Decisions of Death

By David Bruck

There are 1,150 men and 13 women awaiting execution in the United States. It's not easy to imagine how many people 1,163 is. If death row were really a row, it would stretch for 1.3 miles, cell after six-foot-wide cell. In each cell, one person, sitting, pacing, watching TV, sleeping, writing letters. Locked in their cells nearly twenty-four hours a day, the condemned communicate with each other by shouts, notes, and handheld mirrors, all with a casual dexterity that handicapped people acquire over time. Occasionally there is a break in the din of shouted conversations - a silent cell, its inhabitant withdrawn into a cocoon of madness. That's what death row would look like. That's what, divided up among the prisons of thirty-four states, it does look like.

This concentration of condemned people is unique among the democratic countries of the world. It is also nearly double the number of prisoners who were on death row in 1972 when the Supreme Court, in *Furman v. Georgia*, averted a massive surge of executions by striking down all the nation's capital punishment laws.

But in another sense, death row is very small. If every one of these 1,163 inmates were to be taken out of his or her cell tomorrow and gassed, electrocuted, hanged, shot, or injected, the total of convicted murderers imprisoned in this country would decline from some 33,526 (at last count) to 32,363 - a reduction of a little over 3 percent. Huge as this country's death row population has become, it does not include - and has never included - more than a tiny fraction of those who are convicted of murder.

It falls to the judicial system of each of the thirty-eight states that retain capital punishment to cull the few who are to die from the many who are convicted of murder. This selection begins with the crime itself, as the community and the press react with outrage or with indifference, depending on the nature of the murder and the identity of the victim. With the arrest of a suspect, police and prosecutors must decide what charges to file, whether to seek the death penalty, and whether the defendant should be allowed to plea-bargain for his life. Most of these decisions can later be changed, so that at any point from arrest to trial the defendant's chances of slipping through the death penalty net depend on chance: the inclinations and ambitions of the local prosecutor, the legal and political pressures which impel him to one course of action or another, and the skill or incompetence of the court-appointed defense counsel.

In the courtroom, the defendant may be spared or condemned by the countless vagaries of the trial by jury. There are counties in each state where the juries almost always impose death, and counties where they almost never do. There are hanging judges and lenient judges, and judges who go one way or the other depending on who the victim's family happens to be, or the defendant's family, or who is prosecuting the case, or who is defending it.

Thus at each stage between arrest and sentence, more and more defendants are winnowed out from the ranks of those facing possible execution: in 1979, a year which saw more than eighteen thousand arrests for intentional homicides and nearly four thousand murder convictions throughout the United States, only 159 defendants were added to death row. And even for those few who are condemned to die, there lies ahead a series of appeals which whittle down the number of condemned still further, sparing some and consigning others to death on the basis of appellate courts' judgments of the nuances of a trial judge's instructions to the jury, of whether the court-appointed defense lawyer had made the proper objections at the proper moments during the trial, and so on. By the time the appeals process has run its course, almost every murder defendant who faced the possibility of execution when he was first arrested has by luck, justice, or favor evaded execution, and a mere handful are left to die.

This process of selection is the least understood feature of capital punishment. Because the media focus on the cases where death has been imposed and where the executions seem imminent, the public sees capital punishment not as the maze-like system that it is, but only in terms of this or that individual criminal, about to suffer just retribution for a particular crime. What we don't see in any of this now-familiar drama are hundreds of others whose crimes were as repugnant, but who are jailed for life or less instead of condemned to death. So the issues appear simple. The prisoner's guilt is certain. His crime is horrendous. Little knots of "supporters" light candles and hold vigils. His lawyers rush from court to court raising arcane new appeals.

The condemned man himself remembers the many points of his procession through the judicial system at which he might have been spared, but was not. He knows, too, from his years of waiting in prison, that most of those who committed crimes like his have evaded the execution that awaits him. So do the prosecutors who have pursued him through the court system, and the judges who have upheld his sentence. And so do the defense lawyers, the ones glimpsed on the TV news in the last hours, exhausted and overwrought for reasons that, given their client's crimes, must be hard for most people to fathom.

