REWRITING HISTORY: THE USE OF FEMINIST NARRATIVES TO DECONSTRUCT THE MYTH OF THE CAPITAL DEFENDANT

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Those whom we would banish . . . from the human community . . . often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of the courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.[1]

[W]hen you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated, gone.[2]

'The accused is innocent until proven guilty'—jurors take this fundamental tenet of the United States criminal justice system seriously as they approach their role as deciders of a defendant's fate. What happens after a verdict is rendered is markedly less clear. Once a guilty verdict has been handed down, the defendant in a criminal trial can too easily cease to be seen as a "person" and be reduced in the eyes of a jury to no more than the sum of his worst actions.[3] This transition can be especially damaging in the penalty phase of a capital trial, where a jury that has declared a defendant's guilt minutes before is now asked to look beyond the defendant's crime and determine if he is worthy of life.

In the past thirty years, American attitudes towards those convicted of crimes have followed a devastating progression toward the dehumanization of criminal defendants. The evolution of law and policy has mirrored these changing attitudes. The philosophies behind incarceration have shifted from "facilitat[ing inmates'] productive re-entry back into the free world" to "us[ing] imprisonment merely to punish criminal offenders by . . . 'containing' them

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1. McClesky v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).

2. CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987).

3. As the vast majority of individuals on death row in the United States are male, I refer to capital defendants as "he" throughout this paper. *See* Death Penalty Information Center, *Women and the Death Penalty, at* http://www.deathpenaltyinfo.org/womenstats.html (last visited Feb. 2, 2002) (identifying 1.45% of death row inmates as female as of October 1, 2001, and noting that 8 women have been executed since 1976); Victor L. Streib, *Death Penalty for Female Offenders*, 5 (noting that between 1900 to 2000, women comprised 0.6% of all persons executed in America), *at* http://www.law.onu.edu/faculty/streib/femdeath.pdf (last updated Feb. 2001).

behind bars . . . for as long as possible."[4] Rather than preventing crime or rehabilitating offenders, incarceration has become a means to satisfy society's desire for vengeance and retribution. Responding to this push to punish, prosecutors in their haste to obtain a conviction are more likely to stress the heinousness of crimes rather than questioning the circumstances surrounding their commission.

In the wake of society's demands for harsher punishments, recent Supreme Court jurisprudence increasingly has de-emphasized the personhood of offenders.[5] Notably, the Rehnquist Court has upheld the Federal Sentencing Guidelines, which significantly reduce judicial discretion to consider rehabilitative goals or defendants' individualized characteristics when meting out punishment;[6] the Court has severely restricted the availability of habeas corpus, even to defendants who have evidence supporting claims of innocence;[7] and the Court has disregarded the principle of *stare decisis* in order to allow the introduction of highly prejudicial victim impact statements, even in cases where the defendant's life is at stake.[8]

In the clamor urging the dehumanizing of defendants, defendants themselves have been left silenced, powerless to speak on their own behalf. Apart from the legal restrictions placed on criminal defendants, the most frequent defendants in capital trials are individuals who are economically deprived,

4. Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN'S L.J. 27, 56 (1998) [hereinafter Haney, *Devolving Standards*].

5. *See* Judge Stephen Reinhardt, *The Anatomy of an Execution: Fairness v. Process*, 74 N.Y.U. L. Rev. 313, 315 (1999) ("The Rehnquist Court will be remembered for . . . elevating procedural rules over substantive values and limiting rights generally, especially those of racial minorities."); *see also* Haney, *Devolving Standards*, *supra* note 4, at 27–28 ("[T]he health and well-being of the nation in the waning years of the 20th century are threatened less by a crime wave than a *punishment wave* . . . . Over the last twenty years, the United States has witnessed truly unprecedented growth in its punishment industry—both in the amount of pain we dispense in the name of 'criminal justice' and, correspondingly, the size of what is sometimes referred to as the 'prison industrial complex.' . . . [S]uch expansion has been so spectacular and unlike anything else we have seen in the history of criminal justice in this society that even the word 'unprecedented' does not quite begin to capture it.").

6. *See* Mistretta v. United States, 488 U.S. 361 (1989).

7. *See* Teague v. Lane, 489 U.S. 288 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989). In addition, the guarantee of due process in capital cases has been implicated by the 1996 adoption of the federal Anti-Terrorism and Effective Death Penalty Act (AEDPA), which limits federal review of state court convictions and the availability of habeas corpus at the federal level. *See* Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1217, 1217–26 (1996) (codified as amended in scattered sections of 28 U.S.C.).

8. *See* Payne v. Tennessee, 501 U.S. 808, 825 (1991) (White, J., dissenting) ("[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society."), *rev'g* Booth v. Maryland, 482 U.S. 496 (1987); *see also* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1544, 1554 (1998) ("Having been exposed to [victim impact] testimony, jurors may come to think of themselves almost as the victim's agent, thus potentially eroding any prevailing norms of . . . individual juror responsibility.")

learning disabled individuals, or survivors of childhood neglect and trauma,[9] who are ill-equipped to express themselves in the face of the rigid structure of a trial and the pressure of a jury's desire for justice. The arena of a trial neither encourages defendants to express nor urges jurors to seek out alternative voices, especially those that may be critical of society, or those that are difficult or disheartening to hear. When the defendant's life is at stake, the consequences of this silence can be tragic.

The same majoritarian forces that work to silence capital defendants have also historically suppressed the voices of women.[10] In an attempt to discover and recover buried female voices, feminist novelists have constructed stories, or narratives, that highlight the forces that work to oppress and silence certain groups and individuals. The works of Virginia Woolf, Jeanette Winterson, Gregory McGuire, Toni Morrison, and Angela Carter forcefully address stereotypes about women that abound in our society and challenge those stereotypes by placing them in the context of individual stories.

The physical attributes and economic and experiential differences of women, like the economic, racial, or experiential differences of most capital defendants, have traditionally functioned to exclude both groups from achieving full status within society. Feminists—especially feminists of color—and many legal theorists agree that communities do not offer everyone the same potential to fit into a societal order.[11] As demonstrated by African-Americans' experiences during slavery, skin color and appearance may function as a proxy for cultural difference that allows society to blame the marginalized for their own disadvantaged status. In the case of African American slavery, society misinterpreted cultural difference as ignorance and depravity, and attributed these faults to the inherent character of the victims. These supposedly inherent features of the voiceless then became the justification for their brutal oppression.[12]

Many feminists claim that the systemic flaws which generate such inequality are reflected more strongly in society's attitude toward women, than toward the members of any other group.[13] Because of women's obvious physical

9. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 561–63, (1995) [hereinafter Haney, *Social Histories*]; *see infra* Parts IV.A, IV.C (discussing the prevalence of poverty and mental dysfunction in the lives of capital defendants).

10. *See* HÉLÈNE CIXOUS & CATHERINE CLÉMENT, THE NEWLY BORN WOMAN 7 (Betsy Wing trans., 1975) (reviewing social theory literature on suppression of women's voices).

11. *See id.*

12. *See* DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION 58–59 (1998).

13. CIXOUS & CLÉMENT, *supra* note 10, at 8. According to Catherine Clément, women historically have been prone to being stereotyped and confined by society because they are "allied with what is regular, according to the rules, since they are wives and mothers, and allied as well with those natural disturbances, their regular periods." *Id.* At the same time, these regular, natural disturbances "are the epitome of paradox, order and disorder." *Id.* Clément remarks, "It is precisely in this natural periodicity that fear, terror, that which is offside in the symbolic system

difference from men—and men's discomfort with that difference—it historically has been all too easy for men in power to ostracize women or pigeonhole them into certain roles. Society's flaws similarly are exposed in the treatment of defendants during a capital trial. Society transfers its fear, anger and frustration onto the capital defendant, creating an environment in which the members of a jury (the designated representatives of social mores), the judge and the attorneys participate in the experience of ridding the community of the evil, personified in the form of the capital defendant.

In efforts to resist the de-personification of women, authors and literary critics have rejected the assumptions made by society by writing fiction which "assault[s], revis[es], deconstruct[s], and reconstruct[s] those images of women inherited from male literature."[14] Similarly, in the death penalty context, narrative can challenge jurors' preconceptions about the defendant, thereby "render[ing] the capital defendant's world of human rights and responsibilities accessible to the judge and jury [because] opening access to that shared world . . . encourag[es] judges and juries to forgive . . . ."[15] In these efforts to inspire jurors to acknowledge and explore their status as members of the same human community as the capital defendant, attorneys can learn much by referencing techniques used in feminist narrative. Lawyers representing capital defendants can look to these stories as a guide for telling the lives of their clients, and ensuring these voices do not go unheard.

Although parallels drawn between the historical difficulties faced by women and those currently experienced by capital defendants are by no means perfect, both feminists and defense attorneys face similar challenges in confronting pervasive stereotypes that have shaped the way society perceives these groups. Feminists and legal theorists use narrative because they have found that "moral redemption occurs through story."[16] Just as feminist fiction challenges society's misperceptions by giving voice to traditionally silenced women, attorneys' use of social and historical narrative encourages jurors to question preconceived notions regarding the accused.[17] Rather than reinforce jurors' views of the defendant as a proxy for society's distrust and apprehension, narratives help promote the recognition of the defendant as an individual within the "forum of a jury trial [which] can be a promising venue for transcending stereotypes

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will lodge itself." *Id.*

14. SANDRA M. GILBERT & SUSAN GUBAR, THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH-CENTURY LITERARY IMAGINATION 76–77 (1979).

15. Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 349 (1996).

16. *Id.* at 348.

17. *See* Russel Stetler, *Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan.-Feb. 1999, at 35–36, *available at* http://www.nacdl.org/public.nsf/champion/articles/99jan04. Stetler, the Director of Investigation and Mitigation for the Capital Defender Office in New York City, describes social history investigation as "the meticulous biographical inquiry aimed at understanding who the client is and what in his or her background will help to explain what happened in the alleged capital crime." *Id.*

[because it provides] a new way of looking at the world [in its] intense concentration on the clinical details of a unique set of facts."[18]

Webster's dictionary defines narrative as "story" and defines story alternately as "history" and "lie."[19] These opposing definitions reveal the wide range occupied by storytellers in every context. A capital trial often follows one story—the history of a defendant's prior crimes, the horrifying description of the crime at issue, the effects of that crime on the victim's family, and the anticipation of the defendant's future dangerousness. Though this story may be "true," behind the brutal facts offered by the prosecution is a human defendant whose life has been punctuated by personal difficulties and triumphs and influenced by numerous sociological factors. The prosecutor's case, though on one hand a "historical account" of the events, is also at least partly a lie because of what it excludes and ignores. The work of the counter-narrativist is to place this set of true facts, or "history," within a context that reveals another story behind them. This paper focuses on how feminist counter-narrative may be used by defense attorneys as a model for telling the life stories of their clients. Narrative allows for the revelation of the aspects of the lives of these individuals that are too often hidden by dominant social myths.

This paper begins with a brief overview of recent death penalty jurisprudence and explanation of the basic structure of the capital trial, focusing on the purpose fulfilled by the presentation of mitigating evidence in the penalty phase of the trial. The presentation of such evidence provides an ideal opportunity for the defense attorney to offer a counter-narrative to the dominant story of "good vs. evil" by bringing to the forefront the voice of the defendant. I then explore the numerous similarities between the stereotypes confronted by both feminist theorists and death penalty attorneys. The third section of the paper discusses how narrative techniques used by feminist authors can be employed by defense attorneys to combat these pervasive stereotypes. Finally, I discuss the problems of representation frequently encountered by novelists in the literary arena and explain how those same problems can be confronted and overcome by attorneys during a capital trial through reference to narrative.

18. James M. Doyle, *Representation and Capital Punishment: The Lawyers' Art: Representation in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 438 (1996) (citations omitted).

19. WEBSTER'S NEW COLLEGIATE DICTIONARY 1139 (1981).

I.
THE STRUCTURE OF A CAPITAL CASE AND THE IMPORTANCE OF MITIGATION

"He tells lies about us and he is sure that you will believe him and not listen to the other side."
"Is there another side?" I said.
"There is always the other side, always."[20]

We are like our clients' biographers. [W]e have to construct a story that broadens the focus from the single act of violence to a whole life . . . I keep waiting for some Justice on the Supreme Court to have [his or her] child commit a murder. Then our stories will really hit home. Because we feel so differently when we know the people. So we have to make the judges feel as if they know our clients. We have to tell their lives.[21]

In order to understand the significant role played by narrative in capital trials, one must first understand the state of death penalty law in the modern era, which most scholars deem to be the period after the Supreme Court rendered the administration of the death penalty unconstitutional in *Furman v. Georgia*.[22] The *Furman* court held that the Georgia capital punishment statute violated the Eighth Amendment because there was no meaningful statutory basis for distinguishing between those individuals given the death penalty and those given lesser sentences. After *Furman*, several state legislatures passed revised capital punishment statutes that purported to institute features that guarded against arbitrary application of the death penalty in an attempt to convince the Court to sanction a return to capital punishment.[23] In response to these newly-enacted statutes, the Court in *Gregg v. Georgia*[24] identified several principles it viewed as sufficient to direct and limit the discretion of sentencers to ensure that the death penalty not be arbitrarily applied. Such safeguards ostensibly ensure that the imposition of capital punishment is both consistent, meaning that defendants who have committed similar crimes receive similar sentences, and individualized, meaning that all persons who commit the same crime are not automatically given the same punishment.[25]

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20. JEAN RHYS, WIDE SARGASSO SEA 128 (1966).

21. Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 Harv. C.R.-C.L. L. Rev. 353, 369 (1996) (quoting a death penalty lawyer interviewed for purposes of the article).

22. 408 U.S. 238 (1972).

23. *See, e.g.*, Pulley v. Harris, 465 U.S. 37 (1984); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

24. 428 U.S. 153.

