Our Existential Death Penalty: Judges, Jurors, and Terror Management

Jeffrey Kirchmeier
CUNY School of Law

Recommended Citation
http://academicworks.cuny.edu/cl_pubs/153

This Article is brought to you for free and open access by the CUNY School of Law at CUNY Academic Works. It has been accepted for inclusion in Publications and Research by an authorized administrator of CUNY Academic Works. For more information, please contact AcademicWorks@cuny.edu.
OUR EXISTENTIAL DEATH PENALTY: JUDGES, JURORS, AND TERROR MANAGEMENT

Jeffrey L. Kirchmeier*

Non mortem timemus, sed cogitatio nem mortis.¹

I. INTRODUCTION

For many individuals who see the death penalty as inherently right or wrong, their positions on the death penalty are not swayed by logical debate. For example, those opposed to the death penalty on moral or religious grounds are not moved by a discussion of any arguable benefits of the death penalty over life imprisonment.

On the other side, many in favor of the death penalty are not moved by problems with the capital punishment system. Thus, a majority of Americans still support the death penalty despite revelations of innocent people on death row,³ despite systemic problems and the arbitrary application of capital punishment,⁴ despite claims of recent wrongful executions,⁵ despite a lack of evidence that the death penalty deters crime more than

---

¹ Lucius Annaeus Seneca, Epistles, 30 (13). The English translation of this quote is “We do not fear death, but the thought of death.”


³ See generally, e.g., Lawrence C. Marshall, The Innocence Revolution and the Death Penalty, 1 OHIO ST. J. CRIM. L. 573 (2004); Kirchmeier, Another Place Beyond Here, supra note 2, at 39-43.


life imprisonment, \(^6\) despite racial disparities in the use of the death penalty, \(^7\) despite the fact that governments spend much more to execute someone than it would cost to put the person in prison for life, \(^8\) despite a growing league of judges and others who question the value of capital punishment, \(^9\) and despite an expanding international consensus against counties killing their citizens as punishment for crimes. \(^10\)

These Americans who support the death penalty are the only members of society allowed to sit on capital juries. So, for lawyers and legal scholars, the question about why individuals support the death penalty is an especially important one.

The moral desire to kill heinous killers may exist at our birth or it may be taught from the time we are children. \(^11\) Professor Walter Wink has argued that society feeds us stories to perpetrate the myth of redemptive violence. \(^12\) We are taught that violence brings redemption and healing

---


8. See, e.g., Judge Arthur L. Alarcón, Remedies for California’s Death Row Deadlock, 80 S. CAL. L. REV. 697, 710 (2007) (noting study on increased costs for trial, post-conviction proceedings and housing for capital defendants in California versus those serving life sentences); Adam M. Gerrouchowitz, Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty, 41 U. RICH. L. REV. 861, 890-91 (2007) (discussing study finding that each death penalty case costs Texas three times as much as imprisoning someone for forty years and noting similar studies form California, Florida, Kansas and North Carolina).

9. See, e.g., Kirchmeier, Another Place Beyond Here, supra note 2, at 25-36, 43-48, 53-59 (discussing a large number of judges, politicians, conservatives and other prominent individuals who have taken a position against the death penalty).

10. See, e.g., AP, Rwanda Calls for End to Death Penalty, N.Y. TIMES, Sept. 28, 2007 (discussing strategy of a large number of nations to pursue a United Nations General Assembly resolution for a worldwide moratorium on executions). “The death penalty is no longer carried out in 130 countries, including the 27-nation European Union, which has fought for global abolition.” Id.


12. WALTER WINK, THE POWERS THAT BE 42-62 (1999). Professor Wink explained that the psychodynamics of portrayals of redemptive violence include that cartoons and movies allow viewers “to project onto the bad guy their own repressed anger, violence, rebelliousness, or lust, and then vicariously to enjoy their own evil by watching the bad guy initially prevail.” Id. at 49. Wink also connected redemptive violence with scapegoating. Id. at 55-56. Ernest Becker’s theories, though, in addition to explaining scapegoating, also help explain the function of redemptive violence in that these portrayals allow the viewer to reinforce one’s views that death is a controlled actor that only takes the unjust. See discussion infra Section II.
through lessons from various sources, including ancient epic tales,\textsuperscript{13} cartoons of heroes destroying villains,\textsuperscript{14} and movies such as the American Western, where a hero avenges an evil gunslinger in a hail of bullets.\textsuperscript{15} We enjoy these myths and, similarly, death penalty supporters and even some death penalty opponents feel an understandable mythic satisfaction from the concept of the justice of the death penalty.\textsuperscript{16}

If the desire for redemptive violence is bred and taught to us from birth, the goal for abolitionists to eliminate the death penalty through education may be hopeless. And if American society maintains a death penalty, these influences are present in courtrooms, and attorneys must confront these influences when they stand before the jurors and judges who favor the death penalty. Thus, attorneys who seek a full understanding of the death penalty and the urge for redemptive violence must take an interdisciplinary approach to their work.\textsuperscript{17}

\textsuperscript{13} WINK, supra note 12, at 44-48 (discussing the Babylonian creation story from around 1250 B.C.).

\textsuperscript{14} For example, where we watch Popeye suffer near defeat but then he consumes spinach to emerge victorious over Bluto by beating him. Id. at 44.

\textsuperscript{15} For example, see the recent remake of \textit{3:10 to Yuma} (Lionsgate 2007), where Ben Wade (Russell Crowe) finds redemption when he kills his former gang members. The director emphasizes that it is a moment of redemption by showing that the act is prompted by Wade looking at his gun handle, which has the image of Jesus on the cross. Although many westerns show redemption through violence, not all do, and the original \textit{3:10 to Yuma} (Columbia Pictures 1957) did not, and in the classic movie \textit{The Searchers} (C.V. Whitney Pictures 1956), Ethan Edwards finds some redemption when he chooses not to kill. See GARRY WILLS, JOHN WAYNE'S AMERICA 258-59 (1997); WINK, supra note 12, at 50.

\textsuperscript{16} See, e.g., Symposium, Rethinking the Death Penalty: Can We Define Who Deserves Death?, 24 PACER L. REV. 107, 123-24, 129, 138 (2003). See also SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 289 (1988) (stating that "popular support for capital punishment is grounded in the conviction that criminals ought to be paid back for their violent deeds").

\textsuperscript{17} While advances in science have impacted individual cases, the advances have not significantly affected the foundation of our legal system. One of the greatest scientific revelations about human beings was published by Charles Darwin on November 22, 1859 in his \textit{On the Origin of Species by Means of Natural Selection}. Yet, except for some initial decisions about social Darwinism that gave the relationship between human evolution and the law a bad name, this great discovery has had relatively little impact on our great system addressing human relations, our legal system. See Social Darwinism, in THE OXFORD COMPANION TO PHILOSOPHY 829 (Ted Honderich ed. 1995).

Similarly, other advances in understanding human relations have had little impact on how the law works, even though there have been arguments to look to scientific advances to affect legal theory. See, e.g., Laurence H. Tribe, The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics, 103 HARV. L. REV. 1, 23-39 (1989). The law can be resistant to science, as shown by the fact that despite significant advances in understanding human psychology, the test for the criminal defense of insanity used in most jurisdictions today is very similar to the one developed in the early 1800's. See Stanford H. Kadish, Fifty Years of Criminal Law: An Opinionated Review, 87 CAL. L. REV. 943, 960 (1999).

A risk exists, of course, that a mixture of law and science may be misused. In the early 1900's, Social Darwinism infected some judicial opinions, resulting in Justice Holmes upholding a compulsory sterilization plan for a "feeble minded" woman with the infamous statement, "[t]hree generations of imbeciles are enough." Buck v. Bell, 274 U.S. 200, 205-207 (1927). See Stephen Jay Gould, Carrie Buck's Daughter, in THE FLAMINGO'S SMILE 307-13 (1985). Some scholars have been critical of the mixture of science and legal analysis. See generally Laurence H. Tribe, Policy Science: Analysis or Ideology? 2 PHIL. & PUB. AFF. 66 (1972); Laurence H. Tribe, Seven Deadly Sins of
Sociologist-anthropologist Ernest Becker, in the spirit of the Enlightenment, argued for an interdisciplinary approach for understanding humans. Becker combined the ideas of Charles Darwin, Søren Kierkegaard, Otto Rank, and other great scientists and philosophers in his attempts to understand human behavior and why human beings seek violent solutions to problems. His theories address the existential problem of the inevitability of death, our knowledge of that inevitability, our attempts to give meaning to our finite lives, and the causes of violence.

Becker explained that humans are unique creatures in that we are animals with an intelligence that provides us with the knowledge of the inevitability of our death. The understanding that one will some day die and cease to exist on earth is a terror that one must manage. Such an existential terror is overwhelming if thought about consciously, so human beings push the fear of death to the subconscious and try to create illusions of immortality for themselves.

Becker theorized about what happens when people subconsciously create illusions of immortality and about what happens when one encounters another who has contrary immortality illusions. Becker reasoned that our fear of death makes us hostile, and sometimes violent, toward those who differ from us because they threaten our own immortality illusions.

These terror management theories provide insight into the legal system. In recent years, Becker’s theories have been tested by psychologists, and some experiments have considered effects in courtrooms and found that reminders of death make judges more punitive toward certain defendants. A small but growing number of law review articles that mention or discuss Becker’s theories in the legal context are being published, and
there are more books and articles in the medical community about how his theories work in the world.24

Because these terror management theories are tied to human beings’ fear of death, one logical place to apply Becker’s theories is in capital cases.25 Becker’s theories help explain why we have the death penalty, why some jurors may vote for death in some cases but not others, how judges decide cases, and how the death penalty affects everyone in the capital punishment system. Attorneys should be aware of ongoing discoveries that help explain events in the courtroom during capital punishment trials.

This Article’s goal is not to provide a definitive psychoanalysis of the death penalty but to raise questions and ideas that are worthy of further exploration for members of the legal and psychology communities. Part I of this Article provides a brief introduction into the existential theories about the fear of death, discussed, among others, by Ernest Becker. Part II discusses recent empirical terror management research. Part III gives a brief overview of the capital punishment system, and Part IV addresses how terror management affects capital trials. The terror management theories and experiments provide an important understanding of the subconscious influences upon jurors. Next, Part V considers the post-trial terror management impacts on other participants in the legal system such as judges, attorneys and defendants. Part VI suggests how attorneys and judges should work to lessen the death-denial influences in capital cases because these existential influences contribute to the arbitrariness of the application of the death penalty. That section also proposes some ideas for


25. Some other legal areas where Becker’s theories may apply include cases involving civil responsibilities for death, non-capital homicide cases, questions of how to deal with surviving children and possessions of the dead, assisted suicide, and termination of life support.
further experiments that would be helpful to understanding the terror management effects in a legal setting. The conclusion appeals for more education in the legal community and for further interdisciplinary study in the scientific community.

II. EXISTENTIAL THEORIES ABOUT THE RELATIONSHIP BETWEEN LIFE AND CONSCIOUSNESS OF DEATH

The cultural anthropologist Ernest Becker addressed questions about human behavior in several books, including The Denial of Death, which won the Pulitzer Prize. Becker believed in seeking an interdisciplinary understanding of human beings, and his analysis built upon the works of Sören Kierkegaard, Martin Heidegger, Sigmund Freud, Otto Rank, Karen Horney, Paul Tillich and others. His work followed in the footsteps of these and others who sought a deeper understanding of human motivations.

Becker built upon ideas from evolution and existential philosophy, both areas that relatively recently have spawned branches of psychiatry named after them. Becker and the evolutionary psychologists use the foundations developed by Charles Darwin, who revealed how human beings and their motivations have evolved throughout history.

Becker’s work also has a close relationship with the existentialist philosophers who explained how humans seek to give meaning to their lives and define themselves by their choices in life. Although there is no one

26. This section provides an overview of some of Ernest Becker’s work and of some of the theories underlying terror management theory. It is meant to provide a foundation for the legal analysis of this Article and is not meant to be an exhaustive discussion of existential philosophy or psychology.

27. See generally BECKER, THE DENIAL OF DEATH (1973). The Denial of Death built upon Becker’s previous works, including Birth and Death of Meaning and Angel in Armor. See generally ERNEST BECKER, THE BIRTH AND DEATH OF MEANING (1962); ERNEST BECKER, ANGEL IN ARMOR (1975); and ERNEST BECKER, ESCAPE FROM EVIL (1975).


29. The various writers are not discussed in-depth here, but see Ernest Becker’s writings for further discussion of some of these writers. For example, he discussed how “Kierkegaard’s whole understanding of man’s character is that it is a structure built up to avoid perception of the ‘terror, perdition [and] annihilation [that] dwell next door to every man.’” (brackets in original) BECKER, THE DENIAL OF DEATH, supra note 27, at 70 (quoting SøreN KIERKEGAARD, THE SICKNESS UNTO DEATH (1849)). See generally KAREN HORNEY, NEUROSIS AND HUMAN GROWTH (1950) and PAUL TILLICH, THE COURAGE TO BE (1950).


31. See, e.g., S.E. FROST, JR., BASIC TEACHINGS OF THE GREATEST PHILOSOPHERS 266 (1962) (noting existentialism’s “concern with reconciling man with the necessity of death”). Although not all philosophers who are labeled existentialists agree, Jean-Paul Sartre explained that “existence precedes essence,” meaning that “man exists, turns up, appears on the scene, and only afterwards, defines himself.” JEAN-PAUL SARTRE, EXISTENTIALISM, reprinted in BASIC WRITINGS OF EXISTENTIALISM 345 (Gordon Marino ed. 2004).
definition of existential philosophy, the existential crisis each human faces is the search for meaning in life and the realization that each individual is responsible for giving meaning to her or his life. Existential psychologists work to help people take control of their life choices.  

Becker elaborated on this existential dilemma and the quest for meaning that results from the human realization that one is housed in a decaying body that one day will die. Becker and others have recognized that this terrible realization — that you and everyone you know will die -- must impact the lives of humans, who also have evolved to have “a biological proclivity for self-preservation.”

A. The Terror of Being Human

In Denial of Death, Becker argued that a primary motivation for human actions is the “all-encompassing fear of death,” which drives one “to attempt to transcend death through culturally standardized hero systems and symbols.” The foundation for his theories is that humans have a special self-consciousness that puts us above other creatures while at the same time we are mortal like all other life: We have “an awareness of [our] own splendid uniqueness” because we protrude “out of nature with a towering majesty,” but we return “into the ground a few feet in order blindly and dumbly to rot and disappear forever.” While other animals live and disappear with thoughtlessness, humans “live a whole lifetime with the fate of death haunting one’s dreams and even the most sun-filled days.”

