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THE Romance OF REVENGE

AN ALTERNATIVE HISTORY OF JEFFREY DAHMER'S TRIAL

— BY SAMUEL R. GROSS

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On Feb. 17, 1992, Jeffrey Dahmer was sentenced to fifteen consecutive terms of life imprisonment for killing and dismembering fifteen young men and boys.¹ Dahmer had been arrested six months earlier, on July 22, 1991. On Jan. 13 he pled guilty to the fifteen murder counts against him, leaving open only the issue of his sanity. Jury selection began two weeks later, and the trial proper started on Jan. 30. The jury heard two weeks of horrifying testimony about murder, mutilation and necrophilia; they deliberated for five hours before finding that Dahmer was sane when he committed these crimes.

After the verdict, a minister who had counselled members of the victims' families told the *Chicago Tribune*, "I think this will be the beginning of a healing."

At his sentencing two days later, Dahmer said, "I take all the blame for what I did.... Your honor, it is over now. This has never been a case of trying to get free. I never wanted freedom." His lawyer told the press that no appeal was planned.

What happened after Dahmer's arrest is of minor importance by comparison with what he did, which is unspeakable. Still, the criminal justice system did very well in this case. It handled a revolting set of crimes and a potentially explosive trial with as much civility, compassion, and dispatch as possible. Half a year after the arrest, the trial was truly over, and, let us hope, the healing did begin.

Jeffrey Dahmer was tried in Wisconsin — one of the fourteen American states that have no death penalty. How would this drama play in one of the thirty-six other states? He would certainly be charged with capital murder, and then a new set of horrors would begin.

CAPITAL PUNISHMENT IN AMERICA

At the outset, it is very unlikely that Dahmer would plead guilty if he faced the death penalty. He might still want to do so, at least initially; after all, at his sentencing Dahmer told the judge, “Frankly, I wanted death for myself.” His lawyers, however, would feel ethically bound to advise him against pleading guilty to a certain death sentence. At a minimum, they would delay entry of a guilty plea for as long as possible, to prevent their client from taking a fatal step that he could not undo. If necessary, they might attempt to get the court to declare him unfit to enter a plea on his own behalf. In addition, if their client were facing the electric chair (or the gas chamber, or lethal injection), Dahmer’s lawyers would be much more concerned about preventing him from cooperating with the police investigation and from confessing fully, repeatedly, and in detail — as he did.

As soon as Dahmer was arrested in Wisconsin, it was clear that he would never be released. (Indeed, less than three years later, on Nov. 28, 1994, Dahmer was killed in prison by another inmate.) That would be equally true if he was charged across the border in Illinois, or in any other death penalty state, but the significance of that fact would be vastly different. In Milwaukee, it meant that the defense had no strong incentive to delay the day of judgment, since the only open question was *which* state institution Dahmer would live and die in. In Chicago, the issue would be *how long* he would survive in state custody: Would he live to die of natural causes or would he be executed, and if executed, when? In that context, Dahmer’s attorneys would slow the proceedings down as much as possible, to make sure that they did whatever could be done in a case in which their client’s life was at stake, and to postpone a judgment that could only hasten his death.

The trial would be delayed by any number of possible pre-trial motions: to determine the present sanity of the defendant, to declare the applicable death penalty statute unconstitutional, to challenge the seizure of evidence from Dahmer’s apartment, to suppress his confessions, to challenge the composition of the jury panel, and so on. Some of the rulings on these motions might be appealed before trial.

As trial approached, the defense would probably try to obtain special procedures to insure the impartiality of the jury: a change of venue, special and time-consuming procedures in jury selection, a further long delay, and so forth.

