Amicus Journal

Issue 22

Assisting Lawyers for Justice on Death Row
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PUBLICATION
The Amicus Journal is published three times a year, in April, August and December, with the possibility of a fourth issue if there is sufficient material and resources permit. Contributions are not merely welcomed but positively encouraged. See the Notes for Contributors in this issue.

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Charity number: 1019651.
Registered office: MGI Wenham Major Limited,
89 Cornwall Street, Birmingham B3 3BY.

FRONT COVER
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ISSUE 22

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Jon Yorke (ed.)
The twenty-second issue of the *Amicus Journal* includes a peer-reviewed article which explores offender profiling generally, and the notorious “BTK” serial killer in particular. Professor David Wilson, Professor Craig Jackson, and Dr Baljit Rana of Birmingham City University’s Centre for Applied Criminology question fundamental assumptions about the science of offender profiling. The vehicle for their critical analysis is FBI Special Agent John Douglas’s book, *Inside the Mind of BTK*. These authors deconstruct assumptions that Douglas uses to explain the identification and capture of Dennis Rader – the notorious Bind, Torture, and Kill serial killer. More important, they reveal alternative discourses which perhaps better explain serial killing and, therefore, are perhaps better suited to reducing its incidence. Against the Medical-Psychological Tradition of Understanding Serial Killing by Studying the Killers: The Case of the BTK, found in the Scholarly Articles section of this issue, is the third peer-reviewed article published by the Journal. We hope to publish more peer-reviewed articles soon, and encourage our readers to submit their work for consideration.

Lisa Kiff’s *Worldwide Update* examines recent developments in North America, Asia, Africa, and the Middle East. In the United States, the American Board of Anesthesiology issued a statement in April barring its members from participating in executions. At the Fourth World Conference Against the Death Penalty, convened in Geneva, Switzerland in February 2010, families of American murder victims spoke out against capital punishment. The tawdry tale of Texan Charles Dean Hood, whose death sentence was imposed by a judge who had been having a long-term affair with Hood’s prosecutor, took a curious turn when the Court of Criminal Appeals granted a resentencing hearing on grounds entirely unrelated to the grievous personal and ethical misconduct that infected Hood’s capital murder trial. In California, the Democratic Party, in an historic decision, enshrined its opposition to capital punishment in its formal statement of principles. Turning to Asia, Taiwan’s *de facto* moratorium on executions, in place since 2005, ended with the April 2010 executions of four prisoners, and drew international criticism. Singapore’s Court of Appeal upheld a mandatory death sentence for possession of more than 30 grams of heroin. Conversely, in Africa Kenya’s high court unanimously held that mandatory death sentences for murder are unconstitutional. In Uganda, a bill which would punish ‘aggravated homosexuality’ with death appeared likely to become law. Finally, in the Middle East, in Afghanistan, the Taliban orchestrated the public execution by stoning of a young couple whose capital offense was to fall in love and elope. Approximately 200 male villagers, including relatives of the condemned couple, participated in the execution. In Iraq, 62 persons were sentenced to death under anti-terrorism laws.

In the *U.S.A. Focus* section, Editorial Board member and frequent contributor Mark George recounts the appalling story of Alabama death row prisoner Cory Maples whose legal claims were denied review in federal court because of the incompetence of his lawyers. In a mockery of the doctrine that capital cases deserve, and the Eighth Amendment requires, heightened reliability, Maples stands a real chance of being executed without any federal court oversight of his case. Mary Gardner’s article, *Capital Punishment and International Extradition*, explores options in cases where asylum nations refuse to extradite to the United States prisoners who face the prospect of capital charges.

Finally, Jon Yorke’s excellent anthology, *Against the Death Penalty: International Initiatives and Implications*, is reviewed by *Amicus Journal* Editorial Board member and contributor, Lyn Entzeroth. Slated for publication in Issue 21, Professor Entzeroth’s incisive review was pulled for space considerations, and appears here with our belated apologies.

Please let us know your thoughts about this issue. Our goal, as always, is to inform, and to provoke debate, comment and critical thinking. We encourage you to send us your contributions for possible publication and to urge your friends and colleagues to do the same. We are particularly keen to hear any suggestions you might have to improve the *Amicus Journal*. We especially welcome letters to the editors, which may be sent to Randall Coyne at rcoyne@ou.edu or Thomas MacManus at tmacmanus@gmail.com.

Randall Coyne and Thomas MacManus, Joint Editors
Notes for Contributors

We welcome articles concerning legal issues relating to the death penalty in all jurisdictions around the world. The Critical Approaches to the Death Penalty section also provides contributors with the opportunity to scrutinise death penalty issues theoretically and from the standpoint of disciplines other than law. Accordingly, we welcome submissions engaging in the disciplines of philosophy, sociology, psychology, economics, politics, religion, feminism, anthropology and literature.

We also welcome case reports, intern reports from death penalty offices, reviews of books which concern the death penalty (both academic and literature), and editorials on specific aspects of capital punishment. We encourage contributors to engage in a dialogue with all aspects of the death penalty, and also to comment on the Amicus Journal and our Amicus charity. Furthermore, we welcome short entrants for our Worldwide Overview and contributors are welcome to submit jurisdictional developments to be included here.

Please refer to the articles submitted in the journal for our house style. All points of law and fact are to be supported through endnote citation to authorities. Citations are to comply with The Bluebook. The title is to appear in capital BOLD and the chapter headings are to appear in normal case bold, and sub-headings in bold italics. The author’s name should appear in italics with an asterisk (*) footnote symbol, detailing professional position or affiliation.

Main Articles
Between 5,000-8,000 words.

Shorter Articles and Case Commentaries
Between 2,000-3,000 words.

Book Reviews
Up to 1,000 words per book.

Editorials
Up to 1,000 words.

Letters to the Editor
Up to 800 words.

Worldwide Overview
Up to 100 words.


Please send letters or other contributions to either of the Joint Editors, Randall Coyne at rcoyne@ou.edu or Thomas MacManus at tmacmanus@gmail.com.
North America

American Board of Anesthesiology Bars Bember Participation in Executions

The American Board of Anesthesiology (ABA) issued a statement in April 2010 to its 40,000 members expressly prohibiting their involvement in execution by lethal injection. The Board believes that member participation is unethical, and the medicalisation of the lethal injection process would undermine public confidence in the medical profession.

The ABA has confirmed that it will revoke the certification of any member found to be participating in an execution by lethal injection, reflecting the belief that anesthesiologists are “healers, not executioners”. The move brings the ABA into line with the position of the American Medical Association (AMA) which opposes physician involvement in capital punishment on the basis that physicians are members of a profession dedicated to the preservation of life. In the ABA’s statement, secretary Mark A. Rockoff concluded that “the ABA’s policy on capital punishment is intended to uphold the highest standards of medical practice and encourage anesthesiologists and other physicians to honor their professional obligations to patients and society”.

Speaking Up for the Families of Murder Victims

There have been various recent reports regarding whether capital punishment is wanted or actually offers any benefits to the families of murder victims.

Speaking at the Fourth World Congress Against the Death Penalty in Geneva, Switzerland in February 2010, James Abbott, Chief of Police of West Orange, New Jersey, stated how his experiences had led him to hold the belief that life without parole was a preferable alternative to the death penalty. Abbott said he did not expect to reach this position but had been influenced by the numerous accounts he had heard from murder victim’s family members. A common theme was that the lengthy appeals processes associated with the death penalty created uncertainty and offered no closure. Abbott also commented that it meant that the names of the defendants were often remembered over those of the deceased. He also stressed that the money spent in relation to capital punishment could be put to better use by providing much needed services to support affected families.

Abbott’s views echo those of victim’s advocate Kathleen Garcia, a fellow member of New Jersey’s Death Penalty Study Commission. Garcia has stated how her personal experiences have led her to conclude that “the death penalty must be ended and replaced with life without parole, a harsh punishment that provides victims with the swiftness and certainty they need at a fraction of the cost in terms of dollars and human suffering by homicide survivors. Every dollar we spend on a punishment that harms survivors is one we are taking away from the services that can address the emergent and long-term needs of all victims”.

In Utah, in May 2010, the family of Michael Burdell, who was killed by Ronnie Lee Gardner, spoke out to ask that his sentence be commuted to life without parole. They emphasised their belief that Michael Burdell would not want to be the reason that Gardner was killed. However, the warrant for execution was signed and Gardner was executed on 18th June 2010.

Speaking in a television interview in April 2010, Bud Welch, president of Murder Victims’ Families for Human Rights and father of Julie Welch who was killed in the Oklahoma City bombing, said how executions are more often “staged political events” rather than part of the healing process.

Texas Court of Criminal Appeals Grants a Resentencing Hearing to Charles Dean Hood

A number of prosecutors, judges, politicians and legal ethicists have shown support for Texas death row prisoner Charles Dean Hood by filing an amicus brief in support of his petition to the U.S. Supreme Court. Hood was convicted of a 1989 double murder and was sentenced to death for his crimes. What was unknown at the time, however, was that the trial judge, Verla Sue Holland, and the prosecutor, Thomas O’Connell, had been having a long-term affair before, during and after Hood’s trial. Holland said she would have withdrawn from the case had she been asked to by Hood’s defence team. However, the defence team did not become aware of the affair until after trial.

* Former Intern, Virginia; Barrister, Crown Prosecution Service.
A few hours before Hood's scheduled execution, former District Attorney Matthew Goeeler swore under oath that the judge and prosecutor had been having an affair. Once this was confirmed by Holland and O'Connell in depositions taken in 2008, a Collin County judge ruled that the pair had "wrongfully withheld relevant information from defence counsel prior to and during the trial" and that Hood was to be given a new trial. The case then reached the Texas Court of Criminal Appeals, where the court held that because Hood had waited too long to raise the issue the court need not address it.

In the March 2010 National Law Journal, former Texas Governor Mark White wrote about Hood's case. White stated: "The trial judge and the prosecuting attorney's affair breaches every standard of fairness that you would expect a defendant to receive during a capital case or, for that matter, a noncapital case. Hood could not have gotten a fair trial under these circumstances. Hood's case shows, at the most basic level, that there are huge flaws in our procedures and human frailties in the people who administer them".

Ultimately, the Supreme Court declined to issue a writ of certiorari. Nonetheless, on February 24, 2010, the Texas Court of Criminal Appeals vacated Hood's death sentence and ordered a resentencing based on a Penry claim. According to the court, the sentencing scheme employed by the trial court precluded the jury from giving full consideration and effect to Hood's mitigating evidence. Neither former Judge Holland nor former District Attorney O'Connell was sanctioned for their behaviour by the Texas Commission on Judicial Conduct or by the state bar.

Concerns have been expressed that this is yet another example of the State of Texas mishandling a capital case, with reference being made to the case of Calvin Burdine whose death penalty was overturned 10 years ago because his court-appointed lawyer failed to stay awake during proceedings. It has also led critics of the Texas legal system to hope that the embarrassment and blow to public confidence caused by Hood's case will bring Texas closer to a moratorium and eventual repeal of the death penalty.

**California Democratic Party Opposes the Death Penalty**

In an historic move, the California Democratic Party has for the first time enshrined its opposition to capital punishment into its formal statement of principles. The platform was approved on 18th April at the Democratic convention in Los Angeles where the declaration was made that Democrats will "replace the death penalty with a term of permanent incarceration, which will serve to protect the public, provide swift and certain justice for victims' families, and save the state an estimated $1 billion over the next five years". Advocacy groups have welcomed this development, particularly as California has the largest Death Row in the states, with approximately 700 inmates.