The human anxiety that Becker addressed is not just about death alone. The terror of being human occurs also because of the conflicting realiza-

32. See, e.g., EXISTENTIAL PSYCHOLOGY (Roy May et al. eds., 2nd ed. 1996). “[T]he sixties saw the emergence of an existential school of psychology. The works of Rollo May, Viktor Frankl, and Ludwig Binswanger are the most representative of this movement, which focuses on helping the individual to own his or her own choices.” Gordon Marino, Introduction, in BASIC WRITINGS OF EXISTENTIALISM xv (Gordon Marino ed. 2004).
34. BECKER, ESCAPE FROM EVIL, supra note 27, at xvii.
35. BECKER, THE DENIAL OF DEATH, supra note 27, at 26. Some scholars note that as the intelligence and self-consciousness evolved in human beings to provide adaptive advantages in a societal lifestyle, human awareness of mortality developed as a by-product. Solomon et al, supra note 19, at 6. Subsequently, humans who adopted cultural worldviews that helped them cope with the anxiety of death developed an evolutionary advantage. Id. at 18-19. “Archaeological evidence, theory and research from evolutionary psychology, anthropology, and cognitive neuroscience converge in support of the assertion that humans ‘solved’ the problems associated with the realization of their mortality by the creation of uniquely human cultural affections, including art, language, religion, agriculture, and economics.” Id. at 19.
36. BECKER, THE DENIAL OF DEATH, supra note 27, at 27. Becker also addresses how children must struggle as they develop this awareness of the high expectations that they be above the animals while also dealing with their animal bodily functions. See id. at 28-46.
tion that although as humans we are special and intelligent, our finite lives consist of grotesque bodily functions.\textsuperscript{37} We face “the human paradox” of being a creature that is an animal who also knows its animal limitations.\textsuperscript{38} As a human, one must face the ambiguity and powerlessness “to be straightforwardly an animal or an angel.”\textsuperscript{39}

This “condition of individuality within finitude”\textsuperscript{40} creates anxiety and several problems for humans.\textsuperscript{41} As Becker explained in discussing Kierkegaard: “This is the terror: to have emerged from nothing, to have a name, consciousness of self, deep inner feelings, an excruciating inner yearning for life and self-expression – and with all this yet to die.”\textsuperscript{42} Like J. Alfred Prufrock in T.S. Eliot’s poem, we cannot escape our awareness and become “a pair of ragged claws.”\textsuperscript{43} These realizations and their accompanying terror contribute to the many psychological problems that face human beings, such as depression, fetishism, and schizophrenia.\textsuperscript{44}

To survive with this terror, humans push the overwhelming terror of death to the subconscious.\textsuperscript{45} Then we deal with the subconscious knowledge of our mortality by seeking immortality in various ways, some healthy and some not healthy. The terror of life overwhelms humans, so all humans seek some type of illusion to survive.\textsuperscript{46} “The prison of one’s character is painstakingly built to deny one thing and one thing alone: one’s creatureliness.”\textsuperscript{47}

To deal with the knowledge of mortality, humans search for meaning in their lives, for self-esteem, and for the illusion of immortality. Mortal humans create cultural symbols that do not age or decay that allow them to attach themselves to immortal symbols, thus, providing a protection against death.\textsuperscript{48} They strive toward heroism and create immortal works of art. The subconscious fear of death drives humans to build buildings,

\textsuperscript{37} Id. at 87. “Man is literally split in two: he has an awareness of his own splendid uniqueness in that he sticks out of nature with a towering majesty, and yet he goes back into the ground a few feet in order blindly and dumbly to rot and disappear forever.” Id. at 26.

\textsuperscript{38} Id. at 87. Becker quoted Kierkegaard as stating that humans are a “synthesis of the soulish and bodily.” Id. at 69.

\textsuperscript{39} Id. at 69.

\textsuperscript{40} BECKER, THE DENIAL OF DEATH, supra note 27, at 26 (emphasis in original).

\textsuperscript{41} Id. at 49-58. Thus, a problem is that humans are “gods with amuses.” Id. at 51.

\textsuperscript{42} Id. at 87.

\textsuperscript{43} “I should have been a pair of ragged claws/ Scuttling across the floors of silent seas.” T.S. Eliot, The Love Song of J. Alfred Prufrock, in THE HARPER ANTHOLOGY OF POETRY 558 (John Frederick Nims ed., 1981).

\textsuperscript{44} See, e.g., BECKER, THE DENIAL OF DEATH, supra note 27, at 208-52.

\textsuperscript{45} See IRVIN D. YALOM, LOVE’S EXECUTIONERS 6 (2000). “We know about death, intellectually we know the facts, but we—that is, the unconscious portion of the mind that protects us from overwhelming anxiety—have split off, or dissociated, the terror associated with death.” Id. at 5-6 (emphasis in original).

\textsuperscript{46} BECKER, THE DENIAL OF DEATH, supra note 27, at 202.

\textsuperscript{47} Id. at 87.

\textsuperscript{48} BECKER, ESCAPE FROM EVIL, supra note 27, at 3. Becker explained that what people really fear “is not so much extinction, but extinction with insignificance.” Id. at 4 (emphasis in original).
write books, work for corporations, follow political and religious leaders, join organizations, accumulate money, buy large houses, attach to sports teams, write law review articles, etc. \(^{49}\) Humans may also drink and drug themselves to relieve their existential angst, or they shop. \(^{50}\)

At the end of *Denial of Death*, Becker offered advice to our species: Whatever humans do “on this planet has to be done in the lived truth of the terror of creation, of the grotesque, of the rumble of panic underneath everything. Otherwise it is false.” \(^{51}\) Thus, knowledge is the key. Each individual must consciously seek healthy repressions or illusions in finding some type of “cosmic heroism” that is beneficial and not destructive. \(^{52}\)

Although Becker gave special context to his solution, similar advice has been dispensed through the ages. Existential philosophers concluded that “[t]he most powerful inducement for us to adopt a personally valid, self-directed life is the acknowledgment of our personal death.” \(^{53}\) To go back more than two thousand years, Pindar advised: “Desire not thou, dear my soul, a life immortal, but use the tools that are to thine hand.” \(^{54}\) To put it in more modern terms, in a recent popular country music song, a dying friend counseled the singer, “Some day I hope you get the chance/To live like you were dying.” \(^{55}\)

\(^{49}\) *Id.* The connection between the accumulation of money and the seeking of immortality was recognized more than 3000 years ago in the *Upanishads*. See *The Brihadaranyaka Upanishad* 4.2, *in The Upanishads* 35 (Eknath Easwaran trans. 1992) (stating “My lord, if I could get all the wealth in the world, would it help me to go beyond death?”).

\(^{50}\) *Becker, The Denial of Death*, supra note 27, at 284. See also Albert C. Lin, *Virtual Consumption: A Second Life for Earth?*, 2008 B.Y.U. L. REV. 47 (stating “[b]untu[ndash]put, ‘possession and consumption are thinly veiled efforts to assert that one is special and therefore more than just an animal fated to die and decay’”). (quoting Sheldon Solomon et al., *Lethal Consumption: Death-Denying Materialism*, in *PSYCHOLOGY AND CONSUMER CULTURE: THE STRUGGLE FOR A GOOD LIFE IN A MATERIALISTIC WORLD* 134 (Tim Kasser & Allen D. Kanner eds., 2004). All humans have to deal with the reality of the fact they are mortal animals, but not all ways of dealing with the reality are harmful. In addition to some of the coping mechanisms discussed here, the fear of death may play a role in mental illness. “Concerns about mortality play a significant role in the etiology of a variety of forms of psychopathology, including schizophrenia, neuroticism, depression, obsessive-compulsive disorder (OCD), and posttraumatic stress disorder (PTSD).” *In the Wake of 9/11: The Psychology of Terror* 192 (2003) [hereinafter “In the Wake of 9/11”].

\(^{51}\) *Becker, The Denial of Death*, supra note 27, at 283-84. “Whatever is achieved must be achieved from within the subjective energies of creatures, without deadening, with the full exercise of passion, of vision, of pain, of fear, and of sorrow.” *Id.* at 284.

\(^{52}\) *Id.* at 284-85.

\(^{53}\) Leonard L. Martin et al., *The Roar of Awakening: Mortality Acknowledgment as a Call to Authentic Living*, in *HANDBOOK OF EEP*, supra note 19, at 435. “This acknowledgment provides us with both the insight and the urgency we need to define our essence through active choices based on passionately chosen personal values rather than inappropriately internalized cultural values.” *Id.*


B. Scapegoating and Attempts to Destroy Evil

Becker expanded upon the theories from Denial of Death in Escape from Evil, which was published after his death. This last book of his clarifies the impacts of the subconscious fear of death upon our society, and it provides a foundation for some of the current research about violence and hatred in society.

In Escape from Evil, Becker explained that when human beings subconsciously attach themselves to immortality symbols to address their fear of death, “a new kind of instability and anxiety are created.” Each society creates its own culture as an immortality device for its members. So, in order to survive and live in the face of certain death, humans must convince themselves that they will create or belong to something that is immortal. These defenses against the terror of the world and our fear of death have been called “our heroic projects” in our attempt to destroy evil.

In human beings’ subconscious quest for immortality to overcome the terror of death, however, they must oppose belief systems that threaten their own immortality belief systems. If my belief system protects me from the dread of death, your belief system threatens my protection. In response, to save my protection, I must destroy yours. As explained by Ivan Kamamazov in The Brothers Karamazov, people demand others to “[p]ut away your gods and come and worship ours, or we will kill you and your gods!” This quest for immortality and opposition to those who threaten our immortality illusions, result in “scapegoating” of others and

56. Becker, Escape from Evil, supra note 27, at xv.
57. Id. at 5.
58. Id. at 124-25. “[C]ultures are fundamentally and basically styles of heroic death denial.” Id. at 125 (emphasis in original).
- Our desire to merge with a larger whole, to dedicate our lives to a higher cause, to serve cosmic powers makes it easy for ambitious leaders to use. Some Adolf Eichmann. Lt. Calley, Hutu tribesman, or Serbian nationalist who wants desperately to do his duty and belong, can always be found to carry out the bloodier aspects that are necessary for a ‘final solution’ to the problems of evil.
- Id. at 7.
60. Id. at 4. But “[o]ur heroic projects aimed at destroying evil have the paradoxical effect of bringing more evil into the world.” Id.
62. This reasoning helps explain Western culture’s myth of redemptive violence, i.e., the idea presented in popular culture and movies that violence saves us and corrects the ills of the world. See generally, Wink, supra note 12, at 50.
63. Fyodor Dostoevsky, The Brothers Karamazov 282 (Constance Garnett trans. 1996). Ivan explains, “This craving for community of worship is the chief misery of every man individually and of all humanity from the beginning of time. For the sake of common worship they’ve slain each other with the sword.” Id. (emphasis in original).
much of the evil in the world. As scholar Sam Keen summarized, “The root of humanly caused evil is not our animal nature, not territorial aggression, not even innate selfishness, but is the need to gain self esteem, to deny mortality, and achieve a heroic self image.”

Becker explained that various types of killing result from the subconscious fear of death: killing allows us the illusion of controlling what we fear. The Roman arena games showed “the ultimate personal control of death.” Similarly, one reason that war exists is because a nation must represent victory and immortality for its citizens. Humans are able to deal with the subconscious fear of their rotting bodies and death by believing they are attached to their immortal and pure country. By going to war, they control death. Thus, evil results by seeking to triumph over evil. A human “is a frightened animal who tries to triumph, an animal who will not admit his own insignificance, that he cannot perpetuate himself and his group forever, that no one is invulnerable no matter how much of the blood of others is spilled to try to demonstrate it.”

One of Becker’s influences was psychologist Otto Rank, who was one of the first “to incorporate existentialist concepts into a broad theoretical conception of human behavior” and to theorize about the role of fears of life and death. Recent writers who have explored these theories include Erich Fromm, Robert Jay Lifton, and Irvin Yalom. Today, experimental psychologists who have been inspired by Becker’s works are performing experiments to prove his theories. As discussed in the next section, these

64. BECKER, ESCAPE FROM EVIL, supra note 27, at 108-14.
66. BECKER, ESCAPE FROM EVIL, supra note 27, at 110.
67. Id. at 117. For example, in William Shakespeare’s Henry V, to rally his troops to battle, King Henry tells them that they will achieve immortality: “And Crispin Crispian shall ne’er go by./ From this day to the ending of the world./ But we in it shall be remembered --/ We few, we happy few, we band of brothers.” WILLIAM SHAKESPEARE, THE LIFE OF HENRY THE FIFTH act IV, sc. 3 (1918).
68. BECKER, ESCAPE FROM EVIL, supra note 27, at 115.
69. “[E]vil rests on the passionate person motive to perpetuate oneself, and for each individual this is literally a life-and-death matter for which any sacrifice is not too great, provided it is the sacrifice of someone else and provided that the leader and the group approve of it.” Id. at 122.
70. Id. at 151.
71. Tom Pyszczynski et al., Experimental Existential Psychology, in HANDBOOK OF EEP, supra note 19, at 6. See BECKER, THE DENIAL OF DEATH, supra note 27, at 152 (stating that “[t]he strength of Rank’s work, which enabled him to draw such an unfailing psychological portrait of man in the round, was that he connected psychoanalytic clinical insight with the basic ontological motives of the human creature”).
72. Pyszczynski, supra note 71, at 6. Dr. Yalom has identified “four basic concerns that he believes exert enormous influence on all people’s lives: death, freedom, existential isolation, and meaninglessness.” Id. See also generally IRVIN YALOM, LOVE’S EXECUTIONERS & OTHER TALES OF PSYCHOTHERAPY (2000).
experiments also have begun to explore the relevance of these theories for the legal system.

III. RECENT TERROR MANAGEMENT THEORY EXPERIMENTS APPLICABLE TO THE LEGAL SYSTEM

More than 300 studies in the area of experimental existential psychology have shown that Ernest Becker’s theories apply in the real world. Some psychologists have built on Becker’s writings with research to support what they call “Terror Management Theory” [“TMT”]. This theory claims that the combination of the animal biological predisposition toward self-preservation with “the uniquely human awareness of the inevitability of death gives rise to potentially overwhelming terror.”

As explained in the previous section, to address this terror, humans construct “beliefs about the nature of reality that infuse individuals with a sense that they are persons of value in a world of meaning, different from and superior to corporeal and mortal nature.” Because our world views and cultures protect us from our fear of death, those with different world views and cultures threaten those protective devices. Thus, people respond to those with different views by conversion of the outsiders, derogation of the outsiders, assimilation of the outsiders, accommodation of the outsiders, or annihilation of the outsiders.

Many of the studies use similar techniques. The psychologists provide one group of subjects with subtle reminders of death – or mortality salience – and then note the differences in behavior between that group and a control group. This technique of “priming” subjects by giving them an exercise or survey that plants subconscious ideas that affect behavior is

73. See Terror Management Theory: The Theory, http://www.tmt.missouri.edu/index.html. See also Solomon et al., supra note 19, at 22; Jamie Arndt et al., Understanding the Cognitive Architecture of Psychological Defense Against the Awareness of Death [hereinafter Understanding the Cognitive], in HANDBOOK OF EEP, supra note 19, at 36. A full understanding of the psychology of Terror Management Theory is beyond the scope of this Article. The goal of this Article is to raise awareness about the effects of death reminders in capital cases, to discuss some strategies, and to encourage further research with collaboration between members of the bar and the mental health profession.

74. The name “Terror Management Theory” is a somewhat misleading name because the theory for the most part is about the anxiety of individuals and not about international terrorism. Adding to the confusion is the fact that a leading book on Terror Management Theory does feature a large discussion of connections between TMT and the terrorist attacks of 9/11. See IN THE WAKE OF 9/11, supra note 50, at 27.

75. Id. at 27. Studies have shown that reminders of other unpleasant experiences besides death, such as pain, do not have the effects that reminders of death do. See Mark J. Landau et al., On the Compatibility of Terror Management Theory and Perspectives on Human Evolution, 5 EVOLUTIONARY PSYCHOL. 476, 505 (2007).

