THINK LIKE A LAWYER, KILL LIKE A JUDGE

Leland Anderson

The Defendant, Danny Martinez, on trial for capital murder, appeared confused, off-balance, and panicky. He looked quickly at his mother sitting in the first row of the courtroom gallery. Then he looked back at me, warily, but inquiringly, seeking reassurance in my eyes, my voice, and my gestures. I will never forget that moment. I was the presiding judge in a pretrial hearing on a death-penalty murder case. Looking at Defendant Martinez, I looked into the eyes of a frightened man. He stared at me intently, as if searching for a clue to a riddle. I sensed his uncertainty, his distress, and his fear. I wondered if, at some level, he actually trusted me. In a matter of days, I would vote to kill him.

Daniel "Bang" Martinez was charged with the murder of fourteen-year-old Brandaline DuVall, an honor student who made the unfortunate decision to get into a car with strangers one day, the last day of her life. The result was one of the most heinous murders in Colorado history. In May 1997, Daniel ("Danny") Martinez was the leader of the Crenshaw Mafia Gangsters Bloods ("CMG"),[1] a street gang, one of the few Hispanic gangs recognized by the California-based Crenshaw Mafia Gangsters. The Deuce-Seven CMG, Danny's Gang, was recognized by law enforcement, primarily for the gang's lawlessness and potentially lethal impulses.

I was the presiding judge in the Danny Martinez trial. As presiding judge, I was automatically a member of a three-judge sentencing panel assigned to adjudicate the

[1] The Crenshaw Mafia Gangster Bloods (CMGB), also known as the Crenshaw Mafia Gang (CMG), were an African-American street gang active on the West Side of Inglewood, California. Martinez led the Deuce-Seven subset of the CMG, an unusual arrangement in which his Hispanics gang-members were affiliated with a largely Afro-American gang.

question of life or death in the event that the jury convicted Martinez of first-degree murder. Two other judges were selected in a murky lottery system overseen by the Colorado Supreme Court. The other two judges, however, did not participate in or view the guilt-innocence portion of the trial. In the event of a conviction, they would be required to read transcripts of the evidence and listen to additional live testimony in order to determine whether death or life-imprisonment should be imposed under the laws of the State of Colorado.[2]

Of the countless hours working on the Martinez case, the one moment that stands out in my memory was the moment when Danny Martinez looked for his mother, then at me, wondering what he should do. What I saw beneath the icy bravado he had demonstrated up to that moment was a crack in the armor, a brief glimpse of vulnerability that he had concealed up until that instant. Moments before, I had asked him whether he was willing to waive his mother's presence in the trial for a few minutes while I questioned a juror about the juror's background.

As a member of his family, Danny Martinez' mother was permitted to sit in the front row of the courtroom in support of her son. A prospective juror, however, had objected to the mother's presence while she answered questions concerning her personal background and employment. The juror feared possible gang retaliation if her personal

---

[2] In 1995, Colorado instituted a three-judge panel to decide whether to impose death sentences in lie of juries making that determination. The change in the law was a result of legislators' efforts to secure more death penalty convictions in the State of Colorado, which had historically been conservative in juries' willingness to impose the death penalty. The assumption by many was that district court judges who are subject to retention elections and scrutinized by the public every six years would be more likely to impose the death penalty lest they earn a reputation of being soft on crime. In *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court declared in a 7-2 decision that only juries, not judges, can determine whether sufficient aggravating factors existed in a case to justify imposition of the death penalty. As a result, three inmates in Colorado who where sentenced to death by three-judge panels had their sentences overturned and converted to life in prison without parole.

information was disclosed in the presence of the Danny's mother. I deemed the fear insignificant. The last place any person with gang affiliations wanted to be was Division 2 of the Jefferson County Colorado Courthouse. All local probation and parole officers had advised their clients to stay far away from this trial. Nevertheless, in the interest of meeting the juror's concerns, I asked if the Defense objected to the temporary absence of the Danny's mother from the courtroom. Danny's attorney conducted a whispered conversation with his client. Danny Martinez seemed unsure what to do. He looked to his mother who seemed equally uncertain. Then he turned to me in apparent distress and confusion, as if asking me what he should do. Without his mother in the courtroom, he would be isolated with his court-appointed attorney, two Sheriff's deputies, three prosecutors, an investigating detective, a court reporter, and a poker-faced Judge. I silently stared back at him, giving him no signal one way or the other, an implacable response revealing neither malice nor empathy.

Danny Martinez had always surrounded himself with people who supported him, looked up to him, and did what he told them to do. His gang was utterly loyal to him. Now he was alone and the only personal friend he had in the courtroom was being asked to leave. If Martinez insisted on his mother staying in the courtroom, he would appear weak; if he agreed to his mother leaving the courtroom, he would gain the benefit of candor from the prospective juror but at the cost of temporary emotional isolation from his closest family member. Danny eventually elected to proceed without his mother. This did not particularly surprise me; he was the pack-leader. He could not show weakness. However, for a few seconds, I saw the pack-leader waver, stumble slightly, and hesitate in a decision that involved a degree of emotional dependence, a dependence

that lingered from childhood. He actually was afraid. That is the only moment in the trial when I detected any fear from the Defendant, despite the fact he was on trial for his life.

In May 1997, Brandaline "Brandy" Duval, an honor student, was picked up at a bus stop and taken to a house in Adams County, Colorado where she was sexually assaulted and tortured for over four hours by members of Danny Martinez' gang. At the end of an evening of hellish torture, Danny Martinez was not sure what he should do with Brandy DuVall. Should he let her go? Should she be killed? Martinez decided he would hold an impromptu trial in the living room of the house where the assaults had occurred. In the trial, Brandy DuVall was bound, hooded, and forced to kneel on the floor while the gang members questioned her and commented among themselves. Danny Martinez was the presiding judge. Brandy made one mistake in her testimony. She was asked if she knew the address of the house where she was being held. Unfortunately, she stated that she did, thus sealing her fate.

Danny Martinez sentenced Brandy DuVall to death. She was forced into the back seat of a car and driven into the foothills outside Golden, Colorado. In the backseat, one of the gang members practiced stabbing her, commenting that the knife went in like butter. Stopping alongside the highway, Brandy was taken from the car and upon the orders of Danny Martinez, she was stabbed repeatedly. The coroner counted twenty-eight separate stab wounds. Danny was in charge, but he did not participate in the stabbing. The gang flung Brandy's body down a thirty-foot embankment onto the rocks beside Clear Creek. Her partially clothed body was found sprawled on the rocks and snow beside the stream the following day. She had survived the initial stabbing but

succumbed to the cold, chill, and loss of blood, dying on the rocks beside the icy stream.

The jury deliberated less than three hours before finding Danny Martinez guilty of the gang rape, torture, and murder of Brandy DuVall. The DuVall murder was without a doubt one of the most monstrous crimes committed in Jefferson County history. The cruel images of that trial, the ghastly photographs, the coroner's report, and the tears of Brandy's loved ones all remain fresh in my memory more than a decade after the conclusion of that trial.

The Martinez trial was the first time I was called upon to decide life or death of a defendant. The second time came a short time later when I was again assigned to a three-judge sentencing panel as a sentencing judge. The defendant was Donta Page, accused and convicted of the murder of twenty-four year old Peyton Tuthill. Page had been sentenced from an out-of-state court to a halfway house in Denver located two doors down from Ms. Tuthill's apartment. The murder scene photos depicted nothing short of mayhem, chaos, terror, and blood. Page admitted to raping and stabbing Ms. Tuthill to death. He had come to Denver from Maryland, where he had been sentenced to serve in an alcohol-drug rehabilitation program in Colorado. Previously, Page had been sentenced to a 20-year term for armed robbery and burglary. He had been paroled to a halfway house.

