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Slow Law: Temporal Logics in US Death Penalty Mitigation Investigations

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From arrest to sentencing, cases in which the defendant is charged with capital murder in the United States take substantially longer to resolve than homicide cases in which prosecutors choose not to seek the death penalty. One might reasonably attribute the slowness of capital trials to heightened procedural safeguards that attend the potential deprivation of life. In this article, I suggest that this explanation, straightforward as it is, glosses over more probing and analytically interesting truths about the complex temporal dimensions of death penalty trials. Based on my experiences as both a former defense advocate and an ethnographic researcher of capital defense practices, the slowness of capital cases revolves in large measure around the investigative pursuits of sentencing mitigation. Mitigation investigation's knowledge practices are informed by distinct temporal operations whose interrelations feed into a deeper logic to capital defense advocacy. This article parses out and traces the connections between these inner workings, using social theory on time to articulate the processes by which mitigation's temporal logics produce the characteristically slow pace of death penalty cases. I conclude with brief thoughts speculating how the temporal analysis experimented with here might be extended to processes of US criminal adjudication more broadly.

Keywords:
death penalty; defense advocacy; mitigation investigation; temporal analysis

INTRODUCTION

Why do criminal trials in the United States take so much longer when they involve the death penalty? Marceau and Whitson (2013, 154) report that capitally charged cases in Colorado state require an average of 1,902 days from arrest to jury determination of sentence at trial, compared to 526 days for capital-eligible cases not charged with the death penalty. The authors note "the complex procedures involved in attempting to ensure that only the guilty and the deathworthy are executed" (155). Using a different metric, Miethe's (2012, 4) study in Clark County, Nevada, reveals median time estimates for lead and second-chair defense counsel to be a combined 2,222 hours of work over the course of a capital murder trial—again before

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appeals—as opposed to 1,056 hours for a noncapital murder trial. In that jurisdiction, Miethe observes that "murder cases that ultimately result in a death sentence involve far more court-related activities than murder cases that lead to a life sentence or a maximum sentence of less than life or death" (9). Leaving aside the extensive legal challenges by defendants through appeals and postconviction review—an issue that has been the subject of important studies in the death penalty literature (Sarat 1996; Gelman et al. 2004)—procedural slowness appears to be a characteristic feature of capital prosecutions across the nation.[1]

In line with the scholars above, one might reasonably attribute the length of capital trials to their requirements of "super due process" (Radin 1980). As the US Supreme Court stated some time ago, "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" (*California v. Ramos* 1983, 998–99). Certainly, additional time seems a natural consequence of the death penalty's heightened procedural demands. This article, however, proposes that the standard explanation, straightforward as it is, glosses over more probing and analytically interesting truths about the temporal dimensions of capital litigation.[2] Whereas the usual explanations focus on the technical doings of lawyers in the courtroom, my focus here lies on the narrative-driven labor of investigators as they engage with the human relationships and real-world environments that profoundly shaped the life courses of capital defendants. Much of the work of these practitioners is, of course, defined by its expected benefits for procedural strategy; and yet, vital characteristics of capital defense's "slow" brand of advocacy would remain unappreciated with a strict focus on courtroom gamesmanship. Employing the lens of temporal analysis, this article attempts to bring into sharper view the ways in which the technical practice of death penalty defense is bound up with the time horizons of various legal, practical, and personal projects.

Based on my experience as both qualitative researcher and practicing defense advocate, I suggest that the slowness of capital cases revolves in large measure around the investigative pursuits of sentencing mitigation—the development of humanizing life history evidence by the defense in order to persuade key legal decision makers (jurors, prosecutors, judges) against a sentence of death. This article argues that mitigation investigations are in fact informed by a number of temporal operations. Although grounded in its own distinct logic, each of these operations mutually reinforces the others in contributing to a deeper logic to capital defense advocacy more generally. This qualitative study parses out and traces the connections between these inner workings of

1. By way of further examples, a study by the Washington Death Penalty Assistance Center (2004, 14) reveals that of all murder cases completed between 1997 and 2003, the average capital aggravated murder took twenty-five months from arrest to sentencing, as compared to thirteen months for noncapital aggravated murder. An empirical analysis commissioned by the Kansas Judicial Council (2014, 13) finds capital prosecutions in that state to average 40.13 court days versus 16.79 days for death-eligible noncapital cases. And in a report submitted to the United States Judicial Conference, Gould and Greenman (2010, 28–29) observe that defense counsel in federal cases work 4.6 times more on capitally charged cases than on death-eligible noncapital cases—an average of 2,815 hours versus 637.

2. And as straightforward as the standard explanation is, its accuracy remains open to debate. Steiker and Steiker (2016, 154–92), for example, have recently critiqued the concept of "super due process" to be jurisprudentially thin, even though that notion would seem to suggest a robust, intricately articulated quality to procedural safeguards for capital sentencing.

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time, revealing the processes by which mitigation's temporal logics produce the distinctly slow pace of death penalty cases.

The theoretical tools of social inquiry have long been applied to examine subjective constructions of what Durkheim called "social time" ([1915] 1965, 22). But although social theory on time has been developed and applied across a variety of groups and social contexts (Munn 1992; Adam 1994), analysts have largely failed to apply temporal analysis to practices of legal adjudication in the United States (but see Feeley 1979; Greenhouse 1996, both discussed *infra*). With this research gap in mind, this article presents an ethnographic response to the call of one author who, writing from within the US legal academy, asserts that "legal time is still a subject whose significance has not saved it from going mostly ignored" (Bloom 2015, 2–3). The slowness of capital trials presents a promising point of entry. Not only are their operations so clearly bound up with the calendar and the clock, they are also part of a wider apparatus of criminal proceedings in which issues of temporality figure as pivotal concerns. There is, for example, the chronology of alleged events, the right of the accused to a speedy trial, the mundane but often game-changing scheduling of proceedings, and the proper length of deprivations of liberty vis-à-vis law enforcement, the courts, and corrections. For social scientists curious to explore US legal processes as they unfold on the ground, temporal practices surrounding the country's criminal jurisprudence beg for further investigation.

