ARTICLES

ADRIFT IN THE INTERSTICES OF LAW AND JUSTICE: DIVINING RIGHT AND WRONG IN THE SAD, STRANGE CASE OF *PEOPLE V. SCHMIDT*

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INTRODUCTION

Law and justice are imperfect companions.[1] What the law permits, or demands, is not invariably just.[2] What justice embraces may be foreign to law.[3] Their occasionally discordant interplay is evident throughout *People v. Schmidt*,[4] the tragic and fascinating early twentieth-century New York case that elicited Judge Benjamin Cardozo's exposition of the deific decree as a basis for legal insanity and culminated with Hans Schmidt's execution for the murder of Anna Aumuller.[5] The borders of law and justice are blurred at

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[1] For a helpful overview, see Anthony D'Amato, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527, 528 (1992), and JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 1 (Austin Sarat & Thomas R. Kearns eds., 1996).

[2] For example, see the provocatively titled volume authored by PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 3, 4–5 (2006); *see also* Arthur H. Garrison, *The Traditions and History of the Meaning of the Rule of Law*, 12 GEO J.L. & PUB. POL'Y 566, 569–70 (2014).

[3] For references addressing the expansive issues relating to justice, see, for example, MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006); JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001); WHAT IS JUSTICE? CLASSIC AND CONTEMPORARY READINGS (Robert C. Solomon & Mark C. Murphy eds., 1990); David Miller, *Justice*, STAN. ENCYCLOPEDIA PHIL. (June 26, 2017), https://plato.stanford.edu/entries/justice/ [https://perma.cc/CW6C-GQ3B].

[4] People v. Schmidt, 110 N.E. 945 (N.Y. 1915).

[5] *See id.* at 945, 948–49. The primary sources that this Article quotes alternatively spell the victim's last name *Auemuller*, *see, e.g.*, *infra* note 81, and *Aumueller*, *see, e.g.*, *infra* text accompanying note 185.

multiple junctures of this case, including the failed insanity defense presented at Schmidt's trial, the resolution of his troubled appeal, and Governor Charles Whitman's denial of clemency to remove the last official barrier standing between Schmidt and the electric chair.[6] Left lingering are challenging questions about whether Schmidt's conviction and execution should be considered wrongful, either in law or as viewed through the prism of justice.

Wrongful convictions are produced in courts of law.[7] They occur when factually innocent persons are adjudged guilty of a crime.[8] As such, they reflect an objective truth: an individual who was found guilty of a crime did not commit it.[9] Although *wrongful conviction* and *miscarriage of justice* are often used interchangeably, the terms are not synonymous.[10]

Miscarriages of justice are broader in scope and more elusive conceptually than wrongful convictions.[11] Within courtrooms, wrongful acquittals no less than wrongful convictions can fairly be considered miscarriages of justice.[12] And while justice might be served, or disserved, in a court of law, it is not so narrowly confined. Moreover, unlike a wrongful conviction, a miscarriage of justice is not

[6] *See id.* at 945, 950–51; RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS 77–79 (1997).

[7] *See, e.g.*, Ames Grawert, *Wrongful Convictions*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), https://www.brennancenter.org/our-work/analysis-opinion/wrongful-convictions [https://perma.cc/P4CM-H56K].

[8] Two types of wrongful convictions are commonly acknowledged: "wrong person" cases, in which someone other than the person found guilty of a crime actually committed the offense, and "no crime" cases, in which an individual was convicted of a crime but, in fact, no crime actually was committed. *See* JAMES R. ACKER & ALLISON D. REDLICH, WRONGFUL CONVICTION: LAW, SCIENCE, AND POLICY 7–8 (1st ed. 2011); Jessica Dwyer-Moss, *Flawed Forensics and the Death Penalty: Junk Science and Potentially Wrongful Executions*, 11 SEATTLE J. FOR SOC. JUST. 757, 782–83 (2013); Lissa Griffin, *Avoiding Wrongful Convictions: Re-examining the 'Wrong Person' Defense*, 39 SETON HALL L. REV. 129–30 (2009); Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 246 (2012).

[9] Of particular relevance to the instant Article, a wrongful conviction might also be considered to entail a conviction based on an erroneously rejected affirmative defense, including insanity. *See* James R. Acker & Sishi Wu, *'I Did It, But . . . I Didn't': When Rejected Affirmative Defenses Produce Wrongful Convictions*, 98 NEB. L. REV. (forthcoming 2020).

[10] Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUST. 1, 2 (2005).

[11] *See id.*

[12] *See, e.g.*, James R. Acker, *Reliable Justice: Advancing the Twofold Aim of Establishing Guilt and Protecting the Innocent*, 82 ALB. L. REV. 719, 719, 772–73 (2019); Paul G. Cassell, *Tradeoffs Between Wrongful Convictions and Wrongful Acquittals: Understanding and Avoiding the Risks*, 48 SETON HALL L. REV. 1435, 1438 (2018); Larry Laudan, *Different Strokes for Different Folks: Fixing the Error Pattern in Criminal Prosecutions by 'Empiricizing' the Rules of Criminal Law and Taking False Acquittals and Serial Offenders Seriously*, 48 SETON HALL L. REV. 1243, 1244 (2018); David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV., at 61–62.

reducible to a fact, but is instead an abstraction, one that is essentially normative rather than empirical in nature.[13]

Through Judge Cardozo, the New York Court of Appeals ruled that Hans Schmidt's murder trial was tainted by an error of law: the instructions delivered to the jury on the insanity defense were fatally flawed.[14] Yet relying on Schmidt's duplicity—his post-conviction admission that his professed insanity had been a sham—the court declined to grant him a new trial.[15] This, despite the fact that the explanation accompanying Schmidt's admission, if fully credited, would almost certainly have negated the basis for his murder conviction and death sentence and left him guilty of manslaughter only.[16] In short, had they been presented at the outset of his case, relied on, and accepted, either of Schmidt's representations standing alone—(a) his claim at trial that his insanity rendered him not criminally responsible although his acts otherwise qualified as murder,[17] or (b) his post-conviction claim that he was not insane, but his offense was manslaughter and not murder[18]—would have spared him from conviction for capital murder and execution. Considered in hindsight, those twin scenarios combined to nullify one another and leave his murder conviction and death sentence undisturbed. Then, after Schmidt failed to secure relief in court, his plea for executive clemency—a request grounded in justice or mercy, rather than law—was rejected by Governor Whitman,[19] the same person who, prior to his election as governor, served as the district attorney in charge of Schmidt's prosecution.[20]

The case is complicated, vexing, and tragic. If the question is whether Hans Schmidt's conviction and execution were defensible in law and also consistent with justice, the answers, at a minimum, are debatable.

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[13] *See generally* WHAT IS JUSTICE?, *supra* note 3, at 3–8 (discussing "seemingly abstract theories of justice" and how society has historical treated such theories).

[14] *See* People v. Schmidt, 110 N.E. 945, 946 (N.Y. 1915).

[15] *See id.* at 950–51.

[16] *See infra* text accompanying notes 183–185.

[17] *See Schmidt*, 110 N.E. at 945.

[18] *See* 4 Case on Appeal at 5, 15, People v. Schmidt, 110 N.E. 945 (N.Y. 1915) [hereinafter Case on Appeal] (affidavit of Hans Schmidt).

[19] *See* MARK GADO, KILLER PRIEST: THE CRIMES, TRIALS, AND EXECUTION OF FATHER HANS SCHMIDT 195, 196 (2006).

[20] *See About the Office: History of the Office*, MANHATTAN DISTRICT ATTORNEY'S OFF., https://www.manhattanda.org/about-the-office/history-of-the-office/ [https://perma.cc/XJ74-7BEM]; *Hall of Governors: Charles S. Whitman*, N.Y. ST., https://empirestateplaza.ny.gov/hall-governors/charles-s-whitman [https://perma.cc/BM9Q-EYWU]; *infra* text accompanying notes 232–235.

I. THE PEOPLE OF THE STATE OF NEW YORK VS. HANS SCHMIDT

A. A Killing and a Failed Insanity Defense

On September 5, 1913, eighteen-year-old Mary Bann and her eleven-year-old brother spied a bulky bundle floating in the Hudson River near their Woodcliff, New Jersey home, opposite 96th Street in Manhattan.[21] Curious about its contents, they retrieved it and removed the surrounding paper and wire packaging.[22] Inside they found "[t]he upper part of a woman's body."[23] The grisly discovery bore no head, arms, or legs.[24] The police were summoned and they collected the encapsulated torso and brought it to a physician for examination.[25] The doctor estimated that the body part had likely been in the water not more than two days.[26] He ventured that the dismemberment "had been done so skillfully that it might be the work of a surgeon."[27] Newspapers reported sensationally about the "Hudson River mystery,"[28] while additional bundled body parts, which appeared to fit together, like the pieces of a puzzle, emerged downriver over the next few days.[29]

Following leads developed through the manufacturing tag on a pillowcase used in the bundling of the dismembered body, the police linked the discovered items to an apartment located at 68 Bradhurst Avenue in Upper Manhattan.[30] Investigators determined that the unit had been rented to "H. Schmidt."[31] They staked out the premises, hoping that its occupant would soon appear.[32] On September 13, accompanied by fellow New York City Police officers, Officer Frank Casassa climbed the fire escape to the third-floor

[21] *See Find Woman's Body in Bundle in River*, N.Y. TIMES, Sept. 7, 1913, at 11.

[22] *See id.*

[23] 1 Case on Appeal, *supra* note 18, at 13 (testimony of Mary Bann); *see also* POLENBERG, *supra* note 6, at 52 ("Inside was 'the trunk of a young woman severed at the waist . . . .'").

[24] *See Find Woman's Body in Bundle in River*, *supra* note 21, at 11.

[25] *See id.*

[26] *See id.*

[27] *Id.*

[28] GADO, *supra* note 19, at 58.

[29] *See id.* at 55–56, 59; POLENBERG, *supra* note 6, at 52–53.

[30] *See* POLENBERG, *supra* note 6, at 53.

[31] 1 Case on Appeal, *supra* note 18, at 311–13 (testimony of Inspector Joseph Faurot); GADO, *supra* note 19, at 63–65; POLENBERG, *supra* note 6, at 53.

[32] *See* POLENBERG, *supra* note 6, at 53.

apartment and pried open a locked window to gain entry.[33] Inside, the officers found a blood-stained blanket, a knife, a saw, wrapping paper, twine, wire, women's clothing, and indications that a cleaning agent had been applied to bloodied flooring.[34] They also discovered several letters addressed to Anna Aumuller, care of Father Braun, the Pastor of St. Boniface's Church, at 304 East 47th Street.[35] The police learned from Father Braun that Anna Aumuller had worked at St. Boniface as a housekeeper but then left for a similar position at St. Joseph's Church on 125th Street.[36] Father Braun also informed the police that Father Hans Schmidt had previously been in residence at St. Boniface but that he had departed more than a year earlier to serve as a priest at St. Joseph's.[37]

Schmidt was born in Germany in 1881.[38] He was ordained to the priesthood in 1906 and served briefly in various parishes throughout Germany before settling in Munich.[39] He there developed a reputation for mental instability and ran into trouble with the law.[40] He was arrested for forging graduation certificates for students who had not successfully completed their studies and as a consequence was ordered to undergo psychological examination.[41] Schmidt was diagnosed as suffering from a "diseased mental condition."[42] He was admitted to a facility in Württemberg, where he underwent treatment consisting primarily of "the cold water cure."[43] Several of

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[33] Testimony offered at the subsequent trial included the following exchange between Assistant District Attorney James Delehanty and Officer Casassa:

> Q. Who was the first person to enter that apartment? A. I was.
> Q. How did you enter it? A. Through the window from the fire escape in the rear of the house.
> Q. How did you get that window open? A. I had two knives, and I took the window and shook it.
> Q. You forced it open in other words? A. Forced it open, yes.
> Q. It was not unlocked? A. No, sir, it was locked.
> Q. The catch was on and the window was shut down and locked? A. Yes.
> Q. You got in by force. . . . A. Yes.

1 Case on Appeal, *supra* note 18, at 197 (testimony of Officer Frank D. Casassa).

[34] *See* 1 Case on Appeal, *supra* note 18, at 198–200 (testimony of Officer Frank D. Casassa); *id.* at 302 (testimony of Joseph Faurot).

[35] *See id.* at 200 (testimony of Officer Frank D. Casassa).

[36] *See* GADO, *supra* note 19, at 67, 68, 69.

[37] *See id.* at 68–69.

[38] *See* 1 Case on Appeal, *supra* note 18, at 243 (testimony of John J. O'Connell).

[39] GADO, *supra* note 19, at 15–17, 31.

[40] *See id.* at 13–14.

[41] *See id.*; POLENBERG, *supra* note 6, at 54–55.

[42] POLENBERG, *supra* note 6, at 55; *see also* GADO, *supra* note 19, at 14.

[43] 1 Case on Appeal, *supra* note 18, at 414, 426 (testimony of Heinrich Schmidt).

his relatives had similarly experienced mental health difficulties, some of whom had taken their own lives.[44]

Schmidt left Germany and arrived in the United States in 1909, first serving as a priest in Louisville, Kentucky.[45] He subsequently took a position in a church in Trenton, New Jersey, then relocated to St. Boniface's in late 1910, where he met Anna Aumuller.[46] He moved to his assistant pastor position at St. Joseph's in November 1912.[47] Aumuller was born in Hungary and emigrated to the United States from Germany as a child.[48] She was just twenty-one years old at the time of her death.[49] It was later revealed that she and Schmidt had begun a sexual relationship shortly after meeting, resulting in one or more aborted pregnancies.[50] Schmidt also performed a marriage ceremony of dubious legitimacy in which he purported to take Anna Aumuller as his wife.[51] Aumuller was pregnant when she met her death in September 1913.[52]

As midnight approached on September 13, three members of the New York City Police Department visited Schmidt at St. Joseph's Church: Officer Frank Casassa, Detective John O'Connell, and Inspector Joseph Faurot.[53] When Schmidt left his room and descended the stairway to join the officers in the rectory's reception room, "[h]is whole body was shaking."[54] He continued trembling and

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[44] *See* GADO, *supra* note 19, at 11, 134.

[45] *See id.* at 17, 31. Coinciding with Schmidt's residency at St. John's Church in Louisville, an eight-year-old girl, Alma Kellner, disappeared and her body later was discovered in the church's cellar. Another man, Joseph Wendling, eventually was convicted for murdering the child, and served twenty-four years in prison, although he maintained his innocence of the crime. *See* GADO, *supra* note 19, at 19, 27 36, 205. Gado insinuates that Schmidt was likely guilty of murdering Alma Kellner. *See id.*

[46] *See* POLENBERG, *supra* note 6, at 55.

[47] *See id.*

[48] *See id.* at 65.

[49] *See, e.g.*, GADO, *supra* note 19, at 67 (describing police interview with Joseph Igler, who indicated that he and his wife knew Aumuller in Germany and that Aumuller had been born in Hungary and estimating that she was 20 years old); *River Murder Traced to Priest Who Confesses*, N.Y. TIMES, Sept. 15, 1913, at 1 (stating incorrectly that Aumuller was born in Germany); *see also* POLENBERG, *supra* note 6, at 65.

[50] *See* POLENBERG, *supra* note 6, at 65.

[51] *See* 1 Case on Appeal, *supra* note 18, at 308 (testimony of Inspector Joseph Faurot); GADO, *supra* note 19, at 78, 129.

[52] *See* 1 Case on Appeal, *supra* note 18, at 237 (testimony of Officer John O'Connell) (reporting that Schmidt stated that Aumuller was "[a] few months pregnant" at the time of her death); 4 *id.* at 38 (affidavit of Dr. Henry Cattell); *id.* at 42–43 (affidavit of Dr. Justin Herold).

[53] *See* 1 *id.* at 196, 204 (testimony of Officer Frank D. Casassa). Faurot gained national prominence by pioneering fingerprint evidence as a law enforcement tool a few years earlier. *See J.A. Faurot, Expert on Fingerprints, 70*, N.Y. TIMES, Nov. 21, 1942, at 13; GADO, *supra* note 19, at 61–62.

