

When blind justice kills, the innocent die

by Gail G. Billington

Congregation of the Condemned: Voices against the Death Penalty

edited by Shirley Dicks

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Shirley Dicks has contributed a useful resource book on the application of the death penalty in the United States. If you've never read a book on the subject, this one will give the outlines of the problem, with the names of individuals and organizations actively engaged to end capital punishment.

Congregation of the Condemned is a compilation of personal statements from death row inmates and their families; families of victims of capital crimes; legal and medical experts; political and religious leaders; and from organizations that actively oppose the death penalty. The consensus is that capital punishment is legalized murder, perpetuating the very crime it was intended to stop, creating its own victims, and applied arbitrarily and overwhelmingly against those too poor and disabled to defend themselves. It is a throwback to a barbaric age of retributive law and an absolute rejection of that concept of man embedded in the Gospels of the New Testament, which have been the cornerstone of our civilization since the Crucifixion of Christ.

In this review, I intend to focus on two areas, without necessarily reviewing each contribution, to highlight the most horrific dimensions of the problem. I urge those interested to consult the organizations listed in Part Four of the book for further reading materials.

When murder becomes the law

In 1972, the U.S. Supreme Court in *Furman v. Georgia* ruled 5-4 that the death penalty as then applied constituted "cruel and unusual punishment," based on its arbitrary, "freakish," and "racist" application. Four years later, in *Gregg v. Georgia* and two companion cases, *Proffitt v. Florida* and *Jurek v. Texas*, the Court ruled 7-2 to reinstate the death penalty under revised statutes that ordered judges or juries to weigh aggravating or mitigating circumstances in a separate sentencing hearing before imposing a death sentence or life imprisonment on those convicted of capital crimes. Gary Gilmore was the first to die under these statutes in January 1977. Approximately 143 others have followed, and 36 states have adopted similar statutes.

The death penalty today is as arbitrary, capricious, and racist as in 1972. Worse, in the intervening years, the Rehnquist Supreme Court has made clear its intent to strip away constitutional safeguards against wrongful executions and to kill faster and more efficiently, with fewer and fewer questions asked.

Editor Shirley Dicks's eldest son, Jeff, has spent the last 13 years on Tennessee's death row, wrongly convicted as an unwitting accessory to a murder he neither witnessed nor committed, victimized by a bungled defense at trial, where the misuse of circumstantial evidence and manipulated testimony against him were allowed, and stymied in his appeals for lack of money.

Jeff Dicks's situation is not the exception among the over 2,300 people on death row in this country. The evidence is undeniable that the majority on death row are there because they are too poor to defend themselves. At least 300 are certifiably mentally retarded; in Virginia, the estimate is that

30% are retarded, and 70% are borderline. As of February 1989, twenty-seven death row inmates were under the age of 18 at the time of the crimes for which they were convicted. In the last two years, the Supreme Court has permitted the execution of minors and the mentally impaired; at least six have been executed.

Nationwide an estimated 41% of death row inmates are black; 84% of those executed since 1976 were convicted in the murder of a white person, although half of all murder victims in the United States are black. No white has been executed for killing a black in that period. In California, the death row population is disproportionately Hispanic. Sixty-three percent of all death row inmates are in the South, where 90% of all executions have taken place since 1976. Texas, Georgia, and Florida account for three-quarters of that 90%.

Let's stop kidding ourselves about who is being given the "ultimate punishment" and why.

The United States today stands alone among "advanced," "democratic," "civilized" nations in killing its citizens. It is one of seven countries that has carried out 80% of all executions in the world in the last decade. The other six are the Soviet Union, Nigeria, South Africa, China, Iran, and Pakistan. This past year, President George Bush mounted a major fight to add 59 new crimes to the list of those eligible for the death penalty and to further strip the appellate rights of death-row inmates. President Bush, like Chief Justice William Rehnquist, has an insatiable appetite for human blood.