The need to understand the dynamics of slowness appears even more compelling when capital proceedings are compared to typical criminal cases. Death penalty trials clearly stand out as temporal anomalies: US criminal justice is by and large "a system of pleas" that can be characterized, aptly, as fast (*Lafler v. Cooper* 2012, 1388).[3] Feeley's classic work on lower criminal courts in New Haven, Connecticut, famously captured the rapid-fire essence of plea processing, whereby "the overwhelming majority of cases took just a few seconds" to resolve (1979, 11). In this domain, opposite the capital side of the spectrum, prevailing judicial discourse has long associated the speediness of plea bargaining with an inverse *lack* of due process—a systemwide quick fix for ever-burgeoning caseloads.[4] Here, then, time appears to be similarly underanalyzed. Feeley's rare study examined the time logics of criminal defendants to complicate the received wisdom about plea bargaining's prevalence. He recognized defendants' temporal experiences of pretrial detention, their predictions of the time costs of invoking trial rights, and their balancing of these considerations against the time investments of the official

3. In a companion case to *Lafler*, the US Supreme Court observed that "ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas," as opposed to verdicts returned through trial (*Missouri v. Frye* 2012, 1407). The unique time demands of death penalty trials, then, constitute another aspect of the familiar adage that "death is different" (Barkow 2009).

4. In the Supreme Court case of *Argersinger v. Hamlin*, Justice Douglas lamented the growing role of guilty pleas in an increasingly overwhelmed criminal justice system: "An inevitable consequence of volume that large is the almost total preoccupation . . . with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication . . . .[F]or most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way" (1972, 34–35).

A year earlier, however, Justice Burger had presented this same lack of due process as a benefit: "Properly administered, [plea bargaining] is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities" (*Santobello v. New York* 1971, 260).

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punishments that attend speedy plea dispositions. My article attempts to offer something of a parallel analysis from the most extreme end of criminal punishments. Through empirical study of mitigation's time practices, I present a more textured explanation for the slowness of capital cases—a unique feature of US criminal justice that even sophisticated jurists attribute, simplistically, to defense obstructionism (Pennsylvania District Attorneys Association 2015).

As the first study of capital mitigation oriented toward time, this article supplements works that have explored different dimensions of mitigating evidence in death penalty cases (White 2006; Hughes 2009; Kaplan 2010). This line of scholarship has attended a string of important court decisions that, since the turn of the millennium, have addressed capital mitigation with respect to the defense's duty to provide effective assistance of counsel.[5] The top-down pronouncements of US Supreme Court case law are certainly important for understanding the contours of death penalty defense practices. Nevertheless, this study uses high court jurisprudence merely as a point of departure, offering an account of defense advocacy's interrelated logics of time in order to discern a conceptual coherence to its practices. In the latter respect, I take my cue from and attempt to build on Haney's (1995, 2008) scholarship detailing what he has termed "the logic of mitigation," as I shall later elaborate.

The article begins by offering some background on capital mitigation investigations, with an emphasis on its concrete activities. I then lay out the theoretical and methodological framework for the study's temporal approach, setting up my presentation of ethnographic data on three specific, interrelated logics of time. The piece concludes with brief thoughts on how temporal analysis can be applied to sociolegal scholarship on processes of US criminal adjudication more broadly.

BACKGROUND ON CAPITAL MITIGATION INVESTIGATIONS

US case law provides important guideposts for the practice of capital sentencing mitigation: its theoretical underpinnings in an individualized sentencing framework that foregrounds "the diverse frailties of humankind," as uniquely manifested in each defendant's own life (*Woodson v. North Carolina* 1976, 304); the breadth of mitigation's methodological concerns, covering "the character and record of the individual offender and the circumstances of the particular offense" (*Woodson v. North Carolina* 1976, 304; *Lockett v. Ohio* 1978, 604); the philosophical insight that evidence can be properly deemed mitigating if it helps to explain the defendant's behavior, even without necessarily excusing it (*Eddings v. Oklahoma* 1982, 112–17); and the notion that evidence of a "disadvantaged background" and "emotional and mental problems" (*California v. Brown* 1987, 545) constitute mitigating factors that ought to factor in deliberations concerning a "reasoned *moral* response" (*Franklin v. Lynaugh* 1988, 184) as to the level of the defendant's culpability. Such themes presage the Court's more recent holding that in order to make "a fully informed decision with respect to sentencing strategy," the

5. See Stetler and Wendel (2013) for a summary and analysis of this series of US Supreme Court decisions, which includes *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard*, *Porter v. McCollum*, and *Sears v. Upton*.

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defense must first conduct a constitutionally adequate investigation of the client's social history (*Wiggins v. Smith* 2003, 527).

But these are, again, doctrinal touchstones, theoretical in nature. During my research and time in the practice, I learned that advocates have developed a canon of sorts, composed of both practitioner-oriented and academic materials, that explains how the high court's abstract formulations play out in the actual investigative duties of mitigation. In fact, the principles articulated in these works have been standardized in a set of guidelines published by the American Bar Association (2003), an influential, nonpartisan professional association for the general bar nationwide. The Supreme Court has recognized the ABA's guidelines to represent "well-defined norms" concerning adequate representation in capital defense (*Wiggins v. Smith* 2003, 524)—a field of practice long associated with substandard assistance of counsel (Bright 1994). These provisions were later supplemented with guidelines that further detail the critical function of mitigation in death penalty cases (American Bar Association 2008). I return to the canonical sources in order to go straight to works that arose from close engagement with the practice. Indeed, many of these pieces are cited in the guidelines themselves. I hope that this approach will convey the longstanding recognition of mitigation's emphasis on human relationship–building and fact corroboration, and the implications of these for the time frames of effective advocacy.

In a law review article long embraced in the practice, Goodpaster noted that because "the penalty phase is a trial for life . . . [t]here must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings" (1983, 323–24). Given the human stakes on the line, he warned that "[t]he importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized" (324). Other advocates explain that the attempt to construct mitigation's deep biographies requires nothing less than "interviewing the client and virtually everyone who has ever known the client, and finding every piece of paper regarding the client ever generated" (Norton 1992, 43). The task of "investigating a lifetime . . . is a large one" (Heaney 1983, 8) that requires "hundreds of hours of work—with meticulous attention to detail, painstaking efforts to decode and decipher old records, patience and sensitivity in eliciting disclosures from both witnesses and the client" (Stetler 1999, 39). Consistent with the Supreme Court's postmillennium rulings, mitigation's practitioners have long maintained that advocates can afford "no investigative shortcuts" (Norton 1992, 43), but must instead "[c]ollect as much information as [they] can" as an empirical basis for "choos[ing] what to present and what not to present" as a matter of trial strategy (Heaney 1983, 8).