A capital trial of Jeffrey Dahmer (beginning perhaps a year or two after the arrest) would be a vast event. Jury selection alone could easily take longer than the sanity trial that actually occurred. In addition, the state would have

THE FINANCIAL COST OF PURSUING A CAPITAL PROSECUTION THROUGH TO EXECUTION IS HIGH.

to prove that Dahmer committed each of fifteen cruel, disgusting murders. Dahmer could hardly deny that he killed any of his victims — the physical evidence was overwhelming — but the prosecution might not have an easy time proving that he killed *each* of them, with “malice aforethought” and with “premeditation and deliberation.” Weeks, if not months, would be consumed reviewing his atrocities in detail — pictures of mutilated bodies and body parts, testimony from pathologists and criminologists, descriptions of how the remains were found, evidence of bite marks and knife wounds — all to a packed press gallery, if not on live television. Some of this did happen in the sanity trial that actually took place, but not nearly as much as we might expect in a capital case.

Along the way there would be numerous objections and arguments about evidence and procedure, which would fuel future appeals. Everybody involved — the police, the prosecutors, the judge, the defense attorneys, the city administration, perhaps the jurors, perhaps even some of the victims or their kin — would come in for their fair share of abuse.

At the end of the trial, Dahmer would undoubtedly be found guilty on all or most counts — at the cost of millions of dollars and incalculable additional suffering. Then his sanity would have to be determined, as it was in real life. In this scenario, however, that, too, would be a much slower, more contentious, and more expensive proceeding. Finally — if (as I expect) he was found to be sane — there would be a penalty trial, probably before the same jury.²

The penalty proceeding in Dahmer’s actual case was short: Nine relatives of victims spoke about their sorrow, pain,

and anger, and Dahmer himself spoke briefly. A capital penalty trial would be very different. The victims’ relatives would be allowed to speak as they did, but much more would ride on their statements.³ As a result, the defense attorneys would have the right to cross-examine the bereaved survivors. Some of them might not want Dahmer to be executed; that division could surface. (On the other hand, if some of the victims’ relatives told the jury that they did want him to be executed, that could be a basis for a later reversal on appeal.⁴)

In addition, the defense would probably present testimony from psychiatrists and psychologists who would describe Dahmer’s obvious mental pathologies in elaborate detail; the prosecution would counter with its own experts. Dahmer’s childhood and upbringing would be scrutinized. If there is any pain or humiliation that his parents and relatives have in fact been spared, they would not escape it in a capital case.

And then Dahmer would be sentenced. If he were not sentenced to death, there would be fury, frustration, recriminations, perhaps even violence. If he were sentenced to die, at least the prosecution would have achieved its goal. But it would not be over, not nearly. In that situation, unlike in the actual case, Dahmer would appeal.

A CAPITAL CASE ON REVIEW

Procedurally, the appellate review process for a death sentence is quite complex. First, Dahmer would be

entitled to direct review of the trial record by the state supreme court; if he lost, he could petition the U.S. Supreme Court to review that appeal by a writ of certiorari. If the Supreme Court declined to do so, he could file a petition in a state court (usually a state trial court) for “collateral” or “post-conviction” review, raising issues that could not be determined in the first round of appeals. A typical issue at this stage is that the defendant’s trial or appellate attorneys were ineffective — a claim that frequently cannot be addressed on the trial record alone.

State collateral review is extremely variable. The initial proceeding might be over in hours, or it might take years. If Dahmer lost again at that stage, he could probably appeal to a state appellate court — perhaps even to two levels of state appellate courts — and then, again, seek discretionary review from the U.S. Supreme Court. Finally (if he lost at every stage up to this point) he could petition for federal collateral review by filing a petition for a writ of habeas corpus in a federal district court. If that petition was denied, he could appeal to a federal court of appeals, and then ask the Supreme Court for certiorari review a third time. If his third petition to the Supreme Court was denied, Dahmer could file new (“successive”) petitions for collateral review in state and federal courts, and (if necessary) appeals from the denials of these petitions. Successive petitions are increasingly disfavored, but they still succeed sometimes, at least temporarily.

For the most part, any convicted prisoner has these same appellate options. But there are four differences in capital cases:

² See *Lockhart v McCree*, 476 U.S. 162 (1986).

³ *Tennessee v Payne* 111 S.Ct. 2597 (1991).

