A PROSECUTOR WITH A SMOKING GUN: EXAMINING THE WEAPONIZATION OF RACE, PSYCHOPATHY, AND ASPD LABELS IN CAPITAL CASES

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ABSTRACT

Prosecutors play a central role both in weaponizing personality disorder labels in capital cases and in oppressing Black, Indigenous, and People of Color ("BIPOC") within the criminal legal system. This is especially true for antisocial and psychopathic personality disorder labels. Because there are common mechanisms underlying both processes, it is possible that prosecutors' misuse of these personality disorder labels is susceptible to racialization. Thus, we may contextualize prosecutors' exploitation of personality disorder labels in capital cases within the larger historical project of upholding white supremacy and subjugating people of color.

As long as the death penalty is vulnerable to implicit biases held by agents within the criminal legal system and subject to racially disparate applications, lawmakers must implement change. Lawmakers must transform the death penalty through implementing evidentiary, educational, and disciplinary safeguards that target each actor involved in these decisions. If these precautions, collectively, are not sufficient, lawmakers must abolish state and federal governments' power to execute their citizens.

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INTRODUCTION

Carrie Buck was only seventeen years old when, in March of 1924, Virginia passed an act permitting the involuntary sexual sterilization of patients under the state's care who were afflicted with "hereditary forms of insanity" such as idiocy, imbecility, feeble-mindedness, or epilepsy in an attempt to combat their propagation.[1] Buck's foster parents, John and Alice Dobbs, had involuntarily committed her to such an institution—the State Colony for Epileptics and Feeble-Minded—purporting to be concerned about her alleged mental impairment.[2] In reality, Buck was being shunned for her alleged sexual and social deviance, as she had become pregnant at seventeen after she was raped by Alice Dobbs' nephew.[3] She was only a child when she was victimized by this man and when she was selected as the first person to undergo involuntary sterilization under the 1924 act.

In 1927, the Supreme Court, in an opinion by Justice Holmes, upheld the Virginia Eugenical Sterilization Act of 1924 against Buck's due process and equal protection challenges, legitimizing the aims of the eugenics movement as well as the ableist, racist, and classist logic underlying it.[4] Nevertheless, it is now a known fact that Carrie Buck's diagnoses were unsupported and erroneous.[5] Carrie Buck's institutionalization—a deprivation of her constitutional right to liberty—was not supported by a single formal assessment or quantitative metric, but rather solely premised on the word of her foster parents and a brief interaction with a pair of doctors.[6] Decades later, scholars and mental health professionals have disproven the diagnoses underlying Buck's forced sterilization.[7] Buck's story, along with the subsequent repudiation of the term "feeble-mindedness" itself,[8] points to a troubling issue: the extensive weaponization of unreliable

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1. Buck v. Bell, 274 U.S. 200, 205–06 (1927).
2. STEPHEN JAY GOULD, THE FLAMINGO'S SMILE: REFLECTIONS IN NATURAL HISTORY 313–14 (1985). Note that "feeble-mindedness" was a general category imposed upon allegedly mentally degenerate or deficient individuals. *Id.* at 312.
3. *Id.* at 314.
4. *Buck*, 274 U.S. at 208.
5. GOULD, *supra* note 2, at 313–18.
6. *Id.* at 313–14.
7. Mental health experts later confirmed that Carrie Buck was neither mentally ill nor mentally impaired. *Id.* at 313.
8. Meg E. Ziegler, *Disabling Language: Why Legal Terminology Should Comport with a Social Model of Disability*, 61 B.C. L. REV. 1183, 1190 (2020) ("Towards the middle of the twentieth century, the medical field began to use 'mental deficiency' and 'mental defectiveness' due to negative connotations that were associated with the term 'feeble-minded.'").

psychiatric labels to control, punish, and impose irreversible harm upon society's "undesirables," who are often its most vulnerable members.[9]

In 1983, nearly fifty years after *Buck v. Bell*, the Supreme Court again faced some of these underlying issues in a different context. Thomas A. Barefoot was convicted for the murder of a police officer and thus eligible for the death penalty.[10] In capital cases, Texas state law requires that a jury determine whether it is probable that the defendant would, in the future, commit criminal acts that would pose a continuing threat to society.[11] To address the question of future dangerousness during the sentencing proceeding, the prosecution presented two psychiatrists who had never personally examined Barefoot.[12] Both psychiatrists diagnosed Barefoot with sociopathy, grounding their opinions on the prosecutor's hypothetical questions, which themselves were embellished with controverted facts.[13] The experts each testified that Barefoot presented a future danger to society.[14] One of these experts, Dr. James Grigson, went as far as stating that "there was a 'one hundred percent and absolute' chance that Barefoot would commit future acts of violence that would constitute a continuing threat to society."[15]

The American Psychiatric Association ("APA") submitted an amicus curiae brief condemning the testimony presented by the prosecution's expert witnesses, psychiatrists Dr. Holbrook and Dr. Grigson. Despite this, the Supreme Court struck down Barefoot's challenges to their testimonies and affirmed the lower court's simultaneous denial of Barefoot's application for habeas corpus relief and his motion for a stay of execution.[16] The brief first sheds doubt upon the psychiatrists' diagnoses by noting that the APA

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9. As many as 70,000 people were sterilized in the United States throughout the twentieth century. Author Adam Cohen notes that "[m]inorities, poor people and 'promiscuous' women were often targeted" by the state. Fresh Air, *The Supreme Court Ruling that Led to 70,000 Forced Sterilizations*, NPR (Mar. 7, 2016), https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations [https://perma.cc/4SE4-RNUM].

10. Barefoot v. Estelle, 463 U.S. 880, 883 (1983).

11. TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2006).

12. *Barefoot*, 463 U.S. at 885.

13. *Id.* at 905.

14. *Id.* at 918.

15. *Id.* at 919. Dr. Grigson was nicknamed Doctor Death because of the role of his controversial testimonies in propelling death sentences in nearly all the trials he participated in. He was expelled by the American Psychiatric Association ("APA") and the Texas Society of Psychiatric Physicians for unethical conduct in 1995. Laura Beil, *Groups Expel Texas Psychiatrist Known for Murder Cases*, DALL. MORNING NEWS (July 26, 1995) https://web.archive.org/web/20090307034749/http://ccadp.org/DrDeath.htm [https://perma.cc/64GY-SXSJ].

16. *Barefoot*, 463 U.S. at 905.

has declared it unethical for a psychiatrist to offer a professional opinion without first conducting an examination.[17] It also highlights that a sociopathy diagnosis cannot technically be made based on hypothetical questions, as such a complex diagnosis requires psychiatrists' exclusion of alternative diagnoses.[18] Furthermore, psychiatrists' testimony on future dangerousness dresses up actuarial data with a heightened aura of credibility that will likely receive undue weight despite not being scientifically supported. In fact, psychiatric predictions of long-term future dangerousness are wrong two times out of three.[19] Antisocial Personality Disorder ("ASPD") diagnoses are especially prejudicial, given the link between the disorder and perceived social deviance.[20] The APA concludes that given the difficulty of challenging the prejudice resulting from such testimony, psychiatrists should be prohibited from advancing predictions of long-term future violent behavior at the sentencing stage of a capital case or be restricted to testifying as lay witnesses.[21]

The Court's decision ultimately rested upon confidence that the adversarial system enables jurors to uncover and recognize for themselves the shortcomings of expert testimony.[22] Unlike in *Buck v. Bell*, where the credibility of crucial expert testimony was neither at issue nor particularly salient,[23] in *Barefoot* it was both.[24] The *Barefoot* Court explicitly upheld the admission of what has been roundly criticized as unqualified testimony.[25] The death sentence was carried out, and Barefoot, like Buck, suffered irreversible harm at the hands of the State on the basis of controversial testimony on a contentious construct.

Buck and *Barefoot* both demonstrate how expert testimony on psychological labels may be used to facilitate substantial harm against

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17. Brief for American Psychiatric Association as Amicus Curiae Supporting Petitioner at 3–4, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080) [hereinafter *APA Brief*].

18. *Id.*

19. *Id.* at 3.

20. *See infra* Part II (explaining the prejudice associated with an ASPD diagnosis).

21. *APA Brief*, *supra* note 17, at 6.

22. *Barefoot*, 463 U.S. at 899.

23. *Buck*, 274 U.S. at 200.

24. Clinical psychologists Mark D. Cunningham and Thomas J. Reidy noted that faulty risk assessment methods used in capital sentencing, "such as those occurring in . . . *Barefoot v. Estelle* (1983), were subsequently widely criticized in the legal and scientific literature as grossly inadequate in methodology and as profoundly flawed in overestimating both the magnitude of risk and the accuracy of the prediction." Mark D. Cunningham & Thomas J. Reidy, *Don't Confuse Me with the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 CRIM. JUST. & BEHAV. 20, 21 (1999) (citations omitted).

25. *Id.*

groups who are already vulnerable to exploitation. Nevertheless, both Buck and Barefoot—although underprivileged and, for one reason or another, considered socially deviant—benefitted from white privilege.[26] It is likely that Black, Indigenous, and People of Color ("BIPOC") are at a higher risk than white people to be victimized by the weaponization of psychiatric labels.[27] Even though the construct of "feeble-mindedness" has been dismantled, the diagnoses of ASPD and psychopathy persist. Furthermore, while the prevalence of involuntary sterilization has declined,[28] 1,542 people have been executed in the United States since 1976.[29]

This Note will explore the extent to which the weaponization of personality disorder labels—particularly ASPD and psychopathy diagnoses—can be racialized in capital cases. Part I will explore how the criminal legal system has historically been utilized as a tool of oppression against BIPOC as well as persons bearing ASPD or psychopathy diagnoses in capital cases. Part II will explore which mechanisms are central to both of these processes and how these commonalities heighten the risk that personality disorder labels will be misused against BIPOC. In particular, this Part will explore the role of the prosecutor in driving these mechanisms and propagating harm upon BIPOC, people whom they have burdened with a personality disorder label, and especially people who fall into both of these categories. Part III will present potential incremental solutions to these issues, with a particular eye to abolitionist interventions and reimaginings.

I. A History of Misuse

This Part will provide background information on the two problems outlined above: the weaponization of personality disorders against the neurodivergent and the weaponization of the law against BIPOC. The first Section will explore the means through which prosecutors' distortions of personality disorder labels puts capital defendants at risk of being hyper-stigmatized and misunderstood by judges and jurors. The second Section will discuss how lawmakers and the Supreme Court have, in conjunction, disenfranchised and harmed Black people, and by extension other people of

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26. Both Buck and Barefoot were white. GOULD, *supra* note 2, at 310; James R. Acker, *Snake Oil with a Bite: The Lethal Veneer of Science and Texas's Death Penalty*, 81 ALB. L. REV. 751, 774, 774 n.164 (2017) (stating that Barefoot was perceived as white and explaining the use of the Death Penalty Information Center database to support that claim).

27. *See infra* Part II.

28. Philip R. Reilly, *Eugenics and Involuntary Sterilization: 1907-2015*, 16 ANN. REV. GENOMICS HUM. GENETICS 351, 357 (2015).

29. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Jan. 28, 2022), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf [https://perma.cc/JEZ9-CQEU].

color, through "legal" means. It will also discuss the role of prosecutors in perpetuating racial disparities within the criminal legal system. Part I is intended to not only present these two processes, but also to begin exploring their inextricable linkages.

