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Symposium: Death Penalty Stories: Comment: **Dismantling the Free** Will Fairytale: The Importance of Demonstrating the Inability to Overcome in Death Penalty Narratives

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LEXISNEXIS SUMMARY:

... Current research directly analyzes capital juror reactions to a defendant's effort to overcome impairment during the penalty phase. ... Weeks's study focused on juror perceptions of a defendant's efforts to overcome impairment and how those perceptions affected the jurors' sentencing decision. ... The results of the study suggest providing evidence of unsuccessful attempts to overcome impairment increases mitigation value and the probability of a vote for life. ... As a result, when the defendant has engaged in unlawful behavior, the juror reflecting on his experience assumes the behavior is attributable to internal factors, such as deficient moral character. ... The use of this evidence counters juror attribution of internal causes, premature decision-making, and draws attention away from preconceived notions of the stereotypical capital defendant. ... Accurate knowledge of parole can counter juror fears of future dangerousness, thus allowing impairment evidence to maintain a positive and mitigating effect. ... Unsuccessful efforts to triumph over impairment allow defense attorneys to counter internal attributions of a defendant's behavior and hinder premature decision-making.

TEXT:
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I. INTRODUCTION

Dressed in his western attire complete with bandana and cowboy hat, Scott's mind "saddles up and rides off in all directions." [n1] Scott is in a continuous war against the demons he sees in his walls and their voices that terrorize his mind and continually threaten his life. [n2] He attempts to counter the demons, whom he believes are part of a joint conspiracy with the government to prevent him from preaching the gospel, by burying the object they possess and spraying the area with water to exorcise the evil spirit. [n3] At times, Scott has even been possessed by demons but proclaims gold dust descended upon him and God cured him. [n4] Jesus also speaks to Scott and has materialized with other wingless angels. [n5] As a consequence of these delusions, Scott has nailed the curtains shut in his home, is unable

to sleep, and has been hospitalized over a dozen times. [n6] Even with treatment, repressing Scott's delusions requires twenty times the amount of antipsychotic medication than would render the average person unconscious. [n7]

Comparably, David wanders the streets in his underwear proclaiming to be the son of John F. Kennedy and Marilyn Monroe. [n8] Satan orders David to follow his commands, yet David is equally fearful of the Mafia who he believes is trying to kill him. [n9] Fiberglass in his drinking water and "AIDS" infected blood on his drugs are two of many attempts David claims have been made to take his life. [n10] David was given nearly eight times the original prescription dosage of antipsychotic medication before he was deemed competent to stand trial. [n11] Sedated with enough medication "to tranquilize an elephant," David appeared competent to jurors. [n12] Unfortunately, he also appeared unemotional, insincere, **[*1124]** indifferent, and without remorse or sorrow, a disposition which led jurors to vote for his death. [n13]

Stories of impairment are common in capital cases. More than half of the inmates on death row are mentally impaired. [n14] Therefore, revealing and explaining a defendant's impairment is central to telling that defendant's story and presenting an effective narrative. The introduction of evidence of impairment alone is not likely to be as effective when used without evidence of unsuccessful attempts to overcome the impairment. Establishing a "nexus" between the impairment and the cause of the crime is essential to establishing mitigating value. [n15] This evidence demonstrates a less culpable defendant whose behavior is influenced by factors over which he has no control. [n16]

Attribution theory has long suggested a connection between effort and impairment. Current research directly analyzes capital juror reactions to a defendant's effort to overcome impairment during the penalty phase. The results of this research suggest the narrative becomes more influential when an attorney includes the defendant's unsuccessful attempts to overcome the impairment. Failed attempts to overcome impairment illustrate the defendant's reality as it is formed not by choice, but through a series of insurmountable and intolerable circumstances. This evidence dismantles juror notions of **free** will and increases the probability for a life vote.

This article contends that **dismantling** notions of **free** will is a fundamental element of mitigation strategy and incorporating evidence of failed attempts to overcome impairment can be a complementary tool for reaching this goal. First, the article evaluates the role of narrative in mitigation throughout history, the overarching role of **free** will in mitigation strategy, and research concerning the impact of **free** will on juror decision-making. Next, the value of utilizing evidence of unsuccessful attempts to overcome impairment is applied to common mitigation challenges as they are identified by Heider's theory of attribution. Finally, this article confronts the notion that evidence of a defendant's unsuccessful attempts to overcome impairment intensifies statutory aggravators.

II. THE HISTORY OF MITIGATION & THE ROLE OF NARRATIVE

Although the typical vision of attorneys may not be as storytellers, narrative may be the most powerful form of advocacy. Storytelling is at the heart of a criminal trial [n17] and plays a prominent role in preventing capital punishment. [n18] **[*1125]** The narrative brings to life the abuse and adversity that forms the defendant's reality. "[N]arrative has always been a way of holding onto life, or distracting or satisfying those with the power to end life." [n19] Man has been described as "a story-telling animal" attempting to elicit empathy from others. [n20] Narrative is used to "breathe new life into a dead case." [n21] Although narrative is not a novel tactic, it has been renovated and revived under the current capital system.

