

A lecturer and consultant on the death penalty, attorney David Bruck (1949-) has represented numerous death row clients. He has published articles in the Washington Post and the New York Times and has discussed capital punishment on a variety of national television programs. Writing in response to Ed Koch's argument in favor of the death penalty, Bruck prepared the following piece, which first appeared in the New Republic in 1985.

The Death Penalty

by David Bruck

Mayor Ed Koch contends that the death penalty “affirms life.” By failing to execute murderers, he says, we “signal a lessened regard for the value of the victim’s life.” Koch suggests that people who oppose the death penalty are like Kitty Genovese’s neighbors, who heard her cries for help but did nothing while an attacker stabbed her to death.

This is the standard “moral” defense of death as punishment: even if executions don’t deter violent crime any more effectively than imprisonment, they are still required as the only means we have of doing justice in response to the worst of crimes.

Until recently, this “moral” argument had to be considered in the abstract, since no one was being executed in the United States. But the death penalty is back now, at least in the southern states, where every one of the more than 30 executions carried out over the last two years has taken place. Those of us who live in those states are getting to see the difference between the death penalty in theory, and what happens when you actually try to use it.

South Carolina resumed executing prisoners in January with the electrocution of Joseph Carl Shaw. Shaw was condemned to death for helping to murder two teenagers while he was serving as a military policeman at Fort Jackson, South Carolina. His crime, propelled by mental illness and PCP, was one of terrible brutality. It is Shaw’s last words (“Killing was wrong when I did it. It is wrong when you do it. . .”) that so outraged Mayor Koch: he finds it “a curiosity of modern life that we are being lectured on morality by cold-blooded killers.” And so it is.

But it was not “modern life” that brought this curiosity into being. It was capital punishment. The electric chair was J.C. Shaw’s platform. (The mayor mistakenly writes that Shaw’s statement came in the form of a plea to the governor for clemency: actually Shaw made it only seconds before his death, as he waited, shaved and strapped into the chair, for the switch to be thrown.) It was the chair that provided Shaw with celebrity and an opportunity to lecture us on right and wrong. What made this weird moral reversal even worse is that J.C. Shaw faced his own death with undeniable dignity and courage. And while Shaw died, the TV crews recorded another “curiosity” of the death penalty – the crowd gathered outside the death-house to cheer on the executioner. Whoops of elation greeted the announcement of Shaw’s death. Waiting at the penitentiary gates for the appearance of the hearse bearing Shaw’s remains, one demonstrator started yelling, “Where’s the beef?”

For those who had to see the execution of J.C. Shaw, it wasn’t easy to keep in mind that the purpose of the whole spectacle was to affirm life. It will be harder still when Florida executes a cop-killer named Alvin Ford. Ford has lost his mind during his years of death-row confinement, and now spends his days trembling, rocking back and forth, and muttering unintelligible prayers. This has led to litigation over whether Ford meets a centuries-old legal standard for mental competency. Since the Middle Ages, the Anglo-American legal system has generally prohibited the execution of anyone who is too mentally ill to understand what is about to be done to him and why. If Florida wins its case, it will have earned the right to electrocute Ford in his present condition. It is loses, he will not be executed until the state has first nursed him back to some semblance of mental health.*

* On June 26, 1986, the Supreme Court prohibited the execution of convicted murderers who are so insane they do not understand they will be executed. However, if Ford regains his sanity, Florida may execute him.

We can at least be thankful that this demoralizing spectacle involves a prisoner who is actually guilty of murder. But this may not always been so. The ordeal of Lenell Jeter – the young black engineer who recently served more than a year of a life sentence for a Texas armed robbery that he didn't commit – should remind us that the system is quite capable of making the very worst sort of mistake. That Jeter was eventually cleared is a fluke. If the robbery had occurred at 7 p.m. rather than 3 p.m., he'd have had no alibi, and would still be in prison today. And if someone had been killed in that robbery, Jeter probably would have been sentenced to death. We'd have seen the usual execution-day interviews with state officials and the victim's relatives, all complaining that Jeter's appeals took too long. And Jeter's last words from the gurney would have taken their place among the growing literature of death-house oration that so irritates the mayor.

