The Family Capital of Capital Families: Investigating Empathic Connections Between Jurors and Defendants' Families in Death Penalty Cases

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THE FAMILY CAPITAL OF CAPITAL FAMILIES: INVESTIGATING EMPATHIC CONNECTIONS BETWEEN JURORS AND DEFENDANTS’ FAMILIES IN DEATH PENALTY CASES

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The conflict between our duties as citizens and loyalties as family members is relatively uncharted in legal scholarship, especially with respect to how this tension manifests itself within the criminal justice system. Recently, some scholars have begun to pay greater attention to such matters; for instance, in a recent book, Dan Markel, Ethan Leib, and Jennifer Collins have examined state policies that treat criminal defendants better because of their family ties and also impose extra burdens on account of familial status. In this Article, I want to examine a different aspect of defendants’ family ties: How do jurors use empathy to form judgments of capital defendants’ family members, and how do cultural norms of family life affect the way jurors make sense of what happened during a murder?

I was first drawn to this area of research while assessing how the survivors and victims’ family members of the Oklahoma City Bombing confronted Timothy McVeigh, Terry Nichols, and Michael Fortier, the three White male conspirators involved in that case. While McVeigh was perceived by many as a desperate loner who had no relationships with women, Nichols and Fortier were married with children, though each man’s family life was far from perfect. Nichols was divorced from his first wife and had married a Filipino mail-order bride for his second, and by many accounts was very controlling and misogynistic. Fortier and his wife were both drug addicts and/or dealers.

Family ties played key roles in the prosecutions of both defendants; they motivated Fortier to accept his plea bargain and formed a central pillar of Nichol’s sentencing arguments. For Fortier, cooperating and agreeing to a plea bargain could allow his attorney to “negotiate a deal to salvage some of his life with his family,” while refusing would mean that “he could be

1. See generally Dan Markel, Jennifer M. Collins & Ethan J. Leib, Privilege or Punish: Criminal Justice and the Challenge of Family Ties (2009).
executed by lethal injection, leaving his child fatherless.” Journalists knew that Fortier’s daughter Kayla was his “soft spot.” Defense attorney Michael Tigar characterized Nichols as McVeigh’s foil, a man who “baked bread, raised fawns, and received a hardship discharge from the Army in order to care for his 7-year-old son.” At Nichols’s sentencing, “friends and relatives told how he made flash cards and greeting cards for his children out of the file folders and toothpaste he was given in prison.” On one hand, the defendants’ statuses as husbands and fathers demonstrated their ability to enter into an intimate human relationship, humanizing them. On the other hand, it made it more mystifying why these men became involved in the bombing—they had so much more to lose than McVeigh.

If there is a case with contrasting stereotypes of defendant’s family lives, it is that of Lee Boyd Malvo who, together with accomplice John Allen Muhammad (who had himself grown up without parents), engaged in a cross-country sniper killing spree. Malvo, who once called Muhammad father, was an “obedient teenager who killed at Muhammad’s command,” a child without a family of his own. During their killing spree, the two posed as father and son. According to expert psychological testimony at his trial, family instability could have made Malvo more vulnerable to brainwashing by Muhammad (implying that this was not a family of choice); he had endured a fractured “childhood in which his mother often dropped out of his life.” According to news reports, after Malvo’s father abandoned him as a

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6. See id.
7. Witkin & Roebuck, supra note 2.
8. Sandy Shore, Testimony Ends in Nichols Case; Defense Tries to Sway Jurors as Sentencing Phase of Trial Nears Closure, MILWAUKEE J. SENTINEL, Jan. 3, 1998, at 6A.
young boy, his mother allegedly took him with her from “town to town and school to school as she looked for work in the Caribbean, leaving her son with a string of people who were willing to take him in,” never leaving him with anyone for very long for fear he would form close emotional ties with others.\textsuperscript{13} Malvo’s aunt described this fatherlessness as a trend that was a family curse, telling \textit{Newsweek}, “We don’t know what is father love.”\textsuperscript{14} Eventually, his mother traveled to Florida and left Malvo behind in their rented “shack” in Antigua, where he met Muhammad and began the relationship that would lead to life without parole.\textsuperscript{15}

The cases of Nichols and Fortier on the one hand and Malvo on the other present two very different images of family life. Nichols and Fortier both lived with their current wives and children up until their arrests, and actively worked to maintain familial relationships from prison.\textsuperscript{16} Malvo, however, was the product of an altogether different family—one abandoned by a Black father and headed, if at all, by a Black female who was largely absent—which purportedly left him vulnerable to Muhammad’s destructive paternal mentoring.\textsuperscript{17} Both of these family types—the intact, White, emotionally supportive family and the broken, Black matriarchal family—are omnipresent constructions in contemporary mainstream popular culture. According to cultural stereotypes, Malvo’s family is the type of family that violent Black male criminals “should” have, and jurors might expect a capital defendant’s family history to resemble Malvo’s more than Nichols’s.\textsuperscript{18}

This Article makes several contributions to the existing literature. It reveals how and why defendants’ childhoods and images of defendants’ families have profound significance; jurors want to know what sort of life history can produce someone who commits terrible crimes, and they are more comfortable when they can confirm that murderers are the products of abysmal childhoods and not born into families with “normal” home lives. It demonstrates that the perceptions we as citizens and as jurors form of capi-


\textsuperscript{15} Id.


\textsuperscript{17} See Bakarat, \textit{ supra} note 13.

\textsuperscript{18} These expectations could be based upon any number of interdependent sources such as jurors’ conscious or subconscious biases, or social science research connecting childhood socioeconomic deprivation, abuse, and neglect upon future criminal behavior. \textit{See infra} Section II.C and note 195.
tal defendants are often significantly influenced by their family members and histories, and the similarities and differences between “us” and “them.” While jurors may try to put themselves in the shoes of both Nichols and Malvo, they empathically engage with each defendant in different ways according to his family dynamics. Because there is great disparity in how jurors may make sense of and apply these stereotypes in capital sentencing proceedings, this Article proposes that evidence about the defendant’s past and current family life that conflicts with or reinforces stereotypes may aggravate more than it mitigates. Finally, it presents new qualitative research that is a first step towards assessing how jurors might comprehend and apply mitigating evidence of a defendant’s family life and history.

This Article argues that empathy and its role in capital sentencing, in particular capital jurors’ reception of mitigating evidence from or about defendant’s family members, is frequently misunderstood, and its importance underappreciated. Part I critically explores the nature of empathy, its contributions to jurors’ mitigation decisions, and the connection between empathic engagement and social perception within capital mitigation. Part II describes two distinct stereotypical constructions of families that are highly visible in contemporary mainstream culture, politics, and policy: the idealized “normal” White, middle-class family and the “dysfunctional” Black family. It then assesses how these particular stereotypes can hinder as well as help jurors’ reception of mitigation evidence and ability to form empathic connections. In Part III, this Article describes existing and original quantitative and qualitative empirical research on how jurors form perceptions of defendants’ families, and what types of perceptions they are likely to form. This data suggest that jurors tend to view “normal” families in line with idealized White, middle-class family constructs and “dysfunctional” families as its opposite. It also demonstrates that the quality of the emotional connections within a defendant’s family play a key role in jurors’ assessments of that family (i.e., parents are faulted if they did not provide an emotionally supportive environment for children or are not providing support during trial). This research suggests that capital defense attorneys should develop a more sophisticated understanding of how jurors assess information from or about the defendant’s family and underscores the need for further research in this area. Finally, in Part IV, this Article discusses possible strategies by which capital defenders may identify and manage jurors’ comprehension of and reliance upon constructions of family life. Throughout, this Article focuses most heavily on jurors and defendants who are Black and White; the bulk of empirical data and research addresses these two racial groups, and accordingly future work will need to probe the complexities of other racial and ethnic groups.
A. Empathy’s Emotional Role

Many legal scholars have recognized that, in the words of Clare Huntington, “emotion is interwoven into every aspect of our lives—the trading floor, the classroom, the playing field, the street, the courthouse, the kitchen table.”19 Without emotion, humans cannot make appropriate decisions, follow social norms, or lead productive lives.20 Emotion’s influence is felt not just by individuals but also within social units, including families. Though it is easy to stereotype emotion’s role in family life, the emotional landscape of any given family is not simplistically “either solidaristic and altruistic, filled with love and care, or, conversely, . . . filled with anger and jealousy, leading to violence and danger.”21 Moreover, the family is emotionally performative, performing in society by providing for dependents and expressing emotion and performing for society by acting in ways thought to be situationally and socially appropriate to onlookers.22 According to Huntington, in both performative “contexts, emotion is the currency of the performance, making it salient.”23

What exactly is empathy, and what is its relationship to emotion? Social scientists and legal academics are accustomed to use what C. Wright Mills termed the “sociological imagination” when seeking to understand those who are different.24 As I use it here, empathy is “a mode of sociality through which various dispositions, orientations, encounters, and actions materialize or fail to materialize amid specific sets of cultural conditions.”25 It relates to our interpersonal need to explain others’ behavior and to communicate that understanding.26 Empathy is not so much a judgment of connection or disconnection with others, but an evaluative process that, like so many other human processes, is instinctual and aspirational but partial and imperfect.27 “[I]nstead of an immediate response to environmental stimuli, it

20. Id.
21. Id. at 321-22.
22. Id. at 323.
23. Id.
25. Id.
is an appraisal of such stimuli, and as an assessment, ‘may be modified by reappraisal of the environment in other ways.’”

Empathy allows us to both gauge others’ emotions and develop new emotional landscapes. The attraction of an empathic connection is interpersonal difference, which is always present; “I” am never “you.” Humans see others in certain situations and wish to attempt to place ourselves in their shoes. These others may be sentimentalized bodies—bodies in pain, or bodies in tragic predicaments of their own or others’ making—to whom we are emotionally drawn, whether in sympathy or in horror. These sentimentalized bodies are by nature different, bodies marked by misfortune and thus distinct from a population that does not customarily find themselves in such states of affairs, bodies that invite others to attempt to encounter and respond because of their unfortunate or terrible differences. Yet, these same tragic circumstances prompt others to attempt to encounter and respond to sentimentalized bodies, to understand, assess, judge, alleviate, or even aggravate their suffering. Sentimentalized bodies thus prompt empathy pangs—the urge to encounter another who is different and to overcome interpersonal discontinuities, if only temporarily.

Empathy requires both imagination and narrative. When we place ourselves in another’s shoes, we attempt to approximate an experience. Imagination’s power and empathic efficacy lies in the fact that it allows us to expand both our experiential horizons and emotional repertoire, enabling us to grasp so much more than what is apparent from our own immediate experience and environment. But imagination is ungrounded and need not be tethered to any reality. Consequentially, there is always a large gap between our imaginings and our ability to reconstruct what we imagined for others, and so we must be satisfied with approximate understandings. In order to ensure that our imaginings are readily comprehensible to others, we must tie them to a specific social context, setting limits around our imaginative processes so that we may describe a particular imagined construction to


30. Id. at 80 (quoting ALAN HYDE, BODIES OF LAW 192-93 (1997)).

31. Id.

32. Id. at 88.

33. Id.

34. Id.

35. Id.
others who can then assess its appropriateness or rationality.\textsuperscript{36} Social practice enables us to ground imagination; our perceptions of whether an imagined construction is realistic, accurate, proper, or nonsensical is informed by personal and cultural memory, which offer a repertoire of experiences with which we may compare the construction in question.\textsuperscript{37}

Narrative, the most highly structured form of expressive social practice, is also necessary to make our empathic encounters real and meaningful.\textsuperscript{38} As “trajectories plotted upon material reality by our imagination,”\textsuperscript{39} narratives explain what social practices are relevant and why, triggering certain cultural memories.\textsuperscript{40} We need detail and context before attempting to empathically encounter another’s experience, and other forms of social practice may not provide all that we need.\textsuperscript{41} Through narrative, social practice organizes our imaginings, matching them with others already familiar to us and allowing us to orient ourselves while assessing others’ experiential claims.\textsuperscript{42} As communicators, we extend ourselves into the world to encounter, and to express and perform our own experiences, states, and identities; as interpreters, we take the external world with us in our imagined journey into another’s interior.\textsuperscript{43} When we find another’s claims inaccessible or unbelievable, this means that that other’s experience has no accessible parallel within our social practice.\textsuperscript{44} On such empathic journeys, we are left rudderless, with only imagination as our guide. These experiences are interpersonally unrecognizable.\textsuperscript{45}

Processes of empathy may themselves be narratives that are more or less complete, depending on the strength of an empathic connection. At the beginning of an empathic narrative, one is confronted with another who implicitly or explicitly makes an experiential claim that serves as an empathic trigger, sparking a desire to place one’s self in that person’s shoes, to form an empathic connection to assess this experiential claim.\textsuperscript{46} If the claim resonates with the empathizer’s social practice, it becomes comprehensible and credible; if it does not, it is deemed incomprehensible or incredible.\textsuperscript{47} But this is not the end of the empathic narrative; one may not only reach an

\begin{itemize}
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id. at 90.
\item \textsuperscript{39} Id. (quoting Robert Cover, Violence and the Word, in Narrative, Violence, and the Law: The Essays of Robert Cover 5 (Martha Minow et al. eds., 1995)).
\item \textsuperscript{40} Id. at 88.
\item \textsuperscript{41} Id. at 88-89.
\item \textsuperscript{42} Id. at 88.
\item \textsuperscript{43} Id. at 89.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 90.
\item \textsuperscript{47} Id.
\end{itemize}
approximate understanding of another’s experiential claim, but can engage with that claim on a deeper level. In this more profound engagement, we not only realize that another is undergoing a certain experience, but we acknowledge that we are somehow changed by that realization as well. Perhaps this change comes about through a felt connection with another; perhaps it arrives with a radical rejection of that other. This profound empathic experience can actually become an emotion that takes as its object the person with whom we are empathically engaged; the nature of that emotion constitutes a subjective positive or negative evaluation of that individual. We may judge the person to be similar to us, long to do something for or to that individual, or feel an empathic responsibility for her.

