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Standing Between the Past and the Future, How Defense Attorneys Use Stigma Management
Techniques in Presenting Their Closing Arguments in Capital Sentencing Procedures:

A Content Analysis

by

AbdulRahmane Abdul-Aziz

A Thesis submitted in Partial Fulfillment of the
Requirements for the Degree of

Master of Science in Sociology: Corrections Emphasis
in
Department of Sociology & Corrections

Minnesota State University – Mankato

Mankato, Minnesota

July 2021

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STANDING BETWEEN THE PAST AND THE FUTURE, HOW DEFENSE ATTORNEYS
USE STIGMA MANAGEMENT TECHNIQUES IN PRESENTING THEIR CLOSING
ARGUMENTS IN CAPITAL SENTENCING PROCEDURES

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ACKNOWLEDGEMENTS

I would first like to thank my advisor, Dr. Tyler Vaughan, whose expertise, and support was invaluable in formulating my research topic and methodology. Thank you for your enthusiasm and wisdom. I would also like to thank my committee members Dr. Lisa Holleran and Dr. Emily Boyd. Dr. Holleran, thank you for sharing your data, without you my research would not have been possible. Dr. Boyd, I am grateful for your assistance and words of encouragement. I am extremely thankful to the staff and faculty in the Department of Sociology and Corrections, thank you for teaching me to be imaginative.

To my cohort, thank you for indulging my weekly changing research topic.

Lastly, to my family and friends, thank you for believing in me.

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ABSTRACT

In the penalty-phase of a capital case, defense attorneys face a difficult task in managing the identity of their now convicted client. They must present a coherent narrative that combats the prosecution's case and engenders leniency from the jury. The closing argument given by the defense attorney(s) provides a unique opportunity to analyze and understand the general use of stigma management techniques and their applicability to capital cases. Using content analysis, 18 Transcripts from Texas capital cases from 2005 to 2015 were analyzed against the relevant techniques of neutralization (Sykes & Matza, 1957): *appeal to a higher loyalty*, *appeal to good character*, *denial of responsibility*, and an emergent theme of *personal and moral judgment*. The results highlight a reliance on all four techniques, with nuanced variations in the way each was used. Furthermore, this research provides a descriptive analysis of the practical significance of techniques used to construct their closing arguments in capital cases.

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CHAPTER ONE: INTRODUCTION

In capital cases, the portrayal and perception of the defendant plays a critical role in determining a verdict, especially as it relates to sentencing. The claims and statements made by the prosecution and the defense attempt to construct in their own sense, a comprehensive portrayal of the defendant. Capital offenses consisting of aggravated assault, robbery, and murder, all which require a unanimous jury verdict to impose a death sentence. The process of capital cases occurs through a bifurcated trial with a first (guilty) and a second (penalty) phase. If found guilty of a capital offense, the second phase is then used to decide between a verdict of life without parole or a death sentence. The role of capital attorneys in these cases become an illustration of theoretical application of theories in identity management.

The penalty phase process in a capital case varies from case to case, however, critical stages involve the presentation of aggravating and mitigating circumstances by the prosecution and defense to weaken or strengthen the case, as well as the closing arguments before the jury deliberates their sentencing recommendation. The closing arguments represents the last opportunity to comprehensively summarize the case for or against a death sentence. Whereas aggravating circumstances “makes the defendant more worthy of death,” mitigating circumstances “make the defendant less deserving of the death penalty” (Winter and Greene 2007:743). In analyzing responses from capital case jurors, Garvey (1998:1539) concluded that aggravating circumstances such as the defendant exhibiting a lack of remorse or displaying sadistic violence in relation to their crimes are rarely shown mercy; while mitigating circumstances diminishes the defendant’s responsibility for their actions by attributing them to “suffering extreme poverty as children” or experiencing “serious child abuse as children.” Attorneys frequently assert several claims that are akin to the processes of identity construction

through depicting the defendant as a victim by eliciting sympathy or a villain by eliciting blameworthiness (Loseke 2003b). These identity-based narratives either prompt compassion or severity in punishment. Generally, the prosecution's narrative seeks to justify a death sentence, while the defense advocate for leniency by highlighting past experiences that shaped life of a defendant and lead to the commission of the defendants' crimes. Additionally, there is an overall notion of managing the future dangerousness of the defendant by using aggravating and mitigating circumstances of the case (Holleran 2016). Both these circumstances are used to present a causal connection between the defendant and a lesser or higher degree of culpability, resulting in either a life without parole or a death sentence.

From a sociological perspective, the closing arguments in the penalty phase reflect the use of competing narratives regarding the defendant through a stigma management framework. Additionally, these narratives utilize a linguistic tool known as an account, which uses statements that explain the gap between the defendant's actions and public (jury) expectations (Scott and Lyman 1968). Accordingly, it can be argued that a crucial component for an effective closing argument relies upon claims based on aggravating or mitigating circumstances, and interpreting their causal significance to the jury. This suggests that a micro-level analysis into the narrative techniques and strategies used to manage and influence the jury's perception of the defendant will generate a better understanding of the role of identity construction and stigma management in the practice of law; particularly involving the imposition of a death sentence in capital cases.

Context of Current Research

In June 2020 with a 6-3 decision, the Supreme Court decided that Terence Andrus's counsel was ineffective for "failing to investigate and present mitigating evidence regarding

[Andrus'] abusive and neglectful childhood' (*Andrus v. Texas*, 2020)." With this decision, the Texas Court of Criminal Appeals will have to review this case and highlight the *mitigating* evidence they neglected (McCullough 2021). This case is only one example in a seemingly apparent pattern of defense attorneys failing to investigate and present crucial *mitigating* factors for capital defendants. Courts have scrutinized cases involving claims that assistance was ineffective for failing to present *mitigating* evidence related to prior convictions (*Rompilla v. Beard*, 2005; *Frierson v. Woodford*, 2006), disregarding *mitigating* evidence related to mental health (*DeBruce v. Commissioner, Ala. Dept of Corrections*, 2014), and ignoring the link between high-risk behaviors and the correlation to the defendant's upbringing (*Wiggins v. Smith*, 2003; *Stankewitz v. Wong*, 2012; *Stankewitz v. Woodford*, 2004). It could also be hypothesized that this persistent failure also highlights inconsistent practice by capital defense attorneys in connecting *mitigating* evidence to the defendant's criminal behavior when presenting to the jury.

Currently, there are 25 states with a death penalty, 22 without a death penalty, and 3 states with Governor-imposed moratoriums on the death penalty (Death Penalty Information Center 2021). After the reinstatement of the death penalty by the Supreme Court in *Gregg v. Georgia* (1976), there have been 1,534 executions. (Death Penalty Information Center 2021). With about a third of all executions since 1976, Texas alone accounts for 570 executions (Death Penalty Information Center 2021). At the root of this isolated phenomena, is Article 37.071 of the Texas Code of Criminal Procedure. According to Article 37.071 of the Texas Code of Criminal Procedure (2021), capital case jurors must vote a "YES" or "NO" verdict regarding two special issues: (1) if there is a probability of the defendant committing a future act of violence, (2) and if there are sufficient mitigating factors that would warrant a life without parole rather than a death sentence. Although research and psychiatric experts have collectively supported the

fact that it is impossible to accurately predict future dangerousness (Diamond 1974), Article 37.071 of the Texas Code of Criminal Procedure can be interpreted as empowering civilian jurors to select a death sentence based on an arbitrary and extensively inaccurate standard. However, rendering a verdict requires a more intricate process between the attorneys and the jurors.

In the closing arguments of capital cases, attorneys must construct narratives that align with their arguments for or against a death sentence. The prosecution consistently relies on an effective crime-master narrative (Haney 2008). This narrative emphasizes individual responsibility of the defendant for engaging in their criminal behavior, and more importantly that they must be punished for the commission of their crimes (Haney 2008). On the other hand, an effective defense relies on understanding the defendant's life circumstances, suggesting that attorneys must present the connection between the defendant's criminal behavior and factors reducing their culpability for the offense. With the presentation of mitigating circumstances being crucial to a life without parole over a death sentence, this research explores how defense attorneys make the causal connection between mitigating circumstances and the defendant's criminal behavior. Specifically, content analysis will be used to examine the extent to which defense attorneys use stigma management techniques (specifically techniques of neutralization [Sykes and Matza 1957]) in presenting their closing arguments in capital sentencing procedures as a means of advocating for a life without parole sentence. More importantly, this research further investigates whether there is uniformity in the application of techniques of neutralization that could establish consistency in successfully securing a life without parole sentence.

CHAPTER TWO: LITERATURE REVIEW AND THEORETICAL FRAMEWORK

Since the moratorium and re-instatement of the death penalty in 1976, the issue of the death penalty remains a morally charged and divisive topic. Even so, contemporary literature on the death penalty highlights societal attitudes and racial bias, inadequate or severe application of the death penalty, and empirical studies fraught with methodical shortcomings limiting our knowledge on the effectiveness of the penalty as a deterrent (Nagin 2013). However, there is a knowledge gap regarding claims made by defense attorneys to mitigate the death sentence and demonstrate the process of reducing the culpability of their client. According to Winter and Greene (2007), jurors engage in constructing a narrative storyline to interpret and evaluate the trial information presented to them and weigh the evidence to the potential outcomes. The story model developed by Pennington and Hastie (1992:190) included “three components: (a) evidence evaluation through story construction, (b) representation of the decision alternatives by learning verdict category attributes, and (c) reaching a decision through the classification of the story into the best-fitting verdict category.” With the potential of various interpretation of evidence, a juror’s knowledge of similar crimes, and testimonies heard throughout the case, a juror “will ultimately adopt the story that, in his or her mind, best fits the evidence and is most coherent” (Winter and Greene (2007:742). This story model along with the construction of narratives and accounts that manage the perception of the defendant mirror the statements invoked by the prosecution and defense in capital cases.

