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CHILDHOOD ABUSE AND ADULT MURDER: IMPLICATIONS FOR THE DEATH PENALTY

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A jury that convicts a defendant of capital murder must then decide whether that defendant deserves a life sentence or death. Mitigating evidence is crucial to the defense at this stage because such evidence may provide the jury with a basis for imposing a life sentence. In this Article, Professor Crocker argues that evidence that a defendant was abused as a child is paradigmatic mitigating evidence. A detailed presentation of the defendant's childhood experience and a cogent explanation of its long-term repercussions will enable the jury to understand why the defendant committed the crime, perhaps allowing the jury to sympathize or empathize with the defendant. By humanizing the defendant, an effective presentation of evidence of childhood abuse may make the difference between a life and a death sentence. But despite its potential mitigating effect, evidence of childhood abuse is not always effectively presented to the jury. Professor Crocker identifies and discusses impediments in the death penalty system that account for this failure. She then proposes changes to the system that could ensure the proper presentation of evidence of childhood abuse. Professor Crocker concludes with a reflection on the moral tension within society that underlies the legal system's difficulties: a tension between conflicting reactions that must be reconciled in the case where the child who has been abused and the adult who has committed murder are the same person.

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From 1989 to 1994 I was a staff attorney at the Texas Resource Center in Austin, Texas, representing men on death row in their post-conviction appeals. Many of these men had histories of childhood abuse similar to the cases presented herein. Their stories and the response of the legal system to their circumstances formed the catalyst for this Article. I thank those who read drafts of my arguments as they progressed: Joel Finer, Patricia J. Falk, Peter D. Garlock, Daniel J. Givelber, and Sheri Lynn Johnson. My research assistants, Shari A. Slawinski and Jennifer L. Whitney, made valuable contributions. A special thanks to Jeffrey A. Coryell. I also thank the Cleveland-Marshall Fund for its financial support.

[T]he childhood shows the man,
As morning shows the day.[1]

INTRODUCTION

When a child suffers brutal physical abuse, society is shocked by the cruelty carried out against a defenseless person. When an adult murders another person, society is angered by the violence inflicted on an innocent victim. These values conflict, however, when the adult who committed the murder was once the child who was physically abused. On the one hand, a societal understanding exists that a child may suffer long-lasting psychological and behavioral impairments from physical abuse.[2] Yet, a fundamental societal precept is that adults are responsible for their decisions and actions. The tension between these two beliefs is especially acute when the murder is one for which the death penalty is a possible consequence.

A defendant who was physically abused as a child certainly may be found guilty of committing a first-degree murder.[3] It is unlikely that the adverse adult repercussions of childhood abuse would excuse the defendant's actions or negate the defendant's responsibility for the crime.[4] In a death penalty case, however, the decision still remains whether to sentence the defendant to death or life imprisonment.[5] As a question of punishment, the defendant's impairments from childhood abuse may explain his background or

1. John Milton, Paradise Regained, Book IV, lines 220-21, *in* JOHN MILTON: PARADISE LOST AND PARADISE REGAINED 341, 386 (Christopher Ricks ed., Penguin Books 1968) (1671).

2. *See infra* note 53 (citing cases that recognize the long-term damage caused by childhood abuse).

3. In general, an adult is assumed to have "the capacity to understand what he is required by law to do or not to do, to deliberate and to decide what to do, and to control his conduct in the light of such decisions." H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 218 (1968). Defenses that negate this assumption are extremely limited. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 16.01-.03, at 181-84; *id.* § 25.07, at 328 (2d ed. 1995); Paul H. Robinson, *Criminal Law Defenses*, 82 COLUM. L. REV. 199, 221-29 (1982).

4. A history of childhood abuse would meet this criterion only if the defendant could prove that the impairments he suffered from the abuse excused his conduct—on the grounds, for example, of insanity—so that he was not responsible for committing the crime. *See, e.g.*, DRESSLER, *supra* note 3, § 16.03, at 183 (stating that the insanity defense excuses a defendant because, "as a result of his mental disease or defect, he lacks the moral blameworthiness ordinarily attached to wrongdoers"); Robinson, *supra* note 3, at 221-25 (explaining that insanity is an internal disability that causes conditions that excuse the defendant from criminal liability).

5. *See infra* note 20 (explaining how the decision at the guilt phase differs from the punishment phase).

character, or the circumstances of the crime, in a way that persuades a juror that life imprisonment is appropriate and sufficient to punish this defendant.

A history of childhood abuse exemplifies the kind of evidence a defendant should want the jury to consider in making its punishment decision because such evidence has the potential to transform a juror's perception of the defendant in a way that allows the juror to vote for a life sentence. Concomitantly, evidence of childhood abuse typifies the problems encountered in many death penalty cases with ensuring that this information is properly investigated and presented by the defense and adequately considered by the jury. This Article argues that system-wide barriers to the effective presentation and consideration of such quintessential mitigation evidence as childhood abuse reveal the depth of the death penalty system's inability to implement the constitutional command to ensure that a death sentence is a judgment about the appropriate punishment for the individual defendant.

Part I of this Article explains how a history of childhood abuse is paradigmatic of mitigating evidence that the jury should consider as it decides how to punish the defendant. This Part discusses the constitutional parameters of mitigating evidence and how such evidence serves to identify those qualities about the defendant or the crime that may make a death sentence an inappropriate punishment.[6] Next, this Part reviews the psychological and medical literature on the long-term consequences of childhood abuse, including research that documents lasting behavioral and perceptual impairments.[7] It then examines the prevalence of histories of childhood abuse among defendants sentenced to death as presented in appellate court decisions and studies of death row inmates.[8] Finally, this Part explores the relationship between a history of childhood abuse and mitigation.[9] This analysis shows that evidence of childhood abuse has the power to change a juror's perception of the defendant because it documents the strong connection between the defendant's history and his adult behavior.

Part II examines how, despite its mitigating potential, a defendant's history of childhood abuse may not become part of what informs the jury's judgment about whether to sentence the defendant

6. *See infra* notes 19-50 and accompanying text.
7. *See infra* notes 56-85 and accompanying text.
8. *See infra* notes 86-133 and accompanying text.
9. *See infra* notes 134-46 and accompanying text.

to life imprisonment or death. This Part identifies three impediments in the death penalty system that hinder the proper presentation and consideration of mitigating evidence of childhood abuse. First, this Part explores common misperceptions that courts hold about the relationship between a defendant's childhood abuse and his adult conduct.[10] Second, it analyzes how circumstances at the punishment phase of the trial—including ill-prepared defense attorneys and inadequate jury instructions—contribute to the inability of a jury to consider effectively a defendant's childhood abuse.[11] Finally, this Part analyzes how some of the standards used in post-conviction review of death sentences further obstruct the potential role of childhood abuse as mitigating evidence.[12]

The cumulative effect of these barriers is that evidence of childhood abuse, rather than providing the jury with a basis on which to sentence the defendant to less than death, gets caught in the maelstrom of death penalty law. This persistent failure to recognize the significance of such evidence demonstrates the tenacity of the system's arbitrariness and capriciousness. Part III of this Article identifies fundamental changes that must be made to ensure that childhood abuse receives due consideration as mitigating evidence.[13] It also explores how the legal system's difficulties with this issue point to an underlying moral tension in how society perceives the two tragedies of childhood abuse and adult murder.[14]

I. CHILDHOOD ABUSE AS PARADIGMATIC OF MITIGATING EVIDENCE

Childhood abuse exemplifies both the potential value and difficulties inherent in presenting mitigating evidence. Courts and scholars frequently cite evidence that the defendant had a difficult childhood, and specifically that he[15] was abused as a child, as an example of the kind of circumstances that a defendant would want to

10. *See infra* notes 147-201 and accompanying text.
11. *See infra* notes 202-70 and accompanying text.
12. *See infra* notes 271-314 and accompanying text.
13. *See infra* notes 315-26 and accompanying text.
14. *See infra* notes 327-30 and accompanying text.
15. This Article intentionally uses "he" to describe defendants. As of April 1, 1998, 98.73% of those on death row were men. *See* DEATH ROW U.S.A. REP. (NAACP Legal Def. & Educ. Fund, New York, N.Y.), Spring 1998, at 1137. In all but one of the cases discussed in this Article, the defendant was a man. For an exploration of some of the reasons for this discrepancy, see Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501 (1990).

present as mitigating evidence.[16] This focus is justified. A defendant's history of childhood abuse fits the constitutional conception of mitigating evidence.[17] The individualized presentation of factors in the defendant's background and character showing childhood abuse and its long-term negative repercussions on judgment and behavior may make the defendant's commission of the murder more understandable to the jury and, therefore, may provide the jury with a basis on which to sentence him to life imprisonment.[18]

16. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.") (citing McGautha v. California, 402 U.S. 183, 187-88, 193 (1971)); DAVID VON DREHLE, AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW 289 (1995) (analyzing the operation of Florida's death penalty, including individual stories of men on death row, so many of which involved histories of child abuse that he remarks, "Perhaps it is dull by now to say that Daniel Thomas was the product of a ghastly childhood, but he was"); Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1035-36 (1996) (creating a scenario to examine the role of mercy at the punishment phase that begins with a defendant "weaned on violence, fear, abuse, and deprivation at the hands of a sadistic father and alcoholic mother"); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 361 (suggesting that in "most cases" the defendant will want to proffer an explanation for the crime "often" showing a history of child abuse); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 363 (identifying child abuse as one of the three most common types of mitigating evidence, in addition to mental retardation and mental illness). Many of the U.S. Supreme Court death penalty cases concerning the presentation and consideration of mitigating evidence involve evidence that the defendant was abused as a child. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 319-28 (1989) (holding that the absence of instructions informing the jury it could consider and give effect to mitigating evidence of child abuse and mental retardation precluded the jury from providing a "reasoned moral response"); Burger v. Kemp, 483 U.S. 776, 788-95 (1987) (concluding that counsel was not ineffective for failing to investigate the defendant's background, that included both parents throwing him out of their homes and his stepfather beating him); *Eddings*, 455 U.S. at 107-09 (reviewing mitigating evidence that the defendant's father beat him and he suffered emotional and mental difficulties); *see also* Walton v. Arizona, 497 U.S. 639, 682-83 (1990) (Blackmun, J., dissenting) (expressing concern that the jury might not consider the defendant's history of sexual abuse as a child given the Court's holding that the Constitution does not preclude states from requiring proof of mitigating circumstances by a preponderance of the evidence); Stanford v. Kentucky, 492 U.S. 361, 399-402, 401 n.14 (1989) (Brennan, J., dissenting) (noting that the 16-year-old defendant in the companion case was physically abused by his mother); *cf.* Thompson v. Oklahoma, 487 U.S. 815, 860 (1988) (Scalia, J., dissenting) (noting that the 15-year-old defendant was sentenced to death for killing his former brother-in-law in part because the brother-in-law physically abused the defendant's sister).

17. *See infra* Part I.B.3 (discussing how childhood abuse constitutes mitigating evidence).

18. *See infra* Part I.B.3 (analyzing how evidence of childhood abuse may change a jury's perception of the defendant). A history of childhood abuse also encompasses pragmatic considerations attendant to mitigating evidence that the defense must confront. While it may allow the jury to perceive the defendant in an empathetic light, it also may bring to the fore evidence of the defendant's other criminal behavior. *See infra* notes 247-

This Part explores the connection between a history of childhood abuse and its use as mitigating evidence by first explaining the purpose of mitigating evidence at the punishment phase of a death penalty trial. It then reviews the psychological and medical literature on the long-term effects of childhood abuse and analyzes the prevalence of childhood abuse among defendants sentenced to death. Finally, this Part examines the ways in which a defendant's experience of childhood abuse and its long-term consequences may affect a juror's decision to sentence the defendant to death or life imprisonment.

A. The Purpose of Mitigating Evidence

At the punishment phase of a death penalty trial the jury[19] must determine whether death or life imprisonment is the appropriate punishment for the individual defendant. The focus shifts from the narrow question at the guilt phase of whether the defendant committed the murder to a broader judgment about how to sentence this particular defendant for committing the murder.[20] Under the

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59 and accompanying text (discussing the mitigating and aggravating potential of childhood abuse).

19. The sentencing decision may be made by the judge or the jury. *See* Spaziano v. Florida, 468 U.S. 447, 459 (1984) (ruling that the Sixth Amendment does not require sentencing by a jury); James R. Acker & Charles S. Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes*, 31 CRIM. L. BULL. 19, 20-27 (1995) (reporting that in four states judges have exclusive sentencing authority, in four states the jury verdict is only advisory, in five states the judge may set aside the death penalty in certain circumstances, and in all others the jury decision is binding). Throughout this Article, I will refer to the sentencer as the jury.

20. A death penalty trial occurs in two phases, one to decide guilt and the other to decide punishment. *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). The death penalty may not be inflicted as a mandatory punishment. *See* Woodson v. North Carolina, 428 U.S. 280, 288-305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). The jury must decide that the defendant's crime makes him eligible for a death sentence and then must decide whether death or life imprisonment is appropriate. *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 971-75 (1994) (identifying two aspects of capital trials: eligibility for a death sentence and selection of the death sentence as the appropriate punishment). The punishment-phase decision is qualitatively different from the guilt-phase decision. The central issue in conviction is establishing that the necessary elements of the crime are proven beyond a reasonable doubt, but no such central issue exists at the punishment phase, where the jury considers a "myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, 463 U.S. 992, 1007-08 (1983); *see also* WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES 74-76 (1991) (explaining how the jury makes qualitatively different decisions at guilt and penalty trials). In a prior article, I argued that the punishment-phase determination is not a recapitulation of the guilt-phase decision but a reconceptualization of the defendant's culpability and a consideration of new factors unrelated to guilt but related to the defendant's deathworthiness. *See* Phyllis L. Crocker, *Concepts of*

Eighth Amendment, the question of punishment must be individualized to ensure that the sentencer may consider "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[21]

Mitigating factors are "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[22] Within these parameters, death penalty statutory schemes may not restrict the evidence that a defendant presents in mitigation of his sentence,[23] and the jury may not refuse to consider mitigating evidence.[24] A state may, however, structure how the jury considers the mitigating evidence.[25] For example, a state may require that in order for a juror to consider the defendant's evidence "sufficiently substantial to call for leniency," the defendant must establish that it exists by a preponderance of the evidence.[26] Some states require the jury to weigh mitigating evidence against aggravating evidence to determine the defendant's sentence,[27] while others merely require the jury to consider mitigating circumstances in assessing punishment.[28] Despite

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Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases, 66 FORDHAM L. REV. 21 (1997).

21. *Woodson*, 428 U.S. at 304 (opinion of Stewart, Powell, and Stevens, JJ.). "[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* (opinion of Stewart, Powell, and Stevens, JJ.) (citation omitted).

22. *Eddings*, 455 U.S. at 110 (adopting the rule from *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)).

23. *See id.* at 113-15 (holding that the sentencer must not be precluded from considering, and may not refuse to consider, any mitigating factors); *see also* James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299 (1994) (analyzing the purpose and types of mitigating factors).

24. *See Eddings*, 455 U.S. at 114-15 & n.10 (declining to prescribe the amount of weight that a juror must give to mitigating evidence, but noting that "*Lockett* requires the sentencer to listen"); *see also* Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding that a juror who would automatically impose the death penalty regardless of the mitigating evidence may be challenged for cause).

25. *See* Johnson v. Texas, 509 U.S. 350, 372-73 (1993) (citing Saffle v. Parks, 494 U.S. 484, 490 (1990)).

26. Walton v. Arizona, 497 U.S. 639, 649 (1990); *see also* Acker & Lanier, *supra* note 23, at 341-42 (analyzing state statutory requirements and noting that most states assign no burden of proof to the defendant regarding mitigating factors). The jurors need not agree on which circumstances are mitigating. *See* Mills v. Maryland, 486 U.S. 367, 373-75 (1988).

27. *See* Acker & Lanier, *supra* note 19, at 27-52 (analyzing the different types of sentencing formulas that states have adopted for how the jury decides between life imprisonment and death).

28. No one scheme is constitutionally required. *See* Spaziano v. Florida, 468 U.S. 447, 464 (1984); *see also* Acker & Lanier, *supra* note 19, at 27-52 (analyzing the different

the individual vagaries from state to state, the purpose of mitigating evidence remains the same: to provide the jury with a basis on which to consider sentencing the individual defendant to life imprisonment rather than to death.[29]

The challenge facing the defense is to change jurors' focus from the facts of the murder on which the jury convicted the defendant to facts about the defendant that will convince the jury to vote for a life sentence.[30] Courts and scholars often refer to this process as "humanizing" the defendant.[31] The defense must counter the prosecution's depiction of the defendant as an evil being who deserves to die.[32] This action requires providing the jury with a

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statutory schemes). The U.S. Supreme Court has not identified the burden of proof on the prosecutor for establishing the appropriateness of the death penalty. *See* Acker & Lanier, *supra* note 19, at 34. Most states require the prosecution to prove the existence of aggravating factors beyond a reasonable doubt. *See* Acker & Lanier, *supra* note 23, at 341-42.

29. Despite this fundamental role, the U.S. Supreme Court recently held that the Eighth Amendment does not require that the jury be instructed on the concept of mitigation or on the particular mitigating circumstances present in an individual case. *See* Buchanan v. Angelone, 118 S. Ct. 757, 763 (1998). For a discussion of the importance of jury instructions in capital sentencing, see *infra* notes 260-68 and accompanying text.

30. Professor Goodpaster describes this challenge as a "trial for life." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303 (1983). Empirical research confirms the importance and difficulty of refocusing the jury because many jurors make up their minds about punishment before hearing evidence at the punishment phase. *See, e.g.*, William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1089-90 (1995) (reporting that one-third of jurors surveyed in seven states thought, prior to the start of the punishment phase, that the defendant should be sentenced to death); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1191-95 (1995) (finding that the majority of jurors made guilt and punishment decisions simultaneously).

31. *See, e.g.*, Emerson v. Gramley, 883 F. Supp. 225, 245 (N.D. Ill. 1995) (concluding that testimony about the defendant's caring nature could have humanized him to the jury), *aff'd*, 91 F.3d 898 (7th Cir. 1996); Mathis v. Zant, 704 F. Supp. 1062, 1065 (N.D. Ga. 1989) (referring to the need for the attorney to attempt to humanize the defendant at sentencing), *vacated and remanded*, 975 F.2d 1493 (11th Cir. 1992); Goodpaster, *supra* note 30, at 321 ("[I]t is essential that the client be presented to the sentencer as a human being."); Weisberg, *supra* note 16, at 361 ("The overall goal of the defense is to present a human narrative, an explanation of the defendant's apparently malignant violence as in some way rooted in understandable aspects of the human condition, so the jury will be less inclined to cast him out of the human circle."); White, *supra* note 16, at 361 ("In every case, the capital defendant's attorney should seek to 'humanize' the defendant.").

32. *See* David C. Stebbins & Scott P. Kenney, *Zen and the Art of Mitigation Presentation, or, the Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial*, CHAMPION, Aug. 1986, at 14, 14 (arguing that defense counsel must show that the defendant is not evil). Reported cases and articles present numerous examples of how the prosecution characterizes the defendant as evil and less than human. *See, e.g.*, Devier v. Zant, 3 F.3d 1445, 1453 (11th Cir. 1993) (citing the district court opinion, noting that the

different way of understanding the defendant and his conduct—one that provokes the jury to empathize with the defendant,[33] to sympathize with him,[34] or to be merciful toward him.[35] Thus,

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prosecutor argued in closing that the defendant was "like a cancer which should be exorcised to protect society"); Brewer v. Aiken, 935 F.2d 850, 853 (7th Cir. 1991) (noting that, in adopting the jury recommendation to sentence the defendant to death, the trial court said " 'we cannot tolerate the James Brewers of our community' "); Bowen v. Kemp, 769 F.2d 672, 680 (11th Cir. 1985) (stating that the prosecutor characterized the defendant as " 'a product of the devil,' " who was " 'no better than a beast' " (quoting trial transcript)); Tucker v. Kemp, 762 F.2d 1496, 1507 (11th Cir. 1985) (calling defendant "less than human"); Hall v. State, 614 So. 2d 473, 478 (Fla. 1993) (approving a jury instruction that defined "heinous" as "extremely wicked or shockingly evil"); WHITE, *supra* note 20, at 84-85 (recounting a case where the prosecutor's expert testified at the punishment phase that "crime is a 'product of evil' and nothing else"); Goodpaster, *supra* note 30, at 335 (remarking that the prosecutor will portray the defendant as "evil and inhuman, perhaps monstrous"). *See generally* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 548-59 (1995) (discussing how the media turns defendants into monsters and arguing that "demonizing the perpetrators of violence facilitates their extermination at the hands of the state"); Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 L. & SOC'Y REV. 19, 51-52 (1993) (maintaining that evil is a dominant cultural motif for representing violence and victimization).

33. *See* William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 286 (1990-1991) (arguing that evidence causing the jury to empathize with the defendant is "the key to winning a life verdict"). Professor Pillsbury distinguishes sympathy, when another's "situation reminds us of our own," from empathy, which "promotes feeling for another as good in itself, not because it makes the empathizer feel good." Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 695-96 (1989). He maintains that in capital cases courts should "inform[] juries of their obligation to try to empathize with the offender as part of assessing deserved punishment." *Id.* at 703.

34. *See* California v. Brown, 479 U.S. 538, 542 (1987) (holding constitutional an instruction telling the jury not to rely on "mere sympathy" because the trial court directed the jury "to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase"); State v. Bey, 548 A.2d 887, 911-12 (N.J. 1988) (noting that jury instructions "must not mislead the jury into rejecting sympathy engendered by the defendant's background, character, or other mitigating circumstances"). *But see* Johnson v. Texas, 509 U.S. 350, 371 (1993) (noting that the Court has not interpreted its jurisprudence on jury consideration of mitigating evidence "to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant"); Saffle v. Parks, 494 U.S. 484, 487, 494 (1990) (casting doubt on the defendant's argument that *Brown* suggests that "the Constitution requires that the jury be allowed to consider and give effect to emotions that are based upon mitigating evidence" and holding that an instruction directing the jury to "avoid any influence of sympathy . . . or other arbitrary factor" may be proper guidance).

35. *See* Franklin v. Lynaugh, 487 U.S. 164, 190 (1988) (Stevens, J., dissenting) (noting that past conduct may shed light on the defendant's character in a way that evokes a merciful response); Gregg v. Georgia, 428 U.S. 153, 199-203 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (emphasizing the importance of the jury's ability to exercise mercy); Goodpaster, *supra* note 30, at 336 (positing that one element of mitigation is to "spark in the sentencer the perspective or compassion conducive to mercy"). *But see* Garvey, *supra* note 16, at 992 (arguing that the U.S. Supreme Court has no coherent

humanizing the defendant may entail presenting the defendant's positive attributes and/or factors in his character or background that explain his commission of the crime.[36]

A defendant's good character qualities may include being a caring[37] or religious person,[38] or a person without a criminal record or history of violent conduct.[39] The defense may use this evidence to frame the crime as a departure from the defendant's otherwise positive and worthwhile character.[40] Similarly, if the defendant has been a well-behaved prisoner, the defense may use this fact to demonstrate that the defendant's life should be spared because he

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understanding of mercy and proposing that mercy should be considered separately, after the sentencer decides whether the defendant deserves death or not).

36. *See, e.g.*, Geimer, *supra* note 33, at 286 (identifying four types of mitigating evidence: empathy, good guy, positive prisoner, and crime-related) (citing Deana Dorman Logan, *Is It Mitigation or Aggravation? Troublesome Areas of Defense Evidence in Capital Sentencing*, CAL. ATT'YS FOR CRIM. JUST. F., Sept-Oct. 1989, at 14, 14); Goodpaster, *supra* note 30, at 335-37 (positing four elements of the case for mitigation: presenting the defendant's positive qualities; making the defendant's crime understandable in light of his past history; presenting evidence about the inappropriateness of the death penalty in this case; rebutting the State's evidence of aggravation); Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695, 703 (1991) (identifying three types of mitigating evidence: the defendant's good deeds; his "psychiatric, addiction, or family problems" that explain his bad conduct; and his potential for being productive in prison); Weisberg, *supra* note 16, at 361 (suggesting that the defendant consider, when appropriate, casting doubt on his guilt, presenting his good character, or proffering a "causal, determinist" explanation of the crime). Professor Bilionis notes that *Lockett* encompasses circumstances of the defendant's formative years, adjustment to prison, and positive traits such as "remorse, general good character, hardworking nature, success in overcoming considerable hardships, service to the community or the military, or relatively minor criminal record." Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 304-05 (1991) (footnotes omitted) (compiling types of mitigating evidence recognized in state statutes and presented in cases).

37. *See, e.g.*, Hitchcock v. Dugger, 481 U.S. 393, 397 (1987) (noting that mitigating evidence included the fact that the defendant was "a fond and affectionate uncle to the children of one of his brothers"); State v. Stevens, 879 P.2d 162, 168 (Or. 1994) (holding that the jury could infer positive aspects of the defendant's character from testimony about the destructive effect his execution would have on his young daughter).

38. *See, e.g.*, *Franklin*, 487 U.S. at 186 (O'Connor, J., concurring in the judgment) (observing that mitigating character evidence may include good behavior in prison, honorable military service, kindness toward others, and regular church attendance).

39. *See, e.g.*, Acker & Lanier, *supra* note 23, at 313-17; *cf.* Sumner v. Shuman, 483 U.S. 66, 80-82 (1987) (noting that even if the defendant has a criminal record, the nature and quality of the crimes may be mitigating).

40. *See, e.g.*, Goodpaster, *supra* note 30, at 335 (suggesting that every defendant has some good characteristics that the defense attorney must use to convince the jury of his redeeming qualities); Weisberg, *supra* note 16, at 361 ("Where the defendant has evidence of good character, the defense wants to plead that the crime was an aberration.").

will not be a danger as long as he is in prison.[41]

A mitigation theory based on a defendant's positive qualities has a certain appeal because it readily recasts the defendant from an evil and unredeemable monster into a person who committed a serious crime but to whom the jury may still relate as a human being.[42] A high probability exists, however, that the defendant's background or character is not respectable or virtuous.[43] It is far more likely that the defendant's life history will include prior criminal convictions or violent behavior.[44] Thus, while building a mitigation theory around a defendant's nonviolent character may appear desirable, it is likely to be unrealistic and, therefore, ultimately unpersuasive to the jury.

A more promising form of mitigating evidence is that which provides an explanation for the defendant's commission of the crime.[45] By presenting explanatory mitigating circumstances, the defense seeks to show why the defendant committed the crime[46] and,

41. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 157-58 (1994) (noting that the defendant presented evidence that he would not be violent in prison because his dangerousness was directed only toward elderly women); *Franklin*, 487 U.S. at 178-79 (noting that a defendant's clean disciplinary record in prison may be mitigating); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (holding that the defendant must be allowed to present mitigating evidence of his good behavior in jail); *see also* Geimer, *supra* note 33, at 286 (explaining that " '[p]ositive prisoner' evidence shows that life imprisonment is sufficient punishment").

42. *See* Weisberg, *supra* note 16, at 361 (arguing that the goal of the defense is to make the jury "less inclined to cast [the defendant] out of the human circle").

43. *See* Haney, *supra* note 32, at 601 n.121 (observing that "many capital defendants are outliers on a continuum of risk factors like abuse and neglect"); Stebbins & Kenney, *supra* note 32, at 14 (arguing that the problem with planning a case for mitigation as a compilation of good deeds is that "most people facing the death penalty are not choir boys with paper routes who took care of their mothers, obeyed their fathers, and placed flags on graves on Memorial Day").

44. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1995, at 9 tbl.8 (1996) (reporting that 66% of death row inmates have prior felony convictions and 8% have at least one prior homicide conviction).

45. *See* Hill v. Lockhart, 28 F.3d 832, 846 (8th Cir. 1994) (quoting a lawyer who testified as an expert at the post-conviction evidentiary hearing that jurors were more likely to impose a life sentence if the defense attorney could explain why the crime occurred); Geimer, *supra* note 33, at 285-87 (positing that the key to a life verdict is explanatory evidence); Haney, *supra* note 32, at 560 (emphasizing the importance of using mitigating evidence to explain, not excuse, the defendant's conduct); Weisberg, *supra* note 16, at 361 (noting that mitigating evidence explaining the crime is what defendants should most often want to use); White, *supra* note 16, at 361 (explaining that providing a reason for the crime is the most important purpose of mitigating evidence).

