

The Use of Risk and Protective Factors as Mitigation in Death Penalty Cases

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Abstract: In this paper the role of a sociologist/criminologist as a mitigation expert is briefly examined. The author of this paper has worked as a sociologist/ mitigation expert for almost 30 years in over 300 sentencing hearings/penalty phases most of which were capital murder but have also included manslaughter, habitual offenders, miller cases; and other cases of violent crimes where the sentence is plastic. The author suggests that when the factors are so numerous that the concepts of protective/risk factors be used to organize the data presented to the jury in the death /sentencing phase of the trial.

Key concepts/words: mitigation, risk factors, protective factors, expert witness

Sociology and Mitigation

The criminal trial in first-degree murder cases is divided into two phases. The first phase is to determine the guilt or innocence of the defendant. If the defendant is found not guilty the trial ends. In most states if a defendant is found guilty of capital murder and he or she is not legally insane, the jury decides life or death; in all other states the judge must decide on a sentence. In a death penalty case this represents the second phase and involves another trial, but with the same actors in the same settings.

Sociology has immense utility for criminal defense (Dayan, 1991; Forsyth 1995, 1996, 1997, 2007, 2013, 2014, 2015a, 2015b, 2024, Forsyth & Bankston 1997; Forsyth & Forsyth 2007; Hall & Brace, 1994; Rose, 1967). The foundation of sociology's contribution to the explanation of crime stands upon a subtle principle

of law, that is “by happenstance” criminal penalties cannot be inflicted upon a person for being in a condition that the individual is powerless to change. The legal basis for mitigation is that there are aspects of the defendant’s life which demonstrate that he/she is not deserving of the maximum penalty for a crime; hence he should receive a shorter/lesser sentence. The data obtained and delivered by the sociologist also has other uses. It can be used to negotiate a plea so that a trial never takes place (Forsyth & Mire, 2006). The sociologist’s report can be filed in the record to be used at later hearings to reduce the sentence of the client. Finally, the sociologist’s data can be used on appeal to convince the reviewing court that legal errors have more worth because of an inappropriate or disproportionate sentence. The use of sociology may be clearest in the penalty phase of a capital murder trial. The job of the defense in the penalty phase is to explain the criminal behavior of the client so that he or she will not be sentenced to death. The goal of the attorneys and the various experts involved in a specific case is to present one explanation to the jury that has various distinct but parallel parts.

In essence, arguments focus on two adversarial positions: the circumstances of the crime versus the social psychological qualities of the client (Brodsky, 1991; Dayan, 1991; Forsyth, 2013; 2014; 2015a; 2015b, 2024; Forsyth & Bankston, 1997; Najmi, 1992; Thoresen, 1993). Sociology is relevant to the questions of sentencing in capital murder cases. Sociology expands and explains the boundaries of mitigating factors. The expert/sociologist will attempt the more difficult job of explaining why structural, cultural, and familial factors are at least partially to blame for the circumstances of the crime. Any conviction for a crime has a sentencing phase or hearing. A typical sentencing hearing is less dramatic than that of first-degree murder because the stakes are not as high.

The penalty phase of a death penalty trial can take place months after the trial or the next day. There can be a jury or no jury with the judge determining the sentence of life or death. It is the same jury, same judge, same prosecutors, and the same defense attorneys. There are opening and closing arguments by both sides again. The sentencing or penalty phase of the trial cannot begin sooner than 12 hours after the guilt phase. Different states have longer periods between phases and the trial judge can allow a longer period. The importance of this phase is that the ultimate punishment of death is possible (Forsyth, 1995, 1996, 1997, 1998, 1999, 2024; Forsyth & Bankston, 1997).

Any matter the judge regards as relevant to sentencing may be offered as evidence and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present arguments on whether the death penalty should be used (Lewis & Peoples, 1978). The jury (or judge) weighs aggravating and mitigating circumstances before imposing a sentence of death or life in prison (life in prison has a variety of meanings dictated by individual states). The position is an imposing one because these twelve individuals have just found beyond a reasonable doubt that the defendant committed first degree murder. But now the defense is asking that the defendant not be sentenced to death because of the defendant's admirable qualities or due to a life which predisposed him or her to the crime. The prosecution offers aggravating circumstances. Generally, aggravation includes actions or occurrences that lead to an increase in the seriousness of a crime but are not part of the legal definition of that crime (Oran, 1983). These are the intentionality of the act, the propensity of the murderer to kill again and the heinous, atrocious, and cruel nature of the murder.

