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Adversarial versus Inquisitorial Justice

Psychological Perspectives on Criminal Justice Systems

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The Death Penalty and Adversarial Justice in the United States

SAMUEL R. GROSS

In a volume devoted to comparing adversarial and inquisitorial procedures in Western countries, the subject of the death penalty is an anomaly. Any system of adjudication must address several basic tasks: how to obtain information from parties and witnesses, how to evaluate that information, how to utilize expert knowledge, how to act in the face of uncertainty, how to review and reconsider decisions. By comparing how competing systems deal with these tasks we can hope to learn something about the strengths and weaknesses of alternative approaches to common problems. The death penalty, however, is not an essential function of a system of justice; it is not even a common element. Not a single Western country with an inquisitorial system of justice has retained the death penalty, and neither has any major Western country that uses an adversarial system—except the United States. As a result, it is impossible to compare how modern adversarial and inquisitorial systems handle the difficulties of administering capital punishment. Instead, I will address a different question: How well does the American system of adversarial justice manage the difficulties of capital cases?

The answer (hardly a secret) is that we handle capital cases very badly. Perhaps a discussion of the ways in which American adversarial justice fails in this context will contribute to a comparison between adversarial and inquisitorial systems by identifying weak points in the adversarial

method that make it prone to terrible problems when it is subject to the types of stresses that the death penalty creates. But perhaps not. It is by no means clear that Holland or Spain could do much better than Texas if it executed 30 or 40 people a year.

I do not propose to write a comprehensive review of the problems of capital punishment in the United States. There is a voluminous literature on the subject, and it continues to accumulate at a rapid rate. Even a cursory summary would require a book-length treatment. Instead, I will do no more than briefly review three of the major sets of problems that plague the administration of the death penalty in the United States. Moreover, since this volume is a comparison between different legal *procedures*, my review is restricted to practical problems—how the death penalty, as used in America, is discriminatory, arbitrary, and inaccurate. I will not address the arguments that the death penalty, like torture, is inherently immoral and a violation of fundamental human rights.

INADEQUATE RESOURCES FOR LEGAL REPRESENTATION

The American system of adversarial justice is predicated on the assumption that both sides are competently represented and have adequate resources to present their cases. That assumption is often false. In criminal cases, the problems that are caused by inadequate resources are very different depending on the side that is affected. The prosecution in the United States has essentially unlimited discretion to choose which cases to pursue and which to forego. Among those cases that are pursued, the prosecution has equally great discretion to decide when to offer an irresistible plea bargain, and when to insist on trial and severe punishment. An underfunded American prosecutor is likely to respond to limited resources by declining to prosecute cases that seem comparatively unimportant, or those in which convictions may be difficult to obtain because the evidence is weak, and by offering attractive plea bargains to defendants who are prosecuted. The net effect is to exclude or remove cases that are deemed weak or unimportant from the stream of formal criminal adjudication. Only very rarely will inadequate prosecutorial resources result in a full-blown trial at which the prosecution is overwhelmed by a far better prepared defense.

Criminal defense attorneys do not have the power to choose which cases to defend. If they are overworked, underfunded, lazy, or incompetent, they must nonetheless forge ahead and handle the cases that prosecutors bring, however inadequately. In the usual case of bad defense work, that means agreeing to a quick plea bargain without conducting an adequate factual investigation of the case, and without pursuing possible

legal and factual defenses. Once in a while an incompetent criminal defense attorney will proceed to trial; usually, they never get that far. Death penalty cases, however, are very different from other criminal prosecutions, even other murder cases. As a result, the consequences of inadequate resources are quite different, on both sides.

On the defense side, the worst problems are well known: defense attorneys who interviewed no witnesses, presented no defense, came to court drunk, fell asleep at trial (Bright, 1994; Jennings, 2000). Despite these outrageous stories, it is no doubt true that overall the resources devoted to the defense are greater in capital cases than in other criminal prosecutions. The problem is in part that these resources are distributed extremely unevenly. In the United States, most criminal justice policy is set by the states and by local governments rather than by the national government (Israel, Kamisr, & LaFave, 2000). In some states, capital defendants benefit from excellent representation by experienced and well-financed criminal lawyers. In others, they suffer from inexcusably incompetent representation by unqualified lawyers who receive nominal compensation and assistance. In addition, capital cases demand far greater defense resources than other criminal proceedings. Obviously, there can be no plea bargain if the prosecution insists on capital punishment. That means that convictions that result in death sentences—unlike the great majority of other criminal convictions—are almost always the result of full-blown jury trials rather than negotiated guilty pleas (Gross, 1998). Inadequate defense attorneys cannot get out of capital cases cheaply and invisibly by engineering plea bargains; they must do their worst at trial.