46. *See* WHITE, *supra* note 20, at 76 ("Defense counsel must ... explain where the defendant has come from and why he has become the man he is now."); Haney, *supra* note 32, at 560 ("[M]itigating evidence ... is *not* intended to excuse, justify, or diminish the significance of what [the defendant has] done but to help explain it ...."); Sarat, *supra* note 32, at 41 (maintaining that penalty phase evidence must explain but not excuse the

in so doing, to transform the jury's understanding of the defendant and the murder.[47] This kind of mitigating evidence is not offered to excuse the defendant's conduct[48] or to undermine or negate the jury's guilt-phase determination of the defendant's responsibility for the crime. Instead, the defendant's goal is to demonstrate how he came to be the kind of person who committed the murder, that his judgment and behavior are not entirely of his own making, and/or that circumstances outside of his control contributed to and affected his conduct.[49] This type of mitigating evidence is important because it allows the jury to understand the crime within the broader context of the defendant's life and may convince the jury that exacting the most severe punishment is neither appropriate nor necessary.[50]

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defendant's conduct); Stebbins & Kenney, *supra* note 32, at 16-18 (suggesting that the jury must be told how and why forces in the defendant's life caused him to commit murder); *see also* Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 346-49 (1996) (noting the difficulty and the importance of distinguishing excuse from explanation).

47. *See, e.g.*, Sarat, *supra* note 32, at 39-47 (analyzing how a defendant's attorney used evidence of childhood violence against him to assist the jury in understanding, but not excusing, why the defendant killed the victim).

48. By convicting the defendant, the jury rejected any defense based on excuse. Furthermore, mitigating evidence need not rise to the level of a defense for the underlying crime. *See* Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (rejecting the lower court's limitation of mitigation evidence as that which provided a "legal excuse from criminal responsibility"). Even if a mental impairment related to childhood abuse does not constitute a defense to committing the murder, it is still relevant mitigating evidence at the punishment phase. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 309-10, 319-28 (1989) (considering evidence of brain damage related to childhood abuse and mental retardation as relevant to sentencing where the jury had rejected that same evidence when it was presented as part of the defendant's insanity defense); Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995) (rejecting the argument that investigation into the defendant's mental state for the guilt phase was sufficient for the punishment phase).

49. *See, e.g.*, Geimer, *supra* note 33, at 286 (contending that the most important mitigating evidence is that which shows that the defendant's impairments were not his fault or that the fault is shared); Goodpaster, *supra* note 30, at 335-37 (arguing that part of the mitigating case must include a connection between the crime and the defendant's prior history—the "unique circumstances affecting his formative development . . . [that show] that he is not solely responsible for what he is"); Stebbins & Kenney, *supra* note 32, at 18 (noting that expert testimony serves to connect the pieces of the defendant's history and to explain "the factors beyond the client's control that may give the jury a reason to keep the client alive").

50. *See* WHITE, *supra* note 20, at 76 (emphasizing the importance of providing a context for the defendant's crime); Goodpaster, *supra* note 30, at 335-36 (asserting that making the defendant's crime understandable in light of his history may evoke forgiveness and mercy). *But see* Alfieri, *supra* note 46, at 347 (arguing that focusing on how the defendant is not solely responsible for his conduct "suppresses the norm of moral agency, rendering the task of conceptualizing and legitimizing mercy even more difficult").

B. *Mitigating Characteristics of Childhood Abuse*

Evidence that the defendant was abused as a child is one of the more intuitively recognizable forms of mitigating evidence.[51] A general societal understanding exists that a person abused as a child will likely suffer some kind of long-term negative behavioral and perceptual effects. As Chief Justice Rehnquist observed in *Santosky v. Kramer*,[52] a non-death penalty case: "A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens."[53] While the long-term problems that an abused defendant may encounter may not constitute an excuse for his conduct, a jury may find that such problems impair the defendant's judgment or behavior sufficiently to justify punishing him with life imprisonment rather than death.

In order for the defense to persuade the jury that the defendant's history of childhood abuse should influence its punishment decision, however, the jury must have more than a vague sense of the abuse

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51. *See supra* note 16 (citing Supreme Court cases and other authorities that recognize the mitigating potential of childhood abuse); *see also* Haney, *supra* note 32, at 591 ("[M]ost people recognize intuitively that background experiences can shape and influence who we are and what we are capable of becoming."). Evidence of childhood abuse is distinguishable from, for example, mitigating evidence of mental illness, which many people do not understand and therefore fear or distrust. *See* James S. Liebman & Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 817-21, 819 n.275 (1978) (analyzing how mental illness should be considered as mitigating evidence and noting the importance of jury instructions because many people fear and distrust the mentally ill); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 709-30 (1989-1990) (arguing that the movement to abolish the insanity defense is driven by persistent myths about mental illness, including the belief that the defendant is faking his illness, that mental problems are not as severe as organic ones, and that the defendant should "look crazy" if he is insane); *cf.* Tamsen Douglass Love, *Introduction* to Special Project, *Current Issues in Mental Health Care*, 50 VAND. L. REV. 677, 681 (1997) (noting that fear of persons with mental illness affects the allocation of governmental resources for treatment).

52. 455 U.S. 745 (1982).

53. *Id.* at 788-89 (Rehnquist, J., dissenting); *see also* Walton v. Arizona, 497 U.S. 639, 682 (1990) (Blackmun, J., dissenting) ("Presumably, no individual who suffers [sexual abuse as a child] is wholly unaffected."); Russell v. Collins, 998 F.2d 1287, 1292 (5th Cir. 1993) (acknowledging that child abuse as "generally understood" would "have the tendency to affect the child's moral capacity by predisposing him or her toward committing violence"); Bouchillon v. Collins, 907 F.2d 589, 590 n.2 (5th Cir. 1990) (taking "judicial notice" that a defendant's background that included childhood neglect and sexual abuse "increases the probability of [maladjustment and mental] problems"); Haney, *supra* note 32, at 562 (remarking on the increasing societal recognition that children need protection and guidance).

suffered and an intuitive understanding of its general effects. Without a detailed presentation of the defendant's experience and a cogent explanation of its long-term repercussions, a juror's assumptions about childhood abuse may skew her understanding of its significance.[54] It is necessary, therefore, for the jury to know the kind, duration, and severity of abuse the defendant suffered and to understand how this abuse, in concert with other factors,[55] affected the defendant. Such a showing will affect the jury's understanding of the defendant's explanation for the murder.

The following Parts draw on psychological and medical literature to identify the contours of childhood abuse and its possible long-term effects; discuss how these features are reflected in death penalty cases; and analyze the connection between a history of childhood abuse and mitigating evidence.

1. Psychological and Medical Research on Childhood Abuse

Research on the correlation between childhood abuse and adult violence is in a nascent stage, yet it provides critical information about the possible adult consequences of a traumatic childhood.[56]

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54. *See, e.g.*, Card v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990) (accepting the trial attorney's failure to present mitigating evidence of the defendant's deprived childhood because the attorney thought many jurors had difficult lives but did not turn to crime); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1137 (1997) (noting that the response of many jurors to an expert's testimony "about the defendant's hardships . . . was 'Yeah, well, I went through that and I didn't end up a killer.' "); *see also* Haney, *supra* note 32, at 591 (observing that "clear thinking succumbs to fear and denial" when child abuse is proffered as a basis for moderating punishment). For a discussion regarding judges' misunderstandings about childhood abuse, see *infra* Part II.A.

55. *See infra* notes 66, 83-85 and accompanying text (discussing the interaction of the effects of childhood abuse with other impairments).

56. *See* Robin Malinosky-Rummell & David J. Hansen, *Long-Term Consequences of Childhood Physical Abuse*, 114 PSYCHOL. BULL. 68, 68 (1993) (reviewing the literature on the long-term consequences of child abuse and observing that while current research shows a correlation, it does not establish a causal relationship between child abuse and adult impairments); Sheree L. Toth & Dante Cicchetti, *Child Maltreatment: Where Do We Go from Here in Our Treatment of Victims?*, *in* CHILD ABUSE, CHILD DEVELOPMENT, AND SOCIAL POLICY 399, 421 (Dante Cicchetti & Sheree L. Toth eds., 1993) (recommending increased research on the longitudinal effects of child maltreatment); Cathy Spatz Widom, *Does Violence Beget Violence? A Critical Examination of the Literature*, 106 PSYCHOL. BULL. 3, 24 (1989) (reviewing the literature on the relationship between violence to a child and that child's violence as an adult and noting the need for further research because "[w]hy some children succumb and others do not remains an open question").

This Part is based on published literature in the psychological and medical fields. I initially consulted two articles that synthesize much of the current information about child abuse and maltreatment as it informs the development and presentation of defendants'

Certainly, not every child who is abused will, as an adult, engage in violent behavior.[57] The relationship between the abuse and later adult behavior is both complex and uncertain.[58] Nonetheless, strong evidence exists that a person who was abused as a child is at risk of suffering long-term effects that may contribute to his violent behavior as an adult.[59] This Article focuses on physical childhood abuse because it appears to have a closer correlation to later adult aggressive or criminal conduct than does sexual abuse.[60] The concern

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social histories in death penalty cases. *See* Haney, *supra* note 32 (combining social science research data and anecdotal information from cases on which he worked during the last 20 years); Deana Dorman Logan, *From Abused Child to Killer: Positing Links in the Chain*, CHAMPION, Jan./Feb. 1992, at 36, 39 (providing a "theoretical orientation" for defense attorneys). These articles were instrumental in advancing my thinking about the effects of child abuse and their relationship to understanding defendants who are on death row.

57. *See, e.g.*, Dorothy Otnow Lewis, *From Abuse to Violence: Psychophysiological Consequences of Maltreatment*, 31 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 383, 388 (1992) ("[M]ost abused children do not turn into violent criminals."); Cathy Spatz Widom, *Child Abuse, Neglect, and Adult Behavior: Research Design and Findings on Criminality, Violence, and Child Abuse*, 59 AM. J. ORTHOPSYCHIATRY 355, 364 (1989) (reporting results of the author's own study showing that while 29% of abused children had adult criminal records, 71% did not); Widom, *supra* note 56, at 23-24 (concluding that the literature demonstrates that the majority of abused children do not become delinquent).

58. *See, e.g.*, DAVID A. WOLFE, CHILD ABUSE 121 (1987) (describing the correlation between childhood abuse and adult behavior, emotions, and cognition as "circuitous and unpredictable"); Raymond H. Starr, Jr. et al., *Life-Span Developmental Outcomes of Child Maltreatment*, *in* THE EFFECTS OF CHILD ABUSE AND NEGLECT 1, 21 (Raymond H. Starr, Jr. & David A. Wolfe eds., 1991) (concluding that the "connections between childhood experiences of maltreatment and later developmental outcomes are the result of multiple factors that interact dynamically with each other," but that "the best available evidence does suggest that there are significant adult sequelae of child maltreatment"); Widom, *supra* note 57, at 364 ("Being abused as a child significantly increases one's risk of having an adult criminal record (and, for males, a violent one). However . . . the route is not straight-forward or certain.").

59. It is critical to note that the operative language is the "risk"—not the inevitability—of continuing the "cycle of violence." *See, e.g.*, Pamela Y. Blake et al., *Neurologic Abnormalities in Murderers*, 45 NEUROLOGY 1641, 1644-45 (1995) (documenting a history of severe and prolonged childhood abuse in 26 of 31 murderers, which, in concert with brain damage and paranoia, "may have an etiologic role in violence"); Lewis, *supra* note 57, at 387-89 (noting that the author's own studies show that child maltreatment combined with neuropsychiatric and cognitive deficits is "an especially potent precipitant of aggression"); *see also* ARTHUR H. GREEN, CHILD MALTREATMENT 76 (1980) (suggesting that one could expect the cumulative impact of child abuse to jeopardize an individual as an adult). *But cf.* Widom, *supra* note 56, at 3, 23-24 (noting that despite an intuitive sense that " 'violence breeds violence,' " existing research is too incomplete to be certain).

60. *See, e.g.*, JOHN N. BRIERE, CHILD ABUSE TRAUMA 57-58 (1992) (citing studies); Arthur Green, *Childhood Sexual and Physical Abuse*, *in* INTERNATIONAL HANDBOOK OF TRAUMATIC STRESS SYNDROMES 577, 579-80 (John P. Wilson & Beverley Raphael eds., 1993) (noting that aggressive behavior is more often associated with physically abused children, while sexual impulse problems are associated with sexually abused children);

is principally with severe physical abuse—that which causes serious injury to the child.[61]

Researchers in the psychological and medical fields posit that the connection between abuse as a child and adult violent behavior depends on a multitude of factors. For example, the extent of the long-term consequences from physical child abuse may be affected by the type and severity of abuse inflicted on the child, as well as by the individual vulnerabilities of the child.[62] Abuse by a caretaker has the

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Haney, *supra* note 32, at 573 (referring to the synergistic relationship between specific types of child abuse and their adult manifestations as "isomorphism").

61. Two researchers used a conservative definition of abuse that included being "punched or hit on areas of the body other than the buttocks with whips, switches, extension cords or boards," and "deliberate infliction of cuts, burns, broken limbs, and causing bleeding or loss of consciousness," but not "being hit on buttocks with a hand, the leather part of a belt, or a switch" or being "slapped on the face with an open hand." Abby Stein & Dorothy Otnow Lewis, *Discovering Physical Abuse: Insights from a Follow-Up Study of Delinquents*, 16 CHILD ABUSE & NEGLECT 523, 524 (1992). The authors chose this conservative definition in part to distinguish between "extreme physical brutality and culturally condoned physical discipline." *Id.*; *see also* Janice H. Carter-Lourensz & Gloria Johnson-Powell, *Physical Abuse, Sexual Abuse, and Neglect of Child, in* 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/VI 2455, 2456 (Harold I. Kaplan & Benjamin J. Sadock eds., 6th ed. 1995) [hereinafter Kaplan & Sadock] (defining physical abuse as "nonaccidental physical injury" that most often results from "unreasonably severe corporal punishment or unjustifiable punishment," and also includes "intentional, deliberate assault, such as burning, biting, cutting, . . . or otherwise torturing a child"). As discussed *infra* text accompanying notes 126-32, this abuse is the kind most often documented in death penalty cases.

Some scholars suggest that most adults were maltreated as children. *See, e.g.*, BRIERE, *supra* note 60, at xvii (stating that one of his central tenets is that "the majority of adults in North America, regardless of gender, age, race, ethnicity, or social class, probably experienced some level of maltreatment as children"). The defense attorney must be prepared to counter this type of inference about childhood abuse; it too easily belittles the trauma experienced by the defendant and feeds into the misconception that the abuse must not have had long-term effects because most adults, even if maltreated, do not commit murder. Contributing to this perception may be the plethora of novels that involve adults telling their stories of abuse as children. *See, e.g.*, DOROTHY ALLISON, BASTARD OUT OF CAROLINA (1992); URSULA HEGI, SALT DANCERS (1995). While psychologically damaged in devastating ways, the narrators in these stories emerge as functional adults. One exception to this phenomenon in current novels is JANE HAMILTON, THE BOOK OF RUTH (1988), in which the climax of the book occurs when the protagonist, severely abused as a child and mentally slow, kills his mother-in-law in a fit of rage. *See id.* at 292-98.

The point, however, is not that everyone was maltreated and, therefore, that the jury may discount the defendant's experience. As Briere carefully observes, the significance of the maltreatment depends on its severity and other factors such as "social and familial support, external stressors, and developmental level." BRIERE, *supra* note 60, at xvii. It is critical that the defense attorney make this point when presenting this kind of information in mitigation.

62. *See* WOLFE, *supra* note 58, at 101 (noting that it is more accurate to say that problems resulting from child abuse are the "*product of interaction* between the child's emerging personality characteristics, parental treatment, and circumstantial factors");

potential for greater long-term damaging consequences,[63] as does abuse that lasts for an extended period of time, for example, beginning when the child is an infant or toddler and continuing into adolescence.[64] Within a family, one child may be singled out for more extreme or repeated abuse than other children.[65] In addition, the degree of risk and the severity of the violent behavior are exacerbated when the abused child, as an adult, has other psychological, neurological, and cognitive impairments.[66] The likelihood that an adult who was abused as a child will be violent toward others increases when these factors coincide.

In order to understand the long-term consequences of child abuse, it is necessary to know more than the types and degrees of abuse that may contribute to an adult's violent behavior. It is also

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Green, *supra* note 60, at 586 (explaining that the long-term sequelae of child abuse depend on the individual's age, developmental level, preexisting personality; the onset, duration, frequency and severity of the abuse; the relationship between the child and the perpetrator; the family and institutional response; and the availability and quality of therapeutic intervention); Logan, *supra* note 56, at 37 (positing that the effects of child maltreatment will depend on the extent of the abuse and the personal characteristics of the individual); Malinosky-Rummell & Hansen, *supra* note 56, at 75-77 (concluding that the long-term consequences of child abuse may be moderated by the interaction between several factors, including the character of the maltreatment, the individual, his family, and his environment).

63. *See* Bessel A. van der Kolk, *The Psychological Consequences of Overwhelming Life Experiences*, *in* PSYCHOLOGICAL TRAUMA 1, 16 (Bessel A. van der Kolk ed., 1987).

64. *See* Green, *supra* note 60, at 583 (observing that the "ongoing nature of the trauma in cases of abuse is more likely to result in pathological changes in character structure and personality" than one-time catastrophic events).

65. *See, e.g.*, Alan R. Felthous, *Psychosocial Dynamics of Child Abuse*, 29 J. FORENSIC SCI. 219, 229-31 (1984) (noting that "[a]dopted children and stepchildren may be more vulnerable to abuse" and other children may be susceptible because of sex, physical appearance, circumstances attending birth, or congenital anomalies); Green, *supra* note 60, at 585 (noting that severe abuse is "usually limited to one child in a family"). Even if other children in a family are abused, their different ages and stages of development may lessen the consequences of the trauma for them. *See* Haney, *supra* note 32, at 593-96 (explaining that different stages in a family's history and different developmental stages of children will create different experiences of abuse and different perceptions of options available to the individual for how to react); *id.* at 597-98 (describing siblings' explanations for why they may not have been as traumatized by abuse: age, gender, "some idiosyncratic characteristic," "fortuitous events and critical moments of good fortune").

66. *See* Blake et al., *supra* note 59, at 1646 (noting the interaction of childhood abuse and mental impairments among study subjects who committed homicide); Dorothy Otnow Lewis et al., *Toward a Theory of the Genesis of Violence: A Follow-Up Study of Delinquents*, 28 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 431, 436 (1989) (concluding that the combined effect of childhood abuse and mental or neurological impairments is not "merely additive," but increases the "risk and severity of adult violent criminality"); *infra* notes 83-85 and accompanying text (discussing how a combination of impairments creates a "matrix of violence").

essential to identify the ways in which the experience of child abuse may help explain an adult's aggressive behavior. The literature on child abuse identifies possible long-term impairments as developmental, psychological, and physiological.[67] While some of the damaging effects of child abuse may be ameliorated by therapy,[68] the absence of treatment creates a greater likelihood that an individual will suffer life-long difficulties.[69]

Researchers posit that abuse may disrupt a child's normal emotional and cognitive development.[70] "[I]ssues at one developmental period lay the groundwork for subsequent issues.... [T]he child who fails to develop interpersonal trust, receives little affection from others, and is governed by authoritarian rule—

67. *See infra* notes 70-82 and accompanying text (discussing how impairments damage a child).

68. *See* GREEN, *supra* note 59, at 87 (noting the necessity of "vigorous psychotherapeutic and psychoeducational intervention" and observing that reversing the effects of abuse may be more difficult once an individual is past adolescence); *see also* Eddings v. Oklahoma, 455 U.S. 104, 107 (1982) (stating that a psychologist concluded that Eddings could be rehabilitated with 15-20 years of intensive therapy).

69. *See* Arthur H. Green, *Children Traumatized by Physical Abuse, in* POST-TRAUMATIC STRESS DISORDER IN CHILDREN 135, 151-52 (Spencer Eth & Robert S. Pynoos eds., 1985) (stating that, absent intervention and treatment, "abused children are vulnerable to subsequent psychological impairment, vocational and educational failure, violence, delinquency, and criminality, and are likely to repeat the patterns of maltreatment with their own children"); Logan, *supra* note 56, at 39 (positing intervention and treatment as key elements in altering the link between child abuse and homicidal behavior); Toth & Cicchetti, *supra* note 56, at 413 (highlighting the absence of treatment as putting children at risk for psychopathology as adults); *see also* Haney, *supra* note 32, at 574-76 (identifying the lack of psychological services as one component of institutional failure that contributes to later criminal behavior).

70. *See, e.g.*, GREEN, *supra* note 59, at 81-82 (identifying cognitive impairments as including mental retardation, low intellectual functioning, learning difficulties, and speech and language disorders); WOLFE, *supra* note 58, at 101-10 (explaining how child abuse interferes with behavioral, socio-emotional, and social-cognitive development); Stephen R. Shirk, *The Interpersonal Legacy of Physical Abuse of Children, in* ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN 57, 57-75 (Martha B. Straus ed., 1988) (explaining how, depending on the developmental stage of the child, abuse will differently affect social cognition, competence, and aggressive behavior); Toth & Cicchetti, *supra* note 56, at 400-13 (discussing how child maltreatment may interfere with the normal development of attachment to others); *see also* Cynthia M. Perez & Cathy Spatz Widom, *Childhood Victimization and Long-Term Intellectual and Academic Outcomes*, 18 CHILD ABUSE & NEGLECT 617, 626 (1994) (reporting the results of a follow-up study that showed individuals 20 years after childhood abuse had "lower levels of intellectual ability and academic attainment" than the controls); *cf.* Bessel A. van der Kolk, *The Complexity of Adaptation to Trauma: Self-Regulation, Stimulus Discrimination, and Characterological Development, in* TRAUMATIC STRESS 182, 182-203 (Bessel A. van der Kolk et al. eds., 1996) (identifying the effects of childhood trauma as including lack of self regulation, self-destructive behaviors, impaired character development, repetition of trauma, and mental disorders).

common characteristics of the abused child—has missed important socialization experiences that may interfere with adolescent and adult relationships."[71] Rather than learning and integrating healthy and appropriate social skills, a child who experiences violence and rejection as the predominant modes of interpersonal relationships may develop primitive defense mechanisms,[72] impaired impulse control, or masochistic and self-destructive behavior.[73]

Child abuse may also have negative psychological consequences. A person may internalize the experience of child abuse as a negative judgment about himself and blame himself for the abuse as a way of making sense of what was done to him.[74] Children may turn to alcohol or drugs as a form of self-medication to dull or escape the trauma of the abuse, which may then turn into a long-term substance-

71. WOLFE, *supra* note 58, at 98. As Briere, a leading psychologist, observed:

> Like other victims, abused children experience significant psychological distress and dysfunction. Unlike adults, however, they are traumatized during the most critical period of their lives: when assumptions about self, others, and the world are being formed; when their relations to their own internal states are being established; and when coping and affiliative skills are first acquired.

BRIERE, *supra* note 60, at 17.

72. *See* GREEN, *supra* note 59, at 65 (noting that primitive defenses include "denial, projection, introjection, and splitting, in order to cope with threatening external and internalized parental images").

73. *See id.* at 65-70; van der Kolk, *supra* note 70, at 187 (noting that abused children may develop problems with regulating anger and anxiety). A child may also model his behavior on that of his parents. *See* Logan, *supra* note 56, at 38 (observing that modeling includes learning violence as appropriate behavior and failing to learn positive alternative behaviors).

74. *See* BRIERE, *supra* note 60, at 24-25 (stating that parental justifications for the abuse "are likely to increase the victim's sense of guilt, shame, and responsibility for the abuse, and thereby intensify the child's sense of personal badness"); Bessel A. van der Kolk & Alexander C. McFarlane, *The Black Hole of Trauma*, *in* TRAUMATIC STRESS, *supra* note 70, at 3, 15 (observing that traumatized children often blame themselves). An individual may be embarrassed or ashamed that he was abused, or he may deny being abused. *See, e.g.*, Green, *supra* note 69, at 143 (discussing denial as a way to avoid retraumatization); Lewis, *supra* note 57, at 384 (noting that "most grotesquely and recurrently maltreated children dissociate themselves from the abusive experiences" and deny the abuse); *cf.* Shirk, *supra* note 70, at 60-61 (concluding that the age and stage of development when abuse occurs will affect how a child internalizes his guilt for causing the conduct). Self-blame may result in the individual's reluctance, refusal, or inability to discuss being abused. *See* Stein & Lewis, *supra* note 61, at 523 (identifying reluctance, minimization, and denial among the reasons why it is difficult to obtain data about child and adolescent maltreatment); Cathy Spatz Widom & Robin L. Shepard, *Accuracy of Adult Recollections of Childhood Victimization: Part 1. Childhood Physical Abuse*, 8 PSYCHOL. ASSESSMENT 412, 418 (1996) (summarizing reasons given in the psychological literature for misleading retrospective reporting of abuse, including forgetting, redefining, denial, and repression and noting that their own study revealed that 40% of individuals with documented histories of abuse did not report the same, although the reasons for not doing so were not explored in the study).

abuse problem.[75] An adult abused as a child may also manifest mental disorders,[76] such as post-traumatic stress[77] or dissociation.[78]

Finally, but perhaps least understood and documented, childhood abuse may cause damage to the central nervous system, particularly to the brain.[79] If his mother abused alcohol during her

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75. *See* BRIERE, *supra* note 60, at 59-61 (noting that substance abuse is often linked to childhood abuse); Haney, *supra* note 32, at 584-85 (discussing drug and alcohol use as ways to reduce "emotional pain"); Bessel A. van der Kolk & Mark S. Greenberg, *The Psychobiology of the Trauma Response: Hyperarousal, Constriction, and Addiction to Traumatic Reexposure, in* PSYCHOLOGICAL TRAUMA, *supra* note 63, at 63, 65 (characterizing substance abuse as an "ill-fated attempt to relieve their posttraumatic symptoms").

76. *See, e.g.*, BRIERE, *supra* note 60, at 18 (identifying seven major types of psychological disturbances which adults may suffer: post-traumatic stress, cognitive distortions, altered emotionality, dissociation, impaired self-reference, disturbed relatedness, and avoidance); Logan, *supra* note 56, at 37 (listing psychiatric illnesses often associated with child maltreatment, including Organic Personality Syndrome, Organic Mental Disorder, Multiple Personality Disorder, Borderline Personality Disorder, and Post-Traumatic Stress Disorder).

Childhood abuse is one of the risk factors associated with antisocial personality disorder. *See* John G. Gunderson & Katharine A. Phillips, *Personality Disorders, in* Kaplan & Sadock, *supra* note 61, at 1425, 1442. "Antisocial personality disorder is characterized by a pervasive pattern of disregard for and violation of the rights of others beginning in early adulthood." *Id.* at 1441. Individuals who are labeled as antisocial are often viewed as epitomizing the most dangerous type of person because "the hallmark of antisocial personality disorder is lack of remorse in regard to the violence and other antisocial behaviors." Kenneth Tardiff, *Adult Antisocial Behavior and Criminality, in* Kaplan & Sadock, *supra* note 61, at 1622, 1625. However, antisocial personality disorder is not the correct diagnosis if the antisocial behavior is generated by organic causes. *See* Gunderson & Phillips, *supra*, at 1444. As Dr. Tardiff explains, the term "antisocial behavior" is confusing because it refers to behavior *not* due to a mental disorder. *See* Tardiff, *supra*, at 1623. Before an individual may be said to be "antisocial," a "mental disorder must be ruled out as a cause of or factor contributing to violence by the person." *Id.* at 1625. An adequate neuropsychological workup is imperative to determine the existence of a mental disorder before an individual may be classified as antisocial. *See id.* at 1623; *see also* Jonathan H. Pincus, *Evaluation of the Violent Adolescent, in* APPLICATION OF BASIC NEUROSCIENCE TO CHILD PSYCHIATRY 357, 358 (Stephen I. Deutsch et al. eds., 1990) (noting that the problem with not accurately diagnosing organic brain damage and psychosis is that individuals are mislabeled sociopathic and wrongly viewed as unfeeling, amoral, and untreatable).

77. *See* BRIERE, *supra* note 60, at 18; Green, *supra* note 60, at 581, 583; Logan, *supra* note 56, at 37; van der Kolk, *supra* note 70, at 184 (positing that intrafamily abuse may cause complex post-traumatic stress syndromes). Significantly, post-traumatic stress disorder symptoms may have a long latency period so that its effects may be triggered over 15 years later by a subsequent traumatic incident. *See* van der Kolk, *supra* note 63, at 9 (citing a study on responses to combat).

78. *See* Green, *supra* note 60, at 583 (noting that Multiple Personality Disorder usually has its origins in childhood trauma of physical or sexual abuse); van der Kolk, *supra* note 70, at 191-93 (explaining that "[d]issociation can be an effective way to continue functioning while the trauma is going on, but if it continues to be utilized after the acute trauma has passed, it comes to interfere with everyday functioning").