⁴ See *Lockhart*, note 2; *State v Huertas*, 51 Ohio St. 3d 22, 553 N.E. 2d 1058 (1990).

BY ALL ESTIMATES, IT IS CONSIDERABLY HIGHER THAN THE COST OF A NON-CAPITAL MURDER CONVICTION FOLLOWED BY LIFE IMPRISONMENT.

First, traditionally, courts are more careful in reviewing claims of error in capital cases. There is a strong norm that is still widely shared (except, perhaps, by the United States Supreme Court) that a defendant who is facing death is entitled to a higher level of due process than one who is merely at risk of losing time or money.⁵

Second, a non-capital sentence can be implemented before appellate review is complete. Some convicted defendants (Leona Helmsley, for example) are allowed to remain free on bail pending direct appeal, but others (Mike Tyson) are remanded to custody; almost all remain imprisoned during collateral review proceedings. Many defendants never make bail at all, and remain in custody from arrest through the completion of their sentences. One way or another, a sentence of imprisonment may be over by the time the federal courts complete their review of a habeas corpus petition in a non-capital case; post-conviction delay favors the state. By contrast, appellate review of any sort is impossible after a prisoner is executed — the case is moot — so death sentences must be stayed during both collateral and direct appeals.

Third, non-capital defendants have limited access to lawyers. Every defendant has the right to an appointed attorney on direct appeal,⁶ but there is no such right for collateral review,⁷ and very few prisoners can afford to hire lawyers. Prisoners with death sentences, however, are almost always represented by attorneys throughout this process, frequently by first-rate volunteer lawyers.

Fourth, capital trials and the appeals that follow are typically far longer and more complex than those in other cases,

even non-capital murder trials.

If Dahmer's capital trial followed the course I have described, it might take one to three years simply to complete the record for the first appeal. After that, the process of reading the record and writing the briefs might take another six months to a year, perhaps longer. After the case is briefed, the state supreme court would schedule oral argument. This might entail another six- or twelve- or twenty-month delay, depending on the backlog of other capital and non-capital cases. Eventually, the court would hear the arguments and reach a decision — after another lengthy delay during which the judges and their staff digest the small mountain of paper such a case generates, analyze and decide the issues, and come to terms with their own feelings about this horror. They could reverse Dahmer's murder convictions (or some of them), or they could affirm the convictions and reverse the sentence. Karima Wicks, former research director of the NAACP Legal Defense and Educational Fund's Death Penalty Project, estimates that perhaps half of all death sentences or the underlying convictions are reversed on initial appeal — a far higher reversal rate than in other criminal cases. Dahmer's appeal could present excellent grounds for reversal; in a case as complex and messy as this one would be, there is plenty of room for misconduct, unfairness, and error. Nonetheless, I expect that his death sentence, like those of most serial murderers, would be affirmed.

If the death sentence were affirmed at this initial review (perhaps four years or longer after the verdict), the process would continue. In general, the likelihood of success diminishes at each successive stage of defense that follows

direct review, but the chance of winning something somewhere in the multi-step process is still substantial. Equally important, each stage takes time. If there is a reversal at any point, the case is sent back to an earlier point in the process — for a habeas corpus hearing by the federal district court, for a redetermination of an issue on appeal by the state supreme court, for a new penalty trial in the state trial court, etc. — and restarts from that point. Any time this happens, the state has to decide whether to throw in the towel and settle for a life sentence, or start up the hill again. In “ordinary” capital cases, the prosecutors frequently decide to give up the quest after an appellate setback. In Dahmer's case, the prosecution would probably never give up, in part because every visible event would produce a new wave of publicity, new anger, new recriminations — and renewed suffering for the survivors of all the victims.

NO END IN SIGHT

How would it end? Perhaps after five or ten years Dahmer would have his death sentence reversed and reduced to life imprisonment. This is the same sentence he in fact received, but it would not carry the same meaning; it would cause an explosion of pain and anger. Many who were satisfied when he was sentenced to the maximum penalty — life — would be furious that he received only life when death was possible. They would feel devalued, humiliated, cheated — and it's easy to understand why, considering the enormous costs of achieving this outcome, and comparing Dahmer's crimes to those of other murderers who are occasionally put to death.