To discern the client's experiences of frailty's diversity is, again, a central preoccupation of capital sentencing defense. A widely circulated memorandum on the nature and role of capital mitigating evidence notes that investigation "begins with the individual's family history," but that multigenerational behavior patterns and effects of family dynamics "must be considered along with psychiatric and neurologic deficits, developmental disabilities, medical diseases, compromised intellectual functioning, and cultural and ethnic influences" (Holdman n.d., 3–4). Writing in another well-received law review article, Haney observes that "[t]he nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and

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crime is so tight in the lives of many capital defendants as to form a kind of social historical 'profile'" (1995, 580). Nevertheless, he emphasizes that it is not these general commonalities but the particularized differences of each individual's experiences of these factors that explain an aggravated homicide, distinguishing the defendant from others of seemingly similar backgrounds who did not commit capital murder (593–99). Every client's vulnerabilities must be defined and interpreted through his own lived perspective; therefore, "[n]o list of specific factors can adequately describe the diverse elements of mitigation" (Holdman n.d., 4).

These, then, are some of the methodological and attitudinal characteristics of the practice. Capital sentencing investigations are so complex and time-intensive that effective defense teams designate at least one advocate whose role is devoted solely to undertaking them.[6] Over the years, practitioners and legal commentators have highlighted various nuances of the work that further underscore its demands on time. Critical factors that can prove mitigating for capital defendants—their compromised functioning and traumatic life experiences—frequently make it more challenging for advocates to establish necessary relationships of trust, both with their clients and with those who can provide supporting evidence (White 1993, 337–40). The shame and stigma attached to mental illness compel clients and their intimate others to "minimize, normalize or deny" evidence of mitigating impairments (Blume and Leonard 2000, 64). The significant intellectual disabilities that affect many capital defendants are often difficult to prove with court-worthy evidence, and thus must be detected and chronicled with special care (Ellis and Luckasson 1985). Social history investigations of genetic vulnerability must reach back at least three full generations in order to meet medical as well as legal standards of reliability for mental health assessments (Dudley and Leonard 2008). And the mitigation narrative must be both credible and compelling enough to overcome the strong predisposition of many jurors to impose the death penalty before sentencing proceedings have even begun (Bowers et al. 1998). As one legal academic has observed, "Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution" (Vick 1995, 357). The considerations above begin to provide a sense of why, from the defense's point of view, mitigation investigations account for such a sizable portion of a practice that stands out precisely for its consumption of time.

And yet, a more sophisticated grasp of mitigation's temporal mechanics requires more than summing up the time requirements of these tasks—a merely additive operation. In the pages that follow, I argue for a qualitatively richer understanding of capital defense practices that reveals how advocacy incorporates several distinct conceptions of time, each of which bears practical effects that play off the others through the phenomenon of slowness.

6. The need for "mitigation specialists" specially qualified through higher education, training, and experience is established in the ABA Guidelines (Judicial Conference of the United States 1998, 12–13; American Bar Association 2003, 952). Stetler and Wendel's (2013) analysis, above, charts the impact of the ABA Guidelines in the recent string of Supreme Court case law on effective defense representation in capital cases.

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THEORETICAL AND METHODOLOGICAL FRAMEWORK

My conceptual approach is grounded in a theoretical lineage that investigates the processes by which structural forces manifest power through mechanisms of control over time. Foundational works were particularly interested in capitalist wage labor economies, where the imposition of money value on time had profound ramifications on the organization of social life (Thompson 1967; Simmel 1978). More recent studies have investigated specific field sites and institutional practices, demonstrating how various forms of power come to be imposed on social actors' subjective experiences of time. In settings characterized by stark power differentials—for example, prisons in the United States (Comfort 2007), welfare offices in Argentina (Auyero 2012), and immigration detention facilities in the United Kingdom (Turnbull 2015)—dominance is asserted temporally in the form of dictated routines, suspensions, and arbitrary time horizons for freedom. These studies show that for the populations "managed" by these systems, such practices become bound up with self-perceptions of agency, the formation of social identity, and blurred boundaries between public and private domains. Crucially, analysts have recognized time to be a field of action where institutional power can be negotiated or confronted. Exploring themes such as rebellion against authority (Willis 1981), conflicts between institutional and individual interests (Roth 1963; Zerubavel 1979), and, more recently, the creation of possibility amidst precarity (Han 2012; Millar 2014), important works here have illuminated the fine-grained processes of meaning-making involved in contestations of time.

This article contributes to this body of scholarship with its focus on US capital case proceedings—an explicitly adversarial setting in which both parties are expressly concerned with temporal control. There is a reason why defense advocates wish to generate slowness: simply put, acceleration facilitates death sentences. Indeed, I contend that in capital trials, the prosecuting state attempts to speed up proceedings by invoking a dominant temporal order that has long been used to justify sovereign authority and manage populations in Western societies. Although it lies beyond the scope of this article to present a full ethnographic rendering of prosecutorial time, Greenhouse's (1996) groundbreaking work is helpful in sketching some brief outlines of the temporal regime that I view the practice of mitigation to be positioned against.

The prosecution's logic of acceleration is rooted in a prevailing temporal framework that Greenhouse calls "linear time" (1996, 20–24). According to Judeo-Christian traditions, time originates in the universe's creation and advances inexorably to a day of eternal judgment. God transcends time in his enduring completeness and perfection. Human beings, by contrast, exist only within segments of finite, forward-moving time. In Judeo-Christian thought, the inevitability of an individual's bodily demise is bound up with the duty to live a worthy life, in hopes of earning salvation from the original fall from grace. Although political and state institutions in the West eventually moved toward secularization, an important sense persisted in which the state sought to stand in for God. Sovereign entities continued to insist that the individual citizen's purpose would be fulfilled through compliance with timeless, state-ordered arrangements that contributed (purportedly) to the greater social good.

