

DETERMINIST MITIGATION IN CAPITAL CASES

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I. INTRODUCTION

Working as a capital post-conviction defender in Tennessee,¹ I developed a theory of capital case mitigation for more effectively representing my clients and averting death sentences.² This is the idea that mitigation—in all cases—should

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1. I worked for the Office of the Post-Conviction Defender in Nashville, Tennessee, between 2009 and 2013. The exclusive job of counsel within this office is the defense of individuals convicted of capital murder and sentenced to death in state post-conviction proceedings.

2. I first discussed this theory in an earlier article that appeared in a practitioner publication. *See* Avi Frey, *What Mitigation Proves*, FOR THE DEFENSE (Tenn. Ass’n of Criminal Def. Lawyers, Nashville, Tenn.) Jan.–Feb. 2013, at 7.

embody the philosophical argument for determinism over free will, and that this idea should be expressed through the facts of the individual case, and not in the philosophical abstract. Other commentators in the field have advanced this idea as a feature of mitigation proof,³ but they have not endorsed it as directly and wholeheartedly as I do here. My purpose in this essay is to explain my view and offer reasons why practitioners should embrace it. Ultimately, practitioners should embrace this theory because it comports with what we knew about the way jurors think.

This essay is organized as follows. Part II provides an introduction to the role of mitigation proof in capital law. Part III gives an overview of the philosophical debate between free will and determinism. In Parts IV, V, and VI I argue that the most effective mitigation proof is evidence of determinism in the individual case—an approach I call “determinist mitigation.” In Part IV, I explain what it means to make an individualized case for determinism. In Part V, using a hypothetical example, I suggest how determinist mitigation might differ from other approaches in practice. In Part VI, I conclude my argument by offering social science research to support my approach as most likely to avert a sentence of death.

II. MITIGATION

Capital mitigation proof is a feature of the American criminal system that was invented by the Supreme Court in 1976⁴ and has been defined over the past forty years by a combination of Supreme Court law and defense practice.

A. Supreme Court Law

Supreme Court opinions establish a basic framework for the modern death penalty trial. Capital trials are bifurcated such that the first phase determines guilt or innocence of a death-eligible offense in a manner largely indistinguishable from the typical criminal case.⁵ In the second phase, supposing a guilty verdict at the end of the first, the fact-finder determines the sentence by weighing “aggravating” and “mitigating” evidence.⁶ Under the Eighth Amendment, a death sentence cannot be categorically applied.⁷ This weighing of evidence is intended to ensure that

3. Craig Haney is the principal contemporary advocate of placing determinist logic at the center of the mitigation case. See, e.g., Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835 (2008). But Robert Weisberg recognized the determinist logic of mitigation over thirty years ago when the modern death penalty was in its relative infancy. See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 381(1983).

4. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

5. James M. Doyle, *The Lawyer's Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 423 (1996) (“In the first phase, the jurors determine guilt or innocence in a conventional murder trial.”).

6. See Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 331 (1996).

7. *Woodson*, 428 U.S. at 305.

death sentences represent an individualized determination⁸ that the particular offender is “the worst of the worst.”⁹

Aggravating evidence is proof, presented by the prosecution, of specific statutorily defined “aggravating factors,” also known as “aggravators.”¹⁰ Aggravators purportedly “narrow the class of persons eligible for the death penalty . . . compared to others found guilty of murder.”¹¹ Aggravators include specific classes of victims (e.g. police officer, minor), features of the offender (e.g. previously convicted of violent offense, future dangerousness), or circumstances of the offense (e.g. contract killing, killing in the course of a separate felony).¹²

Mitigating evidence, or mitigation, on the other hand, is “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”¹³ In contrast with aggravators, mitigation is not circumscribed by statute, but must, as a constitutional matter, be left open-ended: the “sentencer [must] . . . not be precluded from considering,” any mitigating evidence proffered by the defense in the penalty phase.¹⁴

Capital juries are required to weigh aggravating and mitigating circumstances against each other.¹⁵ A death sentence is proper where aggravators outweigh mitigation, and improper where mitigation outweighs aggravators. How juries are

8. *Id.* at 304 (“[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (citation omitted)).

9. “The worst of the worst” language comes from Justice Souter’s dissenting opinion in *Kansas v. March*, 548 U.S. 163 (2006) (Souter, J., dissenting). But as Souter pointed out in that case, a majority of the Court had already adopted the notion that the Eighth Amendment’s proportionality requirement mandates that the death penalty be reserved for this class of offenders. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (“Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.” (citation omitted))).

10. Aggravating factors are akin to elements of a capital offense that must be found by a jury to justify the imposition of a death sentence. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

11. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). There is good reason to doubt that statutorily defined aggravating factors actually satisfy the narrowing function required by the Court in *Gregg*, 428 U.S. at 196–97 (plurality opinion). Aggravators within a single capital statute are often so numerous and broadly worded as to cover every conceivable homicide offense. See Chelsea Creo Sharon, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 238–39 (2011).

12. See NATIONAL SURVEY OF STATE LAWS 69–97 (Richard A. Leiter, 4th ed. 2003).

13. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

14. *Id.*

15. The balance between consideration of statutorily prescribed aggravators and individualized, open-ended mitigation is intended to create a system of “guided discretion” which the Supreme Court has held indispensable to a constitutional death penalty. See Weisberg, *supra* note 3, at 318; see also *Gregg*, 428 U.S. at 193–95 (plurality opinion).

supposed to “weigh” these forms of evidence is not explained in the case law.¹⁶ In a general sense, though, the decision made in the capital sentencing phase is intended to measure *moral culpability*.¹⁷

The Supreme Court has not only created the legal structure surrounding mitigation, but has also constitutionalized the means by which mitigation is to be gathered. Defense counsel has a Sixth Amendment duty to investigate that derives from the right to counsel.¹⁸ The type of investigation required for competent death penalty representation in the penalty phase of a capital trial is demanding. The duty to investigate embraces a tremendous scope, and has been heavily influenced by the American Bar Association’s “Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases” (hereinafter “1989 ABA Guidelines”).¹⁹ It includes, at a minimum, a comprehensive document review touching on all aspects of the client’s life,²⁰ as well as interviewing all members of the client’s family and

16. For example, how does evidence of a contract killing “weigh” against evidence that the defendant was a caring father to his children? Indeed, the 1976 Court addressed and rejected the challenge to capital sentencing schemes on the ground that the weighing process is so unguided as to permit arbitrariness. *See Profitt v. Florida*, 428 U.S. 242, 257–58 (1976) (plurality opinion). The Court has not only held that the mere statutory delineation of aggravating factors offers sufficient guidance to ward off arbitrariness, *id.*, it has even intimated that a prescribed method for weighing sentencing phase evidence would remove too much discretion from jurors, resulting in an unconstitutional mandatory scheme. *See Tuilaepa v. California*, 512 U.S. 967, 979–80 (1994).

