

**CONFRONTING THE INVISIBLE WITNESS: THE USE OF NARRATIVE TO NEUTRALIZE CAPITAL JURORS’ IMPLICIT RACIAL BIASES**

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ABSTRACT

How can capital defense lawyers craft narratives that neutralize jurors’ unconscious racial and ethnic biases? A well-developed body of research in cognitive psychology indicates that despite even the best of intentions and the absence of conscious prejudice, most Americans harbor unconscious biases against African Americans. These biases influence what we actually perceive, how we interpret what we perceive, and how we act. For reasons related to the content and structure of capital sentencing trials, these unconscious biases are particularly likely to influence capital jurors. In effect, unconscious racial bias acts as an invisible witness against the African American defendant, buttressing the prosecution’s claims concerning his incorrigibility and undermining his case in mitigation. Moreover, implicit bias operates even when—perhaps *especially* when—race is not explicitly at issue. Yet most capital defense lawyers do little to confront this invisible witness.

This Article places the capital defendant at the intersection of cognitive psychology and narrative theory. Specifically, it addresses the following questions: When constructing mitigation narratives, how should capital defense lawyers take into account the research of cognitive scientists on implicit racial biases? What narrative strategies effectively neutralize the testimony of the invisible witness? In attempting to answer these questions, this Article analyzes the opening and closing statements from two capital sentencing trials.

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## I. INTRODUCTION

The past ten to fifteen years have seen an explosion in legal scholarship concerning potential applications of cognitive science<sup>1</sup>—particularly of psychological research concerning stereotyping and implicit biases—to legal

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<sup>1</sup> The term *cognitive science* defies simple definition, but a basic definition should suffice for the purposes of this Article: “Cognitive science is the interdisciplinary scientific study of the mind and its processes. It examines what cognition is, what it does and how it works.” *Cognitive Science*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Cognitive\\_science](http://en.wikipedia.org/wiki/Cognitive_science) (last visited Sept. 16, 2012).

doctrines, structures, and theories.<sup>2</sup> The questions raised by the scholarship are fascinating: Should the legal system reconceive its employment discrimination doctrines?<sup>3</sup> Should jury selection be rethought?<sup>4</sup> Is national school reform legislation doomed to fail due to its failure to account for parents' implicit biases?<sup>5</sup> Underlying all of these questions is a sometimes tacit and sometimes open challenge to the primacy of rational choice theory,<sup>6</sup> which has long driven much judicial decision-making.<sup>7</sup>

Recent years have also seen renewed scholarly interest in the use of both narrative and metaphor in law.<sup>8</sup> All lawyers—litigators most obviously—

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<sup>2</sup> See generally Francis X. Shen, *The Law and Neuroscience Bibliography: Navigating the Emerging Field of Neurolaw*, 38 INT'L J. LEGAL INFO. 352 (2010) (providing extensive bibliography of scholarship about the intersection of law and neuroscience).

<sup>3</sup> See, e.g., Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1004 (2006) (noting scholarly arguments that "established civil rights jurisprudence is premised on models of social perception and judgment that have been significantly discredited by empirical work in social and cognitive psychology"); see also *id.* at 1003–04 nn.21–23 (pointing to articles advocating changes in employment discrimination doctrine).

<sup>4</sup> See, e.g., Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010) (arguing, *inter alia*, for the elimination of peremptory challenges during jury selection); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139 (2010) (arguing voir dire should include administration of the implicit association test to potential jurors).

<sup>5</sup> See Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL'Y 1 (2008).

<sup>6</sup> There are many definitions of rational choice theory, but I will provide one of the simplest. Rational choice theory is a "theory that behavioral choices . . . are based on purposeful decisions that the potential benefits [of a choice] outweigh the risks." BLACK'S LAW DICTIONARY 1376 (9th ed. 2009). This definition is, of course, incomplete. See David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 BYU L. REV. 1275, 1278 n.3 (2008) ("Despite its multi-decade prominence, 'rational choice theory' lacks a settled definition.").

<sup>7</sup> See, e.g., Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naïve Legal Realism*, 83 ST. JOHN'S L. REV. 231, 232–34 (2009) ("A large and growing body of law and psychology scholarship has posed new challenges to traditional assumptions about the behavior of legal actors. While mainstream legal thought has often treated individuals as more or less rational, autonomous actors, scholars in a variety of fields are presenting a new, empirically based, and more formal challenge to law's traditional conceptions of human behavior. . . . [B]ehavioral realists have called for legal analysis grounded in the findings of social science and have given special attention to the ways in which implicit bias might affect how we approach antidiscrimination policy.").

<sup>8</sup> The academic legal writing community, of which I am a part, recently devoted an entire volume to metaphor and narrative (storytelling). See Bruce Ching, *Argument, Analogy, and Audience: Using Persuasive Comparisons While Avoiding Unintended Affects*, 7 J. ASS'N LEGAL WRITING DIRECTORS 311 (2010). Of course, there is a neuroscience of narrative as well; that is,

are storytellers, but the legal academy all too often has treated narrative and metaphor as the “darker brother[s] . . . [sent] to eat in the kitchen/When company comes.”<sup>9</sup> The light-skinned brother, considered smarter, more effective, more respectable, is, of course, logical, syllogistic reasoning.<sup>10</sup> Recently, however, legal scholarship has invited narrative and metaphor to the table, and this invitation has yielded stimulating discourse on a variety of topics, such as the role of narrative in legal education,<sup>11</sup> the implications of using certain metaphors in custody disputes,<sup>12</sup> and the use of myth in constitutional litigation.<sup>13</sup>

The recent focus on both cognitive science and narrative has been most apparent in scholarship and commentary concerning criminal law and the death penalty. Articles about the application of cognitive science to criminal and death penalty law have focused principally on legal actors’ implicit racial biases<sup>14</sup> and have yielded a variety of recommendations. For example, some have advocated reforming the *Batson* framework for use of preemptory

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cognitive scientists and others have studied humans’ need for narrative and metaphor. *See infra* Part III.

<sup>9</sup> LANGSTON HUGHES, *I, Too*, in *THE COLLECTED POEMS OF LANGSTON HUGHES* 46, 46 (Arnold Rampersad & David Roessel eds., 1995).

<sup>10</sup> *See, e.g.*, Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS’N LEGAL WRITING DIRECTORS 1, 4 (2010) (“Some appellate judges claim that they are persuaded only by the legal argument, not by any emotional appeal. Some reject the notion that emotional appeal has any place in appellate advocacy. The rule of law, they claim, requires logical arguments, clearly and neutrally applied. For example, Justice Antonin Scalia and author Bryan Garner argue that ‘[a]ppealing to judges’ emotions is misguided . . . Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.’ Instead of emotional appeals, they write, ‘persuasion is possible only because all human beings are born with a capacity for logical thought . . . The most rigorous form of logic, and hence the most persuasive, is the syllogism.’ Senior Judge Ruggero J. Aldisert writes that a brief is ‘nothing more or less than an expanded categorical syllogism.’”) (internal citations omitted).

<sup>11</sup> *See, e.g.*, Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ASS’N LEGAL WRITING DIRECTORS 37 (2010) (describing the uses of narrative theory and storytelling in the law school curriculum).

<sup>12</sup> *See* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 260 (2009) (arguing that “the cognitive setting for custody disputes—cluttered with outmoded metaphors, simplistic images, and unexamined narratives—interferes with the ability of judges to attend to complex and radical transformations of parent-child relationships”).

<sup>13</sup> *See* Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883 (2010) (analyzing the creation and birth myths used in the Supreme Court briefs in *Miranda v. Arizona*, 384 U.S. 436 (1966)).

<sup>14</sup> Articles touching on these issues are almost too numerous to mention. For one of the most comprehensive, see Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009).

challenges;<sup>15</sup> others, educating jurors during capital sentencing about racism as “structural mitigation”;<sup>16</sup> others, removing the Confederate flag from courthouse grounds;<sup>17</sup> still others, abolishing the death penalty outright.<sup>18</sup> Many articles have simply defined the nature and scope of the problem.<sup>19</sup> The research on implicit racial biases certainly is consistent with and may explain, to a degree, the studies suggesting race (that of the victim as well as that of the defendant himself) acts as a thumb on the “death” scale for African-American defendants during capital sentencing.<sup>20</sup>

Unlike that on law and neuroscience, the literature concerning narrative technique and death penalty litigation enjoys a long history.<sup>21</sup> Still, such articles

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<sup>15</sup> See Antony Page, *Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005) (using research concerning implicit biases to criticize current framework for peremptory challenges and proposing reforms that take implicit bias into account).

<sup>16</sup> See Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557 (2004) (arguing for educating capital sentencing juries about biographical racism as a form of structural mitigation). Haney defines the term *structural mitigation* as “mitigation that is structured into the lives of African-American defendants by the various forms of life-altering racism that remain in American society.” *Id.* at 1577. For further discussion of this issue, see *infra* Part III.C.

<sup>17</sup> See Cecilia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 125 (2011) (arguing that the Confederate flag activates jurors’ implicit racial biases and thus disadvantages black capital defendants).

<sup>18</sup> Cf. Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083 (2004) (although not focusing specifically on implicit biases and cognitive science, arguing that the prevalence of unconscious racial discrimination by judges, prosecutors, and jurors require a conclusion that the death penalty violates the Eighth Amendment’s desert-limitation principle); Alycee Lane, *“Hang Them if They Have to Be Hung”: Mitigation Discourse, Black Families, and Racial Stereotypes*, 12 NEW. CRIM. L. REV. 171, 204 (2009) (discussing “how impossible it is to . . . ensure that a black defendant is fairly tried” and concluding “[i]t is simply time to abolish the death penalty”).

<sup>19</sup> See, e.g., Levinson, *supra* note 14; see also Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004) (recounting an experiment suggesting capital defense lawyers possess implicit racial bias).

<sup>20</sup> See *infra* Part II.

<sup>21</sup> See, e.g., Christopher J. Meade, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732 (1996) (arguing, *inter alia*, that death penalty defense lawyers should use narrative as an anti-death penalty strategy); see also Jeffrey J. Pokorak, *Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases*, 30 ST. MARY’S L.J. 421 (1999) (describing importance of competing narratives offered by the prosecution and defense in capital cases); Austin Sarat, *Narrative Strategy & Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353, 357 (1996) (describing the “work of death penalty lawyers as the work of constructing narratives”).

have proliferated in the past decade,<sup>22</sup> and contemporary scholarship even features a symposium on storytelling and the death penalty.<sup>23</sup> Perhaps most of this literature focuses on storytelling during appellate and post-conviction proceedings,<sup>24</sup> although some looks to capital trials and even earlier stages of capital litigation (such as when prosecutors are considering whether to seek the death penalty).<sup>25</sup> The articles generally agree that effective capital defense storytelling is “meticulously built upon a record”<sup>26</sup> supported by a “truly comprehensive investigation”;<sup>27</sup> “unsettle[s] things”<sup>28</sup> by creating “persuasive and credible counter-narrative[s] that . . . better account for the facts at hand [and that] may be used to debunk, neutralize, or even supplant the [prosecution’s] master narrative with which it is competing”;<sup>29</sup> and—pardon the cliché—“humanizes” the defendant.<sup>30</sup>

This Article places the capital defendant at the intersection of cognitive science and narrative theory. Despite great interest in and a plethora of scholarship on race and capital punishment,<sup>31</sup> most how-to guides on narrative construction in capital cases have treated narrative as race-neutral; that is, such guides typically do not address the possibility that lawyers’ narrative strategies should vary based on the race or ethnicity of the defendant (and possibly of the

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<sup>22</sup> See, e.g., Philip N. Meyer, *Are the Characters in a Death Penalty Brief Like the Characters in a Movie?*, 32 VT. L. REV. 877, 878 (2008) (noting that “narrative persuasion is at the core of [capital] post-conviction relief practice” and providing advocates with basic principles of effective characterization); cf. Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689 (2009) (discussing how flawed media narratives about crime influence administration of the death penalty in the United States).

<sup>23</sup> See Sean D. O’Brien, *Death Penalty Stories: Lessons in Life-Saving Narratives*, 77 UMKC L. REV. 831 (2009) (introducing articles in University of Missouri - Kansas City’s 2009 Law Review Symposium on Death Penalty Stories).

<sup>24</sup> See, e.g., Meyer, *supra* note 22 (focusing on appellate and post-conviction litigation).

<sup>25</sup> See, e.g., Michael N. Burt, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. REV. 877, 879 (2009) (exploring how “‘mitigation counter-narrative[s]’ [are] actually developed and presented by skilled capital defense teams”).

<sup>26</sup> Meyer, *supra* note 22, at 878.

<sup>27</sup> John H. Blume & Sheri Lynn Johnson, *Back to a Future: Reversing Keith Simpson’s Death Sentence and Making Peace with the Victim’s Family Through Post-Conviction Investigation*, 77 UMKC L. REV. 963, 963 (2009).

<sup>28</sup> Mark E. Olive, *Narrative Works*, 77 UMKC L. REV. 989, 989 (2009).

<sup>29</sup> Craig Haney, *On Mitigation as Counter-Narrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911, 913 (2009).

<sup>30</sup> E.g. Sarat, *supra* note 21, at 370 (“Thus, whether narratives emphasize ‘discrete’ stories or universal experiences, the overriding strategic goal in the narratives constructed by all death penalty lawyers is to humanize the client.”).

<sup>31</sup> A February 21, 2012 search of the “JLR” database on WESTLAW containing search terms *race* & (“*death penalty*” “*capital punishment*”) yielded 10,000 documents. Even assuming many—say, half or even three-quarters—of those articles were not on point, the sheer number of documents responsive to my search makes the point far better than a string citation could.

victim).<sup>32</sup> This Article considers that very possibility, specifically examining the following question: If, as suggested above, race acts as a kind of thumb on the “death” scale for African-American and other minority defendants, what kinds of narratives, metaphors, and images help to remove that thumb? (This is a separate, albeit related question from what kinds of narratives place weight on the “life” scale for defendants.) How should capital defense lawyers take into account the research of cognitive scientists on implicit racial biases when constructing mitigation narratives? My basic thesis is that capital jurors’ implicit racial biases can be minimized (at least to a degree) through the use of proper narrative strategies during trial, and this Article attempts to show how lawyers can use narrative to neutralize (at least during trial) such biases.

This topic is limited, focusing solely on the construction of narratives during the sentencing phase of capital trials.

Capital *sentencing* is my locus of concern for two reasons. First, although jurors’ implicit racial biases probably affect their determinations during the guilt-or-innocence phase of capital trials,<sup>33</sup> I am principally concerned with ensuring greater racial justice for guilty defendants (or those who have been adjudicated guilty).<sup>34</sup> Those guilty of capital murder may have forfeited many rights, but surely the right to equal treatment without regard to race or ethnicity is not one of them. Moreover, many good minds are already focused on issues concerning innocence and the many causes of wrongful convictions.<sup>35</sup> Second, implicit racial biases may affect capital appellate and post-conviction proceedings, but, in my view, they likely have less of an effect during such proceedings than during capital sentencing. Race is a more salient

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<sup>32</sup> *But see* Lane, *supra* note 18, at 188 (“Because it does not even begin to address the intersection of race and family, mitigation discourse presents to jurors the defendant’s ‘dysfunctional family’ as if it will do the same kind of work for all defendants, regardless of race.”).

<sup>33</sup> *Cf.* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007) [hereinafter Levinson, *Forgotten Racial Equality*] (arguing that “implicit racial biases affect the way judges and jurors encode, store, and recall relevant case facts” and that this “perpetuates racial bias in case outcomes”); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. ON CRIM. L. 187 (2010) (discussing a psychological experiment that showed mock jurors implicitly associated blackness with criminal guilt and found that implicit biases predicted mock jurors’ evaluation of ambiguous evidence).

<sup>34</sup> *Cf.* Hugo Adam Bedau, *Racism, Wrongful Convictions, and the Death Penalty*, 76 TENN. L. REV. 615, 623 (2009) (comparing and contrasting anti-death penalty arguments concerning wrongful convictions and those concerning racial bias, and concluding the two issues are “twin evils paramount in our current death penalty system”).

<sup>35</sup> Again, the literature is too voluminous to include in one footnote. For a recent discussion of issues concerning wrongful convictions, see BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL CONVICTIONS GO WRONG* (2011).

feature when viewed in the flesh than when mentioned on paper;<sup>36</sup> furthermore, unlike capital sentencing proceedings, capital appellate and post-conviction proceedings typically do not focus directly on the defendant's moral desert but on narrower legal issues (although ineffective assistance claims often do shed new light on a defendant's actual character).

My limiting the question to narrative strategy—what kinds of narratives, metaphors, and images might reduce or neutralize jurors' implicit biases—is pragmatic. Of course, narrative alone cannot lift the thumb. After all, it's a pretty big thumb. Different jury instructions may have a role to play.<sup>37</sup> More diverse juries have a major role to play.<sup>38</sup> And so forth. However, major structural reforms such as constitutionally mandated changes to jury selection procedures have not and may never arrive. In the meantime, capital defense lawyers must craft mitigation narratives anyway and, in fact, have great liberty in doing so.<sup>39</sup> It simply makes sense to focus on an area that might yield immediate returns.

