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# “Mitigate From Day One”: Why Effective Defense Advocates Do Not Prioritize Liberty over Life in Death Penalty Cases

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# **“Mitigate From Day One”: Why Effective Defense Advocates Do Not Prioritize Liberty over Life in Death Penalty Cases**

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## I. INTRODUCTION

As a social scientist attempting to understand defense advocacy practices in murder cases charged with the death penalty, I asked my interviewees to select which, if they were forced to choose, they would prioritize in formulating their overarching litigation strategy: disproving guilt or preventing the death penalty. These were some of the most battle-tested and widely respected capital defense advocates across the country, and they were unanimous in their response: avoiding a death sentence is more vital than winning their client’s freedom. Subsequently, during eight years in practice as a sentencing mitigation specialist in capital cases, I had informal opportunities to ask a number of other advocates, also highly regarded among the nation’s capital defense community, the very same question. The answers again were uniform. According to these standard-bearers of quality representation in a field of law long notorious for ineffective assistance of defense counsel,<sup>1</sup> life, it seems, presumptively trumps liberty.

It is perhaps unsurprising that such would be the position of prudent counsel. Executions are irreversible; no defendant who is administered the ultimate punishment can ever hope to have it reduced to anything less. Moreover, experienced capital defense practitioners accept as common knowledge that when it comes to capital murder, evidence of the client’s culpability is often so overwhelming as to make guilt a foregone conclusion. In this piece, however, I am interested in exposing the peculiar operational characteristics of death penalty trials

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<sup>1</sup> See generally 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 (1994) (arguing that quality of defense representation, as opposed to the specific characteristics of the crime, constitutes the primary factor in determining whether defendants receive a death sentence); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995) (demonstrating that disparities of funding and resources across jurisdictions directly affect whether defense counsel is able to provide competent representation).

that produce the defense's strategic bent toward life, irrespective of these aforementioned truths. For it is a curious feature of death penalty litigation—perhaps one distinct from any other area of American legal practice—that capital defense advocates face substantial, structurally-rooted pressures to forego the best possible outcome for their clients (here, a verdict of actual innocence) simply in order to avoid the worst possible one (a sentence of death). My aim is to articulate the mechanics of these pressures.

The value of such an exposition, I suggest, lies in its ability to account for the immediately palpable difference that death makes in both the attitudinal posture and the concrete practice of effective capital defense. When good defense advocates learn of a capital filing, there ensues a flurry of activity. Learned counsel—specialists in the heightened procedural requirements of death penalty trials—are sought and retained. Requests for records pertaining to various aspects of the client's lifelong personhood (educational, occupational, medical, legal, vital, and more) disperse to their corresponding institutional sources, like grapeshot. Frequent and regular meetings with the client become routinized into the daily rhythms of the practice. Attorneys and life history investigators fan out into the community, beginning to forge the most delicate of connections with the defendant's family members, friends, enemies, overseers, abusers, and mere acquaintances. This drive to “mitigate from day one,” as one of my interviewees put it, does *not* mean that counsel gives up on or pays short shrift to advocacy concerning guilt. Rather, it reflects an impulse from the very outset to view all aspects of litigation through the prism of humanizing, life-saving evidence. And for the most well-respected practitioners in the capital defense bar, as I have gleaned from my research and hands-on experience in the field, this impulse is embraced as a direct and consistent influence on the unfolding dynamics of potentially *all* aspects of trial strategy, including strategy about the client's guilt—and this is so *regardless* of how powerful the case for actual innocence appears to be.

How does life, and not liberty, come to be the orienting compass point that guides the effective practice of death penalty defense to the extent it does? Based on ethnographic fieldwork with elite defense advocates across multiple state and federal jurisdictions around the U.S.,<sup>2</sup> I identify important roots of life-minded

