Ultimate Retribution: capital punishment

Chris Eades describes the faith in retribution that motivates juries in the American South to choose a death sentence over life imprisonment.

Arguably the purest expression of punishment or retributive justice in use is the deliberate and calculated taking of a defendant's life by judicial process: capital punishment. And in the United States this punishment is not ordered by a judge but by twelve jurors whose only qualifications to make this decision are literacy and an abstract ability expressed prior to trial to consider both a life and a death sentence.

That juries which sentence an offender to death do so to punish for punishment's sake is further supported by the fact that juries in the vast majority of death states in the Union are given a straight choice between a death sentence and the sentence of life without the possibility of parole, probation or suspension of sentence – a natural life sentence. In effect this means that juries prefer that a defendant be executed even though the imposition of the only alternative also means that he will die in prison, but somewhat later. The existence of this process represents the desertion of both the ideal of rehabilitation and faith that the good in society can achieve it. In essence it is hard to escape the conclusion that punishment is the aim of a jury that chooses to have a man strapped to a board while he is administered a lethal cocktail of drugs in front of a gathering that includes reporters and the victim's family.

Of course, other factors come into play, but they are mostly subsidiary. For example, jurors 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. (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 1198 jurors from 353 capital trials in 14 states accounting for over three quarters of the death row population. For more information, see *www.cjp.neu.edu*.)

But, generally, the death sentence 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, a church worker, and wounded several others. The local S.W.A.T 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 mêlée 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 simplest 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 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 having 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. What murder isn't cruel? The mitigating circumstances enunciated to 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 being committed by a defendant with a mental disease or defect. Finally, the juries are told that they should 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 with whom we least associate (and thus most abhor). 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,

because of the jury selection process, 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 understanding of the divergence in life path between juror and defendant.

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 May 25, 1963, and then began the rest of his troubles" (Hansen v. State of Mississippi, 592 So. 2d 114, 116 (Miss. 1991). Even that court, usually unmoved by such matters, thought it fit to acknowledge the horribly cruel life into which an innocent child was born. Tracy was executed on July 17, 2002.

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Too easily these 'claims' sound like excuses that anger juries and do nothing to sate their need to find some reason 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. Photographs of Scotty as a young schoolboy taken around the time of these rapes further illustrated his innocence at the time he suffered this abuse. He was sentenced to life without parole.

Capital juries rarely get to hear from the defendants (in part because the prosecution would tear them to shreds with lengthy interrogation about the crimes for which they had been found guilty), 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 to the proceedings. 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, I suppose 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 from the bank to deserted woodland, shot one who survived by playing dead, shot and stabbed another who died, while the third escaped. 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 twenty-one years, and immediately released (for more information, see *www.wilbertrideau.com*). 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.

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