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Recommended Citation

Cheng, Jesse, "Humanity's Subtensions: Culture Theory in US Death Penalty Mitigation" (2017). *Social and Cultural Sciences Faculty Research and Publications*. 282.

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Humanity's Subtensions: Culture Theory in US Death Penalty Mitigation

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Abstract

Criminal law in the United States values conceptual definitiveness in its quest for resolution. But the work of open-ended humanization required of sentencing mitigation advocates in American death penalty cases defies this call for definitiveness. Even as formal legal processes seek to limit the knowledge that can be brought into the courtroom, new theoretical approaches that justify more understanding and fact-finding can help attain tangible goals of defense advocacy. This article provides an ethnographic account of how capital defense practitioners in the United States engage with anthropological theories of culture as a behind-the-scenes advocacy strategy that succeeds by exploiting the anti-definitiveness inherent in culture. I develop the concept of 'subtension' as an analytical trope to help elucidate these processes.

Keywords

advocacy, culture theory, death penalty, definitiveness, humanity, mitigation, subtension, United States

Early in my field research, one of the most well-respected attorneys in the United States' criminal defense bar described to me a moral sentiment that drives sentencing defense practices in murder cases charged with the death penalty. "In order for jurors to decide whether a human being should live or die," the lawyer told me, "justice requires that they know as much as possible about who that person actually is-as a human being." What, exactly, are advocates looking for? Consensus within the capital defense bar has established certain lines of inquiry to be indispensable. The heinous sorts of killings that merit a capital charge often will be best mitigated by evidence of the client's impairment-particularly of the neurological/cognitive/psychological sort, and particularly if such damage can be articulated in terms of entwined forces on the macro-structural level (historical, socio-economic, epidemiological) manifesting in fine-grained phenomena specific to the defendant (subjective experience, genetics). The vocabularies of mental health are thus instrumental in the practice (Sanger 2015; Stetler and Wendel 2013; White 2006). This much I had already known as an American-trained lawyer versed in the jurisprudence of criminal sentencing. As an anthropological ethnographer on the ground, however, I was intrigued to discover that cutting-edge defense advocates supplement these familiar discourses with academic theories from a less obvious source-my other home discipline of cultural anthropology. This article presents an account of these practices.

In nine months of fieldwork in 2006 with death penalty mitigation advocates across the United States, followed by eight years as a practicing capital defense attorney-investigator, I discovered that 'the cultural' is deliberately folded into the tried-and-true frameworks of mental health in order to strengthen the case for prolonging investigation. The lawyers, investigators, and experts I observed and worked alongside were part of a tight-knit circle of practitioners who were instrumental in creating formal advocacy guidelines that now comprise the standard of care for effective defense advocacy in death penalty cases.¹ Capital defenders across the country regard these advocates as authoritative representatives of the field. My argument is that in the work of these standard-setting advocates, practitioners draw from anthropological theories of culture as a source of behind-the-scenes inspiration for developing strategies that instrumentalize the indeterminacy of so-called cultural processes. This ethnographic finding cuts against the grain of previous anthropological analyses, which have generally viewed the accommodation of culture in American law to be a problem or challenge for defense advocates.

The use of culture theory is but one manifestation of capital defenders' efforts to elaborate on the nature and effects of impairment. On one level, this appetite for knowledge is driven simply by due diligence: when a human life is on the line, information about that life must be maximized. This is especially so when the parameters of legal doctrine and evidentiary credibility limit the knowledge that can be brought into the courtroom. But in different and no less important ways, the application of new theoretical approaches, with their justifications for more fact-finding and more understanding, helps to achieve concrete goals of advocacy. The existence of the defendant is extended, literally, while investigation into his life remains in play.² The passage of time can dull the prosecuting state's political motives for seeking the death penalty, and the ongoing discovery of facts may support collateral

litigation that can actually compel prosecutors to decapitalize the charges (Stetler 2003). The protraction of investigation, in other words, comprises a very real form of advocacy in its own right. In this critical dimension of the work, I will demonstrate that culture plays an auxiliary but potentially significant role in the defense's efforts to avoid the ultimate punishment.

This role is also anthropologically relevant. By understanding how others appropriate our theories, we anthropologists may avail ourselves of different and possibly transformative perspectives on our own intellectual projects (Riles 2006). To this end, I introduce the analytical notion of 'subtension' to explain essential aspects of capital defense advocacy-aspects that may, in turn, reflect something interesting about anthropology itself. As the word is commonly invoked, materials or structures 'subtend' an object when they underlie that object so as to be included or inherent in it. In death penalty defense, the subtended object is the act of capital murder. Successful mitigation occurs through processes of knowledge accretion in which facts about the offense radiate ever further outward, ultimately becoming reconfigured in explanations of the client's humanity that span his full life and beyond. Anything about that life has the potential to be mitigating. According to an internal training memo written by the head of the mitigation investigation agency that was my primary field site, "mitigation covers an enormous array of issues ... Only after a leaveno-stone-untuned approach is counsel in a position to marshal effectively a powerful case for life." The basement of the agency-crammed wall-to-wall with file cabinets, boxes of CD-ROMs, and hard drives filled with reams of investigation notes and memos, life history records from all manner of institutional sources, and the documentary output of expert assessments-served as a physical repository of these accreted materials, all intended to procure "the fullest information possible concerning the defendant's life" (Lockett v. Ohio, 604).³ Subtension in this regard thus speaks to a proliferation in the sheer quantity of knowledge produced about the human existence on trial.

