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THE ROMANCE OF REVENGE: CAPITAL PUNISHMENT IN AMERICA

Samuel R. Gross

Before serving on the Royal Commission [on Capital Punishment]... I should probably have said that I was in favor of the death penalty, and disposed to regard abolitionists as people whose hearts were bigger than their heads. Four years of close study of the subject gradually dispelled that feeling. In the end I became convinced that the abolitionists were right in their conclusions—though I could not agree with all their arguments—and that so far from the sentimental approach leading into their camp and the rational one into that of the supporters, it was the other way about.

—Sir Ernest Gowers (1956, p. 8)

AN ALTERNATIVE HISTORY OF JEFFREY DAHMER

On February 17, 1992, Jeffrey Dahmer was sentenced to 15 consecutive terms of life imprisonment for killing and dismembering 15 young men and boys (Associated Press 1992a). Dahmer had been arrested six months earlier, on July 22, 1991. On January 13 he pled guilty to the fifteen murder counts against

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him, leaving open only the issue of his sanity. Jury selection began two weeks later, and the trial proper started on January 30. The jury heard two weeks of testimony about murder, mutilation and necrophilia; they deliberated for 5 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 said "I think this will be the beginning of a healing" (Worthington 1992). 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" (Associated Press 1992b). His lawyer told the press that no appeal was planned (Associated Press 1992a).

What matters most about the Dahmer case is what he did, which is unspeakable. What happened after his arrest is of minor importance by comparison. Still, within the sphere in which it operates, 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 Milwaukee, Wisconsin—one of the 14 American states that have no death penalty. How would this drama play in one of the 36 other states—Illinois, or California, or Texas, or Pennsylvania? He would certainly be charged with capital murder, and then a new set of horrors would begin.

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." (Worthington 1992) His lawyers, however, would feel bound to advise him against pleading guilty to a certain death sentence. At a minimum, they would delay any possible 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 (and probably more important), if their client were facing the electric chair (or the gas chamber, or lethal injection) Dahmer's lawyers would be much more concerned to prevent him from cooperating with the police in their investigation. They might not be able to keep their client from confessing fully, repeatedly, and in detail—as he did (Worthington 1992)—but then again they might.

As soon as Dahmer was arrested in Wisconsin, it was clear that he would never be released. That would be equally true 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, both 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. The impartiality of the jury was a comparatively minor concern in Dahmer's actual trial last January, in part because relatively few issues were in dispute. In addition, Dahmer's chief defense attorney (who did not ask for a change of venue) said publicly before trial that "The police and prosecutors here [have] worked to limit the effects of pre-trial publicity that could bias jurors" (Associated Press 1991). Perhaps the police and prosecutors would behave as well in the heat of a capital trial, but perhaps not. Certainly that sort of professional courtesy and cooperation between the sides is less common in capital prosecutions. For example, before the trial of Robert Alton Harris in San Diego, California, in 1978, the District Attorney not only fanned public outrage by telling the press that the "death penalty is designed to deal with this kind of offense," but engaged in a well publicized battle with the local United States Attorney for the privilege of bringing Harris to trial first.¹

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 to prove that Dahmer committed each of 15 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, let alone that he did so 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 in fact occurred, but not nearly as much. Along the way there would be numerous objections and arguments and disputes 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 undoubtedly would 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 (Associated Press 1992a). 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 psychiatrists and psychologists. The waves of destruction that a capital trial can generate would continue to spread. Dahmer's childhood and his 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.

The Dahmer case was a traumatic crisis for Milwaukee. The police were charged with racism and homophobia for their handling of an incident on May 27, 1991, when two officers brought a dazed young victim back to Dahmer, who killed him as soon as the officers left. That incident, and other aspects of the police conduct, provoked bitter racial and political disputes. After the verdict, various civic leaders expressed hope that there would now be an end to the national and international publicity the case generated, and to the divisions it provoked (Worthington 1992). A full capital trial would not only delay that conclusion, it would pour salt on the wounds all around. And then (unlike the actual case) Dahmer would appeal.

Procedurally, the process of appellate review of 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 United States 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, and 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 United States 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.⁵ But there are four differences. *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.⁶

Second, a non-capital sentence can be implemented before appellate review is complete. Some convicted defendants are allowed to remain free on bail pending direct appeal (Glaberson 1992) but others are remanded to custody (New York Times 1992); almost all remain imprisoned during the pendency of collateral review proceedings. Indeed, many defendants don't even make bail before trial, and remain in custody from arrest through the completion of their sentences. Murder defendants are particularly unlikely to be released on bail at any stage, since the sum of money required (if bail is set at all) is usually prohibitive. 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 collateral proceedings as well as on direct appeals. As a result, the incentive to pursue all avenues of review is much greater for a defendant under sentence of death.

Third, non-capital defendants have limited access to lawyers. Every defendant has the right to an appointed attorney on direct appeal,⁷ but there is no such right for collateral review,⁸ and very few prisoners who are not on death row 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 a year 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. This sounds slow—it *is* slow—but the trial records in comparable cases often consist of ten- to twenty-thousand pages of transcript, plus reams and boxes of exhibits, and the initial appeals often raise dozens of separate legal issues.

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. Overall, perhaps 50 percent of death sentences (or the underlying convictions) are reversed on initial appeal, a far higher reversal rate than in other criminal cases.⁹ 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 after the verdict, perhaps longer) the process would continue. In general, the likelihood of success by the defense diminishes at each successive stage that follows direct review, but there are quite a few separate steps, and the chance of winning something somewhere is still substantial. Equally important, each stage takes time—some more, some less. 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, and so forth—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 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.

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 last February, 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 only received 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.

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 need is an end. On April 21, 1992, Robert Alton Harris became the first person to be executed in California in 25 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 14 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's 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."¹⁰

And when would this final act take place? There is no saying. There were 2,729 prisoners on death rows in the United States, as of April, 1993.¹¹ About 250 new death sentences are meted out each year. In 1992 31 prisoners were executed, the highest total since 1962.¹² As of September 1992, the average stay on death row for all prisoners executed since 1976 was eight years and five months; for those executed since 1989 it is over 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.¹³ 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 1993, 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.

Obviously, Jeffrey Dahmer is not typical of homicide defendants, and a capital trial in his case 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 at trial or on appeal, or because, in the later stages of review, he was not represented at all. In general, however, 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. Other capital cases may be less costly, in every respect, but they are also much more likely to fall by the wayside because the prosecution accepts a plea bargain to life imprisonment, or the jury convicts of second degree murder or sentences the defendant to life imprisonment, or the state gives up after the case is reversed and remanded on appeal, or the case simply lingers and is forgotten somewhere in the long queue leading to the gallows.

The financial cost of pursuing a capital prosecution through to execution is high; by all estimates, considerably higher than the cost of a non-capital murder conviction followed by imprisonment for life (Nakell 1982, Garey 1985, Spangenberg and Walsh 1989). But that expense—multiplied by 10, or 20, or 30 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 as many again who were convicted of capital murder but not sentenced to death, and a comparable group who were tried for capital murder and convicted of lesser offenses or acquitted entirely, and two or three dozen defendants who were charged with capital murder but who were tried for—or allowed to plead guilty to—less serious charges. In each of these cases (and there are thousands a year) 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. The total cost of using the death penalty is exorbitant, by all estimates. In 1988, for example, the *Miami Herald* reported that since 1973 the state had spent over \$57 million on capital punishment and executed 18 prisoners, at a cost of over \$3.2 million apiece (von Drehle 1988a). 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 (Prejean 1988; von Drehle 1988b).

Money can be counted. It 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 even half a billion dollars a year on death sentences, if we want to. The personal and social costs of the process are not quantifiable, but they may be harder to bear.

VENGEANCE AND THE BUREAUCRATIC STATE

Why would anyone even consider a death penalty regime of the sort we now have? The wisdom of law makers of Wisconsin, of Kansas, of Michigan, of

West Virginia, seems so obvious. And yet these states are in a minority. Why?