I am one of those lawyers, and I know the sense of horror that propels those last-minute appeals. It is closely related to the horror that violent crime awakens in all of us - the random kind of crime, the sniper in the tower or the gunman in the grocery store. The horror derives not from death, which comes to us all, but from death that is inflicted at random, for no reason, for being on the wrong subway platform or the wrong side of the street. Up close, that is what capital punishment is like. And that is what makes the state's inexorable, stalking pursuit of this or that particular person's life so chilling.

The lawyers who bring those eleventh-hour appeals know from their work how many murderers are spared, how few are sentenced to die, and how chance and race decide which will be which. In South Carolina, where I practice law, murders committed during robberies may be punished by death. According to police reports, there were 286 defendants arrested for such murders from the time that South Carolina's death penalty law went into effect in 1977 until the end of 1981. (About a third of those arrests were of blacks charged with killing whites.) Out of all of those 286 defendants, the prosecution had sought the death penalty and obtained final convictions by the end of 1981 against 37. And of those 37 defendants, death sentences were imposed and affirmed on only 4; the rest received prison sentences. What distinguished those 4

defendants' cases was this: 3 were black, had killed white storeowners, and were tried by all-white juries; the fourth, a white, was represented at his trial by a lawyer who had never read the state's murder statute, had no case file and no office, and had refused to talk to his client for the last two months prior to the trial because he'd been insulted by the client's unsuccessful attempt to fire him.

If these four men are ultimately executed, the newspapers will report and the law will record that they went to their deaths because they committed murder and robbery. But when so many others who committed the same crime were spared, it can truthfully be said only that these four men were convicted because they committed murder: they were executed because of race, or bad luck, or both.

If one believes, as many do, that murderers deserve whatever punishment they get, then none of this should matter. But if the 1,163 now on death row throughout the United States had actually been selected by means of a lottery from the roughly 33,500 inmates now serving sentences for murder, most Americans, whatever their views on capital punishment as an abstract matter, would surely be appalled. This revulsion would be all the stronger if we limited the pool of those murderers facing execution by restricting it to blacks. Or if we sentenced people to die on the basis of the race of the *victim*, consigning to death only those - whatever their race - who have killed whites, and sparing all those who have killed blacks.

The reason why our sense of justice rebels at such ideas is not hard to identify. Violent crime undermines the sense of order and shared moral values without which no society could exist. We punish people who commit such crimes in order to reaffirm our standards of right and wrong, and our belief that life in society can be orderly and trusting rather than fearful and chaotic. But if the punishment itself is administered chaotically or arbitrarily, it fails in its purpose and becomes, like the crime which triggered it, just another spectacle of the random infliction of suffering - all the more terrifying and demoralizing because this time the random killer is organized society itself, the same society on which we depend for stability and security in our daily lives. No matter how much the individual criminal thus selected for death may "deserve" his punishment, the manner of its imposition robs it of any possible value, and leaves us ashamed instead of reassured.

It was on precisely this basis … that the Supreme Court in *Furman v. Georgia* struck down every death penalty law in the United States, and set aside the death sentences of more than six hundred death row inmates. *Furman* was decided by a single vote (all four Nixon appointees voting to uphold the death penalty laws), and though the five majority justices varied in their rationales, the dominant theme of their opinions was that the Constitution did not permit the execution of a capriciously selected handful out of all those convicted of capital crimes. For Justice Byron White and the rest of the *Furman* majority, years of reading the petitions of the condemned had simply revealed "no meaningful basis for distinguishing the few cases in which [death] is imposed from the many in which it is not." Justice Potter Stewart compared the country's capital sentencing methods to being struck by lightning, adding that "if any basis can be discerned for the selection of these few to be sentenced to die, it is on the constitutionally impermissible basis of race: Justice William O. Douglas summarized the issue by observing that the Constitution would never permit any law which stated

"that anyone making more than $50,000 would be exempt from the death penalty ... [nor] a law that in terms said that blacks, those that never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable would be the only people executed. ***A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.*** *[Emphasis added.]"*

On the basis of these views, the Supreme Court in *Furman* set aside every death sentence before it, and effectively cleared off death row. Though *Furman v. Georgia* did not outlaw the death penalty as such, the Court's action came at a time when America appeared to have turned against capital punishment, and *Furman* seemed to climax along and inexorable progression toward abolition. After *Furman*, Chief Justice Warren E. Burger, who had dissented from the Court's decision, predicted privately that there would never be another execution in the United States.