In theory, the application of an irreversible punishment is only reserved for those that society deems the “worst of the worst.” Instinctively, the person associated with this connotation would represent a singular identity rooted in immorality as the only conceivable way to impose a death sentence. I highlight the organically embedded process of narratives and accounts as a

conceptual framework for understanding the arguments asserted by defense attorneys engage in identity construction; in addition to discussing the use of claims to invoke a victim or villain-based identity to lessen or increase the defendant's culpability. Finally, I discuss the inherent connection between stigma and techniques of neutralization as theoretical foundations crucial to producing an effective capital case defense.

Narratives, Claims, and Accounts

Techniques employed in narratives of self-definition utilize what Scott and Lyman (1968) coined "accounts." Accounts serve as a bridge between action and expectation as a statement made from actors to explain inappropriate or unpleasant behaviors (Scott and Lyman 1968). According to Scott and Lyman (1968), the two types of accounts consist of justification and excuses, defining justification as accepting responsibility by denying values associated with the action, and excuses as a way of lessening responsibility. The use of justifications or excuses can greatly influence the narrative expressed by a social actor. For example, Scully and Marolla (1984) use the notion of accounts as explained by Scott and Lyman (1968) to analyze 114 convicted incarcerated rapist who acknowledges themselves as either admitters or deniers of their actions. They focus on sexual aggression as a socially learned behavior that results in rape with an added component of individuals re-interpreting and negotiating their motives and actions as to present themselves as nondeviant and behaviorally appropriate (Scully and Marolla 1984). Additionally, Stokes and Hewitt (1976:843) explain the term "aligning actions" as a technique used to address problematic situations often involving a "misalignment between the actual or intended acts of participants and cultural ideals, expectations, beliefs, knowledge and the like." As it relates to capital cases, aligning actions can be used to connect the presentation of the defendant's life circumstances or criminal behavior to the construction of the defendant's

identity to influence the jury's verdict. However, capital cases and the consideration of imposing a death sentence highlights and reflects societal notions of who deserves to be punished.

According to Loseke (2003b), punishment is contingent upon determining the intent and reason behind the cause of harm. Drawing on Haidt's (2007; 2012) moral foundation theory, Silver (2017) highlighted that punitive attitudes towards victims and offenders are based on the five domains of the moral foundations. According to this theory, individuals can trigger strong sentiments in reactions to transgression towards other individuals, groups, and the divine (purity of the body) (Haidt 2012). Indicating that triggering strong sentiments from violating societal norms can be directly associated a severe social punishment such as life without parole or the death penalty. The notion of the defendant deserving punishment can also stem from ideals the public holds about the severity of various violated norms. The general public commonly utilize the notion of punishment to show disapproval of deviant acts against the public's consciousness (i.e., morality of the majority) (Erikson 1962; Tyler and Boeckmann 1997). Reinforcing the connection between punitiveness and violation of collective morality (Silver 2017), Cullen, Fisher, and Applegate (2000:15), state that "support for capital punishment is virtually never traced back to positive factors – or factors phrased in a positive way." Research also supports that favoring or opposing the death penalty is related to deterring murder, utilitarian beliefs, and by nature strongly associated with the notion of morality (Zeisel and Gallup 1989).

The Prosecution

The use of various *aggravating* circumstances can influence the jury's perception of the defendant as causing intentional harm in the penalty phase of a capital case trial. Through their claims, the prosecution combines feelings of "blame and responsibility" associated with the intention of causing harm to persuade the jury that the defendant's action is cause enough for a

death sentence (Loseke 2003b:83). The prosecution must portray the defendant as a “villain” through elicitation of blame, anger, and hate to convince the jury that a death sentence is warranted and justified. According to Garvey (1998:1556,1559), capital jurors responded to aggravating circumstances regarding the defendant that made them more likely to vote for death including if “the murder involved torture or physical abuse”, “being a danger to society in the future”, and if they “had a history of violent crimes.” This suggests that for the prosecution to get the jury to impose a death sentence, a link must be made between aggravating circumstances, and an emotional elicitation of blame to influence the jury’s perception of the defendant as a villain.

The process of constructing a villain associates them with imagery of individuals who harms others. According to Loseke (2003b), villains are constructed as someone responsible for a harmful condition that hurts victims. Villains are described with feelings of “blame and responsibility” and “accompanied by emotions of hatred or condemnation” with “the behavioral expression of punishment” (Loseke 2003b:83). Loseke (2003b) elaborates that assigning blame requires establishing an intention to harm others or do harmful things; whereas the acknowledgment of an “accident” makes it difficult to determine intent to harm. Furthermore, the feeling of hatred can only be developed when the harm is being done for “no good reason” as opposed to being justified and possibly uncondemnable (Loseke 2003b:84).

According to Martin (2010:21) institutional actors such as police attempt to discredit victims by employing “identity codes” such as “young black man as drug dealers, gangbangers and troubled youth” to construct the victim’s identity. These constructed narratives then become associated with the deceased victim’s identity and used to explain factors surrounding their homicide (Martin 2010). Additionally, this draws parallels to the reproduction of inequality, the

concept of colonization of identity state that claims-makers removes the claimant's prior social identities and asserts new ones, invoking an identity-claim of an "oppressive other" (Schwalbe et al. 2000:423). The use of identity codes can be adopted to the process of villain construction through claims implying that someone is to blame for the harm of others. Successful villain constructions would elicit feelings of anger and hatred leading the audience to justify their punishment for the harm caused.

According to Haney (2008:842), the prosecution focuses on a crime master-narrative that influences the jury's perception of the defendant's character:

In a capital case, the crime master narrative is also typically at the heart of the prosecutor's argument that the jurors should return a death verdict—a heinous crime has been committed by an essentially bad or evil person who should pay the ultimate penalty. Because his crime is regarded as entirely the product of his free and autonomous choice-making, unencumbered by past history or present circumstances, the defendant alone is seen as fully culpable for it.

Even before deliberating, "jurors come into the courtroom already endorsing or presupposed to" believing the crime master-narrative (Haney 2008:836). Additionally, the guilt phase of a capital trial further ingratiates the perception of the defendant's criminality to the jurors. Furthermore, jurors can only sit on capital cases if they are deemed "death-qualified" and are willing to impose either a life without parole or a death sentence and are prohibited to consider anything outside of these two sentencing options (Lynch and Haney 2018). However, there is a gap in our general knowledge as to the counter-narrative strategy employed by the defense in reducing the defendant's culpability (Haney 2008). Therefore, this literature review and the scope of this

research will limit its scope by focusing primarily on the defense and their counter-narrative strategy.

The Defense

Throughout capital cases, defense attorneys can also construct a narrative that addresses the defendant's identity to persuade the jury. This process of narrative construction with the goal of negotiating the perception of the defendant's identity to the jurors aligns with theoretical understanding of explaining actions through accounts. Along with the presentation of mitigating circumstances, defense attorneys can utilize victim-based claims (Loseke, 2003b) to influence the defendant's identity and portray them to be less of a future danger to society (Holleran 2016). This combination constructs a plausible narrative and less-blameworthy account of the defendant, which often influences the jury to be more lenient (Garvey 1998). At the core of explaining criminal or deviant behavior to negotiate identities, are techniques that influence the jury's perception of the defendant. Acknowledging the role of the defense attorney as a claimant, how and what process they utilize to assert their claims will play a critical role in impacting the sentencing verdict.

Claims-making is the attempt to persuade an audience "that X is a problem, that Y offers a solution to that problem, or that Z should be adopted to bring that solution to bear" (Best 1987:102). According to Best (1987), at the heart of claims-making is rhetoric including grounds to establish basic facts, warrants as statements of justification, and conclusions to offer changes in practice. However, the process of claims-making can apply to a social problem as well as the construction of identities. According to Loseke (2003b), social problem work utilizes persuasion to construct images of people through claims. Therefore, for defense attorneys to persuade the jury, their claims rely on constructive images that elicit feelings of compassion by presenting the

defendant as someone who has suffered as a victim (Loseke 2003a). These claims highlight the use of constructing images that invoke feelings of sympathy or blame. Additionally, Loseke (2003b:77) utilized “feeling rules” as explained by Arlie Hochschild (1979), to assert that the “general conventions surrounding how we ‘think we should feel’” can be associated through claims in the construction of victims through sympathy.

In deciding *Roper v. Simmons* (2005), the Supreme Court referenced *Atkins v. Virginia* (2002), stating that the death penalty is reserved for the most egregious of crimes and for offenders whose culpability makes them deserve execution. The Court’s ruling highlights that claims and statements from defense attorneys should focus on utilize evidence to reduce the jury’s perception of the defendant as culpable. The process of constructing a victim relies heavily upon associating them with the imagery of helpless individuals. According to Loseke (2003b:78), victim construction occurs when an individual deserves sympathy as they “are not responsible for the harm they experience.” This image of a victim tends to emphasize individual responsibility. As such, if they are found to be responsible for their victimization, they will not be given the social status of a victim (Loseke 2003b). For example, Leisenring (2006) discusses victims’ discourse concerning women who have experienced sexual violence in heterosexual relationships, she depicts their identity as someone who has been harmed outside of their control, deserving of sympathy or action to help them, gained increased culpability, and is essentially a powerless individual. However, if these claims are successful, they can “motivate audience members to feel sympathy towards a social problem victim, they simultaneously motivate audience members to support claims that victims must be helped” (Loseke 2003b:79). A victim label can be a powerful way to persuade an audience of claims and gain sympathy, but at the expense of a label that represents someone as powerless and vulnerable.