And these are not just ordinary trials. In addition to all the usual complexities of a murder prosecution, when a defendant is convicted of capital murder in the United States there is an elaborate separate procedure—in effect, a second trial—to decide the punishment, usually before the same jury that convicted him. In this penalty trial the jury is allowed to consider a very wide range of information about the defendant and his crime, and must then make an essentially discretionary decision whether to sentence him to death or to life imprisonment. The outcome is very much up for grabs. The great majority of ordinary criminal trials in America, perhaps 75 or 80%, result in convictions. But among capital penalty trials, only about half or slightly more end in death sentences. In many cases this highly discretionary and variable decision seems to turn on the quality of the defense. On the one hand, clients of the best capital defense attorneys are rarely sentenced to death. On the other hand, there are many cases like that of Horace Dunkins, who was sentenced to death and executed in Alabama in 1989. Before his execution, a juror said publicly that she (and probably other jurors as well) would not have voted for death if she

had known that Dunkins was mentally retarded, but his defense attorney never presented that information in court (Applebome, 1989). The result, in Stephen Bright's (1994) words, is that the death penalty, as often as not, is given not for the worst crime but for the worst lawyer.

On the prosecution side, the consequences of limited resources for capital cases are less obvious but just as important. Death penalty prosecutions are very expensive. They are much more complex than other criminal cases at every stage, from initial investigation through trial to review on appeal. And, of course, this costly process cannot be short-circuited by plea bargaining; in order to obtain and execute a death sentence, the state must go through every step at least once—and, as the process typically unfolds, many of them twice or more. As a result, prosecutors are very selective in choosing which cases to prosecute capitally and which not.

In theory, selectivity in capital prosecution is a good thing. Even the strongest advocates of the death penalty agree that it should be used sparingly. But (at least from the point of view of supporters of capital punishment) infrequency is not a virtue in itself. The idea, rather, is that the death penalty should be used sparingly because it should be reserved for the worst cases. Infrequent use because of limited resources constraints is not likely to fit that mold (Liebman, 2000).

Prosecution in the United States is a local function. With few exceptions charging decisions are made by county prosecutors who are elected separately in each of the more than 4,000 counties across the country (Israel et al., 2000). The offices these prosecutors run also pay for the prosecutions. In addition, county governments typically pay the cost of defending capital cases—which (in some states) can be very high. As a result, the effects of the cost of capital prosecutions not only vary enormously from state to state but within states from county to county. Defendants in some areas are far more likely to face the death penalty than those charged with similar crimes in nearby towns. Moreover, in small counties in particular, capital charging decisions may turn on accidents of time and order. A defendant may be subject to capital prosecution if there has been no capital case in the county for a while, or may be spared the ordeal because someone else got there first and already cost the county half a million dollars. This is one aspect of the issue I will address next: patterns in the use of capital punishment in the United States.

ARBITRARINESS AND DISCRIMINATION

Although the United States executes more prisoners than any other democratic nation, the death penalty is still a rare punishment. In 1999,

there were 98 executions in the United States (Death Penalty Information Center (DPIC), 2001b), a very large number by modern standards, but they occurred in a country in which there were over 15,000 homicides (Federal Bureau of Investigation (FBI), 2001). Some of those homicides were not legally eligible for capital punishment, either because they were committed in the minority of states that don't use the death penalty or because they clearly did not meet the criteria for capital prosecution. Even so, use of the death penalty in the United States has been restricted to a small fraction of the cases in which it could theoretically be applied, perhaps 1 in 50 or fewer (Gross & Mauro, 1989).

