

CULTURE AND BORDERS: PLACE AND SELF

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INTRODUCTION

In making decisions, judges and juries in criminal courts are charged with a difficult task: evaluating the defendant holistically while deciding whether the conduct warrants a criminal conviction. A judge is called upon to balance aggravating and mitigating factors pertaining to the crime and to the individual's background to determine an appropriate sentence. In the criminal context, decision-makers must consider the weight of the defendant's actions, motives, and background—the entirety of the circumstances.

However, not all courtrooms are cut from the same cloth. In *Deported Americans: Life After Deportation to Mexico*, Beth C. Caldwell discusses the lack of judicial discretion in immigration courts and how judges must make particular immigration determinations once a respondent has been convicted of certain crimes.¹ The judge loses any authority to consider the traits and experiences unique to individuals in determining whether they are eligible for relief or protection from deportation.² A judge is not permitted to consider immigrants' familial ties to the United States, the hardship deportation would have on them and their families, their culture, or the place and circumstances surrounding their alleged criminal act.³

This essay discusses the effects of culture and place in criminal proceedings to highlight their importance in judicial decision-making. It highlights how understanding a defendant's culture and place allows for courts to truly understand the nature of a defendant's acts in order to convict or liberate accordingly. The complicated and nuanced approach this essay

1. BETH C. CALDWELL, *DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO* 32-42 (2019).

2. *Id.* at 36-42.

3. *Id.* at 38-39.

describes provides a stark contrast to the lack of judicial discretion in many deportation cases.

UNDERSTANDING THE IMPORTANCE OF CULTURE AND PLACE

Culture and place are very broad concepts. In court cases, where culture and place necessarily attract legal attention, it becomes more complicated when cultures switch places and places exchange cultures. Place provides the context for how culture plays out. This is why cultural competency in court deliberations is an even stickier process when you introduce this culture/place conundrum.

In my experiences as an expert culture defense witness for over thirty years, I must not only be competent in Mexican culture as practiced in Mexico (and Latin America proper) but also Mexican culture as it is practiced in the United States, and various permutations in between.⁴ Cultural competency has thus been an important and useful lens with which to examine and dissect the everyday customs, habits, and patterns that are found in any court case, especially in instances where ambiguity and uncertainty might cloud or undermine the legal pursuit of accuracy. Of most importance is when an expert witness can mitigate and provide another perspective and interpretation as to what appears to be the “truth” or obvious fact based on one type of cultural belief and practice.⁵

In capital cases, particularly, a client’s life reflected in their social history shows their humanity and provides the context for their conduct at the time of the crime. Our purpose is to explain the skills that establish cultural competency, and how those skills relate to the mitigation specialist’s role and, by extension, to the defense team in a capital case. We emphasize the “[p]ersonal developmental factors and cultural influences in the defendant’s family and community background” to situate the gravity of the criminal acts in a new context for the court to reconsider and reframe what punishment is to be applied.⁶ Culture is an important medium for understanding the client and his reactions to his environment. “[C]ulture exists in the different patterns by which we parent, build families, perform

4. For a deeper discussion of the historical, socioeconomic, and psychological developments that have shaped how Mexican culture is practiced in the United States, see JAMES DIEGO VIGIL, *FROM INDIANS TO CHICANOS: THE DYNAMICS OF MEXICAN-AMERICAN CULTURE* (3d ed. 2012) [hereinafter VIGIL, *FROM INDIANS TO CHICANOS*].

5. See Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 883-84 (2008).

6. Michael Winkelman, *Cultural Factors in Criminal Defense Proceedings*, 55 HUM. ORG. 154, 154 (1996).

work, define education, seek community, find hope, and overcome or fall prey to adversity.”⁷

Prevailing standards of capital defense have always required the defense team to integrate the results of a thorough and reliable mitigation investigation into every stage of the legal proceedings.⁸ Culture has the potential to define a client’s interaction with law enforcement during and after arrest, weighing in on the reliability and voluntariness of a client’s statement. Culture affects a client’s expressions of remorse, receptiveness to a plea opportunity, understanding of judicial proceedings (including the role of the judge, the prosecutor, and the defense attorney), demeanor during court proceedings, relationship to counsel and the defense team and how he is perceived by them, conduct during pretrial incarceration, trust of authority figures, and mental health evaluations.⁹

