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# ARTICLES

## THE “ABUSE EXCUSE” IN CAPITAL SENTENCING TRIALS: IS IT RELEVANT TO RESPONSIBILITY, PUNISHMENT, OR NEITHER?

Paul Litton\*

### I. INTRODUCTION

During the sentencing phase of a capital trial, it is defense counsel’s obligation to humanize their client:<sup>1</sup> to have the jurors see not merely a murderer, but a person in whom we see the “diverse frailties of humankind,”<sup>2</sup> which we recognize in ourselves. Counsel, with the aid of a forensic psychologist or social worker, investigate their client’s past, often finding evidence that he suffered extraordinary and continual abuse—even murderous behavior directed towards him from his parents—during his formative years.<sup>3</sup> Craig Haney, who has compiled the social histories of many capital defendants, provides disturbing examples:

[One] defendant was beaten nearly every day of his young life with a switch from a tree or with a belt, was regularly locked in his room, where his parents had removed the handles from the door and installed several locks on the outside of the door and boarded up all the windows. They would leave him in there for days at a time, forcing him to urinate and defecate on the bedroom

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The opinions expressed in this Article are the views of the author and do not necessarily reflect the policy of the National Institutes of Health, the Public Health Service, or the U.S. Department of Health and Human Services.

1. *Marshall v. Hendricks*, 307 F.3d 36, 103 (3d Cir. 2002) (“The purpose of investigation [for the penalty phase] is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense.”).

2. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

3. See generally Marilyn Feldman et al., *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 345 (1986) (finding that eight of fifteen death row inmates in study were the targets of their parents’ murderous behavior); see also Dorothy Otnow Lewis et al., *Intrinsic and Environmental Characteristics of Juvenile Murderers*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 582, 586-87 (1988) (empirical study finding that juvenile murderers, when compared to nonviolent delinquents, “tend to come from more violent, abusive families”).

floor, something for which he would then be punished. He cried and begged to be let out and would become so claustrophobic that he almost asphyxiated several times from the panic attacks that he experienced. The punishment only escalated. As he got older his parents made him do push ups while they held a hunting knife under his chest, as motivation to keep him from faltering.<sup>4</sup>

Penalty-phase jurors often find this kind of evidence to be mitigating, as a consideration in favor of life imprisonment over death.

The purpose of this Article is to articulate the reasons, if any, that evidence of suffering childhood abuse is relevant to a capital defendant's just punishment. The Supreme Court requires state capital schemes to allow a defendant to present evidence of his "character and record . . . and the circumstances of [his] offense"<sup>5</sup> precisely because that evidence "is an indispensable prerequisite to a *reasoned* determination"<sup>6</sup> on punishment. A capital sentencing verdict must not reflect mere sentiment or caprice, but rather a "*reasoned* moral response."<sup>7</sup> If some jurors are affected by such evidence, but it is irrelevant to a *reasoned* determination, then there will be some defendants who receive death and others who receive life without the constitutionally required meaningful, reasoned basis to distinguish them.<sup>8</sup>

Haney exposes one reason for penalty-phase jurors to hear evidence about a defendant's childhood and other life experiences: the idea of a murderer for many people, created by the media, is that of a non-human, pure demonic agent, with "no personal history, no human relationships, and no social context."<sup>9</sup> Evidence of someone's formative circumstances at least reminds jurors that resting in their hands is the life of a *person*, a real human being. To eliminate from sight the social histories of these defendants would help us only to ignore the societal seeds of violence, which we tolerate to an inexcusable degree, and make the decision to execute all too easy.<sup>10</sup>

Having jurors hear this evidence is worthwhile if it has the psychological affect of increasing their sense of the gravity of their decision; but that rationale for allowing such evidence does not answer either the theoretical or practical questions at hand. We need a normative account of *how* penalty-phase jurors should

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4. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 572 (1995).

5. *Woodson*, 428 U.S. at 304.

6. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added).

7. *Smith v. Texas*, 125 S. Ct. 400, 406 (2004) (citing *Penry v. Johnson*, 532 U.S. 782, 796 (2001)).

8. *Cf. Johnson v. Texas*, 509 U.S. 350, 359 (1993) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

9. Haney, *supra* note 4, at 550.

10. *See id.* at 558 ("If violent crime is the product of monstrous offenders, then our only responsibility is to find and eliminate them. On the other hand, social histories—because they connect individual violent behavior to the violence of social conditions—implicate us all in the crime problem.").

consider evidence of abuse as a morally relevant, mitigating circumstance. Moreover, we need a rationale that is consistent with our moral and legal practices of holding persons responsible.

Why question whether such evidence is morally relevant to a defendant's responsibility and just punishment? On first look, it seems obvious why it is relevant: children who are severely abused and neglected are more likely to commit violent crimes as adults than others.<sup>11</sup> In short, severe abuse and neglect *cause* criminal behavior. But James Q. Wilson argues that the law undermines the value of self-control by allowing jurors to consider an "abuse excuse" as a causal explanation of crime.<sup>12</sup> Admitting evidence to explain the *cause* of a crime is troubling because causal explanations are more relevant to social science than to making a moral judgment about a particular act. We normally express moral judgments, resentment, and indignation towards an agent when perceiving a wrong, without exploring all its possible psychological or social causes. Why, then, should causal explanations matter when determining the morally appropriate response to a capital defendant's murder?

Relatedly, the "victim of severe childhood deprivation" is a frequent character in the legal and philosophical literature on responsibility and punishment.<sup>13</sup> A central

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11. See Kenneth A. Dodge et al., *Mechanisms in the Cycle of Violence*, 250 *SCIENCE* 1678, 1681 (1990) (finding that physical abuse increases likelihood of later aggressive behavior even when other factors, such as poverty, family violence, and biological factors, are known); Allan V. Horwitz et al., *The Impact of Childhood Abuse and Neglect on Adult Mental Health: A Prospective Study*, 42 *J. HEALTH & SOC. BEHAVIOR* 184, 189 (2001) (finding that men who were abused and neglected are more likely to have anti-social personality disorder, and women who were abused and neglected reported more symptoms of anti-social personality disorder); Barbara K. Luntz and Cathy S. Widom, *Antisocial Personality Disorder in Abused and Neglected Children Grown Up*, 151 *AM. J. PSYCHIATRY* 670, 672 (1994) (concluding that childhood abuse is a "significant predictor" of antisocial personality disorder); B. Rivera and Cathy S. Widom, *Childhood Victimization and Violent Offending*, 5 *VIOLENCE & VICTIMS* 19 (1990) (reporting that childhood abuse increased risk of violent offending); Cathy S. Widom, *Child Abuse, Neglect, and Adult Behavior*, 59 *AM. J. ORTHOPSYCHIATRY* 355, 364 (1989) (empirical study concluding that abused and neglected persons are more likely to be arrested for violent offenses).

12. JAMES Q. WILSON, *MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM?* 22-43 (1997). While Wilson discusses other kinds of "abuse excuses," the only one under discussion regards the submission of evidence, during a capital sentencing phase, of severe physical, mental, and sexual abuse suffered by a defendant during childhood. As Michael Stocker helpfully points out, "[I]here are many different abuse excuses, many different circumstances in which they are deployed, and many different sorts of concerns motivating their use." Michael Stocker, *Responsibility and the Abuse Excuse*, in *RESPONSIBILITY* 175 (Ellen Frankel Paul et al. eds., 1999). Penalty-phase evidence of childhood abuse differs from other kinds of so-called abuse excuses because it is not offered to show insanity or a less culpable *mens rea*. Defense attorneys stress that it is relevant only to punishment, not responsibility. We should try to understand whether and how that claim could be true. Because analyses of abuse excuses often lump them together and ignore the different purposes for which they are offered, Stocker argues that "almost everything still remains to be done" on assessing the justifiability of particular abuse excuses. *Id.* at 200. This Article takes up his invitation to contribute clarity to the "abuse excuse" literature by analyzing one so-called abuse excuse, presented in one context, for one particular purpose.

13. See MARTHA KLEIN, *DETERMINISM, BLAMEWORTHINESS, AND DEPRIVATION* 1-6 (1990); JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL* 189, 195 (1998); R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 231-33 (1994); SUSAN WOLF, *FREEDOM WITHIN REASON* 37, 44, 75-76 (1990); Peter Arenella, *Demystifying the Abuse Excuse: Is There One?* 19 *HARV. J.L. & PUB. POL'Y* 703, 705 (1996) [hereinafter Arenella, *Demystifying the Abuse Excuse*]; Phyllis Crocker, *Child Abuse and Adult Murder: Implications for the*

question of responsibility theory is whether our practices of holding each other responsible are compatible with determinism—the view that all events, including human choices and actions, are causally necessitated by previous events and the physical laws of nature.<sup>14</sup> Compatibilists—theorists who defend the compatibility of determinism and responsibility—emphasize that, within our practices, we do not excuse people just because there is a causal story behind their actions; thus, we have no reason to think that determinism would provide an excuse for every human choice or action.<sup>15</sup>

P.F. Strawson makes the point in the following terms: Within our interpersonal relationships, we are prone to a wide range of reactive emotions, such as resentment, indignation, and gratitude.<sup>16</sup> Implicit in the experience of these emotions is the belief that the persons with whom we have interpersonal relationships are responsible for their actions. When we suspend these reactive emotions towards an agent (and thereby view her as non-responsible), it is never because we think her actions were causally determined, but rather because of the presence of excuses such as “he didn’t mean to,” “he didn’t know,” or “he’s only a child.”<sup>17</sup>

Our reactive emotions regarding the adult who suffered severe childhood abuse threaten this philosophical defense of responsibility. Even if the resentment and

*Death Penalty*, 77 N.C. L. REV. 1143, 1154-1155 (1999) [hereinafter Crocker, *Child Abuse and Adult Murder*]; Stephen P. Garvey, “*As the Gentle Rain from Heaven*”: *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1025 (1996); Haney, *supra* note 4, at 547; Michael McKenna, *The Limits of Evil and the Role of Moral Address*, 2 J. ETHICS 123, 131 (1998); Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 256, 268-270 (Ferdinand Schoeman ed. 1987) [hereinafter Watson, *Responsibility and the Limits of Evil*].

For discussion of the relevance of a “rotten social background,” see David L. Bazelon, *The Morality of Criminal Law*, 49 S. CAL. L. REV. 385, 385 (1976); Richard Delgado, “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 12-23 (1985); Stephen J. Morse, *Deprivation and Desert*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 114-60 (William C. Heffernan and John Kleinig, ed., 2000) [hereinafter Morse, *Deprivation and Desert*]; Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1267 (1976).

14. I refer to and discuss determinism as the metaphysical/scientific thesis that is traditionally thought to threaten responsibility. Determinism is the view that the physical laws of nature *completely* determine what the state of world will be at a certain time, given the existence of a previous state of the world. However, we may see responsibility threatened by a weaker claim, which T.M. Scanlon calls the “Causal Thesis.” Scanlon writes, “This is the thesis that all of our actions have antecedent causes to which they are linked by causal laws of the kind that govern other events in the universe, whether these laws are deterministic or merely probabilistic.” T.M. SCANLON, WHAT WE OWE TO EACH OTHER 250 (1998) [hereinafter SCANLON, WHAT WE OWE TO EACH OTHER]. Wherever I discuss determinism, my remarks also apply to the compatibility of the Causal Thesis and responsibility.

15. See, e.g., H.L.A. Hart, *Legal Responsibility and the Excuses*, in PUNISHMENT AND RESPONSIBILITY 28-53 (1968); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985), *reprinted* in MICHAEL S. MOORE, PLACING BLAME: A THEORY OF CRIMINAL LAW 481-547 (1997); Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329 (1998); WALLACE, *supra* note 13, at 118-94; SCANLON, WHAT WE OWE TO EACH OTHER, *supra* note 14, at 277-81.

16. Peter Strawson, *Freedom and Resentment*, in XLVIII PROCEEDINGS OF THE BRITISH ACADEMY 1-25 (1962), *reprinted* in FREE WILL 59-80 (Gary Watson ed., 1982).

17. *Id.* at 64-65.

indignation we feel towards a capital defendant are not suspended *entirely* upon learning that he suffered relentless childhood abuse, they are altered, if not reduced in intensity. Why does knowledge of a defendant's miserable childhood alter our reactive emotions towards him? To what implicit belief are our emotions responding? Perhaps they are responding to the belief that a defendant *is* less responsible, to some degree, if her criminal disposition *were causally determined* by abuse suffered as a child. If true, that explanation threatens the compatibilist defense of responsibility. The compatibilist's reliance on our practices of holding each other responsible is undermined if our judgments of responsibility are not as immune to causal explanations (and therefore determinism) as compatibilists, like Strawson, believe.

Beyond this philosophical issue, the present inquiry is important for its practical implications because of the way judges, prosecutors, and defense attorneys talk about this kind of penalty-phase evidence. In summations like the following, prosecutors ask capital jurors to give little weight to childhood abuse because it demonstrates no excuse:

What it really comes down to is requiring [defendant] to accept personal responsibility, personal responsibility for his acts. [Defendant] is personally responsible for the ultimate act, the killing of the innocent [victim]. That's the ultimate act and he should be required to accept the ultimate responsibility for that act and that's the death penalty.<sup>18</sup>

The defense attorney's response in this case was also typical: "[t]his is not about the acceptance of responsibility. . . . [The State is] making it appear like the presentation of mitigating factors is a denial of responsibility, where, in fact, it is a legal right."<sup>19</sup> The defense counsel is correct in saying that his client has a legal right to present evidence of his childhood; but that is beside the point. In asking the jury not to give weight to the defendant's proffer, including evidence of childhood abuse, the prosecutor is raising doubt about the evidence's moral relevance to the jury's decision. The prosecutor's remark provokes the question: If evidence regarding the defendant's childhood is not meant to show an excuse, which reduces the defendant's responsibility for his crime, why should the jurors regard the evidence as mitigating?

The trial court attempted to bring some clarity in its instructions, urging jurors "to remember that evidence of the presence of mitigating factors is not offered to justify or excuse the defendant's conduct. Rather, it is intended to present *extenuating* facts about the defendant's life or character or the circumstances surrounding the murder that would justify a sentence less than death."<sup>20</sup> The state's high court echoed that description of mitigating evidence, holding that it was

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18. *State v. Feaster*, 716 A.2d 395, 437 (N.J. 1998).