⁵ One of the classic statements of this position is by Justice Harlan, concurring in the judgment in *Reid v Covert*, 345 U.S. 1, 77 (1956): “I do not concede that whatever process is ‘due’ and offender faced with a fine or prison sentence necessarily satisfies the requirements of the constitution in a capital case. The distinction is

by no means novel ... nor is it negligible, being literally that between life and death.” See also, for example, *Woodson v N. Carolina*, 428 U.S. 280, 305 (plurality opinion) (1976).

⁶ *Douglas v California*, 372 U.S. 353 (1963).

⁷ *Murray v Giarrano*, 492 U.S. 1 (1989).

On the other hand, Dahmer might someday be executed. That possibility, presumably, is the only justification for this entire process. Perhaps his death would afford some satisfaction to the relatives of his victims, but could that satisfaction possibly make up for the years of gratuitous agony they would have endured? What they really want is an end. On April 21, 1992, Robert Alton Harris became the first person to be executed in California in twenty-five years. The day before the execution, a CNN television news report on the mother of one of the victims stated that “[her] grief began nearly fourteen years ago when her son Michael and his friend John Mayeski were killed by Robert Alton Harris. Over the years her pain has gotten worse instead of better, as Harris’ execution dates came and went.” The report quotes the mother as saying: “It’s time that this particular case came to an end. It’s been inhumane and terrible anguish for the family members, and we want peace.”

And when would this final act take place? There is no saying. As of September 1992, the average stay on death row for all prisoners executed since 1976 is eight years and five months; for those executed since 1989 it is more than ten years, and many are on death row for crimes that took place twelve years ago, or longer, and yet they have no execution dates in sight.⁸ Probably, most death row inmates will never be executed. There is no plausible way to estimate the likely delay for a defendant who is sentenced to death in 1992 and who is among the minority of such defendants who are destined for execution. The best description is that he will remain in limbo and his case will remain open indefinitely.

THE HUMAN AND FINANCIAL COSTS

Obviously, Jeffrey Dahmer is not typical of homicide defendants, and his trial would not be typical of capital trials. Most capital cases are simpler, cheaper, and less promiscuously agonizing. The scenario I have sketched shows what the death penalty *can* do to a homicide case, under extreme circumstances. Often there are fewer steps to the process — or they are less carefully executed — for reasons that are as arbitrary and unfair as any other aspect of the system: because the defendant was inadequately represented, or, in the later stages of review, not represented at all. In general, cases that are less expensive and less excruciating than Dahmer’s to begin with are subject to the same range of distorting effects that I have described, but on a smaller scale.

Although cases like Dahmer’s are rare, they are central to any discussion of capital punishment. These are the crimes for which there is the strongest consensus that the punishment should be death, and these are the defendants who are most likely to be sentenced to death — and sometimes executed. It’s important to consider the damage the death penalty can do in those situations in which we want it most.

The financial cost of pursuing a capital prosecution through to execution is high; by all estimates, it is considerably higher than the cost of a non-capital murder conviction followed by imprisonment for life.⁹ But that expense — multiplied by ten, or twenty, or thirty executions a year — captures only a small fraction of the

price of running a capital sentencing system. For every murderer who is executed there may be ten on death row who will never be executed, and many more who were convicted of capital murder but not sentenced to death, or tried for capital murder and convicted of lesser offenses, or charged with capital murder but tried or allowed to plead guilty to less serious charges, or acquitted entirely. There are thousands of such cases each year, and for each one we pay some proportion of the added costs of an execution — less when the process is aborted early, more the closer it approaches the ostensible goal.

Estimates of the total cost of using the death penalty are exorbitant. In July 1988, for example, the *Miami Herald* reported that since 1973 the state had spent over \$57 million on capital punishment and executed eighteen prisoners, at a cost of over \$3.2 million a piece. In states with fewer executions, the costs per head are necessarily higher. In 1987, the Kansas legislature rejected the death penalty for financial reasons. A budgetary analysis prepared for the legislature estimated that the added expense would be \$10 million in the first year, and at least \$50 million before the first execution took place several years down the road.

