

1-1-2015

Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels

Sean D. O'Brien

Kathleen Wayland

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

Recommended Citation

O'Brien, Sean D. and Wayland, Kathleen (2015) "Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels," *Hofstra Law Review*: Vol. 43: Iss. 3, Article 6.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol43/iss3/6>

This document is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

IMPLICIT BIAS AND CAPITAL DECISION-MAKING: USING NARRATIVE TO COUNTER PREJUDICIAL PSYCHIATRIC LABELS

Sean D. O'Brien*
Kathleen Wayland**

I. INTRODUCTION

Psychiatric labels are often used in judicial proceedings involving issues of life, liberty, or access to rehabilitative treatment. The *Hofstra Law Review* invited us to expand our recent discussion of the use of such labels to invoke prejudicial stereotypes in death penalty cases.¹ Our previous discussion urged courts to reconsider the admissibility of the construct of psychopathy and evidence of certain “personality disorders” because of serious questions and controversies in the mental health field over the reliability and validity of such evidence.² We also suggested that capital defense teams can undermine and rebut that evidence by complying with contemporary standards of performance articulated in the American Bar Association (“ABA”) Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (“Guidelines”) and the Supplementary Guidelines on the Mitigation Function of Capital Defense Teams (“Supplementary Guidelines”).³

* Sean D. O'Brien is an Associate Professor at University of Missouri-Kansas City School of Law, where he teaches courses in criminal law, the death penalty, and mental health law.

** Kathy Wayland, Ph.D., is a clinical psychologist who consults with capital defense teams and specializes in issues related to mitigation themes, psychological trauma, and mental health. We are grateful for the advice and assistance we received from Andrew Rowland, Ph.D.; National Mitigation Coordinator Russel Stetler; and University of Missouri-Kansas City School of Law Student and Research Assistant Sarah Jackson.

1. See generally Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519 (2013).

2. *Id.* at 528-31, 558-61, 565-66.

3. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES], available at <http://www.ambar.org/2003Guidelines>; SUPPLEMENTARY GUIDELINES

Given the length and depth of that discussion, we could only briefly discuss the importance of counter-narrative; the defendant's life story, based on an extensive longitudinal and developmental investigation of the defendant and his family's life trajectory, is the most effective tool to counter the dehumanizing effect of prejudicial psychiatric labels. Adherence to tried-and-true standards of practice calling for the presentation of narrative mitigating evidence transcends the proverbial "battle of the experts" over diagnostic labels that fails to humanize the client.

Every homicide prosecution involves a compelling narrative of a violent crime committed by the defendant. Our original article explained how prosecutors' prejudicial psychiatric labels, such as "Antisocial Personality Disorder" ("ASPD") and "psychopathy," are used to advance that narrative by invoking stereotypes that fuel fear and reduce the decision-maker's natural reluctance to kill another human being.⁴ Prosecutors use these labels to appeal to jurors' and judges' preconceived notions about violent offenders that define them as "Other," making it easier for them to execute the defendant. In Part II, we explore examples of cases in which the client's humanity became lost in litigation focusing on diagnostic labels and psychometric testing.⁵ Although the defense against the death penalty in each of these cases may have been built upon accepted principles of forensic mental health testimony, it was not sufficiently persuasive to withstand the slightest inconsistency or rebuttal. We suggest that such cases place the focus in the wrong place; it is the client's life story, not diagnostic labels, that reveals his humanity.⁶

Part III explores human decision-making processes in relation to preexisting cognitive mindsets, which bias the processing and interpretation of information, and can influence behavior.⁷ Cognitive psychology provides a useful framework for explaining human perceptions, and how implicit or explicit biases can interfere with the

FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, in 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES]; Wayland & O'Brien, *supra* note 1, at 530-31.

4. Wayland & O'Brien, *supra* note 1, at 525-28; see also DAVID GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 30 (1995) (analyzing military data showing soldiers' reluctance to kill even in warfare); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1451-60 (1997) (detailing the strategic process of dehumanization in capital cases).

5. See *infra* text accompanying notes 30-47.

6. See *infra* text accompanying notes 48-51; Part III.

7. See *infra* Part III.

objective interpretation of data in ways that affect judgment and behavior. This research underscores the importance of narrative to the decision-maker's ability to understand and respond to mitigating evidence, especially when such evidence includes psychiatric or cognitive impairments. Capital Jury Project ("CJP") data has shown that jurors have difficulty assimilating mitigating mental health testimony because they distrust mental health experts as "hired guns," and because the "antisocial" or "psychopathic" labels invoke the fictitious popular-culture stereotypes of violent criminals.⁸ This tendency is exacerbated by the use of psychiatric labels, which are particularly damaging and inherently flawed. As a result, life-or-death decisions can be made based on damaging stereotypes and pervasive cultural myths associated with criminal behavior and prejudicial psychiatric labels.

On the other hand, a defense compliant with prevailing standards enables decision-makers to accommodate new information about the defendant by altering or expanding their schemata to interpret the new information. In Part IV, we examine successful cases in which expert testimony is presented in the context of a humanizing life history narrative, as told by lay people and lay experts who know the client.⁹ This enables juries to transcend stereotypes, and to identify with the defendant—to see him in some fundamental way as being like themselves. Jurors who can experience the client's distress can also empathize with him, and are more likely to respond with mercy. The same information presented as a bare chronology of the defendant's life or rote recitation of risk factors, devoid of narrative principles such as plot and conflict, does not produce an empathetic response. Experience shows that a thoroughly investigated, truthful narrative of the defendant's life, told by those who know, love, and understand him, actually works, even in the most aggravated homicide cases.

In Part V, we conclude that the most effective tool to counter these incomplete and misleading stereotypes is to present a compelling, humanizing narrative that extends backwards into the developmental trajectory of the defendant's life and family.¹⁰ This is why prevailing standards of practice demand a detailed life history investigation

8. See *infra* text accompanying notes 65-73, 98-107. The CJP was initiated in 1991 by a consortium of university-based researchers from fourteen states with support from the National Science Foundation. *What Is the Capital Jury Project?*, SCH. CRIM. JUST. ST. UNIV. N.Y. ALBANY, <http://www.albany.edu/scj/13189.php> (last visited Apr. 12, 2015). The CJP was designed to: (1) systematically describe jurors' exercise of capital sentencing discretion; (2) assess the extent of arbitrariness in jurors' exercise of such discretion; and (3) evaluate the efficacy of capital statutes in controlling such arbitrariness. *Id.* For more information, see *id.*

9. See *infra* Part IV.

10. See *infra* Part V.

conducted by a qualified team applying prevailing standards of practice, as described in the Guidelines and Supplementary Guidelines.¹¹ Investigating, developing, and presenting the client's humanizing narrative are indispensable components of contemporary standards of performance for capital defense counsel.¹² These standards provide an effective roadmap that enables the defense team to uncover and tell the stories of the defendant's life that reveal his innate humanity.

II. LABELS, STEREOTYPES, AND THE "BATTLE OF THE EXPERTS"

*"[It] is not clear to us[] that psychiatric terminology affects juries."*¹³

– Chief Judge Frank Easterbrook

*"The detrimental impact of the public stigma of people with mental illness cannot be overstated."*¹⁴

– Melody S. Sadler et al., *Stereotypes of Mental Disorders Differ in Competence and Warmth*

As discussed in our original article, the prosecution uses labels, such as "ASPD," "sociopathy," and "psychopathy," to appeal to the fictional Hollywood stereotype of the remorseless predator depicted in such movies as *Silence of the Lambs*¹⁵ or *Natural Born Killers*.¹⁶ Dr.

11. ABA GUIDELINES, *supra* note 3, Guideline 10.7, at 1021-26; SUPPLEMENTARY GUIDELINES, *supra* note 3, Guideline 5.1, at 682-83.

12. See generally ANTHONY G. AMSTERDAM & JEROME S. BRUNER, *MINDING THE LAW* (2nd prtg. 2002) (explaining how storytelling influences the Supreme Court's decisions regarding the death penalty); LINDA H. EDWARDS, *READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD* (2012) (discussing the importance of framing emotional narratives in advocating for clients); PHILIP N. MEYER, *STORYTELLING FOR LAWYERS* (2014) (explaining the importance of narratives in good lawyering); Sean D. O'Brien, *Death Penalty Stories: Lessons in Life-Saving Narratives*, 77 UMKC L. REV. 831 (2009) (finding that the use of narratives can be life-saving in death penalty cases); Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, at 32 (illustrating an excellent example of a successful, well-constructed, and humanizing capital defense narrative). We have found the research and writing of Professor Craig Haney, a professor trained in both psychology and law, to be especially insightful about the intersection of mental health and crime narratives. See generally Haney, *supra* note 4; Craig Haney, *On Mitigation as Counter-Narrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911 (2009) [hereinafter Haney, *Prison Violence*]; Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995) [hereinafter Haney, *Social Context*].

13. 686 F.3d 404, 408 (7th Cir. 2012).

14. Melody S. Sadler et al., *Stereotypes of Mental Disorders Differ in Competence and Warmth*, 74 SOC. SCI. & MED. 915, 915 (2012).

15. *SILENCE OF THE LAMBS* (Orion Pictures 1991).

16. *NATURAL BORN KILLERS* (Warner Brothers Pictures 1994); see Haney, *Social Context*, *supra* note 12, at 552; Wayland & O'Brien, *supra* note 1, at 519, 525.