25. Unfortunately, it is inevitable that these goals will sometimes conflict. *See* Garvey, *supra* note 8, at 1544 n.21 (1998). In cases immediately post-*Furman*, including *Jurek*, 428 U.S. at 276, and *Pulley*, 465 U.S. at 44, the Supreme Court also intimated that a necessary safeguard against arbitrariness would include automatic appellate review of the proportionality of all death sentences

Currently, thirty-eight states have capital punishment statutes.[26] As required by the constitutional principles articulated in *Gregg*, statutory schemes in each of these states provide for a bifurcated process by which the death penalty may be imposed.[27] The first principle, death-eligibility, guards against the arbitrary imposition of the death penalty by requiring that states either narrow the class of crimes for which punishment by death is an option or specify that certain aggravating circumstances must be found in order for the sentencing authority to impose death.[28] The second principle, individualized sentencing, further guards against arbitrary application of capital punishment by disallowing the automatic imposition of death sentences for certain crimes.[29] Bifurcating the proceeding into two phases—the guilt phase, during which the jury determines whether the defendant is guilty of committing a murder for which the death penalty is an appropriate punishment, and the punishment (or penalty) phase, during which the jury makes an individualized determination as to whether the defendant should be sentenced to death or life in prison—ensures that these principles are satisfied.[30]

During the penalty phase, the jury must balance mitigating factors presented by the defense against aggravating factors presented by the prosecution. Aggravating circumstances introduced by the state may include any factors which "reasonably justif[y] the imposition of a more severe sentence on the

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by the state's highest appellate court with criminal jurisdiction. This criterion has, unfortunately, been severely limited. *Pulley*, 465 U.S. 37 (holding that there is no constitutional requirement for proportionality review of death sentences).

26. Death Penalty Information Center, *States With the Death Penalty*, *at* http://www.deathpenaltyinfo.org/firstpage.html#with (last visited Feb. 4, 2002) (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming).

27. *See* Steven Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 3 n.4 (1980).

28. *See* Garvey, *supra* note 8, at 1545; Tuilaepa v. California, 512 U.S. 967, 971–72 (1994) (requiring that death penalty statutory schemes narrow the class of death penalty-eligible defendants by "genuinely narrowing the class of murderers" and requiring the presence of an "aggravating factor"); *see also* Zant v. Stephens, 462 U.S. 862, 878 (1983) (stating that the Constitution requires aggravating circumstances to circumscribe the class of persons eligible for the death penalty).

29. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

30. *See* William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decisionmaking*, 83 CORNELL L. REV. 1476, 1479 n.7 (1998) ("The rationale for the two-stage proceeding is twofold. First, jurors should make the guilt decision without the contamination of punishment considerations. Second, they are supposed to make the punishment decision in accordance with different kinds of evidence, guidelines, and instructions than those that apply to the guilt decision."); *see also* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 24–25 (1997) [hereinafter Crocker, *Concepts of Culpability*].

defendant compared to others found guilty of murder."[31] The state has wide latitude in selecting which aggravating circumstances to introduce, though frequently they include the nature of the crime and the future dangerousness of the defendant.[32]

In order to effectuate individualized sentencing in capital cases, the Supreme Court has struck down statutes imposing the death penalty as mandatory punishment for certain crimes, holding that a mandatory death penalty does not comport with contemporary social values and does not avoid arbitrary decision-making by juries.[33] The Court has also determined that each capital defendant may not only introduce evidence that contradicts statutory requirements for imposing the death penalty, for example, to argue that that the victim was not actually a police officer or that the crime was not actually committed in the course of a robbery, but also has a constitutional right to introduce an extensive range of mitigating evidence during the penalty phase of his trial, evidencing the Court's recognition that "[j]ustice generally requires consideration of more than the particular acts by which the crime was committed."[34] In considering such evidence, a trier of fact must take into account "the circumstances of the offense together with the character and propensities of the offender."[35] To further guard against arbitrary application, the Court has broadly defined mitigating evidence to include "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers" as a basis for a sentence less than death.[36] In *Lockett v. Ohio*,[37] the Court stated:

> [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

31. *See* Garvey, *supra* note 8, at 1545 (quoting *Zant*, 462 U.S. at 877).

32. *See id.* at 1546.

33. *See Woodson*, 428 U.S. at 304; *see also Roberts*, 428 U.S. at 333 ("[I]ndividual culpability is not always measured by the category of the crime committed.") (quoting *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)). Some members of the Court have wavered from condemnation of a mandatory death penalty. *Graham v. Collins*, 506 U.S. 461, 487 (1993) (Thomas, J., concurring) (suggesting mandatory punishments are a "perfectly reasonable legislative response" to concerns about unguided discretion and discriminatory treatment of defendants); *Walton v. Arizona*, 497 U.S. 639, 671–72 (1990) (Scalia, J., concurring) (contending that a mandatory death penalty is not unconstitutional for crimes traditionally punished by death because such punishment is neither cruel nor unusual).

34. *Woodson*, 428 U.S. at 304 (citing Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937)).

35. *Id.*

36. *Zant*, 462 U.S. at 878–79; *see also* Lockett v. Ohio, 438 U.S. 586, 602 (1978) (citing the Eighth and Fourteenth Amendments in finding that the Constitution almost always requires "that the sentencer . . . not be precluded from considering, as a mitigating factor, *any aspect* of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); Gregg v. Georgia, 428 U.S. 153, 164 (1976) (giving the defendant substantial latitude in introducing mitigating evidence).

37. 438 U.S. 586 (1978).

> character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[38]

At a minimum, the introduction of mitigating evidence fulfills the standards of individualized consideration set forth by the Supreme Court. However, for an attorney, "the moral and strategic purpose of [introducing] mitigation evidence is to evoke mercy in the jury."[39] Due to the bifurcated structure of a capital trial, the presentation of mitigating evidence provides a unique opportunity—possibly the only opportunity in criminal law—for jurors to be given the broad, contextual information which allows them to step into the shoes of a defendant and look at events subjectively.[40] Research indicates that where extensive mitigating testimony has been competently assembled and presented, jurors have been able to "embrac[e] a narrative version of the defendant's life... and [come] to an empathetic understanding of his social history from a largely subjective perspective."[41]

The Supreme Court has held that mitigating evidence may include reference to a wide variety of factors related not only to circumstances surrounding the commission of the crime itself, but also to "compassionate or mitigating factors stemming from the diverse frailties of humankind."[42] These may include, but are not limited to, the defendant's age,[43] mental disorder, physical abuse, and social deprivation,[44] or good conduct while incarcerated.[45] Attorneys have diverse methods of describing and categorizing mitigating evidence, such as the "case-by-case triage strategy to save one life at a time;"[46] or the reduction of culpability into two strands: "proximate culpability," which focuses on the defendant's lack of responsibility for *what he has done*, and "remote culpability," which focuses on the defendant's lack of responsibility for *who he is*.[47]

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38. *Id.* at 604 (original emphasis omitted and emphasis added).

39. Alfieri, *supra* note 15, at 331.

40. Haney, *Social Histories*, *supra* note 9, at 561–62.

41. Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the 'Will of the People,'* 3 PSYCHOL. PUB. POL'Y & L. 303, 329 (1997) (finding that respondents to a death penalty survey conducted in the state of California were sensitive to various contextualizing pieces of information about the defendant and his background, and they acknowledged that these things would likely influence them in reaching a sentencing verdict) [hereinafter Haney, *Commonsense Justice*].

42. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

43. *See* Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982).

44. *See* Penry v. Lynaugh, 492 U.S. 302, 319–22 (1989).

45. *See* Skipper v. South Carolina, 476 U.S. 1, 8 (1986).

46. Alfieri, *supra* note 15, at 327.

47. *See* Garvey, *supra* note 8, at 1562; *see also* Stetler, *supra* note 17, at 36 (offering a lengthy, though not exhaustive, list of proximate culpability mitigating factors which identify the deprivations that shaped the defendant into the kind of person for whom capital crime was a conceivable course of action, including "[g]enetic predispositions" and family histories "including mental illness and/or retardation of caretakers; abuse, maltreatment, abandonment; neglect: malnutrition, anemia, poor hygiene, poor medical/dental care, premature sexualization; instability: divorce, intermittent parents, adoption, foster placements; substance abuse and/or criminal activity among caretakers; domestic violence: physical, sexual, psychological; tragedy: natural disaster,

The law may enable the defense lawyer to present mitigating factors to the jury, but it is up to the lawyer to make sure the jury understands and appreciates them.[48] This task can prove extremely difficult because a juror may be unable to intellectually or emotionally separate the punishment determination from the guilt decision since "conceptual differences between the determinations made at the two phases are often elusive."[49] For example, both the guilt and penalty phase determinations are often described in terms of the defendant's culpability.[50] Jurors' difficulty distinguishing between the two phases frequently leads to confusion at the penalty phase over which evidence must be considered and how much weight should be given to that evidence.[51] It is the task of the defense attorney to ensure that the jury is able to differentiate between the two stages and come to an individualized assessment about the "death-worthiness" of the defendant.[52] An attorney must therefore advocate for her client, while at the same time advocating against the jury's misinformed perceptions about the structure of the capital trial. It is in fulfilling the dual roles of persuader and instructor where the use of story can be most helpful.

Austin Sarat, a sociologist who conducted in-person interviews with forty Southern death penalty lawyers, compares successful lawyering techniques during the penalty phase of the trial to the strategy employed by the character of Scheherazade in *The Arabian Nights*: "Both [use] narrative . . . to tell an alternative story . . . of violence renounced, of human rights vindicated, [and] of the death penalty defeated."[53] Like Scheherazade, death penalty lawyers "use

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death of family members").

48. Stephen B. Bright, *Themes and Facts that Persuade in Capital Cases*, *in* THE LEGAL AID SOCIETY CAPITAL DEFENSE UNIT: INTERN TRAINING MANUAL at 3 [hereinafter Bright, *Themes*].

49. Crocker, *Concepts of Culpability*, *supra* note 30, at 25.

50. *Id.* at 25–26.

51. *Id.* at 25 (citing William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1089–90 (1995)); *see also* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote for Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 41 (1987-1988) (finding that 54% of Florida jurors in a sample thought the death penalty was either *presumptive* or *mandatory* for first-degree murder).

52. *See* Garvey, *supra* note 8, at 1545 n.109; Doyle, *supra* note 18, at 423. This consideration influences the attorney's behavior not only during the penalty phase of the trial, but throughout the guilt phase as well. An attorney must often balance the goal of zealously advocating for her client during the guilt phase against saving her client's life during the penalty phase, because when a defendant completely denies responsibility during the guilt phase—for example, by advancing an alibi defense—and is nevertheless convicted, the jury may be even less sympathetic to the mitigating evidence produced at the penalty phase. To guard against this reaction by the jury, attorney must approach the defense of his client as the creation of a cohesive narrative that, flows from the opening statement at the guilt phase to the presentation of mitigating evidence during the penalty phase.

53. Sarat, *supra* note 21 at 364–65. *See also* ARABIAN NIGHTS 16 (Husain Haddawy trans., Muhsin Mahdi ed., 1990).

> "When I go to the king," [Scheherazade told her sister,] "I will send for you, and when you come and see that the king has finished with me, say, 'Sister, if you are not sleepy, tell us a story.' Then I will begin to tell a story, and it will cause the king to stop his practice [of execution], save myself, and deliver the people."

narrative to forestall death. They remind us that narrative has always been a way of holding onto life, or distracting or satisfying those with the power to end life."[54] .Rather than merely presenting the facts of a defendant's life—the extent of his poverty, the effects of racism, perhaps the impact of a mental disability—placing the facts into the context of an individual story and making the story compelling enough to the jury so that they are convinced the final chapter in that story should not be the defendant's death can help jurors both gain empathy for the client and come to understand the importance of their role is during the latter stage of the capital trial.

In advocating for her client, an attorney must guide the jury in directly confronting stereotypes.[55] For jurors to understand the experiences of those who are different from themselves, they must be instructed to look beyond figures and statistics to evaluate "the complexities of the characters in front of them," instead of basing their assessments "on a set of universal truths or types that might be true on average."[56] Examining the life of the capital defendant will often result in realizations about causes and culpability that are "at odds with the stereotypes created and nourished by the system of capital punishment that prevails in our society,"[57] thus revealing factors which "suggest a powerful indictment of our legal, social, and educational systems that failed to recognize [the defendant's] disabilities at a point in time when it could have made a difference."[58]

In compiling evidence of mitigating circumstances, attorneys and social workers investigate not only a clients' present mental state, but his childhood, family life, and the community in which he was raised. When preparing such evidence, death penalty expert Stephen Bright, Director of the Southern Center for Human Rights, advises attorneys to work as though they were novelists. He recommends that they first develop a "theme for life" which will explain the client's life to the jury, then research topics which have arisen in the case. The attorney "forms the story of his client, first for himself and then for judges and juries, by discerning and emphasizing or de-emphasizing given elements."[59] Story becomes a medium through which "[the] lawyer understands, makes sense of, and presents a case."[60] In the mitigation phase, lawyers, like authors, are

54. Sarat, *supra* note 21, at 365.

55. Haney, *Social Histories*, *supra* note 9, at 559–60.

56. Katherine K. Baker, *A Wigmorian Defense of Feminist Method*, 49 Hastings L.J. 861, 862 (1998).

57. Haney, *Social Histories*, *supra* note 9, at 559.

58. Phyllis L. Crocker, *Essay: Feminism and Defending Men on Death Row*, 29 ST. MARY'S L.J. 981, 1002 (1998) [hereinafter Crocker, *Feminism*].

59. Alfieri, *supra* note 15, at 348 (quoting MILNER S. BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS 23 (1981)).