At the same time, however, I draw from the term's etymological roots-from the Latin *subtendere* (stretch underneath)-to key in on the underlying theoretical riggings that conceptually inhere in the object being analyzed. In other words, my proposed notion of subtension speaks as well to a diversification in the quality of generated knowledge about the offense, its circumstances, and, most importantly, the client's life. This is achieved through advocates' ongoing invocations of conceptual frameworks that loop into, stretch, and transform existing ones. The training memo referred to above notes that "theories of mitigation . allow for great variation in the information presented to and considered by the jury and court." Advocates can strategically adapt "the constellation of factors that were formative in the offender's development, behavior, and functioning," deploying evolving configurations of that information in various procedural maneuvers. Sitting before the mitigation agency's hallway bookshelves, I spent hours leafing through a series of three-inch-thick binders, each containing training seminar materials from panels whose titles were a testament to mitigation's multidisciplinary zeal: "Neighborhood Effects," "Preand Post-Migration Stressors," "Dealing with Anti-social Personality Disorder," "Historical Values." I will suggest that through the new knowledge that theory brings, and the call for new theory that this knowledge then enables, practitioners are able to achieve the extensions of investigation that are so crucial to death penalty defense.

This article focuses on capital defenders' use of culture theory as a set of practices that can illuminate how subtension operates with respect to both quantity and quality. Culture is employed to expand the

fields of subjective considerations that surround and are infused in the defendant's life experiences so as to comprise a vital part of them. With its multiple theoretical formulations undergirding the client's biography, culture appears in advocacy maneuvers in various forms, the product of the defense's efforts to continue stretching knowledge along new directions. Again, an imperative goal of advocacy is to add time to investigation's clock. As an analytical construct, subtension helps to map out how practitioners obtain these extensions through justifications for open-endedness, both in the volume and the self-generative play of knowledge. If this strikes one as rather anthropological, I suggest in this piece that the parallels may not be coincidental-for the reason why academic theories of culture can have a place in mitigation's conceptual universe is, perhaps, because anthropology itself might be viewed as a subtending endeavor. I present some speculative thoughts about this in the conclusion.

The article begins, however, by analyzing the anthropological literature on culture-based defenses in American criminal law. These works have been motivated by a desire to resolve an apparent incompatibility-that while jurisprudential frameworks call for conceptual definitiveness, cultural factors seem to elude easy definition. But capital defense is a different species of legal practice. Mitigation's advocates, I explain, view themselves as having to intentionally counteract the analytical definitiveness that allows the prosecution to equate 'defendant' with 'capital murder' with 'death sentence'. Good defense advocacy succeeds by cultivating the sense that any claim to adequate definitiveness concerning the defendant's life requires more investigation, more resources, more time-and the culture concept provides fertile ground for doing so. The stage is now set for the ethnographic material presented herein, detailing defense practitioners' appropriations of the culture concept in their own theoretical work and in their practices of advocacy on the ground.

The Problem of Definitiveness, Part 1: Anthropological Analyses of Cultural Defenses

In US criminal law, proponents of so-called cultural defenses-that is, the use of cultural factors in assessing and representing the defendant's subjective state of mind for the purposes of diminishing or even outright negating culpability- face a certain challenge when introducing such defenses in legal frameworks. One American legal academic has declared that "to be effective, criminal law must operate with a limited number of concepts that are consistent with each other and with the facts they describe" (Weinreb 2003: 1). And yet, as Rosen (1996: 27) has observed with respect to common law systems in general, "the inherent ambiguities of most cultural forms pose obstacles to the definitiveness required of legal assertions." Thus, Good (2008) notes, wryly, anthropologists' apprehension when legal advocates would have them take the stand in the role of 'cultural expert'. The problem, he states, lies in a conflict of knowledge paradigms: "One core difference between anthropological and legal analyses is that the former treat ambiguity and complexity as immanent aspects of all real-life situations, while the latter seek to prune away 'extraneous' details, so as to identify the abstract, general, de-contextualized legal principles assumed to lie within" (ibid.: S51). In other words, the indeterminacy that anthropologists embrace as the stuff of social life is antithetical to the conceptual 'definitiveness' that the law demands for resolution.

The early anthropological literature relating to culture-based criminal defenses in US courts was marked by a high degree of fluency with the analysis then emerging from the country's law schools. A

prominent theme was how to reconcile the competing paradigms so that anthropological knowledge could assert its relevance in legal settings. Anthropologists attempted to justify the theoretical basis for cultural defenses in American jurisprudence, considering the pros and cons of such defenses with respect to broader legal, ethical, and policy goals (Magnarella 1991; Winkelmann 1996). Other contributions drew from anthropological and social theory to explicate the causal links seemingly required by the law to make cultural dictates relevant to *mens rea* (state of mind) and *actus reus* (criminal act) (Torry 1999, 2000). These important investigations resonated strongly with the jurisprudential themes addressed in the law review pieces with which these anthropological studies were very much engaged.⁴ If early explorations of the culture-culpability nexus were shaped in large measure by the needs of American criminal law, then the country's anthropologists had insights to offer on the legal academy's own theoretical turf, no less about how to identify, conceptualize, and achieve those aims.

