

# THREE KINDS OF POWER: EXPLORING THE TRIAL EXPERIENCE THROUGH THE LOST NARRATIVES OF ITS PARTICIPANTS

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## I. INTRODUCTION

In law school, class discussions usually center on case law and economic theory, ignoring the social issues and individual stories of the parties involved. At times, discussions can be augmented with social science and legal secondary material, attempting to add depth to cold classroom analysis. These sources may contextualize a field of experience—how sexism might affect the bargaining process in contracts or the impact of having one black person on a jury—but by necessity, they paint with a broad brush, reducing human experience to common denominators.

Social science and legal secondary material also tend to provide us with secondhand rather than actual accounts of individual experience. The authors—largely academics—conduct interviews and then transpose the narratives into the language their target audience expects. This process, the molding of interviewees' sentiments into academic writing, can create a loss as much as it informs. The richness and intensity of the interviewee's language can be lost in translation. Similarly, the range of issues at play can be narrowed through the editing process or eliminated altogether in the interests of a thesis.

In short, it can be difficult to get a clear snapshot of how personal experience, social context, and legal process interweave within a single case or individual. This paper endeavors to bridge those worlds and create a holistic view of the trial experience.

Criminal trials are productions with many players: bailiffs, clerks, family members, news reporters. Each of these individuals—each a witness to and a participant in the legal process—possesses a unique story. While many of us are drawn to the lurid fable of the alleged criminal or victim, other players have similarly engaging tales of sacrifice, misstep, or perseverance.

This paper takes a panoramic view of the proceedings in a fictional capital murder trial and plucks out three stories, three points of

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involvement. Albert's brother is on trial. Though he can't afford a private attorney, Albert hopes his daily presence provides some support. Terése is the only single mom on the jury. Weeks of graphic evidence and intense deliberations have left her emotionally fragile. Finally, Jackson is a prosecutor: part empathy, part ambition. Winning this case could provide the job security he needs to start a family. Through three fictional short stories, we learn about Albert, Terése, and Jackson, and about the time they spend in the courtroom. But more importantly, we get a glimpse of the memories, hopes, and responsibilities that inform *how* they process those courtroom experiences.

Though the prose explores the characters' insights, the footnotes actually flesh out the story. These footnotes add legal and social context to the individual stories and the criminal process as a whole. They reference the commonality of Albert's frustrations as a family member, how Terése's experience might be typical (or not) of a capital juror's struggles, and how Jackson's closing argument toes the line of prosecutorial misconduct. The footnotes are written in an accessible narrative style that should be informative for both lay readers and those with legal training.

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In Baltimore County, Maryland, Charlie Mitchell has just been found guilty of first-degree murder. Although Albert, Terése, and Jackson had never met before this trial, their lives are now intertwined. And it is these last few days, the trial's penalty phase—when the jury decides whether or not to sentence Charlie to death<sup>1</sup>—which will have the deepest impact on their futures.

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1. The death penalty as a criminal punishment has been around for thousands of years. The code of Hammurabi (c. 1750 B.C.) had twenty-five offenses qualifying for death, only two of which were murder. LLOYD STEFFEN, *EXECUTING JUSTICE: THE MORAL MEANING OF THE DEATH PENALTY* 31 (1998).

As of 2005, 122 countries had abolished the death penalty by law or de facto by years of inactivity. "In 2004, 3,797 documented executions took place in 25 different countries, with 97% taking place in China (3,400 known), Iran (159), and the United States (59)." Adam M. Clark, *An Investigation of Death Qualification as a Violation of the Rights of Jurors*, 24 BUFF. PUB. INT. L.J. 1, 22–23 (2005).

In the United States, state-sponsored executions remain legal, but a mere thirteen states carry out 90% of executions. *Id.* at 24. Texas leads all states with execution rates almost four times those of the next highest state. *Id.* at 24 n.131. "The number of [U.S.] executions has fallen by 46% from its modern peak in 1999, to 53 [in 2006]. Two-thirds of states executed no one [in 2006], and only six carried out multiple executions." *Revenge Begins to Seem Less Sweet—Capital Punishment in America*, THE ECONOMIST, Sept. 1, 2007, at 21 [hereinafter *Revenge Begins to Seem Less Sweet*].

The United States Supreme Court has ruled that capital punishment does not violate the Eighth Amendment's bar on cruel and unusual punishment as long as there is an adequate procedural process. "[C]oncerns . . . that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that

## II.

## ALBERT MITCHELL

It was Thursday; he was wearing his tan blazer. He had been alternating the tan and blue ones, always paired with pressed jeans. Albert fingered his jacket's fraying cuffs. By this point of the trial, he'd memorized the coat's pattern—plaid stitching with interspersed red lines. The red was faint, and Albert himself hadn't noticed it when he bought the jacket from the Goodwill store on Bruner and Amsterdam.<sup>2</sup> If it had been

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the sentencing authority is given adequate information and guidance." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Thus the modern-day death penalty seeks to avoid the problem of arbitrary death sentences with increased procedural requirements. First, only certain crimes can qualify for the death penalty, and a death sentence can never be an automatic punishment. Second, although each state is free to decide which crimes are death eligible, they must be proportional to the sentence of death. Finally, trials are "bifurcated"; the defendant's guilt is decided in the trial or first phase, and the decision of whether to impose the death penalty is decided in the second or sentencing phase. *See id.* (holding that the death penalty does not constitute cruel and unusual punishment where appropriate procedural measures are followed to avoid arbitrary and capricious decision making).

Capital punishment cannot, however, be carried out upon a person who is insane, mentally retarded, eighteen years old or younger at the time of the offense, or who committed a crime that did not result in the death of the victim. *Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

The capital punishment process remains dogged with allegations of racial bias. *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: DEATH BY DISCRIMINATION—THE CONTINUING ROLE OF RACE IN CAPITAL CASES 4–5 (April 2003). The Supreme Court has examined racial disparities in death sentences, but in the face of overwhelming evidence, has chosen to do nothing:

If we accepted [defendant] McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.

*McCleskey v. Kemp*, 481 U.S. 279, 315–17 (1987). Therefore, because so many groups are unfairly treated by our criminal justice system, the Court reasoned, the system is not equipped to correct itself.

2. This trial takes place in Baltimore, Maryland. Baltimore is the nation's seventeenth largest city with over 650,000 residents. U.S. CENSUS BUREAU, INCORPORATED PLACES OF 100,000 OR MORE, RANKED BY POPULATION: 2000 1 (2001), *available at* <http://www.census.gov/population/www/cen2000/briefs/phc-t5/tables/tab02.pdf>. Baltimore is a majority-minority city with minorities accounting for 65% of the population (64% black, 1.5% Asian, and 0.3% Native American). U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS: BALTIMORE (CITY), MARYLAND, <http://quickfacts.census.gov/qfd/states/24/2404000.html>.

Until recently, Baltimore had been experiencing a steady revival that had accompanied renovations to its waterfront and the addition of the famous Baltimore Aquarium. *See* Jamie Smith Hopkins, *West Side Leads City's Resurgence*, BALT. SUN, Feb. 10, 2005, at D1; Jill Rosen, *Downtown is on the Upswing, Study Says; 'Emerging' Status Puts It Ahead of D.C.*, BALT. SUN, Nov. 15, 2005, at B1; Louis Uchitelle, *Baltimore's Revival Stalled by*

for any other occasion, Albert would have congratulated himself. Rolling his shoulders, he nodded to the mirror. Still got it after all of these years. But this purchase brought him no pleasure. It was one of the few times buying something new—or new to him at least—didn't add a little swagger to his stride.

He sat in the same spot every day: aisle seat, third row back and to the left. In the beginning, he actually thought that he was doing something by being there. It made a difference to Charlie, he'd told himself, to have someone who loved him in his corner. Someone who knew that he was more than what he'd done.<sup>3</sup> But now? Now Albert was so fucking frustrated about all the shit that was being said about his little brother. They made Charlie sound like just another black stereotype. It just made him so . . . tense inside. And he knew there was nothing more he could do.

He had talked to anyone who could help. Hell, he even prayed.<sup>4</sup> In the beginning, he prayed that everything would go well for Charlie, and that the prosecutor would drop the charges, or the jury would see that he was just an innocent little boy in a man's body. But as the trial progressed, his pleas got smaller and more resigned. He made a pact with God to keep the detective from showing up on the day he was supposed to testify. Nothing spiteful, of course, just something like the flu. Or, maybe a couple

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*Housing Downturn*, INT. HERALD TRIB., Oct. 4, 2007, Business section, available at <http://www.ihf.com/articles/2007/10/04/business/baltimore.php>. Even so, in 2003, Baltimore had the third-highest homicide rate in the country with a rate of 41.9 killings per 100,000 persons. Matthew Cella, *Homicide Rate Tops Nation's Big Cities*, WASH. TIMES, Oct. 26, 2004, at B01.

Baltimore County pursues the death penalty in all possible cases. Justin Fenton, *Baltimore Man Found Guilty in Shooting Death of Friend; Terry Might be First Person in 3 Years to Get Death Sentence in MD*, BALT. SUN, Mar. 14, 2007, at 4B. Capital punishment is sought at a rate over thirteen times greater than Baltimore City, five times greater than in Montgomery County, and three times greater than in Anne Arundel County. ROBERT BRAME & RAYMOND PATERNOSTER, AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION 30 (2003), <http://www.newsdesk.umd.edu/pdf/finalrep.pdf>. However, a December 2006 ruling by Maryland's high court imposed a de facto moratorium on executions in the state until lawmakers develop appropriate oversight for the procedure. Jennifer McMenamin, *Lawyers Want to Bar Death Penalty in Case*, BALT. SUN, Mar. 6, 2007, at 4B.

3. A common prosecutorial trial tactic is to reduce the defendant's life to his or her crimes. This approach "serves to deny the humanity of the persons who commit capital murder, substituting the heinousness of their crimes for the reality of their personhood," thereby making it easier for a jury to condemn the defendant to death. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 547 (1995).

4. Even though he would not call himself a religious person, Albert has turned to religion in these moments of pain and helplessness. Whether or not we have faith, religious ideals and customs permeate our society's mass consciousness and carry meaning independent of their specific functions and symbols. "In times of personal or social crisis, these religious meanings and behaviors rise to the surface and reveal the continued public significance of religion." Claire Mitchell, *The Religious Content of Ethnic Identities*, 40 SOCIOLOGY 1135, 1138 (2006).

of pieces of evidence would be lost in one of those infamous bureaucratic mix-ups you always hear about on the eleven o'clock news. In exchange, Albert would go to church every Sunday for the rest of his life. Cross his heart. None of the pacts worked; all they really did was focus his hope. But after a while, even the little hopes got to be tedious and painful.

Some days he found himself staring at the jurors, wondering what they were thinking, what kind of lives they had. Did they have families? Did they realize their decisions affected more than just the man sitting at that table? Maybe, if they'd just look at him, just see how much he loved Charlie, then they'd know that they couldn't even consider killing his little brother.<sup>5</sup> A couple of times, he made eye contact, though he didn't know if it made much of a difference. They had to have seen the pain on his face

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5. Since 1976, black men have been sentenced to death at a rate nearly three times higher than their proportion of the population. Lucy Adams, *Death By Discretion: Who Decides Who Lives and Dies in the United States of America*, 32 AM. J. CRIM. L. 381, 382 (2005) (explaining that blacks have comprised 34% of those executed since 1976 but only roughly 11.5–14% of the national population during that time period). See also *Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, Dec. 1, 2008. This disparity is especially stark in the South where, in the past thirty years, black men have accounted for 71% of the people executed in Georgia, 75% of those executed in Mississippi, and 70% of those executed in Alabama. Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 511 (1994).

Racial disparities in the death penalty aren't relegated to the South; Baltimore County's death sentencing also follows racial patterns. "Other factors equal, 'the odds that a death-eligible defendant will be sentenced to death is [sic] almost four times higher if they kill a white victim than if no victim was white.'" Stephanie Hindson, Hillary Potter & Michael L. Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980–1999*, 77 U. COLO. L. REV. 549, 562 (2006) [hereinafter *Race, Gender, Region and Death Sentencing*] (quoting Raymond Paternoster, Robert Brame, Sarah Bacon & Andrew Ditchfield, *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 MARGINS 2 (2004)).

In the entire state of Maryland, "killers of whites are eight times more likely to get the death sentence than killers of blacks . . . ." STEFFEN, *supra* note 1, at 123. This disparity persists despite one study's finding that the black community experiences a higher rate of violence than the white community. STEVEN K. SMITH, GREG W. STEADMAN, TODD D. MINTON & MEG TOWNSEND, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION AND PERCEPTIONS OF COMMUNITY SAFETY IN 12 CITIES, 1998, at 3 (1999).

Capital punishment also remains a gendered process. "[T]hroughout the history of the American capital punishment system, there have been significantly fewer women both sentenced and executed for capital crimes than their male counterparts." Elizabeth Marie Reza, *Gender Bias in North Carolina's Death Penalty*, 12 DUKE J. GENDER L. & POL'Y 179, 180 (2005). "Only 32 women have been executed since 1930, while 3,827 men have met a similar fate." *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 365 (1972)). Potential reasons for this disparity include: chivalry, a belief that women are more amenable to rehabilitation, the "evil woman" theory (wherein the women who end up on death row are the ones who most transgress gender roles), and statutory bias (women are more likely to be first time offenders). *Id.* at 182–84.

Unsurprisingly, class bias has also been found to be a factor. A 1991 study found that 90% of those on death row were unable to hire an attorney to represent them at trial. STEFFEN, *supra* note 1, at 125.

because they'd quickly look down, fiddle with their notebooks, or clothes, or hair. One day, he felt a heavy hand on his shoulder. The husky bailiff from the corner whispered in his ear. "Hey, man, quit checking out the jurors. You're making them nervous." Albert had been watching the bailiff's mouth and the patch of razor burn under his chubby chin. Albert nodded his head in response. He got two strong pats on the back before the bailiff returned to his post, jingling as he walked from all of the keys, tools, and the gun he wore around his waist.

His eyes returned to his fraying sleeve, as they would all day. His military training had made him a stickler for details. And a part of the dress details was making sure his clothes were always clean and pressed, with no "vines." He was batting two-for-three. Staff Sergeant Richter's voice rang in his ears. "What are all of those strings hanging off your shirt, boy? A monkey could swing on those! Didn't you know you had inspection today? Speak up soldier; I can't hear you! Drop those eyes! What're you lookin' at? You're to be lookin' forward, not at me! Are you lookin' at me because I'm pretty?!" Albert stifled a shiver and pulled another loose string from his coat.

