A life sentence for Zacarias Moussaoui

A triumph of American justice?

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On 3 May 2006, Zacarias Moussaoui who, according to the US government, was 'involved' in the 9/11 terrorist attacks and could have prevented them had he not lied to the FBI, was spared the death penalty by a jury sitting in Virginia. Comment on the case following the verdict, from both sides of the Atlantic, seemed to reach the quick consensus that a life sentence for the alleged '20th hijacker' was a triumph of American justice and a credit to the operation of the American legal system. Yet satisfaction with the verdict in this case, or admiration for the meticulousness of the process, is patently insufficient grounds to praise American justice in pursuit of the death penalty. But what brought the unlikely sentence of life and does this really allow us to feel more comfortable about American justice and the death penalty?

Zacarias Moussoui

It is very difficult to know how or why that jury of nine men and three women reached the decision they did. It could be that they were unconvinced that Mr Moussaoui played a significant role in the 9/11 operation or that they were swayed by a whole host of other things they heard. But one thing is certainly true, it's an extraordinary verdict. Most of the 'legal commentators' witnessing events unfold in the Virginia courthouse, situated just a few miles from the bombed and repaired Pentagon, were convinced that the verdict would be death. The only hope he had, many thought, was if the jury thought that a natural life sentence was a greater punishment for a man who seemed to crave the martyrdom that would come with his death. While Mr Moussaoui's execution would, arguably, have amounted to state-assisted suicide, none of the jurors thought denying him martyrdom sufficient to justify imposing a life sentence — according to the verdict form released by the court. It was something else that motivated this jury.

The hearing itself was basically a death-life trial. A jury was sworn to consider the question of punishment, having decided that Mr Moussaoui was 'eligible' for death in an earlier trial, and they were given two straight choices — a death sentence or a life sentence without the possibility of probation or parole, a natural life sentence. Failure to reach a unanimous verdict as to a death sentence required the imposition of a life sentence, but initial reports suggest that more than three jurors came out in support of the lesser sentence. Even so, acclaim for the U.S. system based on the actions of as little as three individuals is flimsy.

Each one of these jurors underwent questioning by both the defence and the prosecution and the judge was required to excuse those who would automatically vote for either a life sentence or a death sentence. In other words, all those jurors sitting believed in the death penalty, at least in an abstract sense, for someone who had killed. And they were confronted with the only man who has been charged in connection with the worst attack on American soil, an attack that took 3,000 lives.

Among the other evidence that the jury heard over six weeks were details of Mr Moussaoui's trip to the Khalden Al Qaeda training camp in Afghanistan, his association with Richard Reid the 'shoe-bomber', a voice recording from the cockpit of the hijacked United Airlines flight that crashed into a field in Pennsylvania, the testimony of over thirty surviving victims and victims' family members, and the details of his enrolment in a US flight training school. They also heard plenty of comment from Mr Moussaoui himself including outbursts of 'I am Al Qaeda' and statements that not only did he have 'no regret, no remorse' for the 9/11 attacks but wished it could be 11 September 2001, every day. Considering this evidence and the prosecution's exhortations to the jury to kill the man since 'there is no place on this good earth' for him, it's not hard to imagine why even Mr Moussaoui's own lawyers, to whom he refused to talk, thought he was looking at a death sentence.

But something else happened. No one will ever know what went through the minds of the jurors. It might be that the jury found insufficient evidence of Mr Moussaoui's involvement in the 9/11 attacks, beyond the defendant's own maniacal statements, to justify executing him; it might be that in the face of the barbarism of terrorism the jury sought to elevate themselves and the United States above commensurate retaliatory conduct; or it might be that the evidence of Mr Moussaoui's own upbringing and mental illness helped sway the jury. Most likely it is a combination of these things. Following the verdict, former mayor of New York City, Rudolph Giuliani, commented that he thought Mr Moussaoui deserved the death penalty but, nevertheless, he thought the case showed the strength of the American legal system. That cannot be right.

That a few jurors resisted the calls to execute Mr Moussaoui and so 'saved' his life while consigning him to

perpetual solitary confinement in a 'super maximum security' prison is not a strength of the system. It does speak volumes for the potential of human beings when presented with a fuller set of facts to reject calls for revenge and seek something else. And the case illustrates, through both stark contrast and direct comparison to the countless other death trials we hear so little about, the capricious and arbitrary nature of the death penalty that remains a source of constant shame to the United States.

