The Unedited Death Penalty Forum

Question # 1: Why has the death penalty attracted so much scholarly attention from such a wide variety of disciplines?

Austin Sarat: I'm not so sure how broad the disciplinary representation in study of the death penalty is, but I have the sense that DP research has often been quite narrow in its focus. As Zimring pointed out in LSR in 1993, most DP research is advocacy/policy oriented. That work is important, but I think it is also important to connect work on the DP to broader questions about the nature of law, the connection between law and violence, the cultural meaning/significance of punishment.

Leigh Bienen: Actually, the death penalty research has been both very broad and faceted in such a way that huge areas are over looked. The persistence and pervasiveness of the general philosophical interest in punishment, retribution, evil, and justice means that the discourse often seems to be very broad, but that discourse is frequently very superficial, repeating the same old cliches on both side. Then there is the whole tradition of counting: counting the number of people in death row, the number of executions, the time between executions, etc. We count because we are looking for patterns and try to understand what is happening. One of the most interesting relatively new developments is the spill over of decision making theory to the study of jurors and institutional decision making within courts. The capital jury project, but also organizational behavioral studies of courts as institutions.

Jim Acker: This is a multi-barreled question, but fair enough.

First, why "such a wide variety of disciplines"? I suppose the answer is a rather straightforward recognition that no one discipline has a monopoly on the kinds of information or reasoning that can respond adequately to the issue of whether an organized state can legitimately claim and exercise the authority to take life in punishment for crime. A law regulating this area would be soul-less without ethical underpinnings, rootless without history, mindless without empirical foundation, and otherwise lacking without the religious, political, and psychological/sociological dimensions that are associated with capital punishment. Multiple disciplines are involved because of the multiple dimensions of the issue.

Why "so much . . . attention"? So many reasons. The death penalty is about life and death, civil liberty and order, individual and state, crime and justice, race and power, evil and redemption, and other matters that are timeless and both practically and symbolically important to people. It would be surprising if these issues had not gained such attention from so many people over the course of the past few centuries.

And why "scholarly" attention? Because scholars are impressed by the same reasons that make the death penalty command so much attention generally. The issues are interesting and important. Beyond intellectual curiosity, however, I suspect that many are drawn to this area because it is something about which they have more or less strong and passionately held feelings. We hope that our enthusiasm for the issues is tempered by scientific and other

constraints that are supposed to form a part of scholarship, but I think it would be regrettable to attempt to dampen the zest that fuels at least some of the scholarship in this area. It is rewarding to participate in a quest for knowledge and a debate about policy that involve issues that really seem to matter.

Dane Archer: Why does there appear to be substantial scholarly interest in the death penalty? In the case of the United States, at least, concern is no doubt spurred by the imminent prospect of thousands of executions.

For the rest of the industrial world, the issue has scholarly appeal, but may lack some of the urgency generated by the issue here in the U.S. Unlike all other democratic societies, the U.S. is re-embracing the death penalty as appropriate punishment and, indeed, we Americans are expanding the lists of offenses for which execution is merited.

For many American scholars, therefore, the scientific curiosity involves the nature and merit of the kinds of evidence (e.g., "deterrence") or other factors (e.g., "retribution") that apparently convince many Americans that the death penalty is warranted, even as all other industrial nations embrace the abolition of this form of state killing.

The death penalty therefore appears to be another example of "American exceptionalism" -- an example with obviously lethal consequences but without obvious explanation.

Leigh Bienen: The death penalty has attracted so much scholarly attention, and attention from the public, and attention from the popular press, and attention from pop culture because it directly implicates death and dying. The fact that there is a rap or pop music group which calls itself 'death row' says it all. Also the death penalty, the imposition of death by the State, is a fundamental imposition of authority by the State. What could be more of an exertion of the authority of the state than legally taking life? It is the claim to legality which then implicates the "scholarly" community, although in my opinion the line between "scholarly" and popular is not so clear-cut these days. Since the death penalty necessarily involved juries, judges, courts, statutes, the United States Congress, state legislatures, and other "law making" and institutions of legal interpretation and authority, it is surprising there is not more discussion of the death penalty as a matter of public policy. Surprisingly to me a few years ago, the death penalty was something of a dead issue in terms of public policy. That seems to have changed again. Assisted suicide, abortion are similarly "legal issues" which touch upon deep seated emotions and consequently take out
attention.

Shari Diamond: A simple response is that researchers aren't very different from the general population --- which used to turn out in large numbers for executions in the days of public hangings. When you couple that with the obvious horror of an irrevocable error, and the more modern concern with racial discrimination, it's hard to imagine a more compelling research topic. I suppose you may have generated this question in part because the imposition of the death penalty is still a relatively rare event, but we need only look to the huge research literature on (the relatively rare) jury trial to recognize that low frequency generally does not deter the research community. The fascination with the jury may be due to the shadows its casts (a Marc

Galanter image) --- and the same could be said for the death penalty. It speaks to philosophers and social scientists about the meaning of justice.

Leigh Bienen: And yet there seems to be a new and curious cynicism regarding the execution of the innocent these days. That innocent people will be executed is not given much weight in arguments against capital punishment. There seems to be a public acceptance of the fact. Perhaps the new attention given to assuming the risk and the inevitability of risk for any policy, including seat belts, air bags, cancer and cigarettes, etc. There is something very basic about the appeal of jury trials, that everyone can identify with what is happening, with being judged or judging. I also detect a small change in public opinion towards less acceptance of capital punishment recently, perhaps that is wishful thinking.

As to why the death penalty attracts so much attention in comparison to other countries, there are lots of countries outside of western Europe, e.g. China, other parts of Asia, where the government cheerfully executes people and there is no public policy debate. Not that there is much of a public policy debate here, for all the news items which appear on the media. I would argue that a good bit of the public and news interest in the death penalty is rather ghoulish, people's fascination with executions and death, and that little of what you see in the media is "discussion" or even a consideration of the public policy issues or the legal issues.

John McAdams: What Leigh Bienen describes as "cynicism regarding the execution of the innocent" I would regard simply as realism about public policy. There simply is no such thing as a risk-free public policy. Indeed, many policies risk killing innocent people. Bienen has provided an excellent list of such
policies.

The best evidence supports the view that the execution of innocents is extremely rare. Ironically, two scholars who strongly oppose the death penalty have provided this evidence. Hugo Adam Bedau and Michael Radelet found, among about 7,000 people executed in the United States in this century, 23 whom they claim to have been innocent.

Obviously, this is not a number to be taken as the literal truth. On the one hand, the historical record surrounding some executions may be sparse or virtually nonexistent, such that scholars today have little chance to judge the guilt or innocence of the defendent. On the other hand, Bedau and Radelet quite likely viewed the evidence in a biased way, and judged innocent some defendents whom others might believe to be clearly guilty. Indeed, they admitted to the Chronicle Of Higher Education that (in the words of the Chronicle's reporter) "some cases require subjective analysis simply because the evidence is incomplete or tainted." Disturbingly, they admitted this was true of the 23 cases they reported. Indeed, their analysis of one case (that of a certain James Adams) was savaged in the Stanford Law Review for "disregard of the evidence."

The vast majority of Bedau and Redelet's 23 cases date from an era where defendents many fewer due process rights than they do today.

Admittedly, increasing the number of executions -- which is somethingthat death penalty

supporters should and in fact do want -- increases the probablilty of eventually executing an innocent defendent. In spite of reasonable due process protections, eventually innocent people will be executed, just as innocent people will be killed in any war, have been killed by air bags in cars, and have been killed by the FDA's laggard approach to approving new drugs.

Welcome to the real world of policy analysis. We certainly want to reduce the number of innocent deaths. But nobody insists that government can pursue no policies that risk the lives of innocents -- at least not until they want to argue against the death penalty.

QUESTION #2: 25 years ago, the U.S. Supreme Court -- in the case of Furman v. Georgia -- temporarily curbed the death penalty, because its application was arbitrary/capricious ("wantonly and so freakishly imposed," to quote Justice Potter Stewart in a concurring opinion). Is the use of the death penalty today more consistent and less arbitrary... or not? What evidence could you cite to support your views?

Austin Sarat: The death penalty today is, I think, no less inconsistent/no less arbitrary. Gregg didn't eliminate arbitrariness; it just narrowed the range of cases in which arbitrariness could occur. McCleskey provided the best evidence that the problems that concerned the Supreme Court in 1972 were alive and well in the late '80s. The recent de-funding of death penalty resource centers and limitations on habeas have not helped to produce greater fairness.

Jim Coleman: I agree with Sarat. Indeed, an argument can be made that application of the death penalty today is more arbitrary and more inconsistent. And I am not sure that the range of cases in which it is available really is that much narrower.

The Court's decision in Gregg v. GA essentially reached the same conclusion that Justice Harlan had reached in McGautha v. CA: that there is no practical way to guide a jury's ultimate decision whether to impose the death penalty. In the end, the only thing that can be done is to give each defendant facing the death penalty an opportunity to plead for mercy. That was the upshot of Lockett v. Ohio. But Gregg went beyond McGautha and erected the complex guided discretion systems that now exist, imposing super due process requirements, ostensibly for the purpose of limiting or guiding the jury's (or other sentencer's) discretion and thereby make the system fair. Rather than fairness, the result primarily has been complexity without materially affecting the arbitrariness of the decision in a particular case whether to impose the death penalty. In Furman, for example, Justice White posed the question whether one could make a meaningful distinction between the cases in which the death penalty was imposed and those in which the defendant was eligible for the death penalty, but it was not imposed. The answer was "no" and that was proof that the sentence was arbitrary. The answer is still "no", but in Gregg (I believe or Zant v. Stephens) White changed the standard and noted that now, it no longer was true that one could not distinguish between the cases in which the defendant was eligible for the death penalty and those in which he was not! It was never the case that one could not make that distinction.

In McCleskey, of course, the Court even abandoned trying to protect against race arbitrarily affecting the decision to impose the death penalty. Holding that the risk of racial discrimination that it assumed the statistics demonstrated was not constitutionally unacceptable under the 8th

Amendment.

The principal problem with where we are now is that the Court in Gregg abandoned trying to deal with the substantive issue raised by the 8th Amendment, whether the death penalty in America was inconsistent with the dignity of human beings, or whether it accorded with the evolving standards of decency. Brennan in Furman said the answer to that question required a judgment about whether the death penalty was generally accepted for use against all Americans who are equally blameworthy, or whether it is accepted only for use against minorities and outcasts. The Court now answers that question by counting the number of state legislatures that have approved the death penalty in particular circumstances and by noting that the prosecution seeks and juries impose it in those circumstances. That
is too simplistic and does not answer the question posed by Brennan. But once you decide not to address Brennan's question, then you are back in 1971. And, having more rules about how the ultimate issue gets to the jury does not make decisions by juries consistent and nonarbitrary. One still cannot explain in case after case in which the defendant is eligible for the death penalty why the prosecutor seeks it in one but not the other, or why the jury imposes it in one but not the other. That is the definition of arbitrary that the Court had in mind in Furman.

