DEBATING DEATH

Critical Issues in Capital Punishment

BEAU BRESLIN AND DAVID R. KARP

Deserves death! I daresay he does. Many that live deserve death. And some die that deserve life. Can you give that to them? Then be not too eager to deal out death in the name of justice.

Gandalf (J. R. R. Tolkien, The Two Towers)

In April 1999, John Howley, a lawyer and graduate of the college where we teach, gave one of us an unexpected phone call. He was writing a clemency petition to Virginia Governor James Gilmore to spare the life of Death Row inmate Calvin Swann. Working on the case after hours and for free, he needed some help. Were there some students who could do some research for the case, he asked? Eight students volunteered and, for 10 days, worked day and night to help construct the petition before Swann’s scheduled execution on May 12, 1999. Their efforts were successful. Four hours before execution, Gilmore granted Calvin Swann clemency.

For these students, the Swann case helped illustrate many of the controversial issues in capital punishment. Swann is a poor, black man from the rural South. He is mentally ill. He had an inexperienced court-appointed lawyer defending him. In this chapter, we explore the larger issues surrounding Swann’s case, such as poverty, race, geography, and mental illness. We also examine the question of constitutionality, the effectiveness of the death penalty as a deterrent, the execution of the innocent, public opinion, and the impact of the death penalty on victims’ families. We do not pretend to cover these issues exhaustively; instead, we try to introduce you to the major topics in the current debate about the death penalty.

IS CAPITAL PUNISHMENT CONSTITUTIONAL? THE LANDMARK CASES OF FURMAN AND GREGG

In the post–World War II era, many Western nations abolished capital punishment. West Germany banned it in 1949, the United Kingdom in 1973, Canada in 1976, France in
1981, and Italy in 1994 (Bedau, 1997). Many people believed that the United States would follow the path that has now been taken by all other Western nations. Although the United States has made use of capital punishment since the nation’s founding, by 1968 executions had effectively ended (see Figure 20.1). Surprisingly, the hiatus lasted only 9 years, and executions began again with some frequency. Moreover, the number of Death Row inmates has increased dramatically to 3,593 in 2000 (see Figure 20.2). In 1972, the Supreme Court ruled capital punishment unconstitutional. Yet the landmark decision in Furman v. Georgia (1972) was reversed 4 years later in another famous Supreme Court case, Gregg v. Georgia (1976). We had the death penalty, then we didn’t, and then we had it again. Here’s what happened.

The Court’s decision in Furman v. Georgia (1972) marks not only the beginning of the modern era of capital jurisprudence but also the first (and only) time the U.S. Supreme Court has ruled that the practice offends the Constitution. In the case, a deeply divided Court opined that the application of capital punishment under a Georgia criminal statute transgressed the Eighth Amendment’s prohibition against cruel and unusual punishment. Two justices believed that the death penalty was unconstitutional—period. Nothing would change their views on the matter. Another two justices thought the death penalty in the way it was currently administered was unconstitutional. But they held open the possibility that practices could be changed to make it constitutional. A fifth justice, though uncertain whether capital punishment was always or just currently unconstitutional, joined the four to make the majority opinion the law of the land. Capital punishment in America was officially over.

Two justices—William Brennan and Thurgood Marshall—argued that capital punishment violated the Constitution in all circumstances. Their position centered on a shared belief that capital punishment was degrading to human dignity, that it was imposed arbitrarily, that its popularity was waning, and that it was no more effective in preventing crime than less severe punishments. Justice Brennan wrote that “in comparison to other punishments today, the deliberate extinguishment of human life by the state is uniquely degrading to human dignity” (Furman v. Georgia, 1972, p. 291). Quoting a statement by the court in an earlier opinion, he wrote in Furman that capital punishment violated the "evolving standards of decency that mark the progress of a maturing society" (Trop v. Dulles, 1958, p. 101).

The court, however, was divided. Justice Lewis Powell did not see evidence of “evolving standards of decency.” In his view, the public strongly supported capital punishment. “In a democracy, the first indicator of the public’s attitude must always be found in the legislative judgments of the people’s chosen representatives” (Furman v. Georgia, 1972, pp. 436-437). The fact that 40 states, the District of Columbia, and the federal government still permitted executions seemed to undermine any contention that the American people were repelled by the practice. The dissenting justices thought Brennan and Marshall were being disingenuous by relying on abstract notions of human dignity and standards of decency to overturn Georgia’s death penalty statute.

Indeed, public opinion about the death penalty has fluctuated and has by no means steadily declined. Figure 20.3 shows how support has generally increased in the last decades. Figure 20.4, however, shows that support varies across segments of our society. Men support it more than women, whites more than people of color, and Republicans more than Democrats or independents.

The dissenting justices in the Furman case were not just concerned about normative standards. They were also worried about judicial activism. The dissenters argued that an independent judiciary—a judiciary that is in no way accountable to the populace—should avoid grounding its decisions on the private moral convictions of individual justices. Judicial restraint, Justice Powell wrote, demands that the judiciary defer to legislative judgment in cases where the Constitution is silent. Capital punishment is not outlawed by the constitutional text, so Powell concluded that “the sweeping judicial action undertaken [by the majority] reflects a basic lack of faith and confidence in the democratic process” (Furman v. Georgia, 1972, pp. 464-465).

Yet Furman prevailed over the dissenting voices of these four jurists. The key to understanding how the Court’s interpretation of
the Eighth Amendment led to the halting of executions is to recognize that three justices—William Douglas, Potter Stewart, and Byron White—shared deep concerns about the administration of death sentences. Although they were unwilling to admit that capital punishment in all circumstances violated the Constitution, White and Stewart both agreed with Brennan that the punishment of death was unique in its finality and that it was imposed with unconstitutional randomness. Justice Stewart even equated its application with the randomness of being struck by lightning. They insisted that as long as states allowed it to be so “wantonly and freakishly imposed,” the death penalty would breach the Eighth Amendment’s protection against cruel and unusual punishment. Death was different, they concluded, and thus it should be administered with the utmost fairness and caution.

