The Ironies of Helping: Social Interventions and Executable Subjects

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Law and society scholars have theorized about the link between capital punishment and the hegemony of individualism, but few offer empirical investigations to illustrate how individualism makes capital punishment possible (and vice versa) in the contemporary United States. In order to fill this gap, we analyze the legal and human service records that were compiled in the construction of one executable subject, Daniel Farnsworth. Using a critical discourse approach, we look at what was said and not said about Daniel in the records created by various helping agencies. In our analysis, we demonstrate how the helping agencies involved in Daniel's life repeatedly relied on an individuating psychological paradigm that led them to produce decontextualized catalogs of his actions and characteristics. Next, we illustrate how these pathologizing accounts were, ironically, later invoked in court in the name of preserving his life. Finally, we explain how "helping" discourses, along with the rules that regulate capital defense practice, straightjacket defense attorneys into reinforcing individualism in this context.

This is a study of one life, or more accurately, an analysis of the legal and human service records that were compiled in the social construction of one legal subject, a person named Daniel Farnsworth.[1] Daniel can be understood as an "executable subject," or a being who is no longer deemed worthy or capable of nearly all of the rights usually attributed to human beings in Western society. Daniel became executable not only because he committed the type of crime (double murder) that triggers our most punitive legal response (the death penalty) but also because he repeatedly failed to live up to the standards of normalization thrust upon him in the name of "helping." We illustrate how the individuating discourses that shape U.S. social interventions were profoundly destructive in

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[1] All names and places have been replaced with pseudonyms.

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Daniel's life as they persistently decontextualized and pathologized his actions, located "the problem" within his person, and resulted in the cataloging of characteristics that marked him as irredeemable, dangerous, and excludable.

Daniel is only one of the 3,309[2] individuals currently living on death row in the United States. Like many condemned persons, Daniel came in contact with various social interventions over the course of his life: public assistance, child welfare, special education, mental health, juvenile justice, and finally criminal justice. Each of these institutions maintained records on Daniel that contained detailed accounts of his actions and characteristics in need of "treatment" or "correction." And as in many capital cases, these records were gathered and used by Daniel's attorneys both at his trial and on appeal to develop mitigating evidence, or arguments to persuade the judge and jury to spare Daniel's life.

In this article we analyze the ideas and events that constructed Daniel as an executable subject and argue that these ostensibly "helping" projects turned out not to help Daniel but led to ever-increasing levels of social exclusion. The story begins before Daniel was born, when his parents applied for public assistance and were identified as in need of intervention. We then follow Daniel as he moved from one helping system to another and was placed in a series of increasingly restrictive residential facilities. At each phase of the story, we attempt to uncover the frameworks that determine what was said and not said about Daniel in his records.

Furthermore, we illustrate how discourses that pathologized Daniel were, ironically, later invoked by Daniel's advocates in the name of preserving his life. This irony illuminates yet another "contradiction of capital punishment":[3] efforts by defense attorneys to contextualize[4] often draw upon individuating[5] discourses that frame the defendant as responsible. Put another way, Daniel's defense attorneys, while intending to save his life by describing him

[2] Figure as of September 2008, Death Penalty Information Center (http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year).

[3] We use this phrase to refer to the general theme in death penalty research pointing to the social and legal tensions produced by capital punishment, including Zimring's (2003) *The Contradictions of Capital Punishment*. Some of these contradictions include the notion that execution is irrational in a purportedly rational society; the competing values of retribution and due process; the paradox of distinguishing state violence from illegal violence; the competing values of "non-arbitrariness" and individualization; and the contradictory doctrines of individual culpability and "diminished autonomy." See Kaplan (2007, Chapter 1) for a review of this theme in death penalty scholarship.

[4] By *contextualize* we mean explaining the role of the external environment (e.g., poverty, childhood trauma, etc.) in the defendant's actions.

[5] By *individuate* we mean the process of explaining the defendant's actions as exclusively his or her own willful decision and excluding external forces.

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as influenced by social forces, relied on documents that conveyed the opposite message, one of individual choice and culpability. In using such records, capital defense attorneys inadvertently reinforce the ideology of individualism that fueled their client's social exclusion in the first place.

This study aims to develop a theory about the hegemony of individualism in American society. We argue that individualism is so deeply embedded in our social interventions and the law that it is practically impossible to talk about particular subjects in capital cases without reinforcing and valorizing it, whatever the intent of the speaker. We believe that the role of individualism in the life of capital punishment is essential for understanding it as a social fact, and we hope that our argument here will instigate further discussion among scholars in law and society.

Social Interventions and Blaming the Victim

By *social interventions*, we mean efforts by the state and state-sanctioned institutions to act for the benefit of the collective. Social interventions have been critiqued by scholars from a range of disciplines for placing too much faith in scientific rationality to improve the human condition (see, for example, Scott 1999). Another common criticism is that these projects attempt to enforce a certain type of personhood that may or may not be in the helpee's best interest. While the stated goal is to help, the real purpose is to get the person to conform to a certain way of being. Along these lines, Katz (1986) detailed our long history in the United States of moralizing poverty and dividing the poor into those "deserving" and "undeserving" of assistance. Similarly, Platt (1969) demonstrated that the "child-saving movement" (beginning in the late nineteenth century and continuing well into the twentieth) in the United States was grounded in outdated, conservative, and paternalistic ideologies that ended up pathologizing poor, urban children.

A related concept can be found in the work of Foucauldian scholars writing about the "psychological complex," or "psy-complex," defined as "the networks of ideas about the nature of human beings, their perfectibility, the reasons for their behavior, and the way they may be classified, selected and controlled" (Parton 1991:7; see also Rose 1984, 1996; Ingleby 1985). The psy-complex's purpose is to improve people, to change their characters, attitudes, and behaviors through manipulation of their qualities and attributes, and it is dependent on scientific knowledge and professional expertise. The psy-complex comprises not only ideas, but spaces and people, including offices, prisons, and hospitals, and legions of psychologists, psychiatrists, neurologists, and social

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workers (and their patients, inmates, and clients). The psy-complex's individualistic disciplinary mechanisms, and the people who animate them, define who deserves not only to belong, but to live (or die).

The idea that mid-twentieth-century social interventions individuate, blame, and label the persons they aim to serve was articulated with great care by psychologist William Ryan in *Blaming the Victim* (1976).[6] Ryan developed a concise theory of "blaming the victim" that juxtaposes ideologies of "exceptionalism" and "universalism," the former describing an individualistic approach to problem-solving (fix the person) and the latter describing a social approach to problem-solving (fix the context): "Blaming the victim occurs exclusively within an exceptionalistic framework, and it consists of applying exceptionalistic explanations to universalistic problems" (1976:19). In other words, when the psy-complex "explains" the source of trouble as the person rather than the context, it is blaming the victim. The long-term effects of blaming the victim are clear to Ryan:

> The ultimate effect is always to distract attention from the basic causes and to leave the primary social injustice untouched. Prescriptions for cure, as written by [victim blamers], are invariably conceived to revamp and revise the victim, never to change the surrounding circumstances. They want to change his attitudes, alter his values, fill up his cultural deficits, train him and polish him and woo him from his savage ways. (1976:25)

Applying this logic to Daniel, the psy-complex's exceptionalistic accounts of his deviance can be juxtaposed with an alternative explanation—unfortunately, never spoken—in which Daniel's traumatic social world is included for blame. As we discuss below, the basic social problems shaping Daniel's life trajectory are totally bracketed by the psy-complex's blaming approach, leaving the structural situation unchanged.

More recently, in *The Road to Whatever* (2004), Currie echoed Ryan by strenuously arguing that "teen delinquency" must be understood as partially a failure of helping agencies (and families), which is related to a particular form of individualism:

> The road to [delinquency] typically begins in their families, which often embody the "sink or swim" ethos of the larger culture—a neglectful and punitive individualism that sets adolescents up for feelings of failure, worthlessness, and heedlessness that can erode their capacity to care about themselves or others. . . . For many adolescents, the schools and "helping" agencies mainly recapit-

[6] Ryan cited Mills (1943) as a major influence on his ideas about ideology and the pathologization of persons who violate middle-class norms.

