

The Washington Post

OUTLOOK

Front Page

Sunday, December 03, 2000

Among Killers, Searching For the Worst of the Worst

By ROBERT BLECKER

From 1986 to 1999, I wandered with extraordinary freedom inside Lorton Central prison, questioning more than a hundred street criminals, mostly murderers, to find out why they killed and to try to figure out what punishment they deserve. It was a perfect observatory for me: As a criminal law professor and death penalty supporter who believes that our death penalty statutes need to be refined on moral grounds, I was there to interview a different kind of "expert."

Not that criminals' eyes should be our only guiding lights, but by understanding their attitudes, I believe we can better punish their acts proportionately to their evil.

"You stick up a guy, and he pulls a shotgun"—I offered this all too familiar case to David "Itchy" Brooks, 62. Itchy admits to killing more than once, though he vigorously denies the specific murder for which he's doing 20 years to life.

"He's foolish," said Itchy.

"But he doesn't deserve to die for protecting what's his," I insisted.

"I don't deserve to die, neither. Not for a robbery. He's made a choice, *he's elevated it*. It's out of my hands."

"So you claim that killing him would be self-defense?" I said skeptically.

"Not according to the law, but to me," insisted Itchy. "It's different when you take the life of someone who's trying to kill you."

"What about the guy who says, 'This is a stickup. Give me your wallet?'" I continued. "The victim hands over the wallet and the robber still shoots him right in the face?"

Itchy considered.

"If that's it—cut and dried like that—pull the switch on him. Give him his juice."

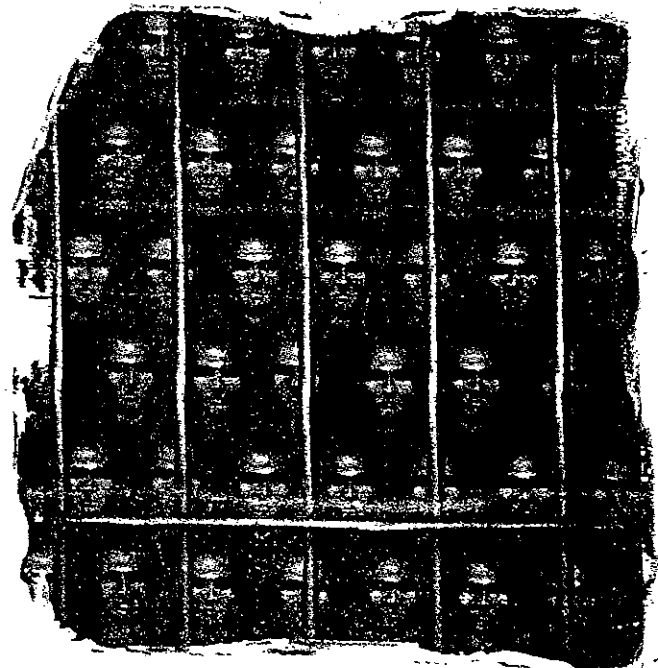
I am a "retributivist" supporter of the death penalty. That is, I believe that some people kill so viciously, with an attitude so callous or cruel, that they deserve to die—and society has an obligation to execute them. But the obligation extends only to the most wicked: We need fewer death sentences, more justly applied. I would argue that the vast majority of the 3,700 murderers on death row today should, instead, spend the rest of their lives in prison. Our responsibility is to figure out who should be included in that small minority—the very worst of the worst—who deserve to die.

We have been making such distinctions throughout our history. In 1675, William Penn shrunk the number of capital offenses in his Quaker colony from 200 to one: murder. A little more than a hundred years later, Pennsylvania again led the way. Declaring that "murder[s] differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment," the state legislature restrict-

ed the death penalty to, and mandated it for, murder in the first degree—defined as a "willful, deliberate and premeditated killing," or one "committed in the perpetration of any arson, rape, robbery or burglary." Other states soon followed suit.

Morally, however, both parts of this simple formula were flawed. An impulsive killing might be more vicious than one committed after agonizing deliberation. And many murders committed "in the perpetration" of a felony did not automatically deserve the death penalty.

Jurors instinctively knew this. And over the ensuing decades, they often violated their oaths by acquitting the clearly guilty rather than sentencing them to what they felt was an undeserved death. States responded—beginning in 1838 with Tennessee—by abandoning all attempts to mandate the death penalty, and left the choice in capital cases entirely up to juries. But in 1972, the U.S. Supreme Court ruled that this system of absolute discretion was "arbitrary and capricious," and therefore unconstitutional.



Robert Blecker, a professor of criminal law at New York Law School, is writing a book about the death penalty to be published next year.