Where Stewart and White disagreed with Brennan was over the possibility that the system
could be fixed. Justices Stewart and White argued that if certain procedures were in place, capital punishment would be a constitutionally acceptable form of punishment. At a minimum, those procedures had to better protect defendants facing execution. The irrevocability of death, they said, demanded mechanisms that minimize the possibility of arbitrary death sentences. A higher degree of due process—"super" due process, as it has come to be known—was imperative when the state sought to end a life.

The result was a series of revised statutes emerging from various statehouses.\(^1\) State lawmakers began crafting new legislation that embraced a higher form of procedural protection. Laws across the country now mandated that capital trials be conducted in a bifurcated fashion, with the first phase of the two-part trial devoted solely to determining the guilt of the defendant and the second phase—the penalty phase—used to determine the appropriateness of a sentence of death. In addition, state laws further required that any capital jury weigh "aggravating circumstances" against "mitigating circumstances" when considering whether to impose death. Aggravating circumstances are those defined as contributing to the general depravity of the criminal or the crime itself, and they are typically specified by law. The aim of requiring aggravating circumstances is to
narrow the field of those eligible for death to only the most barbaric few. A first-degree murder conviction, therefore, no longer carries a possible death sentence unless the offender was, during the course of committing the murder, also engaged in another felony (burglary, rape, etc.). Similarly, a jury can now consider an offender’s prior conviction for capital crimes, or the fact that he or she murdered a police officer, as testament to the seriousness of his or her actions.

The new state laws also permitted juries to hear mitigating circumstances—circumstances that ultimately diminish the offender’s overall culpability for the capital crime. The list of mitigating circumstances most often includes personal characteristics (mental retardation, childhood abuse, etc.) that may soften or temper the jury’s inclination toward death. The point of including mitigating circumstances in the capital trial is, once again, to safeguard the defendant and give him or her every reasonable chance of avoiding execution. Finally, the new laws also stipulated that all capital convictions should be automatically reviewed by the state’s highest court.

By a 7-2 margin, with only Justices Brennan and Marshall dissenting, the Court upheld the new regulations just 4 years after Furman. The case of Gregg v. Georgia (1976) successfully tested the specifics of Georgia’s modified death penalty statute against the protective scope of the Eighth Amendment. The key players in the Furman decision—Justices Stewart and White—were now convinced that the modified law acknowledged the gravity of the death sentence. They were persuaded that Georgia’s revised statute provided for a heightened level of constitutional protection, and thus they joined the Furman dissenters (as well as John Paul Stevens, who had been appointed to the High Court a year earlier) in validating the practice of capital punishment. The country was back in the business of executing capital criminals.

SUPER DUE PROCESS:
HAS IT GUARANTEED FAIR TRIALS?

Since Gregg v. Georgia, any problems associated with the trial process should have been solved. Yet a recent study by James Liebman et al. (2000) found that plenty still remain. The researchers examined all death verdicts from 1973 to 1995, the period following Furman. They discovered that, because of prejudicial error during trial, state and federal courts eventually vacate 68% of all death sentences. “In other words, courts found serious reversible error in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during that period.” Of those, only 18% result in a second death sentence at retrial; 82% result in either a lesser sentence or an outright acquittal. Liebman et al.’s study notes that the two most common errors in death penalty cases are (a) “egregiously incompetent defense lawyers who didn’t even look for—and demonstrably missed”—important evidence that the defendant was innocent or did not deserve to die; and (b) police or prosecutors who did discover that kind of evidence but suppressed it, again keeping it from the jury” (emphasis in original).

Current Supreme Court Justices Ruth Bader Ginsburg and Sandra Day O’Connor, in separate speeches over the past few years, have highlighted constitutional concerns about adequate legal representation of capital defendants (O’Connor, 2001). “People who are well represented at trial do not get the death penalty,” notes Ginsburg. “I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial” (Ginsburg, 2001).

Further, it has become more—not less—difficult to remedy errors at trial. The Anti-Terrorism and Effective Death Penalty Act (AEDPA), a congressional statute enacted in 1996, amends the federal judicial code to establish severe limitations for habeas corpus actions by state prisoners. Habeas appeals in federal courts have been widely used to review state court death penalty decisions. Previously, Death Row inmates were permitted to raise a variety of concerns on appeal, but now the AEDPA specifies that the federal courts must approve successive appeals. The law reduces the number of capital appeals and the window of opportunity for filing them. In short, it speeds up executions by making it increasingly difficult for capital offenders to turn to the federal judiciary for relief. Now that the number and scope of potential
appeals are statutorily restricted, it is not likely that we will see much remedy for the high numbers of errors in capital trials.

EXECUTING THE INNOCENT

While campaigning for the presidency, Texas Governor George W. Bush stated that “as far as I’m concerned, there has not been one innocent person executed since I’ve been the governor” (Yang, 2000). This is a confident statement for a governor who oversaw more executions than any other governor in the nation, presiding over approximately one every 2 weeks while he was in office. Another Republican governor, George Ryan of Illinois, was less confident. In 2000, even though he was a supporter of the death penalty in principle, Ryan declared a moratorium on all Illinois executions. “I now favor a moratorium, because I have grave concerns about our state’s shameful record of convicting innocent people and putting them on death row,” Governor Ryan said. “And, I believe, many Illinois residents now feel that same deep reservation. I cannot support a system, which, in its administration, has proven to be so fraught with error and has come so close to the ultimate nightmare, the state’s taking of innocent life” (Ryan, 2000).

