirecting our attention from motives to [these specific processes] is essential for understanding inequality and—equally important—for contributing meaningfully to social policies that will promote social equality."[193]

The bulk of the discussion of empirical research finding racial disparities in charging-and-sentencing has focused on issues of model misspecification rather than attempting to carefully link racial status to outcomes.[194] While it is beyond dispute that potential bias from the omission of important explanatory variables that may be correlated with the victim's race must be carefully considered,[195] "it is difficult to imagine that a few covariates exist that if included as predictors would lead to clear and justified distinctions between defendants who are charged with a capital crime and defendants who are not; likewise for death sentences."[196] My prior discussion of the extant research literature underscores the fact that the race-of-victim effect on capital charging is largely consistent across study

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[191] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011) (explaining that the "plaintiff must begin by identifying the specific employment practice that is challenged"); *see also* McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting evidence of systemic racial discrimination in the capital charging-and-sentencing process, in part, because of the inability of the plaintiff to specify the source of the disparity).

[192] *See* Part I; Selmi, *supra* note 26.

[193] Reskin, *supra* note 31, at 1.

[194] *See* Part II.B.

[195] *See* Part I; Richard A. Berk, *Randomized Experiments as the Bronze Standard*, 1 J. EXPERIMENTAL CRIMINOLOGY 417, 428 (2005).

[196] Richard A. Berk et al., *Statistical Difficulties in Determining the Role of Race in Capital Cases: A Reanalysis of Data from the State of Maryland*, 21 J. QUANTITATIVE CRIMINOLOGY 365, 387 (2005).

designs, so it does not appear that quantitative estimates of racial discrimination are unduly sensitive to the inclusion or exclusion of relevant factors when a modest number of non-racial variables are taken into account.[197] A similar concern over an apparent preoccupation with potential omitted variables when investigating persistent gender differences in earnings led sociologist Thomas Daymont and economist Paul Andrisani to offer the following admonition:

> [S]uch attempts [to incorporate potentially relevant omitted variables] have not produced any substantial reductions in the size of the unexplained earnings gap. Differences in college majors, training, individual personality traits and tastes failed to account for the gender gap. Thus, after many empirical attempts spanning more than a decade, researchers are still unable to account for more than about half of the male-female difference in earnings through differences in productivity-related variables. For some, this constitutes compelling evidence that labor market discrimination is the primary factor producing earnings inequality. Others remain unconvinced, however, believing that some important productivity-related factors have either been omitted or measured imprecisely.[198]

Rather than remaining embroiled in this "explanatory stalemate,"[199] more attention should be devoted to quantifying the relative contributions of disparate effect and disparate treatment in explaining racial disparities in capital charging.[200] This is possible through identifying the specific processes that link differences in race to differences in capital charging decisions. Racial disparities in capital charging can be attributed to the shifting standards phenomenon in which "the evaluation of 'objective' information can be affected by underlying racial considerations."[201] This explanation can take two different, yet complementary, forms. The first is a general assessment of disparate effect and disparate treatment that examines relevant case characteristics in the aggregate. That is, an inquiry into the differential influence of the group-specific composition of case attributes and behavioral responses to those attributes evaluated as a whole for, respectively, the disparate effect and disparate treatment components. The

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[197] *See* notes 160-172 and related text.

[198] Thomas N. Daymont & Paul J. Andrisani, *Job Preferences, College Major, and the Gender Gap in Earnings*, 19 J. HUM. RESOURCES 408, 409–10 (1984).

[199] Reskin, *supra* note 31, at 1 (noting that social scientists' pre-occupation with motive-based explanations of race and sex disparities have contributed to an "explanatory stalemate").

[200] *See supra* note 11.

[201] *See supra* note 62 and accompanying text. *See generally* Monica Biernat & Melvin Manis, *Shifting Standards and Stereotype-Based Judgments*, 66 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1994) (explaining that shifting standards occur when evaluators make judgements based on subjective criteria that maximize differentiation between groups based on race and gender). Some scholars have argued that racial balance on juries is necessary to limit bias against African American criminal defendants because "jurors of one race, even those well-intended and free of racial animus, will be unable to dependably judge the demeanor of a witness of a different race because they are unable to accurately decipher the cues that the witness uses to communicate sincerity." *See, e.g.*, Rand, *supra* note 62, at 5.

second, and potentially more illuminating, approach is a detailed assessment of the unique contribution of each case attribute in terms its disparate effect and disparate treatment. This analytical framework, which I describe in the following section, is known as "regression decomposition" because it partitions an observed racial disparity into discriminatory and non-discriminatory components. This approach permits closer examination of the "black box" of racial disparities, providing improved insight into *how* racial discrimination influences death charging behavior because the "decomposition [framework] explores potential mechanisms in more detail than a conventional analysis."[202]

IV. ANALYTICAL APPROACH

A. Disaggregating the Sources of Racial Disparity

Multivariate decomposition techniques, also called "regression standardization," have been used for well over a half-century in social scientific research to quantify the contributions to group differences. These techniques were initially introduced by sociologists in the 1950s but popularized by economists in the early 1970s.[203] The most popular iteration of the approach is attributed to economists Ronald Oaxaca and Alan Blinder, and as a result many social scientists refer to the technique as the Oaxaca-Blinder Decomposition. The approach parcels out the components of a group difference in a statistic, such as a mean or proportion, into compositional differences between groups (i.e., differences in the characteristics of the groups) and differences in the returns on the characteristics (i.e., differences in behavioral responses by the decision-makers). The group differences in returns on those characteristics can be further disaggregated into a component that accounts for the fact that differences in characteristics and differences in returns on those characteristics exist simultaneously between the groups. Stated differently, this third component indicates how much of the gap can be accounted for the by fact that the returns to one group (e.g., Caucasians) tends to be greater for those characteristics for which compositional differences are the strongest.[204] Decomposition techniques have been most commonly applied to research on wage differentials for the purpose of understanding the relative importance of group differences in levels of certain characteristics (e.g., education, tenure, prior work experience) and group differences in the returns on those characteristics. More recently, the decomposition approach

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[202] Taber et al., *supra* note 22, at 725.

[203] *See supra* note 29 and accompanying text.

[204] Hailman H. Winsborough & Peter Dickinson, *Components of Negro-White Income Differences*, PROC. OF THE AM. STAT. ASSOCIATION, SOC. STAT. SEC. 6 (Edwin G. Goldfield ed., Washington, D.C. 1971). An alternative decomposition results from the concept that the coefficients from the pooled model represents the nondiscriminatory coefficient vector, and this vector should be used to determine the contribution of differences in the predictor variables. This results in a two-fold decomposition where the first component and second components are differentials relative to the overall baseline. Ben Jann, *The Blinder-Oaxaca Decomposition for Linear Regression Models*, 8 STATA J. 453, 455 (2008).

has been applied to racial differences in sentencing,[205] the use of post-acute rehabilitation care,[206] alcohol treatment completion,[207] and drug treatment commitments.[208] To the best of my knowledge, the approach has yet to be applied to capital charging or sentencing.

In the context of capital charging, the first component of the decomposition, commonly referred to as an "endowment effect," can be interpreted as the proportional change in the likelihood of receiving a death notice that would result if the average African American-victim case had the same characteristics as the average Caucasian-victim case, but there was no change in the manner in which African American-victim cases were treated by prosecutors.[209] The second component, called the "coefficient effect," is interpreted as the proportional change in the likelihood of receiving a death notice that would occur if African American-victim cases were treated similarly as Caucasian-victim cases, but there was no change in the average characteristics of African American-victim cases. The (optional) third component examines the simultaneous change in both the endowment effect and the coefficient effect, and describes how much of the racial disparity can be accounted for by the fact that racially differential treatment by prosecutors tends to be stronger in situations where racial differences in observable case characteristics are most pronounced.[210] The three components can examine the variables in the aggregate (i.e., summing over all case characteristics) or individually.[211] A more formal treatment of the decomposition technique is presented below.

Assume there are two groups of death penalty-eligible cases, W and B, representing cases with Caucasian victims and African American victims, respectively; an outcome variable, N, that takes on the value of "1" if a death notice is filed against the defendant in the case, and "0" if otherwise; and a set of explanatory variables for the death penalty charging decision, X, that indexes aggravating and mitigation factors relevant the defendant's degree of culpability. The gap, G, in the average outcome, $\overline{N}$, between W and B is: $G = \overline{N}_W - \overline{N}_B = P(N_W) - P(N_B)$, where $P(\cdot)$ is the probability that cases in each group receive a notice for the death penalty. G can also be expressed as the difference in the regression predictions of the group specific means:

$$G = P(N_W) - P(N_B) = \mathcal{F}(\overline{X_W \times \beta_W}) - \mathcal{F}(\overline{X_B \times \beta_B}), \qquad (3)$$

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[205] Sorensen et al., *supra* note 29.

[206] George M. Holmes et al., *Decomposing Racial and Ethnic Disparities in the Use of Postacute Rehabilitation Care*, 47 HEALTH SERVICES RES. 1158 (2012).

[207] Jerry Owen Jacobson et al., *A Multilevel Decomposition Approach to Estimate the Role of Program Location and Neighborhood Disadvantage in Racial Disparities in Alcohol Treatment Completion*, 64 SOC. SCI. & MED. 462 (2007).

[208] MacDonald et al., *supra* note 29.

[209] For the purposes of this Article, I define disparate effect as the endowment effect. *See supra* note 11.

[210] Winsborough & Dickinson, *supra* note 204.

[211] *See, infra*, notes 218-220 and accompanying text.

where the subscripts index the groups, β is a vector of k regression coefficients corresponding to $k-1$ explanatory variables, X, and F is the logistic function, $\mathcal{F}(\cdot) = \frac{e^{(\cdot)}}{1+e^{(\cdot)}}$, that relates the effects of β to changes in the probability of observing a particular outcome.[212] To identify the contribution of group differences in predictors to the overall outcome difference, the terms can be rearranged as follows:

$$G = \underbrace{\mathcal{F}(\overline{X_W \times \beta_W}) - \mathcal{F}(\overline{X_B \times \beta_W})}_{E} + \underbrace{\mathcal{F}(\overline{X_W \times \beta_W}) - \mathcal{F}(\overline{X_W \times \beta_B})}_{C}, \quad (4.1)$$

where E and C represent the endowment and coefficient effects, respectively. The terms in Equation 4.1 can be rearranged to underscore the distinctions that each component captures:

$$G = \underbrace{\mathcal{F}(\overline{X_W - X_B)\beta_W}}_{E} + \underbrace{\mathcal{F}\{\overline{X_W \times (\beta_W - \beta_B)}\}}_{C}. \quad (4.2)$$

Equations 4.1 and 4.2 are alternative ways of representing the two-fold composition because they do not consider the portion of the gap that is attributable to the simultaneous influence of E and C.[213] The three-fold composition is:

$$G = E + C + \underbrace{\mathcal{F}\{\overline{(X_W - X_B) \times (\beta_W - \beta_B)}\}}_{CE}, \quad (5)$$

where CE is the interaction between the group differences in endowment and coefficient effects. Both C and CE may be attributed to discrimination,[214] but it is also important to recognize that the terms capture the potential effects of group differences in unobserved variables.[215] The decompositions in Equations 4.1, 4.2, and 5 are formulated from the viewpoint of group W, meaning that the group differences in predictors are weighted by the coefficients of group W to determine the endowment effect, E. Similarly, for the coefficient effect, C, the differences in the coefficients are weighted by group W's predictor levels. The differential could also be expressed from the viewpoint of group B.

An alternative decomposition is possible that uses coefficients from the pooled model as the nondiscriminatory coefficients, and these coefficients

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[212] Alternatively, one could model the gap in the likelihood of a prosecutor filing a notice to seek the death penalty as the difference in the log odds: $G = N_W - N_B = \log_e\left(\frac{P(N_W)}{1-P(N_W)}\right) - \log_e\left(\frac{P(N_B)}{1-P(N_B)}\right)$, which would be consistent with the logistic regression formulation in Equation 1. I prefer the modeling the gap in terms of the differences in probabilities rather than log odds because this differential is both easier to understand and becomes necessary when comparing the effects of specific explanatory variables across groups. For an accessible discussion of the decomposition method for dichotomous variables, *see* Daniel A. Powers et al., *Mvdcmp: Multivariate Decomposition for Nonlinear Response Models*, 11 STATA J. 556, 564–69 (2011).

[213] Recall that E is calculated while holding C constant; similarly, C is calculated while holding E constant.

[214] *See infra* note 255 and accompanying text.

[215] *See infra* Part VI.D.

are used to determine the contribution of differences in the predictor variables.[216] Some scholars advocate using the pooled coefficients as the baseline because there usually is no *a priori* reason to select one group as the baseline over the other when measuring discrimination.[217] This yields in a two-fold decomposition where the first component and second components are differentials relative to the overall baseline, β_P:

$$G = \underbrace{\mathcal{F}(\overline{X_W \times \beta_P}) - \mathcal{F}(\overline{X_B \times \beta_P})}_{E} + \underbrace{\mathcal{F}\{[\overline{X_W \times (\beta_W - \beta_P)}] - [\overline{X_B \times (\beta_P - \beta_B)}]\}}_{C}. \quad (6.1)$$

Similar to Equation 4.1, the terms in Equation 6.1 can be rearranged in order to more clearly emphasize what is being measured by each component on the right-hand side of the equation:

$$G = \mathcal{F}\underbrace{(\overline{X_W - X_B})\beta_P}_{E} + \underbrace{\mathcal{F}\{[\overline{X_W \times (\beta_W - \beta_P)}] - [\overline{X_B \times (\beta_P - \beta_B)}]\}}_{C}. \quad (6.2)$$

The above decompositions have been described at the aggregate level, but as mentioned, *supra*, understanding the unique contribution of each explanatory variable may also be of interest.[218] For example, one might want to know how much of the race-of-victim gap in death noticing behavior is due to differences in aggravating evidence or mitigation evidence. And even within those categories, one might be interested in uncovering how much of the gap is explained by the number of statutorily defined special circumstances present in the case and how much is due to the defendant's criminal history (i.e., endowment effects). Similarly, it might be useful to determine who much of the unexplained gap is related differences in prosecutors' behavioral response to those particular case factors (i.e., coefficient effects). The intuition underlying the detailed decomposition is that the total component is a summation of the individual contributions, although the specific approaches to detailed decompositions differ depending on whether the outcome variable in model is continuous or categorical.[219] This makes it possible to also examine the endowment and coefficient effects of predictors in batches, which may be especially appealing in the context of capital charging because one is able to examine the impact of a collection of thematically related variables (e.g., several

[216] Jann, *supra* note 204, at 455. The pooled decomposition includes race-of-victim in the model as an additional control variable to account for differences in group-specific intercepts. Failing to do so would cause the influence of endowments to be overstated and unexplained differences to be understated. Elder et al., *supra* note 24, at 285, 288.

[217] Jann, *supra* note 204, at 457.

[218] Daniel A. Powers & Myeong-Su Yun, *Multivariate Decomposition for Hazard Rate Models*, 39 SOC. METHODOLOGY 233, 238 (2009) (discussing potential uses for detailed decompositions).

[219] *Id.*

factors related to the defendant's family background or multiple factors related to the commission of the crime).[220]

In Part V, I apply the aforementioned multivariate decomposition approach to actual death penalty charging data in Georgia. These analytical techniques permit me to ascertain (a) the magnitude of victim-based racial disparities in Georgia, (b) the influence of the differential distribution of relevant aggravation and mitigation evidence across Caucasian-victim and African American-victim cases on the racial disparity, and (3) the influence of prosecutors' differential behavioral responses to the aggravating and mitigation evidence on the racial disparity. As explained, *supra*, social scientists interpret this differential behavioral response as racial discrimination. The decomposition technique, like any other regression-based approach, is unable to directly test whether this differential behavioral response is attributable to racial animus, and the Court has never adopted such a requirement;[221] although, the analytical tools I employ may make such an inference even more plausible than inferences based on prior statistical studies.[222] But before applying the model to the Georgia data, I describe the specific information contained in the data that is relevant to carefully scrutinizing prosecutorial charging decisions.

B. Georgia Capital Charging Data

I collected data on 1,238 potential death penalty cases in Georgia over an eight-year period (1993-2000) to examine the extent and sources of victim-based racial disparities impacting the capital charging process. Relevant case-level data on all potentially capital cases from which prosecutors could identify and select defendants for the death penalty were compiled from five separate sources: the Georgia Bureau of Investigation, the Georgia Department of Corrections, the Office of the Georgia Capital Defender, the Clerk's Office of the Georgia Supreme Court, and the Atlanta Journal-Constitution newspaper.[223] Death-eligibility was determined by the presence of *at least* one of eleven crime elements listed in Georgia's death penalty statute for defendants 17 years of age or older.[224] As required by

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[220] Jann, *supra* note 204 (explaining the aggregation of individual variables into subsets in order to capture the collective contributions of those variables to the endowment and coefficient components).

[221] McCleskey v. Kemp, 481 U.S. 279, 293 94 (1987) (acknowledging that statistics can be used to prove intentional discrimination if the evidence is compelling).

[222] Taber et al., *supra* note 22, at 725 (noting that the decomposition framework explores potential causal mechanisms in more detail than conventional analysis).

[223] For a detailed description of these sources, *see* Thaxton, *supra* note 183; Thaxton, *supra* note 10.

[224] GA. CODE ANN. § 17-10-30(a), b(1)-(10). The enumerated aggravating circumstances in the Georgia capital statute are: (a) the death penalty may be imposed for the offenses of aircraft hijacking or treason in any case; (b1) the offense of murder, rape, armed robbery or kidnapping was committed by a person with a prior record of conviction for a capital felony; (b2) the offense of murder, rape, armed robbery or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree; (b3) the offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person; (b4) the offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value; (b5) the murder of a judicial officer,

law, whenever a prosecutor intends to seek the death penalty against a defendant, the prosecutor must file a formal notice with the Clerk's Office of the Georgia Supreme Court, and the Clerk's Office keeps a record of all notices submitted—prosecutors filed notices in 400 cases.[225] The data consist of the *entire* population, and not a mere sample, of homicide cases during the years under investigation. The major benefit of analyzing the entire population of homicide cases is that statistical inference based on sample statistics (e.g., *p*-values, significance tests, confidence intervals, etc.) does not apply in the convention sense, so the focus is on the direction and magnitude of the statistical parameters and quantities of interest derived from these parameters.[226] I selected 1993 as a starting point because the Georgia legislature enacted its life without the possibility of parole (LWOP) statute in 1993, and the law was specifically designed as a sentencing alternative reserved only for capital murder trials.[227] Because juries (and judges if the defendant opted for a bench trial) were only permitted to impose a sentence of LWOP if the prosecutor officially sought the death penalty against the defendant, the statute potentially had a substantial impact on prosecutors' calculi when deciding whether to seek the death penalty. I concentrate on cases after the statute was enacted so the governing statutory regime is consistent across all of the cases. The year 2000 was chosen as a cut-off point in order to allow sufficient time for all of the cases to advance from the charging phase through the initial sentencing phase. Of the 1,238 death-eligible murder cases, roughly 45% involved at least at least one Caucasian victim and 50% involved African American victims.[228] Eighty-

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former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties; (b6) the offender caused or directed another to commit murder or committed murder as an agent or employee of another person; (b7) the offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; (b8) the offense of murder was committed against any peace officer, corrections employee or firefighter while engaged in the performance of his official duties; (b9) the offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; and (b10) the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

In 2006, Georgia's capital statute was amended to include an additional aggravating circumstance: "the offense of murder, rape, or kidnapping was committed by a person previously convicted of rape, aggravated sodomy, aggravated child molestation, or aggravated sexual battery." 2006 Ga. Laws 571, § 22; GA. CODE ANN. § 17-10-30(b)(11).

[225] For a description of Georgia's capital punishment process from initial appearance through execution, *see* Appendix B.

[226] Steffensmeier & Demuth, *supra* note 1, at 160 (explaining that sample-based significance tests are inappropriate when analyzing the entire population of cases). Another source of uncertainty in the estimation of the model parameters is the specification of the model—e.g., the choice and measurement of variables. Modifying the features of the models will result in many plausible models and yields a distribution of estimates. Cristobal Young & Katherine Holsteen, *Model Uncertainty and Robustness: A Computational Framework for Multimodel Analysis*, 46 SOC. METHODS & RES. 3, 32 (2017). I address this form of uncertainty in VI.D. *See also infra* notes 236 and 307 and accompanying text.

[227] 1993 Ga. Laws 569, § 4; Ga. Code Ann. § 17-10-30.1 (1993). The 1993 statute was modified in 2005 to allow LWOP as a sentencing option in non-death penalty cases. This statutory change occurred after the period under investigation in the current study.

[228] Similar with prior studies, I code cases involving at least one Caucasian victim as a Caucasian-victim case. The results do not appreciably change when I coded a multi-victim case with victims of different races/ethnicities as a multi-racial case. *See also* Part VI.A.

three percent of the cases involved a single victim, and when I limited my analyses to these cases, 44% involved a Caucasian victim and 50% involved an African American victim.

As is standard in the extant literature on capital charging, I model the likelihood that a prosecutor files a death penalty notice against a defendant as a function of defendant characteristics, crime characteristics, and victim characteristics. The largest model includes 40 case-level variables indexing the heinousness of the crime and the culpability of the defendant.[229] The first category, *crime-related factors*, includes statutorily defined aggravating factors, circumstances of the murder, type of murder weapon, motive for killing, type of evidence, strength of evidence,[230] and jurisdiction where killing occurred. The second category, *defendant-related factors,* encompasses the number of defendants, defendant's sex, age, race/ethnicity, level of education, employment status, marital status, number of children, military service, history of drug use, psychiatric status, IQ score, troubled family history, prior felony conviction, county of residence, and trigger-person status.[231] The third and final category, *victim-related factors*, contains the number of victims, sex, age, race/ethnicity, and prior relationship with defendant. These factors can also be grouped in terms of

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[229] For a description of the variables, *see* Appendix A. The Georgia dataset includes much more information than the 40 variables included in the model specification. Moreover, the model actually includes more information than the 40 variables imply because I employ a conservative counting method in order to reduce the number of parameters that must be estimated in the model. For example, in terms of inculpatory/aggravation evidence, I have information on the presence or absence of the eleven statutorily defined special circumstances enumerated in Georgia's capital statute, but rather than count them separately, I combined them into a single variable that indexes the total number of statutory aggravating circumstances present in the case. A potential complication with this approach is that it implies that all of the aggravating factors have equal weight in the overall composite measure, and this may not accurately reflect how the factors influence capital charging. It is common practice in statistics to use a summation scale when the individual items have low variability or are highly correlated (or both) – this is the case with the individual items in the statutory aggravating circumstance scale. Table 1 reports that the average number of statutory aggravating circumstances in a case is 2.2 and the range is 1-7; however, only three of the eleven statutory aggravating circumstances were present in more than 10% of the cases. As a result, there is little variability in the factors to access the bulk of the cases and many of the cases were charged with identical aggravating circumstances. Thus, the structure of the data made estimating the individual effects for all of the factors in a single model infeasible. Furthermore, the research literature suggests that the number statutory aggravating circumstances is a better predictor of death penalty charging and sentencing behavior than the individual items, see *infra* note 232. I re-examined the Georgia with the individual items, rather than the composite scale, and obtained results that were nearly identical across the two models with respect to race-of-victim effect. *See infra* note 304. Equally important is that the model with the composite measure fit the data better than the model with the individual items when taking into account model complexity.

Similarly, with respect to exculpatory/mitigation evidence, for example, I have information on the presence or absence of five types of "troubled family background" factors. I combine these factors into a single variable, capturing the total number of problematic family features occurring in a defendant's background.

[230] Consistent with prior research, we limit our analysis to cases that ultimately resulted in a conviction for murder as a proxy for the strength of evidence in the case. BALDUS ET AL., *supra* note 25, at 40–42, 477.

[231] I include legally impermissible/legally suspect factors e.g., defendant and victim's race/ethnicity, sex, and age in my models in order to stay consistent with prior studies of capital charging and make direct comparisons to those studies possible. *See* Part III.A. The lone exception involves defendant's race, where I examine two separate model specifications: one including defendant's race and the other excluding defendant's race. The models meaningfully differ because the defendant's race accounts for approximately 35% of the effect of group differences in case-level attributes (i.e., disparate effect). *See* Part V.

their inculpatory or mitigating character. Important inculpatory/aggravating evidence includes the total number of statutorily defined aggravating circumstances present in the case, defendant's contemporary convictions and prior criminal history, money- or sex-related motive, the number of victims, the relationship between the defendant and the victim(s), and the age of victim. Potentially mitigating evidence includes the defendant's age, marital status, educational background, and employment history, troubled family history, military service, history of drug and alcohol use/abuse, psychiatric status, IQ, and religious affiliation. Many of the specific variables included in the model have been identified in the literature as having the strongest associations with capital charging and sentencing decisions.[232] Several of the factors labeled as inculpatory might be deemed as mitigating in some situations. Similarly, some of the variables categorized as mitigating may be viewed as aggravating depending on the situation. This does not present a problem for the current analysis because the direction of the effect in any individual case is immaterial. The overall effect of each of these variables is estimated from the data and, therefore, reflects the manner in which prosecutors, on average, treat these factors for each race-of-victim group.[233]

Table 1 provides the summary statistics for the variables included in the model for the pooled data, and Table 2 presents the data disaggregated by the victim's race.[234] Because nearly 95% of cases in the dataset involve

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[232] Among the most important factors influencing death sentencing behavior in Georgia are the number statutory aggravating circumstances present in the case; the number of victims killed by the defendant; the commission of a contemporaneous felony; a prior felony conviction or record of violence personal crimes; the presence of multiple mitigating factors (e.g., history of alcohol/drug abuse); and a female victim. David C. Baldus & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 685–86 (1983).

It is nearly impossible to know what information is available to the prosecutor (or to defense counsel) at the time of the charging decision and, as I have argued elsewhere, "many of the factors impacting *capital sentencing* are unknown to prosecutors or defense attorneys at the time of *capital charging*, and specifics about aggravation and mitigation evidence come to light in preparation for trial." *See infra* note 325 at 165. The potential complication arising from this fact is that the statistical model may inappropriate assume the prosecutor was aware of a particular piece of information at the time of charging decision, and this may impact the analysis. But in order for this issue to bias my results, it would need to be the case that Causcasian-victim and African American-victim cases differed in terms of what information was actually known at the time of the charging decision *and* the information had the effect of: (a) making Caucasian-victim cases appear more aggravated (or less mitigated) at the time of the charging decision or (b) making African American-victim cases seem less aggravated (or more mitigated) at the time of the charging decision than the model suggests (or both).

[233] *See* Penry v. Lynaugh, 492 U.S. 302, 323 (1989) (acknowledging the ambiguous effect of aggravating and mitigating evidence); Buchanan v. Angelone, 522 U.S. 269, 275–79 (1998) (holding that the Constitution does not require jurors to be told how they should consider specific evidence offered as mitigation, and an instruction to the jury to consider all relevant evidence is sufficient).

[234] Specific information on case-level variables is missing for a significant number of the cases. Only 29% of the cases have complete information on every variable included in the model, but approximately 75% of the cases are missing data on three or fewer variables. The degree of missing values across all of the variables ranged from 0% to 12.2%. In other words, no single variable had less than approximately 88% of the available information.

My statistical models require that all cases included in the analysis have complete information for every variable analyzed. Discarding cases with missing data will bias the results unless the data are missing completely at random (i.e., missing values cannot be predicted from available information in the dataset—an assumption that the data do not satisfy). Rather than discard nearly 70% of the cases in the data and bias the results because that data are not missing completely at random, I adopt the "fully

African American or Caucasian victims, Table 2 only includes information for these cases. The column on the far-right of Table 2 shows the differences in the averages of each case characteristic between African American-victim and Caucasian-victim cases. As noted, *supra*, the data consist of the entire population of death eligible homicide cases in Georgia from 1993-2000, and not a mere sample, so tests of statistical significance are inapplicable in this context—the differences in means/proportions are the population differences. It is clear from the column reporting differences in observed case-level characteristics across these two groups that, on average, the cases differ along several important dimensions, but the differences are not especially stark for the vast majority of variables. The notable exception is the observed difference in death notices filed (43.4% of Caucasian cases were noticed for the death penalty compared to 18.9% of African American victim cases—a difference of 24.5 percentage points). With respect to defendant's race/ethnicity, 51.6% of Caucasian-victim cases have a Caucasian defendant and 46.1% have an African American defendant, 96.7% of African American-victim cases have an African American defendant (and 2.8% have a Caucasian victim).

The basic structure of the analysis is the estimation of two separate logistic regression equations examining prosecutorial death charging behavior—one for Caucasian-victim cases and one for African American-victim cases:

$$P(N_R) = \mathcal{F}(\overline{X_R \times \beta_R}), \tag{7}$$

where $R = W, B$. Both model specifications include the defendant, crime, and victim factors described above. The right-hand side and left-hand side elements of the equations are defined as above (see Table 1 and Appendix A). The results from Equation 7 are imported into Equations 4.1, 5, and 6.1 to perform the necessary multivariate decompositions.[235]

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conditional specification" (FCS) approach to multiple imputation to address the missing data concern. STEF VAN BUUREN, FLEXIBLE IMPUTATION OF MISSING DATA 108 (2012). The FCS algorithm makes educated guesses about the missing values based on the observed interrelationships between the variables in the data. The process is repeated M times to create M completed datasets. Each individual dataset contains slightly different values for each educated guess to account for uncertainty in the guesses. The datasets are analyzed separately and the M results are combined to provide the final estimates reported in the analyses. The efficiency of the parameter estimates is given by: $1 \div [1 + (F \div M)]$, where F is the fraction of missing data. *Id.* at 49. I used the FCS algorithm to create and analyze twenty complete datasets (M=20), which yields estimates that are approximately 97% as efficient as those based on an infinite number of imputations. I examined the robustness of the estimates by varying M from 10 to 30 and the results were virtually indistinguishable.

I also examined the models on data without missing cases. Disparate treatment accounted for 53% of the gap with race-of-offender included in the model and 89% of the gap with race-of-offender excluded from the model. But these results are only based on 360 cases instead of the full 1,238 cases available via multiple imputation. The magnitude of the differences between multiple imputation and non-multiple imputation estimates is standard in the social science literature when data are not missing completely at random. *See generally* Gary King et al., *Analyzing Incomplete Political Science Data: An Alternative Algorithm for Multiple Imputation*, 95 AM. POL. SCI. REV. 49 (2001).

[235] The pooled decomposition in Equation 6.1 requires the model to be estimated on an aggregation of African American-victim and Caucasian-victim cases to obtain β_P. Elder et al., *supra* note 24, at 285.

V. RESULTS

Table 3 reports the effects of the case characteristics on the capital charging decision for African American-victim and Caucasian-victim cases based on Equation 7.[236] Marginal effects, rather than log-odds are reported for ease of interpretation.[237] A marginal effect is the predicted change in the probability of a capital charge for an incremental change (if continuous) or a unit change (if discrete) in that variable, holding other variables constant.[238] The models are estimated separately for each race-of-victim group, so they do not provide a general estimate for the racial disparity based on a pooled model that calculates the racial gap while holding constant the effects of the other case characteristics.[239] The column on the far-right of Table 3 ("Difference in Effect") captures prosecutors' racially differential behavioral response to each case characteristics. In the words of Sorensen et al., the far-right column "pertain[s] to [prosecutorial] preferences for each group in a binary comparison."[240] For example, the marginal effect of an incremental increase in the number of statutory aggravating circumstances is nearly twice as large for Caucasian-victim cases compared to African American-victim cases ($0.178 \div 0.093 = 1.91$), all else being equal. And not only does the magnitude of the effects of these variables differ across cases, but the direction of the effects for some of the variables also differ. For example, the number of co-defendants, number of contemporary felonies committed by the defendant, the number of prior felonies, the defendant's marital status, high school graduation status, military service status,

[236] The parameters presented in Tables 3, 4, and 5 are based on the *entire* population of death-eligible homicide cases, and not a mere sample, so statistical inference based upon uncertainty from sampling distribution (e.g., *p*-values and confidence intervals) is inapplicable in the convention sense. In other words, there is no uncertainty arising from limitations of the *data*. Nevertheless, to measure the reliability of my estimates of *E* and *C* *assuming they were based on a mere sample*, I calculated a measure of uncertainty for the race-of-victim effect via bootstrapping. In brief, the bootstrapping algorithm randomly samples cases from the data (with replacement) and calculates the variability of *E* and *C* across the samples. ADRIAN COLIN CAMERON & PRAVIN K. TRIVEDI, MICROECONOMETRICS: METHODS AND APPLICATIONS 254 (2005). The standard errors for *E* and *C* were, respectively, 0.024 and 0.028. This suggests that the estimates of *E* and *C* are robust to random variations in the selection of cases from the population and those effects would be statistically significant even if my data were a sample rather than the entire population of cases.

Whereas bootstrapping addresses potential uncertainty arising from limitations with the *data*, another source uncertainty stems from potential limitations of the *model*. Every model rests on certain assumptions about which variables to include, how those variables are measures, and the form of the relationship between the explanatory variables and the outcome variable (e.g., linear versus curvilinear). *See supra* note 226 and accompanying text. I address this type of uncertainty in Part VI.D.

[237] *See supra* note 159 and accompanying text. Furthermore, the comparison of logit coefficients across groups for binary regression models is inappropriate because differences in the magnitude of the coefficients may be an artifact of the differences in the degree of residual variation between the groups. This problem is avoided when using marginal effects. Paul Allison, *Comparing Logit and Probit Coefficients Across Groups* 28 SOCIOLOGICAL METHODS AND RESEARCH 186, 189 (1999).

[238] BACHMAN & PATERNOSTER, *supra* note 157, at 574.

[239] As noted *supra*, the pooled models are based on problematic assumptions about heterogeneous effects of case characteristics. *See* Part III.B.1.

A pooled model was estimated and the race-of-victim disparity is 16.9 percentage point difference in the probability of a death penalty notice. The odds-ratio for the race-of-victim effect is 3.3, which is remarkably close to the 3.1 odds-ratio reported by Baldus and colleagues in *McCleskey v. Kemp*.

[240] Sorensen et al., *supra* note 29, at 11.

defendant's psychiatric status, and whether a firearm was used in the homicide *all* have opposite-sign effects across the Caucasian-victim and African American-victim cases.

Tables 2 and 3 reveal that African American-victim and Caucasian-victim cases differ with respect to both their observable characteristics relevant to aggravation and mitigation, as well as how prosecutors respond to these characteristics. I now use these differences to determine how much of the racial gap in death charging behavior is attributable to racially disparate effect ("endowment") and racially disparate treatment ("coefficient").[241] Table 4 presents the first set of decomposition results.[242] The top panel in Table 4 decomposes the racial gap into the endowment, *E*, and coefficient, *C*, effects. The probability of a defendant receiving a death penalty charge in a Caucasian victim case is 43.4%, whereas the probability for a defendant in an African American-victim case is 18.9%—a racial gap, *G*, of 24.5 percentage points. Of the 24.5 percentage point gap, 8.4 percentage points, or 34.4% of the total racial gap is due to disparate effect—that is, observable differences in case characteristics between the African American-victim and Caucasian-victim cases. The overwhelming majority of the total race gap, 65.6% (or 16.1 percentage points) is attributable to disparate treatment. Stated differently, in the absence of racially disparate treatment, 35% of African American-victim cases would receive a capital charge—much closer to the 43.4% of Caucasian-victim cases receiving a capital charge.[243] This finding is consistent with research on racial discrimination in the employment context: differential treatment is responsible for 50%-70% of the black-white wage gap.[244]

The bottom panel of Table 4 provides results of the detailed decomposition, which indicates the contribution of each variable to the racial gap based on disparate effect and disparate treatment.[245] Column "(*E*)" reveals the proportion of the predicted racial gap attributable to group differences in each variable. So, for example, if African American-victim cases had, on average, the same number of statutory aggravating circumstances as Caucasian-victim cases, then the racial gap would decrease by 4 percentage points. Perhaps a more intuitive way to understand the effect of group differences in statutory aggravating circumstances present in

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[241] *See supra* note 11.

[242] The decompositions in Table 4 use the pooled coefficients as the baseline, so the "coefficient effect" compares differences prosecutors' responses to the case characteristics between African American- and Caucasian-victim cases relative to the non-discriminatory coefficients. David Neumark, *Employers' Discriminatory Behavior and the Estimation of Wage Discrimination*, 23 THE J. OF HUM. RESOURCES 279, 282 (1988) (advocating the use of the coefficients from a pooled regression over both groups as the baseline as opposed to selecting a particular group for the baseline)]. *See supra* notes 216 & 217and accompanying text.

[243] I also examined the robustness of the estimates to individual observations (i.e., outliers) in the data. For each case in the data, I calculated an influence statistic, $\Delta\beta$ (*delta-beta*), measuring the impact of each case on overall effects of the variables in the model. Any case with a value of $\Delta\beta$ over 1 in considered to have undue influence on the results. The largest $\Delta\beta$ value for any case in the data was 0.38 and the median value was 0.002. DAVID W. HOSMER & STANLEY LEMESHOW, APPLIED LOGISTIC REGRESSION (1989).

[244] Fryer et al., *supra* note 187, at 637-39 (citing studies).

[245] *See supra* note 236.

a case is to calculate the percentage of the overall racial gap due to group differences in that particularly variable. Column "Prop. Change (*E*)" provides the answer: 15.5% of the total racial gap is because of African American-victim cases and Caucasian-victim cases differ, on average, in their number of statutory aggravating circumstances ($0.038 \div 0.245 = 0.155$).

Columns "(*C*)" and "Prop. Change (*C*)" can be interpreted in a similar fashion. Returning attention to the statutory aggravating circumstance variable, the racial gap in capital charging would decrease by 2.5 percentage points if statutory aggravating circumstances has the same *effect* in African American-victim cases as they had in Caucasian-victim cases. Stated differently, if prosecutors treated statutory aggravating circumstances in African American-victim cases in the same fashion they treated statutory aggravating circumstances in Caucasian-victim cases, the racial gap would decrease by 10.2% ($0.025 \div 0.245 = 0.101$).

Some of the endowment and coefficient effects have a negative ("-") sign, so the interpretation is opposite of the previous discussion. The variable indicating whether the defendant had a monetary motive for the homicide has a negative sign for the endowment effect in Column (*E*). This suggests that the racial gap in capital charging would *increase* by 0.6 percentage points (or 2.4%) if homicides in African American-victim cases were equally motivated by money as Caucasian-victim cases. With respect to Columns "(*C*)" and "Prop. Change (*C*)," the interpretation is similar. The racial gap in capital charging would increase by 1.1 percentage points (or 4.5%) if defendants' history of drug use in African American-victim cases was treated by prosecutors the same way as in Caucasian-victim cases.

It is also worth noting that the total endowment effect is comprised of variables that are legally impermissible or, at minimum, legally suspect.[246] As a result, the endowment effect does not solely capture non-discriminatory dynamics influencing capital charging decisions. For example, the defendant's race/ethnicity accounts for 13.1% of the total capital charging racial gap (see Table 4, bottom panel). The magnitude of the effect of defendants' race is larger than the strength of evidence in the case (8.9%), and second only to the number of statutory aggravating circumstances (15.5%). So, even assuming, *arguendo*, that that the defendant' race is treated the same by prosecutors across African American- and Caucasian-victim cases, the race-of-defendant endowment effect is likely a measure of racial discrimination.[247] The detailed decompositions displayed in the bottom panel of Table 4 shows that the race-of-defendant endowment effect is 0.032, thus nearly two-fifths of the alleged non-discriminatory component of the capital charging cap is attributable to a legally impermissible factor ($0.032 \div 0.084 = 0.381$), all else equal. When the model is estimated *without* race-of-defendant, the total endowment

[246] *See supra* note 231.

[247] The variable indicating the defendant's race, while itself an impermissible factor, is also subject to disparate treatment. *See* Tables 4 and 5.

effect accounts for 21.2% of the racial charging gap ($0.052 \div 0.245 = 0.212$).[248]

Table 5 presents results from the three-fold decomposition.[249] Recall, *supra*, that this analysis accounts for the fact that racial differences in endowment and coefficient effects may occur simultaneously.[250] The three-fold decomposition isolates the source of the racial disparity that would otherwise be arbitrarily attributed to both the endowment and coefficient effects.[251] The additional component in the three-fold decomposition, *CE*, captures the difference between what is expected from the two individual differences—disparate effect, *E*, and disparate treatment, *C*—and the observed result. In other words, it measures the effect *beyond* a simple summation of the effects of *E* and *C*. Demographers Hailman Winsborough and Peter Dickinson explain that the third component "is the increment (or decrement) in effect due to modifying both aspects of the situation simultaneously [...] over the effect of changing each singly."[252] The top panel of Table 5 displays the percentage of the total racial charging gap attributable *E*, *C*, and the interaction between the two, *CE*.[253] Disparate effect accounts for 37.3% of the gap, disparate treatment comprises 61.4% of the gap, and the interaction effect constitutes 1.3% the gap (or 0.3 percentage points).[254] The magnitude of *CE* will be determined by the size of differences in its component parts, *E* and *C*. Recall from Table 2 that the differences in the case characteristics across the race-of-victim groups are mostly trivial, even though Table 3 reveals that the race-of-victim differences the effects of those case characteristics can be quite stark for many variables. *CE* is a multiplicative term, $CE = (X_W - X_B) \times (\beta_W - \beta_B)$, so the small value of *CE* can be attributed to the fact that racial differences in *E* are minor across most variables.

