Research on the Death Penalty

Speaking of Death: Narratives of Violence in Capital Trials

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How are violence and pain put into legal discourse? How does law distinguish its violence—capital punishment—from other kinds of violence? Do the strategies used to differentiate legal and extralegal violence alleviate anxiety about law and the uses to which law's violence is put? This article addresses these questions through an analysis of a capital trial in which an African-American man is being retried for the murder of a young white woman. It examines the social and cultural resources used to speak about violence and to differentiate legal and extralegal violence, and it suggests that the juxtaposition of narratives about violence in capital trials arouses rather than alleviates anxiety.

At 8:30 A.M. on 15 July 1977, William Brooks accosted Janine Galloway at gunpoint and forced her to drive to a wooded area behind a neighborhood school. There Brooks raped her and shot her to death. Eventually Brooks was arrested, tried, and convicted of kidnapping, robbery, rape and murder; he received a death sentence and two life terms in prison plus 20 years. On appeal the murder conviction and death sentence were overturned though his other convictions and punishments were unaffected.

In January 1991 I traveled to Madison, Georgia, a small town about 60 miles northeast of Atlanta, to attend the retrial of William Brooks. The sole object of this retrial was to reinstate both his murder conviction and death sentence. This trial provides one vehicle through which to consider the complex relationship of law and violence and one opportunity to observe what Robert Cover (1986b:1601) called the "field of pain

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and death" on which law acts. In that trial and others like it, violence is put into discourse, and distinctions between the violence of law and violence outside the law are richly marked. As a result, capital trials, though rare, are enormously important moments in the life of the law (Cover 1986b:1622–23).

Violence, as both a linguistic and physical phenomena, as fact and metaphor (Cornell 1990:1689),[1] is integral to the constitution of modern law (Hobbes 1986; Kelsen 1945; Bobbio 1965; Benjamin 1978). As Cover argues (1986b:1613), "[L]egal interpretation is a practice incomplete without violence. . . . [I]t depends upon the social practice of violence for its efficacy."[2] Modern law is built on representations of aggression, force, and disruption (Sarat & Kearns 1991b), of aggressive acts like the rape and murder of Janine Galloway. And, once built, law traffics in violence every day, using its own force to deter and punish acts it brands illegal. The proximity of law to, and its dependence on, violence raises a nagging question and a persistent doubt about whether law can ever be more than violence or whether law's violence is truly different from and preferable to what lurks beyond its boundaries (see Benjamin 1978; Derrida 1990). To answer that question and to quiet that doubt is for law a continuing necessity. It is achieved, to the extent it is achieved at all, in the representational practices and discursive modes deployed to speak about violence inside and outside law, to distinguish capital punishment from murder in the situated moments—capital trials—when both are spoken about at once.

As pervasive as is the relationship of law and violence (see Held 1989; Minow 1990; Navreson 1991; Wellman 1991), it is, nonetheless, difficult to speak about that relationship or to know precisely what one is talking about when one speaks about law's violence (see Dworkin 1977:15; Sarat & Kearns 1991b:211).[3] This difficulty arises because law is violent in

[1] Cornell (1990:1689) suggests that the violent "foundation" of law is allegorical rather than metaphorical; "the Law of Law is only 'present' in its absolute absence. The 'never has been' of an unrecoverable past is understood as the lack of origin 'presentable' only as allegory. The Law of Law, in other words, is the figure of an initial fragmentation, the loss of the Good. But this allegory is inescapable because the lack of origin is the fundamental truth."

[2] Cover (1986a:818–19) insisted, even at the price of doing linguistic violence, that "the violence . . . [of law] is utterly real—in need of no interpretation, no critic to reveal it—a naive but immediate reality. Take a short trip to your local prison and see." The coercive character of law is central to law, systematic, and quite unlike the "psychoanalytic violence of literature or the metaphorical characterization of literary critics and philosophers." Cover thus invited us to imagine and construct a jurisprudence of violence, and to theorize about law by attending to its pain-imposing, death-dealing acts.

[3] As Ronald Dworkin (1977:15) argues:

> Day in and day out we send people to jail, or take money away from them, or make them do things they do not want to do, under coercion of force, and we justify all this by speaking of such persons as having broken the law or having

many ways—in the ways it uses language and in its representational practices (MacKinnon 1987; Armstrong & Tenenhouse 1989), in the silencing of perspectives and the denial of experience (Minow 1989; Scott 1991:773; de Lauretis 1989), and in its objectifying epistemology (West 1991). It arises from the fact that its linguistic, representational violence (as seen in capital trials) is inseparable from its literal, physical violence (capital punishment). As Peter Fitzpatrick suggests (1991:1; also Wolff 1971b:5):

> In its narrow, perhaps popular sense, violence is equated with unrestrained physical violence. . . . A standard history of the West would connect a decline in violence with an increase in civility. Others would see civility itself as a transformed violence, as a constraining even if not immediately coercive discipline. . . . The dissipation of simple meaning is heightened in recent sensibilities where violence is discerned in the denial of the uniqueness or even existence of the "other". . . . These expansions of the idea of violence import a transcendent ordering—an organizing, shaping force coming to bear on situations from outside of them and essentially unaffected by them.

The difficulty of talking about violence is, however, a difficulty not just for scholars seeking to understand the constitution of modern law. It is, in addition, a continuing problem for law itself. Legal discourse, like all discursive forms, confronts the limits of language and representation when it speaks, as it must in capital trials, about physical violence and physical pain. However, the limits confronted in representing violence would seem, at first glance, to be the opposite of those confronted in representing pain. Violence is visible and vivid. It speaks loudly, arouses indignation, and, as a result, its representation threatens to overwhelm reason. Thus the problem of representing violence would seem to be one of taming and disciplining its representations.

Pain, on the other hand, is invisible. As Elaine Scarry argues (1985:3):

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failed to meet their legal obligations. . . . Even in clear cases . . ., when we are confident that someone had a legal obligation and broke it, we are not able to give a satisfactory account of what that means or why it entitles the state to punish or coerce him. We may feel confident that what we are doing is proper, but until we can identify the principles we are following we cannot be sure they are sufficient. . . . In less clear cases, . . . the pitch of these nagging questions rises, and our responsibility to find answers deepens."

Another version of this difficulty is described by Samuel Weber (1990:2). As he says, "To render impure, literally; to 'touch with' (something foreign, alien), is also to violate. And to violate something is to do violence to it. Inversely, it is difficult to conceive of violence without violation, so much so that the latter might well be a criterion of the former: no violence without violation, hence, no violence without a certain contamination."

> Physical pain has no voice. . . . When one hears about another person's physical pain, the events happening within the interior of that person's body may seem to have the remote character of some deep subterranean fact, belonging to an invisible geography that, however portentous, has no reality because it has not yet manifested itself on the visible surface of the earth.

Pain is, according to Scarry (p. 4),

> [v]aguely alarming yet unreal, laden with consequence yet evaporating before the mind because not available to sensory confirmation, unseeable classes of objects such as subterranean plates, Seyfert galaxies, and the pains occurring in other people's bodies flicker before the mind, then disappear. . . . [Pain] achieves . . . its aversiveness in part by bringing about, even within the radius of several feet, this absolute split between one's sense of one's own reality and the reality of other persons. . . . Whatever pain achieves, it achieves in part through its unsharability, and it ensures this unsharability through its resistance to language.

Yet violence and its linguistic representation is inseparable from pain and its representation. We know its full measure only through the pain it inflicts; the indignation which we experience in the presence of violence is, in large part, a function of our imaginings of the hurt it engenders. In this sense, the problem of putting violence and pain into discourse is one problem rather than two.

It is the business of law in general and capital trials in particular to know violence and pain, and to find the means of overcoming their resistances to language and representation. Scarry herself suggests (1985:10) that the courtroom and the discourse of the trial provide one particularly important site to observe the way violence and pain "enter language." In that discourse the problem of putting violence and pain into language is compounded by the fact that

> it is not immediately apparent in exactly what way the verbal act of expressing pain . . . helps to eliminate the physical fact of the pain. Furthermore, built into the very structure of the case is a dispute about the correspondence between language and material reality: the accuracy of the descriptions of suffering given by the plaintiff's lawyer may be contested by the defendant's lawyer. . . . For the moment it is enough to simply notice that, whatever else is true . . . [a trial] provides a situation that once again requires that the impediments to expressing pain be overcome. Under the pressure of this requirement, the lawyer too, becomes an inventor of language, one who speaks on behalf of another person . . . and attempts to communicate the reality of that person's physical pain to people who are not themselves in pain (the jurors). (Scarry 1985:10; emphasis omitted)

Scarry invites us to consider trials as occasions for lawyers

to "invent" languages of violence and pain (for an important examination of these processes see Bumiller 1991). However, Scarry suggests (1985:13) that in law, as elsewhere, the languages which can be invented are quite limited. "As physical pain is monolithically consistent in its assault on language," Scarry writes, "so the verbal strategies for overcoming that assault are very small in number and reappear consistently as one looks at the words of patient, physician, Amnesty worker, lawyer, artist. . . . " Those verbal strategies "revolve [first] around the verbal sign of the weapon." We know violence and pain, in the first instance, through its instrumentalities. Second, we know them through their effects. Here violence and pain are represented in the "wound," that is, "the bodily damage that is pictured as accompanying pain" (p. 15).

As violence and pain are put into language, we may be tempted to forget that their metaphorical representation as weapons and wounds cannot truly capture the meaning of violence and pain themselves (ibid.). And, in the process of putting those things into language, some kinds of violence and pain, those engendered by particular weapons and those which leave visible marks on the body, may be more easily available to us (see Bumiller 1991; Cobb 1992), whereas more diffuse, systemic violence which leaves no visible marks or scars—the violence of racism, poverty, and despair—will be less easily represented and understood as violence and pain. "A great deal is at stake," Scarry herself suggests (p. 6), "in the attempt to invent linguistic structures that will reach and accommodate this area of experience normally so inaccessible to language."