What happened instead was that the majority of state legislatures passed new death sentencing laws designed to satisfy the Supreme Court. Eleven years after *Furman*, there were roughly as many states with capital punishment laws on the books as there were before it.

In theory the capital sentencing statutes under which the 1,163 prisoners on death row were condemned are very different from the death penalty laws in effect prior to 1972. Under the pre-*Furman* laws, the process of selection was simple: the jury decided whether the accused was guilty of murder, and if so, whether he should live or die. In most states, no separate sentencing hearing was held: jurors were supposed to determine both guilt and punishment at the same time, often without benefit of any information about the background or circumstances of the defendant whose life was in their hands. Jurors were also given no guidelines or standards with which to assess the relative gravity of the case before them, but were free to base their life-or-death decision on whatever attitudes or biases they happened to have carried with them into the jury room. These statutes provided few grounds for appeal and worked fast: as late as the 1950s, many prisoners were executed within a few weeks of their trials, and delays of more than a year or two were rare.

In contrast, the current crop of capital statutes have created complex, multi-tiered sentencing schemes based on lists of specified "aggravating" and "mitigating" factors which the jury is to consider in passing sentence. Sentencing now occurs at a separate hearing after guilt has been determined. The new statutes also provide for automatic appeal to the state supreme courts, usually with a requirement that the court determine whether each death sentence is excessive considering the defendant and the crime. The first of these new statutes - from Georgia, Florida, and Texas - came before the Supreme Court for review in 1976. The new laws were different from one another in several respects-only Georgia's provided for case-by-case review of the appropriateness of each death sentence by the state supreme court; Florida's permitted the judge to sentence a defendant to death even where the jury had recommended a life sentence; and the Texas statute determined who was to be executed on the basis of the jury's answer to the semantically perplexing question of whether the evidence established "beyond a reasonable doubt" a "probability" that the defendant would commit acts of violence in the future.

What these statutes all had in common, however, was some sort of criteria, however vague, to guide juries and judges in their life-or-death decisions, while permitting capital defendants a chance to present evidence to show why they should be spared. Henceforth - or so went the theory behind these new laws - death sentences could not be imposed randomly or on the basis of the race or social status of the defendant and the victim, but only on the basis of specific facts about the crime, such as whether the murder had been committed during a rape or a robbery, or whether it had been "especially heinous, atrocious and cruel" (in Florida), or "outrageously or wantonly vile, horrible or inhuman" (in Georgia).

After considering these statutes during the spring of 1976, the Supreme Court announced in *Gregg v. Georgia* and two other cases that the new laws satisfied its concern, expressed in *Furman*, about the randomness and unfairness of the previous death sentencing systems. Of course, the Court had no actual evidence that these new laws were being applied any more equally or consistently than the ones struck down in *Furman*. But for that matter, the Court had not relied on factual evidence in *Furman*, either. Although social science research over the previous thirty years had consistently found the nation's use of capital punishment to be characterized by arbitrariness and racial discrimination, the decisive opinions of justices White and Stewart in *Furman* cited none of this statistical evidence, but relied instead on the justices own conclusions derived from years of experience with the appeals of the condemned. The *Furman* decision left the Court free to declare the problem solved later on. And four years later, in *Gregg v. Georgia*, that is what it did.

It may be, of course, that the Court's prediction in *Gregg* of a new era of fairness in capital sentencing was a sham, window dressing for what was in reality nothing more than a capitulation to the mounting public clamor for a resumption of executions. But if the justices sincerely believed that new legal guidelines and jury instructions would really solve the problems of arbitrariness and racial discrimination in death penalty cases, they were wrong.

