LAW AND REALITY IN THE CAPITAL PENALTY TRIAL

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For most of the years since reinstatement of the death penalty in Virginia in 1977, another participant in this Colloquium, Marie Deans, has stood with a handful of people (fewer than ten) as the only challengers of the death penalty in the state. To the author's knowledge, the Commonwealth of Virginia, with a death row population of 45, expends no public funds for capital resource centers. In 1988, Washington and Lee University introduced as part of its law school curriculum the Virginia Capital Case Clearinghouse, which the author directs. The Clearinghouse publishes *Capital Defense Digest* semi-annually, conducts a yearly training program for attorneys, and provides case-specific assistance to attorneys defending capital cases at all levels. Most of that assistance has been rendered at the trial level.

I.
THE DECLINE OF COLLATERAL REVIEW AND THE INCREASING IMPORTANCE OF THE TRIAL STAGE

Challenging the death penalty in the next decade will require a significant redirection of resources, research, debate, and scholarship toward the capital trial, and a renewed focus on the penalty trial. In the past, the need to make the most effective use of inadequate resources virtually dictated that those resources be concentrated at collateral review stages. There was simply too great a shortage of funds and of qualified people to confront every death sentence at the trial level. This "backstop" strategy was more cost-effective than trial work because, for several years, federal habeas courts redressed with some frequency the injustices that are common to capital trials.[1] But recent cases limit federal habeas corpus review.[2] In the nineties, legislatures will seek to expand the reach of the death penalty, the reach of federal jurisdiction, and the number of capital crimes.[3] These and other judicial and legislative devel-

1. For persons who have been deprived of liberty in state proceedings, habeas corpus review permits federal adjudication of federal constitutional or legal claims, after state appeals have been exhausted. 28 U.S.C. § 2254 (1988). Habeas review plays a particularly important role in capital cases. In *Woodson v. North Carolina*, the Court had acknowledged that a "penalty of death is qualitatively different from a sentence of imprisonment" and decreed that the difference called for "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." 428 U.S. 280, 305 (1976). In a 1983 opinion, Justice Marshall noted that since 1976, capital habeas corpus petitioners in the courts of appeals had succeeded approximately 70% of the time. Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting).

2. It has become clear that *Woodson* will not be applied to require an extra measure of due process on collateral review. *Barefoot* was the first opinion designed to speed up capital habeas review, denying prisoners the extra degree of scrutiny promised when the death penalty was revived in 1976 by Gregg v. Georgia, 428 U.S. 153 (1976). *Barefoot* prescribed expedited procedures applicable only in capital cases and pronounced direct appeal as the primary avenue of review, with no exception for death cases. 463 U.S. at 887-96. The Court recently reaffirmed *Barefoot*, explicitly holding that trial and direct appeal are the only stages at which capital litigants are entitled to any special consideration. Murray v. Giarratano, 109 S. Ct. 2765, 2770 (1989).

3. The 1988 amendments to the Anti-Drug Abuse Act reinstated the federal death penalty by making certain drug-related homicides capital offenses. Pub. L. No. 100-690, § 7001(a)(2), 102 Stat. 4181, 4387-88 (1988) (to be codified at 21 U.S.C. § 848(e)). Numerous other bills have been filed in attempts to expand the federal death penalty, not all of them requiring the commission of a homicide. For example, Senator Orrin Hatch's bill calls for the death penalty as punishment for an attempt to kill the President, for treason, for espionage, and for sabotage of strategic weapons. S. 1228, 101st Cong., 1st Sess., 135 CONG. REC. S7288-96 (daily ed. June 22, 1989).

If the proposals by Senator Hatch and others pass, they may result in a test of the definition of disproportionality. *Coker v. Georgia* held that the death penalty is disproportionate as a penalty for rape of an adult woman, even with aggravating circumstances. 433 U.S. 584, 598-99 (1977). *Coker* has been believed to preclude the death penalty for all crimes not involving a killing. The applicability of *Coker* was narrowed by *Tison v. Arizona*, which held that the death penalty was not disproportionate for a "major participant" in a felony who acted with reckless indifference to human life, although he neither intended to kill nor inflicted the fatal wounds. 481 U.S. 137, 158 (1987). For the current Supreme Court majority, it would be a short leap from the *Tison* view of proportionality to approval of the death penalty provisions in some or all of the pending legislation.

opments require that the backstop strategy be re-evaluated and modified.

The most pressing problem will be confronting the judicial and legislative efforts to mask the death penalty. Survival of the death penalty has long depended upon insulating the public from the penalty's operational reality as opposed to its conceptual appeal.[4] One way to shield the death penalty from public scrutiny is to restrict meaningful appellate review, thereby limiting the possibility of decisions that narrow the death penalty's application. As a result, each case receives only passing attention in the community in which it is tried, and media interest dissipates after trial. If executions are not to be accepted as part of the social reality, defense resources must be used to challenge the death penalty not only on appeal but also at trial.

The dismantling of habeas review is well under way. In *Teague v. Lane*,[5] the Supreme Court limited the applicability of favorable precedent at federal habeas corpus review, in most instances, to the law as it existed at the time the petitioner's direct appeal became final.[6] For a brief time, it appeared that *Teague* would be construed to allow meaningful habeas review of death penalty procedures.[7] However, the Court's decisions in *Butler v. McKellar*[8] and

4. There is, of course, no way to prove conclusively that this insulation is calculated. A comparison, however, of the amount of information disseminated on operational reality as opposed to conceptual appeal in the 1988 presidential campaign and recent 1990 gubernatorial races in Texas and Florida might provide circumstantial evidence in support of Professor Anthony Amsterdam's contention that: "Capital punishment is a fancy phrase for legally killing people. Much of our political and philosophical debate about the death penalty is carried on in language calculated to conceal these realities and their implications." Amsterdam, *Capital Punishment*, THE STANFORD MAG., Fall/Winter 1977, at 42, *reprinted in* THE DEATH PENALTY IN AMERICA 346 (H. Bedau 3d ed. 1982). By design or not, there has long been a gap between the level of support for the death penalty and the level of knowledge about how it works. *See* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1262-64 (1974). That the gap continues may be inferred from a recent poll showing 64% support for the death penalty dropping to 10% for the execution of retarded murderers. Commonwealth Poll, Virginia Commonwealth University (May/June 1989) (telephone survey of randomly selected sample of 822 residents of Virginia aged 18 and over). In practice, the death penalty allows for execution of the retarded. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2958 (1989).

5. 109 S. Ct. 1060 (1989).

6. The Court in *Teague* held that if the relief that a habeas petitioner seeks would require a "new rule" that "breaks new ground or imposes a new obligation on the states or federal government," it is not to be announced or applied by the courts, unless it falls within two narrow exceptions. One exception is for rules which place "certain kinds of primary, private conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 1075 (quoting Mackey v. United States, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring in part & dissenting in part)). The other exception, which is applicable to the authority to sentence to death, is for rules which require the observance of "those procedures that . . . are implicit in the concept of ordered liberty." *Id.* (quoting *Mackey*, 401 U.S. at 692-93).

7. In *Penry v. Lynaugh*, the Court held that *Teague*'s retroactivity limitations were applicable in capital cases. 109 S. Ct. 2934, 2944 (1989). The *Penry* decision, however, also held that requiring Texas to permit juries to consider evidence of mental retardation as a mitigating sentencing factor was not a "new rule" under *Teague* — rather, it was a logical extension of two cases decided before Penry's conviction became final: Lockett v. Ohio, 438 U.S. 586 (1978) (sentencer must be free to give independent weight to aspects of the defendant's character and record and the circumstances of the offense), and Eddings v. Oklahoma, 455 U.S. 104 (1982)

Saffle v. Parks[9] legislated a change of the *Teague* "new rule" scheme,[10] making development of the law through habeas review constrained, to say the least. In *Sawyer v. Smith*,[11] the Court recently added a gratuitous nail to the habeas review coffin. These judicial efforts to permit executions despite non-harmless trial errors of constitutional magnitude are complemented by legislative proposals, stemming from the report of the Powell Committee, to limit habeas corpus review.[12]

Procedural limitations on habeas review already abound, comprising a well-developed body of law on procedural default. Indeed, most capital post-conviction litigation addresses the preliminary issue of whether possibly or even presumably meritorious claims presented on appeal or collateral review

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(sentencer may not be precluded as a matter of law from considering any relevant mitigating circumstance, but must give individualized consideration of mitigating factors). *See Penry*, 109 S. Ct. at 2944-45. Texas had been trying and executing people for more than a decade under procedures that had been expressly approved in Jurek v. Texas, 428 U.S. 262 (1976), but which did not meet the *Penry* requirement that juries consider evidence of mental retardation as mitigation. 109 S. Ct. at 2945-46. *Penry* generated optimism in the capital defense community, as most rulings sought by habeas petitioners could honestly be said to be logical extensions, or applications to slightly different facts, of constitutional rulings announced in earlier decisions.

