Research on the Death Penalty: Comment

Capital Trials and Representations of Violence

Robert M. Emerson

Sociolegal research focused on equal protection and the death penalty faces an impasse as the result of recent Supreme Court decisions limiting the admissability of social science research in general and of aggregate data on bias in the application of capital punishment in particular. This impasse, however, provides an opportunity to renew investigation and analysis of the deeper meaning and implications of the death penalty in contemporary societies, not in abandonment of but as a complement to equal protection–oriented research.

Foucault's *Discipline and Punish* (1977) provides a major resource for such a refocusing of sociolegal research on the death penalty. In this work Foucault argues that the rise of the prison advanced and reflected a fundamental transformation of the place of violence in society. As one key part of this transformation, capital punishment was removed from public arenas—where executions had become popular, richly elaborated ceremonies—and secreted in prisons as fundamentally administrative and technical occasions. As a result *capital trials* took on special symbolic significance: as executions were hidden from public view, "publicity has shifted to the trial, and to the sentence" (Foucault, 1977:9).

That trials have replaced executions as the public ceremonial drama of capital punishment has allowed the modern state to segregate and sanitize its violence. And as part of this transformation most people no longer directly witness executions and other violent legal punishments; that is, most members of the public no longer see and hence immediately experience capital punishment in all its violence. Members of society en-

Address correspondence to Robert M. Emerson, Department of Sociology, University of California, Los Angeles, 405 Hilgard Avenue, Los Angeles, CA 90024.

Law & Society Review, Volume 27, Number 1 (1993)
© 1993 by The Law and Society Association. All rights reserved.

https://doi.org/10.2307/3053747 Published online by Cambridge University Press

counter punishment and other forms of violence, not as direct immediate experiences, but more indirectly as *representations*, most commonly as *talk*.

In "Speaking of Death," Sarat (1993) examines the talk of capital trial participants—prosecution and defense attorneys, expert and lay witnesses—as this talk presents, represents, highlights, and obscures acts or conditions of violence. Capital trials are critical occasions revealing the social legitimation of violence through talk, Sarat argues; for such trials throw the use of violence by the law and the state into uneasy relief against the violence charged against the offender.

Looking at a single capital trial (actually a retrial) of William Brooks in Georgia, Sarat analyzes key features of the different narratives of violence: the interweaving of violence, sexual purity, and racial stereotypes in constructing the narrative of the rape and murder for which the offender is being retried and resentenced; in the penalty phase of the trial, the ways in which the bilateral individualistic notion of victimization marginalized the violence suffered by the offender during his childhood; and the contradictory representations of the law's own violence generated as the prosecution and defense presented arguments for and against the death penalty.

In contrast to prevalent, statistical modes of social science death penalty research, Sarat approaches the Brooks death penalty trial as an unfolding, open-ended process. His analyses of narratives of violence in this trial provide a number of valuable and subtle insights into key processes in death penalty proceedings. First, social science research has shown that the death penalty is more likely to be invoked when the races of victim and offender differ. In looking closely at language and narrative in the Brooks trial, Sarat explores the striking yet subtle ways in which racial imageries were introduced and relied upon without the use of explicitly racist (or even racial) terms. For example, in presenting evidence the prosecution depicted the victim as having led a pure, innocent, and virtuous life: She lived at home, a devoted daughter to her parents; although engaged, she was a virgin prior to being raped by Brooks. Sarat shows how the stories of the abduction from her safe, secure home by "a black man . . . I'd never seen . . . before" (as recounted by her mother) and of her subsequent rape against the background of her virginity ineluctably *racialized* the violence she suffered, simultaneously invoking and affirming imageries of racial danger and racial purity.

"Speaking of Death" also develops a striking analysis of the death penalty phase of the trial, focusing on how prosecution and defense sought to construct narratives which would shape understanding of those involved and their actions in very different ways. The prosecution consistently invoked and played

https://doi.org/10.2307/3053747 Published online by Cambridge University Press

upon a series of *contrasts* between the victim's absolute lack of blameworthiness and the deliberate but senselessly violent actions of the offender; such polarizing contrastive stories appear to facilitate (indeed, even compel) identification with the first *against* the second.[1] The defense, on the other hand, sought to shift the frame from "one terrible incident" to the offender's "whole life" by presenting narratives of the extreme forms of violence previously suffered by William Brooks, walking the tightrope of trying to "explain without excusing."

Finally, Sarat shows that marking off the violence of the death penalty from the violence done outside the law is not simply a matter of abstract theory or general legal principle. Rather, the legal actors centrally involved in this death penalty trial actively sought to mark off such violence as two distinct forms; and how they did so made up the core of their courtroom strategies in this legal contest. Here, the prosecution sought to distinguish legal violence from Brooks's violence by contrasting the unnecessary and capricious quality of the latter with the "purposive, measured and necessary" character of the "death penalty." In contrast, the defense represented the outcome of the penalty hearing as "killing" and hence as equivalent to Brooks's violence; this framing left it up to the jury to mark off the difference in law's violence by showing restraint and mercy.

The approach and methods Sarat develops in "Speaking of Death" suggest extensions into other domains of research on violence, legal violence, and capital trials. In what follows I want to propose several such extensions. These proposals reflect a concern both to recognize the critical symbolic importance of capital trials in dramatizing issues of violence and to move beyond these highly charged, deeply ceremonial occasions to consider the mundane, everyday handling and representation of violence in contemporary society.