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> ulated, in a different setting, the "sink or swim" individualism that characterized their families, and compounded the problems that had begun at home. (2004:14)

Punitive and neglectful individualism, according to Currie, underlies the practices of both families and helping agencies. Currie was able to make this claim based on extensive interviews with current or former "delinquent teens," families, and mental health professionals. Currie's discussion of mental health practitioners reads, as becomes clear later in this article, like a description of the attitude informing Daniel's "helpers":

> This language of choice and individual responsibility and tools was repeated like a litany in the helping agencies my interviewees encountered, and the emphasis on choice often led to a somewhat paradoxical conception of the agencies' role. Since it was generally assumed that people's difficulties in life were due to their own "bad choices," the job of the helping agencies was not really to help people, for people should [be] held responsible for those choices, but, at most, to offer them the tools to help themselves. But the tools typically consisted of exhorting them to look inward to understand why they behaved the way they did and to work to change their own attitudes and their responses to the people around them. (2004:146)

As Currie made crystal clear, this situation is based on assumptions embedded in the training of "helpers":

> The relentless tendency to define problems as the result of individual failure or deficiency is, in part, a reflection of the training that most practitioners in the helping professions receive. Most have been trained in identifying and addressing individual pathologies, not in understanding the problems of the family as an institution, much less those of the larger society. (2004:148)

The pervasive and entrenched practice of blaming the victim, then, is hegemonic—as Currie explained, the individualistic ideology underlying "blaming the victim" is unspoken, normative, unassailable, and dominating within social interventions.

The Hegemony of Individualism

The psy-complex's values favoring individual responsibility are intimately connected to a fundamental feature of U.S. society—a basic ideology we call, for simplicity, individualism. In the most general sense, individualism describes an ideology in which conceptualizations of personhood and social life are constructed and understood through the lens of a monadic, self-authored subjectivity—an individual person. In individualism, everything about

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personhood and society is understood in terms of the individual. Individualism is fundamental in U.S. society because it lies at the heart of liberal political ideology and capitalist economics. The American experiment is a liberal one, and our Constitution was designed to protect the rights of free citizens (pursing life, liberty, and happiness) against intrusion by the state. As political scientist David Johnston put it,

> The first premise of liberal political theory is that only individuals count. Individuals formulate projects. Individuals conceive values. When values and projects come to fruition, individuals experience the joy of their attainment; when they fail, individuals feel the frustration that results. Liberal individualism—the claim that only individuals count—is the substance and strength of the liberal tradition. (2004:191)

Of course, groups exist and "count" in liberalism, but as Johnston made clear, the ultimate unit of analysis is the individual:

> The liberal view that only individuals count does not require liberals to be blind to the fact that group membership and shared cultural practices are important to individuals and play a significant role in helping many people to build valuable lives. . . . Individuals may and often do make plans together, share aspirations and goals. But the aspirations and hopes associated with these projects and goals are *individuals'* aspirations and hopes. The satisfactions of success and the disappointments of failure are individuals' satisfactions and disappointments. Only individuals can be miserable and can suffer. (2004:20–21; emphasis in original)

In the United States, it seems natural to blame the victim because to do otherwise would mean questioning the whole premise of the American political experiment (compare Bird 1999). Individualism is also tied to capitalist economic organization and ideas about the free market. MacPherson (1962) drew on Enlightenment scholars, especially John Locke, to describe the "naturalization" of individualized ownership:

> The individual was seen neither as a moral whole, nor as part of a larger social whole, but as an owner of himself. The relation of ownership, having become for more and more men the critically important relation determining their actual freedom and actual prospect of realizing their full potentialities, was read back into the nature of the individual. The individual, it was thought, is free inasmuch as he is proprietor of his person and capacities. The human essence is freedom from dependence on the wills of others, and freedom is a function of possession. Society becomes a lot of free equal individuals related to each other as proprietors of their own capacities and of what they have acquired by their ex-

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> ercise. Society consists of relations of exchange between proprietors. Political society becomes a calculated device for the protection of this property and for the maintenance of an orderly relation of exchange. (Macpherson 1962:3)

Perhaps most important for our argument, individualism is also the foundation of our legal system. Radical critiques of Western legal systems have long recognized the influence of individualistic capitalism on the law. For example, Poulantzas (1982) pointed out how "the formal and abstract character of law is inextricably bound up with the real fracturing of the social body in the social division of labour—that is to say, with the individualization of agents that takes place in the capitalist labour process" (1982:191–2). For Poulantzas, capitalist law favors individuals because capitalism needs atomized individuals in order to operate efficiently.

The nineteenth century is considered the formative era of American law, and it was therefore influenced not only by liberal ideology and laissez-faire capitalism, but also by a newly emerging and increasingly dominant account of human behavior, psychological individualism (Haney 1982). Psychological individualism discounted context and situation and acted on abstract individuals and their relevant individual features. While individualism pervaded all areas of the law, one clear example is criminal law, where "the legal system, in harmony with widely held psychological theories about the causal primacy of individuals, acted to transform all structural problems into matters of moral depravity and personal shortcomings" (Haney 1982:226).

One way that individualism manifests in our legal system is through the restriction of what counts as hearable evidence. The criminal legal system adjudicates crimes based on the application of law to "facts." In this system, facts are events or circumstances (evidence) deemed by a judge to be relevant to the case at hand (for a definition of legal facts, see Gifis 2003:193). Legal statutes and case law doctrine in the United States generally restrict evidentiary relevance in criminal cases to the level of the individual. That is to say: evidence is usually deemed irrelevant if it is about the influence of groups, institutions, or societies on criminal defendants—unless it can be proven that some individual within such a group intentionally caused some action to take place.

For example, in *McCleskey v. Kemp* (1987), the Supreme Court rejected McCleskey's equal-protection claim based on evidence of systemic racism against black persons because the social science evidence submitted[7] could not prove that McCleskey himself was

[7] McCleskey submitted the famous "Baldus Study," which showed a statistical "race effect" on capital sentencing outcomes; see Baldus et al. (1990).

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individually discriminated against. The *McCleskey* ruling provides an example of repressive formalism—an instance where substantive justice is precluded by formal equality (for a discussion of repressive formalism, see Milovanovic 2003:21). *McCleskey* is also an example of what Freeman (1990), in his historical analysis of antidiscrimination law, referred to as "the perpetrator perspective" doctrine, which requires harm to be caused by a particular individual. According to Freeman (1990), individualistic antidiscrimination law is intended to:

> isolate and punish racial discrimination viewed as an instance of individual badness in an otherwise non-discriminatory realm. Thus, we cannot find violations of antidiscrimination law in objective social conditions, but only in the actions of identifiable perpetrators who have purposely and intentionally caused harm to identifiable victims who will be offered a compensatory remedy. Central to the perpetrator perspective is the principle of individual (or sometimes) institutional fault. All we need to do is identify and catch the villains; having done so, we can, with confidence, place responsibility where it belongs. (1990:3)

The perpetrator doctrine frames human and social relations as only being relevant at the level of the individual.

In the realm of civil law, Haltom and McCann (2004) demonstrate the hegemonic role of individualism in shaping the well-publicized tort reform movement, which aims to rein in an allegedly out-of-control, hyper-litigious tort system that awards large sums to plaintiffs in personal injury lawsuits. According to Haltom and McCann, tort reformers are involved in a dialectical relationship with popular media institutions in which both parties heartily endorse "individual responsibility" as a bedrock feature of American culture (see Haltom & McCann 2004:24). Note that the authors make clear that this discursive process relies on a specifically *hegemonic* form of individualism:

> It is tempting to dismiss [individualistic tort reform discourse] as merely instrument, even cynical, manipulation of loaded language by self-interested elites concerned only with corporate profits and profitability. However, to do so discounts the power of ideology at stake in the discursive practices we identity. There is every reason to believe that [tort] reformers, no matter how instrumentally savvy, themselves are thoroughly enmeshed in the webs of meaning that they spin to persuade the public. More important, we urge the appreciation of the ideological power conveyed by the values they invoke as a constitutive force binding them to their audience. After all, the discourse of individual responsibility . . . is what Robert Bellah and his colleagues famously called "the first language of American moral life." (Haltom & McCann 2004:60–61)

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Blaming the victim, liberal political ideology, capitalism's and psychology's influence on law, the *McCleskey* ruling, the perpetrator doctrine in antidiscrimination law, narratives about individual responsibility in the tort reform movement—all reflect individualism's deep hegemony in the United States. The logic of courts and the psy-complex are part of the institutional tapestry constituting the United States through hegemonic individualism. In this article, we attempt to improve understanding of how this hegemony is maintained through a close reading of one condemned person's legal case and by outlining the step-by-step process through which he became an excludable and executable individual.[8]

Individualism and the Death Penalty

Some contemporary death penalty scholars argue that individuating ideologies of the self may be involved (in particular) in the retention of capital punishment in the United States (see Poveda 2000; Kaplan 2006). U.S. individualism is embedded in and constructs contemporary U.S. death penalty jurisprudence—and, to some extent, vice-versa. As Sarat (2001, 2005) has argued, to the extent that individualism "causes" capital punishment, it is simultaneously also true that capital punishment "causes" or instantiates individualism.

