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The Social History in Death Penalty Defense Advocacy

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Abstract

This article offers an epistemologically focused descriptive account of the "social history" in American death penalty defense advocacy. Under British scientific empiricism, sufficient investigation forms the basis for representations that aspire to be adequate to investigated realities. As defense advocates see it, however, the very idea of humanity resists the goal of epistemological finality that comes with empiricist adequation. I argue that the social history investigation instrumentalizes this aesthetic of investigation-then-representation, allowing advocates to affirm to themselves the humanity of their clients while sidestepping the goal of adequation.

This article seeks to provide a description of the "social history" in American death penalty defense advocacy. The psychologist Craig Haney, regarded as perhaps the leading academic theorist on capital sentencing (see Haney 1994, 1995a, b, 1997, 2004, 2005), notes that:

> Social histories are not excuses, they are explanations…In each case, the goal is to place the defendant's life in a larger social context and, in the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically important events has been shaped and influenced by them (Haney 1995a, pp. 560–561).

This piece explains the open-ended, generously receptive processes of data collection that support the conclusions of "final analysis" that Haney explores in his work. Indeed, a recent string of rulings from the United States Supreme Court has emphasized the importance of reasonably comprehensive social history investigations as a sound factual basis for strategic decisions on the part of capital defense counsel (see *Rompilla v. Beard* 2005; *Wiggins v. Smith* 2003; *Williams v. Taylor* 2000. These rulings speak directly to longstanding principles of sentencing advocacy that require jurors to be able to consider "any aspect of a defendant's character or record and any of the circumstances of the offense" (*Lockett v. Ohio* 1978, p. 604)—in particular, those that speak to "compassionate or mitigating factors stemming from the diverse frailties of humankind" (*Woodson v. North Carolina* 1976, p. 304).[Footnote1]

The social history investigation forms a key component of the broader practice of capital sentencing "mitigation." As one commentator has noted, a capital case "is a trial *for* life in the sense that the defendant's life is at stake, and it is a trial *about* life, because a central issue is the meaning and value of the defendant's life" (Goodpaster 1983, p. 303). It is absolutely vital in capital cases that advocates research and present "anything that might persuade a jury to punish with less than the death penalty" (Lyon 1991, p. 703). A central theme in the practice of mitigation is the imperative to humanize the client. In an interview with me, Anthony Amsterdam—the lawyer whose win in *Furman v. Georgia* temporarily halted executions across the country in the mid-seventies—pointed out that "to rupture the defendant from the environment is to dehumanize." A human being becomes dispensable once his life can be summed up in the evil that it must take to commit a terrible crime. By contrast, "the definition of humanity involves connectedness." Unfortunately for mitigation's advocates, the laypeople who comprise the jury often arrive at the courtroom with perceptions that prevent them from identifying with the client (see Caldwell and Brewer 2008). The challenge for defense counsel, said Amsterdam, is somehow to "reconstruct the entire set of connections" that laypeople believe themselves to have with the client, empowering these jurors with the insight that they can personally relate to the defendant on human terms.

The work of humanization is as untrammeled and creative as good advocacy will allow. Statutory schemes may specify some of the factors that jurors are obligated to consider as elements in mitigation—e.g., the defendant's impaired capacity, the presence of unusual and substantial duress, mental or emotional disturbance at the time of the crime, relatively minor participation on the part of the defendant, the lack of prior criminal convictions, severe or emotional disturbance at the time of the offense, or the victim's participation in the conduct that resulted in death (see, e.g., 18 U.S.C. § 3592(a) 2006). Mitigation, however, is by no means limited to these factors. The U.S. Supreme Court has held that "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" (*Tennard v. Dretke* 2004, p. 10). For defense advocates, the purpose of the social history investigation is to provide the knowledge base necessary for configuring Amsterdam's "set of connections" in a way that most resonates with jurors.

This article frames its description of the social history with a brief overview of the deeper epistemological structure in which mitigation investigations take shape. I trace how British scientific empiricism was formulated through the mutual influences of science and law on the other. These developments produced an aesthetic of knowledge production—now entrenched in popular western thought—in which investigation (the exploring, researching, questioning, discovering) necessarily precedes representation (the telling, showing, demonstrating, advocating). One important element of empiricism is its aspiration to a sense of finality in knowing: representations are supposed to be adequate to the investigated realities that such representations are intended to stand for.