It must be reemphasized that the three components reduce to a two-component solution in either of two ways: some place *CE* in the disparate effect part, while others place *CE* in the disparate treatment part.[255] Analysts differ on the proper interpretation of the *CE* effect because it has both

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[248] *See supra* note 231.

[249] *See supra* note 236.

[250] *See* Part IV.A.

[251] Daymont & Andrisani, *supra* note 198, at 420–21 (describing the three-fold decomposition).

[252] Winsborough & Dickinson, *supra* note 204, at 7.

[253] The estimates for *E* and *C* reported in Table 4 used the pooled (i.e., non-discriminatory) coefficients for as the baseline, *see supra* note 242. The pooled coefficients cannot be used for the three-fold composition because the calculation of *CE* precludes the inclusion of the non-discriminatory baseline (β_P) in the same model. *See* Part IV.A. The three-fold decomposition in Table 5 is expressed from the point of view of African American-victim cases. Using Caucasian-victim cases as the baseline yields similar results: 31.1% of the gap is explained by *E*; 61.3% percent is explained by *C*, and 7.6% is explained by *CE*.

[254] The bootstrapped standard errors for *E*, *C*, and *CE* were, respectively, 0.062, 0.034, 0.059. This suggests that, if the population were a mere sample, *E* would fail to achieve statistical significance when taking into account the portion of the *E* that is conditional on *C*. In other words, the coefficient effect (i.e., disparate treatment) is the sole phenomenon accounting for the racial disparity in capital charging, as evidenced by both the statistical significance of *C* and the statistical insignificance of *CE*. *See supra* note 243.

[255] *See* Frank L. Jones & Jonathan Kelley, *Decomposing Differences between Groups: A Cautionary Note on Measuring Discrimination*, 12 SOC. METHODS & RES. 323, 329 (1984) (noting that there is no unambiguous way of allocating the interaction effect to endowment or coefficient effects).

discriminatory and non-discriminatory components. *CE* may be a consequence of differences in the case characteristics, and would disappear if Caucasian-victim and African American-victim cases had the same characteristics. But *CE* may also be a consequence of the differential treatment and would disappear if Caucasian- and African American-victim cases were treated similarly. So it is an interaction term in the sense of depending *jointly* on both differences. Researchers have explained that "the choice between [interpreting *CE* as an endowment or coefficient effect] depends on whether or not there is a clear argument for including the interaction as an aspect of discrimination."[256] The preference for a particular interpretation will turn on whether changes in endowment and coefficient effects are independent—that is, whether changes in one component is likely to affect the other.[257] Stated differently, the key question is whether one believes that (a) differences in the treatment of case characteristics are likely to result in differences in the compositions of those characteristics between the race-of-victim groups? *or* (b) differences in composition of those case characteristics between race-of-victim groups are likely to result in differences in the prosecutors' behavioral response to those characteristics by prosecutors?

It appears that logic would dictate that the most plausible interpretation of *CE* is that it is a component of discrimination: the interaction effect captures the percentage of the capital charging gap accounted for by the fact that prosecutorial treatment of African American (Caucasian) victim cases tends to be more punitive—or more lenient, depending on the sign—for those case characteristics for which the differences between African American-victim and Caucasian-victim cases tend to be most pronounced.[258] The contrasting interpretation—that is, the racially differential treatment of case characteristics by prosecutors produces race-of-victim differences in the distribution of objective aggravation and mitigation evidence—seems highly implausible. Due to the relatively small *CE* effect, the placement of *CE* does not meaningfully alter the results from Table 4—namely, at least three-fifths of the racial gap in capital charging is attributable to disparate treatment.[259]

The bottom panel of Table 5 provides the decompositions for the individual case-level factors. The *CE* effect is most pronounced for the number of statutory aggravating circumstances, defendant's WRAT Score, defendant having a monetary motive, firearm homicide, and victim's age. Returning to the effect of the number of statutory aggravating circumstances example, *CE* is the difference in prosecutorial racially differential responses

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[256] *Id.* at 333 (internal quotations marks omitted).

[257] Kitagawa, *supra* note 29, at 1179.

[258] Winsborough & Dickinson, *supra* note 204, at 7 (explaining that the *CE* component "indicates how much of the gap can be accounted for by the fact that the returns to one group [e.g., whites] tends to be greater for those characteristics for which members of that group have higher average values.").

[259] The results from the two-fold and three-fold decompositions reveal that the defendant's race accounts for 38%-42% of the endowment effect, so it is highly likely that the disparate treatment effect is significantly understated in my models.

to the number of aggravators *multiplied* by the difference in the average number of aggravators across the groups. If *CE* is interpreted as evidence of disparate treatment, then the total disparate treatment effect of statutory aggravating circumstances is: $C + CE = 0.020 + 0.005 = 0.025$. This would account for 10.1% of racial gap in capital charging ($0.025 \div 0.245 = .101$), all else being equal.

VI. DISCUSSION AND IMPLICATIONS

The statistical models described this Article provide a template for the investigation of discriminatory charging dynamics in capital and non-capital cases. My analysis of detailed information on dozens of legally relevant variables indexing the level of aggravation and mitigation present in potentially capital cases reveals,[260] consistent with prior research, that defendants accused of murdering Caucasians have odds of being noticed for the death penalty that are 3.3 times greater than a similarly situated defendants accused of murdering African Americans (or an 230% increase in the odds). The magnitude of this racial disparity is very close to the findings reported to the Court in *McCleskey* (3.1),[261] although the data analyzed for *McCleskey* were nearly twenty years older than the data examined in this Article. The magnitude of the race-of-victim effect is also very similar to the average effect discovered across all studies of capital charging over the last twenty-five years (3.03).[262] The race-of-victim effect translates to an increase in the predicted probability of being noticed for the death penalty of 16.9 percentage points if the victim is Caucasian rather than African American, all else equal.[263] These two measures of the likelihood of a capital charge are examples of the traditional metrics used to identify disparate impact and infer disparate treatment. But as explained, *supra*, these two measures are based on implausible assumptions about homogeneous effects of case characteristics for death-eligible Caucasian-victim and African American-victim homicides.[264] Furthermore, they do not provide important insights into how race-of-victim differences plausibly generate the racial disparity in capital charging outcomes.[265]

My study advances our understanding of racial dynamics in capital charging by disaggregating the race-of-victim gap into disparate effect and disparate treatment components, potentially telling a more powerful and intuitive story about the role of race in capital charging.[266] The Article provides answers to a pair of fundamental questions with which courts must wrestle when assessing the merits of a selective prosecution claim. First, how much would the race-of-victim gap change if the two groups were

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[260] *See* Table 1 and Appendix A.

[261] *See generally* BALDUS ET AL., *supra* note 25 (describing the statistical results presented to the Court in *McCleskey*).

[262] *See* Part III.A.

[263] *See, supra*, note 159 and accompanying text.

[264] *See* Part III.B.1.

[265] *See* Part III.B.2.

[266] *See supra* note 11.

identical in terms of their level of culpability, but treated in the current racially-differential manner? And second, how much would the race-of-victim gap change if the two groups were treated in a similar fashion by prosecutors, but retained their current differences in culpability?

There is nearly a 25 percentage point racial gap in capital charging between Caucasian victim and African American-victim cases (43.4% versus 18.9%), and approximately 61% of this gap is attributed to disparate treatment. In other words, less than 39% of difference in charging behavior between Caucasian- and African American-victim cases is accounted for by differences in the case characteristics; the remainder of the difference is due to prosecutor's racially differential behavioral response to those characteristics. The magnitude of disparate treatment reported is likely to be a conservative estimate because the disparate effect measure includes the defendant's race, which compromises a sizable portion of the total disparate effect (approximately 33%). When race-of-defendant is excluded from the models, the differences in case characteristics between Caucasian- and African American-victim cases account for approximately 22% of the racial gap, thereby leaving approximately 80% of the racial gap attributable to disparate treatment.[267] The magnitude of disparate treatment in capital charging is eerily similar to the magnitude of the disparate treatment effect reported in studies of the racial gap in wages.[268]

The detail decompositions, which focus on the disparate effect[269] and disparate treatment components of the individual case factors, are also illuminating.[270] As explained earlier, the descriptive statistics provided in Table 2 clearly reveal that the differences in case characteristics between Caucasian-victim and African American-victim cases are rather insubstantial. For example, the typical Caucasian-victim case has 2.37 statutorily defined aggravating circumstances present, compared to 2.11 for the typical African American-victim case. Differences in the number of contemporary felonies, criminal history, number of defendants, and number of victims are equally trivial. It is only by examining Table 3, which reports racial differences in prosecutors' behavioral responses to these characteristics, do we begin to understand how the racial status of the victim impacts charging behavior. Racially disparate treatment is evident for both aggravating evidence (e.g., number of statutory aggravators, criminal history, monetary motive, trigger-person status, use of firearm, strength of evidence), and mitigating evidence (defendant's employment status at the time of the crime, defendant's marital status, defendant's military service, and defendant's education).[271] Tables 4 and 5 describe how these differences in case attributes and prosecutorial behavior, in the aggregate and uniquely,

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[267] *See supra* note 231.

[268] Fryer et al., *supra* note 187, at 637–39.

[269] *See supra* note 11.

[270] Taber et al., *supra* note 22, at 725 (noting that decompositions provide insights into causal mechanisms for disparities).

[271] *See supra* note 233 and accompanying text.

contribute the overall race-of-victim gap. The "Prop. Change (*E*)" and "Prop. Change (*C*)" columns in Table 4 provide clear evidence that, for most case characteristics, the influence of disparate treatment on the racial gap is larger than the influence of disparate effect. And even after accounting for the fact that differences in disparate effects and disparate treatments exist simultaneously between the race-of-victim groups (see Table 5), we notice that differences in case characteristics are only able to explain a small fraction of the racial gap.

Yet, as illuminating as the aforementioned analyses may be, the results will only be convincing to courts and other empirical legal scholars if the key assumptions underlying statistical models are defensible.[272] There are four key assumptions that I address below: (1) mutual exclusivity of race-of-victim groups;[273] (2) overlapping distribution case characteristics across race-of-victim groups (i.e. common support);[274] (3) adequate representation of the underlying discretionary process (i.e., model fit);[275] and (4) the conditional mean for unobservable case characteristics, given observed characteristics is equal to zero (i.e., unconfoundedness/"no omitted variable bias").[276] As I explained in Part II.B, the latter two assumptions have received the most attention from the courts, so I devote the bulk of my discussion to them.

A. Mutual Exclusivity

The first assumption is that race-of-victim groups are mutually exclusive: that is, a case can only enter the model as having either a Caucasian victim or an African American victim, but not both. This is a potential problem for cases with multiple victims who are racially heterogeneous. Approximately 17% of the cases in the Georgia data involve multiple victims, and 7.6% of those multiple-victim cases involved victims of different races. Consistent with prior research, cases with *at least* one Caucasian victim were coded as having a Caucasian victim for the purposes of this study.[277] Cases involving at least one African American victim and a non-Caucasian victim (i.e., Asian/Pacific Islander, Latino/Hispanic, or Native American) were coded as having an African American victim. The results were substantively identical when these racially heterogeneous-victim cases were removed from the analyses, which is to be expected given the extremely small number of cases that fell into that category.[278]

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[272] *See* Part II.B.

[273] Nicole Fortin et al., *Decomposition Methods in Economics*, *in* 4A HANDBOOK OF LAB. ECON. 1, 14 (Orley Ashenfelter & David Card eds., 2011).

[274] *Id.* at 17.

[275] Part II.B.

[276] Part II.B; Fortin et al., *supra* note 273, at 21.

[277] *See, e.g.*, Raymond Paternoster & Robert Brame, *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction* (Univ. of Maryland, College Park 2003).

[278] *See supra* note 228 and accompanying text.

B. Common Support

The second assumption is that the distribution of values of the case characteristics across the two groups overlap. In statistics parlance, the cases analyzed in the model must share the "region of common support."[279] This means that cases with the same values for the case characteristics have a non-zero probability for being in either group. This is a crucial assumption because it must be reasonable to use the observed outcomes from one group to construct counterfactuals for the other group. When one group has no comparables in the other group in the data, any attempted comparisons between the groups are based on extrapolating the data from where it is observed to where it is needed rather than what the data actually are.[280] In other words, the statistical model assumes what the data "should be" based on parametric assumptions of the model, and as a consequence, the results are extremely dependent on the idiosyncratic features of the model. Political scientists Gary King and Langche Zeng refer to this phenomena as the "dangers of extreme counterfactuals."[281] Only seven cases fell outside the region of common support (0.5%). The results were identical whether or not these cases were included in the analyses.

C. Predictive Accuracy

The third assumption is that the statistical model provides an "adequate" representation of the underlying discretionary process—that is, the model does an acceptable job of predicting outcomes. One must exercise caution when interpreting the adequacy of a statistical model, especially in the criminal justice context, because the discretionary choices may not lend themselves to highly accurate statistical modeling, irrespective of the comprehensiveness model.[282] So even when the predictive power is not particularly strong, it may be difficult to imagine that a few case characteristics, if they exist, would lead to clear distinctions between defendants who are noticed for the death penalty and defendants who are not.[283] Idiosyncrasies associated with charging decisions may be evidence of an arbitrary process, and not misspecification of the statistical model because model fit statistics tend to be small or modest when the "true" model has a large residual variance (i.e., a lot of inherent unpredictability).[284] The difficulty associated with traditional model fit measures is often magnified when analyzing micro-level (e.g., court cases), cross-sectional data (i.e., data taken at a single point in time, rather than data

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[279] Gary King & Langche Zeng, *The Dangers of Extreme Counterfactuals*, 14 POL. ANALYSIS 131, 146–51 (2006).

[280] *Id.*

[281] *Id.*

[282] Berk et al., *supra* note 196.

[283] *Id.*

[284] Gary King, *How Not to Lie with Statistics: Avoiding Common Mistakes in Quantitative Political Science*, 30 AM. J. OF POL. SCI. 666, 675 (1986).

that track changes over time), and non-continuous outcome variables (e.g., yes/no capital charging decisions).[285] Statistical models of cross-sectional micro-level data will typically have lower predictive power because of the greater overall variability in the phenomenon under investigation,[286] and model fit statistics for non-continuous outcomes typically do not scale to unity, even when the model fits the data perfectly, so the predictive power will be lower than an equally predictive model for continuous data.[287]

With the aforementioned caveats in mind, I calculated several different model fit statistics. The first measure, Tjur's *D*, compares the predicted probability of observing an outcome when the outcome is actually observed to the predicted probability of observing an outcome when the outcome is not observed.[288] The statistic has a range from 0% to 100%, and the larger the statistic, the more accurately the model predicts charging decisions. Tjur's *D* for the pooled (i.e., the model that includes both African American- and Caucasian-victim cases), African American-victim, and Caucasian-victim models are, respectively, 33.2%, 28.6%, and 36.9%. Another model fit statistic, R^2, quantifies the percentage of variation in capital charging decisions explained by the model based on a transformation of the outcome variable rather than the natural binary metric of the outcome.[289] This statistic is most analogous to the traditional R^2 for continuous outcomes.[290] The R^2 for the pooled, African American victim, and Caucasian victim models are, respectively, 46.8%, 39.6%, and 50.3%. These R^2 statistics are very similar to the predictive power of the 230 variable model that was the centerpiece of the statistical evidence offered in *McCleskey* ($R^2 = 47\%$), and although the federal trial court criticized the model's predictive capacity,[291] both an *en banc* Court of Appeals[292] and the Supreme Court[293] assumed the model was valid.

A third, and perhaps a more intuitive, measure of model fit is the percentage of capital charging decisions that were correctly classified. For the pooled, African American-victim, and Caucasian-victim models, the classification rates are, respectively, 79.4%, 84.5%, and 78.2%. The primary shortcoming of the classification measure is that it tends to overestimate model fit when the binary outcome is extremely skewed. Nearly 70% of the cases did not result in a death penalty notice, so there is significant skew

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[285] WOOLDRIDGE, *supra* note 119, at 43–44, 536.

[286] *Id.* at 43–44.

[287] *Id.* at 536.

[288] Tue Tjur, *Coefficients of Determination in Logistic Regression Models – a New Proposal: The Coefficient of Discrimination*, 63 AM. STATISTICIAN 366, 369 (2009). Formally, *Tjur's D* = $Pr(y = 1|y = 1) - Pr(y = 1|y = 0)$. The first term on the right-hand side of the equation is defined as the sensitivity of the model (i.e., how well the model predicts the presence of a death penalty notice in a case when, in fact, the case has been noticed for the death penalty) and the second term is the false positive rate.

[289] Richard D. McKelvey & William Zavoina, *A Statistical Model for the Analysis of Ordinal Level Dependent Variables*, 4 J. MATHEMATICAL SOC. 103, 111–12 (1975).

[290] Frank A.G. Windmeijer, *Goodness-of-Fit Measures in Binary Choice Models*, 14 ECONOMETRIC REV. 1995 (2007).

[291] McCleskey v. Zant, 580 F. Supp. 338, 361 (N.D. Ga. 1984).

[292] McCleskey v. Kemp, 753 F.2d 877, 895 (11th Cir. 1985).

[293] McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987).

present. This also explains why the classification rate for the African American-victim model (84.5%) is higher than the pooled and Caucasian-victim models, but the African American-victim model explains the least amount of variance (39.6%). Only 18% of African American-victim cases resulted in a death penalty notice, so there was much less variability in the outcome variable, whereas 44% of Caucasian-victim cases received a death notice. For this reason, the Tjur's D and R^2 statistics are generally preferable to the simple classification measure.[294]

As I noted in Part IV.B, the statistical models analyzed in this study included nearly all of the case characteristics deemed to be primary determinants of capital charging decisions: statutorily defined death eligibility factors, concurrent criminal charges, defendant's prior criminal history, and the relationship between the defendant and the victim. Recent litigation over Connecticut's capital punishment system included statistical models with nearly an identical set of variables, and such models were deemed probative by the state supreme court.[295] It is unlikely, then, that model fit could be substantially improved by including some heretofore elusive legally relevant variable.[296] Moreover, the fundamental task of the statistical models is to include all theoretically relevant variables to the charging decision. Once that task has been accomplished, the Court's equal protection jurisprudence requires the prosecutor to demonstrate the decision was based upon reason rather than caprice or emotion.[297]

D. Potential Omitted Variables

Clearly a statistical model's predictive power and the inclusion of theoretically relevant variables are closely connected, although low explanatory power does not necessarily imply that important variables have been omitted.[298] There is no way to directly test the unconfoundedness assumption analyzing non-experimental data.[299] Other approaches to address potential omitted variable bias, such as the instrumental variable framework popularized by econometricians which isolates the effect of an explanatory variable from possible omitted variables, are generally inappropriate for

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[294] Two additional measures of model fit, the Akaike Information Criterion (AIC) and the Bayesian Information Criterion (BIC) were used to assess whether the inclusion of information about the victim's race substantially improved the fit of model. These statistics do not evaluate any particular model in an absolute sense, rather they permit an assessment of competing models. The smaller the AIC and BIC statistics, the better the model fits the data. The AIC and BIC for the race-inclusive models were both lower than the race-exclusive models (race-inclusive: AIC = 1058, BIC = 1243; race-exclusive: AIC = 1124, BIC = 1304). WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 306 (4th ed. 2000).

[295] Donohue, *supra* note 165, at 646.

[296] *See supra* note 196 and accompanying text.

[297] Wayte v. United States, 470 U.S. 598, 608 (1985) ("It is appropriate to judge selective prosecution claims according to ordinary equal protection standards."); *accord McCleskey*, 481 U.S. at 292; United States v. Armstrong, 517 U.S. 456, 465 (1996).

[298] *See* Part II.B.

[299] Pager & Western, *supra* note 47, at 222 ("[I]n the contemporary United States where acts of discrimination are likely to be subtle and covert, it is extremely difficult to measure discrimination directly.").

examining the effects of immutable characteristics, such as race/ethnicity and gender.[300] A recent report from the National Research Council on measuring racial discrimination underscored this fact: "[t]he most common approach for dealing with omitted variable bias is to use an instrumental variables estimator . . . . [but] [t]his strategy is not likely to be available in observational studies in the case of race . . . . the best we are likely to be able to do with observational studies of racial discrimination is to specify the model as completely as possible."[301] There are, however, other approaches that permit an examination of the sensitivity of the results to alterations to the statistical model. One cannot state with certainty whether the omitted variable bias exists; nevertheless, these approaches underscore the robustness of our results. I adopt two general approaches to assess the robustness of my findings: (a) model uncertainty test and (b) causal bounds test.

Model Uncertainty Test. The first approach examines the stability of the magnitude of the race-of-victim effect across various combinations of the explanatory variables in the model, as well as different measurements of those explanatory variables.[302] The rationale for this typical type of test is that there are many plausible statistical models, but researchers typically only report a small number of preferred causal estimates and neglect to inform the audience about the sensitivity of the results stemming from changes in the model specification. If the results reported can be nullified by small, sensible changes in the model specification, then one should be cautious about the existence of a "true" causal relationship. Sociologists Cristobal Young and Katherine Holsteen have explained that "[r]elaxing model assumptions makes the results more empirical, less model dependent, and focuses attention on the model ingredients that are critical to the results."[303] I examine the robustness of the race-of-victim effect by estimating thousands of statistical models across combinations of explanatory variables (and different measurements of some of those variables) and then calculating both a weighted and unweighted average causal estimate for race-of-victim.[304] Roughly speaking, the weights are based upon the predictive capacity, i.e., model fit, with estimates from superior fitting models given greater weights.[305] The weighted estimates are

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[300] Greiner & Rubin, *supra* note 136.

[301] NAT'L RESEARCH COUNCIL, *supra* note 53, at 141–42; *see also* Pager & Western, *supra* note 47, at 222-23 (advocating the use of audit studies to measure discrimination to limit the likelihood of omitted variable bias).

[302] Steven Deller et al., *Model Uncertainty in Ecological Criminology: An Application of Bayesian Model Averaging with Rural Crime Data*, 4 INT'L J. OF CRIMINOLOGY & SOC. THEORY 683, 684 (2011) (explaining the sources of model uncertainty).

[303] Young & Holsteen, *supra* note 226, at 32.

[304] An example of measurement uncertainty that I examine is the level of statutorily defined aggravation present in each case. There are ten aggravating circumstances enumerated in Georgia's capital statute, so measurement of the level of aggravation might include a summation scale indexing the presence of the various aggravating factors in a case. Alternatively, the individual aggravating circumstances could be included in the model. The former approach assigns equal weight to each aggravating factor, whereas the latter approach assigns an empirically-derived weight for each aggravating circumstance and the sum of those individual effects captures of "total effect" of the level of aggravation in the case.

[305] *See generally* Young & Holsteen, *supra* note 226, at 30.

helpful in calculating a single measure that averages over the entire modeling distribution.[306] The unweighted estimates, on the other hand, provide insight into the distribution of estimates that can be obtained from the data.[307]

The *weighted* average causal effect of the victim's race is a 18.4 percentage point increase the probability of a capital charge (for Caucasian-victim cases).[308] This estimate is larger than the effect of *"C"* reported in Table 4 (16.1), which can be attributed to the weighting algorithm that privileges simpler models over more complex models, all else equal. According to this estimate, 74.1% of the race-of-victim gap results from disparate treatment. Of greater interest, however, are the features of the distribution of the unweighted causal estimates. The 95% confidence interval of the race-of-victim effect reported in Table 4 is [11.7, 20.4]. In other words, racially disparate treatment accounts for as low as 47.8% or as high as 83.5% of race-of-victim gap in capital charging. From this modeling distribution of estimates, I calculate the *robustness ratio* (RR), which is the race-of-victim effect from Table 4 ($\beta_{CV} = 0.161$) divided by the modeling standard error ($s.e. = 0.022$). The RR statistic is analogous to the *t*-statistic and examines the probability that the race-of-victim effect is "zero" in across the various model specifications. The critical value for the *t*-statistic is 1.98. The RR for the race-of-victim effect is 7.3, providing strong evidence that the effect of victim's race on capital charging decisions is not simply an artifact of my model specification ($RR = 7.3;\ p < 0.001$).

Causal Bounds Test. The second approach I used to assess the sensitivity of the causal effect of race-of-victim is a "bounds test."[309] If there are unmeasured variables that simultaneously affect whether a case has a Caucasian victim and a prosecutor files a capital charge, even after holding case characteristics constant, then the causal estimate of the victim's race may be an artifact of these unmeasured factors. This is sometimes called "positive selection" and leads to upward bias in the estimated race-of-victim effect. A causal bounds test quantifies how strong this omitted variables bias

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[306] *Id.*; *accord* Gary King et al., *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. OF POL. SCI. 341, 350–51 (2000) (explaining that model averaging is the "best choice" when the researcher is interested in a single estimate of an explanatory variable because it removes modeling uncertainty by averaging over the modeling distribution of the estimate).

[307] There is a "conceptual analogy between the *sampling* distribution and the *modeling* distribution. While the sampling distribution shows whether a point estimate is statistically significant (i.e., different from zero) [in the overall population], the modeling distribution shows whether it is different from those of other plausible models." Young & Holsteen, *supra* note 226, at 30 (emphasis in original).

The Georgia data comprise the entire population of death-eligible homicides, and not a mere sample, so the uncertainty in the estimate of the race-of-victim effect arises solely from model uncertainty. *See supra* notes 226 & 236 and accompanying text.

[308] The estimate is based on models that potentially include defendant's race as a control variable. As I explained earlier, *see supra* note 231, there is good reason to exclude race-of-defendant from these models separate disparate impact from disparate treatment. When defendant's race is excluded from the model, the race-of-victim effect increases to a 21 percentage point increase in the likelihood of a capital charge.

[309] PAUL R. ROSENBAUM, OBSERVATIONAL STUDIES 105 (2d ed. 2002).

must be in order to undermine the estimate of the causal effect.[310] If the results are very sensitive to the effect potential unmeasured factors, then the unconfoundedness assumption might be unwarranted. The bounds test differs from the model uncertainty tests discussed, *supra*, in that the focus is on the magnitude of the effect of unobserved characteristics rather than the sensitivity of the causal estimates to different combinations of observed factors.

The capital charging decision is a dichotomous variable (yes/no), so I use a variation of the bounds test tailored for this type of outcome. The procedure works as follows: I first match pairs of cases across the different race-of-victim groups that otherwise have the same observed case characteristics.[311] I then manipulate the odds that the matched cases have the same probability of being selected into either race-of-victim group. Under the assumption of unconfoundedness, the cases have even odds of being in either group, so the odds ratio, γ (*gamma*), equals one. By changing $\gamma = 2$, defendants with similar observed case characteristics could differ in their odds of having a Caucasian victim as opposed to an African American victim by a factor of 2. Stated differently, γ is a measure of the degree of departure from a study that is free of hidden bias.[312]

The bounds test produces two test statistics, Q_{MH}^{+} and Q_{MH}^{-}, for each value of γ, that are used to test the null hypothesis that the model has, respectively, overestimated and underestimated the causal effect. For the purposes of this study, I only focus on Q_{MH}^{+} because my interest is in the increased probability of a capital charge when the victim is Caucasian. The bounds test reveals that the race-of-victim estimate is insensitive to hidden bias even when that bias would increase the odds of differential selection up to a factor of 2.6 ($Q_{MH}^{+} = 1.71; p < 0.05$). To provide some context, only two case characteristics increase the odds of capital charge by a factor greater than 2: the number of statutory aggravating circumstances (2.4) and victim's race (3.3). And when case characteristics are used to "predict" the race of the victim in the case, no case characteristic increases the odds of the victim being Caucasian by a factor greater than 2. These findings suggest that it is unlikely that there are unmeasured factors that have remained unidentified in the research literature for more than 40 years which satisfy the conditions that (1) the effect is not proxied by one or more legally relevant variables routinely included in statistical models of capital charging

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[310] STEPHEN L. MORGAN & CHRISTOPHER WINSHIP, COUNTERFACTUALS AND CAUSAL INFERENCE: METHODS AND PRINCIPLES FOR SOCIAL RESEARCH 172–79 (2007).

[311] Matching is based on each case's conditional probability (i.e., propensity score) of having either a Caucasian or African American victim, given the other case characteristics. The assumption of the algorithm is that the cases with the same propensity score have the same distribution of observable and (hopefully) unobservable characteristics, independent of the victim's race. In other words, for a given propensity score, the likelihood of the case having a Caucasian or African American victim should be, on average, observationally identical. A measure of racial disparity can be calculated from the average of the differences across all matched pairs. Paul R. Rosenbaum & Donald B. Rubin, *The Central Role of the Propensity Score in Observational Studies for Causal Effects*, 70 BIOMETRIKA 41, 48 (1983). For the Georgia data, the matching algorithm reveals a 24.2 percentage point racial disparity in capital charging.

[312] The bounds test relaxes the assumption that the matched cases are similar along both observed and unobserved characteristics by altering the degree of dissimilarity between the matched cases based on unobserved characteristics.

and (2) would increase the odds of a case having a Caucasian victim and being noticed for the death penalty by a factor significantly larger than the effect sizes of nearly all legally relevant case characteristics commonly included in models of capital charging.

As I emphasized earlier, the model uncertainty and bounds tests do not unequivocally preclude the potential of omitted variable bias, but they do attempt to quantify the degree of sensitivity of the race-of-victim effect to alterations in the underlying assumptions of the model. These robustness checks suggest that the data are not unduly delicate to the key assumptions of the statistical models. The results should be sufficient to give rise to an inference of discrimination that would require prosecutors to offer more than "general assertions that [they] did not discriminate or that they properly performed their official duties, [and require them to] demonstrate that the challenged effect [is] due to permissible racially neutral selection criteria."[313] Granted, the statistical models do not include every conceivable variable relevant to a capital charging decision, but that standard has not been applied to statistical evidence of purposeful discrimination in jury selection and Title VII cases.[314] The relevant inquiry is whether the models "include those variables that account for the major factors that are likely to influence decisions."[315] The statistical models I analyze in this study account for similar information as other models deemed probative of racial discrimination in the capital charging-and-sentencing process by state supreme courts.[316] And even if deemed insufficient to establish a *prima facie* case of an equal protection violation, the results, at minimum, should permit a defendant to "make a credible showing" of the existence of discriminatory effect and discriminatory treatment[317] to warrant an inspection of the prosecution's files.[318]

CONCLUSION

In his historic dissenting opinion in *Glossip v. Gross*, Justice Breyer remarked that the "arbitrary imposition of punishment is the antithesis of the rule of law. [...] How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of

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[313] McCleskey v. Kemp, 481 U.S. 279, 352 (1987) (Blackmun, J., dissenting).

[314] *Id.* at 327–28.

[315] *Id.*

[316] *See, e.g.*, Donohue, *supra* note 165; Paternoster & Brame, *supra* note 277; David C. Baldus, *Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court* (N.J. Judiciary 1991).

[317] United States v. Bass, 536 U.S. 862, 863 (2002); United States v. Armstrong, 517 U.S. 456, 470 (1996).

[318] United States v. Bass, 266 F.3d 532, 540 (6th Cir. 2001); United States v. Jones, 159 F.3d 969, 978 (6th Cir. 1998); United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987); United States v. Tuitt, 68 F. Supp. 2d 4, 6 (D. Mass. 1999).

law?"[319] He described the vast social scientific literature over the past 40 years documenting the unconstitutional administration of the death penalty, including "numerous studies [that] have concluded that individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty."[320] According to the Justice, the "circumstances and the evidence of the death penalty's application have radically changed"[321] since the Court upheld the constitutionality of the death penalty forty years earlier in *Gregg v. Georgia*.[322] He "believe[s] that it is now time to reopen the question" of the constitutionality of the administration of the death penalty and invited "full briefing that would allow [the Court] to scrutinize [the empirical scholarship on the administration of the death penalty] with more care."[323]

This Article accepted Justice Breyer's invitation and set forth a framework that more carefully parses race-of-victim differences in capital charging than prior studies into the part explained by actual differences in the defendant's level of culpability and the part explained by prosecutors' racially discriminatory treatment of these cases. The model is directly responsive to the Court's critique of much of the existing statistical evidence of racial discrimination—its inability to explicitly connect racial differences in *process* to racial differences in *outcomes*. The approach I adopt quantifies the extent of prosecutorial "shifting standards" in capital charging according to the victim's race and establishes the foundation for an articulation of a more powerful and appropriately nuanced story about the role of race on prosecutorial decision-making.

Accompanying my methodological contribution is an important substantive one: race still matters *a lot* in capital charging decisions in Georgia. And there is good reason to believe that similar results would be obtained in other jurisdictions based on the similarity of empirical findings across studies,[324] as well as the fact that many states modeled their own death penalty statutes after Georgia's (which, itself, was based on the American Law Institute's Model Penal Code).[325] I discover that 60%-80% of the race-of-victim gap in capital charging results from disparate treatment.[326] More importantly, I show that many of the case characteristics relevant to defendant culpability (i.e., aggravation and mitigation evidence) have radically different effects on the likelihood that the prosecutor seeks the death penalty *depending on the victim's race in the case*. In other words, I

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[319] Glossip v. Gross, 135 S. Ct. 2726, 2759, 2764 (2015). *See* Lincoln Caplan, *Richard Glossip and the End of the Death Penalty*, THE NEW YORKER, Sept. 30, 2015 (noting that Justice Breyer's "widely commented-on dissent" will be a point of reference for the ultimate abolition of the death penalty).

[320] *Glossip*, 135 S. Ct. at 2760.

[321] *Id.* at 2755.

[322] Gregg v. Georgia, 428 U.S. 153 (1976).

[323] *Glossip*, 135 S. Ct. at 2755, 2759.

[324] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 328 (1987) (Brennan, J., dissenting) (the "evaluation of [statistical] evidence cannot rest solely on the numbers themselves. We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience").

[325] Sherod Thaxton, *Un-Gregg-Ulated: Capital Charging and the Missing Mandate of* Gregg v. Georgia, 11 DUKE J. OF CONST. L. & PUBLIC POL'Y 145, 145–46 (2016).

[326] *See supra* notes 231 & 267 and accompanying text.

demonstrate how race influences the process of prosecutorial decision-making that leads to racially disparate outcomes.

Of course, any statistical approach to measuring discrimination will only be as reliable as the assumptions of the underlying statistical model are reasonable. So in addition to presenting a novel framework for examining racial discrimination in capital charging, I also describe and implement various diagnostic tools to examine the sensitivity of my results. These tools, like the statistical model to which they are applied, are also responsive to the Court's general concerns about the reliability of statistical evidence. The diagnostic tools, along with underlying framework, constitute a template for the investigation of discriminatory dynamics in the capital context, and therefore are critically important to how judges, lawyers, legislators, and legal scholars think about the constitutional constraints on prosecutorial decision-making and the courts' role in ensuring the rule of law remains operative. As Justice Brennan eloquently explained in *McCleskey*, the "diminished willingness to render [capital punishment] when blacks are victims, reflects a devaluation of the lives of black persons. [...] Race is a consideration whose influence is expressly constitutionally proscribed...and evidence that race may play even a modest role in levying [capital punishment] should be enough to characterize that [punishment] as [unconstitutional].[327]

[327] *McCleskey*, 481 U.S. at 326, 340-41 (Brennan, J., dissenting).

TABLE 1: SUMMARY STATISTICS

Variables	Mean/ Proportion	Std. Dev.	Min	Max
DP Notice Filed	0.301	--	0	1
Total Statutory Aggravators	2.224	1.091	1	7
Year of Offense	--	--	1993	2000
# of Defendants	1.793	1.109	1	7
Defendant White	0.248	--	0	1
Defendant Black	0.728	--	0	1
Defendant Latino	0.018	--	0	1
Defendant Asian/Pacific Islander	0.005	--	0	1
Defendant Male	0.946	--	0	1
Defendant Age	27.150	9.935	17	69
Defendant # of Violent Crimes	2.100	1.413	1	16
Defendant # of Contemp. Felonies	1.724	1.602	0	9
Defendant # of Prior Felonies	0.514	1.332	0	10
Defendant has Children	0.583	--	0	1
Defendant Employed	0.562	--	0	1
Defendant Married	0.179	--	0	1
Defendant High School Grad	0.262	--	0	1
Defendant Military Service	0.084	--	0	1
Defendant History of Drug Use	0.506	--	0	1
Defendant Psychiatric Status	1.219	0.508	1	4
Defendant IQ (Culture Fair)	100.110	14.833	50	151
Defendant WRAT	8.089	3.494	1	13
Defendant Family History	1.298	1.224	0	5
Monetary Motive	0.577	--	0	1
Sex-Crime Motive	0.053	--	0	1
Defendant is "Trigger Person"	0.853	--	0	1
Firearm Homicide	0.644	--	0	1
Strength of Evidence	0.729	0.778	0	3
Defendant Born in Georgia	0.639	--	0	1
# of Victims	1.185	0.504	1	6
Victim White	0.448	--	0	1
Victim Black	0.497	--	0	1
Victim Latino	0.034	--	0	1
Victim Asian/Pacific Islander	0.021	--	0	1
Victim Female	0.368	--	0	1
Victim Age	36.720	18.200	0	97
Victim Stranger	0.350	--	0	1
County	--	--	1	159
Judicial Circuit	--	--	1	46
Total Cases	***1,238***			

Note: Mean (average) values and standard deviations are reported for ordinal and continuous variables; proportions are reported for binary variables.

TABLE 2: SUMMARY STATISTICS (DISAGGREGATED BY RACE-OF-VICTIM)

Variables	Mean/ Proportion (White Victim)	Mean/ Proportion (Black Victim)	Mean/ Proportion (Difference)
DP Notice Filed	0.434	0.189	0.245
Total Statutory Aggravators	2.373	2.113	0.260
Year of Offense	--	--	--
# of Defendants	1.775	1.753	0.022
Defendant White	0.516	0.028	0.488
Defendant Black	0.461	0.967	0.506
Defendant Latino	0.020	0.003	0.017
Defendant Asian/Pacific Islander	0.003	0.002	0.001
Defendant Male	0.940	0.959	0.019
Defendant Age	27.554	27.494	0.060
Defendant Prior Violent Crimes	2.132	2.085	0.047
Defendant # of Contemp. Felonies	1.874	1.670	0.204
Defendant # of Prior Felonies	0.479	0.541	0.062
Defendant has Children	0.554	0.632	0.078
Defendant Employed	0.564	0.573	0.009
Defendant Married	0.174	0.188	0.014
Defendant High School Grad	0.256	0.295	0.040
Defendant Military Service	0.091	0.099	0.008
Defendant History of Drug Use	0.546	0.471	0.075
Defendant Psychiatric Status	1.271	1.152	0.119
Defendant IQ (Culture Fair)	102.409	98.956	3.453
Defendant WRAT	8.428	7.708	0.723
Defendant Family History	1.292	1.340	0.041
Monetary Motive	0.677	0.472	0.205
Sex-Crime Motive	0.046	0.068	0.021
Defendant is "Trigger Person"	0.828	0.874	0.045
Firearm Homicide	0.618	0.664	0.046
Strength of Evidence	0.863	0.615	0.248
Defendant Born in Georgia	0.618	0.664	0.046
# of Victims	1.233	1.214	0.019
Victim White	--	--	--
Victim Black	--	--	--
Victim Latino	--	--	--
Victim Asian/Pacific Islander	--	--	--
Victim Female	0.390	0.363	0.027
Victim Age	42.550	31.337	11.214
Victim Stranger	0.450	0.247	0.203

County	--	--	--
Judicial Circuit	--	--	--
Total Cases	***554***	***613***	

Note: Mean (average) values are reported for ordinal and continuous variables; proportions are reported for binary variables. The number in the final column is the difference in those means/proportions across the two groups.