My analysis of the Brooks case focuses on the representation of violence in capital trials and the ways lawyers use linguistic structures to represent different kinds of violence. How does law overcome the resistance of violence and pain to language? How is the direct, physical violence done by William Brooks to Janine Galloway, the violence of kidnapping, rape, and murder, the violence that extinguished a life put into discourse? How is the more diffuse violence that pervaded Brooks's life from childhood onwards known and understood?

But the discourse of capital trials involves more than the representation of violence beyond law's boundaries. In such trials the specter of law's own violence is real and immediate. It too must be put into language, and it must be put into language in a way that reassures us that law's violence is different from and preferable to the violence it is used to punish and deter. As Cover suggests (1986b:1622–23):

> Because in capital punishment the action or deed is extreme and irrevocable, there is pressure placed on the word—the interpretation that establishes the legal justification for the act. At the same time, the fact that capital punishment consti-

> tutes the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence makes the imposition of the sentence an especially powerful test of the faith and commitment of the interpreters. . . . Capital cases, thus, disclose far more of the structure of judicial interpretation than do other cases. (Footnote and emphasis omitted)

In this article I describe the ways law's own violence is brought into discourse and how, in that discourse, boundaries are constructed between it and the other forms of violence (e.g. murder and abuse) with which it traffics.[4] In capital trials, law seeks to distinguish the killings which it opposes and avenges from the force which expresses its opposition and through which its avenging work is done. In such trials violence of the kind done to Janine Galloway is juxtaposed to the "legitimate force" the state seeks to apply to her killer.

Here I will pay particular attention to the way law's violence is linguistically transformed into such "legitimate force" (Sarat & Kearns 1991b) and distinguished from "the violence that one always deems unjust" (Derrida 1990:927; Friedenberg 1971: 43).[5] In this way law denies the violence of its origins (Derrida 1990:983–84) as well as the continuing disorder engendered by its own violent ordering and peace-making efforts (Wolff 1971b; Waldenfels 1991; Weber 1954; Hay 1975). As Robert Paul Wolff argues (1971b:59), violence is, in the eyes of the law, "*the illegitimate or unauthorized use of force to effect decisions against the will or desire of others*. Thus, murder is an act of violence, but capital punishment by a *legitimate* state is not" (emphasis in original).[6]

In capital trials the violence of law is inscribed in struggles

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[4] Some (see, e.g., Camus, 1957) suggest that there is no real difference between capital punishment and murder. Others (Nietzsche, 1956:214–15) note that the law's reliance on violence erodes its capacity to transform or reform those who disobey its commands. "[W]e must not underestimate the extent to which the criminal is prevented, by the very witnessing of the legal process, from regarding his deed as intrinsically evil. He sees the very same actions performed in the service of justice with perfectly clear conscience and general approbation: . . . the cold blooded legal practices of despoiling, insulting, torturing, murdering the victim."

[5] Friedenberg (1971:43) argues: "If by violence one means injurious attacks on persons or destruction of valuable inanimate objects . . . then nearly all the violence done in the world is done by legitimate authority, or at least by the agents of legitimate authority engaged in official business. . . . Yet their actions are not deemed to be violence." Legitimacy is thus one way of charting the boundaries of law's violence. It is also the minimal answer to skeptical questions about the ways law's violence differs from the turmoil and disorder law is allegedly brought into being to conquer (Wolff 1971b).

[6] Friedenberg (1971:43) contends: "The police often slay; but they are seldom socially defined as murderers. Students who block the entrances to buildings or occupy a vacant lot and attempt to build a park in it are defined as not merely being disorderly but violent; the law enforcement officials who gas and club them into submission are perceived as restorers of order, as, indeed, they are of the *status quo ante* which was orderly by definition." As Fitzpatrick (1991:15) puts it, "[T]his association of law with order, security and regularity rapidly became general and obvious, the violence associ-

to put violence into discourse and to control its discursive representation. Here the language of law becomes, at one and the same time, the medium of law's violent expression and of its reassuring restraint. That language seeks to do a double deed. First, it strains to instantiate and vividly portray the violence that exists just beyond law's boundary—the killing of Janine Galloway—that brings pain to the innocent, that merits condemnation. Second, it works to mute other kinds of violence, the violence of racial injustice, poverty, and abuse, as well as the violence of law itself. This is done in the hope of affirming the social value of law, of reassuring citizens that its use of violence is somehow different from and better than illegal violence,[7] of alleviating anxiety about law by identifying a more terrifying other (Dumm 1990),[8] and, in so doing, of overcoming inhibitions against the conscious, willful use of violence and infliction of pain as an instrument of law itself.

In capital trials those two linguistic gestures coexist, but their coexistence is, I argue, an uneasy one. It is uneasy because, in the Brooks trial and others like it, both gestures are replete with racial symbols.[9] The narratives of violence and victimization that appear in capital trials frequently are racially charged (for a similar argument in another context see Bumiller 1991); they chart the boundaries between law and nonlaw along a racial divide of us versus them, order versus disorder, reason against the mob (Peller 1987:28; Butler 1993).

Because Galloway was a young white woman from a respectable Christian family and Brooks was an unemployed, drug-using, young black male, the Brooks trial (re)enacted a familiar story of race and law (Williams 1991; Lawrence 1987; Carter 1988) in which legal violence is authorized as a response to imagined racial savagery (Fitzpatrick 1991; Omolade 1991; Butler 1993).[10] The juxtaposition of the images of Galloway

ated with the establishment of law and order assuming insignificance in the immeasurability of the violence and disorder of savagery."

[7] As Weisberg argues (1984:385), "The criminal trial is . . . a representational medium that . . . serves as a grammar of social symbols. . . . The criminal trial is a 'miracle play' of government in which we carry out our inarticulate beliefs about crime and criminals within the reassuring formal structure of disinterested due process."

[8] As Dumm (1990:54) puts it, "In the face of the law that makes people persons, people need to fear. Yet people also need law to protect them. . . . Hence fear is a political value that is valuable because it is critical of value, a way of establishing difference that enables uncertainty in the face of danger."

[9] In addition to my observation of the Brooks trial, I read the trial transcripts of 12 other capital cases that reached the penalty phase. The themes of race, law, and violence that are so vividly exemplified in the Brooks trial are found in most of those other trials as well. One important difference was the quality of Brooks' defense team. In many death penalty cases defendants have inexperienced, underqualified lawyers (see Coyle et al. 1990). Brooks's lawyers, in contrast, were highly regarded death penalty specialists. Throughout this article I refer to the lead counsel as Brooks's lawyer.

[10] Fitzpatrick (1991:14–15) argues that in the construction of modern law, "Law and order were constantly combined not just in opposition to but as a means of subdu-

and Brooks told a story of lost innocence and racial danger. Thus even as we are reassured about the legitimacy of law's violence and its difference from violence outside the law, the racialization of that difference arouses other fears which themselves motivate an acceptance, if not a warm embrace, of law's violence as a necessary tool in a struggle between "us" and "them" (Omolade 1991:16).[11]

In this article I use the Brooks trial to examine the representational practices through which violence and pain are put into legal discourse. I examine the explicit and implicit ways law draws distinctions among the various kinds of violence with which it traffics—the violence done to the victim, the violence which allegedly shaped the life of her killer, and the violence of law itself. Throughout, I show the racial content of the different images of violence and pain that appear in the Brooks case, and illustrate how race provides a way of interpreting the relationship of law and violence.

I. Putting Violence into Discourse in the Trial of William Brooks: The Life and Death of Janine Galloway

An Innocent Life: Racial Purity and the Attack on Innocence

Perhaps not surprisingly, the Brooks trial revealed few details about the life of the victim, Janine Galloway. She, after all, was not on trial. At the center of the first, or guilt, phase of the trial was, instead, a narrative about the lawless violence that Brooks perpetrated and that Galloway endured. Indeed as the trial unfolded, Janine's white, female body and the attack on it became a symbol for what the prosecutor called "the body of mankind." The violence unleashed against her body was, at the same time, unleashed against a body that was not her own, the disembodied body of "everyone." Her death became a trope in a Hobbesian tale of anomic violence against a supposedly universal body (Hobbes 1986).

Yet the displacement of Janine and her life story could not be and was not complete. That story was the story of a special

ing the 'disordered and riotous' savages in their state of lawless 'anarchy'. . . . [T]his association of law with order, security and regularity rapidly became general and obvious, the violence associated with the establishment of law and order assuming insignificance in the immeasurability of the violence and disorder of savagery."

According to Omolade (1991:6), "For the West, the mythic power of skin color determines good and evil, guilt and innocence, ignorance and knowledge in the real lives of black and white people."

[11] Here, of course, the first trial of the police officers who beat Rodney King provides a vivid example of the way law's violence is portrayed as an acceptable tool in a racial struggle. See Dumm 1993; also Williams 1992.

life, a life of innocence, purity, and virtue.[12] Throughout the trial it was the innocence of Janine's body that provided the context for the discursive representation of the violence and pain which she suffered. Her innocence became the true measure of her worth and of the horror of her body's violation. It was the white, good Janine who was slain by the black, evil Brooks; it was good assaulted and sullied by evil. Although the prosecutor denied the significance of race ("This isn't black versus white . . ."), the imagery on which he consistently relied was a racial imagery.[13] Sometimes the imagery was overt, as in his repeated references to the fact that Brooks had led his life in "dark places"; sometimes it was more indirect, as in the contrast between those, like Janine, who embrace the "American way, play by the rules, and work hard" and those, like Brooks, who are "mean and lazy." For the prosecutor, and he hoped for the jury, the trial was an opportunity to vindicate, if not restore, Janine's fallen innocence, to assert the value of white life against the devaluing acts of black men (for similar arguments in other contexts see Carter 1988; Omolade 1991:16). As Brooks's defense lawyer said to me in an interview after the case was completed, "It was a classic sort of race case with the young white woman, a virgin according to the newspapers, who was taken from her home by a black man. Your classic southern death penalty case is the rape of a white woman by a young, black man."