Gregg v. Georgia, [n22] marked the beginning of the current capital system. The Gregg court declared capital punishment constitutional when state statutes evade the capricious and arbitrary decision-making process previously employed in Furman v. Georgia. [n23] Furthermore, Woodson v. North Carolina, [n24] recognized "individualized"

treatment as a constitutional requirement for the imposition of death. [n25] Thirty-five states currently have death penalty statutes. [n26] State compliance with these requirements led to a system of bifurcated trials, where separate phases and deliberations determined guilt and sentencing. [n27]

The development of the penalty phase established the express necessity for mitigation evidence. Mitigation was quickly recognized as a requirement of the individualized sentencing doctrine, [n28] and juries could not be prevented from considering mitigating evidence. [n29] Throughout the past thirty years, the constitutional requirements concerning the penalty phase have vastly evolved. In Lockett v. Ohio, the Court prevented state statutes from limiting the presentation of any mitigating factor, record, or circumstance that could lead a jury to find that death was inappropriate. [n30] Today the presentation of mitigating factors surrounding the crime committed and the defendant charged, as well as evidence to counter any aggravating factors is basically unlimited. [n31]

Effective mitigation inquiries and strategies have become a necessary element for effective representation under the Sixth Amendment. The right to effective counsel is constitutionally protected. [n32] Strickland v. Washington, established the rule for ineffective assistance of counsel and required the defendant to show that counsel was deficient and that the defendant was **[*1126]** prejudiced by deficiency. [n33] Strickland further recognized the duty of counsel to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [n34] In Wiggins v. Smith, the Court found counsel ineffective due to his failure to reasonably investigate mitigating circumstances such as the defendant's background beyond the pre-sentence investigation report (PSI) and division of social services records. [n35] Today a clear duty exists to provide any mitigating evidence that could be beneficial to the defendant [n36] because the jury must consider any evidence that provides justification for a sentence less than death. [n37] Moreover, counsel has an affirmative duty to investigate every mitigation possibility even when a client claims such efforts will be futile. [n38]

The effect of these rulings and numerous others that followed was a growing community of individuals who specialized in mitigation research, investigation, and strategies. [n39] In 2003, the ABA Guidelines strongly recommended a mitigation specialist be an "indispensable member of the defense team." [n40] Each of these advancements substantially contributed to the current mitigation system and the strategies that have developed.

The use of narrative is at the forefront of evolving mitigation strategies. "The translation of background, cultural, family, and mental health history into a personal narrative becomes a tool of mitigation." [n41] The narrative tells the story of a defendant's life in a way that compels a sense of understanding and compassion for his situation. [n42] It counters the stereotypical image of the defendant by introducing him as an individual and addressing the complexity that forms his reality. [n43] Narrative "serves as a lens for shaping reality, in light of the law, to explain the facts, relationships, and circumstances of the client and other **[*1127]** parties in the way that can best achieve the client's goals." [n44] It aids in the understanding of an often complicated and unjust world. [n45] The use of narrative to tell the story of impairment is far from novel. However, some classic and contemporary research suggests that including failed attempts to overcome these impairments may add strength to the narrative, thus increasing the probability of a vote for a life sentence over death. [n46]

III. THE **FREE** WILL FAIRYTALE

The **free** will fairytale, or the notion that all individuals have the ability to frame their life unconstrained by external influences, governs our sense of understanding. This philosophy relies on the assumption that we always make a choice to overcome or succumb to life's challenges. Society is ingrained with the idea that we all possess **free** will and have the ability to choose our destiny. [n47] This concept established the foundation of our criminal justice system and is at the

heart of the penalty phase of capital trials. [n48]

Free will is a surmounting issue for capital defendants. Whether the jury believes the defendant chose his path or was unable to "escape[] the downward spiral," often determines whether the jury comes back with a decision for life or death. [n49] At times, the law attempts to ignore that "some are dealt a better hand than others, and the hand one is dealt profoundly, sometimes unwillingly and uncontrollably, affects the course of a life, including the choices available, the choices made, and even the ability to comprehend that choices exist." [n50]

Current research has begun to doubt basic notions of **free** will and has allowed the development of mitigating evidence into the criminal trial process. Genetics researchers have discovered genes that are linked to aggressive behavior [n51] and various disciplines have recognized a correlation between **[*1128]** socioeconomic status and criminal behavior. [n52] Research of this kind has required the criminal justice system to adapt. Culpability, a necessary element of a crime, requires **free** will and without it punishment would be illogical. In Washington v. U.S., Judge Bazelon concluded "it is intellectually dishonest to treat individuals as if they are creatures of their own **free** will when significant evidence refutes this idea." [n53] Accordingly, in the penalty phase mitigation evidence allows the jury to develop a "reasoned moral response" based on the defendant's background and character that would decrease his culpability. [n54]

Capital defendants present a significant challenge to the criminal justice system. These actors often come from a world that is far from ordinary, living as society's outcasts. [n55] The problems presented to the criminal justice system by impairment have been referred to as the "greatest challenge to . . . any modernized culpability regime." [n56] The reality of a capital defendant is one of tragedy and misfortune, dominated by fate rather than **free** will.

Severe impairment, customary in capital cases, is a vital mitigator. Not only does evidence of this impairment make a case for life, it decreases the defendant's culpability by demonstrating the defendant's lack of **free** will. Addressing the issue of **free** will in capital cases is not done to provide an excuse for the defendant's conduct, but to demonstrate decreased responsibility. [n57] This evidence provides an explanation, not an excuse, for the defendant's behavior or what he has become. [n58]

Mitigating evidence that decreases the defendant's culpability has been referred to as "Disease Theory Factors." [n59] These factors are important, not to provide an excuse for the defendant, but to show the jury the defendant was not in control of his actions and what steps led to his criminal behavior. [n60] Narrative can reveal how a brain hindered by impairment processes information. [n61] This impairment demonstrates the limits on **free** will, decreasing the defendant's responsibility, and increasing the likelihood of a life sentence.

