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Dedication

The staff of the AMERICAN JOURNAL OF CRIMINAL LAW dedicate Volume Forty-one to Andrew E. Taslitz, a prolific writer, an accomplished professor, and a passionate contributor to the development of criminal law.

Professor Taslitz dedicated over twenty years to legal academia. After serving as a Philadelphia prosecutor and working at a public-interest firm, he published numerous books and over 100 articles during the course of his lifetime. His work covered a wide range of topics, from improvements to criminal procedure, to the intersection of feminism and evidence law, and, most recently, the role of race in the criminal justice system.

The Capital Punishment Center invited Professor Taslitz to speak at a symposium on "Mass Incarceration and the Death Penalty," which was hosted at the University of Texas School of Law from March 22–23, 2013. After participating in the symposium, Professor Tasltiz wrote and submitted an Article based on his recent lecture. The AMERICAN JOURNAL OF CRIMINAL LAW is pleased to publish the Article "Racial Threat Versus Racial Empathy in Sentencing—Capital and Otherwise" in this issue. Although he will unfortunately not see this published work, the article will be part of Andrew Taslitz' admirable legacy.

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Mass Incarceration and the Death Penalty Symposium Issue

Articles

Article

Racial Threat Versus Racial Empathy in Sentencing —Capital and Otherwise

Andrew E. Taslitz*

I. Introduction

Penalty phase juries in capital cases are but one type—albeit a special type—of sentencing jury.[1] Only a small number of states use sentencing juries in noncapital cases.[2] Nevertheless, the United States Supreme Court began raising the promise with *Apprendi v. New Jersey*,[3] which expanded the use of such juries by holding that they are required to find certain facts relevant to sentence determination in mandatory guidelines regimes.[4] That promise has not been fulfilled,[5] but several commentators nevertheless sing the praises of turning to sentencing juries on policy grounds,[6] while other commentators are less sanguine.[7]

At the same time, capital juries have been condemned for contributing to racial disparity in the administration of the death penalty.[8]

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1. *See* David R. Dow, *How the Death Penalty Really Works*, *in* MACHINERY OF DEATH: THE REALITY OF AMERICA'S DEATH PENALTY REGIME 11, 13–15 (David R. Dow & Mark Dow eds., 2002) (explaining how the penalty phase works and how it is purportedly different from noncapital sentencing proceedings); Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 196–200 (2004) (discussing similarities and differences between capital and noncapital sentencing jury proceedings).

2. *See* King, *supra* note 1, at 195–96.

3. 530 U.S. 466 (2000).

4. *See id.* at 490.

5. Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending* Apprendi *to Upset Most Sentencing*, 15 FED. SENT. REP. 79, 79 (2002) (describing *Apprendi* as "now a caged tiger"); Jonathan F. Mitchell, Apprendi*'s Domain*, 2006 SUP. CT. REV. 297, 297–99 (2006) (arguing that the logic of *Apprendi* and its progeny necessarily limits the scope of the jury trial right at sentencing); Mark S. Hurwitz, *Much Ado About Sentencing: The Influence Of* Apprendi, Blakely, *and* Booker *in the U.S. Courts of Appeals*, 27 JUST. SYS. J. 81, 93 (2006) ("While *Apprendi* and its progeny *Blakely* and *Booker* represented a sea change in some respects, these cases may not have had quite the dramatic influence as one might have first imagined.").

6. *See, e.g.*, W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi, *Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 896 (2009); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 983 (2003) ("there are principles in these cases that . . . lead to the conclusion that jury sentencing is constitutionally compelled."); Bertrall L. Ross II, *Reconciling the* Booker *Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 725, 725–26 (2006) (noting that jury sentencing functions as the constitutionally require bulwark between the [defendant] and the government); *see also* Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1776 (1999) (pre-*Apprendi* defense of jury sentencing).

7. *See, e.g.*, Melissa Carrington, *Applying* Apprendi *to Jury Sentencing: Why State Felony Jury Sentencing Threatens the Right to a Jury Trial*, 2011 U. ILL. L. REV. 1359, 1370–72 (2011).

8. HOWARD W. ALLEN & JEROME M. CLUBB, RACE, CLASS, AND THE DEATH PENALTY: CAPITAL PUNISHMENT IN AMERICAN HISTORY 20 (2008) (noting persistent racial disparities in the imposition of

More broadly, the criminal justice system results in disparate racial impacts at various stages of the life of an ordinary criminal case, including sentencing.[9] Disputes rage, however, over the causes of these disparities and whether they are justified.[10] This article seeks to contribute to the debates over the roles of juries and race at sentencing by comparing the operation of capital and noncapital sentencing juries. Specifically, this piece addresses the potential causes of racial bias in affecting three types of sentencing jury difficulties: (1) finding "raw" facts (who did what to whom?), (2) finding "moral" facts (those facts relevant to moral blameworthiness), and (3) promoting sound democratic decision making.[11]

Error, this piece will argue, stems from the influence of race on empathy and sympathy or compassion.[12] "Empathy" is the ability to stand in another man's shoes—to see the world as he does.[13] "Sympathy" is the desire to reduce another's suffering.[14] Sympathy cannot arise without empathy.[15] Sympathy, at its best, helps to cabin retributive impulses, thus restraining sentence imposition to promote true proportionality between the crime committed by this particular offender and the resulting punishment.[16] In sentencing systems that rely significantly on retributive theory, like those

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the death penalty from the nation's founding through today); Bryan Stevenson, *Close to Death: Reflections on Race and Capital Punishment in America*, *in* DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS FROM BOTH SIDES MAKE THEIR CASE 76, 76–78 (Hugo A. Bedau and Paul G. Cassell eds., 2004) (arguing that race and class biases infect capital punishment decisions); Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 L. & SOC'Y REV. 69 (2011) (documenting racial bias exercised by capital juries); Jennifer L. Eberhardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006); Sheri L. Johnson, *Litigating for Racial Fairness after* McKlesky v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178, 190–201 (2007) (arguing that implicit bias research and the teachings of cognitive psychology support the studies finding racial bias); 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*, 41 CRIM L. BULL. 11 (2010) (finding that race effects, especially those based on the race of the victim, persist).

9. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (documenting this problem extensively).

10. *Cf., e.g.*, Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 OHIO ST. J. CRIM. L. 147, 164 (2012) (arguing that even racial disparities in the imposition of the death penalty do not demonstrate "racial bias" and that, to the contrary, legitimate factors likely account for any purported "race-of-victim" bias in the administration of capital punishment).

11. Andrew E. Taslitz, *The People's Peremptory Challenge and* Batson*: Aiding the People's Voice and Vision Through the "Representative" Jury*, 97 IOWA L. REV. 1675, 1688–89 (2012) [hereinafter Taslitz, *Voice and Vision*] (defining "raw facts" and comparing them to those moral facts that give jury-crafted narratives meaning).

12. For a definition of "error," see BRIAN FORST, ERRORS OF JUSTICE 1–7 (2003); *cf.* CATHLEEN BURNETT, WRONGFUL DEATH SENTENCES: RETHINKING JUSTICE IN CAPITAL CASES 127–52 (2010) (extending the idea of error in capital cases to include errors of intention or mental state).

13. *See* Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH. L. REV. 419, 431–32 (2009) [hereinafter Taslitz, *Tinkerbell*] (defining empathy in more detail).

14. *See id.* at 420.

15. *See id.*

16. *See id.* at 465–66.

in the modern United States,[17] creating institutions that promote empathy and appropriate sympathy is essential to sentencing accuracy.[18] Unconscious racial bias, when present, can undercut empathy and sympathy by introducing forces that magnify the risks of all three types of sentencing error.[19] However, as this piece will explain, institutional design can help to reduce the ill effects of such bias.[20]

Part II of this article summarizes what we know about the influence of race on capital sentencing decisions, with special emphasis on structural features that exacerbate race's ill effects. The practice of "death qualifying" jurors, which ensures that a jury is willing to impose the death penalty, encourages group polarization amongst like-minded jurors and pushes harsh punitive instincts to greater extremes.[21] Death qualification also leads to less racially- and attitude-diverse juries, a problem that the *Batson* prohibition on intentional, conscious racial discrimination in jury selection does nothing to alleviate.[22] Vague jury instructions invite an expanded role for unconscious bias,[23] and victim impact statements combine with these other matters to increase empathy for the victim, correspondingly decreasing empathy and sympathy for the capital defendant.[24] Race thus

17. *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1361 (2000) ("Criminal law is a retributive tool for which utilitarians have thus far found such auxiliary uses as deterrence, rehabilitation, and incapacitation."); *see also* Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 U. MD. L.J. OF RACE, RELIGION, GENDER & CLASS 306, 307-11 (2001) [hereinafter Taslitz, *Civil Society*] (noting that the "civil justice system" in the United States plays a "retributive role"); *see also* THANE ROSENBAUM, PAYBACK: THE CASE FOR REVENGE 27–33 (2013) (arguing that the system's purported commitment to retribution is insufficiently robust).

18. *See* Taslitz, *Tinkerbell*, *supra* note 13, at 433–35 (discussing the impact of empathy and compassion on juror decision making).

19. *See infra* text accompanying Part II.A.

20. *See infra* text accompanying Part V.

21. *See generally* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 111 (2003) [hereinafter SUNSTEIN, DISSENT] (defining "group polarization"); Alec T. Swafford, *Qualified Support: Death Qualification, Equal Protection, and Race*, 39 AM. J. CRIM. L. 147, 148 (2011) (defining "death qualification").

22. Batson v. Kentucky, 476 U.S. 79, 93–95 (1986).

23. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 798 (2012) ("[R]esearchers have found repeatedly that people's implicit biases often defy their awareness and self-reported egalitarian values."); *see also* Anthony G. Greenwald & Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949–52 (2006) (differentiating between implicit and explicit bias in the context of attitudes and stereotypes); *see also* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1063–64 (2009) (explaining the divergence between explicit and implicit bias, and the difficulty of uncovering implicit bias).

24. "Through submission of a victim impact statement or victim impact testimony, a victim can generally communicate to the sentencing judge the direct physical, psychological, and economic impact of the crime and often the victim's opinion as to the crime, the offender, and the desired sentence." Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 70 (1999). *See generally* Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 347–52 (2009) (discussing the origin and development of victim impact statements).

finds an open space to introduce error into the jury's assessment of punishment.

Part III examines the structure of sentencing juries in noncapital cases and the admittedly limited data on the impact of racial bias on these juries' operation. Although the data are mixed, Part III suggests that noncapital sentencing juries have structural advantages that capital ones do not and that further improvement is possible.

Part IV discusses the proper representative and constructive political role of juries generally, sentencing juries more specifically, in our democratic republic and how unconscious racial bias undermines that role. Part IV also explains how improved sentencing juries can lead to a more enlightened and activist electorate outside of the jury room. Part IV.D briefly discusses the hallmarks of "good" deliberative systems, linking them to the idea of "empathic deliberation" in sentencing. Such deliberation, for reasons Part IV.D explains, is on average likely to lead to less instinctively punitive jury sentencing decisions, relative to the current dominant sentencing regime.

Part V, the conclusion, explains more precisely what lessons can be drawn from the above analysis for reforming capital and noncapital sentencing juries. Reforming capital juries requires ending death qualification, using an alternative mechanism to *Batson* for achieving racially unbiased jury selection, improving jury instructions, and changing the use of victim impact evidence. For capital and noncapital juries alike, juries need greater guidance on how to deliberate about sentencing, and juror selection procedures must promote more attitude-diverse jury composition.

II. Empathy, Race, and the Capital Jury

Part II of this article argues that white jurors' empathy for white victims undercuts their empathy for black offenders. The mal-distribution of empathy may lead to racial stereotyping of the black offender as dangerous, fostering a sense of racial threat to whites. That threat can also be understood as an insult to white racial dominance and solidarity. Whites may also feel a form of retributive anger toward the defendant for turning on a member of the "People," understood as the white people with whom the white jurors subconsciously stand. In any event, race-based empathy for the white victim individuates him while deindividuating the black offender, creating a jury socially distant from the offender and unable to feel the compassion required for jurors to depart from psychological forces prodding them toward the decision to impose capital punishment.

A. Overview

1. Racial Bias in Black Offender–White Victim Dyads Undermines Empathy for the Defendant

There is little, if any, doubt that capital punishment is plagued by racially disparate impacts.[25] The causes and meaning of those disparities, however, are subject to dispute.[26] A small number of writers argue that the disparity is coincidental, not the result of any pernicious bias.[27] Some researchers attribute the disparity to subconscious racial bias toward black (and certain other racial minority) defendants,[28] while others disagree.[29] Yet there is overwhelming agreement that disparity does occur when the defendant is black and the victim is white.[30] The causes of this pattern are similarly subject to dispute, but ample evidence supports the thesis that white juror empathy for white victims in the black defendant–white victim dyad is a primary determinant of penalty phase jury decisions.[31] Studies on capital punishment,[32] as well as psychological research on empathy and retribution more generally,[33] lend support to this assertion.

But why should empathy for white victims lead to harshness toward black defendants? Empathy, as here defined, is standing in another person's shoes—feeling, seeing, hearing, smelling, tasting, and understanding the world as he does.[34] Empathy is promoted when observers view another person as part of a shared group identity; conversely, empathy is inhibited when the opposite is true.[35] When racial conflict is not (consciously) salient and a task is ambiguous, subconscious racial influences have freer play, even among observers consciously

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25. *See* BRYAN C. EDELMAN, RACIAL PREJUDICE, JUROR EMPATHY, AND SENTENCING IN DEATH PENALTY CASES 1–5 (2006); *supra* text accompanying notes 8–10.

26. *See supra* text accompanying notes 8–9.

27. *See, e.g.*, Scheidegger, *supra* note 10, at 164.

28. *See* EDELMAN, *supra* note 25, at 152–53.

29. *See* Scheidegger, *supra* note 10, at 164 (concluding that there is zero "indication that people are on death row who would not be there if they were a different race").

30. *See, e.g.*, JOHN D. BESSLER, KISS OF DEATH: AMERICA'S LOVE AFFAIR WITH THE DEATH PENALTY 80 (2003) ("In fact, today's death sentences are over four times more likely to be imposed on murderers whose victims were white than on those whose victims were black."); G. Ben Cohen, *McClesky's Omission: The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM. L. 65, 73 (2012) ("The political energy or capital necessary to secure an execution appears to exist when African Americans are convicted of killing white victims, but hardly ever when whites are convicted of killing African Americans."); EDELMAN, *supra* note 25, at 35, 39, 48 (concluding that archival studies document a pattern of race-of-victim discrimination, much experimental literature finds a race-of-defendant effect on how participants interpret evidence and reach sentencing conclusions, and post-trial juror interview literature finds both race-of-defendant and race-of-victim effects).

31. *See* EDELMAN, *supra* note 25, at 145–48, 151.

32. *See id.* at 151 (citing the "post hoc" model of juror decision making).

33. *See infra* text accompanying notes 296–304.

34. *See* Taslitz, *Tinkerbell*, *supra* note 13, at 420.

35. *See id.* at 431–36 (citing various philosophical and sociological explanations for human formation of empathy).

committed to egalitarian racial values.[36] Simply put, white jurors empathize with white victims, sharing in their suffering and loss, as well as that of their family and friends, due to the subconscious perception that jurors and victims form part of the same racial group.[37] Correspondingly, white jurors do not empathize with black defendants, whose emotional pain fails to resonate with the jurors' subconscious.[38] White jurors thus individuate white victims and view them as compatriots in suffering, while deindividuating black defendants.[39]

2. Lost Empathy for the Defendant Deindividuates His Character and Suffering

a. Stereotypes and Racial Threat

Portions of evidence that could help individualize a black defendant and build a sense of emotional connection between jurors and offender are ignored, forgotten, downplayed, or reinterpreted in nefarious ways, while portions of evidence supporting a white victim's uniqueness and relatedness to jurors are attended to, remembered, amplified, and interpreted in positive ways.[40] Without empathy for the defendant, a jury is left only with stereotypes as the basis for judging him.[41] But stereotypes of black defendants cast them as violent, unfeeling characters, redolent of the sub-human.[42] Blackness alone does not necessarily trigger a sense of black dangerousness; rather, empathy for white victims, but not for black offenders, triggers heuristics portraying blacks as unworthy and threatening.[43]

Yet, while recognizing a link between empathy for white victims and negative attributions toward black offenders, other research questions whether black stereotyping is the mechanism for translating empathy for the victim into animus toward the defendant.[44] This research, however, offers

36. *See* EDELMAN, *supra* note 25, at 72–74; *infra* text accompanying notes 152–1156.

37. *See* EDELMAN, *supra* note 25, at 67–70.

38. *See id.* at 68–72; *infra* text accompanying notes 44–47.

39. *See infra* text accompanying notes 40–43.

40. *See* EDELMAN, *supra* note 25, at 63–68 (noting that when jurors perceive themselves as similar to victims or view victims as in-group members, the jurors cultivate a positive view of victims and victim empathy; correspondingly, perceived dissimilarity leads to jurors withholding positive affect and empathy, resulting in negative juror evaluations).

41. *See id.* at 69–71; Taslitz, *Tinkerbell*, *supra* note 13, at 431–36.

42. *See* Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 54–57 (2003) (discussing the concept of subpersonhood).

43. *See* EDELMAN, *supra* note 25, at 151–53 (discussing data supporting this point); *see also* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 138–46, 155–59 (2003) (discussing the prevalence of stereotypes casting African-Americans and other minority groups as criminals). *See generally* MARK KELMAN, THE HEURISTICS DEBATE 3–11, 157–58 (2011) (explaining and attempting to reconcile views of cognitive heuristics as often useful mental shortcuts or as "biases").

44. *See* Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 905 (1996)

only vague alternatives for explaining just why and how this translation occurs. A plausible explanation missing from this literature is one of racial threat. White juror identification with white victims triggers a view of the black offender as threatening whites as a social group because whites feel the attack on the victim as an attack on the jurors' "own kind."[45] One variant of this justification focuses on perceived threat of physical harm.[46] Another, perhaps more salient, variant would focus on racial insult—the black offender treating his white victim as of less worth than him when the victim is, to the contrary, of greater worth because of her race.[47]

b. Retribution and Racial Insult

A more complex way to view this insult theory is this: empathy is a prerequisite for sympathy or compassion—the desire to reduce another's suffering.[48] But the victim's suffering has ended; she is dead. Jurors might therefore want to reduce the suffering of the victim's surviving family and friends. That explanation assumes, however, that jurors believe executing the defendant will provide some emotional relief to the victims' loved ones—relief stemming from the sense that "justice has been done," viz, that making the offender suffer lessens the pain of the victim's loved ones by "evening the score."[49] Alternatively, perhaps jurors are angry that the defendant has so thoroughly erased the victim from the world that she is no longer present to feel pain. Jurors, frustrated that they can no longer alleviate the victim's pain, instead express rage towards the offender—the one responsible for depriving the victim of the possibility of such help. Alternatively or additionally, jurors may view the offender as having wronged the "People"—that is, the white majority—or at least the public in general, thus sparking righteous indignation against the defendant's

("Although the link between severity of verdict, race, and empathy seems well established, the degree to which race and empathy combine to influence the outcomes of criminal trials could be exaggerated.").

45. *See* LEE, *supra* note 43, at 138–46, 155–59 (discussing whites' physical fears of blacks as a group); SUSAN T. FISKE, ENVY UP, SCORN DOWN: HOW STATUS DIVIDES US 118–22 (2011) (stating "[t]he same two people can relate in an interpersonal way or in an intergroup way," and observing that perceived "[p]roximity, similarity, and a common fate all contribute to 'groupiness'").

46. *See* KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT AND OTHER MACROAGGRESSIONS 125–26 (1998) (explaining that most whites who live in close proximity to blacks fear victimization by those blacks); Charles J. Ogletree, Jr., *The Burdens and Benefits of Race in America: Matthew O. Tobriner Memorial Lecture*, 25 HASTINGS CONST. L.Q. 219, 255 (1998) (quoting former President Bill Clinton who cautioned, "Blacks must understand and acknowledge the roots of white fear in America. There is a legitimate fear of the violence that is too prevalent in our urban areas. And often, by experience or at least what people see on the news at night, violence for those white people too often has a black face.").

47. *See* McCleskey v. Kemp, 481 U.S. 279, 336 (1987) (Brennan, J., dissenting) ("[D]iminished willingness to render [a death] sentence when blacks are victims[] reflects a devaluation of the lives of black persons.").

48. *See* Taslitz, *Tinkerbell*, *supra* note 13, at 420.

49. *See* ROSENBAUM, *supra* note 17, at 27–28 (discussing the role revenge plays in society's concept of justice, and society's strong, emotional desire to see wrongdoers pay a debt "personally owed to the victims of that wrong").

defiance of societal norms to the detriment of the common good.[50] Harming the defendant reaffirms the fundamental social rules that bind society together and brings the force of society as a whole behind the message sent by the state's killing of the defendant: "You are not as high and mighty as you think."[51] Either way, victim empathy fosters retributive impulses against the offender, requiring his death[52] and necessarily constituting his expulsion from the society of the living,[53] rendering him incapable of corrupting that society further.

Whatever the explanation, racial empathy for the victim dramatically increases the chances of a death sentence based on racial attitudes instead of accurate fact determination, neutral evaluation of the relevant values binding *all* Americans, or a legitimate expression of condemnation via democratic processes.[54] Certain features of current capital punishment procedures magnify the risks of one-sided, race-based empathy. Such empathy is one-sided because it stands only with the victim, race-based because racial identity becomes the primary social–psychological basis for that empathy. This article will focus next on examining these features, and Part III will address whether these features are unique to capital punishment.

B. Empathy-Relevant Features of Capital Sentencing

1. Group Polarization and Death Qualification

Death-qualification describes the process in voir dire of ensuring that the only persons selected to serve as jurors in capital cases are those supportive of the death penalty in certain circumstances, or at least those

50. *See* Taslitz, *Civil Society*, *supra* note 17, at 314–15 (noting that, through retribution, society attempts to "correct[] the wrongdoer's false message that the victim was less worthy or valuable than the wrongdoer" by publicly punishing the wrongdoer) (citation and internal quotation marks omitted).

51. *See id.* at 316–18 (noting that the idea behind retributive punishment is to provide the offender with a punishment that justifies the resentment society feels towards the offender); *see also* Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 836–42 (2000) (discussing how and why punishment helps to bond the American people into a sense of oneness in a fragmented and frightening world).

52. Gregg v. Georgia, 428 U.S. 153, 183–84 (1976) (plurality opinion) (noting that one of the purposes of the death penalty is retribution, "impos[ing] upon criminal offenders the punishment they deserve"); *see* James R. Acker, *Be Careful What You Wish For: Lessons From New York's Recent Experience with Capital Punishment*, 32 VT. L. REV. 683, 689–701 (2008) (differentiating retribution in capital sentencing from revenge).

53. *See* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 896 (2d Cir. 1996) ("The practice of banishment has existed throughout the history of traditional societies, and in our Anglo-American tradition as well."). *See generally* Corey Rayburn Young, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U.L. REV. 101 (2007) (asserting that exclusion zones for sex offenders is a type of banishment); *see also* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 1–5 (2004) (illustrating that offenders are often subject to humiliation, essentially turning the offender into an outcast).

54. EDELMAN, *supra* note 25; *infra* text accompanying Part II.B.

willing to impose capital punishment if the law so requires.[55] Persons supportive of the death penalty are, however, more likely to fall into the following demographics: white, male, older, fundamentalist, Republican, and politically conservative.[56] They are also more likely to agree with prosecution rather than defense arguments and to embrace crime control over due process (fairness) orientations toward the criminal justice system.[57] They support more punitive beliefs and view endorsement of the death penalty as symbolic of these beliefs.[58] Psychologist Pheobe Ellsworth describes death penalty supporters as "more concerned about high levels of violent crime," feeling less sympathy for criminal defendants but "more suspicious of defense attorneys," while exhibiting "more favorable attitudes toward prosecuting attorneys and the police."[59] Supporters are even less regretful of erroneous convictions, but more regretful of erroneous acquittals, relative to death penalty doubters.[60]

Politically conservative people also tend to be particularly affected by the "status quo bias," a constellation of beliefs and cognitive processes favoring the current political, social, and economic status quo, which the prosecution represents.[61] Those embracing the status quo bias feel threatened more easily; place great emphasis on avoiding the sense of being "tainted"; and, particularly under circumstances implying danger, are more likely to rely on heuristics, including racially stereotypical beliefs about criminal justice.[62] Indeed, several aspects of the jury trial process help to trigger a sense of threat and moral taint in ways that activate stereotypes that might otherwise not influence judgment.[63] High "cognitive load" (i.e.,

55. *See* WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 186–87 (1991) (providing an overview of various processes related to jury opinions of the death penalty).

56. *See* JAMIE L. FLEXON, RACIAL DISPARITIES IN CAPITAL SENTENCING: PREJUDICE AND DISCRIMINATION IN THE JURY ROOM 23–25 (2012) (describing the correlation between juror characteristics and decision making).

57. Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISIONMAKING 49–50 (Reid Hastie ed. 1993) [hereinafter Ellsworth, *Some Steps*]; Robert Fitzgerald and Phoebe C. Ellsworth, *Due Process v. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 39–40 (1984) [hereinafter Fitzgerald & Ellsworth, *Due Process v. Crime Control*]; M. Sandys, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 391–95 (J.R. Acker et al. eds., 2d ed. 2003) (citing Hovey v. Superior Court, 616 P.2d 1301 (Wash. Ct. App. 1980)) (discussing academic research on conviction-proneness).

58. *See* FLEXON, *supra* note 56, at 24.

59. Ellsworth, *Some Steps*, *supra* note 57, at 49–50.

60. *See* Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 106–09 (1984).

61. *See* Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Criminal Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH L. REV. 315, 327–30 (2012) [hereinafter Taslitz, *Status Quo Bias*] (analyzing the conservative mindset).

62. *See id.* at 330–32.

63. *See id.*

cognitive burdens) also activates stereotypes.[64] The following circumstances contribute to high cognitive load: multiple tasks, tiredness, task difficulty, excitability, anxiousness, negative mood, and processes requiring evaluations.[65] All of these features are likely to be present at a capital trial.

Correspondingly, the death qualifying process excludes death penalty opponents, or at least those less willing to support the idea of a death sentence, from the jury.[66] Yet those excluded persons are more likely to be black, Latino, female, young, Democratic, and politically liberal.[67] They are also likely to be less conviction-prone.[68] But racially diverse liberals are also likely to be less in the grip of status quo bias, and more aggressively supportive of racial, and other, egalitarianism.[69] Combatting stereotype activation requires three things: awareness, motivation, and external social control.[70] Yet death qualification excludes those jury members most likely to be aware of racial stereotypes and motivated to change them.[71] Indeed, some, though not all, research supports a "white male dominance effect," in which five or more white male jurors dramatically increase the chances of a death sentence[72] and a "black male presence effect," in which the presence of even one black male moderates the chances of a death sentence.[73] Death qualification effectively, even if not purposefully, reduces or eliminates black voices, thus silencing alternative perspectives on the evidence and its moral significance.[74]

Therefore, the process of death qualification creates a jury likely to

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64. FLEXON, *supra* note 56, at 33.

65. *Id.* (citing G.V. Bodenhausen & C.N. Macrae, *Stereotype Activation and Inhibition*, *in* STEREOTYPE ACTIVATION AND INHIBITION: ADVANCES IN SOCIAL COGNITION 1 (R.S. Wyer ed. 1998); P.G. Devine and Monteith, *Automaticity and Control in Stereotyping*, *in* DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY 339 (S. Chaiken & Y. Trope eds., 1999); *cf.* B.A. Nosek & M.R. Banaji, *Implicit Attitude*, *in* OXFORD COMPANION TO CONSCIOUSNESS 84 (P. Wilken, *et al.* eds., 2009)).

66. WHITE, *supra* note 55, at 186–87.

67. FLEXON, *supra* note 56, at 23–25.

68. *Id.* at 50.

69. *See id.* at 47, 50 (discussing many of these matters in the death-penalty context); Taslitz, *Status Quo Bias*, *supra* note 61, at 330–32 (discussing political views and the status quo bias more generally, particularly in the context of criminal justice).

70. FLEXON, *supra* note 56, at 31 (citing Bodenhausen and Macrae, *supra* note 65); M.J. Monteith, C.V. Spicer & G.D. Tooman, *Consequences of Stereotype Suppression: Stereotypes on AND Not on the Rebound*, 34 J. EXPERIMENTAL SOC. PSYCH. 355, 373 (1998).

71. *See* FLEXON, *supra* note 56, at 33, 50–52 (death penalty context); Taslitz, *Tinkerbell*, *supra* note 13, at 431–36 (concerning factors, including political attitudes, affecting stereotype activation and inhibition through the lens of status quo bias, including in the criminal justice system generally—even outside the capital context).

72. *See* W.J. Bowers, B.D. Steiner & M. Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Juror's Race and Jury Racial Composition*, 3 PA. J. CONST. L. 171, 194 (2001).

73. *See id.*

74. *See* FLEXON, *supra* note 56, at 46–49 (discussing, on average, the differences in black vs. white life experiences and belief structures that translate into differences in conceptualizations of capital punishment).

be demographically and attitude homogenous in ways that permit racial biases to manifest themselves.[75] The phenomenon of group polarization worsens the problem.[76] Group polarization refers to the process by which groups consisting of like-minded individuals become more extreme in their views.[77] Polarization occurs for several reasons. First, the argument pool is limited—those already favoring one view are more likely to generate many arguments supporting it, but few arguments opposing it.[78] Moreover, people tend to find arguments supporting their existing positions more persuasive than opposing arguments.[79] A person hearing, primarily, arguments favoring his current position thus increases the likelihood that he will come to find that position even more persuasive than before argument began.[80] Second, social comparison leads people to want to be liked, welcomed, and otherwise perceived favorably by group members.[81] Once some listening members hear what other members believe, the listeners will try to join the bandwagon to gain group approval. [82] Third, hearing others agreeing with one's initially tentative views leads a person to hold those views with greater confidence, and develop a willingness to express them in more extreme fashion.[83]

This last process might be characterized as involving a kind of primacy effect. Strong proponents of a particular view are more likely than the less passionate to voice convincing arguments for their position early and often.[84] Earlier juror comments are more influential than later ones, making it difficult for a dissenter to stop the trend later on.[85] Therefore, the group's original position is likely to become both hardened and more extreme during the deliberation period.[86] As group positions are staked out, most people try to maintain their *relative* position in the group.[87] For

75. *See id.* at 51 (discussing "attitude concentration" resulting from death qualification); Fitzgerald & Ellsworth, *Due Process v. Crime Control*, *supra* note 57, at 310 (summarizing the content of those concentrated attitudes); Thompson *et al.*, *supra* note 60, at 95 (discussing additional aspects of that content).

76. *See* Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175, 188, 194 (2002) [hereinafter Sunstein, *Group Polarization*] (noting that deliberations "increas[ing] [] the intensity with which people [hold] their pre-existing convictions" is "consistent with the prediction of group polarization").

77. *Id.* at 176.

78. SUNSTEIN, DISSENT, *supra* note 21, at 120–21.

79. *See generally* CASS R. SUNSTEIN, WHY GROUPS GO TO EXTREMES 10–12 (2008) [hereinafter SUNSTEIN, EXTREMES] (explaining the causes of group polarization).

80. *Id.* at 10–11.

81. SUNSTEIN, DISSENT, *supra* note 21, at 122–24, 129–31.

82. *Id.*

83. SUNSTEIN, EXTREMES, *supra* note 79, at 10–11; *see also* FLEXON, *supra* note 56, at 25, 52–53 (discussing how group polarization specifically plays out in the context of death-qualified jury deliberations).

84. JAMES SUROWIECKI, THE WISDOM OF CROWDS 185–86 (2004).

85. *Id.*

86. *Id.* at 185.

87. *Id.*

example, if the rest of the group's membership moves to the right, a moderate can only remain in the middle by himself moving to the right.[88] The primary virtues of jury group deliberation—the voicing of varied community sentiments, the correction of error, the formulation of law-and-evidence-driven *reasons* for decisions—depend upon relatively time-consuming deliberations by a body large enough to be representative of the community and in which dissenters are empowered.[89] If dissenters lack empowerment, the virtues of jury decision making degrade and are replaced by higher-speed extremism.[90]

The homogeneity of the death-qualified jury is thus likely to amplify its members' punitive, racially-biased views and to promote juror error.[91] Views about race and class can combine to make matters still worse.[92] Controlled, deliberative processes, as opposed to rapid, subconscious ones, are likely essential to inhibiting stereotype activation.[93] Yet the death-qualified jury's susceptibility to group polarization undermines precisely the cognitive processes fairness requires.[94]

2. Victim Impact Statements

Victim impact statements in capital cases are unusually powerful. Such statements convey to the penalty-phase fact finder the harm that the crime did to the victim and to his family and friends.[95] Illustrating that harm requires painting a picture of the victim's life—who she was, her character, how she lived—as well as the pain and suffering inflicted on those who survived her death.[96] In capital cases, the victim herself is naturally unavailable to testify or give a written statement. It is therefore left to family members, friends, coworkers, clergy, and schoolteachers to do so.[97] But unlike in noncapital cases,[98] victim impact statements almost

88. *Id.*

89. *See* Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1602–11 (2006) [hereinafter Taslitz, *Temporal Adversarialism*] (discussing the virtues of jury deliberation); Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 276–84 (2006) (discussing the virtues of properly designed deliberative processes more generally); *Cf.* CASS R. SUNSTEIN, REPUBLIC.COM 65–80 (2001) (addressing the political dangers of group polarization).

90. Sunstein, *Group Polarization*, *supra* note 76, at 176; *supra* text accompanying notes 55–89.

91. FLEXON, *supra* note 56, at 25, 52–53; *see also* DAVID A. HARRIS, FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE 12–14 (2012) (noting group polarization should be especially powerful for individuals closely bonded to their relevant groups).

92. See FLEXON, *supra* note 56, at 137 (suggesting that group polarization resulting from "the death qualification process might be creating a concentration of like attitudes on a jury that may be associated with racially biased information").

93. *Id.* at 50.

94. *Id.* at 25, 52–53, 137–38.

95. LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 122 (2d ed. 2008).

96. *Id.*

97. *See id.* at 126–27 (observing that although basic forms of allowable victim-impact evidence

always involve live, often emotionally-gripping testimony.[99] The unstated goal of such evidence is to have the fact finder decide the victim's worth[100]—the more worthy the victim, the more heinous the killing seems.[101] Victim worthiness is determined, to a large extent, by juror empathy for the victim.[102] A victim's life seems more worthy to jurors if they feel that the victim resembles themselves and those they admire.[103] The social science is also quite clear that racial similarity between victim and jurors promotes empathy.[104] Jurors likewise exercise empathy for the suffering of the victim's family and friends, which is seen as a measure of the social harm caused by the murder.[105]

The relevance of victim impact statements during the penalty phase may legitimize for jurors the use of evidence about the victim's suffering presented during the guilt phase, not simply the evidence raised during the penalty phase. Indeed, it is hard to imagine that jurors will ignore what they have heard about the victim at trial when deciding during the penalty phase the victim's worth and the harm done to the victim.[106] Portions of the guilt phase testimony thus, in effect, operate as victim impact testimony.

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consist of testimony from the victim's family members and close friends, courts tend to be increasing the "universe of witnesses who may testify").

98. *See infra* text accompanying notes 207–214.

99. CARTER, ET AL., *supra* note 95, at 128.

100. *See infra* text accompanying notes 101–143; *see also* Justin D. Levinson, Robert J. Smith & Danielle Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, N.Y.U. L. REV. (forthcoming 2014) *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2307719 (reporting results of an empirical study using a variant of the Implicit Association Test to conclude that death imposition turns on a judgment of the relative racial worth of victim and offender in interracial cases).

101. *See* EDELMAN, *supra* note 25, at 44 (noting that jurors subject to victim impact evidence often view "defendants whose victims were assets to [the] community [as] . . . more deserving of punishment than those whose victims were perceived to be less worthy").

102. Professor Susan Bandes describes this point as the "dark underbelly of empathy," that is, the human tendency to have empathy for those most like us—the victims—rather than those most different from us—the defendants. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements* 63 U. CHI. L. REV. 361, 376 (1996). But empathy is required to judge others because empathy is defined as standing in another person's shoes so that you can understand him. *See* EDELMAN, *supra* note 25, at 65–68 (discussing studies that reveal "perceived similarity . . . cultivate[s] positive affect and empathy" and has "a positive influence on victim evaluations," whereas "perceived dissimilarity" has the opposite effect).

103. *See infra* text accompanying notes 104–129. Victim worthiness may implicitly have been what Justice Rehnquist was driving at in his discussion of the value of victim impact evidence in the Court's opinion in Payne v. Tennessee. 501 U.S. 808, 827 (1991) (holding that there is no constitutional bar on the use of victim impact evidence in capital trials). Rehnquist argued that victim impact evidence "keeps the balance true" by enabling jurors to see victims as unique individuals just as defendants are entitled to be understood by the penalty phase jury as unique persons. *See id.* Justice O'Connor in her concurring opinion elaborated, describing murder as "the ultimate act of depersonalization." "It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person." *Id.* at 832 (O'Connor, J., concurring). Victim impact evidence humanizes the victim, reminding the jury of the victim's unique worth and the harm done by his elimination. CARTER, ET AL., *supra* note 95, at 124.

104. *See infra* text accompanying notes 130–136.

105. *See infra* text accompanying notes 107–1111.

106. *Id.*

Several social scientists described the nature of victim impact statements this way: "[T]hey look at pictures of murdered victims; watch patiently as surviving family members cry on the witness stand; and hear the grim, frightening details of crimes that seem to defy explanation . . . confront another layer of tragedy and horror; . . . ."[107] In one instance, a prosecutor sought to demonstrate victim impact by staging the following:

> A dramatic reenactment of the crime, how the victims were, how they were shot. He got on his knees in dramatic fashion and he started crying and talked about how the guy had two seconds to live and [what] [would] "you" think if you only had two seconds to live and "you" had a gun pointed to the back of your head.[108]

In the infamous Scott Peterson case, the victim's mother testified more than half an hour in front of a picture of her daughter, "berat[ing] [Peterson] for disposing of the body at sea, knowing her daughter had a terrible problem with motion sickness."[109] The victim's mother continued: "You knew she would be sick for the rest of eternity and you did that to her anyway."[110] Said one well-known commentator: "Legal experts, journalists, and jurors reportedly broke down into tears. It is hard to fathom that such emotional testimony will not cultivate juror empathy and sympathy."[111]

Victim impact statements may even go beyond the victims of the murder charged to explore the victims of other crimes the defendant committed.[112] In one vivid example, a storeowner robbed by a capital defendant testified about him hitting her in the face, breaking her jaw so badly that it required five years of treatment, and about him hitting her on the head with a knife after he demanded money from the register.[113] A videotape of this crime was shown at the penalty phase to establish a "pattern of criminality."[114] "The courtroom fell silent during the showing

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107. C. Haney, L. Sontag & S. Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death,* 50(2) J. SOC. ISSUES 149, 150 (1994).

108. Bowers, et al., *supra* note 72, at 247.

109. D.E. Murphy, *'Divorce Was An Option,' Laci Peterson's Mother Cries*, N.Y. TIMES, Dec. 1, 2004, at A22.

110. *Id.*

111. EDELMAN, *supra* note 25, at 153.

112. Law professor Douglas Beloof and his colleagues might disagree that this is the state of the law. *See* DOUGLAS E. BELOOF, PAUL G. CASSEL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 597 (3d ed. 2010) ("Victim impact statement[s][are] typically limited to victims of the charged crime. It is generally error, absent the defendant's stipulation in a plea agreement, to allow victims of uncharged offenses to give an impact statement."). This characterization of the uniform nature of the law may, however, have been limited to noncapital cases. *See id.* Furthermore, in a number of jurisdictions, such statements by victims of crimes other than the one charged are admitted into evidence at the penalty phase, even if they are not necessarily denominated "victim impact statements" but rather admitted on some other theory, such as proving future dangerousness.

113. *See* ALLISON M. COTTON, EFFIGY: IMAGES OF CAPITAL DEFENDANTS 119–20 (2008) (discussing victim Josephine Gill).

114. *Id.*

of the videotape—it was very violent."[115] In another case involving a defendant named Steven Lane, victims of his earlier robberies "[e]merg[ed] like ghosts from the past, their descriptions brought his rap sheet to life in very human and frightening terms."[116] Testifying at Lane's murder trial ten years after being robbed by Lane, one store clerk still could not look Lane in the eye, signifying to the jurors the extreme trauma inflicted by Lane's gunpoint robbery.[117] During the same robbery, Lane held a gun to the store clerk's neck, called a police officer in the store a pig, and threatened to kill the clerk if the officer did not drop his gun.[118] Victim testimony "not only gave a human face to the pain that Lane had caused, but also highlighted how he tended to choose victims much like the jurors themselves"[119]—like them, these victims worked at jobs, filled gas tanks, and generally minded their own business.[120]

Many jurors readily identify with certain victims in certain kinds of killings—so readily that they do not even need to hear victim impact testimony to empathize strongly with the victim. Professor Scott Sundby calls such jurors "fundamentalists."[121] Fundamentalists see the death penalty as a way of teaching the importance of taking responsibility for one's actions. They are particularly offended by evidence of a victim's helplessness and readily put themselves in the victim's position.[122] Guilt of such a crime comes for them with a presumption in favor of death. Doubt does not plague the fundamentalists' decision—in their view, the moral imbalance created by the victim's suffering must be righted.[123] Such certainty prods them to be particularly energetic voices for the victim.[124] Sundby describes two fundamentalist jurors motivated by not wanting "to run into the victim's parents and feel like they didn't do the right thing by the victim and parents."[125] Another fundamentalist juror railed against what he saw as too little evidence about the victim, relative to a "one-sided" focus on the defendant's life.[126] Such jurors often are quite ready to empathize with the victim even before hearing details about the defendant. This same fundamentalist juror, for example, had a son who almost lost his life in a car accident that occurred during the penalty phase.[127] That

115. *Id.* at 120.

