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## Forgetting the future

### *Cause lawyering and the work of California capital trial defenders*

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#### Abstract

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This article aims to push the boundaries of definitions of capital cause lawyering to include a more potentially radical 'cause' that takes on one key ideological underpinning of state killing: individualism. This article studies whether and how capital trial lawyers take up a 'radical' cause by challenging individualism. To the extent that they oppose state killing and illuminate social inequality, the defenders studied in this project engage in something beyond the parameters of their particular trials, and thus fall partially within current definitions of cause lawyering. However, considering that they are unaware of, avoid, or suppress subversive arguments within the expansive discursive space afforded by penalty phase proceedings, they may be 'forgetting the future' precisely so that their clients may avoid a death sentence. Rather, defenders construct narratives that portray a *liminal* conceptualization of the influence of social forces on human free will, a concept known in the defense bar as 'diminished autonomy'.

#### Key Words

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agency • capital punishment • cause lawyering • diminished autonomy  
• mitigation • structure

#### Introduction: cause lawyering

In his article 'Between Violence and Justice', Austin Sarat (1998: 318) summarizes the work of legal scholars Drucilla Cornell, Judith Butler, and Robert Cover to succinctly explicate one important tension in the law:

Law exists both in the 'as yet' failure to realize the Good and in the commitment to its realization. In this failure and this commitment law is two things at once: the social organization of violence through which state power is exercised in a partisan, biased and sometimes cruel way, and the arena to which citizens address themselves in the hope that law can, and will, redress the wrongs that are committed in its name.

According to Sarat, the law embodies a tension between a quest for 'the Good' (perhaps re-stated as 'Justice') and the violence seemingly necessary to achieve Good (although these scholars see the law as never actually achieving Justice but instead manifesting a kind of perpetual promise of Justice that is never quite fulfilled).

Sarat conceptualizes 'cause lawyers' as attorneys who professionally confront this tension. Cause lawyers, exemplified by abolitionist capital appellate attorneys, specifically and purposefully apply themselves discriminately, using the law as a tool to take on a cause: 'Cause lawyers use their professional skills to move law away from the daily reality of violence and toward a particular vision of the Good' (Sarat, 1998: 318). This activism toward 'the Good' can be understood as taking place along a continuum, from the relatively 'professional' cause lawyer who is ('merely') willing to 'undertake controversial and politically charged activities and/or [have] a sense of commitment to particular ideals' (Sarat and Schiengold, 1998: 7), to the 'radical' cause lawyers who:

challenge established conceptions of professionalism with efforts to deconstruct, politicize, and socialize legal practice. While they may be forced by necessity to defend established rights, their real goal is to contribute to the kind of transformative politics that will redistribute political power and material benefits in a more egalitarian fashion. Their primary loyalty is not to clients, to constitutional rights, not to legal process, but to a vision of the good society and to political allies who share that vision.

(Sarat and Schiengold, 1998: 7)

Cause lawyers, working along this continuum, may work toward a vision of the 'good society' that involves a variety of 'causes' such as human rights, feminism, environmentalism, or eradicating poverty (see Sarat and Schiengold, 1998: 5).

Given its inherently political nature—even in its most 'professional' forms—cause lawyering thus presents a problem for the law in a liberal democracy like the United States that purports to maintain a rational and formal legal system. This is because law systems that maintain (or have the veneer of) rational formalism are not supposed to take up 'causes' that could jeopardize their (purported) independence. As Sarat and Schiengold (1998: 8) put it:

in order to accomplish anything substantial, cause lawyers must necessarily become embroiled in controversial issues of politics and public policy. In so doing, they put the legitimacy of an independent law at risk and thus subject their project to backlash and to the *force majeure* that is at the disposal of the state.<sup>1</sup>

Cause lawyering's political nature also presents a problem for the 'professional project' of the legal profession. This is because cause lawyers embody a kind of professional paradox when they 'use' the legal profession to take up a cause (see Sarat and Schiengold, 1998: 10). Cause lawyers promote the legal profession as a *mode* for social change—but this view simultaneously contradicts the commitment to morally neutral advocacy valued by the legal profession. Cause lawyers are thus 'deviants' within their own profession. Nevertheless, as Sarat and Schiengold (1998: 11) argue, the legal profession is elastic enough that multiple and sometimes oppositional ideologies can find room to flourish; this ideological multiplicity, however, suggests 'instability and indeterminacy in the very heart of the legal profession's idea of itself'.

Studying cause lawyers can thus be seen as a method for illuminating particular aspects of the law's indeterminacy—both the tension between political lawyering and legal autonomy, and the tension between social advocacy and professional neutrality. In the case of abolitionist death penalty lawyers, as investigated by Sarat (1998), their particular vision of 'the good society' is both the elimination of the death penalty and a more equal society.<sup>2</sup>

## Methods

This study draws on the transcripts of the entire record of death sentence resulting trials from 1996 to 2004 for three large and diverse California counties ( $N = 37$ ) as well as interviews with 14 capital trial defenders from those counties.<sup>3</sup> I coded the transcripts using a qualitative data analysis software program, which facilitated the process of constructing and refining analytical categories. This process entailed carefully reading and re-reading the transcripts and identifying passages that reflected analytical themes that I had already identified prior to the analysis, and also identifying new and sometimes unexpected themes that emerged from the data. The interviews consisted of semi-structured interviews with 14 California capital trial defenders. The interviews were quasi-ethnographic to the extent that I came to each interview with a set of open-ended questions with the goal of initiating a conversation rather than administering a questionnaire. Each interview lasted between one and three hours; some interviews were recorded and some were not because recording inhibited some interviewees. I analyzed the interview transcripts similarly to the trial transcripts, coding for some pre-determined themes and developing new ones as I went along. Before addressing these data, I will discuss several theoretical issues that are necessary for understanding my analysis.

## The hegemony of individualism

This article aims to push the boundaries of Sarat's definition of capital cause lawyering to include a more potentially radical 'cause' that accounts for the instrumental goals of abolition and social equality but also takes on

one key ideological underpinning of state killing and inequality—what I call, for simplicity, ‘individualism’. For the purposes of this article, I call this ideologically oriented redefinition ‘strong’ cause lawyering.

‘Individualism’ signifies an ideology in which notions of personhood and social life are based on a single, bounded subjectivity (an individual person). Individualism is closely associated with the political ideology of *liberalism*. According to political theorist David Johnston (1994: 191):

The first premise of liberal political theory is that only individuals count. Individuals formulate projects. Individuals conceive values. When values and projects come to fruition, individuals experience the joy of their attainment; when they fail, individuals feel the frustration that results.