The image of Janine's innocence and of the value of her white life was constructed by calling attention to particular facets of her life and emphasizing certain of her attributes, the first of which involved her place as the "child" in a loving family, the second her virginity. In 1977, she was a 23-year-old piano teacher at a local music store and engaged to be married to Harold "Bob" Murray, though she still lived at home with her parents, Earl and Heddie. On the day of Janine's death, Heddie, who worked for an optometrist, was home on vacation. Janine went out the door at 8:30 A.M. to meet her friend, Ann Overton, for breakfast. As Heddie put it in her testimony:

H: Janine went out to the carport. I was beginning to relax after breakfast, and I put the chain on the door because I was alone in the house. I looked out the window and saw Janine's car with the door to the driver's side open. . . .

Q: At that time did you see anyone?

[12] Unlike the rape trial that Bumiller (1990) described, in the Brooks trial the defense did not contest or call into question the victim's innocence.

[13] "The law in its majestic neutrality takes no official note of the race of the victim. . . . Yet our public insistence that race be divorced from debate over crime does not match the activities of our institutions. At the level of private fears, private categorizations, the link between race and crime is an intimate one." See Carter 1988:440.

H: No. I didn't see anyone. I opened the kitchen door and went outside. I called to her, but no one answered. So I went back into the house to see if she was there. And then I walked back out to the carport. That's when I heard her say 'I'm in here.' Her voice came from the utility room.

Q: Where is this?

H: The utility room is just off to the left of the kitchen door. I heard a voice say "I'm in here." And I said, "What are you doing in there?" She said, "I'm just looking for something." She said, "Go back in the house. When I find what I'm looking for I'll let you know." So I went in the house and called my neighbor. I knew something was wrong, but nobody answered. Then I went outside again. The door to the utility room was closed. I started to go back in the house again and the phone rang. I picked it up and it was Ann Overton wanting to know where Janine was and whether she was coming to breakfast. I told her that someone had her in the utility room and I said she should come over here fast. As soon as we hung up I tried my neighbor again. Then I heard the car start up and I ran to the door.

Q: What did you see?

H: I saw her in her car with a black man on the passenger side. I'd never seen him before. I looked inside the car and I got very close to it. She began to back down the driveway. I walked along as she backed out, and I kept my eyes on him. I called out to her to "Please wait." "No," she said, "I'll be back. Don't worry."

There is something nightmarish and terrifying in this testimony of the mother's witnessing of Janine's kidnapping and her excruciating inability to stop it. Both prefigure and foretell the murder to come. It is as if the violence done to Janine was already present, symbolically displaced, and expressed in Heddie's disbelief of Janine's reassurances. Heddie is here depicted as if in a terrible dream in which she is forced to look at the living corpse of her daughter.

In Heddie's testimony race makes a prominent appearance. What is noticed and recounted is the race of the man in the car next to Janine. The danger that first appears as a disruption of domestic routine is thus a racial danger. At an early stage in the trial, in the voice of the victim's mother, a portrait of the violence on the other side of law's boundary and of its association with race begins to emerge.

Lawless violence invades the unworried, safe space of home

and family. Yet that space is a bit less unworried than it might first appear. Even where there has been, as yet, no invasion, the specter of violence is already present. Mrs. Galloway's testimony contained a stark reminder of our collective anxieties about violence. She was herself sufficiently aware of its possibility and its presence that she chained the door to protect herself. Hers was a diffuse anxiety about the particular vulnerability of the woman alone. Her response was to lock the world out so she could "relax."

In addition, the awareness of and anxiety about criminal violence was sufficiently part of Janine's life that, according to the testimony of her fiance, she "went to seminars about what to do if you are raped." For Janine lawless violence could not be locked out; hers was a life in which neither law nor locks could provide security or certainty. Yet in her world of innocence, preparation to meet such lawless violence seemed to some to be nearly incomprehensible. As Bob Murray, her fiance, explained to the court, "I couldn't understand why she went [to the seminars on rape]. I treated it lightly."

Beyond law's boundaries is a violence so bold and powerful that no preparation is adequate. It is so bold and powerful that it takes the innocent daughter literally right out from under her mother's eyes. Thus Heddie watched helplessly as Janine drove away with an unidentifiable "black man" beside her, and as a nightmare of racial victimization was played out before her eyes.[14] Implicit in the testimony about this nightmare is a contrast between the description of domestic routine and the known, but unspoken, soon-to-be-realized fate of Janine Galloway.[15]

Not only was Janine's innocence that of a dutiful daughter, it was, in addition, a virginal innocence. The fact of Janine's virginity was admitted into evidence over the strenuous objection of the defense which contended that it was irrelevant and inadmissible, that it went to no material issue in the case. The prosecution responded that the fact of her virginity went to the issue of nonconsent; it showed that there "was no consent to the crime of intercourse."

Once admitted, Janine's virginity would quickly became quite an important fact in the discursive representation of the

[14] "The black male suspect's guilt or innocence of raping the white woman . . . can not be accurately assessed within a society of believers in racial mythologies and who thirst for hanging black flesh. . . . If the men are innocent of the rape, then they have been guilty of the crime of being black and male which takes precedence over legal innocence. If they are guilty of rape who can separate the guilt associated with their race and gender from their guilt for the crime. . . . [B]lack men are always guilty of raping white women because of who they are" (Omolade 1991:15–16).

[15] But the testimony is equally potent in conveying an image of Janine's effort to distance her mother from danger and to calm her, "I'll be back. Don't worry." The daughter, in her own moment of danger, heroically becomes the mother to her mother.

violence done to her. It became an essential part of the story of the "wounds" which the prosecutor would use to bring Brooks's violence and Janine's pain into discourse. Once admitted, virginity helped to racialize the narrative of Janine's rape. It became the quite unsubtle symbol of her innocence and worth, and Brooks's crime became the paradigm of the racial attack on white womanhood.[16]

In a statement given to the police at the time of his arrest, Brooks said that after he had intercourse with Janine he asked her, "Was it your first time?" and that she had responded that it was. On Brooks's own account, "I didn't believe her." Against his disbelief the trial provided the occasion for an affirmation of the truth of what she had uttered as if her virginity were itself on trial.[17]

The Violence that Knows No Law

If the story of Janine's life was a rather linear narrative of a racial innocence and a gendered purity, the story of her violation was quite complex. From the beginning of the trial the prosecution painted a picture of the violence committed against Janine Galloway as gruesome, wanton, cruel, and unnecessary. In the words of the prosecutor, "Janine died a horrible death. . . . She did nothing to deserve to die."

With these words the prosecutor presented an implicit contrast between the violence outside the law that is visited upon the deserving and the undeserving alike, and respects neither innocence nor virtue, and law's own violence which is reserved for those who by virtue of their guilty acts deserve it (Morris 1970). Unlike the indiscriminate use of violence against the innocent Janine, law provides elaborate procedures (in Brooks's case, a trial, an extended process of review and appeal, and now a retrial) to insure that its violence is visited only on the guilty. What is unspoken here is that unlike Janine, Brooks has done something to deserve death, and that the death to which Brooks might be subject at the hands of the law will be neither wanton, nor cruel, nor unnecessary.

Throughout the trial the prosecutor referred to the irrationality of the crime committed against Janine Galloway and tried to describe the full measure of the pain which she endured. He returned again and again to the issue of her blamelessness. "What did she do?" he asked repeatedly. "She just went outside her home. She was not running around in skimpy

[16] For a vivid exemplification of the fear of such an attack see *McQuirter v. State* (1953).

[17] That affirmation came in the testimony of the medical examiner who had conducted the autopsy on Janine. It was his testimony that Janine "was a virgin prior to the attack."

clothes, and she was taken from her home." In his effort to describe the senseless horror of Brooks's crime, the prosecutor used the behavior of other rape victims whose dress, he seems to suggest, invites the crime as a foil to highlight Janine's innocence (Bumiller 1990). Thus Janine's virtue became a standard against which the flaws of other women, less pure and innocent than she, could be measured.

In his opening statement the prosecutor told the jury that Janine was

> accosted by the defendant at gunpoint. She was forced to drive with him to the woods behind Dawson school. There she was forced at gunpoint to disrobe. She was raped. And then she was shot in the neck at a downward angle. Some time later she died from the gunshot and the fact that she received no medical attention. . . . Behind the school at gunpoint the defendant had Janine strip and then he raped her. She was begging "Let me go." But he taunted her about her virginity. And then he shot her in the neck because she was screaming and she wouldn't shut up.

With these words, the prosecutor sought to make violence and pain speak (Scarry 1985), though he acknowledges to the jury that "it is not easy for us to appreciate the horror" of Janine's suffering. "Shot in the neck at a downward angle," and "begging 'let me go' " suggest that Janine was on her knees when she was shot. The violence unleashed by the shot was designed to silence its victim who was by then so degraded and desperate that she could only beg for a mercy that was not forthcoming.

The violence that Brooks inflicted on Janine Galloway was, in the prosecutor's description,

> done in the course of rape, in the course of armed robbery, in the course of kidnapping with injury. Kidnapping is horrible but this involved an injury to the breast and vaginal area. This was a crime of torture. The defendant wasn't content with just the physical act. He taunted her with his cruel question about her lack of sexual experience.

The prosecutor told the jury that Janine had been shot at close range and that the medical examiner had "found that she had been raped and had been torn up in her private parts. Her panties were very bloody, and on her breast were bite marks. She bled to death over an extended period of time." Violence and pain are put into discourse as a description of wounds and their aftermath.

In the effort to bring violence into discourse and to represent pain as wounds on the body, Janine's body was partialized, objectified, and marked in discrete ways (Bumiller 1991); Brooks's lawless violence is attached to particular parts of her body. It is inscribed as a hole in the neck, bite marks on the

breast, blood from "her private parts." As Bumiller argues (1991:5) about rape trials: "The harm to the victim is verified by making visible pain and pleasure; the 'truth' of the women's violation is located in its visibility."

But it is not vision and visibility that dominate in the recreation of the lawless violence done to Janine Galloway. It is speech that carries the burden of representing violence. Three speech acts were central to the narrative of Janine's suffering. First is the statement of Brooks himself given to the police at the time of his arrest. Second is Janine's speech as well as her silence. Third is the testimony of the medical examiner, Dr. Weber.

