

THE CULTURAL LIFE OF CAPITAL PUNISHMENT:  
SURVEYING THE BENEFITS OF A CULTURAL ANALYSIS OF  
LAW

WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE  
AMERICAN CONDITION. By Austin Sarat.\* Princeton: Princeton  
University Press, 2001. Pp. 324.

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*Austin Sarat's When the State Kills explores the interrelationship between capital punishment and American culture. Utilizing scholarly approaches drawn from sociology, literary criticism, cultural studies, and political science, Sarat illuminates ways in which the official legal regime of capital punishment creates, reflects, and reinforces broader cultural attitudes about crime and punishment. Moreover, he argues that the destructive cultural consequences of state killing provide reasons for abolition over and above criminological or doctrinal arguments against the practice. Thus, When the State Kills is a powerful intervention in the ongoing death penalty debate, but it is also a case study for considering the benefits of studying law through a cultural lens. This Review Essay suggests that a cultural analysis of law is more than simply an "add-on" to doctrinally focused legal policy debates. Instead, sociolegal scholarship provides useful insights into just the sort of normative questions that are at the heart of such debates. A cultural approach demands that we attend to the important relationship between law and culture: how legal institutions construct social reality, how "law talk" gets dispersed throughout society, how individuals deploy and resist legal norms, and how law symbolically reflects and reinforces deep cultural attitudes, fears, or beliefs.*

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When I served as a law clerk to Justice Ruth Bader Ginsburg, during the United States Supreme Court's 1997–1998 term, I found the death penalty cases by far the most emotionally wrenching part of the job. Several times every week, some person was scheduled to die somewhere in the country (usually in Texas or Virginia),<sup>1</sup> and so the Justices and clerks would be on alert all day and often into the night, waiting to receive any appeals or motions that might be filed.

One night I remember sitting in my office with several clerks from other chambers discussing our role in the administration of the death penalty. Of course, in one sense we had no role at all. After all, clerks make no decisions on legal cases; Justices do. But viewed from a broader perspective, we as clerks were part of the administrative bureaucracy of the killing state. We talked that night about the possibility that, perhaps decades in the future, if the death penalty comes to be seen in this country as a human rights abuse, we might be called to account for our complicity. And as we all know, "I was just following orders" would not likely be a valid excuse.<sup>2</sup>

This sort of soul searching is just one example of the myriad indirect cultural byproducts of capital punishment in American society. Nevertheless, although legal scholars, criminologists, legislators, religious leaders, and others have long debated the pros and cons of the death penalty as a moral or policy matter,<sup>3</sup> few have attempted to discuss systematically what might be called the

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1. Of the 142 people executed in the United States between January 1997 and December 1998, fifty-seven of those executions were carried out by the State of Texas and twenty-two by the State of Virginia. No other state had more than nine during the same period. Bureau of Justice Statistics, U.S. Dep't of Justice, *Bulletin: Capital Punishment 1998*, NCJ 179012, at 1 (stating that of sixty-eight executions that year, twenty were carried out by Texas and thirteen by Virginia); Bureau of Justice Statistics, U.S. Dep't of Justice, *Bulletin: Capital Punishment 1997*, NCJ 172881, at 1 (stating that of seventy-four executions that year, thirty-seven were carried out by Texas and nine by Virginia).

2. Cf. *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*; Statement Submitted by the Secretary General at 41, U.N. Doc. A/CN.4/5, U.N. Sales No. 1949.V.7 (1949) (rejecting the suggestion that, where an act in question is an act of State, those who carry out the act are not personally responsible).

3. See generally, e.g., 147 Cong. Rec. S7418–19 (daily ed. July 10, 2001) (statement of Sen. Feingold) (addressing the fairness of administration of death penalty); 147 Cong. Rec. H3265 (daily ed. June 20, 2001) (statement of Rep. Lewis) (asserting death penalty is "not worthy of a great Nation"); Walter Berns, *For Capital Punishment: Crime and the Morality of the Death Penalty* 8–9 (1979) (arguing that, though death penalty is a "terrible punishment, [t]here are terrible crimes and terrible criminals" deserving such punishment as a moral matter); Louis P. Pojman & Jeffery Reiman, *The Death Penalty: For and Against* (1998) (presenting an essay for each side of death penalty debate); Ernest van den Haag & John P. Conrad, *The Death Penalty: A Debate* (1983) (articulating various arguments for and against death penalty); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L. Rev.* 21, 56–64 (1987) (setting forth statistical analysis of capital cases involving potentially innocent defendants in the United States in the twentieth century); Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 *Wis. L. Rev.* 1, 4–10 (2001) (arguing that poor quality of defense counsel in criminal cases and risk of executing innocent render death penalty fundamentally unfair); Conference, *The Death Penalty in the Twenty-First Century*, 45

cultural life of capital punishment: the social, psychological, and symbolic meanings embedded in both the fact that we sanction such state violence and the method by which this violence is carried out.<sup>4</sup>

Austin Sarat's *When the State Kills* offers this type of cultural approach. Although Sarat clearly and unequivocally positions himself in opposition to capital punishment,<sup>5</sup> he offers something far different from the usual set of policy arguments about, for example, whether capital punishment truly deters crime<sup>6</sup> or whether imposition of the death penalty poses an undue risk that

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Am. U. L. Rev. 239 (1995) (debating death penalty policy); Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill Rts. J. 345, 360–91, 459 (1998) (evaluating Supreme Court's death penalty jurisprudence and concluding that "the paradox of the arbitrary mandatory death penalty system can be eliminated only be [sic] eliminating the death penalty"); James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2048 (2000) (arguing that "trial actors have strong incentives to"—and do—"overproduce death sentences," condemning to death men and women who, under state substantive law, do not deserve that penalty); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 371–403 (1995) (examining previous twenty years of Supreme Court jurisprudence and concluding that Supreme Court has produced a "complicated regulatory apparatus that achieves extremely modest goals with a maximum amount of political and legal discomfort"); Jeff Brumley, *Justice vs. Forgiveness*, Press J., May 12, 2001, at C1 (discussing views of Christian ministers who support death penalty); Peggy Fletcher Stack, *Utah's Catholic Bishop to Stress Pope's View on Capital Punishment*, Salt Lake Trib., Mar. 31, 1995, at A1 (discussing Pope's statement condemning death penalty).

4. For two notable exceptions, see *The Killing State: Capital Punishment in Law, Politics, and Culture* (Austin Sarat ed., 1999); *Machinery of Death* (David R. Dow & Mark Dow eds., forthcoming May 2002). For several studies of capital punishment in historical context, see generally William J. Bowers et al., *Legal Homicide: Death as Punishment in America, 1864–1982* (1984); Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865* (1989); *Society's Final Solution: A History and Discussion of the Death Penalty* (Laura E. Randa ed., 1997); Daniel A. Cohen, *In Defense of the Gallows: Justifications of Capital Punishment in New England Execution Sermons, 1674–1825*, 40 Am. Q. 147 (1988); Mark Costanzo & Lawrence T. White, *An Overview of the Death Penalty and Capital Trials: History, Current Status, Legal Procedures and Cost*, 50 J. Soc. Issues 1 (1994); John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. Crim. L. & Criminology 538 (1992); Keith Harries, *The Last Walk: A Geography of Execution in the United States, 1786–1985*, 14 Pol. Geography 473 (1995); George L. Haskins, *Ecclesiastical Antecedents of Criminal Punishment in Early Massachusetts*, 72 Mass. Hist. Soc'y Proc. 21 (1957–60); Norman Krivosha et al., *A Historical and Philosophical Look at the Death Penalty—Does It Serve Society's Needs?* 16 Creighton L. Rev. 1 (1982).

5. Sarat summarizes his objections to capital punishment in the introduction:

State killing damages us all, calling into question the extent of the difference between the killing done in our name and the killing that all of us would like to stop and, in the process, weakening, not strengthening, democratic political institutions. It leaves America angrier, less compassionate, more intolerant, more divided, further from, not closer to, solutions to our most pressing problems.

Austin Sarat, *When the State Kills* 15–16 (2001) [hereinafter Sarat, *When the State Kills*].

6. Compare, e.g., Mark Tushnet, *The Death Penalty* 5–10 (1994) (arguing that a deterrence rationale cannot justify death penalty), and Rudolph J. Gerber, *Death Is Not Worth It*, 28 Ariz. St. L.J. 335, 342–50 (1996) (describing eight different research methods for analyzing deterrence value of capital punishment and concluding that none of the eight leads to conclusion that capital punishment deters crime), with Berns, *supra* note 3, at 87–103 (challenging social science studies

innocent people will be executed.<sup>7</sup> Instead, Sarat, a leading figure in the Law and Society movement and co-founder of the Department of Law, Jurisprudence, and Social Thought at Amherst College, seeks to explore the interrelationship between capital punishment and American culture. Utilizing scholarly approaches drawn from sociology, literary criticism, cultural studies, and political science, Sarat illuminates the ways in which the official legal regime of capital punishment creates, reflects, and reinforces broader cultural attitudes about crime and punishment. Moreover, he argues that the destructive long term cultural consequences of the death penalty provide a reason for abolition over and above any criminological or doctrinal arguments against the practice. In short, he demands that we consider “what the death penalty does *to* us, not just what it does *for* us.”<sup>8</sup>

Thus, *When the State Kills* offers both a powerful intervention in the ongoing debate about capital punishment and an opportunity to consider more generally the benefits of studying law through a cultural lens. Recently, Paul Kahn has argued that a cultural analysis of law could free cultural legal scholars from the need to offer normative arguments that seek to improve legal doctrine or practice. Instead, Kahn encouraged those studying law as a cultural system to move “away from normative inquiries into particular reforms and toward thick description of the world of meaning that is the rule of law.”<sup>9</sup> According to Kahn, if scholars can resist being seduced into focusing on the policy implications of their work, they will better study law the way a religious studies scholar studies religion: not from the perspective of one who is committed to advancing the practice under consideration, but as a more disinterested observer seeking simply to understand the cultural meaning of the practice.<sup>10</sup> Kahn argued that it is a mistake for scholars to be too invested in legal practice, regardless of whether they see themselves as law’s custodians or law’s reformers. Rather, we would be better off suspending our belief in law’s rule altogether,<sup>11</sup> thereby allowing us to analyze legal practice without a

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purporting to show that capital punishment has little or no deterrent effect), and Ernest van den Haag, In Defense of the Death Penalty: A Legal-Practical-Moral Analysis, 14 *Crim. L. Bull.* 51, 57–61 (1978) (citing studies suggesting that death penalty does have some deterrent effects).

7. Compare, e.g., James S. Liebman et al., Capital Attrition: Error Rates in Capital Cases, 1973–1995, 78 *Tex. L. Rev.* 1839, 1849–50 (2000) (summarizing study finding that, from 1973 to 1995, 68% of capital judgments that were subject to judicial inspection were overturned due to errors that substantially undermined reliability of guilt finding or death sentence imposed at trial), with Joseph L. Hoffmann, Violence and the Truth, 76 *Ind. L.J.* 939, 941–46 (2001) (contesting Liebman’s statistics), and Barry Latzer & James N.G. Cauthen, Capital Appeals Revisited, 84 *Judicature* 64, 64–71 (2000) (challenging Liebman’s analysis and arguing that conviction reversal rate in death penalty cases is closer to 27% than 68%, in part because Liebman failed to distinguish between reversals of convictions and reversals of death sentences). See also Valerie West, Jeffrey Fagan & James S. Liebman, Look Who’s Extrapolating: A Reply to Hoffmann, 76 *Ind. L.J.* 951, 951–56 (2001) (criticizing Hoffmann for making false assumptions and trivializing substantive unfairness in death penalty cases).

8. Sarat, *When the State Kills*, supra note 5, at 14.

9. Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* 91 (1999).

10. See *id.* at 3–6.

11. *Id.* at 3.

normative agenda.

Kahn's argument recalls decades of debate about so-called "law and . . ." scholarship.<sup>12</sup> Starting with the legal realist attack on formalism in the early part of the twentieth century, critical legal scholars have long argued that law study and discourse must encompass more than legal doctrine itself. In many respects this critique has been successful. Certainly fields such as economics or political science have made substantial inroads within legal scholarship and judicial decisionmaking, and one is hard pressed to find too many doctrinaire legal formalists remaining among either academics or legal practitioners.

Nevertheless, as Kahn's book makes clear, a cultural analysis of law is still not adequately embraced at law schools around the country. Although formalism is out of favor, most legal scholarship and law school courses continue to be focused on legal doctrine and concerned with arguments attempting either to justify or reform legal rules. And while this "doctrinalist" approach now embraces certain limited fields of interdisciplinary scholarship, analysis of the cultural, sociological, psychological, and symbolic significance of law remains mostly outside the ambit of "mainstream" legal debates about doctrine and reform.

I believe such marginalization of cultural analysis is unfortunate. Accordingly, although I embrace Kahn's argument that a cultural study of law is essential whether or not such study suggests ways of reforming legal practice, I fear he may be conceding too much by relegating cultural analysis to a world wholly outside of legal academia's reformist emphasis. As I hope to suggest in this Review Essay, viewing law through a cultural lens not only creates a separate and autonomous body of important knowledge about law (as Kahn recognizes), it also can provide useful insights into just the sort of normative questions that are at the heart of doctrinal or policy oriented debates.<sup>13</sup>

Thus, the cultural analysis of law is *both* a vital field of academic knowledge in its own right *and* a way of shedding new light on practical questions concerning legal rules and institutions. A cultural approach ensures that we will always attend to the important *relationship* between law and culture: how legal institutions construct social reality, how "law talk" gets dispersed throughout the culture, how individuals deploy and resist legal norms, and how law symbolically reflects and reinforces deep cultural attitudes, fears, or beliefs. This broader view of law can provide a distinctive framework for recontextualizing established legal doctrine or reconceiving intractable policy debates. Indeed, Sarat's book concludes by employing his

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12. For a particularly elegant discussion of the need for multiple approaches due to the fact that no single explanatory framework can satisfactorily describe human action, see Arthur Allen Leff, *Law and*, 87 *Yale L.J.* 989 (1978).

13. Thus, while a cultural analysis of law need not be yoked to the demands of policymaking (and may even benefit from resisting the policy audience, see Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 *L. & Pol'y* 97, 140-42 (1988)), we should nevertheless recognize that such scholarship often may yield important policy insights.

cultural analysis to support the argument that the death penalty violates the Fourteenth Amendment's due process guarantee, whether or not one believes it to be cruel and unusual punishment in all situations.<sup>14</sup> Accordingly, *When the State Kills* allows us to see the ways in which paying attention to law as a cultural practice is an essential component even of more doctrinally focused legal scholarship and teaching.

Part I of this Review Essay briefly summarizes the critical legal tradition from which Sarat's work arises. Part II then uses Sarat's book to identify four specific benefits of a cultural analysis of law. First, such an analysis can help us to go beyond the stated rationale for legal norms by considering the symbolic content of those norms. Second, a study of law that includes cultural and sociological investigation can provide us with "on the ground" data concerning the ways in which those who participate in or experience the legal system actually understand, respond to, manipulate, or resist legal norms. Third, studying the narratives used in official legal settings offers insights about the way law's stories both structure and reflect our experience of the world. Fourth, a broader understanding of what counts as legal discourse allows us to see how the "law talk" that is diffused throughout everyday life and popular culture can become a source of alternative conceptions about law. Each of these benefits, in addition to providing a deeper awareness of how law functions as a cultural mechanism for constructing meaning, also opens up new avenues for discussing normative questions about legal doctrine itself. And, as the Conclusion to this Review Essay points out, cultural analysis, by complicating our assumptions about the relationship of law to society, can even be seen as supporting a more robust democratic discourse.

Of course, interdisciplinary legal scholars have been identifying (and demonstrating) these benefits for decades.<sup>15</sup> The lesson, however, cannot be reiterated too often. We must continually remind ourselves of the need to study law in a broader context, and we must continue to ensure that those who are concerned with reforming legal doctrine consider the insights of scholars drawing from the humanities and social sciences (and not just economics or public choice theory). Moreover, Sarat's book, though it does not purport to be a detailed ethnographic study, provides a particularly useful vehicle for discussing the advantages of a cultural approach. Because it is intended to speak to a popular audience, *When the State Kills* allows us to see how a cultural analysis of law might actually contribute to public discourse.

Capital punishment is fast becoming a peculiarly American institution. Indeed, while nearly every other industrialized nation has abolished the practice,<sup>16</sup> the death penalty in America continues to be imposed regularly<sup>17</sup>

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14. Sarat, *When the State Kills*, supra note 5, at 246–60; see also infra text accompanying notes 227–239.

