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## Capital Jury Decision Making: Looking Through The Prism Of Social Conformity And Seduction To Symmetry

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# Capital Jury Decision Making: Looking Through the Prism of Social Conformity and Seduction to Symmetry

DR. SABY GHOSHRAY†

*Nor does being born into the human species assure our humanity.  
We must find our own path to becoming human.<sup>1</sup>*

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## I. INTRODUCTION

The death penalty confronts us with the most sublime question: How it is possible for one human to sentence another to die? Despite the Supreme Court's carefully calibrated mandate calling for the inclusion of a humanization exercise of the capital defendant in death penalty trials, the death penalty in America continues to be infected with the capital jury's penchant for playing the role of the community's conscience. Thus, calling into question the inherent human bias in the death penalty system, this article examines the jurisprudence of death from a hitherto

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1. David Krieger, *On Becoming Human*, NUCLEAR AGE PEACE FOUND. (Feb. 2002), [http://www.wagingpeace.org/articles/2002/02/00\\_krieger\\_on-becoming.htm](http://www.wagingpeace.org/articles/2002/02/00_krieger_on-becoming.htm).

unexamined dimension, the interplay between individual human's acquiescence toward social conformity and jury decision making.<sup>2</sup> Several well-publicized death penalty trials of late have highlighted the subjective aspect of capital jury deliberation, in which jurors may have been erroneously influenced by the community's expectation.<sup>3</sup> Despite divergence in rationales put forth for such subjectivity in jury decision making, the existence of a common theme cannot be denied. The relationship between a capital jury's enticement to be the community's conscience and the failure to humanize the defendant has not been given due rigor in death penalty literature.<sup>4</sup> Nor has the contemporary discourse within capital jurisprudence adequately addressed<sup>5</sup> the connec-

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2. See *infra* text accompanying note 5.

3. See Michael Landauer, *Does It Matter If a Juror Has Regrets?*, DALL. MORNING NEWS TEX. DEATH PENALTY BLOG (July 19, 2011, 4:43 PM), <http://deathpenaltyblog.dallasnews.com/2011/07/does-it-matter-if-a-juror-has.html>; see also Clay Carey, *Influential Nashvillians, Juror Fight Gaile Owens' Execution*, TENNESSEAN (May 2, 2010, 4:47 AM), [http://www.tennessean.com/article/20100502/NEWS03/5020370/2066/news03?nclick\\_check=1](http://www.tennessean.com/article/20100502/NEWS03/5020370/2066/news03?nclick_check=1); Adrienne Packer, *Maestas Juror Says She Erred*, LAS VEGAS REV.-J., Sept. 23, 2008, <http://www.lvrj.com/news/29582749.html>.

4. Here I draw attention to the phenomenon of individual jurors coming out after the trial and lamenting over the fact that, either they have not had all the mitigating facts about defendant's life, or they are now second-guessing their vote of death during jury deliberation. See, e.g., Landauer, *supra* note 3 ("Unfortunately, although I had doubts when we were deliberating, I was not able to stand up to the other bullies on the jury."); see also Packer, *supra* note 3 ("The decision I came to was wrong . . . I shouldn't have made that decision."). Clearly, there continues to be some dissenting jurors in the jury room who do not feel comfortable voting for death, yet they acquiesce. This area has not been adequately researched. Another example of juror acquiescence is the *Lakhani* case. Although not death penalty related, *Lakhani* does speak volumes to jury cognitive stress. See *United States v. Lakhani*, 480 F.3d 171, 184 (3d. Cir. 2007) ("I said the man [is] not guilty, and there ain't nobody gonna change my mind. And the jury foreman said [that] if I didn't go along with them, I wouldn't see the inside of my house until December. So, I said aw, what the hell. He don't mean nuthin' to me. The man guilty. But I know it was wrong. It wasn't right to do that man like that. It wasn't right. But it's over now." (quoting juror number 9 on how she changed her mind from not guilty to guilty)).

5. A death penalty trial contains a mitigation phase in which evidence is presented with the sole objective of saving the life of the capital defendant. Because the death penalty has been recognized as more "qualitatively different" than any other criminal sentence, see *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), a capital trial contains a separate mitigation phase where available evidence in favor of the defendant is presented to obtain a sentence other than death. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), reprinted in 31 HOFSTRA L. REV. 913, 925 (2003) [hereinafter ABA GUIDELINES]. As the modern death penalty trial has evolved over the last decades, the scope of introducing mitigating evidence has expanded. See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 603-04 (1995). Courts have traditionally allowed capital defendants to introduce almost anything that can be used to save the defendant's life. See ABA GUIDELINES, *supra*, at 1022-23. Although capital mitigation strategies and evidence types may vary, they seem to fall under a central rubric, that of unearthing the basic fundamental humanity of the capital defendant. See Eric M. Freedman, *Introduction: Re-Stating the Standard of Practice for Death Penalty Counsel: The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 663, 663-64 (2008). The idea of capital mitigation is to provide the jury with

tion between individual's precondition toward social conformity and a jury's collective failure to humanize a capital defendant.<sup>6</sup> If capital jury deliberations in the post-*Furman*<sup>7</sup> era continue to be shaped by societal desires and if trial outcomes remain captive to jurors' enticement to con-

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a comprehensive snapshot of the capital defendant; the defense attempts to project him or her as a legitimate member of the human community. See ABA GUIDELINES, *supra*, at 927. By providing a detailed historiographic view of the defendant's life, the defense hopes to develop for the jury a more structured and nuanced view of the social structuring that shaped the defendant, in an attempt to mitigate the individual culpability of the defendant. See Haney, *supra*, at 561. Therefore, the key for such mitigation is to humanize the defendant. Humanization can be introduced in various forms, which can be broadly classified into two types. See ABA GUIDELINES, *supra*, at 1056. The negative characterization may range from difficult upbringing, developmental risk factors, childhood trauma, to relevant and compelling social history that can associate the defendant within stronger and undeniable life forces, which could lessen his own culpability for the crime for which death may be impending. See *id.*; see also Haney, *supra*, at 608. The positive characterization may include traits, accomplishments, and deeds within society and in furtherance of defendant's interpersonal relationships with others that may signal human qualities. See ABA GUIDELINES, *supra*, at 1056. The process of humanization within the capital mitigation phase of a death penalty trial is an attempt to imbue in a capital defendant the qualities of human persons. See Haney, *supra*, at 603–04. The objective is to assist the jury with the rationale that it may take into its deliberation to infer that the defendant is a person belonging to the human family, and there may be reasons that his or her life is worth saving from the ultimate punishment of death. See *id.* I argue, however, for a retrospective look at the process instrumentalities of the death penalty by looking through the prism of jury subjectivity. I call for a reexamination because of inherent systemic bias within the bifurcated trial process involving the second sentencing that gets triggered only if the defendant gets convicted and becomes death eligible. See BLACK'S LAW DICTIONARY 1543 (8th ed. 2004) (defining a "bifurcated trial" as "[a] trial that is divided into two stages, such as for guilt and punishment or for liability and damages"). As I articulate in this article, however, by the time the second capital mitigation phase gets initiated, the majority of the jurors may have formed a firmer opinion regarding the defendant's death eligibility, and therefore the timing of this phase may be insignificant from the defendant's point of view. In my view, there exist strong social forces of dehumanization that a capital jury is subjected to a priori and in effect shape the trajectory of jury deliberation and expected verdicts in most cases—an area that I elaborate on in this article.

6. Among contemporary scholars, Craig Haney has championed the cause for humanization of capital defendants. See, e.g., Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 841 (2008) ("The exclusion of sympathetic background and potentially mitigating social history information from local newspaper reporting means that citizens and potential jurors will have few if any opportunities to get the full story about the real causes of crime and the factors that have influenced the lives of people who commit it. These consistent omissions also implicitly suggest that background and social history information is legally and psychologically irrelevant. That is, because it is covered so little by the press, citizens may come to assume that the circumstances of the defendant's life have no bearing on his blameworthiness or the decision about which punishment should be meted out at the conclusion of his trial"); see also Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL'Y 337, 343–45 (2009) (explaining the humanizing role of the mitigation expert in a capital case). There is a more fundamental issue of why jurors in death penalty cases become more pre-processed toward a verdict of death that has not been adequately analyzed. While the need for humanization is widely accepted, the increasing difficulty for humanization to succeed has not found much attention. This article attempts to establish that there exist societal forces of dehumanization that are more potent and more significantly powerful than the contemporary process of mitigation.

7. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (holding "that the

formity, then has the death penalty in America really come out of pre-*Furman* era capriciousness?<sup>8</sup> This article seeks an answer to this poignant question.

The imposition of the death penalty goes through a complex process. States allowing capital punishment have statutory procedures that capital trials must follow.<sup>9</sup> A set of constitutional guarantees at the federal level ensure capital trials are conducted so that capital defendants can adequately present mitigating evidence in response to states' presentation of aggravators qualifying death.<sup>10</sup> Yet at the core, the outcome of capital trial relies upon two very diverging concepts. First, the success or failure of the death penalty relies on subjective decision-making by an empanelled set of individuals—the jury of one's peers.<sup>11</sup> Second, who

imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments").

8. This article has been prompted by this inquiry, for which it presents the response.

9. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1045 (1995) (discussing states' implementation of capital statutes following the Supreme Court's decision in *Furman*). In this article, I establish a linkage between subjectivity in jury decision making and societal conformity to argue that what appears on the surface as subjectivity is a function of various sociological forces.

10. See *Furman v. Georgia*, 408 U.S. at 286, 289 (Brennan, J., concurring) ("Death is a unique punishment . . . . Death . . . is in a class by itself."); see also *id.* at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind."). In addition to *Furman*, the qualitative difference of the death penalty has been established throughout the post-*Furman* era. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (arguing that the majority opinion, holding it cruel and unusual to sentence retarded persons to death, is the "pinnacle of . . . death-is-different jurisprudence."); *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) ("[T]here is no doubt that 'death is different.'") (citation omitted); *id.* at 614 (Breyer, J., concurring) ("[T]he Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.") (citation omitted); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) ("It hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death."); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) ("[T]he death penalty is qualitatively different from any other punishment . . . .") (citation omitted); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citing the Court's prior recognition of the "qualitative difference of the death penalty") (internal quotation marks omitted); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) ("[T]he death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards . . . ."); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (asserting that the death penalty is qualitatively different); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (finding that the "penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); *Woodson*, 428 U.S. at 305 ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.").

11. See *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985) (emphasizing that a jury in a capital sentencing proceeding must often make a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" (quoting *Zant v. Stephens*, 462 U.S. 862, 900 (1983))). The jury's decision is limited by state-imposed procedural safeguards. While giving primacy to procedural safeguards, the Supreme Court has sought to reshape the scope of the Eighth Amendment's Cruel and Unusual Punishment Clause in several cases. See, e.g., *Atkins*, 536 U.S. at 321 (holding it cruel and unusual to execute the mentally retarded because they do not act with the level of moral culpability that characterizes the most serious adult

lives or dies is based on the defendant's success in becoming humanized in the eyes of his peers whose decisions may be infected with social conformity.<sup>12</sup> Social science research suggests the humanization process may be mediated by the personal bias and subjectivity that individual jurors bring into the jury room.<sup>13</sup> Recent cases have highlighted the challenge defense lawyers face in humanizing their clients in front of the jury due to the preconceived notions jurors bring to deliberation.<sup>14</sup> If allowing the capital defendant all opportunities to be humanized is a constitutional mandate, why do capital trials continue to fall short of their humanization objective? If the outcome of a capital trial can turn on the degree of humanization in jury deliberation, what procedural enhancement must capital trials go through to be an adequate bulwark against the failure to humanize the death eligible?<sup>15</sup> Thus, this article examines why humanization of a capital defendant is so important and why the law must take corrective steps to combat the failure of humanization as a systemic failure of the death penalty process instrumentality.

The death penalty is decidedly final and supremely fundamental.<sup>16</sup> Capital juries both struggle and make mistakes in imposing it.<sup>17</sup>

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criminal conduct); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (finding it cruel and unusual to pronounce death upon a defendant who was under sixteen at the time of his crime); *Enmund v. Florida*, 458 U.S. 782, 797–801 (1982) (finding it cruel and unusual to punish felony murder with death absent a showing that the defendant possessed a sufficiently culpable state of mind); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding it cruel and unusual to punish the crime of rape with death).

12. This is the key theme of my article for which I intend to explore the rationales and argue for changes in the existing instrumentalities of the death penalty process. See *infra* Parts II–IV.

13. See *supra* note 6.

14. See *infra* Part III; see also *Hughes*, *supra* note 6, at 352–57 (discussing three recent cases where the court emphasized the importance of the defense lawyer's mitigation efforts).

15. This is the main enhancement within capital trials that I seek to propose as the arguments evolve in this article. See *infra* Part IV.

16. The finality and irreversibility of the death penalty is indoctrinated throughout the Supreme Court's post-*Furman* era of capital jurisprudence. See *Furman v. Georgia*, 408 U.S. 238, 291, 293 (1972) (Brennan, J., concurring) (noting that the death penalty is vastly different than any other punishment within the criminal justice system and that the finality of a death sentence invites us to recognize that there exists an extraordinary need for reliability in the conclusion that death is the appropriate punishment); see also *id.* at 290 (Brennan, J., concurring) (“[T]he finality of death precludes relief.”); *id.* at 306 (Stewart, J., concurring) (“[Death] is unique in its total irrevocability”); *Ring v. Arizona*, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (noting that DNA evidence indicating that the convictions of numerous persons on death row are unreliable is especially alarming because “death is not reversible”); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (referencing irrevocability); *Spaziano v. Florida*, 468 U.S. 447, 460 n.7, 468 (1984) (referencing irrevocability); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (referencing irrevocability); *Woodson v. North Carolina*, 428 U.S. 280, 305 (referencing finality).

