Death Penalty

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tire. These 35 years from 1973 through 2007 represent a halting progression through an early shaping period into what is now a fully mature death penalty system, albeit one under reconsideration from several perspectives.

Actual executions began soon after the Gregg decision, with the first being that of Gary Mark Gilmore on Jan. 17, 1977, in Utah. By the end of 2007, 1,099 persons had been executed in this current era by 32 states and the federal government, with the continuing execution rate varying between 50 and 70 persons per year. Texas is by far the leader in this practice, accounting for 41% of all American executions since 1977. Well over three-quarters of these 1,099 executions have occurred in the southeastern states.

As of the end of 2007, a total of 36 states have death penalty statutes in force. The federal government has two death penalty statutes, one applying to crimes by members of the military and the other applying to nonmilitary crimes. Fourteen states and the District of Columbia do not have the death penalty. These abolitionist states are located primarily in New England and in the upper Midwest. However, even among the 38 official death penalty jurisdictions, the amount of actual death sentences and executions varies extremely. At the end of 2007, a total of 3,309 prisoners were on these 38 death rows.

CHAPTER 2
ARGUMENTS FOR AND AGAINST THE DEATH PENALTY

The centuries-old debate over the death penalty typically dwells on theoretical, philosophical and religious pros and cons. However, the issues that arise in the day-to-day operations of the American death penalty system often encompass less lofty but perhaps more troubling concerns. The fundamental question here is not whether certain crimes and certain offenders deserve the death penalty. Rather, it is whether we can trust a hodgepodge of loosely-connected government agencies to carry out the death penalty in a fair and rational manner. Sadly, the experience in the United States, as elsewhere, has been that huge, expensive government programs seldom accomplish their perhaps worthy goals, due in large part to the problems that plague our entire society. Following is a sketch of the most common arguments for and against the death penalty, both within criminological and religious theory and within the day-to-day death penalty system actually operating in the real world.
latter, the plaintiff’s attorney clearly does represent the aggrieved family and is seeking compensation for their loss and for their pain and suffering. However, in a murder case in criminal court, the prosecuting attorney represents the state or federal government and all of the citizens of that jurisdiction. A criminal prosecutor’s sworn oath is to seek justice for all of the people, not just retribution for the victim’s family.

The rationale of “an eye for an eye” does lend itself to a sense of balance, of tit for tat. The offender who takes a life should have his life taken. However, literally making the punishment fit the crime is not found in any other area of criminal law. The car thief is not punished by having his car stolen, the battering husband is not himself battered by the police, and the bank embezzler does not in turn have her bank accounts defrauded. In this literal sense, the punishment is almost never like the crime, so the push for taking the life of the killer seems out of context with the rest of criminal law.

Those who oppose this rationale point out that only about 1% of all convicted killers are actually executed, with the rest serving various prison sentences. Therefore, it appears society has concluded that 99% of killers do not “deserve” to die. Even if we doubled or tripled the number of executions, we still would not be executing 95% of all killers. Therefore, almost all convicted killers apparently do not fit the “eye for an eye” formula.

One last version of this “eye for an eye” rationale is that the offender should suffer the same fate as the victim. The offender didn’t consider the victim’s life to be of value and concern, so we should treat the offender as he treated the victim. Opponents to this rationale point out that the murder of the victim was the act of a murderer. A murderer, almost by definition, does not display thoughtfulness, morality, and rationality in his decision to take a life. As society debates and deliberates this life-or-death decision of whether to take a life, it seems odd for society to look to the personal standards of murderers for guidance as to how we should act. Most would agree that society’s standards should be considerably loftier than the standards of murderers and would reject any societal deference to the murderer’s level of concern for the victim’s life.

While not a classic justification for criminal punishment, the notion of symbolism plays a major role in American death penalty law. As a society, we are outraged at our overall murder rate and determined to make a clear statement about it. Our most prominent statement may be to declare that these crimes are so outrageous as to qualify those who commit them for death at the hands of the state. Whether or not such executions are ever imposed or actually carried out, society has thereby made its values known in the most extreme of measures. Such symbolism also occurs on an individual case basis. A homicide victim’s family and local community typically express disappointment if the death penalty is
imprisoned murderer also is incapacitated, essentially permanently, from committing any murders outside the confines of prison. Therefore, it may be that long term imprisonment is nearly as effective an incapacitant as is the death penalty. In any event, research reveals that murderers are very unlikely to repeat their crimes, so the overall need for a long term incapacitant is unclear.