The benefit of an explanation

Although at times the 42-page verdict given by the Moussaoui jury is convoluted and apparently self-contradictory, there are some clear messages in what the jurors found to be 'mitigating factors' in the case. For all but two of the 20 listed potential mitigating factors, less half of the jury agreed that they were present in Mr Moussaoui's case, and none of the jurors believed that eight others were present at all. Yet for two factors, nine jurors agreed. These both related to the circumstances surrounding Mr Moussaoui's upbringing: that he suffered 'an unstable early childhood and dysfunctional family' which resulted in him being placed in French orphanages; that his home life was 'without structure and emotional and financial support eventually resulting in his leaving home because of his hostile relationship with his mother; and that 'Zacarias Moussaoui's father had a violent temper and physically and emotionally abused his family'. Fewer members of the jury also found that Mr Moussaoui was subjected to racism as a youngster 'which affected him deeply', that his two sisters and his father all suffered from psychotic illness, and that his violent father eventually abandoned the family.

These factors clearly affected the jurors' decisions as to the correct punishment, and it these narratives which attempt to help jurors find some explanation for seemingly random and terrifying acts of violence that greatly reduce the chance of a death sentence. If we can be made to see the cruelty and turmoil that others have suffered and if we can, even for the briefest of moments, see what is was or is to be them, then we are far less likely to demand a harsh penalty.

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Of course, other factors are at play. For example, jurors, as they did in Moussaoui's case, sometimes consider the future dangerousness of the offender to be important even though a life-sentenced prisoner will in most cases die in prison. If the man before them has committed acts of violence in prison, jurors might sentence him to death rather than risk injury to a prison guard. Worse still, if a prisoner has attempted escape, this might also influence the jury.[1] But, generally, it is a question of retribution, pay back for abhorrent acts. This is amply illustrated by the Baton Rouge, Louisiana, case of Shon Miller whom I represented on appeal. Shon entered a packed church and shot his wife, young son, and a church worker and wounded several others. The local SWAT team found him holed up in a nearby shed shouting at himself (he was suffering a schizophrenic episode) and they stormed in. In the ensuing melee an officer 'accidentally' discharged his shotgun and Shon was shot in the back. He is now a paraplegic destined to spend the rest of his life in a wheel chair. Still, a jury sentenced him to death even though the chances of him escaping or committing further acts of violence are massively reduced by his condition.

And so, it is the defence attorney's challenge to convince that collection of twelve citizen jurors who believe in the death penalty that the easiest expression of their revulsion, fear, and desire for revenge is not appropriate despite the exhortations of the State and the community at large to return a sentence of death.

In most States, as in Virginia where Moussaoui was tried, the jury are provided with a list of aggravating and mitigating factors to assist them in reaching their decision. The aggravating factors, which take the jury down the path to a death sentence, include such things as the murder being committed for pecuniary gain, the murder being committed by a convict under a sentence of imprisonment, or the defendant knowingly created a risk of death or serious injury to more than one person. Even more vague aggravators include the murder being committed in an especially heinous, atrocious or cruel manner. The mitigating circumstances enunciated to

1. An extensive study of the factors capital jurors consider in reaching a life-death decision has been completed. The Capital Jury Project, initiated in the U.S.A. in 1991 by a consortium of university-based researchers with support from the National Science Foundation, conducted 3-4 hour in-depth interviews with 1,198 jurors from 353 capital trials in 14 states accounting for over three quarters of the death row population. For more information, see http://www.cjp.neu.edu/.

capital juries that pull them toward life include such things as the murder being committed while the defendant was under extreme mental or emotional disturbance, or the murder was committed by a defendant with a mental disease or defect. Finally, the juries are told that they consider any evidence in mitigation — a catch-all that might include an examination of the defendant's history and upbringing.