76. In the WAKE OF 9/11, supra note 50, at 27.

77. Id. at 29-34.

78. The greatest effects occur when the reminders of death are subtle and when the reminders are no longer in a person’s active memory. See IN THE WAKE OF 9/11, supra note 50, at 56, 58.
often used by experimental psychologists. 79 For example, one study of 190 participants revealed that after mortality salience, people showed increased preference for a charismatic political candidate. 80 A similar study concluded that post 9/11 reminders of death may have affected the 2004 U.S. presidential election. 81 One study found that U.S. participants who were reminded of death were more likely to blame a Japanese car manufacturer for an auto accident than those who were not reminded of death. 82 Another study found that mortality salience reduces commitment among romantic partners when the partners have different worldviews. 83

Terror management theory "proposes that the uniquely human awareness of mortality is a ubiquitous concern that plays an important role in virtually all forms of human behavior and underlies the development and maintenance of culture and self-esteem as the primary means by which the fear of death is ameliorated." 84 The confrontation with death is not necessarily conscious for many people, and studies show that subconscious death concerns may be activated by such seemingly unrelated topics as awareness of one’s own bodies, encounters with nature, abandonment by intimates, or an inability to identify with one’s own social group. 85

The studies have found that a person’s behavior is affected by mortality salience where (1) the reminders of death are subtle, 86 (2) the reminders make one think of one’s own death; and (3) there is enough time so that

79. See, e.g., MALCOLM GLADWELL, BLINK 52-61 (2005). For an example of where the technique is used to prime an idea besides mortality, one study found that requiring subjects to compose sentences with words about politeness or rudeness affected the patience of the subjects. Id. at 53-55.
84. Solomon et al., supra note 19, at 28.
85. Sander L. Koole et al., The Best of Two Worlds: Experimental Existential Psychology Now and in the Future, in HANDBOOK OF EEP, supra note 19, at 498.
86. Because the Terror Management Theory effects occur in response to how humans deal with subconscious fears of death and not conscious fears of death, subtle mortality salience has greater effects than stronger reminders of death. See IN THE WAKE OF 9/11, supra note 50, at 56.
the reminders are pushed to the person’s subconscious. 87 If the person is consciously thinking about her or his own death, the mortality salience does not have a significant effect. 88

Studies have used different settings to find significant effects of mortality salience. In one study, participants were put in a room and asked to sift sand out of black dye, and the only way to do so was to sift the sand by pouring the black dye through a cloth. 89 For some participants, the cloth in the room was a white cloth, and for others, it was a small American flag. 90 Terror management theory predicts that after mortality salience, individuals would be less willing to degrade a cherished cultural symbol like the American flag. 91 The results were consistent with that theory as participants who had been reminded of death and put in the American flag room took longer to complete the task than those who had not been reminded of death, while there was no similar difference in the room with the white cloth. 92 A similar study, which asked participants to hang a crucifix when the only device to pound a nail into the wall was the crucifix, had similar findings. 93

Other studies have used legal settings and found that mortality salience makes participants more punitive. 94 Twenty-two municipal court judges in Tucson, Arizona participated in one study. 95 The judges believed the purpose of the study was to examine the relationship between personality

87. “The findings of these studies . . . suggest that worldview defense occurs after death has been made salient but only when concerns about mortality are no longer in active memory when dependent measures are assessed.” Id. at 58.

88. “The fact that both increased defense of the worldview and increased accessibility of death-related thoughts emerge after a delay and distraction suggests that terror management effects emerge when the problem of death is high in accessibility but nonetheless outside current focal consciousness.” Id. at 59.

89. Id. at 51.

90. Id. at 51-52.

91. In the Wake of 9/11, supra note 50, at 52.

92. Id. Another study found that reminders of death made individuals more likely to contribute to a charity supporting an American cause but no effect on the amount of money given to a foreign cause. See Eva Jonas et al., The Scrooge Effect: Evidence that Mortality Salience Increases Prosocial Attitudes and Behavior, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1342, 1351 (2002) (concluding that “supporting one’s own culture’s own causes might serve a protective function against the human fear of death and annihilation”).

93. In the Wake of 9/11, supra note 50, at 51-52. “[F]ollowing mortality salience and needing to inappropriately use the crucifix and American flag to solve the problems, the students took twice as long to complete the problems and reported substantially more negative feelings about undertaking them [compared to students who were asked to think about television instead of death],” Id. at 52.

94. “There is . . . a growing body of research conducted in a variety of independent laboratories demonstrating that intimations of mortality increase punitive judgments toward lawbreakers.” Jamie Arndt et al., Terror Management in the Courtroom: Exploring the Effects of Mortality Salience on Legal Decision-Making, 11 PSYCHOL. PUB. POL’Y & L. 407, 422 (2005). Professors Arndt, Cook, Lieberman and Solomon list twenty-two terror management studies done with legally relevant outcomes. See id. at 414-19. See also Lieberman, supra note 33, at 547.

95. In the Wake of 9/11, supra note 50, at 45.
traits and decisions in setting bond, but the real purpose of the study was to evaluate the impact of death reminders on the judges. 96 The judges completed questionnaires on personality, but half of the judges also were given questions about death, i.e., a mortality salience treatment, while the control group was not given such questions. 97

After completing the questionnaires, the judges were given hypothetical legal case briefs describing information about a defendant charged with prostitution. 98 The brief included basic arrest information and notes from a prosecutor indicating the defendant had no established community ties and that the prosecutor was opposing releasing the defendant on her own recognizance. 99

The study found that the reminders of death created judges who were more punitive than judges who were not reminded of death. In the study, judges in the mortality salience group set an average bond of $455.100 Judges from the control group set an average bond of $50. 101 The psychologists conducting the study concluded that "this result suggests that if one of these municipal court judges, in the course of his or her daily life, happened to have been reminded of his or her own death shortly before setting bond for a person accused of a crime, there is a good chance the unfortunate woman would have been required to come up with substantial bond—or await trial in jail." 102 Further, "[t]his result provided provocative initial support for the proposition that mortality salience engenders a greater need for cultural worldviews and consequently provokes more vigorous reactions to moral transgressors." 103

The study was repeated with some variation using undergraduate college students to set bond options for a defendant accused of prostitution. 104 As in the experiment with the Tucson judges, "students asked to think about death set higher bonds for the alleged prostitute than those in the control group, but only if they had negative views of prostitution from the

96. Id.
97. Id. at 46. In the mortality salience group, judges were asked to write a short response to three questions: "'Please briefly describe the emotions that the thought of your own death arouses in you' and 'Jot down, as specifically as you can, what you think will happen to you as you physically die and once you are physically dead.'" Id.
98. Id.
99. Id.
100. In the wake of 9/11, supra note 50, at 46.
101. Id.
102. Id. Other studies where subjects were asked to think of other unpleasant circumstances besides one's death—such as failures, speaking in public, social exclusion, paralysis and considering the death of someone else—did not yield the same results as the studies involving mortality salience. Id. at 49.
103. Id. at 47. Another scholar has speculated that the September 11, 2001 terrorist attacks may have some similar effects on jurors. See Neal Feigenson, supra note 82, at 972-78.
104. In the wake of 9/11, supra note 50, at 47.
outset.\textsuperscript{105} The result that the effect was obtained only in the situation where students found prostitution morally repugnant is consistent with Becker’s theories. Thoughts of morality make one protect one’s worldview against those with different morals and different worldviews.\textsuperscript{106}

The studies also have found that not everyone has the same level of hostility toward other worldviews and culture following mortality salience. The effects of mortality salience are reduced in subjects who have high self-esteem, worldviews that valued tolerance, secure attachments to others, or strong beliefs in symbolic immortality (such as through children, creative activities, or spiritual attainments).\textsuperscript{107} These factors help lessen the subconscious fear of death, so that there is less hostility toward other worldviews following reminders of death.\textsuperscript{108}

Although mortality salience increases hostility toward groups who are different, studies show that the impact of mortality salience is not all negative. Mortality salience also “increases positive responses to those who validate a person’s beliefs.”\textsuperscript{109} The result, however, may be that jurors will find that a prosecutor who represents the state validates their own beliefs, making the jurors even more biased toward the prosecution and more punitive against a defendant.\textsuperscript{110}

A more overall positive effect of mortality salience is that it may boost a person’s concerns about procedural fairness in some situations. “Several studies have examined the relationship between procedural fairness and [mortality salience] and have found that fair process concerns are greater after individuals contemplate their own deaths.”\textsuperscript{111}

For example, one experiment focused on the ability of jurors to obey a judge’s instruction regarding the inadmissibility of evidence.\textsuperscript{112} The study, which involved presenting participants with a transcript of a robbery trial, found that participants who scored highly on a justice nullification measure were more punitive when told that certain evidence was ruled

\textsuperscript{105} Id.
\textsuperscript{106} See id. TMT experts have also postulated that death reminders might prompt jurors to stick to preliminary decisions about the guilt of an accused and to ignore conflicting information. Eva Jonas et al., Connecting Terror Management and Dissonance Theory: Evidence That Mortality Salience Increases the Preference for Supporting Information After Decisions, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1181, 1188 (2003). “The finding that mock jurors made more guilty decisions when photographs of an actual murder victim were used is consistent with this possibility.” Id. (citation omitted).
\textsuperscript{107} In the Wake of 9/11, supra note 50, at 85-86.
\textsuperscript{108} See Landau et al., supra note 75, at 480-81.
\textsuperscript{109} Arndt et al., Terror Management in the Courtroom, supra note 94, at 422.
\textsuperscript{110} One study has “found that closing arguments in a simulated trial that remind participants of their mortality can increase punitive judgments in robbery, assault, and murder cases.” Alison Cook et al., Firing Back at the Backfire Effect: The Influence of Mortality Salience and Nullification Beliefs on Reactions to Inadmissible Evidence, 28 LAW & HUM. BEHAV. 389, 407 (2004).
\textsuperscript{111} Arndt et al., Terror Management in the Courtroom, supra note 94, at 424-25.
\textsuperscript{112} Id. at 426-27.
inadmissible than when it was ruled admissible.\textsuperscript{113} But participants in the same category regarding justice nullification, when reminded of death, were “less punitive in the inadmissible condition compared with the admissible and control conditions.”\textsuperscript{114} Experts have concluded that “[t]his finding supports the hypothesis that [mortality salience] leads people to defend a worldview that often includes upholding the law and an increased desire for fairness when they rely on their own sense of justice.”\textsuperscript{115} In other words, some people, when reminded of death, cling tighter to the immortality device of the law and the instructions from the judge.\textsuperscript{116}

There are some criticisms of terror management theory. For example, in every situation there are a number of motivations driving an individual, and one might argue that the terror management theorists over-emphasize the role of mortality reminders.\textsuperscript{117} At least one critic has complained that the people conducting some of the experiments use student volunteers as subjects and then extrapolate the results to cover diverse cultures.\textsuperscript{118} Others have argued that TMT is inconsistent with evolutionary biology and that the effects are less than the TMT advocates claim.\textsuperscript{119} The terror management theorists have responded to these critiques, and they continue to do further studies to explore and test their theories.\textsuperscript{120} Thus far, the evidence supports the idea that death reminders may have a large impact on behavior.

\textsuperscript{113} Id. at 426-27.
\textsuperscript{114} Id. at 427. On the other hand, “[j]urors whose personal beliefs involved a strict adherence to the law did not exhibit a backfire effect regardless of [mortality salience].” Id.
\textsuperscript{115} Id.
\textsuperscript{116} The finding from this study is arguably inconsistent with the result in the study of the Arizona judges and other studies finding jurors are more punitive after mortality salience. “On the one hand, mortality salience evokes the motivation to be more punitive toward someone who violates the worldview by breaking the law. On the other hand, there is also the motivation to uphold the law by following a judicial ruling.” Alison Cook et al., supra note 110, at 407 (concluding that at least in one study “the motivation to follow legal guidelines appeared to be the stronger of the two”).
\textsuperscript{117} Even experts in the area of TMT acknowledge that the subconscious fear of death cannot explain all human motivation. Drs. Tom Pyszczynski, Sheldon Solomon, and Jeff Greenberg have noted that “[i]f life is complex, and surely a variety of factors contributes to these phenomena.” Id. at 86. Still, they argue that based on their studies, “TMT should be an essential component of any sincere effort to understand human hatred and violence.” Id.
\textsuperscript{118} Lynn E. DeLisi, \textit{Book Forum: In the Wake of 9/11: The Psychology of Terror}, 160 AM. J. PSYCHIATRY 1019 (2003) (book review). In response, TMT experts note “that terror management findings have been obtained in a variety of countries, with a variety of participant populations . . . , and with a variety of ecologically valid techniques of activating thoughts of death... and measuring their effects.” Arndt et al., \textit{Terror Management in the Courtroom}, supra note 94, at 433. Another study found no terror management effects on bankruptcy judges, but the authors of the study speculated that it was possible they “did not make their mortality salient enough.” Jeffrey J. Rachlinski et al., \textit{Inside the Bankruptcy Judge’s Mind}, 86 B.U. L. REV. 1227, 1256 (2006).
\textsuperscript{120} For example, advocates of Terror Management Theory have written a detailed response to Navarrete and Fessler’s critique, and they argue that TMT is consistent with evolutionary theory. See Landau et al., supra note 75, at 476.
Although the studies have included some experiments in the legal area, there needs to be more work done in the area of cases that by their nature involve reminders of death, such as wrongful death actions and death penalty cases. One law review author has noted a connection between the death penalty and terror management theory. In his article, he addressed how the terror management influence contributed to making the death penalty arbitrary. This Article, however, seeks not only to consider some of the problems that arise in the death penalty system because of terror management, but also how attorneys, judges and legal scholars may use an understanding of TMT to try to lessen its influence and to achieve fairer results in capital cases.

IV. CAPITAL PUNISHMENT CASES AND MORTALITY SALIENCE

In order to sentence someone who has been convicted of murder to death, a jury must make certain findings. Generally, once a defendant is convicted, the jurors consider a range of aggravating factors that often focus on the murder and qualities of the defendant. For example, depending on the jurisdiction and the case, jurors might consider facts about the murder such as whether or not the murder was cruel, whether or not other people were killed or put in danger, and the type of weapon used to kill the victim.

The jurors might also consider information about the victim, such as the age of the victim, the victim’s job, whether the victim had family, and the impact of the victim’s death on her or his family. In Payne v. Tennessee, the Supreme Court held that the Eighth Amendment is not violated when the prosecution presents evidence about the victim’s personal characteristics and the impact of the murder on the victim’s family. For example, a state may allow a witness to testify about the impact of the murder on the victim’s three-year-old child, and the prosecutor may com-

122. See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976) (upholding modern death penalty system); Godfrey v. Georgia, 446 U.S. 420 (1980) (discussing aggravating factors). For a list of aggravating factors listed in statutes throughout the United States, see Kirchmeier, Casting a Wider Net, supra note 4, at 18-25; Kirchmeier, Aggravating and Mitigating Factors, supra note 4, at 400-30. These aggravating factors may be considered either at the sentencing stage or the trial stage. See Lowenfeld v. Phelps, 484 U.S. 231, 233 (1988).
123. See, e.g., Kirchmeier, Aggravating and Mitigating Factors, supra note 4, at 400-15.
124. See, e.g., id. at 381-86, 420-30; Kirchmeier, Casting a Wider Net, supra note 4, at 23-25.
126. Id. at 827. The Payne decision overruled previous Court holdings that such evidence did violate the Eighth Amendment. See Booth v. Maryland, 482 U.S. 496 (1987); South Carolina v. Gathers, 490 U.S. 805 (1989). In those overruled decisions, the Court had reasoned that the admission of victim impact evidence “could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.” Gathers, 490 U.S. at 811 (quoting Booth, 482 U.S. at 505).
ment on the murder’s effects on the victim’s family.\textsuperscript{127} Although the Supreme Court only held that the Constitution does not bar such evidence, several state legislatures have passed laws specifically allowing for such evidence.\textsuperscript{128}

Historically, both judges and jurors have played a significant role in the life-and-death decisions in capital cases at trial. In the past, the Supreme Court sanctioned the practice of sentencing by judges in capital cases.\textsuperscript{129} But more recently the Court has held that jurors must make the findings regarding factors that make a defendant eligible for the death penalty.\textsuperscript{130}

In addition to considering aggravating or death-eligibility factors, jurors also consider mitigating evidence presented by the defendant. Mitigating factors are used to argue that the defendant should spend life in prison instead of being executed.\textsuperscript{131} These circumstances may help explain, but not excuse, the defendant’s conduct.\textsuperscript{132} These factors may also illustrate good qualities of the defendant, show the defendant did not play a large part in the murder, or explain why fairness demands a sentence other than death.\textsuperscript{133}

Beginning with the trial for murder, death is discussed throughout a capital case. The death of the victim is an ever present topic, and when prosecutors introduce victim impact evidence in capital cases, they may expect jurors to put themselves in the place of the family or the deceased. Beyond the discussion that occurs in non-capital murder cases, jurors are constantly reminded during sentencing that the defendant’s life is at stake and that they have power over that life.