79. *See* GREEN, *supra* note 59, at 71-74 (noting the high incidence of central nervous

pregnancy, a child may be neurologically impaired in utero and thus suffer Fetal Alcohol Syndrome.[80] The physical act of abuse itself may damage a child's brain.[81] Lastly, research is beginning to suggest that the neurophysiological makeup of the brain literally may be altered as a result of abuse and its attendant trauma.[82]

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system impairments among abused children but stating that the etiology is unclear: the impairment may precede, result from, or be concomitant with the abuse); Lewis, *supra* note 57, at 386-88 (explaining how the brain learns to respond to aggressive behavior); Logan, *supra* note 56, at 37 (noting that brain damage may be localized or diffuse); Bessel A. van der Kolk, *The Body Keeps the Score, in* TRAUMATIC STRESS, *supra* note 70, at 214, 214-34 (discussing how trauma affects the functioning of the mind, brain, and body). Dr. Green reported central nervous system damage among abused and neglected children that ranged from moderate to severe. *See* GREEN, *supra* note 59, at 73. He characterized the type of neurological impairment as "subtle" rather than structural: "developmental lags and deficits in perception, coordination, and integration of sensory stimuli." *Id.* Notably, these results "would not have been detected by the usual neurological examination" but were present in the tests devised to detect subtle neurological impairment. *Id.* Green concluded by suggesting that neurological examinations should be "specifically devised to detect these manifestations." *Id.* at 74; *cf.* Pincus, *supra* note 76, at 359-67 (explaining the requirements for neurological evaluation of violent adolescents as including history and neurologic examination and neuropsychological testing).

80. *See, e.g.*, Ann Pytkowicz Streissguth et al., *Fetal Alcohol Syndrome in Adolescents and Adults*, 265 JAMA 1961, 1961 (1991) (stating that Fetal Alcohol Syndrome ("FAS") "represents the severe end of the continuum of disabilities caused by maternal alcohol use during pregnancy"). Studies of adults who were born with FAS document that FAS is the leading known cause of mental retardation and that, as adults, persons with FAS experience "major psychosocial problems and life-long adjustment problems." *Id.* at 1965-66; *see also* Blake et al., *supra* note 59, at 1645 (noting that five of 31 murderers studied showed signs of FAS).

81. *See* Green, *supra* note 69, at 145 (noting that brain damage may occur from "direct trauma to the head (skull fracture, cerebral hemorrhage), or indirect trauma" such as shaking a baby); *see also* Robert Geffner & Alan Rosenbaum, *Brain Impairment and Family Violence, in* PREVENTABLE BRAIN DAMAGE 58, 59-62 (Donald I. Templer et al. eds., 1992) (observing that brain damage from child abuse is usually not accurately diagnosed, resulting in a person's behavioral changes being attributed to his environment rather than to brain impairment). It may be that a child's mental deficits, such as mental retardation, provoke abusive behavior by a parent. *See* Green, *supra* note 69, at 145 (citing a study that found a high rate of mental retardation in abused children that "had no evidence of head trauma"); Lewis et al., *supra* note 66, at 436 ("[N]europschiatrically impaired children, by virtue of their hyperactivity and impulsivity, often invite abuse.").

82. *See* Lewis, *supra* note 57, at 388 (describing how childhood abuse may affect the neurophysiology of the brain); Bruce D. Perry, *Incubated in Terror: Neurodevelopmental Factors in the "Cycle of Violence," in* CHILDREN IN A VIOLENT SOCIETY 124, 131 (Joy D. Osofsky ed., 1997) (explaining how "lack of critical nurturing experiences and excess exposure to traumatic violence will alter the developing central nervous system, predisposing to a more impulsive, reactive, and violent individual"); Robert S. Pynoos et al., *Traumatic Stress in Childhood and Adolescence: Recent Developments and Current Controversies, in* TRAUMATIC STRESS, *supra* note 70, at 331, 350-51 (observing that trauma may result in physiological changes and reactions in children); van der Kolk, *supra* note 79, at 227-28 (discussing studies that suggest child abuse may cause neurobiological abnormalities); Bessel A. van der Kolk, *The Separation Cry and the Trauma Response: Developmental Issues in the Psychobiology of Attachment and Separation, in*

The significance of identifying possible impairments a person may suffer as a result of childhood abuse is not just that the individual may be developmentally, psychologically, or neurologically damaged, but that he may be impaired in ways that negatively affect his perceptions and behavior. Dr. Dorothy Lewis posits that the presence of neuropsychiatric and cognitive deficits in a person who was abused as a child create a "matrix for violence."[83] A person's ability to make appropriate judgments, to understand adequately the consequences of his actions and make logical choices, or to control his impulses may be so impaired that in stressful, unfamiliar, or threatening situations he will overreact and engage in impulsive and inappropriate aggressive behavior.[84]

PSYCHOLOGICAL TRAUMA, *supra* note 63, at 31, 51 (explaining that disruptions of attachment during infancy can lead to lasting neurobiological changes).

83. Lewis, *supra* note 57, at 388. Lewis explains that the impulsivity, hypervigilance, and cognitive deficits set the stage for violence because:

> First, brain dysfunction of almost any kind is often associated with irritability, impatience, and mood lability. Second, paranoid ideation and misperceptions, symptoms associated with so many different kinds of psychiatric disorders, increase fearfulness and a tendency to retaliate for both genuine and imagined threats. Finally, cognitive deficits not only impair judgment but also diminish the ability to conceptualize feelings and put them into words rather than actions.

Id.; *see also* Blake et al., *supra* note 59, at 1646 (concluding that the "*interaction* of abuse, paranoia, and neurologic dysfunction provides the matrix of violence").

84. *See* Lewis et al., *supra* note 66, at 436. Lewis and her co-authors explain that the interactive effect of an individual's intrinsic vulnerabilities (such as episodic psychotic symptoms, neurologic and limbic dysfunctions, or cognitive impairments) and environmental stressors will "increase the risk and severity of adult violent criminality." *Id.* They identify four factors that may contribute to adult violence: (1) family violence is a model of aggressive behavior—a neurologically and cognitively intact child will be able to resist modeling his behavior in violent ways whereas a vulnerable child will not; (2) abuse engenders rage, so that an impaired person will have a harder time controlling his rage impulses; (3) abuse that causes injury to the central nervous system creates psychological, neurological, and cognitive vulnerabilities; and (4) neuropsychologically impaired children invite abuse by their hyperactivity and impulsivity. *See id.*; *see also* Blake et al., *supra* note 59, at 1646 ("[A]bnormal psychological development caused by long-standing exposure to severe abuse, together with paranoia and an impaired ability to deal with frustrating environmental factors due to [brain damage], may provide an explanation for the commission of a homicidal act."); Green, *supra* note 69, at 146 (summarizing the "cumulative impact of the repeated physical assaults" as including becoming a "suspicious, hypersensitive adult paranoid," identifying with the aggressor so that "violent assaultive behavior" is his "adaptive response to potentially dangerous situations," and being an individual distrustful of nonthreatening persons); Logan, *supra* note 56, at 38 (identifying four types of behavioral consequences: paranoid thinking and ideation, which may mean that the person sees others as threatening and so responds in a hostile manner; heightened aggression; inability to solve problems; and a modeling response pattern); van der Kolk & Greenberg, *supra* note 75, at 64-65 (concluding that, as adults, abused children may develop extreme reactions and exhibit poor tolerance for arousal; unmodulated anxiety; aggression; or withdrawal).

Although the relationship between childhood abuse and adult violent behavior is both complex and not yet fully understood, experts who study the long-term consequences of childhood abuse recognize important connections. As Dr. Lewis concludes: "[W]hatever increases impulsivity and irritability, engenders hypervigilance and paranoia, diminishes judgment and verbal competence, and curtails the ability to recognize one's own pain and the pain of others, also enhances the tendency toward violence. Abusive, neglectful caretaking does all of these things."[85] While the particular manifestations will vary with each individual, the experience of being abused as a child may cause significant long-lasting negative effects as an adult. Many of these impairments are relevant to a juror's assessment of the appropriate punishment in a death penalty case.

2. The Prevalence of Childhood Abuse Among Defendants Sentenced to Death

The kinds of childhood abuse and their long-term effects documented in the psychological and medical literature are evident among defendants on death row. Many death penalty cases[86] involve defendants who were physically,[87] sexually,[88] and/or psychologically

85. Lewis, *supra* note 57, at 388-89.

86. These examples are drawn from court opinions in which defendants sentenced to death were appealing the constitutionality of their sentence. Based on my own experience representing men on death row, they are representative of the kinds of abuse defendants encountered. *See* Haney, *supra* note 32, at 559-603 (analyzing the role of social histories as mitigating evidence based on his 20 years of experience studying the backgrounds and histories of capital defendants). An exhaustive study of the cases in which evidence of childhood abuse is present would be extremely difficult. Cases in which the defendant received a life sentence based on this type of evidence are often not appealed and are, therefore, unreported. Even when the defendant suffered abuse as a child, it may not be apparent from the opinion. *Compare* Shriner v. Wainwright, 570 F. Supp. 766, 770 (N.D. Fla. 1982) (summarizing evidence about the defendant that the attorney presented at the sentencing hearing as "the defendant's lack of education, sociopathic personality, and harsh childhood"), *aff'd*, 715 F.2d 1452 (11th Cir. 1983), *with* VON DREHLE, *supra* note 16, at 252 (describing Shriner's upbringing as including being "raped by an older relative" and being sent to juvenile reform schools where "[b]eatings and rapes were so commonplace that Shriner actually welcomed his periodic stints in the 'strip cell' where the boy would sit, naked and alone, for as long as three weeks").

87. *See infra* notes 92-99 and accompanying text (describing the kinds of childhood physical abuse defendants suffered, as reported in court decisions).

88. In this category, descriptions of the abuse are usually limited to an identification of the perpetrator. *See, e.g.*, Williams v. Turpin, 87 F.3d 1204, 1211 (11th Cir. 1996) (defendant alleged that his stepfather physically and sexually abused him); Parkus v. Delo, 33 F.3d 933, 935 (8th Cir. 1994) (defendant was sexually abused by his uncle); Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (defendant was "sexually assaulted while at a school for boys"); Squires v. Dugger, 794 F. Supp. 1568, 1577 (M.D. Fla. 1992) (defendant

abused.[89] Expert testimony presented either at trial or during post-conviction review recounts the multiple impairments individual defendants suffer.[90] In addition to cases that show histories of abuse and its consequences, research on death row inmates documents similar patterns of pervasive childhood abuse.[91]

The physical abuse described in the cases usually constitutes what researchers would classify as serious or severe injury.[92] The cases include defendants who were tied or hung up and beaten by their parents,[93] hit with buckles and cords,[94] or beaten until the abuser

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was allegedly beaten and sexually assaulted by his stepparents); Robinson v. State, 574 So. 2d 108, 110 (Fla. 1991) (defendant was sexually abused by his uncle when defendant was seven, by the 15-year-old wife of grandfather, and at migrant camps); State v. Murphy, 605 N.E.2d 884, 910 (Ohio 1992) (Moyer, C.J., dissenting) (defendant "alleged sexual abuse as a child by family friends and staff members at two institutions").

89. *See, e.g.*, Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986) (stating that the defendant's stepfather mentally and physically abused him); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986) (defendant was mentally and physically abused at home); Ford v. Lockhart, 861 F. Supp. 1447, 1454-55 (E.D. Ark. 1994) (defendant was the victim of severe physical and psychological abuse), *aff'd on other grounds sub nom.* Ford v. Norris, 67 F.3d 162 (8th Cir. 1995); *see also infra* note 107 (citing cases in which defendants were forced to witness the beatings of other family members).

90. *See infra* notes 109-15 and accompanying text (describing expert testimony).

91. *See infra* notes 124-32 and accompanying text (discussing studies of men and women on death row).

92. *See supra* note 61 (citing different definitions of physical abuse used in the psychological and medical fields). Often the particular manifestations of abuse are described only generally: for example, "father beat and occasionally seriously injured [the defendant]," Deutscher v. Whitley, 884 F.2d 1152, 1161 (9th Cir. 1989), or the defendant lived in a "violence-ridden and abusive home," Barnes v. Thompson, 58 F.3d 971, 979 (4th Cir. 1995).

93. *See, e.g.*, *Ford*, 861 F. Supp. at 1454-55 (reporting that the defendant was put in a cotton sack, hung up over rafters in the garage, and whipped with an extension cord; when he grew too big for the sack, he was hung by his wrists); Hall v. State, 614 So. 2d 473, 480 (Fla. 1993) (Barkett, C.J., dissenting) (stating that the defendant was tied in a " 'croaker' " sack and swung over a wire, his hands tied to rope attached to a ceiling beam and beaten while naked); *Robinson*, 574 So. 2d at 110 (stating that the defendant was beaten with a switch while his hands were tied and was beaten while "forced to squat with a broom handle between his legs for indefinite periods"); Randolph v. State, 562 So. 2d 331, 334 (Fla. 1990) (stating that the father tied and beat the defendant with his hands, a broomstick, and a belt).

94. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 309 (1989) (noting that the defendant was beaten over the head with a belt); Eddings v. Oklahoma, 455 U.S. 104, 107 (1982) (stating that defendant's father hit him " 'with a strap or something like this' " (quoting the trial record)); Williams v. Turpin, 87 F.3d 1204, 1211 (11th Cir. 1996) (reporting that the defendant was beaten with objects such as hammers, screwdrivers, the heel of a glass slipper, and tree limbs, and was threatened with bar bells); May v. Collins, 904 F.2d 228, 231 (5th Cir. 1990) (per curiam) (observing that the defendant was beaten with coat hangers, belts, and extension cords); Whitley v. Bair, 802 F.2d 1487, 1494 (4th Cir. 1986) (stating that the defendant was "beaten with a belt, sometimes knotted with a buckle"); Brooks v. Francis, 716 F.2d 780, 792 n.7 (11th Cir. 1983) (noting that the defendant had

drew blood[95] or the defendant was rendered unconscious.[96] Some defendants were locked in closets[97] or locked out of the house, sometimes while naked.[98] Some defendants may have been abused in utero.[99]

In addition to the serious nature of the abuse, other significant factors were often present. Usually the abuser was a caretaker.[100]

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scars from being whipped with a belt buckle); Thompson v. Cain, No. 96-2268, 1997 WL 79295, at *27 (E.D. La. Feb. 24, 1997) (stating that the defendant was struck with "coat hangers, extension cords, fists and anything around the house"), *aff'd*, 161 F.3d 802 (5th Cir. 1998); People v. Ledesma, 729 P.2d 839 app. A at 876 (Cal. 1987) (in bank) (reporting that the defendant was "hit with belts, cable wire, an axe handle, extension cords, or 'whatever [his father] could get his hands on' ").

95. *See, e.g.*, *Ford*, 861 F. Supp. at 1455 (stating that the defendant was whipped until "the blood just run from him"); Mann v. Lynaugh, 690 F. Supp. 562, 566 (N.D. Tex. 1988) (noting that the defendant's father beat him with fists, belts, switches, and other objects, sometimes drawing blood); Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993) (reporting that the defendant's mother regularly beat him until she drew blood).

96. *See, e.g.*, Harris v. Vasquez, 949 F.2d 1497, 1506 (9th Cir. 1990) (referring to the testimony of the defendant's sister that their father beat the defendant and other children " 'into unconsciousness several times when they were kids' "); *May*, 904 F.2d at 231 (per curiam) (noting that the defendant "on at least one occasion was beaten to unconsciousness").

97. *See, e.g.*, *Penry*, 492 U.S. at 309 (stating that the defendant was "routinely locked in his room without access to a toilet for long periods of time"); Stafford v. Saffle, 34 F.3d 1557, 1563 (10th Cir. 1994) (noting that the defendant's father locked him in the closet "for days at a time"); Wade v. Calderon, 29 F.3d 1312, 1315 (9th Cir. 1994) (reporting that the mother's boyfriend locked the defendant in a closet "for hours at a time"); Abdur' Rahman v. Bell, 999 F. Supp. 1073, 1097-98 (M.D. Tenn. 1998) (noting that the petitioner's father "made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis"); Rose v. State, 675 So. 2d 567, 571 (Fla. 1996) (reporting that the defendant's mother locked him in the closet for "extended periods of time" and would try to lose him or leave him behind when they went out).

98. *See, e.g.*, *Williams*, 87 F.3d at 1211 (noting that the defendant's mother locked him out of the house, sometimes when he was naked); Bertolotti v. Dugger, 883 F.2d 1503, 1517 (11th Cir. 1989) (stating that the defendant was locked out of the house during the day to protect the house from getting dirty).

99. *See, e.g.*, *Harris*, 949 F.2d at 1506-07 (stating that experts concluded the defendant suffered from fetal alcohol effect); Francis v. Dugger, 908 F.2d 696, 702 (11th Cir. 1990) (noting that a doctor diagnosed Fetal Alcohol Syndrome); *May*, 904 F.2d at 231 (per curiam) (noting that a doctor attributed brain damage to "head injury, malnutrition and other fetal damage"); Deutscher v. Whitley, 884 F.2d 1152, 1161 (9th Cir. 1989) (observing that the family would have testified that the defendant was born prematurely due to his father beating his mother); *see also* Castro v. Oklahoma, 71 F.3d 1502, 1510 (10th Cir. 1995) (raising the possibility of that Fetal Alcohol Syndrome or Effect should have been part of a psychological evaluation); State v. Brett, 892 P.2d 29, 63-64 (Wash. 1995) (en banc) (noting that the defense attorney suspected Fetal Alcohol Syndrome or Effect when he learned the defendant's mother drank heavily during her pregnancy, but the trial court denied a continuance to secure an expert to confirm).

100. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 107 (1982) (father); *Ford*, 861 F. Supp. at 1454-55 (same); Randolph v. State, 562 So. 2d 331, 334 (Fla. 1990) (same); *Penry*,

When one or both of the parents abandoned the defendant as a child, he was sometimes left with a parent or relative who abused him.[101] If, as a young person, the defendant was placed in a detention facility or juvenile home, his history may have included sexual or physical abuse while incarcerated.[102] The abuse often lasted for many years, in some cases extending into adolescence.[103] Some defendants were beaten "daily,"[104] others "regularly."[105] The defendant may have been identified as the one who received the brunt of the abuse in the family.[106] He may also have witnessed the abuse of his mother or

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492 U.S. at 309 (mother); Jackson v. Herring, 42 F.3d 1350, 1365 (11th Cir. 1995) (same); State v. Murphy, 605 N.E.2d 884, 910 (Ohio 1992) (Moyer, C.J., dissenting) (same); *Williams*, 87 F.3d at 1211 (stepparent); Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986) (same); Thompson v. Cain, No. 96-2268, 1997 WL 79295, at *27 (E.D. La. Feb. 24, 1997) (stepfather and uncle), *aff'd*, 161 F.3d 802 (5th Cir. 1998); Whitley v. Bair, 802 F.2d 1487, 1494 (4th Cir. 1986) (older brother); *see also* People v. Ledesma, 729 P.2d 839 app. A at 876 (Cal. 1987) (in bank) (reporting that the defendant's father instructed the brother to beat him if he misbehaved).

101. *See, e.g.*, *Eddings*, 455 U.S. at 107 (noting that the defendant's mother sent him to live with his father who physically abused the defendant when he could not control him); Parkus v. Delo, 33 F.3d 933, 935 (8th Cir. 1994) (stating that the defendant was left to live with an alcoholic uncle who "brutalized and sexually abused him"); Pickens v. Lockhart, 542 F. Supp. 585, 595 (E.D. Ark. 1982) (observing that the mother left the defendant with his father at age five knowing that the father abused him), *rev'd on other grounds*, 714 F.2d 1455 (8th Cir. 1983).

102. *See, e.g.*, Bonin v. Calderon, 59 F.3d 815, 830-31 (9th Cir. 1995) (noting that the defendant was molested as a child in a detention home); *Parkus*, 33 F.3d at 935 (stating that the defendant was abused and raped in state prison); *Murphy*, 605 N.E.2d at 910 (Moyer, C.J., dissenting) (stating that the defendant alleged sexual abuse in two institutions).

103. The range may include a relatively short period of time—such as two years—to much longer. *See, e.g.*, *Jackson*, 42 F.3d at 1365 n.32 (lasting throughout childhood until age 13); *Parkus*, 33 F.3d at 935 (beginning at age three and continuing throughout childhood and adolescence); Madden v. Collins, 18 F.3d 304, 308 (5th Cir. 1994) (occurring for the first two years of life, until the father left the family); Mann v. Lynaugh, 690 F. Supp. 562, 566 (N.D. Tex. 1988) (lasting from age four to age 18); *Pickens*, 542 F. Supp. at 595 (continuing from when the defendant was a young child until age 15).

104. *See, e.g.*, *Jackson*, 42 F.3d at 1365 (stating that the defendant's mother abused her "on an almost daily basis"); People v. Perez, 592 N.E.2d 984, 989 (Ill. 1992) (stating that the defendant's brother described their childhood as living in daily fear that their father would come home drunk and whip the defendant and other family members).

105. *See, e.g.*, *Mann*, 690 F. Supp. at 566-67 (stating that the father beat the defendant four to five times a week as a teenager); Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993) (reporting regular beatings for 15 minutes at a time); Robinson v. State, 574 So. 2d 108, 110 (Fla. 1991) (noting "constant physical abuse"). *But see* Russell v. Collins, 998 F.2d 1287, 1292 (5th Cir. 1993) (observing that the defendant suffered a single severe beating by stepfather who beat him in the face with a baseball bat and then tried to shoot him).

106. *See, e.g.*, Ford v. Lockhart, 861 F. Supp. 1447, 1454 (E.D. Ark. 1994) (noting that the defendant suffered the brunt of the abuse), *aff'd on other grounds sub nom.* Ford v. Norris, 67 F.3d 162 (8th Cir. 1995); *Murphy*, 605 N.E.2d at 908 (observing that the defendant received "the brunt of taunting by his parents and siblings"); *id.* at 910 (Moyer,

siblings.[107] Often the abuse was not limited to one kind or one perpetrator, but was a pervasive presence in the defendant's early years.[108]

The damaging consequences of childhood abuse identified in the psychological and medical literature are also found in these cases. Mental health experts in individual cases have testified that the defendant's psychological and social functioning was impaired due to abuse.[109] The lack of nurturing and protection as a child may have so affected a defendant's psychological development that he had an

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C.J., dissenting) (describing the defendant as the "family scapegoat").

107. *See, e.g., Ford*, 861 F. Supp. at 1455 (noting that the defendant was "made to watch while his father brutalized his mother"); People v. Ledesma, 729 P.2d 839 app. A at 876 (Cal. 1987) (in bank) (stating that the defendant saw his father hit his mother); Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992) (observing that the defendant's father physically abused the defendant's mother in front of him and other children).

A child may personally experience the abuse and may witness abuse of his parent or siblings. *See* Haney, *supra* note 32, at 572 (discussing research by developmental psychologists and the author's own knowledge of defendants' social histories that document the experience and psychological trauma of witnessing abuse); Logan, *supra* note 56, at 36-37 (explaining that a child is traumatized by seeing the abuse of other family members and fearing his own physical danger if he tries to intervene).

108. *See, e.g.*, Williams v. Turpin, 87 F.3d 1204, 1211 (11th Cir. 1996) (stating that the defendant was beaten by his mother and paternal grandmother and was sexually abused by his stepfather); *Ford*, 861 F. Supp. at 1454-55 (describing various kinds of severe physical and psychological abuse inflicted on the defendant); Mathis v. Zant, 704 F. Supp. 1062, 1065 (N.D. Ga. 1989) (characterizing the defendant's background, which included verbal and physical abuse by his father, as "disadvantaged, indeed tormented"), *vacated and remanded*, 975 F.2d 1493 (11th Cir. 1992); *Mann*, 690 F. Supp. at 566 (characterizing the physical abuse experienced by the defendant as "extraordinary"); Hall v. State, 614 So. 2d 473, 479 (Fla. 1993) (Barkett, C.J., dissenting) (describing the defendant as having "suffered tremendous physical abuse and torture as a child"); *Murphy*, 605 N.E.2d at 909-10 (Moyer, C.J. dissenting) (describing the defendant's childhood environment as one of "neglect, abuse, and psychological torment" by family members).

109. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 308 (1989) (reporting that a psychiatrist testified at trial to the defendant's inability to learn from experience and his poor impulse control, which "may have been caused by beatings and multiple injuries to the brain at an early age"); Eddings v. Oklahoma, 455 U.S. 104, 107 (1982) (noting that experts testified that the defendant was emotionally disturbed and mentally and emotionally underdeveloped); Gardner v. Dixon, No. 91-4010, 1992 U.S. App. LEXIS 12971, at *9 (4th Cir. June 4, 1992) (noting that a psychologist on post-conviction review testified that when the defendant was stressed, child abuse influenced his behavior and impaired his judgment); May v. Collins, 904 F.2d 228, 231 (5th Cir. 1990) (per curiam) (stating that in post-conviction proceedings a neurologist and a psychiatrist found that the defendant suffered from trauma caused by child abuse that may have impaired his social functioning and emotional development); *Robinson*, 574 So. 2d at 110 (stating that a clinical psychologist testified to the defendant's antisocial personality disorder and psychosexual disorder); *Murphy*, 605 N.E.2d at 910 (Moyer, C.J., dissenting) (noting that a psychologist testified at trial that the defendant suffered from a "severe, chronic, and disabling" personality disorder that impaired his psycho/social functioning, that he had the emotional age of a five or six year old, and that he had low intelligence).

impaired ability to make proper judgments about how to respond and act in relation to others.[110] He may have acted out of anger without thinking about the consequences or otherwise engaged in destructive behavior.[111] In some cases, defendants also were diagnosed as suffering from abuse-related brain damage that may have made them less able to control their impulses to act.[112] While the long-term nature of many of these impairments might have been ameliorated by professional treatment,[113] that treatment was often absent.[114] As a result, an individual defendant may have been incapable of

110. *See, e.g.*, Bonin v. Calderon, 59 F.3d 815, 832 (9th Cir. 1995) (noting that experts reported that the absence of proper psychological development caused confusion and primitive defenses); *Gardner*, 1992 U.S. App. LEXIS 12971, at *9 (noting that a psychologist concluded that childhood abuse influenced the defendant's behavior and impaired the defendant's judgment); *May*, 904 F.2d at 231 (per curiam) (stating that experts found an impaired ability to reflect on the appropriateness of his action); Sarat, *supra* note 32, at 44 (reporting that a social worker at defendant's second sentencing hearing testified that his childhood abuse caused fear, anxiety, and anger).

111. *See, e.g.*, *Murphy*, 605 N.E.2d at 910 (Moyer, C.J., dissenting) (stating that psychological testimony revealed that the defendant was " 'motivated by very primitive feelings of rage, which have their origin in an extremely chaotic, dysfunctional family' "); Sarat, *supra* note 32, at 44 (quoting a social worker's testimony that the defendant " 'did not develop internal controls or mechanisms for dealing with his anger' "). Sometimes, the State's experts will characterize this kind of behavior as antisocial. *See, e.g.*, Harris v. Vasquez, 949 F.2d 1497, 1504-05 (9th Cir. 1991) (stating that a state psychiatrist testified that the defendant suffered from antisocial personality disorder and linked it to being abused as a child). As discussed *supra* note 76, however, the label of antisocial personality disorder is often inappropriate and damaging to the defendant.

112. *See, e.g.*, *Penry*, 492 U.S. at 308-09 (identifying an organic brain disorder that impaired the defendant's ability to control his impulses, which may have been caused by birth trauma or beatings); *May*, 904 F.2d at 231 (per curiam) (noting that an expert concluded that "May's impulse control was substantially impaired from neurological brain damage" that probably resulted in part from child abuse); Whitley v. Bair, 802 F.2d 1487, 1495 (4th Cir. 1986) (noting that an expert testified that the defendant suffered from "organic brain dysfunction that impaired [his] ability to reason and make judgments"); *see also* Burger v. Kemp, 483 U.S. 776, 818 (1987) (Powell, J., dissenting) (suggesting that the defendant possibly suffered brain damage from beatings). Brain damage may have resulted from injury to the defendant as a fetus. *See supra* note 80 (discussing Fetal Alcohol Syndrome).

113. *See, e.g.*, *Eddings*, 455 U.S. at 107 (noting that a psychiatrist testified that the defendant could have been rehabilitated with 15-20 years of intensive therapy); *Robinson*, 574 So. 2d at 110 (stating that a clinical psychologist testified that the defendant's mental disorders were treatable); *cf.* Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (noting that a clinical psychologist concluded that the chances of the defendant overcoming his mental illness without treatment were almost nonexistent).