17. See Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 *IND. L.J.* 617, 643–44 (1989) (discussing application of the “community's standards” and the need for “error-minimization”).

Research on jury decision making has established the linkage between jurors' difficulty in being consistent with the inherent bias and weakness within the death penalty's structural framework.<sup>18</sup> The constitutional mandate requires that the capital jury be presented with mitigating evidence against aggravating aspects of the defendant's crime.<sup>19</sup> Mitigating evidence is introduced to assist the capital jury in evaluating the appropriateness of death on an individualized basis.<sup>20</sup> Although this is a constitutional requirement introduced within the functionality of the juror's "moral inquiry into the culpability of the individual defendant,"<sup>21</sup> such individualized assessment is designed to showcase elements of humanity within the condemned defendant.<sup>22</sup> Identifying such elements of human-

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18. See Katie Morgan & Michael J. Zydney Mannheimer, *The Impact of Information Overload on the Capital Jury's Ability to Assess Aggravating and Mitigating Factors*, 17 WM. & MARY BILL RTS. J. 1089, 1089-90 (2009) (explaining how capital juries are prone to making either sub-optimal decisions or driven to abdicate their decision making responsibility to other members of the panel).

19. See *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."); see also *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentence . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (footnotes omitted).

20. See John H. Blume et al., *Lessons from the Capital Jury Project*, in *BEYOND REPAIR? AMERICA'S DEATH PENALTY* 144, 172-74 (Stephen P. Garvey ed., 2003); see also, e.g., SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (2005) (summarizing some early findings on capital jury behavior from the Capital Jury Project by examining some nuanced behavioral patterns within jury deliberations).

21. CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* 203 (Ronald Roesch et al. eds., 2005); see also Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1544 (1998) (discussing constitutional requirements of the death penalty); see also Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 126 (2004) ("In a bifurcated trial, the sentencer was also able to put aside the question of guilt and focus freshly on evidence relevant to the appropriateness of death as punishment.").

22. The Supreme Court's legal landscape since *McGautha v. California* has changed course as death-is-different-jurisprudence has advanced through moral and constitutional debates about capital punishment. 402 U.S. 183, 183 (1971). From the beginning, the Supreme Court recognized capital punishment as lawful, as it asserted, "[t]he Constitution itself poses the first obstacle to [the] argument that capital punishment is *per se* unconstitutional." *Furman v. Georgia*, 408 U.S. 238, 418 (1972) (per curiam) (Powell, J., dissenting). Constitutional challenges to capital punishment are based on the Eighth Amendment, which prohibits cruel and unusual punishment. Despite the fact that the Eighth Amendment "has not been regarded as a static concept," *Gregg v. Georgia*, 428 U.S. 153, 173 (1996), and it draws its meaning "from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), the very fact that the Constitution recognizes the lawfulness of capital punishment has proven to be an obstacle to fully accepting this argument. As a result, post-*Furman* judgments increasingly contained arguments where we witnessed moral discourse impregnating legal analysis. See *Furman*, 408 U.S. at 285-287 (Brennan, J., concurring) (referring to human dignity); *People v. Anderson*, 493 P.2d 880, 887 (Cal. 1972) (considering the importance of the lives of the criminals sentenced to death), *superseded by statute*, CAL. CONST. art. I, § 28(d). In this context, Professor

ity is designed to assist in the capital defendant's quest for life through the process of humanization by bringing into focus the defendant's inherent human dignity. As the Supreme Court has long recognized<sup>23</sup> and as I have shown elsewhere,<sup>24</sup> such individualized findings of inherent human dignity geared toward humanizing capital defendants are a foundational pillar of the constitutional death penalty system.<sup>25</sup> Therefore, individualized assessment qualitatively distinguishes itself from other criminal sentencing in that each sentencing of death must be deliberated through the prism of a humanization framework. Despite its substantive promise being premised upon an altruistic motive, the procedural reality of individual assessment has become captive to a communal call for retribution.<sup>26</sup> During capital jury deliberation, the jury members do not set out in search of inherent human dignity, do not

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Perry notes, "The penetration of legal discourse by moral discourse is not surprising. Moral controversy is often at the center of legal controversy; in particular, controversy about whether one or another practice (abortion, homosexual sexual conduct, physician-assisted suicide, etc.) is, at least in some instances . . . legally permissible." See Michael J. Perry, *What Is "Morality" Anyway?*, 45 VILL. L. REV. 69, 70 (2000).

23. The Supreme Court's trajectory for establishing the constitutional basis of mitigating standards in imposition of death penalty was completed in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In *Lockett*, the Supreme Court overturned the petitioner's death sentence on the grounds that the legislators in Ohio failed to leave a sufficient spectrum of categories from which the right mitigating factors could be selected to either counterbalance the aggravating factors, or recognize the unique individuality of criminal defendants. *Id.* at 608. *Lockett's* attempt to form moral contours by finding appropriate law that provides unbridled judge or jury discretion can be traced back to *Furman's* endeavor to attain moral consistency in death sentencing. More specifically, the Court reasoned that, given the death penalty's finality and irreversibility, individualized analysis and due consideration is crucial. *Id.* at 604. Presenting it as a matter of constitutional law, the Court ruled that the sentencer must be allowed to consider all aspects of the defendant's background and circumstances as part of its mitigating evidence within the capital sentencing schemes and, therefore, any capital sentencing process that would "prevent[ ] the sentencer . . . from giving independent mitigating weight to aspects of the defendant's character . . . proffered in mitigation" is *per se* unconstitutional. *Id.* at 605.

24. See generally Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court's Capital Jurisprudence Post-Roper*, 45 J. CATH. LEGAL STUD. 561 (2006).

25. Post-*Furman* death penalty statutes attempted to balance individualized sentencing procedures with guided discretion. See *Gregg*, 428 U.S. at 179–180 (indicating that some thirty-five states enacted such statutes following *Furman*). Stephen R. McAllister succinctly captured the debate:

[T]he Supreme Court identified and applied two primary principles that now form the core of the Court's Eighth Amendment capital jurisprudence. These principles are that (1) the sentencer must be given specific guidance regarding how to determine when death is an appropriate sentence (the "guided discretion" principle) and (2) in making the determination, the sentencer must be permitted to consider each defendant's situation on an individual basis (the "individualized sentencing" principle).

Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 U. KAN. L. REV. 1039, 1040 (1995).

26. See generally Ghoshray, *supra* note 24; cf. Krauss, *supra* note 17, at 650–51 (arguing that



follow an objective decision making process, and do not encourage individualized dissent.<sup>27</sup> Rather, this purported democratic process is mostly a consequence of minority jury members' assent to symmetry.<sup>28</sup> Symmetry mutes the humanization process.<sup>29</sup> Thus, instead of becoming tempered with mercy, justice becomes a *de facto* vehicle for imposing societal subjectivity. Contemporary cases continue to point to capital juries' inability to objectively consider mitigating evidence, rendering their decision making process fractured and inconsistent.<sup>30</sup> This, therefore, makes imposition of the death penalty highly problematic.

The difficulty in processing mitigating evidence at trial resides at the heart of capital juries' inconsistent decision making. This is a systemic weakness. Denying the capital defendant the opportunity for life through the humanization process within the trial is against constitutional mandate. Capital juries' failure to adequately humanize the death

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trials of fact are asked to consider both aggravating and mitigating factors, and balance the two in an attempt to represent the community as a whole).

27. Inherent human dignity can be seen as the inviolable life force that makes the human person inviolable. Throughout the text, I refer to the scope and meaning of inherent human dignity to convey an authentic view of the human person. In my view, this connotes an evolving concept centering on the interplay amongst the uniqueness of the human being, the immutability of death, and the sacred nature of inherent human dignity. I call for viewing the subjectivity of the death penalty through the lens of an authentic, human-driven evaluation. The authentic vision of the human person may not comport with a justice mechanism fraught with the randomness and arbitrariness of the death penalty. Justice Brennan, in *Furman*, echoed this sentiment:

The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

*Furman*, 408 U.S. at 272-73 (Brennan, J., concurring).

28. See S. E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in *GROUPS, LEADERSHIP AND MEN: RESEARCH IN HUMAN RELATIONS* 177, 190 (Harold Guetzkow ed., 1951); see also Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority*, 70 *PSYCHOL. MONOGRAPHS: GEN. & APPLIED*, no. 9, 1956 at 1.

29. See *infra* Part II.

30. Jurors' confusion as a result of faulty instructions or partial guidance has been the driving theme in several high profile Supreme Court cases. Abramson noted that, "a substantial number of capital jurors reported that the wording of judicial instructions misled them into believing that they *must* sentence the defendant to death once they found the presence of a statutory aggravating circumstance." Abramson, *supra* note 21, at 135. In this context, Justice Marshall noted the extremely difficult position faced by capital penalty jurors as, according to him, they are given "only partial guidance" and afforded "substantial discretion." See *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985) (citations omitted). For Justice Marshall, the problem is compounded as the jury instructions make it possible for a jury to feel less responsible about a sentencing or adjudicating error if they have the knowledge that any error can be overcome during the appellate process. *Id.* at 331-32. For a detailed discussion on interjecting *Furman* arbitrariness in death sentencing by using inadequate jury instructions, see MICHAEL MELLO, *AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL* 180-95 (1996).

eligible convict is therefore a sign of weakness in the system.<sup>31</sup> Some scholars have reasoned that “a cognitive and emotional distance between [the jurors and the defendant] . . . acts as a psychological barrier.”<sup>32</sup> This makes the “genuine understanding and insight into the role of social history and context in shaping a capital defendant’s life course difficult to acquire.”<sup>33</sup> This pithy remark can be broken down into a set of component observations. First, it is important to identify factors that prevent humanization of the capital defendant. Second, humanization of a capital defendant is a complex process, which can be construed as the internalization of mitigating factors by looking through the prism of a multitude of dimensions. Third, these dimensions must be identified, and their linkages with humanization have to be understood. I propose answering a series of questions to understand this process. What creates, as Craig Haney calls, “a psychological barrier” for “genuine understanding” of the mitigating factors in a death eligible individual’s life?<sup>34</sup> What causes, as I term and shall explain later in this article, the “cognitive stress”<sup>35</sup> in developing what other scholars called the “empathic divide”<sup>36</sup> in understanding the life story of a criminal defendant? Answering these questions adequately would lead toward exploring the linkage between mitigating evidence and the humanization of a capital defendant. It is my hope that this will allow us to identify the relational factors that collectively might assist in efficiently humanizing the death eligible.

This inquiry is an attempt to understand the didactic process by which capital juries make decisions in death penalty cases. The didactic process in turn can inform us how jurors’ perspectives are both mediated and restricted by their propensity for social conformity. The phenomenon of becoming captive to this social conformity is a disturbing trend in contemporary society. Yet it has not found much introspection in con-

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31. MELLO, *supra* note 30, at 187–89 (discussing factors that Justice Marshall posited convey “substantial unreliability” in the death penalty system).

32. HANEY, *supra* note 21, at 203.

33. *Id.*

34. *Id.*

35. Cognitive stress can be defined as the difficulty or cognitive de-motivation that comes from trying to process a significant amount of subjective information. If we focus our attention to the phenomenon of cognitive stress in evidence processing by jurors, we immediately realize the differing cognitive thresholds an individual must utilize to deal with various types of evidence. Thus, human response to cognitive stress explains why an individual will be prone to seek out an alternative path to arrive at the outcome by minimizing cognitive hurdles. This could explain why, in a trial, a juror would be prone to seek more objective-centric evidence and to avoid subjective-laden evidence. This is the deduction process behind an individual juror opting or seeking to minimize uncertainty in the decision making process. For a detailed understanding of how cognitive stress affects jury deliberation, see Saby Ghoshray, *Untangling the CSI Effect in Criminal Jurisprudence: Circumstantial Evidence, Reasonable Doubt and Jury Manipulation*, 41 *NEW ENG. L. REV.* 533, 547–548 (2007).

36. See HANEY, *supra* note 21, at 203.

temporary discourse.<sup>37</sup> In my view, confronting this trend is one of the keys to understanding the roadblock toward efficient humanization of a capital defendant. I call this trend the “seduction to symmetry.”<sup>38</sup>

Understanding seduction to symmetry will require a discursive construction of the time and place of capital jury deliberations. This is important because such deliberations eventually facilitate and stymie the empathetic and emotional experience in constructing a personhood of the criminal defendant.<sup>39</sup> Thus, the journey to explore the essential ques-

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37. Despite rich diversity of research on the death penalty’s qualitative difference and the capital jury’s need to humanize the defendant, contemporary death penalty studies have not explored in much detail the relationship between jury decision making in capital cases and social conformity. This article is in response to the apparent paucity of nuanced studies to unearth the hitherto unexplored dimension of death penalty studies.

38. By seduction to symmetry, I refer to the complex phenomenon of social ordering in which majority members’ viewpoints gravitate toward a more socially acceptable side of an argument. This sociological trend manifests itself by members of the society exhibiting a predominant bias toward one side of an argument. Symmetry is unification. This unification process proceeds through cohesion amongst members’ behavioral norms and adoption to a predictable set of societal mores, where an emergence of divergence is considered dissent. In a framework where cohesion is the desired target state, any dissent threatens the originator of dissent with expulsion from the community. Thus, the seduction of/to symmetry can be seen as an enticement to a desired community, where acceptance within the community is predicated upon the member following accepted principles or proper conduct. Often, after a community is rocked by violent conduct, both a set of accepted principles and proper conduct are promulgated. Thus, often, a dissenting juror during deliberation for a capital trial is faced with a *de facto* expulsion from community should she consider not following the community’s accepted principles. Thus, seduction to symmetry is a process that can be either imposed upon an individual, or the targeted individual could be drawn to the symmetry. Individual members of the society fall victim to the seduction to symmetry for various reasons, the most significant of which is the inability to bear the cost of being in asymmetry to their environment. Symmetry is the state of being in unison with external forces or at tandem with the external environment. Asymmetry is the state of being in contradiction with the environment. This may include either being in conflict with accepted principles of the community or being in contradiction with the behavioral modes of conduct, all of which can impose various forms of cost upon the individual attempting to decouple from the symmetry. Therefore, seduction to symmetry can often be an existential response to external stimuli. Often, seduction to symmetry is a natural tendency to travel the path of least resistance, in which the agent does not incur the cost of travelling against the societal trend. In this article, I use the term seduction to symmetry and seduction of symmetry interchangeably.