As I have mentioned, infrequency of death sentences and executions would be no problem—indeed, it would be a virtue—if its use were restricted to the worst and most deserving cases. But that is not so. As I have also already mentioned, the fate of a potential capital defendant frequently turns on accidents of geography and timing, or the quality of his legal defense. As often as not, however, there is no apparent reason for the outcome—it is absolutely obscure why some defendants are sentenced to death and others are not. While the most heinous murders are very likely to be subject to the death penalty (serial murders, for example), and the least aggravated ones are very likely to be spared that fate (such as a killing by a jealous spouse), there are exceptions even at those ends of the spectrum, and in between many decisions might as well turn on chance (Baldus, Woodworth, & Pulaski, 1990; Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 1998).

It would be difficult, perhaps impossible, to devise any evenhanded system for imposing a penalty that is so rare and so severe. In the American system of criminal justice there is no feasible way even to try to do so. At the initial charging stage, decisions are made by numerous locally elected autonomous prosecutors. No state official (let alone any national body) directs their discretion. This means that the criteria that are used will vary greatly from town to town and year to year. Each prosecutor is likely to make only a small number of these difficult decisions—one or two a year, none for years at a time—so it is not feasible to expect most of them to articulate (let alone follow) any sort of systematic policies for choosing capital prosecutions. At the end of the process, the American tradition of jury sentencing in capital cases means that most capital sentencing decisions are made by single-case panels of inexperienced lay decision makers. Jury decision-making is a central aspect of the American context. It is important, among other purposes, as a limitation on the influence of politics on the judicial process (remember, for example, that most state-court judges [as well as prosecutors] are elected, Israel et al., 2000). But it cannot produce consistency in a process of this sort. Juries inevitably

reflect local differences in attitudes toward crime and the death penalty in particular, and their decisions frequently turn on accidents of group composition.

If the only problem in the pattern of the use of capital punishment in America were arbitrariness or randomness, that would be bad enough. But the true picture is worse. The use of the death penalty in America is also deeply influenced by systematic illegitimate biases. Some of these are widely suspected but not well proven. For example, it is said that some prosecutors are more likely to ask for the death penalty when they are running for re-election than after they have been recently elected, or that capital prosecutions are more common when the victims are prominent citizens. The most disturbing pattern, however, is well studied and well documented: the death penalty in the United States is infected with racial discrimination (Baldus et al., 1990, 1998; General Accounting Office, 1990; Gross & Mauro, 1989).

Some of the discrimination in the use of the death penalty in the United States is old-fashioned discrimination against black defendants. But the strongest and most pervasive pattern is discrimination by race of victim. Across the country, decade after decade and in state after state, numerous studies have shown that defendants who are charged with killing white victims are several times more likely to be sentenced to death than defendants in similar cases with black victims. This discrimination occurs at both ends of the process, in the initial charging decision of prosecutors, and in the ultimate sentencing decisions of jurors (Baldus et al., 1998; General Accounting Office, 1990).

Discrimination by race of victim seems to be deeply entrenched in the use of the death penalty in America, probably because it has multiple causes. Prosecutors may be more likely to ask for the death penalty in white-victim cases because those homicides attract more attention and concern from the politically powerful white majorities in their districts; they may also respond to the fact that their white constituents favor the death penalty more than the blacks. Jurors may be more likely to sentence a defendant to death if they identify with the victim or see her as a possible friend or relative, because killings that strike closer to home tend to horrify us more than those that seem more remote and abstract. In a largely segregated society in which most jurors are white, this means that defendants who kill white victims will be more likely to be sentenced to death than those who kill blacks. This bias is probably entirely unconscious, but may be quite powerful. And it may also influence prosecutors at charging as well as jurors at sentencing, both because prosecutors may share that emotional response themselves, and because they may anticipate that jurors will be unlikely to return death sentences in black-victim

cases, and therefore decide not to ask for the death penalty in the first place.

ERRORS

Finally, the worst problem with the administration of the death penalty in the United States is that it is extraordinarily prone to error. Arbitrariness, which we have already considered, is one type of systemic error. Capital punishment in the United States is supposed to be reserved for the most heinous murders, but many capital cases clearly do not satisfy that criterion (Baldus et al., 1998). In addition many individual cases are plagued by more specific and disturbing errors of law and fact. A recently released study by Liebman (2000) shows that 68% of all capital cases are reversed on review because of legal errors in the determination of guilt or penalty or both. This is a sharp contrast to other criminal cases in the United States, which are rarely reversed (Liebman, 2000).