According to Best (1997:9), “focusing on victims discounts individuals’ ability to control their own lives and emphasizes the power of social forces because victims cannot control what happens to them.” An operationalized notion of the concept would be the use of mitigating circumstances that falls into the categories of “reduced culpability, general good character, and a lack of future dangerous” (Garvey 1998:1561). According to Garvey (1998:1562), reducing penalty-phase culpability focused primarily on the two categories of proximate and remote:

Evidence of “proximate” reduced culpability is evidence that “suggests any impairment of a defendant’s capacity to control his or her criminal behavior, or to appreciate its wrongfulness or likely consequences.” Evidence of “remote” reduced culpability, in contrast, focuses on the defendant’s character. It includes such things as abuse as a child and other deprivations that may have helped shaped the defendant into the kind of person for whom a capital crime was a conceivable course of action.

These two categories ultimately address the lack of culpability for the defendant’s actions and how that correlates to the person they are and the crime(s) they have committed. Capital case jurors cited significant mitigating circumstances for the defendant to include intellectual disabilities, being influenced by extreme emotional disturbance, a history of mental illness, and adverse childhood experiences such as severe child abuse (Garvey 1998). The defense uses mitigating circumstances linked to an emotional elicitation of sympathy in the hopes constructing a victim and obtaining leniency in the form of a life without parole sentence. Recognizing that defense attorneys are claimants that use techniques of neutralization to disassociate the defendant with a stigmatized identity, how and what techniques they use will greatly influence the jury’s perception and ultimately their verdict.

Stigma Management

In *Stigma: Notes on the Management of Spoiled Identity*, Goffman (1963) discusses identity construction in the context of individuals with their stigmatizing characteristics. Goffman elaborates on the term stigma as a discrediting attribute that individuals in most cases would attempt to conceal from others. Goffman (1963) distinguishes between physical deformities, character blemishes, and tribal stigma and termed individuals who aren't negatively impacted by these stigma's as normal. This notion highlights stigma as a socially imposed attribute of discrediting individuals or groups based on a variety of characteristics they possess. Goffman (1963) states that the discrepancy between the stigmatized individual's virtual (perceived) identity and their actual identity spoils their social identity and lays the foundation of stigma management and identity formation.

The nuances involved in stigma management aligns with the unique dynamics apparent in the process of capital cases. After a guilty verdict in the first phase, the defendant is associated with the circumstances involving the case. Hence the stigmatization of being labeled a murderer is understood and accepted (to a certain extent) by the jury who decides the verdict. However, the penalty phase requires a different understanding and utilization of stigma; especially as it relates to the identity of the defendant. This phase requires the attorneys to present the defendant as a victim to neutralizing their stigmatizing label. Capital cases in this instance requires the defense attorney to dissuade or at the very least present the connection between the defendant's life circumstances and their criminal behavior. When faced with inexcusable forms of deviance such as murder (Levi 1981), defense attorneys must engage in techniques of neutralization and oppose the defendant's stigmatized identity.

Mitigating and Neutralizing

In analyzing the testimonials of 27 perpetrators and their role in the 1994 Rwandan genocide, Bryant et al. (2018) concluded that accused perpetrators utilize techniques of neutralization to rationalize their actions and negotiate their identities. Furthermore, Bryant et al. (2018:594) describes that the courtroom experience is defined by “the social expectation that defendants portray themselves in a positive light and express their acceptance of and support for collective norms and values.” In the course of the trial, , the genocidaires defendants employed the five classic techniques of neutralization (Sykes and Matza 1957) including *denial of responsibility* by denying they had the authority to change events, *denial of injury* by minimizing the damage they’ve caused, *denial of victim* by shifting blame onto those that were impacted, *condemnation of condemners* by shifting blame to the accused, and *appeal to a higher loyalty* by attributing actions to complex set of values (Bryant et al. 2018). Then, they added the techniques of *victimization* where the defendants claimed they were also negatively impacted by the genocide, and *appeal to good character* where defendants assert their admirable characteristics to make themselves seemingly incapable of genocidal crimes (Bryant et al. 2018).

Bryant et al. (2018) concluded that out of the five classic techniques of neutralization, the defendants used *denial of responsibility* and *condemnation of condemners* the most. In addition to jurors exercising leniency to a less-blameworthy account, a defense strategy centered on the *denial of responsibility* technique could lead to effectively connecting the defendant’s life circumstances to their criminal behavior. The presentation of *mitigating* circumstances by the defense aligns strongly with the technique of *denial of responsibility* as it is used to lessen the juror’s perception of the defendant’s culpability (Bryant et al. 2018). At the core of presenting *mitigating* circumstances, is the construction of a narrative focused on presenting victim-based

factors associated with the defendant's criminality, and thereby lessening their culpability to gain leniency and avoid a death sentence.

Here, I present the importance of narrative, claims and account construction engaged in the prosecution and defense in capital cases. These concepts serve as the overarching theoretical concepts applicable to lessening or increasing the culpability of those that are convicted and are to be sentenced. These concepts also serve as a foundation to the construction of an effective defense counter narrative to the prosecution's compelling and often jury-endorsed crime master narrative. This includes an emphasis on how the aligning actions of accounts can be used to influence the jury's perception by negotiating the defendant's culpability in relation to their criminal behavior. Since the guilt phase parallels the process of labelling the defendants through stigma, an effective approach for capital defense attorneys in the penalty phase should incorporate stigma management through effective techniques known to reduce culpability such as *denial of responsibility* (Sykes and Matza 1957).

CHAPTER THREE: RESEARCH METHODS

In this chapter I discuss the methods used to analyze and interpret the research data. I first explain the chosen methodology of content analysis with a directed conceptual approach to adequately assess the research topic. Then, I elaborate on the sample and data and its connection to my research topic. I discuss my analytical strategy with the use of four theory-based primary themes used to analyze content in NVivo and discuss methods utilized to assess the reliability and reproducibility of the analysis.

Research Approach

The current research is a directed qualitative content analysis of secondary data, focusing on how defense attorneys use stigma management techniques in defending their clients during the punishment phase of capital trials. In directed content analysis, the goal is to “validate or extend conceptually a theoretical framework or theory”, in this research theory-based techniques of neutralization are being extended to closing arguments given by the defense in capital cases (Hsieh & Shannon, 2005). Additionally, through the application of a stigma management framework, an interpretive process is allowed between theory and emerging codes from the data. This also allows for a deductive approach regarding the phenomena evident in capital sentencing procedures. This approach allows for interpretation regarding key concepts applicable to both the theory and the research data.

Defense attorneys in the punishment phase of capital trials face a difficult task in that they must manage the identity of their now convicted client. Having established their guilt in the guilt-innocence phase of the trial, the jury has determined that the defendant is eligible for the death penalty and must determine if they will ultimately select them for this penalty. As death-qualified jurors tend to be more prone to select a sentence of death (Haney, Hurtado, and Vega

1994; Johnson 2014; Springer and Lalasz 2014), the defense faces an uphill battle. The penalty phase, and closing argument, represent the last efforts of the defense to mitigate against the jurors' construction of the defendant as dangerous or monstrous based on evidence presented in the guilt-innocence phase. Though the penalty phase consists of lengthy presentation of testimony by both defense and prosecution witnesses, the closing argument involves attorneys weaving evidence and testimony into a coherent narrative of the defendant's life and behavior. Furthermore, jurors' judgments are subject to bias and use of heuristics in which the recency and vividness of information presented in the closing arguments may be particularly influential in the jury's deliberation (Tversky & Kahneman 1974). Theory and research therefore suggest that the closing argument is especially important to deliberating jurors.

The data is comprised of the closing arguments by defense attorneys in 18 trial transcripts from the punishment phase of death penalty cases that occurred between 2005 and 2015 in the state of Texas (Approximately 460 pages of transcripts). This narrows and highlights the constructive process the attorneys engage in while knowing it is their last opportunity to drive a conclusion about the defendant's culpability. With the current research focusing on analyzing the meaning and relationship between selected themes and the closing argument by the defense, the use of content analysis allows for an interpretive analysis while staying close to the research data. The data for this research was shared by Dr. Lisa Holleran who collected it for her dissertation *Future Dangerousness in Texas Death Penalty: A Content Analysis*. Dr. Holleran's (2016:6) research used 18 death penalty cases to assess "whether differences exist between cases in which jurors determined the defendant was a future danger compared to those defendants the jurors determined were not a future danger." Dr. Holleran collected her data by obtaining case transcripts from court clerks, trial attorneys, court reporters, and shared the digital transcripts for

the purpose of addressing the current research topic. The shared data provides digital documents that can be analyzed and coded based on selected stigma management techniques through NVivo, a qualitative data analysis software.

Analytical Strategy

For the current research, the collected data was imported into NVivo 12. In NVivo, the 18 transcripts were categorized into 2 case classifications associated with the sentencing verdict of the cases either being (1) Death or (2) LWOP. NVivo's coding function aided in coding and categorizing the statements made by the defense attorneys in closing arguments, these statements served as the unit of analysis for the current research. Additionally, NVivo helped categorize and allowed for documentation of emerging codes that helped explain the theory-based techniques. Furthermore, NVivo was used to develop secondary themes stemming from the four selected themes established based on the theoretical literature: *denial of responsibility, personal and moral judgement, appeal to good character, and appeal to a higher loyalty*. Whereas *personal and moral judgement* developed as a clarifying theme distinct from *appeal to higher loyalty*, all four themes were used in conducting a coding comparison for the interrater coder.