To illustrate this process of empathic engagement, let us imagine that jurors are presented with a picture of a middle-aged woman who was convicted of a terrible crime: killing a younger woman when she was nine months pregnant—nearly at term—and cutting the victim’s infant from her womb to pass off as her own child. Jurors are told that the perpetrator has claimed that she always wanted an infant but was infertile, and that she decided to take such violent measures out of desperation because she did not know any other way to get a child. This convicted woman is a sentimentalized body—one who has set herself apart from society through a terribly violent act—and jurors may be tempted to place themselves in her shoes to assess why on earth someone would or could behave in this fashion. This attempt to evaluate her actions and reasoning—to encounter her as an individual—is the empathic process.

Thereafter, our own experiential repertoires will inform our subjective evaluations. If jurors themselves have had difficulty conceiving a child or experienced miscarriage, they may recall experiencing anger or jealousy at the sight of pregnant strangers meandering past them at the grocery store or in the park. Or they may recall the emotional experience of desperately yearning for something (not necessarily a child) that seems out of reach. They may thus come to understand how the perpetrator “must have felt” prior to the murder.

But when jurors attempt to move beyond assessing this woman’s emotional state to identify with and thus evaluate her violent actions, they will be unable to credit her claim that cutting another woman’s child out of her murdered corpse was the only solution. They are likely to think of many other options that are not only legal and socially permissible, but actually encouraged, such as adoption or becoming a foster parent. In short, although jurors have empathically “connected” with this perpetrator—put themselves

48. Id.
49. Id.
50. Id. at 90-91.
51. Id. at 91.
in what they imagine to be her shoes—they would evaluate her motivations and choices negatively and would reject her justification for committing the murder. Ultimately, they may reject her position so strongly that they not only fail to credit her claims, but view her as monstrous or evil—determinations that, in turn, reinforce the propriety of our assessments of what we would have done in her position. Deeming her monstrous or evil, in other words, can buttress jurors’ cherished self-conceptions, such as their tendency to see themselves as peaceful, law-abiding citizens.

Of course, jurors’ recollections of our experiences and understandings of social practices can be flawed in a variety of ways, such as ethnocentrism, bias, or prejudice. Whether they operate overtly or covertly, these factors can warp processes of empathic identification. According to Lynch, subtle prejudice (or “modern racism”), though connected to racial stereotyping, is demonstrated not by explicitly applying negative qualities to “out-group members” but instead by assigning positive attributes to “in-group members.”52 Social stereotypes set the groundwork for subtle prejudice by making available a ready stock of negative attributions and creating distance between social groups.53 It does not take much to activate these stereotypes, and research has shown that cultural stereotypes can still be triggered in “low-prejudice people” who do not condone them, particularly when these individuals “are busy, engaging in automatic thinking, distracted, and unable to put effort into controlled thinking.”54 Mere familiarity with negative stereotypes is enough. Unfortunately, subtle prejudice is more covert and thus “more intractable than” earlier, more explicit forms of racism, and both stem from and reinforce social structures that purport to operate according to “fairness, entitlement, and other social values” but are actually engines of racial inequality.55

B. Emotion, Empathy, and Capital Mitigation

Sometimes our empathic encounters with others may be influenced by other socially or institutionally-imposed evaluative roles, as in jury duty. We may feel an urge to empathically place ourselves in the shoes of a convicted murderer as members of a news audience, but we may be under a duty to sentence this offender as members of the jury. There is little doubt that empathy plays a crucial role in capital sentencing.56 We might even go

53. Id. at 184-85.
55. Lynch, supra note 52, at 187.
56. Id. at 189.
further and say that capital sentencing itself is an empathic task, at least if mitigating evidence is introduced; jurors must evaluate the credibility of that evidence as well as how it bears upon the defendant’s autonomy and deserved sentence, and likely will form empathic connections in the process.

Focusing upon the empathic dimensions of capital mitigation also reaffirms empathy’s roles within and contributions to law and criminology. Empathy occurs at a site of injury or in a moment of crisis, when it is particularly crucial for us to seek to understand or rationalize not only what has happened, but why—indeed, the “why” is a central part of the “what.” As Brown asserts, criminology is uniquely positioned to study moments where we seek to connect empathically with offenders and their family members—it studies “injury, harm, and pain” and so can access empathic connections in “those instances of social experience where human connection, understanding, and social knowing are destroyed, avoided, prohibited, or simply impossible.” In addition, both law and criminology are “about the way that humans find themselves in the midst of unchosen relationships, sites with little room for shared feeling or emotional attunement, that, nonetheless, impose an ethical responsibility on the individual and the collective.”

In both criminal justice and law, empathic connections are most often rooted in judgment, a context that profoundly colors the empathic connection that is formed—rendering it difficult to obtain any “empathy that is curious, engaged, authentic, committed, and flexible.”

Legal scholars such as Susan Bandes, Terry Maroney, and Austin Sarat have demonstrated that emotion and emotional processes are central to stories of crime and punishment and the lives that they shape. Empathy may serve as a medium for emotions and their relationship to a sense of justice, and it has both positive and negative attributes that need to be more thoroughly investigated and worked through in this particular context. For instance, empathy often implies favoring the legal party thought to be most like one’s self or with whom one most closely identifies, which may result

58. Id. at 4.
59. Id. at 2.
61. Brown, supra note 24, at 3.
in a biased perspective.62 “Empathy may align with violence [or] vengeance”; it may occur in moderation or excess to the point of immersion in another.63 If attempts at empathic connection fail to approximate the lived experiences of vulnerability and victimization, it can result in the dehumanization of the defendant or the victim.64 Finally, empathy can arise from unsavory motives such as voyeurism or taking pleasure in others’ pain.65 The challenge, as Brown frames it, is to rely upon empathy to cultivate good judgment and deliberative decision making.66 Thus, she calls for the development of an “empathically-attuned criminology” that assesses how best to generate “a truly imaginative empathy with multiple, culturally contingent meanings.”67

Jurors entering capital sentencing proceedings realize that the defendant has already been convicted of a murderous criminal act, which is scarcely a sympathetic position.68 Prosecutorial narratives explain how a capital defendant’s crime is a product of his free will and unhampered autonomy and attempt to reduce the defendant to this murderous act.69 Defense mitigation narratives are purportedly vehicles for explaining why a defendant did not act with full autonomy or why the defendant’s bad act is atypical, creating sufficient juror empathy to save the defendant’s life.70 Capital sentencing proceedings (and, in fact, all sentencing proceedings in serious criminal cases) should be unique empathic forums not only because they call for empathy’s narrative expression in the form of mitigation, but also because they bring before jurors a convicted defendant who has allegedly been marked by terrible and painful life experiences or agency-altering injuries and require jurors to confront a painful phenomenological question—how the defendant’s prior experiences or injuries should bear upon his responsibility for later actions.71

The U.S. Supreme Court and other federal and state courts have routinely held that common mitigation evidence includes information on a defendant’s family history, especially evidence of prior child abuse, neglect, abandonment, and family dysfunction.72 To uncover such details, capital

62. Id.
63. Id.
64. See id. at 21.
65. Id. at 17.
66. Sherman, supra note 26, at 90.
68. Lynch, supra note 52, at 189-90.
70. Lynch, supra note 52, at 190.
71. Madeira, Mast, supra note 28, at 141-42.
72. According to the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, (Rule 2.2(a)(ii)): 
defenders and mitigation experts delve deeply into defendants’ family backgrounds\textsuperscript{73} in a thorough manner that “exposes raw nerves, re-traumatizes, scratches at the scars nearest the client’s heart.”\textsuperscript{74} According to Craig Haney, capital defenders alternate between “the construction of a psycho-

Mitigation evidence includes, but is not limited to, compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g., employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death.

\textit{Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L. Rev. 677, 679 (2008); see also Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (holding that “[e]vidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation” and “there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant”); California v. Brown, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (stating “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”); Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (stating that certain aspects of the defendant’s background, such as a history of abuse, must be given mitigating effect); Wiggins v. Smith, 539 U.S. 510, 537 (2003) (stating that “[h]ad the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance”); Rompilla v. Beard, 545 U.S. 374 (2005) (stressing the importance of a thorough life history investigation); Brewer v. Aiken, 935 F.2d 850, 857-58 (7th Cir. 1991) (finding counsel ineffective for not investigating and presenting evidence of defendant’s disadvantaged family life); Mak v. Blodgett, 970 F.2d 614, 617 (9th Cir. 1992) (finding counsel ineffective for not humanizing defendant through testimony of the defendant’s family); Collier v. Turpin, 177 F.3d 1184, 1202 (11th Cir. 1999) (finding counsel ineffectual for not presenting evidence about his impoverished background and the fact that he was a good “family man”); Nance v. Ozmint, 626 S.E.2d 878, 883 (S.C. 2006) (finding counsel ineffective for not presenting evidence of defendant’s extreme childhood poverty and history of child abuse).


74. Stetler, supra note 73, at 36; see also Jeff Blum, \textit{Investigation in a Capital Case: Telling the Client’s Story}, CHAMPION, Aug. 1985, at 30 (stating that family members will be reticent to discuss physical or sexual maltreatment by other family members); Helen G. Berrigan, \textit{The Indispensable Role of the Mitigation Specialist in a Capital Case: A View From the Federal Bench}, 36 Hofstra L. Rev. 819, 826 (2008) (stating that “[t]he defendant and family members have the firsthand information needed for an effective defense, but are often not forthcoming because the information is highly personal”).
logically oriented social history [in which] key developmental stages and relevant family and social experiences are analyzed together” and “[a] mitigating counter-narrative that incorporates a capital defendant’s social history and immediate life circumstances.” These mitigation narratives are situated within and responsive to a larger account of the crime of which the defendant was convicted. The narrative of the defendant’s crime and the narrative of mitigating evidence position legal parties in diverse and changing roles. In the criminal narrative, the defendant is the one who acted violently, the victim the one whom he acted upon; in the mitigation narrative, the defendant might be the one injured, and a family member might step into the role of violent actor.

It is the capital defense attorney’s goal to orchestrate empathy through effective mitigation narratives, persuading jurors that the defendant has suffered a mitigating injury, that something can and must be done about that injury, and that another person properly bears some responsibility for that injury, rendering the defendant deserving of life. But for better or worse, an attorney’s efforts can only go so far; jurors will use a wide variety of cognitive tools in order to evaluate these mitigation narratives. According to social cognition theory, we rely on mental shortcuts called schemas that are generated as we categorize and make sense of prior experience; when making comparisons, we assess what past information (and schemas) are most similar to the present context, and then superimpose them upon the new information before us. Schemas may come from personal experience, cultural knowledge or lore, and other sources. Scripts, a type of schema, help jurors evaluate the “sequence of events that happen across a period of time,” prompting them to expect that certain actions will occur in a certain order in a specific social context, such as disciplining a child for talking back or visiting a sit-down restaurant. Jurors also utilize role schemas to “organize their existing knowledge about what behaviors are appropriate to what social roles (mother, son, friend, sister, neighbor, priest)”; role schemas are activated when jurors “compare trial evidence about someone’s behavior in a social role, so a judgment can be made that it was normal or abnormal.”

Schemas are not merely useful evaluative tools; they are essential cognitive coping mechanisms for our hectic modern lives that allow us to make rapid judgments about what type of connection we feel to a new individual (whether that person is a member of an in-group or out-group) and evaluate others’ behaviors by imagining how we would have behaved under

75. Haney, supra note 69, at 844.
76. SUNWOLF, supra note 54, at 188-89.
77. Id. at 188.
78. Id. at 188-89.
79. Id. at 126.
these circumstances.  It is not surprising that capital mitigation narratives are designed to activate particular schemas or scripts that may persuade jurors that a defendant merits life and not death. Because such knowledge is acquired through cultural socialization, different racial groups within American society are familiar with mainstream (White) cultural schemas and constructs even if they do not endorse them (in fact, such awareness emphasizes the distinctions between mainstream White schemas and those of non-White populations). Because capital juries have a distinctive composition as compared to juries in nondeath cases—“disproportionately white, male, older, and more religiously and politically conservative”—jurors might be most likely to endorse and apply mainstream White schemas.

