

OTHER VIEWS

CAPITAL PUNISHMENT

Arbitrariness undermines integrity of justice system

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This month marks the 30th anniversary of a Supreme Court decision that has had profound consequences in our criminal justice system, perhaps more than any other in the past three decades. *Gregg vs. Georgia* (1976) reinstated capital punishment four years after the court declared all death penalty statutes unconstitutional. Ever since, the justices have tackled one problem after another to make capital punishment work.

As the court's term drew to a close this year, the justices issued three suggestive decisions on the death penalty.

- One opened a new avenue for challenging lethal injection.
- Another allowed lower courts to review a Death Row inmate's evidence of innocence.
- A third approved mandatory death sentences when juries find aggravating circumstances (for example, committing murder for financial gain) equal to mitigating factors (such as the defendant's emotional state).

The opinions indicate that while the justices recognize current trouble spots in the death penalty system, a

majority on the court still believes it's possible to fix whatever problems arise. That view reflects public opinion. Roughly 70 percent of Americans favor capital punishment, despite rising concern that some defendants sentenced to die are later found innocent.

When the Supreme Court ruled the death penalty unconstitutional as administered in 1972, the reason was that jurors had so much discretion they applied this punishment arbitrarily, seemingly at random. Soon after, state legislatures developed new procedures to guide decision-making. Death penalty cases were divided into two parts. The first was the usual trial to establish guilt or innocence. Only if the jury found the defendant guilty did the second phase begin to determine the punishment. Revised death penalty statutes identified aggravating circumstances to supply jurors with criteria for sentencing. Defendants were also permitted to provide evidence on mitigating factors. *Gregg vs. Georgia* approved this legislative scheme of "guided discretion."

A complex system of death penalty laws has evolved since then. Yet the problems that disturbed Supreme Court justices 30 years ago have not gone away. Despite efforts to reduce arbitrariness, death sentences are not necessarily imposed when the crimes are more severe. Other factors like racial bias and inadequate lawyering

BIAS ON DEATH PENALTY

- In 96 percent of the states where there have been reviews of race and the death penalty, there was a pattern of race-of-victim or race-of-defendant discrimination or both.
 - A University of Maryland study found that defendants in Maryland are much more likely to be sentenced to death if they have killed a white person.
 - A New Jersey Supreme Court report found that, "There is unsettling statistical evidence indicating that cases involving killers of white victims are more likely to progress to a penalty phase than cases involving killers of African-American victims."
- Source: Death Penalty Information Center

have played an important part. Defendants sentenced to death are frequently poor and less educated, African American or Hispanic and, as we have discovered more and more, even innocent of the crimes charged.

These circumstances have moved several justices to express concern over the years. Retired Justice Sandra Day O'Connor, a longtime supporter of capital punishment, conceded that some innocent persons may have been executed. Harry Blackmun, who had voted in the 1970s to keep the death penalty, tried to remedy problems over the next two decades. He gave up in 1994, famously saying "I no longer shall tinker with the machinery of death." Last year, Justice John Paul Stevens described "serious flaws" in the system.

My experience working with

death penalty cases has led me to reflect on the problems, too. A few years after *Gregg vs. Georgia* was decided, I served as a law clerk to a judge on the U.S. Court of Appeals for the 11th Circuit. This court heard cases from Florida, Alabama and Georgia, then and now among the states applying the death penalty most frequently.

The cases I saw highlighted what I believe lies at the root of the difficulties. Capital crimes are by definition the most horrifying. They include torture-murders and children as victims; something that stands out from other killings. It is natural for people to react emotionally. Yet jurors are told to presume the accused innocent until proven guilty. We expect police and prosecutors to maintain their professionalism. Judges must con-

duct trials fairly.

We ask a lot of everyone involved, perhaps too much. The legal process is part art and part science. We can never eliminate the role of human psychology. Emotions matter. Add to that problems that may lead conscientious jurors to convict the wrong person: victims make mistaken identifications, witnesses lie, police and prosecutors may falsify evidence.

The result? An imperfect system of criminal justice in which problems multiply in capital punishment cases. Undoubtedly there are trials where the death penalty appears to work, with skilled defense counsel, an impartial jury and due process. Yet apparent success in some cases highlights the systemic breakdown that has occurred. A fundamental idea of American law is that all defendants should receive fair trials all of the time. The persistent failure to come close to that in death penalty cases undermines the integrity of the legal system.

After three decades of operating under the regime established in *Gregg vs. Georgia*, the issue is no longer what the court can do to make capital punishment work. The real issue is why capital punishment won't work, whatever the court does.

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