At trial, Page was convicted of first-degree murder for the savage and brutal stabbing of Ms. Tuthill. The prosecutors demanded the death penalty. By random lot selection, I once again found myself assigned to a death penalty sentencing panel; I was required to decide for a second time whether another human being should live or die. In preparation for this hearing, I isolated myself in a cabin in the redwood trees above Santa

Cruz, California. I took the time to read the transcripts of the Page trial, to review the myriad photographs of the scene of carnage from Ms. Tuthill's last few moments of life, and to contemplate again the possibility that my decision could result in the death of another human being.

I spent ten years working as a district court judge in Jefferson County, Colorado. During that time, I presided over several murder cases, and I was twice asked to vote "yay" or "nay" on a person's life. In both instances, I voted in favor of what at the time I believed to be the correct decision based upon the law and the evidence. In the Martinez trial, I voted in favor of the execution of Danny Martinez; in the Page trial, I voted against the execution of Donta Page. Neither defendant was sentenced to death because the verdicts of the sentencing judges were not unanimous in either case, and the law at the time required unanimity of the three judges to impose a sentence of death. Further, the Supreme Court of the United States eventually found that three-judge sentencing panels in death penalty cases were unconstitutional. Even if we had unanimously elected to execute either Martinez or Page, their sentences would likely have been converted to life in prison without parole.

Nevertheless, my vote on both cases is a matter of public record. I know from first-hand personal knowledge the intricacies of the machinery of death in a state-sponsored execution program. My knowledge is unique in that few, if any, persons in the history of law have twice been asked to sit in judgment of another and vote for or against execution of a convicted murderer.[3] Being the prosecutor or the defense attorney

[3] Presumably, but for the United States Supreme Court decision in *Ring v. Arizona*, supra, my colleagues and I would have been required over a number of years to sit as deciding sentencing judges in capital cases. I often wonder what impact that would have left on the judiciary and what kind of reputations certain judges might have earned had they participated in a multiplicity of death-penalty sentencing panels.

of one facing the death penalty is as challenging as any professional task can be. Being the decider, however, is equally, if not more, daunting. The prosecutor essentially knows his or her "script," how to argue the facts and law. The defense attorney also abides by a certain "script," understanding that no holds are barred in protecting the life of a defendant that the State wants to execute. The decider, on the other hand, has no script. The law offers no seminars, lectures, retreats, courses, or systematic lessons to teach one how to decide whether a person lives or dies in the criminal justice system.

Early in my career I served as a deputy district attorney, but I never prosecuted a death penalty case. Then I worked as a civil personal injury attorney advancing the rights of injured persons. Nothing in my background, life or experience had prepared me for deciding whether a person should live or die. Though I had served for a time in the United States Marine Corps Reserve and was supposedly a "trained killer," I had in fact never fired a live round at another world citizen during my military career.

The Marine Corps supposedly teaches recruits how to act without thinking, to obediently engage in armed conflict in the face of deadly, life-threatening circumstances. Ultimately, each Marine knows that learning to follow orders without question is a matter of personal survival. The Marine's life and that of his or her comrades is dependent on his or her willingness to take the life of others if necessary. This is not the case when one is sitting in a spacious, cherry-paneled courtroom, behind a Kevlar-shielded bench where all visitors and their belongings have been screened by metal-detectors, constantly monitored by surveillance videos and a host of fully-armed Jefferson County Sheriff's

---

Equally significant, what would be the impact of such circumstances on the individual judges? To the best of my knowledge, when three-judge panels were legislated into existence no one took the time to consider the psychological and professional stresses that might accrue to judges having to be called randomly time and again to decide the life or death of other human beings.

Deputies ready to intervene at the slightest sign of trouble. In those protected surroundings, one is not entertaining notions of self-defense or fear. The courtroom is not a fighting hole for the judge, the attorneys, or the jurors. The courtroom is, however, a fighting hole for a defendant on trial for his life.

We, the life-takers, whether as judges on death panels or as jurors on death penalty cases, stand on the edge of the Defendant's fighting hole. We look down at the Defendant cowering at the bottom of the hole. The Defendant has been convicted of egregious acts. Now he is powerless. He is no longer shooting back. He is cornered. We are asked to kill the Defendant in the name of the law. Most jurors and judges are not trained to kill other human beings. In the Marine Corps, I learned to field strip, disassemble and re-assemble an M-14 and an M-16 semi-automatic rifle. I know which side of an M18A1 Claymore mine is the grumpy side, the side that says "Front Toward Enemy."[4] I have wielded and fired an M-60 machine gun. I know how to hit the bulls-eye of a target ten times out of ten at 300 meters. None of that, however, really prepares one for the experience of killing of an unarmed person in a clean and well-lit courtroom, armed only with books of the law and a fine-point roller-ball pen. Death by a check mark and signature is not as sudden as a bullet, but it is an extraordinarily intentional and premeditated killing.

Questions of ultimate morality are rarely discussed in courts of law. In law school, I recall a student complaining to a property professor that the outcome of a case seemed immoral. The professor abruptly laughed outright while leaning toward the

[4] The Claymore is a remotely-controlled anti-personnel mine that shoots a pattern of steel balls in a kill-zone about 110 yards radius within a 60° arc in front of the device. Should the device be set up facing the wrong way, the results would be not only counter-productive, but also conceivably deadly to the operator of the device.

inquisitive law student and saying, "You are in law school. If you are going to be troubled by the morality of the outcome, perhaps you should enroll in seminary. Your question is impertinent and irrelevant. It may be of interest to Saint Peter but has no bearing on the discussion at hand." Folding his hands casually behind his back, the professor explained:

> My job is to teach you to think like a lawyer. If you think like a lawyer, you craft your concerns around the letter of the law, not the emotional and sentimental fluff of your conscience. The law is a rational enterprise. Argument and reason are your tools. You are not moralists. You are not theologians. You are not philosophers. You are lawyers. You must learn to think like a lawyer.

Those words echo through countless law school classrooms across the country. Time and again, law students are taught that they must learn to "think like a lawyer." The question however, is whether thinking like a lawyer can teach you to "think like a killer."

The law does, however, invite a certain ruthlessness of character. Lawyers are trained, for example, to represent people and causes that others may find repugnant. Criminal defense attorneys, for example, are often asked how they can defend someone who is obviously guilty. Some respond by reference to the law, to the fact that one is presumed innocent before being found guilty, and that guilt requires proof of each element of a crime beyond a reasonable doubt (irrespective of what that really means in practice). Whether the attorney is representing a criminal defendant, an injured plaintiff, a large corporation, or a lunatic, the lawyer is basically asked to dial down personal moral judgments and, within the limits of the law, do whatever is necessary to win the case for the client. Winning the case may not be in the best interest of the community or persons directly affected by a client's behaviors, but those concerns are secondary, if not largely

irrelevant, to a lawyer's duty to his or her client.

The lawyer is asked to disengage his or her personal and emotional reactions to a client's actions, however reproachful or scornful, and secure the best possible legal outcome for the client. These outcomes include keeping the client out of prison, obtaining a multi-million dollar judgment for the client, denying the victim of a morally-justifiable award in damages, avoiding a penalty for polluting a streambed, or obtaining a conviction that will result in the execution of another human being. In other words, the lawyer is asked to set aside personal moral concerns, spiritual misgivings, even community values and more, in order to achieve the best possible outcome for the client. A lawyer's reputation in the legal community is ordinarily secured by winning the case, however dubious the result and regardless of the social or moral value of the outcome.

Over the years, a lawyer becomes accustomed to turning a blind eye to the larger moral implications of his or her client's case and focuses instead on the details of the law, the myriad of evidentiary questions, the unending niceties of procedures and deadlines, and unending shifts in meaning of words and phrases. The lawyer becomes blinded by the technique of the law and succumbs to the illusion that by mastering the techniques, one will become a master of the law.