Initially, consider some of the implications of analyzing narratives of violence as represented in trial transcripts. Transcripts reduce the various lived realities of actual trials to speech presented in relatively impersonal, determinant, sequenced forms.[2] Such transcripts provide a detailed record on how speech exchanges turned out, but obscure emergent, contingent processes whereby actors decide to say this, to put it that way, in the midst of "putting on a trial." We can see and examine various "narratives of violence" but without full ap-

[1] One possible indication of the effectiveness of such dialectical contrastive structures appears in the fact that even in Sarat's text the victim is often identified by first name as "Janine"; the offender is never identified by first name alone.

[2] Although Sarat observed the trial directly and includes several interview quotations from some of the key players in his analysis, he relies heavily on a transcript of the trial proceedings.

https://doi.org/10.2307/3053747 Published online by Cambridge University Press

preciation of how these narratives are actively developed and presented by particular persons at particular times in particular circumstances. To gain this appreciation we need to move beneath or beyond the transcript to see the *work* involved in putting on capital trials, to understand the reasoning and strategic calculations of prosecution and defense attorneys that ultimately give narratives their particular forms and qualities.

Focusing on narratives in transcript form also ignores the broader institutional system which generates and shapes capital trials in the first place. Capital trials and the representations of violence they provide are products of distinctive institutional processes, and must also be understood in relation to these processes; specifically, capital trials arise within the criminal justice system, and must be understood by reference to the routine operation of this institutional system and to the everyday, practical work concerns of those who staff this system.

With reference to what we know about the criminal justice system, capital cases arise infrequently, are regarded as exceptionally serious, and receive special handling; that is, capital cases comprise one form of "*special case*" (Sudnow, 1963), differing from "routine cases" in several critical ways:

1. Capital cases are those assessed by criminal justice decisionmakers as "serious," and arise as the result of these agents' discriminations between "normal" or "routine" cases, on the one hand, and "serious" or "atypical" cases, on the other. Waegel (1981:270) describes a police homicide investigation, for example, in the following terms:

> [A barroom homicide] was termed a "killing" and viewed as a routine case because the victim and perpetrator were previously acquainted and information linking the perpetrator to the crime could be easily obtained. The term "murder" is reserved for those homicides which do not correspond to a typical pattern.

How agents at key stages of the criminal justice system assess and characterize violence, discriminating between "normal violence" and "serious violence," needs to be understood to grasp the import and significance of filing capital charges in particular cases.

2. As special cases, capital cases receive and require exceptional, nonstandardized processing; routine procedures become explicitly inappropriate, as various forms of "super due process" will be observed and documented. For example, whereas both prosecutor and defense attorneys quickly process routine cases by seeking grounds for a negotiated disposition, attorneys in capital cases assume right from the start not only that the case will go to trial but that it will go to trial before a

https://doi.org/10.2307/3053747 Published online by Cambridge University Press

jury, and that the trial outcome if unacceptable will be appealed.[3]

3. Cases become "special" if and when they receive publicity, when the media become interested, attend, and report on the proceedings. It is an intriguing empirical question whether *all* capital cases (or at least those that make it to trial; presumably many initial capital charges are subsequently reduced) receive media coverage.[4] How media coverage emerges and the effects of such coverage on the operations of the criminal justice system are not known. One likely consequence of such coverage is the breakdown of one key aspect of the routine operation of the criminal justice system—the insulated, insider-run "courtroom subculture."

Finally, the very "special case" quality of capital trials is deeply significant: it provides a way of marking "extreme violence"—both that of an offender and that of the law—exactly as "serious" and "extreme." The alternatives—that particularly heinous acts of violence would be treated routinely, unmarked by special recognition or handling in the legal system, that executions might be decided without "super due process," full trials, moral denunciation, and deep anguish—evoke the anonymous, bureaucratized killings of concentration camps.

References

Fishman, Mark (1980) *Manufacturing the News.* Austin: Univ. of Texas Press.

Foucault, Michel (1977) *Discipline and Punish: The Birth of the Prison.* Translated by Alan Sheridan. New York: Pantheon.

Sarat, Austin (1993) "Speaking of Death: Narratives of Violence in Capital Trials," 27 *Law & Society Rev.* 19.

Sudnow, David (1965) "Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office," 12 *Social Problems* 255.

Waegel, William B. (1981) "Case Routinization in Investigative Police Work," 28 *Social Problems* 263.

[3] In general, we lack detailed studies of how prosecutors and defense attorneys handle special cases, including capital cases. We also have not studied how decisions are made to try some cases as capital and not others, or the factors that shape and influence these decisions.

[4] Media attention may give rise to the "specialness" of cases that do not involve intrinsically serious or violent offenses; for example, the media may cover the criminal justice processing of celebrities who have committed relatively minor offenses (e.g, Zsa Zsa Gabor's battery trial in Beverly Hills). In this respect the media comprise a second institutional system the routine operations of which are critical for understanding capital trials as public ceremonies. Fishman's (1980) study of how routine crime reporting relies on the police provides a useful starting point for understanding this system as it involves the print media.

https://doi.org/10.2307/3053747 Published online by Cambridge University Press