A small man asked to get into the row; it was a reporter he'd seen around. Someone from out of town. Albert politely rose to his feet to let him scoot through, pressing his lips together for a thin smile. He glanced at the large wall clock: 1:15 p.m. He'd have to catch the bus in a little over two hours. Since he'd lost his job, he'd been cutting back on as many expenses as possible. A temp working the second shift doesn't get paid shit. To cut corners, he took the bus when he could and pasta was now a staple. When he thought about his boss, his jaw got tight. How could Derrick not give him this time off? He'd been working there for five fuckin' years! In fact, he had been due a promotion, had already been passed up once. He just needed some time off to go to his brother's trial, for Christ's sakes.

"We can't hold the position for you. But if you want to reapply, we'd be happy to talk to you then," Derrick had said.

Albert shot back. He had heard of some sort of policy where you can leave for a month or something if there's a family emergency. "That," Derrick answered, "only applies for people who are sick or caring for someone who is sick. You taking care of someone who's sick?"

"No, of course not." Albert wanted to throw Derrick's smug comments back in his face. Everyone knew what was going on. He fought to keep his voice level and his hands from closing into fists.

"Well, if you want time off for what I think, then that's certainly not a sickness. Although . . ."

"Derrick, I'm the best you've got and you know it. I mean, we're talking two or three weeks. That's it." He paused. "This is my little brother, man. He could die. And I need to be there for him." He usually saved this level of honesty for his ex-wife; he felt dirty and raw.

“And most folks think he should. Save the state some money.<sup>6</sup> But I don’t see how it’s my problem or the problem of anybody else here.” He gestured to his small office window and the equipment beyond. “There’s nothing I can do. You know where personnel is.” Derrick went back to shuffling invoices. The conversation was over.

Albert never wanted to see that fucker again but knew he would. There just weren’t a lot of jobs in town that paid well. And besides, who else was going to give him a chance? “The Brother of a Convicted Murderer” was a title he was never going to get used to.<sup>7</sup>

Stacey hadn’t let him spend much time with the kids since the trial began. She even rearranged her nursing shifts so that she didn’t need him to watch them on Tuesdays and Thursdays. Maybe she thought he’d bring home depravity from the courtroom and track it around like mud. That was such bull, and she knew it. They’d had Charlie over all the time when they were married; he had been their pinch babysitter. Uncle Charlie. He was dependable enough to show up, but not dependable enough to keep

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6. In fact, the death penalty is quite costly. One federal judge estimates each federal death penalty trial (not including appeals) costs taxpayers one million dollars and argues that those high costs siphon resources from an already overburdened and financially strapped court system. See Frederic Block, Op-Ed., *A Slow Death*, N.Y. TIMES, Mar. 15, 2007, at A27.

In Maryland, the average death-eligible case resulting in a death sentence costs the state about three million dollars. John Roman, Aaron Chalfin, Aaron Sundquist, Carly Knight & Askar Darmenov, *THE COST OF THE DEATH PENALTY IN MARYLAND 2* (2008). In contrast, it costs the state roughly \$1.1 million (including prison costs) for a case which is death penalty-eligible, but where such penalty is not sought. *Id.* That \$1.9 million difference means that, in Maryland, it is nearly three times more expensive to sentence someone to death than it is to incarcerate him or her for life. *Id.*

“Martin O’Malley, the governor of Maryland, says that, but for the death penalty, his state would have been \$22.4 [million] richer since 1978. That money would have paid for 500 extra policemen for a year, or provided drug treatment for 10,000 addicts.” *Revenge Begins to Seem Less Sweet*, *supra* note 1, at 21.

7. It is not uncommon for the relatives of the accused to be treated poorly. One relative reported human feces left at her doorstep. Another family’s pets were killed. Some relatives experienced harassment at work and even at church. Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 B.U. PUB. INT. L.J. 195, 209–10 (2007) [hereinafter *No Due Process*].

One young man, eleven-year-old Trevor Dicks, described how his life changed when his older brother was sentenced to death: “My lifelong friends were told they couldn’t play with me because I had a brother on death row accused of murder. I can remember my best friend Travis telling me he wasn’t going to be allowed to play with me anymore. We snuck over to the bushes to hug and talk. Losing friends, feeling like an outcast to society. My friends were not allowed to socialize with me anymore. School was getting real tough. I was forced to drop out of school in the fourth grade. I went on the road to try to raise money to get my brother a new trial.” Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants’ Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 FLA. ST. U. L. REV. 1119, 1159–60 (1999).

sugar cookies out of their grubby hands or get the kids to bed on time. They'd come home from a concert or a movie to one of two scenarios: either the lot of them was playing on those video games, or they were all passed out on the couch with bits of popcorn on their chests and flat cola at their feet. Video game nights were easy to pick out—you could hear the shouts and groans from the street.

Charlie certainly wasn't perfect. He'd been a heavy drinker for years, started sometime in high school. Broke mom's heart. It was part of the reason he hadn't held a steady job for more than six months at a time. But Charlie wouldn't just roll over; he always had some kind of grand plan. There was the photography thing. Then the advertising investment thing—just a big pyramid scheme. And, of course, his ultimate dream, opening a bar. “Charlie, the last thing you need to do is open a bar,” Albert remembered telling him. “One for you, one for me, two for you, two for me.” Though he pretended to be offended, Charlie had a good laugh.

Albert and Stacey had kept a dry house, and Charlie respected that. He never brought drinks to the place, never smelled of alcohol. In fact, Albert thought their babysitting requests were an excuse for Charlie to sober up for a little while, get his act straight, even if it was just for a few days.

One night a couple years ago he and Stacey came home to an empty house. Stacey was the first one to notice the house was quiet. “Maybe he finally got them to bed on time,” she'd teased. Taking advantage of the dark porch, she'd grabbed his face for a peck on the lips. When they got inside, they looked around for Charlie. He wasn't downstairs. Albert went to check on the kids and found their rooms empty. He yelled down to Stacey to call Charlie's cell phone. He must have left a note, right? While Stacey tried to get through on the phone, Albert frantically searched every surface for a note. “They're at the hospital,” Stacey called to him from the kitchen. “Michael had some pains in his side, and Charlie thought it might be appendicitis—had seen some show about it on TV last week. He was just dehydrated or something. He'll be fine. Charlie said he left a note on the front door.” Albert rushed to the front door and yanked it open. There, about chest high, was a little scrap of paper. “We went to the St. Mary's. Don't worry. Call my cell. Charlie.”

Albert looked up again at Charlie. Like his cuff, he knew every detail of the back of his little brother's head. The first few days of trial, he thought that if he concentrated enough, he could look right into his mind—that he could see what Charlie was thinking. This fantasy ended the third or fourth day, around the time they started to present the physical evidence from the crime. Shit! Maybe he didn't really want to know what was going on in there. Sure, before the trial even began, he'd known what happened. It was all over the newspapers and TV, inescapable. They had



filled in the details that Charlie couldn't remember the morning of March 24, 2003.

It was 3:42 a.m. when Charlie banged on Albert's door. Initially scared, Albert rubbed the sleep from his eyes as he looked through the side window to see if his worst fear was true, that something had happened to his children. When he saw that it was just Charlie, fear switched to anger. Albert swung the door back, "You couldn't wait until morning to ask me for some money?!" His words didn't reach their target; Charlie sped past him to the bathroom. He was throwing up long enough for Albert to brew a pot of coffee that they would never drink.

"I think she's dead." Getting to his feet, Charlie used the bathroom doorway for support. When he realized this wasn't a joke, Albert's response was to break his brother's nose. "What the fuck is wrong with you?" Disappointment and shame mingled with the fumes of sweat and vomit. All of those years of support, advice, and sacrifice didn't matter; Charlie was going to be just another thug in prison. Later that morning, Albert held his brother for the first time since he left home. Held him until the police came at noon. As they cuffed Charlie and dipped his head into the police car, Albert cried like the mother they no longer had.

Albert turned to Charlie's attorney<sup>8</sup> and absently scratched his groomed goatee. She was young. Smart, but definitely young. A white girl, he guessed she was probably in her early thirties. He'd spoken with her a few times, mostly to help her get a feel for Charlie, and once when he had to prepare for his testimony as a character witness. "What kind of experience do you have?" he had asked. She'd been a public defender for four years, but this was her first capital case. She'd had two internships in law school with death penalty organizations.<sup>9</sup> He nodded, politely, but all

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8. Charlie and his family were unable to afford a private attorney, so Charlie was appointed counsel by the court. Counsel for indigent clients is usually selected in one of three ways: (1) judicial appointment of an attorney in private practice, (2) a "contract system," in which the jurisdiction contracts with a private attorney to handle all indigent cases for a set amount, or (3) a group of lawyers who handle all indigent criminal cases while not engaging in any outside practice. This third group of lawyers are usually called "public defenders." Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1849-50 (1994).

Maryland uses a public defender program for indigent legal representation, which is how Charlie acquired his counsel. MD. ANN. CODE art. 27A, § 4 (1957).

The caseloads for public defenders outpace fiscal increases. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 2-3 (2000). Salaries remain low; compensation for public defenders in some Southern states is as low a flat fee of \$500-\$1000 for capital cases. Bright, *supra*, at 1853. The choices made by these poorly paid defense attorneys, such as whether to combat illegal, race-based peremptory challenges or to request crucial expert testimony, can greatly disadvantage the defendant in the appeals process because many objections must be raised at trial in order to be reviewed on appeal. *See id.* at 1838-40.

9. Charlie's attorney is part of a trend which has contributed to the decrease in death sentences handed down in the last decade. "The number of death sentences handed down

the while he was thinking, “Internships?! Isn’t that when you work and don’t get paid?”

The first few days of testimony, Albert would catch up with her at the end of the day, firing off questions. “Can he say that? Can he talk about my brother that way? He basically called him an animal. And why do they keep showing those pictures? Can’t we get them to stop?” But he knew that she was working her ass off, knew she only slept a few hours each night. He had seen the room that she and her staff basically lived in during the trial. But as hard as she worked in the office and in the courtroom, Albert could tell that the tide was against Charlie from the start. And now? Now they were barely treading water, just trying to save his life. Surrounded by concrete walls and people paid to kill him, the last thing Charlie would feel would be that small prick in his arm.<sup>10</sup> Albert couldn’t let it go.<sup>11</sup>

So, they fought to keep him locked in prison for the rest of his life. Fought for Charlie’s right to live in a cell, to eat cafeteria food, to earn

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has dropped precipitously, from a modern-day peak of 319 in 1996 to 229 in 2000, and then 155 in 2001. . . . One [reason] is the increasing availability of life without parole as an option, which all but three death-penalty states now offer; . . . [another reason is that] defense attorneys have become more skilled and resourceful in persuading jurors that the lives of their clients are worth saving.” Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, (Magazine), at 34.

10. Maryland uses lethal injection to administer the death penalty. Md. Code Ann., Crim. Law § 2-303(l) (LexisNexis 2002). The U.S. Supreme Court recently declined to define lethal injection as cruel and unusual punishment. *Baze v. Rees*, 128 S. Ct. 1520 (2008). In *Baze*, Kentucky’s use of lethal injection was challenged on the grounds that the three-drug cocktail used to incapacitate and then kill caused an “unnecessary risk” of pain and suffering. *Id.* at 1529. The petitioner also argued the methodology was vulnerable to error. *Id.* at 1530. In Kentucky’s three-drug cocktail, the first drug induces a “deep, coma-like unconsciousness,” the second drug paralyzes the body and stops breathing, and the final drug stops the heart of the individual. *Id.* at 1527. The petitioners argued that there was a “significant risk” that the first drug would not be administered properly, “resulting in severe pain when the other chemicals are administered.” *Id.* at 1530. Petitioners also argued that the second drug, which immobilized the body, would hide expressions of pain if the first drug was not working properly. *Id.* at 1535.

The petitioners also pointed out that these flaws were reason enough for the veterinarian community to reject the cocktail in favor of a more humane single dose of barbiturate. *Id.* The Supreme Court rejected these arguments, stating that the petitioners did not present enough proof that the risk of causing intense pain was “so substantial or imminent as to amount to an Eighth Amendment violation.” *Id.* at 1534. The Court also found that the state’s procedural measures with respect to the drug cocktail and execution process were sufficient to guard against these types of mistakes. *Id.*

11. Law professor Rachel King argues that the death penalty violates the constitutional rights of the families of the prisoners because it deprives them of their fundamental right to family. *No Due Process*, *supra* note 7, at 200. King contends that capital punishment could not survive a substantive due process challenge because it fails to achieve its stated goals (“retribution, deterrence, incapacitation, and denunciation and vindication of legal and moral order”) while creating devastating and permanent consequences for the families of those executed. *See id.* at 219–20. In essence, she argues that “no state interest can justify the encroachment on the liberty of defendants’ family members.” *Id.* at 220.

seventy-five cents an hour working in the prison factory. But he would be alive! And at least they could talk to him, see his shoulders shake when he laughed. He could get clean, even take classes, get together some kind of hobby. Charlie could show them he was so much more than just another worthless thug.

His back was getting tight and Albert realized he'd been leaning forward, elbows on his thighs, body taught. These slick wooden courtroom benches reminded him of church pews. He half expected to see a Bible and hymnal in front of him. He sure as hell wished he had one of them right now; at least it'd be something to hold onto. If he wasn't so afraid he'd get thrown out, he'd drop to his knees right now—on this dingy floor washed with the tears of mothers and wives. He'd drop his head, say every prayer in the book, pray to every saint. He'd do it all if it'd make any kind of difference, if people would listen to him. He looked around at the dulled faces, waiting for the afternoon session to start, and acknowledged one of his fears: the people in here don't give a shit about him and his family. They just want to watch a man hang.<sup>12</sup> He cleared his throat and coughed back the disgust.

Two days ago, Albert had had his chance to testify. He had sat up in that fucking box for three hours. Before, when he'd been watching the trial, he thought it was so powerful. No matter who was testifying, each word that came out had authority. When he got up there, finally got his chance, he felt nauseous, scared. In the end, he outright begged. He let it all out in front of those jurors, lawyers, and reporters—all of those strangers. Albert couldn't bring himself to look at Charlie, or anyone else for that matter, while the words and tears rolled out. He just looked at a small notch in the wood in front of him and traced it with his fingers. Again and again, rubbing deeper as the hours progressed. Maybe if he didn't make eye contact with anyone, they couldn't see him. He clung to that as he told humiliating stories about their childhood to people who were just looking for a reason to kill one of the most important people in his life.<sup>13</sup>

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12. Executions used to be a public spectacle. In the 1800s, attendance at Colorado's executions was "usually high, with as many as 15,000–20,000 watching a hanging in Denver in 1886." *Race, Gender, Region and Death Sentencing*, *supra* note 5, at 553.