I submit that the prosecution's success in obtaining death sentences relies on its ability to propound two key elements of linear time. First, during my fieldwork and years

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in the practice, I saw that prosecutors routinely set forth spiritually inflected claims about the defendant's evil, immoral nature. In other words, his is a soul that is irredeemable by time. Lynch (n.d.) methodically supports these observations in a study I found distributed at various training conferences for capital defense practitioners. Analyzing prosecutorial sentencing strategies across twenty-four capital cases, she discovers that in prosecutors' closing arguments, "the plot was primarily comprised of the usually brief, violent meeting between 'evil' and 'good,' as personified by the defendant and the victims of his violence" (4). The aggravated murders bear horrendous consequences for victims and survivors. As such, these acts represent who capital defendants truly are, revealing what one prosecutor described as the "darkness in their soul" (4). In a common related refrain, another prosecutor declared, "[The defendant] is the person who has violated society's rules. He has demonstrated his lack of social responsibility, his lack of responsibility for his crimes" (9). The evil that makes up the defendant's essential self makes him incapable of complying with the social order and serving the social good. It therefore follows that he merits permanent removal from society itself—and no amount of time will ever prove otherwise.

The same study by Lynch suggests a second relevant element of linear temporality. She observes that "[w]ithout exception, these prosecutors argued, either implicitly or explicitly, that the *significant* starting point in evaluating the defendant's life story began with the earliest documentable violent episode in his life" (2). If human beings exist in finite, mortal time, it is telling that prosecutors attempt in their representations to make the already-delimited segment of the defendant's lifetime even more finite. His life begins not with birth, but with the first expression of his violent nature. It ends not with natural death, but with the execution that he deserves as an agent of irredeemable evil. The prosecution's goal of reducing, analytically and literally, the defendant's lifetime bears out even on the operational level of trial procedure. Defense advocates are aware that underfunded, underinvestigated, and underlitigated cases that are tried more quickly are more likely to end in death sentences (Rountree and Owen 2013). A former colleague of mine, recognizing the prosecutor's typical rush to trial, often spoke of "the government's frog march to the gallows." Finally, if linear time is an instrument of a sovereign power that presents itself to exist in timeless perpetuity, it is worth recalling that in the United States, the prosecution represents the state: criminal cases are titled *United States/State/Commonwealth/etc. v. Defendant.*

Given that death penalty prosecutions succeed by advancing these two aspects of linear time, an effective sentencing defense would seem to lie in somehow undermining the sovereign's temporal order. Core principles developed in the mitigation "canon" might, in fact, be interpreted in just these terms. The defendant is not an irredeemable evildoer, but a vulnerable soul marginalized and ultimately crippled by historical forces over which he had little if any control; and the defendant cannot be analytically reduced to a series of violent crimes, but must be understood instead in the multiplicity of contexts spanning his entire life and even beyond. Anthony Amsterdam, the renowned capital litigator and legal scholar, has explained how "the temporal fabric of narrative reflects the shape of our concerns" (Amsterdam and Bruner 2002, 124; see also Conley 2015). Such is the case with defense advocacy, which challenges linear temporality by patiently expanding the field of considerations relevant to the

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defendant's personhood. In short, the logic of defense advocacy is structured around the systematic amplification of mitigation's time horizons.

My analysis seeks to reveal how and why slowness works to undermine the dominant temporal framework that favors death sentences. I provide an *explanatory* account that addresses why capital trials have come to take so long, going beyond the common issues of subjective agency and social positioning that have lent themselves more to interpretive description. In taking this approach, I borrow from Bear's (2016) recent thinking on the concept of "timescapes." Leaning on the work of social geographers May and Thrift (2003), Bear, an anthropologist, defines timescapes as "networks of representations, technologies, disciplines, and rhythms in time" (2016, 496). They are analytical constructs, "the extent and content of [which] . . . are decided through a process of inquiry in which an analyst's questions are brought into relation to a material fieldsite" (496). As developed through my own field activities, the timescape of mitigation investigations reflects my assessment that the time-intensive nature of death penalty trials is a product of attitudes, habits, and practices that mutually reinforce one other. Unlike Bear, who seeks a theoretical device to expose inconsistencies and disjunctures that remain hidden within social time, I adapt the timescape as a conceptual heuristic that weaves together various operational and philosophical aspects of mitigation's time practices in a synthesized process of advocacy. Imposing this analytical coherence necessarily obscures important tensions within the sentencing defense process. Nevertheless, my goal is to explain how these time practices collectively orient defense advocacy against the prosecution's own time logics, rooted as they are in a temporal order long identified with the exercise of state power.

From theory, I now turn to method. During nine months of ethnographic fieldwork on capital mitigation, my research activities primarily consisted of active casework with a sentencing investigation agency headed by Scharlette Holdman. Until her death in 2017, Holdman, whom I addressed by first name, was one of the most prominent capital defense advocates in the United States—a nonlawyer regarded within the nation's death penalty defense bar as a pioneering figure in mitigation as it has come to be practiced (Chammah 2017). My formal field research with her organization, begun in 2006, was followed by eight years as a full-time defense lawyer and investigator in death penalty trials. During this time, I continued to take anthropological field notes, conduct interviews with practitioners, and collaborate with Scharlette and her agency's investigators on cases. Regarded as one of the elite advocates in the field, Scharlette certainly did not represent the norm of the practice. Nevertheless, she was an influential visionary of the canonical concepts, with their practical manifestation in the overall phenomenon of slowness, that defense advocates now widely take to define the basic requirements of the work.

Although Scharlette and my field interlocutors actively shaped the practices of mitigation, they would not have described its temporal dynamics as I present them below, from the position of academic ethnographer. Certainly, mitigation advocates are themselves nuanced thinkers who are ever mindful of the ticking clock. But rather than simply restating actors' own self-reflexive understandings, ethnographic inquiry can produce novel insights that analytically reconfigure those understandings from the "inside out" (Riles 2000, 6). This article thus begins from practitioners' own preoccupation with time—always present, but largely untheorized within their day-to-day

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operations—in order to analytically move beyond it. As I hope to show below, significant parts of mitigation's practices come into clearer focus when we view them as the accumulation of temporal effects in contravention of the prosecution's linear time.

