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America's Failed Efforts to Reform the Death Penalty

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On June 29, 1972 the U.S. Supreme Court overturned all existing death penalty laws with a decision in *Furman v. Georgia* that focused on *capriciousness*, *racial bias*, and *cruelty* – flaws that states were supposed to correct. Four years later, in *Gregg v. Georgia*, the Justices ruled that new safeguards enacted by several states corrected old flaws and created a "new and improved" death penalty system. In our book, *Deadly Justice*, we examine accumulated evidence over 40 years to ask whether the modern U.S. death penalty actually meets the reform standards established in *Gregg* – or whether, alternatively, new practices replicate the old faults.

Death Sentences and Executions are Still Arbitrary and Capricious

In *Furman*, Justice Potter Stewart compared receiving a death sentence to being struck by lightning, arguing that the death penalty was given to a "capriciously selected random handful" of Americans whose convictions, in principle, made them eligible for death sentences. According to evidence in *Furman*, just 15 to 20 percent of eligible defendants were sentenced to death, and they were not meaningfully different from the remaining 85 percent. To remedy this issue, post-*Gregg* capital punishment statutes were required to be "narrowly targeted" at only certain crimes, and to mandate "proportionality review" by higher courts to ensure that death sentences were reserved for the worst of the worst.

But even with such remedies in place, the data suggest that receiving a death sentence – or actually being executed – is still akin to being struck by lightning. Why? Almost every state with the death penalty includes in its statute at least one "catch-all" category such as "crime was heinous," which in practice means that people convicted of a vast majority of homicides can be deemed eligible for the death penalty. The updated death penalty thus fails to be narrow and targeted enough to meet the standards laid out in *Gregg*.

From 1976 through 2014, FBI statistics tally a total of almost 800,000 homicides, or about 20,000 per year. Between 1973 and 2015, there were 8,588 death sentences, applied to just over one percent of all homicides. Executions have been even rarer – some 1,422 happened from 1976 through 2015, punishments for fewer than one-fifth of one percent of homicides. If anything, the arbitrariness of this extreme punishment has become even more evident.

The Death Penalty is Marred by Racial Bias

In *Furman*, the Justices noted that racial disparities plagued the application of the death penalty. In fact, the racial identities of victims, even more than the identities of offenders, determine who is sentenced to death. An offender who kills a white female is about 12 times as likely to be sentenced to death as an offender who kills a black male. Over its entire history, the state of Louisiana has never executed a white individual who killed a black male – even though black males constitute more than 60 percent of homicide victims in the state. Despite recent reforms, the data show that such racial biases continue throughout the capital punishment system.

Still a Cruel and Capricious System

The Justices who wrote the *Furman* majority opinion also noted that the death penalty was applied in a cruel and unusual manner. The data show that the contemporary death penalty targets the most vulnerable people in the U.S. population – with the poor, those suffering from mental illnesses, and accused with inferior lawyers likely to be the unlucky ones singled out to die. The system is also riddled with delays, reversals, stays and

botched executions. Pennsylvania, for example, has issued over 400 death warrants but carried out just three of them – and all three of those inmates were volunteers for death, having given up further rights of appeal.

Nowadays, the average execution takes place after the inmate has waited on death row for more than *twenty years*. Such long delays, combined with the fact that only 16.5 percent of those sentenced to death have actually been put to death, suggest that in reality the death penalty has been replaced by what one judge called a penalty of life in prison with the remote possibility of execution. Individual inmates can find themselves approaching multiple, repeated execution dates -- and some only receive word that their execution has been stayed after they have had their last meal and said good-bye to their families. Of course, lawmakers did not deliberately design the modern death penalty system to work this way. Nevertheless, the facts show this is how the system has worked since 1976.

Executions themselves may be cruelly botched. Although the injection protocols used in most states demands some degree of medical training, doctors and anesthesiologists following professional ethical rules refuse to participate. Lethal injections are administered by corrections department personnel following protocols that invite error and, increasingly, litigation.

What Next?

Our evidence makes clear that America's death penalty not only retains the flaws that led the Supreme Court to declare it unconstitutional in *Furman v. Georgia*, but has become worse due to newer systematic flaws – including huge costs, excessive delays, high rates of reversal, botched executions, and last-minute stays. The Supreme Court will likely have the ultimate say about this inherently unfair system. In the meantime, more states may follow the lead of those that have recently moved to abolish the death penalty altogether – through legislative action.

Read more in Frank R. Baumgartner, Marty Davidson, Kaneesha R. Johnson, Arvind Krishnamurthy, and Colin P. Wilson, *Deadly Justice: A Statistical Portrait of the Death Penalty* (Oxford University Press, 2018).