19. *Id.*

20. *Id.* at 438 (emphasis added).

improper for the prosecutor to characterize mitigating evidence as an “excuse.”<sup>21</sup> In fact, it is quite typical for courts to define mitigating circumstances as “extenuating” or as making the defendant “less deserving” of death, while not providing an excuse or justification.<sup>22</sup>

The question, though, is *why* would a defendant’s childhood experiences make him less deserving of death. Is the rationale made clear by stating that mitigating factors are not offered to excuse or justify, but rather to show *extenuating* circumstances? No. “Extenuate” means “[t]o lessen or attempt to lessen the magnitude or seriousness of, *especially by providing partial excuses*.”<sup>23</sup> Princeton’s lexical database, WordNet, even equates “extenuating” with “partially excusing or justifying.”<sup>24</sup> The idea that suffering severe childhood abuse is an “extenuating” circumstance, but not an excuse, is unhelpful.

The ABA’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Case state that a “mitigation presentation [is often] offered not to justify or excuse the crime ‘but to help *explain* it.’”<sup>25</sup> But when defense attorneys argue that evidence of childhood abuse aims to explain, but not excuse the defendant’s crime, jurors are left to their own devices to discern the difference between an excuse and an explanation, and whether it has any moral significance.

Thus, this Article’s philosophical inquiry has practical implications. If there is a convincing theoretical rationale for considering abuse evidence at a capital penalty phase, then that rationale should contribute to formulating jury instructions and provide an illuminating vocabulary for prosecutors and defense attorneys when arguing about the relevance of the severe abuse a defendant suffered as a child.

Because of the Article’s practical relevance, and to avoid distraction by the issue’s inflammatory context, the arguments herein assume that the death penalty

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21. *Id.*

22. *See, e.g.,* *People v. Young*, 34 Cal. 4th 1149, 1221 (Cal. 2005); (*Branch v. State*, 882 So. 2d 36, 72 (Miss. 2004); *State v. Prevatte*, 570 S.E.2d 440, 491 (N.C. 2002); *State v. Group*, 781 N.E.2d 980, 1001 (Ohio 2002); *Olsen v. State*, 67 P.3d 536, 588 (Wyo. 2003). *See also* Black’s Law Dictionary 7th ed. 236 (1999) (defining a “mitigating circumstance” as a “fact or situation that does not justify or excuse a wrongful act or offense, but that reduces the degree of culpability and thus may reduce . . . punishment”).

23. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 628 (4th ed. 2000), available at <http://dictionary.reference.com/search?q=extenuating> (defining “extenuate”) (last visited May 28, 2005); *see also* Merriam-Webster On-Line Dictionary, at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=Extenuating> (providing the following definition of “extenuate:” “a: to make light of; b: to lessen or to try to lessen the seriousness or extent of by making partial excuses”) (last visited May 28, 2005).

24. Cognitive Science Laboratory, Princeton University, *WordNet 2.0, Overview for “extenuating,”* at <http://wordnet.princeton.edu/cgi-bin/webwn2.0?stage=1&word=extenuating> (last visited May 28, 2005).

25. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1060 (2003) [hereinafter ABA] (quoting Haney, *supra* note 4 at 560 (emphasis added)); *see also* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 54 (1997) [hereinafter Crocker, *Concepts*] (“Background evidence about the defendant may also serve to explain who he is in a way that mitigates his punishment.”).

is a justified form of criminal punishment. Furthermore, I assume that jurors should not consider abuse evidence as aggravating even if empirically it suggests that the defendant will remain dangerous in the future, and that they should not be concerned with the deterrent effect of their verdict's message to society. Rather, I take the jury's role as determining an appropriate or deserved punishment for the offender without engaging in consequentialist reasoning, and thus, my focus is on whether evidence of suffering severe childhood abuse supports a mitigating consideration.

Herein, I argue that suffering childhood abuse does not render a defendant less than fully responsible for his crime merely because it may be a *cause* of his criminal act. Insofar as the Supreme Court has endorsed suffering childhood abuse as a partial excuse where a defendant's crime is causally "attributable" to his childhood, the Court is mistaken. Causation *per se* does not excuse or diminish responsibility to any degree. If it did, a capital defendant could not offer childhood evidence as mitigating because it would provide no meaningful basis on which to distinguish himself from any other capital defendant (or person, for that matter).

Rather, there are two ways in which childhood abuse may be relevant in mitigation: the first is related to the defendant's responsibility, the other is based on considerations relevant to punishment but not responsibility. The first way recognizes that rational self-control, and not the absence of causation, is the criterion of responsibility. Abuse is relevant if it diminished the individual's capacity for rational self-control to a degree lower than the requisite for being considered fully responsible for one's actions. The evidence would be relevant only if it would support the defendant's claim about his capacity for rational self-control.

However, a second rationale is needed because there are cases for which jurors should be able to consider abuse evidence even though there is good reason to consider the offender fully responsible. As I argue, the degree of rational self-control required for full responsibility for committing murder is not high. Moreover, because there is a deep connection between respecting someone as a person and considering him fully responsible for his actions, we have moral reason to be cautious about explaining all our intuitions about victims of severe abuse by reference to a belief that they are less than fully responsible for their crimes. I offer an account of why suffering severe abuse is relevant to the punishment determination, even if the defendant should be considered fully responsible. Specifically, my view rests on distinguishing the capacities needed for full responsibility from certain safeguards that provide a fair opportunity for persons to avoid incurring criminal punishment and, as such, help justify the burdens of the criminal law. I argue that a minimally decent moral education serves as an important safeguard against incurring punishment, and, thus, it is more difficult to justify the harshest criminal sentence for a defendant whose childhood abuse interfered with a minimally decent moral education in comparison to others who were provided that safeguard.

In the next section, I recount the case of Robert Alton Harris, which will serve

the discussion throughout this article. Section III frames the article's inquiry by summarizing the relevant Sixth and Eighth Amendment jurisprudence of the Supreme Court, including its view of why childhood abuse evidence is relevant to the sentencing jury's determination. I argue in Section IV that suffering childhood abuse, as a cause of adult behavior, does not diminish responsibility; rather, it is relevant to responsibility, and only indirectly, if it diminished a defendant's capacity for rational self-control to a level insufficient for full responsibility. I also argue that in determining the extent to which an agent is morally responsible for conduct, we must distinguish between a diminished *capacity* to conform to moral and legal requirements, and understandably lacking the *motivation* to do so. In Section V, I cite moral considerations, based on the connection between respect and responsibility, to be cautious in interpreting our intuition that abuse evidence is mitigating in a particular case as responding to a belief that the defendant is less than fully responsible. In Section VI, I argue that suffering childhood abuse may be a relevant punishment consideration, if it interferes with a minimally decent moral education, even if the defendant should be considered fully responsible for his crime. Section VII presents and responds to some objections, and I conclude with practical recommendations in Section VIII.

## II. CASE STUDY: ROBERT ALTON HARRIS

Before proceeding to the Supreme Court's jurisprudence and the theoretical analysis, it will be helpful to recall the story of Robert Alton Harris, victim of an excruciatingly painful childhood and subsequent vicious murderer. I quote an article on Harris at length because a full picture of his case, with its many details, is necessary for thinking about issues arising herein.

On the South tier of Death Row, in a section called "Peckerwood Flats" where the white inmates are housed, there will be a small celebration the day Robert Alton Harris dies.

...

"The guy's a misery, a total scumbag; we're going to party when he goes," said Richard (Chic) Mroczko, who lived in the cell next to Harris on San Quentin Prison's Death Row for more than a year. "He doesn't care about life, he doesn't care about others, he doesn't care about himself.

"We're not a bunch of Boy Scouts around here, and you might think we're pretty cold-blooded about the whole thing. But then, you just don't know the dude."

...

State Deputy Atty. Gen. Michael D. Wellington asked the court during an appeal hearing for Harris, "If this isn't the kind of defendant that justifies the death penalty, is there ever going to be one?"

What crime did Robert Harris commit to be considered the archetypal candidate for the death penalty? And what kind of man provokes such enmity that even those on Death Row . . . call for his execution?

On July 5, 1978, John Mayeski and Michael Baker had just driven through [a] fast food restaurant and were sitting in the parking lot eating lunch. Mayeski and Baker . . . lived on the same street and were best friends. They were on their way to a nearby lake for a day of fishing.

At the other end of the parking lot, Robert Harris, 25, and his brother, Daniel, 18, were trying to hotwire a [car] when they spotted the two boys. The Harris brothers were planning to rob a bank that afternoon and did not want to use their own car. When Robert Harris could not start the car, he pointed to the [car] where the 16-year-olds were eating and said to Daniel, "We'll take this one."

He pointed a . . . Luger at Mayeski, crawled into the back seat, and told him to drive east. . . .

Daniel Harris followed in the Harrises' car. When they reached a canyon area . . . Robert Harris told the youths he was going to use their car in a bank robbery and assured them that they would not be hurt. Robert Harris yelled to Daniel to get the .22 caliber rifle out of the back seat of their car.

"When I caught up," Daniel said in a recent interview, Robert was telling them about the bank robbery we were going to do. He was telling them that he would leave them some money in the car and all, for us using it. Both of them said that they would wait on top of this little hill until we were gone, and then walk into town and report the car stolen. Robert Harris agreed.

"Michael turned and went through some bushes. John said, 'Good luck,' and turned to leave."

As the two boys walked away, Harris slowly raised the Luger and shot Mayeski in the back, Daniel said. Mayeski yelled: "Oh, God," and slumped to the ground. Harris chased Baker down a hill into a little valley and shot him four times.

Mayeski was still alive when Harris climbed back up the hill, Daniel said. Harris walked over to the boy, knelt down, put the Luger to his head and fired.

"God, everything started to spin," Daniel said. "It was like slow motion. I saw the gun, and then his head exploded like a balloon, . . . I just started running and running. . . . But I heard Robert and turned around.

"He was swinging the rifle and pistol in the air and laughing. God, that laugh made blood and bone freeze in me."

Harris drove [the] car to a friend's house where he and Daniel were staying. Harris walked into the house, carrying the weapons and the bag [containing] the remainder of the slain youths' lunch. Then, about 15 minutes after he had killed the two 16-year-old boys, Harris took the food out of the bag . . . and began eating a hamburger. He offered his brother an apple turnover, and Daniel became nauseated and ran to the bathroom.

. . .

Harris . . . smiled and told Daniel that it would be amusing if the two of them were to pose as police officers and inform the parents that their sons were killed. Then, for the first time, he turned serious. He thought that somebody might have heard the shots and that police could be searching for the bodies.

He told Daniel that they should begin cruising the street near the bodies, and possibly kill some police in the area.

...

Those familiar with the case were as mystified as they were outraged by Harris' actions. Most found it incomprehensible that a man could be so devoid of compassion and conscience that he could kill two youths, laugh about their deaths and then casually eat their hamburgers.<sup>26</sup>

It is worth taking note of our outrage to this account of Harris, the cold and vicious murderer. Let's now turn to evidence of how he became this kind of man and whether it affects our reaction to him.

[During an interview, Barbara Harris, one of Robert Harris' sisters] put her palms over her eyes and said softly, "I saw every grain of sweetness, pity and goodness in him destroyed. . . . It was a long and ugly journey before he reached that point."

Robert Harris' 29 years . . . have been dominated by incessant cruelty and profound suffering that he has both experienced and provoked. Violence presaged his birth, and a violent act is expected to end his life.

Harris was born Jan. 15, 1953, several hours after his mother was kicked in the stomach. She was 6 ½ months pregnant and her husband, an insanely jealous man, . . . came home drunk and accused her of infidelity. He claimed that the child was not his, threw her down and kicked her. She began hemorrhaging, and he took her to the hospital.

...

His father was an alcoholic who was twice convicted of sexually molesting his daughters. He frequently beat his children . . . and often caused serious injury. Their mother also became an alcoholic and was arrested several times, once for bank robbery.

All of the children had monstrous childhoods. But even in the Harris family, . . . the abuse Robert was subjected to was unusual.

Before their mother died last year, Barbara Harris said, she talked incessantly about Robert's early years. She felt guilty that she was never able to love him; she felt partly responsible that he ended up on Death Row.

When Robert's father visited his wife in the hospital and saw his son for the first time, . . . the first thing he said was "Who is the father of that bastard?" When his mother picked him up from the hospital [after a prolonged stay due to his premature birth] . . . she said it was like taking a stranger's baby home.

The pain and permanent injury Robert's mother suffered as a result of the birth, . . . and the constant abuse she was subjected to by her husband, turned her against her son. Money was tight, she was overworked and he was her fifth child in just a few years. She began to blame all of her problems on Robert, and she grew to hate the child.

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26. Miles Corwin, *Icy Killer's Life Steeped in Violence*, L.A. TIMES, May 16, 1982, reprinted in Watson, *supra* note 13, at 268-270.

"I remember one time we were in the car and Mother was in the back seat with Robbie in her arms. He was crying and my father threw a glass bottle at him, but it hit my mother in the face. The glass shattered and Robbie started screaming. I'll never forget it," she said. . . .

"Her face was all pink, from the mixture of blood and milk. She ended up blaming Robbie for all the hurt, all the things like that. She felt helpless and he was someone to vent her anger on."

. . . Harris had a learning disability and a speech problem, but there was no money for therapy. When he was at school he felt stupid and classmates teased him, his sister said, and when he was at home he was abused.

"He was the most beautiful of all my mother's children; he was an angel," she said. "He would just break your heart. He wanted love so bad he would beg for any kind of physical contact."

"He'd come up to my mother and just try to rub his little hands on her leg or her arm. He just never got touched at all. She'd just push him away or kick him. One time she bloodied his nose when he was trying to get close to her."

. . . All nine children are psychologically crippled as a result of their father, she said, but most have been able to lead useful lives. But Robert was too young, and the abuse lasted too long, she said, for him ever to have had a chance to recover.

[At age 14] Harris was sentenced to a federal youth detention center [for car theft]. He was one of the youngest inmates there, Barbara Harris said, and he grew up "hard and fast."

. . . Harris was raped several times, his sister said, and he slashed his wrists twice in suicide attempts. He spent more than four years behind bars as a result of an escape, an attempted escape, and a parole violation.

