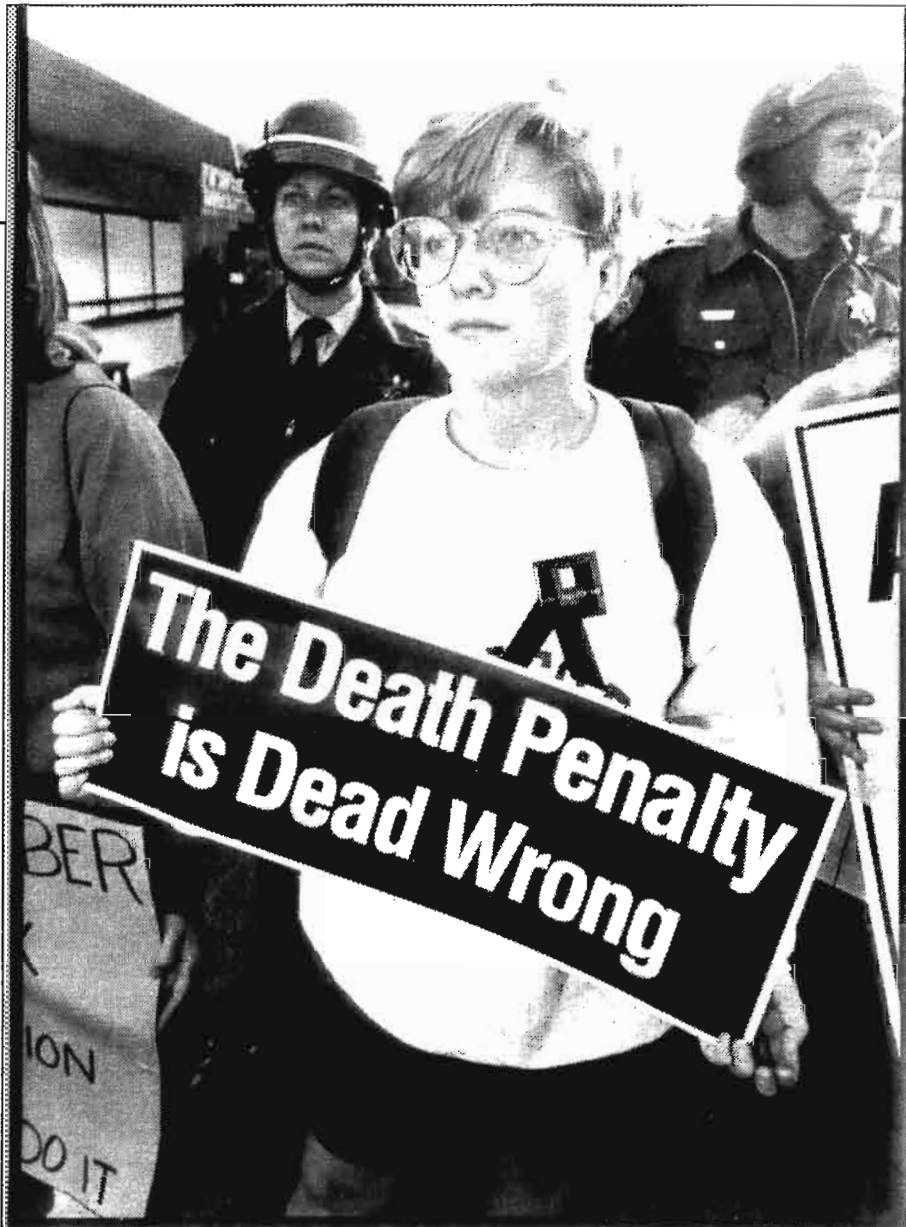


DEATH PENALTY FOCUS

A non-profit group dedicated to the abolition of the death penalty



General Information Packet

MYTHS AND FACTS

California's Death Penalty



MYTH: EXECUTION IS CHEAPER THAN IMPRISONMENT.

FACT: It costs more to execute a person than to keep him or her in prison for life. In March of 1988, The Sacramento Bee reported that it costs at least \$ 1 million to prosecute a capital case at the trial and appellate levels. The Bee concluded that California could save \$90 million a year if the death penalty were abolished. The costly process of appeals is necessary to prevent the execution of innocent people. Even with our system of judicial review in capital cases, 23 innocent people have been executed this century and over 300 innocent people have been convicted of capital crimes.

MYTH: THE DEATH PENALTY IS JUST PUNISHMENT FOR MURDER.

FACT: Killing is not a just punishment for killing. We do not burn the homes of arsonists or sexually abuse those who rape; it does not make sense to kill someone who has killed. There is no question that a murderer should be punished - but not by executing him or her.

MYTH: THE DEATH PENALTY DETERS CRIME.

FACT: Scientific studies have repeatedly shown that the death penalty does NOT deter crime any more than other punishments. U. S. Supreme Court Justice Thurgood Marshall has said, "The death penalty is no more effective a deterrent than life imprisonment."

MYTH: TO BE SAFE, WE MUST EXECUTE MURDERERS.

FACT: Since 1978, California has provided for life sentences without the possibility of parole. That means that the public can be assured that those who commit atrocious murders and receive Life Without Parole will never be free again. In the meantime, executions have a brutalizing effect on society and divert our attention from addressing the root causes of crime.

MYTH: THE DEATH PENALTY IS FAIR.

FACT: Local politics, money, race, and where the crime is committed can play a more decisive part in sending a defendant to the death chamber than the circumstances of the crime itself. Additionally, innocent people have been executed and this injustice can NEVER be rectified.

MYTH: RACE HAS NOTHING TO DO WITH CAPITAL PUNISHMENT.

FACT: Racism is an important factor in determining who is sentenced to die. In 1987, the U.S. Supreme Court case of McCleskey v. Kemp established that in Georgia, someone who kills a white person is more than four times more likely to be sentenced to death than someone who kills a black person. The race of the defendant as well as the race of his or her victim plays a decisive role in who gets the death penalty. More than half of the individuals on California's death row are people of color.

MYTH: THE DEATH PENALTY OFFERS JUSTICE TO VICTIMS' FAMILIES.

FACT: Families of murder victims undergo severe trauma and loss which no one should minimize. But executions do not help family members heal their wounds. The extended process prior to executions prolongs the agony of the family. It would be far more beneficial to the families of murder victims if the funds now being used for the costly process of executions were diverted to provide them with counseling and other assistance.

MYTH: OTHER COUNTRIES USE THE DEATH PENALTY — "LIKE US".

FACT: The vast majority of countries in Western Europe and North and South America have abandoned capital punishment. The United States is now in the company of countries like Iran, Iraq, and China who have longstanding records of human rights violations.

MYTH: THE BIBLE SUPPORTS THE DEATH PENALTY

FACT: Although isolated passages of the Bible have been invoked in support of the death penalty, most religious groups in the United States regard executions as immoral. Literal interpretations of selected passages from the Bible used to defend capital punishment corrupt the compassionate spirit of Judaism and Christianity - a spirit which urges humane and effective ways of dealing with crime and violence.

Death Penalty Focus of California

Death Penalty Focus of California is an organization dedicated to the abolition of capital punishment. We believe the death penalty is an ineffective approach to the serious problem of violent crime. Moreover, by diverting our attention and financial resources away from preventative measures that would increase our personal safety, the death penalty actually causes more societal violence. By capitalizing on our compassion for victims of violent crimes and the fear politicians cling to the death penalty as an expedient symbol of their tough-on-crime stances. Death Penalty Focus believes that when the public is informed about the racism, injustice and costs associated with the death penalty, they will join citizens of every other Western industrialized democracy in choosing responses to violent crime.

Death Penalty Focus is governed by a Board of Directors comprised of 30 renowned political, religious and civic leaders, as well as legal scholars and attorneys who are involved in death penalty litigation and penal reform. In addition, the organization has an Advisory Board composed of community leaders and entertainers who support Death Penalty Focus' work to abolish the death penalty.

Death Penalty Focus sponsors ongoing public educational campaigns, research and demonstrations against the death penalty. The organization also serves as a liaison among anti-death penalty groups in California and nationwide. Among the activities Death Penalty Focus undertakes on a regular basis are the following:

- ☛ Distributes thousands of pieces of educational materials such as "Myths and Facts About California's Death Penalty."
- ☛ Co-sponsored a poll conducted by Field Research Institute, that exposed many misconceptions about the death penalty. Most notably, it revealed that when given a choice, a substantial majority (67%) of Californians prefer the penalty of life in prison without parole and restitution to the victim's family over executions.
- ☛ Enlists volunteers for the Death Penalty Focus Speakers Bureau to present these issues to service organizations, church groups, schools, legal and other professional associations.
- ☛ Publishes a quarterly newspaper, The Sentry, that is distributed widely throughout the state and to other organizations working against the death penalty.
- ☛ Mobilizes abolitionists for rallies, demonstrations, vigils and other public campaigns to oppose executions.
- ☛ Sponsors the Legal Tracking and Research Project, which monitors and advises on pending death penalty prosecutions in California. The data collected by the Legal Tracking Project are used in research projects to examine racism, cost and other issues pertaining to death penalty.
- ☛ Appeals to the public through newspaper advertisements on death penalty issues, including a series of full-page public education advertisements in The New York Times, the San Francisco Bay Guardian and L.A. Weekly.

Board members and other spokespersons also engage in active media campaigns, including broadcast and print reviews and speeches on capital punishment in a diverse range of public forms.

**For further information, please contact Pat Clark, Executive Director;
Death Penalty Focus of California, at 510-452-9505**

THE DEATH PENALTY COSTS TAXPAYERS MORE THAN LIFE IN PRISON

A few cyanide pellets or jolts of electricity versus a lifetime of imprisonment looks like a great savings to taxpayers. But virtually every study on the issue of cost proves that executions are far more expensive than life in prison without parole. From the moment a capital murder investigation begins, through the trial stages and finally to the punishment phase, a capital case is more expensive than a non-capital charge at every level. The potential savings are dramatic. In March 1988, the Sacramento Bee reported the state of California could save \$90 million dollars a year by abolishing the death penalty.

In a 1992 study, the Dallas Morning News determined that executions in Texas cost \$2.3 million – \$1.55 million more than 40 years in Texas' highest security prison. The Miami Herald calculated that one execution in Florida costs \$3.2 million. The New York State Public Defenders Association concluded executions in that state were three times as expensive as life in prison.

Capital cases are an expensive luxury in the criminal justice system. Since 1990, the state government shifted much of the financial burden of death cases to the county level. In the current economic climate, counties in California are planning or are in the process of cutting essential social services to pay for exorbitantly expensive death penalty trials. Monterey County is pursuing three capital trials with a total price tag of \$1.5 million to the county. Simultaneously, the county is considering cuts in sheriff and police protection to cover a projected \$2.5 million budget shortfall.

Streamlining the appeals process will not result in substantial savings. It is unlikely to save much money or markedly reduce the time to execution. When the Supreme Court reintroduced the death penalty in 1976 it was with the understanding that "death is different." Because of its severity and finality the court insisted on systematic guarantees the trial would be as unbiased as possible. These guidelines, known as "Super Due Process," are expensive. Simply put, the time-honored, constitutionally-protected right of due process is irreconcilable with inexpensive capital trials.

Resources

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Alameda County
Edition

Taxpayers pay high price for death penalty

Cost of one execution dwarfs cost of imprisonment for life

BY MICHAEL DORGAN
Mercury News Staff Writer

People might reasonably assume that the cost of an execution is little more than the price of a few poison pellets.

But the death penalty is an expensive luxury item in the criminal justice system. If the additional court costs, attorney fees and appeals expenses are tallied, each of the California executions likely to take place in the coming years will cost millions of dollars — many times the cost of life imprisonment.

"They're a different animal," Robert Bryan, a San Francisco attorney who has tried more than 100, says of death penalty cases. "The politics of death is a bottomless pit that sucks everybody in."

Precise costs are impossible to determine. No

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Executions cost more than life imprisonment

■ DEATH COSTS

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state agency has tried to calculate the total cost of imposing the death penalty, in part because of differing record-keeping procedures of various offices involved and the confidentiality of certain expenses.

But every recent study indicates that executions come with big price tags.

■ The Dallas Morning News last month calculated that the 46 executions in Texas since 1977 each cost an average of \$2.3 million. That compares to \$750,000 for locking someone up for 40 years in the highest-security Texas prison.

■ A review of Florida executions by the Miami Herald in 1988 concluded that death penalty cases there cost at least \$3.2 million each.

■ In the only recent, comprehensive review of death penalty costs in California, the Sacramento Bee in 1988 estimated that a return to the historical rate of six executions per year would cost \$90 million per year — \$15 million per execution. That compared to less than \$1 million to imprison an inmate for 40 years, the average life expectancy.

The reason behind the high cost of capital cases is that lives are at stake. Even though it has streamlined procedures, the U.S. Supreme Court has repeatedly ruled that special safeguards must be in place when prosecutors seek the ultimate punishment.

All of those safeguards cost money. At every level — pre-trial, trial and post-trial — death cases tend to require greater participation from investigators, defense attorneys, prosecutors, experts, jurors and judges.

Just the filing of a death-penal-

ty charge almost guarantees a long and costly court battle. Whereas the overwhelming majority of felony cases are resolved with pretrial guilty pleas, often to reduced charges, few defendants are willing to plead guilty when the penalty is death.

Longer pretrial investigations

At the pretrial stage, the investigations of both the defense and prosecution typically take three to five times longer in capital cases than non-capital cases, according to Robert Spangenberg, a Boston-based legal consultant who has done studies for numerous government entities.

One reason is that lawyers must prepare for a trial that consists of two distinct proceedings. The first determines a defendant's guilt or innocence; the second decides whether the defendant goes to prison or the gas chamber.

The two-tiered trials often last for several months, at an estimated cost of more than \$7,000 per day in California. And even when the outcome is a death sentence, the battle has barely begun. All death verdicts are automatically appealed to the state Supreme Court, and most result in numerous petitions to federal courts.

For example, Robert Alton Harris — who on April 21 is scheduled to become the first person to be executed in California in 26 years — was convicted of a double murder in 1978. His execution has been delayed by the filing of eight state habeas corpus petitions, which took three years to resolve. They were followed by three federal habeas corpus petitions, which took 10 years to resolve. Habeas corpus petitions are used to challenge verdicts by raising a variety of issues that

don't deal with guilt or innocence, such as competency of attorneys.

David Puglia, a spokesman for the state attorney general's office, says the state prosecuting attorneys' fees alone for the Harris appeals total more than \$760,000. That figure does not include court costs, defense attorney fees, the prosecuting attorneys' support staff or the \$25,000 a year it costs to house an inmate at San Quentin Prison.