The law offers amazingly complicated mazes where a lawyer can lose him or herself for an entire day studying the meaning of three or four words in a sentence. The lawyer learns to field strip, disassemble and re-assemble arguments with Aristotelian ease. The lawyer learns trial techniques as well. He learns what he should do to out-gun the opponent or an expert witness. The ultimate truth of the matter is rarely of great significance to a lawyer. The game is to convince the jurors of your client's story, his

narrative, his version of the facts that becomes the lawyer's "truth... This may or may not bear resemblance [to] philosophical or spiritual truth. The lawyer is not paid to really "get to the bottom of the matter." Occasionally this occurs, but that outcome is secondary to convincing the jury of a truth consistent with the outcome desired by a client. Thus, what the jury eventually reaches is an adjudicated truth, a truth that relies as much on the background, experience, prejudices, likes and dislikes of the jurors, as it does on the limited window-box evidence displayed in the process of a trial. It's a truth where gaps and blanks are filled in by imprecise deductive reasoning, both on the part of the lawyers and the jurors.

Any lawyer with any degree of experience will tell you that a trial is not really a search for the truth, and lawyers do not truly want fair and impartial jurors. What they desire is a prejudiced jury that will more likely find in favor or their client on the basis of a narrative-like recreation of the evidence slanted in favor of the client. The law invites lawyers to suspend personal moral judgment when it comes to believing or disbelieving their clients. In many instances, lawyers do not want to know the truth and will often not ask their client the crucial question: "Did you really do it?" Perhaps this is because, as Jack Nicholson suggests to Tom Cruise in "A Few Good Men," "You can't handle the truth." More accurately, a lawyer does not want to suborn perjury and knowingly place a client on the stand who testifies differently from what the client told the lawyer in the privacy of the lawyer's office. By asking the client whether he did it or not, a lawyer may be limiting the option of putting his client on the stand (unless the client is prepared to confess to the crime on the stand). If the client has not actually confessed to the lawyer, the lawyer may yet have the option of placing his client on the stand and

proclaiming innocence without fear of suborning perjury. Thus, the lawyer may have some question about whether his client is the actual culprit of the crime, and even if all the evidence points in the direction of his client, the lawyer is trained to hold his personal beliefs about the matter in suspense.

A lawyer is taught to compartmentalize his thinking. He may know his client is the culprit who committed the crime, but the lawyer will still seek to prove to the jury that the prosecution has not proven the elements of the crime beyond a reasonable doubt and argue that the jury must find his client not guilty. To do this, a lawyer must look, act, speak, and project the appearance of a belief (though it would not be stated as the lawyer's personal belief) that his client is totally innocent. To do this the lawyer must, to some extent, disengage from his inner core of beliefs and act out the appearance of another set of beliefs. Far from revealing his true thoughts and assumptions, the lawyer is taught to zealously advance his client's cause, even at the cost of being at odds with the lawyer's own values, moral choices, beliefs, and principles. This is not simply true of defense lawyers; prosecutors also experience a certain amount of disengagement of feelings and beliefs. They often feel the pressure to convict.

In my courtroom, I sought to remind prosecutors that their first obligation is to do justice, not to convict. I taped the ABA Cannons on the prosecution function to the prosecutor's table in the courtroom – just in case it slipped their mind. Prosecutors are prone to counting the number of convictions they have obtained and are also prone to brag about the length of sentences they obtain on their various cases. If they have doubts about the testimony of certain witnesses, they learn not to expose or explain such doubts. Today, even in the face of un-rebutted DNA evidence establishing the innocence of a

client, some prosecutors will hold onto a conviction because they cannot accept the fact that they might have been wrong in prosecuting an innocent man. Moral disengagement at this level is extraordinary, but it does happen.

The moral disengagement process leads to compartmentalization. The lawyer may tell his spouse at home that he does not believe a witness or client, but once the lawyer gets in the courtroom, such concerns are locked in a closet, and the lawyer explains in suffering detail all the reasons why the witness or client should be believed. This requires a high degree of compartmentalization. The lawyer must set aside personal beliefs and adopt a "story" or "version of the facts" that supports the ends sought by the client, not ones that corresponds to the lawyer's own thoughts and beliefs.

Thinking like a lawyer means learning to see the world in a billion shades of gray. It means saying one thing in one place and something else in another. It means suspending moral judgment as an act of professionalism. This, in turn, can lead to stretching moral judgment on occasion and justifying actions one would not normally justify. In many cases, the compartmentalization and rationalization results in an "ends justify the means" mentality. Lawyers can become so tired of seeing morally ambiguous results from their work that they reach a level of substantial impatience and distaste for the technical inefficiencies of the law. They want to "cut through the bullshit," and make sure someone does not "get away with it" on the basis of some peculiar wording of a case opinion or statute. Having practiced the art of deconstructing moral and spiritual truth in court, lawyers are less concerned about the process and more concerned about the results of the process. For many, winning is not just one part of the process; winning is the only thing. Winning may mean, "put the guy away," or it may mean, "get the guy

off." In the rush to reach the "right result," the first casualty is truth. For lawyers, this is not a stretch, merely a casual reach for a darker shade of gray.

The law only professes to engage in a "search" for the truth. The law, however, does not purport to reach the final truth of any given matter. Trials are story-telling events, where jurors can easily determine in their own minds the outcome of a particular contest before the first witness is even sworn-in to testify. Jurors are susceptible to selective listening, choosing to believe the story that resonates with their own assumptions, while filtering out, rationalizing, or simply ignoring evidence which conflicts with their own story-line biases. In some instances, I would not be surprised if the outcome of a trial or hearing was the result of the blood-sugar levels of the judge at the time of ruling. What I am describing is a system made noble by the art of human reason, but a system plagued with the deficiencies of reason in deciphering and comprehending moral truth. The legal system purports to advance the truth, but it is burdened by the limited energies and willingness of people to invest the time, concentration, and sacrifice of personal ego necessary to achieve not only a true result but also a morally just result. Wrongful convictions are the result of the unwillingness of participants in the system to second-guess themselves, to question their own motives, biases, and decisions, and to admit that they can, in fact, get it wrong. In a system where the cultural ethos is not to second-guess oneself, but to "fashion" a story-line so as to reach a particular desired result, one must ask if this is the kind of fail-safe system that withstands moral scrutiny when relied upon to determine whether a man lives or dies.

How do jurors actually reach decisions? Do they truly wait until they have heard all the evidence in the case and listened to the judge's instructions before deciding the

outcome of the trial? Some would argue (as I have on occasion), that jurors might make up their minds solely on the basis of the opening statements and introduction to the case through voir dire (jury questioning) by the lawyers. I tend to believe the human mind desires resolution and is not comfortable holding matters in abeyance, in continual tension without resolution over a lengthy period of time. In fact, I deem it the mark of a superior intellect when someone is willing to test and second-guess their own assumptions and conclusions and jump back and forth over the logical fence, keeping an open mind throughout the process, setting aside any feelings or sentiments that might favor one side or the other. However, I seriously doubt that most people are capable of doing this.

Even the most important decisions we make in life – those involving health care, jobs, homes, investments, retirement funding, etc., are seldom weighed with totally rational spreadsheet accuracy. Instead, we find ourselves moved by the color of the house, the pleasant personality of the doctor, or the promise of security in the investment. In the most important matters of our lives we ordinarily engage in an emotionally charged decision that has little, if anything, to do with a comprehensive analytical review of all the facts and circumstances of the issue. Even the most intelligent and highly educated among us make irrational decisions about important life decisions on a daily basis.[5] So,

[5] David Brooks, *The Social Animal*, 18 (Random House Trade Paperbacks 2011) ("Decision making is an inherently emotional business.").