116. SCOTT SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 40 (2005).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 40–41.

121. *Id.* at 125–26.

122. *See* SUNDBY, *supra* note 116, at 128 (noting that all jurors felt a personal responsibility to "act as the victim's voice in the jury room").

123. *Id.* at 128.

124. *Id.* at 128–29.

125. *Id.* at 129 (internal quotation marks omitted).

126. *Id.* at 118.

127. *Id.* at 118–19.

accident made him "thankful that his son was alive and angrily resolved to make sure that the victim and his family were not forgotten in the jury room."[128] Watching a videotape of the crime further sparked this juror's righteous indignation while making him feel that the legal system reduced the victim's suffering to a mere category or statistic, "as if he had never been a person . . . ."[129]

Victim empathy has indeed been shown often to overpower empathy for defendants, despite defense efforts to foster such empathy.[130] Race again strongly influences empathy.[131] Victim race is especially likely to influence empathy in cases where the choice of life or death is an ambiguous one—a close case.[132] Whites, at least, view white victims' lives as more valuable than black lives, making the crime seem more heinous.[133] Racial diversity in jury composition can help to counteract this phenomenon.[134] Race alone contributes to juror empathy toward "in-group" victims. That empathy in turn leads jurors to discount evidence mitigating the crime[135] and to interpret evidence in a fashion harmful to the defendant.[136]

The author of a major study on juror empathy in capital cases concluded, "[I]t may not be the worst of the worst who are being sentenced to death, bur [sic] rather the killers of the best of the best."[137] "The best" are those whom jurors perceive to be most like themselves in terms of race, perceived character, and life circumstances.[138] Particularly for such "worthy" victims, "[e]motional expressions of loss may enhance the perceived cruelty of the crime, and as a result prove the existence of th[at] aggravator," whether the law expressly authorizes that use of victim impact evidence or not.[139] Yet, the law can seem conflicting and confusing. At

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128. *Id.* at 119.

129. *Id.*

130. *See* EDELMAN, *supra* note 25, at 26 (discussing the "liberation hypothesis," which states that "evidence overwhelmingly in favor of a life or death sentence usually concludes with an outcome consistent with the evidence).

131. *See id.* at 26–33 (noting the effects of race in an empirical study of homicide cases); *see supra* text accompanying notes 107–128.

132. See EDELMAN, *supra* note 25, at 29 (reporting that in an analysis of a state's homicide reports, cases at the lowest level of aggravation and "involving white victims were nearly twice as likely to result in a death sentence than those involving black victims"). This idea that evidentiary and weight-ambiguity free the jury to turn to stereotypes and related cultural narratives is often called the "liberation hypothesis." *Id.* at 26.

133. *See, e.g., id.* at 18–19 (stating that if jurors are permitted to be guided by their personal evaluations of the victim's life, "then the life of a white, affluent male may be perceived to be more valuable than that of a poor, unemployed African American by a jury dominated by a white majority").

134. *See* Taslitz, *Voice and Vision*, *supra* note 11 (discussing the many virtues of jury diversity).

135. EDELMAN, *supra* note 25, at 4.

136. *Id.* at 4–5.

137. *Id.* at 5.

138. *Id.* at 4–5; *cf.* Taslitz, *Tinkerbell*, *supra* note 13 (explaining the psychology and politics of social status).

139. EDELMAN, *supra* note 25, at 16–17.

least one state statute expressly authorizes the prosecution to present victim impact evidence "to demonstrate the victim's uniqueness as an individual human being . . . ."[140] That authorization sounds much like an invitation to assess victim worthiness as central to the choice of penalty.

Most victim impact statements in noncapital cases lack the emotional force of their equivalents in capital cases, thus reducing the danger that such statements will amplify indicators of bias or distract jurors from a full and fair consideration of all the factors they are expected to assess.[141] The author of a leading social science study on juror empathy summarized the effect of capital-case victim impact statements:

> Because defendant and mitigating evidence evaluations are affected by empathy toward the victim and ensuing victim evaluations, evidence that cultivates this type of empathy will ultimately limit the importance of the defendant's life circumstances on jurors' sentencing decisions. Victim impact statements are likely to have a significant influence on the evaluation of mitigating factors, through their effect on victim evaluations . . . and may also reduce white jurors' defendant evaluations by arousing empathy toward the victim and his or her family.[142]

3. Deindividualization Amplified

The jury is a deliberative institution.[143] The most socially desirable form of deliberation, what I have called Populist Deliberative Democracy (PDD), has these features:

> First, it involves all social groups widely in policymaking. It does not reject representative decision-making, but representatives act only after receiving widespread and diverse input from individuals and social groups. Second, it provides such diverse persons and groups ample opportunity for effective voices in deliberative fora; that is, voices in relatively small venues offering opportunities for informed discussion with the real prospect of such discussion at least sometimes altering policy outcomes. Third, all this activity occurs in an expectation of compromise rather than domination. Citizens and groups practiced in realizing this spirit understand its mutual benefits and develop the skills necessary to achieve them. Fourth, political activity aims at inclusion, not exclusion, requiring a strong commitment to individual liberties. Fifth, and finally, the deliberative, inclusive spirit knows no exceptions, requiring, for

140. FLA. STAT. ANN. § 921.141 (West, Westlaw through 2013 Legis. Sess.).

141. *See infra* text accompanying notes 207–2213.

142. EDELMAN, *supra* note 25, at 153.

143. *See infra* text accompanying notes 261–2282.

example, even convicted offenders to have some voice in their fate.[144]

Where these features are present in the criminal justice system, citizens view offenders as unique individuals and favor more lenient, complex punishments over harsh, simplistic ones.[145] This effect proves true for a host of social institutions across political cultures, including legislatures and juries alike.[146] PDD accomplishes this result in part by enhancing empathy for the accused.[147] Correspondingly, the absence of PDD promotes de-individualized, draconian punishment.[148]

Current capital penalty phase proceedings fail to include essential elements of PDD. Capital juries are neither racially nor viewpoint diverse. They are structured to discourage the full airing of dissenting views, and they include members who quash compromise, care little for civil liberties, and show scant concern for the voice of the offender.[149] These flaws undermine the accuracy-enhancing and positive political features of PDD.[150] They promote results representing a minority of the citizenry's views and ensure that those poorly informed views reinforce stereotypes, racial oppression, and political exclusion.[151]

4. Jury Instructions

Although there is some conflict in the research, substantial reason exists to believe that vague jury instructions in ambiguous cases (those not clearly favoring one side or the other) "liberate" the jury to rely on racial stereotyping.[152] The problem is less the quality of the instructions than the law on which they are based. For example, an instruction that death eligibility turns on whether two or more persons were simultaneously murdered or whether a member of law enforcement was killed is simple and

144. Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 134–35 (2011) [hereinafter Taslitz, *Criminal Republic*].

145. *See id.* at 137 (stating that methods of increasing empathy for others will "moderate carceral impulses").

146. *See generally id.* (noting that "empathy-promoting" reforms "may lead to . . . improvement in currently harsh carceral policies" and change in "America's political system").

147. *See id.* at 178–84 (exploring how "PDD practices increase happiness, thereby decreasing the punitive public spirit").

148. *See id.* at 182–84 (discussing how circumstances absent PDD may result in unforgiving people bent on revenge and hostility in high conflict situations).

149. *See supra* text accompanying notes 144–148.

150. *See generally* Taslitz, *Criminal Republic*, *supra* note 144, at 138–53 (noting the demonstrated virtues of PDD through various state analyses).

151. *See id.* (discussing criminal justice institutions with PDD flaws).

152. *See* EDELMAN, *supra* note 25, at 26 (discussing the "liberation hypothesis," stating that the likelihood that race will have an impact on sentencing is greater in cases where the evidence is ambiguous); *cf.* Yates v. United States, 354 U.S. 298, 327 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978) (discussing the prejudicial impact of vague jury instructions in the context of a Smith Act prosecution).

objective.[153] But an instruction that death eligibility turns on the "unusually heinous" nature of the crime is subject to multiple interpretations, inviting abuse.[154] To eliminate the problems stemming from vague jury instructions, some law reform organizations have recommended narrower, more specific grounds for death eligibility in identifying the "worst of the worst."[155]

Instructions also should explain in detail the purposes and hallmarks of good deliberation. Persons lacking experience in the deliberative process surely need some guidance. Expressly cautioning jurors against racial stereotyping can, however, have a "backfire effect."[156] Nevertheless, providing jurors with an explanation of their own subconscious reasoning processes may help to combat the backfire effect.[157] In short, the kinds of vague instructions about the jury's deliberative task that are used in capital cases, combined with the absence of instructions designed to promote empathy for the offender, can further enable the jury's emotional distancing from a black capital defendant.

III. Empathy and Noncapital Sentencing Juries

This section analyzes whether racial bias handicaps juror empathy in noncapital cases to the same degree that it does in capital cases. Although the empirical data is limited, this section concludes that racial bias still impedes empathy in noncapital cases, albeit to a lesser extent than in capital ones. Moreover, similar, but not identical, causes limit jury empathy in both capital and noncapital cases.

A. Background

Between 1800 and 1900, as many as half of the states used juries to

153. *See* THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 9–17 (2006), *available at* http://www.constitutionproject.org/wp-content/uploads/2012/08/30.pdf (suggesting limitations to death penalty eligibility, including murder of a peace officer and multiple murders, in order to avoid the risk of wrongful conviction).

154. *See* EDELMAN, *supra* note 25, at 25 ("various measures designed to classify cases" based on "the severity of the crime" have been developed, with varying results).

155. *See* CONSTITUTION PROJECT, *supra* note 153, at 9 (suggesting death eligibility ought to be limited to five factors).

156. *See* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 689 (2000) ("The backfire effect occurs when jurors pay greater attention to information after it has been ruled inadmissible than if the judge had said nothing at all about the evidence and allowed jurors to consider it."); *see also* Curtis Hardin & Mahzarian Banajii, *The Nature of Implicit Prejudice: Implications for Personal and Public Policy, in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 22 (Eldar Shafir ed. 2013) (explaining that egalitarian values espoused by those who are unlikable or of low social status may result in a backfire effect).

157. *See* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 133 (1999) (noting, specifically in rape cases, that "[m]aking unconscious biases conscious biases" "seems to help jurors to evaluate victim testimony more fairly").

impose sentences in noncapital felony cases, with other states permitting juries to issue sentencing recommendations.[158] Over time, however, jury sentencing in such cases became the exception, not the rule.[159] Changes in sentencing goals may explain the decline in jury sentencing, particularly the growing emphasis on rehabilitation during the middle of the twentieth century.[160] Rehabilitation embraces a neomedical model in which an expert—the judge—relies on specialized knowledge to craft sentences that will cure the offender of his criminal ways.[161] Once vested with such power, however, judges were apparently reluctant to part with it.[162] Yet, argues Judge Hoffman, the modern rise of retribution, an essentially moral judgment,[163] undermines the rehabilitative justification for judicial control over sentencing.[164] Regardless of the historical reasons for the shift towards judicial sentencing power, today only five or six states retain jury sentencing.[165] Some authors suggest jury sentencing survived in these states because of a democratic impulse,[166] while others attribute the survival of jury sentencing to baser political motives, such as juries keeping power away from judges who were primarily appointed by an opposing party.[167]

Empirical research has not articulated the consequences of allowing juries to retain control over the sentencing process, with several

158. Ronald F. Wright, *Rules for Sentencing Revolution*, 108 YALE L.J. 1355, 1373–74 (1999).

159. *See* Hoffman, *supra* note 6, 965–66 (2003) (describing the historical decrease in jury sentencing within the United States).

160. *Id.*

161. *See generally* JAMES L. NOLAN, JR., THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END (1998) (bemoaning at length what the author saw as the long drift toward a therapeutic or rehabilitative ideal); FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981) (articulating a critical history of the rehabilitative ideal).

162. *See* Hoffman, *supra* note 6, at 966–68, 992–99 (documenting a history of judicial retention of this power, even after the eclipse of the rehabilitative ideal).

163. *See* Taslitz, *Civil Society*, *supra* note 17 (defining retributive theory's moral nature).

164. *See* Hoffman, *supra* note 6, at 995–99 (noting that juror sentencing undermines the discretion necessary for judges to impose sentences focused on rehabilitative goals).

165. *Id.* at 953 n.1, 966. Hoffman includes only five states in his count of juries handling sentencing in noncapital cases because juries generally have ultimate sentencing authority. *Id.* Those states are Arkansas, Missouri, Oklahoma, Texas, and Virginia. *See* ARK. CODE ANN. § 5-4-103 (West 2013); MO. ANN. STAT. § 557.035 (West 2013); OKLA. STAT. ANN. tit. 22 § 926.1 (West 2013); TEX. CODE CRIM. PROC. ANN. art. 37.02(2)(b) (West 2013); VA. CODE ANN. § 19.2-295 (West 2013). Hoffman excludes Kentucky because its statute, KY. REV. STAT. ANN. § 532.055(2) (West 2013), has been interpreted as giving juries only the authority to recommend sentences and judges are not bound to follow those recommendations. *See* Murphy v. Commonwealth, 50 S.W. 3d 173, 178 (Ky. 2001); Hoffman, *supra* note 6, at 954 n.1. Here I more generously include Kentucky.

166. *See* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 316–33, 338–39 (2003) (noting the role of the democratic impulse in early jury sentencing and defending the populist deliberative wisdom of such sentencing without necessarily attributing such impulses and views to retention of the jury's role in certain states).

167. *See* Nancy King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 973, 986–88 (2003) ("[V]irginia's decision to embrace jury rather than judicial sentencing was long-delayed, notably incomplete, and quite likely influenced by party politics as well," while Kentucky's decision to embrace jury sentencing likely turned more on its "settlement practices and legal heritage" than on a zeal for popular democracy or a deliberative decision about the relative merits of the two possible decision makers).

experimental studies reaching mixed findings.[168] That lack of consensus may suggest that race sometimes plays a smaller role in noncapital sentencing and sometimes a greater role.[169] Sheri Lynn-Johnson argues that jurors might be more likely affected by race at the guilt-determination phase because racial stereotypes make members of certain racial groups seem more likely to commit certain crimes.[170] But once the crime is proved, criminal propensity matters less at sentencing—at least in determining appropriate degrees of retribution.[171] Johnson critiques archival and related studies finding racial discrimination in noncapital sentencing as outdated, mostly from Southern states at a time when overt racial bias was more socially acceptable or involving rape cases, which raise unique bias issues.[172] A study specifically comparing judge vs. jury

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168. *See* Alfred Blumstein & Jacqueline Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's Views*, 14 LAW & SOC'Y REV. 223, 243–49 (1979) (finding considerable disagreement among racial subgroups on desirable sentencing lengths but considerable agreement within those subgroups); *see generally* Hubert S. Feld & Nona J. Barnett, *Simulated Jury Trials: Students vs. "Real" People as Jurors*, 104 J. SOC. PSYCHOL. 287, 290–91 (1978) (observing an effect on jury sentencing leniency caused by the educational status of the jury and the social attractiveness of the defendant); *see also* Hubert S. Field, *Rape Trials and Jurors' Decisions: A Psycholegal Analysis of the Effect of Victim, Defendant, and Case Characteristics*, 3 LAW & HUM. BEHAV. 261, 271 (1979) (finding sentences to vary based on an interaction among many factors, including defendant's and victim's race); Yvonne Hardway Osborne & Neil B. Rappaport, *Sentencing Severity with Mock Juries: Predictive Validity of Three Variable Categories*, 3 BEHAV. SCI. & L. 467, 470 (1985) (finding longer sentences based on socioeconomic status but not race); Andrea DeSantis & Wesley A. Kayson, *Defendants' Characteristics of Attractiveness, Race, and Sex in Sentencing Decisions*, 81 PSYCHOL. REP. 697 (1997) (finding subjects imposing harsher sentences on African-American burglars than on white burglars); Kitty Klein & Blanche Creech, *Race, Rape, and Bias: A Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOL. 21, 28–29 (1982) (finding that white subjects sentence black rape offenders more harshly than white rape offenders). It may be that juror racial bias is particularly likely to be evident in inter-racial rape cases; Charlan Nemeth & Ruth Hyland Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCHOL. 221, 226 (1973) (studying the relationship between defendant race and attractiveness, jury education, and sentences imposed). *See* Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 453–60, 481–86 (1996) [hereinafter Taslitz, *Patriarchal Stories*] (discussing how considerations of a defendant's and victim's race have influenced juror decision making in rape cases).

169. *See, e.g.*, Taslitz, *Patriarchal Stories*, *supra* note 168, at 453–60, 481–86 (arguing that subconscious racial bias is likely to be particularly powerful in rape cases). One commentator suggests that juries are likely to handle race better than judges; that is, if there is juror racism it is likely going to be no worse than judges' racism and that it is impossible from the current state of research to flatly state, based upon empirical data, that sentencing racism is likely to be greater for judges, jurors, or neither. *See* Lanni, *supra* note 6, at 1798. This same author goes on to argue, however, that the most likely places where juror racism will rear its head are at the guilt phase and in capital sentencing proceedings. *Id.*

170. *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1625–37 (1985) (describing mock jury studies supporting the hypothesis that racial bias influences guilt determination).

171. *See id.* at 1627 (noting that certain studies show "the significance of the defendant's race varied with the strength of the evidence").

172. *Id.* at 1631–37; *but see* Laura T. Sweeny & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 191 (1992) (arguing that the ambiguous norms at sentencing make it more, not less, likely that racism's role will be greater at sentencing than at trial); *see generally* Nancy King, *Postconviction Review of Jury Discrimination: Measuring the Effect of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 75–99

race-based sentencing disparities in Alabama found no statistically significant race-based differences when data from two decades was considered in the aggregate.[173] Law professor Nancy King, in a study of jury sentencing in Arkansas and Virginia, found race significantly associated with longer sentences in *none* of the nine offense categories studied in Arkansas, and race having a significant association for only three out of the nine offense types studied in Virginia.[174] Though more research is needed, King suggests that this evidence might suggest that race has less of an influence on sentencing in noncapital than capital cases.[175]

Using actual cases to determine ordinary people's preferred sentences, Professors Alfred Blumstein and Jacqueline Cohen found variation across, *but consistency within*, racial, gender, and educational strata.[176] This observation has led at least one critic to argue that entrusting judges, who overall come from fairly uniform racial and class backgrounds, with sentencing decisions creates grave danger of unfair sentencing disparities.[177] The judge is but one person bound by her own experience and racial biases, freed from having to engage with the views of those from other races and classes.[178] Naturally, the question is a comparative one, yet the research on judicial sentencing bias is also conflicting—some finding such bias as a general matter, some not.[179] But more recent research using more fine-grained methods does support the existence of such bias. For example, in one notable study of actual sentences, investigators found that judges imposed harsher sentences on defendants with more "Afrocentric" (more stereotypically African-American) features.[180]

Empirical research has also failed to definitely determine whether noncapital juries are harsher or more lenient than judges.[181] Many judges

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(1993) (offering an overview of jury verdict racism literature).

173. Brent L. Smith & Edward H. Stevens, *Sentence Disparity and the Judge–Jury Sentencing Debate: An Analysis of Robbery Sentences in Six Southern Sta*tes, 9 CRIM. JUST. REV. 1, 6 (1984). Commentator Adrian Lanni critiques this study as "inconclusive and difficult to interpret." Lanni, *supra* note 6, at 1798.

174. King, *supra* note 1, at 204.

175. *Id.* at 203–04.

176. *See* Blumstein & Cohen, *supra* note 168, at 243–49 (discussing results from sentencing studies involving distinct subgroups portioned by sex, income, race, education, etc.).

177. Hoffman, *supra* note 6, at 986–87.

178. *See id.* Sentencing is safer from racial bias if left to several people, rather than a single decision maker, because the participation of a variety of people will force groups to "accommodate their inter-strata differences" when making a sentencing decision. *Id.*

179. Lanni, *supra* note 6, at 1798.

180. *See* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 140–47 (2003) (summarizing studies showing that African-American children adjudicated delinquent are far more likely than are similarly situated white children to face commitment to a juvenile facility); *see also* William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE L. 327, 352 (2005) (concluding that sentencing harshness is linked to the extent of the defendant's "Afrocentric features" as distinct from skin color).

181. *See, e.g.*, Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U.J. URB. & CONTEMP. L. 3, 9–10 (1994) (finding that juries were, for certain categories of cases, harsher sentencers than judges). Weninger also interviewed local attorneys

and attorneys believe that juries will be harsher.[182] Conducting a comparative study of jury versus judicial sentencing in Kentucky and Virginia, Nancy King and Rosevelt Noble found that in both states jury sentences were on average longer than judge-imposed sentences.[183] For some offense types, these differences were substantial.[184] Jury sentences for similar offenses also varied more widely than judicial sentences.[185] King and Rosevelt, and King writing independently, have suggested that judges and prosecutors in these states prefer harsh jury sentences because judges are then freed to give a greater "discount" for briefer, more efficient bench trials, subsequent sentencing, and sentences imposed after guilty pleas.[186] So understood, judges are imposing lower sentences to encourage efficiency rather than because they believe that jury sentences are unduly harsh.[187] Where sentencing guidelines are involved, judges may find it politically expedient not to deviate too readily from those guidelines, even where they believe it might make sense to do so.[188] The judges believe that guidelines variation, even upward variation, may cause them reelection difficulties.[189] Another study of El Paso County, Texas, reached similar

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and judges. Texas, at the time of the study, permitted defendants to waive their right to a sentencing jury, effectively allowing them to decide whether they wished to be sentenced by a judge or a jury. In Weninger's interviews, defense counsel praised this system because it allowed defendants to escape sentencing before unduly harsh judges. *Id.* at 15–16. Prosecutors viewed this same conduct as inappropriate forum-shopping to escape just punishment. *Id.* Weninger, however, made the following observation:

> Jurors, free of caseload pressures, are likely to think about the punishment a defendant deserves without paying attention to the mode of disposition, and are not likely to give a guilty plea discount. Perhaps, then, judges are not really more lenient than lay sentencers but simply let juries set the "price." Courts may then reduce the price set by the jury to induce defendants to waive trial. Possibly, if judges think only about the merits — if they were considering only the penalty the defendant deserves — they might sentence not much differently than juries.

Id. at 17. *But see infra* text accompanying notes 193–199 (discussing studies finding that juries are more lenient sentencers than judges).

182. *See* Nancy J. King and Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 895–96 (2004) (reporting that prosecutors interviewed in three jury-sentencing states gave "ringing endorsements" to juries as sentencers because their presumed harshness encourages defendants to waive jury trials entirely, indeed to plead guilty, thus moving cases).

183. *Id.* at 907–08.

184. *Id.*

185. *Id.* at 907.

186. *See id.* at 896–907 (discussing judicial discretion in giving "plea discounts" in comparison to the judicial limitations and general unpredictability of the "trial penalty"); King, *supra* note 1, at 213–14.

187. King & Noble, *supra* note 182, at 944–45; King, *supra* note 1, at 213–14.

188. *See* King & Noble, *supra* note 182, at 958–59 (discussing how judges and legislators in Kentucky tend to respond to the electorate when making policy decisions on sentencing).

189. King, *supra* note 1, at 206. See King & Noble, *supra* note 182, at 888–89, for two important points. First, King and Noble argue that jury sentencing in the three states they studied did not fulfill its promise to serve as an independent check on abusive sentencing policy (either too harsh or too lenient) crafted by judges, prosecutors, and sentencing commissioners because jurors are "information-blindfolded," that is, they are denied access to much information that is available to judges as sentencers, and because they lack power, since judges and sentencing guidelines may too readily replace the jury's judgment. Second, they point out that even though few states have jury sentencing in

conclusions. [190] Juries sentenced repeat offenders and first-time offenders committing less serious offenses more harshly than did judges, but sentenced first-time offenders for serious crimes less harshly.[191] Moreover, juries favored prison over probation only in guilty plea cases involving first-time offenders, but the study found no statistically significant difference in the prison vs. probation choice in other cases.[192]

Still, several experimental and archival studies found that juries gave offenders more lenient sentences than did judges.[193] A study of Alabama found its sentencing judges to be substantially harsher than sentencing juries.[194] For example, average jury sentences for robbery were 22.5 years, while judicial sentences (after the state's switch to judicial sentencing) averaged 35.9 years.[195] A similar study of Atlanta, Georgia found no statistically significant harshness differences between judges and juries.[196] Other studies have found that properly conducted deliberation by juries also prods them toward more lenient sentences.[197]

There are, however, reasons to believe that properly constituted juries will generally be less racially biased than judges and less harsh. In any event, there is also reason to believe that noncapital juries do a better job than capital juries on sentencing, but not as good a job as they could with certain reforms. These reasons are discussed below.

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noncapital cases, jury sentencing has a far more current impact than that number of states would suggest. *See id.* at 886–87 (noting that "these states form a sizeable segment of the United States" and that the "number of felons sentenced by juries in Texas alone exceeds the number of federal defendants convicted annually by jury, for misdemeanors or felonies, in all districts combined.").

190. *See* Weninger, *supra* note 181, at 38–39 An El Paso study reveals that "public views on appropriate levels of penalties become increasingly relevant" for purposes of sentencing policy. *Id.*

191. *Id.* at 34.

192. *Id.* at 36–37.

193. *See* Shari Seidman Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 BEHAV. SCI. & L. 73, 74–81 (1989) (finding mock jurors as or more lenient than judges); *see also* Smith & Stevens, *supra* note 173 at 34 (finding average Alabama sentences increased when shifting from jury to judge sentencing, albeit suggesting that other factors, such as an increase in punitiveness of public opinion over time, might have been responsible); Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing*, 14 LAW & HUM. BEHAV. 199, 206 (1990) (finding poll respondents' sentencing preferences more lenient than the required minimum residential burglary sentence).

194. Smith & Stevens, *supra* note 173, at 3.

195. *Id.* at 34.

196. WILLIAM A. ECKERT & LAURI E. EKSTRAND, THE IMPACT OF SENTENCING REFORM: A COMPARISON OF JUDGE AND JURY SENTENCING SYSTEMS 8–10 (1975) (unpublished manuscript) (on file with author).

197. James H. Davis et al., *The Decision Processes of 6- and 12-person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. PERSONALITY & SOC. PSYCHOL. 1, 9 (1975); *see also* Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21, 21–22 (1988) (collecting studies showing deliberation produces leniency); Michael G. Rumsey, *Effects of Defendant Background and Remorse on Sentencing Judgments*, 6 J. APPLIED SOC. PSYCHOL. 64, 67 (1976) (similar); Laurence Severance et al., *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 225 (1984) (similar).

B. Factors Favoring and Undermining Victim and Defendant Empathy in Ordinary Cases

1. *Batson* and Group Polarization

Strong empirical evidence shows that the *Batson* rule, which prohibits intentional, race-based discrimination in the exercise of peremptory challenges to potential jurors, has been an utter failure.[198] One reason for this failure is that courts routinely accept facially absurd explanations by prosecutors as constituting "nonracial" grounds for exercising a peremptory strike.[199] *Batson*'s failure reduces the likelihood of achieving racially diverse juries in all criminal cases. Nevertheless, this failure is likely to be far less egregious in most noncapital cases than in capital cases. The reason for this is simple: capital cases involve death qualification.[200] As discussed above, use of death qualification during the jury selection process creates racially and viewpoint homogenous juries.[201] Since noncapital cases lack death qualification by definition, that force in promoting improper jury homogeneity is absent in noncapital sentencing hearings. Ideally, a better alternative to *Batson* would be crafted for all criminal cases. However, as long as death qualification is permitted—and it should not be—improving upon *Batson* becomes essential in capital cases. At the very least, courts should refuse to accept facially absurd prosecutor explanations for a peremptory strike that seems racially motivated. Indeed, even without death qualification, the high stakes of a capital case make fixing *Batson* crucial in such a proceeding. While crafting a complete replacement for *Batson* is a complex, lengthy endeavor beyond the scope of this article,[202] some improvement, at least in the form of greater judicial skepticism towards a prosecutor's reasons for a strike, is essential.

2. Deliberation and Harshness

The greater likelihood of diverse noncapital sentencing juries decreases the chances that they will suffer the same extent of deliberative breakdown that occurs with capital sentencing juries.[203] As a result, noncapital sentencing juries—relative to capital juries—lessen concerns

198. *See* Taslitz, *Voice and Vision*, *supra* note 11, at 1710–11 (noting various studies post-*Baston* revealing the continued use of "race- and gender-based use of peremptory challenges").

199. *See id.* at 1711 (citing empirical studies on the acceptance of "facially absurd justifications" for peremptory challenges).

200. *See supra* text accompanying notes 55–94.

201. *See id.*

202. *See generally* HIROSHI FUKARI & RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION (2003) (discussing various strategies and reforms aimed at increasing representation of racial minorities in trial juries).

203. *See supra* text accompanying notes 143–151 (discussing capital case deliberative breakdown).

that the sentence will unduly emphasize harshness or fail to individually assess each offender.[204] As discussed earlier, however, the empirical data on sentencing harshness for noncapital juries is mixed.[205] Nevertheless, it is improbable that such harshness results from the same degree of deliberative collapse as seems likely in capital cases. I am not saying that deliberation in noncapital cases cannot be improved;[206] but rather, that the need in each noncapital case is diluted relative to the similar need in each capital case.

3. Victim Impact Statements

There has been relatively little written about victim impact statements outside the capital context. For example, Douglas E. Beloof, Paul Cassell, and Steven J. Twist, in the latest edition of their path-breaking casebook on victims' rights, devote thirty-eight pages to victim impact statements.[207] The bulk of this text addresses capital cases and includes excerpts from cases and scholarship as well as original text.[208] Two pages note that the nature of the victim (e.g., fitting certain categories of vulnerable victims) and the nature of the harm inflicted upon her can be relevant under sentencing guidelines.[209] The text further notes that statutes are often vague about whether upward or downward departures are permitted based upon victim impact statements in noncapital cases, including a single case excerpt on the point.[210] The authors also note that mandatory minimum sentences and guidelines sometimes render victim impact statements in noncapital cases irrelevant because the sentence has essentially been predetermined.[211] But the text includes only a single page of notes on the nature of noncapital victim impact statements, contains no excerpts from what the authors consider leading scholarship on the subject, and presents no discussion of the differences between noncapital and capital victim impact statements.[212] Although there are articles published on noncapital victim impact statements, they do not focus significantly on the content of those statements.[213] I am therefore forced to rely on personal experience and anecdote.

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204. *See id.* (discussing deindividualized, harsh justice resulting from deliberative breakdown).

205. *See supra* text accompanying notes 181–198.

206. To the contrary, I have argued that there is substantial room for deliberative improvement. Taslitz, *Criminal Republic*, *supra* note 144, at 10.

207. BELOOF ET AL., *supra* note 112, at 567–607.

208. *Id.* at 567–607.

209. *Id.* at 598–99.

210. *Id.* at 599–604 (using Kansas v. Heath, 901 P.2d 29 (Kan. Ct. App. 1995), as a case example).

211. *Id.* at 604.

212. *Id.* at 597.

213. *See, e.g.*, Trey Hill, *Victim Impact Statements: A Modified Perspective*, 29 L. & PSYCH. REV. 211 (2005); Philip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199 (1988); Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347 (1999).

Conversations with the many prosecutors, defense attorneys, and judges with whom I have spoken at professional conferences match my personal experience: at least for non-violent crimes, victim impact statements in noncapital cases are most often given on paper, rather than in person. In other words, the probation officer or other assigned court official interviews the victims for the presentence report, but the victims do not bother to attend the sentencing hearing. It is not worth their while to miss time from work or family for a simple theft, a routine burglary, or even a car theft. Victims of non-violent crime mostly seek restitution and are often not in favor of harsh punishment for first-time offenders, although if they are aware of a substantial criminal record, they may support more intense punishment. Of the hundreds, perhaps thousands, of noncapital cases I tried or took to a guilty plea, I can remember only a small number in which the victims testified live. Even when a victim did testify, his testimony was often brief, and little about the victim's life or background came to light. Indeed, the victims focused more on the nature of the criminal act—how violent and cruel it was—and on the victim's out-of-pocket losses. To be sure, there were a small number of exceptions—rapes, attempted murders, carjackings and the like—that were particularly violent or brutal. In those cases, prosecutors sometimes worked with victims, usually at the victims' request, to present substantial, emotionally powerful, and live victim impact statements. Such statements, however, were quite rare.

Brief, written victim impact statements, which focus on restitution and the criminal act rather than on the victim's background, her family's background, or the brutality of her emotional pain, are unlikely to sway even noncapital sentencing juries. When little victim background is given, the sentencing proceeding is likely to be less about victim worth and more about the culpability of the offender's act and mental state, the harm done, and the offender's past criminal record. It is true that my experience, and those of most persons I know in full-time practice, is limited to jurisdictions lacking noncapital sentencing juries. I also know of no empirical study of victim impact statements in jurisdictions that do have noncapital sentencing juries. Nevertheless, the relatively less severe nature of most of the cases, the sheer number of cases prosecutors must handle, the pressures on victim time, and the resistance of many victims to repeated court appearances make it likely that victim impact statements in noncapital sentencing jury cases, as in noncapital cases before judges, will be relatively narrow and cursory. Likewise, prosecutors are not likely, generally, to use media, music, or other devices to heighten emotions, nor are they likely to present live victim testimony on a routine basis. On balance, the run-of-the-mill noncapital sentencing case offers far less reason to worry about the distorting effects of victim impact statements than is true in capital penalty phase proceedings.

4. A Brief Comment on Jury Instructions

The ambiguity of jury instructions is likely the same in many noncapital as capital cases.[214] Still, in the typical noncapital case, legal ambiguity is likely to be less important than credibility and evidentiary sufficiency. A car theft, for example, turns on proving, stated in laypersons' terms, that the defendant took someone's car without permission and did not plan on ever returning it.[215] Whether there was an intention not to return the car—to permanently deprive another of the property—will turn on how much circumstantial evidence there was that the defendant was not simply on a joy ride and on the credibility of the defendant should he choose to take the stand on that point.[216] Even when ambiguity does occur there is less reason to worry that the ambiguity will "liberate" jurors to rely on racial bias, provided: victim impact statements avoid status comparisons; juries in noncapital cases are more diverse than in capital cases; and there is low risk of breakdown during jury deliberations. To be sure, the risks of bias and stereotyping in any criminal case where victim and offender are of different races are significant.[217] I am simply arguing that such risks are likely substantially smaller than is true in analogous capital cases.

IV. The Jury's Democratic Function in Capital Cases in the Implicit Racial Republic

The penultimate section of this article argues that diverse, well-informed, truly deliberative juries capable of offender empathy serve political purposes. These purposes include learning to think beyond selfish individualism and about a common good fundamental to American citizenship. This section explains how properly organized deliberative juries are more likely to achieve this stance and take it with them into the broader political arena after trial. Political considerations, like practical ones, thus favor reforms that maximize the jury's capacity for empathy. Those reforms include ending death qualification, replacing *Batson* with a

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214. The ambiguity of jury instructions is likely attributed to the use of ambiguous statutory terms unfamiliar to laypersons, lawyer respect for precedent (no matter how confusing to ordinary persons the precedential language may be), and the legal system's incomplete embrace of the plain language movement. *See generally, e.g.*, STUART GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE (2013) (illustrating the confusing and outmoded nature of many theft statutes); JOSEPH KIMBALL, LIFTING THE FOG OF LEGALESE: ESSAYS ON PLAIN LANGUAGE (2005) (defending the importance of the law's embracing plain language).

215. ELLEN PODGOR ET AL., MASTERING CRIMINAL LAW 186–96 (2008) (laying out the elements of common law larceny and related offenses).

216. *See id.* (comparing larceny's "intent to permanently deprive" element with offenses lacking that element); *see also* ELLEN PODGOR ET AL., CRIMINAL LAW: CONCEPTS AND PRACTICE 236–48 (3d ed. 2013) (discussing the importance of credibility in criminal cases).

217. *Cf.* Andrew E. Taslitz, *Wrongly Accused: Is Race a Risk Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006) (summarizing subconscious factors involving racial stereotyping that can promote mistaken convictions).

superior alternative in capital and noncapital cases, improving jury instructions in both type of cases, and more fully informing juries of information relevant to the task of sentencing. The final portion of this section explains why these political concerns support wider use of jury sentencing in all cases, not merely capital ones, together with reforms to reduce the ill impact of racial bias on jury empathy and compassion.

A. Empathy's Political Role and Preconditions in Jury Deliberation

1. Overview

An under-explored political justification for jury decision making is its role in promoting empathy, sympathy, and the social goods that flow from them.[218] The challenges of everyday life breed selfishness and a narrow focus on one's own world. Philosopher Zygmunt Bauman summarized the point this way:

> [I]ndividuals tend to be self-centered and self-engrossed (and so morally blind and ethically uninvolved or incompetent) because of the slow yet relentless waning of the collectivities to be solidary with. It is because there is little reason to be solidary, "the others" turn into strangers — and of the strangers, as every mother keeps telling her child, one should beware; and best of all keep one's distance and not talk to them at all.[219]

Such extreme individualism is inconsistent with the social bonds needed to create a sense that Americans are part of a people devoted to the common good.[220] Developing a more politically sensitive, socially aware people starts with each of us learning to see beyond our small personal worlds.[221] That process only begins by learning to connect with others who are not our friends, family, or coworkers, but merely fellow citizens and human beings.[222] More specifically, the "separation from a reality of suffering human beings, the inability to see or feel what is happening to them, is a problem of public morality."[223] But the need for criminal justice systems partly arises from individual human suffering.[224] As G.K.

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218. *Cf.* Taslitz, *Tinkerbell*, *supra* note 13 (defining and analyzing the roles of empathy and sympathy in substantive criminal law and in daily moral judgments).

219. Zygmunt Bauman, *Ethics of Individuals*, 25 CAN. J. SOC. 83, 87 (2000).

220. Andrew E. Taslitz, *The Jury and the Common Good: Synthesizing the Insights of Modern and Postmodern Legal Theories*, *in* FOR THE COMMON GOOD: A CRITICAL EXAMINATION OF LAW AND SOCIAL CONTROL 312 (Robin Miller & Sandra Lee Browning eds., 2004) [hereinafter Taslitz, *Common Good*].

221. Taslitz, *Voice and Vision*, *supra* note 11, at 1693–94, 1696–98, 1701–02.

222. *Id.* at 1698.

223. ALBERT W. DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY, & THE JURY 14 (2012).

224. *See* Taslitz, *Tinkerbell*, *supra* note 13, at 419–21 (noting that empathy leads to a desire to alleviate individual suffering, which is reflected in social norms and actions); *see also* Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283,

Chesterton put it, "tragedy is the highest expression of the infinite value of human life."[225] Only by understanding that tragedy, by standing in another person's shoes, can each of us come to see perspectives beyond our own.[226] Lay participation in criminal justice, at its best, makes jurors connect with other humans' suffering, including that of the offender, and prods the questioning of institutional structures making that suffering possible and prolonging it.[227]

Empathy, however, combined with the solemnity of each juror's experience and the requirement that they be accountable to and engage with one another in deliberations, awakens a sense of responsibility for doing something about the suffering observed.[228] Whether that something requires compassion—in the sense of a reduction of the suffering otherwise inflicted by a sentencing jury on an offender—turns on social norms.[229] Jurors must sit in judgment about the degree of the individual's wrong, the harm he has done, the nature and causes of the wrong, and what is needed to right it.[230] Their responsibility is to impose proportional punishment, but considering whether to exercise compassion for the offender is a critical aspect of the proportionality decision, properly understood.[231]

2. Empathy for Trial Participants Requires Jury Diversity

Feeling empathy for another individual who may be from a very different political, social, racial, ethnic, religious, or class background is no easy thing.[232] A diverse jury is required so there will be enough different perspectives and life experiences to, as a whole, aid in better understanding

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1301 (2000) ("By contrast, true compassion shows that the one feeling it can see herself as the subject of similar suffering, and therefore expresses a shared humanity."); Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. L. & GENDER 381, 428 (2005) ("Another account of the wrong of criminal negligence holds that it reflects a culpable character trait of indifference to others' suffering.").

225. G.K. CHESTERTON, *The Twelve Men*, *in* TREMENDOUS TRIFLES 80 (1909).

226. *See* Taslitz, *Tinkerbell*, *supra* note 13, at 431–41 (discussing cognitive, physical, and emotional empathy and how they involve understanding another's plight or suffering).

227. Taslitz, *Voice and Vision*, *supra* note 11, at 1693–94, 1696–98, 1701–02; DZUR, *supra* note 223, at 19–20 (discussing lay participation, such as on a jury, as a solution to the dehumanization and stereotyping of criminal suspects).