Eyewitness to judicial barbarism

Like Shirley Dicks, this reviewer first became acquainted with the nightmare of our criminal system through personal experience. My husband Michael, age 46, stands twice convicted for his activities as a political fundraiser for publishing companies that promoted the policies of Democratic presidential candidate Lyndon H. LaRouche, Jr. Mike was convicted and sentenced in federal court along with Mr. LaRouche on Jan. 27, 1989 on charges of "mail fraud" in the solicitation of political loans. Eight months later he was tried in Virginia, using the same loan solicitation evidence and the same witnesses, and convicted of "securities fraud." Mike received a 3-year sentence in federal court, and 77 years in Virginia for \$76,000 in loans. Shortly after I began reading Mrs. Dicks's book, Virginia's Court of Appeals upheld Mike's conviction and 77-year sentence.

I spent the better part of the last three years visiting Mike at medium-security federal prisons. I know the routine; I have run the emotional gauntlet that goes with it. There is no question that death row is orders of magnitude beyond that, but when Mike was returned to Virginia custody last year, he was on the same floor as former death row inmate Joe Giarratano, whose celebrated metamorphosis in prison best exemplifies the total bestiality of the system which denies that a human being can be thus redeemed.

The high cost of fighting for your life

If you are charged with a capital crime in this country, you'd better be rich or very lucky. The quality of legal representation in a capital trial can be the difference between life and death. David Gottlieb, professor of law at the University of Kansas, reports in *Congregation of the Condemned* on why capital cases are so expensive:

- Capital cases take an average of three times longer to litigate, with far greater use of experts and investigators. Guilty pleas are a rarity. Selecting a jury, for example, requires jury members qualified to rule on guilt and punishment, i.e., life imprisonment or death. Trial preparation in each case requires an average 800-1,000 attorney manhours.

- An entirely separate trial is required for sentencing if the jury returns a guilty verdict.

- If the death penalty is imposed, a long appeal process ensues, including direct appeal to the state supreme court, a petition for *certiorari* to the U.S. Supreme Court, post-conviction applications in state courts and appeals of those, post-conviction applications in federal court and appeals of those to a U.S. Court of Appeals; second, and sometimes third, appeals to the U.S. Supreme Court, and, finally, a petition for state clemency. The appeals process alone can take more than 10 years at a cost 10 times the ordinary murder conviction appeal.

- During this appeal process, the defendant is placed on death row, where each inmate is housed in a solitary cell and is not allowed to contribute to the costs of his upkeep by working in prison industry. The estimated costs for such a facility run from \$75,000 to \$100,000 per bed. Shirley Dicks reports that it costs the state \$800,000 to house an inmate for 20 years; the average stay is 8 years.

Former U.S. Attorney General Ramsey Clark, in commenting on the death penalty in the United States, stated that a good criminal attorney will make (or ask for) \$100,000 to \$500,000 for a capital case. Studies in Kansas, New York, and Florida show that states spend from \$1.6 to \$3.2 million to obtain and carry out a capital sentence.

Amnesty International reports that over 90% of all prisoners sentenced to death in the United States have no financial resources of their own. Others estimate that 75% did not have competent counsel at trial. Public defenders or court-appointed lawyers are overworked, underpaid, and frequently have little if any experience in capital cases, and no resources to conduct an adequate defense.

Among six Southern states with the highest rates of death penalty convictions, Texas, Georgia, Mississippi, and Alabama have no statewide public defender program; in Louisiana and North Carolina, defendants are usually assigned counsel. Alabama, Arkansas, Louisiana, and Mississippi cap total compensation to court-appointed defense counsel in a capital case at \$1,000; South Carolina, \$10 per hour up to \$1,500; Florida, \$3,500. One judicial circuit in Georgia awarded capital cases to the lowest bidder.

The result in Texas is that capital defendants represented

at trial by court-appointed counsel were twice as likely to receive the death sentence.

