Deserving to Die

A key issue in the debate over capital punishment is whether or not it is an effective deterrent to violent crime. In at least one important respect, it unquestionably is: It simply cannot be contested that a killer, once executed, is forever deterred from killing again. The deterrent effect on others, however, depends largely on how swiftly and surely the penalty is applied. Since capital punishment has not been used with any consistency over the years, it is virtually impossible to evaluate its deterrent effect accurately. Abolitionists claim that a lack of significant difference between the murder rates for states with and without capital punishment proves that the death penalty does not deter. But the states with the death penalty on their books have used it so little over the years as to preclude any meaningful comparison between states. Through July 18, 1990 there had been 134 executions since 1976. Only 14 states (less than 40 percent of those that authorize the death penalty) were involved. Any punishment, including death, will cease to be an effective deterrent if it is recognized as mostly bluff. Due to costly delays and endless appeals, the death penalty has been largely turned into a paper tiger by the same crowd that calls for its abolition on the grounds that it is not an effective deterrent!

To allege that capital punishment, if imposed consistently and without undue delay, would not be a deterrent to crime is, in essence, to say that people are not afraid of dying. If so, as columnist Jenkin Lloyd Jones once observed, then warning signs reading “Slow Down,” “Bridge Out,” and “Danger — 40,000 Volts” are futile relics of an age gone by when men feared death. To be sure, the death penalty could never become a 100-percent deterrent to heinous crime, because the fear of death varies among individuals. Some race automobiles, climb mountains, parachute jump, walk circus high-wires, ride Brahma bulls in rodeos, and otherwise engage in endeavors that are more than normally hazardous. But, as author Bernard Cohen notes in his book *Law and Order*, “there are even more people who refrain from participating in these activities mainly because risking their lives is not to their taste.”

Merit System

On occasion, circumstances have led to meaningful statistical evaluations of the death penalty’s deterrent effect. In Utah, for instance, there have been three executions since the Supreme Court’s 1976 ruling:

• Gary Gilmore faced a firing squad at the Utah State Prison on January 17, 1977. There had been 55 murders in the Beehive State during 1976 (4.5 per 100,000 population). During 1977, in the wake of the Gilmore execution, there were 44 murders (3.5 per 100,000), a 20 percent decrease.

• More than a decade later, on August 28, 1987, Pierre Dale Selby (one of the two infamous “hi-fi killers” who in 1974 forced five persons in an Ogden hi-fi shop to drink liquid drain cleaner, kicked a ballpoint pen into the ear of one, then killed three) was executed. During all of 1987, there were 54 murders (3.2 per 100,000). The count for January through August was 38 (a monthly average of 4.75). For September-December (in the aftermath of the Selby execution) there were 16 (4.0 per month, a nearly 16 percent decrease). For July and August there were six and seven murders, respectively. In September (the first month following Selby’s demise) there were three.

• Arthur Gary Bishop, who sodomized and killed a number of young boys, was executed on June 10, 1988. For all of 1988 there were 47 murders (2.7 per 100,000, the fewest since 1977). During January-June, there were 26; for July-December (after the Bishop execution) the tally was 21 (a 19 percent difference). In the wake of all three Utah executions, there have been notable decreases in both the number and the rate of murders within the state. To be sure, there are other variables that could have

influenced the results, but the figures are there and abolitionists to date have tended simply to ignore them.

Deterrence should never be considered the primary reason for administering the death penalty. It would be both immoral and unjust to punish one man merely as an example to others. The basic consideration should be: Is the punishment deserved? If not, it should not be administered regardless of what its deterrent impact might be. After all, once deterrence supersedes justice as the basis for a criminal sanction, the guilt or innocence of the accused becomes largely irrelevant. Deterrence can be achieved as effectively by executing an innocent person as a guilty one (something that communists and other totalitarians discovered long ago). If a punishment administered to one person deters someone else from committing a crime, fine. But that result should be viewed as a bonus of justice properly applied, not as a reason for the punishment. The decisive consideration should be: Has the accused earned the penalty?

The Cost of Execution

The exhorbitant financial expense of death penalty cases is regularly cited by abolitionists as a reason for abolishing capital punishment altogether. They prefer to ignore, however, the extent to which they themselves are responsible for the interminable legal maneuvers that run up the costs.

