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## The Injustice of the Death Penalty

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# OPINION AND COMMENTARY

By Neal Devins  
and Roy Brasfield Herron

Judicial safeguards for preventing the arbitrary administration of capital punishment are not working. The recent United States Supreme Court decision to delay the execution of Thomas Barefoot illustrates the courts' inability to administer death sentences fairly.

The Supreme Court has decided to review again the standards for delaying executions. Yet our nation's experiences with capital punishment suggest that no procedures will illuminate the arbitrary administration of death.

Charlie Brooks Jr. is the latest victim of this arbitrariness. On Dec. 7, 1982, Brooks was executed by injection in a Texas prison. Also in the prison was Brooks's partner, Woodie Loudres, likewise convicted of the same capital offense. Loudres, however, will be eligible for parole in six and a half years. Only he knows whether he or Charlie Brooks shot and killed a Fort Worth mechanic.

Prosecutor Jack Strickland, who persuaded jurors to give Brooks the death penalty, recently said that the state would never know if it executed the man who fired the fatal shot. "It may well be, as horrible as it is to contemplate, that the State of Texas executed the wrong man."

Strickland had been unable to persuade the Texas Board of Pardons and Paroles to grant Brooks a 60-day reprieve. He argued that the extremely different sentences were unfair since each defendant was convicted on the same evidence of the same acts.

Former prosecutor Strickland is right; it is not fair. Unfortunately, it is also not unusual that death sentences are administered with freakish unfairness.

Brooks was one of two Americans ex-

ecuted in the last 15 years who were still pursuing appeals. The other was John Spenkelink. Spenkelink, like Brooks, was one of two persons charged with first-degree murder. The prosecution offered to let Spenkelink plead guilty to second-degree murder. He refused the offer, maintaining that only in self-defense had he shot the professional felon who had assaulted and sodomized him.

Spenkelink testified. The other man accused of murder did not. The other man was released. John Spenkelink was electrocuted.

Late last year another telling occurrence unfolded, this time in Mississippi. Prosecutors were eager to convict and condemn a controversial black political leader named Eddie Carthan. They accused Carthan of contracting to have a political rival murdered.

The district attorney agreed not to prosecute a capital murder charge and five other charges against David Hester, one of the two men who admittedly planned and participated in the robbery and killing. Instead, in return for Hester's testimony against Carthan, the prosecution allowed Hester to plead guilty to a single charge of aggravated assault on a police officer. He will be eligible for parole in eight years.

Carthan ultimately was found not guilty. Yet, if he had been convicted, Carthan could have been executed while Hester, the killer who said he had been hired to shoot the victim, would have been released from prison.

The cases of Charlie Brooks, John Spenkelink, and Eddie Carthan are not isolated instances of disparate treatment in capital cases. Instead, they form a microcosm of the inconsistent application of the death penalty.

Such arbitrariness and capriciousness were what caused the Supreme Court to overturn the country's death penalty laws in 1972

in *Furman v. Georgia*. In 1976, however, the Court in *Gregg v. Georgia* approved certain statutes with specific safeguards designed to remove the arbitrariness and capriciousness.

Death penalty abolitionists argue that because of the strict precautions required by the Supreme Court, the death penalty is likely to be applied very rarely and thus always will appear arbitrary and freakish. This contention is supported by Justice Department and FBI statistics. In 1978 some 18,755 persons were arrested for murder and nonnegligent manslaughter and 197 persons were sen-

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tenced to die. In 1979, some 16,955 offenders were identified in connection with murders and 159 persons were sentenced to die. That averages about one death sentence for each hundred murder arrests.

Of course sentences will vary and one cannot throw out all punishments because of disparities. But the death penalty in fact differs from other punishments. According to Supreme Court Justice William Brennan: "Death is truly an awesome punishment. The calculated killing of a human being by the state involves, by its very nature, a denial of the executed person's humanity."

The late Justice Felix Frankfurter similarly noted, "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights."

But our attempts at fairness have been inadequate. Death has been combined with such disparities as in the cases of Brooks and Spenkelink. Death is meted arbitrarily and capriciously to less than one percent of those committing homicides.

Capital punishment still is administered with such rarity that no execution goes unnoticed. But as federal judge Doug Shaver noted: "1983 will bring some more. So many (of the 1,200) on death row are ripe. They've . . . been through all the (legal) processes."

The Supreme Court may revise those processes in the Barefoot case now before it. Still, whether someone lives or dies will be determined by things largely beyond the control of the Supreme Court such as the adequacy or inadequacy of attorneys, plea bargains, and who sits on the jury.

The point is clear: the death penalty is not administered evenhandedly. Regardless of one's views on the morality or constitutionality of capital punishment, the death penalty cannot rightly be continued in this fashion. A country whose jurisprudence is based on notions of fairness ought to recognize this and act accordingly.

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