39. Accepting the personhood of a death eligible criminal defendant is important because doing so may accentuate and facilitate the process of humanizing the capital defendant. In a bifurcated trial, a specific mitigating phase is designed to humanize the capital defendant such that various elements of personhood become unearthed before the deliberating jury. *See supra* note 5. Yet, this process is not so straightforward. When a person is proven to have committed violent acts, such as taking the life of another human being, the collective empathy toward such an individual tends to diminish. Especially when all available external stimuli and organizing forces surrounding a jury member continue to proclaim in unison the inhuman traits of the capital defendant, it becomes structurally difficult for an untrained juror to go against societal conformity and attach traits of human personhood. Ultimately, the process of humanization comes down to the ability of a capital juror to develop “empathy” or sympathetic feeling toward the condemned. When the juror develops a feeling of extreme antagonism toward a capital defendant for acts of violence, it creates a barrier in the cognitive construct of the juror. *See HANEY, supra* note 21. As a result, the juror is likely to fail to humanize the defendant; this cognitive barrier has been termed

tion—how one human can engage in deductively constructing the logic for the death sentence of a fellow human—must follow the complex process of excavating these interrelated issues in two distinct threads.

In the first construction, I recognize that these issues are grounded in perspectives of cultural norms,<sup>40</sup> indexed at the praxis of communal conformity.<sup>41</sup> Yet, these issues struggle within the multiple dimensions that converge at the nexus of the cultural meaning of selfhood,<sup>42</sup> conformity,<sup>43</sup> and experience.<sup>44</sup> Delineating each of these dimensions is difficult. This article attempts to navigate such a complex terrain through two distinct analyses. First, I analyze how mental confusion breeds cognitive stress. Second, I explore how cognitive stress facilitates an easier pathway, which acts as a relief mechanism to reduce such stress by resorting to seduction to symmetry.<sup>45</sup> Along the way, society constructs certain versions of persons and non-persons. Understanding this didactic process will contribute toward a better understanding of how capital juries arrive at their decisions.

In the second construction, I focus on how societal morality meets constitutional pragmatism during the jury deliberation process in capital cases. This would require us to understand how societal morality is intertwined within contemporary discussion of the death penalty. The Supreme Court had interjected societal morality within its death penalty jurisprudence as a bulwark against arbitrary imposition of the death pen-

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in literature variedly as either “empathic divide” or “empathetic divide.” *Id.* I see the two invocations of this concept synonymously. From an analogical point of view, however, I see the phenomenon where a juror develops a cognitive barrier against humanizing the capital defendant as empathetic divide.

40. By cultural norm here, I refer to the accepted principles or proper conduct that is expected of a member of the community. *See supra* note 38.

41. Communal conformity is the desired end state of an individual within the symmetrization process. Conformity is the driving force behind seduction to symmetry individual members of the society goes through. *See supra* note 38.

42. Death penalty jurisprudence is in tension between two expressive mechanisms. On one hand, the process instrumentality of fact-finding brings out the negative emotions of fear and outrage by attempting to dehumanize the capital defendant. On the other hand, the bifurcated trial’s mitigating phase attempts to bring out the positive emotions of empathy and compassion by attempting to humanize the defendant. Humanizing requires embracing and exploring the meaning of self for the capital defendant, which might conflict with the indigenous conception of the juror’s own self that has been shaped and mediated by cultural tendencies and patterns. Ultimately, a capital juror is saddled with the unenviable task of confronting such confusions and with the awesome responsibility of determining whether a fellow human lives or dies.

43. *See supra* note 41.

44. Here, I generally draw attention to the life experience the capital juror brings to the jury deliberation. Despite the nuances of legal statutes and jury instructions, capital jury deliberation is highly subjective and shaped by the individual juror’s life experience, preconceived notions, and cognitive biases. Thus, the decision capital juries make on the life or death question of a defendant is the outcome of a multi-factor analysis and results from various tendencies and experiences.

45. *See supra* note 38.

alty.<sup>46</sup> As I have examined elsewhere,<sup>47</sup> the contemporary examination and individual assessment of mitigating factors is an outgrowth of the Court's moral consciousness that has found its way into the existing constitutional process.<sup>48</sup> Thus, the process of individual assessment has become an important thread within this court-imposed moral inquiry.<sup>49</sup> Unfortunately, moral inquiry toward humanization has been relegated in favor of society's focus on conformity. This leads to the phenomenon of seduction to symmetry. This symmetry can be understood through a disconnect—the disconnect between the organically developed individual tendency to respond to internal uniqueness and the societally imposed human conditioning that prompts an individual to conform with the environment. This can also be seen as the dissonance between substantive aspiration and procedural reality. The underlying substantive theme is animated in the Supreme Court's moral consciousness that nudges the capital jury toward humanization.<sup>50</sup> Yet, procedural difficulties in the jury deliberation might allow majority jurors' point of view, in conformity with that of society, to hold sway against minority jurors' humanization attempts. Several factors can be cited for such behavioral tendencies.

First, society's mass conception of morality has become a distorted fabric made more from religious traditions and theological perspec-

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46. Although the arbitrariness of the death penalty was examined by various Justices during the post-*Lockett* era, see *Thompson v. Oklahoma*, 487 U.S. 815, 831–832 n. 35 (1988) (highlighting concurring opinions of Justices following *Furman* for the arbitrary application of the death penalty), the Court somewhat backtracked from its path of developing a moral consistency, which centered on the cruel and unusual nature of the death penalty. This is partly because the majority of Justices either did not subscribe to a human-dignity-centric value or did not engage in an “evolving standards of decency” argument surrounding the violability of human life. In part driven by the contemporary society's view on capital punishment, the majority of the Justices, except for Justice Brennan and Justice Marshall, have shied away from a morality laced, human-dignity-centric viewpoint and resorted to a pragmatic approach. For a detailed explanation of this position, see Ghoshray, *supra* note 24, at 598–99.

47. See Ghoshray, *supra* note 24, at 598–99.

48. See *id.* at 577.

49. *Id.*

50. See Ghoshray, *supra* note 24, at 566.

tives<sup>51</sup> than humanistic concerns.<sup>52</sup> Here, a failure to recognize human personhood deprives the criminal convict of his or her inherent dignity<sup>53</sup> through two pathways. First, historical practice continues to subordinate the Court's moral preference, as the Court continues to struggle toward moral consistency in adequately charting a robust contour for the death penalty.<sup>54</sup> Second, a national consensus analysis has become a *de facto* vehicle for the Court to navigate the moral contours of its death penalty jurisprudence.<sup>55</sup> This brings us to a series of interesting questions.

How can we be engaged in a moral discourse without acknowledging the vulnerabilities and weaknesses of the instrumentalities of the death penalty? Can we truly humanize the most hated and least produc-

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51. Perhaps the genesis of the death penalty can be traced to the medieval "eye for an eye" justice mechanism, premised as a driver for vengeance and retribution within the various fundamental religious values, as well as governmental systems. These aspects are important to understand because many in Christianity also support capital punishment. These aspects are described by Pollock-Byrne:

Religious ethics have been used to support and to condemn capital punishment. Old Testament law supporting the taking of an eye for an eye is used by retentionists, while the commandment, "Thou shalt not kill," is used by the abolitionists. . . . It is a telling commentary that for as long as society has used capital punishment to punish wrongdoing, critics have defined it as immoral.

JOYCELYN M. POLLOCK-BYRNE, *ETHICS IN CRIME AND JUSTICE: DILEMMAS AND DECISIONS* 140 (Roy Roberg ed., 1st ed. 1989). Authors Allen and Simonson further outlined the historical relevance of vengeance: The idea of vengeance is not new, nor is it unique in any fashion. Roughly four thousand years ago the Hammurabi Code (1750 B.C.) prescribed specific punishments for Babylonia. See HARRY E. ALLEN & CLIFFORD E. SIMONSEN, *CORRECTIONS IN AMERICA: AN INTRODUCTION* 5-6 (5th ed. 1989). Examples include: If a man knocks out the tooth of a man of his own rank, they shall knock out his tooth; If a son strikes his father, they shall cut off his fingers; If a man destroys the eye of another man, they shall destroy his eye; If a man of higher social rank destroys the eye of a man of lower rank, the man shall pay a fine. See *id.* Moving beyond the Babylonia example, there are historical codes designed with vengeance and retribution in mind. For example, modern American society was more influenced by the Laws of Moses—the Old Testament rules of conduct and penalties. These laws were specific and vengeful, recommending executions and restitution, even for conduct that, today, may seem less than serious. See *Exodus* 21:12-37 (New American) (discussing penalties for various crimes). But, it is not necessary to rely only on history to witness this retributive "eye for an eye" punishment. The retributive concept of "eye for an eye" has imprinted its mark on many Christians, and the history of retribution and vengeance within Christianity is unavoidable. This historical doctrine has influenced the modern-day Church. Perhaps, more than the actual dogma of the Church, the individual Christian reinterprets his or her personal morals to coincide with modern law and to comport with the majority opinion in vogue (i.e., pro-death penalty). Eventually, the "eye for an eye" style of punishment becomes normal among the masses by replicative legitimacy. Once this cycle is repeated over and over again, it ultimately becomes internalized as a fundamental tenet of society.

52. See POLLOCK-BYRNE, *supra* note 51, at 140 (noting that "abolitionists emphasize the 'inherent worth and dignity of each individual.'").

53. Here I draw attention to the inherent human dignity aspect that has taken a backseat within contemporary vision of morality in continuing to disburse the death penalty. See *supra* note 27.

54. See Ghoshray, *supra* note 24, at 573.

55. See *id.*

tive citizen when viewed through the prism of capitalistic distortion and seduction to symmetry,<sup>56</sup> which mediates our understanding of inherent human dignity? Can a capital jury decouple itself from the distortionary shaping effect of the collective consciousness of society? I respond to these challenges by proposing a theoretical framework. The framework explores the conceptual genesis of seduction to symmetry and the societal shaping effect.<sup>57</sup> The exploration then paves the way for an understanding of how both may impact the collective conscience of the capital jury to develop the empathetic divide that prevails between capital jurors and capital defendants. Scholars have expertly researched the empathetic divide in capital trials.<sup>58</sup> This research, however, has been done predominantly through either race-centric viewpoints<sup>59</sup> or through class-based methodologies.<sup>60</sup> This article examines empathetic divide through an examination of how society's shaping effect forces dissenting jurors toward symmetry. At the core, the current analysis is intended to shed light on why and how some capital jurors may not see capital defendants as human beings.

The objective here is to understand the praxis behind the difficulty in engaging in the humanizing process. The exploration is intended to identify how the societal forces at play may prevent capital jurors from seeing capital defendants as humans. If capital jurors are unable to view

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56. See *supra* note 38.

57. By societal shaping effect, I generally refer to the phenomenon by which an individual's perception, viewpoint, and thought process become both mediated and influenced by society. In my view, the urge to be in conformity with the societal trend is the predominant driver in shaping the needs, rationalities, and consciousness of an individual. I have examined this in detail in a forthcoming work, *Using Marcusean Framework to Understand Symmetry, One-Dimensionality and Technological Domination in Contemporary Society*. In this framework, an individual is shaped by society through a two-step process of erasure of both the internal and external history of an individual. In this regard, internal history can be described as the confluence of experiences, realities, and emotions that have formed the needs, rationalities, and consciousness of an individual. External history is the similar set of realities that are external to the individual and influential in shaping the individual's needs, etc., in a similar fashion. The weaker the internal history of an individual, the easier the symmetrization effect on an individual. For a detailed discussion of symmetry, history, and the individual, see MICHAEL LEYTON, *SYMMETRY, CAUSALITY, MIND* (1992).

58. See HANEY, *supra* note 21, at 203–09.

59. See Andrea D. Lyon, *Naming the Dragon: Litigating Race Issues During a Death Penalty Trial*, 53 DEPAUL L. REV. 1647, 1653–54 (2004) (observing that “[b]ecause of the range of discretion entrusted to a jury in capital sentencing hearings, there is a unique opportunity for racial prejudice to operate but remain undetected,” that “[m]ore subtle, less consciously held racial attitudes could also influence a juror’s decision,” and that “[t]he issue of racial discrimination in the selection of juries and the venire from which they are chosen has been difficult for the courts to grapple with”) (footnotes omitted).

60. See Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1573–74 (2004) (exploring the class-based divide in the death penalty through a nuanced description of autobiographic and ethnographic accounts of the lives of capital defendants).

the defendant as a member of the human society, then we could legitimately ask whether the process is fair—fair as intended by the Constitution. This brings us to confront the most fundamental question: When symmetry seduces individuals to become aligned in conformity with the broader community's desires, can the jury of one's peers truly engage in an individualized assessment of the appropriateness of the death penalty?

This article proceeds as follows: In Section II, I develop an understanding of empathetic divide through the prism of human cognitive construct and trace the genesis of the cognitive stress barrier against humanization of the capital defendant. In this part, I also explore the barriers to humanization through various socio-psychological factors, such as symmetry, consciousness, and cognition, to get a better understanding of the dehumanization forces at play during jury deliberation. Identifying these linkages then allows for better understanding of the difficulty in humanization through cognitive bias in Section III. This leads to an examination of how humanization is shaped and mediated by the process constructs of cognition, which leads to my detailed analysis of challenges to humanization in Section IV. Here, I explore in detail two distinct phenomena. First, I examine the role of seduction to symmetry in the jury's failure to humanize the capital defendant by developing conceptual maps of factors that drive symmetry. Second, I dissect the role of technology in contemporary society to better understand the factors at play in the capital jury room. Finally, Section V concludes with considering the U.S. Supreme Court's call for a bifurcating procedure in capital trials that may have been driven by altruistic motives, but remained inadequate as a captive of process instrumentalities that have not responded to societal conformity and seduction to symmetry.