Jim Acker: To my knowledge, the relative lack of data concerning the administration of the death penalty in pre-Furman days makes comparative assessment of the pre- and post-Furman levels of arbitrariness difficult.

However, perhaps we can make some inferences about the likelihood that levels or arbitrariness and capriciousness have changed under post-Furman statutes. As I see it, two major structural legislative changes occurred post-Furman. First, some crimes (rape, burglary, kidnap, robbery) were eliminated as capital offenses. Theoretically (but I don't think so much in practice, largely because of the "contemporaneous felony" and "heinous-atrocious-cruel" aggravating factors), the death penalty also was limited to a narrower class of criminal homicide. Second, capital trials became bifurcated in all jurisdictions, meaning that separate penalty trials were provided during
which additional relevant information in aggravation and mitigation of punishment could be admitted.

But the post-Furman legislative reforms accomplished little else. The schemes purport to regulate only sentencing discretion; they do not even aspire to control charging discretion, which remains a major source of arbitrariness. The class of death penalty-eligible murders remains quite broad. Statutes give minimal guidance about how sentences should be imposed (vague balancing formula are sometimes specified) and even when such statutory guidance is given, the evidence suggests that sentencers simply ignore the statutory guidelines and come to a decision independently of the legislation.

Prima facie, then, there is little reason to expect that the level of arbitrariness has changed much over time. And we know that many current studies reveal significant problems with race, geographic disparities, and other impermissible and extralegal factors influencing capital charging and sentencing decisions. Dave Baldus's study of Georgia did suggest a rather systematic variation between aggravation level of killings and the likelihood that a death

sentence would be imposed, but then of course documented that mid-range cases were rife with evidence of race discrimination (but I will let Dave speak to all this).

In short, with the notable exception that rape (of adults--I understand that Louisiana is threatening capital prosecution of people convicted of raping children) has been eliminated as a capital offense, it's hard to conclude that we have more or less arbitrariness now than in pre-Furman times. But I do not think it is hard to conclude that the amount of arbitrariness now remains unacceptably high.

Shari Diamond: Justice Harlan may have been right (in McGautha (1971) -- pre-Furman) when he wrote that it was "beyond present human ability" to identify in advance those characteristics of the defendant or the crime that call for the death penalty. Even if he was wrong --- and it would be possible, we certainly haven't done it. Although we've taken rape off the table (unless it accompanies a homicide), prosecutorial, judicial, and jury discretion are remarkably wide. The labyrinthine sentencing instructions provide little guidance, leaving juries to rely on their own devices rather than to be guided by legal standards (such as they are) --- and creating new sources for
disparity (two triers of fact can easily arrive at different decisions on the same defendant if they find different meanings in the instructions --- even if they are making every effort to adhere to those instructions). Whether intentional or unintentional, curable or incurable, the structure currently in place offers no serious support for consistency in judgment.

It is interesting to ask whether a "twister" is more arbitrary than a lightening bolt....

Dave Baldus: The issue of arbitrariness, in the sense of comparative excessiveness does not appear to be a matter of public concern outside the profession. Furman and Godfrey appears to be the last decisions that expressed any concern about whether is was possible to distinguish death cases, in any meaningful way, from the great bulk of similar cases that result in less severe punishments. Pulley v. Harris took the issue off the screen as far as the Eight Amendment is concerned.

It is difficult to know whether there is more or less of this brand of arbitrariness than existed pre-Furman, primarily because there is so little data available on which to base such judgments. Our Georgia research (Baldus, Woodworth and Pulaski) examined this issue with a comparison of 240 pre-Furman
with 600 post-Furman cases and we saw some improvement. The post-Furman cases continued nevertheless to reveal a lot of excessiveness, none of which was explicitly corrected by the Georgia Supreme Court.

The earlier e-mail discussion mentioned a number of the reasons for the problem's persistence today especially the death sentences in cases that are not highly aggravated -- ineffective counsel, absence of charging guidelines, and greatly different perceptions in different parts of the country and within individual states as to what constitutes a `death case."

The number of highly aggravated cases that escape the dp is influenced by policies, in a number of places, that allow any killer to plead to life without parole, no matter how aggravated

the case may be if it does not involve a police victim or other important person. The problem is aggravated by the decline to nearly zero of executive clemency, which formerly set to life many of the least aggravated cases. That void has been offset in part by the more active intervention of some state courts who reverse 25-35% of the death sentences on legal grounds. It appears that the chance of obtaining such a sentence vacation is significantly correlated with the aggravation level of the cases. On the other hand, the tolerance of the Supreme Court for significant error in state penalty trials, allows state courts to affirm the highly aggravated cases even when they are riddled with error.

Jim Acker has some good suggestions for reducing comparative excessiveness. I agree also with Judge Alex Kozinski that a worst case only death sentencing system is probably possible only if the scale of the system is greatly reduced and its annual output is brought into some approximate balance with the number of annual executions demanded and expected by the public. For the last fifteen years in which executions have become routine, this is a fairly stable number in most states, although the size of the number varies significantly from state to state.

Is there any way to trim back the system. The legislatures and the governors seem to be unlikely sources of leadership. The federal courts are out of the picture and the state courts are either uninterested or clearly intimidated. On this point the process of "proportionality review" of death sentences which is required in about 15 or so death sentencing states is a failure. Only about 50 or 1% of the post Furman death sentences has been vacate on grounds of excessiveness. Even in New Jersey where the court has set up a data base that allows it to monitor its system for excessiveness, and the judges have life tenure, it appears likely that the review system will be used in only the most extreme and unlikely cases.

If the system is ever to wither, it will likely be through the declining interest of prosecutors and other local officials who question the amounts of money spent on the prosecutions and their utility, as a crime control measure, and realize that the symbolic functions of the death penalty can be adequately served with a greatly reduced system. The recent experience in New York state illustrates what might be, with only about 8 or 9 death notices filed and not a single capital trial conducted since the death penalty was imposed over 16 months ago.

As for the ABA, it could contribute to the goal of better understanding the problems of excessiveness, if it would support research designed to assess the scope of the problem and what may be done to ameliorate it.

Question #3: Jim Acker raises some interesting questions about legislative reforms since the 1970s designed to reduce discretion and, therefore, arbitrariness or bias in the imposition of the death penalty. The prosecutor's decision to seek the death penalty, or not, in any given (death-eligible) case ... what do we know about the use of this discretion? Have there been studies, either cross-jurisdictional studies, case studies, or anecdotal? [The TV show, Law and Order, provides some gripping and complicated (quasi-) fictional tales of prosecutorial discretion generally and, occasionally, vis-a-vis the
death penalty!]

Also, what do we know about the exercise of discretion by sentencers in death penalty cases

-- juries/judges?

Do such studies indicate any clear changes over time -- for the better or worse -- regarding consistency? And is it "sufficient" for, say, Georgia jurisdictions to be consistent with one another, or should we demand a "national" consistency in the application of the death penalty? (a federalism question lurking again...)

Question #4: There seems to be some consensus among those responding, so far, that application of the death penalty is still highly arbitrary, due to a variety of factors. If that's so, what -- if anything -- could be accomplished by the ABA's highly publicized call for a moratorium on executions until greater consistency/fairness can be achieved?

The ABA's Resolution, which was passed - by chance -- the day our listserv discussion began -- cites all of the factors we've already discussed and others -- the recent actions of Congress, including defunding of death penalty resource centers and limitations on habeas, continued racial discrimination in its application, lack of competent counsel in many cases-- especially where counsel for the indigent are appointed from a list of private (not public) lawyers, etc.

Is the situation remediable? if so, how? Or is this a "smokescreen" or backdoor effort to end capital punishment, because no amount of time and effort can solve such intractable problems?

Austin Sarat: I think that Blackmun was right...the problems with the death penalty cannot be remedied; we cannot have a punishment which is individualized and yet one which is consistent. "Greater consistency/fairness leaves open the question of how much greater. But in the end I don't think that the structure of capital punishment can be brought within the Constitution.

Shari Diamond: I don't know the "legislative history" of the ABA's recent resolution, but it wouldn't surprise me if multiple groups with differing agendas contributed to it. It would be well-justified, however, if it were based solely on concerns about arbitrariness and/or discrimination. Note that Justice Blackmun initially supported the death penalty in Furman and Gregg --- but after a 20-year struggle "to develop procedural and
substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor" he gave up, and in Callins v. Collins (1994) declared that he could no longer support it.

Leigh Bienen: I don't think the arbitrariness can ever be eliminated unless prosecutorial discretion is abolished, and that will never happen. and since whether or not you are sentenced to death is hugely effected by the economic resources available to the defendant, that raises fundamental questions about justice. on the other hand the kind of medical care you receive is influenced greatly by your access to high quality doctors, just as the sentence you receive depends in part upon the quality of legal representation you receive, and some but not all of that

is income-related. We all know that some high priced professionals are also incompetent and some low priced ones are very competent. I don't think the death penalty an ever be administered justly, although it can certainly be administered or justly than it is at present.

Jim Acker: The question about the ABA Call for a Moratorium ends by pondering whether any amount of time and effort can "solve" the many problems with the death penalty.

I suppose few problems can ever be totally solved, and some of the issues that remain even after partial solutions have been made are so significant that the partial efforts are not good enough. Nevertheless, I do think it is possible that some problems related to the inequitable distribution of the death penalty can be reduced without abandoning the entire death-penalty enterprise. Enactment of the Racial Justice Act would help in the policing of race discrimination. Seriously narrowing the range of death-penalty eligible crimes (such as to murders with multiple aggravators) would reduce the opportunity for abuses of discretion since only a relatively small number of highly aggravated killings could be punishable by death. Providing well-qualified and adequately funded attorneys to accused and convicted capital offenders would help even the playing field a bit more. Insisting on charging guidelines and a system for enforcing those guidelines would be of some help. Now, federal capital prosecutions must be approved by the Attorney General after a conference during which defense counsel are given a chance to offer reasons why U.S. Attorneys should not be given approval to pursue a death sentence. Something along these lines, with some more teeth (enforceability) would be in order in state systems.

I haven't had the chance to see the ABA proposal for a moratorium, but given the vast distance that lies between what is "fair" and what the system presently looks like, there certainly is an opportunity to make the system "fairer" (perhaps "less arbitrary" is the better description) than it is now, without altogether eliminating the death penalty.

John Paul Ryan: Thanks to Austin and Shari for their posts, which -- quite by coincidence -- both cite Blackmun and his growing discomfort with the potential for application of the death penalty to be consistent (enough).

For the most part, juries -- with a few geographic exceptions -- play no role in criminal sentencing, except in death penalty cases, where our system of justice has created a "people's voice" to legitimize or reach better decisions on life and death... Would we better off if only judges decided the life or death question (admittedly after prosecutors have already screened considerably the pool, as Leigh so well points out). Can a persuasive argument be made that judges can be more easily
constrained by the rule of law, structured guidelines, etc. than twelve citizens? Put another way, does the institution of the jury, as it operates today, aggravate or mitigate inconsistencies in life/death sentencing decisions?