114. *See, e.g.*, *Deutscher*, 884 F.2d at 1161 (noting that the defendant asked for but did not receive treatment); *Murphy*, 605 N.E.2d at 910 (Moyer, C.J., dissenting) (stating that the defendant was "never provided the intense treatment such as daily psychotherapy in a stable setting, that was necessary to foster normal development"); Sarat, *supra* note 32, at 44 (reporting that the defendant needed, but did not receive, professional treatment); *see also* Haney, *supra* note 32, at 574-75 (noting the inadequacy of treatment in prison).

overcoming the deleterious consequences of his childhood upbringing and so continued to bear its marks.[115]

In many of these cases, a history of child abuse was not the only deprivation or hardship with which the defendant had to contend. Defendants may have been raised in poverty or otherwise impoverished environments,[116] had substance-abuse problems,[117] suffered from mental retardation or low intelligence,[118] brain

115. The kind of violence that some of the defendants perpetrated as adults, such as physical or sexual abuse, may have been on the same continuum of violence that they experienced as children. *See, e.g.*, Wade v. Calderon, 29 F.3d 1312, 1318 (9th Cir. 1994) (arguing on post-conviction that defendant's trial counsel should have presented evidence that when the defendant killed his 10-year-old stepdaughter, he believed he was disciplining her in the same way that he had been disciplined); Dobbert v. Strickland, 532 F. Supp. 545, 551, 554 (M.D. Fla. 1982) (stating that the defendant, abused as a child and with a history of abusing his own children, was convicted and sentenced to death for killing his nine-year-old daughter), *aff'd*, 718 F.2d 1518 (11th Cir. 1983); *see also* Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 719-20 (1992) (describing in detail the abuse Dobbert inflicted on his children and the abuse he suffered as a child). Of course the abuse is not identical, because the defendant was not killed as a child. But the defendants may have been subjected to severe abuse that was on the continuum of abuse that, if not stopped, could have resulted in death. *See infra* note 327 (discussing the number of children killed or permanently disabled by their parents each year).

116. *See, e.g.*, Knight v. Dugger, 863 F.2d 705 app. at 749 (11th Cir. 1988) (describing the defendant's "impoverished home" as abusive and lacking supervision); Mathis v. Zant, 704 F. Supp. 1062, 1065 (N.D. Ga. 1989) (noting that the defendant was repeatedly verbally abused by his chronically alcoholic father, missed school one-third of the time, was ridiculed because he was slow, and dropped out in fifth grade; thereafter, he spent most of his time in prisons), *vacated and remanded*, 975 F.2d 1493 (11th Cir. 1992); Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992) (stating that the defendant grew up in poverty and his parents were migrant workers "who often left the children unsupervised"); *Murphy*, 605 N.E.2d at 909 (Moyer, C.J., dissenting) (stating that trial testimony established that the defendant was raised in "desperate poverty"; had an "unloving, unsupportive, and abusive family"; lived in a home described as a shack with no hot water or plumbing; lived on public assistance; and had a father who was an alcoholic).

117. *See, e.g.*, Cockrum v. Johnson, 119 F.3d 297, 300 (5th Cir. 1997) (noting that the defendant began using drugs at age nine or ten and continued until his arrest) (citing Cockrum v. Johnson, 934 F. Supp. 1417, 1443 n.22 (E.D. Tex. 1996)); Mann v. Lynaugh, 690 F. Supp. 562, 567 (N.D. Tex. 1988) (stating that a psychologist noted that drug abuse beginning at age nine or ten may have adversely affected the defendant's development); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (describing the defendant as a "chronic substance abuser"). As noted *supra* note 75 and accompanying text, a defendant may have begun drinking alcohol or using drugs at an early age as a form of self-medication.

118. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 307-08 (1989) (describing the defendant as mentally retarded); Glenn v. Tate, 71 F.3d 1204, 1209 (6th Cir. 1995) (stating that the defendant's grade school classified him as mentally retarded); Jackson v. Herring, 42 F.3d 1350, 1365 (11th Cir. 1995) (classifying the defendant as having borderline intelligence); Parkus v. Delo, 33 F.3d 933, 937 (8th Cir. 1994) (describing the defendant as borderline mentally retarded); *Wade*, 29 F.3d at 1316 (same); *Mathis*, 704 F. Supp. at 1065 (describing the defendant as "at best lower borderline intelligence and at worst mentally deficient"); Rose v. State, 675 So. 2d 567, 571 (Fla. 1996) (identifying the defendant as a slow learner

damage,[119] mental illness,[120] or may have endured a combination of these factors.[121] The presence of these additional impairments may have further damaged the defendant's ability to perceive and respond to stressful situations in a non-violent manner.[122] Indeed, Professor

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with a low I.Q.); *Phillips*, 608 So. 2d at 783 (stating that the defendant had a borderline I.Q.); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (noting that after severe beatings, defendant's intellectual functioning could "best be described as marginal").

119. *See, e.g.*, Castro v. Oklahoma, 71 F.3d 1502, 1509-10 (10th Cir. 1995) (quoting a neuropsychologist who assessed the defendant as suffering from a brain dysfunction that is " 'especially predictive of murder' "); *Glenn*, 71 F.3d at 1208 (noting that the defendant had neurological impairments, possibly from surgery that his mother had early in pregnancy); Elledge v. Dugger, 823 F.2d 1439, 1445 n.12 (11th Cir. 1987) (stating that the defendant suffered from organic brain dysfunction).

120. *See, e.g.*, Williams v. Turpin, 87 F.3d 1204, 1211 (11th Cir. 1996) (schizophrenic); *Castro*, 71 F.3d at 1510 (meets criteria for Paranoid Personality Disorder); *Wade*, 29 F.3d at 1316 (alternate personality); Deutscher v. Whitley, 884 F.2d 1152, 1160-61 (9th Cir. 1989) (mental disorder associated with uncontrollable violence); Middleton v. Dugger, 849 F.2d 491, 493-95 (11th Cir. 1988) (defendant suffered from same mental illness he was diagnosed with at age 12, "schizoid personality [disorder]"); *Rose*, 675 So. 2d at 571 (same); Robinson v. State, 574 So. 2d 108, 110 (Fla. 1991) (psychosexual disorder); State v. Sullivan, 596 So. 2d 177, 191 (La. 1992) (schizophrenic). In some cases the defendants are diagnosed as antisocial. *See, e.g.*, *Penry*, 492 U.S. at 309 (stating that two state psychiatrists testified defendant had an antisocial personality); Eddings v. Oklahoma, 455 U.S. 104, 107 (1982) (noting that a state psychologist testified Eddings had a "sociopathic or antisocial personality"); *see also supra* note 76 (discussing the problem of misdiagnosing individuals as antisocial and noting the opprobrium associated with such labeling).

121. *See, e.g.*, *Glenn*, 71 F.3d at 1208-09 (describing the defendant as neurologically impaired and mentally retarded); *Middleton*, 849 F.2d at 495 (stating that evidence chronicled a childhood of brutal treatment and neglect, sexual and drug abuse, low intelligence, and mental illness); Hall v. State, 614 So. 2d 473, 479 (Fla. 1993) (Barkett, C.J., dissenting) (noting that the trial court found organic brain damage, mental retardation, mental illness, tremendous emotional deprivation and disturbances, tremendous physical abuse and torture as a child, and learning disabilities).

122. *See, e.g.*, *Penry*, 492 U.S. at 309-10 (stating that the defendant suffered from mental retardation combined with organic brain damage, resulting in poor impulse control and inability to learn from experience); Loyd v. Whitley, 977 F.2d 149, 155 (5th Cir. 1992) (noting that a doctor concluded the defendant's commission of the murder was triggered by an organic impairment, although the form of the killing was affected by " ' "emotional or psychological factors" rooted in [his] childhood experience' " (quoting testimony of Dr. Barry Scanlon)); *Elledge*, 823 F.2d at 1445 n.12 (reporting that a psychiatrist concluded the "combination of organic dysfunction, psychotic paranoia and childhood abuse caused a disorder that affected [the defendant]" during the homicide); Whitley v. Bair, 802 F.2d 1487, 1495 (4th Cir. 1986) (observing that the defense argued that the defendant's organic brain damage and antisocial personality disorder accentuated his inability to control his impulses); *Rose*, 675 So. 2d at 571 (holding that organic brain damage, longstanding personality disorder, and chronic alcoholism qualified as statutory mitigating factors of extreme emotional disturbance or inability to conform his conduct to the law); *Heiney*, 620 So. 2d at 173 (noting that the combination of drug abuse, borderline personality disorder and physical and emotional abuse as a child could make a person have "a very difficult time coping with any extremely stressful situation"); *Hall*, 614 So. 2d at 480 (Barkett, C.J., dissenting) (finding that the defendant's mental deficiencies were not surprising in light of a history of physical torture and abuse); *Phillips*, 608 So. 2d at 782-83 (noting that the

Craig Haney posits that the "nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime is so tight in the lives of many capital defendants as to form a kind of social historical 'profile.' "[123]

The frequency with which this kind of evidence arises among capital murder defendants is noteworthy. Haney's assertion that a "social historical profile" exists is based on twenty years of studying men charged with capital murder.[124] Other studies of defendants on death row support his conclusion. In related studies of defendants facing execution, researchers documented extensive histories of mental disorders, neurological impairments, and childhood physical or sexual abuse.[125] A study focusing on the childhood histories of

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defendant was emotionally, intellectually, and socially deficient, was passive-aggressive, had life-long adaptive deficits, and had a schizoid personality and borderline intelligence that made him extremely emotionally disturbed or unable to conform his conduct to the requirements of the law at the time of the murder).

123. Haney, *supra* note 32, at 580; *cf.* Bouchillon v. Collins, 907 F.2d 589, 590 (5th Cir. 1990) (recognizing, in a non-death penalty case, that it should not be surprising that a defendant whose parents abandoned him to an orphanage when he was 12, who was sexually abused by a prostitute with whom he lived after running away from the orphanage, and who suffered psychological problems from serving in Vietnam, would suffer maladjustment or mental problems).

124. Haney, *supra* note 32, at 561 (explaining that 20 years ago little was known about the social and psychological forces that shaped defendants, but that, over time, it became apparent that many "shared a pattern of early childhood trauma and maltreatment"); *see also* Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 919 n.162 (1990-91) (citing numerous authorities for the proposition that most defendants on death row grew up in poverty and many are illiterate, mentally retarded, and/or mentally ill).

125. *See* Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 840 (1986) [hereinafter Lewis et al., *Characteristics of 15 Death Row Inmates*] (reporting that of 15 individuals (13 men and two women) facing execution, five had major neurological impairments (seizures, paralysis, cortical atrophy), seven had a history of blackouts, dizziness, psychomotor epilepsy, and minor neurological impairments, 10 had cognitive dysfunction, nine suffered psychiatric symptoms as children severe enough to require consultation or special education classes, and six were chronically psychotic antedating incarceration); *see also* Marilyn Feldman et al., *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 345, 347 (1986) (explaining a separate study of these same 15 inmates that examined experiences of intrafamily violence); Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 587 (1988) [hereinafter Lewis et al., *Characteristics of 14 Juveniles*] (reporting that a study of approximately 40% of juveniles on death row revealed multiple handicaps, in particular, "[t]hey tend to have suffered serious [central nervous system] injuries, to have suffered since early childhood from a multiplicity of psychotic symptoms, and to have been physically and sexually abused"). Significantly, none of the juries that sentenced these defendants to death heard any of this information. *See* Lewis et al., *Characteristics of 14 Juveniles*, *supra*, at 587-88; Lewis et al., *Characteristics of 15*

fifteen death row inmates substantiated "extraordinary abuse" in twelve of the fifteen cases.[126] Eight of the twelve were classified as victims of "potentially filicidal assaults"[127]—conduct by a parent that was "likely to result in death were they not forcefully curtailed"[128]—and four who were "brutally assaulted," albeit "short of actual attempted murder."[129] Five of the subjects had been sexually abused as children,[130] and in twelve cases, the adults in the abused childrens' lives engaged in "extraordinary violence" toward other adults.[131] Although this study did not explore the long-term effects of the abuse on the defendants, the authors posit several possible adverse effects: modeling, i.e., learning extreme violence as a way of relating to others; organic consequences, i.e., brain injury that may result in poor judgment and impulse control; and displaced rage, i.e., venting one's rage over being abused not at one's parents but at outsiders.[132]

The fact that a history of childhood abuse appears frequently

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Death Row Inmates, *supra*, at 844. The reasons for this failure to present this evidence are explored *infra* Part II.B.1. (discussing barriers to juries hearing mitigating evidence of childhood abuse). These studies are part of an increasing body of research exploring the connection between childhood abuse and the later commission of crimes. *See, e.g.*, Blake et al., *supra* note 59, at 1644-45 (reporting results of a study of 31 murderers and positing a matrix for violence based on the combination of severe childhood abuse, brain damage, and paranoia); Widom, *supra* note 56, at 15 (reporting on a study comparing adult criminal behavior of individuals abused or neglected as children with a matched control group of non-abused children).

126. Feldman et al., *supra* note 125, at 348. Sources of data for family histories included psychiatric evaluations four to 16 hours long, interviews with parents or close relatives, and records from hospitals, prisons, and schools. *See id.* at 347. In all but one case, conclusions were based on the authors' own evaluations and four independent sources of information. *See id.*

127. *Id.* at 348 (describing examples, such as a mother who shot at her son and threatened him with a knife, a father who held his four-year-old son outside a car speeding down the highway, and a mother who burned her son with a hot iron).

128. *Id.* at 347.

129. *Id.* at 348.

130. *See id.* at 348-49 (reporting, e.g., that the mother forced her son to stimulate her orally and fondle her breasts, and that the child was raped by a male cousin).

131. *Id.* at 349 (reporting, e.g., that one subject's mother tried to stab his father with a knife; another subject's father threatened his mother with a gun, and she threatened him with a butcher knife.

132. *See id.* at 350. The authors noted that the long-term effects on an individual would be influenced not only by the nature of the abuse but also by other family dynamics such as "continuing family hostility, neglect, and emotional abandonment," as well as the presence of other psychological and cognitive impairments. *Id.* at 351; *see also supra* notes 56-61 and accompanying text (discussing factors affecting long-term consequences of childhood abuse). The authors also discuss the effects of "lack of parental attachment" as an ongoing consequence of child abuse which may contribute to family members' unwillingness to assist the defendants when they face the death penalty. Feldman et al., *supra* note 125, at 350-51.

among individuals sentenced to death certainly does not mean that the experience or long-term effects are the same among those defendants or that abuse is present in every case. The presentation of mitigating evidence of child abuse, therefore, must be particularized in accordance with the constitutional command for individualized consideration of the appropriate sentence for the defendant.[133]

3. The Nexus[134] Between Mitigation and Childhood Abuse

The mitigating qualities of a defendant's childhood abuse and its long-term consequences go to the heart of the purpose of mitigating evidence: to provide a cogent and compelling reason, based on the defendant's background, his character, or the circumstances of the offense, for a juror to believe that life imprisonment is an appropriate and sufficient punishment.[135] At the same time, the prosecution may use the defendant's impairments to suggest circumstances that support its case against the defendant.[136] Despite the seeming contradictions between these qualities of child abuse evidence, these qualities in fact illustrate the way in which this evidence provides a vital connection between the defendant's crime and his earlier life. By revealing both mitigating and potentially aggravating aspects about the defendant and his behavior, the evidence of long-term impairments from childhood abuse demonstrates the link between the violence the defendant suffered as a child and the violence he committed as an adult.

133. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

134. I use "nexus" to mean the connection between a history of childhood abuse and its ability to provide a basis for the jury to vote for a sentence less than death. This definition is qualitatively different from the nexus requirement for mitigating evidence imposed by the U.S. Court of Appeals for the Fifth Circuit, which requires the mitigating evidence to be linked to the defendant's culpability for the crime: "Constitutionally relevant mitigating evidence" is evidence that demonstrates that the defendant is less culpable for the crime by showing: "(1) a 'uniquely severe permanent handicap[] with which the defendant was burdened through no fault of his own,' and (2) that the criminal act was attributable to this severe permanent condition." Davis v. Scott, 51 F.3d 457, 460-61 (5th Cir. 1995) (alteration in original) (citation omitted) (quoting Graham v. Collins, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc), *aff'd on other grounds*, 506 U.S. 461 (1993)). In a previous article I criticized the Fifth Circuit's position. *See* Crocker, *supra* note 20, at 73-78.

135. *See supra* Part I.A. (discussing the role of mitigating evidence).

136. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court refers to the mitigating and aggravating qualities as being a "two-edged sword." *Id.* at 324. This dual nature does not mean the evidence should not be presented, but that the jury must be assured of a vehicle for considering and giving effect to the evidence as mitigating, not merely as aggravating. *See id.* at 327-28.

Evidence of childhood abuse and its long-term negative consequences on the defendant's behavior may explain the circumstances of the crime in a way that assists the jury in understanding why the defendant committed the murder. For an individual defendant, the experience of physical abuse may have so damaged him psychologically or neurologically that he does not possess the normal capacity to make accurate judgments, to control his behavior, or to understand the consequences of his actions. The fact that these impairments may become more pronounced or debilitating in stressful situations could certainly play a role in circumstances that ended in murder.[137] While not excusing the

137. *See* Haney, *supra* note 32, at 600 n.120 (describing a model of causation that connects risk factors in defendants' lives, such as childhood abuse, to the "immediate situational pressures under which they act"); Lewis et al., *supra* note 66, at 436 (concluding that individual vulnerabilities combine with environmental stressors to increase the risk and severity of adult violent crime).

A poignant example of this appears in the Robert Alton Harris case. Harris was convicted and sentenced to death for killing two teenage boys during a robbery. *See* Harris v. Vasquez, 949 F.2d 1497, 1501-02 (9th Cir. 1990). On post-conviction review, defense counsel argued that the court-appointed experts at trial failed to evaluate and identify properly Harris's multiple disabilities of "organic brain damage, interrelated mental disorders, and the psychological effects of unrelenting abuse and scapegoating during his childhood." Memorandum in Support of Emergency Application for Issuance of Certificate of Probable Cause and for Stay of Execution set for April 3, 1990 at 5, *Harris* (No. 90-55402) (on file with the *North Carolina Law Review*). Defense counsel argued that these disabilities would have explained why Harris committed the murders:

> Together, these disorders have severely impaired Mr. Harris' ability to function in fundamental ways: Mr. Harris has only limited access to the tools of rationality that all of us take for granted in living goal-directed, thoughtful lives in which we exert a fair degree of control over what we do, when we do it, and why we do it. Mr. Harris has only limited abilities to direct his behaviors in a rational way—to identify alternative courses of action, to weigh alternatives, and to choose an alternative on the basis of this weighing process. He is, instead, driven more by impulse, a sudden urge or emotion which springs out of the intersection between himself and stressful contexts in the external world.
>
> With these revelations, Mr. Harris' crime and his behaviors after the crime take on a very different quality. *All* of Robert Harris' actions, both those "planned" and those which arose on the spur of the moment were filtered through a brain that had been damaged by a sea of alcohol in utero and by fists and weapons wielded against him by his parents in early childhood. His conduct was instead driven by impulse, without the mediation of that part of the brain capable of reflecting upon and weighing alternative courses of action in appreciation of the social fabric in which action takes place.
>
> Every sequence in the crime reflected Robert's inability to reign in or modulate his impulsivity with rational, socially-conscious judgment.... Thus, the hallmarks of his interconnected disabilities—emotional lability, impaired rational control processes, inability to rely on instinctive guidance by social norms, and emotional distance from other human beings—were, when unmasked, causally connected to his crimes.

Id. at 9-10.

defendant's conduct, childhood abuse and its attendant long-term impairments may cause a juror to empathize with the defendant's inability to judge the situation accurately, to control his actions, or to respond appropriately rather than overreact with anger or rage.[138] As a result, the juror may find that the defendant is not worthy of death, and that it is unnecessary to exact the most extreme form of punishment.[139]

The evidence of childhood abuse also may evoke a juror's sympathy in the sense of feeling pity or sorrow for the defendant because of the pain he endured as a child.[140] Sympathy may be less compelling than an explanation for the murder based on the defendant's experience of childhood abuse,[141] but it is no less relevant. Sympathy, based on the evidence presented, may be a ground on which a juror decides to vote for a life sentence.[142]

Despite the identifiable mitigating qualities of a history of childhood abuse, this evidence also may be fraught with adverse

138. *Cf.* Logan, *supra* note 36, at 15-16, 18 fig.3 (observing that jurors may consider some experiences of childhood abuse more compelling than others, e.g., physical or sexual abuse may be seen as more mitigating than psychological or emotional neglect).

139. Although "worthy" often has a positive connotation, I use it to mean that the "determin[ation] that the defendant is among the most heinous of murderers should reflect an assessment that he is worthy of death as an extraordinary punishment." Crocker, *supra* note 20, at 26 n.17. The jury's assessment of the defendant's deathworthiness requires a judgment about his character, record, and background, the circumstances and character of the crime, and the harm caused, all of which is broader and different from the defendant's culpability for the crime. *See id.* at 82-85.

140. *See, e.g.*, Burger v. Kemp, 483 U.S. 776, 794 (1987) (" '[A] jury could react with sympathy over the tragic childhood [the defendant] endured.' " (quoting Burger v. Kemp, 753 F.2d 930 app. at 937 n.7 (11th Cir. 1985) (per curiam))); Devier v. Zant, 3 F.3d 1445, 1453 (11th Cir. 1993) (observing that it is "undoubtedly true" that evidence of a "troubled childhood" will present the defendant "in a more sympathetic light to the jury"); Brewer v. Aiken, 935 F.2d 850, 858 (7th Cir. 1991) (recognizing that evidence about the defendant's "disadvantaged childhood" may have put the defendant "in a more sympathetic light").

141. *See, e.g.*, *Burger*, 483 U.S. at 794 (stating that sympathy is not enough to show that the outcome of the punishment phase would have been different); *Devier*, 3 F.3d at 1453 (noting that while presenting the defendant in a sympathetic light, evidence of child abuse presented at the first trial had not caused the jury to vote for life sentence); State v. Steffen, 509 N.E.2d 383, 399 (Ohio 1987) (stating that while the court was "sympathetic towards appellant's . . . lamentable past," which included child abuse, it was not enough to outweigh the aggravating circumstances); *cf.* Brock v. McCotter, 781 F.2d 1152, 1160 (5th Cir. 1986) (concluding that a tragic childhood is "just as likely to evoke sympathy" as to show no hope of reform).

142. *See, e.g.*, State v. Bey, 548 A.2d 887, 911-12 (N.J. 1988) (recognizing that sympathy, based on the evidence, is a legitimate sentencing consideration). A deprived background may evoke sympathy which, while not relevant to a defendant's responsibility for a crime, may be relevant to punishment because "she has been punished *before* the offense by the very conditions that produced her culpability." Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1654 (1994).

consequences. When a defendant suffers from long-term negative behavioral effects, the prosecution may use that evidence to suggest that the defendant will commit acts of violence in the future.[143] As discussed in the next Part, while this complication should not stifle the defense case at the punishment phase, ostensibly it often does.[144]

Evidence of long-term negative behavioral consequences from childhood abuse epitomizes the complexities faced in presenting a compelling case for mitigation at the punishment phase. Childhood abuse may be mitigating because it helps to explain the murder or draws a sobering picture of the suffering the defendant endured as a child in ways that may evoke juror sympathy or empathy. At the same time, it may point to other violent behavior that the prosecution may use against the defendant. While these factors may complicate the presentation of child abuse as mitigating evidence, they may also be part of what makes this evidence so powerful. The potency of mitigating evidence of child abuse comes from its ability to explain that which appears incomprehensible—the commission of a heinous murder. It connects two seemingly unrelated stories of violence: one perpetrated on the defendant as a child and the other committed by the defendant as an adult.[145]

C. *Conclusion*

A history of childhood abuse is paradigmatic of mitigating evidence because it has the potential to transform how a juror perceives the defendant and his commission of the murder. Psychological and medical literature reveals how physical abuse as a child may have long-term negative repercussions for the defendant's ability to make appropriate judgments, to understand the consequences of his actions, and to control his behavior. These features may provide the jury with critical information that explains why the defendant committed the crime. As such, a history of childhood abuse represents the kind of "diverse frailties of

143. *See infra* notes 247-49 and accompanying text (discussing the ways in which the State may try to turn childhood abuse against the defendant).

144. *See infra* notes 250-56 and accompanying text (discussing how the defense may counteract the State's negative gloss on the defendant's childhood abuse).

145. *See* Goodpaster, *supra* note 30, at 335-36 (suggesting that a history of childhood abuse may make the murder "inconceivable to many people, more understandable"); Sarat, *supra* note 32, at 51-52 (arguing that bringing in violence done to the defendant as a child "contest[s] the dominant cultural conception of violence and victimization" in which the defendant is seen only as the perpetrator of violence; it "requires the construction of a more complex narrative of causation and accident, of mixed lives and mixed motives").

humankind"[146] that are constitutionally relevant to the jury's decision about the appropriate punishment for the defendant. As the next Part demonstrates, however, despite this mitigating potential, manifold misunderstandings exist that prevent child abuse evidence from receiving its full and proper consideration.

II. BARRIERS TO THE PRESENTATION AND CONSIDERATION OF CHILDHOOD ABUSE AS MITIGATING EVIDENCE

Just as evidence of childhood abuse is paradigmatic of mitigating evidence on a substantive level, it is also paradigmatic of the system's inability to ensure that the defendant receives individualized consideration of whether the death penalty is his appropriate sentence. This Part analyzes three barriers that impede the presentation and consideration of mitigating evidence of child abuse. First, it identifies common misperceptions that courts hold about the relevance of child abuse and its long-term consequences to the jury's sentencing decision. Second, it examines problems that arise at trial: defense lawyers who fail to investigate or present evidence of the defendant's childhood abuse and fail to anticipate the potential of the long-term effects of childhood abuse as aggravating evidence, and jury instructions that do not facilitate the consideration of childhood abuse and its resulting impairments as mitigating factors. Finally, this Part shows how courts' post-conviction review of death sentences reinforces the barriers at the trial stage. The standard that governs claims of ineffective assistance of counsel, for example, fails to take into account how a history of childhood abuse may inhibit a defendant's interactions with his attorney and tacitly permits the attorney to ignore the defendant's history. While these misperceptions and barriers are not unique to mitigating evidence of childhood abuse, they intersect in particularly pernicious ways that graphically illustrate the arbitrariness and capriciousness of the death penalty system.[147]

A. Misperceptions of Childhood Abuse as Mitigating Evidence

Childhood abuse is a complex phenomenon. Despite the intuitive understanding that it may seriously undermine a child's

146. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

147. *See, e.g.*, WHITE, *supra* note 20, at 87 (concluding that "the penalty trial only exacerbates the disadvantaged position of a defendant who for whatever reason is unable to present a full picture of his background to the penalty jury").

development into a well-adjusted adult,[148] misperceptions abound. This Part focuses on two principal issues that courts misconstrue: the possible long-term adverse behavioral consequences of childhood abuse and the importance of explaining the mitigating connection between the defendant's history of abuse and his commission of murder. Finally, this Part demonstrates the import of judicial failures in these two areas by analyzing decisions that recognize the mitigating potential of a defendant's abuse as a child.

Court opinions reflect misunderstandings about childhood abuse in two ways: some minimize the experience, while others ignore or misconstrue the effects of childhood abuse identified in the mental health literature. The result is that the individual defendant's history of abuse is discounted. The very features that demonstrate his unique "human frailties"[149] are dismissed rather than allowed their due consideration.

The language that appellate courts[150] use to describe a defendant's history of childhood abuse and its consequences often belittles the experience. Courts may describe a history of physical abuse as "childhood woes,"[151] "unfortunate,"[152] "obviously lamentable,"[153] "difficult,"[154] or "unhappy."[155] These terms obscure rather than acknowledge the severity of the particular histories of

148. *See supra* notes 51-53 and accompanying text (discussing general societal recognition of long-term damage from childhood abuse).

149. *Woodson*, 428 U.S. at 304 (opinion of Stewart, Powell, and Stevens, JJ.).

150. Although the examples described in this Part are from appellate rather than trial courts, they display a disregard for the mitigating potential of childhood abuse that lower courts may see as normative.

151. Gardner v. Dixon, No. 91-4010, 1992 U.S. App. LEXIS 12971, at *23 (4th Cir. June 4, 1992). This characterization is in contrast to county social service records, introduced at the state post-conviction evidentiary hearing, that "revealed an extremely difficult home life resulting from an abusive father and a drunken mother." *Id.* at *9. The abuse was severe enough to "influence [the defendant's] behavior and impair his judgment" as an adult. *Id.*

152. Squires v. Dugger, 794 F. Supp. 1568, 1577 (M.D. Fla. 1992). The defendant "assert[ed] that he was beaten and sexually assaulted by stepparents at a young age." *Id.*

153. State v. Steffen, 509 N.E.2d 383, 399 (Ohio 1987). The defendant's childhood included "excessive, almost brutal discipline administered by his stepfather." *Id.* at 397.

154. Card v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990). The childhood described as "difficult" featured "harsh treatment by ... father and stepfather during ... early childhood" including "specific instances of cruelty," head injuries, and being placed in psychiatric care at the age of five or six. *Id.* at 1508-09.