**Asia**

**Singapore Retains Mandatory Death Penalty for Drug Trafficking**

Yong Vui Kong is a 22-year-old Malaysian man who was arrested in 2007 when he was just 19 for carrying approximately 47 grams of heroin into Singapore. In January 2009, Kong was sentenced to death for the crime of drug trafficking. Singapore's Misuse of Drugs Act provides for a mandatory death penalty where more than 30 grams of heroin has been trafficked. The use of the death penalty for drug offences attracts much international criticism.

Kong's sentence was appealed on the basis that the mandatory sentence is unconstitutional and violates the right to a fair trial. The Court of Appeal dismissed the appeal, with Chief Justice Chan commenting, "Further challenges in court on the constitutionality of the mandatory death penalty have been foreclosed by our decision in this appeal".

The decision is disappointing in Singapore's capital punishment development, as in recent years there have been promising signs of a decreased application of the death penalty. Amnesty International reported that in 2009 only one person was known to have been executed in Singapore, compared with 21 in 2000. It was hoped that this represented a move towards Singapore stepping into line with the international trend of limiting the application of capital punishment.

**Taiwan Criticised for Executions**

Taiwan has had a de facto moratorium on the death penalty since 2005, but the execution of four prisoners on 30 April 2010 has been hailed as a set back on the road to abolition. The executions came just five weeks after the resignation of Wang Ching-Feng, the former Minister of Justice, who stepped down after her statement that she would not sign a death warrant because Hood had waited too long to raise the issue the court need not address it.
penalty, but that the government cannot overrule the rule of law or the wishes of the people. The Ministry of Justice has said that when the appeals process has been exhausted for those sentenced to death, the executions must be carried out. Forty people remain on death row in Taiwan.

Catherine Baber, deputy director of Amnesty International’s Asia-Pacific programme, has commented: “These executions cast a dark shadow on the country’s human rights record, and blatantly contradict the Justice Minister’s previously declared intention to abolish the death penalty . . . . The world was looking to the Taiwanese authorities to choose human rights, and to show leadership on the path towards abolishing the death penalty in the Asia-Pacific. Today’s executions extinguished that hope”.

Africa

Uganda Bill Proposes Death Penalty for Homosexuality

In October 2009, a draft ‘Anti-Homosexuality Bill’ was introduced in the Ugandan Parliament. The law seeks to broaden the criminalisation of homosexuality by providing for the death penalty in cases of ‘aggravated homosexuality’. A setback in the global trend towards moratorium, the Bill has attracted international criticism, with some Western governments threatening to cut off financial aid to Uganda. President Obama has referred to the Bill as ‘odious’, and David Kato of Sexual Minorities Uganda has commented: “This bill is a blow to the progress of democracy in Uganda”.

The degree of intense international reaction prompted Ugandan President Yoweri Museveni to form a commission to research the likely implications of the Bill, the result of which was the committee’s recommendation to withdraw the Bill. However, the President does not appear to have taken heed of the recommendations as the Bill looks set to be passed.

Kenyan High Court Rules Hundreds of Death Sentences Unconstitutional

On July 30, 2010, the Court of Appeal at Mombasa, Kenya unanimously held that mandatory death sentences for murder are unconstitutional. The court decreed that automatic death sentences are inhumane and violate the right to life because the law does not provide defendants the right to present mitigating evidence. As a result of the decision in Godfrey Ngotho Mutiso’s case, hundreds of condemned prisoners will be granted new sentencing hearings during which they will be permitted to offer mitigating evidence to support their claims that they should not be executed. The Court of Appeal also suggested that incarcerating someone awaiting execution for more than 3 years would also be unconstitutional.

Middle East

Couple Stoned to Death in Afghanistan

On August 15, 2010, the Taliban ordered the public execution by stoning of a young couple who had eloped. A 25-year-old man named Khayyam and a 19-year-old woman named Siddiqa eloped after Khayyam was unable to persuade family members to permit him to marry Siddiqa. Family members tricked the couple into returning to their village in northern Kunduz Province, where a religious court, following the Taliban’s harsh version of Shariah law, condemned them. Taliban activists began stoning the couple first. Then a crowd of 200 or so male neighbours joined in. The executioners included Khayyam’s father and brother and Siddiqa’s brother.

Iraq Sentences 62 to Death

A court in the Anbar province of Iraq has sentenced 62 Iraqi people to death pursuant to anti-terrorism laws. 130 others were given different prison terms. The information comes from an anonymous source from the Anbar police command. The condemned prisoners were sentenced for crimes including killings and bombings. The 62 are thought to include al-Qaeda associates.

The death penalty was suspended in Iraq in June 2003, but was reinstated in August 2004. According to Amnesty International, at least 120 prisoners were executed in Iraq during 2009.

Sources:

Amnesty International: www.amnesty.org.uk
BBC: www.news.bbc.co.uk
Death Penalty Information Center: www.deathpenaltyinfo.org
The Guardian: www.guardian.co.uk
Human Rights Watch: www.hrw.org
The Independent: www.independent.co.uk
The Salt Lake Tribune: www.sltrib.com
The San Francisco Chronicle: www.sfgate.com
The Straits Times: www.straitstimes.com
Xinhua News: www.xinhuanet.com
Against the Medical-Psychological Tradition of Understanding Serial Killing by Studying the Killers: The Case of BTK

Professor David Wilson, Professor Craig Jackson and Dr Baljit Rana*

This article considers the origins and development of offender profiling and its contribution to the arrest of a specific type of mass murderer known as a “serial killer”. It does this through a critical analysis of a recent and best-selling book on the subject. *Inside the Mind of BTK: The True Story Behind the Thirty-Year Hunt for the Notorious Wichita Serial Killer* was written by John Douglas, one of the originators of “offender profiling” in the United States, and is largely concerned with his part in the apprehension of a notorious American serial killer called Dennis Rader, who was dubbed by the press, “BTK”. Douglas is well-placed to write a book of this type. As an employee of the Federal Bureau of Investigation (FBI) in the United States, he was one of a number of agents who gave prominence both to the phenomenon of serial murder and offender profiling as a means to apprehend this type of murderer. (See, for example, Douglas et al., 1986; Douglas and Munn, 1992; Douglas and Olsacker, 1995; Ressler et al., 1988; Ressler et al., 1992; Ressler and Schachtman, 1992.)

A critical analysis is more than a book review. Jupp (1996: 298), for example, describes a critical analysis as involving “an examination of the assumptions that underpin any account . . . and a consideration of what other possible aspects are concealed or ruled out.” In this article, we seek to deconstruct the taken-for-granted assumptions about offender profiling that Douglas uses to explain the apprehension of Rader, and to reveal what is not being described both in terms of offender profiling and alternative discourses which might better explain the phenomenon of serial killing and reduce its incidence. We begin by outlining the methods that Douglas claims he employs when working as an offender profiler.

Profiling the Profiler: His Working Methods

John Douglas, dubbed the “legendary FBI profiler” by his publisher, makes it quite clear in his writing that “climbing inside the heads of monsters is my speciality,” and that he is “convinced that those of us with a police background have the ability to understand the mind of an incarcerated felon far better than any psychologist or psychiatrist.” Douglas expands that “street smarts” are vital in such work (it should be noted that being streetwise is not the sole preserve of the police) and thereby deliberately broadens the gulf between academics and law enforcement. He also claims to use this speciality as the means by which he constructs an offender profile. He suggests, for example, that he “takes that expression frozen on the face of a murder victim and works backwards. I have to place myself inside the head of both the offender and the victim at the time of the crime.” (Douglas and Dodd, 2007: 8; 15; 64.)

*I believe that by explaining how the mind of a serial killer works, I can begin to help readers understand how to avoid ending up as a victim of a violent crime,*

John Douglas and Johnny Dodd (2007)

Inside the Mind of BTK: The True Story Behind the Thirty-Year Hunt for the Notorious Wichita Serial Killer.

*Centre for Applied Criminology, Birmingham City University.*
Douglas compares himself with the fictional six-year-old boy Cole Sear who saw the dead in the 1999 psychological thriller *The Sixth Sense*, even if “I not only saw dead people – although, actually, they were corpses – but also people killing people. When I plunged myself into a case, I became someone else. I became the killer.” (Douglas and Dodd, 2007: 184.) To this extent, Douglas helps to portray himself and other behavioural profilers as cursed-heroes; men who are compelled to do such noble work despite the unpleasant aspects it entails. Indeed, Douglas stretches this metaphor to the extreme by making constant reference to his near-death experience, brought about by stress of his vocation. He describes an extreme scene when he was sitting at night by a plot in an FBI cemetery that had been earmarked for his body (when his former employers believed he was not going to survive the coma his body had retreated into) and he realises that a killer could be nearby visiting the grave of a victim.

Throughout *Inside the Mind of BTK*, references are constantly made to the disturbing dreams Douglas has about acts of murder, and the litany of disturbed nights he endures, to the point that he becomes less like a rational investigator and more like a shaman who is guided by visions, wild imagination and hallucinations. So, while on the trail of Dennis Rader, a serial killer in Wichita, Kansas who, prior to his arrest and conviction in 2005 claimed the lives of ten people between 1974-1991, Douglas advises that he went to Wichita “to wallow in Dennis Rader, to open up his sick head and dive into his swamplike mind[.]” (Douglas and Dodd, 2007: 152.)

Leaving the hyperbole of the “true crime” genre to one side, here it should be noted that Douglas was the model for the fictional FBI Agent Jack Crawford in the novels of Thomas Harris, such as *Red Dragon* (1981) and *Silence of the Lambs* (1988). Many other offender profilers (from different backgrounds) have written true crime accounts of their work in the United Kingdom. (See, for example, Paul Britton's written true crime accounts of their work in the offender profilers (from different backgrounds) have origins of offender profiling, this premise was to all intents and purposes established in the 1970s within and by the FBI’s Behavioral Support Unit – now known as the Investigative Support Unit – which became famous through Thomas Harris’s books, and subsequent movie adaptations. However, it should be acknowledged that what might now be called ‘offender profiles’ were constructed in 1956 by James Brussel in relation to the case of the “Con Edison” bomber in New York, and that Brussel subsequently wrote about his experiences in his 1968 autobiography *Casebook of a Crime*.

*Offender profiling takes as its central premise that the characteristics of an offender can be deduced by a carefully considered examination of the offence.*

As Ainsworth (2001: 7) put it:

> Offender profiling generally refers to the process of using all the available information about a crime, a crime scene, and a victim, in order to compose a profile of the (as yet) unknown perpetrator.

While it is difficult to be precise about the actual origins of offender profiling, this premise was to all intents and purposes established in the 1970s within and by the FBI’s Behavioral Support Unit – now known as the Investigative Support Unit – which became famous through Thomas Harris’s books, and subsequent movie adaptations. However, it should be acknowledged that what might now be called ‘offender profiles’ were constructed in 1956 by James Brussel in relation to the case of the “Con Edison” bomber in New York, and that Brussel subsequently wrote about his experiences in his 1968 autobiography *Casebook of a Crime*. 

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Scholarly Articles

Psychologist. So too Dr Robert Brittain – Consultant Forensic Psychiatrist at the Douglas Inch Clinic in Glasgow prior to his death in 1971 – who had a clinical interest in sadistic psychopathic killers, was asked by Glasgow CID to offer an opinion about the type of person that they were seeking in the so-called “Bible John” murder case in the late 1960s. His subsequent paper, *The Sadistic Murderer* (1970), remains the classic introduction to the subject, and can also be viewed as a profile.