In reality, the people most likely to receive capital punishment are those who are dehumanised in the eyes of a jury; they can be labelled as 'evil' and, without empathy, killed. This lack of association is founded upon the act for which they are on trial and also the person they are perceived to be. For example, poor, black, young males rarely make it onto juries. Consequently, the defence are desperate to humanise the man on trial — desperate to somehow narrow the gap between him and those in the jury box — no easy task after the prosecution has finished its parade of photos of corpses grotesquely distorted by gunshot wounds, knife punctures, scratches, or, worst of all, sexual assault. But as important is the attempt to explain (*not excuse*) why the terrible act of homicide happened, an explanation of the divergence in life path between juror and defendant.

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The presentation of the evidence is the key. Merely telling a jury that the killer before them was abused as a child will not quench the thirst for the harshest of punishments. Tracy Hansen, a Mississippi Death Row prisoner to whom I became very close, was sentenced to death for the shooting of a Highway Patrol Officer during a routine traffic stop. Tracy suffered horrible abuse at the hands of his mother and her boyfriends, and spent most of his life before becoming a 23 year-old Death Row prisoner in foster homes, reform schools and juvenile detention centres. At his trial this was put before the jury. The same day they sentenced him to die. In affirming his conviction and death sentence the Mississippi Supreme Court remarked: 'Tracy Alan Hansen was born on 25 May 1963, and then began the rest of his troubles.'[2] Even that court, usually unmoved by such matters, thought it fit to acknowledge the horribly cruel life into which an innocent Tracy was born. Tracy was executed on 17 July 2002.

Too easily these 'claims' sound like excuses that anger juries and do nothing to sate their need for some reason, sense, or logic for apparently random acts of extreme violence. A sentencing jury must be made to understand what it means to suffer what the defendant has suffered and this can be done with better testimony and the guiding interpretation of expert witnesses.

In another case, the defendant, Scotty Thibodeaux, was convicted of stabbing to death his girlfriend and her mother (and then cutting off their breasts). There was clear evidence that he was sexually abused as a child. The man responsible for those rapes was in prison and agreed to testify, in prison denims and chains, as to how he raped Scotty as a young boy. The detail was almost too much to bear. Childhood photographs taken around the time of these rapes further illustrated the hell a young Scotty had suffered. He was sentenced to life without parole.

Capital juries rarely get to hear from the defendants, so it is important to present personal detail about them. Narrative testimony about relatively quotidian events can help a great deal if it illustrates broader defence themes. I have seen a favourite teacher's descriptions about their work in class, a teenage girlfriend's recollection of their first date, a co-worker's recounting of a favour done, work well and bring back some humanity. A prisoner's finding of religion can also show that their life may continue to be useful, especially in the Bible belt of the Deep South. On the other hand, insisting that Christian morality demands a life sentence will get you nowhere. I once witnessed a prosecutor telling a jury in Mississippi that Jesus was in favour of capital punishment because he was asked by the thieves crucified with him to let them down from their crosses. His failure to save their human bodies was, the argument went, evidence that Jesus supported the punishment. Mack Arthur King, the defendant, was sentenced to death.

Ultimately, the intent is to challenge the jurors, to make a death sentence impossible for a conscience to withstand, to simultaneously find the humanity in the man on trial and in those sitting in judgement. Convincing a jury that those found guilty of capital murder are more than dangerous detritus is possible, and one Louisiana case in particular illustrates this. Wilbert Rideau, a black teenager in the Jim Crow south, was sentenced to death in 1961 for the murder of a white bank teller following a botched robbery. The prosecution's case was that Wilbert took three tellers

2. Hansen v. State of Mississippi, 592 So. 2d 114, 116 (Miss. 1991).

from the bank to deserted woodland, he shot one who survived by playing dead, shot and stabbed another who died, and the third escaped by jumping in a bayou. Although his conviction was twice overturned over the next decade, he was reconvicted and sentenced to death by new juries before his sentence was commuted to life when the U.S. Supreme Court briefly banned the death penalty in the seventies. Over his forty-four years in prison he became an award-winning journalist, a much admired educator and humanitarian, and co-directed a documentary on life-sentenced prisoners which won the Sundance Grand Jury Prize and received an Oscar nomination. In 1993 Life magazine described him as 'the most rehabilitated prisoner in America.' In 2001 his conviction was again overturned and he was re-tried. In January of this year he was convicted of manslaughter, sentenced to the maximum term available of 21 years, and immediately released.[3] It is thought that the jury considered Wilbert's exceptional life in their remarkable verdict. If any of those first three juries had had their way, Wilbert would have been dead long ago.