TABLE 3: FACTS-OF-CASE EFFECTS (DISAGGREGATED BY RACE-OF-VICTIM)

Variables	Model $P(N_W)$ (White Victim)	Model $P(N_B)$ (Black Victim)	Difference in Effect
Total Statutory Aggravators	0.178	0.093	0.084
Year of Offense	--	--	--
# of Defendants	0.041	-0.013	0.054
Defendant White	0.117	0.044	0.074
Defendant Male	0.031	-0.007	0.038
Defendant Age	-0.002	0.001	0.003
Defendant # of Violent Crimes	0.036	0.028	0.009
Defendant # of Contemp. Felonies	0.004	0.005	0.001
Defendant # of Prior Felonies	0.007	-0.032	0.039
Defendant has Children	0.038	0.034	0.004
Defendant Employed	0.014	0.090	0.075
Defendant Married	0.051	-0.017	0.067
Defendant High School Grad	0.094	-0.037	0.131
Defendant Military Service	-0.095	-0.010	0.085
Defendant History of Drug Use	0.052	0.055	0.003
Defendant Psychiatric Status	-0.003	0.029	0.032
Defendant IQ (Culture Fair)	-0.003	-0.002	0.001
Defendant WRAT	0.001	0.016	0.015
Defendant Family History	0.027	0.006	0.022
Monetary Motive	-0.027	-0.067	0.040
Sex-Crime Motive	0.064	0.046	0.018
Defendant is "Trigger Person"	0.017	0.057	0.039
Firearm Homicide	0.087	-0.014	0.101
Strength of Evidence	0.105	0.070	0.035
Defendant Born in Georgia	-0.029	-0.044	0.015
# of Victims	0.042	0.062	0.020
Victim Female	0.065	0.044	0.021
Victim Age	-0.002	0.000	0.001
Victim Stranger	0.009	0.008	0.001

Note: The numbers in the first two columns are the effects of the corresponding case characteristics on the probability that a death penalty notice was filed in, respectively, Caucasian-victim $P(N_W)$ and African American-victim $P(N_B)$ cases. The number in the final column is the difference in those effects across the two groups.

TABLE 4: TWO-FOLD DECOMPOSITION OF THE RACE-OF-VICTIM GAP IN CAPITAL CHARGING

	Overall	% of Total Gap
White-Victim $P(N_W)$	0.434	
Black-Victim $P(N_B)$	0.189	
Gap (G)	0.245	
Endowment (E)	0.084	**34.4%**
Coefficient (C)	0.161	**65.6%**

Variables	(E)	Prop. Change (E)	(C)	Prop. Change (C)
Total Statutory Aggravators	0.038	0.155	0.025	0.102
Year of Offense	--	--	--	--
# of Defendants	0.000	0.000	-0.001	-0.004
Defendant White	0.032	0.131	0.027	0.110
Defendant Male	0.000	0.000	0.040	0.163
Defendant Age	0.000	0.000	-0.001	-0.004
Defendant # of Violent Crimes	0.001	0.004	-0.001	-0.004
Def. # of Contemp. Felonies	0.001	0.004	-0.001	-0.004
Defendant # of Prior Felonies	0.001	0.004	0.001	0.004
Defendant has Children	-0.003	-0.012	-0.005	-0.020
Defendant Employed	0.000	0.000	-0.045	-0.184
Defendant Married	0.000	0.000	0.014	0.057
Defendant High School Grad	0.000	0.000	0.042	0.171
Defendant Military Service	0.000	0.000	-0.007	-0.029
Defendant History of Drug Use	0.003	0.012	-0.011	-0.045
Defendant Psychiatric Status	0.001	0.004	-0.001	-0.004
Defendant IQ (Culture Fair)	-0.009	-0.037	-0.000	0.000
Defendant WRAT	0.006	0.024	-0.000	0.000
Defendant Family History	-0.001	-0.004	0.000	0.000
Monetary Motive	-0.006	-0.024	0.031	0.127
Sex-Crime Motive	-0.001	-0.004	0.000	0.000
Defendant is "Trigger Person"	-0.001	-0.004	-0.054	-0.220
Firearm Homicide	-0.001	-0.004	0.067	0.273
Strength of Evidence	0.022	0.090	0.001	0.004
Defendant Born in Georgia	0.001	0.004	0.019	0.078
# of Victims	0.001	0.004	-0.054	-0.220
Victim Female	0.002	0.008	-0.001	-0.004
Victim Age	-0.008	-0.033	-0.002	-0.008
Victim Stranger	0.002	0.008	0.004	0.016

Note: Top Panel: $P(N_W)$ and $P(N_B)$ are, respectively, the probability a death penalty notice is filed in a Caucasian-victim and African American-victim case. Gap (G) is the

difference in the probability of a death notice between the two groups of cases. "Endowment (*E*)" is the predicted change in (*G*) that would occur if the two groups of cases had identical case characteristics, in the aggregate. "Coefficient (*C*)" is the predicted change in (*G*) if the two groups of cases were treated identically by prosecutors. Bottom Panel: "Column (*E*)" is the predicted change in (*G*) if the two groups of cases were identical on that specific case characteristic; "Column Prop. Change (*E*)" is the proportional change in (*G*). "Column (*C*)" is the predicted change in (*G*) if the two groups of cases were treated identically on that specific case characteristic; "Column Prop. Change (*C*)" is the proportional change in (*G*).

TABLE 5: THREE-FOLD DECOMPOSITION OF THE RACE-OF-VICTIM GAP IN CAPITAL CHARGING

	Overall	% of Total Gap
White-Victim $P(N_W)$	0.434	
Black-Victim $P(N_B)$	0.189	
Gap (G)	0.245	
Endowment (E)	0.091	**37.3%**
Coefficient (C)	0.151	**61.4%**
Interaction (CE)	0.003	**1.3%**

Variables	(E)	(C)	(CE)
Total Statutory Aggravators	0.027	0.020	0.005
Year of Offense	--	--	--
# of Defendants	-0.000	-0.001	-0.000
Defendant White	0.038	0.001	-0.000
Defendant Male	0.000	0.028	-0.001
Defendant Age	0.000	-0.000	-0.001
Defendant # of Violent Crimes	0.001	-0.000	0.000
Def. # of Contemp. Felonies	0.001	0.000	-0.001
Defendant # of Prior Felonies	0.003	0.002	-0.003
Defendant # of Children	-0.004	-0.014	0.001
Defendant Employed	-0.001	-0.049	0.002
Defendant Married	0.000	0.014	-0.001
Defendant High School Grad	0.002	0.038	0.000
Defendant Military Service	0.000	-0.007	-0.001
Defendant History of Drug Use	0.004	-0.012	-0.001
Defendant Psychiatric Status	0.004	0.002	0.002
Defendant IQ (Culture Fair)	-0.006	-0.001	0.002
Defendant WRAT	0.013	0.005	-0.010
Defendant Family History	0.000	0.001	-0.002
Monetary Motive	-0.013	0.021	0.001
Sex-Crime Motive	-0.001	0.001	-0.000
Defendant is "Trigger Person"	-0.002	-0.048	0.000
Firearm Homicide	0.001	0.064	0.002
Strength of Evidence	0.022	-0.001	0.001
Defendant Born in Georgia	0.003	0.023	-0.000
# of Victims	0.002	0.001	0.001
Victim Female	0.002	0.001	-0.000
Victim Age	-0.007	0.004	-0.011
Victim Stranger	0.005	-0.001	-0.005

Note: Top Panel: $P(N_W)$ and $P(N_B)$ are, respectively, the probability a death penalty notice is filed in a Caucasian-victim and African American-victim case. Gap (G) is the difference in the probability of a death notice between the two groups of cases. "Endowment (E)" is the predicted change in (G) that would occur if the two groups of cases had identical case characteristics, in the aggregate. "Coefficient (C)" is the predicted change in (G) if the two groups of cases were treated identically by

prosecutors. "Interaction (*CE*)" is the predicted change in (*G*) resulting from modifying (*E*) and (*C*) jointly rather than independently. Bottom Panel: "Column (*E*)" is the predicted change in (*G*) if the two groups of cases were identical on that specific case characteristic. "Column (*C*)" is the predicted change in (*G*) if the two groups of cases were treated identically on that specific case characteristic. "Column (*CE*)" is predicted change in (*G*) resulting from the simultaneous effect of (*E*) and (*C*) for that specific case characteristic.

APPENDIX A: DESCRIPTION OF VARIABLES

CRIME RELATED FACTORS
Statutorily defined aggravating factors; circumstances of murder (commission of felony, domestic altercation, other altercation, gang related, drug-related, sex-crime related); type of murder weapon (firearm, knife, automobile, poison, rope, etc.); motive for killing (jealousy, money, revenge, argument, etc.); confession evidence; weapon evidence; video evidence; date; location (home, business, street, bar, etc.); murder conviction.
DEFENDANT RELATED FACTORS[328]
Number of defendants; race/ethnicity (African American, Asian/Pacific Islander, Caucasian, Hispanic, Other); sex; age; level of education (some high school, high school grad/GED, some college, college grad); employment status; marital status; number of children; religious affiliation (Catholic, Hindu, Jehovah Witness, Jewish, Mormon, Muslim, None, Protestant, Other); military service; history of drug use; psychiatric status (no impairment, minimal, serious, severe); IQ (Culture Fair Test); Wide Range Achievement Test (WRAT) (reading, math, spelling); troubled family history (alcoholism, criminality, drug abuse, absentee father, absentee mother, emotional/psychological abuse, physical abuse); prior felony conviction; prior murder conviction; trigger-person.
VICTIM RELATED FACTORS
Number of victims; race/ethnicity (African American, Asian/Pacific Islander, Caucasian, Hispanic, Other); sex; age; relationship with defendant (stranger, intimate partner, family, friend).

[328] The Georgia Diagnostic and Classification Prison conducts diagnostic processing for the state's correctional system. Inmates undergo a battery of tests and diagnostic questionnaires, including the Culture Fair IQ test, Wide Range Achievement Test (WRAT) (reading, math, and spelling), history of substance abuse (summary & detailed report); latest mental health treatment; psychiatric test (based on PULHES Factor), assessment of inmate's family background, alcoholism and/or drug abuse, and presence/absence of parents absent during childhood.

APPENDIX B: PROGRESSION OF GEORGIA DEATH PENALTY CASE (ABRIDGED)

STAGE	DESCRIPTION
First Appearance	Accused presented before a magistrate judge within 48 (warrant) or 72 (without warrant) hours. Unif. Super. Ct. R. 26.1 (2007).
Grand Jury Indictment	Grand jury returns an indictment charging a capital offense within 180 days. Ga. Code Ann. § 17-7-50.
Appointment of Counsel	Pursuant to the Georgia Indigent Defense Act of 2003 (GIDA), if the accused is eligible, she must be appointed two attorneys before she is called upon to plea to the charges, which generally occurs at the arraignment. Unif. App. R. II(A)(1).
Pretrial Conference	Pretrial conference must be held as soon as possible after indictment and before arraignment, and the conference must be recorded and transcribed. Prosecuting attorney must announce intention to seek the death penalty and then file a notice of intent with the clerk of the superior court. The superior court must then transmit the notice to the clerk of the Supreme Court of Georgia. Unif. App. R. IIC(1) (2007).
Arraignment	During the arraignment, the court must read the indictment and ask the defendant to plead to the capital felony and any lesser-included offenses charged. The defendant is allowed to plead guilty, not guilty, or mentally incompetent to stand trial; *nolo contendere* pleas are disallowed. Ga. Code Ann. § 17-7-95.
Capital Voir Dire	The court must empanel forty-two prospective jurors from which the state and defense must select a total of twelve jurors and one or more alternative jurors, if deemed necessary by the judge. Ga. Code Ann. §§ 15-12-160, 168.
Capital Trial	Capital cases are conducted in two phases. If the defendant is convicted of capital murder at the conclusion of the guilt/innocence phase, the case proceeds to the penalty phase where both the prosecutor and defense counsel may present witnesses and evidence regarding the statutory aggravating circumstances, as well as non-statutory aggravating and mitigating circumstances. The jury *may* sentence the defendant to death if, and only if, they find one or more statutory aggravating circumstance beyond a reasonable doubt. Ga. Code Ann. § 17-10-31.
Post-Sentencing and Direct Appellate Proceedings	Following a sentence of death, the defendant may challenge her conviction or death sentence by: filing a motion for a new trial with the superior court or filing a direct appeal with the Georgia Supreme Court. The appeal to the Georgia Supreme Court is automatic and may not be

	waived by the defendant. Ga. Code Ann. § 17-10-35.
State Post-Conviction Proceedings (Habeas Corpus)	A death-sentenced inmate may petition for a writ of habeas corpus to challenge the denial of her rights under the Georgia Constitution. A petitioner may appeal the denial of her petition to the Georgia Supreme Court. Ga. Code Ann. § 9-14-1.
Federal Post-Conviction Proceedings (Habeas Corpus)	A death-sentenced inmate may petition for a writ of habeas corpus to challenge the denial of her rights under the U.S. Constitution. A petitioner may appeal the denial of her petition to the federal appellate court. 28 U.S.C. § 2254.
Clemency	A death-sentenced inmate may apply for a pardon or commutation of her sentence to the State Board of Pardon and Paroles. Following the review of the case, each Board member will individually vote on the case. A majority vote is required in order to grant a pardon or commute a death sentence. Ga. Const. Art. 4, § 2, ¶ II(a).
Execution	Following exhaustion of her appeals and a denial of clemency by the State Board of Pardon and Paroles, the trial court must schedule an execution date. An inmate may not be executed if she if found to be mentally incompetent. Ga. Code Ann. § 17-10-40, 17-10-61.

Article

THE LIMITS OF LAW IN THE EVALUATION OF MITIGATING EVIDENCE

Emad H. Atiq[*] & Erin L. Miller[†1]

Abstract

Capital sentencers are constitutionally required to "consider" any mitigating evidence presented by the defense. Under Lockett v. Ohio and its progeny, neither statutes nor common law can exclude mitigating factors from the sentencer's consideration or place conditions on when such factors may be considered. We argue that the principle underlying this line of doctrine is broader than courts have so far recognized. A natural starting point for our analysis is judicial treatment of evidence that the defendant suffered severe environmental deprivation ("SED"), such as egregious child abuse or poverty. SED has played a central role in the Court's elaboration of the "consideration" requirement. It is often given what we call "restrictive consideration" because its mitigating value is conditioned on a finding that the deprivation, or a diagnosable illness resulting from it, was an immediate cause of the crime. We point out, first, that the line of constitutional doctrine precluding statutory and precedential constraints on the consideration of mitigating evidence rests on a more general principle that "consideration" demands an individualized, moral—as opposed to legalistic—appraisal of the evidence. When judges restrict the moral principles under which they evaluate the mitigating weight of evidence on the basis of precedent or even judicial custom, they fail to give a reasoned, moral response to the evidence. We articulate a three-factor test for when legalistic thinking of this sort prevents a judge from satisfying the constitutional requirement. Restrictive consideration of SED evidence, in many jurisdictions, is a product of legal convention and thus fails the test. Second, we contend that, when the capital sentencer is a judge rather than a jury, she has a special responsibility to refrain from restrictive consideration of mitigating evidence. The Constitution requires that death sentences must be consistent with community values. Unrestricted consideration of evidence—evaluating its mitigating weight in light of a range of moral principles—ensures that the diverse moral views of the

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[1] The authors are equally responsible for the ideas and writing within this article; the ordering of names is alphabetical.

community are brought to bear on the capital question.

"The sentencer must . . . be able to consider and give effect to [mitigating] evidence in imposing a sentence, so that the sentence imposed . . . reflects a reasoned *moral* response to the defendant's background, character, and crime."[2]

INTRODUCTION

It is well-established law, since *Eddings v. Oklahoma*, that evidence of "severe environmental deprivation" (SED)—such as egregious child abuse, neglect, or poverty—must be "considered" by judges as a mitigating factor during the penalty phase of capital trials.[3] In *Smith v. Texas*, the Supreme Court found unconstitutional under *Eddings* a judicial practice of excluding SED from consideration as a potential mitigating factor unless the deprivation suffered met a narrowly defined condition.[4] Rather than broadening their review of SED, the judges who previously engaged in this practice of outright exclusion switched to a subtly different practice: when SED evidence is presented by the defense, judges declare that they are "considering" SED as a mitigating factor but assign it little to no mitigating weight unless it meets the very same condition.[5] Mitigating factors that receive little to no weight make no difference, as far as we can tell, to the defendant's sentence.[6] The practice raises the question: is judicial treatment of SED evidence consistent with the kind of "consideration" the Constitution requires?

Courts of appeals declined to take a position on the issue—until the Ninth Circuit's ruling in *McKinney v. Ryan* in December 2015.[7] In *McKinney*, the Arizona Supreme Court had dismissed SED evidence as non-mitigating because it did not "causally contribute" to the capital crime, claiming that this counted as "consideration" under *Eddings*. A divided Ninth Circuit, sitting *en banc*, disagreed, finding that the state court failed "to evaluate and give appropriate weight" to that evidence, contrary to *Eddings*, because the causal prerequisite it invoked mirrored the one that, until *Smith*, it had used to wholly exclude most SED evidence from consideration.[8] In an impassioned dissent, Judge Bea described the notion that the Arizona Supreme Court "did not *really* consider [the evidence] even though it used the word 'considering'" as "nonsense."[9] He argued that "giving little or no weight to such evidence [after consideration] is perfectly

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[2] Penry v. Johnson, 532 U.S. 782, 788 (2001) (citations omitted).

[3] 455 U.S. 104, 113 (1982); *see also id.* at 114–15 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence . . . . The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."). Henceforth, we use the same *Eddings* pin citation for all grammatical forms of "consider."

[4] Smith v. Texas, 543 U.S. 37, 45 (2004) (per curiam).

[5] *See* discussion *infra* Part I.

[6] *See* discussion *infra* Parts I, II.

[7] McKinney v. Ryan, 813 F.3d 798, 802 (9th Cir. 2015) (en banc), *cert. denied*, 137 S. Ct. 39 (2016).

[8] *Id.* at 820, 823.

[9] *Id.* at 847 (Bea, J., dissenting) (emphasis in original).

permissible under *Eddings*."[10]

Two dueling approaches to the "consideration" of deprivation evidence underpin this dispute.[11] A fact offered as mitigating by the defendant can only be judged mitigating based on a principle concerning moral responsibility or punishment. On some such principles, the fact might have greater mitigating value than on others. For instance, evidence of an act of kindness of the defendant might be mitigating given the principle that mercy is appropriate towards individuals of decent moral character or the principle that even murderers who may be rehabilitated should be spared execution. When a sentencer draws on just one normative principle, or an unduly restricted range of plausible principles, to explain the evidence's mitigating value, they engage in what we call *restrictive consideration*.[12] Restrictive consideration is not necessarily unlawful, but the consideration found inadequate in *McKinney* was both restrictive and unlawful. In that case, and many others in Arizona, the defendant's deprivation was deemed to have mitigating value *only if* it bore a very particular causal relation to the criminal act: namely, that the SED was an immediate or "specific" cause of the act. (For example, SED causes the crime in the relevant sense when it results in a psychological disorder like PTSD that results in an irresistible impulse or motive to commit the crime in question.) This restriction seems to rest on the principle that a defendant's prior deprivation only diminishes his punishment-worthiness when the deprivation directly causes his intention to commit the crime and negates his responsibility for the crime. The *McKinney* majority sought less restricted consideration, which would have appraised the mitigating significance of the deprivation based on alternative moral principles. In what follows, we demonstrate that numerous such alternative principles exist and are not only plausible but widely accepted.

We welcome *McKinney* as a clarification of the *Eddings* consideration doctrine. We argue that implicit in *Eddings* and its progeny is the attractive ideal that it is unconstitutional for sentencers to limit the moral principles under which they consider mitigating evidence for *legalistic* reasons; in evaluating which moral principles bear on the mitigating significance of evidence presented by the defense, the sentencer should rely exclusively on moral reasoning. *Eddings* explicitly held that capital sentencers must not be constrained by legal norms from considering any relevant mitigating evidence.[13] The holding was an extension of *Lockett v. Ohio*, which held that statutes excluding any mitigating factors from the sentencer's consideration are unconstitutional.[14] *Eddings* elaborated that the sentencer's consideration can be unconstitutionally constrained not just by statutes but also other sources of law, like judicial custom. And legal rules can operate as unconstitutional constraints not just by requiring outright exclusion of

[10] *Id.* at 843–44 (Bea, J., dissenting).

[11] *See* discussion *infra* Parts I, II.

[12] By plausible principles, we mean those that are believed by significant numbers of reasonable persons and should be known to the sentencer. *See* discussion *infra* Part I.

[13] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

[14] Lockett v. Ohio, 438 U.S. 586, 606 (1976).

mitigating factors from consideration, but by subtly pressuring judges to limit the conditions under which evidence counts as mitigating. A later case, *Tennard v. Dretke*, clarified that judge-made rules or conventions limiting when mitigating evidence can be considered also amount to unconstitutional constraints on consideration.[15] We argue that *Lockett*, *Eddings*, and *Tennard*, together, stand for the proposition that a practice of restrictive consideration of mitigating evidence where the restrictions are imposed because judges feel *bound by the law* (in a sense to be made precise) is unconstitutional.

McKinney took a step toward this broader doctrinal interpretation by finding an *Eddings* violation in restrictive consideration of SED induced by an informal judicial practice. However, because the Ninth Circuit based its decision on historical facts specific to the Arizona practice, it missed an opportunity to articulate a general rule for identifying when restrictive consideration counts as unconstitutionally induced by a legal custom or practice under *Eddings*. We seize the opportunity *McKinney* missed, offering a three-factor test for just this purpose that applies most obviously to the review of SED evidence and potentially to the review of mitigating evidence more broadly.

We also present an argument, grounded in an original interpretation of Supreme Court precedent, that restrictive consideration of mitigating evidence may be inherently or *per se* unconstitutional when the sentencer is a judge, even if the judge was not acting on the basis of any assumed legal rules. As the Court has repeatedly emphasized since *Gregg v. Georgia*, a death sentence cannot be constitutionally legitimate unless it enjoys broad-based communal support.[16] This is in part why juries—representing a cross-section of their community—are so extensively involved in the administration of capital punishment in nearly every jurisdiction in the United States legal system. We argue that, because of their comparative disadvantage at fulfilling this constitutional function, judges who issue death sentences have a unique responsibility to consider each piece of mitigating evidence in light of different moral theories that give it the broadest potential mitigating value; and to give significant weight to the evidence if, under some such theories, it has significant mitigating value. Doing so does a better job ensuring that the death penalty if issued would enjoy broad based communal support than a practice of restrictive consideration (even if

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[15] Tennard v. Dretke, 542 U.S. 274, 287 (2004).

[16] *See* Gregg v. Georgia, 428 U.S. 153, 190 (1976) ("Jury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" (citation omitted)); Woodson v. North Carolina, 428 U.S. 280, 297–98 (1976) (reflecting on the importance on the moral views of society in the administration of death penalty). *See also* McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (outlining the capital jury's task of expressing "the conscience of the community on the ultimate question of life or death"); Spaziano v. Florida, 468 U.S. 447, 461 (1984) ("[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.") (quotation marks omitted) (citing *Gregg*, 428 U.S. at 184). *Accord* Steve Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 144 n.232 (2002) ("[T]he case law as a whole indicates that communal values must play a role in capital sentencing.").

morally motivated). Given the common and (we argue) reasonable belief that SED is inherently mitigating, judges should give unrestricted consideration to deprivation evidence and assign substantial (though not necessarily dispositive) mitigating weight to it.

While the active controversy over what "consideration" requires has centered in the Ninth Circuit, the question is even more pressing in other jurisdictions. Although most states have shifted to exclusive jury sentencing in capital cases, Alabama, until last year, continued to allow death sentencing by a single judge through a jury override provision, and required no deference to the jury's preference for life; over a hundred inmates on Alabama's death row were subject to this provision and might still appeal their sentences.[17] Alabama is in the Eleventh Circuit, which has shown no signs of following the Ninth's lead in giving teeth to *Eddings's* "consideration" requirement. Prior to a significant shift in Supreme Court doctrine in 2002, many other states also employed judicial capital sentencing, and likely still have inmates on death row who were sentenced by judges under these older regimes.[18]

In Part I, we illustrate how restrictive consideration can become an entrenched judicial practice, using examples of SED review from Arizona, Alabama, and Florida. We attempt to understand the underlying moral principle, called here the "causal nexus theory," which treats SED as mitigating when it has effects at the time of the crime that undermine the defendant's control over his act, similar to those of a serious mental illness. We find, however, that judges in these districts offer no justification for ignoring all *other* moral principles under which SED could have mitigating value.

In Part II, we review recent work in moral philosophy on the mitigating significance of SED, which informs our argument that the causal nexus theory is neither the only nor the most charitable available theory of SED's mitigating value. We make a brief case for the plausibility of three theories that regard SED as mitigating without proof of direct and specific causation, as well as for their popularity among capital jurors.

In Part III, we provide a two-pronged constitutional rationale for appellate courts to scrutinize lower courts' restrictive consideration of SED evidence. First, we trace the Supreme Court's jurisprudence on what constitutes adequate "consideration" of mitigating evidence at trial, arguing that the thread that unifies the holdings in *Lockett*, *Eddings,* and *Tennard* is the principle that the moral theories used by a sentencer to consider relevant

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[17] *See* ALA. CODE §§ 13A-5-39 to -59 (2012); *accord* FLA. STAT. ANN. § 921.141(3) (West 2001). The Supreme Court recently struck down the Florida override in part, but the rest survives intact. Hurst v. Florida, 84 USLW 4032 (2016).

[18] Prior to the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which required extensive jury involvement in capital sentencing, eight states in addition to Alabama—Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska—gave judges either exclusive authority to issue a death sentence or final authority with some level of input from the jury. *See generally* ARIZ. REV. STAT. ANN. § 13-703 (2001); COLO. REV. STAT. ANN. § 16-11-103 (West 2001); DEL. CODE ANN. tit. 11, § 4209 (West 2001); FLA. STAT. ANN. §921.141 (West 2001); IDAHO CODE ANN. § 19-2515 (West 2001); IND. CODE ANN. § xx-xx-x (West 2001); MONT. CODE ANN. § 46-18-301 (West 2001); NEB. REV. STAT. ANN. § 29-2520 (West 2001).

mitigating evidence cannot be subject to legal constraint—whether statutory, precedential, or a matter of judicial custom. We articulate three factors for evaluating whether restrictive consideration of deprivation evidence violates this principle: (i) the court did not even attempt to justify or explain why the moral theory it used was the appropriate one to rely on, or why alternative theories were and should be dismissed; (ii) the same court, or other courts in its jurisdiction, have in the past routinely and without justification used the same theory—and only that theory—in considering mitigating evidence, while citing to precedent; and (iii) independent reasons exist for thinking that a substantial number of reasonable jurors would consider the evidence broadly mitigating on other moral grounds that the judge did not consider. *Second*, we make the case for sentencing judges at both the trial and appellate level having a unique responsibility to ensure that death sentences are issued only when they enjoy broad-based communal support.[19] Applied to the SED context, this means ensuring that SED evidence is given unrestricted consideration regardless of the judge's particular moral beliefs.

I. A TROUBLING CASE OF RESTRICTIVE CONSIDERATION: THE CAUSAL NEXUS REQUIREMENT FOR SED

Nearly all death penalty states require three findings before the issuance of the death penalty: a finding of "aggravating factors," a finding of "mitigating factors," and a balancing of aggravating against mitigating factors based on the "weight" of each.[20] The weight of an aggravating or mitigating factor represents the degree to which it militates in favor of or against the death penalty. A death sentence is legally justified only if the aggravating factors outweigh the mitigating ones. Rules restricting the potential weight of relevant mitigating evidence can, therefore, make the difference between life and death for a defendant, at least in cases involving few or insignificant aggravating factors. The judicial custom of considering the mitigating value of SED evidence *only* on the causal nexus theory, prevalent in multiple jurisdictions, has been restrictive in precisely this way.

A. The Causal Nexus Requirement in Arizona

As mentioned earlier, the causal nexus theory once functioned as an exclusionary rule in Arizona. Under the old rule, SED evidence would be outright excluded from consideration unless the defendant was able to show that the deprivation "caused" the crime or "had an effect or impact on his behavior" at the time of the crime.[21] In practice, the rule demanded proof

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[19] *See, e.g.*, *Gregg*, 428 U.S. at 181–84 (1976); discussion *infra* Part III.

[20] The current capital sentencing scheme in most states has emerged from the requirements articulated in *Gregg*, 428 U.S. at 189–96. *See also* Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. CRIM. L. J. 117, 153 (2004) (describing that scheme).

[21] *See, e.g.*, Poyson v. Arizona, 743 F.3d 1185, 1193 (9th Cir. 2013) (quoting the Arizona trial court's statement that "[t]he court finds absolutely nothing in this case to suggest that [the defendant's commission of the murder] was a result of his childhood"); State v. Phillips, 46 P.3d 1048, 1060 (Ariz. 2002) ("[A]lthough Phillips presented evidence of substance abuse and a difficult childhood, he did not

that the SED was a specific cause.[22] Accordingly, the test set a high bar for admission.[23] Few defendants could offer the required proof, for reasons we discuss below.[24]

Once the Supreme Court invalidated a similar exclusionary rule in the Fifth Circuit, judges switched from "excluding" SED evidence to "considering" it but assigning "little to no mitigating weight" unless the defendant could establish the required causal nexus.[25] The sentencing procedure was "indistinguishable" in practice "from an analytical 'screen' that excludes such evidence from consideration as a matter of law."[26] In practice, the results of restrictive consideration and exclusion were the same. We have found no case in which SED evidence was treated as having "little or no weight" but in which the defendant was ultimately sentenced to life imprisonment.[27] Indeed, the evidence suggests that judges who assign SED

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offer any evidence that these factors caused him to commit the robberies." (citation omitted)); State v. Djerf, 959 P.2d 1274, 1289 (Ariz. 1998) ("[D]ifficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior." (citation omitted)); State v. Mann, 934 P.2d 784, 795 (Ariz. 1997) ("Defendant did not show any [causal] connection."); State v. Towery, 920 P.2d 290, 311 (Ariz. 1996) (en banc) ("These events, however, occurred when Defendant was young, years before he robbed and murdered at the age of 27. They do not prove a loss of impulse control or explain what caused him to kill."); State v. Murray, 906 P.2d 542, 573 (Ariz. 1995) ("[D]ifficult family background is nonmitigating unless defendant can show that something in that background impacted his behavior in a way beyond his control." (citation omitted)). Some early cases added that the "effect or impact" had to be "beyond the defendant's control." *E.g.*, State v. Murray, 906 P.2d 542, 573 (Ariz. 1995); State v. Wallace, 773 P.2d 983, 986 (Ariz. 1989). There were (rare) exceptions. *See generally* State v. Herrera, 850 P.2d 100 (1993) (life sentence in part because of "dysfunctional family background"); State v. Rockwell, 775 P.2d 1069 (1989) (life sentence in part because of SED).

[22] Many of the cases suggested that the causal link they sought was at the moment of the crime, such as an impulse or mental health symptom. *See, e.g.*, State v. Hoskins, 14 P.3d 997, 1022 (2000) (en banc), *supplemented*, 65 P.3d 953 (2003) ("Where we determine questions of aggravation and mitigation in the sentencing process, the significant point in time for causation is the moment at which the criminal acts are committed. If the defendant's personality disorder or dysfunctional family background leads reasonable experts to conclude that the disorder in fact caused the crime, significant mitigation is established."); *Mann*, 934 P.2d at 795 ("An abusive background is usually given significant weight as a mitigating factor only when the abuse affected the defendant's behavior at the time of the crime.").

[23] In a review of cases since *Eddings*, we have found only two in which the court applied the causal nexus test but found the SED sufficiently mitigating to recommend against the death penalty. *See generally* State v. Trostle, 951 P.2d 869 (Ariz. 1989); State v. Bocharski, 189 P.3d 403 (Ariz. 2008).

[24] *See* discussion *infra* Part II.

[25] *See, e.g.*, State v. Prince, 250 P.3d 1145, 1170 (Ariz. 2011) (en banc) ("We consider [SED evidence from the defendant's childhood] in mitigation but give it little weight."); State v. McCray, 183 P.3d 503, 511 (Ariz. 2008) ("A difficult family history is considered in mitigating, but its strength depends on whether the defendant can show it has a causal connection with the crime." (citation omitted)).

[26] *Poyson*, 743 F.3d at 1205. *See also id.* ("Simply altering the label attached to an unconstitutional process does not magically render it constitutional.").

[27] A survey of Arizona capital cases makes clear that mitigating evidence given "little" or "slight" weight rarely, if ever, results in leniency. *See Prince*, 250 P.3d at 1170 ("little" weight); State v. Harrod, 183 P.3d 519, 534 (Ariz. 2008) (en banc) ("minimal weight"); *McCray*, 183 P.3d at 503 ("little weight in mitigation"); *Hoskins*, 14 P.3d at 1022 (trial court accorded the SED evidence "slight" weight). Numerous other cases say that the lack of a causal nexus merely "lessens" the mitigating value of the SED evidence. While we suspect—and believe that an appellate court could find—that these cases, too, give little to no mitigating weight to the SED presented, because they do not address other theories under which the SED could be morally relevant, we do not address them here. *See, e.g.*, State v. Hampton, 140 P.3d 950, 968 (Ariz. 2011) (en banc) ("[The defendant's] troubled upbringing is entitled to less weight as a mitigating circumstance because he has not tied it to his murderous behavior."). Evidence assigned little to no weight is often excluded from the judge's final list of mitigating factors.

"little to no" mitigating weight regard it as wholly non-mitigating.[28] These cases are now constitutionally suspect under the ruling in *McKinney*.[29] However, the Ninth Circuit's ruling was narrow: it placed substantial weight on the fact that the Arizona Supreme Court, despite claiming that it "considered" the evidence, included a pin cite to an older case that relied on the unconstitutional exclusionary rule.[30]

The nature of the causal nexus demanded by Arizona judges becomes clearer upon comparing cases in which SED was treated as mitigating with cases in which it was not. For instance, in the only recent case in Arizona where SED was given substantial weight, *State v. Bocharski*, a psychologist testified that events leading up to the murder triggered symptoms of the defendant's post-traumatic stress disorder, which stemmed from his childhood trauma.[31] In that case, the defendant had been "severely abused emotionally, physically, and sexually as a child" and had suffered from extreme neglect.[32] The court observed that "in assessing the quality and strength of the mitigation evidence" it looks to the "strength of a causal connection between the mitigating factors and the crime."[33] It noted as "evidence of a causal connection" the fact that the psychologist "testified that Bocharski's troubled upbringing helped *cause* the murder of [the victim]."[34] The following facts were cited as supporting that determination: that the murder occurred immediately after a conversation between the defendant and the victim about the defendant's childhood abuse; that one especially traumatizing facet of that abuse involved the malicious killing of the defendant's childhood pet animals; and that the victim mistreated her pets. The explanation that elicited a merciful response from the court was that the defendant's deprivation made him vulnerable to stressful emotions when confronted with animal mistreatment, and the circumstances leading up to the murder placed him in a disturbed emotional state in which he was

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[28] Before affirming a death sentence, Courts routinely attach "little" weight to all of the mitigating factors—as though to emphasize that the mitigating evidence, even cumulatively, could not be decisive. *See, e.g.*, State v. Armstrong, 189 P.3d 378, 392-93 (Ariz. 2008) (en banc) (state supreme court dismissed each of the following mitigating factors as having "little" weight: the negative impact of Armstrong's death sentence on his children, his "troubled and unstable upbringing," his mental health history, and his "compassionate nature" and then affirmed the death sentence); State v. Murdaugh, 97 P.3d 844, 860 (Ariz. 2004) (en banc) (naming five mitigating factors, all of which the trial court had assigned "little weight" before imposing the death sentence); State v. Moody, 94 P.3d 1119, 1168 (Ariz. 2004) (en banc) ("[The trial judge] gave little weight to the [four mitigating factors] . . . and concluded that they were insufficient to call for leniency."). Evidence assigned little to no weight is often excluded from the judge's final list of mitigating factors. *See e.g.*, *Poyson*, 743 F.3d at 1210 ("For at the end of its opinion, the state court listed all of the mitigating circumstances it considered in its independent review of Poyson's death sentence. It omitted from this critical tally both Poyson's personality disorders and his abusive childhood.").

[29] *McKinney*, 813 F.3d at 798.

[30] *Id.* at 820.

[31] 189 P.3d 403, 423 (Ariz. 2013) (en banc). *Bocharski* also mentions that the defendant suffered problems with alcoholism from a young age, and that he was in an alcoholic state on the day of the murder that may have made it harder for him to control his actions. *Id.*

[32] *Id.* at 424–25 (listing childhood hardships that included abandonment; physical abuse and extreme neglect, including starvation, by his mother; squalid living conditions with little privacy; poverty that required foraging in garbage cans; exposure to drugs and sex at a young age; and repeated foster care).

[33] *Id.* at 426 (citing *Hampton*, 140 P.3d at 968).

[34] *Id.* at 426 (emphasis added).

less able to "control and manage his feelings and reactions."[35]

The Court's reasoning in *Bocharski* contrasts with its reasoning in a case decided that same year where SED was given no weight. In *State v. Ellison*, the defendant argued that the abuse he suffered as a child significantly impaired his capacity to make moral choices as an adult.[36] A psychologist testified that "for a person having experienced Ellison's upbringing [and] history of physical and sexual abuse . . . , the damage would carry on into adulthood and potentially destroy the individual."[37] Yet the court determined that the defendant's "childhood troubles deserve[d] little value as a mitigator," given that he had "not provided any specific evidence that his brain chemistry was actually altered . . . so as to *cause* or *contribute* to his participation in the murders."[38] Notably, the court conceded that the psychiatric testimony made it more than likely "that Ellison did suffer some mental or emotional damage due to his [SED]." However, it could not find in this fact any grounds for mitigation.[39]

The different outcomes in *Ellison* and *Bocharski* seem to have turned on the different types of causal connections that the defendants drew between their childhood deprivations and their crimes. In *Ellison*, the nexus was a fairly general one: the defendant's emotional and mental traits, which were shaped by the SED, and, it could be inferred, played a role in his resort to crime. In *Bocharski*, the causal nexus was specific: the defendant's post-traumatic stress disorder, which was originally caused by his abuse and triggered by memories of the abuse at the time of the crime. In other words, the SED did not shape his moral and decision-making faculties themselves, but simply, via the PTSD, subverted them at the time of the murder. Because no such specific and direct causal link between the SED and the crime could be established in *Ellison*, the court deemed evidence that the defendant had suffered from much the same kind of extreme deprivation as Bocharski to be "not of such a quality or value as to warrant leniency."[40]

Similarly, in *State v. Prince* in 2011, the Arizona Supreme Court cursorily dismissed evidence of even severer deprivation that the defendant's father was "an alcoholic, abusive to his wife and children and often on the run from law enforcement," and that as a child the defendant lived in an old barn that lacked adequate heat, running water, a kitchen, or a bathroom and then as a teenager with an adult male who molested and sexually abused him[41]—as having "little weight" because the defendant did not "establish[] a connection between his childhood trauma and the

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[35] *Id.* at 423.

[36] 140 P.3d 899 (Ariz. 2006) (en banc).

[37] *Id.* at 928.

[38] *Id.* at 927-28 (emphasis added).

[39] *Cf.* State v. Anderson, 111 P.3d 369, 399 (Ariz. 2005) (en banc) (finding that the defendant's evidence of sexual abuse, low IQ, frequent moves between schools, and follower-type personality "do[es] not in any way explain his decision, decades later at age forty-eight, to kill three innocent people to steal a pickup," as defendant was not mentally retarded and was able to tell right from wrong in making his own decisions).

[40] *Ellison*, 140 P.3d at 928.

[41] State v. Prince, 250 P.3d 1145, 1170 (Ariz. 2011) (en banc).

murder."[42] A lone citation to *Bocharski* made clear that the court sought a causal "connection" of a very immediate sort, such as a mental illness traceable to the deprivation that prompted the defendant to commit the crime, or to lose control of his mental faculties.[43]

As far as we can tell from these cases, the causal nexus theory Arizona courts have used in considering SED evidence restrictively is similar to the causal nexus theory used to review mitigating evidence of mental illness. Mental illness is generally thought to be mitigating only if it undermines a defendant's control over her actions at the time of the crime.[44] One rationale for this rule is that defendants who lack control or free will when they commit crimes are not culpable, and the defendant's culpability is a critical factor in mitigation. Unfortunately, the opinions in cases like *Ellison* and *Prince* do not explain, in moral and legal terms, why the causal nexus theory is the *only* plausible explanation of the mitigating potential of either mental illness or SED evidence.[45] We argue in the next section that, at least in the case of SED, this absence of a justification for restrictive consideration is troubling because there appear to be many (and more compelling) alternative explanations for why SED is mitigating.

B. Failure to Justify the Causal Nexus Requirement in Alabama

Alabama courts also frequently give restrictive treatment to SED evidence, on a similar causal nexus theory, though they are perhaps more likely to offer an explanation grounded in individual responsibility. No one who suffers from SED is *determined* to commit murder, they emphasize.

For instance, in *Philips v. State,* the trial court rejected the mitigating value of the repeated violence and neglect suffered by the defendant during

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[42] *Id.* at 1170–71.