Leigh Bienen: As to whether or not the death penalty is more or less arbitrary than it was prior to Furman, it seems to be there is more uniformity in rhetoric than there is uniformity across jurisdictions. the huge discrepancies in the number of death sentences imposed and number of executions across state jurisdictions indicate to me that arbitrariness has not decreased. the

culture of the death penalty is very different in Texas and Alabama than it is in new jersey or New York. But more importantly a court which has affirmed many many death sentences (e.g. the Pennsylvania supreme court, or the texas court of criminal appeals) is going to have a very different
attitude towards capital appeals than is a court where a death sentence is a relatively rare event. See the comments of justice handler in State v. Marshall II (i think) 613 A. 2d 1059 (1992?) for comments about how much time some courts have spent on capital cases. some courts now treat affirming death sentences as routine. and there are huge differences in the qualities of courts, as well as the quality of representation at trial and appeal.

Jim Acker: We seem to have at least two distinct questions buried in the general one posed about judge vs. jury sentencing in capital cases. We are asked if we "would be better off" if only judges decided life or death questions, and we are asked whether the institution of the jury aggravates or mitigates inconsistencies in life/death sentencing decisions.

I don't think we would be better off, because any advances that might be made in achieving greater consistency through judge sentencing would be more than offset by sacrificing the collective sentiment of the jury about the justice of a life or death sentence in any case. Notwithstanding the imperfections of the jury system, and the capital jury in particular, I remain convinced that the benefits of the system far outweigh the drawbacks, and that juries are to be preferred over judges in rendering decisions that have the moral dimension that is at the heart of capital sentencing decisions. Steve Bright has published some very compelling articles that suggest that judges may not always be(to put it mildly) the impartial beacons of law and learning that we might hope. Most trial judges are elected, and in the politically supercharged atmosphere of capital trials, the pressure can be significant to impose a death sentence. Not all judges resist that pressure.

Reliance on juries might contribute to inconsistencies in life/death sentencing decisions, but my guess is that the greater consistency through reliance on judicial sentencing might be manifested in a greater number of death sentences. . That more death sentences would be imposed does not prove that those sentences would be unjust. But since there is no agreement on what justice demands in this context, I would rather trust my lot to 12 people tried and true. Studies in Florida (Radelet and Mello) suggest that where judges have an override option, they are much more eager to exercise it by rejecting jury advisory verdicts for life and imposing death sentences, than in imposing life sentences after juries recommend death.

Maybe the optimal combination would be to give judges a one-way corrective power; they could reduce jury death sentences to life if they perceived improper considerations motivating the sentence, but they would not be empowered to override a jury's decision to impose a life sentence. I would prefer to err on the side of erroneous exercises of mercy than arbitrary sentences of death.

Leigh Bienen: I am in agreement with Acker's judgments and opinion regarding the likelihood of judges to sentence to death, when under pressure for election or just under pressure to be 'tough on crime' generally. judges have always been subject to these pressures, which is why juries were conceived of to begin with. i notice the trend in the legislatures is towards more judicial

control over death sentencing, e.g. in Delaware a recent enactment taking the life death sentencing decision away from the jury, to the best of my recollection, and also in Arizona or new Mexico. the purpose behind these enactments, as i see it, is to increase the number of death sentences and make legislators feel that they are being tough on crime. but if you believe, as i do, that disparities are inevitable what is the benefit of having more death sentences and executions? i believe that judges are much more death prone than juries simply because they are 'professionals' in the process. and I believe that the research on comparisons between judge and jury sentencing supports that. it may be as kalven and zeisel showed that judges are more uniform, but they are less merciful. I don't think the criminal justice system would befit from more executions, more death sentences, more people on death row, or more public attention to or catering to the public's hunger for sensational news about death sentences and executions. On the contrary.

John Ryan: We've had a good discussion and exchange of ideas on the "arbitrariness" of the death penalty, past and present; thanks to all who have contributed. Now, let's turn to one possible source of this arbitrariness or inconsistency -- race (both of defendant and victim in capital cases).

NEXT QUESTION

Is the death penalty an area of our criminal justice system (in the United States) that, today, can be called racist or discriminatory? Why(not)?

Austin Sarat: I think that we are all pretty reliant on the Baldus study. And, the results seem to say that race of the victim is key. I think that the race of victim and defendant influences invisible decisions about who to charge and prosecute for capital murder...It is also the case that class can't be left out. Research suggests that the quality of defense counsel makes a huge difference. If you can afford quality counsel then your chances of "surviving" a capital charge (that is, not getting a death sentence)improve immeasurably.

Jim Acker: There is considerable evidence that the output of capital punishment systems in several states--prosecutorial charging decisions and ultimate sentencing decisions (which of course are affected by the prior charging decisions)--is influenced by race. Race of victim typically is found to have a more significant effect than race of defendant. Homicide cases involving white victims and, to a lesser extent those involving African American defendants, are significantly more likely to be prosecuted capitally and result in death sentences, than other cases, "all else being equal."

The race effects may not reflect overt, intentional invidious discrimination. The influences may work more subtly. The media, in response to perceived interest in "the community" (the politically and economically dominant sectors of the community, at least) may publicize white victim homicides much more intensely, for example, which in turn puts pressure on prosecutors to do something in response. The something that is done is to crack down hard on the offense by seeking a capital sentence. Thus, the race effects may originate in or be mediated by sources external to the prosecutor's office. Likewise, prosecutors, who know that capital prosecutions are very expensive, and that reputations are on the line for winners and losers, choose cases in

which they will seek death very cautiously. They may assess (perhaps accurately) that the odds are higher of gaining a death sentence if the homicide victim is white, because these cases are more likely to inspire the outrage of "the community" (again, as defined above). Generally speaking, African Americans are less likely to serve on capital juries because a higher percentage of African Americans do not survive the death-qualification process. Whites tend to support the death penalty more strongly and with greater regularity than do African Americans.

For these reasons and doubtlessly others, the capital punishment process in several states has yet to be purged of race discrimination.

Dave Baldus: Much of the debate on the race issue naturally turns on the interpretation of the data concerning the frequency with which death is sought and imposed on different racial groups.

Earlier remarks have alluded to the way in which the numbers are used. It is useful here to distinguish between gross unadjusted racial disparities and adjusted disparities that control for the presence of the aggravating and mitigating factors (e. g. the number of statutory aggravators and mitigators)that clearly influence the decisions which may also be correlated with race. A failure to adjust the race disparities for these factor introduces a significant risk of an erroneous inference about the influence of race in the system. For this reason, gross disparities, especially based on the entire nation are suspect. For example, critics of race of discrimination claims note that while blacks constitute about 55% of homicide arrestees, blacks account for only 41% of the death row population nationally. Similarly, advocates of the race discrimination theory note that while white victim case account for only about 45% of the homicide cases, there are white victims in about 80-85% of both the death row cases nationally the cases of the defendants who have been executed since l973. At best these data are suggestive and experience indicates that when the disparities in death sentencing rates are adjusted for legitimate case characteristics, unadjusted disparities usually, but not always, decline. Accordingly, as suggested in the earlier posts, the most reliable evidence consists of disparities in treatment that are adjusted to reflect the different levels of culpability of the cases in the different racial groups. But here one must beware of what is usefully called the "average overall culpability" fallacy, which argues, for example that a higher death sentencing rate for black defendants or for white victim cases is explained by the fact that overall the black defendant cases are more aggravated the white defendant case or the white victim cases are more aggravated on average than the black victim cases. The flaw in this argument is that there is no necessary correlation between the average culpability level of white v. black victim cases, for example, and the extent to black and white victim case with similar level of culpability are treated the same in the system. In Baldus et al for example, the evidence clearly showed that white victim case were on average more aggravated than the black victim case. Nevertheless when similarly culpable cases were compared, the white victim cases were at greater risk of receiving a death sentence. It is for this reason that I agree with the posts that place greater weight on the results of controlled studies that estimate racial disparities among case with similar levels of criminal culpability.

What do the data tell us about differences in discriminations between pre- and post- Furman? The data consist of unadjusted disparities, controlled studies, and anecdotal testimony of

defense lawyers, especially in the current era of death sentencing, since 1973. Data from the South suggest that the situation there has improved with respect to race of defendant discrimination. For example, the data collected by Watt Espy indicates that in the pre-Furman period, which I define here as 1920's to the 1960's, nearly 70% of the people executed for murder in the south were black, while the post- Furman rate in the south with respect to both death row and executions is about at the nation average of 40% black. These data are not well-controlled, but you ordinarily don't see differences of this magnitude unless something is going on beyond chance. Moreover, the proportion of blacks in the has not declined sufficiently to explain this difference easily. Also the controlled pre and post (the seventies) Furman study of Baldus et al showed a marked decline in the evidence of race of defendant discrimination, although the race of victim effects were the same in both periods. It has been suggested that these findings must be viewed with caution because the authorities who prepared the case documentation in this period were aware of the concern about race of defencant discrimination an likely emphasized the mitigation in the white defendant cases and emphasized the aggravation in the black defendant cases.

The 1990 GAO review of many empirical studies in the 1970's and early 1980's were consistent with our Georgia post Furman results--race of victim effects were common but race of defendant effect were less pervasive.

The McCleskey decision has apparently reduced interest in this line of statistical study. In the last decade there are three studies of the more recent situation. A Rand study of California penalty trial decisions showed no race effect, while a Kentucky study sponsored by the state legislature, found
race of defendant and victim effects, especially in black/white cases. A recent study in New Jersey conducted by the Administrative Office of the New Jersey courts has revealed evidence of race of defendant effects in the penalty trial
decisions statewide, with black defendants at an enhanced risk of receiving a death sentence, after controlling for statutory and nonstatutory aggravating and mitigating circumstances, and the socioeconomic status of the defendant and victim. However, the study found no race of victim effects in the penalty trial decisions. The issue is mow pending in the New Jersey supreme court.

There is a lot of anecdotal evidence of both race of defendant and race of victim discrimination from the lawyers who represent the capital defendants. Many of them seriously question the validity of the statistical studies that do not reveal race of defendant disparities. Given the state of statistical art today, it is possible that there is such discrimination but that it is not sufficiently gross and stysematic to be picked up by the data.

What's clear about the empirical evidence is that there are significant differences in race effects between different areas of given states and among the several states. For example, studies of jury penalty trial decisions in California show no race effects while those effects are apparent in many other jurisdictions.

There are also differences in the magnitude of race effects at different decision making levels of the various state systems, i.e., prosecutorial decisions to seek, jury decisions to impose

death, and the overall combined effects of these two decision points.

There are also differences in the level or race disparities that correlate with the culpability of the cases. Baldus et al demonstrated in Georgia that the risk of race effects was very low in the most aggravated cases in which almost all jurors would be persuaded by the facts of the case that a
death sentence was appropriate. However, in the less aggravated "mid-range" cases, in which the "correct" sentence was less clear, and the room for the exercise of discretion much broader, the race effects are much stronger in the jurisdictions in which there is evidence of race discrimination. This mid range effect continues to appear in studies that can test for it such as New Jersey.