Defense attorney Barry Scheck and his colleagues offer a chilling account of the “ultimate nightmare” (Scheck, Neufeld, & Dwyer, 2001, pp. 273–288). For ex-marine Kirk Bloodsworth, March 22, 1985, was a tough day. That was the day he was sentenced to die. He was 24 years old. Judge J. William Hinkel had this to say: “The most terrible of all crimes, murder, rape, sodomy . . . was committed upon the most helpless of all our citizens, a trusting little girl. The torture that she endured and the horror that was visited upon her is beyond my mere words to describe or express. . . . Therefore, it is the judgment of this Court that the Defendant be committed to the Division of Correction for the purpose of carrying out the sentence of death” (p. 287). June 28, 1993, was a better day. Eight years after sentencing, now 32, Kirk was released from prison, not to heaven or hell, but back to ordinary life in the state of Maryland as a free citizen. It was not that the crime committed was any less terrible. It was just that Kirk didn’t commit it.

On a warm summer day in Baltimore, two boys were busy catching fish in a small pond. A 9-year-old girl named Dawn Hamilton came wandering by in search of her cousin Lisa. The boys hadn’t seen her. At the same time, a blond, curly-haired man with a mustache joined them. Hearing that Lisa was lost, he offered to help Dawn look for her. As they walked along a wooded path, a woman in her yard saw them and heard them calling for Lisa. Five hours later, Dawn Hamilton was found in the woods. She had been raped and murdered.

Based on descriptions given by the woman and the two boys who had seen the man with Dawn, a composite sketch was created and published in the Baltimore Evening Sun. Among the 286 tips called in to the police, one person thought Kirk Bloodsworth, a man living in Cambridge, Maryland, looked a lot like the sketch. Baltimore detectives brought him in for questioning, and Kirk had no alibi. He couldn’t remember where he had been on the day of the crime; it had been his day off. However, he did say that he hadn’t been to the suburban development where the crime occurred; he didn’t even know where it was. The detectives then showed a Polaroid picture of Kirk along with other photos in a line-up to the two boys who had been fishing. Eight-year-old Jackie didn’t think any of the photos looked like the man he had seen. Ten-year-old Chris thought Kirk did look like the man but that his hair was the wrong color; it was too red. Nevertheless, it was enough for the detectives to get an arrest warrant. The two boys and the woman in the yard watched the news that night, closely watching a handcuffed Kirk as he was escorted to jail. Later, in a police line-up all three witnesses were asked to identify the man they had seen near the pond. Although uncertain, each eventually chose Kirk. But was Kirk the man they had seen at the pond, or was his image familiar because they had seen him on TV?

It was this eyewitness testimony that convicted Kirk and got him a death sentence. But he got lucky. As part of a project at the Cardozo School of Law in New York City, defense attorneys Barry Scheck and Peter Neufeld were able to use a new DNA test on semen found on Dawn Hamilton’s underwear. The results were clear—it was not Kirk Bloodsworth’s. DNA testing may help combat this problem, freeing
innocent men like Kirk. But not every case has evidence amenable to DNA testing. It is not a panacea. Nevertheless, DNA testing is now demonstrating that eyewitness testimony is unreliable and that the court system is imperfect. Innocent people are wrongfully convicted. Even before DNA testing, Hugo Bedau and Michael Radelet (1987) documented 463 cases of wrongful convictions in capital cases over the last century. As we wrote the first draft of this chapter, we received an e-mail announcement that on April 8, 2002, Ray Krone was released from prison in Arizona. He is the 100th inmate to be released from Death Row since the death penalty was reinstated in 1973. It was bad enough that Krone, like Kirk Bloodsworth, was imprisoned for years for a crime he did not commit. Worse, he could have been killed for it.

Not everyone is as lucky as Kirk Bloodsworth and Ray Krone, if we can even call them lucky. Radelet and Bedau (1998) described the tragic case of Jesse Tafero, who was executed in Florida in 1990. He and Sonia Jacobs were both sentenced to death for a murder they had allegedly committed together. When Tafero was executed, the electric chair malfunctioned and his head caught on fire before he died. Two years later, Jacobs was cleared of the crime. The U.S. Court of Appeals concluded that she and Tafero were convicted because the prosecution suppressed evidence of their innocence and made use of a witness who lied about their role in the crime. (The witness lied because he was the real killer.) No Florida official has admitted error or expressed remorse for executing the wrong man. Just like Governor Ryan, we are worried about errors made in the court system. We wonder how many innocent people have been executed, how many innocent prisoners are on Death Row, and how many innocent people will be sentenced to death in the years to come.

DEATH ROW: HOME FOR AFRICAN AMERICANS, THE POOR, AND SOUTHERNERS

When we examine Death Row across America, it becomes apparent that capital punishment is applied unevenly. Three disparities stand out. Blacks are disproportionally represented on Death Row. So are poor people. And Death Rows are crowded in some states but empty in others.

As Table 20.1 illustrates, 38 states and the federal government allow for the death penalty, and 12 have abolished it. And as the table also reveals, the rate of executions varies widely among those that do have the death penalty. Texas executed 239 people from 1977 to 2000, whereas many states executed just a few or none at all. Pro-capital punishment states are overwhelmingly concentrated in the South, the Midwest, and the far West. Indeed, the entire southern half of the country—from Georgia to Arizona, and from Virginia to Florida—retains the option of executing capital defendants. Though we might expect more uniformity in the federal system, geography matters once again. More than 50% of all capital cases come from less than 6% of the federal districts. And 10% of all cases originated in one single district—the Eastern District of Virginia (U.S. Department of Justice, 2000).

