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Listening to the Best Counsel

Litigating in the Shadow of Death: Defense Attorneys in Capital Cases by Welsh S. White

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Welsh White's new book, *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases*, makes a unique and profoundly important contribution to the literature on the death penalty. He interviewed most of the leading capital defense lawyers to study what tactics they used at capital trials, particularly at the penalty phase, and when they did so most effectively. His conclusions are relevant both to the constitutionality of the death penalty and to capital counsel seeking a guide to outstanding representation of death row clients.

Overview

White's study has immediate practical significance. He explores the tactics of capital counsel at each stage of the criminal process—from plea bargaining, to the guilt phase (the trial), to the penalty phase (sentencing), to postconviction relief. He ends up providing what is in effect a detailed training manual for how capital litigators can do their job right. Perhaps even more importantly, White explains what are the correct choices and how they can be made despite defense counsel's living in a world in which their resources are often unduly limited.

By articulating a set of tactics that any capital lawyer acting within the "range of reasonableness" can be expected to pursue, White simultaneously offers courts clear guidelines for evaluating ineffective assistance of counsel claims. Furthermore, White's analysis sharply reinforces the wisdom of the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*—portraying the ABA guidelines not as aspirational standards for ideal performance, but as nesessary safeguards for ensuring minimally effective assistance of counsel within the meaning of the Constitution's Sixth Amendment guarantee.

The United States Supreme Court's standard for the ineffective assistance of counsel, articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and its progeny, has often been challenged as setting an unduly low bar for lawyer performance, especially in capital cases. White convincingly argues, however, that the findings in his book fit within the logic of *Strickland*'s test and thus give the test some oomph—some real, concrete meaning that was always implicit in the test but that White now makes explicit, thus offering a more serious assurance of genuinely effective assistance of counsel to capital defendants.

White reaches another conclusion, as well, that provides a new argument against the constitutionality of the death penalty itself, at least as it is currently implemented. The U.S. Supreme Court has interpreted the Constitution as prohibiting the *arbitrary* imposition of the death penalty. A death sentence is certainly arbitrary if factors irrelevant to the severity of the crime, the future dangerousness of the offender, or the offender's evil character explain who lives and who dies. But White discovers in his sample that "capital defendants who have the best lawyers are unlikely to get the death penalty regardless of their crimes or the Government's aggravating circumstances." (WHITE, at p. 2, ch. 8.) The best lawyers are able to negotiate pleas for a penalty other than death in the "great majority of capital cases, including those in which defendants committed atrocious crimes involving multiple victims." (*Id.*) Moreover, for those cases that do go to trial, the best lawyers convince juries not to impose death, "even in the most aggravated cases." (*Id.*) If the accident of who your lawyer is rather than what you have done or who you are explains who enters the gas chamber, the capital sentencing system cannot be said to be rational. That leaves only two options: end death sentences or take costly and significant steps to ensure consistently high quality legal representation for all capital defendants. Although White's study alone arguably might not prod courts or legislatures to make this choice (though it should!), White's work at a minimum

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points to the need for further research in a similar vein. If other studies confirm White's findings, it will be increasingly difficult for decision makers to avoid the implications of White's data.

The innocence movement link

White's effort also sheds new light on the "innocence movement." DNA testing and other efforts have recently exonerated a significant number of innocent defendants, most of whom were on death row. Research into the causes of those mistakes revealed them to be systemic ones—ones not limited to capital cases. Even the most well-meaning police and prosecutors doing competent work were convicting the innocent from ignorance—a lack of awareness of the forces that contribute to false confessions, suggestive eyewitness identifications, tunnel-visioned investigations, lying or mistaken informants, and flawed laboratory forensics.