Taxpayers foot the bill

Because the majority of death penalty defendants don't have money, California taxpayers often foot the bill for the entire defense case, which includes the fees of two attorneys.

Supporters of the death penalty, including state Attorney General Dan Lungren, don't dispute the high cost of capital cases. But they argue that those costs are due in part to inefficiencies in the state and federal systems.

Lungren said in an interview that he thinks the time between conviction and execution can be shortened to about two years if state and federal courts further streamline procedures. Among the changes he would like to see at the state level are quicker appointments of defense attorneys to handle appeals and rule alterations regarding certification of trial records. At the federal level, he called for courts to include all habeas corpus issues in one filing.

Lungren says such changes would not threaten constitutional protections. Many legal experts, however, are deeply skeptical of streamlining death penalty cases.

'Very scary prospect'

"Much criticism (of court inefficiencies) is a hidden agenda," says Gerald Uelman, dean of the Santa Clara University Law

School. "What they're saying is that the way we should deal with cost is not be so careful. Frankly, I find that a very scary prospect."

Frank Zimring, director of the Earl Warren Legal Institute at the University of California at Berkeley's Boalt Hall, agrees. "The problem with all of this is that the way to drive the cost down is to pay less attention to due process matters and to drive the volume up. The more we execute, the cheaper it costs on a per case basis."

Jim Thomson, past chairman of the death penalty committee of the 3,000-member California Attorneys for Criminal Justice, blames part of the costs on overzealous prosecutors. He says only one out of 10 death penalty cases ends with a death verdict and cites that as evidence that prosecutors "overcharge" many crimes because they view death-penalty cases as beneficial to their careers.

Even if savings can be achieved, Lungren concedes that the death penalty will continue to punish taxpayers as well as murderers.

"I don't look at it from a cost-effective standpoint," he said. "The death penalty should not be imposed because it's cheaper to kill people than to keep them in prison but because it's appropriate punishment for heinous crimes and because it is a deterrent."

On those points, too, Zimring and others disagree. Noting that only 1 percent of all murderers end up on death row, Zimring described the death penalty as a "distraction" from the search for answers to the underlying problems of crime and the criminal justice system.

No Study Proves Conclusively The Death Penalty Deters Crime

The death penalty will not save innocent lives by reducing the numbers of murders. Most studies on this issue conclude there is no evidence to suggest that fewer murders are committed out of fear of the death penalty. In fact, some studies point to higher murder rates following executions.

The widely respected Thorsten Sellin studies conducted in the United States in 1962, 1967 and 1980 concluded the death penalty has no deterrent effect. Furthermore, FBI statistics from 1978 to 1988 show that murder rates in 12 states, that routinely carried out executions, is exactly twice that of 13 states with no death penalty (106 per million, versus 53 per million). The 12 death penalty states also have the highest rate of police officers being murdered (4.9 per million population), while the 13 states with no death penalty, like Massachusetts, have the lowest rate (nearly 50 percent lower, at 2.7 per million).

Another study showed that within one month of every execution in New York since 1930 there were two to three more murders than the murder rate predicted, possibly due to a "brutalizing effect" state sponsored killing encourages.

Since abolishing the death penalty in 1976, Canada's murder rate has declined. In 1987 the Canadian Parliament rejected an attempt to reinstate the death penalty. The British Royal Commission on Capital Punishment analyzed statistics from seven European and three non-European countries which reported no evidence that linked abolition of the death penalty to increased homicide rates. The 1988 Report to the United Nations Committee on Crime Prevention and Control, a detailed international study, found that all of its documented research "has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment."

"The Death Penalty makes a good sound bite, but it does not make the streets safer," Georgia State Senator Gary Parker told the House Judiciary Subcommittee on Civil and Constitutional Rights in May 1990. "The death penalty has symbolic and political value to politicians, but it has no value to black neighborhoods that are plagued with violent crime. Concentration of resources on a few high-profile capital cases helps a prosecutor, attorney general or governor get re-elected or advance to higher office, but it hurts the fight against crime by diverting resources from hundreds of other cases, as well as from problems that are affecting the day-to-day lives in the black community."

Crimes of passion, crimes committed by the mentally handicapped and economically motivated crimes are not deterred by the death penalty. There are, however, proven ways to reduce these crimes through social programs such as counseling, mental health services, job training and employment opportunities. Money could also be spent on proven anti-crime measures such as more -- and better equipped -- police. The time has come for those who talk of concern for crime deterrence to put their money where it will have proven results.

Death penalty riddle lingers

No solid answer on whether executing a killer might deter others

BY JACK FISCHER
Mercury News Staff Writer

If California executes Robert Alton Harris next month as planned, it will do so without knowing the answer to perhaps the single most important question about capital punishment — will Harris' death deter even one other would-be killer?

The public favors the death penalty and many politicians embrace it, but despite decades of trying, social scientists have been unable to prove that capital punishment has any clear effect in deterring murder.

With the state's decision to execute Harris on April 21, ending a 25-year hiatus in California's imposition of the death penalty, debate about capital punishment has been revived.

While common sense suggests that the greater the penalty, the greater the deterrence, attempts to prove that theory have bogged down in the complexities of the real world, social scientists say.

What you find, it seems, depends on what you are looking for. The deterrent value of capital punishment has been "disproved," "proved" and "disproved" again since the first serious studies of the issue in the late 1950s.

Massaging the data

"It's possible to massage the data to make it appear there is a deterrent effect and then, by changing the approach, to make the evidence go away," said Tufts University philosopher Ilugio Be-dau, who has studied the death penalty for more than 30 years.

The problem, researchers say, is that no study yet devised has isolated the effects of the death penalty on homicide rates from other social factors that may affect the reasons people kill each other, such as unemployment rates or the availability of guns.

Since social scientists can't conduct a conventional, controlled study they've turned to a variety of less-reliable research methods that haven't proved equal to the complexity of the task.

That's not to say the death penalty could never deter a crime. Some criminologists speculate that if the death penalty were imposed immediately and inevitably for murder, it might have an observable deterrent effect, but



MAX RAMIREZ — CALIFORNIA LAWYER MAGAZINE

Robert Alton Harris, who is scheduled to die on April 21, finds himself the focus of a recurring debate: is the death penalty a deterrent?

the nature of the U.S. justice system makes that unlikely.

"Maybe if we had 10,000 executions," it might make a difference, Franklin Zimring, a death penalty expert and law professor at the University of California, Berkeley, has said. "But we don't live in that kind of world."

Zimring added that even when executions peaked in the 1930s, with 199 carried out nationwide in one year, no deterrent effect was demonstrated. And even in that record year, there was still only one execution for every 100 criminal homicides. Today, the ratio is about one in a thousand.

Unless revenge is the motive, Zimring argues, the real debate is not whether the death penalty deters murder but whether it deters better than other punishments, such as life imprisonment. But that hasn't been shown either, he said.

"There are two things that we do know: If there is any provable marginal deterrence out there, it has to be small enough to have escaped detection in a whole series of experiments over the years," he said.

But because of either a continued belief in deterrence, or simple satisfaction in seeing wrongdoers

severely punished, 60 percent to 70 percent of the public nationally have supported the death penalty for years.

In California, according to Mark DiCamillo of the Field poll, support has grown steadily since the first polls were taken in the 1950s. In a 1986 Field poll, slightly more than 80 percent of those questioned supported the death penalty.

The first important study of the deterrence of capital punishment was conducted in 1959 by Thorsten Sellin, a nationally renowned sociologist at the University of Pennsylvania hired by the American Law Institute, which wanted help deciding whether to include a death penalty statute in its model criminal code.

Sellin compared homicide rates in death penalty states with those in states lacking it. By using neighboring states with similar social and cultural values, he attempted to minimize extraneous factors, such as widely differing incomes, employment rates and styles of administering justice. Next, he studied states that enacted or abolished death penalties.

"The inevitable conclusion," he wrote, "is that executions have no discernible effect on homicide death rates."

The unknown

Critics said unknown variables may have skewed the results and they suggested that there may be no two areas similar enough to avoid such distortions.

But the first serious challenge to Sellin's work didn't come until 1975, when University of Chicago researcher Isaac Ehrlich used a sophisticated mathematical and statistical approach similar to one used by economists.

Ehrlich's study, an econometric model that considered far more variables than Sellin's, stunned the academic community. According to Ehrlich, "the empirical analysis" showed that every execution during the years he studied — 1933 through 1967 — saved eight innocent victims from being murdered.

The findings sent shock waves through academic and public policy circles, prompting the National Academy of Sciences to name a panel to review the study. That panel concluded that Ehrlich's

How states rank on executions

One hundred, forty-three people were executed in the United States from 1976 through 1990.

Executions

States that have executed people since 1976:

Texas	37
Florida	25
Louisiana	19
Georgia	14
Virginia	11
Alabama	8
Nevada	5
Missouri	5
Mississippi	4
South Carolina	3
North Carolina	3
Utah	3
Arkansas	2
Indiana	2
Illinois	1
Oklahoma	1

States with death penalty but no executions since 1976:

California, Maryland, Tennessee, New Mexico, Arizona, Kentucky, Pennsylvania, Ohio, New Jersey, Connecticut, Delaware, Montana, Washington, Wyoming, Colorado, Oregon, Idaho, Nebraska, South Dakota, New Hampshire.

Without the death penalty:

District of Columbia, New York, Michigan, Alaska, West Virginia, Rhode Island, Wisconsin, Massachusetts, Hawaii, Kansas, Minnesota, Maine, Vermont, Iowa, North Dakota.

Source: Sourcebook of Criminal Justice Statistics, World Almanac

MERCURY NEWS

study, too, was flawed, saying "provides no useful evidence of the deterrent effect of capital punishment."

Ultimately, says Zimring, virtually all countries that have abolished the death penalty have done so because of changing attitudes about the morality and ethics of capital punishment — not academic debates.

"There is nowhere in the world where abolition has occurred principally because of the scientific findings," Zimring said. "The biggest question is always: should it be within a government's power to take a citizen's life? That's the real debate."

RELATED STORY, PAGE 4B

■ Gov. Wilson says he'd 'clemency for Robert'

ALTERNATIVES TO THE DEATH SENTENCE

Despite objections to the death penalty, many people support executions fearing that overly-lenient parole boards will put murders back on the street. This misconception persists even though California has sentenced over 1000 people to life in prison without the possibility of parole since 1977. As with inmates sentenced to death, only in extraordinary circumstances will the governor intervene to release any of those prisoners.

Since the Supreme Court re-authorized the use of the death penalty in 1976, most media attention on the issue assumes capital punishment enjoys overwhelming popular support. Admittedly, many reputable studies have put the approval rating as high as 80 percent among California voters. However, when confronted with specific alternatives that keep murderers in prison, the apparent majority evaporates. In a Field Institute study, only 26 percent of Californians agreed with the death penalty when given the option of "life in prison for keeps."

The Gallup Poll shows similar responses nationwide. Support for the death penalty drops from 76 percent to 53 percent when life in prison without parole is offered as an alternative. Several have conducted polls about support for alternatives. In Florida, 70 percent said they preferred a sentence of life without parole and financial restitution to the victim's family. In New York, 62 percent of voters preferred life plus restitution. In Virginia, 59 percent preferred a sentence of 25 years before parole, plus financial restitution; in Nebraska, 58 percent preferred this arrangement. Even where restitution is not part of the life without parole option, a plurality of those polled in Kentucky and Oklahoma still prefers it over the death penalty.

Life in prison without parole is cheaper; more in-tune with the evolving worldwide standard of decency; prevents executing innocents; is as effective in deterring crime; keeps criminals from repeatedly harming society; and is popularly demanded.

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The LWOP Alternative

Public Favors Life in Prison as the Ultimate Sanction

By Mary Ellen Leary

California's execution of Robert Alton Harris on April 21 is widely expected to open the floodgates to public executions across the United States. Yet even as five more men were added to San Quentin's death row in the scant few days it took Governor Pete Wilson to reject Harris' clemency petition, a growing number of Californians appear to favor substituting life without possibility of parole for the death sentence.

The latest Gallup Poll shows support nationally for the death penalty drops from 76 percent to 53 percent if life without parole — or LWOP — is offered as an alternative. In California, this view is strikingly stronger. While 80 percent of those polled by the Field Institute said they favored the death penalty, the proportion dropped to only 26 percent when the option of "life in prison for keeps" was offered.

While the Field Poll also found a large proportion of the public had doubts that life without parole really means what it says, California juries seem to believe it works. Since 1978 three times as many persons found guilty of first degree murder have been sentenced to life without parole as have been ordered to die. There are now 322 men and two women waiting on death row in Califor-

nia but there are 977 serving the irrevocable life terms.

One thing the jurors know that the general public may not is just how tight California's sentencing law now is. In 1978 the legislature redefined life without parole to require 30 years in prison before any move for clemency can be made, a clemency that is the exclusive prerogative of the governor, not the courts. This is far stronger and more explicit than in most states.

Even ordinary life sentences, which can gain parole, are restrictive in California. No one serving life for first degree murder can be paroled until after serving 25 years in prison. Some 3,849 prisoners are currently categorized as ordinary "lifers" and none has yet reached the point when parole could be considered.

Anti-death penalty advocates believe the frenzy of appeals and last minute stays in the Harris case, on top of a 14-year wait, may actually boost support for the life without parole option in the state. It offers one obvious advantage in that the sentence takes effect promptly upon a judge's order, rarely getting tangled in appellate delays. It also gives the victim's family the satisfaction of knowing that the offender's fate is sealed. And the criminal drops into the anonymity of prison life rather than becoming what many in the public now regard as a mock-hero in dramatized final battles to stave off death.

Another factor favoring life without parole is cost. Studies now show delays for appeal and frequent court hearings

put the costs of the death penalty for the taxpayer at two to three times that of a life sentence. Recent moves to speed up the process and limit appeals may save only a portion of the costs now incurred by legal appeals.

Beyond these pragmatic considerations, there is also the impact a growing repugnance towards capital punishment worldwide may have on sensitizing public attitudes here at home. Virtually every European democracy has abolished the death penalty except Poland (which is currently debating the subject as it rewrites its former communist criminal law code). Even the former Soviet republics and South Africa are now pondering abolition. In the Americas, only Chile, the English-speaking Caribbean and the U.S. retain capital punishment. Its greatest use is in Iran, Iraq and China.

Such shifts in societies abroad are bound to affect public thinking in California, opponents of the death penalty predict. Alice Miller, director of Amnesty International USA's program to abolish capital punishment points to a growing number of civil rights, human rights and women's rights organizations that have recently begun to focus on the death penalty issue.

While such groups are by no means unanimous in advocating life without possibility of parole as a substitute to capital punishment, they are helping create a climate of public opinion that, at least in California, is increasingly receptive to a water-tight prison alternative to death.