Thus, capital cases always contain reminders of death, and it is one area of the law where the subconscious motivations discussed in Parts I and II are especially relevant. Although little has been written about terror management theory or Ernest Becker in legal scholarship, a few authors have noted the connection between the death penalty system as a whole and terror management theory.\textsuperscript{134} Professor Donald P. Judges has

\begin{flushright}
\textsuperscript{127} Payne, 502 U.S. at 827.
\textsuperscript{128} See, e.g., OR. REV. STAT. § 163.150(3) (a) (B) (2007); FLA. STAT. ANN. § 921.141(7) (West 2007).
\textsuperscript{131} See, e.g., Lockett v. Ohio, 438 U.S. 586, 606-09 (1978) (discusses mitigating factors and holds that states may not bar consideration of mitigation).
\textsuperscript{133} See id.
\textsuperscript{134} See Glenn L. Pierce and Michael L. Radel, The Role and Consequences of the Death Penalty in American Politics, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 723-24 (1990/1991) (using terror management theory in discussion of politicians use of the death penalty to increase public fears or
noted that in capital cases the presence of death in the case is likely to re-
sult in excessively punitive reactions. Professor Judges proposed “that
American capital punishment is largely a nonconscious, symbolic defense
against the terror that accompanies awareness of human mortality.”

Professor Judges noted that the death penalty itself contains “the ne-
cessary ingredients for activation of the terror management effect: a re-
minder of mortality, time to push awareness of it to the fringes of con-
sciousness, and an opportunity to indulge in punitive and often authorita-
rian aggression against an offending target person.” The result, accord-
ing to Prof. Judges, is that the death penalty system functions as a ritualis-
tic human sacrifice that is legalized by subconscious motivations beyond
the understanding of judges, legislators, executives and the public.

Although Profrofessor Judges ended his article with pessimism for the
future, this Article considers how there may be some hope by using effec-
tive strategies in individual cases. The larger hope emerges from a faith
in education on a broad scale, and hope exists in the courtroom if attor-
eys and judges are armed with an understanding of the underlying moti-
vations at work.

V. TERROR MANAGEMENT THEORIES APPLY IN CAPITAL TRIALS

In summary, Ernest Becker’s theories, supported by the terror man-
agement studies, consist of several principles. First, because of their in-
telligence, humans face the terrifying knowledge of their own animalness
and the inevitability of death. Second, the concept of the reality of death
is overwhelming. Third, in order to survive the terror of reality, humans
attempt to push the knowledge of death to their subconscious. Fourth, as
humans try to push this fear to the subconscious, they try to deal with the
fear of death by seeking self-esteem, character, material goods, culture,
belief systems, and other structures that appear to give control of death or
attach them to immortality devices. In humans’ attempt to seek immor-
tality and to deny animalness, humans struggle against insignificance and seek
to be heroes. Fifth, reminders of one’s own mortality that sink into the
subconscious make us cling to our belief systems and make us more hos-
tile to others who threaten those belief systems. Sixth, when other humans
threaten one’s immortality devices, such as when others believe in immor-
tality devices that are inconsistent with one’s beliefs, the others threaten

---

136. Id.
137. Id.
138. Id. at 246-48.
one’s protections against the fear of death. So humans seek to destroy those “evil” threats.\(^\text{139}\)

With this process being played out in various venues of life, it is not surprising that the process also works in the courtroom. Experiments have begun to show how this process takes place in law. Although further studies are needed, in capital cases there are significant reminders of death that affect the cases. Legal scholars, attorneys and judges should be aware of how these effects play out in the courtroom.

Together, the subconscious fear of death is at least partly responsible for the existence of the punishment and its unfair application. The sections below highlight areas where the subconscious fear of death plays a role during capital trials, with a focus on: (1) the relationship between terror management and the selection of capital jurors; and (2) the terror management effects on how jurors make their sentencing decisions.

A. Terror Management and Capital Jury Selection

Capital jurors, who play a key role in the determination of who is executed and who lives, must favor the death penalty in order to serve on the jury. Considering the terror management studies, a capital jury consists of people who may be more susceptible to mortality salience than the general population.

During the selection of jurors from members of the venire, under the Sixth Amendment, potential jurors may be removed for cause if for some reason they cannot be fair jurors. In Wainwright v. Witt,\(^\text{140}\) the Supreme Court addressed when a juror may be excluded for cause based upon the juror’s views about the death penalty. The Court in Witt clarified that a member of the venire may be excluded for cause if the person has views on the death penalty that “would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and oath.”\(^\text{141}\) Jurors who would refuse to convict a defendant in a capital case or would not consider the death penalty as a possible punishment may be removed from the jury for cause.

The Court also has considered the timing of the death qualification procedure. In Lockhart v. McCree,\(^\text{142}\) the capital defendant challenged the pre-trial practice of death-qualifying a unitary jury, which decides both guilt and sentence. The defendant argued that the death qualification process pertains to a jury’s infliction of punishment and therefore it should

---

139. See supra Section I and II.
not be done as a prerequisite for jurors to judge guilt.\textsuperscript{143} The defendant was concerned because studies show that death-qualified juries are predisposed toward guilt.\textsuperscript{144} The Court rejected the defendant’s Sixth and Eighth Amendment challenges, and the Court noted that there were benefits to having the same jury decide guilt and punishment, such as judicial economy.\textsuperscript{145}

Thus, in order for a state to ensure that jurors will follow the law, potential jurors must be death qualified before they may serve on a jury. The result of these decisions is that potential jurors who are against the death penalty cannot serve on a jury in a capital case during the sentencing phase. And, in most situations such potential jurors will not be permitted to sit as a juror in a capital case during the guilt phase.

Because all jurors who sit on capital cases must be willing to impose the death penalty, terror management theories that help explain why people support capital punishment give some insight into the jurors who sit on capital cases. This insight is important because many people who support the death penalty do so based upon views about morality and retribution rather than upon policy and empirical evidence.\textsuperscript{146} Therefore, whether or not a potential juror gets to sit on a capital case is largely determined by the person’s culture and views of morality.\textsuperscript{147}

Terror management theory illustrates how a cultural fear of death leads to support for the societal infliction of death. Scholars have noted that our epic tales of heroes appeal to the populace because the stories of redemptive violence allow us to “identify with the protagonist and experience the power of controlling death.”\textsuperscript{148} Psychologists have reasoned that similarly, “Capital punishment symbolically allows the state to remove the power of taking life from those who do so arbitrarily (offenders) and give it to those who will use it in a more predictable manner (at least theoretically) that is socially sanctioned (the state itself is delegating the power to the jury).”\textsuperscript{149} Therefore, “individuals are afforded some protection from death by the removal of the offender from society and by their own adherence to the laws of society.”\textsuperscript{150}

\textsuperscript{143} Id. at 167.
\textsuperscript{144} Id. at 178.
\textsuperscript{145} Id. at 180.
\textsuperscript{146} Symposium. The Role of Organized Religions in Changing Death Penalty Debates, 9 WM. \& MARY BILL RTS. J. 201, 213 (2000) (stating that “in recent years the number one argument in favor of the death penalty has become retribution”).
\textsuperscript{147} Id. “Unlike issues of cost, deterrence, and future dangerousness, retribution is not an issue that is empirical. . . . How much we all deserve . . . is a cultural determination greatly influenced by prevailing standards of morality.” Id. at 213. Prof. Radelet concludes that because “retribution rests on more of a moral base than on an empirical one, it is fundamentally a question that religious denominations need to address.” Id. at 214.
\textsuperscript{148} Arndt et al., Terror Management in the Courtroom, supra note 94, at 432.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
Because the subconscious fear of death may make people more punitive and hostile toward others who are different from them, this subconscious fear helps explain one of the reasons that people, including capital jurors, support the death penalty. The structuralized killing that takes place when a person is executed allows members of society to see death as something that is within their control. Becker referred to public execution as "a controlled display of dying." In the context of discussing crucifixion, he noted, "The longer people looked at the death of someone else, the more pleasure they could have in sensing the security and the good fortune of their own survival."

One legal scholar has noted the connection between the subconscious fear of death and support for the death penalty. Prof. Judges reasoned that "[t]error management theory . . . provides an account of the psychological defense mechanism that may be the driving force behind capital punishment." He explained that capital punishment involves a ritual control of death; it projects undesired qualities onto the defendant; the defendant is chosen in part based on outsider characteristics; and through capital punishment the hated and feared qualities are symbolically destroyed.

Under Becker's theories and terror management theory, then, the death-qualified jurors who serve on capital cases may be more susceptible to mortality salience, resulting in a jury that is more punitive than a non-capital jury would be. Various studies confirm that death qualified jurors who favor the death penalty do tend to be more likely to find a defendant guilty than jurors who oppose the death penalty. Data show that "death qualification makes juries more conviction-prone, more death-prone, less representative, and less accurate in fact-finding."

---

151. The subconscious fear of death and support for the death penalty may be aggravated by news reports about violence. Dr. Sheldon Solomon and others have written about how acts of violence may affect people in different ways, including how people vote. See, e.g., Florette Cohen et al., American Roulette, supra note 81, at 177; See also THE WAKE OF 9/11, supra note 50, at 191-93.

152. BECKER, ESCAPE FROM EVIL, supra note 27, at 110 (emphasis in original).

153. Id.


155. Id. at 186. Capital punishment has been called a ritualistic killing that is similar to human sacrifice. Id. at 185. Prof. Judges argued that "capital-punishment-as-sacrifice symbolically expresses the extra-human, mortality-controlling potency of the sovereign and is an institution people readily identify with in order to establish an anxiety-buffering association with a transvital entity. It also permits authoritarian aggression against the outgroup embodiment of feared and hated attributes, which, under terror management theory, would be the expected response to incipient mortality awareness combined with threat to worldview." Id. at 186.


The finding that death-qualified jurors are more punitive than other jurors is consistent with terror management theory. Terror management psychologists need to do further research to explore the links between pro-death penalty jurors and the bias toward convictions, but their studies in other areas do raise the possibility of a link and help explain why jurors who favor the death penalty are more punitive than other jurors.

B. Terror Management and Why Jurors May Vote for Death

Once jurors who are susceptible to mortality salience are selected for a capital trial and sentencing, they are exposed to reminders of their animalness and their mortality. These reminders, in turn, may make them more punitive.158

1. Mortality Salience Occurs in Capital Cases

Psychologists have noted that jurors can be reminded about their mortality in a number of ways during trial. Reminders may come from such aspects as “the nature of the charge, the details of testimony, or the sentence that may be considered.”159 A closing argument also may remind jurors of their mortality in criminal cases.160

The entire capital sentencing hearing is unintentionally designed to remind the jurors of their mortality.161 During the sentencing hearing, the emphasis is on the way the death of the victim occurred, the victim’s life, and whether the defendant should be killed. Although it is unavoidable that jurors will have to think about the murder, the prosecutor may also try to make the jurors feel connected to the dead victim.162 The defense attorney may try to make the jurors relate to the defendant whose life is in

---

158. Beyond reminders of death that are present in individual capital trials, others have noted that during certain historical events, death is especially salient, and thus will result in more punitive jurites. Arndt et al., Terror Management in the Courtroom, supra note 94, at 432. For example, during times of war, support for the death penalty often increases. See Kirchmeier, Another Place Beyond Here, supra note 2, at 10-11. One explanation for the increase is that the population is reminded of death during wartime, and thus people address their subconscious fear of death by clinging to capital punishment, which offers one the illusion of control over death.

159. Arndt et al., Terror Management in the Courtroom, supra note 94, at 427. In addition to being reminded of their mortality, details from experts and photographs about the causes of death and infliction of wounds will also remind jurors of what Becker called their “creatureliness.” Becker, Denial of Death, supra note 27, at 87.

160. See Alison Cook et al., Terror Management in the Courtroom, supra note 94, at 407.

161. “[T]he most overt way that mortality may become salient to jurors is probably in the penalty phase of a bifurcated murder trial in which capital punishment is an option.” Arndt et al., Terror Management in the Courtroom, supra note 94, at 412.

162. See id. at 421-22 (noting effects of prosecutors encouraging participants in study to consider their own deaths).
question. The death reminders are unavoidable in a capital trial, but the additional attempts to make the jurors relate to the dead victim and the capital defendant are further likely to make the jurors think about their own death.

In addition to the death reminders in the capital sentencing process, there often is time for those thoughts of mortality to creep into a juror’s subconscious. Another commentator has noted that the death sentencing process is an ideal incubator for mortality salience: Capital jurors are reminded of the death of the victim and the mortality of the defendant; trials deal with non-death issues that create the necessary distractions to allow for mortality thoughts to inhabit the subconscious; and jurors are in a stressful decision-making situation.\(^\text{163}\)

Thus, the influences of mortality salience may occur in capital cases. Jurors are reminded of death, the thoughts of death may go into their subconscious, and then the jurors must decide the fate of the defendant, who is someone most likely very different from the jurors. These reminders of death may have various effects on jurors, such as jurors using various defenses to avoid directly considering their own mortality.\(^\text{164}\)

2. The Effects of Mortality Salience in Capital Trials

As the studies on terror management theory reveal, once mortality salience occurs and when reminders of death are in an individual’s subconscious, that individual is likely to be more hostile and punitive to those who are different.\(^\text{165}\) In capital cases, the defendant is often quite different from the jurors. A capital defendant, generally, may likely be poor, may be mentally ill, may be of a different race than the jurors, and may likely live a different life and have different world views from the jurors.\(^\text{166}\)

The terror management effects on jurors may help explain various phenomena revealed in other studies about capital cases, although further studies will help show how these effects occur in individual cases. For example, many scholars have noted that the death penalty is used against the outcasts of society,\(^\text{167}\) and a number of studies have found the existence

---

\(^\text{163}\) Judges, supra note 23, at 186.

\(^\text{164}\) Arndt et al., Terror Management in the Courtroom, supra note 94 at 427-28.

\(^\text{165}\) See id. at 413-24. “[T]houghts of death intensify worldview-supportive biases, and capital cases may increase thoughts of mortality, through both the charge on file and the punishment options.” Id. at 432.

\(^\text{166}\) See, e.g., Jeffrey L. Kirchmeier, A Tear in the Eye of the Law, supra note 132, at 688-93.

\(^\text{167}\) See, e.g., Dora W. Klein, Categorical Exclusions from Capital Punishment, 72 BROOK. L. REV. 1211, 1211 (2007) (noting that “defendants who are poor, or black, or whose victims were white, are disproportionately likely to be sentenced to death”); Corinna Barrett Lain, Furman Fundamentals, 82 WASH. L. REV. 1, 6 (2007) (noting the concern of the Justices in Furman that the death penalty is used against the poor, the despised, those without political clout, and those who are members of a suspect or unpopular minority).
of racial bias in capital cases. The studies show that the race of the victim is a significant factor in capital sentencing in that those who kill white victims are more likely to get the death penalty than those who kill people of other races. When the death penalty was used for the crime of rape, almost 90% of those executed for that crime were black. Similarly, lynching was used predominantly against black men. The racial scapegoating, in part, can be explained by Becker’s theories and the research supporting his theories.