The centers were "gladiator schools," Barbara Harris said, and Harris learned to fight and be mean. By the time he was released from federal prison at 19, all his problems were accentuated. Everyone in the family knew that he needed psychiatric help.

The child who had cried at the movies when Bambi's mother dies had evolved into a man who was arrested several times for abusing animals. He killed cats and dogs, Daniel said, and laughed while torturing them with mop handles, darts and pellet guns. Once he stabbed a prize pig more than 1,000 times.

"The only way he could vent his feelings was to break or kill something," Barbara Harris said. "He took out all the frustrations of his life on animals. He had no feeling for life, no sense of remorse. He reached the point where there wasn't that much left of him."

. . . Harris' family is ambivalent about his death sentence. [Another sister said that] if she did not know her brother's past so intimately, she would support his execution without hesitation. Barbara has a 16-year-old son; she often imagines the horror of the slain boys' parents.

"If anyone killed my son, I'd try my damndest, no matter what it took, to have my child revenged," Barbara Harris said. "I know how those parents must suffer every day."

“But Robbie in the gas chamber . . . .” She broke off in mid-sentence and stared out a window. “Well, I still remember the little boy who used to beg for love, for just one pat or word of kindness. . . . No I can’t say I want my brother to die.”

. . . Since Harris has been on Death Row, he has made no demands of time or money on his family. Harris has made only one request; he wants a dignified and serene ceremony after he dies – a ceremony in marked contrast to his life.

He has asked his oldest brother to take his ashes, to drive to the Sierra, hike to a secluded spot and scatter his remains in the trees.<sup>27</sup>

For many readers, this account of Harris’ formative years alters the emotional reaction experienced in response to the account of his murders. Gary Watson captures well the “pause” that Harris’ childhood gives to our reactive emotions:

It is too simple to say that it leads us to suspend our reactive attitudes. Our response is too complicated and conflicted for that. What appears to happen is that we are unable to command an overall view of his life that permits the

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27. *Id.* at 272-74. According to an Internet account:

Both parents inflicted frequent beatings on young Robert who suffered a broken jaw at the age of two after a punch from his father. For sport, his father would load a gun and tell the children they had 30 minutes to hide outside the house, after which he would shoot them down like animals. Eventually Harris senior was jailed for sexually molesting his daughters, while the mother smoked and drank herself to death.

Clark County Indiana Prosecutor’s Office, *Robert Alton Harris*, at <http://www.clarkprosecutor.org/html/death/US/harris169.htm> (last visited Apr. 4, 2005).

Robert Harris was sentenced to death. When he was executed in 1992, he was the first person put to death in California in the post-*Furman* era. From the California Supreme Court’s opinion denying his direct appeal, it appears that Harris’ sentencer did not hear this evidence of his childhood. In summarizing the sentencing phase presentation, the California Supreme Court mainly described the testimony that came from Robert Harris himself, who testified at both the guilt and penalty phases:

Defendant’s testimony during the penalty phase indicated he had a dismal childhood. When defendant was approximately 11 years old, his father served two separate prison terms for having sexual relations with defendant’s sisters. The family then followed the harvest from state to state with defendant’s mother and her boyfriend. Defendant’s schooling ended in the seventh grade. Defendant’s mother forced him to leave the family when he was 14, saying he was not working hard enough. He soon stole a car and served four years in federal institutions for that crime, escape and a separate instance of attempted escape. He was subsequently imprisoned for the voluntary manslaughter of James Wheeler. Defendant was 26 years old at the time of trial.

Defendant admitted his testimony at the guilt phase—that he had nothing to do with killing the boys—was a lie. Changing his story, defendant testified he had not planned to kill the boys, that his brother had fired first, and “the next thing I knew I was shooting them myself.”

Defendant claimed he was “sorry” about the murders. In support of this claim, defendant called Deputy Sheriff Michael Mendoza who testified that when he inquired into defendant’s emotional state after he cut his wrist and reportedly attempted to stab himself with a pencil, defendant appeared remorseful. However, defendant admitted on cross-examination he had told a jail visitor his attorney wanted him to express remorse and he was not going to do so.

*People v. Harris*, 623 P.2d 240, 245-46 (Cal. 1981).

reactive attitudes to be sustained without ambivalence. . . . The sympathy toward the boy he was is at odds with outrage toward the man he is.<sup>28</sup>

A pressing question is whether feeling "sympathy toward the boy he was" should have any relevance to a juror deciding a criminal sentence for the "man he is."<sup>29</sup> The Supreme Court thinks it does, and we turn now to its jurisprudence to refine the issue at hand and to assess the Court's justification for allowing juries to consider evidence of this kind.

### III. SUPREME COURT'S JURISPRUDENCE: FRAMING THE ISSUE

#### A. Sixth Amendment Right to Counsel

The Supreme Court has held that capital defendants have a right to present evidence of their childhood and that their Sixth Amendment right to counsel requires their attorneys to make reasonable investigations into their background, unless it is reasonable not to. In *Wiggins v. Smith*, decided in June 2003, the Court ordered federal habeas relief for a capital-sentenced defendant because his counsel, without reason, failed to conduct a reasonable investigation into his social history, including his childhood.<sup>30</sup> The attorneys' performance was ineffective, falling below the professional norms for capital defense attorneys prevailing at the time of trial.<sup>31</sup> The ABA Guidelines for capital defense attorneys direct them to explore evidence of their clients' "[f]amily and social history (including physical, sexual, or emotional abuse . . . neighborhood environment, and peer influence) . . . [and] cultural or religious influences."<sup>32</sup> The defendant's attorneys knew "it was a routine practice in the Maryland Public Defender's Office to retain an expert forensic worker to prepare a social history of capital defendants and that funds were available for that purpose."<sup>33</sup> Counsels' performance was also unreasonable because they had "rudimentary knowledge" of defendant's miserable childhood

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28. Watson, *supra* note 13, at 275.

29. In denying clemency for Harris, then-California Governor Pete Wilson stated, "As great as is my compassion for Robert Harris the child, I cannot excuse nor forgive the choice made by Robert Harris the man." Haney, *supra* note 4, at 547 (quoting Decision, In the Matter of the Clemency Request of Robert Alton Harris, at 3 (Apr. 16, 1992)).

30. See *Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003).

31. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (announcing a two-component test for evaluating ineffective assistance of counsel claims). To prove ineffective assistance, a convicted defendant must show that (i) his counsel's performance was deficient and (ii) such deficiency prejudiced his defense. *Id.* Regarding the deficiency prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins*, 539 U.S. at 521 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

32. ABA, *supra* note 25, at 1022.

33. Brief of Amici Curae National Association of Criminal Defense Lawyers et al. at 4, *Wiggins v. Smith*, 539 U.S. 510 (2003) (No. 02-311) (quoting the findings of the district court), available at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/02-311/02-311.mer.ami.nacdl.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/02-311/02-311.mer.ami.nacdl.pdf).

from a presentence report and a social services document,<sup>34</sup> which revealed that his alcoholic mother had left him and his siblings “on at least one occasion . . . for days without food.”<sup>35</sup>

The Court did not merely find the attorneys’ performance ineffective; it held that no reasonable judge could hold otherwise. In ordering federal habeas relief under 28 U.S.C. § 2254, the Court found that the Maryland Court of Appeal’s assessment under the federal standard of whether counsel fulfilled their duties was not merely incorrect, but unreasonable.<sup>36</sup> In the Court’s view, Wiggins’ defense team had an unquestionable duty to investigate whether there was more evidence that defendant suffered a horrible childhood of abuse and neglect.

The Court’s reasoning is based on the empirical fact that juries are affected by evidence of a horrific childhood. The forensic social worker hired by Wiggins’ postconviction team uncovered “powerful” evidence, which proved the prejudice suffered by Wiggins due to his trial counsel’s deficient performance: “[H]ad the jury been confronted with this considerable mitigating evidence, there is reasonable probability that it would have returned with a different sentence.”<sup>37</sup> The new evidence showed that “Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care.”<sup>38</sup>

### B. Eighth Amendment: Reasons v. Arbitrary Factors

The Court’s Sixth Amendment requirement that a capital defense counsel reasonably investigate her client’s social history, unless there is reason not to, finds its roots in the Court’s Eighth Amendment jurisprudence. Essentially, the Court has held that evidence of a defendant’s childhood is relevant to a reasoned determination on punishment. We turn now to the evolution of precedent behind that view.

In *Furman v. Georgia*, decided in 1972, the United States Supreme Court issued a short *per curiam* opinion which overturned death sentences imposed on three defendants, but did not explicate a basis for the decision. Each Justice wrote separately, with five Court members voting to vacate the death sentences.<sup>39</sup> The opinions of Justices Stewart and White represent the holding of *Furman*, according

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34. *Wiggins*, 539 U.S. at 524 (noting counsel’s failure to investigate adequately Wiggins’ past violated established norms of the American Bar Association and the Maryland Public Defender’s Office).

35. *Id.* at 525.

36. *See Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003).

37. *Id.* at 534-36.

38. *Id.* at 535.

39. *See Furman v. Georgia*, 408 U.S. 238 (1972). Justices Brennan and Marshall argued that the death penalty, as a form of punishment in all circumstances, violates the Eighth Amendment. *Id.* at 305 (Brennan, J., concurring); *id.* at 369 (Marshall, J., concurring). Justice Douglas held that the capital statutes at issue, in their application, were discriminatory on racial and economic grounds. *Id.* at 256-57 (Douglas, J., concurring).

to the Court's subsequent jurisprudence.

The capital statutes under review were unconstitutional because they provided no guidance for juror discretion in imposing either life or death on a defendant convicted of a specified capital crime. The two key opinions "focused on the infrequency and seeming randomness with which, under the discretionary state systems, the death penalty was imposed."<sup>40</sup> Justice Stewart concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."<sup>41</sup> Justice White held that the Eighth Amendment forbids unguided jury discretion because it provides "no meaningful basis for distinguishing the few cases in which [the death penalty was] imposed from the many cases in which it [was] not."<sup>42</sup>

To eliminate the problems of unguided discretion, some states responded to *Furman* by eliminating discretion altogether with mandatory death penalty schemes.<sup>43</sup> However, the Supreme Court invalidated those statutes as well, holding in *Woodson v. North Carolina* that they were inconsistent with "the evolving standards of decency that mark the progress of a maturing society" and inform the Eighth Amendment.<sup>44</sup> These evolving standards condemn mandatory statutes because they "treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."<sup>45</sup> The joint opinion of Justices Stewart, Powell, and Stevens announcing the Court's judgment, held that "in capital cases the 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."<sup>46</sup>

In *Gregg v. Georgia*, decided the same day as *Woodson*, the same trio of Justices explained that "accurate sentencing information" about an offender's character and record is constitutionally required because it "is an indispensable prerequisite to a *reasoned determination*" of the appropriate punishment.<sup>47</sup> The Court has since

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Opinions by the remaining two Justices in the majority—Justices Stewart and White—are discussed later in this section. See *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

40. *Walton v. Arizona*, 497 U.S. 639, 658 (1990) (Scalia, J., concurring in part and concurring in the judgment) (discussing Justice Stewart's and Justice White's opinions in *Furman* with respect to the Court's subsequent jurisprudence).

41. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

42. *Id.* at 313 (White, J., concurring).

43. *Rockwell v. Superior Court*, 556 P.2d 1101, 1116-18 (Cal. 1976) (Clark, J., concurring) (discussing mandatory death schemes of California and other statutes enacted after *Furman*).

44. *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (internal quotations omitted).

45. *Id.* at 304.

46. *Id.* (internal citation omitted).

47. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added).

emphasized that “the State must establish rational criteria that narrow the decision-maker’s judgment”<sup>48</sup> and thus help “to ensure that the death penalty will be imposed in a consistent, *rational* manner.”<sup>49</sup> State capital statutes must allow the administration of the death penalty “in a way that can *rationally* distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.”<sup>50</sup>

The Court did not indicate, however, which aspects of a defendant’s character, record, and offense it is rational for a jury to consider. But two years later, in invalidating Ohio’s capital statute for limiting the defense presentation to three statutorily prescribed mitigators, the Court held in *Lockett v. Ohio* that

the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, 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.<sup>51</sup>

Chief Justice Burger’s plurality opinion highlighted reliability, respect, and rationality as the values underlying the Constitution’s requirement that juries be allowed to consider any aspect of a defendant’s character or record proffered as the basis for a life sentence. The heightened need for reliability in capital cases requires such evidence because excluding it “creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty”;<sup>52</sup> the respect owed to each offender implies that he must be able to show his uniqueness as an individual;<sup>53</sup> and evidence of defendants’ characters and records potentially provide “meaningful distinctions” among different cases, necessary for the consistent and rational use of capital punishment.<sup>54</sup>

At this point, one might wonder, in light of *Woodson* and *Lockett*, whether there is any need to look for a reason why suffering severe abuse is truly relevant to discerning a just punishment. After all, those opinions do not demand that there be a mitigating rationale behind evidence proffered by a defendant seeking a life sentence. Rather, they say that the Eighth Amendment allows jurors to hear *any evidence submitted* by a capital defendant in his mitigation case.<sup>55</sup> Because of this open-ended rule, some commentators describe penalty-phase evidence as “wholly

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48. *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987).

49. *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring in the judgment) (emphasis added).

50. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) (emphasis added).

51. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis of “any” added).

52. *Id.* at 605.

53. *Id.*

54. *Id.* at 601 (citing *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)).

55. The objection finds company in Justice Scalia’s now-famous *Walton* concurrence, in which he argued that there is an irresolvable tension between *Furman*’s demand for *guided* discretion and *Lockett*’s directive to allow jurors to hear *any* aspect of the defendant’s character, record, and circumstance of the crime that he puts forth. See *Walton v. Arizona*, 497 U.S. 639, 656-661 (Scalia, J., concurring in part and concurring in the judgment).

unregulated,"<sup>56</sup> with "no substantive limitation at all."<sup>57</sup> One might conclude that a verdict must reflect a *reasoned* determination only if a jury chooses death; the basis of a life sentence, in contrast, need not depend on good reason.