When providing cultural defense testimony, an expert must take care to remember that complex issues or problems are made up of a set of associated variables, more like a cluster of factors rather than a single determinant. Often noted in my work is the importance of multiple marginality, how place, status, family and schooling, and street socialization in combination subject individuals to pressures and strain.¹⁰ The combinative, additive nature of these forces are what must be examined for an assessment of any individual’s gang involvement and participation.¹¹ A stronger argument for a single

7. Holdman & Seeds, *supra* note 5, at 886; see also JAMES DIEGO VIGIL, GANG REDUX: A BALANCED ANTI-GANG STRATEGY 3-5 (2010) (describing how marginalization of certain persons and adaptation to new culture “affects family structure and stability, schooling readiness in the context of language and cultural differences, and points of contact with police and the criminal justice system”); James Diego Vigil, *Streets and Schools: How Educators Can Help Chicano Marginalized Gang Youth*, 69 HARV. EDUC. REV. 270, 270 (1999) [hereinafter Vigil, *Streets and Schools*] (“examin[ing] how home and school are complicit in [the] socialization” of youth to be members of gangs).

8. Holdman & Seeds, *supra* note 5, at 883-85.

9. See *id.* at 883-85, 907; see also EMORY S. BOGARDUS, THE MEXICAN IN THE UNITED STATES (1934) (studying Mexican immigration and labor in the United States and discussing aspects of family life, community, education, health and hygiene, religion, morals, as well as crime and delinquency).

10. For a deeper understanding of the implication of these factors as well as their relationship to street socialization and street identity, see JAMES DIEGO VIGIL, MULTIPLE MARGINALITY AND GANGS: THROUGH A PRISM DARKLY (2020) [hereinafter VIGIL, MULTIPLE MARGINALITY AND GANGS]; James Diego Vigil, *Chicanos in California: Yesterday and Today*, in BOHEMIAN HIGHWAYS: ART & CULTURE ABIDE THEN DIVIDE ALONG THE CALIFORNIA COAST 333 (Kathleen Combs et al. eds., 2015); JAMES DIEGO VIGIL, THE PROJECTS: GANG AND NON-GANG FAMILIES IN EAST LOS ANGELES (2007) [hereinafter VIGIL, THE PROJECTS]; JAMES DIEGO VIGIL, A RAINBOW OF GANGS: STREET CULTURES IN THE MEGA-CITY (2002) [hereinafter VIGIL, A RAINBOW OF GANGS]; JAMES DIEGO VIGIL, BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA (1988) [hereinafter VIGIL, BARRIO GANGS].

11. See VIGIL, MULTIPLE MARGINALITY AND GANGS, *supra* note 10, at 1-3.

factor, such as family strains, is often strengthened in this broader context but, overall, it is the actions and reactions among them that must also be considered.¹²

Though many decades of culture contact, conflict, and change are integral for understanding these macrohistorical and macrostructural developments, a cultural defense expert must make the court aware of and appreciate this background.¹³ Where a person lives—the environmental and social influences—are crucial. Similarly, where a person works, their occupation, income, and economic life are just as important in shaping lives. Generally, place and status, and the background and history issues, help us understand immigration and racism. It further helps us understand why there are separate and visually distinct neighborhoods and housing qualities, and how a persistent and deep life of poverty not only initially but consistently marks and mars the situations and conditions of poor, ethnic minority peoples.

Tracing the aftershocks of these destabilizing starts in life sets the tone and structure of family life, schooling arrangements, and interactions with law enforcement; crowded households, unsupervised circumstances, and fear of all things unknown and impulsive.¹⁴ When the bottom of life falls, it is apparent the only thing left is the streets, meaning nothing but cold reality fashioned by a multiple-aged peer group. Thus, street socialization dominates the lives of these youth and generates a street identity.¹⁵ In this harsh reality bereft of conventional social control tethers, the thinking and appearance of the children takes a turn, and new ways of looking and acting (i.e., the dress, speech, demeanor) are introduced to reflect this new social and psychological front (even the psychosocial moratorium of adolescent passage is affected).¹⁶

In the cases that I have offered expert witness testimony, there are two parts: (1) cultural defense broadly defined when the focus is on Mexican culture; and (2) subculture defense with specifics on the gang subculture.¹⁷

12. See Vigil, *Streets and Schools*, *supra* note 7, at 272, 274.

13. For the kind of information about one's background and culture that the court must be made aware of, see JAMES DIEGO VIGIL, *CHICANO HIGH SCHOOLERS IN A CHANGING LOS ANGELES* (2d ed. 2020); VIGIL, *MULTIPLE MARGINALITY AND GANGS*, *supra* note 10; VIGIL, *FROM INDIANS TO CHICANOS*, *supra* note 4.