17. *See Weisberg, supra*, note 3, at 306 (“The penalty trial, the most interesting product of the past decade, is a curious new legal form in which the state prosecutes a convicted murderer for the enhanced crime, or moral condition, of deserving the death penalty.”); *see also* William J. Bowers, Marla Sandys & Benjamin D. Stener, *Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 18 CORNELL L. REV. 1476, 1483 (“[The] Court has . . . articulated the essence of this decision as a reasoned moral judgment.”).

18. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000). The Court expressly links the duty to investigate to the right to the effective assistance of counsel recognized in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wiggins*, 539 U.S. at 521–23.

19. AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) [hereinafter 1989 ABA GUIDELINES], http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/1989guidelines.authcheckdam.pdf; *see* John H. Blume & Stacey D. Neumann, “*It’s Like Déjà Vu All Over Again*”: *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard*, and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 129 (2007); *see also, Wiggins*, 539 U.S. at 522 (noting that the Court in *Strickland* had pronounced ABA standards generally provide “guides to determining what is reasonable” in the right to counsel context and reaffirming this holding with respect to the specific context of capital mitigation practice and the 1989 ABA Guidelines).

20. 1989 ABA GUIDELINES, *supra* note 19, at 11.4.1(D)(2)(C) (“Collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or history of alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs including cognitive limitations and learning disabilities) [sic]; military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult

social fabric, from conception to the moment of trial.²¹ This approach—a sort of “no stone left unturned” or “scorched earth” investigation—is now the unquestioned norm for constitutional practice. The scope of investigation and methods for its realization are ever-expanding.²²

B. Defense Practice

Defense practitioners have done the bulk of the work fleshing out what types of proof should be the target of the mitigation investigation. Capital defense attorneys, together with the emergent profession of mitigation specialists, developed the investigation methodology that became the 1989 ABA Guidelines later endorsed by the Supreme Court.²³ Practitioners began to “collect all of the information—school records, medical history, family memories, the defendant’s own accounts—that bear on the defendant’s humanity.”²⁴ In other words, “[y]ou’ve got to become your client’s biographer.”²⁵

The consensus is looser, however, as to what should be put on at trial.²⁶ Just as the duty to investigate for the mitigation case is sweeping in scope, best practices for trial presentation call for an expansive showing touching on myriad themes. At a minimum, these practices are understood to include proof portraying the client in a positive light, so-called “humanizing evidence”; explaining the offense as a

and Juvenile record; prior correctional experience (including conduct or supervision and in [sic] the institution/education or training/clinical services); and religious and cultural influences.”)

21. *See id.* at 11.8.3(F) (“In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following: 1. Witnesses familiar with and evidence relating to the client’s life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor; 2. Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client’s capacity for rehabilitation, etc. and/or to rebut expert testimony by the prosecutor; 3. Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself; 4. Witnesses drawn from the victim’s family or intimates who are willing to speak against killing the client.”); *see also* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *BUFF. L. REV.* 329, 363 (1995).

22. *See* John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 *HOFSTRA L. REV.* 1035, 1040 (2008) (detailing exhaustive nature of contemporary understanding of mitigation investigation).

23. *See* *Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 524; *Williams*, 529 U.S. at 396.

24. Doyle, *supra* note 5, at 426 (1996); *see also* Russel Stetler, *Mitigation Evidence in Death Penalty Cases*, *CHAMPION*, Jan.–Feb. 1999, at 35, 35, http://www.acdlaonline.com/zoomdocs/presentations/Mitigation_Evid_Cap_Cases.pdf.

25. James Traub, *The Life Preserver*, *THE NEW YORKER*, Apr. 8, 1996, at 47, 49 (quoting George Kendall, then a Staff Attorney at the NAACP Legal Defense and Education Fund).

26. As a preliminary matter, leaders in the field urge that the evidence must be offered in the form of a compelling narrative, one with the particular details that make a story vivid. *See generally* Mark Olive, *Narrative Works*, 77 *UMKC L. REV.* 989 (2009). But such advice begs the question— which narrative?

consequence of the client's background and circumstances; stressing that the client would not pose a danger in the future and could lead a productive life in prison; rebutting the state's penalty phase case; and diminishing or downplaying the client's involvement in the offense.²⁷

Practitioners have resisted the urge to champion a single overarching theme for mitigation presentation, arguing against a "cookie-cutter approach."²⁸ Instead, practitioners advocate development of a unique theme derived from investigation of the particular case²⁹ reached only after careful deliberation.³⁰ In practice, this means that mitigation cases reflect a variety of approaches, sometimes to the exclusion of others. One common practice is to focus almost exclusively on making the client seem like a good person³¹—what I call the "positive approach." Another, which I call "the kitchen sink method," is to put before the jury every fact uncovered by investigation and hope for the best.³² Still another is to pull back from the circumstances of the individual defendant and put the death penalty itself on trial.³³ And there are many others. This variety in real world application reflects the lack of consensus on a singular theoretical approach to mitigation.

27. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 335–37 (1983); see also Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 365 (1997); Vick, *supra* note 21, at 363–64.

28. Blume, Johnson & Sundby, *supra* note 22, at 1043.

29. *Id.* at 1052–53 ("Understanding that jurors make sense of the world through the creation of stories requires the competent trial lawyer to do more than throw handfuls of mitigation at the jury, hoping someone will catch something. A theme, or a set of related themes, is critical.").

30. Doyle, *supra* note 5, at 447 ("Ordinarily, [practitioners] are compelled to choose a particular representation, to commit themselves to it, to convey only that one representation, and as forcefully as possible. The representation that emerges will not be the product of this one, large strategic choice but of hundreds, even thousands, of smaller tactical decisions. Emphasize this point? Or that one? Is this detail vivid enough? Too vivid? Call this teacher to testify, or that one?").

31. For an account of this approach, see Christopher Seeds, *Strategy's Refuge*, 99 J. CRIM. L. & CRIMINOLOGY 987, 1020–23 (2009). Seeds discusses *West v. Bell*, 550 F.3d 542 (6th Cir. 2008), where trial counsel committed to "present only evidence that portrayed West in a positive light," and failed to include information about other causal factors, like childhood abuse and psychological instability. Seeds, *supra* at 1021.