[54] 1 Case on Appeal, *supra* note 18, at 206 (testimony of Officer Frank D. Casassa); *see also id.* at 305 (testimony of Inspector Joseph Faurot).

buried his head in his hands upon being seated at a desk.[55] He was advised that any statements he made could be used against him.[56] Following some preliminary questions, the police showed Schmidt a photograph of Anna Aumuller.[57] Detective O'Connell twice asked Schmidt, "Did you kill her?" He received no response.[58] As the other officers held Schmidt's hands, Inspector Faurot patted Schmidt on the back and encouraged him to "[s]peak up" and "[t]ell the truth."[59] O'Connell asked for the third time, "Did you kill her?"[60] Schmidt replied, "Yes; I loved her."[61] After O'Connell and Faurot left the room, Schmidt described to Officer Casassa how he had disposed of the parts of Aumuller's body.[62] Before being taken to the police station, Schmidt pointed out where he burned the mattress on which Aumuller lay when he killed her.[63]

It quickly became clear that Schmidt's mental health would figure critically in subsequent legal proceedings. In its September 15 edition, the *New York Times* reported that Father Luke Evans, the chaplain at the Tombs, as the New York City Jail was known,[64] where Schmidt was being held, had spoken with Schmidt and asked him "why he had killed the young woman."[65] Schmidt reportedly replied, "I loved her. Sacrifices should be consummated in blood."[66] The next day, the *Times* quoted Schmidt's lawyer, Alphonse Koelble, as saying "I have talked with the man [i.e., Schmidt], and am certain that he is insane. I do not see how any one hearing him talk could escape that conclusion."[67] A reporter dispatched to Germany to develop more information about the sensational case sent back news that "[b]oth of Schmidt's parents and other relatives living here consider him

[55] *See id.* at 207–08 (testimony of Officer Frank D. Casassa).

[56] *See id.* at 207; *id.* at 305–06 (testimony of Inspector Joseph Faurot).

[57] *See id.* at 208–09 (testimony of Officer Frank D. Casassa); *id.* at 280–81 (testimony of Detective John O'Connell).

[58] *See id.* at 281–82 (testimony of Detective John O'Connell); *id.* at 307 (testimony of Inspector Joseph Faurot); *see also id.* at 209 (testimony of Officer Frank D. Casassa).

[59] *Id.* at 282 (testimony of Detective John O'Connell); *id.* at 307 (testimony of Inspector Joseph Faurot).

[60] *Id.* at 307 (testimony of Inspector Joseph Faurot).

[61] *Id.* at 281 (testimony of Detective John O'Connell); *id.* at 307 (testimony of Inspector Joseph Faurot).

[62] *See id.* at 210, 212 (testimony of Officer Frank D. Casassa).

[63] *See id.* at 309–10 (testimony of Inspector Joseph Faurot).

[64] *See A Tale of the Tombs*, N.Y.C. DEP'T CORRECTION HIST., http://www.correctionhistory.org/html/chronicl/nycdoc/html/histry3a.html [https://perma.cc/CKA2-CCFW].

[65] *River Murder Traced to Priest Who Confesses*, *supra* note 49, at 1.

[66] *Id.*

[67] *Arrest Dentist as Schmidt's Aid in Coining Plant*, N.Y. TIMES, Sept. 16, 1913, at 2 [hereinafter *Arrest Dentist*].

abnormal and say that there were numerous cases of insanity in the family."[68]

Continuing their investigation, the police discovered that Schmidt had rented another apartment, which proved to house a printing press, engraving plates, and other equipment used to produce counterfeit twenty-dollar bills.[69] This development led to the arrest of an associate of Schmidt, a man using the name Dr. Ernest Muret and doing business as a dentist.[70] Bertha Zech, who was with Muret at the time of his arrest, was taken into custody as a material witness.[71] Muret was convicted of counterfeiting in federal court several weeks later, and he was sentenced to serve seven and one-half years in prison.[72] He was found guilty despite Schmidt's testifying at his trial that Muret had nothing to do with the counterfeiting enterprise.[73] Muret and Zech would both figure prominently in Schmidt's later legal proceedings.

A coroner's jury was convened in Schmidt's case in Jersey City, New Jersey because the body parts recovered from the Hudson River were discovered within that jurisdiction.[74] On September 18, the coroner's jury reported that it found cause to believe that Schmidt had murdered Anna Aumuller.[75] Because the killing apparently occurred in New York City, the coroner there scheduled an inquest

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[68] *Aschaffenburg, Sept. 15*, N.Y. TIMES, Sept. 16, 1913, at 2. According to Schmidt's father, Schmidt

> never got into trouble . . . until he went to Munich, where the prosecuting authorities found that he was mentally unbalanced . . . .
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> "Then," said the father, "he fled from the insane asylum where I put him and wandered to America in 1908." . . .
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> . . . ["]His mother and I always feared that something terrible would come from his mental condition. In our family in the past five years there have been four suicides and two attempts at self-destruction."

Muret Schmidt's Cousin?: German Friends of Family Believe that He is Adolph Mueller, N.Y. TIMES, Sept. 19, 1913, at 3.

[69] *See* GADO, *supra* note 19, at 83; *see also Arrest Dentist*, *supra* note 67, at 1.

[70] *See Arrest Dentist*, *supra* note 67, at 1; *see also* GADO, *supra* note 19, at 80–85. Although he used the name Muret, the man's true name was Arthur Heibing and he was not licensed as a dentist. *See* POLENBERG, *supra* note 6, at 56; *see also* 4 Case on Appeal, *supra* note 18, at 54 (affidavit of Arthur Heibing) (identifying Heibing as his correct name and stating that Schmidt knew him "under the name of Ernst [*sic*] A. Muret"); *Find Third Flat Hired by Schmidt*, N.Y. TIMES, Sept. 18, 1913, at 2 (discussing Muret's claims that he did not know about the counterfeiting plant).

[71] *See* GADO, *supra* note 19, at 85; *Arrest Dentist*, *supra* note 67, at 2.

[72] *See* POLENBERG, *supra* note 6, at 56; *Schmidt Fails to Save Muret*, N.Y. TIMES, Oct. 29, 1913, at 20.

[73] *See* POLENBERG, *supra* note 6, at 56; *Schmidt Fails to Save Muret*, *supra* note 72, at 20.

[74] *See Schmidt Ready for More Deaths*, N.Y. TIMES, Sept. 19, 1913, at 1.

[75] *See id.*

on October 3.[76] Before a crowded courtroom, witnesses for the prosecution included Inspector Faurot, who recounted Schmidt's confession, Anna Hirt, who identified Aumuller's body by a prominent birthmark on a portion of the recovered torso, and Dr. George King, who conducted the autopsy.[77] Immediately before the jury retired to deliberate, Coroner Israel Feinberg appealed to the onlookers to consider making a donation to help pay for Aumuller's funeral expenses.[78] The request not only triggered "a buzz of comment and some laughing," but prompted an agitated Schmidt to stand and hurl coins and rosary beads at the spectators.[79] As anticipated, the jury concluded that the evidence supported the accusation that Schmidt had murdered Aumuller.[80]

A New York County grand jury indicted Schmidt the following week for first-degree murder,[81] a charge which under state law

[76] New York City Coroner Israel Feinberg expressed a desire to have "men of exceptional mental power" on the Coroner's jury, and subpoenaed such prominent citizens as Cornelius Vanderbilt, J.P. Morgan, and John D. Rockefeller. None of those men actually served. *John D. Not to Serve at Murder Inquest*, N.Y. TIMES, Oct. 1, 1913, at 5; *see also Coroner Derided in Schmidt Case*, N.Y. TIMES, Sept. 29, 1913, at 5 (noting that the sole purpose of the Coroner's inquest was to determine the cause of death, and quoting a representative of the District Attorney's Office as saying that "[t]he facts in the case are extremely simple. . . . The inquest need not last more than five minutes, and an ordinary Coroner's jury would do very well. The idea of calling only rich and widely known men to act on the jury is extremely ridiculous. The inquest will serve practically no purpose except to please the Coroner.").

[77] *See Schmidt Hurls Coins at Crowd*, N.Y. TIMES, Oct. 4, 1913, at 5. Mary Bann, who discovered a portion of the body in the Hudson River, also testified. *See id.*

[78] *See id.*

[79] *Id.*

[80] *See id.*

[81] The first count of the two-count first-degree murder indictment alleged that

> Hans Schmidt, late of the Borough of Manhattan of The City of New York, in the County of New York . . . and on the second day of September, in the year of our Lord one thousand nine hundred thirteen, at the borough and county aforesaid, with force and arms, in and upon one Anna Auemuller, in the peace of the said People then and there being, willfully, feloniously and of his malice aforethought did make an assault, and her, the said Anna Aumuller, with a certain knife which he, the said Hans Schmidt, in his right hand then and there had and held, in and upon the neck and throat of her, the said Anna Auemuller, then and there willfully, feloniously and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto her, the said Anna Auemuller, then and there with the knife aforesaid, in and upon the neck and throat of her, the said Anna Auemuller, one mortal wound of the breadth of one inch, and of the depth of six inches, of which said mortal wound she, the said Anna Auemuller, did then and there die.

1 Case on Appeal, *supra* note 18, at 3–4 (indictment). The second count alleged that

> the said Hans Schmidt . . . in and upon the said Anna Auemuller, then and there being, willfully, feloniously and of his malice aforethought did make an assault, and her, the said

automatically resulted in a death sentence on conviction.[82] Schmidt was arraigned on October 20.[83] When asked to enter a plea at the arraignment, Schmidt volunteered that "I am guilty."[84] The New York Constitution prohibited guilty pleas in capital cases.[85] Schmidt's declaration was quickly superseded by his attorney, Koelble, who entered pleas of not guilty and not guilty by reason of insanity.[86]

As his case progressed toward trial, Schmidt was examined by several "alienists"[87] who evaluated his mental health.[88] Four of the mental health professionals were selected by the district attorney and two were enlisted by defense counsel.[89] Schmidt also was interviewed by the physician assigned to the Tombs, Dr. Perry Lichenstein, who was present during most of the formal evaluations sessions.[90] The basis for Schmidt's insanity plea became clearer during those sessions and through later trial testimony.[91] As he had volunteered soon after his arrest, Schmidt maintained that God had directed him to kill Aumuller as a sacrificial offering.[92]

The insanity defense had been recognized in New York since the first days of statehood.[93] The New York Constitution of 1777 provided that the common law of England remained effective in the state, "subject to such alterations and provisions" as the legislature

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> Anna Auemuller, in a manner and by means to the Grand Jury aforesaid unknown, then and there willfully, feloniously and of his malice aforethought did kill and murder . . . .

Id.

[82] *See* N.Y. PENAL LAW §§ 1044–45 (Consol. 1909) (repealed 1965); James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 ALB. L. REV. 515, 517–18 (1990).

[83] *See Alienists Pass on Schmidt*, N.Y. TIMES, Oct. 21, 1913, at 10.

[84] *Id.*

[85] *See* N.Y. CONST. art. I, § 2 ("A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death . . . ."); James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 PACE L. REV. 41, 93 (1996).

[86] *See* 1 Case on Appeal, *supra* note 18, at 5; *Alienists Pass on Schmidt*, *supra* note 83, at 10.

[87] *See Alienists Pass on Schmidt*, *supra* note 83, at 10.

[88] *See id.*

[89] *See id.* (identifying Doctors Carlos M. MacDonald, William Mabon, A.R. Dieffendorf, and George Kirby as "the four alienists designated by the State to inquire into the sanity of Hans Schmidt"); *Holds Schmidt is Sane*, N.Y. TIMES, Nov. 22, 1913.

[90] *See* 2 Case on Appeal, *supra* note 18, at 647 (testimony of Dr. Perry M. Lichenstein): *Say Tombs Doctor Aids Schmidt's Side*, N.Y. TIMES, Jan. 6, 1914, at 6 ("[Dr. Lichenstein] was present at all but two of the conferences between Schmidt and different alienists.").

[91] *See, e.g.*, 2 Case on Appeal, *supra* note 18, at 648.

[92] *See id.*

[93] *See* ROBERT ALLAN CARTER, N.Y. STATE LIBRARY, HISTORY OF THE INSANITY DEFENSE IN NEW YORK STATE 2 (1982).

enacted.[94] English common law recognized insanity as an excuse constituting a defense to crime as early as the thirteenth century,[95] although the specific tests defining its availability were variously stated.[96] In the 1724 trial of Edward Arnold in Britain for shooting and wounding Lord Onslow, Judge Robert Tracy of the Court of Common-Pleas instructed the jury to apply what became known as the "wild beast test."[97]

> If he [Arnold] was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever; for guilt arises from the mind, and the wicked will and intention of the man. If a man be deprived of his reason, and consequently of his intention, he cannot be guilty . . . . [I]t is not every kind of frantic humour or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment . . . .[98]

Early court decisions in New York that gave content to the test for insanity similarly relied on the common law concept of the accused's inability to distinguish good from evil.[99] The initial statute

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[94] N.Y. CONST. of 1777, art. XXXV; *see also* N.Y. CONST. art. I, § 14; Brown v. State, 674 N.E.2d 1129, 1138 (N.Y. 1996) ("New York's first Constitution in 1777 recognized and adopted the existing common law of England and each succeeding Constitution has continued that practice.").

[95] *See* S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 125 (1925) ("By Edward I's reign (1272–1307), insanity was admitted as an excuse to crime. . . . By Edward III's reign (1326–1327), . . . absolute 'madness' was a complete defense to a criminal charge."); Benjamin B. Sendor, *Crimes as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1373, 1380 (1986); *see also* MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 73, 74 & n.4, 75 (1994) (identifying the twelfth century origins of the insanity defense at English common law, but apparently meaning the 1200s, or thirteenth century).

[96] *See, e.g.*, GLUECK, *supra* note 95, at 127–29, 137; PERLIN, *supra* note 95, at 75; Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 CAL. L. REV 105, 114 (1925).

[97] *See* GLUECK, *supra* note 95, at 139 & n.2; Crotty, *supra* note 96, at 114.

[98] Rex v. Arnold (1724) 16 How. St. Tr. 695, 764–65 (Eng.); GLUECK, *supra* note 95, at 139 & n.2; DANIEL N. ROBINSON, WILD BEASTS & IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT 133–34 (1996).

[99] *See, e.g.*, CARTER, *supra* note 93, at 2.

recognizing the insanity defense was enacted in the state in 1828, although the legislation failed to define insanity.[100] In due course, the law governing insanity in New York, as in many other jurisdictions, would be shaped by Daniel M'Naghten's trial and acquittal by reason of insanity in England in 1843.[101] M'Naghten's acquittal followed his killing of Edmund Drummond, the secretary of British Prime Minister Robert Peel, in his misguided attempt to assassinate the Prime Minister.[102] In the aftermath of that verdict, the House of Lords presented a series of questions to the judges of the Queen's Bench.[103] Of particular interest, and the core of what would become known as the *M'Naghten* test for insanity, were the following aspects of Chief Justice Tindal's reply:

> [T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.[104]

The *M'Naghten* test found its way into New York jurisprudence as early as 1845 in a reported decision issued by Circuit Judge John Worth Edmonds.[105] State courts at higher levels soon acknowledged

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[100] "No act done by a person in a state of insanity can be punished as an offence . . . ." N.Y. Rev. Stat., Part IV, ch. 1, tit. 7, § 2 (1828), *quoted in* People v. Kohl, 527 N.E.2d 1182, 1188 (N.Y. 1988) (Hancock, J., dissenting); *see also* CARTER, *supra* note 93, at 2.

[101] *See Kohl*, 527 N.E.2d at 1188, 1189 (Hancock, J., dissenting); *see also* M'Naghten's Case (1843) 8 Eng. Rep. 718, 720 (H.L.) ("Not guilty, on the ground of insanity.").