155. Burger v. Kemp, 483 U.S. 776, 789 (1987) (noting that the evidence would have shown that the "petitioner had an exceptionally unhappy and unstable childhood"). As the dissent noted, the defendant "had an I.Q. of 82, was functioning at the level of a 12-year-old, and possibly had suffered brain damage from beatings when he was younger." *Id.* at 818 (Powell, J., dissenting).

abuse.[156] For example, in *Penry v. Lynaugh*,[157] where the evidence at trial revealed that the defendant was mentally retarded and suffered organic brain damage either from birth trauma or from beatings by his mother,[158] Justice Scalia, in dissent, described Penry's childhood as "sad."[159] By using language that trivializes the abuse, courts suggest that the evidence is inconsequential to the evaluation of the appropriate sentence for the individual defendant. Although evidence of childhood abuse will not result per se in a life sentence, such minimizing language demeans its significance.

Courts also make judgments about the relevance of childhood abuse that contradict psychological and medical knowledge about the consequences of abuse. For example, some courts discount the long-term impact of physical abuse on the defendant when his siblings appear to be unaffected.[160] This attitude ignores the mental health literature that identifies reasons why one child may be more affected than others by abuse in the home, including receiving the brunt of the abuse or being at a more vulnerable stage of development.[161] Other courts hold that the abuse happened too long ago for it to continue to affect adversely the defendant's current behavior.[162] This conclusion

156. Within the same opinion, two qualitatively different depictions of the same evidence may be presented. In *State v. Murphy*, 605 N.E.2d 884 (Ohio 1992), for example, the majority characterized the defendant's upbringing, which included verbal, physical, and sexual abuse, as "at times unsettling" but not enough to overcome the aggravating circumstances of the murder. *Id.* at 908. The dissent, calling the majority's description "accurate but not complete," painted a different picture of an "environment of neglect, physical abuse and psychological torment" that directly affected the defendant's behavior and should have made the death penalty inappropriate. *Id.* at 909-10 (Moyer, C.J., dissenting).

157. 492 U.S. 302 (1989).

158. *See id.* at 308-10.

159. *Id.* at 360 (Scalia, J., dissenting).

160. *See, e.g.*, Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987) (maintaining that siblings' "emergence as normal citizens," although subject to similar abuse, could be used against the defendant); State v. Steffen, 509 N.E.2d 383, 397 (Ohio 1987) (finding "enlightening" a psychologist's report noting that the defendant's siblings "were able to survive and become well-adjusted, stable adults"); *see also* Stebbins & Kenney, *supra* note 32, at 18 (noting that many jurors react this way when the defendant's siblings appear to be unaffected).

161. *See supra* notes 62-66 and accompanying text (summarizing psychological literature on reasons why one child may be more traumatized than another).

162. *See, e.g.*, Stafford v. Saffle, 34 F.3d 1557, 1565 (10th Cir. 1994) (finding childhood events too remote by the time the defendant committed the murder at age 27); Francis v. Dugger, 908 F.2d 696, 703 (11th Cir. 1990) (holding that evidence of childhood abuse had "little, if any, mitigating weight" because the defendant was 31 years old); Francois v. Wainwright, 763 F.2d 1188, 1191 (11th Cir. 1985) (concluding, in part because the defendant was 31, that the mitigating evidence of childhood abuse would not affect the outcome of the case); Raulerson v. Wainwright, 732 F.2d 803, 807 n.4 (11th Cir. 1984)

dismisses the extensive evidence that recognizes the great potential for life-long psychological and behavioral consequences.[163] These misperceptions permit courts to conclude that because the defendant did not respond to the abuse the way others did or because the abuse was too remote in time, his experience may be disregarded, rather than factored into his individual circumstances that should be considered at the punishment phase.[164]

Apart from misunderstanding the nature of childhood abuse, courts also fail to appreciate the value of the defense explaining to the jury the connection between the abuse and the crime. A juror may intuitively understand, based solely on facts of physical abuse, that a childhood marred by abuse would have been traumatic.[165] That

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(concluding that because the defendant was 23, his history of turbulent family life could be given little or no mitigating weight); Dobbert v. Strickland, 532 F. Supp. 545, 554 (M.D. Fla. 1982), *aff'd*, 718 F.2d 1518 (11th Cir. 1983) (concluding that the defendant, age 33, was too far removed from his father's abuse to be acting under its influence); *cf.* Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992) (stating that mitigating evidence of child abuse is "far less compelling" for a defendant who is 36, but is still relevant); State v. Murphy, 605 N.E.2d 884, 910 (Ohio 1992) (Moyer, C.J., dissenting) (noting that when he committed his crime, the 22-year-old defendant had not yet "matured to an age when education, normal life experiences, and maturity could have intervened"). The courts in *Raulerson*, 732 F.2d at 807 n.4, and *Dobbert*, 532 F. Supp. at.554, relied on *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), to support their conclusion that the defendant was too old for his childhood circumstances to be a relevant mitigating factor. This reliance is misplaced. In *Eddings*, the Court held that childhood trauma was certainly relevant for a 16-year-old defendant, *see* 455 U.S. at 115, but it does not follow that the mitigating nature of this evidence ceases to exist at some arbitrary point.

163. *See supra* notes 62-85 and accompanying text (summarizing possible long-term developmental, psychological, and neurological impairments from childhood abuse).

164. One court rejected the defendant's argument that his childhood abuse constituted mitigating evidence that the jury should have been able to consider, deeming it instead "an insult to people everywhere who have overcome their injuries and deprivations to become successful contributing members of our community." Buxton v. Collins, No. H-91-494, slip op. at 7 (S.D. Tex. Feb. 23, 1991), *aff'd on other grounds*, 925 F.2d 816 (5th Cir. 1991); *see also* Motley v. Collins, 18 F.3d 1223, 1228 (5th Cir. 1994) (quoting the federal district court judge from *Buxton* making the exact same remarks about a different defendant); Card v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990) (finding the trial counsel's reason for not presenting evidence of childhood deprivation, including abuse, persuasive because "many jurors have had difficult lives, but have not turned to criminal conduct"). As Professor Haney notes, it is "legally disingenuous" to act as though all individuals are psychologically and socially affected in the same way: "To succumb to the argument that a particular defendant is not entitled to mercy because not everybody who has shared his experiences has reacted similarly would render *all* forms of mitigation irrelevant . . . ." Haney, *supra* note 32, at 602; *see also* Lewis, *supra* note 57, at 388-89 (noting that while not all abused children commit crimes as adults, abuse, for a "vulnerable" child, "is often sufficient to create a very violent individual").

165. Some courts are astonished and sobered by histories of childhood abuse and see them as mitigating in and of themselves. *See, e.g.*, Ford v. Lockhart, 861 F. Supp. 1447, 1454 (E.D. Ark. 1994) ("The Court is convinced that had the jury been presented evidence

evidence may make a juror feel sorry for the defendant, but it is unlikely to cause her to vote for a life sentence.[166] The critical part of the defense case for mitigation is explaining *how* and *why* the defendant's history of abuse caused long-term cognitive, behavioral, and volitional impairments that relate to the murder he committed.[167] Without testimony making this connection,[168] jurors probably will not comprehend the significance of the defendant's background to their

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of the brutality Ford suffered as a child, along with evidence of intoxication, they would not, in their weighing of the mitigating and aggravating circumstances, have imposed the death penalty."), *aff'd on other grounds sub nom.* Ford v. Norris, 67 F.3d 162 (8th Cir. 1995); Mathis v. Zant, 704 F. Supp. 1062, 1065-66 (N.D. Ga. 1989) (concluding, after reviewing the mitigating evidence of the defendant's "tormented" childhood, which included verbal and physical abuse, mental deficiencies, and mental illness, that the court "cannot understand how trial counsel could fail to comprehend the significance of such mitigating evidence"), *vacated and remanded*, 975 F.2d 1493 (11th Cir. 1992).

166. *See supra* note 141 (citing cases that recognize the minimal role sympathy may play).

167. *See, e.g.*, *Stafford*, 34 F.3d at 1565 (holding that physical abuse would have been admissible mitigating evidence, but "[the defendant] presented no evidence that these events had any continuing effect on his ability to conform his conduct to noncriminal behavior"); Harris v. Vasquez, 949 F.2d 1497, 1502-06 (9th Cir. 1990) (noting that the family testified about the defendant's abuse as a child, but no experts testified for the defense to explain the long-term consequences of the abuse); State v. Jenkins, 473 N.E.2d 264, 300-01 (Ohio 1984) (giving the history of abuse little mitigating weight because "no psychological testimony linked appellant's involvement in a bank robbery and shooting to attitudes of hostility or aggression he acquired as the result of an abusive childhood"); Sundby, *supra* note 54, at 1170-78, 1181-83 (discussing cases where the defense effectively used family and expert testimony to portray the defendant's childhood of abuse and its relationship to his commission of the murder); *see also supra* notes 45-50, 137-39 and accompanying text (discussing the importance of explaining to the jury the connection between the defendant's history of child abuse and his commission of the murder).

168. This testimony will most often come in through an expert witness such as a social worker, psychologist, or other mental health professional. *See, e.g.*, Geimer, *supra* note 33, at 291 n.71 (citing interviews with a psychologist who emphasized the advantage of using an expert who can link the crime to the defendant's background); Stebbins & Kenney, *supra* note 32, at 17-18 (describing expert testimony as "the glue that cements all the factors of the defendant's life into one cohesive picture; the explanation of how accident of birth, injury, family and environmental background, accident, chance, disease, or substance abuse put him/her in a position to commit the murder on the day in question"); *see also* White, *supra* note 16, at 363-64 (citing a defense attorney who suggests that lay witnesses and social workers may be most effective in presenting mitigating evidence of child abuse). While it is critical for an expert to explain the relationship between a defendant's childhood abuse and his adult behavior, especially the commission of the murder, it is equally important that the defense attorney present lay witnesses who can provide a first-hand account of the abuse and that the defense attorney integrate the expert and lay testimony. *See* Sundby, *supra* note 54, at 1125-44 (explaining juror criticism of expert testimony at the penalty phase, including the failure to link the defendant's deficiencies to the crime); *id.* at 1145-62 (discussing jurors' reactions to lay experts and family/friends, including the power of testimony recounting first-hand knowledge of the defendant's abuse).

sentencing decision.[169]

Courts deny the need to establish this relationship when they hold that expert testimony on the effects of child abuse would not contribute to the jury's understanding of the defendant and the murder.[170] *Gardner v. Dixon*[171] represents a vivid example of a court misunderstanding the mitigating relevance of the consequences of childhood abuse. At trial, Gardner's counsel presented one witness at the punishment phase, a state psychiatrist who had evaluated the defendant for competency. She testified, "[w]ithout going into great detail," that the defendant told her that he moved around a lot as a child, his mother was an alcoholic, he failed several grades and never finished high school, and he began abusing drugs as a teenager.[172] She concluded that the defendant's drug abuse "could have impaired his judgment at the time of the murders."[173] The jury found that the defendant's family history, alcohol abuse, and drug addiction were mitigating circumstances but sentenced him to death.[174]

On post-conviction review, Gardner argued that his attorney was ineffective in part because he had failed to investigate and present evidence of Gardner's childhood abuse.[175] At an evidentiary hearing, Gardner's post-conviction counsel presented the evidence that his trial attorney failed to find.[176] This evidence included testimony from family members about his abusive father and alcoholic mother and

169. Other factors may also affect a juror's inability to understand the role of mitigating evidence. *See infra* notes 219-33, 241-46, 260-63 and accompanying text (discussing ill-prepared attorneys and inadequately-instructed juries).

170. *See, e.g.*, Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995) (holding that expert testimony on the developmental effects of child abuse "is not necessarily an essential ingredient" of a competent presentation of mitigating evidence—trial counsel was competent because he presented the facts of the abuse); Devier v. Zant, 3 F.3d 1445, 1452, 1453 n.18 (11th Cir. 1993) (concluding that expert testimony on the effects of child abuse merely reiterated in clinical terms lay witnesses' testimony, but according to the court the lay witnesses "generally testified that [the defendant] had been a good child and that he was a nonviolent and pleasant adult"); Thompson v. Cain, No. 96-2268, 1997 WL 79295, at *27 (E.D. La. Feb. 24, 1997) (holding that the facts of child abuse were thoroughly explored at trial and, absent evidence of mental defect, the court was not willing to require a psychiatric examination), *aff'd*, 161 F.3d 802 (5th Cir. 1998); State v. Brett, 892 P.2d 29, 63-65 (Wash. 1995) (en banc) (affirming the trial court's ruling that an expert on Fetal Alcohol Syndrome or Effect was not needed to draw a connection between the mother's alcoholism while pregnant with defendant and defendant's later behavioral difficulties, because the defense counsel could argue the inference).

171. No. 91-4010, 1992 U.S. App. LEXIS 12971 (4th Cir. June 4, 1992).

172. *Id.* at *21-*22.

173. *Id.* at *22.

174. *See id.* at *23.

175. *See id.* at *8-*10.

176. *See id.* at *8-*9.

social service records documenting Gardner's childhood abuse.[177] A clinical psychologist testified that "when stressed, [Gardner's] abusive childhood would influence his behavior and impair his judgment" and that at the time of the murder he was " 'under stress,' " suffered from an emotional and mental disturbance, and possessed an impaired ability to conform his conduct to the requirements of the law.[178] The court held that this new evidence "was different in its depth and detail, but not in kind. It presented in greater 'color' the disadvantages suffered by Gardner as a child."[179] The court concluded that the evidence would not have "swayed the outcome in this case."[180]

The court in *Gardner* ignored the qualitative difference that testimony about childhood abuse may make to a juror's decision at the punishment phase. The expert and lay testimony would have provided a factual basis for Gardner's poor performance in school and his drug abuse that began at such an early age. The testimony alone would have given greater meaning to the mitigating circumstances that the jury found, in a way that might have made the mitigating factors outweigh the aggravating circumstances of the murder. More important, however, is the psychological connection between the physical abuse and Gardner's impaired judgment at the time of the crime. The clinical psychologist's testimony would have been significant because she located the precipitating cause of the impairment—childhood abuse—outside the control of the defendant.[181] This testimony provides a markedly different explanation of the defendant's conduct from that created by relying on drug abuse. Absent any contextual explanation,[182] drug abuse may be seen as voluntarily self-inflicted and therefore less mitigating.[183] The expert testimony suggested not only a possible reason for the defendant's early drug use but also a more compelling and pernicious explanation for his conduct. This difference could have transformed

177. *See id.*

178. *Id.* at *9.

179. *Id.* at *24.

180. *Id.* at *25. The court concluded, therefore, that counsel was not ineffective; because this evidence would not have affected the outcome of the case, Gardner was not prejudiced by counsel's failure to present it. *See id.* at *24-*25; *see also infra* Part II.C.2 (discussing the standard governing ineffective assistance of counsel).

181. *See supra* notes 45-50 and accompanying text (discussing the importance of explaining the defendant's history).

182. *See supra* note 75 and accompanying text (discussing how drug abuse may be a form of self-medication against the emotional pain of childhood abuse).

183. *See* Logan, *supra* note 36, at 15 (observing that jurors may be more inclined to condemn a drug abuser because of the large drug problem in this country).

the way a juror understood the causal connection between the defendant's childhood history and his impaired judgment at the time of the murder such that she would have given greater weight to the mitigating factors.[184]

In a related vein, in *Thompson v. Cain*,[185] a federal district court rejected the defendant's argument on post-conviction review that trial testimony about his history of abuse supported his claim that his attorney should have obtained a psychiatric evaluation to determine whether he suffered from "any specific mental disorder or syndrome."[186] The court's reasoning was two-fold: First, the defendant's "history of abuse and personal hardships" was "thoroughly explored and presented" at trial,[187] and second, no evidence in the record indicated any "mental defect at all."[188] Based on the latter reason, the court refused to make what it considered "a quantum leap" by requiring a psychiatric evaluation in every abuse case where no indication of mental illness was present.[189] This response, however, ignored the likelihood of mental problems that an evaluation could have identified.[190] More important, it discounted the difference between a mere recitation of facts and an explanation that could reveal the relationship between those facts and the murder, thus potentially affecting the punishment decision.

184. *See, e.g.*, Ford v. Lockhart, 861 F. Supp. 1447, 1457-58 (E.D. Ark. 1994) (noting that "the jury would have been influenced by the compelling accounts of abuse [the defendant] suffered at the hand of his father"), *aff'd on other grounds sub nom.* Ford v. Norris, 67 F.3d 162 (8th Cir. 1995); *see also* Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (assessing the value of expert testimony that the defendant still suffered from the same mental illness with which he was diagnosed at age 12). The *Middleton* court stated: "This kind of psychiatric evidence ... has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior. 'Thus, [it] not only can act in mitigation, it also could significantly weaken the aggravating factors.' " *Middleton*, 849 F.2d at 495 (quoting Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987)).

185. No. 96-2268, 1997 WL 79295 (E.D. La. Feb. 24, 1997), *aff'd*, 161 F.3d 802 (5th Cir. 1998).

186. *Id.* at *26. Thompson claimed his attorney's failure to obtain a psychiatric evaluation constituted ineffective assistance of counsel. *See id.*

187. *Id.* at *27. A sociologist testified that Thompson's step-father beat him with "coat hangers, extension cords, fists and anything around the house," and that his uncle also physically abused him. *Id.*

188. *Id.*

189. *Id.* The court stated that it was "not willing to analogize evidence of abuse and a traumatic background with mental abnormalities or disorders." *Id.*

190. *See supra* notes 76-78, 83 and accompanying text (identifying common mental disorders and how they may contribute to inappropriate violent behavior). The court also ignored the strong likelihood that even though the defendant appeared psychologically normal, he was not. *See infra* note 318 (discussing the likelihood of mental illness among victims of child abuse, especially violent offenders).

Courts that understand the impact and long-term effects of child abuse and their potential relationship to the crime recognize the importance of fully and accurately conveying that connection to the jury.[191] For example, in *State v. Sullivan*,[192] the Louisiana Supreme Court held that trial counsel provided ineffective assistance because he neither investigated nor presented evidence that the defendant grew up in an "abusive, alcoholic, often brutal environment" or that the defendant's schizophrenia was related to the crime.[193] Although the defendant testified that he had once been diagnosed as schizophrenic,[194] the court found it pivotal that trial counsel did not present an explanation of the continued effects of the disease on the defendant's judgment and behavior.[195] According to the court, this explanation, in concert with testimony about his severely abusive childhood and the love family members still held for him, could have

191. *See, e.g.*, Deutscher v. Whitley, 884 F.2d 1152, 1160 (9th Cir. 1989) (recognizing that having a doctor testify about the relationship between the defendant's fetal injury, subsequent mental disorder, and conduct "might have made a difference"); Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (finding counsel ineffective for failing to investigate and present evidence of the defendant's brutal childhood and mental illness, including expert testimony connecting them to "extreme emotional duress" and "very limited capacity" at the time of the crime); *cf.* State v. Murphy, 605 N.E.2d 884, 909-11 (Ohio 1992) (Moyer, C.J., dissenting) (stating that of all the death penalty cases he had reviewed, he knew of "no other case in which the defendant ... was as destined for disaster as was Joseph Murphy as a direct result of the conditions to which he was exposed by his family"; those circumstances included a history of "neglect, physical abuse and psychological torment" and enduring psychological difficulties). Cases that permit the defense to rely on connecting child abuse to the defendant's antisocial personality fail to appreciate the inaccuracy of that diagnosis and the damage it causes the defendant, given its connotations of amorality and lack of remorse. *See supra* note 76 (discussing harm of labeling someone as antisocial). *Compare* Pincus, *supra* note 76, at 358 (positing that the failure to accurately diagnose psychiatric and neurologic disorders leads to labeling defendants as sociopathic, which "conjures up the image of unfeeling, amoral, impulsive individuals, who are ... untreatable, and in need of ... execution"), *with* Harris v. Vasquez, 949 F.2d 1497, 1523-24 (9th Cir. 1990) (holding that a diagnosis of antisocial personality disorder sufficiently explained the relationship between the defendant's history of child abuse and his commission of the crime), *and* Card v. Dugger, 911 F.2d 1494, 1508-14 (11th Cir. 1990) (rejecting the defense argument that it would have been more helpful to inform the jury that the defendant suffered from organic brain damage and schizophrenia rather than presenting evidence that he was a sociopath, as presented at trial).

192. 596 So. 2d 177 (La. 1992).

193. *Id.* at 191.

194. *See id.* The defendant also told the jury that he thought the death penalty was his appropriate punishment. *See id.* at 181.

195. *See id.* at 191. According to the court, the jury was not told that "while Sullivan may appreciate the difference between right and wrong at an intellectual level, his disease prevents him from integrating the knowledge to the other, emotional side of his personality.... [Nor did the jury hear] that in stressful situations Sullivan disassociates into a fantasy world and cannot differentiate fantasy from reality." *Id.*

altered the jury's decision at the penalty phase.[196]

Similarly, in *Loyd v. Smith*,[197] the U.S. Court of Appeals for the Fifth Circuit rejected the district court's conclusion that experts at trial and on post-conviction review provided similar diagnoses of the defendant's mental state: "While the district court's assessment of the raw evidence [including the fact that the defendant was physically abused as a child] is not in error, the court ignores the completely different and polarized conclusions offered by the two sets of doctors."[198] The doctors at trial principally diagnosed Loyd as depressed and could offer no explanation for his abnormal behavior,[199] while the post-conviction doctors, based on further psychological and neurological testing,[200] "indicated organic brain dysfunction such that Loyd could not control his impulses—a statutory mitigating circumstance."[201]

The courts in *Sullivan* and *Loyd* acknowledged what others ignore: the critical difference that a history of physical abuse and its long-term consequences may make to the jury's decision whether to sentence a defendant to death or life imprisonment. The contrast between courts that appreciate the significance of childhood abuse and those that do not foreshadows the problems that the defense will face in investigating and presenting childhood abuse as mitigating evidence at both the trial and post-conviction stages. When the experience and consequences of childhood abuse are not understood, an attorney's investigation and presentation of that mitigating evidence may be skewed and courts' expectations for and assessment

196. *See id.* at 192.

197. 899 F.2d 1416, 1427 (5th Cir. 1990) (*Loyd I*) (vacating the district court decision for failing to give due deference to state court findings of fact on ineffective assistance of counsel and remanding for reconsideration), *opinion following remand sub nom.* Loyd v. Whitley, 977 F.2d 149 (5th Cir. 1992) (*Loyd II*) (granting writ of habeas corpus based on ineffective assistance of counsel).

198. *Id.*

199. *See id.* at 1421.

200. A report prepared by one of the first set of doctors raised the possibility of brain dysfunction, but " 'there had not been any attempt at a full neuro-psychological evaluation.' " *Id.* at 1422 (quoting the testimony of the doctor at the post-conviction state court evidentiary hearing). This may be an example of the need for full neurological examinations that Dr. Green has suggested. *See* GREEN, *supra* note 59, at 73; *supra* note 79 (discussing Green's work).

201. *Loyd I*, 899 F.2d at 1427. One of the doctors testified that he believed that the form of the murder (raping, sodomizing, and killing a young girl) " 'was probably determined by "emotional or psychological factors" rooted in Loyd's childhood experience. I believe, however, that what triggered his actions was largely an organic (or physical) impairment of thought.' " *Loyd II*, 977 F.2d at 155 (quoting the doctor's testimony).

of the attorney's efforts may be misguided.

B. *The Intersection of a History of Childhood Abuse and the Punishment Phase of a Death Penalty Trial*

The trial in a death penalty case is unlike other criminal trials. The possibility of death as a punishment heightens the need for reliability in the process by which the sentence is imposed.[202] A death penalty trial occurs in two phases, guilt and punishment.[203] The punishment phase is not merely a postscript to the guilty verdict;[204] it is, as one scholar has stated, "a trial for life."[205] Thus, the punishment phase is of equal, if not greater, significance than the guilt phase.[206] An attorney representing a defendant facing the death penalty should, therefore, recognize the importance of each phase and prepare accordingly.[207] Likewise, the trial court, cognizant of the

202. *See* Johnson v. Mississippi, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special ' "need for reliability in the determination that death is the appropriate punishment" ' in any capital case." (quoting Gardner v. Florida, 430 U.S. 349, 364 (1977) (White, J., concurring in the judgment) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)))); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (noting that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *see also* Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 331 (1979) (arguing that capital cases are different because of high emotions and publicity); Goodpaster, *supra* note 30, at 304-05 (maintaining that capital trials are so different from other criminal trials that a higher standard must be used to evaluate the competence of counsel); Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 488-96 (1995) (analyzing how "death is different" jurisprudence infuses every part of a capital trial).

203. *See supra* note 20.

204. *See* Brewer v. Aiken, 935 F.2d 850, 857 (7th Cir. 1991) (" '[C]ounsel may not treat the sentencing phase as nothing more than a mere postscript to the trial.' " (quoting Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989))).

205. Goodpaster, *supra* note 30, at 303 (characterizing the penalty trial as being *for* the defendant's life and *about* the meaning and value of his life).

206. *See* Balske, *supra* note 202, at 353 (arguing that if evidence of guilt is overwhelming, the defense's focus should be on the goal of life imprisonment, beginning with voir dire); Goodpaster, *supra* note 30, at 331 (noting that if the evidence of guilt is strong, the penalty trial is the "only real trial").

207. *See* Glenn v. Tate, 71 F.3d 1204, 1208 (6th Cir. 1995) (concluding that "[i]f the lawyers had done what they should have done" they would have been able to present substantial mitigating evidence to the jury); *Brewer*, 935 F.2d at 857 (stating that the attorney " *'must make a significant effort'* " to present mitigating evidence to the jury (quoting *Kubat*, 867 F.2d at 369)); State v. Sullivan, 596 So. 2d 177, 191 (La. 1992) (observing that "any time a defendant is charged with first degree murder, defense counsel must prepare for the eventuality that a guilty verdict may be returned" and plan a penalty-phase defense); Geimer, *supra* note 33, at 278-81 (maintaining that the possibility of a death sentence should affect counsel's preparation and performance beginning with pre-trial negotiations and continuing through the penalty trial); Goodpaster, *supra* note 30, at

profound nature of the punishment-phase judgment, should seek to ensure the jury's full and careful consideration of the sentencing question.[208] As others have documented, far too often this does not occur: Attorneys do not adequately prepare for their own or the prosecution's case at the punishment phase,[209] and courts do not sufficiently instruct jurors on the meaning of mitigating evidence.[210] The next two Parts examine the ways in which these two problems arise in the punishment phase for a defendant who was seriously abused as a child.

1. Attorney Investigation and Presentation of Mitigating Evidence of Childhood Abuse

A defense attorney must begin preparing for the punishment phase of a death penalty trial at the same time she starts working on the guilt phase.[211] She must develop a coherent theory of mitigation that will inform every stage of the trial.[212] This task requires, at a minimum, a thorough investigation of both the defendant's life history and the crime. Based on this investigation, the attorney can then make strategic decisions about how to present the defendant's case for life imprisonment at the punishment phase.[213]

317-39 (explaining the additional responsibilities that an attorney has in a capital trial); White, *supra* note 16, at 325 (noting that attorneys familiar with the requirements of a capital trial understand that the penalty phase is the "probable focal point").

208. *See infra* Part II.B.2 (discussing the need for jury instructions on mitigation).

209. *See infra* notes 219-46 and accompanying text (discussing ways in which defense attorneys are ill-equipped to handle death penalty cases).

210. *See infra* notes 260-63 and accompanying text (discussing the importance of jury instructions on childhood abuse as mitigating evidence).

211. *See, e.g.*, Goodpaster, *supra* note 30, at 324 (asserting that starting after the guilt phase is too late); Lyon, *supra* note 36, at 703 (stating that the attorney must begin developing the case for mitigation as soon as she is assigned to the case). Scholarly and practice-oriented journals contain many cogent articles explaining what an attorney should do to prepare for the punishment phase. *See, e.g.*, A.B.A., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 91-137 (1989) [hereinafter A.B.A. GUIDELINES] (containing Guidelines 11.3-11.8.6 and related commentary); Balske, *supra* note 202; Jeff Blum, *Investigation in a Capital Case: Telling the Client's Story*, CHAMPION, Aug. 1985, at 27; Geimer, *supra* note 33; Goodpaster, *supra* note 30, at 317-39; Lyon, *supra* note 36; White, *supra* note 16, at 356-60.

212. *See* Balske, *supra* note 202, at 333-37 (explaining how the possibility of punishment by death must make every step of case different: plea bargaining, pretrial motions, voir dire, trial, and penalty trial); Goodpaster, *supra* note 30, at 320 (explaining that the attorney's obligation to investigate and present mitigating evidence must affect what she does before and during the trial: the relationship with one's client, the prosecutor, and the court; voir dire; and the guilt and penalty phases).