Brooks's statement became the interpretable text on which much of the narrative of Janine's suffering was written. While he did not testify in his own defense, it was his statement that set the scene and the action of the crime.

> We drove down the dirt road by the Dawson School into the woods. When we got there I told her to stop the car and get out. She asked me to let her go, but I told her to take her clothes off. Then I had sex with her. When we got done I told her to get dressed. I asked her if it was her first time, and she said yes. I told her that I didn't believe her, and she started to scream. I pointed the gun at her and told her to be quiet. I cocked the gun and it went off. She fell. She was still screaming but I couldn't hear her.

On this account Janine's own movement from silence to speech occasioned the violence of her death. She was unable or unwilling to silently endure, to acquiesce in Brooks's demand for silence in the face of his disbelief in her lost innocence. She spoke in the only way she could, first in an audible then in a quickly silenced scream.

Her silence was, throughout the trial, treated as a kind of heroism, even as its end marked the end of her life. As the prosecutor put it,

> the defendant came up to her, but she didn't scream. She was scared to death but she didn't scream. She had taken a course, but she didn't scream. The defendant hid Janine when her mother came outside looking for her. She wanted to say "Momma save me," but she didn't because she knew what would happen. She didn't scream when she was forced to strip naked as a baby or when she was forced to lay down in the woods or when she was penetrated and her body was torn. Still she didn't scream. Then he taunted her about her virginity. It was only then, only when she saw her death in his eyes that she screamed. And then he killed her.

A third speech act played an important, if unusual role, in representing the lawless violence of William Brooks and in giving a language to Janine's pain by describing the wounds on her body. This was the testimony of the deceased Dr. Weber,

the medical examiner who had testified at Brooks's first trial. In a strange reenactment of that testimony a member of the prosecution team took the stand equipped with the transcript of the first trial. As if from beyond the grave, Weber became an embodied speaker. Another prosecutor asked the same questions that had been asked in the first trial, and Weber's answers were read verbatim. Those answers suggested that Janine's death had been caused by a bullet fired from short range that entered the base of the neck, "tore away the trachea, hit a rib and the spinal column, lacerated a lung and exited between the third and fourth rib."

Weber stated that Galloway had not died quickly; in his opinion she lived for between one-half hour and two hours after being shot. During this time, he suggested, she had endured a great deal of suffering. In addition, Weber indicated that he found "teeth marks on the left nipple, injuries to the vagina including a lacerated hymen . . . and hemorrhaging around the pelvis." He noted that Janine was a virgin prior to the assault and that her injuries were "associated with violent sexual activity." In his account virginity becomes the context for understanding the overt marks of violence and pain. Here again violence and pain speak, as Scarry (1985) argues they must, through their visible effects—lacerations and hemorrhaging.

The context of a capital trial insures that the difficulty of putting violence and pain into discourse is compounded because at every turn, "the accuracy of the descriptions of suffering" given by one lawyer will be "contested" by the other (Scarry 1985:10). This is exemplified in the way the defense reacted to the testimony of Dr. Weber and his representations of Janine's pain. The response was, in fact, to call another medical examiner as an expert witness to contest those representations.

That witness put the words of Dr. Weber on trial; he called particular attention to the language of Weber's autopsy report and his testimony. "Dr. Weber," the expert contended, "used words in his report that I would never use and that I've never seen before. He didn't use the standard scientific terms to describe what he was seeing. He talked about rips and tears. As a result, I don't know what he actually saw. . . . And while he described the hymen as virginal, you can't ever tell that."

On cross-examination, this witness persisted for a time in his analysis of Weber's language.

Q: Have you ever found rape in a murder victim?

ME: I prefer to call it sexual battery not rape. The presence of sperm in and of itself doesn't equal rape.

Q: What is the difference between sexual battery and rape?

ME: Well, a stick or a finger would do injury, and sexual battery takes all this into account.
Q: The defendant said he raped her. Are you arguing with that?
ME: No. But Weber's testimony said more than he said in his report. Sometimes medical examiners say more than they should in order to help prosecutors. Anyway his testimony and his report are inconsistent.

While there would be no argument about Brooks's self-incriminating words, Weber's words could be doubted and argued about. Quickly, however, the prosecutor turned his attention to the language of the expert himself.

Q: Are you saying Janine wasn't raped?
ME: No. But you can be raped without being injured. There is still plenty of evidence to indicate that she was raped.
Q: Does the blood on her panties indicate the trauma associated with this rape?
ME: Yes.
Q: Does it suggest the presence of brute force?
ME: No. What we know is that someone had intercourse with her, caused a laceration, and it bled. Many people are, in fact, raped gently.
Q: Was Janine raped gently?
ME: The bruise on her nipple may or may not have come from a bite. Other than the gunshot wound and the small tear in her vagina there is no evidence she was beaten or choked. There is evidence she was raped but not beaten up.
Q: She was kidnapped and forced to strip at gunpoint, then raped . . .
ME: The defendant said he had sex with her.
Q: The girl said she was a virgin?
ME: Yes.
Q: Was this a pleasant situation to lose her virginity?
ME: No.
Q: Is this the way virgins choose to lose their virginity?
ME: Some might. She did not.
Q: Would this have been painful?
ME: Yes.

In this sequence of questions and answers Weber's speech is put aside and the focus is on the expert's use of the phrase "gentle rape." His introduction of this absurd idea rendered oxymoronic the very idea of rape itself, and it provided the

prosecutor a chance to remind the jury again of Janine's violated innocence, the wounds she had suffered, and the pain spoken through those wounds.

The question of language and its adequacy in describing violence was critical throughout the trial. Brooks's defense insisted that his statement should be taken literally, that it be treated as an honest, full, and precise account of the events surrounding Janine Galloway's death, that the agent of her pain was the gun that "went off" on its own.[18] The prosecutor, in contrast, suggested that the words of that statement, especially the words "it went off" not be taken literally. As the prosecutor explained to the jury, "That's just how he happened to say it. That's just what his lawyer picked up on." Against the literalism of the defense was juxtaposed a theory of linguistic accident, of happenings rather than intentions, of words given meaning only by interpreters with purposes quite foreign to those of the original speaker.[19]

For the prosecutor, what was not said in Brooks's statement was as revealing as what was said in it. "I want you to think about committing crimes and if you were telling the truth when you got to the part about the shooting you'd speak pages. 'I didn't mean to. I was going to let her go.' But none of that was ever said."

The defense responded that the statement was accurate and complete, and it appealed to a rather conventional idea of what makes a persuasive narrative (see Booth 1983).

> The first thing to look at is the statement itself. . . . It is long and detailed. It tells about everything that happened. It said that she was made to get into a car with a gun. The defendant didn't make things up. The statement tells about the crimes he committed in great detail. Those details are, in addition, corroborated by other evidence. Those details are the kind of things that no other person could have known. And every detail paints as bad a picture of the defendant as could be. Everything says it is true. And the prosecution wants you to believe everything but one sentence. Well they can't have it both ways. The whole statement is truthful.

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[18] Brooks's defense lawyer told me:

> I think one of the classic mistakes that people make is to try to keep denying the statement or challenging the voluntariness of it even when it is clear that it is coming in. When they had Brooks admitting to the rape and the robbery and admitting to every other evil, criminal thing that he did and then they wanted to say he was just trying to explain it away. As you know, my argument was that if we accepted everything else we should credit the statement in its entirety. Lawyers should find ways to turn statements like the one Brooks gave to their own advantage. That is what we were trying to do.

[19] The defense accused the prosecution of rhetorical excess, of making a terrible thing seem needlessly worse than it was. "Part of this process is integrity. Things are bad enough. Some of these things were embellished. Things are bad enough. They don't need to be embellished."

Taking the statement literally would mean that the gun would become the personified agent of death. "The gun went off." Here agency is attributed to the weapon itself.[20]

The literal reading of the defendant's statement with its attribution of agency to the gun was bolstered by the testimony of a firearms expert.

Q: Is it possible for a gun to go off by itself?
FE: Yes.
Q: Is it possible for a 357 Charter Arms to discharge inadvertently?
FE: Yes.
Q: How can a revolver discharge accidently?
FE: It depends on the condition of the revolver and whether the safeties are operative. If the weapon is in poor condition the trigger pull might be much too tight so that when a person doesn't intend it, it might fire. You might pull back the trigger accidently after having the hammer back.
Q: Could the shooting in this case have been accidental?
FE: Yes. There was one shot from close range. And the statement of the defendant that the hammer had been pulled back and that it went off. These things are all consistent with the conclusion that the gun in this case could have gone off accidently.

While the defense treated the gun as the agent of death in a killing which Brooks himself did not control or intend, the prosecution presented another version of the weapon and of the agency of violence which was visited on Janine Galloway.

> Guns are dangerous, but they have their place. We all know that they don't just sit there looking to go off. The gun that snuffed out her life didn't really do it. That defendant did it. He pulled the trigger. The mouth that marked her breast is that mouth there. The sex organ that penetrated her is on that man right there. The hand that fired the fatal bullet is on that man.

"Mouth," "sex organ," "hand," each a weapon used against Janine Galloway; each an agent of the violence done to her, each a sign of the pain unjustifiably imposed on her (Scarry 1985). As Cobb puts it (1992:11–12), "The weapons take on the attributes of the pain and require that the 'violated' position themselves as victims of the weapons. . . . Pain and its objectification is accompanied by a loss of self, a loss of voice

[20] As Cobb (1992:11) explains, "[P]ain is a manifestation of violence; but since there can be no description of violence that transcends subjectivity . . . we must understand pain by the way it is objectified via . . . 'the language of agency.' Pain is objectified, that is it is presented as located in that which inflicts pain, i.e. the weapon."

that both signals the disintegration of the world of the person and confers the attributes of pain on the object of the pain—and, in the process, pain is read as power." "Mouth," "sex organ," "hand," these are the significations of a power brutally abused, a power able to silence Janine Galloway, to render her screams unhearable. But they also signify the dismemberment of Brooks's own body, a symbolic dismemberment in which each part of his body is linked with a discrete injury to his victim.