[102] M'Naghten's Case (1843) 8 Eng. Rep. 718, 719 (H.L.). For a comprehensive account describing M'Naghten (whose last name is variously spelled), his mental health, the circumstances surrounding his shooting and killing Drummond, and his trial and its aftermath see RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN xi, 1, 14 (1981), and THE STATE TRIALS REPORT: THE QUEEN AGAINST DANIEL M'NAUGHTON, 1843, *in* 1 THE ROLE OF MENTAL ILLNESS IN CRIMINAL TRIALS 159 (Jane Campbell Moriarty ed., 2001) (reprinting *The State Trials Report, The Queen Against Daniel M'Naughton, 1843*, and the House of Lords Debate).

[103] *See* M'Naghten's Case (1843) 8 Eng. Rep. 718, 720 (H.L.); *see also* GLUECK, *supra* note 95, at 166; MORAN, *supra* note 102, at 168–69.

[104] M'Naghten's Case (1843) 8 Eng. Rep. 718, 722 (H.L.).

[105] *See* CARTER, *supra* note 93, at 2 (noting that although Judge John Edmonds's charge to the jury in *People v. Kleim*, 1 Edm. Sel. Cas. 13, 25 (N.Y. 1845), recited the *M'Naghten* test verbatim, the judge did not cite *M'Naghten*, and misidentifying the case as *People v. Klein*);

that the essential New York test for insanity centered on whether the accused knew right from wrong at the time of the alleged crime.[106] The New York Legislature codified the *M'Naghten* test for insanity in 1881.[107] The legislation provided,

> § 20. An act done by a person who is an idiot, imbecile, lunatic, insane, or of unsound mind, is not a crime. . . .
> § 21. A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, or of unsound mind, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason, as either
>
> 1. Not to know the nature and quality of the act he was doing; or
> 2. Not to know that the act was wrong.
>
> . . . .
> § 23. A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.[108]

One year later, in 1882, the phrase "of unsound mind" was eliminated from sections 20 and 21 of the statute, which otherwise remained unchanged.[109] This test for insanity would serve as the

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Cynthia G. Hawkins-Leon, *"Literature as Law": The History of the Insanity Plea and a Fictional Application Within the Law & Literature Canon*, 72 TEMPLE L. REV. 381, 414 (1999). For a brief biographical sketch of Judge Edmonds, see *John Worth Edmonds*, HIST. SOC'Y N.Y. CTS., http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-04/history-era-04-edmonds.html [https://perma.cc/PKM6-C8X9].

[106] *See, e.g.*, *Kohl*, 527 N.E.2d at 1188 (Hancock, J., dissenting) (quoting Willis v. People, 32 N.Y. 715, 719 (1865)); *Willis*, 32 N.Y. at 718–19; Freeman v. People, 4 Denio 9, 28 (N.Y. Sup. Ct. 1847); *see also* CARTER, *supra* note 93, at 2; Hawkins-Leon, *supra* note 105, at 414–15, 417.

[107] 1881 N.Y. Laws 676, §§ 20–21, 23; CARTER, *supra* note 93, at 5.

[108] 1881 N.Y. Laws 676, §§ 20–21, 23 (enacting those sections of the New York Penal Code); *see also* CARTER, *supra* note 93, at 4–5; Hawkins-Leon, *supra* note 105, at 417–18; John R. Kelligrew, *The Proposed Amendment to the M'Naghten Rule*, 26 ALB. L. REV. 305, 306 (1962).

[109] 1882 N.Y. Laws 384, § 1 (amending §§ 20–21 of the 1881 New York Penal Code); *see also* Hawkins-Leon, *supra* note 105, at 417; *Legislative Changes in New York Criminal Insanity Statutes*, 40 ST. JOHN'S L. REV. 75 (1965) (discussing generally the history of the insanity defense in New York). Current New York law, which reflects important changes enacted in 1965 and 1984, provides,

> In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such

critical standard applicable at Schmidt's trial. After reviewing the reports submitted by the alienists who examined Schmidt for both the defense and the prosecution, Judge Warren Foster announced that "[i]t doesn't appear to me that the defendant is insane,"[110] apparently referring to Schmidt's "present sanity," or competency to stand trial, rather than his "past sanity," or his criminal responsibility at the time of the killing.[111] He denied defense counsel's motion to have a lunacy commission appointed to evaluate Schmidt further,[112] thus clearing the way for his trial to begin.[113]

Schmidt's trial opened on December 8, 1913 in the New York County Court of General Sessions.[114] Even as jury selection began, the *New York Times* reported it was clear that the defense would not contest that Schmidt had killed Aumuller, but rather would contend only that Schmidt was insane and hence not criminally responsible.[115] Testimony over the course of the next two weeks bore

conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:

1. The nature and consequences of such conduct; or
2. That such conduct was wrong.

N.Y. PENAL LAW § 40.15 (McKinney 2020); *see* William C. Donnino, *Practice Commentary*, *in* PENAL § 40.15; *see also Kohl*, 527 N.E.2d at 1183; CARTER, *supra* note 93, at 12; ROBERT DEAN ET AL., REPORT TO THE EXECUTIVE COMMITTEE OF THE NEW YORK STATE BAR ASSOCIATION ON THE USE AND EFFICACY OF PENAL LAW § 40.15 AND CRIMINAL PROCEDURE LAW § 330.20 AND RECOMMENDATION TO ESTABLISH A MENTAL HEALTH TASK FORCE OR COMMITTEE 5 (2019); Hawkins-Leon, *supra* note 105, at 422, 427.

[110] *Holds Schmidt Is Sane*, *supra* note 89.

[111] In this time period, it apparently was common to refer to "present insanity" to mean incompetent to stand trial, i.e., the defendant's lacking the capacity to understand the nature of the legal proceedings and to assist defense counsel, in contrast to "past insanity," meaning the defendant's mental state and criminal responsibility at the time of the alleged offense. *See* Freeman v. People, 4 Denio 9, 21 (N.Y. Sup. Ct. 1847) ("A trial of the question of present insanity is not a trial of the indictment, but is preliminary to such trial. The object, in such a case, is simply to determine whether the person charged with an offense and alleged to be insane, shall be required to plead and proceed to the trial of the main issue of guilty or not guilty."); *see also* Sam Parker, *The Determination of Insanity in Criminal Cases*, 26 CORNELL L.Q. 375, 376 & n.2 (1941); John Ordronaux, *The Plea of Insanity as an Answer to an Indictment*, 1 CRIM. L. MAG. 431, 435 (1880).

[112] *See Holds Schmidt Is Sane*, *supra* note 89; Parker, *supra* note 111, at 386 n.62 ("N.Y. Pen. Code § 836 [Laws 1910, c. 557] before repeal by N.Y. Pen. Code § 870 [Laws 1936] provided solely for inquiry by lunacy commissioners into the question of past insanity. The courts, however, permitted an inquiry into present insanity, likewise."); *e.g.*, JOHN ORDRONAUX, COMMENTARIES ON THE LUNACY LAWS OF NEW YORK 89–90 (1878); Thomas C. Desmond, *New York Smashes the Lunacy Commission Racket*, 30 AM. INST. CRIM. L. & CRIMINOLOGY 653, 653 (1940).

[113] *See Hans Schmidt Trial Dec. 8*, N.Y. TIMES, Nov. 25, 1913, at 3; *Priest Slayer Puts Hope in Alienists*, N.Y. TIMES, Dec. 9, 1913, at 6.

[114] *See Hans Schmidt Trial Dec. 8*, *supra* note 113, at 3; *Priest Slayer Puts Hope in Alienists*, *supra* note 113, at 6.

[115] *See Priest Slayer Puts Hope in Alienists*, *supra* note 113, at 6.

out that prediction, highlighted by the conflicting opinions of the alienists who appeared as defense witnesses and those who served as prosecution witnesses.[116] The jury heard from Schmidt's father and sister about his upbringing, and from them and other witnesses about his aberrational behavior while in Germany and after coming to the United States.[117] Schmidt did not testify. The presentation of evidence concluded on December 26, with closing arguments scheduled following adjournment for the weekend.[118]

Jury deliberations began on the afternoon of December 29 after Judge Foster delivered his instructions on the elements of first-degree murder and the insanity defense.[119] At 11:40 that night, and again shortly after midnight, the foreman reported that the jurors were unable to agree on a verdict.[120] Judge Foster directed the jurors to continue deliberating, which they did throughout the day of December 30 until 10:15 p.m.[121] On learning that the jury remained divided, apparently split 10-2 with the majority favoring conviction, the judge discharged the jurors and declared a mistrial.[122] The prosecutor's office immediately announced its intention to retry Schmidt on the murder charge.[123] The retrial would begin three weeks hence, on January 19, 1914, before Judge Vernon Davis.[124]

Judge Davis had a reputation for moving trials along swiftly.[125] Much of the same territory was covered in Schmidt's second trial as in the initial proceeding. The defense again would not contest that Schmidt killed Anna Aumuller and that he then dismembered and

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[116] Three of the defense alienists, Dr. Smith Ely Jelliffe, Dr. William White, and Dr. Menas Gregory, opined that Schmidt was not criminally responsible, and a fourth, Dr. Henry Cotton, agreed that Schmidt suffered from dementia praecox. The four alienists who appeared as prosecution witnesses, Dr. Carlos MacDonald, Dr. George Kirby, Dr. Allan Diefendorf, and Dr. William Mabon, opined that Schmidt was feigning insanity and that he was criminally responsible. *See Dr. Jelliffe Says Schmidt is Insane*, N.Y. TIMES, Dec. 23, 1913, at 11; *Priest is Shamming, Dr. MacDonald Says*, N.Y. TIMES, Dec. 27, 1913, at 6; *Say Schmidt Is Insane*, N.Y. TIMES, Dec. 24, 1913, at 18; *Schmidt Planned Murder*, N.Y. TIMES, Dec. 25, 1913, at 11.

[117] *See Schmidt Eccentric Before Coming Here*, N.Y. TIMES, Dec. 18, 1913, at 6; *Schmidt Resents Plea of Insanity*, N.Y. TIMES, Dec. 17, 1913, at 6; *Tell Queer Things That Schmidt Did*, N.Y. TIMES, Dec. 19, 1913, at 20.

[118] *See Priest is Shamming, Dr. MacDonald Says*, *supra* note 116, at 6.

[119] *See Schmidt Jury Not Agreed; Locked Up*, N.Y. TIMES, Dec. 30, 1913, at 1.

[120] *See id.*

[121] *See Jury Discharged in Schmidt Case*, N.Y. TIMES, Dec. 31, 1913, at 1; *Schmidt Jury Not Agreed; Locked Up*, *supra* note 119, at 1.

[122] *See Jury Discharged in Schmidt Case*, *supra* note 121, at 1; *infra* text accompanying notes 328–329.

[123] *See Jury Discharged in Schmidt Case*, *supra* note 121, at 1.

[124] *Schmidt Trial Put Off*, N.Y. TIMES, Jan. 10, 1914, at 11; *Schmidt Trial Under Way*, N.Y. TIMES, Jan. 22, 1914, at 20; *To Retry Schmidt on Jan. 12*, N.Y. TIMES, Jan. 1, 1914, at 8.

[125] *See* GADO, *supra* note 19, at 123.

disposed of her body. The exclusive question would be whether he should be found not guilty by reason of insanity.[126] In keeping with the judge's preference for brevity, each side elicited testimony from only two alienists concerning Schmidt's state of mind at the time of the killing.[127] Drs. Smith Ely Jelliffe and Menas Gregory appeared for the defense, and Drs. William Mabon and Carlos MacDonald testified for the prosecution.[128] Dr. Perry Lichenstein, the physician regularly assigned to The Tombs who had examined Schmidt on his admission to the jail and who was privy to later interviews conducted by the alienists,[129] also testified as a defense witness.[130]

Dr. Lichenstein reported that he had spoken with Schmidt on multiple occasions, the first time just ten minutes after Schmidt entered The Tombs on September 14.[131] Lichenstein questioned Schmidt at their initial meeting "as to the nature of the deed." Schmidt replied "that he had made this sacrifice because he had been told to do so by God."[132] Referring to notes he made, the doctor testified that Schmidt said, "I killed her because the blood must flow for the sacrifice and because I loved her. . . . Abraham did his sacrifice in secret. Because she was pregnant made it a better sacrifice."[133] Lichenstein testified about other disturbing details that Schmidt revealed during later conversations:

> He said it was at midnight, he came to her room, and she was asleep; he bent over and kissed her on the mouth but she did not awaken, and then he took the knife and drew it across her throat, and he said he killed her with the first cut. Then he bent down and put his lips to the wound and drank some of the blood. Having done that he cut her head off, took it to the bathroom and drank some more of the blood. Then he came back and he had connection with the body. Having done that he had also practiced pervert acts upon the body, and then he cut the body up. He states, and he also drew a picture to the effect, that he had cut the body into seven parts.[134]

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126 *See id.* at 130.
127 *See* POLENBERG, *supra* note 6, at 64.
128 *See id.*
129 *See supra* note 90 and accompanying text.
130 *See* 2 Case on Appeal, *supra* note 18, at 647.
131 *See id.* at 647, 648.
132 *Id.* at 648, 656.
133 *Id.* at 657.
134 *Id.* at 655; *see also* POLENBERG, *supra* note 6, at 59.

Other witnesses also described Schmidt's purported fixation on blood. According to his sister, when he was just eleven years old, Schmidt determined to become a priest after perceiving the head of Christ in a blood-red stain left on a cloth on an altar in Wertheim, Germany.[135] She related that he took pleasure at the sight of blood, going so far as to visit a local slaughterhouse to observe animals being killed.[136] His father also recounted Schmidt's childhood slaughterhouse visitations, and recalled how at age ten or twelve, Schmidt carried about the severed heads of geese and chickens in his clothing.[137] When he was questioned about this macabre practice, young Schmidt simply explained, "I like to see blood."[138]

The alienists who appeared as expert witnesses for the defense, Dr. Jelliffe and Dr. Gregory, interviewed Schmidt nine times prior to his initial trial during the month of November, and again on December 16, while the first trial was in progress.[139] Typical sessions lasted three hours,[140] allowing the doctors to probe Schmidt about his childhood, his entry into the priesthood, what prompted him to leave Germany for the United States, and his relationship with Aumuller,

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[135] *See* 1 Case on Appeal, *supra* note 18, at 448 (testimony of Elizabeth Schadler). Schmidt reportedly told his sister at the time,

> Now, I have seen the place where about one hundred years ago a priest had dropped a cup of blood, with holy blood. The cup fell over and the blood was changed, and the head of Christ was the blood which came out of this cup.
>
> . . . .
>
> . . . I am glad now, when I will be a real priest I will see the right blood.

Id.; *see also* GADO, *supra* note 19, at 1–4 (explaining significance of the wine-stained cloth covering the altar at Walduren).

[136] *See* 1 Case on Appeal, *supra* note 18, at 448 (testimony of Elizabeth Schadler); *see also id.* at 799 (testimony of Dr. Smith Ely Jelliffe). Dr. Jelliffe reported on information obtained from Schmidt by another examiner, Dr. White:

> There was a large butcher shop a few miles from the town where [Schmidt] and another little boy used to go when the slaughtering or the killing of animals would take place, and among other things . . . it appeared that at the time when these animals were being slaughtered he and this other little boy would masturbate each other. He was then about seven or eight, possibly nine years of age, and also that occurred later, as late as 13 or 14.

Id.

[137] *See id.* at 415 (testimony of Heinrich Schmidt).

[138] *Id.*; *see also id.* at 800 (testimony of Dr. Smith Ely Jelliffe); GADO, *supra* note 19, at 9–11 (describing accounts of Schmidt's childhood activities at the local slaughterhouse and his mutilation of animals and interest in their blood); POLENBERG, *supra* note 6, at 58; *Schmidt Resents Plea of Insanity*, *supra* note 117, at 6.

[139] *See* GADO, *supra* note 19, at 141–42.