213. This investigation is critical so that the presentation to the jury at the guilt phase is consistent with that at the punishment phase. *See, e.g.*, Goodpaster, *supra* note 30, at 328-34 (discussing the effects of guilt-phase defenses on punishment-phase strategy); Lyon,

Complete preparation includes investigating the facts of the crime and the defendant's life history, consulting with mental health experts, and developing a relationship of trust with the defendant.[214] First and foremost, the defense attorney must comprehensively investigate every aspect of the defendant's life to know what information will help the jury understand the defendant and his commission of the crime.[215] The attorney must then consult with mental health professionals who will use their expertise to evaluate, test, and interpret the factual information about the defendant's life and its relationship to the crime.[216] If the attorney is court-appointed counsel, she must seek financial assistance from the trial court to ensure an adequate preparation.[217] Finally, the attorney must

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supra note 36, at 708-11 (explaining the importance of presenting a theory of mitigation that is consistent with the defense at the guilt phase). As Professor Sundby concluded from extensive interviews with jurors in capital cases, it is important to use different types of witnesses—professional and lay experts, family and friends—to "create a coherent defense theme." Sundby, *supra* note 54, at 1163-78 (analyzing the presentation of mitigating evidence in two cases: one that did not harmonize the evidence of mental illness and mitigation and resulted in a death sentence, and one that created a "distinctive" integrated picture of the defendant and resulted in a life sentence); *see also* White, *supra* note 16, at 358 (emphasizing the need to "develop a consistent theory before trial to facilitate consistent strategies relating to jury selection, witness preparation, pretrial motions, and overall strategy").

214. *See, e.g.*, Goodpaster, *supra* note 30, at 321-25; Kreitzberg, *supra* note 202, at 493-95; White, *supra* note 16, at 337-45.

215. *See, e.g.*, Blum, *supra* note 211; Lyon, *supra* note 36, at 703-08; White, *supra* note 16, at 340-42.

216. *See* Castro v. Oklahoma, 71 F.3d 1502, 1510 (10th Cir. 1995) (quoting a mental health expert who explained that "a 'comprehensive biopsychosocial life history outline or evaluation' was necessary" in order to " 'tie together the specific incidents of [the defendant's] life and interpret them so as to provide the jurors a cohesive picture of the life that he lived' "); Stebbins & Kenney, *supra* note 32, at 17-18 (identifying the use of a psychological expert as the key to interpreting the defendant for the jury); *see also* David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, CHAMPION, Apr. 1988, at 34, 35 (suggesting that a psychologist may help identify guilt-phase defenses as well as punishment issues). Mental health experts recognize the ways in which they may assist the defense in a capital case. *See, e.g.*, Arlene Bowers Andrews, *Social Work Expert Testimony Regarding Mitigation in Capital Sentencing Proceedings*, 36 SOC. WORK 440, 441 (1991) (explaining the role of a social worker as an "impartial educator"); Douglas S. Liebert & David V. Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15 AM. J. FORENSIC PSYCHIATRY 43, 46-53 (1994) (explaining the components of a thorough mental health evaluation: obtaining accurate historical biopsychosocial data, conducting a physical and neurological exam and a psychiatric and mental status exam, performing diagnostic studies, and specifying additional experts needed).

217. *See* A.B.A. GUIDELINES, *supra* note 211, at 96 (noting that "counsel should demand on behalf of the client all necessary experts for preparation of both phases of trial"); Stephen B. Bright, *Capital Cases: Obtaining Funds for Experts and Investigative Assistance*, CHAMPION, June 1997, at 31 (discussing the importance of making a detailed case-specific showing of the need for experts); White, *supra* note 16, at 342-44. In *Ake v.*

develop a relationship of trust with her client that will enable her to inquire effectively into sensitive and painful events in the defendant's life, including the crime and his upbringing.[218]

Despite the fundamental importance of this kind of extensive preparation, far too frequently it does not occur.[219] Many attorneys who represent defendants in death penalty cases are poorly equipped to defend their clients. They do not understand the substantive law governing the penalty phase;[220] they do not know how to investigate

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Oklahoma, 470 U.S. 68 (1985), the Court recognized the necessity of providing the defense a competent psychiatrist when the defendant's mental state would be a significant issue either at the guilt or the punishment phase. *See id.* at 77, 80, 83; *see also Castro*, 71 F.3d at 1505 (vacating a death sentence because the trial court refused to grant counsel expert psychiatric assistance).

218. *See* Blum, *supra* note 211, at 28-30 (observing that a client may not open up to an attorney for "weeks or months" but it is the attorney's obligation to create the trust that will eventually allow this to occur); Goodpaster, *supra* note 30, at 321-22 (discussing the importance of having an "effective relationship" with the client); Lyon, *supra* note 36, at 703-05 (noting the importance of establishing trust for investigating the client's background and for support through the trial); White, *supra* note 16, at 374-75 (explaining the necessity of a trusting relationship in order to develop persuasive mitigating evidence, to plea bargain, and to show a bond with the client that may evoke empathy from jurors).

219. *See, e.g.*, McFarland v. Scott, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting from the denial of certiorari) (attributing the "general unavailability of qualified attorneys to represent capital defendants" to two factors: the absence of standards for court-appointed counsel and the absence of funds to compensate lawyers); 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, 1841-66 (1994) (describing the widespread problem of, and reasons for, deficient counsel); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 397-410 (1995) (summarizing anecdotal and empirical evidence about indigent capital defendants being denied adequate counsel); Marcia Coyle et al., *Fatal Defense*, NAT'L L.J., June 11, 1990, at 30 (reporting on a six-month, six-state investigation of the quality of counsel in capital cases); *see also* A.B.A., Report Submitted with Recommendation No. 107, at 5-10 (calling for a moratorium on the death penalty) (approved Feb. 3, 1997) [hereinafter A.B.A. Moratorium Report] (recommending a moratorium in part because of the system-wide failure to provide competent, knowledgeable, and adequately funded trial attorneys); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 64-71 (1990) (documenting numerous examples of attorneys failing to adequately represent clients charged with capital crimes).

220. *See* Waters v. Thomas, 46 F.3d 1506, 1531-32 (11th Cir. 1995) (Clark, J., dissenting) (stating that because the lead attorney had not tried a case since before 1961, when trials occurred in one phase, he had no sentencing phase strategy); *Loyd I*, 899 F.2d at 1423, 1426 (pointing out that the state court found that trial counsel did not know the difference between using an insanity defense and presenting mitigation evidence); Bolder v. Armontrout, 713 F. Supp. 1558, 1567 & n.9 (W.D. Mo. 1989) (concluding that trial counsel's decision not to investigate mitigating evidence was based on not understanding the law), *rev'd on other grounds*, 921 F.2d 1359 (8th Cir. 1990); Goodpaster, *supra* note 30, at 303 n.22, 337 n.151 (compiling examples of attorneys who did not understand the "nature and significance of the penalty trial"); Justice Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 2 (1986) ("The federal reports are filled with stories of counsel who presented *no*

a defendant's background[221] or simply do not investigate at all;[222] they believe that the only relevant type of mitigating evidence is that which portrays the defendant as a good person;[223] they do not seek, or are denied, funds from the trial court to hire investigators or experts;[224] or they are not adequately compensated by the trial court.[225]

It is true that because a death penalty case differs from other criminal trials, many attorneys are unfamiliar with how to prepare for, and what to present at, the punishment phase.[226] For example,

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evidence in mitigation of their client's sentences because they did not know what to offer or how to offer it, or had not read the state's sentencing statute." (footnote omitted)).

221. *See, e.g.*, Mathis v. Zant, 704 F. Supp. 1062, 1063 (N.D. Ga. 1989) (noting that the trial counsel did not seek out family members, but said he would have spoken to them if they had contacted him), *vacated and remanded*, 975 F.2d 1493 (11th Cir. 1992); Rose v. State, 675 So. 2d 567, 571-72 (Fla. 1996) (stating that counsel conducted virtually no investigation because he was "totally unfamiliar with the concept of aggravating and mitigating factors").

222. *See, e.g.*, Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993); *see also* White, *supra* note 16, at 346-53 (discussing cases where trial counsel conducted no investigation for the punishment phase).

223. *See, e.g.*, Burger v. Kemp, 483 U.S. 776, 813 (1987) (Blackmun, J., dissenting) (noting that the trial attorney asked the defendant to identify people who could say " 'anything good about him' " (quoting the Trial App. at 51)); *Mathis*, 704 F. Supp. at 1066 (suggesting that trial counsel did not present mitigating evidence of child abuse, mental illness, and substance abuse because he thought "that only 'good' details" were mitigating).

224. *See, e.g.*, Castro v. Oklahoma, 71 F.3d 1502, 1509 (10th Cir. 1995) (noting that the trial court denied counsel's request for a psychiatric expert); *Loyd II*, 977 F.2d at 152 (observing that counsel did not pursue independent expert assistance after the trial court approved only part of his request for funds for experts and co-counsel did not tell him the family had given additional money for experts); Vick, *supra* note 219, at 391-94 (reporting the statutory limits on funds for hiring experts (e.g., South Carolina $2500, Illinois $250) as well as judicially imposed limits (e.g., Georgia no funds, Texas $500)); White, *supra* note 16, at 350-51 (discussing cases in which the attorney did not seek independent expert witnesses).

225. *See, e.g.*, A.B.A. Moratorium Report, *supra* note 219, at 8-9 (citing examples of attorneys being paid $500-$800 for a capital case); Bright, *supra* note 219, at 1853-55 (comparing the low level of compensation attorneys receive in death penalty cases to significantly higher rates charged by lawyers in civil practice and awarded to attorneys in civil rights cases); Kreitzberg, *supra* note 202, at 511-17 (discussing inadequate funding in light of inexperienced counsel, especially compared to the greater experience and resources in prosecutors' offices); Vick, *supra* note 219, at 385-91 (surveying low statutory caps on appointed attorney fees, low judicial awards of attorney fees, and poorly-funded public defender offices).

226. *See* Goodpaster, *supra* note 30, at 334-35 (noting that at the penalty phase of the trial, counsel takes on an unfamiliar role); Stebbins & Kenney, *supra* note 32, at 16 (stating that capital cases place a defense attorney in the unusual role of putting on an affirmative case, and the attorney usually has no training in how to do that); White, *supra* note 16, at 325 (observing that unfamiliarity with the punishment phase may cause attorneys to focus on the guilt phase).

many attorneys are unaccustomed to presenting an affirmative case in support of life imprisonment,[227] but instead rely on the more familiar argument that the State has not met its burden of proof, as is often urged at the guilt phase.[228] This unfamiliarity should not be tolerated, however, as a justification for not adequately investigating and presenting a forceful case at the punishment phase; its consequence for the defendant is too great.[229]

Not surprisingly, an attorney who does not understand the nature and scope of mitigation often will ignore, or fail to uncover, evidence of childhood abuse.[230] She will not ask the kind of questions that elicit information about abuse.[231] If she asks the defendant to

227. *See* Geimer, *supra* note 33, at 287-88 (arguing that the defense attorney must assume the burden of proving the case for a life sentence for the defendant); Goodpaster, *supra* note 30, at 337-38 (comparing defense counsel's role at the punishment phase to that of a plaintiff's attorney in a civil case: establishing a "prima facie case for life"); Stebbins & Kenney, *supra* note 32, at 16 ("Investigating, theorizing, and presenting an affirmative case for life is something that most attorneys are neither trained to do nor particularly well-suited to do.").

228. *See* Goodpaster, *supra* note 30, at 337-38 (noting that most defense attorneys are not used to this role and yet courts review their performance as though this were their accustomed role); Stebbins & Kenney, *supra* note 32, at 16 (observing that the normal role for defense counsel is to react to the prosecution's case).

229. *See, e.g.*, Burger v. Kemp, 483 U.S. 776, 816 n.14 (1987) (Blackmun, J., dissenting) (arguing that a defense based on making "the prosecutor 'prove his case' " is " 'tantamount to no strategy at all' " (quoting Burger v. Kemp, 753 F.2d 930, 946 (11th Cir. 1985) (Johnson, J., dissenting))); White, *supra* note 16, at 356-57 (arguing that it is inadequate to adopt a strategy at sentencing of " 'put[ting] the government to its burden of proof' ").

230. *See, e.g.*, *Burger*, 483 U.S. at 789-95 (observing that the attorney did not pursue or present evidence about the defendant's childhood, including abuse by his parents, because he thought it would reveal violent behavior that was inconsistent with his punishment phase strategy of showing the defendant was a follower); Barnes v. Thompson, 58 F.3d 971, 979-80 (4th Cir. 1995) (stating that, because the defense counsel strategy was to present the defendant as not a danger, defense counsel did not find evidence of the defendant's "violence-ridden and abusive" childhood); Thomas v. Kemp, 796 F.2d 1322, 1324-25 (11th Cir. 1986) (noting that defense counsel limited his investigation to talking to the defendant's mother and did not seek out other individuals who knew about the defendant's abuse as a child and other difficulties); Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983) (holding that a failure to conduct any investigation denied the jury the ability to consider the defendant's family history); Rose v. State, 675 So. 2d 567, 572 (Fla. 1996) (stating that the defense attorney adopted an " 'accidental death' " theory at the punishment phase without conducting any investigation that would have revealed a history of abuse and mental illness).

231. *See, e.g.*, Williams v. Turpin, 87 F.3d 1204, 1211 (11th Cir. 1996) (noting that the attorneys did not properly interview the defendant's mother or pursue her hints about child abuse or contact the defendant's father); *Barnes*, 58 F.3d at 980 (observing that counsel did not pursue defendant's mental health or childhood abuse because his family only spoke of positive features); Mathis v. Zant, 704 F. Supp. 1062, 1063 (N.D. Ga. 1989) (stating that the attorney "failed to seek detailed information about his client's past"), *vacated and remanded*, 975 F.2d 1493 (11th Cir. 1992); *see also* Blum, *supra* note 211, at 27

identify witnesses who will testify to his good character, it is unlikely the defendant will understand that request to include those who know about his abuse.[232] If an attorney conveys the impression that mitigating evidence consists of character and background information that portrays the defendant in a positive light, the defendant may say that he is unwilling to testify because his past, which includes childhood abuse, will not do that.[233]

Even if an attorney understands the potential scope of mitigating evidence, she will detrimentally limit her investigation if she relies solely on the defendant to identify individuals with relevant information. If the defendant denies being abused he will not be in a position to identify anyone. The defendant may refuse to talk about his history of abuse[234] because he may be ashamed of it[235] or believes that it was his fault.[236] Fear or embarrassment may cause the defendant to instruct his attorney not to talk to the defendant's family,[237] so that no one will talk about the abuse. Even if the

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(noting that the attorney must "[l]isten for any allusions to child abuse or neglect"); Donna Della Femina et al., *Child Abuse: Adolescent Records vs. Adult Recall*, 14 CHILD ABUSE & NEGLECT 227, 230-31 (1990) (giving examples of ways to elicit information of abuse when the individual may be protective of his parents, e.g., "Who in the household has a temper? What's the worst that ever happened?" ... " 'Were you ever hit with a belt?' ... 'Are there any scars I can't see?' "); Lewis et al., *Characteristics of 15 Death Row Inmates*, *supra* note 125, at 844 (reporting that subjects on death row did not tell their attorneys about their abuse or history because no one ever asked them).

232. *See, e.g.*, *Burger*, 483 U.S. at 813 (Blackmun, J., dissenting) (observing that the defendant should not have been expected to tell his attorney about his abusive upbringing when asked to identify persons who would say positive things about him); *see also* Lewis et al., *Characteristics of 15 Death Row Inmates*, *supra* note 125, at 844 (reporting that when researchers asked subjects why they had not told their attorneys about the abuse, they stated that no one had asked them or they did not believe it was relevant).

233. *See, e.g.*, Stafford v. Saffle, 34 F.3d 1557, 1563 (10th Cir. 1994) (noting that the defendant did not want his childhood presented in mitigation and refused to testify because he "thought it would be useless"); *Thomas*, 796 F.2d at 1324 (noting that the defendant's refusal to testify contributed to the attorney conducting no investigation).

234. *See* Dorothy Otnow Lewis et al., *Intrinsic and Environmental Characteristics of Juvenile Murderers*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 582, 586 (1988) (observing that subjects and families had less reason to hide information on family violence prior to the subject committing murder—afterward they may have had fears of self-incrimination); Stein & Lewis, *supra* note 61, at 523 (reporting that one reason it is difficult to reconstruct the experience of abuse is that adults minimize or deny their childhood abuse); *supra* note 74 and accompanying text (discussing why adults may not want to reveal childhood abuse).

235. *See* Lewis et al., *Characteristics of 14 Juveniles*, *supra* note 125, at 588; Stein & Lewis, *supra* note 61, at 523.

236. *See supra* note 74 and accompanying text (discussing reasons why a person may blame himself for being abused).

237. *See, e.g.*, Gardner v. Dixon, No. 91-4010, 1992 U.S. App. LEXIS 12971, at *14 (4th Cir. June 4, 1992) (noting that the defendant told his lawyer about his abusive background

attorney talks to family members, they may deny that the defendant was abused.[238] Finally, even when the defendant is willing to talk about his abusive childhood, he may not be able to identify corroborative sources of information.[239] Other sources, such as records, neighbors, and teachers, must be sought out to provide this critical information.[240] In sum, when the attorney does not understand the nature of the investigation that is required, she will miss the significance of the information she receives and/or fail to locate valuable sources of evidence about the defendant's background, specifically his physical abuse as a child.

When the attorney's mitigation investigation is insufficient, she will likely present an inaccurate or incomplete picture of the

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but refused to allow him to involve family members in the case); Knight v. Dugger, 863 F.2d 705, 750 (11th Cir. 1988) (stating that because the defendant did not want his family history to become public knowledge, defense attorneys did not pursue character witnesses beyond his mother); *Thomas*, 796 F.2d at 1324 (stating that the trial attorney testified that he "made little effort" to find mitigating evidence in part because the defendant "did not 'want anyone to cry for him' "); Bolder v. Armontrout, 713 F. Supp. 1558, 1567 (W.D. Mo. 1989) (stating that the defendant told his attorney not to talk to his family), *rev'd on other grounds*, 921 F.2d 1359 (8th Cir. 1990); Waldrop v. State, 523 So. 2d 475, 482 (Ala. Crim. App. 1987) (noting that the defendant never told trial attorneys about the physical and sexual abuse that he experienced as a child); People v. Perez, 592 N.E.2d 984, 986 (Ill. 1992) (stating that the defendant refused to provide any information about his family or background); *see also* White, *supra* note 16, at 374 n.349 (noting that without the defendant's cooperation, it may be impossible for the attorney to find other sources of information about the defendant). *But cf.* Clanton v. Bair, 826 F.2d 1354, 1357 (4th Cir. 1987) (concluding that because the defendant's father was dead, "no apparent reason for reluctance" existed for telling about his mistreatment).

238. *See, e.g.*, Wade v. Calderon, 29 F.3d 1312, 1341 (9th Cir. 1994) (Trott, J., concurring in part and dissenting in part) (indicating that the record showed that the defendant's mother denied the allegations of child abuse); *Waldrop*, 523 So. 2d at 483 (noting that the father denied abusing the defendant); *see also* Feldman et al., *supra* note 125, at 351 (observing that families may be more interested in concealing abuse than in helping the defendant); Lewis et al., *Characteristics of 14 Juveniles*, *supra* note 125, at 588 (remarking that parents had "vested interests" in concealing abuse).

239. *See, e.g.*, Parkus v. Delo, 33 F.3d 933, 938 (8th Cir. 1994) (concluding that the defendant, who was mentally ill and borderline mentally retarded, should not be expected to know that state agency records existed containing information about his childhood abuse). *But see Gardner*, 1992 U.S. App. LEXIS, at *18-*20 (holding that the attorney was not responsible for failing to locate social service records containing information about the defendant's childhood because the defendant did not tell him such records existed or what county they were in).

240. *See, e.g.*, *Thomas*, 796 F.2d at 1324-25 (noting that high school teachers and former employers would have testified about the defendant's home life); *Perez*, 592 N.E.2d at 987-88 (stating that the attorney had school records that he could have used to develop mitigating evidence even though the defendant would not provide him with family information); *see also* Blum, *supra* note 211, at 27-30 (emphasizing the importance of identifying individuals, including professionals, who may be sources of information about the defendant).

defendant to the jury. The likely result will be that the jury does not hear any evidence of the defendant's physical abuse as a child or how it continued to affect his behavior.[241] The jury may hear testimony about facts of the abuse from one witness, but not hear available corroborating or interpretive testimony.[242] If the jury hears an expert provide a psychological explanation for the long-lasting effects of the abuse, the diagnosis may be wrong[243] or more aggravating than mitigating.[244] These errors will be compounded if the attorney waits until the eve of the punishment phase to begin developing a case for mitigation. She will not have time to conduct the kind of investigation necessary to identify and document the defendant's history of physical abuse and to utilize experts to construct a cogent explanation of the defendant's crime.[245] The result will be a weak

241. *See, e.g.*, Glenn v. Tate, 71 F.3d 1204, 1206-11 (6th Cir. 1995); Barnes v. Thompson, 58 F.3d 971, 979-81 (4th Cir. 1995); Jackson v. Herring, 42 F.3d 1350, 1363-69 (11th Cir. 1995); *Thomas*, 796 F.2d at 1325; Pickens v. Lockhart, 714 F.2d 1455, 1466-67 (8th Cir. 1983); *Bolder*, 713 F. Supp. at 1567; Mathis v. Zant, 704 F. Supp. 1062, 1065-66 (N.D. Ga. 1989), *vacated and remanded*, 975 F.2d 1493 (11th Cir. 1992); Rose v. State, 675 So. 2d 567, 571-74 (Fla. 1996); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993); *Perez*, 592 N.E.2d at 993-96; State v. Sullivan, 596 So. 2d 177, 191-92 (La. 1992).

242. *See, e.g.*, *Parkus*, 33 F.3d at 940 (noting that the State withheld prison records that corroborated the defendant's brother's testimony regarding their uncle's abuse of the defendant and that, at trial, the State ridiculed the brother's testimony as untrue); Devier v. Zant, 3 F.3d 1445, 1453 & n.18 (11th Cir. 1993) (observing that counsel presented family members who testified about the defendant's abuse and its effect on his early life, but not an expert who would have testified about the effects this abuse had on the defendant's development as a child and as an adult); *see also supra* note 167 (citing cases where defense counsel failed to present expert testimony linking the defendant's childhood abuse to his adult behavior).

243. *See, e.g.*, *Loyd II*, 977 F.2d at 154-56 (observing that at trial, psychiatric experts either could not explain why the defendant committed the murder or attributed the etiology of the crime to abuse as a child, while on post-conviction review, independently retained psychiatrists diagnosed mental illness and organic brain damage).

244. This phenomenon occurs most often when the defense trial expert states that the defendant is a sociopath or suffers from antisocial personality disorder and the expert on post-conviction makes a different diagnosis. *See, e.g.*, Card v. Dugger, 911 F.2d 1494, 1511-13 (11th Cir. 1990) (noting that the trial psychologist labeled the defendant a sociopath, while post-conviction experts diagnosed brain damage and schizophrenia); *see also* Graham v. Collins, 506 U.S. 461, 500 (1993) (Thomas, J., concurring) (expressing astonishment that the defendant would claim that antisocial personality is a mitigating factor). As Dr. Pincus explains, the label of sociopath is detrimental and misleading because it is often applied in the absence of adequate psychological and neurological testing. *See* Pincus, *supra* note 76, at 358. *But see* Liebman & Shepard, *supra* note 51, at 829-34 (arguing that sociopathy has at least limited mitigating potential).

245. *See, e.g.*, Brewer v. Aiken, 935 F.2d 850, 851 (7th Cir. 1991) (noting that in the first case under Indiana's new death penalty statute, defense counsel asked for, and was denied, a one-week continuance because he did not know the penalty phase would immediately follow the guilt phase and he was unprepared to proceed); Bertolotti v. Dugger, 883 F.2d 1503, 1516 (11th Cir. 1989) (stating that the attorney tried to have the defendant evaluated

case for mitigation, lacking in corroboration and authenticity, that is prone to attack by the prosecution and dismissal by the jury.[246] The mitigating potential of a history of childhood abuse and its long-term negative consequences for the defendant is lost to the jury.

The mitigating weight of a history of childhood abuse may also be lost if the defense attorney does not anticipate the possibility that the prosecution will turn the long-term negative behavioral consequences into aggravating circumstances. An effective presentation of the mitigating qualities of childhood abuse will include connecting the adverse behavioral and developmental effects on the defendant to the commission of the murder. The defense should expect that the State will try to use this testimony against the defendant in a number of ways. The prosecution may argue that the evidence of child abuse is aggravating by establishing that the abuse has made the defendant a dangerous and violent person.[247] The prosecutor may try to use the defendant's witnesses to elicit testimony about the defendant's prior criminal record or other violent behavior.[248] Finally, the prosecution may suggest that the jury

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by a psychiatrist the morning of the sentencing hearing, but the defendant refused); People v. Ledesma, 729 P.2d 839, 864 (Cal. 1987) (in bank) (observing that the attorney admitted he gave up after the guilt phase and had not prepared for the punishment phase); *Perez*, 592 N.E.2d at 995-96 (concluding that as a result of the attorney's inadequate investigation, the attorney did not know that he needed an expert who could have assisted his communication with the defendant, thus leaving the attorney unable to make any use of the family information the defendant provided just before sentencing); *Sullivan*, 596 So. 2d at 191-92 (noting that the defense counsel did not prepare for the punishment phase because he was confident the jury would convict the defendant of second degree murder); *see also* Goodpaster, *supra* note 30, at 324 (asserting that waiting until there is a guilty verdict is too late to begin the "life investigation"); Sundby, *supra* note 54, at 1185 (noting that integrating expert and lay testimony takes "extensive investigative time and effort").

246. *See, e.g.*, *Mathis*, 704 F. Supp. at 1065-66 (stating that a full investigation of the defendant's background would have uncovered evidence of a "disadvantaged, indeed tormented, upbringing [that] could have resulted in a sentence less than death"); *Heiney*, 620 So. 2d at 173 (concluding that a proper investigation would have revealed mitigating factors, including being chronically physically and emotionally abused as a child, that could have established a basis for upholding the jury recommendation of a life sentence); *Perez*, 592 N.E.2d at 995-97 (holding that the failure to conduct a thorough investigation of family history made the defendant's death sentence unreliable).

247. *See* Penry v. Lynaugh, 492 U.S. 302, 323-24 (1989) (noting that the prosecutor argued that a strong possibility existed that the defendant would continue to commit acts of violence); Clark v. State, 881 S.W.2d 682, 699 (Tex. Crim. App. 1994, pet. ref'd) (pointing out that on cross-examination the State elicited testimony from the defendant's expert that child abuse was "part of the roots/foundation cornerstones/building blocks of Chronic Anger Syndrome").

248. *See* Burger v. Kemp, 483 U.S. 776, 792-94 (1987) (concluding that the State could use the defendant's witnesses to show the defendant's "violent tendencies"); Porter v. Wainwright, 805 F.2d 930, 935-38 (11th Cir. 1986) (noting the State's argument that it was reasonable for the defendant's attorney not to present character witnesses about the

discount the evidence of childhood abuse altogether because others who were similarly abused did not commit murder.[249]

The potential for drawing negative inferences or introducing other violent conduct should not deter the defense from investigating and presenting a case for mitigation based on evidence of childhood abuse.[250] If the case is in a state that allows the introduction of unadjudicated offenses, the prosecution will be able to present evidence of prior violent behavior regardless of whether the defense opens the door to such testimony.[251] When properly prepared, the defense may counter the prosecution's characterization by placing the prior violence in context,[252] presenting testimony about the

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defendant's childhood abuse and damaging experiences in juvenile detention homes because it would have opened the door to his prior criminal activities); Whitley v. Bair, 802 F.2d 1487, 1495-96 (4th Cir. 1986) (finding that the defendant was not prejudiced by his lawyer's failure to present mitigating evidence of child abuse and brain damage because his extensive criminal background would have come in and, in the court's judgment, would have outweighed the mitigating evidence). *But see* Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983) (rejecting the district court's surmise that defense counsel did not put on evidence of the defendant's childhood abuse because it would have brought out his bad criminal record on the ground that "[i]t is sheer speculation that character witnesses in mitigation would do more harm than good"). Independently, the defense attorney must be prepared to counter the prosecutor presenting evidence of the defendant's criminal history as part of its case in chief. *See* White, *supra* note 16, at 344-45, 358-60.