15. See infra notes 20–50 and accompanying text.

16. See Amnesty Int'l, Abolitionist and Retentionist Countries, at <http://www.web.amnesty.org/rmp/dplibrary.nsf/ff6dd728f6268d0480256aab003d14a8/daa2b602299dded0802568810050f6b1!OpenDocument> (last visited Sept. 1, 2001) (on file with the

and remains overwhelmingly popular.<sup>18</sup> Thus, support for capital punishment, whatever its defects, appears to be the product of deep cultural imperatives within American society, and scholars considering the impact of state sanctioned killing must attend not only to the criminological issues involved, but to these cultural factors as well.

Moreover, the death penalty and its legal institutions inevitably construct our cultural reality even as they reflect it. Sarat argues that “[s]tate killing diminishes us by damaging our democracy, legitimating vengeance, intensifying racial divisions, and distracting us from the challenges that the new century poses for America.”<sup>19</sup> Whether one agrees with these particular conclusions or not, anyone seriously interested in wrestling with the question of capital punishment must address the kinds of arguments Sarat raises and consider carefully the many subtle effects of the death penalty on our society. Thus, Sarat’s addition to the death penalty debate demonstrates the ways in which a cultural analysis of law can generate both important descriptive insights about our society and useful normative arguments about legal and cultural reform.

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*Columbia Law Review*) (documenting that Japan and United States are only industrialized nations to retain death penalty). Indeed, the international community has frequently criticized the United States for its stance regarding capital punishment, see, e.g., Elizabeth Olson, Good Friends Join Enemies to Criticize U.S. on Rights, *N.Y. Times*, Mar. 28, 1999, at A9 (describing European disapproval of U.S. human rights abuses, including the death penalty, during annual U.N. meeting), and our embrace of capital punishment may even threaten our foreign policy. See Brief of Amici Curiae Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner in Support of Petitioner, *McCarver v. North Carolina*, 2001 WL 648607, at \*12 (U.S. 2001) (No. 00-8727) (arguing on behalf of nine senior diplomats that imposing death penalty on mentally retarded persons “will further the United States’ diplomatic isolation and inevitably harm other United States foreign policy interests”); see also Raymond Bonner, Veteran U.S. Envoys Seek End to Executions of Retarded, *N.Y. Times*, June 10, 2001, at A3 (“Nine . . . diplomats say [imposing the death penalty on the mentally retarded] puts the United States at odds with the rest of the world, creates diplomatic friction, especially with European allies, tarnishes America’s image as the champion of human rights and harms broader American foreign policy interests.”).

17. The most recent U.S. Department of Justice statistics indicate that, during 2001, sixty-six people were executed. See Bureau of Justice Statistics, U.S. Dep’t of Justice, at <http://www.ojp.usdoj.gov/bjs/cp.htm> (last visited April 9, 2002) (on file with the *Columbia Law Review*).

18. Despite poll results indicating that support for capital punishment has slipped since its peak in 1994, more than two-thirds of Americans surveyed in 2000 were in favor of the death penalty. See Fox Butterfield, Death Sentences Being Overturned in 2 of 3 Appeals, *N.Y. Times*, June 12, 2000, at A1; see also Samuel R. Gross, Update: American Public Opinion on the Death Penalty—It’s Getting Personal, 83 *Cornell L. Rev.* 1448, 1448 (1998) (finding that, as of 1998, public support for death penalty remained at a near record high).

19. Sarat, *When the State Kills*, supra note 5, at 250.

## I. CONTEXTUALIZING A CULTURAL ANALYSIS OF LAW

Sarat's approach, which I have been calling a cultural analysis of law, grows out of the tradition of sociolegal scholarship<sup>20</sup> that extends from the early days of legal realism in the first part of the twentieth century through the founding of the Law and Society Association in the early 1960s.<sup>21</sup> Broadly speaking, the realist critique operated from the premise that legal doctrine is inherently indeterminate, and therefore decisions about contested doctrinal issues always are decided based on non-doctrinal factors.<sup>22</sup> Law and society research in the 1960s and 1970s extended the realist critique, pushing a progressive agenda that sought to use law instrumentally to achieve distributional justice.<sup>23</sup> Nevertheless, although the legal realists and early law

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20. Although one could view the cultural analysis of law as something wholly separate from a sociological study of law, cf. Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 *Yale J.L. & Human.* 3, 5 (2001) [hereinafter Sarat & Simon, *Beyond Legal Realism?*] ("One way to make sense of this turn to culture is to relate it to the parallel decline of 'the social' . . ."), I believe such a rigid distinction is unhelpful, particularly given that an interest in the cultural analysis of law largely developed out of the context of sociolegal scholarship and is now being advanced by many of the same people who were leaders in the Law and Society movement, including Sarat himself. Thus, I define a cultural analysis of law to include both more traditional sociological approaches to legal study and the more recent constitutive approach I discuss *infra*. See also *id.* at 7 ("We see cultural analysis and cultural studies less as competitors against the multitude of intellectual programs already operating in (what might be called) the post-realist legal landscape . . . and more as valuable supplements to the altered environment of the present.").

21. This brief discussion of the progression of twentieth century sociolegal scholarship relies heavily on analyses cowritten by Sarat himself. See generally Bryant G. Garth & Austin Sarat, *Justice and Power in Law and Society Research: On the Contested Careers of Core Concepts*, in *Justice and Power in Sociolegal Studies 1* (Bryant G. Garth & Austin Sarat eds., 1998) [hereinafter Garth & Sarat, *Justice and Power*] (delineating ways in which ideas of justice and power have been deployed in successive waves of sociolegal scholarship); Sarat & Simon, *Beyond Legal Realism?*, *supra* note 20 (surveying intersection of cultural studies and law in contemporary scholarship); Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 *Law & Soc'y Rev.* 165, 167-72 (1987) [hereinafter Silbey & Sarat, *Critical Traditions*] (discussing "epistemological foundations" and emergence of law and society scholarship). For a particularly detailed overview of much of this scholarship, see generally Jonathan Simon, *Law After Society*, 24 *Law & Soc. Inquiry* 143 (1999) (reviewing Stewart Macaulay et al., *Law and Society: Readings on the Social Study of Law* (1995)). For a discussion of twentieth century sociolegal scholarship as the ongoing elaboration of a hermeneutics of suspicion, see generally Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 *Yale J.L. & Human.* 95, 106-18 (2001) [hereinafter Berman, *Suspicious Story*].

22. See William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, in *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991*, at 266, 270-71 (Michael J. Lacey & Knud Haakonssen eds., 1991) (describing realist claim that legal doctrine has limited value). For useful discussions of Legal Realism, see generally William W. Fisher III et al., *American Legal Realism* (1993); Laura Kalman, *Legal Realism at Yale, 1927-1960* (1986).

23. Indeed, a commitment to distributional equality was in the background, if not the foreground, of a number of pioneering law and society studies. See, e.g., David Caplovitz, *The*

and society scholars challenged aspects of the legal order, they retained a faith in the legal enterprise as a whole.<sup>24</sup> “At this stage in the development of law and society research, there was a taken-for-granted understanding of the nature of justice and an unembarrassed commitment to the project of using social research to promote justice through law.”<sup>25</sup>

Thus, scholars focused on the gap between “law on the books” and “law in action” in order to suggest better ways of implementing a just legal order. For example, an American Bar Foundation Survey of the Administration of Criminal Justice in the 1950s and 1960s found that the exercise of discretion among regulators and the police was one factor preventing the criminal justice system from operating consistently with the progressive ideals being articulated by the U.S. Supreme Court in that era.<sup>26</sup> The focus, in this and other “gap studies,” was to identify and explain deviations from the regulatory ideal. However, “[i]mplicit in most of this research was the assumption that the state regulatory policies, like the goals of the criminal justice system, represented an appropriate starting point for a researcher strongly committed to social justice.”<sup>27</sup>

Subsequent sociolegal scholars criticized these gap studies and “raised questions about the ability of the liberal state, even in the best of times and with the best intentions, to realize social justice.”<sup>28</sup> In these works, law was still seen in instrumental terms, but as a force that actually thwarts meaningful reform. These scholars expressed “skepticism about the power of litigation to promote social change, about claims of right generally, about the helpfulness of due process hearings for welfare recipients, the usefulness of consumer rights, the proliferation of alternative dispute resolution mechanisms, and the

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Poor Pay More: Consumer Practices of Low-Income Families 179–92 (1963) (summarizing findings regarding consumer practices affecting low income people and suggesting various reforms); Jerome E. Carlin et al., *Civil Justice and the Poor*, at ix (1966) (“Those of us who years ago were concerned solely with what I might call orthodox issues of civil rights have, little by little and for a time not fully realizing it, been dealing more and more with questions of poverty . . .”); Joel F. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* 191–233 (1978) (summarizing study of attempts by social movements to use court action to achieve concrete changes); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law. & Soc’y Rev.* 95, 135–51 (1974) (suggesting reforms that might address systemic advantages of “repeat players” in civil justice system over individuals or “one-shotters”).

24. See Silbey & Sarat, *Critical Traditions*, supra note 21, at 170.

25. Garth & Sarat, *Justice and Power*, supra note 21, at 4.

26. *Id.* at 4–5. The analysis of the results from the survey was published in five volumes: Robert O. Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence* (1969); Wayne R. LaFave, *Arrest: The Decision to Take a Suspect Into Custody* (1965); Frank W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* (1969); Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (1966); Lawrence P. Tiffany et al., *Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment* (1967).

27. Garth & Sarat, *Justice and Power*, supra note 21, at 5.

28. *Id.* at 6 (citations omitted).

autonomy of the legal profession.”<sup>29</sup> This period also saw the emergence of critical legal studies scholarship<sup>30</sup> challenging the classic doctrines of American law and legal education, including contracts, torts, and corporations, as well as antidiscrimination and labor law.<sup>31</sup> Some analyses argued that appeals to reason or principle are inevitably incoherent and that the resolution of legal questions is therefore inherently political.<sup>32</sup> Others focused on the suppression of alternative values by dominant ideologies.<sup>33</sup> Still others

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29. *Id.* (citing Handler, *supra* note 23; John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1982); Robert L. Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (1988); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991); Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974); Richard L. Abel, *The Contradictions of Informal Justice*, in 1 *The Politics of Informal Justice* 267 (Richard L. Abel ed., 1982); Galanter, *supra* note 23; Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 *Law & Soc’y Rev.* 115 (1979)).

30. For an overview of critical legal studies scholarship, see generally Mark Kelman, *A Guide to Critical Legal Studies* 242–68 (1987); Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57 (1984); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 563 (1983).

31. Peter Gabel has provided a trenchant summary of this strand of critical scholarship. Peter Gabel, *Founding Father Knows Best: The Search by the Framed for the Intent of the Framers*, in *The Bank Teller and Other Essays on the Politics of Meaning* 139 (2000). According to Gabel, critical legal scholars have argued that

there is no such thing as a distinctively “legal” way of deciding when workers have the right to strike under the National Labor Relations Act, or whether industries that dump toxic wastes into rivers and lakes are creating a “nuisance” giving rise to actions for money damages under tort law. Since the law itself is always indeterminate in its application with a stock range of arguments on all sides, Critical Legal Studies writers assert that the resolution of these issues always requires frank political choices, that a legal argument is simply an opinion about the right and wrong dressed up in an elite, technical discourse. The radical aim of this work is not simply to show that all legal decisions are actually political decisions, but to undermine the legitimacy of “legal reasoning” itself as a powerful symbol of cultural authority, a symbol that tends—along with other such fetishized symbols as flags, black robes, and the elevated judicial “bench”—to reinforce people’s passivity before imposing cultural institutions like the Supreme Court, which is imagined to be the repository of a wisdom inaccessible to the average person and the oracle of American political truth. In alliance with the deconstructionist work of Jacques Derrida and the related work of Michel Foucault on the multiple ways that “official” forms of knowledge tend to crush people’s self-confidence and sense of self-activity, this strand of critical legal scholarship means to expose “the law” as basically a lot of posturing baloney, and to empower people to think and feel for themselves.

*Id.* at 140–41.

32. See generally, e.g., *The Politics of Law: A Progressive Critique* (David Kairys ed., rev. ed. 1990) [hereinafter *The Politics of Law*] (collecting essays).

33. See generally, e.g., Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 *Harv. L. Rev.* 1276, 1276 (1984) (describing ways in which corporate and administrative law naturalize bureaucratic power and ultimately erode democratic interaction); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 *Am. U. L. Rev.* 1065, 1074–1113 (1985) (examining how a classic contracts law casebook shapes ways in which readers read the text and thereby obscures questions of gender relations); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1775 (1976) (arguing that participants in the legal arena “who have mastered the language of form can dominate and oppress others”).

contended that legal education was an indoctrination of individuals into a dominant elite.<sup>34</sup> Finally, some critical scholars challenged assumptions underlying communication itself by claiming that all meaning is ultimately determined by the listener/reader.<sup>35</sup>

More recently, building on the work of Antonio Gramsci,<sup>36</sup> Michel Foucault,<sup>37</sup> Michel de Certeau,<sup>38</sup> and the vast, vaguely defined field of cultural studies,<sup>39</sup> sociolegal scholars have begun to engage in cultural analyses of law. These studies take a constitutive, rather than an instrumental, approach to law, focusing not on how law might serve progressive goals, but instead on how law works within a society to help shape social relations.<sup>40</sup> The constitutive view of law sees legal discourse, categories, and procedures as a framework through which individuals in society come to apprehend reality. Thus, law is

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34. See, e.g., Kelman, *supra* note 30, at 184–85 (expressing concern that while many law schools are sympathetic to progressive issues, legal education nevertheless implicitly encourages students to “*argue* right-wing economic politics, as if the case for a private property scheme with considerable faith in undisturbed markets had been convincingly made”); Duncan Kennedy, *Legal Education As Training for Hierarchy*, in *The Politics of Law*, *supra* note 32, at 38, 40 (observing that traditional law school classroom is “hierarchical with a vengeance” and therefore indoctrinates students into a hierarchical system).

35. In 1988, Sanford Levinson and Steven Mailloux observed that, in light of “ambiguities of interpretation, many legal theorists have substituted for the hermeneutics of objective interpretation what Gerald Graff has termed a ‘hermeneutics of power,’ where one emphasizes the political and social determinants of reading texts one way as opposed to another.” *Interpreting Law and Literature*, at xiii (Sanford Levinson & Steven Mailloux eds., 1988) (quoting Gerald Graff, *Textual Leftism*, 49 *Partisan Rev.* 558, 566 (1982)).

36. See, e.g., Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* 245–46 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) (articulating a model of hegemony); see also Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 *Law & Soc. Inquiry* 39, 41 (1992) (“Working within a Gramscian framework, cultural analysts . . . describe how discourses are produced, enacted, and reproduced.”).

37. See, e.g., Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, at 142 (Colin Gordon ed., Colin Gordon et al. trans., 1980) (describing power relations as “interwoven with other kinds of relations (production, kinship, family, sexuality) for which they play at once a conditioning and a conditioned role”). For a discussion of how Foucault’s ideas are relevant to sociolegal research, see Silbey, *supra* note 36, at 39–41.

38. See, e.g., Michel de Certeau, *The Practice of Everyday Life*, at xiv (Steven F. Rendall trans., 1984) (describing “popular procedures” or “ways of operating” by which ordinary people “manipulate the mechanisms of discipline and conform to them only in order to evade them”); see also Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 *Law & Soc. Inquiry* 145, 147–48 (2001) (reviewing Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (1998)) (describing de Certeau’s influence on sociolegal scholars).

39. See, e.g., Mezey, *supra* note 38, at 151 (describing “cultural theory” as “that quirky, ill-defined hash of insights from different disciplines”).

40. See Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* 3 (1993) (describing constitutive theory as focusing “on the way in which law is implicated in social practices, as an always potentially present dimension of social relations, while at the same time reminding us that law is itself the product of the play and struggle of social relations”); Silbey, *supra* note 36, at 41 (“[The] constitutive perspective . . . argues that law does more than reflect or encode what is otherwise normatively constructed; in the constitutive perspective, law is a part of the cultural processes that actively contribute in the composition of social relations.”).

not merely a coercive force operating externally to affect behavior and social relations; it is also a lens through which we view the world and actually conduct social interaction. From this perspective, “law shapes society from the inside out by providing the principal categories in terms of which social life is made to seem largely natural, normal, cohesive, and coherent.”<sup>41</sup> Clifford Geertz perhaps provided a manifesto for the constitutive view in 1983:

[L]aw, rather than a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities . . . an active part of it. . . .

Law . . . is, in a word, constructive; in another constitutive; in a third, formational.

. . . .  
. . . Law, with its power to place particular things that happen . . . in a general frame in such a way that rules for the principled management of them seem to arise naturally from the essentials of their character, is rather more than a reflection of received wisdom or a technology of dispute settlement.<sup>42</sup>

Over the past fifteen to twenty years, sociolegal scholars have increasingly embraced a constitutive vision of law<sup>43</sup> and therefore have treated law as: (1) a belief system that helps to define the roles of individuals within society; (2) a system of organization that determines societal roles; and (3) a language for conceptualizing reality, mediating social relations, and defining

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41. Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 *Yale J.L. & Human.* 129, 134 (2000) [hereinafter Sarat, *Redirecting Legal Scholarship*] (reviewing Paul W. Kahn, *The Cultural Study of Law* (1999)).

42. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* 218, 230 (1983).

43. I realize, of course, that it is impossible to draw neat lines of division between theoretical movements within an ongoing academic discourse. Thus, for example, although the constitutive vision can be viewed as a perspective distinct from the primary concerns of critical legal studies, one can also trace the articulation of the constitutive view to the work of some critical legal studies scholars. See, e.g., Peter Gabel, *The Bank Teller*, in Gabel, *supra* note 31, at 21–24 (describing ways in which hierarchically arranged institutional roles, such as “bank teller,” help to construct individual identity); Peter Gabel & Jay M. Feinman, *Contract Law as Ideology*, in *The Politics of Law*, *supra* note 32, at 373, 373–74 (arguing that contract law constructs and reinforces assumptions about individual autonomy and therefore impedes our ability to recognize societal hierarchy); Gordon, *supra* note 30, at 103 (“[I]t is just about impossible to describe any set of ‘basic’ social practices without describing the legal relations among the people involved—legal relations that . . . define the constitutive terms of the relationship . . .”). On the other hand, as Sarat himself has elsewhere observed, one might also see considerable differences among those who could be grouped together as taking the constitutive view. Sarat, *Redirecting Legal Scholarship*, *supra* note 41, at 134 n.28. For example, Barbara Yngvesson’s study, *Making Law at the Doorway: The Clerk, the Court and the Construction of Community in a New England Town*, 22 *Law & Soc’y Rev.* 409, 443–46 (1988), in which she focuses on the way legal officials construct the social understanding of ideas such as “good neighbor” or “dutiful parent,” seems quite different from the argument of Gabel and Feinman that contract law tends to legitimate oppressive socioeconomic realities by encoding particular conceptions of conflicts and agreements. For Yngvesson, law has a relatively transparent effect on legal meaning, whereas for Gabel and Feinman, the relationship between legal norms and social meaning is more submerged and systematic.

behavior. Following Geertz, they have deployed various interpretive methods to study the “webs of signification”<sup>44</sup> found within law, recognizing that

[w]e experience the rule of law not just when the policeman stops us on the street or when we consult a lawyer on how to create a corporation. The rule of law shapes our experience of meaning everywhere and at all times. It is not alone in shaping meaning, but it is rarely absent.<sup>45</sup>

Moreover, a cultural analysis of law also seeks to analyze legal consciousness itself: the ways in which “legality is experienced and understood by ordinary people as they engage, avoid, or resist the law and legal meanings.”<sup>46</sup> Thus, scholars have attempted to study law in “everyday life.”<sup>47</sup> Such studies ask: How do “commonplace transactions and relationships come to assume or not assume a legal character? And in what ways is legality constituted by these popular understandings, interpretations, and enactments of law?”<sup>48</sup> By emphasizing the everyday moments when people negotiate their own understanding of legality, such scholarship seeks to walk the fine line between liberal theory’s assumption of autonomous individuals exerting free will in society, and structuralism’s conception of the individual as determined by social and economic forces.<sup>49</sup> Thus, this approach operates as a critique not only of liberal conceptions of law (which tend to view law as a self-contained system of rules), but also of many Marxist critiques (which tend to view law as unidirectional, emanating from capitalist class interests and entrenched elites). As one scholar has observed, from this perspective the study of “legal consciousness is neither attitude nor epiphenomenon, but cultural practice.”<sup>50</sup>

This brief history not only sets the context for *When the State Kills*, but

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44. Geertz, *Local Knowledge*, supra note 42, at 182.

45. Kahn, supra note 9, at 124.

46. Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* 35 (1998).

47. See, e.g., id. at xi (examining “the meanings of law in American lives,” including degree to which Americans both use and resist law); Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (1990) (studying one court in eastern Massachusetts and observing way people use the court system to address everyday personal problems); Austin Sarat & Thomas R. Kearns, Editorial Introduction, in *Law in Everyday Life* 1, 1 (Austin Sarat & Thomas R. Kearns eds., 1993) (collecting essays that “confront law in its dailiness and as a virtually invisible factor in social life”); Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court 1–14* (1993) [hereinafter Yngvesson, *Virtuous Citizens*] (observing western Massachusetts county court system to explore how complaints of citizens and responses of courts both reproduce and challenge social hierarchies); Austin Sarat, “. . . The Law Is All Over”: Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 *Yale J.L. & Human.* 343, 343 (1990) [hereinafter Sarat, “. . . The Law Is All Over”] (interviewing welfare recipients and examining “how people on welfare think about law and use legal ideas as well as how they respond to problems with the welfare bureaucracy”).

48. Ewick & Silbey, supra note 46, at 33.

49. See Mezey, supra note 38, at 151 (citing Ewick & Silbey, supra note 46, at 35–38).

50. Id.

also illuminates the four benefits of a cultural analysis of law that I articulated previously. First, Sarat refuses to accept the rules articulated by elite judges simply as autonomous legal acts. Instead, he insists that the production of legal norms is a cultural practice replete with symbolic content. Second, he seeks information about how legal norms are actually experienced and resisted by ordinary people both in their literal encounters with the legal system and in their everyday lives. Third, he understands that the narratives deployed in official legal discourse reflect and reinforce broader cultural attitudes, beliefs, and assumptions. Fourth, he recognizes that “law talk” is diffused throughout the culture and that a proper study of law must address the dissemination of legal consciousness in popular fora such as television and film. These strategies inform and enliven Sarat’s study of capital punishment. The next Part discusses each in turn.

## II. FOUR BENEFITS OF CULTURAL ANALYSIS

*When the State Kills* is addressed to one particular topic: capital punishment in the United States. Nevertheless, by analyzing both the kinds of questions Sarat chooses to explore about the death penalty and the types of insights he provides, I hope to identify four distinct benefits of his cultural approach to legal study that are generalizable to nearly any legal issue. Thus, I have chosen specific chapters of the book that illuminate each of these benefits. Through my reading of these chapters, I argue that cultural analysis: (1) encourages us to analyze the symbolic content of legal norms; (2) seeks data on how legal norms are actually experienced and enacted by those enmeshed in and affected by such norms; (3) suggests that we attend to the importance of legal narratives; and (4) recognizes the role law plays in popular culture. Moreover, I will suggest that each of these benefits not only helps scholars to construct a richer descriptive understanding of the operation of law in society, as Paul Kahn argues, but also contributes to doctrinally oriented normative legal discourse.

### A. *Analyzing the Symbolic Content of Legal Norms*

*When the State Kills* builds on David Garland’s observation that “punishments . . . help shape the overarching culture and contribute to the generation and regeneration of its terms.”<sup>51</sup> Sarat takes seriously the idea that punishment is not just the imposition of rules, but “a set of signifying practices that ‘teaches, clarifies, dramatizes and authoritatively enacts some of the most basic moral-political categories and distinctions which help shape our symbolic universe.’”<sup>52</sup> These practices have a pedagogical effect on society at large. As Sarat notes, punishment “teaches us how to think about categories like

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51. David Garland, *Punishment and Culture: The Symbolic Dimension of Criminal Justice*, 11 *Studies in L. Pol. & Soc.* 191, 193 (1991).

52. Sarat, *When the State Kills*, *supra* note 5, at 23 (quoting Garland, *supra* note 51, at 195).

intention, responsibility, and injury, and it models the socially appropriate ways of responding to injuries done to us.”<sup>53</sup>

Accordingly, Sarat analyzes U.S. Supreme Court jurisprudence not as legal doctrine but as symbolic pedagogy. In so doing, he illuminates the ways in which legal decisions both construct and reflect shifting cultural attitudes toward crime and its impact on society. For example, Sarat compares the Court’s decisions in *Booth v. Maryland*<sup>54</sup> and *Payne v. Tennessee*,<sup>55</sup> two cases which, though decided only four years apart, came to opposite conclusions concerning the use of victim-impact testimony in capital sentencing. But, whereas a doctrinally oriented analysis might simply have discussed both decisions and argued that one or the other was the “better” rule of law, Sarat instead analyzes the change from one legal rule to the other as a reflection of (and perhaps a catalyst for) changes in broader societal perceptions about the appropriate role that the impulse for vengeance should play in the capital sentencing process.

In the 1987 *Booth* decision, Justice Powell, writing for a five-four majority, held that such testimony rendered the resulting death sentences of the defendants unconstitutional under the Eighth Amendment.<sup>56</sup> According to Powell, victim-impact testimony, though emotionally compelling, created a substantial risk of prejudice because such testimony could not contribute to an assessment of the defendants’ “blameworthiness” and therefore was irrelevant.<sup>57</sup> Powell relied on the idea that the *wrong* done by the defendant is different from the *harm* caused to the victim. In Powell’s view, because the capital sentencing decision was appropriately based solely on whether the wrong done was sufficiently egregious to warrant the death penalty, any focus on the harm done to the victim or the victim’s family and friends would divert the jury’s attention from the proper inquiry.<sup>58</sup> In addition, Powell rejected victim-impact statements because such emotional appeals might threaten to overwhelm the “reasoned decisionmaking we require in capital cases.”<sup>59</sup> Victim-impact statements, according to Powell, might “inflare the jury and divert it from deciding the case on the relevant evidence. . . . As we have noted, any decision to impose the death sentence must ‘be, and appear to be, based on reason rather than caprice or emotion.’”<sup>60</sup>

As Sarat points out, Powell’s conclusion rests on several significant assumptions about the nature of punishment itself. In particular, although Powell does not say so explicitly, his opinion symbolically embraces the idea that legal process should function as the rational superego that will restrain the

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53. Id.

54. 482 U.S. 496 (1987).

55. 501 U.S. 808 (1991).

56. 482 U.S. at 509.

57. Id. at 504.

58. See id. at 505.

59. Id. at 509.

60. Id. at 508 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (Stevens, J.)).

id of passion, emotion, and vengeance.<sup>61</sup> In this scheme, “Western legal orders substitute the calm calculation of deterrence, the disciplining logic of rehabilitation, and the stern but controlled authority of retribution for the emotionalism of revenge.”<sup>62</sup> As Sarat argues, drawing on the work of philosopher Robert Nozick,<sup>63</sup> revenge is personal, whereas state sanctioned punishment is meant to be public and not based on a particular emotional connection to the victim.<sup>64</sup>

Significantly, this transformation of private pain into public punishment is precisely what the victims’ rights movement resists: “The goal of victims and those who take up their cause is to repersonalize criminal justice so that the sentencer has to declare an alliance with either the victim or the offender. Criminal sentencing thus becomes a test of loyalty.”<sup>65</sup> Sarat thereby recasts the victims’ rights movement as a symbolic resistance to the rationalization of state punishment and perhaps even a return to a (pre-modern?) conception of punishment as private revenge. Indeed, he argues that the rubric of victims’ rights is “the latest ‘style’ in which vengeance has disguised itself.”<sup>66</sup>

From this perspective, Justice White’s dissent in *Booth*,<sup>67</sup> which argued that capital punishment should be based *both* on the harm caused to the victim *and* the wrongfulness of the act committed by the defendant,<sup>68</sup> was not merely a doctrinal assertion. In addition, Sarat argues, White’s opinion symbolically transformed the public punishment process into a vehicle for private vengeance and facilitated “the breakdown of the categories of public and private” on which the debate about punishment versus vengeance has traditionally depended.<sup>69</sup> Indeed, White’s position implied that a justice based on impersonal abstract reason is not true justice at all. Instead, “the immediate, concrete, and personal reality of pain and grief must be made comprehensible to an audience of strangers through a complicated semiotic process.”<sup>70</sup> Justice Scalia, also in dissent,<sup>71</sup> went farther still, basing his position in part on “an outpouring of popular concern for what has come to be known as ‘victims’ rights.”<sup>72</sup> According to Scalia, “[m]any citizens” have found the criminal

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61. See Sarat, *When the State Kills*, supra note 5, at 39 (discussing contrast between retribution and vengeance, the latter of which is conventionally conceived as “all id and no superego”).

62. *Id.*

63. Robert Nozick, *Philosophical Explanations* 366–68 (1981).

64. Sarat, *When the State Kills*, supra note 5, at 41.

65. *Id.*

66. *Id.* at 43.

67. *Booth v. Maryland*, 482 U.S. 496, 515 (1987) (White J., dissenting). Justice White’s dissent was joined by Chief Justice Rehnquist and Justices O’Connor and Scalia.

68. *Id.* at 516–17 (White, J., dissenting).

69. Sarat, *When the State Kills*, supra note 5, at 49.

70. *Id.*

71. *Booth*, 482 U.S. at 519 (Scalia, J., dissenting). Justice Scalia’s dissent was joined by Chief Justice Rehnquist and Justices White and O’Connor.

72. *Id.* at 520 (Scalia, J., dissenting).

sentencing process one-sided.<sup>73</sup> He argued that it was necessary for the jury to hear “the full reality of human suffering the defendant has produced” because that suffering is “one of the reasons society deems [the defendant’s] act worthy of the prescribed penalty.”<sup>74</sup> Thus, Scalia was content to allow a generalized public sense of street justice to dictate the contours of the criminal justice process itself. Whether one agrees or disagrees with this position, Sarat’s analysis allows us to see that basing criminal sentencing on such an inchoate sense of moral condemnation will inevitably erode the distinction between a system of public justice and its vengeance based alternative.<sup>75</sup>

Four years later, in *Payne*, the Supreme Court reversed course and embraced the view of Justices White and Scalia, signaling a cultural shift in attitude regarding the criminal process as a vehicle for vengeance.<sup>76</sup> Chief Justice Rehnquist, writing for a newly formed six-three majority,<sup>77</sup> ruled both that harm was indeed a relevant factor for consideration in the capital sentencing process and that victim-impact testimony was a useful method of informing the jury about such harm.<sup>78</sup> According to the Court, this testimony gives the jury a more complete picture of the “human cost of the crime of which the defendant stands convicted.”<sup>79</sup> Yet, as Sarat points out, “[f]ocusing on that cost by hearing the voice of the victim personalizes death sentencing in just the way revenge personalizes all punishment.”<sup>80</sup> Thus, the language of the majority opinion eroded the distinction between personal vengeance and state punishment upon which *Booth* was based.

Justice O’Connor’s concurrence,<sup>81</sup> echoing Justice Scalia’s reasoning in his *Booth* opinion, noted a “strong societal consensus” in favor of victim-impact statements.<sup>82</sup> Moreover, according to Justice O’Connor, even the possibility that the statements might be “unduly inflammatory” did not mean that they should be constitutionally prohibited.<sup>83</sup> Rather, O’Connor argued that murder “transforms a living person with hopes, dreams, and fears into a corpse . . . . The Constitution does not preclude a State from deciding to give some of that back.”<sup>84</sup> Similarly, Chief Justice Rehnquist in his majority opinion described victim-impact statements as providing “a quick glimpse of

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73. *Id.* (Scalia, J., dissenting).

74. *Id.* (Scalia, J., dissenting).

75. See Sarat, *When the State Kills*, *supra* note 5, at 50.

76. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

77. *Id.* at 810. The majority opinion was joined by Justices White, O’Connor, Scalia, Kennedy, and Souter.

78. *Id.* at 825–27.

79. *Id.* at 827.

80. Sarat, *When the State Kills*, *supra* note 5, at 52.

81. *Payne*, 501 U.S. at 830 (O’Connor, J., concurring). Justice O’Connor’s concurrence was joined by Justices White and Kennedy.

82. *Id.* at 831 (O’Connor, J., concurring).

83. *Id.* (O’Connor, J., concurring).

84. *Id.* at 832 (O’Connor, J., concurring).

the life which a defendant chose to extinguish.”<sup>85</sup>

Sarat’s reading makes it clear that victim-impact evidence is deemed valuable by these Justices precisely because it does *not* fit the abstract impersonal model often associated with state-sanctioned punishment. Whereas Oliver Wendell Holmes could say with confidence that law’s violence was superior to “the greater evil of private retribution,”<sup>86</sup> the current Supreme Court appears not to share that confidence.<sup>87</sup> Rather, Sarat argues, through victim-impact testimony, “[t]he jury is asked to hear . . . pain and to avenge it, to repay death with death to end the victimization. . . . [T]he return of revenge . . . is now complete as the victim is given both a voice and a champion.”<sup>88</sup> According to Sarat, this return to revenge signals “a nagging doubt that public processes can be built on anything but rage and grief,”<sup>89</sup> and therefore weakens the venerable idea that state violence should be more disciplined and more accountable than private vengeance.<sup>90</sup>

Ultimately, Sarat does not explicitly state his preference for the *Booth* rule, the *Payne* rule, or some other sentencing scheme (though he clearly believes that state sanctioned criminal justice should be understood as a process distinct from private vengeance).<sup>91</sup> Indeed, his aim here is not to determine which rule is preferable as a matter of legal doctrine, constitutional history, or public policy. While such issues would almost certainly be the focus of a more doctrinally oriented analysis, Sarat’s perspective is distinctly different.

