CAPITAL PUNISHMENT AND THE AMERICAN CONDITION

WITH A NEW PREFACE BY THE AUTHOR

Austin Sarat

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TO MY SON,

BENJAMIN,

WITH JOY,

GRATITUDE,

AND HOPE

5

THE ROLE OF THE JURY IN THE KILLING STATE

Let's do it.
—GARY GILMORE

Let's get on with it.
—WILLIAM REHNQUIST

At no time in American history has the role of the jury been as controversial as it is today.[1] In celebrated case after celebrated case—from the first Rodney King verdict to the mistrials of the Menendez brothers and the acquittal of O. J. Simpson in his criminal trial—the media has called our attention to the unexpected and, according to some, incomprehensible decisions that juries have rendered. Confused by complicated testimony, led astray by the "abuse excuse" and the continuing contest to identify real victims, placing racial solidarity ahead of the clear weight of evidence, these and other juries seem to have failed, in some profound way, to do their duty.

As controversial as the role of the jury can be, it stands at the center of the complex efforts to rationalize state killing in and through capital trials. As we have seen in both the McVeigh and the Brooks cases, in most states and in the federal system juries

not only decide on questions of guilt or innocence, but act as the conscience of the community, deciding whether those accused of capital crimes live or die. Writing about the continuing importance of the death penalty in the apparatus of criminal justice in the United States, Supreme Court Justice John Paul Stevens has remarked on the essential role of the jury in both administering and legitimizing that punishment. "If the State wishes to execute a citizen," Stevens wrote,

> it must persuade a jury of his peers that death is an appropriate punishment for his offense. . . . If the prosecutor cannot convince a jury that the defendant deserves to die, there is an unjustifiable risk that the imposition of that punishment will not reflect the community's sense of the defendant's "moral guilt." . . . *Furman* and its progeny provide no warrant for—indeed do not tolerate—the exclusion from the capital sentencing process of the jury and the critical contribution only it can make toward linking the administration of capital punishment to community values.[2]

By highlighting the jury's place in the administration of capital punishment, Stevens called attention to something that is widely taken for granted but is nonetheless remarkable—the fact that ordinary citizens are regularly enlisted as authorizing agents for the state's own lethal brand of violence. This kind of democratically administered death penalty is a reminder of a venerable yet enduring problem in social life, namely the question of how people come to participate in projects of violence, of how cultural inhibitions against the infliction of pain can be overcome in the acts of otherwise decent persons. What factors come into play in capital trials such that ordinary citizens can authorize and lend themselves to the project of using lethal violence as an aspect of state policy?

Despite the support of persons as seemingly different as Gary Gilmore and William Rehnquist, and the substantial public approval that the death penalty continues to garner, it is nonetheless unsettling, as I note in chapter 1, that the United States clings tenaciously to such a punishment long after almost all other dem-

ocratic nations have abandoned it. It is unsettling because the conscious, deliberate killing of citizens as an instrument of state policy is always an evil but never more so than in a democracy. Today the formality, complexity, and ritual of capital trials displace, at least symbolically, execution itself as the site of the state's violent majesty. In capital trials we focus on the case rather than the body of the "condemned."

As a result, the Supreme Court, until relatively recently, invested enormous effort to regulate the conduct of capital trials, insisting more than two decades ago that because "death is different"[3] capital trials must be conducted according to special procedures designed to ensure their reliability.[4] Capital trials are thus both the "field" of pain and death on which law plays and the field of its discursive representation. As Robert Weisberg argues, such trials provide "a representational medium that . . . serves as a grammar of social symbols. . . . The criminal trial is a 'miracle play' of government in which we carry out our inarticulate beliefs about crime and criminals within the reassuring formal structure of disinterested due process."[5]

In this structure the jury provides the means through which the death penalty becomes an instrument of popular sovereignty; it provides the mechanism through which citizens are enlisted to authorize the life-ending violence of the state. A jury's decision to impose a death sentence expresses public condemnation for the violence that exists just beyond law's boundary while muting state violence, shading and toning it down, and rendering it acceptable, thus making the act of the executioner violence that can be approved and rationally dispensed. The jury's role is crucial because in and through jury decisions the law seeks to define the boundary between life and death, guilty killing and innocent execution. Moreover, law embodies a precarious hope that words can contain and control violence, that unspeakable pain can be made to speak, and that jury decisions tame aggression and put it to useful public purposes. If law is to succeed it must always conquer force and calm turmoil, or at least appear to do so. Here again, as Justice Stevens suggested, what the jury does and how it acts is crucial.

The Centrality of the Jury in the Jurisprudence of Death

In the killing state the jury represents the fullest actualization of popular sovereignty, of the right of the people to exercise power over life and death. Thus Judge Patrick Higginbotham correctly notes that "the history of the death penalty and the history of juries are entangled."[6]

> This should not be a surprise. The choice between a sentence of life or death is uniquely laden with expressions of anger and retribution. . . . By its nature it is a decision that we instinctively believe is best made by a group of citizens, because a group of citizens better represents community values and because responsibility for such a decision is best shared. Equally the ultimate call is visceral. The decision must occur past the point to which legalistic reasoning can carry; it necessarily reflects a gut-level hunch as to what is just.[7]

The jury, in Higginbotham's view, both stands in for and represents the vengeful anger of the democratic community and is the truest expression of its values. The jury's justice is itself a kind of violent transgression of both reason and law. Owing to the gravity and uniqueness of a decision to sentence someone to death, the juror voting whether to authorize a killing by the state must go beyond law.[8] "In the final analysis," Justice Stevens states, "capital punishment rests not on a legal but on an ethical judgment. . . . And . . . the decision that capital punishment is the appropriate sanction in the extreme cases is justified because it expresses the community's moral sensibility—its demand that a given affront to humanity requires retribution."[9]

Because the juror allegedly gives voice to the community's sentiments, she helps to diffuse responsibility for the punishment of death. Here then is an important reformulation of the problematic of popular sovereignty and the death penalty. On the one hand, the juror speaks in the powerful, retributive tones of a sovereign assaulted; on the other hand, the juror speaks in the muted, restrained tones appropriate to popular sovereignty.