For this research, my thesis chair, Dr. Tyler Vaughan, served as an interrater reliability coder. As the interrater reliability coder, he coded randomly selected sections using the Code Book (see Appendix A) to demonstrate and ensure reliability amongst coders and the overall research. A third (6 cases) of the transcripts served as a sample size, and within these cases 10% (8 pages) of the total content of each case was coded by an interrater coder. To find 10% of each transcript, the total number of pages for all 18 transcripts was multiplied by 10% and that number was divided by the 6 cases to produce how many pages would equate to 10% of the sample size (see Table 1). Then, a random start page was used to code 10% each transcript in the

sample size and the coding comparison function in NVivo was used to measure the kappa coefficient.

Table 1

Interrater Reliability Equation

$$464 \text{ (Total Transcript Pages)} \times .10 = 46.4 / 6 \text{ (Sample Size)} = 7.7 \text{ (8 Pages)}$$

The coding comparison function allows both coders to compare areas of agreement and disagreement in respective codes. For the purposes of this research, only the Kappa coefficient was used as it provides a statistical measure discerning the level of agreement that could occur by chance regarding the coded data (NVivo Help 2021). The Kappa values and their interpretation ranged from poor to strong agreement (NVivo Help 2021), and although this research focused on general agreement on thematic presence, it established a range of fair to strong agreement for the sample (see Appendix B). Additionally, due to discrepancies in interrater and primary coder understanding of personal and collective sentiments in *appeal to higher loyalty*, the creation of the fourth theme pertaining to *personal and moral judgement* increasing interrater and primary coders agreement in both themes (see Appendix C). Overall, with the use of NVivo's coding comparison query on the sample, the result of the interrater reliability demonstrates a very good if not strong level of agreement between interrater and coder reliability for the primary themes of this research.

CHAPTER FOUR: FINDINGS

The current research was conducted through a directed qualitative content analysis of secondary data, relying primarily on specific techniques of neutralization as theoretical constructs relevant to stigma management (Sykes & Matza, 1957). *Appeal to good character*, *denial of responsibility*, and *appeal to a higher loyalty* were relevant techniques of neutralization, found to be applicable to the capital sentencing context in the literature. However, one additional approach utilized by defense attorneys represented an emergent theme in which *personal and moral judgement* of the jurors was emphasized. The relevant techniques of neutralization highlighted a pattern through association and relatedness across cases. Therefore, secondary themes were drawn from these techniques to contextualize and elaborate on the nuances embedded in the process as the defense attorney presents their closing arguments to the jury. The statistical results (see Appendix D) of data analysis aligned with inconsistencies in defense narrative approaches, ways in which defense attorneys tailor the use of techniques to their clients and brings into focus a process of selective re-interpretation of their clients past experiences to build a comprehensive portrayal of their client.

In the following sections, I describe the extent to which these techniques are relied upon, the variety of statements made which manage stigma through each respective technique. Given the lack of uniformity in defense closings, particularly in comparison to the crime master-narrative used by the prosecution (Haney 2008), I describe secondary themes which were developed to elaborate on the primary themes to and further describe the variability and approaches within each technique of neutralization.

Personal and Moral Judgement

In highlighting statements focused on individual appeals to each juror, this technique encourages each juror to maintain their own opinions in regard to their client. The statistical results (see Appendix E) and findings call attention to defense attorneys also using statements that highlights the discretion the jurors have in deciding what is considered mitigating circumstances. Although it is the least referenced theme, as a death sentence must be a unanimous verdict, its significance cannot be overlooked:

Our law says each and juror must decide independently. You, each and everyone of you, independently will make the decision of life or death for [Client]. The death penalty cannot happen without each juror independently voting for this. This is truly a godlike power you all have. (Case 2)

This defense attorney encourages jurors to be uncompromising even when against the majority opinion regarding his client, he goes on to add, “If you favor life, hang in there, hold on to it, The law does not say you have to vote for death (Case 2).” These statements also shift the focus away from the given structured and rigid legal guidance, to personal and inherently subjective thoughts. In referencing mitigation, one attorney reiterated to the jury that “when it gets down to deciding what is mitigating, what is mercy, what touches you, that’s personal. That is a personal moral judgement (Case 3).” These statements are directly tied with mitigating circumstances, to remind the jury that anything they individual deem as mitigating, can and would be deemed mitigating. Another attorney also stated that “what might be mitigating to one may not be mitigating to another (Case 6)”, demonstrating a further lack of consideration for collective deliberation.

These statements were also used in reference to mitigation involving adverse childhood experiences, history of substance abuse, history of good behavior, history of mental health issues, and even the concept of “mercy”; all which can be subjected to individual and independent acceptance by the jury. In addressing the jury, one attorney informed them that anything you have “heard you may decide is mitigating evidence (Case 4).” This theme also heavily emphasizes an independent choice amongst the jurors. One attorney reiterated that “you were selected as individuals to be jurors” as well as “selected because of your individuality to be jurors (Case 14).” These statements can also be said to engender leniency by asking the jury to empathize with their clients, or to consider something they otherwise did not think was presently a mitigating circumstance.

Appeal to a Higher Loyalty

Appeal to a higher loyalty focused on values and adherence to principles that would influence the jury to select one verdict over the other, in addition, attorneys made statements regarding the defendant’s criminal actions while contrasting it against a constructed notion of the “worst of the worst.” The statistical results (see Appendix F) and the findings reveal an underlying use of statements regarding accountability and mercy in a way that implores the jury to judge the defendant based on how their verdict reflects a society they want to live in, as opposed to merely the defendant’s crime(s). Thus, attorneys attempted to advocate for a sentence that would resemble an opportunity to hold the defendant accountable for their crimes as well as to redeem the defendant for their criminal behavior. This sense of accountability was complimented with pleas of mercy, one attorney asked the jury to demonstrate the “same amount of mercy that when you stand before your maker, your creator on judgement day, that you ask for (Davila)”; another attorney reiterated that the jury must not be swayed by mere conjecture,

sympathy, passion, prejudice, public opinion or public feelings, however, the jury was also reminded that “the word ‘mercy’ is not in there (Case 15).” Both references carried the sentiment of LWOP being a fair and just sentence in a society that should not perpetrate another wrong to make a right. This led to a trend in the statements emphasizing a secondary theme rooted in expressing compassion as opposed to aligning with the common rhetoric of exhibiting punishment.

Exercising compassion over punishment

An evident pattern from the primary theme were statements engendering empathy from the jurors by asserting notions of leniency associated with expressing compassion. This secondary theme also highlights patterns in the defense strategy that contrast the prosecution’s notion of protecting society by appealing to idealistic views representing a higher loyalty:

What does execution, what does the death penalty say about our society? Our society is really better than that. Thou shalt not kill. I heard a prosecutor one time In a closing argument say that Jesus was in favor of the death penalty. It was one of the more ludicrous things I have heard in my life. Thou shalt not kill. Another thing I thought of as he was talking, which is do unto others as you would have them do unto you. (Case 8)

This statement conveys hope to an adherence of empathetic values outside the norm as it relates to the crime the attorney’s client is being sentenced for. Additionally, these statements raise questions regarding what justice is and how it could be achieved in the given case:

But I also ask that you now bring to bear who you are as a person, that you do not abandon your common sense, that you take life experience and you look at these things and you honestly examine in your heart of hearts and you ask yourself, you ask yourself:

Is justice not served if we put this young man on a prison bus and ship him off for the rest of his life? (Case 1)

This highlights the reliance and interpretation of complex values that attorneys present and utilize in their arguments to influence the jury. Additionally, there is an overall reverence of the jury to not just be good and just people, but to be strong enough to see their compassion as justice. At the end of a closing, one attorney stated that “he’s now in your hands, good hands, good people, and I know that you will look to the best that’s in you (Case 2)”; another attorney claimed that Gandhi, Martin Luther King, and even the Pope John Paul II would encourage the jury to “stand behind him [Defendant] no matter what, and say this is wrong, the death penalty is wrong (Case 8).” Rarely was there ever a reference to the defendants’ crimes unless it was accompanied by claims of remorse or expectations of the jury to sympathize with the defendant.

A common strategy seen across cases were claims that link the jury’s verdict to parallel societal views of imposing the death penalty, in addition to notions against justice being seen as imposing only a death sentence. Attorneys would also make references to saving a life as opposed to advocating for a life sentence. Although slight, this distinction forces the jury to contemplate executing the defendant, a decision when compared to the defendants’ crimes requires serious consideration, whereas a LWOP sentence does not carry the same looming burden or intensity in contemplation. This reveals a pattern in advocating against a death sentence, which in it of itself, does not advocate for a LWOP sentence. One attorney stated that “he’s branded a killer. A child killer. he’s gonna die in prison. You don’t have to be part of his execution. (Case 9).” Furthermore, one attorney reminds the jury that their verdict impacts a larger audience, and their choice can move society forward to set society backwards:

You're at a crossroads. You stand between the future and the past. I know the future is with me and what I'm standing for here, not merely for [Defendant]. I am pleading for life, for understanding, for charity, for kindness, for the infinite mercy that considers all. I am pleading that we overcome cruelty with kindness, that we overcome hatred with love. I know the future is on my side in this. You stand between the past and the future. If you vote for death, you will turn your face to the past, and I'm pleading for the future. All life is worth saving. (Case 2)

Overall, this theme has very little to do with the defendant but relies heavily on encouraging the jury to embody values of compassion, mercy, and positive notion of a society they want to live in when deciding their verdict. Additionally, the attorney's must also re-interpret and explain how justice can be achieved with a LWOP sentence, which often leads to attorneys stating that the jury would be just as bad for participating in their clients execution; one attorney stated that his client has done "a horrible thing...killed two kids, and for that , let's get even with him. Let's kill him too (Case 9)." This reiterates the powerful role that jury's play in sentencing, while conveying the societal implications their verdict carries. Along with this theme, attorneys engage in contrasting their client against a portrayal of others who have committed worse crimes.