As Sarat conceptualized the situation, the death penalty is necessary for the staying power of U.S. ideologies, including individualism, precisely because these ideologies are somewhat weak (Sarat 2001). As Lipset (1996) has pointed out, the United States came into being through ideas, such as popular sovereignty, *not* through historical or geographically based ethnic traditions. Sarat's argument about the necessity of capital punishment was that the ideologies in the United States that underlie its sovereignty—including individualism—are in need of perpetual instantiation through symbolic displays such as capital punishment (for a concise summary of this theoretical proposition, see Sarat 2005:16–22). In this article, we offer one example of how individualism appears to be fueling the death penalty, while keeping in mind that the inverse is also true.

There is also an empirical, sociolegal literature relating to the hegemony of individualism in capital sentencing. For example, Haney (1995) carefully deconstructed the "myth of demonic

[8] This undertaking invites the question of whether and/or how *resistance* to individualism's hegemony is possible. This is an important question that should be addressed in light of Ewick and Silbey's (1995) groundbreaking work on narratives of hegemony and resistance. However, in the name of brevity, we leave this question for another day.

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agency" that individuates and dehumanizes capital defendants and argued that mitigation practice must be understood as an effort to debunk false knowledge about the death penalty that "functions to blur the core realities of capital punishment—the social causes of crime, the normative inadequacies of capital trials, and the horror of state-sanctioned executions" (1995:2).

More recently, Fleury-Steiner's (2002) extensive work on capital jurors demonstrated how individualism underlies jurors' "cultural distance stories" in which they "otherize" (and condemn) capital defendants. Fleury-Steiner's subjects repeatedly compared the traumatic backgrounds of defendants to perceived similar experiences in their own lives or the lives of persons they knew. These jurors decided that, in essence, context did not matter—the "cause" of the defendants' violence was entirely their failure of individual responsibility, which was in contrast to their own (or their loved ones') ability to transcend "difficult circumstances" (2002:8). Fleury-Steiner saw this form of individualism's hegemony as complexly bound up with deep-seated racism because the jurors often implicitly interpreted individual failure as symptomatic of race inferiority (2002:6). His analysis illustrates how the ideology of individualism and racialized bias are drawn on, merged, and validated in capital decisionmaking (also see Lynch & Haney 2000).

In this study, we further extend the investigation of individualism and the law to the case of capital mitigation. Building on Fleury-Steiner's (2002) work regarding the role of individualism in juror decisionmaking, we are interested in what makes these expressions of individualism possible in this particular legal arena. What kinds of life stories are presented to judges and juries? Do themes of individualism identified in tort reform, antidiscrimination, and other legal realms emerge in capital mitigation stories well? As a space in which criminal responsibility is debated and attempts are made to contextualize criminal acts, mitigation is a particularly fertile site for understanding the law's relationship to individualism.

Data and Methods

This research is a study of archival documents, focusing exclusively on the entire set of records that were made part of the trial record at Daniel's murder trial. Our methodological approach borrows from various traditions, particularly the anthropology of crime, and critical discourse analysis. Anthropologists of crime treat crime categories not as problems to be solved but as ethnographic objects that can provide insight into cultural and social processes fortifying state power (Parnel & Kane 2003). We attempt to gain

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this insight by tracking the events and ideas involved in constructing one criminalized subject and by linking those ideas to the larger social context.

Similarly, critical discourse analysis aims to uncover connections between discursive practices, cultural processes, and social structures (Fairclough 1992). Critical discourse analysts pay attention to the types of discourses that are employed, privileged, and excluded in a given context to illuminate hidden power relationships. To uncover the discourses at work in Daniel's executability, we analyzed the messages conveyed through the records as a whole, the format of various documents (i.e., behavior checklists that offer a limited choice of solely negative behaviors), and specific phrases and words. In order to gain a deeper understanding of these messages, formats, and phrases, we completed extensive background reading on the history, goals, and institutional practices of the helping systems that created the records (public assistance, child welfare, special education, child mental health, juvenile justice). In addition, we identified and tracked specific messages, phrases, and words that traveled from one system to the next and finally to the capital legal system.

Our analysis was guided by the following research questions: How is Daniel's situation framed by his helpers? What versions or accounts are included? What gets left out? What events trigger his movement from one system or facility to another? What accounts of Daniel's life move from one set of records to the next?

Our goal in this analysis was to trace the events, ideas, and discourses that produced Daniel's executability. In a formal legal sense, Daniel is executable because he committed a crime punishable by death. Through empirical investigation into one case, we hope to provide insight into how a formal explanation of executability is conceivable within the legal system, and what accounts of the human experience make it possible for the state to claim the power to execute citizens.

We have never met with Daniel, his family, the various professionals who created these records, or his trial attorneys. There are drawbacks to using this set of records to tell a human story. Perhaps the most important reason not to rely on these records is that they are decontextualized, or to the extent that these texts leave Daniel's own voice out of the narrative, depersonalized. We have nonetheless chosen to use the records on their own, relatively voiceless as they are, because they alone were used, both at trial and on appeal, to argue that his life should be spared. In this sense, we aim to analyze the specifically *legal* construction of subjectivity—in particular, the legal construction of one executable subject.

While we focus exclusively on Daniel's case in this case study, we wish to make clear that his case is similar to other capital de-

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fendants in two ways: (1) many, if not most, other persons tried for capital crimes had similar encounters with the psy-complex prior to their crimes (for example, many were in the foster care system, special education classes, and mental health systems as youths), and (2) the individuating psy-complex discourses we found in Daniel's case documents are similar to those found in other cases from the same era (Daniel was tried in the 1990s).[9]

We support these claims of generalizability in two ways. First, both authors of this article have extensive experience working as mitigation investigators on capital cases, at both the trial and post-conviction level. Between both authors, we have 14 years of experience in mitigation and have worked closely on 23 cases. Our work was similar to the task given to Daniel's defenders and entailed constructing social histories for our clients by extensively interviewing family members and others who knew them, as well as identifying and collecting any documentation related to them. In our professional experience, both within and between cases, a substantial proportion of social history documents found in capital cases come from the psy-complex and are often written in a similar grammar of individuation.

The other form of evidence in which Daniel's case is similar to other capital cases is that empirical social science research shows that many condemned persons were entangled in the psy-complex prior to their crimes. For example, in their study of the social histories of 43 condemned persons, Lisak and Beszterczey (2007) found that nearly two-thirds had experienced prior incarceration or institutionalization. Similarly, in their study of the social histories of 16 condemned persons, Freedman and Hemenway (2000) found that 15 had suffered "institutional failure," including the failure of various social interventions to "both recognize and remediate need" (2000:1763). This included high levels of institutional failure in schools (14 participants), juvenile facilities, prisons, foster homes (12 participants), and medical and psychiatric facilities (10 participants).

Moreover, in addition to the quantitative similarity of Daniel's case to other capital cases (e.g., many persons facing the death penalty had contact with the psy-complex), we believe that the psy-complex's response to Daniel was qualitatively similar to its response to other capital defendants. That is to say, the individuating discourses found in Daniel's case are similar to psy-complex discourses found in other capital cases. Again, we rely on our 14 years of experience working on capital cases to support this claim.

[9] In terms of race demographics, Daniel is white, as are 45 percent of the persons on death row in the United States (according to the Death Penalty Information Center 2008; http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976).