Since 1970, the Supreme Court has struggled to come to terms with this contradictory image of the jury in capital cases. The Court has, alternatively expressed expansive faith in the jury as a reliable, trustworthy repository of the sovereign right over the lives of citizens, and profound doubt about the jury's capacity to exercise that power responsibly.[10] Throughout, the Court has struggled to define the jury's role as the crucial decision maker in the capital punishment process.

McGautha v. California set the debate of the past three decades in motion and defined its terms.[11] In that case, the defendant alleged that a California statute that left the "decision whether the defendant should live or die . . . to the absolute discretion of the jury" violated due process of law.[12] This claim evoked two very different responses: one, from Justice Harlan, embraced the California scheme and with it expansive power for the jury in capital cases, while the other, from Justice Brennan, rejected that scheme in the hope of encouraging legislatures to provide standards or guidelines to limit jury power.[13] Both Harlan and Brennan, however, used the language of sovereignty and consent to speak about the jury's role in capital cases, and both recognized the jury, not the legislature, as the locus of law's power to kill.

For Harlan the comparison between legislature and jury clearly favored the latter. If the final decision in capital eases were to be acceptable, it had to be based on a highly individualized assessment of a myriad of factors peculiar to each crime and criminal. The detailed and subtle judgments of juries were, in Harlan's view, precisely the kind that legislative assemblies were incapable of making. Unbridled jury discretion to decide who shall die from among all those who commit capital offenses was both just and necessary given what Harlan saw as legislative disability.

> Those who have come to terms with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed . . . [that] [t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority appear to be tasks which are beyond present human ability.[14]

Harlan worried that words would be unable adequately to contain and convey the requisites for authorizing capital punishment. Language fails in the face of death. As a result, legal authority must respond to linguistic inadequacy. If legislatures are unable to speak about the pain and death the state dispenses, the only choice is to legitimate the de facto discretion of the jury.

But the impossibility of specifying, in advance, standards to determine which particular criminals should be executed was not enough to justify a sovereign role for the jury. We must also have an image of how the jury would use its sovereign power. Here the best Harlan could do was to engage in a Tocquevillian imagining of the jury ennobled by the responsibility given to it.[15] In this imagining

> jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors. . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration. . . . The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.[16]

In Brennan's view, by contrast, there was neither persuasive evidence of legislative inability to provide structuring guidelines nor reason to assume that unbridled discretion would not, like all exercises of unfettered power, produce arbitrariness and discrimination rather than reason and responsibility. Brennan countered Harlan's theory of linguistic failure by surveying a variety of means and mechanisms that legislatures might employ to communicate with the jury and to guide it in its interpretive task.

> A legislature that has determined that the State should kill some but not all of the persons whom it has convicted of certain crimes must inevitably determine how the State is to distinguish those

> who are to be killed from those who are not. Depending ultimately on the legislature's notion of wise penological policy, that distinction may be hard or easy to make. But capital sentencing is not the only difficult question which legislatures have ever faced.[17]

In addition, Brennan rejected Harlan's Tocquevillian optimism about jury sovereignty and substituted a hardheaded kind of due process realism. The power and responsibility that Harlan saw as ennobling, Brennan believed to be fraught with the danger of abuse. As he put it, "the Due Process Clause of the Fourteenth Amendment is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice." Brennan suggested that Harlan would ask us to choose between "the rule of law and the power of the states to kill. . . ." and to resolve the conflict "in favor of the states' power to kill."[18]

Two years after *McGautha* this choice was repudiated and undone by *Furman v. Georgia*. Consistent with Brennan, *Furman* held that the unbridled discretion that Harlan had embraced in *McGautha* was constitutionally unacceptable. Yet the justices in *Furman* continued to wrestle with the problem of defining the jury's proper role in capital trials. Like Brennan, Justice Douglas feared that leaving juries with the untrammeled discretion to decide who should live and who should die ensured "selective and irregular use" of the death penalty and allowed the punishment of death to be reserved for "minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer." Instead of Tocquevillian responsibility, Douglas suggested that jury sovereignty meant that "People live or die, dependent on the whim of one man or of 12."[19]

Against Douglas's doubt, Chief Justice Burger took up Harlan's defense of jury sovereignty in capital cases. Burger suggested that "trust in lay jurors . . . [is] the cornerstone of our system of criminal justice" and that juries as the "conscience of the community"

are properly "entrusted to determine in individual cases that the ultimate punishment is warranted." Jurors in capital cases, facing the awesome decision about whether one of their fellow citizens should live or die are, on Burger's account, "meticulous" in their decisions, and "cautious and discriminating [in their] reservation of . . . [the death] penalty for the most extreme cases."[20]

The Harlan-Burger advocacy of complete jury sovereignty was finally put to rest by the Court when, in *Gregg v. Georgia*, it upheld a Georgia statute whose purpose was to provide guidance to jurors in selecting those who should actually receive the death penalty from among the class of convicted capital murderers. Justice Stewart, writing for the majority, held that jury discretion "on a matter so grave as the determination of whether a human life should be taken or spared . . . must be suitably directed and limited so as to minimize the risk of arbitrary and capricious action." Absent such direction he claimed that "juries imposed the death sentence in a way that could only be called freakish."[21]

Stewart, finally completing the work begun by Brennan in *McGautha*, rejected Harlan's arguments about the linguistic impossibility of formulating standards to provide such direction by saying that "while some have suggested that standards to guide a capital jury's sentencing deliberation are impossible to formulate, the fact is that such standards have been developed." He argued that it was particularly important to provide such standards for a jury because "members of a jury will have had little, if any, previous experience in sentencing." Standards that direct the jury's attention to the specific circumstances of the crime and of the person who committed the crime would, in Stewart's view, be sufficient to "produce non-discriminatory application" of the death penalty.[22]

In a line of later cases, however, the Court imposed on the states little more than formal requirements for statutory sentencing guidelines.[23] Thus, despite Stewart's apparent confidence in the efficacy of legislative standards in ensuring the rationality of life and death decisions made by ordinary citizens, how those decisions are made, especially how jurors understand their own responsibility and the violence they are asked to authorize, re-

mains a mystery in the jurisprudence of death. "Individual jurors," Justice Powell has written, "bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.' The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain."[24]