32. The "kitchen-sink method" has been roundly criticized by seasoned capital litigators. See, e.g., Stephen Bright, *Developing Themes in Closing Arguments and Elsewhere: Lessons from Capital Cases*, 27 LITIGATION 40, 40 (2000) ("One too frequently sees cases in which lawyers . . . present a smorgasbord of arguments in closing, hoping that jurors will choose one or more among the many selections.").

33. See, e.g., Nathan Thornburgh, *A Texas Case Puts the Death Penalty on Trial*, TIME, Dec. 6, 2010, <http://content.time.com/time/nation/article/0,8599,2035260,00.html> (discussing a case in which defense counsel presented arguments against the death penalty to the trial court as an issue of law for the judge, rather than as mitigation proof); *State v. Davidson*, 2015 WL 1087126, at *47–48, Slip Op. (Mar. 10, 2015) (following defense counsel's motion to introduce evidence of the cost of the death penalty in Tennessee the trial judge included in jury instructions the finding of the State Comptroller that a capital sentence was more expensive for taxpayers than the alternative).

In contrast to this varied case-by-case approach, determinist mitigation provides a unified theory for the best approach to mitigation in every case. I turn now to the philosophical debate at the root of this claim.

III. FREE WILL VS. DETERMINISM

The concepts of free will and determinism, the tension between them, and their effects on notions of responsibility have been debated for millennia, spawning an immense literature.³⁴ It is not my purpose to take a position on these debates here. Instead, my argument is that one popular conception of determinism—whether right or wrong—can be immensely useful to capital defense practitioners. The conception in question is frequently called “hard determinism” (though I use “determinism” for simplicity’s sake hereinafter).³⁵ Its relation to free will and notions of moral culpability can be understood as follows. Determinism begins from a premise called “universal causation,” the idea that “[t]here are such invariable relations between different events at the same or different times that, given the state of the whole universe throughout any finite time, however short, every previous and subsequent event can theoretically be determined as a function of the given events during that time.”³⁶

This means, to paraphrase, that all events are the result of causes, which are themselves the result of other causes, and so on. Importantly, the principle of universal causation also entails a corollary about alternate possibilities: there are none.³⁷ If all events are the result of causes, then it must be the case that those causes *necessitated* events in accordance with causal laws. And if causes necessitate their events, there is no sense in which alternate possibilities might have occurred. In a very literal way, determinism holds that the nature of the world is *determined*: all events must unfold as dictated by the interplay between the state of the world and causal laws.

When applied to human action, this concept of determinism obliterates the notion of free will.³⁸ Free will is the belief that human beings have the ability to choose their conduct, that their actions are the result of a unique agency that makes

34. See generally Gerald W. Smith, *Determinism, Freedom and Responsibility*, 3 ISSUES IN CRIMINOLOGY 183, 183 n.1 (1968).

35. The terms “hard” and “soft” determinism come from WILLIAM JAMES, *The Dilemma of Determinism*, in THE WILL TO BELIEVE 145, 149 (1956).

36. BERTRAND RUSSELL, OUR KNOWLEDGE OF THE EXTERNAL WORLD 224 (2006).

37. See Michael Levin, *Compatibilism and Special Relativity*, 104 J. PHIL. 433, 457 (2007) (“Determinism is a major crossroads for incompatibilists. Its acceptance leads to hard determinism; its denial and the assumption that there are free acts leads to libertarianism; its denial, denial that random acts can be free, and identification of indeterminacy with randomness leads to the a priori impossibility of freedom (‘impossibilism’).”).

38. The emphasis on “hard” determinism here is important. There is a significant body of thought and literature supporting the idea of “compatibilism,” the belief that determinism is compatible with free will. Such theories rely on a “soft” form of determinism; hard determinism is by definition incompatible with free will. See, e.g., Levin, *supra* note 37.

personal decisions among alternatives.³⁹ But if human events—decisions and actions—are subject to the principle of universal causation, then they likewise do not permit alternate possibilities, and free will is merely illusory.⁴⁰

In the deterministic paradigm, human decisions can be understood as complex events necessitated by their causes in accordance with scientific laws. So, for example, it is uncontroversial that a ball thrown into the air will necessarily return to earth because of the law of gravity. Determinism holds that in exactly the same manner, a person presented with alternatives will necessarily pick one over the other as a result of facts about the person, the existing circumstances, and various scientific laws.

The distinction between free will and determinism has significant moral implications because the existence of alternate possibilities is central to notions of moral responsibility. It is generally accepted that “a person is morally responsible for what he has done *only if he could have done otherwise.*”⁴¹ Choice is thus central: transference of moral evaluations, from outcomes to the individuals that authored them, is only just if the cause of those outcomes resides ultimately in the choice of individuals. Conversely, if individuals are merely conduits for pre-existing facts and scientific laws—all of which ultimately emanate from sources other than individual will—it is as logical to assign moral values to people on the basis of their actions as it is to say that a ball is responsible for falling to the ground after being thrown into the air.⁴²

39. See THE OXFORD ENGLISH DICTIONARY 169 (J.A. Simpson & E.S.C. Weiner, eds., 2d ed. 1989) (defining “free will” as “spontaneous or unconstrained will; unforced choice”).

40. R.M. MACIVER, SOCIAL CAUSATION 239–40 (1942) (“Since behavior, like everything else, is subject to the principle of sufficient cause, we have no choice but to act as we do. We think we are choosing between alternatives, but that is only the subjective aspect of the process which eventuates in a predetermined action.”).

41. Harry G. Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 J. PHIL. 829, 829 (1969). Frankfurt himself considered this formulation of the idea to be flawed, and advocated the more precise wording, “a person is not morally responsible for what he has done if he did it only because he could not have done otherwise.” *Id.* at 838. The difference between the formulations turns on what Frankfurt conceives as a relevant difference between external and internal coercion. *Id.* But hard determinists reject this distinction. See Smith, *supra* note 34, at 189–90. For purposes of this essay, the common version of the principle put forth by Frankfurt in the main text, above, will suffice.

42. Smith, *supra* note 34, at 190 (“To say that all decisions are determined by a person’s character, yet, if a decision is not externally necessitated, then the person is morally responsible, is to the ‘hard determinist’ a gross misconception, for it fails to take into account how the person came to be what he is. If, so the argument goes, we trace the causative factors in a person’s character back far enough we come to the point where he obviously exerts no control. If it is demonstrated that what happens in early childhood determines various adult behaviors and that the link between the childhood training and subsequent adult behavior in [sic] inevitable, i.e., in the sense of being unavoidable, then it makes no sense to hold a person morally responsible, for, while he had no choice in the childhood training he received, he also has no choice in the subsequent behavioral patterns that ‘inevitably’ follow such training.”).