Groups may ‘count’ to some extent in liberalism, but ultimately the central organizing idea is the individual (Johnston, 1994: 20–1). The liberal idea that ‘only individuals count’ is related to MacPherson’s (1962) notion of ‘possessive individualism’ in which he describes the ‘naturalization’ of individualized ownership:

The individual was seen neither as a moral whole, nor as part of a larger social whole, but as an owner of himself. The relation of ownership, having become for more and more men the critically important relation determining their actual freedom and actual prospect of realizing their full potentialities, was read back into the nature of the individual. The individual, it was thought, is free inasmuch as he is proprietor of his person and capacities. The human essence is freedom from dependence on the wills of others, and freedom is a function of possession. Society becomes a lot of free equal individuals related to each other as proprietors of their own capacities and of what they have acquired by their exercise. Society consists of relations of exchange between proprietors. Political society becomes a calculated device for the protection of this property and for the maintenance of an orderly relation of exchange.

(MacPherson, 1962: 3)

‘Possessive individualism’ delineates the ‘naturalization’ of individualized ownership that is arguably inherent to contemporary American society. The idea that individuals are ‘naturally’ and solely the owners of their own behavior is hegemonic, or an idea that, to borrow a phrase from Comaroff and Comaroff (1991), ‘comes without saying’ in the USA. In this article, I attempt to improve understanding of how this hegemony is maintained by studying whether and how capital trial lawyers (a set of actors unusually well positioned to challenge ideologies) take up a ‘radical’ cause by subverting individualism.

## Deregulated death

I propose this broader definition of cause lawyering in the first place because I share the interest of a number of scholars in the relationship

between capital punishment and ideology. For example, Poveda (2000) argues that a commitment to individualism is the primary reason for the somewhat puzzling retention of capital punishment in the United States. Drawing on Lipset's (1996) notion of 'American exceptionalism', Poveda (2000: 261) argues that late 20th-century conservative and exclusionary social policies cultivate a sort of 'executable class' of persons:

The several themes (the 'dark side' of the American Dream, traditions of social exclusion, and social Darwinism) combine to form a distinctive American cultural logic—American exceptionalism—that continues to justify the execution of criminal offenders at a time when other Western democracies have abandoned the practice.

Under this conceptualization, American individualism (e.g. 'social Darwinism') produces a 'double edged sword' that cuts out a class of 'losers' who are seen as so hopelessly marginal that they deserve whatever punishment comes their way, including execution. This is redolent of Mertonian 'strain theory' in that it suggests that individualism functions to exclude a class of Americans who end up becoming deviant (violent) and ultimately alienated and executable.<sup>4</sup> This essay adds to the conversation on ideology and capital punishment by analyzing the unique possibility for ideological battlefields created by what is known as the capital 'penalty phase'.

Predicated on the principle of guided discretion laid out in *Gregg v. Georgia* (1976) and its companion cases<sup>5</sup> (and elaborated upon in subsequent cases, such as *Lockett v. Ohio* (1978)) death penalty trials consist of two distinct phases—the so-called 'guilt phase' and the so-called 'penalty phase'. Generically, each phase is treated by capital litigators as a trial unto itself, although each phase normally has the same jury.<sup>6</sup> In what has turned out to be a remarkable moment in the jurisprudence governing rules of criminal trials, *Lockett* removed virtually all limitations on what is known as 'mitigating evidence' (Zimring, 2003: 52). This means that capital defense attorneys can introduce literally any kind of evidence they want and make any kind of argument they want, as long as it can be in some way linked to the jury's sentencing decision. Due to this remarkable evidentiary latitude, penalty phase proceedings form a legal context in which practically anything is allowable, equating to a rare legal opportunity to publicly record objections to causes such as state killing, racialized inequality, or—to the point—ideologies such as individualism.

As prominent death penalty scholars have shown for over 20 years, the jurisprudence regulating capital trials has been a contradictory mess ever since *Gregg v. Georgia* (1976) (see, for example, Weisberg, 1984; Zimring, 2003). But the doctrinal schizophrenia around trying to discipline state killing is especially vivid in California because the rules governing the capital penalty phase in California are radically indeterminate. California penalty phase jury-instructions are among the most un-structured, and often lead to significant juror confusion (Haney et al., 1994).

The penalty phase of a capital trial appears, at first blush, to be an ideal legal location for cause lawyering. However, as I argue in this article, the

omnipresence of individualism seems to prevent 'strong' cause lawyering from taking place, although as I show below, trial defense narratives do sometimes move in the direction of subversion when explaining their clients' crimes. An interesting puzzle thus emerges—the law formally allows for ideologically subversive cause lawyering, but the hegemony of individualism apparently hinders this possible subversion from taking place. This is not to say that capital trial lawyers do not make strong cases to abolish the death penalty or to expose racial and socioeconomic inequality during their trials. Sometimes they do. However, most capital defense attorneys do not view 'subverting individualism' as a 'cause' in the first place—and this is exactly the point. Individualism is hegemonic, meaning that its oppressive qualities are invisible to the oppressed.<sup>7</sup> There can be little doubt that the hyper-individualism of contemporary US society contributed to the marginalization of the defendants in the cases addressed in this study. The fact that these defendants and their defenders do not recognize this or see the point as irrelevant—and would perhaps scoff at the proposition—demonstrates my point. To draw a simplistic analogy, the capital defender who does not see individualism as a 'cause'—in both senses; a reason for their client's oppression and an ideology to attack—is akin to a woman enthusiastically practicing an orthodox religion that subjugates her.

### The context of capital cause lawyering

According to Sarat (1998), capital cause lawyers swim upstream against an overwhelmingly hostile tide in the legal system. At the time of his essay (1998), death penalty jurisprudence looked very bleak to opponents of capital punishment. The Supreme Court had recently limited the *habeas corpus* rights of condemned prisoners—primarily in the form of the Antiterrorism and Effective Death Penalty Act of 1996—and the tone of judicial opinions rejecting condemned prisoners' habeas claims for relief was openly hostile to capital defenders.<sup>8</sup>

This situation has changed somewhat after the turn of the century, with the notable decisions in *Roper v. Simmons* (2005) (which banned the execution of offenders who were juveniles at the time of the crime) and *Atkins v. Virginia* (2002) (which banned the execution of the mentally retarded). Furthermore, due to the prominence of wrongful capital convictions and controversy related to the constitutionality of lethal injection,<sup>9</sup> the political climate also seems slightly more receptive to the possibility of abolishing the death penalty than it did in 1998.