In this work, however, I am not merely answering to the needs of law *per se*. I am also curious to understand the analytical practices of criminal defense advocates as they pursue their own inquiries into the cultural. In order to bring into sharper focus the distinct features of the ground I wish to stake, I invoke the work of Alison Dundes Renteln as a deliberate point of contrast—an exemplar of the advocacy-oriented ethos represented in the earlier anthropological pieces. Renteln's (2004) *The Cultural Defense* provides the most comprehensive American case law survey to date of the defense in both civil and criminal contexts. Its salient feature for purposes here is that even as Renteln leans on established infrastructures to press for the law's expansion of subjective context,⁵ she, too, finds herself caught in a reconciliation project—that is, how to draw limits for cultural factors to make them work in a system of knowledge that values conceptual definitiveness. She proposes that the cultural defense should apply strictly to *bona fide* cultures, as opposed to more subjectively posited 'subcultures' (mentioning street gangs in particular). These subcultures, Renteln (1993: 497) argues, involve worldviews that are "not radically different from the rest of society." Of course, critical scholars—anthropologists notable among them—might ask what bright lines could be drawn to demarcate radical difference (Ralph 2014; Vigil 1988). So while Renteln (2004) continues with a call for 'maximum accommodation' of cultural factors, key questions persist: what, in tangible, evidentiary terms, is culture, and who gets to say so? These two queries, I believe, were the crucial nodes of entry that the early anthropological analyses on the cultural defense had found so appealing.

While Renteln's work exemplifies this prior anthropological pull toward the pragmatic demands of law, Demian's (2008) more recent article on culture-based criminal defenses insists on pursuing a different tack. Comparing the instrumentalization of 'culture' in domestic criminal defense practices with invocations of 'custom' in Papua New Guinean law, Demian strives to explain how Anglo-American advocates "constitute culture as a revelatory mechanism [for subjective intent] and in so doing constitute their own sphere of action as one without culture" (*ibid.*: 433). Her concern is one of social inquiry on its own terms, with a focus on ethnographically delineating the possibilities and limits of legal actors' modes of knowledge production. Affirming Demian's commitment to the interests of social analysis, I present death penalty defense as a practice unique in American criminal law for the extent to which it goes to create possibilities for knowledge production. Especially noteworthy, moreover, is how mitigation co-opts the tools of academic social analysis itself, embracing the

indeterminacy of culture theory to subvert the law's demand for definitiveness. In order to clarify the stakes involved, I now turn to a brief overview of capital mitigation itself.

The Problem of Definitiveness, Part 2: Death Penalty Mitigation as Analytical Motion

In a seminal statement on capital mitigation, a US Supreme Court opinion held that the sentencing jury is entitled to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (*Lockett v. Ohio*, 604).⁶ The backward succession from character to offense is telling. Although the formal object to be mitigated is the capitally charged act of murder, the court knew that the sentencing defense must eventually foreground the human life on the line- "who that person actually is-as a human being," in the words of my opening interviewee. As a matter of procedure, the same panel of jurors who have found the defendant guilty of homicide must decide whether he should live or die. Thus, according to one of the key contributors to the national capital defense guidelines, the challenge for mitigation is to exert its "transformative capacity to enable jurors to feel human kinship with someone whom they have just convicted of an often monstrous crime" (Stetler 2007-2008: 237).

Advocates are required to undertake constitutionally adequate investigations as a basis for strategic decisions about the sentencing defense (*Wiggins v. Smith*).⁷ Long before the eve of the trial-indeed, from the very moment defenders recognize the possibility of capital charges-the most effective mitigation advocates are already starting to immerse themselves in a multi-generational biographical investigation that can take years to carry out. I recall the to-do lists I scribbled during the first team meeting for each new case, enumerating the various institutions from which to acquire records (educational, medical, psychological, housing, financial, judicial, social services, military), the scores of potential interviewees who had crossed the client's path at some point during the entire duration of his life, and the experts whose diverse fields of knowledge held the promise of revealing new horizons for investigation.

This unrelenting drive to keep knowledge on the move, palpable in the scurrying bodies of my field site, arises in response to the prosecution's core analytical project: to reduce the full complexity of the client's existence to the horror of a rationally conducted murder. As one attorney explained to me: "The killable subject is not a brother, or a father, or a son, or anyone who can be viewed through his connections and human relationships." Rather, he is presented to jurors as nothing more than "a conscious act of evil ... and there's not much more that anyone needs to know about him." Similarly, in a white paper confidentially distributed to participants at a capital defense training seminar, prosecutorial rhetoric drawn from closing arguments showed striking consistency in casting defendants as moral agents without context-"the model of rational choice who simply opted for the side of evil." Victim impact testimony, permissible in American capital trials (*Payne v. Tennessee*),⁸ serves to drive home the suffering that the defendant callously disregarded in his calculus of costs and benefits. The relational context of the defendant's life, the nuances of subjective experience, and theoretical models for understanding his challenges and impairments are but 'extraneous details', irrelevant to the resolution of the case. In short, the prosecution's processes of equivalency- the 'defendant's entire

existence' equals 'aggravated murder' equals 'the death penalty'-achieve the desired advocacy effects by offering the very definitiveness that the law so values.

Hence, for capital defenders, the power of mental health discourses lies in their ability to justify expansions of definitiveness. This strategy is of course central in the trial in advocating for a life sentence. But just as importantly, it also figures in a range of pre-trial arguments that can undermine the capital nature of the prosecution-challenges, for instance, to competence to stand trial, competence to be executed, exemption from execution based on intellectual disability, mental state during interrogations and under conditions of confinement, and the ability to knowingly and willingly waive various constitutional rights. Each of these issues requires inquiry into the defendant's subjective experiences, and each of them presents an opportunity to underscore medical standards that mandate comprehensive life history investigations as the basis for credible mental health evaluations (Dudley and Leonard 2008).