However, it is Brussel’s work which had the greatest influence on the FBI. Douglas and Ressler who were Brussel’s protégés, helped to establish the Bureau’s Behavioral Science Unit in 1972. It is interesting that Douglas was in turn a protégé of Teten. As Malcolm Gladwell (2007: 2) has recently written: “[I]n the close-knit fraternity of profilers, [this] is like being analysed by Freud.” It is no surprise therefore that *Inside the Mind of BTK* closely follows the narrative style and pace of Brussel’s *Casebook of a Crime Psychiatrist*.

Leaving these literary allusions aside, what the FBI wanted to do at a practical level was to find a way to use the wealth of forensic information that they were able to generate from crime scenes and see if that evidence suggested something of the type of offender who had committed the offence. So, in part using their collective experience of investigating multiple murder and sexual assaults, and crucially through carrying out extensive interviews with 36 convicted serial killers, agents began to assert that the personality of an offender – in cases of serial rape or murder – could be gleaned from a consideration of the following five areas: the crime scene; the nature of the attacks themselves; forensic evidence; a medical examination of the victim; and victim characteristics.

A little is known about the 36 interviews that Douglas and his colleagues conducted. In his most recent book, for example, Douglas describes the fact that their interview protocol involved “thousands of questions” and ran to fifty-seven-pages in length. (Douglas and Dodd, 2007: 4.) It is also known that many of these questions were aimed at providing some basic information about the killer’s motivation, victim selection, and the impact that the murders might have had on the killer. Douglas and other profilers working within the FBI set out to answer whether or not their interviewees were “born to kill”, or whether, for example, some childhood trauma had influenced their behaviour. The fruits of these interviews eventually lead to the 1988 publication of Ressler, Burgess and Douglas’s *Sexual Homicide: Patterns and Motives*.

Douglas provides a glimpse of how one of these interviews was conducted in 1981 when he and Robert Ressler visited Attica Correctional Facility in New York to interview David Berkowitz, known as “The Son of Sam”. Berkowitz is an American serial killer and arsonist who murdered six people and wounded seven others in New York between July 1976 and his arrest in August 1977. Douglas explains that he and Ressler had gone to Attica to “pry information out of the head of one of the nation’s most notorious serial killers.” He continues:

We’d arrived unannounced, on a fishing expedition of sorts, hoping to convince David Berkowitz, aka Son of Sam, to help us with our criminal profiling study, which involved a fifty-seven-page interview questionnaire. We wanted answers to such questions as What was his motive? Was there a trigger that set him off on his murderous spree? What was his early childhood like? How did he select his victims? Did he ever visit the grave sites of his victims? How closely did he follow the press coverage of his crimes? His answers would help us better understand the killers we were hunting. (Douglas and Dodd, 2007: 19, emphasis in original.)

Berkowitz was brought to see Douglas and Ressler who were waiting for him in a tiny interrogation room, although as the following exchange reveals it is clear that Berkowitz had no idea who Douglas or Ressler were, or what they wanted.

‘Who are you guys?’ he asked the moment he spotted us seated at the far end of the only piece of furniture in the room – a linoleum-covered table. As planned, the guards had quickly exited before Berkowitz had a chance to tell us to take a hike. ‘We’re FBI agents, David’ I told him. ‘We’d like to talk to you. We’re hoping you might be

However, it is Brussel’s work which had the greatest influence on the FBI.
able to help us. It’s like I always say,’ I explained, ‘if you want to learn how to paint, you don’t read about it in a book. You go straight to the artist. And that’s what you are, David. You’re the artist . . . you’re famous. You’re huge. You had all of New York scared shitless. In a hundred years, no one will remember my name. But everybody will still know who the Son of Sam was. (Douglas and Dodd, 2007: 19-20.)

This flattery seems to have worked, for Douglas suggests that Berkowitz became “putty in our hands” and over the course of the next five hours “he walked us through every dark, twisted corner of his sad life, sharing details he’d never told anyone.” (Douglas and Dodd, 2007: 20.)

Talking with Serial Killers

Douglas does not tell the reader what these details might have been. Consequently, there is no way of validating this claim. Nor does Douglas reveal if Berkowitz actually completed the fifty-seven-page questionnaire that formed the basis of Douglas and Ressler’s research. Indeed, they seem to have simply chatted for a number of hours. However, there are more worrying issues that this account reveals, if this is indeed an accurate depiction of the interview. Ignore the (absence of) ethics of the origin and conduct of the interview – although it should be remembered that Douglas claims those with a police background are better able to understand a convicted offender than psychologists or psychiatrists – and simply consider how credulous Douglas and Ressler seem to have been when they interviewed Berkowitz.

After all, Berkowitz, who at the time of this interview was three years into a 365 year sentence, might have had a variety of reasons for agreeing to be interviewed, rather than simply falling for Douglas’s flattery. Should it not also be considered whether serial killers necessarily tell an interviewer the truth? Might they attempt to confuse or, alternatively, be over-eager in the hope of getting some sort of favour such as parole, a better work detail, or simply a more favourable cell allocation? That Douglas and his colleagues interviewed serial killers who were caught may suggest something about their offending, which may differentiate them from those offenders who remain at large who may have used different approaches. In all of this we might detect the forensic equivalent of a responder-bias. More than this, David Wilson (2006) suggests that in his work with serial killers and other serial offenders in the United Kingdom he encountered two distinct groups: those that spoke and those – the majority – who were “silent and uncommunicative”.

Wilson suggests that those serial killers he spent time with who were prepared to talk had invariably developed a very robust and self-serving view as to why they had repeatedly killed. Time after time, their views and insights were more often than not socially constructed to suit the nature and circumstances of their arrest, conviction and imprisonment. All too often their explanations were either (i) rooted in the forlorn hope that, for example, there might come a day when release was possible through parole; (ii) proffered to engineer a more favourable prison transfer; or (iii) advanced to maintain a conception of “self” more in keeping with their own sense of who they were, and what they thought they were entitled to. Others simply wanted to talk so as to break up the monotony of the prison routine.

Wilson further argues that when one investigated serial killers’ explanations for their offending in any depth they could have been applied more generally to most people in society. After all, who has not had a beloved parent, grandparent, uncle or aunt die? Who did not feel lonely, bullied, or excluded as a child? Who has not been saddened by the end of a close and loving relationship with another person? Who would not like to be given a little more credit for one’s achievements, and a little less criticism for one’s failings? Would these everyday prosaic life-events be enough to push us into “killing for company”, as Masters (1985) claimed in respect of the British serial killer Dennis Nilsen? Are these justifications enough to account for the phenomenon of serial killing? While some British serial killers, such as Robert Black, who abducted, sexually assaulted and killed at least three girls in the 1980s, undoubtedly had appalling childhoods filled with abandonment and abuse, is this justification enough to reliably explain the aetiology of their crimes, especially when so many others have had similar experiences, but have not gone on to kill and kill again?

These observations about the explanations that serial killers give for their motivation stem from Wilson’s experience of working with them after they
had been caught and imprisoned. However, even in the immediate aftermath of arrest, long before their trial and conviction, those serial killers who are prepared to talk regularly construct a picture that is often far removed from the reality of events. Peter Sutcliffe, for example, after his arrest for a series of seven attempted murders and thirteen murders of women in Yorkshire in the 1970s, gave a variety of interviews to detectives working on the case. He appeared forthcoming, but as the leading expert on the murders has commented, “it is now wholly evident that he was grossly deceitful and manipulative”. (Bilton, 2003: 655.) Specifically Sutcliffe – better known as the Yorkshire Ripper, sought to hide any sexual motive for his crimes, and instead wanted to paint a picture of himself as simply mad and presenting with auditory hallucinations, which would thus influence every aspect of his trial and his sentence.

So too Fred West, who before taking his own life, left 111 pages of autobiography. However, as David Canter (2003: 62) explains, anyone hoping to discover clues in this autobiography as to why West killed twelve people would be disappointed for “the journal ignores all of this”. Canter’s observation would come as no surprise to John Bennett, the detective in charge of the West investigation. After West’s arrest, West’s interviews with the police amounted to 145 tape recordings that translated into 6,189 pages of transcript. (Soumes, 1995: 278.) Nonetheless, since his retirement Bennett has commented: “West’s interviews were worthless except to confirm that nothing that he said could be relied upon as anything near the truth”. (Bennett and Gardner, 2005: 168.) Indeed, Gordon Burn, one of West’s most perceptive biographers, simply dismisses him as a “bullshitting liar” who claimed, for example, to have travelled the world with the Scottish pop singer Lulu. (Burn, 1998: 136.) West on occasion claimed he had murdered up to thirty people, but this was never established. Burn explains that West would talk “palaver while apparently talking the truth. Laying out and simultaneously covering up”. (Burn, 1998: 253.)

**Killers Who Will Not Talk**

The second group that Wilson encountered were the mirror opposite of the first. In short, they never talked at all about the motivation that drove them to murder, and they kept their secrets well-guarded. For example, just after Harold Shipman’s conviction in April 2001 for the murder of 15 of his patients, the West Yorkshire Police decided to re-interview him about the deaths of other patients that he had attended whilst practicing in Todmorden. The videotaped interview is very revealing, as the following transcript suggests:

**Police Officer:** No replies are going to be given to any questions during the course of this interview and any subsequent interviews. I think it is fair to say for the purposes of the tape that we are happy that we are interviewing Harold Shipman. (Officer gets up and walks round the table to place a picture in front of the face of Shipman, who has turned to face the wall.)

**Police Officer:** To start with, if I can try to jog your memory by showing you a photograph . . . that’s Elizabeth Pearce. Of the three ladies there it’s the elderly lady dressed in black. For the benefit of the tape Dr Shipman’s eyes are closed. (Officer returns to desk and picks up two photographs)

**Police Officer:** Unfortunately we don’t have a photograph of Mr Lingard. To try and jog your memory here is a photograph of Eagle Street and there is a photograph of where Mr Lingard lived. Just for the benefit of the tape, Dr Shipman’s eyes are closed and he didn’t look at all. (Officer returns to desk and returns with another photograph which he places again in front of the face of Shipman.)

**Police Officer:** Just to try and jog your memory, Dr Shipman, I have here a photograph of Lily Crossley. Just for the benefit of the tape Dr Shipman’s eyes are closed and he didn’t look at all. (Quoted in Peters, 2005: 170-171.)

This final note from the police officer exactly sums up this second group of silent and uncommunicative serial killers: “Just for the benefit of the tape Dr Shipman’s eyes are closed and he didn’t look at all.” Not only did he not look, but he also never spoke. Shipman, Britain’s most prolific serial killer, never discussed why he killed 215 (and possibly 260) elderly people either in Todmorden or Hyde. Ultimately, like Fred West, he chose to commit suicide in his cell at HMP Wakefield in January 2004, rather than reveal the circumstances that led him to murder.

So, to apply Gordon Burn’s phrase about Fred West more generally, there is one group of serial killers who ‘lay out’, and another who ‘cover up’; some who talk endlessly – although not necessarily to any purpose – and others that refuse to, or indeed cannot talk at all.