The discriminatory use of the death penalty is not limited to instances involving race. As Clinton Duffy, a former warden at San Quentin Prison, noted, “[t]he death penalty is the privilege of the poor.” Among other reasons, indigent capital defendants often receive poor representation, but part of the reason for poor representation may come from a hostility toward outsiders that permeates the system. For example, one study found that judges were more likely to find a defendant guilty when the defendant was from a lower economic class. Another report concluded that “[a]s long as the political process governs decision making in regard to capital punishment, the death penalty will continue to be applied as it always has been, to America’s powerless: racial minorities, the poor


169. See HOOD, supra note 168, at 169 (“Those who kill white persons are considerably more likely to be sentence to death than those who kill blacks, regardless of the race of the defendant.”). The United States General Accounting Office in 1990 reviewed twenty-eight studies and found that in 82% of the studies that the race of the victim influenced the likelihood that a defendant would be charged with capital murder. Id. at 172 (citing Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. Gen. Accounting Office, GAO/GGD-90-57, at 6 (Feb. 1990)).


172. “The existence of race effects supports the hypothesis that capital punishment is infected with authoritarian processes and, by inference, the claim that the terror management effect is at work.” Judges, supra note 23, at 220.


174. See, e.g., Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer, 103 YALE L. J. 1835, 1835 (1994). In many states, poor people facing the death penalty may be assigned an inexperienced attorney, an attorney reluctant to defend a capital murderer, or an attorney with no expertise in criminal or capital punishment law. Id. n. 50-60.

and the mentally disabled."\textsuperscript{176} Similarly, gay and lesbian capital defendants have faced prosecutors who have used sexual orientation to inflame jurors against the defendants.\textsuperscript{177}

Another way discriminatory results may occur is that the effects of mortality salience may influence how jurors consider mitigating evidence. Recent studies reveal that different jurors give different amounts of weight to different types of mitigation,\textsuperscript{178} and part of that difference may result from different jurors having different self-esteem levels. Still, thoughts of death may result in the juror being biased against either the defendant or the victim if either of them presents a worldview threat to the juror.\textsuperscript{179} For example, some jurors show hostility toward capital defendants who are mentally ill or who have a substance abuse problem even though those factors should be considered as mitigating.\textsuperscript{180} On the other hand, for some jurors, individual juror characteristics, such as a juror’s level of self-esteem, may diminish the effect of mortality reminders during a trial.\textsuperscript{181}

In summary, the terror management research and Becker’s theories are consistent with the result that the death penalty is used against the poor and powerless by those in power. First, pro death penalty jurors who are susceptible to mortality salience are selected. Then, they are reminded of death repeatedly, and time is given for the reminders to infect their subconscious. These jurors then decide the fate of someone who appears to be quite different from them.\textsuperscript{182} Thus, a murder defendant may threaten


\textsuperscript{177} See, e.g., State v. Grannis, 900 P.2d 1 (Ariz. 1995) (reversing conviction and death sentence of co-defendants because at trial prosecutor introduced photographs of male homosexual pornography found in one of the defendant’s closets); Ruthen Robson, Lesbianism and the Death Penalty: A “Hard Core” Case, 32 WOMEN’S STUD. Q. 181, 181 (2004) (noting “Bernina Mata was sentenced to death in Illinois in 1999 for being a lesbian – or, as the prosecutor labeled her, a ‘hard core lesbian’”).


\textsuperscript{179} Arndt et al., Terror Management in the Courtroom, supra note 94, at 428. See also David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 CORNELL L. REV. 1638, 1715 (1998) (finding that defendants with victims of more than minimal socio-economic status are more likely to receive the death penalty than defendants with victims of lower economic status).

\textsuperscript{180} John M. Fabian, Death Penalty Mitigation and the Role of the Forensic Psychologist, 27 LAW & PSYCHOL. REV. 73, 90 (2003) (“Specifically, mental illness, substance abuse, and having a deprived and abusive childhood, factors that would appear to be mitigating and arising sympathy, may be viewed as aggravating and suggestive of future dangerousness.”).

\textsuperscript{181} “In addition to the buffering effects of self-esteem, recent research has found that bolstering participants’ belief in an afterlife as a form of literal immortality—and, thus, directly targeting the threat of death as absolute annihilation—can attenuate MS-induced bias in legal decisions.” Arndt et al., Terror Management in the Courtroom, supra note 94, at 428 (citation omitted).

\textsuperscript{182} See, e.g., Craig Haney, Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathetic Divide, 53 DEPAUL L. REV. 1557, 1558 (2004) (stating that jurors have a “relative inability to perceive capital defendants as enough like themselves to readily
the immortality devices the jurors have built to protect them against their fears. Further study is needed, but the current studies are consistent with a conclusion that the consideration of death in capital cases make jurors hostile to those with different background and cultures, explaining the resulting subconscious discrimination based upon factors such as race, poverty, class and sexual orientation.

VI. TERROR MANAGEMENT THEORIES APPLY IN CAPITAL CASES POST-TRIAL

The terror management effects in capital cases do not end at trial. Appellate and post-conviction judges are also confronted with their subconscious fears of death. Additionally, death fears affect other participants in the capital punishment system.

A. Appellate and Post-Conviction Judges and Death

Judicial opinions in death penalty cases are written in a context ripe for terror management effects. Appellate judges are reminded of death from reviewing the record, which likely makes them consider their own mortality. While the judges work on writing their opinions, they concentrate on legal standards in a way that allows the direct thoughts of death to inhabit their subconscious. The resulting subconscious terror management effects of death reminders can make judges more hostile toward outsiders like capital defendants. As shown by the experiment with the Tucson judges who evaluated prostitution cases after being

feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors' own.

---

183. Studies have shown a large number of reversals of capital cases on appeals and in post-conviction. See generally James S. Liebman et al., A Broken System: Error Rates in Capital Cases, 1973-1995 (1995), available at http://www2.law.columbia.edu/instructionalservices/liebman/; James S. Liebman et al., A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It (2002), available at http://www2.law.columbia.edu/brokensystem2/index2.html. One implication from that result is that the trial courts and juries are historically more punitive than the appellate judges, and that result may arise from the type of mortality salience that exists where the death evidence is more direct and less removed at the trial level. More studies in this area would help clarify the difference in mortality salience effects at different court levels.


186. See supra Section II. Additionally, judges, as representatives of the law, might be prompted by reminders of death to be more sympathetic to other representatives of the law, such as prosecutors. Others have noted that judges in criminal cases are "likely to view the prosecutor in a more favorable light than defense counsel." WELSH WHITE, THE DEATH PENALTY IN THE NINETIES 119 (1991).
primed with thoughts of death, these effects can make judges more punitive.\textsuperscript{187}

As discussed earlier, studies show that the main effects of terror management occur when one considers one's death unconsciously. In most capital cases, the concepts of death, like the priming surveys in the experiments, are easily pushed to the subconscious. The reason that thoughts of death may go to the subconscious in capital cases is that in most cases, judges are considering procedural and constitutional issues that take the main focus away from death.

For the most part, appellate capital opinions do not dwell on death in a conscious manner, making most opinions likely influenced by the subconscious terror management effects. Professor James Liebman has concluded, "Capital punishment is tailor-made for judicial detachment."\textsuperscript{188} Similarly, he has noted that in capital cases, "the meaning of the judge's act has little to do with the judge's legal interpretation and everything to do with something the judge 'almost never makes a part of the . . . opinion': 'the overwhelming reality of the pain and fear that is suffered.'"\textsuperscript{189}

Like other appellate courts, rarely does the United States Supreme Court examine the death penalty as being about death. Understandably, the majority of opinions address the death penalty in terms of procedures, allowing the Justices to avoid fully contemplating the death they are ordering, making most decisions ripe for terror management influences. The Court does acknowledge that "death is different."\textsuperscript{190} Yet, the Court uses that phrase so often it assumes that the reader understands it, and the Court does not go on to dwell on why death is different or on what death means physically, mentally, and spiritually.\textsuperscript{191}

Consider a recent Supreme Court decision such as \textit{Roper v. Simmons},\textsuperscript{192} where the Court found that it violates the Eighth and Fourteenth Amendments to execute those who committed murder while they were under the age of eighteen. The references to death throughout the major-

\textsuperscript{187} See supra Section II.
\textsuperscript{188} James S. Liebman, \textit{Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963-2006}, 107 COLUM. L. REV. 1, 98 (2007). Professor Liebman noted that in condoning the violence of the death penalty, the Supreme Court Justices use detachment techniques in their opinions such as: not deciding issues, performing mechanical analysis of claims, transforming substantive review of a case into a procedural review of the case, insulating themselves from the issues, and overstating the consequences of ruling against the state. \textit{Id.} at 101-05.
\textsuperscript{189} \textit{Id.} at 95-96 (quoting Robert M. Cover, \textit{Violence and the Word}, 95 Yale L.J. 1601 (1986), \textit{reprinted in NARRATIVE, VIOLENCE, AND THE LAW 238} (Martha Minow et al. eds., 1992)).
\textsuperscript{190} See, e.g., Gregg, supra note 122, at 188 (opinion of Stewart, Powell, and Stevens, JJ.) (stating "penalty of death is different in kind from any other punishment"); Spaziano v. Florida, 468 U.S. 447, 459 (1984) (noting the "qualitative difference of the death penalty"); \textit{Ring}, supra note 6, at 605-06 (2002) (stating that "no doubt that '[d]eath is different") (citation omitted).
\textsuperscript{191} See cases cited in previous footnote. \textit{Id.}
\textsuperscript{192} 543 U.S. 551 (2005).
ty opinion are only in the context of phrases like "death penalty,"193 "sentence of death,"194 and "death eligibility."195

The only time the Roper majority opinion contemplates the cold reality of death is in a reference to trial testimony from the victim’s family members about “the devastation her death had brought to their lives.”196 As in other cases, such as the victim impact case Payne v. Tennessee, the Court seems more willing to contemplate the realities of death in the context of the victim than in the context of the life it is judging.197 But in discussing the defendant, the Court mainly uses the term “death” in the context of technical legal phrases like “death penalty” or “death sentence.”198

Roper is a case where a reader might have expected the Justices to discuss death more than they did. The case came out in favor of the defendant,199 and it included a topic where more discussion of the reality of death in the context of deterrence would have had legal relevance. The Court did acknowledge that juveniles might be deterred less than adults by the threat of death, but it did not expound upon how juveniles might contemplate death.200

This discussion is not to criticize the Court for not dwelling on the reality of death. On a legal analysis level, it arguably often makes sense for the Court not to waste time on a discussion of the death of the defendant and for the Court instead to focus on the procedural analysis of the law and the case.

The point, however, is that Supreme Court Justices -- and other state and federal appellate judges -- are doing the same procedural type of analysis they would do in any case for capital cases even though the capital cases are about the past death of the victim and the future death of the defendant. Thus, the appellate decisions of judges, perhaps even more so than trial court decisions, are made in ideal conditions of mortality salience and terror management. The ideas of death are present. The concepts of death are avoided and pushed back to the subconscious. There is then a risk that these influences add significant arbitrary factors to judicial opinions.201

193. See, e.g., id. at 557-76.
194. See, e.g., id. at 572.
195. See, e.g., id. at 574.
196. Id. at 558
197. Payne, 501 U.S. at 812-16.
198. Id. at 817-27.
199. Under terror management theory, one would expect judges to be less punitive and more likely to come out in favor of the defendant when the judges directly confront the reality of death than in cases where judges are reminded of death but able to put it in their subconscious.
201. A counterargument, however, arises from the testing that indicates that some people who encounter reminders of mortality are likely to embrace systems such as the legal system. See discussion supra Section II. Judges who have devoted their life to legal training and upholding the legal system, then, seem more likely than jurors to strictly follow the law when faced with thoughts of
By contrast, some Supreme Court opinions do analyze the death penalty with more awareness of death than other opinions, and thus these decisions may have less terror management influences. In *Furman v. Georgia*, Justice Brennan discussed the death penalty in terms of "the conscious infliction of physical pain," the "mental pain" caused by the anticipation of death, the destruction of one's "very existence," and as "degrading to human dignity."

Justice Brennan was somewhat rare as a Supreme Court Justice in his willingness to write about the reality of death. In another context, one scholar has noted that in a termination of life-support case, unlike most other Justices and lower court judges, Justice Brennan dealt honestly with the "taboo nature of death" and dared "to put the spiritual meaning of death in the same sentence with the Constitution."

Justice Brennan realized that he viewed death differently than most of his colleagues. Perhaps because he did not push the reality of death into his subconscious, Justice Brennan continued to vote against the infliction of the death penalty throughout his career on the bench.

There are three categories of Supreme Court cases that are more likely to consciously delve into the terror of death and the contemplation of mortality than other cases. In these opinions, the idea of death may not be relegated to the subconscious, and thus one might expect less terror man-

---

2008] Existential Death Penalty 85

…

…

---


203. *Id.* at 288 (Brennan, J., concurring).

204. *Id.*

205. *Id.* at 290.

206. *Id.* at 291.

207. Louise Harmon, *Fragments on the Deathwatch*, 77 MINN. L. REV. 1, 126, 128 (1992) (discussing Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990)). Professor Harmon noted that the writers of the state appellate opinions addressing the issue of termination of life support for Nancy Cruzan "treated the subject of death just like any other subject about which a court might have to infer intent." *Id.* She added that Justice Stevens, like Justice Brennan, directly addressed death in a *Cruzan* dissent. She stated, "I am grateful for those dissents. It is so important for me to see Supreme Court justices acknowledge the difficult and risky nature of death talk; to address the members of the deathwatch and their pain; to dare to put the spiritual meaning of death in the same sentence with the Constitution." *Id.* at 128.

208. Looking back more than ten years after *Furman*, Justice Brennan remembered in a law review article how Chief Justice Burger in *Furman* had distinguished capital punishment from burning at the stake. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 330 (1986). But Justice Brennan believed there was no difference: "Furman might have been characterized not as a case about the death penalty, but rather as a case about death by electrocution, which might fairly be described as ‘frying in a chair.’ How would frying in a chair be distinguished from burning at a stake?" *Id.* (citation omitted).

agement influences in comparison to the procedure-oriented cases. These categories of capital cases with issues that directly confront death are: (1) cases considering execution methods; (2) cases about a defendant’s competency to be executed; and (3) cases that consider the overall constitutionality of the death penalty.

First, an area where one might expect more discussion of death is in the few Court opinions evaluating execution methods because the constitutional analysis of execution methods requires consideration of the infliction of death. In evaluating whether a punishment violates the Eighth Amendment, the Court considers whether a punishment is excessive. In addition to considering contemporary standards through legislative trends, the Supreme Court opinions have considered that: “the punishment must not involve the unnecessary and wanton infliction of pain;” and “the punishment must not be grossly out of proportion to the severity of the crime.” Most recently, in assessing the procedures used in lethal injection cases, a Plurality of the Court considered whether alternative killing methods “significantly reduce a substantial risk of severe pain.”

These inquiries seem ripe for contemplation of the killing process, but the Supreme Court generally has not lingered on the ways that death occurs even in the limited number of execution method cases. In 1879, the Court unanimously upheld a sentence of public execution by firing squad by focusing on the history of execution methods instead of a consideration of what happens to one or one’s soul when a bullet pierces the flesh. Similarly, in *In re Kemmler*, when the Court evaluated the constitutionality of the electric chair, the main focus was upon constitutional history.