But these mental shortcuts can also lead jurors down many paths that a defense attorney would wish to avoid. Schemas are the locus of prejudice; they shape, and perhaps distort, a juror’s memory, prompting the juror to store and recall those details consistent with the perspective chosen. Through out-group homogenization, jurors may perceive all members of an out-group (i.e., all Blacks) as more similar and less variable than in-group members (i.e., all Whites). Under fundamental attribution error, jurors assume that their mistakes are caused by temporary factors, while others’ derive from permanent personality flaws; under false consensus error, jurors see their own choices and behaviors as typical and normal—what reasonable people would do under the circumstances. Well-developed “schemas resist change and” become stronger over time as jurors use them “to imagine an event, to explain how it might occur, or to consider how a judgment might be true.” First impressions matter enormously; schemas triggered early in a trial profoundly affect jurors’ later perceptions, information to which jurors are first exposed primes relevant schemas, and jurors’ categorization of a new person affect subsequent interpretations of his behavior. Suppression of problematic schemas, including prejudicial ones, is difficult and most often temporary, and when asked to put aside such experience or opinions, jurors will usually say that they can, yet will inevitably still be influenced by them. Finally, jurors may not have learned the social “costs” of holding a particular opinion or schema, making it easier to maintain.

80. Id. at 135, 138.
82. SUNWOLF, supra note 54, at 130.
83. Id.
84. Id. at 139, 141.
85. Id. at 131.
86. Id.
87. Id. at 155, 162.
88. Id. at 133.
Schemas and their triggers are strung together within narratives, forming stories of various length and complexity. In deliberation, jurors compare these trial stories to their own stories of personal experience, “insert[ing] their own lived events into deliberations, in an attempt to make sense of the trial evidence.” After analyzing jurors’ “natural storytelling” during deliberations in real cases, Sunwolf found that jurors referenced “common knowledge” stories about their own or others’ experiences, stories about how reasonable people would behave, and imaginative “what-if” or “if-only” stories that placed jurors or others into trial events or in which trial events turned out differently than they actually did; jurors’ most common storying act was “imagining one of the trial participants in some event that the jurors knew did not actually take place.”

A brief perusal of any state capital defense manual illustrates a variety of specific ways in which capital defense attorneys can attempt to trigger jurors’ empathic identification. Mitigating narratives of family history might be used in a variety of ways; a capital defender may rely upon evidence of a defendant’s severely dysfunctional childhood to demonstrate his lack of capacity (as in Lee Boyd Malvo’s case), or introduce evidence of his current harmonious family relations to illustrate his humanity and the impact of his execution upon innocent others (as in Terry Nichols’s case). The Indiana Death Penalty Defense Manual, for instance, asserts that the “mistreatment of the defendant as a child or society’s failure to respond to his cries for help” make particularly powerful mitigating arguments because they help to establish that he is “not absolutely guilty.” The manual reminds public defenders that “one person’s mitigation might be another person’s aggravation” and advises them to use jury selection as an opportunity to “seek out from among those jurors the ones who are responsive to the mitigating factors that you intend to present and to expose those who are left cold by what you are suggesting is mitigation.” To these ends, attorneys can ask jurors revelatory questions such as, “Do you think that a person can go bad when his parents don’t give him discipline and attention?” or “Do you think that a parent shares the responsibility when his child goes bad if the parent hasn’t been giving discipline and attention?” The manual also reminds capital defenders of the importance of the defendant’s family’s trial attendance:

The presence of family and friends in the courtroom supporting the client can have a beneficial impact upon the jury. It is harder for the jury to return a verdict of death when it seems that the client has caring family and friends. Moreover, view-

89. Id. at 269.
90. Id. at 272, 276, 282-83.
91. INDIANA PUBLIC DEFENDER COUNCIL, DEATH PENALTY DEFENSE VOL. 2, 7 § 4-26.
92. Id. at 5 § 3-34.
93. Id. at 5 § 3-35.
The task of the defense attorney, then, is not merely to describe this mitigating evidence, but to construct the defendant as an empathic object. Defense attorneys craft narratives and stories triggering schemas and scripts they feel will be meaningful to jurors based on what they know or believe about the jurors’ cultural backgrounds and values. In this constructive process, narratives of mitigating experiences or injuries must be recognized in their own right as mental illness or injury, as child abuse or neglect. When applied to the defendant and his life history, they may induce empathy, which makes the defendant’s body—a sentimentalized body—an object and may create a corresponding mitigating effect. Often this is accomplished by having family members testify:

You will have to show that the defendant is loved by people just as the victim was loved. It is always best to have the family and friends testify anecdotally about incidents in the defendant’s life. . . . Don’t hesitate to have the family and friends reveal negative things, such as a history of alcoholism and drug abuse. Also have the family and friends be prepared to admit that they have somehow contributed to the defendant’s conduct. . . . Many parents, realizing that their son or daughter may be executed[,] will admit that they abused their child physically and psychologically.96

Thus, through mitigation narratives, defense attorneys construct the defendant and his relatives as analytic and agentic objects, empathic vessels to be produced and proffered to the jury as having the potential to allocate responsibility and alleviate or eliminate injustice.97

Although we have been discussing empathy and mitigation in an emotional context, most legal actors—particularly judges—see mitigation narratives through the lens of evidence instead. In death penalty cases, the Supreme Court has repeatedly affirmed that the decision to impose the death penalty must be a “reasoned moral response . . . rather than an emotional one.”98 Here, emotion is not regarded as a component of moral judgments. Certain emotions—prejudicial emotions—may be privately felt but should not and cannot be publicly seen. Sociologist Arlie Russell Hochschild has

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94. Id. at 6 § 1.2-1.3.
95. Id. at 7 § 1-1.
96. Id. at 7 § 6-14-6-15.
97. These duties are similar to those of a personal injury attorney who tries to induce juror empathy for an injured plaintiff. See Madeira, Scar, supra note 29, at 92.
documented how humans continuously manage their own emotions, displaying some emotions that are felt, attempting to fake other emotions that are not felt, and endeavoring to suppress emotions judged inappropriate. She has posited that emotional management decisions are governed by “feeling rules” established though private, individualized norms. In the courtroom, however, “feeling rules” most often consist of institutional proscriptions that assert “emotion is dangerous . . . because it distorts perception and leads people to act irrationally.”

In effect, the rule of law creates its own emotional culture in which substantive legal norms are threatened by alternative values such as those of empathy. This differs from empathy’s openly acknowledged role in other lay social contexts like routine conversation, where empathic identification is a natural and rational interpersonal response—natural in that it is not contrived, and rational in that it emerges in a patterned and not a random manner and is the predictable outcome of certain interactions. Indeed, in extra-legal contexts, empathy is unavoidable because it is woven into the fabric of inter-subjectivity, and is thus a communicative norm. Empathic intersubjectivity is tied to the interpersonal human instinct to engage with and evaluate others’ experience. Current legal principles disfavoring empathy may be unrealistic because they curtail or altogether deny the power and play that the human empathic instinct has outside of law. Indeed, it is difficult to determine where evaluation of mitigation evidence stops and empathic encounters triggered by that same evidence begin—empathic encounters are, after all, a way for jurors to evaluate the credibility of mitigating evidence. Nonetheless, in creating its own emotional culture and precisely defining the proper role of emotive response and of empathy, law enunciates a code of moral worth that jurors must follow by adjudicating on the basis of evidence and not emotive response.

It is not necessarily improper for legal practice to place new constraints upon lay behaviors that are different from or even wholly alien to lay understanding. But it is also improbable to expect jurors to divest themselves of emotion and empathy at the courtroom door. Empathy is an inevitable part of capital judgment; in evaluating mitigation evidence, jurors must assess whether to acknowledge the defendant’s past suffering and come to an agreement on what consequences it should have. Moreover, several routine occurrences in a capital trial—a capital defender’s assertion that the defendant has suffered in the past and is still affected by that prior trauma, or a glimpse of a defendant’s relative crying in the gallery—are likely

100. Id.
101. See Madeira, Mast, supra note 28, at 192-96.
102. Id. at 194.
to spark empathic identification. Thus, when jurors weigh mitigating evidence, there must be a marriage, not a divorce, of legal and lay understandings regarding empathy’s propriety.\(^{103}\)

Though most scholars have focused on how jurors form empathic encounters with defendants, jurors are also likely to empathically evaluate defendants’ family members.\(^{104}\) Defendants’ relatives are often present during trial and may testify at sentencing; jurors are very likely to take notice of them and evaluate their behavior during trial and on the stand. They, like the defendant, victim, and victim’s family, demand notice and acknowledgment, and their faces and bodies become displays that jurors not only watch, but to which they may want to respond. Though the defendant’s relatives are most likely strangers with whom jurors feel they have little in common, jurors’ empathic connections with these individuals may be integral to their determinations of which sentence is most just. Thus, we should pay attention to how jurors encounter the painful, horrifying but very real lived worlds of defendants’ family members.

What, then, is the relationship between empathy and mitigating evidence that triggers or informs jurors’ empathic assessments of not only the defendant, but the defendant’s family, which is likely a family structure and lifestyle different from most jurors’ own families and upbringings? In order to answer this question more fully, we must understand how and why jurors come to idealize certain kinds of families, family structures or organizations, and values as “normal” and label others as deviant or dysfunctional.

II. EMPATHY AND NORMATIVE CONSTRUCTIONS OF AMERICAN FAMILIES

A. Whiteness and Idealized Images of “Normal” White, Middle-Class Families

White, middle-class family values remain the dominant reference point in today’s “mainstream” culture, and it is impossible to talk about White, middle-class (heterosexual) values without talking about White, middle-class families—the “stick against which all families are measured.”\(^{105}\) As one scholar asserts,

It is not so much discussed as assumed that a family is supposed to be a variation on a productive marriage that features a husband, a wife, and children. That model long ago became a highly coercive ideal. Entering through the portal of collective

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\(^{103}\) Id. at 192.

\(^{104}\) See infra Part III.

imagination, the idealized family permeates all aspects of the nation’s social life. It also penetrates shared structures of thought.\textsuperscript{106}

These values are assumed to have universal currency in contemporary American culture. Thus, in an episode of \textit{The Simpsons}, when Homer asks his family to behave like “a nice, normal family at his company picnic,” the audience knows exactly what he means, and how a “normal” family should look and behave.\textsuperscript{107} We can discuss these values and the fictional, idealized family that exemplifies them using a variety of philosophical, sociological, anthropological, cognitive, and psychological discourses; we can term them images, myths, social constructions, shared cultural beliefs, cultural capital, class culture, cultural schemas, or stereotypes. Whatever terms one uses, these pervasive concepts have indirectly and directly shaped the real lives of millions, coding in hegemonic fashion how society normalizes and evaluates certain ways in which humans live together. These and other cultural models provide structured expectations “about how the world is or should be,” and allow us to imagine a “world of ‘common sense’” featuring a universal and naturalized set of beliefs and an environment in which “prototypical events unfold wholly expectedly in a chain held together by shared assumptions about both physical and psychological causality.”\textsuperscript{108}

Our family structures also serve as identity cues.\textsuperscript{109} As adults and children, members of a society all engage in a collective project of attempting to communicate various elements of “who we are” as a family to outsiders. Mainstream culture supports this identity work for some families more than others; families resembling cultural ideals “see themselves reflected in many cultural representations and easily think of themselves as ordinary.”\textsuperscript{110}

Any discussion of White, middle-class families is incomplete without a discussion of “Whiteness,” a central concept in normative theories of American moral personhood. Whiteness is both “a moral and political category . . . which requires both material practice and symbolic performance for its maintenance,” which until relatively recently, has passed without comment.\textsuperscript{111} Whiteness became a unifying identity following World War II, when light-skinned immigrants and their children began to congregate in

\begin{itemize}
  \item \textsuperscript{107} \textit{Id}. at 489.
  \item \textsuperscript{108} Steven Bialostok, \textit{Metaphors for Literacy: A Cultural Model of White, Middle-Class Parents}, 13 LINGUISTICS & EDUC. 349, 350 (2002).
  \item \textsuperscript{111} John Preston, \textit{Protect and Survive: “Whiteness” and the Middle-Class Family in Civil Defence Pedagogies}, 23 J. EDUC. POL’Y 470, 470 (2008).
\end{itemize}
suburban neighborhoods, where ethnic labels such as “Italian” or “Polish” could be traded for the more universal category of “white-American.” People of color, however, “were kept out of the suburbs by discriminatory mortgage packages, covenants on land purchases and a continuation of restrictive housing (and labour policies) which began in the 1920s and 1930s.” They, like rural Whites, remained pathologized. Miller emphasizes that the emigration from city to suburbia “probably always was and still is largely motivated by a desire to escape the mix of classes and racial and ethnic groups that characterize urban areas” as well as to take advantage of incentives that made owning a suburban home not only a smart investment, but part of the American dream.

Whiteness has played a key role in the construction of an idealized family structure; because members of the White middle-class have been the mainstream cultural myth-makers, “it is their imagination and fragmented perception that historically serve as the template for the American imaginary family.” Though it has had very real effects upon social policy and individual lives, the White, middle-class American family is largely imaginary—a socially constructed image that is the product of many other myths that historically have played important roles in American culture. It has been influenced by the antebellum model of “separate spheres,” which held that the home was the site of “moral, ethical and religious education” provided by the wife-mother, while the husband-father worked to provide for the family outside the home. Although it too was in a sense “imaginary,” Cassuto describes the separate spheres model as “a very powerful myth” with “a strong normative influence” that even now, 200 years later, “continues to drive the debate over ‘family values.’”

