

American Roulette: The Social Logic of Death Penalty Sentencing Trials. By Sarah Beth Kaufman. Oakland, CA: University of California Press, 2020. 260 pp. \$29.95 paperback

Reviewed by Paul Kaplan, San Diego State University in San Diego, CA

American Roulette is a very good book, smart, easy to read, and chock full of incisive ideas about the US death penalty in the twenty-first century. Kaufman's key contribution is her method: observing real-live capital penalty phase trials. These fraught phenomena represent a small but important part of the death penalty's tiny part of the criminal justice system, but they carry huge cultural weight. As recently as July 31, 2020, Boston Marathon bomber Dzhokar Tsarnaev's death sentence was overturned, and it was covered by the national news. As Kaufman's mentor David Garland has prominently said, the main action of capital punishment in the United States is discursive—gazillions of words flow about executions in America but America almost never executes anyone. Because of its rarity compared to America's sprawling carceral system, it has significance to no more than a few thousand people in the country. There is something peculiar about how much hot air is expended on capital punishment compared to its actual occurrence. As much scholarship has shown, its continued existence must derive from something other than commonsensical criminal justice purposes such as deterrence or retributive justice.

Of course, the death penalty matters a lot to those involved: defendants, their loved ones, jurors, lawyers, and most of all “co-victims,” the parents, children, aunts and uncles, and friends of the people killed by capital murderers. Kaufman devotes a major part of the book to this last group, and it is the best part of her analysis. If one is able to think about co-victims in capital cases coolly, it becomes obvious that they are a special interest group with disproportionate power. There is almost no chance that the person who killed their loved one will ever be executed, yet the legal system devotes extravagant resources to prosecuting the killer, ostensibly “for” the co-victims. To my knowledge, there has been very little research of any kind on co-victims, and Kaufman's observations of their courtroom performances is fascinating and makes an important contribution.

Kaufman refers to co-victims as “Mourners in the Court,” showing how the trial serves as highly legitimated, formal, and ceremonial space for murder victims' families to express mourning and be treated with deep respect, compassion, and seriousness. In many cases, this kind of treatment is unusual for

co-victims, who frequently come from similarly oppressed cultural scenes as the defendants across the aisle. Everyone in the room cries when co-victims talk about their lost relative, even the defense lawyers (174). As Kaufman makes clear, these scenes have spectacular power that must be seen and heard to be understood. Studying the race-effect empirically or identifying hegemonic narratives in trial transcripts will not tell us why the death penalty persists in the United States. Being in the room with co-victims might.

Racist hegemonic norms matter a lot, but as Kaufman shows, they have to be instantiated in some fashion, and it is mostly through co-victims' spectacular mourning that this takes place. Despite the efforts of the best capital defenders, the death penalty specializes in simple-answers-to-complex problems. The narratives that tend to resonate with everyone associated with capital cases, including many of those defenders, boil down to a bad Black man deciding to kill a sympathetic victim for no good reason. This narrative is most powerful when co-victims retell it at its most simplistic and hegemonic: "The victims whom I observed as most successful in their performance of mourning conform to heterosexual, middle class, Western norms" (183).

There are other interesting insights in *American Roulette*, such as how the death penalty institution, dominated by prosecutors, insidiously winnows potential capital jurors down to panels of "punitive citizens," who are primed to convict and sentence defendants. This process is, again, better explained by Kaufman's observations than by alternative such as law review studies of *voir dire* jurisprudence. Her analysis here illuminates the hegemonic nature of prosecutorial power in its account of how prosecutors use *voir dire* to show jurors how to appreciate aggravation and dismiss mitigation (106). Capital defenders try to counter this by identifying jurors who might have the backbone to stand up to 11 others and cause a coveted mistrial. The task for capital jurors is notoriously thorny—"weighing and giving effect to" aggravation and mitigation is the kind of cognitive challenge that, if taken seriously, is probably beyond human capability, as the US Supreme Court suggested in *McGautha v. California* (1971) (see also Culbert, 2007). Kaufman's observations make this clear as even intelligent death penalty lawyers sometimes lose the thread and find themselves confusing jurors (109).