[43] The only circumstance in which courts will infer a nexus is if the SED occurred close in time to the murder. The rule is that the mitigating value of SED evidence diminishes as time passes between the deprivation and the murder, entailing that SED seldom serves as a mitigating factor for older defendants. *See, e.g.*, *Prince*, 250 P.3d at 1170 ("Difficult childhood circumstances also receive less weight as more time passes between the defendant's childhood and the offense."); State v. McCray, 183 P.3d 503, 511 (Ariz. 2008) (en banc) ("[A] difficult childhood is given less weight when the defendant is older."); *Ellison*, 140 P.3d at 927–28 ("His childhood troubles deserve little value as a mitigator for the murders he committed at age thirty-three."); State v. Hampton, 140 P.3d 950, 968 (Ariz. 2006) ("Hampton was thirty years old when he committed his crimes, lessening the relevance of his difficult childhood."); State v. McGill, 140 P.3d 930, 944 (Ariz. 2006) ("[T]he impact of McGill's upbringing on his choices has become attenuated during the two decades between his reaching adulthood and committing this murder."); *Anderson*, 111 P.3d at 399 ("Anderson's childhood troubles do not in any way explain his decision, decades later at age forty-eight, to kill three innocent people."). It is clear from *State v. Mann* that the court was not looking for just any psychological connection, because a doctor in the case concluded that the defendant's childhood "directly contributed to Defendant's behavior because he lacked 'healthy socialization experiences.'" 934 P.2d 784, 795 (Ariz. 1997) (en banc).

[44] *See, e.g.*, State v. Hoskins, 14 P.3d 997, 1022 (Ariz. 2000) ("Where we determine questions of aggravation and mitigation in the sentencing process, the significant point in time for causation is the moment at which the criminal acts are committed. If the defendant's personality disorder or dysfunctional family background leads reasonable experts to conclude that the disorder in fact caused the crime, significant mitigation is established.").

[45] For instance, the court in *Prince* stated without explanation that "[d]ifficult childhood circumstances . . . receive less weight as more time passes between the defendant's childhood and the offense." *Prince*, 250 P.3d at 1170.

his childhood on the basis that it did not directly cause the criminal act.[46] It went on to observe: "[t]his Court has heard hundreds if not thousands of cases of drug abuse, neglect, and domestic violence over the last 20 years, but Capital Murder does not naturally result . . . from a bad childhood."[47] The Court of Criminal Appeals affirmed.[48] Similarly, in *Stanley v. State*, the trial court dismissed evidence of a difficult family background as "not mitigating" because the defendant did not offer any "credible evidence that any of these factors influenced the commission of the crime."[49] The trial court emphasized the fact that the defendant's sisters had suffered the same deprivation but did not become criminals.[50] Even more explicitly, the court in *Thompson v. Alabama* observed that:

> [T]he necessity for every person being morally responsible for his or her own actions causes these environmental factors which are offered as mitigation to appear weak . . . . The argument that when a bad social environment produces bad people, that fact should in some way mitigate the punishment for these bad people, leads ultimately to the absurd conclusion that only people who come from an impeccable social background deserve the death penalty if they commit capital murder.[51]

The court here also appeared to be laboring under the misimpression that a disadvantaged background is an *automatic* grant of leniency, rather than one sentencing factor to be considered among many.

In the end these courts also treat SED's mitigating potential on this theory as an all-or-nothing affair: either the extreme deprivation suffered makes it impossible for the defendant to choose not to commit a criminal act (perhaps because of a temporary mental inability at the moment of the crime), in which case SED is mitigating; or the deprivation *could* be overcome, in which case it is assigned *no* mitigating value. Of course, however, most of the effects of SED *can* be overcome, so in effect this reasoning renders SED non-mitigating unless it results in an effect—like a mental illness—that is generally thought to be less subject to the individual's control. In short, Alabama courts, too, engage in restrictive consideration of SED.

Alabama courts see no deficiency in their consideration. The appellate court that reviewed *Stanley*, mentioned above, affirmed, arguing that the sentencing judge adequately "considered all the evidence offered . . . including [the defendant's] family circumstances [and] background."[52] It rejected "Stanley's argument . . . that a trial court's failure to *find* a

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[46] Phillips v. State, No. CR–12–0197, 2015 WL 9263812, at *83 85 (Ala. Crim. App. Dec. 18, 2015).
[47] *Id.* at *81
[48] *Id.* at *85.
[49] Stanley v. State, 143 So.3d 230, 330–32 (Ala. Crim. App. 2011).
[50] *Id.* at 331.
[51] Thompson v. Alabama, No. CR–05–0073, 2012 WL 520873, at *85 (Ala. Crim. App. 2012).
[52] *Id.* at 332.

mitigating circumstance based on certain mitigating evidence necessarily means that the trial court did not *consider* that mitigating evidence."[53] Similar cases abound.[54]

In Alabama, this restrictive consideration of SED has significant consequences not only for the weighing of evidence at sentencing but in other areas of criminal law: judges reject ineffective assistance of counsel claims that are based on counsel's failure to present SED evidence when the defendant cannot show a causal connection between the SED suffered and the crime[55]; and judges reject claims that juries were biased by prosecutorial suggestion that the SED evidence has no mitigating weight because of lack of a causal connection.[56]

C. Other Appearances of the Causal Nexus Requirement

Judges have appealed to the lack of a direct "causal connection" between SED and criminal conduct to justify giving SED no weight in a number of other jurisdictions. For instance, in a relatively recent Florida case, a trial court found that the defendant was emotionally and physically abused as a child, and yet gave those factors "little weight" because "there was no connection between Petitioner's alleged childhood emotional and physical abuse . . . and the murders."[57] The causal connection sought was, once again, a specific one; generally impaired moral and intellectual capacities due to extreme deprivation did not suffice. The Eleventh Circuit affirmed the trial court's treatment of the evidence, arguing that "[a]s long as the defense is allowed to present all relevant mitigating evidence and the sentencer is given the opportunity to *consider* it, there is no constitutional violation."[58] In another case from Florida, the state supreme court suggested that the defendant's childhood abuse could not have reduced his moral responsibility because "the defendant's sister, who had also been abused,

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[53] *Id.* at 331.

[54] *See, e.g.*, Davis v. Allen, No. CV 07-S-518-E, 2016 WL 3014784, at *50–51 (N.D. Ala. May 26, 2016) (rejecting defendant's argument that lower court's "failure to give appropriate weight to the evidence of Davis's childhood abuse because it occurred years earlier than the crime" was unconstitutional); Thompson v. State, 153 So.3d 84, 189 (Ala. Crim. App. 2012) ("While *Lockett* and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually [mitigating] is in the discretion of the sentencing authority") (quoting *Ex parte* Slaton, 680 So. 2d 909, 924 (Ala. 1996)); Waldrop v. State, 987 So.2d 1186, 1202 n.6 (Ala. Crim. App. 2007) (observing that defendant's counsel did not err in declining to present available SED evidence at sentencing, because the sentencing judge had "evidence of [a co-defendant's] abusive childhood and stated in his sentencing order that he afforded it little weight" because "[i]t would be ironic for the courts to determine that environmental factors which cause people to become violent offenders should then be taken into consideration to make these people less susceptible to the death penalty").

[55] *See, e.g.*, Jenkins v. Allen, No. 4:08-cv-00869-VEH, 2016 WL 4540920, at *41 (N.D. Ala. Aug. 31, 2016) ("Any contention that a causal connection exists between the abuse allegedly suffered by Jenkins and the murder of Tammy Hogeland, is undercut by evidence within Jenkins's own family.").

[56] *See, e.g.*, Scheuing v. State, 161 So. 3d 245, 267-68 (Ala. Crim. App. 2013).

[57] Lynch v. Sec'y, Dep't of Corr., 897 F. Supp. 2d 1277, 1299 (M.D. Fla. 2012).

[58] *Id.* at 1339. *See also* Waldrop v. State, 987 So.2d 1186, 1202 n.6 (Ala. Crim. App. 2007) (observing that defendant's counsel did not err in declining to present available SED evidence at sentencing, because the sentencing judge had "evidence of [a co-defendant's] abusive childhood and stated in his sentencing order that he afforded it little weight" because "[i]t would be ironic for the courts to determine that environmental factors which cause people to become violent offenders should then be taken into consideration to make these people less susceptible to the death penalty").

including sexually abused by the same alcoholic father, proceeded to live a normal and productive life."[59] As before, SED's mitigating value was seen to turn on whether it rendered virtually impossible the defendant's ability to conform his conduct to the law. Because it is difficult to show that SED has any such effect, it is routinely dismissed when no direct causal connection between it and the crime is found.[60]

Courts do sometimes dismiss proffered SED evidence on factual grounds. If the record does not show that the defendant experienced truly *severe* deprivation or if it reveals that the defendant was rescued from his unenviable circumstances fairly quickly and led a relatively normal adult life after a short period of deprivation, judges reasonably find that the alleged SED remains unproven.[61] We have no quarrel with this practice. Our concern is exclusively with the narrow scope of the mitigating analysis once it is recognized that the defendant did in fact suffer from especially severe neglect, abuse, and/or poverty.

II. UNRESTRICTED CONSIDERATION OF DEPRIVATION EVIDENCE: THEORY AND PRACTICE

Recent work in moral philosophy and psychology indicates a renewed interest in the reasons why severe environmental deprivation mitigates the punishment a defendant deserves. We briefly review some of this work, much of which forms a key part of the literature on retributive justice, to show that causal analysis plays a limited-to-non-existent role in prominent theories of SED's mitigating force. In addition, we try to show that such theories that support unrestricted consideration of SED are widely embraced, including by a great many judges and jurors.[62] Both the

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[59] Douglas v. State, 878 So.2d 1246, 1260 (Fla. 2004).

[60] *See, e.g.*, Callahan v. Campbell, 427 F.3d 897, 923 (11th Cir. 2005) (rejecting IAC claim for failing to investigate mental health and abuse, noting that "no causal connection between the alleged abuse Callahan suffered as a child and the crime he committed, which were separated by 23 years"); Davis v. Scott, 51 F.3d 457, 461-62 (5th Cir. 1995), *overruled in part by* Tennard v. Dretke, 542 U.S. 274 (2004) (evidence of child abuse, alone, without demonstrating any link to the crime, does not constitute "constitutionally relevant" mitigating evidence); Madden v. Collins, 18 F.3d 304, 308 (5th Cir. 1994) (evidence of troubled childhood not constitutionally relevant mitigating evidence when not linked in any way to the crime); Barnard v. Collins, 958 F.2d 634, 638-39 (5th Cir. 1992) (rejecting a *Penry* claim where the crime was not attributable to the proffered evidence of troubled childhood); Hines v. State, 856 N.E.2d 1275, 1283 (Ind. Ct. App. 2006) ("the trial court was not obliged to afford any weight to [the defendant's] childhood history as a mitigating factor in that [he] never established why his past victimization led to his current behavior.").

[61] *See, e.g.*, State v. Kuhs, 224 P.3d 192, 204 (Ariz. 2010) (defendant grew up in a poverty and was abused at least once); State v. Kiles, 213 P.3d 174, 191 (Ariz. 2009) (mixed evidence, because some witnesses testified that Kiles's family life as "ordinary"); State v. Dann, 207 P.3d 604, 628 (Ariz. 2009) (no evidence of child abuse other than spankings with a belt that his father later viewed as child abuse). We emphasize, throughout this article, that the environmental deprivation we reference is of an especially severe sort. The effects of SED we discuss may or may not be fairly inferable from milder forms of deprivation.

[62] *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 370-71 (2000) (concluding that the defendant's attorney had fallen "below the range expected of reasonable, professional competent assistance of counsel" for failing to investigate and present at his sentencing trial "documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood" and "repeated head injuries"—evidence the Court described as "significant" mitigating evidence).

intuitiveness of such theories and their wide appeal will feature critically in the constitutional arguments we go on to offer in Part III.

A. The Defendant's Diminished Moral Capacities & Culpability

It is not just a scientific platitude but a matter of common sense that the development of key behavioral capacities is critical to pro-social decision-making.[63] These include emotional capacities, like the capacity to empathize with others or to form human attachments, and capacities for self-regulation, including impulse control and anger management. Still others involve basic executive brain function, such as working memory and the capacity to think through the consequences of one's actions.[64]

The development of these capacities, critical as they are to the process of becoming morally mature, is impaired by severe emotional, psychological, and sexual abuse.[65] The psychological evidence is extensive, and often presented at trial by experienced defense counsel in the form of expert testimony. Childhood abuse or neglect is associated with decreased levels of empathy and altruism, and increased levels of aggression and antisocial behaviors, well into adulthood.[66] Extreme poverty, too, is significantly correlated with increased levels of depression, low self-esteem, and diminished impulse control in children.[67] Darcia Narvaez and Daniel Lapsley explain that children who have been subject to regular threats, violence, and deprivation are more likely to develop a "survival-first"

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[63] Moral capacities are generally seen as being influenced by all three of these elements. *See* THOMAS KEENAN & SUBHADRA EVANS, AN INTRODUCTION TO CHILD DEVELOPMENT 297-98 (2009).

[64] *See* Tina Malti & Sophia F. Ongley, *On Moral Reasoning and Relationship with Moral Emotions*, *in* HANDBOOK OF MORAL DEVELOPMENT RESEARCH 166-69, 171-72 (Melanie Killen & Judith G. Smetana eds., 2d ed. 2014) (reviewing the relationship between moral emotions and moral reasoning, and the connection between empathy/sympathy and higher levels of other-oriented moral reasoning and prosocial moral reasoning); Roy F. Baumeister & Julie Juola Exline, *Self-Control, Morality, and Human Strength*, 19 J. SOC. & CLINICAL PSYCH. 29 (2000) ("Self-control refers to the self's ability to alter its own states and responses, and hence it is both key to adaptive success and central to virtuous behavior, especially insofar as the latter requires conforming to socially desirable standards instead of pursuing selfish goals.").

[65] Darcia Narvaez & Daniel Lapsley, *Becoming a Moral Person--Moral Development and Moral Character Education as a Result of Social Interactions*, *in* EMPIRICALLY INFORMED ETHICS: MORALITY BETWEEN FACTS AND NORMS 227 (Markus Christen et. al eds., 2014).

[66] *Id.* at 228. *See also* Joanna Cahall Young & Cathy Spatz Widom, *Long-term Effects of Child Abuse and Neglect on Emotion Processing in Adulthood*, 38 CHILD ABUSE NEGLECT 1369 (2014) (the "effects of childhood abuse/neglect on emotion processing extend until middle adulthood" though it would be worthwhile to have multiple assessments over time); Michael D. De Bellis & Abigail Zisk, *The Biological Effects of Childhood Trauma*, 23 CHILD ADOLESCE. PSYCHIATR. CLIN. N. AN. 2014 185 (2014) ("the data to date strongly suggests that childhood trauma is associated with adverse brain development in multiple brain regions that negatively impact emotional and behavioral regulation, motivation, and cognitive function"); Anthony Nazarov et al., *Moral Reasoning in Women with Post-Traumatic Stress Disorder Related to Childhood Abuse*, 7 EUR. J. PSYCHO-TRAUMATOLOGY 2016 (altruism); Paul A. Miller & Nancy Eisenberg, *The Relationship of Empathy to Aggressive and Externalizing/Antisocial Behavior*, 103 PSYCH. BULLETIN 324 (1988) (Childhood abuse is associated with low levels of empathy/sympathy, which are in turn associated with aggression and antisocial, externalizing behaviors).

[67] David T. Takeuchi et al., *Economic Distress in the Family and Children's Emotional and Behavioral Problems*, 53 J. MARRIAGE & FAM. 1031, 1037-39 (1991) (reporting that economic stress significantly impacts children's emotional and behavioral problems, often resulting in higher levels of depression, antisocial behavior, and diminished impulse control).

mindset—a persistent physical and mental state of "high alert"—that "subverts the more relaxed states that are required for positive prosocial emotions and sophisticated reasoning."[68] When a child's own caregivers are the source of threats and deprivation, the child can miss crucial opportunities to develop interpersonal trust and receive affection from others. These "disruptions and deviations in socialization" can seriously undermine later attempts to form relationships in adolescence and adulthood, and are linked to subsequent emotional and behavioral problems among abused children.[69] Studies also show that these factors more generally limit the development of basic brain functions, including planning skills, inhibitory control, working memory, cognitive focus, and reward processing.[70] The younger the child is at the time of the severe abuse, and the more sustained the deprivation, the worse and more long-lasting are the cognitive, emotional, and behavioral effects.[71] Each one of these developmental deficits is individually linked to physical abuse, sexual abuse, and extreme neglect in childhood, and many capital defendants have experienced more than one of these deprivations.[72]

Adults with histories of childhood deprivation and maltreatment are almost twice as likely to have been incarcerated than those without such histories, and significantly more likely to have been arrested for a violent crime.[73]

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[68] Narvaez & Lapsley, *supra* note 65, at 228-29.

[69] DAVID A. WOLFE, CHILD ABUSE: IMPLICATIONS FOR CHILD DEVELOPMENT AND PSYCHOPATHOLOGY 35-36 (2d ed. 1999).

[70] *See* Nicolas Berthelot et al., *Childhood Abuse and Neglect May Induce Deficits in Cognitive Precursors of Psychosis in High-Risk Children*, 40 J. PSYCHIATRY NEUROSCIENCE 336 (2015) (finding much lower IQ and poorer cognitive performance in visual episodic memory and in executive functions of initiation); DeBellis et al., *Neuropsychological Findings in Pediatric Maltreatment: Relationship of PTSD, Dissociative Symptoms, and Abuse/Neglect Indices to Neurocognitive Outcomes*, 18 CHILD MALTREATMENT 171 (2013) (maltreated persons performed significantly lower on IQ, academic achievement, and nearly all of the tested neurocognitive domains); Kathryn L. Hildyard & David A. Wolfe, *Child Neglect: Developmental Issues and Outcomes*, 26 CHILD ABUSE & NEGLECT 679 (2002) (even neglect alone can have "more severe cognitive and academic deficits, social withdrawal and limited peer interactions, and internalizing [] problems" than physically abused peers); Roy F. Baumeister & Julie Juola Exline, *Self-Control, Morality, and Human Strength*, 19 J. SOC. & CLINICAL PSYCH. 29 (2000) (neglected children can have difficulties predicting the consequences of their behavior); William B. Harvey, *Homicide Among Black Adults: Life in the Subculture of Exasperation*, *in* HOMICIDE AMONG BLACK AMERICANS 153 (Darnell F. Hawkins ed., 1986) (describing how numerous social pressures, including a pervasive sense of hopelessness, contribute to high crime rates among impoverished African American communities within the inner city).

[71] Raquel A. Cowell et al., *Childhood Maltreatment and Its Effect on Neurocognitive Functioning: Timing and Chronicity Matter*, 27 DEV. PSYCHOPATHOLOGY 521 (2015) (children who suffered maltreatment as infants or chronically had higher deficits in working memory and inhibitory control); *see also* Hildyard & Wolfe, supra note 70, at 679.

[72] Gwendolyn M. Lawson et al., *Socioeconomic Status and Neurocognitive Development: Executive Function*, *in* EXECUTIVE FUNCTION IN PRESCHOOL AGE CHILDREN: INTEGRATING MEASUREMENT, NEURODEVELOPMENT AND TRANSLATIONAL RESEARCH (J.A. Griffin et al. eds., 2016); Kimberly G. Noble et al., *Socioeconomic Gradients Predict Individual Differences in Neurocognitive Abilities*, 10 DEVELOPMENTAL SCI. 464 (2007).

[73] Hyunzee Jung et al., *Does Child Maltreatment Predict Adult Crime? Reexamining the Question in a Prospective Study of Gender Differences, Education, and Marital Status*, 30 J. INTERPERSONAL VIOLENCE 2248 (2015); Izabela Milaniak & Cathy Spatz Widom, *Does Abuse and Neglect Increase Risk for Perpetration of Violence Inside and Outside the Home?*, 5 PHYSICAL VIOLENCE 246, 250 (2015); Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1154 (1998) (noting the "strong evidence . . . that a person who was abused as a child is at risk of suffering long-term effects that may contribute to his violent behavior as an adult").

These facts about the link between childhood deprivation and psychological development are close to common knowledge in the judicial system. As Justice Rehnquist observed in *Santosky v. Kramer*, "[a] stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being."[74] Judges also routinely take "judicial notice" of the fact that extreme neglect and sexual abuse "increases the probability of [maladjustment and mental] problems."[75]

Poverty, under-education, and immersion in a culture of violence similarly distort a person's moral compass even later in life. A number of theorists have argued that chronic stressors and high levels of psychological distress due to consistent economic deprivation severely erode "self-esteem and the sense of mastery, control, and personal efficacy."[76]

What is the mitigating upshot of the fact that SED causes such general impairment in the development of critical moral and behavioral capacities? Courts who engage in the restrictive consideration of SED assume that deprivations can only be mitigating if they entirely undercut the defendant's ability to conform to the law. Accordingly, judges look for evidence that the SED directly and specifically caused the criminal act. Interestingly, a similar view informed a seminal article by Judge David Bazelon in the 1970s that was highly *sympathetic* towards SED sufferers. Judge Bazelon likened "mental impairments associated with social, economic, and cultural deprivation" to mental diseases that undermine the defendant's free will, and argued that such deprivation provides grounds for *excusing* the defendant.[77] Courts reasonably resisted such arguments, sometimes pointing to socially well-adjusted siblings of capital defendants, like the Alabama courts cited above.[78] Indeed, none of the studies we have come across suggest that extreme deprivation *destines* persons to lead criminal or immoral lives—which it obviously does not.

But the sentencing question is not whether the defendant should be

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[74] 455 U.S. 745, 788-9 (1982) (Rehnquist, J., dissenting).

[75] Bouchillon v. Collins, 907 F.2d 589, 590 n.2 (5th Cir. 1990). *See also* Russell v. Collins, 998 F.2d 1287, 1292 (5th Cir. 1993) (acknowledging that child abuse as "generally understood" would "have the tendency to affect the child's moral capacity by predisposing him or her toward committing violence").

[76] Mary Keegan Eamon, *The Effects of Poverty on Children's Socioemotional Development: An Ecological Systems Analysis*, 46 SOCIAL WORK 257, 258 (2001); *see also id.* (citing psychological research on the impact of poverty on moral development); Richard Lipke, *Social Deprivation as Tempting Fate*, 5 CRIM. L. & PHIL. 277, 283-84 (2011) (contending social deprivation reduces the incentives for self-control and may work to stunt its development, thereby reducing the culpability of the defendant).

[77] David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 394 (1976). *See also* Richard Delgado, *"Rotten Social Background" Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?* 3 L. & INEQUALITY. 9, 23-34 (1985) (arguing that, in some cases, a propensity toward crime arising from deprivation is so strong as to render the individual not responsible for their crimes).

[78] *See, e.g.*, Douglas v. State, 878 So.2d 1246, 1260 (Fla. 2004) (noting the diminished mitigating value of SED evidence where "the defendant's sister, who had also been abused, including sexually abused by the same alcoholic father, proceeded to live a normal and productive life"). Prosecutors often also present such evidence to persuade courts. *See, e.g.*, State v. Hester, 324 S.W.3d 1, 84 (Tenn. 2010) ("The State also presented evidence that Mr. Hester's other siblings, including a sister who had been sexually abused by her father, had managed to grow up in the same house with the same parents without having become killers.").

altogether excused. The question is whether he deserves to be held *fully* responsible and maximally punished. Accordingly, while the search for a causal nexus seems sensible in the context of evaluating questions of guilt and excuse at the trial stage, it is far from adequate in the context of mitigation once the defendant has already been convicted. Thus, modern theorists of SED's moral significance for punishment are less inclined to treat it as an excuse, and instead regard it in terms of the intuitive notion that moral responsibility comes in degrees.[79] Even a person who *could* have chosen to lead a law-abiding life, and is therefore culpable for his wrongful choices, can, by virtue of the extreme challenges he faced in achieving moral maturity, be *less than fully responsible* and/or deserving of less than maximal punishment.

Arguably the most well-known and influential contemporary moral philosopher, Thomas Scanlon, articulates the moral intuitions underlying this theory of "diminished responsibility" as follows. He argues that a wrongdoer's liability for punishment depends on the adequacy of his "opportunity to avoid" committing the wrongful act and thus suffering the associated punishment. A person's opportunity to avoid making a certain choice "depends on the conditions under which the choice is made: the quality of information that the person has, the absence of competing pressures, the attractiveness of the available alternatives, and so on."[80] In his discussion of a wealthy individual who compares himself to one living in poverty, Scanlon contends that the wealthy person's claim that he "chose" to use his opportunities better than the impoverished person is "weakened by our supposition that the conditions under which the poor man chose—and might have chosen differently—did not provide him with adequate opportunity [to achieve the same results]."[81] Note that "inadequate opportunity" is not equivalent to "no opportunity." The diminished opportunities that SED sufferers have for cultivating their moral capacities and avoiding punishment under the law, accordingly, limits the extent to which we can hold such persons responsible for their actions.[82]

Judges often appeal to the idea that moral responsibility and culpability come in degrees. Justice O'Connor opined, concurring in *California v. Brown*, that "evidence about the defendant's background and character is relevant [in mitigation] because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be *less culpable* than defendants who have no such excuse."[83] Writing for the majority a couple of years later in *Penry v.*

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[79] *See* D. Justin Coates & Philip Swenson, *Reasons-Responsiveness and Degrees of Responsibility*, 165 PHIL. STUDIES 629 (2013).

[80] THOMAS M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 204-05 (2010).

[81] *Id.*

[82] MANUEL VARGAS, BUILDING BETTER BEINGS: A THEORY OF MORAL RESPONSIBILITY 245 (2013) (arguing that the "moral ecology" in which a person comes to make his choices including whether or not he has been "trained up" with the resources to respond to moral considerations in the way we see fit—is relevant to whether or not that person can be thought to be a responsible agent); Lipke, *supra* note 75, at 287 (contending social deprivation reduces the incentives for self-control and may work to stunt its development, thereby reducing the culpability of the defendant).

[83] 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis added).

Lynaugh, O'Connor confirmed that, "[b]ecause Penry was mentally retarded . . . and because of his history of childhood abuse," a rational juror "could conclude that Penry was less morally culpable than defendants who have no such excuse."[84]

Note that on the diminished responsibility theory we are expounding, extreme deprivation's mitigating weight does not turn on any proof of immediate or specific causation of any *particular* crime. It turns on the fact, inferable from established SED evidence, that the deprivation impaired the defendant's capacities, which made it *generally* harder for him to live a law-abiding and decent life.

Many "death-eligible" jurors—that is, jurors who are not in principle opposed to the death penalty—are sympathetic to this theory and are less likely to vote for death because of it. Using data from the Capital Juror Project, Stephen Garvey finds that of 153 capital jurors interviewed who were presented with evidence of extreme poverty and "circumstances over which the defendant had no control [but] that may have helped form (or misform) his character," roughly 32% were less likely to sentence the defendant to death.[85] If a third of a capital jury refused to issue a death sentence, in a state where juries rather than judges control the ultimate sentence, the result would be a life sentence.

B. The Defendant's Suffering & the "Whole Life" View of Retributive Justice

Even if the defendant emerged from childhood trauma with critical behavioral capacities largely intact, the suffering inherent in experiencing severe deprivation can be directly relevant in mitigation. Physical, emotional, and sexual abuse combined with extreme poverty in childhood almost always means not just great physical and psychological pain at the time of the deprivations, but harmful ripple effects throughout a person's life. As Craig Haney observes, capital defendants have often "confronted chronic poverty, extraordinary instability, and, for some, almost unimaginably brutal and destructive mistreatment over which, for most of their lives, they have been granted little or no control."[86] On "whole life" views of retributive justice, such facts about the overall suffering experienced by a person over the course of his life are intrinsically relevant to what punishment the person deserves when he acts wrongfully.

Traditional retributive theories of punishment took a very restricted view of the times relevant to deciding what a wrongdoer deserves. The key animating principle behind such theories was, roughly, that the suffering a wrongdoer inflicts on others *must* be matched by his equivalent suffering in the future, regardless of what had already happened to him in the past:

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[84] 492 U.S. 302, 322-23 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

[85] Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1565 (1998).

[86] Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STANFORD L. REV. 1447, 1565 (1997).

"[t]hose who perform specific criminal acts deserve specific punishments . . . largely independently of their acts or happiness at other times."[87] An eye can be taken for an eye, even if the wrongdoer already lost an eye a long time ago.

By contrast, on what is now called the "whole life approach" or the "life-cycle" view of retributive justice, what wrongdoers deserve cannot be decided without considering previous suffering and unhappiness. As Shelly Kagan, one of the leading proponents of this view, observes, "time drops out from further consideration: we look at lives *as a whole*, to see what one deserves (overall), and whether one has received it (overall)."[88] According to such theorists, the relevant question that the sentencer should be asking in capital cases is whether the defendant, in light of his criminal conduct *and* all of the suffering he has so far endured in his life, deserves so much additional suffering that he should be executed. The sentencer should treat the defendant as substantially less deserving of the harshest and ultimate sentence if the defendant has already experienced incredible suffering in life, as SED sufferers undoubtedly have.[89]

One way of motivating this picture is by appeal to an intuitive principle (a kind of side-constraint on punishment): there is a limit to the amount of suffering we should expect any one person to bear in a lifetime. The need to ensure that no one suffers beyond tolerable levels militates against the execution of SED sufferers—those who have already suffered enough in life. The fact that the suffering happened in the past does not make it any less bad for the person. Defense attorneys routinely appeal to such considerations and judges give voice to them as well. The Court in *Eddings*, for instance, observed that the defendant's terrible family background was relevant to the sentencing decision, because of its "potential for *evoking sympathy*" for the defendant.[90] Arguably, the reason why such facts of deprivation evoke sympathy is that we recognize a duty to help those who have suffered too much in life. One way in which we help is by exercising mercy in sentencing.

As before, the whole life view favors looking beyond the causal nexus theory when considering SED. It regards SED as mitigating with no causal analysis. The morally relevant question is simply: how severe and injurious

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[87] Thomas Hurka, *Desert: Individualistic and Holistic*, *in* SERENA OLSARETTI, DESERT AND JUSTICE 45, 52 (2003) (describing the view that he critiques).

[88] SHELLY KAGAN, THE GEOMETRY OF DESERT 11 (2012) (emphasis added); *see also* DAVID ROSS, THE RIGHT AND THE GOOD 58 (2d ed. 2003).

[89] *See, e.g.*, Knight v. Dugger, 863 F.2d 705 app. at 749 (11th Cir. 1988) (describing the defendant's "impoverished home" as abusive and lacking supervision); Mathis v. Zant, 704 F. Supp. 1062, 1065 (N.D. Ga. 1989) (noting that the defendant was repeatedly verbally abused by his chronically alcoholic father, missed school one-third of the time, was ridiculed because he was slow, and dropped out in fifth grade; thereafter, he spent most of his time in prisons), *vacated and remanded*, 975 F.2d 1493 (11th Cir. 1992); Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992) (stating that the defendant grew up in poverty and his parents were migrant workers "who often left the children unsupervised"); State v. Murphy, 605 N.E. 2d 884, 909 (Ohio 1992) (Moyer, C.J., dissenting) (stating that trial testimony established that the defendant was raised in "desperate poverty"; had an "unloving, unsupportive, and abusive family"; lived in a home described as a shack with no hot water or plumbing; lived on public assistance; and had a father who was an alcoholic).

[90] California v. Brown, 479 U.S. 538, 548 (O'Connor, J., concurring) (emphasis added).

to the defendant was the deprivation suffered? The whole life view of SED's mitigating significance explains why jurors treat the factor as significantly mitigating on its own, without *any* causal connection to the crime or the defendant's capacities. In a study of juror receptivity to mitigation evidence based on 400 mock jurors, Mona Lynch and Craig Haney observed that childhood abuse history and bad family background were regularly treated as significant in mitigation without any indication of its relationship to the crime or the defendant's later life.[91]

C. The Diminished Societal Standing to Punish

We consider one final alternative theory of SED's mitigating value before turning to the constitutional argument. As before, the focus is not so much on proving that these theories are correct from the moral point of view but, rather, on making vivid their plausibility and the unreasonableness of restrictive consideration based on the causal nexus theory alone.

A number of theorists have articulated SED's moral significance for criminal justice in terms of the state's "standing to punish." Such theorists take for granted that society has an obligation to provide a minimally decent quality of life for all of its citizens.[92] What constitutes a minimally decent quality of life is disputed, but it is generally agreed that it involves safety from physical abuse and access to basic necessities, including food, clothing, and shelter.[93] Accordingly, these theorists argue that our failure to mitigate extreme poverty and its effects diminishes our standing to punish those who have suffered from extreme poverty to the maximum extent allowable by retributive principles.[94]

An individual can lose standing—or moral authority—to *hold* another person wholly responsible for a wrongful act, even if the wrongdoer bears full moral responsibility for the act. This happens when the individual himself has "unclean hands" with respect to the act. One source of society's unclean hands when it comes to criminals is its moral failure to ensure an adequate safety net that protects everyone from severe environmental deprivations. As Victor Tadros writes, "[b]y perpetrating distributive injustice against the poor, we lose standing to hold them responsible for what they have done."[95] Another reason for the collective's "unclean hands" concerns the collective's complicity in the wrongdoer's conduct. Tadros

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[91] Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & HUMAN BEHAVIOR 337 (2000).

[92] *See, e.g.*, Philippe Van Parijs, *Why Surfers Should be Fed: the Liberal Case for an Unconditional Basic Income*, 20 PHIL. & PUB. AFFAIRS 101 (1991); *see also* Emad H. Atiq, *How Folk Beliefs About Free Will Influence Sentencing: A New Target for the Neuro-Determinist Critics of Criminal Law*, 16 NEW CRIM. L. REV. 449 (2013); Daniel Markovitz, *How Much Redistribution Should There Be?*, 112 YALE L.J. 2291 (2003).

[93] *See, e.g.*, HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (1996); Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525, 529, 531 (1993) (food, shelter, medical care, housing).

[94] For a discussion of this principle, *see* THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER 256-67 (2000). *See also* Atiq, *supra* note 92; Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFAIRS 317 (1973).

[95] Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. VALUE INQUIRY 391, 393 (2009).

observes:

> There are different explanations of how our standing to hold others responsible may be eroded but two are most important, One is grounded in hypocrisy: the fact that one person commits the same kinds of wrong as someone else deprives the one of standing to hold the other person responsible for his wrongs. The other [reason] is complicity: the fact that one person participates in the wrong of someone else deprives the one of standing to hold the other person responsible for the wrong. A person cannot act as judge when he ought to be a co-defendant.[96]

Tadros views the collective as complicit in the crimes of SED sufferers because we know—or at least ought to know—that extremely poor socioeconomic conditions result in crime, and that we have an obligation to alleviate those conditions. Yet we deliberately choose to invest our resources in causes other than poverty relief, even at the cost of higher crime rates. By so choosing, we are complicit in each crime that we could have prevented had we helped the worst-off. As Tadros put it, "distributive injustice is criminogenic. In perpetrating distributive injustice, the state shows itself to have insufficient concern for the victims of crime."[97] Such rationales for limiting how much we punish SED sufferers may be esoteric, but their logic is compelling.

Judge Bazelon echoes a similar sentiment:

> [I]t is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, 'Behave—or else!' The overwhelming majority of violent street crime, which worries us so deeply, is committed by people at the bottom of the socioeconomic-cultural ladder . . . . We cannot produce a class of desperate and angry citizens by closing off, for many years, all means of economic advancement and personal fulfillment for a sizeable part of the population, and thereafter expect a crime-free society.[98]

Bazelon argues that our "unclean hands" are driven not just by our complicity in the criminal wrongdoing (given its predictability) but also our failure to give the wrongdoer his due: an adequate social safety net.

How is the collective's diminished standing to punish relevant in mitigation? Showing mercy at sentencing is one way of recognizing the

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[96] *Id.* at 394. *See also* G.A. Cohen, *Casting the First Stone: Who Can, and Can't, Condemn the Terrorists?*, 81 ROYAL INST. OF PHIL. SUPPS. (2006).

[97] For a defense of the two premises that poverty is criminogenic and that the collective has a responsibility to alleviate criminogenic conditions, *see* Tadros, *supra* note 94 (arguing that "the state [is] complicit in the crimes of the poor" and thus the poor have a moral claim "for the state to refrain from holding them responsible for their crimes, even if they are in fact responsible for them, which involves diminished blame").

[98] Bazelon, *supra* note 77, at 401-02.

collective's diminished standing to punish. The reasons for exercising mercy, again, do not turn on the causal connectedness between the deprivation suffered and the crime. While the standing view is less obviously embraced by jurors, it is a common strategy of defense counsel to portray the defendant as a "victim" of societal ills. We have found at least one attorney and psychologist, Deena Logan, who concludes, based on an analysis of 31 closing arguments at death sentencing trials, that effective characterization of the defendant as a victim by appeal to his poverty, diminished mental capacity, and deprived social background elicits mercy from juries.[99]

III. THE CONSTITUTIONAL ARGUMENT AGAINST RESTRICTIVE CONSIDERATION OF DEPRIVATION EVIDENCE

In this section, we argue that restrictive consideration of SED evidence warrants constitutional scrutiny. While it is often assumed that judges' weighing of mitigating factors is unreviewable, two strands of constitutional doctrine suggest otherwise. The first is found in a long line of cases identifying certain constraints on the "consideration" of mitigating evidence as unconstitutional.[100] The second is evident in the Court's refrain that the death penalty must not be issued unless it enjoys broad-based community approval. Our elaborations of these two lines of precedent, in combination with the evidence discussed in the previous section of the intuitiveness and broad-based appeal of the moral theories on which SED has mitigating weight absent a causal nexus with the crime, offer grounds for scrutinizing and invalidating restrictive consideration of deprivation evidence.

A. "Consideration" Requires a "Reasoned Moral Response," Not Legal Formalism

It is a bedrock principle of Eighth Amendment jurisprudence that a death sentence must be based on "individualized consideration" of any mitigating circumstances.[101] The case establishing the principle, *Lockett v. Ohio*, found that a statute prohibiting capital juries from taking into account any mitigating factors other than three specifically mentioned violated the individualized consideration requirement.[102] We think the holding rests on a more general principle, which we defend below: that individualized *moral* consideration of mitigating factors requires that the sentencer's reasoning not be cabined by artificial *legal* constraints. The Court has spent three decades elaborating what counts as a legal constraint preventing

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[99] Deana Logan, *Pleading for Life: An Analysis of Themes in 21 Penalty Arguments by Defense Counsel in Recent Capital Cases*, 4 CAL. DEATH PENALTY DEF. MANUAL 2SN-19 (1982); *see also* Deana Logan, *Why This Man Deserves to Die: Themes Identified in Prosecution Arguments in Recent Capital Cases* (1983) (unpublished manuscript).

[100] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

[101] Lockett v. Ohio, 438 U.S. 586, 606 (1978) (sentencers must "treat each defendant in a capital case with the degree of respect due the uniqueness of the individual").

[102] *Id.* at 593-94.

individualized consideration, and SED evidence has played a central role in its elaboration.

Ten years after *Lockett*, the Court prohibited not just statutory limitations on what mitigating factors can be considered, but judge-made rules limiting the conditions under which a mitigating factor can be considered. In *Eddings v. Oklahoma*, the trial judge ignored evidence offered by the defendant of his youth and turbulent family history, stating that he could not "in following the law" consider such evidence unless it "tended to provide a legal excuse from criminal responsibility."[103] The court of criminal appeals affirmed the resulting death sentence. The Supreme Court expressed some uncertainty as to which *law* the trial judge was referring to. But he seemed to be alluding to a M'Naghten-style test for legal insanity, which gives the defendant a full defense if he lacked the capacity to know "the difference between right and wrong."[104] No Oklahoma statute at the time required sentencers to use the insanity defense standard in evaluating mitigating evidence presented at the penalty phase of a trial.[105] The Supreme Court concluded that, by excluding relevant mitigating evidence from consideration out of a sense—correctly or incorrectly—that the law requires it, the trial court and the highest state court had violated *Lockett*. As the Court explained, a judge has discretion to assign weight to a mitigating factor, but "may not give it no weight by excluding such evidence from their consideration."[106]

The Court further clarified the *Eddings* rule in a later case, *Tennard v. Dretke*, which held that judicial precedent—like a statute or a vague sense of what the law demands—cannot cabin a sentencing agent's "consideration" of mitigating evidence.[107] Again, the case involved SED evidence. *Tennard* reviewed the Fifth Circuit's use of a "constitutional relevance" test in determining whether to grant certificates of appealability for *Penry* claims—defendants' claims that jury instructions at sentencing improperly reduced the effect of their mitigating evidence.[108] The Fifth Circuit's test required that the evidence in question represent a "uniquely severe permanent handicap" that bears a "nexus" to the crime.[109] The Fifth Circuit refused to grant a certificate in Tennard's case on the grounds that his evidence of a low IQ and childhood abuse failed the test. The Supreme Court held that the court of appeals was wrong to condition its review on whether the mitigating evidence met a judge-made legal standard.[110]

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[103] *Eddings*, 455 U.S. at 113.

[104] *Id.* at 109.

[105] *Id.* at 118. While the Oklahoma Supreme Court cited to an earlier decision, *Gonzales v. State*, for the test of criminal responsibility in the state, its use of the test as a means for weighing mitigating evidence was a judicial innovation. Eddings v. State, 616 P.2d 1159, 1170 (1980) (citing Gonzales v. State, 388 P.2d 312 (Okla. Crim. App. 1964)).