Mary Ellen Leary, a West Coast correspondent for the *Economist*, wrote this article for *Pacific News Service*

Death penalty support an open issue

When alternatives given, respondents tend to shy away from executions, researcher says

By Larry D. Hatfield
OF THE EXAMINER STAFF

Four out of five Californians say they "favor" the death penalty, but most of that support appears to evaporate if citizens are offered an alternative to execution.

The same is true in other states, says Northeastern University's William J. Bowers, where support for the death penalty drops dramatically when an alternative such as life without parole is offered, and even more when the alternative is life without parole and restitution to the victim's family.

Bowers blames "the recent political stampede on execution" on pollsters failing to ask the right questions and pollsters, the media and legislatures misreading the meaning of answers to the questions that are asked.

A California Poll released last week showed 80 percent of those surveyed support the death penalty while 14 percent oppose it. The results closely parallel a poll of Californians two years ago by the Field Institute, which was taken just before the scheduled execution of murderer Robert Alton Harris.

Two years and a series of unsuccessful court battles later, Harris is again scheduled to die on April 21, the first execution in the state in 25

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Support for death penalty questioned

years.

Bowers, principal research scientist in criminal justice at Northeastern and author of two books on the death penalty, challenges the notion that the polls represent "continuing strong support" for the death penalty, as pollster Mervyn Field declared, or that they reflect "deep-seated pro-death penalty attitudes."

"To be sure, four out of five Californians have not renounced death as punishment," Bowers said. "But this support is hardly strong or deep-seated. To the contrary, it is remarkably soft and shaky."

When specific alternatives to death are offered, Bowers said in a telephone interview, the number of those supporting executions "goes well below 50 percent."

Nearly two out of three Californians, for instance, said they would prefer a sentence of life without parole and financial restitution to the victim's survivors. In Florida, 70 percent prefer that alternative; in New York, 62 percent; Virginia, 59 percent; and Nebraska, 58 percent.

Bowers said the 26 percent of Californians who stuck with the death penalty (7 percent were undecided) did so because they believe life imprisonment is no guarantee that convicted murderers will stay in prison.

"If the public is right, then enforcing the sentences imposed by the courts would remove what may be the foremost source of support for the death penalty among those who would stick with it, and what is surely a source of ambivalence among those who are presently ready to accept this alternative," Bowers said.

Tip Kendall, spokesman for the state Department of Corrections,

said the department does not keep statistics on how many inmates who receive such sentences are subsequently released on appeal.

According to Phyllis Scott, spokeswoman for the state Board of Prison Terms, there currently are 977 inmates in California prisons serving life terms without possibility of parole.

Bowers believes that polls over the last several years indicate clearly that the people want an alternative to capital punishment.

"But pollsters are telling their would-be leaders that death penalty support is strong and deep-seated," he said.

"Californians do want brutal murders punished harshly (84 percent), and they do worry about lifers getting out of prison at some point (64 percent). But they are looking for a better way than the offender's execution to compensate the loss to the victim's family and to collect the offender's debt to society."

[See DEATH, A-16]

THE CRUELEST LOTTERY

In 1971, the U.S. Supreme Court invalidated all existing death penalty statutes because the Court determined they were arbitrarily applied. Six years later the Court allowed for its re-introduction if states engaged in a rigorous "Super Due Process" to assure that there would be no arbitrary assignment of the death penalty. Despite the supposed heightened scrutiny, the death sentence remains a roll of the dice.

If shuffled together, no one could determine which of any 100 murder defendants received death or life sentences, noted one Georgia Pardons Board official. Extraneous variables such as venue, political posturing, economics, race and quality of legal counsel determine the outcome. U.S. Supreme Court Justice Byron White, in voting to overturn all death sentences in 1972, said: "...there is no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many in which it is not."

Of every 100 people arrested for murder in this county, just one is executed. In California, where a small percentage of murder cases include the possibility of the death penalty, just 10 out of every 100 capital cases end with a death judgment.

"It would be one thing to say that ten murderers deserve to be executed for their crimes," says David Bruck of the South Carolina Office of Appellate Defenders. "But it is quite another thing to say that of those ten we will choose three at random, allow one to live because he is white and another because his victim was black, and then execute only the one who remains. In essence, that is what the death penalty does today."

Some mass murderers and serial killers are sent to Death Row. But the vast majority are there for other reasons: their victims are white (particularly if the defendant is black); the judges and juries that condemn them are white; they must deal with a prosecutor's political posturing; they are severely mentally handicapped; or they are defended by grossly inadequate counsel.

Approximately 20,000 people commit murder in the U.S. every year. The approximately 200 persons sentenced to death are not necessarily the most dangerous criminals. Ninety percent of those on Death Row had no involvement in a prior killing, and many are first-time criminal offenders.

Accomplices Get Death While Triggerman Gets Life

Death Row also includes many people who never intended, or anticipated, killing someone in the course of a robbery or other offense. Their accomplices in the crime did the actual killing.

For example, in August 1987, Beauford White was executed in Florida although he did not kill or intend to use lethal force. He objected to any killing before his accomplices started shooting.

In July of 1992, Willy Andrews was executed for a murder he did not commit. He was in another room at the time of the shooting. The arbitrariness of the death penalty system has led to case after case where the triggerman was sentenced to life imprisonment, while the accomplice was sentenced to die. The actual killer often plea bargains his case, in exchange for a life sentence and testifying against his co-defendant.

The Death Penalty: A Lethal Lottery

By Merrilee Morrow

A young, black man is accused of murdering two prominent, elderly white citizens in a rural county with few minorities. He faces the death penalty after an overzealous district attorney, up for re-election, charges him with every possible infraction of the penal code.

A middle aged white man is accused of murdering two prostitutes in another county with a floundering economy, forcing massive cuts in governmental service. The defendant does not face the death penalty because the county can no longer afford to prosecute capital cases.

The Legal Tracking Project of Death Penalty Focus is attempting to piece together this crazy quilt of random factors that can literally mean life or death for capital defendants.

Why is it that for every 100 cases in California where the district attorney seeks the death penalty, 10 receive a death judgement?

The answer often depends on who the defendant is -- his race, sex, background and ability to secure good legal representation. It can also depend on the victim's race, age and prominence in the community. The biases and attitudes of judges, prosecutors and juries also figure in the mix.

The goals of the Legal Tracking Project include gathering statistical information that illustrate these kinds of biases and providing research and experienced litigators as consultants to assist attorneys in presenting the best possible defense.

The project gathers information on every murder case filed since 1987 that include "special circumstances" -- charges which make the defendant eligible for the death penalty or life without the possibility of parole. The most common of these include murder in the course of a robbery or burglary and multiple murder.

Working with the State Public Defender office in Sacramento and the California Appellate Project, the cases are tracked through questionnaires sent to defense attorneys, news clippings and reviews of court records.

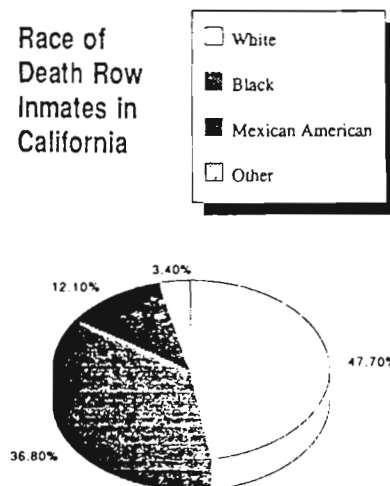
Although much work needs to be done, individual case studies chip away at myths that the death penalty is a deterrent reserved for the most heinous crimes:

* A longtime criminal justice professor with six years experience as a police officer was convicted of killing his ex-wife

after attempting a reconciliation. He knew the law, what the consequences were for murder, and killed anyway. The 45-year-old white male was eligible for the death penalty since he was charged with lying in wait for his victim. But he evaded the gas chamber and was sentenced to 27 years to life.

Despite his education, place in society and his ability to hire his own attorney rather than relying on a public defender, the defendant still had trouble getting an adequate defense. He fired his attorney during the sanity phase of the trial and filed a motion for a new trial based on ineffective counsel after they clashed over the psychiatric defense.

Race of
Death Row
Inmates in
California



The chances that a defendant gets the death penalty often hinge on who the prosecutor wants to pursue and who is offered a plea bargain. In a Los Angeles County case, the victim's wife hired two police officers to kill her husband for \$20,000. Again, two officers who knew the law were not deterred by the death penalty. The prosecutor decided to go after the two errant policemen. The wife turned state's evidence and did not face the possibility of the death penalty even though she hired the killers. The two officers were sentenced to life without possibility of parole.

* If a wife kills her husband herself, she usually isn't eligible for the death penalty. But, if she hires someone else to do the killing because she just can't pull the trigger, the gas chamber can be the result.

In San Diego County a wife hired five

young marines to kill her husband, intending to pay them with insurance proceeds. Three marines pled guilty to first degree murder and were sentenced to 25 years to life. One marine stood trial that resulted in a hung jury. The wife and the final marine were convicted of murder including special circumstances and sentenced to life without possibility of parole.

If the jury couldn't stomach the thought of putting a woman to death (there are just two females on death row) or a young marine - individuals to whom they might relate -- questions emerge when the scenario differs slightly. Would the outcome change if a black woman hired someone to kill her white husband or if the husband paid someone to murder his wife?

* Sometimes the values society places on the murder victim can affect sentences, even if the crime is particularly gruesome. In two Los Angeles County cases involving victims who were gay men, both defendants avoided the gas chamber.

One defendant shot a male prostitute and dismembered the body with a chain saw. The death penalty special circumstance charges included murder during a robbery and one specifically aimed at heinous crimes. The defendant, a 58-year-old white male with a PhD., was found guilty of first degree murder and sentenced to 25 years to life. The heinous charge was dropped prior to trial and the robbery allegation was dismissed.

The second case involved a defendant who befriended the victim and let him live in his home for "considerations." He stabbed the victim 30 times and took his car and credit cards. The defendant pled to second degree murder and was sentenced to 15 years to life.

The ability of a jury to relate to the victim, regardless of that person's race, age, social status or sexual preference, can affect the outcome and influence prosecutors. The district attorney may opt for a plea bargain if he thinks he can't get a death sentence from a jury unsympathetic to a gay victim.

The Tracking Project will continue to monitor capital cases to determine how pervasive the bias is through more in depth research.

Merrilee Morrow is the Legal Tracking Project Coordinator of Death Penalty Focus.

Racism: People Of Color Are More Likely To Be Executed Than Whites

The evidence is clear: justice isn't color-blind when it comes to the death penalty. Blacks who commit murder are far more likely to be put to death than whites. The Government Accounting Office reviewed all the recent studies on this subject and concluded: "Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the (1976) Furman decision," which reinstated capital punishment in this country.

Studies reveal:

- Only one white person has been executed for killing a black in the past 50 years. Of the 16,000 recorded executions in U.S. history, only 31 involved a white killing a black.
- More than 85 percent of those executed in this country since 1976 had killed whites (153 of 179), while almost half of all homicide victims were black.
- In a 1983 study of Georgia sentencing, capital defendants who kill white victims are 11 times more likely to receive the death sentence than are those who kill black victims. Among those indicted for killing whites, black defendants receive death sentences three times as often as white defendants.
- A 1973 study of 1,265 cases from Florida, Georgia, Louisiana, South Carolina and Tennessee demonstrated nearly seven times as many blacks were sentenced to death as were whites. Of 882 blacks convicted of rape, 110 were sentenced to death. Among the 442 whites convicted of the same crime, only 9 received a death sentence.
- In Florida, between 1972 and 1977, black offenders who killed whites were four times more likely to be sentenced to death than those who murdered blacks. Blacks who killed whites were five times more likely to receive the death penalty than whites who killed whites.
- In South Carolina, over a four-year period, prosecutors in murder trials involving white victims and black killers sought the death sentence in 38 percent of the cases. When the killer was white and the victim was black, the figure dropped to 13 percent.
- A study of sentencing patterns in Texas in the 1970s showed that, where a Chicano killed a white, 65 percent of the defendants were tried for murder while only 25 percent of whites who killed black or Chicanos faced the death penalty.

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Race and the Death Penalty

A high-court move to halt repeated appeals stirs concern about an arbitrary process

By JILL SMOLOWE

"The death penalty symbolizes whom we fear and don't fear, whom we care about and whose lives are not valid," says Bryan Stevenson, the director of Alabama's Capital Representation Resource Center. Fair enough. Just whom do Americans fear—and whom do they care about? The answers to these questions of life and death lie in a set of dry but startling statistics:

► Of the 144 executions since the 1976 reinstatement of the death penalty in the U.S., not one white person has been executed for the killing of a black.

► In those 144 killings, 86% of the victims were white, although roughly half of all murder victims in the U.S. are black.

► Of the 16,000 executions in U.S. history, only 30 cases involved a white sentenced for killing a black.

Yet when Warren McCleskey, a black death-row inmate in Georgia, petitioned the Supreme Court in 1987, arguing that his capital sentence should be overturned because the race of his white victim played a significant role in his sentencing, his claim was rejected. Presented with data demonstrating that murderers of whites are four times as likely to receive the death penalty as murderers of blacks, the court allowed that the link between a victim's race and the imposition of the death penalty was "statistically significant in the system as a whole." But, the court concluded, no petitioner could rely exclusively on such statistics to show that "he received the death sentence because, and only because, his victim was white."