210. *Gregg*, 428 U.S. 173 (1976). The execution method cases do raise the question of why society and the Justices reject excessive pain. Perhaps the excessive pain makes the death more real. Although most defendants might prefer a limited period of pain to death, our society will not tolerate punishments that inflict any pain while we do tolerate punishments of death. One wonders whether it is because we are able to subconsciously ignore death.
213. *See, e.g., Nelson v. Campbell,* 541 U.S. 637 (2004) (considering whether a defendant could bring under 42 U.S.C. § 1983 an Eighth Amendment challenge to a state’s “cut-down” procedure to access a defendant’s veins to use lethal injection). The Supreme Court has not struck down any execution method as violating the Eighth Amendment. *See Jeffrey L. Kirchmeier, Let’s Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment [hereinafter Let’s Make a Deal],* 32 CONN. L. REV. 615, 628 (2000). The Court has noted in dicta, however, that punishments such as beheading, public dissection and burning alive would violate the Eighth Amendment. *See Furman, supra* note 11, at 264 (Brennan, J., concurring); *Wilkerson v. Utah,* 99 U.S. 130, 136 (1878); *In re Kemmler,* 136 U.S. 436, 446-47 (1890) (addressing in dicta the punishments of burning at the stake, crucifixion, and breaking on the wheel).
216. *Id.* at 445-49.
Some individual Justices have written opinions in execution method cases that do consider the process of death, though they do not contemplate what occurs after death or the fear of the permanence of death. In *Gomez v. United States District Court*, the Court held that a challenge to execution by cyanide gas was not properly raised. In that case, Justice Stevens wrote a dissenting opinion where he documented the brutal execution of Don Harding in Arizona. Similarly, in a dissent from a denial of a petition for writ of certiorari in *Glass v. Louisiana*, Justice Brennan discussed the evidence that “suggests that death by electrical current is extremely violent and inflicts pain and indignities far beyond the ‘mere extinguishment of life.’” In great detail, Justice Brennan recounted witnesses’ descriptions of contortions, eyes popping, defecation, and smells of burning flesh, etc., in a way that consciously contemplated death and our animalness.

In the most recent case to consider the execution process, the Court in *Baze v. Rees* considered the constitutionality of Kentucky’s three-drug lethal injection method. The Plurality opinion, written by Chief Justice Roberts, concluded that the petitioners were unable to show that the risk of pain from the incorrect administration of the lethal injection protocol was so substantial or imminent to constitute a cruel and unusual punishment. Beyond the expected discussion of the legal standard, though, the Plurality opinion spent little time on the mechanics of death or the suffering from botched executions. The opinion, however, did discuss the chemicals used in lethal injection and their purposes, and it did address some of petitioners’ arguments about alternative lethal injection methods. In the seven written opinions in *Baze v. Rees*, some of the other Justices, such as

---

218. *Id.* at 653.
219. *Id.* at 655-56 (Stevens, J., dissenting). Justice Stevens, like Justice Brennan, has been singled out for his willingness to discuss the reality of death in the context of a termination of life support case. *See* Louise Harmon, *supra* note 207, at 128.
221. *Id.* at 1086 (Brennan, J., dissenting from denial of petition for writ of certiorari).
222. *Id.* at 1086-93.
224. *Id.* at 1533-34.
225. *Id.* at 1534-36.
226. *Id.* at 1535. The Plurality addressed petitioners’ claim that the second drug used in lethal injection, pancuronium bromide, does little beyond suppressing the condemned’s muscle movements that might reveal problems in the administration of the drugs. The Plurality, however, noted that pancuronium stops respiration and that the Commonwealth had an interest in preserving the “dignity of the procedure” by eliminating convulsions and seizures that might be misperceived by witnesses as meaning that the condemned is suffering. *Id.* at 1535. Justice Stevens countered that the minimal interest in making witnesses feel comfortable is “vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect.” *Id.* at 1544 (Stevens, J., concurring).
Justice Breyer and Justice Ginsburg, do devote some discussion to the mechanics of death.  

In a concurring opinion, Justice Stevens appears most affected by the reality of the infliction of death that is invoked by the thoughts about the mechanics of execution. Early in his opinion he used a death word in a context not used by the other Justices when he noted that “Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets.” Instead of the clinical terms like “execute,” he used the harsher word to acknowledge that a state actually “kills.” Thus, the reminders of death remain in the forefront of Justice Stevens’s analysis, rather than being pushed into the subconscious. Then, it is not surprising, that he used this consideration of the killing process to go further than he ever did before to condemn the use of the death penalty overall.

Justice Stevens began the opinion with a consideration of lethal injection, but then he proceeded to consider the fairness of the death penalty process and the risks of error and risks of discrimination. Ultimately – and surprisingly, he concluded that the death penalty itself violates the Eighth Amendment and announced, “I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'”

Similarly, in some other execution method cases, lower courts have paused executions through decisions that dwell on the process of inflicting death. Recently, the Nebraska Supreme Court extensively considered the effects of electrocution in holding that execution in the electric chair is cruel and unusual punishment under the Nebraska Constitution.

---

227. Id. at 1564-67 (Breyer, J., concurring) (discussing lethal injection studies); id. at 1567-72 (Ginsburg, J., dissenting) (discussing procedures used in different states). Also, Justice Thomas wrote a concurring opinion where he discussed prior methods of execution and that argued that a method of execution does not violate the Eighth Amendment unless “it is deliberately designed to inflict pain.” Id. at 1556 (Thomas, J., concurring). Justice Scalia’s separate opinion responding to Justice Stevens did not contemplate death at all, but Justice Scalia did join Justice Thomas’s opinion. Id. at 1552-56 (Scalia, J., concurring).

228. Id. at 1541 (Stevens, J., concurring) (emphasis added).


231. Id. at 1552 (quoting Furman, 408 U.S. at 312 (White, J., concurring)).


reaching that conclusion, the Nebraska court extensively evaluated the physical effects of death by electrocution, discussing brain function, the likelihood that one’s heart would restart, the likelihood that the condemned would survive the electrocution, the types of burns that result, the risks that the condemned will catch fire, and the sources of pain and suffering. As in some of the Supreme Court cases, other lower court opinions sometimes focus on the pain leading up to death, but often the judges generally do not contemplate more than that.

Second, the category of capital cases where the Court has most considered a defendant’s contemplation of death is the small group of cases addressing competency to be executed. In both Ford v. Wainwright and Panetti v. Quarterman, the Justices considered to what extent the Eighth Amendment requires a capital defendant to be able to contemplate the reality of death before the defendant may be executed.

In a Plurality opinion in Ford, Justice Marshall wrote that the Eighth Amendment bars execution of “one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.” Justice Marshall’s opinion focused on the common law history of the ban, noting, however, that “the reasons for the rule are less sure and less uniform than the rule itself.” Most of the possible reasons for requiring competency to be executed focused on the fact that the execution of the insane would not serve retribution or deterrence goals. But he briefly mentioned one reason that focused on the contemplation of death: “Other commentators postulate religious underpinnings: that it is uncharitable to dispatch on offender ‘into another world, when he is not of a capacity to fit himself for it.’”

The Plurality opinion in Ford, however, did not establish a standard for competence to be executed, and subsequent lower court opinions have relied upon Justice Powell’s concurring opinion in Ford for a legal stan-

234. Id. at 261-78.
235. See, e.g., Gray v. Lucas, 710 F.2d 1048, 1061 (5th Cir. 1983) (finding no Eighth Amendment violation for execution by lethal gas because of a lack of evidence that “the pain and terror resulting from death by cyanide gas is so different in degree or nature from that resulting from other traditional modes of execution”); Morales, 465 F. Supp. 2d 978-81 Taylor, 487 F.3d 1072 at *3-7.
236. Unlike the cases involving the issue of competency to be executed, in cases involving mentally retarded individuals and juveniles, the Court has focused the discussion on the responsibility of the individuals for their acts in committing the crime, not on the individual's ability to contemplate death. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 338-40 (1988) (upholding the execution of the mentally retarded); Roper, 543 U.S. 551 (2005) (holding it is unconstitutional to execute inmates who committed the capital crime when they were under eighteen years old); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute mentally retarded individuals).
238. 127 S. Ct. at 2859.
240. Id. at 407.
241. Id. (citation omitted).
standard. Justice Powell stated that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." Thus the standard requires that the condemned be aware of death.

Recently, the Court revisited the competency issue in Panetti, where the defendant claimed that due to a mental illness he did not have a rational understanding of the reasons for his execution. Discussing the retribution rationale for not executing incompetent inmates, the Court noted that one might say that capital punishment is imposed so that the inmate recognizes "at last the gravity of his crime." Although the Court did not explain this reasoning further, the implication is that one purpose of the death penalty is to make a defendant fully contemplate her or his own mortality and what happens after one dies. Only by the conscious terror of such contemplation, the Court implied, will condemned inmates understand the harm they have caused and will justice be served.

Regarding the standard for competency to be executed, the Court in Panetti confirmed that Ford allowed for inquiry into whether a defendant has a rational understanding of the state's reasons for the execution. The Court found that the lower court erred because it did not consider the defendant's claims that "he suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced." As in Ford, however, the Panetti Court did not clearly establish a rule for all competency determinations.

Third, outside the context of execution method cases and competency to be executed cases, the Justices may sometimes contemplate death closely when they consider the overall constitutionality of the death penalty, as Justice Brennan did in Furman.

Another example of a Justice contemplating death in addressing the constitutionality of the death penalty occurred in Callins v. Collins.

242. Id. at 422 (Powell, J., concurring).
244. Id. at 2861.
245. Id. at 2862.
246. Id. The District Court had held that "the Fifth Circuit test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution." Panetti v. Dretke, 401 F. Supp. 2d 702, 711 (W.D. Tex. 2004).
247. Id. "Although we reject the standard followed by the Court of Appeals, we do not attempt to set down a rule governing all competency determinations." Id. Although much of Justice Thomas's opinion focused on procedural issues, he also disagreed with the Court regarding the standard. The opinion, joined by Chief Justice Roberts and Justices Scalia and Alito, argued that under Ford, a defendant only needed to have actual knowledge, not rational understanding, of the reason for execution. Id. at 2873 (Thomas, J., dissenting).
248. See Furman, 408 U.S. at 288-91.
when Justice Blackmun, after more than twenty years of upholding the constitutionality of the death penalty, wrote that he would no longer do so. Although most of Justice Blackmun's opinion focused on the arbitrariness of the death penalty system, he chose to begin the opinion by asking the reader to consider Bruce Callins as "a man, strapped to a gurney, and seconds away from execution." Interestingly, Justice Blackmun's announcement of his opposition to the death penalty, like Justice Stevens's similar announcement fourteen years later in Baze, confronted the reality of death by beginning with the consideration of a lethal injection and the "toxic fluid designed specifically for the purpose of killing human beings."252

In response to Justice Blackmun, Justice Scalia also asked the reader to contemplate death and consider the death of victims of violent crime as being horrible, whether quick or drawn out. He stated that the victim in the Callins case was killed "by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death." He mentioned the death in another case where a girl was raped and killed by four men, concluding, "How enviable a quiet death by lethal injection compared with that!"

The comments by Justices Blackmun and Scalia were brief and not a significant part of each analysis. But it is informative that the issues about the contemplation and terror of death would come up on opinions contemplating the overall constitutionality of the death penalty.

Beyond these three categories of cases, the physical, mental, and spiritual reality of death often seems on the sidelines in the Court's analysis of capital cases. On the one hand, it makes sense from a legal analysis standpoint to focus on the procedural issues at hand. But in light of the recent studies showing that judges are more punitive when thoughts about death are buried in the subconscious, terror management theory raises concerns about possible bias in court decisions that avoid the full contemplation of death.

Considering terror management effects, it is not surprising that a rare time when the Court contemplated the reality of death in Ford v. Wain-
wright, the Court excluded a class of individuals from execution. Also, one sees the full consideration of the realities of death in some of the opinions of Justices who were less punitive and against the death penalty, such as in opinions by Justices Brennan, Marshall, Blackmun, and Stevens. 256 Although one explanation is that these Justices were likely to dwell on death details to support their position against the use of the death penalty, their focus on the realities of death facing a defendant in decisions against the death penalty is consistent with terror management theory. When a judge fully confronts and considers the realities of death, rather than pushing those thoughts to the subconscious, the judge will be less punitive.

Judges in the appellate process may be more removed from reminders of death than jurors in capital cases, and thus, it is possible that the effects of mortality salience are less in the appellate setting. But the reverse may be true. The study with judges that examined mortality salience and the sentencing of prostitutes involved only written information, and the effects of mortality salience were significant. 257 Because the mortality salience effects occur when the reminders of death are relegated to the subconscious, the effects from capital cases may be more pronounced on judges reading a lower court record at their leisure rather than on judges and jurors facing a barrage of intense reminders of death at the trial level.

Some studies, however, find that mortality salience increases fair process concerns because fairness and the legal system are highly valued by judges, who have devoted their lives to the legal system. 258 When subconsciously reminded of their mortality, then, judges may actually cling tighter to judicial fairness as their immortality device. Some studies of the general population have noted an increase in fairness concerns following mortality salience, 259 so it is interesting to contemplate the balance between the punitive and fairness effects that mortality reminders have upon judges. 260 Further experiments on these questions will provide more insight.

257. See discussion, supra, in Section II.
258. See supra Section II. See also Joel D. Lieberman & Bruce D. Sales, Jury Instructions, 6 PSYCHOL. PUB. POL’Y & L. 587, 704 (2000) (noting studies that found that reminders of death increase people’s concerns regarding procedural fairness).
259. See, e.g., Arndt et al., supra note 94, at 424-25.
260. Some experts have noted the conflicting results from mortality salience in that sometimes the decider becomes more punitive and at other times the decider is more motivated to follow legal guidelines. Alison Cook et al., supra note 110, at 407. The authors noted that “[p]revious terror management research suggests that mortality salience effects are often swayed by salient components of an individual’s worldview. Id.
B. Effects of the Death Penalty's Reminders of Death on Capital Defendants and Others in the System

In addition to terror management theory's applicability to jurors during the trial and to judges through trial and appeal, reminders of death also may affect capital defendants, as well as other people within the system. For example, capital jurors often experience emotional trauma and distress that lasts long after the trial has ended.\(^{261}\) Others involved in the capital punishment system experience similar emotional trauma, and terror management theory may assist in understanding the experience and aid in the healing process.

Terror management theory may be useful to attorneys in understanding their clients.\(^{262}\) For example, terror management effects may occur after a defendant is sentenced to death. Between 1977 and July 2007, there were 127 death row inmates who were executed after dropping their appeals.\(^{263}\) Death row inmates who waive post-conviction proceedings or capital defendants who refuse to present mitigating evidence at sentencing are often referred to as "volunteers" because they are volunteering for death.\(^{264}\) Volunteers account for almost 13% of all executions.\(^{265}\)

Various theories exist for why some death row inmates choose to die, including the claim that some inmates accept responsibility for their crime.\(^{266}\) Some commentators have theorized that inmates may waive ap-

---

261. See, e.g., Leigh B. Bienen, Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials, 68 IND. L.J. 1333, 1344-48 (1993) One juror noted that "Vietnam was a piece of cake compared to that" in discussing being a juror and deciding someone's fate in a capital case. Id. at 1347. See also Kate Darby Rauch, After the Verdict: Healing Jurors Who Have Been Traumatized by Violent Testimony, WASH. POST, April 14, 1992, at Z10.

262. Becker's theories may also help explain some of the motivations behind why people commit murders. These reasons currently are not considered by jurors in capital cases. Professor Samuel Pillsbury has noted the connection between Becker's theories and an understanding of why serial killer Ted Bundy committed capital murder. Samuel H. Pillsbury, Evil and the Law of Murder, 24 U.C. DAVIS L. REV. 437, 470 (1990).