Finally, although this Article examines the construction of *defense* narratives, prosecutors certainly should seek to reduce jurors' racial bias as well. If, as most prosecutors would contend, a jury's death sentence should reflect a defendant's actual moral desert, then prosecutors should welcome measures that reduce the influence of race.<sup>40</sup>

This Article proceeds in four parts. Following this Introduction, Part II summarizes the research of cognitive scientists on implicit racial biases and suggests how such biases infect the capital sentencing process. As Part II makes clear, implicit racial biases are prevalent in American society and almost certainly affect the capital sentencing process.<sup>41</sup> Part III shifts direction, introducing the reader to theories concerning narrative and metaphor,

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<sup>36</sup> Cf. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1503 (2005) (noting that "racial schemas are 'chronically accessible' and can be triggered by the target's mere appearance, since we as observers are especially sensitive to visual and physical cues").

<sup>37</sup> See Bennett, *supra* note 4, at 169 (suggesting instructing jurors on implicit biases); see also Levinson, *Forgotten Racial Equality*, *supra* note 33 (regarding jury instructions to function as debiasing measures).

<sup>38</sup> See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 981 (2006) ("A significant body of social science evidence supports the conclusion that the presence of population diversity in an environment tends to reduce the level of implicit bias.").

<sup>39</sup> See *Williams v. Taylor*, 529 U.S. 362 (2000) (discussing constitutional duty of defense counsel to investigate and, where appropriate, present mitigating evidence that might include evidence concerning child abuse, psychiatric diagnoses, and other impairments); see also *Lockett v. Ohio*, 438 U.S. 586 (1978) (noting capital defendant's right to offer wide variety of mitigating evidence).

<sup>40</sup> Cf. Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1331 (2006) (noting the risk that notions of moral desert "may serve as a 'placeholder' for [racial] prejudice and bias").

<sup>41</sup> See *infra* Part II.

discussing the typical use of narrative during capital sentencing, and critiquing that use of narrative as applied to capital defendants. Part IV turns to solutions and brings together the material in Parts II and III by advancing a few tentative ideas about how lawyers can craft narratives and employ metaphors to reduce jurors' racial biases. In advancing these ideas, I analyze the opening and closing arguments from two capital sentencing trials.

## II. THE UNCONSCIOUS NEVER SLEEPS: THE ROLE OF IMPLICIT BIAS, STEREOTYPING, AND STEREOTYPE PRIMING IN THE TRIALS OF BLACK CAPITAL DEFENDANTS

I am the American heartbreak-  
 Rock on which Freedom  
 Stumps its toe-  
 The great mistake  
 That Jamestown  
 Made long ago.<sup>42</sup>

One needn't be a scholar of the death penalty—in fact, one needn't be much more than a casual observer—to know that the history of the death penalty in America is inseparable from America's strange and tragic racial history.<sup>43</sup> In the nineteenth century, for example, Black Codes authorized capital punishment for crimes that were noncapital—at times, non-criminal—if committed by whites.<sup>44</sup> In fact, “[s]ince the Civil War, blacks have been executed for lesser crimes, at younger ages, and more often without appeals than whites; and over this period they have been disproportionately executed for crimes against whites.”<sup>45</sup> To this day, the death penalty is (with minor exceptions) most robust in the former slave states and in those states that once had the highest lynching rates.<sup>46</sup>

<sup>42</sup> LANGSTON HUGHES, *American Heartbreak*, in THE COLLECTED POEMS OF LANGSTON HUGHES, *supra* note 9, at 385. This short poem by Langston Hughes captures the central, tragic, and starring role racism has played in American history. *See id.*

<sup>43</sup> For a variety of interesting and comprehensive discussions concerning race and capital punishment, see generally FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

<sup>44</sup> STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 112–43 (2003) (discussing differences in the death penalty in the North and South during the Eighteenth and Nineteenth centuries).

<sup>45</sup> William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 175 (2001).

<sup>46</sup> *See, e.g.*, Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 18 (2002). Ogletree asserts that “the racially disproportionate application of the death penalty can be seen as being in historical continuity with the long and sordid history of lynching in this country. . . . [T]he states of what is often called the ‘Death Belt’—the southern states that together account for . . . [over ninety percent of] all executions

This racial history has functioned at times implicitly (as “sub-text”) and at times explicitly (as “text”) in the Supreme Court’s post-*Furman v. Georgia*<sup>47</sup> death penalty jurisprudence. The modern anti-death penalty movement began primarily as an arm of the civil rights movement, with the National Association for the Advancement of Colored People (“NAACP”) Legal Defense Fund taking the lead role in such seminal cases as *Furman v. Georgia* and *Coker v. Georgia*.<sup>48</sup> Race served as sub-text in both of these cases, but particularly in *Coker*. The Supreme Court’s ruling in *Coker* was facially race-neutral: the Eighth Amendment bars imposition of the death penalty for rape.<sup>49</sup> However, as many have pointed out,<sup>50</sup> the Court was well aware that, as a practical matter, the only defendants sentenced to death for rape were black men convicted of raping white women. Although the opinion itself made no mention of this fact, the practical effect of the opinion was to ameliorate the disproportionate burden Georgia’s law placed on African American defendants.

If race functioned as sub-text in *Furman*, *Coker*, and other early cases, it functioned directly as text—that is, it played an open and starring role—in *McCleskey v. Kemp*.<sup>51</sup> In *McCleskey*, the petitioner introduced a sophisticated study showing that even controlling for a plethora of other factors, race played a significant role in determining who was sentenced to death under Georgia’s capital sentencing scheme.<sup>52</sup> Relying on this study, the petitioner asserted that Georgia’s capital punishment statute violated both the Eighth Amendment’s Cruel and Unusual Punishments Clause<sup>53</sup> and the Fourteenth Amendment’s

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carried out since 1976—overlap considerably with the southern states that had the highest incidence of extra-legal violence and killings during the Jim Crow era.”

*Id.* at 18.

<sup>47</sup> 408 U.S. 238 (1972). In *Furman*, the Supreme Court struck down Georgia’s death penalty statute (and, by extension, that of all other states at the time) on Eighth Amendment grounds. *Id.* 239–40.

<sup>48</sup> 433 U.S. 584 (1977).

<sup>49</sup> *Id.* at 597 (finding death penalty is a disproportionate punishment for the crime of rape).

<sup>50</sup> See, e.g., Ogletree, *supra* note 46, at 27 (noting that despite *Coker*’s explicit argument concerning racial discrimination in imposition of the death penalty for rape, the Supreme Court “completely sidestepped the racial issue” in its opinion striking down Georgia’s statute); cf. Carol S. Steiker, *Things Fall Apart, but the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1487 (2002) (“Because black men who raped white women were extraordinarily more likely to receive the death penalty than any other racial combination, *Coker*’s elimination of the death penalty for rape, although formally premised entirely on grounds of proportionality, managed to eliminate the most racially disproportionate use of capital punishment at the same time.”) (emphasis added).

<sup>51</sup> 481 U.S. 279 (1987).

<sup>52</sup> *Id.* at 286–87 (describing a study “show[ing] a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant.”).

<sup>53</sup> *Id.* at 299.

Equal Protection Clause.<sup>54</sup> Faced with this direct challenge, the Court simply pointed out its many attempts to reduce the influence of race in the capital sentencing process and noted other features of Georgia's statute that reduced the risk that arbitrary factors such as race would influence sentencing outcomes.<sup>55</sup> Essentially, the Court threw up its hands and declined to issue a sweeping ruling.

Race has also functioned as text in the Court's death penalty jurisprudence concerning *discrete* legal issues (*i.e.*, those in which sweeping rulings are not necessary). For example, *Batson v. Kentucky* bars the use of peremptory challenges based on race.<sup>56</sup> Under *Batson*, prosecutors must offer race-neutral explanations for their peremptory challenges, after which the court must determine whether the defendant has established purposeful discrimination.<sup>57</sup> *Turner v. Murray*, a capital case, held that in cases involving interracial crimes, the defendant has a right to voir dire on the issue of potential jurors' racial bias.<sup>58</sup> In justifying this holding, the Court specifically noted that "the risk that racial prejudice may have infected petitioner's capital sentencing [was] unacceptable in light of the ease with which that risk, being especially serious in view of the finality of the death sentence, could have been minimized."<sup>59</sup>

At their best, *Batson*, *Turner*, and their progeny should prevent conscious and deliberate racial bias by prosecutors, defense lawyers, and potential jurors.<sup>60</sup>

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<sup>54</sup> *Id.* at 291.

<sup>55</sup> *See id.* at 309–10 ("Because of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system."); *see also id.* at 309–11 (describing various safeguards against the influence of arbitrary factors in capital sentencing).

<sup>56</sup> *See Batson v. Kentucky*, 476 U.S. 79 (1986). *See also Miller-El v. Dretke*, 545 U.S. 231 (2005) (explaining application of *Batson* standard).

<sup>57</sup> *Batson*, 476 U.S. at 98.

<sup>58</sup> *Turner v. Murray*, 476 U.S. 28 (1986).

<sup>59</sup> *Id.* at 36.

<sup>60</sup> There is, of course, considerable anecdotal evidence that *Batson* has not succeeded in preventing consciously race-based peremptory challenges by prosecutors. Perhaps one of the most infamous examples of this concerns the training session held for prosecutors in the Philadelphia District Attorney's Office approximately a year after *Batson*. One of the major subjects of the video was how to strike as many black jurors as possible while offering race-neutral explanations that would survive scrutiny. *See McMahon DA Training Video*, GOOGLE.COM, <http://video.google.com/videoplay?docid=-5102834972975877286> (last visited Sept. 17, 2012). Professor Michelle Alexander describes the ease with which prosecutors craft race-neutral explanations:

[O]ne comprehensive study reviewed all published decisions involving *Batson* challenges from 1986 to 1992 and concluded that prosecutors almost never fail to successfully craft acceptable race-neutral explanations to justify striking black jurors. Courts accept explanations that jurors are too young,

Even assuming—and this is a large and unwarranted assumption—that *Batson*, *Turner*, and similar cases work effectively and optimally to prevent conscious racial discrimination in jury selection and allow for dismissal for cause of potential jurors with conscious racial biases, a wealth of empirical evidence strongly suggests that *race still matters*. Research suggests that blacks—particularly blacks accused of killing whites—are judged more harshly and are more likely to be sentenced to death than are similarly situated whites.<sup>61</sup> But why?

I assert (but am not unique in doing so) that the interplay of two factors accounts for the disparate sentencing treatment of blacks who kill whites. First, the implicit, unconscious biases of the trial’s actors—judge, attorneys, witnesses, and jurors—color how jurors hear and interpret evidence and how jurors see the defendant, and these unconscious biases disadvantage black defendants. Second, the narratives presented during capital trials and American cultural narratives concerning crime generally “confirm” (or prime)<sup>62</sup> jurors’ unconscious biases.

In short, if the current rules of criminal procedure (including constitutionally required rules, such as that of *Turner v. Murray*)<sup>63</sup> successfully prevent consciously racist peremptory challenges by prosecutors as well as the placement of consciously racist jurors on a capital jury, then one might suppose—as apparently the law does—that a black or other minority capital defendant generally would receive the same sentence as a similarly situated white defendant. But we know that isn’t the case, at least in cases involving black defendants and white victims: All else being equal, the black defendant

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too old, too conservative, too liberal, too comfortable, or too uncomfortable. . . . Even explanations that might correlate with race, such as lack of education, unemployment, poverty, being single, living in the same neighborhood as the defendant, or prior involvement with the criminal justice system—have all been accepted as perfectly good, non-pretextual excuses for striking African Americans from juries.

MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 119 (2010).

<sup>61</sup> There is a voluminous body of literature on this question. Although the race of the defendant standing alone is not necessarily significant, the post-1990 studies generally “document race-of-victim disparities reflecting more punitive treatment of white-victim cases among similarly aggravated cases” and also suggest that “cases involving black defendants and white victims are treated more punitively than cases of all other defendant/victim racial combinations.” See David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003).

<sup>62</sup> See Levinson, *supra* note 14, at 608 (discussing stereotype priming).

<sup>63</sup> *Turner*, 476 U.S. 28 (finding capital defendants have a right to voir dire questions concerning potential jurors’ racial prejudices).

typically fares worse.<sup>64</sup> Dismissing overt racism as a cause, what accounts for the difference?

Modern cognitive psychologists would say, quite simply, that the legal system's exclusive focus on *conscious* bias is naïve and incomplete because it ignores both (a) the unconscious, or implicit, nature of most bias, including racial bias, and (b) the primacy of unconscious biases in decision-making and in judgments about persons and behavior.<sup>65</sup> What follows is a brief summary of some of the research of cognitive scientists on racial schemas, implicit biases, and the effect of such schemas and biases on behavior.<sup>66</sup> Following the general description of these concepts is some discussion of how these concepts may operate in a capital trial.

#### A. *Introduction to Schemas*

We humans simplify our world through the use of schemas. Humans are presented with an overwhelming amount of information and sensory data, and schemas allow us to organize this information into discrete and recognizable categories and to determine quickly what to think and feel about those categories. The technical definition is as follows: “A schema is a ‘cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes, and the relations among those attributes.’”<sup>67</sup> Many cognitive psychologists would say we have particular exemplars in mind for certain things and that we fit items into a schema based on how closely the items resemble the exemplar.<sup>68</sup> For example, a lion might more readily fit our schema for *mammal* than does the dolphin, although both are mammals. At times, we use mapping rules to determine the category (or schema) into which to place an object or person, and we then ascribe certain meanings (both cognitive and affective) based on the category into which we have placed the item.<sup>69</sup>

Take pie, for instance. It's possible that some groups might not have a schema (or mental category) for pie; that is, the group might have a larger schema for *dessert*, but not for the sub-category *pie*. When confronted with an

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<sup>64</sup> See Baldus & Woodworth, *supra* note 61, at 194.

<sup>65</sup> See *infra* Part II.

<sup>66</sup> As the footnotes in this section will indicate, here I rely heavily on two excellent articles that provide a far more comprehensive discussion of these issues. See Kang, *supra* note 36; Levinson, *supra* note 14.

<sup>67</sup> Kang, *supra* note 36, at 1498 (quoting SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 98 (2d ed. 1991)).

<sup>68</sup> See *id.* at 1498 n.40 (describing prototype model for understanding schemas, which “emphasizes a core conception of the category that is created by some summary or average representation of every element in that category”).

<sup>69</sup> See *id.* at 1499–1500 (discussing mapping rules and meanings in context of race).

object that might be pie or might be something else, we use mapping rules to decide whether the object is pie: Is the object round? Does it appear to have a flaky crust with some kind of filling? Is the object edible? Is it sweet? Note that mapping rules can quickly differentiate seemingly similar items: if, for example, the round, edible object with a flaky crust is filled with eggs, cheese, and vegetables, we might place it into our schema for *quiche* rather than for *pie*. Once we have mapped the item into a category, we assign cognitive and affective meanings to the item based on our schema for that item. A cognitive meaning we might assign to *pie* could be *high in calories*; an affective meaning might be *pleasure! happy!*

Cognitive scientists have found that “schematic thinking operates automatically, nearly instantaneously.”<sup>70</sup> When we encounter a pie, we generally don’t have to think about our mapping rules, nor do we have to remember to be happy to encounter the pie. Moreover, it should be obvious that the meanings we assign can be incorrect either in discrete cases or even across an entire class: there are a few low calorie and bad-tasting pies out there. Still, the schema and the meanings we assign determine our default settings as to any item within that class.

Importantly, we use schemas not only for objects and items, but for human beings.<sup>71</sup> For example, we have schemas for men and women, with automatic mapping rules.<sup>72</sup> We have schemas for jocks, nerds, cheerleaders, bankers, etc.

And at least in this culture, we have schemas for race.

#### B. *The Prevalence and Influence of Racial Schemas*

Research indicates that racial schemas exist and that they matter. As Professor Justin Levinson asserts, “the human mind makes unintentional, but powerful and biased, associations based on gender, race, and ethnicity . . . .”<sup>73</sup> Moreover, “these automatic associations are meaningful, and influence decision making and behavior.”<sup>74</sup>

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<sup>70</sup> *Id.* at 1499.

<sup>71</sup> *Id.* (“When we encounter a person, we classify that person into numerous social categories, such as gender, (dis)ability, age, race, and role.”).

<sup>72</sup> Part of the fun (and frustration) of the old Saturday Night Live skit about Pat (remember Pat?) was that Pat didn’t fit our exemplar for *man* or for *woman*, and the traditional mapping rules for gender simply didn’t work: The name, voice, height, clothing, and physical features simply didn’t make it clear whether Pat was a man or a woman. Given that, viewers didn’t know what meanings to assign to Pat. See *Pat (Saturday Night Live)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Pat\\_\(Saturday\\_Night\\_Live\)](http://en.wikipedia.org/wiki/Pat_(Saturday_Night_Live)) (last visited Oct. 7, 2012).

<sup>73</sup> Levinson, *supra* note 14, at 605.