Preserving executions for the "worst of the worst"

In advocating against a death sentence for their client, some attorneys simple claim that the crime(s) of their client simply does not compare to the likes notorious criminals and serial killers. This theme revealed a pattern that involves statements that juxtapose the defendant's crime to that which an ideal candidate for the death penalty would commit. These statements include sentiments of heinous crimes and psychotic criminals that their client and their crimes do

not equate or live up to. Most statements in this category portray the worst of the worst as criminals that perpetuate acts that are morally irredeemable and deserving of their execution:

Now we discussed about what the – what do we reserve the death penalty for? ... You know, the worst of the worst. The people that we have proof that they're incorrigible, they're not fixable. No matter where we put them, they are going to do bad. They are going to rape, they are going to escape, they're going to do anything. The people that have shown intent to continuously do harm wherever they're put. [Client] is not Ted Bundy. He is not Jeffrey Dahmer. He is not the guy in Aurora, Colorado. That is not [Defendant]. (Case 12)

This contrast provides a very vivid and surreal distinction in severity of crime(s) between the attorney's client and commonly known mass murders. Additionally, this strategy intentionally draws on mundane actions or events and asserts to the jury that the death penalty would severely be inappropriate for the crime that has been committed:

We don't kill people as a society because they don't keep up with their meal cards. We don't kill people as a society because they cover their windows, and we certainly don't kill people as a society because they don't feel well and don't want to go to work that day. (Case 15)

In this example, the attorney's used previous infractions to combat the perception of a danger to the prison society; furthermore, this statement forces the jury to consider if these seemingly mundane actions equate to a death sentence. This also draws on malicious or evil intent regarding the crime(s) committed. One attorney stated that his clients "crime was not premeditated, this is not a crime that was planned", and reiterated that a death sentence would be

reserved for “someone that continuously shows evil intent like that, this is not that case (Case 12).” This theme is also complimented with abstract notion of “why society kills people”, like most attorneys’ statements, acceptable criteria include being incorrigible, sadistically violent, a constant danger to everyone, and cannot conform to institutional life. Some attorneys also use situations where their client restrained themselves in an otherwise violent situation to further separate their client from the Ted Bundy and Jeffrey Dahmer’s of the world. This often transitions to attorneys using these infrequent behaviors as acceptable mitigation, on the bases that the jury personally agree to its mitigating potential.

Appeal to Good Character

In considering how the attorney is going to portray their client to the jury, the assertion and presentation of “good” behaviors and deeds play a critical role in altering the perception of their client. The findings for this theme consisted of statements that categorized the good deeds of the defendant and uses them as indicative of their future behavior in the hopes that it outweighs their criminal actions. These attorney’s statements invoke feelings of sympathy which directly related to constructing a portrayal of their client that the jury would want to express leniency and compassion too:

I can honestly tell you that in speaking with [Client] over the past couple of months, that I have sat down with him on a one-on-one basis. He's laughed with me, he's joked with me, but he has also cried with me. And when he heard the testimony of Lieutenant Stuart Alexander wife's yesterday, he cried with me. That's what he does. So, when you see him, he's a human being, ladies and gentlemen, and at this time, we apologize. There's nothing that we can do. (Case 10)

This closely relates to previously mentioned theories of identity and stigma management to neutralize stigmatized identities and ultimately alter the jury's perception of the defendant enough for a LWOP sentence. Another example includes an attorney stating that "he was denied the opportunities and the interventions that could very well have avoided this tragedy (Case 6)", highlighting the notion that his client did not receive proper care from their parents and is in need of help and support. By generating statements that alters the perception of the attorney's client, their perception become more socially and morally accepted to the point in hopes of engendering leniency for the crime they are being sentenced for. Another attorney repeated notions of good behavior by stating all the helpful things their client did around the neighborhood as a child, stating that "he would always help the elderly people, and also, he was very good with kids (Case 12)"; The attorney later used this same notion of being helpful to highlight an event the highlighted his clients in a positive light:

When his parents died. LaDonna Brown told you how hurt he was...Deborah also, told you how [Client] helped his dying father, [Clients Father], how he cared for him, how he took that shift, how he cleaned the urinal, the feeding And I believe that's [Clients Father] with the tracheal issue. [Clients Father] passed away. And how depressed he was when And you have a picture here where he is with [Clients Father]. They told you the same thing about when [Clients Mother] was sick, how he helped care for her, how he loved her and how he also was very hurt when she passed away. (Case 12)

This theme is rooted in positive portrayals of perceived conscious decision-making by their client. For example, one attorney highlighted that his client has "not one infraction, not one fight, not one argument that would case for disciplinary action"; this attorney went on to use this

record of positive behaviors to assert that there is “absolutely no evidence to conclude that he [Defendant] is going to be a threat to anyone, uh, once we lock him up (Case 9).”

This theme revealed many nuanced underlying patterns that were not saturated enough to be included as standalone secondary themes but enrich and help address this research topic. One minor pattern in the findings support instances where witnesses attest to the demeanor of the defendant. For example, in their closing, an attorney reiterated an officer’s testimony claiming that the defendant was “one of the most respectful inmates I’ve come across (Case 10)”; this character testimony was made more profound knowing that the defendant was being sentenced for the murder of a police officer who was a lieutenant. Another minor reference that is complementary to both secondary themes in this category is the claims that the defendant will ultimately die in prison under if they receive a LWOP sentence. One attorney stated his client would be 60 years old before being eligible to ask for release and stated that the only time he would ever be outside of a prison wall “is to go to the hospital with armed guards”, and that is “the best he can hope for (Case 17).” This is followed by statements referencing no human contact in prison, being in a cell for 23 hours a day, and enduring constant supervision for the rest of their lives:

From the time you wake up until the time you go to bed. Everything you do, you're told when to do it and how to do it. You're never going to have vacations, relax with your family, kick back at a Sunday barbecue. You're caged like an animal for the next forty years. Do you think that is a walk in the park? And that's forty years, and [Client] is still only twenty-two years old. Just do the math. It would make him 62 years old when he is eligible for parole. It doesn't mean he'll get parole. What will you have? An old dog with no teeth by then. And that's if he's alive when he's 62 in our prison system. (Case 18)

This is a direct attempt to show to jury that for the next several years their client would not be enjoying their stay in prison, but rather be voided of all simple pleasures until they are eventually deceased. One of the important notions that was evident in theme discussed good behavior in the context of the attorney's client being previously incarcerated and having demonstrate that they would not be a future danger to the prison environment in the future.

Eliciting leniency through good behaviors

Eliciting leniency through good behavior emphasizes statements that highlight the defendant's good actions and portray them as being indicative of their future action. The findings reveal that this is highly referenced in cases where the defendants have been formerly incarcerated either as youth or as an adult and had a good or positive record while incarcerated. These positive behaviors consist of lack of infractions, successfully completion of boot camps or other court ordered programs, appropriate behavior in a supervised setting, and conveying that a structured environment can be redeeming for the defendant:

Bexar County Jail, ladies and gentlemen, is in a very restrictive setting. I can't remember. I think he gets four hours of rec time a week, and maybe a few hours a day in a day room. And then the rest of his time, ladies and gentlemen, he spent in some type of secluded environment, either alone or with a cellmate. You didn't hear any other acts of misconduct to show you that he couldn't be compliant in that setting. Not one thing. Now, I want you to do some math and think about this. This young man, at least on this case, has been incarcerated somewhere since June 27th of 2005 related to the other acts that took place, the Corvette case and the Shell station. So according to Mr. Ugarte's math, and I trust him on that, June 27th, 2005 to the present, he's been in jail for 600 days. 600

days that you know, 600 days of which there's been just four fighting incidents that have been brought to show you he's a continuing threat to society. Just four. (Case 7)

This could be one of the only situations in a case where a significant incarceration record, with positive behavior, could serve as a mitigating factor in receiving a LWOP sentence over a death sentence. One attorney simply stated, “he has exceptional behavior inside of this jail” (Case 8), this shifts the focus onto an area where the jury can be sure as opposed to speculative as to what the defendant's behavior if they were to select a LWOP sentence.

This success of this strategy lies in being able to highlight a positive record, interpretive the defendant's previous actions, and even highlight how those good behaviors will result in a positive outcome. Some attorneys emphasize the positive impact the defendant could have by coupling with notions of being a good Samaritan or role model:

I could see him talking to younger inmates and other kinds of inmates about his life on the outside, what he did and the kind of life he led and how it got him into this situation, and it would allow them to learn from his mistakes. (Case 2)

Although this strategy relies on the attorney's client to have a relatively low levels of infractions, the statement above demonstrates that some infractions within the prison environment can be blamed on the general incidents involved in being incarcerated. One attorney stated that, “he can comply in that setting, he may push back, he may get in an altercation, that's just the natural part of that setting (Case 7)”, this serves to minimize foreseeable infractions while justifying their occurrence. All aspects of this theme utilize past behaviors to advocate for leniency in the defendant's sentencing. The other form of conduct the attorneys must negotiate are related to violent or aggressive behaviors.