Craig Haney explains that invoking images of these archetypal villains “justifies harsh treatment and insulates us from moral concerns about the suffering we inflict.”¹⁷ Even though there is no scientific support for such Hollywood stereotypes, they “have become so much a part of the public’s ‘knowledge’ about crime and punishment that, despite their fictional, socially constructed quality, they wield significant power in actual legal decisions.”¹⁸ Uncorrected, the stereotype distorts judicial decision-making in multiple ways. A person upon whom such labels are affixed is deemed dangerous, manipulative, selfish, impulsive, remorseless, adept at malingering mental illness, and beyond treatment or rehabilitation.¹⁹ This image of the defendant only widens the “‘empathic divide’ that exists between many white jurors and African-American defendants.”²⁰

In the prosecutor’s narrative, the victim of the homicide is the tragic protagonist, our client’s crime is the trouble that upsets the moral balance of the universe, and the jury can, through its verdict, restore the universe to a new state of moral balance.²¹ It is virtually always a compelling narrative that portrays the defendant as a one-dimensional predatory creature. Professor Philip N. Meyer explains the concept of the “flat character” in narrative theory: “[W]hat they lack, typically, is psychological complexity or the ability to change.”²² No evidence is as helpful to the prosecution in this effort as “scientific” proof that the defendant is indeed “flat” by virtue of being without human emotions or conscience, and beyond treatment or redemption.²³ A narrative

17. Craig Haney, *Exoneration and Wrongful Condemns: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 GOLDEN GATE U. L. REV. 131, 145 (2006).

18. Haney, *Social Context*, *supra* note 12, at 559. See generally Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689 (2009) (citation omitted).

19. See Wayland & O’Brien, *supra* note 1, at 527.

20. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1558 (2004).

21. The prosecution’s crime narrative appeals to a narrative structure as described by Professor Linda H. Edwards:

In another common plot structure, the key characteristic of the story’s opening scene is its normality and stability. The world is not incomplete and life is more or less as it should be. However, this initially stable world enters a stage of disequilibrium. Amsterdam and Bruner refer to this as a “steady state” followed by “trouble.” The steady state is, by definition, legitimate—the legitimate ordinary. In narrative terms, whatever disrupts a steady state is bad. The story describes the struggle to resolve the disequilibrium and return to some version of legitimate stability—either to the original steady state (restoration) or to some other good and stable place (transformation).

Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 887-88 (2010) (citations omitted).

22. MEYER, *supra* note 12, at 75-76.

23. See Wayland & O’Brien, *supra* note 1, at 534 (discussing the fallacy of the position that persons alleged to be “antisocial” are inhuman and cannot respond to treatment).

constructed on such stereotypes is not only false, it is deadly. It renders capital decision-makers unable “to perceive capital defendants as enough like themselves to readily feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors’ own.”²⁴ Dr. Haney emphasizes the “central role of counter-narratives in modern capital trial practice,”²⁵ explaining:

Absent such a mitigating counter-narrative, of course, most capital jurors will have only the master crime narrative to fall back on. Its familiar but often too simplistic assumptions about the nature of violent crime will lead many of them to judge the defendant, and even to condemn him to death, without ever coming to terms with who he is or why. Mitigating counter-narratives are designed to counterbalance and correct for this kind of truncated inquiry and decision making.²⁶

We agree with Dr. Haney that the defense narrative, constructed upon a thorough life history investigation, is the best antidote to the distorting effect of dehumanizing labels.

Unfortunately, defense lawyers often focus primarily on the battle over diagnostic labels, and give insufficient attention to the client’s humanizing life story. We pointed out in our original article the available science that supports challenges to the admissibility of opinion testimony about the construct of psychopathy and related personality disorders, and we suggested how defense counsel can use the fruits of a comprehensive life history investigation to counter such evidence.²⁷ Counsel should always contest the admissibility of such evidence, and object to the prosecution’s use of experts who have a demonstrated bias or financial interest in peddling ASPD diagnoses and the construct of psychopathy to well-funded buyers.²⁸ However, diligent efforts must be made to prevent life-or-death decisions from deteriorating into a “revolving door of experts” battling over which label best fits the client.²⁹ Labels do not humanize; they appeal to stereotype and create false dichotomies; comorbid conditions are the rule rather than the exception among capital defendants.³⁰

24. Haney, *supra* note 20, at 1558.

25. Haney, *Prison Violence*, *supra* note 12, at 918.

26. *Id.*

27. See Wayland & O’Brien, *supra* note 1, at 539-42, 568-74.

28. See *id.* at 554-57.

29. Pinholster v. Ayers, 525 F.3d 742, 770 (9th Cir. 2008).

30. See, e.g., Ronald C. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCHIVES GEN. PSYCHIATRY 1048, 1058-59 (1995) (finding that the presence of a second lifetime disorder is significantly elevated among people with lifetime post-traumatic stress disorder (“PTSD”)); see also Kathleen Wayland, *The Importance of Recognizing*

It is easy to find examples of courts rejecting mitigation presentations that were based solely or mainly on diagnostic labels, because the fight over verbiage failed to foster any understanding of the defendant's humanity or his crime.³¹ In *Pinholster v. Ayers*,³² even where there was no reason to question the credibility of the mental health experts presented by counsel for Scott Pinholster to rebut a pretrial opinion that he was antisocial, one court concluded "that no newly-minted expert theory to explain his behavior would have made a difference" in the face of Pinholster's behavior during the crime.³³ Because other experts affixed different diagnostic labels, the court concluded that it "[could not] believe the jury would have given it much weight."³⁴ In *Overstreet v. Wilson*,³⁵ another capital defendant, Michael Overstreet, was delusional and exhibited disorganized behavior and speech before and during his trial.³⁶ Three different mental health experts agreed that he was mentally impaired, but disagreed as to the diagnosis, and Overstreet was sentenced to death.³⁷ While an appellate court acknowledged there was "little doubt that on occasions Overstreet would have lacked the ability to evaluate his legal situation rationally,"³⁸ the argument over diagnostic labels obscured the issue. The court characterized counsel's argument as "harp[ing] on the theme that an Axis I 'clinical disorder' is worse than an Axis II 'personality disorder' and assert[ing that] the difference surely would have affected the jury."³⁹ The court disagreed: "[I]t was not clear to the state judiciary . . . and is not clear to us, that psychiatric terminology affects juries."⁴⁰ Further, the fight over psychometric testing and diagnostic labels overshadowed other mitigation evidence presented by Overstreet's lawyers. Dismissing

Trauma Throughout Capital Mitigation Investigations and Presentations, 36 HOFSTRA L. REV. 923, 941-44 (2008).

31. See Robert J. Smith et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1229-35 (2014).

32. 525 F.3d 742 (9th Cir. 2008).

33. *Id.* at 770.

34. *Id.* at 773 n.32.

35. 686 F.3d 404 (7th Cir. 2012).

36. *Id.* at 412 (Wood, J., dissenting).

37. *Id.* at 406, 408 (majority opinion).

38. *Id.* at 407.

39. *Id.* at 408. In fact, a few months after the court's decision, the multi-axial system on which Overstreet's lawyers relied so heavily was abandoned. This highlights another serious problem with placing the primary focus on shifting diagnostic labels and terminology. While health care providers' descriptions of symptoms of impairment (hallucinations, delusions, disordered thinking, hypervigilance, pressured speech, etc.) remain consistent over time, diagnostic labels may change from one edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM") to the next.

40. *Overstreet*, 686 F.3d at 408.

counsel's argument about the significance of the diagnostic mislabeling as "say-so" and "lawyer talk," the court concluded that the mental health claim "pale[d] beside" the battle of the experts that the court focused on.⁴¹

The case of *Wilson v. Trammell*⁴² is another good example of failed advocacy over labels. Michael Wilson's trial expert relied primarily on personality tests, such as the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2"),⁴³ to diagnose Wilson with a personality disorder.⁴⁴ Wilson's friends described his positive character traits, and the trial expert interpreted psychometric testing to explain "the two Michael Wilsons"—the one who committed a violent homicide, and the one his family knew.⁴⁵ The prosecutor used computer-generated personality test interpretations to suggest that Wilson had "the characteristics of a psychopath."⁴⁶ In post-conviction proceedings, Wilson alleged that trial counsel overlooked testing data which indicated the MMPI-2 score was invalid, and that he was, therefore, ineffective as counsel for failing to have Wilson retake the test.⁴⁷ The hearing on Wilson's claim was limited to the testimony of trial counsel and the trial

41. *Id.* at 409-10.

42. 706 F.3d 1286 (10th Cir. 2013).

43. JAMES N. BUTCHER ET AL., MINNESOTA MULTIPHASIC PERSONALITY INVENTORY-2: MANUAL FOR ADMINISTRATION, SCORING, AND INTERPRETATION 1-2, 204-05 (rev. ed. 2001).

44. *Wilson*, 706 F.3d at 1290-91.

45. *Id.*

46. *Id.* at 1292. The computer-generated profile of Wilson's responses to the Millon Clinical Multiaxial Inventory-III produced ammunition for damaging and misleading cross-examination in which subjective traits, divorced from context necessary to an accurate, humanizing interpretation, were presented as character deficiencies:

Dr. Reynolds conceded that the [Millon Clinical Multiaxial Inventory-III] interpretive report stated that "[t]he guiding principle of [Defendant] is to outwit others, exerting power over them before they can exploit him," and that Defendant was "easily provoked" and "may express sudden and unanticipated brutality," He also acknowledged that Defendant had responded "True" to the following statements on the test questionnaire: "Lately, I have begun to feel like smashing things"; "I often get angry with people who do things slowly"; "I have had to be really rough with some people to keep them in line"; and "I sometimes feel crazy-like or unreal when things start to go badly in my life."