In addition to incapacitating the executed offender, death penalty proponents argue that its use will deter the behavior of others. The rationale of this principle of general deterrence is that others who were considering committing murders will be frightened away from that behavior due to the threat of being executed for those murders. The appeal of this principle is that it is basically intuitive; a credible threat of being killed if you do something arguably would make anyone think twice before doing it. General deterrence is very popular in political campaigns as well, with almost all political candidates espousing their personal belief that the death penalty is a deterrent.

This general deterrence principle assumes, of course, such things as (1) your knowledge of the death penalty’s existence, (2) your belief that you will be caught and convicted for your acts, (3) your calculation that you would be within the 1% of convicted killers who are actually executed, and (4) your engaging in this detailed cost/benefit analysis before you pull the trigger. Here is where this seductive theory breaks down in practice. An enormous amount of academic research has been performed around this thesis, and the results are as clear as any in social science can be. The death penalty is no greater general deterrent of the behavior of other potential murderers than is long term imprisonment. It appears that most murderers don’t tend to think before they act, plus they have an unrealistic view of their ability to escape arrest and conviction. In any event, fear of spending the rest of one’s life in prison seems more than sufficient to provide the deterrent effect needed.

Some empirical research on this phenomenon has found that the murder rate goes up, not down, following an execution. This finding, dubbed the “brutalization effect,” is essentially that the death penalty stimulates more murders than otherwise would occur. The common explanation for the unexpected result is that the death penalty “brutalizes” the surrounding community, both diminishing respect for life in general and providing the unfortunate example of our highest leaders in public office intentionally taking a person’s life. In any event, despite the professed claims of American political leaders, these research findings indicate that the death penalty does not actually serve a general deterrent function and apparently has the opposite effect.

§ 2.3 Bias, Caprice, and Error

Many of the divisions between the pro-death penalty and anti-death penalty camps can be explained by their different perspectives. Pro-death penalty groups tend to focus upon who “deserves” to die
from a religious and philosophical perspective, with few if any advocates giving serious consideration to the glaring differences between death penalty theory and actual practice. Anti-death penalty groups tend to focus more upon the serious malfunctions of the real-world death penalty system. Both groups oppose bias, caprice, and error in the imposition of the death penalty, but theoretical discussions tend to be much purer than the actions and decisions of the real world of criminal justice.

A key fact from the real world is that less than 1% of those who commit homicide are actually executed for their crimes. Regardless of the constant drumbeat of media coverage of death penalty issues, the reality is that we almost never actually use it. If, in fact, this ultimate punishment is to be reserved for only the most egregious cases, then one would expect those cases to be limited to mass murderers, serial murderers, repeat murderers, etc. However, the hapless few who actually get executed are not the “worst of the worst” of all of killers. They tend to be a fairly random selection from all those arrested for homicide, but a selection skewed by race, sex, poverty level, and just the luck of the draw as to who has been their judge, jury, and defense counsel.

Discrimination is one of the most obvious problems. Research reveals clear and unabashed discrimination based upon race of offender and race of victim. That is, black offenders who kill white victims are several times more likely to be sentenced to death than white offenders who kill black victims under similar circumstances. Research during the past two decades documents that the major racial factor is race of victim. Nothing in American statutes or case law instructs us to treat the murder of a white victim more seriously than the murder of a black victim, but this is in fact what happens at every stage of the process. Try as we might, race discrimination in the application of the death penalty and throughout the criminal justice system continues to stain our efforts to maintain a fair and evenhanded process.

The death penalty system discriminates even more sharply on the basis of sex of offender, with women almost totally excluded. Part of this gender differential can be explained by the different kinds of homicide committed by women as compared to those committed by men, but a residue of gender bias appears to remain. At bottom, despite the well-documented daily violence against women perpetrated mostly by men, it appears that we are less willing to subject women than men to the death penalty.