A 1982 study by the abolitionist New York State Defenders Association — based on proposed (but never enacted) legislation to reinstate capital punishment in New York (Governor Mario Cuomo has vetoed death penalty legislation seven times in recent years — speculated that a capital case involving only the first three levels of review (trial and penalty, appeal to the state Court of Appeals, and review by the U.S. Supreme Court) would cost $1.8 million per case, compared to the projected cost of imprisoning a felon for 40 years of $602,000. In another study, the Miami Herald calculated that it had cost Florida taxpayers $57.2 million to execute 18 men ($3.17 million each), whereas keeping a prisoner in jail for life (40 years) costs $515,964 ($12,899.91 per year). Abolitionists tend, we suspect, to exaggerate death-penalty costs while understating the expense of life imprisonment. According to the Justice Department, for instance, it costs around $20,000 a year to house a prisoner ($1 million over 40 years). Other sources peg it as high as $25,000.

As presently pursued, death-penalty prosecutions are outrageously expensive. But, again, the cost is primarily due to redundant appeals, time-consuming delays, bizarre court rulings, and legal histrionics by defense attorneys:

• Willie Darden, who had already survived three death warrants, was scheduled to die in Florida's electric chair on September 4, 1985 for a murder he had committed in 1973. Darden's lawyer made a last-minute emergency appeal to the Supreme Court, which voted against postponing the execution until a formal appeal could be filed. So the attorney (in what he later described as "last-minute ingenuity") then requested that the emergency appeal be technically transformed into a formal appeal. Four Justices agreed (enough to force the full court to review the appeal) and the execution was stayed. After additional years of delay and expense, Darden was eventually put out of our misery on March 15, 1988.

• Ronald Gene Simmons killed 14 members of his family during Christmas week in 1987. He was sentenced to death, said he was willing to die, and refused to appeal. But his scheduled March 16, 1989 execution was delayed when a fellow inmate, also on death row, persuaded the Supreme Court to block it (while Simmons was having what he expected to be his last meal) on the grounds that the execution

could have repercussions for other death-row inmates. It took the Court until April 24 of this year to reject that challenge. Simmons was executed on June 25.

• Robert Alton Harris was convicted in California of the 1978 murders of two San Diego teenagers whose car he wanted for a bank robbery. Following a seemingly interminable series of appeals, he was at last sentenced to die on April 3 of this year. Four days earlier, a 9th U.S. Circuit Court of Appeals judge stayed the execution, largely on the basis of a psychologist's claim that Harris was brain-damaged and therefore may possibly have been unable to "premeditate" the murders (as required under California law for the death penalty). On April 10, the *Washington Times* reported that the series of tests used to evaluate Harris's condition had been described by some experts as inaccurate and "a hoax."

The psychiatric game is being played for all it is worth. On May 14, Harris's attorneys argued before the 9th Circuit Court that he should be spared the death penalty because he received "inadequate" psychiatric advice during his original trial. In 1985, the Supreme Court had ruled that a defendant has a constitutional right to "a competent psychiatrist who will conduct an appropriate examination." Harris had access to a licensed psychiatrist, but now argues that — since the recent (highly questionable) evaluations indicated brain damage and other alleged disorders that the original psychiatrist failed to detect (and which may have influenced the jury not to impose the death sentence) — a new trial (or at least a re-sentencing) is in order. If the courts buy this argument, hundreds (perhaps thousands) of cases could be reopened for psychiatric challenge.

• On April 2, 1974 William Neal Moore shot and killed a man in Georgia. Following his arrest, he pleaded guilty to armed robbery and murder and was convicted and sentenced to death. On July 20, 1975 the Georgia Supreme Court denied his petition for review. On July 16, 1976 the U.S. Supreme Court denied his petition for review. On May 13, 1977 the Jefferson County Superior Court turned down a petition for a new sentencing hearing (the state Supreme Court affirmed the denial, and the U.S. Supreme Court again denied a review). On March 30, 1978 a Tattnall County Superior Court judge held a hearing on a petition alleging sundry grounds for a writ of habeas corpus, but declined on July 13, 1978 to issue a writ. On October 17, 1978 the state Supreme Court declined to review that ruling. Moore petitioned the U.S. District Court for Southern Georgia. After a delay of more than two years, a U.S. District Court judge granted the writ on April 29, 1981. After another two-year delay, the 11th U.S. Circuit Court of Appeals upheld the writ on June 23, 1983. On September 30, 1983 the Circuit Court reversed itself and ruled that the writ should be denied. On March 5, 1984 the Supreme Court rejected the ease for the third time.

