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Edited by David Leonhardt

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The Upshot
UNUSUAL PUNISHMENT

Life in Prison, With the Remote Possibility of Death

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Justin Wolfers

On Wednesday, a federal judge ruled that California's use of capital punishment was unconstitutional because the system was excessively arbitrary.

The arbitrariness that United States District Court Judge Cormac Carney highlighted is not that too many prisoners are being executed with insufficient due process, but that prisoners on death row are rarely executed, and when executions do occur, it is only after a lengthy and unpredictable delay.

This is unconstitutional, he argues, because a system "where so many are sentenced to death but only a random few are actually executed" is so arbitrary as to violate the Eighth Amendment's protections against "cruel and unusual punishments."

Judge Carney's ruling calls into question a delicate political equilibrium that allows the public both to demand that their lawmakers pledge fealty to the death penalty when running for election, while not actually having to stomach the enormous number of executions that a systematic program of capital punishment would entail. The result is that death penalty statutes remain on the books in most states as death row continues to expand, yet relatively few are actually executed.

Some numbers put all this in perspective. The F.B.I. reports there were 14,827 cases of homicide or non-negligent manslaughter in 2012, of which 11,298 occurred in jurisdictions that have the death penalty. Research indicates that around one-fifth to a quarter of these homicides were for capital-eligible crimes, suggesting there were around 2,500 capital-eligible homicides in 2012, which is both high by global standards and much lower than in previous decades.

Yet there were only 45 executions last year. When fewer than one in 50 capital-eligible homicides leads to the death chamber, it is clear that capital punishment is rare.

Capital punishment is not only rare, but it's also an extraordinarily long and drawn-out process. In total, there were 3,033 prisoners on death row at the end of 2012. The fact that so many receive death sentences but so few are killed tells us that many prisoners are living decades on death row.

A simple thought experiment makes the point: If a death sentence puts you at the back of the queue of 3,000 prisoners to be executed, and only 50 people are executed each year, then it would take you, on average, 60 years to reach the front of the line. Not surprisingly, many die of natural causes while waiting their turn.

The rate of executions is sufficiently low relative to the number of death sentences handed out that the economists Lawrence Katz, Steven Levitt and Ellen Shustorovich have calculated that "the execution rate on death row is only twice the death rate from accidents and violence among all American men." Once you take account of the violent life circumstances of many murderers, they argue, death row may actually be safer than life on the street.

The numbers are particularly striking in California, where over 900 people have been sentenced to death since 1978, with only 13 executions. Ninety-four of these prisoners have died of other causes (suicide or natural causes), while 39 others were released from death row.

California has issued over 100 new death sentences since 2006, but it has not performed a single execution.

Although California is a particularly striking example, it's by no means an exception. Pennsylvania has 185 prisoners on death row but hasn't executed any since 1999.

Even in the states with active death chambers, the pattern isn't that different. Florida had 403 prisoners on death row in 2012 but executed only three of them. Although Texas is the most active executioner, it still only executed 15 of the 290 people on death row. The closest we have to exceptions are Oklahoma and Mississippi, which each executed six prisoners, from relatively small death row populations of 55 and 49.

In a typical year, fewer than a dozen of the 32 states with active death penalty statutes will perform any executions.

And so we continue with our odd political compromise of sending people to death row, but rarely executing them. The result, as Judge Carney observed, is that in the United States, the death sentence is effectively a sentence of "life in prison, with the remote possibility of death."

Justin Wolfers is a senior fellow at the Brookings Institution and professor of economics and public policy at the University of Michigan. Follow him on Twitter at @justinwolfers.

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