8. 110 S. Ct. 1212 (1990).

9. 110 S. Ct. 1257 (1990).

10. As George Kendall from the NAACP Legal Defense and Educational Fund noted, "legislated" is the correct word. Presentation by George Kendall, *New York University Review of Law and Social Change* Colloquium: Challenging the Death Penalty, 1990 and Beyond (Mar. 31-Apr. 1, 1990). In *Butler*, the majority simply announced that it now had the votes to dismantle the *Penry* interpretation of *Teague*. Henceforth, petitioners will be deemed to be seeking "new rules" even though the relief sought is controlled or governed by earlier precedent so long as the earlier cases were susceptible to debate among reasonable minds in the lower courts. *Butler*, 110 S. Ct. at 1216-18. The absurdity of *Butler* is exceeded by that of *Saffle*. In *Saffle* the petitioner ran afoul of the new interpretation of "new rule" although he called upon the same cases invoked by Penry. *Saffle*, 110 S. Ct. at 1260-64.

11. 110 S. Ct. 2822 (1990). *Sawyer* held that a claim based on the prosecutor's misleading comments to the jury in closing argument as to its capital sentencing responsibility, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), is a "new rule" under *Teague* and therefore does not fall within the exception for fundamental rules affecting integrity of the trial. *Sawyer*, 110 S. Ct. at 2827-33. For a discussion of *Caldwell* and its importance in trials, see White, *Prosecutor's Closing Arguments at the Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 297 (1990-91).

12. In 1988, at the behest of Chief Justice Rehnquist, retired Justice Lewis F. Powell agreed to chair the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases [hereinafter the Powell Committee]. The report of this committee has spawned two bills to amend 28 U.S.C. § 2254 (1988), one proposed by Senator Strom Thurmond, S. 1760, 101st Cong., 1st Sess., 135 CONG. REC. S13,480-86 (daily ed. Oct. 16, 1989), and another by Senator Joseph Biden, S. 1757, 101st Cong., 1st Sess., 135 CONG. REC. S13,472-75 (daily ed. Oct. 16, 1989). The Thurmond bill essentially embodies the provisions to speed up habeas corpus review recommended by the Powell Committee. *See* S. 1760, *supra*, § 2257(b) (expiration of stays of execution); *id.* § 2257(i) (limitations on successive petitions); *id.* § 2258 (petitions must be filed within 180 days of appointment of counsel in state post-conviction proceeding). The Biden bill contains many of the same limitations with slightly more liberal time requirements. It also contains a *Teague* section not found in the Thurmond proposal. *See* S. 1757, *supra*, § 2262 (federal habeas court may determine, using a balancing test, whether a prisoner should benefit from changes in the law which relate to an issue raised for the first time on habeas corpus review).

will be heard at all.[13] The growing collection of procedural default holdings[14] works in tandem with the new *Teague* restrictions to shut the door to federal habeas corpus. Finally, the standard for assessing the effectiveness of trial counsel is the last in a trilogy of rules that undermine meaningful appellate review.[15] The standard would be laughable if its results were not so tragic — relief is denied even in instances of gross incompetence.[16] It is cruelly ironic that the federal government has seen fit to increase resources at the habeas corpus level for prisoners sentenced to death[17] at the very time the significance

13. Many meritorious claims about the lawfulness or fairness of the trial are not heard because of judicial rulings that counsel failed: to raise the claims properly at trial; to preserve them in the precisely correct form on direct appeal; or otherwise to comply with the intricacies of state procedural law. *See, e.g.*, Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).

14. *See, e.g.*, Smith v. Murray, 477 U.S. 527 (1986). An amicus curiae brief presented to the Supreme Court of Virginia on behalf of Michael M. Smith raised a presumptively valid constitutional claim, but the United States Supreme Court found that the petitioner had procedurally defaulted. *Id.* at 531-33 (citing Amicus Brief of the Post-Conviction Assistance Project, University of Virginia Law School, Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978) (No. 78-0293)). Smith sought to excuse the failure to raise the claim properly on the ground that the novelty of the claim explained the default: United States Supreme Court decisions establishing the claim's validity were not rendered until after his trial. *Id.* at 536. Earlier, the Court had held that failure to comply with applicable state procedure was excused where the legal basis for a claim was not reasonably available to counsel. Reed v. Ross, 468 U.S. 1, 12-16 (1984). The Court in *Smith* found, however, that the claim had been available to Smith because it had been "percolating in the lower courts for years at the time of his original appeal." 477 U.S. at 537. The current state of the law poses a "catch-22": if a habeas petitioner can satisfy the stringent requirements of *Smith*, entitling her to the "new law" excuse for failing to raise a claim on direct appeal, would she not almost certainly be denied relief on the ground that she was requesting a "new rule" under the *Butler* interpretation of *Teague*?

15. In 1984, the Supreme Court established a requirement that those claiming denial of the sixth amendment right to effective assistance of counsel must show both that they did not receive reasonably effective assistance *and* that confidence in the outcome of the proceeding is undermined because of counsel's unprofessional errors. Further, the claimant must overcome a strong presumption that counsel acted competently. Strickland v. Washington, 466 U.S. 668 (1984).

16. A recent example is Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 2220 (1990). There, without consulting the client, who had never admitted guilt, counsel at the penalty phase of the trial conceded before the jury the existence of the aggravating factors necessary to support a death sentence and argued further: "He may have committed a horrible crime and he did commit two horrible crimes, but he is still a human being with a soul despite the blackness of the crime this man has committed." *Id.* at 499 n.17. The Court nevertheless denied relief saying "[T]hough we do not recommend [the lawyer's] arguments as a model, we hold them not to reflect errors so serious as to have deprived Brown of counsel in a Sixth Amendment sense." *Id.* at 501; *see also* Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980's*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 803-10 (1986); Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259 (1986).

17. Habeas corpus resource centers are coming into being in several states under the authority of the Criminal Justice Act, 18 U.S.C.A. § 3006A (West Supp. 1990). Also, although the Supreme Court recently held that counsel at state post-conviction appeal is not a constitutional necessity, Murray v. Giarratano, 109 S. Ct. 2765 (1989), the proposals of both Senator Thurmond and Senator Biden to accelerate the review of habeas petitions, *supra* note 12, would be available to states only if counsel is provided.

of those proceedings is fading.

All these developments mean that in the nineties challenging death penalty verdicts beyond the trial level will be more difficult. Post-conviction relief, to the extent that it will be available, will depend, even more than in the past, on what was done or not done at trial. The damage posed by these areas of bad law can be minimized only by better trial advocacy.

Unfortunately, these developments have not been accompanied by an increase in the number of capable trial attorneys or the resources available to them. The only way to diminish the number of death sentences is to devise a means of insuring compliance with the law at hundreds of trials across the country. The remainder of this Article will focus on one aspect of the challenges and opportunities that are presented at the trial level — the penalty trial.

The necessity thrust upon us, challenging the death penalty at the trial level, also creates an opportunity to educate the public about the horror of capital punishment. The proper conduct of a capital trial defense can and should produce the most frustrating, expensive, and disillusioning experience ever undergone by a local community. Given the particularized consideration required in each death penalty case,[18] the capital trial can be a powerful vehicle for focusing a community's attention on the injustice of the death penalty. There is no way to conduct a proper capital defense without exposing fundamental errors — not only errors of law, but basic unfairness that will be apparent to lay persons. To soundly defeat the death penalty, we must challenge it not only at the trial level, but also at its roots — the ignorance and indifference of ordinary people to the evil wrought in their names.[19]

II.
TAKING NOTICE OF THE PENALTY TRIAL[20]

I begin with the premise that, in the vast majority of cases, *success* in

18. In two 1976 decisions, the Supreme Court forbade mandatory death penalty schemes. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The Court has reaffirmed its prohibition of a mandatory death penalty for *any* offense by any class of offenders. Sumner v. Shuman, 483 U.S. 66 (1987) (invalidating a mandatory death statute for an inmate convicted of murder while serving a life sentence without possibility of parole). Consequently, each community is required to choose which murderers shall live and which shall die. This case-by-case selection must be done through the public machinery of the courts, thereby opening the community and its institutions to public scrutiny.

