

Homicide as a Sociological Transaction: The Use of Victim Precipitation at a Criminal Trial

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Abstract

This research examines the role of the sociologist as an expert in cases of homicide. The authors argue that sociological knowledge can be particularly important at trial by presenting an interpretation of the social context of a crime. This point is illustrated by describing several case studies of homicides and by using theories and models supporting victim precipitation as an explanation of the crime. Three interacting constructs of victim precipitation are described in which to frame a homicide: 1) the behavior of the victim as it encouraged the specific offender/victim interaction; 2) the level of deviant or criminal behavior in which the victim was engaged; and 3) the level of risk in the lifestyle of the victim.

Introduction

Sociologists are regularly sought as expert witnesses in the courts (Jenkins and Kroll-Smith 1996; Radelet 1987; Rose 1967; Thoresen 1993; Wolfgang 1974). This paper examines the role of sociologists as expert witnesses in homicide cases. The first author of this paper has worked as a sociologist in over 100 capital murder cases in Louisiana. We contend that the sociologist can be particularly important for the defense by presenting an interpretation of the social context of the murder. This point is illustrated by the use and extension of the concept of victim precipitation as a mitigating factor of homicide. Routine activity/lifestyle theory is offered as support for the concept of victim precipitation as an explanation of homicide. We also extend a classification scheme (Meuller 1990; Polk 1997; Sobol 1997), which consists of four victim classification categories, based on the degree of victim involvement. Several cases of homicide, on which the first author has worked, are framed within different levels of victim/offender interaction. Finally, the applicability of viewing homicide as a sociological transaction rather than as a study of offenders and victims is addressed.

The Role of the Sociologists as Expert in Cases of Homicide

Expert witnesses are hired by defense

attorneys to develop mitigation for the sentencing (penalty) phase of capital murder trials. Their responsibility in capital cases is to develop a social history of the defendant that will serve as mitigation (Jenkins and Kroll-Smith 1996; Radelet 1987). Mitigating circumstances are the most important elements of the penalty phase of a trial for the defense (Dayan 1991). Mitigating circumstances are facts that do not justify or excuse an action but can lower the amount of moral blame, lower the criminal penalty for the action, and can serve as a determining factor in life or death decisions (Oran 1983). Thus, the key element in the penalty phase is to explain the criminal behavior of the defendant so that he or she will not be sentenced to death.

In the first phase of a capital murder trial guilt is determined. If the defendant is found not guilty or guilty of a lesser offense, the trial ends. If the defendant is found guilty of a lesser offense, the judge will impose a sentence at a hearing, on the other hand, if a defendant is found guilty of capital murder, the jury must decide on a punishment (Charvat 1996; Hall and Brace 1994). This represents the second phase and involves another trial, but with the same judge, jury, and attorneys in the same setting¹. In Louisiana, the penalty phase cannot begin sooner than 12 hours after the guilt phase verdict, although the judge can allow a longer period of time,

but generally the second phase starts the following day. Due to these time factors, preparations for both the penalty and guilt phase are concurrent. Any matter the judge regards as relevant to sentencing may be offered as evidence in the second phase, and the second phase must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present arguments on whether or not the death penalty should be used (Lewis and Peoples 1978). In Louisiana, the jury weighs aggravating and mitigating circumstances before imposing either a sentence of death or life in prison without parole.

The U.S. Supreme Court has held that courts must consider any and all relevant mitigating evidence that is available. Louisiana law, although recognizing any relevant evidence as plausible mitigating testimony, has created a general classification of factors (West 1998). Any aspects of the defendant's life which demonstrate that he or she is not deserving of the death penalty could be considered mitigating circumstances.

The prosecution, on the other hand, presents aggravating circumstances. Generally, aggravation includes actions or occurrences that lead to an increase in the seriousness of a crime but are not part of the legal definition of that crime (Oran 1983). These are the intentionality of the act², the propensity of the murderer to kill again and the heinous, atrocious, and cruel nature of the murder. Debates about sentencing typically focus on two adversarial positions: the circumstances of the crime versus the social psychological qualities of the client (Brodsky 1991; Dayan 1991; Najmi 1992; Thoresen 1993).