Id. (citations omitted). Personality testing instruments are loaded with questions that force a defendant to choose answers that will make him vulnerable to such cross-examination by the prosecutor no matter how he responds. *See id.* at 1290. Personality tests produce "computerized narratives [which] have been criticized as lacking validity, being devoid of social history context, inaccurate and misleading, and often false." George Woods et al., *Neurobehavioral Assessment in Forensic Practice*, 35 INT'L J.L. & PSYCHIATRY 432, 435 (2012). Experienced capital defense lawyers do not use personality testing because "[t]hese tests do not help to explain a client's life or experiences in an effective way, and there is a high risk that statements endorsed in the test will be taken out of context to portray the individual negatively, and that long-standing symptoms can be misjudged to reflect personality traits rather than neurodevelopmental disorders." *Id.*

47. *Wilson*, 706 F.3d at 1293.

mental health expert.⁴⁸ The psychologist testified that his testing failed to reveal Wilson's history of auditory hallucinations, and that with more accurate test results, he would have considered a broader range of diagnoses, including bipolar disorder and schizophrenia; he ultimately settled upon a diagnosis that the court described as "schizophrenic paranoid personality disorder."⁴⁹ The issue of life or death turned on the Tenth Circuit's lengthy discussion parsing Wilson's performance on personality testing instruments, and the range of conflicting diagnostic interpretations that were possible.⁵⁰ After considering the ways in which each party could spin the test results, the Court of Appeals concluded that the "[d]efendant would have been no better off with the evidence presented at the hearing, and in significant ways would have been worse off."⁵¹ Such are the fruits of engaging in a battle of the experts; Wilson's humanity was obscured by generic interpretations of computer-scored personality testing.

In none of these cases did the mental health evidence advance the decision-maker's ability to view the accused as a unique, complex human being, struggling with the burdens of severe mental and emotional impairments—even though that is a true description of all three defendants. In *Pinholster* and *Overstreet*, the record established that the postconviction experts' findings were supported by far more complete and reliable social history evidence than were the opinions of the trial experts.⁵² In *Wilson*, the postconviction case rested on the trial expert's re-interpretation of personality testing.⁵³ On paper, the data favored the findings of the postconviction experts in all three cases. Yet, in none of the cases was the decision-maker moved to spare the defendant's life. The difference between counsel's failure in these cases, and the successes discussed in Part III, lies in the inability of diagnostic labels, brain imaging data, or psychological testing instruments to communicate the client's unique and complex humanity.⁵⁴ To be accessible to capital case decision-makers, the client's mental and cognitive impairments must be revealed in the context of his humanizing life story.⁵⁵

48. *Id.* at 1294.

49. *Id.* at 1294-95. This is not a diagnosis found in the DSM.

50. *Id.* at 1307-10.

51. *Id.* at 1307.

52. See *Overstreet v. Wilson*, 686 F.3d 404, 413-17 (7th Cir. 2012) (Wood, J., dissenting); *Pinholster v. Ayers*, 525 F.3d 742, 778-82 (9th Cir. 2008) (Fisher, J., dissenting); *supra* text accompanying note 31.

53. See *supra* text accompanying notes 44-46.

54. See *supra* text accompanying notes 25-29; *infra* Part III.

55. See *infra* Part III. Judge Kozinsky criticized performance standards under which "any trial

III. COGNITIVE PSYCHOLOGY, NARRATIVE, AND LIFE-OR-DEATH DECISIONS

*"When men wish to construct or support a theory, how they torture facts into their service!"*⁵⁶

– Charles Mackey, *Memoirs of Extraordinary Popular Delusions and the Madness of Crowds*

Capital defense performance standards emphasize the importance of developing and presenting a narrative of the client's life history, because it is essential to make the mitigation case accessible to the decision-making process of judges and juries. Cognitive psychologists use the term confirmation bias to explain the complexity of an individual's opinions and decision-making: when people are confronted with facts that contradict deeply held beliefs, they will find ways to discount the new evidence and cling more strongly to those beliefs.⁵⁷ Moreover, "[c]onfirmation bias . . . connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."⁵⁸ It does not always occur on a conscious level;

lawyer who fails to worship at the altar of 'humanization' will be labeled an incompetent boob." Pinholster v. Ayers, 590 F.3d 651, 692 (9th Cir. 2009) (Kozinsky, J., dissenting), *rev'd sub nom.* Cullen v. Pinholster, 131 S. Ct. 1388 (2011). But Judge Kozinsky's limited perspective is misguided. He finds his data for performance standards in cases where superficial mitigation presentations similar to that of Pinholster's trial lawyer resulted in death verdicts. *Id.* at 707 (citing generally People v. Cooper, 809 P.2d 865 (Cal. 1991); *In re Visciotti*, 926 P.2d 987 (Cal. 1996)). Dr. Haney points out:

[G]iven the fact that the appellate court reviews the penalty records of only those cases in which death verdicts were rendered, there is no reason to believe that judges have any special expertise or range of experience in reaching conclusions about how background and social history actually affect the life course of a capital defendant, or the way in which evidence about these factors can influence the decisionmaking of (especially) life-sentencing capital jurors. Appellate courts are in need of education about both, otherwise their judgments may approximate those of lay persons, threatened by stereotypes and misconceptions, but absent any meaningful exposure to powerful penalty phase evidence designed to challenge or counterbalance them.

Haney, *Social Context*, *supra* note 12, at 606-07. Judge Kozinsky's reasoning is analogous to the medical field drawing performance standards almost exclusively from cases in which the patient died. See Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 676-81 (2013) (discussing the implications of the fact that appellate courts never see capital cases in which the defendant avoids the death penalty).

56. CHARLES MACKEY, *MEMOIRS OF EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS* 552 (2d ed. 1852), available at <http://www.econlib.org/library/Mackay/macEx10.html#>.

57. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 197 (1998).

58. *Id.* at 175. Political commentators, social scientists, and legal scholars have observed and written extensively on this phenomenon. See, e.g., NAOMI CAHN & JUNE CARBONE, *RED FAMILIES*

confirmation bias “refers usually to unwitting selectivity in the acquisition and use of evidence.”⁵⁹ However, “[m]otivated confirmation bias has long been believed by philosophers to be an important determinant of thought and behavior.”⁶⁰ That such bias exists is well-supported by the evidence:

A great deal of empirical evidence supports the idea that the confirmation bias is extensive and strong and that it appears in many guises. The evidence also supports the view that once one has taken a position on an issue, one’s primary purpose becomes that of defending or justifying that position . . . regardless of whether one’s treatment of evidence was evenhanded before the stand was taken, it can become highly biased afterward.⁶¹

In short, people readily accept information that is consistent with their world view, and reject that which is not. George Lakoff cautions that merely marshaling facts to attack an accepted narrative only reinforces the false belief.⁶² This is true across the political spectrum, and it is equally true in other aspects of human endeavor,⁶³ including decision-making in capital cases by jurors and judges chosen for service

V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 65 (2010); GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE 17 (2004); SHAWN W. ROSENBERG, REASON, IDEOLOGY AND POLITICS 15 (1988). For example, this phenomenon has been used to explain the belief of many Americans that Saddam Hussein was responsible for the September 11, 2001 attack on the World Trade Center even after the report of the 9/11 Commission proved this belief is false. LAKOFF, *supra*, at 18. George Lakoff hypothesizes that this is the effect of skillfully deployed narrative designed to appeal to preconceived biases and prejudices. *Id.* at 71-74.

59. Nickerson, *supra* note 57, at 175.

60. *Id.* at 176 (emphasis added). Raymond S. Nickerson quotes Francis Bacon’s description of this phenomenon nearly four centuries ago:

The human understanding when it has once adopted an opinion . . . draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects; in order that by this great and pernicious predetermination the authority of its former conclusions may remain inviolate.

Id. (quoting Francis Bacon, *Novum Organum*, in THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 24, 36 (Edwin A. Burt ed., 1939)).

61. *Id.* at 177.

62. “The facts alone will not set us free. People make decisions about politics and candidates based on their value system, and the language and frames that invoke those values.” LAKOFF, *supra* note 58, at xiii.

63. See CAHN & CARBONE, *supra* note 58, at 64-65 (discussing the use of metaphor in political messaging to reinforce deeply held beliefs regarding issues involving homosexuality and family structure). Additionally, “[s]uch beliefs are resistant to argument, logic, or facts. Indeed, cultural research suggests that when empirical data conflict with these beliefs, people reinterpret or deny the empirical findings rather than change their views.” *Id.* at 65 (footnotes omitted); see also Donald Braman et al., *Modeling Facts, Culture, and Cognition in the Gun Debate*, 18 SOC. JUST. RES. 283, 292-94 (2005).

based on their support for capital punishment.⁶⁴ This is the phenomenon at play when defense lawyers attack prejudicial psychiatric labels solely with counter-labels and psychometric testing.

The CJP has identified several ways that implicit bias affects the decision-making of jurors who sit on capital cases.⁶⁵ Juror demographics, including race, influence their attitudes toward mercy and their perceptions of whether the defendant is dangerous or remorseful.⁶⁶ Factors that operate to define the defendant as “Other” have an aggravating, dehumanizing effect,⁶⁷ and the influence of race is particularly pernicious.⁶⁸ As we explained in our original article, testimony describing the accused as “antisocial” or “psychopathic” plays into multiple aggravating stereotypes that the accused is remorseless, cunning, manipulative, dangerous, and completely self-centered—maybe even inhuman.⁶⁹ We also discussed many of the problems and controversies with ASPD and the construct of psychopathy, and

64. A capital case jury is selected by eliminating people whose views on the death penalty substantially impair their willingness to impose the death penalty. Although the Supreme Court has upheld the procedure, research demonstrating the biasing effect of death qualification of juries is persuasive. See *Grigsby v. Mabry*, 758 F.2d 226, 232-38 (8th Cir. 1985), *rev'd*, *Lockhart v. McCree*, 476 U.S. 162 (1986). The judicial selection process may also filter out candidates who do not support capital punishment. See William M. Bowen, *A Former Alabama Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 807 (2008) (“The reality is that the death penalty is so political in Alabama that as a practical matter, if you are against the death penalty, you cannot get elected as a judge or any other public official. Once elected, your rulings must reflect your bias for death.”); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776-92 (1995).

65. See John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1056-57 (2008).

66. See *id.* at 1057 (discussing CJP data reflecting that in cases involving black defendants, African-American male jurors are more likely than their white counterparts “to see the defendant as remorseful, to believe that the defendant’s background had adversely influenced his life, to have lingering doubts about the defendant’s role in the crime, and to believe that the defendant did not pose a future danger if given a life sentence”).