228. *See* Taslitz, *Tinkerbell*, *supra* note 13, at 431–41 (noting that emotional therapy, combined with physical empathy, triggers a desire to alleviate the pain of victim); DZUR, *supra* note 223, at 34, 60.

229. *See* Taslitz, *Tinkerbell*, *supra* note 13, at 441–56 (explaining the interaction between compassion and social norms).

230. *See* Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 3–4, 14–24 (1991) [hereinafter Taslitz, *Myself Alone*] (discussing theories on the social process of attributing moral responsibility and on the perceived importance of individualized sentencing in this process).

231. *See* Taslitz, *Tinkerbell*, *supra* note 13, at 441–56 (noting that the exercise of compassion pivots on the jurors' acceptance of a victim's or defendant's self-narrative).

232. *See id.* at 434 (noting the difficulty of overcoming stereotypes for purposes of acquiring empathy).

the person to be judged.[233] Stereotypes also undermine empathy, which requires viewing an individual not as a fungible thing but as a unique being, and a diverse jury helps to combat stereotypes.[234] For the judge, a trial is but a mundane event in his workshop.[235] The novelty and freshness needed to greet each case and person with awe are missing—moral sensibilities dulled by technicalities.[236] Jurors bring as a group new blood and fresh thoughts, the street enlivening the kingdom of justice with human feeling.[237]

A heterogeneous jury thus engages in a "thick" populism in which individuals work together on a difficult joint task, wrestling with the human pain recounted before them.[238] Moreover, assembly-line justice that values efficiency over moral responsibility and reduces persons to "clearances, caseloads, [and] dockets" turns on speedy decisions.[239] The jury trial and jury deliberations slow down the mechanism of justice, investing time and energy in conversation that aims at both intellectual and emotional understanding.[240] A more diverse jury presumably has members with more perspectives to share, thus potentially slowing the process further.[241] Additionally, a judge is hyper-aware of the specialization of labor, the respective roles of the legislature, the executive, the judiciary, and their various internal bureaucracies in administering justice.[242] That can lead to "free-floating responsibility,"[243] "in which everyone and no one has made the choice and sealed a person's fate."[244] But jurors, and the resulting jury as a whole, bear the burden of judgment as if it lay solely on their

233. *See* Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L.J. 1039, 1042, 1049, 1052–55, 1067 (1998) [hereinafter Taslitz, *Abuse Excuses*] (arguing jurors must be capable of multi-perspectival reasoning to achieve the empathy necessary to obtain justice); *see also* Taslitz, *Voice and Vision*, *supra* note 11, at 1702–06 (explaining how jury diversity promotes multi-perspectival thinking).

234. Taslitz, *Voice and Vision*, *supra* note 11, at 1702–06; *see* Taslitz, *Abuse Excuses*, *supra* note 233, at 1039, 1043, 1049, 1052–55, 1067 (discussing how jurors and judges make decisions reflecting their respective worldviews, group affiliations, and social positions); Taslitz, *Tinkerbell*, *supra* note 13, at 231–41.

235. *See* CHESTERTON, *supra* note 225, at 85–86 (noting that judges often grow accustomed to their work and lose sight of the significance or uniqueness of each defendant).

236. *See id.* at 85–86 (discussing how repetition and familiarity dull "expert" understandings).

237. *Id.* at 86; Taslitz, *Temporal Adversarialism*, *supra* note 89, at 1608.

238. *See* DZUR, *supra* note 223, at 32–37 (defining "thick" populism and comparing it to "thin" populism).

239. *Id.* at 19 (emphasis in original deleted); *see* Taslitz, *Myself Alone*, *supra* note 230, at 18–20 (defining "assembly-line justice").

240. *See* Taslitz, *Temporal Adversarialism*, *supra* note 89, at 1590–94, 1602–14 (discussing how a diverse "temporal" jury improves justice by slowing it down).

241. *See id.* at 1606–09 (noting that twelve jurors will bring multiple perspectives to the deliberation process).

242. *See* DZUR, *supra* note 223, at 18 (discussing the hierarchal bureaucratic model of the court system).

243. ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 163 (1989).

244. DZUR, *supra* note 223, at 18.

shoulders.[245] That too helps them to see the person before them as an individual with whom they can empathize.[246] Judges, who come from largely homogenous, relatively privileged classes, races, and educational backgrounds and serve at the top of the trial team hierarchy, may also suffer social distance from the accused.[247] Such distance also blocks empathy.[248] But a diverse jury can bring enough emotional and intellectual knowledge to close the social distance between the judgers and the judged.[249] That creates "attunement" for the jurors' fellow citizens, including triggering responsibility for their fate.[250]

3. Empathy for Fellow Jurors Is Essential and Also Requires Diversity

For these worthy outcomes to occur, however, jurors must learn to have empathy for one another.[251] If they cannot come to understand each other's views and feelings, they cannot have the candid and transformative exchange that enables them to better understand the offender and the victim.[252] Physical closeness in the jury box and the jury room, face-to-face communication in deliberation, and the unsettling insights from hearing those speak who have different backgrounds than you all combine to overcome the isolation of the everyday.[253] "[P]articipatory institutions like the jury offer exposure to different realities, or at least opposing narratives,

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245. *Id.* at 19–20.

246. *See generally* Taslitz, *Myself Alone*, *supra* note 230, at 3–5, 15–19 (discussing the importance of individualized justice in jury trials); Andrew E. Taslitz, *An African-American Sense of Fact: O.J. and Black Judges on Justice*, 7 B.U. PUB. INT. L.J. 219, 233–35 (1998) (illustrating how racial diversity, even among the judiciary, can promote individualized justice).

247. *See* DZUR, *supra* note 223, at 18 (discussing the role of hierarchy and specialization and where judges fit in that scheme).

248. *See* Taslitz, *Tinkerbell*, *supra* note 13, at 431–41 (explaining how social distance blocks empathy).

249. *See supra* text accompanying notes 218–231.

250. *See* DZUR, *supra* note 223, at 19.

251. *See* Taslitz, *Voice and Vision*, *supra* note 11, at 1709 ("Deliberation raised jurors' sense of themselves and their fellow citizens as capable and virtuous, and seemed to promote the kind of detached empathy applauded by philosophers like Adam Smith.").

252.

> In a high-quality process, jurors take turns speaking, address each other in terms they can understand, and consider carefully what each juror has to say about the case. The jurors presume one another's honesty and good intentions, even when honestly disagreeing about the facts of a case or the interpretation or application of the relevant legal statutes. Though within the narrow parameters of a legal proceeding, these are essentially the relational qualities of any deliberative discussion.

JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 93 (2010).

253. *See* BAUMAN *supra* note 243, at 156 ("Physical closeness and continuous co-operation . . . tends to result in group feeling, complete with the mutual obligations and solidarity it normally brings about."); *see* Taslitz, *Voice and Vision*, *supra* note 11, at 1691 (discussing the importance of face-to-face confrontation); *see also id.* at 1709–10 (arguing that diverse juries deliberating to verdict change individual jurors' political character through the exchange of varied perspectives, and also heighten their political awareness and activism once they leave the jury room).

that push participants to question, probe, and see. They extend responsibility outward to all, not exclusively inward to the few."[254] The jurors' shared inconvenience, the need for them to resolve their own conflicts, and the sheer stress of decision can also build empathy and mutual respect.[255] Jurors also can better grasp as a group the effects of their decision on the communities from which they come than can the elite judge.[256] Unanimity cannot be reached until all can agree on the wisdom of the verdict, creating incentives for all to have a voice during deliberation.[257] The process of participation thus helps them to conceive of a public good different from their private good, to view others as collaborators in public-minded action.[258] That reconception has two consequences. First, the jurors are better able, as an informed group mind, to be attentive to crafting coherent narratives from "concrete facts, specific times, and real agents" so that they are "drawn vicariously into neighborhoods, occupations and situations" other than their own.[259] Second, they use these resources to search for a common good.[260]

4. Empathy for Trial Participants and Fellow Jurors Fosters the Common Good

The deliberation process thus helps the jury overcome selfishness and individualism, "which is to societies what rust is to metal."[261] Indeed, though laws state general rules or principles, their application to a perhaps unique individual case requires judgment.[262] But the whole society cannot vote on the law of the individual case, and the raw facts and moral judgments necessarily involved in decision making in a specific instance are murky and debatable.[263] The jury thus "constructs" the law in the individual case on behalf of the People in the only way that is feasible.[264]

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254. DZUR, *supra* note 223, at 48.

255. *See* ANDREW FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION 59–63 (2012) (explaining that equality of information and bonding lead jurors to support equality of ideas in the jury room).

256. Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 146 (1987); DZUR, *supra* note 223, at 56.

257. RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 62–63 (2003).

258. Taslitz, *Common Good*, *supra* note 220, at 326–27.

259. DZUR, *supra* note 223, at 55.

260. Taslitz, *Common Good*, *supra* note 220, at 326.

261. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 316 (Oliver Zunz ed., Arthur Goldhammer trans., 2004).

262. *See* Taslitz, *Voice and Vision*, *supra* note 11, at 1706–07 (discussing jurors' recognition of the need to interpret case facts with "moral judgments about free will, responsibility, fairness, and justice").

263. *See id.* (recognizing a jury's limited ability to act on behalf of the people in a specific trial); *see also* Taslitz, *Temporal Adversarialism*, *supra* note 89, at 1591 (explaining that juries must not only resolve the "raw" facts of a case but also "normative" facts such as the actor's state of mind).

264. *See* Taslitz, *Voice and Vision*, *supra* note 11, at 1706–07 (explaining that, because trials cannot take place in large groups, a small, deliberative body must speak on behalf of the whole).

For this construction to be viewed as legitimately made by the People, the jury must reject any exclusion that does not constitute the People's voice.[265] They must reject material exclusion (denying others their fair share of resources or power), normative exclusion (treating individuals as if they are not governed by, or worthy of benefitting from, the community's core values), and linguistic exclusion (subjecting others to a formal discourse, foreign and incomprehensible to them).[266] Diverse juries engaged in serious deliberation suffer from none of these exclusions. Individual jurors' differing backgrounds reduce the risk of decisions unfairly denying others resources and power.[267] The respect shown others by including them on the jury, and by the jury's struggle to make the law its own, eliminates normative exclusion.[268] The jury room's language is that of everyman, avoiding linguistic exclusion.[269] This implicit egalitarian ethic further fosters a quest for a common good.[270] As John Stuart Mill explained long ago:

> [Each juror is] called upon, while so engaged, to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the common good: and he usually finds associated with him in the same work minds more familiarized than his own with these ideas and operations, whose study it will be to supply reasons to his understanding, and stimulation to his feeling for the general interest. He is made to feel himself one of the public, and whatever is for their benefit to be for his benefit. Where this school of public spirit does not exist, scarcely any sense is entertained that private persons, in no eminent social situation, owe any duties to society, except to obey the laws and submit to the government.[271]

Jury deliberation thus changes juror character to veer from raw individualism towards greater concern with the collective welfare.[272] Juror awareness of rights, their exposure to evidence of law enforcement abuses,

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265. *See id.* (explaining the conditions necessary for effective deliberation for the good of all).

266. *Cf.* Taslitz, *Abuse Excuses*, *supra* note 235 (explaining how rules governing jury trials can affect material, "epistemic," and social power of individuals and groups).

267. *See supra* Part II.B.1 (discussing the role of empathy in sentencing).

268. *See generally* Taslitz, *Voice and Vision*, *supra* note 11 (offering an extended defense of this point).

269. *See* Taslitz, *Abuse Excuses*, *supra* note 233 (explaining the idea and significance of linguistic exclusion in another context).

270. *See* Taslitz, *Common Good*, *supra* note 220 (critiquing four novels about jury trials to contrast competing notions of the common good).

271. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 412 (2d ed. 1861).

272. *See* Taslitz, *Voice and Vision*, *supra* note 11, at 1709 (discussing long-term changes in the political character of citizens who have served on juries in serious criminal cases).

and their sense of responsibility to protect the rights of all teaches jurors greater respect for rights.[273] This combination of experiences teaches jurors what Livingston called the "energy of resistance and a renovating spirit."[274] Juries see themselves as checking the enactment of overly harsh laws or their improper implementation.[275] They do so with the sense that they represent "the country, not the government."[276] Thomas Jefferson likewise recognized that simply casting a ballot is insufficient to build this spirit of resistance.[277] Jefferson thus favored every citizen's active, frequent participation in local "ward republics."[278] In Jefferson's view, such participation would mold a citizen so ready to stand against tyranny that "he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte."[279] The same might be said of juries. Indeed, recent social science demonstrates that criminal jurors—and only criminal jurors—generally return to their communities more active in public affairs.[280] This long-lasting effect grows with the complexity, seriousness, and difficulty of the case.[281]

5. Empathy Brings Epistemic Benefits

Perhaps coincidentally, these changes in citizen perspective and character, wrought by empathy and the obligation to consider exercising compassion, bring epistemic benefits as well. Twelve persons remember more details, bring diverse expertise to better handle complex matters, and have more practical experience to better gauge credibility, in comparison to a single decision maker.[282] But jurors search not only for the raw facts of who hit whom, but also the moral facts of whether a defendant's heart was "depraved" or not.[283] Such moral facts themselves require the voice of those closer to the community, rather than its elite rulers, because the former are able to identify the common good from the particularities of a

273. *See generally* FERGUSON, *supra* note 255 (discussing various constitutional rights and values preserved through juror decision making).

274. EDWARD LIVINGSTON, PROJECT OF A NEW PENAL CODE FOR THE STATE OF LOUISIANA 15–16 (1824).

275. *See* Taslitz, *Temporal Adversarialism*, *supra* note 89, at 1606–10 (describing the checking function of juries).

276. FRANCIS LIEBER, II MANUAL OF POLITICAL ETHICS 405–06 (Theodore D. Woolsey ed., 1875).

277. Thomas Jefferson, *Letter to Joseph Cabell, February 2, 1816*, *in* JEFFERSON, POLITICAL WRITINGS 205 (Joyce Appleby & Terrence Ball eds., 1999).

278. *Id.*; *see generally* Michael Hardt, *Jefferson and Democracy*, 59 AM. Q. 41, 69–72 (discussing Jefferson's conception of the ward republic).

279. Jefferson, *supra* note 277 at 205.

280. GASTIL ET AL., *supra* note 252, at 35 (2010).

281. *See id.* at 35–36 (examining studies showing that more complex criminal trials led to an increase in the likelihood of juror voting in post-jury political elections).

282. *See* JONAKAIT, *supra* note 257, at 90, 124 (noting smaller jury sizes suffer from more inaccuracy and inconsistency than larger jury panels).

283. Taslitz, *Temporal Adversarialism*, *supra* note 89, at 1602–06.

single case.[284] In this sense, they have an epistemic advantage in finding moral facts as well.

6. Reality Versus the Ideal

Of course, this description of the jury's political function merely illustrates an ever-elusive ideal.[285] There are many flaws in current jury deliberative processes that could be corrected to bring reality closer to aspiration.[286] The empathy and the wisdom of sympathy are essential to juries achieving their best-conceived political goals.[287] Yet, as seen above in discussing victim impact statements, empathy can have a dark side too—a problem addressed later in this article.[288]

B. The Sentencing Jury

The jury's political function suggests that it, not a judge, should decide sentences.[289] The length and nature of a sentence sends messages about the wisdom of bringing the prosecution to bear, the degree of moral retribution the community desires, the degree of stigma appropriately visited upon the defendant, and the dominance of the People over the bureaucrats in determining basic principles of justice.[290] Justice Stephen Breyer even recognized in the Eighth Amendment context that the jury more accurately reflects the experiences of the community as a whole than does the judge.[291] Why a jury should be seen as essential for balancing mitigating and aggravating factors in a capital case, but not a rape case, is unclear.[292] Similarly, juries routinely consider moral culpability, at least implicitly, in making the guilt decision.[293] But, especially in a world dominated by retributive theory, similar such moral culpability decisions

284. *Compare* Andrew C. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations,* 5 MICH. J. GENDER & L. 1 (1998) (discussing raw versus moral facts) *with* Taslitz, *Common Good*, *supra* note 220 (discussing how jurors create a common good specific to an individual case).

285. *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 8 (1994) (discussing animating jury ideals and how reality may diverge from those ideals).

286. *See* Iontcheva, *supra* note 166, at 378–80 (discussing ways to achieve this goal in the specific context of sentencing juries).

287. *See supra* text accompanying notes 231–264.

288. *See supra* text accompanying notes 207–214.

289. *See* DZUR, *supra* note 223, at 136–37 (emphasizing that "less public and transparent" exercises of discretionary power, or judicial sentencing, will not contribute to the function of a courtroom as "a public communicative space").

290. *See id.* at 137, 139–40 (discussing juror responsibility in answering questions regarding "the offender's moral culpability" and whether the prosecution has met its burden of proof).

291. Ring v. Arizona, 536 U.S. 584, 615–618 (2002) (concurring opinion) (citing Spaziano v. Florida, 468 U.S. 447, 481 (1984)).

292. Hoffman, *supra* note 6, at 993–94.

293. The very purpose of the *mens rea* requirement is to assess moral culpability. *See* Taslitz, *Myself Alone*, *supra* note 230, at 14–17 (discussing "rule and case logics" that explain the juror process of "attributing moral responsibility" to defendants).

must be made at sentencing too.[294] Retribution, properly understood, should be geared to punish the degree of evil character revealed by the offender's acts and circumstances.[295] But character evaluation is likewise a moral judgment better made by the community's lay members than the elite, bureaucratic, rule-bound judge.

Ample social science demonstrates that fully informed individuals (including jurors) who wrestle with case specifics are likely to be far more lenient than suggested by lay, off-the-cuff responses in crime surveys.[296] The jurors have far more time to be reflective than survey responders, and the jurors confrontation with others' suffering breeds empathy that should counterbalance raw retributive anger or the moral deadening of routinized punishment.[297] A diverse, informed jury may indeed be less subject to bias than many individual judges.[298] The unanimity rule forces them to be reflective and inclusive.[299] Secluded deliberation by one-time decision makers not entrapped by the political influences facing judges (for example, fear of losing the next election or public ostracism preventing elevation to a higher court) is free from at least one source of cognitive distortion.[300] Jury sentencing also makes specific sentences and the sentencing process more public, thus more transparent and easily subject to critique.[301] The possibility of jury nullification of any guidelines also provides jurors the opportunity to exercise the spirit of rebellion against injustice.[302] The jury's ability to reduce social distance between it and the offender minimizes the distortion of deindividualizing justice.[303] If a guilty verdict announces the judgment of the community, stigmatizing an offender by its mere announcement, the sentence potentially amplifies stigma and turns

294. *See* Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1059 (2012) ("[T]oday, many scholars conclude that retributivism is the leading theory for justifying punishment.").

295. *See* Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 45–63 (2000) (explaining how, specifically in date-rape cases, "character-based morality" holds defendants "responsible for the harm that [their] evil *character* causes") (emphasis original).

296. Taslitz, *Criminal Republic*, *supra* note 144, at 173–78 (2011).

297. *See id.* (discussing various studies on well-informed jury deliberations, which "promote[] more careful, systematic analysis" about the cases).

298. *See* Taslitz, *Voice and Vision*, *supra* note 11, at 1707–10 (suggesting that racial diversity on jury panels provides various viewpoints and also motivates jurors to actively avoid bias during deliberations).

299. *See generally* Emile Bove III, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251, 266 (2008) (noting that the unanimity rule affects the quality and the *process* of jury deliberations); Richard Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1447–50 (1997) (describing the benefits of consensus in jury deliberations).

300. *See* Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 439–40 (2013) (discussing judicial hypocrisy present in sentencing decisions).

301. Taslitz, *Voice and Vision*, *supra* note 11, at 1684–85.

302. *See* DZUR, *supra* note 223, at 102–04, 132–37 (describing the Fully Informed Jury Association's effort to promote jury nullification as the power to ignore laws in the name of justice).

303. *See id.* at 139–42 (discussing how sentencing juries individualize sentencing justice).

symbolic insult into the real imposition of human pain.[304] Empathy and the possibility of compassion can be no more important than in making the sentencing decision.

The problem, however, is that accurate judgment arguably requires empathy for all affected by the crime itself and by its punishment. That means empathy for the offender—whose mental state determines his moral culpability and whose character is relevant to his future dangerousness—and the victim—whose suffering and other losses are relevant to the social harm done—alike. Yet, these two types of empathy are sometimes mutually exclusive. At least with death qualified juries and vague jury instructions, victim impact statements in capital cases amplify empathy for the victim but lead to its loss or reduction for the offender.[305] In noncapital cases, victim impact statements are less powerful, and the harms from mistakes, less severe.[306] That may suggest that, in capital cases, empathy for victims must be muted, though not eliminated.[307] In both sorts of cases, greater jury diversity is necessary—meaning *Batson* must be replaced with a stronger remedy and the practice of death qualification must end.[308] The many reforms discussed elsewhere to improve the empathetic, deliberative nature of truly informed juries, such as giving them sentencing guidelines and informing them of sentencing alternatives, must also be considered.[309] No perfect solution is possible, but doing better than we do now is feasible, wise, and morally necessary.

V. Touching on Solutions: Some Lessons Learned

Procedural defects plague capital cases, rendering the capital sentencing hearing more a judgment about the relative status or worth of the victim and offender than about the offender's moral culpability or even future dangerousness. These defects undermine empathy for the offender, thus resulting in a jury that does not really understand the offender's actions, state of mind, or emotions. Racial stereotyping, as well as various types of legal and evidentiary ambiguity, magnify these effects. Although similar flaws plague the noncapital system, these flaws are likely to have significantly weaker ill effects than in capital cases involving victims and offenders of different races. Moreover, there are strong political justifications for using and expanding jury sentencing in noncapital cases. At a minimum, capital cases thus require the following procedural changes:

1. Barring death qualification because it: undermines empathy,

304. Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem,* 44 HARV. C.R.-C.L. L. REV. 393, 407–15 (2009).

305. *See supra* text accompanying notes 95–142.

306. *See supra* text accompanying notes 207–213.

307. *See supra* text accompanying notes 95–142, 207–214.

308. *See supra* text accompanying notes 232–304.

309. *See* Iontcheva, *supra* note 166 (discussing historic sentencing reforms and arguing for the reintroduction of jury sentencing by legislatures).

fairness, racial diversity, viewpoint diversity, and accuracy; encourages group polarization; silences dissent; and allows for the free play of subconscious racial bias;

2. Giving jurors greater guidance on how to deliberate properly;
3. Revamping statutory eligibility as well as aggravating and mitigating factors to reduce ambiguity in jury instructions; and
4. Barring live victim impact statements and limiting technologically flashy or extensive efforts to focus on the social status and worth of the victim and her family.

In noncapital cases, jury sentencing should be expanded for strong political and fact-finding reasons. Death qualification is not a problem, although replacing the *Batson* rule with a more effective one to promote jury diversity would be advisable. Ideally, jurors should also be given greater guidance on how to deliberate and jury instructions should be rewritten in accessible, plain English. But the lesson for noncapital proceedings to glean from capital ones is that jury involvement in the sentencing process reflects a democratic and accuracy-embracing impulse that has equal merit in the noncapital arena. The lesson for capital cases from noncapital sentencing juries is that procedures reducing racial and viewpoint diversity deify victims based on their perceived social status relative to offenders, undermine sound deliberative principles, and also confuse jurors. Furthermore, such procedures create a space for racial bias, deindividualized penal harshness, and simple unfairness that no sound system of criminal justice should tolerate.

Article

Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing

Miriam S. Gohara*

Investigation and presentation of comprehensive life history mitigation is at the heart of successful capital litigation that has contributed to a steady decline in capital sentences. Noncapital incarceration rates have also begun to level, and various legal developments have signaled a re-ascent of more individualized noncapital sentencing proceedings. This return to individualized sentencing invites consideration of whether life history mitigation may, as it has in capital cases, hasten a turn away from mostly retributive punishment resulting in disproportionately harsh noncapital sentencing to a more merciful rehabilitative approach. The robust capital mitigation practice required by today's prevailing professional capital defense norms developed following the Supreme Court's Eighth Amendment doctrine requiring individualized capital sentences that account for the unique characteristics of the offender. No such doctrinal imperative applies to noncapital sentencing. As a result, professional noncapital defense sentencing standards, while providing a general basis for various aspects of sentencing advocacy, remain relatively underdeveloped, though the same bases for ameliorating punishment in capital cases should apply with equal practical force to noncapital cases.

At the same time, institutional and doctrinal barriers—including high caseloads and lack of resources, the prevalence of plea bargaining, and the Supreme Court's "death is different" precedent—present formidable challenges to routine presentation of life history mitigation in noncapital cases. Therefore, the regular presentation of life history mitigation, lacking a constitutional mandate and operating in a structure different from that of capital sentencing, will depend in the immediate term on the initiative of criminal defense lawyers with the will to consistently present it in noncapital cases. A more widespread adoption of comprehensive noncapital mitigation practice will benefit individual clients, change the expectations of sentencing courts concerning what information they should have available before ordering punishment, and provide insight into the social causes of various types of crimes. Over time, as it has in capital

cases, familiarity with the mitigating force of social history may serve as a powerful basis for empathy and amelioration of overly punitive noncapital punishment.

Table of Contents

I. Introduction

In a *New York Times* interview of photographer Dawoud Bey on the occasion of a retrospective exhibit of his series of 1970s portraits of people living in Harlem, Bey described the events surrounding the taking of one of his early portraits—the first one he felt was successful. Bey had walked by a gentleman wearing an overcoat and a bowler hat and decided he wanted to take the man's picture. The man agreed, and Bey asked him to do what he had been doing before Bey interrupted him. Bey wanted his portraits to capture "natural" scenes of "people living their lives."[1] The man then

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leaned against the railing of the brick house in front of which he had been standing and "cupped his left hand, providing what Bey calls a 'grace note.'"[2] Bey went on to explain that although he had figured out some of the technical aspects of artistic photography, "I needed the quirky little gestures of behavior that mark the individual, the stuff you can't make up. I needed a way to create a momentary connection that would leave viewers feeling they knew this person."[3]

The "grace note" that Bey described is akin to the sentencing grail that lawyers representing capital defendants have a duty to discover and present to those who decide whether their clients live or die.[4] It is the peculiarity[5] that individualizes clients and forces a closer look at their humanity in all its complexity, including the "diverse frailties of humankind" that the Supreme Court has long recognized as central to a capital sentencer's consideration of a defendant's moral culpability.[6] Unlike a static snapshot of a single moment in time, capital defense lawyers' work requires discovery and detailed presentation of life *history*—including the social, medical, economic, and historical dynamics that shape every person's behavior. In sentencing, the grace note requires a deeper moral and less fleeting engagement with the person, a beholding that calls forth empathy, mercy, and redemption, more than the momentary connection Bey inspired in his photograph.

The grace notes that capital defense lawyers have presented as characterizing their clients' backgrounds have in innumerable cases spared

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1. Gwenda Blair, *'70s Portrait of Harlem, Gathered For Today*, N.Y. TIMES, July 29, 2012, at A19, *available at* http://www.nytimes.com/2012/07/29/arts/design/dawoud-beys-portrait-of-70s-harlem-gathered-for-today.html.

2. *Id.*

3. *Id.*

4. This is true given that one meaning of "grace" is synonymous with "mercy." The late Professor William J. Stuntz wrote eloquently about the impact of grace as a foundation for effective crime policy. *See* William J. Stuntz, *Law and Grace*, 98 VA. L. REV. 367, 367–77 (2012) ("Grace and mercy and relationship are transformative, and that truth has practical value for people who think about law, politics, and government.").

5. As discussed *infra*, there is unfortunately nothing peculiar about the poverty, trauma, mental illness, and racism with which many capital clients live. Yet, the ways in which these social factors impact each person differ. *See* Mark E. Olive & Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Postconviction*, 36 HOFSTRA L. REV. 1067, 1069 (2008). Explanation of the effect of these forces on a client's functioning and behavior is at the heart of a capital defense team's work. *See* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 592–94 (1995) [hereinafter Haney, *Social Context*].

6. Abdul-Kabir v. Quarterman, 550 U.S. 233, 247 n.8 (2007) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

them the death penalty.[7] In each case, grace depends on the investigation and presentation of mitigation: a persuasive description of the forces that shape human behavior and that, in some instances, explain behavior that violates law.

At least two normative judgments and one mixed normative-descriptive judgment underlie the arguments presented here. First, individualized, offender-focused sentencing is fairer than uniform, offense-based sentencing. Second, social history evidence of a person's disadvantaged background is relevant to his moral culpability. Third, rehabilitation and offender-focused punishment will be both fairer and more likely to lead to effective crime reduction policy because mitigation will help identify the factors that influence people to engage in behavior that breaks the law. This paper offers arguments in support of all three assumptions.

Consideration of wide-ranging facets of a person's background is elementary to fair and proportionate sentencing. In fact, individualization in sentencing has historically been a core value, in rhetoric if not always in practice. Supreme Court precedent has certainly constitutionalized this principle in capital cases, but the ascent of determinate and guidelines-based noncapital sentencing has obscured the value of individualization in routine criminal cases. The death penalty's doctrinal exceptionalism, among other institutional barriers, has deterred comprehensive mitigation presentations in noncapital sentencing as lawyers and noncapital sentencing courts focused on literally calculating sentences.

Notwithstanding the doctrinal and institutional hurdles that have diminished the investigation of life history mitigation in noncapital cases, this paper argues there is simply no principled reason that the same circumstances that courts have recognized narrow opportunity and distort the lives of people charged with capital crimes should not be presented to courts sentencing people for lesser offenses. Moreover, in a departure from the last few decades' emphasis on determinate sentencing, recent Supreme

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7. *See* Mark E. Olive, *Narrative Works*, 77 UMKC L. REV. 989 (2009) (summarizing three habeas grants of capital sentencing relief based on life history mitigation that was not presented at trial). I won habeas relief in one of the three cases, that of Herbert Williams, Jr., who had been sentenced to death in Alabama. Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008). *See* Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 238 (2007–2008) (citing the cases of "beltway sniper" Lee Boyd Malvo, 9/11 hijacker Zacarias Moussaoui, and Oklahoma City bomber Terry Nichols as three infamous cases that resulted in life verdicts); see Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAGAZINE, July 6, 2003, for a detailed discussion of the capital mitigation resulting in a life sentence for Jeremy Gross, who at eighteen robbed and shot to death a convenience store clerk, and including the following information: the crime was videotaped, guilt was not at issue, an Indiana jury saw the crime video, and nevertheless the jury sentenced Gross to life after hearing details of his neglectful and abusive childhood. *See also* Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 233 (2012) [hereinafter Steiker & Steiker, *Entrenchment*] (explaining that "extensive mitigation cases . . . reflect the new reality that no crimes, no matter their severity, are invariably punished by death").

Court decisions have revitalized individualization in noncapital sentencing and made more room for meaningful mitigation presentations in noncapital cases.[8] Given this opportunity for individualized sentencing to return to the fore, defense lawyers should be doing a great deal more mitigation work. The time has come for noncapital defense lawyers to chart a course toward meaningful individualization by routinely putting life history mitigation at the center of sentencing. There are plenty of better noncapital sentencing practices than the current model that prevails. Capital practice norms can serve as a model, and institutions such as holistic defender offices and law school clinics are particularly well-situated to lead the way.

II. Context, Implications, and Overview

This reflection comes at a time when sentencing trends that even a few years ago seemed intractable appear to be giving way to a more merciful approach to punishment. The number of death sentences is falling historically and dramatically[9] and, for the first time in forty years, the incarceration rate is leveling and, in some states, declining.[10] Yet, exploration of what might facilitate or accelerate the drop in incarceration rates has, in many respects, remained obscured by capital cases' outsized place in criminal justice practice and policy and in discourse about crime and punishment.[11] Reasons for the attention devoted to capital cases include the unparalleled gravity and irreversibility of the death penalty and the incalculable human rights impact of the United States' singular commitment to capital punishment among Western democracies. However, the fact remains that the vast majority of criminal defendants are in prison for noncapital crimes, and many are facing prison terms that in regimes without capital punishment would stand out as their own human rights violations.[12] In 2011, there were 43 executions and 3,251 people on death

8. *See infra* notes 91, 93–96 and accompanying text.

9. 2011 marked the first time since the death penalty was reinstated in 1976 that there were fewer than 100 new death sentences annually. *See The Death Penalty in 2011: Year End Report*, DEATH PENALTY INFORMATION CENTER (2011) [hereinafter DPIC Report]. *See also* Ethan Bronner, *Use of Death Sentences Continues to Fall In US*, N.Y. TIMES, Dec. 21, 2012, at A24 (reporting that in 2012 there were eighty death sentences, one third the number reported in 2000).

10. David Cole, *Turning The Corner On Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 29 (2011).

11. Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 190 (2008) [hereinafter Steiker & Steiker, *Opening a Window*].

12. This is particularly true of life without parole (LWOP) sentences, which are often adopted by death penalty advocates as a means of reducing the likelihood of death sentences, but which are rarely imposed in many other parts of the world. In the absence of capital punishment, LWOP would be a very viable target of human rights campaigns and Eighth Amendment litigation. *See* Steiker & Steiker, *Entrenchment*, *supra* note 7, at 234. In fact, reduction in death sentences is often linked to the availability of life without parole as an alternative, which is a cardinal example of the ways in which maintenance of the death penalty promotes draconian criminal punishment broadly. *See* Steiker & Steiker, *Opening a Window*, *supra* note 11, at 176–77; Aman Batheja, *Texas Sends Fewer to Death Row*, CHI. TRIB. (Nov. 28, 2009), http://articles.chicagotribune.com/2009-11-

row;[13] in 2010, by comparison, there were 2.3 million people in U.S. prisons and jails, with all but approximately 3,200 of them serving noncapital sentences.[14] As the death penalty appears to be falling out of favor,[15] there is hope that incarceration rates are also waning. It is worthwhile to consider how the work that has contributed to capital punishment's decline might be deployed to ameliorate noncapital penalties. Effective presentation of capital mitigation has both changed sentencers' perceptions of individual defendants and recalibrated prevailing views of criminality as a product of individual poor choices rather than the range of social factors that influence human behavior.[16]

The same circumstances that impact many capital defendants' lives—including poverty, untreated or self-treated mental illness, addiction, and trauma—also affect many noncapital defendants' lives.[17] Yet, there is no constitutional imperative that noncapital defendants' sentencers hear evidence that the Supreme Court has recognized as central to "assessing a defendant's moral culpability."[18] A person convicted of a noncapital crime has no right to have his sentencer consider his individual circumstances in

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28/news/0911280167_1_death-sentences-death-row-juries (citing prosecutors and defense attorneys as identifying "the biggest game changer" in Texas' death penalty rates as the introduction of life without parole in 2005). From another vantage point, the death penalty leads to "sentence inflation" so that if the most aggravated homicides are punishable by death, then lesser, but still quite serious, crimes must be punishable by the next harshest penalty available: LWOP. *See also* Cole, *supra* note 10, at 41 ("Today, one out of eleven [American] sentences being served is a life sentence. For the same types of crimes, American sentences are roughly twice as long as those in the United Kingdom, four times longer than those meted out by the Dutch, five times longer than those in Sweden, and five to ten times longer than those imposed in France."). There have been successful Supreme Court challenges to the application of LWOP to juveniles, particularly very young teenagers, but no similar challenges to LWOP's constitutionality for adult offenders. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455 (2012); Jackson v. Hobbs, 132 S. Ct. 1733 (2012); Graham v. Florida, 560 U.S. 48 (2010).

13. DPIC Report, *supra* note 9.

14. BUREAU OF JUSTICE STATISTICS, U.S. CORRECTIONAL POPULATION DECLINED FOR SECOND CONSECUTIVE YEAR (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/press/p10cpus10pr.cfm.

15. A 2012 ballot referendum to abolish the death penalty in California lost by about six percentage points. Howard Mintz & Matt O'Brien, *Proposition 34: Death Penalty Repeal Fails*, SAN JOSE MERCURY NEWS (Nov. 6, 2012), http://www.mercurynews.com/elections/ci_21943752/california-proposition-34-voters-decide-whether-keep-states.

16. *See* Haney, *Social Context*, *supra* note 5, at 561–62 ("Capital penalty trials . . . and what they tell us about the roots of violence . . . can . . . serve as the basis for development of a responsible social policy of violence prevention . . . ."). *See also* Mona Lynch & Craig Haney, *Looking across the Empathic Divide: Racialized Decision Making on the Capital Jury*, MICH. ST. L. REV. 573, 590 (2011); Stetler, *supra* note 7, at 264 (describing mitigation as having a purpose outside the courtroom as "an archive for future historians, social scientists, and public health researchers who will look for the causes of the homicide levels in twenty-first century America . . . .").

17. Stetler, *supra* note 7 and text accompanying notes 7, 16 (describing studies documenting the prevalence of mental illness among capital and noncapital prisoners). It is also entirely possible that the degrees or types of mental illness, trauma, addiction, and other prototypical capital mitigation are simply not as prevalent among noncapital offenders. One implication of pushing for more investigation and presentation of whatever mitigation is present in noncapital cases is the accrual of a record of the social circumstances that actually do contribute to noncapital crime. Another research project might center on identifying and distinguishing the social histories of some set of noncapital defendants from those of capital defendants.

18. Wiggins v. Smith, 539 U.S. 510, 512 (2003).

mitigation.[19] As a result, thousands of people are sentenced to thousands of years of prison annually by judges who know very little, if anything, about their backgrounds, including factors that should be considered in any just assessment of their blameworthiness. Given the doctrinal barriers to successful postconviction proportionality challenges of long prison sentences,[20] accounting for all possible mitigating factors at the outset of sentencing is the best hope for stemming overly harsh punishment.[21] Institutional change in defense sentencing advocacy is a logical next step.

A good deal has been written about mitigation in capital sentencing[22] as well as the merits of individualized noncapital sentencing.[23] Articles have also examined reasons and presented proposals to explain declining incarceration rates[24] and compared implications of capital and noncapital Eighth Amendment doctrine.[25] Other scholarship has considered the contours of Sixth Amendment challenges to defense representation at noncapital sentencing.[26] This paper touches on these areas and proposes something new:[27] One way of accelerating the decline in incarceration rates

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19. *See* Harmelin v. Michigan, 501 U.S. 956, 994–95 (1991). *Harmelin*—which challenged a mandatory life without parole sentence imposed on a first-time felony offender convicted of possessing 672 grams of cocaine—is an Eighth Amendment case decided mostly on proportionality grounds. Professor Rachel Barkow has criticized the Supreme Court's proportionality doctrine in noncapital sentencing, which is not the focus of this article. *See* Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and The Case For Uniformity*, 107 MICH. L. REV. 1145, 1155–62 (2009) (arguing that the Supreme Court is not as robust in its proportionality review of noncapital sentences as it is with capital sentences). Mitigation concerning a defendant's life circumstances, including those that influenced his behavior leading up to criminal charges, is certainly relevant to the Supreme Court's threshold proportionality test for noncapital sentences which asks whether "the sentence is grossly disproportionate to the crime" and will uphold a sentence "as long as the state has a 'reasonable basis for believing' that it will serve either deterrent, retributive, rehabilitative, or incapacitative goals." *Id.* at 1156–57 (quoting Ewing v. California, 538 U.S. 11, 28 (2003)). One can hardly determine whether a prosecutor's belief that a sentence will meet one of those enumerated penological goals is reasonable without knowing anything about the individual who will be serving that sentence.

20. *See* Steiker & Steiker, *Opening a Window*, *supra* note 11, at 186–87 (discussing *Harmelin*, 501 U.S. 957).

21. *See* Barkow, *supra* note 19, at 1155–62 (noting that the United States Supreme Court upholds seemingly disproportionate sentences in noncapital cases if the state has a reasonable belief that such a sentence will advance a "deterrent, retributive, rehabilitative, or incapacitative goal").

22. *See, e.g.*, Haney, *Social Context*, *supra* note 5, at 589–90; Stetler, *supra* note 7, at 238; Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 926–28 (2008).

23. *See, e.g.*, Craig Haney, *Politicizing Crime and Punishment: Redefining "Justice" to Fight the "War on Prisoners,"* 114 W. VA. L. REV. 373, 384–85 (2012) [hereinafter Haney, *War on Prisoners*]; Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1050 (2010); Barkow, *supra* note 19 at 1155–62.

24. *See, e.g.*, Cole, *supra* note 10, at 34–43; Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N. C. L. REV. 581, 583–86 (2012).

25. *See* Fan, *supra* note 24, at 608–10; Barkow, *supra* note 19.

26. *See, e.g.*, Carissa Byrne Hessick, *Ineffective Assistance At Sentencing*, 50 B.C. L. REV. 1069, 1072 (2009).

27. The survey of professional noncapital sentencing guidelines discussed *infra* Part IV is also a new contribution to scholarship on sentencing and lawyers' professional and ethical obligations to their

is to make the kind of mitigation that has contributed to the unprecedented reduction in capital sentences central to noncapital sentencing as a means of preventing and challenging excessively punitive sentences.[28] Professor David Cole has suggested that an "empathy gap" that arises from the failure of most Americans to have much concern about the lives of those behind bars is one of the biggest challenges to increasing public will for meaningful prison reform.[29] This article urges noncapital defense lawyers to provide a factual basis for bridging that gap so that sentencers pay closer attention to the human beings whose lives they are being asked to shut away.