Eleven years after capital punishment was officially reinstated following the Supreme Court’s decision in Gregg, Georgia found itself once again at the center of a constitutional firestorm. This time, the problem was race. Warren McCleskey, a middle-aged Georgia man, was convicted and sentenced to death for the 1978 murder of an Atlanta police officer. On appeal, McCleskey’s attorneys argued that the Georgia death penalty statute was being carried out with discriminatory malice. Their claim rested on the findings of a study conducted by Baldus, Pulanski, and Woodworth (1990).

The Baldus team examined more than 2,000 murders in the state of Georgia from 1973 to 1978. Like previous researchers of race and capital punishment, they wanted to know if black defendants were more likely to get death sentences than whites. It seemed likely because Death Row is disproportionately black. Forty-three percent of all Death Row inmates today are black, even though blacks constitute only 12% of the population (Maguire & Pastore, 2001c). Such disproportionality can be explained by criminality or racism. If blacks disproportionately commit capital crimes, they will be disproportionally represented on Death Row. Alternately, it could be a racist criminal justice system that is more content to send a black person to death than a white.
Table 20.1 Geographic Application of the Death Penalty

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<th>Executions 1977–2000</th>
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Baldus et al. did not find the Georgia court system to be overtly racist. “Post-*Furman* . . . there is no evidence of race-of-defendant discrimination statewide” (p. 185). However, they discovered a more subtle form of racism that reveals itself when one is looking at the race of the defendant and the race of the victim. A defendant’s likelihood of receiving a death sentence was 4.3 times greater if the victim was white. That is to say, a defendant who had murdered a white person was more than 430% more likely to receive a death sentence than one who had murdered a black person. Because McCleskey—a black man—was convicted of murdering a white police officer, he had a greater chance of getting a death sentence than if he had been white and the police officer had been black.

The Supreme Court, however, was not convinced. A majority of justices did not find *purposeful* discrimination on the part of the Georgia legislators who crafted the death penalty statute, nor was there any hint that the prosecutors, jurors, or judge in the *McCleskey* case were motivated by racial prejudice (*McCleskey* v. *Kemp*, 1987). According to Justice Powell, who penned the majority opinion for the Court, a violation of the Fourteenth Amendment’s Equal Protection Clause requires that the defendant show discriminatory intent by some actor involved in the process. This McCleskey could not do. Like so many criminal justice systems around the country, the framework in Georgia allows for discretion in the individual prosecutor’s decision to seek the death penalty. Moreover, it allows for discretion in the jury’s choice of punishment. The Supreme Court concluded that any system that offers wide prosecutorial and jury discretion is bound to reveal some degree of bias. But the nature and scale of prejudice uncovered by the Baldus study did not transgress the Equal Protection Clause of the Fourteenth Amendment.

Bolstered by the decision in *McCleskey*, proponents of the death penalty now maintain that racial disparities in capital punishment mirror similar problems in the entire criminal justice system. Race is a factor in many trials, say supporters, and collectively we are trying to correct these injustices. These same individuals argue that the way to remedy the problem of racial prejudice is not by throwing out the system altogether and letting criminals go free but by working more effectively within the statutory rules set by state and federal legislatures. No one suggests, in other words, that we eliminate
life sentences simply because there may be some racial bias in noncapital cases. Hence, it does not make sense to abandon capital punishment because some findings hint at prejudice. The answer, claims Ernest Van den Haag (1997), may be as simple as executing more whites.

McCleskey is the most important Supreme Court case addressing race and capital punishment. But the decision did not end the controversy about race—far from it. On May 9, 2002, Governor Parris Glendening imposed a moratorium on all executions in Maryland pending the results of a study of racial bias in capital cases currently underway at the University of Maryland. And David Baldus and his team of social scientists have continued their research. They recently published findings of both racial and class disparities in the Philadelphia area, and the results complement their earlier research in Georgia (Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 1998). According to the Philadelphia study, there is "substantial" evidence to suggest that the race of the defendant still has some bearing on the outcome of a capital trial. And there is more evidence that the race of the victim is an important factor. From these findings, the Baldus group infers that the discretionary power of juries contributes meaningfully to the disproportionate presence of black defendants on Death Row.

The Philadelphia study also explores the issue of class in a rigorous and systematic way. The Baldus group found that economic position of the defendant correlates with capital sentencing. Socioeconomic status of the victim is also a factor. The likelihood of a defendant getting the death penalty increases as his or her status decreases and as the socioeconomic status of the victim increases. The richer the defendant or the poorer the victim, the less likely it is that a prosecutor will seek the death penalty and a jury will impose it.

Most capital offenders are so poor that they must rely on the aid of court-appointed lawyers—lawyers who do not have the time or resources to represent their clients well. It is thus not surprising that, as Justice William O. Douglas once remarked, there are simply no rich people on Death Row. He wrote in Furman: "One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loeb's are given prison terms, not sentenced to death" (Furman v. Georgia, 1972, pp. 251–252). Justice Ginsburg has similarly voiced concern over the overwhelming population of indigents on Death Row. She and Justice O'Connor have both publicly noted that the quality of representation is so poor when the state appoints defense counsel in death penalty cases that many convictions come to the U.S. Supreme Court under considerable suspicion (Ginsburg, 2001; O'Connor, 2001). Like race or place, they both insist, socioeconomic status should not be the deciding factor that separates life and death.

EXECUTING THE MENTALLY ILL AND THE MENTALLY RETARDED

Diagnosed as a severe schizophrenic, Calvin Swann had been in and out of mental institutions for most of his adult life; and when he was not in state-run mental hospitals, he was most likely in prison. He would speak to objects that were not there, rant about nothing in particular, and periodically engage in self-mutilation. His last crime—the one for which he faced death—involved the murder of Conway Richter. Because of a door left ajar, Swann entered Richter's home demanding money. When Richter refused, Swann fired a single shotgun blast into his chest, killing him instantly. A year later, a Virginia jury sentenced Calvin Swann to death. Ultimately, however, the governor commuted his sentence because of Swann's mental illness.