If accepted, determinism compels the conclusion that moral responsibility for human actions is improper, even “meaningless.”⁴³ Because moral culpability is the fundamental issue in every capital sentencing hearing, the logic of determinism presents an enticing possibility for the defense. First consider the logical syllogism at work in capital sentencing which accepts free will as a metaphysical premise:

- (1) the defendant has killed a person [factual premise];
- (2) killing is morally heinous [normative premise];
- (3) the killing was a product of the defendant’s choice [free will premise];
- (4) the defendant’s choice was evil [first normative conclusion];
- (5) fear and anger regarding the killing is properly directed at the defendant [second normative conclusion].

Now consider the logical syllogism of the defense at sentencing where the metaphysical premise of free will is refuted in favor determinism:

- (1) the defendant has killed a person [factual premise];
- (2) killing is morally heinous [normative premise];
- (3) the killing was a product of facts about the defendant, his circumstances, and the laws of science, all of which ultimately reside outside of the defendant [determinist premise];
- (4) these facts, circumstances, and forces not only led the defendant to kill, but *necessitated* the killing, i.e., the defendant could not have done otherwise, and thus had no meaningful choice in the matter [determinist conclusion];
- (5) fear and anger regarding the killing cannot properly be directed at the defendant [normative conclusion].

Comparison of these syllogisms makes clear that by refuting free will in favor of determinism, defense practitioners can defeat the logic of a death sentence. But how can this be done in an individual case? I turn to that question next.

IV. DETERMINIST MITIGATION: THE SUBSTANCE

Following the syllogism described in Part III, the object of determinist mitigation is to make the overarching theme of penalty phase defense that “the killing was a product of facts about the defendant, his circumstances, and the laws of science, all of which reside ultimately outside of the defendant.”

As a preliminary matter, the case for determinism should be made with reference only to *the individual defendant*, and never in terms of the metaphysical question of whether free will exists. Attempting to convince a jury of the logic of determinism on its own terms would be a considerable mistake. People commonly

43. *Id.* at 187 (“To deny choice, makes it meaningless to talk of moral responsibility. Hence if there are no choices, to say that a person is not morally responsible is just as senseless as proclaiming him morally responsible. The whole notion of moral responsibility evaporates if there are no conditions for meaningful choices to be made.”).

reject determinism specifically because they implicitly embrace free will.⁴⁴ Scholars have offered varying explanations for this, from “simplistic and sensational coverage” in the news media,⁴⁵ to a defensive desire to “distan[c]e ourselves” from “the actions of those we find most deplorable.”⁴⁶ Belief in free will may also reflect a desire to protect societal institutions, since accepting the logic of determinism would compel a reassessment of the moral reason behind any criminal punishment,⁴⁷ not to mention other purportedly meritocratic structures like a capitalist economy.

But perhaps the most intuitive reason for lay society’s rejection of determinism is that free will better comports with perceived human experience. People do not *feel* constrained in their decisions. On the contrary, people often feel they truly live in a world of alternate possibilities.

All of this is to say that asking a capital sentencing jury to embrace determinism and reject free will is almost certain to result in disaster. Such a strategy would alienate the jury and destroy counsel’s credibility.

The solution is to convince the jury of the reality of determinism *only with regard to the defendant and killing at issue*. Put another way, mitigation should prove determinism only in the single, concrete example of the case at hand, and only through proof of the specific, causal factors at play.

How should capital defense counsel present the individualized case for determinism? I offer ten suggestions. They are listed in roughly the chronological order in which they would arise in a capital case, starting with the initial investigation and then addressing the guilt/innocence and penalty phases of trial. The particular defense strategy—whether focused on mitigation rooted in childhood abuse and neglect, for example, or on urging factual innocence of the offense—is left open here, but should be developed based on the best determinist story in light of all the relevant evidence.

44. See DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 77 (2011) (discussing our innate propensity to distinguish between “freely willed action” and “physical causality,” concluding that, “[m]any people find it natural to describe their soul as the source and the cause of their actions”).

45. See Haney, *supra* note 3, at 839.

46. Francine Banner, *Rewriting History: The Use of Feminist Narratives to Deconstruct the Myth of the Capital Defendant*, 26 N.Y.U. REV. L. & SOC. CHANGE 569, 584 (2000).

47. The Supreme Court has shown itself to be averse to recognizing problems that would threaten operation of the criminal justice system at large. A prime example can be found in the decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987). The defendant in that case submitted empirical evidence, known as the “Balduis study,” which showed patterns in capital sentencing along racial lines. The Court rejected this evidence as insufficient to prove a constitutional violation, in part, because “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties.” *Id.* at 314–15. In dissent, Justice Brennan famously dubbed this argument “a fear of too much justice.” *Id.* at 339 (Brennan, J., dissenting).

1. Focus the Investigation

Under the determinist approach, defense counsel should develop mitigation through the following lens: how and why did the client come to this place? Counsel should begin asking this question from the first post-indictment meeting. How did the client come to be locked up, here, in this cell? That is where the causal chain ends, and the work of reasoning backwards begins. Note that this question is compatible with a first-phase theory of innocence, or of guilt of a lesser-included offense. The client might have been indicted because of mistaken identity, for example. Or the causal story might have much deeper roots, tracing through a story of factual guilt to a childhood of violence and deprivation. Whether it is conceded that the client committed the killing or not, the mitigation investigation should principally be a search for the circumstances and causal forces that led the defendant to be on trial for his life.

2. Assess—and Reassess—the Investigative Progress

The determinist mitigation approach provides a metric for assessing the progress of investigation: when the offense makes sense in light of the known facts and circumstances, the case is ready for trial.⁴⁸ If the goal of mitigation is to provide a causal explanation for the offense that leads the jury to root causes external to the defendant, the investigation is necessarily incomplete until the causal chain is perfected.⁴⁹

3. Utilize the Science of the Brain

Counsel must learn and apply the most current brain science available. Proof that the defendant suffered brain damage, or privations in infancy, or was affected by mental illness or intoxication at the time of the offense all help to establish the premise at the heart of determinist mitigation—that the killing was necessitated by myriad causes beyond the defendant's control. The defendant could not control that he was born with low intelligence, or that he was abused during childhood, or that he suffered brain trauma in adolescence, or that he was born pre-disposed to alcoholism. Nor can any defendant control the manner in which such circumstances operated upon his brain, altering his perception of the world and

48. Of course, in an innocence case the event to be explained is not the offense itself, but the fact of the client's arrest and prosecution.