Before John Spenkelink - a white murderer of a white victim - was executed by the state of Florida in May 1979, his lawyers tried to present to the state and federal courts a study which showed that the "new" Florida death penalty laws, much like the ones which they had replaced, were being applied far more frequently against persons who killed whites than against those who killed blacks. The appeals courts responded that the Supreme Court had settled all of these arguments in 1976 when it upheld the new sentencing statutes: the laws were fair because the Supreme Court had said they were fair; mere evidence to the contrary was irrelevant.

After Spenkelink was electrocuted, the evidence continued to mount. In 1980 two Northeastern University criminologists, William Bowers and Glenn Pierce, published a study of homicide sentencing in Georgia, Florida, and Texas, the three states whose new death penalty statutes were the first to be approved by the Supreme Court after *Furman*. Bowers and Pierce tested the Supreme Court's prediction that these new statutes would achieve consistent and even-handed sentencing by comparing the lists of which convicted murderers had been condemned and which spared with the facts of their crimes as reported by the police. What they found was that in cases where white victims had been killed, black defendants in all three states were from four to six times more likely to be sentenced to death than were white defendants.

Both whites and blacks, moreover, faced a much greater danger of being executed where the murder victims were white than where the victims were black. A black defendant in Florida was thirty-seven times more likely to be sentenced to death if his victim was white than if his victim was black; in Georgia, black-on-white killings were punished by death thirty-three times more often than were black-on-black killings; and in Texas, the ratio climbed to an astounding 84 to 1. Even when Bowers and Pierce examined only those cases which the police had reported as "felony circumstance" murders (i.e., cases involving kidnapping or rape, and thus excluding mere domestic and barroom homicides), they found that both the race of the defendant and the race of the victim appeared to produce enormous disparities in death sentences in each state.

A more detailed analysis of charging decisions in several Florida counties even suggested that prosecutors tended to "upgrade" murders of white victims by alleging that they were more legally aggravated than had been apparent to the police who had written up the initial report, while "downgrading" murders of black victims in a corresponding manner, apparently to avoid the expensive and time-consuming process of trying such murders of blacks as capital cases. Their overall findings, Bowers and Pierce concluded,

> *"are consistent with a single underlying racist tenet: that white lives are worth more than black lives. From this tenet it follows that death as punishment is more appropriate for the killers of whites than for the killers of blacks and more appropriate for black than for white killers."*

Such stark evidence of discrimination by race of offender and by race of victim, they wrote, is "a direct challenge to the constitutionality of the post-*Furman* capital statutes . . . [and] may represent a two-edged sword of racism in capital punishment which is beyond statutory control."

This new data was presented to the federal courts by attorneys for a Georgia death row inmate named John Eldon Smith in 1981. The court of appeals replied that the studies were too crude to have any legal significance, since they did not look at all the dozens of circumstances of each case, other than race, that might have accounted for the unequal sentencing patterns that Bowers and Pierce had detected.

The matter might have ended there, since the court's criticism implied that only a gargantuan (and extremely expensive) research project encompassing the most minute details of many hundreds of homicide cases would be worthy of its consideration. But as it happened, such a study was already under way, supported by a foundation grant and directed by University of Iowa law professor David Baldus. Using a staff of law students and relying primarily on official Georgia state records, Baldus gathered and coded more than 230 factual circumstances surrounding each of more than a thousand homicides, including 253 death penalty sentencing proceedings conducted under Georgia's current death penalty law. Baldus's results, presented in an Atlanta federal court confirmed that among defendants convicted of murdering whites, blacks are substantially more likely to go to death row than are whites.