Nevertheless, the important point made by Sarat (1998: 322) is that the legal system presents not only a generally hostile environment for attorneys representing condemned prisoners, but also a difficult venue for advocating abolition of capital punishment. This becomes especially clear when looking at the Supreme Court decisions in *Gregg v. Georgia* (1976) and *McCleskey v. Kemp* (1987). The doctrines in these cases preclude legal attacks on the

death penalty based on either an Eighth Amendment argument about the cruel and unusual nature of arbitrariness or an argument about systemic racial disproportionality.<sup>10</sup> Despite the limited ‘chipping away’<sup>11</sup> at capital punishment represented by *Roper* and *Atkins*, it still seems unlikely, for the moment, that capital punishment will be abolished by way of a legal attack on its fundamental constitutionality.

Given the difficulty of achieving abolition through a legal decision, capital cause lawyers, the argument goes, are engaged in something that transcends both the prerogatives of litigating particular cases and also the abolition of capital punishment. According to Sarat, this other thing is essentially an act of testimony about larger questions of social justice—the ‘cause’ of capital cause lawyers is to testify publicly about the relationships between the ‘immediate’ and ‘small’ injustices of their particular case to larger social injustices: ‘[cause] lawyers broaden the scope of inquiry by linking the particular injustices to which they are opposed with broader patterns of injustice and institutional practice’ (Sarat, 1998: 324). Sarat refers to this act of testifying as ‘remembering the future’ because these lawyers make a record of the presently unjust situation for the benefit of history: ‘Due process guarantees an opportunity to be heard by, and an opportunity to speak to, the future. It is the guarantee that legal institutions can be turned into museums of unnecessary, unjust, undeserved pain and death’ (Sarat, 1998: 323).

The picture Sarat paints for abolitionist death penalty post-conviction and appellate attorneys<sup>12</sup> is bleak—and it is precisely this bleakness that situates these legal practitioners as cause lawyers. Indeed, Sarat’s cause lawyering is defined by the somewhat pyrrhic character of the work. The post-trial attorneys he interviewed describe themselves as ‘being hammered’ by public opinion and the legal institution and developing a ‘bunker mentality’ among themselves to ward off the negativity coming at them from the adversaries, courts, the public, and sometimes their own clients. Under these conditions, capital cause lawyers hardened their ideological commitments to abolition and began to redefine success in terms of delaying executions and ‘testifying’ for a future when capital punishment has become an unpleasant memory (Sarat, 1998: 331). Anthony Amsterdam<sup>13</sup> (2007: 8) practiced something like ‘remembering the future’ when he recently argued that significant *moderation* of capital punishment in the form of restrictions on death-eligible murders

will not end the death penalty or racial discrimination or their symbiosis in this country soon. But they will lessen somewhat the terrible cost of both and the mortgage of shame that our generation is incurring to history on that account.

Sarat limits his conceptualization of death penalty cause lawyers to those working post-trial. One reason for this is that *trial* lawyers are inherently less able, by virtue of the contingencies of trial processes (such as rules of evidence, financial and time pressures of capital trials, or the vicissitudes of



the judge), to do much more than keep their heads above water when trying a death penalty case. Unlike their colleagues working post-trial, trial lawyers have to go to court most days and negotiate the complex everyday of the so-called 'courtroom workgroup' (the social network in court consisting of attorneys, the judge, clerks, bailiffs, etc.) This situation equates to less reading, writing, discussing, and thinking—less hours to contemplate or even formulate a consciousness about any particular cause.

Another reason to focus on post-trial is that lawyers who handle death penalty trials do not always limit their practice to capital trials, whereas post-trial capital lawyers often work in resource centers devoted exclusively to death penalty appeals and habeas petitions. This means that whereas post-trial lawyers are embedded in and constitute a culture of resistance to state killing, capital trial lawyers are often public defenders with experience in a variety of felony trials. This raises the questions of whether or not trial defenders (a) conceptualize themselves as cause lawyers and/or (b) evince characteristics of cause lawyering, whether or not they think of themselves as such.

Although I have just identified some obvious reasons why capital trial lawyers may *not* be cause lawyers, there are aspects of the death penalty trial that create unique legal opportunities for 'testifying'. Most importantly, the penalty phase provides one of the few legal spaces wherein precisely the kinds of 'testimonial' narratives described by Sarat are explicitly allowed—where the practice of capital punishment is especially 'deregulated'. It is in the penalty phase that, for the first time, defenders are legally allowed to 'publicly testify' about the *relationship* between the particular injustices of the defendant's life and broader questions of justice. One measure of trial defenders' status as cause lawyers is whether or not they actually make this 'relationship' argument when provided the chance. That is to say: it is one thing to point out to the jury the specific injustices of the defendant's inevitably grim social history; it is quite another to make explicit the relationship between these and larger patterns of injustice in society. To do the former is to list the sad details of a ruined life with the hope that jurors will develop sympathy. To do the latter is to identify the *causes* of these sad details and to imply that, in a sense, all of US society is implicated in these causes. The implication of such an argument would be that 'we' should not execute someone whose sad, ruined life is partially attributable to social forces in which 'we' all participate (Reiman, 1985: 131–2).<sup>14</sup>

However, this is not a strategically viable argument to make explicitly to jurors, and trial defenders know this. The interesting question, of course, is *why* is it not strategically viable? Why would such an argument lack what Bruner (1991) refers to as 'verisimilitude' (the appearance of truth)? My argument here is that the 'connecting-small-to-large' argument fails *strategically* because it is threatening to individualism. Individualism's hegemony presents the most powerful reason why trial defenders may not be cause lawyers—because 'testifying' about the 'cause' (again, in both senses) would most likely lead to a death sentence for their client.<sup>15</sup>

## Trial defenders

Death penalty research using qualitative methods such as transcript analysis or interviews (as opposed to quantitative studies, such as tests of racial disparity or deterrence) has focused on the practices of elite defense attorneys (see, for example, Sarat, 2001). This approach has the advantage of offering insight about the ‘state of the art’ in capital litigation, but has the disadvantage of overlooking the everyday world of mundane death penalty trials. Note that capital trials are relatively common in California. Executions, however, are extremely rare, adding up to the largest death row in the United States, with 678 condemned persons as of this writing (DPIC, 2009).<sup>16</sup>

It is important to interview and observe experienced, prominent capital litigators, but it is also important to see how the average trial defender handles the average capital trial. The defense attorneys I interviewed were mostly public defenders who had worked on three or fewer capital trials. Many of them had attended death penalty conferences and had undergone special training, and most are well respected for their dedication and competence, but none were high-profile members of the elite guild in the death penalty defense bar.

## The subversive nature of historical testifying

One basic aspect of ‘historical testifying’ is a process of connecting the ‘small’ narrative of the particular defendant’s case to a ‘big’ narrative about injustice (see Sarat, 1998: 324). This process is similar to Ewick and Silbey’s (1995: 219, emphasis in original) notion of subversion wherein some narratives have the counter-hegemonic potential to unmask relations between the individual and his or her social world: ‘subversive stories recount particular experiences as *rooted* in and part of an encompassing cultural, material, and political world that extends beyond the local’.