60. It should be noted, however that "'stories require good listeners as well as good tellers if they are to have effect....' Stories 'cannot gather willing hearers among us if we do not have ears to hear.' Thus... there is a 'limit to the power of stories in law.'" Alfieri, *supra* note 15, at 348 (quoting MILNER S. BALL, THE WORD AND THE LAW 143, 144 (1993)).

able to transcend the limitations of first their own, and then the juries' own experiences by modeling their arguments on literature.[61]

II.
PERVASIVE STEREOTYPES: SIMILARITIES AND MODELS

> *[A] man held an ice pick to my throat and said: Push over, shut up, or I'll kill you. . . .*
>
> *I ended up in the back seat of a police car . . . .*
>
> *They asked me if he was a crow. That was their first question. A crow, I learned that day, meant to them someone who is black.*
>
> *They asked me if I knew him. That was their second question. They believed me when I said I didn't. Because, as one of them put it, how would a nice (white) girl like me know a crow?*[62]

Feminist authors and capital defense attorneys face common dilemmas in representing individuals who have been marginalized by society, mischaracterized by a majoritarian voice, and are frequently perceived with fear and mistrust because they clearly represent the "other" in our society. It is for these reasons that a review of feminist literature can do much to inform the work of capital defense attorneys. Though the connection between capital defendants, who are primarily African-American males, and women may at first seem attenuated, numerous scholars have pointed to the shared "otherness" between the groups. Some have acknowledged that both women and people of color share a common status as members of "outgroups," or "groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized."[63] The experiences of these outgroup members do not fit easily into the authority structure of traditional discourse, and are often best expressed through stories.

Capital defendants are further displaced from society at large not only because of who they are but also because of what they have done. The fact that

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61. *See* Marie Ashe, *Theoretics of Practice: The Integration of Progressive Thought and Action: The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017, 1018 (1992) (discussing the use of Toni Morrison's novel *Beloved* to challenge socially-created stereotypes of the "bad mother" in developing a more sympathetic approach to female clients accused of child abuse).

62. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1087 (1986); *see also* Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 510–511 (1992) ("I knew that sexism infected the law of rape, although it was hardly as one-sided as much of the early feminist writing suggested. It was true that lawyers and judges, armed with the stereotype of the spiteful, vengeful, lying woman, had fashioned special rules designed to make rape prosecutions more difficult. But it was also true that black men charged with raping white women had for decades found the protections of due process illusory: racism trumped sexism when the defendant was a black stranger and the victim a white woman.").

63. Nancy L. Cook, *The Call to Stories: Speaking in and About Stories*, 63 U. CIN. L. REV. 95, 102 (1994) (quoting Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989)).

these men have, in the eyes of most jurors, committed unspeakable acts of violence, leads the majority of jurors to distance themselves from these individuals, and to recoil from the idea that they share a commonality with the defendants. A similar distancing can occur with respect to women in the context of rape or assault trials, where jurors—especially female jurors—may attribute blame to the victim rather than the assailant, partially as a self-protective measure. The rationalization that a rape victim must have done something to provoke the attack allows a juror to avoid the conclusion that the attack could happen to anyone. The prevalence of "rape shield laws" limiting the use of evidence on the accuser's sexual history to prove "provocation" may indicate the frequency of such rationalization.[64] By situating events in the context of individual lives, attorneys may be able to overcome—or at least alleviate—jurors' fear of identifying with the unknown.

While the stereotypes applied to them are distinct—even opposite—both women and capital defendants face similar struggles in confronting an overwhelmingly white male society and legal system and must overcome similar obstacles in challenging objectification by jurors. The operation of systems of racial and gender oppression may be understood as intersectional; race and gender as aspects of identity cannot be understood as exclusive.[65] If we do not confront and critically examine our past treatment of certain groups, we will not be able to overcome the misinterpretations fostered by prevailing stereotypes. Narrative provides a vehicle that women and minorities both can use to examine past inequities and to shape the future. In the same way, narrative can help jurors in capital cases learn to challenge stereotypes that so frequently prevent them from seeing the personhood of the defendant.

Phyllis L. Crocker addresses the confluence of similarities between the marginalization of women and that of capital defendants in her essay, *Feminism and Defending Men on Death Row,* which details the social history of a convicted murderer who was abused as a child and is currently under sentence of death for battering then killing his wife.[66] Although at first conflicted about being faithful to seemingly inapposite roles as a feminist representing a capital

64. Laws in 49 states limit the evidentiary use of a victim's prior sexual history as part of an effort to undermine the credibility of the victim's testimony. *See* James A. Vaught, *Admissibility Of A Rape Victim's Prior Sexual Conduct In Texas: A Contemporary Review And Analysis,* 23 St. Mary's L.J. 893, 895 n.10 (1992) ; *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 492 (4th ed., 2000) (stating "rape shield" statutes have been enacted in almost every state).

65. *See* Cheryl I. Harris, *The Foulston & Siefkin Lecture: Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith - Spectacles of Our Times,* 35 WASHBURN L.J. 225, 231 (1996) (citing Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color,* 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139 (1989)).

66. *See* Crocker, *Feminism,* supra note 58, at 981.

defendant accused of killing his battered wife, Crocker came to realize that feminist legal theory and death penalty jurisprudence actually are quite similar in that both address the response to individual stories of personal violence. She observes that the female experience of battering and the male perpetration of abuse each demonstrate the need to reorder our social and legal priorities so that they emphasize prevention more than punishment.[67] In focusing on these fundamental issues, we can find parallels between the way society responds to female victims of violent crimes and to men on death row who committed some of those crimes.

Feminist revisionist stories and death penalty mitigation function in a similar way, in that they both seek to challenge popular myths and misperceptions by "situat[ing] individual experiences . . . of violence in their broader social context."[68] Feminist authors and death penalty attorneys create their work in the shadow of a canon of traditional stories that represent white European cultural values and prejudices, among them: women are either poor girls or beautiful princesses who will be rewarded only if they are passive, obedient, and submissive; men are and should be aggressive; crimes are committed by evil monsters who consistently prey on the upstanding members of society; money and property are the most desirable goals in life; and "magic and miracles are the means by which social problems are resolved."[69]

The stories told by the dominant members of society are equally applicable in the oppression of women and of capital defendants. Like all individuals, jurors develop conscious and unconscious perceptions within the context of these cultural stereotypes that are ingrained in the fabric of our daily lives.[70] These stereotypes infuse the jurors' perception of every aspect of the case, including the relative worth of the lives of their victims.[71] It is therefore

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67. *Id.* at 1001.

68. *Id.* at 989.

69. *See* JACK ZIPES, DON'T BET ON THE PRINCE: CONTEMPORARY FEMINIST FAIRY TALES IN NORTH AMERICA AND ENGLAND 6 (1987) (citing ROBERT MOORE, FROM RAGS TO WITCHES: STEREOTYPES, DISTORTION, AND ANTIHUMANISM IN FAIRY TALES 6 (1975)).

70. *See generally* Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323 (1997) (arguing that "law is part of a broader cultural endeavor that attempts to promote European values and interests at the expense of all others"); *see also* Haney, *Commonsense Justice, supra* note 41, at 316 (arguing that U.S. law privileges a view of the world that is based on White, middle-class and male values); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–323 (1987) (utilizing cognitive psychology theory, which states that cultural beliefs and stereotypes are transmitted through an individual's parents, peers and the media in such a way that the individual does not realize that culture has changed her perception, but rather these ideas become part of the individual's rational ordering of the world).

71. *See* DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (presenting results of a study of capital sentencing in Georgia, which found that prosecutors charged capital murder more often in white-victim than in black-victim murders); *see also* Death Penalty Information Center, *Race of Defendants Executed Since 1976, at http://www.deathpenaltyinfo.org/dpicrace.html#inmaterace* (last updated Jan. 2002) (finding that over 80% of completed capital cases involve white victims, though nationally only 50% of

unsurprising that the extreme punishment of the death penalty is most often inflicted on the most vulnerable members of society— the poor, the mentally disturbed and members of racial, religious or ethnic minorities.[72] These groups are among the least understood and the most stereotyped and marginalized by dominant myths. As Sister Helen Prejean, an activist who counsels death row inmates at Louisiana State Penitentiary and works with the families of murder victims, points out, "[w]hen you identify with the victim, you want to see the killer receive the ultimate punishment."[73] Thus, the key is to help jurors relate to and understand the defendant by providing an alternative narrative to counter the dominant one.

Recent studies indicate that society has a long way to progress before jurors in capital cases will not approach trials with preconceived notions and prejudices which may be fatal for capital defendants. Based on data gathered during interviews with jurors who sat on capital cases in South Carolina, Stephen Garvey of the Capital Jury Project noted that while circumstances that may have shaped the defendant's experiences and character are given some weight by jurors in capital sentencing decisions, the mitigating effect given to societally-created factors remains limited.[74] Although jurors respond with concern to stories of extreme poverty, serious abuse and unsuccessful attempts to receive help, they are more sympathetic to factors which reduce responsibility for what the defendant has done rather than who he is.[75] Jurors concentrate on the facts surrounding the violent act itself but are reluctant to situate the defendant's crime within the broader social context of the defendant's life or society's responsibility for his life or his crime. They are unable or unwilling to tie this alternative story to the one that the dominant culture has provided. Feminist counter-narratives have been able to situate the acts of individuals so that the reader can understand the context in which those acts occurred.

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homicide victims are white); Richard C. Dieter, *The Death Penalty in Black & White: Who Lives, Who Dies, Who Decides, at* www.deathpenaltyinfo.org/racerpt.html (June 1998) (same); Sister Helen Prejean, *Capital Punishment: The Humanistic and Moral Issues, The Sixth Annual Dean's Lecture, St. Mary's University School of Law,* 27 ST. MARY'S L. J. 1, 6 (1995) (same).

72. *See generally* AMNESTY INTERNATIONAL USA, WHEN THE STATE KILLS... THE DEATH PENALTY, A HUMAN RIGHTS ISSUE (1989).

73. *See* Prejean, *supra* note 71, at 6 ("Do not believe the rhetoric that you hear about the death penalty being reserved for only the most heinous crimes, because it really all depends on the profile of the victim and the identity of those who will feel outrage over the crime.... [O]ne of the first things that I learned about the law is that the law is almost always on the side of people with wealth and power."); *see also* Doyle, *supra* note 18, at 438 (observing that defense lawyers at a capital sentencing "must confront the astonishing confluence of social forces driving the jury towards society's default representation of the defendant: namely, Willie Horton.").

74. Garvey, *supra* note 8, at 1565.

75. *Id.* at 1539.

A. The Myth of Autonomous Free Choice

Among the dominant myths that are used to de-contextualize acts of the defendants, two are most powerful. The first and perhaps most persuasive myth that must be discredited by both feminist authors and capital defense attorneys is that of autonomous free choice—that an individual has acted of his or her own free will and thus is morally responsible for the consequences of those actions.[76] It is difficult for many to accept that "variation in human behavior does not necessarily imply individual choice," and that socially desirable behavior is not the result of noble choices, or that socially undesirable behavior results from less praiseworthy choices.[77] Common "choices" of the poor such as unemployment, crime, and incarceration—like common traditional "choices" of women, for example, prioritizing marriage and motherhood over professional involvement outside the home—are not those of competitors with equal opportunities to advance in the labor market.[78] As a society, however, we persist in attributing free choice to the actions of those we find most deplorable and incomprehensible by distancing ourselves from any responsibility we may have—not for the actions of the capital defendant—but for fostering an environment that reared the individual who committed those actions.

Attorneys representing capital defendants must be wary of the pervasive belief in free choice when seeking to explain to the jury the actions of capital defendants. When faced with a brutal, seemingly senseless act of violence, jurors have a "strong desire . . . to fix personal responsibility on the defendant, to make him a moral agent capable of being held to account for what otherwise seemed unaccountable actions."[79] Unable to comprehend that a horrific act could be committed by a "regular" person, jurors are understandably likely to conclude that the perpetrator of the brutal act himself must be brutal. In the ideal situation, a defense attorney will be able to reveal the personhood of the defendant and explain how another member of society committed an unspeakable crime. The humanity of the defendant remains separate and apart from the barbarity of his actions.

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76. *See* Alfieri, *supra* note 15, at 346–47. Alfieri describes criminal defense advocacy, including abolitionist litigation, as organized around an intentionalism/determinism dichotomy: "Intentionalism is the principle that human conduct results from free choice," whereas "[d]eterminism . . . implies that subsequent behavior is causally connected to prior events." *Id.* at 347 n.139 (quoting Marck Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 596 (1981)). "Abolitionists . . . elevat[e] the determinist excuse of victimization-based diminished capacity over the blameworthy intentionalism of free will." *Id.* at 347.

77. Haney, *Social Histories*, *supra* note 9, at 592.

78. *Id.* (quoting MERCER L. SULLIVAN, "GETTING PAID": YOUTH CRIME AND WORK IN THE INNER CITY 247 (1989)).

79. Alfieri, *supra* note 15, at 346 (quoting Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1128 (1995)).

There is a tenuous relationship between explanation, excuse and responsibility. And in the eyes of a jury, "narratives of deprivation [can] slip easily into narratives of excuse, relocating criminal responsibility and moral accountability beyond the reach of capital defendants."[80] When, in an effort to portray a capital defendant as a human being endowed with positive qualities, a defense attorney brings to light economic and sociological factors beyond a defendant's control that influenced his actions, the attorney can be viewed as challenging jurors' long-held values of moral agency. Jurors may be unsympathetic to a defendant who appears to abdicate responsibility for his crime and are unlikely to be merciful in meting out punishment.

To guard against this reaction, attorneys can develop counter-narratives by referencing the experiences of jurors themselves. Stephen Bright suggests the following appeal: "Yes, there is free will, but we all know that seeing violence, being around drugs, being around the 'wrong people' makes a difference *because we are willing to go to considerable lengths to protect our own children from it.*"[81] Thus, mitigation evidence can create a narrative that not only creates a sympathetic picture of the defendant, but also challenges jurors' perceptions about the choices available to the defendant and explains why his "choice" to commit a crime may really have been no choice at all. "[P]articularly in the case of powerful risk factors and traumatic life experiences like chronic poverty and childhood maltreatment, different kinds of behavior . . . must be understood as variation in adapting, coping, and struggling to survive a set of circumstances that few if any have 'chosen' to endure."[82]

In attempting to create a narrative whereby a defendant's actions are explained rather than excused, defense attorneys can learn much from feminist novelists who, over the past century, have developed practiced methods of challenging the existence of free choice. Many of these can be traced to Virginia Woolf's observation with respect to the range of choices historically available to women in *A Room of One's Own*:

> Here am I asking why women did not write poetry in the Elizabethan age, and I am not sure how they were educated; whether they were taught to write; . . . how many women had children before they were twenty-one; what, in short, they did from eight in the morning till eight at night.[83]

It seems ridiculous to us now to look at women in the Victorian age and assume that those women "chose" to leave school in their teens, to marry young, to give up their right to a family inheritance. On a less extreme scale, it is clear

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80. *Id.* at 346–47.