Moore's execution was set for May 24, 1984. On May 11, 1984 his attorneys filed a petition in Butts County Superior Court, but a writ was denied. The same petition was filed in the U.S. District Court for Georgia's Southern District on May 18th, but both a writ and a stay of execution were denied. Then, on May 23 (the day before the scheduled execution) the 11th Circuit Court of Appeals granted a stay. On June 4, 1984 a three-judge panel of the Circuit Court voted to deny a writ. After another delay of more than three years, the Circuit Court voted 7 to 4 to override its three-judge panel and rule in Moore's favor. On April 18, 1988, the Supreme Court accepted the case. On April 17, 1989 it sent the case back to the 11th Circuit Court for review in light of new restrictions that the High Court had placed on habeas corpus. On September 28, 1989 the Circuit Court ruled 6 to 5 that Moore had abused the writ process. On December 18, 1989 Moore's attorneys again appealed to the Supreme Court.

Moore's case was described in detail in *Insight* magazine for February 12, 1990. By the end of last year,

his case had gone through 20 separate court reviews, involving some 118 state and federal judges. It had been to the Supreme Court and back four times. There had been a substantial turnover of his attorneys, creating an excuse for one team of lawyers to file a petition claiming that all of the prior attorneys had given ineffective representation. No wonder capital cases cost so much!

Meanwhile, the American Bar Association proposes to make matters even worse by requiring states (as summarized by *Insight*) "to appoint two lawyers for every stage of the proceeding, require them to have past death penalty experience and pay them at 'reasonable' rates to be set by the court."

During an address to the American Law Institute on May 16, 1990, Chief Justice Rehnquist asserted that the "system at present verges on the chaotic" and "cries out for reform." The time expended between sentencing and execution, he declared, "is consumed not by structured review … but in fits of frantic action followed by periods of inaction." He urged that death row inmates be given one chance to challenge their sentences in state courts, and one challenge in federal courts, period.

Lifetime to Escape

Is life imprisonment an adequate substitute for the death penalty? Presently, according to the polls, approximately three-fourths of the American people favor capital punishment. But abolitionists try to discount that figure by claiming that support for the death penalty weakens when life imprisonment without the possibility of parole is offered as an alternative. (At other times, abolitionists argue that parole is imperative to give "lifers" some hope for the future and deter their violent acts in prison.)

Life imprisonment is a flawed alternative to the death penalty, if for no other reason than that so many "lifers" escape. Many innocent persons have died at the hands of men previously convicted and imprisoned for murder, supposedly for "life." The ways in which flaws in our justice system, combined with criminal ingenuity, have worked to allow "lifers" to escape include these recent examples:

• On June 10, 1977, James Earl Ray, who was serving a 99-year term for killing Dr. Martin Luther King Jr., escaped with six other inmates from the Brushy Mountain State Prison in Tennessee (he was captured three days later).

• Brothers Linwood and James Briley were executed in Virginia on October 12, 1984 and April 18, 1985, respectively. Linwood had murdered a disc jockey in 1979 during a crime spree. During the same spree, James raped and killed a woman (who was eight months pregnant) and killed her five-year-old son. On May 31, 1984, the Briley brothers organized and led an escape of five death-row inmates (the largest death-row breakout in U.S. history). They were at large for 19 days.

• On August 1, 1984 convicted murderers Wesley Allen Tuttle and Walter Wood, along with another inmate, escaped from the Utah State Prison. All were eventually apprehended. Wood subsequently sued the state for $2 million for violating his rights by allowing him to escape. In his complaint, he charged that, by allowing him to escape, prison officials had subjected him to several life-threatening situations: "Because of extreme fear of being shot to death, I was forced to swim several irrigation canals, attempt to swim a 'raging' Jordan River and expose myself to innumerable bites by many insects. At one point I heard a volley of shotgun blasts and this completed my anxiety."