What might death penalty narratives be subversive *of*? In the context of capital trials, the narrative battleground is often over causality or volition. In the penalty phase, after guilt has been decided, competing versions of the violence of the murder and the social history of the defendant tend to focus on the autonomy of the defendant. In the most general terms, capital prosecutors tend to construct narratives of individual responsibility while defenders tend to tell stories about the influence of social forces on the defendant’s actions. Of course, in particular trials, both sides sometimes stray from this overly simplistic binary—in reality, the ‘agency-*v*-structure’ dichotomy is never as simple as it is in academic discourse. Scholars from many disciplines have addressed this conceptual binary in exhaustive theoretical detail, and some have proposed theories that bridge the gap to conceive of humans as agents, but acting within particular socio-historical contexts that limit perceived and material possibilities for action (Ortner, 2003; see also Dunn and Kaplan, 2009). Despite the complexity of the *reality* of the agency–structure nexus,

in death penalty trials, lawyers, especially prosecutors, tend to weave their respective narratives of responsibility in somewhat simplistic terms (see Kaplan, 2008). Moreover, the theoretical agency–structure binary serves as a useful heuristic tool for analyzing actual trial narratives.

Given the focus on social forces in capital defense narratives, it seems likely that these stories might potentially be subversive of the individualism articulated in prosecution narratives. Indeed, the prototypical or ‘generic’ defense narrative in penalty phases is temporally long, sometimes spanning generations, situating the defendant within a complex social world wherein his specific violent actions are partially determined by forces outside of himself. Such a narrative would appear to be classically subversive per Ewick and Silbey (1995)—especially if the relationship between larger forces of injustice and the defendant’s actions are made explicit. If this connection is made, capital defenders are trying to tell the jury that human action is partially caused by social forces—something close to ‘social determinism’—and thus are engaged in a type of cause that transcends not only abolition of capital punishment through mercy but also transcends general injustices, such as racism, inequality, or unfairness.

Of course, it would be a major piece of ‘historical testifying’ to argue that individualism is somehow the root of the violence of a particular murder. Rarely do we hear in the non-academic death penalty conversation something resembling the ‘social determinism’ narrative: ‘American society cooperatively produces the conditions that sometimes foment violence and that therefore it would be illogical and immoral to execute violent persons because the *cause* of the violence cannot reside exclusively and solely within the mind or heart of the violent person, and indeed resides, to some extent, in all of us.’ To put it crudely, the argument would be: if ‘society let him down’ then it would be wrong for society to execute him.<sup>17</sup> Such an understanding of violence would challenge individualism and simultaneously resist the law’s ‘blind-justice’ tendency to bracket out the role of individualism in producing the oppressive, dystopic conditions of life for many of the USA’s poor. To make such an argument would be another form of ‘remembering the future’, one that goes beyond a protest against state killing or racial inequality to a recording of individualism’s hegemonic role in producing violence.

### **Diminished autonomy**

The taken-for-granted, ‘comes without saying’ dominance of individualism in the USA makes it strategically risky for trial defenders to engage in cause lawyering. In the trials I have analyzed, both sides tend to frame the defendant’s actions causally in individualistic terms. Trial defenders usually delineated some contextual factors and sometimes attributed some degree of causality to those factors, implying the possibility of something in between pure individual free will and ‘social determinism’. But never did any trial defender connect the ‘small’ injustices of the particular defendant’s life to

the ‘big’ injustices in society, nor describe the ideological upshot of this argumentation, that individualism is partially implicated in violence.

Rather, defenders aimed to construct narratives that portrayed a *liminal* conceptualization of the influence of social forces on human free will, a concept known in the defense bar as ‘diminished autonomy’. Diminished autonomy is a term of art for capital defenders and was coined (as it applies to capital defendants) by Russell Stetler, a pioneer of death penalty mitigation work in the USA. Diminished autonomy should not be confused with the legal defense of ‘diminished *capacity*’, which specifically refers to a state of mind in which a defendant cannot fully comprehend the nature of the criminal act. Stetler (1999: para. 41) defines ‘diminished autonomy’ as an objective: ‘We diminish the client’s degree of responsibility, his or her capacity to exercise free will, by demonstrating how his or her decisions in life have been drastically curtailed by biological, social, and psychological influences which were not chosen.’ In a sense, diminished autonomy bridges the gap between the overused and simplistic dichotomy of ‘agency’ and ‘structure’, suggesting that the indeterminacy of free will is not quite as radical as most people believe.<sup>18</sup> Stetler’s diminished autonomy thus represents a *conceptualization of subjectivity* similar to Ortner’s (2005), which includes ‘the ensemble of modes of perception, affect, thought, desire, fear and so forth that animate acting subjects ... as well [as] the cultural and social formations that shape, organize, and provoke those modes of affect, thought, etc.’ (2005: 31). This nuanced vision of human subjectivity is supposed to be the stock-in-trade of state of the art capital mitigation.

When defenders take up something like a diminished autonomy argument, it is usually implicit or tentative. For example, this trial defender dances around the possibility that his client’s free will was limited and influenced by social forces in a penalty phase argument:<sup>19</sup>

You know that old contest between what is our basic nature: Is it determined by nature, or is it determined by nurture? ... Does childhood matter? Is human nature inherently good and then it’s spoiled by something, or is it inherently evil? Or is it both? Or is it neither? And where does free will come into this thing? Obviously, we have to assume in the guilt phase that everybody has a choice. Everybody has free will because we have to protect ourselves. Safety comes first. And so we can’t be engaged in the causes and in these philosophical and religious concerns because we have to protect each other ... What do you really think about free will? Remember during voir dire when [an attorney] brought up that staircase versus the elevator and how every day when he comes to work he has a choice, take that elevator or take the stairs? I guess he has a choice ... And he also brought up cigarettes. I mean I notice that some of you smoke. I know you have a choice, but it’s a tough one ... I think it has to do with the drop in the nicotine level of your blood more than anything is when you get that idea that you’ve got to light up. These are religious and philosophical concerns. They aren’t legal. We’ve already decided where he is going to die. He is going to die in prison.