Money provides a measure of the magnitude of an enterprise, and in this case the measure is startling. Still, we are a rich country. We can afford to spend \$200 million or half a billion dollars a year on death sentences, if we want to. The personal and social costs of process are not quantifiable, but they may be harder to bear.

⁸ These calculations are based on NAACP Legal Defense and Educational Fund, *Death Row U.S.A.*, Spring 1993, and additional data provided by courtesy of Ms. Karima Wicks, research director of the NAACP Legal Defense Fund’s Capital Punishment Project. The averages given exclude “voluntary executions” — cases in which a prisoner was executed after waiving an available avenue of review.

⁹ M. Garey, “The Cost of Taking a Life: Dollars and Sense of the Death Penalty,” 18 *UC Davis Law Review* 1221–1273 (1985); R.L. Spangenberg and E.R. Walsh, “Capital Punishment or Life Imprisonment? Some Cost Considerations,” 23 *Loyola of Los Angeles Law Review*, 45–58 (1989); P.J. Cook & D.B. Slawson, *The Costs of Processing Murder Cases in North Carolina*, Terry Stanford Institute of Public Policy, Duke University.

¹⁰ See Francis A. Allen, *The Decline of the Rehabilitative Ideal, Penal Policy and Social Purpose*, 4–8 (Yale Univ. Press: New Haven, 1981); Francis A. Allen, “Criminal Justice, Legal Values and the Rehabilitative Ideal,” 50 *J. of Crim. L., Criminology & Police Sci.* 226 (1959).

VENGEANCE AND THE BUREAUCRATIC STATE

Why would anyone even consider a death penalty regime of the sort we now have?

There are two parts to the question. First: Why do so many people want the death penalty at all? Second: Having chosen to use the death penalty, why have we ended up with this Kafkaesque system to implement it?

The most telling answer to the first question is the simplest and most natural: People want the death penalty for revenge.

Vengeance has an ambiguous position in our culture. In more liberal times, many would disclaim revenge as a justification for punishment: it seemed too cruel, barbaric, inhumane, selfish, pessimistic. To many, vengeance is un-Christian. A liberal and civilized people should not seek revenge but improvement, of the offender or of society.¹⁰ Even now, in an increasingly conservative era when revenge is regularly described as a justification for punishment, it is renamed "retribution." The change is telling; it removes the subject from the description. Revenge is what the avenger wreaks; retribution is simply what happens to the wrong-doer.

Revenge is not the only possible justification for capital punishment. Most people who favor capital punishment also believe that it deters homicide. Unlike revenge, deterring killing is a universally acceptable objective.¹¹ This would be a powerful justification for the death penalty, if true. But it is not, in two senses. First (although I will not describe the evidence in this context), there is no

systematic evidence that the death penalty for murder *does* deter homicide to a greater extent than lengthy prison terms. The best evidence suggests that it has no effect on homicide rates, and a few studies hint that it might increase the number of murders.¹² Second, belief in deterrence is not the basis for the position of most proponents of capital punishment. In one survey, for example, when asked if they would continue to support the death penalty if it were proved to have no deterrent effect, two-thirds or more of respondents said yes.¹³

I have no difficulty understanding the desire for revenge, even deadly revenge, especially in cases like Dahmer's — a vicious predator who raped, tortured, killed, and dismembered helpless victims, some of them mere children. If a relative of a victim did kill him, I would feel a great deal of sympathy for that relative, and little, if any, for Dahmer. But we do not allow relatives to avenge their dead, not even in egregious cases, and state-administered capital punishment is a poor vehicle for revenge.¹⁴

A personal act of vengeance, properly executed, is timely, passionate, and personal — the grieving father tracking down and killing the killer of his child. The death penalty, in this society, is none of these things. It is slow, passionless, and impersonal, unreliable and rare. And that brings us to the answer to the second question: Why do we have the bizarre death penalty apparatus I have described?