[140] *See* 2 Case on Appeal, *supra* note 18, at 712 (testimony of Dr. Smith Ely Jelliffe); *see id.* at 844–45 (testimony of Dr. Menas Gregory).

up to and including the killing.[141] Both doctors noted Schmidt's preoccupation with blood.[142] During direct examination Dr. Jelliffe insisted that Schmidt could not be feigning insanity, relying in part on an incident which occurred during one session that involved Dr. Gregory, and was witnessed by Dr. Morris Karpas and himself:

> Dr. Gregory had bruised his finger in putting on an automobile tire and there was a blood blister under the nail . . . . I went on with some of the questions that are down here and Dr. Gregory went over in the corner and took a needle and he pricked his finger and raised a large drop of blood on his finger behind Father Schmidt's back. He did not see what was going on. I was engaging him in conversation.
>
> Q. [by Terence McManus, defense counsel] You mean Father Schmidt did not see what was going on? A. [by Dr. Jelliffe] Father Schmidt did not see what was going on . . . . Dr. Gregory came around and thrust his finger right in front of Father Schmidt's face. And then a very definite transformation took place in Father Schmidt. He immediately got red, he flushed, his pupils dilated, he grabbed at the hand, he stood up, Dr. Gregory retreated, he followed him around the room, he grabbed at his hand, Dr. Karpas, who was interposing him, chased him around the room and finally grabbed hold of his hand and put it in his mouth and said, "All blood is mine."[143]

The following exchange took place later in Dr. Jelliffe's testimony:

> Q. [by defense attorney McManus] Is there any chance in your opinion, in view of the nature and scope of the examination that you made and the number of those examinations, that this defendant was shamming insanity? A. [by Dr. Jelliffe] Absolutely not; absolutely impossible.
>
> Q. Is that your best professional opinion? A. It is; a man cannot sham insanity such as he has any more than I can

[141] *See id.* at 716–17 (testimony of Dr. Smith Ely Jelliffe) (recounting Schmidt's childhood); *id.* at 720 (testimony of Dr. Smith Ely Jelliffe) (recounting Schmidt's entry into the priesthood); *id.* at 737 (testimony of Dr. Smith Ely Jelliffe) (recounting Schmidt leaving Germany); *id.* at 719 (testimony of Dr. Smith Ely Jelliffe) (recounting Schmidt's relationship with Aumuller).

[142] *Id.* at 800 (testimony of Dr. Smith Ely Jelliffe); *id.* at 846 (testimony of Dr. Gregory).

[143] *Id.* at 821–22 (testimony of Dr. Smith Ely Jelliffe); *see also id.* at 846 (testimony of Dr. Menas Gregory) (recounting same incident); POLENBERG, *supra* note 6, at 60.

> make an apple or an orange; it is a product of nature, not a product of artifice; no man can make it; it grows that way.[144]

The doctors who testified for the prosecution at Schmidt's trial were equally firm in their conclusion that Schmidt was dissimulating.[145] They relied in part on their tack of leading Schmidt to believe that certain responses to their questions would help verify that he was insane when he killed Aumuller, and then hearing Schmidt deliver those responses.[146] In fact, their representations were nothing but a gambit designed to reveal prevarication. Dr. Mabon reported the following confrontational exchange he had with Schmidt during one examination conducted jointly by Dr. MacDonald and himself:

> Q. [by Dr. MacDonald] . . . [Y]ou have been lying to us all through . . . You killed Annie because you wanted to cover up your crime and for no other reason, and you never told anyone about the voice of God until after you were arrested, and now you want to deceive us into thinking that you were insane. A. [by Hans Schmidt] No, you shouldn't think that.
>
> Q. Oh, you needn't tell me that now.
>
> . . . .
>
> Q. (Continued.) You have lied to us about the pains. They are improbable, impossible pains, practically, and you have just fallen into that trap; and you don't know the symptoms and thought we were asking you for genuine symptoms, and instead of that we were asking for symptoms that don't exist. You said you have them all, every one of them. Now you are trying to deceive us into making us think that you heard the voice of God. You know you never heard the voice of God, not for a moment. A. I told you right in the beginning you shouldn't ask me that.
>
> Q. Now why do you lie so about that? A. Those were only rheumatic pains.
>
> . . . .

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144 *Id.* at 827 (testimony of Dr. Smith Ely Jelliffe).

145 For an argument cautioning mental health professionals against expressing certitude about their conclusions in cases in which insanity is at issue, with particular reference to the testimony offered at Schmidt's trial see Alan A. Stone, *The Line Between Mad and Bad*, PSYCHIATRIC TIMES (Aug. 1, 2005), https://www.psychiatrictimes.com/column/line-between-mad-and-bad [https://perma.cc/R4U5-F9KD].

146 *See* 2 Case on Appeal, *supra* note 18, at 834–35 (testimony of Dr. Smith Ely Jelliffe).

> Q. Now you might just as well drop that role of shamming insanity, because you can't deceive us, not for a moment. We know too much about the subject and you don't. You think by your pretending and claiming that you are not insane, that that's what an insane person naturally does, he claims he is not insane, that we will accept that as a symptom that you are insane. Now that's your motive, to escape the consequences. A. No, it is not.[147]

The defense and prosecution alienists disagreed sharply in their assessments of whether, at the time he killed Aumuller, Schmidt knew "the nature and quality of the act he was doing," and whether he knew "that the act was wrong"—the key determinants of insanity under state law.[148] Ambiguities in the legal test, particularly the opacity of the requirement that the actor did not "know that the act was wrong" when committed, compounded the difficulty inherent in fathoming the complex functioning of the human mind.[149] Both sets of alienists directly focused on the critical components of the insanity test in their evaluations of Schmidt.

For the defense, Dr. Gregory testified on direct examination:

> Q. [by Mr. McManus] Will you tell us whether in your opinion at the time of the commission of this act the defendant knew its nature and quality? A. [by Dr. Menas Gregory] He did not.
>
> Q. Can you tell us with reasonable certainty whether at the time of the commission of this act, the defendant knew that it was wrong? A. No, he thought he was doing the proper thing, that he was obeying the order, the commandment of God; he thought it was the right thing to do.[150]

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147 *Id.* at 969–70 (testimony of Nathan Birchall, Jr.).

148 N.Y. PENAL LAW § 1120 (1882) (current version at N.Y. PENAL LAW § 40.15); *see also supra* notes 105–109 and accompanying text.

149 *See* N.Y. PENAL LAW § 1120 (Consol. 1909) (repealed 1965); *e.g.*, Ordronaux, *supra* note 111, at 443.

150 2 Case on Appeal, *supra* note 18, at 860–61 (testimony of Dr. Menas Gregory).

While undergoing cross-examination by Assistant District Attorney Delahanty, Dr. Gregory elaborated:

> Q. [by Mr. Delahanty] He knew, didn't he, that what he did would cause her death? A. [by Dr. Gregory] Yes, by sacrificing her.
>
> . . . .
>
> Q. Did he know that the act was wrong according to the law of this State?
>
> . . . .
>
> . . . A. He was not thinking of it but if his attention had been called to it he would have recognized that it would be against the law of the State.
>
> Q. There was absolutely nothing in his mental condition that would forbid his knowledge or preclude his knowledge that this act was against the law of the State and the law of God, was there? A. There was, because he had a delusion, a delusional mind, an insane mind; he thought that God had given him a direct command to override the law of this State and the law of God in general.[151]

Elsewhere during the cross-examination, Dr. Gregory repeated his opinion that Schmidt "was telling the truth when he said that he knew it was against the law, but he was above the law, that God had commanded him to do this, and that he believed in God and therefore he did it."[152] Dr. Jelliffe's testimony was similar. In response to questioning by defense attorney McManus, Dr. Jelliffe recounted that Schmidt had insisted that "I don't care much"[153] about New York's criminal law.[154] "There is a higher law," Schmidt maintained, and in Dr. Jelliffe's opinion, Schmidt "was following out the higher law" by killing Aumuller.[155] Dr. Jelliffe spoke directly to the requisites of the insanity defense during cross-examination:

> Q. [by Mr. Delahanty] Haven't you assumed to tell us here that [Schmidt] did not know the nature and quality of the act he was doing? A. [by Dr. Jelliffe] At the time he committed it, yes.

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[151] 3 Case on Appeal, *supra* note 18, at 1204–05 (testimony of Dr. Menas Gregory).
[152] *Id.* at 1203.
[153] *Id.* at 1172 (testimony of Dr. Smith Ely Jelliffe).
[154] *See id.*
[155] *Id.*

> . . . .
> Q. You told me at the last trial that not only did he know there was a state or man made law against murder, but that he recognized the existence of the law of God against killing, didn't you? A. At the time he made it, yes.
> Q. Not only at the time he made it, but subsequently and before he committed the act? A. At the time he committed the act he did not know it, no.[156]

Believing that Schmidt was lying about hearing and responding to the voice of God, the prosecution's expert witnesses disputed that he qualified for the insanity defense. On direct examination, Dr. Mabon testified that Schmidt understood that when he killed Aumuller the criminal law would consider his act to be murder.[157] He explicitly opined that Schmidt was not insane.

> Q. [by Assistant District Attorney Delahanty] Did you ever find in any of your interviews with him, that he lacked a realization that the law demanded punishment for the killing? A. [by Dr. William Mabon] I did not.
> Q. Did you find out what his mind was on that? A. He had a clear realization that the punishment for murder was the electric chair, as he said it in reply to one question.
> Q. Turn to that same page [referring to notes taken during Dr. Mabon's examination of Schmidt], the third question from the last. This was one of your questions: "Q. But you knew it was a crime for you to kill a person?" And what was the answer? A. "Yes, for that reason I wanted to hide it, so that nobody should know it."
> . . . .
> . . . A. He said in reply to a question, "But we have all got to obey the law under which we live, the civil law."
> Q. Were you able to gain from that answer that he had the idea that there was a civil law charged with the duty of punishing crime? A. He had an appreciation that there was a civil law.
> Q. And that he and others were subject to be punished by it if their guilt was found out? Is that correct? A. Yes.

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[156] *Id.* at 1153.
[157] *See id.* at 1111 (testimony of Dr. William Mabon).

> . . . .
>
> Q. In your examination of him did you reach an opinion respecting his mental condition? A. I did.
>
> Q. In your opinion, is the defendant sane or insane? A. In my opinion the defendant is sane.
>
> . . . .
>
> Q. Does that opinion of his sanity go back to the second or first days of September of this year? A. Yes.[158]

Trial testimony came to a close on February 3 after Bertha Zech, the woman found in the company of Dr. Ernest Muret when he was arrested for counterfeiting,[159] appeared as a surprise prosecution witness.[160] Zech had not testified in the first trial, where evidence had been presented that Schmidt had attempted without success to take out a $5,000 life insurance policy on Anna Aumuller in April 1913, well before her death.[161] Zech revealed in her testimony that she had accompanied Schmidt, posing as Aumuller, when Schmidt applied for the insurance policy.[162] The clear inference was that Schmidt had enlisted her in his plan to murder Aumuller and collect the insurance proceeds.[163]

Judge Davis charged the jury on February 5.[164] He initially defined the elements of first-degree murder and explained that if the jurors found that the prosecution had established those elements they would then have to decide "whether at the time he committed that crime he was legally responsible for his act. Was he then sane or insane?"[165] The law then in effect required the prosecution to prove beyond a reasonable doubt that a defendant was not insane when the

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158 *Id.* at 1094–95, 1111.

159 *See supra* notes 69–73 and accompanying text.

160 *See Find Woman Dummy Who Aided Schmidt*, N.Y. TIMES, Feb. 4, 1914, at 4; *see also* GADO, *supra* note 19, at 154.

161 *See Find Woman Dummy Who Aided Schmidt*, *supra* note 160, at 4; *Tried to Insure His Victim's Life*, N.Y. TIMES, Dec. 16, 1913, at 20.

162 *See Find Woman Dummy Who Aided Schmidt*, *supra* note 160, at 4.

163 *See* GADO, *supra* note 19, at 156; *Find Woman Dummy Who Aided Schmidt*, *supra* note 160, at 4.

164 *See* 3 Case on Appeal, *supra* note 18, at 1370.

165 *Id.* at 1371–72, 1373, 1375.

defense was at issue,[166] and the judge so instructed the jury.[167] Defense counsel requested that the jury be charged that Schmidt should be found not guilty if he were "possessed by an insane belief to the effect that he was directed by a Divine power to commit the act in question, and that therefore it was right and necessary for him to do it."[168] Judge Davis rejected that request and repeatedly defined the required finding quite differently:

> He is excused only when he does not know the nature and quality of the act or that the act is wrong. If he knows the nature and quality of the act and that it is wrong—that is, that it is contrary to law—then he is held responsible . . . .
>
> . . . [There] is a very simple, distinct definition of what constitutes a defense of insanity. There must be such a defect of reason that at the time of committing the alleged act the person interposing the defense did not know the nature and quality of the act he was doing or that it was wrong. "Wrong" there means, "criminal"—contrary to the laws of the State.[169]
>
> . . . .
>
> It is claimed by the defense that this act of killing was done pursuant to the command of God given to the defendant. That will not excuse the commission of this crime if at the time he committed the act he knew the nature and quality of the act and that it was wrong, contrary to law.[170]
>
> . . . .
>
> Gentlemen, I charge you as follows: The People are required to prove that the defendant committed the crime charged in the indictment; also that at the time of its commission, he was in such a state of mind as to understand the nature and quality of his act; and that he knew it was against the law of the State of New York. These circumstances must be proved

[166] *See* People v. Kohl, 527 N.E.2d 1182, 1183 (N.Y. 1988) ("Prior to 1984, the so-called insanity defense was catalogued as a traditional defense which the prosecution bore the burden of disproving beyond a reasonable doubt . . . . In 1984, after years of intensive study and debate, the Legislature repealed Penal Law § 30.05 and substituted Penal Law § 40.15, which made mental disease or defect an 'affirmative' defense."); *id.* at 1188–91 (Hancock, J., dissenting) ("Consistent with [the] basic principle that there can be no crime without a sane mind, the burden of proof on the issue of mental competency must be borne by the state."); *see also* Hawkins-Leon, *supra* note 105, at 402, 425–27.

[167] *See* 3 Case on Appeal, *supra* note 18, at 1375, 1377–78.

[168] *Id.* at 1397.

[169] *Id.* at 1376.

[170] *Id.* at 1386.

> beyond a reasonable doubt, and if not so proved, the defendant is entitled to an acquittal.[171]
>
> . . . .
>
> The Court: Has the District Attorney any requests?
>
> Mr. Delehanty: The only matter I would ask your Honor to charge again to the jury, is based on the last request of the defendant, that the term "wrong" as used in your Honor's charge, means "wrong according to the law of the State of New York."
>
> The Court: I so charge you, gentlemen.[172]

Judge Davis finished delivering his instructions to the jury at 12:25 p.m.[173] The jurors lunched and then began their deliberations.[174] Two hours and thirty-five minutes later they delivered their verdict, finding Schmidt guilty of first-degree murder.[175] Death followed automatically as the punishment for first-degree murder,[176] and Schmidt later appeared in court for the formal imposition of that sentence.[177] Although Schmidt declared when the jury announced its guilty verdict that he wanted to be executed and did not wish to appeal,[178] Alphonse Koelble, the lawyer who had represented him from the outset, proclaimed the next day that an appeal would be filed.[179] The *New York Times* reported that Koelble then made the further startling assertion—which was totally at odds with the defense presented at the trial—"that Schmidt was not the murderer of Anna Aumuller and that his reticence is due to his desire to shield some one else."[180] The article continued, "Mr. Koelble would not enlarge on that statement, but it was suggested that he believes that the girl died from the effects of a criminal operation and that Schmidt dismembered her body in order to dispose of it more easily."[181]

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171 *Id.* at 1391.

172 *Id.* at 1393.

173 *See Schmidt Is Guilty in the First Degree*, N.Y. TIMES, Feb. 6, 1914, at 1.

174 *See id.*

175 *See id.*

176 *See* N.Y. PENAL LAW §§ 1044–45 (Consol. 1909); Acker, *supra* note 82, at 517–18; *see also supra* note 82 and accompanying text (describing New York's first-degree murder statute at the time).

177 *See* 3 Case on Appeal, *supra* note 18, at 1398–99.

178 *See Schmidt Is Guilty in the First Degree*, *supra* note 173, at 1.

179 *See Still Fight for Schmidt*, N.Y. TIMES, Feb. 7, 1914, at 3.

180 *Schmidt Is Guilty in the First Degree*, *supra* note 173, at 1; *see also Still Fight for Schmidt*, *supra* note 179, at 3.

181 *Still Fight for Schmidt*, *supra* note 179, at 3.