• On April 3, 1988 three murderers serving life sentences without the chance of parole escaped from the maximum-security West Virginia Penitentiary. One, Bobby Stacy, had killed a Huntington police officer in 1981. At the time, he had been free on bail after having been arrested for shooting an Ohio patrolman.

• On November 21, 1988 Gonzalo Marrero, who had been convicted of two murders and sentenced to two life terms, escaped from New Jersey's Trenton state prison by burrowing through a three-foot-thick cell wall, then scaling a 20-foot outer wall with a makeshift ladder.

• In August 1989 Arthur Carroll, a self-proclaimed enforcer for an East Oakland street gang, was convicted of murdering a man. On September 28, he was sentenced to serve 27-years-to-life in prison. On October 10 he was transferred to San Quentin Prison. On October 25 he was set free after a paperwork snafu led officials to believe that he had served enough time. An all-points bulletin was promptly issued.

• On February 11, 1990 six convicts, including three murderers, escaped from their segregation cells in the maximum security Joliet Correctional Center in Illinois by cutting through bars on their cells, breaking a window, and crossing a fence. In what may be the understatement of the year, a prison spokesman told reporters: "Obviously, this is a breach of security."

Clearly, life sentences do not adequately protect society, whereas the death penalty properly applied does so with certainty.

Equal Opportunity Execution

Abolitionists often cite statistics indicating that capital punishment has been administered in a discriminatory manner, so that the poor, the black, the friendless, etc., have suffered a disproportionate share of executions. Even if true, such discrimination would not be a valid reason for abandoning the death penalty unless it could be shown that it was responsible for the execution of innocent persons (which it has not been, to date). Most attempts to pin the "discrimination" label on capital convictions are similar to one conducted at Stanford University a few years ago, which found that murderers of white people (whether white or black) are more likely to be punished with death than are killers of black people (whether white or black). But the study also concluded that blacks who murdered whites were somewhat less likely to receive death sentences than were whites who killed whites.

Using such data, the ACLU attempted to halt the execution of Chester Lee Wicker in Texas on August 26, 1986. Wicker, who was white, had killed a white person. The ACLU contended that Texas unfairly imposes the death penalty because a white is more likely than a black to be sentenced to death for killing a white. The Supreme Court rejected the argument. On the other hand, the execution of Willie Darden in Florida attracted worldwide pleas for amnesty from sundry abolitionists who, ignoring the Stanford study, claimed that Darden had been "rail-roaded" because he was black and his victim was white.

All criminal laws — in all countries, throughout all human history — have tended to be administered in an imperfect and uneven manner. As a result, some elements in society have been able to evade justice more consistently than others. But why should the imperfect administration of justice persuade us to abandon any attempt to attain it?

The most flagrant example of discrimination in the administration of the death penalty does not involve race, income, or social status, but gender. Women commit around 13 percent of the murders in America, yet, from 1930 to June 30, 1990, only 33 of the 3991 executions (less than 1 percent) involved women. Only one of the 134 persons executed since 1976 (through July 18) has been a woman (Velma Barfield in North Carolina on November 2, 1984). One state governor commuted the death sentence of a woman because "humanity does not apply to women the inexorable law that it does to men."

According to L. Kay Gillespie, professor of sociology at Weber State College in Utah, evidence indicates

that women who cried during their trials had a better chance of getting away with murder and avoiding the death penalty. Perhaps the National Organization for Women can do something about this glaring example of sexist "inequality" and "injustice." In the meantime, we shall continue to support the death penalty despite the disproportionate number of men who have been required to pay a just penalty for their heinous crimes.

Forgive and Forget?

Another aspect of the death penalty debate is the extent to which justice should be tempered by mercy in the case of killers. After all, abolitionists argue, is it not the duty of Christians to forgive those who trespass against them? In Biblical terms, the most responsible sources to extend mercy and forgiveness are (1) God, and (2) the victim of the injustice. In the case of murder, so far as this world is concerned, the victim is no longer here to extend mercy and forgiveness. Does the state or any other earthly party have the right or authority to intervene and show tender mercy on behalf of a murder victim? In the anthology *Essays on the Death Penalty*, the Reverend E.L.H. Taylor clarifies the answer this way: "Now it is quite natural and proper for a man to forgive something you do to him. Thus if somebody cheats me out of $20.00 it is quite possible and reasonable for me to say, 'Well, I forgive him, we will say no more about it.' But what would you say if somebody had done you out of $20.00 and I said, 'That's all right. I forgive him on your behalf'?"