81. Bright, *Themes*, *supra* note 48, at 10.

82. Alfieri, *supra* note 15, at 347–48 n.143 (quoting Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 592 (1995)).

83. VIRGINIA WOOLF, A ROOM OF ONE'S OWN 46 (1929).

to us now that women in the sixties and seventies did not "choose" to abstain from engaging in competitive high school athletics, to be denied admittance into professional schools, or to receive less pay for equal work. These choices made by women choices were not, in fact, choices at all.

In her short story, *The Fall River Axe Murders*, Angela Carter creates a fictional social history for the notorious murderess Lizzie Borden in which she does not excuse Lizzie from responsibility for her actions, but explains why Lizzie's surroundings might compel many people—not just Lizzie—to commit such a crime. It is clear in Carter's work that the mores of nineteenth-century society and the Borden family's circumstances—a deceased mother and overly-strict father—clearly circumscribed the choices available to the mentally fragile Lizzie.[84] Rather than an isolated instance of a heinous crime committed by a "crazy" female, in Carter's work, Lizzie's actions spring from rage fueled by her position as an unmarried middle-aged woman boxed in by social class and familial expectations:

> What the girls do when they are on their own is unimaginable to me.... "Girls" is, of course, a courtesy term. Emma is well into her forties. Lizzie, her thirties, but they did not marry and so live on in their father's house, where they remain in a fictive, protracted childhood, "girls" for good. [85]

While Carter's story focuses upon the effect of an absence of free choice on an individual's life, Jeanette Winterson's *Sexing the Cherry*, a book of "revisionist" fairy tales, demonstrates the power that can be gained when one is truly free to exercise autonomous decision-making. For example, Winterson's version of the popular children's tale, "The Story of the Twelve Dancing Princesses," offers a striking example of the profound power of free will. Winterson rejects the traditional fairy-tale ending to the story, which leaves the female characters happily, if somewhat illogically, married off to twelve male counterparts:

> From this room, every night, we flew to a silver city where no one ate or drank. The occupation of the people was to dance. We wore out our dresses and slippers dancing, but because we were always sound asleep when our father came to wake us in the morning it was impossible to fathom where we had been or how.
>
> You know that eventually a clever prince caught us flying through the window.... He had eleven brothers and we were all given in

84. *See* ANGELA CARTER, *The Fall River Axe Murders*, *in* SAINTS AND STRANGERS 7, 15 (1987) ("It was well known in polite circles in Fall River... that Lizzie suffered from occasional 'peculiar spells,' as the idiom of place and time called...odd lapses of behaviour, unexpected, involuntary trances, moments of disconnection—those times when the mind misses a beat.... From puberty, she had been troubled by these curious lapses of consciousness that often, though not always, came at the time of her menses....").

85. *Id.* at 13–14.

marriage, one to each brother, and as it says, lived happily ever after. We did, but not with our husbands.[86]

Rather than the "fairy tale ending" of the original story, in which twelve princesses are caught doing something they love and essentially married off as a reward to the brothers of the informant who revealed their illicit activities to the king, Winterson's story imagines different endings for each of the princesses. Rather than marrying as a group, each princess is allowed to make a different choice about her life's direction. While not all of them live "happily ever after," Winterson's tale demonstrates the impact one's choices have on her life and highlights the lack of choice available in the original story.

Revisionist fairy tales like Winterson's that are "[c]reated out of dissatisfaction with... social values and institutions which have provided the framework for sexist prescriptions," can serve as an important model for death penalty attorneys as they formulate narratives to help their clients "in a voice that has been customarily silenced."[87] These revisionist tales provide the groundwork for resisting the myth of free choice by documenting the circumstances that lead individuals to make certain life decisions and by demonstrating that the range of choices available to certain members of society may not be available to everyone. Similarly, by re-presenting such themes in a way which empowers characters to make choices previously closed off for them, feminist writers have been able to illustrate the profound effects which can result when such choices are unavailable. While it may be true that a defendant "chooses" to commit a violent act, placing that choice into a narrative context can help a jury to understand that this choice may not have been a meaningful one.

B. An Archetype of Evil

And of the Witch? In the life of a Witch, there is no after, in the ever after of a Witch, there is no happily; in the story of a Witch there is no afterword.... She was dead, dead and gone, and all that was left of her was the carapace of her reputation for malice.[88]

They are not humans like us. They do not learn the way we do. They are incorrigible. They are going to kill again. The rhetoric goes on and on. I guarantee that if you were to sit at a table with eight death-row inmates, you would not really know their identities unless they told you the stories of their lives. You would be amazed at how human these people are, how real they are, and what stories they have to tell.[89]

86. JEANETTE WINTERSON, SEXING THE CHERRY 48 (1989).

87. ZIPES, *supra* note 69, at xi.

88. GREGORY MAGUIRE, WICKED: THE LIFE AND TIMES OF THE WICKED WITCH OF THE WEST 406 (1995).

89. *See* Prejean, *supra* note 71, at 6.

The wicked queen, the evil stepmother, the mad spinster, the old hag, the temptress, the seductress—society has created these stereotypical roles in order to classify women who do not fit into traditional roles of mother, sister, wife.[90] Such labeling distances the individual from the community and creates the second most prevalent myth—that of the actor motivated by pure evil.[91] The death penalty relies heavily on this myth, what has been called the *myth of demonic agency*, which allows society to substitute the heinousness of the defendant's crimes for the reality of his personhood and deny any commonality with the defendant.[92] As the term "witch" has done for women, the label "monster" in the context of the capital defendant has become a shorthand method for society to refer to an element it does not wish to acknowledge. This distancing is facilitated by the media, which frequently presents criminals in the absence of context—a person with no life connections, social relationships, or basic human needs.[93]

The archetype of evil takes various forms. In our criminal justice system, the general public is only given access to "facts" which "underscore defendants' deviance and facilitate their dehumanization," leading society to view capital defendants "as genetic misfits, as unfeeling psychopaths who kill for the sheer pleasure of it, or as dark, anonymous figures who are something less than human."[94] Prosecutors utilize—and in doing so, strengthen—this already prevalent myth, typically by setting forth the image of an evil individual without human decency, for whom rehabilitation will be ineffective.[95] Prosecutors will also encourage juror's perception of the defendant as fitting into an imagined stereotype compatible with the faceless impression made by "murderers from Cain in the Old Testament up until the morning's newspaper. The archetypal figure of the murderer supplies much of the meaning in the prosecutor's representation of the individual on trial."[96] A prime example of this dehumanization can be found in the prosecutor's closing arguments in *State v. Cauthern*,[97]

90. *See* GILBERT & GUBAR, *supra* note 14, at 46 (referring to these stereotypes as the "vexed and vexing polarities of angel and monster, sweet dumb Snow White and fierce mad Queen").

91. *See generally* MAGUIRE, *supra* note 88.

92. Haney, *Social Histories*, *supra* note 9, at 547.

93. *See* Haney, *Commonsense Justice, supra* note 41, at 317 (arguing that the media bombards individuals with "distorted, cartoon-like images" of "criminal depravity . . . abject evil and the like," creating a mythology that substitutes for "commonsense" thinking about crime and punishment.)

94. Haney, *Social Histories*, *supra* note 9, at 549.

95. *See* Bright, *Themes*, *supra* note 48, at 11–12 (citing common prosecutorial arguments such as: "The defendant is a cancer on society that must be removed," "It's time to get tough on crime," and "Show the defendant the same mercy he showed the victim").

96. Doyle, *supra* note 18, at 425. Doyle further explains that "[t]he prosecution . . . is under no pressure to offer a detailed counter-representation . . . [It] knows it can withstand any representation a defendant offers so long as it can argue that beneath that representation abides the murderer as manifested in his crime." *Id.*

97. State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998).

where the defendant was sentenced to death for the murder of a Tennessee couple:

> Yes, whether you like it or not—whether you volunteered or not, you are engaged in the ultimate battle in everyday combat with the evil one, and he's not going to go away. He appeared in Minnesota in the form of Jeffrey Dahlmer [*sic*]. He appeared in Union, South Carolina, and on January the 9th, he appeared in the door of Patrick and Rosemary Smith. You cannot negotiate with the evil one, ladies and gentlemen. You cannot deal in good faith with the evil one. You have got to destroy and destroy, or he and his benefactors will destroy you. He'll destroy us. He'll destroy our children.
>
> The evil one took the name of Ronnie Cauthern on that day. That was his name, and he's beyond redemption. He's beyond rehabilitation. There is no treatment for this individual posing in a mask and taking human form. There is no treatment for this person. This person has been around through the ages and will appear again. You cannot cure him. Don't try to save him. Engage him in combat and destroy him. Do your duty.[98]

Women have also been the target of society's translation of difference to wickedness. From *Daemonologie*,[99] the anti-enchantress tome published by King James I of England in 1597, to the Salem Witch Trials, to images of powerful women as bitches and ball busters, the public has feared and persecuted women who excel in healing, in education, in political life.[100] In the context of feminist literature, writers challenge this one-dimensional perception of wickedness by examining individual life stories of female characters and historical

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98. Cauthern, 976 S.W.2d at 737.

99. JAMES I, KING OF ENGLAND, DAEMONOLOGIE 1597 NEWES FROM SCOTLAND, (1924). An example of the targeting of specific women based upon their skill as healers, is found in the conversation between Philomathes and Epistemon in Chapter 3

> Philomathes: But I pray you likewise forget not to tell what are the Devilles rudiementes....
>
> Epistemon: I meane either by such kinde of Charmes as commonlie dafte wives uses, for healing of forspoken goodes, for preserving them from evill eyes, by knitting roun trees, or sundriest kinde of herbes,...or doing of such like innumerable things by wordes, without applying anie thing, meete to the part offended, as Mediciners doe.

Id. at 11–12.

100. *See* Senator Hillary Rodham Clinton, Remarks at the 150th Anniversary of the First Women's Rights Convention (July 16, 1998), *at* http://usinfo.state.gov/usa/womrts/hilary.htm. Sen. Clinton noted society's long history of demonizing women who challenge traditional roles:

> We may not face the criticism and derision [the suffragists] did. They understood that the Declaration of Sentiments would create no small amount of misconception, or misrepresentation and ridicule; they were called mannish women, old maids, fanatics, attacked personally by those who disagreed with them. One paper said, 'These rights for women would bring a monstrous injury to all mankind.' If it sounds familiar, it's the same thing that's always said when women keep going for true equality and justice.

figures, thus being able to both "identif[y] with and revis[e] the self-definitions patriarchal culture has imposed on them."[101] In *A Room of One's Own*, Virginia Woolf—the forerunner of these authors—discussed Shakespeare's hypothetical gifted sister who, in line with the practices of the time, was not given the opportunity to become educated or develop her talent: "She picked up a book now and then, one of her brother's perhaps, and read a few pages. But then her parents came in and told her to mend the stockings or mind the stew and not moon about with books and papers."[102] After coming to the conclusion that society's imposition of certain roles upon women has historically constrained their ability to succeed, Woolf takes the analysis a step further and ascertains that, if Shakespeare's sister had succeeded in writing as she desired, she most likely would not have been lauded but reviled. By applying history, psychology and sociology to compile in narrative form the life of Shakespeare's sister, Woolf was able to reach the conclusion that, because of overarching societal constraints, "any woman born with a great gift in the sixteenth century would certainly have gone crazed . . . or ended her days in some lonely cottage outside the village, half witch, half wizard, feared and mocked."[103] In essence, Woolf channeled her own anger at society's preconceived notions of women to delve into the reasons behind their historical lack of voice. By channeling her opinions into a compelling story, Woolf educates readers about the plight of women.

Gregory Maguire exposes the myth of demonic agency by employing a similar revisionist technique. In his novel, *Wicked*, Maguire tells the story of the Wicked Witch of the West, re-imagining the Witch—christened Elphaba—as a victim of poverty and discrimination. Maguire interprets the juxtaposition of the Wicked Witch and Dorothy not as a showdown between good and evil, but as a social construct engineered by the political machinery of Oz. Just as our society accepts the dichotomy between heartless criminal and innocent victim, the society of Oz resorted to the labels Wicked Witch and innocent girl avenger. In reporting the circumstances that led Elphaba to be robbed of her given name and renamed Witch, Maguire unveils the personhood underneath the evil façade and shows how quickly an individual's humanity can be subsumed into demonization. Maguire's interpretation of the initial conversation among Dorothy and her friends reflects society's current haste to label that which is "other" in our midst:

> "Of course, . . . it is the surviving sister who is the crazy one," said the Lion. "What a witch. Psychologically warped; possessed by demons. Insane. Not a pretty picture."
>
> "She was castrated at birth," replied the Tin Woodman calmly. "She was born hermaphroditic, or maybe entirely male."[104]

101. GILBERT & GUBAR, *supra* note 14, at 79.
102. WOOLF, *supra* note 83, at 47.
103. *Id.* at 49.
104. MAGUIRE, *supra* note 88, at 1.