The controlled studies that show statistically significant race effect suggest similar level of "practical" impact on the sentencing outcomes. The average overall disparity in death sentencing rates for the two racial groups tend to be in the range of 6 to 8 percentage point, while the disparities in the mid-range are typically two to three times that large. As for practical impact, the coefficients estimated in multiple regression analyses tend to suggest average overall impacts comparable to significant non-statutory aggravating circumstances and less important statutory aggravating circumstances. The data clearly do not suggest that all outcomes are determined by race.

When one calculates how the outcomes would likely have been different if the critical racial characteristics of the cases had been different, the estimates are in the 20-30% range, i.e., had the victims been black rather than white or the defendants white rather than black, there would have been fewer death sentences in the black defendant and white victim categories of this magnitude.

Some of the posts have referred to the impact of race of victim discrimination on the outcome of black defendant cases, since most killers of blacks are also black. It depends, of course, for purposes of the comparison, on whether the evenhanded system one has in mind, sentences for all cases at the black victim rate or the white victims rate. But Baldus et al clearly indicates that, whatever the evenhanded rate applied by the system, the proportion of black defendants on death row will increase if black and white victim cases are treated the same in a jurisdiction that now treats them differently. But in places that treat black defendants more punitively, than others similarly situated defendants, and evenhanded system will reduce the proportion of black defendants if the system moves either to the black or nonblack level of sentencing for all similarly situated defendants.

John McAdams: Dave Baldus' discussion of the literature on the issue of racial inequity is highly useful. Having recently looked at the literature myself, I agree entirely with his characterization of what the data show.

Now, the question for death penalty opponents: is the degree of racial inequity he describes such that it renders capital punishment unacceptable?

The studies don't show discrimination consistently. Studies in some jurisdictions show it, and studies in others do not. This could be the result of genuine differences across jurisdictions, or it

could be the result of a weak *general* pattern, which happens, by statistical accidents, to be "significant" in some studies but not in others.

We may find it in prosecutors' decisions, and not in sentencing, or vice-versa. We find it in the South earlier in the century, but not in recent data.

When we add all this up, I think the system really does discriminate against black *victims* in at least some decisions in at least some jurisdictions. This is wrong.

But it's not the politically correct fantasy of a system massively discriminating against black offenders. It's not at all clear that racial inequity with regard to the death penalty is worse than with regard to other punishments.

Leigh Bienen: It may be true that racial discrimination in the application of capital punishment may not be all that different than that in other parts of the criminal justice system, but that isn't saying much (it's basically the McCleskey position: the death penalty looks like the rest of the system, get used to it) but the difference is the state is killing you. So the result is different. More on racial inequities and the death penalty: those who worry about constitutional issues and criminal defendants do so because that is what the constitution directs us to. It isn't a lack of concern for victims, the constitution isn't concerned with victims. That may be unfortunate public policy, or unwise, but constitutional rights are preponderantly for criminal defendants. There is a reason for this -- because even at the time of the writing of the constitution, persons who are accused of crimes or commit crimes have few supporters, and as a society we believe a fair adjudication' is a primary value. With regard to the fact that the emphasis upon white victims results in fewer death sentences being imposed in cases where blacks are the victims, which is pretty much uncontroverted, as I understand it, in jurisdiction after jurisdiction, consider the following: what if there was a national policy which said 1) the death penalty is too expensive, we can't have it for everyone; so 2) we'll execute every third murderer. It will be racially neutral, they are all murderers, so there won't be an individual unfairness. What's the problem? or maybe there is no problem.

John McAdams: Why? In the first place, why is the state killing you different from the state locking you up for life, or 30 years? Admittedly, death is a more severe penalty, but if racial inequity makes a policy illicit, why doesn't inequity in sentencing make imprisoning people illicit?

In the second place, the state risks killing innocent people in all kinds of cases. The extreme case is when soldiers are sent into combat. But air bags in cars kill people. The FDA's laggard approval of new drugs kills people. In some cases causing killing is clearly acceptable: necessary casualties in a just war, for example. In other cases we clearly should do better, but are not going to "tweak" the policy to perfection. The FDA, for example, has been soundly and properly criticized for being too slow to approve new drugs. But the *optimal* policy would still allow some people to die because they are being denied new drugs (while allowing perhaps a larger-than-present number of people to die from new and not-thoroughly-tested drugs).

Indeed, the current system of tort liability kills people by inhibiting the production and marketing of new drugs.

And racial inequities attach to all these issues.

Are we supposed to dismantle the military? Quit requiring air-bags in cars? Get the government out of the drug regulation business?

It's very hard to avoid the conclusion that people who use the racial inequity argument to try and abolish the death penalty are using arguments they would not *think* of using in any other policy context.

It's certainly correct, to a certain extent, that the Constitution isn't concerned with victims. Or rather, the Bill of Rights isn't. Other parts of the U.S. Constitution and state constitutions giving governments the powers necessary to establish police forces and punish criminals do show a concern for the victims. The concern is never explicit, because at the time of the writing of the Constitution, it wasn't controversial that government has the right to punish criminals.

The problem comes when people start wanting activist judges to invent rights for defendents that aren't in the constitution.

Nothing in the constitution says that, if the state can't apply a particular punishment without racial inequity, it can't apply it at all. It's not explicitly in the document. It's not implicitly in the document. It's no part of the intentions of the Framers.

So we are faced with the interesting situation where anti-death penalty activists are saying to some people "the death penalty is unconstitutional. You've got to respect the Constitution, whether you agree with it or not."

Then to federal judges these same people are saying: "please read this document to say the death penalty is unconstitutional! We know that it doesn't *say* that in there. But work on it. You can find a way."

We are not talking here about people who want to bring policy into line with the Constitution. We are talking about people who want to bring the Constitution into line with their policy preferences! While I can't imagine anybody *intentionally* setting up a system where only every third murderer is executed, this is pretty much the way government works. The IRS -- in addition to having other procedures -- picks some returns randomly to audit. During the Vietnam War, we had a lottery for the draft. Noncombatants are pretty much randomly killed during a war. People randomly get diseases for which drugs are not on the market because tort liability rules have made it excessively risky to put such drugs on the market.

But what is the argument here?

Is it the case that, since the research makes it obvious that racial inequity in executions is not

massive but rather spotty, inconsistent, and sometimes just nonexistent, now mere random inequity makes capital punishment illicit?

Jim Coleman: This is a big subject. Is the criminal justice system racist or discriminatory. I believe that it is, but not in the sense that it violates the Equal Protection Clause; that is, I do not believe the Baldus study indicated that either the juries or the state legislatures intentionally discriminated against McCleskey or that the decision in most cases actively take race into consideration.

In what sense do I think the system is racist or discriminatory? In a case that I have handled since 1983 (Booker v. Singletary, FLA) the prosecutor filed a sentencing recommendation in which it argued that the death penalty ought to be imposed. The prosecutor, defense lawyer, judge and victim were all white. In arguing that the crime was heinous, the prosecutor wrote: "The injuries to this lady's innocent body are numerous, . . . (g) Degrading rape by young male of the opposite race, prior (the word underlined) to fatal stab wound." Neither the judge nor the defense counsel objected to this argument; nor did the Florida Supreme Court notice it in its review. This direct appeal to race, in other words was unremarkable. I don't think that the prosecutor who wrote the memo thought he was being racist. He was just expressing an attitude that prevailed at the time, and that was accepted as normal.

Why has the country been so preoccupied with the OJ Simpson case? I don't think it can be explained entirely by his celebrity status. After the jury in the criminal case, there was open talk about whether a jury that included black people could fairly judge the evidence. The assumption was that the perspective of the white critics of the verdict was "neutral" and that the perspective of the black jurors was biased. The truth probably lies somewhere between the perspective of black supporters of the verdict and white critics. But in capital cases, prosecutors routinely move to exclude all black jurors on the ground that such jurors would be sympathetic to the black defendant! How is a system based on mercy and identification with the humanity of the defendant going to work if a systematic effort is made to exclude from the jury all those who might argue for mercy and for the defendant's humanity?

I think a lot of this can be traced to the legacy of our antebellum criminal system in which slaves and free blacks were not considered equals and in which more severe punishment was accepted as normal. I think the country still believe that black defendants deserve more severe punishment because they are more threatening. That is especially true when the victim of the crimes is white. Conversely, when crime is black-on-black and contained in the black community, the majority society does not view that as a serious concern of the criminal justice system. The lawyer in the Booker case who ignored the appeal to race in the sentencing recommendation told me that it was widely accepted in Alachua County (Gainesville) that black-on-black homicide did not warrant the resources required for murder trials and that the expectation generally was that the state would accept a plea to some lesser charge. Remember, that is the finding of the Baldus: that Georgia treated murder of a white victim as more deserving of the death penalty that it treated black-on-black murder.

Finally, the most troubling and telling statistic in the Baldus study was the finding that prosecutors charged capital murder in 70% of the cases in which the defendant was black and the

victim white, significantly more often that with any other combination. It perfectly parallels the practice before the Civil War and during the Jim Crow period when these things were more of less acknowledged.

I think the criminal justice will never be fair or nondiscriminatory until it is administered by both black and white citizens. Until prosecutors and jurors are forced routinely to deal with the experiences of black people and to factor those experiences into their decisions. There is no such thing as a race neutral decision in the criminal justice system when it affects black people and their voice is not part of the discussion leading to the decision.

Leigh Beinen: I am in strong agreement with Coleman. Surprising to me, however, was that there were significant differences between states, even between southern states, when the ratio of death row population was compared to the number of executions, across states. These tables will appear in a forthcoming article in the journal of criminology and criminal law. Some southern states had large death row populations but not a large number of executions and vice versa. Incidentally, anyone who thinks that the death penalty is applied equally or fairly across states hasn't compared Texas with any other capital jurisidiction. Texas alone has executed over 100, and a substantial portion of those from a single rural county. It's true that the civil justice system also makes mistakes and that public policies endorsed by governments kill innocent people; however, in the case of the death penalty it is a punishment which occasionally kills innocent people, it is not the result of a random error function. Where is the good result to balance against the bad effect of error? I do think one reason why the death penalty and its imposition continues to fascinate so many is its centrality to critical moral issues.

John McAdams: It is important to understand that opponents of the death penalty have promoted both a "mass market" and a "specialist" version of the "racial disparity" argument. And the two are flatly contradictory.

The first attack on the death penalty using this argument claimed that the system is racist because blacks are more likely to be convicted of murder and sentence to death than are whites. Supposedly, the death penalty is "racist" since it involves treating black murderers more harshly than white murderers.

And indeed, blacks are disproportionally represented on death row, by a ratio in the neighborhood of 3 to 1.

Unfortunately for this argument, blacks are disproportionally represented among the victims of murder. And the disproportion of black murder victims is roughly equal to the disproportion of blacks on death row.

Now we notice that the vast majority of murders are intraracial and not interracial. It seems that, in broad outline, about as many blacks are on death row as should be.