In part, this astonishingly high rate of legal error is a direct consequence of the procedural nature of capital litigation. In general, American law greatly limits appellate review of convictions based on guilty pleas. In some states, ordinary appeals are not permitted at all following guilty pleas; where they are allowed only a narrow range of issues can be raised since the entry of a guilty plea obviates the need for most of the procedural steps that might be subject to review. Since the vast majority of criminal convictions in America are the result of guilty pleas, usually after plea bargaining, they are only subject to limited appellate review, or none. Death sentences, however, almost always follow full-blown jury trials, which preserve the defendants' rights to appeal on any available issue. These trials are usually much more complicated than other criminal trials, even on the issue of guilt and innocence. In addition, they also include the unique procedure of the capital-sentencing trial, which is subject to its own complex and error-prone legal rules. Finally, American judges are probably more careful and exacting in their review of death sentences than other criminal convictions—at least on the question of penalty, where a finding of error merely requires a reduction or reconsideration of the defendant's death sentence rather than the underlying conviction.

Many of the errors in capital cases in America are peculiar to the legal requirements that govern the use of the death penalty. In some, reviewing courts reverse death sentences on the ground that the defendant was not eligible for treatment as a capital offender. In others, the problems are procedural—typically, that in one manner or another that the defendant was denied the opportunity to argue effectively for a lesser sentence

(*Lockett v. Ohio*, 1978; *Penry v. Lynaugh*, 1989). Other errors are of types that frequently occur in non-capital cases as well—ineffective representation by defense counsel, use of illegally seized evidence or coerced confessions, etc.—but are less likely to lead to reversal because of the prevalence of plea bargaining and the less demanding standard of review. On these issues, the death penalty may simply be a context in which some of the common faults of criminal adjudication in the United States are uncommonly likely to be exposed. Finally, and most important, quite a few capital defendants have been released from prison for the most fundamental and disturbing legal error possible: because they were convicted and sentenced to death for crimes they did not commit.

Since the death penalty was reinstituted in the United States in 1976, 101 prisoners have been released from death row because they were proven to be innocent, or because of serious and unanswerable questions about their guilt (Death Penalty Information Center (DPIC), 2001c). Most spent many years under sentence of death; some decades. New cases of erroneous death sentences continue to come to light regularly, with no end in sight. Some of these defendants may in fact have committed the crimes for which they were condemned, but there is no doubt that the great majority was completely innocent, and that many other innocent defendants remain on death row. Several defendants who were later exonerated came within days, in some cases hours, of executions that were postponed for procedural reasons. Many if not most of these 101 defendants were cleared by a process that depended on blind luck (Gross, 1998). So far, there is no case with incontrovertible evidence that an innocent defendant was put to death, but it is likely that this has already happened and certain that it will happen in the future if we continue to execute at the current rate (Death Penalty Information Center, 2001c).

What accounts for this great concentration of miscarriages of justice among the tiny proportion of criminal cases in which death sentences are pronounced? In part it is due to the great attention that is focused on capital cases, especially on review. Similar errors in other cases—or for that matter in capital cases that do not result in death sentences—are less likely to be detected. In at least one case, for example, a defendant who was prosecuted for a murder he didn't commit and sentenced to life imprisonment was only exonerated after an investigation into the case of a co-defendant who was sentenced to death proved that neither of them was involved in the killing. In addition there is reason to believe that erroneous convictions are more likely in murder cases in general—and in the heinous murder cases that are likely to lead to death sentences in particular—than in other criminal cases. The main underlying process is that the authorities are much more strongly motivated to solve murder cases than

lesser crimes, and even more so when the murders are particularly gruesome. This is not a process that is unique to capital case. The same thing may happen in a gruesome rape case, or any notorious case with strong political overtones. But murders are the most common category of criminal cases that command that sort of extraordinary attention from the authorities.

