

At death's door

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Richard Bourke's mission is to defend death-row inmates in America and pursue justice in a system corrupted by ambition and racial bias. Selma Milovanovic reports.

HIS name was Michael Wayne Richard. His crimes, the rape and shooting murder of a Texan mother of two during a burglary at her home, were brutal and deserving of a harsh sentence.

But Richard's fate, death by lethal injection in Texas in September 2007, is at the centre of debate about the sustainability of the death penalty in a country that has executed 1160 prisoners since capital punishment was reintroduced in 1976.

Richard was executed on the day the US Supreme Court announced a review of lethal injections to decide whether they were a form of cruel and unusual punishment as prohibited by the country's constitution. All planned executions were put on hold, but a Texan judge refused a request by Richard's lawyers — who had been experiencing computer glitches — to allow them to apply a few minutes after 5pm for a stay of execution.

The judge, Sharon Keller, chief of the Texas Court of Criminal Appeals, was charged with misconduct three months ago. A state politician is pushing for her impeachment.

"Killer Keller", as she was dubbed by US media, had gone home early to let a tradesman in. When the court's general counsel called, she refused a late filing for Richard. She also allegedly omitted to call the judge overseeing Richard's execution, who was at court after hours.

"I couldn't make up any of this stuff," says Richard Bourke, a Melbourne barrister defending death-row inmates in the southern states.

"That's the amazing thing about America. No one would believe you in a million years."

Bourke is the director of the Louisiana Capital Assistance Centre, a non-profit law office in New Orleans defending poor prisoners on death row. After returning to Melbourne from an internship at the centre in 1998, Bourke set up Reprieve Australia, an organisation that sends volunteers to help with death-penalty cases. Many have returned several times to 10 legal offices in America's south, while others have secured jobs there. Bourke points out that it is not important to be a lawyer to volunteer. "The primary requirements are commitment, humility and energy," he says.

He moved to Louisiana permanently in 2002. "After 1998, I always had an inkling to go back, just seeing how bad things were. How corrupt, how racist, how poor the quality of legal representation was for a lot of these guys galled me as a criminal lawyer," he says.

"And I think it's wrong to kill people, particularly using the law as an excuse to do it."

Despite its absurdity, Richard's execution is seemingly just one of many huge cracks in a fractured legal system that has already killed 23 prisoners this year, more than 80 per cent of them black men in the south.

Consider Texan death-row inmate Andre Thomas. His crimes were even more brutal than Richard's, but he was also delusional and mentally retarded. Thomas fatally stabbed his estranged wife, son and stepdaughter and cut out their hearts to "remove demons" — because "God told him" to. Later, in prison, after reading the



Richard Bourke is a Melbourne lawyer who defends inmates on death row in Louisiana. Photo: *Rebecca Hallas*

Bible, he plucked out his right eye.

Despite this, he was ruled fit to stand trial. Then, last December, the prisoner plucked out his remaining eye and ate it. He was finally sent to a prison psychiatric unit — named the Jester Unit.

Incredibly, when the Court of Criminal Appeals unanimously rejected his appeal against the death sentence two months ago, Judge Cathy Cochran wrote that "(Thomas) is clearly 'crazy' but is also 'sane' under Texas law". Like many judges in many US states, Cochran, a white Republican, was elected by voters. Unlike most of her colleagues, however, she is against the idea of electing judges. The state's Chief Justice, Wallace Jefferson, a black Republican, says the system is politicised, irrational and should end.

Judicial elections continue to shock Bourke, especially in Louisiana, where every judge from the local courts upwards is voted in. At a recent public lecture at Melbourne University Law School, there were horrified gasps from the audience when he recounted seeing an invitation for his colleague to a judge's election fund-raiser sitting on the office fax machine. At the time, the colleague was defending a man before the judge in a death-penalty case. The colleague, an old-time Louisiana lawyer, told Bourke the invitation was not accidental.

"The sorts of characteristics you want for a good judge are very different to the sorts of characteristics you find in people who run for elected office," Bourke says. "Politicians are being elected judges instead of the best lawyers and the best jurists."

So what led Bourke to leave the Victorian bar to ply his trade in a foreign criminal justice system that he says infuriates him for its inhumanity?

"I'm a criminal lawyer and the most direct expression of that is doing defence work in death-penalty cases," he says.

The 39-year-old had, until he went to Louisiana, experienced a fairly standard start in the law. A degree from Melbourne University followed a private school education, but Bourke says he studied law, to some extent, by accident.

