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**CONDEMNING THE OTHER IN DEATH PENALTY TRIALS:  
BIOGRAPHICAL RACISM, STRUCTURAL MITIGATION,  
AND THE EMPATHIC DIVIDE**

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# CONDEMNING THE OTHER IN DEATH PENALTY TRIALS: BIOGRAPHICAL RACISM, STRUCTURAL MITIGATION, AND THE EMPATHIC DIVIDE

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*It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined.*

—Justice William J. Brennan<sup>1</sup>

## INTRODUCTION

I have three modest points to make in this brief Article. The first is that most analyses of racial discrimination in the administration of the death penalty—despite their importance to the critical debate over the fairness of capital punishment—are not able to address the effects of many of the most pernicious forms of racism in American society. In particular, they cannot examine “biographical racism”—the accumulation of race-based obstacles, indignities, and criminogenic influences that characterizes the life histories of so many African-American capital defendants.

Second, I propose that recognizing the role of this especially pernicious form of racism in the lives of capital defendants has significant implications for the way we estimate fairness (as opposed to parity) in our analyses of death sentencing. Chronic exposure to race-based, life-altering experiences in the form of biographical racism represents a profoundly important kind of “structural mitigation.” Because of the way our capital sentencing laws are fashioned, and the requirement that jurors must engage in a “moral inquiry into the culpability” of anyone whom they might sentence to die,<sup>2</sup> this kind of mitigation provides a built-in argument against imposing the death penalty on

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1. *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

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

African-American capital defendants. It is structured into their social histories by the nature of the society into which they have been born.

Finally, I argue that so many African-American defendants continue to be sentenced to death in the United States because of the failure to collect and properly analyze this structural mitigation and to present it effectively to sentencing juries, as well as the failure of predominately white jurors to appreciate its significance in assessing moral culpability. Specifically, I will suggest that a particular kind of racially discriminatory death sentencing comes about as a result of an "empathic divide" that exists between many white jurors and African-American defendants. White jurors may have an especially difficult time understanding the mitigation that inheres in the structure of the lives that many African-American defendants have led. 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.

Reaching across the empathic divide is a challenge that always must be met in death penalty trials, irrespective of the race of the participants. It is why "humanizing" capital clients is so important in penalty trials. But the size of the divide may make the challenge greater in cases that involve minority defendants and exclusively or predominantly white jurors.

## II. BIOGRAPHICAL RACISM AND DISCRIMINATORY DEATH SENTENCING

The practice of capital punishment and the social evil of racism have certain things in common. They are both forged from many of the same human emotions, including anger, hatred, and fear. They are both facilitated when their adherents treat people as though they were not human. They both focus our attention only on certain isolated, odious characteristics—observed, inferred, assumed, or simply attributed—which then are taken as emblematic, to the exclusion of all others, and that facilitate our condemnation of their targets.<sup>3</sup> The death penalty and racism depend upon a form of "psychological secrecy"—the refusal to deal with the painful emotional dilemmas that would be generated, and the moral ambiguities we would be forced to

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3. Some of these issues are discussed in Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse To Condemn to Death*, 49 STAN. L. REV. 1447-86 (1997).

confront, if we looked closely and honestly at what we are doing and why.<sup>4</sup> Instead, in the case of the death penalty, the public is given access to only superficial and schematic details of the lives of capital defendants that facilitate their dehumanization and enhance what historians have called the civil ordering function of the execution ritual. Much as racism requires us to ignore the truth about those it victimizes and diminishes, and insists that we keep a distance from the persons that it targets lest we learn the truth about the cruel falsehoods racism perpetuates, capital punishment thrives under circumstances that push us away from truly understanding those on whom it is inflicted and how.

Of course, there are differences between lawfully condemning someone to die and prejudicially condemning someone to the margins of social existence. In addition to the difference between literal and social death is the fact that someone who is condemned to die has almost always done something truly horrible to become eligible for execution, while the victims of racism have done nothing to precipitate their invidious mistreatment. Yet, there are similarities in the psychology by which both proceed, and those similarities have forged an empirical connection between capital punishment and racist times and places. Throughout the history of American criminal justice, African Americans have received death sentences disproportionate to their numbers in the general population. These disproportions have been more shocking in some jurisdictions than others, and for some crimes (rape, in particular) than others, but the variations have rarely been so great as to mask the overall differences in treatment.

Louis Masur's historical study of capital punishment in the eighteenth and nineteenth centuries noted that even then, "[t]hose whom the state hanged tended to be young, black, or foreign."<sup>5</sup> More recent statistics suggest that relatively little has changed since then. For example, between 1930 and 1982, African Americans constituted between 10% and 12% of the United States population but 53% of those executed.<sup>6</sup> In presumably more enlightened times, only modest reductions in these disparities have been brought about. For example, in 1995, a year in which fifty-six persons were executed in the United States, over 40% were persons of color (25 of 56), almost all of whom

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4. See, e.g., Craig Haney, *Psychological Secrecy and the Death Penalty: Observations on "the Mere Extinguishment of Life,"* 16 *STUD. IN LAW, POL. & SOC'Y* 3 (1997).

5. LOUIS P. MASUR, *rites of execution: capital punishment and the transformation of American culture, 1776-1865*, at 6 (1989).

6. Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment 1982*, Aug. 1984, at 9.

were African American (22 of 56, or 39% of the total).<sup>7</sup> The overrepresentation of African Americans on death row also persists. For example, in 1987 they comprised 41% of the prisoners condemned to death in the United States, about 3.5 times their number in the general population.<sup>8</sup>

Of course, these gross racial disparities do not account for the higher rates at which African Americans are arrested for murder in the United States. Yet, even though they do not necessarily speak to "discrimination" in criminal justice system decision making, unadjusted statistics—the percentages of African Americans sent to death row or executed—are nonetheless relevant to discussions of racial fairness. Unless one is prepared to defend the indefensible proposition that African Americans have an innate predisposition to homicidal violence, these persistent disparities indirectly reflect the continued exposure of African Americans to powerful criminogenic conditions, something I discuss later in this Article.

Moreover, even much more sophisticated statistical analyses of patterns of death penalty decision making that do control for rates of arrest, and sometimes for many other variables, generally find that the race of the defendant (as well as, certainly, the race of the victim) has an important effect on whether suspected murderers are charged with death-eligible crimes and whether juries vote to impose the death penalty in their cases.<sup>9</sup> Despite some variation in the outcomes of the studies, racial discrimination in the act of sentencing someone to death persists, sometimes strikingly so, as when an African-American capital defendant has been convicted of a murder in which his victim was white. Because most homicide is intraracial, and criminal justice decisionmakers appear to undervalue African-American victims, the extent that we overpunish African-American defendants is masked somewhat by the smaller number of cases in which they are charged with killing white victims.

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7. Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment 1995*, Dec. 1996, at 9.

8. AMNESTY INT'L, USA: THE DEATH PENALTY: DEVELOPMENTS IN 1987, at 15 (1988).

9. The best archival studies reach these conclusions in varying degrees. Several of them were conducted by persons contributing to this Symposium issue. See, e.g., DAVID BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL EMPIRICAL ANALYSIS* (1990); David 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); SAMUEL GROSS & ROBERT MAURO, *DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989). In a congressionally mandated summary and review of some twenty-eight studies of the topic, a General Accounting Office report found race-of-victim significantly influenced death sentencing in about four out of five of the studies and that race-of-defendant significantly influenced it in about half of them. See U.S. GEN. ACCOUNTING OFFICE, *DEATH PENALTY RESEARCH INDICATES PATTERN OF RACIAL DISCRIMINATION* (1990).

Yet, as troublesome and disheartening as both the gross *and* adjusted statistical comparisons continue to be, they may significantly *understate* the role that racism plays in the system of death penalty imposition in the United States. By focusing exclusively on the narrowly defined concept of “discrimination”—for example, by asking ourselves only how race affects prosecutors’ decisions to charge murders as capital or not, or how it influences juries’ decisions to impose the death penalty—we significantly limit the definition of racial justice in our system of death sentencing. As critically important as the more narrow measure of fairness is, and as elusive as the quest for even this limited version of racial justice has proven to be, concentrating on it alone encourages us to overlook a larger set of issues, ones that continue to implicate the way in which race, crime, culpability, and the death penalty all intersect at deep levels in our society.

Put simply, by focusing only on the issue of discrimination in death penalty-related legal decision making, we already take for granted—theoretically neutralize or statistically control for—some of the most important components of racial injustice. Most studies of the pernicious effects of race on death penalty decision making begin their analyses at the point at which the criminal justice system directly intervenes in the lives of African Americans. Appropriately, this research examines racial differentials at crucial decision points—whether to take someone into custody, charge him (and, if so, with what kind of crime), prosecute, convict, sentence to prison, or condemn him to death. Calculations of whether African Americans are arrested, prosecuted, convicted more often, or sentenced more harshly than whites, for whatever reason, often are taken as the measure of the system’s unfairness, and understandably so.<sup>10</sup>

However, the point at which we begin our calculations in many of these important studies occurs long *after* some of the most potent and destructive racialized forces at work in our society have already taken their life-altering toll. Time spent studying the lives of capital defendants of all racial and ethnic backgrounds reminds us of the extent to which many of their choices are sharply delimited by life circumstances, long before their capital crimes were committed and certainly long before the legal decisions that eventually lead to their capital trials and sentencing verdicts have been made. This is especially—per-

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10. I say “understandably” because there is no longer any constitutional rubric under which a broad-based analysis of structural and biographical racism can be taken into account in legal challenges to the fairness of the system of capital punishment. See, e.g., CRAIG HANEY, *The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15 LAW & HUM. BEHAV. 183-204 (1991).

haps uniquely—true in the case of African-American capital defendants who often are at the far end of the spectrum of exposure to risk factors and criminogenic risk factors.<sup>11</sup>

This kind of racism is structural, it is built into the very social contexts and life circumstances that have surrounded many African-American capital defendants at key developmental stages of their lives. It has helped to shape their behavior, thoughts, and feelings, as well as their social identity—how they think of themselves in relation to others, just as whites are shaped by a racist society that privileges their views, norms, and identities over others. As these experiences accumulate over the life span, they represent a form of biographical racism, a racism that exercises such profound influence over the life course and social histories of those exposed to it that it literally structures their biographies. Yet, as I say, this kind of racism is rarely acknowledged in calculations of whether our system of death sentencing delivers racial justice to minorities. This despite the fact that these life-shaping forces are both psychologically central and, as I will suggest, centrally relevant to the legal decision of whether or not a capital defendant lives or dies.