Increased emphasis on mitigation will certainly stand to benefit individual defendants. In addition, meaningful mitigation presentations have the collective potential to establish a record of the reasons people engage in criminal behavior, as these presentations have done in capital cases.[30] That record stands to alter the balance of our understanding of the root causes of crime and to diminish the appetite for unduly harsh punishment.[31]

Proposing that mitigation play a central role in noncapital sentencing implicates a number of complex issues, some of which this paper touches on and some of which are outside its scope. The biggest implication is the Supreme Court's general rejection of Eighth Amendment challenges to noncapital sentencing.[32] Resources are a second difficult implication, and this paper presents reasons for institutional defender offices to direct resources to develop or strengthen the mitigation practice as well as for foundations and public funding sources to support this work. Holistic public defender offices have been leading the charge in incorporating social workers into their sentencing work and can continue to serve as training centers and models for other practices.[33] Law school clinics are another prospective source of talent and an important incubator for future lawyers and judges trained in high quality noncapital sentencing advocacy. However, the focus on defenders does not address another difficult institutional issue: the widespread cost of individualized sentencing

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clients.

28. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012); Jackson v. Hobbs, 132 S. Ct. 1733 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551, 567–69 (2005). One scholar has proposed that sentencers should consider the fact of mass incarceration itself a mitigating factor. *See, e.g.*, Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. (No. 2) 423, 458 (2013).

29. *See* Cole, *supra* note 10, at 40.

30. This is another idea I do not have the space to consider here, but that could certainly be the basis of future research and scholarship. It is also an area that would lend itself well to collaboration with a law school clinic where students would provide direct representation and collect data on mitigating factors that could be reported and used to advocate for non-incarceration dispositions and support for social services addressing issues that recur in sentencing. As discussed *infra*, this approach would work particularly well in a neighborhood-based office where social problems are concentrated and service agencies are in close proximity.

31. *See* Haney, *Social Context*, *supra* note 5, at 608.

32. *See* discussion *infra* Part V.C.

33. *See infra* text accompanying note 178.

on other actors in the justice system, specifically judges and prosecutors. Certainly, more robust defense sentencing presentations will take more time to consider and rebut and will impact judicial and prosecutorial dockets. On the other hand, the high fiscal and incalculable social cost of overly harsh incarceration is well-documented, and this proposal seeks to lessen that institutional toll.

A third implication involves changes to the professional guidelines for noncapital sentencing practice, which, as described in Part IV, call for basic mitigation presentations. These presentations are a far cry from the specific and layered exhortations of the capital guidelines. One reason for the prescriptive focus here on defense lawyers, as opposed to courts or legislatures, is that defense lawyers with adequate resources have the power to work immediately toward bringing about fundamental changes in each of the areas implicated. With a coordinated strategy, defenders can challenge noncapital constitutional doctrine, as they have successfully in *Miller v. Alabama* and *Jackson v. Hobbs*, discussed *infra*. Defenders also have the capacity, demonstrated over years of capital practice, to align their professional guidelines with advocacy that brings about more proportional and just sentencing. A fourth implication is reform of mandatory or determinate sentencing schemes that by design exclude consideration of any individual circumstances.[34]

Another acknowledgment: much of the discussion herein centers on federal cases simply because the United States presents a single jurisdictional case study reflecting sentencing trends also seen in many states.[35] Surveying state statutes and practice is beyond the scope of this project. However, the proposals here for changes in defense sentencing practice are meant for defense lawyers in all jurisdictions, particularly given that the vast majority of sentences are imposed by state courts.

Finally, this paper is not advocating blurring the line between capital and noncapital cases, ratcheting down the standard of death penalty practice, or diminishing procedural and substantive safeguards applicable to capital litigation. To the contrary, the suggestion here is that if there is a single area in which decades of death penalty law and practice might help noncapital defendants, it is by raising the bar and aligning noncapital mitigation practice with the highest standards of the legal profession developed by capital defense teams.

The next part of this paper provides a brief review of the evolution of capital mitigation, including the development of rigorous professional norms for competent representation following Eighth Amendment doctrine

34. *See* Haney, *War on Prisoners*, *supra* note 23, at 375, 385 (noting that "nothing else beyond the 'seriousness of the offense' was thought to matter to the fairness of the sentence"); *see also* Dharmapala et al., *supra* note 23, at 1043–44.

35. *See, e.g.*, Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65 (2009) (summarizing research on mandatory sentencing laws, with a specific focus on laws in the U.S.).

requiring individualized capital sentencing. Part IV will review the existing professional guidelines for the investigation and presentation of mitigation in noncapital cases, which are less specific than the capital guidelines but establish the elementary steps a defense attorney must take to provide competent sentencing advocacy. Part V presents some of the institutional and doctrinal barriers to more robust noncapital mitigation. This section also explains why in light of these barriers, especially the Supreme Court's adherence to the "death is different" doctrine, noncapital defense attorneys must seize the initiative to improve their mitigation practices and thereby contribute to the paradigmatic shift toward more rehabilitative, individualized noncapital sentencing. This shift hopefully will result in more proportional sentences and fewer and shorter prison terms.

The paper concludes with a case illustrating the inherent value in putting a client's history into the record of an official tribunal before she becomes yet another incarceration statistic, particularly when the client's criminal involvement is, as is often the case, attributable at least as much to social institutional failures as it is to her individual choice to commit crime. In this way, the work capital litigators do to inspire mercy can be applied to noncapital cases to adjust sentencers' views of defendants' moral culpability and to prevent unduly harsh punishment.

III. The Development of Mitigation as the Crux of Capital Sentencing

A. A Brief Review of Foundational Supreme Court Eighth Amendment Precedent in Capital Cases

In the years after the Supreme Court upheld the constitutionality of capital statutes requiring "guided discretion,"[36] the Court decided the cases that laid the foundation of modern capital litigation, including the investigation and presentation of mitigating factors to provide a basis for life sentences.[37] These cases set forth the minimum Eighth Amendment considerations required of sentencers deciding whether to condemn a person to die. First, in striking down North Carolina's mandatory death penalty for first-degree murder, the Court identified one of the state statute's constitutional shortcomings as "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[38] Two years later, the Court held in *Lockett v. Ohio* that the

36. *See* Gregg v. Georgia, 428 U.S. 153 (1976). Four years before *Gregg*, in Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court found that all the capital statutes then in place allowed capital sentencers unfettered discretion in deciding which defendants would be sentenced to death. The Court held that unguided discretion violated the Eighth and Fourteenth Amendments, thus halting all executions until the Court decided *Gregg*. The modern era of capital punishment, including the development of bifurcated capital trials with a guilt phase and a separate penalty phase, followed *Gregg*.

37. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).

38. *Woodson*, 428 U.S. at 303.

Eighth and Fourteenth Amendments require that capital sentencers "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[39] The Supreme Court refined its description of mitigating circumstances in *Eddings v. Oklahoma*, reversing the Oklahoma court for failing to consider evidence of Eddings' life history as mitigation because, in the Oklahoma court's view, the evidence "did not tend to provide a legal excuse from criminal responsibility."[40] The Court held that in a capital case, courts may not refuse to consider as a matter of law any relevant mitigating evidence.[41] Eddings had offered evidence of his youth, of "a difficult family history and of emotional disturbance," which was, even by that relatively early time following the reinstatement of the death penalty, "typically introduced by defendants in mitigation."[42] The Court held that "the background and mental and emotional development of a youthful defendant [must] be duly considered in sentencing,"[43] and scores of cases since *Eddings* have made plain that, regardless of the defendant's age at the time of the offense, his social history and mental conditions are textbook mitigation.[44] Post-offense good conduct is also relevant,[45] and will be particularly relevant in noncapital cases where redemption and prospects for rehabilitation are central sentencing considerations.

These baseline cases establish that capital sentencers must have an opportunity to give–and are required to give–"full consideration of evidence that mitigates against the death penalty [in order to] give a reasoned *moral* response to the defendant's background, character, and crime."[46]

B. A Brief Review of Supreme Court Sixth Amendment Precedent in Capital Cases

Following these Eighth Amendment cases, leading capital defense lawyers' practices evolved to emphasize investigation and presentation of wide ranging social history mitigation. Post-*Lockett*, competent capital defense practice depended on finding evidence that explained defendants'

39. *Lockett*, 438 U.S. at 604 (emphasis in original).

40. *Eddings*, 455 U.S. at 113.

41. *Id.* at 114.

42. *Id.* at 115.

43. He was sixteen at the time of the crime. *Id.* at 116.

44. *See* Abdul-Kabir v. Quarterman, 550 U.S. 233, 245 (2007) (holding that the trial court erred in not permitting the sentencing jury to consider mitigating evidence, such as petitioner's troubled childhood); Tennard v. Dretke, 542 U.S. 274, 287 (2004) (finding that evidence of impaired intellectual functioning is inherently mitigating); Wiggins v. Smith, 539 U.S. 510, 535 (2003) (holding that defense counsel failed to meet professional standards by not presenting mitigating evidence of defendant's troubled history at trial); Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (taking into consideration defendant's mental retardation and abused background).

45. Skipper v. South Carolina, 476 U.S. 1 (1986).

46. *Penry*, 492 U.S. at 328 (internal quotation marks omitted) (emphasis in original).

actions and described the factors that influenced their behavior. After this shift in capital defense practice took hold, the professional guidelines governing that practice began to reflect the new emphasis on mitigation. Perhaps unsurprisingly, in the wake of these evolving professional norms, the next wave of Supreme Court capital mitigation cases pertained to capital defense lawyers' Sixth Amendment duty of competent representation. A trio of decisions from the early 2000s set forth the constitutional standards required of capital defense lawyers at sentencing. *Williams v. Taylor*,[47] *Wiggins v. Smith*,[48] and *Rompilla v. Beard*[49] underscored the breadth of available capital mitigation and counsel's duty to investigate and present a social history in order to provide juries and judges with the information they need to make a decision guided by the "reasoned moral response" required by *Woodson*, *Lockett*, and *Eddings*.[50] *Williams*, *Wiggins*, and *Rompilla* also made plain that capital defendants' "excruciating life histor[ies]"[51] had moved members of the Court to decide that those histories warranted sentencing relief even in cases involving unspeakable offenses.[52] For example, the *Williams* Court provided in a footnote a textured glimpse into Williams' squalid early life, including his experience of being left naked in a house with standing urine in the bedrooms and human excrement on the floors by parents too drunk to find clothes to dress him:

> 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.[53]

Details were provided through unassailable documentary evidence and were

47. 529 U.S. 362 (2000).

48. 539 U.S. 510 (2003).

49. 545 U.S. 374 (2005).

50. *See also* Abdul-Kabir v. Quarterman, 550 U.S. 233, 264–65 (2007).

51. Wiggins v. Smith, 539 U.S. 510, 537 (2003).

52. *See e.g.* Olive & Stetler, *supra* note 5, at 1069 (describing Terry Williams killing of a drunk man by beating his chest and back with a garden tool and stealing three dollars from the victim's wallet leaving him gasping for breath; assaulting two elderly women after this murder and leaving one in a vegetative state; and setting his jail cell afire while being held before his capital trial); *Id.* at 1071 (describing Kevin Wiggins driving the car and pawning the belongings of the drowned seventy-seven-year-old victim whose apartment he had robbed); *Id.* at 1072 (describing Ronald Rompilla's victim as having been stabbed multiple times, including sixteen wounds to his head and neck, beaten with a blunt object, left dead in a pool of his own blood, and set on fire).

53. Williams v. Taylor, 529 U.S. 362, 395 n.19 (2000) (citation and internal quotations omitted).

likely outside the memories of any of those present at the time. That indelible portrait was at the heart of the Supreme Court's grant of sentencing relief.[54] Similarly, in *Wiggins* the postconviction record reflected, among other horrors, that Wiggins had suffered severe physical and sexual abuse in a series of foster homes and at the hands of his sadistic alcoholic mother, who left him and his siblings "alone for days with nothing to eat, forcing them to beg for food and to eat paint chips and garbage."[55] And in *Rompilla*, the postconviction record included the following evidence: Rompilla's father would lock Rompilla and his brother in an excrement-filled dog pen; his mother drank while she was pregnant with him; his father beat Rompilla severely with his hands, fists, leather straps, belts, and sticks; the family had no indoor plumbing; the children slept in an attic with no heat and went to school filthy and in rags; and that Rompilla suffered from organic brain damage and from an "IQ in the mentally retarded range."[56]

These details of the particular terrors endured long before these people became capital defendants are seared into the memories of anyone who has read their cases. It is not just that these children were neglected or abused. It is that they were left with nothing to eat but garbage and paint chips; that they were brutalized with leather straps, belts, and sticks; and that they were housed alongside human and canine waste.[57] Persuaded by these documented atrocities on the lives of children who grew up to be involved in capital offenses, the Supreme Court in *Williams*, *Wiggins*, and

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54. *Id.* at 395.

> [Trial counsel] failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Id.

55. Olive & Stetler, *supra* note 5, at 1071.

56. Olive & Stetler, *supra* note 5, at 1072–73 (internal quotations omitted).

57. There are scores of lower court habeas decisions recounting brutal life histories that have been bases of capital habeas relief. For a few powerful examples, see Olive, *supra* note 7, at 10, 19–21. Herbert Williams, Jr., for example, endured a childhood full of terror and suffered beatings so severe that his bone was exposed. *See Williams*, 542 F.3d at 1334. The circuit court relayed additional details of Williams' trauma. His father broke a chair over his head at age seventeen. *Id.* at 1333. He watched as his father threw his two-year-old brother against a wall with such force that his brother did not speak again for over three years. *Id.* at 1332. His mother participated in his father's brutality, and both parents neglected Williams' most basic needs. *Id.* at 1334. He did not learn that people brushed their teeth daily until he was incarcerated for his capital offense. *Id.* at 1334. Abusive and impoverished childhoods are unfortunately far from unique in the lives of capital defendants or prisoners. The details of each person's social history are the elements of successful mitigation. General statements about trauma and poverty are no substitute for these credible narratives offering views into the forces that shaped the lives of people later tried or convicted for capital homicides.

Rompilla made unequivocal capital trial counsel's duty to develop and present social history mitigation, using prevailing professional norms as a touchstone for whether counsel's performance met the appropriate standard of care.[58] A review of the evolution of those norms follows.

C. Development of Mitigation as Standard Capital Defense Practice

Once the Supreme Court made clear that the presentation and consideration of mitigation must be a part of any constitutionally permissible capital trial, lawyers defending capital clients set about the task of identifying the factors that would humanize their clients, explain their behavior, and give judges and juries a reason to sentence them to life.[59] Successful presentation of mitigation requires going outside the relatively narrow categories of mitigation prescribed by many capital statutes, and instead speaking of the "diverse frailties of humankind" as the source of mercy.[60] Mitigation should inspire recognition of common humanity and bridge the divides between an indigent person presumed to be a deranged, inscrutable killer, and the good citizens who sit in judgment of him.[61] Mitigation includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[62]

With this definition of mitigation firmly established, intrepid and creative capital defense lawyers[63] nationwide set about unearthing and presenting a credible narrative of the factors that landed the client before the sentencer choosing life or death.[64] Capital defense lawyers began to work with investigators[65] whose sole responsibility was to uncover evidence of

58. *See* Wiggins v. Smith, 539 U.S. 510, 524 (2003) (calling the ABA Guidelines "well-defined norms"); *see also* Olive & Stetler, *supra* note 5, at 1074–75 (discussing the Supreme Court's use of the Guidelines in recognizing capital counsel's "long-recognized 'obligations' and the parameters of attorney 'diligence'").

59. Stetler, *supra* note 7, at 237–38.

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

61. As Russell Stetler, a leading light among mitigation specialists, has written:

> The diverse frailties bestow the kinship of humanity. We all have them, to varying degrees, but, for most of us, the protective supports of family and society along with our individual strengths offset those frailties. For many capital clients, the frailties are overwhelming, and the supports are absent. Eighth Amendment jurisprudence confers compensatory protection to allow life-and-death decision makers to extend compassion on an individual basis.

Stetler, *supra* note 7, at 241.

62. Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (internal citation omitted).

63. *See, e.g.*, Sean D. O'Brien, *Capital Defense Lawyers: The Good, the Bad, and the Ugly*, 105 MICH. L. REV. 1067 (2007) (reviewing Professor Welsh S. White, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006)).

64. *See* O'Brien, *supra* note 63, at 1081–82 (emphasizing that "the capital defense bar will always reach out for help and advice from multiple sources" "to unearth sources of human compassion in their cases").

65. *See* Stetler, *supra* note 7, at 248–54 (providing a history of the introduction of mitigation specialists into capital defense teams).

disabilities, mental conditions, and social influences that served as "a basis for compassion—not an excuse."[66] These "mitigation specialists" became essential members of capital defense teams.[67] The mitigation specialist's role is to compile a comprehensive social history and identify mitigating themes. Mitigation specialists also assist counsel in locating appropriate experts and providing the defendant's social history data to allow the experts to reliably evaluate the client. Counsel, the mitigation specialist, and the experts then work together to develop a comprehensive case for mercy.[68] As a consequence of the Supreme Court's post-*Furman* Eighth Amendment jurisprudence, even the most death-prone jurisdictions came to expect this socio-legal data known as mitigation in capital proceedings.

After capital defense lawyers had some time to develop that new baseline standard of practice meeting the requirements of *Lockett*, *Eddings.* and related cases, written professional guidelines coalesced and reflected the work capital defense teams were doing to put together life-saving, credible portraits for mercy and to guide more lawyers to raise their level of practice to meet basic standards.[69] In 1989, the American Bar Association (ABA) first published the *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.[70] Fourteen years later, in 2003, the ABA revised the guidelines to take into account intervening legal developments and "to provide specific guidance to remedy some of the most serious mistakes made by counsel and other actors in the criminal justice system."[71] In particular, the 2003 Guidelines reflected the Supreme Court's emphasis on individualized capital sentencing[72] and crystallized the corresponding professional obligation to employ mitigation specialists at all

66. *Id.* at 262.

67. *Id.* at 250.

68. *Id.* at 245 (citing American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 959 (2003)).

69. The ABA Guidelines' history makes clear that the professional standards have both reflected the most competent capital representation being contemporaneously provided and served as an aspirational beacon for lawyers falling short of that standard. *See also* Olive & Stetler, *supra* note 5, at n.39 ("The Supreme Court has consistently used the ABA's standards and guidelines in capital cases to assess the performance of trial counsel who prepared their eases [sic] before the relevant ABA publications had been issued.") (internal citation omitted).

70. *See* Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 766 (2008).

71. *Id.* In the years immediately preceding adoption of the ABA Guidelines, two Supreme Court justices—Justice O'Connor and Justice Ginsburg—had also expressed concern about the quality of defense representation in capital cases making their way to the high court. Brian Bakst, *O'Connor Says There Are "Serious Questions" About Fairness of The Death Penalty*, ASSOCIATED PRESS (July 3, 2001) http://lubbockonline.com/stories/070301/upd_075-4394.shtml; *see also* Ruth Bader Ginsburg, Associate Justice, United States Supreme Court, Address at U.D.C. School of Law (Apr. 9, 2001), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_04-09-01a.html (Justice Ginsburg opining in a speech at the University of the District of Columbia David A. Clarke School of Law that she had yet to see a capital case in which the defendant was well-represented at trial).

72. Maher, *supra* note 70, at 767.

stages of death penalty litigation.[73] They also required jurisdictions to provide funding for the defense to hire a mitigation specialist in every case.[74]

In the years following the 2003 Guidelines, lawyers and mitigation specialists nationwide developed the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* to define the nature and scope of mitigation and the qualifications and training of mitigation specialists.[75] The Supplementary Guidelines are organized to correspond to the ABA Guidelines and make clear that counsel has the ultimate responsibility for putting together a team that has the skills and tools necessary to provide the client with a comprehensive mitigation investigation.[76]

This history of the development of high-quality capital mitigation standards may be instructive for development of similar norms in noncapital cases. However, there remains a major distinction between the trajectory of capital defense mitigation and noncapital defense mitigation: the former developed in response to the Supreme Court's Eighth Amendment precedent requiring capital sentencing to include meaningful consideration of life history mitigation. No such doctrine applies to noncapital sentencing, so there is no corresponding constitutional mandate for noncapital defense attorneys to pursue mitigation. The one noncapital exception derives from the Supreme Court's holdings in *Miller v. Alabama* and *Jackson v. Hobbs*.[77] Those cases held that mandatory life without parole sentencing of juveniles violates the Eighth Amendment and that individualized sentencing, including consideration of social histories, is required for all juvenile offenders.[78] The *Miller/Jackson* cases, the first to extend the requirement of individualized sentencing to noncapital cases, have provided a limited[79] opening for investigation and presentation of robust noncapital mitigation. In fact, efforts are underway to provide mitigation training for the lawyers who will represent clients receiving resentencing hearings under *Miller/Jackson*. Yet, outside juvenile cases, in

73. *Id.* at 770 (citing ABA Guideline 4.1).

74. *Id.* (citing ABA Guideline 9.1).

75. Though these standards were not developed by the ABA, the organization's Death Penalty Representation Project welcomed them as a "valuable elaboration of the principles embodied in the black-letter ABA Guidelines." Stetler, *supra* note 7, at 263; *see* Maher, *supra* note 70, at 770 (describing the Supplementary Guidelines as a "natural and complementary extension of the ABA Guidelines").

76. Stetler, *supra* note 7, at 245–46.

77. Miller v. Alabama, 132 S. Ct. 2455 (2012); Jackson v. Hobbs, 132 S. Ct. 1733 (2012).

78. *Miller*, 132 S. Ct. at 2468–69.

79. The Court explicitly distinguished cases involving mandatory LWOP sentencing of juveniles from those involving mandatory LWOP sentencing of adults and affirmed its own holding in *Harmelin, v. Michigan*, 501 U.S. 956 (1991), when the Court upheld a mandatory LWOP sentence for cocaine possession. *See Miller*, 132 S. Ct. at 2469–70 (discussing why state arguments against "individualized considerations" in juvenile sentencing to LWOP were not persuasive). *See also* Fan, *supra* note 24, at 604–09 (discussing the factors used by Justice Kennedy to distinguish mandatory LWOP sentencing of adults from individualized juvenile LWOP sentencing).

the vast majority of noncapital cases the presentation and consideration of mitigation remains entirely elective.

The capital defense community has devoted so much attention to capturing and documenting the professional services required to provide clients with effective mitigation because mitigation contextualizes and explains offenses that otherwise remain unfathomable and appear to be attributable to an essential, unchangeable, and irredeemable evil rather than to readily identifiable social forces.[80] As described in the next section, the same social influences that explain capital crimes in many cases explain noncapital crimes.[81] The work used to develop an understanding of people who stand before juries and judges convicted of the most serious offenses should certainly be applied to evoke merciful sentencing for people accused or convicted of lesser violations of the law.[82] That work must begin with defense lawyers applying mitigation to the representation of noncapital clients. The next section describes how, while noncapital defense norms provide broad outlines for competent sentencing advocacy, there is no specific requirement for comprehensive mitigation investigation as there is in capital cases.

IV. Professional Standards of Noncapital Mitigation

A. Supreme Court Dicta on Individualized Noncapital Sentencing

In *Woodson*, the Supreme Court noted that in noncapital cases "the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative."[83] In capital cases, by comparison, "the fundamental respect for humanity underlying the Eighth Amendment" elevated what was only good policy in noncapital sentencing to a constitutional requirement of "consideration of the character and record of the individual offender and the circumstances of the particular offense . . . ."[84] The Court quoted *Pennsylvania v. Ashe*,[85] a noncapital case, in recognizing that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense *together with the character and propensities of*

80. *See* Haney, *Social Context*, *supra* note 5, at 549 (noting that the criminal system and the media cause American citizens "to view capital defendants as genetic misfits"). *See also* Stetler, *supra* note 7, at 248–54 (explaining the importance of collaborative defense work in capital cases). *See also* California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[E]vidence 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.").

81. *See* discussion *infra* Part IV.F.

82. *See* Cole, *supra* note 10, at 37–39, 40.

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

84. *Id.*

85. Comm. of Pa. *ex rel.* Sullivan v. Ashe, 302 U.S. 51 (1937).

the offender."[86]

In *Lockett*, the Court elaborated on the longstanding recognition that "individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country."[87] The Court went on to explain that "sentencing judges traditionally have taken a wide range of factors into account . . . . [a]nd where sentencing discretion is granted, it generally has been agreed that the sentencing judge's possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant *if not essential* to the selection of an appropriate sentence."[88] The Court underscored that in noncapital cases there was "wide acceptance" for the "the established practice" of individualized sentences and that such practice, though not constitutionally mandated as it was in capital cases, was "public policy enacted into statutes."[89]

Capital sentencing continued to move toward individualization while noncapital sentencing, particularly in federal cases but also in many states,[90] moved toward uniformity with the adoption of the mandatory Federal Sentencing Guidelines.[91] More recently, however, the Court has reemphasized the importance of individualized noncapital sentencing.[92] In *Pepper v. United States*, the Court reaffirmed that "possession of the fullest information possible concerning the defendant's life and characteristics"[93] is "highly relevant—if not essential—to the selection of an appropriate sentence."[94] The Court characterized as "uniform and constant"[95] the federal sentencing tradition to "consider 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. . . . Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime."[96]

Woodson and *Lockett* suggest that at one time there was a "prevailing practice"[97] of sentencers taking into account the facts of the offense as well as the "fullest information possible" about the defendant's

86. *Woodson*, 428 U.S. at 304 (quoting *Ashe*, 302 U.S. at 55) (internal quotation marks omitted) (emphasis added).

87. Lockett v. Ohio, 438 U.S. 586, 602 (1978) (citing Williams v. New York, 337 U.S. 241, 247–48 (1949)).

88. *Lockett*, 428 U.S. at 602–03 (quoting *Williams*, 337 U.S. at 247) (internal quotation marks and punctuation omitted).

89. *Lockett*, 428 U.S. at 605.

90. *See, e.g.*, Tonry, *supra* note 35.

91. *See* Pepper v. United States, 131 S. Ct. 1229, 1240–41 (2011).

92. *See* Blakely v. Washington, 542 U.S. 296, 303 (2004); United States v. Booker, 543 U.S. 220, 245 (2003); Apprendi v. New Jersey, 530 U.S. 466, 490–92 (2000).

93. *Pepper*, 131 S. Ct. at 1240 (2011) (internal quotation marks and citations omitted).

94. *Id.* (internal quotation marks and citations omitted).

95. *Id.* at 1239 (internal quotation marks and citations omitted).

96. *Id.* at 1240 (internal quotation marks and citations omitted).

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

life circumstances and character *and* that such consideration was essential to enlightened sentencing practice.[98] The cases also reflect renewed interest in individualized noncapital sentencing, at least among some members of the Court. Yet, the professional norms governing criminal defense lawyers' sentencing practice have not kept pace with such statements concerning the importance of individualized noncapital sentencing.[99] One possible reason is that historically, all parties have relied on court-based probation and parole departments to provide an "independent" sentencing report for the court to reference in meting punishment.[100] Another possibility is that because Supreme Court dicta recognized that there was no *constitutional* imperative for individualized noncapital sentencing,[101] defense lawyers and courts treated mitigation investigation and presentation as elective, and therefore it never took widespread hold as a core defense duty. In addition, the Federal Sentencing Guidelines prohibited consideration of certain life circumstances, such as poverty or disadvantaged upbringing, in favor of a focus on "real conduct."[102] This prohibition trained most federal criminal defense practice on Guidelines calculation rather than on investigation of sentencing factors that courts were instructed to disregard. This led to an atrophying of noncapital mitigation practice among federal defense lawyers.[103] However, as *Pepper* has recognized, the post-mandatory Guidelines era has reopened the opportunity for life history mitigation presentations in federal noncapital sentencing.[104]

While the current guidelines for noncapital defense sentencing advocacy are broad enough to warrant some degree of independent sentencing investigation beyond the data provided by probation departments or prosecutors, they remain a far cry from the capital guidelines' specific prescriptions for comprehensive social history investigation.[105] There is also a significant gulf between the noncapital guidelines' recommendations for essential sentencing advocacy and prevailing defense practice in many jurisdictions, especially those strapped for resources.

The standards reviewed here are those of the major national professional organizations setting forth practice norms for criminal defense lawyers: the ABA, the National Legal Aid and Defender Association

98. Lockett v. Ohio, 438 U.S. 586, 602 (1978).

99. *See generally,* Hessick, *supra* note 26, at 1109–10 (noting that professional standards and substantive law regarding advocacy for noncapital defendants are underdeveloped and "lopsided").

100. Of course this raises the question what, if any, information the defense has been expected to provide to those agencies.

101. *Pepper*, 131 S. Ct. at 1239–40.

102. *Id.* at 1240–41.

103. *See* Adriaan Lanni, *Jury Sentencing In Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1783 (1999) (discussing the Federal Sentencing Guidelines' consideration of various life circumstances as "not ordinarily relevant" to federal sentencing).

104. *See Pepper*, 131 S. Ct. at 1241.

105. *See* Hessick, *supra* note 26, at 1070, 1110 (calling the standards for what constitutes ineffective assistance of counsel in noncapital sentencing proceedings "underdeveloped").

(NLADA), and the American College of Trial Lawyers.

B. ABA Criminal Justice Standards

The noncapital ABA sentencing guidelines include the following principles: independent defense investigation of sentencing factors; individualized consideration of sentences; presentation of mitigating factors; and consideration of those factors by the evaluating court. The court should evaluate both the severity of the offense and the culpability of the particular offender. The principal ABA guidelines for noncapital cases are the *ABA Criminal Justice Standards*, which have existed in various forms for over forty years.[106] Two subsets of those standards speak most directly to the role of mitigation in noncapital cases: the Defense Function standards, which pertain to defense counsel's professional obligations at sentencing, and the Sentencing standards, which govern the role of legislatures, probation and parole agencies, and courts.

The Defense Function standards describe the basic duties of defense lawyers to investigate and to provide sentencing advocacy, but nowhere do they explicitly describe a duty to investigate mitigation. According to the Defense Function standards, a defense lawyer should conduct a "prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to . . . penalty . . . ."[107] Defense counsel should become familiar with all resources and sentencing alternatives available to the court that may meet the defendant's needs.[108] Defense counsel should also be familiar with the court's sentencing habits and any applicable guidelines.[109] Counsel is obligated to explain to the client the consequences of the various available dispositions.[110] In addition, "[d]efense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused," including recommending rehabilitative programs, [111] and must verify, supplement, or challenge information in any presentence report made available to the defense.[112]

The second relevant subset of the *ABA Criminal Justice Standards*, the Sentencing standards, makes recommendations for legislatures, relevant agencies, and sentencing courts.[113] These standards, unlike the Defense

106. *About Criminal Justice Standards*, AM. BAR ASS'N, http://www.americanbar.org/groups/criminal_justice/standards.html (last updated 2014).

107. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 4-4.1(a) (1993) [hereinafter DEFENSE FUNCTION STANDARDS].

108. *Id.* at § 4-8.1(a).

109. *Id.*

110. *Id.*

111. *Id.* at § 4-8.1(b).

112. *Id.*

113. STANDARDS FOR CRIMINAL JUSTICE: SENTENCING (1994) [hereinafter SENTENCING STANDARDS].

Function standards, at times explicitly provide for the development, presentation, and consideration of mitigation, but by the "intermediate agencies" and courts, rather than by defense counsel. For example, one Sentencing standard recommends individualization of sentences,[114] which is consistent with *Lockett*'s recognition that, at least as far back as *Pennsylvania v. Ashe* and *Williams v. New York*, sentencing courts have accounted for a wide range of factors that shed light on the "character and propensities" of the offender, not just the offense.[115] The Sentencing standards urge legislatures to authorize sentencing courts to exercise discretion, taking into account the circumstances of the offense and the characteristics of the offender.[116]

The ABA's Sentencing standards also devote a specific section to "Mitigating Factors" aimed at legislatures and agencies performing the "intermediate function" of identifying relevant sentencing characteristics before sentencing (a function usually performed by probation or parole departments).[117] The ABA recommends that once mitigating factors have been identified, intermediate agencies ought to guide courts to use their discretion to adjust the sentence accordingly.[118] Implicit in this recommendation is the recognition that mitigation may impact the sentencer's consideration of the defendant's blameworthiness. Mitigation may contextualize the defendant's actions through applicable mitigating factors, or change the sentencer's view of the offender by providing information about circumstances that set the defendant apart from "the ordinary offender," particularly if those characteristics are ones of hardship.[119]

This principle is longstanding and crucial in capital sentencing, and the ABA guidelines for courts and agencies preparing sentencing profiles affirm that the principle is fundamental to proportional noncapital punishment as well.

Read together, the noncapital ABA standards offer defense counsel and sentencing courts wide latitude to present and consider a range of mitigation, not necessarily directly related to the defendant's criminal culpability, and to use that mitigation to advocate for or impose an alternative or ameliorated sentence. They also establish that the agencies

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114. *Id.* at § 18-2.6(a).

115. Lockett v. Ohio, 438 U.S. 586 (1978).

116. SENTENCING STANDARDS, *supra* note 113, at § 18-2.6(a)(i)–(ii).

117. *Id.* at § 18-3.2. For a fuller description of the role of probation departments in preparing presentence investigation reports, see ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES 285–86 (Vol. I 1988).

118. SENTENCING STANDARDS, *supra* note 113, at § 18-2.6(a)–(b). Moreover, in regimes with presumptive sentences, the guidelines recommend that courts consider mitigating factors in selecting lesser sentences within a presumptive range, or depart downward from the range. *Id.* at § 18-3.2(d).

119. *Id.* at § 18-3.2(b); *see also id.* at § 18-3.4(c). The standard also requires that all information in presentence reports is accurate, verifiable, and accessible. If it is challenged by either the prosecution or the defense, the preparer of the report must help determine whether the information can be substantiated. *Id.* at § 18-5.3.

tasked with preparing presentence reports have a duty to include mitigation, and courts have a duty to consider mitigation when imposing a punishment.

C. NLADA Guidelines

The National Legal Aid and Defender Association (NLADA), an organization representing both civil and criminal defense legal aid attorneys,[120] likewise has guidelines for defense sentencing representation. The NLADA Guidelines are more specific than their ABA counterparts in describing defense lawyers' duties before and during noncapital sentencing and explicitly require counsel to "ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court[.]"[121] The NLADA also recommends the use of "sentencing specialists" in appropriate cases.[122] Like the ABA standards, the NLADA Guidelines require defense lawyers to be familiar with any sentencing report and to correct misstatements or omissions of helpful sentencing information as well as to be familiar with the relevant law and practice.[123] The NLADA Guidelines also require defense counsel to develop a plan for achieving the least restrictive sentencing outcome based on the particular client's circumstances[124] and social history.[125] The NLADA Guidelines require that counsel, where necessary, specifically request the opportunity to present evidence at the sentencing hearing.[126] Finally, the NLADA Guidelines provide for a defense sentencing memorandum, which presents another opportunity to challenge inaccurate or incomplete information in the official presentence report, to include information favorable to the defendant, and to make a defense sentencing recommendation.[127] In short, the NLADA's compendium of defense lawyers' duties at noncapital sentencing is comparatively more robust and more specific than the

120. The NLADA describes itself as "America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel" and it "serves as the collective voice for our country's civil legal aid and public defender services." NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/About/About_Home (last visited Oct. 5, 2013). This is in contrast to the ABA which is a professional organization representing all attorneys of any specialty, making possible that attorneys other than those practicing criminal defense, and in fact some prosecutors, might have a role in promulgating defense function guidelines. Certainly the adoption of the guidelines by the entire ABA must require the buy-in of current and former prosecutors and judges.

121. PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 8.1(a)(3) (Nat'l Legal Aid & Defender Ass'n 1995) [hereinafter NLADA Guidelines].

122. *Id.* at § 8.1(a)(6).

123. *See id.* at §§ 8.1(a)(2), 8.1(a)(5), and 8.2; *see also id.* at § 8.4 (requiring counsel to provide the person preparing the report information favorable to the client and to be familiar with and prepared to challenge any inaccuracies in the official presentence report).

124. *Id.* at § 8.1(a)(4).

125. *See id.* at § 8.3(a)(3).

126. *Id.* at § 8.3(a)(9); *see also id.* at § 8.7 (recommending that counsel be prepared to request and present evidence at an evidentiary hearing during sentencing).

127. NLADA Guidelines, *supra* note 121, at § 8.6(a)(4) and (a)(7). The NLADA Guidelines also require counsel to advise the client about avenues for petitioning the court for a sentencing reduction and any time limitations on doing so. *See id.* at § 9.5.

analogous ABA Guidelines.

D. Amsterdam Trial Manual

Another source of professional standards for defense lawyers in noncapital cases is the trial manual "For the Defense of Criminal Cases," published by the American College of Trial Lawyers, the NLADA, and the American Law Institute-American Bar Association Committee on Continuing Professional Education.[128] The author of the fifth edition of the manual, Professor Anthony Amsterdam, is a foremost expert in capital and noncapital criminal defense and successfully litigated *Furman v. Georgia*.[129] The chapters relevant to investigation and sentencing, dating back at least to the 1980s, provide a prescription for competent noncapital sentencing representation and reinforce the conclusion that the investigation and presentation of facts favorable to the defendant, including relevant psychological or psychiatric issues, have long been considered critical to meaningful sentencing representation.[130]

Like the ABA and NLADA guidelines, the trial manual emphasizes the importance of defense sentencing investigation, including interviewing life history witnesses and collecting relevant records.[131] The manual adds mental health investigation, which the other guidelines do not explicitly include, and it advises defense counsel to consider having the client psychiatrically evaluated—the results of which might support medical rather than punitive treatment and which might prove useful in mitigation.[132] A comprehensive social history along with corroborating documents undergird any effective mental health evaluation, and that investigation is an indispensable part of developing an accurate and convincing set of conclusions and recommendations concerning a criminal client's mental health history and route to rehabilitation.[133] The manual suggests that trial counsel take the following actions: provide information to the probation officer preparing the sentencing report and recommendation; and work with the client's employer and family to stabilize the client's life and to make a sentencing plan that maximizes the chances of an outcome

128. AMSTERDAM, *supra* note 117.

129. *See* Jeffrey Toobin, *Comeback*, THE NEW YORKER (Mar. 26, 2007), http://www.newyorker.com/talk/2007/03/26/070326ta_talk_toobin.

130. For a history of the Trial Manual's development and editions, see AMSTERDAM, *supra* note 117, at vii–ix.

131. AMSTERDAM, *supra* note 117, at 181–84, 186–90.

132. *Id.* at 196. This is particularly salient given that the Bureau of Justice Statistics has concluded that approximately 60% of prisoners in state prisons and 40% of prisoners in local jails suffer from mental illness. *See* Doris J. James & James E. Glaze, *Mental Health Problems of Prison and Jail Inmates* (2005), *available at* http://www.bjs.gov/content/pub/pdf/mhppji.pdf.

133. 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) ("As a general rule, 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.").

short of incarceration[134]—including recommendations for community resources that can help "lend specialized assistance to a probationary regimen."[135] The manual recommends that counsel litigate for disclosure of the presentence investigation report in jurisdictions where it is not disclosed to the defense.[136] Furthermore, the manual provides more detail than the ABA or NLADA Guidelines about counsel's duty to ensure the accuracy of the client's prior criminal history, requiring, for example, that counsel let the record reflect favorable dispositions of arrests and commitments listed in law enforcement "rap sheets."[137] At the sentencing hearing, the defense should present evidence including witness testimony, affidavits, or letters.[138] Finally, defense counsel should make an argument on sentencing, the focus of which is individualized sentencing with an emphasis on rehabilitation over retribution.[139]

E. Implications of Noncapital Sentencing Professional Practice Guidelines

The ABA, NLADA, and Amsterdam standards together establish that effective noncapital sentencing advocacy requires, at a minimum, independent investigation of a client's background, mental health, conditions that might benefit from treatment or social service intervention, and potential for rehabilitation. They require defense lawyers to provide helpful information to the agency preparing the presentence investigation (PSI) report, substantiate its contents, challenge any inaccuracies, and know the relevant sentencing law and procedure. Finally, defense lawyers must be prepared to present and argue in support of any information that may ameliorate the client's sentence.

Notwithstanding these professional standards, mitigation in capital

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134. AMSTERDAM, *supra* note 117, at 286–87.

135. *Id.* at 291.

136. *Id.* at 288–89. Here, the manual expressly employs the reasoning from the capital case Gardner v. Florida, 430 U.S. 349 (1977)—wherein the Supreme Court struck down a death sentence as unconstitutional because it was issued based on materials provided to the sentencing judge but not to the defense—to argue for disclosure of PSI reports in noncapital sentencing proceedings. *See* AMSTERDAM, *supra* note 117, at 289 ("[A]lthough . . . *Gardner* is, by its terms, applicable only to death cases, much of the reasoning . . . would support a Due Process requirement of PSI reports to the defense in noncapital cases as well.").

137. *See* AMSTERDAM, *supra* note 117, at 297–99; *id.* at 298 (noting that clarification is important because "[o]ccasionally a half dozen entries that make the defendant look like Jack the Ripper may be only several stages in the processing of a single criminal charge"); *cf.* NLADA Guidelines, *supra* note 121, at § 8.6(a)(4) (using general terms to refer to defense counsel's duty to provide "information favorable to the defendant concerning . . . the offense, mitigating factors and relative culpability, prior offenses").

