

Bias and Error in the Death Penalty.

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It is clear that there is much bias in the administration of the death penalty in America. Poor minorities make up a large percentage of the death penalty cases. It is rare that a rich person will be sentenced to death. Blacks are disproportionately represented on death row. This bias was demonstrated in 1965 by Donald Partington, a Virginia lawyer. He documented that between 1908 and 1963 2,798 men had been convicted for rape and attempted rape in Virginia. For attempted rape 13 were executed, for rape 41 men were executed. All those executed were black. . Gender bias is also evident. Although women commit 11.6 percent of the murders, only 1.4 percent of death row inmates are women. This may be related to the severity and circumstances of the crime. The information presented by Partington was part of the data presented to the Supreme Court which ruled in 1972 , *Furman v. Georgia*, that the death penalty was unconstitutionally applied. Executions stopped, but not for long. The states rewrote laws and in 1977 executions resumed (Henslin, 2007).

Where a person commits a murder affects their chances of being put to death. Extreme disparity is seen in examining execution data listed in Statistical Abstracts between 1977 and 2005. During this time period, 871 executions are listed as occurring in the United States. While 23 states carried out no executions, and seven states carried out no more than 1-3, six states were responsible for executing 72% of the total number. These states included Texas (313), Virginia (89), Oklahoma (69), Florida (57), Missouri (61), and Georgia (34). Southern states predominate in death penalty sentencing. Texas was responsible for 35% of these sentences (Henslin, 2007). Between 1927 and 2003, only 37 federal executions were carried out, including that of Timothy McVeigh in 2001, who had bombed a federal building in Oklahoma City killing many people. (DPIC, federal Executions, 2009).

Federal death row now includes three women. In April of 2008, Lisa Montgomery was sentenced to death for killing a mother-to-be and cutting the baby from her womb. She was arrested the next day for showing off the baby as her own. Montgomery is the third woman to be sentenced to federal death row since 1972, when a U.S. Supreme Court ruling was called for an overhaul of death penalty laws across the country. Since 1927, only two women have been executed under the federal system. In 1953, Ethel Rosenberg was executed for passing atomic secrets to the Soviet Union, and Bonnie Hardy was gassed for kidnapping and murdering a 6-year old boy. (Marshall, 2008).

Forms of capital punishment in America.

Capital punishment in America exists in a variety of forms- as a law on the books, as a sentencing practice, and as a practice of execution. States such as New Hampshire have the law on the books, but do not impose death sentences. States including New Jersey impose sentences but fail to carry out executions States such as California impose sentences but execute only a few, while states like Texas impose sentences and follow through with frequent executions. States seeking to abolish the death

penalty are concentrated in the northern part of the country, while execution states are concentrated in the south. (Garland, 2007: 441)

Procedural requirements regulate every stage of the trial from jury selection to sentence choice, post-conviction appeals and habeas corpus review. In contrast to the nineteenth century and early twentieth century when execution followed rapidly after sentencing, the modern American death penalty procedure takes an average of 12 years from sentencing to execution. Although 50 or 60 executions occur in the United States annually, 66 percent of capital sentences are reversed prior to execution. (Garland, 2007:442)

In America today the decision to impose a death sentence is not made by a judge but by a jury of lay people. Recent Supreme Court cases, including *Ring v. Arizona*, have made jury sentencing a constitutional requirement in every state. Jury sentencing is unique to death penalty decisions. It does not occur in any other area of criminal law in America, nor does it exist in other countries. (Garland, 2007:443).

Speech norms govern what can be said. In the context of the death penalty, revenge is denied as a motivation. Officials and respectable people refer to it as a 'necessary evil'. Social retribution, not revenge, is used as a euphemism to describe the process. However, the psychic, historic and cultural forces of revenge provide the energy behind the death penalty.

A report on the lynching of Henry Smith was published in the New York Times on February 2, 1893. Smith – a black man – was alleged to have sexually assaulted and murdered a four year old white girl. "HENRY SMITH DIES AT THE STAKE. DRAWN THROUGH THE STREETS ON A CAR. TORTURED FOR NEARLY AN HOUR WITH HOT IRONS... AWFUL VENGEANCE OF A PARIS (TEXAS) MOB." The mood of the city was joyful, schools were dismissed, and citizens took the law into their own hands. The public lynching of Smith was not unique. Three hundred to four hundred lynchings occurred in the South between 1890 and 1940.