### III. SOME STRUCTURAL COMPONENTS OF BIOGRAPHICAL RACISM

Terrible, traumatizing, and criminogenic social histories are not unique to minority capital defendants.<sup>12</sup> The lives of many criminal defendants are filled with what psychologists have termed “risk factors,” potentially harmful experiences that greatly increase the likelihood that persons will engage in troubled, problematic behavior in the future.<sup>13</sup> Because of the continued correlation of race with so many other painful and potentially damaging experiences in our society, the

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11. Most analyses of racial discrimination in the administration of the death penalty in the United States focus on the treatment of African Americans. Although other minority groups do not share exactly the same historical connection to the death penalty or the tragic legacy of lynchings to which African Americans once were subjected, there is no reason to believe that they have been spared exposure to lifelong forms of discriminatory and disparate treatment that can profoundly affect their social histories. Viewed through the punitive lens of a system of social control, these other racial and ethnic minorities whose numbers are increasing far faster than the socioeconomic opportunities being afforded them—especially, in some parts of the country, Latinos—are likely to be granted much greater “access” to our nation’s prisons and jails and to its system of capital punishment.

12. I have discussed some of these issues more broadly in Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547-609 (1995).

13. See Ann Masten & Norman Garmezy, *Risk, Vulnerability and Protective Factors in Developmental Psychopathology*, in *ADVANCES IN CLINICAL CHILD PSYCHOLOGY* 1-52 (Benjamin B. Lahey & Alan E. Kazdin eds., 1985).

life histories of African-American defendants tend to be replete with such risk factors, in ways that are distinctive, and distinctly mitigating. In this section, I briefly touch on just some of the components of the biographical racism from which many African-American capital defendants have suffered.<sup>14</sup>

For example, we know that poverty forces family members to adapt to scarcity in ways that affect interpersonal relationships and, in turn, child development. One ethnographer studying children growing up in a poor urban neighborhood acknowledged their impressive resourcefulness in coping with poverty, but nonetheless was forced to conclude that these admirable adaptive skills were still "no match for the physical toll of poverty and its constant frustrations and humiliations."<sup>15</sup> African-American children, particularly, are more likely to live under conditions of *chronic* poverty,<sup>16</sup> the kind most harmful to their long-term well being.<sup>17</sup> Many researchers have documented the ways in which chronic economic hardships produce family disruption and psychological distress for both parents and children. This distress undermines parents' ability to provide nurturing care and increases tendencies toward inconsistent discipline that are, correspondingly, associated with increased depression, drug use, and delinquency among their adolescent children.<sup>18</sup>

We also know that persistent poverty is predictive of severe and recurrent child abuse. That is, parental "[v]iolence does occur at all income levels but it is more often repeated among the persistently

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14. There is a very large literature on these issues. In this brief Article, I cannot do it justice. What follows is no more than a partial review.

15. CARL HUSEMOLLER NIGHTINGALE, *ON THE EDGE: A HISTORY OF POOR BLACK CHILDREN AND THEIR AMERICAN DREAMS* 55 (1994).

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

17. Ethnographers have documented many of the ways in which poor children literally live different lives from children who are not poor. They have experienced, as Annette Lareau has phrased it, "unequal childhoods." Although many of the deep consequences of these differences remain "invisible and thus unrecognized," they nonetheless have "profound implications for life experiences and life outcomes." ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* 257 (2003). However, arguments that social class may be a more important predictor of these different life outcomes than race are difficult to resolve, in part because they often overlook the way both class and race still are inextricably bound in our society.

18. See, e.g., Jacques D. Lempers et al., *Economic Hardship, Parenting, and Distress in Adolescence*, 60 CHILD DEV. 25-39 (1989). See also Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, 93 AM. J. SOC. 348 (1987) (suggesting that high crime rates in urban African-American communities stem from structural linkages between unemployment, economic deprivation, and family disruption).



poor.”<sup>19</sup> Thus, even though they suffer disproportionately from “virtually every form of stress affecting full and healthy development,” including being denied proper medical care and deprived of adequate food, clothing, and housing, “[n]one of these stressors is more threatening to the healthy development of black children and to the stability of their families than intrafamilial child abuse.”<sup>20</sup> Among other things, exposure to violent, abusive parenting is *criminogenic*. That is, it shapes and influences young lives in ways that make subsequent criminal behavior more likely and significantly increases the chances of juvenile justice system intervention later on.

Of course, not every family adapts to the pressures of chronic poverty in the same way, and certainly not all African-American capital defendants have experienced abusive parenting. But there are many other potentially harmful risk factors to which they likely have been exposed. The continuing significance of race in our society insures that this is so. For example, significant numbers of African-American children “still encounter expressions of racial hatred, live in racially segregated neighborhoods, and endure the suspicion widespread among many people in positions of authority.”<sup>21</sup> Many of them grow up in communities torn by violence, so that they are at risk of victimization in their own neighborhoods, where they lack physical and psychological safe havens. Indeed, some studies have concluded that children who grow up in urban housing projects are exposed to trau-

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19. Candace Kruttschnitt et al., *The Economic Environment of Child Abuse*, 41 SOC. PROBS. 299, 310 (1994). This fact may help to explain the comparatively higher rates of child maltreatment reported in African-American families.

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

21. NIGHTINGALE, *supra* note 15, at 10. Many compelling urban ethnographies and other social science analyses have been written over the last decade about life in inner-city minority communities. See, e.g., ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND SOCIAL CHANGE IN AN URBAN COMMUNITY* (1990); Elijah Anderson, *The Code of the Streets: How the Inner-City Environment Fosters a Need for Respect and a Self-Image Based on Violence*, ATLANTIC MONTHLY, May 1994, at 81; GEOFFREY CANADA, *FIST STICK KNIFE GUN: A PERSONAL HISTORY OF VIOLENCE IN AMERICA* (1995); DANIEL COYLE, *HARDBALL: A SEASON IN THE PROJECTS* (1993); ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE* (1991); DARCY FREY, *THE LAST SHOT: CITY STREETS BASKETBALL DREAMS* (1994); JONATHAN KOZOL, *AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION* (1995); JERROLD LADD, *OUT OF THE MADNESS: FROM THE PROJECTS TO A LIFE OF HOPE* (1994); NATHAN MCCALL, *MAKES ME WANNA HOLLER: A YOUNG BLACK MAN IN AMERICA* (1994); LUIS RODRIGUEZ, *ALWAYS RUNNING, LA VIDA LOCA: GANG DAYS IN L.A.* (1993); BRENT STAPLES, *PARALLEL TIME: GROWING UP IN BLACK AND WHITE* (1994); MERCER SULLIVAN, “GETTING PAID”: YOUTH CRIME AND WORK IN THE INNER CITY (1989).

matic violence comparable to children living in "war zones." Many suffer the same kinds of prolonged psychological after-effects—and need the same kinds of treatment—as children who have suffered war-related trauma.<sup>22</sup> The failure to acknowledge the nature and scope of these problems means that such treatment is rarely forthcoming.

If it is true, as sociologists teach us, that "[t]o understand the biography of an individual . . . we must understand the institutions of which [he or she is] a part,"<sup>23</sup> then understanding the biographical racism to which African Americans are exposed requires special attention to the nature of the institutions into which they are disproportionately drawn. Indeed, the lives of African-American children are more often shaped and redirected by harsh forms of direct state intervention in ways that increase the likelihood that they will be placed in juvenile justice institutions and, at later ages, incarcerated by the adult criminal justice system.<sup>24</sup> There are many factors that contribute to this funneling effect.

Thus, African-American children, especially—either because of different levels of need or differential processing at the hands of agency decisionmakers, or both—more often become wards of the so-called "child welfare" system in the United States, and subjected to its sometimes painful and potentially criminogenic influences. Although African Americans comprise 17% of the nation's children, they account for 42% of all children in foster care in the United States.<sup>25</sup> In some communities the disparities are even more dramatic. For example, African-American children constitute 95% of all those in foster care in city of Chicago.<sup>26</sup> This means that the serious inadequacies that plague the child welfare system overall are much more likely to harm African-American children than others.<sup>27</sup> Moreover, once they are in

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22. Nancy F. Dubrow & James Garbarino, *Living in the War Zone: Mothers and Young Children in a Public Housing Development*, 68 CHILD WELFARE 3 (1989). See also Joan McCord's introductory chapter on urban violence and the chapters that follow in: *Joan McCord, Inner City Life: Contributions to Violence*, in *VIOLENCE IN URBAN AMERICA: MOBILIZING A RESPONSE* 104.

23. C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* 161 (1959).

24. A report on foster care in California found that about two thirds of all foster children in the state were from two minority groups—African American (36%) and Latino (28%) (Jerome H. Skolnick ed., 1994). See CAL. DEP'T OF SOC. SERV., *CALIFORNIA CHILD AND FAMILY SERVICES REVIEW: STATEWIDE ASSESSMENT* 105 (2002), available at <http://www.dss.cahwnet.gov/cfsr/res/pdf/CAStatewideAssessment.pdf> (last visited Apr. 22, 2004).

25. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 8 (2002).

26. *Id.* at 9.