The problem as capital defense advocates see it, however, is how readily the goal of equating word to world lends itself to the prosecution's simplistic reductions. The full complexity of a defendant's humanity is all too easily stripped down to the horror of a single crime. More fundamentally important, I will explain, is the

difficulty that defense advocates themselves frequently encounter in struggling to relate to their clients on human terms. For these reasons, there is a sense in which the vast quantities of information compiled in the social history prioritize the perpetuation of investigation over the conclusiveness of facts. By consciously positioning themselves to receive the unexpected stories and revelations that an unstinting, wide-ranging social history investigation will produce, defense attorneys and investigators are looking to affirm the humanity of the defendant they represent. This is a vital and too often-overlooked aspect of defense advocacy: before advocates can persuade jurors to appreciate the full range of their client's humanity, they must themselves be ready to appreciate it first. In this regard, the goal of investigation is not an empiricist one, whereby advocates strive to produce representations that are fully adequate to the defendant's being. Instead, the social history is an undertaking that, via the very enactment of that undertaking, affirms the value of the defendant's life by making it something that one can always know more about. The social history investigation presumes the humanity of the client, even as it simultaneously sets out to prove it.

My observations of the practice of capital defense advocacy are based on ethnographic fieldwork conducted from April to December 2006. Research sources include case files, practitioner training materials, and open-ended interviews with attorneys, investigators, and experts held to be guiding lights in the national capital defense bar. In addition, this article's analysis is necessarily shaped by my own firsthand experiences as a social history investigator in several capital cases. Drawing from this qualitative research, the article approaches its description of the social history through an explanation of the processes by which defense advocates exploit the empiricist aesthetic. Supreme Court case law is clearly empiricist in this regard—before strategic representation must come sufficient investigation. But even though advocates appear to be subscribing to the first part of the empiricist aesthetic when investigating the social history, they are in a sense sidestepping empiricism's ultimate goal of adequation. When it comes to finding their own personal connections with the lives they defend, advocates are more interested in the humanizing effect of knowledge production, rather than any sort of epistemological finality.

The Jurisprudential "Fact" and British Scientific Empiricism

According to historians of science, the various epistemological developments that form the roots of British scientific empiricism arose from a growing discomfort with influential precepts of classical natural philosophy (see, e.g., Dear 1995; Poovey 1998; Shapiro 2000). Aristotelian "physics" enlisted observations of nature in order to confirm general principles that everyone, including laypeople, already knew. The Anglo empiricist tradition carried on the notion that knowledge has its basis in experience, *contra* figures like Descartes, who argued for *a priori* knowledge that exists independently of perception. Where the empiricists significantly departed from classical philosophers was in their new focus on particular events, as opposed to general principles. Before, individual cases were taken to be manifestations of some already accepted generalization. Developments in the 1600s, particularly in the work of Francis Bacon, were instrumental in shifting the emphasis of scientific thought from the general and already-known to the anomalously particular and as-yet unknown. Broadly speaking, then, the rise of empiricism during the Scientific Revolution caused a profound shift in what counted as knowledge. In place of verification and common wisdom, philosophers came to valorize experiment, investigation, and discovery (see Dear 2001).

Throughout this all, the construct of knowledge known as the "fact" occupied an unsteady place in the currents of epistemological debate. Popular modern understandings of "fact" hold it out as "a datum of experience, as distinguished from the conclusions that may be based on it" (Daston 1991, p. 345). In the popular view, a fact is a given—a self-evident particular that presents itself via experience, as a datum (Latin *dare*, "to give"). But facts were not always given, nor were they always self-evident. Before Bacon's writings, facts were *done* (Latin *facere*, "to do"). Original conceptions of fact trace back to the idea of action—in particular, deeds alleged to be illegal,

as when criminal lawyers today argue whether or not occurrences happened “after the fact” (Daston 1991, p. 345). And the fundamental principle of Anglo-American criminal jurisprudence, of course, is precisely that the “fact” of the crime is never a self-evident given. In a system based on the presumption of innocence, facts are allegations, and as such, must be proven.

According to Barbara Shapiro, the conceptual evolution of fact in the cultural consciousness “from something that had to be sufficiently proved by appropriate evidence to be considered worthy of belief to something for which appropriate verification had already taken place” is a striking achievement (2000, p. 31). In the legal arena, the contested nature of “fact” is transparent: the disposition of cases turns on the facts, and in an adversarial system, each side will insist on its version of what the facts are. In their original context of jurisprudence, then, facts were contested; they needed to be advocated. In short, they were far from self-evident givens.[Footnote2]

Anglo common law sowed the seeds for empiricism’s epistemological reorientation toward the discovery of unknown particulars. In the legal arena, the particulars of each case were more important than generalities that everyone already knew. What counted as knowledge were “facts”—specific truths to be arrived at through processes of discovery and contestation. And here, in the juridical prefiguring of scientific empiricism, there arose a certain sequence of knowledge production: first comes the investigation—the perceiving, experimenting, discovering, gathering—then comes the representation—the organizing, selecting, writing-up, advocating. This is the same sequence that informs “empirical” ways of investigative knowing, including the work of death penalty mitigation.