19. Millard Farmer and Joe Nursey of Team Defense in Georgia hold the view that the death penalty can be challenged effectively by using the legal framework of a capital trial as a means to hold a mirror before a community, exposing its own injustice and racism. They argue, and demonstrate through their work in the field, that the death penalty is properly understood as a political and not a legal system. I wholeheartedly agree with this view and am aware that the eventual defeat of the death penalty is not likely to result from litigation alone. I maintain only that it is appropriate to exploit *every* means of challenge, including more effective trial defense.

20. Some of the ideas and proposals that follow about the proper use of law and reality in penalty trials are mine, derived from my experience as trial attorney, teacher, and resource

capital defense means having the client sent to prison for life.[21] Though the penalty trial is an essential stage for achieving a life sentence,[22] it is often the part of the capital trial least understood by defense attorneys. It is my hope that this Article will inspire dialogue among both scholars and practitioners about the ingredients and presentation of a successful case in mitigation.

While the focus of this Article is on the penalty trial, practitioners should note that if the penalty trial is reached, other and better opportunities to secure a life sentence have already been lost. Pretrial negotiation,[23] pretrial mo-

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center director. The discussion that follows also relies on writings by and discussion with Deana Logan and Kevin McNally, although neither would necessarily endorse all of the approaches recommended herein. Logan is a lawyer and developmental psychologist who now works at the California Appellete Project. McNally, formerly of the Kentucky Department of Public Advocacy, is now in private practice in Frankfurt, Kentucky.

21. *See* McNally, *Death is Different: Your Approach to a Capital Case Must be Different, Too*, THE CHAMPION, Mar. 1984, at 8, 15. Virginia law provides for life imprisonment without parole only in limited instances and is somewhat ambiguous on the point. *See* VA. CODE ANN. § 53.1-151(B) (1988). At the Virginia Capital Case Clearinghouse, part of our work for the *defense* during plea negotiations in past cases has even involved fashioning plausible constructions of the statute that would result in the client never being eligible for parole.

22. In 1976 the Supreme Court approved three death penalty schemes, all of which contained provisions for either a bifurcated trial or a separate penalty proceeding following conviction of an offense punishable by death. The Georgia statute approved in Gregg v. Georgia, 428 U.S. 153 (1976), and the Florida scheme upheld in Proffitt v. Florida, 428 U.S. 242 (1976), employed at the penalty trial "aggravating" and "mitigating" factors drawn generally from MODEL PENAL CODE § 210.6(3)-(4) (1980). The Texas case upheld by the Supreme Court that same day also involved a bifurcated trial. Jurek v. Texas, 428 U.S. 262 (1976). Unsurprisingly, other states simply used the approved statutes as prototypes. *See, e.g.*, IND. CODE ANN. § 35-50-2-9 (Burns Supp. 1989); MD. ANN. CODE art. 27, § 413 (1987); N.C. GEN. STAT. § 15A-2000 (1988); VA. CODE ANN. § 19.2-264.4 (1990). For an example of a statute which attempts to follow the constitutionally required format for a capital trial, see 28 U.S.C.A. § 848(9)-(n) (West Supp. 1990). The statute provides for a bifurcated trial with a guilt phase, to determine whether the defendant committed the crime, and then a penalty phase, to determine whether the defendant is to receive a sentence of imprisonment or death. The prosecution bears the burden of proof in both phases. *Id.*

Defendants usually have the right to have both stages tried by a jury. For a jury to impose a sentence of death in the penalty phase, henceforth referred to as the "penalty trial," it must find that there are "aggravating" factors, which the defense may counter by presenting "mitigating" factors. Permissible aggravating factors are limited whereas permissible mitigating factors include a catchall category. Both aggravating and mitigating factors may relate to the details and circumstances of the crime or the history and character of the accused.

23. Negotiation of a life sentence or a non-capital trial early in the process is the fairest, most economical, and most efficient resolution for all parties concerned. But especially when the prosecutor initially refuses to negotiate, many defense attorneys erroneously believe that negotiation is not possible. Successful negotiation requires currency. To generate that currency, the first step is to communicate to the prosecutor: that continuing to seek death will entail facing a vigorous, resource-consuming defense; that a death sentence may not be obtained; and that it may not stand up if it is obtained. The second step, often overlooked, involves presenting much of the evidence in mitigation to the prosecutor. This requires that a thorough investigation of possible defenses *and* of the case in mitigation be conducted early. *See infra* notes 53-55, 63-69 and accompanying text.

Before a jury can exercise discretion to impose the death penalty, a prosecutor must exercise discretion to seek it. Courts have consistently refused to regulate the exercise of that discretion. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 307-08, 312 (1987); Gregg v. Georgia, 428 U.S. 153, 199 (1976). Consequently, any reason not to seek death that is acceptable to the

tions practice,[24] jury selection,[25] and defense at the guilt/innocence phase[26] are all potential determinants of a defendant's sentence. Indeed, it is probably true that a successful penalty trial cannot be conducted unless the maximum advantage has been gained from these earlier stages.

In seeking to fashion a more aggressive penalty trial, we must overcome one of the shortcomings of the eighties: ineffective communication of even basic strategies to attorneys in the field. For instance, the need for a theory of mitigation has earned widespread recognition over the last decade. It is also widely acknowledged that preparing to present such a theory requires extensive research and investigation far exceeding anything conducted in preparation for non-capital trials. Yet even the basics of this task can confound capital defense counsel.[27]

One way for defense counsel to approach the case in mitigation is to picture herself in the position of a prosecutor, carrying a burden of proof analo-

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prosecutor is acceptable at law. Mitigation evidence may have a greater impact on a prosecutor than on a jury. The disadvantage of providing discovery is often outweighed by the benefits of providing the prosecutor with a justification for accepting a non-capital disposition.

24. Pretrial motions are particularly important in the capital setting. If the motion is granted, the trial may be a little fairer; if denied, an appellate issue is created. The motion can create currency for negotiation, particularly if it is supported by evidence and designed to expose both the political and legal injustices of the proceeding.

25. A great contribution by many participants in this Colloquium has been to teach us all how to get past our outrage at the poor state of death penalty jurisprudence and turn adverse precedent into advantage. Capital jury selection provides an example. In Wainwright v. Witt, 469 U.S. 412 (1985), the Supreme Court tried to insure that the decision of a trial judge to exclude a juror who has reservations about imposing death escapes meaningful review. *Id.* at 424-26. We may turn the tables on the announced standard that a prospective juror is not qualified if her views would "prevent or substantially impair" performance of duty in accordance with law, using it to confront jurors who favor death too enthusiastically or who would not give serious consideration to the myriad of factors the law permits to be offered in mitigation.

26. For example, a juror's lingering doubt about the defendant's guilt, at least regarding the capital offense, influences her decision to sentence to life and not death. *See* Geimer & Amsterdam, *Why Jurors Vote Life or Death, Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28-34 (1988). Even though it has been held that there is no entitlement to a jury instruction designating such doubt as a mitigating factor, Franklin v. Lynaugh, 487 U.S. 164, 172-75 (1988), the reality of its force compels our best efforts to communicate it to jurors.