Like Satan and the vampire, Bundy saw the moral issues clearly. He understood the suffering he caused and its wrongness in the eyes of mankind. He killed because murder provided self-fulfillment. Bundy acted in order to achieve what Ernest Becker has called "significant immorality." Like most serial killers he was a failure in most aspects of his life, but he found significance in killing. He triumphed over other mortals; he became, for a few moments, God.

Id. (quoting ERNEST BECKER, ESCAPE FROM EVIL, supra note 27, at 24-26). One way to address the reality of death is to try to triumph over it by controlling it and in some sense finding your own immortality by killing others.


264. See, e.g., Kristen M. Dama, Comment, Redefining a Final Act: The Fourteenth Amendment and States' Obligation to Prevent Death Row Inmates From Volunteering to Be Put to Death, 9 U. PA. J. CONST. L. 1083, 1083 (2007).


266. Id. at 966 (finding that a questionnaire sent to attorneys who represented volunteers revealed that in sixteen responses the attorneys said that acceptance of responsibility or acknowledgment of guilt
peals because of "Death Row Syndrome" or "Death Row Phenomena": a "depression caused by extended tenure and conditions on death row."267 The possibility that the harsh conditions of death row could lead to the decision to waive appeals was raised in a case before the European Court of Human Rights, where a psychologist first used the term "Death Row Syndrome."268

In a thorough evaluation of existing studies of volunteers, however, Professor John Blume did not find evidence to support the prison condition hypothesis.269 Instead, he found "important similarities between persons who commit suicide and those who volunteer for execution."270 Among various factors, he found, "Mental illness and substance abuse are strongly associated with suicide, and volunteers suffer from extremely high rates of mental illness and substance abuse—clearly higher than the rates that prevail among nonvolunteers."271 Prof. Blume concluded with the argument that a defendant should not be able to waive appeals when that decision is primarily motivated by suicidal desires.272

Becker's theories help explain the connection between mental illness and the fear of death, and his theories help explain why one under constant threat of death would ultimately choose to control death by giving up any appeals. In Denial of Death, he explained the connection between the subconscious fear of death and mental illnesses—like schizophrenia and depression— that Prof. Blume linked to volunteers.273

The reasoning of some volunteers who claim to accept their guilt and agree to sacrifice their existence for their sins also may be explained by terror management. The inmates overcome the fear of death by embrac-

---


268. Id. at 753-55; Soering v. United Kingdom, 11 EUR. HUM. RTS. REV. 439 (1989). The Soering case involved an extradition hearing in the United Kingdom to extradite Jen Soering, a German citizen, to face capital murder charges in Virginia. Id. at 439. The European Court of Human Rights, citing the possibility of Soering developing Death Row Syndrome, held that the long wait on death row for the death penalty was a cruel and unusual penalty under the European Convention and Soering could not be sentenced to death. See Blank, supra note 267, at 753-55. See also Pratt v. Attorney General for Jamaica, 2 App. Cas. 1 (1994); Pratt and Morgan v. Jamaica, Communication No. 210/1986, 225/1987 (April 7, 1987), U.N. Doc. CCPR/C.35/D.210/1986 and 225/1986 (considering actual examples of Death Row Syndrome).

269. Blume, supra note 265, at 965.

270. Id. at 968.

271. Id. In particular, he noted a high rate of schizophrenia, depression, bipolar disorder and post-traumatic stress syndrome (PTSD) among volunteers, and those mental disorders also make one prone to commit suicide. Id.

272. Id. at 985-86.

273. BECKER, DENIAL OF DEATH, supra note 27, at 210-21.
ing it. And by embracing death, they attach themselves to something immortal in the justice system. They comply with something larger than themselves, justice, and achieve some sort of immortality with that connection, as well as with the media coverage they receive in the days leading up to their execution. 274

Beyond the capital defendants, attorneys, jurors, and judges, death reminders from capital cases may have effects on other individuals within the capital punishment system, as well as on the general public. Complex emotions and fears are part of the mix affecting victims’ families, prison personnel, prison chaplains, governors, legislators, and others. 275 Pat Brown, a former Governor of California who oversaw thirty-six executions, wrote that each decision he had to make about a capital defendant “took something out of me that nothing – not family or work or hope for the future – has ever been able to replace.” 276 A Sing Sing prison doctor who attended one hundred and thirty-eight electrocutions quit when he began feeling urges to join the condemned in the chair of death. 277 Similarly, a number of career executioners were “destroyed by their profession.” 278

In addition to effects on people within the system, the use of the death penalty has been shown to affect the general public, and these effects may partly be explained by terror management theory. Support for Becker’s theory about the brutalizing effects of reminders of death is found in the statistics that show an increase in murders that follow executions. Under Becker’s theories, the executioner’s reminders of death and our own mortality would lead members of society to be more hostile to outsiders and increase violence. Consistent with that theory, a 1980 study by William Bowers and Glenn Pierce of executions between 1907 and 1963 showed that there were two or three murders more than the normal rate following

274. “[I]n guilt one gives with a melting heart and with choking tears because one is guilty; one is transcended by the unspeakable majesty and superlativeness of the natural and cultural world, against which one feels realistically humbled; by giving one draws oneself in to that power and merges one’s existence with it.” BECKER, ESCAPE FROM EVIL, supra note 27, at 101-02.

275. In a law review article, Justice Brennan noted the “terrible stories” of those associated with the crime and the death penalty in addition to the victim and the defendant: “An execution requires an executioner, and they have their stories, as do the prison wardens, the spouses, and the children. There are death row chaplains whose jobs are to minister to the condemned.” Brennan, supra note 208, at 313.

276. EDMUND (PAT) BROWN, PUBLIC JUSTICE, PRIVATE MERCY xiii, 163 (1989).

277. Amos Squire, a doctor at Sing Sing who attended executions during 1914-1925, wrote that he quit after he began to feel “a sudden, terrifying urge to rush forward and take hold of the man in the chair, while the current was on.” Tad Friend, DEAN OF DEATH ROW: THE MAN WHO BECAME THE FACE OF SAN QUENTIN, THE NEW YORKER, July 30, 2007, at 62. 68.

278. Patrick Cain, The Agony of the Executioner: How a Parkdale Man Became Our First Official Hangman and Was Destroyed By It, TORONTO STAR, May 20, 2007, at D04. Canadian’s first professional hangman John Radcliffe noted after the end of his career and shortly before his death that at night when he lies down he sees the condemned he executed: “They haunt me and taunt me until I am nearly crazy with an unearthly fear.” Id.
executions.\textsuperscript{279} Other similar studies also have found that executions increase the number of murders.\textsuperscript{280}

Besides Becker, others have anticipated the results of these studies showing brutalization effects of capital punishment. In 1903, George Bernard Shaw wrote, "Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind."\textsuperscript{281} In fact, one of the reasons that United States officials in the early Nineteenth Century began advocating against public executions was the recognition that public executions increased crimes.\textsuperscript{282}

Even today, some of the debate about the death penalty has centered on detrimental effects to individuals who participate in running the capital punishment system as well as on society as a whole.\textsuperscript{283} Some supporters of the death penalty argue that it serves a deterrent function. The argument that the death penalty may function as a deterrent is based on the idea that the fear of death will have positive influences in causing potential murderers to not kill. But the terror management experiments show that the fear of death has potential to create evil instead of deterring evil.

Thus, reading in the morning paper that the state has killed someone will remind the reader of death and perhaps later result in the reader being hostile toward those who differ from the reader. The government's intentional infliction of death reassures us that we belong to something larger than ourselves that can control death, but it also reminds us of our own mortality. Under terror management theory, those reminders of death may provoke us to be less kind than we would otherwise be.

\textsuperscript{279} "They found that in New York within a thirty-day period following every execution, between 1907 and 1963, there were two or three murders over and above the expected rate." Michael Kroll, The Write Stuff, in A PUNISHMENT IN SEARCH OF A CRIME: AMERICANS SPEAK OUT AGAINST THE DEATH PENALTY 299, 302 (Ian Gray & Moira Stanley eds., 1989).


\textsuperscript{281} GEORGE BERNARD SHAW, MAN AND SUPERMAN 232 (2005). Albert Camus noted this connection when he wrote about the guillotine: "It is a penalty, to be sure, a frightful torture, both physical and moral, but it provides no sure example except a demoralizing one. It punishes, but it forstalls nothing; indeed it may even arouse the impulse to murder." ALBERT CAMUS, Reflections on the Guillotine, in RESISTANCE, REBELLION AND DEATH 197 (Justin O'Brien trans., 1961). Further, "[s]tatistics drawn up at the beginning of the century in England show that out of 250 who were hanged, 170 had previously attended one or more executions. And in 1886, out of 167 condemned men who had gone through the Bristol prison, 164 had witnessed at least one execution." Id. at 189.


\textsuperscript{283} See Kirchmeier, Let's Make a Deal, supra note 213, at 647-49 (discussing detrimental impact of executions on victims, defendants' families, prison guards, governors and others).
VII. HOW ATTORNEYS, JUDGES, AND EXPERIMENTAL PSYCHOLOGISTS MAY USE TERROR MANAGEMENT STUDIES TO CONFRONT THE EXISTENTIAL DEATH PENALTY

Although further terror management experiments may reveal more about how terror management works in the courtroom, there are several things that attorneys may do to address the arbitrary existential influences in capital cases. Below are some suggestions for (1) how attorneys and judges may confront the existential death penalty; and (2) how terror management psychologists might focus further research.

A. Techniques for Attorneys and Judges to Address Terror Management Effects Based Upon Current Research

Although the previous section explained that the subconscious fear of death is partly responsible for many of the problems with our capital punishment system, attorneys and judges may attenuate mortality salience-induced bias in cases. The main way for attorneys to address the subconscious motivations contributing to the arbitrariness of the death penalty is for attorneys to be aware of these existential effects, and further studies by mental health experts will be useful.

More specifically, attorneys may address the effects of mortality salience in capital cases in a number of ways. First, attorneys should consider the death-denial effects in selecting jurors. Second, during the trial stage, attorneys should address mortality salience and work to lessen its impacts. Third, attorneys may fully embrace the fear of death by talking about it openly. Fourth, defense attorneys need to be aware of death-denial effects on their clients and the risk that they might become volunteers. Finally, the burden should not be only on defense attorneys to address these issues. Prosecutors and judges have an interest in justice and in eliminating arbitrary death sentences, so they too should take steps to lessen the impact of mortality salience.

284. Although this article focuses on the effects of mortality salience in the courtroom, there are likely effects outside the courtroom. Our subconscious, of course, works around the clock, and attorneys, as well as jurors, are likely affected by reminders of death. So attorneys and others with the system may display effects of mortality salience in their work environments and their personal lives. Such a discussion is beyond the scope of this article and would benefit from further experiment and study.

285. "[R]esearch further suggests that if education can supplant deeply rooted prejudices and instead build tolerance as a core value of worldviews. . . , then perhaps the unfortunate reactions toward those who are different can be attenuated. Moreover, focusing on understanding the basic needs and fears that provoke such responses may direct inquiry to ways that can further ameliorate these unfortunate consequences." Lieberman et al., supra note 33, at 547.
1. Attorneys Should Address the Effects of Terror Management During Jury Selection

Attorneys should address the terror management bias at the voir dire stage by selecting jurors who are less likely to be subconsciously influenced by reminders of death.\(^\text{286}\) For example, as discussed above, studies show that individuals with high self-esteem are not threatened by other beliefs.\(^\text{287}\) Thus, the mortality salience reminders in capital cases would have less impact on jurors with high self-esteem.

Although several studies have indicated that preexisting attitudes disclosed at voir dire may be poor predictors of behaviors,\(^\text{288}\) some psychologists conclude that attitudes that relate to mortality salience and an individual’s ability to buffer death anxiety may be predictive of how they will behave if put on a jury.\(^\text{289}\) Existential psychologists have found that the best worldviews to minimize ill effects of mortality salience “are ones that value tolerance of different others, that are flexible and open to modifications, and that offer paths to self-esteem minimally likely to encourage hurting others.”\(^\text{290}\)

The suggestion to seek tolerant jurors is nothing revolutionary to defense attorneys, but the self-esteem context given by the existential psychologists – as well as continuing studies in the area – may further inform the voir dire process so attorneys understand why such jurors are desired. For example, one recent study found the most merciful of a group of death qualified jurors tended “to be those who are more educated and those who are more consistent about attending religious services.”\(^\text{291}\) Under terror management theory analysis, such jurors would have stronger self-esteem and a stronger immortality device to protect them from the fear of death. Thus, they would be less likely to be affected by reminders of death, and they would be less punitive than other jurors. So this study is consistent with Becker’s theories.

\(^{286}\) See Arndt et al., Terror Management in the Courtroom, supra note 94, at 430. Different jurisdictions may have different limitations on voir dire, but many experts have noted how important it is for attorneys to have access to jury information in capital trials. See, e.g., Symposium, Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection, 78 CHI.-KENT L. REV. 1179, 1198-1201 (2003). See also Symposium, Probing “Life Qualification” Through Expanded Voir Dire, 29 HOFSTRA L. REV. 1209, 1209-11 (2001) (stating, “The conventional wisdom is that most trials are won or lost in jury selection. If this is true, then in many capital cases, jury selection is literally a matter of life or death.”).

\(^{287}\) See supra notes and accompanying text.

\(^{288}\) See Arndt et al., Terror Management in the Courtroom, supra note 94, at 430.

\(^{289}\) See id.

\(^{290}\) Solomon et al, supra note 19, at 27. “Rigid, fundamentalist worldviews, whether Christian, Islamic, fascist, communist, religious, or secular, are model opposites of such ideals.” Id. at 27-28.

Another way that attorneys may address the mortality salience problem in jury selection is to work to restructure the jury selection process itself. Because jurors who favor the death penalty are more likely to find defendants guilty than jurors who do not favor the death penalty, the death qualification process should only be used when it is necessary. It should be used to select the jurors who will decide the sentence, but not to select the jurors for the guilt phase. Other legal scholars also have suggested that different juries be used for each stage of a capital sentencing process to address the problem that death qualified juries tend to be more punitive than other juries.  

2. During Trial and Sentencing, Attorneys Should Work to Decrease the Terror Management Impacts on Jurors

Once jurors are selected, attorneys should continue to work to lessen the arbitrary influence of terror management. Psychologists have made suggestions for attorneys to attenuate bias during a trial. These suggestions include: use strategies that reduce experiential process and increase analysis; use strategies that prime tolerance, such as requesting judicial instructions “that encourage fairness and strict legal adherence as a cognitively accessible worldview motive;" and use strategies that emphasize similarities between the defendant and the jurors.  

Regarding the last suggestion, “previous research has shown that in general, jurors are less punitive toward defendants who are similar to them on factors such as race, religion, native language, or values.” Other studies, however, have indicated that in some situations, stressing similarities between the defendant and a juror could backfire where identification with the defendant may threaten the juror’s own sense of self-esteem.

For example, one study found that where evidence against a black defendant was strong, a black juror on a jury with mainly white jurors would be


293. One such strategy would be to request that the judge allow jurors to take notes and ask questions. Arndt et al., Terror Management in the Courtroom, supra note 94, at 430. “[S]tudies show that symbolic worldview investments (e.g., prejudice toward those who disparage one’s central beliefs) found after MS [mortality salience] do not occur when participants are induced to process information in a rational mode but are quite robust when participants are induced to process information in a more experiential, intuitive manner.” Arndt et al., Understanding the Cognitive, supra note 73, at 35, 38.