<sup>74</sup> *Id.*

A number of experiments by social and cognitive psychologists have demonstrated the pervasive implicit racial biases held by many, if not most, Americans. One well known such experiment is Project Implicit, site of the Implicit Association Test (IAT).<sup>75</sup> The Implicit Association Test “pairs an attitude object (such as a racial group) with an evaluative dimension (good or bad) and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes.”<sup>76</sup> The idea is that “tasks are performed well when they rely on well-practiced associations between objects and attributes,”<sup>77</sup> but are performed poorly when “weakly associated [objects] and attributes share the same response key.”<sup>78</sup>

Based on their analysis of hundreds of thousands of Implicit Association Tests, researchers have concluded that almost seventy percent of participants “demonstrated an implicit preference for ‘White People’ versus ‘Black People.’”<sup>79</sup> As a practical matter, this means that a substantial majority (approximately 70%) of people who took the test had more positive schemas for whites than for blacks and, conversely, more negative schemas for blacks than for whites. Generally, the data from the Implicit Association Test are consistent with three broad principles of social psychology:

- 1) “[S]ocially dominant groups have implicit bias against subordinate groups.”<sup>80</sup>
- 2) Ingroup Favoritism: Persons have a more automatic association of positive traits with one’s own group.<sup>81</sup>
- 3) Outgroup Derogation: Persons have a tendency to associate negative characteristics with outgroups more easily than with ingroups.<sup>82</sup>

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<sup>75</sup> Links to the Implicit Association Tests and research associated with those tests may be found online at IAT Corp., PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit> (last visited Sept. 17, 2012).

<sup>76</sup> Levinson, *supra* note 14, at 610–11.

<sup>77</sup> *Id.* (quoting Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GRP. PROCESSES & INTERGROUP REL. 359, 359 (2007)).

<sup>78</sup> *Id.* at 611 (quoting Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals* 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001)).

<sup>79</sup> *Id.* at 612 (citing Brian Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2008)).

<sup>80</sup> Kang, *supra* note 36, at 1512.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

Given these general principles, and given the minority status and history of African Americans, one hardly should be surprised that most test-takers exhibited automatic implicit preferences for whites.

Importantly, the evidence is overwhelming that “implicit bias measures are dissociated from explicit bias measures.”<sup>83</sup> In other words, a person may sincerely deny having any conscious racial biases—may, in fact, be deeply committed to principles of equality and racial justice—but nonetheless harbor implicit, automatic biases against African Americans.

Perhaps even more importantly, implicit racial biases (our automatic schemas regarding race) influence what we perceive (perception), how we interpret what we perceive (interpretation), and how we act (behavior). First, several experiments have found a relationship between implicit biases and what we actually perceive. For example, in one experiment testing implicit biases not concerning race, students were introduced to a person, described as a “student, demonstrator, lecturer, senior lecturer, or professor.”<sup>84</sup> Students later were asked to guess the person’s height, and “the higher the social status, the taller the guessed height.”<sup>85</sup>

Second, experiments dating back to the 1970’s also have demonstrated a link between our implicit biases and how we interpret information.<sup>86</sup> For example, Professor Jerry Kang describes an experiment in which high quality resumes were assigned either “white” names or stereotypically “black” names.<sup>87</sup> The high quality resumes with stereotypically “white” names received 50% more callbacks than those with “black” names,<sup>88</sup> leading one to conclude our implicit racial schemas affect our interpretations of quality of credentials.<sup>89</sup> Other experiments have shown that subjects are more likely to interpret ambiguous expressions and gestures as aggressive and hostile when the expressions and gestures are performed by black (as opposed to white) characters.<sup>90</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1504 n.68.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1515–16 nn.117–27.

<sup>87</sup> *Id.* at 1515–16.

<sup>88</sup> *Id.*

<sup>89</sup> This is only one of a wealth of such experiments. Similar experiments have demonstrated effects for gender biases, etc. *See, e.g.*, Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 16–17 (2010) (describing experiment concerning evaluation of Curriculum Vitae (CVs) for male and female job candidates).

<sup>90</sup> *See* Kang, *supra* note 36, at 1515 n.117 (citing H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 593–95 (1980)).

Finally, several experiments have linked our behavior to implicit biases. For example, one experiment found scores on the Implicit Association Test predicted how persons would allocate budget cuts among student organizations.<sup>91</sup> Moreover, a “meta-analysis of IAT studies concluded that IAT scores predicted a variety of behaviors, such as voting [and] consumer choice . . . .”<sup>92</sup> In fact, such implicit biases generally predict behavior more accurately than do our explicit beliefs and commitments regarding race (and other factors).<sup>93</sup>

### C. *Activation and Functioning of Racial Schemas*

“In interpersonal encounters, multiple schemas may be activated.”<sup>94</sup> For example, a person may be a heterosexual, female, Latina engineer, and persons likely have schemas for *heterosexual*, *woman*, *Latina*, and *engineer*. Some of the *content* of the schemas may conflict: in American culture, for example, one might expect the schema for women to include “not good at math,” but one would expect the schema for engineers to include “very good at math.” Given such actual and potential conflicts, which schemas influence perception and behavior? And how does this affect our racial schemas?

As Professor Kang points out, “[w]hich schemas actively influence [an] interaction depend on numerous variables, such as primacy (what gets activated first), salience (which schema cues catch attention), accessibility (which schemas can be retrieved in memory easily, perhaps because of recent priming), and individuating information.”<sup>95</sup>

Perhaps not surprisingly, “the scientific consensus is that racial schemas are not of minor significance.”<sup>96</sup> Differently put, they are likely to influence many—perhaps most—interactions. Contrast race with sexual orientation. A person may have implicit negative biases regarding both blacks and gays and lesbians, but racial schemas probably are more easily triggered. A racial schema is likely to have both primacy and salience: “[W]e as observers

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<sup>91</sup> See Levinson, *supra* note 14, at 612–13 nn.80–87 and accompanying text.

<sup>92</sup> *Id.* at 613.

<sup>93</sup> See Kang, *supra* note 36, at 1514 (“There is now persuasive evidence that implicit biases against a social category, as measured by instruments such as the IAT [Implicit Association Test], predicts disparate behavior toward individuals mapped to that category.”); see also Levinson, *supra* note 14, at 612–13 (describing research findings that “implicit associations and stereotypes . . . predict discriminatory decision making and behavior” and that the IAT was a “better predictor of hiring decisions, verbal and non-verbal pro-social indicators, and other behaviors” than were self-reports of explicit bias).

<sup>94</sup> Kang, *supra* note 36, at 1502.

<sup>95</sup> *Id.* (footnotes omitted).

<sup>96</sup> *Id.* at 1502.

are especially sensitive to visible and physical cues,”<sup>97</sup> and a person’s apparent racial category often will be accessible upon first sight of the person (or, less frequently, upon hearing a voice or learning a name). In contrast, with gays and lesbians, most persons with implicit biases against gays have been exposed to some individuating information about the gay person before learning the person’s sexual orientation; that is, other schemas may have been activated first.

Moreover, particular schemas or stereotypes may be “primed” (activated or prepared for activation), and this priming can be direct or indirect. Professor Levinson has summarized a series of fascinating experiments on stereotype priming. In an example of direct priming, a group of Caucasian and African American students were asked to identify their race just before taking a test. Remarkably, “African-American participants took longer to answer questions and achieved lower overall scores relative to Caucasian participants, but only when they were primed.”<sup>98</sup> In an example of indirect priming, two groups of senior citizens were given a series of words to unscramble. Both series of words contained many neutral words, but one of the series also contained words stereotypically associated with the elderly (*e.g.*, wise, bingo, etc.). Of course, neither group was told anything specific about the elderly or about the content of the word lists. The group indirectly “primed” with stereotypes of the old was found to walk more slowly down a hallway after the experiment than did the group not primed with such stereotypes.<sup>99</sup>

Interestingly, priming some stereotypes of a group can activate other unrelated stereotypes of that group. For example, a group primed with violent rap music, which primed stereotypes of black males as aggressive and violent, “were more likely than other participants to judge a Black job applicant as less qualified for a job requiring intelligence”<sup>100</sup> [lower intelligence being another stereotype pertaining to blacks].

In sum, implicit biases and stereotypes typically operate automatically, generally influence behavior, and can be activated both directly and indirectly. Moreover, in part because a person’s supposed racial category typically is easily identifiable visually, racial schemas often play a significant role in interactions. But what is the content of such schemas or stereotypes, and why is it relevant to capital litigation?

#### D. *The Origin and Content of Racial Schemas*

Many groups are stereotyped in ways that are positive, negative, or neutral. Even indirect priming for the neutral or positive stereotypes concerning

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<sup>97</sup> *Id.* at 1503.

<sup>98</sup> Levinson, *supra* note 14, at 608.

<sup>99</sup> *Id.* at 609.

<sup>100</sup> *Id.* at 632.

a group can, at least in some people, activate the other, negative stereotypes of this group.<sup>101</sup> For example, when primed with a neutral or positive stereotype about African American males—say, that they are good athletes—other, more negative stereotypes of African Americans may be activated in some persons. That said, the more negative stereotypes of African Americans—and, in particular, of African American males—are the primary points of concern for capital defendants who are themselves African American. Several questions arise: What is the content of these negative stereotypes? What are the sources of such stereotypes? And what are the effects of such stereotypes?

There's one major negative stereotype: many persons implicitly associate black males with anger and violence.<sup>102</sup> Various studies show many persons draw a strong association between black males and guns. For example, in one well-known study, persons were faster to recognize guns and frequently mistook tools for guns when primed with pictures of black male faces.<sup>103</sup> This was true without regard to the conscious prejudice of the subject of the test.<sup>104</sup> Scholars have opined that “the stereotype of African-Americans as violent and criminally inclined is one of the most pervasive, well-known, and persistent stereotypes in American culture. Where other negative cultural stereotypes about Blacks have significantly diminished, this one has remained strong and influential, particularly among Whites.”<sup>105</sup>

The stereotype of black males as angry, violent, and disposed to crime has both macro- and micro-effects. On a macro level, many of these stereotypes

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<sup>101</sup> See, e.g., Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1249–50 (2002) (“Words associated with the negative features of a stereotype will activate the stereotype in persons of both low and high [conscious] prejudice. Associated words that are positive or neutral will activate the stereotype only in more prejudiced people.”). One of the scientific theories explaining this phenomenon posits that our brains function like networks and process information in connection to other information: “In connectionist models, the elements that constitute thought processes are not evaluated or processed individually, but are activated in relation to the other elements in the network.” *Id.* at 1259 (citation omitted). For example, people shown a yellow canary and then asked to name a fruit are more likely than others to name lemons or bananas. *Id.* at 1260. The connectionist model generates powerful predictions. For example, “[c]onnectionist models would . . . predict that the kind of music playing when a witness sees an ambiguous object may affect whether the witness ‘sees’ a gun or a pair of pliers in the first few moments of perception.” *Id.* at 1263.

<sup>102</sup> See Kang, *supra* note 36, at 1491 nn.3–5 and accompanying text (describing experiment by social psychologist John Bargh). For example, persons primed with a picture of a black male reacted with greater anger and hostility to a computer crash than those primed with a face of a white male. *Id.*

<sup>103</sup> See Blasi, *supra* note 101, at 1248; see also Kang, *supra* note 36, at 1493 (describing another experiment concerning shooter bias).

<sup>104</sup> See Blasi, *supra* note 101, at 1249.

<sup>105</sup> Mona Lynch, *Stereotypes, Prejudice, and Life-and-Death Decision Making: Lessons from Laypersons in an Experimental Setting*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA, *supra* note 43, at 188.

drive policy discussions: “[T]here is powerful evidence that it is the stereotypes Whites possess of Black men as violent that drives White attitudes about crime.”<sup>106</sup> On a micro level, these (implicit) stereotypes may color opinions concerning appropriate punishment; for example, Professor Kang cites one study in which persons primed with a Black suspect’s mug shot during a newscast supported more punitive remedies than those primed with a White suspect’s mug shot.<sup>107</sup> One intriguing (and deeply disheartening) study found that black defendants with stereotypically black features were sentenced to death at much higher rates than were blacks with less stereotypical features.<sup>108</sup>

As to the source of these implicit biases and racial meanings, Professor Kang notes they stem from both direct and vicarious experiences.<sup>109</sup> Vicarious experiences can include statements from friends and family, news reports, depictions in television shows and movies, etc. Moreover, “[e]ven if direct experience with racial minorities more powerfully shapes our schemas, vicarious experiences may well dominate in terms of sheer quantity and frequency.”<sup>110</sup> Available evidence strongly suggests the news media—especially the local news media—contribute to and prime stereotypes of black males: “[A]mple evidence shows that the media treats Black-perpetrator stories differently, representing and portraying suspects in a more threatening manner than comparable White perpetrators.”<sup>111</sup> Moreover, the local news media tends to devote a disproportionate amount of time to crime stories,<sup>112</sup> and at least one study found that “greater viewing of local news led to . . . more . . . racism.”<sup>113</sup> Much research has noted the “continuing media portrayal of African Americans as aggressive criminals . . .”<sup>114</sup> In fact, according to Benjamin Fleury-Steiner, “the media’s and politicians’ hyper-focus on blacks as criminals . . . reproduces

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<sup>106</sup> Blasi, *supra* note 101, at 1274.

<sup>107</sup> Kang, *supra* note 36, at 1491–92. Importantly, apart from skin hue, the two mug shots were actually of the same face (with the same expression, etc.). *Id.* at 1492; *see also* Levinson, *supra* note 14, at 629 (describing study in which “participants who viewed news stories featuring mostly Black suspects were more likely to make harsh culpability judgments of a race-unidentified criminal. . . . Race need not be specifically mentioned in order to activate racial stereotypes . . .”).

<sup>108</sup> Levinson, *supra* note 14, at 628.

<sup>109</sup> Kang, *supra* note 36, at 1539–40.

<sup>110</sup> *Id.* at 1540.

<sup>111</sup> *Id.* at 1563.

<sup>112</sup> *Id.* at 1550 (“[T]ime allocated to crime stories does not correlate with changes in crime rates.”).

<sup>113</sup> *Id.* at 1553 (describing study that ultimately found that “greater viewing of local news led to greater support for punitive remedies, more old-fashioned racism, and more ‘new racism’”).

<sup>114</sup> Levinson, *supra* note 14, at 627.

the same pre-Civil Rights ideology: whites are law-abiding, and blacks are lawless.”<sup>115</sup>

As the next section will discuss, these automatic and implicit stereotypes concerning African-Americans almost certainly affect jurors’ capital sentencing decisions.

*E. The Activation and Application of Racial Schemas in Capital Sentencing*

Although I am unaware of any psychological studies confirming the operation of racial schemas (independent of other factors) in capital sentencing,<sup>116</sup> the data from the Capital Jury Project, experiments conducted by criminology professor Mona Lynch and psychology professor Craig Haney, and plain old common sense suggest that these schemas nearly certainly affect capital sentencing in ways that disadvantage black males.

First, there’s the argument from common sense: If these schemas generally operate automatically and can be activated both directly and indirectly, there is no reason whatsoever to suppose there is an invisible wall keeping the schemas out of capital trials. In fact, there is every reason to believe they might operate strongly in capital trials. By their very nature, capital trials concern violent crime, an area stereotypically associated with black males.<sup>117</sup> One might reasonably think any discussion of violent crime—even assuming the discussion is facially race-neutral—might prime stereotypes,

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<sup>115</sup> Benjamin Fleury-Steiner, *Death in “Whiteface”: Modern Race Minstrels, Official Lynching, and the Culture of American Apartheid*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA, *supra* note 43, at 156.

<sup>116</sup> Please note that I am focusing here only on capital sentencing. Of course, there is every reason to believe that racial schemas infect virtually every stage of a capital trial, from the decision to seek death, to jury selection, to interpretations of evidence during the guilt phase of trial, etc. See, e.g., Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2102 (2004) (arguing, *inter alia*, that because “the decisions [whether to seek the death penalty] fall to the subjective judgment of the prosecutor, potential abounds for unconscious racial biases to influence outcomes”); see also Antony Page, *Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 156 (2005) (arguing that given the automatic and implicit operation of racial and gender schemas, “the *Batson* peremptory challenge framework is woefully ill-suited to address the problem of race and gender discrimination in jury selection”); cf. Jeffrey K. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1818–19 (1998) (“[T]he prosecutors with ultimate charging discretion in death penalty states are almost entirely white. . . . The first and most obvious channel for this [unconscious] bias arises from the racial disparity between the prosecutors and the death row population. The predominantly white prosecutors are more likely to have absorbed the ‘cultural stereotype’ of black inferiority and thus perceive black defendants as more ‘violent’ and more ‘dangerous’ than their white counterparts.”).

<sup>117</sup> See *supra* notes 102–105 and accompanying text.

leading to changes in how jurors perceive all the data in the trial. Indeed, Professor Levinson has hypothesized that the very death qualification process might activate racial stereotypes, given the long historical relationship between race and the death penalty.<sup>118</sup> Moreover, prosecutors may prime racial stereotypes during capital trials involving black defendants.<sup>119</sup>

Recent studies buttress the common sense conclusion that implicit biases affect capital sentencing. One small study showed that even death penalty defense lawyers—a population one would expect to be racially sensitive and consciously committed to racial justice and equality—harbor the same implicit biases held by most of the rest of the American population.<sup>120</sup> Of course, this does not “prove that their performance [as defense counsel] is impaired by [such] attitudes,”<sup>121</sup> but it does not *disprove* it either. Similarly, a study of Implicit Association Tests taken by trial judges indicates a “strong white preference among the white judges.”<sup>122</sup> Although these automatic preferences do not translate automatically into unconscious discriminatory behavior, they certainly can.<sup>123</sup> I am unaware of any study of the implicit biases of prosecutors, but why should one expect any significant differences? Putting it all together, common sense suggests that if the advocates, judges, and jurors in capital cases generally possess implicit racial biases, there is a distinct likelihood those biases will seep into the capital sentencing process.