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<sup>2</sup> Research was formally conducted from September 2006 to April 2007 and informally extended throughout my time in capital mitigation practice until September 2015. Formal activities were comprised of archival research, participant observation with capital defense teams in four then-ongoing cases, and unstructured, face-to-face interviews with fourteen capital defense attorneys, eight investigators, and five expert witnesses. Interviewees were voluntarily selected via snowball sample and drawn from a circle of defense practitioners who are routinely sought as faculty members in capital case training conferences organized by various criminal defense and civil rights professional organizations, state bar associations, and federal and state public defender offices nationwide. All interviewees are anonymous in accordance with requirements established under Institutional Review Board protocols for the protection of research subjects (petition HS#2005-4484 on file with the Office of Research Administration, University of California, Irvine). Fieldwork and interview notes

advocacy in the bifurcated structure of capital cases. Determinations of guilt are procedurally split from determinations of sentencing in the form of separate trials for each. I argue that the defense’s deliberate integration of the guilt and sentencing defenses—a practice that experienced advocates recognize as a fixture of competent representation in the prevention of death sentences—requires mitigation-emphasizing guilt trial strategies that eclipse, and often sit uncomfortably with, arguments for outright innocence. In the eyes of sensible practitioners who refuse to risk their clients’ lives, the incentive to prioritize life-advancing themes during the guilt phase is strong: these themes serve to foreshadow and reinforce mitigating evidence that will come to the fore during the sentencing trial’s arguments against death. In summary, the bifurcated structure of capital cases creates the need to achieve dense thematic integration between the guilt and penalty hearings, pushing life-minded advocates to approach the first trial not as a self-contained, full-fledged contest to zealously defend their client’s right to be free, but as an anticipatory prelude to later arguments to zealously preserve their client’s right to live.

This work aims for brevity and brisk logical movement, etching out the tactical pathways that justify the “mitigate from day one” approach of effective capital defense practitioners as they actually practice it. Consequently, I choose to sidestep both historical explanation of bifurcation’s origins (it has storied roots in the development of the Model Penal Code<sup>3</sup>) as well as extensive doctrinal elaboration on capital jurisprudence more generally. Given my leanings as an anthropological ethnographer, I strive to explicate the pull toward life largely through the words of defense advocates themselves, drawing not only from one-on-one, in-person interviews, but also from an array of archival sources that includes defense team court filings and work product, pedagogical materials for lawyers and investigators (training guides and manuals, conference lecture notes, informal white papers), and scholarship by advocate-analysts from within the legal academy. My focus is not so much on *how* advocates practice the life-minded approach—the practical techniques and maneuvers involved in trial strategy—as on *why* advocates sense the need to pursue it—the unique, structurally embedded pressures of capital cases that make the foregrounding of life so immediately compelling in the first place. Part I begins with a brief sketch of key elements of

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remain in the author’s possession. Financial support for research activities was provided by National Science Foundation Grant #SES-0548835 and the Department of Anthropology, the School of Social Sciences, and the Center for Ethnography at the University of California, Irvine.

<sup>3</sup> Accounts are ample in the literature. See, e.g., Russell Dean Covey, *Exorcizing Wechsler’s Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189 (2004) (offering a historical analysis of how the MPC’s philosophical foundations in utilitarian, offender-based theories of punishment came to be translated into procedural aspects of contemporary capital sentencing schemes); Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1400–05 (2005) (briefly summarizing the development of the MPC’s capital provisions in relation to contributions by the criminologist Thorsten Sellin).

bifurcation, as these are manifest in virtually every jurisdiction across the country. I argue that for the defense, the procedural split between guilt and penalty creates an epistemological rupture that threatens to put the defense at cross purposes with itself—even as bifurcation makes an eminently well-suited structural vehicle for the prosecution to present its escalating arguments of evil. Part II describes how the defense responds to these challenges. In order to manage the incongruities occasioned by bifurcation, advocates promote the mindful integration of mitigating themes throughout arguments on both sides of the bifurcated divide. In the course of integration, however, opportunities to maximize the potential for a life sentence often tug against strategic choices to win the client's liberty. Finally, Part III identifies three distinctive aspects of capital cases that generate yet additional pressures to maximize life-minded integration—pressures that magnify the problems of bifurcation and that push defense advocates, in the last instance, to acknowledge any result less than a death sentence to be nothing short of a victory.

## II. "A PROVEN CRIME IS ALREADY AN AGGRAVATED CRIME": THE STRUCTURAL BIAS TOWARDS DEATH

Since 1976, all jurisdictions with capital punishment on the books have required the procedural bifurcation of death penalty trials, whereby proceedings to adjudicate guilt are followed by separate sentencing proceedings that generally provide for the weighing of mitigating against aggravating evidence.<sup>4</sup> At the hearing for sentencing, populated by the same judge, attorneys, and jurors involved in the trial for guilt, the government is typically tasked with proving beyond a reasonable doubt at least one aggravating factor enumerated by statute.