Today's process of capital punishment, while performing the same social functions performed by lynching, are the inverse image of public torture and lynching. Federal courts seek to eliminate the southern practices of racial violence. Capital punishment today is an efficient, emotionless procedure. The process is heavily regulated by federal law and administered by state officials. Constitutional rights of due process are fastidiously upheld, executions take place in private at a great distance from the crime, and procedures are designed to minimize bodily injury. . "The death penalty has been cured of its more egregious defects and cruelties. It has been domesticated, bureaucratized, sanitized, and above all, legalized. And yet it has not been abolished." (Garland, 2007: 458).

Doctors as Executioners

As healers bound by the Hippocratic oath, should medical doctors be involved in administering the death penalty? Dr. Priscilla Ray, chair of the Council on Ethical and Judicial Affairs at the American Medical Association says, "The bottom line is that physicians are supposed to cure, not kill...There are a number of doctors who are personally pro-death penalty. But we simply can't be involved in carrying it out." When doctors admit to having helped in an execution, activists file ethical grievances against them. (Thornburgh, 2006)

Lethal injection is used as the method of preference in 37 of 38 states with the death penalty. Physicians have been involved in the development of execution techniques. Thirty years ago Dr. Stanley Deutsch helped to structure the lethal injection. This procedure involves a three-drug combination that is administered through an IV that is inserted into a vein, usually in the arm. Sodium thiopental brings unconsciousness, but may wear off too soon. Pancuronium bromide paralyzes the body, but could mask signs of pain. Potassium chloride stops the heart, but may cause excruciating pain. (Thornburgh,2006)

Dr. Alan Doerhoff, who calls himself the “world’s authority on lethal injection” assisted in more than 54 executions in Missouri. He also assisted in federal executions, including that of Timothy McVey at a federal prison in Indiana. Doerhoff modified the lethal injection procedure by administering the chemicals through a large-bore trauma needle and catheter threaded through a thumb size vein in the groin, neck or shoulder, and positioned near the heart. (Wittenauer, 2008; Kiefer,2008). Critics say this procedure is too complex with a high risk of error and undue suffering for the prisoner.

In 2006, Dr. Doerhoff testified in court under the pseudonym “John Doe 1” that he “improvised” the dosages of the drugs, had no set protocol and kept no records of procedures. He admitted that he was dyslexic and transposed numbers. The St. Louis Post Dispatch reported that Doerhoff had previously been sued for malpractice 20 times. The federal judge banned Doerhoff from participating in lethal injection procedures in Missouri and ruled that Missouri’s lethal procedure subjects inmates to an unnecessary risk of suffering unconstitutional pain. Dr. Doerhoff continued his practice in Arizona, however. Eleven months later, in May of 2007, Dr. Doerhoff had signed off on the execution of Robert Comer in Arizona. (Kiefer, 2008).

Although the expertise of medical doctors is needed to carry out an execution by lethal injection, it is often difficult to find doctors who are willing to participate. Doctors involved in executions conceal their identity and request payment in cash rather than checks. Some doctors rationalize their participation in the death penalty process by saying that death is imminent for the condemned prisoner and palliative care is a noble act. (Thornburgh, 2006)

Texas is responsible for over 30% of the executions in America.

Billboards leading into Huntsville, Texas boast of Ol’ Sparky, the state’s retired electric chair and invite tourists to visit the Texas Prison Museum. When Texas resumed executions in 1982, the state did away with Ol’ Sparky and introduced lethal injections. This is the method now used by all but one of the 38 states that have the death penalty.

Rev. Carroll Pickett, a Presbyterian minister, was the prison chaplain of Texas’ most notorious penitentiary in Huntsville (i.e. the Walls Unit) where the death penalty is administered. As prison chaplain, Pickett accompanied condemned men into the execution chamber and witnessed the death of 95 men. He said, “My responsibility was to prepare them to die... to seduce (the prisoner’s) emotions so he will not fight coming out of the cell, and he will not fight getting up on the gurney and being strapped down.” Pickett justified his participation saying, “I was visiting him as his last friend. I never

strapped him down. It was the law and I couldn't do anything about that. I was not part of the execution team. I was part of the ministry to the man" (Garcia, 2007).

In his book, *Within These Walls: Memoirs of a Death House Chaplain*, Carroll describes his journey from death penalty supporter to ardent opponent.