**Organised and Disorganised**

These criticisms notwithstanding, the FBI used the interviews that Douglas and his colleagues...
conducted to theorize that offenders could be characterised as either “organized” or “disorganized”, and that these distinctions would be related to the personal characteristics of the offender. An “organized” offender is one who uses a great deal of logic and planning, such as wearing gloves, bringing a rope or handcuffs to incapacitate the victim, and classically is very much in control of the crime scene, and as such, few if any clues are left. It is also suggested that “organized” offenders have a specific personality type. They will typically be intelligent, sexually active and competent, and likely to have a partner. They will have skilled or semi-skilled jobs, and to all intents and purposes will appear “normal”. However, this mask of normality hides an anti-social personality. It is also suggested that “organised” offenders follow reports of their crimes in the news, and that they are often propelled to commit crime as a result of anger and frustration in their personal lives.

On the other hand “disorganised” offenders do not plan their offending. Their crimes are sudden and opportunistic (not the same as “random”) and as such disorganised offenders will use whatever comes to hand to help them commit their offences. So, for example, he will tie his victim up using her scarf or underwear; he will attack by using weapons he finds in the home or the vicinity of the offence. There is little attempt to conceal evidence, and often the victim’s body is simply abandoned, rather than hidden. Moreover, the “disorganised” offender is said to live alone, or at home with his parents, and usually offends within his local area. He will be socially and sexually immature, and will often have a history of mental illness. Finally it is suggested that this type of offender commits his crimes whilst frightened or confused.

In other words, and as Douglas, Burgess, Burgess and Ressler (1992: 21) would later describe in their Crime Classification Manual – a handbook of offender profiling issued by the FBI – “the crime scene is presumed to reflect the murderer’s behaviour and personality in much the same way as furnishings reveal the homeowner’s character”. Thus offender profiling could be used to predict the characteristics of the as yet unknown offending subject (unsub) based on information that was available at the crime scene, and would be a boon to the police in terms of identifying and prioritising suspects.

An “organized” offender is one who uses a great deal of logic and planning.

There has been a great deal of criticism about this “homological assumption” at the heart of offender profiling (Mokros and Alison, 2002), and indeed about other issues related to profiling’s origins, development and application. For example, Copson and Marshall (1999) have suggested that many profiles are so idiosyncratic as to be indivisible from the identity of the profiler, and Rossmo (1996) argues that offender profiling has no scientific validity whatsoever, is largely intuitive, and has never been subject to any rigorous academic scrutiny. He further suggests that their central finding – “organised” or “disorganised” – should instead be seen as a continuum, rather than two distinct categories.

But is this criticism justified when we consider Douglas and his work in relation to Dennis Rader, whom he interviewed for the latter part of his most recent book, and about whom he was consulted on three different occasions by the Kansas police at various stages of their investigation into Rader’s ten murders?

Bind, Torture and Kill

Rader who identified himself in a series of taunting notes that he sent to the police by the three words “bind, torture and kill”, or more popularly “BTK”, struck first in January 1974 when he killed the Otero family in their home: thirty-eight-year-old Joseph, his wife Julie, their son Joey, and their eleven-year-old daughter Josephine, who was found hanging from a water pipe in the basement of the house with a large quantity of semen on her leg and the floor nearby. Rader would strike again in April the following year when he stabbed twenty-four-year-old Kathryn Bright (Kathryn’s brother Kevin escaped the attack despite being shot twice), and in March 1977 he bound and strangled Shirley Vian. Over the next four years he committed at least four more murders, although the police investigation into these crimes made little progress. Then, in October 1984, two detectives from Wichita visited Douglas at FBI Headquarters in
Quantico, having previously taken his advice about the murders in the autumn of 1979. It is this second meeting that opens Inside the Mind of BTK. “Let’s go to the conference room,” I told [the Wichita detectives]. Several of my colleagues are waiting for you there. I want you to walk us through the case”. (Douglas and Dodd, 2007: 5.)

After the Wichita detectives had walked Douglas, Roy Hazlewood (author of the true crime best-sellers Dark Dreams and The Evil That Men Do) and Ron Walker through the case, the three FBI agents ‘climbed into the head’ of BTK and offered their opinion as to the type of person that was committing these crimes. As Douglas explains:

We were going to toss out ideas about what sort of person might be responsible for those seven unsolved murders in Kansas, how police might track him down, and ways they could get him to crack once they had a possible suspect . . . in many ways, our goal here felt similar to what musicians do when they get together and jam[,] The objective of the session was to keep moving forward until we ran out of juice, until we were tapped out. It was up to the two detectives from Wichita to take notes, jotting down elements they found helpful. (Douglas and Dodd, 2007: 97-98.)

We don’t know which elements the Wichita detectives did actually find helpful, but on the other hand we do have a very detailed note about the sum total of advice that Douglas, Hazlewood and Walker provided. (See also Gladwell, 2007.) The advice that they gave – based on the account provided by Douglas in Inside the Mind of BTK, which takes up thirteen pages of narrative – is worth assessing, especially in relation to what might be the motivating factors behind the seven (as then) murders, based on their analysis of the crime scenes left by BTK, his victim selection, how he dealt with his victims, and also some of the basic biographical details that Douglas and his colleagues suggested would fit the type of person committing these murders.

Douglas “kicked off the session” by suggesting that BTK was in his mid to late thirties, divorced, lower middle class and living in rented accommodations. Hazlewood thought that he would be middle class and “articulate”. Walker suggested that as BTK had never engaged in any sexual penetration, he would be sexually inadequate and immature, and Hazlewood thought that BTK would be a “sexual bondage practitioner” and “heavily into masturbation”. As a result, suggested Hazlewood, “women who have had sex with this guy would describe him as aloof, uninvolved, the type who is more interested in her servicing him than the other way around”. Douglas too believed that BTK would have “racked up a bit of sexual experience”, and that his partners would be either “many years younger, very naïve, or much older and depend on him as their meal ticket”.

According to Walker, BTK would be a “lone-wolf type of personality”, although he could function in social settings, but only “on the surface” – a conclusion that Douglas agreed with, and which for him suggested that he wouldn’t stay at any one job for any length of time because he wouldn’t like people to have power over him. As such he would not be a “team player”, and Hazlewood thought that he would be a “now person” who wanted instant gratification. His IQ would be somewhere between 105-145. All three thought that he might have some connections to the military (unsurprising given recent previous military drafts for Korea and Vietnam), and Douglas suggested that he would drive a “nondescript type of car – perhaps a sedan”. They also all thought that he would collect detective stories and be interested in law enforcement. Finally, Douglas suggested that “this guy isn’t mental . . . but he is crazy like a fox”. (All quotes taken from Douglas and Dodd, 2007: 97-110.)

It is of interest to note that the results of this brainstorming session were produced at a period in the case when detectives were in possession of three letters from BTK to the media (one of which was a poem), a letter he sent to a potential victim who inadvertently evaded him, and a recording of his voice made when he called 911 informing the police where to find the body of his seventh murdered victim.

So, after six hours, the FBI handed the Wichita detectives a blueprint for their investigation, and as Malcolm Gladwell has put it, what they had to do was:

Look for an American male with a possible connection to the military. His IQ will be above 105. He will like to masturbate, and will be aloof and selfish in bed. He will drive a decent car. He will be a ‘now’ person. He won’t be comfortable with women. But he may have women friends. He will be a lone wolf. But he will be able to function in social settings . . . he will be either never married, divorced or married, and if he is married
his wife will be younger or older. He may or may not live in a rental, and might be lower class, upper lower class, lower middle class or middle class. And he will be crazy like a fox, as opposed to being mental. (Gladwell, 2007: 7.)

Gladwell employs irony to make his point that these characterisations were both so general as to fit millions of suspects and in themselves contradictory, and therefore unlikely to be of much help to the police. But, in any event, Dennis Rader was actually a pillar of his local community; a happily married family man with two children, the President of his local Lutheran Church, a Boy Scout leader, and a reliable employee of the Sedgwick County animal services division.

**At the End of it All**

These criticisms might be too ungenerous to Douglas, although we should also note that Rader was not in fact caught as a result of any profile constructed by the FBI. Two attempts had been made by murder squad detectives to solve the case by re-evaluating the entire case file in the late 1970s (the Hotdog squad) and in the mid 1980s (the Ghostbusters). Both squads used behavioural profiling to no avail.

In 2004, spurred on by hearing that a local author was about to write a book about the BTK case, Rader began communicating more than ever with detectives. In March alone he sent 11 communications, packages, poems, dolls, and sketches to the detectives hunting him, with contents ranging from crime scene souvenirs to false confessions to other killings. In his correspondence with detectives, BTK asked if a floppy disk could ever be used to trace the machine it was used in. Upon believing the lie that detectives fed to him (via a personal advert in the Wichita Eagle newspaper) when detectives informed BTK that it was a “safe” method of communication, he sent his last correspondence to them on February 15th 2005. The package contained (among other things) a purple 1.44Mb Memorex floppy disk, which unknown to BTK, also contained metadata embedded in a deleted Microsoft Word document that was still on the disk. The metadata contained the words “Christ Lutheran Church”, and the document was marked as last modified by “Dennis”. A search of the church website showed Dennis Rader as president of the congregation council.

Nor should we necessarily discount the help that profiling has provided to the police in other cases – both in the United States and also in Europe. And it should be remembered that there have been developments that have pushed profiling in different directions from the early days that Douglas describes in *Inside the Mind of BTK*. Yet, all that having been said, does theorizing of this type – based as it is on ‘climbing into the heads of monsters’ – actually deliver a better understanding of the phenomenon of serial killing, and as a result ensure that fewer people fall victim to violent crime? Or, are there other approaches that might have greater success?

The Canadian social anthropologist Elliot Leyton has been at the forefront of attempts to outline a “structural” analysis of the phenomenon of serial killing. For, as he argues in *Hunting Humans*, the ‘individual discourse’ of the medico-psychological tradition about serial killers fails to meet the challenge of causation by ignoring cultural and historical specificity. After all, dangerous and deranged individuals are a constant feature over time, and between cultures. Yet, given that this is so, how are we then to explain why Britain had no serial killers during the 1920s and 30s, while Germany had 12 (Jenkins, 1988)? Indeed, why did the late 1970s and early to mid 1980s produce so many British serial killers (Wilson, 2006)? For Leyton, focussing on North America, the answer to these questions of cultural and historical specificity is to argue that serial killing cannot just be understood as the result of a greater or lesser number of dangerous personalities existing in society at any one time, but rather has to be seen as the product of the socio-economic system which cannot reward the efforts of all, and thus may dangerously marginalise certain people. By no means is this solely a problem for capitalist societies, as communist countries that produce marginalised groups have also provided examples of serial murderers.

Leyton goes further and argues that serial killing should be viewed as a form of “homicidal protest” (Leyton, 1986: 287) – which in essence suggests that some people will react to challenges to their position in the economic and social structure by killing those in the challenging group. In other words, to truly understand why serial killers kill we need to investigate the very nature of the social structure...
that has created these people whom we label as serial killers and then provides them with readily identifiable groups of victims.

And, as is implicit in this analysis, it also suggests that the responsibility for serial killing therefore does not lie so much with the individual serial killer, but can be equally be found within the social and economic structure of their culture, which may not reward the efforts of all, and in particular may marginalise large sections of society. It therefore should come as no surprise that the victims of British serial killers have been exclusively confined to certain marginalised groups in our culture – the elderly, gay men, prostitutes, immigrants, babies and infants, and young people moving home and finding their feet elsewhere in the country, and that women make up a significant number in all but one of these categories. It is people from within these marginalised groups that are the focus of the murderous efforts of serial killers. If we really wanted to deliver on Douglas’s objective of reducing the numbers of people who fall victim to violent crime, then we would be just as well concentrating on eradicating homophobia, prejudice against sex workers, and supporting young people and the elderly in our communities than climbing into the heads of serial killers.