A. The Coordinated Weaponization of Personality Disorder Labels Against Criminal Defendants

The fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5") states that the essential feature of antisocial personality disorder is "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood."[30] Psychopathy, on the other hand, is not recognized by the DSM-5 as an independent diagnosis; rather, the DSM-5 lists psychopathy as a personality disorder existing under the umbrella of ASPD.[31] As Robert D. Hare and Craig S. Neumann describe it, psychopathy consists of "a cluster of interpersonal, affective, lifestyle, and antisocial traits and behaviours."[32] This concept of psychopathy is attributed to psychiatrist Hervey Cleckley and was operationalized by psychologist Robert Hare through his assessment instruments, the Psychopathy Checklist ("PCL") and Psychopathy Checklist-Revised ("PCL-R").[33]

The PCL-R is widely used in forensic settings.[34] The last three items of the PCL-R—juvenile delinquency, revocation of conditional release, and

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30. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 659 (5th ed. 2013) [hereinafter AM. PSYCHIATRIC ASS'N].

31. Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519, 523 (2013).

32. Robert D. Hare & Craig S. Neumann, *Psychopathy: Assessment and Forensic Implications*, 54 CAN. J. PSYCHIATRY 791, 792 (2009). Furthermore, "[o]n the interpersonal level, people with psychopathy are grandiose, deceptive, dominant, superficial, and manipulative. Affectively, they are shallow, unable to form strong emotional bonds with others, and lack empathy, guilt, or remorse." *Id.*

33. Wayland & O'Brien, *supra* note 31, at 523–24. The PCL-R lists the following 20 items: (1) glibness/superficial charm; (2) grandiose sense of self-worth; (3) need for stimulation/proneness to boredom; (4) pathological lying; (5) cunning/manipulative; (6) lack of remorse or guilt; (7) shallow affect; (8) callous/lack of empathy; (9) parasitic lifestyle; (10) poor behavioral controls; (11) promiscuous sexual behavior; (12) early behavioral problems; (13) lack of realistic, long-term goals; (14) impulsivity; (15) irresponsibility; (16) failure to accept responsibility for own actions; (17) many short-term marital relationships; (18) juvenile delinquency; (19) revocation of conditional release; (20) criminal versatility. Robert D. Hare et al., *Psychopathy and Sadistic Personality Disorder*, *in* OXFORD TEXTBOOK OF PSYCHOPATHOLOGY 558 (Theodore Millon et al. eds., 1999).

34. Wayland & O'Brien, *supra* note 31, at 524.

criminal versatility—are intrinsically linked to criminal behavior,[35] making it difficult to disassociate the disorder from criminality. Perhaps because of this criminal component, the construct of psychopathy has been demonized and conflated with evil.[36] This long-held misconception has been bolstered by an increase in media representations of psychopaths as dangerous, violent, and ruthless villains.[37] Research indicates that these stigmas, as well as the media's perpetuation of them, lead judges and jurors to impose harsher sentences upon defendants labeled as psychopaths.[38]

In addition to being misunderstood, the concept of psychopathy itself has been the center of debate. There is controversy over whether psychopathy, within a legal context, should be considered mitigating or aggravating.[39] There is also a range of opinions regarding whether

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35. Hare & Neumann, *supra* note 32, at 558.

36. Wayland & O'Brien, *supra* note 31, at 526; *see also* John F. Edens et al., *Bold, Smart, Dangerous and Evil: Perceived Correlates of Core Psychopathic Traits Among Jury Panel Members*, 7 PERSONALITY & MENTAL HEALTH 143, 143, 150 (2013) (finding that laypersons associate psychopathy with evil, a potential for violence, intelligence, and boldness).

37. Bang Thi, *The Psychopath's Double-Edged Sword: How Media Stigma Influences Aggravating and Mitigating Circumstances in Capital Sentencing*, 26 S. CAL. REV. L. & SOC. JUST. 173, 176 (2017). Films and television shows such as *American Psycho*, *Breaking Bad*, *Dexter*, and *Mr. Robot* perpetuate the idea that psychopaths are dangerous villains. Additionally, almost all of these productions also show the death or killing of the psychopathic characters, "reinforc[ing] the belief that death is the appropriate punishment for [psychopathic] criminals." *Id.* at 189.

38. *Id.* at 178 (finding that the media's portrayal of psychopaths influences judges and juries to favor harsher sentences overall); Wayland & O'Brien, *supra* note 31, at 526 (noting that stigmas against psychopaths influence juries to favor harsher punishments); John F. Edens et al., *No Sympathy for the Devil: Attributing Psychopathic Traits to Capital Murderers Also Predicts Support for Executing Them*, 4 PERSONALITY DISORDERS: THEORY, RSCH., & TREATMENT 175, 175 (2013) [hereinafter Edens, *No Sympathy for the Devil*] (finding that a defendant's perceived level of psychopathy strongly predicted support for executing them).

39. Ken Levy, *Dangerous Psychopaths: Criminally Responsible But Not Morally Responsible, Subject to Criminal Punishment And to Preventive Detention*, 48 SAN DIEGO L. REV. 1299, 1301–02 (2011) (noting that while some the law generally treats psychopathy as an aggravating factor, empirical studies confirming that psychopaths are victims of neurological abnormalities support the idea that a psychopathy diagnosis should be considered a mitigating or exculpatory factor); Brett Walker, *When the Facts And the Law Are Against You, Argue the Genes?: A Pragmatic Analysis of Genotyping Mitigation Defenses for Psychopathic Defendants in Death Penalty Cases*, 90 WASH. U. L. REV. 1779, 1817 (2013) (discussing how research linking certain genetic patterns to antisocial behavior and psychopathy confounds the significance of such diagnoses in the legal context).

psychopathy[40] and ASPD[41] are treatable.[42] Additionally, although some researchers consider psychopathy a mental illness and frame the disorder as a detriment, others consider it an advantageous and adaptive life strategy.[43] Finally, while some experts are convinced that data demonstrating a statistically significant relationship between the PCL-R and recidivism indicates future criminality,[44] others argue that because the PCL-R is not a reliable tool itself, such predictions of future criminality are inherently harmful, unethical, and vulnerable to misuse in legal settings.[45] Hare himself noticed that despite his assessment tool's explicit scoring criteria, it could be manipulated: "experts hired by the defense always seem to come up with considerably lower PCL-R ratings than do experts who work for the prosecution."[46] Similarly, the use of psychopathy diagnoses and ASPD

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40. John F. Edens, *Unresolved Controversies Concerning Psychopathy: Implications for Clinical and Forensic Decision Making*, 37 PRO. PSYCH. 59, 60 (2006) (noting that although many experts assume that psychopathy is not treatable, this assumption is not scientifically supported).

41. Wayland & O'Brien, *supra* note 31, at 543. The DSM-5 does not take a stance on this issue, but does indicate that the intensity of ASPD symptoms diminishes with age. AM. PSYCHIATRIC ASS'N, *supra* note 30, at 661.

42. Cunningham & Reidy, *supra* note 24, at 30 ("Contrary to the most egregious capital testimony asserting that the disorder is unremitting, ASPD typically wanes in symptom intensity by the fourth decade.").

43. Lauren N. Miley et al., *An Examination of the Effects of Mental Disorders as Mitigating Factors on Capital Sentencing Outcomes*, 38 BEHAV. SCI. & L. 381, 385 (2020).

44. Martin Grann et al., *Psychopathy (PCL-R) Predicts Violent Recidivism Among Criminal Offenders with Personality Disorders in Sweden*, 23 L. & HUM. BEHAV. 205, 205 (1999); Glenn D. Walters et al., *Predicting Recidivism with the Psychopathy Checklist: Are Factor Score Composites Really Necessary?*, 23 PSYCH. ASSESSMENT 552, 556 (2011).

45. Willem H. J. Martens, *The Problem with Robert Hare's Psychopathy Checklist: Incorrect Conclusions, High-Risk of Misuse, And Lack of Reliability*, 27 MED. L. 449, 449 (2008); *see also* Edens, *Unresolved Controversies Concerning Psychopathy: Implications for Clinical and Forensic Decision Making*, *supra* note 40, at 63–64 (cautioning against drawing overzealous conclusions based on the PCL-R because the construct of psychopathy as well as the assessment tool have great potential for abuse); John F. Edens & Jennifer Cox, *Examining the Prevalence, Role and Impact of Evidence Regarding Antisocial Personality, Sociopathy and Psychopathy in Capital Cases: A Survey of Defense Team Members*, 30 BEHAV. SCI. & L. 239, 239 (2012) ("[T]he instrument has demonstrated very little utility in predicting the most relevant outcome for defendants facing death or life in prison: violent behavior in U.S. prisons."). Additionally, the APA's amicus curiae brief discussed in *Barefoot* indicates that a large body of research demonstrates that even under the best conditions, psychiatric predictions of long-term future dangerousness generally are wrong in at least two out of every three cases. *APA Brief*, *supra* note 17, at 3.

46. Wayland & O'Brien, *supra* note 31, at 555 (quoting Robert D. Hare, *The Hare PCL-R: Some Issues Concerning Its Use and Misuse*, 3 LEGAL & CRIMINOLOGICAL PSYCH. 99, 113 (1988)).

diagnoses in criminal proceedings has been criticized when used as a predictor of future violence.[47]

Although experts disagree, in practice, sentencing outcomes for capital defendants bearing these labels are not split, but rather overwhelmingly negative.[48] For instance, in a mock jury trial study, researcher John F. Edens found that a defendant's perceived level of psychopathy strongly predicts whether or not jurors will support sentencing that defendant to death.[49] There are a number of potential explanations behind this pattern. Because these constructs are generally misunderstood by laypersons—who generally make up juries—it is possible that when making sentencing decisions, jurors rely on what is most accessible to them: hearsay and media representations of psychopathy and ASPD. Once jurors assume that capital defendants, because of their personality disorder diagnoses, are evil or criminal by nature as well as unfixable, jurors may come to believe it is "necessary" to punish them as harshly as possible in order to protect society. Also, perhaps the degree of controversy within the field enables the presentation of very extreme views on personality disorders—such as the ideas that people with these disorders are evil and untreatable—within court proceedings. Because there is a lack of consistency across research findings and expert opinions, these extreme views have yet to be collectively repudiated within the field or filtered from criminal trials.[50]

Prosecution teams' decisions to bring these labels into capital cases are even more unsettling sources of these disparate results. Even though ASPD and psychopathy rates are incredibly low across the U.S. population, at only 1–4% and 1%, respectively,[51] prosecutors commonly introduce

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47. Cunningham and Reidy note that "[o]ther problems with making inferences from a diagnosis of ASPD disorder to sentencing determinations include shifting diagnostic criteria, unnumerable symptom variations, absence of symptom weighting, temporal instability, overlap with substance abuse disorders, and diagnostic accuracy considerations." Cunningham & Reidy, *supra* note 24, at 30–31.

48. Miley, *supra* note 43, at 395 (finding that rather than having a mitigating function, the introduction of personality disorder evidence was linked to an increased chance of receiving the death penalty, although this relationship was not significant).

49. Edens, *No Sympathy for the Devil*, *supra* note 38.

50. Doctor Death held some of these exact views, that people he had diagnosed with ASPD or psychopathy were inherently evil, and testified so in court. Laura Beil, *Groups Expel Texas Psychiatrist Known for Murder Cases*, DALL. MORNING NEWS (July 26, 1995), https://web.archive.org/web/20090307034749/http://ccadp.org/DrDeath.htm [https://perma.cc/64GY-SXSJ].