Statutory aggravators across jurisdictions tend to include factors that traditional common law has associated with enhanced forms of homicide—killings, for example, that involve multiple victims, the promise of pecuniary gain, an especially heinous, atrocious, or cruel quality to the criminal conduct, or the existence of some prior history of felony-level violence on the part of the defendant.<sup>5</sup> Upon establishment of at least one enumerated aggravator, many jurisdictions further allow introduction of any non-statutory aggravating evidence, as long as this meets the reasonable doubt standard and pertains to the “character

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<sup>4</sup> 1976 was the year the U.S. Supreme Court struck down so-called “mandatory sentencing” schemes, which required automatic imposition of the death penalty for certain classes of crimes. *See Woodson v. North Carolina*, 428 U.S. 280 (1976). Covey provides an especially lucid historical account of how the Model Penal Code’s provisions calling for the balancing of aggravation against mitigation came to serve as the template for the vast majority of all death penalty schemes that exist today. *See Covey, supra* note 3, at 207–10.

<sup>5</sup> States have in large measure patterned their specific statutory aggravators after the MPC. *See Covey, supra* note 3, at 205 (tracing the MPC’s list of aggravating factors to common law glosses on “especially serious homicidal conduct”).

of the defendant or the circumstances of the crime.”<sup>6</sup> In general, all factors in aggravation must be established by jurors’ unanimous decision.<sup>7</sup>

Mitigating evidence, by contrast, is held to a substantially lower burden of proof.<sup>8</sup> Each juror is allowed—indeed, obligated—to consider any factor she reasonably believes to be mitigating, whether the factor is specified by statute or not.<sup>9</sup> Moreover, decision makers do not have to come to full agreement on whether mitigating factors are present; if any one juror accepts the existence of a mitigating factor, she is entitled to consider it and determine its relative importance vis-à-vis other evidence, regardless of whether fellow jurors accept that mitigating factor.<sup>10</sup> Thus, contemplation of the evidence for life is an individualized undertaking. Once sentencers have established aggravating factors by unanimous agreement, and mitigating factors by their own personal judgment, each juror must then come to her own decision about whether the former sufficiently outweigh the latter in order to pronounce a sentence of death. This is not a quantitative matter of counting, but a qualitative process of evaluation. One aggravator can outweigh all mitigators, and vice versa.

Haney has argued that from a social psychological perspective, the death penalty becomes a viable outcome when the state successfully casts the defendant as “less than human”<sup>11</sup>: “[W]e can tolerate eliminating from the human social order only those who by their very nature stand outside its boundaries.”<sup>12</sup> The prosecution achieves dehumanization, he explains, by invoking what he calls the “myth of demonic agency.”<sup>13</sup> The defendant is depicted as wicked and perverse by his very nature, and his intrinsic evil comprises the sole explanation for why he chose to commit a heinous deed that, in turn, becomes a simplistic, reductive representation of his entire existence.<sup>14</sup> A trial lawyer I interviewed affirmed that “to the typical juror, crime is easily understood as the product of evil”—and,

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<sup>6</sup> *Barclay v. Florida*, 463 U.S. 939, 967 (1983).

<sup>7</sup> Florida and Alabama currently remain the only jurisdictions that do not require unanimity.

<sup>8</sup> Several state statutes that are explicit on this point adopt the preponderance of the evidence standard. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-751 (2014); N.H. REV. STAT. ANN. § 630:5 (2013); WYO. STAT. ANN. § 6-2-102 (2012). *See also* *Walton v. Arizona*, 497 U.S. 639 (1990) (validating the sentencing scheme in Arizona, which imposed a burden of proof on the defense to establish mitigating factors by a preponderance of the evidence).

<sup>9</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) (“Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.”).

<sup>10</sup> *Mills v. Maryland*, 486 U.S. 367 (1988).

<sup>11</sup> Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 548 (1995).

<sup>12</sup> *Id.* at 549.

<sup>13</sup> *Id.* at 547.