That reading of *Woodson* and *Lockett* would be too broad. While the threshold for what counts as relevant mitigating evidence is low, there is, nonetheless, a threshold, according to the Supreme Court: "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could *reasonably* deem to have mitigating value."<sup>58</sup> For a juror *reasonably* to deem some fact as having mitigating value, there must be a plausible reason why that fact is relevant to the punishment determination. Accordingly, the Court expressed "no quarrel with the statement . . . that 'how often [the defendant] will take a shower' is irrelevant to the sentencing determination."<sup>59</sup> Similarly, the Court would not deem it error for a trial court to disallow a *pro se*, white supremacist, capital defendant from submitting that his victim's status as a non-caucasian in and of itself is mitigating. Clearly, a juror could not have a plausible reason to find that fact, based on an invidious claim, to have mitigating value.<sup>60</sup>

Relatedly, the Court held in *California v. Brown* that the Eighth Amendment permits state courts to instruct capital jurors not to "be swayed by mere sentiment, conjecture, sympathy, passion, [or] prejudice."<sup>61</sup> Presumably, *mere* sentiment and feeling are not appropriate bases for a sentencing decision if the adjective "mere" is meant to imply a divorce from reason.<sup>62</sup> Strangely, however, the Court's majority opinion did not rely on that observation, but rather emphasized the right

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56. Garvey, *supra* note 13 at 1011.

57. *Id.* (quoting Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L. J. 835, 853 (1992) (book review)).

58. *Tennard v. Dretke*, 124 S. Ct. 2562, 2570 (2004) (emphasis added) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (internal citation omitted)).

The Court has not given a more specific definition of what "relevant" mitigating evidence is. One commentator suggests that, perhaps, the Court "has desired to remain morally neutral on the matter of when a sentence of less than death is deserved," and thus "has not seen fit to define in any meaningful way the proper scope of mitigating evidence." Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J. L. REFORM 1, 9 (1999-2000). Some commentators praise this lack of restricting definition, arguing that it leaves for jurors to decide the difficult moral question of when death or a more lenient sentence is deserved. Garvey, *supra* note 13, at 1011-12 (citing Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 301 (1991)). Others criticize the lack of doctrine, characterizing the penalty phase as a "free-for-all." *Id.* (citing *United States v. Davis*, 904 F. Supp. 554, 559 (E.D. La. 1995) (describing penalty-phase evidence as "hodge-podge")).

59. *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986) (quoting *State v. Plath*, 313 S.E.2d 619, 627 (S.C. 1984)).

60. *Accord* Garvey, *supra* note 13 at 1011.

61. *California v. Brown*, 479 U.S. 538, 539 (1987).

62. I emphasize "mere" sentiment in recognizing that reason and emotion are not completely divorced from one another. Overwhelmingly strong emotion can interfere with our rational capabilities, but emotions are not, in general, non-cognitive. At least one difference between types of emotion is found in their different propositional content, or rather, in the different kinds of judgments to which they are reactions. For a discussion of the distinctive propositional content of specific moral emotions, see WALLACE, *supra* note 13 at 18-50.

of state courts to “confine the jury’s deliberations to considerations arising from the evidence presented.”<sup>63</sup> The Court’s reasoning is shaky because confining deliberations to the evidence does not rule out “merely” sympathetic responses to it.

It is helpful to look at Justice O’Connor’s *Brown* concurrence because it stands on more convincing ground than the majority opinion and is incorporated into the Court’s subsequent jurisprudence. It states: “The issue . . . is whether an instruction designed to satisfy the principle that capital sentencing decisions must not be made on mere whim, but instead on clear and objective standards, violates the principle that the sentencing body is to consider any relevant mitigating evidence.”<sup>64</sup> Her answer is that such an instruction is not unconstitutional precisely because the “sentence imposed at the penalty stage should reflect a *reasoned moral* response to the defendant’s background, character, and crime rather than mere sympathy or emotion.”<sup>65</sup>

The Court adopted Justice O’Connor’s reasoning in *Saffle v. Parks* when interpreting the implications of *Lockett*.<sup>66</sup> The *Saffle* Court denied habeas relief to a capitally-sentenced petitioner who argued that his Eighth Amendment rights were violated when his trial court instructed penalty-phase jurors to “avoid any influence of sympathy.”<sup>67</sup> Justice Kennedy, writing for the Court, stated that “nothing in *Lockett* and *Eddings* prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant’s mitigating evidence in the form of a ‘*reasoned moral response*.’”<sup>68</sup> The Court reemphasized that line of reasoning in *Johnson v. Texas*, stating that it has

not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant. Indeed, [the Court has] said that “[i]t would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors’ emotional sensitivities with [its] longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary.”<sup>69</sup>

### C. *The Court’s View of the Relevance of Childhood Abuse*

Does a respectful, reliable and rational system allow evidence of a defendant’s suffered childhood abuse? *Eddings v. Oklahoma*, decided in 1982, held that a

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63. *Brown*, 479 U.S. at 543.

64. *Id.* at 544 (O’Connor, J., concurring).

65. *Id.* at 545 (emphasis on “reasoned” added).

66. *Saffle v. Parks*, 494 U.S. 484 (1990).

67. *Id.* at 486.

68. *Id.* at 493 (emphasis on “reasoned” and “response” added) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).

69. *Johnson v. Texas*, 509 U.S. 350, 371-372 (1993) (quoting *Saffle v. Parks*, 494 U.S. 484, 493 (1990)).

defendant's troubled childhood counts as a relevant aspect of a defendant's "character or record" for a jury's sentencing determination.<sup>70</sup> The trial court had stated that "in following the law," it could not consider the defendant's violent background and family history as mitigating.<sup>71</sup> The state appellate court joined the trial court in disregarding the evidence because it did not think it excused Eddings' crime, although it was "useful in explaining" his act.<sup>72</sup> The Supreme Court reversed, holding that the law does not forbid the sentencer from considering a defendant's troubled history.<sup>73</sup> Rather, a sentencer must be allowed to determine the weight of that evidence.<sup>74</sup>

In 1989, in *Penry v. Lynaugh*,<sup>75</sup> the Court endorsed evidence of suffering childhood abuse as a consideration in favor of a life sentence. Penry, the defendant, presented evidence of mental retardation and an abused childhood, but the jury instructions, limiting juror attention to special verdict questions derived from the Texas statute, did not explain how or whether jurors could consider it.<sup>76</sup> The defendant argued "that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment."<sup>77</sup>

The *Penry* majority opinion, authored by Justice O'Connor, is significant because it offers a rationale for why evidence of suffering childhood abuse is morally relevant to punishment:

A rational juror at the penalty phase of the trial could have concluded, in light of Penry's confession, that he deliberately killed Pamela Carpenter to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was less morally "culpable than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood.<sup>78</sup>

The abuse Penry suffered should be relevant to determining his culpability because it exacerbated his mental impairments, which he had since birth.<sup>79</sup> But notice that the Court separates his "history of abuse" from his diminished capacities to control

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70. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

71. *Id.* at 112-13.

72. *Id.* at 113. *But see* Haney, *supra* note 4, at 589-602 (arguing that such evidence is mitigating *precisely* because it may help explain the defendant's crime).

73. *Eddings*, 455 U.S. at 114.

74. *Id.* at 114-15.

75. 492 U.S. 302 (1989).

76. *Penry*, 492 U.S. at 302.

77. *Id.* at 322.

78. *Id.* at 322-323 (quoting *California v. Brown*, 479 U.S. 538, 545 (1986) (O'Connor, J., concurring)).

79. Jamie Fellner provides the following summary of the abuse Penry suffered:

his impulses or to evaluate the consequences of his actions. The Court lists that history, along with the other considerations, as a possible “excuse” or, more precisely, a partial excuse for someone who otherwise acted deliberately.

What is meant by labeling these considerations as an “excuse”? Regarding the characteristics associated with mental retardation, a diminished ability to control impulses and/or to evaluate consequences implies a diminished capacity for responsibility; meaning, an agent who genuinely lacks the capacity to control an impulse is not responsible for acting in accordance with that impulse when experienced. To be considered responsible for one’s actions, an individual needs to have a certain kind of control over his conduct. To the extent that one lacks that capacity for control, his status as a responsible agent is diminished.

Perhaps, then, suffering severe childhood abuse evidences a partial excuse in the same way, by diminishing one’s responsibility-status. But why, in the Court’s view, might a juror justifiably view a person with a deprived background as not fully responsible? Is it because a deprived background implies a diminished ability to control impulses? The Court had the opportunity to talk about Penry’s mental retardation and painful history as both potentially contributing to a diminished ability to control impulses or to evaluate consequences. However, the Court did not; those diminished abilities were associated only with mental retardation, while a “history of childhood abuse” was listed separately. On what ground, then, does a history of childhood abuse constitute a partial excuse, on the Court’s account?

Writing for the Court, Justice O’Connor hints at the reason:

If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, “evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.”<sup>80</sup>

The idea conveyed is that a defendant has some degree of excuse if his criminal acts were *attributable* to his childhood suffering.<sup>81</sup> Now we might interpret that claim in at least two ways. First, perhaps a defendant’s crime is attributable to his

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[His] mother beat him, broke his arms, dipped him in scalding water, burned him with cigarette butts, and forced him to eat his own feces and drink urine. She routinely locked him in his room without food, water, or sanitary facilities for twelve to fourteen hours at a time, then beat him when he could not help defecating in his room. Penry dropped out of first grade. As an adult his mental age is still comparable to the average six-and-a-half-year-old child. His IQ has been reliably measured in the fifties and low sixties.

Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation*, 28 HUM. RTS. 9, 9-10 (2001).

80. *Penry*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1986) (O’Connor, J., concurring)) (emphasis added).

81. For a judicial statement in concurrence with the Supreme Court’s view, see *Muhammad v. State*, 46 S.W.3d 493, 498 (Tex. App. 2001) (“Mitigating circumstances relevant to punishment are circumstances which will

childhood abuse in that the abuse was a *cause* of his act (i.e., such abuse contributes to shaping the kind of person someone becomes, and thus is a cause of that person's conduct which expressed who he is), and it is a cause over which a defendant, as a child, had no control. It seems natural to think that a person is not responsible for an act to the extent that it was caused by factors outside his control. On a second possible interpretation, the Court is arguing that a criminal act is attributable to abuse if the abuse caused deficits in the defendant's capacities that are necessary for moral and legal responsibility. For example, if having free will or the capacity for practical reasoning is the necessary capacity for responsibility, then the claim would be that suffering child abuse has the potential to diminish that capacity to some degree. In the sections to follow, I evaluate the plausibility of these views, and whether either can capture all the ways in which jurors rationally may consider evidence of abuse as relevant to punishment.

#### IV. SEVERE CHILDHOOD ABUSE: RELEVANT TO RESPONSIBILITY?

##### A. *Childhood Abuse as a Cause of the Crime: A Partial Excuse?*

The idea that suffering horrible childhood abuse reduces an agent's responsibility because the abuse is a *cause* of one's crime is premised on a certain theory about the rationale behind excusing conditions. That theory holds that if an agent's action is determined by causes outside his control, then the agent is not responsible at all for the action. The relevant corollary would be that a person's responsibility for an action is reduced *to the extent* that his action was caused by events outside his control, such as suffering abuse.

One reason offered by Phyllis Crocker for why suffering severe childhood abuse is *mitigating* is based on that causal theory of excuse. She argues that the capital "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."<sup>82</sup> She also calls attention to medical research suggesting that the "the neurophysiological makeup of the brain literally may be altered as a result of abuse and its attendant trauma."<sup>83</sup> On this view, childhood evidence can be *mitigating* because it shows that the defendant's judgments, character, and neurological make-up were caused by forces outside his control.<sup>84</sup>

This view fails to justify the moral relevance of evidence of severe childhood abuse. First, it is unable to distinguish between horrible and good childhoods as causes of behavior. Aspects of a person's good childhood have causal effects on his

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support a belief that defendants who commit criminal acts that are attributable to such circumstances are less culpable than others who have no such excuse.").

82. Crocker, *Child Abuse and Adult Murder*, *supra* note 13, at 1155.

83. *Id.* at 1164 (citations omitted).

84. *See also* Crocker, *Concepts*, *supra* note 25, at 54.

decisions and the formation of his character just as events in another person's miserable childhood have on his. If an agent should be excused, fully or partially, because some of the causes of his action can be traced to his childhood, then *all of us* have an excuse available for our actions.

Indeed, the principle that a defendant's childhood is mitigating because it is a cause of a crime undermines the very conception of mitigation in the capital sentencing system. That system entails that (i) some people deserve capital punishment, and (ii) mitigating evidence speaks against imposing death. Those aspects of a capital scheme imply that within the set of defendants who qualify for death (because, for instance, the State can prove an aggravating factor), some of them will be able to present evidence speaking in favor of life that is unavailable to the others. If all defendants could present the same exact mitigating factor, with the same exact weight, that evidence would not, in fact, be mitigating because it would not be a rational basis on which to distinguish those who may deserve death and those who do not. Mitigating evidence is a relational concept: to say that evidence is mitigating is to say that it presents a reason in favor of a life sentence for the defendant presenting it, in contrast to a defendant who is identical in all moral and legal aspects, save for that one factor. Notice, then, how childhood evidence, presented as a *cause* of crime, undermines this conception of mitigation: if childhood experiences excuse as a *cause*, then *every* capital defendant (every person, actually) would have available those grounds for the same partial excuse.

A second problem with the proposal is that it ignores that there are infinite causes of a criminal act that are outside an agent's control. A person's character is formed by one's genetics and experiences of all kinds? good and bad? and his actions express that character. The surrounding context in which someone makes a decision to act unquestionably includes causes of the decision that are outside the agent's control. For example, my decision to buy roasted peanuts from a street vendor is certainly caused by inadvertently noticing the nuts' aroma. In the context of a homicide, a defendant perceives reasons to murder because of circumstances outside his control: perhaps someone approached him with a lucrative offer to kill someone; he has a need for money; etc. These causes are outside the control of our imagined defendant. If he should be partially excused for every cause contributing to his decision or action, then we would wonder rightfully what is left of responsibility.