By closely reading the symbolic pedagogy of the Supreme Court decisions in these two cases, Sarat illuminates a broader shift in cultural attitudes toward crime that might otherwise be missed. As the Supreme Court’s change from *Booth* to *Payne* indicates, the private desire for vengeance felt by victims of violent crime is now the lens through which the death penalty is viewed. Indeed, it is perhaps not surprising that one rarely hears the death penalty even defended as a deterrent to criminal behavior anymore.<sup>92</sup> The

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85. *Id.* at 822 (internal quotation marks omitted).

86. Oliver Wendell Holmes, *The Common Law* 38 (Mark DeWolfe Howe ed., Harvard Univ. Press, Belknap Press 1963) (1881).

87. Indeed, Justice Scalia, in his *Payne* concurrence, specifically noted that *Booth*’s rule barring victim-impact testimony “conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement.” 501 U.S. at 834 (Scalia J., concurring). As Sarat points out, Scalia positions himself as a spokesperson for the movement, and thereby defines justice by a political, rather than an ethical, standard. Sarat, *When the State Kills*, *supra* note 5, at 53.

88. Sarat, *When the State Kills*, *supra* note 5, at 53.

89. *Id.* at 59.

90. See *id.* at 57; see also Rene Girard, *Violence and the Sacred* 13–15 (Patrick Gregory trans., Johns Hopkins Univ. Press 1977) (1972) (locating the root of modern systems of justice in the fear of the unending chain of “reciprocal act[s] of vengeance”).

91. See Sarat, *When the State Kills*, *supra* note 5, at 57.

92. Sarat quotes one scholar of crime and punishment in America who observes “a growing sense that capital punishment no longer needs to be defended in terms of its social utility. . . . The current invocation of vengeance reflects . . . a sense of entitlement to the death penalty as a

arguments now are more likely to be based on society's need to express its condemnation of the accused<sup>93</sup> or the healing impact the killer's death might have for the families of victims.<sup>94</sup> Reading the relevant Supreme Court opinions as cultural texts rather than just as legal doctrine illuminates this shift in focus and therefore provides a greater understanding of cultural attitudes that are worth studying in their own right. Such an analysis also suggests, however, that arguments about the death penalty, in order to be effective, will necessarily need to be recast in order to account for changes in the cultural lens. Indeed, whatever one's position on various criminal justice issues, the terrain on which the battle for popular opinion is fought has changed in fundamental ways over the past decade or so, and Sarat's discussion suggests some of those changes. Thus, his cultural analysis of Supreme Court doctrine yields descriptive insight as well as cultural data that will inevitably inform normative debates about criminal justice policy in America. In some sense, Sarat appears to be saying that it is irrelevant whether a legal scholar thinks *Booth* or *Payne* is the better reasoned position; more important is the cultural zeitgeist those opinions both reflect and construct.

*B. Providing Data on How Legal Norms are Actually Experienced and Enacted*

Legal scholars and policymakers have an unfortunate tendency to assume that legal norms, once established, simply take effect and constitute a legal regime.<sup>95</sup> As Carol Weisbrod has observed, even theorists who position themselves in opposition to prevailing legal norms tend to privilege official legal pronouncements as the relevant site for locating (or changing) law.<sup>96</sup>

Such a perspective fails to recognize the ways in which legal norms are

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satisfying personal experience for victims and a satisfying gesture for the rest of the community." Id. at 12 (quoting Jonathan Simon, *Violence, Vengeance and Risk: Capital Punishment in the Neo-Liberal State* 13 (1997) (unpublished manuscript)).

93. See Donald L. Beschle, *What's Guilt (or Deterrence) Got to Do With It?: The Death Penalty, Ritual, and Mimetic Violence*, 38 *Wm. & Mary L. Rev.* 487, 536 (1997) (suggesting that persistence of death penalty is attributable in part to society's need for ritualized community violence).

94. For example, just after the verdict was announced in the capital murder trial of Timothy McVeigh, President Clinton hailed the verdict as a "long overdue day for the survivors and the families of those who died in Oklahoma City." Robert L. Jackson, *Clinton Hails Verdict as "Long Overdue,"* *L.A. Times*, June 3, 1997, at A23 (internal quotation marks omitted). For an argument that the impact on the *defendant's* family should also be considered, see generally Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 *Fla. St. U. L. Rev.* 1119 (1999).

95. See, e.g., Joseph Tussman, *Obligation and the Body Politic* 73 (1960) ("Taking law as central we develop theories of the state as a legal order or as the 'rule of law.'").

96. See Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 *Ga. L. Rev.* 985, 996 (1990) ("[F]eminist legal scholars, like others in legal academic life, tend to address the powerful and to translate the question 'What is to be Done?' into the question 'What should the State, acting through its judges, do?'" (citation omitted)).

implemented, experienced, adapted, distorted, resisted, and subverted by the very people whom the norm is meant to regulate. Indeed, “[l]aw is continuously shaped and reshaped by the ways it is used, even as law’s constitutive power constrains patterns of usage.”<sup>97</sup> Accordingly, legal actors—such as litigants, witnesses, and jurors—as well as legal subjects—everyone from welfare recipients to home buyers to those seeking a marriage certificate—all possess their own understandings of law; “they deploy and use meanings strategically to advance interests and goals,”<sup>98</sup> and these alternative conceptions can ultimately prompt changes in “official” legal practices.<sup>99</sup>

Sociolegal scholars have made significant contributions over the past few decades by studying the ways in which law operates not in its doctrinal purity, but in the messy pluralism of “on the ground” application.<sup>100</sup> Sarat employs this strategy in *When the State Kills* by offering a lengthy description of the attitudes and assumptions of jurors, culled from interviews, about the capital sentencing process.<sup>101</sup> His analysis is important both because he helps us to understand how jurors reconcile themselves to participation in state violence, and because he shows how the jurors’ own cultural assumptions about the legal system may distort the capital sentencing process even on its own terms.

As Sarat notes, the jury’s role in capital punishment is often taken for granted, but it is quite remarkable: “[O]rdinary citizens are regularly enlisted as authorizing agents for the state’s own lethal brand of violence.”<sup>102</sup> Indeed, the mere fact that people would be able to impose death on another human being in this context brings to mind Stanley Milgram’s famous social psychology experiments about our capacity to inflict pain when we do so under the cloak of official authority.<sup>103</sup> These experiments reveal that, although we may naturally hesitate to inflict pain or death on others, those inhibitions can be overcome.<sup>104</sup> Moreover, as studies from social and behavioral psychology

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97. Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *Law in Everyday Life*, supra note 47, at 21, 55. Of course, one might say that juror behavior in capital cases does not actually exemplify “law in everyday life” because jurors are necessarily working within the domain of state legal processes. Nevertheless, Sarat’s analysis of juror attitudes is analogous because it shows how everyday “folk knowledge” deployed even by those operating within the legal system can affect the application of legal norms.

98. Sarat & Simon, *Beyond Legal Realism?*, supra note 20, at 20.

99. Recognizing this sort of feedback loop allows us to understand the “coexistence of discipline and struggle, of subjection and subversion, and [to direct] attention toward[] a dynamic analysis of what it means to be caught up in power.” Yngvesson, *Virtuous Citizens*, supra note 47, at 121.

100. See, e.g., supra note 47 (citing recent works of sociolegal scholarship).

101. See Sarat, *When the State Kills*, supra note 5, at 153.

102. *Id.* at 127.

103. See Stanley Milgram, *Obedience to Authority: An Experimental View* 113–15 (1974).

104. Milgram recruited subjects from a cross-section of the population by placing advertisements in local newspapers inviting people to participate in a scientific study on learning and memory. When individuals agreed to participate, the experimenter paired each subject with a “learner,” who also appeared to be an experimental subject but who was in fact a confederate of the experimenter. *Id.* at 16–18. Before beginning each session, the experimenter explained that

indicate, “[p]ersons who act within social organizations that exercise authority act violently without experiencing the normal inhibitions or the normal degree of inhibition which regulates the behavior of those who act autonomously.”<sup>105</sup>

The changing legal/cultural attitudes about vengeance in criminal sentencing discussed in the previous section may, over time, weaken jurors’ resistance to imposing death. Yet, in the death penalty context, the social organization of the legal system itself also helps jurors to overcome any inhibitions against violence they might feel<sup>106</sup> by distancing them from a sense of personal responsibility for the state killing. Sarat’s interviews with jurors from a Georgia capital murder trial, at which the defendant had been sentenced to death,<sup>107</sup> suggest two ways in which this distancing occurs.

One obvious (though perhaps not sufficiently appreciated) factor is that the jurors who authorize violence—like the judges and law clerks who later review appeals—do not themselves inflict or even witness the imposition of that violence. Thus, although the juror’s decision to impose a capital sentence begins the process that may lead to death, the death itself seems far removed from the verdict. As Sarat points out,

the juror’s language is performative. Yet jurors are encouraged to think that it is not. Were they required to witness the full consequences of their verdict or were they required to pull the switch on those they condemn to death, the law would find it radically more

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the “learner” would be asked to answer questions about paired words and instructed the subject to administer electric shocks to the “learner” if the learner answered incorrectly. The experimenter gave the subject a sample electric shock. During the session, the “learner” began to make mistakes, and the experimenter instructed the subject to administer the electric shocks in increasing levels of intensity. *Id.* at 22–23. In fact, the “learner” did not receive shocks at all, but acted as if he did. See *id.* at 19. The machine that appeared to give the shocks bore a warning that shocks above a certain level were dangerous. As the shock level increased, the “learner” cried out in pain and begged the subject to stop. The experimenter, however, instructed the subject to continue. *Id.* at 20–23. Twenty-six of the forty male subjects studied in the original experiment administered shocks up to the highest level. *Id.* at 35. A subsequent study of forty women yielded identical results. *Id.* at 61. The Milgram experiments are discussed and placed in the context of a much larger body of experimental work and anecdotal material on decisionmaking in Irving L. Janis & Leon Mann, *Decision Making: A Psychological Analysis of Conflicts, Choice, and Commitment* 268–71 (1977).

105. Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1615 (1986) (describing work of Stanley Milgram, Anna Freud, and Konrad Lorenz).

106. As Robert Cover has observed, law itself would not be possible without such social organization. See *id.* at 1613 (“Because legal interpretation is as a practice incomplete without violence—because it depends upon the social practice of violence for its efficacy—it must be related . . . to the cues that operate to bypass or suppress the psycho-social mechanisms that usually inhibit people’s actions causing pain and death.”).

107. Sarat, *When the State Kills*, *supra* note 5, at 137–54. These interviews were part of a national study of jurors and the death penalty. See generally William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 *Tex. L. Rev.* 605, 643–710 (1999) (presenting findings drawn from national study based on three to four hour interviews with 916 jurors from 257 capital trials in eleven states). Sarat chose four jurors randomly and interviewed them for two to five hours. Sarat, *When the State Kills*, *supra* note 5, at 289 n.37.

difficult to get their authorization to kill.<sup>108</sup>

Moreover, during the trial, although numerous crime scene photographs and descriptions are used to bring the defendant's crime to life, the jurors are given no similarly visceral understanding of the violence that accompanies capital punishment itself. As a result, jurors deliberate with a powerful sense of the crime committed, but the reality of the state's execution recedes far into the background.

Small wonder then that, as the jurors Sarat interviewed discussed the case, "vivid images of the scene of death and the violence that surrounded it were most prominent in their recollections."<sup>109</sup> For example, one juror reported that she did not want to look at the crime scene photographs, but that "[t]hey insisted I had to look. . . . So I had to look, and that's still following me into that deliberating room."<sup>110</sup> Another juror could not even remember the name of the defendant, but could describe the exact points on the body at which the bullet entered and exited, a testament to the power of the crime scene evidence. When asked if there was anything about the case that stuck in his mind, this juror responded:

What I remember is seeing the pictures of the man laying behind the counter, laying in a puddle of blood probably bigger than this table. And the pictures—the other jurors and I had to . . . [i]t was difficult for some of them to look at the pictures. They'd take them up so close and they'd show the clear shots and all. Then we handled the weapon and a lot of them really didn't want to do that.<sup>111</sup>

Asked if he still thought about those pictures and the gun, this juror replied, "Surely."<sup>112</sup> Perhaps most tellingly, a third juror acknowledged:

Normally I consider myself a liberal easterner transplanted here to Georgia and against capital punishment—always was—but after I saw that picture of that man, something popped. I saw the pictures of him slumped down behind the counter and he was shot at somewhere around here and behind the ear, that was terrible. . . . I think about it even now and it bothers me very much.<sup>113</sup>

Thus, there can be little doubt that the crime scene evidence provided jurors with a palpable emotional understanding of the defendant's violence. In contrast, as Sarat points out, "[n]o one showed jurors images of the scene of the prospective execution, of the violence of electrocution. . . . No such images were admissible or available for the juror eager to understand what he was being asked to authorize."<sup>114</sup> As a result, jurors could identify with the pain caused by the *defendant's* killing and yet distance themselves from the reality of the *state's* killing or their role in it.

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108. Sarat, *When the State Kills*, supra note 5, at 135.

109. *Id.* at 138.

110. *Id.* at 140.

111. *Id.* at 139 (internal quotation marks omitted).

112. *Id.* (internal quotation marks omitted).

113. *Id.* at 141.

114. *Id.* at 138.

Jurors may also distance themselves from their role in imposing the death penalty by assuming that appellate review will always be available to defendants, thereby rendering the jury verdict less significant. Indeed, as Sarat points out, the U.S. Supreme Court itself has recognized this problem. In *Caldwell v. Mississippi*,<sup>115</sup> a prosecutor had told jurors that they should not view themselves as finally determining whether the defendant would die because any death sentence would automatically be reviewed on appeal.<sup>116</sup> Justice Marshall, writing for the Court, ruled that it was unconstitutional to permit a death sentence in such a case.<sup>117</sup> According to the Court, “the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.”<sup>118</sup> Moreover, the jurors, freed from the weighty responsibility of feeling that they were actually imposing death, might choose to “‘send a message’ of extreme disapproval for the defendant’s acts,” even if the jurors were “unconvinced that death is the appropriate punishment.”<sup>119</sup>

Nevertheless, even though the Supreme Court has clearly held that jurors must fully understand their responsibility for imposing a death sentence, Sarat’s interviews indicate that many of them continue to deny their role, often based on their own (culturally influenced) impressions about the legal system. Indeed, the jurors Sarat interviewed appear to have found it easier to vote for a capital sentence precisely because they believed that the lengthy appeals process and the possibility of reversal meant that their sentence would probably never be carried out. One juror described the deliberations:

[W]e had to talk about the fact that this, just for the reason that we voted for death, did not necessarily mean that [the defendant] would die. . . . And I think we talked a good bit about the fact that this would go to the Georgia Supreme Court and it would be reviewed and that if anything was out of the ordinary then it would be thrown out, and that even after then the man would have many opportunities to appeal. And I think that probably that discussion helped more than anything to persuade the two that was reluctant. Just because we voted death didn’t mean he would die.<sup>120</sup>

Surprisingly, even though they voted for the death penalty, *not one* of the jurors Sarat interviewed believed that the execution would actually be carried out.<sup>121</sup> As one juror put it: “We all pretty much knew that when you vote for death you don’t necessarily or even usually get death. Ninety-nine percent of the time they don’t put you to death. You sit on death row and get old.”<sup>122</sup>

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115. 472 U.S. 320 (1985).

116. *Id.* at 325–26.

117. *Id.* at 341.

118. *Id.* at 333.

119. *Id.* at 331.

120. Sarat, *When the State Kills*, *supra* note 5, at 149.

121. *Id.*

122. *Id.* (internal quotation marks omitted).

This kind of deflection of responsibility, of course, is precisely what troubled the U.S. Supreme Court in *Caldwell v. Mississippi*. However, Sarat's analysis suggests that *Caldwell's* prohibition of prosecutorial comments regarding appeals may not have gone far enough. As Sarat points out, even if a prosecutor does not explicitly tell the jurors about the appeals process, "[i]nterviews with jurors across the country who have served in capital cases suggest that they often come to court believing that the law grants excessive and undue protections to defendants, which result in endless appeals in capital cases."<sup>123</sup> Sarat quotes one juror who believed that those given the death penalty "go back and appeal, appeal, appeal, so they die of old age."<sup>124</sup> Nevertheless, legal doctrine seems rarely to account for the fact that the participants in the system often bring this sort of "folk knowledge" to their application of legal norms.