13. One view of our modern-day death penalty places it in the context of our human history of sacrifice. When some type of "evil" disrupts the harmony of a community, we have a habit of making a sacrifice to return our society to the status quo. See RENÉ GIRARD, *VIOLENCE AND THE SACRED* 8 (1977). Historically, these sacrifices have been animals, children, minorities, and slaves—those who are "either outside or on the fringes of society." *Id.* at 12. "All our sacrificial victims . . . are invariably distinguishable from the non-sacrificial beings by one essential characteristic: between these victims and the community a crucial social link is missing, so they can be exposed to violence without fear of reprisal. Their death does not automatically entail an act of vengeance." *Id.* at 13.

"We heard testimony during the trial which indicated that your brother had a rough childhood. Can you tell us more about that?"<sup>14</sup> He had to embarrass himself, his family, to save a life. He sat up there and told about their father beating them, and how every time his mother looked away. Talked about how their sister Pat had been raped by their father's friend when she was twelve, but their father was so drunk, he didn't care, didn't do anything.<sup>15</sup> He talked about how they were so poor at times that they had mud fights, because there was no money for toys or presents.

But he wanted to talk about other things. Good things. About how, at the beginning of each month, they'd receive a huge package of government food. The rule was that you couldn't dig in until it was all put away. So, they'd all scurry around like a pit crew clumsily throwing cans of corn and green beans in the cabinet and tossing the sparsely decorated boxes of cornflakes in the pantry. Marcia always put away the eggs. Even when she was only five, she had the patience to place each one carefully into their little beds on the refrigerator door.

When all of the food was at least *behind* a pantry or refrigerator door, they'd pull out the four-pound block of American cheese and a loaf of

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Rather than perpetuating the cycle of violence, state-sanctioned killing purports to end it. Some, especially family members of those executed, believe that the deaths of the victims necessitate some type of vengeance. Unfortunately, the family members of those killed by the state do not receive the same societal sympathy. They will get no "justice" for the death of their loved one; according to the state, the death itself represents justice.

14. In the sentencing phase of the death penalty trial, the jury is asked to weigh aggravating and mitigating factors. Aggravating factors are those facts that make the crime eligible for the death penalty, such as killing an elderly person or committing a murder for hire. *See infra*, notes 50–60. Mitigating circumstances are the defense's opportunities to present information which might help explain, rather than excuse, the defendant's behavior. Mitigators tend to include such considerations as a history of mental illness or the lack of a prior violent conviction. But presenting the evidence necessary to support these mitigators may require the family, doctors, or specialists to reveal embarrassing, even traumatizing experiences.

Good capital defense lawyers make the most of these mitigation factors. Charlie's attorney hopes that by encouraging Albert to reflect on Charlie's painful childhood, she can arouse sympathy in the jurors. Defense attorneys are increasingly relying on "mitigation specialists," trained social workers who learn the tools of a private investigator to help contextualize the defendant's life choices. In February 2003, the American Bar Association added a section to its capital defense guidelines that encouraged attorneys to work closely with mitigation specialists. Alex Kotlowitz, *The Unwitting Abolitionists*, N. Y. TIMES, July 6, 2003, § 6 (Magazine), at 36.

Even though mitigation specialists are helpful and strongly encouraged, Maryland has not yet required its defense attorneys to procure these services in capital cases. In a recent capital case, the Court of Appeals did not uphold a claim of ineffective assistance of counsel based solely on the defense attorney's failure to call a mitigation specialist or present her social history report. *Maryland v. Borchardt*, 914 A.2d 1126 (2007).

15. Charlie is not unusual. Many capital defendants suffered from trauma and maltreatment in early childhood. They were often victims of poverty, physical abuse, or chronic neglect as children. Haney, *supra* note 3, at 561–63.

bread and make the world's best grilled-cheese sandwiches. This was usually Charlie's job and he was known for the enormous amounts of cheese he used. Every year, it seemed, the slices got thicker and thicker. They'd break out the skillet, slap on some butter and Charlie would start hovering over the stove. He'd be there for about half an hour, making everyone else's sandwich first. All the kids would crowd around the kitchen with him, legs dangling from the counter and hair-braiding in the corner. Each in turn munching on warm gooey heaven, catching the dripping yellow cheese with their hands and mouths.

But Albert couldn't tell those stories. No one wanted to hear them. They only wanted to hear about how fucked up things were. When they met to go over what he was going to say, the defense attorney had told Albert to talk more about the shitty things, not the good times. "If you talk about the good stuff, they might think, 'Well, this guy had a good life and he threw it away.' You need to talk more about the rough times." She had talked about mitigation or something like that. "The jury is going to be weighing all the bad things he's done, against the type of life he's had."<sup>16</sup> He hadn't bought it at first. "Wouldn't it make more sense to talk about what he means to me and my family, and talk about the parts of him that can't be replaced?" he'd asked. "They haven't talked much about the good parts." "Sure," she had said, "you can talk about that stuff, but you've got to talk about the bad times, too. Basically, we want the jury to sympathize with him. We want them to see that he's also someone who's been hurt and that he should get a second chance because of it."<sup>17</sup> So,

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16. Some argue that "[a] regime asking jurors to 'weigh' or 'balance' a clutch of random intangible evils (heinousness of the crime, planning of the crime, whether the crime was done for pecuniary gain) against a clutch of random intangible mitigators (the defendant was dropped on his head as a baby, the defendant is the prison's Scrabble champion) is demented. It's not just weighing apples against oranges. It's a way to make a decision to kill or not kill look like a math problem with one right answer." Dahlia Lithwick, *Death Math: The Supreme Court Tinkers with the Calculus of Capital Punishment*, SLATE, Apr. 25, 2006, <http://www.slate.com/id/2140541/>.

17. Explanations of the defendant's poor choices as an outgrowth of the horrible treatment and circumstances in which he was raised are common in the mitigation phase. This approach has been cynically referred to as the "rotten social background" defense. This defense was first introduced in *United States v. Alexander*, wherein a black youth was said to have shot a Marine in response to being called a "black bastard." 471 F.2d 923, 957-59 (D.C. Cir. 1972). The defendant had grown up poor in the Watts neighborhood of Los Angeles, California and had learned, through years of racist treatment, to fear and hate white people. Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize A Defense of Severe Environmental Deprivation?, 3 L. & INEQ. 9, 20 (1985).

Some argue that, in failing to make allowances for the dire economic and social circumstances of the most deprived elements of the population, criminal law is departing from its professed principle that only the morally responsible may be punished for their acts. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459, 463 (1994). In essence, is it fair to hold criminals morally responsible for their acts when they have been treated immorally for most of their lives? "The law is . . . much more cautious in admitting 'defects

Albert did what he was told. At the end of his testimony, he didn't know if he felt so sick because his brother might die, or because he sold him out. He hadn't told the world that Charlie wasn't a monster, or why he loved him so much.

The courtroom's large wooden doors were slowly pushed open. Balancing a stack of files, a briefcase, and a bottle of orange juice, the prosecutor strode toward his table. Albert was raised not to hate anyone, but this guy . . . this guy was a test. Hate is such a strong word, his mother had warned him. "White people use it when they think of blacks. They use it to keep people out, keep people down."<sup>18</sup> But the best way to fight hate," she'd say, "is not to let it in. It's a black hole. And the things that are good about *you* can get lost in that black hole." So he made a promise to his mother. He could dislike. He could despise. He could want to beat the shit out of someone. But he would never let himself hate—anyone. But during this trial, he felt his promise to his mother slipping away.

This wasn't the first time that promise had been in danger. When he was fifteen, this kid on the ball field didn't like that he'd just tagged him out. It was the first time he remembered someone calling him a "Nigger." He almost decked the kid. Would have, too, if the teacher hadn't hauled the little shit off and given him detention. But Albert didn't hate that kid. And Sheila. Sheila. They met when he was twenty-three. She was closer to thirty. Her eyes were hazel, lashes long, and he could still remember her scent. They were inseparable for three months, and then she had to move away to Ohio. Her grandmother had just had a stroke and needed someone to live with her and help with her recovery.

He visited her once, several months after they'd broken up. She'd wanted to get back together. She said she loved him. Always had. He was

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of the will' than 'defects in knowledge' as qualifying or excluding criminal responsibility." H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 33 (1968). But not everyone believes that our social backgrounds should be a factor in the courtroom. Supreme Court Justice Clarence Thomas believes the label "diminished responsibility" and its attendant treatment keeps the individual from full rehabilitation and impedes the moral authority for the state to punish. "How can we teach future generations right from wrong if the idea of criminal responsibility is riddled with exceptions and our governing institutions and courts lack moral self-confidence?" Clarence Thomas, *Punishment and Personhood*, 4 CITY J., Autumn 1994, at 41, 45.

18. Stigma, prejudice, and oppression are intertwined concepts; stigmatized individuals, like minorities and the disabled, are more often the victims of prejudice, even hatred. See ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 4-5 (1963). Two core types of stigma may be applicable. The first includes "blemishes of individual character" (such as weak will, unnatural passions or dishonesty), which may be inferred from a long record of "mental disorder, imprisonment, addiction, alcoholism, homosexuality, unemployment, suicidal attempts, and radical political behavior," for example. *Id.* at 4. The second includes the stigma "transmitted through lineages"—those of race, nation, and religion—which "equally contaminate all members of a family." *Id.* Religious and racial minorities in America have been fighting both stereotypes for centuries.

fortified on the drive home, singing along with the catchy love tributes on the radio. Albert and Sheila were on the phone nearly every night for weeks until she moved back. They would talk until one of them was strong enough to hang up or exhausted enough to fall asleep. But a week after she got back into town, she dumped him. With pity and a sneer, she said she'd only gotten back together with him because she was lonely and needed support: someone to listen, to love her. Now that she had her life back, had her friends, she didn't need him anymore. While she emptied her closet to find the perfect club outfit, she told Albert they were through. Sheila had hurt him—badly. And you know what, he didn't even hate her. Just felt sorry for her.

But now, watching the prosecutor swagger to his seat, he could feel that evil of hate coming up like vomit. This white kid walked around like he owned the place. With his slick blue suit and tie. Probably never had to work with his hands a day in his life. Just to prove himself right, Albert stretched his neck to get a good view of the guy's hands. The prosecutor pulled some files out of his bag. Albert moved his head to the right, avoiding the head of the victim's sisters, two rows up. There! He could see the guy's left hand. First, running through his hair, then organizing folders on the table. Aha! His hand was as smooth as a baby's ass. Probably only used his hands to sort papers and push around weights in some gym somewhere—this was the guy who was killing his brother. He was killing his fucking brother, and he didn't even have to get calluses on his hands!

"All rise." Albert stood up, as tall as he could, and smoothed out his jeans. The judge, a thin, short, white woman, appeared from the judge's chambers and walked briskly to her cushioned leather chair. As Charlie stood, he turned his head, looking for his brother. He found Albert and gave him a tight, faint smile. "You may be seated." Everyone in the courtroom settled into their seats, into their roles.

As the prosecutor began to speak, Albert closed his eyes and fought back those persistent images of the victim. Instead, he thought about those damned grilled cheese sandwiches and smiled.

### III.

#### TERÉSE

She knew it was inappropriate, but Terése couldn't help but feel a little giddy. Four long weeks—jury selection, a trial, sentencing—and it was almost over.<sup>19</sup> With a quick head flick, she moved her bangs and looked around to the people with whom she'd shared, well, too much. Andre was going over his notes from the morning session. Marcus was

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19. Jury trials are actually relatively uncommon, making up only about three percent of the total closed state felony cases. STEVEN W. PERRY, U.S. DEP'T. OF JUSTICE, PROSECUTORS IN STATE COURT: 2005, at 6 (2006).

dozing as usual. That man cannot keep his eyes open on a full stomach. And seated below her, Debbie was tireless in her pursuit of a ponytail with no bumps. They'd been her world for a month, and honestly, she was dying to get rid of them.

These last few days had been the worst of all. Since this was the first capital murder case in Maryland in years, the story was everywhere. So much so that, during these last weeks, she'd had to avoid pretty much any public place and most television to honor her oath. Basic cable television and takeout sucked, but she'd dealt with it. Until it got worse.

As they neared the end of the trial, there was an enormous increase of death penalty protesters. Used to be that the jurors could avoid them by leaving through the back door of the courthouse. But the crowds grew and the protesters covered so much space that the back door no longer provided privacy or protection. Terése and the others had to wait an hour—or two—for the crowd to thin before their rides could pick them up. Finally, that lady judge made the decision that they would all be sequestered. Terése had never used the word in conversation before last week. Sequestered. She knew what it was, had heard it on *Law & Order* or on Court TV. She had chalked it up to a couple of days in a nice hotel. On TV, the judge would be afraid of jury tampering because of the mafia or a celebrity. So they would send the jurors to a hotel to keep them away from all of the attention or keep them safe. She had pictured an experience akin to a vacation—but local, of course, and law enforcement-supervised. Time in a hotel, away from work, away from bills, away from loading the dishwasher and mopping the floors. Maybe some of the jurors would get a card game together after dinner. Or it would be peaceful nights of watching movies with complete privacy—all on the government's dime. Any mother would jump at the chance.

Now, her impressions had certainly changed. Expectations of late night poker were replaced with evening group therapy sessions. They knew they weren't supposed to talk about the case outside of their "mahogany prison" (as Jessica called it), but it just happened. After a few anecdotes about kids or sports or bosses from hell, someone would get quiet, tune out—and they all knew why.<sup>20</sup>

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20. To be able to deal with emotionally difficult situations, people often try to distance themselves or morally disengage from the process. Moral disengagement is common in the criminal justice system.

First, prosecutors and jurors may, intentionally or not, participate in the dehumanization of the capital defendant. See Craig Haney, *Violence and the Capital Jury: Mechanisms for Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1451–56 (1997). "The easier to derogate defendants, the easier it is to treat them harshly." *Id.* at 1462. In other words, the greater the difference we perceive between ourselves and the defendant, the easier it is to impose a harsh sentence.

Second, "[h]uman beings react punitively toward persons whom they regard as defective, foreign, deviant, or fundamentally different from themselves." *Id.* at 1460.



Sure, there was privacy and a hell of a lot of movie watching. But she hadn't known how often her eyes would stray from the flickering screen to the pictures of her son and fiancé propped against the lamp near her bed. One little photo was curling on the corners and had the slight crispness of water damage. That was the one she'd kept in her pocket every day during the trial. When the testimony was especially graphic, or just plain hard to take, she'd slip her hand into her pocket and finger the print—pretending that both Jaime and Alex were there with her. How could that guy do those things? She'd been watching him throughout the trial, his reactions, the nervous way he wrung his hands. He seemed mild enough, like someone she went to school with, or one of her co-workers. But she was still scared of him. Those same soft, unwrinkled hands had disfigured a young woman's face. She reminded herself that part of the reason she was there was to protect the two men in her life. She had to be strong for them. And being strong sometimes meant you had to do difficult things.