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We now undertake to describe in detail the processes that fueled increasing social exclusion and eventual executability as they appear chronologically in Daniel's legal record.[10]

Public Assistance: The Department of Pensions and Welfare (DPW) and the Farnsworth Family

The main social service agency involved in Daniel's early life is the Manaloosa County office of DPW. Manaloosa County is located in a Southern state that has a poverty rate higher than the national rate but near the median rate for the state. DPW is a county branch of a state agency that was established in 1935 to administer federal public assistance programs established under the Social Security Act. Over the years, the agency expanded to cover child welfare, foster care, and other social services.

The production of Daniel's legal subjectivity begins before he is born, when his mother Brenda applies for Aid to Dependent Children (ADC) in September 1955. According to the DPW records, she is 24, separated from her husband, recently released from a state facility for the mentally retarded, and living with her mother and her daughter, named Charlene. Her ADC check is later terminated when her mother reports to DPW that Brenda has moved in with Fred Farnsworth (court records: p. 2275). Reflecting the historical imperative to separate the so-called worthy from the unworthy poor, DPW's eligibility requirements are not based on financial need alone but on a perceived necessity to avoid rewarding immoral behaviors, such as adultery, thought to cause poverty.

In 1962 Brenda and Fred, now Mr. and Mrs. Farnsworth, go to the DPW office to apply for ADC for their baby Laura and Brenda's daughter Charlene. The Farnsworths are living off of the $55 per month that Fred receives from the Veterans Administration. Fred tells DPW he cannot work because he is disabled. DPW conducts regular house visits in order to determine Fred's ability to work. After the caseworker discovers that Fred is hauling scrap metal and picking blueberries, the caseworker decides to terminate the family's ADC checks. Fred visits the office on several occasions to request reinstatement of financial assistance. He is consistently denied (court records: p. 2283).

In 1967, the records indicate that Fred begins to visit the office to complain about Brenda, who he claims is not keeping the house or providing adequate care for the children. At this point, DPW learns that the Farnsworths have three more children: Fred Jr.,

[10] All quotations and data cited in the discussion below come from the agency records submitted to the court at his capital trial, referred to here as "court records."

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John, and Sally. Fred requests that his children be moved and placed under the care of his daughter from a previous marriage, Barbara, and her husband Bill Edwards. DPW conducts a home visit and submits a report to the court that awards temporary custody to the Edwardses. A year later, Fred asks that his children be returned to him. When he is denied custody, he goes to the Edwards home in an attempt to physically remove the children. He is arrested and placed in jail (court records: p. 2291). By the time Daniel is born, both of his parents are deeply involved with, supervised by, but receiving little to no financial assistance from, DPW. The family has already been targeted as troubled, and the construction of Daniel's legal subjectivity has begun.

Child Welfare: Daniel's Entry Into Foster Care

Daniel is born in July 1969 amid numerous court hearings and home visits regarding custody of his older siblings. The month before he is born, DPW conducts a "social study" and writes the following regarding its client, Brenda:

> This is a very difficult case because of the fact that the mentality of the client is very limited. Her background is of the poorest. She has never known what morals are, and has been promiscuous ever since she has been known to the agency. It has been recently reported to us that she has been carrying on terribly with any and every man she could get a hold of in the area . . . . Any assistance the worker can give Mrs. Farnsworth would be helpful as there appears to be no area in which she has no need. Her person is filthy, and from all accounts, the home in which she lives in an unfit place of anyone to stay because of her poor housekeeping habits.
>
> Mrs. Farnsworth is obese and extremely dirty and unkempt. She doesn't realize that she isn't mentally able to care for the children. She doesn't know that although she loves her children she is responsible for giving them more than just love. She must give them balanced meals, keep them clean and stay at home with them. Mrs. Farnsworth and her husband have had very deprived childhoods, meager means and morals that aren't acceptable due to their limited mental ability. (court records: pp. 2288–89)

According to the logic of the DPW worker's account, it is Brenda's fault that the state must take her children away from her. The problem is located *within* Brenda's person—what the caseworker describes as a lack of intelligence and morals and an inability to keep the house clean. Brenda is judged biologically and morally incapable of living up to "normal" standards of motherhood. She is *not* situated within the social world, but instead understood as a

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self-authored yet deficient subject—a monad whose (immoral and unclean) actions are determined by her autonomous choice and *not* partially determined by the social matrix in which she lives.

Daniel is still an infant when he is placed in foster care. Two years later, his father goes to the DPW office to discuss visitation and the possibility of the children returning to his home. In addition to concerns about Fred's finances, the DPW worker notes various (deficient) personal characteristics, including that he has limited education, is "somewhat retarded," and does not have a wife (court records: pp. 2308–09).

When Fred returns to DPW with his new wife two years later, DPW staff are more receptive to the idea of returning the Farnsworth children. In contrast to Brenda, who is "promiscuous," of "limited mentality," and "filthy," the DPW worker describes Fred's new wife, Janice, as "a very friendly, easy person to talk to who is plain in appearance but seems to have average intelligence" (court records: p. 2324). When the couple returns to DPW a few months later to again request the children, the worker notes:

> This couple is most anxious to have the children returned to them and Mrs. Farnsworth is very emphatic about the fact that she wants to try having all six of them at once since she does not feel it is fair to take some and leave the others. . . . Mrs. Farnsworth is going to insist that [their landlord] get a bathroom in the house and that she had gotten him to agree to pay for having electricity installed. (court records: p. 2325)

Four of the Farnsworth children, including Daniel, are sent to live with Fred and his new wife. The county continues to monitor the family but does not provide adequate financial support to counteract their poverty. A few months later, Fred returns to DPW, and the caseworker notes that "he is afraid he is going to have to go back to the Veteran's Hospital because of trouble with his jaw and with no more income than they have they do not feel they will be able to keep the children and see that they have what they need to stay in school. He requested that we put them back in boarding care" (court records: p. 2331). Daniel, now four years old, is replaced in foster care. He lives in four different foster homes before returning to his father's house one more time briefly at age seven. He re-enters foster care shortly thereafter.

Special Education

In March 1977, at age seven, Daniel is placed at Rock Hill Regional Center for the Developmentally Disabled after his foster mother completes an application checklist, marking the following problems: "over active, can't remember, short attention, destroys

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things, fighting, tantrums, lying, crying, and stealing" (court records: p. 2652). She explains that the stealing and lying mainly have to do with taking extra food and then denying it. A staffing summary completed on Daniel at Rock Hill reads in part:

> Diagnosis: 1) Normal child with: a) Intellectual abilities estimated at being in the low average range of mental ability with strengths in performance area testing and with mild visual-motor integration delays. b) Mild speech and language delays. Normal hearing and normal vision on screening testing. c) Academic skills estimated at being at late first grade to beginning second grade . . . d) History of early childhood deprivation with current family stress . . . e) Low frustration tolerance for school difficulties and in such activities as games also. Sometimes low frustration manifests as withdrawal and other times as acting out behavior. (court records: p. 2661)

The summary also includes educational, medical, psychological, speech and hearing, and recreational therapy evaluations and an educational classroom summary. This is in keeping with a treatment model, where all areas of Daniel's life that could affect his school performance are assessed in order for appropriate treatment to be determined. With his skills and characteristics observed, measured, and removed from context, Daniel's school behavior is determined to be a matter of individual pathology (Ferguson 2000). Daniel is labeled an emotionally conflicted child, damaged but still fixable with appropriate individualized treatment.

Over the course of his educational career, Daniel is given approximately six IQ tests and numerous achievement tests and disability screenings. Daniel's perceptions of school and of being tested are not recorded in his records. However, one entry suggests that by age nine, Daniel is already concerned with his academic performance and its potential consequences. In one of the several psychological evaluations in his file, the psychologist writes:

> Daniel was a significant challenge to evaluate. He was reluctant to be tested in the intellectual area, and was quite sensitive to his inabilities to perform. He would ask frequent questions regarding his performance, and would spend as much time attempting to evaluate his performance as he would in actually engaging in the tasks presented. Throughout the intellectual evaluation, he displayed very low tolerance for frustration and a substantial tendency to test the limits. He would do everything possible to avoid placing himself in a position where he might fail. (court records: p. 2431)

As increasing amounts of information are gathered on Daniel, by progressively intrusive means, the more his caretakers "know" about Daniel. This information is used by caretakers in the name of

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helping to make decisions about where Daniel will live and how much freedom he will have. Any resistance Daniel shows to the information-gathering process or the resulting decisions is recorded as further indication of individualized pathology. Daniel must either conform or become further socially excluded.