<sup>14</sup> *See id.* at 548–59.

therefore, “a proven crime is already an aggravated crime.” In other words, by the time proceedings have reached the penalty phase, the prosecution has already made the case for the defendant’s monstrosity through the process of proving guilt. The further evidence presented to demonstrate formal aggravation—the specifically death-worthy characteristics of the defendant and the offense—serves simply to exacerbate the theme of evil that jurors have just embraced. For the prosecution, then, the bifurcated structure of capital trials lends itself to tight thematic synthesis of typical arguments for the death penalty, as they naturally unfold—first, in establishing the baseline evil required to commit murder, and then, in proving the aggravated, subhuman evil that would merit the ultimate punishment. In other words, bifurcation maps cleanly onto a logical progression that enables the prosecution to advance its agenda for death every step of the way.

Competent defense practitioners view the readily intuitive, inherently self-reinforcing qualities of the state’s arguments for dehumanization as a daunting challenge. Describing the prosecution’s and the defense’s disparate foci in penalty arguments, one advocate has observed:

Because the defense in a capital case conveys a broad presentation of the defendant’s character, a demonstration of capacity for life, while the prosecution seeks only to emphasize the horror of his act, the presentations are asymmetrical. The prosecution concentrates on one brief, vivid incident; the defense reviews an entire life.<sup>15</sup>

In both phases of trial, the state can continuously develop notions of the horror of the crime and its consequences, driving home the repulsiveness of the defendant’s innate perversity. By contrast, the defense, having just had its legalistic arguments against guilt rebuffed by the jury, is forced to shift epistemological gears to present a deeply moving, humanizing biography that spans the entire gamut of the client’s living existence.

The respective defense roles that bifurcation assigns to each hearing—first advocating against guilt, and then pleading for the value of the client’s life—are, by design, mutually non-reinforcing at best, and mutually contradictory at worst. There is a clear conceptual gap between “He didn’t do it” and “Please spare him for what he did”—between the skeptical, piece-by-piece dissection of the state’s evidence and arguments, and the sweeping, empathy-inducing presentation of character witnesses and intimate anecdotes exhibiting highly individualized manifestations of the “diverse frailties of humankind”<sup>16</sup> that have defined the client’s life conditions.

Despite this jarring epistemological rupture, authoritative figures in the

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<sup>15</sup> James M. Doyle, *The Lawyers’ Art: “Representation” in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 425 (1996).

<sup>16</sup> *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

criminal defense bar widely believe that a persuasive sentencing case must be built around humanizing strategies that invoke the power of the defendant's life story. Writing more than ten years ago, White noted that "[f]or more than two decades . . . experienced capital-defense attorneys have recognized that introducing mitigating evidence explaining the defendant's background and history to the penalty jury is generally the best way to dissuade the jury from imposing a death sentence."<sup>17</sup> "Life-history mitigation," one accomplished advocate concurs, "has long made up the most cogent and common mitigation in capital litigation."<sup>18</sup> Haney argues that from a psychological standpoint, "any meaningful explanation for capital violence must begin with an examination of the structure of the lives of those who commit it."<sup>19</sup> In the face of jurors' ready predisposition to accept narratives of evil, the need for a "mitigation counter-narrative" becomes all the more dire to generate sympathetic open-mindedness by means of a "comprehensive and empirically well-documented understanding of a capital defendant's life."<sup>20</sup>

Thus, in the view of standard-setting defense advocates, the allure of pursuing a penalty phase strategy that plays primarily to jurors' residual doubt of the defendant's guilt is a classic rookie trap. Certainly, this approach has surface appeal. Studies of capital jurors show that sentencers proclaim lingering uncertainty about criminal responsibility to be a resonant factor in mitigation.<sup>21</sup> Indeed, if thematic consistency is a structurally-rooted advantage in the prosecution's game plan, then continuing to build on guilt phase challenges would seem an obvious countermove for the defense. However, my interviewees stressed that this approach comes with high risk. Jurors may very well bristle at defense efforts that appear to second-guess the validity of their newly-minted verdict. One litigator explained that in his experience, penalty phase arguments for innocence are seldom effective, and that "lingering doubt will tend to kick in" for jurors as a mitigating factor, in the rare instances it actually does, only after the defense has first "unlocked the door to their sympathies." This is a feat best achieved, once again, through an exhaustively investigated and well-crafted life history.

In summary, the pressure to consider liberty through the lens of life begins with what defense advocates see themselves up against. Stock arguments for death are nevertheless potent ones, and bifurcation provides a serviceable structural

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<sup>17</sup> Welsh S. White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants*, 102 MICH. L. REV. 2001, 2009 (2004).