During those days in the hotel, her small body drowned in the queen-sized bed. She'd wanted to be held, wanted someone to confide in, someone to remind her of her strengths and dreams. She wanted someone to tell her this wasn't what the world was about. The world had beauty, not just rape and death. Knees tucked under her chin, she'd wrap her arms around her legs and cling to the fleshy outer part of her calves.

She'd memorize the details of the curtains, the cheap sailboat print above the dresser. Closed eyes brought visions of the victim's mother, skinny and wrinkled from decades of smoking and shitty jobs. Her baby. Thick glasses magnified her red eyes. He'd taken her baby.<sup>21</sup> Or the guy's

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Death-qualified juries are less likely to be the defendant's race and are less likely to share with capital defendants the economic, educational, and social characteristics or life experiences "that would otherwise enable them to bridge the vast differences in behavior the trial is designed to highlight." *Id.* at 1463.

Third, jurors may see the infliction of the death penalty as vicarious self-defense. *See id.* at 1468–69. Earlier use of the death penalty occurred in societies that did not have access to modern prisons; they simply could not safely contain the violent members of their communities. *Id.* at 1473. Now, even though we have the tools to contain violent criminals, fear of their release drives some to see the death penalty as the only sure way to protect themselves and their community. *Id.* at 1470.

The current criminal justice system is set up to minimize the personal consequences of capital violence. Executions are done in private with the responsibility for "pulling the switch" diffused among several individuals. *Id.* at 1475. Making the execution process routinized and distant from the jurors' actions allows them to accept only minimal responsibility. *See id.* at 1477. The final type of moral disengagement is the perceived instructional authorization for capital punishment. The law, as explained by the judge or the prosecutor, asks jurors repeatedly "whether they can 'follow the law' and impose the death penalty." *Id.* at 1482. For some capital jurors, voting to impose the death penalty does not feel like their own decision—"they are just following legal orders." *Id.* at 1484.

21. Each day of the trial forces the family to relive the tragedy. For the survivors and relatives, the stress of the trial can take a physical toll, leading to stomachaches and weight loss. The son of one victim said "[y]ou get past some of the hurt and you start to get over it, and then you've got to come back to court and all that hurt is back in your face and it

brother who begged for mercy. Tears and snot dripped from his face onto his lap; he pleaded with them until the judge cut him off.

Terése dug her fingers deeper, pulled her legs in closer. She knew her skin was turning red, but the pain was a comfort. That dead woman was just a little bit younger than her, just three years. She'd grip tighter and tighter, feeling the strain in her back and arms. Just a little younger. She thought of Jaime's scent, his stubble. She'd fall asleep like that, coiled in a tight ball with the television on. Letterman then Conan, and that guy that came on after them. She didn't watch, just listened to the audience's canned laughter. She needed the company without having to speak. This was life for four nights.<sup>22</sup>

Today was different. What she had been waiting for was in sight. But this end wasn't a blessing. This afternoon they would hear closing arguments in the sentencing phase. Today, she and eleven others would decide if a man lived or died.<sup>23</sup> The power, the scope of it all made her

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doesn't stop." Denise M. Bonilla, *Crash Trial a Time of Rage, Sadness: Relatives of Meadowbrook Victims Cope Any Way They Can*, NEWSWEEK, Oct. 13, 2006, at A16.

Some courts are moving to provide services for the victims' families to help them cope. During the Oklahoma City bombing trials in Denver and the Washington, D.C. sniper trials in Virginia, officials set up an auxiliary courtroom for survivors and relatives, where they could watch the trial on a closed-circuit television. Officials provided the services of a police chaplain and a nurse, as well as catered food and fresh flowers. Patricia Davis, *Sniper Trial Hosts Offer More Than Just Courts; Survivors, Relatives Given Viewing Room, Other Comforts*, WASH. POST, Nov. 16, 2003, at C01.

22. Juror stress may resemble mild symptoms of post-traumatic stress disorder, but their duties as jurors prohibit them from processing their stress with friends and family. See Thomas W. Krause, *Program Offers Jurors Counseling*, TAMPA TRIB., May 7, 2007 (Metro), at 1. And even though "[j]urors may experience sleepless nights, relationship strains, emotional trauma and even physical ailments as a result of their service," few juror counseling programs exist. Amy L. Edwards, *Jurors Sentenced to the Memories: Gruesome Evidence From Criminal Trials May Forever Haunt the Innocent Who Serve*, ORLANDO SENTINEL, Apr. 15, 2007, at B1.

"I don't think there's anything you can compare it to, because I've never been asked to take the life of someone else," says Brenda Barrett, who sat on a capital jury in 1993 and sentenced the defendant to death. "[The case] becomes a reality to you. It's not something you just read in the paper, but it's something you pick up, you touch, you look at, you see, you smell, you know, you become part of it." ALAN BARLOW, DEADLY DECISIONS: PART 1: JUROR RESPONSIBILITY (American Radio Works Aug. 2002), available at <http://www.americanradioworks.org/features/deadlydecisions/index.html>.

23. Capital jurors must be death-qualified, meaning they have sworn that, if necessary, they could vote to impose death on another human being. See Haney, *supra* note 20, at 1482. Since this procedure necessarily excludes all those who are fundamentally opposed to the death penalty, "it produces a slice of the community that is more punitive and death-prone than the community at large." William Bowers, *Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors*, 84 B.U. L. REV. 609, 631 (2004). As such, the jurors may evaluate the case before them differently than the jury pool at large; their "evidence perceptions, verdict preferences, and evaluation of aggravating and mitigating circumstances" could be colored by a tendency toward conviction. *Id.*

feel lightheaded and fogged her mind with guilt, sadness, and her own self-pity.

When they marched into the courtroom in their customary order, the silence fell like judgment. Seat number nine, juror number nine. It was now like a middle name. Frank on her left and Carolyn on her right. From here, she had a good view of the courtroom. The older bailiff, Wilson, had a habit of rocking on his heels and nodding to music in his head. The court clerk would doze through most of the morning while he pretended to type on the computer. How old was he anyway? Twelve? She guessed he was at least in his twenties, but he looked so damn young. The judge's right hand man probably got carded at R-rated movies.

It was one of the last times she'd be in that room and Terése made a mental note of everything: the people, even the woodwork. The room was a comfort as much as a prison because it kept all of them from things, decisions, that were even more painful. After hearing the closing arguments and the judge's instructions,<sup>24</sup> they were on their own. They would go back into the room with that one window. The room she had grown to hate. On the bright side, she knew that today would be her last full day in that hard seat. Her poor ass thanked her for that.

Terése looked over at Frank. His shaved brown head was already beginning to glisten even though the courtroom was certainly not hot. The arguments hadn't even started yet, and of course, he was already doodling. What was it this time? Sheep? Pigs? Ahh, the cows in the pasture. For a fifty-two-year-old cable technician, he sure loved to draw farm animals. Who knew? Come to think of it, she had never asked him if he grew up on a farm . . . always meant to. Lately, there'd been less small talk, and Frank's topic of choice was his wife and how much he missed her. Hmmm, maybe the two were connected. The cows, his wife. . . . She chuckled to herself. Frank looked up expectantly. She shook her head "no." He shrugged and went back to fleshing out the grass.

While they were waiting for the judge, she flipped through her notepad. She didn't have as many pages of notes as she thought. There were snippets of some of the hardest experiences she'd ever heard. A woman writhing in a pool of blood. Facial bruising from forced oral sex. Interspersed in these notes were doodles of boxes and other geometric shapes. They protected her from eye contact, kept her from facing others' expectations.

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Maryland law states that the court shall impose a death sentence after a jury determination. However, if the jury cannot agree within a reasonable time, the court shall not impose a death sentence—instead the defendant shall be sentenced to life in prison, with or without the possibility of parole. MD. CODE ANN., CRIM. LAW § 2-303(j) (LexisNexis 2002).

24. State law provides the jury instructions in death penalty proceedings. The judge must inform the jury about the findings they must make about the aggravating and mitigating factors, as well as the burdens of proof required of each finding. MD. CODE ANN., CRIM. LAW § 2-303(f)–(i) (LexisNexis 2002).

Phillip and Marcus had made up their minds about Charlie on the first fucking day—during the opening arguments. Come to think of it, maybe they'd come in with their minds made up. She just knew that in the first week, they had been talking about how they couldn't wait to fry the guy and get some justice for the families.<sup>25</sup> "We're not supposed to talk about the case right now," Jessica pointed out once when they had all sat down to lunch. They would just roll their eyes or snicker. Veronica joined up with them somewhere along the line.<sup>26</sup> The three of them were joined at the hip. If he hadn't done something, they argued, he wouldn't be here.<sup>27</sup> He would have pleaded out to a lesser charge. Plea bargains happen all the time. Or better yet, he would have never been arrested. He got to this point because he did something wrong<sup>28</sup>

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25. Though justice is often conflated with revenge, they are not the same. The philosopher Robert Nozick distinguishes retribution and revenge: "'Retribution is done for a wrong, while revenge may be done for an injury or harm or slight and need not be a wrong.'" C.L. TEN, *CRIME, GUILT, AND PUNISHMENT* 43 (1987) (quoting ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366 (1981)). That is, retribution is meant to correct the equilibrium skewed by a wrong. *See id.* Because of this, Nozick argues that retribution has an internal limit. Revenge, by contrast, is based on the feeling of the person committing the act and has no internal limits. *Id.* Revenge is personal and "often the person seeking revenge harms his victim until he is satisfied, and he may not be satisfied until he has inflicted much greater harm on the victim than had been inflicted by the victim on him or his loved ones." *Id.*

"The best way to understand revenge is not as some disease or moral failing or crime but as a deeply human and sometimes very functional behavior," said Dr. Michael McCullough, a psychologist at the University of Miami. "Revenge can be a very good deterrent to bad behavior, and bring feelings of completeness and fulfillment." Benedict Carey, *Payback Time: Why Revenge Tastes So Sweet*, N.Y. TIMES, July 27, 2004, at F1. Unfortunately, people in our criminal justice system are likely to be the focus of revengeful behavior though are frequently those with the least power, those who may not be financially stable, highly educated, or supported by strong social networks.

26. As reflected in this jury's dynamics, "a sense of community can arise from collective aggression." WALTER BURKETT, *HOMO NECANS: THE ANTHROPOLOGY OF ANCIENT GREEK SACRIFICIAL RITUAL AND MYTH* 35 (Peter Bing trans., Univ. of Cal. Press 1983) (1972). "Collective aggression [includes] different forms for aggressive behavior carried out by groups of individuals whose behavior is shaped by the fact that they are acting as part of a group. . . . [It] is often based on a normative structure evolved within the group, such as limiting aggression to specific target groups or locations." BARBARA KRAHÉ, *THE SOCIAL PSYCHOLOGY OF AGGRESSION* 144 (2001). Common examples of collective aggression include sports aggression, rioting, and gang violence. *Id.* at 132. In collective aggression, typical inhibitions are often reduced because responsibility is spread throughout the group. This diffusion of responsibility frees individuals to showcase behaviors and make decisions that may normally be socially unacceptable. *See id.* at 134 (describing the "de-individualization" theory with regard to rioting).

27. Michael Callahan, an insurance broker in Lombard, Illinois, described being a juror on a capital trial: "There were probably eight jurors that I was satisfied made up their minds, before the trial started, that someone's going to pay for what they did to this little girl," describes Callahan. 'As a matter of fact, the first recess, the first day of the trial, the gentleman who was elected subsequently as the jury foreman, he said, 'Well, they're here, they sure must have done something.' And I thought, you know, that's the wrong way to start out a trial.'" BARLOW, *supra* note 22.

28. Phillip, Marcus, and Veronica seem to be unaware that statistics show that the race of the victim may play a larger role than the crime itself in getting the case death qualified.

and the prosecutor thought it was too horrible to let him off with a plea. It was their job, they argued, to decide the degree of what he'd done wrong.

Those three showed no respect to those who had questions about the evidence or expressed any doubt. They'd turn away or let out an exaggerated sigh to punctuate something they didn't agree with. It was especially bad every time Jessica or Andre spoke. "Fucking bleeding heart liberals." Phillip's mutter was not at all quiet and clearly meant to be heard by his pals, Marcus and Veronica. "We're not," Andre had said. "We just want to make sure we're doing the right thing."<sup>29</sup> We took the same oaths that you did. We said we'd follow the law." Phillip crossed his arms, pushed back from the table, and didn't say a word.

It got worse. Phillip and Marcus started openly talking about the death penalty after the detectives testified. "He won't die anyway."<sup>30</sup> And even if

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One hundred percent of the murder victims of the men on death row in Maryland were white. This is true even though African Americans persistently constitute *over 80%* of the victims of homicide in the state. MARYLAND CITIZENS AGAINST STATE EXECUTIONS, MARYLAND'S DEATH PENALTY: FAIR AND EQUAL UNDER THE LAW? 1, <http://www.mdcase.org/files/CASEFSFairness.pdf> (last visited Mar. 8, 2009).

If Charlie had murdered a black person, would he be facing the death penalty? Many studies acknowledge the criminal justice system's racial and class flaws. Rates of incarceration are higher and the terms of incarceration longer for minorities and the unemployed, even controlling for the crime committed. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3-4 (2007); TUSHAR KANSAL, THE SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 4, 7-8, 12-13 (2005).

But not everyone is moved by proof of disparate treatment. Kay Cross is a parent of a murder victim. She questioned: "Is the death penalty handed out fairly in Maryland? No, and how inconsiderate of Joey to be murdered allegedly by a black man." *Religion and Ethics News Weekly: Maryland's Death Penalty* (PBS television broadcast May 9, 2003), available at <http://www.pbs.org/wnet/religionandethics/week636/cover.html>.

29. More and more innocent individuals languishing on death row have been exonerated through DNA evidence. In 2003, Illinois placed a moratorium on the death penalty when professors and students at Northwestern University exonerated seventeen death row inmates, and determined that over 150 of the capital cases in the state had been reversed for resentencing or a new trial. George Ryan, "*I Must Act*," in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 218, 218-21 (Hugo Adam Bedau & Paul G. Cassell eds., 2004).

"Since 1973, 124 Americans have been released from death row because of doubts about their guilt; and of the 7,662 sentenced to death between 1973 and 2005, 2,190 had their sentence or conviction overturned." *Revenge Begins to Seem Less Sweet*, *supra* note 1, at 30.