Authorizing Death

From the perspective of someone interested in understanding the killing state as well as the relationship of democracy and the death penalty, how ordinary citizens, in their roles as jurors, could allow themselves to use their sovereign power to authorize death is indeed almost inexplicable. This is because "to any person endowed with the normal inhibitions against the imposition of pain and death, the deed of capital punishment entails a special measure of reluctance and abhorrence."[25]

The work of the late Yale law professor Robert Cover, however, provided some insight into both the nature of that reluctance and how it is overcome. Cover noted that while for most people "evolutionary, psychological, cultural and moral considerations inhibit the infliction of pain on other people . . . in almost all people social cues may overcome or suppress the revulsion to violence under certain circumstances." Because the provision of such cues is the peculiar work of law, Cover called attention to distinctive features of the "organization of the legal system [itself that] operate . . . to facilitate overcoming inhibitions against . . . violence."[26]

Two features of that organization have special relevance for understanding how ordinary citizens become the authorizing agents of state violence in capital trials. First, those who authorize violence, in this case the death penalty, do not themselves carry out the deed that their verdict allows. The juror is asked only to say

the words that will activate a process that at some considerable remove may lead to death. These words do things. Like many other kinds of language the juror's language is performative. Yet jurors are encouraged to think that it is not. Were they required to witness the full consequences of their verdict or were they required to pull the switch on those they condemn to death, the law would find it radically more difficult to get their authorization to kill. As Cover puts it, "The most elementary understanding of our social practice of violence ensures that a judge knows that she herself cannot actually pull the switch. This is not a trivial convention. For it means that someone else will have the duty and opportunity to pass upon what the judge has done."[27] What Cover says about the judge is surely no less true of jurors. Second, jury decisions are subject to review on appeal.[28] The judge or juror who initially authorizes execution is able to transfer responsibility for his authorizing act and, in so doing, to deny the very authority of that act.[29] The consequences of this ability to transfer responsibility have been well understood in the jurisprudence of death. They are, in fact, detailed by the Supreme Court's opinion in *Caldwell v. Mississippi*.[30]

In *Caldwell* the question before the Court was whether comments by a prosecutor to the effect that a jury should not view itself as finally determining whether the defendant should die because a death sentence would automatically be reviewed by the state supreme court violated the Eighth Amendment. Reviewing those comments in light of its prior holdings, the Court found that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.[31]

Justice Marshall, writing for the majority in *Caldwell*, explained that,

> This Court's Eighth Amendment jurisprudence has taken it as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. . . . Belief in the truth of the assumption

> that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility," has allowed this Court to view sentencer discretion as consistent with—and indeed indispensable to—the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case."[32]

The question of how juries sentence is, in Marshall's view, central to the question of whether they may constitutionally exercise the sovereign power to make life and death decisions.

Marshall then went on to paint a picture of the capital sentencing jury as

> made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.[33]

Marshall, echoing the insights of Cover, suggested that anything that encouraged the sentencing jury to believe that it was not responsible for authorizing death would make it more likely that juries would provide such authorization. The jury thus unburdened might use a death sentence, even when it is "unconvinced that death is the appropriate punishment" to "'send a message' of extreme disapproval for the defendant's acts."[34]

Yet the mystery of how jurors are enlisted as agents of the killing state remains. This mystery is, as I have already suggested, in one sense a problem of popular sovereignty and in another sense a problem of understanding how humans relate to the imposition of pain and violence on other humans. It can be explored only by carefully attending to what jurors actually do in, and say about, capital trials.

The Case of John Henry Connors

Convenience stores are, despite their reassuring, welcoming name, some of the most dangerous places in America. Late at night such stores provide, as much as anything else, convenient settings for robbery and murder. This is as true in small towns like Bowling, Georgia,[35] as it is in big cities throughout the United States. The case of John Henry Connors is an apt illustration.

At 10:30 P.M. on a hot July night two friends picked up John Henry Connors from his modest home on the outskirts of Bowling. Connors, twenty-six years old, worked in a local auto body shop. He had been married for seven years but was now having serious marital problems. As a result, he frequently sought the company of his friends to escape his troubled relationship. On the night of July 23, they spent several hours driving around, smoking marijuana, and drinking. Each had a gun.

There was, however, nothing unusual in any of this. It had become a regular leisure activity for these men to drive along back country roads, get high, and fire shots into the night until they got bored, or sick, or sleepy. Three hours after they first went out, Connors and his friends stopped at the local Jiffy Store to buy "Do-It-Yourself Microwave Meals" and some beer. The two friends went to the back of the store while Connors waited for them near the counter where Andy Donaldson was working at his job as a cashier. After Donaldson finished ringing up the friends' purchases and opened the cash register to make change, Connors suddenly pulled out the .357 Magnum pistol that he had brought with him and shot Donaldson in the chest.

Connors's friends, who would later be offered the chance to plead to reduced charges in return for their testimony against him, were, by their own account, taken totally by surprise. At the sound of the shot they ducked and then ran for the door. Meanwhile, Donaldson fell to the floor in a bloody heap, moaning and writhing in pain while Connors took ten one-dollar bills and some food stamps from the register. Connors then leaned over

the counter and fired a second shot, which hit Donaldson above the left eye. After firing the second shot he joined his friends in their car and escaped into the night.

Eight days later Connors was arrested when his two friends turned themselves in to the police. At the time of his arrest, the gun that killed Andy Donaldson was found in Connors's home along with the food stamps and nine of the bills he had taken from the Jiffy Store.[36] Connors was charged with, and subsequently convicted of, robbery and malice murder in the death of Andy Donaldson. He was sentenced to death.

In what follows I recount what the jurors in the Connors case said about that case and explore how they made the decision that John Henry Connors should be sentenced to die.[37]

Imagining Violence

As noted in chapter 4, one of the crucial tasks of the prosecution in a capital case is to answer two questions: what was done by whom to whom and why does the killer deserve to die. To answer these questions the prosecutor has to portray, in a vivid and compelling way, the circumstances and nature of the killing. He has to make what is for most people quite unreal—namely, a scene of violent death—real.