MITIGATION'S TEMPORAL LOGICS

This section presents three specific time logics that together make up a unified timescape of mitigation investigations. The first focuses on legal strategy; the second, on the work of human relationship building that straddles legal and extralegal concerns; and the third, on the overarching ethos of care within which the investigators I studied contextualized their legal practice. My aim here is not so much to present a "thick description" of mitigation investigations writ large. Rather, I wish to highlight practitioners' perceptions of certain temporal demands within each of these logics, explaining how dispositions and actions become synthesized across them to generate slowness overall. The structure of the sequence, beginning with law and extending beyond, is intentional. I view time as a conceptual thread that winds, first, through the law itself; second, through social processes that are bound up with it; and, finally, through spheres of social life that actors perceive to transcend it. I have selected the logics below to be representative of these dimensions.

Chasing Slowness

During my period of formal research with Scharlette's agency, the Center for Capital Assistance was inconspicuously located in a two-story residential home in the suburbs of San Francisco. The organization's five investigators had approved my stay in an upper-level bedroom for the duration of my research—an arrangement that, I quickly found, would bring with it some of the jarring revelations typical of immersive fieldwork. One early morning, I was roused awake by the sound of footsteps coming up the creaky wooden steps, followed by Scharlette's southern twang. "Jesse! Jesse! Are you up yet? The lawyer's on his way here!" From beneath the covers, I could practically feel the kinetic energy of her fidgeting on the other side of the bedroom door. I glanced at the clock. It was a few minutes before 7:00 a.m.

One of my earliest and most prominent discoveries as a participant observer was a simple one: when it came to time, zealous defense practitioners appeared to share a sense of never having enough of it. The agency's staff arrived early and left late. Our workdays were marked by hours of uninterrupted labor, punctuated on occasion by flurries of panic. There was the steady turning of pages as advocates pored through reams of life history records; the car drives and international plane rides out to the homes of potential witnesses who could tell about their childhood memories of the accused; the constant generation of interview reports, internal strategy memos, revised investigation plans, production logs, and other work product; the frantic trips to the detention facility where the client had just revealed to the jail psychiatrist suicidal ideation; the impromptu visits from inspired lawyers who had news to share with the team at seven o'clock in the morning; and throughout this all, a sense of anxiety that our efforts would

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not be enough to keep the client alive. On one particularly chaotic day, a mitigation specialist sighed and remarked out loud, "Okay, we just have to remember the toxic stress running through our brains and tell ourselves to chill out"—a tongue-in-cheek reference to research, known by the agency's investigators through the work, on the corrosive neurological effects of constantly elevated stress hormones triggered by adverse childhood experiences (National Scientific Council on the Developing Child 2005).

As a legally trained ethnographer who had taken coursework on US capital case procedure, I initially found my observations in the field to be consistent with my book learning about funding-related pressures faced by the defense. I knew that a few states restricted resources for the defense through jurisdictionally imposed compensation caps or flat fees. These limitations on funding directly translated into limitations on the time that judges would grant for conducting adequate mitigation investigations. I was also aware that most capital jurisdictions lack these hard caps; this was true in the California and federal cases that Scharlette's agency tended to handle. In these regions, judges typically have discretion to allocate funding and time to the defense as they see fit. But here, many defense practitioners perceive their advocacy efforts to be compromised by a system in which judges can choose to stop granting resources at any moment (Bright 1997, 820). Given that funding for investigation seemed always to be in jeopardy, the preoccupation with the limits of time appeared to make sense.

I was mistaken, however, about exactly why. I had presumed that if resource limitations restricted time, then the defense's logical response would be to work as quickly and assiduously as possible, hoping to develop just enough of a mitigation narrative to persuade decision makers against the death penalty. But as I later learned from Scharlette, this mentality carried a risk. She explained to me:

> A big way to overturn death sentences is to show that the [original trial] lawyers failed to conduct adequate mitigation investigation. This violates their [Sixth Amendment] duty of effective assistance of counsel. But if lawyers just accept the funding limits without fighting and try to scrounge up what investigation they can, they may produce a mitigation case that gets death at trial and yet is good enough not to be overturned [on postconviction review] (Scharlette Holdman, pers. comm. 2006).

The danger, as she described it, is that "you do just enough to kill your client." Therefore, the sense of time's shortage that I witnessed in the advocates' dawn-to-dusk efforts did not reflect a resignation to its externally imposed limits. It reflected instead the need to generate discoveries that can themselves be used to justify further time and resources—in particular, investigative leads that pertain to classically mitigating themes such as intellectual disability, psychiatric impairment, traumatic brain injury, childhood trauma, and genetic histories of mental illness, as well as the rebuttal of aggravating factors that militate for the death penalty.[7] Trial judges have an incentive to grant these

7. In *Williams v. Taylor* (2000), for example, the US Supreme Court found trial counsel ineffective for failing to investigate the defendant's childhood abuse, his parents' incarceration for criminal neglect, and evidence of borderline intellectual disability. The Court's decision in *Wiggins v. Smith* (2003) highlighted, among other things, the defendant's diminished mental capacities and his multiple experiences of rape in

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continuances. They do not want the case overturned on appeal for failing to grant adequate time and funding for the investigation of evidence clearly relevant to sentencing mitigation. In so doing, the trial court would lie in error for, in effect, preventing the defense from providing effective assistance of counsel.

Consequently, when advocating for continued resources, the defense teams that Scharlette's agency worked with routinely focused on the unpursued leads produced by the investigation thus far, emphasizing the incomplete state of preparations for the sentencing trial. In one case we worked on, this mindset was evident in the structure of a defense team memorandum submitted to the court. The first section of the filing was titled "Tasks Performed." Here, the memo noted that efforts up to that point had "focused on client participation in his defense; assessing and documenting *[defendant's]* significant cognitive deficits, medical health, and psychiatric history; identifying and collecting social history documents; and interviewing his family of origin to obtain a social history." This was followed by a section describing how these tasks generated "Preliminary Findings." These included, among many other indicators of psychiatric impairment, a formal school diagnosis that the client's academic progress had been limited by "moderate/severe receptive and expressive language disorder." The judge could reasonably anticipate that jurors might view this diagnosis, a form of cognitive deficiency, to be significantly mitigating. Indeed, the team was hopeful that the diagnosis would eventually support a showing that the client was outright intellectually disabled, and thus categorically exempt from the death penalty (*Atkins v. Virginia* 2002).