Although blacks account for some 60 percent of Georgia homicide victims, Baldus found that killers of black victims are punished by death less than one-tenth as often as are killers of white victims. With the scientific precision of an epidemiologist seeking to pinpoint the cause of a new disease, Baldus analyzed and reanalyzed his mountain of data on Georgia homicides,

controlling for the hundreds of factual variables in each case, in search of any explanation other than race which might account for the stark inequalities in the operation of Georgia's capital sentencing system. He could find none. And when the state of Georgia's turn came to defend its capital sentencing record at the Atlanta federal court hearing, it soon emerged that the statisticians hired by the state to help it refute Baldus's research had had no better success in their search for an alternative explanation. (In a telephone interview after the Atlanta hearing, the attorney general of Georgia, Michael Bowers, assured me that "the bottom line is that Georgia does not discriminate on the basis of race," but referred all specific questions to his assistant, who declined to answer on the grounds that the court proceeding was pending.)

The findings of research efforts like Baldus s document what anyone who has worked in the death-sentencing system will have sensed all along: the Supreme Court notwithstanding, there is no set of courtroom procedures set out in law books which can change the prosecution practices of local district attorneys. Nor will even the most elaborate jury instructions ever ensure that an all-white jury will weigh a black life as heavily as a white life.

At bottom, the determination of whether or not a particular defendant should die for his crime is simply not a rational decision. Requiring that the jury first determine whether his murder was "outrageously or wantonly vile, horrible, or inhuman;' as Georgia juries are invited to do, provides little assurance that death will be imposed fairly and consistently. Indeed, Baldus's research revealed that Georgia juries are more likely to find that a given murder was "outrageously or wantonly vile, horrible, or inhuman" when the victim was white, and likelier still when the murderer is black hardly a vindication of the Supreme Court's confidence in *Gregg v. Georgia* that such guidelines would serve to eliminate racial discrimination in sentencing.

At present, 51 percent of the inhabitants of death row across the country are white, as were seven of the eight men executed since the Supreme Court's *Gregg* decision. Five percent of the condemned are Hispanic, and almost all of the remaining 44 percent are black. Since roughly half the people arrested and charged with intentional homicide each year in the United States are white, it would appear at first glance that the proportions of blacks and whites now on death row are about those that would be expected from a fair system of capital sentencing. But what studies like Baldus s now reveal is how such seemingly equitable racial distribution can actually be the product of racial discrimination, rather than proof that discrimination has been overcome.

The explanation for this seeming paradox is that the judicial system discriminates on the basis of the race of the *victim* as well as the race of the defendant. Each year, according to the F.B.I.'s crime report, about the same numbers of blacks as whites are arrested for murder throughout the United States, and the totals of black and white murder victims are also roughly equal. But like many other aspects of American life, our murders are segregated: white murderers almost always kill whites, and the large majority of black killers kill blacks. While blacks who kill whites tend to be singled out for harsher treatment - and more death sentences - than other murderers, there are relatively few of them, and so the absolute effect on the numbers of blacks sent to death row is limited.

On the other hand, the far more numerous black murderers whose victims were also black are treated relatively leniently in the courts, and are only rarely sent to death row. Because these dual systems of discrimination operate simultaneously, they have the overall effect of keeping

the numbers of blacks on death row roughly proportionate to the numbers of blacks convicted of murder - even while individual defendants are being condemned, and others spared, on the basis of race. In short, like the man who, with one foot in ice and the other in boiling water, describes his situation as "comfortable on average," the death sentencing system has created an illusion of fairness.

In theory, law being based on precedent, the Supreme Court might be expected to apply the principles of the *Furman* decision as it did in 1972 and strike down death penalty laws which have produced results as seemingly racist as these. But that's not going to happen. *Furman* was a product of its time: in 1972 public support for the death penalty had been dropping fairly steadily over several decades, and capital punishment appeared to be going the way of the stocks, the whipping post, and White and Colored drinking fountains. The resurgence of support for capital punishment in the country over the last decade has changed that, at least for now.