As the jurors in the Connors case talked about that case, vivid images of the scene of death and the violence that surrounded it were most prominent in their recollections. Words and photographs were used in the Connors case, as in most other capital trials, to bring to life the violence outside law. No comparable effort, however, was made to enable jurors to imagine the scene of the violence and death that they were being asked to authorize. No one showed jurors images of the scene of the prospective execution, of the violence of electrocution, like those contained in Justice Shaw's opinion in *Provenzano*.[38] No such images were admissible or available for the juror eager to understand what he was being asked to authorize.

Images of the weapons and wounds made the violence that Connors had visited on Donaldson real and pressing. As Joseph Rane, one of the Connors jurors, put it,

> Connors shot the man—I don't remember the man's name, I can see his face, I don't remember his name—he shot him. If I'm not mistaken it went into his chest and came out by his shoulder blade with a .357 Magnum, if I remember correctly. He leaned over, got some money out of the cash register. The clerk of the store was laying on the ground, moaning and moving around from . . . you figure a maximum of three feet with a high-powered weapon like that. It had knocked him against the back . . . he was on the floor bleeding. And he reached over the counter as he was retrieving the money and shot him again. It went in, if I'm not mistaken, over his eye and out behind his ear on the opposite side.

Like other jurors, Rane was able to speak in a detailed way about the murder weapon as well as about the entry and exit wounds that it caused, and about its ballistics and bullet trajectories. When asked if there was anything specific about the case that stuck out in his mind, Rane, a twenty-eight-year-old salesman, said, "What I remember is seeing the pictures of the man laying behind the counter, laying in a puddle of blood probably bigger than this table. And the pictures—the other jurors and I had to . . . It was difficult for some of them to look at the pictures. They'd take them up so close and they'd show the clear shots and all. Then we handled the weapon and a lot of them really didn't want to do that." When asked if he still thought about those pictures and the gun, Rane replied, "Surely."

Another juror in the Connors case, a seventy-three-year-old retired grandmother, Belle Givens, recalled the violence that Connors had done in terms of "a big gun. Right that's it. He used a big gun." Confronting the instrument of death was a horrifying experience. She described herself as an unwilling victim of a process that would not respect her squeamishness in the face of violence. "Reason I say big gun is because they passed it around and made me look at it and touch it, and I didn't want to. They made

me look at it and touch it." The image of the violence done by the big gun "followed us into the jury room and it bothered me very much."

For her, like Joseph Rane, the image of violence also was fixed in the photographic evidence of the crime scene. "These photographs," cultural critic Luc Sante argues, "lack the functions that are usually attached to images of death. They do not memorialize, or ennoble, or declare triumph. . . . As evidence they are mere affectless records, concerned with details, as they themselves become details in the wider scope of police philosophy, which is far less concerned with the value of life than with the value of order. They are bookkeeping entries, with no transfixing mission, and so serve death up raw and unmediated."[39]

Once seen, the image was deeply imprinted on Belle Givens.

> But what did this idiot do. As the guy fell down behind the counter he hit the shelves right in back of him, and John Henry took the gun and leaned over the counter—bam—and another shot killed him. And they showed a picture of the man to the jury. I didn't want to look. They insisted I had to look. If I don't look, what they decide, well. I didn't want not to look and then have to have another trial. So I had to look, and that's still following me into that deliberating room.

In the system of state killing, while the execution is hidden and the violence jurors are asked to authorize has no image, and while no one can claim an entitlement to see the deadly deed,[40] it is compulsory to view representations or instruments of the violence to which they are asked to respond. Jurors must view such graphic representations and grasp the death-producing instrumentalities, which are given special evidentiary value in the state's case against the accused. To refuse to consider all the evidence is tantamount to defying one's oath as a juror. Because the gaze cannot be legitimately averted, the juror becomes a "victim" of viewing.[41]

Images and instrumentalities, in their evidentiary guise, engender a vivid and immediate confrontation with illegal violence and its consequences by emphasizing a particularized focus. As another juror, Charlotte Howles, explained, "The only thing we saw were pictures they had taken of the scene and they were just from the head up. You know, of where the gunshot wounds were at. That's all we saw of him." The victim is presented only in the violent images of the wounds that ended his life.

Being forced to confront those images has dramatic consequences in enlisting jurors to authorize execution. The victim will often be remembered as nothing other than the wounds that ended his life. As Sante says, "If photographs are supposed to freeze time, these crystallize what is already frozen, the aftermath of violence, like a voice-print of a scream. If photographs extend life, in memory and imagination, these extend death, not as a permanent condition the way tombstones do, but as a stage, an active moment of inactivity. Their subjects are constantly in the process of moving toward oblivion."[42]

Indeed, so powerful are those images that Charlotte Howles, when asked if she could remember what Donaldson looked like, said, "No, because to be honest I didn't look directly at the picture of his face because we were looking at where the bullets went in and came out. I didn't really look in his face." Or as Ms. Givens put it, "Normally I consider myself a liberal easterner transplanted here to Georgia and against capital punishment—always was—but after I saw that picture of that man, something popped. I saw the pictures of him slumped down behind the counter and he was shot at somewhere around here and behind the ear, that was terrible. . . . I think about it even now and it bothers me very much."

Assigning Responsibility and Explaining Motivation

But the juxtaposition of images of murder made vivid and the virtual invisibility of the state's own violence does not, in itself, explain how jurors allow themselves to be enlisted as authorizing agents of capital punishment. The testimony of the Connors's jurors suggests that two other factors are crucially in play. The first of those factors is what I call the "compulsion" to assign responsibility and explain motivation.