14. For works that trace the aftershocks of these destabilizing starts, see VIGIL, *MULTIPLE MARGINALITY AND GANGS*, *supra* note 10, at 9, 11; VIGIL, *THE PROJECTS*, *supra* note 10, at 5, 7; Vigil, *Streets and Schools*, *supra* note 7, at 272, 274.

15. VIGIL, *BARRIO GANGS*, *supra* note 10, at 150, 163.

16. *Id.*

17. See generally P. Jeffrey Brantingham et al., *The Ecology of Gang Territorial Boundaries*, 50 *CRIMINOLOGY* 851, 853-54 (2012).

An example from a case where Mexican culture is the basis for the defense is when a Mexican laborer was charged with plotting the murder of a fellow worker when he met with a co-defendant at a local cantina.¹⁸ The laborer had been seen with a collaborator at the bar one night before the crime, and without knowing what they discussed, it was inferred that the two were planning the murder that occurred a few days later. The cultural defense that I offered pointed out that cantinas often serve as meeting or gathering places for other purposes, given that migrant laborers must negotiate or generate, through friends or compadre networks, favors to trade resources either in kind or loans of other kinds, like a place for a temporary time. Such testimony opened the door to another explanation for the cantina meeting.¹⁹

In another gang subculture case, the prosecution attempted to show that the defendant was involved in a drive-by shooting as a driver of his own car.²⁰ Several citizens testified that the driver was known not to be a member of a gang. He had provided a ride to a childhood friend and during the short ride, the friend saw a rival gang member in another car, pulled out a gun and fired, hitting the car and not a person. My testimony was unequivocal in showing the defendant was not a gang member but a victim in not knowing that there was neither a gun in the car nor a shooter that committed a crime.²¹

The above are just examples of cases that showed where cultural competency helps broaden the view of law-breaking incidents to include other explanations. Other examples from my personal history also exist and demonstrate that cultural competency does make a difference. A case where a Zapotec speaking man from Oaxaca, Mexico, was a presumed witness to a murder was challenged in court when it was proven that he had no knowledge of the English language spoken by the perpetrator. Initial police interaction with the migrant worker neglected to inquire whether he spoke English.²² Another case involved Catholic religious rituals from Mexico, which differ among urban elites and rural peasant communities, and the case hinged on testimony underscoring whether a couple was married or just living together, or *juntos* (together) as the indigenous believe.²³ This fact made a difference in proving whether the male in the marriage was legally obligated to cover the expenditures made by his wife or female companion.

18. For further descriptions of author's expert testimony, see VIGIL, BARRIO GANGS, *supra* note 10.

19. See VIGIL, FROM INDIANS TO CHICANOS, *supra* note 4.

20. See *supra* note 18.

21. See VIGIL, FROM INDIANS TO CHICANOS, *supra* note 4.

22. See *supra* note 18.

23. See *supra* note 18.

Most of my cases, however, are focused on the Chicano gang subculture tradition that arose from Mexican adaptation to the United States, mostly in the Southwest.²⁴ Almost from the inception of the arrival of Mexicans in the United States in California and Texas during the 1920s, and their concentration in cities like Los Angeles and El Paso, the gang problem began to surface; or more correctly, the wayward youth phenomenon appeared.²⁵ Working in low-paying and demanding jobs, family heads adapted to the hardworking conditions but suffered personal and family strains in the adaptation to the new country. Initially, the children of these families adjusted to the new circumstances in a hit-or-miss fashion, and by the 1940s, congregations of youths in different neighborhoods (barrios) began to show signs of a collective style of dress, behavior, and assertiveness.²⁶ Known as *pachucos* for this street style,²⁷ they were an offshoot of the *choloization* process of cultural marginality traced to the early colonial period.²⁸ There was a culture of mixed attributes from an already amalgamated Mexican one that now began to add Anglo-American variations to the developing creation in America. Though throughout the United States gang culture exists in many places and ethnic groups, the Mexican variant is different and distinct and thus qualifies as a culture that requires a certain competency to distinguish motivations and actions of people under these set of values and norms.

