1978

The Death Penalty and the Insanity Defense

Hans Zeisel

OCCASIONAL PAPERS

FROM THE LAW SCHOOL

THE UNIVERSITY OF CHICAGO

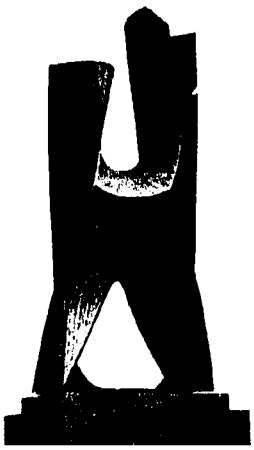
NO. 14

1978

Occasional Papers
from
THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

THE DEATH PENALTY AND THE INSANITY DEFENSE

Hans Zeisel

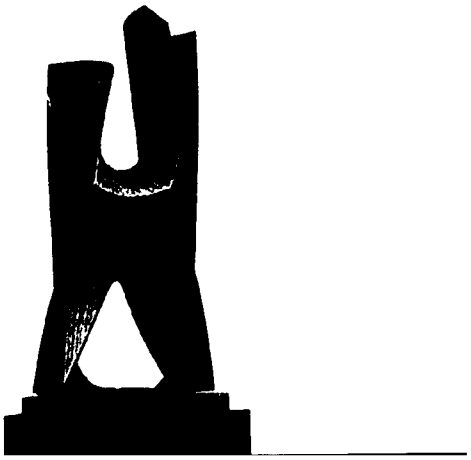


Copies of *The Law School Record, The Law Alumni Journal,* and *Occasional Papers* from the Law School are available from William S. Hein & Company, Inc., 1285 Main Street, Buffalo, New York 14209, to whom inquiries should be addressed. Current numbers are also available on subscription from William S. Hein & Company, Inc.

Occasional Papers
from
THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

THE DEATH PENALTY AND THE INSANITY DEFENSE

Hans Zeisel



The Death Penalty and the Insanity Defense

Hans Zeisel*

Thomas Whisenhant, a white man in his thirties, married and the father of two small children, had committed four unconnected murders:

On November 21, 1975, he walked into a convenience store in a Mobile, Alabama, suburb and shot a 27 year-old woman in the head with a pistol. The woman fell dead behind the counter. He possibly beat or kicked her in the groin after the shooting. He left the cash drawer untouched.

On April 19, 1976, he accosted a 44 year-old woman with the same pistol at a similar convenience store in the same Mobile suburb. He forced her to leave the store with him in his pick-up truck and took her to a remote farmhouse where he made her undress. He shot her in the head. No rape, sexual molestation, or robbery occurred. The next day he returned and mutilated the body with a knife by cutting off her breast and slitting open her abdomen. He returned later for more mutilation, but the corpse had been found by the police.

On October 8, 1976, he abducted another woman, 24, from a similar convenience store in the same Mobile suburb. He took her to an isolated field near his home, forced her to undress and raped her. He then shot her in the head and returned the next day and similarly mutilated her body. He was seen near the body by a local farmer and apprehended by the police shortly thereafter. Upon capture, he thanked the officers for catching him and made a full confession. Probing his background revealed that he shot and killed an elderly woman when he was fourteen, but was not convicted because of in-

*Professor Emeritus of Law and Sociology, University of Chicago.

sufficient evidence. He subsequently admitted this fourth murder.

At the time of the most recent murders, the defendant was on parole after having served seven years of a twenty-year federal sentence for assault with intent to kill a female civilian employee on an Air Force base while in the military.

Whisenhant had not known any of the five women he assaulted.

The state of Alabama indicted him for capital murder for the last killing because it involved the statutory aggravating factor of rape. A distinguished private psychiatrist employed by the State Mental Hospital to head a lunacy commission testified that the defendant was legally insane; his testimony was rebutted by a state employed psychologist who testified that the defendant was sane.

Under Alabama law, the jury, if it found the defendant committed the crime, had only two alternatives: to find the defendant guilty and impose the death penalty, or to acquit him for reason of insanity; the jury could not convict him of a lesser included offense and could not impose a different sentence.

The jury convicted. After such a conviction Alabama law provides for a hearing before the trial judge after which he must decide whether to impose the death penalty or sentence the defendant to non-parolable prison for life.