(Trial 33: 7039–41)

Cleverly, the defender here attempts to draw a parallel between the quasi-deterministic aspects of his client's social history and an addiction to nicotine. But as should be clear by his emphasis on the jury's choice and opinion about free will, his argumentation never moves beyond a vague implication that free will is slightly more complex than prosecutors make it out to be, and does not explicitly address the role of state policies or marginalizing individualism in creating his client's social history. This becomes clearer as he somewhat strangely equates an assumption of total free will with public safety: 'Obviously, we have to assume in the guilt phase that everybody has a choice. Everybody has free will because we have to protect ourselves. Safety comes first. And so we can't be engaged in the causes and in these philosophical and religious concerns because we have to protect each other' (Trial 33: 7039). The implication here is that the safety purportedly provided by the law is too important to jeopardize by threatening its formalist foundations with 'philosophical concerns' about degrees of free will. Indeed, one way to read this passage is as an *instantiation* of individualism. The trial defender here is speaking individualism's hegemony—even as individualism oppresses his client, he extols its necessity.<sup>20</sup>

Most defense narratives lacked even the limited sense of diminished autonomy hinted at in the quotation above. Instead, if defenders introduced the idea that social forces matter at all, most did so gingerly, often in the midst of valorizations of individualism. In the following passage, the defender proposes the idea of diminished autonomy while simultaneously acknowledging the primacy of free will:

[W]e will present that evidence to you to show not that he didn't have free will, not that he couldn't exercise free will, but that the ability to exercise that free will would be more limited than you, for example, or most people—you know—that his view of choices and his ability to control himself within those choices would be a little less than most people.

(Trial 2: 5395–6)

Similarly, this passage suggests the possibility of diminished autonomy, but also defers to the primacy of individual free will:

Yes, there was free choice. That is clear. And we will not deny that ... The question you have to decide is whether the free choice is of such a quality that maybe you can find some reason and understanding in it. And that is where I ask you to go back to those particular stressors on him and that particular model which is him and his coping skills and his childhood all erupting at that particular time.

(Trial 10: 6745)

Here the defender makes a causal argument about childhood trauma and adult autonomy, but does so while contemporaneously 'not denying' that the defendant chose to murder the victim. These penalty phase arguments exemplify the common practice among capital defenders of 'explaining but not excusing' their client's murders; of walking a tightrope with free will on one side and social determinism on the other.

In most of these cases, defenders did not explicitly discuss ‘free will’, but instead listed childhood (or pre-crime) traumas and either implied or explicitly argued that these traumas had a causal relationship with the murder, often implying or declaring that the trauma is not an excuse but an explanation. For example, this defender vividly describes a series of traumatic events and suggests that these events can explain (but not excuse) the defendant’s crimes:

I wonder what a child learns at age 4 when he’s forced by his father to rub excrement on his chest. I wonder what that child learns that becomes a part of him and that he carries with him the rest of his life. I wonder what a child learns from he’s called shit for brains and he’s unequivocally rejected by his father. I wonder what a child learns when his father hits his face and his cheek, strikes his braces and oozes blood. And then he still has to go to school that day, suffering the pain and the humiliation. Is it any wonder that [the defendant] turned to drugs and alcohol to escape the pain that he experienced? I don’t offer this as the so-called abuse excuse, but it certainly sheds a lot of light on how [the defendant] came to sit in this courtroom in the chair he’s in.

(Trial 9: 6448–9)

To the extent that this passage catalogs abuse, it is representative of many passages in the penalty phase arguments I analyzed in this project.<sup>21</sup> But unlike in this passage, most others did not include the causal rhetoric and simply listed traumatic events and explained to the jury that they ‘can consider’ them when rendering their decision. With few exceptions, the trial narratives in these data rarely went beyond citing defendants’ life traumas to make an explicit argument about how traumatic experiences diminish persons’ autonomy.

## The potential lethality of subversion

Moreover, when asked about the possibility of including potentially subversive themes in trial stories, defenders made clear that such a ‘cause’ risked offending jurors and triggering a death sentence. For example, one mitigation specialist told me about a recent case in which the defendant was accused of ordering several murders to enforce his control over drug markets in a Midwestern city. The defendant is allegedly a major gang leader from California who brought his crack cocaine operation to the Midwest. According to the mitigation specialist, this defendant wanted a defense that explicitly challenged capitalism and the US government. His line of argument, according to my interviewee, was that government policies and extreme poverty created the conditions in his community that spawned the notorious drug markets of the 1980s and 1990s. His argument was essentially that ‘the Government kept us poor and brought the crack into the community to keep us down’ (Mitigation Specialist 1), which is quite an explicit and potentially subversive critique of capitalism and the Government.

This discussion reminded me of a case I worked on as a mitigation investigator. My client also wished to use his trial as a forum for protest—in this case against a nebulous ‘modern society’ that the defendant believed oppressed all people. In both cases, the defendant’s legal team steered him away from such a ‘cause’ and instead assembled a more standard and presumably jury-palatable social history narrative for the penalty phase.<sup>22</sup> The standard social history narrative constructed in each of these cases included some of the aspects of poverty and dystopia that each defendant attributed to their ‘causes’ (capitalism and government conspiracies for the former and ‘modern society’ for the latter), but cast the defendant as a victim of trauma rather than as a subversive ‘Robin Hood’ or ‘revolutionary’ type rebel. The following exchange about the drug case is a good example of the attitude I encountered when bringing up the idea of cause lawyering with trial caseworkers:

Q: Why do you think it is that the kind of ideological arguments that I’m talking about right now aren’t made in trials or post-convictions?

A: They are too scary.

Q: For who?

A: For our clients.

Q: They would lose?

A: Yeah I think you would lose. Plus, as a community it’s hard to try these things. You got to stick with what works, and even if you stick with what works, it doesn’t work. Also, maybe it’s me not having too much faith in our jurors or our peers, but it’s hard enough to present simple arguments to our juries.

Q: It goes over their heads.

A: Yeah, it makes them responsible, we’re kind of making them responsible always, it makes all of us responsible, but pointing that out could be the wrong move

Q: Strategic disaster ... why do you think it’s so scary then?

A: I think people over there especially, the majority of people in the country, but people in [the Midwest], for certain, are more fear based than the rest of us. And will fear someone who is perceived as a terrorist, or someone who sympathizes with people who have been called terrorists. That’s really scary. We’re trying to get our client away from that.

Q: What if he’s right?

A: It doesn’t matter, unfortunately. A lot of the stuff he says and writes about, he is right. He has become a product of what we have made him.

Q: A real capitalist society?

- A: Yeah, he grew up in [the ghetto], where we brought in the crack. He became a crack dealer. We made him this, and he's saying, 'look, you can't punish me for making me do this ... you made me do it.' I agree with that. Jurors in [the Midwest] are not going to buy that, and they're not going to care. It's going to actually piss them off.
- Q: It's insulting to them, because they are like, 'hey man you got to take responsibility for yourself.'
- A: Exactly, how dare you put that ideology, how do you put that on me. I didn't go out and kill all those people, I didn't make those choices. It's easy to sit and talk about choices we might have made, if we were in those situations. Well, you're not in those situations, you don't know what choices you have, you don't understand choice, a lot of these people ... it's all you have.