## II. UNDERSTANDING THE EMPATHETIC DIVIDE—DEHUMANIZATION AND THE COGNITIVE STRESS BARRIER

The capital jury's difficulty in humanizing death eligible individuals is mostly a consequence of an empathetic divide found in the jury room.<sup>61</sup> This empathetic divide mostly shapes the outcome of jury deliberation<sup>62</sup> by preventing capital jurors from adequately processing all the mitigating factors.<sup>63</sup> How does empathetic divide enable the capital jury's failure in processing the available mitigating factors, such that life can translate into death? What is the genesis of such an empathetic

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61. See Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Radicalized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV., 573, 590.

62. See *id.* at 583–84.

63. See *id.*



divide? Despite announcing its existence and its causal relationship with the failure to humanize the capital defendant, social science research into the mechanics of the death penalty has not made further inroads into understanding the genesis of the empathetic divide. Responding to this failure, I develop in this section a conceptual construct to understand factors behind the capital jury's failure to overcome the empathetic divide.

Jury deliberation in a death penalty trial is about identifying a constitutionally mandated path between two competing forces. Prosecutors attempt to monsterize a fellow member of society.<sup>64</sup> Defense lawyers attempt to humanize the same individual, by combating all forces of dehumanization.<sup>65</sup> Therefore, understanding this dehumanization is a

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64. I would argue that prosecutorial interpretations of current societal trends and historical traditions of the supervising legal jurisdiction impacts the randomness of who lives and who dies—an issue that has dominated the historical trajectory of death penalty jurisprudence since the pre-*Furman* era. Often the details of the charges are not based solely on the facts of the case, but encompass a plethora of components the prosecutor must manage, from historical traditions of the locality, to expectations of the public, and even to the type of judge ruling over the case. Existing capital jurisprudence scholarship does not fully capture how various socially imposed inequities and hierarchies have created a framework whereby some murderers become death eligible more as a result of societal bias than due to the severity of the crime. Often, despite the similarity and intensity of the associated violent acts, some murderers are viewed through an altered prism that monsterizes their behavior and thus works toward facilitating the imposition of a much harsher punishment. One scholar captured this monsterization aspect of the death penalty while observing the qualitative difference in societal perceptions in distinguishing between who gets life and who is condemned to death within the context of female defendants. According to writer Katherine Dunn:

On the rare occasion when a woman has been held responsible for her actions, she's been branded a monster far more frightening than a male perpetrating the same acts. For years scholars believed female criminals were hormonally abnormal, with more body hair, low intelligence, even an identifiable bone structure. Freud thought all female criminals wanted to be men. The female criminal violates two laws—the legal and cultural stricture against crime and the equally profound taboo against violent females.

Katherine Dunn, *Just as Fierce*, MOTHER JONES, Nov./Dec. 1994, at 34, 38.

65. By all forces of dehumanization, I generally draw attention to two significant forces that defense lawyers are confronted with: a strong prosecutorial bias toward dehumanizing a death eligible convict and a systemic bias within society toward seeing a fellow member killed. While societal penchant for death has been highlighted throughout this article, prosecutorial bias must be revisited. Prosecutorial zealotry has often been transmogrified into prosecutorial bias, an area that has been well-documented within jurisprudence. See *Banks v. Dretke*, 540 U.S. 668, 675–76 (2004) (discussing prosecutorial misconduct); *Wiggins v. Smith*, 539 U.S. 510, 537–38 (2003) (finding ineffective assistance of counsel where counsel failed to investigate the accused's background and to present mitigating evidence); *Miller-El v. Cockrell*, 537 U.S. 322, 347–48 (2003) (ordering new hearing for death row inmate who had presented substantial prima facie evidence of unconstitutional race-based challenges to jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (finding error by the trial court on the grounds of faulty jury instruction by refusing to instruct the jury that, under state law, defendant would be ineligible for parole if sentenced to life imprisonment); Linda Greenhouse, *Prosecutorial Misconduct Leads Justices to Overturn Death Sentence in Texas*, N.Y.

vitaly important social obligation on the part of a capital jury because the outcome of a death penalty trial depends on who wins out: the supporters or the detractors of the humanization process.

Dehumanizing the capital defendant is as old as law itself.<sup>66</sup> Despite rich literature on the mechanism of the death penalty, a process view of how this dehumanization process unfolds in reality is somewhat muted in scholarship.<sup>67</sup> In addition, research into capital jury deliberation focuses on dynamics within the jury room. Most contemporary research does not consider jury deliberation as integral to the societal deliberation process. Recognizing jury deliberation as decoupled from a societal deliberation process may be a flawed framework. It fails to identify the impact dehumanizing forces can have on empanelled members of a capital jury. Thus, it is important to recognize that the empathetic divide does not exist in isolation, nor does it emerge spontaneously. There is a strong linkage between dehumanizing forces and empathetic divide that needs exploring.

#### A. *Dehumanization and Empathetic Divide—Understanding the Linkage*

Who lives and who dies is a measure of empathetic divide each juror develops during deliberation. This measure of empathetic divide is shaped significantly by the various dehumanizing forces that come from disparate sources and directions.<sup>68</sup> The defense's successful mitigation of the dehumanizing force is important in bridging the empathetic divide in the jury room.<sup>69</sup> Dehumanization during the fact-finding phase within a capital trial is predominantly established through procedural instrumentalities that unleash negative emotions through expressions of fear and outrage. Often it acts as a bulwark against positive emotions of empathy and compassion that the defense attempts to introduce in the later phase of the trial to humanize the defendant. Thus, process instru-

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TIMES, Feb. 25, 2004, at A14 (discussing the Supreme Court's decision to overturn death sentence because prosecutors withheld evidence that would have made jurors less likely to impose the death sentence).

66. See *supra* note 51.

67. Here I draw attention to the trend in scholarship, where the need for humanization during the mitigating phase has been discussed in detail, yet literature has been somewhat silent as to the cause for needing such humanization. See, e.g., *supra* note 6. This article points out that its systemic weakness resides within the current process of the instrumentalities of capital trial. This is seen during the fact-finding phase of a capital trial where the seeds are sown in the minds of the capital jury by an elaborate phase of dehumanization of the defendant, which becomes mostly insurmountable for the defense to overcome in the later mitigating phase.

68. See *supra* note 65.

69. See Lynch & Haney, *supra* note 61.

mentalities of the death penalty may permanently disable the humanization process. This is how it unfolds.

A juror's inability to empathize and humanize is informed by elements that are derived from the dehumanization process. The state's interest in seeking the death penalty is often tied to issues unrelated to the search for truth, a phenomenon that has been documented extensively elsewhere.<sup>70</sup> The state attempts to dehumanize the criminal defendant through various steps in the trial process that are both complex and drawn out. The longer the process goes, the easier it becomes for the dehumanization forces to effectively align themselves. Given that the capital jury is mostly chosen from the affected community, the state begins the process of indoctrinating the jury into believing the justness of the death penalty long before the defense can respond. A process of monsterization and dehumanization of the defendant gets underway through media interviews and news conferences well before the defense can examine the evidence.<sup>71</sup> Relentless emphasis on the ferocity and monstrosity of the crime and its emotional impact upon the affected injects the community at large with the requirement of capital punishment so as to be in conformity with societal norm. This is all part of the typical death penalty process. As part of process instrumentalities, these external negative expressions allow for dehumanizing forces to align effectively. Just as the unwritten social mores of being in conformity with the community's desires begin to develop, the seeds of seduction to symmetry are carefully introduced into the minds of potential jury members.

A capital jury is part and parcel of the community where the trial takes place. It is important to recognize that jury members carry the aspiration of their community. Without adequate technical training for the special considerations that must be given to a death penalty trial, a capital jury is no different from a jury for other criminal trials. Thus, a capital jury begins its responsibilities from a complex and difficult position of balancing the community's aspiration and the constitutional requirement of responding to the humanization attempts by the defendant.<sup>72</sup> Earlier I posed a question: Can society truly humanize the most

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70. See generally Norman Redlich, *Politics and The Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 *Fordham URB. L.J.* 239 (1993-1994) (examining the politics of death penalty and exploring issues other than actual crime that are often at play in the process).

71. See Haney, *supra* note 6, at 840-41.

72. This balance can become even more skewed when white jury members are considering the fate of black defendants. See William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 *U. PA. J. CONST. L.* 171, 259-66 (2001) (comparing the different perspectives black and white jurors exhibit when exposed to the same evidence).

hated and the least productive members of society? Humanization requires a deeper understanding of inherent human dignity.<sup>73</sup> By introducing moral outrage in creating a viable story of monstrosity before the trial, the state is well underway in perpetuating an asymmetric view of a dehumanized individual<sup>74</sup>—an individual that is devoid of personhood<sup>75</sup> and stripped of humanity. Humanization during the jury deliberation process thus requires the capital jury to disassociate and decouple itself from this distortionary shaping effect. Yet, as can be seen here, the shaping effect is inherent within the process instrumentalities of the death penalty. Understanding the dehumanization process is important in appreciating the difficulties faced by a capital jury.

Capital jury deliberation is about dealing with the tension between two significant forces. One comes through positive emotions of empathy by recalling the inherent human dignity of an individual attempting to humanize the defendant.<sup>76</sup> The other emerges from negative emotions of outrage and anger attempting to monsterize and dehumanize the defendant.<sup>77</sup> The system presents the jury with a herculean task of resisting from succumbing to societal conformity. Moreover, the dehumanizing forces' socially advantageous position makes it difficult for a capital jury to decouple itself from the impact of monsterization. This results in the impact of empathetic factors becoming attenuated in the minds of

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73. Inherent human dignity is, in my view, the central theme on which the right to life for all humans stands. It is indexed at the inviolability of a human person. The concept that every person has the right to life can evolve in various forms. For example, what does it mean that every person shall have the right to life? What is a "person"? When does "personhood" and life initiate? Can a human person ever forfeit the right to life? The answers to all such queries can be encapsulated by extracting the inviolability of the human person within the intersection of moral and jurisprudential discourse. I will argue that every person has the right to life and, therefore, that right is inviolable. Judicial extrapolation of this issue then invalidates all capital punishment, an outcome with which both the judiciary and legislators have yet to come to grips. In this context, Michael Perry notes, "Indeed, the proposition that every human being is inviolable (or some functionally equivalent proposition) is axiomatic for so many secular moralities that many secular moral philosophers have come to speak of 'the moral point of view' as that view according to which 'every person [has] some sort of equal status.'" See Perry, *supra* note 22, at 101 (quoting JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, & MORAL IMPORTANCE* 239 (1987)).

74. By asymmetry, I emphasize the lack of balance in presentation, as the dehumanization process is largely a function of society's outrage and the prosecutor's objective in seeing the criminal defendant dead.

75. Human dignity exists as a result of our existence, which is characterized by human personhood. Human personhood should be seen as so fundamental that it must not be dependent upon social conditions, race, class, gender, or sexuality, as human personhood cannot be earned or artificially achieved. Contemporary society, however, is able to change this by imposing value judgments on humans as the hierarchical system within society sees fit. Because the human person is the starting point for a moral vision of society, the destruction of human personhood is one of the objectives of the death penalty from the state's point of view.

76. See *supra* note 5.

77. See *supra* text accompanying note 64.

jurors. Further, as various informational dimensions mediate<sup>78</sup> and shape group thinking during the deliberation process,<sup>79</sup> empathetic divide continues to widen. This leads to the development of a cognitive stress barrier<sup>80</sup> in the minds of a subset of jurors who struggle with the moral enquiry of humanity and the presented picture of dehumanization. To succeed in humanizing the death eligible, this cognitive stress barrier must be overcome. Each juror faces an individual cognitive stress barrier, a phenomenon that we must recognize to understand how this cognitive stress barrier is causally linked to the humanization process.

### B. *Cognitive Stress—Interplay of Symmetry and Consciousness*

Each juror is required to assess mitigating factors that may have shaped and enabled the capital convict. By the time mitigating factors are presented, however, dehumanization forces have already encapsulated the juror's mind, setting the process of creating a cognitive stress barrier, while the juror is conflicted with two opposing forces representing death and life. Mitigating factors enter a juror's cognitive construct by virtue of the defense presentation. Yet for these mitigating factors to have any humanizing impact, the mitigating factors must enter deeper into a juror's consciousness. An individual is convinced of these mitigating factors' strengths in relative importance to the dehumanizing forces only if the mitigating factors enter into the individual's consciousness. Thus, for a capital juror to humanize a capital defendant, the framework of mitigation must work in such a way that the mitigating factors enter the juror's consciousness. If, however, the cognitive barrier threshold remains unperturbed, the mitigation factors fail to cross the threshold such that the humanization process does not rise to the level of transforming death to life.

In the context of life versus death, what role do mitigating factors play? In other words, given their significance in the dynamics of the death penalty, what are mitigating factors designed to create? Mitigating

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78. The current status of technology has enabled individuals in contemporary society to use any available medium, such as Twitter postings and Facebook updates, as a means of not only revealing private emotions and information about their lives, but also as a means of influencing and shaping opinions. These information updates often assume a frenzied status, where instant opinion is formulated, nurtured through instant updates and corroboration without necessarily allowing the time and space to introspect and process. Living in such a fastpaced, technology-mediated environment allows groupthink to set in and solidify. This is in part driven by the fundamental reality of that life in the twenty-first century occurs in cyberspace. *See generally* JENNIFER CHEESEMAN DAY ET AL., U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2003 (2005), available at <http://www.census.gov/prod/2005pubs/p23-208.pdf> (showing increased percentages of U.S. citizens using computers and the internet).