Kirk Bloodsworth is a former Maryland death row inmate who was exonerated. "[After I got out,] I worked at a tool company, and people used to write 'child killer' on the side of my truck. A lot of people don't understand what DNA is, they just believe it is some sort of technical jump to get out of prison, like a loophole—when, in fact, it is a white knight to me." *Religion and Ethics News Weekly: Maryland's Death Penalty*, *supra* note 28.

30. It is a common juror belief that a death sentence is just the beginning of a long legal process rather than the end of someone's life. "Life . . . does not mean life and death . . . does not mean death. . . . [None of the jurors in a Georgia capital case] believed that execution was a likely result of a death sentence. As [one juror] put it, 'We all pretty much

he does, he'll be on death row until our kids graduate from college. All of those damned appeals.<sup>31</sup> This is our duty," they reasoned.<sup>32</sup> Terése didn't ask God for a lot of favors. But she did ask him, during the second or third week of trial, to keep Phillip and Marcus from ever crossing her path again.

Deliberations had been intense.<sup>33</sup> Folks were friendly in the

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knew that when you vote for death you don't necessarily or even usually get death. Ninety-nine percent of the time they don't put you to death. You sit on death row and get old." Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1133 (1995).

Fred Romano, the president of the Maryland Coalition for State Executions, agrees. "Life in prison to me does not mean death in prison. Because you've got some [legislator] who is going to try and change the laws, and the next thing you know all those guys who were serving life in prison with no parole are going to be eligible for parole. And they all are going to be walking the street and killing again." *Religion and Ethics News Weekly*, *supra* note 28.

In fact, in the 1990s, an average of three hundred people were sentenced to death each year; an average of fifty-five were executed annually. Hugo Adam Bedau, *An Abolitionist's Survey of the Death Penalty Today*, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT?, *supra* note 29, at 15, 26–27.

31. Jurors are supposed to refrain from guessing what may happen if the case is appealed. In Maryland, juries are told that "[a]ppellate courts deal only with legal questions; they will not change a verdict if the jury decided the facts based on proper evidence and instructions." MARYLAND JUDICIARY PUBLIC AWARENESS COMMITTEE, TRIAL JURY SERVICE: AN INFORMATIVE GUIDE, available at <http://mdcourts.gov/juryservice/jurybrochure.pdf>.

It is true that appeals can be time consuming. The slow process of appeals in California has meant that some inmates have spent more than twenty years on death row; more have died from other causes, such as suicide or AIDS, than execution. Dean Murphy, *San Quentin Debate: Death Row vs. Bay Views*, N.Y. TIMES, Dec. 18, 2004, at A1. But the appeals process is not as "favorable" for the convicted as it used to be. The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 "has dramatically altered federal habeas corpus practice . . . . The Act establishes a statute of limitations for first habeas petitions; revises the procedures for treatment of unexhausted claims in various ways that benefit the state and disfavor the petitioner; creates a new, additional hurdle for petitioners seeking appellate review of a federal district court's denial or dismissal of a petition; significantly curtails the opportunities for federal habeas corpus petitioners to file a second or 'successive' petition in cases in which a claim could not be filed or fully adjudicated at the time of the first petition; and, in what appeared to be the most profound change, alters the standard of habeas corpus review in ways that appear to call for greater deference to state court rulings on legal issues and mixed questions of fact and law." Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 702–03 (2002).

32. As jurors, Phillip and Marcus are a part of the retributive power of the criminal justice system. To place it in the framework of anthropologist René Girard's writings, the two believe, through the sacrifice of Charlie, that they can restore harmony to the community. See GIRARD, *supra* note 13, at 8. Thus, the hope is that this state-sanctioned killing will restore the equilibrium for both family and society. STEFFEN, *supra* note 1, at 104.

33. One juror described the four stages of jury deliberations: "First is the orientation or ice breaking stage when jurors, nervous about their task, become better acquainted, choose seats, designate a foreperson, and decide procedures. This relative cooperation cedes to the conflict stage when individuals advocate for their sides or viewpoints, often

beginning: small talk about family, work, and, for the guys, sports. But each day, the fuses got shorter. You could see it in the little things. Doors weren't held open. Marcus and Stephanie refused to make eye contact. For that matter, there were some folks that Marcus didn't even acknowledge.

In the end, Frank and Terése had been the last holdouts.<sup>34</sup> It didn't escape her that they were also two of the three minorities on the jury. Frank saw Charlie as the typical neighborhood screw-up, which in Frank's case, was his teenaged son. The third day of deliberations, while the two of them were in the corner digging into their fried rice, Frank shared his conflict. "David's never really had problems with drinking, though, believe me, I know the kid smokes pot. Y'know, kids are pretty stupid sometimes. They think that AXE body spray will cover up anything." Terése shared the story about how her eight-year-old tried to cover up a broken the lamp by using tape. "Alex actually thought I wouldn't notice because he used clear tape!" Frank snorted so hard he almost choked on his broccoli.

Eventually, they got back to Frank's son David. "You know, he's been arrested before—a couple of times." Frank looked at Terése out of the corner of his eye and started playing with his wedding ring. "Nothing violent, but he and his friends were arrested for, um . . . disorderly conduct. They were basically yelling at another group of kids and someone called the police. The usual kid stuff. They said David refused to leave the area when the police asked him. Course he was high at the time." Terése nodded her head, and hesitantly placed her left hand on his forearm for support—she realized she'd never touched him before. "So, sometimes," he shrugged, "when I look at Charlie, I see David."

For Terése, that last day was maddening. The jury foreman, Tom, was a middle-aged white guy who was a school principal in his life outside the courtroom. As he did every morning and every afternoon, he asked for a vote. At first, Andre had been advocating for secret ballots, but he'd stopped by the second day. Formalities had no place there. And besides, in such a small group, there were no secrets.

The vote this morning was the same as the day before. Neither Terése nor Frank raised their hands for conviction, though she could tell Frank

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adamantly disagreeing. Finally, from conflict emerges consensus as jurors compromise or abandon previous positions. The final stage is reinforcement when a spirit of togetherness and group supportiveness develops, affirming the sense that justice has been done." Stacy Caplow, *The Impossible Dream Come True—A Criminal Law Professor Becomes Juror #7*, 67 BROOK. L. REV. 785, 798 (2002).

34. Usually, between one and four jurors want more time to think about their decisions. These "responsibility holdouts" soon become "the focus of attention—occasionally even hostility—from other jurors who wanted to get on with the sentencing process." Joseph L. Hoffmann, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1143–44 (1995).

was wavering. She heard an exasperated "Jesus!" from the right corner of the table. "Don't you guys ever want to go home?"<sup>35</sup>

And then it began—the firing squad of persuasion. An hour later, Nate interrupted Marcus, waving him off as he leaned forward. "Listen, this is real simple. Did Charlie Mitchell hit the police officer? Yes or no?" Terése squirmed, "But I don't think he meant . . ."<sup>36</sup> By now, Nate was too tired to listen, "Doesn't matter. Did he physically hit the police officer?" Terése nodded. "Okay, then we're getting somewhere. Did he hit her twice?" She nodded again. "Okay, good." Terése could hear the relief in his voice. "Did the second blow kill her?" She didn't respond. Nate waited another few seconds, and then banged the table with his palm in frustration.<sup>37</sup> Tom interrupted in his monotone, vaguely condescending voice, "Okay, everyone, let's calm down here." Thankfully, the attention shifted to Frank.

Two-thirty was break time. Doug cornered Terése as she went to grab a soda. "Listen, I know you feel for this guy, but . . . Terése, we've all got

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35. Terése is Latina, but most empirical studies compare only blacks and whites. In one study, black jurors in capital cases that involved a black defendant and white victim "were most likely to believe that the jury rushed to a verdict, was intolerant of disagreement, and was dominated by a few outspoken jurors." William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 229 (2001). Another survey "found that while African Americans were less likely to believe law enforcement officers tell the truth in court and more likely to believe minorities were treated less fairly than others in court, . . . African Americans were twice as likely to say they would try to avoid jury duty if called." Matthew B. Stannard, *Minority Jurors Noticeably Absent*, S.F. CHRON., Oct. 3, 2003, at A1.

The Capital Jury Project found that in cases where the defendant was black and the victim white, there were two distinct patterns of racial influence: "white male dominance," which contrasted with "black male presence effects." William J. Bowers, Marla Sandys & Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1501 (2004). Death sentences were more than twice as common when there were five or more white males on the jury, as compared to four or fewer. Similarly, the presence of at least one black male on the jury was strongly correlated with life sentences. *Id.* In black defendant/white victim cases, black and white jurors "became polarized on punishment—whites for death and blacks for life—over the course of the trial." *Id.*

36. Based on interviews with 1200 capital jurors, taking place over thirteen years, the Capital Jury Project found that "the most important factor in leading a jury to spare someone's life is lingering doubt." Kotlowitz, *supra* note 14, at 36.

37. Jury deliberations can be intense. Robert Nickey, a black juror on a capital case involving a white defendant in New York, recalled tense disagreements in the jury deliberations. A second black juror asked the other jurors if they would have any trouble convicting the man of murder with intent if he were black. Nobody spoke for five minutes. Nickey said, "right then we were convinced there was some prejudice because the young man was white, young, a lot of money was behind him." Nickey interpreted that moment to mean that "'beyond a reasonable doubt' meant one thing for white defendants and another for blacks." Peggy C. Davis, *Law as Microaggression*, 98 YALE L. J. 1559, 1569 (1989) (discussing the McCleskey decision as microaggression which is typically a small, daily interaction that expresses and reinforces power, prejudice, and control).



problems,” he gestured to the others, “but we dealt with them, we didn’t end up in here. Me? All right, I’m gonna be straight with you. I used to drink. It got a helluva lot worse during my second divorce.” Terése looked around uncomfortably. She wondered why people thought she was always open for confessions. “Before, I mean, y’know when this thing started, I thought that maybe, if I hadn’t gotten clean, that I might be where Mitchell is. But, by the end of the first week, I *knew* we were different.” She flinched as he put a hand on her shoulder. “I could never hurt anyone like that. That kind of violence . . . it’s just not in me. And, you know what? It’s not in you. That guy isn’t like us,<sup>38</sup> Terése, so don’t feel sorry for him. If you want to feel sorry for someone, feel sorry for the woman he killed. Feel sorry for her family. But, drinking? That ain’t an excuse.”

Terése twisted her shoulder from his grip. She heard her name in the room’s hushed conversations so she ducked out to the bathroom. She needed the privacy of the stall, the protection from others, from her decision. She sat and listened to her own steady breathing. Her mind wandered to the serenity of her front porch, her wicker chair with the neck pillow. After a few minutes, Terése reluctantly left the protective walls. A plump woman commented on the chalky pink soap. Terése forced a smile before wetting a paper towel and pressing it on her face. When she heard the woman’s clunky heels retreating, she lowered her hands and surveyed

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38. At times, we distance ourselves from certain behaviors by mentally relegating the behavior in question to people with a particular background or from a certain group. Our preconceptions, or stereotypes, regarding which groups are prone to negative behavior enable us to more easily compartmentalize them. See John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-justification and the Production of False Consciousness*, 33 BRIT. J. OF SOC. PSYCHOL. 1, 3 (1994); Diane Cole, *Don’t Race to Judgment*, U.S. NEWS & WORLD REPORT, Dec. 26, 2005, at 90–91. Stereotypes such as these can be imprinted early—by the age of five—and can come from mass media, peer pressure, or the actual balance of power in society. Annie Murphy Paul, *Where Bias Begins: The Truth about Stereotypes*, PSYCHOL. TODAY, May 15, 1998, at 52, 55.

Rather than confront our imprinted prejudices, we often rationalize them. The rationalization process enables us to align a particular belief with our understanding of how the world works. See Jost & Banaji, *supra* at 10–13. For example, an individual may believe that blacks are prone to violence. Even though he may recognize this belief stems from pure prejudice, he may excuse himself from confronting that prejudice because many similarly situated Americans share the same belief. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994). How are common beliefs absorbed into our legal justice system? For starters, the “reasonableness” standard is a cornerstone of our tort system, a common law basis for defining a duty of care. REST. (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 (2008). Second, reasonable belief can be an element of a crime or affirmative defense. For example, self defense allows a reasonable amount of force be used if the defender reasonably believes she is in danger of bodily harm and force is necessary to protect against it. Armour, *supra*, at 786. And jurors themselves are to be our peers, purportedly “typical people holding typical beliefs.” *Id.* at 788. Thus, common and typical beliefs become a norm through which parties are screened to determine whether their behaviors violate the law.

her face in the mirror. Her eyes were puffy. Her lips looked pursed. "Tell me what to do," she asked.

That evening, the vote to convict was unanimous.

So, here they were, the last day of the sentencing arguments. As they had been told, the prosecutor spoke first. Terése had never liked him and her intuition told her it was mutual. He seemed a little too slick. He strolled back and forth dramatically as he talked, occasionally grabbing the edge of the jury box when he wanted to make some big point. She sneaked a couple of looks at the defense attorney; poor woman actually looked a little queasy. Terése wished she could give her an afghan and some chicken noodle soup.

"It's been a long trial, and you've done your job well," he said. "You sat here and listened to all of the evidence in the trial phase. There was a lot of it, too. All of the witnesses and reports and doctors. You sat here every day and let it sink in. But you weren't just bumps on a log, you were active. Inquisitive. You asked questions in your head, and hopefully I answered most of them for you. You saw what really happened and you voted unanimously to bring these families over here, the ones who have been sitting here every day with you, bring them a little closer to justice."

He finished up with the totally unnecessary recount of what Charlie had done. Though she knew this wasn't his intent, this performance upset her. Did he think we had forgotten? By now, she was sure each juror had a deep and detailed imprint of what had happened. Thinking back to how last night's pillow was soaked with tears, Terése was looking forward to the process of forgetting.

#### IV. JACKSON (JACK)

Usually the rain helped him stay focused. But tonight it just kept him indoors. Jack had been thinking about taking a short run for most of the evening. Just a little jet through the neighborhood—up to Joe's, then around the park—in the hopes that it would help him clear his mind. But instead he'd squandered away the hours sharpening pencils and brainstorming ways to install a wall-shelving unit in the den, even though it had those crappy plaster walls. Anyway, a jog was now out of the question; it was too wet, or too late, or both.

Even though he'd left his watch on the coffee table in the living room, he knew it was almost obscenely late. His eyes itched almost constantly now. Jack took off his glasses and tossed them onto the desk calendar he'd bought through his nephew's school fundraiser. A puppy played with a kitten on the cover. At least it was functional. He could never say no to Michael; he was just happy he had kept it down to one item this time. Besides, he knew the big candy sale was coming in the spring. His mouth

started to water at the thought. My God. Pecan Clusters. He would walk on glass for Pecan Clusters. Okay, maybe not glass. But something very uncomfortable. He heard the soft creaking of the hallway floorboards. Two arms encircled his neck and Jack eased back into their warmth. A light floral scent completed his capture. Jasmine leaned over to give her husband a firm kiss on the neck.