The most consequential ingredients for the defense are mitigating factors. Mitigating circumstances are facts that do not justify or excuse an action but can lower the amount of moral blame, and thus lower the criminal penalty for the action (Forsyth, 2024; Oran, 1983). Most states' law recognizes any relevant evidence as plausible mitigating testimony, but generally classifies the factors to be appraised as such: The offender has no significant prior history of criminal activity; The offense was committed while the offender was under the influence of extreme mental or emotional disturbance; The offense was committed while the offender was under the influence or under the domination of another person; The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct; At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication; The youth of the offender at the time of the offense; The offender was a principal whose participation was relatively minor; or any other relevant mitigating circumstance. In all other sentencing hearings, there are less guidelines, but it remains aggravating v. mitigations factors.

Risk and Protective Factors

The problem is how to organize and present the data so that a jury can make sense of expert testimony. The theory of mitigation must be understood by the jury so it cannot be a complicated puzzle. Indeed, even the concept of mitigation must be explained because jurors must know what you are trying to do. This expert recently used the concepts risk and protective factors in the penalty phase of a death penalty case (Forsyth, 2024). The reasons were that the risk factors were so numerous it was doubtful the jury could organize all the factors in a complex five generational social history. While the risk factors were numerous the protective factors were nonexistent. Hopefully that dramatic comparison would sway some of the individual jurors toward a life sentence.

Risk and protective factors have 4 domains: Peers, Community, Family, School. The risk and protective factor model of prevention is an empirical based method/theory for revealing how prosocial and antisocial behaviors among youth influence delinquency and future criminality (Catalano et al., 2005). This model is based on the simple premise that to prevent a problem from happening, the factors that increase the risk of that problem developing need to be identified and then find ways to reduce the risks. Risk factors include characteristics of school, community, and family environments, and of students and their peer groups known to increased drug use, delinquency, school dropout, and violent behaviors among youth (Vogel & Keith, 2015).

Protective factors are situations, events, settings, or characteristics that decrease the likelihood that young people will become delinquent and adult criminals. Protective factors shield youth from contexts that contribute to delinquency or provide the resiliency to avoid crime.

RISK FACTORS—expert must describe which ones are present in the specific defendant's social history

- Pregnancy and delivery complications, Difficult temperament,
- Poor Black Male,
- Mother smoking/alcohol consumption/drug use during pregnancy,
- Teenager mother
- High turnover of caretakers
- Poorly educated parents

Parental substance abuse or criminal behavior
Poor parental child communication
Poverty/low social economic status
Serious marital discord
Large family size
Aggressive/disruptive behavior
Persistent lying
Risk taking and sensation seeking
Harsh and /or erratic discipline practices
Maltreatment or neglect
Television violence
Stealing and general delinquency
Early onset of other disruptive behaviors
Early onset of illegal substance use and sexual activity
Withdrawal behavior
Positive attitude toward problem behavior
Victimization and exposure to violence
Poor parental supervision
Poor academic achievement repeating grade
Truancy
Negative attitude toward school
Poorly organized and functioning schools
Peer rejection
Residence in a disadvantaged neighborhood
Residence in a disorganized neighborhood
Drug dealing in area.
Availability of weapons.
High unemployment in area
school dropout
gangs in immediate area

PROTECTIVE FACTORS—expert must describe which factors are present in the specific defendant's social history

Opportunities for Prosocial Involvement

Rewards for Prosocial Involvement

Prosocial Involvement

Interaction with Prosocial Peers

Belief in the Moral Order

Religiosity

High performing schools

Commitment to school (an investment)

Success in conventional activities

White Female

High SES family

Frequent shared activities with parents

High parental expectations

High academic achievement

Consistent presence of parent at key times (when awakening, school activities, arriving home from school, before going to bed)

The expert must be prepared to define each factor, to explain the presence or absence of each factor in the defendant's life, and the theoretical basis for each.

The Theory of Risk and Protective Factors

Individuals are influenced by the attitudes and behaviors of family, community, peers, and school. Associations with deviant values can increase the likelihood one's own values and norms are increasingly criminal/deviant. This can concentrate one's social influences to delinquents/criminals. A mutually reinforcing loop of escalating deviance and weakened ties to family and to school lead to more delinquent involvements, which are then likely to further weaken these ties to family, school, community, and prosocial peers. (Farrington, Piquero, & Jennings, 2013; Forsyth, 2024; Sutherland, 1939).