In the sentence hearing in the Jefferson Circuit Court of Alabama, the prosecution called three witnesses: the police chief, a psychiatrist, and a psychologist. Counsel for the defendant, Morris Dees, the director of the Southern Poverty Law Center, had asked me to testify at the hearing. I was qualified primarily as co-author of *The American Jury*, and as author of "The Deterrent Effect of the Death Penalty."[1] The court was informed that I had read the essential parts

[1]H. Kalven, Jr. and H. Zeisel, *The American Jury*, Little Brown & Co., 1966; University of Chicago Press, 1971. H. Zeisel, *The Deterrent Effect of the Death Penalty: Facts vs. Faith*, 1976 Supreme Court Review 317.

of the trial record. What follows is my testimony as dictated after the hearing from my notes.

"Your Honor,

The crime for which this defendant was convicted was a horrible one, and the defendant is clearly a very dangerous person. Moreover, whatever the jury judged him legally to be, he was obviously a sick person, or at least a person with sick inclinations.

The defense in the case was insanity and the jury responded in a predictable and, I might add, sensible manner. Given the choice between finding this defendant not guilty by reason of insanity and finding him guilty, the jury had no doubt. Knowing that what it wanted to achieve was the permanent removal of this defendant from society, it considered the guilty verdict the safer way of achieving this end.

I do not know what the jurors in this case thought the consequences of an acquittal by reason of insanity would be. Normally, if the jurors ask the judge about these consequences, he instructs them that this is none of their business. At times it is even suggested to the jury that there is no way of telling how soon a defendant acquitted by reason of insanity might be released. The jury in such cases makes it its business to remove the defendant permanently by finding him guilty.

The jury's common sense requires disregard of the various Latin and Greek names psychiatrists use, and of the nice distinctions they and the law make between mental disease and personality disorder. In short, the jury in such a case finds little merit in the insanity defense; if permanent removal is the issue, conviction of such a defendant appears as the only rational solution.

I might add that in our comprehensive study of the jury in criminal cases, Harry Kalven and I found precisely this reaction.[2] In a case involving a similarly terrible crime, the jury brushed the insanity defense aside and convicted the de-

[2]*The American Jury*, p. 403.

fendant. In that case, the trial judge informed us that, if there had been a bench trial, he would have had to find the defendant insane. Significantly, he refrained from setting the jury's verdict aside, thereby expressing agreement with the jury's common sense.

It would be a mistake, therefore, to conclude from the verdict of the jurors in this case that they consider the defendant to be sane; in a case such as this the jurors will find the defendant guilty even if they or the psychiatrists consider him insane.

The truth perhaps is that a case like this, which defies human understanding, also defies psychiatric knowledge such as there is. One can but marvel at how psychiatrists can say with certainty, as they did today in this case, that the "irresistible impulse" was operative only at the time the defendant dismembered the dead body of the victim, but not at the time he killed. In any event, the question of insanity is dwarfed by the patent dangerousness of this offender and the overpowering, agreed upon need for his permanent removal.

The question of insanity, however, is not dwarfed by, but is central to, the decision this court must now make as to which form the removal of this defendant should take; whether he is to be removed by execution or by the nonparolable prison sentence for life which Alabama law provides.

Alabama law, as I read it, lists the mitigating and aggravating circumstances this court may consider and weigh, but the law does not say how this weighing should be done. It does not say, for instance, that the court must count the mitigating and aggravating circumstances and then, if there is a majority of aggravating circumstances, impose the death sentence. The law leaves the decision to the discretion of the court.

At this point it becomes important to consider the presumed function of the death penalty. If its function is retribution, the court could simply say that this crime ranks among the most inhuman and senseless murders ever committed;

hence if there be a case which under the law deserves the death penalty, this surely is the one. But retribution alone, according to the law of the land and according to our morals, is not any longer a sufficient ground for the death penalty. In *Gregg,* the United States Supreme Court discusses two functions of the death penalty: its deterrent effect and its retributive function, the latter reflecting the community's outrage over the committed crime. The Court leaves no doubt as to which of the two functions it considers the more important. And, I believe, if the Justices were not convinced that the death penalty had a deterrent effect, it is doubtful that they would have sustained its constitutionality. Indeed, it is the belief of those who advocate and defend the death penalty that its primary purpose is to save lives by deterring would-be murderers. A person or, for that matter, a court, convinced that the death penalty is not a deterrent, could not well defend it. The important question, therefore, is whether in a case like this the death penalty is an effective deterrent.

