

THE REALITY OF THE DEATH PENALTY

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We are nearing 1000 executions since the states resumed killing people in 1976. More than 3,500 others are still on death row. They are condemned to die for crimes they did (or in some cases did not) commit. Convicted murderers all.

The crimes they committed are often horrific. There was the one who poisoned all the Halloween candy he distributed to children on his block but gave extra poison to his own children so that they would die and he could collect the insurance money. He's dead now, killed by the state of Texas. There are the two in Ohio who buried their roommate alive, then forged his signature on title papers and sold his car. As I write this, the U.S. Supreme Court just declined to hear the first round of their appeals. There's another in Ohio who raped and killed two young girls, then more than a year later, raped and killed an adult woman, and a few months after that, raped and almost killed another woman. It is said that he has raped and killed others. His appeals are in a fairly early stage.

They are, at least as often, almost ordinary murders. There is the street kid who shot the clerk while robbing a convenience store, didn't really mean to kill, just wanted to frighten the clerk, thought he'd shot him in the arm, but actually got him in the chest. There's the guy who struggled with an old man who resisted during a robbery and, without much meaning to, killed him. There's the guy who killed his ex-wife in a fit of anger. Their appeals are in various stages of process, but all have at least a few years before they'll be executed - if they ever are.

Those stories, the ordinary and the horrific, are no different, really, than the stories of the ones who did not end up on death row. One shot three people in cold blood during a robbery, killing two of them. One arrived with a gang of friends and shot up a birthday party killing an

altogether innocent and well-liked high school student. One young man killed the manager at a fast food restaurant because he was scared and embarrassed that she saw him robbing the place. One was convicted of shooting and burying, perhaps burying alive, his cousin for ripping him off on a drug deal. One was a university police officer who kidnaped and shot - 14 times - a lovely young nursing student at the university where he worked, leaving her body frozen to the ground early in the morning on Valentines Day, then joined in the hunt for her killer.

They are crimes of people who led truly appalling lives. One was addicted to drugs as a child, taught by his parents to commit burglary, kidnaped by his father, then by his mother, then by his father again, and so on, forced by his father to watch his sister being forced to have sex with horses. One is a retarded young man, hardly more than a boy at the time he killed an old woman in his neighborhood while robbing her of her saved bag of pennies. He had been physically, emotionally, and sexually abused by his parents and others. The chief justice of the Ohio Supreme Court said of him that of the dozens of capital cases he'd reviewed, he'd never found anyone more "destined for disaster." The latest disaster, of course, is that Ohio intends to murder him.

I also know the stories of men who are innocent - sometimes wholly innocent. Wilford Berry was there for the killing for which he was found guilty and executed, but he almost certainly did not actually commit the murder. Kenny Richey sits on death row in Ohio for murders during an arson that was probably an accidental fire for which he had no responsibility at all (though he did try to save the lives of the victims). Danny Brown did not kill and viciously rape Barbara Russell. After he spent 19 years in prison, they finally tested the DNA and learned who did commit the crime. Danny is out now, though the state refuses to admit they made a mistake. Roger Coleman was not so lucky; he's been executed. The DNA from the rape-murder

in his case is still there, can still be tested, but Virginia won't test it. They don't want to know that they may have killed the wrong man.

Coleman was killed because his lawyer missed a filing deadline. Calvin Burdine was almost killed because his lawyer quite literally slept through "significant portions" of his trial. Anthony Porter was saved because a class of college journalism students decided to investigate his case and discovered the real killer.

I know some of these stories because I represented, at one time or another, many of these men. I know others because when you do death penalty defense, you learn about them. You learn about the police who planted blood from the victim on the pants of Odell Barnes. You learn about the police who coerced what were not really confessions out of Gary Gauger. You learn about the eyewitness who was probably just wrong when she identified said Gary Graham as a killer. You learn about the cops who decided that one of two men killed a young girl and chose to pin the crime on Clarence Brandley because, as one officer told him, "Since you're the nigger, you're elected." Barnes and Graham were executed anyway. Gauger and Brandley are out, trying to get on with their lives.

