

To Be Equal

Death penalty opens door to 'arbitrary, irrational sentencing'

Supreme Court Justice Harry A. Blackmun created quite a stir last month when he wrote an extraordinary dissent in a death penalty case.

"From this day forward," the justice wrote, "I no longer shall tinker with the machinery of death." And he said that "the death penalty experiment has failed," and is unconstitutional.

He dropped this bombshell into the midst of a public debate on crime that seems limited to calls for longer and mandatory sentences and broader application of the death penalty.

So he has injected a note of common sense and caution into a debate moving toward the irrational and reckless.

The justice pointed to the fundamental contradiction behind the court's maintenance of the death penalty.

The court has ruled that the death penalty is not an unconstitutional "cruel and unusual punishment," but only if the death penalty is imposed fairly and with reasonable consistency.

At the same time, since the death penalty is so severe and irrevocable, the court ruled that juries can consider evidence that would influence their choice of a penalty.

The conflict between the fairness and consistency doctrine and jury discretion in imposing the death sentence was exposed in Justice Blackmun's dissent.

He correctly pointed out that statutes or procedures intended to eliminate arbitrariness from the imposition of the death penalty would also limit a jury's ability to tailor a sentence to the circumstances of the offense and the offender.

And statutes and procedures designed to give juries and judges greater discretion in imposing the death penalty would "throw open the back door to arbitrary and irrational sentencing."

That has allowed a clear pattern of racial discrimination in the way the death penalty is administered. Most murder victims in the United States are African Americans, but the death sentence is more likely in cases where the victim is

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white.

The government's General Accounting Office reports that blacks who kill whites get the death sentence at "nearly 22 times the rate of blacks who kill blacks and more than seven times the rate of whites who kill blacks."

This most serious of penalties remains trapped in a web of racial prejudice and irrational arbitrariness, and current trends can only make the problem far worse.

The Supreme Court majority seems determined to restrict the rights of appeal and continues to uphold the death penalty even in cases where evidence of arbitrariness is clear.

And the crime bill now before the Congress would greatly expand the death penalty for federal crimes, although most experts agree that the penalty has no impact on public safety and does not deter criminals from committing those crimes.

Further, no matter how fair a trial is, mistakes can happen. Over the past two decades, 48 people have been freed from Death Row because evidence of their innocence was discovered.

Proponents of the death penalty claim that the Constitution does not bar it and even refers to "capital" crimes. But the Constitution is a living document, and what passed for normal state behavior in the 1790s can no longer be deemed normal in the 1990s.

The death penalty is a throwback to the law of the jungle. It demeans a civilized state. When the government kills in revenge it lowers itself to the status of the criminal and undermines its moral authority.

Justice Blackmun has moved from supporting the death penalty to opposing it. His colleagues on the court should now join him.

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