Pickett was raised in Victoria, Texas, a small town south east of San Antonio. In Texas the death penalty is part of the "culture steeped in the lore of frontier justice." Pickett said, "I was for (the death penalty) because I saw the injustice...I began to change because the system was so bad. I saw 17-year-old killers and the mentally retarded (executed)." In 2000, Pickett testified before Texas legislators as they considered a moratorium on the death penalty. He said, "All 95 met the same fate... The repentant died with the unrepentant, the mentally competent died with the mentally incompetent and the innocent died with the guilty" (Garcia, 2007).

On February 11, the San Antonio Express News reported that Texas the night before had executed its 7th inmate in 2009, the first of two to be executed that week. Dale Devon Scheanette was condemned for one rape-murder and charged with another. When asked if he had a final statement, he said, "My only statement is that no cases ever tried have been error free." (Graczyk, Feb. 11, 2009) A few weeks before, condemned prisoner Frank Moore was executed for a double killing. He repeated from the death chamber gurney his unsuccessful plea to stop the punishment, saying, "Self-defense is not capital murder." (Graczyk, Jan.22, 2009).

Sam Millsap, a former district attorney of Bexar County, Texas recognizes the fallibility of the death penalty system and says that an honest assessment of the problem is overdue. He contends, "We cannot sanction a death penalty system that gets it right most of the time."

Millsap examined Texas cases where the condemned inmate was exonerated. After spending 14 years on death row, DNA testing failed to connect Michael Blair to the rape and murder of 7-year-old Ashley Estell. The Death Penalty Information Center reported that Blair was the fourth person exonerated from death row nationally in 2008, and the 130th since 1973. In August of 2008, the Texas Forensic Science Commission investigated possible misconduct in the arson case of Cameron Todd Willingham who was executed in 2004 for setting a fire that killed his three daughters. According to the Innocence Project, experts later determined that the fire was not arson. Similar analysis in 2004 exonerated Ernest Ray Willis, who had spent 17 years on Texas' death row. Millsap concludes, "When it comes to human life, a system that gets it right most of the time should not exist at all." (Millsap, 2008).

Exonerations weaken the credibility of the death penalty

The finality of the death penalty raises concern following more than 200 exonerations based on DNA evidence, including prisoners on death row.

Jurisdictions across the country are enacting policy reforms to protect against wrongful convictions.

Inmates in all but eight states are now given access to DNA evidence that may not have been available at the time of trial. In a 2005 study, Professor Samuel R. Gross found that between 1989 to 2003, 340 prisoners, 95% convicted of murder and rape, had been exonerated. DNA evidence was used to exonerate 144 of these inmates. False witness identification was involved in half of the murder

convictions and 88% of the rape convictions. Peter J. Neufeld, a co-director of the New York City-based Innocence Project said that “The legislative reform movement as a result of these DNA exonerations is probably the single greatest criminal justice reform in the last 40 years.” (New York Times, 2007)

In February of 2009, DNA evidence allowed a Texas state district court to exonerate Tim Cole who had been sentenced to 25 years for the 1985 rape of a Texas Tech student. Even though the man who had actually committed the rape had given a jail-house confession to the crime in 1995, Cole was not released. Unfortunately the exoneration arrived too late. Cole died of an asthma-induced heart attack in 1999. (Editorial, 2009).

The case of Troy Anthony Davis has become synonymous with error in the death penalty system. Davis was sentenced to die in 1991 after being convicted of shooting and killing an off duty policeman despite complete lack of physical evidence. Since the trial seven of the nine witnesses have come forward to say that they were coerced by police into identifying Davis as the gunman. Amnesty International, death penalty abolition groups and thousands of concerned individuals, including President Jimmy Carter, Pope Benedict XVI, and Bishop Tutu, have challenged the perceived injustice. Troy Davis was granted a stay on his September 23, 2008 scheduled execution while the U.S. Supreme Court considered his petition. The court declined to hear his case. Another execution date was set that was stayed by the Eleventh Circuit Court of Appeals in Atlanta. Davis continues to wait and still faces execution. (Lajoie, 2007; AIUSA, 2008)

Lethal Objection – challenging the system.