> The research described in this book attests to a simple point: Our experience of ourselves is misleading. We have a sense that thee is a central spot in our brains where information is processed, options are considered, and decisions are made. We have a voice in our head, which seems to be responsible for what we do. We have a sense that as we look out onto the world we are aware of what we are seeing. But these propositions are not quite right. There is not central homunculus—so simple self—making decisions. The voice in the head may think it is in control, but in fact it is a mere supporting actor,

then, why do we believe the average juror is capable of changing the way he or she makes important decisions in life after being swept into a courtroom and dumped in a seat in the jury box? The juror is not suddenly able to think "rationally" because the Judge tells him that is how jurors need to think. Most jurors believe they already make rational decisions when in fact most of their life's decisions are made in anything but a rational manner.

Judges want the public to believe that the law is consistent, comprehensive, and totally logical, and that judges are masters of logic who mechanically review the law and

---

> unaware of the main protagonists down below. We are not aware of most of what we see and sense around us, or even of how we are responding to it.
>
> We are not who we think we are.
>
> People have always known that there are hidden forces that propel us, of course, but over the last thirty years researchers have begun to appreciate just how dominant these unconscious processes are. This is one of the big intellectual stories of our time.
>
> ****
>
> For much of the nineteenth and twentieth centuries, a systematizing ethos prevailed, which held that people are rational, utility-maximizing, self-aware, consistent, and predictable. But starting in the early 1970s, [Daniel] Kahnean and [Amos] Tversky started poking holes in all this. They detected all sorts of hidden processes involved in the way people perceive and process the world.
>
> ****
>
> [T]he brain is a vastly complicated collection of parallel and distributed thinking systems, gazillions of which are churning at churning at any one time. The conscious mind generally can't follow what's really going on, so it just looks at the results and forms an interpretation. It makes up a story. (Some researchers believe this is all the conscious mind does. We have no free will, just a bunch of post-hoc rationalizations.
>
> ****
>
> One of the constant implications of this research is that we have to be completely modest about what we know and can know. We don't even know ourselves, let alone other people. We don't really know any situation, even as much as our own brain does. We can't trust our own evaluations of how much we know. We have a constant tendency to be overconfident.
>
> Entire industries are based on overconfidence. There are large numbers of fund managers who think they can beat the market when picking stocks. The vast majority are wrong. One study analyzed the judgment of doctors who were "completely certain" they had correctly diagnosed the disease of an ailing patient. After the patients died, autopsies were performed. The clinicians who were "completely certain" were wrong 40 percent of the time. [**NOTE: Consider the danger of the "overly confident, completely certain" juror.** Id. 377-380.

through the process of logic and deduction conclude the rational outcome of a case. I can assure you that I have engaged in this kind of analysis – at one time staying up all night long in the courtroom attempting to sort out the holdings in a series of cases that would lead me to a logical and consistent result in light of legal precedent and reason. The task was sheer folly. I wasted a night of rest in the effort. The outcome was virtually a toss-up, and the so-called "balls and strikes" call of the decision came down to who I wanted to win as much as anything. The law is far more inconsistent, nebulous, and uncertain than jurists want the public to believe. A lot of so-called discretionary or judgment calls on the part of judges are calls that reflect the judge's background, bias, experience, values, prejudice, and knowledge of life. Yes, I said prejudice because I believe most verdicts and most decisions are invested with a certain amount of pre-judgment, or prejudice. I have decided cases where the precedents supporting both sides were of equal weight and significance, and found myself with no truly "moral" guidance or commentary from the law as to which result best serves the interests of the law or the community.

Does a judge's decision depend upon what he or she had for breakfast? Judges are expected to act with swiftness, determination, and resoluteness. Judges are considered weak if they change their mind, if they hesitate in making a decision, or if they wobble back and forth on a difficult question. You learn quickly that acting with too much caution will be perceived, at best, as wishy-washy and at worst as ignorant and intellectually weak. A trial judge's mantra is "damn the torpedoes and full-speed ahead.". Thus, rather than approaching cases with a "beginner's mind," the judge is expected to size up the situation solely utilizing his powers of reason and his knowledge of a voluminous body of inconsistent and inconclusive case law and legislative enactments,

and to promptly deliver a decision with cunning and ruthless efficiency. The cultural ethos requires that a judge adopt a "ready, fire, aim" attitude in making decisions. The substance of the decision is less important than the fact a decision is made and made quickly. Speed of decision making and control of one's docket is of the highest priority among those whose duties involve assessing a judge's strengths and weaknesses. The need for speed is felt throughout the system. "Justice delayed is justice denied" is the clarion call of the judiciary. Under this mantra, a judge may hear as many as 90 or more cases in one day, processing cases in matters of minutes, if not seconds, so as to gavel-out at 5 o'clock p.m. In the haste, processing the case assumes paramount importance to the truth of any given matter. The attitude among the lawyers is, "We don't care what the decision is. We just want a decision."

Against this background, we encounter the death penalty. When a judge or juror is faced with what may be one of the most important decisions of his or her life -- whether another person should live or die -- the law offers only one tool to guide the decision; reason. Reason requires one to make sense of things, to apply logic, to test and verify facts using logic, deduction, and common sense. That takes time. That takes a superior intellect. The history of the twentieth-century demonstrates that rationality and reason can be used to justify the most egregious of human behaviors. Even terrorists use logic and reason to justify acts that are purely evil. Reason can be misused, misapplied, and misguided. In matters of life and death, one's reliance upon reason alone is a dicey choice. In some matters, one's intuitive faculties, one's sense of the situation may tell us more about the truth of the matter than all the logical arguments posted by both sides. At times, answers to some of life's most difficult questions come in the dead of night, in a

dream, a thought or inspiration that wakes us from our sleep, the voice of an angel, a nagging question, a hunch. Most definitely, important decisions should not rest upon whim, fancy, or speculation. The horses of passion require the reins of reason. Still, one must ask if reason alone is adequate enough to solve the perplexity of inconsistent testimony, conflicting evidence, and shifting precedent.

Though reason and deduction are extraordinarily valuable tools, what happens when reason alone is relied upon to render a sentence of death? Is reason without the authority of religion, psychology, philosophy, ethics, and wisdom of the soul adequate to address the question of whether a life should be taken in the name of the law?

The law's reliance on reason was born in the Enlightenment. On November 10, 1793, Notre-Dame Cathedral in Paris became a Temple of Reason where a ritual was conducted called the "Feast of Reason." In the Nave, the cathedral was transformed from a holy Christian sacred site into a temple dedicated to the worship of philosophy and reason. Before the altar of reason burned the torch of truth. An actress dressed in red, white, and blue personified the concept of liberty. From this exaltation of reason, the constitution and laws of our country were formulated. Without doubt, this was a great gift and a welcomed departure from the rule of kings and despots as well as the excesses of the clergy. [6]

To advance the notion that the goddess of reason is able to answer to the darkest questions of the human heart is a conceit and fantasy civilization would do well to avoid. Any astute historian will tell you that "reason," as the handmaiden of truth and morality,

[6] Kennedy, Emmet, A Cultural History of the French Revolution, Yale University Press, (1989) ISBN 0-300-04426-7, p. 343; Palmer, R.R., Twleve Who Rules, Princeton University Press (1969) ISBN 0691051194, p. 119; Carlyle, Thomas, The French Revolution: A History, Little & Brown, OCLC 559080788, p. 379.

was ground into the mud of the trenches at the Somme and Verdun in World War I. Too often in history, "reason" has been utilized to rationalize the most hateful and vile of human actions. Reason and logic, without wisdom, have advanced and served the darkest lies and outrages of the twentieth century. Reason, in and of itself, is a tool that may be used and may also be misused in the name of the law.

Beyond the tool of reason, the law offers little in the way of moral and spiritual guidance to its practitioners. Though some may argue that our laws are the embodiment of natural law reflecting the norms and expectations of the Creator, few if any lawyers post that argument to judges or jurors. Most judges do not appeal to natural law in making their "wise" choices. Lawyers do not make natural law arguments to the jury. Arguing, for example, that God is on one's side in a courtroom would likely result in a very long recess, a very long lecture from the bench, and possibly even a mistrial if stated in front of the jury. Most judges, in fact, would conclude that praying to God and asking God's assistance and guidance in making a decision is inappropriate. Most judges, in fact, leave out the "so help you God" part of the oath when a witness is sworn. I often tell litigants that they should not view a courtroom as the temple of God. I tell them it is Caesar's temple where the powers and principalities of this world are in charge. God stays clear of courtrooms, and thus, "we render unto Caesar that which is Caesar's." When I am asked to weigh a man's life in the balance, what does Caesar offer?