<sup>18</sup> Kevin M. Doyle, *Lethal Crapshoot: The Fatal Unreliability of the Penalty Phase*, 11 U. PA. J.L. & SOC. CHANGE 275, 290 (2008).

<sup>19</sup> Haney, *supra* note 11, at 559.

<sup>20</sup> Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 836 (2008).

<sup>21</sup> See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM L. REV. 1538 (1998); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1988).

framework for the government to continuously ramp up its theme of evil. By contrast, bifurcated trials engender a strategic rupture for the defense, forcing advocates to do a sharp pivot from legal arguments that analytically slice and dice allegations of a single discrete criminal act, to the sort of gripping, life-spanning storytelling that, effective counsel invariably agree, is a tried-and-true generator of juror findings of mitigation. How, then, are defense advocates to respond to this structural challenge? And how is it that their responses skew toward trial strategies that ultimately privilege broadly holistic arguments for life over black-boxed claims of actual innocence?

A. *“Disarm the Prosecution by Preparing the Jury”: The Ideal of Life-Minded Integration*

I present a passage here from a law review article written by a young defense litigator in 1979:

Insuring that the trial will complement the overall strategy is critical. That is, if a life sentence is the goal toward which you are aiming, and the evidence of guilt is overwhelming and undeniable, then admit guilt, starting with voir dire and continuing through opening statement and closing argument. Disarm the prosecution by preparing the jury for the bad things to come. If an acquittal is a possibility, then be sure that you do not do anything that will destroy your credibility at the sentencing hearing, if a conviction results. In short, visualize the case as a play, in which the trial is only one of many acts, and then be sure that your trial presentation is consistent with the entire production.<sup>22</sup>

The author then went on to write the following about the penalty trial:

Unfortunately, this phase of a capital case only follows a guilty verdict, and no matter how prepared for it you are, a guilty verdict is very painful. Fortunately, if you have tried the case properly, you will have set the stage for the final and victorious act. Therefore, rather than scurrying around to discover information to save your client, your job will consist of administering the most persuasive presentation possible from the wealth of information already accumulated, in such a way as to compliment, through consistency, your trial presentation.<sup>23</sup>

As a historical artifact on the evolution of capital litigation tactics, this

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<sup>22</sup> Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 353 (1979) (citation omitted).

<sup>23</sup> *Id.* at 353–54.

practitioner's observations presage important aspects of contemporary defense strategies for life. At a minimum, the "wealth of information" acquired through penalty investigations must be presented in a manner "consistent with the entire production." This information needs to be collected far in advance, long before jurors render a judgment of guilt. And for attorneys representing the value of their client's humanity, the "final and victorious act" is one that results in anything less than a death sentence—not exclusively in outright acquittal.

Several years later, Goodpaster's field-defining article on effective assistance of defense counsel in capital cases would recognize that mere consistency of arguments between the bifurcated divide is necessary, but by no means sufficient:

Counsel's obligation to discover and appropriately present all potentially beneficial mitigating evidence at the penalty phase should influence everything the attorney does before and during trial: it should shape the relationship with the client, prosecutor, court personnel, and jurors; it should determine how voir dire proceeds, how potential jurors are questioned, which potential jurors are challenged for cause and which peremptorily; and it should directly affect the nature of the defense presented during the guilt trial and the affirmative mitigating case put on at the penalty trial.<sup>24</sup>

Advocates have long understood that the overarching defense strategy must be anchored in the ultimate strategy for life, and that to a considerable degree, the mitigation strategy can and should shape what the defense will present at guilt. In modern-day practice, Goodpaster's prescriptions have been formally institutionalized in advocacy guidelines that leading defense attorneys have accepted—and the U.S. Supreme Court has affirmed—as articulating the prevailing standard of care in capital defense representation.<sup>25</sup> These guidelines require that once counsel has formulated "an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages,"<sup>26</sup> she should advance that theory "during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument."<sup>27</sup>

In the face of government arguments that strategically develop the theme of

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<sup>24</sup> Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 320 (1983) (citation omitted).

<sup>25</sup> See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The high court has described these guidelines as "well-defined norms" to which the high court's own justices "long have referred." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

<sup>26</sup> ABA GUIDELINES, *supra* note 25, at 1047–48 (citation omitted).