The construct of the idealized American family has also been heavily influenced by American sentimentalism, a movement in social thought that drew heavily upon the separate spheres model and emphasized feelings and emotions rather than logic and reason. Thanks to American sentimentalism, love became as important a factor in marriage as finances, and middle-class Americans became concerned with others’ suffering and worked to end social ills such as slavery, child labor, and inhumane prison conditions. American sentimentalism has impacted men and women differently; while the “man of feeling” was once just as proper as the domestic and demure

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112. Id. at 471.
113. Id. at 472.
116. Id. at 490.
117. Id. at 490-91.
118. Id. at 492.
wife-mother, towards the middle of the twentieth century the “man of feel-
ing” became the “man of action” as WWII-era America became more mas-
culine and began to fear and ridicule emotion in masculine, public
spheres.119

Contemporary images of the White, middle-class family were forged
in the tidy ranch houses, manicured lawns, and picket fences of mid-
twentieth century suburbia—the scene of America’s “Golden Era,”120 the
landscape of Baby Boomer childhood.121 Within this environment, families
became the core unit of civilized (White) American society. Sociologists
such as Talcott Parsons asserted that this family structure was ideal for ad-
aptation to the modern industrial economic system, with a husband/father
“who managed the outside world and connected his children to the econom-
ic system” and a wife/mother who “was the expressive leader, who helped
to protect Dad from the pressures of the economic world and manag[ed] the
home front.”122

Family structure was important for both civil defense and nation build-
ing; family failings were thought to lead to national crises. In these subur-
ban families, Stephanie Coontz asserts, women were supposed “to be sensi-
tive, understanding, patient, selfless and faithfu[l],”123 rich in maternal love
for their children and romantic love for their husbands.124 Yet they were also
supposed to proactively prepare for the defense of family and nation, and
were “encouraged to keep and monitor a well-stocked kitchen with supplies
for possible use in a nuclear attack [and to] . . . co-ordinate familial civil
defence exercises.”125 White women as goddesses of domesticity and na-
tional security were “both the causes and the potential redeemers of a dete-
riorating society.”126 But women were to be protectionist, not overprotec-
tive; in WWII America, Philip Wylie coined the term “momism” in 1942
“to describe a cultural phenomenon of maternal over-protection apparently

119. See generally ANN DOUGLAS, THE FEMINIZATION OF AMERICAN CULTURE (1977);
JANE TOMPKINS, SENTIMENTAL DESIGNS: THE CULTURAL WORK OF AMERICAN FICTION, 1790-
120. Susan Kellogg, Exploring Diversity in Middle-Class Families: The Symbolism of
121. Id.
122. Frank Furstenberg, If Moynihan Had Only Known: Race, Class, and Family
Change in the Late Twentieth Century, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 96-97
(2009).
123. Laura Dubek, White Family Values in Ann Petry’s Country Place, 29 MELUS
59 (2004).
124. See STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND
125. Preston, supra note 111, at 475.
126. Dubek, supra note 123, at 60.
responsible for an overly feminized American masculinity as well as a host of other social problems.”

In 1945, faced with the highest divorce rate in the world, government and social leaders ushered in a “cultural glorification of the family unit,” promoting values such as “stable and traditional marriage.” In this era, the “state of the American family unit was consistently framed as a national issue of great moral significance.” In postwar films, Whiteness appeared “not through direct comparisons between [Whites] and ethnic or racial ‘others’ but instead through the appropriation of universal qualities such as devotion to family, loyalty to friends, . . . sincerity, courage, and the capacity for romantic love.” This image of the ideal family provided a haven from a toxic social climate tense with anti-Communist suspicions, fears of nuclear war, conformity, conservatism, and the demands of the “outside world” and industrial economy.

The embrace of suburbia also shaped the emotional structures of the White, middle-class families who took up residence in the suburban ranch houses. Increasingly, the family was seen as what Christopher Lasch termed, “a haven in a heartless world,” a source of companionship and emotional support, and comparatively isolated suburban dwellings were portrayed as havens of pleasant family togetherness. Families were not merely social units—clusters of relatives who lived with one another—but sociable units—individuals who enjoyed spending time with one another. Thus, family structures adapted to suburban ideals “about finding a homogenous community of like-minded people, about living in a home that provides comfort and diversion, and quite centrally, about finding an environment in which family ties can be strengthened.” The suburban lifestyle aided this evolution, isolating families from one another and removing ready access to the many opportunities and public spaces where family members socialized with others outside the family that had characterized city life. This isolation both matched and reinforced a well-grounded cultural emphasis on individualism and family autonomy.

127. Id. at 60.
128. Id. at 65.
129. Id. at 60.
130. Id.
131. Id. at 61.
132. Id. at 64; Cassuto, supra note 106, at 493.
133. Furstenberg, supra note 122, at 96.
134. CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD (1995).
135. Miller, supra note 114, at 394.
136. Id. at 395.
137. Id. at 411.
138. Kellogg, supra note 120, at 32.
The image of the White, middle-class suburban family was fueled not only by governmental and market incentives, but also by cultural mediums that rendered suburban models of family life desirable and attainable. In describing how these images continue to be reinforced through contemporary cultural mediums, Pyke has noted that “[p]arents in . . . middle-class, mostly White, television families are emotionally nurturing and supportive, understanding, and forgiving . . . . [S]uch shows tend to focus on the successful resolution of relatively minor family problems, which the characters accomplish through open communication and the expression of loving concern.”  

Although the white picket fences of *Leave It to Beaver* are now roughly sixty years behind us, their influence is still evident in White middle-class values of today; mainstream culture still “glorifies and presents as normative that family headed by a breadwinning husband with a wife who, even if she works for pay, is devoted primarily to the care of the home and children.”  

Today, the idealized American family remains one characterized by interpersonal and emotional relations prioritizing sensitivity, honesty, open communication, flexibility, forgiveness, democratic ideals, individual autonomy, and psychological well-being. Images of intimate family life continue to be marked by affection and sentimentality. Although many now mock the conformity of suburban denizens and environments, and can frankly acknowledge that the suburban vision of family intimacy is itself an idealization, this image continues to maintain a prominent cultural foothold. At front and center of today’s idealized White, middle-class family structure is a “valuation of private life, centered on the family, over all forms of public intercourse.” Even though one might not be able to fully attain them, society still appears to believe in and cultivate suburban ideals despite the harsh realities of domestic violence and child abuse and neglect:

[T]here is still a strong sense that the sentiment behind it is a noble goal, and that suburbia offers the best chance to reclaim the spirit of togetherness. Suburban living is thought to hold the possibility of shielding children from urban drugs and urban-inspired nihilism, and of reminding adults that domestic ‘values’ are the ones that really matter the most to them.

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140. *Id.*
141. *Id.*
142. *Id.*
143. Preston, *supra* note 111, at 471.
144. Miller, *supra* note 114, at 395.
145. *Id.* at 397.
146. *Id.* at 402.
Moreover, most readily accept that middle-class values promote personal and social well-being. As partners and parents, Americans attempt to distinguish themselves through adherence to these values, and may experience anxiety, guilt, or social censure if they or their children do not measure up.\textsuperscript{147} While these values are in fact emblematic of middle-class ideology, they are widely regarded as matters of “common sense,” as basic mores embraced by all “decent” Americans irrespective of class, ethnicity, gender, or race. They are so fundamental that most cannot imagine their own lives—or anyone else’s life—without them.\textsuperscript{148} And society continues to blame social problems on family structures that do not fit this mold, “suggest[ing] policies that ignore or punish families that don’t fit the construct,” and implicitly condemning their members on the bases of race, ethnicity, and class.\textsuperscript{149}

B. The Construction of the Dysfunctional, Lower-Class Black Family

It is not surprising that Whiteness and the myth of the idealized White, middle-class suburban family have in turn generated myths about other families that do not fit this mold, including African-American families, poor White families, and immigrant families. Black families provide a case-in-point.

Although all families are judged by the standard of the intact nuclear family, society holds out very different expectations for members of White families than for members of Black families. Expectations for White families are consistent with the idealized, White middle-class family structure; those for Black families are much lower.\textsuperscript{150} According to Stephanie Coontz, the stereotypical Black family is construed not as stable but as broken: “In almost every decade, for 200 years, someone has ‘discovered’ that the black family is falling apart.”\textsuperscript{151} Thus, across the tracks from White middle-class suburbia and its images of cozy family intimacy have sprung contrasting myths of Black families, including the clan “headed by a single mother with numerous children and living in a roach-infested tenement,”\textsuperscript{152} or the family that produces Black criminals that White society must capture and convict.\textsuperscript{153}

\textsuperscript{147} See Bialostok, supra note 108, at 351.
\textsuperscript{148} Id. at 366.
\textsuperscript{149} Pyke, supra note 105, at 241.
\textsuperscript{150} Bryant, supra note 109, at 8.
\textsuperscript{151} COONTZ, supra note 124, at 235.
\textsuperscript{153} Alycee Lane, “Hang Them if They Have to be Hung”: Mitigation Discourse, Black Families, and Racial Stereotypes, 12 New Crim. L. Rev. 171, 192 (2009).
One development in particular directed national attention to poor Black families, and “helped to establish the conventional wisdom that the black family system was and still is distinctively different from the rest of the population.”\footnote{154} In 1965, a report by then-sociologist (and later U.S. Senator) Daniel Patrick Moynihan was released entitled, \textit{The Negro Family: The Case for National Action}.\footnote{155} Better known as the “Moynihan Report,” the report addressed the root causes of Black poverty; Moynihan concluded that the absence of fathers in Black families and female-headed households led to a variety of social ills, including illegitimate children, welfare dependence, and ultimately economic and political inequality.\footnote{156} Apparently influenced by the idealized image of the White, middle-class nuclear family, Moynihan reported that Black families headed by Black females, fostered by social forces beginning with slavery, undermined the authority of Black boys and men:

In essence, the Negro community has been forced into a matriarchal structure which, because it is too out of line with the rest of the American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well.\footnote{157}

Thus, the dysfunctional Black family, headed by the single Black mother, was irrevocably linked to the genesis of the Black male criminal.\footnote{158}

The report was criticized almost immediately by leaders in the Black and civil rights communities for stereotyping the Black family and for locating the causes of poverty within the Black community instead of within larger social influences such as racism or discrimination.\footnote{159} In 1971, William Ryan published \textit{Blaming the Victim}, coining the famous phrase in the course of critiquing the Moynihan Report’s focus on Blacks’ behavior, culture, and lifestyle to the exclusion of broader social structures.\footnote{160} Others observed that Moynihan failed to see that the changes taking place in poor Black families were also happening among other types of poor families.\footnote{161}
Moreover, this publication had a tremendous effect on sociological scholarship. Prior to the Moynihan Report, Furstenberg reports, researchers such as W.E.B. Du Bois reported class differences in Black communities that mirrored stratifications in mostly White communities; although “at the lower end, the distribution of families across the social class spectrum varied enormously for whites and blacks[;] . . . descriptions of family life were cast in remarkably similar terms.” 162 But following the Moynihan report, researchers focused on issues such as the “culture of poverty” and changing poor families’ values, and so for a time, sociological scholarship lost its “comparative focus on intraethnic and intraracial class differences and interethnic and interracial class similarities.” 163

In the 1980s, similar alarmist discourses surfaced in debates about “poverty, race, and family,” embodied in fears of swelling populations of poor Blacks and images of the Black “welfare queen” popularized by conservatives. 164 Again, these images of Black families were contrasted with the idealized White, middle-class family, creating “a vision of white society and white cultural values as under siege by the uncivilized blacks,” and giving rise to narratives of White victimization instead of social inequality. 165 According to Lane, these narratives “not only resist the telling of race, gender, and class subordination, but also resist an understanding of black families outside the framework of pathology, irresponsibility, and danger.” 166 Popular culture has also fallen into the trap of examining Black family life through the lens of Whiteness. It was not until the “The Cosby Show” that millions of White families invited a “nice, normal” Black television family into their living rooms; numerous scholars have criticized the upper-class Huxtables for tracking too closely White stereotypes and values. 167 Ironically, however, some family scholars have faulted others for essentially the same mistake—unquestioningly placing White, middle-class models of family life on a pedestal as the standard to which all other family structures should be compared. As Pyke explains:

Family scholars have rarely displayed analytic concern about the emphasis on emotional expressiveness and affective sentimentality that pervades much of the family ideology, probably because the majority—who as middle-class, well-educated Whites live in the heartland of such values—do not regard them as problematic. As a result, this Western value orientation can seep imperceptibly into the interpretive framework of family research. 168

162. Id. at 98.
163. Id. at 101.
164. Lane, supra note 153, at 194.
165. Id. at 195.
166. Id. at 196.
These statistics and scholarship have produced and reinforced myths or stereotypes about Black families that are broadly disseminated, widely accepted, and extremely harmful. Research studies indisputably affect individuals’ lives; as Allen notes:

Social and behavioral research findings exert profound influence on public policy, which shapes the lives of an inordinate number of Black families and children. . . . It would be naïve to think that research findings have no consequences for how key decision makers operate. Research findings taught in the classroom, reported in popular scholarly journals, reported in the popular media, and discussed over cocktails, shape their ideas of both the appropriate and the possible.169