49. This is an ideal—in every capital case, there will be elements that defy explanation. But as an ideal, the deterministic explanation is helpful in directing and measuring the mitigation investigation's progress. This metric can prove vitally important when there is pressure from the prosecution and the court to set a date for trial. Counsel must know when their investigation is incomplete, and be prepared to advocate for sufficient time and resources to fully prepare the mitigation case.

steering him towards one course of conduct over another. Without the requisite causal *science*, the connection between these events and the ultimate offense will be unclear, and the jury will be left free to reject the argument that such events necessitated the later killing. It is the role of experts, working with counsel, to uncover the causal pathways and explain them to counsel and, finally, to the jury.

4. *Supplement Voir Dire*

Capital litigators should be trained in some school of “life qualification,”⁵⁰ and should absolutely consider jurors’ attitudes toward the death penalty the most important factor in selecting a jury.⁵¹ But during *voir dire*, jurors often provide insight into their views on free will, and this information should also be registered and given weight. For example, when a juror says during *voir dire*, “I just believe we all make choices,” that juror is saying that he or she is inclined to reject mitigation. A juror with a strong, deeply-held belief in free will may hear extensive, complete mitigation and nonetheless insist, despite the defense proof, that the defendant somehow made a decision to kill. Such jurors are to be avoided.

5. *Frontload Determinist Mitigation*

Defense counsel have long recognized the importance of frontloading mitigation—that is, introducing mitigation evidence to the extent possible in the first “guilt-innocence” phase of trial.⁵² The conventional justification for this is that, “having heard this information once, jurors are primed to be more receptive to related evidence that they will come to realize proves crucial during the penalty trial.”⁵³ But frontloading determinist mitigation offers another benefit by leading

50. Jurors must, as a constitutional matter, be able to consider and give weight to mitigation evidence; the Constitution forbids empaneling a capital juror who will automatically vote for death once the facts of the indictment are proven. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). This holding has given rise to the practice of “life qualification.” Capital defense attorneys conduct *voir dire* on jurors’ ability to keep an open mind in the face of the government’s proof and to consider mitigation and a sentence less than death, striking for cause those jurors who are automatic votes for death. See generally John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209 (2001). Life qualification is itself in keeping with a determinist view of mitigation, insofar as jurors who would automatically vote for death are likely, as a matter of logical consistency, to be strong proponents of free will.

51. The “Colorado Method”—named for its development in Colorado by attorney David Wymore—is the preeminent approach to capital *voir dire*. See generally Mathew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, 34 CHAMPION 18 (2010).

52. See Jesse Cheng, *Frontloading Mitigation: The “Legal” and the “Human” in Death Penalty Defense*, 35 L. & SOC. INQUIRY 39, 53 (2010) (“Frontloading is a practice whereby defense advocates conduct wide-ranging sentencing investigations in search of information that can be strategically presented during the guilt-innocence phase in a way that validates, and ideally reinforces, arguments presented at the penalty hearing.”).

53. *Id.*

the jury to acquit or settle on conviction for a lesser included offense. This is because determinism does not apply uniquely as a defense against the death penalty. Insofar as it undermines personal responsibility, it counsels against *any* form of punishment. Where effectively presented, the case for determinism thus instills an inclination towards leniency, which, in the first phase, can mean acquittal or conviction of something less than capital murder.

6. *Make the Causal Narrative Explicit*

Counsel should attempt to draw a line for the jury from a time period preceding the defendant's birth to the moment of the defendant's arrest and indictment for first degree murder. The line drawn is a causal one—it depicts the manner in which, like dominos, facts and laws of nature external to the defendant played out in the defendant's life to result in the ultimate, inevitable killing.

7. *Avoid Gaps*

To the extent possible, the explanation provided for the killing (or wrongful arrest) must be air-tight. Any holes in the causal chain will permit the jury to re-inject notions of free will. For example, if the jury learns that the defendant, while a baby, suffered brain damage as a result of smoke inhalation in a fire, but hears nothing of how this affected the client in a manner that persisted up until the time of the offense, the jury may fail to see causation. There may be jurors who themselves escaped a childhood fire and, absent proof of a straight and continuous line, will conclude that the difference between their situation and the defendant's is the defendant's bad or evil agency.

8. *Embrace and Explain "Negative" Determinist Mitigation*

Counsel should not shy away from so-called "negative information" if it plays an important role in the causal narrative. Even experienced capital defense counsel frequently foreclose avenues of proof that would entail telling the jury about the client's prior bad acts or questionable character. This is understandable if the point of mitigation is to present the client as likeable. But if the point is instead to comprehensively explain the offense in terms of causes external to the defendant, then bad facts can play a vital role. It may be, for example, that the client's adolescent onset of schizophrenia was first detected through a series of assaults, or that the client always beat his domestic partner while intoxicated in precisely the fashion that his father abused the family in his childhood home. In other words, in drawing a continuous line from the direct causes of the offense to their causal

antecedents, it will frequently be necessary to traverse earlier problem areas. The full story often has a ring of truth that a carefully manicured one cannot match.⁵⁴

9. *Integrate All Mitigation into the Determinist Approach*

Counsel should present mitigation proof that is seemingly unrelated to the offense as part of the same larger, determinist theme. For example, defense counsel often present whatever “good guy” mitigation evidence they can find. This may include so-called “*Skipper* evidence” of good behavior while incarcerated,⁵⁵ testimony of loved ones that the defendant would be missed, or proof of remorse. Such evidence is not obviously part of the causal chain that culminates in a killing. But such proof can nonetheless be presented as part of the larger case for determinism over free will if the defense embraces it as a counterfactual. This proof says “look at the defendant’s behavior under more favorable circumstances.” Here again, expert testimony and argument from counsel are necessary. Capital defense counsel can put on psychiatric experts to testify that individuals with a history of trauma or mental illness do better in stable, structured environments.⁵⁶ It is thus possible to highlight not only when the client behaved in a law-abiding, even lovable manner, but to explain that this too was a feature of innate, environmental factors external to the client. In other words, *all* mitigation proof—even that not clearly linked to the offense—can be used to reinforce the determinist premise.

10. *Invoke Determinist Metaphors*

Finally, counsel should embrace the use of determinist metaphors in their argument to the jury. One classic example is the metaphor of “the perfect storm.” The circumstances and causal laws that result in a killing are always multiple and complex. Had any of those facts or circumstances been different, the causal calculus would be altered and the outcome changed. It is in this sense, perversely, that the storm is “perfect”—the unique and unfortunate combination of circumstances is always exactly the sort to necessitate the killing that occurred. Another popular metaphor invokes John Bradford’s famous adage, “There, but for the grace of God, [go I].” This, too, appropriately captures the all-important

54. For a fuller discussion of the benefits of defense narratives that embrace so-called “bad facts” with candor, see Linda H. Edwards, *Advocacy as an Exercise in Virtue: Lawyering, Bad Facts, and Furman’s High Stakes Dilemma*, 66 *MERCER L. REV.* 425, 431–43 (2015).