27. For example, see Robert Pear, *U.S. Finds Fault in All 50 States' Child Welfare Programs, and Penalties May Follow*, N.Y. TIMES, Apr. 26, 2004, at A17, reporting that states throughout the nation were cited for failing to have caseworkers visit children often enough, assess their needs, provide them with appropriate services, or keep them safe from abuse and neglect.

the child welfare system, African-American children are less likely to receive in-home social services or mental health care, and they are more likely to be institutionalized for their emotional problems.<sup>28</sup>

Other patterns in the lives of African-American children are likely to have differential criminogenic effects. For example, they appear to be singled out disproportionately for school discipline, and are more likely to be punished for nebulous infractions (such as "excessive noise" and "disrespect"). The differentials are large—one study found that, even after controlling for socioeconomic differences, African-American children in middle school were more than twice as likely to be sent to the principal's office or suspended, and four times as likely to be expelled than their white counterparts.<sup>29</sup>

Some social scientists have theorized about various ways that public schools help to construct "bad boys" out of young African-American male students.<sup>30</sup> For example, differences in "manners, style, body language, and oral expressiveness" may subtly but systematically influence the way in which teachers apply school rules and label African-American students, ultimately placing them "at the bottom rung of the social order."<sup>31</sup> Of course, labeling inappropriate student be-

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28. ROBERTS, *supra* note 25, at 20-23.

29. RUSSELL J. SKIBA ET AL., IND. EDUC. POLICY CTR., *THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT* 13, 16 (2000), available at <http://www.indiana.edu/~safeschl/cod.pdf> (last visited Apr. 4, 2004). Earlier reports on the same issue found some of these same patterns of racially discriminatory treatment in public schools: In Oakland, California, at a time when African-American students comprised 28% of the students in the school system, they represented 53% of the suspensions. COMM'N FOR POSITIVE CHANGE IN THE OAKLAND PUB. SCH., *KEEPING CHILDREN IN SCHOOLS: SOUNDING THE ALARM ON SUSPENSIONS* 1 (1992). The issue received national attention in the early 1990s. See Jon D. Hull, *Do Teachers Punish According to Race?*, TIME, Apr. 4, 1994, at 30. Almost a decade later, the problem had not abated. See Jodie Morse, *Learning While Black*, TIME, May 27, 2002, at 50. See, also, a comprehensive statistical analysis sponsored by the *Seattle Post-Intelligencer* examining nearly 40,000 Seattle secondary school disciplinary records that found that African-American students were more than twice as likely as any other group to be suspended or expelled. The statistical disparities remained even after the variables of poverty and living in a single-parent family (both of which also were associated with higher rates of school discipline) were taken into account. The differentials were particularly pronounced for vague or subjective offenses like "disobedience" and "interference with authority." Rebekah Denn, *The Racial Discipline Gap in Seattle Schools*, SEATTLE POST-INTELLIGENCER, Mar. 15, 2002, at F1, available at LEXIS, News Library, Seapin File.

30. ANNE ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY*. See also NAT'L ASS'N OF SCH. PSYCHOLOGISTS, *CHILDREN AT RISK: POVERTY, MINORITY STATUS, AND OTHER ISSUES IN EDUCATIONAL EQUITY* (A. Barona & Eugene Garcia eds., 1990); JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991).

31. FERGUSON, *supra* note 30, at 51. Indeed, Ferguson noted that schools are "replete with symbolical forms of violence," in part because children who are regarded by authorities as "troublemakers" are themselves "conscious of the fact that school adults have labeled them as problems, social and educational misfits" and many are also aware "that what they bring from

havior and disciplining those who misbehave is a routine part of the socialization process for students of all races. Yet, when certain students appear to be singled out for discipline, they experience school as painful and aversive; their behavior may become even more disruptive as a result. Moreover, as Anne Ferguson has put it, "[i]n the case of African American boys, misbehavior is likely to be interpreted as symptomatic of ominous criminal proclivities,"<sup>32</sup> and the long-term consequence of this interpretation may be to "substantially increase one's chance of ending up in jail."<sup>33</sup>

There is also evidence of racial inequality in the assignment of African-American children to special education classes. Nationwide statistics indicate that they are three times more likely to be labeled developmentally disabled and twice as likely to be labeled emotionally disturbed as their white counterparts.<sup>34</sup> Once diagnosed, they are more likely than white students to be separated from mainstream classrooms, and are more often relegated to under-funded and poorly designed programs that provide them with marginal educational experiences and minimal employment skills. At least one study of this problem concluded that its long-term effects contributed to higher rates of unemployment and incarceration among young African-American adults.<sup>35</sup>

Despite their well-documented harmful effects, the social and educational policies and practices that have differential impacts on minority children persist. New policies promise to continue racial disparities or create even larger ones. For example, so-called "zero tolerance" policies that recently have been implemented in many public schools are likely to have disproportionately criminogenic effects on African-American children. They not only have increased the number of school suspensions and expulsions, but also the number of children whose school misconduct has placed them at serious risk of juvenile and even adult criminal justice system confinement. As one critic

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home and neighborhood—family, structure and history, forms of verbal and nonverbal expression, neighborhood lore and experiences—has little or even deficit value." *Id.* at 169.

32. *Id.* at 89.

33. *Id.* at 230. That is because, "[i]n the daily experience of being [named as a 'troublemakers'], regulated, and surveilled, access to the full resources of the school are increasingly denied as the boys are isolated in nonacademic spaces in school or banished to lounging at home or loitering on the streets." *Id.* Moreover, time spent in the school detention center "means time lost from classroom learning; suspension, at school or at home, has a direct and lasting negative effect on the continuing growth of a child" so that "human possibilities are stunted at a crucial formative period of life." *Id.*

34. DANIEL J. LOSEN & GARY ORFIELD, RACIAL INEQUITY IN SPECIAL EDUCATION xx (Daniel J. Losen & Gary Orfield, eds. 2002).

35. *Id.* at xxi.

noted, "[a]fter years of campaigns aimed at keeping children at risk in school, the zero tolerance effort seeks instead to identify troublesome students and get them *out* of school."<sup>36</sup>

Because most zero tolerance policies require school officials to report infractions to law enforcement, they increase the chances that once these students have been moved out of school they will be moved into juvenile justice institutions. Zero tolerance also discourages (and, in some instances, actually prevents) school officials from inquiring into the reasons for the rule infraction or the context in which it occurred. Among other things, this means that students whose troublesome behavior may be the result of emotional turmoil or preexisting psychological problems are at increased risk of being expelled from school or worse.

As one commentator observed, "As student misconduct is increasingly criminalized, more and more children with learning disabilities are entering the juvenile justice system."<sup>37</sup> This is because, "[f]or many special education students, particularly those who carry the label 'emotionally disturbed,' delinquent behavior such as threatening comments, property destruction, and aggression towards others is often a manifestation of their disability."<sup>38</sup> Yet school administrators, who legally are prevented from expelling children for behavior that is a direct consequence of a disability, appear increasingly willing to file criminal charges against them. Not surprisingly, children who are already at risk of leaving school,<sup>39</sup> including a disproportionate number of African-American and Latino children, are the ones most adversely affected by these policies.<sup>40</sup>

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36. Eric Blumenson & Eva S. Nilsen, *How To Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER, RACE & JUSTICE 61, 64 (2002). See also the conclusion of two researchers to the effect that "school personnel may simply be dumping problem students out on the streets, only to find them later causing increased violence and disruption in the community." Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 376 (1999).

37. ANDREW K. BLOCK, UNIV. OF VA. INST. OF LAW, PSYCHIATRY & PUB. POLICY, JUVENILE JUSTICE FACT SHEET: SPECIAL EDUCATION LAW AND DELINQUENT CHILDREN: AN OVERVIEW 9 (2000), available at [http://www.ilppp.virginia.edu/Publications\\_and\\_Reports/SpecEdLaw.html](http://www.ilppp.virginia.edu/Publications_and_Reports/SpecEdLaw.html) (last visited Apr. 4, 2004).

38. *Id.* at 7.

39. See, e.g., Pedro Reyes, *Factors That Affect the Commitment of Children at Risk To Stay in School*, in CHILDREN AT RISK 18 (Joan M. Lakebrink ed., 1989).

40. For example, see the discussion of a twelve city-wide study concluding that "in disproportionate numbers, it is African American and Latino students whose futures are wrecked by zero-tolerance." Rebecca Gordon et al., Applied Research Center, *Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools*, at 10, at [http://www.arc.org/downloads/ARC\\_FTC.pdf](http://www.arc.org/downloads/ARC_FTC.pdf) (Mar. 2000) (last visited Apr. 4, 2004).

As adolescents, African Americans are more likely to be exposed to violence in their neighborhoods and in their schools, experiences that not only predispose them to higher rates of post-traumatic stress disorder (PTSD),<sup>41</sup> but serve as risk factors for subsequent emotional problems, drug use, delinquency, and criminality. One critically important consequence of the way these and other risk factors combine in the lives of African-American children and adolescents is the *much* higher rate of juvenile justice system intervention to which they are subjected.

In fact, the over-representation of minority youth in these institutions is so widespread that juvenile justice researchers and policymakers refer to it by its acronym—"DMC" (for "disproportionate minority confinement"). African-American and Latino children are over-represented at literally every stage of juvenile justice system processing—in arrests, referrals to juvenile court, and among those who are held in detention awaiting the disposition of their case. They also are more likely to be formally charged in juvenile court, more likely to have their case waived from juvenile to adult court, and more likely to receive a disposition that requires an out-of-home placement (such as a commitment to a locked institution).<sup>42</sup>

Indeed, minority youth represent the *majority* of children held in juvenile facilities. For example, although they constituted 34% of the U.S. population in 1997, they represented 62% of children who were incarcerated that year. The disparities are especially large for African-American youth. For example, African-American children with no prior admissions to the juvenile justice system were six times more likely to be incarcerated in a public facility than white children with the same background who were charged with the same offense. African-American children who had one or two prior admissions were *seven* times more likely to be incarcerated than whites with the same

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41. See, e.g., Margaret Berton & Sally Stabb, *Exposure to Violence and Post-Traumatic Stress Disorder in Urban Adolescents*, 31 *ADOLESCENCE* 489, 494-95 (1996).