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 the desire for 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 (Allen 1981, pp. 4-8; Allen 1959). Even now, in a more conservative era when revenge is regularly described as a justification for punishment, it is cleansed and 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.¹⁴ Detering killing (unlike revenge) is a universally acceptable objective.¹⁵ 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 periods of imprisonment. On the contrary, the best evidence suggests that it has no effect on homicide rates (Hood 1989, pp. 117-148; Lempert 1981; Zimring and Hawkins 1986, pp. 167-186), and a few studies hint that it might increase the number of murders (Bowers and Pierce 1980). Second, belief in deterrence is not the basis for the position of most proponents of capital punishment—two-thirds or more, when asked if they would continue to support the death penalty if it were proven to have no deterrent effect, say "Yes" (Ellsworth and Ross 1983, p. 147; Gallup and Newport, see note 14). In a 1991 Gallup poll, supporters were asked why they favor the death penalty; 50% said "A life for a life," but only 13 percent said "It is a deterrent" (Gallup and Newport, see note 14).

I have no difficulty understanding the desire for revenge, even deadly revenge. When I read about cases like Dahmer's—a vicious predator who raped, tortured, killed, and dismembered helpless victims, some of them mere children—one of my reactions is "Kill the bastard." 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 vengeance (Lempert 1981, pp. 1185-1187).

A personal act of vengeance, properly executed, is timely, personal, and passionate—the grieving father tracking down and killing the killer of his child. The death penalty, as we use it, is not personal vengeance. The impulse to kill

those who kill our kin is surely the root of the institution, and an execution may satisfy the diffuse desire for revenge that many people feel after any murder in proportion to its proximity and its cruelty. But an execution is a collective act embodying a social judgment that killers (or some of them) should be killed by the state, and the main retributive justifications for executions are more abstract and elaborate: to reaffirm fundamental values, to exclude and separate us from those who break sacred bonds, to balance moral accounts. The process by which we carry out this judgment has little in common with the conduct of an avenger. It is slow, passionless, impersonal—unreliable, and rare. And that brings us 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 an innocent person (and it does happen) (Bedau and Radelet 1987). More frequently, the possible errors are smaller, or at least more slippery. What role did the defendant play in the killing? Was he acting in self defense?¹⁶ Did his intentions constitute “malice”? Did they amount to “premeditation”? To what extent was he provoked? How intoxicated was he? Was he legally insane?

If capital punishment were restricted to serial killers, these questions might not be very troubling. Obviously Jeffrey Dahmer (or John Gacy, or Ted Bundy) acted with “malice” and “premeditation” (if these terms mean anything), without provocation and under no threat of personal danger. In addition, 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 apparent best way to avoid errors in criminal prosecutions. The American method is an adversarial system of adjudication, set in the constitutional framework of the Bill of Rights and the due-process clause of the Fourteenth Amendment. It is, for better or for worse, a system that relies heavily on procedural devices to guarantee fairness and accuracy (Gross 1987). 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 mind-numbing case 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 procedural care and due process as other defendants—and probably more.

Factual errors are not the only problem. Through the 1980s, about 20,000 Americans were killed in criminal homicides each year, and nearly that many were arrested for killing them (Federal Bureau of Investigation 1981-1990). Of these, fewer than 2 percent were sentenced to death.¹⁷ Were these 200 to 300 a year 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” (Berns 1980).

The dangers of arbitrariness and discrimination are not restricted to capital punishment. The penalties for burglary and shoplifting also vary a great deal, and may also turn on illegitimate considerations. In this context, however, these problems are at their worst, 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.¹⁸ 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.

Saliency. The death penalty is a troubling and divisive institution. A substantial minority still oppose it in principle¹⁹—while very few have similar qualms about imprisonment—and those who favor the death penalty are divided about when and how to use it. Some people experience equally strong internal conflicts. Those who do not have strong and well-defined views about the death penalty may be especially torn if they are required to decide the fate of a particular defendant. As a result, life or death 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 from 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.²⁰ How much does this 5-second sound bite tell us about Harris? Would he have deserved death any less if he had bought his lunch himself?

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.²¹

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 (Baldus, Woodworth, and Pulaski 1990; Gross and Mauro 1989).

Judges and legislators are aware of this problem. They have tried to correct it, or at least contain it, by creating an array of procedural devices that are designed to produce even-handed, nondiscriminatory capital sentencing. All states are required to conduct elaborate, trial-like capital penalty hearings;²² many also engage in post-verdict “proportionality review” of death sentences.²³ These procedures may or may not have any useful effect; they certainly are not entirely successful. One way or another, they do take time—to prepare, to schedule, to conduct, and to review. Equally important, the knowledge that many prisoners on death row have been unfairly or arbitrarily singled out adds weight to other procedural claims, and moves judges to review death cases more carefully, and less expeditiously.

Perhaps executions could be speeded up, somewhat. I can imagine that we could contrive to conduct most of them within 5 years of arrest, rather than 10 or 12. If we try to go much faster than that we will have to dismantle the procedural core of our system of criminal justice—a structure that was created largely to protect defendants—in order to expedite the cases of those defendants who have the greatest need of protection. This cuts strongly against the grain; it will not happen. Given that limitation, there is relatively little incentive to accelerate the process at all, since even a five- or six-year delay in killing 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.

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. Is it any wonder that the enthusiasm to kill so often withers?

Delay, arbitrariness, and discrimination are only part of the problem. State sponsored executions are not only slow, uneven and unpredictable, they are also impersonal. We are willing to kill murderers, but we do not want anyone to derive satisfaction from doing it. We would never consider turning a prisoner over to private executioners with a personal stake in his death—the victim's relatives or neighbors for example. We recoil even at the idea of a public executioner who enjoys his work. The British Royal Commission on Capital Punishment expressed this feeling almost forty years ago: “[T]he ambition that prompts an average of five applications a week for the post of hangman, and the craving that draws a crowd to the prison where a notorious murderer is being executed, reveal psychological qualities of a sort that no state would wish to foster in its citizens” (Royal Commission on Capital Punishment 1953).

Judge Parker of Arkansas, one of the famous hanging judges of the American frontier, is supposed to have said on his death bed “I never hanged a man. It is the law” (Gregory and Strickland 1971). Some advocates of the death penalty may feel comfortable with a more personal role, and some who speak in Judge Parker's terms may be hypocrites. Nonetheless, this is the dominant ideology, and it is treated with respect. We execute people because we must, because “it is the law,” and not because we like to do it.

The same ideology applies to other criminal penalties, and it is undercut by similar violations. We know that some cops are brutal, and some prison guards are sadistic, but we do not approve. Occasionally (as in the Rodney King case) they are caught (if not always punished). The problem becomes much more acute, however, when the state *authorizes* the imposition of a penalty that is inherently painful and cruel. We would confront a similar difficulty if we continued to employ flogging, or ear cropping: how to find agents who will administer the punishment, and yet derive no joy from the suffering they inflict.

One of the oddities of capital punishment in America is the search for a “painless” method of killing, as if the pain of a swift execution could compare to the terror of life under a sentence of death (Zimring and Hawkins 1986, pp. 107-125). I wonder if it is not this ambivalence in our attitude toward executioners, rather than an abstract desire to avoid causing pain, that drives the movement to substitute lethal injection for electrocution, hanging, and poison gas.

In 1973, then-Governor Reagan of California captured the essence of the argument for this new method:

Being a former farmer and horse raiser, I know what it's like to try to eliminate an injured horse by shooting him. Now you call the veterinarian and the vet gives it a shot.... [M]aybe

we should review and see if there aren't more humane methods [of execution]—the simple shot or tranquilizer (Schwartzchild 1982).

This is an appealing comparison—so neat and easy—but it is terribly misleading. A condemned man, strapped to a gurney after an interminable wait, is not a horse with a broken leg; he *knows* what's going on. More important, Governor Reagan's homily is also terribly revealing. Euthanasia (even if, somehow, we could carry it off) is not execution. It's a necessary evil, something we do because the alternative is worse. A condemned prisoner does not present this unhappy choice. We can simply leave him in prison—where he has already spent years—with the thousands of others on death row and the multitudes in the general prison population. Once we start thinking in such terms, execution becomes a distasteful and unnecessary task, something to delay and avoid.

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 rarer 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—generate new doubts, new procedures, new delays, and so on.

AN AMERICAN DREAM

The logic of the progression I have described seems inexorable. Several elements are required: monopolization of legitimate punishment by the state; widespread use of imprisonment; a commitment to fairness and procedural regularity in criminal prosecutions; cultural ambivalence about revenge in general and about the death penalty in particular. Once these are all in place, the expected pattern is simple: a decline in executions, followed by *de facto* or *de jure* abolition. And indeed this is exactly what has happened in every Western democracy, except one—the United States (Zimring and Hawkins 1986, pp. 3-23).