The origin and force of this "compulsion" in the case of John Henry Connors can perhaps be appreciated if we first understand that the story of his killing of Andy Donaldson is a seemingly random, meaningless death.[43] Events like the shooting of a clerk in the context of a ten-dollar robbery produce an intense effort to restore meaning, to answer the kind of question put by juror Howles when she asked, "Why? Why did he do it? Why, for such a small amount of money? I would love to have confronted him, face-to-face, and asked him why he committed such a senseless [act. It is] stupid to me to take another human life." Howles's questions express "a simple primal fear that our collective attempt to reassert meaning and value in a world deconstructed by random violence . . . will be . . . fleeting and unsuccessful. . . . [The juror] is swamped by a physical as well as psychic need not to succumb, not to be drawn, not to be sucked under, not to be seduced by the meaninglessness of such murders, into the falsely sophisticated, David Lynch-ian belief in the meaninglessness of the particular lives ended." The response is a virtually overwhelming desire to "assign personal responsibility for the murder and its consequences—including the arrest, trial and its outcome-imposition of the death penalty—squarely and irrevocably on the defendant."[44]

The Connors jurors voiced a strong desire to fix personal responsibility on the defendant, to make him a moral agent capable of being held to account for what otherwise seemed unaccountable. For each of those jurors the capital trial was, in fact, a drama dominated by the question of Connors's responsibility. As Ranes said, "There really wasn't much of a question about Connors' guilt. He was there. He never denied that. His gun fired the shot; he never denied that. There was just a lot of talk as if, you know, the fact he was drinking, as if the bottle left Connors behind, got out of the car, went into the Jiffy, and fired the shots." As Howles explained,

> They [the defense] said that alcohol had taken hold of his mind at the moment and that, if he had not been under the influence of alcohol, he wouldn't have been where he was at. They were blaming it on the alcohol because that's when they were questioning us as jurors . . . that was the one question they asked us, did we think that alcohol could make you do things that you normally wouldn't do. It was one of the questions that the defense asked when they were selecting the jurors.

Another juror, Sylvia Mann, a forty-nine-year-old high school social studies teacher, rejected the argument that alcohol could provide a sufficient explanation of why Connors killed Donaldson or that it should somehow diminish his responsibility.

> It did come up that he was under the influence of alcohol and drugs even though they told us from the beginning that that was not a defense. I felt that the defense really pushed it a lot. They kept talking about it a lot even though they said it was not a defense. When we deliberated it was brought up fairly often that the person was under the influence. But so what? I mean a lot of people get drunk, but they don't take guns and go shoot up the Jiffy Store. I don't think anybody really ever felt it was much of a defense. . . . He shot someone because he wanted money. Like lots of people want money but they don't kill other people to get it. And he knew what he was doing. Because he'd already shot the man and the man was on the floor and unconscious and there was no need to shoot him a second time. Apparently he intended for the man to die.

For this juror, Connors was a moral agent despite his alcohol problems, fully capable of knowing what he was about, one whose actions suggest an inexcusable intention to kill. "Bottles," she continued, "don't kill people. Only people, people like Connors, kill people." By insisting that Connors was both legally guilty and morally responsible for the murder of Donaldson this juror and her colleagues refused to accept the picture of a social world of events governed by causes beyond human control; instead, they constructed a moral world of free agents making choices for which they could be held to account.

As Joseph Rane saw it,

> There is a simple explanation for why he [Connors] did it. He made a really bad choice. He valued human life for ten dollars. And whether he was under the influence of alcohol or drugs or whatever, he's still responsible for what he does and that's something that was brought out. . . . He wanted money though if you are familiar with convenience stores you know that after eleven o'clock they don't even carry twenties in the drawer. And being under the influence of drugs and alcohol, there's no telling what it'll make you do. But you still do it. I think he just saw an opportunity to get some money to go get whatever and he just took that opportunity. . . . There was no reason in the world why somebody under the influence of alcohol or drugs should take anybody else's life. Why should he be any different from the rest of us?

In these narratives we see jurors confronting what Ranes himself called "just one of them whimsical things." We see their need to "reassert responsibility and human agency for a momentous act and momentous deprivation; so that we can again feel in control of destiny."[45] To his jurors Connors seemed enough like them that he could be justly subject to their judgment. Yet, at the same time, he was different enough that his "cold-blooded," "vicious" act seemed to deserve the most severe, and thus unusual, punishment.

But as the jurors in the Connors case contemplated whether to authorize such a punishment, another question of responsibility having to do with their own responsibility as jurors arose. As Robin West argues,

> The juror's responsibility for his fellow citizen, and responsibility to reach the morally right decision, is precisely what defines the juror as citizen. . . . That capacity gives the juror a stake in the affairs of others and makes him care about the consequences of his decision. The juror's capacity for doing so, his duty to engage this capacity, and his responsibility for the outcome are all necessary contributions . . . to the vitality of a liberal, participatory, and nonapathetic society.[46]

If Marshall's speculations in *Caldwell* are correct, responsible jurors, those who see themselves directly and personally responsible for the executions their decisions authorize, would be less likely to support state killing, whereas those who convince themselves that the responsibility lies elsewhere would be more likely to do so. Three jurors in the Connors case conformed to Marshall's expectation; even as they insisted on Connors's responsibility for murder, they refused to see themselves as agents of death.

Jurors Mann, Givens, and Rane each talked about their decision to condemn Connors to death as if that decision was somehow made elsewhere, as if they were not really making choices or authorizing anything. Each of them echoed an argument made by the legal philosopher Herbert Morris, namely, that the person who is truly responsible for the punishment is the defendant himself.[47] In this view the murderer, by his own acts, determines the death sentence. Thus the juror who votes for such a punishment is merely the agent of the defendant.

However, the efforts of Mann, Givens, and Rane to avoid responsibility for authorizing violence did not end there. Each was acutely aware of a point made by Cover, namely, that "the social organization of legal violence . . . [ensures that] responsibility for the violence must be shared." Cover noted, "Law . . . manifests itself in the secondary rules and principles which generally ensure that no single mind and no single will can generate the violent outcomes that follow from interpretive commitments. No single individual can render any interpretation operative as law—as authority for the violent act."[48] This is, of course, readily apparent from the group character of jury decision making, but it is also apparent to jurors from law's hierarchical social organization.

The jurors in the Connors case knew, or at least believed, that their decision was not the last word. Each knew or believed that it would be reviewed by the judge who presided over the trial and/or by an appellate court. All thought that the appeals courts were as likely to reject the death penalty imposed on Connors as to accept it, and Mann, Givens, and Rane said that the fact that their death sentence would be reviewed by other actors in the legal process meant that, should Connors actually be executed, they

would not have his death on their consciences. For them, the very structure of "super due process," and of extended review and appeal, which had been put in place to ensure heightened reliability in capital cases, made it easier to impose the death penalty.