Research conducted by the Capital Jury Project in South Carolina demonstrates the role of impairment in juror decision-making. [n62] The study revealed that jurors are more likely to spare the defendant's life when factors that **[*1129]** decrease the defendant's responsibility are present. [n63] The existence of mental retardation, emotional disturbance, mental health problems, and extreme poverty resulted in increased likelihood for a life vote. [n64] The existence of each of these factors provides evidence that **free** will was absent, thus, enhancing the case for life.

An example of how **free** will philosophy weighs into our decision-making and assessment of culpability is a story of individual impairment that did not result in criminal behavior. Prosecuting attorneys often provide information about a defendant's sibling that has a similar impairment or life history but has not engaged in criminal conduct. **Free** will philosophy assumes that the ability of a sibling to overcome a particular set of circumstances reveals the defendant's ability to choose a path other than crime. The semblance of choice demonstrated by a successful sibling creates an

arduous task for any capital defense attorney.

A case described in Craig Haney's, The Social Context of Capital Murder, demonstrates how even the best mitigating evidence can be surmounted by notions of choice and **free** will. [n65] Haney mentions a judge who clearly expressed her belief that the defendant's life was a brutal and constant "hell." [n66] She even said that the mitigating evidence presented was the most compelling mitigation she believed possible. [n67] In spite of the evidence, however, the judge reasoned that a death sentence was appropriate because "fortunately everybody . . . who grew up in that miserable environment did not turn into a violent criminal." [n68]

It may be reasoned that individuals who engage in criminal activity ended up there because they lack moral fortitude or did not try as hard as their siblings who do not have a criminal past. Simplistically stated, these stories imply that the defendant could have chosen a different a path.

Realistically, similarly situated individuals do not have the exact same life experiences even when living in the same home. This notion was demonstrated in Cooper v. Oklahoma. [n69] Byron Cooper was regularly and severely beaten throughout his childhood. [n70] His mother would strike him with brooms, hammers, and extension cords. [n71] Although Byron's siblings were also abused, Byron received the most frequent and extreme beatings because he resembled his father. [n72] Cooper's post conviction counsel utilized this information to explain how Byron's experience differed from his siblings and how the abusive **[*1130]** environment contributed to his mental impairment and eventually shaped his future. [n73]

Everyone does not react the same way to a specific stimulus or have the same options available to them. A deeper understanding of the situation reveals that an individual's reaction can be effected by a number of influences including their state of development, perception of available solutions, and coping strategies available. It is not only one factor, but a combination of factors that collectively have a debilitating effect. These assumptions about the freedom of choice are what capital defense attorneys must strive to invalidate.

During the penalty phase the capital defense attorney has the opportunity to confront notions of **free** will. Surmounting **free** will philosophy may be easier when evidence of failed attempts to overcome impairment is presented. Evidence of continuous failed attempts to overcome calls into question whether the defendant had a choice or even a chance. When used in mitigation this evidence "challenges jurors' perceptions about the choices available to the defendant and explains why his 'choice' to commit a crime may really have been no choice at all." [n74] An act that initially seemed callous is explained and illustrated as "adapting, coping, and struggling to survive a set of circumstances that few if any have 'chosen' to endure." [n75] Without choice, the defendant's situation becomes clear and comprehensible to jurors who are seeking to understand why a life was taken and determine if the defendant's life should be spared.

IV. THE IMPORTANCE OF FAILED ATTEMPTS TO OVERCOME IMPAIRMENT

The advantages of mitigation evidence in shaping juror decision-making are well documented. [n76] Exactly what influences juror opinion, however, remains unclear. Several studies have attempted to ascertain the strategies most influential in rendering a life vote and provide a model for capital defense attorneys to follow. [n77]

Stephanie Wright Weeks recently released research on the mitigation value of impairment and defendant effort. [n78] Weeks's study focused on juror perceptions of a defendant's efforts to overcome impairment and how those perceptions

affected the jurors' sentencing decision. [n79] The results of the study suggest providing evidence of unsuccessful attempts to overcome impairment **[*1131]** increases mitigation value and the probability of a vote for life. [n80] Furthermore, the findings indicate that Heider's attribution theory accurately depicts juror assessment and decision-making during sentencing. [n81]

Weeks's study simulated a capital jury for the purpose of obtaining the most accurate and realistic results. Two hundred forty participants were selected to serve as twenty mock juries. [n82] Jurors in capital sentencing must be "death-qualified." [n83] Therefore, Weeks simulated a capital jury by removing participants who said they would always or never vote for life. [n84]

Weeks also simulated the bifurcated trial system required by the Model Penal Code. [n85] Weeks provided a summary of evidence concerning the defendant's guilt, weighing strongly in favor of guilt. [n86] Participants then voted guilty or not guilty. [n87] Individuals who voted not guilty were removed from the study. [n88]

During the penalty phase of the simulation, participants were provided testimony about the defendant's effort to overcome his impairment. [n89] Half of the participants received testimony that the defendant had put forth little to no effort to overcome his impairment. [n90] The other half was given testimony that the defendant had exerted great effort to overcome his impairment. [n91] Subsequently, participants were provided with a questionnaire concerning their perceptions of the defendant's effort, ability to control the effects of the impairment, and whether the juror would vote for a life sentence or death. [n92] The responses were calculated to establish a mitigation value of how influential the mitigating evidence was in determining the participants' vote for life or death. [n93] The results of the study revealed the importance of defendant effort on juror perceptions of impairment, control, mitigating value, and a vote for life. [n94]

Weeks's study established that increased perceptions of a defendant's effort led to higher perceived impairment. [n95] Thus, the greater the defendant's perceived **[*1132]** impairment the greater the mitigation value. [n96] This evidence is illustrative of the need for capital defense attorneys to integrate the defendant's effort into the mitigating evidence. As attorneys provide evidence of the defendant's completed treatment, willingness and desire to take medication, and other efforts to overcome their impairment, juror perception of the severity of the impairment increases. [n97] The attorney's ability to increase juror perception of impairment increases the mitigating value of the evidence and the probability for a vote for life.