51. Kimberly B. Werner et al., *Epidemiology, Comorbidity, and Behavioral Genetics of Antisocial Personality Disorder and Psychopathy*, 45 PSYCHIATRIC ANNALS 195, 195 (2015).

evidence concerning these disorders during the sentencing phase.[52] In a study surveying defense attorneys, mitigation specialists, and investigators, researchers Edens and Cox established that prosecutors presented evidence of ASPD, psychopathy, and sociopathy in virtually every case in which they presented mental health evidence.[53] These labels serve two legal functions: heightening defendants' perceived risk of future dangerousness and rebutting mitigating evidence.[54] Regardless of whether the prosecutors actually believe the ASPD or psychopathy label is reliable for any particular defendant, their reliance upon these labels has two effects. First, whether intentionally or not, it is likely to activate laypersons' aforementioned misconceptions around the disorders. Second, it is likely to activate decisionmakers' implicit biases against neurodivergence. Thus, prosecutors' choice to introduce evidence of ASPD or psychopathy is a driving force behind disproportionately adverse capital outcomes for people bearing ASPD or psychopathy labels.

B. Lawmakers', Decisionmakers', and Prosecutors' Coordinated Weaponization of the Law Against BIPOC

White people in power within the legal system—as enforcers, makers, or interpreters of the law[55]—have historically used the law to uphold white supremacy, which inherently results in the oppression and exploitation of BIPOC and especially Black people.[56] Throughout U.S. history,

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52. Edens & Cox, *supra* note 45, at 239 (finding that evidence of antisocial personality disorder, sociopathy, and psychopathy were most often introduced by the prosecution in the sentencing phase to address a defendant's risk of future dangerousness and to rebut mitigating evidence).

53. *Id.* at 248.

54. *Id.* at 239.

55. It is important to note that even as people of color have also come to inhabit these positions of power, racial hierarchies have persisted. Paul Butler notes that although white police officers kill more Black people than Black police officers do, studies indicate that Black men are more likely to be killed by Black police officers than white police officers. A study by the Department of Justice found that Black and Latinx police officers exhibited higher rates of "threat-perception failure," meaning that officers of color, more often than white police officers, mistakenly believed that an unarmed suspect was in possession of a weapon. PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 33–34 (2017). This pattern, as well as evidence indicating that Black men are actually more critical of other Black men than white men, reflects the reality that people of color, like white people, internalize some of the stereotypes and biases prevalent in United States culture and media. *Id.* at 29, 34.

56. *See also* SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 57 (1997) ("Blackness marks a social relationship of dominance and abjection and potentially one of redress and emancipation; it is a contested figure at the very center of social struggle."). *See generally* Bryan Stevenson, *A*

many laws and policies have either explicitly targeted or implicitly disfavored people of color.[57]

For instance, upon formation of the United States in 1776, its laws actively held up the preexisting system of enslavement targeting African descendants. In addition to classifying enslaved people as property, the supreme law of the land also categorized Black people as subhuman.[58] Eighty years later, the Supreme Court ruled that Black people, whether free or enslaved, were not considered American citizens within the meaning of the Constitution.[59] Although, facially, it appears the Thirteenth Amendment of 1865 was intended to end slavery,[60] numerous Black scholars suggest that in practice, the Thirteenth Amendment merely transformed the institution of slavery and the language surrounding it.[61]

By permitting involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted,"[62] the Thirteenth Amendment did not fully eradicate the practice, but rather refocused its scope from Black people to a seemingly more neutral category: criminals.[63] However, many scholars argue the Thirteenth Amendment's focus on

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Presumption of Guilt: The Legacy of America's Historical and Racial Injustice, *in* POLICING THE BLACK MAN 3 (Angela J. Davis ed., 2017) (reviewing the historical causes and effects of institutionalized white supremacy).

57. *See generally* Stevenson, *supra* note 56 (exploring the history of oppression and exploitation of Black people in the United States); BUTLER, *supra* note 55 (examining how law enforcement and criminal justice systems continue to target and disfavor Black men); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010) (unpacking the origins and influence of Black criminality as a concept crucial to the making of modern urban America).

58. In 1787, the inaugural version of the Constitution of the United States declared—in what is known as the "Missouri Compromise"—that for the purposes of quantifying the population in order to establish proportional representation in Congress, enslaved people were to count as three-fifths of a person. U.S. CONST. art. 1, § 2, cl. 3, *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

59. Scott v. Sandford, 60 U.S. 393, 406 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

60. U.S. CONST. amend. XIII, §1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

61. *See generally* DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (discussing the system of neoslavery developed after the enactment of the Thirteenth Amendment that specifically targets Black people); 13TH (Ava Duvernay & Kandoo films 2016) (noting the parallels between slavery and the prison industrial complex as mechanisms enabling the exploitation of Black people, and by extension, other people of color within the United States).

62. U.S. CONST. amend. XIII, §1.

63. *Id.*

criminals is not and cannot be race neutral given the imposition, by a white supremacist government and society, of perceived criminality on Blackness.[64] Immediately following the Civil War and the abolition of slavery, a wave of incarceration, enabled by this criminalization of Blackness, again confined Black people to another system of forced labor.[65] Furthermore, despite the Thirteenth Amendment's attempt to appear racially neutral, laws that intentionally harmed Black people abounded.[66] These laws, in addition to the Constitution's failure to provide positive rights (to equality) as opposed to negative rights (from discrimination), left Black communities vulnerable to facially neutral yet anti-Black policies. Despite the Supreme Court's abolishment of *de jure* segregation, the vestiges of past legal and social models continue to impact the Black community.[67] Without confronting the discriminatory bias that permitted (1) the widespread oppression of Black people, (2) subsequent criminalization of Black people,

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64. *See generally* MUHAMMAD, *supra* note 57 (analyzing how statistics were used to promulgate the narrative that the failures of white people were the product of social problems while those of Black people were pathological and stemmed from characteristics inherent to their race).

65. The Equal Justice Initiative notes that after creating discriminatory "Black Codes" to target and criminalize newly freed Black people through vagrancy and loitering laws, states also passed laws "authorizing public officials to lease prisoners to private industries. While states profited, prisoners earned no pay and faced inhumane, hazardous, and often deadly working conditions. Under these laws, thousands of Black people were forced into a brutal system that historians have called 'worse than slavery.'" EQUAL JUSTICE INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876, at 38 (2020) [hereinafter EJI], https://eji.org/wpcontent/uploads/2020/07/reconstruction-in-america-report.pdf [https://perma.cc/F9BV-3F4H].

66. The Black Codes and later Jim Crow laws in the South closely controlled the homes, jobs, resources, and spaces formerly enslaved people could access. Through the doctrine of "separate but equal," the Supreme Court ruled that racial segregation was constitutional, again legally legitimizing the subordination of Black people. Local and state laws establishing educational and housing segregation, upholding discriminatory employment practices, and prohibiting interracial marriage were further empowered through indirect Constitutional approval. *Id.* at 95; 13TH, *supra* note 61 (exploring the history of racial inequity in the United States and its role in the mass incarceration of Black people).

67. In addition to disparities in generational wealth and access to quality housing, education, and employment, the criminal legal system continues to closely control, incarcerate, and exploit for labor, and take the lives of Black people at a rate more than double their presence in the overall population. Shayanne Gal et al., *26 Simple Charts to Show Friends and Family Who Aren't Convinced Racism Is Still a Problem in America*, BUS. INSIDER (Jul. 8, 2020), https://www.businessinsider.com/us-systemic-racism-in-charts-graphs-data-2020-6 [https://perma.cc/83V3-FPYN]; NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 5 (2021) [hereinafter DEATH ROW U.S.A.], https://www.naacpldf.org/wp-content/uploads/DRUSASpring2021.pdf [https://perma.cc/5R4R-C5M7].

and (3) the shift toward a new model of systemic exploitation, the Thirteenth Amendment's prohibition on slavery continues to be incomplete.

Today, the United States has the highest rate of incarceration in the world.[68] Despite collectively making up only 29% of the U.S. population, Black and Latinx people comprised 57% of the U.S. prison population in 2016.[69] While some people may see these disparities as unfortunate consequences of the criminal legal systems, others argue that it is functioning just as intended: to control Black people.[70] Black men are discriminated against at every stage within the criminal legal system—from being overpoliced, given harsher sentences, and disproportionately denied parole[71] to being sentenced to death and executed at higher rates[72]—and prosecutors' actions and decisions are arguably the driving force behind these racial disparities.

Angela Davis has gone as far as calling prosecutors "the most powerful officials in the criminal justice system."[73] Because the law allows prosecutors to use discretion when making decisions around bail, charging, and plea bargains—decisions that can either liberate an individual or propel them further into the criminal legal process—they have the opportunity to create and maintain racial disparities as well as the power to significantly counter and diminish mass incarceration.[74] Nevertheless, as is the case with

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68. SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1 (Mar. 2018) [hereinafter THE SENT'G PROJECT], https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf [https://perma.cc/SF8B-W4LN].

69. Additionally, Black and Latinx adults are, respectively, 5.9 and 3.1 times more likely to be incarcerated than white adults. *Id.* at 6–7.

70. BUTLER, *supra* note 55, at 17 ("American criminal justice today is premised on controlling African American men. Many other people—including African American women, immigrants, poor white people, Muslims, and Native Americans—are caught in its snares, but they are collateral damage of a process that is designed for black men.").

71. SENT'G PROJECT, *supra* note 68, at 4–8.

72. The 2019 census indicates that Black and white people make up 13% and 76.3% of the population, respectively. Nevertheless, Black death row inmates make up 41.29% of the total death row inmate population, only slightly less than whites, who represent 42.37% of this group. The actual rate of executions is also alarming. Five hundred and twenty-four Black defendants have been executed since the death penalty was reinstated in 1976, making up 34.20% of executions, while 856 white defendants have been executed, making up only 55.87% of executions. DEATH ROW U.S.A., *supra* note 67, at 1, 5.

73. Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 823 (2013).

74. Although prosecutors' power to address mass incarceration is limited by statutory mandatory minimum sentences, the will of their supervisors, and the requirements of their office, among other factors, prosecutors also wield significant

individuals with personality disorder labels, such as ASPD and psychopathy, racially disparate outcomes permitted and driven by prosecutors persist. Part II of this Note will address exactly how prosecutors, consciously or not, play a key role in such outcomes.

II. Compounded Biases

As discussed in Part I, the criminal legal system has victimized people diagnosed with personality disorders such as ASPD and psychopathy as well as BIPOC. Personality disorders, more commonly and consistently than other types of mental health disorders, are interpreted as aggravating factors. Meanwhile, Black and Brown people are more susceptible to overpolicing in their communities, heightened charges, and harsher punishment than their white counterparts. Looking to a key player in these processes—prosecutors—illuminates the potential for an overlap between them: the intersecting racialization of the process of weaponizing personality disorder labels in death penalty proceedings. Exploring (1) how prosecutors drive and reinforce mechanisms central to both processes—meaning the weaponization of ASPD and psychopathy labels as well as the racialization of legal processes—in addition to considering (2) how prosecutors' actions impact other players within the decision-making process ultimately clarifies the relationship between race and the misuse of personality disorder labels.

A. Prosecutors' Role in Legitimizing Unreliable Social Science Evidence

1. Reliance on Unreliable ASPD and Psychopathy Diagnoses

Prosecutors continue to introduce evidence of APSD and psychopathy, even though psychology scholars have criticized ASPD and psychopathy as false constructs on several grounds.[75] A fundamental issue

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authority. They "have the power to flood jails and prisons, ruin lives, and deepen racial disparities with the stroke of a pen. But they also have the discretion to do the opposite." *The Power of Prosecutors*, ACLU (Nov. 17, 2021), https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors [https://perma.cc/6SXM-PVLU].