Perhaps even more disturbing than the fact that capital jurors may be distanced from their own responsibility for imposing a death sentence is Sarat's revelation that these jurors may actually vote for the death penalty even if they do not believe it is warranted, simply because they want to ensure that the defendant stays in prison for life. Sarat reports that the jurors he interviewed "were overwhelmingly concerned with incapacitation as a goal of criminal punishment."<sup>125</sup> Their principal aim was to make certain that the defendant would never return to the streets of the town where the crime took place. Yet, because at the time of trial Georgia law did not provide for a sentence of life without parole, the jurors believed that voting for death was the only way to accomplish this purpose. As one juror explained,

[i]f he had not been found guilty of capital murder he would have gotten life. But that doesn't mean that he would have served a life term. It means he would have gotten out in however many years it is you have to serve before you get out on parole. Isn't it something like seven years. I think I'm just going by what I hear on TV, you know.<sup>126</sup>

Two other jurors similarly reported that they would have preferred voting for life in prison without possibility of parole, but they chose death because this alternative was not available.<sup>127</sup> Thus, juror perceptions that the parole process is overly lenient may actually result in more death sentences being imposed.

Yet, as Sarat points out, although this perception of parole leniency is widespread,<sup>128</sup> it tends to reflect the distortions of media misinformation and

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123. *Id.*

124. *Id.* at 149–50 (internal quotation marks omitted).

125. *Id.* at 147.

126. *Id.* at 148 (internal quotation marks omitted).

127. *Id.*

128. *Id.* at 151 (describing as "cultural common sense" the idea that courts do not punish severely or effectively enough and that prisons release incarcerated offenders too soon). His impression seems to be borne out by more quantitative analyses. See, e.g., Julian Roberts, *Crime, Criminal Justice, and Public Opinion*, in *The Handbook of Crime and Punishment* 31–57

political rhetoric, rather than actual practice. For example, he notes that, throughout the 1980s and 1990s, the media in Georgia regularly reported that murderers not given the death penalty would be eligible for parole within seven years.<sup>129</sup> However, from 1985 to 1994, the Georgia State Parole Board policy was that persons sentenced to life for capital crimes would be considered for parole only after fifteen years,<sup>130</sup> and since 1993 state legislation provides that a person accused of capital murder and sentenced to life in prison without parole “shall not be eligible for any form of parole during such person’s natural life” absent a finding of factual innocence.<sup>131</sup> On a national level, Sarat cites the infamous Willie Horton advertisements during the 1988 presidential campaign as “the most striking example” of this emotionally laden rhetoric.<sup>132</sup> The ads, which created a “narrative nightmare” of a killer released from prison who kills again has, Sarat argues, “provided the bedrock for both political rhetoric and the consciousness of crime and punishment ever since.”<sup>133</sup> It is not surprising, therefore, that the jurors in the Georgia case described by Sarat reacted against their perception that prison inmates receive “undue solicitude”<sup>134</sup> and viewed a death sentence as the only viable option.

Taken as a whole, Sarat’s interviews provide useful cultural insights about the way in which jurors actually receive, reinterpret, and refashion legal norms. These insights demonstrate some of the ways in which “law” resides in cultural attitudes as well as official legal practice. Thus, judges, legislators, and legal scholars cannot assume that legal doctrine simply imposes a rule that is self-executing. Rather, law is a multivocal conversation, and the official pronouncement, though powerful and coercive, is not the only voice to be heard.

Moreover, listening to the voices of jurors, as reflected in Sarat’s interviews, suggests several concrete ways in which official legal practice might respond so that the imposition of the death penalty might at least embody the community sentiment it purports to reflect. First, jurors might be permitted (or required) to view photographs or movies documenting actual executions or to hear testimony from people who have witnessed the death penalty in practice. This evidence might help jurors to gain a visceral sense of

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(Michael Tonry ed., 1998) (describing more than three decades of research indicating that public sees courts as too lenient).

129. Sarat, *When the State Kills*, supra note 5, at 151.

130. Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 *Colum. Hum. Rts. L. Rev.* 211, 227 n.48 (1987). In addition, the general percentage of those considered for parole who were actually set free was infinitesimal. See, e.g., *id.* at 229 n.53 (noting that offenders sentenced to life for noncapital murder were eligible for parole in seven years, but fewer than one percent were actually released).

131. Ga. Code Ann. § 17-10-16 (1997).

132. Sarat, *When the State Kills*, supra note 5, at 152.

133. *Id.*

134. *Id.* (internal quotation marks omitted).

the consequences resulting from their sentence. Likewise, judges and law clerks involved in the administration of the death penalty might also be encouraged to see such evidence or even witness an execution.<sup>135</sup> Second, jurors might be informed of the relatively low percentage of capital cases that are actually reversed on appeal,<sup>136</sup> so that they will be less able to avoid taking responsibility for sentencing another human being to die. Third, the U.S. Supreme Court might expand the rule enunciated in *Simmons v. South Carolina*.<sup>137</sup> *Simmons* held that, where the defendant's future dangerousness is at issue and state law prohibits the defendant's release on parole, due process requires that defense counsel be permitted to inform the jury that the defendant would not be eligible for parole if sentenced to life in prison.<sup>138</sup> As Justices Souter and Stevens pointed out in concurrence, however, "on matters of law, arguments of counsel do not effectively substitute for statements by the court."<sup>139</sup> These justices argued that it was the trial court's responsibility to inform the jury regarding parole ineligibility,<sup>140</sup> and two more recent Supreme Court decisions also emphasize the importance of the judge's instructions.<sup>141</sup> In light of the deeply ingrained cultural assumptions about parole that Sarat's data reveals, this argument is particularly compelling.<sup>142</sup>

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135. Alternatively, televising executions might result in greater public consciousness of state killing. Sarat discusses this issue elsewhere in the book. Sarat, *When the State Kills*, supra note 5, at 187–208. For a discussion of this argument, see *infra* text accompanying notes 206–210.

136. A recent study of decisions by twenty-six state high courts from 1990 to 1999 found that the overall capital conviction reversal rate was approximately 27%, and that of those reversals, only 39% were conviction reversals, while 61% reversed the sentence only. Moreover, this study considered only those cases that were actually reviewed on appeal; it did not count cases in which no appeals were filed in the state's highest court. See Latzer & Cauthen, supra note 7, at 65–67.

137. 512 U.S. 154 (1994).

138. *Id.* at 156 (plurality opinion); *id.* at 172 (Souter, J., concurring).

139. *Id.* at 173 (Souter, J., concurring).

140. *Id.* (Souter J., concurring).

141. See *Kelly v. South Carolina*, 122 S. Ct. 726, 729–34 (2002) (stating that, at least when defendant's "future dangerousness" is put at issue during sentencing phase, statements by defense counsel were "inadequate to convey a clear understanding" of parole ineligibility); *Shafer v. South Carolina*, 532 U.S. 36, 52–54 (2001) (rejecting argument that defense counsel's statements at sentencing phase, coupled with trial court instructions that "life imprisonment means until the death of the defendant," were sufficient to satisfy *Simmons*).

142. Recently, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, has also signaled a willingness to extend *Simmons* and require that jurors be informed about parole eligibility in *all* death penalty cases, not just those in which life without parole is an available option. See *Brown v. Texas*, 522 U.S. 940, 940–42 (1997) (opinion of Stevens, J., respecting the denial of the petition for writ of certiorari). These justices suggested that jurors should be told, for example, that under state law a defendant sentenced to life in prison would be incarcerated for thirty-five years before he would be eligible for parole. See *id.* at 941 (arguing that Texas law prohibiting defense counsel from conveying such truthful information to jury is in "obvious tension" with *Simmons*).

Indeed, testifying to the pragmatic value of "on the ground" information in this area, these justices extensively cited empirical data showing that support for the death penalty decreases substantially if respondents are offered an alternative of life without parole for at least twenty-five

Thus, sociological research like Sarat's serves a dual role. First, his interviews provide particularly compelling evidence that the structure of the capital sentencing process and the effect of deeply held cultural beliefs can affect how easily jurors reconcile themselves with imposing a death sentence. Second, his data create a context for pursuing specific legal and policy reforms. By analyzing the way in which legal rules actually operate on the ground, we may come to understand better the complex ways in which individuals actually experience, use, and reinterpret legal norms. We may also see that legal institutions must respond to this "user" feedback and not just assume that law is always implemented in the pure form that the study of doctrine might lead us to believe.

### C. *Studying the Role of Legal Narratives*

Philosopher Wilhelm Dilthey wrote that "reality only exists for us in the facts of consciousness given by inner experience."<sup>143</sup> For every experience, however, a wide range of possible meanings can be assigned. And for every possible meaning there is a range of stories we can tell. As anthropologist Edward Bruner has pointed out, "[i]f we write or tell about the French Revolution, for example, we must decide where to begin and where to end, which is not so easy, so that by our arbitrary construction of beginnings and endings we establish limits, frame the experience, and thereby construct it."<sup>144</sup> Accordingly, "[e]very telling is an arbitrary imposition of meaning on the flow of memory . . . every telling is interpretive."<sup>145</sup>

Legal scholarship has sometimes implicitly rejected this insight, focusing instead on the ideals of objectivity,<sup>146</sup> neutrality,<sup>147</sup> and noncontextualized

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years. See *id.* at 941 n.2 (citing William J. Bowers, et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 *Am. J. Crim. L.* 77 (1994)). This data is striking. For example, "[i]n Nebraska . . . although 80.4% of people support capital punishment in the abstract, only 51.6% prefer the death penalty when the alternative is life imprisonment when the defendant would be ineligible for parole for 25 years." *Id.* (citing Bowers et al., *supra*, at 105). In addition, support for the death penalty dropped in each state when life imprisonment was presented as an alternative and the defendant would be parole ineligible for twenty-five years. See *id.* (stating that "support for death penalty dropped from 77% to 62% in Arkansas, from 64% to 45% in Virginia, and from 75% to 53% in Georgia" in such circumstances (citing Bowers et al., *supra*, at 89–90)). Not surprisingly, the death penalty becomes even less attractive as the length of parole ineligibility increases. See *id.* ("While 51.6% of people in Nebraska prefer the death penalty when the alternative is life imprisonment when defendant would be parole ineligible for 25 years, only 46.4% prefer the death penalty when defendant would be parole ineligible for 40 years." (citing Bowers et al., *supra*, at 105)).

143. Wilhelm Dilthey, *An Introduction to the Human Studies*, in *Selected Writings* 159, 161 (H.P. Rickman ed. & trans., 1976).

144. Edward M. Bruner, *Experience and Its Expressions*, in *The Anthropology of Experience* 3, 7 (Victor W. Turner & Edward M. Bruner eds., 1986).

145. *Id.*

146. See, e.g., H. Richard Uviller, *The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 *U. Pa. L. Rev.* 1067, 1067 (1975) ("[I]t seems to me that properly directed and purged of obvious abuses, the juxtaposition of two contrary perspectives,

theory.<sup>148</sup> Such a focus can result in an emphasis on impersonal abstractions rather than particular voices and dramas.<sup>149</sup> Nevertheless, echoing the work of literary critics, anthropologists, sociologists, and others,<sup>150</sup> interdisciplinary

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the impact of challenge and counter-proof, often discloses to a neutral intelligence the most likely structure of Truth.”); see also Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* 10 (1992) (“For the past two hundred years, irrespective of their differences, Anglo-American and Continental courts of law have put primary emphasis on true representations of the facts.”).

147. See, e.g., Bruce A. Ackerman, *Social Justice in the Liberal State* 309–10 (1980) (“[C]itizens of a liberal state have more than the right to complain in court when others frustrate their desires. They have a right to relief when their fellows prove incapable of justifying their power through Neutral dialogue.”); *id.* at 10–12 (discussing desirability of neutrality); see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1 (1959) (advocating that decisions should be based on preexisting neutral principles rather than on outcomes).

148. See, e.g., Ronald Dworkin, *Taking Rights Seriously* 116–17 (1977) (describing ideal judge as one who “must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well”); John Rawls, *A Theory of Justice* 13 (1971) (“Justice as fairness begins . . . with one of the most general of all choices which persons might make together, namely, with the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions.”).

149. See Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 *Vt. L. Rev.* 681, 682 (1994) [hereinafter Sherwin, *Narrative Construction*] (“In legal academia, impersonal abstractions rather than particular voices and dramas have ruled the day.”).

150. See generally, e.g., *The Anthropology of Experience*, *supra* note 144 (collecting essays exploring relationship between experience and narratives used to describe experience); Roland Barthes, *Introduction to the Structural Analysis of Narratives*, in *Image—Music—Text* 79 (Stephen Heath trans., 1977) (using linguistics to construct, describe, and classify a theory of narratives); Vincent Crapanzano, *Tuhami: Portrait of a Moroccan* (1980) (exploring conflicting storytelling styles between anthropologist and subject); Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1974) (1967) (drawing on work of linguist Ferdinand de Saussure to argue that language provides no direct access to reality and therefore what we call “reality” is a set of narrative conventions); Claude Levi-Strauss, *The Effectiveness of Symbols*, in *Structural Anthropology* 186, 197–204 (Claire Jacobson & Brooke Grundfest Schoepf trans., Basic Books 1963) (1958) (describing use of narratives to encapsulate pain); Renato Rosaldo, *Culture and Truth: The Remaking of Social Analysis* 21 (1989) (advocating that social science acknowledge the role of conflicting narratives and subjectivity in descriptions of reality); Peter Brooks, *The Law as Narrative and Rhetoric*, in *Law’s Stories* 14, 14 (Peter Brooks & Paul Gewirtz eds., 1996) (“Narrative appears to be one of our large, all-pervasive ways of organizing and speaking the world—the way we make sense of meanings that unfold in and through time.”); Hayden White, *The Value of Narrativity in the Representation of Reality*, in *On Narrative* 1, 2 (W.J.T. Mitchell ed., 1981) (“[N]arrative is a metacode, a human universal on the basis of which transcultural messages about the nature of a shared reality can be transmitted.”); see also Jerome Bruner, *Acts of Meaning*, at xii (1990) (describing ways in which narratives shape experience and proposing to examine “the nature and cultural shaping of meaning-making, and the central place it plays in human action”); Reid Hastie et al., *Inside the Jury* 6–14 (1983) (first examining how jurors construct meaning and then developing a framework to study jurors’ decisionmaking processes, in order to “reduce the dependence of legal policy makers on the vagaries of intuition and personal experience”); Merry, *supra* note 47, at 110–33 (exploring “the way meanings are raised and contested during discussions of conflict situations within the court . . . [and] the way parties argue about meanings and about frames of meaning”); Simon Schama, *Dead Certainties* 322 (1991) (using historical novella genre to

legal scholars have in recent years increasingly studied the role of narratives in structuring our experience of the world.<sup>151</sup>

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illustrate how “claims for historical knowledge must always be fatally circumscribed by the character and prejudices of its narrator”); Richard A. Shweder, *Thinking Through Cultures: Expeditions in Cultural Psychology* 1–23 (1991) (using anthropological and psychological analysis to envision the world through narrative structures and study diverse ways of “thinking through cultures”); Donald P. Spence, *Narrative Smoothing and Clinical Wisdom*, in *Narrative Psychology: The Storied Nature of Human Conduct* 211, 211–32 (Theodore R. Sarbin ed., 1986) (using Freud’s analysis of Dora to examine narrative constructs); Barbara Yngvesson, *Re-examining Continuing Relations and the Law*, 1985 *Wis. L. Rev.* 623, 645 (1985) (arguing that “law and other forms of normative order” are not static identities, but instead “shape, and are shaped by, continuing relationships”).