27. In Saffle v. Parks, 110 S. Ct. 1257 (1990), the penalty trial evidence consisted only of the testimony of Parks' father. Conversation with Vivian Berger, Professor of Law and Vice-Dean of Columbia University School of Law (Mar. 31, 1990). With better penalty trial evidence, there might have been no need for the life of Robyn Parks to hang on the considerable skills of Professor Berger and others who provided volunteer post-death sentence representation. The homicide in *Saffle* had been accomplished by a single shot, and the death sentence was supported by only one aggravating factor, seeking to avoid an unlawful arrest or prosecution, a circumstance not designed to inflame passions. In Hyman v. Aiken, 824 F.2d 1405, 1415 (4th Cir. 1987), the penalty trial began before defense counsel read the relevant Supreme Court cases or the South Carolina death penalty statute. *Id.* at 1412-13. In House v. Balkcom, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984), and Young v. Zant, 677 F.2d 792 (11th Cir. 1982), *cert. denied*, 476 U.S. 1123 (1986), defense counsel were unaware that there is a separate penalty trial in capital cases. *House*, 725 F.2d at 619; *Young*, 677 F.2d at 794.

gous to that mandated by In re *Winship*[28] as to the "elements" of entitlement to a life sentence. To identify and prove the elements of life entitlement, it is essential at every step of the defense to understand the proper role of legal and extra-legal factors, that is, of law and reality.

III.
STRATEGIC USES OF THE LAW IN THE PENALTY TRIAL

As Kevin McNally has written, "No state legislature would have the foggiest idea what moves juries towards mercy. Any lawyer who looks to the death penalty statute for guidance on 'mitigation' is crazy."[29] Bearing in mind McNally's warning, this Section describes the principal, but limited, uses of law at the penalty trial. The first two uses mirror functions of pretrial practice.

A. To Create Currency for Negotiation

Even at the late stage of the penalty trial, the errors committed by the trial judge and prosecutor may cast doubt on the desirability, likelihood, or durability of a death verdict.[30] To be sure, a non-capital agreement may be rendered less likely by the investment already made in the trial. That investment seems less compelling, however, if the prosecutor and judge are made aware that the penalty trial will be gruelling, contentious, and fraught with the possibility of reversible error.

B. To Create Appellate Issues

That the trial will assume preeminent importance in the nineties does not imply that appellate relief will never be available. For the past thirteen years, penalty trial issues have consistently provided the one bright spot in Supreme Court capital jurisprudence. *Lockett v. Ohio*[31] and its progeny command that the widest possible leeway be given in presentation of defense penalty trial evidence.[32] Indeed, the law of mitigation is the best law we have.[33]

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28. 397 U.S. 358, 364 (1970) (due process requires that prosecution prove beyond a reasonable doubt the existence of every fact necessary to constitute guilt).

29. K. McNally, "Sensitive" Mitigation: Getting Inside the Client, His (Her) Family and Others Who Have "Failed", *presented at* National Legal Aid and Defender Association Conference: Life in the Balance: Defending Death Penalty Cases (Feb. 24, 1989) (on file with author).

30. My experience in Virginia indicates that some prosecutors and judges are aligned on the same side of a capital trial. There are ways to disrupt that alignment. Defense counsel may convince one of the two that the other has committed legal error, or convince one of them that the client does not deserve to die. Law may then be used to justify the discretionary decision to prohibit, or to abandon pursuit of, the death penalty.

31. 438 U.S. 586 (1978).

32. *See infra* note 45 and accompanying text.

33. There are some recent indications, however, that the Supreme Court may begin to retreat on this front as well. *See* Boyde v. California, 110 S. Ct. 1190, 1196 (1990) (states are free to structure and shape consideration of mitigating evidence); Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990) (upholding state's death penalty statute that mandates capital sentence upon finding at least one aggravating factor and no mitigating factors). It is not possible to

C. To Control the Prosecutor

Defense counsel can use the law as a tool for shutting the prosecutor down and taking charge of the penalty trial. For example, the law of aggravation dictates a narrow concept of relevance and can therefore be employed to restrict the prosecutor's penalty trial evidence and closing argument.

The law in the courtroom is on the side of the defense. The beauty of using law to support interruptions of the prosecution's argument, for example, is that it is unimportant how the Supreme Court will ultimately interpret the constitutional principle being argued. It is unimportant what the balance of the circuit courts is on the point. All that is needed to justify interruptions is unfairness, perceived in good faith, and arguably supported by some body of law. Whether the scope of argument has been improperly limited by the trial court is a matter for the next generation of appellate opinions.

There are numerous examples of support in law for the interruption and limiting of the prosecution's argument. *Caldwell v. Mississippi* established that it is improper for the prosecutor to suggest to the jurors that someone other than they will be ultimately responsible for taking the life of the defendant.[34] In *Zant v. Stephens*,[35] an otherwise bad decision for capital defense, Justice Stevens stated in dicta that it is a violation of due process to use certain considerations as aggravating factors, to wit: that the defendant has engaged in constitutionally protected conduct, factors that should be mitigating, and constitutionally impermissible or totally irrelevant factors such as race, religion, or political affiliation.[36]

Cases decided after *Zant* demonstrate dramatically that its third category, factors "irrelevant to the sentencing process," places severe restrictions on the prosecution that are not applicable to the defense. In fact, the Supreme Court has repeatedly emphasized, initially in *Gregg v. Georgia*,[37] that, when

assess the impact of these decisions at this time. Most likely, they herald only a further paucity of appellate relief and will not pose any significant limitation on penalty trial defense.

Defense counsel enjoys some procedural advantages at the penalty trial as well. A brief opinion particularly valuable in this respect is Green v. Georgia, 442 U.S. 95, 97 (1979) (holding that use of state hearsay rule to exclude defense penalty trial evidence is constitutionally impermissible).

34. 472 U.S. 320, 325, 341 (1985); *see also* White, *supra* note 11, at 301. The strength of the constitutional rule of *Caldwell* was later undermined by the Supreme Court in *Darden v. Wainwright*, which held that the prosecution's closing argument, stating that defendant was an animal who should be out of his cell only on a leash, and expressing a desire to see the defendant with his face blown off, was improper but not a denial of due process. 477 U.S. 168, 180-83 (1986). On appeal, a state attorney general might argue that *Darden* applies. In effect, though, *Darden* illustrates the importance of using the law as an obstacle to the prosecution's improper arguments at trial. Because the precise boundaries of improper argument are unknown, a prosecutor interrupted at trial would be put in the position of contending that, although this type of argument is reprehensible and has been condemned by several courts, it does not sink to the rock-bottom level of violating fundamental fairness and, in any event, constitutes only harmless error.

35. 462 U.S. 862 (1983).

36. *Id.* at 885.

37. 428 U.S. 153 (1976).

deciding whether to sentence a defendant to death, the fact finder must identify some enhanced degree of individual moral culpability in the offender beyond that necessarily present in the commission of the capital offense.[38] The proposition that *any* penalty trial evidence or argument not relevant to this single issue of moral culpability is constitutionally impermissible may also be derived from the Court's more recent decisions in *Booth v. Maryland*[39] and *South Carolina v. Gathers*.[40]

D. To Allow Evidence of Mitigation

While the law provides a basis for arguing the irrelevance of much of the prosecution's penalty trial evidence and closing argument,[41] there is no reciprocity with respect to the admissibility of defense evidence or closing argument. Although *Boyde v. California*[42] and *Blystone v. Pennsylvania*[43] suggest that the Court may be beginning to define some limits on the presentation of mitigating circumstances,[44] the overwhelming body of law permits defendants to proffer and argue virtually anything as a basis for a sentence of less than death.[45]

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38. *Id.* at 197; *see, e.g.*, Tison v. Arizona, 481 U.S. 137, 156-57 (1987) (requiring determination of individual culpability of accomplices); Enmund v. Florida, 458 U.S. 782, 798 (1982) (inconsistent with eighth amendment to execute one convicted of robbery who did not kill or intend to kill); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (requiring determination of individual culpability of juvenile with turbulent family history); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (individualized determination constitutionally required in capital cases because imposition of death is so profoundly different from other penalties).

39. 482 U.S. 496 (1987).

40. 109 S. Ct. 2207 (1989). *Booth* and *Gathers* reversed death sentences on the ground that it was improper to base such an irreversible penalty either on salutary characteristics of the victim or on the impact of the crime on the victim's family. In *Gathers*, the Court specifically reaffirmed the command of *Enmund* that the death penalty must be tailored to the personal responsibility and moral guilt of the accused. *Id.* at 2210. The Court relied heavily on its decision in *Booth*, which held that the admission of irrelevant evidence diverting jury attention from the background of the defendant and the circumstances of the crime risks arbitrary imposition of the death penalty. *Booth*, 482 U.S. at 503-05.