The expert/sociologist explains how sociological factors have, at least partially, shaped the circumstances of capital murder (Rose 1967). The utility of sociology in a murder case may be clearest in the penalty phase of the trial, but the data obtained and delivered by the sociologist have uses other than in the penalty phase. It can be used to negotiate a plea so that a trial never takes place or at a sentencing

hearing for a conviction of manslaughter which has a range of sentences rather than a determinant sentence. Such data can be used to help shorten the sentence of the client. The sociologist's report can be filed in the record to be used at later hearings to reduce the sentence of the client. Sociological data can be used on appeal to convince the reviewing court of the questionable moral appropriateness of the death sentence in the client's case, or that the death sentence of the client is disproportionate (Dayan 1991).

The major focus in this paper is the contention that sociological knowledge has and should continue to inform sentencing decisions in capital cases and other cases of homicide where appropriate. Key among the knowledge that might be useful is the concept of victim precipitation. Victim precipitation illustrates the arguments that place a defendant in social and cultural worlds that, even if they do not necessarily "explain" or "justify" grievous and heinous acts, absolve the murderer of a sufficient amount of guilt to spare his or her life or perhaps lessen the sentence if presented at the guilt phase of the trial or at trials for manslaughter or second degree murder.

The concept of victim precipitation can be counted on to cause controversy because it poses a counterintuitive notion, that a person was engaged in behavior that would bring about his or her own death. But, victim precipitation can be shown to be relevant in some cases of homicide. One of the circumstances for capital murder in Louisiana is when the offender kills while engaged in the distribution, exchange, sale, or purchase of a controlled dangerous substance. In such circumstances it is quite likely that the victim was also involved in this encounter and consequently contributed to his or her death. We suggest an interpretation of the social context of the crime in a manner that can enable judges and juries to make sense of the interactions between defendant and victim. By focusing on the specific circumstances the sociologist also avoids the criticism directed at trends rather than individuals. The law abhors abstract ex-

cuses, but indeed is keyed toward concrete explanations.

The Theoretical Grounding of Victim Precipitation

The expert who testifies about victim precipitation must be prepared to theoretically ground the data (Glasser and Strauss 1967). The defense expert must be prepared for any possible questions the prosecution may pose. In essence, the expert must be over-prepared. The following is an extensive review of the literature on the concept of victim precipitation and a somewhat brief exploration of routine activity theory and the lifestyle approach to the study of victimization.

Routine Activities and Lifestyle

Although homicide is a complex and dynamic phenomenon (Sobol 1997), there are basically two approaches to the study of homicide (or any violent crime). These may be viewed as either a study of what causes criminal behavior or of what causes victimization. Part of the emphasis on victimization has been on the situational factors that accompanied a particular crime. One of the most accepted perspectives accounting for victimization is derived from the routine activity and lifestyle approaches. These two theories developed during the same period and have considerable overlap. Both theories assume that the lifestyles and behavioral patterns of some individuals increase their potential for being victims, primarily because they are at risk for contact with offenders (Bennett 1991; Cohen and Felson 1979; Cohen, Kleugel, and Land 1981; Felson 1987; Messner and Blau 1987).

There has been a cache of research on the theory of deviant places (Stark 1987). Research findings support the view that there are certain "hot spots" where crime is more likely to occur, and that people whose activities take them routinely into these "hot spots" will greatly increase their risk of being victims of crime (Kennedy and Forde 1990; Miethe and Meier 1990; Miethe, Stafford, and Long 1987; Roncek and Maier 1991).

Lifestyle theory stresses that the lifestyle

of some people puts them more at risk for becoming crime victims; you are more likely to become a victim if you spend a lot of time with people who themselves commit high numbers of crimes. People who spend a lot of time in bars or in the street increase their chances of becoming victims. Research on robbery, auto theft, rape, and other sexual crimes in one city demonstrated all such crimes occurred in only five percent of the locations, while 95 percent of the places in the city were free of any of these crimes in a one year period (Sherman, Gartin, and Buerger 1989). Crime rates in residential areas indicate that those blocks in which bars or taverns are located have significantly higher rates of every type of index crime (Kennedy and Forde 1990; Roncek and Maier 1991; Stahura and Sloan 1988).

