

AGAINST THE AMERICAN SYSTEM OF CAPITAL PUNISHMENT

By Jack Greenberg

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Over and over, proponents of the death penalty insist that it is right and useful. In reply, abolitionists argue that it is morally flawed and cite studies to demonstrate its failure to deter. Were the subject not so grim and compelling, the exchanges would, by now, be tiresome.

Yet all too frequently, the debate has been off the mark. Death penalty proponents have assumed a system of capital punishment that simply does not exist: a system in which the penalty is inflicted on the most reprehensible criminals and meted out frequently enough both to deter and to perform the moral and utilitarian function ascribed to retribution. Explicitly or implicitly, they assume a system in which certainly the worst criminals, Charles Manson or a putative killer of one's parent or child, for example, are executed in an even-handed manner. But this idealized system is *not* the American system of capital punishment. Because of the goals that our criminal justice system must satisfy - deterring crime, punishing the guilty, acquitting the innocent, avoiding needless cruelty, treating citizens equally, and prohibiting oppression by the state - America simply does not have the kind of capital punishment system contemplated by death penalty partisans.

Indeed, the reality of American capital punishment is quite to the contrary. Since at least 1967, the death penalty has been inflicted only rarely, erratically, and often upon the least odious killers, while many of the most heinous criminals have escaped execution. Moreover, it has been employed almost exclusively in a few formerly slave-holding states, and there it has been used almost exclusively against killers of whites, not blacks, and never against white killers of blacks.

Here is how America's system of capital punishment really works today. Since 1967, the year in which the courts first began to grapple in earnest with death penalty issues, the death penalty has been frequently imposed but rarely enforced. Between 1967 and 1980, death sentences or convictions were reversed for 1899 of the 2402 people on death row, a reversal rate of nearly eighty percent. (1) These reversals reflected, among other factors, a 1968 Supreme Court decision dealing with how juries should be chosen in capital cases, (2) a cause they were imposed arbitrary and "freakishly," (3) and a 1976 decision holding mandatory death sentences unconstitutional. (4) Many death sentences were also invalidated on a wide variety of common-place state-law grounds, such as hearsay rule violations or improper prosecutorial argument.

Today, the death row population has grown to more than 1600 convicts. About 300 prisoners per year join this group, while about 100 per year leave death row, mainly by reason of judicial invalidations but also by execution and by death from other causes. (10) Following Spenklink's execution, some states began to put some of these convicted murderers to death. Five persons were executed involuntarily in 1983, twenty-one in 1984, and fourteen in 1985. (11) Nevertheless, the number of actual executions seems to have reached a plateau. The average number of executions in the United States hovers at about twenty per year; as of March 1, only one person has been executed in 1986. (12) Yet even if this number doubled, or increased fivefold, executions would not be numerous either in proportion to the nation's homicides (approximately 19,000 per year) (13) or to its death row population (over 1600). (14)

States not only execute convicted killers rarely, but they do so erratically. Spenklink's execution, the nation's first involuntary execution since 1967, did not argue

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well for new systems of guided discretion designed to produce evenhanded capital justice in which only the worst murderers would be executed. Spenklink was a drifter who killed a traveling companion who had sexually abused him. The Assistant Attorney General of Florida in charge of capital cases described him as "probably the least obnoxious individual on death row in terms of the crime he committed." (17)

It is troubling as well that the current level of executions has been attained only by using expedited procedures that undermine confidence in the fairness of the death penalty process. Recent executions have occurred during a period in which some federal judges, frustrated with the slow pace of capital justice, have taken extraordinary measures to expedite capital cases in federal courts. For example, the Fifth Circuit has quickened habeas corpus appeals in capital cases by accelerating the dates of arguments and greatly compressing the time for briefing cases. (21) Increasingly, the Supreme Court has encourage this hurry-up justice. The Court has not only denied stay applications, (22) but it has also vacated stays entered by lower courts (23) in cases in which stays would have been routine in earlier times. (24) In sum, the recent invalidation rate seems unlikely to change significantly, thereby perpetuating the current system of erratic and haphazard executions.

Of course, one major difference exists between the period 1982 to 1985 and earlier years: increasingly, the death penalty has been concentrated geographically, not applied evenly across the United States. In the most recent period, there were forty-three involuntary executions. Quite strikingly, all occurred in the states of the Old Confederacy. Thirty-four of the forty-three states, and more that a quarter were in a single state, Florida, with thirteen. (26) In all but four cases, the defendants killed white persons. (27) In no case was a white executed for killing a black person. (28)

The limited number of actual executions seems to me to reflect the very deep ambivalence that Americans feel about capital punishment. We are the only nation of the Western democratic world that has not abolished capital punishment. (32) By contrast, countries with whose dominant value systems were ordinarily disagree, like the Soviet Union, China, Iran, and South Africa, execute prisoners in great numbers. (33)

We have a system of capital punishment that results in infrequent, random, and erratic executions, one that is structured to inflict death neither on those who have committed the worst offenses nor on defendants of the worst character. This is the "system" - if that is the right descriptive term - of capital punishment that must be defended by death penalty proponents. *This* system may not be justified by positing a particularly gregarious killer like Charles Manson. Or commitment to the rule of law means that we need an acceptable *general* system of capital justice if we are to have one at all. However, the real American system of capital punishment clearly fails when measured against the most common justifications for the infliction of punishment, deterrence, and retribution.