But there is no need to proceed in ignorance any longer. An enormous volume of both social science and law review literature now documents the causes of error and the necessary solutions. Many police and prosecutors have indeed begun to implement improvements on their own. The ABA has itself recently articulated innocence policies, as has the Constitution Project's Death Penalty Initiative. All this information is readily available online in easily accessible forms and is being taught in continuing legal education courses and discussed in professional magazines aimed at practicing lawyers. White's examination of the sources of wrongful convictions in capital cases demonstrates that there is no longer any excuse for defense counsel in such cases to be unaware of the innocence literature or to fail to challenge flawed evidence of all kinds—from lineups, to confessions, to lab results—based on the insights in that literature.

Crafting a narrative of life

Some of the most interesting parts of White's book stress the importance of counsel preparing early on for the penalty phase—the hearing on whether a defendant lives or dies—rather than focusing solely on the guilt phase. Extensive investigation into the defendant's upbringing, schooling, work history, friendships, family life, medical history, indeed into every aspect of a defendant's life, is required. Making a strong case for life over death early on puts defense counsel in a strong position to negotiate a plea bargain in which the risk of a capital sentence is taken off the table. Should a plea not come about but a conviction follows, thoughtful early preparation for the penalty phase can enable defense counsel to offer a persuasive case against the jury's imposing death. Such a case must not only offer strong reasons for the jury to choose life, but must be based on evidence presented in a memorable and emotionally powerful fashion. Defense counsel's goal is to make a space for jurors to feel some measure of empathy for the defendant and to see some value for others in the defendant's continuing to live. Achieving that goal requires crafting a powerful narrative of the defendant's life.

That narrative cannot begin, however, as White demonstrates, at the penalty phase. The seeds for the developing life story must be planted far earlier. Talented capital counsel hint at life themes in the voir dire questions that they use during jury selection, seeking to select jurors likely to be most receptive to the particular life tale to be told. Likewise, defense counsel offers some evidence at the guilt phase that will not hurt the case for acquittal (if there is one), but hints at the themes to be sounded should the penalty phase be reached. By the time defense counsel starts to tell the client's story at sentencing, the jury has already been primed for the telling. Preparation for sentencing thus affects strategy throughout the process, from pretrial proceedings, to trial, to the penalty phase.

White also explores the microtools used by defense lawyers to bring their clients' tales to life. The lawyer's use of metaphor, analogy, popular and high culture, pace, volume, and visual aids are examined by White in detail. This is vivid, gripping stuff. Although the importance of narrative to law, especially at trials and in capital cases, has been explored before—the most thorough work in this area being done by social scientists—no one has explored in such detail the precise techniques used by capital lawyers to make the tales told successful ones. Nor has anyone written about the lawyer's role in crafting effective trial narratives in a way that is accessible and persuasive to a wide audience that has not been specially trained in the dry, technical language of much social science. Furthermore, in other chapters, White demonstrates how lawyers use these same narrative skills to negotiate pleas and craft successful appeals for postconviction relief, two stages of the justice system process where the role of talented storytelling is rarely examined. White's contribution to understanding the micropoetics by which trial lawyers express narrative themes is alone a tour de force.

White's book is also an important illustration of how the law in practice, rather than as it is stated on the books, is a process rather than a thing. The process of law involves a complex interaction among political forces, social biases, choice of decision maker, and

negotiating skills. Whatever the law books say, the real law—the law as it affects people's everyday lives—is constructed in the give-and-take among justice system participants, a give-and-take in which the rules of law are but the starting point for an evolving and never-ending conversation. This conversation is less one about legal technicalities than about the meaning of justice and the worth of a human life. This conversation is one in which the heart and not only the mind is actively and properly engaged.

Seen from this perspective, White's book can also be understood as a plea for lawyers to develop high emotional intelligence. The "A" trial techniques student who appeals to prosecutors, judges, and juries' brains but not their souls may be the real cause of executions.

Conclusion

It is rare that any book can combine practical wisdom with theoretical insight, but White manages to do so extraordinarily well. His clear, concise, vivid prose, combined with his willingness where appropriate to fade into the background and let others speak in their own way, also makes this book a quick, easy, powerful read, sometimes feeling more like a novel in which you want to know what comes next than like the serious scholarly work that it is. Not to read this book would itself be a crime.