Thus, the pattern goes with each case in need of a cultural explanation/clarification. For example, it is common belief that gang members yell or shout their gang name driving through enemy territory, thus showing dominance over the other gangs. After a drive-by or gang altercation, however, the perpetrators usually refrain from doing so to avoid drawing unnecessary attention to the incident or crime. My testimony in court challenged the law enforcement position, which maintained that it was common for gang members to publicly proclaim their victory over the rival gang in this manner. When asked the question, whether this action was common and predictable, I responded: Yes, this is an interpretation, but it

24. See VIGIL, *THE PROJECTS*, *supra* note 10, at xiii; VIGIL, *A RAINBOW OF GANGS*, *supra* note 10, at 31; VIGIL, *BARRIO GANGS*, *supra* note 10, at 35.

25. See VIGIL, *MULTIPLE MARGINALITY AND GANGS*, *supra* note 10, at 29.

26. See James Diego Vigil, *The Established Gang*, in *GANGS: THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES* 95, 96 (Scott Cummings & Daniel J. Monti eds., 1993); VIGIL, *BARRIO GANGS*, *supra* note 10, at 6.

27. VIGIL, *BARRIO GANGS*, *supra* note 10, at 6.

28. See James Diego Vigil, *Cholo!: The Migratory Origins of Chicano Gangs in Los Angeles*, in *GLOBAL GANGS: STREET VIOLENCE ACROSS THE WORLD* 49, 56 (Jennifer M. Hazen & Dennis Rodgers eds., 2014) [hereinafter Vigil, *Cholo!*].

was more common among gang members to consider this action of broadcasting one's law-breaking behavior as a "stupid" explanation.²⁹

Gang members typically mature-out of a gang when they find love (a mate, marry) and labor (a steady job) and thus their time and energies are spent toiling for the family thereafter.³⁰ Several times I have testified in court that "maturing-out" is quite common for gang members who tire of gang life and select to devote more time to working and playing with wife and children. A recent and continuing position of the LAPD is to maintain that gang members sign up for life, and mistakenly never find other paths and avenues of conventional behavior.³¹ Among gang researchers this is not true, and late-in-life choices are more often a happenstance than what police believe.³² This is a controversial area because for decades police have promoted the notion that gang members are lifers and keep them on their CalGang rosters.³³ Even on occasion, gang members are placed in a new gang roster if they happen to move into a new neighborhood. They protest this placement but to no avail; they now live in the new barrio, so they must belong to the barrio gang.³⁴

In a gang injunction case, an older, former gang member was arrested for fraternizing with a gang individual currently involved in the named gang.³⁵ He was merely talking to the person when an officer in a police car stopped and arrested him for breaking the gang injunction. I testified that this was a spontaneous happenstance for the former member who, by now some several years later, had shown he had disassociated himself from the gang by marrying, starting a family, and regularly showing up at a job. In short, there was little time for gang associations, involvement, and activities.

29. See generally James Diego Vigil, *Cholos and Gangs: Culture Change and Street Youth in Los Angeles*, in *GANGS IN AMERICA* 116, 124-25 (C. Ronald Huff ed., 1990) ("Most of the time spent with gang street peers is devoted to having a good time At times, however, gang activities take on a more deviant character, as members strive to live up to street-induced notions of 'manly' behavior or to demonstrate their loyalty to the gang: gang fights, for example, and sometimes criminal activity directed outside the gang arena. It is the latter, less widely accepted activities that have gained the public's attention.").

30. VIGIL, *BARRIO GANGS*, *supra* note 10, at 107.

31. VIGIL, *MULTIPLE MARGINALITY AND GANGS*, *supra* note 10, at 56.

32. Letter from ACLU of California to Xavier Becerra, Att'y Gen., California Dep't of Just. (June 25, 2019), https://www.aclusocal.org/sites/default/files/20190625_civil_rights_calgang_reg_cmts.pdf. In June of 2019, the ACLU of California sent a letter to the Office of Attorney General and California DOJ to object and recommend changes to regulations to reflect the Legislature's intent in passing the Fair and Accurate Gang Database Act. Sent along with this letter was the expert declaration of the author.