The Problem of Adequation

Recent works in social studies of science have queried this paradigm of “the facts in the world and the description after it” (Maurer 2005, p. 16), the idea that data are preexisting givens, referents to which analysis can then be applied (also see Keane 2003; Latour 1999). This ordering sets up what Latour (1999) called the problem of “adequation.” Any representation is bound to be an imperfect abstraction of reality; hence, there arises the difficulty of how to construct representations in a way that is sufficiently adequate to the realities they are supposed to stand for. On the other hand, the adequation of word and world was not a concern for John Locke’s brand of empiricism. For him and other seventeenth century thinkers, the challenge was to come up with an epistemology that shook itself loose of the church’s insistence on absolute knowledge. “Truth” no longer had to take on the form of unquestionable, God-given proposition. It was enough that men exercise their senses and rationality in arriving at conclusions that, in measured probability, were good enough to accept as reasonably certain—facts, one might say, beyond a reasonable doubt (Shapiro 1991).

The courtroom setting has long made the sufficiency of adequation the very criterion for resolving legal cases. For example, a criminal defendant’s culpability rests on the government’s success in investigating and representing facts that compose the doctrinal elements of the offense. Prosecutors must establish that their representational abstractions—the words they speak and write, the witnesses they procure, the corroborating documents they submit into evidence—are adequate to the reality they are advocating. Representations must be good enough to reach a certain level of moral certainty, such that the quality of adequation lies beyond the doubt of a group of reasonable peers.

In theory, the defense’s job is to hold the government to its burden of proof—but defense advocates insist that capital cases are out of the ordinary. The reality is that the defense shoulders an affirmative duty to humanize the client. And as many in the capital defense bar see it, adequation is eminently troublesome, for it seems that no set of abstractions can ever hold up to the complex totality that is a human life. One mitigation specialist said to me, “The client is a different person for every person who knows him.” He is an unstable referent, too vast in

his complexity to be understood, much less represented, in his entirety. Moreover, the limits of the courtroom's media of communication cannot possibly allow for the unwieldy quantities of data that are produced in mitigation investigations.

An even greater problem, however, is how easily the empiricist goal of adequation plays into the prosecution's mission to execute the defendant. Craig Haney, the psychologist whose quote opened this article, has argued that the very possibility of capital punishment relies on various "mechanisms of moral disengagement": the defendant is dehumanized, his differences exaggerated, fears of future dangerousness exploited, the consequences of decision-making trivialized, and moral responsibility for the defendant's death diverted elsewhere (Haney 1997). Each of these mechanisms cultivates a kind of willful ignorance on the part of the decision-maker—an inclination to shut himself off from knowing more. When left with "no personal history, no human relationships, and no context" with which to understand capital defendants, the juror has "no explanation for what they did except for their own personal evil" (Haney 1995a, p. 550). Those human beings whom prosecutors successfully reduce to the evil act are precisely the ones whom jurors are able to sentence to death.

The impulse to view capitally charged individuals as immoral (or amoral) decision makers is a powerful one. Indeed, experienced defense lawyers and investigators recognize how prone the defendant's own advocates can be to it. In training sessions on trust-building with the client, one highly regarded mitigation specialist emphasizes that the words advocates use to think about the client directly impact the team's efforts to represent him. She uses the following visual to make the point:

MISPERCEPTIONS AND UNHELPFUL LAY OBSERVATIONS
ASSHOLE *** LIAR *** MANIPULATOR *** COLDBLOODED *** DEVIOUS *** SLEAZY *** UNCOOPERATIVE *** HARD TO GET ALONG WITH *** COLD *** HARD HEADED *** JUST PLAIN MEAN *** LONER *** ANGRY *** STREET SMART *** STUBBORN *** BED WETTER *** FIRESETTER *** ANIMAL *** CRUEL ANIMAL TORTURER *** SPOILED SOCIOPATH *** DISRESPECTFUL *** DIFFICULT *** LAZY *** LEADER *** DR. JEKYL & MR. HYDE *** EXPLOSIVE *** WALKING TIME BOMB *** EVIL

Helpful Observations
In a haze *** sad *** afraid *** slow *** not like the other children *** different *** clumsy *** sickly *** hungry *** anxious to please *** ashamed *** playful *** class clown *** retarded *** made fun of by others *** left behind *** ragged *** couldn't understand simple things *** gentle *** loved animals *** always took the blame *** easily led astray *** afraid to look at you *** didn't like to talk *** learned not to cry *** worshipped his brother *** protected his sister *** afraid to talk about his home *** jumped at the slightest sound *** always worried *** numb *** glazed over *** stared into space *** wasn't all there *** wandered around *** walked on eggshells *** couldn't sleep *** lost his appetite *** couldn't tie his shoes *** couldn't learn to read and write *** nervous and shakey *** rocked back and forth *** banged his head *** passed out

By refusing to relate to the defendant with patience and sympathy, advocates deny themselves the ability to foster meaningful dialogue with him and to appreciate the full depth and range of the way he experiences the world. And when the client's own advocates fail to cultivate in themselves a thought process for discovering and embracing what makes him human, they are unlikely to be able to persuade jurors to do the same.