138. AMSTERDAM, *supra* note 117, at 301–02.

139. *Id.* at 302 (noting that the focus "must be on the defendant as a person: his or her good record, lack of violence, and the other factors that make the defendant nondangerous if released; the pressures of the moment that led the defendant to commit this crime and will not recur; the needs for the defendant in the community (to support his or her family, to earn money to make restitution to the complainant); and the greater rehabilitative potential of the favorable disposition counsel urges than of any harsher one").

cases is still generally far more developed and robust than it is in noncapital cases. The noncapital guidelines and practice norms certainly provide wide latitude and broad prescriptions for the development, presentation, and consideration of a variety of factors in support of merciful individualized sentencing. However, everyday noncapital defense sentencing practice does not yet reflect the lesson of capital sentencing that presentation of circumstances that have affected the client's understanding and behavior is crucial to a fair assessment of his blameworthiness and to the imposition of a proportional and just sentence.

F. The Relevance of Mitigating Factors To Noncapital Sentencing

Although the very same circumstances that impact consideration of a capital offender's moral culpability are prevalent among defendants and prisoners implicated in less serious crimes, as discussed *infra* the Eighth Amendment "death is different" doctrine has definitively distinguished capital from noncapital sentencing.[140] That distinction has obscured the impact of circumstances such as poverty, trauma, mental illness, intellectual disability, and other unquantifiable and idiosyncratic vulnerabilities in routine criminal cases. Decades of determinate and Guidelines-based sentencing have also discouraged presentation of social history factors deemed irrelevant to the sentencing grids. As described in the next section, institutional and legal hurdles to investigation and consideration of mitigation in noncapital cases certainly remain, but sentencers will continue to lack a meaningful opportunity to consider the relevance of mitigating factors unless noncapital defense lawyers uncover them, corroborate them, and explain their impact on clients' lives. Only after defense lawyers insist on mitigation's consideration will courts routinely begin to accept its salience to any just sentencing.

Comprehensive noncapital mitigation presentations will benefit individual defendants by providing a basis both for a fair sentence and for a meaningful road to rehabilitation and redemption. As in capital cases, development of more probing noncapital mitigation, primarily social histories, will present a more systemic opportunity to "provide a framework for comprehending a single, violent social history, and serve as the basis for the development of a responsible social policy of violence prevention in lieu [of] . . . mindless punitiveness . . . ."[141] Because capital cases necessarily begin with homicides, much capital mitigation helps to explain the genesis of the violence. It follows, however, that some of the same psychological and public health[142] factors that correlate with violence lead

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140. *See* discussion *infra* Part V.C.

141. Haney, *Social Context*, *supra* note 5, at 562. Professor Haney also describes the destabilizing consequences of poverty, including the chaos occasioned by frequent moves and new schools. *Id.* at 567.

142. For example, lead exposure has been linked to a myriad of health problems and rising crime rates. Kevin Drum, *America's Real Criminal Element: Lead*, MOTHER JONES, Jan./Feb. 2013, *available*

others to numb themselves through drug use.[143] It also follows that poverty[144] correlates with violent crime and some theft (other than most white collar embezzlement).[145]

1. Poverty and Trauma

Two of the most prominent features of capital mitigation are poverty and trauma, including parental abuse and neglect.[146] Poverty's impact is unmistakably widespread and, though it defies generalization, its psychological and behavioral consequences among some capital defendants include: endemic despair, frustration, undersocialization of children, interference with nurturant parenting, and, in some instances, aggression leading to violence.[147] There is every reason to expect that poverty has the same psychological effects on people who happen to commit less serious offenses. Yet, unlike in capital cases, in noncapital cases there is no imperative for a sentencer to consider the consequences of poverty on the defendant's moral culpability or for a defense lawyer to present it in mitigation.

The same can be said of trauma, including childhood abuse and neglect[148]—factors nearly ubiquitous in capital cases.[149] The psychological and behavioral results of trauma are, like poverty, complex and varied but include: post-traumatic stress disorder (PTSD), depression, anxiety,

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at http://www.motherjones.com/environment/2013/01/lead-crime-link-gasoline.

143. Haney, *Social Context*, *supra* note 5, at 585; Wayland, *supra* note 22, at 942. *See also* S. Fazel et al., *Journal of the AMA* (May 20, 2009) (schizophrenia study); S. Fazel et al., *Archives of Gen. Psychiatry* (Sept. 2010) (bipolar study documenting markedly higher rates of crime among people with bipolar disorder or schizophrenia when combined with substance abuse).

144. *See* Jeremy Kaplan-Lyman, *A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City*, 15 YALE HUM. RTS. & DEV. L.J. 177, 185 (2012) (noting the positive correlation between poverty and violent crime); Candace McCoy, *From Sociological Trends of 1992 to the Criminal Courts of 2020*, 66 S. CAL. L. REV. 1967, 1980 (1993) (suggesting poverty's association with other circumstances, such as unemployment, may "dispose a person to commit crimes").

145. For an exploration of the application of mitigation to noncapital white collar criminal proceedings, see Todd Haugh, *Can the CEO Learn from the Condemned? The Application of Capital Mitigation Strategies to White Collar Cases*, 62 AM. U. L. REV. 1 (2012). For a more general description of white collar sentencing trends, see, for example, Daniel Richman, *Federal White Collar Sentencing in The United States: A Work In Progress*, 76 LAW & CONTEMP. PROB. 53 (2013).

146. *See* Haney, *Social Context*, *supra* note 5, at 561–63 (discussing a social history analysis of capital defendants and the common themes of trauma and poverty).

147. *Id.* at 565.

148. *Id.* at 574–75.

149. *See generally* Wayland, *supra* note 22, at 930–31 (noting that "[t]he most common traumatic events experienced by many [capitally charged] clients" include "childhood victimization, physical and sexual assault, [and] severe neglect" which are "rarely isolated occurrences"); Haney, *Social Context*, *supra* note 5, at 573 ("[W]hen many of us began doing this work . . . looking carefully at the social histories of capital defendants, we were struck, all of us, by the frequency with which our clients were brutalized as children. The patterns were striking, but it took years to carefully document them. Now, there is little question about the causal connections. Study after study has confirmed the cycle of violence . . . .").

psychosis, dissociation, significant impairment, and substance abuse,[150] which is at the heart of several and various types of criminal cases.[151] Moreover, the effects of childhood maltreatment "reverberate throughout the life course."[152] This fact is well established and is gaining traction in the popular press, with one conservative commentator writing that schools and health care providers are beginning to look more closely at trauma and poverty as "producing enormous amounts of stress and unregulated behavior, which dulls motivation, undermines self-control and distorts lives."[153]

The criminal justice system, along with the health care system, is the institution most likely to document the psychological and behavioral effects of poverty and trauma on adults—yet it requires no accounting of these factors in noncapital cases. When adults who have survived brutal abuse and neglect in childhood or trauma inflicted in adulthood, including in custodial settings, commit noncapital crimes, there is no requirement that sentencers account for the trauma or its psychological or behavioral effects before they fix punishment. Notwithstanding the professional guidelines, there is also no legal requirement that defense lawyers present such evidence of their clients' traumatic histories.

2. Racial Discrimination

The effects of racial discrimination constitute another pervasive trauma that is common among those charged with and convicted of crimes. As Professor Haney has eloquently put it: "You must confront the fact that racism, institutional racism, exposes persons of Color to experiences that *no one else has in this society*, experiences that leave an indelible mark."[154] The convergence of racism with other types of maltreatment and poverty is uniquely debilitating.[155] Racism is also a major contributor to arrests or convictions of "street crimes," which are often the basis of defendants' prior records and increase their punishment liability.[156] In fact, at least one court

150. Wayland, *supra* note 22, at 943.

151. Haney, *Social Context*, *supra* note 5, at 584; *see also* BUREAU OF JUSTICE STATISTICS, DRUGS AND CRIME FACTS, *available at*, http://bjs.ojp.usdoj.gov/content/dcf/duc.cfm#drug-related.

152. Debra Umberson et al., *Social Relationships and Health Behavior Across Life Course*, 36 ANNU. REV. SOCIOL. 139, 139 (2010). The Supreme Court has continued to affirm the principle that youth is particularly mitigating. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012); Jackson v. Hobbs, 132 S. Ct. 1733 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005). Yet, the impact of youthful trauma is not neatly quarantined to the period before a person turns eighteen, particularly because juvenile status is the paradigmatic "bright line" condition. It is absurd to think that someone who may be eighteen and a half, nineteen, or even in his early twenties is somehow so far removed from events marring his formative development that his background is not relevant to an assessment of his moral culpability.

153. David Brooks, *The Psych Approach*, N.Y. TIMES, Sept. 28, 2012, at A35, *available at* http://www.nytimes.com/2012/09/28/opinion/brooks-the-psych-approach.html?_r=0.

154. Haney, *Social Context*, *supra* note 5, at 582 (emphasis in original).

155. *Id.* at 580.

156. Lanni, *supra* note 103, at 1786.

has issued a downward sentencing departure based on criminal history in recognition of the disproportionate arrests of black men for minor traffic violations, which in that case comprised most of the defendant's prior convictions.[157] Another federal sentencing court considered in remarkable detail the defendants' social histories and the role of racism in trapping some of those defendants in a practically inescapable matrix of deprivation.[158] These decisions suggest that some courts are open to consideration of racial discrimination as a mitigating factor. Despite the fact that racism is a trauma that diminishes opportunity and increases exposure to punishment, the impact of racism, much less the cumulative effect of racism compounded by multiple trauma and poverty, rarely if ever makes it into a presentence presentation of any kind in a noncapital case.[159]

3. Intellectual Disability

Intellectual disability, formerly known as mental retardation, is so central to the evaluation of a capitally charged person's moral culpability that it precludes imposition of the death penalty.[160] Among the reasons people with intellectual disability should not be sentenced to death are their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[161] The intellectually disabled are also more likely to be followers rather than leaders and to act on impulse rather than as the result of premeditation.[162] Intellectual disability may also interfere with a person's capacity to assist with his defense or to appear remorseful for his crimes.[163] Each of these characteristics applies with equal force to intellectually disabled people charged with noncapital crimes.[164] Yet, the Supreme Court has never held that intellectual disability is a relevant noncapital sentencing consideration, leaving it up to individual jurisdictions how they account for intellectual disability at punishment—even when the defendant is facing a sentence as harsh as life without the possibility of parole.[165]

157. United States v. Leviner, 31 F. Supp. 2d 23, 33–34 (1998).

158. United States v. Bannister, 786 F. Supp. 2d 617, 631–33 (2011) (dedicating a portion of the opinion to the "Roots of African American Segregation and Poverty").

159. As with a number of the mitigating circumstances described herein that capital defense lawyers have presented in their cases but noncapital defense lawyers generally have not, evidence of systemic racism has long been used in capital litigation. *See* Buck v. Thaler, 132 S. Ct. 32 (2011); Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005); McCleskey v. Kemp, 481 U.S. 279 (1987).

160. Atkins v. Virginia, 536 U.S. 304, 306–07, 321 (2002).

161. *Id.* at 318.

162. *Id.*

163. *Id.* at 320–21.

164. *See* Barkow, *supra* note 19, at 1161.

165. *See id.*

The upshot is that though the very same adverse social forces that characterize the lives of capital defendants riddle the backgrounds of noncapital defendants, aside from recommendations in the professional standards for criminal defense lawyers, there is no doctrinal requirement that defense attorneys present these factors, or that noncapital sentencers be made aware of or take these factors into account before imposing punishment. To be sure, the convergence of factors in any person's life is going to impact her uniquely.[166] But the hard work of describing the particular mitigating effect of a terrible life history on the person standing accused of an aggravated crime is at the heart of effective capital representation, and it should be at the core of noncapital representation as well. Otherwise, individualized justice will continue to elude most criminal proceedings, and the view that unfettered choice, endemic personal evil, and unmoored "free will" are the reasons people violate the law will continue to unduly influence noncapital sentencing.[167] Meaningful noncapital mitigation presentations also present affirmative opportunities to treat sentencing hearings as fact-finding tribunals that produce a cumulative record of social histories that can discern patterns to help experts, social service providers, policymakers, and actors in the justice system develop effective treatments for the recurring ills strongly associated with crime.[168]

4. Positive Sentencing Factors

One final point on the development of mitigation in noncapital cases: as the professional guidelines and Professor Amsterdam's trial manual reflect, in noncapital sentencing there must be more emphasis on positive factors in the defendant's life, such as educational and employment opportunities, family support, and access to and amenability to rehabilitative services.[169] This is how it should be if alternatives to long-term incarceration and rehabilitation are primary goals of the justice and penal systems. In order for noncapital defense lawyers to advocate successfully for less punitive sentences and alternatives to lengthy prison terms, they will need to account for both the adverse life circumstances that explain a client's participation in a criminal offense as well as the positive and protective factors in the client's life that will make him a candidate

166. Haney, *Social Context*, *supra* note 5, at 602 ("[V]irtually no psychological cause or social influence produces the same effect in everyone.").

167. *See id.* at 603.

168. *See id.* at 606–08. This argument does not account for the fact that plenty of wealthy people break the law privately all the time (*e.g.*, abusing drugs) and are never caught, arrested, or charged, so any conclusions about the roots of criminal behavior will be skewed by arrest and charging patterns. Relatively wealthy law breakers' behavior may not be attributable to poverty, or, if they are white, to racism, but it may be influenced by trauma or other mental illness.

169. *See* AMSTERDAM, *supra* note 117, at 196; NLADA Guidelines, *supra* note 121, at § 8.2; *cf.* Barkow, *supra* note 19, at 1201 (suggesting courts use a more restrictive approach, requiring "only mitigating evidence that relates to a defendant's reduced culpability" and not requiring "evidence about a defendant's good moral character or prospects for rehabilitation").

worthy of rehabilitation and, even if he is sent to prison, eventual reintegration into the free world. In a noncapital case, it will not be enough, as it might be in some capital cases, to explain the roots of someone's law-breaking behavior. A good sentencing advocate must also describe how a person will live, and what resources the client needs and will have available if he is given a chance outside prison. This is particularly true because circumstances such as mental illness and addiction may inspire fear in the sentencer that if the defendant is not incarcerated he will be a danger to others or to himself.[170] In capital cases, by contrast, there is usually no possibility that the convicted person will be released, so the consideration is only whether he will be a danger in prison. Thus, in noncapital cases the careful presentation of protective factors that will buffer the adverse consequences of the defendant's troubled life history is crucial to guarding against the conclusion that mitigation is double edged.

Notwithstanding the reasons outlined here—those grounded in professional duty, those supporting individualized sentencing, and those urging an opportunity to learn more about the true causes and possible means of reducing crime—powerful institutional hurdles present challenges to widespread adoption of the worthy practice of investigating, presenting, and considering social history mitigation in noncapital sentencing. The next section explores some of those challenges.

V. Institutional Hurdles to More Robust Noncapital Mitigation

Several institutional and legal hurdles hinder more robust noncapital mitigation. The sheer variety and volume of possible cases and lack of indigent defense resources (both time and money), and the fact that most noncapital cases are resolved by pleas preclude mitigation efforts. Further, there are challenges in applying the "death is different" paradigm that has been the basis of the Eighth Amendment requirement of individualized capital sentencing and related challenges in applying it to noncapital sentences, particularly in jurisdictions with mandatory sentencing and where judges, not juries, impose punishment.

A. Variety and Volume of Noncapital Cases

Noncapital criminal cases run the gamut from petty theft to noncapital murder, unlike in capital cases where a homicide with some aggravating feature forms the basis of the capital charge. It is therefore almost impossible to enforce a uniform set of actions that defense lawyers

170. For example, evidence of brain damage might be double-edged in a noncapital case. When presented effectively in a capital case, brain damage can be quite powerful mitigation. *See* Porter v. McCollum, 558 U.S. 30, 42 (2009). In a noncapital case, however, where the sentencer will be concerned about the permanence or intractability of a defendant's proclivity for instability, unpredictable behavior, or violence, emphasis on brain damage may not be ideal mitigation if the defense's goal is reduced incarceration time.

must take in every criminal case in order to ensure effective sentencing advocacy.

As the noncapital guidelines establish, the following are basic tools that should apply in every case, and this list is by no means exhaustive: independent defense investigation of the circumstances of the offense; defense verification or challenge of items in any agency-prepared presentence report; defense investigation of a client's prior record, including mitigating factors relevant to prior offenses and clarification if certain charges never resulted in convictions; defense investigation of the client's social history—including poverty, living conditions, dependent relatives, employment history and opportunity, history of mental illness or substance addiction, cognitive ability or intellectual deficit, trauma history; investigation of community resources that are viable alternatives to incarceration or a means of improving prospects of rehabilitation even if prison is unavoidable; and preparation of a defense sentencing plan and argument to be presented orally or in writing, with supporting evidence, to the probation agency, if appropriate, and the sentencing judge.[171]

Each case will warrant its own approach, tailored to the individual client and the seriousness of the charged offense. The more serious offenses may necessitate hiring a defense sentencing specialist akin to a mitigation specialist in capital cases.[172] Minor offenses may call for a simple explanation of the circumstances leading to the client's criminal involvement and a proposal for social work or mental health intervention, along with some form of appropriate restitution instead of a lengthy incarceration. The range of possibilities for sound sentencing advocacy will vary along a continuum according to the seriousness of the offense. This is not to suggest, however, that consideration of a client's background should be taken less seriously in cases involving minor offenses. To the contrary, if a defense team identifies a client's vulnerabilities and areas that would benefit from available support and can advocate successfully for programs that will divert him from more serious criminal involvement, then defense counsel will have succeeded in using mitigation exactly as it is intended to work.[173]

The caseloads facing most defense lawyers, especially public

171. *See, e.g.*, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 317 (2011) (discussing defense counsel's "duty to investigate evidence relevant to mitigation of the sentence"). *See also* State v. Fuerst, 512 N.W.2d 243, 246 (Wis. Ct. App. 1994) (noting that a defendant's "personal and social history is important to" sentencing consideration); Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 52 (2011) (stating that sentences can vary "based on the particular facts and circumstances surrounding the crime, such as harm to the victim or the defendant's motive").

172. The sentencing specialist would assist in interviewing witnesses and gathering documents to build the social history, facilitate work with any experts who can help explain the impact of the client's background on his behavior, particularly leading up to the offense, and assist in drafting the defense presentence report and proposed plan for treatment and rehabilitation or for appropriate therapeutic support while the client is in custody.

173. *See, e.g.*, Roberts, *supra* note 171, at 317.

defenders, present a more difficult institutional obstacle to routine comprehensive defense sentencing investigation. In many jurisdictions, public defender offices bear dockets of 100 or more cases per attorney, preventing these attorneys from performing basic tasks required by the Sixth Amendment, such as staying in touch with their clients or filing motions in their cases.[174] In addition, since most noncapital prosecutions proceed much more quickly than capital prosecutions, the difficulties of building trust and rapport with witnesses and gathering records in enough time to meaningfully investigate mitigation are exacerbated in the noncapital context. Money is also an issue, especially for court-appointed lawyers who work in private practice rather than in institutional defender organizations with staff investigators, social workers, and budgets for mitigation specialists and other experts.[175] It is therefore difficult to imagine overburdened public defenders having the time or resources to provide comprehensive mitigation investigation in each of their cases on a regular basis.[176]

Plenty has been written proposing strategies to reduce public defender caseloads and allow for more effective indigent criminal representation, and those recommendations need not be repeated here.[177] The proposal here, instead, is that public defender offices and other attorneys with available resources take the lead in devoting time and funding to meaningful investigation into mitigating circumstances relevant to their client's blameworthiness and capacity for rehabilitation. Some dedicated defenders and innovative offices already do so.[178] Those who do

174. *See* NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 12–13 (Joel Schumm ed. 2011); *see also* Hessick, *supra* note 26, at 1113 (citing the "overwhelmingly large number of noncapital convictions and sentencings" that occur annually).

175. *See* James M. Anderson & Paul Heaton, *Measuring the Effect of Defense Counsel on Homicide Case Outcomes*, NAT'L INST. OF JUST. Dec. 2012, at 3, 36–37, *available at https://www.ncjrs.gov/pdffiles1/nij/grants/241158.pdf* (reporting that in Philadelphia homicide cases, defendants with lawyers from the public defender's office, as opposed to appointed private counsel, had more favorable case outcomes, including reduction of life sentencing by 64% and reduction of overall expected prison time by 24%, and citing the public defender office's ability to hire experts as one reason for the disparity).

176. Resources are a very difficult implication in capital cases as well, and many capital defendants face trial and habeas proceedings with fewer resources than necessary for a meaningful defense. Even in *Rompilla*—one of the Supreme Court's bedrock capital ineffective assistance cases—the dissent pointed to the difficulty of implementing the majority's holding given the scarcity of resources for capital defenders. *See* Rompilla v. Beard, 545 U.S. 374, 403 (Kennedy, J., dissenting) (noting that the public defender's office that represented Rompilla at trial had two investigators for 2,000 cases).

177. *See, e.g.*, LEFSTEIN, *supra* note 174; THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 7–9 (2009), http://www.constitutionproject.org/pdf/139.pdf (noting the impediments to effective defense systems and reforms in the system); NAT'L ASSOC. OF CRIMINAL DEFENSE LAWYERS, MINOR CRIME, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S MISDEMEANOR COURTS (2009), http://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf (explaining factors rendering attorneys incapable of providing adequate legal representation to minors and recommendations to improve such legal representation).

178. The Neighborhood Defender Service of Harlem and the Bronx Defenders in New York City

are advancing a necessary movement toward more meaningful individualized sentencing, a reduction in overly harsh punishment, and a look into the root causes of various crimes that may provide an opportunity for development of more effective crime policies. Neighborhood-based public defender agencies are especially well-situated to provide comprehensive mitigation more efficiently than other indigent defense providers because their locus in a particular community and an intimate knowledge of a concentrated client population lowers the cost of aggregating information about mitigating circumstances—such as arrest patterns in over-policed areas, knowledge of particularly violence-plagued housing complexes, shortages of mental health care resources, and so on.[179] These neighborhood defenders might therefore be best positioned to provide wholesale mitigation data to courts at the lowest cost, after developing the data in individual clients' cases.

Law school clinics are another resource.[180] Clinics may partner with institutional defenders to expand defender offices' capacity to investigate and present mitigation in sentencing hearings. Clinics may also represent clients on their own and develop improved sentencing practices that they might share through the development of practice manuals and trainings made available to attorneys and investigators in their communities. Partnerships with law schools, social work schools, and schools of public health, for example, could augment defenders' resources and utilize research and scholarship to develop data that might help explain whether and why certain life circumstances are correlated with particular types of criminal involvement.

Foundations and public funding sources dedicated to improving justice systems should make resources available that will foster such partnerships and allow public defender agencies to reduce their caseloads, provide attorney and investigator training, and hire mitigation specialists that will enhance their capacity for comprehensive sentencing advocacy.

None of these are perfect solutions, but they are steps toward normalizing and making more widespread the expectation that mitigation is a central, rather than marginal, part of competent noncapital defense sentencing advocacy.

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are good examples of offices that integrate social workers into their criminal defense teams to work toward the best possible sentencing dispositions for clients. NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, http://www.ndsny.org/programs/criminal-defense.html (last visited Oct. 20, 2013); BRONX DEFENDERS, http://www.bronxdefenders.org/our-work/social-work (last visited Oct. 20, 2013).

179. *The Four Pillars of Holistic Defense*, THE BRONX DEFENDERS (Nov. 15, 2010), http://www.bronxdefenders.org/the-four-pillars-of-holistic-defense/.

180. Stanford Law School's Three Strikes Clinic has provided effective mitigation representation in the cases of clients who have been life-sentenced based on sometimes low-level offenses that counted as their "third strikes." Brent Staples, *California Horror Stories and the 3-Strikes Law*, N.Y. TIMES, Nov. 25, 2012, at SR10, *available at* http://www.nytimes.com/2012/11/25/opinion/sunday/california-horror-stories-and-the-3-strikes-law.html?_r=0.

B. Prevalence of Plea Bargaining

The vast majority of noncapital criminal cases are resolved by pleas.[181] In the 2012 term, the Supreme Court in *Missouri v. Frye*[182] and *Lafler v. Cooper*[183] delineated the considerations for determining when a lawyer's performance is constitutionally ineffective when a client is convicted at trial and the resulting sentence is substantially longer than the sentence that would have resulted had the client been properly advised of an available plea.[184] In doing so, the Supreme Court recognized, as lower courts have for some time,[185] that the prevalence of agreed dispositions in criminal cases necessitates a standard for the effective assistance of defense lawyers not just at trial but also during plea bargaining, which has become "central to the administration of the criminal justice system."[186] In fact, one federal appellate judge has observed that "virtually all defendants plead guilty, usually in return for some sentencing concession as compared with the 'going rate' after trial."[187] That "going rate" is inflated by design in order to incentivize more defendants to choose pleas,[188] and a defendant's principal incentive to plead guilty is to leverage the best possible sentence, which is usually better than the sentence that could result from a trial conviction.[189] In the federal system, the Sentencing Guidelines explicitly reward cooperation by offering "acceptance of responsibility" and "substantial assistance" credits that reduce the defendant's sentencing liability if he provides information helpful to prosecutors about other prospective defendants.[190] Prosecutors hold nearly unilateral discretion[191] in choosing charges, and that choice in turn determines minimum sentences.[192]

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181. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (noting that "plea bargains have become . . . central to the administration of the criminal justice system"); Lafler v. Cooper, 132 S.Ct. 1376, 1388 (2012) (noting that 97% of federal convictions and 94% of state convictions result in guilty pleas); *see also* Hessick, *supra* note 26, at 1070 n.5 (citations omitted) (citing federal and state rates on plea bargaining). For a discussion of the duty of counsel to negotiate pleas in capital cases, see Russell Stetler, *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases*, 31 HOFSTRA L. REV. 1157 (2003).

182. 132 S. Ct. 1399 (2012).

183. 132 S. Ct. 1376 (2012).

184. *Frye*, 132 S. Ct. at 1410–11; *Lafler*, 132 S. Ct. at 1386.

185. Gerald E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39, 42 (2012).

186. *Frye*, 132 S. Ct. at 1407; *see also Lafler*, 132 S. Ct. at 1388.

187. Lynch, *supra* note 185, at 40.

188. *Id.* at 41.

189. *Id.*

190. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2011); 18 U.S.C. § 3553(e) (2013); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2485–86 (2004) (noting that "[t]he Federal Sentencing Guidelines have put a huge premium on another plea-bargaining technique: cooperating with the government").

191. Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 25–26 (2008–2009).

192. Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn't*, 117 YALE L.J. 1374, 1386 (2008).

Prosecutors then decide how much sentencing credit to recommend.[193]

The deeply entrenched dependence on plea bargaining, which is premised on bartering reductions of "going" sentencing rates, to resolve the vast majority of cases poses an essential challenge for the prospect of individualized punishment.[194] It may be, in fact, that making mitigation central to noncapital sentencing requires an upending of the current approach to plea bargaining and reimagining prosecutorial discretion altogether[195]—but that revolution does not appear in the immediate offing, which is the reason the focus of this paper is on the means immediately available to defense lawyers to erode barriers to more mitigation-centered noncapital sentencing.

The way plea bargaining works now—including prosecutors' nearly unfettered power in charging, negotiating, and recommending sentences[196]—only underscores the importance of mitigation in noncapital pled cases, where the audience for mitigation needs to be as much the prosecutor as it does the sentencing court.[197] In pled cases, the timing of investigating and presenting mitigation may be compressed as compared to tried cases, particularly where post-trial sentencing takes place at a hearing weeks or months after conviction.[198] It may mean that the social history investigation and the involvement of any experts who will help counsel determine the impact of available mitigation must take place prior to the plea negotiations, and ideally before a prosecutor decides which charges to bring. As noted, once a particular charge attaches, there is enormous incentive for prosecutors to recommend a sentence within a uniform range. Regardless of its timing, a defense mitigation presentation should play a central role in the negotiation influencing a prosecutor's decision whether to settle a case and by what terms. The practice guidelines for defense counsel in noncapital cases buttress the point and cast it in terms of professional

193. Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & CIV. RTS. L. REV. 377, 380 (2010).

194. *See* Nancy Gertner, *From "Rites" to "Rights": The Decline of the Criminal Jury Trial*, 24 YALE J.L. & HUMAN. 433, 436 (2012) (recognizing that plea bargaining has caused "many aspects of the criminal justice system" to suffer, including "meaningful discovery" and "the jury trial").

195. *See, e.g.*, Simons, *supra* note 193 (suggesting prosecutors develop policies, in the post-*Booker* era, which ensure that prosecutorial discretion is exercised "in ways that are fair, rational, and consistently based on the principles of punishment").

196. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004) (stating that prosecutors possess much more power and opportunity to dictate outcomes of plea bargaining than defense attorneys); *see also* AMSTERDAM, *supra* note 117, at 353–54. (describing the kinds of sentencing recommendations prosecutors can make and of conditional versus unconditional pleas); *see also* Barkow, *supra* note 19, at 1153 (acknowledging that the structure of federal and state criminal codes add to "the likelihood of discriminatory application of sentencing in noncapital cases").

197. One federal public defender I spoke with went as far as saying that given how seldom federal cases proceed to trial, he and his colleagues should be considered "mitigation specialists" themselves, because most of their advocacy goes to leniency after a plea.

198. Gertner, *supra* note 194, at 436.

responsibility.[199] In fact, the Supreme Court has said explicitly that in pled cases, any dereliction of this professional duty that results in an increased prison sentence for a client has constitutional implications.[200]

Moreover, to the extent that prosecutors are repeat actors in criminal cases in a given jurisdiction and feel compelled to "treat like cases alike" based on charges or alleged conduct, zealous advocacy requires defense lawyers set their clients apart from others accused of similar offenses by presenting evidence of the client's unique vulnerabilities, comparatively diminished relative culpability, prospects for rehabilitation or a productive life outside of prison, and any other mitigating factors. This lies at the heart of the duty to present an individualized sentencing portrait to the person with the most power over the disposition, which in pled cases is, de facto, the prosecutor.

The challenge will be for over-worked and under-funded defense lawyers to adopt these practices in the cases where their clients intend to plead. Aside from defense resource constraints, changing prevailing plea bargaining practices and expectations among the defense bar, prosecutors, and judges in any given jurisdiction will require a number of fundamental changes beyond the scope of this paper, beginning with a significant reduction in cases prosecuted. Still, a concerted defense effort to begin raising standards and laying a course for more rigorous mitigation investigation in noncapital cases resolved by plea is a critical starting point for working mitigation into the largest category of criminal cases.[201]

C. Death Is Different

The most fundamental doctrinal impediment to more routine, rigorous mitigation in noncapital sentencing is the Supreme Court's as-yet unwavering position that "death is different."[202] There is no constitutional

199. NLADA Guidelines, *supra* note 121, at §§ 8.1(a)(1), 8.2(c)(1); *cf.* DEFENSE FUNCTION STANDARDS, *supra* note 107, at § 4-6.2 (where the ABA Guidelines are again far less specific than the corresponding NLADA Guidelines).

200. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012) ("[I]neffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because any amount of additional jail time has Sixth Amendment significance.") (internal quotation marks and punctuation omitted); *see also* Glover v. United States, 531 U.S. 198, 203–204 (2001) ("[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.").

201. Raising the bar of criminal practice can be brought about either through the work of trial attorneys who adopt more rigorous practices and turn those practices into the prevailing norm, or by habeas challenges to a particular lawyer's performance which a court may use as an occasion to clarify the baseline for competent practice. Habeas challenges to ineffective assistance of counsel during plea bargaining will be difficult to prove because of the off-the-record nature of plea negotiations and the paucity of appeals following voluntarily accepted pleas. For that reason, as well as the difficulty of proving prejudice in pled cases, some have argued that even if the Supreme Court were to recognize heightened professional norms applicable to noncapital sentencing, they would not benefit most noncapital defendants, particularly those who choose to plead. *See* Steiker & Steiker, *Opening a Window*, *supra* note 11, at 199–200.

202. Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 n.1 (2004) (chronologically tracking development of the Supreme Court's

right to individualized noncapital sentencing, and therefore no corresponding requirement that the defendant's life circumstances be investigated, presented, or considered before punishment is handed down in a noncapital case.[203] As Professor Rachel Barkow has written, however, "The Court's decisions prohibiting arbitrariness, requiring individualization, and ensuring proportionality are grounded in the Eighth Amendment, which prohibits the infliction of 'cruel and unusual punishments.' There is no hint in the text itself that these terms should mean one thing in capital cases and another in noncapital cases."[204] The death penalty certainly benights the rest of our criminal justice system. Yet, as long as it remains available, it *is* different in its irreversibility and finality;[205] every safeguard against its infliction is justified and many should be expanded.[206] However, the fact remains that the vast majority of criminal defendants are in prison for noncapital crimes, and many are facing staggering prison terms. As long as there is no Eighth Amendment requirement of individualized noncapital sentencing, challenges to noncapital sentences' proportionality are unlikely to succeed, and there is no basis for a finding of Sixth Amendment *Strickland* prejudice when a trial lawyer fails to investigate or present mitigation at noncapital sentencing.

Though mitigation is crucial to any meaningful shift toward individualized sentencing—because it will require courts to slow down and learn about the people they are punishing, shed light on the root causes of crime, ideally influence a reconsideration of lengthy incarceration in many individual cases and, in the long-term, across cases—doctrinally there is no Sixth or Eighth Amendment requirement that lawyers present or that courts consider noncapital mitigation. Moreover, the different structures of capital and noncapital sentencing proceedings make it such that most noncapital habeas claims challenging counsel's effectiveness refer to guilt rather than penalty. In addition, though the Supreme Court has held that there is a

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"death-is-different" doctrine).

203. *See* Harmelin v. Michigan, 501 U.S. 956, 994–95 (1991).

204. Barkow, *supra* note 19, at 1163. Also see Haney, *Social Context*, *supra* note 5, at 603–04 for the following support:

> Despite the tension that social history evidence creates in the operation of the system of death sentencing, the opportunity to find and present such evidence is now constitutionally mandated. The principle that a sentencer's 'possession of the fullest information possible concerning the defendant's life . . .' is essential to the selection of the appropriate penalty predates the modern era of capital jurisprudence and has never been restricted exclusively to death penalty cases. It was embraced and reaffirmed both before and after *Lockett*, the case generally identified as having given rise to this requirement in contemporary capital litigation.

205. *But see* Barkow, *supra* note 19, at 1167–74 (arguing that death is not uniquely severe or final); *Id.* at 1201 (advocating for limiting the types of mitigation that may be presented in capital cases as one strategy for bringing uniformity to noncapital and capital sentencing). This is a position I cannot agree with given the qualitative difference between state-imposed execution and a long prison term, which undoubtedly is a taking of a different kind, but not one that extinguishes a life. In prison, there is always a chance of redemption, rehabilitation, or release.

206. Steiker & Steiker, *Opening a Window*, *supra* note 11, at 157–59.

single Sixth Amendment standard for judging attorney effectiveness, it has enforced that standard more robustly in capital than in noncapital cases.[207] The structural differences between capital and noncapital sentencing make it difficult to apply the Supreme Court's capital ineffectiveness doctrine squarely to noncapital sentencing.[208]

First, capital defendants are nearly always sentenced by juries rather than judges.[209] Although there are jurisdictions with noncapital jury sentencing, most noncapital sentences are imposed by judges.[210] Much has been written about the different approaches to sentencing taken by juries as compared to judges.[211] Judges are more likely to want to treat like cases alike and maintain some semblance of uniformity in sentencing. They are also professional sentencers, as opposed to juries who are generally making a single sentencing decision and are therefore less likely than judges to suffer from "compassion fatigue" after hearing day in and day out tales of poverty, trauma, and mental illness.[212] However, more comprehensive mitigation at noncapital sentencing may upend the idea that judges are bound to treat cases that may appear at first blush to be alike when the focus is only on the offense. As for compassion fatigue, the precise challenge is to present facts that persuade the sentencer that no matter how many stories he has heard before, *this* defendant is both worthy of leniency and capable of redemption. If capital litigation has demonstrated anything, it is that mitigation, even in cases involving the most serious crimes, has the power to convince the sentencing court that viewing a defendant's actions during a particular criminal offense in isolation and at face value is not a just basis for fixing punishment.[213] Cases that may appear to be alike may not be alike at all, and the defense lawyer's role is to set her client apart and provide a basis for mercy before a court accustomed to routinely handing down prison terms without much information about the people being sent to

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207. As discussed above, nearly all the Supreme Court precedent on the effective assistance of counsel during sentencing has been decided in capital cases and depends on the bifurcated capital proceedings in which sentencing is its own phase of trial, presided over by a jury required to consider mitigating evidence. *See* Hessick, *supra* note 26, at 1071, 1071 n.8 (citing Eva S. Nilsen, *Decency, Dignity and Desert: Restoring Ideals of Human Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 152 (2007) (characterizing the Supreme Court's noncapital sentencing jurisprudence as a "virtual blank check" to legislatures)). *See also* Steiker & Steiker, *Opening a Window*, *supra* note 11, at 190–91.

208. *See* Steiker & Steiker, *supra* note 11, at 198–99.

209. *See* Douglas A. Berman, *Examining the Blakely Earthquake and Its Aftershocks*, 16 FED. SENT'G REP. 307 (2004).

210. Barkow, *supra* note 19, at 1153; Hessick, *supra* note 26, at 1095.

211. *See, e.g.*, Nancy King, *How Different Is Death? Jury Sentencing In Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. OF CRIM. L. 195 (2004); Morris B. Hoffman, *The Case For Jury Sentencing*, 52 DUKE L.J. 951 (2003); Lanni, *supra* note 103.

212. *See* Dianne Molvig, *The Toll of Trauma*, 84-DEC. WISC. LAW. 4, 8 (2011) (stating that judges are among those affected by compassion fatigue).

213. *See* Lanni, *supra* note 103, at 1778 (contrasting "just deserts" sentencing, which focuses on the nature of the crime, with rehabilitative sentencing, which looks more at the individual characteristics of the offender).

prison.[214]

For state cases, the role of elected judges complicates the picture. The perception of judicial leniency has cost some judges their seats and electoral pressures therefore promote a tendency to be "tough on crime" in all but the most unusual cases.[215] There is no easy answer to this other than to use zealous defense sentencing practices to shift both the expectations of courts and the punishment baselines over time so that the touchstone of harshness or leniency becomes less draconian. Moreover, studies have shown that lay people are actually less punitive than judges when presented with detailed information about particular people convicted of crimes.[216] If the discourse around crime moves from the offense to the provision of more data about the person accused or convicted of the offense, the seemingly bottomless appetite for harsh punishment may abate.

Judicial sentencing in noncapital cases also has implications for appellate review or reconsideration of sentences. Unlike in capital cases, a court examining a Sixth Amendment challenge to counsel's performance in a noncapital case will not determine the probability that a juror would have decided differently in light of the new evidence, which is a question requiring judges to substitute their own judgment for that of a reasonable juror. Rather, challenges to defense counsel's performance during judge-imposed sentencing will require judges to consider whether a reasonable *judge* would have found a particular set of mitigating circumstances persuasive enough to have imposed a less punitive sentence.[217] That may pose a formidable obstacle to habeas challenges to noncapital sentences for some time, particularly when federal courts are reviewing state court judgments.[218] However, this also presents another opportunity to educate

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214. A United States Sentencing Commission survey of federal judges reveals that although some judges believe that factors such as "mental condition" and "disadvantaged upbringing" are relevant to sentencing within the guidelines—and, in some instances, to whether to grant a downward variance from the guidelines range—these factors are less relevant in most judges' view than is evidence of rehabilitation. *See* U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, 18 (2010), http://www.ussc.gov/Research_and_Statistics/Research_Projects/Surveys/20100608_Judge_Survey.pdf. This bolsters the conclusion that more must be done to expose judges to life history mitigation and to persuade them of its salience. Of course someone's mental condition or social disadvantage will affect his ability to improve his life and will define the starting point from which he must travel before he is considered truly rehabilitated. In other words, it is impossible to evaluate prospects for rehabilitation apart from a defendant's social context.

215. *See, e.g.*, Lynn Adelman & Jon Deitrich, *Why Habeas Review of State Court Convictions Is More Important than Ever*, 24 FED. SENT'G REP. 4 (2012) (discussing how state judicial elections influence decisions in criminal cases); *see also* Haney, *War on Prisoners*, *supra* note 23, at 400 (explaining that the penal process became "politicized" and the judiciary "became a convenient symbol for criminal justice system-related frustrations"); *cf.* Lanni, *supra* note 103, at 1782 (describing the similar effect of electoral pressures on politicians and legislators).

216. Lanni, *supra* note 103, at 1780.

217. The appellate courts must determine whether the sentence is reasonable by applying sentencing factors enumerated by Congress. United States v. Booker, 543 U.S. 220, 261 (2005).

218. *See* Adelman & Dietrich, *supra* note 215 (discussing the importance of habeas review of state court convictions).

judges through repeated exposure to mitigation and serves as another compelling reason for defense lawyers to expand and routinize the presentation of life history mitigation in noncapital sentencing proceedings.