Faced with my first death-penalty trial, my first reaction was to operate at a certain level of denial. Though I thought about the fact that I would be asked to order a man's execution, I buried myself in the quotidian details of pretrial motions, hearings, and legal research, thereby avoiding any morally significant moment when I would

ponder the significance of such an event in my life. Avoidance and delay were useful in keeping the truth at bay. Frankly, as long as the man was not yet convicted, I justified my lack of emotional investment on the basis that he was still an "innocent" man until proven guilty. In essence, I put the death penalty out of my mind and focused instead on the issues of guilt or innocence and the hundred-plus motions I would be handling to get the case in shape for trial.

I found solace in the law's complexity and difficulty. I escaped the truth of my situation and the defendant's situation by burying myself in procedural questions, juror issues, lawyer timing issues, and hundreds of other details that accompany a first-degree murder death-penalty case. When a death penalty case hits your docket, it is like you have been hit with a landslide. The ground becomes covered with muddy urgency. Everyday matters are pushed to the side to make way for countless meetings and hearings that are required to supervise discovery matters and determine questions of constitutional import. The case virtually overwhelms the court, and everything else becomes of secondary importance. Twelve and fourteen hour days become the norm. Even the smallest detail, such as how to fit three-judges on a bench intended for one judge, can be accomplished. I ended up using television trays from home to supplement the minimal desk space available to the other judges on the three-judge panel. Those same TV trays were ultimately used in about three different death penalty cases. The names of the accused are now printed on the bottoms of those television trays.

In short, hundreds if not thousands of decisions have to be made to get the so-called show on the road. Of course, the presumption of most people is, "You are the judge. You should know what to do and how to do it." The public presupposes that

being a judge in and of itself provides one with the ability to understand and apply complex laws and capably interpret those laws in light of the facts, to do so in a matter of seconds when ruling from the bench while maintaining a heightened level of concern about when and how the jurors will get lunch, whether the defendant has been provided a different coat and tie for each day of trial, whether the coffee-maker in the jury room is working, simultaneously remembering to pick up a gallon of milk on the way home, resolve the question of which court reporter is available to take testimony after 5 o'clock at night because the division court reporter has a dental appointment, review the presentence reports on a dozen prisoners who require sentencing before I begin the trial again in the morning, and sooner or later, get around to deciding whether I should order the execution of a man who wants to know whether I think he should agree to allowing his mother leave the courtroom for fifteen minutes. In the cacophony and tumble of events in the courtroom, a moral gap grows, a gap between the reality of time, space and the limits of human reason and deep, reflective wisdom. Where in the insane busyness of the law does one find time for moral imagination, for deep reflection, or for appeals to powers beyond the highest courts of the state or the land? Where does one turn when reason alone offers no answer or comfort?

Violence is at the heart of the American system of jurisprudence. The metaphor trumping all other metaphors in our system of justice is the adversarial system. Viewing the other side as the adversary or the opponent suggests that so-called truth is best elicited in the crucible of conflict where each side vies to destroy the opponent and win a verdict. Cases are prepared in "war rooms" in law offices. Witnesses are "drilled" on the stand. Experts "skewer" the opposition, or are in turn "killed" on cross-examination. Closing

arguments are deemed "devastating." Evidence is "marshaled" like material in preparation of an invasion. People "get their butts kicked" in court or they have "bomb-proof" cases. Witnesses are demeaned and humiliated, sent crawling out of the courtroom. Defendants are demonized, paraded as threats to the community. Prosecutors are ruthless and arrogant.

The name-calling, hyperbole, and descriptive adjectives and nouns utilized to describe the trial process bears more relation to a military operation than a dignified process of decision-making reflecting restraint and calm deliberation. "The adversarial model invites the language of war and violence into the courtroom. Humiliation, embarrassment, and disgrace are frequently advanced as laudable goals in trial."[7] Edmund Burke, commenting on the revolution in France that resulted in the enthronement of reason commented:

> All the decent drapery of life is to be rudely torn off. All the superadded ideas, furnished from the wardrobe of a moral imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked shivering nature, and to raise it to dignity in our own estimation, are to be exploded as a ridiculous, absurd, and antiquated fashion.
>
> On this scheme of things, a king is but a man; a queen is but a woman; a woman is but an animal; and an animal not of the highest order. All homage paid to the sex in general as such, and without distinct views, is to be regarded as romance and folly. All the superadded ideas, furnished from the wardrobe of a moral imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked shivering nature, and to raise it to dignity in our own estimation, are to be exploded as a ridiculous, absurd, and antiquated fashion.
>
> On the scheme of this barbarous philosophy, which is the offspring of cold hearts and muddy understandings, and which is as void of solid wisdom, as it is destitute of all taste and elegance, laws are to be supported only by their own terrors, and by the concern, which each individual may find in

[7] L.P. Anderson, *A 'More Excellent Way,' Moral Imagination & the Art of Judging*, 22 NOTRE DAME L.J. ETHICS & PUB. POL'Y, 399 (2012).

> them, from his own private speculations, or can spare to them from his own private interests. In the groves of *their* academy, at the end of every vista, you see nothing but the gallows.[8]

Edmund Burke's comments on the French Revolution are applicable to our American system of justice. In the interest of the adversarial model of dispute resolution and as a result of the war-model of trial rhetoric, the "decent draperies of life" have been "rudely torn off." Are our courts now devoid of "moral imagination?" Do we slog forward with our reason-based laws only to find ourselves floundering in with "cold hearts and muddy understandings"? Are our modern courtrooms with their clusters of computers, voice-to-text recognition devices, microphones, cameras and listening devices "void of solid wisdom?" At the end of each day, do some see "nothing but the gallows?"

Hippocrates, the father of modern medicine, taught, "*Primum non nocere*" or "*First, do no harm*." Physicians and medical students universally accept this precept as the first and foremost ethical requirement in the practice of medicine. Doing no harm or "Non-maleficence" suggests that it is better to do nothing than to do something that might cause harm. Lawyers and Judges abide by canons of ethics as well. We are not, however, bound by the Hippocratic oath. We are not prohibited, ethically or otherwise, from doing harm.

Almost every decision judges make cause some kind of harm. The harm may be economic – one side benefits at the expense of another. It may be social – we can isolate people from society, their loved ones, and friends through imprisonment or restraining orders. It may be physical – we can force people to be chained or to be involuntarily committed to psychiatric facilities. And sometimes our orders may be fatal – we can,

[8] Edmund Burke, *Reflections on the Revolution in France*, 239040 (J.C.D. Clark ed., Stanford Univ. Press 2001) (1790).

under the power and authority of law, extinguish human life. We inflict a variety of harms in the name and interest of justice.

We are called upon to "do justice," to insure a just result. Normally, what most people consider justice is some kind of harm being inflicted on another human being. Justice and harm are synonymous terms in the eyes of many. Whether the harm is taking away money, freedom, or life, it is still deemed justice in today's society. Requiring someone to change their lives, to participate in a program or project for the betterment of the community, to seek some kind of economic or spiritual transformation so as to be freed of the fetters of poverty, ignorance and prejudice is not deemed justice. Justice has to do with limiting, restricting, taking away, reducing, debasing, humiliating, lessening, hurting, and ultimately, killing.

Interestingly, few of us in the law have been trained philosophically, spiritually, or theologically to understand the meaning of justice. Is justice only about accountability? Is justice ever about transformation, redemption, compassion, or forgiveness?