Here first is the summary of careful scrutiny of the many available studies of the problem: If there is an overall deterrent effect of the death penalty, it can only be minute, since not one of the many research approaches—from the simplest to the most sophisticated—was able to find it.

The U.S. Supreme Court in *Gregg* nevertheless believed that in certain situations the death penalty may be an effective deterrent. The Court cited three examples: the hired killer, the murder for gain, and the so-called "free-murder," the one committed by a defendant serving a life sentence in a jurisdiction that does not have the death penalty. There is no need here to discuss these examples. For our purpose here it will suffice to see what all three examples have in common: they are highly rational murders, murders in which the consequences of the deed are coldly calculated.

From these examples of the type of murder in which the death penalty might conceivably de-

ter, it is impossible to envision how the execution of this defendant could have a deterrent effect. His crimes were surely not of the calculated sort. Even if these crimes were, as the psychiatrists today have asserted, on the sane side of the borderline that divides insanity from sanity, they are certainly close to that line—sick crimes of a sick person; this is how they seem to us laymen—jurors, judges, professors. Even the psychiatrists might agree that the closer a crime is to the pathological borderline, the less likely it is deterrable.

There is even important evidence to the effect that for such crimes and such a criminal the death penalty might be a negative deterrent, i.e., an invitation to commit murder as a means of committing suicide with the help of the law. There is both statistical evidence and substantial evidence from psychiatric case studies of the existence of such a negative deterrent effect.[3] We all remember Mr. Gilmore in Utah who committed an absolutely senseless crime under circumstances that made his capture certain, and eventually left no doubt that what he wanted was to die.

The improbability that crimes such as this defendant's can be deterred is reflected in the attitude of the common law which reduces the degree of responsibility for crimes that are close to the pathological borderline. While such closeness might not remove the defendant's responsibility under the law, it often reduces that responsibility, thereby reflecting the sound view that criminal responsibility is not necessarily a dichotomous yes/no decision but a question of degree.

The closeness to the pathological borderline raises still another issue. Being one inch on one side or the other may not only be the difference between death and life, but the difference between death and not being tried at all. Sometimes the psychiatrists have different opinions, which only emphasize the slimness of the mar-

[3]*The Deterrent Effect of the Death Penalty*, p. 342.

gin by which a case may be removed from the borderline.

One cannot help seeing the parallel between this present case and the by now famous New York case of the Son of Sam. There the first two court appointed psychiatrists found the defendant incompetent to stand trial.

This court might consider the question whether such an enormous difference as that between life and death should be allowed to hinge on such a small deviation to one or the other side of the pathological dividing line.

Altogether it would seem that the court in making its decision might care to be guided by the precept of the law about which jurors are instructed when they are about to decide on the defendant's guilt. They are told they must find a defendant guilty only when they find him so beyond any reasonable doubt. Likewise the death penalty should be imposed only if, beyond any reasonable doubt, it will be a deterrent and have the effect of saving other lives. The doubt in this case is grave.

If your Honor should decide in favor of a non-parolable life sentence, it is quite possible that some people who only know of the gory details of this case from the media will not easily understand your decision, and your opinion would have to enlighten them. I think, however, the jurors in this case, who have seen the whole picture, would understand and approve the decision.[4] If your Honor should decide for the non-parolable life sentence, the decision of the court and the intention of the jury in this case, I believe, would be in agreement, and substantive justice would be done."[5]

[4]After the verdict, the defense had contacted the jurors and asked them: "If the law had given you a choice—which it didn't—of giving this defendant, after you found him guilty, the non-parolable life sentence or the death sentence, for which would you have decided?" Seven of the jurors responded that they would have given the life sentence. The defense had subpoenaed these jurors and asked the judge to hear them. The judge refused.

[5]A comprehensive analysis by J. S. Liebman and M. J. Shepard of the problems posed by mental disorder to the

P.S. The judge imposed the death sentence and the case of *Alabama v. Th. Whisenhant* is now on appeal.

In an earlier death case, handled by the Southern Poverty Law Center, *Alabama v. John Jacobs,* the defense challenged the constitutionality of the Alabama death penalty statute. The Alabama Supreme Court heard arguments on January 27, 1978. If the court sustains the challenge, the death sentence of Whisenhant would be commuted to nonparolable life.

---

administration of the death penalty is about to appear in the *George Washington Law Review.*