Last week McCleskey again petitioned the Supreme Court. This time he sought to have his conviction reviewed on the ground that his constitutional right to counsel had been violated when the police

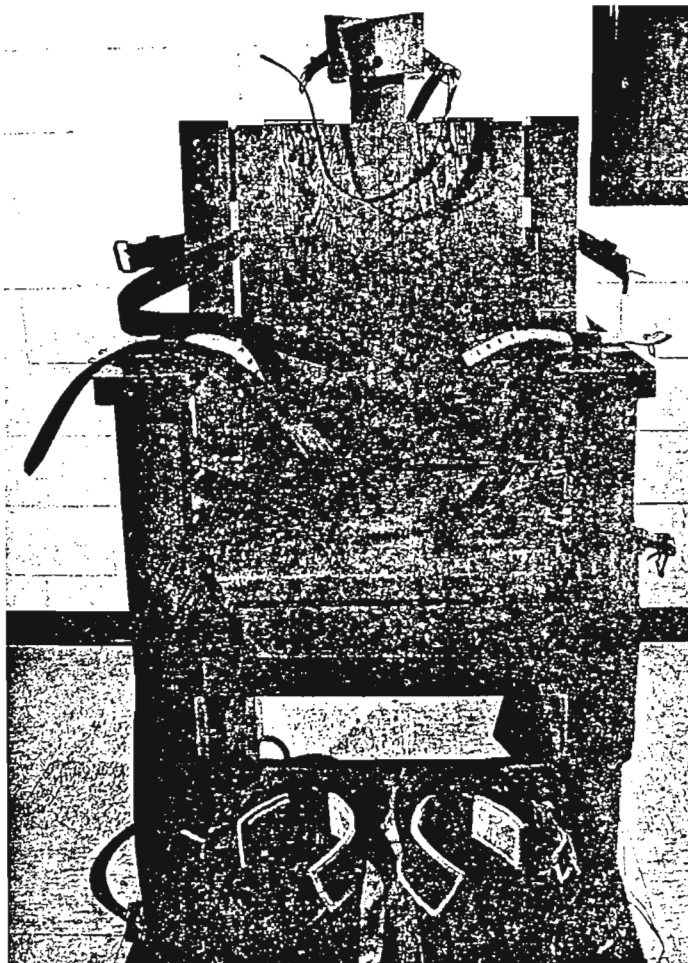
used a jailhouse informer to obtain a confession from him; this time the court was even sterner in its rejection. In a 6-to-3 ruling, the majority said such repeated petitions as McCleskey's "threatened to undermine the integrity of the habeas corpus process." Then the court set tough new standards that severely curtail a state prisoner's ability to bring claims of violations.

the criminal-justice system that are going awry," says Randall Kennedy, a professor at Harvard Law School. "Who's going to shine a light on the way the system works other than the people enmeshed in it?" Gerald Chaleff, one of Southern California's top criminal-defense attorneys, warns, "You judge a society by how it imposes its harshest penalty, and in the U.S.

we are now in a rush to see that it happens quickly rather than that it happens fairly."

In many of the 36 states that have capital-punishment statutes, the decision concerning who shall live and who shall die often has disturbingly little to do with the heinousness of the crime. More pertinent factors commonly involve the race of the victim and the competence of the defendant's counsel. Many legal experts believe the race of the defendant also plays a role—12% of the U.S. population is black, though blacks constitute 50% of death-row inmates—but the evidence is equivocal. "The trouble with the death penalty is that it's like a lottery," says law professor Steven Goldstein of Florida State University. "There are so many discretionary stages: whether the prosecutor decides to seek the death penalty, whether the jury recommends it, whether a judge gives it."

Nowhere is that point illustrated more starkly than in Columbus, Ga. Since Georgia adopted its current death-penalty law in 1973, four white men in the Columbus district attorney's office have decided which murders will be prosecuted as capital crimes. To date, 78% of their cases have involved white victims, although blacks are the victims in 65% of the community's homicides. Among the other factors that may create greater sympathy for a white victim or defendant: all four judges in the state superior court, which tries capital cases, are white, and often the juries are all white,



A stark symbol of whom Americans fear—and whom they care about

of his constitutional rights before a federal court.

Legal experts who believe the death penalty in the U.S. is applied in an unjust and arbitrary fashion are further alarmed by this latest ruling. "When you cut back on procedural grounds, you're talking about preventing discussion of disputes that may shine a light on various areas of

although blacks account for 35% of the Columbus population.

Given the odds stacked against black defendants who kill whites, the results are perhaps predictable. Last February two men were convicted of murder in separate trials in Columbus. James Robert Caldwell, a white defendant, was found guilty of raping and murdering his 12-year-old daughter and repeatedly stabbing his 10-year-old son. His sentence: life imprisonment. Jerry Walker, a black, was convicted of murdering the 22-year-old son of a white Army commander at nearby Fort Benning during a convenience-store robbery. His sentence: death. Caldwell's trial lasted five weeks. Walker's lasted 12 days. His jury deliberated for 97 minutes. Says Stephen Bright of the Atlanta-based Southern Prisoners' Defense Committee: "The death penalty was imposed not for the crime in Walker's case but because of the race and prominence of the victim's family."

Columbus is not alone in its skewed application of justice. A 1990 report prepared by the government's General Accounting Office found "a pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty." A midterm assessment of the Bush Administration's civil rights track record issued last week by the independent Citizens Commission on Civil Rights found a similar "pattern of inequity" in death sentencing. Richard Burr of the NAACP Legal Defense and Educational Fund's capital-punishment project puts it more bluntly, "Prosecutors frequently pay no attention to the families of black homicide victims. They don't even stay in touch with them." Later this year Congress will consider a measure that aims to enable defendants to quash death-penalty sentences if they can provide evidence demonstrating a racial bias in sentencing patterns.

While Congress deliberates, defendants in capital cases must make the best of often terrible circumstances. According to the Washington-based Death Penalty Information Center, more than 90% of the 2,400 men and women currently on death row were financially unable to hire an attorney to represent them at trial. A few states, most notably California, take pains to ensure that defendants receive competent counsel. But in many states, particularly in the South, there are no safeguards. Because most states lack a public-defender system, courts appoint lawyers arbitrari-

ly. The result, says Bright, is that "people aren't sentenced for committing the worst crimes; they're sentenced for having the worst lawyers."

Often the lawyers tossed into capital cases are either the most inexperienced, the most jaded or the most unethical. A 1990 investigation conducted by the *National Law Journal* found that lawyers who represented death-row inmates in six Southern states had been disciplined, suspended or disbarred at a rate of up to 46 times that of other attorneys in those states. In Louisiana, the state with the highest rate of disciplinary action against death-row trial lawyers, the average length of a capital trial is just three days, and the average penalty phase lasts just 2.9 hours.

Small wonder, given how ill-prepared many of the defense lawyers are when they enter the courtroom. Some of these attorneys meet their clients for the first time on

Protesting capital punishment in Austin: many legal experts contend that death sentences are doled out in an unjust and discriminatory fashion

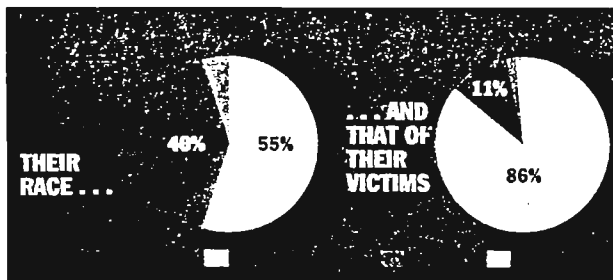
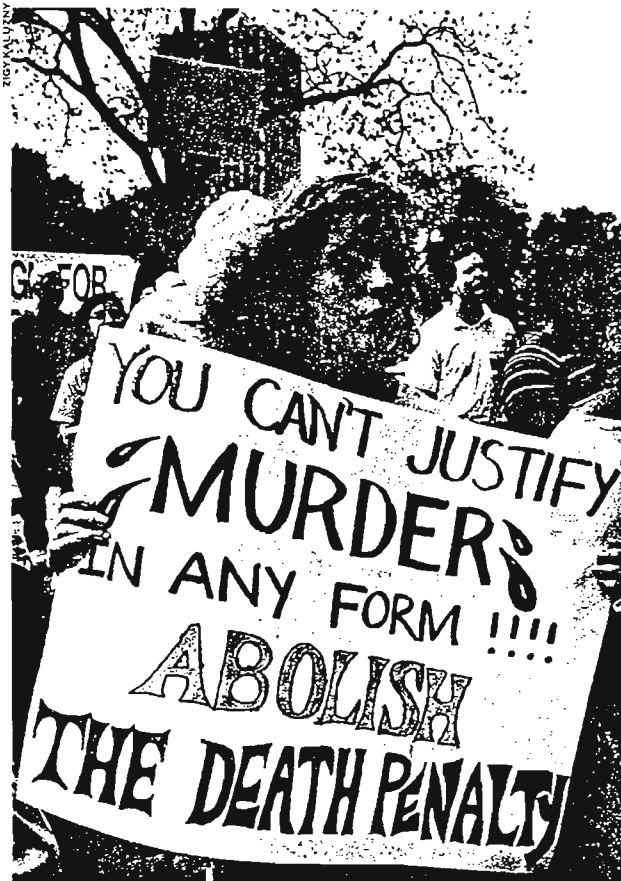
the day of arraignment. More than half the lawyers are handling a capital case for the first time. Some have drinking problems; others have decided biases. One Louisiana defendant learned that his lawyer was living with the prosecutor. A Florida man discovered that his public defender was a deputy sheriff. In Georgia, Eddie Lee Ross was defended by a white attorney who referred to Ross as a "nigger" and had been the Imperial Wizard of the local Ku Klux Klan for 50 years. Ross now awaits the electric chair.

Even court-appointed lawyers with good intentions are hampered by stingy allowances. Many work in states where there is a cap on both fees and legal expenses. Arkansas imposes a \$100 limit on expenses and a \$1,000 maximum on lawyer's fees. California, by contrast, routinely approves two lawyers for capital cases, pays them each an average of \$75 an hour, and covers expert services, such as

private investigators, which typically add \$5,000 a month more to the defense tab. The state bill in an uncomplicated case comes to about \$25,000, whereas in Arkansas, says Stevenson of the Resource Center, "we're asking lawyers to work for \$1 an hour." Next month two Arkansas attorneys will challenge the cap before the state supreme court.

This week the U.S. Supreme Court will hear arguments in the case of *Payne v. Tennessee* about the value of "victim-impact evidence." On two prior occasions, the high court ruled that at the time of sentencing in capital cases, it is improper to introduce testimony dealing with the impact of a crime on a victim's family. The Bush Administration is sending no less a figure than Attorney General Dick Thornburgh to the court to argue for Tennessee's position allowing such impact evidence. After last week's ruling in the McCleskey case, many legal experts are concerned that the

Justices this time will side with Tennessee. "The court is quite systematically knocking out regulations, streamlining the road to the electric chair," says Harvard's Kennedy. In the rush to make the process more efficient, the rights of criminal defendants are getting battered. —Reported by Jonathan Beaty/Los Angeles, Cathy Booth/Miami and Julie Johnson/Washington



MENTAL RETARDATION, MENTAL ILLNESS AND THE DEATH PENALTY

Despite permanent limitations on their ability to learn and reason, hundreds of mentally retarded inmates sit on Death Row. The mentally retarded, due to their immature notions of cause and blame, often accept responsibility for acts in which they had little involvement. They are more susceptible both to coercion and a desire to please, making them considerably more likely to confess to crimes they didn't commit.

The case of Jerome Bowden, a young black man charged with murder in Georgia, is typical. Bowden had been consistently diagnosed over many years as severely retarded. All the physical evidence implicated a co-defendant who agreed to testify against Bowden in exchange for a life sentence. With no physical evidence, fingerprints or eyewitnesses implicating Bowden, the entire case was based on his own confession and the plea-bargained testimony of his co-defendant. Bowden later explained that the detective who had interrogated him said he was a "friend" who would help Bowden. The detective asked him to "sign here" and Bowden did. The court determined that Bowden was competent to waive his constitutional right against self-incrimination and that his confession — which he could not write — was voluntary and reliable. He was executed in 1986.

Many mentally retarded defendants condemned to death do not function at Bowden's limited level. According to Stephen Bright, director of the Southern Prisoners' Defense Committee in Atlanta, many capital defendants "cannot perform such basic functions as making change. One of our clients who was sentenced to death had an IQ of 49. He could not tell you whether he's American or Chinese."

The American Bar Association in February 1989 adopted a resolution that the mentally retarded should not be subject to execution; they argued that executing "a person with mental retardation violates contemporary standards of decency."

At least seven people diagnosed as mentally retarded have been executed in the U.S. since 1984. In the general population, 2.5 percent are mentally retarded. On Death Row, the numbers range between 10- and 30 percent. Five states — Tennessee, Georgia, Maryland, Kentucky and New Mexico — now expressly prohibit the execution of the mentally retarded. In June 1989, the U.S. Supreme Court held the Constitution does not bar the execution of the mentally retarded.

Mental Illness Often Goes Undetected During Trial

Alarming evidence of this neglected aspect in many capital cases emerged from a 1986 study of Death Row inmates. In the study, 15 inmates were selected for psychological examination because their executions were imminent — not because of evident psychopathology or mental illness. All 15 had histories of severe head injury, 12 had neurological problems (five had major neurological impairment), most had attempted suicide and six had forms of schizophrenia.

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Should retarded convicts be executed for crimes?

5 states ban their death-row status; 21 others are considering it

By Karen MacPherson
and John Bennett
SCRIPPS HOWARD NEWS SERVICE

Earl Washington Jr., 31, doesn't know the colors of the American flag. He can't define "evidence."

Nor can he explain why he's sitting on Virginia's death row, convicted of raping and stabbing to death a 19-year-old mother of three.

He is one of what experts believe are hundreds of mentally retarded prisoners — men with the minds of children — sitting on death rows across the nation. These are men who can't count change. They can't tell the time of day or recite the alphabet. They have the social maturity of 7- to 10-year-olds.

All have been convicted of some of the most heinous crimes imaginable.

Most grew up in poverty, and many were subjected to often unspeakable physical and mental abuse as children of troubled parents.

Troubled by these facts, five states have adopted bans on the execution of the developmentally disabled. Similar legislation has been introduced in another 21 states. (There is no such ban in California, nor has legislation been introduced.)

In many cases, advocates don't question the guilt of the developmentally disabled on death row. But they do question a system of justice that would execute men who don't understand the basic legal concepts upon which they were convicted.

That's certainly the case for Washington, who has spent the last nine years on Virginia's death



1986 FILE PHOTO

Jerome Bowden's mental retardation wasn't revealed until after his execution in Georgia.

row. In fact, much of life is a puzzle to Washington, who has an IQ of 69; the average person has an IQ of 100.

A psychiatrist who was asked by defense attorneys to evaluate Washington said: "This man is easily led. . . . It was my impression that if, on the evening of his execution, the electric chair were to fail to function, he would agree to assist in its repair."

IQ of 68

Hundreds of miles away, Robert Wayne Sawyer lives in a 6-foot-by-9-foot cell on Louisiana's death row, sentenced to die for the brutal 1979 murder and burning of a 23-year-old woman.

Like Washington, Sawyer has been diagnosed as developmentally disabled, with an IQ of 68. Experts hired by his attorneys say Sawyer's retardation, coupled with serious organic brain damage, have made it virtually impossible for him to comprehend important legal concepts.

During a recent psychological

examination, Sawyer was asked to explain "reasonable doubt." He crushed a lighted cigarette, pointed to the smoke and said: "The smoke ain't reasonable out."

At least 250 mentally retarded men sit on death row nationwide, according to the Southern Center for Human Rights in Atlanta. But other experts dispute that number, saying no one knows for sure how many of the 2,500 death row inmates are developmentally disabled because a comprehensive study has never been done.

Those pushing for a ban on executions of the developmentally disabled make clear they do not question the need to punish the men for their crimes.

"Society needs to be protected. Families and other victims need to feel that justice has been done," said John McGee, an associate professor of psychiatry at Creighton University. "However, the death of a person with mental retardation has no meaning other than sheer vengeance. It holds no significance to the person with mental retardation."