Allen, for one, strongly criticizes existing scholarship on Black families for its “theoretical and methodological shoddiness” and “ignorance concerning the internal dynamics and motives of Black family life in this society.”170 Existing research, he maintains, has become riddled with “crude categories, poorly defined concepts, and negative stereotypes,” including references to “‘family disorganization,’ the ‘underclass,’ ‘culture of poverty,’ and ‘the Black matriarchy.’”171 Empirical studies frequently engage in apples-to-oranges comparisons between two-parent White families and single-parent Black families and then label the findings as racial differences.172 Researchers design studies focusing on married couples with children who are mostly White and middle-class, along with families with “relatively minor difficulties.”173 Other types of families are seen as “exceptional” and are included under the “diversity” category, and families with more serious problems are studied as localized examples of a particular issue—“poverty, illness, or disability”—and not in a manner that integrates the problem “as part of the fabric of family experience.”174 Finally, many scholars seeking explanations for Black family structures, whether they theorize that Black culture was “lost during slavery” or that a distinct Black culture exists, have urged Black families to attempt to mirror White families in order to make their families healthy and strong and to ensure success.175

169. Allen, supra note 152, at 586.
170. Id. at 570.
171. Id. at 571.
173. DeVault, supra note 110, at 56.
174. Id.
175. See Phillips et al., supra note 156, at 138. The authors note that adherents of a “cultural deviant perspective” believe that Black culture was “lost during slavery” and that “weak” family structures are indicative of Black reluctance to assimilate to American values, while adherents of a “cultural variant perspective” do recognize a distinct Black culture but advocate that all groups should adopt the White nuclear family structure. Id.
Only relatively recently have scholars begun to note that the differences between Black families and mainstream White models are not signs of dysfunction. Rather, these different family structures have evolved in response to different social challenges; Black family structures exemplify “flexible, effective ways of pooling resources and building community,” and accord the same priority to extended family and civic networks as White family structures.\(^{176}\) According to historian Stephanie Coontz, the Black family structure itself is not a social challenge that Black communities have had to overcome.\(^{177}\)

Other scholars have urged family studies scholars to cease analyzing Black family structures and lives from the external and contrasting perspective of the White, middle-class family.\(^{178}\) Adopting a radically different and more neutral orientation, Allen contends, would produce more honest and accurate scholarship that accepts Black families on their own terms and that would illustrate how “the trends in African American family life [are] much more complex and elusive” than they are currently portrayed.\(^{179}\) In addition, patterns thought to be characteristic of “Black family life” are now characteristic of other family structures as well; recent class-comparative sociological studies conclude that “white patterns of sexual behavior, family formation, and gender relations among lower-income families increasingly resemble the family patterns that troubled Moynihan,” including trends among low-income Whites towards nonmarital childbearing and a growing tendency to postpone marriage while pregnant.\(^{180}\)

Black families need not and must not be expected to fit into White molds or declared “broken” or “dysfunctional” when they do not. Different family structures evolve in response to different social forces, but these distinctions are not inherently negative—any such normative gloss is applied by other social and cultural forces. For instance, whereas White men’s wages have historically been high enough for their wives to stay home, both Black parents have traditionally been wage earners because most Black men could not earn enough to keep their wives out of the labor force.\(^{182}\) Thus, Black women have enjoyed more economic independence than White women, fostering attitudes of freedom and equality.\(^{183}\) Black women have also

\(^{176}\) Coontz, supra note 124, at 242.

\(^{177}\) Id.

\(^{178}\) Allen, supra note 152, at 569. As Allen notes, “Seen outside rather than through the lenses provided by their special circumstances and experiences, African American family values, behaviors, and styles have been alternately misrepresented and misunderstood.” Id. at 578-79.

\(^{179}\) Id. at 590.

\(^{180}\) Furstenberg, supra note 122, at 101.

\(^{181}\) Id. at 105-06.

\(^{182}\) See Phillips et al., supra note 156, at 139.

\(^{183}\) Id. at 139-40.
played key roles as “culture bearers” and have developed “female-centered networks” that extend notions of family in which living without a man is acceptable.\textsuperscript{184}

Other, more recent statistics reveal that, overall, Black families continue to differ from White families. Black marriage rates have declined more sharply than in other groups, perhaps because there are more Black women than men, producing a shortage of marriable mates.\textsuperscript{185} It is frequently reported that forty-three percent of Black families are headed by women as compared to thirteen percent of White families, that 22.5% of Black families live below the poverty line whereas just 8.4% of White families do, and that the median income for Black families is only two-thirds that of White families.\textsuperscript{186} Other, lesser-known statistics indicate that Black families attend church more frequently than White families, and their members enjoy greater contact with grown siblings and more visits from other family members.\textsuperscript{187} And many studies conclude that Black families generally are more cohesive, better organized, more open to free expression of feelings, more emotionally supportive of their children, and experience less conflict than White families—even after adjustments for respondents’ socioeconomic status in childhood and adulthood.\textsuperscript{188}

C. How Social Constructions and Stereotypes of Family and Family Life Affect Empathy and Capital Mitigation

If negative constructs such as the dysfunctional Black family or poor White family affect our perceptions of and empathic identification with others in everyday interactions, it is highly improbable that they would not impact jurors in a capital sentencing phase.\textsuperscript{189} Disparate images of family structures remain a fertile source of cultural dissonance.\textsuperscript{190} The defendant’s family and family history, offered as a mitigating explanation for the defendant’s bad acts or illness, may “unintentionally yet dangerously reproduce and thus legitimize racist tropes about black family life.”\textsuperscript{191} Yet, “very

\begin{itemize}
  \item \textsuperscript{184} Id. at 141-42; see also Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 18-21 (2d ed. 2000).
  \item \textsuperscript{185} See Phillips et al., supra note 156, at 139, 146.
  \item \textsuperscript{186} Clay et al., supra note 172, at 244.
  \item \textsuperscript{187} Id.
  \item \textsuperscript{188} Id. at 245.
  \item \textsuperscript{189} Alycee Lane notes, “Given how ubiquitous is the perception of black families as sites of dysfunction, violence, discord, and pathology, it is . . . difficult to imagine that these perceptions do not loom large for jurors sitting on the trials of black capital defendants.” Lane, supra note 153, at 172.
  \item \textsuperscript{190} Scharlette Holdman & Christopher Seeds, Cultural Competency in Capital Mitigation, 36 Hofstra L. Rev. 883, 890 n.40 (2008).
  \item \textsuperscript{191} Lane, supra note 153, at 172.
\end{itemize}
little has been said about how stereotypes regarding black families might also shape and determine those sentencing decisions,” and mitigation treatises and scholarship rarely address these stereotypes or their impact.192

Moreover, the disparities between conflicting images of family life are bolstered by social science evidence on the effects of childhood poverty.193 No matter his race, not every child who is abused grows up to be a killer.194 Yet, there is a large body of social science research on how child abuse and neglect, poverty, and other factors have both immediate and long-lasting effects and produce problems later in children’s lives, including increasing the likelihood of criminal behavior.195 These conditions have cumulative effects; for example, poverty places increased strain on parents, increasing the likelihood that they will abuse and neglect their children, place too much responsibility upon their shoulders, or provide “psychologically unavailable caregiving” where adults devote their resources to managing their own problems and have nothing left for their children.196

The goal of mitigation evidence is to humanize a convicted capital defendant, to present him as a sympathetic figure, and to provide explanations for his violent conduct that illustrate a weakened capacity for self-control or judgment.197 Such evidence may consist of an absence of social supports, bonding, supervision, parental absence, deprivation, mental or physical disabilities or unmet health needs, and immature moral development.198

Evidence of a defendant’s family history is frequently introduced in capital sentencing proceedings;199 its importance was underscored in Williams v. Taylor,200 in which the U.S. Supreme Court held that a capital de-

192. Id.
193. Haney, supra note 69, at 865.
194. “There is no one to one relationship between being abused as a child and becoming a killer. One does not inevitably lead to the other. Just as each abused child’s life is different so is the path leading up to every homicide.” Deana Dorman Logan, From Abused Child to Killer: Positing Links in the Chain, CHAMPION, Jan-Feb 1992, at 32.
195. See Haney, supra note 69, at 865-75 (summarizing research on the effects of child neglect, poverty, and economic deprivation).
196. Id. at 867.
197. See State v. Winkler, 698 S.E.2d 596, 603 (S.C. 2010) (finding that the trial court did not err by allowing capital defense counsel to present mitigating social history evidence and call defendant’s family members as mitigation witnesses over defendant’s objection; mitigation evidence that was presented served the purpose of humanizing defendant to the jury, and the introduction of that evidence was a tactical decision made by trial counsel); see also Lane, supra note 153, at 176 (citing Stetler, supra note 73).
fense attorney provided ineffective representation for failing to introduce such evidence—the first time it made such a finding since Strickland v. Washington.\textsuperscript{201} The Supreme Court held that the defendant, Williams, had a constitutionally protected right to introduce mitigating evidence, and that his counsel had either failed to discover or failed to offer evidence of his “nightmarish childhood”—that Williams’s parents had been imprisoned for criminally neglecting their children, that he had been severely and repeatedly beaten by his father, that he had been in an abusive foster home while his parents were imprisoned, and that he had been returned to his parents after their release.\textsuperscript{202} Thus, the Court determined, Williams’s attorneys did not “conduct a thorough investigation of the defendant’s background.”\textsuperscript{203}

Mitigating evidence involving the defendant’s family begins to objectify its members even before jurors learn of it. While both ABA Guidelines and Supreme Court jurisprudence emphasize the mitigating importance of family life and family history, they do not consider how “mitigation investigation might impact the defendant’s family, whose deeply personal information is often under intense scrutiny during the investigation” or how the investigation might affect other social groups.\textsuperscript{204} Emily Hughes has observed that effective capital representation may entail a crisis of objectification; capital defenders may portray “the defendant’s family and society at large as objects to be investigated rather than as subjects with independent needs,” yet feel that this is “necessary to protect a capital defendant’s right to effective assistance of counsel even if this objectification goes largely unexamined.”\textsuperscript{205} The participation of social workers and other mitigation specialists who are trained in “respecting family dynamics and individual dignity” may diminish the objectification experienced by individual family members,\textsuperscript{206} but will probably do little to prevent the defendant’s family as a whole from fitting into or triggering a negative dysfunctional family stereotype.

Alycee Lane has written extensively on how the presentation of mitigation evidence involving the defendant’s family inevitably has consequences for how the family and its members are portrayed by attorneys and perceived by jurors. She asserts that mitigation evidence literature implies that defense attorneys deploy the defendant’s family as a tool (in conjunction with expert witnesses) to explain not only the defendant’s current state,  

\begin{itemize}
  \item 466 U.S. 668 (1984); Lane, \textit{supra} note 153, at 177-78.
  \item \textit{Williams}, 529 U.S. at 363-64.
  \item \textit{Id.} at 396.
  \item \textit{Id.}
  \item \textit{Id.} at 359. Hughes notes that including such individuals on the capital defense team can help but can also increase tensions because “the act of objectifying a client’s family members competes directly with a social worker’s ethics and world views.” \textit{Id.}  
\end{itemize}
but also his prior bad acts, forcing the family’s “sins” or “crimonogenic” influences into the spotlight. In mitigation narratives, then, the defendant’s family is both revealed and concealed. The family inflicts abuse upon the defendant but is only explained in terms of abuse and neglect, and details of family life are limited to those that help to explain the defendant’s character and actions.

Yet, capital defense attorneys may be unwittingly ignorant of and may feel obliged to ignore the consequences of both family stereotypes and narrow portrayals of defendants’ families. According to Lane, mitigation narratives and the defense attorneys who create them are likely “unselfconscious” about the socially constructed nature of images of families in general and the defendant’s family in particular. Mitigation discourse may be sensitive to racist stereotypes of Black defendants, but not of Black families. Capital defenders may not realize that “to tell the story of a defendant’s family life is to tell it against, or even in terms of, other narratives of ‘family.’” Moreover, Lane asserts, defense attorneys may also make other harmful assumptions. They might believe that evidence of dysfunctional family life always aids a defendant’s case or humanizes him, regardless of the defendant’s race, the specific facts of a defendant’s family history, and other variables. Conversely, they might presume that jurors’ preexisting conceptions of what “normal” family life is like will not harm the defendant’s case, even though this conception will most often resemble the idealized White, middle-class family and not the defendant’s family.

Jurors, too, may unknowingly assess mitigation evidence involving a defendant’s family or family history in a way that reinforces negative stereotypes, dehumanizes capital defendants and their relatives, and aggravates instead of mitigates. Lane contends that mitigating evidence concerning dysfunctional family history might persuade jurors that a particular defendant is “anything but unique and individual,” merely the predictable bad outcome of a predictably bad Black, poor, or otherwise problematic family. Such evidence may also prompt jurors to perceive the defendant and his relatives as genetically “predatory and criminal in nature.” Or jurors may frame the capital trial itself, particularly the defense attorney’s mitigating arguments, as “a form of welfare by which they themselves are victimized” through wasted time and money. A vote for death might seem to be a vote

207. Lane, supra note 153, at 183-84.
208. Id. at 185-86.
209. Id. at 187.
210. Id.
211. Id. at 188.
212. Id.
213. Id. at 190.
214. Id. at 198.
The Family Capital of Capital Families

for preserving the idealized White middle-class culture of “law-abiding, innocent, hardworking, family-oriented insiders.” Thus, mitigating evidence that reinforces negative family stereotypes may inadvertently encourage jurors to judge both the defendant and his family harshly.