From the 1930s through the 1960s, the number of executions in the United States declined steadily (Bowers 1984, pp. 25-26). The highest rate was in 1935, when 199 prisoners were killed. In the 1940s, the totals dropped to the low 100s; in the 1950s, they ranged from 49 to 105; by the mid-1960s there were a handful of executions a year; and in 1968 executions stopped. Four years

later the Supreme Court decided that all existing death sentences in the nation were unconstitutional.²⁴

At that point, it looked as if the United States would follow the pattern of Western Europe, that a lengthy moratorium on executions would turn into permanent abolition. Instead, executions started up again in 1977. They have been going on in fits and starts ever since, with no end in sight. But the historical forces that produced the moratorium could not be entirely denied. They did not achieve abolition, but they had an effect. The apparently inevitable progress toward abolition was side-tracked into a macabre loop, the nightmarish structure we now use to eke out a dozen or two dozen killings each year.

How did we come to this pass? The sequence of events that created our present death penalty apparatus is well known; I will describe it in only the sketchiest detail. The history can be divided into four stages: moratorium; first backlash; stalemate; second backlash.

Moratorium. Starting in the mid-1960s, the NAACP Legal Defense and Educational Fund spearheaded a drive to halt all executions in the United States (Meltzner 1974). The general strategy was to present constitutional challenges to every prospective execution, to obtain stays, to build up a large backlog of prisoners on death row, and ultimately to force the Supreme Court to consider a series of general challenges to the constitutionality of the death penalty. The strategy worked extremely well. In 1965 there were 7 executions; in 1966, 1; in 1967, 2; from 1968, on, none. The culmination of the moratorium drive came in 1972, in the case of *Furman v. Georgia*,²⁵ when the Supreme Court vacated all death sentences then in effect—629 in all—on the ground that they had been imposed by a system that was arbitrary and capricious.

First Backlash. At the time, *Furman* was widely interpreted as the judicial abolition of the capital punishment in the United States (Meltzner 1974, pp. 286-316; Zimring and Hawkins 1986, pp. 37-41). In fact, the *Furman* decision (an extremely complex set of five separate concurring opinions) merely held that existing death penalty laws were unconstitutional. *Furman* was widely and angrily condemned by politicians and law enforcement officers (Zimring and Hawkins 1986, p. 38). State legislatures immediately started to write new death penalty laws that might satisfy the Supreme Court. By July 1976, 35 states had reenacted the death penalty,²⁶ 592 prisoners had been condemned to death (Greenberg 1982, p. 916), and public support for capital punishment had grown from 57 percent to 65 percent.²⁷ At that point, in *Gregg v. Georgia*,²⁸ the Supreme Court held that capital punishment was not inherently unconstitutional, and approved several of the new death penalty laws that attempted to control the arbitrariness that had been condemned in *Furman* by “limiting” and “guiding” the discretion of the sentencers.

Stalemate. From July 1976 through June 1983 the death penalty was available in the United States, but essentially unused. Only seven executions were carried out in seven years, and in four of them the condemned men had voluntarily chosen to forego available appeals.²⁹ To some extent, this near-moratorium was a predictable short-term effect of the Supreme Court's decisions in 1976. In *Gregg* (and its companion cases) the Court not only approved a number of "guided discretion" death penalty statutes, it also declared "mandatory" death sentences unconstitutional.³⁰ As a result of that holding, courts overturned more than 400 death sentences between July 1976 and October 1979 (Greenberg 1982, p. 916). In addition, a series of major Supreme Court cases after 1976 addressed a host of procedural issues that were left unresolved by *Gregg*; most of these cases were decided favorably to the defendants.³¹ With several major issues still unresolved, and with one or another usually pending before the Supreme Court, almost all executions were stayed. In the meantime, many lower federal courts were paying careful attention to the first crop of post-*Gregg* capital habeas corpus petitions, and, in most cases, finding reversible constitutional error in the state proceedings.³²

Second Backlash. By June 1983 it was clear that *Gregg* had not really restored the death penalty in America. It was not clear what would happen next. If matters had simply proceeded on the existing trajectory, the pace of executions would probably have picked up a bit as procedural problems were ironed out. On the other hand, the death penalty might have been abolished by stages, as the Supreme Court attempted to keep its impossible promise to eliminate arbitrariness and discrimination from capital punishment. Instead, the Court decided to take action to speed up the pace of executions. In a series of decisions starting in June, 1983, the Court eviscerated the procedural protections against arbitrariness that it had imposed in *Gregg*,³³ and approved expedited procedures for handling federal habeas corpus appeals.³⁴ In later decisions, the Court precluded any plausible claim that a state's death penalty laws might be unconstitutional because of the arbitrary or discriminatory results they produce³⁵ and made federal habeas corpus increasingly unavailable for any purpose.³⁶ The number of executions increased immediately: 4 from September through December of 1983; 21 in 1984; an average of 20 a year from 1984 through 1992.³⁷

While it's easy to describe *how* we arrived at our present system of using the death penalty, it's not so easy to explain *why* it happened. It would have made a lot of sense for the United States to move along the same path as Canada, Great Britain, France, and Germany. Instead, we find ourselves grouped with countries with whom we have far less in common, except the practice of execution: China, Iran, South Africa, the former Soviet Union.³⁸ Why?

An obvious explanation is the widespread public support for the death penalty in the United States, which recent polls measure at over 75 percent.³⁹ But the public in Canada, Great Britain, France, and Germany also supported the death penalty at the time that it was abolished, and at levels that were comparable to the level of public support for the death penalty in America in 1976. Support for the death penalty has declined in some of these other countries, but it did so several years *after* abolition (Zimring and Hawkins 1986, pp. 10-22). What has made public opinion on this issue so much more powerful a force in the United States than in Europe or Canada?

The use of the death penalty is not the only feature of our criminal justice system that sets us apart from other Western nations. We also imprison a far higher proportion of the population than any other industrial democracy (Mauer 1991). Both of these phenomena may be reactions to the unusually high rate of violent crime we suffer, a rate that climbed rapidly through the late 1960s and early 1970s, just as the abolition movement was picking up steam (Federal Bureau of Investigation, 1980-1990). To some extent, a higher crime rate produces a higher incarceration rate simply because there are more criminals to arrest. In the United States, that effect has been multiplied by a wave of punitiveness. We not only arrest more criminals than in the past, we imprison a higher proportion of those we arrest, and for longer and longer periods. This general punitiveness has undoubtedly contributed to the growing public support for capital punishment through the late 1970s and 1980s, and the increasing institutional commitment to it.

Another factor that may help explain this history is the federal structure of the United States, and the fact that criminal justice is a function that is largely left to the states. To a great extent, the death penalty in America is a Southern institution. Since 1935, 63 percent of all executions in this country have been carried out in the South (Zimring and Hawkins 1986, p. 32); since 1976, 88 percent.⁴⁰ In several Southern states, the pro-death penalty backlash after *Furman* was extremely strong. In California, and perhaps elsewhere, the second (post-*Gregg*) backlash was equally powerful. The passionate opposition of some states may simply have made it impossible to abolish at the national level, either by Congress, or (as almost happened) by the Supreme Court. Perhaps the radical swings in our national policy on capital punishment simply reflect a 50- or 70-year time lag between the South (and some Western states), and the remainder of the nation.

But probably the most basic reason for the restoration of capital punishment in the United States in 1976 is the politicization of issues of crime and justice. The high crime rate, the climate of punitiveness, and the fragmentation of a federal system, all played their parts, but they did so in a charged context.

At first glance, it seems odd that whenever the death penalty has been abolished in a Western country, it would have been retained if the matter had been put to a public vote. But is it? The general public in every democracy

always wants things that are bad policy or impossible for the government to provide: lower taxes, higher social benefits, cheaper gasoline, the execution of murderers. Some public demands become effective political issues, others do not. At the moment, for example, popular pressure to reduce official perquisites has changed the workings of Congress, and may cost many incumbents their seats. By contrast, the setting of interest rates has been largely removed from the electoral arena in the United States—a pattern held even in the early 1980s, when interest rates over 15 percent caused massive economic dislocations. If our system for operating the death penalty had been left to function and develop outside the realm of electoral politics, it would have collapsed under its own weight. But it wasn't.