(Mitigation Specialist 1)

For this caseworker, critiquing the State's (or 'society's') role in creating the violent crack markets of the 1980s and 1990s might equate to 'terrorism' in the minds of jurors, at least in the Midwest. As such, it is strategically *verboten*—precisely because such a critique has the effect of animating the relationship between the jurors' participation in US society's individualistic capitalism and the violence it (individualistic capitalism) produces. Put simply, such a narrative points the finger at the jurors and declares, 'you are partially responsible for the murders this man committed'. This situation brings jurors and the defendant together—but in the inverse direction as 'humanizing'; instead of characterizing the defendant as 'like' jurors, it implicates jurors in the defendant's violence, characterizing them as 'more like' him. Using a capital trial to advocate a 'cause' such as those desired by these defendants would thus represent subversion. Cause lawyering of this 'strong' type, however, seems to be precluded by the hegemony of individualism because challenging ideologies is understood by capital defenders as lethal for their clients.

## Humanizing vs otherizing

Although most defenders told me it is difficult to generalize about their approaches to capital cases, it became clear that several key themes related to cause lawyering resonate for many of them. Most of the defenders I interviewed said that their primary goal when handling a death penalty case is to save their client's life. As one defender put it: 'Ordinarily guilt or innocence is never much of an issue. The goal is to try and save the guy's life' (Defender 1).<sup>23</sup>

Most defenders I interviewed understood their life-saving narratives as having two primary inter-related objectives, 'humanizing' the defendant, and 'explaining' (but not excusing) the murder.



A: I have to have the jury know that my client is human. A case that I had last year that settled, my client, an undocumented alien who was in the United States, killed a woman. He kind of burglarized this house, the woman was away, and he was staying there, and he was desperate to get back to Los Angeles where he used to live. Where he has a life, a common law wife, where he has a child that was born while he was in prison ... He is illegal, as many clients are. He gets deported to Mexico from prison. Well all he wants to do is get back to LA. He was working. He is a good worker, all of those things. All he wants is to get back to LA so he enters illegally and the border patrol catches him and sends him back. And a couple of days later he enters illegally and the border patrol catches him and throws him back. And this happens, in a month, at least three times he gets caught and sent back. And he is calling his wife in LA saying 'I'm trying to get there.' And finally he gets in [a rural area], a very isolated area. He gets to a phone and calls 'can somebody come pick me up. Can somebody come give me a ride?' But nobody can. And so he is in this house and this woman comes over to feed the animals and he asks her for a ride, this is according to him, she picked up a gun and started threatening him. It was a starter pistol, but he didn't know that. So he threw something and then hit her in the head and beat her and killed her. So that was the case. There is a story there about him. If I compare him to Jeffrey Dahmer he sounds better than Jeffrey Dahmer.

(Defender 5)

This passage provides a good example of the relationship between 'explaining' and 'humanizing' because it shows how it is through the process of 'explaining' the murder that the defendant becomes 'human'. This synopsis of a tale of desperate border crossing resembles those of countless Latinos in California. This 'explanation'—that the defendant ended up killing the victim in the midst of what appears to be a desperate struggle for survival—is supposed to vivify him, rendering him not unlike persons known to jurors. In this sense, 'humanizing' may be too imprecise a term to describe the rhetoric of 'explanation'. To argue 'he is human' is tautological—every person is human. What 'humanizing' really signifies here is the idea that murder defendants are not 'alien' humans, but characters familiar to and normal to jurors. This narrative demonstrates individualism's hegemony—jurors are meant to empathize with the bootstrapping aspects of the story that call to mind a Horatio Alger novel. According to the defender, his client is an oppressed working immigrant trying to support his family, striving to join the 'American Dream' of work and stability. Indeed, this is precisely what is meant to convey his humanity. 'Humanity' equates to an underdog striving to join the American Dream.<sup>24</sup>

Another trial defender discusses the importance of 'humanizing':

I know a lot of my jurors at that point and I try to fashion an argument, sometimes I'm successful and other times I'm not, but I try to fashion an argument that will appeal to one or more of the jurors. How do I do it? I always try to humanize my client. That's what I try to do. I often try to think of it as there is a circle of humanity that the prosecution is trying to put my client out

of and virtually in every case I've ever tried I know this person. I feel like he is very much like me, because of circumstances of growing up or whatever, I try to convey to the jury that this person is not outside our circle of humanity and here are the parts about him or her that make them worth living.

(Defender 4)

In this instance, the defender speaks generally about humanizing, not drawing a connection between explaining and humanizing. Yet this passage reveals her consciousness about the processes of 'otherizing'—and her job to fend it off—that takes place in capital trials.<sup>25</sup> From the perspective of prosecutors, capital defendants are not 'one of us' but one of *them*, something alien and monstrous. Defenders work to re-characterize their clients as 'us', as 'human'.<sup>26</sup>

How do jurors respond to humanizing and explaining-but-not-excusing? Due to the limitations of my data set, which consists entirely of death sentence cases, I cannot empirically answer this question. This study is not an investigation into the effect of narratives on trial outcomes. But investigating trial defenders' attitudes about the verisimilitude of such narratives is important because it reveals defenders' consciousness of ideology in the law; defender use of individualistic stories reveals a knowledge—perhaps unconscious—that individualism seems truthful and more likely to convince jurors. This situation sheds light on the question of the broader definition of cause lawyering—'strong' cause lawyering—that I have discussed in this article. If trial defenders are thinking about the verisimilitude of their narratives primarily in terms of *trial outcomes* it suggests that they are engaged in something less than that.

## Discussion and conclusion

Are capital trial defenders cause lawyers? To the extent that they oppose state killing and sometimes illuminate social inequality, the defenders studied in this project are engaging in something beyond the parameters of their particular trials, and they fall on the relatively 'professional' side of the continuum of cause lawyering delineated by Sarat and Schiengold (1998). However, considering that they are unaware of, avoid, or suppress subversive arguments within the expansive discursive space afforded by penalty phase proceedings, they may be 'forgetting the future' precisely so that their clients may avoid a death sentence. As Sarat and Schiengold (1998: 4) point out: 'The politically motivated lawyer acts ethically not by evading the essentially political character of relationships but by responsibly representing the political aims of her entire client constituency even at the price of wronging individual clients.' At least in these limited data, this political action does not take place.

I have argued in this article that this partial 'forgetting of the future' can be explained by the hegemony of individualism. In a society where 'only individuals count', the attorneys working in perhaps *the* principal institution governing that society (the law) inhale and exhale individualism whether

it helps or hurts their 'entire client base'. Individualism is hegemonic, in the classic, Gramscian sense of invisible power. The hegemony of individualism is so profound, I argue, that it rarely occurs to capital trial lawyers to contemplate how to challenge it.