41. Every state has rules of evidence that are substantially the same as Federal Rules of Evidence 401 and 402. They provide that evidence is relevant only if it tends to make more likely or less likely something a party is entitled to prove at the proceeding, and that evidence which is not relevant is generally not admissible. The simple evidentiary ground of lack of relevance is often overlooked.

42. 110 S. Ct. 1190 (1990).

43. 110 S. Ct. 1078 (1990).

44. In both *Boyde* and *Blystone*, the Supreme Court rejected challenges to jury instructions which required a sentence of death if the aggravating circumstances found by the jury outweigh the mitigating circumstances. *Boyde*, 110 S. Ct. at 1194-96; *Blystone*, 110 S. Ct. at 1084. States may structure consideration of mitigating evidence to achieve rational and equitable administration of the death penalty. *Boyde*, 110 S. Ct. at 1196.

45. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989) (remanded for resentencing because the jury was unable to consider and give effect to mitigating evidence of mental retardation and substance abuse); Hitchcock v. Dugger, 481 U.S. 393, 395-99 (1987) (mere presentation of mitigation evidence not sufficient; sentencer must be permitted to consider it along with other statutory factors); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (prior adjustment to incarceration is relevant mitigation); Eddings v. Oklahoma, 455 U.S. 104, 115

E. To Provide a Better Context in Which to Argue for Life

When a guilty verdict is returned, fatigue, disappointment, and even depression may set in. But it is absolutely essential to seize initiative from the prosecutor at the penalty trial. There is no reason why it should not be so. The remaining choices for the defendant are death or life in prison. The jury has seen and heard much of the grisly details of the offense. It has seen little or nothing of the offender.

Law can be employed to facilitate the quest for a life sentence in a given case. At this point, however, the limits of the usefulness of law have just about been reached.

IV.
SEARCHING FOR THE "ELEMENTS" OF LIFE ENTITLEMENT

A. Law's Irrelevance as a Source of Life Entitlement

The law would seem a likely source from which to derive elements of an entitlement to life. However, death penalty statutes are barren of helpful guidelines. Even the most articulate judge's instructions implementing statutory guidelines of mitigation and aggravation often dissolve in the context of a jury's actual decision-making process. Upon consideration, the law provides little guidance for a defense lawyer seeking to develop a methodology with which she can convince jurors to deliver a life sentence. The mitigating factors that appear in death penalty statutes represent nothing more than legislative efforts to reinstate the death penalty by mirroring the three statutory schemes approved by the Supreme Court in 1976.[46] For this reason, the factors have virtually no value in defining the "elements" of life entitlement. They do not even represent a considered legislative policy judgment about what makes an offender comparatively less culpable.

Nor is much guidance offered by the Supreme Court's later insistence that mitigating factors not be limited to those enumerated in statutes.[47] Although this law has provided helpful grist for appellate opinions, it does not determine, in reality, which factors move jurors. When seeking to define the elements of a life sentence, I would suggest not looking to the law of mitigation at all.

A good way to illustrate the differing functions of law and reality in capital sentencing would be to picture the capital jurors in *McKoy v. North Caro-*

(1982) (turbulent childhood is relevant mitigation); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (any proffered aspect of character or record of defendant or circumstances of offense is relevant mitigation); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (death penalty schemes must permit individualized consideration of the "diverse frailties of humankind").

46. *See supra* note 22.

47. Lockett v. Ohio, 438 U.S. 586 (1978), Hitchcock v. Dugger, 481 U.S. 393 (1987), and many other cases establish that it is unconstitutional to limit mitigating factors to those provided by a legislature. *See supra* note 45. Some statutes even contain a catchall mitigating factor. *See, e.g.*, CAL. PENAL CODE § 190.3(k) (West 1988).

lina[48] and *Mills v. Maryland*.[49]

At the penalty trial in each case, attorneys for McKoy and Mills made and sufficiently preserved objections on federal grounds to the state procedures governing the passage of information between judge and jury. The essence of their claims was that reasonable jurors operating under those schemes might conclude that, before they could consider a particular mitigating circumstance, the jury would have to be unanimous as to its existence.[50] If this were true, factors considered as mitigating against a sentence of death by any number of jurors less than twelve would be excluded from the balancing process required by the state's sentencing scheme.[51]

Professor Amsterdam and the others who persuaded a majority of the Supreme Court in *McKoy* and *Mills* that the schemes were an unconstitutional limitation on the decision to sentence to life were absolutely correct in the terms of law. It is only just that the two decisions effectively emptied substantial portions of the death rows of Maryland and North Carolina.

Defense counsel must not, however, prepare for the penalty trial with any expectation that jurors will engage in a sophisticated weighing of aggravating and mitigating factors. Making the not-insignificant assumption that jurors understand the instructions of the court and attempt to implement the complex discretion-guiding mechanisms of the statutes, nothing in the research that I have conducted or read about suggests that the sentencing decision is controlled by this model of "weighing."[52] It is unlikely that the capital decision-making process is in reality one of stacking only the statutorily designated aggravating factors on one side of an imaginary scale and an unlimited list of mitigating factors on the other side. Prosecutors often urge "weighing" imagery upon juries because they know that gory photographs will outweigh the pleas of the defendant's crying mother.

B. Identifying the Content of Life Entitlement

If law does not provide guidance for the conduct of penalty trials, how do we go about persuading a jury not to kill a client? Too many of the attorneys with whom we work have great difficulty articulating a reason not to kill to members of the Clearinghouse, much less to a jury.[53] It is necessary to iden-

48. 110 S. Ct. 1227 (1990).

49. 486 U.S. 367 (1988).

50. *McKoy*, 110 S. Ct. at 1230; *Mills*, 486 U.S. at 373-74.

51. *McKoy*, 110 S. Ct. at 1231; *Mills*, 486 U.S. at 371, 374.

52. *See* Hans, *Death by Jury*, in CHALLENGING CAPITAL PUNISHMENT 161-63 (K. Haas & I. Inciardi eds. 1988) (citing studies indicating likelihood that capital jurors do not use algebraic model of decision making, assessing and weighing each piece of evidence, but rather employ narrative or "story" model to form plausible sequence of human events); *see also* Geimer & Amsterdam, *supra* note 26, at 23-25 (statutory list of factors ostensibly designed to guide jury discretion had little influence on capital sentencing decision).

53. At the Virginia Capital Case Clearinghouse, we have become accustomed to long periods of silence when we ask "How is the mitigation investigation going?" "What is your theory of mitigation?" "If the jurors convict your client, why shouldn't they kill him?" Our single

tify an articulable reason not to kill, and to persuade jurors of the merit of the reason.

Logan identifies four general categories of defense penalty trial evidence: "empathy" evidence, "good guy" evidence, "positive prisoner" evidence, and "crime-related evidence." "Good guy" evidence is what the name implies: thoughtful caring deeds, cooperation with authorities, good job history, and so on. Similarly, "positive prisoner" evidence can include lack of problems in jail, continuing education, and useful work skills. "Crime-related" evidence includes lingering doubt, subordinate role in the crime, remorse, and confession. "Empathy" evidence includes a much longer list of factors, including abuse, stress, retardation, institutional failure, and substance abuse.[54]

Logan concentrates primarily on "empathy" evidence because she believes, unless handled very carefully, it has the greatest potential for turning into evidence in *aggravation* or at least failing to be persuasive. I believe it is the most important category, not only for the reasons identified by Logan, but also because the key to winning a life verdict is establishing a "no fault" or "shared fault" impairment that is traced directly and understandably to the crime.[55]

"Good guy" evidence, that is, evidence of any worthwhile characteristics of the client, is important but supplemental. There will be exceptions, perhaps even a defendant whose positive characteristics are so exemplary that they call for mercy even without evidence of impairment. "Positive prisoner" evidence shows that life imprisonment is sufficient punishment, in part because defendants will not be dangerous and will adjust well to prison. Except for evidence of remorse, "crime-related" mitigation evidence should, in most instances, have been established prior to the penalty trial.

C. Assuming the Burden of Proving Life[56]

I have urged that law is not the key to persuasion at the penalty trial.