<sup>27</sup> *Id.* at 1048 (citation omitted).

evil with every pass, some life-minded practitioners have asserted that failure to present an integrated defense for life is a relevant consideration in arguing for ineffective assistance of counsel.<sup>28</sup> In one case I followed, for example, a social history expert submitted a declaration in support of post conviction counsel's argument that the original trial attorneys were deficient in

[M]erely characteriz[ing] [*defendant*] as “disturbed” without the benefit of any guilt phase psychiatric or psychological testimony to support this characterization . . . . Without “front loading” some of this kind of testimony in the guilt phase, presenting expert testimony to at least give the jury some insight into who [*defendant*] was, and how the life she had lived might have impacted and compromised her thought process before and during the crimes for which she was convicted, they shifted an enormous burden to her penalty trial.

In sum, both in theory and in practice, competent practitioners have consistently held out thematic integration to be an indispensable cornerstone of defense strategy. Indeed, as they see it, integration arguably rises to the level of constitutional necessity.

Thus, the challenge for the defense becomes how to negotiate the transition between the epistemological rupture wrought by the bifurcation of capital trials. Several defense counsel have described to me the “bleed-through insanity defense” as a classic pioneering example of a life-minded strategy that seeks to do exactly this. Conceding factual commission of the capital crime, advocates key in on the client's compromised mental health to raise questions about his state of mind—not just with respect to the criminal offense proper, but also with respect to his fractured, lifelong perceptions of the world in general. Through injection of this evidence into the guilt trial, the defense is able to prepare jurors for themes of psychological impairment that will become critical in building the sentencing case. The analytical move between guilt and penalty now becomes a more palatable one: he *did* do it, and please spare him for what he did. Having established this foundation of logical consistency, the defense can then proceed to orient the guilt phase defense toward mitigation-priming facts that will actively reinforce the overall theme for life across the bifurcated divide.

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<sup>28</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing ineffective assistance when counsel's performance is deficient, and the deficient performance prejudices the client). A series of Supreme Court rulings beginning at the turn of the millennium has addressed Sixth Amendment claims in the capital context, centering around the issue of counsel's failure to undertake adequate social history investigation as a necessary factual basis for trial strategy. See generally Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 636–37 (2013) (outlining the lineage of Supreme Court decisions that begins with *Williams v. Taylor* and continues with *Wiggins v. Smith*, *Rompilla v. Beard*, *Porter v. McCollum*, and, most recently, *Sears v. Upton*).

Admission of *actus reus* frees up a range of opportunities for the defense to “front load” mitigating evidence during the guilt phase hearing—and herein lies a formidable source of pressure that makes the defense bring a critical eye to strategies geared toward head-on contestations of guilt. In another example an advocate gave me, a defense of voluntary intoxication would acknowledge that the defendant did the deed. However, by concentrating on the question of criminal intent during guilt trial arguments, the defense can begin to foreshadow notions of impaired behavior control, overwhelming stressors and experiences of depression that impelled the client to self-medicate, and lifelong, intergenerational histories of addiction among family members—all the quintessential stuff of penalty phase mitigation. If mental health considerations are by now woven into the fabric of effective capital defense,<sup>29</sup> a significant reason for this is because advocates hear the respective vocabularies of psychology, psychiatry, and neurology speaking directly to guilt-conceding defenses that focus on state of mind—duress, mistake of fact, proportionate culpability relative to co-defendants, intoxication, and, of course, insanity/diminished capacity.<sup>30</sup>

Finally, emphasizing life over innocence also enables the defense to make certain maneuvers that would not be feasible with straight-up arguments against guilt. Good defense advocates know that experienced prosecutors save much of their evidence for the penalty hearing, waiting until then to unleash a torrent of aggravating information. An integrated, life-centered defense allows advocates to voluntarily bring up unfavorable evidence early on in order to preempt its effects down the line. One lawyer explained to me the “prophylactic” value of “introducing aggravating evidence on [the defense’s] own terms”—a move that would not square well with the simplistic, “good guy” depiction of the client as an innocent man. Furthermore, several advocates pointed out to me that, according to their experience and knowledge, jurors tend to find evidence of the defendant’s remorse to be one of the more compelling factors in mitigation.<sup>31</sup> The implication of this for the guilt phase is obvious: a defendant cannot regret a murder he denies committing.

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<sup>29</sup> “[M]ental health issues are so ubiquitous in capital defense representation that the provision of resources in that area should be routine . . . .” ABA GUIDELINES, *supra* note 25, at 957.