While the violence of Janine's death was, in the words of the defense, a tragic and accidental violence which knew no logic and for which no one could be held responsible, the prosecution portrayed the violence which took the life of Janine Galloway as the painful, humiliating violence of torture and slow death. But most of all, it was an unnecessary violence. "If he wanted her to shut up he could have hit her with a big hand. When she woke up he would have been gone." This violence was, moreover, the willful, immoral, predatory gesture of an evil will transgressing against innocence itself. "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."

"It was all so unnecessary . . ." and using another "for his lust . . ." bring together two different narrative strands in the prosecution argument. The first is the portrait of violence outside the law with its implicit comparison to law's own violence, and the second is the story of race. With regard to the first, the violence outside law is senseless, random, almost inexplicable. Why did Brooks pick Galloway as his victim? Why that woman at that time? As the prosecutor put it, "We don't know whether he had staked out the Galloway house or whether he was just looking for anybody to rob." Thus the horrifying quality of Janine Galloway's murder was that it was a

> chance encounter between strangers, in which what . . . [was] casually exchanged happens to be death. . . . The radical disjunction, or discontinuity, between the immeasurably great value of what is being destroyed . . . and the minuscule, trivial, "perceived gain" that prompted the murder . . . leaves . . . a palpable, profound and almost physical need to reestablish sense and meaning in the universe. (West 1990:10–11)

Galloway's murder, as described by the prosecution, was an instance of what Robin West has called "post-modern murders" (p. 11) Such murders, West argues,

> strip the natural world of its hierarchy of values—life, love, nurture, work, care, play, sorrow, grief—and they do so for no reason, not even to satisfy the misguided pseudo-Nietzschean desire of a Loeb or Leopold to effectuate precisely

> that deconstruction. They are meaningless murders. (Emphasis omitted)

If there is meaning in Galloway's death, it is found only in a racial narrative in which "animal" passions of the young black male lead him to use another person to satisfy his "lust" (Omolade 1991:16). "How," the prosecutor asked, "did the defendant treat Janine—like some mother's baby, some daddy's little girl, or like something disposable?" The invitation in this question is to recover meaning by assigning responsibility and by asserting the difference between a violence which knows no law and a violence necessary to control or deter it, between the animal inability of black men to control their "lust" and respect the sanctity of human life and the human need for self-respect and self-control.

Garfinkel (1956:422), in his famous discussion of the "conditions of successful degradation ceremonies," gives us a way of seeing how William Brooks and his heinous act can be accommodated to a general scheme of preferences and values. Both Brooks and his act are treated as instances of a "type." The prosecutor's denunciation of Brooks as the type who would use another human being for his pleasure and then dispose of her invites the jury to identify with a "dialectical counterpart" (ibid.). It is only, as Garfinkel argues (p. 423), by the reference "it bears to its opposite" that the "profanity of an occurrence . . . is clarified."[21] As between meaninglessness and a racially coded meaning, the invitation is to reject the former and embrace the latter (West 1990:12)[22] and to see Brooks and his act as "inexplicably alien, horrendous and inhuman" (p. 15). The jurors in the Brooks case accepted that invitation and rejected what the prosecutor had disparagingly called the "I didn't mean to" version of the death of Janine Galloway. As a result, they convicted Brooks of malice murder, and the trial moved into the second or sentencing phase.

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[21] Indeed Garfinkel (1956:423) makes explicit reference to murder trials as examples of degradation ceremonies. "The features of the mad dog murderer," he argues, "reverse the features of the peaceful citizen."

[22] West (1990:12) argues that such narratives

> create a palpable need to reassert responsibility and human agency for a momentous act and momentous deprivation; so that we can again feel in control of our destiny. They create a need to assign responsibility, not just liability and not just guilty. The defendant's ultimate responsibility for the murder is, in a nutshell, essential to the coherence of those stories as human stories, and the coherence of these stories is essential to the meaningfulness of our lives.

II. Putting Violence into Discourse in the Trial of William Brooks: The Life and Death of William Brooks

The story of Janine Galloway's murder exemplifies one way in which violence is brought into legal discourse and suggests one set of comparisons between law's violence and its lawless counterpart. That story embodies what Stephen Carter calls (1988:421) "bilateral individualism." In such a conception the status of victim is accorded to

> someone who loses something—property, physical safety—because of the predation of someone else. Victimization, then, is the result of concrete, individual acts by identifiable transgressors . . . [B]ilateral individualism . . . invents a reality in which the only victims [of crime] are those who have suffered at the hands of transgressors. (Ibid.)

In the penalty phase of Brooks's trial we see another way in which violence is put into legal discourse and a story about a different kind of violence. In this phase it was a narrative about violence that the defendant himself had endured that took center stage. Here again, a racial narrative was constructed, only this time by the defense, a narrative of racial pain and racial victimization in which the rage of the young black male is portrayed as an understandable, if not justifiable, response to the constitutive violence of a world beyond his making.

In contrast to the direct, personal, decontextualized violence that Janine suffered at Brooks hands, the violence that was part of the defendant's life story was more diffuse, spread out over a longer period of time, and more systemic. In contrast to the violence that took Janine's life, the violence that Brooks had endured made his life what it is. In this alternative conception of violence and victimization, both become matters "of the sweep of history, not the actions of individual transgressors. . . . In this vision of victimhood, the criminal behavior of so many black males is itself a mark of victimhood, a victimhood virtually determined from birth"[23] (Carter 1988: 426–27).

If in the first phase of the trial the narrative of violence and death was thick and the narrative of life thin, just the opposite would be the case in the penalty phase. In this phase, Brooks's life became the central object of inquiry while the violence that

[23] The construction of this narrative is made all the more complex when, as in the Brooks case, the defense lawyer resists "bilateral individualism" and argues that the defendant did not do what he is accused of doing [malice murder] in the guilt-innocence phase of the trial, and then, in the penalty phase, shifts the frame to the alternative conception of violence and victimization in order to explain *why* the defendant did what the jury found him guilty of doing.

might take his life was, as Foucault (1977) would have suggested, left virtually invisible.

Seeing the Tragic Life behind the Tragic Event: From Predator to Victim

In the penalty phase of the capital trial "[t]he overall goal of the defense is to present a human narrative, an explanation of the defendant's apparently malignant violence as in some way rooted in understandable aspects of the human condition" (Weisberg 1984:361). Thus Brooks's lawyer began his opening argument in the penalty phase by saying,

> It is hard to get up in front of you. You reached a verdict on Saturday that is not what we had hoped, but I accept it. To this point, however, all you've heard about is one terrible incident. Now you must consider the larger picture of William Brooks's life as you decide about the most extraordinary and extreme punishments—life in prison and being electrocuted by the state. The fact of his conviction for murder is not enough. The state must prove particular aggravating circumstances in this case. And even if those circumstances are established you still have to consider whether this person is so beyond redemption that he should be eliminated from the human community. To do that you must look at his whole life—good and bad. . . . We are going to tell the story of a life. In court we usually talk about just one incident. . . . Now we are going to talk about a life.

The invitation in this argument is to consider the person behind the crime, to put the crime in context.[24] Through his rhetorical insistence that it is a "life" that must be talked about, Brooks's lawyer reminds the jury of the reality of law's violence; he reminds them that there is now another life at stake, a life that can be extinguished through a legal gesture and a legal judgment with as much crushing finality as the life-destroying gesture of Brooks himself. Brooks's lawyer names that gesture "electrocution" and, in so doing, makes the violence of law at least momentarily visible by identifying its instrumentality. He urges each juror to take full responsibility for a life-or-death decision that is now unavoidable. "Each of you," he says, "is the Supreme Court today. It is your decision whether he lives or dies."

This is an anxiety-producing exhortation which is fraught with its own anxieties. As Scarry (1985:10) suggests, the effort to invent a language to represent violence and pain is shaped by the awareness of the jury's capacity to accept particular linguistic representations. In the narration of the violence in

[24] On the role of blameworthiness in criminal sentencing see Wheeler et al. (1988). Another way of thinking about the penalty phase would be to see it as an instance of the "expansion" of a dispute. See Mather & Yngvesson 1980–81.

Brooks's life and in the description of the context against which his crime might be judged, the defense has the difficult task of explaining that that narrative does not undo, or diminish, the seriousness of the murder itself. If it fails, or suggests that context overdetermines crime,[25] it invites the jury to reaffirm the correctness of its judgment of guilt by imposing the death penalty (West 1990:11).[26] What must be provided, then, is a narrative of violence and pain and a context for understanding both that explains but does not excuse, "that could respond to the need to assign responsibility . . . to the defendant, society, or history" (ibid., p. 14), and that helps the jury understand the sources and origins of the lawless violence perpetrated by William Brooks without suggesting that they should forgive that violence or recant their judgment.

> The defendant has hurt people and sinned against man and God. What you need to consider is what forces pushed him in that direction. But will any of this excuse what happened? Nothing excuses or justifies his crime. . . . Let me remind you what is not before you. This isn't about whether the defendant will be excused. There is no excuse for what William Brooks did. When you consider mitigating evidence it isn't to excuse or justify. He is responsible for what he did. That's why we are here, why we are at this point. That's been decided. . . . Mitigating evidence is offered to help you understand what he did and why, not to excuse or justify it.

Instead of excusing the crime, the narrative of Brooks's life is presented as a reason for showing mercy (see Davis 1987; Murphy & Hampton 1988). Brooks's lawyer appealed to the jury to be better than the killer who showed no mercy to Janine Galloway, to follow "feelings of mercy and sympathy that flow from the evidence." "As Christians," he argued,

> we learn about the place of mercy and compassion. Here the law makes room for mercy and compassion. We are proud of our law because it allows us to show mercy. If you find mitigation that can be a reason to give life—anything about William Brooks's life and background, or about his life in prison that makes him worthy of not being killed. If anything you think merits mercy whether I've told you or not, you can vote for life.