One might respond by saying that the difference between suffering severe childhood abuse and other events that are causes of criminal behavior is that we *know* that there is a strong correlation between suffering abuse and adult crime.<sup>85</sup> However, this response fails. First, it makes one's responsibility for an action turn on the arbitrary fact of whether we have knowledge about the other causes of one's act; it is not our knowledge that undermines an agent's responsibility on the causal

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85. For a discussion of "Partial Determinist" strategies, see MOORE, *PLACING BLAME*, *supra* note 15 at 508-11.

theory of excuse, but causation. Second, we do not withhold evaluative judgments of actions even when we *do* know of a strong correlation between one's action and an event outside her control. For example, loving one's parents is initially caused by forces outside one's control, and there surely is a causal correlation between loving one's parents and doing nice things for them. But there is no reason to think that our love for a parent undermines to any extent our responsibility for actions that express that love.

Some may have the lingering intuition that an abused childhood causally determines adult behavior to a greater degree than a good childhood. Perhaps the argument would be that abused childhoods have greater deterministic force, which undermines one's ability to exercise free will and avoid criminal conduct. But as Michael Moore points out, the fact that a certain *type* of event makes it more probable that an agent will engage in a certain *type* of conduct does "not purport to tell us to what degree a particular action is caused."<sup>86</sup> Ultimately, the idea that childhood abuse causes criminal acts to a greater degree than other childhood experiences cause non-criminal acts is based on an ad hoc judgment that reflects a sense of how responsible an agent like Robert Harris is for his crimes.

The identified problems with reducing responsibility because of causal determination are really aspects of a more general underlying defect: the view assumes a false theory of excuse. Causation *per se* does not undermine responsibility at all. Certainly, there is intuitive appeal to this position. To illustrate, we excuse persons, whom we generally hold responsible, when they are forced to act under duress. It is natural to say that we excuse the person threatened at gunpoint for committing an otherwise criminal act because he was caused to do so by the coercing agent. Similarly, it seems natural to think that we do not hold the insane responsible because their actions are attributable, or caused, by their mental disease, which is clearly outside their control.

But as we have seen, there are many causes that do *not* undermine responsibility. A convincing account of the excusing conditions in law and morality must identify what it is about certain causes, such as the mental disease of the insane or the gun of a coercing agent, that undermines or mitigates responsibility. And because we do not excuse an agent merely because we can identify causes of her action, we cannot accept the view that suffering severe childhood abuse mitigates responsibility merely because such abuse is a cause of a defendant's crime.

### B. Responsibility and Practical Reasoning

Causation and responsibility are compatible because rationality is "the touchstone of responsibility."<sup>87</sup> That is, responsible agency does not require contra-

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86. *Id.* at 509.

87. Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 266 (2000) [hereinafter Morse, *Rationality and Responsibility*].

causal free will, the ability to remove oneself from the causal forces of the universe; rather, persons that we should and do consider responsible have the capacity to reason practically: the capacity to recognize and assess reasons, and to guide their conduct according to judgments about reasons. Regardless of whether there are causal explanations for our actions, there is a significant moral difference between intentional human action and other caused events: persons have the capacity to give justifying reasons for their intentional actions. On a physical level, it may be possible to explain human actions by citing the mechanistic workings of the human brain as part of the physical universe, governed by the laws of physics. But there is a distinct, and no less significant, level of explanation for human action: we can ask a human agent for the reasons for which she acted.

The connection between responsibility and practical reasoning is implicit in our conceptions of law and morality.<sup>88</sup> Criminal law provides a helpful example. It provides rules for our behavior and threatens us with varying degrees of punishment for violating those rules. By doing so, the law assumes persons are capable of taking a rule and its threat of punishment as a reason not to engage in the proscribed form of conduct. If we generally did not have the capacity to consider the reasons provided by law, then it would be useless. Indeed, we excuse the insane, not because their behavior is causally determined, but because they are irrational, incapable of recognizing and assessing reasons, and making choices in light of their assessments. Rational self-control entails other abilities, including “the ability to perceive accurately, to get the facts right, and to reason instrumentally.”<sup>89</sup>

The idea that responsibility can come in degrees is also made intelligible by this view. Take older children, for example. An eleven year old is responsible for his conduct to some degree, unlike an infant, but we are uncomfortable claiming that she should be considered fully responsible, like a normal-functioning adult. The power of regulating one’s behavior in light of reasons is not all or nothing: it can come in degrees, and therefore can account for our considered convictions about youth.<sup>90</sup>

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88. MOORE, *PLACING BLAME*, *supra* note 15, at 610 (“Rationality is one basic feature persons must generally possess for our criminal doctrines to have application to them.”); SCANLON, *WHAT WE OWE TO EACH OTHER*, *supra* note 14, at 280 (arguing that moral responsibility requires the capacity to “understand and assess reasons” and to give effect to one’s judgments through action because that capacity is a prerequisite to participating in morality, understood as a “system of co-deliberation”); Morse, *Rationality and Responsibility*, *supra* note 87, at 253 (arguing that the “concept of the person as a practical reasoner” is implicit in the idea that law is meant to guide behavior).

89. Morse, *Deprivation and Desert*, *supra* note 13, at 122.

90. See *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005) (holding that the Eighth Amendment forbids execution of offenders who committed crime under the age of eighteen because, in part, of their “lack of maturity and an underdeveloped sense of responsibility,” which “often result in impetuous and ill-considered actions and decisions; and their diminished “control, or less experience with control, over their own environment”) (internal citations omitted); *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (holding that the Eighth Amendment prohibits execution of person who committed crime at fifteen years old because, in part, youth are less responsible

Additionally, certain statutory mitigating factors make sense, given that responsibility is based on the capacity to reason practically and comes in degrees. For example, in New Jersey capital juries may consider mitigating evidence showing that:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution[, and]

...

(d) The defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution[.]<sup>91</sup>

Extreme mental or emotional disturbance can interfere with one’s ability to assess rationally one’s situation and make a decision based on an assessment of the reasons one has. In some situations, an emotional disturbance can be so great that it undermines the requisite *mens rea* for a criminal charge, either reducing the degree of one’s crime or excusing the agent altogether. The New Jersey capital statute recognizes, however, that one’s mental or emotional disturbance may interfere with rationality to a lesser degree, which would not excuse the defendant of murder, but nonetheless reduce responsibility. Likewise, a complete incapacity to appreciate the wrongfulness of one’s conduct or to control oneself in light of the law’s demands excuses because it is inconsistent with the ability to assess and grasp reasons, make choices in light of those assessments, and to give effect to those choices through action. But the ability to appreciate the wrongfulness or nature of one’s actions and to conform one’s behavior can come in degrees, which the statute recognizes.

### C. *Practical Reasoning and Childhood Abuse*

Therefore, one way that suffering severe childhood abuse could be relevant to penalty-phase deliberations would be if the defendant’s capacity for rational self-control was diminished by the maltreatment to a point below the capacity required for full responsibility. Notice, though, in that case, the mitigating factor is a diminished capacity for rational self-control, not the fact of abuse. Evidence of abuse may be necessary only to support the claim that the defendant’s capacity for rational self-control was diminished at the time of the crime. This subsection explores some ways in which severe abuse has the potential to diminish a person’s capacity for rational self-control. However, I also argue that for cases in which suffered abuse does not diminish one’s capacity for rational self-control, the intuition remains that jurors should hear evidence of the defendant’s childhood. If

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than adults because they have “less capacity to control their conduct and to think in long-range terms”) (internal citations omitted).

91. N.J. Stat. Ann. § 2C:11-3 (1995).

that intuition has a rational basis, then there must be another way in which childhood abuse could be relevant to penalty-phase deliberations.

To begin, we must understand in what way suffering severe abuse could diminish one's capacity for rational self-control, either in general or under specific circumstances. Crocker offers a suggestion, arguing that many persons who suffered severe abuse have a diminished capacity for making reasoned judgments in particular kinds of circumstances. She points out that the "lack of nurturing and protection as a child may have so affected a defendant's psychological development that he had an impaired ability to make proper judgments about how to respond and act in relations to others. He may have acted out of anger without thinking about the consequences or otherwise engaged in destructive behavior."<sup>92</sup> Citing medical testimony, she notes that some "defendants [have been] diagnosed as suffering from abuse-related brain damage that may have made them less able to control their impulses to act."<sup>93</sup>

Crocker's arguments are plausible because they recognize that severe childhood abuse diminishes an actor's responsibility only if, and to the extent that, the abuse diminishes one's capacity for rational control. A diminished ability to control impulses is, arguably, a diminished ability to reflect on and evaluate the worth of acting on an impulse before doing so. Also, extreme anger can interfere with one's ability to reason with clarity by inordinately focusing one's attention on the object of anger, compromising one's ability to foresee and evaluate consequences. If suffering severe childhood abuse causes these kinds of impediments for rational self-control, then we have found one reason why such abuse could be relevant to a defendant's punishment, depending on its lasting effects in his psychology and the circumstances of his crime: 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."<sup>94</sup> These aspects of a diminished capacity for rationality may reduce the responsibility of a capital defendant, whether due to severe abuse, age, mental retardation, other cause, or combination of causes, in comparison to defendants without such impairments.<sup>95</sup>

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92. Crocker, *Childhood Abuse and Adult Murder*, *supra* note 13, at 1170-1171.

93. *Id.*

94. *Id.* at 1165.

95. Crocker writes:

A defendant's mental capacity to reason, reflect, and make appropriate choices and judgments is considered in distinctly different ways at the guilt and punishment phases. At the guilt phase, a mental impairment will affect the defendant's culpability for the murder only if he establishes such a high level of disability that it constitutes a mental disease or defect such that he may be judged insane or, where recognized, as possessing diminished capacity. Nonetheless, the Supreme Court has held that the death penalty is, or may be, an inappropriate punishment for certain defendants because of their inability to make mature and reflective choices and judgments. This determination

While Crocker does illuminate one way in which severe abuse can be relevant to a defendant's responsibility, her argument has a significant limitation for justifying juror consideration of childhood abuse. Her argument is relevant only to murders committed in response to some occurrence or interaction that represents a "stressful, unfamiliar, or threatening" situation for the perpetrator, such that his diminished ability to control his impulses or to foresee and evaluate consequences "may become more pronounced or debilitating,"<sup>96</sup> thereby leading to murder. The argument is inapposite to premeditated murders, for which prosecutors are more likely to seek death. Yet many jurors consider evidence of suffering severe childhood abuse relevant to punishment in cases of premeditated murder, where a defendant's possibly diminished ability for rationality under stressful or threatening circumstances is irrelevant.

Take Robert Harris, for example. Our intuition is that jurors should hear evidence of his childhood, yet his murders were not reactions to a stressful situation that he was placed in non-culpably. After Harris carjacked them, Mayeski and Baker agreed to wait in a desolate area while Harris and his brother committed their planned robbery. They did not resist at all. They turned to walk away—Mayeski wished Harris good luck—and then Harris shot his first victim in the back. It is implausible that Harris killed his victims because he could not control his impulses or because he was under stress, even if he were concerned that the boys could implicate him later in the robbery. His joyous reaction after murdering the boys evidenced his unmistakable endorsement of the reasons upon which he acted. He did not want to control his impulses or act otherwise.<sup>97</sup>

We are still left without a justifying reason for the shared intuition that suffering severe childhood abuse should be considered during a capital penalty-phase trial when the murder at issue was premeditated or, at least, not the product of a stress-inducing interaction or circumstance. We should assess, then, whether Harris' childhood is relevant to punishment because it diminished his general capacity for rational self-control (meaning, whether under stress or not, his capacity for practical reasoning was not sufficient to consider him fully responsible for any of his actions). Again, the suggestion would not be that Harris' capacity for rational self-control is on par with the insane, deserving a full excuse, or even below those of defendants with mental retardation, who may be held

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relies not on the contention that the defendant lacks criminal responsibility but rather that he lacks what the Court refers to as the culpability required for the death penalty. The Court has applied this concept to young age, mental retardation, and other mental disabilities.

Crocker, *Concepts*, *supra* note 25, at 39–40 (internal footnotes omitted).

96. Crocker, *Childhood Abuse and Adult Murder*, *supra* note 13, at 1177.

97. At his post-conviction review hearing, his counsel argued that his actions were "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." *Id.* at 1177 n. 137 (quoting defendant's memorandum in support of an application for a stay of execution, on file with the North Carolina Law Review).

criminally responsible but not exposed to the death penalty.<sup>98</sup> Admittedly, we may not be able to make a certain assessment without helpful psychiatric or psychological testimony about his reasoning processes. Nevertheless, assuming the account we have of Harris and his crime are true and complete, we can begin a determination as if we were jurors.

We can start by looking to the considerations that the Supreme Court used to endorse the widely shared view that offenders with mental retardation are less culpable for their crimes than unimpaired adults even though they “frequently know the difference between right and wrong”:<sup>99</sup>

[T]hey have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.<sup>100</sup>

These impairments do not seem to apply to Harris. The account bears no evidence that he had trouble understanding and processing the information needed to conform his behavior to the law. He clearly could engage in logical reasoning and act on a premeditated plan to an adequate level: he planned to rob a bank; reasoned that he should use someone else’s car in order to reduce his chances of getting caught; the account suggests he knew how to hotwire a car; etc.<sup>101</sup> He was not a blind, unreflective follower: he took the lead in executing the robbery plan he shared with his brother.<sup>102</sup> And significantly, the account suggests that he had the ability to understand the moral and emotional reactions of others: he knew that his victims’ deaths would cause incredible pain to their parents, and that his actions were evil.<sup>103</sup>

Of course, these considerations need not exhaust all relevant factors related to an agent’s capacity for practical reasoning. Furthermore, the assessment thus far does not show that some people are not better reasoners than others. The question is whether Harris’ capacity for practical reasoning was at a level that should be

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98. See *Atkins v. Virginia*, 536 U.S. 304, 317-321 (2002) (holding that the Eighth Amendment forbids states from executing criminal offenders with mental retardation).

99. *Id.* at 318.

100. *Id.*

101. See Corwin, *supra* note 26.

102. See *id.*

103. *Id.* at 27. Harris did suggest searching for cops to kill—cops who might be searching for bodies after hearing shots. *Id.* That suggestion might seem irrational; if he were worried that the sound of his gunshots hindered his chances of escaping detection, firing more gunshots in the same area help would not help. Nevertheless, whether or not his suggestion was irrational under the circumstances, he did not act on it. *Id.*

considered mitigating, with respect to holding him responsible for violating the criminal law against murder. Thus far, there is no reason to think that Harris' capacity for rational self-control was diminished in a sense that justifies holding him less than fully responsible for his act.