The major effect of this extra attention is that the police and prosecutors use more resources in the investigation and prosecution of homicides, and bring more killers to justice. At the same time, however, the political and emotional pressures to resolve these cases impel the authorities to take cases to trial with weaker evidence than they would for other crimes. As a result, capital juries see a mix of cases that include a disproportionately high number in which the evidence is in serious doubt, and they must make more difficult, close decisions on factual issues than other juries. Inevitably, that leads to a higher proportion of mistakes (Gross, 1998). These same pressures also push prosecutors and police officers to take liberties with the procedural rules that are designed to prevent erroneous convictions. Most of the cases in which innocent defendants have been convicted of capital crimes—and many of the capital cases that have been reversed for other types of error—involve official misconduct. The common, garden-variety type of misconduct is the concealment of evidence favorable to the defendant, but some cases involve more extreme misconduct such as the destruction of physical evidence or the procural of perjury. In part as a result, perjury is the leading cause of erroneous convictions in capital murder cases; in other cases, the dominant cause is eyewitness misidentification (Gross, 1998).

The review process that is supposed to detect these errors has strained the resources of the appellate system in many American states. As a result there is an enormous backlog of cases on death rows across the United States, and long delays in processing those cases. As of January 1, 2001, there were 3,726 prisoners under sentence of death, most of them at the early stages of the complex process of review (Death Penalty Information Center (DPIC), 2001a). The average time between death sentence and execution in the United States is over 10 years and growing, and many prisoners have been under sentence of death for 20 years or more with no execution date in sight. These long delays have produced what has become known as the "death row phenomenon"—the terror of indefinite imprisonment under threat of eventual execution. European courts consider this process a human rights violation in itself (*Pratt v. Attorney General of Jamaica*, 1994; *Soering v. United Kingdom*, 1989). But any attempt to speed up the process of review would come at a cost. Many of the innocent defendants have been released from death row because of

information that became available, typically by chance, late in the process of review. If the appellate procedures had been more efficient, they would now be dead.

CONCLUSION

It may be possible to draw comparative procedural lessons from the American experience with capital punishment, but I doubt it. Perhaps the structure of inquisitorial adjudication, with its greater reliance on presumptively impartial official investigation and its reduced dependence on adversarial criminal defense, would do a more even-handed and accurate job of administering this extreme penalty. Maybe the use of professionally trained, non-elected, career prosecutors and judges would improve the process greatly. Perhaps the inquisitorial system of review, with its emphasis on factual accuracy rather than procedural regularity, would do a better job of catching errors. But this is speculation. The central fact remains that there is no Western inquisitorial system that retains the death penalty. Inquisitorial systems are subject to their own pathologies, which I have not explored. If a country that has such a system had retained the death penalty, or were now to restore it, those problems might emerge in full force.

But there is another possible link between the death penalty and adversarial justice that deserves mention. The most striking fact about the death penalty in America is that we continue to use it, and frequently, when every other Western democracy has abandoned the practice. Does our system of adversarial adjudication contribute the retention of the death penalty? The answer, I think, is yes, although the causal connection is indirect.

There are no doubt many reasons for this American exception, but a central one is the politicization of criminal justice in the United States (Gross, 1994). The death penalty is a major context in which this drama is played out—in what other country would the candidates' positions on capital punishment be a major issue in presidential elections?—but not the only one, and probably not the most important. Our drug policies and our astonishingly draconian use of imprisonment are also the products of electoral politics rather than rational policy (Gross & Ellsworth, in press).

Adversarial justice is neither a sufficient condition nor a complete explanation for the political nature of the American practice of punishment. Other countries with adversarial systems do not suffer from intrusion of politics into criminal procedure to the same extent as the United States. But adversarial procedure may contribute to the American way in

at least two respects. First, the tradition of citizen participation on juries may foster political interest in criminal justice and perpetuate direct political control over its administration through the local election of prosecutors, judges, and police chiefs. Second, the most powerful position in the system, that of the prosecutor, is assigned to a role that, at least in the context of electoral politics, seems to demand ever-greater punitiveness. Prosecutors run for office on their "toughness" on crime, and then do it again when they run for senator, governor or, president—and their opponents respond in kind (Gross, 1994).

In other words, adversarial justice may be most important to capital punishment in the United States not because it makes the process run better or worse but because it is part of the reason that we continue to use the death penalty at all.