Moreover, data from the Capital Jury Project suggest the influence of racial schemas and of other cognitive in-group/out-group processes in jurors’

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<sup>118</sup> Levinson, *supra* note 14, at 626–27.

<sup>119</sup> For an example of a prosecutor’s priming of racial stereotypes, see Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC’Y REV. 19, 27 (1993):

Although the prosecutor denied the significance of race (“This isn’t black versus white . . .”), the imagery on which he consistently relied was a racial imagery. Sometimes the imagery was overt, as in his repeated references to the fact that [the African-American defendant] had led his life in “dark places”; sometimes it was more indirect, as in the contrast between those, like [the white female victim], who embrace the “American way, play by the rules, and work hard,” and those, like [the African-American male defendant], who are “mean and lazy.”

*Id.*

<sup>120</sup> See Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1553 (2004) (analyzing results of IATs and concluding that “capital defense attorneys, both trial and post-conviction (trial lawyers and habeas lawyers), look like our [student control group] in their implicit attitudes about race and, as far as we can tell, pretty much like the rest of the population. White men have the strongest automatic preference for white, followed by white women.”).

<sup>121</sup> *Id.* at 1542.

<sup>122</sup> Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009).

<sup>123</sup> See *id.* at 1221 (concluding, *inter alia*, that “implicit biases can affect judges’ judgment, at least in contexts where judges are unaware of a need to monitor their decisions for racial bias”).

decision-making.<sup>124</sup> Capital Jury Project data suggest three major differences between black and white jurors on issues relevant to the life-or-death decision during the capital sentencing trial.<sup>125</sup> First, to a greater degree than white jurors, black jurors experienced and were influenced by residual doubt (lingering doubts, notwithstanding the guilty verdict, that the defendant was truly responsible for the murder at issue).<sup>126</sup> Black jurors in black-on-white capital murder cases (and, to a lesser degree, in other cases) “were far and away the most likely to have lingering doubts and to regard such doubts as important in making the punishment decision.”<sup>127</sup> Whites typically were not afflicted with such doubts and also were less likely to consider them important to sentencing.<sup>128</sup>

Second, black and white jurors differed in their findings concerning defendants’ remorsefulness. Specifically, “[b]eliefs that the defendant was remorseful for the crime were more common among black than white jurors and most common among black jurors in [black-on-white] cases.”<sup>129</sup> White jurors in cases involving black defendants (regardless the race of the victim) were “especially likely to see the defendant as lacking remorse.”<sup>130</sup> Differences in judgments concerning remorse are especially important given the documented association between jurors’ beliefs regarding a defendant’s remorse and their “receptivity to arguments of mitigation and their willingness to grant mercy.”<sup>131</sup>

Third, black and white jurors differed in their opinions regarding defendants’ future dangerousness. The data from the Capital Jury Project indicate that jurors’ assessments of future dangerousness are central to decisions regarding punishment, even in jurisdictions (unlike, say, Texas) in which future dangerousness is not an explicit sentencing factor.<sup>132</sup> White jurors not only “appeared to believe that black defendants are more dangerous than white defendants”<sup>133</sup> but also appeared to rely much more heavily during

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<sup>124</sup> For an extensive discussion of the role of capital jurors’ race in capital decision-making, see generally Bowers et al., *supra* note 45. Although this study and the Capital Jury Project data upon which it relies are a little old, the information is sufficiently relevant and useful that it merits a somewhat more extensive discussion.

<sup>125</sup> *Id.* at 203.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 207.

<sup>128</sup> *Id.* at 208.

<sup>129</sup> *Id.* at 215.

<sup>130</sup> *Id.* at 216.

<sup>131</sup> *Id.* at 211.

<sup>132</sup> *Id.* at 224.

<sup>133</sup> *Id.* at 222.

sentencing on considerations regarding future dangerousness.<sup>134</sup> Moreover, future dangerousness actually was discussed more during deliberations in black-on-white cases than in white-on-white cases.<sup>135</sup>

Notably—and somewhat related to the differences concerning residual doubt, remorse, and future dangerousness<sup>136</sup>—in certain kinds of cases there was a gap in empathy for the defendant. Except in the black-on-white cases, “jurors’ identification with the defendant was not race-specific.”<sup>137</sup> Perhaps not surprisingly, in the black-on-white cases, black jurors showed the highest degree of identification with the defendant,<sup>138</sup> and white jurors were “especially unlikely to be reminded of someone by the defendant or to place themselves in the situation of the defendant’s family in such cases.”<sup>139</sup>

Given the research on implicit stereotypes and biases, the results of the Capital Jury Project studies are hardly surprising. Take, for example, the future dangerousness question. If the evidence concerning future dangerousness was ambiguous, one might expect white jurors to fall back on racial schemas—implicit default settings—associating black men with violence and crime, *i.e.*, with danger. Such a finding also would be consistent with the principle of outgroup derogation, that is, the tendency more easily to associate negative traits with outgroups than with ingroups.<sup>140</sup> Such a finding also is consistent with what is known as the “ultimate attribution error—the tendency to accept the good for the ingroup and the bad for the outgroup as personal and dispositional, but more important, to explain away the bad for the ingroup and the good for the outgroup with situational attributions.”<sup>141</sup> In short, one would expect white jurors, whose implicit biases would treat black males as an outgroup, to see the defendant’s act of violence as a stable character trait rather than a function of situational factors.

Finally, two sophisticated experiments conducted by Professors Lynch and Haney strongly suggest racial schemas are hard at work during capital sentencing. A full discussion of the experiments is beyond the scope of this Article, but a few factors emerge as significant. First, the race of the defendant played a significant role in the sentencing decisions in both experiments: both individual jurors and juries as a body were more likely to impose death

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<sup>134</sup> *Id.* at 225.

<sup>135</sup> *Id.* at 224.

<sup>136</sup> *See, e.g., id.* at 218 (“Jurors’ impressions of the defendant’s remorsefulness, their personal identification with the defendant, and their feelings that the defendant deserved mercy were interrelated.”).

<sup>137</sup> *Id.* at 217.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 242.

<sup>140</sup> *See supra* note 82 and accompanying text.

<sup>141</sup> Kang, *supra* note 36, at 1566 (citation omitted).

sentences upon black defendants.<sup>142</sup> More important than the influence of race upon ultimate outcome was its influence upon how jurors viewed the evidence. Although the jurors in the experiment heard the *very same* mitigating evidence regarding the defendant's horrifically abusive childhood, psychological difficulties during adult life, and positive traits as an older brother, husband, and father, jurors assessed that evidence differently based solely on the race of the defendant. Generally, this evidence had less mitigating value for jurors when the defendant was black, particularly when the crime was a black-on-white crime.<sup>143</sup> In fact, jurors treated mitigating evidence as aggravating more often with black than with white defendants.<sup>144</sup>

Second, one of the experiments found that the facts of the crime itself, which were the primary aggravating circumstance in the case, were "weighed more heavily toward death in the case of the Black defendant than the White defendant."<sup>145</sup> In other words, jurors considered a crime more "death-worthy" based simply on the race of the defendant.

Third, racial effects were magnified when the jury instructions were not well understood, with life sentences more likely (than would be the case with well understood instructions) for white defendants and death sentences more likely for black defendants.<sup>146</sup> This magnification effect was predictable because research shows that reliance on racial stereotypes (schemas) increases in ambiguous situations presenting high cognitive demands.<sup>147</sup>

As was true of the Capital Jury Project data, the qualitative data from these experiments—specifically, the answers to a set of open-ended

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<sup>142</sup> Lynch, *supra* note 105, at 194–96. As Lynch noted, most studies of actual capital cases show a race-of-victim effect. In the experiments by Haney and Lynch, race-of-victim served as an amplifier: that is, "the *greatest* differences between groups were consistently evident in the two cross-racial [black-on-white and white-on-black] condition comparisons." *Id.* at 200. Lynch further opined that the "race of victim effect may have been attenuated due to our approach, in which we manipulated only race, and no other variables, resulting in a suppression of the correlates to race that exist in the real world." *Id.*

<sup>143</sup> See *id.* at 194. Lynch states as follows:

When assessed by condition, comparisons revealed significant differences for the weight given to all of the individual pieces of mitigating evidence, based on the racial characteristics of the conditions. In the condition where the White defendant kills a Black victim, significantly more weight was given in favor of life on all of the mitigation compared to other conditions. Jurors' assessments of three of the four mitigating circumstances . . . revealed the influence of race in that these pieces of evidence or testimony were weighted significantly more in favor of life for the White defendant."

*Id.*

<sup>144</sup> *Id.* at 195.

<sup>145</sup> *Id.* at 197.

<sup>146</sup> *Id.* at 195.

<sup>147</sup> *Id.* (relying in part on Kerry Kawakami et al., *Racial Prejudice and Stereotype Activation*, 24 PERSONALITY & SOC. PSYCHOL. BULL., 407, 407–16 (1998)).

questions—reflected a “withholding of empathy for the Black defendant, and indeed *some resentment that such a sentiment was sought for him.*”<sup>148</sup> Even in those instances in which jurors found the mitigating evidence powerful in the black defendant’s case, their responses did not reflect the same degree of identification with him as was the case when this mitigating evidence was used in the white defendant’s case.<sup>149</sup>

In short, common sense, empirical data about capital juries, and psychological experiments all suggest that racial schemas influence capital sentencing in a variety of ways, including how jurors view mitigating evidence about childhood, mental health, etc.; whether jurors see the defendant as remorseful; how jurors assess a defendant’s future dangerousness; and the degree of and influence of residual doubt in jurors’ sentencing decisions. The common thread appears to be an absence of empathy for the (perceived) *Other*.

What (if anything) can be done to reduce jurors’ implicit racial biases?

#### F. *Research on Countering Implicit Bias*

Although humans will continue to think schematically about race and about other categories, racial *meanings*, that is, the cognitive and affective content of the particular (implicit) racial schemas, can change over time as there are cultural and other shifts. Professor Kang points out the dramatic shift in the cultural schema for Chinese immigrants:

At the end of the nineteenth century, the illegal immigration problem in America had a Chinese face. The Chinese were viewed as inscrutable, subhuman, incapable of higher learning; useful laborers but otherwise despicable; vectors for disease, filth, and immorality. And now, the racial meaning ascribed to the very same body is often “model minority.” . . . [I]t would be disingenuous to deny substantial transformations in both the cognitive and affective content [of schemas] toward Asian people. While explicit and implicit biases against that category have by no means disappeared, they have transformed within one lifetime.<sup>150</sup>

Although I certainly would welcome a shift in the negative content of the implicit racial schemas concerning African-Americans, particularly black males, long-term cultural shifts are beyond the scope of this Article. For purposes of this Article, I assume that the implicit racial schemas of many Americans (including many capital jurors) associate black males with criminal violence, aggression, etc. The cognitive meaning assigned to the black male

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<sup>148</sup> *Id.* at 200 (emphasis added).

<sup>149</sup> *Id.* at 198–99.

<sup>150</sup> Kang, *supra* note 36, at 1532.

category might be *aggressive, violent, and angry*; the affective association with the black male category might be *fear*.

The question, then, is not whether the content of the schemas can be changed entirely and permanently, but whether jurors' implicit biases can be neutralized or countered as the capital jury hears evidence and considers the defendant's sentence.<sup>151</sup> As to this question, there is cause for cautious (and very modest) optimism.

Researchers have identified a variety of ways the activation or application of stereotypes may be inhibited at least temporarily. First, more than one schema applies to most persons (someone may be an Asian female mechanic, for example, and there are different schemas for *Asian, female, and mechanic*), and causing people to focus principally on one of those categories—*mechanic*, for example, “inhibits the activation of stereotypes associated with another category.”<sup>152</sup> Professor Kang notes that role schemas may, at times, trump racial or gender schemas. When one sees an African-American police officer, the schema for *police officer* typically assumes primacy during any interaction.<sup>153</sup>

Second, the activation of stereotypes is dependent to a degree on “emotion and . . . our sense of ourselves.”<sup>154</sup> Events that increase self-esteem reduce the likelihood that negative stereotypes are applied, and “events that reduce self-esteem can increase the likelihood that negative stereotypes are applied.”<sup>155</sup> For example, persons praised by a black doctor will show less implicit bias and fewer negative stereotypes of African Americans than persons criticized by the black doctor.<sup>156</sup> In explaining this phenomenon, Professor Gary Blasi notes that “[a]lthough these phenomena take place below the level of conscious processing, it is almost as if basic cognitive processes are looking out for our subjective sense of well-being: We feel better if we can admire our admirers and disparage our critics, subconsciously telling ourselves to consider

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<sup>151</sup> As will become clear, some of the potential methods for neutralizing jurors' implicit biases during trial actually may ultimately reinforce such biases in other settings. See Blasi, *supra* note 101, at 1246 (“Taking the [cognitive] science seriously might, at least in some contexts, privilege short-term strategies or alter the calculation of tradeoffs.”). Whether to take steps that might have such an effect is a question of values. I expect most advocates would privilege the interests of their immediate client—someone facing a possible death sentence—over the interests in potential long-term changes in racial schemas.

<sup>152</sup> *Id.* Accordingly, though, inhibition of one stereotype under these conditions may cause a “rebound” effect in the future; the suppression of a stereotype somehow leads to its reinforcement in the future. *Id.*

<sup>153</sup> Kang, *supra* note 36, at 1503 n.3.

<sup>154</sup> Blasi, *supra* note 101, at 1250.

<sup>155</sup> *Id.* at 1251.

<sup>156</sup> See *id.* at 1250.

the source.”<sup>157</sup> In other words, because we want to believe the praise given us is credible, we are less likely to activate stereotypes that would call the value of the praise into question.

Third, just as one may prime racial, gender, and other such stereotypes, there is reason to believe one can prime persons with ideals of fairness and equality that might suppress, to a degree, racial and other stereotypes. Professor Blasi cites a line of experiments suggesting “that it is possible to counter stereotypes at the same preconscious level at which they are activated.”<sup>158</sup> For example, people primed with scrambled words associated with achievement were more likely to persist in a problem-solving task (puzzles).<sup>159</sup> “These results suggest that priming subjects with fairness or egalitarian goals might activate unconscious cognitions that would counter the effects of the automatic activation of stereotypes . . . .”<sup>160</sup>

Fourth, exposure to or images of counter-stereotypical exemplars—people who belong to the category in question (female, black, etc.) but whose traits plainly do not conform to the stereotype of the group—may inhibit activation of or may reduce implicit biases.<sup>161</sup> Professor Kang describes an experiment in which exposure to positive black exemplars “reduced . . . implicit bias by more than half.”<sup>162</sup> That said, some researchers would suggest that exposure to so-called counter-stereotypical exemplars may lead to the creation of sub-types or sub-categories while leaving the larger stereotype untouched.<sup>163</sup> Regardless, this line of research suggests either (or both) of two strategies: (1) try to reduce implicit bias by exposing others to counter-stereotypical exemplars, or (2) try to exempt one from implicit bias through arguments that the person actually belongs to a sub-type to whom the stereotype does not apply.

In the context of a capital sentencing trial, advocates necessarily must use the tools of narrative to counter jurors’ (and perhaps the court’s) implicit biases. Part III of this Article provides a brief overview of narrative and metaphor, describes their typical use during capital sentencing trials, then examines criticisms of their use in cases involving black and other minority defendants.

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1254.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *See, e.g.,* Kang, *supra* note 36, at 1559.

<sup>162</sup> *Id.* at 1558.

<sup>163</sup> *See* Blasi, *supra* note 101, at 1268–69 (describing research suggesting that “when people encounter a person who differs from a previously held stereotype, they tend not to change their stereotype, but to create a new subtype to accommodate the exception”).

### III. THE ROLE OF NARRATIVE, COUNTER-NARRATIVE, AND METAPHOR IN CAPITAL CASES

Narrative is central to law. Lawsuits—whatever the subject—essentially are stories about things that went wrong—love gone bad, a deal gone sour, yet another “somebody done somebody wrong song.”<sup>164</sup> People may disagree about what *really happened* or *what it all means*, but lawsuits always concern *something* that happened. But what exactly is narrative? What characterizes legal narratives? In what ways is narrative central to death penalty cases in general and capital sentencing trials in particular? This section explores these questions.

#### A. Introduction to Narrative and Metaphor

##### 1. Narrative

The “recipe for making stories”<sup>165</sup> typically contains five basic ingredients: (1) scene or setting, (2) agent (the cast of characters), (3) action (the plot), (4) agency (the means or instruments of action), and (5) purpose (the motivations and goals of the characters).<sup>166</sup> Of course, these ingredients must blend well:<sup>167</sup> a plot needs characters and a setting appropriate to that particular plot line. Alvie Singer, the protagonist in *Annie Hall*,<sup>168</sup> would be ill suited to a traditional Western. Importantly, sometimes these five ingredients are interchangeable.<sup>169</sup> For example, a setting—take, say, the hotel in *The Shining*<sup>170</sup>—may function effectively as both setting (abandoned hotel) and character (villain causing the protagonist to go mad). Finally, narratives generally contain “recurring melodies” within the plot line<sup>171</sup>—*i.e.*, themes. For the story to be believable there must be congruence between the theme and the other five ingredients.<sup>172</sup>

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<sup>164</sup> B.J. THOMAS, (*Hey Won't You Play) Another Somebody Done Somebody Wrong Song*, on REUNION (ABC Records 1975), available at [http://www.youtube.com/watch?v=yym\\_mJokfTQg](http://www.youtube.com/watch?v=yym_mJokfTQg) (last visited Sept. 17, 2012).