[106] *Eddings*, 455 U.S. at 115.

[107] Tennard v. Dretke, 542 U.S. 274 (2004).

[108] Penry v. Johnson, 532 U.S. 782 (2001) [hereinafter *Penry II*].

[109] *Tennard*, 542 U.S. at 274.

[110] We actually think that *Smith* and *Tennard* are best understood as applications of *Eddings*, though the Court did not discuss them that way. Why didn't the Court come out and explain that more directly? Because the Fifth Circuit was not in the business of weighing mitigating evidence; that task was left for the jury. The court of appeals was merely reviewing whether the SED evidence was relevant in order to

Eddings and *Tennard* indicate that judges cannot limit their own moral consideration of relevant mitigating evidence out of a sense that the law—whether statute or judicial precedent—requires it. These cases are a logical application of the *Lockett* holding that capital sentencing requires individualized consideration of mitigating factors. Implicit in these cases is an important general principle that has yet to be fully articulated: that a judge's consideration of relevant mitigating evidence is unconstitutionally narrow when it involves assessing the evidence relative to a limited set of moral principles out of a sense that *legal* rules demand it (where 'it' refers to the limitation on the moral principles by which the evidence is judged). We do not intend to offer an analysis here of what it means to follow a rule or practice *because it is the law*. But it is easy to identify paradigmatic cases of legalism or legal rule following. For example, a judge might follow a rule out of a sense that it is binding precedent or because other judges have an informal convention of following the norm. When restricted consideration of mitigating evidence is the result of judges imposing restrictions legalistically, this violates the principle implicit in the *Lockett* line of cases.

The key to our interpretation is that the individualization principle of *Lockett* has its roots in the distinction between moral reasoning and legal reasoning. In *Lockett*, *Eddings*, *Tennard*, and *Smith*, the Court did not decide in an ad hoc way that particular sorts of legal rules may not constrain the capital sentencer's moral consideration of mitigating evidence. The Court was concerned with eliciting moral consideration from sentencers by removing legal constraints on their ability to consider the evidence from a purely moral point of view. This is why the Court has emphasized time and again that a capital sentence must reflect a "reasoned moral response to the defendant's background, character, and crime."[111] The Court itself has acknowledged that the "reasoned moral response" principle "first originated" in *Lockett* and *Eddings*.[112] As Justice Stevens once wrote, "in the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of . . . the moral guilt of the defendant."[113] In a precursor case to *Lockett*, the Court explained that capital sentencing requires "particularized consideration of relevant aspects of the record of each convicted defendant" lest defendants be treated as a "faceless,

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decide *whether it should hear the case*.

[111] *Penry II*, 532 U.S. at 788 (citations omitted).

[112] Brewer v. Quarterman, 550 U.S. 286, 289 (2007) ("[W]e have long recognized that a sentencing jury must be able to give a 'reasoned moral response' to a defendant's mitigating evidence—particularly that evidence which tends to diminish his culpability—when deciding whether to sentence him to death. This principle first originated in *Lockett v. Ohio* and *Eddings v. Oklahoma*, in which we held that sentencing juries in capital cases "must be permitted to consider *any* relevant mitigating factor."); *see also* Abdul-Kabir v. Quarterman, 550 U.S. 233, 264 (2007) ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence . . . the sentencing process is fatally flawed.").

[113] Spaziano v. Florida, 465 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part). *See also* McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (outlining the capital jury's task of expressing "the conscience of the community on the ultimate question of life or death"); Woodson v. North Carolina, 428 U.S. 280, 297-98 (1976) (reflecting on the importance on the moral views of society in the administration of death penalty); Witherspoon v. Illinois, 391 U.S. 510, 519-20 (1968) ("[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less than express the conscience of the community on the ultimate question of life or death.").

undifferentiated mass to be subjected to the blind infliction of the penalty of death."[114]

In *McKinney v. Ryan*, the Ninth Circuit appears to have implicitly relied on something like this insight in finding unconstitutional the longstanding practice among Arizona judges of considering a defendant's SED to have appreciable mitigating value only if it "caused" his crime.[115] As explained in Part I, judges who engaged in this practice did not view themselves as following binding judicial precedent, as they did when they relied on the old exclusionary rule invalidated by *Tennard*. Rather, they appeared to be following an informal custom amongst judges who had previously applied the exclusionary rule. Judicial customs can, of course, give rise to informal norms and rules that judges follow out of habit or a sense of their legality and the obligations of the judicial office. The practice of giving SED effectively no weight absent a causal nexus bore all the earmarks of such a judicial custom. The court of appeals deemed the practice unconstitutional under *Eddings*. Unfortunately, *McKinney*'s decision remains unnecessarily localized, given the *en banc* court's decision to focus not on the existence of an entrenched judicial practice of restricted consideration but on the practice's historical link to the old exclusionary rule.[116] As previously mentioned, the court emphasized the Arizona Supreme Court's pin citation to the old rule.[117] Because of this choice of emphasis, the Ninth Circuit missed an opportunity to articulate a general test for identifying when the improper influence of a legal practice or custom makes a court's consideration of evidence inadequate under *Eddings*.

We offer a three-factor test for this purpose, drawn from cases—such as those reviewed in Arizona and Alabama—in which an entrenched judicial practice clearly seems to have induced restrictive consideration of relevant evidence. Appellate courts have grounds for finding an *Eddings* violation when all three of the following facts concerning a lower court's sentencing analysis obtain: (i) the court did not even attempt to justify or explain why restrictive treatment of the mitigating evidence was morally appropriate, or why alternative theories of the moral significance of the evidence should be rejected; (ii) the same court, or other courts in its jurisdiction, have in the past routinely appraised the evidence according to the same circumscribed set of moral principles while citing to prior precedent; (iii) independent reasons exist for thinking that a substantial number of reasonable jurors would consider the evidence mitigating based on principles that the court did not even consider. The combination of these factors suggest that the court did not engage in a careful, individualized *moral* assessment of the mitigating evidence, but instead simply followed an entrenched legal practice or custom. The first factor suggests an absence of moral analysis; the second indicates that the court was following a legal convention; and the third factor indicates that if the court had considered alternative, widely

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[114] *Woodson*, 428 U.S. at 303.
[115] McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015).
[116] *Id.* at 813-18.
[117] *Id.* at 814.

endorsed moral principles, then it would have reached a different conclusion about the evidence's mitigating value.

Of course, other factors might supplement an appellate court's review. For instance, it would undoubtedly be relevant if, as is in Arizona, a statute or precedent had previously demanded the same limited consideration.[118] The Arizona Supreme Court had, before *Tennard*, interchangeably described SED evidence lacking the requisite causal connection as "irrelevant" and as having "little to no weight," and switched to exclusive use of the weighing language only after *Tennard*.[119] This suggests that the court saw the outright exclusion of SED evidence from consideration and the denial of weight to it after restrictive consideration as equivalent.

Our test applied in the SED context suggests that restrictive consideration of SED evidence by judges is frequently unconstitutional. To approach the analysis in reverse, consider the third factor. We offered arguments in Part II in support of the notion that SED evidence is mitigating irrespective of its exact causal relationship with the crime—arguments concerning the defendant's moral capacities and culpability, the defendant's prior suffering, and the state's moral standing to punish. We also referred to studies demonstrating that a substantial number of jurors tend to treat SED evidence as *inherently* mitigating.[120]

Now consider the first and second factors. We have struggled to find instances—in any American jurisdiction—where a court made a serious attempt to explain why from the moral point of view SED can only be mitigating if the causal nexus with the crime obtains, as discussed in Part I. Indeed, the opinions we have reviewed rarely if ever provide any rationale for the limitation. Instead, courts tend to cite earlier cases where a judge relied on restrictive consideration—and not as *persuasive* authorities, because the cited cases rarely include an explanation of the moral grounds of the causal nexus requirement.

In the rare instances in which judges attempt to critique alternative approaches to SED evidence, they critique caricatures of them. For instance, in one case the Alabama state court of criminal appeals stated that "[t]he argument that when a bad social environment produces bad people, that fact should in some way mitigate the punishment for these bad people, leads ultimately to the absurd conclusion that only people who come from an impeccable social background deserve the death penalty if they commit capital murder."[121] We are unaware of any judge or scholar who has argued either that *mild* deprivations are mitigating, or that even severe deprivations

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[118] State v. Hoskins, 14 P.3d 997, 1022 (Ariz. 2003).

[119] The Ninth Circuit has expressed some confusion about the Arizona Supreme Court's application of the causal nexus exclusion rule, stating that "Arizona's case law in this regard is conflicting," and citing interchanging examples of the state supreme court saying that it was either (a) considering evidence without a causal nexus but giving it no weight or (b) altogether refusing to consider such evidence. Towery v. Ryan, 673 F.3d 933, 946 (9th Cir. 2012); *see also* Lopez v. Ryan, 630 F.3d 1198, 1200 (9th Cir. 2011) (noting that "Arizona has a checkered past" with respect to using the causal nexus test as a clearly illegal screening mechanism and as a weighing mechanism). This mixed record might be explained if the state court saw no difference between the two rules.

[120] *See* discussion *infra* Part II.

[121] Thompson v. Alabama, No. CR–05–0073, 2012 WL 520873, at *85 (Ala. Crim. App. 2012).

automatically disqualify a defendant from receiving the death penalty.[122] Certainly the arguments we consider in Part II do not have either of these implications. In another case, the Florida Supreme Court suggested that the defendant's childhood abuse could not have reduced his moral responsibility because "the defendant's sister, who had also been abused, including sexually abused by the same alcoholic father, proceeded to live a normal and productive life."[123] But on most theories of SED's mitigating value, as discussed in Part II, the deprivation need not *determine* a person's wrongful acts in order to diminish his punishment-worthiness.

Admittedly, the application of *Eddings* to the practice of restrictive consideration of SED evidence is imperfect, a point that the dissent in *McKinney* was eager to emphasize.[124] The court of appeals in *Eddings* explicitly stated that it was using the "legal test of criminal responsibility" to *exclude* the SED evidence as "non-mitigating." By contrast, courts that give restrictive consideration to SED's mitigating value do not claim to be "following the law," and they tend to give SED "little to no" mitigating weight rather than none at all. As we explained above, however, we think that *Eddings* rests on a broader principle: that a sentencing judge should not limit their moral evaluation of mitigating evidence based on any legal custom or authority, even if the custom is never expressly acknowledged or even recognized by the judge. A test for SED's mitigating value that is applied in customary fashion, one that drastically and counter-intuitively limits the deprivation's mitigating weight, is inconsistent with such a principle.

Moreover, as explained in Part I, in jurisdictions that favor restrictive treatment, "little to no" mitigating weight is equivalent, at least in effect, to excluding the evidence outright. A survey of Arizona capital cases, for example, makes clear that mitigating evidence given "little" or "slight" weight rarely, if ever, results in leniency.[125] Before pronouncing a death sentence, courts often cursorily attach "little" weight to *all* of the mitigating factors in the case—indicating both that the "little" modifier is meant as a dismissal, and that mitigating factors of "little" weight do not warrant a lighter sentence *even when considered in aggregate*.[126] In other cases, mitigating evidence assigned little to no weight is so far from the sentencing judge's mind that it is excluded from her final list of mitigating factors.[127]

Accordingly, appellate courts have sound basis to find a failure to "consider" SED evidence under *Eddings* whenever lower courts routinely rely on restrictive consideration of deprivation evidence without explanation or defense, especially in light of the strong reasons for thinking that SED is

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[122] Of course, mere humanity might be thought to be automatic disqualification—but this would apply to all persons and not just SED sufferers.

[123] Douglas v. State, 878 So.2d 1246, 1260 (Fla. 2004).

[124] McKinney v. Ryan, 813 F.3d 798, 843-44 (9th Cir. 2015) (Bea, J., dissenting).

[125] *See supra* note 27.

[126] *See supra* note 28.

[127] *See, e.g.*, Poyson v. Ryan, 743 F.3d 1185, 1210 (9th Cir. 2013) ("For at the end of its opinion, the state court listed all of the mitigating circumstances it considered in its independent review of Poyson's death sentence. It omitted from this critical tally both Poyson's personality disorders and his abusive childhood.").

mitigating in the absence of any causal connection with the crime. Restrictive consideration *may* pass constitutional muster when a sentencing judge offers some explanation or justification for taking a markedly limited view of SED's mitigating value, and there are indications that the judge is engaging in independent moral analysis. In general, however, restrictive consideration of SED evidence in the jurisdictions we have studied appears to be the product of an entrenched judicial practice or custom that has artificially cabined the individualized moral inquiry that *Lockett* and its progeny demand.

B. Communal Endorsement & the Constitutional Importance of Evaluating Mitigating Evidence Under a Range of Reasonable Moral Principles

Judges could simply consider SED's mitigating value on the basis of a variety of different moral perspectives and principles. For example, instead of considering whether SED is mitigating based on the impaired capacities/responsibility theory alone, they might also consider it's mitigating weight on the basis of the whole-life view of retributive justice. This would obviate the need to justify a restrictive view of SED's mitigating value in the sentencing decision. More importantly, it would be consistent with a line of Supreme Court precedent since *Gregg*, emphasizing that the death penalty depends for its constitutional legitimacy on its link with community values.[128]

Whereas our argument above emphasized the constitutionally suspect nature of the practice of taking a restrictive view of SED's mitigating weight for granted and without explanation, here we argue that judges may be constitutionally obliged to give unrestricted consideration to SED evidence: that is, consideration based on a number of different moral principles that are sufficiently plausible. Unrestricted consideration is *inclusive*: it incorporates a diversity of perspectives on the mitigating potential of SED; and sole-sentencing judges have a special responsibility to ensure that the defendant is sentenced to death only if such a penalty would enjoy broad-based communal support.

The importance of broad-based communal support to the

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[128] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (outlining the capital jury's "task of express[ing] the conscience of the community on the ultimate question of life or death" (citation omitted)); Gregg v. Georgia, 428 U.S. 153, 184 n.30 (1976) ("Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them."(citation omitted)); *id.* at 181 (reflecting on the importance of maintaining a link between contemporary community values and the penal system (citation omitted)); Woodson v. North Carolina, 428 U.S. 280, 297–98 (1976) (reflecting on the importance on the moral views of society to the administration of death sentences (citation omitted)); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (noting that the capital sentencing jury as a representative of a criminal defendant's community provides him with "diffused impartiality" (citation omitted)); Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) (describing the sentencer's task as that of "express[ing] the conscience of the community on the ultimate question of life or death"). *See also* Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 144-45 n.232 (2002) (reciting evidence that the "the case law as a whole indicates that communal values must play a role in capital sentencing").

constitutionality of capital sentencing schemes is well established. The death penalty must be tested against the "conscience of the community,"[129] and "one of the most important functions" of the sentencing agent in a capital trial is to "maintain a link between community values and the penal system."[130] It is, indeed, no coincidence that the constitutionality of the death penalty, in light of the Eighth Amendment's familiar prohibition against "cruel and unusual" punishments,[131] turns on the contemporary moral values of the public. The Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,"[132] and in the past fifteen years alone, the Supreme Court has held that capital punishment is unconstitutional for the mentally handicapped,[133] for minors,[134] and for crimes other than murder and treason[135]—all to bring our sentencing practices into alignment with the evolving moral standards of the citizenry. The fact that the death penalty is ever on the verge of being cruel and unusual by contemporary standards underscores the fact that capital sentencing depends for its ongoing legitimacy on the people's approval.[136]

The importance of broad moral approval is also apparent in the near-universal state legislative preference for jury-based capital sentencing. Even before a Supreme Court ruling in the last decade constitutionally mandated jury participation in capital sentencing, 33 of 38 death penalty states already required it.[137] In 27 of the current 31 death penalty states, the jury's decision to sentence a defendant to life imprisonment is final and cannot be

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[129] *Witherspoon*, 391 U.S. at 519 ("[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less than express the conscience of the community on the ultimate question of life or death."). *See also* Spaziano v. Florida, 468 U.S. 447, 469 (1984) (Stevens, J., dissenting) (a death sentence "is ultimately understood as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live"); *id.* at 483 ("But more important than its procedural aspects, the life-or-death decision in capital cases depends on its link to community values for its moral and constitutional legitimacy.").

[130] *See Gregg*, 428 U.S. at 181 ("[O]ne of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." (citation omitted)).

[131] U.S. CONST. amend. VIII.

[132] *Gregg*, 428 U.S. at 173 (citation omitted). *See also* Kennedy v. Louisiana, 554 U.S. 407, 419 (2008); Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *id.* at 274-79 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 332 (Marshall, J., concurring); *id.* at 382-84 (Burger, C.J., dissenting); *id.* at 409 (Blackmun, J., dissenting); *id.* at 429-30 (Powell, J., dissenting); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[133] Atkins v. Virginia, 536 U.S. 304 (2002) (abolishing the death penalty for the mentally retarded).

[134] Roper v. Simmons, 543 U.S. 551 (2005) (abolishing the death penalty for individuals under the age of eighteen at the time of their capital crimes).

[135] *Kennedy* 554 U.S. at 407 (abolishing the death penalty for rape where the death of the victim was neither the result nor the intent).

[136] While it is not our concern in this article to defend this conception of capital sentencing, we take the rationale to be fairly obvious. The state, acting on society's behalf, needs to earn its moral approval before it inflicts such a grave harm on a person as death; in a pluralistic society, this means ensuring that a death sentence has been tested against as many of the dominant moral views of a community as possible.

[137] Ring v. Arizona, 536 U.S. 584 (2002), requires that juries find all aggravating factors in death penalty cases, so juries must be involved at least to that extent. The only state in which the jury continues to be formally uninvolved in capital sentencing is Montana, which issued its last death sentence in 1996, prior to *Ring*. *See* MONT. CODE ANN. § 46-18-301 (2013). Even before *Ring*, only four other states Arizona, Colorado, Idaho, and Nebraska—used exclusively judicial capital sentencing.

overridden by a trial judge.[138] The case law and academic commentary explain this legislative preference in terms of the jury's perceived status as an especially reliable indicator of the "conscience of the community."[139] The twelve-person capital sentencing jury is selected to approximate a random cross-section of the community, one believed to be significantly more likely than a sole sentencing judge to bring a diversity of moral perspectives to bear on the sentencing decision.[140] The jury's unanimity—required for the imposition of the death penalty in every state save Florida and Alabama[141]—makes even likelier that each death sentence will enjoy widespread public support. Evidence that would mitigate the defendant's punishment-worthiness in the eyes of a substantial portion of the community is less likely to be overlooked by multiple jurors than by a judge acting as the sole sentencer—or so the advocates of jury sentencing argue.[142]

Until recently, two states allowed trial judges to independently issue death sentences, even when it meant overriding a jury's recommendation of life imprisonment. Yet even while doing so, Florida gave privileged status to the jury verdict, because of the jury's ability to represent communal sentiment. In that state, the trial judge could not impose death over a jury's recommendation of life unless "the facts suggesting a sentence of death

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[138] Woodward v. Alabama, 134 S. Ct. 405, 407 (2013) (Sotomayor, J., dissenting). The only states in which jury decisions are not final are Delaware, where only one jury life sentence has been overridden in favor of death, and that was overturned by the state supreme court; and Indiana, where the judge may decide the sentence if the jury cannot reach a unanimous sentence, 2002 Ind. Acts 1734.

[139] *See* Atkins v. Virginia, 536 U.S. 304, 323 (2002) ("[the jury] . . . is a significant and reliable objective index of contemporary values") (quoting Coker v. Georgia, 433 U. S. 584, 596 (1977) (plurality opinion) (quoting Gregg v. Georgia, 428 U.S. 153, 181 (1976))); *id.* (noting the jury's function of "maintain[ing] a link between contemporary community values and the penal system"(citation omitted)); Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)) (arguing that juries preserve the essential link between capital punishment and communal values). *See also* Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1003 n.56 (1996) ("Capital sentencing juries are said to represent the 'conscience of the community.' However, they 'represent' the community only because they are members of the community, not because they discern and then apply community standards."); Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L REV. 1, 101-19 (1980) (arguing that the jury, as representative of the community, is more likely to accurately measure the offense against community outrage); Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 48 (1986) (arguing that "the requirement that a capital sentencing jury consist of twelve persons as compared with a solitary person acting as judge also contributes to the prospect that a cross section of the community will be making the sentencing decision").

[140] *Id.* Of course, a single jury may not fully reflect dominant community sentiment insofar as voir dire challenges can skew a jury's cross-sectional character. *See* Williams v. Florida, 399 U.S. 78, 102 (1970) ("Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge."); Gary Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 798 (1983) ("[W]hile the jury role is essential to ensure expression of present and developing community sentiment there is a risk that individual juries may not reflect that sentiment.").

[141] FLA. STAT. ANN. § 921.141(3) ("Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death.").

[142] *See, e.g.*, Ballew v. Georgia, 435 U.S. 223, 233-34 (1978) (surveying the empirical data and concluding that a greater number of decision makers increases the likelihood of approximating "the common sense of the community," and that "the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result" (citation omitted)). *See also* SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 125 (2005) (describing the difference in moral perspectives of pro-life vs. pro-death jurors).

[were] so clear and convincing that *virtually no reasonable person could differ*."[143] Florida's specific override provision was overturned in 2016 as a violation of the Sixth Amendment right to have all critical findings necessary to impose the death penalty decided by jury, because the jury in Florida issued no factual findings with its recommended verdict.[144] Although the Supreme Court has previously approved Alabama's judicial override, which did not require deference to the jury but did require the jury to find aggravating factors, doubts about the constitutionality of the practice linger. Earlier this year, the Alabama governor signed legislation banning the override for defendants convicted after April 11th.[145] The constitutional question is not entirely moot, however, because Florida may still rewrite its judicial override scheme and the recent Alabama legislation left the 183 inmates already on the state's death row unaffected.[146]

One of the central doubts animating resistance to judge-determined death sentences regards the trial judge's capacity to adequately embody the "conscience of the community" in sentencing.[147] Justice Stevens, dissenting in *Harris*, where the majority approved Alabama's capital sentencing scheme, observed that, "an unfettered judicial override of a jury verdict for life imprisonment cannot be taken to represent the judgment of the community. A penalty that fails to reflect the community's judgment that death is the appropriate sentence constitutes cruel and unusual punishment under our reasoning in *Gregg*."[148] His dissent argued that:

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[143] Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). The Supreme Court recently, in Hurst v. Florida, 136 S.Ct. 616 (2016), invalided an iteration of Florida's override because it allowed the judge to override the jury not just on the overall weight of the aggravating factors against the mitigating factors but on the initial finding of aggravating/mitigating factors as well.

[144] *Hurst*, 136 S.Ct. at 624 (2016).

[145] "Alabama Ends Death Penalty by Judicial Override," Associated Press (Apr. 11, 2017),https://www.usnews.com/news/best-states/alabama/articles/2017-04-11/alabama-ends-death-penalty-by-judicial-override; Harris v. Alabama, 513 U.S. 504, 515 (1995). *See also* Brooks v. Alabama, 2016 WL 266239, at *1 (U.S. Jan. 21, 2016) (Sotomayor, J., concurring in denial of cert.) ("This Court's opinion upholding Alabama's capital sentencing scheme was based on *Hildwin v. Florida*, and *Spaziano v. Florida*, two decisions we recently overruled in *Hurst v. Florida*.").

[146] "Alabama Ends Death Penalty by Judicial Override," Associated Press, Apr. 11, 2017, https://www.usnews.com/news/best-states/alabama/articles/2017-04-11/alabama-ends-death-penalty-by-judicial-override.

[147] Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). *See also* Williams v. New York, 337 U.S. 241, 253 (1949) (Murphy, J., dissenting) ("In our criminal courts the jury sits as the representative of the community. Its voice is that of the society against which the crime was committed. A judge, even though vested with statutory authority to do so, should hesitate indeed to increase the severity of such a community expression."); Scott E. Erlich, *The Jury Override: A Blend of Politics and Death*, 45 AM. U. L. REV. 1403, 1431 (1996) (noting that a judicial override is problematic because "it tends to dilute the community's voice as represented by the collegial body—the jury"); *id.* at 1434 ("[T]his deficiency has created a situation in which the conscience of the community—the jury—has been all but removed from Alabama's capital sentencing process."); Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037 (1985) (arguing that the constitutional law demands a sentencing body that has competency to decide the death question fairly); Shannon Heery, *If It's Constitutional, Then What's the Problem?: The Use of Judicial Override in Alabama Death Sentencing*, 34 WASH. U. J. L. & POL'Y 347, 392 (2010) (noting the jury's role to represent the community); Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 47 (1986) ("Given that the purpose of a death sentence is to reflect community standards, judges should be denied the power of the override unless or until we are willing to evaluate prospective judges as to their propensity to embody communal consciousness.") .

[148] Harris v. Alabama, 513 U.S. 504, 525 (1995) (Stevens, J., dissenting).

> [T]he men and women of the jury may be regarded as a microcosm of the community, who will reflect the changing attitudes of society as a whole to the infliction of capital punishment, and that there could therefore be no more appropriate body to decide whether the fellow-citizen whom they have found guilty of murder should . . . [die] or receive a lesser punishment.[149]

More recently, Justice Sotomayor, dissenting from the Court's decision not to hear a case that would have provided an occasion to reconsider the constitutionality of Alabama's judicial override, observed that, "[b]y permitting a single trial judge's view to displace that of a jury representing a cross-section of the community, Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes."[150] Notably, these justices perceived a tension between the majority's tolerance for judicial overrides in *Harris* and the Court's earlier precedent, in cases like *Gregg*, emphasizing the need for death sentences to be issued *only if* they would enjoy broad-based communal support.[151]

Setting aside the question of the constitutionality of judge sentencing in the capital context, we think that, at the very least, the importance of ensuring broad-based communal support for the death penalty militates strongly in favor of unrestricted consideration of deprivation evidence whenever the judge is the sole sentencer, precisely because such consideration involves assessing the evidence based on a diverse range of moral perspectives on SED's mitigating value. In fact, we think our argument generalizes to all mitigating evidence: judges should embrace unrestricted analysis whenever they and not the jury decide the death penalty. The consistency of the Supreme Court's death penalty jurisprudence would be well served by a more explicit acknowledgment of this fact.

The sole sentencing judge does not enjoy the benefits of multiple voices participating in the sentencing process. If she brings only her *own* private moral beliefs to bear on the sentencing decision, the likelihood becomes high that any death sentence she issues will reflect only her private, as opposed to a communal, moral response. To guard against that risk, the sentencing judge, unlike the individual juror, needs to take seriously moral principles endorsed by her fellow citizens that assign significant weight to

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[149] *Id.* at 517 (quoting Royal Commission on Capital Punishment 1949-1953, Report 200 (1953)).

[150] Woodward v. Alabama, 134 S. Ct. 405, 409-10 (2013 (Sotomayor, J., dissenting)) ("For example, Alabama judges frequently override jury life-without-parole verdicts even in cases where the jury was unanimous in that verdict. In many cases, judges have done so without offering a meaningful explanation for the decision to disregard the jury's verdict. In sentencing a defendant with an IQ of 65, for example, one judge concluded that "[t]he sociological literature suggests Gypsies intentionally test low on standard IQ tests." Another judge, who was facing reelection at the time he sentenced a 19 year-old defendant, refused to consider certain mitigating circumstances found by the jury, which had voted to recommend a life-without-parole sentence. He explained his sensitivity to public perception as follows: "'If I had not imposed the death sentence, I would have sentenced three black people to death and no white people.'"(citations omitted)).

[151] Gregg v. Georgia, 428 U.S. 153, 181 (1976) (quoting *Witherspoon*, 391 U.S. at 519 n.15).

relevant mitigating evidence that she may not ultimately be persuaded by.[152] If some factor would be deemed, for plausible reasons, to be substantially mitigating by a significant number of reasonable judges and jurors, the sentencing judge should regard it as such even if she is ultimately unconvinced of its mitigating worth.[153]

Accordingly, sole sentencing judges should embrace unrestricted consideration of SED evidence. Unrestricted consideration incorporates the view that SED is mitigating when it impairs the defendant's ability to control his conduct and thereby limits his culpability. It recognizes the life-cycle view of retributive justice and the constraints on inflicting excessive suffering on persons who have led miserable lives. It considers the state's diminished standing to punish individuals who have been left behind. In other words, unrestricted consideration involves recognizing SED's substantial mitigating significance in the absence of demonstrable causal connections with the crime, and thereby ensures that serious deprivation has the effect at sentencing that it would have had it been considered by a representative collection of members of the community. As discussed in Part II, the treatment of SED as inherently mitigating is based on moral considerations that are substantively reasonable and enjoy wide-appeal. If one of the most important functions that the sentencer can serve in capital cases is ensuring that the death penalty is only issued if would enjoy broad-based communal support, sole sentencing judges should embrace unrestricted consideration of SED's mitigating value (and of mitigating evidence more generally).[154]

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[152] In other words, the judge, as sentencer, needs to be a more self-conscious representative of public morality than the individual juror in a twelve-person jury. Feminist approaches to the role and responsibilities of the judge have been especially clear on the importance of "communal modes of decision-making" and the need to consult multiple, competing perspectives. *See, e.g.*, Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1924-26 (1988).

[153] To be clear, we are not agreeing with Justice Stevens's view in his *Spaziano* dissent that only the jury should be permitted to impose the death penalty. *See Spaziano v. Florida*, 468 U.S. 447, 490 (1984) (Stevens, J., dissenting). We argue only that the judge ought to emulate the jury when performing a function traditionally—and for good reason—left to juries.

[154] A few caveats are in order. Our argument may seem as relevant to evidence offered in aggravation as it is to evidence offered in mitigation. After all, the sentencing agent must aim to capture the community's outrage as well as its compassion. Does this not entail that, if a great many reasonable persons believe that SED mitigates only if it was a specific cause of the crime, judges should give *less* weight to such SED? The simple answer is no. Structurally, the capital sentencing process is designed to be more responsive to the compassionate side of the community's moral response than to its vindictive side. By requiring jury unanimity for death sentences, most states tilt the scales in favor of the community's mercy. A single holdout vote for a life sentence generally has decisive power on a jury, whereas a single vote for the death penalty is powerless. Moreover, while the Supreme Court prohibits any constraints on the sentencing agent's authority to assess factors as mitigating, it has imposed constitutional constraints on which factors may be regarded as aggravating. *See* Penry v. Lynaugh, 481 U.S. 279, 304 (1987) ("In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (noting that a greater degree of reliability is required precisely on the issue of death-deservingness). Indeed, the scope of potentially aggravating evidence must be narrowly defined by statute. Zant v. Stephens, 462 U.S. 862, 877 (1983) ("[To avoid a constitutional flaw] an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others *found* guilty of murder."). Moreover, whereas the imposition of death must enjoy broad moral

Finally, it should be noted that our argument only extends to the *moral* or *normative* evaluation of mitigating evidence. There remains substantial room for judicial discounting of SED evidence on *empirical* grounds, and judges are under no obligation to consider communal values when reviewing the empirical facts. As mentioned above, the factual record may sometimes lead a judge to reasonably question whether claimed environmental deprivation actually occurred. In such cases, proffered SED evidence may well be properly dismissed by the judge before the question of moral significance even arises.

CONCLUSION

At critical junctures throughout the sentencing process, individual actors are tasked with making moral determinations. Yet very little attention has been paid to when this moral discretion is exercised correctly. That seems to be changing, at least in the capital sentencing context, with appellate courts being more willing to scrutinize sentencing decisions for failures to properly "consider and give effect to" relevant mitigating evidence. We have attempted to provide some clarity to this area of jurisprudence by closely examining the nature of the moral consideration of mitigating evidence that is required under constitutional law. Using the unusually restrictive treatment of severe environmental deprivation evidence in some jurisdictions as our starting point, we have devised a three-factor test for determining when restrictive treatment of such evidence—the conditioning of deprivation's mitigating potential on restrictive conditions like its being a specific cause of the crime—represents an *Eddings* violation. Our test is based on the principle, drawn from a long line of Supreme Court rulings, that the sentencer cannot artificially limit her consideration of the mitigating weight of evidence presented by the defense using legal rules, whether those rules are derived from statute, prior case law, or judicial custom. Additionally, we have argued that in light of the importance of ensuring that the death penalty is sanctioned by communal values, sole sentencing judges have an obligation to consider all of the possible ways in which SED might be seriously mitigating—at least those that many reasonable jurors and judges would endorse. In other words, unrestricted or broad consideration of deprivation evidence is in general mandatory under constitutional law. Between these two independent lines of constitutional argument, appellate courts have more than enough basis for review of cases in Arizona, Alabama, and wherever else restricted consideration of severe deprivation evidence by sentencing judges has unfairly and unlawfully prejudiced defendants convicted of capital crimes.

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approval in order to be legitimate, the Supreme Court has never indicated that such broad appeal is necessary for a life sentence. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972). Our argument accordingly requires judges to take greater care in giving effect to the community's compassion than to its vengeance. Although we have not discussed it here, there may be further reason for judicial deference to merciful moral concerns discoverable in the fact that there are many members of society who do not favor the death penalty under any circumstance.

Article

WHERE BIAS LIVES IN THE CRIMINAL LAW AND ITS PROCESSES: HOW JUDGES AND JURORS SOCIALLY CONSTRUCT BLACK CRIMINALS

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I. INTRODUCTION

Is criminal conviction a reliable test of someone's subjective culpability? Or are criminals socially constructed by factfinders in racially biased ways that make criminal convictions of blacks, for instance, unreliable indicators of their moral blameworthiness? Criminal conviction can seem like a strong and reliable indicator of a black wrongdoer's moral blameworthiness by the following logic:

- Because wrongdoers enjoy a constitutionally protected presumption of innocence in criminal trials,[1] the jury is generally instructed that the State must prove beyond a reasonable doubt not only that a wrongdoer committed a prohibited act but that he or she did so with a certain level of blameworthiness or subjective culpability or *mens rea*.
- Accordingly, a criminal conviction generally means that a jury found the wrongdoer to be morally blameworthy (that is, to have acted with the necessary *mens rea*) beyond a reasonable doubt.[2]
- Hence, criminal conviction establishes accurately and reliably—i.e., beyond a reasonable doubt—that a black person deserves blame and contempt.

The hidden and mistaken assumption in this argument, however, is that jurors' judgments of black blameworthiness—and thus their *mens rea* findings about blacks—are not racially biased. For if jurors' moral judgments about blacks are racially tainted, if black wrongdoers systematically suffer harsher moral evaluations than similarly situated whites, they will more often satisfy the *mens rea* requirement for criminal conviction, which means that black criminals are "constructed" and not merely "found" in the bias-laden fact "finding" process of a criminal trial, which in turn means that a criminal conviction is unreliable evidence of blameworthiness in cases involving blacks. Put differently, proof of racially-biased moral assessments by ordinary people implies that many black criminals are manufactured in the adjudication process through the racially-biased *mens rea* findings of ordinary factfinders. As I discuss below, studies on attribution bias[3] and ingroup empathy bias[4] indeed do show that black wrongdoers systematically suffer harsher moral appraisals than similarly situated white wrongdoers.

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[1] *In re* Winship, 397 U.S. 358, 364 (1970).

[2] As I will show, contrary to what mainstream legal commentators say, direct moral judgments of a wrongdoer are the basis of guilty verdicts in many, if not most, criminal trials.

[3] *See infra* footnotes 13–19, 30–31 and accompanying text.

[4] *See infra* footnotes 35–71 and accompanying text.

II. DENIALS OF RACIALLY BIASED CONSTRUCTIONS OF BLACK CRIMINALS: WHY PARADIGMS MATTER

From the standpoint of the prevailing paradigm of *mens rea*, however, it is wild exaggeration to claim that large numbers of black convictions result from racially-biased moral judgments of black wrongdoers by judges and jurors or that many "Bad Negroes"[5] are socially constructed in the adjudication process. Those trained in American law schools have learned to think about the *mens rea* requirement in ways that conceal its central role as a vehicle for factfinders to make frontal moral judgments of wrongdoers. This is why paradigms matter—looking at things through the wrong ones can conceal where racial bias lives in the substantive criminal law and adjudication of just deserts. The concept of a scientific paradigm developed by Thomas Kuhn in *The Structure of Scientific Revolutions* applies as much to the legal as to the scientific arena. "Paradigm" for Kuhn means a model or theory that explains most or all phenomena within its scope. The power of a paradigm lies in its ability to channel thought, structure perceptions, and define the terms of analyses and debates about a subject; it determines what constitutes "normal science" for an area of inquiry.[6] The prevailing paradigm of *mens rea* in the substantive criminal law should be overhauled because it does not adequately serve the most basic function of a sound paradigm—it does not explain many phenomena within its scope. Worse still from a racial justice perspective, like a conceptual cataract, the prevailing paradigm obstructs a clear view of where bias lives both in black letter law and in the processes by which factfinders apply the black letter to blacks.

The following analysis will provide a clear picture of how under current law biased moral judgments of a wrongdoer can directly and indirectly determine whether factfinders "find" the necessary *mens rea* for criminal conviction. Once the conceptual cataract has been removed through this more coherent interpretation of *mens rea*, a clear and simple truth comes into focus: Bias lives in the *mens rea* requirement and in how judges and jurors apply it to black wrongdoers.

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[5] In RANDALL KENNEDY, RACE, CRIME, AND LAW (1997), Professor Kennedy urges blacks to practice a politics of respectability in criminal matters by distinguishing between law-abiding "good Negroes" and criminal "bad Negroes." Kennedy exhorts good law-abiding blacks to "distinguish sharply between 'good' and 'bad' Negroes" for the sake of safety and racial respectability. His litmus test for "bad Negroes" is criminal wrongdoing. My analysis undermines the normative basis for a politics of respectability in criminal matters, for it shows that many "bad Negroes" are products of racially biased adjudications of blameworthiness– it calls for epistemic humility in our moral judgments of others (especially if they belong to negatively stereotyped groups) and hence for skepticism about any politics rooted in moral distinctions between "good Negroes" and "bad Negroes."

[6] It achieves this in part by establishing pedagogical priorities that teachers use to inculcate in new students the assumptions and frames of reference widely shared by practitioners. In the legal arena, these trained practitioners then further entrench and disseminate the paradigm by having it inform their work as legislators, advocates, and judges, as well as legal commentators and pundits.

A. EVIDENCE OF BIASED CONSTRUCTIONS OF BLACK CRIMINALS IN CHARACTER-BASED APPROACHES TO MENS REA

The legal requirement of subjective culpability or *mens rea* assures that "the punishment fits the blame": In its liability function, the requirement shields morally innocent wrongdoers from any punishment,[7] and in its grading function the requirement subjects the less culpable to less punishment and the more culpable to more.[8] Because the subjective culpability or "desert" of an offender can be and often is measured by his character, the *mens rea* requirement often calls on jurors to judge the character of the wrongdoer. In RETHINKING CRIMINAL LAW, George Fletcher points out that "[a]n inference from the wrongful act to the actor's character is essential to a retributive theory of punishment"[9]—that is, a theory under which it is unjust to punish a person who does not deserve punishment and unjust to punish him more than he deserves (and deserts for punishment purposes are measured by subjective culpability). As he more fully states it:

> (1) [P]unishing wrongful conduct is just only if punishment is measured by the desert of the offender, (2) the desert of an offender is gauged by his character—i.e., the kind of person he is, (3) and therefore, a judgment about character is essential to the just distribution of punishment.[10]

Excuses negate "broad"[11] *mens rea*, so excuses, in Fletcher's words, "preclude an inference from the [wrongful] act to the actor's character."[12] Put differently, a wrongdoer makes out an excuse and defeats a finding of *mens rea* inasmuch as the jury attributes her wrongful act to her situation rather than her character.[13]

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[7] According to the maxim *actus non facit reum, nisi mens sit rea* or "an unwarrantable act without a vicious will is no crime at all" in Blackstone's translation.

[8] For instance, under ordinary *mens rea* analysis, culpable but unintentional wrongdoers are punished less than culpable but intentional ones because someone who kills a pedestrian accidentally generally deserves less blame than one who kills one on purpose.

[9] GEORGE FLETCHER, RETHINKING CRIMINAL LAW 800 (1978).

[10] *Id.*

[11] I recognize that under the prevailing *mens rea* paradigm, "excuses" are not called *mens rea* requirements; *mens rea* under the prevailing paradigm is limited to the aware mental states and negligence. Even traditional scholars (*see generally* KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (8th ed. 2007).), however, grant *mens rea* status to excuses by saying excuses go to "broad" *mens rea*. I discuss the broad and narrow senses of *mens rea* and how excuses figure in both senses. *See infra* footnotes 89-96 and accompanying text.

[12] FLETCHER, *supra* note 9, at 799.

[13] As I discuss below, this character-based approach also explains the role of the "reasonable person" test of *mens rea* that figures centrally throughout the substantive criminal law, including negligence, recklessness, provocation, extreme emotional disturbance, self-defense, and duress. In sum, attributions and character judgments routinely guide jurors' *mens rea* judgments about whether wrongdoers cross the threshold from non-criminal mistakes and accidents to criminal killings and whether someone who has crossed into the criminal realm *deserves* to be blamed and punished more or less.