151. See, e.g., Guyora Binder & Robert Weisberg, *Literary Criticisms of Law* 23, 201–91 (2000) (arguing that “the value of the narrative criticism of law lies not in invoking some abstract idea of narrative to challenge law, but in examining, critiquing, and revising the particular narratives embedded in law, and the identities and institutions these narratives enable”); Rebecca Redwood French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* (1995) (detailing legal narratives of Buddhist Tibet as reflecting entire cosmology that derives from broader cultural/spiritual understandings); Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990) (challenging narrative categories that tend to be assumed in legal analysis); Robin West, *Narrative, Authority, and Law* (1993) [hereinafter West, *Narrative*] (arguing that jurisprudence is a form of narrative and should be read for its literary attempts to articulate meaning); James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (1990) [hereinafter White, *Justice as Translation*] (arguing that justice requires recognition of multiple points of view); Kathryn Abrams, *Hearing the Call of Stories*, 79 *Cal. L. Rev.* 971, 982 (1991) (examining “feminist narrative scholarship as a distinctive form of legal argument”); Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 *Am. U. J. Int’l L. & Pol’y* 791, 792 (1995) (engaging in anthropological analysis to study storytelling and arguing that “the representation of law in contexts shaped by global flows of people, capital, information, imagery, and goods demands new forms of scholarly representation”); Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 *Va. L. Rev.* 1229 (1995) (comparing discourse of autobiography to discourse of law, and contending that both types of narrative are nuanced and complex); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 4 (1983) (arguing that “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning”); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *Stan. L. Rev.* 807, 808 (1993) (providing overview of “legal storytelling,” and investigating role of stories in legal studies); Jane B. Baron, *Resistance to Stories*, 67 *S. Cal. L. Rev.* 255, 256, 285 (1994) (contending that Farber and Sherry “miss the point of the storytelling movement,” arguing that what people perceive as “mainstream, ordinary, and conventional [storytelling] standards” are social constructs, and concluding that the storytelling movement must “clarify[] its own claims about truth”); Rebecca R. French, *Of Narrative in Law and Anthropology*, 30 *Law & Soc’y Rev.* 417, 418 (1996) (comparing use of narrative in disciplines of law and anthropology); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *Harv. C.R.-C.L. L. Rev.* 323, 324 (1987) (examining development of racial exclusion and racial distinctiveness theories, and contending that victims of racial discrimination speak with a unique voice that warrants more serious attention); Kim Lane Scheppele, *Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 *N.Y.L. Sch. L. Rev.* 123 (1992) (examining Anita Hill testimony and stories from abused women, and observing that traditional modes of storytelling fail to appreciate role of silence, revisions, and counterstories); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 *Mich. L. Rev.* 2073, 2073, 2098 (1989) (introducing symposium issue focused on storytelling and law, and arguing that because courts provide arena for pluralistic voices and stories, they may protect

One part of this focus on narrative has been the study of legal storytelling. Early work by James Boyd White used the tools of literary criticism to analyze appellate decisions.<sup>152</sup> More recently, scholars have borrowed from neurobiology and cognitive psychology to explore how stories shape the ways in which legal decisionmakers process information or conceptualize truth.<sup>153</sup> Still others have analyzed lawyers' use of rhetoric and narrative in the courtroom.<sup>154</sup> All of these studies ask questions that had not previously been the subject of legal discourse. Among those questions are:

How does a story trigger our narrational expectations, leading us to the familiar site of a known genre? How does the story exploit our world knowledge—the numerous and varied cultural scripts, schemata, and stereotypes, that we carry around in our heads? How does the story make use of shapeshifting mood devices . . . which alter the action of the verb from a *fait accompli* (the historical fact of the matter) to an action that is psychologically in process (what we might call the contingent or *subjunctive* mode)? Or consider: How

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countermajoritarian interests); Symposium, Legal Storytelling, 87 Mich. L. Rev. 2073 (1989) (collecting essays on law and narrative); James Boyd White, Law as Language: Reading Law and Reading Literature, 60 Tex. L. Rev. 415 (1982) [hereinafter White, Law as Language] (comparing literary and legal analysis of texts).

152. See generally, e.g., White, Justice as Translation, *supra* note 151, at ix–xvii; White, Law as Language, *supra* note 151, at 415–19, 425–26.

153. See generally, e.g., Anthony G. Amsterdam & Jerome Bruner, Minding the Law 1–8 (2000) (examining the way in which cognitive processes of categorization and narrative construction affect legal reasoning); Steven L. Winter, A Clearing in the Forest: Law, Life, and Mind, at xi–xvii (2001) (applying advances in cognitive theory to law).

154. See, e.g., W. Lance Bennett & Martha S. Feldman, Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture, at ix (1981) (exploring how bias in trials may result from different modes of telling and listening to stories); Bernard S. Jackson, Law, Fact and Narrative Coherence I (1988) (examining how structural semiotics and “narrative coherence” affect how legal actors perceive facts and law); Law’s Stories, *supra* note 150 (compiling twenty-one essays examining narrative, rhetoric, and law); Richard K. Sherwin, When Law Goes Pop: The Vanishing Line Between Law and Popular Culture, at ix–x (2000) (urging readers to heed carefully “the legal implications of significant shifts in our storytelling practices”); Anthony G. Amsterdam & Randy Hertz, An Analysis of Closing Arguments to a Jury, 37 N.Y.L. Sch. L. Rev. 55, 55–58 (1992) (analyzing storytelling techniques, narratives, and “dialogic structure” in attorneys’ closing arguments); Guyora Binder, Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie, 98 Yale L.J. 1321, 1321–24 (1989) (describing various narratives at play in French trial of accused Nazi war criminal Klaus Barbie); Robert A. Ferguson, Becoming American: High Treason and Low Invective in the Republic of Laws, in The Rhetoric of Law 103, 103–05 (Austin Sarat & Thomas R. Kearns eds., 1994) (discussing underlying narratives of treason trials in early America); Richard K. Sherwin, Lawyering Theory: An Overview: What We Talk About When We Talk About Law, 37 N.Y.L. Sch. L. Rev. 9, 20 (1992) (arguing for cultural approach to legal analysis, which calls into question “taken-for-granted models, prototypes, schemas, or images of self, others, and social institutions that make up particular social domains and legal practices”); Sherwin, Narrative Construction, *supra* note 149, at 687 (examining legal briefs submitted to Supreme Court to consider “how particular story elements can be used to shape and inform the meaning of a particular legal reality”); Symposium, Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law, 18 Vt. L. Rev. 567 (1994) (collecting essays on legal storytelling).

do story structure and character-typing interact with narrative composition and genre selection in the creation of meaning?<sup>155</sup>

In *When the State Kills*, Sarat does not attempt a comprehensive analysis of any of these questions. Nevertheless, he does explore some of the typical narratives employed by lawyers in capital trials and attempts to link those narratives to broader cultural attitudes about crime, violence, free will, and personal responsibility. As such, he shows how a cultural analysis of law, with its embrace of interdisciplinary approaches (such as the study of narratives), can illuminate the ways in which legal proceedings and larger cultural attitudes both reflect and reinforce each other. Moreover, Sarat not only provides a series of useful insights regarding the social role of legal proceedings, he also uses his analysis of narrative to suggest a rationale for opposing capital punishment that might otherwise escape attention.

Sarat offers his own eyewitness account of a Georgia capital trial involving an African American male, William Brooks, who was accused of raping and murdering a white woman, Carol Jeannine Galloway.<sup>156</sup> He reports that at the Brooks trial, as at most capital trials, two archetypal narratives were fighting for prominence. The prosecution attempted to “turn[] crime and punishment into a simplifying and reassuring story of individual responsibility, of evil people doing evil deeds and calling down upon themselves a just and inevitable punishment.”<sup>157</sup> In contrast, the defense, “while not denying that individuals can and should be held responsible, trie[d] to contextualize [the] crime by focusing on the social conditions that [brought] it about.”<sup>158</sup> Significantly, both sides attempted to conceptualize their “protagonist” as a victim whom jurors should view with sympathy. The prosecution’s tale focused on a figure of perfect innocence, “injured by [a] crime”; the defense, in contrast, constructed a portrait of an unfortunate criminal, injured by a “tragic life.”<sup>159</sup> Thus, both sides invoked “stock characterizations to create sympathetic identification.”<sup>160</sup>

Although the prosecutor in the Brooks case denied the significance of race, saying the case was not about “black versus white,”<sup>161</sup> the racial component of this rape/murder hovered over the trial from the start. Moreover, Sarat reports that, despite the prosecutor’s disclaimer, much of the imagery he relied upon was racially tinged, “as in his repeated claim that Brooks had led his life in ‘dark places.’”<sup>162</sup> Meanwhile, the prosecution presented Galloway as “the body of mankind”<sup>163</sup> and constructed a narrative attesting to the

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155. Sherwin, *Narrative Construction*, supra note 149, at 686–87.

156. See Sarat, *When the State Kills*, supra note 5, at 87–125. For another account of the same case, see William S. McFeely, *Proximity to Death* 84–124, 143–82 (2000).

157. Sarat, *When the State Kills*, supra note 5, at 88.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 93.

162. *Id.*

163. *Id.*

innocence and purity of that body. For example, the victim was portrayed as a “child” in the bosom of a loving family, despite the fact that she was twenty-three years old at the time of her death.<sup>164</sup> In addition, the prosecution was able to have Galloway’s virginity entered into evidence (on the ground that it was relevant to the issue of whether she had consented to have sex with Brooks); her virginity then became, in Sarat’s words, “the unsubtle symbol of her innocence and worth, and Brooks’s crime became an incorporation of the stereotypical racial attack on white womanhood.”<sup>165</sup>

The prosecution sought to portray Brooks as evil incarnate, in juxtaposition to Galloway’s purity and innocence. Brooks was depicted as an individual of free will choosing to inflict immoral, predatory violence on innocence itself.<sup>166</sup> In the words of the prosecutor, “One thing keeps coming back. It was all so unnecessary. If one person hadn’t decided to use another for his lust she would still be alive. This is not the age of disposable people.”<sup>167</sup> Thus, as Sarat describes it, the prosecution invited jurors “to see Brooks and his act as ‘inexplicably alien, horrendous and inhuman.’”<sup>168</sup>

The defense, in contrast, told a story of a random, chaotic universe where inexplicable events simply happen, and no one can be held responsible.<sup>169</sup> The key to this story was Brooks’s own confession, in which he said that after he and Galloway engaged in sexual intercourse the victim started screaming. He pointed the gun at her, cocked it, and then “it went off.”<sup>170</sup> The defense insisted that the statement should be taken literally and offered testimony indicating that the gun used by the defendant might indeed have discharged accidentally.<sup>171</sup> Thus, in place of the prosecution’s narrative about free will and personal agency, the defense constructed the gun as the agent of death.

Later, at the penalty phase, the defense offered a story of Brooks as a victim to parallel the prosecution’s earlier story about Galloway. Indeed, the defense story constructed Brooks as an innocent child, victimized by a physically abusive stepfather,<sup>172</sup> just as the prosecution had portrayed Galloway as a virgin child victimized by the defendant. Yet, as Sarat describes, “[i]n contrast to the direct, personal, decontextualized violence” of the crime, “the defendant’s life story was marked by a more diffuse, systemic

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164. *Id.* at 94.

165. *Id.* at 97.

166. *See id.* at 105.

167. *Id.*

168. *Id.* at 106 (quoting West, Narrative, *supra* note 151, at 175).

169. *See id.* at 105.

170. *Id.* at 99.

171. *Id.* at 103–04.

172. *See id.* at 111–12. The story of this systemic violence also reveals law’s failure to ensure a safe society, particularly for African Americans. *See id.* at 113 (“Like many other young black men, Brooks lived beyond law’s protection and suffered pitifully for doing so. Looming over this story is the specter of violence generating violence, aided and abetted by law’s inability to provide protection or defense.”).

violence, spread over a longer period of time.”<sup>173</sup> While acknowledging that this systemic violence could not excuse the defendant’s crime, the defense argued that the story of the defendant’s life was a reason for showing “Christian[] . . . mercy and compassion.”<sup>174</sup>

This effort to portray the defendant as a victim provoked a paradigmatic clash between two narratives that are at the core of cultural discussions about crime in America. The defense offered what Sarat calls a “high-culture, scientific-discourse explanation” portraying the defendant’s behavior as “complex and hard to disentangle from the violence he had experienced.”<sup>175</sup> In contrast, the prosecution provided a “low-culture, commonsense rendering”<sup>176</sup> that focused on individual free will and personal responsibility. The prosecutor’s cross-examination of a social worker who had testified about the defendant’s upbringing provides a particularly good example of this clash:

Q: Do you believe that God gave us the capacity to choose right from wrong?

A: Yes, that can happen if one has a nurturing environment that would support that capacity and allow it to be used.

. . . .

Q: How do you explain why some people who come from bad homes do well in life?

A: We all have different innate endowments and ability to tolerate frustration. One can’t just look at people and know who will turn out good and who will turn out bad. You have to look carefully at the environment and especially at family dynamics.

Q: Are you saying that people are not responsible for what they do?<sup>177</sup>

In this exchange, we can hear the familiar, even clichéd, dialogue that has been at the heart of American discussion of criminal justice issues for decades.

Through his study of these trial narratives, Sarat suggests that the destructive impact of the death penalty cuts deeper than simply the state’s murder of a human being. In addition, prosecutors, on behalf of the state, reinforce “a sociologically simple world of good and evil, and a morally clear world of responsibility and desert.”<sup>178</sup> Thus, “[i]nstead of confronting complex social problems, we are invited to see them in stark and simple terms.”<sup>179</sup> Defense narratives, while attempting to complicate the sociological portrait, nevertheless tend to adopt the same convention of focusing on a victim who deserves our individualized mercy and compassion. Yet, “[d]efending a murderer like Brooks requires the construction of a more complex narrative of causation and accident, of mixed lives and mixed

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173. *Id.* at 107.

174. *Id.* at 110.

175. *Id.* at 113.

176. *Id.*

177. *Id.* at 114.

178. *Id.* at 122.

179. *Id.* at 123.

motives.”<sup>180</sup> And, of course, as discussed previously, nobody tells the story of the state’s own violence. Indeed, “[i]n this process, state killing is barely perceivable as violence.”<sup>181</sup>

Beyond merely describing the narratives at play in the Brooks trial, Sarat goes further and argues that these narratives, which inevitably become diffused throughout the culture, harm society over and above any harm that arises from the fact of state killing itself. He writes: “In addition to the actual violence often unleashed and the linguistic violence done in the process of rendering state killing abstract, capital trials regularly reaffirm racialized social conventions as well as flat narratives of purity and danger, responsibility and excuse, and innocence and guilt.”<sup>182</sup> Although trials are sometimes viewed as a useful site for discourse among multiple competing worldviews,<sup>183</sup> Sarat’s analysis suggests that, at least in the death penalty context, the narrative tropes employed at trial stifle rather than advance public debate by freezing in place a set of cultural categories, stereotypes, and preconceptions.

Thus, Sarat’s approach not only offers useful insights about the role of narratives in constructing our understanding of crime and punishment, but also provides a distinct normative justification for resisting the current capital punishment system. Indeed, Sarat appears to argue that capital punishment should be resisted, over and above any other reasons, precisely *because* the narratives of capital punishment impoverish public debate in this way. According to Sarat, capital punishment constructs and reinforces fixed, often racist, conceptions of complicated ideas like victim, offender, guilt, innocence, free will, personal responsibility, causation, and agency.<sup>184</sup> One might think that a great power of trial narratives is their ability to articulate grand cultural themes and foster social solidarity by allowing the community to heal itself after the breach of a social norm.<sup>185</sup> Yet, Sarat argues that, at least in the death

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180. *Id.* (citing Robert Weisberg, *Deregulating Death*, 1983 *Sup. Ct. Rev.* 361).

181. *Id.*

182. *Id.* at 125.

183. See, e.g., Berman, *Suspicious Story*, *supra* note 21, at 133–34 (“[L]aw is a social practice that both recognizes the existence of many different narratives and provides the opportunity to create new narratives that may help forge group identities. Legal proceedings, therefore, function in part as a site for adjudicating among various explanatory narratives for describing reality.” (citation omitted)); White, *Law as Language*, *supra* note 151, at 444 (“The multiplicity of readings that the law permits is not its weakness, but its strength, for it is this that makes room for different voices, and gives a purchase by which culture may be modified in response to the demands of circumstance.”).

184. Of course, such criticisms might be leveled at all criminal trials, not simply capital murder cases. Nevertheless, although Sarat does not address this point, it is reasonable to assume that death penalty narratives may impoverish discourse even more than the narratives in a noncapital trial because capital punishment is by its nature irreversible. In this respect, a capital trial implicitly asserts that the narrative reality being conjured in the courtroom is not just preferable but infallible.

185. Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 *Yale J.L. & Human.* 1, 37 (1999) (“[T]rials not only redress the harm to a community by punishing a guilty individual; they also ‘perform the laws’ so that the community can reenact a sense of its own order and redraw its

penalty context, these grand themes may stand in the way of truly binding society together because so many alternative narratives about crime and punishment are squelched.

By focusing not on the legal niceties of the trial but on the stories told during the legal process, Sarat's cultural analysis illuminates the ways in which the death penalty may impoverish our discourse about crime, its root causes, and the most effective ways to make society safer. As Sarat observes,

Each narrative of lawless violence—whether of Brooks's crime or of the abuse he suffered—reminds us of the failure of state violence to guarantee security. Each narrative of violence turns us into anxious citizens caught between a fearful aversion to one kind of violence and a fearful embrace of another.<sup>186</sup>

According to Sarat, the narratives that capital trials tell actually harm us as a polity and deflect our rhetorical and psychological resources from a more nuanced examination of crime in America.