However, as scholars of resistance narratives have shown, rarely is hegemonic domination a simple, one-way-street dynamic. Rather, hegemony is perpetuated dialectically: 'ideologies that are encoded in particular stories are "effectively protected from sustained critique" by the fact that they are constituted through variety and contradiction' (Ewick and Silbey, 1995: 212). The concept of diminished autonomy—especially the 'hard' version—inherently challenges the notion that 'only individuals count'. As I have claimed in this article, diminished autonomy can be understood as a liminal state, something like a bridge between 'agency' and 'structure' to explain events (such as homicide). As such, it casts a suspicious (if not truly or entirely subversive) light on the veracity of a liberal, rational-formal legal system that usually precludes discourses that assign blame outside of the individual. In this sense, diminished autonomy is, perhaps, a step toward ideological cause lawyering, although—following Ewick and Silbey—it might also be seen as a temporary antithesis in the dialectical reproduction of individualism's hegemonic power.

Is it possible to subvert individualism during legal proceedings? Under what conditions might lawyers who believe that individualism itself (beyond racism, unfairness or the other normative complaints of capital defense attorneys) harms their 'entire client base' be able to say something about it without risking their clients' death?

Ewick and Silbey (1995) argue that several conditions are probably necessary for subversive narratives to emerge. First, the narrator must be socially marginalized because it is 'the marginal whose lives and experiences are least likely to find expression in the culturally available plots and characters' (1995: 220). Second, the narrator must have an awareness of the structural or institutional plausibility of creating a subversive story (1995: 221). Finally, the venue for the potentially subversive story must 'create both a common opportunity to narrate and a common content to the narrative, thus revealing the collective organization of personal life' (1995: 221). Each of these characteristics is on display in the context of capital trials in which defendants and their defenders together construct narratives. Defendants are almost always marginalized, their defenders understand the institutional parameters the law provides for telling their story, and the capital penalty phase furnishes one of the few venues in the American legal system where these types of stories are at least theoretically possible.

Nevertheless, as this study suggests, it may be impossible to employ subversive story-telling in capital *trials* precisely because of the ironic narrowness created by the life-saving prerogative discussed earlier—although the rules governing penalty phase proceedings provide a venue for just about any kind of evidence or argument, the life-saving norm straightjackets trial defenders into telling 'jury-friendly' stories that will not upset the ideological apple cart.<sup>27</sup>

I began this article discussing Sarat's (1998) study of cause lawyering among *post-trial* capital defenders, and I return to it now because while capital *trials* seem to largely preclude ideological cause lawyering, the jury-free, temporally long context of post-conviction proceedings seem to leave more room for taking on ideologies. As Sarat shows, many post-trial death penalty lawyers 'remember the future' and see their work as ideological protest in the form of testimonial. This may be simply because post-trial lawyers have more time—death penalty appeals are measured in years, trials in days.

We might search for subversive stories farther along in the process of state killing to include clemency hearings. Perhaps those advocates begging for their clients' lives in the short days or weeks prior to an execution date are able to 'remember the future' and make a record of protest against individualism's harms. This seems unlikely to me, however, precisely because of the near totally one-way relation of power in clemency hearings. As Sarat (2005: 69) makes clear in a different text, the possibility of *mercy* created by clemency is directly related to the total discretion of an executive of the state (usually a governor) (see also Whitman, 2003). Only those with near-monarchical power are in a position to grant mercy. In such a context, resistance narratives seem exceedingly unlikely unless the resistor has resigned himself to a pyrrhic and ultimately self-immolating victory. My choice of the word 'begging' when describing the discourses of lawyers representing the condemned at clemency hearings was not off-hand. When one is a beggar, it is usually rather difficult to challenge the hegemony of the beggee.

Finally, the work of Brisman (2009) suggests that the potential for resistance to hegemony may be found, or at least searched for, at every step of the death penalty process—even the very last step. Brisman (2009: 3) proposes that certain forms of 'volunteering' (the waiver or withdrawal of appeals by the condemned) might be understood as a form of protest against state power. This is quite a controversial argument, and one that is fervently resisted by many in the capital defense bar because of the lethal result and what some perceive to be a naïve and overly abstract orientation to state killing. Nevertheless, Brisman's argument is worth considering in light of his suggestion that such an approach might function to consolidate resisters by connecting the condemned with others involved in different, unrelated protests against state power (2009: 19).

LaChance (2007) makes a similar argument, suggesting that state policies allowing the condemned to request a special 'last meal' and also the opportunity to speak special 'last words' ironically vivify the condemned man and inscribe him with a kind of last-minute sense of agency, albeit within a structure of total domination. LaChance (2007: 704) argues that these fleeting moments of individuality confer just enough of a sense of willfulness on the condemned that they embody something like a 'self-made monster', a character that paradoxically both cannot help being dangerous (like an animal), but also possesses willfulness. The execution of 'self-made monsters' maintains a retributive tone that prevents state killings from seeming like bizarre, ceremonial (and anachronistic) euthanizations of rabid animals (2007: 719–20).

The difference between LaChance and Brisman on these final moments of the condemned person's life is that Brisman explicitly views condemned agency as potentially resistant of the State, while LaChance sees the dead-man-walking's last moments of individuality as a kind of faux-agency. Indeed, LaChance (2007: 719–20) argues that 'last meals' and 'last words' simply offer *the veneer* of agency for doomed prisoners; just enough of a veneer as to retain the retribution that keeps the death penalty popular. For LaChance, the agency of the condemned man is literally co-opted by the State. Resistance by any of these measures—cause lawyering, volunteering, or making rebellious 'last words'—seems futile.

In the end, the simple question of whether or not capital trial defenders are cause lawyers is, in a sense, beside the point. The capital trial, which seems to offer the best legal venue for resistance, turns out to be quite restrictive. This is so, in part because capital trial lawyers, like most everyone else in contemporary US society, live and breathe individualism.