Only Charlotte Howles saw herself as directly and personally responsible for the death sentence for which she voted. As she put it,

> I was really surprised when I could go in and vote for death because really and truly, before I was on this jury I had never given it a lot of thought. And I didn't have any strong convictions one way or the other. It is a big responsibility, and hard to accept, but I think that's why they have juries so people like me have to make those hard decisions. I felt from the beginning that it would be my call, and I thought that if the facts are there . . . I would have no problem going in and finding somebody guilty and giving them the death penalty. I think that if it's a heinous thing and if it warrants it, then I would certainly vote again for the death penalty. . . . My opinion was that, hey, I'm not going to let this guy [Connors] out. I would feel the same way if he was guilty, electrocuted later on, and they found him innocent. I'd feel bad, but not as bad as if I didn't give him the death penalty and he somehow got out and killed again. For me, my job was to make sure that that didn't happen again.

The moral responsibility that Howles felt most acutely was to use the death penalty to address a social crisis engendered by the kind of random, valueless violence perpetrated by Connors. In contrast to the act for which Howles was prepared to hold Connors responsible, Howles saw state killing, and her participation in the authorization of death itself, as meaningful and purposive, as being necessary to protect innocent others from him.

When "Life Doesn't Mean Life" and "Death Doesn't Mean Death"

As we saw in the Brooks case, not all jurors vote for death and not all juries impose it. Nonetheless, when people like Charlotte

Howles accept responsibility for imposing the death penalty, one might still ask, What is the meaning of the penalty they are voting to impose? When jurors lend their voice and vote for capital punishment, how do they understand the act they are authorizing?

My conversations with the jurors in the Connors case suggest that glaring inadequacies in the arsenal of criminal punishment as well as in the processes of review and appeal that automatically accompany a death sentence combined to push them to authorize such a sentence, although most were neither enthusiastic about their decision nor convinced that Connors would ever be executed. These conversations point to the instability and unpredictability of the responses of readers-listeners-jurors to the stories presented at trial. The jurors in the Connors case "rewrote" or supplemented the stories of both prosecution and defense, insisting that another story had to be told, this one a story of the unreliability of the state and the inadequacies of its penal policies.

That unreliability and those inadequacies make the death penalty seem to some jurors necessary and, at the same time, a highly improbable event. Focusing on the unreliability of the state and the inadequacy of its policies allowed jurors in the Connors case to decide one thing, that Connors should be sentenced to death, as a way of achieving another—namely, that he should spend the rest of his life in jail. While Connors's violent act could not be undone, the jurors responded by ordering a violent act that they thought would not be done at all.

The jurors in the Connors case were overwhelmingly concerned with incapacitation as a goal of criminal punishment. None of them believed that executions served as a deterrent to others, and none embraced a purely retributivist rationale for capital punishment. Each of them was, however, deeply concerned with the possibility that Connors might someday be back on the streets of Bowling. Each seemed sure that Connors's vicious, bloody acts qualified him to die under the laws of Georgia, yet each believed that what was necessary to achieve justice was something less than his death at the hands of the state.

Because, at the time of the trial in the Connors case, Georgia law did not provide for a sentence of life without parole, each was

persuaded that unless they voted for death John Henry Connors would soon be out of prison posing a threat to innocent others. For these jurors, then, sentencing someone to die was the only way of insuring that he would live the rest of his life in prison. As juror Howles explained, "If he had not been found guilty of capital murder he would have gotten life. But that doesn't mean that he would have served a life term. It means he would have gotten out in however many years it is you have to serve before you get out on parole. Isn't it something like seven years. I think I'm just going by what I hear on TV, you know." Like the other jurors, Howles voted for death as a form of insurance: "If we didn't give him the death penalty, if he did get back out into society, he would hurt someone else. And I really didn't want that."

Rane and Mann stated that they would have preferred an alternative to the stark choice of death or a life sentence that did not really mean life in prison. Both said that they would have preferred it if they could have voted for life in prison without the possibility of parole. Both suggested that they chose death because this alternative was not available.

In fact, Rane reported that a substantial part of the jury's initial deliberations about Connors's fate focused on the meaning of life in prison.

> We were concerned that if he got life in prison he would serve only a few years and then be turned loose. There was one woman who was particularly adamant that she didn't want that, only problem was she said that she couldn't vote for death. So that's when the question of life in prison without the possibility of parole came up and that's when we sent a note to the judge asking if we could give that. And he called us back out and had us in the jury box again and he read the question and then told us that we couldn't, that that was not one of the options given. It would either be the death penalty or life in prison which meant he would have a possibility of parole.

This turned out to be a decisive moment in the Connors case. As Sylvia Mann said,

> I was truly amazed because many of the people that were on the jury did not really seem to understand that life does not mean life. And I was astonished that a good number did not realize that when they started it. Those of us who did understand that, it took us to explain it to them because they really did not understand that. A lot of them would have liked to have given John Henry Connors life if it had really meant life, you know, that he was going to go to jail and stay there forever. When the judge told us it was either life that didn't mean life or death that changed things for most of us. But there were still a couple who didn't want Connors to die. . . . That meant that we had to talk about the fact that this, just for the reason that we voted for death, did not necessarily mean that Connors would die. . . . And I think we talked a good bit about the fact that this would go to the Georgia Supreme Court and it would be reviewed and that if anything was out of the ordinary then it would be thrown out, and that even after then the man would have many opportunities to appeal. And I think that probably that discussion helped more than anything to persuade the two that was reluctant. Just because we voted death didn't mean he would die.

Life that doesn't mean life and death that doesn't mean death—given these alternatives jurors in the Connors case struggled to find a way to express their view that the appropriate response to Donaldson's killing would be to put Connors away and to throw away the proverbial key. Indeed, no one—not Howles, Mann, Givens, or Rane—believed that execution was a likely result of a death sentence. As Howles put it, "We all pretty much knew that when you vote for death you don't necessarily or even usually get death. Ninety-nine percent of the time they don't put you to death. You sit on death row and get old."

This belief is typical of the views and attitudes of Americans.[49] Interviews with jurors across the country who have served in capital cases suggest that they often come to court believing that the law grants excessive and undue protections to defendants, which result in endless appeals in capital cases. As one juror who sat on a case that resulted in a life sentence said about persons given the death penalty, "They go back and appeal, appeal, appeal, so they

die of old age." Or, as a juror who voted for death in another case explained, "Just because someone is sentenced to the death penalty doesn't mean he'll ever die. They don't put people to death. For example, [name of defendant] has now been on death row for many years. He's still there. Every time you turn around he's appealing again. . . . I'm very unhappy. I think the man should be put to death."