Diminishing their client's capacity for violence

To convince the jury that their client would not constitute a future danger, attorneys utilize statements that diminish or significantly alters any behavior that would depict their client as violent. In this case, future dangerousness is heavily associated with exhibiting violent or aggressive behaviors. This theme reveals the importance for attorneys to minimize or at least convey to the jury that the defendant does not pose a threat to society. The process diminishing the defendant's capacity for violence involves negotiating past aggression and minimizing any foreseeable harm:

And strangely enough, when I asked him whether or not he got along with Officer Lopez, Officer Rodriguez says, "No, he was, in fact, one of the most polite and respectful inmates I've run across." And the State says, "Well, you know, Officer Rodriguez, you just mean in his disciplinary area, right?" He goes, "no, the whole jail." How strange is that for the man that the State is trying to paint as this hardened, cold-hearted cop killer who hates law enforcement? It doesn't make any sense. (Case 10)

This highlights how previous patterns of good behavior or lack of infractions from a prior incarceration can also serve as mitigating circumstances for the jury to consider. One attorney simply stated that his client "has no prior act of criminal violence (Case 6)", while another attorney highlighted a jail supervisors testimony claiming his client "wasn't violent (Case 8)" and emphasizing how unique it is for a correctional officer to say that. One attorney even discussed their client's commission of a crime and directly related it the lack of violence involved in the commission of said crime:

When you look at his prison record, take a look at what he has been convicted for. He has not been sent to prison for violent acts. He's been sent to prison for burglaries. Not once did we hear from a single victim of a burglary that they confronted [Victim/Witness], that they were in the house, that there were signs of violence. (Case 15)

This statement is unique in the sense that it brings attention back to the commission of the crime in a completely new perspective that serves as a possible mitigating circumstance. The findings demonstrate that attorneys first and foremost explain to the jury that the defendant will be in prison regardless of their verdict. This introduces the idea of a “prison society” and coupled with past positive behaviors while incarcerated lays out a strategy that seemingly addresses the question of future danger for the jury. This is highlighted when one attorney emphasized the notion of his client understanding what it means to belong to a prison society:

But [Client's] assaultive behavior on the outside has been very, very limited and wrong. With that best predictor, [Client] has been the kind of prisoner that he's been with a physical stature that gives him opportunities that a lot of -- that I wouldn't have. He has not used it to promote violence in a structured -- in that structured society. (Case 2)

This statement portrays the client as being someone who is physically able to perpetrate a certain level of violence, however, the attorney used the notion of a structure society to complement their client being a lack of future danger. Minimizing foreseeable harm could also be a way to alter the jury's perception of the defendant and exclude from the “worst of the worst” category. One attorney stated that “he [Defendant] has no prior acts of criminal violence (Case 6)”, another attorney highlighted the conscious decision of the defendant to “not inflict bodily injury on individual when he had the chance to (Case 18).” Other behaviors such as expressing compassion while incarcerated and being respectful all work in the favor of altering the jury's

perception of the defendant. Although negotiating and interpreting the defendant's behavior was a prominent strategy, more attorneys relied on narratives that dissociate the defendant from their criminal behaviors.

Denial of Responsibility

More than any other theme, denial of responsibility directly aims to particularly diminish the defendant's blameworthiness for their crime. Highlighting the defendant's culpability, the attorneys attempt to convince the jury that there were other uncontrollable factors that led to the commission of the crime; and those factors should be heavily considered when deciding a sentence. Another key aspect of this theme lies in the attorneys utilizing statements that disconnect their clients from the commission of their crime(s). As previously mentioned, it is critical for these statements to portray their client in a way that encourages the jury to be lenient. In addition to attorneys using claims to shifting responsibility and decreasing culpability, these claims highlight their client's life event that influence the nature of their character:

So when the community failed, [Client] found the only family that he could. It was in gangs. It was La Tercera Crips. And as twisted as it is, you remember wat their motto was? Love and respect. And what do you want from your family? Love and respect. He got it the only place he could. He got it the only place he could. (Case 1)

This attorney utilized statements that justified their client's deviant affiliation as just a way for them to fulfill their need for a stable and nurturing family. At the core of this strategy are sentiments of family instability, which other attorneys have frequently highlighted as a result for the character their client displayed in the past and how it manifested in the present. One attorney referenced an expert witness testimony and stated, "[Expert Witness] the first person who

mentioned ADHD in this trial, [Expert Witness] the first person that mentioned a bad family structure as a risk factor (Case 2).” Another attorney recounted the testimony of his client’s mother how her actions endangered and impacted his client:

If you recall her testimony—I ask you to do so—came up and just with her head down. We drank We drank. My whole family drinks. We’re alcoholics. My whole family drinks. And we would drink at lunch. And we were young, and we had just been married, and we were partying. I that’s not evidence of maternal alcohol exposure, fetal exposure—it’s confirmed evidence. (Case 6)

This theme serves to bring many mitigating factors into focus regarding the attorney’s client. The overall strategy seems to be to convey a better understanding of these influencing factors and related back to the commission of their crime(s). Other attorney’s use statements that do not necessarily shift blame, but work to minimize their client’s involvement as well as diffusing the blame to other:

There is nothing good about it all. Hitting anybody, a woman or your wife, is a bad situation, but it happens in families. It happens more often than we want it to, of course. And sometimes there’s blame on both sides, sometimes not. (Case 2)

This statement however cryptic, conveys the idea that his client may only be partially responsible for his role in deviant or criminal activities. Although this references something morally wrong, the statement emphasizes an ambiguity as to who is at fault in the situation. As mitigating factors are based on individual juror discretion, these statements can be seen as measuring and shifting culpability; and measuring as a concept pertaining to how much responsibility should be assigned the attorney’s client. A notable trend in these statements are the attorney statements

diminishing the personal role their clients played in leading to or in some cases the commission of their crime(s).

Negating personal accountability

The death penalty is frequently pursued and justified as furthering utilitarian punishment goals (i.e., protecting society), though commonly held views concerning justice and retribution equate justice with retaliation or retribution. The extent to which one can be held accountable or be blameworthy for their behavior depends critically on their state of mind (*mens rea*) or their ability to choose their behavior; highlight the notion of culpability as the crucial link that greatly impact punishment. This leads to patterns in a multitude of areas regarding the factors that primarily reduce accountability in relation to committed crimes. These outside factors include drugs, alcohol, familial trauma, emotional disturbance, and mental health issues. Furthermore, it takes into consideration the environment they grew up, physical and emotional abuse they sustained, and the trauma they saw and expressed and a fairly young and impressionable age; all these aspects influence and play a large role in the narrative of the defense:

And since the State's asking for you to take his life, I submit it's only fair that you look at what's gonna happen in the rest of [Clients] life based on the identical risk factors that [Expert Witness] told you about: ADHD, poor family structure, bad mom, socioeconomic factors. (Case 3)

Statements such as these begin to present the attorney's client as someone who through surviving their own victimization went on to commit violent acts. Other attorney's use the facts of the case to also shift or minimize the culpability of their client. In one case that involved the death of a fetus, the attorney stated, "now, that fetus was pre-available, under any circumstances it was too

young to survive outside the womb (Case 12).” In this interpretation, nothing is said about the crime committed, however, the facts regarding the fetus was used to minimize the impact of their client’s crime. Another attorney highlighted the actions their client participated in after their crime:

On the day of the incident he had an ounce of methamphetamine and he drank a liter. You-all know what a liter is. A liter of rum. If he hadn't slept for two to three and he had those things going on, you or I couldn't make a decision that we would know the consequences of. We wouldn't be able to function. So how do you expect him to? (Case 4)

A reoccurring idea in this theme was a lack of choice in life decisions endured by the defendant, and a portrayal of the defendant being a victim of circumstance. One thing these statements allow the attorney to do is invoke sympathy for the defendant and what they have had to endure:

And by the age of ten he was found in the bathroom, in the shower trying to cut his wrists. A couple of months later he's found overdosing on 20 pills and sent to Spohn psych triage. This is the type of person, this is the blueprint of [Defendant]. (Case 10)

This highlights a series of events in the defendant’s life that attorneys assert must be considered to under the defendant and reason behind the crime they have committed. Most defendants experienced the gamut of adverse childhood experiences and attorneys would contrast them with notions of “what if.” One attorney highlighted that his client “didn’t just get a bad set of cards, he didn’t get them all...and then the ones he got were bad (Case 3)”; emphasizing the vivid reality

that his client suffered that inevitable led them to the commission of the crime they are being sentenced for.

In relation to mental health and substance abuse, many attorneys highlight conditions impacting the defendant such as suffering from hallucinations, fetal alcohol syndrome, impulsive behaviors, personality disorder, and various disabilities. This lends to attorneys contextualizing the state of mind of the defendant that led them to committing juvenile then adult crimes. Other examples include an attorney stating that they'll never know the effects on the psychic of when his client was eight and his father was murdered and "his sister being raped and impregnated (Young)." Another statement consisted of the attorney asking the jury, "would you be where you are sitting right now had you had his [Defendant] life? (Case 3). Additionally, some attorney's shift blame entirely on the mitigating circumstances involved in the crime:

It's not a matter whether they loved [Client] or hated [Client], it's a matter with them as experts saying, we've looked at this and evaluated this, and this was our opinion. And the opinion was, [Client], his decisions, his actions, the death of [Victim], for a large part impacted through the use of drugs and alcohol. (Case 18)

Along the same sentiment, one attorney stated that "if on Friday he killed these people and on Saturday night he was in New York, how did you think he got there...yeah, he was on drugs (Case 4)." This highlights how attorneys utilize some aspects related to the commission of the crime to portray their clients as less culpable for their actions.