249. *See* Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987) (noting that siblings' testimony could have been used against the defendant in part because they emerged as "normal citizens" even though they had suffered "similar abuse and neglect"); State v. Wilson, No. CIV.A.92CA005396, 1994 WL 558568, at *37 (Ohio Ct. App. Oct. 12, 1994) (quoting the prosecutor's argument that " 'a lot of people have had tough childhoods ... [and] we all know that lots of kids have been abused, but they don't go out and commit the kind of offenses that [defendant] commit[ted]' "), *aff'd*, 659 N.E.2d 292 (Ohio 1996); State v. Kinley, No. 2826, 1993 WL 224496, at *24-*25 (Ohio Ct. App. June 24, 1993) (noting that the prosecutor argued that other persons endured abusive childhoods and did not commit murder), *aff'd*, 651 N.E.2d 419 (Ohio 1995).

250. *See* Kenley v. Armontrout, 937 F.2d 1298, 1309 (8th Cir. 1991) (holding that mitigating evidence should have been presented even if it would have caused the jury to hear aggravating information; in light of the defendant's "crazed and violent actions" on the night of the crime, it was "doubtful that much of the additional aggravating information would have had any significant incremental aggravating effect on the jury").

251. *See* Cockrum v. Johnson, 934 F. Supp. 1417, 1446 (E.D. Tex. 1996), *rev'd on other grounds*, 119 F.3d 297 (5th Cir. 1997); Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249, 1267-77 (1993) (reviewing the laws in the 16 states that permit the State to introduce evidence of unadjudicated offenses at the punishment phase).

252. *See Burger*, 483 U.S. at 814 (Blackmun, J., dissenting) (noting that minor criminal offenses easily could have been outweighed by circumstances of child abuse and neglect); Abdur' Rahman v. Bell, 999 F. Supp. 1073, 1099, 1100-01 (M.D. Tenn. 1998) (concluding that a mental health expert could have testified about the defendant's background and mental health history and "could have offered an explanation placing in context the negative aspects of [his] past" that included convictions for assault and second degree

defendant's lack of future dangerousness,[253] and refocusing the jury's attention on the precipitating source of the defendant's violence—his own abuse as a child.[254] The defendant also may rebut the claim that the abuse is irrelevant because others who were abused did not kill anyone. Family and expert witnesses should be prepared to testify about individual circumstances that made the defendant's experience of abuse especially severe and debilitating—for example, the defendant may have endured the brunt of the abuse in the family,[255] or his mental deficiencies may have compounded the harm from the abuse.[256] Unfortunately, courts,[257] and defense attorneys themselves,[258] often say that the aggravating potential was a reason

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murder and misconduct in prison and in school).

253. *See* May v. Collins, 904 F.2d 228, 231 (5th Cir. 1990) (per curiam) (noting that a doctor explained that the defendant functioned well in a structured setting and was not now dangerous); *see also* Logan, *supra* note 36, at 15, 19 (suggesting that the defendant's lack of future dangerousness may be established by demonstrating that the circumstances of the crime were unique, and/or that the defendant's behavior is being controlled in prison).

254. *See, e.g.*, Richard v. State, 842 S.W.2d 279, 283 (Tex. Crim. App. 1992, no pet.) (en banc) (observing that defense counsel used cross-examination of the State's expert to establish that "many of the circumstances of [the defendant's] brutalized past were either contributory to or indicative of" the sociopathic personality the expert ascribed to the defendant); *see also May*, 904 F.2d at 231 (per curiam) (noting that a doctor explained how defendant's brain damage and childhood abuse may have impaired his social functioning and emotional development and may have impaired his ability to "reflect on the appropriateness of his actions before manifesting them").

255. *See supra* notes 65, 106 and accompanying text (discussing psychological literature and cases on defendants who were singled out for abuse).

256. *See supra* notes 66, 83-85, 116-33 and accompanying text (discussing the negative interactive effect of childhood abuse and mental impairments).

257. *See, e.g.*, *Burger*, 483 U.S. at 792-95 (concluding that the defense attorney acted reasonably in not presenting evidence of childhood abuse and turmoil because it suggested violent tendencies at odds with his chosen penalty phase strategy—that the defendant acted under another's influence); Porter v. Singletary, 14 F.3d 554, 558-60 (11th Cir. 1994) (affirming the district court's findings that attorneys at two sentencing hearings reasonably decided not to present evidence of the defendant's background because it included extensive criminal activity); Whitley v. Bair, 802 F.2d 1487, 1495-96 (4th Cir. 1986) (concluding that negative aspects of the testimony of the defendant's sister about the defendant's mother and brother beating him and expert testimony on the defendant's organic brain dysfunction and antisocial personality disorder meant the defendant was not prejudiced by the trial counsel's failure to develop or present such evidence); Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983) (disagreeing with the district court's ruling that counsel was reasonable not to present evidence of the defendant's background). *But see Burger*, 483 U.S. at 814 (Blackmun, J., dissenting) (arguing that the mother's testimony about the defendant's father kicking him out of the house in Indiana and the defendant thereafter selling his shoes to buy food while hitchhiking to her home in Florida "may well have outweighed the relevance of any earlier petty theft").

258. *See, e.g.*, *Burger*, 483 U.S. at 790-94 (stating that the trial attorney did not have defendant's mother or others testify to his abusive childhood because they might have testified about one petty offense and juvenile probation, which were contrary to the clean

not to present the mitigating evidence of abuse.[259] This attitude is an attempt to excuse the failure to investigate or present evidence of childhood abuse rather than confront the complexity and strength of childhood abuse as a mitigating circumstance.

2. Jury Instructions on Mitigating Evidence of Childhood Abuse

Even when the defendant's history of childhood abuse is fully developed and presented to the jury at the punishment phase, the defense may face an additional hurdle: jury instructions that do not adequately guide the jury's consideration of childhood abuse as a mitigating factor. Jury instructions play a critical role by informing the jury how it may consider evidence it has heard regarding the defendant's sentence.[260] Empirical research suggests that, in general, jurors have a difficult time comprehending instructions at the penalty phase of a death penalty trial.[261] Jurors appear to have an especially

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criminal record then before the jury); Barnes v. Thompson, 58 F.3d 971, 980-81 (4th Cir. 1995) (finding no prejudice from defense attorney's failure to pursue or present evidence of child abuse or mental condition because he maintained, and the court agreed, that it would show that the defendant was dangerous); *Porter*, 14 F.3d at 558 (noting that the trial attorney did not present evidence of the defendant's troubled childhood, including physical abuse by his stepfather, in order to "shield the jury from Porter's prior extensive criminal activity").

259. I recognize that cases may exist where an attorney legitimately decides not to present the defendant's childhood abuse because attendant aggravating circumstances would overwhelm the mitigating aspects of the evidence. As Logan points out, some forms of child abuse possess more mitigating potential than others, e.g., physical abuse may have more mitigating potential than emotional neglect. *See* Logan, *supra* note 36, at 16. None of the cases analyzed in this Article, however, make that kind of nuanced analysis.

260. *See* Gregg v. Georgia, 428 U.S. 153, 190-95 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (discussing the importance of guiding the jury's sentencing decision); Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317, 345-46 (1981) (stating that the 1976 Supreme Court death penalty decisions recognized that jury instructions are "an indispensable device for ensuring" proper consideration of the evidence); Liebman & Shepard, *supra* note 51, at 786-89 (arguing that a constitutional imperative exists for a court to instruct the jury on mitigating factors).

261. *See, e.g.*, Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996) (discussing two studies, one showing a misunderstanding of the central issues such as the scope of mitigation, non-unanimity on mitigating factors, and the requirements of weighing mitigating and aggravating circumstances; and the other showing greater clarity when less confusing instructions were given); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995) (reporting the results of the Capital Jury Project North Carolina study, showing that jurors misunderstood standards regarding aggravation and mitigation, burdens of proof, and the lack of unanimity requirement). *See generally* Symposium, *The Capital Jury Project*, 70 IND. L.J. 1033 (1995) (presenting the preliminary results of the Capital Jury Project study,

difficult time understanding the role and meaning of mitigating evidence.[262] Despite the intuitive, empathetic sense that some jurors may have about how childhood abuse may impair a defendant's development and subsequent adult behavior, they may not know how it should relate to their judgment regarding the proper punishment for the defendant.[263]

While it should be incumbent on trial courts to explain the meaning of mitigating evidence in every case, it is not constitutionally required according to the Supreme Court. The Court has held that the Eighth Amendment does not require the trial judge to instruct the jury on the concept of mitigation or on the existence of particular mitigating evidence presented in the case.[264] The Court also has upheld death penalty statutes that do not designate sentencing factors as mitigating or aggravating.[265] These holdings pose particular problems when attorneys present evidence such as childhood abuse.

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documenting juror misconceptions about their role and sense of responsibility, jury instructions, and the function of the guilt and punishment phases).

262. *See* Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411, 420-24, 433 (1994) (finding that statutory aggravating and mitigating factors were not understood); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1 (summarizing studies and anecdotal evidence regarding juror confusion about the meaning of mitigation).

263. *See* WHITE, *supra* note 20, at 84-85 (reporting that in a case where the defendant presented substantial mitigating evidence, including childhood abuse, a juror remarked that the jury did not know if the defendant's background could be considered mitigating, but thought mitigating circumstances had to be related to the crime); Logan, *supra* note 56, at 36 (observing that judges and jurors report not understanding the connection between the defendant's childhood abuse and the crime). Courts may be equally misinformed. *See, e.g.*, Buxton v. Collins, No. H-91-494, slip op. at 6 (S.D. Tex. Feb. 23, 1991), *aff'd on other grounds*, 925 F.2d 816 (5th Cir. 1991) (suggesting that evidence of child abuse would evoke "vacuous sentimentality" or be "as likely to exacerbate as to mitigate").

264. *See* Buchanan v. Angelone, 118 S. Ct. 757, 758-59 (1998); *see also* Saffle v. Parks, 494 U.S. 484, 490 (1990) (concluding that while states may not limit *what* the jury considers at the punishment phase, the Constitution places no limitations on *how* states instruct juries to consider that evidence).

265. *See* Tuilaepa v. California, 512 U.S. 967, 977 (1994) (holding that the failure to classify the sentencing factor of age as either mitigating or aggravating was not unconstitutionally vague and noting that competing arguments by both sides regarding age as mitigating or aggravating promote reasoned decisionmaking); *id.* at 981-82 (Stevens, J., concurring in the judgment) (emphasizing that the failure to characterize factors as either aggravating or mitigating reduces the risk of arbitrary sentencing); Zant v. Stephens, 462 U.S. 862, 875 (1983) (finding the Georgia sentencing statute constitutional even though it did not specify standards to guide the jury's consideration of mitigating and aggravating factors); *see also* Johnson v. Texas, 509 U.S. 350, 372-73 (1993) (holding that as long as the jury can "consider in some manner" mitigating evidence, no constitutional violation exists).

As demonstrated above, childhood abuse is potentially double-edged:[266] Both the prosecution and the defense may argue that the evidence of childhood abuse and its long-term consequences for the defendant supports their positions.[267] Without proper guidance, a juror may not understand that evidence of childhood abuse and its consequences is a legitimate basis on which to consider life imprisonment as the appropriate punishment for the defendant.[268]

3. Conclusion

The confluence of inadequately prepared defense attorneys and improperly instructed juries creates insurmountable barriers to the effective consideration of mitigating evidence that the defendant was abused as a child.[269] This is not to say that jurors will always consider such evidence mitigating enough to vote for a sentence of life imprisonment over death, even when this evidence is adequately presented and explained.[270] However, when a defendant who was abused as a child and who now faces the death penalty is so consistently disadvantaged by systemic obstacles, the presumption that the death penalty is no longer arbitrarily and capriciously applied is seriously challenged.

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266. *See* Penry v. Lynaugh, 492 U.S. 302, 324 (1989) ("[M]ental retardation and history of abuse is thus a two-edged sword: it may diminish [the defendant's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."); White, *supra* note 16, at 364 (noting that childhood abuse, like mental illness, may suggest that the defendant will continue to be a threat to society).

267. *See supra* notes 137-42, 247-49 and accompanying text (identifying how each side may use childhood abuse to advance its case).

268. *See Penry*, 492 U.S. at 328.

269. *See* WHITE, *supra* note 20, at 87 (arguing that if the defendant is unable to, or does not, present a full picture of his background, the penalty phase exacerbates the defendant's disadvantageous position and suggesting that the penalty phase fails to reduce the extent of arbitrariness).

270. *See, e.g.*, Abdur' Rahman v. Bell, 999 F. Supp. 1073, 1098 (M.D. Tenn. 1998) (recognizing that "[p]eople with bad childhoods can be sentenced to death," but that the Constitution requires that evidence of childhood abuse be presented to the jury); Sireci v. State, 587 So. 2d 450, 454-55 (Fla. 1991) (affirming the trial court's finding that defendant's brain damage and childhood abuse were mitigating, causing the court to give less weight to the heinousness aggravating factor, but still finding death the appropriate penalty); State v. Murphy, 605 N.E.2d 884, 909-10 (Ohio 1992) (Moyer, C.J., dissenting) (noting that the jury heard evidence of "neglect, physical abuse and psychological torment" that the defendant suffered as a child and psychological testimony about the negative consequences of his upbringing, yet the jury still imposed death, as did a majority of the court in its independent review of the evidence).

C. *Post-Conviction Limitations on the Analysis of Childhood Abuse as a Mitigating Factor*

The trial of a defendant facing the death penalty is considered the " 'main event.' "[271] The resources of the criminal justice system are supposed to be concentrated at the trial to ensure that the defendant receives a fair trial.[272] As the previous Parts demonstrated, however, failures by the defense attorney or the trial court may prevent the realization of this goal. Under these circumstances, a defendant may raise constitutional challenges to his conviction and sentence in post-conviction proceedings in state and federal court.[273] In general, post-conviction review of a death sentence is narrowly circumscribed.[274] This Part examines how restrictions placed on two

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271. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

272. *See id.* ("Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.").

273. *See* McFarland v. Scott, 512 U.S. 849, 859 (1994) (noting that while the trial is the main event, a defendant is entitled by federal law to challenge his conviction and sentence). In federal court, post-conviction review is governed by statute. *See* 28 U.S.C. §§ 2241-2254 (1994), *as amended by* Antiterrorism and Effective Death Penalty Act of 1996, Title I, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA] (codified at scattered sections of 28 U.S.C.); JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.6 (2d ed. 1994 & Supp. 1997) (explaining the role of habeas corpus review in capital cases); *id.* § 3.2 (outlining federal habeas proceedings). Substantively, the statute authorizes a state prisoner to raise claims asserting that he is being held in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). *See generally* LIEBMAN & HERTZ, *supra*, §§ 9.1-9.2 (discussing claims cognizable in federal habeas); *id.* § 11.2c (listing and describing claims that have resulted in courts granting petitions for writ of habeas corpus, including improper jury selection procedures, denial of expert assistance, improper jury instructions, ineffective assistance of counsel at trial or on appeal, and prosecutorial misconduct). Each state has its own statute authorizing post-conviction proceedings. *See id.* § 3.1d (summarizing state court practices); *id.* §§ 6.1-7.2 (explaining state post-conviction processes and constitutional issues).

274. *See, e.g.*, LIEBMAN & HERTZ, *supra* note 273, § 2.4d, at 66-71 (describing the expansion of federal habeas corpus review in the 1960s and its contraction by the U.S. Supreme Court beginning in 1976); Panel Discussion, *Capital Punishment: Is There Any Habeas Left in This Corpus*, 27 LOY. U. CHI. L.J. 523 (1996) (discussing the legal and political factors that restrict the post-conviction review of death sentences at both the state and federal levels). In 1996, Congress passed the AEDPA to further restrict and expedite federal habeas corpus review of death penalty cases. *See* LIEBMAN & HERTZ, *supra* note 273, § 2.7a, at 10-12 (quoting H.R. CONF. REP. NO. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944 (Conference Committee Report on the AEDPA)); *see also* 28 U.S.C.A. §§ 2261-2266 (West Supp. 1998) (containing provisions for death penalty cases where the state has "opted-in" to special accelerated provisions by meeting certain standards such as the appointment, compensation, and reimbursement of state post-conviction attorneys); LIEBMAN & HERTZ, *supra* note 273, § 2.7 (identifying how the new provisions affect post-conviction litigation). How the AEDPA will actually affect death penalty cases is an open question. *See* Panel Discussion, *Dead Man Walking Without Due*

areas of review—procedural bars and ineffective assistance of counsel claims—interfere with the evaluation of whether a defendant's mitigating evidence of childhood abuse was properly investigated, presented, and considered at trial.

1. Procedural Barriers

Numerous barriers constrain a court's consideration of the merits of a defendant's constitutional challenges on post-conviction review.[275] For example, under the doctrine of procedural bar, a federal court may be unable to consider the merits of a claim if the claim was not properly and timely raised in the State court.[276] While this doctrine may apply to any constitutional claim,[277] it has an especially devastating effect when the claim is based on the jury's inability to consider mitigating evidence of child abuse.[278]

In an extraordinary line of cases, the U.S. Court of Appeals for

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Process?, 23 N.Y.U. REV. L. & SOC. CHANGE 163 (1997) (discussing changes wrought by the AEDPA); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 384 (1996) (suggesting that "there is more bark in this dog than bite").

275. *See* LIEBMAN & HERTZ, *supra* note 273, §§ 22.1-22.2 (summarizing prerequisites, limitations, and exceptions to federal court review, including the doctrines of exhaustion, procedural bar, and retroactivity).

276. According to the Supreme Court, the test for when a federal court may hear a claim that was not properly preserved in state court is as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). *See generally* LIEBMAN & HERTZ, *supra* note 273, §§ 26.1-26.4 (analyzing the components of the test).

277. *See* LIEBMAN & HERTZ, *supra* note 273, § 26.1, at 807. Applying the procedural bar doctrine in death penalty cases has especially dire consequences. *See, e.g.*, Stephen B. Bright, *Death By Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 683 (1990) (arguing that between the restrictions of procedural bar and lax enforcement of ineffective-assistance-of-counsel standards, capital defendants are wrongly sentenced to death).

278. *See, e.g.*, Bolder v. Armontrout, 921 F.2d 1359, 1362-65 (8th Cir. 1990) (holding that a claim of ineffective assistance of trial counsel for failing to present mitigating evidence, including childhood beatings, was procedurally barred because no reason was given for the post-conviction attorney's failure to present evidence supporting this claim to the state court). *But see* Ford v. Lockhart, 861 F. Supp. 1447, 1451-53 (E.D. Ark. 1994) (holding that the ineffective assistance of counsel claim was not procedurally barred because "no reasonable juror would have sentenced [the defendant] to death under the state's sentencing law" had she heard the mitigating evidence trial counsel failed to investigate or present), *aff'd on other grounds sub nom.* Ford v. Norris, 67 F.3d 162 (8th Cir. 1995).

the Fifth Circuit effectively invoked a procedural bar to refuse to hear defendants' claims that their sentences violated the Eighth Amendment because the Texas death penalty statute kept them from presenting mitigating evidence to the jury.[279] Defendants argued that they had not presented available mitigating evidence at the punishment phase because the Texas death penalty statute effectively allowed the jury to give such evidence only aggravating consideration.[280] The court held that in order for it to hear the merits of these claims, the defendants had to have presented the mitigating evidence at trial.[281] Thus, if a defendant's mitigating evidence was childhood abuse, the court of appeals required the defense attorney to have presented this evidence to the jury at trial, even though the jury could not give it mitigating effect under the Texas sentencing scheme.[282] The court ignored the untenable quandary in which this procedural rule put the defense attorney: to present the jury with evidence it could consider only as aggravating and thus use to sentence his client to death, or not to present the evidence because of its harmful potential and later risk losing a claim based on that constitutional infirmity after the defendant was sentenced to death.[283]

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279. *See, e.g.*, Mann v. Scott, 41 F.3d 968, 979 (5th Cir. 1994) (citing cases); Anderson v. Collins, 18 F.3d 1208, 1214-15 (5th Cir. 1994); Callins v. Collins, 998 F.2d 269, 275 (5th Cir. 1993); Cordova v. Collins, 953 F.2d 167, 174-75 (5th Cir. 1992); May v. Collins, 904 F.2d 228, 231-32 (5th Cir. 1990) (per curiam) (*May I*); *id.* at 234 (Reavley, J., specially concurring).

280. This claim grew out of *Penry v. Lynaugh*, 492 U.S. 302 (1989), in which the Court held that the defendant's sentence violated the Eighth Amendment because, under the Texas statute, the jury could give only aggravating effect to the defendant's evidence of child abuse and mental retardation. *See id.* at 319-24. If the jury could not give mitigating effect to such evidence, it did not make sense for the defendant to present it, but that also meant that the jury would not hear evidence it should have been able to consider as mitigating. *See id.* This situation created a classic, and deadly, "Catch-22" for defendants facing the death penalty.

281. In *May I*, the court stated that the "*Penry* claim must fail" because the attorney had made a "tactical decision" not to present this mitigating evidence. *May I*, 904 F.2d at 232 (per curiam). Given the harsh consequences that attended presenting much of the available mitigating evidence, the court's characterization of the failure to present mitigating evidence as "tactical" is disingenuous at best. Subsequently, and more forthrightly, the court described "*May* and its progeny" as imposing a "procedural bar" on *Penry* claims if the defendant did not proffer the mitigating evidence at trial. *Mann*, 41 F.3d at 979.

282. *See Mann*, 41 F.3d at 979. Although the circuit court opinion does not mention the nature of the mitigating evidence, the district court opinion quotes the petitioner's description of " 'extraordinary physical abuse as a child' " in addition to " 'substantial drug abuse.' " Mann v. Lynaugh, 690 F. Supp. 562, 566-67 (N.D. Tex. 1988).

283. *See May I*, 904 F.2d at 234 (per curiam) (Reavley, J., specially concurring). Post-conviction counsel also asserted that the State, through its statute, violated the defendants' Sixth Amendment right to effective assistance of counsel by chilling trial attorneys' choice

The Fifth Circuit applied this reasoning in *May v. Collins*,[284] in which the defendant's mitigating evidence, presented on post-conviction review but not at trial, included physical abuse beginning at age three that may have " 'substantially impaired his ability to reflect on the appropriateness of his actions before manifesting them.' "[285] Based on prior Fifth Circuit decisions, the court refused to consider May's claim that his death sentence was unconstitutional because the Texas statute would have prevented the jury from giving mitigating effect to this evidence.[286] Two judges on the panel filed a special concurrence explaining that, while the court's holding adhered to precedent, the result was that May's jury did not make a "fully informed judgment of his crime and character," and that May was "caught in a web spun of words and logic that, in the end, has deprived May of his constitutional rights, a deprivation that may cost him his life."[287] These judges recognized the compelling nature of the evidence of childhood abuse and the difference that it could have made to the jury's sentencing decision. Nonetheless, the court did not consider whether May's death sentence violated the Eighth Amendment: Because his attorney had not presented the information to the jury, the court held that it would not address the merits of this claim.[288]

2. Standard for Ineffective Assistance of Counsel Claims

Even if a defendant's constitutional claim is heard on the merits, the court's evaluation may be governed by a standard that effectively denies relief. This is especially true for claims that the trial attorney provided ineffective assistance of counsel by failing to investigate and present mitigating evidence of childhood abuse at the punishment phase. The Supreme Court held in *Strickland v. Washington*[289] that to state a claim for ineffective assistance of counsel requires a two-part showing: (1) that counsel's performance was deficient; and (2) that

about whether to present mitigating evidence. *See* May v. Collins, 948 F.2d 162, 166 (5th Cir. 1991) (*May II*). The Fifth Circuit rejected this claim on the ground that the attorney made a reasonable tactical decision not to present the evidence. *See, e.g., id.* at 167-68; *see also Mann*, 41 F.3d at 980 (affirming the holding of *May II*).

284. 904 F.2d 228 (5th Cir. 1990) (per curiam).

285. *Id.* at 231 (quoting the neurologist/psychiatrist who examined May during post-conviction proceedings).

286. *See id.* at 232 (per curiam).

287. *Id.* at 234 (per curiam) (Reavley, J., specially concurring). The State of Texas executed Justin Lee May on May 7, 1992. *See* DEATH ROW U.S.A. REP. (NAACP Legal Def. & Educ. Fund, New York, N.Y.), Spring 1998, at 1147.

288. *See May I*, 904 F.2d at 232 (per curiam).

289. 466 U.S. 668 (1984).

the performance prejudiced the defendant.[290] Key features of each part of this test clash with the possible long-term perceptual and behavioral effects of childhood abuse.[291]

a. Deficient Performance

The indicia for evaluating whether counsel's performance was deficient focus on two factors: the information the defendant provided his attorney during the investigation of mitigating evidence, and the attorney's strategy for presenting the case for mitigation. Under *Strickland*, if the defendant gave the attorney reason to believe that certain avenues of investigation would be "fruitless or even harmful," the attorney's failure to pursue that course will not be considered unreasonable.[292] Similarly, counsel's performance will not be deemed deficient if the mitigating evidence investigated and presented on post-conviction is inconsistent with the trial attorney's punishment-phase strategy.[293]

These two factors are problematic when the defendant was physically abused as a child and suffered long-term psychological and

290. *See id.* at 687. Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* To establish prejudice the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

291. The *Strickland* test has been extensively criticized, especially as it is applied in death penalty cases. *See, e.g.*, Bright, *supra* note 219, at 1857-66 (analyzing cases showing *Strickland* permits ineffective assistance of counsel); William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 92-160 (1995) (arguing that *Strickland* has corrupted not only the evaluation of counsel's performance also but other components of the criminal justice system such as the harmless error doctrine and ethical standards governing attorney conduct); Kreitzberg, *supra* note 202, at 486, 499-506 (arguing that *Strickland* is largely to blame for the failure of the criminal justice system to ensure that the death penalty is constitutionally applied because *Strickland* ignored "the special nature of capital cases ... and hindered the assurance of effective legal representation"); Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN L. REV. 461, 463 (1987) (contending that *Strickland* does not ensure effective assistance of counsel to defendants at the punishment phase of death penalty cases); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1930-33 (1994) (arguing that *Strickland* imposes too high a standard). This Part builds on that criticism by examining how the test for ineffective assistance of counsel interfaces with one aspect of a death penalty case—the failure to investigate and present mitigating evidence of childhood abuse.

292. *Strickland*, 466 U.S. at 691.

293. *See* Burger v. Kemp, 483 U.S. 776, 788-95 (1987).

behavioral effects. Relying on the defendant to tell his attorney the relevant sources of investigation assumes that the defendant accurately understands the scope of mitigating evidence and that he is able and willing to identify those aspects of his past which fit that scope.[294] This assumption belies the capacities of many defendants facing the death penalty,[295] but it is particularly troublesome with a defendant who was abused as a child. This defendant may believe that certain avenues of investigation are fruitless or harmful because his understanding of mitigating evidence is that it consists of only positive information about his background or character.[296] While a history of childhood abuse is certainly mitigating, it does not qualify as "good" information.[297] Thus, the defendant may not disclose his history, or may tell his attorney not to contact family members or others who know about the abuse, because he believes it will not help his case.[298] Furthermore, a defendant who was abused as a child may not be aware who knew about the abuse, such as teachers, and so may wrongly inform his attorney that he does not know anyone who can assist the investigation.[299] Similarly, a defendant who denies a history of abuse will not provide relevant information to his attorney.[300]

When an attorney is permitted to rely on her client to inform the

294. *See supra* notes 231-40 and accompanying text (identifying reasons, related to childhood abuse, that a defendant may be unable or unwilling to talk about his history).

295. *See* White, *supra* note 16, at 337 & n.84 (noting that assumptions made about a defendant's ability to have a helpful relationship with counsel were "dubious in 1984" and are "patently incorrect today"); *see also* Mello, *supra* note 124, at 919 n.162 (describing characteristics of most men on death row as "illiterate, retarded, and/or mentally ill"); Naftali Bendavid, *Death Row Appeals Lawyers Sought: Chicago Firm's Suit Challenges System*, CHI. TRIB., Aug. 22, 1997, § 1, at 4 (reporting that a recent study of Mississippi defendants on death row found that 32% were at least borderline mentally retarded).

296. *See, e.g.*, *Burger*, 483 U.S. at 813 (Blackmun, J., dissenting) (noting that the attorney asked the defendant who could say " 'anything good about him' " (quoting the Trial App. at 51)); Mathis v. Zant, 704 F. Supp. 1062, 1066 (N.D. Ga. 1989) (speculating that counsel may have thought only " 'good' details" were mitigating), *vacated and remanded*, 975 F.2d 1493 (11th Cir. 1992).

297. *See Burger*, 483 U.S. at 820 (Powell, J., dissenting) ("[T]his Court's decisions emphasize that mitigating evidence is not necessarily 'good.' Factors that mitigate an individual defendant's moral culpability 'ste[m] from the diverse *frailties* of human kind.' " (second alteration in original) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))).

298. *See supra* notes 234-37 and accompanying text (discussing the reasons why a defendant may not reveal his childhood abuse).

299. *See supra* note 239 (citing cases where the defendant was not aware of corroborating state agency records).