Schmidt was transported to Sing Sing Prison to join other condemned offenders on death row while his appeal was readied.[182]

B. Motion for New Trial and Appeal: Judgment Affirmed

On July 25, 1914, Alphonse Koelble filed a notice of motion asking Judge Davis to conduct a hearing and grant a new trial based on newly discovered evidence.[183] Affidavits subsequently supplied in support of the motion presented a dramatically different account of Anna Aumuller's death than was presented at trial; an account that, if credited, undermined the basis of Schmidt's first-degree murder conviction and suggested that his criminal liability would not exceed manslaughter.[184] Schmidt's sworn affidavit, dated October 30, 1914, set forth detailed new allegations:

> I am at present confined in State Prison at Ossining under conviction in the first degree of the murder of Anna Aumueller.
>
> I am innocent of said crime and my previous statement that I caused her death by cutting her throat is untrue; as she died as the result of a so-called criminal operation on Labor Day, September 1st, 1913.
>
> I am not now nor was I ever insane although mentally I may not be normal.[185]

Schmidt swore in the affidavit that Aumuller attempted unsuccessfully to terminate her pregnancy on September 1 in the Bradhurst Avenue flat that Schmidt had rented, was in pain as a result, and had asked for his help "to have the operation . . . completed."[186] He claimed that he then visited Dr. Arnold Leo, who he met through Ernest Muret, the ersatz dentist Schmidt had collaborated with in the counterfeiting scheme that resulted in Muret's conviction and imprisonment.[187] Accompanied by Muret, Dr. Leo allegedly examined Aumuller but refused Schmidt's appeals to perform the abortion.[188] Following Leo's departure, and prompted by

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[182] *See* GADO, *supra* note 19, at 170, 174.

[183] *See* 4 Case on Appeal, *supra* note 18, at 2, 3–4.

[184] *See id.* at 5; *Schmidt Is Guilty in the First Degree*, *supra* note 173, at 1; *supra* notes 16–18 and accompanying text.

[185] *See* 4 Case on Appeal, *supra* note 18, at 5.

[186] *Id.* at 5, 8.

[187] *See id.* at 6, 8; *supra* notes 69–70, 72 and accompanying text.

[188] *See* 4 Case on Appeal, *supra* note 18, at 9.

Bertha Zech, his frequent companion and housekeeper, Muret purportedly agreed to carry out the procedure.[189] Schmidt maintained that Muret attended to Aumuller as she lay in bed while Schmidt waited in an adjoining room.[190] His affidavit continued,

> I could hear Anna's groaning. Some time after we arrived there, Muret passed to the bathroom and in his hand he held a foetus. It was well enough developed to tell its sex; it was a boy child and Muret said, I think in the hearing also of Bertha Zech, "It shows, Hans, what you are capable of."
>
> Muret then proceeded on his way to the bath and toilet room and I never saw the foetus thereafter. Subsequently, after this incident, Bertha Zech called to me in German, "Come, Hans, for God's sake, Anna has fainted." Anna lay on the bed pale with eyes closed. . . . She was unconscious. . . . All three of us were panic stricken. Anna became weaker and weaker and later Muret said she was dead.[191]

Schmidt's affidavit continued with his account of what transpired in the aftermath of Aumuller's death. He claimed that after Muret and Zech left the flat, he sought out Dr. Leo, who returned to the flat with him and confirmed that Aumuller had died, but he refused to issue a death certificate for fear of being blamed for carrying out the fatal operation.[192] Schmidt stated that he later discussed "what was best to do" with Muret and Zech and that he and Muret "returned to the Bradhurst Avenue flat . . . between 11:30 and midnight."[193] There, he maintained, "Muret said the best thing to do was to cut up the body of the unfortunate girl and get rid of [her] remains in such a manner as would escape detection."[194] Schmidt explained that he

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[189] *See id.* at 9–10.

[190] *See id.* at 10.

[191] *Id.* at 10–11.

[192] Schmidt's affidavit read,

> Dr. Leo pronounced her dead and I then asked him whether he would not issue a death certificate to save what was an awful situation. . . . [H]e said, "Why should I want to help out when somebody else was responsible. If an undertaker comes here and sees all the blood on this mattress, he will know what happened and then I will be in trouble." . . . Dr. Leo said to me, 'Don't ever tell anybody that I was in this flat at any time for if you do, everybody will say I did it," referring to performing this operation, and I gave him my word that I would not . . . .

Id. at 12.

[193] *Id.*

[194] *Id.*

retrieved a large knife and a saw from the apartment housing their counterfeiting operation and that Muret used them to "perform[] the work" of dismembering the body.[195] The next day, he said, Zech, Muret, and he each took portions of Aumuller's body and disposed of them.[196]

> Bertha Zech, Muret and myself also talked the matter over although we avoided the subject as much as possible. Muret suggested to me in the very beginning that I pretend to be insane. He said at various times in effect, " . . . I will help you out in the insanity defense. It will be the easiest way out for all concerned. . . . Otherwise it would be about twenty years in State Prison for manslaughter in the first degree for you and me. With the insanity plea, it will not come to any trial at all, but you will be sent to an asylum where they will dismiss you after some time as cured."[197]

Schmidt averred, "I felt . . . morally responsible for Anna's death and I promised Muret, Bertha Zech and Dr. Leo that I would take all the blame on myself to protect them all."[198] He claimed to have "deceived [his] attorney" from the outset but after being sentenced to death came to the realization that he could no longer protect Muret, Zech, and Leo.[199] His affidavit concluded,

> The facts presented in this affidavit are the absolute truth and any statements I have made at any time in conflict therewith are untrue, including those regarding sexual excesses or perversions involving Muret, Anna or any other person. I concealed the truth from my attorneys to save the others though the attorneys wished to save me.
>
> My attorney and [his associate] Terence J. McManus asked me a few days before I was convicted whether I was alone connected with Anna's death, and they implored me to tell the truth, and I answered that I alone was responsible. I have no

[195] *Id.* at 14.

[196] *See id.* at 14 ("Bertha Zech took away the smallest parcel having the head, Muret took away another part and I took away and disposed of all the other parts.").

[197] *Id.* at 15.

[198] *Id.*

[199] *See id.* at 16–17.

> desire for life, but I feel I have right [*sic*] to be spared from the ignominy of death as a cold blooded murderer.[200]

Additional affidavits accompanied Schmidt's motion for a new trial. One was filed by Dr. Henry W. Cattell, a pathologist and the author of medical texts, who had extensive experience conducting "autopsies on those dying from the effects of an abortion."[201] Another was submitted by Dr. Justin Herold, a physician, the author of a prominent text on legal medicine, and professor of medical jurisprudence at Fordham University.[202] Each doctor reported that they examined the remains of Anna Aumuller's body in the New York City morgue on November 9, 1914, or more than fourteen months after her death, and examined slides prepared from her uterine tissue.[203] Each also reviewed the medical testimony presented at the coroner's inquest and at Schmidt's trial, in which physicians were called as prosecution's witnesses, and offered their opinions that Aumuller's death resulted from bleeding caused by her decapitation.[204] Dr. Cattell and Dr. Herold both reported that they found insufficient evidence to support that conclusion, and both opined that the evidence supported that Aumuller bled to death as a result of complications from an abortion.[205] The prosecution secured

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[200] *Id.* at 17–18.

[201] *Id.* at 37 (affidavit of Henry W. Cattell, M.D.).

[202] *See id.* at 40 (affidavit of Justin Herold, M.D.).

[203] *See id.* at 37 (affidavit of Henry W. Cattell, M.D.); *id.* at 40 (affidavit of Justin Herold, M.D.).

[204] *See id.* at 37–38 (affidavit of Henry W. Cattell, M.D.); *id.* at 40–41 (affidavit of Justin Herold, M.D.).

[205] Dr. Cattell's affidavit provided, in part,

> I find nothing in the postmortem examination as described by . . . [prosecution's witnesses] Doctors King and Haskings to warrant the statement that the said Anna Aumuller came to her death from bleeding occasioned by the severance of the head from the body . . . , the said head and neck above the torso never having been examined. I do find, however, every evidence from the parts examined and from my knowledge derived from similar cases of abortion that the said Anna Aumuller came to her death from bleeding and shock due to an abortion. I base this opinion from . . . the appearances of the gross and microscopical parts examined in and from the body of Anna Aumuller.

Id. at 37–38 (affidavit of Henry W. Cattell, M.D.). Dr. Herold's affidavit included a detailed explanation in support of his opinion and his conclusions were somewhat more definitive than Dr. Cattell's:

> The postmortem examinations described by Doctors King and Haskings do not warrant the statement that Anna Aumuller came to her death from bleeding occasioned by severing the head from the body.
>
> . . . .

several affidavits to counter those submitted on Schmidt's behalf. Bertha Zech swore that Schmidt's representations about her were wholly untrue:

> I did not know Anna Aumuller . . . . I was not present at any abortion committed upon her. I did and witnessed none of the things described in his affidavit as he said occurred in the Bradhurst Avenue flat. I was not present at the time Anna Aumuller died and I had nothing whatever to do with the disposition of her body.[206]

Muret—now using his "correct name," Arthur Heibing[207]—similarly offered a complete denial of the inculpatory allegations made in Schmidt's affidavit:

> I never met Anna Aumueller in my life.
> . . . At no time did Schmidt, [Dr. Arnold] Leo and myself have any conversation together concerning Anna Aumueller . . . .
> I never was in the flat at 68 Bradhurst Avenue in my life . . . .
> The first I knew of the death of Anna Aumueller was on the afternoon of the second Sunday following Labor Day when I read of Schmidt's arrest . . . .
> Schmidt, Bertha Zech and I never had any conversation together as regards any defence that Schmidt was to interpose on his trial. . . .
> I know nothing of, and had absolutely nothing to do with, the disposition of the body of Anna Aumueller.[208]

Judge Davis denied Schmidt's motion for a new trial on January 28, 1915 without holding an evidentiary hearing.[209] Koelble's appeal to the New York Court of Appeals sought reversal of Schmidt's murder conviction because of alleged trial errors and also challenged

> From my examination . . . I came to the conclusion that death in the case of Anna Aumuller was caused by shock and hemorrhage following an incomplete abortion.

Id. at 41, 43 (affidavit of Justin Herold, M.D.).

[206] *Id.* at 52 (affidavit of Bertha Zech).

[207] *See id.* at 54 (affidavit of Arthur Heibing).

[208] *Id.* at 54–55.

[209] *See id.* at 358–59.

the denial of his motion for a new trial.[210] Benjamin Cardozo, whose distinguished judicial career culminated with service as Associate Justice on the United States Supreme Court from 1932 until his death in 1938,[211] had been sworn in as a judge on the New York Court of Appeals in 1914, just two days after the jury returned its verdict that found Schmidt guilty of first-degree murder.[212] He wrote the opinion for a unanimous court affirming Schmidt's conviction and death sentence.[213] His opinion quickly dismissed granting a new trial based on newly discovered evidence, dwelled at some length on the insanity defense instructions delivered at Schmidt's trial, and then circled back to examine the issues in tandem.[214]

The statute authorizing new trials based on newly discovered evidence required a showing "that upon another trial, the defendant can produce evidence such as if before received would probably have changed the verdict."[215] It further required that "such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence."[216] Cardozo noted at the outset of his opinion that Schmidt's "most extraordinary tale" alleging that he fabricated his earlier account of killing Aumuller as a sacrifice to God stemming from an insane delusion, and that she actually bled to death following an abortion, had been "known to [Schmidt], on his own showing, from the beginning."[217] Accordingly, the basis of the new trial motion had not been "discovered since the trial," as the statute demanded.[218] Even if the allegations were true, Cardozo wrote, "the courts are powerless to help him," and for good reason.[219]

> A criminal may not experiment with one defense, and then when it fails him, invoke the aid of the law which he has flouted, to experiment with another defense, held in reserve

[210] *See id.* at 9, 30, 31, 34.

[211] *See* ANDREW L. KAUFMAN, CARDOZO 471, 567 (1998).

[212] *See id.* at 129; *Schmidt Is Guilty in the First Degree*, s*upra* note 173, at 1. Cardozo's appointment as a Court of Appeals judge began on February 7, 1914. *See* KAUFMAN, *supra* note 211, at 129.

[213] *See* People v. Schmidt, 110 N.E. 945, 951 (1915). Judges Hiscock, Chase, Cudderback, Hogan, Pound, and Chief Judge Bartlett concurred in the result. *See id.*

[214] *See* POLENBERG, *supra* note 6, at 74–75.

[215] *Schmidt*, 110 N.E. at 946.

[216] *Id.*

[217] *Id.* at 945–46.

[218] *Id.* at 946.

[219] *Id.* at 946.

> for that emergency. It would be strange if any system of law were thus to invite contempt of its authority.[220]

The opinion then shifted ground to consider whether the trial judge erred by instructing the jury that Schmidt would qualify for the insanity defense only if he did not know, when he killed Aumuller, that his act was "wrong" in the sense that it was contrary to New York law.[221] Although the ensuing analysis emphatically rejected that narrow definition, it represented little more than "an elaborate *dictum*"[222] in light of Schmidt's sworn admission that he had fabricated his trial defense and was not insane under any construction of the statute.[223] Cardozo took advantage of Schmidt's appeal to explain at some length why a more expansive interpretation of the term "wrong," one contemplating not only awareness that an act violates the law, but that it is a "moral wrong," was required in light of the history and essential rationale of the insanity defense.[224] He constructed a compellingly sympathetic narrative to expose the flaw he perceived in the trial judge's more restrictive definition of the term.[225]

> A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. It seems a mockery to say that, within

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[220] *Id.*

[221] *See id.*

[222] Note, *Is Legal or Moral Wrong Involved in the "Knowledge of Right and Wrong" Test of Insanity?*, 29 HARV. L. REV. 538, 538–39 (1916); *see also* Christopher Hawthorne, *Deific Decree: The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1788 (2000) ("[I]n a remarkable rhetorical trope, [Cardozo] made it seem as if he *had* to reach Schmidt's next argument [involving the meaning of "wrong" as used in New York's insanity defense], though he had just disposed of the case in the previous paragraph."); *id.* at 1792 (describing the portion of the opinion in *People v. Schmidt* that addressed the insanity defense issue as "[t]he great dictum"); POLENBERG, *supra* note 6, at 74 ("Having barred further judicial intervention [in the portion of his ruling rejecting the request for a new trial based on newly discovered evidence], Cardozo could have stopped but went on instead to consider the meaning of the word 'wrong' in the law regarding insanity.").

[223] Indeed, Cardozo's opinion essentially acknowledged that addressing the insanity defense instruction was dicta: "It is of no importance now whether the trial judge charged the jury correctly upon the question of insanity, because in the record before us the defendant himself concedes that he is sane, and that everything which he said to the contrary was a fraud upon the court." *Schmidt*, 110 N.E. at 950.

[224] *See id.* at 949.

[225] *See id.* ("The interpretation placed upon the statute by the trial judge may be tested by its consequences.").

> the meaning of the statute, she knows that the act is wrong. If the definition propounded by the trial judge is right, it would be the duty of a jury to hold her responsible for the crime. We find nothing either in the history of the rule, or in its reason and purpose, or in judicial exposition of its meaning, to justify a conclusion so abhorrent.[226]

The jury's rejection of the insanity defense at Schmidt's trial and its consequent decision to find him guilty of first-degree murder thus rested on an interpretation of the law so flawed as to represent a "mockery" and invite an "abhorrent" result.[227] Yet because of Schmidt's admitted duplicity, his "having fabricated a defense of insanity in order to deceive the trial court,"[228] the otherwise indefensible guilty verdict would not be disturbed. Cardozo now risked painting his opinion into a corner. With Schmidt's trial defense accepted as false, did not his alternate account that Aumuller met her death through a botched abortion, perhaps justifying his conviction for manslaughter but certainly not first-degree murder, gain sufficient credence to require a new trial and spare him from execution?