The ability to reveal to jurors their human connections with the defendant turns on the willingness of defense advocates to discover their own points of connection with him. One attorney I spoke to—a law professor and the director of one of the most highly regarded hands-on training programs for capital defense litigators (see Kreitzberg 1995)—described the social history as a vehicle to accomplish this. The social history investigation is not simply about casting the client as a victim or making him out to be a "good guy." It is impossible to predict

what will turn up, so advocates should not shortchange their investigation with predetermined notions. Instead, the goal should be to revel in the impossibility of explaining everything that one could possibly want to know about the defendant.

In so doing, the undertaking of the investigation itself—with its implication that the defendant is worth knowing, and hence worthy of extensive efforts to get to know him—at once presumes and sets out to prove the humanity that lies inside him. This is a critical purpose of the investigative undertaking known as the social history, and one that is distinct from the empiricist project of adequation.

The Nature of Social History Facts

In a training guide on penalty phase investigations, a veteran mitigation specialist offered the following by way of introduction:

> An essential skill in mitigation investigation is the ability *not* to know. You must not jump to conclusions. There are no investigative shortcuts. You must continually reassess the information you have gathered. Capital cases require hundreds of hours of investigation, first to figure out what your client's history is and what went wrong, and second to place that information thematically in the context of various social and scientific disciplines. By grasping at the first theories and information you develop, you may be missing far more persuasive evidence.

The "ability *not* to know" presumes a willingness on the part of the investigating advocate to suspend judgment. As one attorney said to me, the point of "nonjudgmental reception" is to put off "trigger-happy strategizing." According to her, the natural tendency of many lawyers is to cut to the chase, to structure and thereby limit investigation by hewing to a theory of the case. But it is only when the advocate is sufficiently apprised of the facts—when he has figured out what the client's history is—that he can start producing meaningful knowledge about the client—relating that information thematically, by employing the various disciplinary resources at his disposal.

In her prescriptions, this mitigation specialist leans on the empiricist aesthetic in order to justify a kind of generous anticipation. If presentations of strategy are supposed to follow the objective collection of data, then investigation, she insists, must rid itself of pretensions to knowing. Before the construction of knowledge must come discovery, unbiased and unhindered. In consciously resisting the pull of "first theories and information," advocates must anticipate that what seems insignificant at the moment may turn out to be critical down the line. Just about anything carries the potential to become important. Hence, investigators need to take in as much as they can, subjecting themselves to an information-saturated process of immersion. One legal analyst—the Reporter for the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* [Footnote3]—has noted that capital defense advocacy demands investigations "of an intensity and complexity unknown to any other legal field" (Freedman 2003, p. 904). Interviews are conducted, archives pored through, informant networks established. The ranks of data swell. And throughout this all, advocates have their mind on the gargantuan task of obtaining, making sense of, and ultimately communicating to strangers "the fullest information possible" (*Lockett v. Ohio* 1978, p. 603) about a human life.

Mitigation's advocates hold the social history to be their most important construct of knowledge. One advocate described the social history as "the bulwark of mitigation." Various commentators have defined the "fundamental task" of mitigation in terms of the need to conduct a social history that is as comprehensive as possible (Leonard 2003, p. 1145; also see Miller 2003, p. 1137; White 1993, pp. 355–356). For practitioners, the significance of the social history lies in its provision of facts that are relevant not only to sentencing, but also to

legal issues that affect all stages of a capital trial. In a declaration supporting a motion to appoint a mitigation specialist, one investigator writes,

> Developing a social history is the crucial first step in determining the range of mitigation evidence that counsel can offer at penalty phase. A social history also serves the purpose of allowing counsel to rebut, defeat, or mitigate evidence offered by the prosecution as aggravation. Finally, a competent mental health evaluation by psychiatrists, neurologists, psychologists, or social workers requires reliable and independently documented data about [*defendant*] that forms the foundation of a social history. Only with properly gathered and documented history can mental health professionals determine the presence, severity and effect of mental disorders and life experiences that affected [*defendant's*] behavior.