300. *See supra* note 234 and accompanying text (discussing reasons why a defendant may deny a history of childhood abuse). The defendant's family may also deny that the defendant was abused. *See supra* note 238 (citing examples of families denying the defendant's abuse and psychological explanations for same).

scope of the mitigation investigation, a grave likelihood exists that she will not discover mitigating evidence of childhood abuse.[301] It is unconscionable that the constitutional standard for an acceptable level of attorney performance in a death penalty case should countenance conduct that is so likely to result in an ineffectual investigation. Some courts recognize that the attorney's duty to investigate is not limited by a client's instructions or knowledge but also includes locating witnesses and information even though the client resists, as well as talking to the client about why he does not want family members contacted.[302] Yet, unless this comprehensive duty to investigate is required in every case, a defendant who suffered childhood abuse too often will be put at risk by an attorney who does not conduct the necessary investigation to ensure that the jury hears relevant and available mitigating evidence.

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301. *See* Gardner v. Dixon, No. 91-4010, 1992 U.S. App. LEXIS 12971, at *14-*19 (4th Cir. June 4, 1992) (noting that the attorney did not look for sources of information beyond the mother and father, whom the defendant told him not to contact, except for an uncle whom the attorney described as "incoherent"); Thomas v. Kemp, 796 F.2d 1322, 1324-25 (11th Cir. 1986) (stating that the attorney "made little effort" to look for mitigating evidence because the defendant told him he would not testify and he did not " 'want anyone to cry for him,' " but former teachers would have testified to his childhood mental and physical abuse, employers to his work habits, and others that he was a "loving son" who "struggled to succeed in life"); Bolder v. Armontrout, 713 F. Supp. 1558, 1567 (W.D. Mo. 1989) (observing that the attorney did not talk to the family because the defendant told him not to), *rev'd on other grounds*, 921 F.2d 1359 (8th Cir. 1990).

302. *See, e.g.*, Stafford v. Saffle, 34 F.3d 1557, 1563-64 (10th Cir. 1994) (holding that when the defendant says he will not testify, attorney must explain purpose of mitigation and use others as witnesses); People v. Perez, 592 N.E.2d 984, 995-96 (Ill. 1992) (emphasizing the duty to investigate mitigating evidence even when the defendant is recalcitrant and the attorney knows the defendant was abandoned by his family, which could account for his reluctance to provide information). Other courts have reached the same conclusion outside of the specific context of a reluctant defendant with a history of childhood abuse. *See, e.g.*, Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991) (holding that trial attorneys may not " 'blindly follow' " defendant's instructions not to present mitigating evidence because, " 'although the decision whether to use such evidence is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering potential merit' " (quoting Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986))); Gray v. Lucas, 677 F.2d 1086, 1093-94 (5th Cir. 1982) (stating that a defendant's refusal to identify potential witnesses limits but does not negate an attorney's duty to investigate); *see also* Emerson v. Gramley, 91 F.3d 898, 906 (7th Cir. 1996) (giving no weight to the defendant's statement to the trial court that he did not want mitigating evidence presented where defense counsel had not conducted any investigation and the defendant was not told by counsel or the court of the high likelihood of a death sentence absent some mitigating evidence). *But cf.* DeLong v. Thompson, No. 92-40000, 1993 WL 24788, at *2 (4th Cir. Feb. 4, 1993) (holding that while the defendant's "desire not to present mitigating evidence does not wholly exempt counsel from conducting a reasonable investigation of potential mitigating evidence," the lawyer fulfilled his obligation by writing one letter to the defendant's father even though the father's reply indicated the family did not want to testify).

Problems also arise for a defendant who was abused as a child when courts examine the quality of the trial attorney's performance based on the relationship between her punishment-phase strategy and the new mitigating evidence presented in the post-conviction proceeding. If the new evidence is inconsistent with the strategy that the attorney employed at trial, the Supreme Court has held that this constitutes a strategic reason for not investigating or presenting the evidence.[303] The Court's analysis considers the extent to which the new evidence is consistent with what the trial attorney actually did at trial, not with what the trial attorney should or could have done had she known about the information at the time of trial.[304]

This framework is untenable when the new evidence is a history of child abuse and its negative adult behavioral consequences. If the trial attorney's strategy was to portray the defendant as "not a violent person," evidence of childhood abuse likely will be inconsistent with that theory of mitigation.[305] A frequent justification for not investigating or presenting mitigating evidence of child abuse is that it could "open the door" to the depiction of the defendant as a violent person with a history of criminal acts.[306] Defense counsel,

303. *See* Burger v. Kemp, 483 U.S. 776, 788-95 (1987) (finding counsel not ineffective for failing to pursue and present evidence of the defendant's childhood because, even though he presented no mitigating evidence at trial, the new information about the defendant's upbringing was inconsistent with counsel's punishment-phase strategy); Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (concluding that "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation").

304. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

305. *See, e.g., Burger*, 483 U.S. at 793 (stating that evidence about the defendant's childhood, which included beatings but also would have revealed "violent tendencies," was "at odds" with portraying the defendant as a follower); Stout v. Netherland, Nos. 95-4008, 95-4007, 1996 WL 496601, at *10-*11 (4th Cir. Sept. 3, 1996) (concluding that the attorney made a strategic decision not to use a psychological report that included information about the defendant's childhood abuse because it also concluded that the defendant suffered from anti-social personality disorder which was inconsistent with the attorney's strategy of presenting the defendant as non-violent); Barnes v. Thompson, 58 F.3d 971, 979-81 (4th Cir. 1995) (holding that the attorney was not ineffective where the defendant's childhood abuse was inconsistent with portraying him as non-violent); Bertolotti v. Dugger, 883 F.2d 1503, 1519 (11th Cir. 1989) (finding that evidence of psychological abuse and mental illness was inconsistent with a penalty phase strategy to present the defendant as "normal"). *But see* Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983) (rejecting the district court's conclusion that the attorney did not err in failing to present any mitigating evidence, including that the defendant was physically abused by his father, because it might have had an adverse effect on the jury).

306. *See, e.g., Burger*, 483 U.S. at 792-95 (explaining how, if presented at trial, the

however, should anticipate that the prosecution will present evidence of prior violent or criminal conduct anyway.[307] While it may complicate the defense case at punishment, effective counsel should be prepared to incorporate that prior conduct into the mitigation theory—not ignore it.[308] The defense should convey to the jury that it is the *source* of the defendant's violent conduct as an adult that matters. Although the defendant is responsible for committing a murder, he should not be faulted for suffering physical abuse as a child and then being unable to overcome its adverse effects as an adult.

To excuse the investigation and presentation of child abuse and its later consequences because the defendant did not point to it or because the possibility exists that such evidence may open the door to evidence of prior violent behavior should not be constitutionally acceptable because it renders meaningless the promise of effective assistance of counsel guaranteed by the Sixth Amendment.[309] The pivotal issue in assessing whether the trial attorney's performance was deficient should not be how well the new evidence of child abuse fits the punishment-phase theory that the attorney pursued, but how much more closely the evidence conforms to the individual defendant's actual background and character.[310] Otherwise, claims of

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prosecutor could have elicited the defendant's prior criminal conduct from defense witnesses); Porter v. Wainwright, 805 F.2d 930, 937 (11th Cir. 1986) (holding that the attorney made a reasonable tactical decision not to present evidence about the defendant's background because it would have "opened the door to damaging character evidence, including evidence of [the defendant's] prior criminal activity"); Whitley v. Bair, 802 F.2d 1487, 1494-96 (4th Cir. 1986) (concluding that the defendant was not prejudiced by his attorney's failure to call his sister or mental health experts because their testimony could have entailed negative information); *Pickens*, 714 F.2d at 1467 (disagreeing with the district court that found trial counsel reasonable in not presenting any mitigating evidence because of the "potential adverse effect such evidence might have on the jury").

307. *See supra* notes 247-49 and accompanying text (discussing how a prosecutor may utilize evidence of the defendant's childhood abuse against him).

308. *See supra* notes 250-56 and accompanying text (explaining how the defense attorney may effectively diffuse the prosecutor's attempt to place the defendant's childhood abuse in a negative light).

309. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.").

310. These two issues may at times complement each other. *See, e.g.*, *Burger*, 483 U.S. at 820-22 (Powell, J., dissenting) (arguing that the mitigating evidence not presented about the defendant's mental and emotional immaturity and his tragic childhood bore on his lack of moral culpability and responsibility, which was the defense counsel's strategy); Jackson v. Herring, 42 F.3d 1350, 1369 (11th Cir. 1995) (holding that evidence showing the "genesis of [the defendant's] irrational rage through an abusive upbringing" in addition to "good character" evidence would have benefited the defense more in explaining the murder than trial counsel's failure to present any mitigating evidence and his weak closing argument).

ineffective assistance of counsel are caught in a conundrum in which inadequate lawyering itself becomes an obstacle to showing that the lawyering was inadequate.

b. Prejudice

The second part of the ineffective assistance of counsel test requires a showing that the attorney's deficient performance prejudiced the defendant. In the context of the punishment phase of a death penalty case this part of the test requires a showing that a reasonable probability exists that the defendant would have been sentenced to life imprisonment rather than death.[311] In these situations, a common refrain among courts is that in light of the aggravating circumstances of the murder, no mitigating evidence could have changed the defendant's sentence.[312] This kind of reasoning fails to take into account the constitutional principle that the death penalty is not appropriate in all cases.[313] Mitigating evidence, effectively investigated and presented, may convince one juror that life imprisonment is the proper punishment for this individual defendant.[314] This potential exists for mitigating evidence

311. Some scholars maintain that the prejudice prong should not apply in death penalty cases. *See* Bright, *supra* note 219, at 1864-65 (arguing that the prejudice prong is "inappropriate" because it is "impossible" to determine the difference investigation and presentation of mitigating evidence could make); Geimer, *supra* note 291, at 130 (observing the "gross unfairness" of applying the prejudice prong because it results in "rank speculation" about how jurors would respond to evidence).

312. *See, e.g.*, Gardner v. Dixon, No. 91-4010, 1992 U.S. App. LEXIS 12971, at *24-*25 (4th Cir. June 4, 1992) (finding no prejudice because "the murders in this case were senseless and brutal" and the additional mitigating evidence "would not have swayed the outcome in this case"); Francois v. Wainwright, 763 F.2d 1188, 1191 (11th Cir. 1985) ("[Defendant] has no chance of changing the outcome of the five death sentences in this case ...."); *see also* Note, *supra* note 291, at 1931 (suggesting that the nature of the murder combined with "overwhelming evidence of guilt" is one reason courts reviewing ineffective assistance of counsel claims "are often unable to imagine that a jury would have imposed any sentence but death").

313. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (holding mandatory death sentences unconstitutional); *see also* Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1988) (rejecting State's argument that in light of substantial aggravating factors, no amount of mitigating evidence would matter on the ground that this would eviscerate individualized sentencing any time there are many aggravating factors); State v. Holland, 777 P.2d 1019, 1028 (Utah 1989) (recognizing that the "psychological reality" of the sentencing hearing is that aggravating circumstances will "virtually always" outweigh mitigating circumstances because murder is a "heinous act," but also recognizing that the Eighth Amendment "does not permit the death penalty to be imposed for every intentional homicide").

314. Except where the jury's sentence is advisory, or the judge imposes sentence, only one juror needs to vote for life imprisonment. *See, e.g.*, Emerson v. Gramley, 91 F.3d 898, 907 (7th Cir. 1996) (holding that the need to convince only one juror, in addition to other

in general, but it is particularly true for childhood abuse because of the potential to forge a strong connection between the defendant's devastating childhood experience and his commission of the murder.

The limitations of post-conviction review of death sentences inflict an especially harsh consequence on a defendant who was abused as a child but whose jury did not receive that information. The long-term effects of abuse that may help the jury understand the defendant and his actions also may be seen as providing a basis for not presenting that very evidence. Courts may invoke procedural bars to avoid resolving this tension. In addition, the constitutional standard that governs claims of ineffective assistance of counsel countenances a resolution of that dilemma in a way that denies the defendant the individualized consideration of his mitigating history of child abuse. Too often, the defendant's impairments from childhood abuse are allowed to excuse the attorney's failure to investigate or present that very mitigating evidence.

D. Conclusion

Despite the mitigating potential of evidence that a defendant was physically abused as a child and continued to suffer behavioral consequences as an adult, numerous barriers exist to a jury's consideration of that evidence. Courts' misunderstandings about the effects of childhood abuse may prevent proper evaluation of this evidence as a mitigating circumstance, inadequate counsel may not learn of the abuse or present it effectively, judges may not instruct the jury on how to consider it, and the standard for post-conviction review may perpetuate constitutional errors made at trial. The presentation of childhood abuse is sabotaged by allowing the difficulty of uncovering and presenting it to overwhelm its mitigating characteristics. The result is that the jury is denied, rather than guaranteed, the information necessary to make a judgment about the individual defendant's punishment.

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factors, meant that the case for mitigation that could have been presented "cannot confidently be reckoned trivial"); Abdur' Rahman v. Bell, 999 F. Supp. 1073, 1101 (M.D. Tenn. 1998) (concluding that, despite the "negative evidence," "had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) ("The swaying of the vote of only one juror would have made a critical difference here.").

III. TAKING SERIOUSLY CHILDHOOD ABUSE AS MITIGATING EVIDENCE

A defendant's history of childhood abuse is paradigmatic mitigating evidence in a death penalty case because it has the potential to transform a juror's perception of the defendant from an individual who deserves to die to a person for whom life imprisonment is a just punishment. Despite this potential, impediments exist throughout the trial and post-conviction review process that prevent jurors from hearing and considering evidence of the defendant's childhood abuse and its long-term consequences. The chasm between the mitigating promise of childhood abuse and the system's inability to fulfill that promise demonstrates the need for a transformation in the way courts understand and analyze the significance of mitigating evidence. If the constitutionally indispensable consideration of the individual defendant's background and character and the circumstances of the offense is to occur, then the concepts of adequacy of trial counsel, proper instruction of jurors, and meaningful post-conviction review must be wholly redrawn.

The expectations for, and evaluation of, trial counsel's investigation and presentation of mitigating evidence should reflect the importance of the jury's punishment-phase decision. As some courts have recognized,[315] an attorney should not be permitted to base her investigation of mitigating evidence on what the defendant tells her to do or not to do. The possible long-term effects of child abuse show that this kind of reliance may easily hide important facts about the defendant's background and character.[316] Similarly, no attorney should be allowed to rely on a punishment-phase strategy of presenting the defendant as a good, non-violent person when that does not conform to the defendant's history. As others have argued, at a minimum, every defense attorney should be required to initiate and conduct a complete investigation, including a thorough social history and mental health evaluation, of the defendant.[317] I suggest that the investigation should presume that the defendant's background includes a history of child abuse and possible mental illness or brain damage.[318] The attorney must then have the training

315. *See supra* note 302 (citing cases where courts recognize the breadth of an attorney's duty to investigate).

316. *See supra* notes 232-37 and accompanying text (discussing reasons why a defendant may not reveal childhood abuse).

317. *See supra* notes 211-18 and accompanying text (discussing components of a complete investigation).

318. The frequency with which child abuse, mental illness, and brain damage occur

and resources to devise an effective trial strategy[319] and to present a compelling case for mitigation at the punishment phase. Such a focus will begin to allow a history of childhood abuse to be uncovered and presented to the jury in a persuasive manner.

Judges must recognize the importance of their role, both at trial and on post-conviction review, to ensure that the jury hears the complete circumstances of the defendant's childhood abuse. Thus, the judge must understand the ways in which a history of child abuse may have contributed to the defendant's commission of the murder, as well as the ways in which that history presently impairs communications between the defendant and his attorney about the crime and his childhood. The ramifications of childhood abuse, as they affect the commission of the crime and the defendant's relationship with his attorney, require courts to ensure that sufficient training and resources exist for trial counsel so that she may properly and timely investigate and present a sound mitigation theory at the punishment phase.[320] This must include access to and presentation of

among convicted murderers and those on death row demonstrates the likelihood that the attorney will find this kind of evidence. *See* Blake et al., *supra* note 59, at 1645 (stating that, of 31 charged or convicted murderers in their study, all but two reported that "continuous abuse lasted a decade or more"); *supra* notes 125-32 and accompanying text (discussing a study that found 12 of 15 subjects on death row had experienced severe childhood abuse). The defense attorney must overcome the assumption that one's client is "normal." *See* Blake et al., *supra* note 59, at 1642 (noting that in the study of 31 charged or convicted murderers, where testing revealed that none of the subjects was neurologically or psychologically normal, *all* of the attorneys, except one whose client had cerebral palsy, thought that their clients were "normal"); *cf.* Pincus, *supra* note 76, at 359 (observing that doctors who examine violent juveniles must appreciate the high probability that they "will have histories of severe accidents or illnesses and will manifest neurological and psychiatric abnormalities that may contribute to their maladaptive behaviors").

319. *See, e.g.*, A.B.A. GUIDELINES, *supra* note 211, at 41-92 (proposing standards for the appointment of attorneys and their compensation in capital cases); Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495 (1996) (reviewing the state of capital defense nationwide and explaining the experience in Indiana after the Indiana Supreme Court adopted a rule setting standards for defense counsel in capital cases); *see also* Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 251 (1990-1991) (arguing that present conditions for defending capital cases—lack of training, experience, and funding—"virtually guarantee" ineffective assistance of counsel).

320. *See* Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1360-64 (1997) (proposing reforms to the provision of counsel, including substantially increasing compensation and available funds and recognizing capital defense as a specialty that requires experience and specialized knowledge); Lefstein, *supra* note 319, at 501-03, 505-26 (analyzing the effect of an Indiana Supreme Court rule requiring, among other factors, training and adequate funding for defense attorneys in capital cases, including specifically the sentencing phase); *see also*

expert testimony that explains the connection between the defendant's abuse, his long-term impairments, and his commission of the crime. When this does not occur, courts should be willing to recognize the harm done, not only to the defendant, but also to the expectation that the death penalty is not imposed arbitrarily or capriciously.[321] The constitutional promise that the jury base its sentencing decision on characteristics of the individual defendant[322] should demand no less.[323]

Equally important, however, is ensuring that the jury understands how it may consider evidence of childhood abuse as mitigating, once evidence of that nature is presented. It is not enough for jurors to hear testimony about the beatings the defendant suffered, or the impact that such abuse had on the defendant as a child and as an adult. The defense attorney must explain to the jury how it should take the defendant's childhood abuse into account. She could argue that the defendant's long-term impairments, while not lessening his responsibility for the crime, make it more comprehensible, such that life imprisonment is a sufficient punishment; that the death penalty would be an excessive punishment given the magnitude of his ongoing trauma from the abuse; or that sentencing this defendant to death would not deter others who have been subjected to similar abuse. In every case the trial court should instruct the jury on the meaning of mitigating

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Kreitzberg, *supra* note 202, at 511-17 (emphasizing the importance of adequate compensation in addition to experience and skill). To the extent that legislatures restrict the funds available to courts for death penalty cases, it should be incumbent on judges to work with the legislature to change these limitations. *See* Bilionis & Rosen, *supra*, at 1364-66 (arguing that judges should act as the catalyst to require legislative reforms).

321. *See* Fong, *supra* note 291, at 493 (proposing that courts presume prejudice when an attorney fails to investigate for the punishment phase, and if she investigates but does not find any mitigating background information, she must present other arguments in mitigation); Kreitzberg, *supra* note 202, at 507-08 (arguing that to ensure individualized sentencing, the U.S. Supreme Court must create a "presumption of ineffectiveness" when counsel does not investigate the defendant's background in preparation for the punishment phase); *see also* Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the "Will of the People,"* 3 PSYCHOL. PUB. POL'Y & L. 303, 336 (1997) (arguing that, because death is different, attorneys should be required to "provide the humanizing social histories that give jurors a glimpse of the causal origins of the violent actions they must judge and the life of the defendant against which it is weighed").

322. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

323. *See* Bilionis & Rosen, *supra* note 320, at 1312 (arguing that the Eighth Amendment requires that "[a]ny jurisdiction that opts for capital punishment bears a constitutional obligation to provide a system that minimizes the arbitrariness attributable to inefficacies and disparities in the quality of capital defense lawyering").

evidence generally[324] and should instruct the jury that it may consider particular evidence presented by the defendant, such as a history of child abuse, as mitigating.[325] Because the jury is entrusted with making a profoundly moral judgment about the defendant's punishment,[326] the court must give the jury sufficient guidance to assure that this type of judgment occurs.

Apart from specific trial-related issues, the legal system's difficulty with allowing mitigating evidence of childhood abuse to inform the punishment-phase decision points to an underlying moral dilemma concerning how society addresses the connection between the two tragedies of childhood abuse and adult murder. A child is not blamed for being physically abused—society holds the abusers responsible for the violence they inflict on him. At the same time, the community acknowledges that it shares that responsibility because it did not protect the child. When that child grows up[327] and, as an adult, commits his own act of violence, the community's sense

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324. The instruction, at a minimum, could track the language of *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), that mitigating evidence is "any aspect of [the] defendant's character or record [or] any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (plurality opinion); *see also* TEX. CODE CRIM. P. ANN. art. 37.071 § 2(f)(4) (West 1994) (defining mitigating evidence as "evidence that a juror might regard as reducing the defendant's moral blameworthiness"); State v. Bey, 548 A.2d 887, 910-11 (N.J. 1988) (requiring the trial judge to instruct the jury so that "a reasonable juror will understand the meaning and function of mitigating factors" and noting that this means more than stating the statutory language identifying mitigating circumstances).

325. As occurs in many states, the jury should be instructed on the mitigating circumstances on which the defendant presented evidence. *See, e.g.*, State v. Breton, 663 A.2d 1026, 1051 (Conn. 1995) (requiring the trial court, if requested by the defendant, to instruct the jury on "each of the statutory *and* nonstatutory mitigating factors claimed by the defendant"); TRIAL JUDGES COMM. ON CAPITAL CAUSES, N.J. ADMIN. OFFICE OF THE COURTS, JUDGES BENCH MANUAL FOR CAPITAL CAUSES app. J at J23-J44 (Nov. 1, 1995) (proposing model jury charge for penalty phases that includes detailed explanatory instructions on statutory mitigating factors). *See generally* Brief for Petitioner, Buchanan v. Angelone, 118 S. Ct. 757 (1998) (No. 96-8400), *available in* 1997 WL 375539, app. at *1a (summarizing every death penalty state's requirements for jury instructions identifying and explaining mitigating circumstances).

326. *See* Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

327. "If" is also an appropriate qualification here. According to the U.S. Advisory Board on Child Abuse and Neglect, approximately 2000 infants and young children die each year from abuse or neglect by their parents or caretakers and 18,000 are permanently disabled. *See* U.S. ADVISORY BOARD ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVICES, A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES at xxiii, xxv (1995). Dr. George Curtis, one of the first psychiatrists to suggest a correlation between childhood beatings and adult criminal behavior, expressed concern that such children may "become tomorrow's murderers and perpetrators of other crimes of violence, *if* they survive." George C. Curtis, *Violence Breeds Violence—Perhaps?*, 120 AM. J. PSYCHIATRY 386, 386 (1963) (emphasis added).

of shared obligation is not the same. Despite the recognition that childhood abuse may traumatize a person for life, when that person commits an extreme act of violence, such as murder, society is inclined to distance itself and hold the person solely accountable. By denying the relationship between the childhood experience of violence and the later adult act of violence, society tells the defendant, in effect, that he is responsible for his abuse and for failing to overcome its damaging consequences.

The moral tension between holding an adult responsible for his actions and acknowledging the result of society's failure to protect a child from harm is particularly pronounced in the context of deciding whether to sentence a defendant to death. This tension suggests that we need to reevaluate the underlying significance of imposing the death penalty. Rather than view the decision to sentence a defendant to death or life imprisonment as a statement about whether he should be cast out of the circle of humanity,[328] we should understand it as one about recognizing that the defendant is part of the community.[329]

328. *See, e.g.*, Devier v. Zant, 3 F.3d 1445, 1453 (11th Cir. 1993) (quoting the trial court's account of the prosecutor's argument that the defendant " 'was like a cancer which should be exorcised to protect society' "); Brewer v. Aiken, 935 F.2d 850, 853 (7th Cir. 1991) (noting that, in following the jury recommendation of a death sentence, the trial court stated that "[i]t is unfortunate; [the defendant's] life has been a brutal life.... But we cannot tolerate the James Brewers of our community"); Alfieri, *supra* note 46, at 349 (suggesting that when the jury votes for death it is "expelling the defendant as a moral outcast"); Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 423 (1994) (arguing that the current capital punishment system reflects a societal view that the criminal is the " 'other' "); Haney, *supra* note 32, at 549 (arguing that "the long-term viability of the system of death sentencing *requires* that capital defendants be depicted" as standing outside the boundaries of the social order); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1460-67 (1997) (positing that seeing the defendant as "defective, foreign, deviant, or fundamentally different from themselves" is one way that jurors morally disengage from the reality of their task of deciding the defendant's punishment, thus making it easier to sentence him to die); Sarat, *supra* note 32, at 49 (explaining that the prosecutor argued to the jury "we have a right ... to be vindicated and protected," thus identifying the defendant as the outsider); Weisberg, *supra* note 16, at 361 (suggesting that the goal of the defense is to humanize the defendant "so the jury will be less inclined to cast him out of the human circle"); *see also* Smith v. Francis, 474 U.S. 925, 927 & n.1 (1985) (Marshall, J., dissenting from the denial of certiorari) (arguing that the Court must be vigilant against the death penalty being used as part of a broader effort to rid the community of mentally retarded defendants); *cf.* Walter Berns, *The Morality of Anger*, *reprinted in* THE DEATH PENALTY IN AMERICA 333, 339-40 (Hugo Adam Bedau ed., 1982) (arguing that since the Supreme Court outlawed banishment, capital punishment serves to instill " 'profound respect or reverential fear' ").

329. *See* Pillsbury, *supra* note 33, at 657, 685-98, 703-04 (arguing that the concept of "moral caring," combining "moral outrage ... and empathy," should determine the defendant's deserved punishment, and proposing jury instructions that acknowledge the jurors' anger but ask jurors to "care for the good" in the defendant); Pillsbury, *supra* note

When the death penalty represents a casting out, the decision to sentence a defendant to death does, in effect, blame the defendant for not being strong enough to overcome the harm done to him as a child. It allows the jury as representatives of the community to sentence the defendant for violating society's law, while avoiding the responsibility society had to the defendant as a child.[330] It also sanctions the view of courts that the defendant, rather than his lawyer, is responsible for what is presented at the punishment phase.

A different perspective emerges if we consider the decision to sentence a defendant to death as acknowledging that he is part of the community. A juror may be less willing to sentence the defendant to death if he is seen as a member of the community because she may be more inclined to recognize that society shares responsibility for his fate. The connection between society's failure to protect the defendant as a child and his commission of a murder as an adult may make life imprisonment the more appropriate societal response. In this light, rather than dismissing the potential impact of mitigating evidence because of the facts of the crime, courts should be more insistent that the trial attorney present, and the jury consider, the defendant's individual mitigating circumstances. To take seriously the mitigating qualities of childhood abuse requires restructuring what constitutes competent trial attorney representation, adequate jury instructions, and appropriate post-conviction review. Only then will we be in a position to assess accurately the appropriate punishment for a defendant who was abused as a child and who now faces the death penalty.

CONCLUSION

Childhood abuse takes a tremendous toll on individuals and on our society as a whole. When a defendant who faces the death penalty was also abused as a child, the jury's assessment of

115, at 752 ("We punish offenders not because they stand outside of society, not because they are alien enemies, but because they are fundamentally like the rest of us."); Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 175-76 (1990) (arguing that liberals on the U.S. Supreme Court should, in addition to continuing to emphasize the defendant's rights in death penalty cases, write about the defendant's life story, so that we might "learn once again to recognize these people as human, as 'like us' ").

330. *See, e.g.*, WOLFE, *supra* note 58, at 105 (noting that society fears the association between child abuse and adult aggression); Alexander C. McFarlane & Bessel A. van der Kolk, *Trauma and Its Challenge to Society*, *in* TRAUMATIC STRESS, *supra* note 70, at 24, 27 (observing that society is asked to be compassionate toward those who suffer trauma but that it is resentful at having its illusion of safety shattered).

punishment ought to reflect society's understanding and appreciation of the connection between the childhood abuse, the murder, and the sentence. This will not occur until fundamental changes are made in the trial proceedings and post-conviction review of capital cases. The fact that these changes would constitute a major transformation in how a death penalty trial is conducted is a powerful indication of how far the current law is from the promise that the "diverse frailties of humankind"[331] will be an integral part of the decision to sentence a defendant to death. The inability of the death penalty system to ensure that mitigating evidence of childhood abuse is effectively investigated, presented, and considered exemplifies the depth of this chasm.

331. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).