The routine activity approach is an attempt to explain why it is that some people become victims of crime. The foundations of the routine activity perspective are in human ecological theory (Hawley 1950). It was Hawley's idea that human activities are performed not only in a particular territory or area, as is criminal victimization, a point recognized as early as 1929 (Shaw et al. 1929), but also at a particular time (Hawley 1950). The convergence of these interrelated factors, temporal and spatial components, is fundamental to the understanding of the routine activity perspective.

Routine activities theory argues that some people engage in routine activities that increase their risk of victimization. Essentially, the approach assumes that it is a change in the routine daily activities of victims that affects an increase or decrease in victimization. For victimization to occur three phenomena must occur simultaneously: 1. the presence of an attractive target (person or property); 2. the presence of a motivated offender; 3. the absence of people who might observe or stop the crime (guardianship) (Cohen and Felson 1979). An increase in victimization is anticipated to occur only when there is a convergence in both time and space of motivated offenders and suitable targets in the absence of capable guardians.

Accordingly, a decrease is anticipated when any one of these criteria is not met. Implicit within routine activities and lifestyle theories is the idea that some individuals increase their chances of becoming crime victims by committing crimes themselves, in essence the conception of victim precipitation (Amir 1971; Sampson and Lauritsen 1990; Wolfgang 1958).

Victim Precipitation

In criminology, one of the recurring concepts that cues much of the research on homicide is the idea that victims often precipitate their own deaths by playing an antagonistic role in the events preceding the fatal encounter (Mann 1996; Polk 1997; Sobol 1997). Wolfgang (1958) used the term victim precipitation to describe a type of homicide (or other acts of violence) in which the victim took some active role (striking the first blow or making the initial threatening gesture) in their own victimization.

Up to one-half of all criminal homicides may be provoked by victims who initiate physical violence...The prevalence of victim precipitation in murder and assault cases is clearly contrary to the popular image of victims as totally innocent bystanders to predatory attacks (Miethe and McCorkle 1998:28).

Many homicides take place between individuals who have had prior social interaction with each other, although victim precipitated killings involve more than prior interaction between the two parties. In the cases designated as being victim precipitated, the victims induced their death through their own menacing actions (Amir 1971; Polk 1997). Violence from this perspective is to be understood as an outcome of action and responses by both parties and not merely those of the killer. Calculating the number of victim precipitated homicides is an arduous task, because it requires intimate knowledge of the interaction before the killing took place. Since one of the participants is dead, reconstruction of the event must rely on personal accounts by the killer and by any available witnesses. Estimates have nev-

ertheless been made and range from 25% to 50% of homicides (Wolfgang 1958). Fattah (1991) offers a definition of victim precipitation where the victim's actions were a necessary part of the event.

A form of overt, aggressive, and provocative behavior by the victim that triggers the action of the criminal. It is an actualizing factor; the stimulus that elicits the violent response...had it not been for the precipitating actions of the victim, the victimization would not have occurred against that particular victim in that particular situation (Fattah 1991:295)

Fattah (1991) also describes certain behaviors by the victim which may not attain extreme levels of precipitation but which may still play a major or a minor causal role.

...victim-precipitation is usually (and justly) confined to conscious, deliberate, and active behavior; the functional role of the victim may be in the form of...acts of negligence, carelessness, recklessness, and imprudence, which create a temptation or opportunity situation or make it easier for the potential offender to commit a certain crime, are contributing factors, even though they may not fit a narrow operational definition of victim precipitation (Fattah 1991:297).

Earlier works on victim precipitation have been primarily concerned with studying the behavior of the victim. Other researchers (Meuller 1990; Polk 1997; Sobol 1997) have suggested a continuum of victim precipitation based on the level of involvement of the victim. They have combined much of the victim precipitation perspective into a practical application. Their model of victim precipitation offers four categories of victims based upon an increasing level of responsibility for the event. These four categories are: Innocent Nonparticipating, Noncriminal Facilitating, Criminal Facilitating, and Criminal Precipitating. Luckenbill (1977) and others (Kennedy and Sacco 1998) have suggested a broader approach; not only looking at the actions of the victim but the offender as well. This approach is

best exemplified by the concept situated transactions (Luckenbill 1977). Luckenbill characterized homicide as a product of a sociological transaction. The victim ends up dead because of what goes on between the actors involved in the event(s).