75. Wayland & O'Brien, *supra* note 31, at 586 ("[T]here are enormous contextual problems that plague mental health evaluations and prosecutorial characterizations of individuals who are capitally charged and convicted, and who are often inappropriately labeled as antisocial or psychopathic."); Richard Rogers et al., *Prototypical Analysis of Antisocial Personality Disorder: A Study of Inmate Samples*, 27 CRIM. JUST. & BEHAV. 234, 234, 237 (2000) ("[The] illusion of a unitary ASPD diagnosis is shattered by integral shifts in

with the diagnosis of personality disorders is the underlying assumption that personality types are discrete and qualitatively distinct.[76] Furthermore, ASPD symptoms, such as impulsivity, are imprecise and open to subjective interpretation.[77] Each symptom is weighed equally, making it impossible to reflect extremely severe manifestations of certain symptoms, compared with less severe manifestations within final score results.[78]

The use of psychopathy diagnoses as evidence in death penalty sentencing is also particularly problematic given the body of evidence suggesting that the PCL-R is not a reliable predictor of future dangerousness.[79] Research also suggests that the PCL-R is less reliable in the field than in research settings due to concerning factors: the subjectivity of the symptoms of psychopathy as well as evaluators' tendency to skew their opinions in a direction that favors the party that hired them.[80] Clinical psychologist Kathleen Wayland and Professor Sean D. O'Brien argue that the "data suggests that problems associated with risk assessment conclusions gathered from the PCL-R are so serious that inferences drawn from them could damage the integrity of the adjudicative process."[81] Further, as demonstrated by the APA's refusal to recognize psychopathy as an independent diagnosis within the DSM-5,[82] it is clear that the construct is not

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the diagnostic criteria and the innumerable possibilities under the succession of polythetic models.")

76. Wayland & O'Brien, *supra* note 31, at 536.

77. *Id.* at 540–41.

78. *Id*. at 541.

79. *Id.* at 553 ("[A] meta-analysis of nine commonly used risk assessment instruments found that the PCL-R Factor (the factor commonly associated with 'psychopathy') predicted violence no better than chance for men."). Despite these criticisms within the field of psychology, researchers have found that the PCL-R is, of the tools reviewed, among the 40% that received generally favorable reviews by clinicians. Tess M.S. Neal et al., *Psychological Assessments in Legal Contexts: Are Courts Keeping "Junk Science" Out of the Courtroom?*, 20 PSYCH. SCI. PUB. INT. 135, 150 (2020). Although researchers found that the tools, collectively, had a 5.1% rate of admissibility challenges within legal contexts, of the cases reviewed in the study, the PCL-R was challenged in 8% of cases. *Id.* at 149.

80. Wayland & O'Brien, *supra* note 31, at 555–57; Daniel C. Murrie et al., *Does Interrater (Dis)agreement on Psychopathy Checklist Scores in Sexually Violent Predator Trials Suggest Partisan Allegiance in Forensic Evaluations?*, 32 L. & HUM. BEHAV. 352, 353 (2008) (noting the confirmed trend of clinician's opinions shifting towards the outcomes pursued by the party that retained their expertise). In 2016, although it did not render the PCL-R inadmissible, the New York Supreme Court noted these exact flaws. State v. Gary K., 2016 N.Y. Slip Op. 51465(U) (N.Y. Sup. Ct. 2016). ("But the PCLR [sic] has multiple flaws including problems with inter-rater reliability and the allegiance effect. PCLR cut-off scores are also not consistently applied.").

81. Wayland & O'Brien, *supra* note 31, at 551.

82. Casey Strickland et al., *Characterizing Psychopathy Usin*g *DSM-5 Personality Trait*s, 20 ASSESSMENT 327, 327 (2013).

widely accepted within the field. Therefore, it becomes necessary to question why such controversial evidence is permitted within courtrooms.

The Court's rationale in *Barefoot*—that the criminal legal adversarial system enables laypersons to discern between evidence that is and is not problematic[83]—does not address the argument made by the APA in its amicus brief. There, the APA argued that cross-examination and rebuttal experts cannot effectively combat the prejudicial effect of expert testimony on future dangerousness relying on evidence such as personality disorder diagnoses and assessment tools such as the PCL-R.[84] Defendants' psychiatrists, who are less likely to make such predictions themselves, can only challenge the expertise of the prosecution's psychiatrist, but not the substance of their testimony or their particular prediction.[85]

Although defense teams may also introduce evidence of ASPD and psychopathy on behalf of capital defendants, the damning effects of such evidence make it difficult to imagine that any competent capital defense attorney would attempt to use an ASPD or psychopathy diagnosis as a mitigating factor.[86] Nevertheless, courts are routinely presented with defense attorneys who, perhaps out of ignorance to the effects of these labels, make such attempts.[87] Although psychiatrists are the ones diagnosing defendants and presenting this information to jurors, their aforementioned tendency to distort their findings in support of the party—usually prosecutors—that hired them once again centers prosecutors in the process of introducing questionable science and evidence into the courtroom. Just as prosecutors should not rely on or use racially distorted crime statistics, they should not introduce controversial "experts" and assessment tools that taint decisionmakers' perspectives on defendants' future dangerousness, especially in light of empirically-supported statements from the APA and researchers cautioning such use.

In addition to presenting general ethical concerns, prosecutors' reliance on experts' ASPD or psychopathy diagnoses and the PCL-R could, in

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83. Barefoot v. Estelle, 463 U.S. 880, 899 (1983).

84. *APA Brief*, *supra* note 17, at 6.

85. The APA argues that "[b]ecause most psychiatrists do not believe that they possess the expertise to make long-term predictions of dangerousness, they cannot dispute the conclusions of the few who do." *Id.*

86. Wayland & O'Brien, *supra* note 31, at 530.

87. Because some defense attorneys—particularly those uninformed about the negative stereotypes imposed on such diagnoses—understand psychopathy and ASPD as personality disorders outside of the individual's control, they may attempt to present such diagnoses as mitigating evidence. *Id.*

certain instances, amount to a *Napue* claim,[88] which courts have extended to determine the admissibility of expert testimony.[89] In *Giglio v. United States*, the Supreme Court established the requirement that prosecutors reveal any evidence to the court that may cause the value of a witness' testimony to come into question.[90] One may thus contend that the APA's condemnation of assessments of future dangerousness, particularly based on ASPD/psychopathy diagnoses, brings psychiatrist experts' diagnoses of these disorders into question. Thus, a prosecutor's failure to disclose this condemnation, particularly by the leading authority on matters within the field of psychology, could amount to a *Giglio* violation. This seems especially true in instances in which experts claim they are one hundred percent certain in their predictions on future dangerousness, elevating their testimony from opinion to fact.[91] Through *Napue* and *Giglio*, the Supreme Court has made it clear that prosecutors have an ethical responsibility to disclose the credibility (or lack thereof) of their witnesses and the validity of their testimony.

2. Crime Statistics and the Criminalization of Black People

Like psychopathy and ASPD labels, crime statistics have also been coopted to overpolice, incarcerate, and ultimately terrorize vulnerable communities.[92] White supremacists not only distorted biology and psychology, but also perverted crime statistics to criminalize Blackness.[93] These race "scholars" first sought to justify their racial biases through studying supposed racial differences in the mind and body.[94] After failing to do so, white supremacist scholarship then shifted its attention to a "behaviorist paradigm" that looked to Black people's behavior within

88. Napue v. Illinois, 360 U.S. 264, 269–70 (1959) (holding that in criminal cases, prosecutors' knowing use of false testimony, even if it only speaks to the credibility of the witness, violates the Due Process Clause of the 14th Amendment).

89. *See* Drake v. Portuondo, 553 F.3d 230, 247–48 (2d Cir. 2009); Hall v. Washington, 343 F.3d 976, 983–85 (9th Cir. 2003).

90. Giglio v. United States, 405 U.S. 150, 153–55 (1972) (holding that when a witness' reliability may be determinative of a defendant's guilt or innocence, the prosecution's failure to disclose evidence affecting their witness' credibility, whether withheld in good or bad faith, provides grounds for a new trial under the Due Process Clause of the 14th Amendment).

91. This is exactly what "Doctor Death" claimed in the *Barefoot* case. Barefoot v. Estelle, 463 U.S. 880, 919 (1983).

92. MUHAMMAD, supra note 57, at 20–22.

93. *Id.*

94. Race "scholars" looked to brain size, gray matter, hair texture, skin color, and body odor, among other bodily features, in the search for fundamental differences between racial groups. *Id.* at 22.

society.[95] These "scholars"—including historians, economists, anthropologists, political scientists, and sociologists[96]—used evidence of political, economic, and social inequality to justify theories of white supremacy and alleged Black inferiority; "coercion, duplicity, and genocide were subsumed within an understanding that the oppressed were dominated because of their own inherent weaknesses."[97] When race "scholars," through statistical data, discovered a difference in Black crime rates as compared to white crime rates, the prevailing explanation for this difference looked to an internal source—inherent criminality[98]—and again ignored the impact of external, racialized oppression, such as overpolicing.[99] Collectively, these approaches demonstrate how empirical efforts, when racially motivated, are unreliable. They also show the issue with studying race, a socially-constructed concept, in isolation from the effects of society itself.

Over time, prosecutors, intentionally or not, have contributed to this project of using criminalization to justify racist conclusions in academic scholarship. Through charging Black people with crimes specifically designed to criminalize Blackness, prosecutors have fueled the crime statistics underlying those racist conclusions. In the late nineteenth and early twentieth centuries, prosecutors drove the increased incarceration of Black people based on vagrancy and loitering charges, which, although based on facially neutral laws, disproportionately impacted Black communities.[100] Today, prosecutors continue to pursue charges based on facially neutral laws that disproportionately impact BIPOC, including certain drug, housing, and employment laws.[101] Prosecutors should instead use their discretion to undo some of this racially biased and targeted work.

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95. *Id.* at 24.

96. *Id.* at 23.

97. *Id.* at 24.

98. Professor and historian Khalil Muhammad describes this process, of building on biological and behavioral paradigms through racialized crime statistics, as follows: "Racial knowledge that had been dominated by anecdotal, hereditarian, and pseudo-biological theories of race would gradually be transformed by . . . namely racial statistics and social surveys. Out of the new methods and data sources, black criminality would emerge, alongside disease and intelligence, as a fundamental measure of black inferiority." *Id.* at 20.

99. In particular, white supremacist scholars overlooked the fact that widespread vagrancy and loitering statutes especially impoverished Black people, thus amplifying the proportion of incarcerated Black people. EJI, *supra* note 65.

100. EJI, *supra* note 65.

101. *Race and the Drug War*, DRUG POLICY ALLIANCE, https://drugpolicy.org/issues/race-and-drug-war [https://perma.cc/V4SW-HMX3]; Jerusalem Demsas, *America's Racist Housing Rules Really Can Be Fixed*, VOX (FEB. 17, 2021), https://www.vox.com/22252625/america-racist-housing-rules-how-to-fix [https://perma.cc/DN45-AVV9];

B. Psychopathy/ASPD are Conflated with Criminality and Dangerousness, Leading to Harsher Sentences for BIPOC

Widespread inherent bias against neurodivergence—particularly toward personality disorders such as ASPD and psychopathy, and toward Black and Brown people, as established above—is linked to jurors' imposition of perceived criminality and deviance, which results in jurors skewing toward harsher sentences for these populations. Laypersons' conflation of these racial identities and disorders with criminal deviance is fundamental to this process. Outside of the courtroom, prosecutors have the opportunity to make decisions that reverse the statistics that provide illusory support for these biases. Within the courtroom, prosecutors have the choice to either divert or activate these biases.