55. Such evidence derives from *Skipper v. South Carolina*, 476 U.S. 1 (1986), which held that a capital defendant may present during the sentencing phase evidence of good behavior in jail that occurred post-arrest, pending trial for the capital offense.

56. See, e.g., *Williams v. Taylor*, 529 U.S. at 395–97; Blume, Johnson & Sundby, *supra* note 22, at 1049.

conclusion of the deterministic argument: it is mere luck, or “God’s grace,” which produces different outcomes for different individuals.

It is important and valuable to invoke such metaphors for two reasons. First, they provide a familiar, acceptable generalization from the individualized proof that is presented. Despite defense counsel’s effort to make the determinist case *individual* only, jurors may generalize and see a threat to free will. To defend against this, counsel can use metaphors that are more familiar and palatable than a broad challenge to free will. Second, metaphors can have a folksy quality that softens the technical, scientific tenor of much determinist mitigation. Jurors are known to harbor a certain distrust for experts as “hired guns,” but metaphor suggests to a jury that, whatever the complicated science, they get the big picture—it is something they have always known.

These ten suggestions are only a broad-strokes guide to the project of assembling determinist mitigation—there are many more details and benefits to be explored by attorneys in practice. I now turn to the question left hanging before: what is the practical difference between determinist mitigation and other approaches?

V. DETERMINIST MITIGATION: THE DIFFERENCE

Theorists and practitioners have long advocated a capital trial presentation that includes various elements of determinist mitigation.⁵⁷ These include the suggestions that mitigation should: explain, though not necessarily excuse, the offense;⁵⁸ broaden the temporal context put before the capital jury in sentencing;⁵⁹ stress that “childhood matters”;⁶⁰ demonstrate a “narrative chain” connecting a background of disability and deprivation with the ultimate offense,⁶¹ and promote a language of “risk factors,” instructing the capital jury that instances of, for

57. See, e.g., Vick, *supra* note 21, at 363–64 (calling the need to explain the offense in causal terms “the most significant” purpose of mitigation proof).

58. See Haney, *supra* note 3, at 881; see also Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 560–62 (1995); Stetler, *supra* note 24, at 35–36.

59. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 594 (1981) (“[C]onduct that could be viewed as freely willed or voluntary if we looked only at the precise moment of the criminal incident is sometimes deemed involuntary because we open up the time frame to look at prior events that seem to compel or determine the defendant’s conduct at the time of the incident.”).

60. See Haney, *supra* note 3, at 856–57; Mark D. Cunningham, *It’s Not Just an Abuse Excuse: Mitigation Concepts from the Department of Justice* (2001) (unpublished research synopsis) (on file with the *N.Y.U. Review of Law & Social Change*), <http://www.nlada.org/DMS/Documents/1007403153.11/t%27s%20Not%20Just%20an%20Abuse%20Excuse%20-%20Mitigation%20Concepts%20From%20the%20Department%20of%20Justice.doc>.

61. See Alfieri, *supra* note 6, at 333; Weisberg, *supra* note 3, at 381.

example, mental illness or childhood abuse are like building blocks that, when stacked, diminish the autonomy necessary to making good decisions.⁶²

My approach, in contrast, places the individualized, determinist premise front and center. As outlined in the ten suggestions above, I advocate for a practice that makes determinist mitigation the driving engine behind investigation, development, and presentation of capital defense. To some extent, the difference between determinist mitigation and other approaches is one of degree rather than kind. But there are instances where alternate approaches directly undermine determinist mitigation. In those instances, the difference in presentation can be stark.

To see why this is so, consider the following hypothetical:

The client killed his wife in the course of an argument in their living room. According to his police statement—which contains details that assures its veracity—he assaulted her over a period of forty-five minutes, during which she begged for her life. Ultimately, he killed his wife by bludgeoning, using a glass paperweight.

The client is a repair-man at a local community college. He has a steady, unblemished employment history and is beloved at work. He is said to have a gift for tinkering with machines. He was previously married and since divorced with no children, but he has a close relationship with his two nephews. He has no criminal history.

The client does have a history of domestic violence, but while these incidents resulted in several disturbance calls, he was never arrested or charged. The client also has a personal and family history of substance dependency. His father suffered from alcoholism, as did his paternal uncles and sister. Psychiatric evaluation reveals symptoms of narcissistic personality disorder. When the client was young, he was passed back and forth between his parents and other relatives. His father's drinking and domestic violence led other family members to intervene and remove him for months at a time. The client's favorite place to stay in such times was with his grandfather, who operated a slaughterhouse. The client spent much of his youth in this slaughterhouse playing in the "gut bucket."

Using this fact pattern, I next compare the divergent development and presentation of the case under alternate approaches to mitigation. The first will reflect what I have called the "positive approach,"⁶³ which focuses on humanizing the defendant by portraying him in a positive light. The second will demonstrate the determinist mitigation approach.

62. See, e.g., Banner, *supra* note 46, at 585 (quoting Stephen B. Bright, *Themes and Facts that Persuade in Capital Cases*, in THE LEGAL AID SOCIETY CAPITAL DEFENSE UNIT: INTERN TRAINING MANUAL at 3); Stetler, *supra* note 24, at 38; Cunningham, *supra* note 60.

63. See Seeds, *supra* note 31, at 1020–23.

A. The Positive Approach

Counsel begin by conducting an extensive mitigation investigation and assembling a social history. They uncover evidence of the client's narcissistic personality disorder, alcohol and substance addiction, and history of domestic violence, but because this evidence casts the client in a negative light, they consider it all unhelpful and discard it.

Instead, counsel decide to emphasize the client's lengthy and positive employment record, his good relationships with family, friends, and his nephews, and the absence of any prior criminal record. They present this through records and lay witness testimony. The client's sister testifies to the client's upbringing in a home marked by domestic violence and alcoholism. She also notes that the client "got shuffled around a lot" between caretakers during his early years.

Counsel present the offense as "an aberration:" a bewildering, horrific act by an otherwise decent man. Regarding the gruesome facts, counsel give a wide berth, believing their best chance is to focus the jury's attention elsewhere.

B. The Determinist Mitigation Approach

Counsel conduct a thorough investigation and assemble a social history, working with a psychiatrist and addiction specialist to connect the client's life with the offense. They arrive at a theory that combines wounded narcissism, intoxication, violent behavior modeled in childhood, and cognitive disorders resulting from instability and childhood trauma. They present this through lay and expert witness testimony.