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most difficult and frustrating task is translating the expertise provided to us by skilled attorneys and other professionals around the country into trial action by the attorneys we assist.

54. Logan, *Is it Mitigation or Aggravation? Troublesome Areas of Defense Evidence in Capital Sentencing*, CALIF. ATT'YS FOR CRIM. JUST. F., Sept.-Oct. 1989, at 14, 16.

55. Logan emphasizes the importance of answering the "why" question, that is, of giving jurors some understanding of how the defendant could have committed the crime. Another major theme emphasized by Logan, and present in virtually every case, is "if only:" if only certain critical things had happened differently in the life of the defendant, she would not have committed the crime. *Id.* at 18. McNally speaks of "tracing the anger:" "With few exceptions, juries vote for life because they come — not necessarily to accept — but to understand the client's anger." McNally, *supra* note 29, at 3, 4. Both themes can be construed as ways of describing impairments. The critical importance of linking impairments to the crime is reflected below in sections 1 and 2 of my hypothetical "Reality in Sentencing Act." *See infra* text accompanying note 62.

56. The detailed proposals in the following Section are only suggested approaches. Not enough is yet known to prescribe with confidence. To mount an effective challenge to the death penalty in the nineties, we must facilitate greater sharing of penalty trial data by attorneys and undertake more research on jury motivation.

Nevertheless, the trial is ostensibly a legal proceeding, conducted by attorneys in a familiar legal format. Perhaps one obstacle to the effective use of the penalty trial is that attorneys lack a familiar legal form to assist them in organizing and presenting unfamiliar themes and evidence.

Effective trial attorneys know of the need for a guide or framework around which to group evidence. Civil litigants often use the basic pleadings for this purpose. Similarly, prosecutors employ the indictment, which has in turn been drawn from the statutory definition of the offense. These frameworks are useful both before and at trial for organizing one's presentation because they force contemplation of what one will undertake to prove and why. The utility of the framework is not dependent upon any assumption that the model will transfer directly to and be employed by the jury as a framework for the decision-making process. It is a tool for the presenter, not for the recipient of evidence.

Likewise, trial attorneys are aware that, in reality, the law's assignment of burden of proof on a particular issue has significance in only very marginal cases, if at all. They do not assume that juries will be unaffected by attitudes and impressions already formed from the trial of the lawsuit as a whole, or that juries can be depended upon to decide every close matter against the party who technically bears the burden of proof. Instead, trial attorneys litigate every important issue in the belief that the party who needs favorable resolution of the issue must assume the burden of proving it.

Very able criminal attorneys lose sight of these accepted truths when they reach the penalty trial of a capital case. Often, they simply dump their evidence into the laps of the jurors — without theme, without form, and apparently in the naive belief that the state bears the burden of proving death in the manner prescribed by the statute.[57] This may be due in part to the unfamiliarity of defense counsel with initiating persuasion. Much of what defense counsel does is reactive to the prosecution.[58] Assuming the burden of proof is also made difficult by the ethereal nature of "proving life." The reality that defense counsel bears both the burden of production and the burden of persuasion in a capital penalty trial becomes quite clear when one considers the typical aggravating factors assigned for "proof" to the prosecution. They have no new elements; instead, they derive from matters which were established during the

57. A recent example is Spencer v. Commonwealth, 238 Va. 563, 385 S.E.2d 850 (1989). Defense counsel contested critical DNA evidence vigorously at the guilt/innocence phase. After Spencer was convicted of beating, raping, sodomizing, and murdering a young neurosurgeon, however, the defense penalty trial evidence consisted of a friend and two family members who testified that the defendant was a "normal young person" who never caused any problems for them. *Id.* at 569-70, 576, 385 S.E.2d 854, 858. *Cf.* VA. CODE ANN. § 19.2-264.4(C) (1990) (penalty of death shall not be imposed unless Commonwealth proves aggravating factor beyond a reasonable doubt).

58. *See* Stebbins & Kenney, *Zen and the Art of Mitigation Presentation, or The Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial*, THE CHAMPION, Aug. 1986, at 14, 16.

guilt/innocence phase.[59]

D. *A Framework for Proving the Elements of Life Entitlement: The "Reality in Sentencing Act"*

To accomplish the task of persuasion, at least four things are required: a theory; evidence to support the theory; a logical, understandable framework for presenting the evidence and the theory; and center stage. This looming task, which includes investigating, preparing, and effectively presenting penalty trial evidence, might be made easier if one could refer to a guiding document.[60] I offer the following hypothetical statute, which is similar to the statute, indictment, or pleading employed as a guide by litigants who bear the burdens of both production and persuasion in other proceedings. It presents the fact-based elements of life entitlement in a familiar legal format.[61]

§ 00.00 REALITY IN SENTENCING ACT[62]

All capital sentencing proceedings under the authority of this chapter shall be conducted with due regard to the seriousness of the

59. *E.g.*, GA. CODE ANN. § 17-10-30(b)(4) (1990) (murder committed for purpose of receiving money or any other thing of monetary value). Other aggravating factors may simply be unfocused appeals to the jury's fear or revulsion. *E.g.*, VA. CODE ANN. § 19.2-264.4(C) (1990) (conduct of accused was outrageously or wantonly vile, horrible or inhuman; probability that defendant would commit criminal acts of violence that would constitute a continuing serious threat to society).

60. I claim no special expertise in this daunting task, but others have taken the search for elements of a life entitlement beyond the common admonition of the eighties that we must seek to "humanize" the client. "It is axiomatic in capital defense literature that 'it is much easier to kill a sack of cement than a human being.' However, with 1500 people presently on death row, it seems fairly easy for a jury to kill a human being, too." Stebbins & Kenney, *supra* note 59, at 14. Since 1986, the death row population has increased to 2393. NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Sept. 21, 1990).

61. By using this statute, defense counsel effectively put themselves in the position of prosecutors operating under the legal mandates of *In re* Winship, 397 U.S. 358 (1970), and Patterson v. New York, 432 U.S. 197 (1977). *Winship* established the constitutional requirement that the prosecution alone must bear the burden of proving beyond a reasonable doubt "every fact necessary" to constitute the crime alleged. 397 U.S. at 364. There followed a period of uncertainty about exactly what was encompassed by the prosecutor's burden. For a time, it even appeared that the burden included matters traditionally assigned to defendants to prove. *See* Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (defendant may not be required to prove heat of passion or sudden provocation to negate the malice aforethought element of murder). The Court in *Patterson*, however, limited the burden to the material elements of offenses as drafted by legislatures. 432 U.S. at 205-11.

Thus, the criminal statute defines the proof obligation of the prosecutor just as my suggested "Reality in Sentencing Act" defines the task of capital defense counsel. Of course, proving life entitlement presents challenges rarely faced by prosecutors. Chief among these is the fact that the "material elements" of a life entitlement, as well as the witnesses, exhibits, documents, and argument needed to establish them, are far more difficult to identify than are the *mens rea* and *actus reus* of the ordinary criminal offense.

62. The Act to some extent follows the theories of mitigation proposed by Logan, *supra* note 54 and accompanying text, at 16; *see* text accompanying note 55. "Empathy" evidence provides the category of proof for sections 1-3 of the "Reality in Sentencing Act." "Good guy" and "positive prisoner" evidence, correspond directly to section 4 of the hypothetical statute;

offense of which the accused stands convicted and without excessive reliance upon legal technicality.

Therefore, in all sentencing hearings before a jury to determine whether the appropriate sentence shall be death or life imprisonment, the jury shall fix the punishment of the accused at death unless she shall have satisfied the jury beyond a reasonable doubt:

(1) That there occurred in the life of the accused, an impairing event or series of events over which she had no control and for the occurrence of which she cannot justly be held responsible; OR

(2) That there occurred, in the life of the accused, an impairing event or series of events for which others not now facing punishment share an appreciable degree of responsibility with the accused; AND

(3) That there is an unbroken causal link between the impairing event or events established pursuant to subsections (1) or (2) and the circumstances of the capital offense of which the accused stands convicted; AND

(4) That the accused has at some time demonstrated worthwhile characteristics tending properly to associate her with the community of human beings. Evidence of these characteristics may include evidence tending to show that the accused struggled, albeit without success, to overcome the impairments established pursuant to subsections (1) or (2); AND

(5) That as a consequence of the above, the punishment of imprisonment for life is, in this case, severe and sufficient.