Crime has been high on the political agenda in United States for decades. One reason may be the unusual democratization of our criminal justice system. Unlike continental countries, we use juries of common citizens to try criminal cases, and to sentence in capital cases. Most state-court judges are elected, as are almost all state prosecutors—a practice that is virtually unknown elsewhere. Most of our police officers are employed by local governments, and subject to local political control. A public that is accustomed to choosing judges and prosecutors, and to playing an direct role in the operation of the system they run, may also expect to set the policies they implement. In a period of rising crime rates, public pressure is likely to become increasingly insistent.

This sort of demand is irresistible in the undisciplined context of American politics. The reigning wisdom of electoral politics is to tell the public what it wants to hear. For several years, our national leaders have been tripping over each other in their haste to commit themselves to simultaneously eliminate the federal budget deficit, preserve social security benefits, and impose no new taxes. These are politically dangerous fictions; they impinge directly on the lives of most people, and the inevitable failures and broken promises are visible. Criminal justice issues, on the other hand, are abstractions for most of the electorate. Even those who are victimized by crime have no way of appreciating the consequences of different policies on incarceration. Attitudes toward the death penalty in particular are almost entirely symbolic (Ellsworth and Ross 1983, pp. 161-165) since, despite our high homicide rate, few people have any personal contact with murder.

There is no significant organized constituency that opposes draconian punishments. No American politician risks losing support by endorsing longer sentences for drug offenses, or mandatory minimum terms of imprisonment, or the death penalty—and sometimes they seem to gain. Predictably, many candidates run for governor, or for President, or for mayor of New York City, on their support for capital punishment and for other punitive measures. Being "tough on crime" puts you on the right side—even if there is no other side—at almost no risk. The costs of these policies are rarely immediately apparent; sometimes they take years to surface. As for their effectiveness, since most

people have little or no contact with courts and prisons they can simply be *told* that a new system of punishment has made a difference. Worse, they can come to believe that executing so many dozens, or imprisoning so many thousands, are accomplishments in themselves.

And then, there is the question of race. Crime in the United States is a deeply racial issue. Blacks—black men—commit a disproportionate number of the violent crimes in this country. They constitute about half of our prison population, a rate of imprisonment nearly seven times that of white men (Blumstein 1982). For the most part, the victims of black violence in general—and of black homicide in particular—are also blacks, usually black men. Nonetheless, the image of the black criminal has become the focus for white fear and hatred, and a political weapon that has been used to great effect. The best example is the notorious, cynical and successful use of black murderer Willie Horton by George Bush in his 1988 presidential campaign against Michael Dukakis. The *medium* was a political appeal for tougher law enforcement, but the *message* was unmistakably racial: we (the Republicans) are the party of the whites, they (the Democrats) are the party of black criminals. The usual defense against this coded racial charge is the one relied on by Bill Clinton in his 1992 campaign for president: I may be a democrat but I'm for the death penalty; in fact I've signed death warrants for two prisoners who were executed just this year.

It is instructive to compare the recent history of the death penalty in Great Britain and in California. The use of capital punishment in Great Britain has been debated many times since the end of the Second World War. In 1948, the House of Commons passed a measure (the Silverman Amendment) suspending the death penalty for murder for five years; the measure was defeated in the House of Lords, and, in the absence of active government support, died (Christoph 1962, pp. 35-75). However, in 1949, in response to the public controversy over the issue, the Government appointed a Royal Commission on Capital Punishment, to consider "whether the liability under the criminal law to suffer capital punishment for murder should be limited or modified." The Commission issued a Report in 1953, which was critical of the existing procedures for handling capital cases. In its Report, the Royal Commission on Capital Punishment noted that "The wider issue of whether capital punishment should be retained or abolished was not referred to us." Nonetheless, it observed that "in Great Britain, with its largely industrial population of fifty millions, the average annual number of executions during the past half-century has been only about thirteen. It is clear that a stage has been reached where there is little room for further limitation short of abolition" (Royal Commission on Capital Punishment 1953, p. 212).

In 1955, in the aftermath of the publication of the Royal Commission on Capital Punishment Report, an abolitionist amendment was narrowly defeated in the House of Commons. In 1956 a similar motion was passed by the

Commons; once again, in the absence of Government support, it died in the House of Lords. As a compromise, however, the Government offered the Homicide Act, which was passed and became law in 1957, and which greatly narrowed the availability of the death penalty. From 1957 through 1964, the average number of executions a year dropped from twelve to five (Hollis 1964, p. 58). In 1965, the Murder Act suspended capital punishment experimentally for five years; in 1969 abolition was made permanent.

Throughout this period public support for the death penalty remained strong. In November, 1947, a Gallup poll found that 65 percent supported capital punishment, and several polls found that at least that proportion disapproved of the Silverman Amendment (Hollis 1964, pp. 43, 53-57). In 1965, Gallup found that only 23 percent favored abolition, and in 1966—after suspension—76 percent favored reintroduction. In the 1970s, after permanent abolition, support for the death penalty increased. In 1975, for example, 82 percent supported capital punishment for terrorists and bombers. This level of support continued into the 1980s. In 1983, for instance, majorities of 77 percent and 74 percent, respectively, favored the death penalty for terrorist murders and for “murdering someone just for the fun of it”; nonetheless, 65 percent thought that capital punishment would not in fact be brought back into use.⁴¹ And indeed, bills to reinstate the death penalty have been debated and defeated in parliament a dozen times since 1969—most recently in December 1990, by an overwhelming majority (Moncrieff 1990).

Abolition was possible in Great Britain, despite public opinion, because there capital punishment has long been considered a “question of conscience” which is not suitable for treatment as a “political” issue. This tradition has two consequences. First, with rare exceptions, bills dealing with capital punishment have been presented to the House of Commons on “free votes” in which party discipline is suspended, and members can act as they choose. Thus, for example, bills to restore the death penalty were defeated repeatedly during the administration of Prime Minister Margaret Thatcher, despite her personal support (e.g., *Chicago Tribune* 1987). Second, “no political party, and few individual candidates, would think it proper, or wise, to base an appeal to the electorate on specific moral views [such as those on capital punishment], however relevant those views in fact are likely to be to future legislative activities....” (Buxton 1973, p. 231) This is not to say that individual members of parliament have never been subject to political pressure on account of their views on capital punishment. Some have, but on a scale that is minuscule by American standards, and the issue has never been central to any major electoral campaign (Buxton 1973, p. 241). After the latest vote in parliament some analysts said that the question may now be closed forever. The most recent Gallup poll (April 1992) still shows a majority in favor of death for terrorists and bombers, but a dwindling majority—66 percent.⁴² Perhaps public opinion in Great Britain is beginning to fall into place behind public policy.

The recent political history of capital punishment in California begins on February 18, 1972. On that date, four months before *Furman*, in the case of *People v. Anderson*,⁴³ the California Supreme Court became the first court in the world to judicially abolish the death penalty, under the California State constitution. Within weeks a petition to amend the state constitution had gathered enough signatures to place the issue on the ballot, and in November, 1972, a referendum to permit the use of the death penalty was approved by 67 percent of the voters (Poulos 1990, pp. 170-71). Pursuant to this referendum, the state legislature passed a new death penalty law in 1973; it was declared unconstitutional in 1976, under *Gregg v. Georgia*, because it provided for mandatory capital sentencing.⁴⁴ In 1977, the legislature enacted a new "guided discretion" death penalty statute that was sponsored and backed by then state senator George Deukmejian.

In 1978, George Deukmejian was elected Attorney General of California, running in large part on his role in promoting capital punishment. In the same general election, 72 percent of the voters approved a referendum that replaced the 1976 statute with a "tougher" death penalty law. In 1982 Deukmejian was elected Governor. In 1986, he led a successful campaign to defeat Chief Justice Rose Bird and two liberal Associate Justices of the California Supreme Court, whose appointments by the preceding governor had to be confirmed in a general election. This enabled him to reshape and dominate that court in one fell swoop. Although Deukmejian and his allies had numerous quarrels with the decisions of the Bird court on business, tort and environmental issues, the campaign focussed entirely on the justices' records in deciding capital appeals (e.g., Clifford 1986). Indeed, the argument against the justices consisted of little more than a single well publicized fact: Chief Justice Bird had voted to reverse each of the sixty-one death sentences she had reviewed.