Schools are places where some students are rejected by conventional others and others can learn conventional social skills. This positive behavior accompanied them throughout early schooling experiences, during which these children can practice prosocial skills and obtain necessary academic skills. One of the earliest institutions that may intervene in a life of deviant behavior is the school.

Importantly, these developmental stages are interrelated; if an individual can form strong ties to the family in early childhood, he or she is more likely to

succeed in forming strong ties with peers and teachers in school. Students who are committed to their education and perform well in school are less likely to engage in later delinquency and drug use.

Along the prosocial path, youth who are given opportunities to be actively involved in the classroom can learn and practice social and academic skills. As these students improve their skills, they are recognized and rewarded for their involvement. This positive reinforcement leads to strong attachment to prosocial teachers and peers and commitment to education and other prosocial activities, resulting in normative beliefs that prevent antisocial behavior.

Essentially, students who are weakly attached to their schools and have little dedication to educational goals are more likely to engage in crime than those who do not possess these qualities. The consistency seen in deviant behavior is partly a result of this behavior undermining social bonds early in life, which then reduces youth opportunities to participate in conventional experiences such as those found in school. This loss can then continue the cycle of school failure and rejection by the school community, which could potentially lead to a lifetime of offending (Sampson & Laub, 1997; Jennings & Reingle, 2012; Moffit et al, 2002). This reduces opportunities to learn and practice prosocial skills, leaving them with a behavioral repertoire limited to aggression, hostility, and violence. Eventually, youth who have been consistently rejected by teachers and prosocial peers react by withdrawing, continuing the cycle of lost conventional opportunities. This cumulative effect also occurs through a loss of academic skills. This leads to limited future educational and/or occupational opportunities, which may then foster offending in adulthood. These youth are less likely to pursue higher education, or have successful jobs, or attract a prosocial significant other; failure in these areas increases the likelihood of committing a deviant act which reduces inhibitors that would impede later deviance. Interactions with deviant others lead to stronger antisocial skills, which are then rewarded and reinforced by deviant peers. This strengthens the attachment to these peers, commitment to deviant activities, and belief in antisocial norms. One of the keys in Sutherland's original theory of differential association is if the youth *perceive* these criminals to be successful the socialization will be even more complete. Such communities breed criminals because conventional success moves out with the unsuccessful staying. *Successful* criminals that remain become role models. These multiple co-occurring problems have different labels: a *problem*

behavior syndrome (Jessor & Jessor, 1977); the *generality of deviance* (Gottfredson & Hirschi, 1990) or *cumulative continuity* (Moffitt, 1993; Sampson & Laub, 1997).

Conclusion

Schools are social institutions that may promote positive social bonds. They typically provide access to conventional role models and encourage students to form attachments to these prosocial others, who, in turn, may reinforce positive behavior demonstrated by the students. This should reduce deviant behavior because of the value youth place on these relationships. Schooling also establishes commitment to conventional goals, such as students' current education as well as later educational and occupational attainment. Again, this is likely to reduce deviant behavior because of the value youth place on these goals. In addition, schools encourage student involvement in conventional activities, which helps individuals form attachments to prosocial peers and reduces unsupervised free time that may be spent on deviant activities (Payne & Kelly, 2016).

Education may also increase access to social capital (Ford & Schroeder, 2011), a phenomenon that has not been a prominent subject of previous research. Students who graduate high school may continue with post-secondary education, thereby providing them with greater status and a more advantageous social position. These individuals tend to have more opportunities to get better-paying jobs, have more successful marriages, and have greater influence in society. They are also likely to have larger and more supportive social networks, which can further increase their social capital.

Discussion

All expert witnesses and criminal attorneys must stay aware of the emerging literature, including critics. Attorneys are now more likely to hire their own experts to rebut opposing experts in all fields. The consequence of this point was obvious in a recent case where a psychiatrist testified for the prosecution in a death penalty case. The support for his testimony was his own theory which had been discredited by several scholars. The defense attorney offered no rebuttal. Even as part of the defense team I had not been made aware of this witness. If I had been informed, I would have made the defense attorneys aware of this other research, advising him to hire a psychiatrist to refute the prosecution's expert witness. Suffice to say

this brings up several problems, but one paramount to this issue is that long-time experts (and attorneys) must keep up with the changing literature.

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