Another way in which death is different is that capital cases are bifurcated, and sentencing is a stage of trial over which the jury presides and at which the prosecution and the defense generally present live witnesses. Structurally, it is more formal and anticipates a good deal more evidence than is usually involved in noncapital judge sentencing, though contemporary noncapital sentencing more often than not does involve advocacy from both sides.[219]

In addition, a capital sentence can never be mandatory,[220] while in noncapital sentencing—beginning in the late 1970s in response to criticisms about discretionary sentencing leading to inconsistent, racially biased punishment[221]—both federal and state criminal statutes moved toward uniform determinate and mandatory sentencing, with an explicit departure from individualization.[222] Strong arguments pointing to wide sentencing disparities in pre-Guidelines systems support uniformity, treating like cases alike, and reducing the risk of individual sentencing bias—particularly racial bias. These arguments favor determinate, offense-based punishment and suggest that a return to individualization runs the risk of a return to inconsistency in punishment, where the least advantaged are the most likely to face the harshest penalties. One response to this argument is that the pre-Guidelines era of individualized punishment mostly pre-dated the developments in capital mitigation, described *supra* Part III, that form the basis of the recommendation that noncapital mitigation follow a similar trajectory. In other words, we do not actually know what noncapital individualization—a type based on meaningful mitigation investigation aimed at identifying human frailty and explaining law-breaking behavior—looks like or how it works because that practice has not taken hold on a wide scale outside capital cases.

In any event, determinate and mandatory punishment regimes introduced a seismic shift in criminal sentencing that eschewed

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219. *See* Hessick, *supra* note 26, at 1080 (discussing the changing role of counsel at the sentencing phase).

220. *See* Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (holding Louisiana's mandatory death sentence statute unconstitutional); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (holding North Carolina's mandatory death sentence statute unconstitutional).

221. Dharmapala et al., *supra* note 23, at 1040, 1044.

222. *See* Haney, *War on Prisoners*, *supra* note 23, at 377–86 (discussing the emergence of determinate sentencing and abandonment of rehabilitative, individualized sentencing); Dharmapala et al., *supra* note 23, at 1043–44. Uniformity was also paramount to the *Furman* decision striking down capital punishment as being inconsistently imposed. Furman v. Georgia, 408 U.S. 238, 309 (1972). *Furman* then gave way to *Gregg*'s "guided discretion," which relies on juries' consideration of individualized mitigating and aggravating factors. Gregg v. Georgia, 428 U.S. 153, 206 (1976). Meanwhile, uniformity in noncapital sentencing remains robust, likely because of legislatures' perception that judges, as professional repeat actors, can more easily be relied on to impose uniform sentences.

rehabilitation in favor of offense-centered, "just deserts" punishments that have dramatically increased the number and length of prison sentences courts have imposed in the last four decades.[223] In fact, the Supreme Court has upheld the application of mandatory noncapital sentences, even for life without the possibility of parole.[224] At the same time, the only context in which the Supreme Court has held that a noncapital defense lawyer's sentencing failure has resulted in prejudice, thus violating the Sixth Amendment right to the effective assistance of counsel, has been that of a mandatory sentence resulting in a significantly harsher penalty than would have resulted absent counsel's calculation error.[225] In the years since that case was decided, the Supreme Court has curtailed mandatory sentencing, in cases such as *United States v. Booker*, and has required prosecution teams to prove beyond a reasonable doubt the presence of any sentencing factor besides a prior conviction that can increase a sentence beyond the statutory maximum.[226] Additionally, as described *supra* Part III.C., *Miller/Jackson* provides another opening for a return to individualized sentencing.[227]

Despite these decisions pushing back against mandatory determinate sentencing, absent consideration of individual offenders' characteristics, uniformity and just deserts remain the dominant punishment paradigm within which noncapital mitigation practice operates for the time being.[228] One might argue that—particularly because uniform sentencing schemes are almost exclusively offense-centered[229]—determinate sentencing is an obstacle to the investigation and presentation of social history mitigation since judges must impose a sentence within a particular range, often with mandatory minimums[230] in the federal system as well as in many states,[231] upon conviction of certain crimes.[232] In fact, the opposite is true. In mandatory sentencing regimes, it is all the more imperative that

223. Haney, *War on Prisoners*, *supra* note 23, at 391.

224. Harmelin v. Michigan, 501 U.S. 956, 996 (1991).

225. *See* Hessick, *supra* note 26, at 1081–82 (discussing Glover v. United States, 531 U.S. 198, 203–04 (2001)).

226. *See* Hessick, *supra* note 26, at 1082–85 (discussing Blakely v. Washington, 542 U.S. 296, 303 (2004); United States v. Booker, 543 U.S. 220, 245 (2003); and Apprendi v. New Jersey, 530 U.S. 466, 490–92 (2000)).

227. *See supra* note 79 and accompanying text.

228. Haney, *War on Prisoners*, *supra* note 23, at 410.

229. *Id.* at 394.

230. *See, e.g.*, Kimbrough v. United States, 552 U.S. 85, 93, 105 (2007) (noting the lower court's disapproval of the disproportionate limitations on sentencing under the Guidelines and discussing in detail the disproportionality between Guidelines sentences for trafficking crack cocaine and for trafficking powder cocaine).

231. *See, e.g.*, Tonry, *supra* note 35, at 69.

232. *See* Lanni, *supra* note 103, at 1783, 1785 ("[T]he Federal [Sentencing] Guidelines severely curtail judicial discretion by declaring 'not ordinarily relevant' many personal characteristics of the offender previously considered by sentencing judges, such as . . . mental and emotional conditions, socioeconomic status, and 'lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing.'") (quoting U.S. SENTENCING GUIDELINES MANUAL §§ 5H 1.1, 3, 5, 6, 10, 12 (1998)).

defense lawyers present whatever credible evidence is available to persuade prosecutors to adjust their charging decisions to avoid conviction for offenses involving lengthy mandatory sentences.[233] Defense attorneys must also present courts with persuasive reasons to either depart from the Sentencing Guidelines or sentence their clients to the lower end of the mandatory range.

Rita v. United States is an example of both the availability and the limits of an individualized sentencing presentation within a Guidelines-reliant system.[234] Rita, a U.S. military veteran who had served as a cooperating law enforcement witness in other cases, faced sentencing for making false statements to a federal grand jury.[235] The probation department, with the help of the defense and the prosecution, produced a presentence report that considered both "the offenses and . . . the offender,"[236] including "Rita's personal and family data, Rita's physical condition (including a detailed description of ailments), Rita's mental and emotional health," as well as his educational background and his twenty-five years of military service.[237] The presentence report cited no circumstances that warranted departure from the Sentencing Guidelines.[238] Rita's lawyer agreed with the judge's identification at sentencing of two factors warranting departure from the Guidelines: Rita's cooperation with law enforcement, which made him a "vulnerable defendant" in prison, and his military service.[239] Defense counsel presented Rita's "poor physical condition" as a third reason and argued that "[j]ust [those] three special circumstances" warranted a below-Guidelines sentence.[240] The court was not persuaded and sentenced Rita to thirty-three months in prison, the bottom of the Guidelines range.[241] As Justice Stevens suggested in his concurrence, however, even though aspects of Rita's personal history were introduced at his sentencing, the Guidelines did not allow for their meaningful consideration.[242] In particular, the Guidelines did not account for the "significant recognition" Rita received for his military service, and neither did the sentencing court.[243] *Rita* illustrates the mechanical, actuarial

233. *See* Lanni, *supra* note 103, at 1786 ("[D]eterminate sentencing merely shifts power and discretion from the sentencing judge to prosecutors and probation officers . . . ."); Richman, *supra* note 192, at 1386 ("With substantial control over the flow of offense-related facts to the judge, and even over the investment of resources in the discovery of facts to begin with, prosecutors were left with unprecedented sway over sentencing.").

234. 551 U.S. 338, 338 (2007) (holding that a federal court of appeals may apply a presumption of reasonableness to a district court sentence that is within the properly calculated Federal Sentencing Guidelines range).

235. *Id.* at 341, 345.

236. *Id.* at 342.

237. *Id.* at 343–44.

238. *Id.* at 344.

239. *Id.* at 344–45.

240. *Id.* at 345 (alteration in original).

241. *Id.*

242. *Id.* at 367.

243. *Id.*

approach to "individualized" sentencing presentations under a Guidelines-based regime.[244] Rita's lawyer presented "just those three" special circumstances. The Court made no mention of any comprehensive social history or narrative describing who Rita was or any convincing presentation of what pressures, incentives, or medical conditions may have influenced his behavior. The sentencing court was apparently expected to look at three discrete categories of mitigating information and decide, simply because they could be checked off a list, that Rita deserved a lower sentence. Such a sentencing presentation in a capital case would fall short of accepted defense standards where, at minimum, "connecting the dots" of mitigating factors and explaining their impact on the defendant's behavior is basic and critical to a persuasive sentencing.[245] In fact, capital mitigation is almost universally aimed at showing how a defendant's multi-dimensional life does not conform to a grid of the sort that Guidelines-based sentences depend on.

Rita shows that, even post-*Booker*, the Sentencing Guidelines cast a long shadow over federal sentencing and remain a hurdle to a truly comprehensive consideration of social history mitigation. *Rita* further demonstrates that defense lawyers whose practice continues to be limited by the strictures of the "relevant" Guidelines considerations will fail to do their clients justice.[246]

In many ways, mandatory regimes present the same binary question that capital proceedings do: Has the defendant's conduct fallen in the range requiring application of particular sentencing reductions or enhancements?[247] This determination requires prevailing on the decision-maker's sense that the particular defendant standing before her is less blameworthy than another convicted of the same offense. At its base, all sentencing is subjective and defense lawyers must routinely investigate their clients' life histories and determine which factors are most likely to inspire mercy. This paper calls for a move away from the crime-focused, decontextualized, heavily retributive sentences that determinate schemes require,[248] and a move toward a more rehabilitative, individualized approach to punishment that depends on meaningful consideration of mitigating circumstances. Over time, the persistent presentation of

244. *Cf.* Gall v. United States, 552 U.S. 38, 58 (2007). *Gall* describes a district court's departure from the Guidelines and imposition of probation following a conviction for conspiracy to distribute 10,000 ecstasy pills following the presentation of a substantial amount of evidence of Gall's immaturity at the time of the offense and subsequent rehabilitation and years of legitimate employment. *Id.* at 41–43.

245. Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 357–58 (1979), *cited with approval in* Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 672 n.189 (2013).

246. *See generally Rita*, 551 U.S. at 347 (discussing a presumption of reasonableness when the trial court follows the Sentencing Guidelines range).

247. Hessick, *supra* note 26, at 1089.

248. *See* Lanni, *supra* note 103, at 1787 (noting recent academic critique of determinate sentencing and the need for an individualized approach to sentencing).

noncapital mitigation may erode support for mandatory sentencing altogether as defense lawyers, prosecutors, and courts realize that individual life circumstances and characteristics matter and there is no one-size-fits-all approach to punishment.[249]

With regard to non-mandatory sentencing, Professor Carissa Byrne Hessick has urged further development of noncapital professional norms and substantive case law governing discretionary noncapital sentencing.[250] Professor Hessick has argued that, in many ways, noncapital discretionary sentencing is not unlike capital sentencing; and, therefore, Sixth Amendment claims challenging the sentencing performance of defense counsel should only have to prove a reasonable probability that the defendant's sentence was increased by any amount of actual jail time.[251] However, the relatively broad standards for the type of mitigation defense lawyers need to investigate in noncapital cases presents a challenge in proving ineffective assistance during discretionary noncapital sentencing.[252] Professor Hessick suggests that constitutionally required investigation of capital mitigation may provide a foundation for noncapital cases,[253] but the "death is different" doctrine again proves to be a formidable hurdle here since there is no Sixth Amendment requirement that mitigation be presented in a noncapital case. As Professor Hessick recognizes, the baseline requirements of the types of mitigation that must be investigated have been far better developed in the capital context.[254]

The Supreme Court's longstanding Eighth Amendment jurisprudence, and the practical reality that death remains unique in its irreversibility and in its degree of cruelty, requires the conclusion that death is different (for the time being). Development of capital judicial decisions and defense practices is impossible to divorce from this context. There is almost no comparable noncapital case law and, as discussed previously, the noncapital sentencing professional standards, while providing an outline of basic duties, pale in comparison to the capital guidelines.[255]

In light of the comparatively general noncapital professional standards and a lack of substantive case law establishing a top-down constitutional duty to investigate and present noncapital mitigation, the most immediate avenue for improving noncapital defense sentencing baselines remains changing defense lawyers' actual standard of practice in everyday cases. This is the best hope for changing the expectations of courts (both in sentencing and habeas proceedings), prosecutors, and clients

249. *See* Barkow, *supra* note 19, at 1205 (advocating for uniform capital and noncapital sentencing standards in order to prohibit mandatory noncapital sentencing, which would "make a dramatic difference for thousands upon thousands of defendants serving [mandatory] sentences").

250. Hessick, *supra* note 26, at 1111–12, 1121–22.

251. *Id.* at 1087, 1090.

252. *Id.* at 1106–07.

253. *Id.* at 1107–09.

254. *Id.* at 1107.

255. *Id.* at 1110.

about what basic and competent noncapital sentencing advocacy requires, and for ensuring that noncapital sentencing courts moderate sentences and account not only for the facts of the offense, but also for the unique individual frailties of the offender.[256]

VI. Conclusion

Individualized noncapital sentencing appears to be resurging and its expansion will have an impact on incarceration rates. The Supreme Court's recent emphasis that the background of a convicted person is as important as the crime itself should serve as a clarion call for institutional change. Though resource and doctrinal constraints present challenges to a full reconciliation of capital and noncapital mitigation practice, a good deal of change can begin immediately by reorienting defense lawyers to take mitigation as seriously in noncapital cases as capital defense lawyers do, and to realign their practices and professional standards accordingly.

Making mitigation central to noncapital sentencing will benefit individual defendants by reducing prison time and will simultaneously result in more systemic reform, which sheds light on root causes of crime by explaining factors that actually influence defendants' behavior before they break the law. Routine and robust noncapital mitigation presentations will also change sentencing courts' expectations of sentencing practice and increase the eventual likelihood of a new constitutional baseline for mandatory noncapital sentencing mitigation as there has been for decades in capital cases.

Finally, I will end on a grace note—one played out in a noncapital case which, like scores of cases all over the country, is by most measures unremarkable to anyone but the defendant, who was spared prison, and her family. The court that sentenced the defendant allowed for hope and the possibility of a successful future because it paused to consider the range of circumstances that influenced her behavior. This case also speaks to the reality of many defendants' life courses, which often include relapses into criminal involvement rather than an undeviating line to immediate redemption.

In 2002, Chastity Hawkins, a young woman from the South Bronx with no prior criminal record, pled guilty to federal fraud charges stemming from participation in the "family business,"[257] led by her father, which

256. *See* Steiker & Steiker, *Entrenchment*, *supra* note 7, at 239 (discussing the professionalization and improved practice of the capital defense bar as contributing to the greater scrutiny of capital sentences). Successful habeas challenges to defense sentencing failures can provide a wider-reaching doctrinal foundation for improved sentencing representation in noncapital cases as they have in capital cases, so it is also important to consider bringing these challenges in cases with strong facts. Yet another significant challenge to more robust noncapital habeas practice is the fact that noncapital prisoners, unlike death row prisoners, have no statutory right to counsel in federal habeas. *See* 18 U.S.C. § 3599(a) (statute granting death row prisoners the right to counsel in federal habeas proceedings).

257. United States v. Hawkins, 380 F. Supp. 2d 143, 145 (E.D.N.Y. 2005), *aff'd*, 228 Fed.

involved defrauding insurance companies by staging car accidents and then "initiating false legal and medical claims based on fabricated injuries."[258] Hawkins' conviction exposed her to a $148,814 restitution charge and a 12-to-18-month prison sentence under the Federal Sentencing Guidelines.[259] Defense counsel moved for a downward departure on the grounds of extraordinary family circumstances and extraordinary rehabilitation, based in part on her being a young mother, though Hawkins herself admitted "she was not a great mother . . . ."[260] During this initial proceeding, "the court . . . [nevertheless] had a strong impression that [Hawkins] . . . may have bottomed out, that is reached the end of her difficulties, and that she was coming back into useful society."[261] Based on this assessment, the court granted a year-long supervised adjournment of sentencing so that Hawkins could have "a chance to show full rehabilitation."[262] Yet within that year, she continued to commit fraud, this time by falsely certifying she was not working while simultaneously collecting unemployment checks.[263] At the end of the probation, the court nevertheless took into account the progress Hawkins had made in legitimate employment as well as in her relationship with her daughter and determined that she had demonstrated "extraordinary rehabilitation"—a formal downward departure under the Sentencing Guidelines. The court sentenced her to three years of probation and full restitution.[264]

The case was remanded after the government's post-sentencing appeal challenging the conclusion that Hawkins had been rehabilitated. During remand, Hawkins' attorney submitted a motion for downward departure as well as for a non-Guidelines sentence,[265] and the district court held a hearing on evidence of extraordinary rehabilitation. The hearing provided an unusually detailed record explaining a noncapital sentencing court's sentencing considerations. The defense motion argued extensively that Hawkins deserved a non-incarceration sentence because of her successful employment, attainment of a GED, and general stabilization of her life.[266] The motion also described the importance of Hawkins' support of her nine-year-old daughter.[267] It also referred to Hawkins' diminished relative culpability and "truly extraordinary" transformation "[w]hen

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Appx. 107 (2d Cir. 2007).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 162.

262. *Id.* at 166.

263. *Id.* at 169.

264. *Id.* at 167.

265. Motion for Downward Departure at 8–9, United States v. Hawkins, No. 1:02-CR-563-JBW (E.D.N.Y. 2005), ECF No. 358.

266. *Id.* at 4–5.

267. *Id.* at 4, 6. Previously, Ms. Hawkins' daughter had been in court with her and had impressed the court with her straight-A report card. Transcript of Sentencing Record at 4, United States v. Hawkins, 380 F. Supp. 2d 143 (E.D.N.Y. 2005) (No. 02-CR-563).

considered in the context of her past life and resources, or lack thereof."[268] During the evidentiary hearing, Hawkins testified that before her arrest, she was mainly receiving help from public assistance and her father when she was not working. She also reported that she partied every week, spent a lot of time shopping, and had not been a good mother.[269] By contrast, Hawkins testified that after her arrest she developed a much better relationship with her daughter[270] and that her marriage to her daughter's father (who remained incarcerated as he had been almost since the child's birth) had brought the family closer together.[271] She also testified to an improved work ethic and to developing employment skills.[272] Hawkins also attested that she did not know who would care for her daughter if she were incarcerated. The government nevertheless argued in support of the 12-to-18-month maximum prison sentence and cited, among other reasons, Hawkins' fraud during the pre-sentencing adjournment and Hawkins' lies to a probation officer about being fired from a job for impermissibly cashing checks.[273]

The court concluded at the end of the hearing that Hawkins had, despite occasional missteps, indeed exhibited extraordinary rehabilitation. This required a view of Hawkins' behavior in the context of her family and social history: "A rehabilitative design takes into account the fact that a person's actions may reflect genetics, social advantage, and deprivation as well as free will, merit, and culpability . . . . Pure retribution, or 'just deserts,' ignores the handicapping effect of social, economic, and natural deprivation."[274] As to Hawkins' particular deprivations, the court considered her "dysfunctional" family history significant.[275] Her crimes, after all, had been at the behest of her father, and both her parents were "career criminals" who had spearheaded the instant conspiracy.[276] Her father was "an alcoholic . . . who used his position of power in the

268. Motion for Downward Departure at 6–7, United States v. Hawkins, No. 102-CR-563-JBW (E.D.N.Y. 2005), ECF No. 358.

269. *Hawkins*, 380 F. Supp. 2d at 170–71.

270. *Id.* at 171.

271. *Id.*

272. *Id.*

273. Government's Proposed Findings of Fact and Conclusions of Law, United States v. Hawkins, No. 102-CR-563-JBW (E.D.N.Y. 2005), ECF No. 369.

274. *Hawkins*, 380 F. Supp. 2d at 150–51. The court quoted Jonathan Kozol's *Amazing Grace*, a book about the extreme poverty blighting the communities in New York City from which nearly three quarters of New York state prisoners hail. *Hawkins*, 380 F. Supp. 2d at 151 (citing JONATHAN KOZOL, AMAZING GRACE 3-5 (Perennial ed. 2000)). During a lengthy analysis of the Federal Sentencing Guidelines, the court rejected the government's rather perverse argument that someone with a relatively law-abiding life who engages in low-level criminal conduct cannot benefit from the extraordinary rehabilitation departure because her conduct was never so bad as to warrant any extraordinary rehabilitation. *Hawkins*, 380 F. Supp. 2d at 158–59.

275. *Hawkins*, 380 F. Supp. 2d at 172. Ms. Hawkins' attorney had referred in the Motion for Downward Departure to her father's role in introducing her to fraudulent activity. Motion for Downward Departure, *supra* note 268, at 8.

276. *Hawkins*, 380 F. Supp. 2d at 174.

household to pressure other members into illegal conduct."[277] The court gave great shrift to Hawkins' efforts to educate and train herself in skills that had allowed her to maintain legitimate, gainful employment.[278] Finally, the court described the circumstances of Hawkins' dropping out of high school in eleventh grade:

> [Hawkins was] attack[ed] by a twenty-five year old stranger who threw acid on her face . . . [which] caused extensive facial scarring that is still visible in the form of welts across her face and neck. She was reluctant to be seen in public for a year following this attack, which was a contributing factor to her leaving school.[279]

It is not difficult to imagine this extraordinary interruption of opportunity alone inspiring the court's empathy. The court also took into great account Hawkins' evolving relationship with her daughter and that she had done "what was reasonably within her power to normalize her daughter's life."[280]

In addressing Hawkins' missteps while her sentencing was pending, the court concluded, with empathy tempered by years of practical observation, that when defendants are "emerging from troubled or criminal circumstances, backsliding is not an uncommon occurrence."[281] In the end, the court concluded that, after some setbacks, Hawkins was building a "law-abiding lifestyle"[282] and that probation was the only viable sentence, as any term of incarceration would not account for Hawkins' rehabilitation and "would have a disastrous effect on [Hawkins'] daughter, a matter of importance in sentencing jurisprudence."[283]

The unmistakable impact of social history mitigation was fully evident as the court considered the young woman's conduct and future prospects:

> A child forced into crime by a criminal father surely emerges from a different starting point than the child of a legitimately employed parent . . . . Defendant's background reflected social as well as socioeconomic deprivation—a scarred personality as well as an acid-etched visage. That she has progressed from an irresponsible white collar criminal to a law-abiding hard working

277. *Id.* at 172.

278. *Id.* at 164.

279. *Id.* at 172–73. The Motion for Downward Departure had also mentioned the acid attack. Motion for Downward Departure, *supra* note 268, at 5. Ms. Hawkins had also testified about the attack and about its impact on her ability and willingness to go out in public, including the fact that she was hospitalized for three months because of her injuries. *Hawkins*, 380 F. Supp. 2d at 173.

280. *Hawkins*, 380 F. Supp. 2d at 175.

281. *Id.* at 176.

282. *Id.* at 177–78.

283. *Id.* at 178.

citizen is quite extraordinary, given this starting point.[284]

This is the grace note, the pursuit of which is certainly worthy for more outcomes like this.

284. *Id.* at 161.

Article

Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment

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I. Introduction

The empirical study of capital punishment in the "modern" era[1] has

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1. The "modern" era of capital punishment, at least in reference to the legal structures and mandates that guide its administration, is generally perceived as the period following the landmark case of *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the U.S. Supreme Court ruled that the death

been largely decoupled from scholarship addressing the corollary late 20th century noncapital punitive developments, such as the rise of mass incarceration. Consequently, research that has examined the problem of racial disparities in the administration of the death penalty and research on the proportional growth of minorities in American correctional populations have advanced on parallel tracks, rarely intersecting. In light of this symposium's effort to strengthen the linkages between the death penalty and mass incarceration, this article examines two seemingly distinct cases of racially disparate criminal justice practices—the trial courts' processing of contemporary capital cases and federal drug trafficking cases—to illustrate the institutionalized mechanisms that produce racial inequalities in both mass incarceration and capital punishment. I advance a meso-level, social-psychological theory on the production of institutional racism that also aims to integrate contested lines of thought about the mechanisms of bias and discrimination. To accomplish these ends, I specifically focus on three problem areas in the structure and operation of contemporary American criminal justice: 1) the codification of inequality in how crimes and criminal culpability are defined and how sentencing rules are structured; 2) the distribution, by both stage and actor, of discretionary decision-making power; and 3) the mechanisms for relief from the harshest potential punishments.

While federal drug trafficking cases comprise only a small proportion of the overall number of felony drug cases in the U.S.,[2] they represent the "iconic case"[3] of the American war on drugs by virtue of the strikingly long sentences meted out and the vast resources spent by the federal government on seeking such convictions. Similarly, while the death penalty is sought and imposed in only a small fraction of all eligible homicide cases,[4] the uniquely severe nature of this punishment, coupled with the complex jurisprudence that governs its implementation, makes capital punishment a qualitatively important object of study. My selection of these two relatively specialized cases, however, should not be taken to mean that these are the biggest challenges to humane and racially-equitable

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penalty, as then administered, violated the Eighth and Fourteenth Amendments of the U.S. Constitution in part due to the breadth of death eligibility, but also due to the unbridled discretion afforded to decision makers to impose a death sentence. Furman, 408 U.S. at 309. In the wake of this decision, the majority of states that had previously authorized the death penalty refashioned their statutes to remedy the problems identified in *Furman.* LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT 63 (3d ed. 2012).

2. Mona Lynch, *Theorizing the Role of the 'War on Drugs' in US Punishment*, 16(2) THEORETICAL CRIMINOLOGY 175, 194 (2012) [hereinafter Lynch, *Theorizing*] (indicating that federal courts are responsible for about 6–7% of all felony drug convictions a year).

3. *Id.* at 178.

4. In 2004, for instance, there were 12,360 homicide arrests, 8,400 homicide convictions, and 138 death sentences imposed nationally. *See Death Sentences in the United States From 1977 By State and By Year*, DEATH PENALTY INFORMATION CENTER, *available at* http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008. There are no standardized sources for how many death sentences are sought by prosecutors annually. *See id.*; *Sourcebook of Criminal Justice Statistics*, UNIVERSITY AT ALBANY, SCHOOL OF CRIMINAL JUSTICE, *available at* http://www.albany.edu/sourcebook/.

systems of punishment. The problematic processes that I highlight here are at least as serious, if not more so, in the more mundane kinds of criminal cases whose punitive outcomes have cumulatively resulted in contemporary mass incarceration.[5]

Part II of this article will provide a short overview of the two sites of inquiry: the contemporary federal criminal justice system since the implementation of the Federal Sentencing Guidelines in 1987 (and the particularities of drug cases within that system); and the modern, post-*Furman* American death-penalty system. Part III will briefly lay out the dominant strands of contemporary social-scientific and legal theory of racial bias and its manifestation in institutional settings. Part IV will put forth a model of institutional racism that integrates sociological, psychological, and legal approaches in an attempt to reconcile the divide between the individual-level, typically cognitively-based understandings of racial bias, and the social-structural understandings derived from sociology. This integrated theory will also aim to expand existing understandings by identifying key places within the criminal justice system that contribute to racial bias. In Part V, I use examples from the worlds of capital punishment and the federal criminal courts to illustrate the three mechanisms that have especially contributed to racially-problematic outcomes. I conclude by discussing the implications of this model for remediation.

II. Two Contemporary Systems of Punishment

A. The Federal Sentencing System in the Guidelines Era

The 1984 Sentencing Reform Act authorized the establishment of the United States Sentencing Commission, which was charged with developing a set of sentencing guidelines designed to "rationalize" sentencing in the federal criminal justice system.[6] The new sentencing structure was designed to strictly limit the range of possible outcomes for like defendants, increase certainty that convicted defendants would be punished, and increase the severity of penalties for certain offense categories.[7] Within three years of this mandate, the Commission had drafted a rigid set of presumptive guidelines that became effective on November 1, 1987.[8] While many inside and outside of the federal court system initially resisted and criticized them,[9] the Guidelines fundamentally

5. *See, e.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–19 (2012) (arguing that the contemporary criminal justice processing of misdemeanors present some of the most serious threats to justice and fairness).

6. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. cmt. (2012).

7. U.S. Sent'g Comm'n, *2009 Annual Report* 1 (2009), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2009/Chap1_09.pdf.

8. *Id.*

9. *See generally*, KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS, 38–77 (1998).

transformed the federal criminal justice system and came to represent a new paradigm of criminal sentencing.

The Guidelines have been supplemented with an ever-increasing number of statutory mandatory minimum and enhancement sentencing schemes that Congress has passed on a regular basis since 1984.[10] These statutory provisions generally dictate lengthy minimum prison sentences that must be imposed upon conviction as derived from various offense characteristics, such as specified drug weights, and defendant characteristics including certain prior convictions.[11] Under both sentencing schemes, judicial sentencing discretion was substantially constrained; consequently, much discretionary power shifted to federal prosecutors.[12] Because the Guidelines specify a very limited sentencing range for a given conviction, prosecutors' decisions on what to charge functionally determine sentence outcomes under the presumptive Guidelines and in mandatory minimum cases, especially given the high rate of guilty pleas entered in that system, which stands at about 97%.[13] Federal prosecutors thus function in some sense as "first-look sentencers"[14] by virtue of their enhanced charging power.

Although several major Supreme Court decisions in the last decade have returned some sentencing discretion to judges,[15] the Guidelines must still be employed as a first step to sentencing determination, thereby anchoring outcomes to the punitive Guideline "recommendation." Moreover, mandatory minimum statutes remain intact, so in cases in which both Guidelines and mandatory minimums apply, prosecutors' charging decisions are highly determinative of the sentence outcome.[16] While over 170 mandatory minimum statutes exist on the books, the most frequently

10. *Id.* at 77.

11. *Id.* at 77.

12. *See, e.g.,* Bennett Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 418–19 (1992); Lynn D. Lu, *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys,* 19 FED. SENT'G REP. 192, 192 (2007); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L. J. 1420, 1430–34 (2008).

13. U.S. Sent'g Comm'n, *2012 Annual Report* 42 (2012), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/2012_Annual_Report_Chap5.pdf [hereinafter *2012 Annual Report*].

14. Douglas Berman, *Afternoon Keynote Address: Encouraging (And Even Requiring) Prosecutors To Be Second-Look Sentencers*, 19 TEMP. POL. AND CIV. RTS. L. REV. 429, 430 (2010).

15. *In United States v. Booker,* 543 U.S. 220, 245 (2005), the United States Supreme Court rendered the Guidelines "effectively advisory," giving federal judges back the authority to impose a non-Guidelines sentence as long as it is consistent with the broad purposes of punishment, as outlined by Congress. Two years later, the Court reiterated its position that the Guidelines are merely advisory, when it ruled in *Kimbrough v. United States*, 552 U.S. 85, 108 (2007), that judges are free to sentence outside of the prescribed Guidelines' range on the grounds of policy disagreements. In *Gall v. United States*, 552 U.S. 38, 50 (2007), a case decided at the same time as *Kimbrough,* the Court imposed a standard of appellate review that mandates deference to sentencing judges' decisions and that allows judges to use an individualized assessment of a given case and defendant in deciding whether and how to depart from the Guidelines.

16. Berman, *supra* note 14, at 30.

used involve drug and weapon offenses.[17]

The federal sentencing transformations in the 1980s had a direct and dramatic impact on rates of federal imprisonment in the ensuing years. While states' use of imprisonment also rapidly expanded over the same period, the federal rate of growth far surpassed that of the states.[18] In the twenty-five years between 1985 and 2010, the federal-prison population grew nearly six-fold, while the state-prison population tripled.[19] The federal prison explosion was the direct result of the following factors: first, federal prosecutors significantly increased case production; second, many more of those prosecuted in the federal system received a prison sentence due to the Guidelines' mandates; and third, sentence lengths increased significantly as a function of the Guidelines' presumptive formula.[20]

Those convicted of drug trafficking offenses were especially impacted by these changes. Drug trafficking defendants sentenced in federal courts totaled 5135 in 1980.[21] By 1991, that number had grown to 13,521 defendants[22] and by 2012 it reached 24,729.[23] In 1980, prior to the Guidelines' implementation, approximately 72% of convicted drug trafficking defendants received a prison sentence; since 1989, 95% or more of convicted drug defendants have been sentenced to prison annually.[24] The average time served for those convicted of drug trafficking nearly tripled under the Guidelines, increasing from about thirty months to eighty months over a seven-year period.[25] The combined impact of the increased number

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17. U.S. Sent'g Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 121 (2011), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_07.pdf [hereinafter *Report to Congress: Mandatory Minimums*].

18. At year-end 1985, state prisons held 451,812 inmates, and federal prisons held 35,781. Bureau of Justice Statistics, U.S. DEP'T OF JUSTICE, *Prisoners in Custody of State or Federal Correctional Authorities 1977–98 – Spreadsheet*, 1 (2000), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2080 [hereinafter *Prisoners in Custody*]. At year-end 2010, state prisons held 1,402,624 prisoners, and federal prisons held 209,771. Bureau of Justice Statistics, U.S. DEP'T OF JUSTICE, *Prisoners in 2010 (Revised)* 2 (2011), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2230 [hereinafter *Prisoners in 2010*].

19. *See Prisoners in Custody*, *supra* note 18, at 1; *see also Prisoners in 2010*, *supra* note 18, at 2.

20. Lynch, *Theorizing*, *supra* note 2, at 179.

21. Bureau of Justice Statistics, U.S. DEP'T OF JUSTICE, *Federal Criminal Cases, 1980-1987* 3 (1989), *available at* http://www.bjs.gov/content/pub/pdf/fcc8087.pdf.

22. U.S. Sent'g Comm'n, *Changing Face of Federal Criminal Sentencing* 7 (2008), *available at* http://www.ussc.gov/Research_and_Statistics/Research_Publications/2008/20090127_Changing_Face_Fed_Sent.pdf.

23. *See 2012 Annual Report*, *supra* note 13, at 45.

24. *Supra* note 21; U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 52 (2004), *available at*
http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/15_Year_Study/index.cfm [hereinafter *Fifteen Years of Guideline Sentencing*].

25. One exception to this general rule was "economic crimes," primarily white collar offenses. Post-Guidelines, the likelihood of receiving a prison sentence increased significantly, but the average sentence length imposed for white collar convictions was cut in half, from about thirty months to fifteen

of federally-sentenced defendants, the increased likelihood of prison as a sanction, and the increased average length of those sentences meant that the federal prison population ballooned largely on the backs of federal drug defendants, who comprised 56% of federal prisoners by the turn of the 21st century.[26] There was no inherent reason for the rate of federal prosecutions generally, or drug trafficking prosecutions specifically, to so dramatically increase as a result of the Guidelines sentencing system. However, the promulgation of the Guidelines and mandatory-minimum statutes happened in the context of an emerging "war on drugs," and broader "war on crime," launched in earnest at both the state and federal levels in the 1980s and hardening in the 1990s, that particularly targeted people of color.[27]

The federal version of the "war of drugs" has especially impacted minority populations. A 1995 U.S. Sentencing Commission annual report pointed out that the proportion of white federal drug defendants had steadily declined since the Guidelines' implementation, while correspondingly increasing for minorities, especially Hispanics.[28] Moreover, as a result of the sentencing calculus underlying the Guidelines, the sentences meted out have significantly diverged as a function of defendants' race since the Guidelines' implementation.[29] A Commission study indicated that while whites and African Americans were sentenced to similar sentence lengths in the pre-Guidelines federal system, within ten years of their implementation, the average sentence quadrupled for African American defendants, while only doubling for white defendants.[30] These disparities are a direct consequence of the Guidelines' design in that the legal factors deemed most punishment-worthy are those that correlate with the race of the defendant.[31]

The federal government has contributed to American mass incarceration in a number of key ways: it has expanded its reach to become a major player in the prosecution and punishing of criminal defendants, especially as a result of drug law-making in the 1980s; it has reformed its sentencing structure to dramatically increase the severity of sanctions; and it has implemented policies and sentencing mandates "that foreseeably treat

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months. *See id.* at 58–59.

26. In 2000, 70,500 of the 123,044 federal prisoners were imprisoned for drug convictions. By 2010, 99,300 of the 190,641 federal prisoners were imprisoned for drug convictions. Bureau of Justice Statistics, U.S. DEP'T OF JUSTICE, *Prisoners in 2011* 10 (2012), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4559.

27. *See generally* DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS (2007) (for the federal version of this war); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 87–93 (2010) (for both state and federal contexts); KATHERINE BECKETT, MAKING CRIME PAY: LAW & ORDER IN CONTEMPORARY AMERICAN POLITICS (1999) (for a history of the larger racially targeted war on crime).

28. U.S. Sent'g Comm'n, *1995 Annual Report* 110–11 (1995), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/1995/ANNUAL95.htm.

29. *Id.*

30. *See Fifteen Years of Guideline Sentencing*, *supra* note 24, at 116.

31. *Id.* at 131–32. As I will detail later, the most infamous example of this is the 100-to-1 powder-to-crack-cocaine disparity that was prescribed by statute and incorporated into the Guidelines grid.

black offenders much more harshly than white ones."[32]

B. The "Modern" American Capital Sentencing System

As numerous commentators have detailed, the U.S is anachronistic among its Western peers in that it retains the death penalty for ordinary crimes.[33] Although the federal government also authorizes the use of capital punishment, most American capital cases are tried at the state level.[34] Nonetheless, a complex body of federal case law governs capital trial procedure in the post-*Furman* "modern era."[35] Thus, state-level capital statutes differ from each other, but all have some common features, largely due to requirements imposed by the U.S. Supreme Court since the mid-1970s.[36] First, death-eligible offenses—practically speaking, homicides—must be distinguished as more serious than "ordinary" murders, so prosecutors generally allege some form of statutorily defined aggravation[37] in order to seek death. This "narrowing" requirement ostensibly provides rationality to the death-penalty system by ensuring that only the most deserving defendants are prosecuted capitally and sentenced to death. In practice, however, death eligibility is very broad in most jurisdictions, and county-level prosecutors exercise enormous discretion in the case-selection process.[38]

A second feature of the "modern" death penalty regime is the bifurcated trial, in which the guilt stage is followed by a penalty stage, taking place only if the defendant is convicted of the capital crime.[39] In most jurisdictions, sentencing after conviction on noncapital charges is in the exclusive purview of the judge; however, in death penalty cases, a jury comprised of death qualified community members is responsible for the life

32. Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 29 (2008).

33. *See generally*, Carol S. Steiker, *Capital Punishment and American Exceptionalism,* 81 OR. L. REV. 97, 97 (2002); *see also* FRANKLIN ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 58 (2003); ROGER G. HOOD AND CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 10–13 (2008).

34. JOEL D. LIEBERMAN & DANIEL A. KRAUSS, JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES 159 (Joel D. Lieberman & Daniel A. Krauss eds., 2009).

35. ZIMRING, *supra* note 33, at 71.

36. *See generally* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution,* 85 MICH. L. REV. 1741, 1765–70 (1987); *see also* James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1619–23 (2005) (on the ironies and contradictions in this body of law).

37. In California, these are called special circumstances. CAL. PENAL CODE § 190.2(a) (West WestlawNext current with all 2013 Reg. Sess. Laws, all 2013–2014 1st Ex. Sess. Laws, and Res. C. 123 (S.C.A.3))

38. *See* Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 232–37 (discussing the discretion of the county prosecutor in deciding to seek a death sentence and noting the "distribution of death sentences [and] the distribution of executions [reveal] a skewed geography").

39. Burt, *supra* note 36, at 1751–52.

or death sentencing decision.[40]

The scope of evidence considered in the penalty stage is also broader and more elaborately presented in comparison to noncapital sentencing proceedings. In most jurisdictions, the prosecutor presents evidence about statutorily defined aggravating circumstances in order to make the case for a sentence of death.[41] Common aggravators include: the circumstances of the crime itself that have been legislatively defined as especially serious, such as multiple victims, use of torture, or the concurrent consummation of another felony, regardless of an intent to kill; prior felony record; prior acts or threats of violence; and victim impact evidence.[42] The defense presents evidence in mitigation, which can include anything that might lead the jury to arrive at a sentence less than death.[43] Mitigating evidence often includes: social history testimony; psychological or psychiatric assessments of the defendant's mental status; evidence about the defendant's prior good acts; and, evidence indicating the defendant's suitability for a sentence of life in prison.[44]

Because most death penalty statutes rely on a guided-discretion model of decision making, capital juries are directed, through judge-delivered jury instructions, to consider and weigh aggravating and mitigating circumstances against each other in order to determine the appropriate sentence.[45] Depending upon how the statute is designed, there must either be a specific finding of aggravation in this stage before death

40. In Ring v. Arizona, 536 U.S. 584, 609 (2002), the U.S. Supreme Court ruled that because the judicially-determined sentence required consideration of aggravating evidence that may lead to a death sentence, it was a Sixth Amendment violation of the right to a jury, per Apprendi v. New Jersey, 530 U.S. 466 (2000). In *Apprendi,* the U.S. Supreme Court addressed the practice of judicially-imposed sentencing enhancements that require a finding of fact on the existence of aggravation. 530 U.S. at 2349–50. The Court ruled that the defendant's Sixth Amendment right to a jury trial was violated when the judge, after determining that the crime had been motivated by bias, imposed a sentence exceeding the statutory maximum for the crime to which the defendant pled guilty. *Id.* at 2350–51. The effect of the case has been to curtail a range of judicially-imposed enhancements that were typically tacked on during sentencing if the judge found by a preponderance of evidence that some "aggravating" circumstances did exist. LINDA E. CARTER, *supra* note 1, at 141 n.20. Prior to *Ring*, most death penalty jurisdictions already relied upon jury sentencing, therefore it is a longstanding norm in capital cases. *Id.* at 77. Four states still allow for judicial override of the jury-sentencing recommendation of life. *See* FLA. STAT. § 921.141(2) (West 2010), ALA. CODE § 13A-5-47 (West 2013); IND. CODE 35-50-2-9(e) (West 2012); 11 DEL. CODE § 4209(d)(1) (West 2013).