In a case I observed, the defense counsel presented to the court preliminary revelations from family member interviews concerning events that seemed to support the hypothesis of psychological trauma. Over the course of the defendant's childhood and adolescence, his closest friend committed suicide, his next door neighbor was paralyzed from a random shooting, his home had been the target of repeated armed invasions, his father regularly assaulted all his family members, his mother was shot, he was routinely beaten by antigang police officers, and he witnessed his brother being murdered. A potential finding of traumatic stress, with its effects on perception, cognition, impulse control, and mood regulation, could be materially relevant for mental state considerations in multiple stages of the case. Here, the defense focused on the implications for trial itself. Acknowledging the attorney's argument that evidence of these events "will be relied upon by mental health professionals at the trial who present [defendant's] social history through their testimony," the judge granted an additional 520 hours of investigation over the next four months to further examine each of these incidents and to contextualize them in the trajectory of the client's psychological development.

The subtending operations of mental health are straightforward in this example. Given the relevance of such knowledge to mental state issues, the defense argued that an adequately definitive social history needed more information about each of these incidents. In this process of accretion, increasingly relevant and humanizing sets of facts attach, as it were, to the offense as the object of analysis, recasting themselves in shifting conceptual configurations to shed light on the human being under scrutiny. Knowledge grows in terms of quantity, and as it branches out in divergent directions, it is stretched as a matter of quality. Faced with the prosecution's paradigm of agentive responsibility, the mental health disciplines offer an authoritative language for putting pressure on that paradigm. Granted, the guilty defendant must be held accountable. But accountability must factor in the defendant's moral capabilities as a decision maker. Investigation into the client's individualized experiences of psychological trauma informs this determination. Thus, as fact-generating frameworks for keeping an investigation on the move, the mental health sciences function not to ascertain who, definitively, the defendant is, but rather to determine what remains an open question. In short, advocates perceive the value of mental health to lie in its distinct quality of anti-definitiveness. This has direct implications for advocacy because what stands unanswered merits a continuance⁹ of

investigation, with its constitutional requirements of additional resources and time and its continued deferrals of a possible death sentence.

Culture Theory in Theory

Nevertheless, it is mitigation practitioners' attention to theories of culture, specifically as played off the discourses of mental health, that I am interested in here. Cultural factors have been recognized by no less an authority than the nation's highest court as an indispensable consideration in capital sentencing investigations.¹⁰ But in my field engagements with defense practitioners, 'culture' was more than just another item to be crossed off the investigation's checklist. Whereas the conflict between cultural indeterminacy and American criminal law was viewed by the earlier anthropological works as a jurisprudential problem to be solved, capital defenders' use of 'culture', I now propose, instrumentalizes that concept's open-endedness-its anti-definitiveness-as a practice of advocacy. But how is this instrumentalization supposed to unfold, according to capital defenders themselves? What, in other words, is their theoretical take on how theories of culture are to be invoked?

The quote below, taken from one of those training material binders in the hallway bookshelves, is authored by a psychologist and former academic who often worked closely with the advocates at my home base mitigation organization:

A comprehensive understanding of a client's social history must always consider the unique aspects of that client's cultural background. Culture, which has been defined as "local worlds of everyday experience," is realized in daily (intergenerational) patterns of life activities (e.g. customs and rituals of social and community life, common cultural models of the world, shared understandings of causality, people, and phenomena such as illness and health). To fully understand a client's cultural background, multiple levels of analysis are needed. Such an analysis might include fact development within an oral historian/cultural model, which strives for nested levels of understanding about the individual, his or her family, the community or communities in which he or she has lived, and the larger world or worlds. A public mental health model might also be used, where nested levels of risk factors are considered in placing a client's social history within the perspective of political, economic, societal, and demographic variables that influenced his or her life.

The image of 'nested' contextual relationships is an evocative one for understanding the quantitative aspect of subtension: the defendant's humanity gradually emerges as strata upon strata of accreted knowledge expands outward from the capital crime. According to this expert, these widening ambits of socio-cultural forces must be explored in order to obtain a complete understanding of a defendant's social history. Investigation into culture adds on layers of fact-facts about the structure and experience of social relations, as well as facts pertaining to measurable variables to be weighed in calculations of vulnerability. As the investigation leads to justifications for more investigation, these layers run wider and deeper, underlying yet also infused in an account of the defendant's life such that they ultimately become inseparable from it. And the anthropological resonances here are not coincidental. I would later discover through a Google search that the definition of culture quoted above, unsourced in the materials themselves, is pulled directly from the work of the medical anthropologist and psychiatrist Arthur Kleinman (1996: 16).

In capital defenders' use of culture, these quantitative processes of knowledge accretion are, furthermore, bound up with qualitative processes of conceptual stretching. In the course of my work with the mitigation agency, I was directed to a book co-authored by attorney Anthony Amsterdam and cognitive psychologist Jerome Bruner (2000) about storytelling in legal practice. Amsterdam was the lead attorney in the most successful challenge to capital punishment in US Supreme Court history.¹¹ In the book, academic anthropologists and their interlocutors are well represented in a bibliography that includes figures such as Lévi-Strauss, Saussure, Durkheim, Whorf, Gramsci, Foucault, Kroeber, Sperber, and Geertz, among others. But before the advocates pointed me to this text, Amsterdam had already discussed in a field interview with me what he called "social-institutionalist" and "interpretive-constructivist" notions of culture. The first, he explained, relates to objectively posed theories that present cultures as sets of established arrangements and structures. The second refers to subjectively posed theories that hold all social facts to be products of interpretation by culture's actors as well as the anthropologists (he knew I was one) who study them. In the legal arena, compelling advocacy requires that both be used in "dialectical" (his word) fashion. Amsterdam proceeded to critique simplistic, non-dialectical applications of culture in mitigation—those that merely tack cultural dressing onto pre-existing facts, rather than recognizing that effective investigation involves "not adding context to fact, but creating a thick, dense alloy of the two." The difference between hackneyed story lines and powerful mitigation lies in the difference between thin, factual recitation and thick, meaningful description—the sort, he said, advanced by Clifford Geertz.