References

R Ressler and T Schachtman (1992), Whoever Fights Monsters, New York: St Martin’s Press.
The case of Cory Maples is a shocking example of the inhumanity and callous disregard for justice that is associated with the death penalty. It also provides a salutary lesson for well-meaning out of state lawyers who dabble in death row cases but fail to pay proper attention to the needs of their clients.

In 1995, Cory Maples killed two of his friends after an evening spent drinking and playing pool. In due course, Maples was convicted of capital murder and sentenced to death. His conviction and death sentence were affirmed on direct appeal by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Maples timely filed a petition for post-conviction relief pursuant to Alabama Rule of Criminal Procedure 32 (Rule 32), claiming amongst other things that trial counsel was ineffective for failing to investigate or present evidence of his mental history, his intoxication at the time of the offense, and his drug and alcohol history. Maples also claimed that the jury had been misdirected by the trial judge who had failed to include an instruction on the lesser offense of manslaughter due to voluntary intoxication.

Sometime later those claims were all dismissed by the trial court.

In May 2003 a copy of the Rule 32 order was sent by the court to the offices of Sullivan and Cromwell in New York where two lawyers were on the record on behalf of Maples and had done a substantial amount of work on the Rule 32 petition. The court also sent a copy to Maples' Alabama-based counsel. Unfortunately for Maples, the two attorneys at Sullivan and Cromwell had left the firm by the time the court order arrived and the office simply returned the envelope containing the order to the Alabama state court without bothering to open it. His Alabama lawyer also did nothing by way of responding to the court order. The 42-day limit for filing a notice of appeal duly passed and, in August 2003, the State's Attorney wrote to Maples pointing out that, although he was out of time for an appeal against the Rule 32 order, he still had four weeks in which to file a federal habeas corpus petition.

Sullivan and Cromwell then filed a federal habeas petition under 28 U.S.C. § 2254, alleging the same ineffective assistance claims asserted in the Rule 32 petition and the same jury instruction claim originally asserted in his direct appeal. The district court denied Maples' §2254 petition, concluding that (1) the ineffective assistance claims were procedurally defaulted because Maples had failed to file a timely appeal against the dismissal of his Rule 32 petition; (2) even if Maples could establish that the default was because of the failure of his lawyers to file an appeal, such ineffectiveness could not establish cause for the default because there is no constitutional right to post-conviction counsel; and (3) the decision of the Alabama appellate courts that Maples was not entitled to a jury instruction on manslaughter was not contrary to, or an unreasonable application of, clearly established federal law.

That decision was appealed to the United States Court of Appeals for the Eleventh Circuit. By a majority of 2-1, the Court rejected Maples' appeal and affirmed the decision of the district court denying Maples' §2254 petition. The first issue was whether Maples' ineffective assistance of trial counsel claims were procedurally barred from federal habeas review. The court concluded that because Maples never appealed the dismissal of his Rule 32 petition (because of the incompetence of his lawyers) he did not properly exhaust those claims in state court, which is a necessary prelude to raising those claims in federal habeas proceedings. Furthermore, since any further attempt by Maples to exhaust those claims in state court would be futile because they were already out of time, his unexhausted claims were procedurally defaulted. Since the Alabama courts had already refused Maples' request for an out-of-time Rule 32 appeal, Maples had procedurally defaulted his ineffective assistance claims.

Maples urged the court to overlook the procedural default on the grounds that the Alabama courts had not regularly enforced time limits for appeals in other cases. In order that a state procedural ruling may preclude federal habeas review of Maples' ineffective assistance claims, the state court's ruling

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Marshall v. State

Maples relied upon Marshall v. State in which the Alabama courts did allow an out of time appeal. However the Court of Appeals distinguished that case on the basis that, in Marshall, the court clerk appeared to have taken upon himself a duty to serve papers on Marshall personally, despite the fact that Marshall also had lawyers acting for him. By contrast, Maples relied exclusively upon his lawyers and had no direct dealings with the court clerk. Thus, the Court of Appeals found that Maples’ case was entirely different from Marshall and concluded that there was nothing arbitrary or inconsistent in the way Alabama enforced the 42-day rule for appeals. Therefore, those procedural rules were adequate and independent state law procedural rules which barred Maples from obtaining federal habeas review of his ineffective assistance claims. For good measure, the Court of Appeals also rejected a claim by Maples that he had been caused prejudice as a result of his lawyers’ failure to file a timely appeal. Since there is no constitutional right to post-conviction counsel, the court reasoned, Maples could not be prejudiced by any failure on the part of his counsel to act properly.6

Judge Rosemary Barkett did not agree with the majority and filed a strong dissenting opinion. She did not accept that Maples’ claims were procedurally defaulted because she did not accept that Alabama’s law on out-of-time appeals was “adequate” pursuant to the Supreme Court’s definition of that term in Coleman v. Thompson.7 Neither did Judge Barkett agree that the procedural rule had not been applied in Maples’ case in an unprecedented and arbitrary fashion. Indeed, Judge Barkett’s opinion compared Maples’ case to Marshall and showed that the rule which the majority applied to Maples was not firmly established and that its application to Maples’ case was arbitrary. Judge Burkett concluded that the distinction drawn by the majority between Marshall and Maples’ case was a false one. Like Maples, Marshall had had no contact with the court clerk before his Rule 32 petition had been dismissed. Marshall, like Maples, had counsel to represent him in his Rule 32 proceedings and both sets of counsel had failed to file timely appeals. Yet, despite these indistinguishable facts, the Marshall court granted an out-of-time appeal and the Maples court did not. As Judge Barkett pointed out, “This inconsistency in the application of Alabama’s law on granting out-of-time appeals renders the rule an inadequate ground on which to bar federal review of Maples’ claims.”

Many readers of this article will have found themselves increasingly dismayed at the apparent callous disregard for justice that this case displays. Lest it be forgotten, Cory Maples is under sentence of death. He appears to have valid grounds for an appeal, the merits of which have yet to be adjudicated. Nonetheless, the court appears unperturbed by the prospect of his impending death and evidently prefers to uphold procedural rules even if the result is that justice is denied in a capital case. Judges who use procedural rules as a cloak for permitting injustice to prevail bring nothing but discredit upon themselves and the system they administer. It is of some comfort, therefore, to read that Judge Barkett thought that “the interests of justice” were of importance and that they cried out for Maples to be permitted to have his claims reviewed by the federal courts, particularly as the alleged default of those claims occurred through no fault of his own. Pointing out that such default was entirely the fault of Maples’ post-conviction counsel, Judge Barkett put the matter into stark focus by saying, “[T]his court is allowing him to be put to death because of that negligence.”

Judge Barkett pointed to high authority that “the penalty of death is different in kind from any other punishment imposed under our system of criminal justice”8 and that the Eighth Amendment demands “heightened reliability . . . in the determination whether the death penalty is appropriate in a particular case.”9 Judge Barkett referred to the fact that Maples’ federal habeas petition contains more than 90 pages of allegations of ineffectiveness on the part of his trial counsel. More than 30 of these claims related to allegations of ineffectiveness during the sentencing phase of the trial which ended with the jury voting for death 10 to 2, the minimum required under Alabama law.10 Judge Barkett concluded that, “if the facts alleged by Maples to support his claims of ineffective assistance of counsel are true, then the jury in this case was left without sufficient information of Maples’ character and individual circumstances when it returned a verdict for the death penalty.” Judge Barkett acknowledged that habeas corpus “is governed by equitable principles”11 but added that “in certain cases, like the present case, those equitable principles must yield to the imperative of correcting
a fundamentally unjust sentence." In the absence of a review of Maples' claims, there could be no determination of the reliability of Maples' death sentence.

You don't have to be an opponent of the death penalty to be shocked by the outcome of Maples' case. Whatever your views may be, the simple fact is that justice has not been done. In this case the default was not the fault of the prisoner. There can never be a justification for putting procedural niceties ahead of ensuring that justice has been done and been seen to be done. All the more is this true in a case where the prisoner faces the ultimate sanction available in any criminal justice system. Ultimately, justice is about doing the right thing, and by denying Cory Maples the chance to have the merits of his claims assessed by the court, the majority have not done the right thing.

2 Ex parte Maples, 758 So. 2d 81 (Ala. 1999).
3 Maples v. Allen, 586 F.3d 879 (11th Cir. 2009).
7 Judd v. Haley, 250 F.3d at 1313.
8 Siebert v. Allen, 453 F.3d 1269, 1271 (11th Cir. 2006).
12 Judgment at p. 33.
15 For a summary of the allegations of ineffective assistance of counsel, see footnote 3 on p. 34 of the judgment.
Capital Punishment and International Extradition: What Options Exist for the United States and the Asylum Nation After a Denial of Extradition?

By Mary Mahala Gardner*

Introduction

Extradition is the official surrender of an alleged criminal by one state or nation to another state or nation having jurisdiction over the crime charged. International extradition is extradition in response to a demand made by the executive of one nation on the executive of another nation. In general, extradition is beneficial to both the asylum and the requesting state. On one hand, extradition provides the requesting country the ability to prosecute criminals who have fled beyond their borders. On the other, extradition discourages criminals from seeking shelter in the asylum country. Both countries benefit, and because that is so, extradition can be an important factor in international relations.

The following article gives a brief overview of extradition concepts and then delves into two topical discussions regarding extradition and the death penalty. First, how the United States can and should respond to a denial of extradition on the grounds that the accused fugitive might be sentenced to capital punishment. Second, what choices are available to an asylum nation for dealing with an accused fugitive after denying extradition to the United States.

Extradition in General

Extradition in the United States

In the United States, the right to demand extradition and the duty to extradite exists where a treaty of extradition has been entered into between the United States and the requesting/requested foreign nation. In the absence of a treaty, there is no obligation to surrender persons in the country to foreign authorities for prosecution. The process by which a fugitive is extradited to the United States for prosecution is controlled by the terms of the treaty.

For extradition to be proper, the charged offense must be considered a serious crime under the laws of both the country housing the fugitive and the country requesting extradition. This concept is known as 'dual criminality' or 'double criminality'. Typically, the crimes both nations consider to be extraditable offenses are enumerated in the terms of the treaty. The government of the asylum country determines whether the facts of a given crime could be characterized as one of the extraditable offenses specified in a treaty.

Most extradition treaties acknowledge that political crimes will not be considered extraditable offenses. The term ‘political offense’ means an act committed in the course of, and incidental to, a violent political disturbance such as a war, revolution, or rebellion. Homicide and assault may be termed political offenses when related to a political uprising, but armed robbery, murder, kidnapping, fraud, embezzlement and similar crimes are not considered political crimes where not associated with a present revolutionary movement.

In practice, the United States relies solely on bilateral extradition treaties, treaties agreed upon between the United States and only one other

* University of Oklahoma, J.D., 2009.
country, but nothing legally prohibits the United States from signing on to multilateral treaties, those entered into by several nations. As of March 2007, the United States had entered into bilateral treaties with 111 nations, including all of South and Central America, and most of Europe, and was also a party to two multilateral extradition treaties. To date, the United States has not entered into extradition treaties with many Asian and Middle Eastern nations, including Russia, China, Iran, and Saudi Arabia. The United States also lacks extradition treaties with many African nations including Algeria, Sudan, and Zaire.