Residential Child Welfare

At age eight, Daniel is sent to live at Serenity House, a residential child welfare facility, for six months. A treatment summary is completed upon Daniel's discharge, which describes his "bizarre behavior which was almost animal-like" (court records: p. 2410) and his frequent noncompliance. The summary explains the cause of his problematic behavior in the following manner: "Daniel has lived an unsettled life. He has been shuffled around from living with family to a few foster homes. He has never been able to establish a relationship with any family. He has not been able to understand how to cope with anger and frustration in an acceptable way" (court records: p. 2410). Staff at Serenity define the problem as emotional. Daniel can be "fixed," over time, if he can learn to control his emotions. The recommended cure is long-term treatment.

Daniel returns to foster care for two months before being sent to St. Anne's Home, another residential child care facility where he will live from age nine to age thirteen. The St. Anne's care philosophy is illustrated in a progress report completed on Daniel shortly after his arrival:

> Daniel was admitted to St. Anne's Home because his disruptive behavior in foster homes caused difficulty. It was felt that the group experience would be beneficial in diluting the intensity of relationships as well as helping him to develop social skills and peer relationships. It was felt that we could offer him a model to learn appropriate behaviors, to help him with his school problems and learning gaps and to evaluate his behavior and health. (court records: p. 2601)

Here the problem is defined as a lack of behavioral skills. Daniel can become normal and "appropriate" if he can acquire those skills.

Four months after he arrives, Daniel is sent off-site for a psychological evaluation. In his report, the psychologist makes the following recommendation:

> At the present time I would be pessimistic about the possibility of a foster placement ... It might be wise to consider Daniel a somewhat longer term placement in order to permit him to make

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> the adjustments, and perhaps benefit from acceptance in the present atmosphere. (court records: p. 2432)

At age nine, Daniel's autonomous self is clearly identified as the problem. Nothing outside of Daniel needs to change; Daniel just needs to adjust. He is slotted for long-term institutionalization by an expert he has met once. The expert does not require more time with Daniel, as the decision is made based on a matrix of individual characteristics that can be measured through tests. The cataloging of negative behaviors produced by his "helpers" brings forth his social exclusion as he is banished to long-term institutionalization.

Daniel is asked to leave St. Anne's after he assaults a staff member. After several months in three different shelter programs, Daniel, now almost 14 years old, is transferred to another residential facility, Passages. Staff at Passages utilize a behavior modification program to control and correct the actions of the young people in their care. The residents are rewarded for some kinds of behavior with privileges such as weekend home passes and punished for others with loss of privileges or extra chores for bad behavior. Write-ups and "positive person papers" also influence the decisions as to whether residents move up or remain at the same "level." The residents' level represents progress made in the program and determines their privileges. The behavior modification program results in near-constant surveillance by staff.

During his stay at Passages, Daniel is continually described as inherently and individually "bad." For example, a DPW social worker completes Passages' student referral form on Daniel. On the form, there is a checklist of almost exclusively negative behaviors:

> [s]ullen or sulky, daydreams, quarrelsome, acts "smart," lacks sense of humor, sad or depressed, difficulty following direction, overly sensitive, disturbs other children, extremely shy, temper outbursts, actively engages in group activities, isolated by other children, accepted by the group, assumes leadership in a group, easily led by the group, interferes with activities of other children, demands attention, submissive, defiant, sensitive to criticism, impudent, indifferent or ignoring, cooperative, ignores school rules, overly anxious to please, bites nails, trembles, lisps, complains of headaches, stutters, steals, cries, blinks eyes, sucks thumb, stomach aches, unusual mannerisms. (court records: p. 3079)

Daniel's caseworker checks off several of the behaviors on this list and adds that he is "emotionally disturbed, has mild interest in school, does poor school work, has a poor self concept, changes schools frequently, has few friends, has an inability to control or delay impulses, and throws temper tantrums" (court records: p.

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3079). In the name of helping, Passages staff members continue to build the case that Daniel is excludable.

Apart from the progress notes, the Passages records are mostly a catalog of rule violations. Daniel is written up for a wide array of actions, creating a somewhat absurd monument to micro-surveillance that includes:

> [s]itting on the patio after bedtime, being somewhere without permission, refusing to leave when asked, being outside of his cottage during quiet hour, entering a building without a pass, fighting, calling his therapist an inappropriate name, inappropriately seeking attention from staff, refusing to let staff pass, cursing staff, being nosy, physically provoking another youth, missing an Explorers meeting, holding the door to prevent staff from seeing who he was, refusing to go to school, slamming doors, not cleaning his room or doing his chores properly, playing with paper and fire, being behind cottage 5A with two other male youths, using the bathroom with the door open, instigating, damaging school property, leaving school without permission, writing on school desk, throwing paper on the floor, blocking doorway, coming into office without permission, cursing supervisor, being inappropriate, removing cigarettes from an ashtray, getting involved in an agitating conversation between another youth and a staff, giving cigarettes to a youth who does not have permission to smoke, calling staff a bitch, telling staff to go to hell, being defiant and refusing to do as he is asked, getting tennis equipment out of room when asked not to and for being disrespectful, pitting staff against staff, running around, constantly leaving class without permission, scraping a rake against the window of the school, causing bodily harm to self when he scratched the outside of his arm with a piece of glass, hanging up phone while staff was trying to use it, sleeping all day, getting out of bed without permission, dressing inappropriately, bringing a glass out of the dining room, locking himself in a closet, threatening staff, beating on lockers, refusing to give book to teacher, climbing up on a chair and trying to take a picture from the wall, stealing cereal, stealing cigarettes, horse playing, playing with the emergency lights, being off task, sleeping during school, not coming to a social work conference, eating whip [*sic*] cream with his hands, answering the telephone, continuing to have his feet on the sofa after being warned several times, playing too much with staff, touching staff inappropriately, entering the supervisor's office without knocking, and running away. (court records: pp. 2445–3135)

This list stands as testament to the insularity of institutional life and the level of surveillance at components of the psy-complex such as Passages. With its individualizing "status offenses" such as *being* in certain forbidden places (behind a cottage) or *being* certain ways (nosy), it also testifies to the radically individuating nature of this

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institution's discourse. The centrality of the verb *be* in Passages' social construction of Daniel's subjectivity cannot be overemphasized. In this catalog of Daniel's transgressions, he *is* disrespectful, *is* out-of-bounds, *is* inappropriate, *is* nosy, etc. Again, the problem lies not with Passages, the child welfare system, U.S. social policy, or unequal distribution of resources in the United States, but *within* Daniel.

Daniel's Passages dossier is composed of heavy cataloging, the literal weight of which demonizes him as a troubled/troublesome subject thereafter. When he is discharged from Passages for assaulting two staff members, the cataloging of negative behaviors over his 16-month stay serves to justify an increased level of coercion as he moves from child welfare to the mental health system.

The Mental Health System

In September 1984, at age 15, Daniel is committed to Alcona Adolescent Adjustment Center by the Manaloosa County Juvenile Court. He is deemed "in need of treatment due to his violent and dangerous behavior" (court records: p. 1530). Alcona is "a restrictive environment for adolescents who have pronounced behavior problems, such as Daniel's . . . . Daniel has a series of behaviors which could be very threatening to himself" (court records: p. 1530). Like Passages, Alcona employs a behavior modification program consisting of privileges and consequences, requiring staff to document Daniel's infractions and the consequences given. The microlevel cataloging of individual characteristics and behavior continues as the stakes increase, and the Alcona records consist mostly of checklists and progress reports detailing whether Daniel complies with or violates facility rules and the goals of his treatment plan.

Formerly diagnosed with Adjustment Reaction with Behavior Problems at age eight and Dysthymic Disorder when he is almost 15, staff at Alcona give Daniel the much more consequential diagnosis of Conduct Disorder, Socialized, Aggressive (DSM-IV 312.23). Conduct disorder is the precursor to the Diagnostic and Statistical Manual (DSM-IV) adult diagnosis of Anti-Social Personality Disorder. While conduct disorder is psychiatry's term for *delinquent* and in need of intervention by the juvenile court, *antisocial* equates to being criminal, untreatable and in need of intervention, usually in the form of incapacitation, by the criminal court.[11] Daniel is well on his way to making the transition from redeemable to irredeemable at the hands of his helpers.