The new California Supreme Court—under the leadership of Chief Justice Malcolm Lucas, a Deukmejian appointee—affirmed 97 of the first 124 death sentences it considered; as of May 3, 1991, it had affirmed 27 *consecutive* death sentences (Hager 1991). In its first three years, capital appeals accounted for 39 percent of the published output of the Lucas court (Uelmen 1989) while other matters were neglected (Hager 1990b). This endless and depressing preoccupation with capital cases is widely believed to be the main reason for the rapid turnover that has plagued the California Supreme Court recently, 4 resignations in 3 years, including all three justices appointed by Deukmejian after the 1986 election (Hager 1990a; Hager and Gillam 1991).

Whatever the view from the California Supreme Court, the death penalty remains very popular among Californians at large. Since the mid-1980s the polls have shown 80 percent or more in favor (Field and DiCamillo 1992). In the political arena, active support for capital punishment is now a practical requirement for any serious candidate for state-wide office in California. For example, one of the two candidates in the 1990 Democratic gubernatorial

primary was the Attorney General, John Van De Kamp, who was personally opposed to the death penalty. Nonetheless, Van De Kamp made a point of his willingness to enforce California's death penalty law—"I respect the fact the people have spoken" (Mathews, Broder and Taylor 1990)—and campaigned as "the only candidate for governor, Democrat or Republican, who has put people on death row in California" (Love 1990). He lost. The winner was Dianne Feinstein, the former Mayor of San Francisco, who made the death penalty a focus of her campaign, and who claimed that she was the candidate with the truest and most personal commitment to conducting executions (Love 1990; Mathews, Broder, and Taylor 1990).

For all this commotion, there has been only one execution in California since 1967—that for Robert Alton Harris, whose sentence had been affirmed by the Bird Court in 1981. As of this writing, no others seem near (Bishop 1992).

MORE OF THE SAME

At a glance, the death rows of America seem headed for a massacre. 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 waves of executions have been predicted. The same was said (among other occasions) in 1976, after *Gregg*; in 1977, when the first post-*Gregg* execution occurred; in 1983, when the Supreme Court drastically revised the restrictions on capital punishment that it had imposed; and in 1987, when the Court rejected Warren McCleskey's challenge to racial discrimination in capital sentencing. It hasn't happened.

These projections were not all completely wrong—executions did begin after *Gregg*, and the pace did increase in 1983—but the anticipated flood has never occurred. I do not think it will happen now either, although the rate of executions is likely to move up a notch from 15 or 20 a year to 30, 40, or conceivably 50. That would be a change, but only in degree not in kind. Even at fifty a year, executions would still be infrequent—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 is simply this: 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 delays, but the system does produce what the public demands: a widely available death penalty that is rarely carried out.

There are two parts to this argument.

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 samples of the population to state their opinions on the sentences courts generally pronounce, and large majorities said that they were too lenient. However, when asked to evaluate actual court sentences, or to choose the terms themselves, most of the same people found the judicial sentences to be about right or too harsh (Doob and Roberts 1983, 1988; Stalans and Diamond 1990). In the context of the death penalty, many people 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 then choose life imprisonment as the correct penalty in just such a case.⁴⁵ 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*” (Bedau 1982, p. 68). 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.⁴⁶

Second, and more important, even those who do want executions do not want many. The retributive *argument* for executing killers is usually stated in terms of equivalence and consistency—“a life for a life.” The actual impulse, however, seems to focus on symbolism and ceremony. Many Americans, probably a majority, want some executions to take place as public statements about crime and murder. But that desire can be satisfied by a small number of well publicized electrocutions and poisonings. Few advocates of capital punishment—probably none—would seriously argue that we should strive to take a life for each of 20,000 homicide victims who are killed each year, or even for each of 2,000. “Twenty-thousand homicides” is not an event—like a TV news story—it’s a statistic (and an obscure TV statistic at that).

Bedau suggests that “the average person seems convinced the death penalty is an important legal threat, abstractly desirable as part of society’s permanent bulwark against crime, but that he or she is relatively indifferent to whether a given convict . . . is ever executed” (Bedau 1982, p. 68). Bedau is probably right, although that does not mean that the average death penalty supporter is indifferent to whether *anybody* is ever executed. If we conduct *no* executions capital punishment will cease to be a threat, even abstractly—indeed, we will *not have* a death penalty. The anger that built up in California through the 1980s was expressed in just those terms: We voted for the death penalty repeatedly and by overwhelming margins, and yet years have gone by and nobody has been put to death; the will of the people has been thwarted. That sort of frustration, however powerful, is easily alleviated. The public may insist on occasional executions, but it does not demand many.

But lack of demand will not stop executions in itself. If the machinery were in place, it could crank out 100 or 200 a year whether or not anybody wants them unless there is some positive force to limit the output. In fact, the conditions for that scenario are not met, in two respects. First, the metaphor is wrong. Our capital punishment system is not an assembly line that has been constructed at great cost, but once in place chugs along predictably grinding out executions. To conduct executions a state must overcome two types of resistance: internally, the inertia, the doubts, the unease and the ambivalence of some or all of the officials who handle the cases; and externally, the legal moves of the defense attorneys. A few condemned prisoners slip cheaply through the cracks, but they are the exceptions. Typically each execution requires a fresh commitment of significant state resources.

Second, there *is* widespread aversion to the prospect of numerous executions. It shows up repeatedly, and in different contexts; it is a startling illustration of the abstract nature of most people's attitudes toward capital punishment. A single execution is not truly an act of revenge but it looks like revenge, 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 killing by the state, slaughter. 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.

This aversion to mass executions was a central aspect of the legal strategy of the NAACP Legal Defense Fund in late 1960s. During the moratorium years from 1967 through 1972 approximately 700 inmates accumulated on death row, an unprecedented number, all of whom were subject to execution if the Supreme Court upheld the constitutionality of capital punishment. The prospect of a bloodbath may have given the Court pause. Justice Hugo Black—who resigned and then died the year before *Furman*, and who personally believed in the constitutionality of capital punishment—is said to have predicted privately that the Court would strike down the death penalty because the Court “would not want that much blood on its hands” (Woodward and Armstrong 1979, p. 207).

Since *Gregg* it has become clear that no Supreme Court decision will produce a bloodbath. Nowadays, in the wake of a conspicuous execution or a legal defeat for death penalty opponents, the press frequently publishes stories that say the opposite: No, there will not be hundreds of executions in quick succession, there are still many procedural obstacles that will slow the process down (e.g., Shapiro 1986; Taylor 1987; Bishop 1992). The message to the public is unmistakable: Don't worry, we won't start having lots more executions than you want. Even at current levels the number of executions we conduct can

produce criticism. In 1987, Louisiana executed 8 prisoners in the space of a few months; as a result the state was targeted by Amnesty International for human rights violations, and state officials began to receive critical mail from Amnesty members and government leaders from around the world (Prejean 1988). More recently Death Watch, a British human rights group, has started urging British tourists to boycott one of their more popular vacation sites—Florida, “the Sunshine State that kills.”⁴⁷ In 1992 there was a spate of negative reports in the European Press on Robert Alton Harris’s execution, including the comment that the United States “executes its criminals in greater numbers than any country except Iraq and Iran—sad comparisons” (Associated Press 1992c).

So far, my argument is abstract. I have identified pressures and counterpressures, and made the claim that the number of executions will not increase dramatically. But how do these forces play out? Certainly there are no coordinating bodies that set the rates, nationally or state by state. By what mechanisms, then, do these pressures limit the number of prisoners who are put to death?