Capital defendants receive no mandatory aid for legal appeals beyond the first confirmation of their sentence in state court. Beyond that, prisoners are on their own or must rely on "volunteer" counsel. The one exception is Florida, which has one of the highest rates of execution. In 1985, the Capital Collateral Representative office was created to take cases past the automatic first appeal stage. With 10 staff

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lawyers and several investigators, this office has won reversal of 50% of its death penalty cases because they have proved prosecutorial misconduct, ineffective defense counsel at trial, or the discovery of new evidence.

That there is some hope for death row inmates or capital defendants in the South is largely due to the heroic efforts of people like Joe Ingle, cofounder of the Southern Coalition on Jails and Prisons, who ministers to this "Congregation of the Condemned," and Marie Deans, Death Penalty Legal Defense Coordinator in Virginia, both of whom have contributions printed in this volume. This reviewer was introduced to this horror story by reading the 1990 congressional testimony of Stephen B. Bright, director of the Southern Prisoners' Defense Committee, which was created by the Southern Coalition on Jails and Prisons as a legal assistance program in 1976, and which is also represented in Mrs. Dicks' book.

The innocent pay the ultimate price

The consequence of this failed representation of capital defendants at trial and on appeal is that the innocent have been and are being put to death, not just those who have committed the most heinous crimes. Several of the book's contributors cite the results of a book-length study published in the *Stanford Law Review* by Prof. Hugo Bedau of Tufts University in Massachusetts and Prof. Michael Radelet of the University of Florida, entitled "Miscarriages of Justice in Potential Capital Cases." In their research, the authors

found 350 cases of defendants in this century convicted of capital or potentially capital crimes, and often sentenced to death, who were subsequently proven to be innocent of the charges. Of those 350, twenty-three were executed. According to Gov. Mario Cuomo, eight were in New York.

Shirley Dicks also reports that, since the 1972 *Furman* decision, 23 defendants sentenced to death were later freed because of doubts about their guilt, and one was executed despite such doubts.

Both Professors Bedau and Radelet contributed to *Congregation of the Condemned*, and it is my hope to devote an entire review to their lengthy study in a future issue. For now, I will simply highlight Professor Bedau's remarks. He reports that in the last 60 years, over half a million murders have been committed in the United States, as compared to only 4,000 executions. If we are to accept the arguments of pro-death penalty spokesmen, it might be comforting to think that maybe those 4,000 were the worst of the worst criminals in captivity. The truth, says Professor Bedau, is the opposite. He is quick to point out that it is not possible to extrapolate from the 23 wrongful executions reported in the joint study to reach an estimate of the total number of wrongful executions from the 7,000 executions carried out in the United States since 1900. In order to do that, new work must be done.

However, Professor Bedau states: "In virtually every year in this century, in some jurisdiction or other, at least one person has been under death sentence who was later proved to be innocent. Based on this evidence, it is virtually certain that at least some of the nearly 2,000 men and women currently under sentence of death in this country are innocent."

Professor Bedau reports that nearly one-quarter of the 350 cases of wrongful conviction were due to "clear injustices perpetrated by the police." Nearly half of those injustices were caused by coerced confessions. In 22 instances, the police secured perjured testimony against the defendant in exchange for more lenient treatment for a crime committed by the lying witness. Suppression of exculpatory evidence is a third major factor.

Finally, Bedau points to two decisions by the Supreme Court that he says suggest that the Court "does not judge the risk of wrongful conviction to be so great as to warrant certain minor modifications in the imposition of the death penalty." In 1984, the Court refused to require a simple majority vote of jurors to impose death at sentencing. In 1986, the Court refused to prohibit the exclusion of jurors in capital cases who oppose the death penalty.

On reading this last point, this reviewer was so provoked that I frantically tried to confirm what Bedau meant. Unable to reach him, I contacted Professor Radelet by phone, who informed me that three states, Indiana, Alabama and Florida, allow trial judges to impose the death sentence, overriding a jury recommendation of life imprisonment. This has happened twice in Indiana, 15 to 20 times in Alabama, 130 times in Florida where 3 subsequent executions occurred.