Poverty level of the offender and victim also determines in part the outcome. That is, an offender from lower economic and social strata who murders a victim from higher economic and social strata stands the greatest chance of being sentenced to death and actually executed. These and other legally irrelevant factors cause these literally life-and-death decisions to be made in a pervasively discriminatory manner.
Perhaps even more bedeviling than the impact of these various forms of discrimination is the appearance of mere chance and caprice. Comparing sketches of the crimes and criminals receiving the death penalty with those which receive only prison sentences, it seems impossible to find rational distinctions between the two lists. Many of what seem to be the worst cases end up with prison sentences, while many mid-level, garden-variety homicides receive the death penalty.

A major part of this apparent chance and caprice is the luck of the draw. Each capital jury is different, with some juries clearly leaning more toward the death penalty than other juries. Prosecuting attorneys have similar differences as to their interest in the death penalty. Even the same individual prosecutor may see political advantage in seeking the death penalty in one case while not in a nearly identical case falling at a different point in the political term of office. Judges also must keep one eye on the political polls if they face reelection, with several well-known examples of judges facing stiff political opposition for their decisions in death penalty cases. And as one moves around within almost any death penalty state, one can find hot spots and cold spots as to the actual imposition of the death penalty, even though the state law is supposed to be uniform across the entire state.

Probably the most important factor in caprice is the defense attorney for the capital defendant. While the 6th Amendment guarantees the "assistance of counsel," the ability, support-level, and work ethic of capital defense counsel vary quite widely. A capital defendant's attorney should be experienced in capital cases, should devote major portions of time and energy to the case, and be aided and supported by legal assistants, investigators, mitigation specialists, and other members of a complete defense team. This is the sort of team effort that the prosecuting attorney has, so the defense attorney should have a comparable team.

Only very rarely, however, does the defense team equal the prosecution team in numbers, experience, and funding. Most pro-death penalty advocates have no wish for the defendant to have inadequate counsel, although some have voiced criticisms of defense teams that "try too hard" to avoid the death penalty for their client. Anti-death penalty advocates regularly claim that the mismatch between prosecution and defense too often results in a denial of a full and fair consideration of the defendant's guilt and sentence. Capital defendants with inadequate defense teams may receive the death penalty while essentially identical cases result only in a prison sentence, with the only difference being the quality of the defense attorney.

The ultimate end result of discrimination, caprice, and just plain bad luck can be clear error: convicting and sentencing to death an innocent offender. The death penalty system is operated and controlled by human beings who are not immune to human error. Innocent people are sentenced to death and, in some cases, actually executed. Whether for or against the death penalty, almost no one
wants innocent people executed. First is the obvious tragedy of the death of an innocent person, but remember that this also means that the real murderer is still running around loose with no one looking for him.

Over 125 innocent persons have been sent to death row in the current era (since 1973), and states such as Illinois have put a hold on executions to find out why. Several other states have also ordered a moratorium on executions. This criticism of the death penalty system may be the most telling politically, and many groups are studying means for improving the accuracy of the system and reducing the number of innocent persons receiving the death penalty. Some death penalty opponents are demanding perfect accuracy before executions can be carried out, but this is simply impossible to achieve. A system operated by human beings operating under intense political pressures is bound to make mistakes, so the more reasonable goal may be to minimize errors rather than to eliminate them. The overarching issue, of course, is how many death penalties for innocent persons is too many?

§ 2.4 Other Concerns

A wide variety of other, perhaps lesser, concerns exist for many people. One broad fear is the continuation of the cycle of violence by our killing those who have killed others. This is the ultimate legitimation of intentional, premeditated killings, a lesson that is not lost on young and impressionable persons wondering whether "thou shalt not kill” means what it says. Pro-death penalty advocates argue that a convicted murderer’s life is not of comparable value as that of the innocent victim, and the only way to show proper respect for the victim’s life is to impose the ultimate penalty upon the murderer who took that life. Death penalty opponents see all human life as being of infinite value, and the life-for-a-life premise of the death penalty simply continues the cycle of killing.

This cycle of violence debate is part of a larger concern about the nature of human dignity. Death, obviously, is inevitable, so executing a convicted murderer simply moves his death to a time somewhat earlier than it otherwise would have occurred. In essence, the death penalty does not require a life-or-death decision, it only imposes an “unnatural” death now in lieu of a “natural” death whenever nature takes its course. Life, at least life forever, is not an earthly option. Death penalty opponents, however, argue that the inevitability of death does not justify the government’s imposition of an “early” death on a convicted offender.