In the first months of 2006, five inmates had their executions put on hold because of concerns about lethal injection. Since 1985, inmates in 24 cases had suffered inhumane suffering when procedures went awry. When Bennie Demps was executed in Florida in 2000, prison personnel had struggled for 33 minutes to insert the tubes into his veins. Strapped to the gurney, Demps made a last statement, “They butchered me back there... They cut me in the groin. They cut me in the leg...This is not an execution, it is murder.” In Oklahoma, Scott Dawn Carpenter had drug induced seizures on the gurney. (Thornburgh, 2006)

Opponents challenged the procedure of lethal injection, saying that inadequate doses of barbiturate may expose prisoners to pain, while the second paralyzing drug leaves them unable to cry out. This concern was confirmed in April 2005 when the British medical journal *Lancet* reported that toxicology reports from six states suggests that inmates may have still been conscience while they slowly suffocated or suffered intense pain. (Thornburgh, 2006).

The death penalty is costly.

Concerns about the death penalty go beyond moral and emotional injustices. The death penalty system is an expensive cost to the taxpayer compared to a system with life sentence without parole.

Richard C. Dieter, Executive Director of the Death Penalty Information Center, testified about the costs of the death penalty before the Colorado Senate Judiciary Committee in February of 2007. He testified that death penalty cases required everything necessary for an ordinary trial, except more so.

“* more pre-trial time is needed to prepare...

* more pre-trial motions will be filed...

* more experts will be hired.

* twice as many attorneys will be appointed for the defense...

* jurors will have to be individually quizzed on their view about the death penalty...

* two trials instead of one will be conducted: one for guilt and one for punishment.

* the trial will be longer...

* and then will come a series of appeals...” (Texas Death Penalty Education, 2009).

The Dallas Morning News, in 1992, reported that “a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years.” (Texas Death Penalty Education, 2009). Other states report similar extreme costs for the death penalty system. In 2007, California reported that it costs an additional \$90,000 a year per inmate to confine an inmate on death row as opposed to those sentenced to life without parole. With California’s death row population of 670, that cost amounted to \$63.3 million annually. (DPIC ,Costs, 2009)

In 2000, the U. S. prison population reached 2 million prisoners, up from 1 million in 1990. The U.S. Justice Department reported that 461 of every 100,000 Americans were serving a prison sentence of at least one year. C.M. “Marty” Lensing, warden at Louisiana’s Elayn Hunt Correctional Center, noted that cost effective alternatives were not sought because the incarceration business had a financial interest in perpetuating itself. He said, “We’ve used prison beds to stimulate the economy...In other words, it’s an industry.” (Katz, 2000)

Efforts to abolish the Death Penalty

Activists opposing the death penalty are engaged in efforts to abolish capital punishment . Persistent campaigns were successful in abolishing the death penalty in New Jersey in 2007. Additional pieces of legislation at both the federal and state levels are considering the possibility of reform or abolishment of the death penalty.

* In 2007, the New Mexico House and the Montana Senate voted for abolition, and both states will put the issue on the table in 2009.

* In the summer of 2008, activists packed the room with abolition supporters as The Maryland Commission on Capital Punishment held hearings to determine whether the state should retain or repeal the death penalty.

* Nebraska came close to ending executions in 2007 when an abolition bill failed by one vote. In 2008 Nebraska ruled that the electric chair is unconstitutional. The 2009 legislative session will consider adopting lethal injection. The Amnesty International chapter (AIUSA) at the University of

Nebraska-Lincoln is organizing families of murder victims who support abolition. These families have been a powerful voice in the discussion of capital punishment.

* Legislative action is also expected in New Hampshire where no executions have occurred since 1939. Public outrage in New Hampshire over the injustices of the Troy Davis case in Georgia spurred a coalition of death penalty abolitionists to call for significant reforms.

* Federal legislation includes a bill to investigate how the death penalty is applied nationwide and guaranteeing foreign nationals the right to contact their consulate.

Brian Evans of Amnesty International's Campaign to Abolish the Death Penalty says, "It looks like it (2009) will be an eventful year for death penalty debate in our nation's capitals, and AIUSA will be in the thick of it." (Amnesty International, 2008).

The death penalty is viewed by some as a deterrent to future crime, but this is not generally supported by data. Conclusions from many studies show little evidence that the death penalty deters crime. The opposite is true. States that carry out higher numbers of executions actually have higher murder rates. Supporters argue that "therapeutic vengeance" brings peace of mind and closure to victims or relatives of the crime. Others contend that laws and objectivity, not emotion, should control the process of justice. (Parrillo, 1999: Sullivan, 2000)

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