67. Haney, *Social Context*, *supra* note 12, at 548-59. Dr. Haney explains that painting a “distorted, exaggerated, and mythologized” picture of the defendant “not only makes it easier to kill them but also to distance ourselves from any sense of responsibility for the roots of the problem itself. If violent crime is the product of monstrous offenders, then our only responsibility is to find and eliminate them.” *Id.* at 558.

68. Empirical research suggests “that in cases involving a Black defendant and a White victim—cases in which the likelihood of the death penalty is already high—jurors are influenced not simply by the knowledge that the defendant is Black, but also by the extent to which the defendant appears stereotypically Black.” Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing the relationship between racially discriminatory law enforcement practices and America’s historically unprecedented incarceration rate).

69. See Wayland & O’Brien, *supra* note 1, at 524-31.

provided the scientific and research framework for challenging the reliability and admissibility of such evidence based on its subjectivity and unreliability.⁷⁰

The universal stigma of psychiatric and cognitive disabilities attests to the powerful negative perceptions and stereotypes associated with mental illness. Indeed, prosecutors throw the term “psychopath” into capital trials to activate the archetype that it evokes in the jurors’ imaginations.⁷¹ The use of labels to describe a person on trial for his life invites decision-makers to fill the gaps in information with popular culture stereotypes of violent criminals. When the client is branded “antisocial,” prosecutors are empowered to call the defendant names—monster, animal, psychopath, maniac—and thereby deny the defendant individualized consideration of his human dignity and individuality.⁷² In his place, a false and misleading one-dimensional archetypal character is built, whose downfall Hollywood has conditioned us to savor.

Cognitive psychologists tell us that an appeal to the jury’s intellect and reason with carefully researched factual information about mental disease and cognitive disorders may have the opposite effect; it may drive jurors to cling more strongly to their preconceived stereotypes of expert witnesses and violent criminals. The client’s fate then hangs on the proverbial “battle of the experts” that glazes the eyes of most judges and juries.⁷³ When CJP researchers asked capital jurors if either party called a witness they felt “backfir[ed]” or was “hard to believe,” two-thirds of them identified mental health experts, who were perceived to be hired guns for the defense.⁷⁴ This explains CJP data indicating that when the defense relies on expert testimony to carry the core of its mitigation

70. *Id.* at 532-66.

71. In one recent study, researchers asked 203 undergraduate students to review a capital case in which “the results of the defendant’s psychological examination were experimentally manipulated.” John F. Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?*, 23 BEHAV. SCI. & L. 603, 603 (2005). Where the expert testified that the defendant was psychopathic, participants were much more likely to support a death sentence (60%) than when he was found to be psychotic (30%) or not mentally disordered (38%). *Id.* Although “psychotic” defendants fared much better than psychopathic defendants in John F. Edens’ research, mental illness triggers negative associations with lay people. Sadler et al., *supra* note 14, at 916-17.

72. Haney, *Social Context*, *supra* note 12, at 558-59; Wayland & O’Brien, *supra* note 1, at 525-27.

73. See, e.g., *Wilson v. Trammell*, 706 F.3d 1286, 1290-1304 (10th Cir. 2013) (involving expert battles over psychiatric labels); *Overstreet v. Wilson*, 686 F.3d 404, 412-13 (7th Cir. 2012) (Wood, J., dissenting). The fact that the client is afflicted with delusional thinking unconnected with reality is far more important than whether the delusions are a product of schizophrenia, bipolar disorder, major depression with psychotic features, or PTSD.

74. Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123, 1126-30 (1997).

case, juries tend to reject it; only when “the expert takes the role of accompanist and helps harmoniously explain, integrate, and provide context to evidence presented by others, the jury is far more likely to find the expert’s testimony . . . to be trusted.”⁷⁵

Juror suspicion of mental health experts shows up in the CJP data in multiple ways. Jurors are more likely to be persuaded by “lay experts,” e.g., teachers, healthcare providers, counselors, or social workers, who know the client, and who can testify about his human struggles with internal impairments and life circumstances.⁷⁶ A juror’s belief that the defendant loves his family adds to their sense that he is capable of remorse, and also correlates favorably with a vote for life.⁷⁷ All of these findings demonstrate the impact of thorough mitigation investigations and presentations that portray the client as a unique, complex human being—the antithesis of anti-social personality disorder. This is what we meant when we said that when a client is labeled “antisocial,” the investigation, not the client, is shallow and superficial.⁷⁸

Decades of research in social and cognitive psychology, augmented by recent findings from neuroscience, provide a useful framework and vocabulary for analyzing how individuals (including police officers, attorneys, jurors, and judges) may differentially perceive and interpret the information presented to them during criminal justice proceedings and capital trials. The field of cognitive psychology was heavily influenced by Jean Piaget’s seminal work on cognitive development, which focused on critical processes for the development and integration of knowledge.⁷⁹ Embedded in Piaget’s theory is the construct of schema, an organized pattern of thought or behavior, a structured cluster of preconceived ideas, a mental framework to organize social information, and assumptions used to interpret and process new information.⁸⁰

75. *Id.* at 1144.

76. Melissa E. Whitman, *Communicating with Capital Juries: How Life Versus Death Decisions Are Made, What Persuades, and How to Most Effectively Communicate the Need for a Verdict of Life*, 11 CAP. DEF. J. 263, 278-79 (1999).

77. See Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1621 (1998) (finding a high correlation between jurors’ beliefs that the defendant was sorry for his crime and that he loved his family). It has been noted that “[j]urors perhaps think that defendants who are capable of showing love to their families also have the capacity to experience remorse.” *Id.* Jurors who perceive the defendant as remorseful are less likely to vote for death. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559 tbl.4, 1560-61 (1998).

78. Wayland & O’Brien, *supra* note 1, at 531 & nn.74-75.

79. See generally JEAN PIAGET, *THE ORIGINS OF INTELLIGENCE IN CHILDREN* (Margaret Cook trans., 1952).

80. See *id.* at 174-84; see also HERBERT P. GINSBURG & SYLVIA OPPER, *PIAGET’S THEORY OF INTELLECTUAL DEVELOPMENT* 19-22 (3d ed. 1988).

The importance of this research in a capital litigation context is that jurors and judges do not enter the courtroom with a neutral frame of reference with respect to the defendant and the violent crime with which he is charged. Each brings his own schema through which the evidence will be interpreted; this schema fills in gaps in data by providing explanations that go beyond the absorbed information.⁸¹ Developing a template for processing information about the world enables us to quickly analyze and respond to new situations. However, a decision-maker's schema may include faulty notions regarding the cause-and-effect of violent behavior, mental health and cognitive development, the deleterious effects of trauma, or even racial stereotypes that generate erroneous conclusions.⁸² Professors Anthony G. Amsterdam and Jerome Bruner explain:

Nobody has the time or mental energy to deal with everything encountered as if it were unique, *for the first time*. So we use the past to manage the present. We need to be able to say, as William James put it, "here comes a thingumabob again." Another way to put it is that categorization minimizes surprise, allows us to treat things *as if* they were the same as what we had encountered before. It ensures that the limited number of slots we have for processing what is going on around us are used to good purpose, not wasted on lavish particularity.⁸³

Therefore, our world view is organized into "cognitive 'shortcuts' that transform unfamiliar situations into events that are within an individual's range of experience."⁸⁴ Human beings interpret sensory perceptions in relation to schema, or "interpretive frameworks," that "constantly 'filter and affect'" what an individual "should be seeing and feeling in a given situation."⁸⁵

It is the process of filling in gaps in knowledge that leads to trouble for criminal defendants. As Amsterdam and Bruner point out, "[t]he

81. See Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 700-01 (1994).

82. See *id.* at 700 & n.60, 701-04.

83. AMSTERDAM & BRUNER, *supra* note 12, at 21 (footnotes omitted). For popular culture discussions of this phenomenon, compare MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 136-45 (2005) (suggesting that these neurological shortcuts save us from the dilemma of an information overload or analysis paralysis), with MICHAEL R. LEGAULT, *TH!NK: WHY CRUCIAL DECISIONS CAN'T BE MADE IN THE BLINK OF AN EYE* 1-14 (2006) (criticizing Gladwell's suggestion that snap judgments are no substitutes for critical thinking).

84. Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 259 (2009).

85. *Id.* at 259-60.

burden of this new work in the human sciences, to oversimplify a bit, is that categories are *made in the mind* and not found in the world,” which raises questions: “Why do we *create* our categories as we do, *justify* them in what are often very odd ways, and *put things into them or not* by what are often dubious procedures? How can categorizing lead us into trouble and error?”⁸⁶ An incomplete mitigation presentation invites this process, with potentially fatal result; gaps in decision-makers’ knowledge about the client will be filled with images drawn from categories—stereotypes—that reside in their own schemata.

Research in cognitive psychology and neuroscience provides insights about how this preexisting interpretive framework shapes perceptions, conclusions, and behavior in the criminal justice setting, causing individual police officers, attorneys, jurors, and judges to perceive and interpret differently the information presented to them. Within this body of research is the rubric of “implicit social cognition,” which refers to biases, attitudes, and stereotypes that operate without intentional control, and at a level below cognitive awareness.⁸⁷ Early research focused on measures of “explicit racial bias,” stereotypes, or beliefs that are endorsed on a conscious level.⁸⁸ As awareness grew about the role of social desirability and impression management in the study of explicit racial bias, these measures were increasingly questioned for their ability to shed light on issues related to racial and other biases. This led to new methods of studying bias, and gave rise to the study of implicit social bias. Research indicates that these hidden “implicit” biases are “robust and pervasive,” and can influence the way we perceive and behave, even when individuals are committed to being fair and objective.⁸⁹

86. AMSTERDAM & BRUNER, *supra* note 12, at 9-10.

87. See, e.g., *Helping Courts Address Implicit Bias: Resources for Education*, NAT’L CENTER ST. CTS., <http://www.ncsc.org/ibeducation> (last visited Apr. 12, 2015); see also CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013, at 6, 11-12 (2013) [hereinafter STAATS, IMPLICIT BIAS 2013], available at http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf. The Kirwan Institute’s 2014 report is also available online. CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014 (2014), available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf>. Implicit bias has been studied in numerous ways, including: physiological approaches; priming methods; response latency measures; and the Implicit Association Test. See STAATS, IMPLICIT BIAS 2013, *supra*, at 21-28 (discussing these methods and relevant findings). For example, functional Magnetic Resonance Imaging has been used to study the amygdala, the part of the brain that reacts to threat and fear, and which has a “known role in race-related mental processes.” *Id.* at 22 (citation omitted). Several studies have shown that Caucasian subjects in general show greater amygdala activation when exposed to unfamiliar African-American faces as opposed to unfamiliar Caucasian faces. *Id.*

88. See STAATS, IMPLICIT BIAS 2013, *supra* note 87, at 13-15.

89. *Id.* at 7-8.