Concerns about defining victims versus offenders and the role that each play in precipitating the crime event raise the need to address the event in a way that involves looking at more than what one person does to another. Using this approach, we emphasize the study of what goes on between the participants rather than what any one of them does. This approach allows us to account not only for offender and victim actions but also for the behavior of third parties in addition to the situational factors that may influence the outcome of the interaction. The idea of a situated transaction allows us to look at social interaction in terms of a play, with designated roles, scripts to be followed, and scenes to be designed (Kennedy and Sacco 1998:106).

Understanding homicide from this perspective means that it can be better understood as a drama in which actors have roles and perform associated behaviors (Goffman 1959).

In an attempt to frame this dramaturgical analysis (Goffman 1959) of homicide, we offer three constructs of homicide victims, which the expert/sociologist can use to begin to frame the data gathered. Also offered are examples of a continuum of behaviors within these constructs. The three constructs are: 1. the behavior of the victim as it encouraged the specific offender/victim interaction (no interaction with the offender on any level-sarcastic or derogatory verbal remarks directed at the offender-verbal threats-physical threats); 2. the level of deviant or criminal behavior in which the victim was engaged (normal-deviant-criminal); and 3. the level of risk in the lifestyle of the victim (cautious-risky-risky without guardianship). The first construct is the most important because threatening behavior is the essence

of victim precipitation and it most closely approximates the legitimate concept of self-defense. The second construct is more important than the third because being involved in deviant or criminal behavior indicates recklessness or imprudence on the part of the victim. Indeed, the third is a precarious construct, because it involves acceptable behavior. These constructs should also be viewed as interactive. It also should be noted that although the specific dynamics of each crime are different, we are attempting to fit them into categorical constructs. We also realize that these constructs will not always provide mutually exclusive dimensions to categorize homicides. We recognize these limitations, but indeed, feel it is a workable framework.

For example, a woman who sells or exchanges sex for crack cocaine has a deviant, perhaps criminal lifestyle. Each day she runs a very high risk of being involved with potential offenders. Her specific actions with an individual can discourage or encourage events leading to her being a victim. If she gets in a car and goes to a remote place with someone she meets in a crack house she is facilitating the potential for violent behavior. If she gets into an argument with this individual in a remote place she promotes the potential for violence. The intersection of lifestyle and behavior occurs on the interactional stage. The prostitute leads a high risk lifestyle and is engaged in an illegal activity (in most places). The prostitute's potential for becoming a victim is augmented because sex takes place in private, where guardianship is lacking.

The information for assigning a category to this sociological transaction is obtained by the sociologist during the gathering of data about both the offender and the victim. The lifestyle of the victim can be constructed from focused interviews with a broad sample of individuals who know of the victim's behavior. These are the same methods which can be used to gather defendant information. Behavior at the crime scene can only be obtained from the defendant and any witnesses to the crime or events surrounding the crime. Although

criminals have a vested interest in distorting the reality of their commission of a particular crime, most researchers have found interviews with offenders to be excellent sources of data regarding criminal motivations for and the situational dynamics of the crime (Miethe and McCorkle 1998). Police crime scene evidence can also aid in the reconstruction of this drama.

Some Cases of Homicide

The following five case studies of homicide serve as a means to illustrate the applicability of the constructs of victim precipitation. In the first four the charge was capital murder; in the fifth case study the charge was second degree murder. In each case there is some degree of victim precipitation, albeit at significantly different levels.

1. The offender was arrested for the murder of a man who was searching for a homosexual encounter at a rest stop located on an interstate highway. The victim and the offender were strangers but each had engaged in this type of behavior before. The victim had even been warned by friends of the dangerousness of his behavior. The offender had "earned" money through homosexual encounters in the past. The victim and offender met at the rest stop and then drove to another location, where the victim was robbed and beaten to death. The victim had a risky lifestyle, was facilitating violence by going to a location where no one could stop the crime and was engaging in a deviant activity. The homicide was the direct result of being involved in some deviant activity, but the victim did not threaten or physically attack the offender. The victim facilitated his death through his deviant behavior.