The Death Penalty and International Extradition

Most often, in extradition law, the ‘rule of non-inquiry’ applies. The rule of non-inquiry states, in essence, that an asylum nation receiving an extradition request focuses solely on the terms of the extradition treaty without inquiring whether the requesting nation will treat the fugitive fairly. Thus, while the asylum country may look into whether the fugitive is correctly identified, whether the fugitive committed a crime in the requesting nation, and whether that act meets the requirement of dual criminality, the asylum nation does not ask how the fugitive will be tried or about the potential punishment. However, along with the world’s growing concern with human rights, an exception to the rule of non-inquiry has developed in the area of capital punishment.

The application of the death penalty in the United States has caused many countries, particularly European states, to begin questioning extradition demands made by the United States.

Death Penalty Clauses in Extradition Treaties

Many extradition treaties include clauses conditioning the grant of extradition on whether the fugitive will be subject to the death penalty. This practice began in the mid-nineteenth century as a result of the increasing number of nations abolishing capital punishment. Examples are:

The European Union–United States Extradition Treaty which states:

Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought ...

The United States–United Kingdom Extradition Treaty which states:

When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may
refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out.32

The United States–Italian Extradition Treaty which states:

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not provide for such punishment for that offense, extradition shall be refused unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.33

Many other extradition treaties, including the United States-Brazil treaty and the United States-Israel treaty, also contain clauses permitting the refusal to extradite in death penalty cases.34

United States Response to Denial of Extradition Request

Extradition requests by those countries that still utilise the death penalty have been and will continue to be denied by nations which oppose capital punishment.35 If a court in the United States refuses to order the extradition of a fugitive to another country, the requesting nation’s options are limited to refiling their complaint or abandoning prosecution.36 For the United States, a foreign nation’s denial of extradition based on the possibility that the death penalty will be imposed theoretically leaves open three options: (1) assure the asylum nation that there is no possibility that a death sentence will be imposed, (2) abstain from attempting to extradite or prosecute the fugitive, or (3) assure the asylum nation that the death penalty will not be imposed but upon return of the fugitive, apply the sentence.

Assurances to the Asylum Nation that the Death Penalty Will Not be Imposed

Without a doubt, every nation has an interest in protecting the rights of its citizens and punishing those individuals who have infringed on its citizens’ rights or committed crimes within its borders. In an extradition where the asylum nation conditions the release of a fugitive on assurances that the fugitive will not be sentenced to death, the United States is faced with a conundrum. In order to gain custody to prosecute the fugitive, the United States has the option of promising the asylum nation that capital punishment will not be sought. But the U.S. must balance its interests in prosecuting individuals who have committed crimes in the United States and maintaining foreign relations against its interest in upholding and enforcing a system of criminal justice, in particular capital punishment, which it has constitutionally approved. Ironically, those criminal acts which the United States has the greatest interest in prosecuting at home are those that are also most likely to result in a possible death sentence. Simply put, the United States greatly desires to prosecute those individuals accused of committing the most heinous crimes in the United States, but those who have committed such egregious offenses are the ones most likely to be death penalty eligible.

Even if the United States government decided to provide an asylum nation an assurance that capital punishment would not be sought, that assurance could not necessarily be guaranteed. Under the United States’ federal system, the federal government is prohibited from placing restrictions on the state and state judiciary powers to impose penalties.37 While the federal government may seek an assurance that the death penalty will not be sought from a state Governor or Attorney General, neither the Governor nor the Attorney General has the authority to prevent the judiciary from utilising a sentence mandated by law.38 The Governor would have the power to commit himself to commuting a sentence or exercising clemency, but this is not always an effective solution because states have differing procedures in death penalty cases and governors are hesitant to make promises of clemency prior to final judgment.39

Even if the United States assured an asylum nation that capital punishment would not be sought, foreign nations have learned from past experience that assurances cannot always be relied upon. The case of Ernest Kirkwood provides an illustration.

In 1984 California, a death penalty state, sought to prosecute Ernest Kirkwood for double homicide.40 Kirkwood was a United States citizen but resided in...
the United Kingdom. The U.S. requested extradition. Kirkwood appealed to the European Commission of Human Rights, arguing that the death penalty, due to the death row phenomenon, constituted cruel, inhuman, and degrading treatment or punishment in violation of Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. The European Commission of Human Rights agreed that Article 3 was implicated, but concluded that the California death row conditions were not severe enough to constitute "a gravely aggravating aspect." Extradition was granted, but was done so because the United States had provided a written assurance to the United Kingdom that the death penalty would not be sought. Unfortunately, while an agreement had been reached between the United States and the United Kingdom, the United States federal government failed to receive the same assurance from California authorities. In California, at that time, the death penalty was optional and different trial procedures were undertaken depending on the prosecutor’s choice to either seek or forego the imposition of the death penalty. Pursuant to California law, a District Attorney had the right to engage in California’s death penalty process without any intrusion or hindrance from the California Governor or Attorney General. When Ernest Kirkwood returned to the United States, the District Attorney undertook the proceedings which involved the possibility of capital punishment. This case brought the U.K. and Europe to the realisation that they could not depend upon promises from the United States federal government that capital punishment would not be sought.

There is also the possibility that the United States’ assurance that the death penalty will not be sought would never affect an asylum country’s decision to deny extradition in capital punishment cases. The case of Pietro Venezia illustrates this situation.

Pietro Venezia was an Italian citizen and the owner of a Florida restaurant who was accused of, and pled guilty to, fatally shooting a tax official after his bank account had been frozen for failure to pay taxes. Following the murder, Venezia fled home to Italy; the United States requested that Italy extradite Venezia for prosecution. On three separate occasions, in the form of an unsigned diplomatic note, the United States government gave Italy assurances that a capital sentence would not be sought. Despite these declarations, and Article IX of the October 13, 1983 United States-Italy Extradition Treaty which permits the extradition of an individual from Italy to the U.S. on the condition that the death penalty not be imposed, Italy denied extradition. The Italian Constitutional Court deciding the issue stated that Article 2 of Italy’s Constitution protects the right to life as the first of all sacred human rights and because of this, the abolition of capital punishment has immense constitutional significance. The Court held that it would be unconstitutional for Italy to cooperate in imposition of punishments that Italy’s constitution forbids. In its ruling, the Court effectively declared unconstitutional those provisions of United States-Italy Extradition Treaty that make it possible for Italy to extradite fugitives to nations in which capital punishment is even an option for the crime for which they are to be tried. Thus, seemingly no assurance made by the U.S. would permit Italy to extradite a fugitive accused of committing a crime for which the possibility of a death sentence exists.

The views of the victim’s family members on the death penalty constitute another variable which could impact the United States’ decision whether to withdraw the death penalty from the available sentences in order to secure an extradition.

The views of the victim’s family members on the death penalty constitute another variable which could impact the United States’ decision whether to withdraw the death penalty from the available sentences in order to secure an extradition. Just as anti/pro death penalty sentiments divide the United States in general, victims’ families are split on how they would prefer the United States to respond to a denial of extradition of the criminal who potentially murdered someone they love. As an initial matter, victims’ families are split on the very idea of capital punishment. Some family members claim to have found peace and closure in the execution of the criminal who murdered their family member. Other family members adamantly oppose capital punishment for the same reasons that abolitionist countries do. Anti-death penalty family members likely support the denial of extradition, but would prefer the United States to give, and the asylum nation to accept, an assurance that capital punishment will not be imposed so that the family may at least see the accused tried for his crimes. Those who support the death penalty might find themselves conflicted. On one hand, at the very least they would like to see the fugitive held accountable for his acts. On the other hand, they...
may feel robbed of the right to punish the fugitive in the manner they consider fair and just. Some family members might prefer that the system either capital try the accused or not try the accused at all. It seems more likely that they would favor some form of punishment over no form of punishment, and therefore agree with anti-death penalty families in urging the United States to provide, and the asylum nation to accept, an assurance that the fugitive will not be executed if found guilty.

A final consideration is what the provision of assurances says about the United States globally. Are the promises seen as signs that the United States is, in ways, held accountable to and affected by the ideals of the international community? Do these agreements not to seek the death penalty weaken the perception of the United States as a global superpower? Wholly apart from those negative inferences, are the assurances viewed as an example of the United States’ willingness to cooperate with foreign nations? Do assurances indicate that the United States is becoming less fierce in insisting on the right to impose capital punishment? One thing is certain: whether positive or negative, there are political repercussions that inevitably will result from whichever choice the United States makes.

Abstention from Attempting to Extradite or Prosecute the Fugitive

If the asylum nation refuses to extradite the fugitive, should the United States’ position be, “Fine, you keep him”? As with the decision to withdraw from imposing capital punishment, there may be a number of political consequences of that decision. What does the decision to abstain from prosecution completely, rather than abstain from imposing the death penalty, say about the United States to the international community? There is the possibility that abstention would be a sign of surrender, a sign of weakness. There is also the prospect that abstention indicates America’s reluctance to cooperate with an international community strongly concerned with human rights. Will the United States be seen as a petulant child who cannot do what he wants to do or will it be viewed as a milksop, with no power to make foreign nations comply with its extradition demands? Although it is unlikely that the United States would be viewed worldwide as a weakening, it is possible that the United States’ inability to influence an asylum nation into extraditing a prisoner might be seen as a flaw in the United States’ image as an all-powerful nation. If the United States government was unwilling or unable to give an assurance that the death penalty would not be imposed, the decision to abstain from prosecution might be viewed as showing respect for the human rights beliefs of the asylum nation.

In rare circumstances, the United States has no choice but to abstain from prosecution. Recall the Venezia case discussed above, where the Italian Constitutional Court operatively held that Italy is constitutionally barred from extraditing fugitives to nations where capital punishment is an option for the crime they are accused of committing. Italy, the asylum nation, effectively forced the United States to abstain from prosecution.

False Assurances to the Asylum Nation that the Death Penalty Will Not Be Imposed

Theoretically, the United States could pledge that capital punishment would not be sought if the asylum nation agreed to extradite the fugitive, and then upon receipt of the accused, seek a death sentence anyway. This would likely never happen because the consequences would be tremendous. The international community would lose faith and trust in the United States and, in future circumstances, place little value in the United States’ word, whether the circumstance involved extradition and the death penalty or not. In an international community context, a false promise would be foreign relations suicide.

Asylum Nation’s Choices after Denial of Extradition Request

After an asylum country denies extradition, what becomes of the fugitive accused of committing the crime? There appear to be different options.

Asylum Nation Prosecutes the Fugitive in Its Own Court System

Barring any international law issues, the asylum country could try the accused criminal in its own nation and, if convicted, sentence the individual to a punishment which the asylum country does not consider to be cruel or unusual. Although the situation may not be ideal for the requesting nation, it is likely preferable to the idea of the asylum country allowing the criminal to go free after
denying extradition. This solution provides at least some measure of punishment while permitting the requested nation to uphold its human rights ideals. These twin goals would likewise be accomplished if the asylum country granted extradition conditioned on the promise that the death penalty would not be sought during prosecution.