Which brings us to the "specialist" version of the racial disparity argument. Various scholars have done carefully controlled studies and reached the conclusion that offenders who murder black victims are less like to get the death penalty than are offenders who murder whites.

Although the magnitude of this racial bias is not large, I'm convinced that it is real, and that this is a systematic factor that stands out above the "noise" in the data.

Often virtually unsaid, but clear from the data, is the fact that these are black murderers who are being treated more leniently than the (mostly white) murderers of whites.

It seems that people who argue for racial disparity will adopt whatever perspective is necessary to claim "racism." When the statistics seem to indicate that the system is tougher on black offenders, this is evidence of "racism." When a more careful look at the data shows that the system is more *lenient* on black offenders, this also is evidence of racism. It indicates that the lives of black victims are being valued less than white lives.

It's obvious to me that the "specialist" version is superior. It's superior empirically because it fits the data, and it's superior normatively in its concern for the victims of crime. It's not clear, however, that this concern for the victims is something death penalty opponents can ever be comfortable with.

John McAdams: This is not an easy question to approach, empirically. Certain data that are frequently quoted in the popular press are pretty much worthless. For example, it is clearly the case that blacks who murder whites are treated more harshly than are blacks who murder blacks.

This looks like racial disparity if you assume that the circumstances are similar in the two cases. Unfortunately, it's vastly unlikely that they are. Most murders, remember, are among people who know each other. Murders done by strangers are much more likely to be regarded as heinous than are murders growing out of domestic quarrels, drug deals gone wrong, and such.

It might seem reasonable to compare the punishment received by blacks who murder whites with the treatment received by whites who murder blacks. Unfortunately, while black on white crime is relatively rare, white on black crime is even rarer. There simply isn't an adequate statistical base to allow us to generalize about whites who murder blacks.

Which pretty much leaves us to compare the way the system treats blacks who murder blacks with the way it treats whites who murder whites. When we do this we find some fairly solid-looking evidence that the system is unfairly tough on white murderers -- or if you prefer, unfairly lenient on black murderers.

But even this finding is one we have to be skeptical about. Is the average black on black murder quite similar to the average white on white murder? Or are there systematic differences? We can trust the data that show racial disparity only so far as we are convinced that there are not such differences.

I'm very far from being convinced of this.

One final problem follows from the fact that there are so few executions. If we really want to look for racial disparity it might seem that the sensible thing to look at is executions. But since they are so few, we often study the question of whether blacks or whites are

disproportionallysentenced to death (regardless of whether the sentence is carried out)or even worse, whether prosecutors disproportionally ask for the death sentence for black or white defendants.

I would love to observe that this situation is atypical in public policy analysis, and that we usually have good data and convincing analysis that answers the key empirical questions about any policy. Unfortunately, this isn't so. Death is not different where social science and policy analysis are concerned.

Jim Coleman: There is a difficulty we have talking about race that makes empirical evidence less useful than perhaps in areas of research that don't involve race. In rejecting the Baldus study, the district court in McCleskey attacked the adequacy of the test. The study had not accounted for all of the factors that might have lead a prosecutor to seek or a jury to impose the deeath penalty. In its equal protection analysis, the Supreme Court declined to assume that the absence of any other explanation for the study's results meant that race was the explanation. In Batson, although the Court was willing to require the prosecutor to offer an explanation for why he/she had excluded all blacks from a petit jury, virtually any racially neutral explanation would satisfy the state's burden. The result is that an additional step is added, but in the end, blacks still can be excluded from the jury.

One of the things that always interested me was whether Baldus et. al, looked at jury racial composition in their study. In McCleskey, the jury was 11 whites and 1 black man, a retired county worker. My guess is that the result in McClesky's case can be explained as much by the absence of an effective opportunity to plead for mercy as by race influencing the decision to seek the death penalty in the first place. In the early jury cases (Strauder, Rives, etc.) the Court went to pains to make clear that all it was recognizing was the right of black people to be considered for jury service, not a right actually to serve. The implication being that a racially neutral decision could be made to exclude particular black jurors (or all of them) and that the administration of justice was not affected.

I question the premise. In the 11th Circuit's decision in Thigpen v. Jackson (name in District Court), the court held that although the defendant had established a Batson violation (the prosecutor's office conceeded that it excluded black people from jury service because they would be sympathetic to black defendants), the error was harmless because the defendant could not show that the decision of a racially mixed jury would have been different. That result seems compelled by neutral principles, but it ignores reality. Do any of us believe
that having black people participate in the decision whether to impose the death penalty on a black person would not make a
difference in the deliberations? If a black defendant is denied an opportunity to plead for mercy from a jury that is aware or and cares about his experiences as a black person, he is denied the same opportunity as a white defendant who appeals to the same jury. I doubt that many would argue that the make up of the two juries in the Rodney King cases did not influence the result in each.

Is this affirmative action/quotas? That is always the reaction to any suggestion that racial inclusion should be a goal. I think it is impossible to administer a criminal justice system (the

objects of which are to protect all of the public and to punish fairly all of the perpetrators based on each's blameworthiness) without including in the decision-making the experiences of all segments of the community, at least the significant ones. If the system punishes black people more harshly or provides less protection to the black community, it is flawed. Even if one thinks the jury in the Simpson criminal case ignored the evidence and acquitted him because of its racial
composition, it should be troubling that the black community, because of its collective experiences, would be willing to free a killer rather than accept the judgment of the police and prosecutors that Simpson was guilty. The response, it seems to me, should be to deal with whatever leads to that result, rather than recompose the jury racially to exclude the trouble makers. Even if the problem is one of false perceptions, it still must be addressed.

In the end, I think that the death penalty will never be fair racially as long as black people are excluded from administration of the criminal justice system. It will neither be used to protect the black community nor applied fairly against black defendants. In the mid-range of cases found by Baldus, where the jury exercises discretion, it is not possible to say that the punishment was not excessive in a particular case if one defendant is not given a fair opportunity to argue for life. There is a limit to what empirical studies can tell us about that. Sometimes policy has to be made on faith.

Leigh B. Bienen: There is a whole other dimension with regard to arguments that the death penalty is "racist". The death penalty and the criminal justice system is an institutional system controlled by and dominated by whites, although the recipients of punishment, including the recipients of the death penalty, are disproportionately black. The death penalty is a symbol of state
control and it is a symbol of white control over blacks, in fact and in its popular and sensationalist presentations. Black males who present a threatening personae and a defiant personae are the favorites of those administering the punishment, including
the overwhelmingly middle aged white male prosecutors who are running for election or retention or re-election and find nothing gets them more votes than demonizing young black men. By portraying themselves as punishers and avengers of whites who are the "victims" of blacks, prosecutors get a lot of political support. The reasons for this have much more to do with the larger politics of the country than with the death penalty. If the death penalty is about nothing else it is about social control. I would also argue that the class aspects and the class and economic discrimination effecting the death penalty
are "worse" in the sense of being more unjust than the racial elements.

Dane Archer: In addition to the issues surrounding fairness, racial differences, etc., should we not also be asking
questions about the purpose of the death penalty?

It is in this area, after all, that the U.S. increasingly appears to be the "deviant" case. Virtually all Western, democratic, industrial societies have embraced
abolition and--if one can safely judge from
international media--citizens of those nations more and more regard as barbaric America's renewed enthusiasm for executions.

More important, the abolitionist nations seem to regard the death penalty as lacking an ethical purpose. Beginning in the 1950s, when abolition swept much of Europe, people began asking if there was any serious evidence that the death penalty accomplished anything other than the death of the executed.

In a book titled Violence And Crime In Cross-National Perspective (Yale Press, 1987), my co-author Rosemary Gartner and I searched our archive of international data for any evidence that the presence/abolition of the death penalty had an effect on homicide rates. We concluded that there was no evidence for any form of a "deterrence" effect.

Is it therefore time to ask whether the European perspective is valid? Other than vengeance--not, perhaps, the most laudable basis for law and public policy--what then is the purpose of the death penalty?

This is the question asked of us by other democratic nations; are we going to avoid answering it?

John McAdams: The notion of the U.S. as the "deviant" case is interesting. When used by opponents of the death penalty, this is simply a variety of the argumentum ad populum. If a majority of nations have ended the death penalty, it must be a bad thing.

Ironically, proponents of the death penalty can use the same argument form to claim that since an overwhelming majority of U.S. citizens favor the death penalty, it must be a good thing.

Both arguments, obviously, are fallacious.

The whole notion of "American exceptionalism" is one saturated with ideological double standards. Among liberals, American exceptionalism in regard to government funding of religious schools, the rights of people accused with crimes, and the activist role of the courts have been applauded. American exceptionalism in regard to gun control, socialized medicine, and the death penalty have been deplored. Among conservatives, of course, the positions have been reversed.

To state the obvious: if people in Europe do things differently, that might be for good reasons, or it might be for bad reasons. While being part of the majority on a question might be more comfortable than being among a minority, it's no indication whatsoever that one is in the right.

Dane Archer: John McAdams reply is well stated, but I worry that I must not have stated my question clearly, for he misses the main point.

The issue is NOT whether an opinion "head count" shows more nations opposed to the death penalty than in favor of it. This could be a matter of fashionability, as McAdams seems to imply.
The REAL issue is an empirical question: Where is the evidence that the death penalty deters homicide specifically or violent crime generally? Surely it is incumbent on those who favor executions to show that they are effective, accomplish deterrence, etc.?

The burden of empirical proof would seem to lie with the pro-death penalty scholar. As my previous message indicated, Rosemary Gartner and I searched for evidence of a deterrence effect in our cross-national research, but no such effect was found.

In the absence of any consistent evidence for deterrence, are we really satisfied using the death penalty in the U.S. for some reason--at present unclear to me--other than deterrence? If so, what is that other reason?

John McAdams: I want to strongly insist that when we consider the racial equity of the death penalty, or indeed any other issue in criminal justice, that we give priority to the interests of the victims of crime -- to law-abiding citizens.

Politically correct attitudes make this difficult. A key element of policical correctness is the conviction that blacks are victims of white racism. All issues are assumed to pit blacks against whites. Naturally, one should side with blacks -- the historical victims of oppression.

This has all sorts of perverse consequences. Between a black defendant, on the one hand, and white cops, prosecutors, and corrections officials, the natural tendency is to side with the defendant. Thus it sometimes seems that people concerned with racial injustice are unhappy that while guilty white offenders go free equally guilty black offenders get imprisoned. Fair enough. But then they seem to want to address the injustice by letting
more guilty blacks go free!

This overlooks one overtowering reality about crime: most crime is intraracial, and not interracial. Even if, via some sort of warped notions about historical affirmative action, it were acceptable for black criminals to rob and assault whites, the reality is that this is not what the vast majority of black criminals do. Rather, they rob and assault other blacks.

Further, the vast majority of whites have the option of fleeing from any neighborhood that becomes unsafe and taking refuge in an affluent suburb, or at least some fashionable section of the city. They are less dependent on public transportation, and have attractive recreational opportunities that do not involve using public parks. The affluent, in short, can do what the affluent at all times and in all places have done: avoid the worst consequences of the breakdown in the social fabric.