Plainly, Amsterdam knew much of the language and substance of social theory. More impressive was his sophisticated manner of implementation. The inconsistency between the two sets of cultural theories does not, in his view, preclude their use toward the aims of advocacy. On the contrary, putting both types in direct relation with one another is essential for crafting persuasive mitigating evidence. The tensions of culture theory can help produce this melding of fact with context, neither pre-existing the other nor separable from it. It is through the push-and-pull of concept work—the theoretical stretching born of these tensions—that the 'dense alloy' of textured reality can begin to be investigated and represented.

These pronouncements on culture from capital defense's high theorists were certainly fascinating from an academic point of view. The question, however, was how such theorizing could actually translate into formal outputs of advocacy. In this respect, Kleinman's place in the shadows proved significant. I would soon come to learn that such theoretical formulations appeared to work best behind closed doors, as a committed engagement with open-endedness that would publicly assume the form of investigation into a knowable, objectified culture.

Culture Theory in Action

With this array of theory tucked in their analytical tool kit, advocates from my capital mitigation field site began a life history investigation for a new capital client, a Mexican American gang member from a family of migrant farmworkers. Through records collection and preliminary interviews over the first several months, the defense team discovered a range of phenomena typical of capitally charged defendants from agrarian communities: multiple traumatic head injuries beginning in childhood; lifelong, unprotected exposure to pesticides, organophosphates, and other neurotoxins, including exposure in utero; addiction to drugs and alcohol, including inhalation of glue, paint, and other organic

solvents; a family history of affective mental disorders; chronic violence in the home life; multiple suicides within the family; compromised intellectual functioning; and episodes of loss of contact with reality. Obviously, the contributions of mental health expertise would be undeniable.

In this case, our investigators had found additional inspiration for investigation through the ethnographic work of James Diego Vigil, an urban anthropologist and street gang researcher. Defense advocates often find it difficult to determine how the issue of gang membership should factor in a mitigation case. In an e-mail responding to another defense team's request for advice on the matter, the lead investigator in our agency wrote: "I always worry that capital teams in so-called gang cases will take up the sociological stance of labeling behaviors, goals, and relationships in an objectifying, othering, and blaming way, and that the gang experts' positions will be made part of some case that defines gangs according to rituals, hierarchy, intent, and crime ... Gangs are not understood by talking about crime, jumping in, putting in work, signs, and labels. It's all about trauma, fear, and racism." Advocates in our case were therefore drawn to Vigil's (1988: 166) explanations of how the psychologically traumatic, fear-infused climate of gang neighborhoods contribute to locura behavior—the "crazy," unpredictable acts and modes of self-expression tolerated and even normalized among Mexican American gang youths. There was added significance, too, in Vigil's methodological approach. "He uses life histories!" our lead investigator exclaimed to me after one team meeting. Indeed, as I had already known from his work, Vigil believes that detailed individual biographies have the unique ability to "show how the multiple strands of [barrio] reality are intertwined" in processes that reflect "the varied differences that distinguish one gang member from another . in effect, how their social and personal identities mesh and diverge" (ibid.: 65).

The defenders' knowledge of Vigil's research came as a pleasant surprise to me: Vigil had served on my anthropology dissertation committee in graduate school. But the value the advocates saw in his analysis was apparent from the perspective of mitigation's subtending designs. With his generous call to adapt and integrate competing analytical approaches, Vigil (1988: 173) describes his "multiple marginality framework" as "a way to build theory rather than a theory itself." His approach appears to embody the very spirit of 'dialectical' concept-stretching that Amsterdam had explained above. Accompanying these qualitative expansions of knowledge was a call for quantitative accretions of contextualizing fact. For Vigil, any individual's personalized experiences of gang life must be seen to arise from interrelated dynamics that cut across macro-historical, macro-structural, ecological, socio-economic, socio-cultural, and social psychological levels. Through the investigation of facts relevant to each of these domains, one could come to understand "how gang members experience multiple crises and confusions over living, working, associational, developmental, and identity situations and considerations" (ibid.). This is a far cry from the "objectifying, othering, and blaming" forms of testimony that our advocate had warned of in conventional gang expertise.

I admit, too, that my affiliation with Vigil bought some credibility for me as an ethnographer trying to position myself in the field. During a conversation with the agency's practitioners toward the beginning of fieldwork, my convoluted attempts to explain anthropology's self-critical struggles with the elusiveness of cultural processes were first met with silence and then with one advocate's pointed response: "But we have to make culture knowable." Although they would not have put it in such terms, they worried that the academy's fraught musings on culture would hold little sway in legal processes

that require conceptual definitiveness. For the purposes of anti-definitive advocacy, then, the pivotal feature of Vigil's (1988: 7) research lies in how it presents a straightforward object of analysis, namely, the Mexican American street gang "subculture." While cultural considerations were held out to be graspable through empirical investigation, such considerations demanded amplifications of fact and theory that would reconstitute this purportedly knowable object (the gang) in evolving arrangements of complexity, drawing from a variety of knowledges and narratives. Vigil's multiple marginality framework appealed to the team, not only because it framed a mental health issue (psychological trauma) in expansive, life history terms, but also because it made those expansions appear knowable by presenting the gang subculture, definitively, as an object to be analyzed. As the lead investigator would later remark to me, Vigil's work provides an example of how advocates can "use culture to kick down the door" of law's limitations on relevant life history evidence.