79. *See supra* note 28.

80. *See* Ghoshray, *supra* note 35, at 547–48.

factors must create a sociological historiographic construct of a human individual,<sup>81</sup> designed to highlight the inherent human dignity of an individual. If a jury is adequately trained to understand the rigors and complexities associated with a death penalty trial, they must be capable of understanding the individual by constructing the individual's sociological contingencies.<sup>82</sup> The sociological approach would then allow a properly trained capital jury to be informed of an individual's development by a series of constructions that sociologists called contingencies.<sup>83</sup> These contingencies include historical conditions that shaped the individual's cognitive construct, inheritances from his past that formed his individual identity, and his cognitive capacities that influence his consciousness.<sup>84</sup>

Thus, a properly constructed set of mitigating factors—when seen through the prism of historical contingencies—will allow the jury to understand an individual's identity. In this understanding of individual identity, it is important to understand the form and structure of forces that predominantly determine the sort of actions that an individual per-

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81. By sociological historiography of the human individual, I refer to the detailed process-oriented construct of a human person that captures the detailed evolution of a human person from birth. This is important for two reasons. First, I make a conscious delineation by calling this "historiography" as opposed to "history" as a way to emphasize the evaluation of the subject's background without bias or prejudice. Thus, capturing the history must be analyzed for its process integrity. Second, I call for an evaluation of a comprehensive history from birth on account of the gravitas of the scenario at play. If terminating a human life through governmental instrumentalities is being contemplated, it is highly important that construction of the history of the subject be made from birth. Such detailed construction of the death eligible individual's background should provide information regarding the individual's early exposure to trauma, deprivation, degradation, or torture that may provide a causal linkage with the individual's development of criminogenic factors. A detailed construction of history is intended to assist an adequately trained capital jury in developing a connection between such criminogenic factors and the defendant's criminality. The quality of such linkage should allow for a qualitative determination of the defendant's culpability. Furthermore, detailed historiography based on sociological construction should allow a capital jury to consider whether the violent acts of the defendant were mediated and shaped by mental health afflictions, cognitive or neurological impairments, or other disability or debilitating maladies.

82. By sociological contingencies, I refer to the theoretical paradigm that attempts to understand an individual's life trajectory through the constraints placed on the individual by virtue of his or her placement within an environment in a particular time frame. This theory posits that historical events that take place and sociological conditions that emerge in an individual's life occur by chance and are not controlled by the individual. Yet, some individual might be impacted and shaped by those historical events and sociological conditions over which the individual has no control. Reviewing sociological contingencies for a death eligible individual is important to understand whether there exists contingencies beyond the individual's control that may have impacted his or her actions that brought him or her to face the death penalty. See generally Philip E. Tetlock & Jennifer S. Lerner, *The Social Contingency Model: Identifying Empirical and Normative Boundary Conditions on the Error-and-Bias Portrait of Human Nature*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 571 (Shelly Chaiken & Yaacov Trope eds., 1999).

83. See Tetlock & Lerner, *supra* note 82, at 573.

84. See *id.*

forms in society. This in turn can shed revelatory light on an individual's culpability.<sup>85</sup> This discursive reconstruction of an individual's historical structuring based on social contingencies can effectively unveil a capital defendant's personhood; yet it is a complex process.<sup>86</sup> This requires highly nuanced and informed deliberations by construing the time, place, and history of an individual through a process akin to mapping a historical past that opens up a window into an individual's inherent human dignity.<sup>87</sup> Thus, an adequate death penalty trial is really a journey into the sociological history, through construction of historiographic contingencies.

A detailed analysis as described above requires conceptualizing sociological forces to construct an individual's personhood. This elaborate process requires moral engagement by members of a capital jury.<sup>88</sup> Unfortunately, however, sociological conditions foster the converse of what is required at a minimum. Evolving trends in society,<sup>89</sup> technologi-

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85. *See id.*

86. The central theme on which the right to life for all humans stands is the inviolability of a human person. Understanding human personhood, I would argue, is a complex process. Humanizing a capital defendant, in this context, is to internalize that every person has the fundamental right to life—the termination of such a right must go through an elaborate and cumbersome process of determination. For example, and referenced earlier, some of the most poignant questions that a juror must try to answer are: What does it mean that every person shall have the right to life? What is a “person?” When does “personhood” and life initiate? Can a human person ever forfeit the right to life? *See supra* note 73. The answers to all such queries can be encapsulated by extracting the inviolability of the human person within the intersection of moral and jurisprudential discourse, while attempting to internalize the meaning of human personhood. I will argue that this is a rather tall order for an untrained juror. If we attempt to judicially extrapolate this further, it will amount to invalidating all capital punishment, an outcome with which both the judiciary and legislators have yet to come to grips.

87. *See supra* note 27.

88. The requirement of a capital juror's moral engagement comes from two fronts. First, the qualitative difference of the death penalty calls for an exhaustive process of mitigation analysis to temper the justice process with humanization. Second, justice fundamentally calls for robust moral equity in its disbursement that requires the trier of fact and giver of punishment to be engaged morally. In this context, the normative ethical perspective of moral equity was originated by Aristotle, and defined by Rawls: “All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.” JOHN RAWLS, *A THEORY OF JUSTICE* 303 (1971). Here, Rawls' legal justice attempts to bring equitable application across all constituents, but the law's inherent deficiencies sometimes make equitable application untenable, especially in capital penalty. This, therefore, calls for developing actions that can correct the defects in moral consistency and trace a path of moral contour along the rigid lines of law that cannot be drawn without a capital jury's active moral engagement. This is what Aristotle described as moral contour formation. *See* ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 140–43 (Martin Ostwald trans., Bobbs-Merrill Co. 1962) (c. 384 B.C.E.) (noting that the law is not always equitable and not all things can be decided by law).

89. Here I draw attention to society's focus on specific issues or events that may have a significant shaping effect on the jury. Not necessarily drawn from moral engagement, this social conformity could have significant impact on whether an individual lives or dies.

cal overreliance,<sup>90</sup> and the phenomenon of seduction to symmetry<sup>91</sup> create fertile ground for moral disengagement during the jury deliberation process. This moral disengagement is the primary driver for the development of cognitive stress. Subsumed in instrumentality, buffeted by seduction to symmetry, and burdened by the community's expectation, a capital juror's tortured consciousness is incapable of dealing with such cognitive stress. Thus, the threshold remains unperturbed.<sup>92</sup> The humanization process fails to cross the vital threshold. Therefore, cognitive stress should be seen as a function of the interplay of cognitive bias,<sup>93</sup> majoritarian expectation,<sup>94</sup> and a hierarchical value system,<sup>95</sup> which eventually generates distortion in the decision making process.

Cognitive bias can be construed as the carryover remnant of societal expectation that has continued to shape a juror's decision making process even after the elaborate evaluation of mitigation process has been completed. This societal expectation is borne by the community's shaping effect and nurtured by false consciousness,<sup>96</sup> an area I have

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90. See *supra* note 78.

91. See *supra* note 38.

92. In the process of jury deliberation, cognitive stress in the mind of a juror unfolds within a spectrum, such that this stress exists within the cognitive construct and waits to impinge deeper into the conscience level. Cognitive stress can evolve in two forms, where the subject—the deliberating juror—could develop two kinds of doubt about the impending decisions. There is positive doubt or negative doubt. In the case of positive doubt, the presented evidence points equally to two outcomes: life or death. Negative doubt occurs when the individual is unable to accept an outcome without the existence of additional mitigating evidence. In other words, the individual is unable to humanize a defendant without that “clinching” evidence. In this scenario of negative doubt, the juror makes the decision to sentence the individual to death, while accepting the lack of proof about humanization. In this process, the threshold of cognitive barrier comes into play as the mitigating evidence does not impinge into the juror's conscience. This results in attaching a verdict of death, as the threshold remains unperturbed. See *supra* note 35.

93. There exists a plethora of cognitive and psychological elements at play in a criminal trial that shapes both a juror's expectations and the outcome of the criminal trial. Within the context of capital trial, cognitive bias is introduced when a particular member of the jury brings in preconceived ideologies either as a result of his or her experience with vengeance-driven justice mechanism or as a result of the community's outrage against the defendant's violent act. The issue to be examined is whether the cognitive bias is unwarranted or signals a distortion in the capital jury system and thus can rise to the level of jury manipulation. It is especially problematic if the jury rejects legitimate mitigating evidence and fails to humanize the defendant as they are infected with cognitive bias. Cognitive bias can also work within the context of the jury seeking a heightened standard of evidence. For example, seeking scientific evidence of neurological impairment or historiographic evidence of childhood trauma does not necessarily constitute a distortion in the jury decision making process owing to cognitive bias. At the end of the day, this cognitive bias is a carry-over effect of a multitude of instances borne out of the capital jury's preconditioned and predisposed environment, which calls for an elevated standard of assessment and training for convening a capital jury.

94. See *supra* text accompanying note 12.

95. See *infra* Part II.D.

96. False consciousness, for introductory purposes, can be seen as a distorted version of collective consciousness that takes root among a larger collection of humanity as a result of a



examined in detail elsewhere.<sup>97</sup> Thus, an individual juror's cognitive stress shapes his or her ability to overcome the empathetic divide, which in turn determines whether the jury fails or succeeds in humanizing the defendant. This conceptual finding calls for further examination of how social science research methods can be constructed to measure such cognitive stress.

### C. *Measuring Cognitive Stress through Perceived Distortion*

Distortion is a deviation from an expected outcome based on accepted factors in like scenarios. In this context, the idea of equality of justice is premised on the conceptual understanding that like scenarios should generate like outcomes.<sup>98</sup> When outcomes do not follow such predicted trajectories, a distortion is identified. Such distortion is highly prevalent in outcomes of death penalty trials. Jurisdictional divergences

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multitude of factors. I argue that false needs—for example, the community's collective outburst of vengeance after a violent criminal act—in conjunction with other societal forces, give rise to false consciousness. There seems to exist some controversy, however, in the conceptual distinction between false and true needs. I would concede, therefore, that as the anthropological concept of "needs" become crystallized, the degree of causality between false needs and false consciousness might change. I feel strongly, however, that notwithstanding the evolution of our understanding of "needs," the qualitative causality between false needs and false consciousness will remain a stronger one. In this context, consciousness at a preliminary or rudimentary level may be defined as an awareness of the self and the environment. This awareness calls for an individual's ability to independently react to changes in the self or the environment. By environment, I refer in general to the society in which the individual resides. In the Hegelian sense, an individual becomes aware of the distinction between the self and the environment in which the self engages in a process of discovery. During this process, the individual is expected to use tools from the environment, including "tools of reason," to interpret the objective world. In this way, the individual objectifies herself by injecting subjectivity into the discovery process, resulting in newer needs and more tools to develop a mastery of the environment. Within the context of criminal jurisprudence and the predisposition of a capital jury, the "tools of reason" could arrive from a social media driven frenzy for the blood of the criminal defendant. Clearly, external stimuli have severely impacted both the reasoning and desires of individual members that eventually construct the capital jury pool. Thus, individual human essence manifests itself by the constant struggle between the inner self and the externally imposed stimuli, the outcome of which is shaped by the machine-like repetition bereft of spontaneity, alienating the inner consciousness from the individual core. As a result, the spontaneous, free-spirited person loses her inherent consciousness, as that consciousness becomes only a means to continue the machine-like work as a byproduct of social conformity. For a detailed explanation of false consciousness, see generally Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature*, 49 SANTA CLARA L. REV. 165, 179 (2009).

97. *See id.*

98. Fundamentally, equality is premised upon ensuring that similarly situated scenarios within the justice mechanism must have similar outcomes. *See* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1868 (2002) (explaining the various implications of equality and noting how scholarship often espouses a narrower view of equality). Equality is also seen through the prism of outcome consistency, in the process viewing equality and liberty as linked. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749–50 (2011) (viewing equality and liberty as interconnected).

aside, the death penalty is one of the most highly unpredictable and immensely inconsistent processes, where lack of equality in outcomes can be attributed largely on subjective decision making by the jury. Distortions must be delineated from basic divergences, where isolated occurrences of difference or random anomalies in outcomes within the event horizon must not be recognized as distortions.<sup>99</sup>

Therefore, it is important that distortion in the death penalty's outcome be seen through the impact of inherent cognitive stress in process instrumentalities. Such distortion can be measured through statistical dispersion.<sup>100</sup> By categorizing available mitigating factors and mapping qualitative influences of each mitigating factor, it may be theoretically possible to identify what may have shaped a particular outcome. So, how do we measure jurors' cognitive stress by measuring distortion? Once a set of mitigating factors is connected to an available outcome, it is possible to construct and identify a marginal quantum of mitigating evidence. This is procedurally complex. In this article, I am restricting the discussion to developing a theoretical paradigm only, a full procedural explication of which is forthcoming.

Therefore, the process of humanization must be viewed through the complex prism of the interconnected construct of the cognitive stress barrier, perceived distortion, and the societal shaping effect. Unfortunately, analysis of humanization in capital jury deliberation has not gotten its due rigor. This is due in part to the inherent complexity of conceptualization of the construct itself. This, in my view, is one of the fundamental hurdles in recognizing and incorporating humanization in capital jurisprudence. In this context, two additional related issues require recognition at this point.

First, despite both scholarship and jurisprudence recognizing that death is different, it has not been translated from the constitutional framework into procedural instrumentalities,<sup>101</sup> requiring a newer jury

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99. For a detailed discussion of distortion, anomaly of outcomes, and statistical measure of distortion, see Saby Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Due Process in Modern Class Action Litigation*, 44 *LOY. U. CHI. L.J.* 467 (forthcoming 2012).