It is important to remember that identifying the content of what must be proven at a particular penalty trial is not possible without the willingness and ability to undertake a most thorough investigation of the life of the client and all who have influenced that life.[63] It cannot be emphasized enough that, although the pretrial and guilt phase of course affect the sentencing decision, the penalty trial is the first time that the jurors see the client as a person.[64]

Logan also appropriately suggests that if we define mitigation as lessening the jurors' urge to punish with death, we are forced to take into account the possibility that some of our evidence might open the door to damaging rebuttal evidence not otherwise admissible. As a result, there might be no net reduction in the urge to punish with death, a situation that should be anticipated

"positive prisoner" evidence is also relevant to section 5. The statute does not mention crime-related mitigation evidence because this should have been proved at the guilt/innocence stage.

There is a proper case in mitigation for every capital defendant. Each is, of course, a different human being with a different story. Therefore, it will be necessary to adjust the "statutory" framework to individual cases.

63. *See infra* notes 67-69 and accompanying text. The investigation, of course, not only identifies the theme and content of the case but permits it to be presented.

64. I interviewed several jurors who made it clear that their observations and impressions of the defendant throughout the trial were important. One noted: "He didn't move a muscle except for crossing his legs. By the time of the penalty phase, the jury was not inclined to feel sorry for him. Minds were already colored." Geimer & Amsterdam, *supra* note 26, at 52.

and dealt with as effectively as possible before trial.[65] However, the prospect of damaging rebuttal is never, as a practical matter, an excuse not to put on any evidence at the penalty trial.[66]

V.
PROVING THE LIFE ENTITLEMENT

The "Reality in Sentencing Act" attempts to set forth the content of life entitlement as elements of a statute. These elements must be prepared, presented, and proved to the jury.

A. Preparation — Investigation

Investigation for the penalty trial must be comprehensive, requiring counsel to learn about the client's life from pre-birth to the present. Investigation should be conducted in its initial stages without a precise objective. That is, the first stage should be a massive data-gathering exercise with nothing more particular in mind than the elements of the "Reality in Sentencing Act," if that.

Most importantly, a trail of documents significant to the life of the client should be collected, including a birth certificate, medical records, jail records, employment records, school records, military records, and social service agency records. If there is any advantage to the fact that discretion to seek death is exercised predominantly against the poor and impaired, it is that these people come in contact with government agencies far more frequently than most individuals. Employees of these agencies have a professional duty to keep records and ostensibly have a legal and moral duty to assist the government's "beneficiaries."[67] Only when this data has been collected and inter-

65. Logan, *supra* note 54, at 15. Logan suggests filing pretrial motions *in limine* and motions for discovery of rebuttal evidence. Such litigation may also generate appellate issues and uncover *Brady* violations. Even ethical prosecutors rarely take note of the broad scope of mitigating evidence. It is rare that a rebuttal witness will not have communicated to the prosecutor *something* arguably mitigating, and even rarer that the prosecutor will be aware of *nothing* that might impeach the credibility of that witness. *See* Brady v. Maryland, 373 U.S. 83, 86-88 (1963); Giglio v. United States, 405 U.S. 150, 153-55 (1972).

66. This is true because the defendant has nothing to lose. In the absence of further evidence, the sentencing verdict *will be* death, except in the rare case where the jury's lingering doubt about the defendant's guilt is very strong and may be lessened by defense penalty trial evidence. It is very unfortunate that the Supreme Court's most important recent opinions defining the sixth amendment right to effective assistance of counsel were capital cases where defense counsel's failure to present evidence at the penalty trial was found to be acceptable. *See* Burger v. Kemp, 483 U.S. 776, 794-95 (1987); Strickland v. Washington, 466 U.S. 668, 699-700 (1984). The former case, in particular, is an invitation to lazy lawyers to invent *post-hoc* "tactical" reasons that excuse failure to investigate. *See Burger*, 483 U.S. at 794-95; *see also* Whitley v. Bair, 802 F.2d 1487, 1494-95 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

67. For insight into innovative ways to conduct this investigation with very limited resources, I am indebted to a fellow participant in this Colloquium, Scharlette Holdman. I was privileged to assist her as part of a team of volunteers from several states who sought unsuccessfully to save the life of Alton Waye, executed by the Commonwealth of Virginia in August 1989. The investigation was conducted in less than three weeks. It uncovered startling evi-

views conducted with everyone who was even slightly important in the life of the client,[68] can a real social history be prepared and the particularized plan for proving entitlement to life be formulated.[69]

B. Presentation of Testimony

1. Expert Witnesses

Given the task of proving both an impairment and its relation to the crime, some consider it essential to present expert testimony at the penalty trial in every case. Particularly because experts can give opinions about how stress has affected the life and conduct of the client, Stebbins and Kenney take this position.[70] Logan is skeptical of using traditional psychiatric testimony in the penalty phase, but encourages the use of other mental health professionals to show how the client's difficulties led to her criminal behavior.[71] McNally is less enthusiastic about the use of mental health professionals. He asserts that some cases, especially residual doubt cases, can be presented effectively without expert testimony, and certainly without a psychologist or psychiatrist. He argues against using the testimony of mental health professionals for several reasons. Few court-appointed mental health professionals do a good job in capital cases — thorough, competent evaluations are scarce. Mental health experts tend to label the client, and they testify in a clinical and detached manner. They often use technical terms that confuse the jury. In some cases, their testimony opens the door to damaging cross-examination and rebuttal.[72]

My own experience with Virginia trials confirms McNally's position. Competent evaluations are scarce. While this is due in part to the ineffective-

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dence of organic impairment. In Virginia, however, as one team member put it, "Nobody knew at the time of trial, and nobody cares now." I chose to write this Article in part because I am convinced that, had the case in mitigation that this team prepared in 1989 been presented in 1979, Waye would be alive today. *See also* Blum, *Investigation in a Capital Case: Telling the Client's Story*, THE CHAMPION, Aug. 1985, at 27.

68. Excellent, concise suggestions for obtaining critical mitigation evidence from those who do not wish to give it can be found in McNally, *supra* note 29, at 9-12.

69. Never rely upon a social history based solely on the paper trail and prepared by a social worker or probation officer. They are not writing the history with a case in mitigation in mind. They may be reluctant to highlight their own personal or institutional failures, and may even be openly biased against the defendant. For example, the probation officer who prepared the social history in Alton Waye's presentence report openly editorialized that Waye's death sentence should be upheld.

70. *See* Stebbins & Kenney, *supra* note 58, at 16, 18.

71. Logan, *supra* note 54, at 18. According to Logan, significant advantages of the expert witness are the ability to introduce hearsay and the ability to link the crime to the background problems of the defendant. What is needed, Logan suggests, is someone who can be an effective social historian, who can pull together and authoritatively explain the client's story, tailoring her knowledge to the mitigation theme. Depending on the case, such a witness might be a child abuse expert, substance abuse expert, clinical social worker, or even a cultural anthropologist. Logan recognizes, however, that psychiatric diagnoses can sometimes be problematic for the defendant. Interviews with Deana Logan, Ph.D., California Appellate Project, in San Francisco (Mar. 27 & May 7, 1990).

72. Telephone interview with Kevin McNally, Esq., Frankfurt, Kentucky (Mar. 27, 1990).

ness of some psychologists and psychiatrists, it is also a reflection of the shortcomings of attorneys and the legal system itself. Ideally, the mental health evaluation should be performed only after counsel has conducted the exhaustive investigation described above, developed a preliminary theory of mitigation, and communicated the theory and the results of the investigation to the mental health expert. That seldom happens. The situation is exacerbated by the fact that trial courts rarely order sufficient resources to be provided for the investigation or the evaluation. Finally, in spite of *Estelle v. Smith*,[73] and *Satterwhite v. Texas*,[74] there are legal and practical dangers associated with having the client talk to any mental health professional.[75]

Perhaps the most important argument for omitting expert testimony is that there are alternative means of supplying the expert's information in the penalty trial. It is of little or no practical importance that the law provides that the argument of counsel is not evidence. The law does permit counsel to argue to the jury her interpretation of the evidence presented at trial. This can serve a function very close to that of the expert witness.