Another practitioner specifies the various technical issues that may be affected by mental health evaluations and, by extension, the social history facts that inform them. The excerpt below appears in a statement submitted to the court to explain the purpose of mitigation investigations:

> The social history is the necessary first step in any reliable determination of the offender's mental state at the time of the offense, the reliability and voluntariness of any statements or admissions made to law enforcement or others, competency to aid and assist counsel and to understand the nature of the proceedings, competency to waive any rights that are afforded him, and, of course, presence of mitigation.

On several levels, the law presumes that the defendant possesses uncompromised agency as a decision-maker who has the capacity to navigate the procedures before him. By bringing various challenges to this presumption through the vocabulary of mental health, defense advocates create opportunities to frontload evidence that exposes the client's impairments and vulnerabilities. But before this can happen, investigation must be conducted, empirically, as the "necessary first step" to accumulate credible information upon which legal arguments can be based.

The social history thus provides a knowledge base not only for the substance of the penalty defense proper, but also for a variety of technical matters that can prefigure it. The wide-ranging, heavily empirical work of data collection that goes into the mitigation investigation creates a pool of information with which to create different kinds of knowledge—challenges on procedural grounds, proof of affirmative defenses, counterfactual claims to contest the government's allegations, psychological profiles, childhood tales, character sketches, historical narratives, reconstructions of different worlds of meaning. To understand the adaptive nature of social history facts requires a closer examination of what, exactly, those foundational facts are about, and how they become manifest as artifacts of information. I elaborate on these facts to impart a better sense of the qualitative nature—and the quantitative unwieldiness—of the "givens" that comprise social history "data."

According to one of the leading academics and testifying social historians in the field of mitigation (see Andrews 1991), every aspect of the defendant's social history needs to be contextualized in broader ecological and socio-cultural factors. The social history serves as a source of facts that help to explain how larger forces of history, politics, ethnic and racial conflict, war, population movements, resource distribution, and institutional dynamics bear out in concrete, on-the-ground effects on people's lives. In order to foster an appreciation for an individual's situated position in time and space, mitigation investigators typically research at least three generations of the defendant's family. At a minimum, competent advocates learn about his grandparents, parents, and the defendant himself along with his siblings. Usually, there is some investigation of his great-

grandparents' generation. Almost always, practitioners recommend meeting and getting records for the client's own children, if he has any.

The social history chronicles the defendant's own life beginning with the circumstances surrounding birth—as one mitigation specialist put it, "vulnerabilities that exist from the moment of conception." But while the Supreme Court has expressly called for explorations of the diverse frailties of humankind, advocates are interested not only in how such frailties may have overwhelmed him. They also ask how the client may have desperately, even heroically, attempted to overcome them. Investigators are careful to account for the nature of the client's relationship, the mother's health during pregnancy, any complications that may have arisen in utero or postpartum, the quality of early health care, and whether the client's mother experienced birth or aftercare problems with any of her other children. For the defendant's development up to the age of eighteen, the social history pools hundreds of facts that speak to a variety of issues: developmental support; various aspects of the interpersonal dynamics within the household (emotional nurturance, communication, approaches to problem solving, values, authority structure, discipline, coalitions within the family, caregivers' perceptions of their status vis-à-vis the wider community); signs of abuse, neglect, or sexual exploitation; housing conditions (frequency of moves, transience, quality of living environment); physical and mental health; social networks; religious beliefs; substance abuse by the defendant or household members; major losses or psychological trauma; educational and employment experience; sexual maturity; skills development; the presence or lack of mentors; ethnic or cultural community context; and involvement with formal institutions (law enforcement, social services, courts, the military).

Exploration of the client's adulthood focuses on social relations (with family, co-workers, neighbors, friends, and intimate partners), conditions of habitation, daily living routines, employment and education, military service, contributions to community, substance abuse, physical health, mental health, self-perceptions, and criminal involvement. Advocates emphasize that investigation does not stop with the client's arrest for the capital crime. The U.S. Supreme Court has held that jurors are entitled to consider the testimony of jailers and visitors as evidence in mitigation (see *Skipper v. South Carolina* 1986). This type of evidence has attracted greater attention with judicial rulings on the question of the defendant's "future dangerousness" in prison—whether the fact that he has killed before indicates that he will pose a safety risk for prison staff and fellow inmates. Supreme Court cases have upheld the admissibility of future dangerousness evidence offered by the prosecution as long as the defense can present evidence in rebuttal (see *Ake v. Oklahoma* 1985; *Barefoot v. Estelle* 1983). Advocates believe, and academic research suggests, that the issue of future dangerousness is always prominent on the minds of sentencers, regardless of whether the prosecution argues it, or whether statutes explicitly require its consideration (Blume et al. 2001). With these various developments, forward-looking evidence about the post-arrest experiences of the client's adult life have come to figure as an essential aspect of the social history. The emphasis on adjustment to confinement resonates with recent attention in the practice and in the academy on the impact of execution on the client's families, and especially on his children (see, e.g., Beck et al. 2003, 2007; King and Norgard 1999).