Like killing children

Adam Stein, a North Carolina defense attorney, argued that executing developmentally disabled defendants is akin to killing children.

"Like children, mentally retarded defendants don't have the ability to really appreciate what they are up to," Stein said.

Not surprisingly, prosecutors disagree.

"If (a defendant) is found competent, has a rational understanding of the proceedings and is found legally sane, then certainly he is eligible for the death penalty," said Arthur Eads, a district attorney in Belton, Texas, who has been a national voice on the issue.

"The people who commit those types of crimes aren't normal anyway," Eads said.

Dorothy Pendergast, the prosecutor now involved in Robert Sawyer's case, said: "The issue comes

SUPREME ARGUMENT

In 1989, the U.S. Supreme Court upheld the execution of mentally retarded defendants in the landmark case of Penry vs. Lynaugh, but left the door open for reconsideration if more states ban such executions.

In Penry, 10 professional and voluntary associations interested in people with mental retardation argued in a friend-of-the-court brief against the execution of mentally retarded defendants.

The argument

I The disabilities that accompany mental retardation are directly relevant to the issue of criminal responsibility and to the choice of punishment for those convicted of crimes.

II The degree of reduction in moral blameworthiness caused by a defendant's mental retardation renders imposition of the death penalty unconstitutional.

III The execution of a person with mental retardation serves no valid penological purpose.

IV A ruling that the Eighth Amendment to the Constitution, which prohibits the imposition of cruel and unusual punishment, bars the execution of people with mental retardation is appropriate and necessary.

SOURCE: Scripps Howard News Service

EXAMINER GRAPHICS

down to, 'Do they know right from wrong?' . . . There are a lot of mentally retarded people who do not commit crimes."

Virginia Smith, mother of the young woman murdered by Sawyer, symbolizes the anger of many victims' families when she scorns his claim to be mentally retarded.

"It isn't true, for one thing," Smith said. "He's not a genius, but he knows how to take care of himself."

Little attention to cases

Until recent years, the courts paid little attention to developmentally disabled defendants. The focus of the legal system was on those found to be mentally ill rather than mentally retarded. If a defendant — mentally retarded or not — knew right from wrong in a capital murder case, then the death sentence could be imposed.

In a landmark 1989 decision, the U.S. Supreme Court upheld such executions, as long as a jury weighs the defendant's mental capacity as a mitigating factor against the crime.

The court, however, said it might readdress the issue if more states prohibit the execution of the developmentally disabled. Georgia, Kentucky, Maryland, New Mexico and Tennessee have such bans.

Georgia's law was sparked by public outrage over the fact that the mental retardation of convicted killer Jerome Bowden wasn't revealed until after his execution.

Bowden's IQ ranged from 59 to 65, according to the tests administered. His conviction for the stabbing death of a 55-year-old woman during a burglary was based solely on a confession that Bowden's attorney said Bowden had signed simply because the detective interrogating him indicated he would help Bowden.

To proponents of similar bans, Morris Mason, a developmentally disabled man executed in Virginia in 1985 for the rape and murder of two elderly women, provides graphic evidence of the inability of many developmentally disabled people to understand even the finality of their death sentences.

Before his death, Mason asked a friend what he should wear to his funeral. Mason also asked the friend to carry a message to another inmate that, "When I get back to the row. I'm going to play basketball."

**PUBLIC
SUPPORT
FOR
THE DEATH
PENALTY
IS
DISTORTED**

Despite political posturing and common perceptions, the public's desire for capital punishment is far weaker than initial readings of opinion polls suggest.

Most Americans accept the death penalty in principle when asked "do you favor or oppose the death penalty for convicted murderers." However, the results change dramatically when people are given an option — a life sentence without possibility of parole plus financial restitution to the victim's family. The option, available in California, commands an absolute majority.

A widely quoted poll conducted shortly before Robert Harris' execution in April 1992 indicated that 80 percent of Californians supported the death penalty. A Northeastern University researcher challenged these findings with another survey. When specific alternatives to the death penalty are offered, support for the death penalty drops below 50 percent. Two out of three Californians said they preferred life in prison without parole plus restitution over the death penalty. The findings are consistent with those in other states:

- In Florida, 70 percent said they preferred a sentence of life without parole and financial restitution to the victim's family.
- In New York, life plus restitution was preferred by 62 percent.
- In Virginia, 59 percent preferred a sentence of 25 years before parole, plus financial restitution; In Nebraska, 58 percent preferred this arrangement.
- Even where restitution is not part of the life without parole option, a plurality of those polled in Kentucky and Oklahoma still prefer it over the death penalty.

Other evidence that public support for the death penalty is waning includes:

- In Texas, the state with the most executions in the modern era, during the last gubernatorial elections the two most strident pro-death penalty candidates both lost.
- In Louisiana, where eight people were executed in as many weeks in 1987, the number of jury verdicts for death remained nearly zero for a long period following this wave of executions.
- In March 1991, New Mexico became the fifth state—after Georgia, Maryland, Kentucky and Tennessee — to prohibit the execution of the mentally retarded, a significant population on any Death Row.
- In September 1990, the two New York assemblymen who had most recently converted to a pro-death penalty position were defeated in the primary election by anti-death penalty candidates, prompting this headline in the *Albany Times Union* newspaper: "Support for Death Penalty Fatal for Assemblymen."

Because most Americans incorrectly assume that killers will be out on the streets again in a few years, apparent support for the death penalty is exaggerated. However, in 31 states — most recently Oregon, Florida, Maryland and Oklahoma — have adopted a life prison term with no chance of parole for certain offenses. According to the California governor's office, not a single prisoner sentenced to life without parole has walked out of prison since the state provided for that option in 1977.

(Sections reprinted with permission of the Death Penalty Information Center)

Death Penalty Opposition Seen as Impolitic in '92

Strong Public Backing Frustrates Liberal Foes

By Thomas B. Edsall
Washington Post Staff Writer

Support for the death penalty has become so strong that liberal adversaries increasingly believe elective politics is an almost hopeless avenue in their drive to end capital punishment.

"My analysis of this is that, with the possible exception of [New York Gov.] Mario Cuomo, there is no way the Democrats can nominate somebody against the death penalty and make it and be viable," said Stephen Bright, director of the Southern Center for Human Rights in Atlanta. Cuomo is one of the few prominent Democrats to oppose the death penalty.

Interviewed after yesterday's execution of Robert Alton Harris, Bright, who has devoted 10 years to an increasingly futile effort to prevent use of the death penalty, voiced deep frustration with liberals' inability to convince politicians or voters to support spending on education, jobs and gun control instead of "spending millions of dollars so we can engage in ritualistic executions."

"Unfortunately," said Vivian Berger, vice dean of Columbia Law School and counsel on capital punishment to the American Civil Liberties Union, "it is impossible to get to the right of perceived public opinion on the death penalty.... The ordinary day-to-day dialogue [in politics] is death, death and more death."

Both President Bush and Arkansas Gov. Bill Clinton, the likely opponents in the presidential election, favor the death penalty. Clinton, who earlier this year oversaw the Arkansas execution of Ricky Ray Rector, a convicted murderer, yesterday reiterated his support for capital punishment under "appropriate circumstances."

Democratic opponents of Clinton, including Sen. Tom Harkin (D-Iowa) and former California governor Edmund G. "Jerry" Brown Jr., sought to use the issue to win liberal support in primary elections, with only modest success.

The prospect of a presidential election in which the candidates agree on the death penalty stands in direct contrast to the 1988 contest when Bush repeatedly capitalized on his support of executions, while Democrat Michael S. Dukakis appeared to pay a significant price for his opposition to the sanction.

In Congress, the debate is now much less over the death penalty than over the legal protections and appeals available to those facing execution.

For a brief moment in the middle

of the 1960s, a plurality of voters opposed the death penalty. Since then, with rising crime rates and growing distrust of liberal policies on crime, public opinion has moved decisively in favor of imposing the ultimate sanction on murderers.

"In terms of public opinion, the death penalty has become a virtually one-sided issue. There is a clear consensus that the death penalty is a legitimate punishment for the most serious crimes," Democratic pollster Geoffrey Garin said.

According to Gallup surveys, a strong majority supported the death penalty through the 1950s to the start of the 1960s. By 1965, however, the public was effectively split, 45 percent in favor and 43 percent opposed. And in one year, 1966, opposition reached 47 percent and support fell to 42 percent.

Public opinion then moved steadily to the right on the issue. By 1969, 51 percent supported the death penalty and 40 percent opposed it, and by 1981, when President Reagan first took office, the margin of support was 66 to 25—better than 2 to 1. When Bush ran in 1988, the margin had moved to an overwhelming 79 to 16.

The Supreme Court in 1972 barred the use of the death penalty, but then reinstated it four years later. There are now more than 2,500 people, almost all of them men, on death rows in states across the country.

The South, which has been a crucial force in the emergence of a conservative presidential coalition, has been the driving force in the revival of the death penalty. Texas leads the nation in executions with 46, followed by Florida with 27, Louisiana, 20; Georgia 15; and Virginia with 13.

Garin argued that one of the major changes in recent years in the politics of the death penalty is that "it no longer is the kind of litmus-test issue on the left that it once was," a development reflected in part in Clinton's success in Democratic primaries.

One of the reasons for this shift, he said, is that "black voters have become much more supportive of the death penalty over the years so that support for the death penalty is much less of a racially charged issue."

Garin would not go as far as Bright in describing opposition to the death penalty as an almost guaranteed signal of probable defeat. But, he said, "If someone opposes the death penalty, he or she has to go out of their way to prove that they are going to be tough."

Polling analyst Sharon Warden contributed to this report.

THE VICTIMS

Opponents of the death penalty have been accused of not having sympathy for the victims of crime, even though many of the most outspoken abolitionists are crime victims. Most abolitionist groups favor comprehensive support services for victim's families — especially financial support when an income earner has been killed. But these groups oppose any further manipulation of the sorrow we all feel toward victim's families to justify executions. Instead, abolitionists encourage real assistance to victim's families, more effort to address the underlying roots of criminal activity and proven policies that protect us all from violent crime.

The cause of criminal behavior has been at the center of the debate between liberals and conservatives for the last 40 years. Liberals stress the social causes of crime while conservatives point to individual moral failure as the main factor. During the 1950s and 1960s, liberals developed ideas to address the origins of criminal behavior: poverty, alienation, lack of education and racial discrimination. Despite considerable power of the state, legal scholars built protections for the constitutional rights of the accused. These reformers found an ally in the U.S. Supreme Court, especially under Chief Justice Earl Warren. The *Miranda* ruling, which ensured people arrested by police were read their rights, is an example of the liberal Warren court's strict scrutiny of criminal procedure based on the Bill of Rights.

In the late 1960s and 1970s, however, a rising chorus of conservative voices assailed the position of the high court. E. Van Allen wrote in 1968, "What good are our police...if a court like the U.S. Supreme Court continues to put what is tantamount to a premium on lawlessness while it in effect penalizes the victim.... We have seen what the criminal-protecting U.S. Supreme Court decisions have done to the cause of justice. They have made the criminal's rights superior to those of the victim." Conservatives saw an opportunity to challenge the Court's protection of the accused by championing the rights of the victim. The "discovery" of the crime victim" gave conservatives a powerful tool to reshape criminal procedures "thus making it appear the balance was more 'equal.'"

During the course of the 1980s, conservatives prevailed through groups representing crime victims and from legal theorists who favored a more conservative approach to the judicial system.

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What Say Should Victims Have?

A boy's anguish at watching the murder of his sister may change the death-penalty laws

By WALTER SHAPIRO

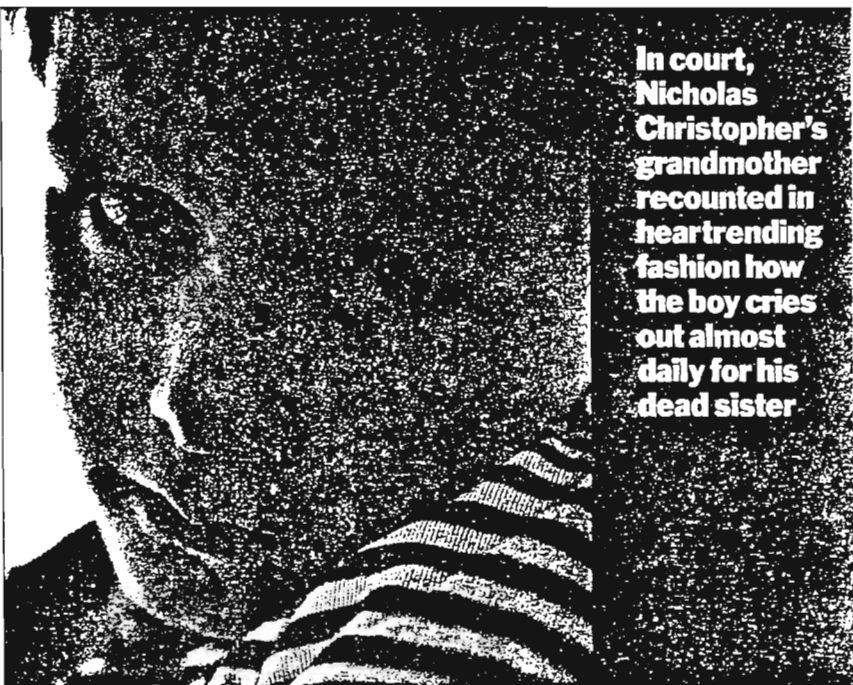
If, as the Declaration of Independence so eloquently declares, "all men are created equal," then can society place an unequal weight on the tragically lost lives of murder victims?

This is not an exam question in a college philosophy course but a moral conundrum at the core of perhaps the most intriguing case facing the U.S. Supreme Court. *Payne v. Tennessee*. Justice David Souter, the court's swing vote, asked during oral argument last month whether "it really is legitimate to value victims differently depending upon the circumstances of the lives that they have chosen to lead." Tennessee Attorney General Charles Burson's response was unequivocal: "There can be no doubt that the taking of the life of the President creates much more societal harm than the taking of the life of the homeless person."

Just 25 years ago, such stark legal reasoning was virtually unknown in modern American jurisprudence. Punishment was meted out because of the nature of the crime, devoid of any reference to the social identity of the victim. But since then, compassion and political calculation have combined to transform crime victims and their advocates into a potent lobbying force.

Beginning with California in 1978, 47 states now allow some form of so-called victim-impact statements to be included among the evidence weighed during the sentencing phase of criminal trials. Congress endorsed the principle in 1982 by approving victim-impact statements in federal cases. But the Supreme Court, by a 5-to-4 vote in 1987, carved out a crucial exception: neither the life of the victim nor the suffering of his survivors could be a factor in any state or federal case punishable by death. Now the court appears about to reverse itself in its forthcoming decision in *Payne*.