<sup>165</sup> Ty Apler et al., *Introduction to Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 20 (2005).

<sup>166</sup> *Id.* (citing KENNETH BURKE, A GRAMMAR OF MOTIVES XV (1945)).

<sup>167</sup> *Id.* at 21 (noting that the five dimensions of narrative “need to be in tune”).

<sup>168</sup> ANNIE HALL (United Artists 1977).

<sup>169</sup> *Id.*

<sup>170</sup> THE SHINING (Warner Bros. 1980).

<sup>171</sup> Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 J. LEGAL WRITING INST. 229, 260 (2006).

<sup>172</sup> See JOHN GARDNER, THE ART OF FICTION: NOTES ON CRAFT FOR YOUNG WRITERS 70 (Vintage Books ed. 1991). According to John Gardner, an appropriate theme arises from within a

There is a rich literature on storytelling (or narrative) and the law,<sup>173</sup> but Anthony Amsterdam and Jerome Bruner's revered *Minding the Law*<sup>174</sup> has wielded particular influence. According to Amsterdam and Bruner, of the five dimensions of narrative, the two *sine qua non* are plot and characters.<sup>175</sup>

a. Introduction to Plot

Trials, troubles, and tribulations are the stuff of plots. Indeed, “[t]he launching pad of narrative is breach, a violation of expectations, disequilibrium.”<sup>176</sup> A typical plot has a beginning, middle, and end, and consists of the following elements: (1) an initial steady state; (2) a disruption of the steady state by some trouble (“Trouble”) “attributable to human agency or susceptible to change by human intervention”;<sup>177</sup> (3) “efforts at redress or transformation, which succeed or fail”<sup>178</sup> in remedying the Trouble; (4) restoration to the former steady state or transformation to a newly created (but different) steady state; and (5) a coda—the moral of the story.<sup>179</sup> If disequilibrium is narrative’s launching pad, the “landing pad . . . is balance, the reestablishment of equilibrium.”<sup>180</sup>

We see this plot arc in movies and television all the time. Take *Super 8*,<sup>181</sup> one of 2011’s summer features. As is often true, the story consists of several narratives. One of the narratives in the movie begins with a steady state: a group of boys on the verge of adolescence are making a zombie movie in their sleepy Ohio steel mill town. Trouble then intrudes. After a spectacular train wreck, strange things begin happening. The electricity is on, then off; objects (car motors, appliances, etc.) go missing; people disappear; dogs run away from town; the Air Force, tightlipped, shows up in search of something unnamed. Initial efforts at redress fall woefully short. Once the source of the Trouble is discerned—an alien captured and held hostage for years by the Air Force was freed in the train wreck and is taking (and eating) people—there are renewed efforts at redress. Attempts by the Air Force to kill or subdue the creature fail spectacularly. The town returns to its steady state after one effort at

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story; that is, there must be a close fit between the story actually told and the theme of the story. *Id.* Without such a fit, either the theme or the story itself will lack believability and integrity. *Id.*

<sup>173</sup> See generally Meyer note 171, at 238–40 (providing a list of useful sources on both narrative and, more specifically, legal narrative).

<sup>174</sup> ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

<sup>175</sup> *Id.* at 113.

<sup>176</sup> Apler et al., *supra* note 165, at 6 (emphasis omitted).

<sup>177</sup> AMSTERDAM & BRUNER, *supra* note 174, at 113–14 (emphasis omitted).

<sup>178</sup> *Id.* at 114.

<sup>179</sup> *Id.*

<sup>180</sup> Apler et al., *supra* note 165, at 6 (emphasis omitted).

<sup>181</sup> *SUPER 8* (Paramount Pictures 2011).

redress—namely, the pre-adolescent protagonist’s demonstration of empathy for the creature—succeeds. And the alien, healed by the boy’s empathy, is able to go home.

There are, of course, other kinds of plots. Some plots begin not with a steady state, but in “incompleteness, distress, or disarray, and the goal is the completion of an important task or the restoration of the normative world.”<sup>182</sup> Journey narratives, such as that of Odysseus, follow this plot line.<sup>183</sup> Again, one of the narratives within *Super 8* follows this pattern. The movie begins with the funeral of the pre-adolescent protagonist’s mother following an accident at a steel mill. Even before the action begins, the world of the boy and his father has been disrupted, and one of the goals within the plot is their healing.

Certain stories enjoy special resonance within particular cultures. Myth, that is, “archetype or other master story,”<sup>184</sup> provides “ready templates for plots.”<sup>185</sup> Every culture has its myths or master stories as well as its stock stories, and, in fact, humans have schemas for such stories. That is, “stories embedded in our experience provide mental blueprints and cognitive shortcuts.”<sup>186</sup> “[T]hese myths practically run in our veins,”<sup>187</sup> so when one of our cultural master stories is activated, we “are inclined to see both events and ideas as fitting into [these] archetypal stories.”<sup>188</sup> In a trial, for example, when jurors “perceive[] the familiar lineaments of [a stock script or story prevalent in our culture] . . . [they are] cued to interpret other pieces of evidence and eventually the whole of it consistently with the familiar story line.”<sup>189</sup> The stock story becomes a “cognitive framework for the jury’s interpretation of the evidence.”<sup>190</sup> That is, our plot schemas influence what we actually *see* and the meanings we ascribe to these perceptions, and much information remains unseen, unacknowledged, invisible.<sup>191</sup> Although our master narratives serve many positive ends—they make life more manageable—they also have the

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<sup>182</sup> Edwards, *supra* note 13, at 887.

<sup>183</sup> *Id.* at 886.

<sup>184</sup> *Id.* at 889. Another definition of “master story” is a narrative “that embodies the history and traditions of a people.” Berger, *supra* note 12, at 268.

<sup>185</sup> Edwards, *supra* note 13, at 890.

<sup>186</sup> Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 281 (2011).

<sup>187</sup> Edwards, *supra* note 13, at 884.

<sup>188</sup> *Id.* at 891.

<sup>189</sup> Apler et al., *supra* note 165, at 7.

<sup>190</sup> *Id.* at 16.

<sup>191</sup> See, e.g., Berger, *supra* note 186, at 277 (noting that stories “unavoidably shape our perceptions”).

potential to “crowd out other points of view.”<sup>192</sup> Within a culture, “master narratives stand as the presumptive, default point of view.”<sup>193</sup>

For example, Professor Craig Haney has posited that American culture contains a master narrative about the nature of violent crime in the United States.<sup>194</sup> This narrative is inhabited with a stock character, the violent criminal. According to Haney, in this narrative:

[C]riminal behavior is understood as an individual-level phenomenon that lacks an explanatory social context. Thus, . . . individual lawbreakers are seen as the primary or exclusive causal locus of criminal behavior; they alone are responsible for their actions and, collectively, for the overall magnitude of the “crime problem.” The crime master narrative portrays their lawbreaking as the product of their entirely free choices, ones exercised by persons unencumbered by background and circumstance. These choices are commonly regarded as having been willfully and selfishly made, despite the perpetrators’ full knowledge of their hurtful consequences. As a result, criminal behavior is seen as a reflection of the inherent “badness” of those who engage in it.<sup>195</sup>

To paraphrase Haney, our cultural master story concerning crime offers individualistic explanations for criminal behavior, chalking bad behavior up to Bad Seeds, who are, of course, a kind of stock character.

#### b. Introduction to Character

“Character is often at the core of legal storytelling . . . .”<sup>196</sup> Amsterdam and Bruner assert that even if they are purportedly animals, aliens, or machines, a story’s characters must be “human-like . . . capable of willing their own actions, forming intentions, holding beliefs, having feelings.”<sup>197</sup> Within a narrative, characters may be either flat or round.<sup>198</sup> Round characters are complex and multi-dimensional (like, one hopes, most human beings), while flat characters are simple and one-dimensional.<sup>199</sup> With exceptions for some

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<sup>192</sup> Craig Haney, *On Mitigation as Counter-Narrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911, 913 (2009).

<sup>193</sup> *Id.* at 914.

<sup>194</sup> *See id.*

<sup>195</sup> *Id.* at 914.

<sup>196</sup> Meyer, *supra* note 171, at 261.

<sup>197</sup> AMSTERDAM & BRUNER, *supra* note 174, at 113 (emphasis omitted).

<sup>198</sup> *E.g.*, Philip N. Meyer, *Are the Characters in a Death Penalty Brief Like the Characters in a Movie?*, 32 VT. L. REV. 877, 885 (2008).

<sup>199</sup> *Id.* (citing GERALD PRINCE, A DICTIONARY OF NARRATOLOGY 12 (rev. ed. 2003)).

genres (fables, myths, etc.), the protagonist in a narrative typically is a round character.<sup>200</sup>

Just as there are archetypal plots, there are archetypal characters—kinds of characters about whom we have embedded knowledge—who inhabit those plots.<sup>201</sup> Once we are attuned to the character, we know the plot (and vice versa) and the character's role in the plot. Again, our character schemas shape what we actually see and may obscure other information: we may not, for example, see that the Jock loves gardening and classical music. These archetypal or stock characters often are flat characters, but this flatness can serve the larger needs of the plot.

Obviously there are differences between character construction in fiction versus litigation. A lawyer's construction of character must be based in reality, that is, in facts that can be presented. If, for example, the lawyer intends to depict her client as gullible, real facts—evidence—must support that depiction. That being said, lawyers nonetheless are engaged in the process of character construction. Most human beings are “bundle[s] of contradiction,”<sup>202</sup> and in telling a client's story, lawyers necessarily emphasize certain aspects of a client's character, downplay the importance of others, and leave other traits out entirely (perhaps because the traits simply aren't relevant or will remove emphasis from other characteristics).

Professor Philip Meyer has noted a variety of ways in which a storyteller may construct and depict character. First, a storyteller can depict character “economically and elegantly through use of selected details,”<sup>203</sup> with a few such details perhaps capturing the essence of a person. What might one make, for example, of a person depicted as always seeming to have ketchup on his tie? Second, “character can and does indeed imply conduct, not only attributing motivation and explanation to what has already happened, but also foreshadowing what will happen next.”<sup>204</sup> For example, in a capital case, jurors sometimes must predict whether the defendant will be dangerous in the future, and the picture drawn of the defendant both by the prosecution and the defense largely will drive this determination; differently put, jurors will predict future dangerousness based on their assessments of the defendant's character.

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<sup>200</sup> *Id.*

<sup>201</sup> See Edwards, *supra* note 13, at 890 (“Myth, too, provides a ready stock of characters to ‘people’ [these] plots with champions, children, tricksters, mentors, kings, mothers, demons, and sages.”); see also Ruth Anne Robbins, *Harry Potter, Ruby Slippers, and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767 (2006) (analyzing uses of Hero archetype in legal advocacy).

<sup>202</sup> ANNE FRANK, *THE DIARY OF A YOUNG GIRL: THE DEFINITIVE EDITION* 335 (Otto H. Frank & Mirjam Pressler eds. 1995) (referring to herself as a “bundle of contradiction”).

<sup>203</sup> Meyer, *supra* note 171, at 263.

<sup>204</sup> *Id.* at 264.

Finally—and importantly—characters can develop and change throughout a narrative.<sup>205</sup>

c. Introduction to Other Aspects of Narrative

Although this Article principally is concerned with plot and character, both theme and setting play major roles in litigation narratives.

Professor Meyer has described theme as the “recurring melody” within a plot line.<sup>206</sup> According to John Gardner, an appropriate theme arises from within a story;<sup>207</sup> that is, there must be a close fit between the story actually told and the theme of the story. Setting focuses on the *where* and *when* of a plot.<sup>208</sup> In litigation, opposing lawyers may disagree on the proper setting for a narrative: should the lens be closely focused on one or two events, or does the action begin at another time and place?

2. Metaphor

If we in law are “swimming in a sea of narrative,”<sup>209</sup> then metaphor surely is the salt in the sea. As is true of stories, the images created by metaphors “unavoidably shape our perceptions and reasoning processes, often unconsciously.”<sup>210</sup> According to cognitive scientists, “metaphor is fundamental to both thought and expression,”<sup>211</sup> so its use in legal analysis and persuasion is inevitable. Indeed, metaphors allow us to think about and analyze abstract ideas.<sup>212</sup> Five minutes with a freshman poetry anthology makes this clear: hope is “the thing with feathers,”<sup>213</sup> and freedom is “just frosting [o]n somebody else’s [c]ake.”<sup>214</sup>

Why should lawyers and legal scholars care about metaphors? Metaphors for the abstract concepts one encounters in law are important

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<sup>205</sup> *Id.* at 263.

<sup>206</sup> *Id.* at 260.

<sup>207</sup> See GARDNER, *supra* note 172, at 70.

<sup>208</sup> Cf. Meyer, *supra* note 171, at 269–70 (“While creating a sense of place in stories often does not have the power or significance of ‘character’ in modern storytelling practices, descriptions of settings and environments are more significant than they may initially appear.”).

<sup>209</sup> Edwards, *supra* note 13, at 884.

<sup>210</sup> Berger, *supra* note 186, at 277.

<sup>211</sup> Berger, *supra* note 12, at 265.

<sup>212</sup> See Berger, *supra* note 186, at 283 (“Metaphor frames issues by allowing us to map inferences from concrete visual images onto abstract concepts and to fit concepts into categories.”).

<sup>213</sup> Emily Dickinson, *Poem # 254*, in SIX AMERICAN POETS: AN ANTHOLOGY 79 (Joel Conarroe ed., Vintage Books 1993).

<sup>214</sup> Langston Hughes, *Frosting*, in THE COLLECTED POEMS OF LANGS, *supra* note 9, at 550.

because they are not only “ways of seeing or highlighting some aspects of a concept . . . [but] they also are ways of not seeing others.”<sup>215</sup> One who conceives proximate cause as a stream “joined by tributary after tributary”<sup>216</sup> and ultimately leading to the ocean sees something different from one who conceives it as a “chain or . . . a net.”<sup>217</sup> In fact, the choice of a particular metaphor in law often “lends an aura of logical inevitability to the legal conclusion that follows the categorization.”<sup>218</sup>

Furthermore, like master stories, certain metaphors possess particular power by virtue of how deeply embedded they are within a culture.<sup>219</sup> The more deeply embedded certain narratives and metaphors are, the more influential they will be once activated.<sup>220</sup> In fact, under such circumstances, “judgments are more likely to be based on assumptions derived from categories and schemas than on evidence of individual characteristics.”<sup>221</sup>

Because of their great power, narratives and metaphors deeply embedded within a culture can present immense opportunities and hazards for advocates. If an advocate can invoke a deeply embedded narrative or metaphor that advances her client’s position, probably more than half of her work is done. If, however, the master stories and metaphors initially seem to favor the client’s opponent, the advocate faces a daunting task. How can she challenge such narratives and metaphors?

Simply put, she probably can’t challenge them directly,<sup>222</sup> but must reframe the conflict. Invocation of fresh and different metaphors may allow for rethinking of what was thought to be known, established, and settled. A new

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<sup>215</sup> Berger, *supra* note 186, at 278.

<sup>216</sup> *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

<sup>217</sup> *Id.* Powerful examples abound within and outside law. Consider the difference between the following metaphors for the body:

“Or do you not know that your body is a temple of the Holy Spirit?”

1 Corinthians 6:19.

“Death is the bowel movement of the soul evacuating the body by intense pressure on the spiritual anus.”

JAMES GEARY, *THE WORLD IN A PHRASE: A HISTORY OF APHORISMS* 186 (2005) (quoting Malcom de Chazal).

<sup>218</sup> Berger, *supra* note 12, at 265.

<sup>219</sup> See Berger, *supra* note 186, at 279 (“Imaginative maps for understanding become deeply embedded in our consciousness because we acquire them through our daily experience in the world.”).

<sup>220</sup> Consider, for example, how Jefferson’s “wall of separation” metaphor has influenced the Supreme Court’s First Amendment Establishment Clause jurisprudence. See *id.* at 290 (“[T]he image of a wall has become our common-sense understanding about the relationship between religion and the government.”).

<sup>221</sup> *Id.* at 301.

<sup>222</sup> See *id.* at 303 (“Because embedded narratives represent past stories and events, they cannot be proven wrong.”).

narrative can reframe the Trouble: the Trouble may appear to be *x*, but in fact is *y*, and the master story doesn't "fit" *y*. In my opinion, one of the best ways to reframe the conflict is to find *other* culturally embedded metaphors and narratives that may better explain the facts of the case than do the narratives and metaphors that favor your opponent.

*B. The Use of Narrative and Metaphor in Capital Trials*

As with movies, capital trials contain multiple narratives. They also contain competing narratives—the narratives offered by the prosecution and the counter-narratives offered by the defendant. The outcome of the litigation and the fate of the defendant depend on whose narrative prevails either as the "true" narrative or as the "master" narrative (assuming the truth of several of the narratives).