The memo's final section outlined a "Proposed Investigative Plan" that provided an extensive list of the information sources to be followed up on—potential interviewees, institutions to visit, records to obtain, photos and other documentary evidence to gather—as identified or implied by sources from the investigation thus far. For example, the school records from which the defense team learned of the client's language disorder further reported that he had been the subject of an AB 3632 referral—in California, a now-defunct directive to provide state-funded services to assist special education students with disabilities. The memo stated that investigation of this one referral would require ten hours for obtaining and analyzing all pertinent write-ups, as well as twelve hours to locate and interview all named personnel associated with the file. Altogether, the numerous leads produced by the team's "Preliminary Findings" would call for an additional 600 hours of continued work over the next five months. Significantly, the memo was careful to portray this requested time segment as "the next phase of mitigation investigation," leaving the door open for work on leads yet to be uncovered. The court granted the time and funding. "Investigation produces more investigation," Scharlette told me. "You have to throw them [the funding authorities] a bone" (Scharlette Holdman, pers. comm. 2006).

I suggest here that this temporal logic of the practice, situated squarely within the technical legal practice, may be usefully conceptualized as "chasing slowness." Throughout my stay with the agency, I observed over and again that in the view of its practitioners, zealous advocacy required that slowness be earned through hard and characteristically stressful work. More specifically, advocates perceived themselves

foster homes. And in *Rompilla v. Beard* (2005), the Court faulted trial counsel for failing to investigate evidence they reasonably should have anticipated would be introduced as aggravating factors.

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as facing constant pressure to generate a sufficient number of the sorts of unquestionably mitigating leads that trial judges would feel compelled to honor. The labor I observed, accompanied by the palpable sense of always being behind, reflected the rush to discover enough to make the "next phase" of investigation a reality. Put another way, slow law for these advocates had little to do with an idleness or leisureliness of pace, but rather with a sense of urgency to produce findings that would merit further investigation and time.

Cultivating Rhythms

"Let's check in about this after you see the aunt and client this week," Scharlette said to me (Scharlette Holdman, pers. comm. 2006). We were discussing the prospect of identifying and interviewing a former gang associate of the defendant. During one of my weekly meetings with the client, whom I shall call Juan, he had mentioned to me in passing that he and an unnamed childhood friend had joined the same street gang when they were teenagers. I did not press him for specifics at the time; the issue was tangential to that conversation. But I made a mental note to follow up, knowing that this childhood acquaintance could prove an indispensable witness for understanding the defendant's turn toward criminal associations.

It had become my routine to meet Juan every Friday in the detention facility where he was awaiting trial. I would also visit the aunt, who had raised him since he was a child, at her home whenever she was available earlier in the week, depending on her always-changing schedule. The agency's staff members all were aware of this routine. There had emerged an established rhythm to my interviews that the investigators had come to internalize when mapping out their own next steps on the case. In the present instance, an investigator informed me that if Juan was willing to offer his friend's name at our next meeting—maybe even a rough home address—the team could then immediately conduct searches of all publicly available court records with this friend's name attached to them, using that information to locate and learn as much as possible about the friend and any gang associates mentioned in the files. We expected that the client would know some of the latter. Such court searches, she said, were standard practice before witness interviews. "Seeing the aunt and client" came to be understood among the team as markers of time, lending a rhythmic structure to our collaborative work in a way that advanced the investigation.

From my own perspective in my attempts to build trust with Juan, this routine also had a logic to it. Having heard from his aunt that I was continuing to speak to her at home, answer her questions, and tend to her needs concerning the case, Juan was growing noticeably more open in my interactions with him. On this particular week, the routine's logic carried some added urgency. Like many defendants, our client was wary of implicating those he cared about in criminal proceedings, as I would be doing by involving his old friend in the case. The team needed Juan to trust us with this person's name. If I could first have a preparatory conversation with the aunt, then during her subsequent visit with Juan, she could help to ease whatever fears he might have about doing so.

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I had not always been able to count on the rhythms of these meetings as a given in my relationship-building efforts. Before meeting the client for the first time, I had already known, again through my book learning, that the defense team could face considerable challenges trying to foster Juan's willing engagement with the team. Capital defendants

> may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. (American Bar Association 2003, 1007)

I was also aware that the specific demands of death penalty mitigation can further strain the relationship, in that capital clients typically exhibit a "natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense" (1008). Hence, by my third conversation with the defendant, I thought I was making decent progress. I had intentionally been keeping the conversation light in order to establish rapport, and Juan had never objected to meeting with me. This time, however, he concluded our chat by abruptly declaring that it was not necessary for me to come anymore. "I don't need these social visits," he said (Juan, pers. comm. 2006).

I saw myself at an impasse. I could not continue to impose my presence on the client against his wishes. On the other hand, I would never be able to learn his stories or help to earn his participation in his own defense—including disclosure of those personal and painful facts—without meaningful engagement with him. I needed to build trust in order to continue interacting with Juan, but I needed continued interaction in order to build trust. When I explained the situation to Scharlette, she immediately proposed that I turn my attention to the aunt. Our conversations in Spanish soon turned to her own struggles emigrating from Mexico to the United States as the young de facto mother of Juan. She spoke of the frequent absence of her husband, who I would later learn had been a *narcotraficante*. Although I am not trained as a psychologist, she referred to me among family members as "*el psicólogo*" (the psychologist)—a fact that I took with now-guarded optimism to indicate some level of comfort confiding in me. When, upon Scharlette's suggestion, I visited the client again and told him I had been checking in with his aunt, Juan said he had been hearing from her about our conversations. Not only did he seem to appreciate that I, as a representative of the legal team, showed respect for her worries and needs; he now also appeared to better understand the humanizing purpose of our mitigation investigation, and its importance for his case. My weekly visits with him recommenced.