#### *D. Moral Competence and Responsibility*

Several moral and legal theorists, including Jay Wallace, argue that the theory of responsibility invoked in the previous discussions is not complete: the capacity for practical reasoning, generally, is a *necessary* condition of responsibility, but not sufficient.<sup>104</sup> In order for it to be fair to hold someone morally responsible for his actions, on this view, he must have the capacity to grasp and be guided by *distinctly moral* reasons.<sup>105</sup> The argument assumes that an agent can be a practical reasoner without the capacity to understand and be guided by moral considerations. But like the capacity to reason generally, the capacity to recognize and be guided by moral reasons comes in degrees. One might argue, then, that suffering severe childhood abuse can diminish a person's capacity to grasp and be guided by distinctly moral reasons, and therefore, to the extent to which someone's capacity for moral competence is diminished by his abuse, he is less than fully responsible.

In applying his theory of responsibility to the victim of severe childhood abuse, Wallace points out that such childhood circumstances often will make it "extremely difficult to take moral requirements seriously as independent constraints on what they do."<sup>106</sup> He continues: "They may be subject to a kind of pent-up, displaced anger much more insistent than the emotions most of us experience, and this may be a source of unusually strong incentives to antisocial behavior."<sup>107</sup> Finally, Wallace highlights that victims of severe abuse may feel unworthy of respectful relationships and, thus, may engage in self-destructive behavior because it "confirms their sense of failure and worthlessness."<sup>108</sup> On this account, suffering severe abuse as a child is relevant to responsibility, not as a cause, but because "it leaves [these] continuing traces in the adult's psychological life"<sup>109</sup> that impair the agent's power to grasp and be guided by distinctly moral considerations.

Wallace's argument does not provide a reason to consider a less severe criminal penalty for someone like Robert Harris. To see why, let us start with Wallace's characterization of his view: "[A]ppeals to childhood deprivation affect our

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104. WALLACE, *supra* note 13, at 154-194 (providing several possible exemptions to accountability based on a lack of "reflective self-control" by the acting party); *see also* FISCHER & RAVIZZA, *supra* note 13, at 79-80; WOLF, *supra* note 13, at 70-71, 117 (1990); Peter Arenella, *Convicting the Morally Blameless*, 39 UCLA L. REV. 1511, 1609-10 (1992); Stephen J. Morse, *Reasons, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 375-76 (2004).

105. *See* WALLACE, *supra* note 13, at 154-94.

106. *Id.* at 232.

107. *Id.* at 232-33.

108. *Id.* at 233.

109. *Id.*

judgments of responsibility by altering our perception of the motives and abilities of the wrongdoer as an adult; they make the adult wrongdoer's actions seem, not inevitable, but psychologically intelligible."<sup>110</sup> First, evidence that makes a criminal act "psychologically intelligible" does not, by itself, provide any reason to conclude that the actor's capacity to conform to moral or legal requirements was diminished at all. A mental health expert can make "psychologically intelligible" any murder by exposing the subconscious, as well as conscious, forces contributing to an agent's decision. Even having very strong antisocial desires does not, by itself, imply a diminished capacity for conforming one's behavior to moral and legal requirements. Wallace's key claim, then, is that severe childhood abuse "alter[s] our perception of the *motives* and *abilities*"<sup>111</sup> of the adult criminal.

First, regarding an agent's moral abilities or capacities, Wallace argues that to hold an agent responsible fairly, he must have a "participant understanding" of the reasons expressed in moral principles "that goes well beyond the ability to parrot the moral principle in situations in which it has some relevance."<sup>112</sup> Wallace continues:

What is needed, rather, is the ability to bring the principle to bear in the full variety of situations to which it applies, anticipating the demands it makes of us in those situations, and knowing when its demands might require adjustment in the light of the claims of other moral principles.<sup>113</sup>

We can see how someone like Harris would lack a participant understanding of certain moral principles that require attunement to more nuanced moral considerations. Because of his life circumstances, he may be inadequately familiar with our general expectations regarding considerateness, gratitude, the moral norms internal to friendship, etc., in addition to lacking any motivation to fulfill them.

But is it plausible, even on Wallace's account of what it means to grasp moral considerations, to conclude that an agent like Harris, due to the abuse he suffered, lacks the capacity to grasp moral reasons not to murder others? Again, he demonstrated a capacity to understand how important that principle is: he knew the kind of pain his murder would cause his victims' parents. Furthermore, the "ability to bring [that] principle to bear in the full variety of situations to which it applies" does not require a significant degree of moral abilities beyond those already entailed by the general ability to reason practically. Of course, within everyday life, it is almost *never* permissible to violate the principle. There are cases in which it is difficult to determine how that principle binds us: is euthanasia or abortion murder? Is a battered wife justified in killing her sleeping abuser? But the fact that an agent like Harris does not care whether he violates the principle does not imply

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110. *Id.* at 233 n.8.

111. WALLACE, *supra* note 13, at 233 n.8 (emphasis added).

112. *Id.* at 157.

113. *Id.*

that he lacks the capacity to understand that the principle would be relevant for such topics. And finally, even if moral competency requires the ability to understand some reasons behind a moral rule, it would be difficult to argue that very basic reasons behind "do not kill people" are beyond the grasp of adults who have the capacity to reason practically, even if severely abused as children.

It is more accurate to say that Harris had the capacity to understand and be guided by moral considerations, but that, to a great extent, lacked the *motivation* to conform to them. He exhibited no respect for the value of his victims or the rules of society, but far from showing an incapacity to understand moral demands, his actions showed his grasp. As Michael McKenna points out, Harris' "callous wish to inform the parents of their losses, his willingness to kill police (those who enforce the moral order), and the pleasure he took in shooting two young boys" are evidence that Harris' "evil, murderous mind was precisely so *because* he understood quite well the depth of [our moral] values."<sup>114</sup> He recognized moral requirements, but chose to "repudiat[e] . . . the moral community"<sup>115</sup> that, in his eyes, rejected *him*.

Also, from the evidence we have, it is plausible to conclude that Harris did value, or at least showed some minimal respect, for the value of his siblings' lives. His sister Barbara talked about how he expressed his rage by breaking things and torturing animals, but she provided no evidence that he harmed family members. Harris asked his older brother the favor of scattering his ashes after his death. Assuming he had reason to trust his brother, they must have had at least some mutual respect and affection if he could expect his brother to fulfill his wishes. Presumably, Harris did feel the force of the reasons to treat his siblings in certain ways and refrain from harming them. He had the capacity to understand those sorts of reasons; but with regard to others, he seemed to have no moral motivation.

If Harris had the capacity to recognize and be guided by moral considerations, does our knowledge of his history of abuse alter our perception of his motives, making him seem less blameworthy? As Wallace suggests, we might think that a victim of childhood abuse who commits adult acts of violence is motivated, in part, by self-destructive forces due to his lack of self-worth, and not merely by a malicious attitude towards his victim and others. A murder motivated, in part, by self-hatred, and not merely by greed or malice for the victim might seem less blameworthy than a murder motivated purely by viciousness.

However, the discovery of unconscious motivation should have no bearing on our moral assessment of an agent's blameworthiness. In morally assessing an agent's action, we assess the quality of her reasoning: we assess her attitudes towards us and others that she expresses through the reasons she considers, acts upon, and ignores. Whether someone unconsciously desired to self-destruct says

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114. McKenna, *supra* note 13, at 131.

115. Watson, *Responsibility and the Limits of Evil*, *supra* note 13, at 271.

nothing about the attitude he expresses towards others in violating their rights. Even if Harris subconsciously desired to self-destruct, he nonetheless expressed that urge through a choice to murder other people.<sup>116</sup>

Thus far, I have rejected the idea that Harris' capacity for recognizing and applying distinctly moral reasons is diminished in a way that would reduce his responsibility for his murders. I have argued that there is a distinction between having the *capacity* to recognize and be guided by moral considerations, and actually having the *motivation* to do so. In part VI, in arguing that there is reason for jurors to consider the history of abuse that a defendant like Harris suffered, I will return to that distinction.

## V. RESPECT AND RESPONSIBILITY

Before doing so, I argue that we should be cautious about concluding that Harris and other individuals with similar childhoods should be considered less than fully responsible for their actions, in general. As stated, there is reason to consider them less responsible when their abuse has caused mental or emotional problems that interfere with their capacity for practical reasoning. But for moral reasons, we should guard against interpreting our reactive attitudes towards Harris and similar individuals as responding to the proposition that they are less than fully responsible.

First, to deem an agent less responsible solely because of a historical fact about his past is to make the same claim for anyone with that kind of past. That conclusion is demeaning to people who have a similar background of suffering, especially because the overwhelming majority do not become murderers.<sup>117</sup>

Craig Haney makes an argument implying that it would *not* be demeaning to others with similar backgrounds to think capital defendants who suffered abuse are less responsible. He argues that there are always differences in life circumstances between those who become violent adults and those who do not.<sup>118</sup> For Haney, the thought, "not everyone at risk for criminal behavior becomes a criminal" does not speak in favor of viewing capital defendants who were abused as fully responsible. He argues that the "not everyone" argument ignores that there are causal explanations for why one abused child winds up on death row, while another does not. Due

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116. Furthermore, it would be unconvincing to argue that unconscious urges, by their influence on someone's actions, diminished one's responsibility. We can understand an unconscious motivation as a *cause* of an agent's decision, but we have no reason to interpret it as compelling an agent's choice. See Michael S. Moore, *Responsibility for Unconsciously Motivated Action*, 2 INT'L J. L. & PSYCHIATRY 323, 338 (1979).

117. See Crocker, *Childhood Abuse and Adult Murder*, *supra* note 13, at 1158 (citing 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 study finding that over seventy percent of adults who were abused children had no criminal record at all).

118. See Haney, *supra* note 4, at 589-602.

to some cause or another, people use varying ways of coping and struggling with their past abuse. Therefore, along Haney's line of thought, it would not demean non-violent survivors of abuse to consider defendants like Harris less responsible because there are salient differences between them.

The problem with Haney's argument is that it takes causation as the basis for undermining responsibility or, in his words, "free choice." His view approaches too closely the sentiment of the French proverb, "*tout comprendre c'est tout pardonner*"—to understand all is to forgive all<sup>119</sup>—the better we become at identifying the psychological and social causes of behavior, the more reason we will have to reduce someone's responsibility. But, as argued, responsibility depends on rationality, and not the absence of causation. Therefore, from the perspective of morality and law, we do not have reason to investigate all the causal differences leading one abused child to a non-violent life and another to death row. It remains demeaning, then, to the former to reduce the responsibility of the latter based on a history of abuse; to do so implies that they both lack the requisite capacity for responsibility. The "not everybody" argument does not mean that capital defendants should be prohibited from introducing evidence of childhood abuse; but it does show that we should not reduce the responsibility of a capital defendant just because he was abused.<sup>120</sup>

A second moral problem with holding agents like Harris less than fully responsible despite their capacities for reason is that from their own point of view, it is demeaning to be grouped with older children and agents with some mental impairment, with regard to their responsibility-status. In general, adults do not treat older children as equals and do not think they have adequate experience to know what is best for themselves. It is degrading to an adult to be treated like a child in certain ways, including being viewed as less than fully responsible. This consideration is not dispositive, of course; if someone with a diminished capacity for practical reasoning finds it demeaning to be viewed as less than fully responsible, we do not have moral reason to resist the conclusion that the person *is* less than fully responsible. However, if there is a compelling alternative account of our intuitions and emotional reactions to agents like Harris, these kinds of moral considerations give us reason to resist interpreting our intuitions and reactions as based on a judgment of diminished responsibility.

Third, deeming Harris less responsible diminishes the *wrong* (as opposed to the harm) suffered by his victims. An extreme case helps illustrate the point. If a victim is injured in an earthquake or at the hand of someone completely insane, then the victim, while harmed, was not wronged. There is no one from whom the victim can demand a justification or an apology. Moving along the responsibility spectrum,

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119. Moore, *Causation and the Excuses*, *supra* note 15, at 1092.

120. To emphasize, abuse reduces responsibility only if it causes a diminished capacity for rational self-control.

imagine being victimized by an adult, as opposed to a child. The harm caused may be the same, but we take the wrong committed by the adult as more serious, legitimizing greater resentment and indignation because the adult, but not the child, is fully responsible. Therefore, *to the extent* that a wrongdoer's responsibility is diminished because of a partial excuse, the wrong suffered by the victim is diminished.

The wrong Harris committed against his victims does not appear, in any sense, diminished because of Harris' childhood. This point may be seen most easily from the perspective of the victims' parents. From their viewpoint, Harris had full control over his actions, capable of making different choices on that day. He did not have any reason to kill their sons. Nothing coerced him into shooting those boys. And this view of Harris and his crimes seems plainly right. In light of these facts, it is objectionable to justify a view about Harris' responsibility that would imply that the wrong he committed against those boys was not as serious as the wrong committed against other murder victims.

These considerations represent moral reasons to prefer an interpretation of our intuitions that does not imply that agents like Harris are necessarily less than fully responsible. In the following, I suggest a reason why evidence of childhood abuse is relevant to determining a just punishment for an individual even if the abuse did *not* cause a diminished capacity for rational self-control. That is, even if Harris was fully responsible for his crimes, there was good reason for a penalty-phase jury to consider his childhood as a mitigating factor.

## VI. RELEVANCE TO PUNISHMENT BUT NOT RESPONSIBILITY

### A. *Attributive versus Substantive Responsibility*

The distinction between attributive and substantive responsibility, clarified by T.M. Scanlon, is helpful to understanding the reason for jurors to consider evidence of childhood abuse, even if the defendant should be considered fully responsible for his crime. An agent is responsible for an action in the attributive sense if "it is appropriate to take [that action] as a basis of moral appraisal of that person."<sup>121</sup> It is this kind of responsibility that has been discussed primarily throughout this Article. To illustrate, recognizing that an insane person should not be considered responsible is to say that her acts should not be attributed to her, and thus should not be taken as a basis for praise, blame, or other evaluative attitude. When we criticize someone's actions, we charge her with either failing to recognize or ignoring a reason he had to perform or avoid a certain action. Therefore, it makes sense to consider responsible, in the attributive sense, only agents who have the capacity to recognize and be guided by reasons.