In the literary arena, the juxtaposition of good and evil is perhaps most apparent in the context of the fairy tale, where there is a fundamental connection between the aesthetic components of fairy tales and their historical function within the socialization process which forms all of our tastes, mores, and habits.[105] In Winterson's retelling of Rapunzel, she views the concept of evil as a proxy for that which is "other" in society; this particular character is deemed evil because she presents a challenge to traditional heterosexual relationships. Winterson counteracts the traditional oppressive messages by turning them in on themselves and exposing what they attempt to hide:

> You may have heard of Rapunzel.
>
> Against the wishes of her family . . . she went to live in a tower with an older woman.
>
> Her family were so incensed by her refusal to marry the prince next door that they vilified the couple, calling one a witch and the other a little girl . . . .
>
> One day the prince . . . dressed himself up as Rapunzel's lover and dragged himself into the tower. Once inside he tied her up and waited for the wicked witch to arrive. The moment she [arrived] . . . the prince hit her over the head and threw her out again. Then he carried Rapunzel down the rope he had brought with him and forced her to watch while he blinded her broken lover in a field of thorns.
>
> After that they lived happily ever after, of course.[106]

Just as common misperceptions facilitated by male-centered storytelling have given feminist authors a structure against which they can rebel, "cultural demonization" of criminal defendants affords defense counsel an opportunity to humanize their clients by using narrative.[107] This strategy of humanization has developed in response to the belief that jurors, like the rest of society, will only condemn those whom they see as fundamentally "other," as inhuman and outside the community. To successfully address the jury, "the client must be given a unique human face and an inhuman act must be put into a distinctive narrative of human tragedy. The lawyer must turn the narrative attached to his client from a

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105. *See* ZIPES, *supra* note 69, at 2.

106. WINTERSON, *supra* note 86, at 52.

107. *See* Alfieri, *supra* note 15, at 331–32 (quoting Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 852 (1995) (book review)).

> Cultural demonization . . . provides the emotional energy to condemn without remorse and eventually to pull the lethal switch, but it also leaves a large opening for defense counsel, because that picture of the generic Mobster or Mugger seldom corresponds to the facts of the particular case. If a guilty criminal is defined as a moral monster who deserves execution or isolation from human society forever, then the individual on trial—a three-dimensional person with human frailties and human needs—probably will not fit the picture . . . .

Id. at 332 n.38.

horror story into a sentimental tale, from a story that evokes fear and disgust to one that evokes pity or identification."[108]

The parallels between the strategies of feminist fiction and legal narrative are clear in one attorney's opening statement in the penalty phase of the capital trial of a young African-American man, which clearly echoes Woolf's voice in *A Room of One's Own:*

> [W]hat we want to talk about here is this young man—who has hurt people, who has sinned grievously against man and against God—what are some of the forces that pushed him in that direction? What are some of the things that made these things come to pass in the life of this young man? What kind of life did he have compared to the life that other people have? And what does that tell us in terms of understanding a part of what happened?[109]

Similarly, capital trials often maximize the differences between the defendant and the jury, with little contextual explanation of the socio-historical patterns that may help explain the defendant's conduct.[110] An unfortunate result is that juries will essentialize the differences between themselves and the defendant.[111] Thus the counter-narrative must draw connections between the defendant and the jurors.

Feminist counter-narratives have shown that the archetype of evil myth can be debunked by resisting efforts to de-contextualize an individual. As is made clear time and again, in the death penalty context, what defeats jurors' ability to make connections and is the foremost contributor to the notion of evil is perception of the defendant as an "other." Defense lawyers must constantly work to counter the prosecution's theory that the death penalty is appropriate "because the crime was in the defendant's nature; . . . [that i]n the crime, the true defendant finally and comprehensively revealed himself."[112] In capital trials, the task of humanizing the client is made even more difficult by the fact that defendants are so often poor or minorities or mentally challenged individuals because they are already viewed as "others."

III.
COUNTERNARRATIVES

For the actions of marginalized individuals to become accessible to a general audience, it is essential that counter narratives be interwoven into individual stories. The stark realities of a defendant's upbringing—poverty, racism,

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108. *Id.* at 372 (citations omitted).

109. Stephen Bright, *Case Example: Presenting a Theme Throughout the Case,* THE LEGAL AID SOCIETY CAPITAL DEFENSE UNIT: INTERN TRAINING MANUAL, at 10 [hereinafter Bright, *Case Example*].

110. *See* Haney, *Commonsense Justice, supra* note 41, at 325.

111. *Id.*

112. Doyle, *supra* note 18, at 425 (citation omitted).

substance abuse or mental illness—are better revealed as the backdrop to an individual's life than as facts and figures in a study or report. Feminists have identified various social conditions that are conducive to marginalization and have created narratives that expose the conditions under which such marginalization occurs. These conditions are also applicable to death penalty defendants and must be used as central points around which counter narratives are organized.

A. Poverty

Weaker in moral sense than,
Idealism of,
Greater consciousness of . . .
Offered as sacrifice to,
Small size of brain of,
Profounder sub-consciousness of . . .
Mental, moral, and physical inferiority of . . . [113]

These hypothetical entries from the index of a journal which Virginia Wolf titled "Women and Poverty" highlight the central premise of *A Room of One's Own*: that poverty—not in the sense in which we consider it today, but rather as a historical lack of enfranchisement by laws regarding communal property in marriage and patrilineal inheritance—has played a central role in women's historical inability to truly express their voices. Perhaps more strikingly, poverty profoundly affects women in low income communities by circumscribing nearly every choice they make—from the decision to stay with a battering spouse, to the decision to take a job out of the home, to the decision of how and where to raise children. Jean Rhys illustrates the dire effects of financial instability on women in her novel, *Wide Sargasso Sea*, which explores the early life of Bertha, the "madwoman in the attic" in Charlotte Bronte's novel Jane Eyre. In explaining the circumstances which eventually led to her madness, Rhys imagines that Bertha, whose real name is Antoinette, was driven to marry Rochester not out of love, but because society gave her few other options. She imagines a conversation between Antoinette and her maid:

> "But there must be something else I can do."
>
> She looked gloomy. "When man don't love you, more you try, more he hate you . . . . I hear about you and your husband," she said.
>
> "But I cannot go. He is my husband after all."
>
> She spat over her shoulder. "All women . . . nothing but fools . . . . A man don't treat you good, pick up your skirt and walk out. Do it and he come after you."
>
> "He will not come after me. And you must understand I am not rich

113. WOOLF, supra note 83, at 28–29.

> now, I have no money of my own at all, everything I had belongs to him."
>
> "What you tell me there?" she said sharply.
>
> "That is English law."[114]

Rather than merely stating the facts—Antoinette is a battered wife who has chosen to stay with her husband primarily for economic reasons and against the advice of others—Rhys's narrative compels the reader to empathize with Antoinette by revealing what is between the lines. From this short paragraph we may hypothesize that Antoinette and her maid have a caring relationship, that before marriage, Antoinette was wealthy and now has surrendered all of her property to her husband, and that walking out is not as simple as it initially may have appeared.

Poverty circumscribes the circumstances of most capital defendants, who have often been born into lives of profound deprivation.[115] "[C]hildren who grow up in deprived households are less likely to be hopeful, self-directed, and confident about their future than those who grow up under better economic conditions."[116] Because poverty undermines parents' ability to care for and guide their children, children often too rapidly take on adult roles and increasingly suffer from depression or engage in drug use as adolescents.[117] Placing these effects of poverty into narrative helps give the experiences of underprivileged children meaning and context:

> You see these kids and then you see the drug dealers coming into the neighborhood. The drug dealers are the ones with the gold chains and the nice cars. These kids know that if they get a job at McDonald's, their pay will be taken off their mother's welfare check, which is already just one-third of the poverty level in the United States. Yet, the endless rhetoric about realizing the great American dream persists—come on kids, you can do anything; you can be the president of the United States; you can be a bank president if you want. I would encounter the same things on death row that I encountered at the projects, except that death row illustrates a more dramatic version of the rhetoric.[118]

By creating a structural narrative like that of Sister Helen Prejean and Rhys's *Wide Sargasso Sea*, death penalty lawyers are able to "write history."[119] This history not only serves to explain what happened in an individual case, but ties in considerations of "poverty and social neglect, mental illness, and the

114. RHYS, *supra* note 20, at 109–10.
115. Haney, *Social Histories*, *supra* note 9, at 563.
116. *Id.*
117. *Id.* at 564–65.
118. Prejean, *supra* note 71, at 3–4.
119. Sarat, *supra* note 21, at 375.

unforgivable desire to 'get rid of' people with problems rather than trying to fix those problems."[120] The effects of these linkages are even more entrenched in the black community—reflected in the fact that an unusually high percentage of capital defendants are persons of color.[121]

B. Racialization

> *It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined . . . and the way in which we choose those who will die reveals the depths of moral commitment among the living.*[122]

> *"It's the wrong color," said Frex.*
> *"What color is the wrong color?" . . .*
> *"It's green," he finally said. "Nanny, it's green as moss."*
> *"She's green, you mean. It's a she, for heaven's sake."*
> *"It's not for heaven's sake." Frex began to weep. "Heaven is not improved by it, Nanny; and heaven does not approve . . . ."*[123]

Justice Brennan remarked in his dissenting opinion in *McCleskey v. Kemp* that Americans' shared historical experience has caused individuals within our culture to unconsciously attach a ubiquitous and often irrational significance to race.[124] This theme is carried forward by Maguire's *Wicked*, which vividly illustrates how society's disdain for an individual is made easier when her skin color enables her peers to immediately identify her as "other." Because the Wicked Witch is so easily differentiated from the rest of society, it is simpler for society to deem her inherently evil than to look beyond the difference to ascertain her human qualities. Maguire's novel demonstrates the racism inherent in *The Wizard of Oz* because it equates "beauty and virtue with the colour white and ugliness [and evil] with the color black."[125] The novel also seeks to eradicate such racism by showing how Elphaba's status as outsider not only formed society's impression of her but her own reaction to society. Initially ostracized from the community on the basis of her appearance, Elphaba grows into a woman who is angry, isolated and intent upon revenge. By documenting the progression from her ostricization to her reaction to being outcast, Maguire

120. *Id.* at 375.

121. *See* Haney, *Social Histories*, *supra* note 9, at 579.

122. McClesky v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

123. MAGUIRE, *supra* note 88, at 23 (describing when Frex, the father of the Wicked Witch of the West on seeing his daughter for the first time).

124. *McClesky*, 481 U.S. at 332–33 (Brennan, J. dissenting).

125. ZIPES, *supra* note 69, at 6.

places her behavior in context and renders it more comprehensible to the audience.

The use of race as a proxy for violence—either explicitly or unconsciously—has long been an element of criminal trials. Almost daily, jurors are confronted by news reports detailing the violence in inner cities, most of which is committed by non-white males. From a prosecutorial perspective, it is all too easy to press jurors to infer from the fact that the majority of crimes are committed by minority males that minority males must therefore be predisposed toward committing crimes.[126] This conflation ignores the individual and societal factors that in combination may propel any individual—not only a minority male—into a life of violence.

For the defense attorney, the task is twofold: she must confront both the racism inherent in the institution of capital punishment and demonstrate the effects of racism on the defendant. The attorney must attempt to inspire jurors' mercy for the defendant by demonstrating how race negatively impacted an individual to push him toward crime—overcoming the jurors urge to believe that the defendant just naturally fulfills a racial stereotype. As Maguire has accomplished in the literary arena, in order to unearth the cause of ostricization, historians and sociologists strive to create a narrative that situates society's treatment of black individuals, both as victims and as perpetrators, in a similar historical context.

Capital punishment is a direct descendant of lynching and remains one of America's most prominent vestiges of racial oppression.[127] As African-Americans, many death penalty defendants are descendants of slaves, and it is quite possible that capital defendants have ancestors who died by lynching.[128] It has been proven time and again that the death penalty disparately impacts African-Americans.[129] Discriminatory impact is reflected not only in the fact

126. This line of reasoning was advanced explicitly in the case of Vincent Saldano by the state's expert witness, clinical psychologist Walter Quijano, Quijano testified to Saldano's future dangerousness, a required element for a death sentence in Texas. On the stand, Quijano said that his opinion was based partly on the fact that Saldano is Hispanic, and that Hispanics are overrepresented in the criminal justice system. The United States Supreme Court reversed Saldano's sentence because of Quijano's testimony on racial propensity, but not before Quijano testified that race should be a factor in assessing future dangerousness in eight other capital trials. James Kimberly, *Death Penalties of 6 in Jeopardy*, HOUS. CHRON., June 10, 2000, at A1.

127. Stephen B. Bright, *Challenging Racial Discrimination in Capital Cases*, CHAMPION, Jan./Feb. 1997, at 19, *available at* http://www.nacdl.org/champion/articles/97jan01.htm.

128. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 42 (1997) (discussing the fact that, between 1882 and 1968, at least 4,743 people were lynched in the United States, 72.7 percent of whom were black); *see also* William S. McFeely, *A Legacy of Slavery and Lynching: The Death Penalty as a Tool of Social Control*, CHAMPION, Nov. 1997, at , *available at* http://www.nacdl.org/champion/articles/97nov03.htm (Nov. 1997) (discussing the phenomenon known as "legal lynching," a phrase coined by death penalty opponents because, "as killings outside the law declined in the twentieth century South, the infliction of the death penalty by the courts increased.").

129. *See generally* BALDUS, *supra* note 71.

that black defendants are more likely to receive the death penalty than white defendants, but also in the fact that defendants, both black and white, are much more likely to receive the death penalty if they kill white, rather than black, victims.[130]

Though perhaps it is more stark in the death penalty context, the impact of discrimination does not begin during an individual's trial, but rather when that individual is born into a society which is still replete with the vestiges of its racist past.[131] The profound presence of racism in our society and particularly in the criminal justice system is clear in this description of Louisiana's prison system:

> Everybody in Louisiana calls our prison Angola. The prison is made up of 18,000 acres that were once three cotton plantations. The name Angola is a reminder of the slaves from Angola, Africa who once worked these plantations. At the prison, there are two columns of men walking out . . . to do their work in the fields. Most of them are black, and very few are educated beyond a fifth-grade level. You begin to wonder how much has really changed. The next time you read the Thirteenth Amendment, which abolished slavery, notice the fine print. Even on the books, slavery has not been abolished for those who are incarcerated in the United States of America.[132]

For individuals born into poverty, the effects of racism are magnified, as evidenced in the unequal effect of the cycle of violence on African-American and white children. One study, which examined court records from 908 substantiated cases of child abuse or neglect, and compared them against a control group of non-abused children, found that while white children who had been abused or neglected were no more likely to be arrested than their non-neglected counterparts, black children who were abused or neglected showed significantly increased rates of violent crime compared to black children who were not abused or neglected..[133] Further, among capital defendants, such abuse and trauma

130. *See McCleskey*, 481 U.S. at 312 (describing race-based sentencing disparities for similarly-situated defendants as an "inevitable part of our criminal justice system."); *see also* BALDUS, *supra* note 71, at 336 (analyzing the data relied upon in the *McCleskey* case and finding that in the county where McCleskey was convicted, if accused is black, he is ten times more likely to be sentenced to death if victim is white than if victim is black); U. S. GENERAL ACCOUNTING OFFICE, STUDY GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990) (finding that race of victim influences all stages of criminal process, especially in the earlier stages of the process, including prosecutor's decision to charge).