The prosecution of a fugitive by an asylum country raises a fundamental legal question: where does the asylum nation derive the power to prosecute an individual for criminal actions which occurred beyond the borders of the asylum nation? Under the territorial principle, a sovereign state has jurisdiction to create law governing behavior that occurs, in whole or in substantial part, within its borders. A sovereign state, however, does not always have jurisdiction to create law governing behavior that occurs outside its territory. The United States, for example, is limited by extraterritoriality principles in its ability to hold an individual legally accountable for actions occurring beyond its borders. Fortunately, there are several principles, recognised by international law, which permit a nation to exerciseextraterritorial jurisdiction. In these situations, an asylum nation has the power to exercise jurisdiction over an individual accused of committing crimes outside the nation’s borders.

The first principle is known as the “objective territorial principle.” Under this principle, jurisdiction is asserted over acts performed outside a country that subsequently cause harm within that country. The objective territorial principle is the flip side of the subjective territorial view, the classic situation where jurisdiction extends because the person is located within the country and violating that country’s laws. The objective territorial principle is aimed at conduct outside a country’s territory that has or is intended to have a substantial effect within the country's territory. There is little issue when the principle is applied to establish jurisdiction over acts such as cross-border gunfire, the transmission of libelous material across borders, or product liability cases. Controversy exists, though, in the principle's application when extraterritorial jurisdiction is asserted on the basis of economic effects in the country. It is doubtful that an asylum country would use the objective territorial principle to establish jurisdiction because of economic effects, for it is unlikely that a country would attempt to base jurisdiction over acts serious enough to warrant capital punishment on the harmful economic effects such acts cause within its borders. In general, the objective territorial principle is often only considered valid when the effect or intended effect is substantial and the exercise of jurisdiction is otherwise reasonable.

Imagining a situation where the objective territorial approach might be used by an asylum country to establish jurisdiction in a capital case is difficult. Nonetheless, here is an example: A man stands in the State of Washington at the border of the United States and Canada. The man begins to shoot across the border into Canada with the intention of killing Canadian citizens. Police officers from Washington arrive on the scene and attempt to stop the man. The man begins shooting at the Washington police officers, killing several and injuring others. Eventually, the man flees into Canada. The United States requests extradition, but for humanitarian reasons Canada does not want to extradite the man back to the United States and rather seeks to prosecute the man in Canada. For jurisdictional purposes, Canada may rely on the objective territorial principle because although the conduct occurred outside Canada’s territory, it was intended to have substantial, harmful effects within Canada’s borders.

The second principle, known as the “national principle,” is where jurisdiction is based on the nationality or national character of the offender. The exercise of jurisdiction based on nationality alone is considered abnormal; as discussed further below, the national principle is often coupled with the territorial principle to make the exercise of jurisdiction reasonable. If the asylum country lacks territorial based jurisdiction, however, it may seek to combine other jurisdictional principles with the national principle to support an exercise of jurisdiction.

A third principle is called the “protective principle.” Jurisdiction is established under the protective principle when a country’s national interest is affected or injured by the criminal act. It applies to conduct, by non-nationals, outside a country’s territory that is directed against the security of the country or against a limited class of other national interests; conduct “threatening to the integrity of governmental functions that are generally recognised as crimes by developed legal systems, e.g., espionage, counterfeiting of the state’s seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws.” The protective principle has been characterised as a subsection of the objective territorial principle, but it is still acknowledged as an independent ground for jurisdiction. It seems improbable that an asylum nation would use the protective principle as a basis for jurisdiction when seeking to prosecute an
individual accused of a capital crime in another country. Those offenses which provide a foundation for the use of the protective principle – espionage, counterfeiting, and falsification of documents – are not crimes for which the death penalty is generally imposed. Thus, if these were the crimes committed, it is improbable that the asylum country would deny extradition in the first place because without a demand for a death sentence there is likely no issue of cruel and unusual punishment.

The “universality principle” is the fourth principle. Under the universality principle, jurisdiction is based on the physical custody of the offender. The sole fact that the fugitive is in the hands of the asylum country allows that country to exercise jurisdiction over him. This, for obvious reasons, is what would be used when an asylum country seeks to punish an individual for a crime but does not seek a death sentence. However, this principle is strongly limited by the “reasonableness” standard discussed below.

The final principle is known as the “passive personality principle.” Through this principle, jurisdiction is based on the nationality or national character of the victim of the crime. Ordinarily, the principle is not well-received for commonplace torts or crimes. Its use, though, has been progressively more accepted as “applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality, or to assassination of a state’s diplomatic representatives or other officials.”

In order to support jurisdiction over a fugitive, and also to reinforce the reasonableness of exercising jurisdiction, courts may seek to establish jurisdiction under several principles. In U.S. v. Martinez, although certain criminal acts occurred in Mexico, the United States sought to prosecute Martinez in the states. Based on facts that the defendant was an American citizen, that the victim was an American citizen, that the defendant was charged with travelling in foreign commerce from the United States to Mexico, and that the victim returned to the United States after escaping from the defendant, the court concluded that extraterritorial jurisdiction was appropriate under national, passive personality, and territorial principles. In the case of Pietro Venezia, discussed above, although Italy denied extradition to the United States because of its capital punishment demand, the Italian Constitutional Court found that it was permissible under Italian law for Venezia to be tried by Italian courts for criminal acts committed abroad. This exercise of extraterritorial jurisdiction was possibly the result of a combination of nationality and universality principles.

Despite the existence of one or more of these principles, in order to establish extraterritorial jurisdiction, an asylum country must also prove that the exercise of jurisdiction is not unreasonable. The reasonableness of jurisdiction is determined by examining all relevant factors, including:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

These factors are not exhaustive and no importance is implied by the order of their listing. Depending on the facts of a particular case, each factor may be given a different weight, and some factors may not be considered at all. In sum, if an asylum country decides to prosecute a fugitive under its own judicial system, that nation will need to make a showing of the foundation for its jurisdiction as well as the reasonableness of exercising jurisdiction.

It is of course possible that the asylum country is unable to establish jurisdiction over the fugitive.
Thus, while the asylum country may want to prosecute the fugitive in its own court system, its laws will not permit it to do so. The lack of jurisdiction to prosecute may or may not affect the asylum country’s decision to deny extradition. Potentially, an asylum country could be faced with a choice between letting the accused criminal go without trial or punishment or turning the fugitive over to face capital charges in a criminal system which the asylum country morally abhors.

It is interesting that, in some situations, depending on the nature of the crime, it may be that the asylum nation which denies extradition has no choice but to prosecute. This appears to be true for those countries that are signatories to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, also known as the Montreal Convention. Article 1 of the Convention outlines those offenses to which the Convention applies: unlawful acts against the safety of civil aviation that jeopardise the safety of persons and property, and seriously affect the operation of air services. Article 7 of the Convention states:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall make their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Accordingly, under the Montreal Convention, if the fugitive is accused of one of the aircraft offenses enumerated in Article 1, yet the asylum nation denies extradition, the asylum nation is obligated to prosecute the fugitive in the same manner it would had the individual committed the crime within the borders of the country. It appears that the Convention does away with jurisdictional issues by compelling prosecution “without exception whatsoever and whether or not the offence was committed in its territory.” Signatories to the Montreal Convention include the United States, the United Kingdom, Canada, China, Japan, Germany and Mexico.

Asylum Nation Extrادات Fugitive for Trial Phase but Brings Fugitive Back for Sentencing

One possibility, hypothesised by M. Cherif Bassiouni in the fourth edition of his treatise on international extradition, is for the asylum nation to permit temporary extradition for the guilt phase in the requesting state and then have the fugitive returned to the asylum state for sentencing or the carrying out of a sentence in a manner that would not be cruel or unusual. This method essentially amounts to a conditional grant of extradition; the asylum state grants extradition to the requesting nation, but conditions that grant upon the promise that after the conclusion of the trial phase, if the fugitive is found guilty, then he or she will be returned to the asylum nation for the sentencing phase. As discussed above, the ability of nations to guarantee what will or will not happen after receipt of the fugitive is problematic. An issue could arise from the assurance to return the fugitive after the guilt phase. Depending on the laws of the requested and requesting state, problems may exist with the mixed application of law. Further, logistical problems of transporting the fugitive back and forth between the countries may exist. Although this concern might be easily addressed in cases between the United States and Mexico or Canada, transportation issues obviously would be more difficult and costly if the asylum nation is halfway across the globe. In some cases, the problem is avoided altogether because the countries have entered into various treaties governing the transfer of prisoners.

One positive consequence of temporary extradition is the avoidance of jurisdictional problems the asylum state would have encountered had it attempted to prosecute the fugitive in its own courts. If an asylum state were unable to assert a valid basis for jurisdiction over a fugitive, temporary extradition provides a way for the requesting country to hold criminals accountable while simultaneously permitting the asylum nation to honor its commitment to abolishing the death penalty.

Asylum Nation Abstains from Prosecuting Fugitive

An asylum nation could choose to refrain from initiating any criminal action against the fugitive. The fugitive would be set free, and as long as he or she remained within the borders of the asylum country, the fugitive would remain protected from extradition, prosecution and punishment. Taking this path, however, could lead to unwanted repercussions for the asylum state.

The fact that a requesting country has expended the time and resources necessary to commence the extradition process in pursuit of an alleged criminal indicates a strong likelihood that the crimes the
country seeks to prosecute the fugitive for are serious in nature. In order for a requested country to grant extradition, the requesting country has to produce information establishing that (1) the fugitive is in fact the person the requesting country is seeking and (2) the fugitive committed a crime in the requesting nation. Accordingly, the asylum nation not only has information that the fugitive is being accused of committing a serious offense; the asylum country can be reasonably assured that the fugitive actually committed those offenses. The crux of the problem is this: capital punishment is a sentencing option generally reserved for only the most heinous crimes. If the asylum country denies extradition because of the possibility that the fugitive will be sentenced to death, the asylum nation has been placed on notice that the fugitive sought may well be a dangerous criminal. Abstention would mean that a potentially dangerous fugitive would roam free among the citizens of the asylum country.

Another potentially serious repercussion exists for the asylum nation that denies extradition yet either cannot or does not prosecute the fugitive. The asylum country may develop a reputation as a haven for capital offenders who flee where capital punishment is imposed. Suspected criminals will seek refuge in the asylum country to avoid capital prosecution in the nations where they allegedly have committed their crimes. Although some of these individuals may be innocent and travel abroad seeking protection from false accusations, many others will likely deserve punishment and flee to abolitionist countries to escape the death penalty. Abolitionist asylum nations are thus in danger of becoming meccas for the world’s most serious criminals.

The asylum nation may choose to refrain from prosecuting the fugitive, yet decide to monitor him to determine whether he is dangerous to society or otherwise likely to commit a crime. The feasibility of the surveillance option turns on whether the asylum nation has the resources necessary to constantly monitor the fugitive. In addition, if the country became known as a safe haven for those suspected of capital crimes, the need for monitoring could quickly outstrip available resources.

Just as political consequences attend whatever decision the United States makes in response to a denial of extradition because of capital sentencing, so too are political consequences likely for the asylum nation that chooses to deny extradition and also chooses to refrain from prosecution. Although the requesting nation might understand a situation where the asylum nation is jurisdictionally barred from prosecution, in all other circumstances it is highly improbable that a requesting nation would passively accept the asylum country’s failure to hold the accused accountable. The requesting country has strong interests in vindicating the rights of its citizens and holding the guilty responsible for their crimes. The asylum nation’s refusal either to allow the United States to try the accused or to try the fugitive in the asylum nation’s courts is a rejection which can be expected to negatively impact foreign relations between the two countries.

Suspected criminals will seek refuge in the asylum country to avoid capital prosecution in the nations where they allegedly have committed their crimes.