These are my observations from my own work in death cases, but they do lead me to suspect that the evidence as presented to Mr Moussaoui's jury was similarly important. The lead attorney for Mr Moussaoui was Gerald Zerkin who has been defending those facing the death penalty in Virginia since 1980 and is greatly respected. The jurors heard evidence from Mr Moussaoui's sisters about the abuse the family suffered at the hands of their father and their own battles with mental illness. They heard descriptions too that he was a loving child. The jury heard from a behavioural expert about the abuse of Mr Moussaoui's mother suffered during her pregnancies and the potential effects of Mr Moussaoui's being dumped in numerous French orphanages before being finally abandoned. Psychiatrists testified as to the mental illness Mr Mousaaoui laboured under and a psychologist attempted to explain the alienation felt by many Muslims living in racist Western societies, and the experience of French-Moroccans more specifically.[4] The jurors also heard from victims' family members who did not desire a death sentence that would mean, according to one, 'get[ting] caught in a whirlpool of sadness and anger'. Another survivor told the jury that all people are 'children of God and loved by God'.

Also like many other death trials, the jury was faced with some horrific photography; pictures of a charred body in a Pentagon office, of body parts in the ruins of the World Trade Center, and of young children who lost a parent. Also too came the pleas from the prosecution that only the jury could give the dead justice and that Mr Moussaoui was 'pure evil'. The jurors weighed the arguments and came back with a life sentence.

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A triumph?

Gerard Baker, writing in *The Times* following the verdict, thought that '[i]t is this ability of the jurors to weigh the law and the evidence in a sober way and to set aside the claims of right vengeance that is most impressive and most uplifting about the verdict.'[5] That is certainly true but is it enough to leap to the conclusion that this was enough to remind us that 'the United States still represents the very highest ideals of humanity — freedom, fairness, compassion and above all, justice.'

As has been mentioned, there were indeed similarities between this and other death trials, though these, from a single, extraordinary case, are not enough for such generalisations.

Mr Moussaoui was tried under the federal court system and not in state court. Between 1973 and 2004, 7,529 persons were sentenced to death in the United States, 43 of these were within the federal system. Although the federal criminal justice system is far from perfect, it does avoid two of the more severe iniquities suffered in many State criminal justice systems.

First of these is the election of many of the main players. In Louisiana, where I spent most of my time

3. For more information, see http://www.wilbertrideau.com/
4. This testimony appears similar to some of the work of Dr Felicity de Zulueta, an expert on the effects of trauma and causes of violence, who argues persuasively that:
'One of the most important aetiological factors driving Islamic terrorists is the experience of alienation and shame. This sense of being made to feel totally invalidated, of feeling worthless in the eyes of the other, is at the root of rage and violent revenge, implying that the way the current 'War on Terror' is being fought by the United States and the United Kingdom can only lead to more terrorism and danger for our society'. *Medicine, Conflict and Survival*, January — March 2006; 22(1): 13–25, 13.
5. *The Times,* p.21, 'No lethal injection, no single blow of a sword: American justice triumphed'.

working on death cases, the Sheriff is elected, the District Attorney (the supervising prosecutor) is elected, and the trial judge is elected. Putting the decision of who to charge, for what, and whether to seek a death penalty in the hands of elected officials creates obvious and real dangers. A lawyer's decision should serve the ends of justice alone, and not the people funding the election campaign or those likely to vote. Worse still are elected trial judges. Although the verdict, guilty or not guilty, life or death, lies with the jury in Louisiana, the trial judge is the defendant's God. It is the trial judge that decides on a whole range of issues, from where the trial will be held and which jurors will sit on the jury through how much time and money the defence will get to present their case, to the admissibility of all evidence and testimony, and it is these issues which have most bearing on how a jury will vote. Trial judges in Louisiana, more often than not, are ex-prosecutors. Sometimes they have even worked directly for or with the prosecuting DA before them. Again they are subject to the pressure for votes and for election contributions. In Louisiana this situation is not helped by the fact that the State Supreme Court — the court responsible for reviewing all decisions of the lower courts — consists of seven justices, all elected.