<sup>30</sup> Not to mention the various collateral issues that precede and orbit around both the penalty and guilt adjudications. “Evidence concerning the defendant’s mental status is relevant to numerous issues that arise at various junctures during the proceedings, including competency to stand trial, sanity at the time of the offense, capacity to intend or premeditate death, ability to comprehend *Miranda* warnings, and competency to waive constitutional rights.” *Id.* at 956.

<sup>31</sup> See also Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) (using statistical analysis with South Carolina jurors to show the influence of remorse, particularly in murders perceived to be less vicious).

### III. "CRIME IS EASILY UNDERSTOOD AS THE PRODUCT OF EVIL": FURTHER PRESSURES TOWARD INTEGRATION

To be clear, I am not claiming that competent defense practitioners believe zealous advocacy against the government's case for guilt is categorically impossible or invariably inadvisable. My point is that based on what experienced advocates know to work as mitigation, and in light of the state's facile exploitation of structural bifurcation to ratchet up its narratives of evil, the defense encounters self-perceived (and, arguably, constitutionally mandated) pressures to integrate life-affirming themes at every available opportunity. These pressures, in turn, create strategic choices that advocates would not have to contend with were the trial simply one about the defendant's factual guilt. In this final part, I suggest that the stakes of these strategic choices are brought into even sharper relief with three distinct features of capital trials, each of which further underscores my prior interviewee's concern that for typical jurors, "crime is easily understood as the product of evil."

First, as strong as a claim of innocence may seem, defense advocates know from both practical experience as well as long-validated academic findings<sup>32</sup> that "death-qualified" jurors are significantly more likely to return a conviction of guilt.<sup>33</sup> In a training seminar paper entitled *Presenting Mitigation Evidence During Phase One: Frontloading Mitigation*, one lawyer wrote,

[E]ven in those cases which would normally be 'tryable' on the issue of guilt or innocence, the reality of death qualifying the jury significantly moves the jury towards a conviction. Thus, even in cases where counsel may legitimately hope for a verdict of not guilty or a conviction on a lesser included offense, experience tells us that more likely than not the client will be convicted and face the death penalty.

A necessary strategic consequence of this, the author continues, is that "mitigation [be] woven into the guilt innocence presentation." Two attorneys noted to me that sometimes, when the government is really more interested in securing a conviction than a death sentence, prosecutors will bring a capital charge,

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<sup>32</sup> See Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 25 BEHAV. SCI. & L. 57 (2007); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984); George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971).

<sup>33</sup> A potential capital juror's views on the death penalty cannot "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 496 U.S. 412, 424 (1985). He must be able to impose a sentence of death if the law calls for it.

select jurors through the death qualification process, and then amend the charge to a non-capital offense, just to empanel a jury that is more conviction-prone. Given advocates' awareness that death-qualified jurors are also more inclined to actually pass a sentence of death when presented with the opportunity,<sup>34</sup> the need to prioritize holistic mitigation strategies over self-contained claims of innocence appears all the more urgent.

A second source of pressure stems from the fact that in capital trials, the rules of evidence are often relaxed to a significant extent during the sentencing phase.<sup>35</sup> Just as the defense may submit a broad range of information about the client's character and his circumstances, the looser evidentiary standards of the penalty phase can work, too, in favor of the government. The Supreme Court's allowance of victim impact evidence in capital trials was based in large part on the Court's interpretation of the penalty phase's evidentiary liberties. According to the majority in *Payne v. Tennessee*, it did not make sense that

[W]hile virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering a quick glimpse of the life which a defendant chose to extinguish, or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.<sup>36</sup>

One attorney observed that victim impact evidence can be especially powerful for the way it invokes "the intuitive idea of cause-and-effect" to drive home notions of the client's wicked nature. If the defendant had any sense of empathy, the argument goes, he would not have done what he did, knowing that his actions would wreak havoc on the lives of innocent people. The thematic reinforcement that comes with a front loaded, tightly integrated defense becomes vital to weather these largely unregulated displays of anguish.

The final unique dynamic of capital trials is that defense practitioners identify a kind of catch-22 with respect to the need for expert testimony. On the one hand, it is a virtual given that the penalty defense will require experts. One mitigation specialist told me that if neither the prosecution nor the defense puts on expert

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<sup>34</sup> See also William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (analyzing interview data showing the inclination of death-qualified jurors to reach a sentencing decision prior to the penalty phase of trial).