Bearing these thoughts in mind, the agency's advocates worked closely with defense attorneys to file a motion requesting that the court grant increased funding and time for neuropsychological assessment of the client. The purpose of neuropsychological testing is to determine how injury, disease, or abnormal brain development may contribute to behavioral and cognitive impairment (Swanda and Haaland 2009). This form of mental health expertise often has profound implications for the full range of collateral legal issues described above—issues that, again, draw from, although are not formally subsumed under, mitigation-type evidence developed in the life history investigation. The legal team worked with the neuropsychologist to file a declaration, submitted by him in his capacity as an expert witness, that presented culture to be of primary relevance in developing a psycho-social assessment of the client. I draw attention below to the expert's portrayal of Mexican culture as an essentialized abstraction that would be altered by social and biological forces.

Any psychological assessment of [defendant] must take into account his cultural background. [Defendant] is a Mexican American, reared in almost exclusively Mexican and Mexican American communities by his parents and grandparents. Strong Mexican cultural values and beliefs regarding family life played a central role in [defendant's] development and subsequent behavior as a young adult. The standard of care within the mental health community requires that any mental health assessment of [defendant] must take into account the role of his culture on his functioning ... While generalized descriptions tend to capture the flavor of traditional Mexican family values and normative rules, I will also determine how [defendant's] family deviated from generalizations. Traditional Mexican family life is an abstraction, an exaggerated and therefore inaccurate version of what various Mexican American families actually believe and practice today. These traditional family rules are modified by a number of environmental influences including poverty, migration, and physical and mental health of family members. In [defendant's] family, there is a strong possibility that both this mother and father have mental illness—a factor that would profoundly alter how culture is expressed within the family.

To be sure, the investigation's discoveries continued to reinforce a mental health story line: two of the client's cousins committed suicide, his mother described hallucinatory visions, our client received psychiatric care following a serious suicide attempt, and his father and one of his brothers had serious histories of substance abuse. Nevertheless, as the lead investigator reminded the team in one of our first strategy sessions on the case: "A thorough social history is the foundation for accurate mental

health evaluations." Culture here operated as a gateway into an exploration of that social history. Attuned to the performed definitiveness of Vigil's gang subculture, the declaration similarly presented the investigation of Mexican culture as a feasible means to delve into that wider history. And it did so even as it sought, anti-definitively, to lay the groundwork for further investigation that would undermine any generalized notion of culture.

As a matter of informational quantity, the neuropsychologist's invocation of culture would require the accretion of facts that a scientifically valid social history was obligated to include. For example, in a passage on how cultural values may play a role in the psychological stresses of family dysfunction, the expert's declaration noted:

Investigation may show that [defendant] and his brothers differed significantly in how they responded to poverty, abandonment, and abuse. One brother may identify strongly with traditional family values while another family member may be highly motivated to oppose compliance ... Consequently, sibling or generational family coalitions may emerge, partitioning the family unit into opposing factional groups.

Furthermore, by presenting culture as a knowable entity subsequently worked on by external factors, the defense was also making a case for diversifying and extending the limits of its fields of investigation. Culture had to be investigated both in addition and in relation to those environmental influences, and mental health, again, provided but one set of such influences. In his call to explore the effects of poverty, migration, and physical health in connection with those of culture and mental health, the expert opened the door to qualitatively distinct frameworks that would continue to stretch the boundaries of knowledge.

In summary, capital defenders' interest in academic theories of culture derives from the anti-definitiveness such theories contemplate. Their quantitative and qualitative expansions of knowledge production further elaborate on those achieved through the mental health discourses. Advocates publicly hold out culture to be empirically accessible, even while the subtending effects of academic theories of culture assert themselves quietly, stoking knowledge's self-perpetuation. As layers of context extend farther outward, the client's humanity emerges through accretions of fact that, bit by bit, come to appear ever more relevant in helping to make sense of the crime. Finally, the subtending effects of cultural investigation, inspired as they are by high theory, result in concrete accomplishments of advocacy. The expert's statement above concluded with a recommendation for extensive collection of records and repeated interviews with family members, friends, teachers, counselors, and other informants, as well as a series of clinical interviews with the defendant to accompany administration of the standard three-day neuropsychological testing protocol-tasks that the court agreed would justify 75 hours (an estimated four months) of the expert's time.

Conclusion: Anthropology's Subtensions

A common saying among capital defense practitioners is that mitigation is where the law "runs out." For advocates, the moral imperative toward unbounded humanization would ideally involve the disintegration of legal principles that restrict investigation and representation. Herein lies the value of anthropological thought for defense advocacy. As Choy and Zee (2015: 212) observe, an important virtue of anthropology's mode of inquiry is that it "not only describes worlds but holds them in such a

way as to allow them to settle into different arrangements, possibilities." An object of investigation (a capital murder) becomes enveloped in swirling currents of data, dissolved through the reconstitutions of theory (neurological, psychological, cultural) and ethnographically reformulated in new and unexpected representations (the human). But still, the law never stops demanding definitiveness. Consequently, even as academic theories of culture provide inspiration to push against the limits of law, the defense's knowledge practices remain tethered to concepts with established jurisprudential purchase (culture, social history, state of mind).