Other statements in this theme associated reducing the culpability of the client with distancing them from their crimes through dissociation. This theme almost mirrors the process of appeal to good character, but in this case, past behaviors and experiences are used to invoke

sympathy and dissociate from the crime they are being sentenced for. The findings reveal a pattern of attorneys asserts claims surrounding unintentionality and elaborates on the defendant's state of mind during the commission of the crime. Additionally, this includes statements that emphasize that "something went wrong" or "it was never supposed to turn out like this"; for example, one attorney emphasized mitigation through unintentional:

But that was years ago when he was a juvenile. And it was a reckless act, and it wasn't an intent to hurt somebody. He may have had his side of it. That really doesn't matter. He should have never done it, whatever it was. But it wasn't an intentional act. (Case 2)

These statements further emphasize the notion of the defendant not meaning to cause the harm they are being sentenced for. Attorneys relied heavily on this theme to minimizing the harm their clients perpetrated and provided a more comprehensive identity in the process. This identity however is constructed around the best intentions and focus less on what crime was committed and more on what their client was or has experienced.

Statistical Overview

Quantitative analyses also highlight key findings that add practical significance by examining the extent to which each technique is used as well as by examining the relationship between verdict and frequency of reference to each theme. Using NVivo, the *coverage* of themes, or the total percentage of characters coded at each theme, were examined on a case by case basis. Concerning *personal and moral judgment*, cases ranged from 0% to 1.72% coverage, indicating attorneys dedicated little of the closing statement to this technique. In 7 cases, attorneys did not use this technique, and when used, between 2 and 5 statements of this type were made (median = 2 statements, less than 1% coverage). These findings reinforce previous

findings from the qualitative section that appealing to jurors individually is significant. Especially in considering the importance one dissenting opinion could have on negating the death penalty as the decision must be unanimous amongst the jury to be imposed. This also leaves room to interpret the impact of narratives that encourages individual jurors to determine what they believe to be justifiable mitigating circumstances.

Concerning *appeal to higher loyalty*, attorneys tended to use this technique more frequently, with coverage ranging from 0% to 6.76%. In only 3 cases did the defense not employ this defense, and attorney made between 3 and 11 statements when deploying this strategy (median = 5 statements, about 1.4% coverage). When examining the technique of *appeal to good character*, attorneys spent considerably more time attempting to parry the prosecution's claims of future dangerousness and thus dedicated more statements to this technique. Coverage ranged from 0% to 11.45%, with attorneys deploying the strategy using between 1 and 21 statements to appeal to good character (median = 7 statements and about 3% coverage). In three cases, the attorney made no statements appealing to good character. This finding supports a general reliance on the appeal to good character technique, especially in negotiating past instances of aggressive or violent behavior. This also allows for a general inference to be made regarding the role of reducing the violent perception and violent actions of their client; especially in demonstrating that their client is not a future danger to the prison society.

Finally, attorneys engaged in somewhat less denial of responsibility, with coverage ranging from 0 to 10.97%. In three cases attorneys made no statements denying responsibility, and when deployed attorneys made between 1 and 24 statements, with a median of 2.5% coverage. Examining all techniques combined, attorneys do engage in stigma management to a certain extent—in only one case was no technique used. Attorneys made between 2 and 39

statements, covering between 0 and 21.74% of the closing statement content. The median coverage was 10%, meaning that about 1 in every 10 words in the attorney's closing argument was a direct statement relating to stigma management.

To assess the relationship between the deployment stigma management and verdict the cases were divided at the median coverage for each technique (i.e., low personal moral judgment/ high personal moral judgment) and the number of death verdicts were tallied for each group. Of the 9 low personal and moral judgment cases (between 0 and 0.15% coverage), 7 were death verdicts as compared to 2 death verdicts in the high coverage personal and moral judgment cases (between 0.23% and 2.8% coverage). Of the 7 cases where no statements concerning this theme were made, 6 were cases resulting in a death sentence. Moving to appeal to higher loyalty, the low appeal to higher loyalty cases (0% to 1.35% coverage) resulted in 5 death sentences, and the high appeal to higher loyalty cases (1.51% to 6.76% coverage) resulted in 4 death sentences. The low appeal to good character cases (0% to 2.4% coverage) resulted in 4 death sentences, and the high appeal to good character cases (4.03% to 11.45% coverage) resulted in 5 death sentences). Finally, low denial of responsibility cases (0% to 1.58% coverage) resulted in 6 death sentences, but high denial of responsibility cases (2.25% to 10.97% coverage) resulted in 3 death sentences. Obviously, one cannot infer based on these data that the deployment of the stigma management technique caused a difference between groups in the percentage of death verdicts, however these patterns indicate that there is a slight relationship between the deployment of at least two techniques (personal and moral judgment & denial of responsibility) and the verdict selected by the jury. Dividing the 18 cases on total stigma management technique coverage, the low stigma management cases (0% to 9.61% coverage) resulted in 5 death sentences, and the high stigma management cases (9.81% to 21.74% resulted in 4 death sentences.

Overall, the statistical analysis of these technique highlights a general use of appeal to good character and denial of responsibility, especially when the aggravator is multiple and robbery. This highlights a general presence and applicability of victim construction by shifting culpability and negotiant violent and aggressive behavior. Although appeal to a higher loyalty was referenced less than the previous two techniques, it was prevalent in more LWOP sentences. However, when these statements were made, they were made quite often and in cases involving various aggravators. Since personal and moral judgement stemmed from appeal to a higher loyalty, the resemblance in verdict aligns with the data presented. Since this technique is a more direct and individual appeal, and contained additional references to discretion of mitigating circumstances, this techniques in a purely descriptive sense was critical to the portrayal of the defendant.

CHAPTER FIVE: CONCLUSIONS

This research was designed to explore how defense attorneys use stigma management techniques in their closing arguments in the penalty phase of a capital case. The aim was to apply relevant stigma management techniques such as *personal and moral judgement*, *appeal to a higher loyalty*, *appeal to good character*, and *denial of responsibility* in analyzing 18 capital case sentencing transcripts from 2005 to 2015. This research set out to analyze and report general and specific application of stigma management techniques in the hopes of discovering and elaborating on a sense of uniformity in closing arguments given by the defense. In this section, I highlight a summary of the key findings of each technique. Then, I elaborate on the general presence of stigma management techniques and their role in capital cases and address the use of these techniques and their implications to the procedural process of any criminal case.

Personal and moral judgment

The result of this theme highlighted statements used to emphasize the juror's ability to decide what is a mitigating circumstance in the case and what is not; additionally, statements in these theme portrayed the jurors as individual and independent jurors who do not need to compromise on their opinion to reach a collective consensus. In fact, most defense attorneys encourage individual jurors who had doubts to be uncompromising. Defense attorneys also suggested that anything in the areas of adverse childhoods experiences, family instability, history of mental health, as well as concepts relating to mercy; could all be factors deemed mitigating by the jury. This strategy allows defense attorneys to encourage the juror to consider any factor mitigating and be uncompromising in their opinion—a critical consideration as the death penalty can only be imposed on a unanimous verdict.

Appeal to a higher loyalty

As jurors, when participating in a capital case they are given instruction and guidance to not be influenced by mere conjecture, sympathy, or public feelings. However, no instruction was given on adherence to principles that would influence jurors to endorse one verdict over the other. These statements essentially asked the jury to select a verdict that reflects the world they want to live in. While this serves to diminish the presence of their clients' crimes, attorneys also highlight the possibility of redemption if their client was given a LWOP sentence. Attorneys relied on statements that engendered empathy by appealing to idealistic views used to combat the prosecution's notion of protecting society. These notions appealed to how a LWOP sentence would achieve justice and reflect a society the jurors would be proud of. Additionally, other commonly referenced statements include a contrast between the attorney's client and the likes of sadistic serial killers. These contrasts are commonly exaggerated notions of extreme violence that forces the juror to contemplate if an aggravated assault equates to a punishment befitting a mass murder. This also reduces the perception of the level of violence the attorney's client has committed in the crime they were convicted of and allows the attorney to make a claim that they would not be a future danger to the prison society if they receive a LWOP sentence.

Appeal to good character

Defense attorneys play a crucial role in the portrayal of their clients to the jury. Through their statements, they must invoke feelings of sympathy and compassion to engender leniency and portray their client as someone in need of help as opposed to someone that should be executed. These statements involve reiterating events of good behaviors by their client and using their past actions while formerly incarcerated to be indicative of future behavior. Attorneys relied heavily on statements that give insight into the good nature of their client such as recounting

positive attributes, highlighting positive testimonials, and emphasizing their client's conscious decision-making all to demonstrate how their client would not pose a threat to the prison society. Additionally, attorneys mentioned the low or lack of infractions their client had when previously incarcerated to demonstrate their client's capacity to be compliant in a supervised setting. In these examples, the longer the previous sentence and the lower the number of infractions the better case can be made for their client as a lack of future danger; a healthy number of infractions could also be explained away as a natural part of being imprisoned. Along with this, attorneys also relied on their client's low levels of infraction to minimize the foreseeable harm their client could perpetrate in the prison society.

Denial of responsibility

As the verdict of the case depends on the level of culpability the jury ascribe to the attorney's client, being able to diminish or shift accountability from their client to other factors serve as a reoccurring pattern amongst most of the statements analyzed. Defense attorneys use these statements to shift responsibility and decrease culpability by highlighting often traumatic life events that could be said to have an impact on the commission of the crime their client is being sentenced for. These life events include deviant affiliation, substance abuse, episodes of emotional disturbance, and mental health issues to highlight what their client was or has experienced. These statements act to bring up mitigating factors while engendering leniency based on what their client has endured. Attorney statements in this theme emphasized that their client experienced victimization and should be helped as opposed to being punished.