131. *See* Haney, *Commonsense Justice, supra* note 41, at 330 (suggesting that, even in the post-Furman years, race still plays a significant role in the ability of the jurors to take the defendant's point of view, which manifests itself in a continuing effect that the race of the defendant and also the victim has on death-sentencing rates, to the disadvantage of black defendants).

132. Prejean, *supra* note 71, at 4.

133. *See* Cathy S. Widom and Michael G. Maxfield, *The Cycle of Violence: Revisited 6 Years Later*, 150 ARCH.PED. ADOL. MED 390, 392 (April 1996).

histories are "virtually universal," whether such abuse occurred within the home or within the community, "where growing up as an inner-city person of color means witnessing violent death of peers and loved ones."[134] It is not surprising, then, that when a capital defendant finally reaches death row, the jury and the system react as if he has completed a self-fulfilling prophecy.[135]

C. *Learning Disability, Mental Retardation and Mental Illness*

Wickedness is not the worst. There is madness in that family.[136]

Getting hardened criminals to tell their secrets is another way of identifying with the witch.[137]

Other conditions that can lead to marginalization and may best be explored through counter-narrative are mental difficulties and learning disabilities. Mental health is frequently a central issue in capital cases. Many death penalty defendants have histories of mental illness, such as schizophrenia, and psychiatrists and neurologists have found that among death row inmates, neurological problems occur with a frequency far above that of normal population.[138] Cognitive dysfunction is over-represented among groups of offenders, with estimates placing the number of affected individuals at between twenty and fifty-five percent of the incarcerated population.[139] Mental health experts estimate that ten percent of the death row population nationwide suffers from some type of mental retardation.[140] Recent studies have also begun to find links between criminal behavior and brain damage, frequently stemming from repeated childhood abuse.[141] For example, the defendant in the landmark case *Penry v. Lynaugh* suffered brain damage which may have occurred when he was beaten over the head with a belt as a child. Mr. Penry was in and out of state

134. Stetler, *supra* note 17, at 37.

135. Doyle, *supra* note 18, at 434–35.

136. RHYS, *supra* note 20, at 96.

137. When psychiatrist Dorothy Lewis, who studies criminal behavior and has interviewed numerous death row inmates including Ted Bundy, was asked if, when she read about witches being burned at the stake, she identified with the witch or with the onlookers, she stated that she identified with the witch. Malcolm Gladwell, *Crime and Science*, NEW YORKER, Feb. 24/Mar. 3 1997, at 135.

138. *See id.* at 138–39 (describing one study of fifteen randomly-selected death row inmates that found forty-eight separate incidents of head injury, many resulting from beatings by parents and relatives).

139. *See* Nancy Cowardin, *Disorganized Crime: Learning Disability and the Criminal Justice System,* 13-SUM CRIM. JUST. 11, 11 (1998).

140. Raymond Bonner & Sarah Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift,* N.Y. TIMES, Aug. 7, 2000, at A14.

141. Psychologists' studies of disadvantaged toddlers, half of whom had been subjected to serious abuse showed that while almost all nonabused children responded to a crying peer with concern or sadness, none of the abused toddlers showed any concern; the majority either grew distressed and fearful themselves or lashed out with threats, anger, and physical assaults. Gladwell, *supra* note 137, at 140.

schools and hospitals throughout his childhood, and struggled for a year to learn how to print his name.[142]

Though the Supreme Court has mandated that juries be allowed to give effect to the presence of mental illness or disability at sentencing, so far the Court has refused to declare unconstitutional the execution of mentally disabled individuals.[143] As one writer put it, we reserve the most severe punishment for the least intelligent criminals.[144] Currently, only eighteen of the thirty-eight states permitting capital punishment have laws barring execution of the mentally retarded.[145] Thus, it is essential that attorneys not only present clinical evidence of a defendant's mental illness, but effectively convince the jury as to *why* those reasons imply that the defendant should not be sentenced to death.

Because "[a]dvances in the understanding of human behavior are necessarily corrosive of the idea of free will," presenting evidence of an individual's organic impairment may help to reduce his culpability in the eyes of the jury and begin to dismantle their assumptions.[146] However, "unless properly explained, such evidence may actually work in reverse, and jurors may equate mental illness with future dangerousness and therefore vote in favor of death."[147] As

142. *See* Penry v. Lynaugh, 492 U.S. 302, 309 (1989); *see also* Gladwell, *supra* note 137, at 143–44. Gladwell describes the case study of a young African-American man on death row who killed a motorist and then denied the crime, even though he had the victim's blood on his clothes and the murder weapon in his pocket. *Id.* When psychologists examined the young man and spoke with relatives, they found he had exhibited long-term symptoms of dissociation—violent episodes, memory loss, a seemingly fractured personality—and that his childhood was marked by extraordinary trauma and violence. *Id.* The young man had been shot at as a child, beaten with a bull whip and other weapons, and would frequently run away and live in fields behind his home. Wilson's inability to remember the shooting turned out to be genuine—abuse had affected the memory retrieval system in his brain. *Id.*

143. *See* Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (arguing that family and social background, and mental and emotional development, are relevant mitigating factors when considering the death penalty, but that they do not vitiate responsibility for a deliberately committed murder); *see also Penry*, 492 U.S. at 340 (finding that the execution of an individual with the mental age of seven or younger is not considered unconstitutional, but juries must be allowed to give full effect to defendant's evidence regarding reduced culpability due to mental impairment). In September, 2001, the Court announced that it will again consider the issue of whether executing mentally retarded individuals violates the Eighth Amendment with the case of Daryl Atkins, a Virginia death row inmate with mental retardation. *See* Atkins v. Virginia, 534 S.E. 2d 312 (Va. 2000), *cert. granted*, 122 S. Ct. 29 (2001).

144. *See* Bonner & Rimer, *supra* note 140, at A14.

145. *See* 2001 Ariz. Sess. Laws 260; ARK. CODE ANN. § 5-4-618 (Michie 1993); COLO. REV. STAT. ANN. § 16-9-403 (West 1993); 2001 Conn. Acts 151 (Reg. Sess.); 2001 Fla. Laws, ch. 202; GA. CODE ANN. § 17-7- 131(j) (1988); IND. CODE ANN. § 35-36-9-6 (Michie 1994); KAN. STAT. ANN. § 21-4623 (1994); KY. REV. STAT. ANN. § 532.140 (Banks-Baldwin 1990); MD. ANN. CODE art. 27, § 412(g) (1989); 2001 Mo. Laws 267; NEB. REV. STAT. § 28-105.01 (1998 & Supp. 2000); N.M. STAT. ANN § 31- 20A-2.1 (Michie 1991); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995);2001 N.C. Sess. Laws 346; S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2000); TENN. CODE ANN. § 39-13-203 (1990); WASH. REV. CODE ANN. § 10.95.030(2) (West 1993).

146. Gladwell, *supra* note 137, at 145–46.

147. *See* Doyle, *supra* note 18, at 445 (observing that evidence of mental illness is "double-edged: It provides some mitigation for the defendant's crime but it also proves to most jurors that the defendant will be dangerous in the future.").

the *Boston Globe* reported after the prison suicide of John Salvi, who murdered two women in two abortion clinics, "John C. Salvi . . . was insane . . . but we didn't care. The violence he inflicted was so horrific, the victims he claimed were so appealing, . . . we simply shut our eyes to the reality of his madness in order to reap the rewards of our revenge."[148]

In the context of a capital trial, "empathy evidence," such as mental problems, substance abuse, or family background difficulties, can facilitate the jury's image of the defendant as an "irreparable monster" who was so retarded, scarred, or disturbed by child abuse that he just could not contain his rage and for whom jail time would not be rehabilitative. This is highlighted in the recent capital trial of Oliver Cruz in Texas.

The Cruz case, involving a defendant who suffered from severe mental retardation, drew international disapproval when the prosecution effectively argued that the defendant's mental disability—the fact that he "may not be very smart"—made him more dangerous because he would be unable to stop himself from killing again.[149] In cases like Mr. Cruz's, the client's future dangerousness may cease to be mitigating and instead become the foremost reason to have him eliminated. Mental illness or organic brain disorder also may have prompted the client to deny commission of the crime during the trial phase. In such a case, when empathy evidence is admitted at the penalty phase of the trial, any lingering doubt over the defendant's culpability is dispelled and the defendant appears dishonest in the eyes of the jury.

To counteract the effect of fears and stereotypes which may cause jurors to perceive mentally disabled defendants as inherently dangerous and unreceptive to rehabilitation, attorneys must first evaluate evidence of mental illness from a juror's perspective. Lawyers who are unable to work within the framework of a lay understanding of mental illness risk "affirmatively wound[ing] their client[s]."[150] To both understand societal perceptions of mental illness and develop a strategy for inspiring mercy even in the context of such perceptions, Kathleen Wayland of the California Appellate Project recommends consulting works of fiction, such as Steinbeck's *Of Mice and Men*, Toni Morrison's *The Bluest Eye*, and William Faulkner's *As I Lay Dying*.[151] She notes that reference to fiction can assist lawyers in emphasizing that psychological and psychiatric

148. Eileen McNamara, *Nobody Cared He Was Insane,* BOSTON GLOBE, Nov. 30, 1996, at B1.

149. Bonner & Rimer, *supra* note 140, at A1. Oliver Cruz faced execution in Texas for the rape and murder of a 24 year old woman. Cruz had an I.Q. between 64 and 76 and could barely read or write but had been periodically employed cutting grass and taking tickets for a traveling carnival. *Id.*

150. Doyle, *supra* note 18, at 445.

151. Kathleen Wayland, *The Phenomenology of Mental Illness and Organic Impairments: Understanding the Inner Experience and Symptoms of Mental Illness through Non-Fiction, Literature and Autobiography,* CACJ/CPDA Capital Case Seminar Monterey, CA 1–2 (1997).

disorders are no less real than biological disorders, that they often have neurobiological bases and that they often lurk undiagnosed.[152]

In the context of feminist fiction, Jean Rhys's development of the Jane Eyre character Antoinette exposes the onset of mental illness and the roots of society's perception of and fear of that illness. Like many schizophrenics, Antoinette was born into a family with a history of the disease and is plagued by the fear she will end up like her mother, whose madness had grown so severe she was shut away because she tried to kill her husband.[153] Though she attempts to remove herself from the pressures that she fears may cause the illness to develop as it did in her mother, financial constraints and traditional expectations force Antoinette into marriage with Rochester. Once Rochester learns about Antoinette's family history, he reacts with typical fear about her potential for dangerousness, no longer acknowledging her as the person he met and fell in love with and locking her up as if she had already gone mad.[154]

Though we have come far since the days of electric shock treatments, our society remains wary of and uninformed about mental illness. Because they do not understand the roots of mental disability, or how that disability frame the defendant's actions, jurors are likely to desire, like Rochester, to lock up a mentally ill defendant to guard against potential future dangerousness.

To work against this denial of personhood that so often occurs in the context of mental illness, witnesses and family members should, as Rhys has, tell stories through anecdotes and specific acts rather than through generalizations. The story of Mario Marquez, who was executed in Texas in 1995, incorporates the testimony of professionals and family members and illustrates the potential power of such a narrative:

> Abandoned by his family and by the same State that would later execute him, Mario Marquez was never able to develop normally either mentally or emotionally. . . .
>
> Because of his mental retardation, Mario was a target of abuse. His father would beat him because he was slow tying his shoes, because he was not able to read or do his school lessons well, and because he could not respond to his father's call as quickly as the other children. Mario was beaten on his head and face with sticks, whips, and two-by-fours. . . .
>
> Mario received no assistance from the education system or from social services despite the fact that school testing at age nine showed he had an I.Q. of 62 and a mental age of five years. During his schooling, he was placed on the side of the room with those who could not read—

152. *See* Stetler, *supra* note 17, at 36.

153. *See* RHYS, *supra* note 20, at 97. Earlier in the story, young Antoinette looks at her mother and sees herself "like in a looking glass." *Id.* at 45.

154. *See id.* at 147–48 (Rochester refuses to continue to call her Antoinette because she was named for her mother; he refers to her as Bertha, the name of Jane Eyre's madwoman in the attic).

these children were given books to color and no attempt was made to teach them. . . .

When Mario was 12, both parents abandoned him and his younger siblings, leaving Mario as the oldest person in the home. One year later, local authorities came to the household and took the younger children away. Mario was left behind, and from the age of 12 on, he was completely without parental supervision. By the time he became an adult, Mario Marquez was a grown man who functioned as a damaged child.[155]

Such a narrative, most effectively presented by those closest to the defendant, should be followed up with evidence to assuage the jury's fears regarding the defendant's future dangerousness, thus dispelling the myth of pure evil. This may be presented by family members, through "positive prisoner" evidence, detailing the defendant's good behavior in prison, or through testimony by a mental health expert.

Cognitively impaired individuals, like Mr. Marquez may engage in criminal behavior because they are less able than others to assess the probable consequences of their actions or the seriousness of their circumstances.[156]. Their "gullibility" leaves them vulnerable to manipulation by peers and to be left "holding the bag" when the police arrive at the crime scene. Once crimes are underway, reduced internal speech, impulsivity, and failed foresight can lead to tragedy if situations escalate.[157] By combining concrete evidence of the effects of mental disability with compelling narrative, attorneys can make juries aware of the complex issues surrounding mental illness and how those issues may explain the behavior of the capital defendant and suggest how he may be rehabilitated.