> It is argued that we ought not to accept [Schmidt's] statement that his defense of insanity was a sham, and reject his statement in the same affidavit that the victim died from a criminal operation. But that is not an accurate description of our attitude. We neither accept nor reject the defendant's present statement of his participation in the crime. We merely say that if it is true, it does not make out a case of newly-discovered evidence. We find the statement coupled with a confession that the defense of insanity was a fraud upon the court; and we hold that while that confession remains before us, the defendant who made it, who still adheres to it, and who must be presumed to have sufficient mind to be responsible for it, will not be suffered by a court of justice to take advantage of his wrong.[229]

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[226] *Id.*

[227] "If . . . there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong." *Id.*

[228] *Id.* at 950.

[229] *Id.*

With the rejection of his insanity defense, and the denial of his motion for a new trial and appeal, Schmidt's hopes were dashed for relief from the courts.[230] Perhaps mindful of the potential incongruity in accepting Schmidt at his word concerning his fabricated trial defense while simultaneously denying him the chance to present the defense he had allegedly covered up, Cardozo strongly intimated that Schmidt might have recourse elsewhere.

> The remedy and the one remedy available to a criminal who finds himself thus enmeshed in a trap of his own making, is not in the processes of courts or the machinery of law; it is by appeal to the clemency of the Governor. Strange to say, with all its incongruous features, the defendant's tale supplies a plausible explanation of some of the mysteries of this tragedy. We do not mean to express a belief that the tale is true. All that we say is that in an appropriate proceeding it would merit earnest scrutiny. We do not doubt that such scrutiny will be given to it, and that right will be done, if hereafter an appeal for clemency is made to the Executive.[231]

Thus, in a last-ditch effort to ward off his execution, Schmidt's counsel prepared and submitted a request for clemency with the governor, who under the New York Constitution was vested with the authority to commute sentences and grant pardons.[232] In yet another odd and ironic twist in this already peculiar case, the Governor who would consider Schmidt's petition for clemency was Charles S. Whitman, the same man who oversaw Schmidt's prosecution as the New York County District Attorney.[233]

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[230] Schmidt's later motion for reargument of his appeal also was denied. *See* People v. Schmidt, 111 N.E. 1095, 1095 (N.Y. 1916) (per curiam). While issuing its denial, the Court of Appeals additionally held that "[t]he request of [Schmidt's] counsel for a certificate that a Federal question was involved in the appeal cannot be complied with for it is not the fact." *Id.* Alphonse Koelble, Schmidt's defense attorney, persisted by traveling to Washington, D.C., to ask Associate Supreme Court Justice Charles Evans Hughes to issue a writ of error to allow the Supreme Court to review Schmidt's case. *See* POLENBERG, *supra* note 6, at 78. Justice Hughes denied the request. *Id.*

[231] *Schmidt*, 110 N.E. at 946.

[232] When Schmidt's application for clemency was filed in 1916, the governor's "power to grant reprieves, commutations and pardons after conviction" was established in article 4, section 5 of the New York Constitution. That authority currently is provided in article IV, section 4 of the New York Constitution. *See* N.Y. CONST. art. IV, § 4; People *ex rel.* Forsyth v. Court of Sessions, 36 N.E. 386, 388 (N.Y. 1894).

[233] *See About the Office: History of the Office*, *supra* note 20; *Hall of Governors: Charles S. Whitman*, *supra* note 20; *infra* notes 232–235 and accompanying text.

C. Clemency Denied

Schmidt's clemency request was not the first time Governor Whitman was asked to spare a prisoner from execution after he had helped secure the man's conviction and death sentence as prosecutor.[234] During Whitman's tenure as the District Attorney of New York County,[235] he prosecuted Charles Becker, an allegedly corrupt lieutenant in the New York City Police Department, for ordering the killing of a reputed gambler, Herman Rosenthal.[236] Becker was convicted of murder and sentenced to death amidst sensational publicity,[237] as were the four men who actually carried out the murder.[238] The four gunmen were executed in 1914,[239] before Whitman became governor.[240] Becker was retried after his initial conviction was reversed on appeal,[241] was again convicted,[242] and his execution was not scheduled until 1915,[243] when Whitman took office as governor.[244] Whitman denied clemency[245] and Becker, who some commentators have argued was likely innocent,[246] was executed.[247]

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[234] *See Charles Seymour Whitman: 1868–1947*, 33 A.B.A. J. 473, 474 (1947); *see infra* notes 235–248 and accompanying text.

[235] Whitman served as district attorney from 1910–1914, and as New York's Governor from 1915–1918. *See About the Office: History of the Office*, *supra* note 20; *Hall of Governors: Charles S. Whitman*, *supra* note 20.

[236] *See* Edward Conlon, *The Story of an NYPD Officer Sentenced to Death*, DAILY BEAST (July 30, 2015, 1:01 AM), https://www.thedailybeast.com/the-story-of-an-nypd-officer-sentenced-to-death100-years-ago-today [https://perma.cc/PND2-85WL]; *Charles Seymour Whitman: 1868–1947*, *supra* note 234, at 473–74.

[237] *See* ANDY LOGAN, AGAINST THE EVIDENCE: THE BECKER-ROSENTHAL AFFAIR 175–78 (1970); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 96 (1987); *Charles Seymour Whitman: 1868–1947*, *supra* note 234, at 474; Conlon, *supra* note 236.

[238] The four convicted gunmen were Harry ("Gyp the Blood") Horowitz, Frank ("Dago Frank") Cirofici, Louis ("Lefty Louie") Rosenberg, and Jacob ("Whitey Lewis") Seidenschmer. *See* GADO, *supra* note 19, at 95; LOGAN, *supra* note 237, at 72; *Charles Seymour Whitman: 1868–1947*, *supra* note 234, at 474.

[239] WILLIAM J. BOWERS ET AL., LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982, at 462 (new ed. 1984).

[240] *See Hall of Governors: Charles S. Whitman*, *supra* note 20.

[241] *See* People v. Becker, 104 N.E. 396, 410 (N.Y. 1914).

[242] *See* People v. Becker, 109 N.E. 127, 138 (N.Y.), *reargument denied*, 109 N.E. 1086 (N.Y. 1915).

[243] *See* GADO, *supra* note 19, at 189.

[244] *See id.* at 188.

[245] *See Grants Becker Short Reprieve*, N.Y. TIMES, July 2, 1915, at 1.

[246] *See* Bedau & Radelet, *supra* note 237, at 72–73, 95–96 (arguing that Frank Cirofici likely was also innocent); *see also* HENRY H. KLEIN, SACRIFICED: THE STORY OF POLICE LIEUT. CHARLES BECKER (1927) ("Becker was innocent of the crime for which he was convicted."); LOGAN, *supra* note 237.

[247] *See* GADO, *supra* note 19, at 190; LOGAN, *supra* note 237, at 322; *Becker Unnerved Goes to Chair; His Bonds Slip*, N.Y. TIMES, July 31, 1915, at 1.

Addressing the same issue present in Schmidt's case, Becker's attorney argued to no avail that because "the prosecutor of the defendant is now Governor of the State," a "final examination of his case by an impartial Executive, which the Constitution assures every man under sentence of death, this defendant cannot hope to enjoy."[248]

During an era when a capital sentence was mandatory on conviction for first-degree murder in New York, a practice that did not give way entirely until 1963,[249] the state's chief executives were not reluctant to commute death sentences to life imprisonment.[250] New York governors commuted 217 death sentences while allowing 631 executions to go forward in the six decades spanning 1900 through 1959, or in one-fourth (25.6%) of the 848 cases in which they confronted clemency decisions.[251] Governor Whitman commuted 11 death sentences while in office between 1915 and 1918,[252] and permitted 48 executions to be carried out.[253] After receiving Schmidt's clemency petition, Whitman granted a temporary reprieve on January 12, 1916, delaying Schmidt's scheduled execution to allow time for the United States Supreme Court to consider intervening[254] and to enable further investigation of the case.[255] He acknowledged that he was "thoroughly familiar with every detail of [Schmidt's] case, inasmuch as it was my duty as District Attorney of New York County

[248] *Whitman's Position a Plea for Becker*, N.Y. TIMES, June 11, 1915, at 9 (quoting brief filed by Becker's attorney, Martin T. Manton, in support of motion for re-argument in New York Court of Appeals).

[249] *See* Acker, *supra* note 82, at 522–23.

[250] *See* James R. Acker et al., *Merciful Justice: Lessons from 50 Years of New York Death Penalty Commutations*, 35 CRIM. JUST. REV. 183, 184 (2010); Joshua D. Freilich & Craig Rivera, *Mercy, Death, and Politics: An Analysis of Executions and Commutations in New York State, 1935–1963*, 24 AM. J. CRIM. JUST. 15, 16, 20 (1999); Talia Roitberg Harmon, James R. Acker & Craig Rivera, *The Power To Be Lenient: Examining New York Governors' Capital Case Clemency Decisions*, 27 JUST. Q. 742, 743–44, 750 (2010).

[251] Acker, *supra* note 82, at 566 n.303.

[252] State of New York, Public Papers of Charles Seymour Whitman, Governor, 1916, 470–72, 474 (1916) (Antonio Africano and Madeline Ferola); State of New York, Public Papers of Charles Seymour Whitman, Governor, 1917, 554–56, 556–58 (1917) (Elias Jazia and William McNamara); State of New York, Public Papers of Charles Seymour Whitman, Governor, 1918, 268–70 (1918) (Emil Green); State of New York, Public Papers of Charles Seymour Whitman, Governor, 1919, 349–50, 353–54, 359–60, 361–62, 365–68, 377–78, 383 (1919) (William Flack, Francis Fowler, Antonio Giordano, Gennaro Mazzella or Mazielo, Onne Talas, and Charles Stielow).

[253] BOWERS, *supra* note 239, at 459, 462–63.

[254] See GADO, *supra* note 19, at 195.

[255] *See* Public Papers of Charles Seymour Whitman, Governor, 1919, 382 (1919); *Reprieve to Hans Schmidt*, N.Y. TIMES, Jan. 13, 1916, at 8; GADO, *supra* note 19, at 195; POLENBERG, *supra* note 6, at 78.

personally to direct the prosecution," while noting that "the actual conduct of the trial [was] in the hands of my former assistant."[256]

Whitman's investigation consisted of asking two physicians "to examine into the medical phase of the case . . . and to report to [him] their opinion respecting it."[257] Both doctors examined organs and tissue harvested from Aumuller's body, including her uterus.[258] Dr. W.C. MacCallum, a Columbia University pathology professor, concluded that Aumuller's death resulted from "rapid haemorrhage, [but] it is not possible to determine how the haemorrhage occurred."[259] He could "not . . . offer a definite opinion as to the cause of death," but found "no evidence to show that the woman died from a postpartum haemorrhage from the uterus."[260] Dr. Francis Carter Wood, also an experienced pathologist, likewise refrained from opining about "the actual cause of [Aumuller's] death."[261] Yet focusing on "whether there is in the evidence or in the data any support for"[262] Schmidt's "contention that the death of Anna Aumuller was caused by a hemorrhage following an abortion,"[263] he concluded, "I find none."[264]

Governor Whitman construed the physicians' reports to mean, "[i]n substance, . . . that there is no evidence in support of the defendant's assertion that Anna Aumuller died from a post partum hemorrhage from the uterus."[265] He continued,

> Taking the positive declarations of the physicians who made the autopsy, together with the opinions of the learned gentlemen who have looked into the question at my request, I can find no reason whatever for the belief that the defendant's story, told after the judgment of death was pronounced against him, is credible.[266]

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[256] Governor's Statement Denying Clemency, at 2, People v. Schmidt, 110 N.E. 945 (1916) (available through the New York State Archives).

[257] *Id.* at 3.

[258] *See id.* at 4–5.

[259] *Id.* at 4. The records quoted in this Article use *haemorrhage* and *hemorrhage* interchangeably. *See, e.g.*, *infra* text accompanying note 265.

[260] *Id.* at 4 (quoting report submitted by Dr. W.G. MacCallum).

[261] *Id.* at 6 (quoting report submitted by Dr. Francis Carter Wood).

[262] *Id.*

[263] *Id.* at 5.

[264] *Id.* at 6.

[265] *Id.* at 3.

[266] *Id.* at 6.

The conclusion that Schmidt's post-conviction story—to the effect that Aumuller bled to death after her own unsuccessful attempt to abort her pregnancy and Muret's subsequent intervention—lacked credibility, is certainly defensible. Whether there was "no reason whatever for" crediting that story is far less clear.[267] Unable to examine Aumuller's head and neck, which were never recovered, neither doctor appointed by Governor Whitman were able to pinpoint a cause of death.[268] The doctors interpreted the evidence to support an inference that Aumuller bled rapidly to death because her throat had been slashed, a conclusion consistent with the version advanced at Schmidt's trial.[269] In particular, the condition of the uterine tissue that the doctors inspected was difficult to square with the contention that Aumuller bled to death from complications from an abortion.[270] Still, both doctors confirmed that she had an abortion, and Dr. Wood recited evidence which "seems to me to negative the idea of an unskillful abortion."[271] In his post-conviction affidavit, Schmidt claimed that Muret carried out the abortion, which Muret adamantly denied,[272] and, significantly, that Muret was skilled in employing the instruments allegedly used.[273] In addition, Dr. MacCallum concluded his report by observing that

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[267] *Id.*; *see also* POLENBERG, *supra* note 6, at 79; *infra* note 268 and accompanying text.

[268] *See* Governor's Statement Denying Clemency, *supra* note 256, at 4, 6. Dr. MacCallum stated in his report, "Because of the lact [*sic*] of any examination of the head, I do not feel that I can offer a definite opinion as to the cause of death of the deceased." *Id.* at 4 (reproducing report submitted by Dr. W.G. MacCallum). Dr. Wood stated in his report, "In the absence of an inspection of the head of the deceased, no effort has been made by me to form an opinion as to the actual cause of death." *Id.* at 6 (reproducing report submitted by Dr. Francis Carter Wood).

[269] *See id.* at 4, 5; *supra* note 81.

[270] *See* Governor's Statement Denying Clemency, *supra* note 256, at 4, 5.

[271] *Id.*

[272] *See supra* text accompanying note 208.

[273] 4 Case on Appeal, *supra* note 18, at 10 (affidavit of Hans Schmidt). Schmidt maintained in an affidavit that after a disparaging remark from Bertha Zech regarding his competency in medical matters, Muret

> stated that he would show what he could do and then he began putting a number of things in a satchel he had in the office. Among other things he put in cotton and a large bottle filled with liquid. I recall that there was also a small saw, some small instruments and an instrument which I since learned is known as a speculum and which in front is formed like the beak of a duck.

Id. In addition, when County Physician Dr. George W. King examined parts of Aumuller's body shortly after they were discovered, he observed "that the dismemberment of the body had been done so skillfully that it might be the work of a surgeon. The flesh had been cut clean with a sharp knife, and the bones had been cut evidently with a surgical saw." *Find Woman's Body in Bundle in River*, *supra* note 21, at 11.

> [w]hile the contracted condition of the heart and the general bloodlessness of the body indicate death from rapid haemorrhage, it is not possible to determine how the haemorrhage occurred. Death from haemorrhage from the uterus postpartum does occur and there is a remote possibility that the uterus might finally contract, and expel the last blood clots.[274]

Whitman nevertheless expressed no doubt about Schmidt's guilt. He was singularly unmoved by his plea for clemency:

> This defendant has been fairly tried. He has attempted and once nearly succeeded in foisting upon the court a story which he himself now admits was false. He has demonstrated beyond the question his capacity and skill in shamming and falsifying, and all the proof before me compels me to believe that his assertain [*sic*] now as to the manner of the decedent's death is utterly false. In fact, I do not see that the falsity of his story could be more clearly established than it has been.
>
> No suggestion has been made to me by the Trial Judge that the sentence should be commuted, and I am convinced that I should be recreant to my duty should I interfere with the judgment of the Court.
>
> The petition is denied.[275]

The denial of clemency was issued Wednesday, February 9, 1916.[276] Schmidt's execution was scheduled for the following week.[277]

D. Execution

When Governor Whitman announced his decision denying clemency, Schmidt had been confined under sentence of death in Sing Sing Prison for almost exactly two years, since February 11, 1914.[278] As Schmidt's execution date approached, 130 executions previously had been carried out at Sing Sing.[279] The first was conducted in

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[274] Governor's Statement Denying Clemency, *supra* note 256, at 4.