42. See, e.g., KIMBERLY K. LEONARD ET AL., *MINORITIES IN JUVENILE JUSTICE* (1995); AMNESTY INT'L, *BETRAYING THE YOUNG: HUMAN RIGHTS VIOLATIONS AGAINST CHILDREN IN THE US JUSTICE SYSTEM* (1998), available at <http://web.amnesty.org/library/print/ENGAMR510571998> (last visited Apr. 11, 2004). HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CENTER FOR JUVENILE JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT* (1999), available at <http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html> (last visited Apr. 4, 2004); MIKE MALES & DAN MACALLAIR, *BUILDING BLOCKS FOR YOUTH, THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA*, available at <http://www.buildingblocksforyouth.org/colorofjustice/coj.html> (last visited Apr. 4, 2004); EILEEN POE-YAMAGATA & MICHAEL A. JONES, NAT'L COUNCIL ON CRIME & DELINQUENCY, *AND JUSTICE FOR SOME* (2002), available at <http://www.buildingblocksforyouth.org/justiceforsome/jfs.pdf> (last visited Apr. 11, 2004).

background history. Moreover, African-American youth who were held in custody remained an average of sixty-one days longer than whites. And the disparity in length of confinement was particularly pronounced for drug offenses, for which African-American juveniles were confined an average of ninety days longer than their white counterparts.<sup>43</sup>

Urban ethnographers have written about the way in which institutions of social control have come to play increasingly larger roles in the lives of inner-city children, their harshness reinforcing the lessons of what euphemistically is referred to as the "forceful parenting" some of the children already may have received at home. Further: "[B]y equating child punishment with jails and being prepared to employ the police, parents demonstrated just how closely their philosophies resonated with those of mainstream institutions of law and order."<sup>44</sup> Unfortunately, there is more to the experience of these mainstream punishment-oriented institutions than the law and order philosophy they espouse. Indeed, there is much evidence to suggest that juvenile institutionalization is psychologically harmful to many of the children who undergo it.

For example, researchers in the 1970s and 1980s described many juvenile institutions as engendering "a constant struggle for survival" in an environment in which wards "spend much of their time either exploiting weaker youths or defending themselves against victimization."<sup>45</sup> A team of criminologists appropriately labeled the victimization of juveniles inside the very institutions where they had been sent for help as a "paradox." The authors described the extraordinary adaptations young offenders were forced to make as they tried to cope in an institutional environment that was, on the one hand, a "punishment-centered bureaucracy,"<sup>46</sup> and, on the other hand, a "terrifying . . . social world." The living units in the facilities they examined were "worse than the streets,"<sup>47</sup> places where young inmates often were required to "feign bravery and toughness so convincingly that [they

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43. These data appear in Robert DeComo, *The Juveniles Taken Into Custody Research Program: Estimating the Prevalence of Juvenile Custody Rates by Race and Gender*, NCCD FOCUS, Sept. 2003.

44. NIGHTINGALE, *supra* note 15, at 95. The potentially destructive effects of normatively ineffective, stigmatizing juvenile justice system processing has been recognized for some time. See, e.g., EDWIN SCHUR, *RADICAL NONINTERVENTION: RETHINKING THE DELINQUENCY PROBLEM* 4 (1973).

45. Donn T. Davi, *Chance, Change and Challenge in Juvenile Corrections*, JUV. & FAM. CT. J. May 1982, at 47.

46. CLEMENS BARTOLLAS ET AL., *JUVENILE VICTIMIZATION: THE INSTITUTIONAL PARADOX* 197 (1982).

47. *Id.* at 271.

were] not challenged" by others.<sup>48</sup> They concluded that, even in the best juvenile institutions, "very little correction, training, or adjustment occurs—or can, in fact, occur under present circumstances and social policies."<sup>49</sup>

Similarly, a major study sponsored by the Department of Justice and published in the early 1980s reached a number of negative conclusions on the effects of juvenile institutions: "With few exceptions, intervention by the agencies of social control does not play even a moderate role in decreasing the seriousness of adult contacts."<sup>50</sup> Worse than failing to accomplish anything positive, juvenile justice system processing appeared to be counterproductive: "To place youth in the 'troublemaker' category early in their school careers may only result in treatment which maximizes the fulfillment of the prophesy."<sup>51</sup> Thus, "disproportionate minority confinement" means that minority children are placed at even greater risk of subsequent incarceration as a result of this form of early state intervention.

Despite these critical conclusions, the use of juvenile institutions that were plagued by criminogenic conditions has persisted. By the end of the 1990s, the American Bar Association and the Justice Department issued a joint report that reached many of the same negative conclusions about many juvenile justice institutions in the United States. Echoing the concerns expressed in previous nationwide studies, the report acknowledged that the facilities were "increasingly overcrowded," "significantly deficient," and held a disproportionate number of minority young offenders incarcerated for property and drug-related crimes. The authors expressed concern over the "[w]ell documented deficiencies" in conditions of confinement, and the nature and poor quality of treatment and educational services, security, and suicide prevention. As they noted, "Subjecting youth to abusive and unlawful conditions of confinement serves only to increase rates of violence and recidivism and to propel children into the adult criminal justice system."<sup>52</sup>

Again, these harmful consequences necessarily fall more heavily on African-American children than others. In fact, analysts like Barry

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48. *Id.* at 12.

49. *Id.* at 271. See also Clemens Bartollas, *Survival Problems of Adolescent Prisoners*, in *THE PAINS OF IMPRISONMENT* 165 (Robert Johnson & Hans Tock eds., 1982).

50. LYLE W. SHANNON, U.S. DEP'T OF JUSTICE, *ASSESSING THE RELATIONSHIP OF ADULT CRIMINAL CAREERS TO JUVENILE CAREERS: A SUMMARY* 8 (1982).

51. *Id.* at 13.

52. PATRICIA PURITZ & MARY ANN SCALI, U.S. DEP'T OF JUSTICE, *BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY* xi (1998) available at <http://www.ojjdp.ncjrs.org/pubs/walls/contents.html> (last visited Apr. 11, 2004).



Feld have argued persuasively that the "increasingly punitive juvenile justice policies [that] impose harsh sanctions disproportionately on minority youths" have, in turn, transformed the very nature of the juvenile court system in the United States, blurring the differences in procedures and substantive goals between it and the adult criminal courts.<sup>53</sup> In part because "the segregation of blacks living in concentrated poverty in urban America coalesced and influenced patterns of youth crime,"<sup>54</sup> it was easier for predominately white policymakers deciding how to handle "someone else's kids"—usually African-American kids—to implement increasingly severe punishments. Softer and more benign methods, once justified by the increasingly defunct rehabilitative ideal, fell into disfavor.

Many African-American children are further "propelled" toward the adult criminal justice system by an additional set of factors compounding whatever painful and damaging experiences they may have suffered in juvenile institutions. For adults as well as juveniles, much crime is shaped by its social ecology—the characteristics of the neighborhoods in which it occurs. Once released from juvenile and adult institutions, a disproportionate number of African Americans return to inner-city environments filled with criminogenic risks and threats.<sup>55</sup> In fact, in many of these communities, there are so many persons returning from prison or jail on such a regular basis that the cycle of incarceration and re-entry actually transforms the neighborhoods themselves. Lacking any social and economic cushion with which to absorb so many returning and displaced residents, these places hover at the "tipping point," beyond which insurmountable levels of personal and neighborhood disorganization and chaos occur.<sup>56</sup>

In many such places, the lives of African-American residents can be adversely affected by what researchers have termed "criminal embeddedness"—immersion in a network of interpersonal relationships that increase their exposure to crime-prone role models.<sup>57</sup> Neighborhoods characterized by criminal embeddedness are highly criminogenic and also extremely difficult to survive. Recent statistics indicate that Afri-

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53. BARRY FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 5 (1999).

54. *Id.* at 14.

55. For a discussion of some of the problems ex-convicts bring with them as they reenter free society, as well as the problems they confront once they arrive, see *PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES* (Jeremy Travis & Michell Waul eds., 2003).

56. See, e.g., Todd R. Clear et al., *Incarceration and the Community: The Problem of Removing and Returning Offenders*, 47 *CRIME & DELINQUENCY* 335 (2001).

57. See, e.g., Bill McCarthy & John Hagan, *Getting into Street Crime: The Structure and Process of Criminal Embeddedness*, 24 *SOC. SCI. RES.* 63 (1995).

can Americans are about nine times more likely than whites to be murdered with firearms.<sup>58</sup> Not surprisingly, as Michelle Fine and Lois Weiss found in their study urban inner city residents of both genders and all races and ethnicities were very concerned about street crime and violence. However, despite the high rates at which they were victimized by street crime, African-American and Latino men were more likely to voice fears about "*state-initiated* violence, detailing incidents of police harassment, the systemic flight of jobs and capital from poor communities of color, the over-arrest of men of color, and the revived construction of prisons."<sup>59</sup>

Other researchers have used the term "neighborhood disadvantage" to describe the nexus or cluster of interrelated factors that often accompany poverty in minority communities and amplify its negative effects on individual development as well as adult behavior.<sup>60</sup> As I noted above, the impact of these factors disrupts the social organization of the neighborhood, undermines the development of shared community norms, and weakens families and their ability to socialize children in positive ways. Not surprisingly, many of these neighborhood disadvantages are criminogenic in nature. For example, high rates of unemployment and the prevalence of single-parent families in neighborhoods can minimize the amount of time that children spend with positive role models. Disadvantaged neighborhoods also tend to suffer much higher levels of transience and mobility that contribute to an overall sense of impermanence and disorganization. Stable, consistent, and consensual community norms against crime and violence are undermined as a result.