The point is simply that there is no way, in this life, for a murderer to be reconciled to his victim, and secure the victim's forgiveness. This leaves the civil authority with no other responsible alternative but to adopt justice as the standard for assigning punishment in such cases.

Author Bernard Cohen raises an interesting point: "… if it is allowable to deprive a would-be murderer of his life, in order to forestall his attack, why is it wrong to take away his life after he has successfully carried out his dastardly business?" Does anyone question the right of an individual to kill an assailant should it be necessary to preserve his or her life or that of a loved one?

Happily, however, both scripture and our legal system uphold the morality and legality of taking the life of an assailant, if necessary, before he kills us. How, then, can it be deemed immoral for civil authority to take his life after he kills us?

Intolerant Victims?

Sometimes those who defend the death penalty are portrayed as being "intolerant." But isn't one of our real problems today that Americans are too tolerant of evil? Are we not accepting acts of violence, cruelty, lying, and immorality with all too little righteous indignation? Such indignation is not, as some would have us believe, a form of "hatred." In *Reflections on the Psalms*, C.S. Lewis discussed the supposed spirit of "hatred" that some critics claimed to see in parts of the Psalms: "Such hatreds are the kind of thing that cruelty and injustice, by a sort of natural law, produce…. Not to perceive it at all — not even to be tempted to resentment — to accept it as the most ordinary thing in the world — argues a terrifying insensibility. Thus the absence of anger, especially that sort of anger which we call indignation, can, in my opinion, be a most alarming symptom."

When mass murderer Ted Bundy was executed in Florida on January 24, 1989, a crowd of some 2000 spectators gathered across from the prison to cheer and celebrate. Many liberal commentators were appalled. Some contended that it was a spectacle on a par with Bundy's own callous disrespect for human life. One headline read: "Exhibition witnessed outside prison was more revolting than execution." What nonsense! As C.S. Lewis observed in his commentary on the Psalms: "If the Jews

cursed more bitterly than the Pagans this was, I think, at least in part because they took right and wrong more seriously." It is long past time for us all to begin taking right and wrong more seriously.

No Mercy for the Innocent

Another interesting aspect of the death penalty is its contrast with abortion. Often, those who work hardest to save the lives of convicted killers are also active in the movement to extinguish the lives of innocent, unborn human beings. The ACLU, for instance, considers it constitutional to kill the unborn via abortion, in disregard of the goal (stated in the Constitution's Preamble) of securing the blessings of liberty to "our posterity." (A few years ago, its Louisiana affiliate auctioned off an abortion for $30 during a fund-raising event.) Yet, the ACLU vigorously opposes the death penalty for murder and other heinous crimes, despite the clear authorization for capital punishment in the Fifth Amendment (which defines the circumstances in which persons can be held to answer for "capital" crimes; asserts that no one can be put in "jeopardy of life" twice for the same offense; and provides that persons may indeed be "deprived of life," but only in accord with "due process of law") and the 14th Amendment (which precludes the states from depriving "any person of life … without due process of law"). Similarly, Supreme Court Justices Thurgood Marshall and William J. Brennan oppose the death penalty under any and all circumstances, on the grounds that it is inherently "cruel and unusual," yet regularly vote to allow abortion.

On November 18, 1969, the *Washington Post* editorialized that "it seems clear that a drastic relaxation of existing restraints [on abortion] is imperative," yet two years later (April 2, 1971) opposed the death penalty for Charles Manson (and his accomplices in the seven Tate-LaBianca murders) on the grounds that allowing them to live "is to say to mankind that all human life has value even though it may be beyond human discernment."

Dr. Karl Menninger once asserted during congressional testimony that, just as doctors were "under no circumstances [to] kill their patients, no matter how helpless their condition," similarly "capital punishment is in my opinion morally wrong." Yet, at that very moment, he was a member of the International Sponsors Council of Planned Parenthood-World Population, an abortionist organization.