1. Prosecutors' Introduction of Labels Conflated with Evil Prejudices Death Penalty Case Jurors

Widespread misunderstanding of ASPD and psychopathy lies at the heart of prosecutors' ability to weaponize these labels at the expense of BIPOC defendants. Because the general public is misinformed about personality disorders[102] and their distinction from mental disorders,[103] prosecutors can appeal to jurors' distorted and overwhelmingly negative perceptions of ASPD and psychopathy. Laypersons may assume that a psychopathy or ASPD diagnosis means that the person is riddled with negative traits popularized in media and popular culture as characteristic of these disorders.[104]

As discussed in Part I, media representations emphasize particular traits of ASPD and psychopathy more than others. Some of these represented traits, such as being inherently evil and violent, are unobjective and

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Caroline Fredrickson, *How Labor Laws Disfavor People of Color*, BRENNAN CENTER (June 29, 2020), https://www.brennancenter.org/our-work/analysis-opinion/how-labor-laws-disfavor-people-color [https://perma.cc/F7M9-7Q52].

102. Laypersons' obliviousness to the complexities of personality disorders is pervasive. In some cases, defense lawyers themselves, who are unaware of their aggravating effect on criminal legal outcomes, unintentionally harm their clients and facilitate prosecutors' attacks on their clients by introducing evidence of ASPD and psychopathy. *See* Ledford v. Warden, 709 S.E. 2d 239, 245 (Ga. 2011) (denying defendant's federal habeas petition challenging his death sentence despite defense counsel's introduction of evidence of ASPD and psychopathy).

103. Miley, *supra* note 43, at 385.

104. Thi, *supra* note 37, at 174.

baseless.[105] Other traits, such as lacking remorse[106] and being manipulative, do make up part of the PCL-R[107] but are not exhibited by every person labeled a psychopath. In addition to finding that psychopathy ratings correlate positively with the likelihood of being sentenced to death, researchers have found that defendants with affective and interpersonal features of psychopathy are uniquely correlated with jurors' support for capital punishment.[108] Affective/interpersonal features of psychopathy (or those traits historically associated with psychopathy, including callousness, remorselessness, grandiosity, and superficial charm) are better predictors of death sentences than global psychopathy ratings, or ratings that take all types of psychopathic traits, including criminal and antisocial traits, into account.[109] Although the PCL-R is typically introduced into capital cases to inform the question of future dangerousness, the affective/interpersonal features driving support for capital punishment—such as pathological lying and superficial charm—are not inherently nor clearly linked to violence.[110] In fact, research suggests that of all the types of psychopathic features, affective and interpersonal ones are the least predictive of violence despite being the most prejudicial for jurors.[111] It is possible that those affective/interpersonal features, which are generally known by the public and commonly represented in media portrayals of psychopaths,[112] activate jurors' memories of those other baseless representations of evil and violence, which are also part of the collective perception of psychopathy and perpetuated by media representations. This potential explanation of the empirically-supported correlation between affective/interpersonal features of psychopathy in a defendant and heightened juror support for capital punishment is particularly troubling. It points to the possibility that

105. Wayland & O'Brien, *supra* note 31, at 526-27.

106. Note that researchers and scholars have found a positive correlation between a defendant's perceived lack of remorse with jurors' imposition of the death penalty. Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 L. & HUM. BEHAV. 185, 198 (1992); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1558 (1998).

107. Hare & Neumann, *supra* note 32.

108. Edens, *No Sympathy for the Devil*, *supra* note 38, at 178.

109. *Id.* at 175, 178. Edens notes that prosecutors tend to focus on these exact features—the affective/interpersonal features of psychopathy—in capital murder cases. *Id.* at 176.

110. *Id.* ("[T]he accumulated body of research suggests that [the affective and interpersonal features of psychopathy] are the least relevant to predicting violence").

111. Patrick J. Kennealy et al., *Do Core Interpersonal and Affective Traits of PCL-R Psychopathy Interact with Antisocial Behavior and Disinhibition to Predict Violence?*, 22 PSYCH. ASSESSMENT 569, 569 (2010).

112. Thi, *supra* note 37, at 174 ("Thus, psychopaths, who are predominantly characterized by interpersonal and affective deficits, are viewed as the quintessential villain who manipulates, cheats, and destroys.").

prosecutors may be able to convince jurors that a defendant is dangerous without actually providing evidence that properly supports this claim.

Whether or not they do so intentionally, prosecutors allow psychopathy labels, and the unfounded biases of jurors, to speak for themselves. By failing to clarify that evidence of the affective/interpersonal features of psychopathy do not necessarily inform the question of dangerousness, prosecutors potentially mislead jurors towards imposing the death penalty.

2. Prosecutors, Through Preserving the Racially Disparate Rates of Punishment, Perpetuate the Conflation Between Criminality and Blackness

In the late 1800s, following the abolition of slavery, social science "experts" used Black crime statistics, particularly arrest and incarceration rates, to support the alleged concept of Black criminality and inherent dangerousness.[113] White Supremacist scholars created a feedback loop within the criminal legal system. They used these statistics of inherent criminality to justify more frequent and harsher punishments upon Black people, in turn amplifying the statistics that enabled their racially disparate treatment toward Black people in the first place.[114] Today, the imposition of criminality and dangerousness on Blackness itself holds. Researchers have confirmed that the more jurors perceive Black defendants to be "stereotypically" Black, the more likely they are to sentence that person to death.[115] Researchers have also confirmed that in modern times, the correlation between Black facial features and heightened punishment also impacts whites: darker skin tone and stereotypically Afrocentric facial features are especially damaging for white defendants.[116]

Prosecutors maintain this feedback loop consisting of racial bias, amplified crime statistics, and harsher punishment. Their role is especially salient given that more than 97% of criminal cases are resolved by prosecutors in the plea bargain stage—where prosecutors hold more power

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113. Muhammad, *supra* note 57, at 33–34.

114. *Id.*

115. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 383 (2006) (finding that in cases involving a white victim, the more stereotypically Black a defendant was perceived—through features such as dark skin, a broad nose, and thick lips—the more likely jurors were to sentence that defendant to death)

116. Ryan D. King & Brian D. Johnson, *A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice*, 122 AM. J. SOCIO. 90, 115 (2016) (finding that white defendants with Afrocentric features were treated more punitively in court than other white defendants without such traits).

than when they are before a judge.[117] Prosecutors' sentencing recommendations and charging decisions during the bargaining stage have the potential to propel defendants further into the criminal legal system, where racial disadvantage accumulates across its multiple stages and is especially harmful to Black and Latinx defendants.[118] Additionally, prosecutors' bond decisions, which disproportionately harm Black defendants,[119] heighten the cumulative disadvantage faced by Black defendants at later stages in the criminal legal process.[120] Whether or not prosecutors' decisions are racially motivated, they occur in a biased system and bolster the statistics that support the manufactured link between BIPOC and criminality, which itself plays a role in actively generating racially disparate criminal outcomes.

C. Prosecutors' Dehumanization of Defendants Through Ableism and Anti-Blackness

Prosecutors' direct or subtle use of coded language effectively dehumanizes defendants, serving to distance decisionmakers from the defendant and facilitate the imposition of harsher punishment. When prosecutors use personality disorder labels or engage in the more pervasive and implicit project of incarcerating people of color, dehumanization is a crucial tactic. Nevertheless, while certain tactics—such as the use of racially coded language—are common to both problems, prosecutors' dehumanization of Black people is perhaps more explicit and pointed than their dehumanization of neurodivergent people.

1. Prosecutors' Use of ASPD or Psychopathy Evidence Dehumanizes Capital Defendants

As established in Part I, the people who prosecutors claim suffer from a personality disorder, such as ASPD or psychopathy, may not actually qualify for such diagnoses.[121] As is the case with prosecutors'

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117. NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14 (2018) [hereinafter NACDL).

118. William Y. Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 WAKE FOREST J. L. & POL'Y 441, 446–47 (2016).

119. John Wooldredge et al., *Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants*?, 14 CRIMINOLOGY & PUB. POL'Y 187, 204 (2015).

120. Chin, *supra* note 118, at 447.

121. For instance, even though the prevalence of psychopathy is 1% in the general population and 15-25% in incarcerated populations, a survey study found that in capital cases, "mental health evidence concerning APD, sociopathy, or psychopathy was presented

dehumanization of BIPOC defendants, prosecutors' imposition of personality disorder labels on capital defendants may serve to facilitate death sentences through the simultaneous degradation and demonization of these people.

As opposed to their invocation of racial images, which requires the use of strategic language, prosecutors are able to activate jurors' dehumanization of capital defendants just by presenting these widely and inherently prejudicial labels. Wayland and O'Brien argue that the label of psychopath alone invokes the idea that the defendant is dangerous, unchangeable,[122] and subhuman.[123] Nevertheless, while prosecutors often impose an aura of inferiority upon people allegedly suffering from these personality disorders, it is also common for prosecutors to elevate people diagnosed with ASPD and psychopathy to a superhuman status. Defendants are presented not only as weak and riddled with an unfixable illness but also, simultaneously, as monstruous[124] and uniquely dangerous.[125] In contrast with other disorders such as depression or dissociative identity disorder, in which the person may be seen as a victim of their illness, prosecutors present people diagnosed with ASPD and psychopathy as beneficiaries of their disorders. Prosecutors transform certain symptoms of ASPD and psychopathy, such as superficial charm and manipulativeness, into traits seen as superpowers. This perception endangers people with ASPD and psychopathy labels by heightening the possibility that they will be exploited or harmed.[126]

Further, in addition to allowing prosecutors to isolate people diagnosed with ASPD and psychopathy from the rest of the population and present them as both sub- and superhuman, widespread misinformation regarding the nuances of personality disorders facilitates prosecutors' deindividualization of defendants diagnosed with them. The potentially mitigating effects of the different types of ASPD and psychopathy, the particular combination of symptoms exhibited by the defendant, and the nuances of the disorders fall away in the face of the ignorance and misinterpretation of the jurors. Prosecutors are thus able to use this ignorance against these defendants. The lives, stories, and individual complexities of each defendant become secondary to the typical prosecutors'

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by prosecutors in virtually every case in which they presented any mental health evidence at all." Edens & Cox, *supra* note 45, at 248.

122. Wayland & O'Brien, *supra* note 31, at 543.

123. *Id.* at 525, 558.

124. *Id.* at 526.

125. *Id.* at 527; Miley et al., *supra* note 43, at 385–86.

126. *See generally* Wayland & O'Brien, *supra* note 31, at 527–30 (discussing how prosecutors may use prejudicial language or misunderstandings relating to ASPD and psychopathy against defendants).

presentation of defendants diagnosed with psychopathy as monolithic, distorted, and non-human. Whether prosecutors degrade or exalt capital defendants diagnosed with ASPD or psychopathy, these tactics propel jurors to impose the death penalty. By concurrently diminishing their humanity and individuality, prosecutors may inhibit jurors' abilities to relate to and empathize with capital defendants diagnosed with ASPD and psychopathy. Such barriers to empathy reinforced by prosecutors facilitate juror's imposition of harsh punishments.[127]

2. Prosecutors' Use of Coded Language Similarly Dehumanizes and Animalizes Black People

Dehumanization of Black people by prosecutors, like the dehumanization of the neurodivergent, is not new. As discussed in Part I, the laws of the United States, fueled by racial animus, have long worked to propagate the oppression of Black people—an effort started long before this country was founded. Proven ongoing racial disparities in death penalty sentences and executions provide perhaps the clearest and most troubling example of the criminal legal system's continued and legally-sanctioned devaluation of Black lives.

