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Capital Punishment -- Arbitrary by Nature

According to an Associated Press three part series of articles published this past May, the arbitrary nature of imposing the death sentence in the United States today came clearly into focus. This series stated, in part, "In a major study of 1,936 indictments reported to the Ohio Supreme Court by Ohio counties with capital cases from October 1981 through 2002, the Associated Press found that capital punishment has been applied in an uneven and often arbitrary fashion." ("The Difference between Life and death" 2005) Some of the sobering findings of this study included: defendants that killed white victims were more likely to get the death penalty; nearly half of potential death penalty cases resulted in plea bargains; geography played a major role in who was sentenced to death; and defendants who commit similar crimes receive different sentences from judges. Unfortunately, this issue is not limited to Ohio, since similar statistics have been documented in California, Kansas, Alabama, and elsewhere.

The charge that death penalty sentences are arbitrary is certainly nothing new. That phrase was undoubtedly used most notably by Justice Douglas in writing the majority opinion for *Furman v. Georgia*, the famous 1972 Supreme Court decision that outlawed (temporarily) all federal and state executions. Justice White also focused on the arbitrariness of the application of capital punishment, including the appearance of racial bias against black defendants. The court also called executions capricious. It seems incomprehensible that implementation of the ultimate punishment could be administered in a way that is impulsive, unpredictable, or erratic.

Former Supreme Court Justice Potter Stewart compared the arbitrariness of the

death penalty to the freakishness of being struck by lightning. Ironically, that appraisal has proven eerily accurate since, in the last five years, an average of 78 people have been executed in the United States annually; while, in one recent year, 76 Americans were struck by lightning. (Hawkins 2005) Despite these strong legal views regarding the death penalty, the moratorium put in place by the Supreme Court in 1972 ended in 1977 with the execution of Gary Gilmore.

It has been widely assumed by the general public that the rationale for pursuing the death penalty in cases - and an execution being ordered - is based primarily on the brutality of the crime or number of victims. If that were true, the death penalty would seem far less arbitrary. However, there is no consistent pattern that can be found in any state or federal court to make that case. Instead, it is just as likely - in fact more so - that a poor black man will be executed for the murder of one white person than a white man receiving the death penalty for serial murders. A perfect example is Gary Leon Ridgeway (who is white), known as the 'Green River Killer'. Although he has acknowledged killing over 48 people, he pleaded guilty to escape the death penalty.

Contrast that with the case of Gerald Lee Mitchell (who is black), executed in 2001 for a murder he committed when he was 17 years old. The attorney for Mitchell argued that at the time of the murder Mitchell had an IQ of 75 and had been diagnosed as functioning on the borderline level of retardation. He was put to death in spite of calls for clemency from numerous countries, world leaders, and even the president of the American Bar Association. (Progressive Newswire 2001) One of the few exceptions to this trend was Timothy McVeigh, who was executed for the terrorist bombing in Oklahoma City. However, I believe he is the exception that proves the rule.

Mitchell has been outlived by other serial killers besides Ridgeway. The most egregious example is undoubtedly David Berkowitz, the infamous Satan-worshipping 'Son of Sam'. He has his own website now, piously entitled "Forgiven for Life", where he

promotes himself as a 'born again Christian'. The very fact that a serial killer is allowed to live to 'find Jesus' while a man who was a teenage drug addict when he committed a drug-related murder found the needle of a lethal injection, is powerful testimony to the arbitrary nature of sentencing in this country.

Although a majority of the population favors the death penalty, many states are moving to prevent future executions in their states. For instance, in 2000 Illinois Governor George Ryan declared an indefinite death penalty moratorium in his state after the release of 13 death row inmates whose convictions were flawed. (Death Penalty on Trial 2003) The subsequent commission that was formed by the governor recommended improving the mechanism for appointing competent attorneys in capital cases, and eliminating the death penalty when convictions are based solely on the word of jailhouse informants. In 2002 Maryland Governor Parris Glendening declared a similar moratorium in his state. Currently, thirty-four states permit executions, and moratoriums are being promoted in other states.

Another factor that may be considered in determining if death penalty sentences are arbitrary, is the fact that a number of dissimilar methods may be used by states to put someone to death. Here are just a few actual examples (these are not made up): Tennessee - On or after 01-01-99, then lethal injection. Before 01-01-99, then electrocution, unless inmate elects lethal injection. If lethal injection or electrocution are held unconstitutional, then any constitutional method; Utah - Lethal injection. If court holds that defendant has right to firing squad choice under prior law, then firing squad. If lethal injection held unconstitutional, then firing squad. Think the federal government must have something more consistent? Think again: Federal Government - Lethal Injection is general method pursuant to 28 CFR, Part 26. However, under the Violent Crime Control Act of 1994, the method is that of state in which the conviction took place, pursuant to 18 U.S.C. 3596. ("The Death Penalty" 2005)

For many years, worldwide, the trend has been towards the abolition of the death penalty, with over 50 countries taking that step. Primarily, this is due to the belief that the death penalty is wrong in itself, but also considered is the fact that it has not been carried out in any uniform or consistent way. In the United States however, the political climate is such that few politicians are willing to appear soft on criminals by coming out in favor of ending capital punishment. It would appear, barring some dramatic changes in policy, that the death penalty will remain as one of this country's primary instruments of criminal policy. (Rutherford 2003)

Among the countries that still practice capital punishment, 90% of all executions take place in only four countries. The United States is one of those four. So, with our long-standing belief in equal protection under the law for all of our citizens, what countries join America in this 'honor'? Surely it must be other, similar-minded countries with a high regard for democracy, civil rights, and freedom. That is not the case. The United States is joined at the top of this list by these paragons of virtue: China, Iran, and Saudi Arabia. I can not think of any context in which our country would want to be grouped with those countries. ("Death Penalty on Trial" 2003) Granted, this argues more for the complete abolishment of the death penalty, but with sentences being so inconsistent, that just seems to make sense.

One unusual experiment has probably done more to prove the arbitrary nature of the death penalty than anything else has. According to a recent report in The Christian Science Monitor, a software program - known as an artificial neural network - using 28 years of data regarding prisoners facing a death sentence, managed to predict with more than 90 percent accuracy who would be executed. (Leach p.17) The implication, says Dee Wood Harper, one of the researchers and a professor of criminal justice at Loyola University in New Orleans, is that "if this mindless software can determine who is going to die and who is not going to die, then there's some arbitrariness here in the

[United States justice] system."

The problems inherent with the death penalty are abundantly clear. Racial biases in death penalty cases are evident. The inability of poor defendants to receive equal representation is well documented. The death penalty is used many times as a political tool - apart from any merit of the case. Prosecutors have no consistent policy that would tell them when to seek the death penalty. Not to mention the fact that scores of prisoners have been exonerated - while on death row - after their innocence was proven. Unfortunately, we will never know how many of the nearly 1000 prisoners put to death in the last 30 years may have been innocent.

As we go through our daily lives, we make many decisions that may be capricious or arbitrary because they simply do not make a great deal of difference. Conversely, when it comes to decisions of life or death, that must never be the case. Death penalty sentencing, as currently practiced is, without a doubt, arbitrary - and must be ended.

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