One might presume that justice has something to do with truth, but what kind of truth emerges in a discussion where intuition, inspiration, vision, prayer, wisdom, spirituality and ethical instruction are not allowed or invited into the conversation? If justice has anything to do with honesty, righteousness, humility, mercy, restoration, or redemption, law schools rarely if ever offer a curriculum requiring law students to be instructed in such topics. Law schools have no required courses in wisdom literature. They have no required courses in the meaning of "justice." They have no required courses in "human rights." At most, law schools may require a course or two in what is

called "legal ethics," the primary thrust of which is to explain to law students that attorneys are not supposed to steal from their clients. As to other aspects of personal or corporate morality, those are apparently conversations lawyers may have with St. Peter, but not within a law school. A law student may complete an entire legal education and not once consider or discuss moral imagination in the law.

Within this cultural and ethical context, the Colorado legislature concluded that judges, those professionally trained servants of the law along with their "muddy understandings" of human behavior, would be most likely to inflict lethal harm on other citizens in the name of justice. And so it was that the Colorado legislature, weary of relying on the populace to decide whether murderers should be murdered, decided to take the decision out of the hands of the jury and place it in the hands of the judges. Thus, the three-judge sentencing panel was born in death penalty cases.[9]

The hope and desire behind the three-judge panel was that judges would more likely have the "guts" to kill, particularly knowing that they would be up for retention elections following these "shared" decisions. The logic of the legislation was that people would now have to stand for office based upon their record in death-penalty cases. Did this Judge pull the trigger? Did he have what it took to take someone out of the gene pool? In this way, the legislature sought to make the death penalty a political issue and each case a potential political hurdle if the sentencing judges wished to remain in office. The reality of this effort was magnified in the recent 2014 Colorado Gubernatorial election. Governor Hickenlooper's decision to indefinitely stay the execution of Nathan Dunlap became a centerpiece issue in the campaign. Supporters of his opponent in the

9 See *People v. Dunlap*, 975 P.2d 723, 765 (Colo. 1999); People v. Harlan, 8 P.3d 448, 483 (Colo. 2000); *See* Ch. 244, sec. 1 § 16-11-103, 1985 Colo. Sess. Laws 1290-93.

election argued Governor Hickenlooper did not have the "guts" to be a good Governor, and that Colorado was a less safe place to live because of Hickenlooper's unwillingness to sign a death warrant. When a particular inmate's execution becomes the cause célèbre of a political campaign, notions of justice become nothing more than vigilantism disguised as noble campaign promises. This marked a new low in Colorado politics, Colorado's version of a Willie Horton campaign.

The decision has now been placed back in the hands of jurors and the political whim of the particular governor in charge at any given moment. Now, once again, jurors are facing the momentous and staggering responsibility of placing another human being's life in the balance. In the end, I was spared the ultimate reality of sentencing a man to death.[10] I was not, however, spared the experience of being a "decider" or one who was forced to vote for or against life or death. That responsibility now goes back to Colorado's ordinary citizens, people from a myriad of walks of life, some of whom believe in God, some of whom do not, others of whom decry religion, some of whom give to charity, others who contribute only to their retirement accounts.

In order to qualify for service, jurors must at some level agree to apply the law, including the death penalty. That necessarily excludes all the wisdom, thoughtfulness, ethical insights, vision and beliefs of the many who oppose the death penalty. We are instead left, at best with jurors who don't have a clue what "justice" really means and at worst believe "justice" implies retribution and harm. Regardless of that fact, nothing in their lives will quite prepare them for this decision, unless they, like me, discover and apply certain defense mechanisms to hold at bay as long as possible the reality of what

they are being asked to do – all asked to be done in the name of reason.

Jurors on death penalty cases sit confined in a small space for hours and even weeks at a time. They sit in public circumstances where every sigh, breath, and gesture is scrutinized by lawyers, investigators, jury consultants, the public, and the press. This is an emotionally depleting and extraordinary experience. They are being asked to hold in abeyance all presuppositions, prejudices, and presumptions and endure endless hours of detailed and difficult testimony. None of the testimony will be made available for them for review if they have some question about whether a particular witness said this or that once they begin their deliberations. They will not be given transcripts of testimony to review and quibble over the meaning of a witness' particular words. They will be forced to rely solely on their memories and the collective memory of the other jurors. Some of that will inevitably be in error. Ordinary people are not accustom to making important decisions of such a magnitude in this manner, without privacy, with the fear of judgment by others, and with their every gesture and tear being reported in the news.

As a judge, I felt the same pressures. I felt the sense of being watched, scrutinized, and studied. Divorcing one's self from the efforts of others to influence, persuade, and manipulate is difficult to do, even for a seasoned judge. What happens to the decision maker in such circumstances? What I experienced in the Danny Martinez trial was a retreat from emotion and sympathy. I discovered I was capable of disregarding feelings of compassion, sympathy, anger, and repulsiveness, feelings that would normally be attendant to a murder as repugnant as Brandy DuVall's. I discovered that I could simply retreat to logic and the law. I drowned myself in artful and

[10] The participant judges in both penalty panels I sat on were in disagreement as to the appropriateness of the death penalty foreclosing the possibility of execution.

intellectual questions about the law. Specifically I focused on whether the death penalty could be appropriately applied when the person on trial was not the person who performed the actual killing but was the primary instigator and leader of those who did the actual act. Retreating to the palace of reason, I found myself going to a cold place, a place constructed by severe and unbending logic, unadorned by the draperies of normal life and civilization. I was in a place devoid of moral imagination, slouching toward Bethlehem on a trail of muddy understandings.

In the end I voted in favor of Danny Martinez' death. Had you told me in college that one day I would have a role in voting whether another human being would be executed, I would have looked at you in astonishment and horror. Finding myself in the position on the bench, I would have supposed that the inner moral core defining who I had been all my life would revolt at the prospect. Shockingly, my training and experience in thinking like a lawyer had numbed me to the point that I felt virtually nothing. I felt neither fear nor anxiety, remorse nor regret, anger nor righteousness, courage nor sadness. I felt almost nothing. That feeling was perhaps the most disturbing result of having served on the Martinez case.

I had come to a place in my career where I was all but dissociated from feelings, convictions, and moral imperatives. I was focused almost exclusively on the rationalization of premeditated death in the eyes of the law. You see, if the law says it is just, and the law says it is an appropriate consequence, one can easily rationalize a departure from one's own sympathetic ethical instincts and justify one's actions on the basis that this decision is for the benefit of the public at large and comes with the blessing of the law. I did not suffer loss of sleep, nightmares, deep ruminations, restlessness, or

significant changes in mood. I had become morally disengaged from my core self and focused exclusively on whether a rational argument could be posited beyond a reasonable doubt that justified the imposition of the death penalty. I found I was capable of putting together that rational argument without reference to any spiritual wisdom, authority, or guidance. I did not need such authority. The law provided all the justification I needed.

My defense mechanism was cold logic, unburdened by spiritual or philosophical wisdom or understanding. In my mind, reason trumped all other considerations. Absorbed in the logic of the law, I attempted to expand the law of capital punishment in Colorado, advancing the notion that a person could be legally executed even though that person had not personally wielded the instrument of death. In other words, I was willing to extend the death penalty to a complicitor, albeit one who had ordered others to perform the killing. Thus, behind the barricade of reason, I rationalized a broadening of the scope of the death penalty beyond anything previously recognized in Colorado.