[11] There is something tautological about the DSM-IV's definition of Antisocial Personality Disorder because it partially relies on previous evidence of conduct disorder, meaning that the definition of *antisocial* is circular—those who "behave badly" in the past are diagnosed as antisocial. The diagnosis and definition are one and the same. Moreover,

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In both the intake and the discharge form, there is very little about Daniel's family or about his long and troubled history in the child welfare system. Though the staff recognize and attempt to facilitate Daniel's desire for contact with family members, it is not out of concern for Daniel's wishes but because family contact is considered part of the treatment regime. In progress reports, staff members focus on Daniel's behavior and his responsiveness to Alcona's treatment program:

> At the onset of treatment, this writer found Daniel to be somewhat withdrawn and mistrustful of confiding his true emotions and feelings on therapy. When confronted about his inappropriate behavior, he would attempt to find some fault in every situation and expand on these faults, neglecting responsibility for his own actions. He attempted to present himself to others as being a very strong and unfeeling individual. However, behind this facade was a very insecure and lonely adolescent who was craving attention. He was demanding as well as self-centered in his relationship with others causing his peers to perceive him as being asocial and unfriendly. He appeared to view others in his environment as threatening and would act out in an antisocial manner in compensation for his weak defensive abilities. . . . Significant improvement in Daniel's responsiveness to our program was observed and correlated with increased correspondence from family members. (court records: p. 2471)

In the psy-complex's mental health system, Daniel must not only control but truthfully express his emotions. Treatment goals continue to evince a moralistic tone; they aim not at understanding the roots of Daniel's troubles, but at making Daniel into a certain kind of citizen, a particular kind of "social" being—one Daniel can (and will) be blamed for failing to become.[12]

The Juvenile Legal System

Daniel enters the juvenile justice system when he is charged with burglary and criminal mischief after he and his girlfriend enter a private dwelling by breaking a lock and four window panes. Daniel is sent to a juvenile diagnostic center where he undergoes evaluations by a psychiatrist and a psychologist and is once again given a diagnosis of Conduct Disorder. In addition to the psychological evaluation, the

it is somewhat arbitrary that "bad behavior" prior to age 18 counts as treatable conduct disorder, but after a person's 18th birthday, the behavior is thought to be incorrigible.

[12] A side note: the Alcona Adolescent Adjustment Center was closed in (1995), following court involvement regarding severe and pervasive safety problems and abuse of residents.

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staff also completes a social evaluation, a vocational services report, and an individualized educational plan. At this point Daniel is 16 years old, has been under state care almost his whole life, and faces a new set of requirements and possibilities for "change" of his person. A variety of services are recommended, including vocational counseling, vocational training, on-the-job training, psychotherapy, living skills training, driver's education, sex education, decisionmaking counseling, GED preparation, career education, drug and alcohol education, and counseling to enhance self-concept and look to adult role models. Job and life skills are now the main emphasis as Daniel prepares to age out of the juvenile system and his chance for self-improvement begins to shrink. The goal is to give him the skills he needs to pull himself up by his bootstraps and earn enough money to survive.

Within a few months of completing the evaluation, Daniel is transferred to the Red Road Group, a group home for adjudicated youth near Manaloosa. Six months later, Daniel takes a job as a low-wage worker at Burger King. The records become somewhat sparse at this point. According to comments attributed to Daniel in a later psychological evaluation, Daniel runs away from the group home after getting into an argument with his roommate. He goes to visit his father in Manaloosa and gets a job working at a furniture store. He is fired a year later for "messing with the boss's daughters." He moves to a nearby town and works at a 76 Truck Stop, where he meets Veronica and her daughter Maryanne, ages 43 and 17, respectively. Soon after meeting the pair, Daniel begins a romantic relationship with Maryanne. Two months later he rapes, stabs, and kills both women in their home.

Use of Records in Capital Sentencing

Periodically, U.S. courts are able to hear structural arguments. Such was the case when the Supreme Court declared the death penalty unconstitutional in 1972, citing concerns about arbitrary application and structural unfairness for poor and minority defendants. However, a focus on the defendant as an individual informed the Court's jurisprudence when it reinstated the death penalty in a set of cases in 1976:

> [I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human being" and has made a reliable determination that death is the appropriate sentence. (Woodson v. North Carolina 1976:304–5)

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Under contemporary sentencing schemes, capital juries are presented with evidence of aggravating and mitigating factors to help them determine whether a death or life sentence fits the particular circumstances of the case at hand.

Aggravating evidence commonly presented includes details about the murder, the victim's suffering, the impact on the victim's family, and the defendant's criminal history, as well as evidence concerning the defendant's future dangerousness. To counteract the aggravating evidence, the defense presents mitigating circumstances in hopes of convincing the jury to show mercy and vote for a life sentence. Defense attorneys may bring any evidence that is relevant to the character or life history of the defendant, including evidence that he or she suffers from mental illness, brain damage, mental retardation, drug and alcohol addiction, and/or other disabilities; was the victim of physical, sexual, and/or psychological abuse; is remorseful; and/or is making a good adjustment to prison life.

During the penalty phase of Daniel's capital trial, his lawyers do not call any witnesses and instead rely on testimony offered during the guilt phase. They submit Daniel's records to the court without any explanation of their significance or how their contents are related to the request for mercy. More than 2,000 pages of incident reports, problem checklists, and other reports and records are put before the judge and jury with very little elaboration. Daniel is sentenced to death.

The failure of Daniel's trial attorneys to present a more convincing mitigation case is not uncommon. While most lawyers working on capital trials know they are supposed to present mitigating evidence, few know how to do it effectively. The gold standard of capital mitigation includes a full social history investigation and the hiring of multiple experts from the psy-complex (social workers, psychologists, neurologists, addiction experts, corrections experts, etc.). Yet because coordinating a mitigation "team" requires both familiarity with the language of the psy-complex and a commitment to strong advocacy for capital defendants, many defense attorneys continue to present mitigation cases that fall below this standard.

Six years after Daniel is sentenced to death, attorneys working on his postconviction case argue that the trial lawyers were ineffective for failing to perform several tasks. The legal claim of Ineffective Assistance of Counsel (IAC) has become one of the most effective avenues for relief in postconviction capital litigation. The argument we wish to highlight is the defense failures to investigate, develop, and present evidence that the petitioner suffers from neurological impairments. In support of this argument, his appellate lawyers argue:

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> [h]is background is remarkable for the prevalence of mental illness and mental retardation in his family, and the complete abandonment and lack of nurturing he experienced early in life. These factors, in combination with a variety of facts gleaned from petitioner's records, strongly suggest the presence of one or more neurological impairments.
>
> Petitioner's mother and his sister, Christine, were both described by state evaluators as "extremely retarded." Petitioner's father was likewise suspected of suffering from mental retardation, in addition to his well-documented mental illness. Petitioner has also exhibited consistently large discrepancies between the verbal and performance scales on IQ tests, suggesting neurological dysfunction . . . .
>
> His development was recognized to be slow even when he was an infant, and at almost two years of age, he could say only two words and often appeared not to understand what was being said to him . . . . By his early teens, petitioner was described as emotionally disturbed, infantile, sullen, and unable to remember the dates of important holidays. . . .
>
> Had trial counsel properly investigated and developed the available evidence, and secured the assistance of a qualified expert, they . . . could further have presented testimony explaining how petitioner's impairments adversely affected his ability to control aggression and cope properly with stressors. Taken together, *this evidence would have supported the conclusion that petitioner was substantially less morally culpable for the crimes he allegedly committed* than the jury was led to believe at trial. (Brief filed March 3, 2004, on behalf of Daniel Farnsworth in the Court of Criminal Appeals, pp. 41–4; emphasis added)

Daniel, his appellate attorneys argue, is less morally culpable than "normal people" because he carries "problems"—neurological impairments and emotional disturbance—within his person. Like other participants in both the law and the psy-complex, these attorneys locate the *source* of Daniel's behaviors within the borders of Daniel. Despite their good intentions of preventing Daniel's execution at the hands of the state, these attorneys perpetuate the psy-complex's project of profound individualization. In doing so, capital defenders risk the possibility of a Pyrrhic victory—winning one death penalty case while losing a more sustained battle against the ideology of individualism that fuels their client's social exclusion.