You learn about George W. Bush who, as governor of Texas, mocked Karla Faye Tucker for seeking clemency after she turned her life around in prison. And you learn that his advisor, Alberto Gonzales, who will be Attorney-General by the time you read this, didn't bother to tell Bush the reasons urged for clemency when giving him the information on which he based his clemency decisions (denied 152 times, granted once).

You learn about the lawyers who are appointed to death penalty cases because they made large campaign contributions to the judge or because they won't make work for the judge by actually defending the client. You learn about the police who beat confessions out of prisoners

and then lied about it and got promoted, and about the prosecutors who helped them do it and are rewarded with raises and, sometimes, judgeships. You learn about the coroners who testify about autopsy results when they did not bother to do the autopsy but just asked the prosecutors what they wanted the results to be. You learn about prosecutors who pursue death penalty cases because they will garner votes, and about the prosecutor who agreed to a plea bargain in a death penalty case because he wanted to go campaign at the county fair when the trial was scheduled. You learn about judges who know all of this but can't seem to bring themselves to say that the convictions or death sentences were unfair or that the process is corrupt or the results arbitrary. You learn that at least one Justice on the United States Supreme Court believes that the Constitution is not offended by the execution of the factually innocent while another has said that counsel in every death penalty case she had reviewed was incompetent.

You learn all of these things because they are, frankly, routine. They are the norm of the process.

Death row in this country is filled with men (and a few women) who are there not because they are the worst of the worst who did the worst things but because of incompetence, dishonesty, carelessness, laziness, poverty, and racism. They are there because prosecutors believe that getting convictions and death sentences means getting re-elected. They are there because the courts don't care about fundamental fairness or the integrity of the system. They are there because we choose in this country to have a wholly impossible and immoral system and don't care enough to make even a serious pretense of trying to make it work right. They are there because, as John Spink explained when he was strapped into Florida's electric chair, they call it capital punishment "cause them without the capital gets the punishment."

In 1972, the Supreme Court declared that the death penalty as applied in this country was

unconstitutionally arbitrary and capricious. There was, the Court said, no rational way to determine who should live and who should die. Four years later, the Court found that some of the new death penalty laws that had been enacted avoided that problem because they provided “guided discretion” in allowed rational, individualized determinations of when death was appropriate. The Court was wrong in 1976. The process cannot be rationalized.

Governor Ryan, in Illinois, called a moratorium on executions when he realized that Illinois had executed 12 men and exonerated 13 from death row. Supreme Court Justice Antonin Scalia, who strongly endorses the death penalty, concedes that from time to time an innocent person will be executed. It’s a fair price, he thinks. The late Harry Blackmun, Scalia’s colleague on the Court for many years, changed his view over time, ultimately declaring that he was morally and intellectually obligated to concede that “the death penalty experiment has failed.” As for the innocents, Blackmun wrote that the execution of an innocent man comes “perilously close to simple murder.”

He was right, of course.

But if the killing of the innocent is murder, so is the killing of the guilty. In Ohio, the only capital offense is aggravated murder. The statute defining that offense says, “No person shall purposely, and with prior calculation and design, cause the death of another.” The executioners, in our name, do just that when they take the condemned to the execution chamber, strap him to a table, stick needles in his arms, and pump poison into his veins.

We try to sanitize the process. We call it “lethal injection,” and its advocates say it’s just like putting a pet dog to sleep. But we use chemicals that can cause enormous pain - chemicals that veterinarians are not permitted to use on dogs because they are so painful. It doesn’t much matter. There’s no nice way to murder someone in cold blood.

I have represented dozens of men charged with capital offenses or sentenced to die. I have come to know many of them pretty well. They have been charged with and convicted of terrible crimes. Most are guilty of something close to the crime they were convicted of. But they are people. All are better than the worst thing they have ever done. Those who ended up on death row are no worse than those who did not. They're just a lot less lucky. And when luck is the basis of the system, the system doesn't work.

There are signs that things are changing. Death sentences are down. Executions are down. Polls show that public support for state killing is down. People understand that executions don't deter murder. They know the system is unfair. They recognize that the innocent will sometimes be killed. We're winning this struggle for abolition.

Just don't tell that to the guy who's due to be killed next week. It's too late for him.

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