This appeal to mercy suggests that law's violence can and should be different from the violence Brooks used against Janine Galloway, and that law can and should show compassionate concern for even the undeserving. It suggests that the question of whether law's violence, in the end, will be different rests in the hands of the jury. To establish its difference and to

[25] For an example of a case in which the defense argument suggested that crime was overdetermined see *State v. Sikora* (1965).

[26] And to reaffirm, as West (1990:11) notes, "meaning and value in a world deconstructed by random violence."

legitimate law's violence, the jury must show the very restraint which Brooks himself did not show; it must hear the call of mercy in ways that Brooks himself did not hear when Janine Galloway begged for her life. In making this argument, Brooks's defense gave the state "its moral victory by acknowledging his crime" while at the same time trying to "persuade the jury that it can accommodate the crime into the assumptions of [a] social order it wants to reaffirm" (Weisberg 1984:362). At the center of those assumptions is the view that law must be different and better than those over whom it exercises the power of life.

The story of Brooks's life that might merit mercy was one of abuse, cruelty, and victimization. This story itself is a reminder not of law's victories but of its defeats, not of its capacity to protect but of its frustrating limits. Brooks was the object of a lawless violence that showed no mercy. In contrast to the untroubled innocence of Janine Galloway's life, "the defendant's life," his lawyer contended, "was one nightmare after another." His family was torn apart by violence and abuse, violence first directed at his mother by an alcoholic father who was himself ultimately murdered on the streets of Columbus, Georgia, and then against Brooks by his stepfather.

In this narrative of violence and victimization directed against the perpetrator of violence, the defense faced the same task of representing pain, of putting pain into language, that the prosecution faced in its own efforts to speak about the pain of Janine Galloway. Here again the appeal was to wounds and weapons as the medium of pain's representation (Scarry 1985). As the defense lawyer put it,

> The defendant carries scars on his back from the beatings he received from his stepfather who would take him in a room, lock the door and whip him on his back with a belt buckle. Gwen [Brooks's sister] used to come home and hear William screaming. When the beating was done William would come out of the room, his back bloody from the beatings. Such beatings were a daily event.

The story of the violence done to Brooks was played against a domestic and familial life quite different from that of Janine Galloway. While home for her was a fortress against lawless violence, for Brooks it was the continuous scene of such violence. Whereas Janine's mother was called to the stand to speak about lost innocence, the disruption of domestic tranquility, and her singular, tragic inability to rescue her child from harm, Brooks's mother was called to testify to her continuous inability to do so.

Q: What happened after you moved to Columbus?
M: My husband began to drink heavily. And then he would try to hit me and we would have fights. He'd hit me and we would tussle. William saw all of this. He saw everything and he'd get very upset. Once [my husband] broke my nose and I had to go to the hospital. Another time he hit me and I began to beat him with the heel of my shoe. All the kids were there.
Q: Did you ever inflict injuries on your husband?
M: Well, once I scalded him with hot coffee . . . when we had a fight. And the children they saw it. They were all at the table.
Q: How frequent were the fights?
M: Every weekend. Pretty soon I had to leave every weekend and take the kids to my parent's house. . . . Later my father bought me a shot gun and told me to use it if he tried to beat me again. . . . Once my oldest daughter took the gun and shot him in the hand.

Three of William Brooks's sisters also testified about the violence he and they had experienced as they grew up. Brooks's sister Gwen provided the most vivid portrait of William's victimization.

Q: What was life like with your stepfather?
G: It was a kind of holy terror. He was abusive and when he wasn't being abusive he made us feel unwanted. He'd curse us and made us feel out of place in our own home. He'd always have a house full of young men drinking, smoking and being fresh. He could get away with all that being abusive because my mother was at work.
Q: How did he treat William?
G: He really hated him. He beat him all the time with his belt buckle or with an extension chord. He was always hitting him and pushing him against the wall. More than once I'd heard my brother screaming when I came home. Once I pushed against the door in the room where the screams were coming from. My brother was lying on the mattress and there was blood all over the walls. William begged me to make him stop, but he threw me out of the room and started beating William again.

There is no lost innocence, no fall from grace, in this story because there was never an innocence to be lost. The violence directed against Brooks has its own particular instrumentali-

ties—the "belt buckle" and the "extension chord." It was brutal, continuous, and inescapable. Like many young black men, Brooks lived in a kind of state of nature close to home, a state of nature made real in the pains imposed on him and the inscriptions on his body. What is made visible in this story is the specter of violence generating violence in which law is complicit by its inability to provide protection or defense.

But the discourse of law could neither fully contain nor explain the lawless violence to which the defendant was subject and the impact of that violence in precipitating or explaining what he did to Janine Galloway. For such an explanation the defense turned to an expert, a social worker experienced in issues of child development and in child abuse and neglect. As she put it,

> William Brooks was subject to persistent and brutal abuse throughout his childhood. He saw explosive tempers all around him, and they became for him a model of how to behave. . . . To say the least, he grew up in the absence of a nurturing environment. . . . The abuse and neglect which he suffered caused fear, anxiety and anger. He was left alone to deal with these things. He needed but did not get professional help. Through no fault of his own the very volatile feelings inside him were left to fester. . . . He did not develop internal controls or mechanisms for dealing with his anger. He never found a place to put it.

The introduction of this testimony turned the penalty phase of the Brooks trial into a high culture/scientific expertise versus low culture/commonsense contest in which what was contested was the extent to which violence constituted Brooks as a subject, the extent to which it shaped him and contributed to his own violent acts. The high culture/scientific discourse implied that the explanation for Brooks's behavior was complex and hard to disentangle from the violence which made him what he was. The low culture/commonsense rendering searched for a more parsimonious explanation. Thus in the midst of his cross-examination of the social worker, the prosecutor asked:

Q: Do you believe in the Christian principle of free moral agency? Do you believe that God gave us the capacity to choose right from wrong?

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

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

SW: Almighty God gave us the potential. . . .

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

SW: 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?

SW: What William Brooks did was the product of interaction between himself and his environment.

Q: Can a child be spoiled?

SW: Yes.

Q: Can someone be just plain mean?

SW: No, not without reason. Children aren't born mean. Children are responsive to their environment.

In this denunciation of Brooks and counterexplanation of his actions, the prosecutor seeks to identify with what Garfinkel (1956:423) calls the "dignity of the supra-personal values of the tribe," of a community of persons committed to the theological principle of free choice. "Just plain mean" is presented as the community's commonsense response to a "scientific" discourse that seemed to make the explanation for violence disappear or to locate it outside the acting subject. For the prosecution what was at stake was the location of the responsibility for violence in a freely acting subject, what was at stake was the very idea of responsibility itself. As the cross-examination continued this theme reappeared.

Q: Was the defendant a time bomb? Was violence inevitable?

SW: He had no way of expressing what was happening to him. His feelings were just festering inside him. He could have learned to channel those feelings and the violence if he'd gotten help.

Q: Suppose he confronted a young woman in her yard, twenty-three years old, a small woman, and he heard her mother coming. Would he be able to transport his victim to a place of seclusion so as to be able to continue his criminal enterprise?

SW: One could not have predicted how he would act out. His anger was there. How it would be expressed could not be predicted.

. . .

Q: Whose fault was it that Brooks kidnapped Janine?

SW: He would have to take responsibility for that.

Q: And for all his other voluntary acts?

SW: He would be responsible.

. . .

Q: Isn't it true that heaven helps those who help themselves?

SW: That capacity, like any other human capacity, needs to be activated by outside sources.

Q: Not even God could help him. It would take counseling.

SW: The counselor would be an instrument of God.

. . .

Q: Aren't you saying that he wasn't responsible?

SW: I'm not saying that. I'm not saying that he wasn't responsible for what he did. I am saying that things in his childhood caused problems and that he needed professional help that he never received.

The language of responsibility again provided the medium through which the prosecutor could construct a narrative about violence, about the life of William Brooks and his violent acts. Those acts have to be assigned individuated agency for law's response to have any pretense of efficacy. The narrative of violence begetting violence, of an abused person enacting his abuse, was characterized by the prosecution as a "Devil made me do it" defense. Such a defense "had" to be rejected (see *State v. Sikora* 1965:202). Ironically, perhaps, the language of compulsion is used to authorize/require the idea of responsible choice which the prosecution sought to defend. "We *have* to believe that God gave everybody the ability to know right from wrong, good from evil. . . . It is the American way to play by the rules, work hard. That's what he rejected. . . . The defendant, by his own volition, selected to live his life in dark places."

The prosecution denied that there was anything special about Brooks's life. He was a subjectivity constituted not by the violence of its origins and influences but by the violence engendered by its willed choices (Dan-Cohen 1992). Brooks had to be judged and punished in the same way as anyone who made such choices should be judged and punished. For the defense, however, the story of Brooks's life was a story of difference not similarity. It was a life entirely contained by violence, a life unlike those imaginatively denoted by appeals to God's will or the American way.

> People aren't all the same [Brooks's defense lawyer argued]. Free will, yes, but we are not all the same. . . . Some people grow up in good ground, but William Brooks's seed was sown among the thorns. Yes, some sown among the thorns will grow up well. Some will survive, but even they aren't like those that are planted in the field. This little seed tried to struggle through the thorns. And the fact that some make it,

> well, that's life. You've got to look at where his seed was sown. "Just plain mean"—some people are just plain mean. When we see new babies do we see anyone who is just plain mean? When kids are two or five are they just plain mean? Do they exercise free will in deciding whether they are going to turn out to kill people? . . . People who are abused and neglected, it isn't surprising that they get in trouble. We know there's a road to that even though it doesn't make it okay. . . . It doesn't make it okay. . . . We are not saying if you are abused you can kill.