This situation presents a deep irony, another contradiction of capital punishment in light of the potential for subversiveness presented by the penalty phase in capital trials. As Kaplan (2007) has argued elsewhere, because of the evidentiary latitude afforded to defendants in the penalty phase, capital trials represent one of the rare venues in U.S. law for telling contextualizing stories that have

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the potential for challenging U.S. individualism. Indeed, the principles of guided discretion laid out in *Gregg v. Georgia* (1976) and its companion cases, and elaborated upon in subsequent cases, especially *Lockett v. Ohio* (1978), removed virtually all limitations on mitigating evidence. But despite this opportunity to subvert one of the ideological underpinnings of U.S. retention of capital punishment, defenders usually rely on decontextualizing discourses that inadvertently (but hegemonically) instantiate individualism.

Conclusion

Daniel's story illustrates how contemporary death penalty practice in the United States both instantiates and validates individualism. Due to his parents' involvement with DPW, Daniel was determined to be in need of services/surveillance before he was even born. As he moved from foster care to residential treatment to corrections, observation and documentation of his behavior and emotions, particularly those considered to be problematic, increased. Though the various systems involved in Daniel's life differed somewhat in their professed missions, they all produced checklists and progress notes outlining how far from normal Daniel had become. In these records, Daniel's actions were consistently decontextualized. Whether the problem was identified as a neurological deficiency, a lack of behavioral skills, or an inability to control his emotions, it was always viewed as inside of Daniel. His records document his existence as an individual; they make individualism "real."

His records, and the pathologizing discourses they represent, also make Daniel executable. A discursive transformation occurs in the steps from socio-medical intervention to the legal process of mitigation: Daniel's "dossier" becomes not "him," but a set of discursive traces or characteristics that *mark* him or construct a simulacrum *of* him as in league with others who no longer retain the right to live before the law.[13]

It is obvious that not all those who encounter helping systems will become excluded, violent, or lethal. This point is made regularly by proponents of capital punishment. Indeed, as Currie (2004) has shown, some young people chronically involved with helping institutions are able to reject the "road to whatever" (or worse) by recognizing the blaming discourses of these institutions and redefining themselves in less blameworthy terms: "They came to make a crucial distinction between having done screwed-up

[13] See Haney (1995) for a seminal discussion of how representations of capital defendants "deny the humanity of the persons who commit capital murder, substituting the heinousness of their crimes for the reality of their personhood" (1995:1).

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things and being a screwed up person" (2004:219). Achieving this redefinition, however, takes more than individual gumption—it requires some kind of pragmatic, external help from institutional mechanisms prepared to be forgiving and affirming rather blaming and individualizing (2004:241). According to Currie, examples of such positive external forces tend to come from the educational system:

> These institutions served as ladders out of stuck and desperate lives precisely because their inner culture was so different from that of the typical high school. They often took note of the potential of even the most marginal or troubled young people, where the regular high school had generally focused on those students' failings; they were frequently willing to roll up their sleeves and tackle a youth's problems, where the regular high school or middle school had been neglectful or rigidly punitive. Often these institutions succeeded simply because they were relatively neutral places, where the conventional high school had typically been intrusive and moralistic—places where talents and interests could be explored, and credentials gained, without the atmosphere of surveillance, disparagement, and confrontation that so often marred the regular school. (2004:241–2)

Unfortunately, these kinds of actually helpful institutions tend to be far and few between (2004:241). For those young people able to find the courage to shake off the blame of the psy-complex's helping systems, finding their way to a truly supportive institution is often a matter of chance:

> But their stories also show that breaking out of the pattern is often almost a random process—sometimes not much more than luck, a matter of being in the right place at the right time. Helping people up in a systematic way does not come naturally in American culture: often these young people escaped from apathy or desperation only because they stumbled on one of the relatively few institutions that were able and willing to do it. (2004:252–3)

Despite the truism that many persons who come in contact with the helping institutions in the United States do *not* become marginalized and violent, we believe it is safe to say that most persons who are "helped" by the psy-complex will leave with a set of files that label them as individuals who own a set of characteristics. When those records find their way to consequential arenas in which accounts of reality are contested and the state teaches how to deal with problems, oppositions, differences, and resistance, they take on a new level of significance. Capital sentencing hearings are just such consequential arenas—they not only determine life or death but also prop up the state's sovereignty (Sarat 2005). In this case,

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which we believe is similar to other capital cases, it appears that the reality that was constructed is one in which "only individuals count," both in explaining murder and in conceptualizing the American legal subject.

We have two hopes. One is that this article will create interest in the following questions: If the current mode of capital mitigation practice often perpetuates a destructive individualism, is another form of mitigation possible? Are there tools outside of the psy-complex that could be used to avoid death sentences while simultaneously combating destructive individualism? Or is our legal system so fundamentally individualizing that it is incapable of hearing other accounts of the human experience? We think these questions are important not just for capital practitioners (and their clients) but for sociolegal scholars interested generally in what law is doing in the world and how it might come to do something different.

Capital mitigation presents a unique site for studying the law's relationship to individualism and how that relationship might be disrupted and transformed. As discussed above, due to the latitude defense attorneys are afforded in penalty-phase trials, these proceedings form an unusual legal context in which practically any type of evidence is allowable, equating with a rare legal opportunity to test the law's commitment to individualism. Practitioners here have an opportunity to subvert individualism's dominance by telling *truly* contextualizing stories.

Capital practitioners are bound, however, by the requirement that the mitigating evidence presented must be perceived as relevant to the jurors' task of deciding the appropriate sentence. One cannot introduce evidence of poverty, for example, without showing how poverty affected the defendant personally and individually. Structural arguments, when presented, thus tend to be rendered individualized by the prerogative of relevance. Practitioners rely on psy-complex discourses not only because these discourses abound in their defendant's records but also because they provide a (necessarily) individualized argument. To move beyond the psy-complex requires finding new ways of talking about human behavior that contextualize action while fitting within the law's requirement that the evidence presented be specific and relevant.

Scholars from many disciplines have grappled with the micro versus macro (or agency versus structure, subjective versus objective) debate (for a summary of this debate, see Bourdieu & Wacquant 1992:7–14). Do people act solely on their will or according to programmed scripts supplied to them by social structures? The hegemonic individualism that pervades our helping and legal systems relies on microlevel theories of human behavior—people commit crime because they choose to do so or because they lack the necessary moral training, intellectual ability, neurological wiring, or

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emotional control not to. People are either found to have full or diminished agency based on personal characteristics. This understanding of behavior and criminal responsibility is problematic because it ignores the sociocultural aspects of being human.

On the other side of the debate, human action is thought to be the result of social and cultural forces—people act because they have been assigned a social role that comes with a set of rules for behavior or because the course of history is working through them. Under this conceptualization, people have no free will; their behavior is determined by forces beyond their control. An example of this might be a "strong" version of labeling theory,[14] in which people learn to become the labels they are given. Those who are called deviant, criminal, or mentally ill (or honor student) internalize the label and take on the traits a person with that label is supposed to have. The label then becomes a self-fulfilling prophecy.

Macrolevel theories challenge the dominant U.S. definition of personhood, the idea of the autonomous, self-authored individual. But employing a purely structural or social-determinism approach effaces any remnants of human agency and creates an equally limited and inaccurate understanding of the human experience. To challenge individualism with social determinism not only risks being un-hearable—due to the legal requirement for relevance—but also risks replacing one destructive ideology with another. To avoid this problem, we can borrow from theorists who have bridged the micro-macro divide by identifying links between human agency and social structures (e.g., Bourdieu 1977; Giddens 1984; Ortner 2005). We can use these theories to help us develop contextualizing stories that include cultural, social, and affective components of human action.

We think Ortner's (2005) definition of subjectivity is useful here because it includes "the ensemble of modes of perception, affect, thought, desire, fear and so forth that animate acting subjects . . . as well [as] the cultural and social formations that shape, organize, and provoke those modes of affect, thought, etc." (2005:31). Our emotions are both personal and social; we feel within particular sociocultural milieus that shape how we experience and express emotions (Lutz & Abu-Lughod 1990). Similarly, our actions are both ours and not totally ours. Humans are agents, but they act within particular socio-historical contexts that limit perceived and material possibilities for action (Ortner 2003).