Race may compound the prejudicial effect of psychiatric labels. Substantial research establishes the existence of implicit bias on the part of police,⁹⁰ judges,⁹¹ prosecuting attorneys,⁹² defense lawyers,⁹³ jurors,⁹⁴ and physicians.⁹⁵ It is difficult to imagine that implicit racial bias does not come into play when the defendant is labeled “antisocial” or “psychopathic.”⁹⁶ Our original article discussed substantial research establishing the existence of examiner bias in the interpretation of the Psychopathy Checklist-Revised (“PCL-R”), although race was not a

90. In one study, officers were shown pictures of white and black faces, and with no additional information were asked, “Who looks criminal?” The results established that race played a significant role in officers’ judgments:

When officers were given no information other than a face and when they were explicitly directed to make judgments of criminality, race played a significant role in how those judgments were made. Black faces looked more criminal to police officers; the more Black, the more criminal. These results provide additional evidence that police officers associate Blacks with the specific concept of crime.

Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 888-89 (2004). Other studies confirm a “shooter/weapons bias,” which “refers to the strong and pervasive implicit association between Blackness . . . and weapons.” which can mean life or death for innocent Black citizens. STAATS, IMPLICIT BIAS 2013, *supra* note 87, at 37-38.

91. STAATS, IMPLICIT BIAS 2013, *supra* note 87, at 39 (“Even with an avowed commitment to impartiality, judges, like the rest of the general population, display implicit [racial] biases.”). Judges may have an “illusion of objectivity,” meaning they tend to be overconfident of their ability to avoid racial prejudice in decision-making. *Id.* at 39-40.

92. Cheryl Staats explains the impact of implicit bias on prosecutors:

Prosecutors are as susceptible to implicit racial biases as anyone else, and the unique nature of their job provides numerous opportunities for those biases to act within criminal justice proceedings These choices can have tremendous impacts on suspects’ lives, particularly when prosecutors are deciding between trying someone in juvenile court vs. adult court, or determining whether to pursue the death penalty.

. . . .

[P]rosecutorial implicit biases can crop up during aspects of trial strategy, such as jury selection and closing arguments. During closing arguments, in particular, prosecutors may activate implicit biases by referring to the accused in terms that dehumanize them, such as using animal imagery.

Id. at 43-44.

93. Defense attorneys’ implicit bias can adversely affect their performance in a number of areas, including jury selection and the quality of the attorney-client relationship. *Id.* at 45.

94. Research indicates that jurors tend to show biases against defendants of a different race, and that racial composition of juries has a considerable impact on legal decisions. *Id.* at 40-42. As racial issues are at the heart of many capital trials, this points to the importance of defense attorneys carefully considering the ramifications of racial issues in multiple aspects of capital litigation.

95. Research into the implicit racial biases of physicians found “implicit and explicit attitudes about race align well with the patterns found in large heterogeneous samples of the general population, as most doctors implicitly preferred Whites to Blacks.” *Id.* at 47.

96. Researchers suggest that additional studies are needed “to further explore how the construct of psychopathy as assessed by the [Psychopathy Checklist-Revised] fits with different cultural conceptualizations of mental illness and criminality,” as most extant research addresses European populations. Elizabeth A. Sullivan & David S. Kosson, *Ethnic & Cultural Variations in Psychopathy*, in CHRISTOPHER J. PATRICK, HANDBOOK OF PSYCHOPATHY 439 (2006).

factor addressed in most of those studies.⁹⁷ In addition to the issue of examiner bias, experimental evidence supports concerns that jurors are more likely to perceive a black defendant as having “antisocial” or “psychopathic” traits.⁹⁸ Given the powerful and pervasive effect of implicit racial bias, the use of prejudicial psychiatric labels to a minority defendant is especially dangerous.

The danger, of course, is that the reliability and fairness of life-or-death decisions are undermined by the preexisting implicit bias inherent in each juror’s schema. Professors Amsterdam and Bruner observe: “[W]e are always at risk that our categories may lead us astray. Indispensable instruments, they are also inevitable beguilers.”⁹⁹ They have commented on this trait:

[It has spawned] a collective way of thought disposed to all-or-none judgments, to sharp polarization, to defining the Other as simply non-Us, to defining Us as non-Them. It renders us insensitive to middle grounds and the subtle qualities of Others. We Americans find it peculiarly hard to appreciate mitigating circumstances, peculiarly tempting to cast blame rather than find explanation. Put them in jail, one-two-three out, for-us or against-us! This turn of collective thought reflects itself, we suspect, in resistance to affirmative action, in our reluctance to carry the American Creed “too far,” in unwillingness to abolish the death penalty, and above all, in our stumbling efforts to come to terms with our racism—Them and Us.¹⁰⁰

A significant body of cognitive science confirms this is so:

Most commentators, by far, have seen the confirmation bias as a human failing, a tendency that is at once pervasive and irrational. It is not difficult to make a case for this position. The bias can contribute to

97. See Wayland & O’Brien, *supra* note 1, at 554-58. Although the issue of racial bias in the context of expert testimony on ASPD and psychopathy has not been well researched, available research suggests there are important differences in the performance of African Americans and Caucasians on the PCL-R, and that certain PCL-R items appear to be particularly subject to race bias. David Freedman, *Premature Reliance on the Psychopathy Checklist-Revised in Violence Risk and Threat Assessment*, J. THREAT ASSESSMENT, 2001, at 53, 58-59.

98. For example, in mock jury studies of racial influence on juries, Caucasian jurors have shown a tendency to rate African-American defendants as “more aggressive, less honest and moral, more likely to reoffend, and more likely to have a ‘criminal personality type’ than Caucasian defendants. To the extent that minority defendants also are ‘diagnosed’ as psychopathic by an expert witness, it seems plausible that this bias might be magnified.” John F. Edens et al., *Psychopathy and the Death Penalty: Can the Psychopathy Checklist-Revised Identify Offenders Who Represent “a Continuing Threat to Society”?*, 29 J. PSYCHIATRY & L. 433, 461 (2001) (citing Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 212-13 (2001)).

99. AMSTERDAM & BRUNER, *supra* note 12, at 19.

100. *Id.* at 16.

delusions of many sorts, to the development and survival of superstitions, and to a variety of undesirable states of mind, including paranoia and depression. It can be exploited to great advantage by seers, soothsayers, fortune tellers, and indeed anyone with an inclination to press unsubstantiated claims. One can also imagine it playing a significant role in the perpetuation of animosities and strife between people with conflicting views of the world.¹⁰¹

Testimony which purports to be science-based and labels the client as “antisocial” or “psychopathic” appeals to the fictitious popular culture stereotype of the dangerous psychopath.¹⁰²

Fighting such evidence with a counter-label, rather than a counter-narrative, is not likely to be successful. Labels appeal to stereotype:

Once we put a creature, thing, or situation in a category, we will attribute to it the features of that category and fail to see the features of it that don't fit. We will miss the opportunities that might have existed in all the alternative categories we did *not* use. We will see distinctions where there may be no differences and ignore differences because we fail to see distinctions.¹⁰³

Thus, psychiatric labels do not communicate the client's innate uniqueness and complexity, nor do they reveal the things that would enable the jury to see him as like themselves—a human being with hopes, dreams, beliefs, and values, in many ways similar to their own. When applied to a person accused of a violent crime, labels inspire severe punishment, not mercy:

Historically, the depiction of criminals as defective has always facilitated their mistreatment at the hands of the criminal justice system, and the more “scientifically” the defect could be documented, the greater the mistreatment. Thus, the easier it is to derogate defendants, the easier it is to treat them harshly. Both sides of this dynamic help to explain the American public's fixation with the potential biological and genetic basis of criminality: The belief that criminals are born defective and therefore different facilitates society's harsh treatment of them.¹⁰⁴

101. Nickerson, *supra* note 57, at 205.

102. Wayland & O'Brien, *supra* note 1, at 525-26.

103. AMSTERDAM & BRUNER, *supra* note 12, at 49.

104. Haney, *supra* note 4, at 1461-62. Dr. Haney explains that “jurors can morally disengage from the defendant by substituting the disorder for the person.” *Id.* at 1464 n.84. Dr. Haney provides that the most “extreme example” of prejudicial labeling

occurs when prosecutors encourage jurors to substitute an “antisocial personality” for the personhood of the defendant, robbing him of many human qualities with which jurors might otherwise identify and instead putting in their place a host of diabolical traits that

The structure of a capital trial facilitates the dehumanization of the defendant. In the guilt-or-innocence stage of the trial, a defense restricted to narrowly-defined statutory criteria for insanity or diminished mental capacity “requires extensive reliance on psychiatric opinion and the corresponding use of medical terminology and diagnostic labels. Yet, this kind of labeling can reduce very complicated human beings to disembodied psychiatric categories.”¹⁰⁵

At best, a battle of the experts over psychiatric labels simply substitutes one stereotype for another—switching the juror’s image of the capital defendant from Hannibal Lector (from *Silence of the Lambs*), to Norman Bates (from the movie *Psycho*)¹⁰⁶ is not likely to engender sufficient empathy to motivate her to reject the death penalty. Instead, “the starting point for compassionate justice becomes the recognition of basic human commonality—an opportunity for capital jurors to connect themselves to the experiences, moral dilemmas, and human tragedies faced by the defendant.”¹⁰⁷ This is not accomplished with the charts, graphs, and images developed through psychometric testing and medical imaging; decision-makers respond to narrative in a fundamentally different way. In describing narratives, they tend to “cohere differently, not through the mechanics and chemistry of cause and effect but through the play of human intentions and purposeful acts in the worlds of striving, accomplishment and failure, victory and defeat.”¹⁰⁸ We can

typically imply, without benefit of proof, an evil “inner self” that extends far beyond any overt behavior.