They met at the University of Maryland. Poli. Sci. 102. Jasmine was breathtaking. Lovely eyes with long lashes. Flawless dark brown skin. And her mouth! He used to watch her lips while she asked questions that flustered the professor. Once, she caught him staring at her, and she let a smile drift down. He was hooked, though he didn't actually gather the courage to ask her out until his junior year. By then, the self-proclaimed "taller version of Toby McGuire" had added about twenty pounds of muscle and a semester in London.

Turns out she'd thought that *he* wasn't interested. He was a little dubious about that claim until he finally met her family during Christmas their senior year. There was a definite "so, *this* is the guy we've been hearing about for so long" vibe. Her mother is the stern type, a librarian with the glasses and the requisite string around the neck. But thankfully, her version is patently more hip. Her father, a contractor, is a beefy man with a corny joke for every occasion. Jack won them over instantly; homemade peach cobbler will do that.

He laced her fingers through his and inspected her wedding and engagement rings. He congratulated himself on his excellent taste. Jack made a mental note for their fifth anniversary; maybe he'd add a stone. He knew what she really wanted, though, and it wasn't jewelry, or chocolate, or even a romantic vacation. He saw the way her eyes lingered over strollers and school playgrounds. Jasmine was ready for kids.

One boy and one girl. That was the plan. He knew their kids would be sweet and tough, friendly and smart, empathetic and aggressive. One little Terminator and one little Rambo, making forts out of sofa cushions and eating chicken nuggets shaped like dinosaurs. He grinned. He just wanted to hold off a little bit longer, until there was no question of their financial stability. They were almost finished paying off his law school loans and besides, this case was going to make his career. He had felt ill when he got the assignment, but now, resigned to his role, he looked forward to never being the second seat again. He could probably get a promotion if he won. He had a small stack of newspaper clippings supporting his popularity.<sup>39</sup> Hey, maybe he'd run for district attorney in a

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39. Jack could ride a wave of popularity if he wins this case, but there may be social consequences if he fails. "In times of stress, people in groups tend to embrace almost anyone as a potential savior, especially someone totally unknown and thus easily endowed with a certain exotic prestige. If things do not rapidly improve, however, the new man's instant popularity is likely to turn into its opposite, and yesterday's idol becomes today's

couple of years. Then they'd be set and he'd be ready to help out with diaper changes and science projects.

"Where are you right now?" Jasmine breathed into his ear. "I was thinking of the first time we met," he answered. He couldn't see her, but he knew she had just rolled her eyes. "I knew it! Back when you were a lame college boy who wouldn't ask a girl out." She chuckled and gave him a light push. "Listen Mister *Esquire*, I just came in here to check up on you. You know you can play the nostalgia game all night, but if you're going to get any sleep at all, you'd better get your ass in gear. No more daydreaming. Okay?"

"Okay, okay," he groaned. Jasmine was right. Like always. Funny how, when she was getting her master's, she didn't need any prodding at all. She was disciplined about her time and got her work done. He loved it . . . but also found it thoroughly annoying. Don't normal people procrastinate? But she was right; he had to get back to work.

After a thirty-second shoulder rub and a kiss on the head, Jasmine was gone. Jack did a couple of neck rolls and leaned back into his chair. He interlaced his fingers and stretched his back and arms. The popping sounds from his joints were satisfying. He dug his toes into the plush Ikea rug and looked at the computer screen. In twelve hours he would convince the jury to give Charlie Mitchell the death penalty.<sup>40</sup>

As the jury marched into the courtroom the tension was almost suffocating. Everyone was steaming in his or her own righteousness or pain. Defense counsel was certainly no exception. The woman looked like she'd been hit with a brick, or at least a bout of chronic insomnia. Her hair looked as sharp as her suit, but her skin was pasty. The pallor reminded him of old-time Europe—some Dickens novel where food was scarce but work was not.

Jack sat up straight, smoothed the front of his new blue suit and fixed his cuffs. Just twenty minutes before, he'd been leaning over a toilet on the fourth floor, giving his cruller and coffee back to the universe. He hoped his own complexion didn't betray his sleepless night, where the images of the dead woman filled his mind and the weight of a man's life crushed his chest. Early this morning, Jasmine had held his face between

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scapegoat." René Girard, *Generative Scapegoating*, in *VIOLENT ORIGINS: RITUAL KILLINGS AND CULTURAL FORMATION* 73, 82 (Robert G. Hamerton-Kelly ed., 1987).

40. Executions in Maryland have been rare—the state has executed only four people since 1976. Former Governor Robert Ehrlich lifted a two-year moratorium on capital punishment after he took office in January 2003. Maryland's first execution in six years was carried out in June 2004, when the state put Steven Oken to death. Julie Bykowicz, *Maryland Puts Oken to Death: Ending Years of Appeals, Killer Dies by Lethal Injection*, *BALT. SUN*, June 18, 2004, at 1A. Steven Oken was considered a poster child for death penalty advocates because he was white and his crimes were egregious, including three rapes and two murders in a two and a half-week span. *Id.* In December 2006, another de facto moratorium was implemented. McMenamin, *supra* note 2.

her cool hands. “Are you okay?” “Of course,” he lied, “just nervous.” They had dressed in silence. Jack took a deep breath, settling into prosecutor mode. Today was his day and he needed to give the performance of his life. He needed a win.

As he sorted his notes, he could feel the weight of the defendant’s brother’s stare. He certainly wasn’t the first one to stare at Jack like *he* was the criminal. Nor was he the first one to approach him during the trial, asking for leniency. When he joined the district attorney’s office, Jack told himself he’d be a different kind of prosecutor.<sup>41</sup> Yes, the criminal justice system was flawed—with economics and race playing leading roles—but victims needed advocates too. The plan was to fight for change from the inside out, to dish out fair pleas and convict people ethically.<sup>42</sup> He’d do his part to make the flawed system better. But he couldn’t explain this to every person he met in the courtroom. Couldn’t explain that he’d almost refused the Mitchell assignment. Couldn’t explain that his hands shook as he wrote his opening statement all those weeks ago, knowing that his words could actually help kill a man. Frankly, none of this was their business. So, he told the brother what he told all of them, that he was just doing his job.

He looked over the jurors as they settled into their seats. This had been a long trial, and their faces were now so familiar they could be those of his friends. Feeling his gaze, some of them met his eyes and smiled. He smiled back. He continued down the third row and stopped at the woman flipping through her notes. He peered curiously at Terése, the only Hispanic in the box. From her juror questionnaire, he knew she only had

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41. Some prosecutors have embraced a role as part of a restorative justice system, which utilizes victim-offender reconciliation and other effective alternatives to incarceration to address “public safety demands while meeting the needs of the victim and the community.” Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651, 1652 (2000). That understanding of the prosecutors’ duties casts them as the “gatekeepers of the system,” a necessary part of promoting a restorative justice system that “is much more concerned about remedying harms than exacting punishment.” *Id.*

42. Although Jackson sees himself as a different kind of prosecutor, he is a part of a system of institutional racial disparities that leads to biases in charging and sentencing. Prosecutors with the ultimate charging discretion in death penalty states are overwhelmingly white: 97.5%. Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817 (1998). At the same time, 83% of the victims of those on death row are white. *Id.* at 1819. Unconscious biases, such as cultural stereotypes of black inferiority or feelings of greater connection with the victim, may influence prosecutors when they decide whether or not to pursue the death penalty. *Id.*

Former prosecutor Ronald Sievert said the biases in his office stemmed less from traditional racism and were more a reflection of the frustration that their dockets were overwhelmingly filled with minorities. Prosecutors can become “angry” with the segment of the population considered responsible for committing the largest number of crimes. Ronald J. Sievert, *Capital Murder: A Prosecutor’s Personal Observations on the Prosecution of Capital Cases*, 27 AM. J. CRIM. L. 105, 109 (1999).

one child, a son, about eight. She lived with her sister and nieces in a large house just outside of Baltimore. She was a payroll clerk at the corporate office of a local bank. She had an associate's degree in . . . business management was it? By all accounts, Terése seemed like a good woman, but he hadn't wanted her on the jury.

From his initial impression, he thought she might be too compassionate, too soft. During jury selection, he'd made every effort to have her in the last group questioned.<sup>43</sup> Hopefully by then, they'd already have their jury picked. But his gamble hadn't worked, and by the time she was interviewed, he was all out of peremptory challenges.<sup>44</sup> So, there she was, turning her yellow legal pad this way and that, her big heart as obvious as her welcoming face. As Jack tapped his pen on his notes, he preferred to think of her as a challenge. She was an honest woman, probably very loyal and, unlike some, she took her job as a juror seriously.

43. Jurors for a trial are selected from a larger jury pool based on their answers to questions posed by the prosecution, defense, and the judge, a process called *voir dire*. Either party can challenge a juror for cause, thereby requesting that the judge dismiss the juror because he or she is ineligible to serve as an impartial arbiter. Peremptory challenges enable either the prosecution or the defense to excuse a juror for any reason or for no reason at all. In a sense, they are free passes. See *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (noting that peremptory challenges were historically free of judicial control).

Both the prosecution and defense attempt to gain advantages over the opposing party through the *voir dire* process, but peremptory challenges are limited both in number and method of use: they cannot be used based solely on a potential juror's race or gender. *Id.* at 89 (forbidding use of race as sole factor for peremptory challenge); *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994) (prohibiting peremptory challenges based solely on the sex of the juror). Over the years, prosecutors have used a variety of practices to remove blacks from the jury, including the use of skewed *voir dire* questions and the shuffling of seating arrangements. *Miller-El v. Dretke*, 545 U.S. 231, 253–56 (2005).

In order to serve on a capital case, jurors must be qualified as “death eligible.” Jurors who would automatically impose the death penalty or who would oppose the death penalty in all cases can be challenged for cause. *Morgan v. Illinois*, 504 U.S. 719, 728–29 (1992).

44. In Maryland, “[a] citizen may not be excluded from jury service due to color, disability, economic status, national origin, race, religion, or sex.” MD. CODE ANN., CTS. & JUD. PROC. § 8-102(b) (West 2009). Even though there are strict curbs on the discriminatory use of peremptory challenges, parties attempt to sidestep those rules by using proxies for race or other protected classes. For example, in *Edmonds v. Maryland*, the prosecutor struck all prospective jurors who had relatives with criminal convictions. 812 A.2d 1034, 1038–40 (2002). For many reasons, including over-policing and poor legal representation, blacks make up a disproportionate sector of our jail and prison population. PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 6 (2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) (explaining that one in fifteen black men over eighteen are incarcerated compared with one in one hundred and six for white men over eighteen). Because black people are incarcerated at such higher rates than whites, there is a higher probability that a black person will be related to someone with a criminal conviction. In *Edmonds*, the prospective juror's dismissal was challenged as a *Batson* violation, but the court found no violation existed. Excluding a juror because he or she was related to a person with a conviction is “not a surrogate for race and thus is not an inherently discriminatory basis for a peremptory challenge.” *Edmonds*, 812 A.2d at 1047.

She always appeared rapt, even when he found himself eyeing the court benches for a short nap.

By the way they nodded with him, he knew he had a group of them on his side from the beginning. But the rest of them weren't so easy, they nodded with him *and* the defense. So, with Terése, and a few others, he had one goal: he had to make use of those big hearts. Mitchell brutally killed a female cop and now everyone in that box had accepted that fact. Today, his challenge was to ensure their *only* loyalties were to the victim's family.

#### A. Closing argument<sup>45</sup>

We've been with each other for quite some time now. Every day, day in and day out, for a month. I think I've gotten to know you folks. And I think you've gotten to know me pretty well too. I've been paying attention to all of you. To what you like and don't like, to when you're disgusted or sad. I know when the evidence moves you and when you think things don't quite add up. And, I know you've also been paying attention to me. I think by now you know that I'm a stand-up guy. I care about my family and my community. As a prosecutor, I have a lot of responsibility. My job is to support the police to make sure the criminals they catch are put away. My job is to take all of the evidence of the crime, bring it into this courtroom, and prove to you *why* this guy is guilty. My job is to work with the cops to keep our community safe. And I take my job seriously.

But you know what? You have a job too. As you remember from what we told you in voir dire, you are the fact-finders. Your job is to assess the evidence, to figure out who is telling the truth and who isn't. Your job is to settle on the facts and to use them to decide whether or not

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45. Attorneys often break rules during closing arguments in order to evoke sympathy for the victim or loathing for the defendant. See Peter W. Agnes, Jr., *An Ounce of Prevention is Worth a Pound of Cure: A Collaborative Approach to Eliminate Improper Closing Arguments*, 87 MASS. L. REV. 33 (2002) (analyzing "chronic problem" of "improper closing arguments" in Massachusetts).

Common types of prosecutorial misconduct during closing arguments include: pointing out the failure of the defendant to testify, making inferences to evidence outside of the record, attacking defense counsel's ethics, drawing attention to defendant's prior criminal conduct, testifying as if an expert witness, making inflammatory remarks, and name calling. Charles L. Cantrell, *Prosecutorial Misconduct: Recognizing Errors in Closing Argument*, 26 AM. J. TRIAL ADVOC. 535, 536-57 (2003).

Jackson uses several questionable tactics in his closing argument, including his repeated "vouching" for the case and evidence. He attempts to leverage the jurors' trust in him into a trust that they should agree with him and sentence Charlie to death. "Vouching" is impermissible. The evidence must stand on its own and neither party may substitute their judgment for the jury's. See, e.g., *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005) (holding that prosecutor's impermissible vouching during closing argument constituted reversible error).

the defendant is guilty. The police and I, we are a part of the criminal justice system. Your job is to help make this system work.<sup>46</sup>

Through voir dire, we learned that each of you is smart and capable. Each of you is willing and able to listen to the instructions and testimony, and come to a well thought-out decision.<sup>47</sup> But, we didn't just choose you because of how you think. We chose each of you because you also have a good heart. In here, you represent the community.<sup>48</sup> You represent the mayor, the nurses, the mechanics—you represent all of the people outside those doors.<sup>49</sup> You're here to listen for them and to voice their concerns. That's how this system works. And if it's going to work, you must do what your mind *and* your heart tell you to do.

You know, when I got this case and sat down with all of the files and the pictures and the police reports, I was almost . . . overwhelmed by what this guy'd done. This guy, this slight guy, had all of this rage and violence inside him. Inside. Waiting for an opportunity to come out. And it did. What he did not only affected those people in the store. He hurt this community, hurt each one of us.