By some estimates, as many as 16% of all prisoners are plagued by some mental incapacity, and the percentage is even higher on Death Row (Diton, 1999). Death Row inmates suffer from a variety of mental health diseases, such as schizophrenia and severe depression. Although distinct, another significant portion of Death Row inmates are considered mentally retarded, a condition defined by "significantly sub-average intellectual functioning" combined with limitations in adaptive skill areas like communication, self-care, and socialization (American Association on Mental Retardation, 2002). Together, the presence of so many on Death Row with some degree of mental shortcoming
raises concerns about the moral culpability of these individuals and their capacity to understand their fate.

The judiciary’s attitude toward the mentally ill has been generally protective. Insanity, for example, is ordinarily viewed as a legitimate defense against criminal action. Concerning capital punishment more specifically, the Supreme Court has decided that the Eighth Amendment prohibits the execution of the insane. Writing for the majority in *Ford v. Wainwright* (1986), Justice Marshall noted that in every stage of history the execution of the insane has been widely condemned. From our earliest forebears to the present, Americans have viewed the state-sponsored killing of those who lack “the capacity to come to grips with their own conscience” as offensive (*Ford v. Wainwright*, 1986, p. 409). It does not comply with our commitment to the dignity of the individual, Marshall wrote, and neither does it conform to the high standard of decency we have set for society itself. Justice Marshall then concluded by adding that there is no retributive value served by executing the insane. Subjecting the insane to death, he said, “provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment” (*Ford v. Wainwright*, 1986, p. 407).

Just 3 years after *Ford v. Wainwright*, however, the United States Supreme Court addressed the issue of mental retardation and capital punishment with ambiguous results. The case was *Penry v. Lynaugh* (1989), and it involved a challenge to the Texas death penalty statute by a moderately retarded man under the Eighth Amendment’s “cruel and unusual punishment” provision. John Paul Penry’s attorneys argued that their client’s mental capacity (equivalent to that of a six-and-a-half-year-old at the time of the 1980 trial), his severe antisocial behavior, and his low IQ (between 50 and 63) meant that he had neither the competency to stand trial nor the capacity to understand that he might eventually be executed. Defense attorneys further argued that the retarded lack the moral culpability required to justify the imposition of the death penalty. They insisted that there is a growing national consensus against executing the mentally retarded. Accordingly, they said, executing Penry would constitute a transgression of the Eighth Amendment.

The Supreme Court did not agree. By a narrow 5-4 margin, the majority rejected the argument that there exists a national consensus against executing the mentally retarded. Despite pleas by the American Association on Mental Retardation and other interest groups hoping to save Penry’s life, Justice O’Connor wrote that there was insufficient evidence to suggest any national movement, particularly when one considers that only two states have laws that prohibit the execution of the mentally retarded (since 1989, 16 more states have outlawed the practice). In her estimation, a “severely” or “profoundly” retarded individual might warrant the court’s protection against execution, but Penry was neither severely nor profoundly retarded. He had been defined as only “moderately retarded” and was thus found competent to stand trial by a jury of his peers.

Justice O’Connor’s opinion did, however, indicate that mental retardation is a powerful mitigating factor to be considered by a jury during sentencing. “In sum,” she wrote, “mental retardation is a factor that may well lessen a defendant’s culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry’s ability convicted of a capital offense simply by virtue of his or her mental retardation alone” (*Penry v. Lynaugh*, 1989, p. 340). Giving hope to abolitionists, her opinion also left open the possibility that the Court might reconsider the question of a national consensus against executing the mentally retarded sometime in the future.

The opportunity to revisit that issue arose in 2002. The case was *Atkins v. Virginia*, and it involved a Virginia man who, by most accounts, has an IQ of 60. His case garnered national attention because it was accompanied by a movement among many state legislatures to exclude the mentally retarded from capital sentences. Since 1989, when only two states exempted retarded persons from capital punishment, 16 additional states have now outlawed the practice. That was enough for the Supreme Court to reverse its earlier conclusion that a national consensus had not yet developed. In an opinion written by Justice Stevens, the majority
of the Court characterized the movement away from executing the mentally retarded as a "dramatic shift in the legislative landscape that provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." Stevens further noted that it was "not so much the number of these states that is significant, but the consistency of the direction of change," particularly when one considers the recent popularity of anticrime legislation around the country.

The case is likely to have a wide impact. Some estimate that as many as 200 or more Death Row inmates will be released into the general prison population as a result of the Atkins decision. At the center of the Court's opinion is a concern that the protections afforded criminal defendants do not work as well when applied to the mentally retarded. Stevens cited their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions" as evidence that they "face a special risk of wrongful execution." Over a scathing dissent by Justice Scalia, Stevens concluded that the intellectual deficiencies of mentally retarded persons do not exempt them from criminal punishment but certainly "diminish their personal culpability."

Deterrence: Does the Death Penalty Make Criminals Think Twice?

One of the most compelling arguments in favor of the death penalty is that of deterrence, a term that has two meanings—"special deterrence" and "general deterrence." Special deterrence refers to an intervention that prevents an offender from committing crimes in the future. It is hard to argue against the effectiveness of the death penalty on this point. And many juries vote in favor of death penalty for this reason alone—they want to make sure that the offender can never again threaten public safety. Then again, a sentence of life without parole is also an effective special deterrent. But jurors sometimes believe that a "life sentence" does not really mean "life." As one capital juror noted, "We all had decided if we were absolutely sure that he would never have gotten out of prison we wouldn't have given him the death penalty. But we were not sure of that" (Lifton & Mitchell, 2000, p. 156). Recently, there has been a movement to tighten the rules so that "life without parole" means exactly what it says. As this occurs, juries may believe that such a life sentence offers the same deterrent benefit and may increasingly choose this option.

