

THE JURY SYSTEM ON TRIAL: DO JURORS EXECUTE JUSTICE?

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Introduction

After graduating from law school, I spent some time working on death penalty cases in Mississippi. During this time, I found myself working on a case to which I had become particularly attached. *I know, I was already breaking a fundamental rule of the legal profession!* The trial lasted less than six whole days but the effect of this short period will last a life time. I do not think I have ever experienced such a ferocious, fast changing, broad range of emotions in a time as short as this. *Unprofessional.* It was this experience that has inspired me to write this paper. In particular, a short but very powerful surge of pure, *how shall I describe it?* hatred (*I am only human*) directed at a jury led to a great curiosity into jurors. Some interviews and research later, it was clear that my paper could only be on juries. *Juries... covered ad nauseum already! What more is there to say?*

A jury is a body of people (usually twelve) sworn to give a verdict in a legal case on the basis of the evidence submitted in court. These people are to be free of any ideological bias so that they are without opinions at the start of trial. Once all the evidence has been presented, the jury retires and deliberates in absolute privacy. It is this blanket privacy afforded by the law that makes juries so mysterious. Much of the research into juries is, therefore, reliant on mock juries and retrospective interviewing, and thus can be criticised for its lack of direct observation.

The jury method of trying a case is a historic cornerstone of the legal system thought to be an ultimate reflection of democracy: guarding against oppression and tyranny. This method is, in theory, an excellent justice tool. In practice however, the system is riddled with flaws and leaves much to be desired. The determination to preserve this traditional ideal has created a resistance to change which is potentially extremely damaging. This article serves not only to highlight some of the main problems with the current system in the context of capital trials but also to uncover some of the enigma surrounding the jury decision process. Six prominent flaws are discussed.

The Fatal Flaws of this Jury System

The current system has many flaws which together render it, in many cases, unreliable and unjust. It would be impossible to give an extensive list of all the problems here. Outlined below is just a selection of problems to provide an insight into how inadequate the system is.

Burden of Proof

The problem regarding the burden of proof stems from either the jurors' inability to understand where the burden lies or a conscious/subconscious refusal to accept it. No matter how much a juror believes that the defendant is innocent until proven guilty, their suspicions are already aroused. It is sometimes enough that the defendant is in the court room. This does however rely on other factors such as the juror's view of the D.A., the Sheriff and his department. A juror who has good faith and has had pleasant experiences with the Sheriff's department may believe that it is highly unlikely for them to place a person in a court room for no reason. Similarly, if the juror sees the D.A. as a well respected and intelligent individual they are less inclined to believe that they may have the wrong person. As a result, rather than the prosecution having to prove their case it is for the defence to bring the jury round from guilty to innocent.

For example, when asked about their views of the attorneys, jurors often remarked upon the length of the defence's case in comparison to the prosecution's. In a survey one juror commented upon how surprised they were that the defence's case was so short.¹ A clear indication that they were forgetful of the fact that the defence need not say anything at all. Additionally, the suspicions already in the minds of jurors are in danger of being reinforced if the defendant does not testify.

The law itself recognises that this is a problem or else there would be no need for the protection afforded to the defendant in the Fifth Amendment to the United States Constitution, which guarantees the right to silence. The case of *State v. Lee*,² which places

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emphasis on the defence having a “wide latitude” to question jurors on whether they will hold it against the defendant if they do not testify, reflects that there is a clear problem with preventing inferences being drawn. The real problem is that the law is unable to detect and control the thought processes of jurors. The written words of the Constitution are not good enough.

Race

Research has consistently indicated that in today’s justice system the black defendant is at a disadvantage. For example, Berk and Lowery³ using a sample of 404 cases in Mississippi and thirty nine variables indicated that a black defendant was 1.5 to four times more likely to receive the death penalty than white counterparts. A black defendant with a white victim was 4.9 times more likely to receive this sentence. Similarly, Wolfgang and Riedel⁴ find that the probability of a black defendant receiving the death penalty for raping a white victim was thirty four per cent higher than any other defendant/victim combination. They believed that the defendant/victim combination was by far the most important variable that explained which defendants received the death penalty. Support for this result can be found in Gross and Mauro.⁵ However, they did argue that only in Arkansas was there a statistical disadvantage for black defendants.