The implications of being most concerned about the victims are obviously up for debate.

Does concern for the victims require the end of the exclusionary rule? The hiring of blacks as police chiefs in major cities with large black populations? The execution of more convicted murderers? A movement toward "community corrections?"

All of these issues are debatable, but the debate is going to be much more sensible if we keep our priorities straight.

Jim Acker: It is difficult for me to dismiss the constitutional principle of "equal justice under law" as political correctness. Nor am I willing to assume that this is a "blacks against whites" issue, instead of an issue about which all are entitled to be concerned, no matter which way the evidence of discrimination points. And if the real concern is to be directed toward the victims of crime, as Randall Kennedy has pointed out, then the anger of those who believe in capital punishment as a deterrent
or in the name of retribution should be redoubled when evidence suggests that homicides involving African-American victims are treated as less serious events by actors in the criminal justice system. Under these circumstances, African Americans reap none of the presumed benefits of the capital punishment system, yet the capital sanction is sought and delivered with comparatively great regularity in white victim homicides, especially those committed by African-American offenders.

The debate hardly involves arguments that guilty people should go free. Severe alternative sanctions are available to capital punishment, including life imprisonment without parole in many jurisdictions.

The point is that, "all other relevant facts being equal," white victim homicides, and black offender-white victim homicides are treated as more serious events in death penalty systems in many jurisdictions.

At least in my neck of the woods, "white" does not translate into "affluent," and I suspect that the ease with which people can and do pack up their bags and flee to the suburbs is just slightly overstated.

Sometimes the erroneous assumption is made that opponents of capital punishment are not concerned about victims of crime, or that they somehow denigrate the awful seriousness of murder. If the execution of murderers is all that can be offered crime victims, (and the death penalty does tend to deflect attention from more constructive solutions to crime and victimization because if offers the illusion that at least something is being done), maybe it's time to regroup and think a bit harder.

John McAdams: Acker writes, "It is difficult for me to dismiss the constitutional principle of equal justice under law' as political correctness." I hope you are not implying that I said anything even *close* to this. What I said is that political correctness inclines many people to adopt an offender-centered approach to any question of racial inequity, rather than a victim-centered approach.

I really find it difficult to understand the absence of concern for the victims -- who are disproportionally black and poor -- in discussions of the death penalty.

Acker writes, "And if the real concern is to be
directed toward the victims of crime, as Randall Kennedy has pointed out, then the anger of those who believe in capital punishment as a deterrent or in the name of retribution should be redoubled when evidence suggests that homicides involving African-American victims are treated as less serious events by actors in the criminal justice system."

I agree with this entirely. But I fail to see why this is any sort of reason not to use the death penalty.

Acker writes, "Under these circumstances, African Americans reap none of the presumed benefits of the capital punishment system, yet the capital sanction is sought and delivered with comparatively great regularity in white victim homicides,
especially those committed by African-American offenders."

To repeat something I said in an earlier message, the fact that black murderers of whites are treated more severely than black murderers of blacks is *not* evidence of unfairness, unless you really want to claim that the circumstances are equivalent in both kinds of murders.

This is vastly unlikely. Most murders are among people who know each other. When people murder strangers, the circumstances are likely to be very different, and much more likely to be regarded as heinous.

Acker writes, "The debate hardly involves arguments that guilty people should go free. Severe alternative sanctions are available to capital punishment, including life imprisonment without parole in many jurisdictions."

But why not apply the same logic to *these* punishments? If they are administered in a racially inequitable way, aren't they illegitimate?

There is really no reason to believe that racial inequity will be reduced if we simply punish people less severely. Indeed, given the attention that death penalty cases typically get -- from the press, from political activists, and from public officials (governors who have the power of clemency, for example) -- refusing to execute anybody may increase unfairness.

Remember, it's the death penalty opponents who are saying that fairness is more of an issue where execution is concerned than it is with other punishments. They say that racial unfairness

precludes using the death penalty, but not using imprisonment. The abolutionist argument that "we must abolish the death penalty because it's unfair" thus has an unfortunate corollary: "since we're not executing anybody, we don't have
to worry so much about fairness."

John McAdams: I'm a bit surprised to find Dane Archer, in the context of the question of whether the death penalty deters murder, claim that: "The burden of empirical proof would seem to lie with the pro-death penalty scholar."

To state the obvious, if we execute murderers and there is in fact no deterrent effect, we have killed a bunch of murderers.

If we *fail* to execute murderers, and doing so would in fact have deterred other murders, we have allowed the killing of a bunch of innocent victims.

I would much rather risk the former. This, to me, is not a tough call.

John Ryan: Both Dane Archer and John McAdams, in their posts and replies, suggest that we might do well to talk a bit about the larger purposes/bases of the death penalty. Of course, [general] deterrence is the most frequently-cited basis for the death penalty, and as Archer has noted considerable research has explored the empirical basis for the link. Most or all of this research is skeptical (am I correct?) that the threat or use of the death penalty deters. But there are other justifications for the death penalty, including societal revenge (to which Archer alludes) and cost-effectiveness (it may, or may not, be
less expensive to execute defendants than house them for a lifetime without parole). Certainly, the Supreme Court -- for now -- does not believe that the death penalty violates the 8th amendment's ban on cruel and unusual punishment, and this jurisprudential perspective seems -- for better or worse -- to have (partially) removed moral and ethical claims from the larger dialogue about the death penalty.

Any other thoughts on this?

Austin Sarat: I think that the moral/ethical claims are still there. But the "new" abolition presents itself as a form of legal conservatism--emphasizing fairness/due process and equality/equal protection. Larger purposes...may have to do with symbolic satisfaction/
frustration/mean-spiritedness...

Jim Coleman: I don't understand the current resort to the "victim" in response to almost any criticism of the criminal justice system. It is as if the end--the interests of the innocent

victim--justifies the means--a system that is unfair and discriminatory. To the extent that the death penalty, or any punishment is a deterrent, all innocent people benefit;
and to the extent that the defendant gets the punishment he deserves, the particilar victim's interest is served.

But none of that deals with questions of fairness in the imposition of sentence. A death sentence can be warranted in the particular case and still unfair. The Supreme Court in Gregg and McCleskey made the point that a defendant who "deserves" the death penalty is in no position to complain that others equally deserving are shown mercy. The problem with this position is that it ignores how the system contributes to the inconsistent results.

If only Native Americans were being sentenced to death, I am confident we would not argue that they have no complaint if they are eligible for the death penalty. To determine if a punishment is being imposed fairly, we have to look at both those who receive it and those who are eligible to receive it and do not. And if mercy for those who do not receive it is granted on some basis that is not available to those who are sentenced to death, the system is unfair.

In this case, mercy means the decisions of all of the actors who have the discretion to save a particular individual from death, although he is eligible for the punishment. I go back to Brennan. If the death penalty is not used to punish offenders generally--not the rich, not the famous, or only the poor, only vagrants--or if it is not being used to protect all communities equally, then the punishment is being imposed unfairly. Similarly, if some defendants are denied an effective opportunity to plead for their lives, the punishment is being administered unfairly. Such unfairness occurs, if it occurs, in the
Baldus study's midrange cases, where discretion is exercised.

Calling a position "politically correct" does not confront its merits. Some who oppose the death penalty or are indifferent to its use also care about how the criminal justice system functions.

John McAdams: In fact, the interests of the victim *may* justify a system that is unfair and discriminatory, if the choices are to continue the system or dismantle it. The harm that follows from dismantling the system may exceed the harm involved in the unfairness. And my point was that the failure to properly punish criminals disproportionally harms black people. Coleman hasn't disputed this point, that I can see.

Suppose we find that black robbers are treated more harshly than white robbers? Does it follow that we want to stop punishing black robbers? Or does it follow that we want to properly punish white robbers also?

Nobody would argue that racial inequity in punishing robbers means we have to stop punishing robbers. Nobody would argue that, if we find that white neighborhoods have better police protection than black neighborhoods that we address the inequity by withdrawing police protection from *all* neighborhoods. Yet people make arguments exactly like this where capital punishment is concerned.

Let me also note that the evidence of inequity with regard to the death penalty is not strong. I do think it shows a modest but real tendency to treat black murderers a bit more *leniently* than white murderers. Or to put it in more politically correct language, to undervalue the lives of black victims.

Coleman seems, unless I misunderstand him, to embrace the "mass market" version of the racial inequity argument.

In fact I would argue exactly that [we would not argue that Native Americans have no complaint if they are eligible for
the death penalty]. Every *other* group in society which had failed to received the protection that "Native Americans" received would have a right to complain loudly about the unfairness.

In this case, I fail to see why we would want to stop sentencing "Native Americans" to death. It looks to me like we would want to start equally sentencing members of other racial groups who had committed equally evil crimes.

But why do we remedy the unfairness by refusing to punish
those who admittedly deserve punishment, rather than by punishing those who have heretofore gotten off?

Coleman is making an argument that nobody would make with regard to fining offenders, or imprisioning them. In those cases it would be obvious that our failure to achieve perfect justice cannot require that we don't do justice at all.

It appears to me that Coleman continues deal with this issue entirely from the perspective of the offender. For him, thinking about victims distracts from working for equity for offenders. I applaud efforts to treat offenders of all racial groups fairly, but insist that the victims deserve first priority. They are the ones who are unfairly suffering. The offenders usually deserve the punishment they get, even if they get it unequally.

Jim Coleman: John misstates the choice. It is not whether to punish or not to punish. Of course we don't stop punishing black robbers because white robbers are permitted to go free. UNLESS: the evidence is that taking money by force generally is not a crime unless it is committed by black people. In that case, we have a system that is morte akin to the slave code, which created special crimes for slaves and free blacks, which were not crimes if committed by white people. I think it is well established that equal protection requires that people be punished similarly for similar criminal conduct.

The issue therefore, is whether the death penalty is reserved to punish only certain disfavored groups, and that criminals from other groups are not subjected to such punishment, although their conduct makes them eligible. Baldus's study does not indicate that this is what is happening generally. But as others have said, the question is whether in particular counties or states this is what is happening.

In fact, I have not embraced the "mass market" version of racial equality argument. Rather, my particular concern is quite retail. It is whether the rules permit prosecutors to manipulate the decisionmaking process (e.g. by excluding black jurors) to deny some defendants an opportunity effectively to plead for their lives. If the rule is that every defendant has the right to plead for his life, then presumably we all agree that that is how the system ought to work.

I also am concerned about the result that the state does not protect some communities, perhaps because it undervalues their lives or perhaps because it reflects priorities for spending scarce resources. The fact that evidence of this appears in the case of the death penalty suggests that it happens with less serious crimes. There was a time, for example, when rape of a black woman was not a serious crime (and in the case of a white rapist, not a crime at all). The evidence suggests that while rape generally is not pursued all that aggressively relative to how much of it occurs, it is pursued significantly less aggressively when the victim is black.