Still another juror talked about the influence that the allegedly prolonged appeals process had in the deliberations of the jury on which he sat. "There was," he said, "a lot of discussion about the appeals and the money it would cost to keep him trying and in the end he might still get life after years of appeal. . . . So, this came up that there could be appeal after appeal after appeal and in the end you still get life." Finally, another person suggested that for the jury on which he sat the issue of endless appeals was very important. "If this guy gets death," the jury hypothesized, "they are going to appeal the hell out of it on all kinds of grounds because [name of defense lawyer] is that good. . . . If we say he gets the death penalty there is no guarantee that he'll get it. He'll appeal all the way up through the Supreme Court for the next ten years. And who is to say that through some technicality he won't get off scot free." Thus if a life sentence doesn't necessarily mean life, it is also not clear that a death sentence will mean death.

In this context it is important to note that, since the mid-1960s, uneasiness about social disorder generally, and about criminal behavior in particular, has given rise to what political scientist Stuart Scheingold calls the "myth of crime and punishment." This myth stresses punitiveness as the appropriate response to crime, in contrast to seemingly out-of-vogue alternative scenarios he labels the "myth of redemption" and the "myth of rehabilitation."[50] The so-called myth of crime and punishment provides the rationale for scapegoating and stereotyping entire categories or classes of people as the "criminal element."[51] It calls for harsh and lasting punishment as the appropriate solution—indeed, the only adequate solution to the frightening scourge of allegedly random, predatory criminal violence.[52]

Mistrust of the criminal justice process is inherent in public support for harsh punishment. It is reflected in a cultural common sense that holds that courts do not punish severely or effectively enough, that prisons release incarcerated offenders "far too soon."[53] Underlying these sentiments is the view that the criminal justice system has been and continues to be "faulty," especially those agencies responsible for the imposition and administration of criminal punishment.

The impression of leniency owing to the breakdown of the criminal justice system is conveyed best, perhaps, by news accounts of the recidivism of ex-convicts or persons on probation, parole, or furlough from prison—in the worst case, by the nightmare of the murderer released to murder again. In Georgia, where the Connors jury sat, as in the rest of the nation, the mass media play a key role in reinforcing and reproducing the perception that early release is endemic to the criminal justice system. Throughout the 1980s and 1990s the media in Georgia have repeatedly reported that murderers not given the death penalty will be eligible for parole in seven years. They have done so despite the Georgia State Parole Board's explicit statement in 1985 that class I murderers, persons sentenced to life for capital crimes, are considered for parole only after fifteen years,[54] despite official reports of the parole board indicating that class II murderers who do become eligible for parole in seven years are extremely unlikely to actually be paroled in seven years,[55] and despite legislation in 1994 that altogether abolished parole for capital offenders not sentenced to death.[56] The extremely infrequent use of parole after seven years for noncapital murderers and the explicit rejection of parole consideration before fifteen years for capital murderers not given the death penalty have received virtually no publicity and have thus been ignored in political rhetoric and news accounts of murders. As a result, the realities of the justice system have had little chance of penetrating the consciousness of even the most attentive Georgian.

The most visceral confirmation or "proof" of a defective criminal justice system and of the need for more severe punishment is

the early release of criminals who return to violent crime. Such cases easily become the focal points for public debate about the "crime problem" and how it should be dealt with. In this debate, what the public knows or thinks about the release of criminals in general and murderers in particular may well be reinforced and reproduced by politicians and others in the "law and order marketplace" with a stake in having the public see the issue in one way or another. The public's apprehension about crime and punishment invites politicians to assume a "get tough" posture in their political campaigns, and to tell stories of early release and what they will do about it as a way of garnering support from a public ever wary of crime.[57] Especially when the crime is murder and early release is blamed, politicians will be tempted to use emotionally laden media accounts accompanied by allegations of the contributing role of early release to present the crime problem to the public.

Perhaps the most striking example of such accounts were the two "Willie" Horton ads in the presidential campaign of 1988.[58] Those ads proved to be ideal fodder for an election year media rampage that turned the tide for then vice president Bush. They created a narrative nightmare of escape from punishment that resonated with public fears of criminal violence. They have provided the bedrock for both political rhetoric and the consciousness of crime and punishment ever since. The Horton narrative did so by making a black man who senselessly brutalized a white couple the symbolic representation of Michael Dukakis (the Democratic candidate for president) and the alleged failure of his criminal justice policy,[59] a racial theme also echoed in media crime coverage.[60]

In this context it should not be surprising that jurors like those in the Connors case were extremely vocal in articulating concern about early release. Their statements provide strong evidence of a cultural common sense focused on "undue solicitude" for defendant's rights and "insufficient severity" in dealing with the most dangerous criminals. Time and again, jurors in the Connors case, and in others returned to those issues. As one man put it, "The prosecution and the judges. . . . It's the pardons and parole

people and the judges that keep interfering with the system that turn them loose." This language is interesting in its separation of particular actors in the criminal justice system from that "system" itself, suggesting that the source of problems is personal rather than institutional. In contrast, another juror's analysis moved from the personal to the systemic as he explained his thinking about crime and punishment; "I feel like our justice system has gotten—now I can get on the soapbox—that our justice system has gone way too much for the criminal instead of the victim. I think they definitely have gotten more."

So pervasive is the belief about early release that some jurors regard any contrary belief as frivolous.[61] One juror explained how he had responded when he encountered such a belief during his jury's deliberation.

> One of the women, she was under the impression that if you gave someone life in prison they would be in prison for the rest of their life and myself and a couple of other jurors had to explain to her that if he did get life in prison, he would stand a chance of parole in years to come and that they would be back out on the streets again. There was only one way to actually stop him from doing what he did again. It was to give him the death penalty.

When asked if he explained that to the other juror, he replied "Myself and someone else, because she wasn't aware that a life sentence means you can be released in 7–9 years." The female juror's view is attributed to ignorance, to a lack of awareness of what the respondent takes as an established fact.