In the process of the adjudicating the Martinez case, a terrible irony arose, one I hardly recognized at the time. Like Danny Martinez, I would not be the one who would actually commit the execution. Others would handle that part of the business. The fact that others shared the burden of the killing made it far easier to do the touching and hands-on work to actually accomplish the act. Nevertheless, both Danny Martinez and I have this in common: each of us were in the position of ordering the execution of another person. Danny ordered the execution of Brandaline Duvall. I in turn am asked to order the execution of Danny Martinez himself. Both of us would be spared the detail of doing the actual hands-on killing ourselves.. Nevertheless, I would become a killer of a human being as much as Danny Martinez was a killer of a human being. The thought

never entered my mind. In retrospect, however, I believe whatever instinct or rationalization caused Martinez to disengage from his moral core and order the execution of Brandy DuVall was the same mechanism that allowed me, through denial, rationalization, dissociation, or whatever else may have been at play in my psyche, to sign off on an opinion that Danny Martinez should die by lethal injection at the hands of persons working in the prison system in the State of Colorado. Somewhere, I believe I lost my spiritual moorings in signing off on that opinion.

My background was conservative, evangelical, non-political, Pietist Christianity. We did not discuss politics, retribution, justice, warfare or killing in the house where I was raised. My father was not a hunter. Above all, he loved giving gifts to others. Christmas was his favorite time of year. My mother was hard working and utterly loyal to my father. She was raised as a farm-kid. She never raised her fist in anger to anyone, and spent most of her life helping and serving other people. Neither of my parents was political. Neither one was invested in the big moral questions of the day. Morality in their minds consisted mostly of hard work and not drinking, gambling, or dancing. That was my life growing up. I was raised to turn the other cheek, to regularly forgive, to commit acts of mercy, to believe all persons deserved the mercy of God, and to pray for redemption of anyone who had sinned against God.

How did I come from that place to a place where, without sympathy or sadness, I could write a lengthy intellectual opinion and coldly justify the execution of another person? Is this only because I was taught to "think like a lawyer?" Was it merely my experience slicing and dicing arguments and counter-arguments that I learned to adopt the soul and logic of an amoral rationalist? A moral gap grew between what I could

justify on intellectual and rational grounds and what I believed at my core moral center, if indeed I still had one.

Social cognitive theory pioneer Albert Bandura published a 2005 study in *Law and Human Behavior* entitled "The Role of Moral Disengagement in the Execution Process."[11] In this study, he sought to understand the strategies used by prison wardens and officers to cope with the repeated duty to perform executions and with feelings surrounding the execution. What he discovered was that individuals were required to "morally disengage" in order to act in a manner that was contrary to their individual values and personal moral standards. Bandura's collaborator was a Stanford psychology student named Michael Osofsky. He found that, "Capital punishment is a real-world example of this type of moral dilemma where everyday people are forced to perform a legal and state-sanctioned action of ending the life of another human being, which poses an inherent moral conflict to human values."[12]

Osofsky discovered eight behaviors, or coping mechanisms, utilized to cope with extreme experiences like executing persons who pose no imminent threat of harm to the executioner. These defenses included "moral justification, the use of euphemistic language, advantageous comparison (for example, 'the execution prevented him from killing many more people'), displacement of responsibility, diffusion of responsibility, distortion of consequences (i.e. minimizing the execution process: 'lethal injection is humane as the inmate has no pain'), attribution of blame, and dehumanization of the

[11] Law and Human Behavior, Vol. 29, No. 4, August 2005; 31 Journal of Moral Education (2002)
[12] Tolly Moseley, *The Enforcers of the Death Penalty, How does capital punishment affect the prison guards and wardens tasked with carrying it out?,* THE ATLANTIC, Oct. 1, 2014. *See also*, Bandura, *Selective Moral Disengagement in the Exercise of Moral Agency*, 31 Journal of Moral Education (2002).

prisoner."[13]

Interestingly, the corrections officers did not experience out of the ordinary trauma or depression arising from their duties. Through these psychological ruses, they were able to carry out their duties without suffering undue personal and psychological harm. [14]

Did I utilize the same subterfuges to disengage my psyche from my moral core? As I think back on the trial process, I believe some or all of those techniques may have played a role, smaller or greater, in protecting my psyche from the onslaught of questions that would normally flow from my moral core. I took comfort in the fact that if I made a mistake, appellate courts could correct it. I took comfort in the fact that two other judges had to make the decision with me. Thus, the responsibility was spread. I took comfort in the fact that the murder was truly ghastly and that the defendant's actions were sub-human in carrying out such an atrocity. I took comfort in the fact the gang would be disbanded and their leader obliterated. I took comfort in the fact someone else would do the actual killing, that I would not be the one to place a needle in Danny Martinez' arm.

We may ask ourselves whether it is moral to make other human beings die for their actions.[15] "But should we also be asking how moral it is to appoint other human beings to be their killers?"[16] But that is exactly what we ask jurors to do. We ask jurors to decide upon the killing. Now the judge is even further dissociated emotionally from the killing process because the judge can rest upon the jury's decision, thereby side-

[13] *Id., Selective Moral Disengagement.*

[14] Tolly Moseley, at FN 11.

[15] As noted in the Atlantic article, see Tolly Mosely, supra at FN 12.

[16] *Id.*

stepping personal moral concerns the judge may have about the death penalty. Of course the judge must ultimately sign the actual sentencing order, but that is more or less an administrative detail requiring no searching review of the record or the judge's conscience. Judges will engage in the the same rationalizations that I did – all I did was sign my name to a piece of paper. This level of detachment becomes necessary when the law burdens citizens with the task of executing fellow human beings.

I carried the burden of the execution decision twice in my life. By the time the second trial rolled around, I had acquired more insight into the process of judicial executions, and by then I reconnected at some level with my moral core. I was able to view the prosecutors with more knowledgeable eyes. I could see what they were doing more clearly, but I could also see what they were not doing. The same was true of the defense. What I saw was an alliance between the prosecutor and the victim's family. The prosecutor encouraged the victim's family, directly or indirectly, to believe that the only "just" solution, to close the case on their daughter's murder, was the execution of another human being. I was saddened to perceive that any other solution was deemed unjust, unfair, and inadequate. In their mind, the word "justice" was associated with ultimate harm and nothing less. Few holds were barred in the prosecution's attempt to elicit sympathy from the sentencing judges – including allowing the victim's mother to bring a bouquet of flowers and an assemblage of framed photographs of her daughter to the witness stand. The effort to influence the judges' decision through pity and sympathy was patently clear to me. In this instance, I believed these appeals, however well placed, were questionably effective.

By now I was accustomed to seeing the family and friends of murder victims

appear in court with placards, cards, t-shirts, and flowers symbolizing the life and loss of the victim. Is the only answer to such an outpouring of grief the sacrifice of another human life?

Learning from the Martinez trial, I resisted the impulse to review the evidence in a purely cold, rational, and mechanical fashion. I refused to allow my emotions and spirit to become detached from my judgment. I fought against any inclination to dissociate from my feelings or my moral core. I refused to surrender my own humanity. Instead, I voted in favor of justice through restoration and redemption. In reaching this decision, I did not conclude that the death penalty was immoral or should be outlawed. That decision would take years of further reflection and conversation with my spouse and closest friends. Nevertheless, I felt more fully engaged as a whole human being, exercising both the left and right side of my brain in addressing the crux decision in the Page trial. Were I to be called again to serve on a death penalty case, I would refuse from the beginning. I no longer support the death penalty. As a result, I am automatically disqualified from serving on a death penalty case. The wisdom, the knowledge, and the insight I have gained through the process of twice deciding whether another person should be executed is probably of little note or concern to those actively engaged in the prosecution of death penalty cases. They are likely too consumed by details of the processes and procedures of death in the courtroom to stop and ask themselves why they are doing what they are doing or to second-guess the impact of their activities on their own humanity.

So what has changed? Reflection, meditation and prayer have done much to crystallize my thinking about the death penalty. What I have finally concluded is that I

cannot stand by while the "decent draperies of life" continue to be rudely torn by those whose understanding of justice and truth is at best muddy. What I have discovered is the most sacred promise in life is the promise of redemption, the promise not simply that a soul may be redeemed, but that people are indeed capable of transformation, of deep change, of renewal. People's lives, however sordid up to that point in time, should begin to stand for something, to signify more than empty sound and fury. I now find myself praying that the condemned may yet have the opportunity to become a more goodly and caring person, that they may some day experience and believe in the power of love and forgiveness rather than hatred and retribution.