The major force that limits the rate of executions is simply the structure of the system—the number and the complexity of the procedural hurdles that must be cleared, and the inevitable setbacks along the way. For more than a decade critics of the process have focused their attention on the last stage, federal habeas corpus.⁴⁸ For example, in 1989 retired Supreme Court Justice Lewis Powell wrote an article complaining about the delays in executing death sentences, delays which he attributed to abuse of federal habeas corpus: “If capital punishment is to serve its intended purposes, perhaps the time has come for some reexamination of our system of dual collateral review” (Powell 1989, p. 1035). It is true that federal habeas corpus used to be a narrow valve that severely restricted the flow of death cases. Before 1983, federal-court hearings were comparatively easy to obtain in death cases, and an extraordinary proportion of such cases were reversed (see note 32). Since 1983,⁴⁹ and especially since 1989,⁵⁰ the Supreme Court has been busily limiting the scope of habeas corpus and restricting access to the federal courts. These revisions have made a difference. The *Barefoot* decision in 1983 was probably the most important single reason for the increase in executions from 1 or 2 a year to 10 or 20; the recent spate of cutbacks is likely to push the number up over 30. Nonetheless, the changes in federal habeas corpus that have occurred—which are at least as radical as any Justice Powell mentioned—will do no more than put a dent in the delay and infrequency he criticized.

Part of the reason is that federal habeas corpus survives, albeit in reduced form. Some issues still must be heard; on others, federal trial court judges now have essentially unreviewable discretion to conduct review or to refuse to do so (Liebman 1991). The upshot is that many state death sentences are being held up or reversed by the federal courts, but the process has become even

less predictable than in the past. At one extreme there is David Michael Clark, who was executed in Texas on February 28, 1992. His attorney filed an initial habeas petition in federal district court on January 16, 1992; it was denied in about half an hour, the denial was affirmed on appeal about one hour later, and the Supreme Court denied a stay of execution the next day.⁵¹ At the other end of the spectrum, there are death cases in which the prisoners file federal habeas petitions, the district courts grant stays, and then for several years nothing happens whatever.

The Supreme Court, or Congress, may limit federal habeas still further. Whatever they do, however, will probably have only a marginal effect on the rate of executions. Most death cases have never reached federal habeas corpus; most of the delay and most of the reversals have always occurred in the state courts. The drastic changes in habeas corpus have increased the pace of executions among the comparatively small number of cases that do reach that stage but they have not encouraged state courts to affirm more death sentences. If anything, the trend seems to be the opposite: as federal oversight has decreased some state supreme courts have become more prone to reverse. The diminution of federal habeas has certainly done nothing to speed the progress of capital appeals through the state courts. Once again, California provides the starkest example. The California Supreme Court is now into the sixth year of a concerted campaign to keep current on its capital docket. Nonetheless, as of April, 1992, about 200 death cases were pending on direct appeal—76 without defense lawyers—and the time between sentence and decision had risen to nearly 6 years (Bishop 1992). Apparently, the court has reached the limit of its capacity to process capital appeals, to no avail.

Direct review is not, of course, the only stage at which the actions of state officials influence the rate of executions. There is state collateral review, there is executive clemency (a rarely exercised power in this era [Bedau 1991]), and there are various procedural interstices in which death cases are sometimes allowed to sit and wait for months or years: between verdict and judgment, between judgment and the filing of an appeal, between direct review and state habeas corpus, between state review and federal habeas corpus, between federal habeas corpus and the setting of an execution date.

No doubt some of the judges, governors and attorneys general who are responsible for overseeing this process have their own misgivings about the death penalty. Others may prefer to keep down the number of executions even if they do not oppose capital punishment in principle. They might not want their state to be labelled "the Iran of America," or they might be anxious to limit the number of times they make a public decision that could turn out to have been a terrible and embarrassing mistake. But for the most part, I suspect, state officials are not so much wary about moving ahead with too many executions as unmotivated. Almost every execution produces a flurry of activity, antagonizes some constituency, and poses some political risk. These

are not prohibitive costs—far from it—but they mount. When there are no executions or very few the pressure to kill may get high, and the possible political gain from each execution is real. But when executions take place at a regular pace, however slow, there is no public pressure to speed things up. Once that point is reached, state officials have little incentive (and significant disincentives) to set aside other cases in order to affirm yet another death sentence, to assign another assistant attorney general to briefing capital appeals, or to devote scarce resources to pushing recalcitrant judges into action and chasing death row inmates through the courts. So death cases—many of them—are allowed to linger, and linger (see Zimring 1991).

By now prosecutors and judges must realize that most death sentences are not carried out even if they are affirmed, even in states that do conduct some executions. So why bother? Ultimately, this feedback from the end of the line is likely to discourage prosecutors from filing capital charges in homicide cases that are not politically sensitive. This may already have started in some jurisdictions. In New Jersey, for example, prosecutors sought death sentences in 57 percent of potentially capital homicide trials from 1983 through 1987, but in only 35 percent of such cases since the beginning of 1988.⁵² This same knowledge may also discourage state appellate courts from affirming death sentences, or at least from doing so expeditiously. On the other hand, there are constant incentives to *reverse* death cases, and, if possible, to do so quickly. A reversal on one issue may obviate the need to decide ten others. A case that is dumped on direct review will not be back and occupy the court's time on state habeas corpus. And finally, there is bed pressure. Death rows are filling up and overflowing. State supreme courts and attorneys general can alleviate this problem by reversing or dropping close cases, by accelerating consideration of those cases that are likely to be reversed, and by choosing to forego new capital proceedings after reversal. Knowing that most death row inmates never get executed anyway makes these options easier. It would be cynical to conclude that docket pressure and similar considerations are the main determinants of the outcomes and timing of decisions on capital appeals and collateral review, but it would be naive to suppose that they do not make a great deal of difference in the large range of marginal cases.

If the forces I have described do in fact determine the rate of executions, we should expect them, eventually, to reach some sort of equilibrium. For the United States as a whole that certainly has not happened. The population on death row continues to increase by about 140 a year, and the pace of executions may also be increasing.⁵³ However, in several states that have been conducting executions since the early 1980s equilibria may already have been established.

The clearest example is Georgia. Five prisoners were put to death in Georgia in 1987, the highest annual total in the post-*Gregg* period; only 3 have been executed in the five-and-a-half years since. The number of death row inmates, however, has remained almost constant for nearly twelve years: it was 106 in

June 1981, 106 in May 1987, and 107 in April 1993. In that entire period 15 executions were conducted in Georgia (an average of less than 1.3 a year), 139 new death sentences were pronounced, and 123 prisoners were removed from death row because of reversals on direct or collateral review, or death from suicide, homicide or natural causes.

Florida may have achieved a similar equilibrium more recently. There were 8 executions in Florida in 1984, but only four or fewer each year since. In Florida, however, unlike Georgia, the number of prisoners on death row continued to increase for several years after the high point in executions, from 223 in December 1984, to 313 in September 1990. At that point, it hit a plateau. From September 1990 through April 1993, 6 prisoners were executed in Florida, while approximately 100 new defendants were sentenced to death. Reversals and deaths from other causes, however, kept pace, and the death row population hardly changed, from 313 to 317. Louisiana seems to be following a similar path, although the number of death row inmates is considerably smaller. There were 8 executions in Louisiana in 1987, but only 6 in the 5 1/2 years since. In the meantime, the size of Louisiana's death row *dropped* from 52 in May 1987 to 34 in April 1991; in April 1993 it was 410.

Georgia, Florida and Louisiana are among the four leading states in number of post-*Gregg* executions. In each of these states a big year for executions was followed by a sharp and apparently lasting slowdown. In each the size of the death row population seems to have stabilized at some point after post-*Gregg* executions started up again. Alabama (which ranks sixth in the number of recent executions), and Arkansas, Mississippi, and South Carolina (with four post-*Furman* executions each) may be following the same pattern, but it's too early to say.

Other death penalty states are definitely not falling into line, so far. Conspicuously, in Texas—which has executed 56 prisoners since *Gregg*, more by far than any other state—the death row population and the execution rate are both on the increase. In addition, death rows have been growing steadily in several states that have held no post-*Gregg* executions, or have just recently begun—California, Illinois, Pennsylvania, Oklahoma, Ohio, Arizona, and Tennessee. Still, the experience of Georgia, Florida, and Louisiana may foreshadow the general look of the death penalty in America at the turn of the century, when executions have once again become an established fact in most or all death penalty states. If the rest of the country does follow suit we could reach a national equilibrium in 10 or 15 years. Projecting from recent experience, it might be something like this: A death row population of about 4000, to which roughly 200 new death sentenced inmates are added each year, and from which roughly 200 are removed: 35 by execution, 100 by reversal on direct appeal, 40 by reversal in collateral proceedings, 10 by commutation, and 15 by death from other causes.