41. This is part of the narrowing requirement. In some states, like California, this is done at the guilt or eligibility phase. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1311–14 (1997).

42. LINDA E. CARTER, *supra* note 1, at 129–30.

43. *Id.* at 169–70.

44. Two states, Texas and Oregon, use a "special issues" model that centers the case around the question of future dangerousness of the defendant in determining death. *See* OR. REV. STAT. § 163.150 (West 2013); TEX. CODE CRIM. PROC. ANN. ART. § 37.071 (West 2013). Nonetheless, even under this model, the defendant has the right to present any mitigating evidence that would warrant a sentence less than death. *See* OR. REV. STAT. § 163.150(1)(c)(A) (2013) (West 2013); TEX. CODE CRIM. PROC. ANN. ART. § 37.071 (West 2013). Virginia uses a hybrid model. VA. CODE ANN. § 19.2-264.4 (West 2013).

45. LINDA E. CARTER, *supra* note 1, at 136.

can be considered, or there is a statutory provision requiring that the aggravating evidence outweigh the mitigating evidence before death can be imposed.[46] Once instructed, jurors then deliberate to a sentencing decision.

While the pursuit and imposition of death sentences has declined in recent years, the modern era of capital punishment remains plagued by racial disparities in outcomes. By the time the Supreme Court ruled in *Furman*, declaring capital punishment unconstitutional as then administered, the totality of empirical evidence indicated that "the significant racial differentials found in the imposition of the death penalty are indeed produced by racial discrimination."[47] Because *Furman* left open the door to a "constitutional" death penalty—which was fashioned four years later in *Gregg v. Georgia*[48]—scholars continued to assess patterns of racial disproportionality in the administration of capital punishment. Thus, through the 1980s, a number of longitudinal state-level studies were conducted which indicated that while the nature of racial disparities in death sentencing had changed from pre-*Furman* to post-*Furman*, they had not been eliminated.[49]

The ultimate study of this type was conducted by Baldus, Woodworth, and Pulaski,[50] who examined sentencing patterns in the state of Georgia pre- and post-*Furman* using regression analysis that controlled for hundreds of potentially legally-relevant variables. The analyses demonstrated a strong post-*Furman* race-of-victim effect, in that cases involving white victims were more likely to receive death, and an interaction effect, so cases involving African American defendants and white victims were the most likely to receive death sentences.[51] This study became the empirical basis for a challenge to Georgia's death penalty law on equal protection grounds, culminating in the Supreme Court case *McCleskey v. Kemp*.[52] The Court rejected the underlying argument put forth by the plaintiffs—that a pattern of racial disproportionality, as

46. This is not constitutionally mandated. *See, e.g.*, Walton v. Arizona, 497 U.S. 639 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002) (approving of statutes not requiring that aggravation outweigh mitigation as long as the statutory scheme had a mechanism for "rationally" narrowing the class of death-eligible defendants); *see also* Kansas v. Marsh, 548 U.S. 163 (2006) (same). Several states do not specify such a formula in the weighing portion of the statute.

47. Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 133 (1973).

48. Gregg v. Georgia, 428 U.S. 153, 195 (1976).

49. *See, e.g.*, William Bowers & Glenn Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQUENCY 563 (1980); *see also* SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 20 (1989); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. OF CRIM. L. & CRIMINOLOGY 754, 766 (1983); Michael Radelet & Glenn Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587, 590 (1985).

50. DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY 57–59 (1990).

51. *Id.* at 149–57.

52. McCleskey v. Kemp, 481 U.S. 279, 282–83 (1987).

demonstrated by the Baldus study, was evidence of an equal justice violation—and instead articulated a standard of proof that requires a showing of individualized intent to discriminate.[53] Thus, while the Court did not completely dispute the findings of significant racial disparities, the majority denied their legal relevance.[54]

The *McCleskey* decision disillusioned many scholars who had spent years working in this area. Baldus, however, continued to produce a number of studies at the state and local levels documenting racial inequality in the administration of the death penalty.[55] In doing so, he and his colleagues have pinpointed the stages at which discretion seems to lead to bias.[56] Taken together, the extensive body of research on racial disparities in capital charging and adjudication demonstrates a clear race-of-victim effect, which appears to be largely produced by prosecutorial filing decisions, and a smaller but relatively consistent race-of-victim and defendant-interaction effect that appears to be the product of jury behavior.

III. What is (Institutionalized) Racial Bias?

A. Predominant Social Scientific Perspectives on Racism

Within the social sciences, there has been something of a divide in how racial bias is conceptualized. In the field of psychology, a burgeoning body of research suggests that the modal form of contemporary bias or prejudice is "implicit" in nature.[57] Social psychologists distinguish between stereotyping, which is a cognitive categorization process; bias or prejudice, which has an evaluative/affective component; and discrimination, which has an action component.[58] These are key distinctions that may all have implications for institutionalized bias.[59] Social-cognition research within psychology indicates that many human social judgments occur outside of conscious processes, including racial and other kinds of demographic stereotyping and biases that are said to be pervasively present as unconscious, non-motivated phenomena.[60] So even where measures of more explicit prejudice indicate a waning of such biases in contemporary society, implicit bias is characterized as present, to varying degrees, within

53. *Id.* at 292–94.

54. *Id.* at 297.

55. David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (examining how racial discrimination has continued in the implementation of the death penalty).

56. *Id.* at 1659.

57. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128–29 (2012).

58. *See* David M. Amodio & Patricia G. Devine, *Stereotyping and Evaluation in Implicit Race Bias: Evidence for Independent Constructs and Unique Effects on Behavior*, 91 J. PERS. & SOC. PSYCHOL. 652, 652 (2006); ANATHI AL RAMIAH ET AL., MAKING EQUALITY COUNT 86–89 (2010),

59. AL RAMIAH et al., *supra* note 58, at 91.

60. *Id.* at 89–90.

the majority of humans, including those in subjugated groups.[61]

These implicit biases and attitudes are measured in various ways. The most well-known method is the Implicit Association Test (IAT), which uses timed tests of association between race-based "attitude objects" and positive or negative terms to measure levels of bias.[62] While the IAT and the more general conceptualization of unconscious or implicit bias have engendered some controversy within psychology,[63] this framework for understanding racial bias as a cognitive phenomenon has nearly reached hegemonic status in the field.[64] There is also some evidence that implicit biases may have better predictive power about discriminatory behavior (among other things) than do measures of explicit bias,[65] although the cognition-behavior relationship is relatively weak and malleable in either case.[66]

Although the "cognitive turn"[67] in explaining bias is beginning to seep into sociological conceptualizations of racism and inequality,[68] sociology has generally not subscribed to an understanding that is so atomized within the individual. Rather, sociologists usually examine processes and outcomes at the group level and/or structural level, with less concern for the role of individual-level cognition.[69] For example, within sociology, racial inequality has been explained by variations of conflict theory, which holds that as the "threat" posed by minority groups to the status quo majority's power increases, the majority group deploys its institutional resources, including the criminal justice system, to mitigate that racial threat.[70] Such a model presumes some group-level rationality,

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61. *See generally* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2007).

62. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERS. & SOC. PSYCHOL. 17, 18 (2009).

63. *See, e.g.*, Hart Blanton & James Jaccard, *Arbitrary Metrics in Psychology*, 61 AM. PSYCHOLOGIST 27, 61 (2006); Frank J. Landy, *Stereotypes, Bias, and Personnel Decisions: Strange and Stranger*, 1 INDUS. & ORG. PSYCHOL. 379, 388 (2008); Philip E. Tetlock & Gregory Mitchell, *Calibrating Prejudice in Milliseconds*, 71 SOC. PSYCHOL. Q. 12, 12–13 (2008).

64. *See* Emily L. Fisher & Eugene Borgida, *Intergroup Disparities and Implicit Bias: A Commentary*, 68 J. SOC. ISSUES 385 (2012).

65. Greenwald, et al., *supra* note 62, at 32 (concluding that, for "socially sensitive topics," the "predictive validity of IAT measures significantly exceeded that of self-report measures").

66. *See* Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs about Gender and Behavioral Control*, 91 J. PERS. AND SOC. PSYCHOL. 268, 268–69 (2006); *see also* Icek Ajzen & Nicole Gilbert Cote, *Attitudes and the Prediction of Behavior*, *in* ATTITUDES AND ATTITUDE CHANGE 289–311 (William D. Crano & Radmila Prislin eds., 2008).

67. William Bielby, *Promoting Racial Diversity at Work: Challenges and Solutions*, *in* DIVERSITY AT WORK 55 (Arthur P. Brief ed., 2008).

68. *Id.*; *see generally* Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221, 231 (2012) (illustrating that sociological studies typically take a broader view in explaining bias); *see also* Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 ANN. REV. SOC. 299, 314–15 (2006).

69. JOHN LEVI MARTIN, THE EXPLANATION OF SOCIAL ACTION 28–29 (2011).

70. HUBERT M. BLALOCK, TOWARD A THEORY OF MINORITY-GROUP RELATIONS 150–73 (1967)

and even widespread coordination, in strategizing to maintain and deploy resources.[71] The model typically relies upon the relationship between various measures of minority group threat, including population size and aggregated measures of political and economic power. It then relies on disparate inter-group outcomes as evidence in support of the theory. [72]

The other predominant sociological approach is to examine various social structures and institutions in order to uncover how they produce and maintain inequality. Bonilla-Silva has been at the forefront of theorizing in this line, suggesting that the focus on racism as a psychological or ideological problem elides the importance of how hierarchical "racialized social systems" develop, operate, and endure.[73] While Bonilla-Silva includes a place for racial ideologies and cognitions, he argues that "free-floating ideology in fact has a structural foundation" that is evidenced in enduring race-based hierarchies.[74] Thus, in the U.S. context, the historical pattern of white domination, established in part through the accretion of economic, cultural, political, and legal power, has ensured inequitable distributions of resources and opportunities, which are then maintained through policies and practices that protect the hierarchical arrangements.[75] While the methods for such maintenance have changed shape over time and overt expressions of racial animosity have diminished, making them difficult to identify and even harder to rectify, macro-structures continue to operate in ways that ensure racialized hierarchies are preserved.[76]

There is some explicit tension between the sociological and psychological perspectives, both methodological and political. Thus, sociologist David Wellman has forcefully argued that the theories of implicit racism lose sight of historical and contemporary group processes and intergroup relations, structural inequality, and status position; and, instead, these theories isolate the problem of racial bias within the individual.[77] He also suggests that by explaining racism as a function of

("The power threat posed by a numerically large minority group can obviously be expected to be related to motivation to discriminate."); See David Eitle, Stewart J. D'Alessio & Lisa Stolzenberg, *Racial Threat and Social Control: A Test of the Political, Economic, and Threat of Black Crime Hypotheses*, 81 SOC. FORCES 557 (2002), for a test in the criminal justice context.

71. *See* HUBERT M. BLALOCK, TOWARD A THEORY OF MINORITY-GROUP RELATIONS 118–20 (1967) (describing minorities as having "pressure resources" and "competitive resources" that they utilize as a whole).

72. *Id.* at 119.

73. Eduardo Bonilla-Silva, *Rethinking Racism: Toward A Structural Interpretation*, 62 AM. SOC. REV. 465, 469 (1997).

74. *Id.*

75. DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL 195–209 (2007) (discussing the political, economic, educational, social, and cultural mechanisms that reinforce inequality).

76. *See* Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1064–68 (2010) (stating that most whites view inequality in the criminal justice system as a feature of social reality).

77. *See* David Wellman, *Unconscious Racism, Social Cognition Theory, and the Legal Intent Doctrine: The Neuron Fires Next Time*, *in* HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 56–65 (Hernán Vera & Joe R. Feagin eds., 2007).

unconscious individual processes, those individuals and groups responsible for discrimination are let off the hook.[78] Conversely, Berard criticizes some structural-sociological theorizations for incorrectly specifying causal relations, making erroneous inferences about the meaning of outcomes and effects, and employing faulty reasoning in making group-level assumptions.[79] He suggests that most conceptualizations begin with the effect—harmful disparities and disadvantages as a function of race—without specifying the causal mechanisms by which institutions racially discriminate.[80] Yet, as legal scholar Jerry Kang points out, and Bonilla-Silva recognizes, an either-or choice between these two levels of analysis is not mandated.[81] There are models for explaining racism that draw upon elements of individual-, group-, and institutional-level theories, as I discuss in more detail in Part II.C.

B. Contemporary Legal Understandings of Racism

Social-scientific understandings of racism have seeped into legal scholarship that grapples with how the law falls short in recognizing and remediating race-based harms. Critical race theory (CRT), in particular, pioneered the adoption of a more sociologically-attuned explanation of racism, by incorporating a definition of "race" that recognizes the historical, social, and structural elements that determine how humans understand race.[82] Thus, race is understood as a social category for which its meanings emerge from both historical and ongoing social and structural relations, and race organizes and hierarchizes those relations accordingly.[83] Critical race theorizations are also attuned to psychological phenomena. "[R]ace is not just a structural or macro dynamic. It is a micro and interpersonal dynamic as well; racial identities are formed in, and produced by, social encounters. In the context of everyday interactions, people construct—that is, they project and interpret particular images of—race."[84]

In CRT, the conceptualization of racism has also drawn on both psychological and sociological lines of theory. Charles Lawrence's

78. *Id.* at 12–13.

79. Tim Berard, *The Neglected Social Psychology of Institutional Racism*, 2 SOC. COMPASS 734, 734–37 (2008).

80. *Id.* at 735, 737

81. Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1147 (2010).

82. *See generally* Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). It should be noted that Critical Race Theory is more than just an explanation of race and racism; it is also a social and intellectual movement, emerging from the legal academy. Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking back to Move Forward*, 43 CONN. L. REV. 1253, 1259 (2011).

83. Crenshaw, *supra* note 82, at 1259; *see also* Bonilla-Silva, *supra* note 73; Haney López, *supra* note 76.

84. Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1771 (2003).

groundbreaking essay, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," published in the *Stanford Law Review* in 1987,[85] is paradigmatic in this regard, mapping out both a theory of non-motivational racism and an agenda for legal remediation that flows from this theory. While mainly psychological in orientation, Lawrence's perspective is not wholly isolated to an individual level of analysis.[86] Rather, it offers a complex and contextualized model of racism and bias, including a robust account of the emotion-laden dialogue (verbal and nonverbal) that comes with contemporary racism, including the emotional harms done to people of color, and a more historicized and structurally-oriented backdrop to its pervasiveness.[87] Moreover, where much of the implicit bias literature suggests that the "implicit" form of racism is distinct from and even, in some accounts, a substitute for "old-fashioned prejudice,"[88] Lawrence's theory highlights the interrelations of overt and directed expressions of "the ideology of white supremacy"[89] and unconscious racism/implicit bias.

About two decades later, legal scholars discovered the psychology of implicit bias in earnest, promulgating a large body of scholarship on "behavioral realism" and equal protection. For example, in 2006, the *California Law Review* published a symposium on "behavioral realism"[90] in which all six contributions, written by influential legal scholars and psychologists, directly addressed the relevance of implicit bias for the law. While much of this work squarely addressed equal protection issues, there is an emerging interest in the implication of implicit bias for Sixth Amendment issues related to jury composition and juror bias. For instance, Roberts evaluates the potential of two sets of IAT-based remedies for jury bias: one that would use the IAT to screen out biased jurors, and another that would use it as a tool to educate jurors about the problem of implicit bias.[91]

Legal practitioners, too, have begun to take seriously the implications of implicit bias for the law. Northern District of Iowa federal

85. Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). This piece functions as both a social theory of racism and as a groundbreaking argument for a new test for determining whether racial discrimination occurred—the "cultural meaning" test. See Part III for a full articulation of this test. For my purposes, I examine the legal theories for Lawrence's arguments about racism as a social and institutional phenomenon, and I am less concerned with the specifics of the legal remedies he puts forth.

86. *See id.*

87. *See id.* at 336.

88. Colin Wayne Leach, *Against a Notion of a 'New Racism,'* 15 J. CMTY. & APPLIED SOC. PSYCHOL. 432, 434 (2005).

89. Charles Lawrence, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 942 (2008).

90. *Symposium on Behavioral Realism*, 94 CAL. L. REV. 945 (2006).

91. Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 827 (2011) (arguing against the use of the IAT to screen out biased jurors and encouraging the use of the IAT as a tool to educate jurors, so long as it is done at jury orientation).

District Judge Mark Bennett suggests the IAT might hold the key to addressing some of the unresolved problems with the *Batson*[92] line of remedies.[93] He proposes that along with eliminating peremptory challenges and allowing for expanded attorney-led voir dire, jurors should be told about the research on implicit biases, and even assessed for implicit bias via the IAT.[94] He personally shows jurors who serve in his court a short presentation about the problem of implicit bias in an effort to mitigate its effects in the case at hand.[95]

This behavioral realism or implicit bias line of legal scholarship seems to owe as much to Lawrence's pioneering insights as to cognitive psychology, in terms of CRT's pioneering insights on the implications of cognitive processes for the law. Despite the conceptual overlap, however, the new legal scholarship has not always been explicit in giving such credit. So while Lawrence's original work was published almost two decades before the *California Law Review* symposium and has been groundbreaking in so many arenas, it garnered only a set of footnote mentions in one of the six articles in that 2006 symposium issue.[96] Indeed, Charles Lawrence himself has raised concerns about the narrow conceptualization of the social-cognition version of implicit bias and its potential for negative unintended consequences in legal reform efforts:

> I . . . fear that cognitive psychology's focus on the workings of the individual mind may cause us to think of racism as a private concern, as if our private implicit biases do not implicate collective responsibility for racial subordination and the continued vitality of the ideology and material structures of white supremacy. In its most extreme manifestation, this view of implicit bias, as evidence only of private, individual beliefs, is expressed as a right to be racist.[97]

Thus, as a line of theorizing, Lawrence's ideas tilt more toward the

92. Batson v. Kentucky, 476 U.S. 79 (1986).

93. Judge Mark Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions,* 4 HARV. L. & POL'Y REV. 149, 166 (2010).

94. *Id.* at 169.

95. *Id.* Likewise, Federal District Judge Janet Bond Arterton, in the District of Connecticut takes it upon herself to make race salient for jurors in her courtroom and educate them about unconscious racism. Honorable Judge Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1029–33 (2007–2008).

96. The only mention was in the article by Christine Jolls and Cass R. Sunstein, *The Law of Implicit Bias,* 94 CAL. L. REV. 969, 979, 986 (2006). While Lawrence's conceptualization, *supra* note 85, used the psychoanalytic discourse of "unconscious" rather than the kind of cognitive/heuristic language used by psychologists, many of the insights about the processes and outcomes of new forms of bias can be found in his scholarship. *Id.*, at 942.

97. Lawrence, *supra* note 89, at 942.

psychological end of the scale, yet they reserve a place for the role of structures and paradigmatic ideologies, which have not received as much attention in the behavioral-realism version of implicit bias.

There has been some reconciliation within legal scholarship between the behavioral-realism version of implicit bias and the perspective of CRT in regard to unconscious forms of racism. For example, two recent edited texts, "Critical Race Realism: Intersections of Psychology, Race, and Law"[98] and "Implicit Racial Bias Across the Law,"[99] integrate scholarship from both perspectives, with the former more explicitly grappling with the relationship between the two.[100] Ultimately, these perspectives are united in rejecting the legally required showing of intent in equal protection claims by highlighting the non-motivational, unconscious psychological processes by which humans understand and respond to race.[101]

On the other end of the spectrum, several legal scholars have looked to sociology for insights about the causes of and legal remedies for racism.[102] Ian Haney López, for instance, argues against the individual-perpetrator model of racism, instead turning to stratification theory for insights about contemporary racism.[103] Haney López suggests that "race in the United States functions as a form of social stratification: *racial categories arise and persist in conjunction with efforts to exploit and exclude.*"[104] Racial categories thus serve as "a central means of ordering and rationalizing the distribution of resources, broadly conceived."[105] CRT scholar Richard Delgado similarly argues for the centrality of "material factors" and the hierarchical structures that maintain material inequalities as root causes of racism.[106] In his conceptualization, the idealist/discourse theories, like Lawrence's, have very limited remedial potential in that they limit the scope of inquiry to individuals' interior life and elide the "structural, material-interest-serving means by which one group subordinates another."[107] Ultimately, however, given that the law is individualistic in orientation,[108] sociological understandings of racism have

98. CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW (Gregory S. Parks et al. eds., 2008).

99. IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

100. The Levinson and Smith volume includes contributors from Critical Race Theory, including Charles Lawrence himself, but outside of the Lawrence chapter, the framing is nearly exclusively in the "implicit bias" camp. For an example see *id.* at 6–7.

101. CRITICAL RACE REALISM, *supra* note 98, at 62–63; IMPLICIT RACIAL BIAS, *supra* note 99, at 202–03.

102. *See, e.g.*, Richard Delgado, *Two Ways to Think about Race: Reflections on the Id, the Ego, and other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001); *see also* Haney López, *supra* note 75 (evolving from a more integrated perspective of racism to a more fully sociological one based on social stratification theory).

103. Haney López, *supra* note 76, at 1027.

104. *Id.*

105. *Id.* at 1040.

106. Delgado, *supra* note 102, at 2280.

107. *Id.* at 2294.

108. *See generally* Craig Haney, *Making Law Modern: Toward a Contextual Model of Justice*, 8

less successfully penetrated the law than have psychological theories. Thus, implicit bias as a framework for understanding racism is increasingly dominating legal scholarship.

Nonetheless, given the prerogative within law (more so than in the basic social sciences) to mobilize knowledge in the furtherance of legal change, this body of scholarship has had to confront the relative strengths and weaknesses of each explanation of the mechanics of contemporary racism.[109] Consequently, one of the tension points underlying these various understandings has to do with their implications for the real world, particularly in terms of developing workable remediation strategies to combat racial inequality and injustice. In that regard, as Delgado[110] and Haney López[111] both make clear, beginning and ending with a purely individualistic, psychological conceptualization of racism will have limited remedial value for social inequalities. The utility of implicit-bias theories to generate relief will likely be limited to individuals who experience individualized harms and who can point to other individuals' expressions or behavior, consciously motivated or not, as the source of harm. Moreover, because implicit bias operates as an individual-differences theory of internalized, even non-conscious evaluative cognitions, its remedial utility is quite limited in the real world. It is hard to imagine how, on its own, the demonstration of implicit bias through the IAT or any other means could prompt a legal intervention, absent some clearly linked behavioral outcome of those cognitions.

C. Bridging the Levels of Analysis: Integrated Theories of Institutional Bias

There is no real debate that the network of organizations and institutions that comprise the American criminal justice system have deepened racial inequality in the mass incarceration era.[112] It therefore stands to reason that neither a theory that only explains individual-level cognitive processes[113] nor one that relies primarily upon aggregated outcomes as evidence of bias,[114] but can only indirectly infer the underlying causal mechanisms through logical assertions, will be of much use—in

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PSYCHOL. PUB. POL'Y & L. 3, 15 (2002).

109. Gregory S. Parks, *Toward a Critical Race Realism*, *in* CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 4–7 (Gregory S. Parks et al. eds., 2008).

110. Delgado, *supra* note 102, at 2282.

111. Haney López, *supra* note 76, at 1028.

112. *See generally* ALEXANDER, *supra* note 27; *see also* Haney López, *supra* note 76; Tonry & Melewski, *supra* note 32; *see generally* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

113. Again, the evidence for a cognition-behavior relationship is weak, especially if we think about how action takes place in massive people-processing institutions like criminal courts.

114. *See* P.J. Henry, *Institutional Bias*, *in* THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION (John Dovidio et. al eds., 2010) (critiquing the proposition from a methodological approach).

isolation—to temper the racial stratification and inequality inherent in criminal justice operations.

Thus, theories that aim to explain how individual actors—as situated in the context of legal organizations—generate racialized outcomes are particularly useful. Several articulations of institutional forms of bias[115] have explicitly grappled with the linkages between institutional-level outcomes and the individual-level processes occurring within and between those who occupy formal organizations.[116] Along these lines, social psychologist P.J. Henry puts forth a model for "institutional bias"[117] that explicates two dimensions—an intentional versus unintentional bias dimension and a "sum-of-individuals" versus "standards-of-practice" dimension—by which to categorize manifestations of institutional bias.[118] Thus, four quadrants emerge: 1) intentional bias that is the product of the sum of individuals (for example, the sum-of-individuals racist police officers who decide to make arrests based on the race of suspects); 2) unintentional sum-of-individuals bias (for example, the aggregate of those individuals who hire from their own social networks and who happen to share demographic features); 3) intentional bias that is the product of standards of practice (for example, laws that prohibit participation in a public benefit by race); and 4) unintentional standards of practice (for example, insurance policies that charge based on location of the insured, resulting in racially disparate impact due to residential segregation).[119] Henry argues that the type of institutional bias present, based on this four-quadrant categorization, will dictate the appropriate remediation strategy.[120] Those discriminators in quadrant two, for example, might be "corrected" through education, prejudice-awareness programs, and diversity training, thereby reducing institutional racism at least as a piecemeal project.[121] Yet, such a remedial method will have no effect on standards-of-practice forms of bias without corollary measures that actually intervene in those standards.

In earlier work grappling more explicitly with the psychological

115. *See* Mona Lynch, *Crack Pipes and Policing: A Case Study of Institutional Racism and Remedial Action in Cleveland,* 33 L. & POL. 179, 180–83 (2011) [hereinafter Lynch, *Crack Pipes and Policing*] (reviewing the classic articulations of "institutional racism").

116. As a sociological concept, an "institution" has proven hard to define, and it generally can encompass so many systemized social practices that, as an empirical matter, it is often necessary to narrow institutional inquiries to sub-types within that larger category. My working definition of "institution" here is more pedestrian than its more expansive sociological meaning. I view the web of organizations and systems that make up American criminal justice as a network of formal bureaucratic structures that, taken together, comprise a sub-type of legal institution imbued with cultural norms about how things are understood and done, as well as more formalized rules and regulations that set some parameters around those meaning-making processes. *See generally* W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS: IDEAS AND INTERESTS (2007).

117. Henry, *supra* note 114, at 434.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 436–37.

and sociological strands of theorizing about racism, Ian Haney López articulated a particularly useful model of institutional racism.[122] Here, Haney López challenges "rational action" theories of discrimination, turning to "new institutionalism" within the sub-discipline of organizational sociology to explain how discriminatory practices persist within legal institutions.[123] To set up his explanation of institutional racism, he builds on the concepts of "script institutionalism," which is the process by which institutional actors develop and use a set of "stock prescriptions of conventional action" that involve little conscious thought about their meaning or consequences,[124] and "path institutionalism," which speaks to the constraints and boundaries of institutional decision making, while allowing for more thoughtful and autonomous action.[125]

Institutional racism occurs when institutions engage in action that reinforces racial-status hierarchies—either harming a disadvantaged group or benefitting an advantaged group—while relying upon racial institutions.[126] Haney López defines the term "racial institution" as "any understanding of race that has come to be so widely shared within a community that it operates as an unexamined cognitive resource for understanding one's self, others, and the-way-the-world-is."[127] In this conceptualization of institutional racism, action may or may not be intentional, but it requires both the involvement of racial institutions *and* a behavioral component that enforces or reinforces a racial-status hierarchy.[128]

Haney López further specifies two forms of institutional racism: script racism, which is relatively undirected and automatic, and path racism, which is more directed and deliberated.[129] This bifurcation roughly maps onto Henry's intentional/unintentional dimension. However, it more explicitly considers how institutional actors' different kinds of cognitions and actions operate within a structured and constrained context, which encourage a limited set of responses often shaped by "racial institutions," to manage routine tasks.[130] Finally, Haney López argues that there is significant resistance to reform efforts, because racially institutionalized ways of thinking and acting become normalized and routinized, especially within highly bureaucratic settings. As a result, reforms seeking a change of

122. Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L. J. 1717, 1723 (2000) [hereinafter, Haney López, *Institutional Racism*]; *see also* Delgado, *supra* note 102, at 2287 n.76 (characterizing this theorization as a "bridge" between the unconscious racism/implicit bias line and the materialist approach advocated).

123. Haney López, *Institutional Racism*, *supra* note 121, at 1723.

124. *Id.* at 1781.

125. *Id.* at 1784.

126. *Id.* at 1806–08.

127. *Id.* at 1808.

128. *See id.* at 1809.

129. *Id.* at 1819–22.

130. *See id.*

practice are resisted because they do not make sense or seem appropriate within this context.[131]

Haney López and Henry converge in distinguishing levels of intentionality and in considering the degree to which individual-level behavior is constrained by institutional policies and practices. Ultimately, though, the Haney López model foregrounds the institutional influences in a manner more congruent with contemporary, bureaucratic organizational life. It also implicitly speaks to the role of norms and culture in organizational settings and teases out how expectations and operational logics develop in organized group settings, which consequently either catalyze or constrain behavior within institutional settings.

While Henry suggests that the unintentional standards-of-practice form of institutional bias is "the most dangerous, and controversial,"[132] Haney López well-illustrates that this is precisely where modern forms of institutional bias are most prevalent, particularly in legal settings. Under most circumstances, laws and public policies cannot deliver harms or provide benefits on explicit racial grounds, so intentional standards-of-practice forms of racism are not common.[133] Moreover, in legal institutions, individual actors are generally not fully autonomous in their actions, but rather behave according to scripts that allow varying, albeit constrained, degrees of individualized discretion. Consequently, the kinds of remedies that solely target sums-of-individuals forms of bias will not achieve much in large, complex, bureaucratic institutions where decision-making power is both diffused and often multi-level.

IV. Expanding the Haney López Model: Adding Empathy and Delineating Trigger Points

As noted above, there are some weaknesses in the conceptions underlying existing theories of racism about the human actor, as situated in the social world. In regard to the cognitive theories, much of the psychological research on implicit bias seems to proceed on an assumption that the behavioral manifestations of such attitudes are autonomous individual-level processes, unconstrained by the situational, group-level, organizational and institutional factors in which our lives operate. But such factors can and do constrain, direct, catalyze, or neutralize the expression of individuals' cognitions into actual behavior, so they are absolutely key to the ability of the empirical lab-based findings to have real world impact.[134]

131. *Id.*

132. Henry, *supra* note 114, at 435.

133. Although there are those who argue the implementation of the federal crack mandatory minimums especially, and other punitive drug laws generally, rose to this level of intentionality. *See* ALEXANDER *supra* note 27; *see also* Tonry & Melewski, *supra* note 32, at 5.

134. Within this is the generally unstated assumption that implicit bias functions much like a psychological trait—even though it is referred to as an attitude—so it has varied levels across individuals, much like extroversion, authoritarianism, and other personality traits. Therefore, it is

Thus, there is not a robust body of empirical research within the implicit-bias literature that meaningfully grapples with these real world conditions, particularly in the kinds of organizational settings that (re)produce bias. As such, the tacit message is that the "group" or the "organization" is simply the additive sum of its individual members, so identifying and taming individuals' level of bias will solve the problem of group-based or organizational-level discriminatory decision making. Henry's institutional-bias theory begins to address that shortcoming in the psychological literature.

Second, "implicit bias" is, for the most part, put forward in psychological scholarship as a cognitive construct, so most empirical examinations do not systematically wrestle with how emotion is tied to implicit forms of racism,[135] nor how the expression of bias uses the language of emotion. Accordingly, under the modal conceptualization of implicit bias, racist action is not conceptualized as being expressed affectively, but rather through situationally "appropriate" and ostensibly nonracial means.[136] Yet evidence suggests that cognitive and affective processes are both implicated in how individuals process information, make judgments, and behave in racially disparate ways.[137] Specifically, "implicit stereotyping processes are predictive of instrumental forms of race-biased behavior, whereas implicit evaluative processes are predictive of consummatory forms of race-biased behavior."[138] Moreover, in the criminal justice context, the mobilization of emotion has played a powerfully strategic, often-explicit role in advancing the racialized war on crime that has brought mass incarceration and sustained capital punishment into the U.S.,[139] so to ignore affective elements of racism is short-sighted. On that note, the implicit bias model is underdeveloped in regard to how racial stereotypes and biases become manifested—often complexly—even when they remain tacit by not openly expressing racial content.[140]

In regard to sociological conceptions of the human actor, there is an often-unacknowledged tendency to rely upon a "rational actor" model, if

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relatively stable and dispositional in nature. For an exception to this approach, *see* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1027–28 (2006) (delineating the way that various social psychological phenomena interact, from internal processes to situational ones, to shape behavior).

135. *See, e.g.*, Amodio and Devine, *supra* note 58.

136. Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism, in* PREJUDICE, DISCRIMINATION, AND RACISM: THEORY AND RESEARCH 61–89 (J. Dovidio & S. Gaertner eds., 1986).

137. Amodio and Devine, *supra* note 58, at 652.

138. *Id.* at 659.

139. *See, e.g.*, Beckett, *supra* note 27, at 11; *see also* JONATHAN SIMON, GOVERNING THROUGH CRIME 141–43(2007); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MAS INCARCERATION IN AMERICA 226 (2006) (discussing how the American political structure allows for the kind of emotionally manipulative populist politics that contributed to late 20th century penal expansion).

140. *See* generally DEVON W. CARBADO & MITU GULATI. ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA 15 (2013) (discussing the intricacies of this process in "post-racial" America wherein African Americans and other minorities in predominantly white institutions are often in a "racial double bind" as to how their Whites expect them to act.).

one is relied upon at all.[141] Moreover, the theoretical elaborations do not articulate the decision-making mechanisms implied by threat and other theories that view outcomes as the products of strategic action of dominant group members.[142] How do those individuals and groups who make race-based choices to benefit their own interests weigh their options? How do those decisions get constrained by social norms, bureaucratic rules, laws and regulations? In short, sociological models convincingly demonstrate group and institutional effects, but the process by which those effects come about is not as well-articulated nor as directly documented by empirical data.[143] Moreover, racism is conceptualized in many quantitative empirical models addressing discriminatory outcomes in a way that reduces "race" to a kind of essentialized causal variable unelaborated in its social meanings and effects. In Martin and Yeung's words:

> [R]ace as a term in causal models may reinforce the idea that race is itself a 'cause' of differences in outcomes between, say, Whites and Blacks. Not only does this invoke an idea of causality that makes little statistical sense . . . but it may lead us to consider that we can answer questions as to the reason for certain differences . . . simply by invoking the 'fact' of race, as opposed to considering this itself as a problem to be explained.[144]

In order to have a fully workable theory of how institutional bias occurs and persists, we need to begin with the following: First, a clear articulation of the institutional parameters (goals, purposes, rules, policies, and regulations) that comprise the setting and shape the institutional "toolkit"[145] that functions to define the universe of organizational responses, shape decision-making strategies, and order the modes of action. Second, we need a clearly articulated conceptualization of the institutionally situated actors who occupy and propel formal organizations. I suggest that this conceptualization is best rooted in social psychological understandings (as opposed to dispositional ones) of how contexts shape individual thought and action. Third, we need a clearly articulated conceptualization of institutional action in light of those parameters and actors.

Haney López's line of theorizing significantly advances this effort on all three counts. The institutional actor is well conceived in his account, particularly in terms of how both undirected and more purposeful cognitions are shaped by institutional parameters ("scripts"), which then

141. *See* Haney López, *supra* note 76, at 1039–40 (noting that the presumption of a rational actor is that people consider race when evaluating others simply due to it being efficiently observable).

142. *Id.*

143. Henry, *supra* note 114, at 436.

144. John Levi Martin & King-To Yeung, *The Use of the Conceptual Category of Race in American Sociology, 1937–99*, 18 SOC. F. 521, 522–23 (2003). On this point, see also, Osagie Obasogie, *Race in Law and Society: A Critique, in* RACE, LAW, AND SOCIETY (Ian Haney López ed., 2006).

145. Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273, 273 (1986).

shape action.[146] Moreover, he explicates how hegemonic ways of thinking at the societal level ("racial institutions") interact with the micro-organizational cognitions to produce racially discriminatory outcomes.[147]

In a recent line of work on selective drug-law enforcement, I built on the Haney López model of institutional racism by adding the concept of "institutional empathy,"[148] and its withholding, as one of the potential causal forces or triggers of biased action.[149] I was concerned with how institutional processes in criminal justice work to deny a place for empathy toward those subject to its intervention, and I argued that institutional empathy is largely locked out of the mundane practices of criminal justice, allowing for systematic racial harms to persist.[150] In this conceptualization, though, empathy is not merely an individual-level, cognitive-affective capacity or characteristic; rather, it functions at the group level and is catalyzed or constrained by contextual factors such as role demands, rules, policies, norms, and practices that dictate how things are and ought to be done.[151] I suggested that empathy was particularly important for understanding institutional racism in the administration of criminal justice because most of those adversely affected are already culturally constructed as especially unsympathetic by virtue of the criminal label.[152]

I also provided some initial evidence from a case study of policing and prosecution in low-level crack cases that demonstrated how this process works, finding that the significant constraints on institutional empathy played a part in the persistence of institutional racism in the face of direct, empirical, and often public challenges.[153] Its persistence was due to more than just shared, largely unconscious cognitive processes.[154] Institutional role parameters and case processing norms contributed to an accompanying lack of empathy among key decision makers for those who suffered the negative consequences of institutional racism in those cases.[155]

In the coming analysis, I aim to further advance a model of institutional bias specific to the criminal justice process by delineating three

146. Haney López, *Institutional Racism*, *supra* note 121, at 1781.

147. *Id.*

148. Lynch, *Crack Pipes and Policing*, *supra* note 115, at 183.

149. My working definition of empathy was as follows:

> In its narrowest sense, empathy refers to an individual's capacity to take on the perspective of another. From a psychological standpoint, though, empathy generally encompasses much more than that, in that it expects the empathizer not only to perceive another's point of view, but also to feel that other's experience . . . . Thus, empathy can be thought of as having both cognitive and affective components . . . and it may trigger a behavioral response as well. Empathy is generally considered an individual-level attribute; however, some have applied the concept to group-level processes.

Id. at 183.

150. *Id.*

151. *Id.*

152. *Id.* at 184.

153. *Id.* at 183.

154. *Id.* at 182.

155. *Id.* at 199–200.

ways in which institutional structures and context interact with those institutional actors who propel institutional action to produce bias. I hope to more precisely lay out the specific triggers for racial discrimination within criminal justice organizations by examining the immediate context for the existence of different moments of decision making in these settings, and by deconstructing the formal and informal rules, policies, and practices that govern how decisions are made. Within this context, I further probe the operation of "institutional empathy" by delineating when and where it is authorized, the mechanisms and opportunities for its exercise, and the costs associated with its exercise in both the capital system and the federal sentencing system. The model of institutional racism that I put forth is a meso-level theory that is robust in regard to the role of both institutional actors and the organizations in which they operate. In that sense, it is classically social-psychological, working between the disciplines of psychology and sociology to account for the "psychology of social institutions,"[156] with an emphasis on how the immediate contexts of those institutions produce and reproduce discrimination.

I start with a conception of the "situated legal actor" that derives from social psychology.[157] That is, I understand individuals who occupy institutional roles to be substantially shaped by their role and setting. Social psychology recognizes that individual dispositional differences exist but, in its classic version, it is concerned with how individuals make sense of the social world, and then how they act, based on contextual forces.[158] Thus, beginning with the foundational studies in the early 20th century, social psychologists have provided significant empirical evidence that situational factors can often prompt and predict behavior more effectively than dispositional ones.[159] The Milgram obedience studies, for example, powerfully demonstrate the power of the situation by documenting how the majority of subjects came to impose what they thought were damaging and even lethal voltages of electricity on other human beings because they were instructed to do so by the experimenter.[160] Similarly, the Stanford Prison Study from the 1970s demonstrated how the simulated prison environment, and the mere assignment of healthy young adults to the roles of prisoner or guard quickly bred a dangerous level of dysfunctionality.[161]

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156. HANS H. GERTH & C. WRIGHT MILLS, CHARACTER AND SOCIAL STRUCTURE: THE PSYCHOLOGY OF SOCIAL INSTITUTIONS (1954).

157. *See generally* LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991) (discussing the roots of situationist social psychology, including the pioneering studies).

158. *Id.*

159. *Id.*

160. Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57, 59 (1965). *See* Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and their Interactions*, 60 J. PERS. & SOC. PSYCHOL. 398, 399 (1991) (reviewing Milgram's study).

161. Craig Haney, Curtis Banks & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L. J. CRIMINOLOGY & PENOLOGY, 69, 89 (1973) [hereinafter Haney et al., *Interpersonal*

In short, to begin to deconstruct institutionalized systems of biased action, the actors must be understood as both thinking and acting within the constrained context of their given institutional settings. This means delineating the features of those contexts in order to make meaning of the human decision-making that emerges from them. Thus, three key guiding questions should be posed in an effort to reveal the production of racism in criminal justice institutions:

1. Where and how is bias implicitly inscribed in policies, procedural rules, and practices? These are the formal laws, internal policies, procedural rules, *and* the unwritten norms that dictate how business gets done in a given institution, comprising, in part, the institutional parameters delineated above. These become the taken-for-granted rules of engagement, therefore recognizing their biasing impact is difficult for institutional insiders.