For these reasons, many scholars remain critical of contemporary mitigation narratives focusing on the defendant’s family. Lane asserts that such mitigation discourse “resists a deeper and fuller analysis of the family” and “contains the family within a limited, defendant-focused story that may ultimately drain the family of . . . dimensionality” so that it fits within the “preexisting stereotypes by which jurors define black family life.” The defendant’s humanity appears, if at all, as that of his family wanes, to the point that it becomes “a violent and uncontrollable collection of individuals.” Instead, Lane advocates, mitigation discourse needs to confront racist stereotypes of Black families so that mitigation narratives do not reinforce these stereotypes, and attorneys should explore jurors’ conceptions of “normal” families through jury questionnaires and voir dire.

Although the previous discussion has focused on the impact of Black defendants’ families upon White jurors, our curiosity about and concern with the impact of stereotypes of family life upon jurors cannot be confined to race, but must extend to all differences. Thus, the issue with which Lane is most concerned—the impact upon jurors of mitigating evidence about a defendant’s dysfunctional Black family life—is only one part of the problem. One profound question involves mitigating evidence of functional family life that approximates or attempts to approximate idealized visions of family life. Take, for instance, a capital defendant who grew up as the only child in a two-parent middle-class Black family, or a lower-income family headed by a single mother who, abandoned by her husband, worked several jobs to provide for the defendant and his many siblings. Such mitigating evidence tends to exonerate the defendant’s family, and not the defendant, and may not be highlighted as mitigating evidence at all. Or what about the White capital defendant who grows up in a dysfunctional White family—the idealized image of the White middle-class family is equally damning to White defendants whose families do not measure up. Another research question is whether (and why) if jurors do not expect certain defendants’ families to be dysfunctional, they still compare these families to approximate idealized constructions that come to seem “normal” or “healthy”, do

215. Id. at 199. In Black defendant/White victim cases, this might mean that “sentencing the ‘other’ has as much to do with constructing black identity as it has to do with confirming whiteness.” Id. at 204.

216. Id. at 196.

217. Id. at 201.

218. Id.

219. Id. at 202.
they assume that, like (most) other members of their race or class, such family members will not “measure up”? Empirical data from interviews with capital jurors, in which jurors described their perceptions of defendant’s family members, help us begin to assess how jurors form perceptions and what types of perceptions jurors form about a variety of defendant’s family members on the basis of their past conduct and trial behavior.

III. HOW JURORS REGARD DEFENDANTS’ FAMILIES: EVIDENCE FROM SOCIAL SCIENCE RESEARCH

A. What We Know From Prior Social Science Research

Social science research suggests that jurors can comprehend mitigation evidence of a defendant’s family in a variety of different ways, not all of which are beneficial to a defendant’s case. Mitigation evidence that reduces a capital defendant’s culpability for murder can be categorized as either “proximate” (which “speaks to the defendant’s lack of responsibility for what he has done”) or remote (which “speaks to his lack of responsibility for who he is”). Mitigation evidence of dysfunctional family life is classified as remote, since it focuses on the defendant’s character. According to Steven Garvey, jurors might not find such evidence very persuasive; Garvey’s analysis of data from the Capital Juror Project demonstrated that only one-third of capital jurors assigned mitigating weight to evidence that a defendant was seriously abused as a child, and only fifteen percent of jurors assigned mitigating weight to evidence that a defendant had a background of extreme poverty, while approximately fifty percent would assign mitigating weight to evidence that a “defendant had been in state institutions but had never received any ‘real help or treatment.’” Garvey concluded:

[N]otions of collective or societal responsibility for shaping the defendant’s character played some role in jurors’ capital sentencing decisions, especially if it appeared that the defendant tried to get help for his problems but society somehow failed him. Notions of individual responsibility, however, played a larger role. Ju-


221. Id.

222. Some of the most useful data on mitigation evidence’s juror impact has come from the work of scholars involved in the Capital Jury Project (CJP), a National Science Foundation-supported cluster of research studies on the decision-making of capital jurors based upon juror interviews. Capital Jury Project, SCHOOL OF CRIMINAL JUSTICE, UNIVERSITY AT ALBANY, http://www.albany.edu/scj/13192.php (last visited Apr. 5, 2012).

223. Garvey, supra note 220, at 1565.
rors were not completely unsympathetic to factors that reduced the defendant’s responsibility for who he was, but they were more persuaded by factors that reduced his responsibility for what he had done, at least if he had no control over those factors.  

Research also suggests that race influences jurors’ comprehension of family mitigation evidence. In one study by Mona Lynch and Craig Haney, Black and White mock jurors viewed various types of mitigating evidence for two sets of cases featuring either a White defendant and Black victim or a Black defendant and White victim: a mother’s testimony about physical, psychological, and sexual abuse committed by his stepfather; a half-brother’s testimony about the abuse and how the defendant cared for and mentored him as a child; and a wife’s testimony about the defendant’s psychological troubles and the fact that she and their children needed him and loved him. Afterwards, participants were asked to decide how to sentence the defendant, both individually and in small groups. Lynch and Haney found that in individual determinations, death-voting participants emphasized the facts of the murder, while life-voters prioritized the defendant’s terrible childhood and psychological problems. But race also appeared to influence participants’ valuation of this mitigation evidence; sixty-eight percent of life-voters who named child abuse as the most important evidence viewed the White defendant materials, while fifty-nine percent of death-voters who ranked the child abuse evidence least important viewed the Black defendant materials. Similarly, in group settings, ninety-four percent of life-voters named the abuse and psychological evidence as most important (sixty-four percent of which viewed White defendant materials).  

But Lynch and Haney’s study also demonstrated that jurors can view mitigating evidence of abuse as an aggravator. Some death-voters inappropriately ranked the child abuse evidence most important; fifty-eight percent of these individuals viewed the Black defendant materials. One death-voting mock juror who viewed the Black defendant materials listed the child abuse evidence as both least and most important, wondering simultaneously why the defendant hadn’t attacked his stepfather if the beatings were the root cause and where the mother had been while her children were being attacked. Lynch concluded that, although few participants men-

224. Id. at 1565-66.
225. Lynch, supra note 52, at 197.
226. Id.
227. Id.
228. Id.
229. Id. at 197-98.
230. Id. at 198.
231. Id.
232. Id.
tioned race, there was evidence of subtle prejudice in their “withholding of empathy for the Black defendant, and indeed some resentment that such a sentiment was sought for him.”233 While this study did not directly assess the impact of negative stereotypes of Black families and idealized images of White middle-class families, its results suggest that these constructions have complex influences upon jurors. Indeed, Lynch observed that “racialized stereotypes about the propensity of violence among Blacks appeared to shape several of our mock jury participants’ assessments of the defendant’s life history.”234

Other empirical research confirms that White jurors frequently employ various strategies to distance themselves from Black defendants, such as viewing the Black defendant not as a unique individual but as a faceless out-group member. Fleury-Steiner has posited that White jurors perform racial hegemony by “emplotting stories of their own experiences into the broader narrative of evaluating the defendant’s responsibility for the crime.”235 To these ends, White jurors may evolve a variety of thematic narratives, such as accounts that focus on the “tragedy of the ‘black’ group”236 (i.e., “[i]t was a very sad situation all the way around, he was black, raised in the ghetto, and so on”).237 These narratives encourage White jurors to see a Black defendant not as a unique individual with a distinctive and tragic life history, but as part of a “valueless, ‘black’ group” suffering from race-wide tragedies such as child neglect.238 Fleury-Steiner found evidence of these narratives in jurors’ remarks such as, “I just saw him as a loser from day one, as soon as he was born into that environment, and into that set of people who basically were into drugs, alcohol, illegitimacy, AIDS, the whole nine yards,” and “there are 10,000 others like him out there, which is very tragic.”239 Jurors’ comments also revealed that media coverage helps White jurors to form stories of “what ‘these people are’”; when asked how well the phrase “severely abused as a child” fit the defendant, one juror replied, “I believe that was what he endured most as a child: severe neglect. They were from the lower socioeconomic Black group. From what we read about in the paper a lot, he was definitely from that group.”240

Fleury-Steiner has also observed that Black jurors critique White suburban stereotypes and express frustration with White jurors’ inability to see into Black experience. One working-class Black male juror lamented, “They

233. Id. at 200.
234. Id.
236. Id. at 560
237. Id. at 562.
238. Id.
239. Id.
240. Id. at 562-63.
wanted to fry those black boys . . . . I felt that they didn’t give a shit one way or the other. They wanted to go home to their husbands or to the football game instead of worrying about whether these people were going to die or not.” 241 Here, home “to their husbands” and “‘football games’—as a trope of white indifference”—both express the juror’s disillusionment with “the lack of concern the white majority had toward [the defendant’s] life” and a negative evaluation of the “white suburban lifestyle.” 242 Another college-educated Black female juror expressed frustration with failed efforts to educate fellow White jurors about “poor blacks’ lifestyles”:

There was testimony where they said that the defendant stayed out until eleven o’clock at night. But we are looking at a different kid here. This kid came out of a broken home where there was no structure, no authority figures. . . . And they were arguing, “Well, my kid comes in at such and such.” . . . And I was frustrated. . . . Because they were looking at this thing from a white middle-class perspective, and you have to put yourself in that black lifestyle this kid came out of. That particular lifestyle where there was not a good home, no supervision, there were no authority figures for this kid. 243

Here, jurors’ explicit comparisons between a Black defendant’s childhood and those of White jurors’ children do not merely indicate conflicting images of family life, but actually produce and reinforce cultural distance and social estrangement from Black life. 244 Thus, Fleury-Steiner concludes:

Media and jurors’ personal resources give meaning to an underlying clash of cultures in jurors’ cultural distance stories. Both popular culture and personal experiences help them confirm what they already know about “blacks” like the defendant. Using such cultural and personal capital enables jurors to see the defendant as “other” and indeed worthy of the death sentence. 245

Finally, research involving quantitative CJP data has enabled us to learn much about whether and when jurors identify with defendants and their family members. According to Bowers, Steiner, and Sandys, fifty-one percent of participant jurors stated they imagined themselves in the situation of the defendant’s family. 246 Juror identification with the defendant and the defendant’s family was most common among Black jurors in Black defendant/White victim capital cases, and less common among White jurors, particularly White males. 247 Fleury-Steiner has noted, however, that “more-educated white jurors were more likely to express an understanding and

241. Id. at 570.
242. Id.
243. Id. at 571-72.
244. Id. at 572.
245. Id. at 564.
247. Id. at 216-17, 235.
sympathy toward a Black defendant’s upbringing and disadvantaged surroundings.248 Black male jurors in particular were significantly more likely to say that the defendant was someone who loved his own family and to deny that the defendant’s family seemed very different from his own.249 Thus, Bowers and his coauthors concluded, “The identification black male jurors make with the defendant and his family must make them especially sensitive to the human dimensions of the capital sentencing decision, and it must surely enhance their receptivity to mitigation.”250 Though these observations are no doubt helpful, more analysis is needed as to why White jurors seem reluctant to identify with the defendant’s family, and about jurors’ “investment . . . in white families as paradigms of normality and functionality.”251

B. A Closer Look at Quantitative and Qualitative Capital Juror Project Data

We will now turn to what jurors interviewed in CJP data found memorable about defendants’ family members; this research illustrates on what bases jurors form perceptions of and react to defendants’ family members, and what aspects of trial narratives, testimony, and individual behavior can activate particular constructs of family life. This CJP study involved 1,198 capital jurors who were involved in the trials of 466 Black defendants and 626 White defendants.252 As part of the interview, former capital jurors were asked the following question: “Whether or not they came to the trial, did you have any of the following thoughts or feelings about (DEF) ______’s family?” They then were asked to answer “yes,” “no,” or “not sure” to a number of options: whether they imagined themselves in the defendant’s family’s situation; felt anger or rage toward the defendant’s family; felt contempt or hatred for the defendant’s family; felt sympathy or pity for the defendant’s family; thought that the defendant’s family seemed very different from their own families; wished they knew the defendant’s family personally; imagined themselves as members of the defendant’s family; and had other reactions. When asked if they had “other reactions” to the defendant’s family, 321 jurors chose to give qualitative responses. Only twenty-one of these participants were Black, the remainder were White.

248. Fluery-Steiner, supra note 235, at 558.
250. Id.
251. Lane, supra note 153, at 190.
252. This is the same data set used by other researchers involved in the Capital Jury Project, in particular Bill Bowers. While our quantitative conclusions may overlap, I have performed my own frequencies and crosstabulations on this data. I am deeply grateful to Bill Bowers for granting me permission to use this data.
1. General Quantitative Trends and Patterns in Jurors’ Perceptions of Defendants’ Family Members

In general, jurors affirmed that they were willing to or had empathically engaged with the defendant’s family members. 47.5% of jurors had imagined themselves in the defendant’s family’s situation, and 14.5% stated that they had actually imagined themselves as a member of the defendant’s family. Few jurors (only 11%) felt anger or rage for the defendant’s family; even fewer felt contempt or hatred (5.7%). By contrast, 81% felt sympathy or pity for the defendant’s family. A majority of jurors (63.1%) did seem to feel that the defendant’s family was very different than their own, and very few (6.3%) wished that they knew the defendant’s family personally.