[275] *Id.* at 6–7.

[276] *Id.* at 7.

[277] *See Hans Schmidt Must Die*, N.Y. TIMES, Feb. 10, 1916, at 7.

[278] *See* GADO, *supra* note 19, at 174, *Hans Schmidt Must Die*, *supra* note 277, at 7.

[279] *See* SCOTT CHRISTIANSON, CONDEMNED: INSIDE THE SING SING DEATH HOUSE 147–51 (2000).

1891.[280] The most recent one, that of Giuseppe Marendi, occurred February 4, 1916.[281] All of the condemned died in the electric chair, an innovation introduced in New York and first used at Auburn Prison in 1890.[282] The cells confining the death-sentenced prisoners at Sing Sing were in close proximity to the electric chair.[283] They also adjoined the room where autopsies following executions were performed with the use of an electric saw, which was clearly audible to those such as Schmidt who were awaiting that same fate.[284]

With all legal obstacles standing in the way of his execution removed, Schmidt was led from his death row cell to the room housing the electric chair in the early morning hours of February 18.[285] He was allowed to say mass with the prison chaplain, Father William Cashin, who walked with him to the death chamber.[286] Seventeen witnesses assembled to watch the execution.[287] Just before prison guards strapped him to the electric chair, Schmidt faced the witnesses and proclaimed, "Gentlemen. I ask forgiveness of those whom I have offended or scandalized. I forgive all who have injured me."[288] When secured in the chair he stated, "My last word is to say goodbye to my dear old mother."[289] His head was shrouded in a hood, three surges of electricity were administered, and Hans Schmidt's execution for murdering Anna Aumuller was completed.[290]

II. ON LAW, JUSTICE, AND *PEOPLE V. SCHMIDT*

Decisions made at critical junctures of the legal proceedings in *People v. Schmidt* were, to say the least, controversial. One facet of the case, involving the trial judge's instructions to the jury regarding the scope of the insanity defense, was acknowledged as being clearly

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[280] *See id.* at 147.

[281] *See id.* at 151; *see also* BOWERS, *supra* note 239, at 462.

[282] *See* RICHARD MORAN, EXECUTIONER'S CURRENT: THOMAS EDISON, GEORGE WESTINGHOUSE, AND THE INVENTION OF THE ELECTRIC CHAIR 88, 89 (2002); Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 692 (1994).

[283] *See* CHRISTIANSON, *supra* note 279, at 17.

[284] *See* GADO, *supra* note 19, at 192; POLENBERG, *supra* note 6, at 79.

[285] *See* GADO, *supra* note 19, at 201–02.

[286] *See id.*

[287] *See Hans Schmidt Dies in Chair*, N.Y. TIMES, Feb. 18, 1916, at 12. *But see* GADO, *supra* note 19, at 201 (providing that there were eighteen, instead of seventeen, witnesses present at Schmidt's execution).

[288] *Hans Schmidt Dies in Chair*, *supra* note 287, at 12.

[289] *Id.*

[290] *See* GADO, *supra* note 19, at 203; POLENBERG, *supra* note 6, at 80; *Hans Schmidt Dies in Chair*, *supra* note 287, at 12.

erroneous even though Schmidt's conviction and execution ultimately were deemed lawful.[291] Whether the several rulings made in the course of the proceedings combined to produce a just outcome raises separate, challenging questions. In a case fraught with as many difficult issues as Schmidt's, the governing laws supply only a general framework for making decisions. The most consequential questions—implicating matters such as individual responsibility, blame, just deserts, and mercy—require judgment and principled discretion, and beg answers beyond the reach of formal legal rules. This is hardly surprising. The law operates in a complex world inhabited by complicated people. Hans Schmidt and his conviction and execution for causing the death of Anna Aumuller convincingly illustrate the imprecise borders demarcating law and justice.

The law's limitations in responding to the complexities of human behavior are vividly demonstrated by the insanity defense, which Schmidt unsuccessfully invoked at his trial. Dr. Smith Ely Jelliffe, one of the alienists who examined Schmidt and testified on his behalf, expressed open disdain for the law governing insanity during his cross-examination by Assistant District Attorney James Delehanty:

> Q. [by Mr. Delehanty] You know the test of the law of the State of New York of criminal responsibility, don't you? A. [by Dr. Jelliffe] I do.
>
> Q. And in respect of that have you not made the statement that that test was farcical? A. I have.
>
> Q. Do you believe it? A. I do.
>
> Q. You call it nonsense? A. I have.
>
> Q. Do you believe that too? A. I do.[292]

[291] *See* People v. Schmidt, 110 N.E. 945, 946, 949, 950 (N.Y. 1915).

[292] 3 Case on Appeal, *supra* note 18, at 1156–57.

Although not as bluntly as Dr. Jelliffe, other experts in both psychiatry[293] and law[294] have expressed skepticism about the law's ability to define the contours of criminal responsibility by using the language of tests for insanity.[295] The jury that rejected Schmidt's plea of not guilty by reason of insanity faced an especially severe disadvantage because it did not even have the chance to apply the test authorized by law.[296] Its deliberations were governed by erroneous instructions which rendered irrelevant Schmidt's claim that he did not know that killing Anna Aumuller was wrong because he had acted in response to a directive from God.[297] The verdict of guilty, although predicated on this fundamental misstatement of law, remained undisturbed because the New York Court of Appeals identified what it considered to be an offsetting irregularity: Schmidt's confessed duplicity in presenting insanity as a defense.[298] In light of that admission, Judge Cardozo's opinion concluded that, "no injustice has resulted."[299]

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[293] For example, commenting specifically on Schmidt's case, Dr. Alan Stone writes,

> I believe that the law's effort to formulate the right question about criminal responsibility and psychiatry's efforts to answer it are equally misguided. After centuries of efforts on the part of great legal scholars, jurists and philosophers to define the precise question they want answered, might it be time to acknowledge that such a definition is beyond the reach of legal reason? And if the legal question is unaskable, psychiatrists, even the best trained forensic psychiatrists, should recognize that it may be unanswerable.

Stone, *supra* note 145.

[294] For example, arguing in favor of abolishing the insanity defense, noted legal scholar Norval Morris maintains, "We fail in this classificatory effort [using the insanity defense as a mechanism to identify those who 'are mad, not bad, sick not wicked'] and are doomed to failure no matter how we try since the distinction surpasses our moral and intellectual capacities." NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 73 (1982); *see also* Richard Lowell Nygaard, *On Responsibility: Or, the Insanity of Mental Defenses and Punishment*, 41 VILL. L. REV. 951, 970 (1996) ("[T]hroughout the states, several variations on these main themes [reflected in insanity tests] guide jurors in the critical decisions they must make with respect to a person's mental capacity. . . . [However], none of these tests confronts the reality that clear and definite rules are necessary for jurors who must decide these weighty issues, and such simplistic tests cannot account for the human psyche's myriad of variables nor for the offender who is defensively using these definitions as a strategy to escape punishment for his criminal acts.").

[295] *See* Nygaard, *supra* note 294, at 970, 971; Stone, *supra* note 145.

[296] *See* People v. Schmidt, 110 N.E. 945, 945–46, 949 (N.Y. 1915).

[297] *See id.* at 946, 949.

[298] *See id.* at 950.

[299] *Id.* ("It is of no importance now whether the trial judge charged the jury correctly upon the question of insanity, because in the record before us the defendant himself concedes that he is sane, and that everything which he said to the contrary was a fraud upon the court. . . . [H]e tells us that he never saw the vision and never heard the command. He concedes, therefore, that the issue of his sanity was correctly determined by the jury; he concedes that even if there was error in the definition of insanity no injustice has resulted . . . .").

Yet Schmidt's admission, which the court credited, was coupled with a companion assertion which the court did not credit.[300] Schmidt additionally claimed that Aumuller died from complications stemming from an illegal abortion, conduct which presumably would be punishable as manslaughter but not murder.[301] It is plausible, of course, that Schmidt was being doubly duplicitous, both in presenting a false insanity defense at trial and also in advancing his alternative account that Aumuller died following complications from an abortion. It nevertheless is unclear why confidence should be placed in one of Schmidt's representations (that he had fabricated his insanity defense), but not the other (that Aumuller's death resulted from the abortion). The explanation apparently lay in the undesirable policy implications of rewarding such ostensible gamesmanship by nullifying a conviction and providing a prevaricating defendant a "do-over."[302] Whether Schmidt's presumed chicanery is adequate cause for allowing his execution to go forward without more rigorous scrutiny of his dual accounts is certainly disputable.[303]

Schmidt also was barred from seeking relief from his conviction because of newly discovered evidence.[304] Even if Schmidt's averments were true, Judge Cardozo reasoned, they did not qualify as newly discovered evidence under the statute authorizing new trials on that ground because the alleged facts were known well in advance of Schmidt's trial.[305] Schmidt's attorney, Alphonse Koelble,

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[300] *See id.* (holding that while the court believed Schmidt's admission of fabricating his insanity, it chose to ignore Schmidt's claim that Aumuller died as a result of abortion complications).

[301] *See id.* at 945.

[302] *See id.* at 946 ("A criminal may not experiment with one defense, and then when it fails him, invoke the aid of the law which he has flouted, to experiment with another defense, held in reserve for that emergency.").

[303] *See* Hawthorne, *supra* note 222, at 1791 ("Cardozo states, 'It would be strange if any system of law were thus to invite contempt of its authority.' Not only is Schmidt disreputable, not only is he a persistent liar, but when is [*sic*] found out, he is brazen enough to demand justice from the system he has just tried to defraud. . . . [I]t seems not only inevitable but right that Hans Schmidt be denied a new trial. . . . If it were not for Cardozo's masterful insinuation in his statement of facts, the reader might reverse the proposition: a tribunal should not condition justice on whether or not a defendant shows respect for its authority. Put this way, whether Hans Schmidt deserves a new trial is a far closer question than Cardozo's rhetoric would suggest." (quoting *Schmidt*, 110 N.E. at 946)).

[304] *Schmidt*, 110 N.E. at 950.

[305] *Id.* at 946 ("The statute says that a new trial may be granted 'when it is made to appear, by affidavit, that upon another trial, the defendant can produce evidence such as if before received would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence.' The power to order a new trial in criminal causes is created and measured by the statute. The defense now offered by the defendant was not 'discovered since the trial.' It was known to him, on his own showing, from the beginning." (internal citations omitted)).

raised another statutory basis for relief in his appellate brief,[306] but Cardozo's opinion neglected to address it. Koelble cited a section of the criminal procedure law, originally enacted in 1855 "in a spirit of liberal and enlightened humanity,"[307] which provided that "when the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below."[308] This authority, which was codified in the state constitution in 1894,[309] empowered the Court of Appeals when reviewing capital convictions to "examine the facts of a case and determine whether the verdict was manifestly unjust, [or] against the law or not supported by the weight of the evidence."[310] Schmidt's admittedly falsified insanity defense apparently was construed to nullify any claim sounding of a miscarriage of justice.[311] If the symmetry embedded in that sentiment is somewhat appealing, it rings simultaneously of irony. As Cardozo's biographer, Richard Polenberg, observed,

> It is true that Schmidt had been a bald-faced liar and had not told the truth until he thought it could benefit him. But having once committed perjury, what alternative was then left to him? Suppose Schmidt had maintained his pretense of insanity: Was Cardozo implying that he then would have been

[306] Brief for Appellant at 9, *Schmidt*, 110 N.E. 945 ("This Court has never failed to exercise the great power vested in it by Section 528, whenever it appeared that the conditions warranted its exercise.").

[307] O'Brien v. People, 36 N.Y. 276, 278 (1867), *quoted in* People v. Romero, 859 N.E.2d 902, 905 (N.Y. 2006); *see* Brief for Appellant, *supra* note 306, at 9 (referring to Section 528 of the Code of Criminal Procedure).

[308] People v. Strollo, 83 N.E. 573, 582 (N.Y. 1908). The origins and evolution of legislation providing the Court of Appeals with "interest of justice" review in capital cases are described in *Romero*, 859 N.E.2d at 905–09.

[309] *See Romero*, 859 N.E.2d at 906 n.1.

[310] *Id.* at 905. The Court of Appeals additionally had "the authority to review alleged errors that had not been objected to during the trial—the equivalent of today's 'interest of justice' jurisdiction." *Id.*; *see also* People v. Conrow, 93 N.E. 943, 948 (N.Y. 1910) ("Where the judgment is death the jurisdiction of this court is not limited to the review of questions of law. If the dramatic recounting of the alleged acts and sayings of the defendant [at his trial] was calculated to affect the jury in determining the guilt or innocence of the defendant notwithstanding that they were at least in form removed from its consideration, we have the power and it is our duty to give the defendant a new trial for that reason.").

[311] Referring to section 542 of the Code of Criminal Procedure, a somewhat related statutory provision, "which commands us to do justice without reference to technical defects," Judge Cardozo declared, "We cannot listen to a claim of error which is conceded to have no relation to anything except a fraudulent defense. The refusal to give ear to such a claim does not need the sanction of express statute. The power is implied in the very function of courts of justice." People v. Schmidt, 110 N.E. 945, 950 (N.Y. 1915).

> deprived of due process by the judge's inaccurate charge to the jury and would have deserved a new trial? If no man should profit by his own wrong, should he profit, so to speak, by perpetuating the wrong?[312]

The decision of the Court of Appeals to affirm Schmidt's murder conviction left his death sentence in effect.[313] The Court of Appeals did not further review the automatic death sentence. As Schmidt's case moved from the courts to Governor Whitman's desk, the primacy of the rule of law would explicitly give way[314] to the dominant functions of executive clemency: bestowing mercy in appropriate circumstances, and dispensing a more refined justice than might have been achieved judicially.[315] Although clemency decisions have been recognized as highly discretionary and lacking in procedural regularity,[316] Schmidt's concern that Whitman's role as the chief

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[312] POLENBERG, *supra* note 6, at 76.

[313] *See id.* at 77–78.

[314] Addressing the President's constitutional clemency authority in federal cases, the Supreme Court long ago described a pardon as "an act of grace." United States v. Wilson, 32 U.S. 150, 160 (1833); *see also* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 280–81 (1998) (plurality opinion) ("[T]he heart of executive clemency . . . is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations."); Herrera v. Collins, 506 U.S. 390, 413 (1993) (quoting *Wilson*, 32 U.S. at 160–61).

[315] *See* Harbison v. Bell, 556 U.S. 180, 192 (2009) ("Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" (quoting *Herrera*, 506 U.S. at 415)); *see also* Daniel T. Kobil, *The Evolving Role of Clemency in Capital Cases*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, 673, 676–77 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 2d ed. 1998) ("In the context of capital punishment, clemency represents the final deliberative opportunity to consider whether [under all of the circumstances] a sentence of death should be imposed . . . . It might be described as a quintessentially *humane* procedure, one that is intended to provide a last chance for the condemned to plead for mercy with another human being who is charged with the responsibility of considering the plea and vested with the power to do something about it. Because of its inherent flexibility, clemency offers an opportunity to avoid mistakes that may not be corrected through the more rigid procedures that characterize other aspects of our criminal justice system."); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 572 (1991) ("[C]lemency is often thought of as an expression of mercy that enhances justice in a broader sense by suspending the operation of our justice system."); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 419 (2005) ("Mercy as equity may occur, for example, when the executive grants clemency to an offender because the law of rules has failed to produce the just result.").

[316] *Woodard*, 523 U.S. at 284–85 (plurality opinion) (quoting Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)); *id.* at 289 (O'Connor, J., concurring in part) ("[A]lthough it is true that 'pardon and commutation decisions have not traditionally been the business of courts,' and that the decision whether to grant clemency is entrusted to the Governor under Ohio law, I believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether

prosecutor in securing his conviction would compromise his fair-mindedness as governor in exercising his clemency authority is far from frivolous.[317] His concern was doubtlessly amplified because Whitman served in a similar dual capacity when he prosecuted Charles Becker for murder while district attorney and then, as Governor, denied Becker clemency.[318] Schmidt and Becker became acquainted on death row, and Becker's execution took place just a few months before Schmidt filed his clemency petition.[319]

Governors making clemency decisions in capital cases in New York between 1920 (the year after Whitman left office) and 1970 frequently cited and explained the importance of recommendations for leniency made by the prosecuting attorneys in condemned prisoners' cases when they exercised their authority to commute death sentences.[320] For obvious reasons, there was little prospect of a supportive prosecutorial recommendation in Schmidt's case. Reservations about the full measure of condemned prisoners' culpability, including but not limited to actual innocence, also proved important to New York governors who granted clemency during this era.[321] Such considerations were unlikely to trouble Governor

to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." (quoting *Dumschat*, 452 U.S. at 464)).