The only major justification for criminal punishment in general that is not commonly given for the death penalty is reform of the offender. Obviously, in death penalty cases the offender is to be executed instead of being given a lengthy opportunity to reform himself. Note, however, the well-established tradition of permitting the condemned prisoner ample opportunity to consult with a religious advisor, typically a Catholic priest or Protestant minister, as execution draws near. Such religious counseling is
made available even to those condemned prisoners who previously have shown no interest in religion. This suggests at least some governmental recognition of the prisoner's need to reform himself before leaving this life. Death penalty opponents nonetheless decry the condemned prisoner's lost opportunity to engage in fundamental reform and go on to lead a life of meaning and value.

At the other end of the spectrum from the value and meaning of human life, an often-heard argument for executing the offender is that it saves us the cost of providing room and board in a maximum security facility for the rest of the offender's life. Given the life expectancy of such prisoners and the annual costs of operating our prisons, the total expenditure might well be in the range of a million dollars.

The surprising fact is that the death penalty is much more expensive than life imprisonment. The very long and tedious death penalty process, coupled with the rarity of it ending in actual execution, results in a very high cost-per-execution. Research in several jurisdictions has shown that the average cost-per-execution is several million dollars, much more than the cost of keeping that executed prisoner in prison for several lifetimes. This is counterintuitive to those who argue that we shouldn't use precious tax dollars to feed and house convicted murderers. It turns out that many more of those tax dollars are required to execute the prisoner than would be needed to keep him in prison.

Another argument over the death penalty stems from the worldwide movement to abolish it. Essentially all developed nations with very much in common with the United States have abandoned the death penalty for domestic crimes, retaining it perhaps only for treason and war crimes. Among those countries still executing prisoners, China and Iran tend to be the perennial leaders. These are not countries which we tend to emulate in human rights matters. In addition, several international treaties forbid the application of the death penalty against juveniles, for example. Our stubborn refusal to abandon the juvenile death penalty until the Supreme Court found it unconstitutional in _Roper v. Simmons_, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) had put the United States in conflict with this international law. The resulting domestic debate was whether we should be persuaded to join the rest of the global community or just continue to do what we think is best, even if we go it alone.

One final point of contention is both of immediate impact and of long term significance. Advocates of the death penalty point with great concern at violent crime in America, particularly our murder rate. We want answers, not theories, and we want them now. The death penalty is promised by some as the answer to murder, so it tends to be embraced by much of our society. This strong, emotional need for a "quick fix" for violent crime explains at least part of America's strong faith in the death penalty de-
spite so many rational and factual questions concerning it.

Opponents of the death penalty point out that we are latching onto a "quick fix" for the extremely complex problem of violent crime. We might be compared to obese persons who grab at any new weight-loss program promising minimal if any effort on our part. We know in the back of our minds that the probable solution to our weight problem includes regular exercise and a careful diet, but these seem too daunting for us. Similarly, strong reliance upon the death penalty may divert us from seeking appropriate, long-term solutions to our violent crime problems. The "exercise and diet" alternative here requires us to face several of society's toughest problems, and they also seem too difficult for us to accomplish. However, our reliance upon the death penalty "quick fix" for our violent crime problem diverts us from a sober and realistic approach based upon facts and logic.

CHAPTER 3

BASIC CONSTITUTIONAL CHALLENGES AND LIMITATIONS

The bedrock of the American death penalty is the United States Constitution, guaranteeing Due Process and Equal Protection within the criminal justice system and prohibiting Cruel and Unusual Punishments by that system. Not surprisingly, these constitutional guarantees have channeled the application of the death penalty to specific crimes and offenders. Understanding these constitutional principles is critical to decoding death penalty law.

Adding to the challenge is the fact that the Supreme Court has consistently held that these constitutional principles can and do "evolve" over time. Particularly since the early 1970s, even the most basic constitutional challenges and limitations have "evolved" dramatically and have changed the landscape of death penalty law.

§ 3.1 Critical Provisions of the United States Constitution

About 99% of death penalty cases are state prosecutions alleging violations of state law, being tried in state courts, and seeking to impose the state death penalty. Each state has its own constitution,