It is striking that responses were largely consistent between jurors in cases involving Black defendants and those in cases involving White defendants, as seen below in Tables 1 through 4. Slight differences became evident when juror race was factored in; for example, Black jurors were slightly more likely (by 6-9%) to imagine themselves in the defendant’s family’s situation than White jurors, and much more likely (by 10-18%) to imagine themselves as members of the defendant’s family. This may suggest that, as Bowers and his colleagues have reported, Black jurors tend to be more empathetic than White jurors.

<table>
<thead>
<tr>
<th></th>
<th>Imagined Self in Def’s Family’s Situation</th>
<th>Imagined Self as Member of Def’s Family</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>Black Def</td>
<td>47.8% (217)</td>
<td>52.2% (237)</td>
</tr>
<tr>
<td>White Def</td>
<td>47.9% (293)</td>
<td>52.1% (319)</td>
</tr>
<tr>
<td></td>
<td>14.8%</td>
<td>85.2%</td>
</tr>
<tr>
<td></td>
<td>14.3%</td>
<td>85.7%</td>
</tr>
</tbody>
</table>

Table 1: Whether Jurors Imagined Themselves in the Defendant’s Family’s Situation or as Part of the Family (broken down by defendant race)

<table>
<thead>
<tr>
<th></th>
<th>Felt Anger/Rage Towards Def’s Family</th>
<th>Felt Contempt/Hatred Towards Def’s Family</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>Black Def</td>
<td>10% (46)</td>
<td>90% (414)</td>
</tr>
<tr>
<td>White Def</td>
<td>12.4% (77)</td>
<td>87.6% (546)</td>
</tr>
<tr>
<td></td>
<td>6.1% (28)</td>
<td>93.9% (432)</td>
</tr>
<tr>
<td></td>
<td>5.8% (36)</td>
<td>94.2% (582)</td>
</tr>
</tbody>
</table>

Table 2: Whether Jurors Felt Negative Emotions Towards the Defendant’s Family (broken down by defendant race)
The data also reveal several other interesting trends and patterns, some of which may be spurious due to small numbers of Black jurors (particularly in cases involving Black defendants). Of course, all should be reassessed in future research. As seen in Table 6, Black jurors appeared to be twice as likely to feel anger or rage towards a Black defendant’s family than a White defendant’s family (8.3% versus 4.4%, respectively), and White jurors were roughly 33% more likely to feel anger or rage towards a White defendant’s
family than a Black defendant’s family (13.1% versus 9.7%, respectively). Black jurors also appeared marginally more likely to feel contempt or rage for Black defendants’ families than White defendants’ families, while White jurors’ responses were almost identical for both racial categories.

Moreover, as Table 7 illustrates, Black jurors were roughly 12% more likely to feel sympathy or pity for White defendants’ family members than for relatives of Black defendants; again, White jurors’ responses were consistent across both racial categories. White jurors were marginally more likely to state that Black defendants’ families seemed very different from their own families than White defendants’ families. Finally, as shown in Table 8, Black jurors indicated they wished to know White defendants’ family members three times as often as they indicated they wished to know Black defendants’ family members (16.3% versus 5.1%, respectively), whereas White jurors’ responses were consistent across racial categories.

### Table 6: Whether Jurors Felt Negative Emotions Towards the Defendant’s Family (broken down by defendant race and juror race)

<table>
<thead>
<tr>
<th></th>
<th>Felt Anger/Rage Towards Def’s Family</th>
<th>Felt Contempt/Hatred Towards Def’s Family</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Black Jurors</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black Def</td>
<td>8.3% (5)</td>
<td>3.3% (2)</td>
</tr>
<tr>
<td>White Def</td>
<td>4.4% (7)</td>
<td>0% (0)</td>
</tr>
<tr>
<td><strong>White Jurors</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black Def</td>
<td>9.7% (37)</td>
<td>6.6% (25)</td>
</tr>
<tr>
<td>White Def</td>
<td>13.1% (74)</td>
<td>6.4% (36)</td>
</tr>
</tbody>
</table>

Table 6: Whether Jurors Felt Negative Emotions Towards the Defendant’s Family (broken down by defendant race and juror race)
My purpose in summarizing this data is not to assert that these trends and patterns definitively exist, but merely to illustrate what types of information have been collected, to display the potential of this type of empirical research, and to argue that further investigation is urgently needed. As it stands, it appears as if both Black jurors and White jurors may be harsher on the defendants’ family members of their own race. If this is in fact accurate, then perhaps jurors are forming negative perceptions of those families that either go against idealized constructs of middle-class family life (in the case of White jurors and White defendants’ family members) or confirm negative stereotypes of dysfunctional families (in the case of Black jurors and Black defendants’ families). Also, to the extent that Black jurors actually feel sympathy or pity for White defendants’ families or wish they knew them personally, it might be that racial differences between jurors and defendants either prompts jurors to be more cautious when answering researchers’ questions or encourages them to more carefully consider their
perceptions of defendants’ family members at trial. More research is needed with increased numbers of cases (such as those involving Black jurors/Black defendants) to determine if these relationships are significant.

2. Assessing Jurors’ Qualitative Remarks About Defendants’ Family Members

Jurors’ qualitative remarks concerning their assessments of defendants’ family members provide additional insight into their thoughts about and reactions to these individuals, providing a much deeper perspective on why jurors may have felt anger, contempt, or sympathy for certain families and not for others.253 I propose that jurors’ empathic connections with defendants’ families are based in large measure on their normative assessments of the quality and extent of emotional connections within these families—whether the emotional connections within capital defendants’ families are characterized as “normal” or “dysfunctional.” The question, of course, is what is considered “normal”?

There are several dimensions of emotional connectedness. Jurors attributed positive (and therefore normative) valence to several factors as signs of a “normal” or “functional” family, including perceptions of “love” or “caring” behaviors,254 an intact family, whether parents “tried their best” to raise their children right, whether parents had good jobs or nice homes or adequate money, whether families offered their support to the defendant (including attending his trial), and whether relatives reacted with appropriate emotions to trial developments. Conversely, jurors evaluated many other factors negatively as symptomatic of a troubled or dysfunctional family: family separation (a family that was “not intact”), abuse between members, parents who were “failures” in some material or emotional respect, poor social and economic environments, lack of support for the defendant (including failing to attend the trial), inappropriate emotional behavior at trial (e.g., relatives were emotionally distant), and family members who seemed to be either threatening or complicit in committing or covering up the defendant’s crime. To preserve their anonymity, jurors will be referred to by number, and all will be referred to as members of the male gender.

I have divided participants’ qualitative remarks into nine categories or themes. Four of these categories (Doing One’s Best, Importance of Love, Ingredients for Love, Appropriate Loving Attitudes) are positive; four oth-

253. The quotations are not attributed to specific jurors by name because Capital Jury Project Interviews were anonymous in order to protect participants’ identities. Instead, participating jurors were assigned numbers at the time of their interview. These numbers are, in turn, used to cite jurors’ remarks that appear in this Article.

254. Interestingly, all twenty-two jurors who used the terms “love” or “care” in their responses were white, and most of them were female (fifteen female, seven male).
ers (Bad Lifestyle, Toxic Family Relationships, Inappropriate Loving Attitudes, Impact of the Lack of Love) are negative; one (Expressions of Empathy) is neither positive or negative because it consists of jurors’ remarks about how they envisioned their empathic role at trial.

a. The “Normal” Family

Jurors perceived normal families to be affective families; one juror (5) empathically recalled “thinking at the time how lucky [I was] to be raised in a ‘normal’ family . . . ! How important the family is, a warm, nurturing, caring family with normal values and values [systems] is.” While such reflections show that emotional connections are important in distinguishing functional from dysfunctional family units, they did not reflect positively on defendants’ families that they perceived as emotionally dysfunctional (other jurors were “thankful” for their “good” families (7)). Still others commented on how the defendants’ relatives loved them: “[T]he Aunt that took him in spoke highly of [defendant] as a child . . . [a]nd she really did dearly love him. He just somehow got off.” (26).

Jurors looked for evidence that the defendants’ relatives loved them. Family members’ love for the defendant was often described as unconditional; one juror remarked that a defendant’s mother “loved him even if he wasn’t the right kind of boy,” (1587), and another was “sure they loved him” even though “[t]hey probably knew he was a bad boy” because that type of knowledge “[d]oesn’t stop you from loving and caring about him, just because you love somebody doesn’t mean you approve of what they do” (1619). Jurors could empathically relate to unconditional love: “They had[,] just like all of us that have had teenagers, you know they’ve had their problems with him . . . as a parent, I’ve gone through that.” (319). A juror even gave one defendant’s relative the benefit of the doubt when he engaged in questionable behaviors out of love for the defendant: “Don’t know if his dad was just taken in by his son or just cared because he was his son. He gave/loaned defendant money during trial[,] and it turns out it was to hire someone to kill a witness.” (14).

Some jurors’ remarks intimated that familial love occurred in certain family environments, predominantly “nice” homes where educated parents had secure, well-paying jobs. The very fact that a family’s child was a capital defendant probably led jurors to expect that the defendant’s family would not possess these qualities; one juror confessed to being “surprised that his parents were well educated and had good jobs” (141). But if these factors were present, jurors believed success should surely follow:

I just didn’t understand how they could get themselves into such a mess as they did raising these kids. I mean, the father had a good job and they had money and land and a nice house for the area and I just couldn’t understand how things got out of hand (130).
Another juror (192) who remarked that the defendant came from a “normal, average family” admitted that he “couldn’t understand someone coming from that type of family and doing what he had done.” In these situations, one juror speculated that the defendant’s family might actually experience more emotional pain as a result of his actions: “It was obvious they were very well-to-do and prominent—they carried themselves well. The fact that the crime was committed by the son of a prominent family must have hurt even more.” (160).

Normal families were also ones in which, although the family might not have been intact or experienced hard times, parents worked and sacrificed for the betterment of their children; as one juror (19) said, “It appeared that his mother tried the best she could. She was the only one working, trying to raise three kids with a husband she couldn’t count on.”

Finally, in normal families, affective habits matched up with mainstream White, middle-class values of emotional expression. They were “close” families whose members were “shocked by what he did” (91). Normal families attended the defendant’s trial to exhibit “solidarity” and “support” (99, 215). Jurors noted when the defendant had strong bonds with family members; one remarked that the defendant’s relationship with his mother was a “real healthy bond” (99). It was also appropriate for defendant’s relatives to express emotion while testifying or while in the courtroom; one juror “felt sorry for the father. He cried a lot during testimony,” and others remarked that they heard defendants’ grieving relatives’ courtroom reactions to death sentences. A supportive family was a “very protective” family that “did not seem much different” from jurors’ own (1075). Sometimes, however, jurors could view an “ultra-supportive” family as potentially blameworthy: “I also felt that the family was helping him cover up the crime.” (244).

b. The “Dysfunctional” Family

In contrast to normal families whose members enjoyed more education, secure jobs with good wages, and comfortable houses, dysfunctional families were products of impoverished emotional, social, and material environments; “bad” lifestyles; and toxic family relationships. One juror remarked that the defendant’s family was a “[p]oor white beer drinking family” (1830), and another established cultural distance between himself and a defendant’s family by noting that the family exemplified others found in that area: “They’re what they are. It’s the area that they live in; there’s a lot of that down there.” (18).

These types of families suffered from relational, emotional, and economic poverty. Toxic family relationships and terrible childhoods led to families that produced criminals and that jurors described as “the furthest thing from a family” (64). These types of parents were “losers” (10) who
“dropped the ball on raising [the defendant]” (15). Prominent examples included abusive parents or parents who abandoned their children; one defendant’s father “basically hauled up with his stakes and kinda took along a combination of some of the family and just left the area and left [defendant behind]” (27). A family with an “absent father,” and a mother who didn’t even “know how old [the] defendant was” did not care about their children, could not provide a “good home life” and was “not a very close family” (1081). Jurors frequently talked about such parents in terms of disgust: “His mother never came to the trial at all and his father is every kind of pervert you can think of. His stepfather was a wifebeater and a child abuser. His father was a homosexual, wifebeater. His parents should have been on trial with him.” (1651). One juror noted that “[t]he entire family had a history of sodomy and incest” (8); another remarked that “they [family members] should have been there [on trial] because of his family history, he was troubled; because of his broken home he became an outlaw” (9).

Jurors emphasized that a lack of familial love as well as “family togetherness, unity” (1224) had terrible consequences for defendants. Jurors readily accepted the connection between being unloved as a child and turning to criminal behaviors as an adult. One juror emphasized that “they raised him like an animal. He had no love, [and was a] product of his environment.” (382). Another noted that the defendant’s “[f]amily was somewhat brutal and incredibly distant. No love. So you could see the connection not that everyone who has no love goes out and kills everybody[,] but I bet a lot of people who do like this guy probably didn’t have warm loving [families].” (78). Such evidence did have a mitigating effect of sorts; it explained, but did not excuse, the defendant’s actions: “[T]here’s a little [] sense of, to me that didn’t justify why he became a murderer, but at least you could kinda piece together . . . how this could all take place . . . . so that was kind of an important feature.” (27).