The client's first wife tells the jury that violent outbursts followed a similar pattern: any time the client perceived her behavior as undermining his public perception, he would fly into a rage. This pattern resonates with the facts of the homicide offense: the fight that ended with the client killing his wife began when she refused to accompany him to a work retreat.

Mental health experts explain how the client's background and symptoms of mental illness work in tandem in the client's brain to create unique vulnerability to perceived slights, with resulting unpredictability, rage, and violence. These experts also trace these issues back to the client's own upbringing in shifting households and exposure to alcoholism and domestic violence. Counsel present lay witness testimony from friends, relatives, and coworkers regarding the client's positive traits. The same experts note that this behavior was typical of the client in circumstances where he felt respected and in control.

Counsel go into the offense itself in some detail. They walk their expert witnesses through the grisly facts, eliciting testimony that despite the prolonged nature of the offense, the client was incapable of responding with reason or empathy because of his flawed cognitive processes, intoxication, and the preceding circumstances. Counsel also ask expert witnesses how it is that the client was not jarred to his senses by the extreme gore of the assault and killing. Here, experts

rely on the client's upbringing playing in the "gut bucket"—he was desensitized, they say. Counsel then argue that the unique facts and circumstances about the client, together with those leading up to the offense, created a perfect storm that propelled an otherwise caring, law-abiding man to commit a very brutal killing.

C. The Relevant Difference: Choice

The most significant difference between these presentations is the question of choice. Under the "positive approach," the client has been humanized and comes off as a fundamentally decent guy. But the offense is unexplained, leaving open the conclusion that the client killed as a product of choice. Under the determinist mitigation approach, on the other hand, the client is less sympathetic—he is an acknowledged narcissist and wife-beater, and his role in a graphic offense has been thoroughly scrutinized. But counsel have suggested a complete explanation for the offense, presenting a causal chain that links back to sources ultimately external to the client.

So far, this difference is only descriptive. On what grounds do I claim that determinist mitigation is superior? This is the subject of Part VI.

VI. THE EMPIRICAL CASE FOR DETERMINIST MITIGATION

Determinist mitigation is more likely than the "positive approach" or any other alternative to result in a sentence less than death. This is because, first, long-established research on human cognition suggests that causal explanations are crucial to moral judgments and, second, empirical findings on the actual thinking of capital jurors make manifest that causality is at the forefront of sentencing judgments.

A. Cognitive Science

Research in the field of cognitive science has much to say about the way humans perceive the actions of others, which is akin to the process a juror goes through in assessing a defendant's moral culpability. The field is enormous, and I do not pretend to offer anything approaching a comprehensive survey here. But even a brief synopsis of well-established findings demonstrates that determinist mitigation comports with our best understanding of human cognition.

Experiments dating to the 1950s have shown that people innately seek causal explanations for events. This is a feature of cognition known as "attribution," which is likely a biological adaption designed to make the world sensible, coherent, and predictable to increase chances of survival.⁶⁴ This feature of our thinking is so automatic that the mind does not wait for complete information.

64. KAHNEMAN, *supra* note 44, at 76 ("[T]he evidence is that we are born prepared to make intentional attributions.").

Instead, it settles on a causal explanation based on whatever information is readily available.⁶⁵ With limited information, people form inferences on the basis of past observations and personal beliefs. In other words, existing biases fill in the causal gaps.⁶⁶

Research has exposed many biases in our thinking.⁶⁷ For purposes of my argument, the most significant is the tendency to attribute causes to internal features of individuals as opposed to external, environmental factors.⁶⁸ This bias is compounded if the event is viewed as extreme or unusual, a phenomenon known as the “augmentation principle.”⁶⁹ Moreover, when an event is perceived as negative, such as a personal failing or character flaw, our tendency is to judge the actor differently depending on whether the cause is determined to be internal or external. If external, judgment is relatively mild. In experiments, subjects charged with doling out punishments in response to human failures do so less severely when the cause is perceived to be external.⁷⁰ But where undesirable events are attributed to causes internal to the agent that authored them, judgment is more severe: “[a] long line of studies shows that the degree of anger and aggression expressed in reaction to another person’s frustrating behavior is related to how much the available information about his behavior affords a basis for attributing it to him.”⁷¹

65. See *id.* at 85–88 (Kahneman refers to this fallacy of reasoning as the bias that “what you see is all there is.”); see also, Harold H. Kelly, *The Processes of Causal Attribution*, AM. PSYCHOL. 113 (1973) (“In these circumstances [where multiple observations are lacking], [the observer] may make a causal inference on the basis of a *single observation* of the effect.”).

66. John T. Lanzetta & T.E. Hannah, *Reinforcing Behavior of “Naïve” Trainers*, 11 J. PERSONALITY & SOC. PSYCHOL. 245, 251 (1969).

67. See generally KAHNEMAN, *supra* note 44. One relevant bias in causal attribution is a predilection for proximity: “close temporal relation [is] essential to a causal interpretation,” with the result that “effects ordinarily are assumed to occur *closely after* their causes.” Kelly, *supra* note 65, at 109. As a result, jurors can be expected to look to causes close in time in seeking to understand the offense. This underscores the importance of explaining, through expert and lay testimony, as well as argument from counsel, that remote events in the client’s history have continuing effects that may lead directly to the offense.

68. For a discussion of this bias, see Kelly, *supra* note 65, at 115 (“Given the effect and the external cause absent, an inference of the presence of the internal cause is indicated unequivocally Given the effect and the external cause present, there is uncertainty as to whether or not the internal cause was also present.”). See also Lanzetta & Hanna, *supra* note 66, at 251 (Data supports a “general bias to perceive persons as primary ‘causes’ of failure.”); Fritz Heider, *Social Perception and Phenomenal Causality*, PSYCHOL. REV. 358, 361 (1944) (“[T]here probably exists a tendency . . . to see the cause of [others’] success and failures in their personal characteristics and not in other conditions.”).

69. Kelly, *supra* note 65, at 114 (“The augmentation principle refers to the familiar idea that when there are known to be constraints, costs, sacrifices, or risks involved in taking an action, the action once taken is attributed more to the actor than it would be otherwise.”).

70. Lanzetta & Hanna, *supra* note 66, at 251 (“Given the information that the task is difficult and the subject incompetent, failure is attributed by the trainer to factors over which the trainee has no control, and consequently is not responded to with a high level of punishment.”).