Indeed, many autobiographical and ethnographic accounts of the lives of African Americans have underscored precisely these disadvantages, ones that many African-American capital defendants have confronted throughout their lives.<sup>61</sup> They are the result of powerful sociopolitical and economic forces that adversely affect the choices of individual actors, choices that are often less a product of rational or conscious decision-making processes than attempts to struggle with

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58. CRAIG PERKINS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: WEAPON USE AND VIOLENT CRIME (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf> (last visited Apr. 11, 2004).

59. MICHELLE FINE & LOIS WEISS, *THE UNKNOWN CITY: THE LIVES OF POOR AND WORKING-CLASS YOUNG ADULTS* 110 (1998). There is an extensive literature on this interrelated set of problems. See, e.g., William J. Chambliss, *Policing the Ghetto Underclass: The Politics of Law and Law Enforcement*, 41 SOC. PROBS. 177, 183 (1994); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

60. Delbert S. Elliott et al., *The Effects of Neighborhood Disadvantage on Adolescent Development*, 33 J. RES. IN CRIME & DELINQUENCY 389 (1996).

61. See sources cited *supra* note 21.

"[f]eelings of sheer humiliation and embarrassment, disappointment and frustration, grief and loneliness, and fear and anxiety (especially concerning suspicion, rejection, and abandonment)."<sup>62</sup>

Race continues to shape the biographies of African-American capital defendants well into adulthood. For example, the racial dimension to poverty in the United States in some ways deepens the stigma of being poor by making the consequences of poverty more difficult to overcome. The criminogenic effects of this kind of race-based structural disadvantage have been well documented.<sup>63</sup> In some areas of the country the economic disparities are staggering. For example, Neeta Fogg reported in 2003 that an incredible 45% of black men in Chicago between the ages of twenty and twenty-four were out of work and out of school.<sup>64</sup> Similarly, nearly half of all African-American men between the ages of sixteen and sixty-four in New York City were unemployed in 2003.<sup>65</sup> In the face of such severe deprivation and disadvantage, race seems to heighten the sense of injustice, and intensify the righteous outrage that develops among people who have been confined in what one commentator has termed a "subculture of exasperation."<sup>66</sup>

In addition to the sociological and economic forces at work, racism has powerful psychological dimensions. Thus, the biographies of African Americans include exposure to significantly higher levels and unique forms of interpersonal and "environmental" stress.<sup>67</sup> For example, they are more likely to be subjected to what have been termed "micro-aggressions"—the "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks" by whites who may

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62. NIGHTINGALE, *supra* note 15, at 40.

63. See, e.g., Sampson, *supra* note 18. See also James W. Balkwell, *Ethnic Inequality and the Rate of Homicide*, 69 SOCIAL FORCES 53 (1990) (reporting that ethnic inequality is a strong predictor of homicide); Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114 (1982) (finding that racial and economic inequality contributed to levels of violent crime).

64. See Bob Herbert, *Locked Out at a Young Age*, N.Y. TIMES, Oct. 20, 2003, at A17. See also *Out-of-School & Jobless Youth Reach Crisis Levels: 87,000 Jobless Youth Walk Chicago's Streets; New Report Releases Data on State, Metro, and City Disconnected Youth*, P.R. NEWswire, Oct. 20, 2003 available at LEXIS, News Library, PRNews File.

65. Janny Scott, *Nearly Half of Black Men Found Jobless*, N.Y. TIMES, Feb. 28, 2004, at B1. For the full report, see Mark Levitan, *A Crisis of Black Male Employment: Unemployment and Joblessness in New York City, 2003*, in COMMUNITY SERVICE SOCIETY ANNUAL REPORT, available at [http://www.cssny.org/pubs/special/2004\\_02labormarket.pdf](http://www.cssny.org/pubs/special/2004_02labormarket.pdf) (last visited Apr. 11, 2004).

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

67. See, e.g., GRACE CARROLL, ENVIRONMENTAL STRESS AND AFRICAN AMERICANS: THE OTHER SIDE OF THE MOON (1998).

employ them “unintentionally” but nonetheless persistently.<sup>68</sup> The cumulative impact of these micro-aggressions “has the potential to be the straw that breaks the camel’s back due to the relentless nature of the racialized bombardment and the difficulty of attributing racial animus, that hostility which is thought to indicate intention.”<sup>69</sup>

Although African Americans are subjected to many such provocations, they do not have the same leeway as others to respond. Indeed, the greater amount of criminal justice system surveillance, monitoring, and intense policing of African Americans, disparities in the prosecution and punishment of African Americans for similar crimes that are treated very differently (perhaps as a function of the race of the defendants likely to commit them),<sup>70</sup> and the multitude of other criminogenic criminal justice interventions to which they are differentially exposed (such as higher rates of “three strikes” prosecutions<sup>71</sup>) help to account for the continuing overincarceration of African-American adult men—rates that exceed those of blacks in South Africa.<sup>72</sup> Prison itself, the difficulties of post-prison adjustment, and the fact that probation and parole now function as agencies of social control

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68. Peggy C. Davis, *Law as Microaggression*, 98 YALE L. REV. 1559, 1565 (1989) (quoting psychiatrist Chester Pierce, who first coined the term). See Chester Pierce, *Offensive Mechanisms*, in THE BLACK SEVENTIES 265 (Floyd B. Barbour ed., 1970).

69. Camille Nelson, *Breaking the Camel’s Back: A Consideration of Mitigatory Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & LAW 77, 93 (2003).

70. For example, although blacks and whites use drugs at approximately the same rate, African Americans have been arrested for drug offenses at a much higher rate than whites. See Alfred Blumstein, *Making Rationality Relevant—The American Society of Criminology 1992 Presidential Address*, 31 CRIMINOLOGY 1, 2-3 (1993). For a discussion of the sentencing disparities between powder and crack cocaine-related offenses, see Bianca A. Poindexter, Comment, *The War on Crime Increases the Time: Sentencing Policies in the United States and South Africa*, 22 LOY. L.A. INT’L & COMP. L. REV. 375, 397 (2000). See also references cited *supra* note 59.

71. See, e.g., Lisa E. Cowart, *Legislative Prerogative vs. Judicial Discretion: California’s Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615, 652 (1998) (citing sources to the effect that “African Americans are sentenced under three strikes laws at a rate of thirteen-to-one over Caucasians”). See also DRAGAN MILOVANOVIC & KATHERYN RUSSELL, *PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM: THE DARK FIGURE OF RACISM* (2001).

72. Anthony E. King, *The Impact of Incarceration on African American Families: Implications for Practice*, 74 FAMILIES IN SOC’Y: J. OF CONTEMP. HUM. SERVICES 145-46 (1993). Approximately one-third of all African-American men between the ages of twenty and twenty-nine are in prison, or on probation or parole. MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 3 (1995). Although the rate at which white men were imprisoned in the United States rose dramatically in the 1980—growing from a rate of 528 per 100,000 in 1985 to a rate of 919 per 100,000 in 1995—it never remotely approximated the incarceration rate for African Americans. The number of African-American men who were incarcerated rose from 3,544 per 100,000 in 1985 to an astonishing rate of 6,926 per 100,000 in 1995. BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995* (1997).

rather than providers of reintegrative services<sup>73</sup> all combine in potentially destructive ways to more adversely affect the lives of African Americans than others.

This brief cataloguing of the structural and other obstacles faced by African Americans has addressed only some of the factors that distinguish their lives from just about everyone else in this society. These components of biographical racism go a long way toward explaining—at a broad level with sobering implications—the continuing disproportion of African Americans in our nation's prisons and on its death rows. Anyone who has worked extensively with capital defendants knows firsthand about the wages of this kind of racism, the way it interacts with criminal justice system decision making, and inflicts additive effects upon the lives of young minority men that often explain the troubled path they have traveled toward their trial for life.

Carefully examining the role that race has played in the lives of many capital defendants forces us to confront its unique nature, and the fact that the race-based influences do more than just make other adverse conditions or risk factors, like poverty, worse. Instead, they expose persons of color to experiences—in their nature, severity, duration, and amount—that no one else in this society has and that may leave an indelible mark. And for many capital defendants, this biographical racism—the accumulation of these and other race-based experiences—is the dominant framework around which their social histories have been structured. Yet, as I say, most analyses of discriminatory death sentencing examine decisions made long after these powerful social historical forces have taken their toll.

#### IV. STRUCTURAL MITIGATION IN THE SOCIAL HISTORIES OF AFRICAN-AMERICAN CAPITAL DEFENDANTS

Discussions of the racial fairness of capital punishment often omit consideration of biographical racism in part because it is so difficult to quantify. Moreover, there is no straightforward legal mechanism by which these structural factors can be used in overarching constitutional challenges to racial injustice. In *McCleskey*, the United States Supreme Court restricted constitutional claims to a narrow form of intentional discrimination, further winnowing the scope of relevant

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73. See e.g., Edwin Lemert, *Visions of Social Control: Probation Considered*, 39 CRIME & DELINQUENCY, 447 (1993); JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990 (1993).

race-based factors and diminishing concerns over biographical racism even more.<sup>74</sup>

Yet, on a case-by-case basis, biographical racism represents a clear form of “structural mitigation”—mitigation that is structured into the lives of African-American defendants by the various forms of life-altering racism that remain in American society. In precisely the degree to which African-American capital defendants are more likely to have undergone these unique and potentially criminogenic experiences, they approach their capital trials with social histories that include a built-in store of significant mitigation that capital juries are required to consider in deciding their fates.

To be sure, this is not categorical mitigation—it does not, on its face, preclude the imposition of the death penalty (as the Supreme Court now has ruled that, say, age and developmental disability do).<sup>75</sup> Nor is this an argument to the effect that African Americans are not “capable” of committing a capital crime or that they are not “responsible” for what they do.<sup>76</sup> Rather, it is a statement about the special store of mitigation—considerations that weigh heavily in favor of granting life rather than death verdicts—that has been inscribed into their social histories by the very nature of the experiences to which, as a result of their race, African-American defendants have been exposed and subjected.