Part of the problem is that we feel that we have to take great care to insure that the death penalty is used fairly. The most basic concern is to avoid errors. Nobody wants a part in executing the wrong person, or even the right person if the judgment is marred by serious mistakes

on issues of intent or sanity.

If capital punishment were restricted to serial killers with bodies in the freezer, the question of possible errors might not be very troubling. Obviously Jeffrey Dahmer (or John Gacy or Ted Bundy) acted with malice and premeditation, without provocation, and under no threat of personal danger. Moreover, most people probably don't care whether a serial murderer is insane; they want him killed just the same. But our death penalty laws are not restricted to the rare, extreme, and bizarre murders. A capital trial is much more likely to involve an addict who kills a checkout clerk at a convenience store. In that context, the jury's judgment may well turn on uncertain and disputed evidence, or on slippery interpretations.

There is no obvious best way to avoid errors in criminal prosecutions. Our American adversarial system of adjudication, for better or worse, relies heavily on procedural devices to guarantee fairness and accuracy.¹⁵ An accused has no particular right to a careful and thorough investigation by the police. He does, however, have rights to counsel, to remain silent, to privacy, to an impartial jury, to confront his accusers, to present a defense, and so on. These rights may be implemented by judicial action at every stage — pre-trial, trial, post-trial, appeal, collateral review. All this takes time, but we can hardly deny these rights to those defendants who stand to lose the most simply because time (for a change) is on their side. In the heat of the moment in some cases we may want to drag the culprit straight out and hang him. But when that passion subsides we will still believe that those the state wishes to kill are entitled to at least the same level of

¹¹ See, e.g., P.C. Ellsworth and L. Ross, "Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists," 29 *Crime and Delinquency*, 116–16 (1983); and Alec Gallup and Frank Newport, "Death Penalty Support Remains Strong, But Most Felt Unfairly Applied," *The Gallup Poll News Service*, Vol 56 No. 81, 3 (June 6, 1991).

¹² R. Hood, *The Death Penalty: A Worldwide Perspective*, 117–148 (Oxford: Clarendon Press, 1989); R. Lempert, "Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment," 79 *Michigan Law Review* 1776–1231 (1981); Zimring and Hawkins, *Capital Punishment and the American Agenda*, 167–186 (New York: Cambridge University Press, 1986); and W.J. Bowers and G.L. Pierce,

"Deterrence or Brutalization: What is the Effect of Executions," 26 *Crime and Delinquency*, 511 (1980).

¹³ Ellsworth and Ross (cited in note 11).

¹⁴ Lempert, 1981, 1185–1187.

¹⁵ See Samuel R. Gross, "Loss of Innocence: Eyewitness Identification and Proof of Guilt," 16 *Journal of Legal Studies*, 395–453 (1987).

THE SYSTEM DOES PRODUCE WHAT THE PUBLIC DEMANDS:

procedural care and due process as other defendants — and probably more.

Factual errors are not the only problem. Through the 1980s, nearly 20,000 people were arrested for homicides annually; of these, fewer than 2 percent were sentenced to death. Were these 200 to 300 people really the most heinous murderers we caught? Or were they chosen by chance, or, worse, because of some impermissible criteria — race, poverty, the race of their victims, and so forth? Walter Berns, an articulate advocate for capital punishment, has summarized the problem well: However strongly one may favor the death penalty in principle, its propriety in practice “depends on our ability to restrict its use to the worst of our criminals and to impose it in a nondiscriminatory fashion.”¹⁶

The dangers of arbitrariness and discrimination are not restricted to capital punishment, but they are at their worst in this context, for three reasons.

Infrequency. Again, if we limited the death penalty to serial murders, we could probably do a decent job of identifying capital homicides and imposing death sentences uniformly. Instead, most death-penalty states select a small number of capital cases from a large and amorphous range of death-eligible crimes. Many are at risk, but few are condemned. As a result, every potentially capital case is subject to a series of discretionary choices — by the police, the prosecutor, the judge, the jury — each of which might be based on happenstance or bias.