One explanation for these results is that the jury selection process is institutionally racist. There is a disproportionate exclusion of black jurors. The prosecution often has a variety of tactics to overcome the rulings such as that in *Batson v. Kentucky*⁶. Using *Witherspoon v. Illinois*⁷ many black jurors are struck for cause because they are more likely to question the death penalty.⁸ More black jurors are struck as a result of peremptory challenges. The law requires the defence to work very hard just to ensure that the judge will consider the possibility of discriminatory practice.

Another explanation is down to the selected jurors themselves. It is inevitable that each jury will bring with them their moral beliefs based on personal experiences since childhood. As Juror Ralph Lewis says: “anybody that was born and raised in the South when I was born and raised in the South and says they’re not prejudicial (sic) is a liar. I try very, very hard to get over it. Every time... I meet a nigger...and what the difference between me and anybody else is that I admit it.”⁹

Racist attitudes are reinforced by the adversarial process and the persuasive language of the prosecution. For instance the use of “we” implies that

the prosecution and jury are different to the defendant, often moral law abiding citizens. They are also reinforced by the courts’ refusal to condemn racist practices.

For example, in *Bacon v. Lee*¹⁰ the court declined to consider evidence that jurors referred to the defendant’s race and interracial relationship. They also appeared to make racist jokes. Similarly, in *U.S. v. Roach*¹¹ a black juror’s affidavit alleging that ten white jurors coerced their vote via threats and insults was held to be inadmissible. In *Frazier v. State*¹² the court held that there was no plain error when the prosecutor argued that the crime was especially heinous because of the defendant’s race. At times it appears that the courts protect racial inequality. For instance, in *State v. Williams*¹³ it was held that jurors’ negative views of racial intermarriage and social preferences did not necessarily reflect upon their ability to judge freely and fairly. The case went on to state that the true test is whether that juror possesses the ability to judge impartially, and that this will be assessed on the evidence at the trial. Ultimately, this simply means that an assertion from a racist juror during the *voir dire* that they can be fair, as is often the case with issues other than race, for example acquaintance with the deceased, is sufficient.

As it stands, then, a jury often falls short of the requirement that no cognisable group should be under-represented. It also tends to allow those that cannot be impartial to serve. It follows that the jury is usually in violation of the fair trial and due process rights in the Sixth and Fourteenth Amendments to the United States Constitution.

Misconception of Mitigation

Every jurisdiction requires that a capital trial is divided into two stages. These resemble mini trials. The first stage is the Culpability Phase. Here, the prosecution will seek to prove beyond a reasonable doubt that the defendant committed the crime with which they are charged. The question for the jury is: “Has the prosecution proved that the defendant committed the crime?” Their role is as fact finders. Only if the jury conclude that the defendant is guilty is it necessary to go on to the second stage.

The second stage is the Sentencing Phase. This allows the jury to decide the most appropriate sentence once the defendant has been found guilty of the capital crime.¹⁴ The issue is no longer one of fact but is instead a question of moral judgment: “Does this person deserve to live?” The prosecution will present evidence of aggravating factors. Typically state law will require a jury to find at least one aggravating factor before they can make the decision of death.

However, the presence of aggravating factors does not mandate a death sentence and the mere fact that a defendant is guilty should not be a reason to impose it.¹⁵ Then the defence will present evidence of mitigating factors. The jury is constitutionally required to take these into account even if they are not related to culpability for crime.¹⁶ Thus they must give at least some weight to the defendant's background, character and any other circumstance that may warrant a lesser sentence than death. It is clear then that the law is open to not imposing the death penalty, and makes an effort to separate the worse from the bad.

It is therefore obvious that mitigation is an important part of a capital trial. It is unconstitutional for a jury to dismiss such evidence without giving it some consideration. However, the failure of jurors to consider mitigation remains one of the most fundamental flaws of the system. There are two main plausible explanations.