To develop this notion a little more, let me briefly comment on how mitigation is supposed to operate in capital trials. The operative legal definition of capital mitigation was first framed in 1977, in *Lockett v.*

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74. *McCleskey v. Kemp*, 481 U.S. 279 (1987). Professor Peggy Davis has suggested that there are times when the law itself operates as a form of microaggression. She characterized the Supreme Court's *McCleskey* decision as a microaggressive statement from the Justices to African-American citizens. See Davis, *supra* note 68.

75. For Supreme Court rulings regarding age, see *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989); for developmental disability, see *Atkins v. Virginia*, 536 U.S. 304 (2002).

76. A false dichotomy is often interposed by critics of this approach, suggesting that people must be seen either as fully autonomous agents who are not only equally responsible but completely culpable for everything they do or, otherwise, are being depicted as helpless, downtrodden victims who cannot initiate actions or make choices on their own. Of course, neither caricature is accurate, and the dichotomy is a false one. An analysis that accurately describes the way in which structural and other forces influence actions and constrain choices does not diminish the dignity of the persons to whom it is accurately applied. Professor Martha Nussbaum is persuasive on this point. She writes: “[P]eople are dignified agents, but they are also, frequently, victims. Agency and victimhood are not incompatible: indeed, only the capacity for agency makes victimhood tragic.” MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 406 (2001). Thus, I do not understand the logic of the argument that the dignity of persons can be upheld by holding them fully culpable and even by executing them for crimes they committed in part in response to conditions created and imposed on them by others.

*Ohio*, as "any aspects of a defendant's character . . . that the defendant proffers as a basis for a sentence less than death."<sup>77</sup> Although the *Lockett* Court was not specific about which aspects of the defendant's character should serve as the basis of such a sentence, the opinion established the importance of having "possession of the fullest information possible concerning the defendant's life."<sup>78</sup>

Legal commentators have helped to refine the concept of mitigation by reminding defense attorneys that they must show jurors that a defendant's actions were "humanly understandable in light of his past history and the unique circumstances affecting his formative development."<sup>79</sup> Thus, a mitigating social history that highlights the role of factors like poverty and abuse in a defendant's life does not excuse his serious violent crime. Instead it renders past criminal behavior "more understandable and evokes at least partial forgiveness."<sup>80</sup> It is a framework that must be brought to bear in a capital penalty trial in order to "spark in the sentencer the perspective or compassion conducive to mercy."<sup>81</sup>

In 1987, Justice Sandra Day O'Connor articulated what she characterized as a "long held" societal belief, namely that, "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."<sup>82</sup> She summarized the significance of this belief for "the individualized assessment of the appropriateness of the death penalty," noting that the process of understanding the role that defendants' disadvantaged background or their emotional or mental problems have played in their life course and past criminal behavior is central to the constitutionally required "moral inquiry into the culpability of the defendant."<sup>83</sup> And, just last Term, Justice O'Connor authored an opinion that imposed a *duty* upon defense attorneys to assist jurors with this inquiry by developing

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77. *Lockett v. Ohio*, 438 U.S. 586, 604 (1977).

78. *Id.* at 603 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949) (internal quotation marks omitted)). Two years earlier, *Jurek v. Texas* also had emphasized that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." 428 U.S. 262, 276 (1976).

79. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 335 (1983) (footnotes omitted).

80. *Id.* at 336.

81. *Id.*

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

83. *Id.*

mitigation through a detailed social historical analysis of the capital defendant's life.<sup>84</sup>

These legal notions about the basis of mitigation are grounded in sound psychological theory. The theoretical basis for a model of mitigation begins with what social psychologists know as "attribution theory," the notion that people regularly make causal attributions about the behavior that they witness others perform.<sup>85</sup> Depending on whether the causes of the behavior are attributed to the internal dispositions and willful choices of the actor, or to external circumstances and conditions over which the actor has less control, the behavior and the actor are regarded very differently. That is, the nature of the causal attribution affects the judgments we make about the moral quality of the act and the moral culpability of the actor.

Research confirms that jurors engage in exactly this kind of attributional process when they analyze the causes of defendants' behavior, their intentions in the course of that behavior, and the outcome of the behavior itself. These analyses are central to the way jurors attribute blame, gauge blameworthiness, and assess culpability.<sup>86</sup> When the

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84. *Wiggins v. Smith*, 123 S.Ct. 2527 (2003). Postconviction investigation revealed that Mr. Wiggins had a "bleak life history" that included neglect and severe forms of abuse "at the hands of his mother and while in the care of a series of foster parents." *Id.* at 2533. His trial attorneys did not uncover, develop, or present any of this information at his sentencing hearing. *Id.* The Court found that had the jury been appraised of this "troubled history," which constituted "considerable mitigating evidence," there was "a reasonable probability that it would have returned a [life] sentence." *Id.* at 2542-43. The *Wiggins* Court imposed a duty upon competent trial counsel to diligently seek to develop precisely this kind of information in capital cases.

85. Attribution theory was first formalized in FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* (1958). It has been corroborated, elaborated, and extended in numerous publications since then. For thoughtful overviews, see EDWARD E. JONES ET AL., *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* (1987); Harold H. Kelley, *Attribution Theory in Social Psychology*, 15 NEB. SYMP. ON MOTIVATION 192-238 (1967); Harold H. Kelley, *The Processes of Causal Attribution*, 28 AM. PSYCHOLOGIST 107-128 (1975); Harold Kelley & John Michela, *Attribution Theory and Research*, 31 ANN. REV. PSYCHOL. 457 (1980); and LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1991).

86. There are too many studies on this topic to cite in a comprehensive way. One of the best syntheses of this scientific theory is KELLY G. SHAVER, *THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS* (1985). For a representative sample of research studies in which the theory is elaborated and extended, see Celesta Albonetti, *An Integration of Theories To Explain Judicial Discretion*, 38 SOC. PROBS. 247 (1991); NORMAN ANDERSON, *Psychodynamics of Everyday Life: Blaming and Avoiding Blame*, in *CONTRIBUTIONS TO INFORMATION INTEGRATION THEORY* 243 (Norman Anderson ed., 1990); Brad E. Bell, *Distinguishing Attributions of Causality, Moral Responsibility, and Blame: Perceivers' Evaluations of the Attributions*, 17 SOC. BEHAV. & PERSONALITY 231 (1989); Francis T. Cullen et al., *Attribution, Salience, and Attitudes Toward Criminal Sanctioning*, 12 CRIM. JUST. & BEHAV. 305 (1989); Dariusz Dolinski et al., *Perpetrators' Freedom of Choice as a Determinant of Responsibility Attribution*, 128 J. SOC. PSYCHOL. 441 (1988); Frank D. Fincham & Robert E. Emery, *Limited Mental Capacities and Perceived Control in Attribution of Responsibility*, 27 BRIT. J. SOC. PSYCHOL. 193 (1988); Darnell Hawkins, *Causal Attribution and Punishment for Crime*, 2 DEVIANT BEHAV. 207 (1982);



perceived cause of a criminal act is internal and volitional—stemming from personal traits and choices—increased levels of culpability are assigned and higher levels of punishment are perceived as warranted. Mitigation reverses or moderates the attributional process by which higher levels of culpability are assigned by providing a fuller, more contextual set of alternative causal explanations for actions or for an entire life course. Thus, in terms of the “moral inquiry into the culpability of the defendant” that is essential to the capital jury’s choice between life and death, mitigation helps jurors understand how past traumas, powerful external forces, or other conditions or causes not entirely under the control of the defendant nonetheless influenced the troubled direction taken at various points in his life.

This is simple to describe, perhaps, but difficult to do. It certainly cannot be done successfully without a great deal of time and effort having been invested by the attorneys in charge of telling this story at the defendant’s penalty trial. This is in part because of the well documented general tendency for people to attribute actions to the actor, not to the situation or to other background factors—committing what social psychologists call the “fundamental attribution error.”<sup>87</sup> Moreover, all other things being equal, the greater the harm that the particular behavior brings about, the more likely that it will be attributed to internal causes (i.e., to the perpetrator of the act).<sup>88</sup> In addition, the less similar the persons whose behavior is being judged to the persons making the judgment, the greater the tendency to perceive internal

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Joanne Joseph & James Tedeschi, *Perceived Responsibility and the Least of Evils Principle*, 7 LAW & HUM. BEHAV. 51 (1983); J.W. Mann, *Extrapunitive Attributions*, 130 J. SOC. PSYCHOL. 453 (1990); David A. Pizarro et al., *Causal Deviance and the Attribution of Moral Responsibility*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 653 (2003); Joseph Sanders & V. Lee Hamilton, *Is There a “Common Law” of Responsibility? The Effect of Demographic Variables on Judgments of Wrongdoing*, 11 LAW & HUM. BEHAV. 277 (1987); Arvind K. Sinha & Pawan Kumar, *Antecedents of Crime and Suggested Punishment*, 125 J. SOC. PSYCHOL. 485 (1985); Thomas R. Shultz et al., *Judgments of Causation, Responsibility, and Punishment in Cases of Harm-Doing*, 13 CAN. J. BEHAV. SCI. 238 (1981); Bernard Weiner et al., *An Attributional Examination of Retributive Versus Utilitarian Philosophies of Punishment*, 10 SOC. JUST. RES. 431 (1997); Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 SOC. PSYCHOL. Q. 67 (1991).