Salience. The death penalty is a troubling and divisive institution. A substantial minority (18 percent in a 1991 Gallup and Newport poll) still oppose it in principle, and those who

favor the death penalty are divided about when and how to use it. As a result, life or death decisions may turn on the identity of the prosecutor, the jurors, or the judge, or on their reactions to peculiar, incidental facts. For example, the most memorable fact of Robert Alton Harris’s crimes is that after he killed his two teenage victims, he ate the hamburgers they had bought at Jack-in-the-Box. This incident was mentioned repeatedly in news stories throughout the fourteen-year life of the case; it almost certainly influenced the jury that sentenced him. How much does this five-second sound bite tell us about Harris? Would he have deserved death any less if he had eaten lunch before he kidnapped his hapless victims?

Juries. Jury sentencing is uncommon for non-capital crimes in the United States, but it is the rule in capital cases. In other words, the hardest and most discretionary sentencing decisions are made by ad-hoc panels of one-time lay decision makers — hardly a process calculated to minimize arbitrariness and discrimination. And yet we believe that jury sentencing plays an important role in legitimating the death penalty, and ensuring that its use reflects community values.¹⁷

The sum of the effects of these forces is a depressing fact: Consistency in criminal sentencing is least likely in decisions on life and death, where it matters most. Not surprisingly, there is a great deal of evidence that race and chance both play large roles in determining who is sentenced to death in the United States, and who is spared.¹⁸

Consider two stylized capital punishment systems. System I: We grab every person who commits a murder and quickly kill them. System II: We (equally

efficiently) grab every person who commits a murder and put them into a holding pen. After five years, we empty out the pen and decide which of the inmates to kill. System I has a harsh, Old Testament quality, but if you want revenge, it might seem right. The execution is a direct response to the murder. System II, however, is a closer approximation of what we actually do, and must do; but in this version the task is very different. It’s not just the wait, it’s the process of *choosing* who will die and who will live: Death is now served by a repetitive, comparative, untrustworthy, selection procedure.

Judges and legislators are aware of this arbitrariness and potential discrimination. They have tried to curb these problems by creating an array of elaborate procedural devices such as trial-like capital penalty hearings and post-verdict “proportionality review” of death sentences. These procedures may or may not have any effect — they certainly are not entirely successful — but they do take time. Moreover, the knowledge that death row prisoners may have been unfairly or arbitrarily singled out makes judges move more carefully and less expeditiously on all other procedural points as well.

Perhaps executions could be speeded up somewhat. I can imagine that we could contrive to conduct most of them within five years of arrest, rather than ten. We can’t go much faster than that without dismantling the procedural structure of our system of criminal justice — a structure that was created largely to protect defendants. This cuts strongly against the grain; it will not happen. Given that limitation, there is little incentive to accelerate the process at all,

¹⁶ W. Berns, “Defending the Death Penalty,” 26 *Crime and Delinquency*, 511 (1980).

¹⁷ *Witherspoon v Illinois*, 391 U.S. 510, 519 (1968).

¹⁸ See D.C. Baldus, G.G. Woodworth, and C.A. Pulaski Jr., *Equal Justice and the Death Penalty*, (Northeastern University Press, 1990); S.R. Gross and R. Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing*, (Northeastern University Press, 1989).

¹⁹ *Death Row U.S.A.*, cited in note 8.

²⁰ P.C. Ellsworth, “Attitudes Toward Capital Punishment: From Application to Theory,” a paper presented at the SESP Symposium on Psychology and Law, Stanford University, October 1978.

²¹ H.A. Bedau, *The Death Penalty in America*, at 68 (New York: Oxford University Press, 1982).

A WIDELY AVAILABLE DEATH PENALTY THAT IS RARELY CARRIED OUT.

since even a five-year delay is enough to gut the meaning of revenge. The man you wanted to kill was the abusive robber, high on crack, who pistol whipped and shot two customers at a Seven-Eleven store in 1984. Instead, in 1990, the state electrocutes a balding, religious model prisoner in a neat blue denim uniform.