That *mens rea* findings often turn on whether jurors attribute the wrongdoer's act to his character or to his situation maps directly onto a body of social psychological research called attribution theory. Fritz Heider, known as "the father of attribution theory," focused his research on what he called "naive" or "commonsense" psychology, the kind employed by ordinary people, including jurors and court officials. For Heider, people were like amateur scientists, trying to understand other people's behavior (here the behavior of wrongdoers) by piecing together information to explain its causes. Put differently, this research describes how ordinary people ("social perceivers") answer the "why" questions that arise when they interpret another's (wrongdoer's) conduct.[14] According to attribution theory, when trying to decide why people (wrongdoers) behave as they do, social perceivers make either an internal, dispositional attribution or an external, situational attribution. ("Attributions" are the explanations social perceivers come up with.) An internal attribution is the inference that a person (wrongdoer) is behaving a certain way because of something about him or her, such as the person's attitudes, character, or personality. An external attribution is the inference that a person (wrongdoer) is behaving a certain way because of something about the situation he or she is in. Research indicates that individuals (wrongdoers) whose acts are viewed as stemming from external factors are generally held less responsible than those whose acts are viewed as stemming from internal factors.[15]

Most pregnant with implications from a racial justice standpoint are studies showing differences in social perceivers' attributions about the causes of wrongful behavior by white versus black wrongdoers. In a classic experiment, Birt Duncan showed white subjects a videotape depicting one person (either black or white) ambiguously shoving another (either black or white). Subjects who characterized the shove as "violent" more frequently attributed the wrongdoing to personal, dispositional causes when the harm-doer was black, but to situational causes when the harm-doer was white.[16] A recent study of juvenile offenders finds pronounced differences in court officials' attributions about the causes of crime by black versus white youths: Court officials are significantly more likely to perceive blacks' crimes as caused by internal factors and crimes committed by whites as caused by external ones.[17] In the words of the researchers, "[b]eing black

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[14] Attribution theory also probes how ordinary people explain or diagnose their own behavior, but that research is not relevant to this analysis.

[15] Julian B. Rotter, *Generalized Expectancies for Internal Versus External Control of Reinforcement*, 80 PSYCHOL. MONOGRAPHS: GEN. AND APPLIED 1 (1966). A well-documented finding of this research is that when people explain the behavior of others, they systematically tend to overlook the impact of situations and overestimate the role of personal factors. Because this bias is so pervasive, and often so misleading, it is called the fundamental attribution error.

[16] Birt. L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. OF PERSONALITY AND SOC. PSYCHOL. 590, 595–97 (1976).

[17] George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998).

significantly reduces the likelihood of negative *external* attributions by probation officers and significantly increases the likelihood of negative *internal* attributions, even after adjusting for severity of the presenting offense and the youth's prior involvement in criminal behavior."[18] In addition, researchers found that to the extent that court officials attribute black crimes to internal causes and white crimes to external causes, "they may be more likely to view minorities as culpable and prone to committing future crimes."[19] Thus, differential attributions about the causes of crime by blacks and whites contribute directly to differential evaluations of subjective culpability and dangerousness.[20]

Often, if factfinders attribute the prohibited conduct to the defendant's character, they find the necessary *mens rea*; if, instead, they attribute it to her situation, they do not find the requisite *mens rea*. Yet, the demonstrable race-based differences in attributions about the causes of crimes imply that in assessing *mens rea*, factfinders more readily find the requirement met for blacks than for similarly situated whites, for they will more readily attribute a black defendant's commission of the *actus reus* to his character than they will his similarly situated white counterpart.

B. Concrete Illustration

One arresting implication of this analysis is that criminals—including even murderers—are often socially constructed by factfinders in the adjudication process.[21] For instance, assume a black and a white actor, each of whom intentionally kills another person under similar circumstances and claims provocation. In a common law jurisdiction, the *mens rea* for murder is "malice"—unlawful killings committed with "malice" are murder and those without are manslaughter. Malice means (among other things) an unprovoked intention to kill; thus, an adequate provocation negates malice. Accordingly, if jurors in such a jurisdiction find that the defendant intentionally killed in the heat of passion, triggered by an adequate provocation, they will find no malice and hence convict him only of manslaughter, but if they do not find an adequate provocation, they will find malice and convict him of the more blameworthy kind of criminal homicide, murder. Under one common approach, the provocation, to be adequate, must

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[18] *Id.* at 563–564 (emphasis in original).

[19] *Id.* at 557.

[20] Such findings support the anecdotal observation of a California public defender who noted, "If a white person can put together a halfway plausible excuse, people will bend over backward to accommodate that person. It's a feeling 'You've got a nice person screwing up,' as opposed to the feeling that 'this minority person is on track and eventually they're going to end up in state prison.' It's an unfortunate racial stereotype that pervades the system. It's all an unconscious thing." Christopher H. Schmitt, *Plea bargaining favors whites as blacks, Hispanics pay price*, SAN JOSE MERCURY NEWS, December 8, 1991.

[21] Such findings would also reveal why some studies might fail to recognize the existence or full magnitude of such discrimination, for such studies only compare blacks found guilty of, say, murder with whites found guilty of the same crime. But lost in such a comparison would be that blacks who intentionally kill are more likely to be found to have the *mens rea* for murder than whites who commit the same act.

be such as might cause[22] *a reasonable or ordinary person in the same situation* to "lose self-control and act on impulse and without reflection."[23]

It is here that there is room for biased moral judgments and social construction because it is here that judges and jurors make attributions. As Model Penal Code reporters Jerome Michael and Herbert Wechsler observed:

> Provocation . . . must be estimated by the probability that [the provocative] *circumstances* would affect *most men* in like fashion . . . Other things being equal, the greater the provocation, measured in that way, the more ground there is for attributing the intensity of the actor's passions and his lack of self-control on the homicidal occasion to the extraordinary character of the *situation* in which he was placed rather than to any extraordinary deficiency in his own *character*.[24]

In other words, in determining whether the accused's intentionally homicidal act constitutes murder or manslaughter, the factfinders must decide whether to attribute that act to external, situational factors or to internal, dispositional ones. Inasmuch as they attribute such an act to his situation, they will find the necessary provocation to negate malice and hence find only the *mens rea* for manslaughter; inasmuch as they attribute it to his, in the words of one court, "wickedness of heart or cruelty or recklessness of disposition,"[25]—in other words, to his character—they will not find adequate provocation and hence will find malice or murderous *mens rea*.

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[22] To be more precise, the provocation must be such as would sorely test an ordinary person's self-control.

[23] United States v. Roston, 986 F.2d 1287, 1294 (9th Cir. 1993) (Boochever, J., concurring) (citing 9th Cir. Crim. Jury Instr. 8.24C (1992)). This does not mean reasonable people kill whenever adequately provoked. "[A] reasonable person does not kill even when provoked..." MODEL PENAL CODE § 210.3, cmt. AT 56 (AM. LAW INST. 1980) (citing Glanville Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 742). As *Roston* further explains, "[t]his standard does not imply that his actions." *Roston*, 986 F.2d at 1294 (Boochever, J., concurring).

[24] Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937) (emphases added). They continue: "While it is true, it is also beside the point, that most men do not kill on even the gravest provocation; the point is that the more strongly they would be moved to kill by circumstances of the sort which provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing *serve to differentiate his character from theirs*. But the slighter the provocation, the more basis there is for ascribing the actor's act to an extraordinary susceptibility to intense passion, to an unusual deficiency in those other desires which counteract in most men the desires which impel them to homicidal acts, or to an extraordinary weakness of reason, and consequent inability to bring such desires into play." *Id.* at 1281-1282 (emphasis added).

[25] Maher v. People, 10 Mich. 212, 219 (1862). "[W]ithin the principle of all the recognized definitions [of malice aforethought], the homicide must, ... though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition." *Id.*

Hence, it is here that differential attributions about the causes of crime by blacks and whites can lead to differential evaluations of subjective culpability; it is here that murderous black criminals are socially constructed: Because of race-based attributional bias, factfinders will more readily attribute an intentional homicide committed by a black actor to his "wickedness of heart or cruelty of disposition" than a similar killing committed by a white actor. Thus, they will tend to find a black actor guilty of murder when a similarly situated white actor would only be convicted of manslaughter. Hence, black murderers are not merely found in the adjudication process, they are socially constructed through the racially biased moral evaluations of jurors.

The Wechsler and Michael analysis of murderous *mens rea* and the provocation mitigation not only recognizes the central importance of the "character vs. situation" or "internal vs. external" distinction in jurors'[26] assessments of subjective culpability, it also points out the kind of information that ordinary people (including ordinary jurors) rely on to decide between an internal and external explanation or attribution, namely, information about how *most people* would respond to the provocative stimulus: "Provocation," they point out, ". . . . must be estimated by the probability that [the provocative] circumstances would affect *most men* in like fashion."[27] More generally, the reasonable person test[28] makes information about the reactions of *most people* decisive not only in provocation cases but also criminal negligence and recklessness and a host of defenses. In the words of Mark Kelman, implicit in the reasonable or ordinary person test is the moral norm that "blame is reserved for the (statistically) deviant"[29]—typical beliefs and reactions generally qualify as reasonable ones. Hence, the reasonable person test directs factfinders to consider information about typical reactions in assessing a wrongdoer's blameworthiness.

This approach to the reasonable person standard fits hand in glove with attribution research which finds that ordinary social perceivers give great weight to how typical an actor's reactions are in deciding whether to attribute them to external or internal factors. Thus, under Harold Kelly's Covariation Principle, one kind of information that people rely on when forming an attribution is consensus information.[30] Consensus information is

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[26] I'm interpreting their insights into how jurors determine *mens rea* murder cases as descriptive of how ordinary people currently do make judgments about subjective culpability rather than prescriptive of how they ought to make those moral judgments.

[27] Michael & Wechsler, *supra* note 24 (emphasis added). As the court puts it in *Maher v. People*, "In determining whether the provocation is sufficient or reasonable, *ordinary human nature*, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard." *Maher*, 10 Mich. at 221 (emphasis in original).

[28] Recall that to negate malice, the provocation must be viewed by the jury as the kind that might cause a reasonable or ordinary person in the same situation to lose self-control.

[29] Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY, 798, 801 (1991).

[30] For Kelly there are three types of information that people consider when forming an attribution: consensus, distinctiveness, and consistency. Consensus information concerns how different persons react to the same stimulus. Distinctiveness information concerns how the same person reacts to different stimuli. Consistency information concerns the extent to which the behavior between one actor and one

information about the extent to which other people behave the same way toward the same stimulus as the actor does. If most others also respond to a stimulus in the same way as the actor, then social perceivers will see his behavior as high in consensus and will tend to attribute it to the stimulus or situation. Conversely, if most people do not respond to the stimulus in the same way as the actor, then social perceivers will see his behavior as low in consensus and thus more diagnostic of what kind of person he is—that is, they will tend to make an internal attribution.[31] Thus, the reasonable or ordinary person test, by calling on factfinders to consider consensus information in assessing defendants' subjective culpability, provides a very common legal vehicle for the formation and application of internal or external attributions and explanations by judges and jurors who are adjudicating a wrongdoer's just deserts.

Moreover, the Model Penal Code makes it clear that the point of the word "situation" (in phrases like "reasonable person in the actor's *situation*") is to furnish factfinders with a discretion-laden doctrinal vehicle for excusing those reactions of an actor that can be attributed to his "situation" (and hence do not reveal internal, dispositional defects) and blaming the actor for those reactions that do reveal character defects (because they cannot be attributed to situational pressures). Thus, the Code makes the test for heat of passion whether the defendant acted "under the influence of extreme emotional disturbance for which there is reasonable explanation or excuse," and then directs that the determination of the reasonableness of the explanation or excuse shall be made "from the viewpoint of a person *in the actor's situation.*"[32] In clarifying this formulation, the Comments state:

> The word "situation" is designedly ambiguous. . . . There thus will be room for interpretation of the word "situation," and that is precisely the flexibility desired. . . . In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse *sympathy* in the ordinary citizen. Section 210.3 faces this issue squarely and leaves the ultimate judgment to the ordinary citizen in the function of a juror assigned to resolve the specific

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stimulus is the same across time and circumstances. Distinctiveness and consistency information generally will not be available to factfinders in that they would involve admitting into evidence historical facts about the defendant and evidence of prior bad acts, and such evidence is generally (but not always) inadmissible. Harold H. Kelley, *The Processes of Causal Attribution*, 28 AM. PSYCHOLOGIST 107 (1973).

[31] An alternative theory of the kind of information people take into account when making attributions, Edward Jones's and Keith Davis's Correspondent Inference Theory, still finds that social perceivers believe that a person's actions tell us more about him when they depart from the norm than when they are typical or otherwise expected under the circumstances. Edward E. Jones & Keith E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, 2 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 220 (1965); *see also* ELLIOT ARONSON ET AL., SOCIAL PSYCHOLOGY: THE HEART AND THE MIND 176-77 (1994).

[32] MODEL PENAL CODE § 210.3 (AM. L. INST., Proposed Official Draft 1962) (emphasis added).

case.[33]

Thus, the Code recognizes the "situation" directive as a flexible standard that draws on the common sense and *sympathy* of ordinary social perceivers to determine whether to attribute the actor's wrongdoing to his situation and thus partially excuse or to his "moral depravity"[34] (or other character defect) and thus fully blame.

Because empathy and sympathy constitute a critical basis of jurors' blameworthiness or *mens rea* determinations whenever criminal liability turns on the "reasonable person in the situation" test, let's consider the empirical case for widespread anti-black empathy bias that makes jurors less likely to sympathetically identify with them in criminal prosecutions. "Ingroup empathy bias" has a neural basis in the brain that researchers have captured using functional magnetic resonance imaging (FMRI). FMRI measures brain activity by detecting the changes in blood oxygenation and flow that occur in response to neural activity—more active brain areas consume more oxygen and blood flow increases to the active area to meet this increased demand.[35] FMRI can produce an activation map or "NeuroImage" displaying which areas of the brain are active during a particular thought, action, or experience.[36] Recent studies in social neuroscience show that "empathy for [another's] pain is supported by neuroanatomical circuits underlying both affective and cognitive processes."[37] These studies reveal distinct neural mechanisms of empathy and altruistic motivation. Specifically, one area of the brain or "neural matrix" (including bilateral anterior insula (AI) and anterior cingulated cortex (ACC)) is thought to support the emotional or affective ingredients of empathy while another area (including parts of medial prefrontal cortex (MPFC)) is thought to underlie cognitive components of empathy, "such as the capacity to take another person's perspective."[38] According to these

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[33] MODEL PENAL CODE § 210.3, cmt. at 62-63 (AM. LAW INST. 1980).It is worth noting the Code's recognition of a link between attributions and sympathy. To the extent that we attribute an actor's misbehavior to her situation, we are more disposed to sympathize with her: "There but for the grace of God go I" suggests recognition that, because of ordinary human frailty, in the same situation, I, the person passing judgment, might commit the same act; conversely, the more we sympathize, the more disposed we may be to attribute her misbehavior to her situation. (So sympathy could drive attribution or attribution could drive sympathy or sympathy and attribution could be bi-directional and mutually influence each other.) By the same token, to the extent we attribute her misbehavior to her character, we may withhold sympathy, for we may think that we could not possibly commit the same act in the same situation. We see the act not as an expression of ordinary human frailty but rather as an expression of her extraordinary weakness or depravity. Put differently, to the extent that we sympathize with wrongdoers, it may be possible to feel some sense of solidarity with them despite their plight; but without sympathy we can more readily view them as inalterably different, alien, other. Attribution processes (especially attributional stereotypes) may strongly affect how we define "us" and "them" whether we opt for a politics of solidarity or a politics of distinction in relation to criminals.

[34] *Id.* at 63. As other examples of character defects, the code lists "exceptionally punctilious sense of personal honor" and "abnormally fearful temperament". *Id.* at 62.

[35] *Introduction to FMRI Nuffield Department of Clinical Neurosciences*, UNIVERSITY OF OXFORD, https://www.ndcn.ox.ac.uk/divisions/fmrib/what-is-fmri/introduction-to-fmri (last visited Nov. 24, 2017).

[36] *Id.*

[37] Vani A. Mathur et al., *Neural Basis of Extraordinary Empathy and Altruistic Motivation*, 51 NEUROIMAGE 1468, 1468 (2010).

[38] *Id.*

findings, "the capacity to understand and share another's pain is supported by both affective (e.g., affect resonance) and cognitive (e.g., perspective-taking) mechanisms in the brain"[39] and these mechanisms can be mapped using functional magnetic resonance imaging.

While their brain activity was being monitored with FMRI, subjects (14 Black and 14 White) were shown scenes depicting either Black or White individuals "in a painful (e.g., in the midst of a natural disaster) or neutral (e.g., attending an outdoor picnic) situation."[40] During scanning, participants indicated how much empathy they felt for the person in the target image (e.g., how bad do you feel for this person?) using a four-point scale (1 =not at all to 4=very much). Outside of the scanner, subjects also rated how much money and how much time they would be willing to donate to help each target. In addition, participants were given behavioral exit surveys after scanning to test their disposition for "perspective taking" (that is, the reported tendency to spontaneously adopt the psychological point of view of others in everyday life)[41] and to test their love for, identification with, and loyalty to their social ingroup (using the Multigroup Ethnic Identity Measure or MEIM).

As in other social neuroscience studies of empathy, researchers found that, irrespective of race, subjects showed empathy for humankind in general through greater neural activity within anterior cingulated cortex (ACC) and bilateral anterior insula (AI) when observing the suffering of other humans.[42] However, only Black subjects showed extraordinary empathy for the pain of Black victims by showing greater response within the medial prefrontal cortex (MPFC) when perceiving Blacks in distress.[43] The MPFC, recall, is thought to support cognitive components of empathy like the capacity to take another person's perspective. Unlike Whites, Blacks "recruit medial prefrontal cortex when observing suffering of members of their own social group."[44] Across subjects, activity within the MPFC when perceiving the pain of ingroup relative to outgroup members predicted a subject's higher empathy ratings and greater willingness to donate money and time to help the distressed victim.[45] These findings suggest that there are distinct neural mechanisms of empathy and altruistic motivation in the brain and that these brain mechanisms (or neurocognitive processes) associated with an observer's self-identity underlie extraordinary empathy and altruistic motivation for members of her own social group.[46]

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[39] *Id.*

[40] *Id.* at 1469.

[41] Mark H. Davis, *A Multidimensional Approach to Individual Differences in Empathy*, 10 JSAS CATALOG OF SELECTED DOCUMENTS IN PSYCHOLOGY 85 (1980) (manuscript at 1), https://www.uv.es/~friasnav/Davis_1980.pdf. See also Mathur, supra note 37, at 1469-70.

[42] Mathur, *supra* note 37, at 1472.

[43] *Id.*

[44] *Id.* at 1468.

[45] *Id.* at 1472.

[46] *Id.* at 1468.

Researchers have also used electroencephalography (EEG) to capture White brains spontaneously displaying insensitivity to Blacks and other outgroups. When people are sensitive to the feelings, intentions and needs of others, they "resonate with them by adopting their postures, intonations, and facial expressions, but also their motivational states and emotions."[47] That is, when someone (the subject) observes another (the object), the object's body actions and facial expressions activate the subject's (observer's) neural networks for the same physical actions and expressions.[48] The observer's neural networks *mirror* those of the object. In short, observers vicariously participate in the experiences of people they observe by mentally simulating their actions and expressions (going beyond purely mental simulation in many cases and physically mimicking their expressions, gestures, and body postures).[49] Such vicarious activation of the observer's neural system for action during perception of others' actions and expressions is called "the perception-action-coupling." According to the "perception-action-model of empathy,"[50] such "perception-action-coupling" or mental simulation of another's actions and expressions is the way the observer's brain understands the other's actions, intentions, and emotions. This perception-action link is made possible by "shared neural networks"—neural mechanisms that allow observers to mirror the actions and emotions of those they observe, "thereby synchronizing the inner states of both individuals."[51] These shared neural networks are the basic building blocks of empathy. Research has identified shared neural networks for perception and experience of disgust,[52] pain,[53] touch,[54] and facial expressions.[55] The system of neurons making up these shared networks are often called "the mirror-neuron-system."[56] This mirror-neuron-system enables observers to mentally simulate actions and emotions of others (that is, to experience perception-action-coupling), thereby increasing interpersonal sensitivity and laying the foundation for empathy and social understanding.[57] Accordingly, sensitivity

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[47] Jennifer N. Gutsell & Michael Inzlicht, *Empathy Constrained: Prejudice Predicts Reduced Mental Simulation of Actions During Observation of Outgroups*, 41 J. OF EXPERIMENTAL SOC. PSYCHOL. 841, 841 (2010).

[48] *Id.*.

[49] *Id.* at 842.

[50] *Id.* at 841.

[51] *Id.*

[52] *Id.*.

[53] *Id.*.

[54] *Id.*.

[55] *Id.* (citing L. Carr et al., *Neural Mechanisms of Empathy in Humans: A Relay from Neural Systems for Imitation to Limbic Areas*, 100 PROC. NAT'L ACAD. SCI. 5497 (2003)).

[56] Mirror neurons were discovered in area F5 of the rhesus monkey premotor cortex and are visuomotor neurons that discharge in response to the execution or observation of similar action. Giacomo Rizzolatti & Laila Craighero, *The Mirror-Neuron System*, 27 ANNUAL REV. NEUROSCIENCE 169, 169 (2004) (citing G. Di Pellegrino et al., *Understanding Motor Events: A Neurophysiological Study*, 91 EXP. BRAIN RES. 176 (1992); V. Gallese et al., *Action Recognition in the Premotor Cortex*, 119 BRAIN 593 (1996); Giacomo Rizzolatti et al., *Premotor Cortex and the Recognition of Motor Actions*, 3 COGNITIVE BRAIN RES. 131 (1996)).

[57] "Simulating others' actions and expressions elicits the associated autonomic and somatic responses, thereby increasing social sensitivity." Gutsell & Inzlicht, *supra* note 47.

or indifference to the actions, thoughts, and feelings of ingroup and outgroup members should be reflected in the shared neural networks that make up the mirror-neuron-system.

The disturbing discovery of researchers is that the "mirror-neuron-system" underlying the capacity of observers to mentally simulate the actions, intentions, and emotions of others is biased against Blacks and other outgroups.[58] For instance, while observing others in pain, people show less activity in brain areas associated with the experience of pain when observing ethnic outgroup members in pain than when observing similarly situated ingroup members.[59] An even more basic and general bias against Blacks and other outgroups dwelling within "the mirror-neuron-system" of observers keeps Whites from mentally simulating simple, gross motor responses like those associated with reaching for a glass, picking it up, taking a small sip of water, and then putting the glass back in its place. An observer's ability to mentally mirror another person's gross motor responses is "the physiological process thought to be at the core of interpersonal sensitivity."[60] Such a fundamental bias against mentally simulating the actions of members of outgroups, say researchers, "would not only make it difficult to empathize with outgroup members' suffering, but also to understand their actions and intentions."[61]

EEG has been used to measure mirror neuron activity by recording "mu rhythm suppression" in observers while they passively observe ingroup and outgroup members. The "mu rhythm" is generated by the area of the brain involved in voluntary motor control. Mu rhythm or "mu waves"—waves in the frequency range of 8–13 Hz—attain maximal "amplitude" or "power" when individuals are at rest.[62] Early studies showed that the amplitude of "mu waves" could be *suppressed,* their power diminished, by execution, observation, or imagination, that is, by a subject's own physical movement or by his observation of others performing actions or by imagined movement.[63] "When mu power decreases during observation of an object other, the subject's motor neurons are active and the subject is presumed to

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[58] *Id.* These brain mechanisms are especially biased against disliked outgroups. *Id.* The idea that observers mirror the actions of ingroup more than outgroup members finds *behavioral* support in studies showing that people mimic others' expressions, gestures, and body postures with less frequency for outgroup members. *Id.* at 842. But this behavioral evidence does not give us strong evidence of exactly how such bias in mimicking or resonating with others occurs in the observer's brain.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Henri J. Gastaut & Jacques Bert, *EEG Changes During Cinematographic Presentation*, 6 ELECTROENCEPHALOGRAPHY & CLINICAL NEUROPHYSIOLOGY, 433, 438 (1954); Deziree Holly Lewis, Mu Suppression, Mirror Neuron Activity, and Empathy (May 2010) (unpublished honors thesis, Texas State University) (on file with Texas State University Digital Collections), https://digital.library.txstate.edu/bitstream/handle/10877/3223/fulltext.pdf.

[63] These studies showed that mu activity is inversely related to motor cortex activity less mu activity or power (i.e. more mu suppression) reflects more motor cortex activity while more mu activity (i.e. less mu suppression) reflects less motor cortex activity.

be simulating the object's action."[64] Thus, more mu activity or power (i.e. less mu suppression) reflects less motor cortex activity; less mu activity or power (i.e. more mu suppression) reflects more motor cortex activity. Today, mu suppression is a common measure of motor cortex activity[65] and has recently been used to measure activity in the mirror-neuron-system by looking at motor cortex activity in subjects during passive observation of others performing actions.[66]

In an article published in the *Journal of Experimental Psychology*, Gutsell & Inzlicht used EEG to look at the neural networks that support mentally simulating the actions of others—the "mirror-neuron-system"—while people passively observed ingroup (other Whites) and outgroup (Blacks, South Asians, and East Asians) members. The subjects (or observers) in the experiment were 30 White, right-handed Canadian (University of Toronto Scarborough) students (13 female; mean age of 18.46). Researchers measured suppression of EEG oscillations in the 8–13 Hz "mu" frequency at scalp locations over the primary motor cortex, the area of the brain associated with gross motor responses. They found that observers showed increased mu suppression when passively observing ingroup members, indicating motor cortex activity when participants passively observed other Whites.[67] These findings suggest that they did mentally simulate the actions of ingroup members. Critically, however, participants did not show significant mu suppression when observing outgroup members, indicating no activity over motor areas when they observed outgroup members.[68] These findings suggest that they did not mentally simulate the actions of outgroup members.[69] Thus, in the words of Gutsell & Inzlicht, "those neural networks underlying the simulation of actions and intentions—most likely part of the 'mirror-neuron-system'—are less responsive to outgroup members than to ingroup members."[70] They conclude from this evidence that "people experience less vicarious action and their associated somatic and autonomic states," the basic building blocks of empathy, "when confronted with outgroups than with ingroups."[71]

The "reasonable person in the actor's situation" approach to *mens rea*, therefore, combines two discretion-laden standards that enable factfinders to

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[64] Gutsell & Inzlicht, *supra* note 47, at 842.

[65] *Id.*

[66] *Id. See also* Lewis, *supra* note 62, at 5 (citing S.D. Muthukumaraswamy & B.W. Johnson, *Changes in Rolandic Mu Rhythm During Observation of a Precision Grip*, 41 PSYCHOPHYSIOLOGY 152 (2004); L.M. Oberman et al., *EEG Evidence for Mirror Neuron Dysfunction in Autism Spectrum Disorders*, 2 *COGNITIVE BRAIN RES.* 190 (2005); J.A. Pineda et al., *The Effects of Self-Movement, Observation, and Imagination on Mu Rhythms and Readiness Potentials (RP's): Toward a Brain-Computer Interface (BCI)*, 8 IEEE TRANSACTIONS ON REHABILITATION ENGINEERING 219 (2000); S. Cochin et al., *Observation and Execution of Movement: Similarities Demonstrated by Quantified Electroencephalography*, 11 EUR. J. NEUROSCIENCE 1839 (1999); R. Hari et al., *Timing of Human Cortical Functions During Cognition: Role of MEG*, 4 TRENDS IN COGNITIVE SCI. 455 (2000)).

[67] Gutsell & Inzlicht, *supra* note 47, at 843.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 844.

[71] *Id.*

form and make attributions about, or to sympathetically identify with, wrongdoers:

1) The "reasonable person" ingredient, which directs factfinders to consider consensus information and
2) The "situation" ingredient, which directs factfinders to weigh situational factors in deciding whether to attribute conduct to external or internal causes, circumstances or character.

For convenience, I will use "the reasonable person" test as shorthand for "the reasonable person in the actor's situation" test, but the shorthand should be understood to include both attribution-enabling ingredients. As I show below, the reasonable person test constitutes a core element of many crimes. Hence, it figures pivotally in a wide range of legal directives jurors use to weigh and measure a wrongdoer's blameworthiness.[72] This insight will expose the many and varied opportunities in the substantive criminal law and its processes for the social construction of black criminals: The malleable reasonable person test enables differential juror attributions about the causes of crime by blacks and whites that can lead to differential evaluations of the subjective culpability of blacks and whites not only in provocation cases, where it drives the social construction of black murderers, but across the entire body of substantive criminal law, from criminal negligence to self-defense, where the malleable test drives the biased social construction of black criminals in general.[73] Further, the elastic reasonable person test provides a doctrinal vehicle for jurors to construct criminals in racially biased ways on the basis of ingroup empathy bias. What's more, common approaches to *mens rea* other than the reasonable person test—approaches that seem more factual and rule-like such as "awareness," "premeditation" and "intent"—can be just as malleable as the reasonable person formulation of the culpability requirement and thus can provide just as much room for the biased social construction of black criminals. Only through radically overhauling the prevailing *mens rea* paradigm can we shed light on the enormous number of opportunities that exist in criminal trials for jurors' racially biased moral judgments to result in the biased social construction of black criminals.

[72] Which is to say that it figures pivotally in jurors' liability and grading judgments.

[73] In other settings e.g., negligence, recklessness, putative self-defense, duress—we will see the "reasonable person in the actor's situation" formula does precisely the same attributional work it does with respect to heat of passion, with one exception, namely, in these other settings, if the factfinders attribute the actor's wrongful actions and reactions to his situation, it results in full rather than partial exculpation.

III. PREVAILING *MENS REA* PARADIGM IGNORES ROOM FOR BIASED SOCIAL CONSTRUCTION OF BLACK CRIMINALS

Trained under the prevailing *mens rea* paradigm, many American lawyers think of *mens rea* as an "aware mental state"—like "purpose," "knowledge" or "conscious disregard"—that must accompany the prohibited act or *actus reus*; in other words, it refers to an actor's subjective awareness of wrongdoing.[74] One cannot *choose* to do wrong if he lacks awareness of wrongdoing and *choice* is the bedrock of personal and criminal responsibility for many courts[75] and commentators.[76] Under this familiar approach, *mens rea* is a "descriptive" requirement because it is "descriptive"[77] of—that is, it describes—an aware mental state.[78]

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[74] Mentalism rests on an approach to personal responsibility known as choice theory. Awareness is a necessary condition of responsibility under this theory because only if an individual is aware of engaging in prohibited conduct can we regard it as being a choice of his or an expression of his will. Thus choice theory is sometimes related to Kant's view of the "will" as the locus of moral worth and proper object of moral criticism. R. A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL., 345, 346 (1993). For Kant, whether my "will" accords with moral law alone determines the moral worth of my action; such "inclinations" —desires, aversions, etc. as may help to motivate it are not relevant to the moral appraisal of my action. *Id.* Early in the career of this approach to responsibility, therefore, we see an effort to separate the choosing agency the will—from those desires and aversions that may motivate choice. As we shall see, efforts to disembody the "choosing self" continue to inform modern choice theory. The important point for present purposes is that for choice theorists, an invasion or excessive imperiling of a protected interest can be properly imputed to a person if, but only if, that invasion or excessive risk creation represents an expression of her will or she chooses it. But if she lacks awareness that her conduct invades or unduly threatens a protected interest, the invasion or excessive risk creation cannot be said to express her will or to be chosen by her. Note that to choose to invade or excessively endanger a protected interest, she need not subjectively desire the invasion or act with the purpose of doing so. It is enough that she was aware that her conduct would invade or unduly jeopardize such an interest and that she chose to act or voluntarily proceeded to act as she did. (Such unintended but aware conduct can be said to be an expression of the will in the sense that it manifests a willingness (or preparedness) to cause a certain consequence or bring about a certain state of affairs.)

[75] *E.g.*, Morissette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

[76] *E.g.*, SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 203 (7th ed. 2001) (emphasis added): "The vicious will [in Blackstone's translation of *actus non facit reum, nisi mens sit rea*] was the *mens rea*; essentially it refers to the blameworthiness entailed in *choosing* to commit a criminal wrong. One way the requirement of *mens rea* may be rationalized is on the common sense view of justice that blame and punishment are inappropriate and unjust in the absence of *choice*." *See also* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 28 (1968). Because negligent actors lack awareness of wrongdoing and hence cannot be said to choose their wrongdoing, some staunch Choice Theorists refuse to recognize negligence as a form of *mens rea*. Professor Glanville Williams wrote: "The retributive theory of punishment is open to many objections, which are of even greater force when applied to inadvertent negligence *than in crimes requiring mens rea*." GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 122 (2d ed. 1961) (emphasis added). Larry Alexander argues that "negligence as inadvertent risk-taking is not culpable conduct" and hence is indistinguishable from strict liability. Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 949-952 (2000).

[77] Martin R. Gardner, *The Mens Rea Enigma: Observations of the Role of Motive in the Criminal Law Past and Present* 1993 Utah L. Rev. 635, 668 (1993).

78 Or lack thereof in cases of negligent inadvertence, which some commentators do not view as legitimate forms of *mens rea. See, e.g.*, Alexander, *supra* note 76, at 949-952; WILLIAMS, *supra* note 76 at 122. In the words of Williams, "With the best will in the world, we all of us at some times in our lives make negligent mistakes. It is hard to see how justice (as distinct from some utilitarian reason) requires mistakes to be punished." WILLIAMS, *supra* note 76, at 122.

Descriptive requirements (rules, elements, and tests) reduce the grounds of liability to predesignated and dispositive "facts" that jurors can "find" without needing to make moral judgments.[79] A statute criminalizing "sexual intercourse with a person less than fifteen years of age" and not recognizing a defense of mistake turns on a descriptive requirement.[80] The "fact" of the victim's age determines criminal liability and factfinders can determine whether that requirement was met without making a moral judgment about the defendant. There is little room for bias in finding such "facts" or applying such descriptive requirements. In contrast, nondescriptive or normative requirements (rules, elements, and tests) direct factfinders to make moral judgments in reaching their verdict. A statute defining murder as an unintentional killing accompanied by "a depraved and malignant heart"[81] turns on a nondescriptive, normative requirement. The depravity and malignancy—in a word, the wickedness—of the wrongdoer's heart determines criminal liability here and factfinders cannot determine the wickedness of his heart without making a moral judgment of him. In jury instructions that provide factfinders with nondescriptive and normative standards by which to judge a wrongdoer's *mens rea,* factfinders are *directed* to make a frontal evaluation of his moral blameworthiness before returning a guilty verdict.

The dominant *mens rea* paradigm gives short shrift to the role of nondescriptive and normative standards in the substantive criminal law and its processes and so may be fairly characterized as "mentalist" and "descriptivist": Its mentalism lies in its assumption that criminal culpability for wrongdoing lies only in an aware mental state, specifically, an intent to do wrong or at least a conscious awareness of wrongdoing; its descriptivism lies in its assertion that the *mens rea* tests contained in the jury instructions do not direct, invite, or enable factfinders to morally judge the wrongdoer. The legal directives used by jurors who sit in judgment on wrongdoers, according to descriptivists, avoid the background moral issue of the wrongdoer's wickedness and focus instead on the factual (or empirical) issue of whether the wrongdoer acted with an aware mental state. For descriptivists, once the issue of guilt or innocence has been reduced to that of the presence or absence of an aware mental state, there is no need for the factfinder to make any kind of direct moral judgment of the wrongdoer to convict him. For descriptivists, viewing *mens rea* tests as equivalent to an "aware mental states" requirement minimizes the factfinders' discretion and the legal room they have for biased social constructions of black wrongdoers.

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[79] Descriptive standards are legal directives that reduce the grounds for liability to predesignated and dispositive "facts" that fact finders can determine without making moral judgments. Alan C. Michaels, *"Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism*, 100 COLUM. L. REV. 54, 62 (2000).

[80] *Id.* at 64.

[81] *Id.* at 75.

In this respect, the distinction between descriptive standards of *mens rea* like "purpose," "knowledge," and "aware mental states" and normative ones like "depraved and malignant heart" tracks the more familiar one between rules and standards. In the words of Kathleen Sullivan:

> [L]egal directives take different forms that vary in the relative discretion they afford the decision maker. These forms can be classified as either 'rules' or 'standards' to signify where they fall on the continuum of discretion. Rules, once formulated, afford decision makers less discretion than do standards. . . . A legal directive is 'rule'-like when it binds a decision maker to respond in a determinate way to the presence of delimited triggering facts. . . . A legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.[82]

From this perspective, inasmuch as the *mens rea* requirement binds factfinders to focus only on the "facts" of aware mental states, it is "rule"-like and descriptive; conversely, inasmuch as it frees them to exercise discretion in morally judging the defendant's subjective culpability, it is "standard"-like, nondescriptive,[83] and normative.

If indeed the *mens rea* requirement is descriptive and "rule"-like[84] and concerned only with aware mental states, as proponents of the prevailing paradigm assert, then there is much less room in the criminal law and its processes for the biased social construction of criminals through racially-biased moral judgments. Bias in the social construction of black criminals thrives on juror discretion, which is greatest when factfinders are asked to make direct moral judgments on the basis of nondescriptive standards that

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[82] Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–58 (footnotes omitted).

[83] The worry that more nondescriptive directives may redound to the detriment of socially marginalized groups finds support in recent research on different tests for heat of passion. Under traditional common law and pre-Model Penal Code statutes, courts developed quite descriptive rules on what constituted adequate provocation to reduce murder to voluntary manslaughter. An intentional killing was reduced to manslaughter "almost as a matter of law" once certain *facts* were found—namely, if the ultimate victim provoked the defendant with battery, mutual combat, a serious crime against a close relative, illegal arrest, or adultery. A triable issue of fact on "heat of passion" could not be raised unless these facts were established. Many courts have moved toward a more nondescriptive regime by departing from the categorical approach in favor of a more subjective approach to the defendant's claims. The Model Penal Code has taken the most nondescriptive approach to provocation, allowing a reduction to manslaughter when the actor killed under "extreme mental or emotional disturbance for which there is reasonable explanation or excuse . . . . determined from the viewpoint of a person in the actor's situation." MODEL PENAL CODE § 210.3(1)(b) (AM. L. INST., Proposed Official Draft 1962). Professor Nourse found that in jurisdictions employing nondescriptive approaches, a significant number of cases got to juries involving women who were killed for simply rejecting or trying to separate from the killer without any evidence of infidelity or violence. No such cases got to juries in descriptive jurisdictions. Moreover, cases involving so-called "infidelity" after the relationship had *ended* were far more likely to reach juries in nondescriptive than descriptive jurisdictions. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L. J. 1331 (1997).

[84] That is, if it merely directs factfinders to ascertain whether an aware mental state accompanied the wrongdoer's prohibited conduct.

are flexible and open-ended. Such discretion-laden and open-ended normative standards give maximum elbow room to conscious and unconscious bias.[85] But insofar as *mens rea* is no more than an aware mental state, it may be viewed as an empirical fact whose existence factfinders can ascertain without making any moral judgment, as they can ascertain a person's blood pressure, pulse, or, with the right equipment, the electroencephalographic oscillations of his brain.[86] This very narrow conception of *mens rea* leaves jurors and judges few doctrinal opportunities to socially construct black criminals through biased moral judgments based on "ingroup empathy biases" or "race-based attributions" or other distortions entrenched in our cognitive unconscious.[87]

IV. THE PREVAILING PARADIGM LIMITS ROOM FOR BIASED SOCIAL CONSTRUCTION TO "DEFENSES" AND "EXCUSES"

Proponents of the dominant *mens rea* paradigm acknowledge that, in limited situations, factfinders must weigh the reasons for a defendant's wrongdoing and so must make a moral judgment about his subjective culpability. Thus, once jurors determine that a defendant has committed a prohibited act *with mens rea*, he may still escape liability by raising a "*mens rea* defense" of justification or excuse. In the words of Paul Robinson and Jane Grall:

> *[M]ens rea* describes only a subjective state of mind *required by the definition of an offense*. One who has the necessary *mens rea* may nonetheless be blameless because of a general *defense*, such as insanity, self-defense, or duress, that precludes moral culpability. By adopting a *narrow* concept of *mens rea*, *which refers only to elements of an offense definition*, one does not necessarily reject a normative view of criminal liability.[88]

This approach regards substantive "defenses" as either "excuses" (e.g., duress, provocation, extreme emotional disturbance, putative or mistaken

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[85] Inquiring only into a wrongdoer's aware mental states would not require factfinders to make any kind of moral judgments or diagnostic assessments of motives and reasons for the wrongdoing

[86] As brain imaging technology grows more sophisticated, "aware mental states" may someday be photographable by, say, skullcaps outfitted with newfangled EEGs and MRIs. Certain neural patterns associated with cognition and affect could at least provide strong evidence of the actor's consciousness of a risk or circumstance.