General deterrence refers to the broadcast message of the death penalty: would-be killers will think twice if they know they could be executed. The well-publicized execution of one is a lesson for others. Many Americans believe that the death penalty is a general deterrent. In a 2001 national poll, respondents were asked, "Do you feel that executing people who commit murder deters others from committing murder, or do you think that such executions don't have that much effect?" Forty-two percent of Americans believed that executions are a deterrent (Maguire & Pastore, 2001b). Are they correct?

The deterrence argument is not an argument about morality or justice; it is an argument about crime control and prevention. It suggests that the death penalty can be a rational strategy to lower the homicide rate. In this way, it moves the debate from ethics to science, offering a hypothesis that can be verified through empirical research. So let's take a close look at the research on general deterrence. Does the death penalty reduce murder in America?

In 1980, a prominent criminologist named Thorsten Sellin (1980) published a study comparing homicide rates in states that had the death penalty and those that did not. If the death penalty were a general deterrent, we would expect lower homicide rates in states that impose death. That is not what Sellin found, however. A more recent analysis demonstrates, in fact, that states with the death penalty have a much higher homicide rate than states that have abolished the death penalty (Kappeler, Blumberg, & Potter, 2000). Another way Sellin looked at deterrence was to look at homicide trends over time. If the death penalty was a deterrent, then states that abolished the death penalty should show an increase in homicides.
after abolition, and states that reinstated the death penalty after a period of abolition should see a decline after reinstatement. Again, Sellin found no effect. The trends continued independently of changes in sentencing.

Perhaps the studies were too general. Perhaps if we selected one arena for close inspection, we would find a deterrent effect. For instance, in states that have capital punishment, most people (presumably criminals too) know that killing a police officer is an offense that makes one highly eligible for the death penalty. Moreover, most people know that the police will work long and hard to solve a crime. Perhaps, then, capital punishment deters the killing of police officers because the would-be killers know that they are likely to get caught and to get a death sentence. Does capital punishment offer a second “bulletproof vest” to police officers, increasing their safety by deterring would-be “cop killers”? Bailey and Peterson (1994) conducted a study to examine this question for the period from 1976 to 1989. Over this period in the United States, 1,204 police officers were killed and 120 offenders were executed, 12 of them for killing police officers. A close examination of the relationship between homicides and executions nationally yielded findings that were consistent with those from other studies of deterrence. The death penalty did not reduce homicides of police officers—the murder rates were not different between states that had the death penalty and those that did not. The death penalty has not provided extra protection to police officers as was hoped.

Some scholars have examined the possibility that execution not only is ineffective as a deterrent but may even increase homicide rates. This is called the “brutalization hypothesis.” This theory suggests that some citizens learn that they live in a “brutal” society in which killing is normative, even endorsed by the state. As such, when citizens learn of executions, such as with highly publicized cases, some may be more inclined to commit homicides themselves. Murder rates, according to the brutalization hypothesis, will increase soon after an execution. Three recent studies examined this, finding evidence supporting the brutalization hypothesis. Cochran, Chamlin, and Seth (1994) looked at homicide rates in Oklahoma 1 year prior to and 1 year following the execution of Charles Troy Coleman, the state’s first execution in 25 years. Ernie Thomson replicated their study twice, examining the effect of Arizona’s execution of Donald Eugene Harding (Thomson, 1997) and of California’s execution of Robert Alton Harris (Thomson, 1999). In all three studies, the researchers noticed that homicide rates increased after the executions. Although more research is necessary to fully support the brutalization hypothesis, the findings are troubling. What if the death penalty not only fails to deter murder but actually encourages it?

The evidence clearly suggests that the death penalty is not a deterrent. Each time there has been a serious evaluation of the research, the reviewer has drawn this same conclusion. This was true for Thorsten Sellin in 1967, for Franklin Zimring and Gordon Hawkins in 1986, and for William Bailey and Ruth Peterson in 1997, who wrote, “The available evidence remains ‘clear and abundant’ that, as practiced in the United States, capital punishment is no more effective than imprisonment in deterring murder” (p. 155).

But intuitively we often feel it should—the evidence doesn’t seem to conform to our gut feelings, which tell us that the more severe the penalty, the less likely someone will be to break the rule. Of course, this assumes a basic rationality on the part of a killer. He or she must pause and quietly reflect on the possibility of punishment. Because many murders are not premeditated, it is unlikely even this assumption can be held. Nevertheless, severity of punishment is important for deterrence. No one would argue that homicide should go unpunished or that murderers should pay a fine as we do with traffic tickets. Severity of punishment is calibrated to the severity of the offense, partly for reasons of justice and partly for deterrence. Yet fine-grained distinctions in severity may be irrelevant for deterrence. Would a thief be deterred if he knew that he might get a 24-month sentence but not be deterred if the sentence was for 18 months? Would a killer be deterred if he knew he would get the death penalty but not deterred if he would get life without parole? Both are harsh sentences. The deterrent value of severity, if it exists, is not likely to be different between two types of severe sentences but only between the mild and the severe.
Finally, for deterrence, severity may not be as important as certainty and swiftness. The threat of punishment works only when the potential offender believes that he or she will definitely be caught, that the punishment will definitely be applied, and that this will happen pretty quickly. In Cesare Beccaria’s classic essay on criminology, published in 1764, he wrote, “One of the greatest curbs on crimes is not the cruelty of punishments, but their infallibility.… The certainty of punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity” (Beccaria, 1764/1985, p. 85). In our country, the rarity and uncertainty and fallibility of the death penalty combine to undermine any possible deterrent benefit that can be gained by its severity.