The processes I have described feed on themselves, and on each other. To reduce errors in capital cases we generate new procedures; these procedures must be followed in future cases, which increases delay. As executions are delayed, they are increasingly drained of content as acts of revenge; as a result, it is increasingly easy to accept further delays, or to forego the killings altogether. As delays and reversals become more common, executions become increasingly rare; the more rare they are, the more likely it is that those who are killed will be the victims of bias or caprice — and the more distasteful the task of singling out and killing the few who will die. Rising concerns about discrimination and arbitrariness — and growing uneasiness with the whole process — in turn, generate new doubts, new procedures, and new delays.

MORE OF THE SAME

At a glance, the death rows of America seem headed for a massacre. As of April 1993, there were 2,729 prisoners on death rows in the United States, and about 250 new death sentences are meted out each year.¹⁹ Public support for the death penalty is intense, politicians fan the heat, and condemned prisoners pile up like dry

brush. When Robert Alton Harris was put to death in April 1992, some observers speculated that the first execution in California in a quarter of a century would be the spark.

This was hardly the first time that massive executions have been predicted. It hasn't happened. I do not think it will happen now either, although the rate of executions is likely to move up a notch from twenty or thirty a year to forty or conceivably fifty. That would be a change, but only in degree, not in kind. Even at fifty a year, executions would still be the exception rather than the rule after a death sentence — and they would still be slow, costly and unpredictable.

My basic argument why little is likely to change has two parts.

First, support for the death penalty does not necessarily mean support for executions. Public attitudes on criminal sentencing are notoriously inconsistent. Several researchers have asked people about their attitudes toward perceived and actual sentences. The results show basic inconsistencies between what we say we want, and what we ourselves would actually do. In the context of the death penalty, many say they are for "mandatory" death sentences for certain crimes — killing a police officer, for example, or homicide in the course of a rape — but when given an actual sentencing decision, choose life imprisonment as the correct penalty in just such a case.²⁰ Hugo Bedau has argued that many of those who say they favor capital punishment may want "only the legal threat of the death penalty, coupled with the judicial ritual of trying, convicting, and occasionally sentencing a murderer to death, rather than actual executions."²¹ Some people, I expect, support capital punishment in order to keep every possible

weapon in the public arsenal; others favor the death penalty (with or without executions) simply because they do not believe that life imprisonment lasts for life.²²

Second, and more important, even those who do want executions do not want many. Many Americans, perhaps a majority, want some executions to take place as public statements about crime and murder, but there is widespread aversion to the prospect of numerous executions. A single execution is not truly an act of revenge but it looks like one; it symbolizes our desire and our willingness to seek vengeance. When we single out one murderer we can focus on what he did to deserve death. But if we were to conduct a hundred executions in close order, we would lose any illusion of individual vengeance; all we would see is mass slaughter by the state. The symbolism would change; the issue would now be the nature of our society, our culture. At a minimum, it would be a humiliating comment on our failure to control violence by less bloody means; at worst it would provoke repulsive comparisons with Hitler and Stalin.

In short, appearances to the contrary notwithstanding, the death penalty we have is pretty much the death penalty we want. The costs of the process are mostly hidden from view. Politicians and judges grumble about the delays, but the system does produce what the public demands: a widely available death penalty that is rarely carried out.

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²² Ellsworth & Ross, 29 *Crime and Delinquency* at 151–52, (cited in note 11) (50 percent of sample agreed that "Even when a murderer gets a life sentence, he usually gets out on parole, so it is better to execute him," and 65% agreed that "One advantage of the death penalty is that it makes it impossible for convicted murderers to later go free on account of some legal technicality.")

Professor Samuel Gross's interest in the death penalty dates back to his work as a criminal defense attorney in San Francisco in the 1970s. He has written extensively on the topic, on the use of expert witnesses in litigation, and on settlement and trial patterns in civil cases. He teaches Evidence, Criminal Procedure, and courses on the use of social science in litigation.