An Alternative Option for the Asylum Nation

The asylum nation may have the option of committing the fugitive to a mental institution. In 2005, the American Civil Liberties Union estimated that five-to-ten per cent of America’s death row population suffer from serious mental illness. Since 1983, more than 60 prisoners diagnosed as mentally ill or with mental retardation have been executed in the United States.” These numbers exist despite the fact that the Eighth Amendment of the United States Constitution prohibits the infliction of the death penalty upon a prisoner who is insane. This may be because some courts are of the opinion that a State does not violate the Eighth Amendment when it executes a prisoner who became incompetent during his stay on death row, but who subsequently regained competency through appropriate medical care. This position is criticized by those who assert that although medication may be effective in reducing or alleviating psychotic symptoms, it is not a cure for underlying mental illness. One thing is clear though – the international community prohibits the execution of the mentally ill or insane. In 2000, the U.N. Commission on Human Rights appealed to non-abolitionist nations to renounce the imposition of the death penalty on persons suffering from any form of mental disorder.

The asylum nation may have the option of committing the fugitive to a mental institution.
These statistics indicate that, to some degree, the mentally ill may be prone to committing crimes subject to capital punishment. The data also suggest that a number of mentally ill individuals are convicted and sentenced to death for those crimes. Hence, there is a very real possibility that any given fugitive sought by a requesting country and accused of a capital crime may be mentally ill.

If a fugitive is believed to suffer from a psychological disorder, the asylum nation could have the individual committed to a psychiatric hospital or other mental health facility. If the fugitive is in fact mentally ill, the commitment alternative would likely be an attractive option to the asylum nation. Abolitionist members of the international community particularly abhor the infliction of capital punishment on the insane or mentally ill. By choosing to provide a fugitive with medical help, instead of punishing the individual for criminal acts which may have been performed while in a psychotic state, the asylum nation furthers human rights goals by avoiding the death penalty and by treating those with mental disorders compassionately.

Further, although other nations may differ, United States courts generally regard a commitment to a mental facility as a civil proceeding. It is considered to be civil because the power exercised over the individual is not punitive or penal. The detention does not amount to punishment because restricting the freedom of a dangerously mentally ill person is a legitimate, nonpunitive governmental objective. Because of the civil nature of a mental commitment, the asylum nation’s court system can treat the fugitive as a danger to society and criminal jurisdiction need not be established. By choosing the civil commitment alternative, the asylum country would avoid the thorny jurisdictional problems described above.

Conclusion

Although options appear limited in the wake of an extradition refusal, the details and consequences of any given choice are numerous. A final decision is presumably the result of much deliberation, debate, and perhaps compromise, on the best outcome for the nations, for the fugitive, for the victims, and for human rights.

1 BLACK’S LAW DICTIONARY 273 (8th ed. 2004).
2 Id.
3 Andrea Cortland, United States v. Burns, Canada’s Extraterritorial Extension of Canadian Law and Creation of a Canadian “Safe Haven” in Capital Extradition Cases, 40 U. MIAMI INTER-AM. L. REV. 139, 146 (Fall 2008).
4 Id.
5 Id.
8 31A AM. JUR. 2D Extradition § 50 (2008).
9 Theresa L. Kruk, J.D. and Russell G. Donaldson, J.D., Annotation, Test of “Dual Criminality” Where Extradition to or from Foreign Nation is Sought, 132 A.L.R. FED. 525 (1996).
10 Id.
11 31A AM. JUR. 2D, supra note 8, at § 39.
12 Id. at § 42.
14 31A AM. JUR. 2D, supra note 8, at §§ 47, 48.
15 M. Cheri Bassouli, INTERNATIONAL EXTRADITION, UNITED STATES LAW AND PRACTICE 80, 87 (Oxford University Press, 5th ed. 2007).
16 Id. at 985-92.
19 Id.
20 Id.
21 Bassouli, supra note 16, at 620.
22 Id. at 623.
23 Id.
25 Id.
27 Clarke, supra note 19, at 48.
34 31A AM. JUR. 2D, supra note 8, at § 152.
BASSIOUNI, supra note 16, at 629.

Id.


Id. at 160-61.

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BASSIOUNI, supra note 16, at 629.

Id. at 630.

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John Tagliabue, Italian Court Blocks Extradition, Citing Death Penalty in Florida, N.Y. TIMES, June 28, 1996.

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Id. at 630.

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BASSIOUNI, supra note 16, at 629.

Id. at 630.

Id. at 630-31.

Id. at 160.

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BASSIOUNI, supra note 16, at 629.
Against the Death Penalty: International Initiatives and Implications
Jon Yorke (ed.)
Review by Professor Lyn Entzeroth*

The able collaboration of a number of accomplished practitioners and scholars who have worked to abolish capital punishment makes Against the Death Penalty: International Initiatives and Implications, edited by Jon Yorke, an invaluable resource to students, scholars, lawyers, and judges. For those courageously engaged in the struggle to end the death penalty, this important book provides guidance, caution, and hope.

Against the Death Penalty is divided into three main sections with chapters written by leading lawyers, scholars and activists. In the opening chapter, Roger Hood, Professor Emeritus of Criminology at the University of Oxford and Emeritus Fellow of All Souls College, surveys the current abolitionist movement. Noting that a large majority of countries passed a United Nations resolution supporting a worldwide moratorium on executions pending eventual abolition of capital punishment, Professor Hood observes that this current trend is the result of efforts over the past twenty years to persuade countries to abandon death as a form of punishment. As Professor Hood points out, the proliferation of anti-death penalty scholarship is an important component of the struggle to abolish the death penalty. To this end, the scholarly contributions contained in Against the Death Penalty play a vital and potent role.

Part I of Against the Death Penalty reviews the state of capital punishment around the globe. In Chapter 2, William Schabas, Professor of Human Rights Law at the University of Ireland, Galway, and Director of the Irish Center for Human Rights, charts the evolution of the death penalty debate as well as the trajectory of this debate toward abolition both within the United Nations and among its member states. Furthermore, the chapter illustrates the tug-and-pull of competing national views as the United Nations moves toward abolition. Besides ably recounting the story of the course of abolition in the United Nations, the chapter also provides specific and useful discussions on the resolutions and votes that will prove instructive to students of the death penalty and the international movement toward abolition.

Chapter 3, written by Jon Yorke, addresses the human rights debate in the Council of Europe and tackles the issue of renouncing a nation’s sovereign right to impose the death penalty. Professor Yorke considers the actions and public discussion of the Council of Europe with a particular focus on the actions and evolution of the European Convention of Human Rights in connection with the drafting of Protocols 6 and 13. Professor Yorke provides a compelling and well-researched discussion of the evolution of Europe’s abandonment of the death penalty as a legitimate punishment. He asserts that the abolition movement and arguments against the death penalty are “part of the human rights never-ending story.” The prospect of reinstatement haunts every generation and demands that abolitionists continue their work.

In Chapter 4 Lilian Chenwi, a senior researcher in the Socio-Economic Rights Project of the Community Law Centre at the University of the Western Cape, South Africa, examines the abolition debate in Africa where, although fourteen African nations have abolished the practice, most nations still retain the death penalty. The African experience is fascinating and significant to the ongoing global

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Book Review

The African experience is fascinating and significant

The challenge of abolition. The chapter details the actions of the African Commission in providing procedural guarantees as well as substantive jurisprudence, and the author charts a path toward abolition in Africa.

The final chapter in Part I examines the death penalty in the Caribbean. As barrister and author Quincy Whitaker observes, Caribbean nations do not appear to be following the global trend toward abolition, although many have not carried out the death penalty in recent years. Ms. Whitaker explains the function of the Privy Council in capital cases generally and its complicated historical role in Caribbean nations. Ms. Whitaker urges the Privy Council to move beyond its colonial roots and emerge in the twenty-first century as a modern constitutional court recognising the shared fundamental values of its relevant jurisdictions.

Part II of Against the Death Penalty provocatively poses perspectives and questions for retentionist countries. In Chapters 6, 7 and 8, Julian Killingley, professor of American Public Law at Birmingham City University, Jane Marriott, lecturer in the law at the University of Surrey School of Law, and Richard Dieter, executive director of the Death Penalty Information Center, examine the American death penalty system and offer varying views and opportunities for abolition. Professor Killingley examines the constitutional constraints on American death penalty practices, focusing particularly on the Eighth Amendment of the United States Constitution, which prohibits cruel and unusual punishment. Relying on the Eighth Amendment and relevant U.S. Supreme Court precedent, Killingley offers arguments that those who advocate for the condemned may make to establish future constitutional havens from the death penalty. Similarly, Professor Marriott looks at the extent to which the Eighth Amendment constrains the infliction of the death penalty, concentrating her attention on the lengthy terms of incarceration on death row that American prisoners typically serve before execution. Her discussion provides important insights into the sustainability of American death penalty procedures. Richard Dieter rounds out the discussion of the American death penalty system by providing valuable information on the trends and attitudes about the death penalty in the United States. While noting the continued support of the death penalty by a majority of Americans, Mr. Dieter finds that American opposition to the death penalty has grown in recent years. This trend can be attributed to the danger that the death penalty has been or will be carried out on an innocent person. Observing that the death penalty cannot be realistically altered to eliminate the risk of human error and wrongful execution, Mr. Dieter provides cogent evidence that Americans are becoming cognisant of and concerned about this reality.

Chapters 9 and 10 focus on China and Asia, where the death penalty remains a viable penalty. In Chapter 9, Nicola Macbean, the founding director of The Rights Practice, discusses the distinctive development and process of the death penalty in China, highlighting the development of a rule-based system of justice after the Cultural Revolution. In Chapter 10, Sangmin Bae, associate professor of political science at Northeastern Illinois University, explores Asian values in the context of the death penalty and the reaction of Asian countries, politicians and intellectuals to the imposition of external human rights values. Professor Bae then chronicles Korea’s possible passage of the first abolitionist bill in East Asia and the potential impact of such a legislative feat.

Part III of Against the Death Penalty considers strategies for abolition and alternative punishments. In Chapter 11, Peter Hodgkinson, Seema Kandelia and Lina Gyllensten offer a critique and a vision for the future of abolition. Citing the experience of the United States and the Caribbean, the authors observe that a litigation strategy alone has not resulted in abolition. Indeed, the authors caution that such a strategy may result in a retrenchment of the practice by capital punishment proponents. With respect to the global moratorium movement, the authors provide examples indicating that a temporary halt to executions may not translate to a permanent end to the practice. In light of continued public support for capital punishment, the authors urge abolitionists to engage in public education campaigns and to develop and advocate for alternative remedies as a necessary ingredient in the efforts to end the death penalty.

Finally in Chapter 12, Rachael Stokes, research and publications manager at Penal Reform International, considers the problems of long-term imprisonments...
as an alternative to a punishment of death. As jurisdictions eliminate or restrict the death penalty, legislatures often offer sentences of life imprisonment as an alternative to the more severe punishment of death. Ms. Stokes, however, challenges the reader to seriously consider the social and psychological impact that such long term incarceration has on the prisoner and on society. She argues that the abolition movement must include an agenda to promote human rights within the prison system, as well as advocating for an end to capital punishment.

Comprehensive, ambitious, and thought provoking in its scope and analysis of death penalty practices across the globe, Against the Death Penalty: International Initiatives and Implications makes an important and significant contribution to the literature on capital punishment. It is an essential addition to any serious collection of capital punishment materials.
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