A Different Approach to the Death Penalty

So states began enacting new death penalty statutes, based largely on the "Model Penal Code," drawn up by academic experts in 1959. This proposal laid out factors "of aggravation and of mitigation" that had to be weighed before a defendant was sentenced to death.

In accepting these new statutes, the Supreme Court has insisted that the death penalty must be imposed only for "particularly serious" murders, and that capital punishment must be a "reasoned moral response" to the defendant's "character and crime."

States have done their best. It has not been good enough. Thus, seeking a better way to judge murderers, I looked not only in law books, but in Lorton Central.

A thick scar snakes around Itchy's neck, the remains of a legendary confrontation when he was serving an earlier sentence at 19. Unarmed and naked in the prison shower, he was attacked by three guys wielding a knife, a razor and an ice pick. By the time guards reached him, Itchy's head was barely attached to his slashed-up body—but two of his attackers were dead, and the third was fleeing. When I first met him 30 years later, Itchy, prison boxing coach and law librarian, was a role model for tough old convicts and a magnet for the youngsters inside. And, for the next 13 years, an invaluable source of insight for me.

Many convicts categorically denounce the death penalty, or any other punishment, for that matter. A surprising number, however, facing a lifetime inside, become introspective and interested in discussing a subject in which they are undoubtedly well-versed: murder and its aftermath.

Over the years, I have tried to put their opinions and insights in context, to examine them through a coherent moral and legal lens. Seeking to obey the Supreme Court's call for a "reasoned moral response" to the question of punishing murder, I often found myself recalling Itchy's core moral principle: "It's different when you do somebody who's trying to do you"—a variation on the classic "do unto others."

Consider the charge that has put more people on death row than any other—murder in the course of a robbery. Robbery is the most common "aggravating circumstance" that turns murder into capital murder. The conventional reasoning is simple: Life is sacred; property is not. An armed robber seemingly comes prepared to kill over money—in the words of the law, "from a pecuniary motive." But that is not necessarily true.

As the older, professional stickup boys like Itchy emphatically assert, the more important moral distinction to make is whether or not the victim was resisting. The felon who kills a victim who has "bucked a stick-

up" by pulling a weapon of his own has definitely *robbed* from a pecuniary motive—but he did not *kill* from a pecuniary motive.

I've considered this for years—not just from the convicts' point of view, but from the law's. And I have come to believe that, in the context of "capital robbery murder," we should reserve the death penalty for the robber who kills an unresisting victim.

What about the robber who kills to eliminate his victim as a witness? Here the professional lawbreakers mostly concur with professional law enforcers: He's a selfish coward and deserves to die. A robber should "mask down" to hide his identity, they say, or take his chances.

But, then, not all witnesses are alike. Killing an innocent bystander who happens to see a crime in progress is one thing; killing a paid informant who has made a deal with the government is another, the inmates told me. "If you [are] in the army and get captured by the enemy, and you tell where everybody in your platoon is, I feel you need to be killed," explained Itchy. "It's the same thing with us. Whatever you have chosen to be about, you should stick by the code."

It makes sense to me. A felon who has turned state's evidence—who has "flipped the script"—may deserve witness protection, in a world where deals are part of law enforcement. But if that protection fails, his killer should be caged, not executed. There is a code, however perverse, at work: That killer is simply not the worst of the worst.

Let me repeat: I am not saying any murderers should "get off" lightly—they should be locked up for life, and the most vicious among them should be put to death. But the death penalty is too final and profound a punishment to be administered wholesale.

Return for a moment to that "pecuniary motive" aggravator, and consider the hired killer. Most states single out such killers for execution, along with those who pay them. Should they? I put the question to Robert Dent, a former drug lieutenant in his early twenties. Unlike many of the younger convicts I met, he was known for having principles on the street; the older guys said Dent never killed unless he "had to."

"What about a hired killer?" I asked. "What about a guy who will take out anybody? Isn't he different from you? Doesn't he deserve to die?"

Dent considered carefully, but did not agree. "Hit men get paid for what they do," he said. "It's a job with them. It's wrong, but I would respect the person that killed for money more than I would respect the person that's just killing for fun."

Most convicts agreed. Street criminals are among the most ardent capitalists I've met; they believe that hard work and effort should and will be rewarded. "Every man's entitled to his own hustle," they say. And: "Society do the same thing we do; they just call it by a different name."

Certainly straight society sometimes rewards people who endanger life from that purest of motives, the profit motive: corporate executives—I call them red-collar killers—who maintain lethal workplaces or sell lethal products. We should address that problem. But Dent is wrong. "It's a job" doesn't change the fact that killers for hire deserve to die.