THE MORAL DEBATE: RETRIBUTIVE VERSUS RESTORATIVE VISIONS OF JUSTICE

Thus far we have examined the instrumental logic of the death penalty—whether the public supports it, whether the Constitution affirms it, whether innocent defendants are executed, and whether it is applied unfairly by class, race, or place. For many people, however, all of these issues are secondary. The real question is moral—is capital punishment the right thing to do, even if it has some unfortunate side effects?

In a recent poll, American citizens who supported the death penalty were asked to explain their reasons (Maguire & Pastore, 2001d). Ten percent gave a simple reason—it saves money. Although the cost-saving rationale makes intuitive sense, they happen to be wrong about this. States spend much more money on capital cases than they would have by incarcerating the defendants for life. One study found that Florida spent six times as much money in capital cases as they would have spent by treating them as noncapital cases. Another found that California would save $90 million per year if it abolished the death penalty (Kappeler et al., 2000). The point, however, is that cost savings—even if erroneous—are not the driving reason for most supporters of the death penalty. Neither is deterrence. Only 16% of the survey respondents offered this as a reason for their support. Earlier we reported that 42% of Americans believed that the death penalty was a deterrent, but even so, this was not the major explanation for their support.

For those who support the death penalty, the reason given most frequently (by 60% of those polled) is retribution. They believe the offender deserves it. They believe death is the just response. They believe it is called for in the Bible. They believe it is the way to honor victims. They believe execution most clearly signals our society’s repulsion for the crime. According to legal philosopher Ernest Van den Haag (1997):

They believe that everyone who can understand the nature and effects of his acts is responsible for them, and should be blamed and punished, if he could know that what he did was wrong. Human beings are human because they can be held responsible, as animals cannot be. In that Kantian sense the death penalty is a symbolic affirmation of the humanity of both victim and murderer. (p. 454)

The retributive perspective is the dominant theme of our society’s justice system. It is based on the belief that accountability should be measured on a scale of proportional punishment—a light sentence for a minor crime and the “ultimate” sentence for the worst crimes. Just as it would be inappropriate to execute a burglar, it would be inappropriate not to execute a murderer. The scales of “Lady Justice” are brought back to equilibrium by applying a punishment that “fits the crime.” The focus of justice is not practical or instrumental; it is moral. We do what is necessary to affirm society’s standards, even if it is costly, even if we make occasional errors.

Recently, another punishment philosophy has gained national attention. It is called “restorative justice” and provides a different moral perspective on the problem of accountability (Braithwaite, 2002; Zehr, 1990). As in retributive justice, a focus is placed on balancing the scales of justice. Through his or her crime, the offender has incurred a debt that must be paid back to victims and to society. But in restorative justice, unlike retributive justice, this
debt is not paid through passive submission to punishment. The offender does not receive a proportional amount of harm to equate with the harm caused. Accountability is defined as an active responsibility on the part of the offender to make amends for what he or she has done. This is relatively simple in minor crimes. If an offender has broken a window, justice requires that he or she fix it or pay for it. But how can murderers be held accountable when they cannot bring their victims back to life?

It is important in both perspectives of justice that offenders are prevented from profiting from their crimes—from getting away with it. The difference is in how they are held accountable. From a restorative perspective, a prison sentence is a strange way to “pay one’s debt to society” because the victim suffers once as a result of the crime and then suffers again because he or she is a taxpayer who must pay for the offender’s incarceration. Meanwhile, the offender does nothing to compensate the victim. Of course, incarceration serves a very important other purpose—in incapacitation. We impose prison sentences not only for moral reasons but also for the instrumental purpose of preventing the offender from inflicting more harm upon victims and society. But restorative advocates believe offenders should engage in a variety of tasks that make amends. Earning money to pay restitution is the most basic task. Victims shouldn’t pay for their offender’s incarceration; offenders should be paying victims back for the harm they caused. Their labor should also be used to pay for victims’ services—programs that help people recover from the traumatic experience of victimization.

Advocates of restorative justice believe that the death penalty is not a good way to hold murderers accountable. Instead, they argue that justice is best served when offenders actively work to make amends in whatever way they can, for the rest of their lives. By focusing on the offender’s obligations, restorative justice prioritizes the needs of victims. What victims researchers have discovered is that victims have many needs, that much could be done to help in their healing process, and surprisingly, that offenders themselves can sometimes play a positive role in the healing process.

EXECUTING TIMOTHY
MCVEIGH: DID EXECUTION BRING RELIEF TO VICTIMS’ FAMILIES?

Timothy McVeigh was executed on June 11, 2001, for his bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995. It was an unusual event because the nation learned about how differently victims’ families reacted to the death penalty. We expected comments like those from Gloria Buck, the niece of a bombing victim:

I know some people didn’t get closure, didn’t get anything from this, but I got a lot from it. Timothy McVeigh, he’s done. I really wouldn’t want to be where he is right now. I thought about that right when they announced he was dead. I feel like I can finally start walking away from this. (Tuchman, 2001)

For Buck, McVeigh’s execution marked the end of one chapter in her healing process. Many victims are told that the death penalty is necessary so that they can achieve a feeling of closure, move on with their lives, and overcome the feeling of trauma associated with violent victimization. Kathleen Treanor, the mother and daughter-in-law of bombing victims, however, noted that closure is not so easily achieved:

I don’t think anything can bring me any peace or anything from this. I’ll always face the loss of my daughter. I’ll never get over that. When I die and they lay me in my grave is when I’ll have closure. That’s when I’ll stop grieving for my daughter. (Tuchman, 2001)

Bud Welch, whose daughter was killed in the bombing, opposed the execution. He had this to say:

At first I was in absolute pain. All I wanted was to see those two people freed. I was smoking three packs of cigarettes a day and drinking heavily. . . . I knew that the death penalty wasn’t going to bring her back, and I realized that it was about revenge and hate. And the reason Julie and 167 others were dead was because of the very same
thing: revenge and hate. . . . Once I turned loose of that revenge and hate, the feel-good was tremendous. After that, I was able to get things sorted out. I started getting a handle on my drinking and cutting back on smoking. I was able to start reconciling things within myself. (Zehr, 2001, pp. 60–62)

For Welch, the execution did not aid in his healing; what helped was overcoming his own impulses toward “revenge and hate.” Most family members of homicide victims experience post-traumatic stress disorder, and it typically takes years before the worst symptoms disappear (Freyd, Resnick, Kilpatrick, Danksy, & Tidwell, 1994)—symptoms such as repeatedly reliving the trauma in painful recollections or nightmares, emotional numbing, estrangement from others, insomnia, difficulty concentrating or remembering, and guilt about surviving when others did not (Goldenson, 1984). Unfortunately, the criminal justice process often gets in the way of victim recovery. Part of the problem is that victims do not receive the services they need and expect. Often they are not provided good information about how criminal cases are proceeding or how they can participate (Day & Weddington, 1996). Capital cases are particularly onerous because the proceedings last for years. We have two unanswered questions. First, given that 68% of initial death penalty sentences are overturned at a later date (Liebman et al., 2000), does this “rollercoaster” ride for family members prolong their suffering? Second, do family members for whom the offender received a life sentence at the outset recover more quickly than those in death penalty cases? No one yet has the answers to these questions.

Recently, restorative justice practitioners have begun programs that enable homicide victims’ family members to meet with offenders. As we are now discovering, many victims want to meet with offenders in order to tell them of the pain they caused, to learn from the offender why he or she committed the crime, and to see if the offender has taken responsibility. The results from these meetings and in other cases where victims of severe violence meet with their offenders are striking because of the healing they seem to provide. According to Mark Umbreit and Betty Vos (2000):

The overall effects of the mediation session reported by victims included the following: they had finally been heard, the offender now no longer exercised control over them, they could see the offender as a person rather than a monster, they felt more trusting in their relationships with others, they felt less fear, they were no longer preoccupied with the offender, they felt peace, they would not feel suicidal again, and they had no more anger. (p. 66)

In capital cases, Umbreit and Vos found that the mediation sessions also have an impact on victim attitudes toward the death sentence. In one case, they found that “the granddaughter and the sister [of the victim] both reported that initially they had wanted to execute him themselves; now they were more ambivalent” (p. 80). In other words, part of what they hope to personally achieve through the execution might be found in victim-offender mediation. Of course, much more research is necessary to explore this topic. However, we speculate that although some families are relieved by the execution, other families are not well served by it, in part because it denies them the chance for mediation. The lesson of McVeigh’s execution is that the death penalty cannot always be imposed on behalf of victims or their surviving relatives. In fact, a national organization called Murder Victims’ Families for Reconciliation uses the motto “Not in Our Name” in opposition to the death penalty.5

CONCLUSION

To capture an accurate sense of the frustration felt by both supporters and opponents of capital punishment, consider the career of the late Harry A. Blackmun, former Associate Justice of the U.S. Supreme Court. One of the first cases Blackmun heard as a member of the High Court was Furman v. Georgia. His opinion, although short in comparison to those penned by Justices Brennan, Douglas, and Powell, was no less emotionally charged. He wrote of his “distaste, antipathy, and abhorrence, for the death
penalty," insisting that "cases such as these provide an excruciating agony of the spirit." "For me," he remarked, "capital punishment violates childhood’s training and life’s experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of 'reverence for life'" (Furman v. Georgia, 1972, pp. 405–406).

Yet despite his confessed aversion, Blackmun ultimately disagreed with the opinion shared by the majority of his brethren that the practice of state-sponsored executions violated the Eighth Amendment to the Constitution. He voted in favor of upholding Georgia’s death penalty statute and, had he been able to secure one more vote, would have supported the execution of William Furman. In the end, Justice Blackmun’s moral opposition to the capital punishment was exceeded by his faith in the democratic process. He argued that the duty of a judge was to interpret the Constitution with dispassion and that personal moral belief should never creep into the Court’s decisions. The forum for eliminating capital punishment was therefore to be found in America’s legislatures—not in its courts.

Twenty years later, Blackmun’s faith in the democratic process had all but eroded. He wrote in Callins v. Collins (1994):

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of the Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. (p. 1145)

In Blackmun’s mind, the same issues that perpetually keep capital punishment in the headlines—issues ranging from the race and socioeconomic status of the offender, to the question of executing the innocent and the possibility of closure for the victims’ families—are the ones that are the most difficult to address. But just the same, these are the issues that most require our attention. Death is different, he was quick to remind us, and thus we must approach the ultimate punishment with the degree of humility and respect it demands. Until we do that, Blackmun believed that our only rational response was to hope that more capital defendants experience the same walk away from Death Row that Calvin Swann once enjoyed.

NOTES

1. In all, death penalty statutes were revised in 35 states.
2. For more information about Scheck and Neufeld’s Innocence Project, check out www.innocenceproject.org.
3. Timothy McVeigh was the first person to be executed in the federal system in the post-Furman era. He was executed in 2001.
4. Another report from the same year yielded similar findings (U.S. General Accounting Office, 1990). The GAO report was a systematic analysis of all the studies of racial discrimination in capital punishment conducted during the 1970s and 1980s.
5. To learn more about this organization, go to www.mvfr.org. To learn about victims’ families who support the death penalty, explore www.murdevictims.com.

REFERENCES