In their influential study focusing on death sentences in Georgia, David C. Baldus, George Woodworth, and Charles A. Pulaski, Jr., found that a victim's race influences death penalty decision outcomes.[128] Scholars have since replicated those authors' methodology and have confirmed that the findings extend beyond Georgia to other states.[129] Building on these findings, researchers Mona Lynch and Craig Haney suggest that race-based discrimination in death penalty cases is most likely to influence the jury at the penalty phase.[130] They found that study participants weighed mitigating evidence in a racialized manner, meaning they were less willing to consider mitigating evidence when it was introduced on behalf of a Black defendant

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127. *See generally* KATHLYN TAYLOR GAUBATZ, CRIME IN THE PUBLIC MIND (1995) (attributing the shift toward more punitive responses to crime in the 1990s at least partially to decisionmakers' inability to empathize with criminal defendants presented as deviant from social norms).

128. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL EMPIRICAL ANALYSIS 2 (1990) ("[A]lthough the levels of arbitrariness and racial discrimination in capital sentencing have declined in the post-*Furman* period, none of these promises [meant to end arbitrary and/or discriminatory capital sentences] have been fulfilled . . . .").

129. Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 576 (2011) [hereinafter *Empathic Divide*].

130. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & HUM. BEHAV. 337, 337 (2000).

compared to a white defendant.[131] These racial disparities in sentencing outcomes are linked to white jurors' inability or unwillingness to cross what Lynch and Haney later named the "empathic divide."[132] Ultimately, they conclude that racial disparities in capital sentencing outcomes, more so than being due to the overt expression of negative feelings, are attributable to the withholding of positive affect, including positive feelings such as empathy, admiration, and sympathy.[133]

Sheri Lynn Johnson's work on racial imagery provides a counterpoint to the idea that what Lynch and Haney describe as "negative feelings"—conceptualized as outright bias in Johnson's texts—play a secondary role in racialized legal outcomes.[134] Johnson suggests that when different actors in the criminal legal system use "racial imagery," or what she calls "a species of bias," they are not tasked with *creating* bias. Instead, their use of racial images repeats, recalls, and reshapes biases that are already there.[135] The invocation of racial imagery first plays a role by increasing the salience of race in jurors' minds. Given the robust body of research pointing to racial disparities within each facet of the criminal legal system, it is clear that racial animus, whether consciously or not, lives on in the minds of decisionmakers, thus leaving racial imagery available for misuse.

Regardless of the source of jurors' decisions—explicit or implicit anti-Black bias, inability to empathize with Black defendants, or even a combination of the two—dehumanization of defendants plays a role. Whether or not jurors approach their decision-making tasks with outright racial bias, it is the prosecutors, not the jurors, who are the driving force behind the dehumanization of defendants of color. First, prosecutors commonly use language that equates defendants of color with animals, thus suggesting they are inherently subhuman.[136] When animalizing language is used to describe white defendants, it arguably lands differently on white jurors. The effect is probably not as robust, likely because white people—who place themselves at the top of an artificial but socially reinforced racial

131. *Id.*

132. *Id.* at 353; Lynch & Haney, *Empathic Divide*, *supra* note 129, at 584.

133. *Id*. at 353–54 (2000).

134. Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1742 (1993) ("Even more vile explanations are possible, but hinting at their existence may be enough.").

135. *Id.* at 1743.

136. *Id.* at 1753 ("Equally abhorrent are portrayals of persons of color as animal-like or subhuman in some way. . . . Animal imagery is actually quite common in prosecutors' summations, perhaps because not all courts deem it impermissible."). For examples of such animalizing language and examples of subsequently discussed racial imagery in criminal cases, see Sheri Lynn Johnson's text.

hierarchy—are not as commonly compared to or treated like animals.[137] Prosecutors' use of references to animals may seem unproblematic when considered in isolation from the racialized history of this country. However, the long history of slavery, forced servitude, internment, disproportionate incarceration, and killing of people of color within the United States[138] facilitates and strengthens the activation of a mental link between BIPOC and animals,[139] ultimately enabling and amplifying the degree of dehumanization inflicted upon BIPOC. Furthermore, the pervasiveness of the "ape thesis"[140]—or the idea that Black people are not human beings but, rather, are subhuman and animalistic apes—runs rampant within the criminal legal system and is not limited to exploitation by prosecutors. Some police departments, particularly the Los Angeles Police Department, went as far as labeling crimes perpetuated by a Black person toward another Black person as "N.H.I.—no human involved," reflecting the reality that many people actually consider Black people not as human beings but, rather, as subhuman or animalistic.[141]

Another related form of dehumanization of Black defendants involves prosecutors' imposition of racist intentions on people of color in cases involving white victims. Prosecutors frequently use what Sheri Lynn Johnson calls "'us-them' imagery," or language that creates or highlights an imagined barrier between whiteness and Blackness.[142] This tactic presents violence perpetrated by Black people and victimizing white people (or "black-on-white" violence) as inherently more atrocious than other forms of violence.[143] Prosecutors often also lace these racial images with the idea that

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137. In fact, psychologist Jennifer Eberhardt and her team have found that people unconsciously associate Black people with animals, particularly with apes. Subjects were able to recognize an ape faster after being exposed to a black face as opposed to a white face. PAUL BUTLER, *supra* note 55, at 25.

138. The forced relocation and incarceration of Japanese Americans into internment camps during World War II, the continual violence towards and exploitation of immigrants, and the ongoing project of indigenous genocide are just a few examples of a pervasive pattern of racialized abuse within this country. *See generally* LAWSON FUSAO INADA, PATRICIA WAKIDA, & WILLIAM HOHRI, ONLY WHAT WE COULD CARRY: THE JAPANESE AMERICAN INTERNMENT EXPERIENCE (2000) (retelling the firsthand experiences of Japanese Americans forcibly banished to internment camps in the United States); CRISTINA BELTRAN, CRUELTY AS CITIZENSHIP: HOW MIGRANT SUFFERING SUSTAINS WHITE DEMOCRACY (2020) (discussing the history of racialized violence and exclusion targeting immigrants within the United States, particularly those from Latin America); ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLE'S HISTORY OF THE UNITED STATES (2014) (tracing the centuries-long genocide of indigenous peoples within the United State's settler-colonial scheme).

139. PAUL BUTLER, *supra* note 55, at 25–26.

140. *Id.*

141. *Id.*

142. Johnson, *supra* note 134, at 1756.

143. *Id.*

crimes allegedly committed by Black and Latinx defendants against white people are motivated by racialized "revenge."[144] Prosecutors then emphasize the importance of punishing Black defendants more punitively in order to prevent future racialized crimes of revenge.[145] However, even within this narrative, in which whites are the victims of racialized crimes, the underlying assumption is that this dynamic is inherently more problematic than a dynamic involving a victim of color. This assumption relies on a racial hierarchy that places whites at the top.

Regardless of whether these prosecutors are employing these images with the intent to uphold racial disparities within the criminal legal system, such racialized narratives cannot be invoked without uplifting whites and subjugating BIPOC. This is an effect that prosecutors should know to anticipate. Intuitively, when comparing human beings to animals, prosecutors present defendants of color as a subhuman threat to (white) humanity.[146] "Us-them" narratives function similarly. Crimes against whites are considered more horrific and dangerous because white lives are subconsciously assumed to be more valuable than the lives of people of color. Prosecutors cannot juxtapose concurrent white fragility and white superiority against their blatant devaluation of Black and Brown lives without realizing these narratives may impact a decision in which BIPOC lives are at stake.

Finally, both of these approaches—animalization and "us-them" narratives—also play a role in activating jurors' negative feelings towards defendants of color and/or in impeding jurors' ability to empathize with them. Prosecutors' demonization of Black and Brown people as inherently dangerous and fixated on revenge likely elicits a negative bias towards, or even fear of, these groups.[147] Additionally, when presenting BIPOC as either subhuman or diametrically opposed and threatening to whiteness, prosecutors distance jurors, especially white jurors, from BIPOC defendants. This distancing may evolve into a barrier blocking an empathic connection—or even an "empathic divide" as identified by Lynch and Haney—between white jurors and defendants of color. Finally, prosecutors are specially situated with the opportunity to use their closing arguments to repeat racial images invoked throughout trial and sentencing—regardless of whether those images were previously raised by prosecutors themselves, witnesses, or any other actor within the trial—as well as the chance to introduce new dehumanizing racial imagery. In doing so, prosecutors make these ideas—

144. *Id.* at 1757.
145. *Id.*
146. *Id.* at 1753.
147. *Id.* at 1750, 1757.

which ultimately make it easier for jurors to feel comfortable sentencing BIPOC to death[148]—all the more salient to jurors moments before they deliberate and make their decisions.

D. Compounded Biases: Intersection of Personality Disorders and Race

The sections above, on the role of prosecutors in perpetuating (1) the overreliance on unreliable social science, (2) the conflation of ASPD, psychopathy, and BIPOC with evil and criminality, and (3) the dehumanization of these groups, are intended to demonstrate the similarities between bias toward racial minorities and bias toward individuals diagnosed with personality disorders. These biases, given their commonalities, interact and compound in ways that make individuals who are perceived to fall within both of these categories—BIPOC diagnosed with personality disorders—even more vulnerable to receiving an arbitrary death sentence. This Section will discuss evidence suggesting that race and personality disorder diagnoses are inextricably linked, thus bolstering the possibility of a biased death sentence.

Race plays a biasing role in the diagnosis of psychological disorders. The Black community in particular has historically been overdiagnosed with schizophrenia and underdiagnosed with affective disorders such as bipolar disorder.[149] Numerous psychologists have attributed these racialized

148. Lynch & Haney, *supra* note 129, at 587 ("Among other things, persons who already have been demonized, are perceived as somehow less than fully human, or are regarded as fundamentally 'other' and are easier to punish because the psychological barriers against hurting them have been lowered in advance.").