100. *See id.*

101. The penalty phase of the capital trial is separately considered after the adjudication of guilt, and the jury is required to hear both aggravating and mitigating evidence. Most state statutes make it mandatory for the jury to make specific findings of certain permissible, aggravating circumstances to justify the death penalty. *See Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (“[T]he Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.”) (citation omitted). Yet, by the time the second capital mitigation phase gets initiated, a majority of the jurors may have formed a firmer opinion regarding the defendant's death eligibility, and therefore, the timing of this phase may be insignificant from the defendant's point of view, which calls for an examination of how this bifurcated proceeding must be made more effective from the purported goal of humanizing a capital defendant. *See supra* note 6.

cognitive construct for the death penalty. Stated simply, while an abundance of research continues to proclaim the qualitative difference of death,<sup>102</sup> trials have not yet required a different juror cognitive construct for being eligible to be empanelled. If jury qualifications for death penalty trials are not universally delineated from the jury qualification for basic criminal trials, how can the paradigm of “death is different” be constitutionally supported by the trial process? Unless there is a heightened expectation from the capital jury, unless specialized training is given to them, contemporary death penalty trials cannot really inculcate the fundamental premise of the “death is different” framework.

Second, despite cognitive stress being highlighted in literature and its relationship in jury deliberation established,<sup>103</sup> its importance in the death penalty trial has not been established. Fundamentally, the attempt to overcome cognitive stress by reducing uncertainty typically results in a flawed interpretation of mitigating factors, merely due to inadequate understanding, characterization, and uncertainty. The outcomes in death penalty trials are often evaluated through the prism of expected variation within a system. These variations are never analyzed to identify whether there exists either a systemic weakness or inherent bias within the process instrumentalities of the death penalty. Thus, such variation is never encapsulated within a manageable quantitative process. This characterization of uncertainty within the administration of the death penalty has become a *de facto* license to give in to the arbitrariness of the process. Yet, the characterization of uncertainty connotes dissociation from objective decision making. Therefore, certain uncertainties in jury decision making must signal the need for redefining the contours of the capital trial process. Developing an adequate understanding of marginal mitigating evidence is the first step in reducing or eliminating uncertainty from the contemporary vocabulary. Marginal quantum of mitigation can be defined as that additional increase in mitigating value for a fixed quantum of aggravating evidence. Is it possible to conceptualize a marginal quantum of mitigation? How can it redefine the jury deliberation process?

It has been argued that allowing unrestricted mitigating evidence into the trial can effectively level the playing field from the asymmetric impact of admitting victim impact evidence.<sup>104</sup> Death penalty trials as measured by their outcomes signal a different reality. The constitutional-

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102. See *supra* note 10.

103. See *supra* note 35.

104. See Evan J. Mandery, *Notions of Symmetry and Self in Death Penalty Jurisprudence (With Implications for the Admissibility of Victim Impact Evidence)*, 15 STAN. L. & POL'Y REV. 471, 473 (2004) (“Defenders of victim impact evidence say that if the defendant is allowed to offer mitigating evidence of questionable relevance, the surviving victims should be able to offer

ity of the death penalty requires that consideration of aggravating evidence be structured as articulated in *Gregg v. Georgia*.<sup>105</sup> Yet there is no objective measure of whether such mitigating evidence at the later end of the chronological spectrum within a death penalty trial can effectively humanize a capital defendant. Partly derived from *Woodson v. North Carolina*,<sup>106</sup> and announced in *Lockett v. Ohio*,<sup>107</sup> the requirement that the defendant be permitted to offer any and all mitigating evidence irrespective of quality or relevance may be temporally deficient. By the time mitigating evidence enters a death penalty trial, the jury is sufficiently processed. Thus, they are more than likely to render a death sentence.

Presentation of all available mitigating evidence is recognized as indicative of procedural fairness, mainly relying on its identification as a symmetrical response to victim impact statements.<sup>108</sup> This symmetry argument, however, is fundamentally flawed. They may be reciprocal responses, but mitigating evidence and victim impact evidence are not symmetrical. One scholar noted in this context, “[t]hey rely on fundamentally different kinds of inferences, their misapplication leads to different kinds of errors, and they embrace different views of human nature.”<sup>109</sup> Therefore, the system must develop a more objective framework capable of analyzing during the trial whether the available mitigating evidence is sufficient to combat forces of dehumanization. Without such an objective measure, achieving substantive fairness in the death penalty is difficult. One way to navigate this would be to index the discussion of marginal quantum of mitigation along a dynamic pivot.<sup>110</sup> Introducing marginal quantum of mitigation can enable the judges to determine how much of the aggravating evidence or victim impact statements the jury can hear during the trial. The process should be dynamic, because the quantity and quality of evidence that either side can introduce may not be fixed *a priori*. Rather, it should be evaluated on a case-by-case or event-by-event basis.

It may be practically difficult to construe an amount of mitigation that will sway the decision in favor of life for a particular amount of aggravating evidence. Theoretically, however, we can identify the quan-

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aggravating victim impact evidence . . .”) (footnote omitted); *see also id.* at 478–82 (discussing the relevance of victim impact evidence).

105. 428 U.S. 153, 164 (1976).

106. 428 U.S. 280 (1976).

107. 438 U.S. 586 (1978).

108. *See* Mandery, *supra* note 104, at 473 (explaining that defenders of the admission of victim impact evidence and state supreme courts recognize symmetry in the admission of victim impact evidence to combat admission of the defendant’s mitigating evidence).

109. *Id.*

110. By dynamic pivot, I draw attention to the dynamic nature of indexing that must accompany an objective assessment of mitigation.

tum of mitigation that might convert a death to a life by identifying the amount that should be considered equivalent to the minimal threshold required for humanization to be effective. Following this general contour might allow us to structure a system that can construe what evidences should come in and what evidences should be left out. The idea is to develop an objective measure of relative evidence that can be utilized in a death penalty trial to provide a death eligible convict a realistic opportunity for humanization. Therefore, a quantum of marginal mitigation can be seen as that amount of mitigating evidence that when measured against the aggravating evidence, can enhance the impact of humanization to a sufficient level, such that a decision of death can be converted to a decision of life.

#### D. *Distortion of Humanization—Negative Shaping Effect*

What are the predominant factors that go against the purported objective of humanization? Or, what are the factors that would allow cognitive stress to impact jury decision making in favor of death? In this section, I want to examine the negative shaping effect that comes from a hierarchical value imposition in society. For this, the impact of technology and how it mediates and aligns all the dehumanization forces to a confluence must be understood to adequately understand the jury deliberation process. Let us look at the fundamental process at play here.

First, there exists an inherently biased hierarchical value system within contemporary society.<sup>111</sup> Despite its invocation of equality, society at large continues to operate by a hierarchical value system based on the majority's viewpoint.<sup>112</sup> As contrarian viewpoints are largely looked down upon, individuals found on the wrong side of the criminal justice process are immediately subjected to the societal value system.<sup>113</sup> This process both weakens the humanization attempt and introduces bias in the system.

Value judgments within society effectively construct the allowable contour each human is destined to traverse. Human interactions within society occur at almost every level through the mediated praxis of inherent hierarchical value-based bias. This inherent societal bias at a deeper level can also prevent members of society from moral engagement. This in turn prevents members from understanding the inherent dignity of a human person. Humanization during jury deliberation is fundamentally

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111. See *supra* note 74 (equating societal asymmetry with the imposition of hierarchy within society).

112. See *supra* text accompanying note 12.

113. See *supra* note 111.

reliant on moral engagement,<sup>114</sup> which requires a detachment from hierarchical value imposition. Moral engagement also requires a propensity toward active human interaction. Without active human interaction, the ability for humanization tends to attenuate. Let us understand how technology in contemporary society has significantly contributed to such attenuation.

Ever increasing use of technology, and our excessive reliance on it in everyday life, has created a technology-mediated society, where face-to-face interaction and frequent interaction as a behavioral norm have become increasingly muted.<sup>115</sup> Today's societal individuals are increasingly wired; relationships are formed, constructed, and mediated online. Human interaction is both mediated and shaped by technology.<sup>116</sup> Unfortunately, this development has unintended consequences, one of which is a significant decrease in human interaction within society. When communication is mediated predominantly through technological media, active human engagement gets muted.<sup>117</sup> Thus, decreasing human interaction increases moral disengagement of societal members, which effectively reduces the capacity for empathy. This leads to the development of empathetic divide between the capital defendant and the jury of his or her peers. This is a natural outgrowth of societal development. If society is constructed of elements where its members have increasingly muted their human interactions, such members may have effectively reduced their moral engagement with their peers. Thus, it is reasonable to understand why these same individuals, when empanelled within a jury, might not bring the empathy and moral engagement required for humanizing a fellow member.

Earlier we observed that aggravating factors and mitigating factors are not based only on qualitatively different inferences; they are sourced from different human emotions. The factors that constitute them are informed from qualitatively different viewpoints and are constructed to serve fundamentally different human processes. Here, the human traits, emotions, behavioral norms, and interactions are the object of inquiry. Their qualitative differences are subject to our analysis. Their relationship to capital jury deliberation is the focus of our hypothesis. Often, these two fundamentally distinguishable sets of human factors are shaped qualitatively by media. In this context, the aggravating factors

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114. See *supra* note 88.

115. For detailed explanation of this phenomenon of technology's impact on contemporary society, see generally Saby Ghoshray, *Privacy Distortion Rationale for Reinterpreting the Third-Party Doctrine of the Fourth Amendment*, 13 FLA. COASTAL L. REV. 33 (2011).

116. See *id.* at 55–56.

117. See *infra* Part IV.B.

are used to dehumanize and monsterize the defendant.<sup>118</sup> They can be effectively mediated and their impact on the jury enhanced by impersonal, technology-mediated social exchanges.<sup>119</sup> But identifying a roadmap to develop the social contingencies behind the human person identified as death eligible cannot be done through wired impersonal settings. Such construction requires empathy. Such construction is predicated upon bringing out human factors that would deeply impinge within the cognitive construct.<sup>120</sup> Thus, modern society's way of life and its technology-mediated social exchanges are heavily designed to foster the creation of such an empathetic divide, which makes dehumanization in the jury deliberation more probable than the contrary outcome of humanization.

Contemporary society's reliance on technology-mediated exchanges, manifested through social media engineered behavioral norms, acts as a fertile ground for moral disengagement.<sup>121</sup> Factors like empathy and moral inquiry require an individual to be reminded of the inviolability of human personhood.<sup>122</sup> Technology-enhanced interaction cannot replace the requisite level of human interaction. In my view, a technology-driven contemporary society, at a deeper fundamental level, is incapable of overcoming cognitive stress in most situations.<sup>123</sup> Technology-based social exchanges also introduce a perpetuation and bolstering of hierarchical imposition. Human interaction is required for developing a construct of human personhood to identify and inculcate the conception of inherent human dignity. The forces of dehumanization, however, continue to stay intact within a technology-mediated societal construction. Next, I discuss how cognitive bias presents hurdles toward effective humanization and how it unfolds during jury deliberation.

### III. HUMANIZATION THROUGH COGNITIVE BIAS

Humanization is the internalization of the mitigating forces that allow a human to overcome the empathic divide between capital defendants and capital jurors. The process of humanization gets stymied by certain factors during the jury deliberation process. Earlier in Section II,

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118. *See supra* note 64.

119. *See supra* text accompanying note 117.

120. For a discussion of how cognitive construct gets perturbed, see Ghoshray, *supra* note 35, at 553–55.

121. Here I draw linkages between lack of human interaction and decrease in moral engagement as societal morality gets superimposed on individuals.

122. *See supra* note 73.

123. *See* Ghoshray, *supra* note 35, at 548–50 (explaining the connection between cognitive stress and jury decision making).

I discussed how the alignment of dehumanization forces can mediate, and at times elevate, the cognitive stress barrier. I have also explained how technology can enhance barriers to humanization through disengagement. This immersion in technology may have the undesirable impact of reducing empathy within an individual through the process of disengagement. This in turn can enhance the empathetic divide. In this context, we must recognize another role of technology in mediating jury behavior—its role in the symmetrization effect on individual jurors<sup>124</sup>—an area I discuss later in Section IV.

Cognitive stress evolves as an outgrowth of the interplay between symmetry and consciousness. Upon entering a juror's cognitive construct, the mitigating factors cannot perturb the consciousness if they are unable to cross the cognitive barrier,<sup>125</sup> as entering at the consciousness level requires crossing the adequate threshold. As a result of a juror's societal immersion, where technology mediated social exchanges may have replaced an active human interaction, overcoming this threshold becomes difficult. This may degrade a juror's ability to respond to empathetic factors significantly, resulting in the development of cognitive stress within the juror's construct.<sup>126</sup> Thus, in a technology-mediated society, where conformity with communal norms predominate behavioral framework, cognitive stress levels remain a viable mechanism through which capital jurors continue to deliberate. Before we get into an explication of how seduction to symmetry unfolds in society and within individual constructs and its role in the jury deliberation process, let us examine the phenomenon of the cognitive stress barrier further.

Jury interviews conducted at the conclusion of a number of recent death penalty trials have revealed a disturbing trend. An increasingly significant numbers of jurors have exhibited post-sentencing remorse and have lamented upon imposition of the death penalty at various times.<sup>127</sup> These interviews have consistently highlighted the phenomenon in which jurors post-sentencing have routinely gone through discontent or sadness in their ability to stay the course of their personal views. Anecdotal research, especially in the well-known longitudinal long-term research study in the Capital Jury Project,<sup>128</sup> revealed some disturbing trends. In a significant number of cases, minority jurors overwhelmingly changed their votes from life to death. Relevant statistics reveal, if a

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124. For a discussion of how society's overreliance on technology for basic communication may have shaped members of society into a forced conformity through a massive groupthink phenomenon, see *infra* Part IV.B.