33. CAL. STATE AUDITOR, *THE CALGANG CRIMINAL INTELLIGENCE SYSTEM 2015-130* (2016), <https://www.voiceofsandiego.org/wp-content/uploads/2016/08/CalGangs-audit.pdf>.

34. Letter from ACLU to Xavier Becerra, *supra* note 32.

35. See *supra* note 18.

The court agreed with this interpretation. As a result of this and other similar cases, gang injunctions are being challenged and discredited as a tool of law enforcement.³⁶

Another case of mistaken identity concerned a gang member who upon parole moved into an entirely different barrio, and when he reported to his parole officer, he was summarily referred to as a gang member of the new neighborhood.³⁷ When he argued that he was not a member, it was to no avail. When an incident occurred, the police first checked with the parole office, and his name came up. It took many hours and various conversations to clear up this confusion, but as too often happens, police often take the easy route that complicates the life of someone overly identified as the culprit.

Overall, we must remind ourselves that it is not just enough to understand why someone would commit a crime but learn the difference between perpetrators and bystanders. Much of what happens is *de rigueur* in “routine activities” (place) theory—*wrong place at the wrong time*. However, we must point out the loose, spontaneous, informal, and unstructured nature of gang life: “To repeat, most gang members’ behavior is not criminal, and most gang members’ crimes are not violent. And of course, most violent people are not gang members, so [it’s] not very useful to define gangs in terms of violent crime alone.”³⁸

Issues of trauma must be raised and underscored; living and surviving in a “place” that resembles a “war zone.” Early experiences at home and on streets during a child’s developmental years cause children to socialize on the street (“street socialization”). Street socialization, in turn, causes these children to desire acceptance from their peers by fighting (or fleeing) from conflict, “Fight-Flight (Fright!) Syndrome.” And ultimately, this brings about PTSD.³⁹ Street “*locos*” are most traumatized, evidenced by their violence, but are also typically the leaders who set the standard for their subordinates, generally less traumatized, to follow. There is a difference between a *loco* actor and a *loco* act! One can do a *loco* act without being a *loco* actor. But in order to assuage the fear that the *loco* actors instill, subordinates become like them, at least externally, and perform *loco* acts.⁴⁰

36. See, e.g., *Court Issues Historic Ruling Against Gang Injunctions in L.A.*, ACLU S. CAL. (Mar. 15, 2018), <https://www.aclusocal.org/en/press-releases/court-issues-historic-ruling-against-gang-injunctions-la>; Katie Fretland, *Lawyer Challenges Constitutionality of Gang Injunction*, COM. APPEAL (Mar. 6, 2016, 6:00 AM), <https://www.commercialappeal.com/story/news/courts/2016/03/06/lawyer-challenges-constitutionality-of-gang-injunction/90453312/>.

37. See VIGIL, BARRIO GANGS, *supra* note 10.

38. MALCOLM W. KLEIN, *THE AMERICAN STREET GANG: ITS NATURE, PREVALENCE, AND CONTROL* 29 (1995).

39. VIGIL, *THE PROJECTS*, *supra* note 10, at 112.

40. See *id.*

Fearful incidents can freeze you—fright—even though observers might think you have decided to fight! A lawyer, with the facts of the case in hand, must work with experts to help, guide, and direct his understanding of the facts, and thus his understanding of a case.

CONCLUSION

Understanding the culture of the streets and that of Mexico (Latin America) is the foundation required. My studies and research prepared me by living in both places and learning from the people first-hand. As we have noted, there are numerous areas to focus on in understanding and explaining a crime, and not always the most obvious. Ethnography aims to capture the culture of a place and people, and a short time stay will produce a photograph and a stay of long duration will generate a film. As noted, basic information on the nuances of culture, a slight emphasis on how a hat is worn, the color of the shoes, how a phrase is yelled out, and whether grandparents are provided special significance if they are also godparents who testify on behalf of the plaintiff.

Providing cultural examples is helpful and laying out the overall differences and contrast between cultures should set the tone for why cultural competency is important in every case. Beth C. Caldwell's book is a living example of the importance of immigration in all its variations as a basis for this type of competency as what happens on the border today is so unpredictable and seldom what meets the eye.⁴¹

41. CALDWELL, *supra* note 1.