## Notes

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1. Sometimes the State's response can have dire consequences for cause lawyers, as in the example of Lynne F. Stewart, a defender of unpopular political defendants; in 2005, Stewart was convicted of 'aiding terrorism' by conveying messages for convicted terrorist Sheikh Omar Abdel-Rahman and sentenced to federal prison (see Reinholz, 2005).
2. Theories of abolition are complex and sometimes inconsistent with one another. For example, abolition based on 'mercy' would be very different than abolition based on 'social injustice' because the former represents a gift from an inculpable to a culpable while the latter suggests that we are all partially culpable. See Whitman (2003) and Sarat (2005).
3. I also informally interviewed several non-attorney 'mitigation specialists' who thoroughly investigate capital defendants' backgrounds.
4. See also Whitman (2003), Zimring (2003), and Kaplan (2006) for more on the relationships between ideologies and capital punishment.
5. *Proffitt v. Florida* (1976), *Jurek v. Texas* (1976), *Woodson v. North Carolina* (1976), and *Roberts v. Louisiana* (1976). These cases re-established the constitutionality of capital punishment in the United States.
6. However, in the relatively common situation in which the original jury is unable to unanimously decide on a penalty (either Life Without the Possibility of Parole [LWOP] or death), prosecutors in California and many other states have the option of retrying *only* the penalty phase—with

- a new jury—or accepting a judge-imposed LWOP penalty. In these ‘penalty-retrial’ cases, the new jury is instructed that the defendant has already been found guilty of capital murder and that their job is simply to decide between a sentence of LWOP or death.
7. This Gramscian notion of hegemony focuses on the invisibility of power processes. Colloquial uses of ‘hegemony’ often exclude consideration of power’s visibility, rendering ‘hegemony’ a synonym for ‘domination’ or ‘repression’. I explicitly employ the original meaning of the word.
  8. See Zimring (2003: 146–9) for a discussion of the judiciary’s dissatisfaction with the practices of capital defense attorneys.
  9. Although the US Supreme Court ruled that lethal injection is basically constitutional in *Baze v. Rees* (2008), local jurisdictions are still attending to various technical and legal issues surrounding the actual practice of lethal injection executions (see Furillo, 2008).
  10. Notably, the Governor of North Carolina recently signed into law the North Carolina Racial Justice Act, which allows capital defendants (and the condemned) to include statistical evidence when challenging racial bias in the death penalty system, effectively creating a legislative ‘end run’ around the doctrine established in *McCleskey* (DPIC, 2009).
  11. Justice Scalia uses the term ‘incremental abolition’ in *Atkins v. Virginia*, 536 US 304 (2002) at 353.
  12. Technically, ‘post-conviction attorney’ refers to an appeals lawyer working on claims *outside* the record—essentially a *habeas corpus* attorney—while ‘appellate attorney’ refers to a lawyer working on claims based on the record of the trial. Most death penalty lawyers working on cases post-trial work on both aspects, although many certainly specialize in either ‘legal’ issues (from the record) or ‘habeas issues’ (often complex social history evidence). Although it might be interesting to investigate differences between habeas and direct-appeal specialists vis-a-vis the question of cause lawyering, I do not take up that question in this article. Hereafter, I use the term ‘post-trial’ to include both.
  13. The undisputed champion of death penalty defense lawyers who successfully argued *Furman* in front of the United States Supreme Court in 1972.
  14. This represents a *moral* argument against capital punishment. Baumgartner and his colleagues (2008) have shown that these types of arguments have little current purchase on the public’s imagination, having been eclipsed largely by the question of *innocence*.
  15. Individualism’s covert hand in the criminal justice system parallels individualism elsewhere in American society, from the pervasive valorization of personal wealth accumulation to ‘punitive and neglectful individualism’ in schools and social service agencies (see Currie, 2004: 14).
  16. It is hard to know precisely why executions are so rare in California, but one likely explanation is the slow and contentious post-conviction process. The recently convened California Commission on the Fair Administration of Justice (2008: 4) has gone as far as to declare that ‘the backlogs in post-conviction proceedings will continue to grow until the system falls of its

- own weight'. Moreover, the sentencing–execution dichotomy might reflect a fundamental cultural tension in California between conservative values in agricultural cities like Fresno and lily-white affluent suburbs in Orange County (accounting for death sentences), and liberal views in cosmopolitan cities like San Francisco or Los Angeles (accounting for post-trial resistance).
17. See Reiman (1985).
  18. The notion of 'diminished autonomy' itself can perhaps be divided into what we might call 'soft' and 'hard' versions that themselves parallel the agency–structure dichotomy. 'Soft' diminished autonomy would be a theory of violence that essentially shifts the blame from the defendant to a different *individual*, such as a parent or other abusive caretaker. In soft diminished autonomy, the source of evil is still *a person*, only not the defendant. 'Hard' diminished autonomy would be a theory of violence in which *collective social forces* are partially to blame. As should be clear, hard diminished autonomy has more subversive potential than soft diminished autonomy.
  19. This defendant was convicted of capital murder and sentenced to death for participating in the kidnapping, rape, robbery, and lethal shooting of one woman. His co-defendant got LWOP; each defendant claimed the other pulled the trigger.
  20. This trial defender later makes one of the more strenuous arguments in this data set about the diminishing effects childhood trauma has on adult autonomy.
  21. This passage also reflects 'soft' diminished autonomy because it shifts the blame to the defendant's father. A 'hard' version of the story would ask: 'where were *we* when he was forced to rub shit on his chest?'
  22. In both cases, the defendant received a sentence of LWOP.
  23. Notably, in a study of California prosecutors (Kaplan, 2008), none said that their goal in a capital trial is to kill the defendant. Rather, they tend to describe their goals in terms of following the law and fairness.
  24. Perhaps not surprisingly, prosecutors tend to construct negative mirror image narrations of defendants, emphasizing the details that oppose defense versions of 'humanity', such as laziness, irresponsibility, and antisocial violence. Of course, these attributes are just as human as the 'good' ones delineated by defenders (see Kaplan, 2008). Concepts of 'human' and 'humanizing' are complex, subtle and suffused with ideological meaning—something rarely consciously reflected upon by trial defenders and prosecutors.
  25. Fleury-Steiner's (2004) book *Jurors' Stories of Death* is a good source on 'otherizing' in capital trials.
  26. However, defenders' consciousness about jurors is complex, and also evidently influenced by individualism. When defenders recast jurors as benevolent heroes who can take pity on the condemned and vote for LWOP, it is not because they hope that jurors will identify with the condemned's depravity, but because they want jurors to see themselves as merciful *individuals*. This strategy aims to make individualism work on behalf of the defendant rather than against him. But true subversion would involve a

leveling down of the juror to the level of the defendant, of getting the jurors to see blood on their own hands. True subversion would ‘de-individualize’ the juror in ways that might preclude the possibility of ‘mercy’ because mercy can only be granted by a sovereign individual. In this sense, we can see how individualism drives defenders’ beliefs about both defendants and jurors, in different ways. Thanks to Daniel LaChance for pointing this out to me.

27. Although as Chancer (2005) has shown, in some high-profile cases criminal trial defenders have been able to mobilize extra-legal ‘causes’—such as racism—to manifest a sort of inverse cause lawyering (also known as ‘jury nullification’). O.J. Simpson’s ‘dream team’, led by Johnnie Cochran famously invited the Simpson jurors to ‘send a message’ to the racist LAPD by acquitting O.J.

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