125. See *supra* note 93.

126. See *supra* note 92.

127. See *supra* note 4.

128. See Bowers, *supra* note 9.



minority jury falls below one-fourth in favoring life at the initial polling, in an overwhelming percentage of the time, those minority members change their votes from life to death. When these initial polling numbers fall between one-third and one-fourth, the frequency with which these jurors tend to change their final votes in favor of death is slightly lower, but still disturbingly more than seventy-five percent.<sup>129</sup>

Besides being humanistically abhorrent, this may signal a relative weakness within the constitutional framework of the capital jury system in death penalty trials. From a phenomenological point of view,<sup>130</sup> this can be explained by the mechanism of cognitive stress. A jury member's eventual alignment with the majority and acquiescence to the wishes of the majority members can be explained by a theoretical framework that relies on understanding how cognitive stress develops within the human mind and what triggers the release of such stress.

Cognitive stress can be thought of as a dam that is under stress as a result of a sustained downpour of rain. Under the continuous flow of water, the dam reaches a breaking point where it could either burst or the water must be released. Staying locked up for days in the jury room, minority jurors' mental framework becomes that of the internal chambers of a dam. They either require releasing the external elements of such cognitive stress, or they must acquiesce to the majority's wishes. Once again, anecdotal evidence points to a multitude of cases in which judges have repeatedly sent jury members to further deliberate on a deadlocked deliberation.<sup>131</sup>

Let us again consider some anecdotal evidence related to jury delib-

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129. See Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, at 106–111 (2010).

130. In general, the phenomenology space holds that the sense of space is the basis of all social experiences and perceptions of experiences. In this context, the context of space goes beyond the understanding of physical space, and it extends to all the perceptions and shared social experiences that are contained in that space. Here, I bring in the concept of phenomenological space to examine the social conformity and groupthink phenomenon experienced by a capital jury. The objective of my analysis here is to dissect the problem of the flawed and conceptually “false” consensus reached by a capital jury, especially when minority jurors acquiesce to a sentence of death from a different perspective than that contained in the existing discourse. See generally DAVID MORRIS, *THE SENSE OF SPACE* (2004) (detailing how phenomenological space is constructed and how it mediates individual perception and cognitive construct); see also Saby Ghoshray, *Guantánamo: Understanding the Narrative of Dehumanization Through the Lens of American Exceptionalism and Duality of 9/11*, 57 WAYNE L. REV. 163, 185–91 (2011).

131. When judges urge jurors to go back to the jury room and continue deliberating, which, as I have detailed, adds to the cognitive stress, it may lead to a finding for death. See, e.g., William Glaberson, *Jury Begins Deliberation on Penalty for Killer*, N.Y. TIMES, NOV. 5, 2010, [http://www.nytimes.com/2010/11/06/nyregion/06cheshire.html?\\_r=0](http://www.nytimes.com/2010/11/06/nyregion/06cheshire.html?_r=0) (noting that the jury was divided during deliberations in convicted killer Stephen Hayes' sentencing); Dave Gibson, *Jury Gives Stephen Hayes Death Penalty*, EXAMINER.COM (Nov. 8, 2010), <http://www.examiner.com/article/jury-gives-stephen-hayes-death-penalty> (reporting that the jury ultimately voted for death).

eration where jurors talk about being coerced into finding death post-sentencing.<sup>132</sup> Research reveals that in a significant number of cases, when a jury is deadlocked for more than a specified number of days, if the dissenting jurors fall in a specified range, in an overwhelming majority of cases those dissenting jurors have gravitated to the majority's wishes after being sent by the judges to further deliberate.<sup>133</sup> Here, economy of trial and the efficiency of the justice mechanism overwhelmingly forces only one outcome.<sup>134</sup> Time and again it has been established that when majority of the jurors favor death, the outcome is unmistakably tilted and thus must be recognized as constitutionally flawed. In such circumstances, minority jurors that dissent are put under tremendous pressure—pressure coming from both within the empanelled members and external expectations from the community. Examples from the Capital Jury Project further illustrate the dynamics of this minority jury acquiescence toward majority wishes in capital jury deliberation.<sup>135</sup> Yet the societal framework and the psychological dynamics behind such a highly successful rate of minority jury conversion from life to death has not been the subject of much research. As a result, capital jurisprudence continues to languish under *Furman*-era-like capriciousness. Therefore, it is of paramount importance to delve deeper into the mechanics of societal conformity and how it shapes capital jury deliberation. Let us examine seduction to symmetry next.

Seduction to symmetry manifests itself in this process of aligning with the majority despite internal struggles against conformity. Here, seduction to symmetry can be seen as the path of least resistance. When a capital juror is faced with a cognitive stress barrier, he or she must overcome a tremendous number of hurdles to go against the wishes of

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132. See Ashby Jones, *When Jurors Change Their Minds: The Ronnie Gardner Saga Goes On*, WALL STREET JOURNAL LAW BLOG, <http://blogs.wsj.com/law/2010/06/16/when-jurors-change-their-minds-the-ronnie-gardner-saga-goes-on/> (June 16, 2010, 6:13 P.M.) (providing anecdotal evidence of juror remorse post-verdict).

133. See Trisha Renaud, *The Biggest Bully In the Room*, THE JURY EXPERT (May 1, 2010), <http://www.thejuryexpert.com/2010/05/the-biggest-bully-in-the-room/> (chronicling a series of instances where minority jurors were bullied and pressurized to join the majority to either end deliberation or return unanimous verdict); See also Vanessa Blum, *3 'joe cool' jurors say they were pressured*, SUNSENTINEL.COM (October 2, 2008), available at [http://articles.sun-sentinel.com/2008-10-02/news/0810010492\\_1\\_gun-charges-jurors-convict](http://articles.sun-sentinel.com/2008-10-02/news/0810010492_1_gun-charges-jurors-convict) (minority juror voting for guilty after being badgered and bullied during deliberation by the majority jurors); Paul Purpura, *C-Murder jury deliberation needs investigation, Louisiana NAACP president says*, NOLA.COM/THE TIMES-PICAYUNE, (December 7, 2009, 12:02 P.M.), available at [http://www.nola.com/crime/index.ssf/2009/08/la\\_naacp\\_wants\\_state\\_supreme\\_c.html](http://www.nola.com/crime/index.ssf/2009/08/la_naacp_wants_state_supreme_c.html) (voting guilty to end deliberations after having been emotionally and physically crumbled, as evidenced by a juror who voted "just to end deliberations because of the 'brutal' pressure applied by some jurors on another juror . . . ." Another juror "wrote on a polling slip that she voted 'under duress, to get the hell out of here.'").

134. See *supra* note 131.

135. See Sundby, *supra* note 129, at 125–127.

the majority. This struggle between internal consciousness and mitigating factors, perched at the construct level, needs a way out. Here, alignment with the majority provides this way out in the form of the most desirable pathway. The process of seduction to symmetry should be analyzed from four fundamental precepts: (i) seduction to internal symmetry; (ii) seduction to external symmetry; (iii) the process of successive symmetrization leading to humanization; and (iv) the relationship between empathetic divide and overcoming asymmetry. Let us now analyze each of these factors that collectively provide us with a fuller conceptualization of symmetry.

#### IV. HUMANIZATION THROUGH THE LENS OF SYMMETRY AND SOCIAL MEDIATION

Humanization resides at the core of the mechanics of death penalty jurisprudence. As has been identified earlier,<sup>136</sup> whether an individual lives or dies depends most often on how successful the humanization process is. The factors responsible for the humanization process have been highlighted in the previous Section. There remains, however, a conceptual difficulty in adequately understanding the phenomenon of empathetic divide during jury deliberation.<sup>137</sup> This article proposes a theoretical framework constructed out of the interplay of the symmetry component with jury decision making. This symmetry helps us understand the drivers of a social psychological crowding phenomenon that affects the convergence from one state to the other during the jury deliberation process. Why do I call it seduction of symmetry? Rather, should this be seen as seduction *to* symmetry?<sup>138</sup> Let us begin by developing the conceptual parameters of the phenomenon.

##### A. *What is Symmetry?*

Understanding symmetry is important to frame the interrelationships amongst dehumanizing forces, the empathetic divide, and the shaping effect of communal conformity and how they interact with the mitigating factors presented during jury deliberation. Symmetry can be viewed as indistinguishability.<sup>139</sup> This indistinguishability is manifested

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136. See *supra* Part III.

137. Here, I remind the reader that both phrases “seduction of symmetry” and “seduction to symmetry” are used interchangeably throughout my article, as I defined earlier, see *supra* note 38.

138. See *supra* note 38.

139. In this article, I bring in the concept of symmetry to refer in general to the process of unification among the individuals. This unification process manifests itself in developing phenomena, such as uniformed assent, similarly in desires, and universality in acquired social order. I will argue that the process of symmetrization allows for the formation of universal assent within a society, thereby eliminating or minimizing dissent. This is done by the various external

by behavioral norms. It may be one of the vital ingredients in characterizing the collective behavioral norms of humans in the post-modern era. In this context, it is important to trace the antithetical relationship between symmetry and asymmetry<sup>140</sup> and how they are connected to the development of group thinking or collective decision making in jury deliberations.<sup>141</sup> It is in the nature of individual humans to want to

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agents or forces such that an individual's internal process of cognitive stress finds the path of least resistance through its external manifestation in the form of symmetry within the social fabric. Within the context of capital jurisprudence, these external stimuli or forces comprise various dehumanizing forces that have been identified in this article. For technical definition of symmetry and its manifestations, see generally LEYTON, *supra* note 57.

140. It is important to distinguish conceptually the two diametrically opposite states of being: symmetry and asymmetry. Symmetry is being in unison with external forces. Asymmetry, therefore, can be seen as being in conflict, or being in a state of turmoil with the environment. A constant state of conflict or turmoil causes cognitive stress and therefore, is not the desired status for which individuals long. From its phenomenological characteristics, asymmetry also imposes costs on an individual. Here we need to recognize that asymmetric responses to external stimuli are a function of an individual's internal history, as internal history creates a roadmap for an individual's response to external stimuli, which in turn enables an individual to dissent from the external mediating forces. Thus, if an individual is allowed to retain her internal history, and is nurtured to develop its existence asymmetric with respect to society, the chances are greater for that individual to develop dissent. This, in turn, can lead to interjecting opinions that are contrarian to the interests of the broader society that functions efficiently through symmetry, as asymmetry imposes costs on both individual and society. This is because lack of symmetry among individuals can inject diverging subjectivities, which can allow for a diverging set of consciousness among different members of society, a proposition not readily acceptable for perpetuation within society. In this context, an individual who retains her internal history is more susceptible to becoming asymmetric with respect to the greater society or environment where she resides. On the other hand, if the internal history of an individual (or a subgroup within a greater superset, for that matter) is either manipulated or erased, it becomes easier to interject a distorted sense of history into the individual. It is therefore to the benefit of a supervisory system to mediate in such a way that impact of internal history of an individual is minimized or muted to the extent possible by interjecting within the individual the seduction of being in symmetry with its environment. Therefore, the distinguishability of symmetry and asymmetry is important because individual humanity thrives on lack of symmetry. Within the context of jury decision making it is therefore important to promote dissent and diversity of opinions even at the cost of individuals incurring cost or cognitive stress—a framework that requires specialized training in death penalty deliberation. Thus, diversity of opinion and sustained dissent in the jury room is not attainable with imposed symmetry. We can interpret symmetry with minimization of humanizing, such that forced symmetry in jury deliberation can signal the departure from true humanization. In this context, it is important in practice to reduce the monolithic tendency of an individual within a symmetric social order, as it only allows for society's collective needs to proceed forward and is driven by an artificially created rationality. Individuals under the influence of such bounded rationality and socially imposed desire cannot truly deliberate as the Constitution expected that individual to do. This is because, for such an individual, societal needs have been carefully designed and sublimated into her deeper consciousness by the interjection of bounded rationality. In this existence, the individual rationalizes not only her false needs but also her requirement of symmetry within her environment, in such a way that rationality cannot extend the artificial barrier imposed upon her current consciousness. This distorted rationality is therefore a vital ingredient in perpetuating the dehumanization process that contemporary state-sponsored capital trials encourage.

141. See *supra* note 140.

belong in a community of peers. Although individuals desire to be uniquely qualified within a group setting, there is also the fear of isolation, which goes against the concept of generating asymmetry. Yet asymmetry is important for the humanization process to develop in jury deliberation because asymmetry allows for empathy to hold sway over the moral disengagement that takes place during deliberation.<sup>142</sup> Conceptually, the problem comes from the fundamental disconnect at the root level. In order for asymmetry to take a deep root over a period of time within a particular system, there has to be a causal interaction between the existing system and the second system.<sup>143</sup> Post-modern societal configuration, on the other hand, has created a set of personal and social variables that have a direct bearing on a person's perception of special restrictions and his attempt to cope with the constraints. This is an important concept to investigate further.

Stabilization and sustainability of asymmetry has been shown to require causal interaction with a second system.<sup>144</sup> Humans within a society evolve through a system that contains inherent limitations. Restrictions have historically been imposed within this system on account of time, space, and distance. In contemporary society, disconnects between time, space, and distance are being erased due to the highly successful adoption and immersion of technology.<sup>145</sup> Technology-based mediation has therefore rendered the existence of a second system virtually impossible to locate.<sup>146</sup> Therefore, the inherent process construction of the system is such that it breeds symmetrical environment rather easily. This brings in the interjection of cohesive elements to further enhance the process of symmetrization.

Cohesion in society acts as a precondition for symmetrization of its population.<sup>147</sup> In this construction, the virtues of conformity are emphasized over values of non-conformity. This dynamic underlies the deliberative process in a capital trial, where the call for conformity and desired symmetry overshadows dissent from minority jurors. Conforming to the wishes of majority has therefore become the predominant vehicle in forming consensus in the community expectation from a capital jury. Thus, whenever a particular community is confronted with violent acts of criminal behavior, every member of such community is interjected

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142. See *supra* note 88.