2. Where and how is empathy—particularly in the form of relief from the harshest aspects of criminal justice intervention—authorized, and where and when is it unauthorized? This would include its articulation in formal policies, such as sentencing mandates and guidelines, as well as procedural structures that provide for, or punish, the exercise of empathic discretion.

3. What are the stages and places where institutional actors have the most decision-making autonomy and the least oversight? These are places in which the convergence of individual actor features—explicit or implicit cognitions and affective responses that are both societally and micro-institutionally produced—and discretionary decision-making power would be expected especially to lead to racially biased outcomes.[162] Within this, how do the distinct institutional roles differentially inhere such power?

Below, I explore each of these questions by sketching out their relevance for both the administration of modern capital punishment and the Guidelines-era federal courts' war on drugs.

V. Institutional Bias in Two Punishment Systems

A. Inscribing Racism in Sentencing Laws, Policies, & Procedures

The most infamous of the formal inscriptions of racism in criminal law since the Civil Rights era is the provision of the Anti-Drug Abuse Act of 1986 in which Congress specified that crack cocaine be treated significantly more severely than any other drug.[163] Under the 1986 Act, it took a trafficking offense involving 500 grams of powder cocaine to trigger

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Dynamics].

162. As an empirical matter, this suggests the difficult task of examining how decision makers work behind closed doors. *See* Jeffery T. Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 JUST. Q. 1 4–5, 25 (2012) (discussing this challenge).

163. Richard Dvorak, *Cracking the Code: 'Decoding' Colorblind Slurs during the Congressional Crack Cocaine Debates,* 5 MICH. J. OF RACE & L. 611, 613 n.4 (2000).

a mandatory minimum sentence equal to that involving five grams of crack cocaine.[164] Two years later, Congress intensified its disparate treatment of crack: a provision of the Omnibus Anti-Drug Abuse Act of 1988 specified that mere possession of crack cocaine triggered a mandatory prison sentence of five years, whereas no other possession offense in the federal system required a prison sentence at all (a *maximum* one year sentence was typically specified).[165] These laws distinguished two drugs—crack and powder cocaine—that are distinct only by level of refinement for disparate punishment in the midst of a panic that identified African Americans with crack use and that blamed this use for a host of social crises.[166]

Michael Tonry suggested that such laws were enacted in a manner that "forseeably and unnecessarily blighted the lives of hundreds of thousands of young, disadvantaged black Americans,"[167] and the data bear that out. The U.S. Sentencing Commission suggested in its *15 Year Report*, as well as in previous reports on federal cocaine policy,[168] that the crack cocaine provisions of the Guidelines were directly responsible for the changing racial demographics of those sentenced in the federal system.[169] The Commission arrived at this conclusion after analyzing the high proportion of crack cases sentenced and the extreme racial disproportionality in the federal crack cocaine caseload.[170] Since the crack cocaine mandatory minimums have been enacted, federal courts have sentenced thousands of people per year for crack offenses, peaking in 1998 with over 9,500 sentences imposed for crack offenses. Of those so sentenced, fewer than 10% have been white, and between 80–90% each

164. In the late 1990s, Congress began to ramp up the punishment against methamphetamine offenses to equalize crack and methamphetamine punishment. *See* Kyle Graham, *Sorry Seems to be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765 (2011) (giving a full account of crack and powder mandatory minimum law-making).

165. *Id.* at 779 n.69.

166. *See generally*, DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS (2007).

167. MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 82 (1996).

168. *Fifteen Years of Guideline Sentencing, supra* note 24, at 113, 131–32; *see also* U.S. Sent'g Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 154 (1995), *available at*:
http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/index.cfm; U.S. Sent'g Comm'n,
[hereinafter *Cocaine and Federal Sentencing Policy*]; U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 102 (2002), *available at*:
http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf; U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* at B-13–B-24 (2007) *available at*:
http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf

169. *Fifteen Years of Guideline Sentencing, supra* note 24, at 113, 131–32.

170. *Id.*

year have been African American.[171] Conversely, African Americans make up less than 30% of the defendants sentenced for powder cocaine offenses.[172] Thus, by distinguishing these two forms of cocaine and then assigning significantly harsher sentences to crack offenses, African American drug defendants end up with dramatically longer offenses, and are less likely to be eligible for non-prison sanctions than are other drug defendants. Such outcomes are the combined product of the formal law's construction coupled with federal prosecutors' extreme discretion in selecting eligible cases into the federal system to prosecute, which appears to correlate with defendants' race.[173]

While the federal crack sentencing laws are the most well-known example of criminal law-making with a disparate impact,[174] the Guidelines themselves have inscribed racial bias in multiple, less obvious ways. Most significantly, the criminal record of sentenced defendants figures into sentencing in an additive and highly consequential manner. On its face, a criminal record might be understood as an objective and rational basis for distinguishing degree of sentencing; however, there is substantial evidence that the populations of the criminally involved and the criminally convicted are distinguishable, and race plays a role in that distinction. Some portion of the arrestable population is protected from detection—and, to a lesser extent, conviction—as a consequence of race, ethnicity, age, gender, geography, and economic circumstances.[175] Thus, the acquisition of a formal criminal record is demographically and systematically stratified, particularly in offense categories subject to proactive and/or discretionary policing.[176] Even violent priors implicate racial inequality. Spatial segregation by race, which characterizes the American residential landscape, and racially stratified economic disadvantage that maps onto those segregated patterns intersect in ways that give rise to violence and turmoil in the most disadvantaged, predominantly minority

171. *Id.*

172. *Cocaine and Federal Sentencing Policy*, *supra* note 168, at 15.

173. *See, e.g.*, United States v. Clary, 846 F. Supp. 768, 771–73 (E.D. Mo. 1994) *rev'd* 34 F.3d 709 (8th Cir. 1994) (grappling with evidence of selective prosecution in crack cocaine cases); *see also* United States v. Armstrong, 48 F.3d 1508, 1512–16 (9th Cir.1995), *rev'd* 517 U.S. 456 (1996) (same).

174. In part due to the sustained critique by a broad range of groups and the organized mobilization of a number of constituencies, Congress passed the 2010 Fair Sentencing Act, which reduced the 100-to-1 powder-to-crack cocaine quantity disparity to 18-to-1, and eliminated mandatory minimums for simple possession of crack cocaine.

175. *See generally*, *infra* note 176.

176. *See, e.g.*, Jeffrey Fagan et al., *Street Stops and Broken Windows Revisited: Race and Order Maintenance Policing in a Safe and Changing City*, *in* EXPLORING RACE, ETHNICITY AND POLICING: ESSENTIAL READINGS (Stephen K. Rice and Michael D. White, eds., 2010) (discussing the extreme demographic disparities in proactive policing in New York); Lynch, *Crack Pipes and Policing*, *supra* note 115 (discussing selective enforcement of drug laws in Cleveland); A. RAFIK MOHAMED & ERIK D. FRITSVOLD, DORM ROOM DEALERS: DRUGS AND THE PRIVILEGES OF RACE AND CLASS (2010) (discussing the relative immunity from arrest and prosecution of well off, predominantly white college student dealers).

neighborhoods.[177]

The race-related nature of the production of prior criminal justice involvement is no more prevalent than in the demography of drug offending arrests and prosecutions, both misdemeanors and felonies, which have been well-documented to be unrepresentative of actual offense prevalence demographics.[178] Such crimes are particularly prone to the "policing race and place"[179] practices that are inherent in proactive order-maintenance and hotspot policing practices that deploy officers in patterns that ensure over-representation of the poor and minorities in arrest and conviction statistics.[180]

Moreover, the very discretionary police power to make contact with those in public places and stop motorists is wielded unevenly and in racially biased patterns.[181] Young men of color are hugely overrepresented among those subjected to such stops, and are further likely to be subject to questioning, frisks, and searches.[182] Moreover, over the past several

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177. RUTH D. PETERSON AND LAUREN J. KRIVO, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE (2010).

178. *See, e.g.*, Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 129–31 (2006); *see also* Katherine Beckett et al., *Drug Use, Drug Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 435–37 (2005); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, JUST. Q. 22–23 (Jan. 22, 2013), http://www.gmuace.org/documents/publications/2013/examining.pdf.

179. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. R. 43, 44 (2009).

180. Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL L. STUD. 591, 594–98 (2010); *see also* Mona Lynch, et al., *Policing the 'Progressive' City: The Racialized Geography of Drug Law Enforcement,* 17 THEORETICAL CRIMINOLOGY 335, 335 (2013) ("examin[ing] how historically embedded local politics shape the varied styles and structures of policing that result in racially discriminatory enforcement patters").

181. *See* Capers, *supra* note 179, at 56–59; *see also, e.g.,* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. R. 946, 1030 (2002); Albert J. Meehan & Michael C. Ponder, *Race and Place: The Ecology of Racial Profiling African American Motorists*, 19 JUSTICE Q. 399 (2002); Kenneth J. Novak & Mitchell B. Chamlin, *Racial Threat, Suspicion, and Police Behavior: The Impact of Race and Place in Traffic Enforcement*, 58 CRIME & DELINQ. 27 (2012); Sunghoon Roh & Matthew Robinson, *A Geographic Approach to Racial Profiling: The Microanalysis and Macroanalysis of Racial Disparity in Traffic Stops*, 12 POLICE Q. 1137 (2009).

182. Fagan et al., *supra* note 176, at 313. Jeffrey Fagan's statistical analyses of NYPD's policing practices were critical to the decision in *Floyd v. City of New York*, 283 F.R.D. 153, 166–67 (S.D.N.Y. 2012), in which Judge Scheindlin determined that the NYPD's stop-and-frisk practices, which also involved racial profiling of African Americans and Latinos, were unconstitutional. This body of work exemplifies how the risk of police contact is racially determined, which contributes to the over-selection of minorities for prosecution and conviction as a function of race. See also VICTOR RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS, (2011) for an in-depth ethnography of how African American and Latino boys are policed and criminalized in an urban California setting. This kind of discretionary policing extends to possession of guns and other illegal items as well. It also extends to non-public spaces wherein youth in urban settings are disproportionately subject to searches and discipline at schools and other social spaces to a degree that suburban and rural youth are not. *See* Aaron Kupchick, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 159–93 (2010) (citing prior research on this and reporting on his own research documenting racially unequal treatment in schools). In addition, the racial composition of student bodies at schools predicts the level of punitive intervention, such that schools with large African American populations are especially likely to engage in highly punitive responses to misbehavior, including suspensions, expulsions, and arrests. *See* Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 35–40

decades the rise of gang-related status offenses and enhancements has further racialized the policing and prosecution of youth and young adults who reside in neighborhoods deemed gang-infested.[183] Consequently, the criminal records of those subject to sentencing in federal court have been shaped at least in part by experiential differences in exposure to early and repeated police contact. As such, the "prior record" is hard to sustain as an objective and true measure of either criminal propensity or punishment desert.

Under the Guidelines and statutory mandates, a defendant's prior record figures into the sentencing calculus in multiple ways. First, it is the basis for assigning a Criminal History category, which ranges from one to six and weighs heavily in the final sentence. The Criminal History category is determined by a points system that provides values for prior convictions and sentences based on the quantity, severity, and recency of those priors.[184] For instance, the final Guideline minimum sentence for a defendant with an offense level of twenty-one (near the middle of the Y-axis of the Sentencing Table)[185] who is in Criminal History category one is thirty-seven months, but the same conviction for someone in Criminal History category six is seventy-seven months.[186] But that is just the start of how criminal history affects sentencing. In drug conviction cases subject to mandatory minimum sentences, the only relief from the prescribed minimum sentence that a judge can directly grant is through the "safety valve."[187] This exception is only available to those with the most minimal prior record: roughly, anyone with a prior conviction that resulted in a sentence of more than sixty days confinement and/or was on any criminal justice supervision at the time of the instant offense does not qualify for the exception.[188] The U.S. Sentencing Commission demonstrates that this relief is differentially available as a function of race. In 2010, white drug defendants were three times more likely to obtain a safety-valve reduction than African American drug defendants.[189]

Moreover, prior controlled-substance felony convictions are lumped in with violent priors as qualifiers for both the "career offender" and "armed career criminal" statutory enhancement, both of which dramatically increase sentence lengths.[190] Career offenders may only have

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(2010).

183. Robert J. Durán, *Legitimated Oppression: Inner-City Mexican American Experiences with Police Gang Enforcement*, 38 J. CONTEMP. ETHNOGRAPHY 143, 163 (2009). *See also* RIOS, *supra* note 182.

184. U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 4A1.2 (2012).

185. *Id.* ch. 5, pt. A.

186. *Id.*

187. *Id.* § 5C1.2.

188. *Id.* § 5C1.2; *see id.* § 4A1.1(b), (d) (describing what offenses qualify as "prior offenses" for purposes of the Criminal History category of the Guidelines).

189. *Report to Congress: Mandatory Minimums*, *supra* note 17, at 123, 132.

190. U.S. SENTENCING GUIDELINES MANUAL § 4B1.4 (2012) (providing for the Guidelines calculation under the armed career criminal statute); *id.* § 4B1.1 (providing for the calculation of the

two prior felony drug convictions—even ones that resulted only in community supervision sanctions—but will automatically be placed in Criminal History category six and receive a further enhancement of sentence when this sentencing provision is imposed.[191] The armed career criminal enhancement requires a mandatory minimum sentence of fifteen years; and, when the instant conviction is subject to a sentence of fifteen or more years, it further lengthens the total sentence to be served.[192] The Commission acknowledged the racially disparate impact of the career offender provision in the 2004 *15 Year Report*.[193] Finally, unique to federal drug cases subject to mandatory minimums, 21 U.S.C. §§ 841(b) and 960(b) both include enhancement provisions based on the defendant's prior drug convictions.[194] A qualifying prior drug conviction increases a five-to-forty year range to a ten-years-to-life range, and it increases a ten-year mandatory minimum to a twenty-year mandatory minimum. A second qualifying prior conviction increases a ten-year mandatory minimum to a mandatory life sentence.[195]

Race is also inscribed in capital punishment law and procedure. As in the federal drug trafficking context, the criminal record plays a role in capital eligibility and sentencing, although with less force. Certain prior convictions, or indicia of prior criminal justice involvement, can be used under some statutes to elevate a murder case to capital-eligibility. In many jurisdictions, a prior homicide or other serious felony conviction serves as such a qualifier, as does the commission of a crime while in detention or under the control of the criminal justice system.[196]

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career criminal guideline).

191. *Id.* § 4B1.1; *see also* Amy Baron-Evans & Kate Stith, *Booker Rules,* 160 U. PA. L. REV. 1631, 1688 ("The Commission concluded that the career offender guideline—as applied to those who qualify based on prior drug convictions, which most defendants subject to this guideline do—vastly overstates the risk of recidivism, has no general deterrent effect, and has a disproportionate impact on black offenders.").

192. U.S. SENTENCING GUIDELINES MANUAL § 4B1.4 (2012).

193. *Fifteen Years of Guideline Sentencing*, *supra* note 24, at 133 ("Although Black offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline. Most of these offenders were subject to the guideline because of the inclusion of drug trafficking crimes in the criteria qualifying offenders for the guideline.").

194. 21 U.S.C. §§ 841(b), 960(b) (West 2010).

195. These provisions require notice to be filed by the U.S. Attorney's office seeking the enhancement, pursuant to 21 U.S.C. § 851 (West 2010).

196. For example, the Missouri "narrowing" statute includes three aggravators along these lines. Missouri Revised Statute §565.032 specifies seventeen aggravating circumstances, one of which would need to be found true in order to be eligible for death. MO. REV. STAT. § 565.032 (West, WestlawNext current through the end of the 2013 First Regular Session of the 97th General Assembly, pending corrections received from the Missouri Revisor of Statutes). The three aggravators implicating prior criminal justice involvement are: "(1) [t]he offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;" "(9) [t]he murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;" and "(10) [t]he murder in the first degree 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." *Id.* at §

More broadly, prior criminal record is often specified as a factor for juries to consider when deciding between a life and death sentence.[197] To that end, where a given prior is used as both a narrowing factor and as an aggravating factor, it counts twice against the capital defendant. The mirror of this—with a similar consequence—is that in many jurisdictions, the sentencing statute specifies that a lack of criminal record can be considered as mitigation in favor of a life sentence.

The capital punishment system also has a unique policy feature that inscribes bias within its institutional parameters: death qualification of the sentencing body. The death qualification process sorts potential jurors as a function of their ability to "follow the law" in imposing punishment; so, they must be open to the possibility of sentencing a defendant to death, but not to the point that they would not also consider a life sentence.[198] Death qualification, in practice, disproportionately excludes potential jurors of color,[199] who are more likely to be empathic to all capital defendants[200] and less likely to demonstrate racial bias against minority defendants.[201] As such, the "standards of practice" for determining who is eligible to make the ultimate sentencing decision in a capital case introduces racial bias through the narrowing of eligibility on ostensibly non-racial grounds.

B. Empathy's Place: Authorized and Unauthorized Modes for Mitigating Harsh Punishments

Empathy is both formally and informally regulated in the contexts of federal drug prosecutions and in capital cases. At the formal end of regulation, however, death penalty sentencing statutes—as governed by a large body of Supreme Court jurisprudence—and the Federal Sentencing Guidelines diverge as to when and how empathy is authorized. Both

565.032(2)(1), (9), (10).

197. For just one example, see CAL. PENAL CODE § 190.3(c) (West, WestlawNext current with urgency legislation through Ch. 800 of 2013 Reg.Sess., all 2013-2014 1st Ex.Sess. laws, and Res. Ch. 123), which authorizes prior felony convictions as factors that can be weighed in favor of death. The actual language of the statute directs the fact-finder to "take into account any of the following factors if relevant . . . (c) [t]he presence or absence of any prior felony conviction." *Id.*

198. *See, e.g.*, Wainwright v. Witt, 469 U.S. 412, 419–26 (1985); Morgan v. Illinois 504 U.S. 719, 728–29 (1992); *see also* Marla Sandys & Adam Trahan, *Life Qualification, Automatic Death Penalty Voter Status, and Juror Decision Making in Capital Cases*, 29 JUST. SYS. J. 385 (2008) (discussing the difficulties of screening out automatic death penalty jurors).

199. *See* James D. Unnever & Francis T. Cullen, *Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race*, 44 J. RES. CRIME & DELINQ. 124 (2007) (discussing how whites differ from many minorities in their attitudes about capital punishment).

200. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 30 (2000).

201. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 257–58 (2001); *See also* Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 LAW & SOC. REV. 69, 75 (2011) (noting one is more likely to feel empathetic toward another perceived to be similar to himself, thus a minority juror is more likely than a white juror to feel empathetic toward a minority defendant).

systems have an overarching goal of "uniformity," or at least rationalization, in outcomes for "like" defendants subject to sentencing.[202] However, since capital punishment is supposed to be applied narrowly and is meant to be reserved for only the most culpable of convicted defendants, the system walks an awkward tightrope as to how that narrowed class is ultimately determined.[203] Put more concretely, the capital sentencing structure is supposed to be closed-ended in defining those factors that can be weighed in favor of a death sentence,[204] and completely open-ended in what can be offered as mitigating evidence.[205] Consequently, "sympathetic"[206] emotional responses to the defendant are authorized by case law (and sometimes by statute, as in the case of California), including empathetic identification.[207]

Evidence from empirical studies employing a wide range of methodologies indicates that, partly as a consequence of the individual and group-level biasing that results from death qualification, an "empathic divide"[208] exists between capital sentencers and those whom they sentence, particularly defendants of color. There are two dimensions to the racialized empathic divide. First, as Haney argues, capital jurors generally have life experiences that are vastly different than most capital defendants, and white jurors who sit on cases involving African American defendants are even less likely to understand and empathize with the structural forms of racism that shape the lives of many African Americans , thereby not giving weight to appropriate "structural mitigation."[209]

Moreover, whites, especially white men, appear to discount the *same* mitigating evidence for African American defendants that they decide is mitigating, in favor of white defendants, suggesting that racial difference in itself serves as a barrier to empathy.[210] Indeed, the findings from the

202. Barclay v. Florida, 463 U.S. 939, 960 (1983).

203. *Id.*

204. Zant v. Stephens, 462 U.S. 862, 890–91 (1983).

205. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

206. See CAL. PENAL CODE § 190.3(k) for an example of a statute authorizing sentencers to "consider sympathy or compassion for the defendant or anything [they] consider to be a mitigating factor."

207. Despite the limited nature of aggravation, the capital sentencing system also allows empathy and other emotional responses for the victim, presented in victim impact testimony, which has the potential to exacerbate victim-based racial disparities in sentencing. *See* Payne v. Tennessee, 501 U.S. 808, 808 (1991) ("The Eighth Amendment erects no per se bar prohibiting a capital sentencing jury from considering 'victim impact' evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family, or precluding a prosecutor from arguing such evidence at a capital sentencing hearing.").

208. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1558 (2004) ("The empathic divide describes jurors' relative inability to perceive capital defendants as enough like themselves to readily feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors' own.").

209. *Id.* at 1582–84.

210. Lynch & Haney, *supra* note 201, at 88–89.

Lynch and Haney experiments suggest that individual and group-level bias are not evidenced as differential negative cognitive assessments (i.e., the African American defendant was not rated as more dangerous or callous), but rather as emotionally driven in-group favoritism, with white jurors, especially white men, giving more effect to mitigating evidence for white defendants.[211] This process was magnified as a function of jury composition, suggesting that the less diverse the jury unit, the more differential empathy plays a role in judgment.[212] Thus, in the case of capital sentencing, by first setting parameters that inscribe racial bias through the inclusionary rules for legal actors, then authorizing empathic judgments, the exercise of empathy becomes a racially-biasing mechanism in this setting.

Conversely, since their inception, the Federal Sentencing Guidelines have tightly regulated individualization and empathy in the formal sentencing process. Indeed, the Guidelines represent one of the most radical transformations in sentencing policy precisely *because* they remove nearly all traditional sentencing factors from the calculus, effectively reducing sentencing judges to mere clerks who find the correct sentence in the sentencing grid.[213] The Guidelines deemed most aspects of the sentenced defendant's past history (other than criminal history), present circumstances (except the circumstances of the offense, even if unproven in court), and future needs or potential as irrelevant to the sentencing decision.[214] The Guidelines Manual, in most cases, specifically prohibits judges from considering a host of traditionally relevant defendant-specific individualizing factors in sentencing for purposes of "departure," including age, educational attainment or vocational skills, employment history or career potential, family status or responsibilities, physical, mental or emotional condition, and disadvantaged background.[215]

Thus, the Guidelines and statutory mandatory sentencing schemes have aimed to minimize the human aspects of sentencing in ways that excise an individualized and potentially empathic sentencing procedure. First, they aim to severely constrain the discretion and individualized decision-making of judges in sentencing cases by specifying in great detail how culpability levels are to be determined and the appropriate sentence range for each of the 258 possibilities that exist in the grid. Second, the Guidelines removed consideration of many of a given defendant's unique characteristics from the sentencing equation. The defendant's background is only relevant with respect to prior criminal acts; otherwise, special needs, talents, strengths, or deficiencies are generally not to be considered in

211. *Id.*

212. *See generally* Bowers et al., *supra* note 201 (demonstrating this through CJP research involving interviews with former capital jurors).

213. Judge Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing,* 4 OHIO ST. J. CRIM. L. 523, 533–34 (2007).

214. *See* Baron-Evans & Stith, *supra* note 191, at 1694–97 (providing a detailed history of how the Commission came to exclude most sentencing mitigation from the Guidelines).

215. U.S. SENTENCING GUIDELINES MANUAL ch. 5 (2012).

sentence determinations. Even the defendant's motivations and intentions relative to the instant offense have been given short shrift during the Guidelines era, particularly in drug offense cases. Even under the post-*Booker* advisory Guidelines, judges must still begin with the calculation, and then provide a written justification for any departures from the Guideline sentence, thereby yoking all sentences to these rules before deviations can occur. As a consequence, empathic consideration by the court is discouraged by the procedures and rules that guide sentence decision-making, making it an aberration to consider individualizing sympathetic factors.

The Commission viewed this system as the best method of reining in various forms of sentence disparities, including racial disparities in sentence outcomes. But as indicated in Part II.A., the Guidelines led to vastly more and longer prison sentences for African Americans relative to whites, particularly in drug cases. In part, this over-regulation of formal sentencing institutionalized inequality by defining "equality" as narrowly construed by known criminal acts, past and present, thereby reducing the sentenced defendant to little more than his current and prior criminal record. As noted in the previous section, this construction is not the objective, race-neutral indicator it is purported to be; moreover, this narrow construal of the sentenced subject ensures that racially divergent life experiences cannot mitigate the extremely harsh punishments that are, themselves, racially disparate.

One final point about the role of institutional aspects of empathy: As a structural matter, the exercise of empathy in noncapital contexts is generally a matter of exception. As such, it comes with costs to those actors who exercise it. Judges who sentence leniently on the basis of an individualized empathic response to a given defendant's plight may incur anger from prosecutors, mark themselves as easy targets for defense attorneys, or be viewed by peers as being rogue and thereby damaging the overall legitimacy of the judge role. Prosecutors, too, spend human capital when they give breaks in individual cases and thus run the risk of reprimand within their offices, in addition to marking themselves as soft touches in plea negotiations. In the federal system, the forms of authorized "exceptions," to the draconian default sentences, including 5K1.1 "substantial assistance" departures granted by prosecutors, run the risk of becoming the currency of disparity.[216] And to the extent that those actors themselves can identify with and empathize with the defendants seeking relief, they can be expected to be more willing to use their capital to extend

216. In an analysis of federal sentencing outcome data from the years 1997–2000, Brian Johnson and his colleagues found that "black and Hispanic offenders were less likely to receive both substantial assistance and other downward departures compared with whites, and they generally received slightly shorter sentencing discounts." Minority defendants were especially disadvantaged relative to whites in receiving substantial assistance departures. Brian D. Johnson et al., *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 CRIMINOLOGY 737, 769 (2008).

consideration.[217]

C. The Discretionary Moments: The Unregulated Front End of the System and the Complexly Regulated Back End

The discretionary decision-making power in these two systems, as well as in other criminal justice systems, is best conceptualized as both path-dependent and integrated across stages and decision-makers. Thus, the final decision point in trial-level criminal courts—sentencing—is the cumulative product of many discretionary decisions, often made by different actors in preceding stages. Consequently, those left standing to be sentenced by a judge, or a jury in death penalty cases, are not necessarily representative of those who would qualify in the initial pool for prosecution and conviction. Moreover, where discretion is constrained at one stage or for one set of actors, it is thereby increased somewhere else and/or for someone else in that system. In other words, discretionary power never disappears in these kinds of people-funneling institutions; it instead shifts to different actors and/or points in the process when it is reduced for a given actor or process.[218]

Both the American capital punishment system and the federal criminal justice system represent extremes in how decision-making discretion is regulated system-wide. Specifically, both are characterized by vast charging discretion, substantial plea negotiation discretion, and complexly regulated formal-sentencing discretion. This funnel of discretion fits most of criminal justice, however, the acute angles on these two funnels contribute especially to the production of institutional racism. This is partly the result of the attempts to address disparities in outcomes by regulating *only* the last stage in the system.

Institutional racism is also the function of the super-discretionary nature of the capital punishment and federal criminal justice systems. As I detail below, local prosecutors typically seek a death sentence in only a small fraction of capital-eligible homicides, and their calculus for determining which to pursue as such is generally hidden from the public. Similarly, in the federal system, U.S. Attorneys infrequently have primary crime-fighting responsibilities since states manage the prosecution and sanctioning of most criminal offenses. This is especially true in drug-related offenses, where the federal code overlays a very extensive network of state laws that criminalize drug possession, manufacturing, distribution, and sales. Consequently, federal prosecutors select just a minute share of

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217. Research findings demonstrate that the demographic diversity of U.S. Attorneys' Offices mitigates racial disparities in sentence outcomes in the federal system. Geoff Ward et al., *Does Racial Balance in Workforce Representation Yield Equal Justice? Race Relations of Sentencing in Federal Court Organizations*, 43 L. & SOC'Y. REV. 757, 794 (2009).

218. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2, 10–11 (2013) (discussing hydraulic discretion in criminal justice).

potentially eligible defendants to charge and prosecute, and this decision-making process is largely hidden from scrutiny. This early stage of processing appears to be one that is key to racially disparate outcomes in both systems.[219] Yet, in both systems, efforts to regulate racial disparities have largely ignored this discretionary starting point.

One of the constitutional problems identified in *Furman* was the capricious manner in which the death penalty was imposed, which was seen, at least by Justice White, to be the consequence of the infrequency with which it was applied to potentially eligible cases.[220] This set off the multiple legislative, and ultimately jurisprudential, efforts to construct a "rational" system.[221] Unfortunately, little of this construction regulates prosecutorial discretion in seeking death sentences, despite its import to these constitutional concerns. There is little doubt, empirically speaking, that in most death penalty jurisdictions, the characteristics of the group of murder cases that are pursued as death cases have significant overlap with the group for which death is not sought.[222] As such, the rationality called for by extensive case law is elided at the front end of the system. Indeed, courts have imposed no real restrictions on how prosecutors decide which of the ostensibly death-eligible cases they receive will be pursued as capital cases, nor have they regulated how prosecutors use capital charging as a tool to obtain guilty pleas.

Take Los Angeles County as an example. Partly due to its size, it has produced the most death sentences in the state of California in the modern era, and it is among the top counties in the nation in that regard.[223] Nonetheless, data from 1996–2006 indicate that on average, only 4.5% of the homicide cases[224] that were filed in that office were pursued capitally, of which 39% ended in a death sentence.[225] Prosecutors did, however, file "special circumstances" much more broadly, likely in an effort to induce

219. *See* Lynch, *Theorizing*, *supra* note 2, at 180 (discussing this in the drug-law context); *see also* Barbara O'Brien, *Recipe for Bias: An Empirical Look at the Interplay between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009) (discussing cognitive bias, structural factors, and prosecutorial decision-making generally); Baldus, et al., *supra* note 55, at 4–5, 8–11 (noting how much the capital case selection process contributes to defendant and victim racial disparities).

220. Furman v. Georgia, 408 U.S. 238, 310, 313 (1972).

221. Burt, *supra* note 36, at 1765–82 (describing the period following *Furman*).

222. *See* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1306–07 (1997) (discussing how the California statute is broader post-*Furman* than it was pre-*Furman*); *see also* Liebman and Marshall, *supra* note 36, at 1647 (discussing the jurisprudence that allows for this to persist).

223. Nicholas Petersen & Mona Lynch, *Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, 102 J. CRIM. L. & CRIMINOLOGY 1233, 1253 (2012).

224. *Id.* at 1248 (showing data from several studies indicating that nearly nine out of ten first-degree murder cases would qualify to be a capital case, based on the expansive list of "special circumstances" in California).

225. *Id.* (noting that there were, on average, 571 homicide cases filed per year, 168 in which special circumstances were filed, 26 that were pursued as death cases, and 10 that resulted in death).

guilty pleas.[226] Little is known about how this office, or others, select the handful of cases in which they pursue a death sentence.[227] What we do know is that this is precisely the stage where victim-based discrimination emerges. White victims are overvalued relative to victims of color in the sense that prosecutors are more likely to seek death in cases with white-victims, other case-relevant factors being equal.[228]

Similarly, in the federal criminal justice system, part of the stated rationale for the original promulgation of the Guidelines was to address disparities in outcomes. In many ways, the enactment of the Sentencing Reform Act, and similar state-level legislative acts, was a radical response to that stated problem, given the level of intervention it authorized into what had been the relative autonomy of judicial sentencing discretion.[229] If Congress was inclined to radically reform how cases were adjudicated and sentenced in federal courts, it could have also, or alternatively, intervened in the autonomy of prosecutors. But like most of the "sentencing revolution" happening around the country during that period, the target of reform was nearly exclusively aimed at judges and their authority at the final stage of the adjudication process.[230] As a consequence, federal prosecutors are unregulated as to whether and how they charge eligible suspects within their jurisdiction, leading to vast variations between districts in criminal caseload sizes, composition, and demography of federal defendants.[231]

This front-end super-discretion in the federal system does triple-duty in producing bias. First, case selection itself appears susceptible to racially biased determinations, especially in drug trafficking cases.[232]

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226. *Id.*; *see also* Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 484–86 (2013) (noting that increasing the severity of the possible punishment increases the chances the defendant will seek a plea bargain).

227. In Los Angeles County, there is a "special circumstances committee" that advises on such decisions, but the actual deliberative process within that body remains a black box. A PRA request was made by this author for the "Special Circumstance Evaluation Memos" from 1995–2009 as part of the Petersen & Lynch study, *supra* note 223, but the request was denied "because it would be unduly burdensome to review and compile these documents." Email letter to Mona Lynch, author, from Priscilla Musso, Deputy District Attorney, Los Angeles County (April 15, 2010) (on file with author).

228. *See* David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1423–26 (2004) (reviewing this phenomenon).

229. *See generally* Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from* Brown *to* Booker, 11 ROGER WILLIAMS U. L. REV. 473 (2006) (suggesting this radical change stemmed primarily from legislators' political motivations).

230. *See id.* (making a compelling argument that this Congressional effort was largely borne of racial politics, in which conservative members had an agenda to limit the power of federal judges who were held as responsible for dismantling Jim Crow).

231. Paula M. Kautt, Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses, 19 JUST. Q. 633 (2002); Mona Lynch & Marisa Omori, Legal Change and Sentencing Norms in Federal Court: An Examination of the Impact of the Booker, Gall, and Kimbrough Decisions, 28–38 (Nov. 2012) (on file with the U.S. Department of Justice), https://www.ncjrs.gov/pdffiles1/nij/grants/243254.pdf.

232. United States v. Armstrong, 48 F.3d 1508 (9th Cir. 1995), rev'd 517 U.S. 456 (1996) (grappling with the existence of discriminatory intent behind selective prosecution). The difficulty here is that there is no statistical record to document the baseline of eligibility, and courts (and U.S.

Second, formal charging of those selected into the system is unregulated, but is highly determinative of the final sentence given the constraints imposed by the Guidelines.[233] Thus, it stands to reason that those U.S. Attorneys' offices that over-select people of color for prosecution, particularly when that over-selection is based on an offense type that has been elevated as a policy concern (i.e, crack cocaine), may also use the charging stage to ensure the highest possible conviction rate. Indeed, Rehavi and Starr found that charging policies, especially the differential use of charges subject to mandatory minimums, accounted for a significant share of unexplained disparity between otherwise similarly situated African American and white defendants in federal courts.[234] Finally, those first two decisions set in motion the way that defendants can get relief from the sentence they face on the books, which, in mandatory minimum cases, is the near-exclusive purview of the same actor—the prosecutor.[235]

Moreover, in both systems, the power imbalance between the defense and prosecution is especially extreme due to the prosecutor's vast discretionary weapons and the stakes at play. There is empirical evidence in the capital system that the threat of a death-notice filing is used to coerce defendants into pleading guilty to charges that mandate life without parole sentences.[236] In the federal system, the discretionary nature of case selection means that cases typically have a high probability of conviction, and the substantial degree of fluidity in charging and enhancement options helps ensure a high "trial penalty" for those who assert that right and lose at trial. As a consequence, in each of these settings, the prosecutor can set the terms of plea negotiations and ultimate sentence by virtue of his control over nearly all aspects of the case. Therefore, the idealized checks on state power in criminal justice—procedural rights for defendants and the adversarial process for determining guilt by a fact-finder that is overseen by a neutral judicial "referee" in open court—are rarely observed in practice.[237] The ultimate risk to racial equality with such a structural imbalance of power is the accumulation of low-visibility biasing opportunities within one decision-making body, without external checks in place to regulate against that risk.

Attorneys' offices) are not interested in allowing the development of such a record to examine whether there are disparities in selection.

233. Berman, *supra* note 14, at 430.

234. M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences* 1 (Michigan Law Program in Law & Economics Working Paper Series, Working Paper No. 12-002, 2012), available at http://ssrn.com/abstract=1985377.

235. The safety valve, which is only available to a small number of defendants in drug cases, is typically the only other way around this result.

236. Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 JUST. SYS. J. 313, 314 (2008); *see also* Thaxton, *supra* note 226, at 537 (discussing how his study demonstrated how death notice filings in Georgia deterred about 20% of capital defendants from going to trial to avoid death).

237. In federal drug cases, 97% or more of all sentenced defendants in fiscal year 2012 resolved their cases through a guilty plea. U.S. Sent'g Comm'n, *Annual Sourcebook*, Table 13 (2012).

VI. Conclusion

The captivation with "implicit bias" as a framework for explaining discriminatory outcomes in social and legal settings harkens and revives classic debates in psychology. As the sub-discipline of social psychology began to powerfully demonstrate through a number of ingenious experiments in the mid-20th century, social context is often a better predictor of behavior than individual trait and attitude differences.[238] An early icon of this empirical insight is Stanley Milgram. After conducting twenty-one versions of his obedience study, with a number of different configurations and types of subjects, Milgram concluded the following:

> The disposition a person brings to the experiment is probably less important a cause of his behavior than most assume. The social psychology of this century reveals a major lesson: often it is not so much the kind of person a man is as the kind of situation in which he finds himself that determines how he will act.[239]

Similarly, the Stanford Prison Experiment researchers concluded that the highly aberrant behavior that emerged among the subjects in their study was "not the product of an environment created by combining a collection of deviant personalities, but rather the result of an intrinsically pathological situation which could distort and rechannel the behaviour [sic] of essentially normal individuals."[240] The researchers further explained that "[t]he abnormality . . . resided in the psychological nature of the situation and not in those who passed through it."[241] By acknowledging the power of contexts in conceptualizations of problematic behavior—like racial discrimination—we not only assent to a more empirically supportable understanding, we also open up the possibilities for remediation in expansive and potentially impactful ways.

The model I have attempted to delineate here takes as a given that different actors within institutions possess varying levels of a range of individual traits, attitudes, and cognitive predispositions, including implicit biases. But that is only the starting point. As both a moral and legal matter, to end there would leave us with little to do besides wring our hands about the evils of human nature. Indeed, it is hard to imagine a remediation scheme that authorizes measuring the implicit cognitions of criminal justice actors for the purposes of reducing biased outcomes, much less one that authorizes screening of those measures for hiring, selecting juries, assigning tasks, or dismissing from duties. Even if such practices passed legal

238. ROSS & NISBETT, *supra* note 157.

239. Stanley Milgram, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 205 (1974).

240. Haney et al., *Interpersonal Dynamics*, *supra* note 161, at 90.

241. *Id.*

muster, their utility would be quite limited in scope. On the other hand, it is easy to imagine all kinds of remediation strategies that reform decision-making parameters and contexts once we develop a clear understanding of where and how biased actions are produced. The above discussion only begins that task, and only for two relatively specialized areas of criminal justice. There remains much more to be done, particularly to combat the vast expanse of injustices that are produced in run-of-the mill, mundane criminal matters in state courts across the country.

Unfortunately, though, many of the potential remedies that would most directly address the problems I have identified here have little precedential support in existing case law, making the jurisprudential road to combatting systemic discrimination in criminal systems a difficult one. *McCleskey*[242] still casts a long, ominous shadow impeding racial justice in the criminal context, its reach shutting down inquiries into the most egregious example of discriminatory practices in the 20th century—federal crack prosecutions.[243] To be sure, there have been some promising developments aimed at tempering the American punitive binge of the late 20th century emerging from the courts,[244] state and federal law-makers,[245] and executive branch actors[246] that at least indirectly have the potential to relieve some racial injustice in our criminal and capital systems, even if only indirectly. But there remains considerable reticence in the courts, legislatures, and the public arena to confront, head-on, the continuing racial harms produced in our criminal and capital systems of justice. As Ian Haney López has forcefully argued, the first step to overcome this reticence is to re-center racism, especially its structural manifestation, as a problem in the public, political, and legal sphere:

> In the decades to come we will look back on *McCleskey* as a stain on the reputation of the Supreme Court, and on racialized mass incarceration at the turn of the twenty-first century as a national shame. But we will only get there if, today, we recognize and

242. McCleskey v. Kemp, 481 U.S. 279 (1987).

243. United States v. Armstrong, 48 F.3d 1508 (9th Cir.1995), *rev'd* 517 U.S. 456 (1996) (discussing selective prosecution in connection with drug trafficking cases).

244. For a few notable examples in recent years, see Brown v. Plata, 131 S. Ct. 1910 (2011), for mass incarceration; Roper v. Simmons, 543 U.S. 551 (2005), and Atkins v. Virginia, 536 U.S. 304 (2002), for capital punishment context.

245. The Sentencing Reform Act of 2010 provides the most significant federal example; *see* JUDITH GREENE & MARC MAUER, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 3 (2010) (reporting on sentencing code reforms passed in New York, Michigan, and Kansas that have reduced prison populations).

246. *See, e.g.*, Eric Holder, U.S. Attorney General, Remarks at the Annual Meeting of the American Bar Association's House of Delegates, available at http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html (outlining the administration's plan for reforming federal law enforcement practices, especially in the case of drug prosecutions).

protest against structural racism.[247]

247. Haney López, *supra* note 76, at 1073.