In late April of this year, the Senate approved a combined death penalty/abortion amendment to (1) authorize the death penalty in the District of Columbia for drug-related murder, and (2) allow unrestricted local abortion funding in the District. Most DC leaders had long supported increased local abortion funding (for nearly two decades, there have been more annual abortions than live births in the nation's Capital), but 12 of 13 Council members said that the plan was not worth being forced to accept the capital punishment provision. In a letter to House and Senate leaders, the double-standard dozen wrote: "It is totally unconscionable for the Congress to require that a local jurisdiction carry out executions [of drug-pushing killers] as a price to treat its women fairly [by allowing them to execute their unborn babies at taxpayer expense]."

Similarly, after a House-Senate conference committee killed the combined amendment on May 17, Council Chairman David Clarke told reporters: "If they had to go together, then I'm reluctantly pleased that the city was not put in the position of having to execute people it did not want to have to execute [i.e., killers] in order to get something it deserves [i.e., increased authority to kill the unborn]."

Seeds of Anarchy

As we have seen, most discussions of the death penalty tend to focus on whether it should exist for murder or be abolished altogether. The issue should be reframed so that the question instead becomes

whether or not it should be imposed for certain terrible crimes in addition to murder (such as habitual law-breaking, clearly proven cases of rape, and monstrous child abuse).

In 1953 the renowned British jurist Lord Denning asserted: "Punishment is the way in which society expresses its denunciation of wrongdoing; and in order to maintain respect for law, it is essential that the punishment for grave crimes shall adequately reflect the revulsion felt by a great majority of citizens for them." Nineteen years later, U.S. Supreme Court Justice Potter Stewart noted (while nevertheless concurring in the Court's 1972 opinion that temporarily banned capital punishment) that the "instinct for retribution is part of the nature of man and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law."

To protect the innocent and transfer the fear and burden of crime to the criminal element where it belongs, we must demand that capital punishment be imposed when justified and expanded to cover terrible crimes in addition to murder.

Sidebar: Candidate for Capital Punishment

In 1965, when he was 15, Earl Kenneth Shriner was declared a "defective delinquent" after choking and beating a seven-year-old girl. He was sent to a Washington state school for children with "emotional disabilities." The next year, he murdered a 15-year-old retarded teenager. Because he was only 16, he could not be charged with murder under existing Washington law. He was sent to a state school for individuals with "developmental disabilities." In 1968 he was committed to a state mental hospital after officials at the state school declared that he was too dangerous for them to handle. In 1973 he was sent home to live with his mother. In 1977, he was ordered committed to a state mental hospital after pleading guilty to raping two 16-year-old female hitchhikers. The hospital refused to accept him, claiming that he was "not amenable to treatment." He was transferred to a state prison, where he received psychiatric counseling.

Shriner was released from prison in May 1987 after serving only ten years for the two rapes he had committed. He had been sentenced to two 10-year terms, but the judge had neglected to state specifically that they were to run consecutively (20 years) rather than concurrently (10 years). The state supreme court subsequently ruled that, unless specifically stated otherwise, sentences must run concurrently.

A cellmate told Department of Corrections officials during a March 1987 taped interview that Shriner had talked "about buying a van and having the back end customized where he could have chains and shackles on the walls plus a cage or two in there so he can take a kid into the van and drive off into the woods."

In November 1987 Shriner was charged with simple assault for stabbing a 16-year-old boy. He served 66 days in jail and was released to his mother. Then, on May 20, 1989, he dragged a seven-year-old boy into the woods near the boy's school, sodomized him, cut his throat, stabbed him in the back, and cut off his penis back to his abdomen. Incredibly, the youngster survived (and is recovering). On February 7 of this year Shriner was convicted of first-degree attempted murder, two counts of first-degree rape, and first-degree assault. He was sentenced to more than 130 years in prison by the judge (who rejected the state's proposal for a sentence of more than 250 years). The death penalty was not considered. We

can only hope that he will never escape or be released.

The sordid record of Earl Kenneth Shriner is an example of the price innocent people (in this case, children) are compelled to pay for the maudlin reluctance to impose just penalties for heinous crimes. Had Shriner been executed for murdering the young girl when he was 16 (under today's Supreme Court guidelines, he could have been), he could not have committed his subsequent atrocities.