If capital punishment can be a deterrent greater than life imprisonment at all, the American system is at best a feeble one. Studies by Thorsten Sellin (34) showed no demonstrable deterrent effect of capital punishment even during its heyday. Today's death penalty, which is far less frequently used, geographically localized, and biased

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according to the race of the victim, cannot possibly upset that conclusion. The forty-three persons who were involuntarily executed from 1982 to 1985 were among a death row population of more than 1600 condemned to execution out of about 20,000 who committed non-negligent homicides per year. While forty-three percent of the victims were black, (35) the death penalty is so administered that it overwhelmingly condemns and executes those who have killed whites.

Very little reason exists to believe that the present capital punishment system deters the conduct of others any more effectively than life imprisonment. (36) Potential killers who rationally weight the odds of being killed themselves must conclude that the danger is nonexistent in most parts of the country and that in the South the danger is slight, particularly if the proposed victim is black. Moreover, the paradigm of this kind of murderer, the contract killer, is almost by definition a person who take his chances like the soldier of fortune he is. (37)

But most killers do not engage in anything like a cost-benefit analysis. They are impulsive, and they kill impulsively. If capital punishment is to deter them, it can do so only indirectly: by impression on potential killers a standard of right and wrong, a moral authority, and influence on their superegos that, notwithstanding mental disorder, would inhibit homicide. This conception of general deterrence seems deeply flawed because it rests upon a quite implausible conception of how this killer population internalizes social norms. Although no mentally disturbed enough to sustain insanity as a defense, they are often highly disturbed, of low intelligence, and addicted to drugs or alcohol. In any event, the message, if any, that the real American system of capital punishment sends to the psyches of would-be-killers is quite limited: you may in a rare case be executed if you murder in the deepest South and kill a white person. (38)

The consequences of the real American system of capital justice are no more favorable as far as retribution is concerned. Retributive theories of criminal punishment draw support from several different moral theories that cannot be adequately elaborated here. While some of the grounds of retribution argument resemble the conscience-building argument underlying general deterrence theory, (39) all retribution theories insist that seeking retribution constitutes a morally permissible use of governmental power. To retribution theorists, the death penalty makes a moral point: it holds up as an example worthy of the most severe condemnation one who has committed the most opprobrious crime.

As with many controversies over moral issues, these purely moral arguments may appear to end any real possibility for further discussion. For those who believe in them, they persuade, just as the moral counter-arguments persuade abolitionists. But discussion should not end at this point. Those who claim a moral justification for capital punishment must reconcile that belief with other moral considerations. To my mind, the moral force of any retribution argument is racially undercut by the hard facts of the actual American system of capital punishment. This system violates fundamental norms because it is haphazard, and because it is regionally and racially biased. To these moral flaws, I would add another: the minuscule number of executions nowadays cannot achieve the grand moral aims that are presupposed by a serious societal commitment to retribution.

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Some retribution proponents argue that is the pronouncement of several hundred death sentences followed by lengthy life imprisonment, not the actual imposition of a few executions, that satisfies, the public's demand for retribution. Of course, the public has not said that it wants the death penalty as it exists - widely applicable but not infrequently used. Nor, to the best of my knowledge, is there any solid empirical basis for such a claim. I find morally objectionable a system of many pronounced death sentences but few actual executions, a system in which race and region are the only significant variable in determining who actually dies. My objection is not grounded in a theory that posits any special moral rights for the death row populations. I cannot reconcile an erratic, racially and regionally biased system of executions with my understanding of the core values of our legal order.

Death penalty proponents may respond to the argument by saying that if there is not enough capital punishment, there should be more. If only killers of whites are being executed, then killers of blacks should be killed too; and if many sentences are being reversed, standards of review should be relaxed. (41) In the meantime, they might urge, the death penalty should go on. But this argument is unavailing, because it seeks to change the terms to the debate in a fundamental way. It seeks to substitute an imaginary system for the real American system of capital punishment. If there were a different kind of system of death penalty administration in this country, or even a reasonable possibility that one might emerge, we could debate its implications. But any current debate over the death penalty cannot ignore the deep moral deficiencies of the present system. (42)

Given the situation as I have described it, and as I believe it will continue so long as we have capital punishment, one could argue that the death penalty should be declared unconstitutional in all its forms. But the Court is unlikely to take that step soon. Only ten years have passed since the type of death statute now in use was upheld, and some states have had such laws for an even shorter period. Thirty-seven states have passed laws showing they want some sort of death penalty. Public opinion polls show that most Americans want capital punishment in some form. Having only recently invalidated on application of the death penalty in *Furman v. Georgia* in 1972, the Court is unlikely soon to deal with the concept wholesale again. But, if the way capital punishment works does not change materially. I think that at some point the court will declare the overall system to be cruel and unusual. If this prediction is correct - and it is at least arguably so - an additional moral factor enters the debate. Is it right to kill death row inmates during this period of experimentation? There is, of course, an element of bootstrapping to my argument: exercising further restraint in killing death-sentenced convicts reinforces arguments of freakishness and rarity of application. But unless one can assure a full and steady stream of executions, sufficient to do the jobs the death penalty proponents claim that it can do, there is further reason to kill no one at all.

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