D. The Importance of Humanization

The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity .... An executed person has indeed "lost the right to have rights."[158]

155. *See* TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 64–66 (2000), *available at* http://www.texasdefender.org/study/Chap5.pdf. The study cited testimony by various professionals included in Mr. Marquez's Clemency Petition, as well as testimony given by his mother and information included in his school records that came to light during the post-conviction appellate process. *Id.*

156. *Id.* at 67 (citing Miles Santamour & Bernadette West, *The Mentally Retarded Offender: Presentation of the Facts and a Discussion of the Issues, in* THE RETARDED OFFENDER (M. Santamour & D. Watson, eds. 1982)) ("[M]entally retarded offenders are particularly susceptible to coercion, reacting readily to both friendly suggestions and intimidation.").

157. *See* Cowardin, *supra* note 139, at 11.

158. Gregg v. Georgia, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting) (quoting Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring)).

> *"I see myself there: the girl witness, wide-eyed as Dorothy. Staring at a world too horrible to comprehend, believing—by dint of ignorance and innocence—that beneath this unbreakable contract of guilt and blame there is always an older contract that may bind and release in a more salutary way.... Neither Dorothy nor [I] can speak of this, but the belief of it is in both our faces...."*[159]

Feminist authors have observed that roles such as the witch or sorceress to which society assigns female "outsiders," are both "antiestablishment" and "conservative." They are "[a]ntiestablishment because the symptoms—the attacks—revolt and shake up the public," but they remain "conservative because every sorceress ends up being destroyed, and nothing is registered of her but mythical traces."[160] Too often, capital defendants play a similar role in society: their actions first provoke outrage and disbelief, and the individual is eventually eliminated; all that is left is the publicity surrounding the "heinous" crime he has committed.

Feminist revisionist novels work against the conservative expectations of society by ensuring that more than "mythical traces" remain of the female characters who have been destroyed by the societies in which they lived. Such novels emphasize the illusory nature of fairy tales or myths that society propagates by demonstrating ways in which they have been structured to categorize and subordinate women. Jack Zipes argues that "in speaking out for women[,] the feminist fairy tale also speaks out for other oppressed groups and for an other world."[161] This is possible where a novel initiates an "open-ended discourse," which the reader then completes in terms of his own experiences, much like a trial in which the attorney presents the jury with a story to which the jurors, in rendering a verdict, provide the ending. In this way, feminist works provide a counter-narrative and alternative record of women's lives and histories—a "herstory"—which challenges the reader to look beneath traditional societal expectations.

Wicked constructs such a counter-narrative for the Wicked Witch of the West, explaining how the "punishing political climate of Oz" gave a woman named Elphaba a "twisted life" as the Witch, but also enabled her to develop mechanisms to cope with the constant pressure of poverty and discrimination:[162]

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159. MAGUIRE, *supra* note 88, at 383 (quoting the "Wicked Witch of the West" as she observes the bond she and Dorothy both share as members of society and their faith in the underlying morality of that society).

160. CIXOUS & CLÉMENT, *supra* note 10, at 5 (emphasis omitted).

161. *Id.*

162. MAGUIRE, *supra* note 88, at 4 ("She would emerge. She always had before. The punishing political climate of Oz had beat her down, dried her up, tossed her away.... But surely the curse was on the land of Oz, not on her. Though Oz had given her a twisted life, hadn't it also made her capable?").

> "I have always felt like a pawn," said the Witch. "My skin color's been a curse, my missionary parents made me sober and intense, . . . my love life imploded and my lover died, and if I had any life's work of my own, I haven't found it yet . . . ."[163]

By identifying themes central to Elphaba's development—her disillusionment with her skin color; her fear of water, which her mother used to taunt her;[164] and her resentment over some ruby slippers, which were given to her favored younger sister rather than to her[165]—McGuire constructs a bridge between Elphaba's emotions and experiences and those of the reader. This link enables the reader to empathize with Elphaba and to question the appropriateness of labeling her 'evil' or 'witch.' When the novel reaches its conclusion, the reader readily understands why the Witch imprisons Dorothy, who has been convinced by the Wizard to come to kill her:

> The Witch shrieked, in panic, in disbelief. That even now the world should twist so, offending her once again: Elphaba . . . now begged by a gibbering child for the same mercy always denied her? How could you give such a thing out of your own hollowness?[166]

Just as feminist novels demand that the reader use his or her own experiences to complete a narrative begun by the author, death penalty mitigation provides an opportunity for the attorney to "write a history of the present in the face of . . . counter-narratives produced in the legal process."[167] One lawyer observes:

> "I'm telling a story with page after page of facts which are put together to show the richness and complexity of my client's life, of the crime, and of the injustices of his trial . . . . This is . . . the best way to make sure that the story is not just pushed aside and forgotten. And if enough of these narratives get produced then maybe they won't be ignored when, say fifty years from now, people try to figure out why we were executing the people we were executing in the way we were doing it."[168]

Austin Sarat describes death penalty attorneys as

> historians of the present . . . [who] use narrative both to remember the future and to insist that the future remember. They construct narratives first to humanize their clients and second to connect their clients' fates

163. *Id.* at 345.

164. *Id.* at 33 ("'Shall we go walk by the edge of the lake today and maybe you'll drown?' But poor Elphaba would never drown, never, because she would not go near the lake. 'Maybe we'll go out in a boat and *tip over*!' Melena shrieked.").

165. *Id.* at 149.

166. *Id.* at 402.

167. Sarat, *supra* note 21, at 378.

168. *Id.* at 379 n.92 (quoting from an interview with a capital defense attorney).

> with broader social and political concerns. In so doing, they establish a political claim for their work even in an era in which the odds of ending capital punishment are so heavily stacked against them.[169]

To accomplish this mission, defense counsel must investigate, then map out and present to the jury, a clear and comprehensive picture of the world of her client. The lawyer must then show the effect of this world on the client's view of reality. Where most of society may see a witch, a princess, a madwoman or a murderess, the authors discussed herein present the stories of women who are also members of society but whose lives have been quite different from the lives of others due to a number of sociological and economic factors. While in reality we share the same homes and cities and places of work with these characters, our opinions of and reactions to daily life may be radically different.

It is in this description of the effect of circumstances on a client's reality where the creation of narrative is most vital. As described in the last section, the conditions of the client's reality often responsible for the individual's marginalization—namely poverty, racial oppression and mental illness—are what narrative must expose. The specific realities around a defendant's life can be varied in their deprivation. "Many clients have experienced abandonment, beginning with their parents. They have been molded and malformed by orphanages, foster care, and a host of institutions that have failed them along the way."[170] Substance abuse and addiction are commonplace. "Narrative helps to make meaningful a world whose violence is sometimes overwhelming. It provides the bridge that connects a bleak present to an image of justice realizable, if at all, only in the future."[171]

Angela Carter provides such narrative for the life of Lizzie Borden by explaining to the reader what life was like from Lizzie's point of view. Like the fictional Wicked Witch of the West, and many very real defendants, the personality of Carter's Lizzie has been shaped by early experiences of trauma and violence. She writes:

> [Lizzie] used to keep her pigeons in the loft above the disused stable and feed them grain out of the palms of her cupped hands. She liked to feel the soft scratch of their little beaks . . . .but Old Borden took a dislike to their cooing . . . .and one afternoon he took out the hatchet from the wood-pile in the cellar and chopped the pigeons' heads off. . . .
>
> The old man loves his daughter this side of idolatry and pays for everything she wants but all the same he killed her pigeons when his wife wanted to gobble them up.
>
> That is how she sees it. That is how she understands it.[172]

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169. *Id.* at 379–80.

170. Stetler, *supra* note 17, at 37.

171. Sarat, *supra* note 21, at 379.

172. CARTER, *supra* note 84, at 30–31.

From an outsider's perspective, Lizzie appears to have an enviable position. She is the youngest daughter in an affluent family and is well cared for by her stepmother, her father, and the family maid. From Lizzie's perspective, however, she is a thirty year-old woman who has no opportunity for marriage or a career outside the home. Further, even her most valued possessions can be taken from her at her father's whim.

Justice Brennan has argued that in the criminal context, the temptation to ignore the underlying contract of human rights that binds all individuals in a society, is great because "those granted constitutional protection in this context are those whom society finds most menacing and opprobrious."[173] Unless we articulate the narrative of society's mutual responsibility for all of its members, like the stories of Lizzie Borden and the Wicked Witch of the West, we are validating society's denial of responsibility for not only a defendant's violence, but also his ultimate fate. "Silence validates our societal self-delusion that the capital defendant's fate is not inextricably linked, through chains of causation, responsibility, commonality and community, with our own."[174]

IV.
INTERNAL AND EXTERNAL HAZARDS OF REPRESENTATION

> *Before the woman writer can journey through the looking glass toward literary autonomy . . . she must come to terms with the images on the surface of the glass . . . . [A] woman writer must examine, assimilate, and transcend the extreme images of "angel" and "monster" which male authors have generated for her.*[175]

> *Th[e] combination of the artists' and the lawyers' tools may or may not be good courtroom strategy . . . . [N]either artists nor lawyers are engaged in a straightforward, mechanical process of reproduction. Inevitably, both are vulnerable to distortion by, among other things, power dynamics and cultural stereotypes.*[176]

For female writers, the "essential process of self-definition is complicated by [intervening] patriarchal definitions."[177] Because the writer herself spends her life within the constructs of the patriarchy, there is not only a danger that the author's internalized preconceptions will stifle her own voice, but that the influence of stereotypical images will stifle the voices of the characters she has

173. McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).

174. Doyle, *supra* note 18, at 441 (quoting Robin West, *Narrative Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term,* 1 MD. J. CONTEMP. LEGAL ISSUES 161, 170 (1990)).

175. GILBERT & GUBAR, *supra* note 14, at 16–17.

176. Doyle, *supra* note 18, at 427.

177. GILBERT & GUBAR, *supra* note 14, at 17.

created.[178] Virginia Woolf views the character of the madwoman in the attic in Charlotte Bronte's *Jane Eyre* as being borne out of the author's fear of defying patriarchal conventions, contributing to an "anxiety of authorship:"[179]

> It is upsetting to come upon Grace Poole all of a sudden . . . if one reads [those pages] over and over and marks the jerk in them, that indignation, one sees that [Bronte] will never get her genius expressed whole and entire. Her books will be deformed and twisted. She will write in a rage where she should write calmly. She will write foolishly where she should write wisely . . . . She is at war with her lot. How could she help but die young, cramped and thwarted?[180]

Death penalty attorneys face a similar dilemma. In the context of a death penalty trial, there are two narratives at work: that authored by the lawyer, who is constrained by the limitations of her own role as well as by her own perceptions of the defendant, and the self-account of the client.[181] "Works of art . . . are produced by specific people in specific contexts, and neither the individuals nor the contexts are immune to the power dynamics and stereotypes that affect representation."[182] In presenting her case to the jury, a lawyer is sketching her own representation of her client, and like the works of novelists and artists, the lawyer's representation is never fully removed from the concepts that are ingrained in the lawyer's own experience.

Marie Ashe, a clinical law professor who instructs students advocating on behalf of mothers charged with child abuse, observes that a lawyer's perception of moral deficiencies in a client may support the lawyer's aversion to representing the client.[183] Just as Charlotte Bronte's "indignation" impeded her ability to create a flowing narrative, a lawyer's conscious or unconscious feelings about her client's actions may impair the lawyers' efforts to re-present the realities of the client's life. At the outset, the pervasiveness of a stereotype can frustrate the attorney-client relationship, so that the relationship is marked by the lawyer's own preconceptions. Later, stereotypes may interfere with the lawyer's ability to approach the attorney-client relationship as "client-centered," causing the lawyer to substitute his or her own judgment for the client's judgment. "Depiction is power," and "the representation of others is not easily

178. *See* CIXOUS & CLÉMENT, *supra* note 10, at 74–75 ("[T]he enemy is all over the place . . . . But the worst of it is that among my brothers, *in my own imaginary camp*, some aggressors appear who are as narrow-minded, crude, and frightening as the ones confronting me.") (emphasis added).

179. The overarching presence of societal stereotypes results in what Adrienne Rich has termed "the anxiety of authorship"—the author's fear that she cannot create or that the act of writing will isolate or destroy her. GILBERT & GUBAR, *supra* note 14, at 49.

180. WOOLF, *supra* note 83, at 69–70.

181. *See* Alfieri, *supra* note 15, at 343–44.

182. Doyle, *supra* note 18, at 437.

183. Ashe, *supra* note 61, at 1017.

separable from the manipulation of them."[184] Stereotypes often go hand-in-hand with value judgments, and a lawyer who embraces stereotypes may too easily be led unwittingly to morally devalue her client, leading the lawyer to a conclusion that her client's goals in representation are less worthy than her own.[185]

To confront the dilemma that faces attorneys representing alleged child abusers, Toni Morrison's *Beloved* can be noted for raising "compelling questions which make it impossible to classify a stereotypical 'bad mother' . . . as a client undeserving of . . . representation and advocacy."[186] The feelings elicited by the "bad mother" through her "self-interpretation, in the treatment of her act of infanticide by the law, and in the constructive interpretation of her act by the moral community that she inhabited at the time it occurred and from which she came to be excluded."[187] While it is easier to empathize with a character in a work of fiction than with a flesh and blood defendant who has committed a horrible crime, "the limitations of [lawyers'] own experiences" can be addressed in part by "reference to literature [which is the] narrative form most capable of assaulting . . . seemingly intransigent stereotype[s]."[188]

Capital defense attorneys have much to learn by referencing narrative techniques, especially those employed by feminist authors to understand divergent realities and alleviate the influence of cultural stereotypes. Potential divides may exist between attorney and client for w variety of reasons. The lawyer has a high level of education and is, most likely, middle class, whereas the client has been raised in very different circumstances. The client has lived through at least one, and most likely several, incidents of violence, while his attorney has possibly only encountered violence in the arena of the courtroom. The race and

184. Doyle, *supra* note 18, at 422 (quoting CLIFFORD GEERTZ, AFTER THE FACT 130 (1995)).

185. *See* Ashe, *supra* note 61, at 1020–21 (observing that law students' professional or academic motivations in representing clients may overshadow the defendant's own feelings about how his case should proceed); *see also* Doyle, *supra* note 18, at 428 (observing that while a client may see his exposure as mentally retarded or sexually abused as unbearably painful, the lawyers may see such exposure as the only hope for the client to escape the death penalty; asking, "Are the lawyers trusted to save the client's life at any cost? By any means? Or trusted to allow him to face a death sentence with dignity or integrity?").