Weeks's study also found that as perceived effort increased, juror's perceptions of a defendant's ability to control the effects of his impairment decreased. [n98] The lack of ability to control the impairment also resulted in an increase in the defendant's perceived impairment. [n99] The increase in perceived impairment was correlated with a higher mitigation value and increased likelihood of a vote for life. [n100]

These results document the correlation between effort, accountability, and juror decision-making. [n101] Jurors who have knowledge of a defendant's unsuccessful efforts to overcome his impairment are less likely to believe the defendant is able to control the effects of the impairment. [n102] This lack of control is fundamentally equivalent to lack of choice in determining one's behavior. Without choice, notions of **free** will no longer provide an explanation for defendant's behavior or rationalize a vote against life.

A clear connection exists between demonstrating effort to overcome impairment and **dismantling** notions of **free** will. The ability to overcome the **free** will philosophy leads to a greater likelihood that a vote for life will result. Capital defense attorneys should therefore provide jurors with knowledge of their client's effort to overcome impairment.

The results of Weeks's study are consistent with Heider's theory of attribution. [n103] Attribution theory asserts a correlation exists between effort and ability. [n104] As an individual's effort to perform a task increases, the perception of their ability to successfully complete the challenge decreases. [n105] This relationship explains the mitigating role of unsuccessful attempts to overcome impairment. Attribution theory will therefore serve as a guide in assessing the possible effects of such evidence when applied to common mitigation challenges.

[*1133]

V. APPLICATION TO COMMON MITIGATION CHALLENGES

Capital defense attorneys are presented with a number ofcomplicated challenges. From the time the penalty phase has commenced, the capital defendant and attorneys are inevitably at a disadvantage. Specialists in the field differ widely among preferred strategies to influence juror opinion. This section addresses some of the challenges of capital defense attorneys and how evidence of unsuccessful attempts to overcome impairment can impact juror decision-making. Attribution theory is employed to hypothesize how a typical juror would react in various mitigation-based situations.

Attribution theory, developed by Fritz Heider, attempts to explain how individuals interpret events and behavior. [n106] The theory is based on the premise that all people are "na ve scientists" attempting to understand behavior by determining its cause. [n107] Knowledge of what causes behavior gives individuals the ability to "understand, predict and control." [n108] Jurors are often searching for why the defendant engaged in criminal behavior. [n109] The role of the attorney is to provide them with answers.

Heider believed there was a negative relationship between effort and ability. [n110] The greater the effort required to overcome impairment, the less ability an individual has to take control of it. [n111] As an individual is perceived as being less able to overcome their impairment, accountability decreases for behavior that is a result of the impairment. [n112] Similarly, the less effort required to overcome impairment the greater the assessment of accountability. [n113] This theory suggests a need to demonstrate a defendant's effort to overcome his impairment. Evidence that the defendant put forth great effort to overcome his impairment will result in the perception that the defendant was less able to control the effects of the impairment, thus decreasing accountability. [n114]

The most basic problem that notions of **free** will present in mitigation is the assumption that the defendant's lack of character or poor disposition caused him to engage in criminal behavior. In seeking knowledge of what causes behavior, individuals attribute causes to behavior. [n115] These causes can be internal or external. [n116] An internal attribution assumes that the individual's behavior is the **[*1134]** result of the person's attitude, character, or disposition. [n117] External attributions hold environmental factors accountable for the individual's behavior. [n118] These attributions are often made without the intent or knowledge to do so. [n119]

Obviously, capital defense attorneys do not want juries to attribute internal causes to their client's behavior. Internal attributions elicit increased culpability whereas external attributions provide an explanation for the defendant's behavior and a basis for understanding and compassion. [n120] It is the role of the attorney to use narrative to illustrate how external attributions resulted in the defendant's behavior and that **free** will was a minimal or nonexistent factor.

Bobby Shaw was a capital defendant whose sentence was commuted by Governor Carnahan. [n121] Shaw had a likable personality that was characterized by his love for dancing. [n122] Sadly, external forces dominated Shaw's positive internal attributes. Shaw suffered from an abusive environment, low intelligence, brain damage, and schizoid personality disorder. [n123] The tremendous external forces demonstrated Shaw's decreased culpability and diminished

ability to make rational choices. [n124]

The use of examples demonstrating the inability to overcome external influences is central to expressing the lack of **free** will. When jurors begin to understand that the defendant exercised what **free** will they could in an attempt to overcome but continuously failed, the rational result is to focus on external attribution. By painting the picture of environmental forces at odds with a defendant's success in combination with failed attempts to overcome them, the attorney can guide jurors away from the notions of **free** will and toward a decision for life.