Id.

105. *Id.* Dr. Haney’s observation helps explain why “[l]awsuit stories often suffer from their close association with lawyers. Many lawyers cannot help but choke the humanity out of a story by reducing it to its legal essentials.” Michael N. Burt, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. REV. 877, 900 (2009) (quoting Gerald Reading Powell, *Opening Statements: The Art of Storytelling*, 31 STETSON L. REV. 89, 92 (2001)).

106. *PSYCHO* (Paramount Pictures 1960).

107. Haney, *supra* note 4, at 1465.

108. AMSTERDAM & BRUNER, *supra* note 12, at 12. Cognitive scientists explain that “[o]n the one hand, the person incorporates or assimilates features of external reality into his own psychological structures; on the other hand, he modifies or accommodates his psychological structures to meet the pressures of the environment.” GINSBURG & OPPER, *supra* note 80, at 18. Piaget explained that:

Intelligence is *assimilation* to the extent that it incorporates all the given data of experience within its framework. . . . Assimilation can never be pure because by incorporating new elements into its earlier schemata the intelligence constantly modifies the latter in order to adjust them to new elements. Conversely, things are never known by themselves, since this work of accommodation is only possible as a function of the inverse process of assimilation.

PIAGET, *supra* note 79, at 6-7. Narrative is the medium by which jurors can respond to mitigation evidence by assimilating the new and different information about a capital defendant into their schemata, and by expanding or altering their schemata to accommodate it.

inundate the jury with logic and scientific facts about mental illness and human behavior, and proper diagnostic procedure and terminology, but without knowing the story of the defendant's life, decision-makers cannot arrive at an empathetic understanding of him or his crime.

Narratives, or stories, serve as an interpretive framework in which multiple schemata are operating at once. Humans have a "predisposition to organize experience into a narrative form;" in fact, "this predisposition toward narrative is . . . as natural to human comprehension of the world as [an individual's] visual rendering of what the eye sees . . ."¹⁰⁹ Consequently, narrative form is "an innate schema for the organization and [understanding of human] experience."¹¹⁰ Because humans learn by interacting with their environment, they understand concepts expressed in the form of stories better than they understand abstract principles. Thus, narratives are "central to [an individual's] ability to make sense out of a series of chronological events."¹¹¹

Only through exhaustive life history investigation can the stories and storytellers of the client's life be discovered. Our emphasis on the central importance of narrative in addition to science is consistent with Justice Brennan's observation regarding the origin of the long-term trend toward moderation in criminal punishment:

[B]eliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.¹¹²

Capital defense attorneys, wherever possible, rely on lay witnesses, lay experts, and documentary and demonstrative evidence, in addition to expert witnesses, who can tell the jury a truthful narrative of the defendant's life that explains his mental impairments, disorders, or limitations, as well as his hopes, accomplishments, and failures in the context of his humanity.¹¹³

109. J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 57-58 (2008) (citing JEROME BRUNER, *ACTS OF MEANING* 45 (1990)).

110. *Id.* at 58 (citation omitted).

111. Sheppard, *supra* note 84, at 261 (citation omitted).

112. *Furman v. Georgia*, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (quoting THORSTEN SELLIN, *THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* 15 (1959)) (internal quotation marks omitted).

113. WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* 105-07 (2006). Capital trial attorney Michael N. Burt explains:

IV. NARRATIVE WORKS

We have discussed examples of mitigation cases that failed when the litigation focused on expert battles over evidence of ASPD, psychopathy, and other psychiatric labels.¹¹⁴ Our discussion of mitigation counter-narratives is inspired by our fruitless search for cases in which the capital client won a battle of the experts over psychiatric labels without also engaging the client's life story. The successful mitigation cases that we found focused on symptoms and life history more than on diagnoses and testing. They did not invariably ignore the controversy over diagnosis, but the story, not the label, took center stage. Thorough life history investigations enabled defense teams to discover and tell stories about conditions and events that frustrated the client's attempts to make it in life, and moved the decision-makers away from death.¹¹⁵

Although we caution that focusing on diagnostic labels may simply conjure up its own stereotype in the jurors' minds, expert witnesses may indeed be an important part of the client's life narrative. Mental health experts can help the defense team and the jury understand the client's symptoms and impairments, and interpret the testimony of lay people describing events that reveal the client's limitations. They can also help the jury understand how symptoms and impairments are manifested at different developmental stages, and the impact of these symptoms and impairments on a client's perceptions, behavior, and functioning. If presented in the context of a complete and accurate narrative, even prior crimes or acts of violence can help a decision-maker understand the client's state of mind at the time of the homicide. For example, in

The "record" at the trial level is primarily based upon the thorough life history investigation that the capital defense team is constitutionally obligated to undertake. An exhaustive social history investigation undertaken by a skilled mitigation specialist is premised on the well-grounded assumptions that "no meaningful account of criminal behavior can begin without extensive social historical knowledge about the life of the perpetrator" and that "because people's actions are influenced in large part by their past experiences, counter-normative behaviors (like crime) must be partly rooted in counter-normative social historical experiences."

Burt, *supra* note 105, at 881 (quoting Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 843 (2008)).

114. See *supra* notes 26-51 and accompanying text.

115. See Mark E. Olive, *Narrative Works*, 77 UMKC L. REV. 989, 994-1003, 1006-16 (2009) (discussing the successful post-conviction mitigation narratives presented in *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008), *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008), and *Walbey v. Quarterman*, 309 F. App'x 795 (5th Cir. 2009)). All three cases are good examples of developing a persuasive counter-narrative in mitigation; in *Walbey*, the counter narrative trumped the trial expert's testimony that his behavior was consistent with ASPD. *Walbey*, 309 F. App'x at 800-06.

Rompilla v. Beard,¹¹⁶ records found in the file of Ronald Rompilla's prior rape conviction pointed to school and social service records that became a springboard for a robust mitigation narrative.¹¹⁷ In *Atkins v. Virginia*,¹¹⁸ the underlying facts of Darryl Atkins' six prior ill-conceived and poorly-executed criminal episodes that produced twenty-one felony convictions underscored his intellectual disability.¹¹⁹ Atkins' prior crimes were an effective lens through which to view his struggles with his intellectual disability. More often than not, "double-edged" mitigation will provide critical clues to developing accurate and reliable social histories and contextualizing the defendant's behaviors.¹²⁰ Capital defense teams do not automatically shy away from double-edged mitigation evidence when exploring and telling the client's life story with the nuance and context that is core to an effective and truthful narrative.¹²¹

The role of narrative is so important to moving a decision-maker toward life that experienced capital defense lawyers do not even select mental health experts until they have conducted enough investigation to know the client's life story, and what experts will be helpful in communicating it to the jury:

Only after the social history data have been meticulously digested and the multiple risk factors in the client's biography have been identified will counsel be in a position to determine what kinds of culturally

116. 545 U.S. 374 (2005).

117. *Id.* at 389-93.

118. 536 U.S. 304 (2002).

119. See Brief for Petitioner at 12 n.20, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452).

120. The Supreme Court's analysis in *Porter v. McCollum*, 558 U.S. 30 (2009) illustrates this point. The prosecution's case portrayed George Porter, Jr. as a violent drunk who murdered his girlfriend and her new boyfriend after she attempted to end her tumultuous and abusive relationship with Porter. See *id.* at 31-33. The Florida Supreme Court had concluded that Porter's military record would have opened the door to adverse evidence that he went absent without leave and drank heavily. *Id.* at 43-44. The Supreme Court rejected this conclusion as objectively unreasonable:

[T]he relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter. The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. To conclude otherwise reflects a failure to engage with what Porter actually went through in Korea.

Id. Further, the Court reasoned, "[i]t is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with Williams." *Id.* at 43.

121. WHITE, *supra* note 113, at 85 ("[E]xperienced capital defense attorneys invariably conclude that mitigating evidence must be presented, even if there is some chance that the jury may view it as double-edged."). Capital defense attorneys are trained to "always present mitigating evidence that will explain the defendant's background and history to the jury, thereby enabling the jury to gain an understanding of the defendant as a person." *Id.*

competent experts are appropriate to the needs of the case, what role the experts will play, and what referral questions will be asked of the experts.¹²²

Rather than asking experts to diagnose a client and opine whether his condition triggers statutory defenses or mitigating circumstances, experienced defense lawyers frame referral questions in the language that will help tell the client's mitigating life story. They will want the expert to help explain how the client's mental impairments "explain or contribute to [his behavior] . . . , especially as it relates to the crime," or whether the client "suffer[s] from mental health difficulties that the decision-maker might find mitigating even though they did not directly lead to the defendant's criminal behavior."¹²³ Other possible referral questions include the course of the defendant's mental difficulties, how his multiple impairments interact with one another to influence his behavior or impair his functioning, whether he was treated prior to the crime, or whether he would respond to treatment in a prison setting.¹²⁴ In formulating referral questions, counsel should be mindful that much more important than diagnosis are the social, psychological, developmental, familial, cultural, religious, and environmental factors that played a role in shaping the client's development and functioning. Such questions are much more likely to generate thorough, thoughtful exploration of the client's life, and will inevitably produce humanizing narratives that demonstrate the client's strengths and frailties. Diagnoses, psychometric test scores, and brain scans are not narratives. These tools persuade only when accompanied by compelling stories that reveal the client's intrinsic humanity.