[87] Accordingly, this traditional paradigm cannot recognize or acknowledge the enormous role racial and other social bias plays in the legal and social construction of black criminals. Because this impoverished *mens rea* paradigm conceals where bias lives in jury instructions and the adjudication process, its inadequacies must be exposed so that it can be replaced with one more up to the task of explaining the many opportunities there are in the substantive criminal law and its processes for judges and jurors to socially construct criminals in racially biased ways.

[88] Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 686 n.21 (1983) (emphasis added).

self-defense, insanity) or "justifications" (e.g., actual self-defense). From this standpoint, if a harm-doer has a valid excuse or justification for consciously committing a prohibited act, he lacks *mens rea* in its *broad* sense—that is, in its "all-encompassing usage, which treats the term '*mens rea*' as synonymous with moral fault."[89] Thus, under this approach, "defenses that aim to establish the absence of moral blameworthiness" "can be considered '*mens rea*' defenses."[90] In contrast, *mens rea* also has a formal, legalistic, *narrow* sense under the traditional approach: "*Mens rea* in its narrow sense," according to the dominant model, "refers only to the kind of awareness or intention that must accompany the prohibited act."[91] Because most "excuses" or "*mens rea* defenses" (duress, provocation, extreme emotional disturbance, self-defense) hinge on an extremely open-ended and malleable nondescriptive test of blameworthiness (namely, the "reasonable person in the situation" test), the traditional approach must admit that sometimes the criminal law directs jurors to evaluate the wrongdoer's blameworthiness on the basis the flexible, nondescriptive, "reasonable person in the situation" standard—precisely the kind of legal directive that provides the most latitude for jurors to make biased attributions and indulge ingroup empathy bias.[92]

In sum, the traditional model of *mens rea* bifurcates blameworthiness, creating a two-pronged conception and analysis of subjective culpability and limits the opportunity for biased moral judgments and biased social construction in the adjudication process: The first culpability prong, denominated definitional or "narrow" *mens rea,* comprises aware mental states[93] and calls on factfinders to make purely factual judgments about the wrongdoer's psychic condition based on descriptive, "rule"-like legal directives;[94] the second culpability prong, denominated "defenses" or "broad" *mens rea*, comprises excuses and justifications and calls on factfinders to make discretionary, moral judgments based on nondescriptive standards like the reasonable person test.[95] So, under the traditional paradigm's bifurcation of blameworthiness, each culpability prong—the *prima facie* fault or "narrow" *mens rea* prong (driven by descriptive rule-

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[89] KADISH ET AL., *supra* note 11, at 213.

[90] *Id.*

[91] *Id.*

[92] But, as we will see, it minimizes the impact of that admission by strictly limiting the excuses and defenses available to wrongdoers.

[93] It perhaps also includes negligence, a frowned upon form of *mens rea* by some commentators because the wrongdoing lacks awareness of wrongdoing and hence is not choosing to do wrong.

[94] Most crimes are *defined* to require that narrow *mens rea* be proven before any exculpatory claim—broad *mens rea*—comes into play. According to this logic, saying that an individual invaded a legally protected interest without *broad mens rea* amounts to saying that he is excused for consciously committing a prohibited act; but saying that he committed such an act without *narrow mens rea* amounts to saying that he needs no excuse because an indispensable element of the crime has not been satisfied, thus resulting in failure of the *prima facie* case.

95 Hence, under this analysis, someone who *intentionally* (with an aware mental state) gives away important state secrets under death threats sufficient to cause a *reasonable person* in his situation to do the same acts both with and without *mens rea*—he acts with narrow *mens rea* but without broad *mens rea.*

like tests of aware mental states) and the excuses or defenses prong (driven by the non-descriptive "reasonable person in the situation" test)—turns on fundamentally different kinds of legal directives and calls for radically different kinds of judgments (factual in the first prong, moral in the second) from the factfinders.[96] Again, from this perspective there may be some room for biased moral judgments and social construction with respect to excuses and justifications, given their focus on motives and their grounding in the flexible and nondescriptive reasonable person standard, but from this viewpoint there is hardly any room for the biased social construction of black criminals in narrow and definitional "*mens rea*," the form of *mens rea* that as a practical matter comes into play most in criminal trials.

This posited cleavage in the *mens rea* requirement makes it possible for descriptive mentalists to reconcile their narrow, descriptive conception of the *mens rea* requirement with its historical, doctrinal, and functional role of ensuring that criminal liability turns on blameworthiness. Because the category "defenses" includes all the considerations relevant to *broad mens rea* or "all-encompassing moral fault," it seems that without losing anything important the term "*mens rea*" can be limited to and treated as synonymous with *narrow mens rea*.[97] Thus, the distinction between definitions and defenses provides crucial doctrinal support for the contention of proponents of the prevailing *mens rea* paradigm that a descriptive, factual, non-

[96] Under this distinction, all considerations relevant to the objective wrongfulness of the act, on the one hand, and the subjective culpability of the actor, on the other, fall into either the category of inculpatory definitional elements or exculpatory defense elements. The offense definition establishes the *prima facie* wrongfulness of the act by identifying the protected interest that ordinarily must not be invaded or excessively imperiled, and it establishes the *prima facie* subjective culpability of the actor by identifying the aware mental state that must accompany such act. Defenses defeat the inferences (or presumptions) of wrongfulness or subjective culpability to which the offense definition normally gives rise by going behind the definition and weighing the defendant's reasons or explanations for his behavior. Explanations that defeat the inference of wrongfulness, such as self-defense, are justifications; those that defeat or attenuate the inference of subjective culpability, such as duress, provocation, and extreme emotional distress, are excuses.

[97] Thus, different substantive standards—reflecting substantive differences in the nature and scope of the subjective culpability inquiry—are supposed to apply to definitional than to defense elements. Suppose, for example, that the offense definition for criminal homicide requires the killing of a human being. The defendant shoots at a target (or what he believes to be a bear) and kills a nearby bystander (or fellow hunter). Because the error (or mistake) concerns a definitional fact, descriptive mentalists hold that the defendant should *not* be criminally liable if he was unaware of risk of hitting a bystander (or of being mistaken), even if a reasonable person would have possessed such awareness. In contrast, suppose the mistake concerns a justificatory fact, such as whether he was under attack by a gun wielding assailant. Because this mistake concerns a defense fact, it is not enough that he lacked awareness that he might be mistaken in his perceptions; he must be reasonably mistaken to make out a valid claim of self-defense. In *Regina v. Morgan*, the landmark rape case, the court followed the same methodology, suggesting that because non-consent was part of the definition of rape, the defendant had to be aware that the intercourse was without consent to be criminally liable (i.e., any actual belief in its existence was exculpatory), but that if it had been proper to characterize consent as a defense (a justification), the defendant could be liable even though he lacked such awareness (i.e., only a reasonable belief that there was consent would have sufficed). Seeking to avoid the result in *Morgan* while still adhering to and forcefully advocating the same methodology, George Fletcher in Rethinking Criminal Law argues that consent should be viewed as a defense element (a justification) in rape, thereby rendering defendants liable despite their lack of an aware mental state, so long as a reasonable person in their position would have been aware. KADISH ET AL., *supra* note 11, at 213–214.

normative approach to *mens rea* does not mean the law does not care about the subjective culpability of citizens it blames and punishes.[98] Nevertheless, this traditional perspective minimizes the opportunities for jurors' race-based attribution and empathy bias to infect criminal cases and socially construct black criminals by limiting the reach of potentially biased moral judgments jurors can make to a few narrowly circumscribed "defenses," reserving the standard "*mens rea*" designation for inquiries into "aware mental states," a factual inquiry that leaves little room for the social construction of black criminals through the racially-biased moral assessments of judges and jurors.

V. ANOMALIES THAT EAT THE PARADIGM

There are fatal flaws with this approach. First, it is simply wrong to say that excuses, justifications, motives, causes, non-descriptive standards, and normative or moral judgments do not figure in definitional *mens rea*. To the contrary, they are at the core of *mens rea* tests required by the "offense definition" of countless crimes. For instance, of the four "kinds of culpability" (*mens rea* tests) of the Model Penal Code (purpose, knowledge, recklessness and negligence), half (specifically, negligence and recklessness) explicitly require factfinders to use the malleable and nondescriptive "reasonable person standard" to determine a wrongdoer's subjective culpability,[99] that is, to determine whether the motives or causes of his harmful act support a claim of justification or excuse.

Of course, referring to offense definition elements like negligence and recklessness as excuses is unconventional; conventionally, these levels of culpability are viewed as requirements—preconditions—that must be met before there is a crime to excuse. Thus, for criminal homicide, it might seem that the prosecution must first prove that the defendant negligently, recklessly (or intentionally) killed the victim, for only then is there a criminal homicide to excuse. So *in form* negligence and recklessness (and intent) seem like "inculpatory" elements; excuses and defenses like duress and self-defense seem like "exculpatory" elements. But negligence and recklessness often *function* as excuses; legally they are exculpatory elements masquerading in inculpatory clothing.

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[98] Unfortunately, however, the promise to give full or principled or even coherent attention to the wrongdoer's general blameworthiness in the "defenses" and "excuses" prong of the *mens rea* analysis is never made good. Primarily for reasons of policy and social welfare rather than justice to the individual, courts and legislatures and commentators severely circumscribe defenses like duress and provocation and filter out mitigating factors like a wrongdoer's "disadvantaged social background" in ways that leave defendants with very few doctrinal opportunities to argue that he is not blameworthy once he has met the *prima facie* tests of narrow *mens rea* and been relegated to the "defenses" and "excuses" culpability prong.

[99] We are only looking at moral guilt or innocence at the stage of *mens rea* analysis because it presupposes that the actor has already been found "guilty" of committing the *actus reus* and so is a wrongdoer—someone who has committed a prohibited act.

A. The Negligence Anomaly

For instance, under the MPC, a person acts negligently when he fails to appreciate that his conduct creates a substantial and unjustifiable risk, and when his lack of awareness "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[100] The "unjustifiable risk" element calls for a judgment of whether the conduct itself is excessively risky.[101] Whether an act is excessively or unjustifiably risky goes to *actus reus* (prohibited conduct) not *mens rea* (subjective culpability)—justifications center on acts, excuses, on actors.[102] Anytime someone engages in harmful and unjustified conduct, his wrongful act—wrongdoing—must be excused.

State v. Everhart clearly illustrates this crucial distinction between ingredients of the negligence definition that require factfinders to morally appraise the *act* and those that require them to morally appraise the *actor* and her excuses. In *Everhart*, a young girl with an IQ of 72 gave birth in her own bedroom, wrapped the baby in a blanket from head to foot, and, believing that the baby had been born dead, accidentally smothered him to death. To convict the girl of criminal negligence, the prosecution had to prove not only that wrapping the baby in that way under those circumstances was an unjustified (excessively risky) act. Assuming the factfinders conclude that his act was unjustifiably risky (which it clearly was in this case), the law directs them to determine whether the person who created those excessive risks (someone we can now call the "wrongdoer") did so with subjective culpability or *mens rea*. That is, to prove criminal negligence, the prosecution must show not only that the defendant engaged in excessively risky conduct (wrongdoing), but also that her mental and emotional shortcomings, her cognitive and volitional failings, were *not* those of a "reasonable" or "ordinary person in the situation." This is the "excuse" dimension of negligence. Under this ingredient, someone who runs excessive risks without wickedness—i.e., without differentiating herself from ordinary people "in her situation"—is excused for her unjustifiably risky act.[103] If the court viewed her IQ of 72 as a morally relevant excuse, it can make her low IQ part of her "situation" for purposes of the "reasonable person in her situation" test.[104] The court in *Everhart* followed precisely this

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[100] MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST., Proposed Official Draft 1962).

[101] For example, whether its benefits outweigh its risk or respects individual rights.

[102] J. L. Austin, *A Plea for Excuses*, 57 PROC. OF THE ARISTOTELIAN SOC'Y 1, 2–3 (1956–1957).

[103] Thus, drawing on "consensus information" (the reactions of ordinary or typical people to the same stimulus or "situation"), factfinders who attribute the inadvertent and unjustifiably risky conduct to the "situation" *do* excuse—that is, do not find negligence. (If most people would respond to the situational stimulus the same way, the response can be attributed to the "situation" rather than the wrongdoer's character.) But those who attribute such conduct to the defendant's character deficiencies *do not* excuse—that is, do find negligence. FLETCHER, *supra* note 9.

[104] The act can be unjustified without the actor being unreasonable; reasonable people in certain situations can—without subjective culpability—commit unjustified acts. Calling someone who creates unjustified risks reasonable is functionally equivalent to excusing her; calling her unreasonable is

analysis, holding that because of the defendant's low IQ and the accidental nature of the death, the prosecution failed to prove culpable negligence.[105]

Someone driving a car in an emergency—to rush a relative to the hospital, for instance—provides a more general illustration of the *excuse* function that the reasonable person test routinely serves in negligence or recklessness analyses. This Distraught Driver might expose others to more risk than can be justified by the benefit of his speeding. If the injury to the relative was clearly not life-threatening, for instance, the cost (increase) in health and safety risks imposed on others by speeding may outweigh the benefit (decrease) in health and safety risks to the relative produced by speeding to get him there sooner. Or the driver might suffer some other failure of judgment or self-control (like failing to keep a proper lookout or taking longer to react to a suddenly appearing pedestrian), lapses that he would have avoided under less stressful circumstances. A factfinder might find that the driver's act or conduct was "unreasonable" (i.e. excessively risky or unjustified) but nevertheless conclude that his error in judgment or reduced self-control was "excusable" (an ordinary expression of human frailty) and *therefore* ultimately "reasonable."[106] Reasonable responses need be neither rational nor right when the reasonable person test functions as an excuse inquiry and directs factfinders to make allowances for the harm-doer's ordinary human limitations. Thus, our hypothetical Distraught Driver can claim to be excused and reasonable if an ordinary person confronted by a similar emergency could have made similar mistakes on the basis of similar cognitive and volitional failings.

Even in torts, where some commentators claim that negligence only focuses on acts and their justifications, not actors and their excuses, the reasonable person test clearly directs jurors to excuse some excessive risk-takers. Only the excuse function, for instance, explains so-called emergency doctrine in civil negligence. Under the emergency doctrine, trial judges in effect instruct juries that they may excuse an actor for an unjustified act if he acted under the taxing cognitive and volitional pressure of an emergency. Specifically, under the doctrine, judges instruct juries to consider the emergency that confronted the defendant in determining his reasonableness. As Dan Dobbs points out, the only logical application of the emergency doctrine occurs when there is wrongdoing—when the act inflicted more evil than it prevented. If the defendant's conduct would be reasonable even without considering the pressure of the emergency, then the emergency doctrine is irrelevant, for there is no wrongdoing to excuse. For instance, assume an emergency that confronts a defendant with a sudden and pressure-filled choice between causing death and causing property damage. If the defendant chooses the presumptive lesser of available evils—property

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equivalent rejecting her excuse claim. Thus, the "reasonable person in her situation" ingredient in definitions of criminal negligence and recklessness functions as an excuse claim.

[105] KADISH ET AL., *supra* note 11, at 425.

[106] Because reasonable *acts* are always justified yet reasonable *actors* may be merely excused, a reasonable actor can commit an unreasonable act.

damage—he is doing exactly what he would be expected to do even with hours for calm deliberation and decision. But then nothing about the choice being sudden and pressure-filled is doing any independent moral or legal work. In such a case, as Dobbs observes, "it is right to hold that he is not negligent and not liable, but wrong to suggest that the emergency doctrine has anything to do with the decision."[107]

Clearly, then, the function of the emergency doctrine is to highlight for the factfinders that the "reasonable person in the situation" test excuses *ordinary* expressions of human frailty in the face of certain situational pressures. The cognitive and volitional deficiencies (expressions of human frailty) caused by the situational pressures excuse an unjustified act when the actor was "*reasonably* [i.e., an ordinary person would have been] so disturbed or excited [by the emergency] that the actor [could not] weigh alternative courses of action."[108] But, paradoxically, the most compelling evidence that the emergency doctrine provides for the existence of an excuse function at the heart of the reasonable person test in negligence is that courts increasingly reject the emergency doctrine itself; the reason they increasingly reject giving a separate instruction on emergency circumstance is because they recognize that judges already always instruct the jury that the defendant is held to the standard of the reasonable person in the "situation" or under the "circumstances." "Emergency, if one exists, is one of the circumstances, and lawyers are free to argue to the jury that the defendant behaved reasonably considering the emergency (*or any other circumstance*)."[109] Courts increasingly reject a specific emergency instruction because they see that the general instruction on the reasonable person standard fully covers the emergency excuse and all other excuses arising from the circumstances. A separate emergency instruction lacks neutrality because the "the effect is to emphasize one circumstance that favors the defendant."[110] Any sound application of the general reasonable person test already makes allowances for all kinds of situational pressures, including those generated by emergencies, so a separate emergency instruction "highlights a single circumstance, the emergency, for special consideration"[111] and thus "unduly emphasizes the defendant's side of the

[107] 1 DAN B. DOBBS, THE LAW OF TORTS 305–06 (1st ed. 2001).

[108] KEETON ET AL., PROSSER AND KEETON ON TORTS 196 (5th ed. 1984) (emphasis added). Under such conditions, as Prosser and Keeton observe, "the actor cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision, one which no reasonable person could possibly have made after due deliberation." *Id.* Another civil court found that a defendant acted reasonably because "he was suddenly confronted with unusual emergency which 'took his reason prisoner.'" *Id.*, at n.29. In the words of one civil court, in an emergency, the actor's choice "may be mistaken and yet prudent." *Id.*, at 196.

[109] DOBBS, *supra* note 107, at 308 (emphasis added).

[110] *Id.* The same defendant-friendly redundancy infects the "unavoidable accident" (no negligence if the accident was unavoidable by the exercise of ordinary care) and "mere happening" (the mere happening of the accident or injury is not itself evidence of negligence) instructions—both "unduly emphasize the defendant's side of the case in preference to the plaintiff's." *Id.*

[111] *Id.*

case."[112] Accordingly, courts increasingly see emergency instructions as unnecessary and unfair.

The upshot of this analysis is that, in everyday operation, the general reasonableness standard functions as a legal vehicle for excuse claims in negligence, civil or criminal.[113] In fact, the reasonableness test does double duty, functioning as a legal vehicle for two separate levels of excuse claims: the general first-level excuse claim, covering mistakes and accidents of ordinary people caused by emergencies and other external situational pressures;[114] and the second-level excuse claim, covering mistakes and accidents of atypical people—like the young girl with an IQ of 72 in *Everhart*—caused by an idiosyncratic deficiency, one afflicting a limited subdivision of the population. The general first-level excuse—always implicit in a reasonable person test—claims that the wrongdoer, in the words of H.L.A Hart, has taken "those precautions which any reasonable man with normal capacities would in the circumstances have taken."[115] Applied to emergencies, for instance, the claim is that the psychological and emotional pressures created by the emergency could cause any ordinary person with normal capacities to suffer similar cognitive or volitional impairments. In contrast, the second-level excuse—the relevant moral basis for appraising the defendant in *Everhart* claims that, again in Hart's words, given the wrongdoer's idiosyncratic "mental and physical capacities," she "[c]ould . . . [not] have taken those precautions."[116] Applied to the case of the accidental baby killing by the girl with an IQ of 72, her excuse claim is that because of her cognitive deficiency she could not have taken "those precautions which any reasonable man with normal capacities would in the circumstances have taken."[117] From the standpoint of subjective culpability, she can reason, why treat someone with less mental and psychological capacity differently than someone with less physical capacity? Just as a shorter or blind person cannot be faulted for failing to see or avoid danger that could only be seen by a taller or sighted person, someone with an IQ of 72 cannot be faulted for failing to appreciate danger that could only be appreciated by someone of normal intelligence. Her excuse claim is that because of her cognitive deficiency she, once more in Hart's words, "could not have helped [her] failure" to act and think like someone without her disability.[118] As Hart observes, if the criminal law punishes those who could not help themselves by refusing to adjust the reasonable person test to the individual capacities of the wrongdoer, then it

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[112] *Id.*

[113] KEETON ET AL., *supra* note 108, at 197 n.32 ("doctrine merely emphasizes the 'under the circumstances' portion of general standard of 'reasonable under the circumstances'").

[114] The first-level excuse claim is commonly called the "objective" test of reasonableness; the second-level, the "individualized" test.

[115] HART, *supra* note 76, at 154.

[116] *Id.*

[117] *Id.*

[118] *Id.* Excuse claims generally take the form of either "I couldn't help myself" or "I didn't mean to."

punishes the morally innocent, for in such a case "criminal responsibility will be made independent of any 'subjective element.'"[119]

B. The Recklessness Anomaly

Recklessness is another dominant approach to "definitional" *mens rea* that contradicts the prevailing paradigm's tenet there is little or no room in definitional *mens rea* for the biased social construction of black criminals because excuses and normative standards do not figure in definitional *mens rea*. Under the MPC, a person acts recklessly when he *consciously* disregards a substantial and unjustifiable risk, as well as when his disregard "involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[120] Once again, just as with negligence, the factfinders must first determine whether the conduct was unjustifiably risky, then, assuming an affirmative answer to that question, whether such conduct was accompanied by subjective culpability, that is, whether the wrongdoer was consciously aware of his excessive risk taking and, if so, whether such conscious wrongdoing represents a "gross deviation" from what "a law-abiding [read: reasonable][121] person...in the actor's situation" would have done. Once more, factfinders who attribute the actor's conscious creation of unjustifiable risks to the "situation" will not find a gross deviation from the reasonable person standard and so will not find recklessness; but those who attribute such conscious behavior to the defendant's lack of a "law-abiding" disposition or other character flaw will typically find a gross deviation and hence recklessness.[122]

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[119] *Id.* Just like the "reasonable person" test, the "gross deviation" test directs the factfinders on how to distinguish unjustifiable acts that are excused from those that are unexcused and hence criminally blameworthy: The requirement tells jurors not to excuse a wrongdoer who creates excessive risks if they find both that an ordinary person in the same situation would *not* inadvertently have run the same risks (the civil test of negligence) and that the wrongdoer's inadvertence was "gross," that is, that his inadvertence displayed criminally culpable indifference to the wellbeing of others.

[120] MODEL PENAL CODE 2.02(2)(c) (AM. L. INST., Proposed Official Draft 1962).

[121] There is no reason to treat "law-abiding" as significantly different than "reasonable." Both formulations are clearly nondescriptive standards inviting normative judgments by the factfinders, and if anything, the "law-abiding person" verbalization focuses attention on the state of the actor's internal dispositions (and whether to attribute the unjustifiably risky conduct to those dispositions or to the situation) even more directly and explicitly than the "reasonable person" verbalization.

[122] Consider, for instance, the case of *Parrish v. State*, 97 So.2d 356 (Fla. Dist. Ct. App. 1957), in which a man in a car with companions pursued his ex-wife through the city streets of Jacksonville in the early hours of the morning. He was armed with a bayonet and was apparently attempting to carry out his threat to kill her. He caught up with her at one point and broke her car window with his bayonet, but she maneuvered her car and eluded him. Continuing her escape, she disregarded a stop sign and drove at a high rate of speed into a through street. In so doing she struck another car and subsequently died of the injuries. The ex-husband was convicted of second-degree murder. Suppose, however, that the ex-wife had survived but the driver of the car she struck had been killed. Could *she* be convicted of negligent or reckless homicide? First, whether this raises a question of negligence or recklessness depends on whether she was aware of the risk of injury to others as she ran the stop sign. This could go either way, as her defense attorney could say (and the factfinders could conclude) that fear flooded her consciousness to the point that she was completely oblivious of such risks, or the counsel representing the interests of her victims could perhaps persuasively contend that she was aware of *some* degree of risk. (As we will see, this awareness line between negligence and recklessness is sheer and permeable.) The next issues would

Because negligence and recklessness establish the minimum requisite levels of culpability for a vast array of crimes, the collapse of the standard organizing distinctions – inculpatory vs. exculpatory elements, definitional elements vs. defenses, *mens rea* vs. excuses, aware mental states vs. reasonable person standards, descriptive directives vs. normative standards—demolishes the descriptivist dream of a non-normative approach to *mens rea* that limits factfinder discretion and thus minimizes the opportunities for the racially biased social construction of criminals in the adjudication process. This fantasy could be entertained only so long as a crime—at least at the "prima facie," "inculpatory," "offense definition" level—only consists of the description of prohibited conduct coupled with an accompanying aware mental state. Under such a conception, direct moral judgments by jurors about the wrongdoer's character are relegated to the realm of "defenses," especially "excuses." Once cabined in this way, normative factors and discretionary judgments can be further discounted and disregarded by severely circumscribing what can constitute an excuse or defense.

But contrary to this bifurcated conception of blameworthiness, in cases of negligence and recklessness, justification and excuse claims are incorporated into the definitional *mens rea* analysis. When these two core *mens rea* tests determine guilt and innocence, the prevailing paradigm's distinctions between narrow, descriptive, definitional *mens rea* and broad, nondescriptive *mens rea* defenses dissolve into incoherence.[123] Under both *mens rea* requirements, jurors must weigh a host of different factors

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be, first, whether the risk she created was unjustified, and second, whether the risk she took, "considering the nature and purpose of [her] conduct and the circumstances known to [her], involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Model Penal Code § 2.02(2)(d) (AM. L. INST., Proposed Official Draft 1962). However justified the conduct appears under this original statement of facts, we could alter them in various ways until they struck us as not sufficient to actually justify the conduct (say, the threat she was fleeing was dramatically less grave, or there was a police station she could have pulled into before reaching the stop sign, which she would have noticed under ordinary circumstance, but which she failed to perceive in her panic). Then we would have an "unjustified act" and the question would become whether she should be excused for excessively risky conduct. Under the MPC's approach she should be excused unless her unjustified act "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Under this language, the distorting effect that fear can have on an ordinary person's awareness of options and judgment of appropriate risk-taking could affect whether jurors excuse her (by hypothesis) unjustified act, as could any post-traumatic stress disorders she may have developed at the hands of her abusive ex-husband.

[123] But with malice we saw that a single inquiry into subjective culpability may turn on both descriptive and nondescriptive legal directives, requiring factfinders to make both factual and normative judgments in evaluating blameworthiness—a factual judgment about the presence of an aware mental state (namely, intent) coupled with a normative one about the presence of provocation sufficient to sorely test the self-control of a reasonable person in the actor's situation. Like recklessness, malice is clearly an element of the offense definition when state law defines murder as an "unlawful killing with malice aforethought," as the Supreme Court made clear in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Consequently, provocation is not a "defense" under such a statute, but rather also a definitional element, whose absence the State must prove beyond a reasonable doubt, according to the Court. Hence, definitional elements can encompass both descriptive and nondescriptive directives. With malice, if factfinders attribute the intentional homicide to the situation, it only results in a mitigation from murder to manslaughter; but with recklessness, if they attribute the conscious creation of unjustified risks to the situation, it results in full exculpation.

simultaneously in reaching an unavoidably moral judgment about whether to attribute excessively risky conduct to the situation (and exculpate) or to the actor's bad character (and inculpate).[124]

Finally, negligence and recklessness cannot be treated as minor anomalies in the prevailing *mens rea* paradigm. Negligence is a common ground of criminal liability, which, in some legal arenas, such as rape, constitutes the dominant approach—in the words of one casebook, "Most of the recent American cases permit a mistake defense, but only when the defendant's error as to consent is honest and *reasonable*."[125] And recklessness—the all-purpose and possibly most common *mens rea* requirement under the Model Penal Code[126] and throughout the common law[127]—figures centrally in an enormous number and variety of crimes. Thus, the prevailing paradigm cannot serve the most basic function of a sound paradigm—it cannot adequately explain many phenomena within its scope.

Because the malleable and amorphous "reasonable person in the situation" test (with help from the "gross deviation" requirement) does most of the *mens rea* or subjective culpability work in both negligence and recklessness, black wrongdoers are looking at double-barreled bias from jurors who must determine their guilt or innocence in crimes requiring negligence or recklessness:

- Inasmuch as the Model Penal Code rightly views the reasonable person test as a flexible vehicle for jurors to express sympathy and empathy with the wrongdoer,[128] "ingroup empathy bias"[129] makes it less likely that white jurors will sympathize with a black wrongdoer and find that he acted like a reasonable person in the situation.
- Inasmuch as the MPC rightly views the reasonable person test as a flexible vehicle for jurors to make attributions about the wrongdoer, "attribution bias" makes it less likely that jurors of all races will find that a black wrongdoer met the reasonable person test.

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[124] Negligence not only contradicts descriptivist interpretations of *mens rea*, but also mentalist ones, as it requires no aware mental state.

[125] KADISH & SCHULHOFER, *supra* note 76, at 358 (emphasis added).

[126] MODEL PENAL CODE § 2.02(3) (AM. L. INST., Proposed Official Draft 1962): "Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto."

[127] *See, e.g.*, R v. Cunningham [1957] 2 QB 396 (Eng.).

[128] *See* MODEL PENAL CODE § 210.3, cmt. at 62-63 (AM. LAW INST. 1980). "The word 'situation' is designedly ambiguous . . . . In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen." *Id.*

[129] *See infra* at pp. 8-13.

VI. HOW RACIAL BIAS INFECTS "FACTUAL" OR DESCRIPTIVE TESTS OF MENS REA THROUGH "INTERPRETIVE CONSTRUCTION"

Descriptivist proponents of the prevailing paradigm assume that because recklessness *includes* an aware mental state requirement (namely, conscious awareness of a substantial and unjustifiable risk), it is the kind of "descriptive" *mens rea* test—call it the "conscious awareness" test—whose existence can be "found" by factfinders without any moral judgment rather than socially constructed through biased moral judgments.[130] But the awareness requirement only looks like a descriptive directive which requires a purely factual determination by the jury;[131] through the hidden and often unconscious manipulation of factual descriptions—that is, through the process of "interpretive construction"[132] of the underlying facts—the awareness requirement often functions like a flexible and discretion-laden standard that can therefore enable the racially-biased social construction of black criminals through jurors' biased moral judgments. In other words, we come now not just to where bias lives in the criminal law and its processes—but to where it hides. The concept of "interpretive construction"[133] will help us root out bias in seemingly factual judgments and descriptive standards like woodlice from under the lumber pile.[134]

A. Interpretive Construction and Intent

Let's begin with a fact pattern that frequently arises in criminal law textbooks—a case of Russian roulette. Assume that in a park after school a sixteen-year-old wrongdoer produces a handgun from his backpack and proposes to a friend that they place a live round in one of the gun's six empty chambers, spin the cylinder, and each take turns pointing the revolver at the shin of the other and pulling the trigger. The cylinder would be spun again after each turn. Either participant could end the game at any time by saying the word "chicken" and calling off the contest—in which case the other player would be the winner. After five or ten turns where the hammer drops harmlessly on an empty chamber, the wrongdoer takes his turn, spins

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[130] That is, rather than socially constructed through a value-laden diagnostic interpretation of the wrongdoer by jurors.

[131] One that requires the jury to make a factual finding about a precise and empirically verifiable mental state.

[132] *See generally* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

[133] For a thoughtful general discussion of the phenomenon of interpretive construction in criminal law settings, *see id.*

[134] To that end, first I will illustrate how easily and often factfinders inconspicuously manipulate or "interpretively construct" or what I will call "play the accordion" on—the legal facts in a case in which the prototypical aware mental state of "intent" governs the dispute. Then I show how easy it is for well-meaning and conscientious jurors to consciously or unconsciously play the accordion on the facts of a criminal case and thereby interpretively construct the aware mental states of awareness and premeditation. In turn, this analysis will show how readily biases in the adjudication of just deserts can socially construct black criminals.

the cylinder, points the gun at the victim's lower leg, and fires a live round into his tibia.

In a prosecution for "intentional wrongdoing," assume the jury believes the wrongdoer when he says that he had firmly resolved not to call off the game or "chicken out," but also that he did not subjectively desire to shoot the victim; rather, he sincerely hoped and subjectively desired that the other player "chicken out" before someone suffered a gunshot wound. In that case, to prove the wrongdoer intended to cause the victim's injury, the prosecution must prove that he knew with substantial certainty one of the two of them would be shot. In turn, whether the shooter "intended" to cause this injury (in the "knew it would result from his conduct" sense of intent) depends entirely on how the jury frames or interpretively constructs the facts, not on the substantive test of intent itself (namely, knowledge with substantial certainty) or on the shooter's actual state of mind as he squeezed the trigger. At the instant he squeezed the trigger, the shooter could only be aware of a 1-in-6 chance of injuring the victim; so if we frame the *actus reus* or prohibited conduct narrowly as only encompassing each discrete turn in the game (that is, if we interpret the facts from the standpoint of each individual spin of the cylinder and squeeze of the trigger), the shooter's act cannot be characterized as accompanied by any knowledge-based or constructive intent to injure the victim. In contrast, if we frame or "interpretively construct" the facts broadly (that is, if we view the *actus reus* as the entire course of conduct and see both players as firmly resolved not to "chicken out"), the victim's injury can be characterized as an intended consequence of the shooter's conduct in that he knew with substantial certainty that eventually—inevitably—someone would be shot and then the doctrine of "transferred intent" makes him responsible for the intended shooting of that particular victim who was eventually shot, whoever that turned out to be. Seen in this light, the constructive intent requirement itself is mere window dressing, the real basis of the decision being how the facts are interpretively constructed; whatever factors determine that characterization really determine the outcome of the case, not the window dressing "intent" requirement.

Some thoughtful authorities on the nature and scope of the constructive intent requirement take issue with my conclusion. Professors Henderson and Twerski, for instance, argue that proper conceptualization of the constructive intent requirement requires recognition of a distinction between "the proximate consequences of discrete acts, on the one hand, and the inevitable consequences of general courses of conduct, on the other."[135] They contend that the concept of "intended consequences" should not be applied to a course of repetitious conduct—such as batting in the lineup on a major league baseball club throughout a long season—undertaken by an

[135] James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1141 (2001).

actor, because over the course of such conduct "some types of unhappy consequences are, sooner or later, virtually certain to occur."[136]

> For a batter in the major leagues, hitting foul balls into the stands, thereby striking patrons, is certain to occur from time to time across many thousands of swings of a bat. Yet, in connection with any given swing, not only does the batter not desire to hit a foul ball when he swings the bat, he does not believe that such a consequence is certain—or even very likely—to follow. The player understands at the outset of the baseball season that foul balls will inevitably occur; but the "act" referred to in the phrase "one intends the consequence of an act" is the discrete act of swinging a bat at a pitched ball, not the deliberate undertaking of the course of conduct involved in batting regularly in a major-league lineup. Properly conceptualized, intent focuses on discrete acts, not general courses of conduct.[137]

This clever distinction works, however, only to the extent that we accept their interpretive construction of the facts, for, again, regardless of the substantive legal standard applied to a fact pattern, choosing to broadly or narrowly describe the facts can make a case "easy" or "hard" and preordain its outcome. In proximate cause, for instance, the substantive legal criterion may be "foreseeability," but these cases really hang on how the jury or other factfinder interpretively constructs the facts. Thus, in *Hines v. Morrow*, the defendant negligently permitted a railroad crossing to become full of potholes.[138] A car became mired in the mud at the crossing. The plaintiff attempted to step out from between the two vehicles, but found that he could not because his wooden leg had sunk into a mud hole. A coil from the tow rope caught the plaintiff's good leg, causing it such serious injury that it had to be amputated below the knee. On appeal, the defendant argued that the condition of the crossing was not the proximate cause of the plaintiff's injury, that is, he argued that it was not foreseeable that the victim would suffer injury in such a bizarre and freakish way.[139]

In cases that turn on a flexible test like "foreseeability," lawyers and factfinders put the rabbit in the hat (predetermine the outcome) when they interpretively construct the facts and pull it out again (confirm the predetermined outcome) when they wed the substantive law to those "found" facts. As Professor Morris has pointed out, had the court focused on the details of the events, the defendant might have proved the absence of foreseeability and prevailed. Instead, the court adopted a broader interpretive focus in line with the plaintiff's description of the facts:

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[136] *Id.*
[137] *Id.* at 1141–42 (internal citations omitted).
[138] Hines v. Morrow, 236 S.W. 183, 184 (Tex. 1921).
[139] *Id.*

> The case, stated in the briefest form, is simply this: [Plaintiff] was on the highway, using it in a lawful manner, and slipped into this hole, created by [defendant's] negligence, and was injured in undertaking to extricate himself. . . . [To the defendant's argument that it] could not reasonably have been foreseen that slipping into this hole would have caused the [plaintiff] to have become entangled in a rope, and the moving truck, with such dire results. . . . [the] answer is plain: The exact consequences do not have to be foreseen.[140]

This kind of interpretive legerdemain lies behind the intuitive appeal of the authors' foul ball analogy. A demystifying counter-analogy could be a shooter who fires not a single shot from a single action rifle into a crowd, but one who, armed with an automatic AK-47 with a long ammunition belt, takes aim at a crowd. Imagine that the ammunition belt he feeds the AK-47 contains a hundred randomly selected rounds, ninety-nine of which are blanks and only one of which is "live." If we interpretively construct the facts by narrowing the time frame to each discrete shot and disjoining (or disaggregating) each shot from its predecessor and successor, we might conclude that he did not "intend" or "know with substantial certainty" that he would injure anyone in the crowd. Indeed, we can even assume that the shooter connects the AK-47 to an automatic timer and abandons it, so that it only fires one round from the ammunition belt per day or week, resulting in great temporal distance between the *discrete* acts. Nevertheless, our intuitions would demand that he be responsible for an intentional injury when the "live" round is finally discharged into the crowd. Whether we expand or narrow the relevant time frame—how we play the interpretive accordion—depends on such moral intuitions, which means these moral intuitions really produce the outcome, not the knowledge or constructive intent requirement, which merely serves as window dressing or a conclusory label that does no real independent normative work.

B. Interpretive Construction and Awareness

To be reckless, the Model Penal Code requires that the actor "consciously disregard a substantial and unjustifiable risk" that some circumstance exists or that some result will occur. Does this formulation require the actor to be aware (i) of the risk, (ii) that it is substantial, *and* (iii) that it is unjustifiable? Or does it only require the actor to be aware of some risk, which the jury finds to be substantial and unjustifiable? Or does it require the actor to be aware of a substantial risk, which the jury finds to be unjustifiable? As one casebook correctly observes, "Grammatically, the Model Penal Code appears to require conscious awareness as to all three of

[140] *Id.* at 187–88.

the crucial factors. But is this interpretation tenable in practice?"[141] Certainly such an interpretation seems required by the conception of *mens rea* championed by mentalists and choice theorists—only if an actor was aware that his conduct was unjustified, could it be said that he was aware of wrongdoing and consciously chose to do wrong. Simply being aware of creating "substantial" risks proves nothing about an actor's awareness of wrongdoing; as the MPC Comment points out, "Even substantial risks, it is clear, may be created without recklessness when the actor is seeking to serve a proper purpose."[142] So any equation of subjective culpability with awareness of wrongdoing and choosing to do wrong cannot logically avoid requiring the actor to be aware that the risk is unjustifiable. Nevertheless, no such interpretation is tenable, for it would insulate from criminal liability persons whose idiosyncratic values, beliefs and attitudes lead them (perhaps unconsciously) to honestly conclude that conduct most of us would find outrageously risky either was not very risky[143] or promoted interests so weighty that its social utility outweighed its social costs (that is, it "served a proper purpose"). An honest mistake about the relative social value of competing interests might cause an actor to lack awareness that certain risky conduct is unjustifiable (does not "serve a proper purpose"), yet to exculpate on this ground would amount to excusing him because of his mistake or ignorance of law, in violation of the principle that such mistakes and ignorance are no excuse. Thus, the awareness and choice approach to subjective culpability does not fit a plausible interpretation of the awareness requirement in recklessness.

Requiring the actor to be aware of a "substantial" risk which the jury finds to be unjustifiable is not tenable, either. Just as "[e]ven substantial risks . . . may be created without recklessness when the actor is seeking to serve a proper purpose," conversely, even very small—i.e., insubstantial—risks may be created with recklessness when the actor seeks to serve a patently improper purpose.[144] In shooting a gun into the air to celebrate a Lakers win, an actor may be aware of creating only a tiny risk that the bullet will hit someone when it falls back to earth, but because the creation of such a risk is so egregiously unjustifiable and constitutes such a gross deviation from the reasonable (or law-abiding) person in the situation standard, if it causes an innocent death, a jury could have little difficulty finding the actor reckless. Substantiality remains geared to unjustifiability and does little work independent of it. Jurors who are instructed to "find" awareness of a substantial risk before convicting someone who has created what they see as an outlandishly unjustified (albeit small) risk can simply conclude that he

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[141] KADISH & SCHULHOFER, *supra* note 76, at 215.

[142] MODEL PENAL CODE § 202, cmt. at 237 (AM. LAW INST. 1985).