My thoughts and conclusions are ultimately tied to my own life, to my own spirituality. My thoughts have evolved over time. The death penalty represents and symbolizes an anti-life force in society. If there is such a thing as ontological evil, I am persuaded that it is at the deepest level an anti-life force, a force that wants all life dead. The law at its best should serve to protect citizens from evil, from those who commit acts of reprehensible brutality and evil. The law, however, seeks to contain and control the "enemy at the gates" by utilizing the same tactics as the enemy. In other words, in its effort to contain, control, and subdue violent acts of the citizenry, the law chooses to perpetuate violence itself. In the name of justice, it commits an ultimately violent act to stop violence. In applying the death penalty, the law itself becomes an instrument of the anti-life force in the universe, participating in the same evil that it seeks to eradicate. Thus, we become like our enemies.

Justice is defined in terms of retribution and vengeance rather than redemption, transformation, and restoration. Our current notions of justice, argued throughout the

courts of this land, doom this country to repeated cycles of violence. In capital murder cases, instead of serving as an instrument of life, hope, transformation, and redemption, the law resorts to the anti-life solution. Those participating in this final solution ultimately become victims themselves. They process their anger through a mechanical crucible of despair. They naively delude themselves by asserting that their actions will bring the victims of such crimes closure, but closure never comes.

I am reminded of Victor Hugo's marvelous story, *Les Miserables*. The story pits the law against the soul's struggle for redemption. All it took for Jean Valjean to become a more loving and honorable (honest) person was the gift of two silver candlesticks. Having been caught by a priest stealing two silver candlesticks, Valjean believes he will be severely and unmercifully punished. Instead, the priest turns the candlesticks into gifts, forgiving Valjean and blessing him with an act of unselfish mercy. Javert, on the other hand, symbolizes the law in its most retributive form. He is the human embodiment of the law at its worst, relentless, spiteful, intemperate and unforgiving. Javert stands for the notion that righteousness means keeping your nose clean, adhering to the letter of the law, and exchanging an eye for an eye and a tooth for a tooth. Javert is fear-based and seeks to overcome his own fears of life by erecting rigid structures of protection and defensiveness, reserving special punishment those who do not conform or follow the absolute letter of the law. Fixated on the scofflaws and filth of society, Javert was unable to see beyond his compulsive mission to stamp out non-conformism. Jean Valjean, on the other hand, discovers that forgiveness and grace are the greater and more powerful instruments of change, redemption and salvation.

In the end, Javert realizes that his slavish obedience to black-and-white rules and

eye-for-eye consequences damns him and his hard-rule standards. He discovers that his retributive standards of justice cost him not only his life but also his soul. Even though Jean Valjean spares Javert's life, Javert understands that without his soul, his life is meaningless. Jean Valjean teaches us that true justice is more than vindictiveness, greater than retribution, broader than revenge. Should justice be defined in absence of intuition, inspiration, vision, prayer, wisdom, spirituality, and moral imagination? Or should justice encompass mindfulness, humility, mercy, restoration, and redemption? The purest form of justice is love and the capacity of love to transcend, restore, and heal human pain and suffering. I pray on a daily basis that I may be able to give two silver candlesticks to someone I meet, but this is not always easy, not at all.

My voice is admittedly obscure, old, and tired. My crusading days are at an end. I am, however, willing to stand peacefully and quietly beside those who advocate an end to the death penalty. I do so with trepidation because of my admittedly ambiguous personal journey and the concern I have that injecting my own thoughts and beliefs into this very difficult question may only serve to confuse rather than clarify the issues. Nevertheless, I wish to amend the record of my moral choices and add my name to those who seek abolition of the death penalty. I applaud the efforts of so many who have gone before me: clerics and priests, social scientists and psychologists, philosophers and journalists, all of those whose thoughtful words and studies have advanced notions of forgiveness, transformation, and redemption through the law. If the endless cycle of retribution and violence is to be stopped in our society, it should begin with the law itself.

Martin Luther King, Jr. once said, "Hate begets hate; violence begets violence; toughness begets a greater toughness. We must meet the forces of hate with the power of

love … [o]ur aim must never be to defeat or humiliate the white man, but to win his friendship and understanding."17 Elaborating on this theme, Dr. King said:

> The ultimate weakness of violence is that it is a descending spiral begetting the very thing it seeks to destroy, instead of diminishing evil, it multiplies it. Through violence you may murder the liar, but you cannot murder the lie, nor establish the truth. Through violence you may murder the hater, but you do not murder hate. In fact, violence merely increases hate. Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars. Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that.[18]

The best I have to offer in place of the terrible violence we witness on the street, in theatres, in schools, and homes are two silver candlesticks. One burns in favor of forgiveness. The other burns in favor of transformation and hope. With these two candlesticks, I return thanks to the public who gave me the wonderful opportunity to explore the meaning of justice in my career as a judge, however disturbing and unsettling that journey may have been.

In writing these words I am following my own path of wisdom. I now clearly understand the wisdom of Edmund Burke who said, "All that is necessary for the triumph of evil is that good men do nothing"[19] I would add the words of Dietrich Bonhoeffer who said, ""Silence in the face of evil is itself evil: God will not hold us guiltless. Not to speak is to speak. Not to act is to act."[20] Thus, I am speaking. I am acting.

---

[17] "Struggle for Equality: Quotes From Martin Luther King, Jr.," Scholastic Inc., January 2011.

[18] Dr. Martin Luther King Jr., *Where Do We Go From Here? Chaos or Community*. 62 (Beacon Press 1967).

[19] This quotation largely attributed to Edmund Burke is one of the most quoted political maxims on the internet. Much confusion surrounds the origination and actual words used by Burke. For an intriguing analysis of this statement, see Marin Porter's discussion of the quote at http://tartarus.org/~martin/essays/burkequote.html

[20] http://www.qotd.org/search/single.html?qid=27940

(from THINKING LIKE A LAWYER). The argument of this remark as in fact being favorable to lawyers is a marvel of sophistry, twisting of the meaning of words in unfamiliar source, disregard of the evident intent of the original author and ad hominem attack. Whoever first came up with this interpretation surely must have been a lawyer. The line is actually uttered by a character "Dick The Butcher".Â It makes as much sense to conclude that since the "kill the lawyers" joke is expressed by villains, who later commit murderous deeds "there shall be no money; all shall eat and drink on my score" is an approval of Libertarian thought, and a warning about Communists. Now, just after this exchange, the scene changes tone. examine and judge a legal case, or someone who is thought to be guilty of a crime in a court. court. the place where a trial is held, or the people there, especially the judge and the jury who examine the evidence and decide whether someone is guilty or not guilty. to sentence someone TO something. if a judge sentences someone who is guilty of a crime, they give them a punishment. to charge someone WITH something. to state officially that someone may be guilty of a crime.Â a lawyer in Britain who can represent people in courts. sue. to make a legal claim against someone, especially for money, because they have harmed you in some way. solicitor.Â You might also like 6. Education, Study, and Jobs English Vocabulary Listâ€¦ Judges are like the conductor and the lawyer is like the musician, sort of. You hire the lawyer to represent you and talk to the judge and other lawyers for you. You can hire a judge but that is more difficult and illegal. The judge wears a robe and sits at the head of the room behind a giant desk called "The Bench". The lawyer wears a suit and sits next to you at your little table. Judges are pretty much "The Boss".Â Judges have far more legal power than lawyers do- they can issue subpoenas, direct courtroom proceedings, decide civil cases, and issue sentences in a criminal case (so long as the jury finds the defendant guilty). Lawyers can do none of these things. Lawyers will argue a case in court before a judge. Their job is to try and win the case. The Judge's job is to direct the proceedings.