<sup>35</sup> Federal law, for example, holds that during capital sentencing proceedings, "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c) (2002).

<sup>36</sup> 501 U.S. 808, 822 (1991) (citation omitted) (internal quotation marks omitted).

evidence at sentencing, the defense will almost always lose. Experts play a central role in providing credible insights about complexities of biology and context—the profound effects of mental disabilities, psychological disorders, local culture and group dynamics, institutional failure, and socioeconomic circumstances.<sup>37</sup> At the same time, jurors—who, again, tend to more readily grasp straightforward narratives of the defendant’s evil—will often reject overly complicated testimony from “hired guns” who appear to lack any meaningful personal connection with the client. This skepticism aligns well with the government’s goal of analytical reduction, which aims to flatten the subtle nuances of the defendant’s personhood into what one lawyer described to me as a “generic profile of evil.” For competent defense advocates, a strategy for life must work nonstop to pique jurors’ interest in the defendant as a human being, cultivating receptivity to sources, lay and expert alike, that can procure knowledge of the individual he is.

Evil is generic and hence easily understood, but humanity must be personalized—and in this difference, effective defense counsel locate the root of the three strategic considerations described above. Death-qualified jurors comprise a more skeptical audience for the defense’s efforts to personalize the client’s humanity. Death-qualified jurors make a more *sympathetic* audience for the state’s presentations of personalized suffering by those whom the defendant’s evil actions have harmed. And death-qualified jurors, again, are a more *skeptical* audience for the expert testimony that the defense relies on heavily to present the fullest truth possible of who the client is. Each of these three challenges, significant in its own right, feeds directly into the call to bridge the bifurcated divide with a counter-narrative capable of matching the thematic unification of the government’s processes of demonization. As defense advocates view it, the battle for life, let alone liberty, is an uphill one that already figures to be precariously steep.

#### IV. CONCLUSION

Thus, one respected practitioner’s training notes declare in plain terms the endgame of capital defense advocacy: “[m]ake no mistake—a win is a life sentence.” For those whom members of America’s capital defense bar look to as leading lights of the practice, death penalty defense is not really about holding the government to its burden of proof, in accordance with a fundamental presumption

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<sup>37</sup> In the context of mental health, for example, Stetler observes that:

[I]t is . . . important to offer well-prepared expert testimony to explain the effects of life experiences on an individual’s functioning and behavior. Lay witnesses, on their own, are unlikely to understand the significance of the symptoms and behaviors they describe. Only an expert is likely to provide an overview of the factors that shaped the client over the course of his life and offer an empathic framework for understanding the resultant disorders and disabilities.

Russell Stetler, *Mental Health Evidence and the Capital Defense Function: Prevailing Norms*, 82 UMKCL. REV. 407, 410 (2014).

of innocence. It is about proving, affirmatively, the humanity of the client, in sober acknowledgement of what clear tactical vision would hold out to be a fundamental presumption of death. Such is the impetus that has competent advocates perceiving the need to "mitigate from day one," beginning, immediately and urgently, to spin strands of humanizing themes that will potentially infiltrate and shape even the most seemingly far-removed facets of trial strategy—and, almost certainly, the defense case on guilt.

I end with a provocation. If those who number among the country's most talented, creative, and uncompromising defenders of constitutional rights were suddenly relieved of the convergence of structural pressures described above—that is to say, if these advocates were liberated to pull out all stops in zealously putting the prosecuting state to its burden of proof, as the deep-seated ideals of Anglo-American criminal jurisprudence hold they should<sup>38</sup>—might the defense be more likely to find success casting reasonable doubt about the client's guilt? I have no empirical basis to say one way or another. I suggest only that, in theory, the possibility exists—and that capital punishment, given its stakes, is a practice that must take seriously what happens at its margins. As an anthropological account, then, this piece stands as a report from the field of what may be a critical point of disconnect between law and its mores—an elaboration of the contortions of advocacy that effective defense practitioners deem necessary to accommodate the death penalty in a legal order that would purport to vigilantly safeguard the rights of its citizens not merely to live, but to be free.

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<sup>38</sup> Presumably, Blackstone would take his famous maxim to ring *especially* true if his innocent defendant's suffering were to involve the loss of life. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*352 ("[B]etter that ten guilty persons escape, than that one innocent suffer.").