[143] Kadish and Schulhofer make this point with the following hypothetical: "Consider a person who regards himself as an extraordinarily skillful driver. Finding himself in a hurry, he drives in a manner that creates an outrageously high risk of killing someone. He believes, however, that there is little risk because of his expertise as a driver. He drove negligently, but did he drive recklessly?" KADISH & SCHULHOFER, *supra* note 76, at 215.

[144] Alexander, *supra* note 76, at 933-935.

was aware of a substantial risk in view of its outlandishness and his subjective culpability in creating it. Nothing in the Code or Commentaries defines what constitutes a substantial risk nor prohibits such discretionary judgments by factfinders. To the contrary, in the words of the Comment:

> Some standard is needed for determining *how* substantial and *how* unjustifiable the risk must be in order to warrant a finding of culpability. There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned.[145]

Clearly the Comment recognizes that both the substantiality and unjustifiability criteria are flexible nondescriptive legal directives, each calling on factfinders to make a "value judgment" in determining whether it has been met. The substantiality criterion does no independent work either in defining whether the risk was excessive or whether the actor's awareness of creating an excessive risk was reckless.[146]

The most tenable interpretation of recklessness is that it only requires the actor to be aware of *some* risk, which the jury finds to be unjustifiable. As discussed above, the jury's inquiry into whether the risk was unjustifiable concerns the *actus reus* ingredient in recklessness—excessively risky conduct is prohibited conduct. That leaves all the *mens rea* or subjective culpability work on the requirements that the actor be aware of *some* risk and that acting with such awareness constituted a gross deviation from the behavior of a reasonable person in the actor's situation. But because we are all aware of *some* risk in just about everything we do (from getting behind the wheel of a car to getting out of bed), this element also does little independent work as a basis for distinguishing between negligence and recklessness as it amounts to a featureless generality—"awareness of some risk"—that hovers over all human activity and hence can easily be "found" (or not) at the discretion of the factfinders.

Take a prosecution for "date" rape, for instance, in a jurisdiction in which the *actus reus* or prohibited act is defined as nonconsensual sexual intercourse. Assume no dispute as to the conduct element (both parties agree that intercourse occurred) and further assume that the factfinders conclude

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[145] MODEL PENAL CODE § 202, cmt. at 237 (AM. LAW INST. 1985).

[146] Of course, we must be careful here to distinguish between the role of substantial and unjustifiable risks in establishing the *actus reus* (excessively risky conduct) as against *mens rea* (according to mentalists, awareness of engaging in excessively risk conduct). The substantiality requirement does no work independent of the unjustifiability requirement in either case. Thus, conduct that jurors deem extremely unjustified will not have to be very likely to cause harm to be judged reckless, and an actor who is aware of creating risks the factfinders deem extremely unjustified will not have to be aware of a high likelihood of harm to be judged reckless. It would make little sense to say that jurors could find a very small risk "substantial" for *actus reus* purposes but would require the actor to be aware of a larger risk before determining it to be "substantial" for purposes of *mens rea*. How much larger for *mens rea* purposes than for *actus reus* purposes?

that the complaining witness was not subjectively willing to have sex. The dispositive issue, then, distills to whether the defendant had *mens rea* as to the circumstance element of non-consent. What difference does it make whether the jurisdiction's *mens rea* requirement for rape is negligence (the weight of authority) or recklessness? Because "the crucial factor distinguishing these levels of culpability is awareness,"[147] where the requisite *mens rea* is recklessness, the jury must find that the defendant acted with awareness of a risk of being mistaken about the fact of consent. But aren't we all always aware of some risk (however slight) of miscommunication or erroneous factual judgments? In general, we all know that things are not always as they seem, that appearances can be deceiving, that there is some risk of error in all human perceptions, inferences, and beliefs. Again, awareness of *some* risk amounts to a featureless generality that hovers over all human judgments, perceptions, and beliefs and hence can easily be "found" (or not) at the discretion of the factfinders.

The awareness requirement in recklessness is malleable and indeterminate in still other ways. Deaths from distracted drivers who text, dial, talk and tune are tragically common. Many of these drivers do not see themselves as more skillful than anyone else, so they are aware—on some level—of taking added risks. But do they have the requisite level awareness for reckless manslaughter (or perhaps even depraved heart murder)? For instance, a two-year-old child named Morgan Pena was killed by a driver who was attempting to dial a number on his cell phone. The driver surely was aware that failing to keep a proper lookout increases risks to pedestrians like Morgan and that a proper lookout is impossible while his eyes and attention are on his key pad. Nevertheless, the driver "apparently failed to appreciate the full extent of the danger his conduct created."[148] The driver was cited for careless driving and running a stop sign, "but he was not charged with a more serious offense because the police determined that he was not reckless."[149] Professor Kimberly Ferzan refers to this level of culpability as "opaque recklessness"—"awareness of some risk but failure to appreciate how substantial it was."[150] Opaque recklessness "is probably a regular feature of dangerous behavior, and it arguably lies somewhere between the Model Penal Code notions of recklessness and negligence."[151] Amorphous, indeterminate, "in between" states of awareness like opaque recklessness—states of awareness that may accompany the majority of unintentional homicides and other crimes—leave it to the unguided discretion of the factfinder whether to find the harm-doer responsible for recklessness or negligence.[152]

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[147] KADISH & SCHULHOFER, *supra* note 76, at 214.

[148] KADISH ET AL., *supra* note 11, at 229.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] Let's say that out of this welter of workaday risks of which we are all dimly aware emerge certain more concrete and specific ones, and let's assume it is these more concrete, specific, and salient risks to which the recklessness requirement of awareness refers. Put differently, let's assume that only

To avoid a vague and amorphous to the point of vacuous awareness test, we could frame the risk he must be aware of more narrowly—that is, rather than saying he must be aware of the general risk of driving while talking on a cell phone, we could say he must be aware that driving in such a manner poses risks to pedestrians, or more specifically still, that such driving poses a risk to the particular pedestrian who was in the crosswalk when the actor's car entered it. But nothing in the awareness requirement itself dictates at what level of generality or particularity the relevant risk must be framed, thus leaving it to the discretion of the factfinder whether to frame the risk the actor must be aware of broadly or narrowly.[153] If the risk is framed very broadly (risk of an accident from cell phone use), the awareness requirement may be more easily met; but if the risk is framed very narrowly (the risk of this particular pedestrian, who the actor may not have noticed on the occasion of the collision, being hit due to cell phone use), then the awareness requirement may not be as easily met. So, much of the work is being done not by the awareness requirement but by how broadly or narrowly the risk is framed or interpretively constructed, and no legal directive tells the factfinders at what level of generality they must frame the risks, leaving it to their unregulated discretion, which may be guided by any number of conscious or unconscious influences. In a word, the frame of the relevant risk can be stretched or squeezed like an accordion, with the awareness requirement dancing to whatever tune played by the interpretive construction of the facts.[154] Thus, a finding of awareness (or lack thereof) by ordinary jurors may often serve as a conclusory label attached to a negative evaluation of the defendant that plays the interpretive accordion that then becomes the justification or rationalization for the initial and underlying negative evaluation.

For instance, in *People v. Hall*,[155] the harm-doer, while skiing, flew off of a knoll and collided with the victim, who was crossing the slope below.

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those risks that present themselves to our conscious mental processes with a certain degree of clarity, immediacy, and vividness matter for purposes of the awareness requirement. Such criteria still leave enormous latitude for factfinders to determine *how* concrete, *how* specific, *how* vivid.

[153] *See* MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST., Proposed Official Draft 1962).

[154] Among the factors influencing how the accordion is played i.e., how widely or narrowly the risks are framed–may be attributional processes, especially since a pivotal requirement that factfinders must consider in determining both recklessness and negligence (namely, the "reasonable person in the actor's situation" test) encourages attributional processes. To the extent that excessively risky conduct is attributed to the actor's serious character deficiencies, the factfinders may more readily frame the risks broadly, thus increasing the likelihood of a finding of awareness and recklessness. But if they attribute such conduct to somewhat less serious character deficiencies, they may more readily frame the risks narrowly, thus decreasing the likelihood of a finding of awareness. Thus, attributional processes may do double duty, driving both grading and liability determinations. As to liability determinations, inasmuch as factfinders attribute dangerous conduct to the situation, they find no criminal liability for either negligence or recklessness. As to grading determinations (assuming they have already decided to attribute such conduct to the actor's character), the more grave they view his dispositional deficiency, the more likely they are to frame the risks in such a way as to satisfy the (descriptive) criterion for the greater crime (recklessness) over the lesser (negligence); normative and psychological factors play the accordion to which the purportedly non-normative and non-discretionary directives dance.

[155] People v. Hall, 999 P.2d 207, 210 (Colo. 2000).

Hall, a "trained ski racer who had been coached about skiing in control and skiing safely,"[156] "for some time over a considerable distance"[157] travelled too fast for conditions in an out of control fashion—"back on his skis, with his ski tips in the air and his arms out to his sides to maintain balance." A witness, himself a ski instructor, "said that Hall was bounced around by the moguls on the slope rather than skiing in control and managing the bumps."[158] Hall admitted that he first saw the victim "when he was airborne and that he was unable to stop when he saw people below him just before the collision."[159] The People charged Hall with reckless manslaughter ("recklessly causing the death of another person"), requiring the prosecution to prove that Hall "consciously disregarded"—was aware of[160]—a substantial and unjustifiable risk that, in the court's words, "by skiing exceptionally fast and out of control [over a prolonged period]161 he might collide with and kill another person on the slope."[162]

These facts initially seem to support a slam-dunk finding of awareness if this requirement actually turns on an empirical judgment about an empirical fact—surely an experienced skier speeding down a popular slope out of control "for some time over a considerable distance" is aware of the possibility of a fatal collision with someone. Yet in a later trial, the jury rejected the charge of reckless manslaughter and convicted only of the lesser offense of negligent homicide.[163] Colorado statutes follow the Model Penal Code's definitions of manslaughter and negligent homicide, so "the crucial factor distinguishing these levels of culpability is awareness." In other words, the jury had to conclude that Hall met the elements that negligence and recklessness have in common—namely, substantial and unjustified risk-taking that grossly deviates from the kind of risk-taking that a reasonable person in the situation would undertake—but that he lacked awareness of doing so.

One can only suppose that the jury found only negligence—despite abundant proof that Hall was aware of creating unnecessary risks—because to them a manslaughter conviction simply seemed too severe; on their intuitive grading scale, he only deserved to be blamed and punished for negligence. That is not to say that they consciously disregarded their duty to apply the law to the facts. This analysis assumes that most factfinders do not practice jury nullification in most cases. Rather, they may have sincerely concluded that Hall lacked the *requisite* awareness of the *requisite* risk at

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[156] *Id.*, at 223.

[157] *Id.*

[158] *Id.* at 222.

[159] *Id.*

[160] The Court equates conscious disregard of a risk with awareness of that risk: "[W]e next ask whether a reasonably prudent person could have entertained the belief that Hall consciously disregarded that risk. . . . Hall's knowledge and training could give rise to the reasonable inference that he was aware of the possibility that by skiing so fast and out of control he might collide with and kill another skier unless he regained control and slowed down . . ." *Id.*, at 223.

[161] "[N]ot the type of momentary lapse of control or inherent danger associated with skiing . . ." *Id.*

[162] *Id.* at 224.

[163] *Colorado Skier Is Convicted in Fatal Collision on Slopes*, N.Y. TIMES, Nov. 18, 2000, at 9.

the time of the fatal collision.[164] Nevertheless, their conclusion that Hall deserves to be blamed and punished for something less than manslaughter was probably directly and intuitively generated by urges and values rooted in conscious and unconscious psychological processes, preceding and merely rationalized by their finding of no aware mental state.

In practical application of the recklessness test of wickedness by jurors, the concepts of *awareness* and wickedness often reverse the roles usually assigned to them in moral and legal theory. Looked at from the "common sense view of justice that blame and punishment are inappropriate and unfair in the absence of choice,"[165] one might expect the conclusion that A should be blamed for recklessly causing B's death to be based, in part, on the factfinder's judgment that A was at least subjectively aware of creating an unjustified risk of causing B's death. Because there can be no choice without awareness and no wickedness (*mens rea*) without choice, there can be no wickedness without awareness. However, in practice the conclusion of factfinders that A deserves to be blamed and punished may be directly and intuitively generated by evaluative judgments or retributive urges rooted in conscious and unconscious psychological processes, preceding and merely rationalized by the finding of an aware mental state. If factfinders can play the interpretive accordion on the awareness requirement to suit their retributive urges and moral judgments, a finding of fact about awareness may often really be a value judgment about the wrongdoer's wickedness masquerading as a factual judgment about the presence or absence of an aware mental state.

In the end, the legal directives doing the lion's share of the subjective culpability work in recklessness come down to whether the actor's beliefs or reactions constituted a "gross deviation[166] from those of a "reasonable

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[164] The Model Penal Code requires for recklessness that the person "consciously disregards a substantial and unjustifiable risk." MODEL PENAL CODE § 202(2)(c) (AM. LAW INST. 1985). Grammatically, it seems to require conscious awareness of the substantiality and unjustifiability of the risk. But taking the awareness requirement this seriously is hard to defend. Under this approach, a factfinder *must* acquit on the charge of reckless manslaughter despite concluding that Hall skied in a manner that created an outrageously high risk of killing someone, if she also concludes that Hall himself did not believe that he was creating extra risk, or substantial extra risk, because of his honest but inflated sense of his own skills—his oversized ego is a complete defense! Focusing solely on the harm-doer's state of awareness forces the factfinder to morally and legally ignore the reason why he lacks the required awareness—his culpable over-confidence. By the same logic, another result of this approach is that even if she concludes that he was aware that the increased danger was substantial, she still must acquit him if she concludes that he lacked awareness of wrongdoing because he personally "figured that taking risks was part of the good life and hence justifiable" —his idiosyncratic or egoistic moral values exculpate. In practice factfinders are unlikely to morally ignore why a harm-doer lacks awareness—his motivations – and can easily manipulate the awareness test to give legal effect to their moral evaluation of those reasons and motivations.

[165] "The vicious will was the *mens rea*; essentially it refers to the blameworthiness entailed in choosing to commit a criminal wrong. The requirement of *mens rea* reflects the common sense view of justice that blame and punishment are inappropriate and unfair in the absence of choice." KADISH, *supra* note 11, at 213.

[166] The "gross deviation" element—"gross" being about as nondescriptive and open-ended as directives get—tags along as a reminder that the fault should be greater than that which suffices for civil liability.

person in the actor's situation," with lots of latitude for the factfinder to play the interpretive accordion on the awareness part of the test. Just as with negligence, in short, determinations of recklessness turn decisively on jurors' moral judgments of the actor by means of malleable nondescriptive standards like "reasonable person" and "gross deviation"; the extremely malleable and amorphous "awareness" requirement follows jurors' (often unspoken or even unconscious) urges[167] and intuitions.

C. Interpretive Construction and Premeditation

Awareness requirements are not the only "mental state" ingredients of guilt and grading that look like descriptive standards calling for factual judgments but really allow factfinders to play the descriptive accordion in vindication of their potentially bias-ridden character judgments of defendants. Similarly, premeditation—actual reflection by the harm-doer on his intent to kill—seems to require a simple factual judgment from the juror, namely, whether the harm-doer actually reflected on his murderous intent. Yet many courts hold that some premeditation is required while simultaneously holding that "no time is too short" for the requisite premeditation to occur.[168] In *Young v. State*, for instance, an argument erupted over a card game, escalating into a scuffle during which the defendant shot two men in the chest with .22 caliber gun. Upholding the defendant's conviction on two counts of premeditated (first-degree) murder, the court reasoned that "[no] appreciable space of time between the formation of the intention to kill and the act of killing" was required and that "[p]remeditation and deliberation may be formed while the killer is 'pressing the trigger that fired the fatal shot.'"[169] It is a transparent fiction to maintain that premeditation can occur in the nanoseconds it takes to squeeze a trigger; saying that it can essentially collapses the distinction between intentional and premeditated acts. A mental process that can be fully realized in a small fraction of a second can be called meditation and reflection only in a Pickwickian sense. The Arizona Supreme Court reached this same conclusion in a case where the Arizona legislature tried to define premeditation as an intention that "precedes the killing by any length of time to permit reflection" with the further clarification that "[p]roof of actual reflection is not required."[170] The Court reasoned that eliminating proof of actual reflection eliminates the difference between intentional killings that are first-degree murders and those that are second-degree. Because real legal consequences ride on the formal distinction between premeditated (first-degree) and merely intentional (second-degree) murders, the way the Arizona legislature tried to define premeditation, concluded the Court, was

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[167] *See* Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 46-56 (2014).

[168] KADISH, *supra* note 11, at 385.

[169] Young v. State, 428 So.2d 155, 158 (Ala. Crim. App. 1982).

[170] State v. Thompson, 65 P.3d 420 (Ariz. 2003).

unconstitutional because arbitrary and capricious, in violation of due process.[171] To salvage its constitutionality, the court interpreted the statute to require proof of actual reflection.

Be that as it may, in the many jurisdictions where "[no] appreciable space of time between the formation of the intention to kill and the act of killing" is required, the rule simply gives the jury the unfettered discretion to make a *mens rea* grading judgment[172] about the defendant based on their assessment of his deserts: If they think he does not deserve maximum condemnation and punishment, they can conclude that less than a second between the formation of the intention and its execution is not enough time for actual reflection on the intention to kill, but if they think he does deserve the maximum, then—in keeping with the "oft repeated statement . . . that 'no time is too short for a wicked man to frame in his mind the scheme of murder'"[173]—they can conclude that he did adequately meditate the intent in the instant it took to squeeze the trigger.[174]

VII. PREJUDICE ABOUT BLACK CHARACTER AND *MENS REA*

Exacerbating the often unconscious tendencies to attribute black wrongdoing to character flaws rather than situational factors discussed earlier is the quite conscious belief by many Americans that blacks have defective characters that render them prone to criminality.[175] This supposed bad black character increases the likelihood that any particular black wrongdoer acted with the requisite *mens rea* or wickedness for criminal guilt. Thus, in *People v. Zackowitz*, the defendant's wife broke into tears after being insulted by one of four men at work repairing an automobile on a city street. The enraged defendant, Zackowitz, warned the men that "if they did not get out of there in five minutes, he would come back and bump them all off."[176] Once back at their apartment, his wife disclosed the content of the insult—one of the men had propositioned her as a prostitute. With rekindled rage, Zackowitz returned to the scene of the insult with a pistol in his pocket. After words and blows—defendant kicked Coppola in the stomach, Coppola went for defendant with a wrench—there was a single fatal shot. On the key question of the Zackowitz's state of mind at the moment of the killing, the question was not whether he intended to kill but whether that

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[171] *Id.* at 427.

[172] There are two basic *mens rea* judgments: liability judgments and grading judgments.

[173] Commonwealth v. Carroll, 194 A.2d 911, 916 (1963). Defendant contended that the logic of this claim implied that, "conversely, a long time is necessary to find premeditation in a 'good man.'" *Id.*

[174] Formally, it is possible to go further than "no time is too short" for the necessary premeditation to occur approach in *Carroll* by holding, as Pennsylvania decisions after *Carroll* have, that "the requirement of premeditation and deliberation is met whenever there is a conscious purpose to bring about death . . . . We can find no reason where there is a conscious intent to bring about death to differentiate between the degree of culpability on the basis of the elaborateness of the design to kill." Commonwealth v. O'Searo, 352 A.2d 30, 37–38 (1976).

[175] Tom W. Smith, *Ethnic Images 9* (Dec. 1990) (General Social Survey Topical Report No. 19).

[176] People v. Zackowitz 172 N.E. 466, 467 (1930).

intent was formulated before the shot (before "he went forth from his apartment"),[177] making the crime first-degree murder, or whether the intent to kill was first formulated during the fight, making it murder in the second-degree. As proof of premeditation, the prosecution pointed to three pistols and a teargas gun Zackowitz kept in a radio box in his apartment. The prosecution did not claim that Zackowitz brought the pistols or teargas gun with him to the encounter. The only relevance of the weapons was to prove "that here was a man of vicious and dangerous propensities, who because of those propensities was more likely to kill with deliberate and premeditated design than a man of irreproachable life and amiable manners."[178] In his appellate brief, the District Attorney defended the admissibility of the evidence on precisely this ground, stating that "the possession of the weapons characterized the defendant as 'a desperate type of criminal,' a 'person criminally inclined.'"[179] In Cardozo's words, "[a]lmost at the opening of the trial the People began the endeavor to load the defendant down with the burden of an evil character."[180] He was put before the jury as "a man of murderous heart, or criminal disposition..."[181] The jury found that Zackowitz acted with premeditation and sentenced him to death.

Cardozo, writing for the majority, ultimately reverses the judgment of conviction, but first admits that evidence designed to show "bad character" or criminal propensity *is* relevant in the Rules of Evidence sense of "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[182] Quarrelsome defendants, he admits, are "more likely to start a quarrel than one of milder type" and "a man of dangerous mode of life more likely than a shy recluse."[183] He assumes that evidence of bad character or criminal propensity tends to show that the defendant was more likely to have acted "in conformity therewith."[184] He assumes a statistically significant relationship between character traits and actions in conformity therewith. McCormick agrees, stating that evidence designed to show the defendant had "bad character" and thus was more likely to be guilty of the crime "is not irrelevant."[185] It is rational to consider character in

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[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at 469.

[182] FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). *See also* FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided. . . . Evidence which is not relevant is not admissible.").

[183] *Zackowitz*, 172 N.E. 466.

[184] *See* FED. R. EVID. 404(b): "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ."

[185] EDWARD W. CLEARY ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 447 (2d ed. 1972). Bad character is the 800 pound gorilla in the middle of criminal trials of blacks, "but in the setting of jury trial the danger of prejudice outweighs the probative value." *Id.*

assessing blameworthiness for the same reason it is rational to consider race in assessing the likelihood that someone has or will engage in criminal activity. Defenders of racial profiling contend that blackness itself indicates propensity, at least in the statistical sense, that blacks pose a greater risk of crime than non-blacks. In surveys, most Americans agree with the statement that "Blacks are prone to violence." Both evidence of "bad character" and "evidence" of blackness – and its associated propensities—can be viewed as increasing the likelihood of actions in conformity therewith. Bad character evidence and "rational" racial profiling practices rest on the same statistical logic. Cardozo attacks this logic, however, as inadequate to justify allowing even relevant evidence of "murderous propensity" to get to the factfinder. "Character is never an issue in a criminal prosecution unless the defendant chooses to make it one," he declares.[186] The underlying reason for keeping relevant evidence of the defendant's character and propensities away from the factfinder, he says, "is one, not of logic, but of policy,"[187] specifically, the "policy" of protecting the innocent by preserving the rationality and accuracy of the fact-finding process.[188] Recast in the language of the Federal Rules of Evidence, Cardozo views otherwise relevant evidence of the defendant's bad character as inadmissible because its prejudicial effects *categorically*[189] outweigh its probative value:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to [such evidence] and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.[190]

Cardozo worried if the jury believed that, generally speaking, the accused has "an evil character" or is a "man of murderous disposition,"[191] they would too readily conclude that he premeditated his intent on the occasion of the murder, or that even if he did not premeditate his intent on that particular occasion, he still deserves to be blamed and punished "consistent with guilt in its highest grade." Again, recast in the language of the Federal Rules of Evidence, the prejudicial effect of character evidence arises

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[186] *Zackowitz*, 172 N.E at 468.

[187] *Id.*

[188] *Id.*

[189] Generally speaking, it may be true that evidence of other crimes, wrongs, acts or dispositions is more prejudicial than probative in one of the senses Cardozo identifies. But this cannot be claimed categorically. There can be cases where the danger of prejudice is arguably insufficient to justify exclusion. So, in addition to the "intrinsic" reasons for excluding character evidence (the ones that center on the rationality and accuracy of the factfinding process), there may be weighty "extrinsic" reasons for restricting the admissibility of character or other-crimes evidence.

[190] There may be cases where the danger of prejudice is arguably not enough to justify the exclusion. Then we would have to invoke more basic principles and assumptions about criminal responsibility and just punishment.

[191] *Zackowitz*, 172 N.E at 467.

because the jury is likely to give the evidence too much weight (overestimate its probative value) or because the evidence will arouse undue hostility toward one of the parties.[192] Prejudice, used here as a term of art, includes (but means more than) conscious bias, the kind that tempts jurors to disregard an instruction from the judge on what elements the prosecution must prove for conviction. This amounts to jury nullification.[193] The kind of prejudice contemplated by the Rules of Evidence can also arise from the impact of certain evidence on mental processes that occur without the factfinders' conscious awareness or control. For instance, prejudice arising from the impact of character evidence on the factfinders' cognitive unconscious may determine how they interpretively construct the "facts"[194] or otherwise manipulate malleable and discretion-laden legal tests like "the reasonable man." The reason for the analytic work we did above on the nature of legal directives used by factfinders was to identify where character- and stereotype-driven judgments can invisibly and unconsciously determine legal (and moral) judgments and outcomes. It should come as no surprise that when the substantive criminal law, through jury instructions, requires the jury to perform an intellectual feat that runs counter to the jury's moral intuitions and gut reactions and other inclinations, the jury may unwittingly follow its inclinations rather than the blackletter laid down in the jury instructions. Thus, as Justice Jackson admonishes, "The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."[195] And in the words of another court:

> [O]ne cannot unring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it.[196]

Empirical research corroborates these concerns: studies find that jurors exposed to a defendant's record of prior convictions for similar offenses significantly increases the likelihood of conviction and that cautionary instructions eliminate little or none of the prejudicial effects that flow from such evidence.[197] Similarly, studies found that exposure to a legally inadmissible confession significantly increased the chance of a guilty verdict

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[192] KADISH ET AL., *supra* note 11, at 19.

[193] For a defense of jury nullification in cases where it would promote rather than subvert racial justice in criminal matters, *see generally* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

[194] *See* discussion of interpretive construction *supra,* notes 132–173 and accompanying text.

[195] Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

[196] Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

[197] *See* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 601 (1997) ("For example, significantly more uninstructed participants (72%) than instructed participants (50%) incorrectly understood that evidence about a defendant's prior convictions could not be used for any purpose. In addition, whereas 50% of instructed participants incorrectly thought evidence of prior conviction could not be used to assess the defendant's believability, significantly more (74%) uninstructed jurors made the same mistake.").

despite weak other evidence and that instructions to the jury to ignore the confession had no measurable effect on the probability of conviction.[198] Again, the jury may strive to "approach their task responsibly and to sort out discrete issues given to them under proper instructions,"[199] but courts and codes generally recognize that certain kinds of evidence, like bad character and criminal propensity evidence, is likely to have an improper impact on the legal outcomes. Specifically, the jury gives such evidence "excessive weight," which implies that such evidence causes jurors to convict more often than they would if they were not improperly influenced in a way detrimental to the accused. Bad character and criminal propensity evidence, in the words of Justice Harlan in *Winship*, increases the risk of "factual errors that result in convicting the innocent."[200] Jurors may not think they are giving certain evidence "too much weight," may strive not to do so, and may even be prompted to resist the temptation or human tendency to do so by instructions from the judge. Evidence is nevertheless excluded as prejudicial when it is likely to subvert the rationality and accuracy of the fact-finding process despite jury instructions and despite dutiful factfinders. Thus, according to McCormick, character evidence "is not irrelevant, but in the setting of jury trial the danger of prejudice outweighs the probative value."[201] And when the Judicial Conference of the United States, the policy-making body of the federal judiciary, was chaired by Chief Justice Rehnquist, the Conference decried new rules permitting evidence of bad character and criminal propensity in prosecutions for child molestation and sexual assault, pointing out that the new rules posed a "danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person."[202] As the Judicial Conference noted, its conclusion that evidence of bad character and criminal propensity distorts the rationality, accuracy and fairness of the fact-finding process reflects a "highly unusual unanimity" of the judges, lawyers, and academics who make up its advisory committees.[203]

This near unanimous recognition of the rationality-subverting effect of evidence of character carries negative implications for black people on trial.

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[198] *See* Saul M. Kassin & Lawrence S. Wrightsman, *Coerced Confessions, Judicial Instruction and Mock Juror Verdicts*, 11 J. OF APPLIED SOC. PSYCHOLOGY 489, 503–04 (1981) ("Experiment 1 demonstrated quite clearly that the currently available forms of the instruction are ineffective. Instruction effects were obtained on certain dependent variables, but not on the two practically important judgments. Experiment 2 revealed that although no instruction significantly affected verdicts, the dual instruction (i.e., emphasizing both the unfairness and the unreliability of an induced confession) did significantly alter subjects' voluntariness judgments.").

[199] Spencer v. Texas, 385 U.S. 554, 565 (1967).

[200] *In re* Winship 397 U.S. 358 (1970).

[201] CLEARY ET AL., *supra* note 184, at 447. *See also* Michelson v. United States, 335 U.S. 469, 475 476 (1948): "The inquiry is not rejected because character is irrelevant; on the contrary it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

[202] KADISH ET AL., *supra* note 11, at 26.

[203] *Id.*

In cases involving black defendants, their pigmentation[204] is proof of their bad character or criminal propensity. Stereotypes—both as statistical generalizations and as well-learned sets of associations[205]—often relate to character traits, such as "blacks are hostile or prone to violence."[206] The propensities (or proclivities) associated with blacks are established as stereotypes early in the memories of factfinders, in early childhood, and can function as conscious beliefs (especially when supported by statistics) or unconscious sets of associations;[207] so in a real sense, in the courtroom (as well as on the street), a black actor wears evidence of his "bad character" and criminal propensity on his face. Accordingly, the prejudicial effects of evidence of bad character and criminal propensity pointed out by the Federal Rules of Evidence, McCormick, Rehnquist, the Judicial Conference and many others, may routinely influence the adjudication of black blame and punishment. When we put together our understanding of the gravitational pull exerted by value judgments about defendants' character on the factfinders' judgments about every other element of a charged offense, with our understanding of the role of negative stereotypes about black character traits in the perceptions and judgments of jurors and other social decisionmakers, we see much room within the rules and standards themselves for bias to thrive in adjudications of criminal guilt. As *Zackowitz* teaches, the seemingly factual judgment about whether the defendant actually reflected on his intent, for instance, may often be—or merely reflect[208]—a moral appraisal of the killer's character and deserts, with a finding of premeditation merely serving as a conclusory label for the determination that "he was a man of murderous heart, of criminal disposition."[209]

Often the substantive criminal law directs jurors to make explicitly character-based assessments of the defendant's deserts, character, and subjective culpability in assessing *mens rea*. Thus, an unintentional killing can constitute not only manslaughter (if the jury concludes that it resulted from criminal negligence or recklessness) but also murder (if it concludes that it resulted from criminal negligence or recklessness *plus* some "additional" degree of wickedness or subjective culpability). All the epithets describing the "additional" *mens rea* requirement invite the factfinder to directly evaluate the defendant's character, especially when traits of

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[204] And identity performance. *See, e.g.*, Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

[205] Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 741 (1995).

[206] *Id.* at 753.

[207] *Id.* at 741-42, 753-59.

[208] Interpretive construction may mediate the relationship between the factfinder's moral judgment of the harm-doer and the formal legal requirements that must be met by a factfinder (who seeks to follow jury instructions) to back up that moral judgment with criminal blame and punishment. Interpretive construction can consciously or unconsciously message the legal materials to align the factfinder's moral judgment of the accused with the formal legal requirements.

[209] People v. Zackowitz, 172 N.E. 466, 469 (1930).As a propensity argument the evidence goes to the increased likelihood that a bad person will premeditate the intent; as a character argument the evident goes to that he deserves punishment whether or not he premeditated!

character are viewed as "the kinds of dispositions that wants and aversions are,"[210] that is, when character traits are viewed as desires, desire-states, cares, concerns, values and aversions. Collectively and for convenience, this constellation of wants and aversions can be referred to as the "heart" of the accused. To be succinct, the legal tests jurors use to distinguish between murder and manslaughter all center on the condition of the defendant's heart. Thus, the verbal formulas given to the jury to guide its identification of the added element of subjective culpability it must find for murder include: "the dictate of a wicked, depraved and malignant heart," "an abandoned and malignant heart," "a depraved heart regardless of human life," and "that hardness of heart or that malignancy of attitude qualifying as 'depraved indifference.'"[211] Because factfinders can *diagnose* a harm-doer's depraved heart even from inadvertent or negligent risk creation,[212] the harm-doer need not even be aware of running excessive risks to be convicted of murder. The malice for murder need not include an aware mental state: different factfinders could convict the *same* inadvertent killer of negligent homicide, manslaughter, or murder solely on the basis of different diagnoses of the condition of his heart at the time of the excessively risky conduct. The depraved heart approach of the common law and statutes based upon it makes the distinction between murder and manslaughter turn on "the degree of the jury's moral abhorrence"[213] to the killing and killer. Such a test "remits the issue to varying and highly subjective judgment calls of the judge or jury."[214] Does the Model Penal Code fare any better in providing decision rules that avoid remitting the issue of the harm-doer's moral blameworthiness to "varying and highly subjective judgment calls of the judge or jury?" The leaner, modern *mens rea* language of the Model Penal Code, with its precise delineation of levels of culpability, has been hailed as a vast improvement over the vague and value-laden traditional definitions of *mens rea* which required proof that the harm-doer acted "willfully," "maliciously," "corruptly," and "wantonly." These traditional *mens rea*

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[210] Richard B. Brandt, *Traits of Character: A Conceptual Analysis*, 7 AM. PHIL. Q. 22, 28 (1970).

[211] 4 WILLIAM BLACKSTONE, COMMENTARIES *199; CAL. PENAL CODE § 188 (West 2014); MODEL PENAL CODE § 210.2 cmt. at 22 (AM. LAW INST. 1980); *People v. Roe*, 542 N.E.2d 610, 618 (1989).

[212] The Model Penal Code appears to oppose murder liability for inadvertent risk creation: "The Model Penal Code provision makes clear that inadvertent risk creation, however extravagant and unjustified, cannot be punished as murder… At least it seems clear that negligent homicide should not be assimilated to the most serious forms of criminal homicide catalogued under the offense of murder." MODEL PENAL CODE § 210.2, cmt. at 27-28 (AM. LAW INST. 1980). Nevertheless, the MPC provides in Section 2.08(2) that recklessness need not be shown if the defendant lacked awareness of the risk because he was voluntarily intoxicated. MODEL PENAL CODE § 2.08(2) (AM. LAW INST. 1985). But this approach contradicts the Code's own claim that "inadvertent risk creation" or "negligent homicide"—"however extravagant and unjustified"—"cannot be punished as murder." This approach treats negligence in drinking before driving as sufficient *mens rea* for murder where, for instance, the defendant honestly but stupidly believes that he can safely drive drunk and has a substantial personal history of doing so without incident. *See* United States v. Fleming, 739 F.2d 945 (4th Cir. 1984); State v. Dufield, 549 A.2d 1205 (N.H. 1988). The illusion of a bright descriptive line (awareness) between at least murder and manslaughter if not between criminal and civil liability cannot be nursed under these approaches.

[213] KADISH ET AL., *supra* note 11, at 429.

[214] *Id.*

formulas were criticized as conveying "more atmosphere or emotion than concrete meaning."[215] To distinguish between manslaughter and unintentional murder, instead of proof of a depraved heart, the Model Penal Code requires proof of recklessness "in circumstances manifesting *extreme indifference to the value of human life*." But this test of unintentional murder requires a judgment call just as subjective as depraved heart. The jury's moral abhorrence is still the touchstone of murder. The leaner, more modern, less vituperative language of the Model Penal Code can lull the unwary into a false impression that modern approaches to *mens rea* require the factfinder to make fewer direct moral judgments of the harm-doer. The unacknowledged truth is that there is as much room for "subjective judgment calls" in the modern terminologies and approaches to *mens rea* as there was in the traditional formulations—it's the same old value-laden and discretionary wine in high-tech terminological bottles. At many levels of narrow, definitional *mens rea* analysis negligence, recklessness, depraved heart malice, extreme indifference—the rule of decision that goes to the jury not only invites but requires it to make a "subjective judgment call" about the harm-doer's deserts and character. Other ostensibly factual *mens rea* elements—premeditation and awareness—remain tightly tethered to such subjective judgment calls through both interpretive construction and the open-ended malleability of the substantive legal tests. And according to a Model Penal Code Comment, even the most factual or "descriptive" *mens rea* tests—knowledge and purpose—are morally rooted in the same depravities of heart or extreme indifference that make some unintentional killings murder.[216] Where there is ambiguity in the interpretation or application of even knowledge and purpose, there is room for judgments about the harm-doer's character and deserts to determine whether factfinders find the *mens rea* for guilt.

Although Cardozo's warning about the dangers of character evidence are forceful and accurate, his claim that "character is never an issue in a criminal prosecution unless the defendant chooses to make it one" is misleading; for measuring the harm-doer's subjective culpability or *mens rea* routinely requires factfinders to make character judgments about harm-doers. The universally accepted principle (subject to certain "exceptions") is that evidence offered "to prove the character of a person in order to show action in conformity therewith"[217] is inadmissible. Under this rule, the

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[215] *Id.* at 217.

[216] MODEL PENAL CODE § 210.2, cmt. at 21-22 (AM. LAW. INST. 1980).: "In a prosecution for murder, however, the Code calls for the further judgment whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provocation or other mitigation apart, purposeful or knowing homicide demonstrates precisely such indifference to the value of human life." *Id.*

[217] *See* FED. R. EVID. 404(b)(1, 2): "Crimes, Wrongs, or Other Acts. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

prosecution cannot prove that the accused had a bad character or criminal propensity in order to prove that he was more likely to have committed the charged criminal act. In a word, bad character must be inferred from a wrongful act, not a wrongful act from bad character.[218] But the jury can properly infer from a criminal act that the harm-doer has a depraved heart, insufficient care and concern for others, or other bad character trait for which he deserves blame and punishment.

VIII. How *Mens Rea* Bias Can Prevent Detection of Bias by Sentencing Studies

This same analysis also reveals how easily investigators who compare punishments meted out to blacks and whites for the same crimes can either completely miss or grossly underestimate such bias. For to the degree that race-based attribution bias infects jury findings about *mens rea,* much racial discrimination cannot be captured by seemingly neutral statistics about race and sentencing. Thus, even if the sentences meted out to blacks and whites *convicted* of, say, murder or manslaughter were the same, it would not prove that white and black defendants are treated equally in the adjudication process. Rather, the real discrimination may very well have been swept under the rug of jury findings about the presence or absence of the *mens rea*—malice—for murder. These differential diagnoses of wrongdoing as a function of the wrongdoer's race result in racial differences in blame and punishment that are easily hidden from empirical examinations of racial biases in criminal justice. Comparing sentences meted out to whites and blacks convicted of the same crime would not capture it.

For instance, say hypothetically that blacks convicted of negligent homicide get the same sentences as whites convicted of the same crime. By the same token, assume blacks convicted of manslaughter get the same sentences as whites, as do blacks and whites convicted of either 2nd or 1st degree murder. Such race-neutrality in sentencing can conceal profound racial discrimination in moral judgments by jurors and factfinders about black wrongdoers. This easily overlooked racial discrimination could be swept under the carpet of jury findings about whether the wrongdoer crossed a significant moral threshold: from, say, ordinary negligence to criminal negligence, or from criminal negligence to ordinary recklessness, or from the ordinary recklessness (for manslaughter) to the "extreme" or depraved heart recklessness (for murder), or from voluntary manslaughter to 2nd degree murder. Despite the mistaken claims of some criminal scholars and commentators, each and every one of these liability or grading thresholds requires a direct moral judgment of the wrongdoer. So this kind of racial bias can remain hidden in jury characterizations of a killing as either

[218] Nor can subjective culpability requirements –such as premeditation or depraved heart—be directly inferred from other crimes, wrongs, or other evidence of bad character and criminal propensity.

criminal or not criminal, or, if criminal, either murder, manslaughter, or criminal negligence. The differences between these characterizations turn entirely on differences in the moral appraisals of wrongdoers by jurors, for the *mens rea* requirement directs jurors to morally appraise a wrongdoer before finding him guilty of any of these grades of criminal homicide.

All this casts serious doubt on the reliability, rationality, and trustworthiness of criminal conviction as a test for identifying morally blameworthy blacks who, according to some commentators, deserve our moral contempt and social ostracism. Although criminal courtrooms are major construction sites for the biased social construction of morally blameworthy blacks through racially differential moral evaluations, other busy construction sites abound, for the same bias that infects moral judgments of blacks by jurors also infects moral judgments of blacks by ordinary people. Whenever the moral turpitude of black wrongdoers becomes the topic of the moment on talk radio, in coffee shops, and around water coolers, another potential site for the biased social construction of black criminals becomes active. Cognitive and social psychology tell us that whether we are official or unofficial factfinders, given our inability to avoid most unconscious bias against certain stereotyped groups, we should approach our moral judgments of members of such groups with grave doubts about our objectivity and impartiality—in a word, with great "epistemic humility." This epistemic humility should temper our contempt toward black wrongdoers inside and outside the courtroom.