[14] We say *strong* here because one of labeling theory's creators, Howard Becker (1963) refuted the idea that "stick-up men" stick people up because they are labeled "stick-up men." For Becker, the labels make "deviant" behaviors more likely because they change the life circumstances of the actor, making it harder for him or her to live a "normal" life.

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Truly contextualizing stories can help tap into the subversive potential of capital sentencing hearings because they show the person and the context in relationship. They might challenge individualism's autonomous being because they connect the person's motives, feelings, and perceptions to social phenomena. Truly contextualizing stories can bring social institutions, economic structures, and cultural forms and values into the courtroom so that decision makers are forced to grapple with the role they themselves play in the social world in which violence takes place. Ultimately, truly contextualizing stories can bring us face to face with aspects of our society that are dysfunctional—instead of sweeping them under the rug with "simple" remedies such as execution.

What might a truly contextualizing story have looked like in Daniel's case? It would have included information about the forces shaping Daniel's trajectory. His family was initially brought under the state's gaze because they were poor, so the story should include an explanation for their dire economic conditions. It would also include a discussion of the paradigms shaping the various facilities where Daniel was housed. Jurors would be presented with information to help them understand the purpose of these interventions in our society, whose interests they serve, and the cultural values they represent. Jurors would also learn about Daniel's reactions to these institutions, what he felt as he entered each new environment, how they shaped his understanding of the world and his place in it, and what he saw to be his possibilities for action. Such a story, one that included the personal and the social in relationship, might have caused jurors to confront the contradictions that shape these social interventions and to question the state's portrayal of the defendant as solely responsible.

Our second hope is that this article will encourage scholarship on mitigation as a site for the continuing study of the ways our legal system reproduces the ideology of individualism. The practice of mitigation is an aspect of capital punishment that is severely understudied. It is important to find out what is happening on the ground in capital mitigation. What kinds of arguments are practitioners using and why? What kinds of arguments do they see as possible and impossible and why? Are practitioners attempting what we believe might be *truly* contextualizing stories, along the dimensions we have discussed here? If so, how are these stories understood by courts and juries? Answering these questions will require extensive ethnographic work in law offices and courthouses, following mitigation projects from beginning to end—much the same way as mitigation-specialists study their own clients.

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References

Baldus, David, et al. (1990) *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*. Boston: Northeastern Univ. Press.

Becker, Howard (1963) *Outsiders: Studies in the Sociology of Deviance*. New York: Free Press of Glencoe.

Bird, Colin (1999) *The Myth of Liberal Individualism*. Cambridge, United Kingdom: Cambridge Univ. Press.

Bourdieu, Pierre (1977) *Outline of a Theory of Practice*. London: Cambridge Univ. Press.

Bourdieu, Pierre, & Loïc Wacquant (1992) *An Invitation to Reflexive Sociology*. Chicago: Univ. of Chicago Press.

Currie, Elliott (2004) *The Road to Whatever: Middle-Class Culture and the Crisis of Adolescence*. New York: Metropolitan Books.

Ewick, Patricia, & Susan S. Silbey (1995) "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative," 29 *Law & Society Rev.* 197–266.

Fairclough, Norman (1992) *Discourse and Social Change*. Cambridge, United Kingdom: Polity Press.

Ferguson, Ann (2000) *Bad Boys: Public Schools and the Making of Black Masculinity*. Ann Arbor: Univ. of Michigan Press.

Fleury-Steiner, Benjamin (2002) "Narratives of the Death Sentence: Toward a Theory of Legal Narrativity," 36 *Law & Society Rev.* 549.

Freedman, David, & David Hemenway (2000) "Recursors of Lethal Violence: A Death Row Sample," 50 *Social Science & Medicine* 1757–70.

Freeman, Alan (1990) "Antidiscrimination Law: The View from 1989," 64 *Tulane Law Rev.* 1407.

Giddens, Anthony (1984) *The Constitution of Society*. Cambridge, United Kingdom: Polity Press.

Gifis, Steven (2003) *Barron's Law Dictionary*. Hauppauge, NY: Barron's.

Haltom, William, & Michael McCann (2004) *Distorting the Law: Politics, Media, and the Litigation Crisis*. Chicago: Univ. of Chicago Press.

Haney, Craig (1982) "Criminal Justice and the Nineteenth-Century Paradigm," 6 *Law and Human Behavior* 191–235.

——— (1995) "The Social Context of Capital Murder: Social Histories and the Logic of Mitigation," 35 *Santa Clara Law Rev.* 547–609.

Ingleby, David (1985) "Professionals as Socializers: The 'Psy Complex,'" 7 *Research in Law, Deviance and Social Control* 79–109.

Johnston, David (1994) *The Idea of a Liberal Theory: A Critique and Reconstruction*. Princeton, NJ: Princeton Univ. Press.

Kaplan, Paul J. (2006) "American Exceptionalism and Racialized Inequality in American Capital Punishment," 31 *Law and Social Inquiry* 149–75.

——— (2007) "The Subject of Execution: Narratives of the American Creed in U.S. Capital Punishment." Ph.D. diss., University of California, Irvine.

Katz, Michael (1986) *In the Shadow of the Poorhouse: A Social History of Welfare in America*. New York: Basic Books.

Lipset, Seymour Martin (1996) *American Exceptionalism: A Double-Edged Sword*. New York: W. W. Norton.

Lisak, David, & Sara Beszterczey (2007) "The Cycle of Violence: The Life Histories of 43 Death Row Inmates," 8 *Psychology of Men & Masculinity* 118–28.

Lutz, Catherine, & Lila Abu-Lughod (1990) *Language and the Politics of Emotion*. Cambridge, United Kingdom: Cambridge Univ. Press.

Lynch, Mona, & Craig Haney (2000) "Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty," 24 *Law and Human Behavior* 337–58.

MacPherson, C. B. (1962) *The Political Theory of Possessive Individualism*. Oxford, United Kingdom: Oxford Univ. Press.
Mills, C. Wright (1943) "The Professional Ideology of Social Problems," 49 *American J. of Sociology* 165–80.
Milovanovic, Dragan (2003) *An Introduction to the Sociology of Law*, 3d ed. New York: Criminal Justice Press.
Ortner, Sherry (2003) *New Jersey Dreaming: Capital, Culture, and the Class of '58*. Durham, NC: Duke Univ. Press.
——— (2005) "Subjectivity and Cultural Critique," 5 *Anthropological Theory* 31–52.
Parnel, Phillip, & Stephanie Kane (2003) *Crime's Power: Anthropologists and the Ethnography of Crime*. New York: Palgrave Macmillan.
Parton, Nigel (1991) *Governing the Family: Child Care, Child Protection, and the State*. New York: St. Martin's Press.
Platt, Anthony M. (1969) *The Child Savers: The Invention of Delinquency*. Chicago: Univ. of Chicago Press.
Poulantzas, Nicos (1982) "Law," in P. Beirne & R. Quinney, eds., *Marxism and Law*. New York: John Wiley & Sons.
Poveda, Tony (2000) "American Exceptionalism and the Death Penalty," 27 *Social Justice* 252.
Rose, Nikolas (1984) *The Psychological Complex: Psychology, Politics and Society in England, 1869–1939*. London: Routledge.
——— (1996) *Inventing Ourselves: Psychology, Power, and Personhood*. Cambridge, United Kingdom: Cambridge Univ. Press.
Ryan, William (1976) *Blaming the Victim: Revised, Updated Edition*. New York: Vintage Books.
Sarat, Austin (2001) *When the State Kills: Capital Punishment and the American Condition*. Princeton, NJ: Princeton Univ. Press.
——— (2005) *Mercy on Trial: What It Means to Stop an Execution*. Princeton, NJ: Princeton Univ. Press.
Scott, James (1999). *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven, CT: Yale Univ. Press.
Zimring, Franklin (2003) *The Contradictions of Capital Punishment*. New York: Oxford Univ. Press.

Cases Cited

Gregg v. Georgia, 428 U.S. 153 (1976).
Lockett v. Ohio, 438 U.S. 586 (1978).
McCleskey v. Kemp, 481 U.S. 279 (1987).
Woodson v. North Carolina, 428 U.S. 280 (1976).

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