By contrast, anthropological subtension allows for a more explicit and substantially more radical undoing of its own analytics. Anthropologists have long emphasized the theoretical flexibility required by our practices of critical reflexivity (Marcus and Fischer 1986). Against this intellectual backdrop, we can write against the discipline's flagship concept (Abu-Lughod 1991) in order to analytically avail ourselves of "the experiential continuity of being-in-the-world" (Ingold 1993: 230). Or, like my adviser Vigil, we can retain culture as "a heuristic device ... to talk about processes, grasp connections between different domains, and abstract more general patterns and relationships from specific manifestations" (Cowan et al. 2001: 14).

In this regard, the notion of subtension may clarify some of the kaleidoscopic features of our reflexive lens. How are our objects of analysis theoretically constructed to invite or cut off information that can be taken to be 'included' in them and thus relevant for helping to explain them? Where are our conceptual arrangements more elastic and thus more amenable to divergent potentialities, and where do our theories insist on snapping back? What explanations are we able to offer about our processes of ethnographic reconfiguration, about the succession of activities, movements, decision making, and fortuities that surround theory and data as they rework our objects of analysis? And, more broadly, what accounts for the successes and failures of our shifting conceptual riggings in holding together anthropology's apparatuses of knowledge? These open questions may lead to new and unexpected ones. And if anthropology's subtensions signify its own anti-definitiveness, then continuing to ask questions is the very point.

Acknowledgments

I thank Bill Maurer, who gifted me this article's central analytic, and the capital defense advocates with whom I had the privilege of working throughout my formal research and beyond. Martin Holbraad and the anonymous reviewers provided spot-on insights and indulged my muddling with good humor and a generous supply of patience. They truly shepherded the piece along to its present form. Thanks, finally, to Shawn Kendrick for her fine editing throughout. All shortcomings remain my own.

Notes

1. The Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, published in 2003 by the American Bar Association, has been described by the US Supreme Court as presenting "well-defined norms" to govern the effective representation of capital charged defendants. See *Wiggins v. Smith*, 539 U.S. 510 (2003), 524.
2. My use of the masculine pronoun to refer to capital defendants throughout this article reflects the fact that the vast majority of death sentences in the United States—98.13 percent as of 1 January 2016—are imposed on men (NAACP Legal Defense and Education Fund 2016).
3. See *Lockett v. Ohio*, 438 U.S. 586 (1978).

4. Many of these works were concerned with arguing the cultural defense's pros and cons. For example, legal analysis concerning 'equal protection of the laws' either supports the defense, since American law is already imbued with Western cultural influences and therefore is obligated to incorporate other cultural viewpoints (Renteln 2002), or it does not, because defendants who are not immigrants lack cultural factors to assert and hence stand at a disadvantage in the courts (Cardillo 1997; Coleman 1996). Similarly, opponents of the defense argue that the slipperiness of the culture concept renders it void due to vagueness and because it may be potentially overbroad in application (Kim 1997), whereas proponents contend that it is the concept's versatility that makes it adaptable to any number of standard criminal defenses and hence perfectly intelligible within the existing system (Renteln 1993). Finally, theories about culture's infinite diversity and mercurial nature could support proponents' exhortations for doctrine-based calls for individualized justice. See, for example, Evans-Pritchard and Renteln (1994), Kim (1997), and "The Cultural Defense in the Criminal Law," *Harvard Law Review* 99 (6) (1986): 1293-1311. Yet they could also uphold opponents' claims of doctrinal impracticability (Cohen and Bledsoe 2002; Goldstein 1994; Sacks 1996).
5. Quoting directly from a UNESCO document, Renteln (2004: 10) urges that the law could accommodate a working conception of culture by defining it as "a dynamic value system of learned elements, with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential."
6. See *Lockett v. Ohio*, 438 U.S. 586 (1978).
7. See *Wiggins v. Smith*, 539 U.S. 510 (2003).
- 8 See *Payne v. Tennessee*, 501 U.S. 808 (1991).
9. 'Continuance' is actually a formal legal term, referring to the postponement of significant court proceedings in order for one or both parties to 'continue' onward with activities upon which those proceedings rely.
10. In the Supreme Court case of *Wiggins v. Smith* (524; emphasis omitted), the majority opinion specified that major areas of investigation that require counsel's consideration, as established by prevailing standards for the defense of capital clients, include "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Defense advocates who conduct inadequate, incomplete investigations do so at risk of violating the Sixth Amendment's constitutional right to effective Assistance of Counsel. See *Wiggins v. Smith*, 539 U.S. 510 (2003).
11. *Furman v. Georgia* halted executions across the nation for four years based on the grounds that the death penalty, as it was administered at the time, was impermissibly arbitrary so as to constitute cruel and unusual punishment, in violation of the Eighth Amendment of the US Constitution. See *Furman v. Georgia*, 408 U.S. 238 (1972).

References

- Abu-Lughod, Lila. 1991. "Writing against Culture." In *Recapturing Anthropology: Working in the Present*, ed. Richard G. Fox, 137-162. Santa Fe, NM: School of American Research Press.
- Amsterdam, Anthony G., and Jerome Bruner. 2000. *Minding the Law*. Cambridge, MA: Harvard University Press.
- Cardillo, Cathy C. 1997. "Violence against Chinese Women: Defining the Cultural Role." *Women's Rights Law Reporter* 19: 85-96.
- Choy, Timothy, and Jerry Zee. 2015. "Condition-Suspension." *Cultural Anthropology* 30 (2): 210-223.
- Cohen, Jane M., and Caroline Bledsoe. 2002. "Immigrants, Agency, and Allegiance: Some Notes from Anthropology and from Law." In Shweder et al. 2002, 99-127.
- Coleman, Doriane L. 1996. "Individualizing Justice through Multiculturalism: The Liberals' Dilemma." *Columbia Law Review* 96 (5): 1093-1167.
- Cowan, Jane K., Marie-Bénédicte Dembour, and Richard A. Wilson. 2001. "Introduction." In *Culture and Rights: Anthropological Perspectives*, ed. Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson, 1-26. Cambridge: Cambridge University Press.