Capital trials are bifurcated and consist of a guilt-or-innocence phase and, assuming a guilty verdict in the first phase, a sentencing phase during which the parties present evidence relevant to the appropriate punishment. Defense counsel's obligation to provide constitutionally effective assistance during the sentencing phase includes the duty to conduct a "thorough investigation of the defendant's background"<sup>223</sup> and, where appropriate strategically, to present evidence that mitigates the defendant's culpability.<sup>224</sup> This mitigating evidence reaches beyond the circumstances of the crime itself.<sup>225</sup> Both the 1989 and more recent 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases repeatedly stress counsel's duty to investigate and present relevant mitigating evidence, including evidence concerning a defendant's family history and mental impairments.<sup>226</sup>

For example, in *Williams v. Taylor*,<sup>227</sup> the Supreme Court found a capital defense lawyer constitutionally ineffective for failing to investigate and present (1) evidence "describing [the defendant's] nightmarish childhood, . . . [including evidence] that Williams' parents had been imprisoned for the

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<sup>223</sup> *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

<sup>224</sup> *See id.* at 393 (noting the defendant had a "constitutionally protected right to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer").

<sup>225</sup> *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.").

<sup>226</sup> *See* AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (Rev. ed. 2003), available at [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/Standards/National/2003Guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2003Guidelines.authcheckdam.pdf).

<sup>227</sup> 529 U.S. 362.

criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody";<sup>228</sup> or (2) evidence "that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school."<sup>229</sup>

Typical narrative strategies vary by phase of trial. The initial "Trouble" in a capital case is well-defined: a member of the community has suffered a violent death, presumably at the hands of another human. The guilt-or-innocence phase of trial often is defined by *plot*: What actually happened? Even assuming the Trouble, was the defendant the source of the trouble; that is, did the defendant kill the victim or did someone else? Or is what appears to be one kind of Trouble really another? Perhaps the decedent actually committed suicide or suffered a terrible accident.

Naturally, character plays some role in the guilt-or-innocence phase. Character may be relevant to issues concerning mens rea or credibility, for example. An insanity defense may change the narrative battlefield from one dominated by plot to one dominated by character. But generally the guilt-or-innocence phase of a capital trial is plot-driven.

In contrast, the penalty phase of a trial is, at least from the defendant's perspective, driven by character and, to a degree, by setting. Importantly, the narratives from the guilt-or-innocence phase continue to play a role, because the jury accepted the prosecution's narrative during that portion of trial. Often, of course, the prosecution will contend that the nature of the defendant's crime provides sufficient information about the defendant's character, and many capital jurors agree that a defendant's crime itself tends to reveal enough about character upon which to base the sentencing decision.<sup>230</sup> In short, the prosecution's narrative strategy frequently focuses on one act—the crime in question—as revealing the defendant's "true" character.<sup>231</sup>

One potential difference between the guilt-or-innocence phase and the penalty phase from the prosecution's perspective is the nature of the Trouble. In the capital trial's first phase, the fact of the murder is the Trouble. In the penalty phase, the fact of the guilty defendant is (at least potentially and to the prosecution) the Trouble: we have someone in our midst who has disrupted our tranquility through killing one of our own, so what action or redress is appropriate?

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<sup>228</sup> *Id.* at 395.

<sup>229</sup> *Id.* at 396.

<sup>230</sup> See Bowers et al., *supra* note 45, at 199 (noting percentage of jurors with an opinion regarding sentence at the end of the guilt-or-innocence phase of the trial).

<sup>231</sup> Of course, if the defendant committed crimes in the past, the prosecution also may point to those as revelatory regarding character.

As many have pointed out, the job of defense counsel is to create an effective counter-narrative to the prosecution's narrative:

One important limit to defense creative styles and methods in these cases is surely that “the state bats first, creating an instant narrative when someone is accused of murder. Words get thrown about and stick: brutal, vicious, violent, dangerous.” . . . From defense counsel's standpoint, the virtue of effective storytelling is “to turn the dominant narrative—the one created by the state that stresses the crime and its brutality—upside down by calling for a reversal of traditional courtroom storytelling.” . . . [I]n a well-trying capital case, there is a stark juxtaposition that now regularly occurs in capital penalty trials: a conventional “crime master narrative” . . . is contrasted with a “mitigation counter-narrative” that incorporates a more comprehensive and empirically well-documented understanding of a capital defendant's life.<sup>232</sup>

Professor Haney posits that the prosecution's most powerful narrative is our societal crime master narrative that understands criminal behavior “as an individual-level phenomenon that lacks an explanatory social context.”<sup>233</sup> In short, crime—including violent crime—is a product of the bad character of the criminal.

To counter the prosecution's narrative, defense lawyers broaden the lens beyond the defendant's criminal act. The setting for the defense narrative changes dramatically, perhaps beginning years before the defendant's birth and spanning any number of places—schools, mental hospitals, the home, perhaps even battlefields in distant lands. Finally (and almost invariably), defense lawyers will challenge the prosecution's characterization of the defendant as a stock character—the violent criminal, the monster, the brute—with information showing the defendant to be multi-dimensional, flawed but ultimately capable of redemption. For example, a mitigation narrative may touch upon the defendant's attempts to overcome a history of severe abuse, service in the military and subsequent PTSD, family and personal history of severe mental

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<sup>232</sup> Michael N. Burt, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. REV. 877, 879 (2009) (citations omitted). See also, e.g., Haney, *supra* note 192, at 913 (“An especially persuasive and credible counter-narrative that appears to better account for the facts at hand may be used to debunk, neutralize, or even supplant the master narrative with which it is competing.”) (citation omitted); Sean O'Brien, *Death Penalty Stories: Lessons in Life-Saving*, 77 UMKC L. REV. 831, 835 (2009) (“The use of sound narrative technique, both in the investigation and presentation of the defense case, is now a standard practice for capital defense work.”); cf. Mark E. Olive, *Narrative Works*, 77 UMKC L. REV. 989, 989 (2009) (describing the job of capital post-conviction counsel as “changing what the case is about” through more complete and more accurate narratives).

<sup>233</sup> Haney, *supra* note 192, at 914.

illness, gentleness as a husband, father, brother, or son, his low intelligence and domination by a more sophisticated defendant, etc. As one lawyer explained to Austin Sarat: “Well-done biography is what wins hearts and minds.”<sup>234</sup>

Of course, the overarching goal of creating this broader narrative lens is to (re)humanize the defendant to the jurors. The equation commonly (if not directly) recognized by defense lawyers is that empathy equals life: “To persuade decision-makers against the death penalty, the story [counter-narrative] must reveal the client’s intrinsic humanity.”<sup>235</sup> The basis for defense lawyers’ faith in this equation is their “widely held belief that jurors and judges will only condemn those whom they see as fundamentally ‘other,’ as inhuman, and as outside the reach of . . . compassionate beings.”<sup>236</sup>

Although there certainly is some support for lawyers’ assumptions that traditional mitigation testimony is associated with greater juror empathy and with life sentences,<sup>237</sup> all too often defense lawyers accept uncritically the assumption that a generous helping of traditional mitigation testimony—evidence of child abuse and neglect, family “pathology” and mental illness, and poverty, for example—will allow jurors to empathize with capital defendants. But what if, in the case of black defendants, traditional mitigation testimony—at least if not very carefully presented—risks creating a greater chasm between the defendant and the mostly white jurors than already exists? What if, in other words, jurors hear traditional mitigation narratives differently when the narrative concerns a black defendant? Could a compelling narrative for a white defendant become a stock script when applied to a black defendant? There is some reason to fear that is exactly the case.

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<sup>234</sup> Austin Sarat, *Narrative Strategy Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353, 369 (1996).

<sup>235</sup> O’Brien, *supra* note 232, at 847 (describing common thread in defense lawyers’ theories about the role of storytelling in capital litigation).

<sup>236</sup> Sarat, *supra* note 234, at 370–71 (citation omitted).

<sup>237</sup> See, e.g., Lynch, *supra* note 105, at 197 (explaining that the results of mock experiment showed “among those who voted for life, the testimony about the defendant’s history of child abuse and the psychiatric problems he faced as a result of his upbringing was the most compelling evidence in favor of life”); see also *id.* at 190 (“Because creating empathy for the defendant in the penalty phase through a mitigation narrative is key to overcoming a death verdict, the willingness and/or ability of jurors to empathize with the defendant will influence outcome . . . [A]mong the most plausible explanations for the consistent finding in archival analyses that killers of Whites are more likely to receive death sentences than killers of Blacks is that White jurors, who end up being the majority in most capital juries, feel more empathy for White victims.”).

C. *Criticism of the Traditional Mitigation Counter-Narrative When Applied to Black and Other Minority Defendants*

Lawyers and researchers know that white jurors tend to empathize less with black defendants than with white defendants, even when exposed to the same mitigation narrative.<sup>238</sup> The experiments performed by Professors Lynch and Haney<sup>239</sup> revealed that white participants “were reluctant to attach much significance at all to mitigating circumstances when they were offered on behalf of an African American defendant. . . . [and] appeared less able or willing to empathize with or enter the world of African-American defendants.”<sup>240</sup>

There appear to be two major criticisms of the use of traditional mitigation discourse—that is, a mitigation strategy focusing on the defendant’s tragic history of abuse, neglect, mental illness, and family dysfunction or trauma—in capital cases involving black defendants. First, some critics argue that when it comes to black defendants, traditional mitigation narratives are underinclusive and, therefore, less effective than they could be.<sup>241</sup> According to these critics, defense lawyers should educate jurors about the long-term effects America’s racist history has had upon the lives of black families and, more specifically, upon black capital defendants.<sup>242</sup>

The second major criticism is related to the first but is more radical. It posits that not only does traditional mitigation discourse do little to bridge the empathy gap between white jurors and black defendants, but it may, in fact, create a greater chasm than existed before.<sup>243</sup> In other words, a defense lawyer’s conscientious but uncritical use of a traditional mitigation narrative may augment rather than counter the prosecution’s sentencing phase narrative, thereby increasing the likelihood of a death sentence for the black defendant.

Craig Haney is a major proponent of the position that traditional mitigation narratives are underinclusive when one considers black capital defendants. Although acknowledging that “[t]errible, traumatizing, and criminogenic social histories are not unique to minority capital defendants,”<sup>244</sup> Professor Haney posits that “the life histories of African-American defendants

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<sup>238</sup> See *id.* at 194–95.

<sup>239</sup> See *supra* notes 142–149 and accompanying text.

<sup>240</sup> Haney, *supra* note 16, at 1584–85.

<sup>241</sup> See, e.g., *id.*

<sup>242</sup> *Id.* at 1558 (arguing that a large number of black defendants “continue to be sentenced to death in the United States because of the failure to collect and properly analyze this structural mitigation [information about the effects of racism on African-American defendants] and to present it effectively to sentencing juries”); see also *id.* at 1586–88 (describing how defense lawyers might go about presenting evidence of biographical racism as structural mitigation).

<sup>243</sup> See Lane, *supra* note 18.

<sup>244</sup> Haney, *supra* note 16, at 1562.

tend to be replete with such risk factors, in ways that are distinctive, and distinctly mitigating.”<sup>245</sup> Like many—perhaps most—capital defendants of any race, African-American capital defendants frequently were exposed during childhood to criminogenic influences like poverty, unsafe and crime-ridden neighborhoods, and abusive parenting.<sup>246</sup> Additionally, however, African-American children are disproportionately “shaped and redirected by harsh forms of direct state intervention in ways that increase the likelihood that they will be placed in juvenile justice institutions and, at later ages, incarcerated by the adult criminal justice system.”<sup>247</sup> For example, African-American children are more likely to become wards of the child welfare system and are, therefore, more likely to be harmed by the “serious inadequacies that plague the child welfare system.”<sup>248</sup> They are “singled out disproportionately for school discipline”<sup>249</sup> and are far more likely to be assigned to special education classes or labeled emotionally disturbed.<sup>250</sup> They also are disproportionately represented in the juvenile justice system; for example, “African-American children with no prior admissions to the juvenile justice system were six times more likely to be incarcerated in a public facility than white children with the same background who were charged with the same offense,” and the average sentence of juvenile justice incarceration was longer.<sup>251</sup> (As Professor Haney points out, juvenile justice institutions are “plagued by criminogenic conditions.”<sup>252</sup>)

Pointing to these and other factors, he concludes that persons of color frequently are exposed “to experiences—in their nature, severity, duration, and amount—that no one else in this society has and that may leave an indelible mark.”<sup>253</sup> Professor Haney uses the term “biographical racism” to describe the sum total of these various influences.<sup>254</sup> After pointing out the features of biographical racism, he argues such racism is a form of “structural

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<sup>245</sup> *Id.* at 1563.

<sup>246</sup> *Id.* at 1563–64.

<sup>247</sup> *Id.* at 1565.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 1566.

<sup>250</sup> *Id.* at 1567.

<sup>251</sup> *Id.* at 1569–70.

<sup>252</sup> *Id.* at 1571.

<sup>253</sup> *Id.* at 1576.

<sup>254</sup> *See id.* at 1562 (“As these experiences accumulate over the life span, they represent a form of biographical racism, a racism that exercises such profound influence over the life course and social histories of those exposed to it that it literally structures their biographies.”).

mitigation”<sup>255</sup> about which capital jurors should be educated during the sentencing phase of capital trials.<sup>256</sup>

My principal criticism of Professor Haney’s suggestion is one he would probably share. Namely, it’s all well and good to discuss the need to educate jurors about biographical racism as a form of structural mitigation, but actually *doing so effectively* isn’t easy at all. He notes the particular “empathic divide” that exists between white jurors and black capital defendants, admitting that his own research suggests that “white jurors . . . are either less able or less willing to empathize and come to terms with, in a mitigating way, the significance of key background factors in the lives of African-American defendants in making assessments of blameworthiness and moral culpability.”<sup>257</sup> He suggests defense counsel must provide jurors not only with data about biographical racism, but also must somehow present information in such a way that allows jurors to *feel* what discrimination is like.<sup>258</sup> Unfortunately—and apparently he would admit this—he fails to provide specific recommendations for how to accomplish this.

Attorney Alycee Lane is the major proponent of the more radical position that traditional mitigation discourse may increase the empathic divide that already exists between white jurors and black capital defendants. According to Lane, traditional mitigation narratives about defendants’ dysfunctional family lives may reinforce jurors’ racial prejudices, undermine defense attempts to create juror empathy for capital defendants who happen to be black, and ultimately increase the likelihood of death sentences against such defendants.<sup>259</sup> Lane’s particular focus concerns mitigation narratives about the family. As any capital defense lawyer knows, major portions of case investigation and sentencing phase testimony focus on the defendant’s family life.<sup>260</sup> Capital defense lawyers routinely present evidence regarding the impoverished, abusive, and chaotic families whence their clients came, hoping jurors will find the client less culpable given the client’s childhood deprivations.

Lane considers this strategy naïve in its failure to take into account the influence of the defendant’s race upon the jurors’ expectations of “typical” family life. Specifically, she notes that “[b]ecause it does not even begin to address the intersection of race and family, mitigation discourse presents to

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<sup>255</sup> See *id.* at 1577 (defining “structural mitigation” as “mitigation that is structured into the lives of African-American defendants by the various forms of life-altering racism that remain in American society”).

<sup>256</sup> See *id.* at 1558 (arguing that “so many African-American defendants continue to be sentenced to death in the United States because of the failure to collect and properly analyze this structural mitigation and to present it effectively to sentencing juries”).

<sup>257</sup> *Id.* at 1586.

<sup>258</sup> *Id.* at 1587.

<sup>259</sup> See Lane, *supra* note 18.

<sup>260</sup> See *supra* notes 223–229 and accompanying text.

jurors the defendant's 'dysfunctional family' as if it will do the same kind of work for all defendants, regardless of race."<sup>261</sup> Lane implies that traditional mitigating evidence about a defendant's family life may work well enough for many white defendants, for whom jurors may harbor implicit expectations of a "normal" (*i.e.*, nuclear) family and a nurturing family life, the absence of which strongly affected the defendant's development. However, white jurors' schemas for the "black family" may include so-called pathology as a defining feature: these jurors may see the "black family" as the "household of the single black mother, in which unkempt and out-of-control children—all with different, perhaps unknown fathers—abound."<sup>262</sup> If a black capital defendant's family life is consistent with this schema, that actually may be a cause for *less* juror empathy rather than *more*:

But because of the power and resilience of racist stereotypes about the black family, the "dysfunctional family" might in fact do more harm than good for black defendants facing the death penalty. Specifically, it may frame black defendants as typical, predictable, and always already known factors because they are what black families inevitably produce. It may, in other words, underscore that black capital defendants are anything but unique and individual, something jurors are already predisposed to believe. . . .

Far from undermining . . . cultural distancing, then, the dysfunctional family construct most likely rationalizes it, and may function as part of white jurors' "understanding" of "that set of people," *i.e.*, "the black group." Consequently, it may also serve as a means to view the defendant not as a unique individual, but as part of an undifferentiated, "inferior 'other.'"<sup>263</sup>

Lane's point, which I believe is accurate, can be expressed using the language either of cognitive psychology or of Amsterdam and Bruner's plot formulations. Consider first cognitive science. Recall that priming a subject with one stereotype of a group can activate other stereotypes of that group: for example, violent rap music that primes the stereotype that blacks are aggressive and violent also activates other stereotypes concerning blacks, such as stereotypes concerning intelligence and ability.<sup>264</sup> If white Americans hold implicit biases about "the black family"—and there is every reason to believe

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<sup>261</sup> Lane, *supra* note 18, at 188.