The details of the case are grisly: in 1987 a three-year-old boy, Nicholas Christopher, watched as his mother and baby sister were stabbed to death in Millington, Tenn., a Memphis suburb. The murders were committed by Pervis Tyrone Payne, a 20-year-old retarded man, who also badly wounded the boy. Payne's guilt is not in



In court, Nicholas Christopher's grandmother recounted in heartrending fashion how the boy cries out almost daily for his dead sister

JOHN CHASSON—SYGNA FOR TIME

question; in 1988 he was convicted by a Tennessee court.

Instead, what is at issue before the Supreme Court is the legal validity of evidence the prosecution presented to the jury before it decreed death rather than life imprisonment for Payne. The most controversial testimony was provided by the boy's grandmother, Mary Zvolanek, who recounted in heartrending fashion how Nicholas cries out almost daily for his dead sister. The prosecutor ended his final argument to the jury with this emotive passage: "Somewhere down the road, Nicholas . . . is going to know what happened to his baby sister and his mother. He is going to know what type of justice was done. With your verdict, you will provide the answer."

But should young Nicholas' anguish have a direct bearing on Payne's punishment? Will a Supreme Court decision upholding Payne's sentence create a climate where the wails of a murder victim's relatives will ordain vengeance in the form of capital punishment? During the oral argument, Chief Justice William Rehnquist probably reflected his own views when he asked Payne's attorney, "Are you suggesting that the jury's feeling of sympathy or perhaps outrage at the crime and what it's left the victim with is not a permissible factor at all?"

Like the debate over capital punishment itself, the *Payne* case is rife with emblematic importance, yet it is only tangentially connected with the nation's alarming murder rate. Currently, the death penalty is decreed in only 3% of all murder convictions, and only a small percentage of these lead to actual executions. "The significance of *Payne* is more societal in terms of what it says about the proper role of the crime victim in the criminal-justice sys-

tem," argues Richard Samp, a lawyer with the conservative Washington Legal Foundation, which is representing the Zvolanek family. This political symbolism has not been lost on the Bush Administration; Attorney General Dick Thornburgh made a rare appearance before the Supreme Court to argue that a jury should be given "the full picture of the nature and extent of the harm that's been caused to the family."

Critics of the government's position raise provocative philosophical and practical objections to an additional legal enshrinement of victims' rights. "It will take a giant step away from presumptions of equality in the worth of lives," broods Tufts University philosophy professor Hugo Bedau. "The criminal-justice system has traditionally been held to the myth of equal treatment of all who come before it."

With serious questions of racial and class bias already swirling around capital punishment, there are concerns that a decision upholding Payne's death sentence will produce further inequities. Hypothetically, the grieving family of a murdered bank president would be persuasive witnesses for the death penalty, while no one would speak for a slain prostitute. Diann Rust-Tierney of the A.C.L.U. is worried that the Supreme Court will "sanction different punishment based on the worth of the victim and aggravate an already pronounced discrimination in the way that the death penalty is applied."

There is, sad to say, no way society can ever provide more than token recompense to the relatives of murder victims. That is why it is an illusion—born of compassion, it is true—that justice can be found by adding their pain to the calculus of retribution in the courtroom.

—Reported by

Julie Johnson/Washington

THE DEATH PENALTY: POOR MAN'S JUSTICE

"Too often the death penalty is punishment not for committing the worst crime but for being assigned the worst lawyer," said Georgia attorney Stephen Bright. More than 90 percent of those on Death Row were financially unable to hire an attorney to represent them at trial. As a result, poor defendants often were defended by young, inexperienced or incompetent counsel — lawyers willing to accept the low fees provided by many states, particularly those in the South.

Evidence supporting this travesty of justice is conclusive. The Houston Chronicle reported that in Kentucky, one-quarter of the attorneys who represented the 26 convicts on death row last year had been either disbarred or suspended. In Georgia, serious questions about the quality of legal counsel were raised in a majority of the 14 cases of men executed there.

- In a Louisiana case, the defense attorney for Freddie Kirkpatrick had not noticed until the trial was underway that the murder victim was an old friend. The attorney missed this obvious conflict of interest earlier because he failed to do the appropriate pre-trial preparation. Obligated to finish, the defense attorney told jurors they would be "justified" in sentencing the defendant to death. They did. Kirkpatrick's co-defendant, represented by a different lawyer, received a life sentence for the same crime.
- Judy Haney and her family were abused by her husband for 15 years. The jury, however, was unaware of this mitigating circumstance because her attorney did not bring the evidence to trial. He was ordered to spend the night in jail because he was drunk in court. The attorney was released from jail the following morning to return to court but had been unable to prepare for trial. Haney was sentenced to death.
- A Georgia lawyer who represents many poor defendants facing the death penalty was unable to give a judge the name of one death penalty case. He named only two, one of which, the Dred Scott decision, was not a criminal case. Precedents are the basis of practicing law yet this attorney was not judged to be incompetent.

Given the U.S. Supreme Court's stance on refusing death penalty appeals to federal courts because of incompetent lawyers, adequate trial-level counsel becomes critical. The high court reached this decision even though federal judges have found constitutional errors in more than 40 percent of the death penalty cases that reached them through the habeas corpus petitions in the last 16 years.

Paying for adequate counsel is particularly serious in California since the \$20 million allocated for public defenders for capital cases was cut from the state budget in 1990. Currently, counties pick up the tab for these costly cases, but money is scarce.

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YOU DON'T ALWAYS GET PERRY MASON

As Coleman goes to the chair, questions remain about his case—and the quality of legal defenders



William Andrews

NEXT TUESDAY MARKS THE latest hearing in a long appeals process for William Andrews, who has spent more than 17 years on death row. In 1974 Andrews and Dale Selby held up an electronics store in Ogden, Utah, and kept five hostages in the building's basement. The bystanders were tied up and forced to drink liquid drain cleaner during a brutal torture session. Although Andrews left the room before Selby raped one woman and shot all the hostages, killing three of them, both men were convicted of murder. (Selby was executed in 1987.) The Tenth Circuit Court of Appeals ruled last year that Andrews received competent representation, but his current attorneys say the inexperienced public defender assigned to the case made a number of tactical errors. They criticize the lawyer—who had been practicing just two months before the case came to trial—for not conducting a defense wholly independent from Selby's, and say he failed to effectively cross-examine witnesses for the prosecution, which could have helped Andrews avoid execution. If the state court does not find a reason to delay the sentence once again, it will order that Andrews die by lethal injection or firing squad within 60 days.

By RICHARD LACAYO

WITH TWO POWERFUL JOLTS OF ELECTRICITY, Roger Keith Coleman was executed last week in Virginia. But the questions about his guilt could not so easily be disposed of—in part because his court-appointed lawyers failed to put them to rest at his trial. On the night that Wanda Fay McCoy was murdered, Coleman claimed to have been at several points around the coal-mining town of Grundy. Shouldn't his lawyers have tried to retrace his steps on that night and search out witnesses? Shouldn't they have ventured into McCoy's or Coleman's home? At the very least, shouldn't they have presented to the jury the bag of bloody sheets and two cowboy shirts McCoy's neighbor found a few days after the murder?

Over six years ago, Jesus Romero was sentenced to death for taking part in the 1984 gang rape and murder of a 15-year-old in San Benito, Texas. He might have been sent to a mental hospital instead if his court-appointed attorney had presented available evidence to the jury that supported an insanity defense. "His lawyer had no idea there was information available that Romero was completely insane at the time of the crime," contends Nick Trenticosta, who handled Romero's appeals. During the course of his appeals, a lower federal court ruled that Romero had received ineffective counsel at his trial, but a higher appeals court reversed that ruling. Last week Romero died by injection in Huntsville, Texas.

Accused killers don't tend to be attractive people. Quite a few of them, perhaps the overwhelming majority, are guilty. But even the most dubious characters are supposed to get a fair trial, in which their attorneys are equipped to make the best possible case on their behalf. Because the majority of murder defendants are also broke, however, many of them get court-appointed lawyers who lack the resources, experience or inclination to do their utmost. When the Supreme Court restored capital punishment in 1976, it did so in the expectation that death sentences would be imposed in a fair and equitable manner. It hasn't always worked that way. Some people go to traffic court with better prepared lawyers than many murder defendants



Judy Haney

NOW ON DEATH ROW IN ALABAMA and appealing her 1988 sentence, Judy Haney admits paying her brother-in-law to kill her husband in 1984. Her motive, she says, was more than 15 years of physical abuse. Haney's appeals attorney claims that her court-appointed lawyers at the trial failed to obtain hospital records of treatment for injuries that she says were inflicted by her husband. "If the jury had appreciated the role of the abuse Haney and her children had suffered, it would have been a very strong mitigating factor," says Haney's new attorney, Stephen Bright. A hospital worker initially said such records could not be found; one of the trial attorneys, Gould Blair, finally located them—after the sentencing. During the trial, Blair was held in contempt and jailed for a night after the judge concluded he was intoxicated in court. "This kind of trial has no place in the legal system," says Bright. But since the jury members did not witness Blair's drunkenness and weren't told of it, it could not have influenced their verdict. Blair says he deeply regrets the drinking incident. He insists, however, that Haney undermined her own defense by taking the stand, against his advice, and leaving the impression that she had masterminded the crime. Says he: "She was not underrepresented one damn bit."

Since 1900, 350 innocent people have been sentenced to death, according to a study in the *Stanford Law Journal*. At least 23 were executed for crimes they did not commit. Since the 1970s, 34 innocent people have been released after many years on Death Row — often following the accidental discovery of evidence clearing them of capital offenses.

For example, deliberate misconduct by Los Angeles law enforcement officials secured capital murder convictions for Clarence Chance and Benny Powell. Powell and Chance served 17 years in prison for a murder they did not commit. In 1972, all death row inmates — including Powell and Chance — had their death sentences commuted after the U.S. Supreme Court struck down capital punishment laws as “freakish” and arbitrarily applied. Capital punishment was reinstated in 1976 after the laws were rewritten. Had Chance and Powell been tried today, they probably would have received death sentences. Despite the safeguards these new laws are supposed to provide, defendants aren’t protected from willful miscarriages of justice by an overzealous criminal justice system. Both Chance and Powell were released from prison in the spring of 1992.

The Rev. Jim McCloskey, an investigator from Princeton, N. J., specializes in uncovering evidence which proves the innocence of Death Row inmates. He helped free Chance and Powell. Recently he worked on the Howard Coleman case in Virginia.

Without any physical evidence, Coleman was condemned to death for the murder of his sister-in-law. A fellow inmate claimed that Coleman had confessed to the murder while they were in prison together. Coleman was electrocuted in May 1992. “The criminal justice system in the United States is a far leakier cistern where many people slip through a wider crack than the public would care to believe,” said McCloskey.

A dramatic example of this death penalty travesty is the case of Randall Dale Adams. A movie about his case, “The Thin Blue Line,” helped demonstrate his innocence. He was released after 12 years in prison. Other recent examples include:

- Gary Nelson was convicted of raping and murdering a 6-year-old girl in 1978. After working for 11 years without pay, Nelson’s lawyers secured his release in November 1991. The state’s case rested on the knowing use of false testimony and the willful suppression of evidence pointing to Nelson’s innocence.
- James Richardson was sentenced to die in Florida before the *Furman* U.S. Supreme Court decision invalidated capital punishment in 1972. He was released in 1989 after 21 years in prison. Volunteer legal counsel showed the prosecution had knowingly introduced false evidence and withheld information which would have resulted in an acquittal.
- Clarence Brandley was released in January 1990 after a decade on Death Row in Texas when two white prosecution witnesses admitted that a white man had committed the crime. Like Richardson, Brandley is black.

Discovery of these errors often is cited as proof the system works. In truth, most of these problems were found accidentally and only through the persistence of volunteer investigators. Standard legal procedures designed to safeguard against such lethal errors failed. Today, even the meager protection for the innocent that time provides is in doubt. Congress is considering procedures that would speed up the appeals process — changes strongly endorsed by William Rehnquist, chief justice of the U. S. Supreme Court.

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**WE
EXECUTE
THE
INNOCENT**

Will the innocent be executed?

What the Rehnquist court has wrought

By John Tucker

THE EVENTS leading to the execution of Robert Alton Harris in San Quentin's gas chamber at dawn on April 21 dramatically focused public attention on the final stages of Chief Justice William Rehnquist's long crusade to limit the power of federal courts over the execution of prisoners sentenced to death by the states.

While public attention was focused on the drama inside San Quentin and the concurrent drama in Washington as the Supreme Court dissolved lower court stays of execution as fast as they could be entered, a broader and ultimately more significant story was gathering force in less visible cases in Virginia and Texas.

NO ONE seriously contended that Harris was innocent of the murders for which he was convicted, and in the end the question was only

when and how he would be executed. But for Roger Coleman in Virginia and Leonel Herrera in Texas, for hundreds of other death-row inmates across the country — and for thousands more who will be sentenced to death in years to come — the issues are quite different. Simply stated, they are these:

- Whether the federal courts will continue to play a significant role in protecting defendants from the unfair trials and erroneous convictions that occur with surprising frequency in the emotional and political crucible created when someone is prosecuted for a heinous murder.

- Or whether the courts instead will withdraw from the

Please see WHAT, Forum 6

Continued from Forum 1
process and leave the accused to the not-so-tender mercies of state court judges and governors who may in turn be subject to the pressures of an aroused electorate that wants someone punished for the crime.

Federal review of state criminal cases occurs primarily under the federal habeas corpus statute, which empowers federal courts to order a state to release a citizen held in violation of due process and other constitutional protections.

If a defendant can show that a coerced confession was used against him, for example, a federal court can order the state either to retry him without the confession or release him outright.

Beginning in the early 1950s, the Supreme Court substantially broadened the availability of habeas corpus to provide more protection against unfair state court trials. But for the past two decades, and with increasing success, Rehnquist has campaigned in opinions and speeches to limit federal court use of habeas corpus to review state criminal cases — especially in death-penalty cases.

IN RECENT weeks, considerable attention has been focused on Roger Coleman, a Southside Virginia coal miner convicted of murder and scheduled to die on May 20. Coleman's lawyers have developed not only examples of unfair government conduct at his trial, but also substantial evidence that he is innocent.

But thus far Coleman has been unable to obtain a federal hearing on his claims, because in 1986 one of his appointed lawyers mistakenly filed a paper one day late. Last term the Rehnquist court held that the lawyer's mistake required dismissal of Coleman's petition for a writ of habeas corpus in federal court.

Coleman's lawyers, believing the decision left open the right to a hearing on a substantial claim of actual innocence, filed a new federal petition on April 22.