Moreover, we may consider practical reasoners (attributively) responsible only

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121. SCANLON, WHAT WE OWE TO EACH OTHER, *supra* note 14, at 248.

for attitudes, beliefs, choices, intentions, and other phenomena that are *judgment-sensitive*. Intentions are judgment-sensitive, for example, in that it is sensible to ask someone for her reasons for performing a particular action. It is senseless to ask someone to justify her height or why she loves her newborn, but quite appropriate to ask why she is going to the airport, why she stepped on your foot, or why she did not like a certain movie.

Judgments about agents' *substantive* responsibility, on the other hand, express "claims about what people are required (or . . . not required) to do for each other."<sup>122</sup> Our substantive responsibilities include our duties to others, such as our duty not to murder, to care for our children, etc. But our substantive responsibility also includes other kinds of burdens it is fair to impose on each other. For example, it is our responsibility to bear the burden of the criminal law's threat of punishment and to suffer the burden of actual punishment when we commit crimes.

Attributive and substantive responsibility are related to each other in the following way: our substantive responsibility is affected, in part, by the choices we make, for which we are responsible in the attributive sense. To illustrate, in determining whether it is fair to impose a particular burden on an individual (what she is substantively responsible for), one consideration is whether the person had opportunity to avoid incurring that burden by exercising her capacity for choice (attributing her choice and action to her). One reason it is fair to impose criminal punishment on people who violate the criminal law is that they had an opportunity to avoid incurring punishment by choosing different courses of action. It is unfair to punish the insane because, as non-responsible individuals, they did not have the opportunity to choose appropriately.

Scanlon seeks to explain this relationship, asking why it "seems that when a person could have avoided a certain result by choosing appropriately, this fact weakens her grounds for rejecting a principle that would make her bear the burden of that result."<sup>123</sup> His answer is that persons, as a class, have good reason to want the way in which others treat them to depend on their choices or, at least, on having had the opportunity to choose. First, we have instrumental reasons. Generally, a person is better able to satisfy her desires if what happens to her depends on her choices. I more likely will receive what I want at a restaurant if the wait staff brings me food that I choose, rather than choosing for me.<sup>124</sup> Second, many of our choices have *representational* value, in that they reflect what we care about. Taking Scanlon's example, I more likely will buy my wife something that she wants if I ask for her preferences, but I want to choose an anniversary gift myself to "reflect my thoughts about her and about the occasion."<sup>125</sup> Third, choice has symbolic value. In circumstances in which we expect competent persons to make choices for

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122. *Id.*

123. *Id.* at 256.

124. *See id.* at 251-52.

125. *Id.* at 252.

themselves, it is demeaning not to respect a person's choice because it deems them incompetent.<sup>126</sup> For example, having the right to vote not merely allows someone to increase the odds that her preferred candidate will win; possessing the right symbolizes one's status as an equal among others.

Because of these positive reasons to want what happens to us to depend on our choices, we have reason to endorse moral and legal rules that distribute burdens based on how we exercise our capacity for choice. Put differently, our grounds for complaint against a scheme for distributing burdens are weakened if the rules give us fair opportunity to avoid incurring them.<sup>127</sup> The justifiability of criminal law rests, in part, on the fair opportunity to avoid incurring punishment.

### *B. Burdens and Safeguards*

However, in many circumstances, the fact that an agent chooses to perform an act that he knows may bring great suffering upon himself will not, by itself, license others to impose that suffering. The Eighth Amendment's prohibition of cruel and unusual punishment recognizes that moral principle. It is immoral to impose certain forms of punishment—such as a torturous death—on an individual *even if* that person believed that by choosing to perform a certain act he was exposing himself to the risk of suffering a torturous death. In addition to the reason to want what happens to us to depend on our choices, other moral considerations bear on the determination of what burdens it is fair to place on each other.

Because the criminal law exposes people to a risk of harm that is quite severe (i.e. punishment), certain safeguards are morally necessary to justify exposing people to it. The excusing condition of duress represents one safeguard. The conditions under which someone makes a choice have normative significance “separate[] from the fact of choice itself;”<sup>128</sup> and the coercive conditions under which an agent under duress makes a choice do not provide a fair opportunity for her to avoid what looks like a criminal act. Additionally, as other commentators have recognized, certain societal and economic conditions provide a necessary safeguard for individuals against incurring punishment.<sup>129</sup> The state does not have the right to punish if economic and societal conditions are such that it is clearly rational for citizens to commit crimes rather than pursue a decent life within the law. The maintenance of certain social and economic conditions, then, provides a safeguard against incurring punishment to the extent that those conditions reduce the rationality of committing crime.

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126. *See id.* at 253.

127. *See* SCANLON, WHAT WE OWE TO EACH OTHER, *supra* note 14, at 263.

128. *Id.* at 261.

129. *See, e.g., id.* at 264 (stating that a necessary safeguard is “the maintenance of social and economic conditions that reduce the incentive to commit crime by offering the possibility of a satisfactory life within the law”); Bazelon, *supra* note 13, at 386-87 (contending that a truly just criminal law requires social justice); Jeffrie Murphy, *Marxism and Retribution*, in PUNISHMENT: A PHILOSOPHY & PUBLIC AFFAIRS READER 3, 17-27 (A. John Simmons et al. eds., 1995) (arguing that societal conditions created by capitalism call into doubt the state's right to punish).

### *C. Moral Education as a Safeguard*

The existence of safeguards that create a fair opportunity for citizens to avoid incurring punishment is necessary for the justifiability of the criminal law. Our societal practice of socializing our children—of giving them a moral education so that they internalize moral principles—also serves as a safeguard for individuals against incurring punishment. Being adequately socialized allows individuals to choose more wisely between a life of crime and a life within the law's demands. The law deters us from committing crimes by threatening punishment, but most of us avoid violating the criminal law without considering that threat. We have internalized moral principles, such that we do not even consider committing violent crimes. Even if the thought of committing a crime is contemplated, most of us reject the idea as immoral. For times when the temptation to commit crime may cloud someone's thinking, the law's threat of punishment adds a strong reason of self-interest against committing a prohibited act.

Developing a respect for the rule of law is part of a moral education's function as a safeguard against choosing crime. But imagine the understandable effects of a childhood like Harris' on one's respect for the legal order. Not only did no one protect Harris from his father's violence and his mother's disdain; when the state took over his care, it failed him horribly. His sister reported that he was raped several times when housed in federal youth detention centers, which she described as "gladiator schools."<sup>130</sup> He had to "learn[] to fight and be mean" to survive, and simultaneously indicated that life was not worth living, slashing his wrists twice in suicide attempts.<sup>131</sup> If presented with this evidence of Harris' life during a penalty phase, a juror might infer that he expected nothing from the law and saw it as having absolutely no value for his life. It is understandable that "[p]eople whose sense of being wronged is not recognized and affirmed by the law have less respect for and less investment in it."<sup>132</sup> "[O]ne important step in building respect for the rule of law lies in ensuring that people have the right sense of what they can demand from a legal system and that they see the legal order as valuable because it provides these benefits."<sup>133</sup>

Harris' moral education was excessively poor. If his parents' goal was to raise a violent criminal who would not care about respecting other people, then they used very effective means. The kind of treatment Harris suffered inhibits the internalization of fundamental moral principles and breeds violent tendencies. It is difficult to fathom that he understood the benefits of participating in respectful interpersonal relationships. It is understandable that children who are not protected and suffer

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130. Watson, *Responsibility and the Limits of Evil*, *supra* note 13, at 273.

131. *Id.*

132. T. M. Scanlon, "Punishment and the Rule of Law," in *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 219, 223 (2003).

133. *Id.* at 225.

miserably from severe abuse do not see the value of living on terms of mutual respect with others. To the extent that someone has not been shown the value of living kindly and morally with others, it is understandable if he does not feel the force of the reasons to live in that way. That observation does not imply that someone like Harris is less than fully responsible, in the attributive sense, for his crimes. To repeat briefly, he had the capacity to assess his choices, to grasp reasons not to commit murder and risk punishment, and, as such, his intentions and choices expressed his judgment-sensitive, vicious attitudes about the value of his victims' lives.

But we are now in a position to see why suffering severe and extended abuse and neglect, insofar as it is inconsistent with a moral education, should be considered a mitigating circumstance by penalty-phase jurors: In determining the fairness of imposing a particular burden on an individual, it is morally relevant whether he was deprived of an important safeguard against incurring that burden. It follows that in determining the fairness of imposing our harshest burden under the criminal law, we should consider the extent to which he was deprived of a moral education because that serves as an important safeguard against incurring criminal punishment. That deprivation is especially significant because other offenders, raised in circumstances conducive to the internalization of moral principles, *were* provided that protection.

Reflecting on our capital punishment system helps clarify that last point. The death penalty is not meant for all murderers. There is an important moral distinction between those who were afforded the safeguards against incurring criminal punishment and those who were afforded fewer. In relation to someone who received a moral education, it is more difficult to justify the harsher punishment—the more severe burden—on someone who was deprived of that safeguard against choosing a life of violence. The conclusion is not that being deprived of a safeguard automatically rules out the justifiability of the more severe of the two sentencing options. Rather, it is that in comparison to another defendant who did receive the safeguard of a moral education, there is a reason speaking in favor of the more lenient sentence for the defendant who did not.

Compare your intuitions about Harris with those in response to another well-publicized capital defendant. Fred Neulander was convicted of murdering his wife by hiring a hitman, who completed the job with a lead pipe.<sup>134</sup> Clearly, like Harris, Neulander proved capable of committing a cruel and vicious crime. But let's stipulate that Neulander did not suffer extreme and continual abuse as a child. At least we have reason to think that he was provided the safeguard of a moral education. First, Neulander was a rabbi, a founder of one of New Jersey's largest

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134. John Springer, *Rabbi Gets Life in Prison, Still Professes Innocence in Wife's Slaying* (describing the sentencing of Rabbi Fred Neulander to life in prison for the contract killing of his wife), at [http://www.courtvt.com/trials/neulander/sentencing\\_ctv.html](http://www.courtvt.com/trials/neulander/sentencing_ctv.html) (last visited May 30, 2005).

reform synagogues.<sup>135</sup> Presumably, he gave sermons advocating a life within "God's law." Second, there was no evidence of childhood abuse presented at his penalty phase.

My claim is *not* that death was necessarily appropriate for Neulander, but not Harris.<sup>136</sup> My only claim is that a jury should consider Harris' formative years, which were antithetical to a moral education, because he was deprived a significant safeguard against incurring punishment that figures in the justification of criminal punishment. Moreover, I do not claim that a penalty-phase jury should find mitigating any and all evidence showing that the defendant suffered abuse as a child. The jury must decide in light of the defendant's social history and possibly other expert testimony whether and to what extent the defendant was deprived of a minimally decent moral education (in addition to whether his capacities necessary for attributive responsibility were diminished). For example, suffering abuse from one parent may not provide any evidence that the defendant was deprived of a minimally decent moral education if he received affection and consistent, nonarbitrary, nonpunitive discipline from his mother.<sup>137</sup>

#### *D. Moral Intelligibility: Bearing the Burdens without Benefits*

One might object that my account falls prey to the criticisms I offered against the view that predicated the excuses on causation. An objector might claim that the lack of a moral education is merely a *cause* of crime, which makes it more likely that a person will wind up in the defendant's chair. Furthermore, there are many causes that precede an individual's decisions to commit a criminal act, *i.e.*, there are many factors that contribute to the likelihood that a child will grow up to be an adult who violates the law. For one, we know that being male makes it more likely that a person will commit a crime, all other factors held constant. From the viewpoint of social science, these causes affect someone's abstract chances of committing a crime. So, the objector might conclude, why wouldn't the existence of *any* event or fact that made it more likely for someone to commit a crime count as the absence of a safeguard against incurring punishment? What distinguishes a lack of moral education?

Severe abuse and its potential accompaniment of a lack of moral education are not relevant merely because they may be a cause of a defendant's crime. It is not merely that Harris' childhood was a psychological cause of his failure to feel the force of reasons to respect other persons and the law. Rather, knowledge of his

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135. Matt Bean, *The Rabbi, His Wife, and the Hitmen* (reporting on the capital murder charge against Neulander), at [http://www.courtvt.com/trials/neulander/background\\_ctv.html](http://www.courtvt.com/trials/neulander/background_ctv.html) (last visited May 30, 2005).

136. Other factors are relevant to discerning a just punishment. But also note that my argument in this Article is consistent with the view that no one deserves the death penalty.

137. See Joan McCord, *The Cycle of Crime and Socialization Practices*, 82 J. CRIM. L. & CRIMINOLOGY 211, 224-25 (1991) (finding that "[m]aternal affection, self-confidence, and consistently nonpunitive discipline or supervision served as protections against criminogenic influences).

formative years makes his rejection of those reasons *morally intelligible* to us. In assessing the fairness of imposing burdens on each other, we accept the moral principle that it is fair to place the burdens of a practice on an individual to the extent that the agent benefits from participating in that practice. If the benefits of a practice are possible only by imposing certain burdens on people, there is, at least, a *prima facie* reason to see fairness as requiring those burdens to be placed on the practice's beneficiaries. To the extent that someone does not benefit from the practice, it is more difficult to justify placing burdens of the practice on that individual.

Being male, for example, might be a factor that makes it statistically more probable for someone to commit a crime; but being male does not make one's moral failures morally intelligible. Harris' motivations are not merely psychologically intelligible as a reaction to the way he was treated throughout his life; they are, somewhat, morally intelligible as a response, based on our general view that someone should not bear the burdens of a practice from which he does not benefit. To be overly cautious, I emphasize that I am not saying his cruel and vicious actions were morally justified to any degree. Rather, suffering severe abuse and neglect is a morally relevant cause of crime because we have reason to empathize with the individual's failure to feel the force of living on terms of mutual respect with other persons: learning that someone suffered extremely severe and continual abuse, was unloved, neglected, punished arbitrarily, and otherwise treated as an object of disdain, understandably affects our view of how severely we may punish him, in comparison to someone who was shown the value of respectful interpersonal relationships. We simultaneously see that an agent like Harris had the capacity to recognize moral considerations and control his behavior, but his lack of moral motivation is morally intelligible.