2. The offenders were involved in the killing/robbing of two out-of-town drug dealers. The two victims were in town to buy drugs. Their deaths were planned. The victims were shot and killed in a car as they were being driven by the two defendants to the alleged drug deal. The victims were also robbed of a large amount of money. The victims were engaged in an illegal activity. Their criminal behav-

ior facilitates their becoming victims, in that, the homicide was the direct result of being involved in some criminal act. Like case one, the victims did not threaten the offenders. But these victims had a history of robbing other drug dealers; this creates a sort of retaliatory aura. It can also be considered a threatening behavior, albeit a general threat, to all people with whom they engage in drug deals.

3. The offender waited in hiding for the owner of a small cafe to leave his business after closing. The victim, as he did every day, left the store in the early hours of the morning alone, and with the reputation for having large sums of cash in his possession. The cafe was located in a high crime area. The victim was robbed and killed. The victim was facilitating violence by leaving his business alone at a time when no one could stop the crime. This victim did not take standard crime prevention measures and consequently placed himself in a vulnerable position. If the victim had hired Wells Fargo to pick up his cash at the end of the day he would not have been a target for robbery. He has a somewhat risky lifestyle because he operates a late night restaurant in a high crime area. He is not engaged in criminal and/or deviant behavior. But the victim indirectly encouraged interaction with the defendants by having large sums of cash with him without guardianship.

4. The offender was under the influence of alcohol. He attempted the robbery of a small discount store. The robbery took place at closing. The clerk was a woman and the only person in the store. The offender attempted a robbery with no weapon. After getting the money from the register the offender attempted to lock the victim in a storage room, but the clerk grabbed a knife from a sales rack and stabbed the offender several times. The offender took the knife from the woman and killed her with the weapon. The victim encouraged the homicide by attempting to subdue the offender. The victim was a law abiding person who advanced the homicide by her unnecessary risk taking. This can include a wide range of self-defense measures of victims including vic-

tims of lesser crimes such as theft who elect to arm themselves and attack the criminal, hence prompting the offender to expand his or her actions. The clerk facilitated her victimization.

5. The offender entered a bar under the influence of both drugs and alcohol. Once in the lounge he saw a man who owed him money. He confronted the man who acknowledged the debt, but the victim told the offender to "go fuck yourself"; laughed at him and told him to get out before "I kick your ass." Everyone in the bar saw and heard the confrontation. The offender suffered public humiliation and an argument began. The victim was shot by the offender and then the offender took money from the wallet of the victim. The offender had a history of violent behavior while under the influence of substances. He was also assumed to always be armed with a gun. This victim did not initiate the interaction, he merely responded verbally to the offender's initiation, and was not involved in anything criminal or even deviant. He is not the aggressor in the interaction, does not commence the violence, or the interaction, but directed a derogatory verbal remark and threat at the offender. The victim encouraged the behavior of the offender through a verbal threat to an individual whom he knew would respond to the challenge violently.

Victim precipitated homicides are most likely to occur when those involved know each other and are attuned to each other's personality. Tensions and mutual aggravations may reach the point where both personalities see reconciliation only through violence (Curtis 1974; Wolfgang 1958). In a sense, this type of victim makes the greatest contribution to his or her own death.

Cases one, two, three and four are similar in that capable guardians were lacking. In case five it is feasible that the victim wrongly assumed that there was a high level of guardianship in the bar. Only in case 5 were there witnesses, otherwise the reconstruction of the crime scene was based on the statement of the defendant and the crime scene evidence. In four (1,2,4,5) of these cases the defense could

have benefited from the presentation of victim precipitation in some form. Cases one and two are significantly different. The victim in case one was involved in a minor criminal act, rather than serious criminal behavior as is case two. Case three involves carelessness, but the victim bears no responsibility for the crime. Case three has the least amount of victim precipitation. Of the five cases, case four has the highest level of victim precipitation. In cases four and five the idea of victim precipitation is weakened because neither of the victims was engaged in deviant or criminal behavior. In case four the victim was guilty of the violation of formal norms dictating behavior in a particular situation; in case five the norms the victim violated were informal. In descending order of victim precipitation these cases would appear: 4,2,1,5,3.