#### D. *Understanding Law in Popular Culture*

The three benefits of a cultural analysis of law I have discussed so far are all linked to a fourth, broader insight: Law is not an autonomous system of rational inquiry, but is instead, as Clifford Geertz observed, “a distinctive manner of imagining the real.”<sup>187</sup> Thus, law operates as much by influencing modes of thought as by determining conduct in any specific case. It is a constitutive part of culture, shaping and determining social relations.<sup>188</sup>

Sarat himself has written elsewhere that “legal meaning is found and invented in the variety of locations and practices that comprise culture, and . . . those locations and practices are themselves encapsulated, though always incompletely, in legal forms, regulations, and symbols.”<sup>189</sup> This

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boundaries.” (citations omitted)); see also *id.* at 37–38 (arguing that trials function, in part, as “status degradation ceremon[ies]” (quoting Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, *Am. J. Soc.* 420, 420–21 (1960))). The link between social solidarity and criminal punishment was drawn most famously by Emile Durkheim. Emile Durkheim, *The Division of Labor in Society* 108 (George Simpson trans., MacMillan Co. 1933) (1893) (observing that crime constitutes a challenge to the moral framework of society and that “the only means of affirming [the moral framework] is to express the unanimous aversion which the crime continues to inspire, by an authentic act which can consist only in suffering inflicted upon the agent”); see also, e.g., Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 *Hastings L.J.* 829, 834–48 (2000) (using Durkheim's theory to argue that people in diverse, secular societies such as U.S. try to forge social solidarity through criminal punishment). For a particularly detailed discussion of the relationship between Durkheim and theories of modern punishment, see David Garland, *Punishment and Modern Society* 23–81 (1990).

186. Sarat, *When the State Kills*, *supra* note 5, at 125.

187. Geertz, *supra* note 42, at 184.

188. See Silbey, *supra* note 36, at 41 (arguing that “law is a part of the cultural processes that actively contribute in the composition of social relations”).

189. Sarat & Simon, *Beyond Legal Realism?*, *supra* note 20, at 21.

understanding of law and culture as “co-constitutive”<sup>190</sup> permits cultural legal scholars to explore the numerous ways in which legal norms permeate our everyday lives. Indeed, “[l]ong before we ever think about going to a courtroom, we encounter landlords and tenants, husbands and wives, barkeeps and hotel guests—roles that already embed a variety of juridical notions.”<sup>191</sup> We cannot escape the categories and discourses that law supplies.

This cultural conception of law clearly is something very broad indeed. Not only does it encompass formal legal rules and procedures, but also “quasi-legal” discourses and practices that sometimes straddle the law/entertainment boundary.<sup>192</sup> These include television court channels, legal talk shows, legal “thriller” novels and films, public memorials and ceremonies (such as the monument to victims of the Oklahoma City bombing or candlelight vigils to build community after hate crimes), and marches on Washington (such as the “Million Mom March” to lobby for stricter handgun regulations). Even more broadly, a cultural analysis of law takes into account the often unnoticed practice of “law talk” in the society at large. Such talk includes abstract (and often inchoate) ideas of street justice, due process, civil disobedience, retribution, deterrence, and rights, all of which are frequently invoked in public discussions and dinner table conversations alike.

Viewing law in this way not only broadens our understanding of law’s role in culture, it also allows us to see that the relationship of law and culture is not unidirectional. Legal categories shape broader social discourse. But at the same time, law talk, diffused throughout society, becomes a source of alternative conceptions of law:

Legality . . . operates through social life as persons and groups deliberately interpret and invoke law’s language, authority, and procedures to organize their lives and manage their relationships. In short, the commonplace operation of law in daily life makes us all legal agents insofar as we actively make law, even when no formal legal agent is involved.<sup>193</sup>

We have already seen the way death penalty jurors interposed their own ideas about the criminal justice system in deliberating about a death sentence.<sup>194</sup> A cultural analysis of law makes clear that this kind of negotiation takes place

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190. See Julie A. Nice, *Equal Protection’s Antinomies and the Promise of a Co-Constitutive Approach*, 85 *Cornell L. Rev.* 1392, 1392 n.2 (2000) (using phrase “co-constitutive theory” to emphasize mutually constitutive relations of law and society).

191. Sarat & Simon, *Beyond Legal Realism?*, *supra* note 20, at 20.

192. See, e.g., Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in The Sweet Hereafter*, 34 *Law & Soc’y Rev.* 3, 5–10 (2000) (arguing that sociolegal scholars must “take on” cultural studies by considering how law exists in a world of film and television images); Alison Young, *Murder in the Eyes of the Law*, 17 *Stud. L. Pol. & Soc’y* 31, 31 (1997) (exploring how law “appears and reappears in the cinematic text”); see also Richard K. Sherwin, *Picturing Justice: Images of Law & Lawyers in the Visual Media*, 30 *U.S.F. L. Rev.* 891, 893 (1996) (evaluating how narrative and rhetorical strategies of popular culture seep into the courtroom, and urging legal professionals to be cognizant of popular culture discourses).

193. Ewick & Silbey, *supra* note 46, at 20.

194. See *supra* text accompanying notes 120–134.

constantly, even in more mundane situations, both within formal legal structures and in everyday life.

Naturally, popular culture also is a potential site for generating alternative conceptions of legality. In *When the State Kills*, Sarat spends the last two chapters directly addressing the death penalty as it exists within the pop cultural forms of television and film. In both chapters, his analysis illuminates the possibility that the alternative stories delivered through such powerful media could challenge the hegemony of official legal discourse about the death penalty. First, he wades into the debate about televising executions, arguing both that the survival of capital punishment is largely due to the state's success in keeping the death penalty invisible and that public exposure to executions might galvanize abolitionist activity. Second, he analyzes three recent films that address the death penalty—*Dead Man Walking*,<sup>195</sup> *Last Dance*,<sup>196</sup> and *The Green Mile*<sup>197</sup>—and concludes that, though these films take ambiguous stances toward capital punishment as a political matter, the cultural politics of the films are conservative because the works do not challenge “the basic categories through which we judge murderers and assess penalties.”<sup>198</sup>

In his discussion of televising executions, Sarat starts from the premise that the public is inevitably implicated in the death penalty whether we are permitted to see the killing or not. He contends:

[T]he public is always present at an execution . . . as an authorizing audience unseeing and unseen, but present nonetheless. This is the haunting reality of state killing in a constitutional democracy. So long as there is capital punishment in the United States, the only question is the terms of our presence. Are we able to see what we do?<sup>199</sup>

He acknowledges the argument that televising executions might result in “a new kind of voyeurism,” but insists that the issue of witnessing the death penalty at work goes beyond “manners.”<sup>200</sup> Rather, he argues that “[c]ontrol over vision is . . . a question of control over execution itself.”<sup>201</sup>

Historically, of course, executions were occasions for large scale public gatherings. As Michel Foucault has pointed out, “[i]n the ceremonies of the public execution, the main character was the people.”<sup>202</sup> But, significantly, the public presence at executions was more than simply an occasion for ghoulish entertainment. Rather, according to Foucault, public participation meant that resistance to the death penalty was possible:

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195. *Dead Man Walking* (Polygram Filmed Entertainment 1995).

196. *Last Dance* (Touchstone Pictures 1996).

197. *The Green Mile* (Warner Brothers 1999).

198. Sarat, *When the State Kills*, supra note 5, at 245 (quoting William Connolly, *The Will, Capital Punishment, and Cultural War*, in *The Killing State*, supra note 4, at 187, 194).

199. *Id.* at 205.

200. *Id.* (quoting Wendy Lesser, *Pictures at an Execution* 40 (1993)).

201. *Id.*

202. Michel Foucault, *Discipline and Punish: The Birth of the Prison* 57 (Alan Sheridan trans., Pantheon Books 1977) (1975).

Preventing an execution that was regarded as unjust, snatching a condemned man from the hands of the executioner, obtaining his pardon by force, possibly pursuing and assaulting the executioners, in any case abusing the judges and causing an uproar against the sentence—all of this formed part of the popular practices that invested, traversed and often overturned the ritual of public execution.<sup>203</sup>

Thus, the public nature of executions functioned in part to ensure popular sovereignty over the process.

In contrast, the modern American death penalty is almost completely hidden from view, seen only by a small group of witnesses.<sup>204</sup> This shift, Sarat asserts, is no mere happenstance. Rather, “limiting the visibility of lawfully imposed death is part of the modern bureaucratization of capital punishment and of the strategy of transforming execution . . . [into] a soothing matter of mere administration.”<sup>205</sup> Indeed, making the death penalty invisible to the public may have much the same effect on society at large that it appears to have on jurors: The execution is rendered less tangible, less real, and less a part of our responsibility. Although Sarat’s discussion of victim-impact statements earlier in the book indicates that a desire for vengeance increasingly may be driving the imposition of the death penalty, such vengeance can be exercised more freely, he argues, when the society need not witness the consequences.

Sarat goes further, however, and suggests that the surprising persistence (and popularity) of the death penalty in America may actually be due in large part to this invisibility. He contends that, in a society that had already replaced public punishment and torture with the modern correctional facility, state killing was anachronistic and could only survive through its transformation “from a public to a private affair, from an affair of politics to a matter of administration, and the visual field into which it would be projected had to be circumscribed.”<sup>206</sup> Accordingly, opening capital punishment back up to the public might well galvanize opposition to the death penalty itself. Moreover, he argues forcefully that giving the public the ability to view state killing would also allow the public to appropriate and subvert the conventional (and state sanctioned) narratives of capital punishment:

[T]he presence of the camera would signify the flood of thousands, or millions, of uncontrollable looks into the execution chamber. . . . I believe that with those looks would come resistances, demands, assertions of power, some calling for more vengeful pain, some for an end of death imposed in the name of popular sovereignty. Just as jurors renarrate, rework, and supplement the stories presented to

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203. *Id.* at 59–60.

204. See John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 *Fed. Comm. L.J.* 355, 359–68 (1993) (surveying decline of public executions in United States).

205. Sarat, *When the State Kills*, *supra* note 5, at 189.

206. *Id.* at 206.

them, allowing citizens to view state killing would provide for their own creative and unpredictable interpretations of it.<sup>207</sup>

This may be wishful thinking on Sarat's part.<sup>208</sup> After all, television never presents a transparent exposure to "truth" and so the televised execution would itself become a narrative presentation that might or might not galvanize resistance. Indeed, televised executions could impose very powerful visual narratives to structure and construct the meaning of the death penalty. These narratives would be framed by media outlets and by the state itself. Moreover, to the extent that state killing becomes increasingly "medicalized" (through the use of lethal injections) and seemingly less violent, the process might actually be made to appear banal and uncontroversial.

Nevertheless, Sarat likely would support televising executions even if it did not serve his particular instrumental goals. To Sarat, the important point is that state killing is killing in our name and therefore, as a matter of both popular sovereignty and democracy, we must be entitled to take part and witness. Moreover, by opening up the death penalty to the popular gaze, at the very least the state would have somewhat less control over the available narratives. Whereas "bureaucratization smooths the way from the authorizing words to the violent act itself,"<sup>209</sup> allowing the public to witness executions would inevitably add some element of uncertainty and indeterminacy regarding the political effects of the practice. And to Sarat, anything that disrupts "the attempt to dignify state killing and to reduce it from political spectacle to administrative act"<sup>210</sup> is worth supporting.

Popular films also have the capacity to provide a source of alternative narratives about the death penalty. Yet, despite the centrality of capital punishment to *Dead Man Walking*, *Last Dance*, and *The Green Mile*, Sarat concludes that, "whatever the intentions of those who made them, [these films] enact and depend on a conservative cultural politics."<sup>211</sup> For example, he argues, the films tend to replay narratives about individual responsibility that

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207. Id. at 194.

208. Indeed, at least one critic of the death penalty has argued that televising executions would have a deleterious effect. See Wendy Lesser, Pictures at an Execution 141 (1993) (asserting that televised executions turn death into a "pure spectacle, unmediated by the understanding and knowledge that convert spectacle into experience. Far from 'being there' with the condemned man, we would be completely outside of him, viewing him as an easily liquidatable object . . ."). Others argue, as does Sarat, that televising executions should be permitted because it would promote debate. See Jef I. Richards & R. Bruce Easter, Televising Executions: The High-Tech Alternative to Public Hangings, 40 UCLA L. Rev. 381, 417 (1992) ("[T]elevised coverage of executions may create feelings of unrest and anger . . . [H]owever, these broadcasts probably will promote debate on an issue of high public importance—the death penalty. Thus, the public debate that televised access likely will cause is precisely the reason that the government must allow it . . ."). For further discussion of this question, see generally Gary N. Howells, et al., Does Viewing a Televised Execution Affect Attitudes Toward Capital Punishment?, 22 Crim. Just. & Behav. 411 (1995).

209. Sarat, When the State Kills, *supra* note 5, at 207.

210. Id. at 208.

211. Id. at 213.

ignore the broader social context of crime. In the book, Sarat discusses these films at great length and weaves together a number of different arguments about them. For the purpose of conveying a sense of Sarat's approach, however, a brief outline of just one of his arguments will suffice.

Sarat observes that all three of these films ask the audience to empathize with a murderer condemned to die. To accomplish this aim, each film pairs the condemned with one other person—a nun, a lawyer, and a prison guard—who functions as a proxy for the audience.<sup>212</sup> The implicit question is whether we can have as much compassion as the empathetic friend. Do we recognize our shared humanity with these murderers? Do they deserve to die? Thus, as Sarat points out, “the basic structure of viewing is juridical.”<sup>213</sup> Although none of these films involves a trial, the spectator is invited to judge the protagonist. But, Sarat observes, it is a particular type of juridical role. We judge not the protagonists' guilt or innocence, but only whether they should be executed. “[W]e sit as if on a jury in the penalty phase of a capital trial deciding who deserves to die and who does not.”<sup>214</sup>

According to Sarat, this framework serves to distract us from broader questions about criminal responsibility as well as the meaning of state killing. Instead, the films focus “intently on the question of whether a single person deserves to die for his crimes and on the simplifying effort to distinguish evil from good, the redeemable from those who cannot be saved.”<sup>215</sup> Sarat argues that this focus encourages the viewer to accept the legal and political status quo.

For example, none of the films explores the systemic social conditions that are commonly the subject of defense narratives at the penalty phase of the capital trial.<sup>216</sup> Instead, these films substitute an emphasis on personal character and responsibility. Sarat observes: “To the extent these films contain an explanation of crime and a justification for punishment, they locate it in the autonomous choices of particular people.”<sup>217</sup> Moreover, Sarat argues that, because the structuring question in each of these films is whether or not the protagonist “deserves” to die, the films send two implicit messages: “[F]irst, citizens can, and will, be held responsible for their acts; second, they can, and should, internalize and *accept* responsibility.”<sup>218</sup>

This emphasis on individual responsibility, according to Sarat, renders the underlying messages of the films conservative. For example, in *Dead Man Walking*, Sister Helen Prejean, a nun who has befriended Poncelet, the condemned man, asks him why he committed the murder for which he is to be executed. When Poncelet begins to offer reasons, she rejects them and insists

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212. Id. at 215.

213. Id. at 243.

214. Id.

215. Id. at 244.

216. See *supra* text accompanying notes 172–176.

217. Sarat, *When the State Kills*, *supra* note 5, at 212.

218. Id.

that he must take individual responsibility for the choices he made. She tells him: “Don’t blame [your accomplice]. You blame him. You blame drugs. You blame the government. You blame blacks. . . . You blame the kids for being there. What about Matthew Poncelet? Is he just an innocent, a victim?”<sup>219</sup> These questions are, of course, almost precisely the same ones that the prosecution in the Brooks trial asked of the social worker.<sup>220</sup> And, as we saw in the discussion of that trial, the film’s focus on individual responsibility inevitably deflects attention from broader systemic questions of social structure, environment, or even a challenge to the idea of rational free will itself.

Thus, Sarat argues that *Dead Man Walking*, *Last Dance*, and *The Green Mile* repeatedly employ categories, such as agency, will, and responsibility, “the meaning[s] of which [are] at issue in contemporary culture wars.”<sup>221</sup> In such a simplified view of individual responsibility, the harsh childhood of the killer is permitted to “‘mitigate’ the crime or to provide ‘extenuating’ circumstances; these experiences are not treated as violences that enter into the very crystallization of the perpetrator’s will.”<sup>222</sup> According to Sarat, instead of questioning the adequacy of our criminal justice categories, these films “are grounded on the notion of a responsible person as the proper object of punishment . . . someone caught up in simplifying narratives of good and evil.”<sup>223</sup> Accordingly, the fundamental ways in which we judge murderers and assess penalties remain unscathed.

Whether one agrees with Sarat’s particular conclusions or not, his reading of these films illuminates the ways in which such cultural products both reflect and reinforce the legal categories implicit in societal discourse about crime and punishment, categories that appear again and again, not only in death penalty trials, but in public debate as well. Indeed, the narratives of the films repeat the standard prosecution narrative of individual agency and responsibility that Sarat describes in his discussion of the Brooks trial. These narratives (one from pop culture and one from the courtroom) therefore serve to reinforce each other and become cultural “truth.” Thus, law and culture are inevitably intertwined, and law resides not only in the recognizably coercive acts of the state, but also in the language we take for granted when we conceptualize our ideas about innocence, guilt, and individual agency.

Moreover, such conceptions can either be reinforced or subverted by the narratives present in our cultural products, such as television and film. Although Sarat finds that *Dead Man Walking*, *Last Dance*, and *The Green Mile* fall short of providing a truly subversive counternarrative to our accepted cultural categories about crime, one could easily imagine a powerful film that

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219. *Id.* at 225–26 (internal quotation marks omitted).