186. *Beloved* gives account of the murder by a runaway slave woman, Sethe, of her daughter, and tells, also, the physical and spiritual consequences of that murder for Sethe and the moral communities that surround her. In stating the . . . responses to Sethe's act by various moral communities—including the law, white abolitionists, and other former slaves—the novel inquires into the moral interpretations and imaginings of people who have been variously victimized. It manifests the utter inadequacy of the 'bad mother' stereotype in its treatment of Sethe . . . . [T]he novel can be read as inquiring how the experiences of victimization and oppression underlie what can properly be called moral agency and ethics. Specifically, it demonstrates inquiry into certain realities of the 'bad mother': who she is; what motivates her; . . . what is the moral value of her acts?

Ashe, *supra* note 61, at 1022–23.

187. *Id.* at 1018–19.

188. *Id.*

gender of attorney and client may be, and in the death penalty context probably are, different.

Divergent experiences are capable of wreaking havoc on the attorney-client relationship. "Clients are often difficult to interview about their own lives, and capital defense counsel must learn to see them as poor historians, rather than uncooperative liars."[189] A capital defendant's encounter with his defense lawyer is never the client's first experience of being represented by a person of higher status; usually it is only the most recent in a very, very long series of such experiences. As a result of race, poverty, mental disability, youth, illiteracy, and dysfunctional family backgrounds, most capital defendants have spent their lives in subcultures of people who are seldom given the opportunity to assert their own voices.[190] As Virginia Woolf worked to understand the circumstances that surrounded the lives of the women before her, so must death penalty attorneys strive to understand the realities of their clients, whose "own instincts," like those of Charlotte Bronte, may be "hostile to the state of mind which is needed to set free what[ ] is in [their] brain."[191]

To give these individuals voice, attorneys, like authors, must society's—and therefore, their own—perceptions. Power "is only one of many forces that intervene in representation .... Even very good lawyers will see their clients through a haze of transpersonal, transhuman, and transcultural forces [such] as class, ... gender, race and structure. The depth of the haze will vary, but even a quite passionate desire to pierce its veil is unlikely to succeed entirely."[192] In the work of female authors, this haze has been turned inward,[193] which, in the case of Charlotte Bronte, results in the creation of the madwoman in the attic, "the monster that [the author] fears she really is rather than the angel she has pretended to be."[194]

To move beyond stereotypes and accurately define themselves and those they represent, both authors and attorneys must "redefine the terms of [their] socialization." Feminist authors have accomplished this through the act of

189. Stetler, *supra* note 17, at 37.

190. Doyle, *supra* note 18, at 429.

191. WOOLF, *supra* note 83, at 51.

192. Doyle, *supra* note 18, at 431.

193. *See* GILBERT & GUBAR, *supra* note 14, at 77. As an example, in *The Fall River Axe Murders*, Angela Carter acknowledges the duality fostered by use of the mirror to enforce self-esteem, writing: "There is a mirror on the dresser in which [Lizzie] sometimes looks at those times when she snaps in two and then she sees herself with clairvoyant eyes, as though she were another person. 'Lizzie is not herself, today.'" CARTER, *supra* note 84, at 30. In *Wide Sargasso Sea*, Jean Rhys also recognized the power of self-discovery implicit in the looking glass:

> There is no looking-glass here and I don't know what I am like now. I remember watching myself brush my hair and how my eyes looked back at me. The girl I saw was myself yet not quite myself. Long ago when I was a child and very lonely I tried to kiss her. But the glass was between us—hard, cold and misted over with my breath. Now they have taken everything away. What am I doing in this place and who am I?

RHYS, *supra* note 20, at 180.

194. GILBERT & GUBAR, *supra* note 14, at 77.

revision, by which they "enter[] an old text from a new critical direction."[195] Similarly, death penalty attorneys attempt to construct an "alternative discourse," based on the construction of a more complex narrative that elucidates the "mixed lives and mixed motives" of capital defendants.[196] While feminists work against the framework of a patriarchal story, capital defense attorneys must provide a counter-narrative to the story told by the State.[197] In this way, lawyers "disrupt[] the tight narrative of wrongdoing and justified conviction . . . [b]y pointing out false articulations, oversights, simplifications, and partial truths."[198]

However, both authors and attorneys must be wary of falling prey to the "crisis in representation" that occurs any time that the strong or dominant describe the weak or the subordinated.[199] During a capital trial, the representation that a lawyer constructs substitutes for the actual defendant. However, if there is a verdict for death, the actual defendant supplants the representation. While the novelist's success is measured by her ability to evoke sympathy in the reader, causing a reevaluation of preconceived notions about a character or her situation, a capital defense attorney's success is measured by whether she saves the life of her client. No matter how compelling the picture painted of the capital defendant, it is the actual client who will be executed if the jury's verdict is for death.

Further, unlike authors, lawyers do not "have the artists' absolute freedom to define their work."[200] Jurors may have inferred moral guilt from a defendant's silence at trial, even when that silence is rooted in the fear and oppression that has marked his life experience. In addition, though a defendant's history of class or racial victimization may provide an explanation for violence, jurors may view such an explanation as an attempt to excuse the defendant's actions, and respond to that excuse by voting for death. It is essential, therefore, that defense attorneys "sustain the defendant's moral voice" and "maintain his moral credibility with the jury."[201] It is always a possibility that the lawyer's version of the defendant may diverge so significantly from jurors' own preconceptions that it alienates them entirely.[202] As William Doyle explains, "A factor like race or mental illness can be used to explain a defendant's crime, but . . . [e]verything is lost if the jury (having just convicted the defendant of murder) interprets the

195. *Id.* at 49 (quoting ADRIENNE RICH, *When We Dead Awaken: Writing as Re-Vision*, *in* ADRIENNE RICH'S POETRY 90 (1985)).

196. Alfieri, *supra* note 15, at 346 (quoting Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trial*, 27 LAW & SOC'Y REV. 19, 51 (1993)).

197. *But see* Sarat, *Narrative Strategy*, *supra* note 21, at 377 (cautioning that "death penalty lawyers may have no special claim to [the] authenticity" of their narratives if a jury focuses on the fact that an alternative story can *always* be told).

198. *Id.* at 377.

199. Doyle, *supra* note 18, at 429.

200. *Id.* at 439.

201. Alfieri, *supra* note 15, at 349.

202. Doyle, *supra* note 18, at 417 (citation omitted).

use of mitigating material as an attempt to excuse the murder or evade responsibility."[203]

Death penalty lawyers represent their clients both by speaking for them and by presenting to a judge or jury their portrayal of them.[204] This means that "advocates must win and hold the trust not only of the clients, but also of the jurors." They cannot stray too far from accepted cultural norms.[205] For example, a defense attorney must not appear to devalue the life of the victim in her struggle to present the defendant as sympathetic—or even a victim—himself. Similarly, it is more effective for an attorney to situate the defendant's actions within his and the jurors' personal experience rather than to speak in broader terms about abolition or racial injustice, which may be perceived by jurors as an indictment of their own norms and values.

Defense attorneys must remember that prosecutors do not have sole claim on the plight of the crime victim:

> Those who defend capital cases are as offended by loss of life as anyone else.... Remind the jury that counsel is a member of the community who shares their values. Their concern about crime, their concern about the suffering of the survivors. Acknowledge the loss and suffering, while reminding the jury that its decision will not bring the victim back.[206]

In this way, the death penalty defense lawyer becomes "a transmitter of community norms," rather than someone who is engaging in the law of capital punishment in an effort to take on a cause or make a moral statement. By "adopt[ing] a discourse of community," the lawyer can engage the jury in an examination of the "'larger values' of moral and social citizenship."[207] "Affirming the values of agency and community empowers the jury to recognize the capital defendant in context, restoring a sense of personhood and sympathy."[208] "Participation in story enacts community through inclusive narratives that humanize the violator of community norms, showing he is both a moral agent *and* a victim. The narratives . . . help 'weav[e] the violator back into the fabric of the larger society.'"[209] In this way, the presentation of mitigation evidence not only saves the lives of individual clients, "[i]t also helps to illuminate, one case at a time, the causes of the violence that plagues American

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203. *Id.*

204. *Id.* at 420 (citation omitted).

205. *Id.* at 431–32 (citation omitted).

206. *See* Bright, *Case Example*, *supra* note 109, at 10.

207. Alfieri, *supra* note 15, at 350–51 (citing Margaret Jane Radin, *Reconsidering Personhood*, 74 OR. L. REV. 423, 447 (1995)).

208. Alfieri, *supra* note 15, at 351.

209. *Id.* (quoting Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 162 (1990)).

society . . . century so much more severely than other similarly industrialized nations."[210]

CONCLUSION

If [we can] not grasp the truth about [women] . . . in the past, why bother about [women] in the future?[211]

[W]e remain imprisoned by the past as long as we deny its influence in the present.[212]

As other nations move swiftly toward abolishing the death penalty, the United States has persisted in a strategy of "ritual amnesia," working toward erasing rather than resolving our most perplexing social problems. Recently, there have been definite signs of a shift in the nation's attitude toward imposition of the death penalty. Courts have embraced new DNA testing strategies to safeguard against execution of the innocent, the state of Illinois has imposed a moratorium on executions pending full investigation of arbitrary imposition of the death penalty, the Supreme Court is reconsidering the issue of the execution of the mentally retarded and the media has begun to pay increasing attention to the arbitrary and racist infliction of capital punishment. However, both presidential candidates in the year 2000 election supported application of the death penalty. President Bush, who ran on a platform of "compassionate conservatism," had overseen the execution of over 140 prisoners in Texas since taking office as governor of that state in 1995. In fact, Texas has executed more individuals in the past five years than any other U.S. state has executed in the past two decades.[213] Most recently, a bill to prohibit the execution of the mentally retarded in Texas was vetoed by Governor Rick Perry in June 2001.[214]

As Governor of Texas, George Bush, Jr. approved the executions of mentally retarded individuals,[215] those who committed their crimes as children,[216] those who have shown marked remorse and religious conversion,[217] and

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210. Stetler, *supra* note 17, at 40.

211. WOOLF, *supra* note 83, at 30.

212. McCleskey v. Kemp, 481 U.S. 279, 345 (1987) (Brennan, J., dissenting).

213. *See* Amnesty International, *Conveyor Belt of Death in Texas Must Stop*, *at* http://www.amnestyusa.org/abolish/usa08242000.html (August 24, 2000).

214. Peggy Fikac, *Perry Vetoes Death Penalty Provision*, SAN ANTONIO EXPRESS-NEWS, June 18, 2001, at A1.

215. David G. Savage & Eric Lichtblau, *Aides Clarify Bush Stance on Executing Retarded Inmates*, L.A. TIMES, June 13, 2001, at A7 (citing the executions of Oliver Cruz, Terry Washington, and Mario Masquez).

216. For a list of juvenile defendants under death penalty sentence, see Death Penalty Information Center, *Case Summaries for Current Death Row Inmates Under Juvenile Death Sentences*, *at* http://www.deathpenaltyinfo.org/juvcases.html (Feb. 2001).

217. *See* Tunku Varadartjan, *Karla Tucker Executed as Final Appeals are Rejected*, THE TIMES, Feb. 4, 1998, at 1.

even those who presented substantial evidence of innocence.[218] This stalwart march toward extermination makes clear that in this time of increasingly harsh jurisprudence, we "have become a society that has . . . a very difficult time conceptualizing and legitimizing compassion, mercy, charity, and understanding."[219]

In the face of a legal system intent on imposing violence, the work of death penalty lawyers is increasingly not only about saving their clients' lives, but about recording the stories of those lives. "As the prospect of saving lives diminishes, the importance of saving the stories of those whose lives are lost increases in importance."[220] Lawyers must strive to make connections between the poverty and abuse which breeds violence and the unresponsiveness of a legal order intent on justice characterized by violence.

By reconstructing a fictive world along non-sexist lines, the works of feminist writers provide an example of those who have succeeded in "address[ing] society at large [and] question[ing harmful] . . . patterns of values and . . . expectations about roles and relations."[221] Using the novelists' tools, lawyers may gradually be able to effect similar change, humanizing individual clients by constructing a narrative that emphasizes the distinctive features of their lives and, at the same time, situating those lives in the context of the broad political and social conditions that have influenced them.[222] Just as feminist novels provide a lasting record of the richness and depth of women's experience, courthouses become arenas in which new voices may be heard and diverse stories can be preserved.

Both feminist novelists and defense attorneys use language to build a bridge between the reality of the subject's life and the perceptions and misperceptions of the audience about that life. In the author's case, the story they tell is imagined, but may be truer to the life of the protagonist than the "factual" history that existed before. Similarly, the attorney must move beyond the factual history of the defendant presented by the prosecution to construct a truer story of the defendant's life. By delving deeper into our common history and telling the truths—about race, gender, wealth, violence—that lie behind the myths that are commonly accepted in our society, attorneys and novelists can write a new history. What's more, they can make substantial inroads toward changing the present.

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218. President Bush was heavily criticized for the execution of Gary Graham, who was executed in June 2000, based upon no physical evidence and the testimony of one witness. Then Governor Bush stated that he was "confident that justice was being done." *See* Patrice Dickens, *Reno Is Asked To Investigate An Execution Case in Texas*, WASH. POST, Aug. 25, 2000, at A13.

219. Alfieri, *supra* note 15, at 347 (quoting Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1223, 1227 (1995)).

220. Sarat, *supra* note 21, at 364.

221. ZIPES, *supra* note 69, at xii.

222. Sarat, *supra* note 21, at 373.