<sup>262</sup> *Id.* at 192. In describing this schema for the black family, Lane attributes the schema in large part to the long shadow cast by the Moynihan Report of the 1960s. *Id.*

<sup>263</sup> *Id.* at 188.

<sup>264</sup> See Levinson, *supra* note 14, at 632 (describing experiment).

that they do<sup>265</sup>—then mitigating information consistent with these biases may activate or strengthen other implicit racial biases that may hurt the defendant. Such implicit biases may include stereotypes concerning black criminality, aggression, and violence. Here, this is particularly likely to be the case given the strong cultural association (created in part by the Moynihan Report) between the single black mother and black male criminality.<sup>266</sup> In other words, the schema-consistent mitigating evidence about the defendant's family life may simply activate other racial schemas that are, in fact, aggravating.

Viewed in plot terms, the influence of racial stereotypes is equally apparent. If the general schema for "family" in American culture continues to be a schema in which two parents—a male and female—though imperfect, generally are nurturing, and in which basic material needs are met, then a defendant's birth into an abusive and impoverished family constitutes a kind of trouble meriting the jury's attention. If, on the other hand, there is a schema sub-category for "black families" that includes poverty, abuse, neglect, and other pathology as *expectations*, then the defendant's birth into such an environment isn't trouble at all; rather, it's just another stock script peopled by stock characters and calling for a stock response—here, death.

#### IV. THE USE OF NARRATIVE AND METAPHOR TO CHALLENGE OTHER EMBEDDED NARRATIVES AND TO CHALLENGE RACIAL SCHEMAS: TWO CASE STUDIES

Part II demonstrated that jurors' implicit biases likely influence how they perceive and interpret evidence concerning black defendants, and, consequently, also influence their sentencing decisions. After providing a general overview concerning narrative and its usual use in capital trials, Part III noted that even defense narratives in capital trials actually may reinforce jurors' implicit racial schemas. This section brings Parts II and III together by addressing how lawyers might use narrative and metaphor to neutralize or minimize jurors' implicit biases.

If the recommendations of Professors Blasi and Kang<sup>267</sup> about minimizing implicit bias are correct, then defense narratives probably should (a) determine other schemas (beyond the racial or ethnic ones) that apply to a defendant, and work to emphasize those, thereby inhibiting the activation of a racial schema; (b) incorporate (to the extent the facts allow it) themes based on

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<sup>265</sup> See, e.g., Lane, *supra* note 18, at 192–96 (discussing media and other stereotypes of the black family and associations of these stereotypes with societal violence).

<sup>266</sup> See *id.* at 193 (noting that Moynihan "seamlessly connected the black family, through the figure of the single black mother/matriarch, with the issue of black male criminality. Specifically, Moynihan makes single black mothers the source of the 'crime, violence, unrest,' and 'disorder' that black men visit upon black communities.").

<sup>267</sup> See *supra* Part II.F.

fairness and equality, thereby priming jurors not to act in discriminatory ways; and (c) either expose the jurors to counter-stereotypical exemplars or, in the alternative, fit the defendant into a subtype that exempts him from the negative characteristics associated with the larger group. The research on narrative and metaphor suggests that the use of new metaphors and narratives—particularly those that already are deeply embedded within a culture—may help shift jurors' perspective and may activate different schemas, thereby inhibiting the activation of negative racial or ethnic schemas.

This section analyzes narratives in two capital cases, looking at the opening and closing arguments in those cases. As to each case, this section will identify some of the schemas that the defense attorney must challenge and will analyze how the attorney's use of narrative and metaphor does or does not challenge/inhibit the negative racial or ethnic schemas that may otherwise influence the jurors in sentencing.

A. *Alan Quinones*<sup>268</sup>

This section begins with a capital case involving a Latino defendant, Alan Quinones.<sup>269</sup> Given this Article's focus on the use of narrative to challenge implicit biases concerning *black* defendants, initially I hesitated to discuss this case. However, defense counsel's narrative strategies during opening and closing are precisely those I believe should be used to combat jurors' implicit biases about race. Among other things, counsel invoked competing role schemas, presented Mr. Quinones as a counter-stereotypical exemplar, and employed metaphor to prime jurors' belief in the dignity of every human being. To be sure, counsel was trying to challenge implicit biases concerning ethnicity and role—the “Latino drug trafficker”<sup>270</sup>—rather than implicit biases about black males. Nevertheless, counsel's effectiveness in countering various stereotypes was sufficiently impressive that I concluded that

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<sup>268</sup> Capital defense lawyer Michael Burt reproduced portions of this opening statement in his article in UMKC's symposium on Death Penalty Stories. See Michael N. Burt, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. REV. 877, 897–900 (2009). We use many of the same passages, but I have used other passages as well (taken both from the opening and closing statements). Like me, Mr. Burt used the opening statement to provide an example of effective storytelling, concluding that an “effective opening statement in the sentencing phase of a capital trial ‘must . . . develop the nature and character of the people involved.’” *Id.* at 900 (citing Gerald R. Powell, *Opening Statements: The Art of Storytelling*, 31 STETSON L. REV. 89 (2001)). I wholly agree with this statement but am examining the opening statement in a slightly different light. I am particularly concerned with how the opening statement's narrative and metaphors challenge culturally embedded images and master stories with other culturally embedded images and master stories; that is, I examine how the opening statement's narrative may inhibit activation of schemas involving Latinos and drug traffickers.

<sup>269</sup> *United States v. Quinones*, 511 F.3d 289 (2d Cir. 2007).

<sup>270</sup> Psychological studies suggest widespread implicit bias against Latinos. See Kang, *supra* note 36, at 1512 (citing study).

a discussion of his techniques and narrative choices should be fruitful to someone seeking to counter implicit racial biases.

What follows is an examination of defense counsel's opening and closing statements during the penalty phase of the capital trial of Mr. Quinones. In considering these statements, one should be aware of the evidence to which the jury already had been exposed. A short summary of such evidence follows.

At the guilt-or-innocence phase of trial, the jury had convicted Quinones of racketeering, drug trafficking, and the murder of a confidential informant in relation to a continuing drug enterprise.<sup>271</sup> The guilt-or-innocence phase evidence indicated that Quinones was a relatively large scale dealer of cocaine and heroin, distributing drugs obtained from Florida and New York in Pennsylvania.<sup>272</sup> The United States also introduced evidence that, upon learning one of his associates had informed upon him and set him up for arrest, Quinones spent three months looking for the man and threatening to "put his head in a box."<sup>273</sup> Quinones eventually located the informant, whom the police later found hog-tied and burned beyond recognition; the medical examiner's reports suggested the informant had died of asphyxiation.<sup>274</sup> There was evidence that Quinones bragged about the murder and claimed to relish the chance to kill another informant.<sup>275</sup>

As should be apparent, the defendant entered the sentencing phase of trial burdened by several deeply embedded (not to mention deeply negative) narratives and images. Foremost among these are the culture's master stories about drug violence and character schemas for drug dealers. According to our culture's deeply embedded (in my view) character schemas, drug dealers or traffickers are ruthless, violent, avaricious, and—importantly here—often Latino underworld parasites who prey on economically depressed communities and kill brutally and without compunction. I suspect that for most who serve on federal juries, a drug trafficker is almost wholly *Other*, and capital jurors tend to kill those whom they view as *other*—especially when those *others* do, in fact, appear to be quite violent. In countering the prosecution's narrative, with its deeply embedded character schemas, attorney Kevin McNally employed a number of devices:

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<sup>271</sup> *Quinones*, 511 F.3d 289. The facts I provide about the guilt-or-innocence phase of the trial are taken directly from the Second Circuit's opinion. Obviously certain questions of facts were disputed at trial, and, just as obviously, the facts from the court's opinion necessarily are incomplete. That said, the jury at least heard—and, to a degree, accepted—a more elaborate version of the facts recounted in the Second Circuit's opinion.

<sup>272</sup> *Id.* at 292.

<sup>273</sup> *Id.* at 293.

<sup>274</sup> *Id.* at 294.

<sup>275</sup> *Id.*

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- Use of an initial metaphor both to challenge the “Latino drug trafficker” schema and to alter the setting for the narrative;
- Presentation of Quinones as a counter-stereotypical exemplar among drug traffickers, thereby exempting him (to a degree) from the “Latino drug trafficker” schema;
- Invocation of competing role schemas (not to mention a competing master story) that both countered the “Latino drug trafficker” schema and better explained all of Quinones’s behavior;
- Brief invocation, during the closing argument, of a cultural master narrative concerning the immigrant story and the American Dream that placed Quinones squarely within a broad American tradition.

Each of these devices helped to neutralize and, at times, to upend the negative schemas suggested by many of the facts of the crime and by the prosecution’s narrative.

#### 1. The Opening Metaphor

Defense lawyer Kevin McNally began his penalty phase opening statement with a simple metaphor: “36 years ago a *child of God* was born, and I say that because all children are children of God.”<sup>276</sup> Although McNally’s metaphor may appear trite at first blush,<sup>277</sup> the metaphor is deeply embedded within American culture and quickly and effectively furthers at least three aims essential to an effective defense.

First, recall that implicit stereotypes can be less powerful when persons have been primed with ideals of fairness and nondiscrimination.<sup>278</sup> Here, the “child of God” metaphor implicitly primes within jurors one of the central values animating Eighth Amendment jurisprudence: namely, respect for the dignity of the individual—that is, the idea that every individual in society is a person of worth and that, therefore, any punishment must be based on individual facts and circumstances, not generalities. By selecting an image most jurors would accept, McNally is implicitly reminding them of their own commitments not to be reductive when determining character—someone is

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<sup>276</sup> Transcript of Record at 2942, *Quinones*, 511 F.3d 289 (No. 00-761) [hereinafter *Quinones* Transcript] (emphasis added).

<sup>277</sup> Note, however, that it appears trite in part because it is so well-accepted; even many atheists would embrace the general sentiment the metaphor is intended to express.

<sup>278</sup> See *supra* notes 158–160 and accompanying text.

never *just* a drug trafficker or a member of a particular ethnic group, so the jury should listen carefully to all of the evidence about who Quinones is. In narrative terms, this metaphor establishes Quinones as a round character rather than the flat character implied by the “Latino drug trafficker” character schema: to be a child of God is to be complex, worthy of respect and sustained and serious consideration.

Second, recall that capital jurors are less likely to impose death sentences upon those for whom they feel empathy, but that otherness can equal death.<sup>279</sup> Here, the “child of God” metaphor not only primes jurors to treat Quinones as an individual, but also challenges the characterization of Quinones as *Other*. A “Latino drug trafficker” may be *Other*, but we are *all* “children of God.” Rather than the law-abiding jurors existing within one circle and the defendant drug trafficker within a foreign, frightening, and far away circle, the jurors and Quinones are joined within one circle from the beginning of the opening statement. This image thus not only challenges the reductive drug trafficker schema but opens the door to empathy.

Third, the “child of God” image subtly alters the setting in which the narrative takes place. While the guilt-or-innocence narrative may have been set only around the time of the crime itself, the sentencing narrative begins much earlier and concerns issues far broader than merely the crime itself. In short, the very beginning of defense counsel’s opening statement signals to audience members that they’re about to hear a new story, one with a round character (the child of God, with his individual traits) rather than the flat, stereotypical “drug trafficker” of the guilt-or-innocence phase, and one that begins long before the crime of which Quinones was convicted.

## 2. The Defendant as Counter-Stereotypical Exemplar

Defense counsel’s work to neutralize the “Latino drug trafficker” schema hardly stopped at his opening metaphor. Counsel also undermined the negative character schema by acknowledging that although Quinones had, in fact, trafficked in drugs, he was an extremely atypical drug dealer—that is, a counter-stereotypical exemplar or, at the least, a subtype. (Recall that presentation of counter-stereotypical exemplars can reduce or inhibit activation of implicit biases.<sup>280</sup>)

Throughout the opening and closing statements of the sentencing phase of trial, McNally called attention to facts showing Quinones’s atypicality as a drug trafficker. At times McNally was explicit: “[t]his is not a common drug dealer. You won’t find evidence of big cars and mansions and flashy jewelry

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<sup>279</sup> See *supra* notes 234–237 and accompanying text; see also *supra* notes 148–149 and accompanying text (describing jurors’ frequent lack of empathy for black defendants and the resulting effect on sentencing decisions).

<sup>280</sup> See *supra* notes 161–163 and accompanying text.

and being self-centered and being that kind of stuff.”<sup>281</sup> During closing, McNally pointed out that rather than spend his money on mansions and jewelry, Quinones spent it as a “secret Santa” for orphans in his neighborhood,<sup>282</sup> spent it on bribes to secure housing for his mentally ill mother,<sup>283</sup> and spent it helping his sister “dry out” and establish a new life for herself.<sup>284</sup>

On other occasions, McNally’s presentation of Quinones as a counter-stereotypical exemplar is less explicit. Rather than expressly invoking the common stereotypes concerning drug traffickers, McNally simply points to facts that are inconsistent with such stereotypes. For example, he notes that Quinones “treats women with incredible respect. . . . [He has] female friends that he listens to and cares about. . . . He has not had sexual relationships with these women. These are women who are his friends.”<sup>285</sup> Indeed, Quinones “never raised a hand to a woman.”<sup>286</sup> He helped his nieces and nephews with their homework.<sup>287</sup> Although none of these details change the actual fact Quinones has trafficked in cocaine and heroin, they nonetheless distance him from the common stereotype of the drug trafficker as avaricious, materialistic, and violent toward women.

### 3. Employment of Competing Role Schemas and Use of Archetypal Characters

McNally most strongly counters the “Latino drug trafficker” schema and the implicit associations accompanying it through his use of a competing role schema. Recall that there are many schemas that may “fit” any particular person and that the activation of one schema may inhibit the activation of other, inconsistent schemas (for example, a female engineer may be perceived as good at math despite a schema for women as mathematically inept).<sup>288</sup> Recall, as well, a related point: schemas for archetypal characters are quite powerful,

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<sup>281</sup> Quinones Transcript, *supra* note 276, at 2957; *see also id.* at 3953 (“The money may have been from illegal activities, but he could have bought a mansion, or he could have bought expensive jewelry, or he could have lived like your ordinary drug dealer. But that’s not who he is.”).

<sup>282</sup> *Id.* at 3955; *see also id.* at 2961 (“He did a secret Santa every year, which is where he would go and read the letters that children would write, and he would pick the ones which the child wanted something not for themselves but for their family, and he would give them those presents.”).

<sup>283</sup> *Id.* at 3953.

<sup>284</sup> *Id.* at 3950, 3953.

<sup>285</sup> *Id.* at 2955.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 3954.

<sup>288</sup> *See supra* notes 152–153 and accompanying text.

and once such schemas are activated, listeners tend to interpret additional information in ways that are consistent with the schema and that validate their expectations for the archetypal character.<sup>289</sup>

Rather than leave the jury to accept the “Latino drug trafficker” stereotype of Quinones, McNally invokes several character archetypes that cast Quinones in a positive light while acknowledging and explaining his illegal behavior. At various times during the opening and closing statements of the sentencing phase, McNally depicts Quinones as Father/Protector and as Self-Sacrificing First Generation Immigrant.

a. Father/Protector

The depiction of Quinones as a protective father figure initially is buried in McNally’s narrative concerning Quinones’s life as an abused and vulnerable child.<sup>290</sup> The early portion of the opening statement during sentencing recounts in detail Quinones’s horrific and deprived childhood:

- As a child, Quinones knew hunger: a social worker documented that at one point, the food for the household of seven consisted of some rice and a can of peas.<sup>291</sup> “Mayonnaise sandwiches were a meal.”<sup>292</sup>
- He was exposed repeatedly to domestic violence: on one occasion, Quinones and his brother were afraid to come home for three days because they feared their mother “was lying there dead” after a brutal beating administered by their father;<sup>293</sup> on another occasion, he witnessed his father “sexually abusing his half sister Diana.”<sup>294</sup>
- Quinones himself suffered violence at the hands of family members; for example, he once tried to stop his father from stabbing his mother, and his father “lift[ed]

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<sup>289</sup> See *supra* notes 184–193, 201 and accompanying text.

<sup>290</sup> One might argue that McNally creates a rescue narrative as well, but discussion of that narrative is beyond the scope of this Article.

<sup>291</sup> Quinones Transcript, *supra* note 276, at 2944.

<sup>292</sup> *Id.* at 2945.

<sup>293</sup> *Id.* at 2948; see also *id.* at 2946 (“The boy first remembers his father cornering his mother when he was three years old.”); *id.* at 2947 (noting that “the father’s attacks on the mother increased, becoming more and more violent”).