294. Solomon et al., supra note 19, at 13, 27.

295. Arndt et al., Terror Management in the Courtroom, supra note 94, at 430.

296. Id. (citation omitted).

297. Id. at 430-31.
more likely to convict a black defendant than a white juror would. Thus, especially "when people have been reminded of death and are therefore in need of strong anxiety buffers," then "increased identification between the jurors and defendant may at times backfire and lead jurors to try to psychologically deny such similarities."  

One way to lessen the impact of terror management effects is to try to prevent jurors from connecting themselves to the victim in a way that will make them think of their own death. But under Payne v. Tennessee, courts have allowed the use of victim impact evidence that likely functions as mortality salience for jurors. Hearing family members of the victim discuss their loss will certainly result in jurors relating to the family and the victim, and they may likely contemplate their own death. The terror management psychologists should perform further studies in this area to see whether victim impact statements function as mortality salience. But it seems reasonable to assume the use of such evidence does cause terror management effects, especially because most jurors are likely to share more traits and worldviews with victims than with the defendants.

The current Supreme Court does not find a constitutional violation when victim impact evidence is introduced, but the decision whether to actually use such evidence is left to state legislatures and individual prosecutors. An ethical prosecutor, perhaps, should consider the relevance of such evidence and its likelihood of contributing to an arbitrary sentence. And if the prosecutor introduces such evidence, a defense attorney will have to consider how to address the mortality salience impact of such testimony.

3. Another Approach that Attorneys Might Take Is to Directly Confront Terror Management to Prevent the Death Reminders From Resorting to the Subconscious

Failing to eliminate mortality salience reminders, attorneys might fully embrace the death reminders and terror management. Mortality salience only has the impact of making jurors more punitive if the death reminder is suppressed in the juror’s subconscious. As discussed above, if one consciously thinks about death, one is not more punitive toward others. As noted earlier, Ernest Becker explained that whatever one “does on this

298. Id. at 431.
299. Id.
300. See discussion supra Section II.
301. See, e.g., Symposium. 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, 516-17 (2004) (arguing that the introduction of victim impact evidence by the prosecutor introduces additional arbitrariness in the capital sentencing procedures and that prosecutors should be allowed to instead introduce a different response to mitigating evidence).
planet has to be done in the lived truth of the terror of creation, of the
grotesque, of the rumble of panic underneath everything. Otherwise it is
false. 302 His advice about living life can apply in the courtroom. The
results of the studies are consistent with conclusions from existential philo-
sophers that a direct acknowledgment of those things we fear—anxiety,
uncertainty, and death—allows us to live better lives. 303 If the fear of
death is openly discussed, the impact of subconscious fears may be mini-
mized. More ideally, the impact of subconscious fears would be further
minimized if attorneys may present evidence regarding the effects of mor-
tality salience and terror management.

Appellate defense attorneys should consider similar techniques to pre-
vent appellate judges from relegating thoughts of death to the subcon-
scious. One scholar has noted that one of the best capital appellate attor-
neys, Prof. Anthony Amsterdam, used a strategy in Furman to emphasize
what was at stake and the Court’s responsibility. 304 This approach of mak-
ing the judges consciously aware of death may help lessen the terror man-
agement influences.

Attorneys should also confront the terror management effects occur-
ring outside the courtroom. In dealing with clients who are volunteers or
potential volunteers, attorneys—consultation with mental health experts
—should consider the impact of the ongoing threat of death on the client.
As discussed above, death-row phenomena and mental illness may contri-
but to decisions to voluntarily be put to death. As Albert Camus, an ear-
ly existentialist philosopher, stated, “There is but one truly serious philo-
sophical problem, and that is suicide.” 305 Further studies should focus on
the impact of the constant threat of death on the subconscious.

4. Judges and Prosecutors Should Also Work to Lessen the Arbitrary
Terror Management Effects

The burden to minimize the mortality salience effects in capital cases
should not fall only upon the defense attorneys. Judges and prosecutors
have an obligation to minimize arbitrary influences on the decision-making
process, so they should also work to minimize terror management influ-
ences.

302. BECKER, DENIAL OF DEATH, supra note 27, at 283-84.
303. See Leonard L. Martin et al., The Roar of Awakening: Mortality Acknowledgment as a Call to
Authentic Living, in HANDBOOK OF EEP, supra note 19, at 435.
304. Liebman, Slow Dancing With Death, supra note 188, at 107-12. The Furman lawyers “ren-
dered the Court helpless to retreat from the violence to an observer’s outpost and maximized
the judicial deployer’s discomfort and need to justify the violence or, if not, overthrow it.” Id. at 111.
305. ALBERT CAMUS, THE MYTH OF SISYPHUS 441 (1955), reprinted in BASIC WRITINGS OF
EXISTENTIALISM 441 (Gordon Marino ed. 2004). “Judging whether life is or is not worth living
amounts to answering the fundamental question of philosophy.” Id.
Terror management researchers advise that judges should give direct instructions to jurors with strict legal definitions and with directions to analyze the evidence in the case.\(^\text{306}\) Although judges ordinarily give instructions to guide jurors to follow the law, especially in capital trials, judges should be aware of the arbitrary terror management influences as they craft their jury instructions. The instructions need to be especially clear because non-TMT studies have found that jurors often misunderstand or do not follow the law. As one scholar has concluded, “The scientific data on jury behavior, particularly the research that has been conducted since the Furman decision, indicates that we should exercise more rather than less control over capital juries.”\(^\text{307}\) Perhaps more studies by the terror management experimental psychologists can give more insight into the effectiveness of specific jury instructions to limit the mortality salience effects.

In addition to giving clear instructions, trial judges should consider allowing jurors to take notes and ask questions.\(^\text{308}\) Terror management studies show that strategies that encourage analysis and the rational processing of information decreases terror management effects compared to when one processes information in a more intuitive manner.\(^\text{309}\)

Appellate judges too should be aware of terror management influences in deciding cases. As discussed earlier, appeals are ideal incubators for such influences, and judges who at least aware of the possibilities for such influences are less likely to be subject to mortality salience.

Therefore, the goal of attorneys and judges seeking a fairer death penalty should be to lessen the impact of terror management effects. Defense attorneys need to be aware of the impact and try to lessen the impact of death reminders on the jury, because such reminders can contribute to arbitrary death sentences. But judges and prosecutors also should educate themselves to try to lessen the role of terror management in order to seek justice and a fairer death penalty system.

---

306. Arndt et al., Terror Management in the Courtroom, supra note 94, at 430. Also, “reducing cognitive demands by allowing jurors to take notes, utilize case notebooks, and ask questions may facilitate their ability to process information and thus reduce the experiential and heuristic processing that tends to result.” Id. Another scholar has observed that judicial instruction may help curb jurors’ emotions in deciding cases. Neal Feigenson, supra note, 68 Brook. L. Rev. at 997.


308. Arndt et al., Terror Management in the Courtroom, supra note 94, at 430.

309. Arndt et al., Understanding the Cognitive, supra note 73, at 38.
B. Suggestions for Further Experimental Terror Management Studies

Attorneys, judges and prosecutors may find further guidance from additional studies by the experimental existential psychologists. Several types of studies would be helpful.

First, although the current set of studies strongly support the conclusion that death penalty trials provide adequate mortality salience for terror management effects, additional studies should be done to determine whether the mortality salience of focusing on the death of other people may have the same effects as the experiments where the mortality salience has focused on reminders of the subject’s death. Although some studies have examined the effects of different types of prompts, more studies focusing on how reminders of death work in the legal setting would be informative.

Second, studies should focus on the terror management effects of victim impact evidence. Testimony by a family member about the impact of the victim’s death seems likely to connect with jurors and remind them of their own mortality, but further study on how such testimony works as mortality salience would be useful.

Third, the experimental existential psychologists have found two effects from mortality salience that contrast in the legal setting: (1) the result that some individuals become more punitive and (2) the result that some individuals are more likely to cling to and follow legal standards. One question that arises is how to determine which individuals will become more punitive and which will be more likely to follow legal standards. It seems likely that those who have high regard for the law would be more likely to cling to the law when reminded of death, and thus, considering career choices, judges might be more likely to cling to the law when reminded of death than most jurors. In the prostitution experiment with the Tucson judges, however, those judges became more punitive when reminded of death. Some studies have already been done in this area, but additional experiments to delineate the two contrasting effects would provide further understanding to the terror management effects. 310

In evaluating the interaction between increased punitiveness and an increased desire to follow the law, the terror management psychologists should consider that in some situations, these two effects may combine to make judges and jurors even more punitive. For example, a judge who normally is against the death penalty might feel forced by law to uphold death sentences. In fact, a number of judges who are opposed to capital punishment have voted to uphold death sentences. 311 Thus, reminders of

310. See, e.g., Lieberman et al., supra note 33, at 550-51.
311. See, e.g., Kirchmeier, Another Place Beyond Here, supra note 2, at 32-36 (discussing several state and federal judges who have been critical of the death penalty but who vote to uphold capital
death might lead some to use the immortality device of the law as a tool to be punitive against outsiders.

Fourth, studies should examine the difference between a trial setting and an appellate setting for terror management purposes. An appellate setting may create greater terror management effects because it seems closest to the setting of the experiments that have been done, where subjects read about reminders of death and were given a chance for the reminders to sink into the subconscious. A question exists, though, of whether the types of reminders in capital cases will create more of a mortality salience effect in trial settings, with live testimony, or in appellate settings, where the judges read about the evidence.

Fifth, studies should examine possible ways to lessen the terror management effects in capital cases. One place to begin would be further examination of some of the suggestions for attorneys and judges discussed in this article. For example, experiments with different types of jury instructions might provide some insight into what types of instructions best counter the terror management effects in capital cases. Further experiments might also help reveal whether or not the approach of directly discussing death will counter the punitive effects of mortality salience.

Finally, studies should examine the terror management effects that occur on both families of murder victims and on capital defendants. An understanding of these effects might aid families in healing and decrease the number of volunteers.

The studies about how terror management works in the courtroom would not be only about giving new tactics to attorneys. At the least, these studies will help attorneys and judges eliminate some of the arbitrary factors that arise in capital cases. At the most, additional terror management studies on defendants may also reveal information about the causes of violence, which would further inform the capital sentencing process. More optimistically, such knowledge and further education may help prevent violence in society.

---

sentences). Justices Blackmun upheld death sentences for more than twenty years before deciding to vote against every death sentence during his final term. Id. at 27. In Baze v. Rees, Justice Stewart followed stare decisis to concur in rejecting a challenge to Kentucky’s lethal injection procedure even as he reasoned he believed that the death penalty was unconstitutional. Baze, 128 S. Ct. at 1552. As Justice Powell neared his own death, he regretted his votes to condemn capital defendants. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994); John C. Jeffries, Jr., A Change of Mind that Came Too Late, N.Y. TIMES, June 23, 1994, at A23.
VIII. CONCLUSION

"[[If we know that evil takes human form in oppressors and hangmen, then we could at least try to make our hatreds . . . intelligent and informed."

Near the end of the movie Eraser, bad guy Robert Deguerin (James Caan) and his colleagues appear to be escaping justice as they walk out of a court hearing. They get in a limousine, laughing at how they will beat the system. After a short drive, the limo driver stops the vehicle, locks the passengers in the limo, and flees the car. The limo phone rings. It is a call from the hero, John Kruger, played by Arnold Schwarzenegger, who tells Deguerin, "You’ve just been erased." We see Schwarzenegger overlooking the limo, which is parked at an intersection at a train crossing. A train comes along and destroys the limo and kills its occupants, thus bringing justice to the bad men. A few minutes later when Schwarzenegger is asked what happened to the bad guys, he deadpans, "They caught a train." The end.

Almost a decade after the movie was released, the actor who played the hero in Eraser was the governor of California and facing the real life-and-death decision regarding whether to grant clemency to Stanley “Tookie” Williams on California’s death row. In his “Statement of Decision” addressing the clemency request, Gov. Schwarzenegger noted that Williams, a co-founder of the gang the Crips, had written books and spoken out against gang violence. But Williams did not admit to the murders of which he was convicted, so the governor concluded, “Without an apology and atonement for these senseless and brutal killings there can be no redemption.” Gov. Schwarzenegger denied clemency, and Williams was “erased” that evening after midnight.

We pay money and enjoy watching Arnold Schwarzenegger send the unarmed movie murderer James Caan to his death in a locked limo. We gain some pleasure from such movies; otherwise movies where the hero brings a violent reckoning on evil would not be so popular. The movies protect us from our subconscious fear of death by creating an illusion both that death can be controlled and that death comes only to those who de-

312. BECKER, ESCAPE FROM EVIL, supra note 27, at 145.
315. Id. at 5.
serve it. Redemptive violence appears to heal us, and it gives the illusion of control over our world and over death. Thus, we enjoy watching violent movies and feel good as long as the bad people get killed in the end.

These same motivations are at work in the application of the death penalty, and they help explain why a majority of people support the death penalty and supported the execution of Tookie Williams. The subconscious fear of death not only affects what movies we enjoy but also how we conduct our lives and our basic belief systems that we choose and construct. If these motivations affect our lives, they also affect our roles as jurors, attorneys and judges. In capital cases, that influence then affects the determination of whether a capital defendant lives or dies.

Because these motivations affect humans in numerous areas of our lives and in our decision-making, one might view the results of terror management studies in despair. Subconscious influences and motivations affect our lives and make the legal system arbitrary and unfair, especially in cases where life is at stake. What we created to be rational is irrational. And the aspiration for a solution to the arbitrariness problem is hopeless because these influences have existed since human beings first gained intelligence to contemplate their mortality. The playwright Eugene Ionesco wrote, “As long as we are not assured of immortality, we shall never be fulfilled, we shall go on hating each other in spite of our need for mutual love.”

But Ernest Becker, like many of the existential philosophers, had hope. The hope for humans to overcome their cruelties is in education across cultures and across disciplines. Similarly, in the courtroom, attorneys, judges, and psychologists must confront the terror management effects head on, just as humans may embrace life by acknowledging their mortality and their fears. Thus, attorneys and judges need to understand terror management and consider the suggested strategies in this Article, while the terror management psychologists should continue to study the effects of the subconscious fear of death in the legal setting.

317. See generally WINK, supra note 12, at 42-62.
318. See BECKER, ESCAPE FROM EVIL, supra note 27, at 117 (quoting Hugh Duncan stating, “[W]e cannot become humane until we understand our need to visit suffering and death on others”).
319. Death penalty supporter Professor Robert Blecker has explained the feeling this way: The “worst of the worst” “deserve to die. I know that. I feel certain; and those two words are crucial. I feel certain, therefore, I am certain. Feeling – emotion – informed emotion – is very much part of a jurisprudence that is necessary and sufficient for the death penalty.” Symposium, Rethinking the Death Penalty: Can We Define Who Deserves Death?, 24 PACE L. REV. 107, 123-24 (2003).
320. In Ecclesiastes, King Solomon wrote, “It seems so tragic that everyone under the sun suffers the same fate [death]. That is why people are not more careful to be good. Instead, they choose their own mad course, for they have no hope. There is nothing ahead but death anyway” Ecclesiastes 9:3 (New Living Translation).
321. BECKER, ESCAPE FROM EVIL, supra note 27, at 136.
322. See, e.g., id. at 145.
In *Escape from Evil*, Ernest Becker explained that “[t]he logic of killing others in order to affirm our own life unlocks much that puzzles us in history, much that with our modern minds we seem unable to comprehend.”\(^{323}\) The logic of killing also can unlock much that puzzles us in law. The law, as a practice concerned with fairness and justice, should embrace the science of humans and use the knowledge of the existential influences affecting lawmakers, judges, juries and attorneys. Psychologists need to continue studying the effects of reminders of death, and attorneys must educate themselves and use the information wisely as long as humans inflict the existential death penalty.

\(^{323}\) *Id.* at 110.