- Demian, Melissa. 2008. "Fictions of Intention in the 'Cultural Defense.'" *American Anthropologist* 110 (4): 432-442.
- Dudley, Richard G., Jr., and Pamela B. Leonard. 2008. "Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment." *Hofstra Law Review* 36 (3): 963-988.
- Evans-Pritchard, Deidre, and Alison D. Renteln. 1994. "The Interpretation and Distortion of Culture: A Hmong 'Marriage by Capture' Case in Fresno, California." *Southern California Interdisciplinary Law Journal* 4: 1-48.
- Goldstein, Taryn F. 1994. "Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a 'Cultural Defense'?" *Dickinson Law Review* 99: 141-168.
- Good, Anthony. 2008. "Cultural Evidence in Courts of Law." *Journal of the Royal Anthropological Institute* 14 (S1): S47-S60.
- Ingold, Tim. 1993. "The Art of Translation in a Continuous World." In *Beyond Boundaries: Understanding, Translation and Anthropological Discourse*, ed. Gisli Pálsson, 210-230. London: Berg.
- Kim, Nancy S. 1997. "The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis." *New Mexico Law Review* 27: 101-139.
- Kleinman, Arthur. 1996. "How Is Culture Important for DSM-IV?" In *Culture and Psychiatric Diagnosis: A DSM-IV Perspective*, ed. Juan E. Mezzich, Arthur Kleinman, Horacio Fabrega, Jr., and Delores L. Parron, 15-25. Washington, DC: American Psychiatric Press.
- Magnarella, Paul J. 1991. "Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial." *Journal of Ethnic Studies* 19 (3): 65-84.
- Marcus, George M., and Michael M. J. Fischer. 1986. *Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences*. Chicago: University of Chicago Press.
- NAACP Legal Defense and Education Fund. 2016. *Death Row U.S.A. Criminal Justice Project*. <http://www.deathpenaltyinfo.org/documents/DRUSAWinter2016.pdf>.
- Ralph, Laurence. 2014. *Renegade Dreams: Living through Injury in Gangland Chicago*. Chicago: University of Chicago Press.
- Renteln, Alison D. 1993. "A Justification of the Cultural Defense as Partial Excuse." *Southern California Review of Law and Women's Studies* 2: 437-526.
- Renteln, Alison D. 2002. "In Defense of Culture in the Courtroom." In Shweder et al. 2002, 194-215.
- Renteln, Alison D. 2004. *The Cultural Defense*. Oxford: Oxford University Press.
- Riles, Annelise. 2006. "Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage." *American Anthropologist* 108 (1): 52-65.
- Rosen, Lawrence. 1996. "Common Law, Common Culture, Commonsense: A Brief Introduction to Arab Legal Reasoning." *Political and Legal Anthropology Review* 19 (2): 27-32.
- Sacks, Valerie L. 1996. "An Indefensible Defense: On the Misuse of Culture in Criminal Law." *Arizona Journal of International and Comparative Law* 13: 523-550.
- Sanger, Robert M. 2015. "IQ, Intelligence Tests, 'Ethnic Adjustments,' and Atkins." *American University Law Review* 65 (1): 87-150.
- Shweder, Richard A., Martha Minow, and Hazel R. Markus, eds. 2002. *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies*. New York: Russell Sage Foundation.
- Stetler, Russell. 2003. "Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases." *Hofstra Law Review* 31 (4): 1157-1165.
- Stetler, Russell. 2007-2008. "The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing." *University of Pennsylvania Journal of Law and Social Change* 11 (2): 237-264.
- Stetler, Russell, and W. Bradley Wendel. 2013. "The ABA Guidelines and the Norms of Capital Defense Representation." *Hofstrn Law Review* 41 (3): 635-696.
- Swanda, Rex M., and Kathleen Y. Haaland. 2009. "Clinical Neuropsychology and Intellectual Assessment of Adults." In *Kaplan and Sadock's Comprehensive Textbook of Psychiatry*, vol. 1, 9th ed., ed. Benjamin J. Sadock, Virginia A. Sadock, and Pedro Ruiz, 935-951. Philadelphia, PA: Lippincott Williams & Wilkins.

- Torry, William I. 1999. "Multicultural Jurisprudence and the Culture Defense." *Journal of Legal Pluralism* 44: 127-161.
- Torry, William I. 2000. "Culture and Individual Responsibility: Touchstones of the Culture Defense." *Human Organization* 59 (1): 58-71.
- Vigil, James D. 1988. *Barrio Gangs: Street Life and Identity in Southern California*. Austin: University of Texas Press.
- Weinreb, Lloyd L. 2003. *Criminal Law: Cases, Comment, Questions*. 7th ed. New York: Foundation Press.
- White, Welsh S. 2006. *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases*. Ann Arbor: University of Michigan Press.
- Winkelman, Michael. 1996. "Cultural Factors in Criminal Defense Proceedings." *Human Organization* 55 (2): 154-159.