The cultivation of rhythms directly aids the chase for slowness. The trust gained through steady relationship building yields mitigating disclosures. After three months of meeting with the aunt, she shared with me that she had grown up in a violent household—an emotional admission that, in turn, led her to connect her own personal history with the harsh beatings she would administer to Juan throughout his childhood.[8]

8. My experiences here are consistent with a passage in the strategy memorandum authored by Scharlette, cited in the section above on concepts developed within the mitigation "canon": "Witnesses to abuse and perpetrators are extremely reluctant to divulge accurate information about the nature and

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It was then straightforward for the defense team to argue to the court that the defendant's experiences of physical abuse and their behavioral repercussions required additional time to investigate. From the opposite perspective, the pressure to produce in the chase for slowness also feeds into the cultivation of rhythms. Because time is of the essence in attaining the next round of funding, defense advocates seek to maximize every opportunity with each witness interview to lay the groundwork for someday learning those sensitive truths about the client. When, due to his aunt's encouragement, Juan finally gave me the name of his gangster friend, the team was quick to complete a court records search and hand me all the files, which included the address of his childhood home. As it turned out, this enabled me to start relationship rhythms with this friend through the often challenging—and time-consuming—task of actually finding the witness (when I knocked on the door, he answered). But just as importantly, it also gave me a chance to prepare for our conversation by better understanding his own criminal history and the dynamics of his neighborhood, including the emergence of street gangs there in the 1980s. These would all prove useful points of dialogue in developing trust, earning repeat visits, and addressing this witness's fears of involvement in a federal death penalty case.

The Temporalities of Care

In one of my last conversations with Scharlette shortly before she passed away, she explained to me how her approach to mitigation grew directly from her earlier advocacy efforts for humane prison conditions.[9] Regardless of what inmates had done, she still recognized them as human beings who deserved the minimum level of care that basic dignity required—for instance, access to medical treatment, chances for emotional connection with loved ones, and opportunities to find meaning during their sentences of incarceration. But Scharlette came to believe that in order to truly appreciate the value of such bare essentials, others had to understand that those needs existed within a context of a person's history. Headaches were not just a reason to dispense aspirin; they were the ongoing sequelae of traumatic brain injury from a childhood accident. A visit from a spouse and an infant was not just face time for a young family; it was the latest development in a complex backstory of intimate relationships—and a potential turning point in the development of the prisoner's postincarceration hopes and dreams. In short, the details of the past mattered in acknowledging the humanity of the condemned so that others could also experience concern.

This ethos of care became central to what Scharlette's vision of death penalty mitigation would become. Invariably, she saw capital clients as broken people. In advocating for the humanity of capital murderers, she therefore urged defense practitioners

frequency of abuse within the household. Interviews around issues of abuse are likely to fracture and disrupt family functioning and cause non-cooperation with some family members—especially the perpetrators. Shame, embarrassment, and fear initially create barriers to accurate disclosure, and the mitigation specialist must exercise skills aimed at overcoming those barriers. She must build an atmosphere of trust and respect for the witness and provide confidentiality for disclosure. Multiple and lengthy interviews over time are necessary in order to create a protective climate that allows reluctant and fearful witnesses to provide accurate information" (n.d., 26).

9. Due to the personal nature of this visit during the final months of her terminal illness, I did not record or transcribe this conversation. What follows is drawn from notes I took from memory after our talk.

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to thoroughly assess the care that the defendant did *not* receive throughout his life. This, however, required an equally comprehensive investigation of the life conditions that accounted for the failure to meet fundamental physical and emotional needs, the mental illnesses and neurologic impairments that were caused and/or exacerbated by these life conditions, and the difference that even one variable could have made in changing the course of his existence. As one of Scharlette's longtime collaborators explained to me in a prior interview, "It's like that saying, 'There, but for the grace of God, go I.' Any one of us could be in [the client's] shoes today if we were put in similar circumstances" (pers. comm. 2006). For defense practitioners, imparting this sense of shared vulnerability is a crucial part of advocating for what connects the defendant with the rest of humanity. In my interpretation of Scharlette's philosophy, I understand her emphasis on this denial of care to locate much of mitigation's potency in the historical frame of the past subjunctive. Capital defense advocacy is effective when grounded in a thorough life history investigation, precisely because it is by internalizing the details of the past that legal decision makers can think to ask, what if something about the client's life had been otherwise?

The ethos of care, however, has additional temporal dimensions beyond suggesting conjectural alternatives to history. Advocates also view themselves as *present* purveyors of care who are contributing to *future* chapters in the defendant's history. As co-authors of this ongoing history, they provide for his physical and emotional well-being in ways that he may have rarely experienced before the crime, and that may change the course of his life after capital proceedings. This orientation can certainly serve the ends of legal strategy. Nevertheless, advocates see it to extend, substantively and temporally, beyond the sphere of legal practice.[10]

In the case of a defendant I here name Franky, the client told the team's lawyers that he wanted to marry his girlfriend to prove his devotion to her and their young son through what could be years of legal proceedings. According to marriage laws in California, however, vows had to be exchanged before a registered officiant in the same room. The problem was that the facility's visitation restrictions with Franky separated him from his family in different rooms, only permitting them to communicate through walls with intercoms set in bulletproof glass. Normally uncommunicative, the client stated several times his wish to get married. It was clear how important this was to his emotional well-being. One day, immediately after a status conference in open court with several codefendants present, the team arranged to have Franky and his girlfriend call out "I do" across the bar separating the defendant's table from the public gallery. The vows were administered by the lead attorney on the case, who was temporarily deputized as a marriage officiant specifically for the event. Although the ceremony took place within a span of seconds, the defense team knew that its significance could go well past the life of the case. In this regard, this act of care, not technically required by his legal defense, was rooted in a larger sense of an intimate human history that began long before we met Franky, and that we knew would carry onward into his future, regardless of how our relationship with him bore out.

10. Here, I recall Mulla's own ethnographic analysis of the relationship between care and the time practices of forensic sexual assault interventions, in which she observes that "[l]aw, healing, and biography are thick with their own temporalities" (2014, 58).