Knowledge about the people with whom the client lived is a critical component of the social history—in particular, facts about those who ostensibly bore the responsibility of raising him. Important considerations pertaining to caretakers include their level of social functioning, occupation, educational level, parenting styles (especially with regard to how they responded to what happened to their children outside the home), mental retardation, mental illness, learning disabilities, substance abuse, medical conditions and medications, disabilities, experiences of violence or sexual abuse, witnessing of others' victimization, and criminal involvement. Facts about the defendant's relations with extended family overlap with many of these concerns. As with broader factors of ecological and socio-cultural context, the defendant's relationships with caretakers

and extended family are assessed at each stage of the defendant's developmental trajectory, from the prenatal period on through infancy, early childhood, school-age years, early and late adolescence, and adulthood.

Academic Disciplines and The Application of Theory

The resistance of "first theories and information" leads not only to the generous receptivity of data; it also inspires a roving search for various theoretical orientations toward knowledge. In the office of the mitigation investigation agency that served as my home base for fieldwork, the bookshelves hold works by criminologists, psychiatrists, psychologists, sociologists, anthropologists, historians, philosophers, geographers, statisticians, scholars of jurisprudence, critical theorists of race, gender, and sexual orientation, journalists, artists, novelists, and religious figures. In a working paper on mitigation investigations circulated in the community, advocates talk about the ecometric theory of Raudenbush and Sampson (1999); the emphasis on neighborhood by Chicago School sociologists Shaw and McKay (1969); Bronfenbrenner's (1979) work on the ecology of human development, theories of trauma from Judith Herman (1992); Glueck and Glueck's (1950) conceptualizations of juvenile delinquency; and Elijah Anderson's (1999) ethnography on the code of the streets.

I return to the passage from the introductory guide to mitigation, which advised to begin with what is known to be fact, empirically, and then to use theory to create stories, testimony, proof, and legal arguments out of it. There are a couple of curious aspects to note about these instructions. First, the empirical fiction of a-theoretical data is recognized by practitioners to be a fiction. I quote here from an article on the mental health dimensions of mitigation, taken from a periodical for criminal defense practitioners:

> In the context of mitigation (as opposed to treatment), diagnostic precision is less significant than a rich and detailed inventory of symptoms, a carefully chronicled phenomenology of the client's mental anguish. Mitigation is an area where the law does not ask what mental disease or defect affects an individual's present functioning or mental state at the time of the offense. Instead, the law asks how individual frailties manifested over the course of a lifetime, whether through co-occurring mental disorders or chronic and episodic manifestations of one disorder…It is the symptoms themselves which are capable of evoking empathy and kinship, by providing context, explanation, and insight into the world as the capital client experiences it.

As these particular commentators see it, the theory of mitigation proper, as it were, centers on empathetic ties, contextual explanation, and personalized experience. Theory is everywhere in this business; and advocates acknowledge that the practice of mitigation is itself already theorized, such that its theorizations may be at once influenced by and in tension with those of the academic disciplines.

The second observation concerns the introductory guide's emphasis on academic knowledge. Practitioners realize and preach that the most effective courtroom testimony comes not from academic experts, but from lay witnesses, whom jurors view to have more organic and thus more credible relationships with the defendant (Sundby 1997). In a declaration on the presentation of mental health issues, an attorney stated, "Experts must highlight and emphasize the important facts about the client and relate their opinions to those facts. Their opinions must be presented as an aid to understanding the facts, not as the primary facts." Moreover, when jurors do find expertise persuasive, they tend to favor presentations that are based more on clinical encounters than academic science (Krauss and Sales 2001).

What, then, is at stake for advocates in making social history facts out to be untheorized, even though they really are? And why should the academy be the source of the conceptual technology that theorizes them, even though courtroom actors are skeptical of disciplinary expertise? Or, to put it another way, why hold facts out to be so matter-of-fact, and why hold theory out to be so theoretical?