We must stress that the offender is always to blame for the murder, the victim is never to blame, however the causal sequence behind some homicides begins with certain actions the victim(s) initiates or encourages. Blame and cause should be kept separate. Homicide victims are not to be blamed for their violent deaths at the hands of another. On the other hand, a great deal of evidence suggests that in a large percentage of all cases of criminal homicide, the conduct of the victims actually contributed to their deaths. Such contributions exist on a continuum from a direct causal action, such as a physical threat to lesser contributions such as taking certain risks (Fattah 1991). Also being involved in a criminal activity does not inherently represent victim precipitation, but on a continuum it is closer to victim precipitation than law abiding behavior.

We have described the crimes in terms of the three constructs of victim precipitation and have not offered a level of victim precipitation on each case. In that all crimes are different, this would serve no practical purpose and would ultimately be subjectively assigned and open to interpretation. Indeed, there is no way to absolutely place these crimes within categorical levels of victim precipitation. These constructs should be seen as frames

with which to situate, discuss, and perhaps mitigate penalties for a particular crime.

Discussion

We have suggested victim precipitation as an appropriate classificatory scheme to facilitate defense/mitigation in some cases. The legal basis for presenting this sociological knowledge during the guilt phase of the trial is that it demonstrates "a degree of guilt" rather than mitigation. During the penalty phase of a capital murder trial its legal appropriateness has already been established.

There is growing evidence that many homicide victims precipitate their own deaths (Mann 1996; Miethe and McCorkle 1998; Sobol 1997; Wolfgang 1958). In many cases it is not possible to accurately deduce the level of victim precipitation. Most homicides are an outcome of action and responses by both parties and not merely those of the subsequent killer. The reconstruction of the event is difficult because doing so requires intimate knowledge of the interaction before the killing took place. Unless there are witnesses, the defendant is the only source of information regarding the immediate interaction which led to the crime.

There are a number of practical problems which emanate from the use of the concept of victim precipitation, the most significant of which is the offensive view that it may convey to the juror. However, it is the most useful guide with which to examine the interaction between offenders and victims (Polk 1997). Experts should develop such a focus first for understanding the homicide and subsequently for use at trial, if appropriate.

Victim precipitation has been most successfully used in the battered woman's defense strategy. This defense requires gathering data from a broad sample of individuals who have knowledge of the offender/victim relationship, in order to reconstruct the event. Ironically, this data will usually reveal that the victim has justified his history of battering with his own version of victim precipitation. The first author has worked on two cases of homicide in which husbands have murdered

their wives. Each gave accounts of victim precipitation; neither argument was persuasive. Both experience as an expert and the literature suggest that batterers almost always cite provocation (Jenkins 1996; Westervelt 1998).

The sociological character of criminal acts emanates from the fact that they involve interaction between human beings. Criminologists should be interested in more than just the motivation of the offenders or the actions of the victims, although these are important ingredients to any violent crime.

Criminologists should attempt to distinguish between a victim's responsibility for crime prevention and the offender's responsibility for crime commission.

In this paper we have presented another tool for use in mitigation. Whether or not it is good mitigation can only be confirmed by its usefulness in court. In the penalty phase all twelve jurors must vote for death if the defendant is to receive this ultimate sentence. If one juror of twelve is persuaded by expert testimony and subsequently refuses to vote for a death penalty then it was useful.

When hired as an expert in a capital case it may be several years before the case gets to trial, indeed many never get to trial. Among the other experts and attorneys, the sociologist has the most interaction with the family. During the course of this work the expert/sociologist comes to know the defendant and his or her family very well. Success renders an embrace from a mother who thanks you because her son will not be executed. Failure means another kind of meeting. This is not an academic exercise.

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Notes

¹ In some states the convicted offender may chose sentence by jury or judge.

² Although intentionality is part of the legal definition of the charge of homicide, the concept is subjectively applied in many cases. Intent is a subjective mental element of a crime. Lack of intentionality is always part of the defense strategy. The first degree (capital) homicide statute in Louisiana states the offender must have specific intent to kill and or to inflict great bodily harm while engaged in certain prohibited activities. Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or his failure to act (West 1998).



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