The narrative of Brooks's life was itself a narrative of violence and pain. The appeal to understand his suffering was, in turn, an appeal to see in it pain acting in a world known only as a source of pain. It was an appeal not to privilege and power but to the recognition of the ways that powerlessness and racial deprivations act out their powerful rage. The appeal here is to a shared, though not equally shared, responsibility for Janine Galloway's death. It suggests "an alternative understanding of societal responsibility" that challenges the prosecutor's "bi-lateral individualism" (Carter 1988:42). Brooks, after all, was not "Ted Bundy. He didn't go to law school. He isn't somebody who had all that smarts. You've got to ask yourself, is this some poor kid who had never been taught values? You punish those people differently." In the discourse of law, punishment is the measure of all things. In this discourse the recognition of a different, of a violated, life required a different, less violent punishment.

Naming Law's Violence

In the penalty phase of a capital trial, law's own violence is put, as it always must be, precariously into discourse, and the disposition and use of law's ultimate power over life and death is made the subject of contention. In this moment the legitimation of that power is the most pressing because law enlists ordinary citizens and asks them to exercise its power over life and death. In so doing law seeks to make its violence our violence.

Yet even at this moment it is striking that so little is actually said about the nature of that violence. In contrast to the detailed presentation of the violence outside the law by both prosecution and defense, neither presented a similarly detailed narrative of the prospective violence to which the jury is being asked to commit William Brooks. This is, of course, not surprising as a tactic of the prosecution; one would expect him to foreground the violence done to the victim and the pain which she endured and to tread lightly on the terrain of law's own violence (see Weisberg 1984; West 1990). It is, however, not what one would have expected, at least initially, from the defense until one confronts the fact that in all death cases the defense

confronts a "death-qualified" jury, that is, a group of persons who as a condition of their service in a capital case must have already attested to their ability and willingness to impose the death penalty.[27] Given such an audience with its known dispositions, to attack frontally and repeatedly the death penalty, to highlight its gruesome violence, would be to undertake the burden of conversion.

Nonetheless, while neither prosecution or defense undertakes a detailed explication of the nature of law's violence, the question before the jury in the penalty phase of a capital trial like that of William Brooks is what kind of violence are they being asked to do? And how does that violence differ from the violence to which it is opposed? The prosecution in the Brooks case consistently called that violence "the death penalty" as if there were no means or mechanisms of violence that would necessarily be deployed to bring about death. The instrumentality, the weapon, the objectification of the pain of the violence imposed, found no expression.

The defense, not surprisingly, both named the weapon and the act. What the prosecution called the "death penalty" the defense called the "most extreme and extraordinary punishment." Brooks's lawyer insisted that what was at stake was the "elimination of life by 2200 volts of electricity." What was at stake was not a penalty abstractly called death but whether law would "kill" William Brooks. The insistence that law's violence is a killing violence effectively blurs the distinction between the

[27] I arrived in Georgia in time to watch the jury being selected for the Brooks trial. Immediately the specter of law's violence took center stage as the presiding judge, Judge Lawson, a stout, balding, serious-looking man, conducted voir dire. Lawson provided each potential juror with a brief overview of the procedure to be followed in the case. "The defendant," he said,

> is charged with one count of malice murder and if he is convicted the state will seek the death penalty. This trial will take place in two stages. In the first phase guilt and innocence is the only question. If the defendant is found guilty there will be a second stage or sentencing hearing. At the conclusion of the sentencing hearing the jury decides between life and death. The jury's decision is final. In this state the death penalty is authorized in particularly aggravated circumstances. The death penalty can be imposed on more serious, more severe murders. Aggravating circumstances mean more than being guilty of murder. But if the jury finds aggravating circumstances it is not required to impose the death penalty. Imposition of the death penalty is never mandatory. The defense is permitted to present mitigating circumstances, that is, anything in mercy and fairness having to do with the defendant or his background. Imposition of the death penalty is never mandatory. Finally, I would instruct you that you are to draw no inferences about the guilt or innocence of the defendant from the fact I have given you these instructions.

These instructions introduce potential jurors to the prospect of imposing a death sentence before they have been empaneled and heard any evidence. Because the death penalty is never mandatory, each of the potential jurors at the outset would have to face the question whether they could, should circumstances warrant, impose death as a punishment. As part of what is called the process of "death qualification" Lawson asked each of the jurors, "Are you conscientiously opposed to the death penalty?" "If the state seeks the death penalty and you felt the death penalty was justified would you be able to vote to impose it?"

act of the criminal and the act of law itself (Camus 1957). And it suggests that the legitimation of law's violence cannot rest securely in any sanitized renaming of the death-doing, life-destroying instrumentalities of law itself.

The prosecution addressed the question of the legitimacy of law's violence by making explicit what had earlier in the trial been left unspoken. Here the violence on law's side of the boundary is overtly labeled purposive, measured, and necessary. "We have a right," the prosecutor claimed, "to be vindicated and protected." "We" is both an inclusive and a violent naming, a naming fraught with racial meaning. Who is included in the "we"? While this "we" reaches from this world to the next as a remembrance of and identification with Janine, at the same time, it makes the black Brooks an outsider in a community that needs protection from people like him. It excludes him by claiming law as an entitlement against him. Law's violence is necessary both to vindicate and protect "us" from him.

By speaking the language of "we" the prosecutor seeks to invest himself with authority to speak for the jury and the community it represents as well as to speak to it. He reminds the jury that the trial which has brought them to the point of considering a capital sentence "has been conducted according to the rule of law." He identifies himself with the jury and the community while distancing himself and them from the defendant who he denounces. As Garfinkel (1956:423) puts it, in a successful degradation ceremony "the denounced person must be ritually separated from a place in the legitimate order. . . . He must be placed 'outside,' he must be made 'strange.' "[28] In this case law's violence could, the prosecutor claimed, properly be used to vindicate Janine's lost innocence and to protect those who, like her, lead innocent lives from those like Brooks who live in "dark places" and have "forfeited their place in the human community."

And the prosecutor argued that this vindication and protection would be, again engaging the project of legitimating law's violence by differentiating it from violence of the kind that Brooks visited on Janine Galloway, a proportionate response to a horrible and horrifying violence:

> It fits the crime. Janine was taunted and tortured. It wasn't like TV. When it was all over she didn't get up and walk away. . . . When the defense says "mercy," think of what the defendant did to Janine. . . . Go back behind Dawson School when Janine was screaming, begging for her life and the de-

[28] As Garfinkel (1956:423) puts it, "The denouncer must arrange to be invested with the right to speak in the name of those ultimate values. . . . The denouncer must get himself so defined by the witnesses that they locate him as a supporter of those values. Not only must the denouncer fix his own distance from the person being denounced, but the witnesses must be made to experience their distance from him also."

> fendant shot her and she was screaming and no scream came out. I want you to hear that silent scream when you hear him [the defense lawyer] say "mercy and mitigation."

But in the end, the most powerful authorization and the most unquestionable legitimation of law's violence rests with those to whom it would be applied (Morris 1970). Unlike Janine who did nothing to precipitate the violence that was done to her, Brooks had, by his own choice and acts, put himself in harm's way. "Some," the prosecutor argued, "by their own acts forfeit the right to breathe the air we breathe. If he had left Janine alone none of this would have happened. Mr. Brooks showed in what he did to her that he believes in the death penalty."

Juxtaposed to this argument was the defense's contention that the death penalty would be neither necessary nor rational *in this case*. To apply it would expose law's violence as excessive; to apply it would be, in essence, to reduce law's violence to the level of the violence which by their earlier verdict the jury had, in essence, condemned. Killing Brooks would be a vindictive desecration of someone who was already leading a life on the other side of a line that separates the incarcerated from the free, those in law's custody from those allegedly beyond its confinement. In some sense Brooks was already dead (Scheppele 1990:49). The defense continued:

> What's at stake in this case isn't life as we know it. We are not talking about someone who can go home and play with his kids. We are talking about life lived inside a prison. I know the defendant is here because I hear the chains rattling. A life in chains and in prison, that is already an extreme and harsh punishment. . . . This is not about not being punished. You are choosing between two punishments. And you should remember that society has ways of punishing without killing people.

This questioning of the necessity of another killing dominated a defense argument that suggested that a violence dispensed excessively, unnecessarily, is a violence no different from the violence used against Janine Galloway. For law's own violence to be different and better it has to meet the test of necessity and, in so doing, live with its own restraint. According to the defense this was a threshold that had not been, and could not be, met in the Brooks case.

> We don't need to kill this defendant. The law doesn't require us to do so. There may be times when we need to but this isn't one. . . . No case requires the death penalty. There is no automatic capital punishment. There was no death penalty for the people who murdered those young, black children in Atlanta, or for the man who killed Dr. King or Medgar Evers. . . . No case has to bring the death penalty. . . . Society can be protected without killing William Brooks. . . . You don't have to kill. . . . Brooks's crimes were terrible, evil, and

> vile. But Janine Galloway's life can't be brought back. If we could bring Janine back I would electrocute William Brooks myself. . . . For everything there is a season. This is a time to punish, but not to kill.

While "You don't have to kill William Brooks" was the repeated refrain in the defense's argument against "electrocution," Brooks's lawyer's statement that "If I could bring Janine back I would electrocute William Brooks myself" was quite extraordinary in marking the nature of law's violence. It served to identify the defense lawyer with the jurors; like them, he suggests he has no conscientious objection to the death penalty. Rather than seeking to turn them against the death penalty, this lawyer suggests that law's violence must be used in measured ways to achieve purposes which can be achieved by no other means. In this case, his statement serves to drive home the point that each use of law's violence must be justified on its own terms. In this case, he challenged the jury to maintain the legitimacy of law's violence by exercising restraint and by insuring that it is not used where it is unnecessary.

For William Brooks this was a persuasive appeal.[29] For him, January 1991, in fact, turned out to be a time to be punished, but not to be killed, a time to receive yet another life sentence rather to be killed by electrocution.

III. Conclusion

Capital trials remind us that law's violent constitution does not end with the establishment of legal order. The law constituted, in part, in response to metaphorical violence traffics with literal violence (see Friedenberg 1971:43; see also Fitzpatrick 1991:15; Todorov 1984). In capital trials, we see the ways different kinds of violence first are made part of legal discourse and then are differentiated from one another.