143. See LEYTON, *supra* note 57, at 13 ("Increased asymmetry over time can occur in a system only if the system has a causal connection with a second system." (emphasis omitted)).

144. See *id.*

145. See *infra* Part IV.B.

146. See *infra* Part IV.B.

147. See *supra* note 38 (discussing cohesion as a precondition for assent to symmetry).

with the expectation of the community.<sup>148</sup> When and if such members become part of a capital jury, their actions become both restrained and mediated by the *de facto* expectation to fulfill the conscience of community. This faulty sense of belonging and a flawed imposition of community conformity create the necessary ingredients for symmetrization of a deliberating jury. This call for communal conformity impacts several other components that eventually aid in symmetrization.

Constitutional jurisprudence nudges a capital jury toward a moral-centric deliberation before selecting death for a fellow member of the society.<sup>149</sup> This moral inquiry component of capital jury's mandate, however, becomes infected with the overwhelming and overpowering desire to carry the consciousness of the community.<sup>150</sup> The enticement to be in conformity with a community is the seduction to symmetry. In this construct, becoming an integral part of the majority confers upon such individuals the faulty sense of legitimacy, a flawed conception of validated individual identity. Fundamentally, it also allows an individual to relieve herself from the agony of confronting the cognitive stress that eventually develops as the diverging forces converge. This seduction to symmetry allows the individual to escape the courage of individual expression and personal responsibility in overcoming the empathetic divide, identified as one of the vital ingredients for the mitigating factors to work effectively in creating the process of humanization. In this way, the call for symmetry unfolds both externally, as an individual's part within the broader society, and internally, as an empanelled member during the jury deliberation process. Before we distinguish these two types of symmetry, let us analyze how symmetry works with technology in aligning the various dehumanizing forces.

#### B. *Mediation by Technology in Consolidating Symmetry in the Post-Modern Era*

Smartphones, Android, Facebook, Twitter, and iChat—each represents a dimension through which post-modern individuals communicate, exhibit emotions, and form communities.<sup>151</sup> In essence, they live their lives wired—connected, uploaded, downloaded, and streamed online. For these wired individuals, fulfilling all of the promises life has to offer often proceeds through a very informal technology-mediated trajectory

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148. Throughout this article, I explain how jurors carry with them not only personal bias, but also the community's expectation in the jury room.

149. *See supra* note 50.

150. *See supra* text accompanying notes 148–49.

151. *See, e.g., Net Impact: US Becomes a Facebook Nation*, BUS. NEWS DAILY (Apr. 6, 2011, 4:20 PM), <http://www.businessnewsdaily.com/840-facebook-smartphone-majorityamericans-online.html> (discussing the increasing use of Facebook).

in which human interactions are mostly avoided.<sup>152</sup> As a result, these members of society slowly decouple themselves from positive emotions of empathy, moral engagement and introspective moral inquiry into the social contingencies of fellow humans.

The post-modern individual's avoidance of frequent human interaction has been shaped by over use of technology. In this technology-mediated communicative paradigm, individuals gain legitimacy within society by replicating individual behaviors. Technology, by reducing the barriers of time, space, and distance has not only dismantled the external systems that could have been sources of asymmetry, it has also created a perpetual need for humans to be busy. In this flawed conception of busyness, the post-modern individual lost the sense of spacing—spacing that is needed to allow contradictory thought processes to interject, to allow asymmetric viewpoints to enter the individual construct. In this way, technology has created a replicable legitimacy within society, where the dehumanizing forces are able to crowd out the humanizing forces, a phenomenon I have explained earlier. Devoid of empathy and without human interaction and intervention, dehumanization forces can propagate efficiently. For example, in technology-driven social media, the conceptualizing of evil and capturing images of monsterization<sup>153</sup> get mediated easier than responding to the need for humanization. In this way, symmetry works together with technology in aligning various dehumanizing forces, and this continues to shape both the collective consciousness and the individual decision making for a capital jury.

### C. *Seduction to External Symmetry*

Symmetry lies at the root of the dehumanization process. By external seduction to symmetry, I refer to the socially cultivated external stimuli to which an individual juror is already exposed. By tacit imposition to acquiesce to a community's conscious and by requiring conformity to the community's wishes, the members of the jury have become distorted even before they have been empanelled. Why is this phenomenon so fundamental? Let us take a look at the symmetry versus asymmetry divide. Every individual wants to be in harmony with his or her environment, such that the individual is prone to embrace the path of least resistance.<sup>154</sup> Here, the individual is more prone to respond to assent, to be drawn to an equilibrium scenario. Here, symmetry works as an equilibrium generator, by nudging the individual toward the path of

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152. Ghoshray, *supra* note 115, at 55–56.

153. *See supra* note 115.

154. *See supra* note 139.

least resistance. Symmetry invites an individual to be part of its own framework.

The technology-driven society has defragmented the societal space in such a way that spacing has been virtually evaporated. Without this spacing, an individual refuses to be drawn into asymmetric thinking. Asymmetric thinking requires available space for dissenting and diverging thoughts to exist. Shrinking space brings in an existential crisis for contrarian viewpoints. Thus, it becomes increasingly difficult to be asymmetric. As a result, the technology-mediated lifestyle has become an all-consuming race toward symmetry. As the human interaction lessens, empathy has become difficult to be generated. Because technology attempts to redefine the boundaries of time, space, and history, it has become much easier to acquiesce to equilibrium, rather than take the path toward resistance, toward dissent—toward asymmetry. Given the current societal setting, the post-modern individual is already living in a symmetry-driven existence. Thus, it becomes difficult for the individual to respond to calls for asymmetry, even when the operating space changes or becomes restricted, including that individual who moves from the broader society into the capital jury room. Let us try to understand this linkage between two types of seductions—the seduction to external symmetry and the seduction to internal symmetry. Further, let us consider how acquiescence to one type of symmetry can confer legitimacy to seduction of the other type of symmetry.

#### D. *Seduction to Internal Symmetry—Deliberation in the Capital Jury*

The idea of humanizing a capital defendant requires taking all available mitigating factors and constructing a socio-historical roadmap of the social contingencies that reside at the backdrop forming this individual's identity. This is indeed a tall task when the symmetrizing forces are so prominent within a society. Therefore, when such societal members enter in that restricted space of the jury room mostly isolated from external influences, they become even more prone to symmetry by the influence of a stronger current of socially-mediated dehumanization forces. Asymmetry within this deliberative process cannot emerge unless some members of the jury traverse against the current of social conformity to evaluate the social contingent driven roadmap of the defendant. When the majority of jurors, however, bring community aspiration to the deliberation process, these individual minority jurors must be empowered with even stronger impulses of asymmetry. Unfortunately, asymmetry requires unique individuality.<sup>155</sup> Asymmetry also

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155. See LEYTON, *supra* note 57, at 10–16 (discussing asymmetry within the framework of the “second system”).



requires additional space for it to evolve in its phenomenological space. Others have identified this as requiring a second system with causal connection to the first, such that the already prominent seduction to symmetry can be minimized.<sup>156</sup> In reality, however, as the various existing research on jury dynamics will highlight, the deliberation process inside a jury room goes through a successive process of symmetrization. The deliberation process goes from external symmetrization to internal symmetrization in an attempt to homogenize the remaining dissenting jurors.

The road to a unanimous verdict during jury deliberation is mostly a call to symmetry. Devoid of logic, forced to communal conformity, the jury deliberation process becomes regulated by another layer of seduction to symmetry. It is important to understand this successive process of symmetrization. Sometimes symmetrization works in a multi-step process. In each step it attempts to symmetrize some members of the jury, and in each successive process, a greater set of dissenting jurors gets symmetrized. Here, each successive process of symmetrization creates a greater chance of a follow-up symmetrization, whether imposed on an additional juror or whether imposed on the same juror. Regardless of the scenario, an event of symmetrization breeds a successful follow-up of symmetrization. Because at the core, symmetrization is a race to homogenization, and it is within the drive to be part of a homogeneous whole, to be part of a cohesive unit, the post-modern individual suffering from lack of spacing is seduced into symmetry, the all-encompassing seduction to symmetry.

Understanding both the process of symmetrization and the call for social conformity provides us with a nuanced view of the contemporary capital jury deliberation process. This system must be reviewed through an adequate prism that allows us to decipher why it is difficult for a minority dissenting juror to overcome the barrier of empathetic divide. Clearly, sociological forces within contemporary technology-mediated society create a fertile environment for empathy to attenuate at the cost of failure of humanization. As I have shown elsewhere,<sup>157</sup> imposition of symmetry not only allows individual cognitive stress to be dispersed into an equilibrium setting, but also allows an individual to escape uncertainty. Since not being part of a majority may create an uncertain future for an individual, the fear of being wrong often drives an individual to commit to a position even though there is a probability that the position may be fundamentally wrong. Yet the post-modern individual, a product of a redefined concept of time, space, and distance, more often than not commits to that erroneous position. The wired individual of

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156. *See id.* at 13.

157. *See supra* text accompanying note 141.

today thus succumbs to the technology mediation to such an extent that they operate in a barrier-less continuous spectrum, so that the asymmetry of thoughts do not come into their construct. The lack of asymmetry does not force these individuals to allow their consciousness to arise above their construct. Because values of conformity are superimposed, and therefore greatly manifested over values of non-conformity, it is difficult to show the courage of individual expression.

Symmetry is succumbing to unification with others, where an individual can abdicate his or her unique responsibility. Fulfilling one's unique responsibility without society's conformity requires courage of conviction. Seduction to symmetry forces the individual to escape from this courage of individual responsibility, an act that eventually attains legitimacy through a forced democratization process of replication. As more and more individuals thrive on replicable legitimacy, they are unable to overcome the empathetic divide, which results in a collective failure to humanize the capital defendant. In this context, it is debatable whether the existing concept of sequestering the jury is necessarily a good idea. Symmetrization is accelerated in the absence of a space, time, and distance divide. It is enhanced within a narrower constriction. When jurors are sequestered, their inputs are limited, their external stimuli are constrained, and they are exposed to a much narrower set of external forces. Given the discussion above, every single capital juror comes to deliberation having been already preprocessed by an externally imposed symmetrization. Therefore, sequestration allows symmetrization within a narrower confine to continue unabated. This internal symmetrization process allows a conscientious capital juror to succumb to moral disengagement. This moral disengagement is an essential phenomenon that allows dehumanizing forces to take primacy over the humanizing urges confronted by the capital jury. In this way, symmetry plays a much greater role in shaping community expectation in the groupthink. Thus, developing an understanding of this will allow us to better develop the cognitive construct of a death-qualified jury. This understanding will then assist in adequately conceptualizing the basic parameters of such death-qualified jury, and is the first step in our effort on the humanization of a death-eligible capital convict.

## V. CONCLUSION

Prompted by its recognition of the qualitative difference of the death penalty compared to other punishments, the Supreme Court emphasized the individualized assessment of the appropriateness of the death penalty as a constitutional matter in the United States. This assessment by the Court is based on an implicit assumption that capital jurors

are capable of considering both aggravating and mitigating evidence within a particularized framework for a specific capital defendant and in the process can perform their duty without bias. Current legal and social science-based research, however, emphatically established the capital jury's inability to perform without bias, which renders the United States capital punishment procedure inherently weak and structurally defective as a system. Prompted by such observation, this article is a journey to explore the root cause of the capital jury's systemic bias.

Constitutional mandate requires adequately and appropriately conducting humanization efforts on behalf of the capital defendant, in furtherance of individualized assessment. Empathetic divide, the chasm between the jury's ability to humanize the condemned and the law's quest for the defendant's personhood, resides at the vortex of death bias in jurisprudence. Scholarship has recognized this weakness, which promoted my inquiry in this article into developing a conceptual map of this empathetic divide.

Fulfilling the constitutional promise of death penalty jurisprudence in America depends on placing the issue of humanization along a robust contour of reason and objectivity. Humanization fails without overcoming the capital jury's empathetic divide. In this article, I developed a process view of empathetic divide looking through the lens of human cognitive construct. Tracing the anatomy of this cognitive construct, this article identifies a cognitive stress barrier as the cognitive manifestation of empathetic divide that is shaped by seduction to symmetry. Further delving into the mechanics of this seduction, I identify the drivers within contemporary society that encourage assent, reject divergence of thought, and continue to proceed along the path of least resistance within a technology-mediated social exchange mechanism. This article outlines all the linkages and relationships within society that create a fertile ground for seduction to symmetry to unfold, causing a capital jury to hopelessly become captive to societal conformity. This presents almost an insurmountable hurdle for capital defendants to prevail in the constitutional matter of individual assessment of death appropriateness.

This article is about developing the conceptual map of cognitive dissonance into empathy for the capital defendant. I call for a reexamination of how the capital jury is convened and instructed in capital trial. This reexamination must recognize the two distinct issues—the qualitative difference of the death penalty and the stronger impulse of seduction to symmetry shaping the capital jury's failure to appropriately humanize the defendant. Therefore, just as death is different, so must be the training for empanelling a capital jury. Otherwise, the capital penalty in America will continue to languish in the post-*Furman*-era inconsis-

tencies, further highlighting the inherent weakness of a system that is infected with a hopeless seduction to symmetry.

Finally, in a clarion call to dissent toward asymmetry, I end with an ode on becoming human. I end with the words of a song that asks, “Are we human?”<sup>158</sup> The song, sung by the aptly named group, The Killers, has many interpretations. But upon deeper listening, the lyrics echo the arduous walk to the death chamber. An obvious somber resolve of death is heard as the defendant ultimately surrenders to fate. The rhythmic chorus quizzes, are we human?

I did my best to notice  
When the call came down the line  
Up to the platform of surrender  
I was brought, but I was kind . . .  
Are we human or are we dancer?  
My sign is vital, my hands are cold  
And I’m on my knees looking for the answer  
Are we human or are we dancer?<sup>159</sup>

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158. See The Killers, *Human*, in *Day & Age* (Island Records 2008).

159. *Id.*