87. For a good discussion of this and related topics, see ROSS & NISBETT, *supra* note 85. For examples of fundamental attribution error in practice, see V. Lee Hamilton, *Intuitive Psychologist or Intuitive Lawyer? Alternative Models of the Attribution Process*, 39 J. PERSONALITY & SOC. PSYCHOL. 767 (1980); Eric M. Hansen et al., *Actors and Observers: Divergent Attributions of Constrained Unfriendly Behavior*, 29 SOC. BEHAV. & PERSONALITY 87 (2001); Joel T. Johnson et al., *Causal Attribution and Dispositional Interference: Evidence of Inconsistent Judgments*, 20 J. EXPERIMENTAL SOC. PSYCHOL. 567 (1984); Martin A. Safer, *Attributing Evil to the Subject, Not the Situation*, 6 PERSONALITY & SOC. PSYCHOL. BULL. 205 (1980).

88. See, e.g., D. Chimaeze Ugwuegbu & Clyde Hendrick, *Personal Causality and Attribution of Responsibility*, 2 SOC. BEHAV. & PERSONALITY 76 (1974).

causes for their behavior, to hold them more responsible and culpable for their actions, and to punish them more harshly.<sup>89</sup>

In the case of capital jurors, who typically are called upon not just to evaluate a single act but an entire life—indeed, to assess the moral worth and overall culpability of the person who is on trial in a death penalty case—the process of understanding the attributional causes of the course of the defendant's life requires a narrative understanding of who the defendant is and how and why he has done the things he has. As one commentator has summarized it: "In compiling evidence of mitigating circumstances, attorneys and social workers investigate not only a clients' present mental state, but his childhood, family life, and the community in which he was raised."<sup>90</sup> In other words, in a capital penalty trial, the inquiry over moral culpability is broadened in a way that provides the jury with insights into how defendants made certain life altering choices and, as a result, what level of blameworthiness attaches to them overall.<sup>91</sup>

Thus, evidence that provides a humanizing narrative account of the defendant's life and prior actions is essential to a case in mitigation because it helps capital jurors understand how forces beyond the defendant's control shaped the direction of his life and the adaptive nature of many of the actions in which he engaged. A narrative that allows the jury to see the defendant as a person, rather than, for example, as a "monster," shifts the attributional framework and thereby lessens his level of moral culpability.<sup>92</sup>

Compassionate justice requires jurors to walk the "delicate line" that philosopher Martha Nussbaum describes: "We are to acknowl-

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89. See, e.g., Curtis Banks, *The Effects of Perceived Similarity Upon the Use of Reward and Punishment*, 12 J. EXPERIMENTAL SOC. PSYCHOL. 131 (1976).

90. Francine Banner, *Rewriting History: The Use of Feminist Narratives To Deconstruct the Myth of the Capital Defendant*, 26 N.Y.U. REV. L. & SOC. CHANGE 569, 579 (2001).

91. Because the most important insights come out of the narrative force of the social history that is presented in a capital case—the way mitigating features of a defendant's background cohere into a compelling story about his life course—mitigation is not easily quantified. This may explain why earlier archival studies of discriminatory death sentencing failed to take mitigation into account at all. Perhaps not surprisingly, more recent, sophisticated studies that do code for the amount of mitigation in the case, controlling for it in statistical analyses designed to determine whether white and African-American capital defendants are treated differently, tend to find greater amounts of discrimination. For example, see the especially careful and sophisticated research described in the 1998 Baldus study. Baldus et al., *supra* note 9. But even those studies cannot place a numerical value on the narrative coherence and biographical integrity of the mitigation that is presented—the way the whole of a life story is greater than the sum of its parts. And, of course, no study of the trial record alone can code for all of the mitigation that could have and should have been presented but, for whatever reason, was not.

92. It should go without saying that these principles cannot be implemented as mere tactics or ploys. Mitigation must be rooted in the actual social history and life circumstances of the capital defendant, as reflected in and conveyed by the testimony of numerous lay and expert witnesses.

edge that life's miseries strike deep, striking to the heart of human agency itself. And yet we are also to insist that they do not remove humanity, that the capacity for goodness remains when all else has been removed."<sup>93</sup> Of course, like all capital defendants who are more than the sum total of the risk factors to which they have been exposed, African-American defendants are whole persons whose humanity transcends the biographical racism to which they have been subjected and the structural mitigation offered on their behalf.

Moreover, my suggestion that there are overall group differences in the amount of structural mitigation in the lives of white and African-American defendants is not meant to ignore much overlap in the distributions of harmful risk factors to which they have been exposed. That is, I know well that there are many white capital defendants who have trauma-filled histories and compelling mitigating life stories that rival or exceed those of many African American defendants. In fact, there are certain places in this society—some prisons, for example—where whites are more at risk than many African Americans. But this does not detract from my earlier observations about the continuing significance of race in this society, and the way that biographical racism—at structural levels and in myriad ways—has profound life altering consequences for some defendants and not others.

Thus, precisely because African-American capital defendants typically have so much structural mitigation—race-based, disproportionate exposure to “life’s miseries”—in their lives and in their social histories that other groups generally do not, mere parity with white defendants in the rates at which they are sentenced to death does not reflect “equal justice.” All other things being equal in a truly fair decision-making process, the presence of built-in structural mitigation in the lives of African-American defendants should result in their rates of death penalty imposition being much *lower*, not equal. In the next section I discuss one important reason that this is rarely the case.

#### V. CROSSING THE EMPATHIC DIVIDE: THE NEED TO TRANSCEND OTHERNESS

A meaningful moral inquiry into the culpability of individual defendants requires capital jurors to cross an “empathic divide”—the cognitive and emotional distance between them that makes genuine understanding and insight into the role of social history and context in shaping a capital defendant’s life course so difficult to acquire. The recognition of basic human commonality—an opportunity for capital

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93. NUSSBAUM, *supra* note 76, at 409.

jurors to connect themselves to the defendant through familiar experiences, common moral dilemmas, and recognizable human tragedies—is the starting point for compassionate justice. But the empathic divide stands in the way of that kind of understanding. Its roots are deep but not difficult to trace. Precisely because the harm for which the defendant has been held responsible is so great, and the typical capital defendant is perceived by jurors as truly different from themselves (made so by his behavior if nothing else), there is always a gap in understanding that must be overcome.

However, the empathic divide between African-American capital defendants and white jurors is made wider by another force at work. There is an even more extreme form of attribution error that whites tend to commit when they interpret and judge the behavior of minority group members. Indeed, this tendency to attribute the causes of the behavior of African Americans to their negative internal traits has been termed the “*ultimate* attribution error”<sup>94</sup> because it is so persistent and pernicious. Whether the error is ultimate or merely fundamental, its consequences are profound. As Anthony Amsterdam and Jerome Bruner have observed, racism involves the opportunistic use of race

[t]o disempower the group constructed as “other” in order to empower *our group* by contrast to “them.” This requires the creation and maintenance of an *essentialist*, “natural kinds” category scheme that imbues the “others” with intrinsic, immutable qualities making them different from us.<sup>95</sup>

Attributing deeper and more negative traits and motives to minority group members in our society—traits and motives that are perceived as natural, intrinsic, and immutable—makes it even more difficult for whites to appreciate the role of social history and present circumstances in shaping the life course of African Americans. In capital cases, it interferes with the jurors’ ability to take structural mitigation into account as they assess the culpability of individual African-American defendants. If the psychological distance between white jurors and African-American defendants is even greater than usual—for example, if the jurors themselves are especially racially prejudiced—then the problem is much worse.<sup>96</sup> In addition, the legally mandated

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94. See, e.g., Thomas Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, in INTERGROUP RELATIONS: ESSENTIAL READINGS. KEY READINGS IN SOCIAL PSYCHOLOGY 162-73 (Michael A. Hogg & Dominic Abrams eds., 2001).

95. ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW 247 (2000) (footnote omitted).

96. There is extensive research linking racial prejudice with death penalty support. See Adalberto Aguirre & David V. Baker, *Racial Prejudice and the Death Penalty: A Research Note*,

process of death qualification insures that white (and African-American) capital jurors are not likely to be representative of their respective groups in the communities from which they are drawn. Moreover, death-qualified juries are likely to be different from other juries in ways that further increase the distance between them and the persons whom they judge.<sup>97</sup>

My colleagues Laura Sweeney and Mona Lynch and I have conducted several studies on the nature of the death sentencing process in which the empathic divide appears to have played a role. For example, in a meta-analysis of experimental studies of race and sentencing, Laura Sweeney and I found that jurors sentenced differently as a function of the racial characteristics of the case. The statistically significant discriminatory effects were larger when the studies were well controlled and, in particular, when the race of the jurors was taken into account. Specifically, white jurors in these experimental jury studies tended to sentence African-American defendants more harshly.<sup>98</sup>

Because the results suggested that special decision-making processes might be at work when jurors and defendants were of different races, Sweeney and I followed the meta-analysis with a direct simulation study of the death-sentencing process in which we systematically varied the race of the defendant and victim. We found that our research participants discriminated against African Americans both as defendants and as victims—that is, student-jurors who considered exactly the same case facts and “evidence,” presented in exactly the same way, rendered significantly more death sentences if the defendant was African American and if the victim was white. When we tried to determine how and why this occurred by asking participants in each condition to explain their sentencing decisions, we found that white participants tended to weigh aggravating circumstances more heavily when the defendant was African American. Similarly, they were reluctant to attach much significance at all to mit-

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20 SOC. JUST. 150 (1993); Robert Bohm, *American Death Penalty Opinion, 1936-1986: A Critical Examination of Gallup Polls*, in *THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH* 113 (Robert Bohm ed., 1991); James Finckenauer, *Public Support for the Death Penalty: Retribution as Just Deserts or Retribution as Revenge?*, 5 JUST. Q. 81 (1988); Robert Young, *Race, Conceptions of Crime and Justice, Support for the Death Penalty*, 54 SOC. PSYCHOL. Q. 67 (1991).

97. See, e.g., Robert Fitzgerald & Phoebe Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW AND HUM. BEHAV. 31 (1984); Craig Haney, Aida Hurtado & Luis Vega, “Modern” Death Qualification: New Data on Its Biasing Effects, 18 LAW AND HUM. BEHAV. 619 (1994).