But whether Coleman ever gets his hearing may depend on two questionable assumptions: that his lawyers can obtain a stay of execution or a commutation to keep him alive until the Supreme Court decides a case involving Texas inmate Leonel Herrera; and that the court will hold in that case that the Constitution requires consideration of a substantial claim of innocence based on evidence uncovered after the judgment of conviction becomes final.

Leonel Herrera was convicted and sentenced to death for the 1981 murder of two police officers, primarily on the basis of eyewitness identifications and

proof that the killer was driving a car owned by Herrera. Three years later, in a privileged conversation with his lawyer, Leonel's brother Raul allegedly confessed that he, not Leonel, killed the policemen.

The lawyer's subsequent affidavit presented this account: Raul stated that he had driven his brother's car to South Padre Island for an appointment — involving drug smuggling — that his brother was too ill to keep. Raul said the first policeman killed was a participant in the drug ring, and the killing resulted from a dispute between the two of them; the second officer was killed when he stopped Raul for speeding as he fled the scene of the first murder. (The second officer signaled his identification of Leonel as the killer on his hospital deathbed, but other witnesses have testified the brothers look much alike.)

According to his lawyer's affidavit, Raul said he and Leonel had always believed Leonel would ultimately be exonerated, since he was in fact miles away

from the scene of the crime. Several weeks after making his confession, Raul himself was murdered during an argument with another alleged member of the ring — and the stage was set for ultimate appeal to the Supreme Court.

Leonel's appointed lawyers learned of Raul's confession and in late 1990 succeeded in persuading the lawyer who had heard it — a former Texas state judge — that in light of Raul's death and the imminent execution of Leonel, he was released

from the obligations of the attorney-client privilege and should reveal Raul's statement. The courts, however, were not persuaded by the lawyer's hearsay recitation of his deceased client's statement.

Then, last December, Raul Herrera's son, Raul Jr. came forward. Raul Jr. was 9 years old in 1981. According to his statement, his father had taken him along on the trip the day of the murders, and he had witnessed both killings. Raul Jr. swears that his father killed

both police officers, and that his uncle Leonel was not even in the car.

WHILE THE vast majority of Americans now favor the death penalty, presumably most of us would oppose executing an innocent man for his brother's crimes. And we probably would be shocked to learn that our legal system provides no procedure for considering evidence of innocence once a conviction is final, even if the result is to execute an innocent man.

And yet that is the position the state courts have taken in both Texas and Virginia, and the lower federal courts have said the same thing in the Herrera case.

Many legal observers expect the Rehnquist court to affirm that view when it decides the Herrera case next fall, leaving Leonel Herrera and Roger Coleman — if he's still alive — without any court to consider the substantial evidence that they are innocent.

In Illinois, Lloyd Eldon Miller came within a day of execution numerous times during the 11 years he spent on death row. Finally a federal court ordered a new trial when it was revealed that a pair of "blood-stained" undershorts the prosecutor had displayed to the jury were stained with paint, as the prosecutor knew from a laboratory report he had concealed from the defense.

Thereafter, it was shown that his confession was coerced and that the testimony of the only witness against him was false, and Miller was released.

In the case that gave rise to the widely praised documentary film "The Thin Blue Line," Randall Adams was released by the state of Texas in 1989 after 13 years in prison when there could no longer be any serious doubt that the murder for which he had been sentenced to die was in fact committed by his accuser.

ROBERT ALTON Harris, executed the week before last in San Quentin, was not innocent, but Lloyd Miller and Randall Adams and others were. It is doubtful that any of them would be alive today if the courts had applied the rules that Chief Justice Rehnquist is attempting to invoke in the handling of death-penalty cases in the future.

His determination to limit the availability of habeas corpus and remove the federal courts from most death-penalty decisions is certain to have an enormous impact on the 2,594 prisoners on death rows across the country, some of whom are almost certainly innocent.

Sacramento Bee May 3, 1992

MYTH: THE BIBLE SUPPORTS THE DEATH PENALTY

Standing outside the gates of San Quentin Prison the night before Robert Harris' execution, numerous protesters for and against the death penalty carried placards with biblical passages supporting their respective views on the death penalty. Understanding the Judeo-Christian teachings on capital punishment, however, cannot be reduced to media bites: It has a long history with a clear evolution that points against using death as a punishment.

Many of the pro-death penalty passages come from the Torah, the first five books of the bible. Yet those books have some confusing and conflicting teachings on the death penalty. For example, a passage in Exodus calls for "a life for a life, an eye for an eye and a tooth for a tooth." But the Torah also mandates execution for children who curse their parents (Exodus 21:17), adults who have sex during menstruation (Leviticus 21:18), and Sabbath breaking (Exodus 31:14 and Numbers 15:32-36). While the Torah insists on the most severe punishment for minor offenses, it also tells the story of Cain, the first murderer, who God forgave for the premeditated and unprovoked murder of his brother Abel.

A later period of Judaism is recorded in the Mishnah (roughly 200 B.C. to about 200 A.D.). In this era, Death Penalty trials required 23 judges and two eye witnesses to the commission of the crime. The testimonies of near relatives, slaves, women and those with a bad reputation were not allowed in these trials. These carefully constructed rules prevented executions except in the rarest cases.

In the books that follow the Torah, there are few references to the Death Penalty. By the time of the Mishnah, capital punishment was discouraged. Israel has never had capital punishment — reflecting how today's Jewish state interprets pro-Death Penalty passages in the Torah. The American Jewish Congress says "capital punishment degrades and brutalizes the society which practices it; . . . the death penalty is cruel, unjust, and incompatible with the dignity and self respect of men."

Other churches opposing the death penalty include: the Catholic Church, the American Baptist Churches, American Ethical Union, American Friends Service Committee, The Episcopal Church, Friends United Meeting, The Lutheran Church, The Mennonite Church, The Moravian Church, National Board YWCA, the Presbyterian Church, United Methodist Church and many other religious organizations.

The teachings of Jesus in the New Testament are clear in their condemnation of capital punishment. Jesus said: "You have heard it said, 'an eye for an eye and a tooth for a tooth.' But I say to you do not set yourself in violent or revengeful resistance against an evildoer. But if any one strikes you on the right cheek, turn the other also" (Matthew 5:38). Mother Theresa, in her appeal to Governor Wilson to grant clemency to Robert Harris recalled Jesus' call for mercy — even to the apparently undeserving. Jesus said: "Inasmuch as you have done it to one of the least, you have done it unto me."

Jesus was confronted by the death penalty directly in John 8. The Scribes and Pharisees made a woman stand before him to be judged. They said, "Teacher, this woman was caught in the very act of committing adultery. In the law, Moses commanded us to stone such women. Now what do you say?" They were plotting against Jesus, and "they said this is to test him, so that they might have some charge to bring against him." If he said flatly, "God's mercy forbids the death penalty," they could charge him with the blasphemy of disagreeing with Moses and stone him. Jesus answered, "Let anyone among you who is without sin throw the first stone." The woman lived.

While it is true that some passages in the Bible seem to support capital punishment, they all come from the earliest writings — writings that call for the execution of murderers and disobedient children. Judeo-Christian support for death sentences began to wane several hundred years before Christ. The theme of mercy, forgiveness and redemption that pervades the New Testament specifically denounces executions. Jesus himself was a wrongfully-convicted victim of capital punishment. From the cross Jesus said, "Father, forgive them, for they know not what they do." Byron Eshelman, the San Quentin Death Row chaplain during the 1950s and 1960s, uttered a similar prayer during each execution: "It would end up with words only a little different from those spoken on the cross. 'Oh God, have mercy upon this morning as we prepare to take the life of this man.... Father, forgive us, for we know not what we do.'"

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Allen's P. C. B. Est. 1888

Punishment Paradox

■ **Execution:** Supporters and opponents of the death penalty cite biblical passages to justify their stands.

By TAMMERLIN DRUMMOND
TIMES STAFF WRITER

"An eye for an eye, a tooth for a tooth." So goes the often-quoted ancient biblical code of justice and retribution in the Old Testament.

But in the New Testament, Jesus says something entirely different:

"You have heard that it was said, 'an eye for an eye, a tooth for a tooth' but I tell you . . . whoever slaps you on your right cheek turn the other to him also."

This apparent biblical paradox mirrors a split in the religious community over the morality and ethics of capital punishment. Does the first passage, from Deuteronomy 19:21, mean that the Bible condones the death penalty? Or is the second example, from the "Sermon on the Mount" in Matthew 5:38, truer to God's teachings? How is a devout Christian to decide?

As the execution date of Robert Alton Harris draws near, both pro- and anti-death penalty forces are recalling these and other Scripture passages to rationalize their positions.

Harris, 39, has been sentenced to die in the gas chamber Tuesday for the July 5, 1978, murders of two 16-year-old boys in San Diego. A jury found him guilty of forcing the boys to drive their car to an isolated spot, shooting them, then

finishing their half-eaten hamburgers. Harris and his brother Daniel used the boys' car in a bank robbery.

Ironically, Harris' execution is scheduled to occur barely a day after Easter—the Christian holiday commemorating the Resurrection of Christ, who Christians believe was a victim of capital punishment.

Although theological considerations have generally not been the main arguments for or against Harris' execution, the Bible is a weapon that has been frequently employed by both camps in the highly charged debate.

"I think what happens is that people already have their own values and conclusions, then they go back to the Bible to find the evidence," said Marvin Meyer, a professor of religion at Chapman College in Orange County and a death penalty opponent. "But you can prove all sorts of things by manipulating the text and taking it out of context. People used the Bible to justify slavery."

Most of the outcry comes from within the Catholic clergy. Cardinal Roger M. Mahony in Los Angeles has stated the Catholic church's unequivocal opposition.

San Francisco Archbishop John Quinn has appealed to Gov. Pete Wilson to cancel the execution. Even Mother Teresa, the Catholic nun famous for feeding India's

poor, has joined the chorus.

A virtual listing of "who's who" in other mainline Christian and Jewish denominations have also issued statements condemning the death penalty: The World Council of Churches. The Organization of Conservative Rabbis. The Northern California Ecumenical Council.

Amnesty International and other death penalty foes have printed up shock posters depicting Jesus on the cross, with the caption: "Maybe the death penalty should have been abolished a long time ago."

Despite the activism on the part of the clergy, there is a tremendous gap between the pulpit and the pews.

According to a recent California Poll, a majority of people who consider themselves to be spiritually minded support the death penalty. The poll found 88% of Protestants and 77% of Catholics in favor of capital punishment. (The margin of error was 4%. Jews and other people with religious affiliations other than Protestant or Catholic were not sampled in large enough numbers to provide an accurate measure of their opinion.)

"There is such an overwhelming majority of Californians who favor the death penalty that it doesn't really matter what their religious background is," said Mark DiCamillo, associate director of the California Poll.

Consequently, many religious leaders find themselves in an uncomfortable situation as bearers of an extremely unpopular message.

"In upholding this position, we recognize that we are clearly in the minority," Mahony said. "Nonetheless, moral and ethical principles cannot and will not be dictated by public opinion polls."

The Rev. Bill Fling, one of the few religious leaders to publicly support the death penalty, said the opposition has strayed from the teachings of the Bible.

He has been maintaining a vigil in front of San Quentin prison for the last few days—a determined advocate of the death penalty amid a sea of opponents.

"I've seen that a lot of these people demonstrating against capital punishment are preachers and I wonder: 'How can they do that?'" said Fling, a Church of Christ pastor in Orangevale, just outside Sacramento. "If people believe the Bible to be the real, inspired word of God, then they believe that capital punishment is ordained by God."

Religious Preference and the Death Penalty

The California Poll, directed by Mervin Field, surveyed 615 California adults in March and found overwhelming support for capital punishment, regardless of religious preference. The margin of error is 4.1%.

Because the percentages polled of Jews and people with religious affiliations other than Protestant or Catholic were smaller than the margin of error, their views could not be measured with any degree of accuracy.

	FAVOR	OPPOSE	NO OPINION
■ All Californians	80%	14%	6%
■ Protestants	88%	9%	3%
■ Catholics	77%	14%	9%
■ No Religious Preference	71%	26%	3%

SOURCE: The California Poll, March, 1992

PARADOX: Supporters, Foes of Death Penalty Cite Biblical Passages

Continued from S1

Yet the Rev. Earl Smith said in an interview this week that he does not believe that Harris should be executed. He cited the abuse that Harris received as a child and the remorse he has shown during prison Bible study meetings as reasons Wilson should have spared him.

Referring to the harsh code set out in Deuteronomy, Smith said: "If we take the eye after the victim has expired, who are we taking the eye for? When we get it, does it replace that which has been taken? I can't see where it has."

The Deuteronomy verse is probably the passage most often quoted in support of the death penalty. At Harris' clemency hearing Wednesday, Andy Mayeski, brother of one victim, referred to it in a letter to Gov. Wilson urging that the execution go forward.

According to historians, the "eye for an eye" principle, formally known as *lex talionis*, originated in ancient Babylon around 1792 BC. It comes from the Code of Hammurabi, a set of 282 case laws that covered a range of civil and criminal issues from slavery to murder.

Criminal penalties were by no means uniform: They depended upon not only the severity of the offense but the status of the wrongdoer as well.

The basic idea of *lex talionis* was

In a recent interview, Fling cited several biblical verses in support of his theological views.

There is Genesis 9:6: "Who so sheddeth man's blood, by man shall his blood be shed for in the image of God made he man."

Or, Numbers 35:16-17: "And if he strike him with an instrument of iron, so that he die, he is a murderer: The murderer shall surely be put to death."

And, Deuteronomy 19:21, in its extended version.

"And thine eye shall not pity but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot."

"All of these things repeated

time after time show that it was God's view that a murderer has to pay with his life," Fling said. "Not only does God [punish] people with death in the Bible but he commands man to do that to murderers because human life is sacred and God made us in his image."

However, death penalty foes counter that this view strikes at the core of the Christian doctrine of forgiveness. Christians learn that God sacrificed his son, Jesus Christ, to atone for the sins of mankind. The Bible says Jesus asked God to forgive his killers because "they know not what they do." Death penalty opponents have urged Gov. Pete Wilson to spare Harris "as

Jesus would have done," but Wilson rejected Harris' clemency plea.

Fling acknowledges that a man can receive divine forgiveness for his sins if he repents. "But forgiveness from God means that the man won't have to suffer the next death penalty, which is hell," Fling said. "Jesus never made forgiveness a license for a pardon from a civil penalty for murder."

The San Quentin chaplain who has counseled Harris for the last nine years agrees that divine forgiveness cannot erase the murders or the anguish that Harris has inflicted on the families of his victims.