149. Michael Baglivio et al., *Racial/Ethnic Disproportionality in Psychiatric Diagnoses and Treatment in a Sample of Serious Juvenile Offenders*, 46 J. YOUTH ADOLESCENCE 1424, 1424 (2016) (finding that Black youths are more likely to be diagnosed with conduct disorder than white youths, that Black and Latino male youths are less likely to be diagnosed with ADHD than white male youths, and that Black males are less likely to receive psychiatric treatment than white males). Note that this comparison between schizophrenia and bipolar disorder diagnoses is an intra-group, not inter-group, comparison and does not suggest that Black people are diagnosed with bipolar disorder less often than their white counterparts. In fact, Black youth are more likely to receive depressive disorder, bipolar disorder, and alcohol/substance abuse disorder diagnoses than white youth. Joradana Muroff et al., *The Role of Race in Diagnostic and Disposition Decision Making in a Pediatric Psychiatric Emergency Service*, 30 GEN. HOSP. PSYCHIATRY 269, 269 (2008) (concluding that these racial disparities in diagnoses highlight the pervasiveness of non-clinical factors such as race and ethnicity in clinical diagnostic decisions made as early as childhood); *see also* Robert C. Schwartz & David M. Blankenship, *Racial Disparities in Psychotic Disorder Diagnosis: A Review of Empirical Literature*, 4 WORLD J. PSYCHIATRY 133, 138 (2014) (reviewing empirical studies over a 24-year period and finding a clear pattern wherein Black and Latinx Americans were disproportionately

misdiagnoses not to differences in the prevalence of psychological disorders across races but, rather, to (1) the role of racial stereotypes and (2) an insensitivity to cultural differences in the manifestations or displays of the same disorders across different racial groups.[150]

Nevertheless, in 2002, Richard Lynn published a study arguing that psychopathic personality disorder is actually distributed at higher rates in Black and indigenous people than in white people and that underlying genetic factors are at the root of this disparity.[151] In addition to reviewing data on personality scales and relationship stability, Lynn also relied on crime rates in order to bolster his argument.[152] This study explicitly echoed white supremacists' aforementioned fixation on evolutionary biology and genetics and overreliance on distorted crime statistics to explain social differences across race. Here, Lynn applied those methods and ideologies to attempt to explain racial differences in pathologized personality disorders. Lynn's analysis demonstrates the impact of the imposition of a racially-biased perspective upon personality disorder diagnoses. In addition to assuming that the disparity in the prevalence of psychopathy has an internal, genetic basis, Lynn discounted the role of systemic social factors on these diagnoses.

Racial disparities in treatment at every stage of the criminal legal system have been attributed to racial bias.[153] The distortion of psychopathy as a construct cannot be dissociated from racialized crime statistics because the construct itself is reliant on the individual's criminal background: the last three items on the PCL-R are juvenile delinquency, revocation of conditional release, and criminal versatility. As outlined in Section IIB, BIPOC are more likely to become ensnared by the criminal legal system due to the prevalence of racial bias at every stage of the criminal legal system. Although researchers have rebutted Lynn's finding of a disparity in the prevalence of psychopathy across racial groups,[154] these investigations on the racialization of

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diagnosed at rates three to four higher and more than three times higher, respectively, with Schizophrenia than their European-American counterparts).

150. Baglivio, *supra* note 149.

151. Richard Lynn, *Racial and Ethnic Differences in Psychopathic Personality*, 32 PERSONALITY & INDIVIDUAL DIFFERENCES 273, 273, 309 (2002).

152. *Id.*

153. SENT'G PROJECT, *supra* note 66, at 4–8; J.L. Skeem et al., *Psychopathic Personality and Racial/Ethnic Differences Reconsidered: A Reply to Lynn (2002)*, 35 PERSONALITY & INDIVIDUAL DIFFERENCES 1439, 1448 (2003). For example, "[b]lack males were overrepresented among arrests for crimes that were open to police discretion (e.g. drug offenses), but were relatively infrequently arrested for crimes that tend to be investigated with absent knowledge of the perpetrator's ethnicity (e.g. burglary)." *Id.*

154. J.L. Skeem et al., *Are There Ethnic Differences in Levels of Psychopathy? A Meta-Analysis*, 28 L. & HUM. BEHAV. 505, 505 (2004).

psychopathy diagnoses point to the harm that personality disorder labels may inflict when imposed upon BIPOC, especially given their heightened vulnerability to being targeted and victimized by the criminal legal system.

III. Solutions

In the summer of 2020, millions of people across the United States and the world gathered to protest persistent, state-sanctioned violence against Black people.[155] In a letter to the judicial, executive, and legislative branches of the government, Bernette Joshua Johnson, then Chief Justice of the Supreme Court of Louisiana, argued that the racial bias that permeates the criminal legal system jeopardizes the legitimacy of the law itself.[156] A number of state supreme court judges across the country joined Chief Justice Johnson in acknowledging and condemning the existence of racial bias in the courts and throughout the criminal legal system.[157]

The issues presented in this Note point to the criminal legal system's failure to insulate itself against bias toward racial minorities and people perceived as neurodivergent. When compounded, the effects of these biases may be magnified beyond their individual capacities, making capital defendants existing at their intersection dangerously more vulnerable to arbitrary death sentences mandated by jurors but compelled by prosecutors. Nevertheless, the individual impact of these types of biases is not equal. Although bias against those with ASPD and psychopathy is deeply harmful, racial oppression and violence are far more persistent in society. For instance, Hervey Cleckley's seminal text establishing the modern conception of the psychopath was published in 1941,[158] yet the white supremacist order is essential to colonization and predates the formation of the United States. While Part II of this Note pointed towards the shared mechanisms involved in prosecutors' weaponization of biases towards racial minorities and people diagnosed with ASPD/psychopathy in capital cases, it should be noted that

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155. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/4NL5-G37T] ("Four recent polls . . . suggest that about 15 million to 26 million people in the United States have participated in demonstrations over the death of George Floyd and others in recent weeks.").

156. Jesse Wegman, *We Are Part of the Problem They Protest*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/opinion/state-supreme-courts-racial-justice.html [https://perma.cc/8XHM-SDJT] ("I firmly believe in the rule of law. But its legitimacy is in peril when African-American citizens see evidence every day of a criminal legal system that appears to value Black lives less than it values White lives.").

157. *Id.*

158. HERVEY CLECKLEY, THE MASK OF SANITY: AN ATTEMPT TO REINTERPRET THE SO-CALLED PSYCHOPATHIC PERSONALITY (1941).

the latter microprocess reflects and functions within the macroprocess of subjugating BIPOC within the criminal legal system. In turn, this macroprocess fits within the larger historical project of subjugating BIPOC generally and beyond just the legal system.

Given the recognized pervasiveness and force of the impact of racial bias within the criminal legal system, a solution that addresses the central issue presented in this Note—the compounded effect of bias against racial minorities and personality disorders on capital defendants—must prioritize its racial dimension. The following Sections of this Note will explore potential solutions to this issue. First, I outline those that will most likely fail in addressing these issues. Second, I describe a set of solutions that may be more effective but will not address these issues in their entirety. Finally, I propose a framework and accompanying steps that should put an end to arbitrary death sentences.

A. What Probably Will Not Work

In response to the misuse of ASPD/psychopathy labels in criminal cases, Wayland and O'Brien have suggested that a "thorough and methodical ABA and Supplementary Guidelines-based approach to investigating a client's life history will protect the client from the dehumanizing inferences that flow from being labeled antisocial."[159] They suggest that such an approach would protect defendants from misleading, incomplete, and damaging assessments.[160] Nevertheless, the psychopathy label alone invokes misconceptions and baseless assumptions about the defendant. This approach fails to protect defendants who actually do exhibit severe cases of ASPD or psychopathy but are nonviolent and not dangerous. These individuals may exhibit the affective/interpersonal traits of psychopathy to an extreme degree, and thus qualify for a psychopathy diagnosis, without necessarily posing a future danger to society.[161] However, jurors may still be unconsciously prejudiced by a reliable and complete assessment of the person by the prosecution's experts due to the prevailing societal and media misrepresentations of psychopaths as inherently dangerous and evil.

Further, due to the pervasiveness of institutional racism within the field of psychiatry,[162] it is unlikely that the ABA Guidelines themselves are free of racial bias. Although the Supplementary Guidelines establish the

159. Wayland & O'Brien, *supra* note 31, at 586.

160. *Id.* at 588.

161. Recall that these particular psychopathic features are not predictive of future violence. Edens, *No Sympathy for the Devil*, *supra* note 38, at 178.

162. Sabshin et al., *Dimensions of Institutional Racism in Psychiatry*, 127 AM. J. PSYCHIATRY 787, 787 (1970).

requirement that at least one member of the defense team must be trained in identifying psychological illnesses and disabilities as well as the influences of race and ethnicity on behavior,[163] even this person's good faith efforts to account for racial and ethnic variation may be distorted and ineffective due to their own unconscious racial biases. Establishing an explicit guideline on the importance of racial sensitivity is insufficient if the underlying racial bias necessitating such considerations goes unaddressed.

Another approach that will likely fail is the shift from relying on the opinions and diagnoses of expert witnesses to relying on actuarial instruments. Courts are becoming more receptive to the idea of admitting biological evidence, including neuroimaging and genotypical evidence, in criminal cases, including capital cases.[164] Such a shift from subjective opinions to seemingly more objective bodily markers is a move in the right direction. However, these methods, while promising, have not yet been consistently shown to be reliable.[165] Furthermore, given the harm already endured by the Black community as a result of bodily-centered evidence and crime statistics,[166] it is likely that even seemingly "objective" evidence may be distorted by "scientific" racism.

Another prospective solution is the application of the Federal Rules of Evidence ("FRE") to capital sentencing contexts, since the FRE do not currently apply in sentencing proceedings. Even the states that have adopted the FRE follow this practice.[167] Scholars argue that because research indicates that the PCL-R's ability to predict future dangerousness is only weak-to-moderate—in addition to its deleterious and misguiding impact on jurors—applying the FRE to capital cases could possibly keep erroneous future dangerousness evidence from influencing capital cases.[168] *Napue* and *Giglio* alone should already place a barrier against the introduction of information that prosecutors know or should know is false. Rules of particular relevance include FRE 401 (providing for the inclusion of relevant evidence)[169], 402 (establishing the inadmissibility of irrelevant evidence),[170]

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163. Wayland & O'Brien, *supra* note 31, at 568.

164. Hannah L. Bedard, *The Potential for Bioprediction in Criminal Law*, 18 COLUM. SCI. & TECH. L. REV. 268, 289 (2017).

165. *Id.* at 322 ("Biobased evidence is not yet ready to be used in the legal context for dangerousness predictions, but it is only a matter of time before it will be, and should be, admitted.").

166. MUHAMMAD, *supra* note 57, at 66.

167. *Id.* at 1062.

168. Jaymes Fairfax-Columbo & David DeMatteo, *Reducing the Dangers of Future Dangerousness Testimony: Applying the Federal Rules of Evidence to Capital Sentencing*, 25 WM. & MARY BILL RTS. J. 1047, 1047 (2017).

169. FED. R. EVID. 401.

170. FED. R. EVID. 402.

403 (giving the court discretion to exclude relevant evidence if its probative value is outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence),[171] 702 (requiring that expert testimony be based on sufficient facts or data and the product of reliable principles and methods as applied to the case),[172] and 703 (permitting experts to testify on inadmissible evidence only if experts in the field would reasonably rely on such evidence and only if the prejudicial effect of the evidence is substantially outweighed by its probative value).[173] The application of these rules during the sentencing stage could provide the necessary additional obstacles to the admission of unreliable evidence of future dangerousness, particularly estimates produced through the use of assessment tools that are themselves questionable.[174]

Nevertheless, death penalty states such as Texas pose a critical challenge to this theory. The Texas Rules of Evidence are almost identical to the FRE.[175] However, as demonstrated by *Barefoot*, although the Texas Rules of Evidence applied, the prosecution was still able to introduce prejudicial, controversial, and unreliable evidence into a Texas courtroom at the expense of Thomas Barefoot's life. Further, even though many scholars and organizations within the field of psychology denounce the PCL-R as an unreliable assessment tool[176] and go as far as questioning the constructs of ASPD and psychopathy, many scholars have also produced studies in their favor.[177] This makes it unlikely that an application of the FRE to sentencing

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171. FED. R. EVID. 403.

172. FED. R. EVID. 702.

173. FED. R. EVID. 703.

174. Fairfax-Columbo & DeMatteo, *supra* note 168, at 1062.

175. TEX. R. EVID. 401, 402, 403, 702, 703.

176. Joakim Sturup et al*., Field Reliability of the Psychopathy Checklist-Revised Among Life Sentenced Prisoners in Sweden*, 38 L. HUM. BEHAV. 315, 316 (2014).