I understand that this position is debatable. If an expert is available who will do thorough and competent work despite the limited resources, whose theory is consistent with the theory of mitigation, who will testify in clear and simple language about the meaning of the evidence presented by lay witnesses, and who can successfully withstand cross-examination, then — although there is no guarantee the jury will believe the defense's expert instead of the prosecution's — the expert's testimony will certainly be more persuasive on certain points than the defense's closing argument. Otherwise, I believe defense counsel can effectively substitute for the expert.

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73. 451 U.S. 454, 466-69 (1981) (psychiatrist may not testify against defendant at penalty trial based on disclosure made during examination without having given *Miranda* warnings).

74. 486 U.S. 249, 254 (1988) (reaffirming rule of *Estelle v. Smith*); *see also* Powell v. Texas, 109 S. Ct. 3146, 3147 (1989) (recognizing a separate sixth amendment right to have counsel notified of the scope of any examination that may reveal that the client will be dangerous in the future).

75. *Buchanan v. Kentucky* held that the request of a defendant for a psychiatric evaluation to prove a mental state defense constituted a waiver of the right to raise a fifth amendment challenge to the prosecution's use of evidence obtained from that examination in order to rebut the defense. 483 U.S. 402, 421-25 (1987). *Buchanan* did not expressly address the capital penalty trial. The Fourth Circuit has recently indicated that it would consider a defense request for a psychiatric examination to be a waiver for all purposes, including for use of the defendant's own statements against her at a penalty trial. Giarratano v. Procunier, 891 F.2d 483, 488 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 222 (1990).

If experience in other states is comparable to ours in Virginia, there are also practical dangers in securing examinations necessary for the later presentation of testimony by mental health experts. Virginia provides for sanity evaluations and the appointment of a mental mitigation expert. VA. CODE ANN. §§ 19.2-169.5 (1990). The statute mandates that the full report of the examination be disclosed initially only to defense counsel. Nevertheless, there have been cases in which reports containing information damaging to the defendant were forwarded to the trial judge and even to the prosecutor. I have encountered several such cases through my work. *See also* Estelle v. Smith, 451 U.S. 454 (1981).

2. Lay Witnesses

Lay witnesses can powerfully communicate impairment. Every successful attorney with whom we have worked at the Virginia Capital Case Clearinghouse would agree with Logan that: "Counsel should carefully prepare witnesses to tell their stories through anecdotes and specific acts rather than through generalization and the use of character or reputation evidence. Such anecdotes not only make the testimony more vivid but are also more likely to avoid opening the doors to deadly rebuttal."[76]

C. Presentation of Closing Argument

The very practical need at every capital penalty trial is to seize the initiative from the prosecutor and command the attention of the jury. Closing arguments provide the opportunity for doing so.

First, it is not difficult to fashion a closing argument that in effect makes defense counsel the missing expert witness. In terms understandable to the jury, counsel can explain the causal links between impairment and the crime. She can emphasize the severe reality of a life sentence. She can also explain helpful case law defining mitigation, highlighting that imposition of a life sentence is permitted and contemplated by the law. Jurors can thereby be given "permission" to do that which the evidence should have persuaded them to want to do.

Second, counsel often can maintain focus on the defense and the case in mitigation by frequently interrupting the prosecutor's closing argument,[77] a tactic which should be employed in virtually every penalty trial. Interruptions throw the prosecution off stride and provide an opportunity for supplemental defense argument. They also remind the jurors of the importance of the decision before them and of their obligation to make that decision according to the law.

The defense can use closing argument as an opportunity to emphasize to the jury that the law favors life. It is true that black-letter law, with its lists of aggravating and mitigating factors and its assignments of burdens of proof, probably has little to do with jury decision making and therefore should not be looked to for the content of life entitlement. Logan contends, however, that jurors have four major concerns at a capital penalty trial, and one of them is to follow the law.[78] It is important, then, that defense counsel use her closing argument to assure jurors that sentencing the defendant to life in prison is clearly contemplated by law. If the law did not envision that a life sentence should be given to some who commit capital murder, it should be pointed out,

76. Logan, *supra* note 54, at 18.

77. *See supra* notes 34-41 and accompanying text.

78. The other three are protecting society, punishing the defendant, and serving justice. Logan, *Pleading for Life: An Analysis of Themes in 21 Penalty Arguments by Defense Counsel in Recent Capital Cases*, in 4 CALIF. DEATH PENALTY DEF. MANUAL H-298 (1983).

there would be no need for a penalty trial decision.[79]

The matters discussed above represent but a few of the means by which defense counsel can seize initiative. Whatever the outcome, both law and reality suggest that only fatigue, despair, and lack of adequate preparation prevent the defense from dominating the capital penalty trial.

CONCLUSION — THE CONCEPT OF MINIMUM SHARED RESPONSIBILITY

As the death penalty is challenged in the nineties and beyond, trial by trial, locality by locality, a common concept will become evident. Over the past two decades, this concept has been a crucial feature of the challenges mounted at the judicial, legislative, and community levels. It is the same concept that dominates the approach to capital penalty trials suggested in this Article. It is the concept of minimum shared responsibility.

Somehow, whether directly or tangentially, individuals not on trial for their lives had a hand in getting a defendant to the point of facing the horror of a penalty trial. They abused, impaired, and failed her at critical times. As members of the human community, we are they. The minimal responsibility that we share for the crimes of others prescribes at least a minimal limitation on permissible punishment. It forbids inflicting death. That is why it is important under the "Reality in Sentencing Act" to prove the causal link between societal impairments that have influenced the defendant and the commission of crime. For too long we have permitted individual jurors and the general public to believe that there are only two competing life-or-death factors: unlimited determinism and unlimited individual accountability.

The determinist explanation for every harmful act, expressed in *West Side Story* as "I'm depraved because I'm deprived," will not succeed. If deterministic factors are all that is established, the sentence will almost certainly be death. The fact that juries tend to reject the theory of pure determinism can be seen every day, especially in the common mistake of equating "mitigation" with "excuse" instead of "explanation."[80] There is no excuse for what the defendant did. Despite the fact that society is often partially responsible for the defendant's actions, the community has the right to hold all defendants accountable and to punish them, even through this wretched and unjust legal system. Jurors can be counted upon to recognize and assert that right.

When jurors and the public appropriately reject absolute determinism, they commonly choose unlimited individual accountability, an equally flawed

79. As Logan puts it:

> If the law required all defendants convicted of [a capital offense] to die, there would be no decision to make, and jurors would not be needed. If the factors could be objectively counted and weighed, a computer could do it. Jurors should be made to see that the law says they *are* needed for a very human calculation . . . . This point forcefully made will, hopefully, arm those who want to vote for life with a legal justification for doing so.

Id. at H-301 (emphasis in original).

80. *See* Logan, *supra* note 54, at 19.

theory. Capital defendants are rarely, if ever, solely accountable for their crimes, and certainly their accountability never reaches the point where society can justifiably require them to forfeit their lives. Precisely because capital defendants did not spring full blown onto the earth at the moment of their crimes, contrary to the thrust of many prosecution closing arguments, they cannot justly be killed as punishment. We can argue this concept under the jurisprudential rubric of the eighth amendment, which imposes proportionality limitations on the retributive goal of punishment.[81] Perhaps more importantly, we must communicate this fundamental notion in more uncluttered terms to capital jurors at penalty trials.

As we begin the nineties, the idea that severe punishment short of death is justified, sufficient, and implicit in the concept of minimum shared responsibility, is gaining strength. People are slowly beginning to favor life without parole over death[82] — a fact that brings us one small step further from the cave.

81. Though it did not discuss shared responsibility, the Supreme Court at one time held that death sentences were disproportionate punishment and therefore violative of the eighth amendment if they did not measurably contribute to the retributive goal of insuring that defendants get their "just deserts." Enmund v. Florida, 458 U.S. 782, 801 (1982).

82. *See, e.g.*, L.A. Times, Mar. 1, 1990, at A3, col. 4 (reporting Field Institute poll showing 80% general support for death penalty by Californians, but 67% preferring life without parole with restitution provisions for the victim's family instead of death). The legality and morality of life without parole for offenses now punishable by death is, of course, a question for a future generation.