71. Kelly, *supra* note 65, at 126; accord Edward E. Jones & Richard DeCharms, *Changes in Social Perception as a Function of the Personal Relevance of Behavior*, 20 SOCIOMETRY 75, 83

Taken together, this research suggests that capital jurors are naturally inclined to seek causal explanations for an offense, and indeed, that they will do so whether the defense proffers an explanation or not. If the defense fails to put forth such an explanation, jurors will make a causal inference based on a bias that unexplained events—particularly extreme events like a homicide—are the result of internal causes or, in the terms discussed here, the defendant’s free will.⁷² This conclusion carries with it a harsher judgment of the defendant and a tendency to punish more severely. By contrast, if the defense offers a persuasive causal explanation that points to external factors, the jury’s free will bias can be circumvented and the urge to punish thereby diminished. In this manner, cognitive science research suggests that determinist mitigation is the preferred approach to avoiding a death sentence.

B. *The Capital Jury Project*

In addition to the more abstract social science research on cognition, research by the Capital Jury Project (“CJP”) provides concrete support for the efficacy of the determinist mitigation approach. The CJP is a well-regarded data collection effort that relies primarily on interviews with individuals who have served on capital juries across a number of states.⁷³

The findings of the CJP support my claim that the individualized case for determinism is more likely to succeed than alternatives in a number of ways. I focus here on what capital jurors have to say about mitigating and aggravating evidence.

First, the CJP findings reveal what evidence capital jurors actually consider to be mitigating. The data suggest that jurors find the strongest mitigation to be evidence that explains the offense by identifying causal factors beyond the defendant’s control.⁷⁴ For example, jurors “attach significant mitigating potential to facts and circumstances that show diminished mental capacity, such as mental retardation⁷⁵ or extreme emotional or mental disturbance at the time of the offense.”⁷⁶ Jurors find evidence of incapacitation for reason of intoxication less mitigating, and perhaps even aggravating, because such circumstances are

(1957) (“[W]hen the locus of phenomenal causality is perceived as internal to the agent of frustration, negative evaluation is more severe.”).

72. Of course, the jurors will also have the prosecution’s version of the offense, which is likely to rely heavily on notions of free will.

73. For a complete description of the CJP’s methodology, see generally Bowers, Sandys & Steiner, *supra* note 17, at 1486 & nn. 37–39, 1487 & nn. 40–44.

74. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539 (1998) (“On the side of mitigation, jurors tend to focus most on factors that diminish the defendant’s individual responsibility for his actions.”).

75. “Mental retardation” now categorically exempts a defendant from capital punishment on Eighth Amendment grounds following *Atkins v. Virginia*, 536 U.S. 304 (2002).

76. Garvey, *supra* note 74, at 1539.

perceived to be a result of the defendant's choice.⁷⁷ With regard to evidence of childhood abuse and neglect, jurors appear to consider this somewhat mitigating, but less so than evidence of incapacitation that is more proximate to the offense.⁷⁸ On the other hand, jurors assigned almost no mitigating value to so-called "good guy" evidence irrespective of the offense:

Interestingly, jurors tended to attach little mitigating weight to the *absence* of any previous criminal history. Less than a quarter thought that a clean record was mitigating. Similarly, only slightly more than a quarter said that they would be either slightly or much less likely to vote for death if they thought the defendant "would be a well-behaved inmate."⁷⁹

The data on what evidence jurors actually consider to be aggravating is similarly probative. Overwhelmingly, capital jurors report that the most aggravating facts are those suggesting an especially brutal or gory killing.⁸⁰ This finding vividly illustrates the "augmentation principle," and supports the notion that, absent alternative explanations, jurors are prone to attribute the facts of the offense to the defendant's character. As we have seen, such attribution is of the utmost importance in the sentencing phase.

Collectively, these data fit hand in glove with my claim that the individualized case for determinism should be the centerpiece of the mitigation case. They suggest that actual capital jurors consider the offense itself, and its apparent causes, central to the penalty phase decision. Causal explanations that place the ultimate source of the offense outside the defendant's control are the most mitigating, and upsetting facts surrounding the offense itself are most aggravating.⁸¹ In sum, the

77. *Id.* at 1565 ("[Jurors] were noticeably less sympathetic if they thought the defendant's lack of control was his own fault. Only 18.5%, for example, would attach mitigating significance to the fact that the killing was committed under the influence of drugs, and only 18.3% would attach mitigating significance to the fact that the killing was committed under the influence of alcohol."); accord Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1468 (1998) ("[C]ausal factors that might be seen as within the defendant's control—intoxication or acting on political beliefs—do worst, with 55% to 63% supporting the death penalty.").

78. Garvey, *supra* note 74, at 1565–66 ("In sum, notions of collective or societal responsibility for shaping the defendant's character played some role in jurors' capital sentencing decision, especially if it appeared that the defendant tried to get help for his problems but society somehow failed him. Notions of individual responsibility, however, played a larger role. Jurors were not completely unsympathetic to factors that reduced the defendant's responsibility for who he was, but they were more persuaded by factors that reduced his responsibility for what he had done, at least if he had no control over those factors.").

79. Garvey, *supra* note 74, at 1560.

80. Garvey, *supra* note 74, at 1555.

81. To be sure, the data suggests the priority of causal factors more proximate to the offense as opposed to instances of childhood trauma and privations. But this is consistent with a cognitive bias in favor of proximity in causal attribution generally, see Kelly *supra* note 65, at 109, and may fairly be interpreted to suggest only that defense counsel have their work cut out for them in asserting the

lesson from capital jurors is clear: defense counsel must explain the offense in a manner that traces causes back to sources beyond the defendant's individual will.

VII. CONCLUSION

Viewing mitigation as a means of arguing for determinism can help defense counsel in every facet of the capital case, from directing investigation and discovery, to formulating a theory of defense for both phases, to presenting continuous, internally consistent proof at trial. Armed with the knowledge that for any capital offense the deepest causes reside not in the defendant's mind but in countless causal forces either external or prior to it, capital defense counsel can strive to show the jury not only that the defendant is human, but more to the point, that punishing him would be morally wrong. Determinist ideologies have informed mitigation practice almost from the beginning of capital defense work. It is time that capital defense counsel put determinist mitigation at the center of their practice. The empirical data suggests it is uniquely persuasive to jurors, and thus a critical tool to achieving life sentences for clients.

significance of more remote causal factors, see Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1184–85 (1999) (“The critical part of the defense case for mitigation is explaining *how* and *why* the defendant's history of abuse caused long-term cognitive, behavioral, and volitional impairments that relate to the murder he committed. Without testimony making this connection, jurors probably will not comprehend the significance of the defendant's background to their sentencing decision.”). To the extent that the CJP suggests that evidence of temporally remote causal factors has been less significant to jurors, this may only reflect poor performance by defense counsel in drawing causal links across time. See Crocker, *supra* at 1191–1202.