These numbers, of course, are guesswork. Any actual equilibrium may be quite different, and—if it is established—will shift and change in response to changes in society. In addition, under my plausible scenario, the population on death row will age and its health will decline. Unless governors begin a regular practice of commuting the sentences of aged and infirm prisoners, the number of deaths on death row from natural causes may someday exceed the number of executions.

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NOTES

1. *People v. Harris*, 28 Cal. 3d 935, 968-971, 171 Cal. Rptr. 679, 697-698 (1981)), Bird, C.J., dissenting.

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

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

4. See *id.* n.2; *State v. Huetas*, 51 Ohio St. 3d 22, 553 N.E.2d 1058 (1990).

5. The exception is automatic review by the state supreme court, which is not generally available in non-capital cases. For example, compare Florida Constitution, Art. V § 3 (death penalty appeals are within the jurisdiction of the Florida Supreme Court) with Florida Constitution Art. V § 4 (other criminal appeals within the jurisdiction of the Florida District Courts of Appeal).

6. 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. North Carolina*, 428 U.S. 280, 305 (plurality opinion) (1976).

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

8. *Murray v. Giarratano*, 492 U.S. 1 (1989).

9. This estimate is based on conversations with Ms. Karima Wicks, former Research Director of the Death Penalty Project of the NAACP Legal Defense and Educational Fund. In 1988, her

predecessor—Ms. Tanya Coke—informed me that as of that time, the reversal rate on initial review was 41 percent (Gross and Mauro 1989, pp. 220, 226-27). Although I do not have comparably precise information for the last few years, I understand that close observers believe that for the country as a whole the reversal rate has increased.

10. CNN News, April 20, 1991, Transcript #12-1.

11. NAACP Legal Defense & Educational Fund, *Death Row U.S.A.*, Spring 1993 (“Death Row U.S.A.”).

12. *Id.*

13. These calculations are based on *Death Row U.S.A.* (note 11) and additional data provided by courtesy of Ms. Karima Wicks, former Research Director, Capital Punishment Project of the NAACP Legal Defense Fund. The averages given exclude “voluntary executions”—cases in which a prisoner was executed after waiving an available avenue of review.

14. For example, in 1975 Ellsworth and Ross (1983, pp. 145-46) found that 62 percent of a sample of Californians, and 93 percent of those who favor capital punishment, believed the death penalty deters homicide more than life imprisonment. Similarly, in 1985 the Gallup Poll organization found that 62 percent of a national sample thought the death penalty deterred murder; in 1986, 61 percent; and in 1991, 51 percent. Alec Gallup & Frank Newport, “Death Penalty Support Remains Strong, But Most Fell Unfairly Applied,” *The Gallup Poll News Service*, Vol. 56 No. 8a, 6/26/91 p. 3.

15. The other two commonly cited justifications for criminal sanctions are not relevant here. The death penalty, obviously, is incompatible with rehabilitation, and, while it is a permanent incapacitator, so (in theory at least) is the usual alternative—life imprisonment. Some people do support the death penalty because they fear that life imprisonment will not be what it is supposed to be (Ellsworth and Ross 1983, pp. 151-52) but that is a weak sort of support for capital punishment, if it is support for capital punishment at all.

16. On occasion throughout this paper I refer to death penalty defendants using male pronouns. This is an empirical generalization—a strong one—rather than a linguistic convention. For example, as of April 1993, over 98 percent of death row inmates in the United States were men, as were all but one of the first 199 prisoners executed after 1976. (See *Death Row U.S.A.*, note 11.)

17. *Death Row U.S.A.* (note 11).

18. For example, Baldus, Woodworth, and Pulaski (1990, pp. 88-89) found that 80 percent of a post-*Furman* sample of Georgia murder convictions, 483 out of 606, were death eligible.

19. For example, Gallup and Newport (note 14) found that 18 percent opposed the death penalty in 1991.

20. For example, “Harris, who became notorious for snacking smugly on a bag of hamburgers taken from his victims....” (Anderson 1991; see also Time 1992).

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

22. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Bullington v. Missouri*, 451 U.S. 430 (1981).

23. See *Pulley v. Harris*, 465 U.S. 37 (1984).

24. *Furman v. Georgia*, 408 U.S. 238 (1972).

25. 408 U.S. 238.

26. *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (opinion of Justices Stewart, Powell, and Stevens).

27. Gallup and Newport (note 14).

28. 428 U.S. 153.

29. *Death Row U.S.A.* (note 11).

30. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

31. See, for example, *Lockett v. Ohio*, 486 U.S. 586 (1978); *Godrey v. Georgia*, 446 U.S. 420 (1980); *Bullington v. Missouri*, 451 U.S. 430 (1981).

32. *Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (dissenting opinion of Justice Marshall) (capital defendants won 23 of 34 federal habeas corpus cases decided by circuit courts of appeals between 1976 and 1983).

33. *Zant v. Stephens*, 462 U.S. 880, 915 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); *Pulley v. Harris*, 465 U.S. 37 (1984).

34. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

35. *McCleskey v. Kemp*, 408 S. Ct. 279 (1987).

36. *Teague v. Lane*, 489 U.S. 288 (1989); *McCleskey v. Zant*, 111 S.Ct. 1454 (1991) (McCleskey II).

37. Death Row U.S.A. (note 11).

38. South Africa may no longer belong on this list since a moratorium on executions went into effect in November, 1989 (Reuters 1992).

39. Gallup and Newport (note 14).

40. Death Row U.S.A. (note 11).

41. Data obtained from Mr. Peter Duffin, Gallup Poll, Gallup House, 307 Finchley Rd., London NE3 6EH ("British Gallup Data").

42. British Gallup Data (note 41).

43. 6 Cal. 3d 628, 100 Cal. Rptr. 152.

44. *Rockwell v. Superior Court*, 18 Cal. 3d 420, 134 Cal. Rptr. 650 (1976).

45. Phoebe Ellsworth, "Attitudes towards Capital Punishment: From Application to Theory" (Paper presented at the SESP Symposium on Psychology and Law, Stanford University, October 1978).

46. For example, Ellsworth and Ross, (1983, pp. 151-52) found that 50 percent of their respondents 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 percent 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."

47. National Coalition to Abolish the Death Penalty, *Lifelines*, no. 56, April/May/June 1992, p. 8.

48. A conspicuous early example is then-Associate Justice Rehnquist's opinion dissenting from the denial of certiorari in *Coleman v. Balkom*, 451 U.S. 949, 956-7 (1980).

49. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

50. *Teague v. Lane*, 489 U.S. 288 (1989).

51. *Clark v. Collins* 112 S.Ct. 924 (1992) (opinion of Justice Stevens dissenting from the denial of a stay) (see Coyle 1992).

52. David C. Baldus, "Proportionality Review of Death Sentences: New Jersey's Options," working draft, University of Iowa, May 11, 1992 (cited with the author's permission).

53. The data in this paragraph, and the several paragraphs following it, are derived from Death Row U.S.A. (note 11) together with additional data generously provided by Ms. Karima Wicks, former Research Director, Capital Punishment Project of the NAACP Legal Defense and Educational Fund.

REFERENCES

- Allen, F.A. 1959. "Criminal Justice, Legal Values and the Rehabilitative Ideal." *Journal of Criminal Law, Criminology & Police Science* 50: 226.
- Allen, F.A. 1981. *The Decline of the Rehabilitative Ideal, Penal Policy and Social Purpose*. New Haven: Yale University Press.

