

Fair and Equal Under the Law?

The death penalty's uneven playing field

Just one percent of murders in the United States have resulted in a death sentence over the last decade. But are those individuals truly the “worst of the worst” – or simply those with the worst lawyers or the wrong geographic location?

We all expect justice to be blind. Otherwise it's not justice at all. Yet the uneven playing field that characterizes the U.S. death penalty compromises the integrity of the entire criminal justice system.

A lottery of geography

- ◆ Where a crime occurs can play as big a role as the nature of the crime in determining who will live and who will die. Similar murders might get 40 years in one county and death in the next county over.
- ◆ Many states, like Ohio, Maryland, and Tennessee, have a large percentage of death sentences originate from just one or two counties.
- ◆ Geography plays a role across states and nationally as well. In 2012, over three-quarters of all executions took place in just four states.
- ◆ Fewer than 15% of all counties across the country have sent *anyone* to death row in the modern era. Most counties simply don't use it.

“Being selected as a defendant for a capital case is as random and serendipitous as being struck by lightning.”

– Robert DeLufo, former NJ Attorney General

No “dream team,” no defense?

- ◆ We've heard it in the movies a thousand times – “You have the right to an attorney.” But there is little guarantee in most states that poor defendants will receive a competent one.
- ◆ Our nation's death penalty is littered with shocking examples of lawyers who were drunk, asleep, or later disbarred. Others have been represented by collections or tax attorneys or lawyers fresh out of school. Some court-appointed lawyers can be so overworked or indifferent that they don't even bother to defend their clients at all.
- ◆ Courts often allow the most egregious mistakes to stand. In the famous “sleeping lawyer” case of George McFarland, a Texas court ruled, “the Constitution guarantees the right to an attorney. It doesn't say the lawyer has to be awake.”

Bad lawyers: Stories of a broken system

- ♦ Mose Young was executed in Missouri in 2001. His lawyer, Jack Walsh, saw Young just one time before the trial, never visited the crime scene, conducted no investigation or preparation, and failed to interview a witness who said Young was not the shooter. During the trial, Walsh came to court with a can of soda spiked with alcohol.
- ♦ Gary Nelson's lawyer had never tried a capital case. He was paid less than \$20 per hour and did not request any funds for an investigator. His closing argument was 255 words long – less than half the length of this fact sheet. Nelson was eventually exonerated and released.
- ♦ Jesús Romero was executed in Texas in 1992. His lawyer's *entire* closing argument for the penalty phase of his trial was four sentences: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say."

"Our criminal justice system doesn't always mete out justice and fairness in neat little packages – sometimes it's a little rough. It's not something you can compute with a calculus or with any kind of certainty as to who belongs and who doesn't on death row."

– Martin Franz, prosecutor,
Wayne County, OH

Plagued by arbitrariness

- ♦ Individual prosecutors have broad discretion to decide when to seek the death penalty. Such discretion is one of the hallmarks of our nation's legal system. But the definition of "death eligible" is so broad that there is little guidance for prosecutors to make that decision. That leaves room for bias and other factors to seep into the decision making process, despite a prosecutor's best intentions.
- ♦ Many of the nation's most high-profile murderers or serial killers don't get the death penalty because they can afford better lawyers who negotiate deals. Accomplices may get executed while the person who committed the murder got life.
- ♦ All murder is horrible, but the death penalty is supposed to be for the "worst of the worst." Human beings have differing opinions on what counts as the worst – making it impossible to create a human system that is objective and consistent in selecting people for death.

A jury of your peers?

- ♦ People who do not support the death penalty are excluded from serving on capital juries. The result is that large segments of the population, including those with religious or moral qualms about executions, cannot participate in the most serious cases.

Fairness in the death penalty is a moving target. Tinkering has only made the system more complex – not more fair. After 40 years, we have not found a way to make the death penalty any less arbitrary. And when a life is on the line, good luck simply isn't good enough.