The reason we stop sentencing Native Americans to death is because we would not have a death penalty for non-Native Americans. That is the point. We are not sentencing Native Americans according to the same rules as we sentence others. They alone are being punished by death.

Again, the choice is not to free Native Americans who murder, but to sentenced them under the same rules that all other defendants are being sentenced. One way to look at it is that Native Americans are receiving greater protection. Another way to look at it is that we accept the death penalty only if its use is limited to Native Americans.

I look at the issue of the death penalty from the perspective of the offender because he/she is the person affected by the flaws in the system. I think one can care about the victim and also care about the system. I don't think in the long run we benefit the victim if our criminal justice system looses the public's support. Our system works because most of us are willing to accept its results because we believe on the whole they are fair. But if it appears that the results no longer are fair, then the system is in jeopardy. That, by the way is what motivated the ABA to adopt its moratorium resolution. Twenty of the 24 past presidents of the Association supported the resolution. I doubt that anyone would argue these are all (19 men and one woman) radical people out to abolish the death penalty. I think we do of duty as lawyers when we bring to the public's attention things about its justice system that might undermine confidence in its results.

John McAdams: I don't see how this follows. If we are sentencing "Native Americans" to death, and not whites or blacks in similar cases, that is an injustice. The injustice can be remedied by (1) not sentencing *anybody* to death, or (2) making all groups equally subject to the death penalty.

There is no reason to prefer (1) to (2) unless we dislike the death penalty for other entirely separate reasons.

Or to sentence everyone *else* under the same rules that apply to "Native Americans." But

it's possible for concern with the offender to produce policies that sacrifice the welfare of victims and potential victims. I think that the notion that we must achieve perfect fairness in the application of the death
penalty, or else abolish it, is one such case. As I look at public opinion polls, public dissatisfaction with the
criminal justice system is heavily the result of people feeling that the system is too lenient with offenders, not that it is too tough on them.

Overwhelmingly, the public views "fair" as being tougher on offenders. Admittedly, some public notions about how that should be implemented are simplistic. But the moral instincts are sound ones.

[The ABA call for a moritorium] is simply an Appeal to Authority.

It's been quite obvious in recent years that the internal politics of the ABA has become increasingly dominated by liberal political activists. ABA positions on abortion, affirmative action, family leave, gay rights, and health care make this perfectly obvious.

Dave Baldus: The evidence of statistically significant racial disparities in a well controlled statistical study suggests three possibilities concerning operation of the system. The first is that similarly situated defendants in the system on average are not being treated the same. The second is that in spite of the statistical significance of the estimated racial disparity, it is most likely the product of chance. Third, the results are questionable because the statistical analysis did not control for all of the relevant variables that may have been influencing the charging and sentencing decisions included in the study. After all, multiple regression analyses can control for only so many different variables, 20-30 is usually the limit, and it is well known that more factors than that actually influence prosecutors and juries. However, if on the basis of further analysis, for example, including an analysis of the facts of the cases to determine if they were misclassified by the regression analysis, one discounts these latter two rival hypotheses as implausible, it may be possible to conclude that on average, defendants with different racial characteristics are being treated differently, especially in close cases.

Why might this be the case? The likely answers depend on the jurisdiction, and the decision makers involved. Of primary importance is the level of public pressure felt by prosecutor and sentencing judges. Prosecutors with limited resources for prosecuting death cases may be inclined in many jurisdictions to allocate the scarce resources to cases that attract public and media attention which often involve black defendants and white, prominent or sympathetic victims.

Sentencing judges are subject to these same pressures, as has been noted in earlier posts. Finally, white jurors, as has also been noted, are less likely to identify with black defendants and black victims. Also, Jim Coleman properly notes, that many participants in the system, whether black or non black, may consider young black males more deserving of severe punishment because of their widely perceived dangerousness and threat to the community. A combination of these factors seem to be, in most places. a more plausible explanation for the observed race disparities than blatant racism.

The earlier posts noted the enhanced risk of both race of defendant and race of victim discrimination arising from the process by which jurors are summoned and selected in voir dire. This problem is particularly acute when defense counsel is ineffective or indifferent to these issues, as well as to racial slurs and other obvious appeals to racial prejudice, such as an increased use of animal metaphors in describing the defendant to the jury.

John Ryan: I'd like to turn the discussion toward pedagogy, as we wind down toward the end of the second and last week of our group discussion. Teaching and student learning -- i.e., providing faculty with resources and strategies for teaching about law within the liberal arts -- is one of the special missions of the ABA's College and University Program and Focus on Law Studies, in particular.

So, my NEXT QUESTION is:

What are 2 or 3 of the best books for teaching about the death penalty? Could you say at least a sentence or two about each book, including how/why it's been effective with students.

Jim Acker: My top 3 teaching books are:

1. Coyne & Entzeroth, Capital Punishment and the Judicial Process(Carolina Academic Press 1994). This is the only casebook, to my knowledge, that covers the death penalty. It presents major cases and has interesting discussion notes. It probably is a must for law school teachers who do not use their own case materials.

2. Victor Streib (ed.) A Capital Punishment Anthology (Anderson Press 1993). This is an edited collection that presents judiciously edited excerpts from numerous law review articles. The articles cover the range of law, philosophy, and empirical aspects of the death penalty. I find it to be an excellent complement to Coyne & Entzeroth. The recent editions of this book now come with a disc on which Streib presents edited cases and other materials. This is an invaluable addition for those who can use electronic teaching materials.

3. Hugo Bedau (ed.), The Death Penalty in America (Oxford Univ. Press 1983, 3d ed.) remains the classic collection of historical, legal, empirical articles about the death penalty, with a few edited cases. It now is dated, however. Bedau is hard at work on a 4th edition which promises to be in the same tradition. I think it is due out later this year or next year.

There are many more books, of course, that might be appropriate for classes with different objectives.

Austin Sarat: One of the best books for teaching about the death penalty is Capote's In Cold Blood. It gives a deep and rich sense of who the killers are and why they did what they did as well as a nice portrait of their trials, their lives on death row, and their execution. Another good book for teaching purposes is Lesser's Pictures At An Execution. This book picks up the important question of how, if at all, the death penalty differs from murder. It provides a nice overview of literary treatments of capital punishment while focusing on the Harris execution,

California's first post-Furman...

Leigh B. Bienen: Regarding books and teaching: This semester in my Persuasion course I am teaching Mikal Gilmore's Shot in the Heart as my death penalty book. I find it a very powerful book in terms of setting out the family background and institutional
history of Gary Gilmore. It is also very well written and was a
nominee for a national book award. Last year in the same course,
which is structured around three non-fiction books about the law by non-lawyers, I used Helen Prejean's Dead Man Walking. this book was also very good in showing law students a side of the death penalty most of them had not thought about. The popularity of this book and the movie have made that less true in 1997 than it was in 1995. In my Homicide course I spend a good bit of time on the capital punishment statutes, especially the statutory aggravating and mitigating factors and their use of language. I find this a useful teaching device and one which has considerable spillover value to other work in law. In my Persuasion course I ask the students to look at capital punishment opinions as if they were literary texts, in terms of the persuasive aspects of the opinion: narrative sequence in the statement of facts, attribution of sources for material in the statement of facts, and tone, diction, language, etc. I always enjoy these exercises and find the students make observations I would not have thought of. One problem with teaching capital punishment materials is how to deal with the negative materials: the brutality, the indifference of the judicial system; the pervasive violence; the
tolerance for injustice. All of those characteristics of the criminal justice system as a whole which are magnified and exaggerated in capital punishment.

John Ryan: There has been some discussion, in various contexts, about social inequalities and the criminal justice system. It strikes me that in the 1990s our public discourse and public policies shy away from talking about or dealing with poverty or social/wealth inequalities as problems and, instead, focus on the failures of social institutions to operate fairly to all -- i.e., to level a/the playing field among people from different backgrounds. The most obvious example is schools; but do we
also look at the criminal justice system in a similar way? Does our criminal justice system -- and the death penalty part of it
reinforce, aggravate, or ameliorate inequalities of race, class and wealth in the larger society?

John McAdams: This issue of whether the death penalty has any deterrent effect is a classic one for any course on social science research methods. All the issues are there!

1. How does one define the variable "death penalty?" Many studies compare jurisdictions that have the death penalty on the books with others that don't. Unfortunately, many jurisdictions that have the death penalty on the books rarely or never execute anybody. Most sensible models of human behavior suggest that people will not be much influenced by a punishment that isn't actually imposed.

2. Simultaneous causality. Hypothetically, the death penalty reduces murders. But do murders affect the death penalty? Are jurisdictions with a lot of murders more likely to have the death penalty? The most likely answer is "yes, murders create a political demand for more severe

punishment." Thus, death penalty opponents enjoy pointing out that Wisconsin (say) has fewer murders than Texas, although Texas has the death penalty, and Wisconsin doesn't. The problem here is that if Wisconsin had the same high murder rate as Texas, Wisconsinites might well demand that their legislators enact capital punishment.

And it might well be that Texas would have an even higher murder rate if it didn't execute murderers.

3. Confounding variables. Jurisdictions that have the death penalty are likely to be different in all sorts of ways from jurisdictions that don't. Thus any two-variable analysis is likely to be misleading. For example, in places where the culture approves of private citizens settling disputes with guns, the culture may also be more favorable toward government executing people. If we find a higher murder rate in such places, it's not because the death penalty has failed to deter murders, but rather because the culture is different.

Sometimes attempts to control for these confounding variables are lame indeed. Thorsten Selin, for example, tried to control for such variables by using pairs of geographically adjacent states. He compared the murder rate in Massachusetts and Connecticut with that in Rhode Island. He compared the murder rate in Wisconsin and Minnesota with that in Iowa. Anybody living in any of these states will immediately doubt the efficacy of this strategy.

Modern multivariate statistical methods are an improvement, allowing elaborate controls for all the *measurable* things about jurisdictions that might affect murder rates. Unfortunately, we can't be sure we have measured everything important. Cultural differences, especially, may be ignored in our statistical models, no matter how sophisticated.

4. Lack of variance in the key variable. The death penalty has been imposed fairly rarely. Indeed, even in the first part of this century there were relatively few executions, relative to the number of murders. Thus we have a situation a bit like an agricultural experiment station that must try to determine the effect of a new fertilizer, but can only use one pound per acre. If the stuff is real potent, it *might* have a statistically perceptible effect on the crop it's tested on. But even a highly effective fertilizer might fail to show a statistically significant effect in such small quantities.

When we combine 3. (a lot of variance in confounding variables) and 4,(little variance in our variable of theoretical interest) we have a situation in which finding a deterrent effect of capital punishment would be impressive indeed.

From this perspective, we can see how time-series studies (which look at executions and murder rates across time) would be particularly useful. Rates of murder and execution may change sharply while possibly confounding variables change only slowly.

From this perspective, we can see how cross-national comparisons are unlikely to show a deterrent effect. The variance in confounding variables -- cultural, economic, racial, religious --

is particularly large in such studies.