Still another juror talked about how he had confounded the judge and the lawyers during voir dire.

> They asked something about life in prison and I said "Well, there's really no such thing," and of course they all went "uhhhh." And they said "What do you base your opinion on?" I said "I read a lot while I was growing up. I got the impression that when you were sentenced to life in prison and you died in prison, you weren't killed, but you died in prison." But I said "This is not true. You get out in seven years, you know, even for the most heinous crimes."

So deep is this belief that it is not clear that some jurors are prepared to hear or accept a view that contradicts it. "If we could definitely determine," one juror suggested, reflecting on the deliberations of the jury on which he sat, "that he would not get out of prison rather than being electrocuted that might have been allowed, but the fact that a life sentence would mean but a few years in jail meant that we had to go the other way. . . . The judge was saying that life in prison means life in prison period. *But we knew better.*"

Thus where state killing is concerned, saying yes does not necessarily mean yes. To the jurors in the Connors case, and in others in the everyday world of the killing state, saying yes to the death penalty meant both more and less than it seemed. For the Connors jurors it was a way of expressing moral horror and revulsion at the violent and "whimsical" killing of Andy Donaldson and of ensuring, as best they were able, that Connors would himself never be an agent of such violence again.

Conclusion

The capital sentencing decision is, at least in theory, distinctive. It is a state-authorized collective choice made by citizens under legally prescribed procedures with explicit rules to govern, or at least guide, the decision-making process. The decision is supposed to be a "reasoned moral choice" between life and death informed by aggravating and mitigating considerations in accord with retributive standards.[62]

As the Connors case illustrates, the realities for those called upon to make this decision are different. Jurors in capital trials are asked to participate in a set of complex rituals through which the state seeks to gain the right to exercise the ultimate power of sovereignty, namely the power over life itself. They are asked to cast the weight of citizenship on the side of state killing. It is, as I have said, a remarkable and troubling aspect of democratic politics that jurors regularly do so. The Connors case helps us understand how and why this happens.

In the Connors case, and other capital trials, the representation of violence is as difficult and as uncertain as it is anywhere else. Yet capital trials make some kinds of violence vivid and visible while effectively hiding others and rendering them invisible. The violence made visible is the murderous violence of people like John Henry Connors whose acts are graphically displayed and the consequences of which are eagerly described to jurors. While the prosecution makes great efforts to persuade jurors that such violence is unnecessary, irrational, indiscriminate, gruesome, and useless, the violence of the death penalty is described, when it is spoken about at all, as rational, purposive, and controlled through values, norms, and procedures external to violence itself. The jury's verdict, the spoken truth of the community, is the ultimate affirmation of the meaningfulness of that difference. Thus death sentences, some might assume, speak for themselves. They intermingle a politics of vengeance with a fearful concern about dangerous persons and convey the authority and the desire that someone should be put to death by the state. They represent the ultimate public embrace of the killing state.

In the Connors case, while the death sentence did authorize the state to extinguish the life of John Henry Connors, it is by no means clear that the jurors truly desired this result. The death sentence was not simply a linguistic command whose integrity depended on Connors's execution. It was at one and the same time a powerful condemnation of Connors for his vicious crime and a way of ensuring that he would be imprisoned for life. Where death sentences are not imposed, it may be because jurors feel that execution is disproportionate and perhaps, as in the Brooks case, because they believe, contrary to the weight of public opinion, that a life sentence means what it says.

The Connors jury verdict was also an expression of distrust in the criminal justice system. It has now become conventional wisdom that state policy is too lenient and ineffective—in particular, that murderers not condemned to death will be back in society

far too soon. The Connors case shows the way such beliefs may help shape legal action in the killing state.

Though represented in state law as a strictly regulated and formally guided exercise of reasoned moral judgement, in practice the capital sentencing decision is often a negotiated social transaction fraught with tactics of persuasion, advocacy, rhetorical claims, and intimidation. In this context, jurors' claims about the timing of release become potent tools in negotiations over the right punishment. These claims empower citizens, giving them a conception of how state law does, and should, operate, whose source is independent of those whose legal authority derives from formal training or official position. Instructing jurors in capital cases not to think about what the sentence alternatives would be when they are deciding guilt and refusing to explain to them what the death penalty alternative would be when they are deciding punishment may make sense within the highly structured ideology of due process, but doing so defies cultural common sense and, as such, is regularly resisted.[63]

Lawrence Friedman, of Stanford Law School, observes that "The jury's power to bend and sway, to chip away at the official rules, is built into the system. Juries are not supposed to be lawless, but the system is set up in such a way that lawlessness . . . cannot be prevented—cannot even be detected."[64] But how can law tolerate death as a punishment when prevailing public attitudes compromise the constitutional protections required by state law? It can do so only by ignoring this fact. By "deregulating death" the Supreme Court is able to ignore the sacrifice of legal protections, while insisting that lower courts exercise heightened care and reliability in the handling of capital cases.

Yet the Supreme Court has recognized the difficult position capital jurors are put in when they are not informed about sentencing alternatives prescribed by state law.[65] As a result, the Court held that it is the defendant's right to have jurors know what the alternative to the death penalty would be, though under limited conditions.[66] But would telling jurors about the alternative override their anxieties about early release and their mistrust of the criminal justice system?

While some may argue that beliefs about early release with their adverse impact on defendant's rights can be dispelled by jury instructions, the evidence presented here raises serious doubts. Jurors' ideas are embedded in more general folk beliefs about early release. They are the product of a perception that murderers get out of prison far too soon, which, in turn, is rooted in a deep-seated mistrust of the criminal justice system and its punitiveness and in the belief that due process unfairly tips the scale in favor of defendants.

Evidence inconsistent with taken-for-granted assumptions about the right way of dealing with criminals and the dangers of deviating from those methods does not penetrate.[67] Given the repeated and insistent political and media emphasis on the prospect of early release in murder cases, and jurors' beliefs in the unreliability of evidence about parole practice in such cases, they are not apt to trust court pronouncements that run contrary to their deeply ingrained folk knowledge. Thus a public enlisted by the state to impose death may do so, but not in the way required by the Constitution as a condition for using that punishment. The killing state, in spite of the formal protections of the law, may end up being a lawless state.