First, of course, is the death of the victim. In constructing a narrative of violence and pain and in telling this story, prosecutors, like the prosecutor in the Brooks case, construct a sociologically simple world of good and evil and a morally clear world of responsibility and desert (Weisberg 1984:361; see also Dan-Cohen 1992). The prosecution seeks to create a binary opposition between the "angelic" character of the victim, who did not deserve to die (Bumiller 1990) and the "evil" character of

[29] When I later asked Brooks's defense lawyer to explain the verdict he suggested:

> No jury is just going to let a guy walk away free when he's responsible for another person dying. . . . But this is the kind of thing that would cause a jury to compromise upon a penalty verdict. I don't think they were sure that he (Brooks) really maliciously intended this, but they could go and convict him of murder and then give him a life sentence as a compromise.

the perpetrator who does not deserve to live. This is the dominant cultural motif for representing violence and victimization.

The second kind of violence and pain whose "reality" is put into discourse in capital trials is the violence done, in their childhood and throughout their life, to defendants like Brooks, the violence of an abusive home and family, the violence that crafts a life and a way of living. Inventing a language to accommodate and express this kind of violence and pain involves contesting the dominant cultural conception of violence and victimization (Carter 1988). Defending a murderer like Brooks requires the construction of a more complex narrative of causation and accident, of mixed lives and mixed motives (Weisberg 1984:361).

The third kind of violence that is put into discourse in capital trials is the violence of law itself. While the other kinds of violence are presented as weapons and wounds and described in vivid, concrete, gory detail, law's violence is hardly presented at all. It is named, when it is named, in the most general, abstract, and impersonal ways. As Foucault argues (1977:9):

> Punishment . . . [has] become the most hidden part of the penal process. This has several consequences: it leaves the domain of more or less everyday perception and enters that of abstract consciousness; its effectiveness is seen as resulting from its inevitability, not from its visible intensity; it is the certainty of being punished and not the horrifying spectacle of public punishment that must discourage crime. . . . As a result, justice no longer takes public responsibility for the violence that is bound up with its practice.

In this process, capital punishment in particular becomes, at best, a hidden reality. It is a violence known by indirection.[30] What we know about the way law does death comes in the most highly mediated way as a rumor, a report, an account of the voiceless expression of the body of the condemned rather than in a detailed recounting in the narratives of capital trials. However, even such highly mediated accounts convey the ferocity of

[30] Silencing the condemned and limiting the visibility of lawfully imposed death is part of the modern bureaucratization of capital punishment and part of the strategy for transforming execution from an arousing public spectacle of vengeance to a soothing matter of mere administration (Foucault 1977:ch. 1). The association of law and violence though rendered invisible in the bureaucratization of capital punishment is sometimes made visible elsewhere, for example, in the use of lethal force by police. It is, moreover, linguistically present in the ease and comfort with which we speak about enforcing the law. "Applicability, 'enforceability,' is not," as Derrida (1990:925) puts it,

> an exterior or secondary possibility that may or may not be added as a supplement to law. . . . The word "enforceability" reminds us that there is no such thing as law that doesn't imply in itself, *a priori*, . . . the possibility of being "enforced," applied by force. There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic."

death at the hands of the law and, in so doing, arouse anxiety and fear.[31]

The events those accounts describe suggest that law's violence bears substantial traces of the violence it is designed to deter and punish. In Foucault's words (1977:9), "it . . . [was] as if this rite that 'concluded the crime' was suspected of being in some undesirable way linked with it. It was as if the punishment was thought to equal, if not to exceed, in savagery the crime itself . . . to make the executioner resemble a criminal, judges murderers." The bloodletting which such acts signal strains against and ultimately disrupts all efforts to normalize them, routinize them, and cover their tracks. While execution itself is effectively hidden from public view, the spectacle of law's dealings in death may be (re)located and made visible, if it is made visible at all, in capital trials like that of William Brooks. Under the force of this relocation we focus on the case rather than the body of the "condemned" (Foucault 1977:9). As Foucault puts it (ibid.), "publicity has shifted to the trial, and to the sentence; the execution itself is like an additional shame that justice is ashamed to impose on the condemned man."

The Brooks trial, and others like it, expresses and embodies a deeply felt anxiety about the proper relationship of law and these three forms of violence. This anxiety is reflected in the scrupulousness with which capital trials are themselves organized, regulated, and reviewed. It is also reflected in the enormous efforts put into the rationalization and justification of the apparatus of punishment, efforts which serve to efface the violence of law by renaming it. As Robert Weisberg recently observed (1992:175–76):

> Anglo-American law has traditionally suffered a serious identity crisis over its awkward relation to violence. . . . Our system assumes that law is to hold a monopoly on violence, but this is a monopoly viewed as both necessary and discomforting. It is necessary because it is viewed as the alternative to something worse—unrestrained private vengeance—and it is discomforting because those who make and enforce the law would like us to believe that, though they may be required to use force, force is somehow categorically distinguishable from violence. . . . [T]he efforts of modern jurisprudence to finesse or deny the role of violence have not ceased.

In all capital trials the juxtaposition of narratives about violence is disquieting if not destabilizing. This is especially true of the juxtaposition of the narratives of violence outside law with the linguistic representation of law's own violence. In

[31] A recent story about the execution of Robert Alton Harris reported that "According to several witnesses Mr. Harris appeared to lose consciousness after about one and one-half minutes although his body continued a series of convulsive movements and his head jerked backward several times" (Bishop 1992; see also Sarat & Vidmar 1976; Johnson 1990).

these moments putting law's violence into discourse threatens to expose law as essentially similar to the antisocial violence it is supposed to deter and punish.[32] Benjamin (1978:286) argues that "in the exercise of violence over life and death more than in any other legal act, law reaffirms itself. But," he continues, "in this very violence something rotten in law is revealed, above all to a finer sensibility, because the latter knows itself to be infinitely remote from conditions in which fate might imperiously have shown itself in such a sentence." The violence of law itself threatens to expose the facade of law's dispassionate reason, of its necessity and restraint, as just that—a facade (Sarat & Kearns 1991b:269) and to destabilize law by forcing choices between the normative aspirations of law and the need to maintain social order through force (see *McCleskey v. Kemp* 1987; Cover 1975).[33] Violence threatens to swallow up law and leave nothing but a social world of forces arrayed in aggressive opposition (LaCapra 1990:1065). Where violence is present, can there be anything other than violence? This question puts enormous pressures on events like the capital trial to demonstrate and affirm the difference between the violence of law and the violence that law condemns.

Here, then, is the site of the most intense efforts to finesse and deny the role of violence in law, to mark the differences between violence beyond law's control and that which law itself dispenses, and to transform law's violence into legitimate force. Capital trials are occasions for overcoming doubt and regaining stability. The cultural resources for doing so are both internal and external to law itself. Random, unnecessary, irrational violence is vividly portrayed. While the violence outside the law is unnecessary, irrational, indiscriminate, gruesome, and useless, law's violence, the violence of the death penalty, is described as rational, purposive, and controlled through values, norms, and procedures external to violence itself. In capital trials, the force of law is represented as serving common purposes and aims against the anomic savagery lurking just be-

[32] See also Camus (1957). The imperatives of violence may be so overwhelming as to distort and destroy prevailing normative commitments. Two powerful examples are provided by Justice Powell in *McCleskey v. Kemp* (1987:1756) (holding that statistical evidence of racial discrimination may not be used to establish *prima facie* case of discrimination in death penalty cases), and by Justice Rehnquist in *Payne v. Tennessee* (1991) (devising new understanding of the bindingness of precedent to overturn two decisions forbidding the use of victim impact information in death penalty litigation).

Unfortunately, except in the utopian imagination, there is no symmetry in the relation of law and violence. Law never similarly threatens violence. Even when we realize the way law itself often exaggerates the threat of violence *outside* law, we can never ourselves imagine that law could ever finally conquer and undo force, coercion, and disorder; its best promise is a promise to substitute one kind of force—legitimate force—for another.

[33] "Force is disdainful of reason; it pushes it aside; it takes over completely. Reason and force have no way to share control of human agency" (Sarat & Kearns 1991b:269).

yond law's boundaries (Jacoby 1983; Rieder 1984).[34] Elaborate rituals and procedures, "super due process," give evidence of the care and concern with which law traffics in violence. The case of the condemned is treated with a seriousness equal to, if not greater than, any other in law. Thus the procedures and purposes of law are emphasized while its instrumentalities and wounding effects are kept in the background.

Externally, law draws upon cultural symbols of race and danger. Law's violence is, thus, "our" violence against "them" (Higginbotham 1978). As Justice Powell reminded us in *McCleskey* (1987:1778), the racialization of capital punishment and its disproportionate use against black men and especially those who kill white victims is not sufficiently disturbing in this culture to be "constitutionally significant." It is the allegedly civilizing violence of white order against savage disorder. Thus in the Brooks trial and in others like it, the price paid for such efforts to alleviate anxiety is very great. In addition to the actual violence which is all too often unleashed and the linguistic violence done in the ritual naming and in the process of rendering law's violence abstract, racialized social conventions—as well as flat narratives of purity and danger, responsibility and excuse, and innocence and guilt—are regularly reaffirmed.

Yet the anxiety which surrounds the violence of law is not put to rest. Capital trials place several narratives of violence side by side, one a narrative of violence which has already taken life, one a narrative of abuse and poverty which has shaped another life, and one the story of a prospective killing. While the first is intended to justify and strengthen the last, the last stands as an internal reminder of the artifice and artificiality of the very distinctions on which law's anxiety-alleviating legitimacy depends. Each narrative of lawless violence—whether of the kind that Brooks did or the kind that he suffered—is a reminder of the failure of law's own violence to guarantee security. Each narrative of lawless violence reminds us that law's violence constitutes us as anxious, fearful subjects (Dumm 1990) caught between a fearful aversion to the former and a fearful embrace of the latter.

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[34] As Justice Stewart put it in his concurring opinion in *Furman v. Georgia*, (1972:309), "The instinct for retribution is part of the nature of man and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."

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