First, the jury may be unable to consider the evidence because they are unable to understand what mitigation is. This is probably due to the fact that there is no one clear and concise definition of mitigation. The widely accepted definition of mitigation is "circumstances which do not justify or excuse the offense, but which, in fairness or mercy [should be] considered as extenuating or reducing the

degree of moral culpability and punishment."¹⁷ This is a complex and somewhat ambiguous definition. Mississippi statute, by contrast, attempts to clear up any ambiguity by providing a list of mitigating circumstances.¹⁸ However the list is not exhaustive, unlike the list of aggravating circumstances under Mississippi statute.¹⁹ The upshot is that what constitutes mitigation remains confusing for jurors whereas what constitutes aggravating circumstances can be readily understood.

Secondly, the jurors may understand what mitigating circumstances are but be unwilling to give them appropriate consideration. Aggravation plays a more major role than mitigation. One reason for this can be seen in the results of the Capital Jury Project. Almost half of the jurors in the study mistakenly thought that mitigating factors needed to be proven beyond a reasonable doubt to be considered, and more than half mistakenly thought that they could only be considered if all the jurors agreed.²⁰ Other jurors

dismiss mitigation because they view the stories of poverty, abuse and crime as "thinly veiled excuses."²¹

For whatever reason, jurors are not receptive to mitigating evidence.

Misconception of Parole

I read the papers everyday, and I'd say sixty to seventy per cent of the crime committed in my area is committed by people who've been in prison and got out early on several different occasions. We have had quite a few murders, and early release is the cause of it.

Juror Leslie Odou.²²

Parole is a major misperception that plays a key role in the decision process of a jury. It is often the overriding reason for "hold out" jurors changing their

minds and voting for death.²³ With the like of Bush's pro death penalty, tough on crime approach and the influence of the media, jurors' belief that the criminal justice system favours criminals over law abiding citizens is reinforced. According to Paduano and Smith, those in the southern states think that life means seven years and death simply a lifetime in prison on death row.²⁴ This misunderstanding is due to a lack of knowledge

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which fuels a fear that has incredible consequences. The prospect that killers will some day be back on the street is an important issue for juries and one which scares them into issuing more death sentences. Sixty per cent of jurors have reported discussing the defendant's future dangerousness in society a great deal or fair amount during deliberations. An alarming 31.9 per cent thought that the instructions meant they were required by law to impose the death penalty if they believed the defendant to be a future danger and seventy five per cent found this to be the case.²⁵

In some states such as Mississippi, future dangerousness is not an aggravating factor.²⁶ As the prosecution is prohibited from arguing future dangerousness the court is prohibited from explaining parole eligibility to the jury.²⁷ While this is correct in theory the assumption that jurors will be able to disregard future dangerousness does not reflect reality. In a Mississippi poll, two-thirds of

those questioned stated that they would be less likely to impose the death penalty if life meant that there was no parole eligibility.²⁸ Similarly, in another study of 800, forty one per cent would not support the death penalty if alternatives like life without parole were available.²⁹

Inflammatory evidence

Inflammatory evidence refers to evidence that arouses the jury's emotions regardless of whether that reaction was intentional. Examples include gruesome crime scene photographs, blood stained weapons, and compelling "victim impact" evidence. In one case, where the trial took place a couple of weeks before Christmas, the prosecution entered into evidence a photograph of the victim (a baby) alive dressed in a Christmas outfit.³⁰ In another, the prosecutor entered a polystyrene head that was dramatically marked in red pen to indicate the injuries sustained by the deceased. The head was then placed on the clerk's desk facing the jury throughout the trial. This evidence is often shocking and horrifying. It angers the jury and, as a result, heightens their desire to punish somebody for the crime. This inability to distinguish between the crime and the criminal ultimately means that regardless of who stands before them, the jury is more likely to convict.

In addition to the above, it follows that the jury will be more likely to impose the death penalty. They are unable or unwilling to separate the two phases of a capital trial and follow fundamental constitutional principles. Instead of focusing on the aggravating and mitigating circumstances, the jury becomes preoccupied with the evidence of guilt. Alternatively, the jury may have already determined the appropriate sentence when the evidence was first introduced during the culpability phase. Thus, the sentencing stage becomes pointless. Many jurors in the Capital Jury Project indicated that they focused on the evidence of guilt when coming to their decision to impose the death penalty: "and someone said, well, all of the evidence pointed to him being guilty and the only thing I can say is, you know, if he's guilty he should get the death sentence."³¹