220. See *supra* text accompanying note 177.

221. Sarat, *When the State Kills*, *supra* note 5, at 212.

222. William Connolly, *The Will, Capital Punishment, and Cultural War*, in *The Killing State*, *supra* note 4, at 187, 194.

223. Sarat, *When the State Kills*, *supra* note 5, at 212.

might someday do so. In addition, the broad dissemination of images of executions through the media might also become a site for future contestation. Whether such alternative narratives will emerge in the specific context of the death penalty debate is unclear. Nevertheless, by expanding the canvas on which we see the reach of law, a cultural analysis refuses to accept law's claim that its domain is limited only to official legal discourse. Rather, law is embedded in popular culture, as well as in our everyday conversations, our cognitive categories, and our sense of "folk justice." And, as with the three benefits of cultural legal study already discussed, an understanding of the relationship of law and popular culture, if taken seriously, not only provides a useful field of study in its own right, it also inevitably poses new avenues for consideration when thinking about a host of legal policy questions, from the use of cameras in the courtroom, to the admissibility of a broader range of narratives at trial, to the televising of executions, to the educative or rhetorical role of judicial decisions.

#### CONCLUSION

A cultural analysis of law insists that we recognize the subtle ways in which law operates to construct our understanding of the world and what we take to be the "natural" order of things. Even after decades of interdisciplinary exploration and development, this is still not the approach to legal study most often taught in law schools or discussed in law journal articles. Although there may be only a few remaining true believers in legal formalism, most law teaching and scholarship continues to focus on arguments pitched firmly within the parameters of legal doctrine. Nevertheless, space for a cultural lens has gradually opened up within the legal academy. As Robert Post observed a decade ago:

We have long been accustomed to think of law as something apart. The grand ideals of justice, of impartiality and fairness, have seemed to remove law from the ordinary, disordered paths of life. For this reason efforts to unearth connections between law and culture have appeared vaguely tinged with *exposé*, as though the idol were revealed to have merely human feet. In recent years, with a firmer sense of the encompassing inevitability of culture, the scandal has diminished, and the enterprise of actually tracing the uneasy relationship of law to culture has begun in earnest.<sup>224</sup>

This cultural analysis, properly understood, need not be an enterprise wholly independent of doctrinally based legal scholarship or teaching; rather, it is a fundamental part of any well rounded analysis of legal doctrine.<sup>225</sup>

Austin Sarat's wide ranging discussion of the death penalty in America

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224. Robert Post, Introduction, *in* *Law and the Order of Culture*, at vii (Robert Post ed., 1991).

225. Of course, serious attention to the relationship between law and culture also undoubtedly transforms doctrinal analyses to some degree, but given the usefulness and importance of cultural analysis, this seems to be a salutary development.

attempts to trace the relationship of law to culture on the terrain of one of America's most contested social practices. In so doing, he shows us how fruitful such an analysis can be. Instead of simply hashing out questions of policy as if the categories of the debate were fixed and stable, his approach seeks to identify what the cultural assumptions underlying the categories are, how they became fixed, and how these unstated categories circumscribe the range of possible approaches we consider. This cultural analysis understands that law is more than the recognizable ways in which the state regulates behavior. Rather, "[l]aw is part of the everyday world, contributing powerfully to the apparently stable, taken-for-granted quality of that world and to the generally shared sense that as things *are*, so *must* they be."<sup>226</sup>

A cultural approach to legal study, as Paul Kahn has emphasized, is important in and of itself because it allows scholars to understand law more fully and illuminate law as a branch of meaning-making to be explored just as any other field of human endeavor. Nevertheless, interdisciplinary legal scholars need not limit their contributions to such descriptive projects. After all, a cultural analysis of law also contributes to doctrinally based legal scholarship by providing new perspectives, new tools for generating normative policies, and new ways to tackle old debates.

Indeed, the conclusion to *When the State Kills* is strongly normative. Sarat suggests that those opposed to the death penalty should abandon the focus on the immorality of state killing, a focus that has been defined in large part by the Eighth Amendment's prohibition on "cruel and unusual punishments."<sup>227</sup> Instead, he argues that abolitionists would do well to emphasize that the death penalty simply cannot be administered in a manner compatible with the commitment to fair and equal treatment embodied in the Fourteenth Amendment guarantee of due process.<sup>228</sup>

This alternative focus takes its cue from U.S. Supreme Court Justice Harry Blackmun's famous renunciation of the death penalty toward the end of his time on the bench. In 1994, Blackmun, who twenty-two years previously had refused to find that capital punishment violated the Eighth Amendment,<sup>229</sup> completed a slow transformation away from this early embrace of the death penalty by stating flatly that "[f]rom this day forward, I no longer shall tinker with the machinery of death."<sup>230</sup>

Blackmun started from the premise that capital punishment "must be imposed fairly, and with reasonable consistency, or not at all."<sup>231</sup> Such

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226. Sarat & Simon, *Beyond Legal Realism?*, supra note 20, at 19 (internal quotation marks omitted).

227. Sarat, *When the State Kills*, supra note 5, at 249–51 (citing U.S. Const. amend. VIII).

228. *Id.* at 251–57; see U.S. Const. amends. V, XIV.

229. *Furman v. Georgia*, 408 U.S. 238, 405–14 (1972) (Blackmun, J., dissenting).

230. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of petition for writ of certiorari).

231. *Id.* at 1144 (Blackmun, J., dissenting from denial of petition for writ of certiorari) (citing *Furman*, 408 U.S. 238).

reasonable consistency would require “that the death penalty be inflicted evenhandedly, in accordance with reason and objective standards, rather than by whim, caprice, or prejudice.”<sup>232</sup> Thus,

[w]e hope . . . that the defendant whose life is at risk will be represented by competent counsel—someone who is inspired by the awareness that a less than vigorous defense truly could have fatal consequences for the defendant. We hope that the attorney will investigate all aspects of the case, follow all evidentiary and procedural rules, and appear before a judge who is still committed to the protection of defendants’ rights—even now, as the prospect of meaningful judicial oversight has diminished. In the same vein, we hope that the prosecution, in urging the penalty of death, will have exercised its discretion wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State.<sup>233</sup>

Yet, according to Blackmun, “our collective conscience will remain uneasy” because, “despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.”<sup>234</sup>

Although Blackmun’s rhetoric was powerful in and of itself, Sarat argues that the significance of Blackmun’s opinion is that it points to a new way of framing opposition to the death penalty.

Blackmun’s abolitionism found its locus in neither liberal humanism nor radicalism nor religious doctrine, nor in the defense of the most indefensible among us. It is, instead, firmly rooted in the mainstream legal values of due process and equal protection and in a deep concern with what state killing does to the condition of America. Blackmun did not reject the death penalty because of its violence, argue against its appropriateness as a response to heinous criminals, or criticize its futility as a tool in the war against crime. Instead, he shifted the rhetorical grounds.<sup>235</sup>

Thus, Blackmun did not question the abstract legitimacy of state killing; he simply conceded that “the death penalty experiment has failed.”<sup>236</sup> Moreover, he concluded that “no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.”<sup>237</sup> According to Blackmun, “The basic question—does the system accurately and consistently determine which defendants ‘deserve’ to die?—cannot be answered in the affirmative.”<sup>238</sup>

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232. *Id.* (Blackmun, J., dissenting from denial of petition for writ of certiorari).

233. *Id.* at 1143 (Blackmun, J., dissenting from denial of petition for writ of certiorari).

234. *Id.* at 1143–44 (Blackmun, J., dissenting from denial of petition for writ of certiorari).

235. Sarat, *When the State Kills*, *supra* note 5, at 252.

236. *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of petition for writ of certiorari).

237. *Id.* (Blackmun, J., dissenting from denial of petition for writ of certiorari).

238. *Id.* (Blackmun, J., dissenting from denial of petition for writ of certiorari).

In Sarat's view, Blackmun's opinion permits abolitionists to "change the subject from the legitimacy of execution to the imperatives of due process, from the philosophical merits of killing the killers to the sociological question of the impact of state killing on our politics, law, and culture."<sup>239</sup> Accordingly, Sarat returns to the normative argument he has been pursuing from the beginning: that the death penalty should be resisted because of its effect on American society. And he appears to suggest that the Fourteenth Amendment due process concerns raised by Justice Blackmun provide a legal framework for making that argument.

Sarat's focus on "the sociological question of the impact of state killing on our politics, law, and culture," of course, extends far beyond the set of concerns traditionally encompassed within legal conceptions of due process, and as a strictly doctrinal matter he is probably stretching the Blackmun position. Moreover, it is an interesting irony that Sarat, who throughout the book has explored the ways in which social conceptions of reality are influenced by legal categories, should ultimately adopt an argument that is itself defined by the categories of the U.S. Constitution. Sarat might respond that he is seizing on the Fourteenth Amendment simply because, in the current political climate, a due process argument is likely to be the most successful legal/political hook for advocating the abolition of the death penalty. Thus, in the end, it appears that law constrains even the way in which a cultural analysis must be framed if it is to be "successful" in changing policy (which in turn supports Sarat's point that legal categories help to define the range of narratives that are deployed throughout society).

More importantly, his arguments, whether or not they turn out to be legally cognizable under the Fourteenth Amendment, demonstrate that a cultural analysis of law can generate discussion about precisely the sorts of normative policy questions favored by doctrinally oriented legal scholarship. For example, many of the issues Sarat explores might never arise except through an analysis of capital punishment that attends to the intertwined relationship between law and culture. Thus, although cultural analysis can and must view itself as a body of knowledge about society that exists independently from questions of legal doctrine, it need not be limited *only* to such an independent existence. Rather, as Sarat's book makes clear, a cultural analysis of law *also* has much to contribute to normative debates about legal doctrine and social policy.

Indeed, Sarat's fundamental argument is that capital punishment actually diminishes democracy itself and that a cultural analysis of the death penalty demonstrates the ways in which the practice erodes our central democratic and legal values: "State killing diminishes us by damaging our democracy, legitimating vengeance, intensifying racial divisions, and distracting us from the challenges that the new century poses for America. It promises simple solutions to complex problems and offers up moral simplicity in a morally

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239. Sarat, *When the State Kills*, *supra* note 5, at 253.

ambiguous world.”<sup>240</sup> Sarat’s vision of democracy, while not spelled out in detail, seems premised on the idea that broad ranging discourse is essential and that we therefore need our social institutions to allow maximum space for contestation among multiple points of view. To Sarat, democracy appears to be a mode of public dialogue as much as it is a system of allocating governmental authority. Thus, democracy takes on a kind of Arendtian quality as a space of public encounter<sup>241</sup> in which we must continually enter into complex negotiations with the world’s ambiguities, aim to broaden our framework of analysis and perspective, and recognize that politics (or law) is a terrain of engagement among multiple competing cultural perspectives.<sup>242</sup> Capital punishment and its accompanying narratives, in contrast, impoverish discourse and efface ambiguity.<sup>243</sup>

This conception of democracy also provides an additional justification for the very cultural analysis of law Sarat deploys. *When the State Kills* is concerned that the simplification and reduction of complex social phenomena through limiting narratives will close down the democratic negotiation of moral ambiguity. As this Essay has observed, a cultural study of law similarly allows us to resist the potentially simplifying narratives of doctrinal legal analysis by complicating our assumptions about the relationship of law to society. Thus, by broadening our understanding of where law is and how it operates, cultural analysis can itself be seen as supporting a more democratic societal discourse.

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240. *Id.* at 250.

241. See Hannah Arendt, *The Human Condition* 50–58 (1958) (conceptualizing the “public” as a space of appearance where actors stand before others and are subject to mutual scrutiny and judgment from a plurality of perspectives). In Arendt’s view, the public “consists of multiple histories and perspectives relatively unfamiliar to one another, connected yet distant and irreducible to one another.” Iris Marion Young, *Inclusion and Democracy* 111–12 (2000) (discussing Arendt). For an interpretation of the Arendtian public in terms of plurality and democracy, see Young, *supra*, at 115 (arguing that inclusion of multiple voices “motivates participants in political debate to transform their claims from mere expressions of self-regarding interest to appeals to justice[, and] maximizes the social knowledge available to a democratic public, such that citizens are more likely to make just and wise decisions”); see also Susan Bickford, *The Dissonance of Democracy: Listening, Conflict, and Citizenship* (1996) (elaborating a theory of plurality and democratic discourse). For an application of Young’s gloss on Arendt to the field of law, see Berman, *Suspicious Story*, *supra* note 21, at 128–38.

242. For a similar conception of law as democratic discourse, see Paul Schiff Berman, *An Observation and a Strange but True “Tale”*: What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?, 52 *Hastings L.J.* 123, 130–31 (2000) (“[L]egal and quasi-legal discourse, particularly when it is widely dispersed within a culture, may provide a useful language for both debating and contesting social and political issues and for adjudicating among the multiple narratives that are inevitably present in a heterogeneous society.” (footnote omitted)).

243. One wonders, of course, what would happen if this view of democracy came into tension with more conventional democratic concerns about governmental legitimacy and power. For example, what if an autocrat, ignoring the overwhelming will of the populace and the wishes of the legislature, abolished the death penalty by executive order? Such a move might be seen as antidemocratic in one sense, but it also might help foster the sort of nuanced understanding of crime and punishment that Sarat seems to associate with successful democratic discourse.

The particular cultural analysis contained in *When the State Kills* could usefully be developed in future scholarship. Both because Sarat is aiming his book at a popular audience and because he chooses to address many different aspects of the death penalty in America, he necessarily sacrifices some detail. For example, though he repeatedly argues for an approach to crime that does not rely so heavily on the assumption of individual free will, he provides only generalizations about the sort of alternative analysis he has in mind. Similarly, his discussion of victim-impact statements as a return to private vengeance seems overly simplistic. After all, there might be some cultural value in allowing the narratives of community members to be heard more directly in the legal process. Indeed, Sarat argues elsewhere that executions should be televised because public participation in the process could generate alternative narratives for understanding or resisting the death penalty.<sup>244</sup> Likewise, it seems possible that the call for community participation in criminal trials could also ultimately make trials more of a forum for alternative narratives about crime and punishment. Finally, I was disappointed not to see more empirical research.<sup>245</sup> Sarat's interviews with capital jurors comprise perhaps the most interesting section of the book, but a number of the chapters are surprisingly dominated by doctrinal analyses of judicial decisions. If Sarat truly wishes to show how state killing affects our democracy, our categories for conceptualizing crime and punishment, our race relations, and our understanding of moral complexity, we need a more detailed mapping of how the death penalty affects everyday social attitudes.<sup>246</sup> In short, if we are to understand fully what the death penalty does "to us," as Sarat keeps insisting we should, then "we" need to be more present in the analysis.

Nevertheless, a book that points the way toward future fruitful avenues of

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244. See Sarat, *When the State Kills*, supra note 5, at 207–08.

245. This is particularly so because some of Sarat's most significant contributions in academia have been based on empirical research. See generally, e.g., Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 *Law & Soc'y Rev.* 737 (1988) (analyzing transcripts of conversations between lawyers and their clients); Sarat, ". . . The Law is All Over," supra note 47 (drawing on data derived from observations of legal services offices in two midsized New England cities, including interviews with nineteen welfare recipients and the lawyers handling their cases, regarding their perceptions of the legal system); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 *Yale L.J.* 1663 (1989) (analyzing data gleaned from observational study of 115 lawyer/client conferences over a thirty-three month period in California and Massachusetts); see also William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *Law & Soc'y. Rev.* 631 (1980–1981) (arguing for the value of empirical research to investigate emergence and transformation of legal disputes).

246. The turn from the social to the cultural, see Sarat & Simon, *Beyond Legal Realism?*, supra note 20, at 5–9, should not render irrelevant empirical analyses of how law is received and reconceptualized by ordinary people in everyday life. See, e.g., Ewick & Silbey, supra note 46, at 23 ("Reconceptualizing legality as an internal and emergent feature of social life requires that we shift our empirical focus away from law to 'events and practices that seem on the face of things, removed from law, or at least not dominated by law from the outset.'" (quoting Sarat & Kearns, supra note 97, at 55)).

research can hardly be faulted for failing to pursue fully each and every one of these paths. And I have confidence that subsequent cultural analyses of the death penalty, whether by Sarat or others, will excavate the terrain this book leaves unexplored.

More importantly, we should celebrate the two significant successes of *When the State Kills*. First, Sarat develops a context for discussing the death penalty in America that eschews the traditional moral and political debates and instead focuses our attention on the broader cultural effects of state killing and the system that supports it. Second, he demonstrates the value of approaching legal issues through a cultural lens, both as a significant source of knowledge about how law makes us who we are as a people and as a contribution to normative debates about legal doctrine and policy. Thus, by introducing a popular audience to the core insights of cultural and legal analysis and then showing why those insights are relevant to public policy, Sarat has helped to advance both an interdisciplinary academic field and an important societal debate. One could hardly ask for more than that.