<sup>294</sup> *Id.* at 2949.

him up by the neck up against the wall and choke[d] him.”<sup>295</sup>

- Quinones grew up in violent, drug-infested communities: he and his siblings “remembered the gunfire [in their neighborhood] and diving under the table or under the bed for protection.”<sup>296</sup> On another occasion, the child Quinones saw a gang beat a man until blood ran from the man’s mouth.<sup>297</sup>
- Quinones and his siblings enjoyed practically no security or nurturance; by age twelve, Quinones had lived in between ten and twenty different foster homes, shelters, and welfare hotels.<sup>298</sup> Moreover, his mother suffered from both psychiatric illness and various drug addictions, his father abused drugs, and the family lacked the help of any extended family members.<sup>299</sup> The family was in such desperate straits that the human beings—the children of God—in the family were not valued even in ways most people take for granted:

The family did not celebrate holidays or birthdays, certainly not in the later years. There were no turkeys cooked on Thanksgiving. The child never had a birthday party. He never had a birthday cake. And, as he would put it years later to a psychologist, not even a cupcake with a candle.<sup>300</sup>

To be sure, even standing alone, the description of Quinones’s tragic childhood is powerful: what “child of God” deserves the childhood Quinones got? Nonetheless, this form of mitigation standing alone carries risks. Most capital defendants have suffered horrific childhoods, and, as demonstrated above in Part III, such evidence may, at times, reinforce certain negative schemas: here, the idea that, yes, many drug dealers come from bad backgrounds, so this man is just like the others and deserves more or less the same thing—a bad end. However, McNally uses these horrible facts as a setting for the introduction of a deeply embedded character archetype—Father/Protector—that better (and more sympathetically) explains Quinones’s illegal behavior.

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<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 2946.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 2944.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 2947.

Even relatively early in the narrative of Quinones' life as depicted in the opening statement, Quinones begins to function as a protector. While describing the terrible deprivation and abuse suffered by Quinones and his siblings as children, McNally points out Quinones' attempts to protect others: "[H]e would hide little pieces of bread and then later share them with his brothers and sisters when there wasn't any food."<sup>301</sup> Later, but still during childhood, Quinones got a job at a grocery store and "[w]hen he earned money, he would run home and give it to his mother to help support the family."<sup>302</sup> Indeed, McNally depicts Quinones's entry as a teen into the drug trade as an attempt by an uneducated, traumatized, and culturally deprived young man to lift his family from its desperate poverty.<sup>303</sup>

The image of Quinones as a protector and father figure grows stronger throughout the narrative. In fact, immediately after recounting Quinones's transition from boyhood to manhood,<sup>304</sup> McNally focuses on Quinones's paternal qualities. Specifically, Quinones supplies to others not only material goods and physical security, but also the nurturance he and his siblings were denied. He supports his parents and siblings,<sup>305</sup> but more importantly, he nurtures the "next generation."<sup>306</sup> Although he never had as much as a cupcake with a candle on it, for his own child and at least twenty other children<sup>307</sup> he "remember[ed] birthdays, [gave] Christmas gifts, [took] them out to eat and [talked] to them about the importance of staying in school and staying off the streets . . . [and] about relationship problems."<sup>308</sup> A niece he helped was attending college at the time of the trial.<sup>309</sup> As defense counsel summarizes it, "the evidence will be that he tried to create a family."<sup>310</sup>

Introduction of the Father/Protector schema is especially important. First, his growing up to be a nurturing parent is remarkable given his

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 2952–53 ("Being without food and decent clothes, a safe place to sleep for so long, he just decided that he was going to go out and support not only himself but as many of his family as he possibly could. . . . [B]eing a kid with a sixth grade education and no skills, his options [for earning money] aren't really very many. I mean, I guess he could get a gun and go rob people, which he didn't, or he could sell drugs, which he did.").

<sup>304</sup> *Id.* at 2954 ("Over the years, this man, now a boy, grew to be a man.").

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 2957.

<sup>309</sup> *Id.* at 2955.

<sup>310</sup> *Id.* McNally also points out that Quinones's paternal protectiveness and generosity extended beyond his biological family. For example, upon learning of orphans in his neighborhood, Quinones "decided that they [had] to have school clothes and school supplies." *Id.* at 2958.

background; that he grows up to treat his children well suggests his intrinsic goodness. Second, the Father/Protector schema puts his unlawful behavior into context: fathers and protectors use whatever means they have to provide for and protect their families, and, given Quinones's childhood, his perceived (and actual) options were quite limited. The depiction in the narrative of Quinones as a protective father figure "redeems" much of his unlawful activity: although he did many bad things, he did them in service of ultimately admirable ends. In short, many of his actions have been bad, but he himself is not.

b. Self-Sacrificing First Generation Immigrant

At the beginning of his closing argument during the penalty phase, McNally briefly invokes another deeply embedded cultural image—that of the first generation immigrant:

To impose a death sentence on this first-generation immigrant who grew up in the killing fields of the Bronx, one witness [who] . . . talked about it [said it] reminded him of Berlin at the end of World War II. . . .

. . . Would imposing a death sentence on this first-generation immigrant, who grew up the way he grew up and who struggled to lift up his family and *in the end sacrificed himself to do that*, would that be the moral decision that we want to make here?

Look at the second generation. . . . Look at these children here who have been lifted up . . . would that be a moral decision?<sup>311</sup>

Like the Father/Protector image, this image—not to mention the master story that accompanies it—challenges the "Latino drug trafficker" schema. First, the "first generation immigrant" characterization undermines the notion that Latino immigrants are somehow foreign and not legitimately American: to be a first generation immigrant is to be a familiar character in a uniquely American narrative. Second, given the considerable evidence of Quinones's generous, nurturing behavior, the cultural narrative about first generation immigrants better explains his behavior—even his criminal behavior—than does the cultural narrative about drug traffickers. The cultural master story about first generation immigrants is that they sacrifice themselves for the sake of later generations. Here, Quinones's entry into the drug business and, perhaps more importantly, his return to it after an attempt at a low-paying "legitimate" job are depicted as acts of self-sacrifice necessary for saving, protecting, and creating opportunities for his immediate family and for the next generation:

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<sup>311</sup> *Id.* at 3935–36 (emphasis added).

This is the choice he had when he came out of prison [the choice whether to have a lawful, low-paying job or the choice to continue in the drug business]. . . .

His mom was essentially homeless. Diana is in prison, Anibal is in prison. Afortunada needed help. [referring to siblings and other close relatives]

He thought his nieces and nephews were at risk. Lily with her seven children. . . . He's working at Kutztown Foundry [a "legitimate" job], and he's working at other places in Pennsylvania, and he worked hard. He was trying to lift his family up, but he couldn't do it.

He couldn't do what he wanted to do.

And perhaps he made an unconscious decision to risk his own life. He never imagined it would result ultimately in the death of Edwin Santiago, Jr. He may have thought it would result in his own death. But he did it for others, not because he wasn't happy eating red beans and rice. He did it for others. It makes a difference. This is a choice that he had. He could cut them loose or he could not.

He frankly was incapable of cutting them loose psychologically because of who he is.<sup>312</sup>

Finally, note the close connection between pretrial investigation and the ability to neutralize jurors' implicit biases. Had defense counsel's investigation been less thorough, he may not have been able to identify competing role schemas or ways in which the defendant was a counter-stereotypical exemplar. Moreover, had McNally been less sensitive to the jurors' likely preconceptions (or implicit biases) about "Latino drug traffickers," his narrative strategies certainly would have been less effective. Ultimately, the jury determined death was not the appropriate punishment for Alan Quinones. Apparently counsel's strategies worked.

#### *B. Christopher Williams*

This section concludes with a short analysis of the opening and closing arguments in a capital case in South Carolina. Unlike Alan Quinones, Christopher Williams was sentenced to death by a capital jury.<sup>313</sup> The defendant, Christopher Williams, was black, and the victim, Mandy

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<sup>312</sup> *Id.* at 3952–53.

<sup>313</sup> *State v. Williams*, 690 S.E.2d 62 (S.C. 2010).

Williams,<sup>314</sup> was white. They were co-workers at a local grocery store in a medium-sized Southern city, and they had dated briefly.<sup>315</sup> Mr. Williams shot Ms. Williams to death during a hostage standoff at the grocery store, and the State of South Carolina sought the death penalty.<sup>316</sup> The major mitigating evidence during sentencing concerned Mr. Williams's fragile mental state: specifically, the defense presented evidence that the twenty year-old Mr. Williams was abused and neglected as a child, suffered from mental illness, and basically had decompensated during the two months prior to the crime itself.<sup>317</sup>

Before the opening and closing statements are examined, a few points merit discussion.

First, one reasonably can assume that the risk of implicit racial bias was particularly high. The crime was committed by a black male against a white female, and, as many studies have indicated,<sup>318</sup> racial sentencing disparities tend to be greatest in cases involving black defendants and white victims.<sup>319</sup> Moreover, as Professors Lynch and Haney have concluded,<sup>320</sup> white jurors (at least mock jurors) tend to lack empathy for black defendants in such situations and even tend to view mitigating evidence as aggravating. Third, the defendant was a young black male, and major implicit associations with such a group include anger and violence. Although there was obvious anger and violence in the case itself, implicit racial bias could lead jurors to interpret any ambiguous evidence consistent with greater moral culpability and a higher risk of future dangerousness.<sup>321</sup>

Second, although the prosecution's case for guilt was very strong, the sentencing case was a close one.<sup>322</sup> Given the defense's strong case in mitigation, the need to use strategies to neutralize jurors' implicit racial bias was particularly acute: jurors with strong implicit biases will not hear a black defendant's evidence in mitigation as fully or as sensitively as will jurors without such biases. Accordingly, the opening and closing statements assumed particular importance.

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<sup>314</sup> Christopher Williams was not related to Mandy Williams.

<sup>315</sup> *Williams*, 690 S.E.2d at 63.

<sup>316</sup> *Id.*

<sup>317</sup> See Transcript of Record at 2383–86, 2391, 2393, *Williams*, 690 S.E.2d 62 [hereinafter *Williams Transcript*].

<sup>318</sup> See *supra* note 61 and accompanying text.

<sup>319</sup> Moreover, Southern jurors—particularly any older Southern jurors—may have disapproved of the prior interracial relationship between the defendant and the victim.

<sup>320</sup> See *supra* notes 143–144, 148–149 and accompanying text.

<sup>321</sup> See *supra* note 90 and accompanying text. Recall as well that the principle of outgroup derogation suggests white jurors might attribute Williams's violent behavior to a stable internal disposition rather than to external stressors.

<sup>322</sup> Although the jury ultimately returned a death sentence, initially it was deadlocked during sentencing deliberations, with three jurors favoring life. *Williams*, 690 S.E.2d at 64.

Unfortunately, however, defense counsel's opening and closing statements during sentencing (and during guilt, where Mr. Williams's mental state was at issue to a degree) made little use of any metaphors or narrative strategies that might have neutralized jurors' implicit racial biases. This is not to say that counsel's statements were inadequate, simply that they did little to neutralize implicit racial biases. Obviously defense counsel were well prepared for the sentencing trial: they had gathered substantial evidence concerning the defendant's horrific childhood, mental illness, and deterioration, and they alluded to such evidence repeatedly during their opening and closing narratives.<sup>323</sup> Nonetheless, the opening and closing narrative did not include many strategies to neutralize racial bias. Comparisons with the opening and closing statements in *United States v. Quinones* make this clear.

First, however, defense counsel did prime certain important values. Like defense counsel in *Quinones*, Williams's lawyers reminded the jurors of two of the central values animating the Eighth Amendment's prohibition on cruel and unusual punishment: the dignity of human life and the duty of individualized consideration during sentencing. As discussed above, defense counsel for Quinones primed these values—both of which tend to neutralize racial and ethnic schemas based on stereotypical ideas about groups—by using a metaphor: “A child of God was born.” Here, Williams's counsel more directly reminded the jurors of the values in question: “We want you to listen and to consider what you hear . . . because in fact life, *any life* is worth giving meaningful consideration.”<sup>324</sup> Antidiscrimination norms and other values can be primed both directly and indirectly,<sup>325</sup> and here Williams's counsel directly reminded jurors of the value of every human life. One might question whether the reminder might have been even more effective had counsel used a widely accepted metaphor (like *child of God*) or had counsel more frequently used words that prime antidiscrimination norms (e.g., *fairness*).<sup>326</sup>

Also like counsel in *Quinones*, defense counsel for Williams arguably included one counter-stereotypical exemplar. (Recall that use of counter-

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<sup>323</sup> See, e.g., Williams Transcript, *supra* note 317, at 1529 (describing “erosion of Chris's ability to control himself”); *id.* at 1530–31 (describing Williams's mental health spiraling out of control and culminating in a suicide attempt, a bizarre open assault, and the crime in question); *id.* at 1534–35 (noting that the State obviously recognized that the defendant may have suffered from psychiatric illness); *id.* at 2383–84 (describing Williams's “atrocious family”); *id.* at 2385 (“He is the face of mental illness.”).

<sup>324</sup> *Id.* at 2126 (emphasis added).

<sup>325</sup> See, e.g., Blasi, *supra* note 101, at 1276 (noting the importance of activating antidiscrimination norms “either directly or indirectly”).

<sup>326</sup> *Id.* at 1277 (“For example, it appears that merely seeing or hearing words like ‘fairness’ can cause people to behave as if they are more committed to being fair, entirely without the conscious knowledge of the subjects. This suggests that lawyers or others interested in countering the effects of automatic stereotyping should insert into their presentations as many contrarian priming words, pictures, and other stimuli as possible.”).

stereotypical exemplars can inhibit implicit racial biases.)<sup>327</sup> In *Quinones*, Alan Quinones himself was the counter-stereotypical exemplar: he was a very atypical drug trafficker. In *Williams*, the counter-stereotypical exemplar was the defendant's sister. Despite coming from an abusive, difficult background, Williams's sister, Maureen, became a college-educated professional: Williams's lawyer pointed out, "You know Maureen was kind of smart. Maureen's kind of smart. Maureen has put herself through college and has become a nurse and she's thought about how other families do it, and she's trying to do it."<sup>328</sup>

Although counsel's discussion of Maureen's accomplishments legitimately served important narrative purposes, unfortunately it likely did little to inhibit activation of jurors' implicit racial biases. This is true for three reasons. First, the relevant implicit bias likely concerned African-American males as opposed to African Americans more generally, so an African-American female probably really *isn't* a counter-stereotypical exemplar in this context. Second, even assuming the relevant implicit bias concerned African Americans generally, Maureen may well not have been considered a counter-stereotypical exemplar, but, instead, a subtype ("the educated African American") that left the larger stereotype untouched.<sup>329</sup> Third, defense counsel explicitly contrasted the "kind of smart" Maureen with her "not the smartest guy in the world"<sup>330</sup> brother. Given these reasons, the discussion of Maureen was unlikely to neutralize any implicit biases.

To a (minor) degree, counsel depicted Christopher Williams himself as a counter-stereotypical exemplar by pointing to ways in which Mr. Williams may not have fit the "black male criminal" stereotype. Counsel pointed out that Mr. Williams "didn't use drugs"<sup>331</sup> despite a terrible childhood. Although Mr. Williams had acted violently, it was during a "two-month period in his life"<sup>332</sup> and was attributable to mental illness, a condition that ran in his family.<sup>333</sup> In short, if jurors hold implicit beliefs that black male violence is linked to persistent anger and a generally violent disposition, then attributing Mr. Williams's violence to a short-term "melt down" caused by mental illness (rather than by characteristic anger or dangerousness) may have helped to exempt him, to a degree, from the usual stereotype.

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<sup>327</sup> See *supra* notes 161–162 and accompanying text.

<sup>328</sup> Williams Transcript, *supra* note 317, at 2384.

<sup>329</sup> See *supra* notes 161–163 and accompanying text.

<sup>330</sup> Williams Transcript, *supra* note 317, at 2386.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 2392.

<sup>333</sup> *Id.* at 2386 ("This is something that was given to his dad, this mental illness, it was given to his mom. It was given to his grandparents, and it's been given to him. And he didn't choose that.").

Generally, though, the defense narrative did little to neutralize any implicit racial biases jurors may have held. In fact, if Alycee Lane is correct,<sup>334</sup> then the defense's portrayal of Mr. Williams's "atrocious" and indifferent family, with a mother who did nothing when her young son was struggling in school<sup>335</sup> and a father who left the family,<sup>336</sup> may actually have exacerbated the jurors' implicit racial stereotypes. That said, the evidence concerning Mr. Williams's background was both true and significantly mitigating. What is one to do if what should be mitigating has the potential to activate (or even exacerbate) jurors' unconscious prejudices? There are no simple answers, but, when crafting opening and closing arguments, counsel should carefully consider (1) how to prime themes based on fairness and equality, (2) how to incorporate counter-stereotypical exemplars in the narrative, and (3) what kinds of schemas might "fit" a client while supplanting jurors' unconscious racial schemas. In short, counsel's strategy must take into account the risk that, if not countered, jurors' implicit racial bias may become an (invisible) star witness for the prosecution.

#### V. CONCLUSION

My recommendations are tentative and modest, ultimately amounting to little more than a *cri de coeur*. The stories death penalty lawyers tell in opening and closing statements will not—cannot—eliminate implicit racial biases that have been several hundred years in the making and that remain pervasive in the United States. Indeed, the stories likely cannot even send such biases into hibernation for the duration of a capital sentencing trial. Nevertheless, death penalty lawyers must *try* to neutralize the invisible witness—jurors' implicit racial bias—first by learning about this witness, then by studying and considering how best to discredit his pernicious testimony. Both vigorous advocacy and fundamental principles of justice demand no less.

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<sup>334</sup> See *supra* notes 261–263 and accompanying text.

<sup>335</sup> Williams Transcript, *supra* note 317, at 2388 (describing parental indifference to the defendant's struggles in school).

<sup>336</sup> *Id.* at 2385 ("And Dwight left a family situation that was so bad it caused him to leave his son. Now, that's either an indictment of the family or an indictment of Dwight. . . . Either way, it's not good for Chris.").