Similarly, a juror in another case explained how the evidence of guilt formed the basis of their decision to sentence the defendant to life without parole: "The only reason the jury went for life was because there was no physical evidence placing the weapon in Mr. X's hand. No one doubted that he was there and that fact alone was enough to find him guilty of capital murder according to the instructions. If there had been physical evidence, he would have been given the death penalty."³²

Denial of responsibility

If you followed it and got yes for this part and yes for this part it all kind of fell in place it seemed like...it kind of progressed into...there is really not much choice.³³

It is a common reaction for a juror to look to the law for guidance in making a difficult decision. In actual fact, little guidance is offered other than that the jury is to be left to exercise its discretion in a way it sees fit. Despite this, jurors avoid feeling personally responsible for their decisions by blaming the judge or the law. The Capital Jury Project indicated that five out of ten jurors reported arriving at a death sentence because they thought that the law required it. The project also demonstrated that three-tenths claimed that the law was responsible in comparison to only one-tenth who believed the jury as a group was responsible. More than half believed it was the defendant who was ultimately responsible.³⁴

The most likely cause for this is that they accept the responsibility of fulfilling the role of a juror but are uncomfortable with the task of deciding an individual's fate. By passing the responsibility, a juror is able to reduce their feelings of anxiety. Support for this can be found in Milgram's "Agentic Shift" theory.³⁵ Milgram indicates that ordinary citizens are willing to inflict pain (in this case, electric shocks) on other humans (those who answered questions incorrectly) if reassured that they are not responsible. The responsibility is transferred from oneself to some other source which is often one of authority. He said that people in such a situation simply view themselves as an agent or instrument acting out somebody else's wishes. Therefore, all responsibility is absolved. Milgram claims that this is a normal human response among careful and conscientious people confronted with anxiety in an unfamiliar situation with dire consequences. However, it is worth noting that the role the participants play in this study differs to that played by the jurors. The jurors are being asked to determine whether a punishment should be given, not if they will administer it.

Another plausible explanation is that jurors believe that their sentencing decisions will be varied as a result of executive action. The end result, however, is that jurors are less likely to approach deliberations with the moral seriousness that is required. So the avoidance of personal responsibility increases the likelihood of a death sentence. The unreliability of such jurors' verdicts has been recognised by the law. For example in *Caldwell v. Mississippi*,³⁶ where the Supreme Court held that capital jurors must not believe that the

responsibility for a defendant's sentence rests anywhere other than with themselves.

Conclusion

The law provides for a very complex jury selection system which is the source of much confusion. It places great emphasis on the importance of this procedure and a heavy burden on the defence. The likelihood of selecting a fair and impartial jury is minimal. The process is weighted towards selection of a jury predisposed to convict and, in the event of conviction, impose a capital sentence. This is partly a result of jurors' political, religious or moral beliefs. It is impossible for a jury to put aside the values and beliefs that were formed in childhood and continue to be the essence of how they live their lives today. To ask otherwise is to expect too much. Additionally, a simple statement that one can put aside these feelings is not sufficient and should not be allowed to stand in court.

Jurors are forced to leave their family, their home and work. They are placed in an uncomfortable

environment with strangers and faced with an awesome responsibility of deciding somebody's fate. The horror, alienation, confusion and ultimate desire to get out of this as quickly as possible have huge consequences. The majority are too easily influenced. They often fail to recognise attorney tricks and manipulation. They are also susceptible to fears and tend to distrust the sentencing process. Most, whilst accepting the general responsibility of jury duty, are unable to cope with the awesome responsibility of determining whether the defendant in a capital trial is guilty, and, if he is, the appropriate sentence. Instead they are anxious to emphasise the defendant's responsibility for his fate in an effort to deny their own. Often it is a simple misunderstanding or understating of responsibility, but viewing themselves as less responsible than the law indicates a failure to make reasoned, moral choices. Jurors are preoccupied with guilt at the sentencing phase and tend to presume death is the appropriate sentence. Too many believe that the law requires death. Jurors also discount and ignore mitigation, whilst eagerly taking on board aggravating factors of the crime. The result is verdicts that are blind, unreliable and unfair.

¹ Juror MS/01/04, Fleury-Steiner, "Jurors' Stories of Death," (2004), The University of Michigan Press, U.S.A..

² 559 So. 2nd 1310, 1316 (La. 1990).