From this perspective, we can see why one of the studies showing the clearest effect of capital punishment was one done by Kenneth Wolpin using data from England and Wales. During the early part of the period his study covered, about half of convicted murderers were executed there.

Arnold Barnett looked at one reasonably well-done study of the death penalty (Passell's) that showed no deterrent effect. He looked at the statistical prediction error in Passell's study, and calculated that if each execution deterred five murders, that effect would have been imperceptible in Passell's model. In other words, the combination of confounding variables and the rare application of the death penalty meant that even if the death penalty has a substantial effect, the model would not have shown it.

When we consider all these factors, it's surprising that a number of good studies have shown statistically significant deterrent effects of executions. Particularly, studies by Isaac Ehrlich, James Yunker, Kenneth Wolpin, Cover and Thistie, David Lester, Stephen K. Layson, and Dale Cloninger have shown that executions deter murders.

There are, of course, numerous other studies -- including some recent and well-executed ones -- that show no deterrent effect of executions. But what is interesting is that those other studies *do* show that punishment (imprisonment) deters crime, and specifically that punishment deters murder. And more severe punishments deter better.

If we had excellent evidence on the *specific* deterrent effect of executions, we could ignore this finding and look only at the evidence on executions. But given the methodological problems and the mixed findings on executions, the clear fact that punishment deters murders provides a reasonable basis for believing that the most severe punishment deters better than less severe ones.

LAST QUESTION(s):

John Ryan: How do students respond in the classroom to the issue of the death penalty? Are they passionate, objective, uninterested? Are their views firmly fixed or fluid? Do their attitudes get in the way of critical exploration of various aspects of the topic?

And how do your own beliefs and attitudes about the death penalty
influence your teaching?

Jim Acker: I have found it rewarding to teach semester-length classes on the death penalty. As more material is covered, it seems that everybody becomes bothered (in a healthy sense) about something, no matter what opinions or views about capital punishment they began the class with. Thus, students who start out firmly in the pro-death penalty camp often become troubled by the issue of executing innocent people, or by evidence of race discrimination, or by the quality of lawyering in some cases, or

by the Supreme Court's apparent retreat from meaningful policing of death penalty systems. Students who are strongly against the death penalty often are given pause when they confront the brutal case facts involved in capital murders, or issues of serial killers or life term prisoners who kill, or when asked to contemplate alternative punishments that strike the right combination of justice and social utility. Students who find themselves without strong convictions perpetually agonize, probably more deeply than the strong pro- and anti- students. I find very few to be indifferent.

In teaching about the death penalty, I suppose one of the challenges is to capitalize on the emotions that typically drive students' initial views, by channeling them into more systematic lines of inquiry, and in different directions. I think it would be a mistake, and probably futile, to try to squelch these sentiments. Death penalty CLASSES usually succeed precisely because they are comprised of groups of INDIVIDUALS with sharply different views, anchored by others who pose equally challenging questions and represent unique points of view. As in other areas, some minds are hopelessly closed and will not entertain diverse perspectives or struggle with evidence contrary to their beliefs, but by and large the discussions that evolve over the course of a semester, and the growth that many students do evidence give me confidence that most students are willing and able to test their views and to think about the issues in academically rigorous fashion.

I think I would be less optimistic about unsettling preconceived notions about the death penalty (and I think teaching can largely be such a process in unsettling) if only a class or two is devoted to the subject.

From a teaching perspective, I continuously am reminded that reasonable people can and do disagree about capital punishment on all levels--from emotional to intellectual. These reminders make it difficult to get lazy, or even entirely comfortable with the treatment given issues. Because the issues can be supercharged, I find myself playing more than usual the role of devil's advocate, in an attempt to not let people (or myself) rest easy with the last statement made. When all clicks, death penalty classes do seem to engage people in the discussion and analysis of important issues, and for those reasons they can be quite rewarding to all involved.

Jim Coleman: I agree completely with Jim Acker's last response. I also teach a semester-long seminar (which I have taught since 1989). As one might expect at Duke, my students come with many different views on capital punishment. And over the course of the semester, I think all of the students find themselves revisiting things they began the semester firmly convinced of.

For the last two years, I have added a clinical component to the seminar, co-taught by a colleague. Actually, we assign students in teams of two to work with NC lawyers on post-conviction issues, including investigations. The students devote 100 hours to this assignment over the semester. My colleague, Bob Mosteller, and I, assisted by one of the students from my first seminar in 1989 who now works for what used to be the NC Resource Center, generally supervises the students, but the primary supervisors for the case work are the

lawyers handling the cases. This component of the class has been an extraordinary success. Students on all sides of the death penalty issues all agree that working with an actual defendant on real issues brings alive the issues we discuss in class.

One of the things that Bob and I also have found is that the papers the students have written these last two years are some of the best papers we have received from students. The papers are thoughtful and interesting, and cover a very wide span of issues. he students devote an enormous amount of time to the seminar, but I am convinced all of them leave finding the work well worthwhile.

Our students feel comfortable disagreeing with each other about issues we discuss. I think that is critical to a successful seminar. Students who favor the death penalty do not feel reticent about expressing their views and those who oppose the death penalty try to deal with the legal issues on the merits, rather than resort to moral or politically correct positions. I also play the devil's advocate, but students know what my position is on the death penalty. We all try not to let our personal views prevent us from discussing the issues and respecting and listening to each other's views.

Dane Archer: I have included capital punishment in an inclusive course on violence and crime. In one part of the course, the students have a chance to meet violent offenders from a nearby California Youth Authority facility. This experience is an interesting one, and many initially "progressive" students find themselves unexpectedly embracing the penal goals of incarceration and incapacitation, even if they are not persuaded that prisons are otherwise effective (e.g., rehabilitation).

When we then examine the debates regarding the death penalty, I have the students break into small discussion groups to try to identify the DIFFERENT purposes that are (or might be) served by executions--specific deterrence, general deterrence, retaliation, economics, psychological respite for the victims, etc.

I find that this approach sensitizes students to the underlying issues surrounding the purposes (and there are of course several) that can be served by punishment in general, and the death penalty in particular.

Finally, I include in the course documentary videos about dramatically reprehensible crimes of violence--e.g., child homicide, spousal killing, etc. With the students thus engaged--intellectually and emotionally-- I get them to explore questions about the most appropriate punishments, whether various policies or their enforcement could have prevented these specific acts of violence, etc.

I find that this experience sensitizes students to the powerful emotions inherent in crime and punishment but, at the same time, encourages them to disentangle the interwoven rationales that generally surround debates about the wisdom of punishment and executions.

Finally, I encourage students to examine their own views about the death penalty to learn what KIND of pro-executionist or abolitionist they are. WHY do they support the death penalty, and what purposes do they believe it serves? WHY do they oppose the death penalty, and what harm do they believe it causes?
In either case, I encourage students to articulate what kinds of empirical EVIDENCE would provide support for their views.

There are important typologies or dimensions underlying both positions, and I believe critical dialogue requires that students find out where they stand on each of these.

Leigh Bienen: I think the death penalty is a very rich topic for teaching in law and the social sciences and the humanities, because it is truly a crosscutting issue. The legal issues are technical, complicated, and involve statutes, cases, rules, federal and state law, and everything else. The social science questions are profound, and the philosophical and humanitarian issues are very sharp, on both sides. Plus the death penalty hits us where we live as a society, our uniqueness, our
perception of ourselves as a just society which protects criminal
defendants and provides support for victims and others who become
enmeshed in the criminal justice system. The role of the press, the media, the entertainment industry... the death penalty is right there in all of those parts of the society with strong positions on both sides.

John McAdams: I frankly envy members of this discussion who have the luxury of teaching an entire semester course on capital punishment. I teach the subject in about two weeks of a broader Public Policy course.

In such a framework, expecting students to fully examine and reconsider their own views is simply too ambitious. I do think I can convey the following few points, which students seem quite open to:

1. The issue is more complex than they think. Anti-death penalty students who think that the possibility of the execution of even one innocent person renders the policy unacceptable need to think about the myriad of government policies that have the foreseeable effect of killing innocent people. Pro-death penalty students who think it is cheaper to execute murderers than to imprison them need to know that this is untrue, and that making it true would require reforms that are in fact highly unlikely. Politically correct students who want to force this issue into a racial framework need to know that the vast majority of murders are intraracial, not interracial.

2. The empirical evidence is unclear. When we study the question of whether the welfare system encourages illegitimate births, or whether private schools perform better than public schools, we find nasty methodological problems, and a lack of clear answers to guide policy. So when we study the death penalty, students are not surprised to find similarly murky answers to

their empirical questions. The issue then
becomes: "what do we risk if we bet that [take your pick] welfare causes illegitimacy, or that private schools are no better, or that executions deter murder."

3. There are real possibilities of "unintended consequences." Students who like the death penalty because they want to "get tough" with crime have to face the possibility that some juries will render "not guilty" verdicts in capital cases because they don't like the idea of the defendant being executed. Students who think the death penalty illegitimate because of inequity should consider the possibility that lesser punishments will be administered even more inequitably.

Students are not resistant to these points, probably because none of them challenge students on the basic social values that determine their views of the death penalty. I don't ask students to express an opinion pro or con on the issue, and I very much doubt that any change their minds.

What I hope for is a bit more subtle and nuanced opinions, but not different opinions.

Let me conclude by saying that the discussion here, as well as my own experience in teaching a course on the Kennedy Assassination, has impressed on me the value of having students dig into an issue in great detail. Here at Marquette -- and most everywhere else, I suspect -- even upper-division undergraduates and graduate students take courses that are fundamentally surveys of some broad topic. The intellectual process of intensive study of a narrow topic is different. Not better, necessarily, but different and probably too rare in most curricula.

Leigh Bienen: What a good idea to teach a course on the Kennedy assassination, especially a "courts and society" type of course. I did teach a public policy seminar on the reiminpostion of capital punishment in New Jersey for a semester to Woodrow Wilson school undergraduates. it was an assessment of the law ten years after reenactment. the first day of class i did a survey of their attitudes and opinions. and the last class i handed out the same survey. their attitudes had changed somewhat, in the direction generally seen by other researchers, that those who are 'better informed' about the death penalty are less likely to support it. the students wrote quite detailed papers. one of the papers was a study of the legislative history of the reimposition with original interview material from several key legislators, including 'the father of the death penalty in nj'. that is still the best legislative history of the death penalty in nj, and
i frequently cite it. the report the students wrote became part of the official legislative record of a then pending constitutional amendment regarding capital punishment and was distributed throughout the state to every official repository of state documents. and the students testified at a legislative hearing on the proposed constitutional amendment which had the purpose and effect of widening the class of death eligible cases. i always tell the students that i spent more than 15 working for the public defender actively engaged in litigation challenging the reimposition. but i certainly don't expect them to agree with me. most of them are in favor of capital punishment. what i find is that their attitude towards capital punishment mirrors their attitude towards the criminal justice system generally. i am most disturbed by the attitude that none of this has anything to do with them. the people who end up in jail aren't like them, no one they know will ever be involved in the criminal justice system, except as a prosecutor, etc.