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As ethical undertakings that mitigation practitioners view to exceed the law, relationships of care may actually outlive court proceedings. For example, in one case that I observed postcompletion, an investigator continued to maintain regular contact with the defendant's ex-wife, and even attended the high school graduation of one of their children. But whether or not relationships literally endure, the time horizons of care routinely project well beyond the time frames of trial. Investigators find motivation in knowing that their work can strengthen fragile ties between the defendant and his broken family, creating a community that they all can live for if the death penalty is spared (Hughes 2009; Cheng 2018). In the temporal logic of *cura personalis*, the narrative of "what should have been" directly informs the narrative of "what might possibly be"; and this logic becomes entwined with the logics of funding advocacy and human relationship building in establishing the deliberate tempo of capital trials.

With respect to funding, the chase for slowness supports the work of care. Perceived time pressures push advocates to identify and pursue all available opportunities to learn about the client—not only to discover mitigating evidence, but also to care for him. For example, the collection of life history records that practitioners begin immediately at the outset of every case often helps to serve the client's care needs as his relationship with the defense team starts to develop. Having quickly established a historical archive of care to identify classic mitigating themes, the defense team knew from Franky's records that he had received inadequate and sporadic medical treatment from free clinics throughout his childhood. Poor vision and skin rashes appeared to be persistent problems; and during our first weeks on the case, both became issues that advocates brought up and worked with him to solve. Every interaction became a precious chance to observe what care he needed, whether it was the frequency with which he scratched his legs, the particular way he squinted trying to read documents, or the agitation we could sense when he talked about not being able to marry his girlfriend.

Franky's advocates were also well aware that the role of care could be instrumental in cultivating the relationship rhythms that set the conditions for mitigating disclosures. In fact, all the attorneys and investigators on his team had originally found him challenging to work with. He had been reticent and seemingly skeptical of defenders appointed by the same court system that he saw to be prosecuting him. By all accounts, however, his demeanor following the marriage was perceptibly more responsive and relaxed. In my own meeting with him after that day, Franky made the request, theretofore unimaginable, for me to buy flowers on his behalf for his new wife's birthday. This created an opportunity for me to follow up with a visit to report how she had received them—in turn generating momentum for conversations that would eventually address the traumatic impact of his mother's death on the client and his brother as teenagers in a Los Angeles gang neighborhood. In this regard, care not only helped create relationship rhythms, but it also produced the classic investigative leads that would justify the continued chase for slowness.

Conversely, the cultivation of rhythms bolsters relationships of care. One defense expert I interviewed, a psychiatrist, observed that in a traditional counseling setting, effective therapy requires sustained engagement with mental health patients. Defense advocates similarly require "repeat interactions" with clients and witnesses in order to "observe firsthand the signs of their mitigating impairments and trauma, so that you know how to navigate them and even set them on a path to healing if they're ready

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to make sense of their own pasts" (pers. comm. 2006). On the more mundane level of daily needs, Scharlette told me that in her experience with prisoners and capital defendants, individuals in confinement often refrain from asking their legal teams for assistance with basic amenities (an extra blanket, funds for commissary, access to prescription medications). This reluctance may stem from mistrust of their defenders, fear of upsetting institutional officials, ignorance of what institutions are able or willing to provide, or simply reluctance to impose on advocates. It is only after multiple and regular visits, she said, that defendants develop the trust and comfort level to "let the team look after them, which for many clients is really the first time they've ever been able to rely on someone to do that" (Scharlette Holdman, pers. comm. 2006).

CONCLUSION

In an article elaborating the "nature and logic of mitigation," Haney (2008) explains how developments in US Supreme Court case law on capital sentencing since the 1970s have been both affirmed and expanded by advances in the behavioral sciences. Informed by these discoveries, investigations and presentations of mitigating evidence now put into stark relief the ways in which "capital defendants are outliers on many of the dimensions that we [researchers] know to exacerbate the effects of the risk factors to which they have been exposed" (880). Over the years, effective defense advocates have come to embrace "multi-level analyses" that tie together "background, social historical, situational, community, and structural variables" (864). Haney's argument underscores the conceptual consistency between the high court's jurisprudence, with its increasingly contextual bent, and the academic sciences that significantly influence how effective practitioners now approach mitigation.

Here, I point out resonances between Haney's work on mitigation's deeper logic and my earlier discussion of the two aspects of linear time—the temporal foil, I argued above, for mitigation's practices. The first aspect involved the defendant's purported failure to prove his moral worth during his lifetime. Haney similarly recognizes the generic prosecutorial narrative in capital cases, that "a heinous crime has been committed by an essentially bad or evil person who should pay the ultimate penalty" (2008, 842). Against this depiction of an evildoer who is hopelessly irredeemable by time, he describes how the sentencing defense proceeds through counternarratives that tell of persons "whose early lives have been pervaded by . . . potentially damaging risk factors and whose present circumstances include numerous environmental stressors" (858). The second aspect of linear time pertained to the analytical reduction of that lifetime to violent acts. Haney observes that in typical capital prosecutions, "the defendant's criminal behavior is asserted as the full measure of his life and the primary justification for ending it" (843). In response, the defense seeks to lengthen and complicate the biographies of capital defendants, fleshing out "the ways in which background and social history as well as immediate social circumstances and context combined to profoundly influence people's behavior" (856). In these respects, the temporal interventions I have described in action map directly onto important aspects of Haney's own conceptual bridgework, connecting his logics of theory with logics of mitigation's investigative

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practice. I have argued, in essence, that the former are in large measure operationalized by way of the latter.

If this study offers different insights into capital trial advocacy, I suggest that this is because it benefits from theoretical perspectives on time that can unveil subtle yet consequential dynamics of legal practices. Theories and sensibilities from a variety of academic perspectives can further elucidate various facets of US criminal adjudication. In addition to the "fast law" plea processes that dominate the country's landscape of criminal convictions, there are the time-sensitive filing practices involved in other forms of capital litigation (direct review, habeas corpus claims, clemency petitions); judicial interpretations and imaginings of various noncapital constitutional principles related to time (temporary detentions by law enforcement under the Fourth Amendment, reasonable lengths of custodial interrogations under the Fifth, the right to a speedy trial under the Sixth); the intriguing time practices that attend jury decision making, both in and out of the deliberation room; as well as the multiple perspectives involved in post-conviction challenges concerning actual innocence, with its critical issue of time served. Here lies rich empirical ground for applying and extending social analysis on time. This article stands as a call to do so, invoking the full range of sociolegal disciplines.

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