- Anderson, H. 1991. "Harris Witness Says He Lied." *United Press International* (5/7): Regional News.
- Associated Press. 1991. "Dahmer Pleads Not Guilty to Charges of Killing 15." *New York Times* (9/11): A20.
- _____. 1992a. "Dahmer Gets 15 Life Terms." *Chicago Tribune* (2/17): C1.
- _____. 1992b. "15 Life Terms and No Parole for Dahmer." *New York Times* (2/18): A14.
- _____. 1992c. "Another U.S. Execution Amid Criticism Abroad." *New York Times*. (4/24): B7.
- Baldus, D.C., G.G. Woodworth, and C.A. Pulaski, Jr. 1990. *Equal Justice and the Death Penalty*. Boston: Northeastern University Press.
- Bedau, H.A. 1982. *The Death Penalty in America*. New York: Oxford University Press.
- Bedau, H.A. 1990-91. "The Decline of Executive Clemency in Capital Cases." *New York University Review of Law and Social Change* 18: 255-295.
- Bedau, H.A., and M.L. Radelet. 1987. "Miscarriages of Justice in Potentially Capital Cases." *Stanford Law Review* 40: 21-179.
- Berns, W. 1980. "Defending the Death Penalty." *Crime and Delinquency* 26: 511.
- Bishop, K. 1992. "No Rush to More California Executions." *New York Times*. (4/27): B10.
- Blumstein, A. 1982. "On the Racial Disproportionality of United States' Prison Populations." *Journal of Criminal Law & Criminology* 73: 1259-1281.
- Bowers, W.J. (with G.L. Pierce and J.F. McDevitt). 1974. *Legal Homicide: Death as Punishment in America, 1864-1982*. Boston: Northeastern University Press.
- Bowers, W.J., and G.L. Pierce. 1980. "Deterrence or Brutalization: What is the Effect of Executions?" *Crime and Delinquency* 26: 453-484.
- Buxton, R.J. 1973. "Criminal Law Reform: England." *American Journal of Comparative Law* 21: 230-244.
- Chicago Tribune. 1987. "Death Penalty Again Rejected in Britain." *Chicago Tribune* (4/2): C20.
- Christoph, J.B. 1962. *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty, 1945-57*. Chicago: University of Chicago Press.
- Clifford. 1986. "Voters Repudiate 3 of Court's Liberal Justices." *Los Angeles Times* (11/4): II.
- Coyle, M. 1992. "The 33-Hour Habeas Appeal." *National Law Journal* (2/3): 3.
- Doob, A.N., and J.V. Roberts. 1983. *An Analysis of the Public's View of Sentencing*.
- Doob, A.N., and J.V. Roberts. 1988. "Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys." In *Public Attitudes to Sentencing: Surveys From Five Countries*, edited by N. Walker and M. Hough. Aldershot, Hants, England: Gower.
- Ellsworth, P.C., and L. Ross. 1983. "Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists." *Crime and Delinquency* 29: 116-169.
- Federal Bureau of Investigation. 1980-1990. *Uniform Crime Reports, Crime in the United States*. Washington, DC: U.S.G.P.O.
- Field, M. and M. DiCamillo. 1992. "No Change in Public's Longstanding Overwhelming Support for the Death Penalty." *The California Poll*, Release #1616.
- Garey, M. 1985. "The Cost of Taking a Life: Dollars and Sense of the Death Penalty." *U.C. Davis Law Review* 18: 1221-1273.
- Glaberson, W. 1989. "Helmsley Gets 4-Year Term for Tax Fraud." *New York Times* (12/13): B1.
- Gowers, E. 1956. *A Life for a Life*. London: Chatto & Windus.
- Greenberg, J. 1982. "Capital Punishment as a System." *Yale Law Journal*, 91:908-936.
- Gregory J. and R. Strickland. 1971. *Hell on the Border*. Muskogee, Oklahoma: Indian Heritage Publications.
- Gross, S.R. 1987. "Loss of Innocence: Eyewitness Identification and Proof of Guilt." *Journal of Legal Studies* 16: 395-453.

- Gross, S.R., and R. Mauro. 1989. *Death & Discrimination: Racial Disparities in Capital Sentencing*. Boston: Northeastern University Press.
- Hager, P. 1990a. "Justice Eagleson to Retire in 1991; Supreme Court: He Will Be the Third Deukmejian Appointee to Depart After Brief Tenure. Governor Will Name a Successor, Who Must Face the Voters." *Los Angeles Times* (4/19): A1.
- Hager, P. 1990b. "Decisions by State Justices Drop Sharply." *Los Angeles Times* (5/26): A1.
- Hager, P. 1991. "State Supreme Court Upholds Sentence of Death for Three Killers; Punishment: Appellants Included Man Who Murdered Former Football Star's Relatives. Justices Have Affirmed the Penalty 27 Consecutive Times Since June." *Los Angeles Times* (5/3): B3.
- Hager, P., and J. Gillam. 1991. "Wilson Names L.A. Justice to High Court." *Los Angeles Times* (7/30): A1.
- Hollis, C. 1964. *The Homicide Act*. London: Victor Gollancz, Ltd.
- Hood, R. 1989. *The Death Penalty: A World-wide Perspective*. Oxford: Clarendon Press.
- Liebman, J.S. 1990-91. "More Than 'Slightly Retro': The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in *Teague v. Lane*." *New York University Review of Law and Social Change* 18: 537-635.
- Love, K. 1990. "Feinstein Ads Get the Race Going; Politics: Her Television Spots Seeking the Democratic Nomination for Governor Begin Today. In One, She Takes an Early Swipe at Rival Van De Kamp." *Los Angeles Times* (1/23): A2A.
- Lempert, R. 1981. "Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment." *Michigan Law Review* 79: 1177-1231.
- Mauer, M. 1991. *Americans Behind Bars: A Comparison of International Sentencing Rates*. Washington DC: The Sentencing Project.
- Mathews, J., D.S. Broder, and P. Taylor. 1990. "Democratic Boos Greet California's Death Penalty Law." *Washington Post* (4/8): A6.
- Meltsner, M. 1974. *Cruel and Unusual: The Supreme Court and Capital Punishment*. New York: William Morrow & Co.
- Moncrieff, C. 1990. "Crushing Defeats for Death Penalty Bid." *Press Association, Ltd* (12/17): Parliamentary News.
- Nakell, B. 1982. "The Cost of the Death Penalty." Pp. 241-246 in *The Death Penalty in America* edited by H.A. Bedau. New York: Oxford University Press.
- New York Times. 1992. "Tyson Denied Freedom During Appeal of Case." *New York Times* (4/25): 1,34.
- Pierce, G.L., and M.L. Radelet. 1990-91. "The Role and Consequences of the Death Penalty in American Politics." *New York University Review of Law & Social Change* 18: 711-728.
- Poulos, J.W. 1990. "Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California." *U.C. Davis Law Review* 23: 157-332.
- Powell, L.F., Jr. 1989. "Commentary, Capital Punishment." *Harvard Law Review* 102: 1035-1046.
- Prejean, H. 1988. "The Death Penalty Costs More Than Life." *Newsday* (2/3): 62.
- Reuters. 1992. "Justice Minister Suspends Hangings in South Africa." *Los Angeles Times* (3/28): A2.
- Royal Commission on Capital Punishment. 1953. *Royal Commission on Capital Punishment, 1949-1953 Report*. London: Her Majesty's Stationery Office.
- Schwartzchild, H. 1982. "Homicide By Injection." *New York Times* (12/23): A15.
- Shapiro, R. 1986. "Outlook on Death Penalty." *U.S. News & World Report* (5/19): 31.
- Spangenberg, R.L., and E.R. Walsh. 1989. "Capital Punishment or Life Imprisonment? Some Cost Considerations." *Loyola of Los Angeles Law Review*, 23:45-58.
- Stalans, L.J., and S.S. Diamond. 1990. "Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent." *Law & Human Behavior* 14: 199.
- Taylor, S. 1987. "Death Penalty Rulings: Opening New Era for Appeals." *New York Times* (4/24): A11.

- Time. 1992. "California Revives the Death Penalty; After 25 Years, San Quentin Prepares to Execute a Murderer." *Time* (4/27): 15.
- Uelmen, G.F. 1989. "A Cure for the Court's Death Row Burnout; Justice: Accept Appellate Judgment on Nitty-Gritty Aspects, Leaving Only the Sentence Itself for Review by the Lucas Court." *Los Angeles Times* (11/29): B7.
- Von Drehle, D. 1988a. "Capital Punishment in Paralysis." *Miami Herald* (7/10): A1.
- Von Drehle, D. 1988b. "Death Penalty Price Too High for Kansas." *Miami Herald* (7/13): 12A.
- Woodward, B., and S. Armstrong. 1979. *The Brethren*. New York: Simon & Schuster.
- Worthington, R. 1992. "Dahmer Sane, Faces Life Terms." *Chicago Tribune* (2/16): C1.
- Zimring, F., and G. Hawkins. 1986. *Capital Punishment and the American Agenda*. New York: Cambridge University Press.
- Zimring, F. 1991. "Ambivalence in State Capital Punishment Policy: An Empirical Sounding." *New York University Review of Law & Social Change* 18: 729-742.