So far, the power of the death penalty as a social symbol has shielded from scrutiny the huge demands in money and resources which the death sentencing process makes on the criminal justice system as a whole. Whatever the abstract merits of capital punishment, there is no denying that a successful death penalty prosecution costs a fortune. A 1982 study in New York state concluded that just the trial and first stage of appeal in a death penalty case under that state's proposed death penalty bill would cost the taxpayers of New York over $1.8 million - more than twice as much as imprisoning the defendant for life. And even that estimate does not include the social costs of diverting an already overburdened criminal justice system from its job of handling large numbers of criminal cases to a preoccupation with the relative handful of capital ones. But the question of just how many laid-off police officers one execution is worth won't come up so long as the death penalty remains for most Americans a way of expressing feelings rather than a practical response to the problem of violent crime.

It is impossible to predict how long the executions will continue. The rise in violent crime in this country has already begun to abate somewhat, probably as a result of demographic changes as the baby boom generation matures beyond its crime-prone teenage and early adult years. But it may well turn out that even a marked reduction in the crime rate won't produce any sharp decrease in public pressure for capital punishment: the shift in public opinion on the death penalty seems to have far deeper roots than that. The death penalty has become a potent social symbol of national resolve, another way of saying that we're not going to be pushed around anymore, that we've got the will-power and self-confidence to stand up to anyone, whether muggers or Cubans or Islamic fanatics, that we're not the flaccid weaklings that "they" have been taking us for. The death penalty can only be understood as one of the so-called "social issues" of the Reagan era: it bears no more relationship to the problem of crime than school prayer bears to the improvement of public education. Over the past half-century, executions were at their peak during the Depression of the 1930s, and almost disappeared during the boom years of the 1950s; and early 1960s. The re-emergence of the death penalty in the 1970s; coincided with the advent of chronic inflation and recession, and with military defeat abroad and the decline of the civil rights movement at home. Given this historical record, it's a safe bet that whether the crime rates go up or down over the next several years, public support for executions will start to wane only as the country finds more substantial foundations for a renewal of confidence in its future.

In the meantime we will be the only country among all the Western industrial democracies which still executes its own citizens. Canada abolished capital punishment in 1976, as did France in 1981: England declined to bring back hanging. By contrast, our leading companions in the use of the death penalty as a judicial punishment for crime will be the governments of the Soviet Union, South Africa, Saudi Arabia, and Iran-a rogues' gallery of the most repressive and backward-looking regimes in the world. Just last week Christopher Wren reported in the *New York Times* that the total number of executions in the People's Republic of China may reach five thousand or more this year alone.

It's no accident that democracies tend to abolish the death penalty while autocracies and totalitarian regimes tend to retain it. In his new book, *The Death Penalty: A Debate*, John Conrad credits Tocqueville with the explanation for this, quoting from *Democracy in America:*

> *"When all the ranks of a community are nearly equal, as all men think and feel in nearly the same manner, each of them may judge in a moment the sensations of all the others; he casts a rapid glance upon himself, and that is enough. There is no wretchedness into which he cannot readily enter, and a secret instinct reveals to him its extent. . . . In democratic ages, men rarely sacrifice themselves for one another, but they display general compassion for the members of the human race. They inflict no useless ills, and they are happy to relieve the griefs of others when they can do so without much hurting themselves; they are not disinterested, but they are humane..."*

Tocqueville went on to explain that his identification of America's democratic political culture as the root of the "singular mildness" of American penal practices was susceptible of an ironic proof: the cruelty with which Americans treated their black slaves. Restraint in punishment, he wrote, extends as far as our sense of social equality, and no further: "the same man who is full of humanity toward his fellow creatures when they are at the same time his equals becomes insensible to their affliction as soon as that equality ceases."

In that passage, written 150 years ago, Tocqueville reveals to us why it is that the death penalty - the practice of slowly bringing a fully conscious human face to face with the prospect of his own extinction and then killing him - should characterize the judicial systems of the least democratic and most repressive nations of the world. And it reveals too why the vestiges of this institution in America should be so inextricably entangled with the question of race. The gradual disappearance of the death penalty throughout most of the democratic world certainly suggests that Tocqueville was right. **The day when Americans stop condemning people to death on the basis of race and inequality will be the day when we stop condemning anyone to death at all.**

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