Pointing to external causes may become convoluted when the impairment the defendant experiences is a mental disorder that is a product of prolonged drug use. [n125] The use of drugs is often seen as a choice that led to a situation the defendant can no longer control. [n126] Regardless of his current state, the defendant may be viewed as responsible or culpable because his actions are seen as an exercise of **free** will to engage in drug use. [n127] The defendant's use of drugs generally has been characterized by some judges as "more aggravating than mitigating." [n128] In these situations the attorney must begin the narrative before the **[*1135]** drug use and discuss what environmental factors led the defendant to that point. The attorney should therefore "tell the story of a child." [n129] Steps the defendant took to overcome his hardships before the drug use show that external factors not only led to his current state but to his drug use.

Premature decision-making is a significant issue for capital defense attorneys. Jurors that have endured the guilt phase of trial have likely made a premature decision concerning the penalty phase long before mitigating evidence is presented. [n130] Research by the Capital Jury Project suggests that over half of jurors spent at least a fair amount of time discussing the defendant's future dangerousness during the guilt phase of the trial. [n131] Sixty-four percent of jurors that decided what the defendant's punishment should be before the penalty phase said that they were "absolutely convinced" of the defendant's guilt. [n132] Attribution theory indicates that these premature decisions are not likely favorable to the defendant.

People respond differently when making attributions of others rather than themselves. [n133] Although individuals are capable of attributing external causes to others' behavior, a bias exists toward focusing on internal attributions. [n134] Conversely, people seem predisposed to attributing external causes, rather than internal causes to their own behavior. [n135] This is known as the overattribution effect. [n136] One possible explanation for the overattribution effect is that we have observed ourselves in more situations than we have others. [n137] Another theory is that when watching another's behavior we are seeing the person, whereas when we are engaging in a behavior we are seeing the environment. [n138] Regardless of its origin, juror bias toward internal attribution of others is a hindrance to capital defense attorneys.

Before the penalty phase begins, the jury is likely subconsciously attributing the defendant's crime to internal causes. Generally, the presiding assumption is that **free** will or people are responsible for a defendant's **[*1136]** behavior. [n139] Jurors are likely making the assumption that the defendant's appalling behavior could only be the result of an evil creature with a fiery temperament and impassive personality. [n140] This disadvantage provides even more reason to confront the notions of **free** will and redirect juror attention to a reality far from a fairytale.

Illustrating the external forces at work on the defendant, and his inability to overcome them attempts to counter the gross imbalance toward a juror's internal attribution. Repeated undertakings to defeat external forces demonstrate positive internal forces such as motivation, responsibility, and the aspiration to move beyond present circumstances. Allowing the jury to become acquainted with the defendant's numerous failed attempts to overcome allows them to see the external factors at play through the eyes of the defendant's struggles. Seeing the defendant's act as one of compulsion that resulted from external forces beyond his control prevents jurors from engaging in internal attribution. [n141] Furthermore, the more situations the jury is able to see the defendant respond to, the more likely they are to

attribute external factors to unexplainable behavior. [n142] Convincing the jurors that the defendant's will was anything but **free** begins with fighting against the internal attributions that have occurred before mitigation even begins.

Unfortunately, the attribution of internal causes is considered involuntary and instinctive whereas external attributions are more controlled and deliberate. [n143] This compulsory response is often learned by one's culture. [n144] This is especially true in Western culture, which emphasizes the conviction of **free** will, and where the involuntary attribution of behavior to internal causes is prominent. [n145]

Although jurors are instinctively likely to attribute internal causes to a defendant's crime, this predisposition is not impossible to overcome. Heider's research suggests jurors can make an external attribution but doing so is a deliberate position against principles that have been ingrained in their understanding of the world. [n146] To counter this longstanding belief system, capital defense attorneys must demonstrate the extreme nature of the defendant's situation and that he was unable to overcome it.

Prosecutors characterized the life of Ronald Rompilla as helpless and merciless. [n147] Rompilla's post conviction counsel, however, reframed the issues into a compelling and life-saving narrative focused around external forces that **[*1137]** were beyond Rompilla's control. [n148] Rompilla's story began as a child victim who was locked in dog pins filled with feces. [n149] He suffered immense abuse, brain damage, and repulsive living conditions. [n150] Rompilla's functioning was at a third grade level and he experienced "abnormalities on the schizophrenia, paranoia, neurosis and obsessive compulsive scales." [n151] This information illustrated Rompilla's reality, not as a man of choice but of horrendous misfortune.

Repeated unsuccessful attempts to overcome external factors demonstrate that internal factors such as a defendant's personality and attitude are not composed of the dreadful characteristics one may assume exist. The lack of intrinsic immorality questions the notion that internal factors could be cause of the behavior. Additionally, the inability to overcome environmental factors despite the possession of strong internal assets expresses the considerable weight the external factors possess. Information concerning the force of environmental factors and the defendant's inability to overcome their influence provides the jury the tools necessary to make a reasoned and calculated decision against the impulsivity of internal attribution.

An additional challenge in mitigation is that jurors perceive the world through their own experiences. A form of attribution theory known as self-perception theory suggests "individuals use the same information to make inferences about their own dispositional makeup as they use to make inferences about others." [n152] We assume others will act as we do. [n153] Most people believe that everyone is "responsible for their actions." [n154] Therefore, without a reasonable external explanation for our own behavior we assume it is internal. [n155] Therefore, if Juror number three has never drank alcohol and did not have a reasonable external explanation for why, he would assume the behavior was resultant of internal causes. Subsequently, Juror number three would likely attribute the defendant's drinking behavior to internal causes.