What do we mean by narrative, and how does it work in a capital case? In the legal arena, narrative is "factual and truthful storytelling, meticulously built upon a record."¹²⁵ More succinctly, narrative is "[c]hronology with meaning."¹²⁶ More importantly, it is a way of communicating information in a form that is accessible to decision-makers. Unlike facts offered to refute the prosecutor's case for death, "[n]arratives do not contradict theories but cut across them; the two are

122. Russell Stetler, *Mental Health Evidence and the Capital Defense Function: Prevailing Norms*, 82 UMKC L. REV. 407, 427 (2014).

123. Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 985 (2008).

124. *Id.*

125. Philip N. Meyer, *Are the Characters in a Death Penalty Brief Like the Characters in a Movie?*, 32 VT. L. REV. 877, 877-78 (2008).

126. Jon Franklin, *The Narrative Tool*, AM. EDITOR, <http://files.asne.org/kiosk/editor/98.octnov/franklin1.htm> (last updated Dec. 2, 1998).

incommensurate.”¹²⁷ Although we may speak about a capital defense team’s “theory of mitigation,” what we really mean is, “[w]hat is your mitigation story?” This is why experts, such as Dr. Haney, consistently talk about the mitigation “counter narrative” as the key to bringing the decision-maker to an empathetic understanding of the defendant.¹²⁸ Stories of the client’s life reveal his innate human qualities, his flaws as well as his strengths, and enable decision-makers to see him as like themselves.

Rompilla is perhaps the best-known story of a mitigation counter-narrative overcoming the antisocial stereotype that was created by trial counsel’s shallow investigation.¹²⁹ Rompilla was convicted of killing tavern owner James Scanlon at his bar, the Cozy Corner Cafe, by stabbing him repeatedly and setting him on fire.¹³⁰ Rompilla stole Scanlon’s wallet and between \$500 and \$1000 from the bar.¹³¹ At approximately 6:30 a.m., later that morning, Scanlon’s son found his father’s body lying behind the bar in a pool of blood.¹³² The circumstantial evidence against Rompilla was strong; his own statement and witnesses placed him in the Cozy Corner Cafe the evening before the murder, and he was seen making repeated trips to the bathroom, which was the burglar’s point of entry.¹³³ Blood on Rompilla’s sneaker matched Scanlon’s blood type, and the sneaker’s tread matched bloody footprints at the scene of the murder.¹³⁴ Scanlon’s wallet was found in the bushes a few feet from the hotel room Rompilla rented the night of the murder, and Rompilla’s fingerprint was recovered from one of the knives used to stab Scanlon to death.¹³⁵ In the penalty phase of trial, the jury found statutory aggravating circumstances that Rompilla killed Scanlon “while in the perpetration of a felony,” that “[t]he offense was committed by means of torture, and that [Rompilla] had a significant history of felony convictions involving the use or threat of violence to the person.”¹³⁶ The last aggravator was supported by Rompilla’s two

127. AMSTERDAM & BRUNER, *supra* note 12, at 12.

128. See Haney, *Prison Violence*, *supra* note 12, at 928-29.

129. See *Rompilla v. Beard*, 545 U.S. 374, 393 (2005), *rev’g Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004).

130. *Id.* at 377. This description of Rompilla’s crime is condensed from the Pennsylvania Supreme Court’s opinion affirming the conviction on direct appeal. *Commonwealth v. Rompilla*, 653 A.2d 626, 628-29, 634 (Pa. 1995), *aff’d in part, rev’d in part sub nom. Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004).

131. *Rompilla*, 63 A.2d at 629.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 629-30.

136. *Id.* at 634 n.13.

prior convictions, one for rape and the other for a burglary, during which he threatened the victim with a knife.¹³⁷ Rompilla was sentenced to death.¹³⁸

Rompilla's trial counsel presented a defense that U.S. District Judge Ronald L. Buckwalter described as "unreasonably brief and lacking in real substance considering the nature of the proceedings."¹³⁹ Trial counsel's investigation was limited to interviews with the client, his ex-wife, sister-in-law, and three of his five siblings—a very narrow sampling of sources.¹⁴⁰ The family told counsel "that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody," and Rompilla himself said that his childhood and schooling had been "normal."¹⁴¹ Judge Buckwalter summarized the penalty phase presentation:

Petitioner's counsel called five witnesses on his behalf at that hearing: Darlene Rompilla, his sister-in-law; Nicholas Rompilla, Junior, an older brother; Robert Rompilla, a younger brother; Sandy Whitby, a sister; and Aaron Rompilla, a son who was 14 at that time. . . . Not one witness discussed [Rompilla's] traumatic childhood, his alcoholism, mental retardation, cognitive impairment or organic brain disorder. What they did say were, "He was a good family member"; "We never had a problem"; "I don't think my brother did it"; "Have mercy on him"; "I was close to him, he loved my family, he just didn't have a chance"; "They didn't give him no rehabilitation"; "Why can't he get help like all the rest of the people get help"; "I love him very much" (crying); "I've never seen the bad side of my brother, never"; "He just loves us like we love him."¹⁴²

Although the jury did not hear from mental health experts, defense counsel consulted two psychiatrists and a psychologist who evaluated Rompilla.¹⁴³ Based on their testing and the history described in the preceding paragraphs, "the experts found nothing helpful to Rompilla's

137. *Id.* at 633-34.

138. *Id.* at 628, 634.

139. *Rompilla v. Horn*, No. 99-737, 2000 U.S. Dist. LEXIS 9620, at *13 (E.D. Pa. July 11, 2000), *aff'd in part, rev'd in part*, 355 F.3d 233 (3d Cir. 2004).

140. *Rompilla v. Horn*, 355 F.3d 233, 241 (3d Cir. 2004), *rev'd sub nom. Rompilla v. Beard*, 545 U.S. 374 (2005).

141. *Rompilla v. Beard*, 545 U.S. 374, 381-82 (2005).

142. *Rompilla*, 2000 U.S. Dist. LEXIS 9620, at *11-12, *aff'd in part, rev'd in part, Rompilla*, 355 F.3d 233.

143. *Commonwealth v. Rompilla*, 721 A.2d 786, 790 (Pa. 1998), *aff'd in part, rev'd in part sub nom. Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004).

case and diagnosed him as a sociopath.”¹⁴⁴ The Pennsylvania Supreme Court concluded that because of this diagnosis, “counsel had a reasonable basis for proceeding as they did.”¹⁴⁵ Thus, trial counsel’s inaction enabled Rompilla’s family to dupe the jury into believing that they had given Rompilla a “normal” upbringing, and therefore the fault for Rompilla’s criminal behavior lay exclusively with him. The diagnosis of ASPD fit that false picture perfectly, so trial counsel were justified to abandon pursuit of mitigating evidence of Rompilla’s mental health impairments, or so it seemed.

A thorough postconviction investigation proved the trial experts wrong; Rompilla’s family had betrayed him. Trial counsel themselves became significant players in Rompilla’s tragic life story when they failed in their duty to investigate his defense. Postconviction counsel gathered extensive life history documents, including a mental evaluation conducted in connection with Rompilla’s rape prosecution, a copy of which was in the court file stored in the same courthouse in which Rompilla was tried for murder—all trial counsel needed to do was walk across the hall and ask for it.¹⁴⁶ Rompilla’s sisters, Randi Rompilla and Barbara Harris, lived in town and attended the trial, but were never interviewed.¹⁴⁷ The necessity to investigate further was so obvious that the court concluded that competent counsel “could not reasonably have ignored mitigation evidence or red flags” pointing to the need to investigate further.¹⁴⁸

The new data “destroyed the benign conception of Rompilla’s upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts.”¹⁴⁹ The court summarized a portion of the new evidence of Rompilla’s childhood:

Rompilla’s parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla’s mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he

144. *Id.*

145. *Id.* at 789-90.

146. *Rompilla v. Horn*, 355 F.3d 233, 282 (3d Cir. 2004) (Sloviter, J., dissenting), *rev’d sub nom.* *Rompilla v. Beard*, 545 U.S. 374 (2005).

147. *Id.* at 280.

148. *Rompilla v. Beard*, 545 U.S. 374, 391 n.8 (2005).

149. *Id.* at 391.

was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.¹⁵⁰

Easily obtained school, medical, juvenile, and prison records established that before Rompilla dropped out of school, his mother was reported “missing from home frequently” for weeks at a time, and was “frequently under the influence of alcoholic beverages, with the result that the children have always been poorly kept and on the filthy side which was also the condition of the home at all times.”¹⁵¹ School records showed Rompilla’s IQ was in the intellectually disabled range.¹⁵² At age sixteen, Rompilla quit school and began a series of juvenile incarcerations for assaultive behavior “related to over-indulgence in alcoholic beverages.”¹⁵³ The juvenile incarceration files contained reports “pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling.”¹⁵⁴ A reasonable investigation enabled mental health experts to credibly explain that Rompilla’s mother’s alcoholism during her pregnancy with him resulted in organic brain damage; his impulsive behavior and cognitive deficits were consistent with fetal alcohol syndrome.¹⁵⁵

The new narrative based on a thorough investigation worked; Rompilla’s sentence of death was vacated, and on remand, the Allentown prosecuting attorney waived the death penalty, commuting Rompilla’s sentence to life.¹⁵⁶ While the courts mention, in passing, a variety of psychiatric and cognitive disabilities from which Rompilla may suffer, including schizophrenia, mental retardation, and fetal alcohol syndrome, his claim for relief did not depend upon staking out a

150. *Id.* at 391-92 (quoting *Rompilla*, 355 F.3d at 279).

151. *Id.* at 393.

152. *Id.*

153. *Id.* at 390-91.

154. *Id.* at 391.

155. *Id.* at 391-92 (quoting *Rompilla*, 355 F.3d at 282).