Please see PARADOX, S6



JOE PUGLIESE / For The Times

'The Gospel has the power to transform anyone's life no matter how terrible. Capital punishment says we don't believe it and this strikes at the heart of the Gospel.'

The Rev. JOE M. DOSS
founder of Death Penalty Focus

have *quid pro quo*. You don't kill someone because they crippled your cow or knocked out your tooth. If they knock out your tooth, knock out theirs."

In fact, said the Rev. Joe M. Doss, an Episcopal priest in Palo Alto, some of the most famous figures in biblical history were murderers. These included Moses, who delivered the Jews out of Egypt, and David, one of the great Kings of ancient Israel. Both were forgiven by God after repenting for their

ly, David repented and God allowed him to return to his kingdom.

Doss, the founder of Death Penalty Focus, an organization working to abolish capital punishment, believes that David's saga is a strong biblical argument against the death penalty.

"The Gospel has the power to transform anyone's life no matter how terrible," Doss said. "Capital punishment says we don't believe it and this strikes at the heart of the Gospel."

Death penalty foes also cite John 8:1-11 to support their cause.

The passages tell the story of a woman who was arrested for adultery. She was brought before Jesus by the Scribes and Pharisees, who reminded Jesus that under Mosaic law, the woman must be stoned to death.

However, Jesus told them: "He that is without sin among you, let them cast the first stone."

But no one did, and, according to the passage, "when they heard it, being convicted by their own conscience, [they] went out one by one, beginning at the eldest . . . and Jesus was left alone [with] the woman standing in his midst."

The Rev. Ralph Fowler knows better than most how the theological arguments over the death penalty play out in real life. An Assemblies of God pastor from

Arizona, Fowler was among the witnesses at the April 6 execution of 43-year-old Donald Eugene Harding, who was sentenced to die for killing three businessmen in 1980. Fowler, who once considered himself a "law and order man," said the "nightmarish" 10-minute, 32-second ordeal has made him rethink his position.

"I don't have all the answers," said Fowler, who served as Harding's pastor for nine months before his death. "But my statement to people who've never been to an execution is when you're far away from the details, it's a lot easier to be dogmatic on things."

He is not the first clergy member to be deeply affected by an execution.

The late Byron E. Eshelman, who served as San Quentin's Death Row chaplain in the 1950s and 1960s, became an ardent critic of the death penalty.

During each execution, Eshelman wrote in his 1962 book, "Death Row Chaplain," he would say a silent prayer.

"It would end with words only a little different from those spoken on the cross," Eshelman wrote. "Oh God, have mercy upon this morning as we prepare to take the life of this man. . . . Father, forgive us, for we know not what we do."



THE WORLD AND THE DEATH PENALTY

No death penalty

Country	Date of abolition	Last execution
Andorra	1990	1943
Australia	1985	1967
Austria	1968	1950
Cambodia	1989	N/A
Cape Verde	1981	1835
Colombia	1910	1909
Costa Rica	1877	N/A
Czechoslovakia	1990	1988
Denmark	1978	1950
Dominican Republic	1966	N/A
Ecuador	1906	N/A
Finland	1972	1944
France	1981	1877
Germany	1949/1987 ²	1949 ²
Haiti	1987	1972*
Honduras	1956	1940
Hungary	1990	1988
Iceland	1928	1830
Ireland	1990	1954
Kiribati		1
Liechtenstein	1987	1785
Luxembourg	1979	1949
Marshall Islands		1
Micronesia		1
Monaco	1962	1847
Mozambique	1990	1986
Namibia	1990	1988*
Netherlands	1982	1952
New Zealand	1989	1957
Nicaragua	1979	1930
Norway	1979	1948
Panama		1903
Philippines	1987	1976
Portugal	1976	1849*
Romania	1989	1989
San Marino	1865	1468*
Sao Tome	1990	1
Solomon Islands	1966	1
Sweden	1972	1910
Tuvalu		1
Uruguay	1907	
Vanuatu		1
Vatican City State	1969	
Venezuela	1863	

TOTAL: 44 countries

Special circumstances

The following countries' laws provide for the death penalty only in exceptional cases such as military crimes or crimes committed in wartime.

Country	Date of abolition for "ordinary" crimes	Date of last execution
Argentina	1984	
Brazil	1979	1855
Canada	1976	1962
Cyprus	1983	1962
El Salvador	1983	1973*
Fiji	1979	1964
Israel	1954	1962
Italy	1947	1947
Malta	1971	1943
Mexico	1937	
Nepal	1990	1979
Peru	1979	1979
Seychelles	1	
Spain	1978	1975
Switzerland	1942	1944
United Kingdom	1973	1964

TOTAL: 16 countries

Not used

Countries and territories which retain the death penalty for "ordinary" crimes but have not executed anyone during the past 10 years or more.

Country	Date of last execution
Bahrain	1977
Belgium	1950
Bermuda	1977
Bhutan	1964*
Bolivia	1974
Brunei	1957
Comoros	1
Djibouti	1
Greece	1972
Hong Kong	1966
Ivory Coast	
Madagascar	1958*
Maldives	1952*
Nauru	1
Niger	1976*
Papua New Guinea	1950
Paraguay	1928
Senegal	1967
Sri Lanka	1976
Togo	
Western Samoa	

TOTAL: 21.

In keeping with the U.N. classification system, all of these countries and territories can be considered abolitionist in that they have not carried out executions for the past 10 years or more. However, death sentences continue to be imposed in some places, and not all of them have a policy of regularly commuting sentences.

In use

Countries and territories which retain and use the death penalty for crimes. Most of these places have carried out executions during the past 10 years. On some countries Amnesty International has no record of executions but is unable to ascertain whether or not executions have been carried out.

Country

Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Armenia, Azerbaijan, Bahamas, Bangladesh, Barbados, Belarus, Belize, Benin, Botswana, Bulgaria, Burkina Faso, Burma, Burundi, Cameroon, Central African Republic, Chad, Chile, China, Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Estonia, Ethiopia, Gabon, Gambia, Georgia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Lithuania, Malawi, Malaysia, Mali, Mauritania, Mauritius, Moldova, Mongolia, Morocco, North Korea, Nigeria, Oman, Pakistan, Poland, Qatar, Russia, Rwanda, St. Christopher and Nevis, St. Lucia, St. Vincent and The Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, South Africa, South Korea, Sudan, Suriname, Swaziland, Syria, Tadjikistan, Taiwan, Tanzania, Thailand, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United States of America, Uzbekistan, Vietnam, Yemen, Yugoslavia, Zaire, Zambia, Zimbabwe.

TOTAL: 106 countries and territories

*Date of last known execution. No executions since independence. ¹The death penalty was abolished in West Germany (FRG) in 1949 and in East Germany (GDR) in 1987. The last execution in the FRG was in 1949; the date of the last execution in the GDR is not known. The FRG and the GDR were unified in October 1990.

Death Penalty Returns in U.S., But Other Countries Spurn It

By Reynolds Holding
Chronicle Staff Writer

Many people thought Aaron Mitchell's execution in California's gas chamber 25 years ago would be among the last in America.

The number of executions in this country had dwindled from a high of 199 in 1935 to just one in 1966. Opinion polls in 1966 showed that a majority of Americans opposed capital punishment. Most of the Western world had stopped putting criminals to death.

But today, Robert Alton Harris is next in line on a U.S. death row that now includes 2,500 killers.

The turning point came with the U.S. Supreme Court's 1972 decision striking down death penalty laws. The resulting public backlash pushed the court into accepting capital punishment four years later, turning American law against an accelerating trend among all but the world's most repressive governments to stop executing killers.

Among the explanations for the backlash:

■ **CRIME:** After declining for decades, the murder rate doubled in the United States between 1962 and 1972. Americans were terrified of losing what many felt was the ultimate weapon against ruthless killers.

■ **FRUSTRATION:** American society was going through some of its most dramatic social changes of the century, with the citizenry anxious and divided by fights over civil rights, the Vietnam War, drugs, the then-fledgling women's movement and other matters. Some analysts said the death penalty provided an outlet for people frustrated over the erosion of U.S. institutions.

■ **STATES' RIGHTS:** Having fought a civil war to protect what they believed were their rights, Southern states recoiled at more orders from the federal government. Throughout the South, America's execution belt, state legislators reacted angrily to the high court's ruling.

Moreover, the high court had left an opening for a return of the death penalty in its 1972 ruling on Georgia and Texas laws. The justices stopped short of declaring executions to be "cruel and unusual" punishment — and thus unconstitutional — in all cases. In essence, the justices said the problem with those laws was that they were often applied arbitrarily.

"If the Supreme Court had held the death penalty unconstitutional, there would have been a fuss, but the country would have ac-

cepted it," said Phillip Johnson, a professor at Boalt Hall School of Law and a former prosecutor in Visalia. "Instead, it created procedural obstacles (to executions) and forfeited its moral leadership."

Swift Backlash

The country jumped all over the decision. Georgia Lieutenant Governor Lester Maddox, a segregationist of national notoriety, said the Supreme Court decision offered "a license for anarchy, rape, murder." Alabama Lieutenant Governor Jere Beasley said the justices "lost contact with the real world." Public support for the death penalty shot up to 67 percent in 1973. By 1974, 28 states — including California — had passed new laws under which 100 people had been sentenced to death.

Today, many legal scholars suggest that the court misread the reasons behind the backlash when it reinstated the death penalty. Many factors that had nothing to do with capital punishment — namely, a general resistance to the assertion of federal power — fueled the public anger, according to scholars.

Other, bolder Western nations overcame such political concerns in their efforts to abolish the death penalty, said William Bowers, principal research scientist in the criminal justice department at Northeastern University in Boston.

"The court got cold feet. It's that simple," Bowers said.

Social Frustration

The nation's wrenching debate over the death penalty came at a time when its crime rate was higher — and rising faster — than almost anywhere else in the world. In addition, violent demonstrations against the Vietnam War, riots in Watts and Detroit and the assassinations of Martin Luther King Jr. and John and Robert Kennedy "made people feel like things were getting out of control," said Scott Sundby, a professor at Hastings College of the Law.

"The perception that crime is out of hand inevitably fuels the belief that we need to give government as much power to combat it as possible," Sundby said.

Still, there is no direct correlation between the crime rate and public attitudes toward the death penalty. For example, wide fluctuations in crime rates since 1975 have not caused corresponding movements in opinion polls on capital punishment.

In South Dakota, where the crime rate is low, support for the death penalty is high.

Another factor in the public

backlash was that differences over the death penalty — like religion — break partly on cultural lines. Historically, strong support for the death penalty has come from people who "resent elite culture — represented by academics, lawyers and judges — that imposes its will on the rest of us," said Johnson.

Human-Rights Consideration

Other nations have encountered similar resistance in their attempts to abolish the death penalty. Large majorities opposed abolition of the death penalty by West Germany in the late 1940s, Britain in the 1960s and Canada in the 1970s.

The worldwide trend away from capital punishment actually started in the United States in the mid-1800s. Michigan, Rhode Island and Wisconsin all ended the practice before Portugal, which in 1867 became the first European nation to do so.

Amnesty International, which considers the death penalty to be a violation of human rights, lists 81 nations as "abolitionist countries." The death penalty remains in effect mostly in the world's more repressive nations, such as Iraq, Chile, Libya, North Korea and the People's Republic of China.

Qualified Support

The latest U.S. polls on capital punishment show that support approaches 80 percent. Abolitionists, however, point out that support for the death penalty is qualified. For example, the numbers drop dramatically when the public is asked whether it would still support executions if the inmate had no possibility of parole or if the condemned had a mental illness.

Some experts believe that current legal support for capital punishment is just a blip on this country's historical screen. They maintain that the United States will abolish the death penalty in the next two decades, especially as the expansion of the death penalty changes the debate from the theoretical to a flesh-and-blood matter.

In the near term, the Harris execution is expected to increase the clamor for capital punishment.

"There are those who say that the state is justified in protecting its citizens from outlandish violence," said Eugene Sweeters, the San Francisco deputy district attorney in charge of prosecuting "Night Stalker" Richard Ramirez, already convicted of 13 murders in Los Angeles. "If it is necessary to do that by exacting the ultimate punishment, well, so be it."

The Ultimate Penalty

☪ ☪ ☪

A Dozen Quotes

☪ "It smacks of little more than a lottery system."

—Retired U.S. Supreme Court Justice William Brennan, Jr.

☪ "...we are the only Western democracy that still has capital punishment. In my view it should be abolished. Let me just add this: It does not deter murders. It serves no purpose."

—Retired U.S. Supreme Court Justice Lewis R. Powell, Jr.

☪ "The death penalty differs from all other forms of criminal punishment not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as the basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

—Late U.S. Supreme Court Justice Potter Stewart

☪ "We tolerate harsher, separate and unequal standards of justice for one half of the murderers in this country — those who have killed whites. By reserving the penalty of death for black defendants, for the poor, or for those who have killed whites, we perpetuate the ugly legacy of slave times — teaching our children that some lives are inherently less precious than others. When we reserve capital punishment for those who have no capital, we tell all the world that justice in this country is bought, and not easily afforded if your skin is black."

—Joseph Lowery, President, Southern Christian Leadership Conference

☪ "When a black man kills a white man or white woman, it's murder. When a white man kills a black man or black woman, it's justifiable homicide. And when a black man kills a black man or black woman, it's just another dead nigger."

—Georgia State Senator Gary Parker, Columbus

☪ "Remember, what you do to these men, you do to God."

—Mother Theresa, speaking to a guard on San Quentin's Death Row

☪ "The one place that a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box."

—Georgia State Senator Gary Parker, Columbus

☪ "It is the poor, the sick, the ignorant, the powerless and the hated who are executed."

—Former U.S. Attorney General Ramsey Clark

☪ "The discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking of political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law, a Brahman was exempt from capital punishment . . . We have, I fear, taken in practice that same position, partially as a result of making the death penalty discretionary and partly as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the nation."

—Late U.S. Supreme Court Justice William O. Douglas

☪ "The people have a constitutional right to the death penalty and we'll do our best to make it work rationally. But you can see what it's doing. Capital punishment is destroying the system."

—Retired Chief Justice John Dixon, Louisiana Supreme Court

☪ "It is the deed that teaches, not the name we give it. Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind."

—George Bernard Shaw

☪ "Good people are always so convinced they're right."

—Last words of Barbara Graham, executed June 3, 1955 at San Quentin



"The discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking of political clout, or if he is a member of a suspect of unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law, a Brahman was exempt from capital punishment.... We have, I fear, taken in practice the same position, partially as a result of making the death penalty discretionary and partly as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the nation."

- *Late U.S. Supreme Court Justice, William O. Douglas*

Cover photo: A anti-death penalty protester at sunset in front of San Quentin State Prison during a vigil before the Robert Alton Harris execution.

4-20-92 photo by Alain Mc Laughlin