³ Richard Berk and Joseph Lowry, "Factors Affecting the Death Penalty: Decisions in Mississippi," 14 (June 1985, unpublished manuscript) (calculated from data in text). Cited in Daniel C. Baldus, George G. Woodworth and Charles A. Pulaski Jr., "Equal Justice and the Death Penalty: A Legal and Empirical Analysis," 258, (1990) North Eastern University Press, Boston.

⁴ Wolfgang and Riedel, "Race, Judicial Discretion and the Death Penalty," 107 Annals 119, 123 (1973).

⁵ Gross & Mauro, "Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization," 37 Stan. L. Rev. 27, 65 (1984).

⁶ 476 U.S. 79 (1986).

⁷ 391 U.S. 510 (1968).

⁸ See Craig Haney, A. Hurtado and L. Vega, "Modern Death Qualification: New Data on its Biasing Effects," 18 Law & Human Behaviour, 619 (1994).

⁹ Fleury-Steiner, *ibid*, 53.

¹⁰ 532 U.S. 950 (2001).

¹¹ 164 F.3d 403, 407 (8th Cir. 1998).

¹² 758 So. 2d 577, 604 (Ala. Crim. App. 1999).

¹³ 410 So. 2d 217 (La. 1992).

¹⁴ *Gregg v. Georgia* 428 U.S. 153, 191 (1976).

¹⁵ *Sumner v. Shuman* 483 U.S. 66 (1987); *Woodson v. North Carolina* 428 U.S. 280 (1976).

¹⁶ The failure to consider mitigation will amount to a violation of the Eighth Amendment to the United States Constitution. *Lockett v. Ohio* 438 U.S. 586, 729 (1982); *Eddings v. Oklahoma* 455 U.S. 104, 115 (1982).

¹⁷ Fifth Circuit Court of Appeal's definition

¹⁸ Miss. Code. Ann. § 99-19-101(6) (1972).

¹⁹ Miss. Code. Ann. § 99-19-101(5) (1972).

²⁰ Ursula Bentele and William J. Bowers, "How jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; And Mitigation is No Excuse," 66 Brooklyn L. Rev. 1043 (2001).

²¹ Fleury-Steiner, *ibid*, 38.

²² Fleury-Steiner, 3, 31.

²³ Marla Sandys, "Cross Overs – Capital Jurors Who Change Their Minds About Punishment: A Litmus Test for Sentencing Guidelines," 70 Ind. L. J. 1183, 1217 (1995).

²⁴ Paduano and Smith, "Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty," 18 Columbia H.R. L. Rev. 211, 213 (1987).

²⁵ Bedau, Hugo Adam, "The Death Penalty in America: Current Controversies," 336, (1997) Oxford University Press, New York.

²⁶ *Balfour v. State* 598 So. 2d 731 (Miss. 1992).

²⁷ *Coward v. Commonwealth* 178 S.E. 797, 799 (Va. 1935).

²⁸ Dayan et al, "Searching for an Impartial Sentencer Through Jury Selection in Capital Trials," 23 Loy. L. A. Rev. 151, 166 (1989). Cited in Peter A. Barta, "Between Death and a Hard Place: Hopkins v. Reeves and the 'Stark Choice' between Capital Conviction and Outright Acquittal," 37 Am. Crim. L. Rev. 1429, 1467 (2000).

²⁹ "The View From the Juror Box," The National Law Journal, Feb. 22nd 1993 at S2. Cited in Bedau, *ibid*, 120.

³⁰ Case MS/01/04, Fleury-Steiner, *ibid*.

³¹ Juror SC-1234, quoted in Bentele and Bowers, *ibid*, 1023.

³² Juror MS/02/04, Fleury-Steiner, *ibid*.

³³ Juror SC-1288, Capital Jury Project. Cited in Bentele and Bowers, *ibid*, 1033.

³⁴ Capital Jury Project. Cited in Theodore Eisenberg, Stephen P. Garvey and Martin T. Wells, "Jury Responsibility in Capital Sentencing: An Empirical Study," 44 Buffalo L. Rev. 339 (1996).

³⁵ Stanley Milgram, "Obedience to Authority: An Experimental View," 132 (1974).

³⁶ 472 U.S. 320 (1985).