"I was 18 when I went to law school. I could tell you what else I had on my mind but you wouldn't be able to print it," he laughs.

If he hadn't met Melbourne barrister Peter Morrissey when he graduated, Bourke might never have practised law. While studying, he worked with homeless and abused children at the Department of Human Services and planned to continue doing so. Morrissey, who has defended some of Victoria's nastiest criminals, as well as a Bosnian general who was acquitted of war crimes at The Hague, talked him into being a lawyer "over 23 beers or so" in Acland Street 16 years ago.

Bourke did his articles at law firm Clarebrough Pica and worked on Children's Court matters before covering a variety of criminal cases when he was admitted to the bar. Eventually, he became restless.

"I was having a great time but I had a sense I was going to be sitting in chambers ... looking over a brief and I hadn't done anything else."

His first encounter with men on death row came during a prison visit on his volunteer stint in Louisiana in 1998.

"I was enormously impressed with their dignity and their humanity, notwithstanding the conditions in which they were kept and the situation in which they found themselves."

Dignity and humanity may well be the last words people, especially Americans in the south, would associate with murderers. Yet a growing movement of victims' families has gone beyond simply accepting that these words might apply to those who have slain their loved ones. They have campaigned against the death penalty in and out of the courtroom.

Bourke cites victims' families as some of his heroes, along with Morrissey and former barrister and now County Court judge Duncan Allen.

He remembers how the centre in Louisiana set up a private meeting between a woman and Bourke's client — her daughter's killer. He will never forget how the woman argued before the judge that the man should not be executed or even imprisoned for life without parole.

"She had simply got past the hate caused by the death of her daughter and ... allowed herself to meet him and learn more about who he really was and see his humanity ... He was no longer this one-dimensional caricature who could ... embody all the hate and anger and depression she had at her daughter's death."

Bourke says many victims' families who have taken this step have spoken of feeling as if they were participating in a system over which they previously had no control.

These developments, unthinkable a couple of decades ago, are indicative of what Bourke says is a growing movement against the death penalty.

Huge problems with the lethal injection, failures of DNA testing and lessening racism feature in recent polls as reasons behind the changed attitudes.

In May 2006, the Gallup Poll found that 65 per cent of Americans supported the death penalty — a 15 per cent drop in 12 years. A survey in 1996 found that 84 per cent of American criminologists rejected the idea that capital punishment was a deterrent to murder.

WHILE the death penalty exists in 35 states, exonerations can and do happen. But the freeing of death-row inmate Roy Criner, an innocent man who served 10 years in a Texan jail, is, according to Bourke, an example of everything that is wrong with the US justice system, despite the favourable outcome. Criner, a white intellectually disabled man, was jailed for the rape and murder of a woman after crucial forensic evidence was withheld by police and prosecutors. At appeal, Judge Sharon Keller rejected a new trial after post-conviction DNA showed Criner had not raped the woman.

"We can't give new trials to everyone who establishes, after conviction, that they might be innocent," she said. "We would have no finality ... and finality is important."

Criner was eventually pardoned by George W. Bush, then the Texas governor.

A problem with reining in judges like Keller, Bourke says, is that since 1996, federal courts can no longer overturn the death penalty. He says the arrival of Barack Obama will change little, although he is heartened by the President's vow to increase the accuracy of forensic testing and freedom of information.

Another growing issue is the effectiveness of lethal injections, made up of three drugs that the American Veterinary Medical Association has banned for euthanasing dogs. The drugs are sometimes dosed and administered incorrectly by poorly trained medical technicians, leading to condemned inmates being left awake and paralysed while the final drug slowly kills them. Qualified medical staff refuse to take part as their professional duty lies in preserving life.

Bourke admits obstacles such as these are huge and he says there is still much work to be done. His immediate future lies in New Orleans, where he and his American wife, Christine Lehmann — also a lawyer at the centre — are raising daughters Stella, three, and Greta, one.

Despite working in a legal system that often baffles and enrages him, Bourke finds solace in small victories.

"One of the things this work teaches you — in both cruel and kind ways — is humility," he says. "Even just to be the lawyer who ... helps (the prisoner's) family visit them ... something which is able to engender a little bit of humanity into a system bereft of it. When you are able to achieve even small victories like that, that keeps you going. And when you are able to achieve even bigger victories in a system that is deliberately set up to rip off your clients and get them killed, that's even better."

Selma Milovanovic is legal affairs reporter.