For the purposes of investigation's work of collecting information, it is not the theory that is so important, but the "new" data that it generates. Theory has considerable influence on the kinds of data produced in the social history. In the paper draft mentioned above, e.g., advocates explore an "ecological–transactional" approach patterned on models advanced in the field of developmental psychology (see Belsky 1980; Bronfenbrenner 1979; Cicchetti and Lynch 1993). This theory "provides a structure in which to situate the capitally charged client within his/her family dynamic; and to place the client's relationship with family into the neighborhoods he/she was raised and lived in; and to place the family and neighborhood within the broader social environment of his/her life and the social institutions with which he/she had contact." The authors emphasize the importance of delineating the relationships between these nested levels of influence. Consequently, they urge that the social history investigation incorporate a number of additional types of documentary evidence—among them, census records on demographics, public assistance rates, child care burdens, voting percentages, and health insurance coverage; environmental exposure records pertaining to neurotoxic chemicals, and the proximity of these substances to residential neighborhoods and areas where children congregate; information that reflects social participation rates, including volunteering activities and the presence of community organizations; business records that indicate the number and kinds of businesses in the client's community, as well as the individuals or entities who own them; and housing records that document turnover rates, vacancies, proportion of renters versus owners, the percentage of homes with active versus cancelled utilities services, and housing code violations. During the penalty hearing, jurors may learn of this data. They may develop a genuine appreciation for the thick interconnections between client, family, neighborhood, and social environment. But in all likelihood, they will never hear bookish talk of the "ecological–transactional" model that drew investigators to this information.

Thus, one reason that advocates portray theory to be theoretical is because in performing the "empirical" task of data-collection, they wish to underscore the production of data. During the investigation phase, the aim of invoking academic analysis is the discovery of more data, not the theorized presentation of information to jurors. Of course, some disciplinary resources may fit quite readily into representations made to the court. This is particularly true if academic insights can be conveyed through lay witnesses or firsthand clinical opinions. But with respect to investigation, as opposed to representation, advocates have tapped academic theory as a source of knowledge production to appropriate for their ends. By treating data as if they lie "out there," to get a hold of, and by treating theory as if it lies "in the books," to become informed about, mitigation's practitioners wish to foreground the generously receptive work of mediation that lies in between them—the process of informed-getting-*cum*-getting-informed that transacts theory and data.

This is the work of method. Here, what is significant is not the substance of the particular data that investigators find, but the very carrying-on of the investigative process. In a sense, then, the social history investigation is circular in its self-perpetuation. The anticipation of human connections to be found produces a posture of receptivity that leads to provisional findings. These findings fuel a sense of anticipation of even more human connections to be made, and validates a continued sense of receptivity. In the eyes of mitigation's advocates, the humanity of the client is proven even as it is presumed.

To be sure, the empiricist project of procuring "found" data is a crucial aspect of mitigation investigations, and the academic disciplines can help to do that. Indeed, the empiricist vision of early law and society studies had the social sciences providing the facts with which to improve the policies that drive law. As Lawrence Friedman writes of this traditional view, "[P]olicy is policy. Ideally it should be based on sound foundations: facts, data, knowledge" (2005, p. 15). But once again, capital defense practitioners fear that the representational abstractions they draw from the client's life will never be adequate to the profound scope of his humanity. In addition to carrying out empiricism as usual, advocates use the diverse application of theory as a means for placing the "same" data in multiple frames. This theoretical frame-shifting leads to unrecognized insights and

unexpected leads for data, none of which could have been foreseen at the outset. The mediational work of method keeps advocates engaged with information by fostering a sense of anticipation about unpredictable connections yet to be made.

It is the very *dis*inclination of jurors to engage that allows for the denial of his human nature, and the possibility of his death. Especially significant for advocates, then, is to begin by affirming the client's humanity in their own minds, by deliberately perpetuating their own engagement with information. The social history investigation is engagement "in the rough," so to speak, as advocates originally bring themselves to experience it. I cite a popular refrain of mitigation's advocates: attorneys themselves must be willing to understand what they can about the defendant before asking jurors to do the same. The transactions of academic theory with data exert frame-shifting effects that perpetuate an advocates' own engagements with respect to investigation.

Conclusion

The Transactions of "Context"

This article has attempted to provide a descriptive account of the social history investigation in capital sentencing defense advocacy. I began with a broad sketch of the epistemological underpinnings of mitigation investigations. Even though the social history is nominally directed toward the eventual presentation of the client's humanity, I suggested that a more fundamental objective is for defense advocates to establish their own human connections with the defendant. In order to accomplish this, advocates must resist their own tendency to equate the defendant with evil—the same kind of reductionist adequation that enables sentences of death. Thus, even as the social history subscribes to the empiricist aesthetic of investigation-then-representation, it sidesteps the empiricist goal of adequation. By way of conclusion, I underscore the self-perpetuating dimension of the social history with some thoughts on the idea of "context."