177. Salekin et al., *A Review and Meta-Analysis of the Psychopathy Checklist-Revised: Predictive Validity of Dangerousness*, 3 CLINICAL PSYCH.: SCI. & PRAC. 203, 203 (1996) (finding that the PCL and PCL-R appear to be good precitors of violence and general recidivism); Leistico et al., *A Large-Scale Meta-Analysis Relating the Hare Measures of Psychopathy to Antisocial Conduct*, 32 LAW & HUM BEHAV 28, 28 (2008) ("The construct of psychopathy has a long and esteemed history in both criminal forensic psychology research and clinical practice"). *But see* Jeandarme et al., *PCL-R Field Validity in Prison and Hospital Settings*, 41 LAW & HUM BEHAV 29, 29 (2017) ("Consistent with recent studies from other countries, these results suggest inadequate field reliability and validity in prison and hospital settings . . . ."); Edens et al., *How Reliable are Psychopathy Checklist-Revised Scores in Canadian Criminal Trials? A Case Law Review*, 27 PSYCH. ASSESSMENT 447, 447 (2015) ("These and earlier findings concerning field reliability in legal cases suggest that the standard error of measurement for PCL-R scores . . . is likely to be much larger than the value of 2.90 reported in the instrument's manual.").

proceedings will completely or consistently exclude evidence relying on these assessment tools or constructs.

Finally, some researchers have proposed eliminating the use of the PCL-R altogether to prevent abuse of the construct of psychopathy.[178] However, this solution does not address the harm imposed by experts who, like Dr. Holbrook and Doctor Death in *Barefoot*, diagnose defendants without using the PCL-R, and perhaps even without ever examining them to begin with.

B. What Might Work

This Section explores the implementation of incremental, "piecemeal" solutions that involve each actor involved in the capital cases, including prosecutors, defense teams, and decisionmakers.

1. Training Defense Teams

In addition to attempting to limit bias from actors outside of the defendant's team, it is also important to reduce biases held by defense attorneys. Moreover, because prejudices towards racial minorities and personality disorders often have harmful effects on capital defendants, defense teams should receive targeted trainings on the nuances of race and personality disorders as well as their relation to social and political structures. Defense teams should also educate themselves on mental illness generally in order to be able to properly combat deficient personality disorder diagnoses.[179]

2. Heightening Evidentiary Standards on Expert Testimony

It is possible that the FRE, if applied to the sentencing stage of death penalty cases, could sufficiently impede the introduction of prejudicial

178. David DeMatteo et al., *Statement of Concerned Experts on the Use of the Hare Psychopathy Checklist-Revised in Capital Sentencing to Assess Risk for Institutional Violence*, 26 PSYCH., PUB. POL'Y, & L. 133, 137 (2020) ("[O]ne cannot use the PCL–R in the context of capital sentencing evaluations to make predictions that an individual will engage in serious violence in high-security institutional settings with adequate precision or accuracy to justify reliance on the PCL–R scores.").

179. ASPD and psychopathy are diagnoses of exclusion, meaning that other, more common disorders such as depression and anxiety disorder must first be ruled out to proceed with a personality disorder diagnosis. If defense teams are able to gather evidence pointing to a mental disorder, which comparatively are less aggravating than personality disorder diagnoses, they may be able to insulate their client from the prejudicial effects of personality disorder labels. Miley et al., *supra* note 43, at 385–86.

evidence if augmented by additional standards. Although FRE 702 requires that testimony be supported by sufficient facts and already prohibits the admission of testimony rooted in unreliable principles and methods,[180] this rule does not provide a precise standard defining these requirements. In *Barefoot*, the Supreme Court upheld the introduction of evidence demonstrated to be valid only 33% of the time.[181]

Within the field of psychology, the concept of reliability looks to the consistency of a measure, while validity looks to its accuracy. Questionable testimony may more effectively be filtered out if, in addition to proposing a reliability requirement, the rules of evidence employed in death penalty cases also involved a heightened validity standard. For example, such a rule might require that assessment and predictive tools be at least as accurate as leaving a prediction to chance (50%), if not more.

Furthermore, lawmakers should establish a rule prohibiting the introduction of tools, constructs, or practices that have been widely condemned within a particular field, even if this condemnation is disclosed to the jury. In this context, this would ban the practice of assessing future dangerousness based on psychopathy or ASPD diagnoses.

3. State Supreme Court Judges May Commission Relevant Reports

State supreme court judges, who are positioned with the opportunity to commission reports on particular issues, could help bridge the gap between important advances and discoveries made within certain fields—such as evolving understandings of ASPD, psychopathy, and relevant assessment tools—and the legal field. Knowledge from the fields of psychology, psychiatry, and neuropsychology, among others, has the potential to shape the way these disorders are conceptualized within the criminal legal system and beyond. Specific information about nuances regarding how different types of psychopaths react to certain types of interventions, for instance, and a shift toward making particularized interventions available to decisionmakers, could shift the conversation around personality disorders and punishment itself. Reports explicitly demonstrating the degree to which bias towards personality disorders compounds with racial bias in capital cases as well as variations in this pattern—perhaps across regions and states—could not only make actors within the criminal legal system aware of this issue, but also provide insight

180. FED. R. EVID. 402.
181. *Barefoot*, 463 U.S. at 899 n.7.

into how particularized solutions can be implemented by individual actors and by the system as a whole.

4. Reimagining the Role and Duties of Prosecutors

Because of the central role of prosecutors in upholding and sustaining the systemic oppression of BIPOC and people bearing ASPD or psychopathy labels, prosecutors are also an essential part of the solution. Perhaps reimagining the role of the prosecutor around the preexisting principle of not doing harm could justify a shift toward the practice of prosecutors working diligently to actively exclude prejudicial evidence from capital cases. When the effects of racial bias and personality disorder labels are contextualized with the concept of enabling harm against a defendant, it becomes clear that the prosecutor must task themselves with the responsibility of actively preventing factors such as race and personality disorder diagnoses from skewing a death penalty case. As discussed in Part II, prosecutors may inadvertently activate jurors' biases. Thus, it becomes necessary for prosecutors to actively work toward preventing these activations and, by extension, the harm they can cause.

C. What Will Work: Abolishing the Death Penalty Will Fundamentally Address these Issues

The criminal legal system as it functions today does not properly protect people living in the United States—particularly BIPOC, people diagnosed with personality disorders, and especially people at the intersection of these identities—against nonarbitrary applications of the death penalty. If the disparate application of such an enormous and irreversible harm is not sufficient to justify lawmakers' abolition of the death penalty, perhaps considering the underlying purpose of the death penalty could shed light on how to address the issues discussed here. Two purposes of the death penalty—the desire to take into account the wishes of the victims or survivors of people harmed by capital defendants and the desire to prevent future harm to society—both point to the same solution: the abolition of the death penalty.

In addition to being conceptualized as a way of punishing the perpetrator of a crime and protecting society at large from future harm, the death penalty may be considered a form of restitution to the victims of the defendant's crime as well to their loved ones. Scholars have continually argued that the criminal legal system must consider the wishes of family members and close friends when seeking "justice": "Victims need a sense of justice and the opportunity to be included in the process. Trauma is disempowering because victims feel little sense of control over what has

happened."[182] The judicial system exacerbates this trauma by offering them no place to "participate actively and meaningfully."[183] Scholars also note that when excluded from the criminal judicial process, "[f]amily members often feel revictimized."[184] In effect, decisionmakers' disregard for the wishes of those most directly affected by the harm has the potential to retraumatize or amplify the grief and harm caused by a defendant's actions. In *Is Restitution Possible for Murder?—Surviving Family Members Speak*, author Judith W. Kay discusses two separate studies in which researchers sought to uncover exactly what it is that different survivors wanted and needed in response to their loss. Particularly, they engaged with subjects who had lost a close family member to murder. Researchers discovered that the subjects found the concept of an economic pay-off repugnant and insulting.[185] Furthermore, every single subject participating in each study opposed the death penalty,[186] with many proposing crime-preventative measures as their preferred response to the tragedy they faced.

Again, a solution that prioritizes both the wishes of the victims and survivors of harm, and concurrently addresses the issue of crime prevention, points away from the death penalty and toward abolition. In *Are Prisons Obsolete?*, Angela Y. Davis clarifies that far from entailing a single alternative to the carceral and capital systems, abolition is a preventative and metamorphic framework.[187] Rather than demanding the instant destruction of the systems in place, which may not be practicable in today's environment, abolition calls for "radical transformations of many aspects of our society,"[188] particularly, those alternatives that address the biases—such as racism, homophobia, class bias, and male hegemony—underlying and empowering the criminal legal system. Davis discusses solutions, including "demilitarization of schools, revitalization of education at all levels, a health

182. Tammy Krause, *Reaching Out to the Other Side: Defense-Based Victim Outreach in Capital Cases*, *in* WOUNDS THAT DO NOT BIND: VICTIM BASED PERSPECTIVES ON THE DEATH PENALTY 386, 386 (2006). *See generally* Carroll Ann Ellis et al., *The Impact of the Death Penalty on Crime Victims and Those Who Serve Them*, *in* WOUNDS THAT DO NOT BIND: VICTIM BASED PERSPECTIVES ON THE DEATH PENALTY 431, 437 (2006); Judith W. Kay, *Is Restitution Possible for Murder?—Surviving Family Members Speak*, *in* WOUNDS THAT DO NOT BIND: VICTIM BASED PERSPECTIVES ON THE DEATH PENALTY 323, 332 (2006).

183. Krause argues that "legal teams need to understand that while their job is to focus on the laws that have been violated, there is great potential to incorporate the needs of those who have been most affected by the violation. And it can begin when both teams reach out to the other side." Krause, *supra* note 183, at 395.

184. Ellis et al., *supra* note 183, at 438.

185. Kay, *supra* note 183, at 332, 345.

186. *Id.* at 332.

187. Angela Y. Davis, *Abolitionist Alternatives*, *in* ARE PRISONS OBSOLETE?, 7, 108 (2003).

188. *Id.*

system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance,"[189] that target not the issues resulting from the system, but the inequities underlying the social relations that perpetuate the imagined need for prisons and capital punishment. The abolitionist lens seeks to not only prevent harm, but to also delink crime and punishment.[190] Interrogating the assumption that crime must be met with punishment allows every person enveloped by the legal system, from lawmakers and decisionmakers to everyday citizens, to imagine alternative responses to crime, from rehabilitative efforts to particularized community- or survivor-oriented interventions.

CONCLUSION

Applying an abolitionist framework to the issues described in this Note provides by far the most holistic and effective solution to arbitrary death sentences. In addition to addressing the systemic injustices often underlying criminal activity, this framework does so, in part, through efforts that aim to shift societal attitudes away from prejudiced forms of thinking, which often produce and entrench the systemic injustices in question. Such an approach would eliminate not only arbitrary applications of the death penalty based on race and personality disorders, but it would eliminate criminal activity that is arguably enabled or necessitated by the precarious conditions created by social inequality. In a post-death penalty, post-carceral society centered around compassion, dignity, and mutual respect, the death penalty itself would be replaced with rehabilitative responses to crime, thus completely eliminating the issues discussed here. Of the potential solutions discussed, abolition is the only path that completely addresses the issue of arbitrary death sentences and goes beyond that problem to the core of the injustices underlying the criminal legal system.

189. *Id*. at 107.
190. *Id.*