The assumption that others will act as we do causes many problems for the capital defense attorney. Clearly, capital defendants have not acted according to society's established norm. If jurors do not have an external explanation for why they have not engaged in behavior similar to the defendant they have likely attributed internal factors as the cause. For example, a juror may have never engaged in criminal activity and without an external explanation for their lawful behavior the juror assumes it is due to an internal factor, hisgood moral character. As a result, when the defendant has engaged in unlawful behavior, the juror reflecting on his experience assumes the behavior is attributable to internal **[*1138]** factors, such as deficient moral character. It is the role of the attorney to confront these assumptions.

Evidence of failed attempts to overcome impairment can facilitate the battle against juror self-perception. Illustrating the defendant's continuous unsuccessful attempts to overcome his environment demonstrates the error in making internal attributions. Viewing the world from the defendant's point of view allows jurors to understand how the defendant got to this point. [n156] Numerous failed attempts to surmount environmental challenges demonstrate the defendant's desire to overcome without the ability to do so. The lack of choice forces a juror to confront the fallacy in his logic and develop a reasonable explanation for the defendant's behavior outside of his experience.

Countering the stereotypical image of a capital defendant can also be arduous for capital defense attorneys. Television and movies have brought the stories of capital trials into the public view. [n157] These stories are often told without the realities of death and execution. [n158] Instead, the media has portrayed capital punishment through the image of "poster boys" like Jeffrey Dahmer and Timothy McVeigh. [n159]

The media image of a capital defendant has created a general assumption about the image of a capital defendant. The "typicality effect" dominates juror notions of capital defendants. [n160] "[P]eople typically envision an idealized or hypothetical defendant who is more deviant, powerful, and dangerous than the . . . defendant who actually appears in court." [n161] The stereotypical image of a capital defendant is that of a serial murderer, giving rise to juror overestimation of the likelihood that a defendant will re- offend. [n162] The media displays the capital defendant as "crying out for the ultimate punishment." [n163] These images, although perfect for leading roles in film, are not authentic or representative of capital defendants generally. Nevertheless, these images dominate juror perceptions and must be addressed by counsel.

It is important for the jury to see the defendant as a human being and not as a television criminal. "The defendant must be seen not only as the victim of chance but as someone different than the typical murderer." [n164] Defense attorneys must set the defendant apart from this image. This can be done by demonstrating the defendant's positive character traits and good deeds. [n165] An essential step in **[*1139]** confronting the stereotypical image of capital defendants includes increasing the jury's identification with the defendant. [n166]

Attribution theory suggests people are always searching for explanations of others' behavior. [n167] When people find something unexpected however, the "state [of surprise] might lead us to examine, correct, extend, or entirely revise our previously held implicit casual assumptions." [n168] Furthermore, people tend to intently seek explanation for behavior that is out of the ordinary. [n169]

The state of surprise can be advantageous for capital defense attorneys who must convince jurors to confront and alter their perceptions. Attorneys should present information that is atypical to get the jury's attention. A unique situation that the defendant has fought to overcome, the number of attempts to overcome it, or the extremity of the attempts made can all be used to grab the attention of the jurors and lead them to inquire into their preconceived attributions. Evidence of failed attempts to overcome impairment illustrates a defendant that has struggled to change his life, but was never presented the choices to do so. This image is far from stereotypical and begins to introduce the defendant as a person rather than a criminal.

Evidence of defendant's failed attempts to overcome impairment facilitates the many battles of mitigation. The use of this evidence counters juror attribution of internal causes, premature decision-making, and draws attention away from preconceived notions of the stereotypical capital defendant. Evidence of unsuccessful attempts to overcome impairment can be extremely advantageous to capital defense attorneys, even though it is not perfect for all capital cases.

VI. ADDING TO OR SUBTRACTING FROM AGGRAVATORS

Evidence of impairment has a tendency to be "double-edged." [n170] The most prevalent rationale for not providing evidence of impairment is fear that the jury will perceive the mitigating evidence as an aggravator. [n171] Concern that the jury would view the defendant as a bad seed or too dangerous to risk placement back into society is a concern for mitigation experts. [n172] For this reason, attorneys may be wary about presenting evidence of a defendant's failed efforts to overcome impairment. This apprehension, however, can often be remedied through a delicate balancing of information. When coupled with evidence of additional sentencing options, defendant's positive qualities, and the possibility of future contributions to society, the defendant's failed attempts to overcome impairment strengthen the mitigating evidence.

[*1140]

The prevailing anxiety concerning the presentation of impairment evidence derives from the role of future dangerousness during the penalty phase of trial. The defendant's future dangerousness is a dominating force during the penalty phase. [n173] Defense attorneys want to avoid contributing to the defendant's perceived dangerousness and fulfilling any remaining doubts of the defendant's guilt. [n174] Nevertheless, "experienced capital defense attorneys invariably conclude that mitigating evidence must be presented, even if there is some chance that the jury may view it as double-edged." [n175] The question for attorneys should not be whether to present evidence of the defendant's impairment but rather how the evidence can be presented most effectively. [n176]

The role of future dangerousness is a growing concern for capital defense attorneys. Twenty-one states currently incorporate the defendant's future dangerousness as an aggravating circumstance for jurors to consider when making the sentencing determination. [n177] In addition, two other states require a determination of future dangerousness before a sentence of death can be imposed. [n178] Furthermore, a study conducted by the Capital Jury Project suggests that the defendant's future dangerousness is extremely influential to capital jurors and may even be the most significant aggravator in sentencing. [n179] Therefore, future dangerousness is a crucial element of the penalty phase.