Second, funding within the federal system is both greater and fairer than that which exists in the states. This means that defendants are more likely to be represented by experienced and competent counsel committed to the defendant's cause and financially able to gather the evidence and witnesses necessary to the case. In Louisiana, for example, capital defendants are often left with a local public defender with no experience of the unique and complicated nature of capital litigation. Most of these public defenders are part-time and the representation of the poor must compete with the lawyer's cases involving paying clients. I have met more than one hundred and fifty men on Death Row in three states and every last one was poor; many of my clients were living in shocking states of poverty prior to their arrests. Not one enjoyed the representation of multiple skilful lawyers over six weeks in trial. As Clive Stafford Smith, the civil rights lawyer for whom I worked, used to say 'the thing about capital punishment is that those without the capital get the punishment.' Poor people can't afford lawyers, investigators or expert witnesses. Without proper assistance, for which there is neither the political will nor the money, they end up on Death Row.

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It is no coincidence either that the ranks of the poor are filled disproportionately with people of colour, but there are other problems that come with the infection of the entire process with racism. Prosecutors attempt to exclude blacks from sitting on death penalty juries, particularly if the defendant is black.[6] This tactic does much to ensure that black defendants, who are already under-represented on the Register of Voters from which the potential jurors are drawn, do not see black jurors.[7]

More obviously, Death Row and the prisons beyond are disproportionately black. According to the US Census Bureau, Mississippi has a black population of about 36 per cent, but more than half of the prisoners waiting to be executed are black. Louisiana is worse: a 32 per cent black population becomes a 64 per cent black population on Death Row. The same is true for the imprisoned population. The rate of incarceration for blacks compared to whites across the US is very different. For example, about 8.4 per cent of black males aged 25 to 29 were sentenced prisoners at the end of 2004, compared to 1.2 per cent of white males.[8] But more important than the colour of the defendant's skin as an indicator of whether it will be a life sentence or a death sentence, is the colour of the victim's skin. From 1976 until the end of 2005, there were 1,004 executions in the USA, 79.58 per cent of those executions were for the killing of whites[9].

6. In the case of one Louisiana parish, the office I worked for set up a website to monitor these 'blackstrikes'. See http://www.blackstrikes.com/
7. Most States in the Union have felony disenfranchisement laws that prevent any person with a felony conviction from ever voting or sitting on a jury. Thirteen million Americans — six per cent of the adult population — have been convicted of a felony, currently at a rate of one million a year and blacks are disproportionately represented.
8. US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* (October 2005), p.1
9. *Death Row USA*, Winter 2006, p.8

The message is that black life, as either victim or defendant, is worth less than white life. Inevitably these inequalities, the abuse of the poor by the powerful, and the scale of a system that aims to mete out final and cruel revenge to those before it, will mean some terrible mistakes are made. Since 1976, 123 people sentenced to death have been freed from Death Row. While I was working in Louisiana, I met a teenager on Death Row, Ryan Matthews, sentenced to death for the killing of a grocery store owner when Ryan was 17. A year and a half ago I met him again in the House of Commons at a reception given by Peter Bottomley, M.P. after Ryan was freed with the help of Reprieve, a London-based charity.

The verdict in the Moussaoui trial is reason to feel relieved. It is reason to believe that human beings, when given more than a glimpse at those 'evil' people who commit terrible crimes, do not necessarily call for a violent revenge. However, it is no reason at all to praise the fine functioning of the US criminal justice system, a system that employs the death penalty and boasts 2.2 million prisoners. That system is set up to mete out retributive, vengeful justice. It has more prisoners, serving longer sentences, many — like Mr Moussaoui — without a chance of getting out who will 'die with a whimper' as the trial judge gloated. It has largely given up on rehabilitation or treatment or the ability of the State to deliver it. Rarely does it seek to understand why people commit terrible acts. The operation of the system is arbitrary and capricious. Generally, a sentence of death is a better indicator of how much money you have in your pocket, the colour of your skin, the lawyer you had at trial and the colour of the skin of the victim, than it is of the nature or quality of the acts of the defendant or their guilt. If a jury, or a few resolute individuals within it, refuses to deliver a death sentence we should be happy, but we should be surprised since it is in the face of a system that is designed to deliver — where, when and how it wants.