The argument presented exposes a different kind of consideration that is relevant to punishment. Traditionally, on deontological accounts of punishment, the guilty should be punished according to the "wrong one commits or the harm one causes," and one's responsibility for that wrong or harm.<sup>138</sup> At least in the capital context, my argument implies that a third kind of consideration may be relevant: the extent to which a defendant was deprived of a safeguard against incurring punishment that plays a role in establishing the fairness of imposing criminal sanctions on individuals. As argued, the fact that Harris suffered extraordinary abuse and neglect does not alter the wrong he committed or his responsibility, given that he had an adequate capacity for rational self-control. But it is relevant to the extent that it deprived him of a morally significant safeguard.

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138. David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1557 (2004). Brink's discussion specifically references a "retributive conception of punishment," as opposed to the broader category of deontological understandings of the criminal law. For a non-retributive, non-consequentialist understanding of the criminal law, see Scanlon, *Punishment and the Rule of Law*, *supra* note 132.

## VII. SOME OBJECTIONS AND REPLIES

### A. *Is It Responsibility in Disguise?*

Earlier, I argued that from the evidence provided, there was no reason to consider Harris less than fully responsible for his crimes on the basis that he had a diminished capacity for considering distinctly *moral* reasons. One might counter that the argument I present, emphasizing moral education as a safeguard against incurring criminal punishment, is inconsistent or in tension with my earlier claim. The objection might be that I am admitting that a childhood like Harris' makes it more difficult for him to bring moral principles to bear on the choices he makes. As Wallace states, such a childhood makes it difficult for the victim, as an adult, to take moral requirements seriously.<sup>139</sup> The objection is also based on an aspect of responsibility that I endorsed; that is, responsibility comes in degrees. The objector would conclude, insofar as responsibility requires the ability to control oneself in light of moral principles, and not simply the ability to reason practically, I am admitting that Harris' was not fully responsible for his crimes.

There are two ways to interpret the objection. First, perhaps it raises a partial global excuse or exemption for Harris: that in general, he is not a fully responsible agent because of a diminished capacity to control himself in light of moral considerations. I have argued that there are moral reasons to reject this view because it is demeaning to Harris and persons with similar backgrounds, as persons who assess reasons and live according to those assessments, to be deemed less than fully responsible. However, an objector might think those moral reasons are beside the point: if Harris is less than fully responsible, then, regardless of the distasteful implications, so be it.

This objection conflates the distinction between having the general *capacity* to grasp and be guided by our most basic moral considerations and lacking the *motivation* to live according to them. As argued, Harris understood quite well what constitutes cruelty. He did not feel the force of the reasons not to be cruel, but that does not imply that he lacked a capacity to recognize those reasons and control his behavior. His childhood allows us to understand why he was not *motivated* by moral and legal considerations, but lacking motivation does not provide any kind of excusing condition, even if it means a person is more likely to engage in immoral and criminal conduct.

Second, perhaps underlying the proposed objection is a persuasive rationale for local excuses, such as duress. For example, Stephen Morse argues that the law excuses an agent under duress because she was wrongfully faced with a "hard choice." More specifically, "an agent faced with a particularly 'hard choice'—commit a crime or be killed or grievously injured—is excused if the choice was too

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139. WALLACE, *supra* note 13, at 232.

hard to require the agent to resist.”<sup>140</sup> The standard is objective: “If the person of reasonable firmness would resist, the choice is not too hard.”<sup>141</sup> Clearly, even a partial excuse based on this construal of duress is not available to Harris; no other agent coerced him into choosing between murdering his youthful victims or be killed, himself. But one might suggest that some agents face “internal” hard choices, such as drug or gambling addicts. Such agents find it very difficult not to give in to their impulses, and perhaps that is why we are tempted to see them as less responsible when they do.<sup>142</sup> Extending the reasoning to Harris, the suggestion would be that, because of his anti-moral education, it is too difficult for him to choose the right course of action when he sees an opportunity for anti-social conduct; therefore, we have reason to think he is less than fully responsible.<sup>143</sup>

This objection fails because the way in which it is “difficult” for Harris to refrain from anti-social conduct is not analogous to the way in which it is difficult for someone under duress or an addict to make the right decision. There are two essential components to duress, whether external or internal, that are absent in Harris’ case. First, there is the threat of severe pain, due either to physical harm caused by a coercing agent or to a “supremely dysphoric inner state[]”<sup>144</sup> caused by failing to satisfy a compulsive desire. Second, in assessing whether a person of reasonable firmness would resist the threat of such pain, we assume that the agent has a countervailing motive to do what is right or best. Those two features of duress make intelligible the claim that coerced agents are faced with a hard choice. They are strongly motivated to avoid great pain and death, and also motivated to avoid doing what they see as wrong. Neither feature exists in Harris’ case. He was under no threat of severe harm, either from a coercing agent or the thought of not giving into a compulsive desire like a drug addict’s. And even if it would have caused him psychological pain to resist anti-social impulses, he was clearly lacking a countervailing moral motive to resist. His expressed satisfaction in killing the boys evidenced his endorsement, after the fact, of his murders. He did not show any remorse, in the way that an unwilling addict would after giving in to his addiction. To say that it was difficult for him to control his actions in light of moral considerations, then, has nothing to do with the “difficult choice” that underlies local excuses such as duress.

### *B. Is It Nevertheless Elitist or Demeaning?*

I previously argued that there are moral reasons to deem the suffering of severe abuse as a punishment-related, but *not* a responsibility-related, consideration. It is

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140. Morse, *Deprivation and Desert*, *supra* note 13, at 124.

141. *Id.* at 125.

142. I agree with Morse, though, that we do not excuse, or even partially excuse, such agents for giving in to their desire for drugs or to gamble on the basis that they face an “internal hard choice.” Rather, as Morse argues, addicts would only have an excuse insofar as their rational capacities are diminished. *Id.* at 126-27.

143. This proposed objection is only based on Morse’s responsibility theory, and is not necessarily implied by his view.

144. Morse, *Deprivation and Desert*, *supra* note 13, at 126.

important not to diminish the responsibility-status of beings capable of recognizing and being guided by reasons because it is demeaning. However, one might argue that my account is nevertheless demeaning to agents like Harris. After all, I am saying that there is reason to consider imposing the more lenient of two sentences on them, compared to other defendants who commit equally atrocious acts. On this objection, respect requires equal punishment.

The proposed objection might appeal to reasoning similar to Michael Moore's argument for why retributive judgments are not necessarily spawned by vicious emotions, but rather may be motivated by virtuous guilt. Moore argues that "[o]ur concern for retributive justice might be motivated by . . . the feelings of guilt we would have if we did the kinds of acts that fill the criminal appellate reports of any state."<sup>145</sup> He invites us to imagine how we would feel if we committed an absolutely brutal murder. Moore writes that he hopes he would feel "guilty unto death," that no amount of suffering imposed could exceed what he would deserve.<sup>146</sup> Guilt would be the virtuous response. His conclusion is that we should trust the judgment reflected by this imagined guilt (that we would deserve death) because, as a virtue, this feeling "comes with good epistemic credentials."<sup>147</sup>

Moore next asks whether there is any reason not to extend this judgment to any responsible agent who committed such a murder.<sup>148</sup> He argues that we should be morally suspicious of any inclination not to because "[i]t is elitist and condescending towards others not to grant them the same responsibility and desert you grant to yourself."<sup>149</sup> It is demeaning to regard oneself as "more of a person" than others.<sup>150</sup> Rather, we should determine someone's just deserts by asking what *we* would deserve if we committed the crime in question.<sup>151</sup>

Based on Moore's remarks, one might contend that my argument is demeaning to responsible adults who suffered severe abuse as children because I would not see a reason to mitigate my own punishment if I committed a murder like the one Harris committed. If I would "feel guilty unto death" for committing a murder, then, on risk of being elitist, I should extend the underlying judgment to all other fully responsible agents.

First, it is important to emphasize a limitation on the argument presented. I have not argued that capital defendants who suffer severe childhood abuse do not deserve the death penalty. I have argued that there is a reason to consider severe childhood abuse as one mitigating factor. Relative to capital defendants who were

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145. Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 212 (Ferdinand Schoeman ed., 1987).

146. *Id.* at 213.

147. *Id.* at 214.

148. See *id.* at 215.

149. *Id.*

150. *Id.*

151. Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 216 (Ferdinand Schoeman ed., 1987).

provided the safeguard of a moral education, it is more difficult to justify the most severe form of punishment for defendants deprived of that safeguard.

Second, in response, it is not elitist to consider severe childhood abuse as a mitigating factor because doing so does not rest on a thought of being “more of a person” than someone with such a background. It is not rooted in a great “we-they” attitude towards criminals, which Moore rightly warns us against adopting or endorsing. Rather, the reactions that many jurors have to evidence of childhood abuse are based on the same kind of thought experiment Moore raises. Hearing evidence about the torture and disregard Harris suffered makes us wonder how we would have responded to such treatment, forcing us to consider whether our moral self is more fragile than we would like to think.<sup>152</sup> Of course, there is something metaphysically suspicious about considering the counterfactual, “if I had been raised like Harris . . .”; in a clear sense, I would not be *me* if I had such a drastically different childhood. But nevertheless, the point is that our initial intuition that suffering severe abuse is relevant to punishment is not rooted in a shameful, elitist emotion, but rather in an empathetic attitude.

#### VIII. CONCLUSION AND RECOMMENDATION

A penalty-phase jury’s verdict is supposed to reflect a *reasoned* moral response,<sup>153</sup> not “turn on the vagaries of particular jurors’ emotional sensitivities.”<sup>154</sup> At the same time, not only must states allow capital defendant to submit evidence of their childhood experiences, but a capital defense attorney would violate his client’s Sixth Amendment right to counsel if she did not make reasonable investigations into her client’s past, unless it was reasonable not to.<sup>155</sup> This Article has searched for the reasons for penalty-phase jurors to consider evidence showing that a capital defendant suffered severe abuse and neglect as child. This kind of prevalent penalty-phase evidence is worrisome if the rationale for its consideration in mitigation is that a defendant’s crime may be attributable to his childhood experiences, in the sense that it was caused by his past.

There are two ways in which suffering severe childhood abuse and neglect may, in fact, be relevant to a sentencing jury’s determination. First, suffering abuse is relevant if it caused an individual’s capacity for rational self-control to be

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152. Watson, *Responsibility and the Limits of Evil*, *supra* note 13, at 276. Watson writes:

What is unsettling [when hearing such evidence] is the thought that one’s moral self is such a fragile thing. One tends to think of one’s moral sensibilities as going deeper than that (thought it is not clear what this means). This thought induces not only an ontological shudder, but a sense of equality with the other: I too am a potential sinner.

153. *Smith v. Texas*, 125 S. Ct. 400, 406 (2004) (citing *Penry v. Johnson*, 532 U.S. 782, 796 (2001)).

154. *Saffle v. Parks*, 494 U.S. 484, 493 (1989).

155. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Stickland v. Washington*, 466 U.S. 668, 690-691 (1984)).

diminished to some degree, in comparison to the capacity for rational self-control necessary for full responsibility. Note that if the abuse has caused a diminished capacity for rational self-control, whether in general or in stressful situations, what is morally relevant to assessing the agent's responsibility is not the abuse, but rather the diminished capacity for reasoning.

Even if the abuse did not cause a diminished capacity for responsibility, we intuit that capital sentencing jurors, nevertheless, have a reason to consider evidence that the defendant suffered severe abuse and neglect. And there is a reason: In determining whether it is fair to impose a sanction on an individual, it is morally relevant whether he was deprived a morally important safeguard against incurring that sanction. Insofar as suffering severe abuse and neglect is inconsistent with an effective moral education, individuals who suffered such abuse were deprived a safeguard against entering a life of violence that plays a role in establishing the fairness of imposing criminal punishment. It is difficult to justify our harshest sentence under law for an offender when he was deprived of a significant safeguard, especially in comparison to others not deprived of it.

An attractive feature of that second rationale for abuse evidence is that it avoids the problematic moral implications of the conclusion that the relevance of abuse must be connected to reducing a capital defendant's responsibility. To the extent that we partially excuse someone who rightfully understands himself as having the capacity to reason practically and control his behavior, we demean him because of the connection between being considered responsible and the respect due persons. We also risk diminishing the wrong suffered by the victim.

A practical upshot of these arguments is that courts and attorneys should cease describing this kind of mitigating evidence as an "explanation" of the crime or as exhibiting an "extenuating circumstance." That language is unhelpful and confusing, at best. And when those terms are used in contrast to "an excuse" or a denial of responsibility, we should expect them to be viewed with suspicion. If the defense is claiming that the defendant's childhood left him with mental impairments that interfered with his capacity for rational self-control, in comparison to others without such impairments, it should state that the defendant is not seeking an excuse, but only a very limited, partial excuse in relation to others without the defect in reasoning capacities.

More illuminating language is available for a case like Harris', in which the defendant did not commit his crime under any stress or circumstance that compromised his capacity for rational self-control. Defense attorneys and court instructions should explain that evidence that the defendant suffered through a miserable childhood of constant abuse is aimed to show that he was deprived of a morally significant protection or safeguard against living a violent life. In recognizing that the death penalty is not intended for all murder convicts, it is worth stressing that defendants who suffered severe abuse and neglect were deprived of a safeguard in comparison to others who were not treated as such. We all can acknowledge that a childhood conducive to internalizing moral principles provides

a better chance for an individual of avoiding violence and criminal sanctions, and it is therefore easier to justify a harsher punishment for someone who has been shown the value of the law and the benefits of living a moral life and participating in interpersonal relationships based on mutual respect and affection. It can be appropriate to hold a defendant fully responsible for his crime and simultaneously maintain that the more lenient of two sentencing options is appropriate, relative to another individual responsible for the same crime, because the latter was provided an extra safeguard or better chance of avoiding antisocial conduct. For such a case, we *can* make sense of the typical defense claim that the defendant is not seeking at all to excuse himself from responsibility, but is rather making a case for life imprisonment instead of the death penalty.