The use of future dangerousness in the penalty phase is littered with controversy. Prosecutors often introduce prediction evidence through psychiatrist testimony that the defendant is highly likely to re-offend. [n180] The use of future dangerousness predictions is extremely controversial and has received disapproval from the American Bar Association and the American Psychiatric Association. [n181] Various studies have been released demonstrating the gross inaccuracy of future dangerousness predictions. [n182] These studies suggest that **[*1141]** only 0.2% of capital defendants commit violent offense while incarcerated. [n183] In fact, capital defendants have even been referred to as "among the most docile and trustworthy inmates in the institution." [n184] This process, although extremely inaccurate, is highly influential in shaping juror decisions.

States such as California and Mississippi have ruled that the use of future dangerousness evidence is reversible error. [n185] The Supreme Court, however, has yet to find the presentation of future dangerousness evidence unconstitutional. [n186] Therefore, future dangerousness remains a relevant concern for at least twenty-three states. [n187]

The significant impact of future dangerousness demonstrates a definite need to be mindful when presenting evidence of failed attempts to overcome impairment. The defendant's inability to overcome his impairment can still be presented, however, with due consideration and a delicate balancing of factors. Evidence of a defendant's failed attempts to overcome impairment can be a positive addition to a narrative strategy when paired with that defendant's moments of triumph, evidence of strength and good character, success in structured environments, capacity for redemption, ineligibility for parole and other characteristics that demonstrate the likelihood of future contributions to society.

The possibility of parole, known as the "silent aggravator," can have a dramatic impact on a life decision. [n188] Parole is a factor that significantly affects juror decision-making in nearly all capital cases. [n189] Significant evidence suggests that the discussion of parole infiltrates jury rooms before and during the penalty phase. [n190] Unfortunately, jurors are often without information of alternative sentences or have erroneous beliefs about sentencing options and the availability of parole. [n191] Jurors attempting to make a decision between life and death can benefit greatly by knowing the options available to them. Accurate knowledge of parole can counter juror fears of future dangerousness, thus allowing impairment evidence to maintain a positive and mitigating effect.

Capital defense attorneys must provide the jury with information concerning sentencing and the availability of parole. Juror confusion about sentencing options and what a life sentence entails is common. [n192] Alternative **[*1142]** sentencing options should be made clear to the jury. Jurors give great weight to the defendant's expected sentence if a death sentence is not imposed. [n193]

All available sentencing options should be discussed with the jury as well as the ramifications of each alternative. Three different types of life sentences exist: life without parole, life with a fixed minimum, and life with parole after seven to ten years. [n194] Jurors, however, have a tendency to underestimate the amount of time defendants spend incarcerated for capital offenses. [n195] This underestimation may greatly affect a juror's sentencing decision.

Reminding jurors of alternative sentencing options can increase the probability of a life determination. Current research suggests the existence of an "underlying ambivalence" toward the death penalty and that most people would prefer an alternative to capital punishment. [n196] Sixty-nine percent of Americans are generally in favor of the death penalty. [n197] However, this number shrinks to forty-seven to fifty-four percent when individuals are provided a choice between a death sentence and life without parole. [n198] Therefore, jury decision-making is affected by the availability of sentencing alternatives.

When jurors are presented with accurate information about sentencing alternatives, they are more likely to vote for life. Typically, jurors do not have accurate information about sentencing alternatives. [n199] Jurors polled by the Capital Jury Project stated they believed the average time spent in prison for capital cases before being released was on average 16.8 years among jurors who voted for death. [n200] Jurors who voted for life, however, believed capital defendants spent an average of 23.8 years in prison before release. [n201] This evidence suggests accurate information concerning alternative sentencing options such as life without parole and statutory minimum requirements before parole eligibility could be significantly influential. Presenting the jury with accurate alternative sentencing information will likely decrease juror concern with future dangerousness and increase the probability of a life decision.

Increasing juror knowledge of sentencing alternatives is essential. Thirty-five states have the death penalty [n202] and life without parole is offered in all but three of those states. [n203] If life without parole is available, the jury should know it is an option and exactly what it entails. Moreover, due process requires the lack of parole eligibility to be provided to the jury when evidence of future **[*1143]** dangerousness is provided. [n204] "Where the State puts a defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible." [n205]

Jurors may provide a death sentence out of fear that the defendant will be paroled. [n206] Providing the jury with accurate information about sentencing alternatives and how they are truly applied can prevent this resolution. [n207] With information about the available alternative sentencing, the juror should not be concerned withthe defendant's danger to society. Therefore, evidence of impairment will not make the defendant appear more dangerous. Rather, the defendant's continued attempts to overcome his impairment without success will only decrease his culpability and build

a case for life.

Rehabilitation evidence can also be used to counter notions of future dangerousness. Demonstrating the defendant's ability to contribute to society while incarcerated may provide an incentive to make a life decision. [n208] The presentation of a narrative that extends beyond the crime in combination with evidence that the defendant thrives in structured environments and has a support network that can facilitate treatment makes a good case for life.

Narrative should not end with a crime or a trial. It is important to continue the narrative by demonstrating the future possibilities for the defendant. [n209] Some researchers suggest that stopping at the time of the crime only highlights the offense and it is pivotal that mitigation evidence continues to a point of redemption. [n210] Therefore, defense counsel should continue the defendant's story to illustrate the possible contributions the defendant can make to society if his life is spared.