98. The specific results can be found in Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179 (1992).

igating circumstances when they were offered on behalf of an African American defendant. The participants also mentioned "stereotype-consistent" reasons for their sentencing verdicts (i.e., negative qualities of the African-American defendants), and they appeared less able or willing to empathize with or enter the world of African-American defendants (as manifested by the tendency to write significantly less overall in explaining their sentencing decision in those conditions, and significantly less about the black defendant specifically).

Professor Lynch and I also studied discriminatory death-sentencing processes, but in conjunction with the difficulties that jurors in general have in comprehending capital-sentencing instructions.<sup>99</sup> We found that our predominately white jurors sentenced African-American defendants to death overall more often than they did white defendants. However, among those participants who had a difficult time understanding the sentencing instructions—the bottom half of our group of participants in terms of instructional comprehension—the margin of discriminatory death sentencing actually doubled.<sup>100</sup> Thus, being confused about the instructions seemed to allow a greater amount of prejudice to come into play in the death-sentencing process. Keep in mind that the case facts—including all of the facts that were presented at the penalty trial—were identical; race was the *only* thing that varied. Thus, we were surprised to find that our jurors regarded exactly the same mitigating and aggravating evidence very differently depending on whether it was offered in a case in which the defendant was white as opposed to one in which he was African American. Thus, for three of the four mitigating factors we introduced—that the defendant

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99. Our studies have shown that capital jury sentencing instructions are extremely difficult for people to comprehend and accurately apply. See, e.g., Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411 (1994); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Arguments*, 21 LAW & HUM. BEHAV. 575 (1997). Other researchers have reached similar conclusions. See, e.g., Shari Diamond, *Instructioning on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOLOGIST 423 (1993); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161-82 (1995); Richard Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. APPLIED PSYCHOL. 455 (1995).

100. This study appeared as Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337 (2000). There was about a ten percentage point overall difference that was determined by race—white defendants were given death sentences a little more than 40% of the time, African-American defendants a little more than 50%. But when we looked only at the participants whose comprehension scores were in the low half of the group, that margin of discriminatory death sentencing doubled from a ten to a twenty percentage point difference. That is, African-American defendants were sentenced to die 60% of the time, to life by 40% of the participants; exactly the reverse was true in the case of white defendants—they got life sentences about 60% of the time, and death sentences 40%.

suffered from abuse as a child, had psychological problems that had gone untreated, and suffered from drug abuse—jurors found the testimony significantly more mitigating for white defendants than it was for African Americans.<sup>101</sup> In addition, jurors not only were more likely to underuse mitigation for African-American defendants, but many of them actually *misused* it. That is, they were more likely in the case of African-American defendants to take the mitigation that was presented and use it as aggravation.

There are a number of ways to interpret these data, of course. But whatever else they mean, I believe they point to the potential role of the empathic divide in the death-sentencing process. That is, that white jurors, in particular, are either less able or less willing to empathize and come to terms with, in a mitigating way, the significance of key background factors in the lives of African-American defendants in making assessments of blameworthiness and moral culpability. This failure to hear and acknowledge the impact of race in the lives of African-American defendants, apparently brought about by the empathic divide, is reminiscent of what Peggy Davis wrote about the Supreme Court's handling of *McCleskey*, here writ somewhat smaller in the minds of capital jurors whose "cognitive habit[s], history, and culture" sometimes leaves them "unable to hear the range of relevant voices and grapple with what reasonably might be said in the voice of discrimination's victims."<sup>102</sup> But that barrier—the built-in barrier against hearing, understanding, taking into account, and integrating into compassionate decision making—has potentially fatal consequences for African-American capital defendants.

For African-American capital defendants to be treated fairly in the capital-sentencing process, a way has to be found to reliably bridge an empathic divide that separates them from white jurors. This can be accomplished only through the most conscientious effort by defense team members who engage in painstakingly in-depth and elaborate investigation, the organization of diverse life facts into a meaningful narrative with coherent mitigating themes, and an effective, honest, humanizing presentation to jurors that places the defendant's behavior in a larger context that will allow them to better understand him.

Although there is no simple formula by which the empathic divide can be bridged, there are some basic approaches to this critically important task. In one provocative passage in Derrick Bell's *Faces at the Bottom of the Well*, he introduced fantastical "racial data storms that

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101. Only one mitigator—that the defendant had a loving family that did not want to see him die—was interpreted the same way for African-American as white defendants.

102. Davis, *supra* note 68, at 1576.

rained down on white citizens.”<sup>103</sup> Indeed, a series of data storms “entered their consciousness and flooded them with data.” The data addressed continuing disparities between African Americans and whites “in infant death rates, educational attainment, income based on education, life expectancies, prison terms for the same crime, the death sentence, and housing and health care costs and availability.”<sup>104</sup> But the daily data storms contained more than information; somehow they conveyed “the *feelings* of frustration, despair, and rage that blacks experience” when they suffered these forms of disparate treatment. Although at first frightened and then angry at this unexplained and uninvited bombardment, whites soon began to demand that the government “do something” to address the nation’s social and economic problems and “the heavy financial, political, and moral burden racism imposed on all races.”<sup>105</sup>

The capital penalty trials of African-American defendants are occasions for racial data storms to be brought to bear in the effort to bridge the empathic divide. Just as in Bell’s scenario, the information must be systematic, detailed, and somehow must convey “doses of feeling what discrimination is really like.”<sup>106</sup> Presenting this information tactfully, respectfully, and effectively allows capital jurors to better understand the forces that have helped to shape the defendant’s life course. To be sure, general information and generic feelings about discrimination are not enough. Nonetheless, they provide an important backdrop for the rest of the essential mitigating social history that will trace the individual defendant’s own unique life course.<sup>107</sup> Here, as in all capital penalty trials, “the goal is to place the defendant’s life in a larger social context and, in the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically-important events, has been shaped and influenced by them.”<sup>108</sup>

Of course, racial data storms and mitigating narratives that contextualize the lives of capital clients do not fall from the sky as they did in

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103. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 147 (1992) (in particular, see Chapter 8, entitled “Racism’s Secret Bonding”).

104. *Id.* at 147-49.

105. *Id.* at 149 (emphasis added).

106. *Id.* at 150.

107. The goals of these capital case-related racial data storms are more modest than the one envisioned by Professor Bell—“the greatest social reform movement American had ever known.” *Id.* Although they may not lead to sweeping, permanent social reforms, they can and do bring much-needed insight and perspective to capital juries.

108. Haney, *supra* note 12, at 561.



Bell's parable. They have to be assembled, organized, and presented by defense teams, some of whose members have very little background or experience with these issues. Here, too, an empathic divide may impede the work that needs to be done. That is, in some instances the disparities in the death sentencing of African Americans and the lack of mitigation that is developed in their cases may come about as a result of a lack of training, resources, motivation, or insight on defense teams whose members fail to uncover, analyze, integrate, and present the important facts and circumstances that make the defendant's life understandable. Yet, even though the empathic divide may separate defendants of different races and cultures from the persons responsible for telling their story, the need to give capital jurors an opportunity to understand the defendant's life struggle is no less important. Indeed, the responsibility to accomplish the task competently and effectively is now constitutionally mandated and, as I have suggested, even more crucial to inquire into the culpability of minority capital defendants.<sup>109</sup>

## VI. CONCLUSION

In this Article I have used three concepts—biographical racism, structural mitigation, and the empathic divide—to discuss aspects of racial fairness in capital trials. I have suggested that, at the last stages of the process of death sentencing when “discrimination” typically is measured, many of the most powerful racialized treatments and experiences have already had their life-changing effect and many of the most critical psychological, social, economic, and legal decisions in an African-American capital defendant's life already have been made. On the other hand, as a result of the biographical racism to which they have been subjected, African-American defendants are likely to have a significant amount of structural mitigation to present in any capital

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109. This kind of empathic divide may operate at many levels of the criminal justice system and affect many decisions in ways that are beyond the scope of this Article. In their comprehensive study of error rates in capital cases, Professors James Liebman, Jeffrey Fagan, and their colleagues note that “African-American representation among states, judges, prosecutors and defense lawyers is extremely low throughout the country, including in states with high percentages of African-American residents” and cite data showing the overall low rates of participation of African Americans on capital juries as well. JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT* 164 (2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf> (last visited Apr. 4, 2004). Whatever else this means, African-American defendants are likely to have their cases processed and brought to trial in systems with predominately white major trial participants and decisionmakers. The fact that, unlike capital penalty trials, there is no mandate or mechanism to overcome the empathic divide elsewhere in the criminal justice system does not mean it will not affect other outcomes.

case that, if conveyed effectively to capital jurors receptive to its meaning and significance, ought to result in lower overall numbers of death verdicts.

Persistent high rates of death sentencing may be attributed in part to what I have termed an empathic divide between whites and African Americans in the criminal justice system. This divide may separate defense attorneys from their clients and jurors from defendants whose lives they judge and whose fates they decide. It places special burdens on defense attorneys who represent African-American defendants and even judges who preside over cases in which they are at risk of receiving the death penalty. The biographical racism that is built into the lives of many African-American defendants—that they continue to be the targets of societal racism and, as a result, have been differentially exposed to criminogenic conditions and experiences as a function of who they are and how they have been treated—can become a powerful form of mitigation if the facts of the defendant's life are conscientiously investigated and assembled, thoughtfully analyzed and organized before trial, and effectively presented during capital penalty trials.

Until the race-based barriers and other forms of structural mitigation are removed from the lives of African Americans in our society, explicitly requiring that the moral culpability of the defendant to be factored into the equation of whether he lives or dies, and doing so in ways that honestly address the racialized context in which the defendant's social history has unfolded, are minimal steps that can be taken to increase the fairness and reliability of the death-sentencing process. Finding and implementing ways to overcome the empathic divide that separates African-American defendants from white decisionmakers seems essential to accomplishing this important goal.