When capital defenders are able to make sense of the horrible mess they hope to explain, they must then somehow convince jurors to make a "herculean shift" (122) in their perceptions of human behavior in order to see the defendant's actions in context. This effort involves calling on an expert witness to try to explain how human beings make bad decisions, given a particular

individual's background. This would be hard to do under any circumstances but becomes almost grotesque (according to prosecutors) when the decision made was to kill. As Kaufman shows, the best way to understand this process is to watch it in-person in real time. According to Kaufman, the interactions between the lawyers, witnesses, defendant, and jurors might be just as important as the words uttered by the actors. In this part of the book, Kaufman shows how the dynamic between a quietly confident attorney and an avuncular expert witness enabled the witness' story of "risk and protective factors" in the defendant's makeup to make sense for mercy. She contrasts this with an awkward and stunted interaction from a different case, in which the witness conveys almost the exact same story. In the former case—with objectively more horrible circumstances and more victims—the jurors voted for life; in the latter case—with a single victim who the defendant did not himself kill (his involvement was peripheral), the jurors voted for death. This disjunction in outcomes is why Kaufman calls the death penalty American Roulette.

As good as Kaufman's trial observations are, the first third of the book (Part I) feels beside the point. This section comprises a discussion of forces that shape capital trials, such as their position in relation to the (much) bigger picture of criminal justice, some background on Victim Impact Testimony, and the courtroom workgroup, which Kaufman calls "the capital sentencing field," for some reason. Much of this could be considerably trimmed. In fact, I found the last section of Part I superfluous. It is not necessary to understand Bourdieu's concept of *habitus* to know that death penalty trials are performed by specialized actors (the courtroom workgroup) to a special audience (jurors). Kaufman is a good writer, so this section is okay, but chances are that most readers will know enough about the death penalty that all of Part I could be reduced to one short chapter.

Another problem is the title. *American Roulette* is not so much about arbitrariness as it is about the dynamics between the actors in the drama. And what is more, the factors that influence these dramas are not so much arbitrary as they are ideological. The race, class, gender, and competence of defendants, victims, lawyers, and judges are not comparable to spinning chambers in a revolver. Kaufman's insight is not that defendants are unlucky when they are Black and their lawyer has been an intellectual and emotional genius to prevent a death sentence. Rather, the point is that the complex ideological systems that conspire to put Black men on death row—parts of which occasionally divert to keep them *off* death row—are acutely on display when observed in a trial. It is impossible to *predict* which of thousands of homicides might result in a death sentence or execution, and we thus say

that the death penalty is arbitrary. But once a homicide has become a capital trial, the obfuscation of scale has winnowed, and we can see hegemonic knowledge about race, class, and gender operating through actors in a tragic human drama. This is not roulette.

I have written before that if we want to learn about what causes the death penalty, the answer will not be found at end stages, but rather at the point of capital *charging* (Kaplan 2017). As Kaufman discovered (34), this is currently a practical impossibility because prosecutorial decisionmaking is a guarded secret. Little is known about how or why prosecutors make any decision, let alone about homicide cases. This is actually rather scandalous because there is a *strong likelihood* that the same ideological forces we can see flowing through the actors in capital trials are also at work at the front end of the process. Until we have research on capital charging, studies of actual trials like Kaufman's are most welcome.

References

- Culbert, Jennifer. 2007. *Dead Certainty: The Death Penalty and the Problem of Judgement*. Palo Alto, CA: Stanford Univ. Press.
- Kaplan, Paul. 2017. "Comment, *Executing Freedom: The Cultural Life of Capital Punishment in the United States*, by Daniel LaChance." *Social Justice* 44: 133-66.

* * *

Stranger Danger: Family Values, Childhood, and the American Carceral State. By Paul M. Renfro. New York: Oxford University Press, 2020

Reviewed by Daniel LaChance, Department of History, Emory University in Atlanta, GA

"If you dare to prey on our children, the law will follow you wherever you go," President Bill Clinton proclaimed at the 1994 signing ceremony for Megan's Law (qtd. on 210).

With its requirement that states disseminate information on convicted sex offenders to the public, Megan's Law was part of a wave of legislation in response to "stranger danger," the widespread fear that American children were vulnerable to abduction, sexual abuse, and murder by strangers. Beginning with Etan Patz's 1979 abduction from a New York City street corner, high-