Overall, the completion of this research was able to provide general insights on the use of stigma management techniques and its applicability to closing arguments given by the defense in capital cases. Additionally, the presence of these stigma neutralizing techniques highlights

dimensions such as past and present life experiences outside the commission of the crime. Moreover, this research demonstrated that in the need to provide a comprehensive portrayal of their client, defense attorneys are exclusively selective to experiences highlighting socially admirable attributes. This research was also able to identify the general reliance on all four themes with no identifiable structure, and a willingness to alternate between themes as needed. With this foundation, additional research could be conducted to expand on which theme is more effective; and could possibly lend to providing defense attorneys a uniform approach in providing an effective defense.

APPENDIX SECTION

APPENDIX A Code Book.

General Coding rules: The coding will include statements from the defense attorney given in the closing argument of the penalty phase. Do NOT code statements that relate to the guilt phase of the trial. Do NOT code commentary or statements by the judge or prosecutor. Statements can be as short as one sentence and as long as a paragraph.

Themes & Description:

Primary Theme: **Personal and Moral Judgement**

Definition	Examples
<p>Statements that acknowledge and encourage the jury to uphold standards not as a collective choice but through personal and individual determination. Additionally, includes statements that encourage jurors to think about the impact their individual role and decision in a sentencing decision serves as a reflection of ideal societal values.</p>	<p>Make sure what decision you make, if you make a decision, is reflective of what you individually think ought to be the outcome in this case, what you individually think is the right thing to do.</p> <p>When you get down to deciding what is mitigation, what is mercy, what touches you, that's personal. That is a personal moral judgment.</p> <p>You to show [Client], the same mercy that when you stand before your maker, your creator on judgement day, that you ask for. Not, Dear Jesus, give me retaliation for all my sins. Dear Jesus, have mercy on my soul.</p> <p>Determine, each one of you, is this the kind of person that has to have the death penalty?</p> <p>Whatever you all think is a proper mitigating factor. That's fine for you all—each individually are the judges of what is mitigating in this case.</p>

Primary Theme: **Appeal to Higher Loyalty**

Definition	Examples
<p>Statements that acknowledge and encourage committing to a higher set of values than those already instructed. Suggests the jury seriously consider long-term implication of either verdict and its influence on the defendant and themselves.</p>	<p>But do know this: I pray and I ask Godspeed, that he allow each of you to make a decision, again, if you can arrive at a decision, that is just, that is fair, and indeed merciful.</p> <p>We are all brothers and sisters. We share a common heritage. We may be different in race and age and sex, but despite our differences, we share so much more in common. The spirit I'm asking you to consider is that even the life of a sinner has value. All life has value.</p> <p>If you find it sufficiently mitigating, mercy alone is enough for a life sentence in a case.</p> <p>And we asked you, can you follow the law and the evidence and not base a decision on revenge or retribution? And each one of you said that you could and now we're going to hold you to that.</p> <p>But right now the 12 of y'all going into that jury room are frankly the 12 most powerful people on the face of this earth at this moment. You have the authority and the power to decide if another person is executed and dies. And that is an awesome, awesome responsibility.</p>

Primary Theme: **Appeal to Good Character**

Definition	Examples
<p>Statements that highlight characteristics regarded as morally right and socially admirable. These characteristics of discipline,</p>	<p>It's bad, but is it that psychopathic, sociopathic, you know, violence that we're looking for in the worst of the worst? That's</p>

conscientious decision-making, and overall demeanor alters the stigmatize perception of the defendant. These characteristics are used to engender compassion, leniency from the jury, and contend that they are incapable of violating more social norms. Furthermore, it guides the jury to reflect on the defendant's identity and creates a contrast to the notion of being considered as "the worst of the worst."

for you to decide before we take someone's life.

If looking at all of this, you could reasonably say -- And I believe you can -- that if everybody, every prisoner in a Level 5 maximum security institution over all of this period of time had the same disciplinary records as [Client], it would be a safer place, a much safer place than it is.

And the closest thing we have to that, he's lived in a prison for the last 22 months. And if there were a single guard or jailer or licensed vocational nurse or court bailiff or staff of any kind that would say that he's been anything other than respectful and polite and courteous and nonaggressive and nondisruptive, they would have called those people.

One of the best ways to look at what a person's future conduct is going to be is look at what they've done in the past. In the last four years she has behaved herself. She has threatened nobody. There's been no allegations brought against her of any kind.

Because as we talked about before, almost two and a half years in jail he's been fine. He's not a troublemaker. He is salvageable. He is not someone that should get the death penalty.

The death penalty is only reserved for those that have no redeeming value, no positive character trait whatsoever that should merit anything other than death and whose level of violence and propensity is to such a degree that there is no other answer than to extinguish their life.

Primary Theme: **Denial of Responsibility**

Definition	Examples
<p>Statements that reduce the defendant's culpability in relation to their crimes by denying or shifting fault to other factors. Suggests that the defendant had a diminished capacity to control various factors that influenced the commission of their crimes and had an inability to change or have authority to change events that impacted the commission of their crimes. Assumes the defendant is not entirely at fault for their deviant behavior or criminal actions and minimizes their otherwise deviant behaviors or criminal actions.</p>	<p>So when the community failed, [Client] found the only family that he could. It was in gangs. It was La Tercera Crips. And as twisted as it is, you remember what their motto was? Love and respect. And what do you want from your family? Love and respect. He got it the only place he could. He got it the only place he could.</p> <p>There's nothing good about it at all. Hitting anybody, a woman or your wife, is a bad situation, but it happens in families. It happens more often than we want it to, of course. And sometimes there's blame on both sides, sometimes not.</p> <p>Did [Client] choose to have a 13-year-old mother? Is that something that you would choose? Is that something that [Client] chose? I want a 13-year-old mother, that's what I want. Did [Client] choose for their -- for his grandfather to sell his mother? Sell her as property. Is that your choice in grandpa and papa? Is that your choice in how you want your beginnings to be? Is that a label, or is that significant? Did [Client] choose to be conceived in a violent rape? Is that -- would that be your choice? Is that just a label, or is that significant? You know it is. Did [Client] choose [Client' Father] as his father? Would that be your choice for a pop? Did [Client] choose to be brought into a world where there was no support system, no grandparents?</p> <p>What we tried to paint for you all in this case, to illustrate for you all on the horrible upbringing for [Client] is that a severe life of no safety or security for a young boy would lead to misery and despair.</p>

	<p>His dad is a crack addict. [Client] doesn't have the opportunity for the structure that Jonah had.</p> <p>No nexus is required between that mitigation evidence that we just went over and the offense itself.</p>
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APPENDIX B Interpretation of Kappa Value.

Kappa Value	Interpretation
Below 0.40	Poor agreement
0.40 – 0.75	Fair to good agreement
Over 0.75	Strong agreement

APPENDIX C Interrater Reliability & Kappa Coefficient Results.

	<i>Primary Themes</i>	<i>Kappa Coefficient</i>
Case 1	<i>Appeal to a higher loyalty</i>	1.0000
	<i>Appeal to good character</i>	0.9952
	<i>Denial of responsibility</i>	1.0000
	<i>Personal & moral judgement</i>	1.0000
Case 2	<i>Appeal to a higher loyalty</i>	0.6166
	<i>Appeal to good character</i>	0.8768
	<i>Denial of responsibility</i>	1.0000
	<i>Personal & moral judgement</i>	0.6923
Case 3	<i>Appeal to a higher loyalty</i>	0.9521
	<i>Appeal to good character</i>	1.0000
	<i>Denial of responsibility</i>	0.7886
	<i>Personal & moral judgement</i>	0.8376
Case 13	<i>Appeal to a higher loyalty</i>	0.8101
	<i>Appeal to good character</i>	0.7722
	<i>Denial of responsibility</i>	1.0000
	<i>Personal & moral judgement</i>	0.9957
Case 14	<i>Appeal to a higher loyalty</i>	0.5000
	<i>Appeal to good character</i>	0.9532
	<i>Denial of responsibility</i>	1.0000
	<i>Personal & moral judgement</i>	0.8061
Case 16	<i>Appeal to a higher loyalty</i>	0.4843
	<i>Appeal to good character</i>	0.7234
	<i>Denial of responsibility</i>	0.8394
	<i>Personal & moral judgement</i>	0.9548

APPENDIX D Statistical Results of Data Analysis.

	<i>Personal and Moral Judgement</i>	<i>Appeal to a Higher Loyalty</i>	<i>Appeal to Good Character</i>	<i>Denial of Responsibility</i>
<i>Number of Cases</i>	11	15	15	15
<i>Coding References</i>	28	85	131	139

APPENDIX E Personal and Moral Judgement Statistical Results.

Number of Coding References	Number of Cases
0	7
2	7
3	3
5	1

APPENDIX F Appeal to a Higher Loyalty Statistical Results.

Number of Coding References	Number of Cases
0	3
3	4
4	1
5	3
6	2
7	2
8	1
9	1
10	1

APPENDIX G Appeal to Good Character Statistical Results.

Number of Coding References	Number of Cases
0	3
1	1
2	1
4	1
5	2
7	3
10	2
11	2
14	1
16	1
21	1

APPENDIX H Denial of Responsibility Statistical Results.

Number of Coding References	Number of Cases
0	3
1	1
2	3
3	1
5	1
7	1
8	1
10	1
11	1
14	1
16	1
17	2
24	1

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