156. *Allentown Man to Spend Life in Prison for 1988 Murder*, DAILY AM. (Aug. 13, 2007), http://articles.dailyamerican.com/2007-08-13/news/26304740_1_ronald-rompilla-allentown-tavern-owner-allentown-man.

position based on a diagnostic label.¹⁵⁷ Unlike the decisions in *Pinholster*, *Overstreet*, and *Williams v. Allen*,¹⁵⁸ Rompilla's lawyers and experts did not square off over labels. Postconviction counsel understood that "not antisocial" is not a theory of mitigation. Mental health expert assessments played a supporting role in Rompilla's life story; it was the powerful narrative of his tragic childhood, his trial counsel's inept representation, and his sisters' love that saved him from execution.

Rompilla fits a pattern that we found among successful cases involving mental and cognitive impairments; the client's humanizing life story takes center stage, and mental health experts play a supporting role. In *Parkus v. Delo*,¹⁵⁹ Steven Parkus' life-long pattern of running away, truancy, and institutionalization prompted pretrial diagnoses of ASPD by both state and defense examiners, but those experts repudiated their findings upon learning that, at age four, Parkus had been placed in foster care with an uncle who was a sadistic pedophile.¹⁶⁰ In *Stankewitz v. Wong*,¹⁶¹ although the prosecution mustered substantial aggravating evidence showing that Douglas Stankewitz "had a violent, antisocial personality," it was overcome by the story of Stankewitz's tragic childhood.¹⁶² In *Cooper v. Secretary, Department of Corrections*,¹⁶³ Richard Cooper's own defense lawyer presented evidence that he had ASPD, which in the view of the trial court "merely buttressed the state's contention that an aspect of Cooper's character was that he was really

157. Indeed, comorbidity is so common among capital defendants that, in many cases, multiple conditions could be diagnosed. This is particularly true with respect to trauma. Wayland, *supra* note 30, at 941 (explaining that "the vast majority of people who meet diagnostic criteria for PTSD also meet diagnostic criteria for one or more additional psychiatric disorders").

158. 542 F.3d 1326 (11th Cir. 2008).

159. 33 F.2d 933 (8th Cir. 1994).

160. *Id.* at 935-36, 939-40. Parkus was eventually removed from death row pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), the only circumstance in which a diagnostic label matters because it results in a categorical exclusion from capital punishment. See *In re Parkus*, 219 S.W.3d 250, 252-56 (Mo. 2007) (en banc).

161. 698 F.3d 1163 (9th Cir. 2012).

162. *Id.* at 1173. The court was moved by evidence that "Stankewitz was born into a poverty-stricken home described by police and probation reports as dirty, covered in cockroaches and fleas, and without electricity or running water," and that "[t]here was often not enough food for Stankewitz and his nine siblings." *Id.* at 1168. Stankewitz's mother was an alcoholic since childhood, severely intellectually impaired, and "she would regularly drink three to four six packs of beer or two fifths of a gallon of whiskey in a night, including while she was pregnant with Stankewitz." *Id.* Mrs. Stankewitz was beaten severely by Stankewitz's father, Robert, while she was pregnant, and both parents beat Stankewitz and his siblings regularly and severely with electrical cords, and belts, and threatened them with a gun. *Id.* The court easily concluded that Stankewitz's impulsive behavior was attributable to "significant emotional damage [that] followed from his troubled childhood." *Id.* at 1169.

163. 646 F.3d 1328 (11th Cir. 2011).

without remorse.”¹⁶⁴ A thorough life history investigation told a story that was so different that a reasonable jury would not have sentenced him to die.¹⁶⁵ We found many other examples of successful defense cases in which a thorough life history investigation produced a compelling and truthful mitigation counter-narrative against which claims of ASPD faded into insignificance.¹⁶⁶

V. CONCLUSION

Our research led us to conclude in our original article that the “enormous contextual problems that plague mental health evaluations” that inappropriately label defendants as “antisocial” or “psychopathic” contribute to a “misinformed and badly skewed vision” of capital decision-makers.¹⁶⁷ We, again, urged adherence to the standards of performance articulated in the Guidelines and Supplementary Guidelines, “including the admonition that at least one member of the team be qualified, by training or experience, to identify symptoms and characteristics of mental and emotional impairment.”¹⁶⁸ Experienced capital defense attorneys understand that “it is critically important to

164. *Id.* at 1340-41.

165. *See id.* at 1355-56. A thorough life history investigation produced documents, evidence, and testimony establishing that since he was barely out of diapers, Cooper received daily beatings from his father, who beat, punched, and kicked Cooper and his siblings and “pick[ed] [them] up off [their] feet and slam[med] [them] against the wall.” *Id.* at 1342. Cooper’s father used “boards, switches, belts, and horse whips, leaving welts up and down their bodies and bruises from being grabbed and hit so hard.” *Id.* at 1343. In spite of the beatings, Cooper loved his father, and “was always wanting to kill himself because he thought he was the one causing the problems.” *Id.* Cooper’s father also withheld food as punishment, and Cooper and his brother “would go out to the barn and eat dog food and drink horse’s milk from their nursing mare.” *Id.* at 1344. A psychologist testified in Cooper’s postconviction hearing; without harping on a particular diagnosis, he explained to the court the damage that Cooper suffered as a result of “[p]sychological abuse and an extreme deprivation of security and love.” *Id.* at 1345. The court’s extensive discussion of Cooper’s life story, along with its relatively brief description of the expert’s harmonious findings that emphasized impairment and symptoms over testing and diagnosis, demonstrates that Cooper’s tragic life story transcended diagnostics and psychometrics.

166. *See, e.g.,* Blystone v. Horn, 664 F.3d 397, 427 (3rd Cir. 2011) (finding that “the result of his sentencing hearing would have been different, had counsel conducted an adequate investigation of mitigating circumstances”); Goodwin v. Johnson, 632 F.3d 301, 328 (6th Cir. 2011) (holding that there was “little trouble finding a reasonable probability that at least one juror would have voted against death had defense counsel attempted to humanize Goodwin by presenting evidence of the hardships and disadvantages he faced growing up”); Correll v. Ryan, 539 F.3d 938, 954 (9th Cir. 2008) (finding that “the evidence of [Michael] Correll’s ‘excruciating’ history could have provided an alternative—and much more sympathetic—context for the horrific observations and conclusions that were before the judge in the presentence report”).

167. Wayland & O’Brien, *supra* note 1, at 586-88.

168. *Id.* at 588.

construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors.”¹⁶⁹

We also advised, as we do here:

The best antidote to the influence of prejudicial psychiatric labels is a compelling mitigating narrative based on a thorough life history investigation which uncovers humanizing conditions and events in the client's life that demonstrate his human complexity, including the mental, emotional, or developmental impairments which he has struggled to overcome.¹⁷⁰

Psychometric testing and diagnostic labels are incapable of capturing the complexity and uniqueness of our clients; only through a narrative life history presentation can we communicate his or her innate humanity:

Significantly, the defendant's personal history and family life, his obsessions, aspirations, hopes, and flaws, are rarely a matter of physical evidence. Instead they are both discovered and portrayed through narrative, incident, scene, memory, language, style, and even a whole array of intangibles like eye contact, body movement, patterns of speech—things that to a jury convey as much information, if not more, as any set of facts.¹⁷¹

Narrative is critical; “a plea for mercy in conclusory terms such as ‘he is a good person, friendly, nice, polite, hard-working, decent, compassionate,’ et cetera has not proven to be particularly helpful” in persuading a judge or jury to spare a defendant's life.¹⁷² For decades, capital defense attorneys have understood that “[i]t is always best to have the family and friends testify anecdotically about incidents in the defendant's life;”¹⁷³ “[w]e have long known that client stories are crucial in litigation.”¹⁷⁴ The Supreme Court itself has found that defense lawyers performed deficiently for failing to develop a “powerful mitigating narrative.”¹⁷⁵ Nowhere is this more important than in death penalty cases

169. ABA GUIDELINES, *supra* note 3, Guideline 10.11, at 1061.

170. Wayland & O'Brien, *supra* note 1, at 586.

171. Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, in CALIFORNIA DEATH PENALTY MANUAL N-6, N-7 (Supp. 1982). Lacey Fosburgh's article explains the necessity of working with a mitigation specialist, a member of the defense team who “should have nothing else to do but work with the defendant, his family, friends, enemies, business associates and casual acquaintances, perhaps even duplicating some of what the private detective does, but going beyond that and looking for more.” *Id.*

172. Marshall Dayan, *The Penalty Phase of the Capital Case: Good Character Evidence*, CHAMPION, June 1991, at 15, 15.

173. Dennis N. Balske, *The Penalty-Phase Trial: A Practical Guide*, CHAMPION, Mar. 1984, at 40, 44.

174. Edwards, *supra* note 21, at 883-84.

175. *Wiggins v. Smith*, 539 U.S. 510, 537-38 (2003).

in which the prosecution relies on the highly questionable construct of psychopathy and flawed diagnoses of ASPD.¹⁷⁶

We are grateful to have this opportunity to supplement those conclusions with our discussion of what the field of cognitive psychology adds to our understanding of why a narrative account of the client's life story is an essential ingredient to the mitigation case. Each capital case decider comes to the case with preconceived notions of persons who commit violent crimes and what should be done with them, and charts, graphs, scans, or psychiatric jargon are not likely to reach them. Even though cognitive psychology informs us that these "categories are *made in the mind* and not found in the world,"¹⁷⁷ logic and data alone are incapable of modifying the world-view of death-qualified jurors and judges. Only the truthful and detailed narrative of the client's life story can provide the essential context that enables decision-makers to respond empathetically to the client, and extend mercy even for the most terrible crime. As Dr. Haney urges, "the now well-established use of these more valid, nuanced, psychologically-sophisticated mitigating counter-narratives in capital cases must continue."¹⁷⁸

176. See John F. Edens, *Unresolved Controversies Concerning Psychopathy: Implications for Clinical and Forensic Decision Making*, 37 PROF. PSYCHOL. RES. & PRAC. 59, 59 (2006); see also Wayland & O'Brien, *supra* note 1, at 531-66.

177. AMSTERDAM & BRUNER, *supra* note 12, at 9.

178. Haney, *Prison Violence*, *supra* note 12, at 945.