I know, better than anyone else, what kind of position you are in. This isn't easy. But do you know what gets me through it? Knowing that I can make a difference. I can bring *this* guy to court. I can work days and nights and weekends to make sure I get all of the evidence, make sure

46. Jack is appealing to the juror's sense of obedience, an impulse that can take priority over one's ethics, sympathy, and moral conduct. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 1 (1974).

47. In a 1999 experiment conducted with death-eligible jurors, California psychology professors Craig Haney and Mona Lynch found that those jurors who had a low comprehension of the jury instructions were far more likely to vote based on racial biases—they were 20% more likely to sentence a black defendant to death than a white defendant. BARLOW, *supra* note 22.

48. In Baltimore County, the juror pool comes from the statewide voter registration list and the driver's license and state-issued identification card lists kept by the Maryland Department of Motor Vehicles. Order Adopting New Plan for Random Selection of Jurors in Baltimore County, Md. Ct. App. CJ § 8-206(a)–(b), § 8-213 (Sept. 21, 2006), *available at* <http://www.courts.state.md.us/juryservice/juryplans/baltimoreco.pdf>. Even though the process for jury selection can appear to be neutral, juries are often disproportionately white. See Shari Diamond, *Beyond Fantasy and Nightmare: A Portrait of a Jury*, 54 BUFF. L. REV. 717, 734–36 (2006). Economics play a role. The length of trial may cause working class minority jurors to remove themselves from the pool. Many employees, especially those with hourly wage jobs, may not be able to get the weeks or months off from work that are necessary to serve on the jury of a long trial. “[N]ational studies have shown that such economic factors disproportionately affect minority jurors.” Stannard, *supra* note 35.

49. Jackson's statement may be misleading. A 2004 Potomac Inc. poll found that barely half of Maryland's citizens, or 53%, favored the death penalty, while 34% opposed it, and 11% stated that it depends on the situation. Death Penalty Information Center, State Polls and Studies: Maryland, <http://www.deathpenaltyinfo.org/state-polls-and-studies#Maryland> (last visited Mar. 10, 2009). From these figures, we can deduce that a death-qualified jury, where every person is not opposed to the death penalty, is *not* an accurate representation of the community as a whole.



everything is in order and show it to you guys. What gets me through it is knowing that, if I do *my* job, then you all can do *your* job. As a prosecutor, that's what keeps me going every day. Knowing that, if I work hard, I can protect the people outside those doors—my people, your people—from him and the people like him in this world who would want to hurt us, and hurt what we believe in. But you know what; now I need your help. I can't do it alone.

As you know, this is the sentencing phase. You decide whether or not he goes to prison or gets the ultimate punishment. It may seem overwhelming. But, it's not as if we give you a whole bunch of information and send you back there with no guidance. There's a procedure, just like in the trial phase.<sup>50</sup> The government has set this up in a way that's systematic.<sup>51</sup> So, let's just take it step by step. First, there are what you call aggravating and mitigating factors. And you weigh the two.

The aggravating factors are what make Charlie Mitchell eligible for the death penalty. They are the things that the good people in the Maryland state legislature say are just so heinous, so loathsome that anyone who does them relinquishes his own right to life.<sup>52</sup> Forgive me if I'm a little technical, but there are ten of them. The aggravating factors are (1) the victim was a law enforcement officer killed while performing his or her duties, (2) the defendant committed the murder while in prison, (3) the defendant committed the murder while trying to escape from custody, (4) the victim was killed in the course of a kidnapping or abduction, (5) the victim was a kidnapped child, (6) the defendant was hired to kill, (7) or hired someone else to kill, (8) the defendant committed murder when already sentenced to death or life imprisonment, (9) the same incident produced multiple murder victims, and (10) the defendant committed the murder while committing, or trying to commit, a carjacking, armed carjacking, robbery, arson, or rape.<sup>53</sup>

Now, at least one of these needs to happen for the case to be eligible for the death penalty. And, as you know, more than one applies to our situation. The murder victim, Marina Blake, was a young police officer

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50. This procedure is set out by statute and includes the following explanation: aggravating factors qualify the defendant for the death penalty, while mitigating factors are those histories, circumstances, and shortcomings that favor granting the defendant leniency. Md. Code Ann., Crim. Law § 2-303(g)–(h) (LexisNexis 2002). Jurors must find at least one aggravator beyond a reasonable doubt before imposing the death penalty. § 2-303 (g) (2) (ii).

51. A myth in death penalty lore is that of “super due process,” which implies that the procedural rules in capital cases are so vigilantly administered and are so concerned with defendants’ rights that only the truly guilty will be put to death. Haney, *supra* note 3, at 547–48.

52. BRAME & PATERNOSTER, *supra* note 2, at 10.

53. MD. CODE ANN., CRIM. LAW § 2-303(g) (LexisNexis 2002).

with a successful career ahead of her. Second, this murder was committed during the course of a robbery *and* a brutal rape.

The mitigating factors are the other part of this equation.<sup>54</sup> Though they don't justify anything that has happened, these are the things that may lean in favor of lenience. *You* essentially decide what is and isn't mitigating, but the state does give you some guidance on that, too. They've found eight basic types of mitigation. And, a little warning, I'm going to get technical again. The mitigating factors are (1) the defendant has not previously been convicted of or pled guilty to a violent crime, (2) the victim participated in the crime or consented to the act which caused her death, (3) the defendant acted under substantial duress, domination, or provocation by another person, (4) the defendant couldn't understand the criminality of his actions or conform to conduct required by law because he has some degree of mental incapacity, mental disorder, or emotional disturbance,<sup>55</sup> (5) the defendant was young when he committed the crime, (6) the act of the defendant was not the only cause of the victim's death, (7) it is unlikely that the defendant will engage in further criminal activity that would constitute a threat to our society, and (8) the catch-all: any other facts that the jury or the court specifically sets forth in writing that it finds to be mitigating circumstances in the case.<sup>56</sup>

In the end, what you do is take a look at the aggravating factors and the mitigating factors and see how they match up.<sup>57</sup> Think about the things that this criminal has done, the damage that he has caused, the lives he has ruined. If you think these outweigh the mitigating factors, then you vote for the death penalty. However, if you think the kind of things that he's gone through weigh in favor of mercy, then you don't vote for the death penalty. Basically, you all have to look within yourselves and decide which side outweighs the other.<sup>58</sup> All of you must vote together for the death

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54. The court or jury determines whether there are mitigating circumstances by a preponderance of the evidence. § 2-303(h) (2).

55. In *Ford v. Wainwright*, the Supreme Court held that the Eighth Amendment's proscription of "cruel and unusual punishment" bars execution of the insane, but the Court offered no definition of what constitutes insanity. 477 U.S. 399 (1986).

56. MD. CODE ANN., CRIM. LAW § 2-303(h) (2) (LexisNexis 2002).

57. § 2-303(i). The court or jury determines whether the aggravators outweigh the mitigating circumstances by a preponderance of the evidence. *Id.*

58. Attorneys for convicted killer Steven H. Oken pushed to pass a bill in the Maryland legislature that would change the standard of proof required for a death sentence from "preponderance of the evidence" to "beyond a reasonable doubt." In their pursuit to earn a stay of execution from the Maryland Court of Appeals, they used an Arizona court ruling that questioned how a jury makes its sentencing decision. Relying on the Arizona ruling, they argued that the question of whether the aggravating factors outweigh the mitigating circumstances should be considered an element of the crime, and the required standard of proof, therefore, is beyond a reasonable doubt. They failed; the bill was defeated and the preponderance standard prevails. Stephanie Desmon, *Senate Narrowly Defeats Capital Punishment Bill*, BALT. SUN, Mar. 20, 2003 at 2B.

penalty. *It has to be unanimous.*<sup>59</sup> However, if after listening to the testimony over the past few days, you decide there are no mitigating factors, then you don't have to weigh the circumstances—the presumptive sentence is death.<sup>60</sup>

So, let's go back to the crime to see how it matches up with this new information. I know, I know, you probably can't wait to get the things this guy has done out of your mind. But it's important for the families represented here today that we give one last voice to their painful losses.<sup>61</sup> Let's go back to March 23 of 2003. Charlie Mitchell was drunk that evening; he was drunk a lot around that time. In fact, you heard his testimony that the whole month of March was a blur. So, one day, this day, he and his friends decided that they needed more beer, so they went to the convenience store to get another 24-pack. But, they weren't planning on paying for that 24-pack—they were going to steal it, along with all of the money in the cash register. That's why Trevor brought the gun and why John just happened to have a big knife in his belt. That's why the both of them went in together. And that's why Charlie was supposed to stay in the car—so that they could get out of there fast.

Now, why did they pick that particular store? They could have picked any store in the area. In fact, as we've shown, there were six stores within a half-mile radius. But this store, this is the one where John's ex-girlfriend worked. The ex-girlfriend who had filed a restraining order against him just a couple of weeks before. The ex-girlfriend that had called the cops on him three times in the past eight months for physically assaulting her. She worked part-time at this store and she just happened to be working the night that John and Trevor and Charlie just happened to need some more beer. They picked *this* store because John knew that the guy whose shift ended at 10:00 always left a few minutes early to meet his girlfriend. Leah usually worked the register alone for fifteen minutes to a half hour until the new girl showed up. They picked *this* store because John wanted to scare Leah, show her he was the boss, and because he could. This store would be an easier mark for them to rob.

Now Charlie wanted us to believe that John and Trevor made these plans all by themselves, that Charlie was just drunk and along for the ride.

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59. MD. CODE ANN., CRIM. LAW § 2-303(i) (3) (LexisNexis 2002).

60. BRAME & PATERNOSTER, *supra* note 2, at 11. "As long as one juror believes that there exists a mitigating factor, and that this factor is not outweighed by the aggravating circumstances, and if such juror continues to adhere to his or her position, the sentence will not be death under the statutory scheme." *Mills v. Maryland*, 527 A.2d 3, 14 (Md. 1987). However, a defense attorney who offers no mitigating evidence at all may be condemning her own client to death.

61. Kay Cross, a relative of a murder victim and Maryland resident, maintains, "We have to fight tooth and nail to try and get justice done when that should be readily available to us. You know, that is what we are entitled to—justice." *Religion and Ethics News Weekly: Maryland's Death Penalty*, *supra* note 28.

He said he wasn't even in the front seat. How could he have planned to be the getaway driver? But you didn't believe that trumped-up story. You saw through the smoke to the truth.<sup>62</sup> That Charlie was there because he needed the money. He couldn't keep a job, he was facing eviction, and his brother was tired of bailing him out. He stayed in the car, not because he was too drunk or some conscientious objector opposed to breaking the law, but because he was the getaway driver.<sup>63</sup>

So, the three of them, Charlie, John, and Trevor, wait in their car, smoking joints and sucking in the pot fumes, until there were no customers. Then, John and Trevor bust in with the gun. John goes behind the register, grabs Leah by the hair and forces her into the back storeroom while Trevor knocks over the video camera. In the back, John pushes Leah against the wall, face first, and takes out his knife. He holds it against her neck, drawing a little blood, while she sobs, barely able to stand because she's scared out of her mind. Then he pushes her down on her knees and *forces* her to perform oral sex on him while he holds the knife just under her chin. Trevor is in the front, emptying the cash register and trying to find the safe.

Now, in comes Marina. Marina had been on the force for several years, but this was only her third undercover job. Leah had been a low-level pot dealer and Marina was supposed to try to crack into her network. Marina walks in for her shift to see Trevor trying to jimmy open the safe, a gun next to him on the counter. Leah is nowhere to be seen. Marina pulls her back-up gun from her ankle holster and yells for Trevor to freeze. He grabs his gun and they have a stand off, both guns pointed at each other. Marina tries to talk Trevor down, but what she doesn't know is that Charlie is outside keeping watch.

Charlie gets out of the car, grabs a two-by-four that had been propped next to the ice machine and creeps up behind her. He doesn't want to

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62. Here, Jackson is seeking to have the weight of the jury's finding of Charlie's culpability at the guilt phase of the trial determine, or substitute for, the jury's separate decision of what punishment is appropriate. When, during the sentencing phase, prosecutors refer back to their guilt-phase arguments or to the guilty verdict, "they invoke the power of the conviction and the moral opprobrium it represents to provide the answer to the punishment question. This occurs, for example, when a prosecutor argues in the punishment phase that the defendant's mitigating evidence does not excuse his conduct, or when the prosecutor refers back to a guilt-phase argument that mental disease or defect does not affect a defendant's criminal responsibility." Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 80-81 (1997). Through the use of such language, the prosecution is encouraging the jury to conflate the two decisions. *Id.*

63. If Charlie had stayed in the car, as a passenger or even a getaway driver, he could not have been prosecuted for capital murder. In Maryland, "the defendant must have been convicted of first-degree murder and have been found to be a principal in the first degree. . . . The 'principalship' requirement means that one who is eligible for the death penalty must, therefore, be the actual killer. . . . A jury finding of principalship must be unanimous." BRAME & PATERNOSTER, *supra* note 2, at 8.

have a fair fight, he wants to gang up on a woman. Two against one. And he sure as hell doesn't want her to know he's there. It would spoil his fun. "Put the gun down now!" she yells at Trevor. A second later, Charlie braces himself and, using his old baseball training, cocks the wood and smashes it into the back of her head. Her gun goes off, nicking Trevor in the arm. She falls to the ground writhing. As John runs out of the back room, pulling Leah behind him by her shirt, Trevor yells for Charlie to hit her again. "Man, she's still moving, knock her out!" Charlie knocks her out all right. The next blow, the one Charlie delivers when she is unarmed and on the floor, that blow kills her. It's so hard that some of her hair and skin actually get embedded in the wood.<sup>64</sup> John stabs Leah three times in the stomach and leaves her for dead. Then, the three run out to the car, leaving with \$236.

Look at this guy. This is the *man*, who crept up behind a woman, a police officer, and bashed her head in. *You* decided that his story—that he was passed out in the car, and woke up to see his friend with a gun to his face—was a lie. The story that he was just protecting his friend was a lie. This criminal helped *plan* a robbery and the rape of a helpless woman. It doesn't matter that he didn't actually do the rape. He knew what was going on between John and Leah, knew what was going to happen. And he didn't care.

Yeah, he had a bad childhood, but so do a lot of people. And we don't see them all in here. Most of them are good citizens. This guy is different. As all of you have probably noticed, he barely seems to show any emotion when we talk about the things he's done. He's been stone-faced throughout the whole trial, when we showed some pretty grisly pictures, and even when his own people were testifying for him. It's like he isn't even here. He doesn't have any feelings anymore.<sup>65</sup>

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64. Though prosecutors take great pains to make the violence perpetrated by the defendant as vivid as possible, there is little or no effort made to "enable jurors to imagine the scene of violence and death they are being asked to authorize." Sarat, *supra* note 30, at 1124. The jurors are not asked to picture the defendant strapped to a table as a doctor struggles to find a vein, and "no such images were admissible or available for the juror." *Id.*

65. We don't know why Charlie has been so withdrawn. Unfortunately for him, a defendant's demeanor during the trial affects whether jurors think he is remorseful, and showing remorse can affect the sentence the defendant receives. Theodore Eisenberg, Stephen P. Garvey & Marvin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1600 (1998). Jurors have cited lack of remorse as a compelling reason for their decision to vote for death. Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1560 (1998).