Not surprisingly, dysfunctional defendants’ families exhibited inappropriate loving attitudes towards the defendant at trial, which jurors found “hard to understand” (132) and “interesting” (1956). Jurors characterized these relationships as “disconnected” (89), “cold” (132), and ones in which relatives “didn’t seem like they cared that much” (1956). A few jurors remarked that any semblance of emotional closeness seemed like a performance for the jury’s benefit, either “like a forced closeness to protect sonny all of a sudden” (217) or an attempt to “put on a good show for him when it comes time to see if he got the death penalty” (369). One juror who believed that the defendant’s family members only “pretended to care at trial” was in the restroom and “heard [the] mother say [she] hated [defendant], but [the] sister said [she] had to act like she loved him—very strange” (723). Jurors frequently speculated on whether the family’s affection was real or was all an act: “I guess I wondered if they had put on a show in raising this [man].
. . Had they really . . . taught him values. You know was it all just a big show, for our sakes, so had they really loved and cared for him?” (1264).

But sometimes the defendant’s family members did not bother to support the defendant at trial at all or to the extent that jurors believed they should. One juror remarked, “I questioned his . . . closeness with them because of the fact that they were not there.” (167). Jurors frequently found it noteworthy when defendant’s family members were altogether absent: “[T]here was nobody there to support him. He had no support. The dead man’s family was there through the whole case, but the man who was alive had no support.” (656).

Jurors were especially bothered by mothers or wives who did not pay attention or testify at trial, who attended infrequently, or did not attend at all. Undutiful wives attracted the most ire. It was easy for jurors to disparage wives who were, to say the least, “colorful”:

Kind of unusual that his wife never testified . . . . She was never there. They did show in the evidence a picture of his wife, 8 x 12 glossy, pregnant, in front of a store. Smoking a cigarette, very pregnant, shorts to mid-knee. Tattoos of snakes on her legs. Common-law wife. She looked like something from the circus (266).

But jurors could also find fault with less colorful wives; one juror remarked of a defendant’s wife who was also a doctor, “[S]he was there maybe every other day although she was a practicing physician[,] which may have made a difference. I felt that it was strange she wasn’t more involved in the case.” (229). Such disengagement irked jurors: “[T]he w[ife] really bothered [me]—she slept or did crossword puzzles during trial. ‘She couldn’t care less about what was going on.’” (1083). There was a sense that a wife wasn’t really a “wife” if she exhibited such disinterest: “[S]he couldn’t testify against her husband, and I think that’s why they got married—because they didn’t seem like a loving couple.” (39).

Finally, jurors were taken aback when mothers did not testify on the defendant’s behalf. One was “really amazed” that a mother did not testify until “forced” (1697), and another was altogether unable to relate to or condone such behavior: “If this were my son. I was wondering how a mother would not be there for the child . . . . I just cannot comprehend . . . just no[t] to be at the trial.” (350).

c. Jurors’ Remarks on Empathic Engagement with Defendants’ Family Members

Jurors’ comments illustrated that many consciously attempted to empathically engage with defendant’s family members, even if they did not actually term these connections “empathic.” Jurors compared defendants’ families to their own, remarking that they were thankful to have been raised in a “normal” or “good” family (presumably unlike the defendant). Jurors also noted that they had put themselves in family members’ shoes: “Just
thinking in terms of if I was a member of his family, how would I feel about this situation, how would I handle such a thing as this.” (212). Some remarked that the defendant’s family was “very different” from their own family, illustrating that they made comparisons between the defendant’s childhood experiences and relatives and their own. Another juror described this type of connection as a way of penetrating another’s being:

I think as the trial went on, you felt like you knew this person because obviously all of this is coming out and your sympathy is going to the person even though you would have never met them in your life and never know them afterwards but you kinda . . . you’re down into their being if that makes any sense (980).

Sometimes, empathic connections were facilitated by mutual experience of familial roles: “I felt pity for his mother because I’m a mother.” (86). Another juror felt very strongly for the defendant’s mother, and emphasized that some of her own mothering choices had been imperfect:

The way the defense tried to paint it [as the father’s and mother’s fault] . . . . I really felt for that lady. . . . I think the lady did the best she could under the circumstances. . . . She could have done a million things wrong, but she also had to have done some things right. . . .

. . . I feel myself there’s a lot of things I could have done differently with mine. . . . You show me a perfect parent (1962).

Other jurors saw empathic engagement as inherent in their decision-making roles. One juror noted at length that:

The only reason [I indicated “yes” to questions such as “whether juror identified with defendant’s family”] is to try to see things from their perspective in coming to our decisions, is there something they could do to help her? Or you know, the kind of effects it would have on them, either guilty or not guilty . . . so I just tried to put myself in their shoes, so to speak (59).

More research is needed to determine how jurors see themselves as empathizers as well as the types, strengths, directions, and impacts of empathic efforts and connections.

IV. STRATEGIES FOR RECOGNIZING AND MANAGING JURORS’ RELIANCE ON CONSTRUCTIONS OF FAMILY LIFE

Presented with evidence that stereotypes of family life do in fact impact jurors’ capital judgments, the question we must resolve is not whether stereotypes of idealized White middle-class and disparate stereotypes of Black family life influence capital jurors, but how they do so, and how their positive influences can be amplified and their potentially fatal impact abated.

Presumably, capital defense attorneys are as likely to be as ignorant or dismissive of cultural family stereotypes’ unconscious or subconscious influence as the rest of us and therefore need to be educated on these processes of influence and trained on how best to thwart them. Sunwolf, for one,
The Family Capital of Capital Families

has urged that capital defenders “need coaching on how to become aware of the typical distortions they have developed about their clients and the facts of the case . . . [for example] a client’s childhood being perceived as excellent ‘factual’ mitigation evidence rather than as ‘painful’ re-lived abuse.”

Scholars describe these training opportunities as limited, but capital defense training experts and non-profit organizations assert that they exist but are not readily forthcoming on particulars, on the grounds that such information must be closely held so to keep it from falling into prosecutorial hands. Other generally-applicable trial attorney training materials on jury dynamics, however, provide an excellent picture of the types of capital defender education and training that would be useful.

First, capital defense attorneys should learn that mitigating evidence involving the defendant’s family life and family members may be among the most frustrating types of evidence from which they will have to create their mitigation narratives. Defendants with abusive histories may be challenging clients who find it difficult to successfully collaborate with their attorneys. A capital defender working with a difficult client may not push to work with her client as deeply as she should, or may distance herself from her client out of her own anger, frustration, or sadness instead of focusing more on her client’s emotions, thoughts, and fears. If they are made explicitly aware of these tendencies through techniques that explicitly encourage attorneys to take their clients’ perspective, capital defenders may realize why clients are defensive and develop new strategies for working with them. For instance, attorneys may cease using “data-driven questioning” that triggers client resistance once they realize why such questioning prompts certain “adaptive functions,” encouraging defendants to become defensive when they feel threatened or self-protective when they feel vulnerable.

Second, capital defense attorneys should be trained to employ methods using empathy and imagination—the very same processes jurors rely upon to form perceptions of defendants’ family members—to encourage jurors to reconsider problematic opinions and evolve more conscientious and individualized perceptions of defendant’s families. This is accomplished primarily through talking with jurors, beginning in voir dire. Capital defenders should first assess what perceptions jurors have formed or could form about individuals like the defendant and his family members. For instance, an attorney could assess a potential juror’s value systems by asking what types


256. Id. at 69, 89.

257. Id. at 75.
of life goals or character attributes that potential juror prioritizes or disparages.258 It might be particularly useful to invoke a schema without reference to how it is relevant in the case at hand; an attorney who wants to assess jurors’ perceptions on how parental discipline affects a child’s character need not pose to jurors a hypothetical based on the defendant’s situation but instead could ask jurors if they can recall a time from their childhood when they were afraid of parental discipline, and ask them to describe that situation, immediately drawing jurors into their own experience.259

Along these lines, Sunwolf advises attorneys to explicitly discuss a negative schema with jurors in voir dire to uncover which jurors may attempt to put that schema aside and which will not.260 For example, an attorney could follow a script: ask potential jurors about a particular schema (“Don’t we all think . . .”), opt into the negative schema herself (“Me too”), elaborate on the negative stereotype (“We also believe . . .”), introduce a weakened form of an alternative positive schema, ask jurors if this alternate schema might ever be true for one person or one situation, discuss these issues one-on-one with jurors, and follow with potential challenges for cause.261 This strategy both normalizes the human tendency to develop and use negative schemas and helps jurors to confront specific schemas that may prove to be especially problematic.

Once capital defense attorneys are familiar with their jurors’ perceptions and values, they can prompt jurors to confront negative schemas and use empathic and imaginative techniques to encourage jurors to change them. A capital defender can comment directly upon a juror’s belief in a problematic negative schema. For instance, an attorney faced with a juror who remarks, “I wouldn’t be sympathetic to any defendant just because he had a bad childhood,” may respond through “collaborative conversation” (“Most folks might agree with you. Would you share your thinking on that?”), or may actively intervene to “normalize contrary positions.”262 Either strategy ensures that the attorney is engaged in helping jurors to think

258. Sunwolf describes various types of value systems, including the pioneer (prizes work and thrift and hates dereliction and waste); enlightenment (prizes science and rationality and hates ignorance and irrationality); progressive (prizes practicality and progress and hates the old-fashioned and close-minded); transcendental (prizes emotion and humanitarian ideals like respect and love and hates science, reason, and coldness); personal success (prizes goals involving career, family, economic security and hates dullness, poverty, and laziness); and collective success (prizes cooperation and equality and hates selfishness and inequality). Sunwolf, supra note 255, at 147.

259. Id. at 132.

260. Id.

261. Id. at 128.

262. Id. at 299.
through and perhaps reject negative schemas instead of ignoring them or arguing with them.263

Like others, jurors judge by comparison, and so capital defenders must actively intervene in juror impression formation by carefully constructing choice options.264 It is essential that capital defenders confront possible negative perceptions about key trial elements (i.e., the behavior of the defendant’s mother towards the defendant when he was a child) as early as possible in order to prime jurors’ mental schemas that involve mothers and mothering behaviors.265 Attorneys can exploit jurors’ schemas by invoking a problematic schema just to draw specific contrasts between that image and the uniquely bad or good qualities of a particular individual. For instance, a capital defender can invoke jurors’ common knowledge about what it means to be a “good mother” and “use thematic adjectives to alter th[at image] . . . beginning in voir dire and continuing through opening statements,” such as by emphasizing: “[S]he wasn’t the sort of mother you had or your friends had. She was the sort of person who never should have been a mother to anyone.”266

Other techniques of confrontation and reform may also prove useful. Since jurors are likely to compare the defendant’s family to an idealized image of a White middle-class family, attorneys may provide them with more diverse images of family life; “[t]he attorney who offers an anchor for comparison participates in the juror’s comparing processes, while the one who does not leaves it up to the juror.”267 A capital defender could also describe the power and dangers inherent in mental categories and simplified judgments before moving on to a discussion of a specific negative schema relevant to the case, wherein she asks jurors how long they have believed in that schema or whether they have defended it to others who felt differently.268 If we tend to attribute our own mistakes to temporary circumstances and those of others to personality flaws, then an effective defense attorney could help jurors realize that many different variables affect their own behaviors and mistakes before asking them to apply this new principle of self-awareness to others.269 Alternatively, she could ask jurors to evaluate their own behaviors as if they were outside observers, or to view another’s behaviors as if they were in that person’s shoes.270 Both strategies increase the likelihood that jurors will be more empathic and apply situational reason-

263. Id. at 301.
264. Id. at 40.
265. Id. at 130.
266. Id. at 126.
267. Id. at 40.
268. Id. at 127.
269. Id. at 140.
270. Id.
Finally, capital defense attorneys can undermine jurors’ confidence in well-established schemas by making them aware of the unique legal consequences of being wrong—dangers such as convicting the innocent, of not properly exercising mercy.  

CONCLUSION

In this Article, I have argued that our human instinct to empathize plays a key but underappreciated role in capital sentencing by helping jurors to evaluate mitigating evidence through intersubjective engagement with others such as defendants’ family members. I have also hypothesized that certain cultural stereotypes, in particular positive images of idealized White, middle-class family structures and negative images of dysfunctional Black family life, can distort or altogether derail these processes of empathic engagement. Empirical research suggests that this warping effect actually occurs, particularly where there are racial differences between capital jurors and capital defendants. Yet, this picture is still manifestly incomplete; more research is urgently needed in order to provide a more complete picture of how jurors’ potential understandings and usage of such constructions impact their assessments of whether defendants deserve to live or die.

Fortunately, a number of strategies allow attorneys to actively combat the pernicious influence of stereotypes of family life: asking jurors to confront problematic perceptions, encouraging them to think of alternative possibilities, and utilizing jurors’ capacity for imagination. These tactics for combating negative family stereotypes confirm that our human instinct for empathic engagement, channeled through imagination, narrative, and storytelling, simultaneously poses a threat to and extends the promise of immersive sociality and mercy. Thus, the process of understanding and perhaps extending empathy’s potential necessitates that capital defenders themselves become not only its converts but its missionaries, for one should not preach a gospel to others without placing her faith in the same creeds.

271.  *Id.*

272.  *Id.* at 133.