In short, if we want to respond to the high court's call for a "reasoned moral response" to murder, we should revise death penalty statutes to include the aggravating circumstances "killing an unresisting victim," "killing from a pecuniary motive" and "killing to eliminate an innocent witness." Then we could and should drop the grossly overbroad "capital robbery murder" aggravator altogether. The worst of the worst could still get the death penalty; the lesser killers would be sentenced to life in prison.

As an added bonus, we would largely cleanse the death penalty process of racism: Capital punishment studies have consistently demonstrated that racial bias operates almost exclusively in these "mid-range" murder cases—such as the common murder in the course of a robbery. Refining the aggravating circumstances in those cases would undoubtedly make sentencing less arbitrary, and less prone to bias.

Balanced against the aggravating factors, jurors consider mitigators—reasons to spare a killer's life. Here, too, we need to take a fresh look.

One common factor that mitigates against a death sentence is that the killer's "capacity to appreciate the criminality of his conduct" was impaired by alcohol or drugs. On this question, street criminals, like straight society in general, disagree among themselves. Leo Simms, an addict himself, took a hard line.

"I say kill him, because I've been shooting heroin all my life and I ain't never killed. I mean, trying to get the drug is a must, but I'm aware of what I'm doing," he said. "... I'm not so fogged up that I can use that as a reason for taking your life. That don't excuse me from the death penalty."

But crack and PCP are different, everyone agrees. Crack makes a user vicious and desperate he'll do anything to get more; PCP makes him feel at once paranoid and omnipotent.



BY JON KRAUSE FOR THE WASHINGTON POST

Getting the View From Lorton

Lorton Correctional Complex—the District of Columbia prison system located in Northern Virginia—is now all but shut down, but it served me long and well. My access to the inmates began with the late John Allen, a convicted robber with a lot of influence on the inside. Johnny opened up to me as a favor to his lawyer, Philip B. Heymann, my former law professor at Harvard. Heymann once got Johnny off on a robbery charge, then helped Johnny write his autobiography and get it published.

Now, busted again—this time for a robbery he pulled while he was confined to a wheelchair (they respect that on the inside)—Johnny was happy to introduce me to his fellow inmates and vouch for me as “all right.”

As former chief of the Criminal Division of the U.S. Justice Department, Heymann also helped get permission from the authorities for my research. Walter Ridley, director of the D.C. Department of Corrections at the time, allowed me unrestricted access to the prisoners. Wardens James Bragg and David Roach could easily have imposed crippling security restrictions, but instead they embraced my study.

And so prisoners were permitted to talk with me in comfortable settings—classrooms, trailers and administrative offices—unshackled and with no guards present. I could bring them candy and cigarettes; some sessions lasted all night. These meetings went on at regular intervals for 13 years.

—Robert Blecker

Gleno Waters, 29, remembered that he was at his best friend's house watching a ballgame on TV, stoned on PCP and crack. “I walk in the kitchen and I see a butcher knife sitting in the sink. And I grab it, because the lights was out,” he recalled. “It was dark. So [my friend] come out of the bathroom and the next thing I know he's on the floor, balled up, saying, ‘Why you do this to me?’”

“‘Why I do what?’ I gave him the phone. He dialed 911 and said, ‘I've been stabbed.’ . . . I killed a good friend.”

I put the case to Itchy. “When somebody kills under the influence of crack or PCP,” I asked, “should that mitigate to spare his life?”

“If he's responsible for taking the drug, then he's responsible for what comes as a result of that.” Itchy paused. “I don't know, maybe in some cases—but how would you know which ones were which?”

In general, I found that drug-using street criminals agree: Except for crack and PCP, drugs generally don't make you a different person. They loosen inhibitions, amplify the user's personality. Or, as one convict said, they “take you where you want to go, only more so.”

Thus, using the killers' own experience, I have come to believe that the standard mitigator “killed under the influence of alcohol or any other drug” is too broad. The mitigation should be limited to a drug that significantly diminished the killer's mental capacity and self-control, and then only if the killer was not aware while sober of the drug's probable effect on him and did not get high to summon the courage to kill.

A great majority of the American people support the death penalty for those who deserve it. I hope that someday soon, DNA testing, adequate defense counsel, and swift but detailed judicial and executive review will give juries near absolute certainty of guilt before they consider execution. But our mechanism for deciding the great moral question—whether this or that killer deserves to die—still needs refinement.

Execution is society's ultimate sanction, to be threatened rarely and applied even more rarely. We must rethink the death penalty, revise and refine our statutes. If we consult the experts—including killers—and rethink it right, I am convinced we will end up converting the sentences of thousands of murderers presently on death row to life imprisonment.

The remaining few hundred monsters we should execute.