In a volume devoted to the notion of context, Roy Dilley describes contexts as "sets of connections construed as relevant to someone, to something or to a particular problem, and this process yields an explanation, a sense, an interpretation for the object so connected" (1999, p. 2). Context refers to the connections that are deemed pertinent to the object being contextualized. The quality of different contextual frames is defined by different notions of what it means to be relevant to the object in question. In this sense, shifts in context are possible only if there are shifts in judgment about what is relevant and, by implication, what is expendable. It then becomes important to ask who is making those judgments. Contextualizations of an object require that the perceiver's relation with that object also be contextualized. If empiricist adequation aspires to equate objects with their representations, the shifty nature of context upsets the project. Context challenges the representer's role in constructing objects to be so. The "same" object can appear quite different in other contextual frames. The onlooker begins to question why he has taken that object for granted, how he has done so, and what more remains to be known.

Given Amsterdam's thoughts on the importance of humanizing connections, it is perhaps not surprising how frequently the idea of context is invoked in the practice of mitigation. Writing for a periodical for criminal defense practitioners, two experienced advocates declare that the purpose of social history is to "put [] into context *every* event, person, institution and environment—often going back several generations—that has had an impact on the defendant" (my emphasis). The psychologist Haney observed in an interview with me that context-building makes the social history "the most effective tool in mitigation." First, it offers facts to make various audiences curious about the whole person of the defendant; and second, it allows information to be packaged in any number of ways to strike a chord with the intended audience.

Haney's thoughts merit careful consideration for what they imply about method. Clearly, the notion of "context" is theoretically fraught. From a methodological standpoint, however, the content of its multiple and variegated

theorizations is just as important as the doing of multiplication and variegation itself. As Haney explained to me, one of the messages of mitigation done right is that the capital offense is but one event of many during the client's lifetime. As a working document, a social history chronology typically records information as "events." A comprehensive document can include hundreds of these entries; hence, the popular refrain in the defense community that "the client is more than the crime."

With the multiplication of events come redefinitions of what comprises an event, reformulations of how events are related to one another, and the diversification of contextual theorizations to explain each of these events and their interconnections. Theory offers myriad ways to shuffle and reshuffle information, to frame and reframe context. For example, one can explain institutional factors of destitution to describe the defendant's rotten social background (Delgado 1985); trace the effects of violence on life course events (Johnson et al. 1997); outline the ties between genes and environment in a disease theory of mitigation (Kirchmeier 2004); emphasize the facts that speak to the philosophical aspects of the death penalty's moral appropriateness for the client (Bilionis 1991); undercut the applicability of American legal constructs by considering the client's cultural perspective (Renteln 2004); or incorporate into the practice the disciplinary tools of social work (Schroeder 2003) or forensic psychology (Fabian 2003).

As long as the contours of context are malleable through theory, the potential always exists for new insights and unearthed stores of data. Of course, it is impossible to investigate "*every* event, person, institution and environment" in terms of every single context conceivable. Advocates are quite realistic about this. But as far as the perpetuation of method is concerned, it is the continued production of connections and reconnections that could not have been foreseen that is really the point. Context, then, is an effective conceptual tool that encourages advocates to continually reassess their data, finding different ways to remain ever curious about the lives they seek to represent. As advocates advocate the defendant's humanity to themselves, the processes that go into social history investigation remain eminently empirical, even if not necessarily empiricist.

Notes

1. These decisions followed *Furman v. Georgia* (1972), in which a highly fractured Supreme Court had come to the conclusion that capital jurors, under the statutory schemes that then existed, enjoyed an impermissible level of discretion in administering death sentences. *Furman* resulted in a nationwide moratorium on executions. The *Woodson* ruling, which called for separate trials for guilt-innocence and sentencing, was one of five decisions in 1976 that allowed for the death penalty's reinstatement by establishing provisions to control juror discretion.
2. Historians of science have explained the conceptual development of fact by situating the construction of knowledge within the social conditions of seventeenth century scholarship (see, e.g., Daston 1991; Shapin 1994; Shapin and Schaffer 1985). These were acrimonious times for intellectual debate. Sensing the paralyzing effects of such bitter rivalries, scholars came to believe that some foundational type of knowledge—one that everyone could accept to be theoretically impartial—was necessary in order to establish a space for civil dialogue. "Facts" became a kind of consensus knowledge, buttressed by the approval of a community of gentleman witnesses, on which scholarly exchange could then proceed.

   Well before these debates in the academic circles of natural philosophy, Anglo jurisprudence had established the idea of fact as a particular event whose fact-uality was determined by an impartial group of peers. Shapiro (1991, 2000) offers a textured account of how the category of fact evolved through law's effects on philosophy, and vice versa.
3. Although the American Bar Association is a professional organization for the nation's legal community in general, and not a legislative or judicial body, its guidelines for capital defense lawyers (see American Bar Association 2003) have arguably taken on the force of law with the Supreme Court's ruling in *Wiggins v. Smith* (2003). There, the majority observed that the court's justices "long have referred" to the ABA criteria as "well-defined norms" with respect to quality of representation (p. 524).

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