

# Storytelling as a Tool to Ensure Racial Justice in Capital Cases

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# Overview

- Effective storytelling—storytelling that arouses the empathy of jurors—is central to the defendant's success during the penalty phase of a capital trial.
- A defense narrative during capital sentencing is less likely to arouse the empathy of jurors if the defendant is black, even if the narrative is *identical*.

# Overview

- One reason the same story is less compelling to jurors when told about a black defendant is that jurors' often unconscious racial schemas incorporate other narratives that shape how jurors hear the narratives presented during capital sentencing.
- In representing black defendants (especially in black-on-white cases), lawyers should: \_\_\_\_\_.

# Review: Basics of Plot (Amsterdam & Bruner)

- Steady State, interrupted by
- Trouble, followed by
- Efforts at Redress or Transformation, followed by either
- A Return to the Steady State or a Transformation, followed by
- The Coda

# Review: Basics of Character (Meyer)

- “Flat” or “round” characters
- Casting (who is in & who is out)
- Character as implying conduct (past motivation plus future actions)
- Character is not fixed; characters can change
- Ways of revealing character

# Plot and Character in a Capital Trial

- **Guilt-or-Innocence Phase**
  - Principally plot-driven
  - Relevance of character at times
  - (Potentially) competing narratives
- Penalty Phase**
  - Principally character-driven
  - Strongly competing narratives

# Narrative Challenges for the Defense During the Penalty Phase

- Jurors' prior acceptance of State's narrative
- Relevance of State's guilt-or-innocence narrative to penalty phase questions concerning character
- Influence of invisible characters

# Race as an Invisible Character

The Findings of Cognitive Psychology

# Influence of Race in Capital Trials: the Data

- Baldus studies & others: race of victim plays largest role in outcomes, with black-on-white cases most likely to result in death sentences.
- Bowers (et al.) studies of Capital Jury Project data: racial & gender composition of the jury is a very important factor in determining whether a particular defendant will be sentenced to life or death.

# Influence of Race in Capital Trials: More on Bowers

- Racial differences (by jurors) in findings concerning:
  - Residual doubt
  - Remorse
  - Future dangerousness

# Influence of Race in Capital Trials: The Experimental Data

- Conclusions based on experiments by Mona Lynch and Craig Haney:
  - Both individuals jurors and juries (as a whole) were more likely to impose death sentences on black than on white defendants.
  - Jurors assessed the *same* mitigating evidence *differently* based on the race of the defendant, with the mitigating evidence given less weight for black defendants.

# Influence of Race in Capital Trials: The Experimental Data (cont.)

- Additional conclusions from Lynch/Haney experiments:
  - Jurors weighed the principal aggravating evidence—in the experiment, the facts of the crime itself—more heavily for black defendants than for white defendants.
  - Qualitative data from the experiments reflected a “withholding of empathy for the Black defendant, and indeed some resentment that such a sentiment was sought for him.”

# Explanations: Activation and Application of Racial Schemas

# Schemas Generally

- Definition: “cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes, and the relation among those attributes.”
  - Mapping rules
  - Meanings (cognitive and affective)
  - Nearly automatic & instantaneous operation
  - Largely unconscious

# Influence of Schemas on Conduct

- Experiment with senior citizens
- Experiment with Asian American females
- “Priming” generally

# Content of Schemas

- Direct experiences
- Vicarious experiences

# Activation of Schemas

- “Priming”
- Choosing among multiple available schema (some may conflict):
  - Primacy (what gets activated first)
  - Saliency (which catch one's attention)
  - Accessibility (which can be retrieved in memory more easily)
  - Individuating information

# Racial Schemas

- Implicit Association Test
  - Most persons express automatic preference for whites over blacks
    - Includes capital defense lawyers
    - Includes trial judges
  - Conscious commitments largely are irrelevant
  - Blacks are more associated with a variety of negative traits, including violence and criminality

# Racial Schemas (cont.)

- Effect on Both Interpretation and Behavior
  - Resume experiment (interpretation)
  - Assault case experiment
  - Funding experiment
- Note: Racial schemas may play a greater role when race is not specifically at issue.

# Racial Schemas (cont.)

- Content of Racial Schemas concerning African Americans
  - Aggression
  - Violence
  - Criminality
  - Family pathology

# “Priming” and Activation of Racial Schemas

- Priming for one stereotype can activate automatic thoughts concerning another stereotype.
  - Violent rap and interview experiment
  - Word scramble for senior citizens

Activation of racial schemas is associated with more punitive attitudes generally.

# Countering Racial (or other) Schemas

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- Implicit means for countering
- Use of counter-stereotypical exemplars
- Priming for ideals of fairness, etc.
- Increasing primacy, saliency, etc. of other roles (giving primacy to competing schemas)
- Increasing self-esteem

# Racial Schemas and Storytelling in Capital Sentencing

- “Priming” of schemas by the prosecution
- “Priming” of schemas by the basic facts concerning the crime

# Racial Schemas and Mitigation Narratives

## Standard Mitigation Narratives:

Abuse (family pathology)

Neglect (family pathology)

Mental illness

Brain damage

Positive character evidence

Do traditional, competently constructed mitigation narratives prime stereotypes that may make death a more likely sentence when the defendant is African-American?

# The Problem Recast in Storytelling Terms

# Non-Solutions

Failure to present relevant mitigating evidence concerning abuse, neglect, etc. is not an option.

# Potential Solution #1

Incorporation of principles of fairness and equality into the defense's penalty phase theme

# Potential Solution #2

Activation of other (competing) schemas concerning the defendant: character construction

# Potential Solution #3

Expand the time frame for the narrative beyond the lifetime of the defendant's immediate relatives, and expand the setting beyond the defendant's immediate family.

# Overarching Considerations when Crafting the Mitigation Narrative

1. The defendant's mitigation counter-narrative should take into account not only the prosecution's narrative concerning the crime and the defendant's character, but also prevailing cultural narratives concerning race.
2. Some defense counsel will find it helpful to imagine Race as one of the characters in the narrative or one of the witnesses.

**Ideas? Suggestions?**