[317] Similar claims were presented by North Carolina prisoners who were under sentence of death in cases in which Governor Michael Easley previously participated in his capacity as State Attorney General and/or the district attorney at a trial resulting in one of the prisoner's conviction and death sentence (later vacated on appeal, although the inmate again was convicted and sentenced to death at a trial which took place after Easley left the district attorney's office). *See* Bacon v. Lee, 549 S.E.2d 840, 843–45 (N.C. 2001). The North Carolina Supreme Court found no merit in the due process-based claims that Easley's prior service as Attorney General prevented him from impartially considering petitions for executive clemency. *See id.* at 851. The court did not reach the claim of the prisoner who was convicted and sentenced to death at a trial in which Easley served as district attorney, holding that he had not exhausted available alternative avenues of relief and his claim consequently was not ripe for consideration. *See id.* at 849. Courts generally have been unwilling to grant relief to prisoners seeking executive clemency based on alleged conflicts of interest or a lack of impartiality by the clemency authority. *See* Wainwright v. Brownlee, 103 F.3d 708, 709–10 (8th Cir. 1997); Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 235–36 (2003); Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. L. 37, 48, 52 (2009). In a different but related context, the Supreme Court ruled that the participation of a Pennsylvania Supreme Court Justice in considering an appeal filed by a death-sentenced prisoner in whose case the Justice had participated as the chief prosecuting attorney presented an unconstitutional risk of bias in violation of the prisoner's Due Process rights. Williams v. Pennsylvania, 136 S. Ct. 1899, 1903, 1910 (2016).

[318] *See* Stephen G. Christianson, *Charles Becker Trials: 1912–14*, LAW LIBR.-AM. L. & LEGAL INFO., https://law.jrank.org/pages/2778/Charles-Becker-Trials-1912-14-Tried-Again.html [https://perma.cc/FEK6-ZVE8].

[319] *See* GADO, *supra* note 19, at 188–89, 194–95.

[320] *See* Acker et al., *supra* note 250, at 188–89.

[321] *See id.* at 191–92.

Whitman who, after all, had presided over Schmidt's prosecution. The conclusions Whitman drew from the findings of the two physicians he appointed to re-investigate the cause of Aumuller's death during the brief reprieve he granted prior to Schmidt's execution would, at a minimum, be difficult to insulate from the contention he had implicitly vouched for in his role as prosecutor at Schmidt's trial, that she died from a knife wound slitting her throat.[322]

Issues such as those surfacing in Schmidt's case raise legitimate concerns about whether the critical discretionary functions of executive clemency in dispensing mercy and enhancing justice remain unsullied when the governor vested with clemency authority has served as prosecutor in the same case. Clemency historically has served an especially vital role in capital cases,[323] where considerations of mercy and justice are accentuated because human life lies in the balance. Even assuming that Governor Whitman's decision to deny Schmidt clemency was entirely lawful, his prior participation in the case as district attorney further clouds conclusions about whether procedural and substantive justice ultimately prevailed in *People v. Schmidt*.

Because New York law mandated a capital sentence for first-degree murder, the jury that convicted Schmidt had no say in whether Schmidt deserved to die for his crime. Decades later, New York law

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[322] *See supra* text accompanying notes 274–277. Professor Polenberg writes,

> According to Whitman, the physicians reported that "there is no evidence in support of the defendant's assertion that Anna Aumuller died from a post partum hemorrhage from the uterus."
>
> But this was not quite what the physicians had reported. MacCallum only said that while there was no proof that death had resulted from uterine hemorrhaging, such a possibility could not be excluded: "I do not feel that I can offer a definite opinion as to the cause of death of the deceased." Wood went somewhat further. He began by making the irrelevant point that hospital statistics showed virtually no cases of death from post-partum hemorrhaging in full-term or even premature births. Then, he said, his examination of the uterus revealed "no indication of unskilled instrumentation." So if an abortion had taken place, it must have been performed, as Schmidt said, by a skillful person. Since such cases are "practically free" of rapid hemorrhaging, Wood concluded that Anna Aumuller had not died from such a cause.
>
> With one pathologist unable to offer an opinion and the other able to support his finding only with inapt statistical evidence, the governor could have reached any conclusion he wanted to.

POLENBERG, *supra* note 6, at 79.

[323] *See* Herrera v. Collins, 506 U.S. 390, 411–12 (1993); Gregg v. Georgia, 428 U.S. 153, 199 (1976) (plurality opinion); James R. Acker & Charles S. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 211–12 (2000).

gave juries discretion to choose between life imprisonment and death in capital murder cases,[324] and the United States Supreme Court recognized that mandatory capital punishment laws ran afoul of the Eighth Amendment prohibition against cruel and unusual punishments.[325] The automatic imposition of death on conviction, the nation's High Court ruled, was impossible to square with prevailing standards of decency:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[326]

The movement to discretionary sentencing in capital cases came far too late to be of assistance to Schmidt. Schmidt's initial trial resulted in a hung jury because two jurors credited his insanity defense and refused to convict him of first-degree murder.[327] Notably, the jury foreman reported, "The nearest we arrived to a verdict . . . was an agreement which proved unacceptable to the court. We were all willing to vote to have Schmidt convicted of murder with the understanding that he should not be put to death, but should spend

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[324] *See* Acker, *supra* note 82, at 522–23.

[325] *See, e.g.*, Sumner v. Shuman, 483 U.S. 66, 85 (1987); Roberts v. Louisiana, 431 U.S. 633, 633, 638 (1977) (per curiam); Roberts v. Louisiana, 428 U.S. 325, 327, 336 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Following Supreme Court precedent, the New York Court of Appeals invalidated provisions of the state's mandatory capital sentencing law that were enacted in the aftermath of *Furman v. Georgia*, 408 U.S. 238 (1972), in which the Supreme Court ruled that death sentences imposed by juries whose decisions were not guided by legislative criteria and informed by relevant sentencing information violated the 8th Amendment. *See* People v. Smith, 468 N.E.2d 879, 898 (1984); People v. Davis, 371 N.E.2d 456, 466 (1977); Acker, *supra* note 82, at 532–33.

[326] *Woodson*, 428 U.S. at 304. Mandatory death sentencing had been roundly rejected over time in jurisdictions that authorized capital punishment, indicating that the practice was not compatible with the evolving standards of decency that represented a hallmark of the Court's death-penalty jurisprudence. *See id.* at 301. Nor did mandatory death penalties prevent arbitrary capital sentencing decisions. Juries often refused to convict defendants of capital crimes despite persuasive evidence of guilt in order to avoid the automatic imposition of death. Such jury nullification simply "papered over" the problem of unregulated sentencing discretion. *Id.* at 302–03.

[327] *See Jury Discharged in Schmidt Case*, *supra* note 121, at 1.

his life in jail."[328] It thus is apparent that the law mandating Schmidt's punishment by death was considered by the jurors in Schmidt's first trial to be unnecessary, and perhaps as an affirmative impediment to justice. Of course, the jurors might have abandoned those views had they been informed that the psychiatric evidence they heard stemmed from Schmidt's admitted falsehoods. And the jurors at his second trial had no apparent misgivings in convicting him and subjecting him to the death penalty on that same evidence.[329] Nevertheless, even if Schmidt was guilty of the premeditated murder of Aumuller by slitting her throat, and not a lesser crime as he later maintained in his insistence that she died from a mishandled abortion, the mandated death sentence was necessarily blind to his documented history of mental illness,[330] the good deeds he performed as a priest,[331] and other mitigating factors that might have spared him a capital sentence under a discretionary sentencing statute.[332]

And so, Hans Schmidt was executed in Sing Sing's electric chair on February 18, 1916.[333] His death sentence, automatically imposed following his conviction for murder, was lawful under prevailing

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[328] *Id.* (quoting jury foreman William Ottinger, elsewhere identified in the *Times* article as Lawrence Ottinger). One of the holdout jurors was quoted as saying, "The other ten were willing to acquit the defendant on the ground of insanity, except that they were afraid that he would go to Matteawan [State Hospital] and get out . . . . So they thought the only thing to do was to send him to the electric chair." *Id.* (quoting William A. McAuliffe). Schmidt's attorney, Alphonse Koelble, echoed that sentiment: "The cause of the disagreement of the jury is the bad law. I think there are several men on the jury who do not want Schmidt to go to the electric chair but they are afraid that if he is sent to Matteawan he may get out later . . . . Consequently, they would like to send him to the penitentiary for life." *Id.*

[329] *See* People v. Schmidt, 110 N.E. 945, 945 (N.Y. 1915).

[330] *See supra* text accompanying notes 42–44, 68, 110–113.

[331] *See, e.g.*, POLENBERG, *supra* note 6, at 55 ("Father Braun [the rector at St. Boniface's church, where Schmidt served for a time as assistant pastor] and his sister mistrusted [Schmidt] . . . . Yet even the Brauns admitted that he was generous to a fault: 'He was very good to the poor; anyone came in there and gave a good story he was ready to give to them.' Many parishioners at St. Joseph's refused, at first, to believe the charges against him. As one woman said, 'Father Schmidt was idolized by most of his parishioners. By many he was considered almost a saint.'").

[332] *See* Lockett v. Ohio, 418 U.S. 586, 604 (1978) (plurality opinion) ("[T]he Eighth and Fourteenth Amendments require that the sentence . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); *see also* Abdul-Kabir v. Quarterman, 550 U.S. 233, 263–64 (2007) ("Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense.").

[333] *See Hans Schmidt Dies in Chair*, *supra* note 287, at 12; *Schmidt Electrocuted at Sing Sing Yesterday*, CORNELL DAILY SUN, Feb. 19, 1916, at 4.

constitutional norms.[334] It just as clearly would be deemed not only unlawful, but also manifestly unjust, under standards enunciated by the Supreme Court sixty years later.[335]

CONCLUSION

It has been suggested that criminal trials have trappings of public morality plays, in that they reveal and reinforce fundamental social norms encompassing culpability, condemnation, and the propriety of punishment.[336] If that is so, the emergent truths in connection with the conviction and execution of Hans Schmidt remain elusive. Anna Aumuller's lamentable and untimely death, while she was pregnant and only 21 years old, was unambiguously tragic. The ensuing legal proceedings, including the conduct and decisions of the other principals involved in the case—Hans Schmidt, Benjamin Cardozo and his fellow judges on the New York Court of Appeals, and George Whitman—are considerably more difficult to characterize. In being held responsible for Aumuller's murder, Schmidt met his death by

[334] *See* Acker, *supra* note 82, at 519, 520.

[335] *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("This Court has previously recognized that '[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.' Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)) (first citing Williams v. New York, 337 U.S. 241, 247 (1949); and then citing Trop v. Dulles, 356 U.S. 86, 100 (1958))); *supra* notes 325–326 and accompanying text.

[336] *See, e.g.*, Thomas A Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1925 (1995) ("The criminal trial represented a first stage in the criminal process at which the law, reflecting general social mores, insisted upon the existence of free will; this stage, wherein guilt or innocence was assessed, was, as always, a morality play that confirmed our deepest longings about who we are as human beings."); Joseph E. Kennedy, *Facing Evil, High Profile Crimes: When Legal Cases Become Social Causes*, 104 MICH. L. REV. 1287, 1287–88 (2006) ("The public attends to stories of crime and punishment as never before because they satisfy a felt need for morally instructive stories. Punishment has become, more than anything else, an ongoing national morality play."); George C. Thomas III, *Criminal Trials as Morality Plays: Good and Evil*, 55 ST. LOUIS L.J., 1405, 1405 (2011) ("It is trite, but true, that criminal trials function as morality plays."); *see also* Joachim J. Savelsberg & Ryan D. King, *Law and Collective Memory*, 3 ANN. REV. L. & SOC. SCI. 189, 193 (2007) (comparing trials to plays).

operation of law, yet within a system hailed as serving the callings of justice.[337]

Was justice served in Hans Schmidt's case? A skeletal accounting of his conviction, appeal, and execution presents a troubled portrait.

After Schmidt's first trial resulted in a hung jury, his insanity defense was rejected by a jury that deliberated and reached a verdict based on instructions from the trial judge that fundamentally misstated the law.[338] Schmidt was convicted of Aumuller's murder and a death sentence followed automatically, rendering any potentially mitigating considerations pertaining to the case or to Schmidt's troubled history irrelevant.[339] Judge Cardozo's unanimous opinion for the New York Court of Appeals ruled definitively that the trial judge erred in his jury instructions regarding the insanity defense.[340] Yet when Schmidt submitted that he fabricated that defense, and maintained that he was guilty of manslaughter rather than murder in contributing to Aumuller's death via an illegal abortion, the court opinion credited only the former representation and not the latter.[341] Even if the abortion story was true, the opinion reasoned, it was barred procedurally.[342] To recognize it as Schmidt requested would invite systemic abuse. The guilty verdict, although a product of the flawed jury instructions, would not be disturbed. The court opinion signaled that executive clemency remained as a possible corrective, but this decision would rest in the hands of a governor who had overseen Schmidt's prosecution while serving as

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[337] In his opinion for the New York Court of Appeals in Schmidt's case, Judge Cardozo stated,

> The law does not force its ministers of justice to abet a criminal project to set the law at naught. . . . [T]he confession that the defense of insanity was fabricated is part of the record, and the defendant himself has invited us to consider it as a basis for our judicial action. The principle is fundamental that no man shall be permitted to profit by his own wrong. It enters, by implication, into all contracts and all laws. We cannot ignore it in the application of a statute which commands us to do justice without reference to technical defects. We cannot listen to a claim of error which is conceded to have no relation to anything except a fraudulent defense. The refusal to give ear to such a claim does not need the sanction of express statute. The power is implied in the very function of courts of justice.

People v. Schmidt, 110 N.E. 945, 950 (N.Y. 1915) (first citing People v. Priori, 163 N.Y. 99 (1900); and then citing Riggs v. Palmer, 115 N.Y. 506 (1889)).

[338] *See Schmidt*, 110 N.E. at 949; *Schmidt Must Die, Court of Appeals Says*, N.Y. TIMES, Nov. 24, 1915, at 16.

[339] *See Schmidt Must Die, Loses Final Appeal*, N.Y. TIMES, Jan. 8, 1916, at 5.

[340] *See Schmidt*, 110 N.E. at 949.

[341] *See supra* notes 298–303 and accompanying text.

[342] *See id.* at 946, 950.

the district attorney of New York County.[343] Governor Whitman discerned no reason, in justice or mercy, to spare Schmidt from execution. Hans Schmidt thereupon died in the electric chair in Sing Sing Prison.[344]

As nettlesome as the questions are that arise from the separate strands of Schmidt's case, the composite resulting from their interwoven nature makes conclusions all the more tenuous about whether justice ultimately was served. It may be inevitable that questions of great moment that arise in the context of criminal trials and punishment will defy resolution through the application of formal legal rules. The meat of these consequential decisions—embracing such matters as the parameters of individual responsibility, the assignment of blame, the meaning of just deserts, and how and when justice should be tempered by mercy—resides elsewhere, in a realm where judgment and principled discretion take precedence over pre-established rules. This should hardly be surprising. The world in which the law operates, and the people subject to it, are uncommonly complicated. Hans Schmidt, and his conviction and execution for causing the death of Anna Aumuller, are testament to these truisms, and to the ill-defined borders demarcating law and justice.

[343] *See supra* note 20 and accompanying text.

[344] *See Hans Schmidt Dies in Chair*, *supra* note 287, at 12; *Schmidt Electrocuted at Sing Sing Yesterday*, *supra* note 333, at 4.