The jurors in the Scott Peterson trial, for example, were affected by the lack of emotions he evinced at trial. Peterson was arrested and subsequently convicted for the murder of his pregnant wife. After the trial, one juror stated "I still would have liked to see, I don't know if remorse is the right word. . . . He lost his wife and child—it didn't seem to faze him." *Peterson Faces Death: Jurors Speak Out*, FOX NEWS, Dec. 14, 2004. Another

This, right here, this is hard. Justice is hard. The only place where it looks easy is on TV. Justice definitely looks easy on *Law & Order*.<sup>66</sup> Someone commits a crime. The police do a day or two of searching and then pick up the criminal.<sup>67</sup> There's some kind of twist about halfway through. You guys know what I mean. Then in the end, the bad guy is behind bars and everything is rainbows and roses again. But this isn't TV—this is real life. Real life. Marina was a young cop. She wanted to go to law school a few years down the line so she could do what I do. She wanted to be sitting next to me in a courtroom, and in a way she is. Her family is not going to forget her. And neither is her daughter, Candace, who's just now five. At that time, she'd barely been potty trained. Marina never even got to the point where she could see her baby go to her first day of school, much less her prom.<sup>68</sup>

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stated, "[f]or me, a big part of it was at the end—the verdict—no emotion. No anything. That spoke a thousand words—loud and clear." *Id.*

In the Connecticut death penalty case for Robert Courchesne, juror Richard Bruce remarked that, "[t]he grisly facts of the murder didn't seem to faze him at all. . . . It helped looking at him when those facts came out and how he reacted." Elaine Griffin, *Deciding on Death Takes Toll on Jurors: Emotional Stress Often Kept Inside*, HARTFORD COURANT, Oct. 6, 2004, at A1.

Jurors have interpreted the seemingly cold demeanor of the defendant as a reflection of his or her conscience or degree of remorse. But this may be an oversimplification of the defendant's state of mind. Seventeen-year-old Jonathan Smith, who was convicted of robbery, intimidation of a witness, and felony harassment, explains the cold demeanor he sometimes effects. "Let me elaborate in depth about this mask. When I wear it, I'm fearless and I don't care about anything or anyone. I show no remorse and display such anger verbally and physically. When I don't have it on, I'm caring and real. I try to help out and I respect others." Jonathan Smith, *Juvenile Life, in THROUGH THE EYES OF THE JUDGED: AUTOBIOGRAPHICAL SKETCHES BY INCARCERATED YOUNG MEN*, 135, 144 (Stephanie Guilloud ed., 2001).

66. Television criminals are usually "depicted uniformly without context, life connections, social relationships, basic human needs, wants, or hardships." Haney, *supra* note 3, at 550. Unlike real people, characters exist in a vacuum. Because television depicts criminals as purely evil people, rather than individuals with personal history, fictional criminal problems can be readily solved by confining or killing those evildoers. *Id.*

67. In reality, investigations may be short because the police are skewed toward looking for "likely" suspects. In determining the likelihood of a suspect, the police rely on their personal experience, "common sense," and cultural assumptions. It is within this framework that institutional racism can play a part. Institutional racism refers to the "attitudes and practices that [lead] to racist outcomes through unquestioned bureaucratic procedures." Karim Murji, *Sociological Engagements: Institutional Racism and Beyond*, 41 SOCIOLOGY 843, 844 (2007). It produces patterns of systemic inequality even when individuals act without racist intent. *Id.* at 845. A British Commissioner of the Metropolitan Police, Sir Ian Blair, understands institutional racism and the role it may play in policing, but worries that individual, and especially junior, officers may not understand its nuances. "It seemed to them to be literally an attack on their personal integrity, on whether they were a racist or not." *Id.* at 849.

68. Jackson's references to the life that Marina left behind are called "victim impact evidence." In *Payne v. Tennessee*, the Supreme Court ruled that states can allow victim impact evidence both as a way to balance the mitigating factors and to let the jury see the specific harm of the violent act. 501 U.S. 808 (1991).

And even though Leah isn't dead, I know for a fact that some days, she wishes she was. Every time she looks at that scar on her neck, she's going to be reminded of March 23, 2003. Every time she takes a shower or puts on a bathing suit, she sees those scars above her navel.

This isn't television; this is real. The police officer Charlie Mitchell murdered is gone. Marina is never coming back. Leah, her trust in other human beings, that's gone forever. And the defendant isn't a TV character; he's *real*. There isn't a screen between you and this guy. You can't turn him off with a remote control. He is in here with us, his crimes are real; his victims are real. When he picked up that two-by-four and swung it, he relinquished his place in our society. He doesn't believe in the same things we believe in. He's no longer one of us.<sup>69</sup>

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Victim impact evidence purportedly expands the jury's view of the victim. See John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 258–59 (2003); The National Center for Victims of Crime, Victim Impact Statements, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32515> (last visited on March 8, 2009). Indiana and Mississippi are the only two states that significantly restrict the admission of this evidence. Blume, *supra* at 268. In addition to the testimony from witnesses about the financial, emotional, and psychological effects the crime will have on them, some courts have allowed the prosecution to present “poems, videotapes, pre-death photographs, and handcrafted items made by the victim.” *Id.* at 271–72.

69. Prosecutors often toe the line when they distinguish the defendant as an “other.” Defendants have been referred to as animals, monsters, or other names that strip them of their humanity.

In *Darden v. Wainwright*, references to the accused as an “animal” were deemed improper but harmless error. 477 U.S. 168, 180–81 (1986).

In *People v. Clark*, an Illinois state's attorney compared the defendant to the biblical Cain and suggested that the defendant's crossed eye marked him as guilty. 340 N.E.2d 171, 172 (Ill. App. Ct. 1975). The appellate court reasoned that comparing the defendant to Cain, while “inaccurate and improper,” was not prejudicial. *Id.* at 173. The court also found that the comments about the defendant's crossed eye were based on evidence of the victim's identifying testimony, and therefore were not improper. *Id.* at 172–73.

In an Alabama capital murder prosecution, neither the prosecutor's reference to defendant's “animal lust” nor his reference to defendant as a “cancer” that needed to be cut out of society was held to be improper. The court held that the prosecutor “may characterize the accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with evidence of the case.” *McWilliams v. Alabama*, 640 So. 2d 982, 1001–01 (Ala. Crim. App. 1991).

The Georgia Supreme Court held that the prosecutor's characterizations of the defendant as “misogynistic, woman hating demon of the devil” and “Satan's lap dog,” while improper and unprofessional, did not warrant reversal of convictions in light of the overwhelming evidence of the defendant's guilt. *Pace v. Georgia*, 524 S.E.2d 490, 504 (1999).

Direct references to race or color in conjunction with references to animals are less likely to be admissible. Where two black defendants were charged with fatally shooting a white man during a racial confrontation in a shopping center parking lot, the prosecutor's repeated references to the defendants in closing argument as “animals” who armed themselves for the specific purpose of shooting “white honkies” was held reversibly improper. *Louisiana v. Wilson*, 404 So. 2d 968 (1981). The court observed that under state statute, a mistrial was mandatory when a prosecutor “‘directly or indirectly’ referred to race or color, ‘where the remark or comment was not material and not relevant, and might create prejudice against the defendant in the jurors’ minds.’” *Id.* at 970.

His punishment should be just as real as the damage he has caused. Send a message. Tell everyone that the citizens of Baltimore County will not tolerate these types of heinous crimes. Tell criminals that they have to pay for what they do.<sup>70</sup> Tell the families of the victims that you will give them the ultimate justice.<sup>71</sup> The police have done their job and so have I. I urge you to do *your* part to make this criminal justice system work. This cop killer, Charlie Mitchell, deserves to be put to death.”<sup>72</sup>

Jack met each juror’s eyes and bowed his head slightly. “Thank you.” As he walked, slowly and deliberately, back to his seat, he felt the dampness of his chest and back as his body moved under his clothes. His hand trembled as he pulled out his chair; he hoped no one had noticed.

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Despite all this, prosecutors face minimal consequences for bad behavior—sanctions for prosecutorial misconduct are almost nonexistent. Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W.L.REV. 283, 300–01 (2001).

70. “The theory of simple deterrence is that threats of punishment can reduce crime rates by causing a change of heart in would-be offenders, induced by the unpleasant prospect of the specific consequences threatened. Many individuals who are tempted by a particular form of threatened behavior will, according to this construct, refrain from committing the offense because the pleasure they might obtain is more than offset by the risk of great unpleasantness communicated by a legal threat.” FRANKLIN ZIMRING, *PERSPECTIVES ON DETERRENCE* 3 (1971).

Studies supporting capital punishment’s deterrent value assert that the death penalty saves lives, up to eighteen per execution. *Revenge Begins to Seem Less Sweet*, *supra* note 1, at 22. However, these studies are based on limited data, and their findings have been seriously questioned. *Id.*

71. This focus on “justice” in capital cases for the families of murder victims is based on an “unquestioned assumption” that “justice is achieved only if the perpetrator is killed. Yet some victims’ family members feel differently”—that is, they oppose the death penalty. ROBERT RENNY CUSHING & SUSANNAH SHEFFER, *MURDER VICTIMS’ FAMILIES FOR RECONCILIATION, DIGNITY DENIED: THE EXPERIENCE OF MURDER VICTIMS’ FAMILY MEMBERS WHO OPPOSE THE DEATH PENALTY* 8 (2002). The victims’ rights movement seeks to ensure that the family members of victims are treated with respect and given a voice in the criminal justice process. *Id.* However, because many victims’ services are linked to prosecutor’s offices, “they are often granted and enforced only at the prosecutor’s discretion”—which may silence those victims’ families who oppose the death penalty. *Id.* These families may find victims’ services withheld, victims’ rights advocates aloof, information about the case withheld by the prosecutor’s office, and may even be denied the right to give testimony. *Id.* at 9–13. SueZann Bosler, who survived the attack that killed her father, was told by the judge during the trial of her attacker that if she mentioned her opposition to the death penalty as part of her testimony, she risked six months in jail and a \$500 fine. *Id.* at 11.

72. If Terése and her fellow jurors vote to sentence Charlie to death, his case will be appealed. All death sentences imposed in Maryland are subject to automatic and unwaivable appellate review by the state’s Court of Appeals. *Brame & Paternoster*, *supra* note 2, at 11.



V.  
CONCLUSION

Albert, Terése, and Jackson exhibit three kinds of power.

Albert is a divorced father of two. He has recently lost his job and his brother is on trial for a capital crime. But none of these negates his power. His presence in the courtroom shows the jury that Charlie has a family and support—that he is not just a murderer. He also serves as a reminder to the defense attorney that, more important than her moral or emotional drive for victory, the life of another’s loved one rests in her hands.

Terése’s power lies in a single vote. Our legal system dictates that the arguments and evidence presented in the courtroom form the sole basis for the jury’s (and each individual juror’s) decisions. But Terése’s vote isn’t decided within that artificial vacuum. Personal alliances and group dynamics in the jury room can work against collective problem solving and impact the verdict. Terése also brings her own predilections to the decision-making process. As a mother, she is torn between retribution for the victim and discomfort with taking a young man’s life.

Jackson’s obvious power lies in his words. His decisions help determine whether Charlie lives or dies. And like every prosecutor, Jackson has the opportunity and the forum to stamp his own values onto the legal system. He can decide whether or not to prosecute, to issue lower charges, and to encourage alternatives to incarceration. The language he uses to define the crime and the perpetrator impacts how the world views the individual.

Each person who has been touched by the criminal justice system is an unabridged living text from which we have much to learn. These three fictional narratives may be similar to the stories of the woman sitting next to you on the airplane or standing in front of you in the check-out line. Her experiences are no less poignant because they haven’t been memorialized. In America, millions are incarcerated or under court supervision.<sup>73</sup> And each person whose life has touched theirs—each family member, court officer, witness, and victim—has his or her own distinct experience with the criminal justice system. Albert, Terése, and Jackson represent just three.

This paper is an attempt to fill a void reflected in case law. Between procedural history and legal discussion lie the “facts,” which summarize the underlying conflict and the participants’ involvement. A succinct

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73. Currently, over 2.3 million are people incarcerated in the United States. PEW CENTER ON THE STATES, ONE IN 100, *supra* note 44, at 5. Significantly more people have run-ins with the criminal justice system. In 2007, there were over fourteen million arrests nationwide. FEDERAL BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFORMATION SERVICES, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2007, tbl.29 (Sept. 2008), [http://www.fbi.gov/ucr/cius2007/data/table\\_29.html](http://www.fbi.gov/ucr/cius2007/data/table_29.html).

paragraph, or several pages at best, may outline the events leading to a criminal charge. This is a void of necessity. People are an aside; to courts, the meat of the matter is the law.

Those seeking a better understanding of the parties or the social impact of legal decisions turn to academic texts and reports. But these authors cull studies, investigations, and accounts to create a narrative for their specific audience. Inherent in any summarizing process is a judgment call about what is or is not important, which words must be quoted and which can be summarized, which facts are compelling, and which fit into the story the author seeks to tell. But distillations can simplify and sterilize the complexities that exist in each of us. As we saw, Albert's love for his brother conflicted with his loyalty to his family and the memories they had collectively shared. The only way he could help his brother's case was to reveal painful, private stories about childhood poverty and family trauma. Through author translation, Albert's conflict might become nothing more than the cold phrase: "he expressed frustration with his limited role in the legal process." Or the judgmental: "it was clear that Albert felt powerless because of the turmoil in his personal life and inability to have more control in his brother's trial." Neither does Albert justice.

This is why this format, fictional stories with sociological and legal footnotes, was essential. Against the backdrop of Albert, Terése, and Jackson's individual experiences, we can examine broader motifs like the role of race in our system of capital punishment or the way our society casts capital defendants as "others" and outsiders. The narratives let us see the impact these overarching themes have on the people who play a role in them, while the footnotes reflect upon the typicality of the characters' stories and expose the systems in which they exist.

Each case, article, and legal theory is ultimately rooted in the experiences of individuals. Albert, Terése, and Jackson's stories and their attendant footnotes bridge the worlds of personal experience and legal process, and hopefully, touch on the layers inherent in our daily encounters and decisions.