Various witnesses can be called to provide evidence of the defendant's ability to rehabilitate or make future contributions to society. Capital defense attorneys should demonstrate the defendant's ability to thrive in a controlled environment. The Court in Williams v. Taylor, noted counsel's duty to provide evidence that the defendant would not pose a danger to the public if placed in a structured environment. [n211] A prison psychologist can testify as to the defendant's ability to thrive in the structured prison atmosphere. [n212] This evidence can also be achieved by demonstrating the defendant's past success in controlled environments or by providing examples of work completed by inmates working for the state. [n213] Defense attorneys can also provide evidence of the defendant's **[*1144]** relationship with his family through family impact statements and how this relationship can foster his rehabilitation. [n214]

Evidence of rehabilitation can counter fears of a defendant's dangerousness in the future. The defendant's impairment no longer increases his perceived future dangerousness when the likelihood of his success and ability to effectively contribute to society is evident while incarcerated.

Evidence of a defendant's failed attempts to overcome is argued against notions of future dangerousness when presented in accordance with Heider's theories. Heider suggested using surprise or presenting atypical information to confront premature judgment. [n215] When challenging juror inclination toward future dangerousness, capital defense attorneys should display the defendant's unique situation, circumstances, and struggles that contradict the conventional television serial offender. The stereotypical image that fosters juror estimation of a defendant's future dangerousness can be confronted by the presentation of the defendant's atypical scenario as previously discussed.

Regardless of numerous mitigation theories and strategies, a "magic formula" for mitigation success fails to exist. [n216] Ascertaining a defendant's future dangerousness is a big issue for jurors. [n217] It is possible that mitigating evidence may be perceived as aggravating. [n218] There is a risk that extensive evidence of impairment may frame the defendant as a bad person who is irreparably broken and will continue to commit violent crime. [n219] Evidence of impairment may even be interpreted as an "abuse excuse." [n220] Defense strategy is therefore fundamental to mitigation. Furthermore, individualization is central to the constitutionality of the mitigating process. [n221] When it appears that evidence of impairment may hurt the defendant more than help him, counsel may make a strategic decision not to disclose the information to the jury after a thorough investigation. [n222] Experienced attorneys, however, will always use impairment evidence but present it in combination with evidence of defendant's assets.

Some situations may increase the likelihood impairment evidence will be perceived as more aggravating than mitigating. For example, if the defendant has an extensive criminal history, the future danger of the defendant is a

primary **[*1145]** issue that may present additional difficulties in supplementing evidence of impairment. A defendant's history of violent crime dramatically increases the likelihood of a death vote. [n223] Fifty-eight percent of death row inmates executed in Texas since 1982 had a criminal record that resulted in a prison term before they were sentenced to death. [n224] Evidence provided by the state through expert testimony that the defendant is likely to present a future danger to society, although, significantly impacts juror decision-making. [n225] In these situations evidence of impairment and lack of **free** will must be used to demonstrate the defendant's life before crime and what led to the current circumstances.

The use of failed attempts to overcome impairment is not rendered ineffective by future dangerousness considerations. Defense attorneys presenting impairment evidence should provide the jury with information about alternative sentencing options, parole, the defendant's rehabilitative opportunities, and possible future contributions to society. This combination will allow impairment evidence to maintain a positive mitigation value notwithstanding future dangerousness.

Discussing the defendant's failures in overcoming impairment does not mean that the entire focus of the narrative should be on the defendant's incompetence. Rather, information of a defendant's failed attempts at overcoming impairment should be paired with evidence of success, however brief. Evidence of a defendant's success when presented with a structured environment, ability to help others, demonstrations of strength, and good character or other available contributions to society, can be an effective tool in balancing against inclinations to associate the defendant's inability to overcome impairment with future dangerousness.

VII. CONCLUSION

Evidence of a defendant's failed attempts to overcome impairment can help create a more successful narrative. Evidence of failed attempts to overcome impairment has a greater mitigating value than impairment evidence alone, increasing the probability of a life determination. Unsuccessful efforts to triumph over impairment allow defense attorneys to counter internal attributions of a defendant's behavior and hinder premature decision-making. The inability to overcome one's impairment addresses the fallacy in stereotypical images of capital defendants and allows jurors to see the defendant's reality through his eyes rather than their own.

Although impairment evidence is a successful tool to strengthen a narrative, it also presents a number of challenges. Impairment evidence can be seen as **[*1146]** aggravating rather than mitigating. The role of future dangerousness in the penalty phase exacerbates this risk. However, effective strategies may be employed to counter this effect. Evidence of a defendant's good character, remorse and capacity for redemption demonstrate the defendant's life is worth saving. Available sentencing alternatives, the defendant's success in structured environments, and the possibilities of future contributions to society allow jurors to see an opportunity for the defendant in a safe and controlled environment.

Notions of **free** will dominate our perceptions of capital defendants. The use of impairment evidence strengthens mitigation by demonstrating that the defendant's life was dictated by external forces beyond his control. Without choice, the defendant's culpability decreases and jurors can begin to appreciate the defendant's life as it was dominated by adversity and infirmity. This awareness elicits compassion and commiseration, allowing jurors to override notions of choice and give the defendant a chance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureSentencingCapital PunishmentBifurcated TrialsCriminal Law & ProcedureSentencingCapital PunishmentDeath-Qualified JurorsCriminal Law & ProcedureSentencingCapital PunishmentMitigating Circumstances

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