Koch quotes Hugo Adam Bedau, a prominent abolitionist, to the effect that the record fails to establish that innocent defendants have been executed in the past. But this doesn't mean, as Koch implies, that it hasn't happened. All Bedau was saying was that doubt concerning executed prisoners' guilt are almost never resolved. Bedau is at work now on an effort to determine how many wrongful death sentences may have been imposed: his list of murder convictions since 1900 in which the state eventually admitted error is some 400 cases long. Of course, very few of these cases involved actual executions: the mistakes that Bedau documents were uncovered precisely because the prisoner was alive and able to fight for his vindication. The cases where someone is executed are the very cases in which we're least likely to learn that we got the wrong man.

I don't claim that executions of entirely innocent people will occur very often. But they will occur. And other sorts of mistakes already have. Roosevelt Green was executed in Georgia two days before J.C. Shaw. Green and an accomplice kidnapped a young woman. Green swore that his companion shot her to death after Green had left, and that he knew nothing about the murder. Green's claim was supported by a statement that his accomplice made to a witness after the crime. The jury never resolved whether Green was telling the truth, and when he tried to take a polygraph examination a few days before his scheduled execution, the state of Georgia refused to allow the examiner into the prison. As the pressure for symbolic retribution mounts, the courts, like the public, are losing patience with such details. Green was electrocuted on January 9, while members of the Ku Klux Klan rallied outside the prison.

There is another sort of arbitrariness that happens all the time. Last October, Louisiana executed a man named Ernest Knighton. Knighton had killed a gas station owner during a robbery. Like any murder, this was a terrible crime. But it was not premeditated, and is the sort of crime that very rarely results in a death sentence. Why was Knighton electrocuted when almost everyone else who committed the same offense was not? Was it because he was black? Was it because his victim and all 12 members of the jury that sentenced him were white? Was it because Knighton's court-appointed lawyer presented no evidence on his behalf at his sentencing hearing? Or maybe there's no reason except bad luck. One thing is clear: Ernest Knighton was picked out to die the way a fisherman takes a cricket out of a bait jar. No one cares which cricket gets impaled on the hook.

Not every prisoner executed recently was chosen that randomly. But many were. And having selected these men so casually, so blindly, the death penalty system asks us to accept that the purpose of killing each of them is to affirm the sanctity of human life.

The death penalty states are also learning that the death penalty is easier to advocate than it is to administer. In Florida, where executions have become almost routine, the governor reports that nearly a third of his time is spent reviewing the clemency requests of condemned prisoners. The Florida Supreme Court is hopelessly backlogged with death cases. Some have taken five years to decide, and the rest of the Court's work waits in line behind the death appeals. Florida's death row currently holds more than 230 prisoners. State officials are reportedly considering building a special "death prison" devoted entirely to the isolation and electrocution of the condemned. The state is also considering the creation of a special public defender until that will do nothing else but handle death penalty appeals. The death penalty, in short, is spawning death agencies.

And what is Florida getting for all of this? The state went through almost all of 1983 without executing anyone: its rate of intentional homicide declined by 17 percent. Last year Florida executed eight people – the most of any state, and the sixth highest total for any year since Florida started electrocuting people back in 1924. Elsewhere in the U.S. last year, the homicide rate continued to decline. But in Florida, it actually rose by 5.1 percent. 13

But these are just the tiresome facts. The electric chair has been a centerpiece of each of Koch's recent political campaigns, and he knows better than anyone who little the facts have to do with the public's support for capital punishment. What really fuels the death penalty is the justifiable frustration and rage of people who see that the government is not coping with violent crime. So what if the death penalty doesn't work? At least it gives us the satisfaction of knowing that we got one or two of the sons of bitches. 14

Perhaps we want retribution on the flesh and bone of a handful of convicted murders so badly that we're willing to close our eyes to all of the demoralization and dangers that come with it. A lot of politicians think so, and they may be right. But if they are, then let's at least look honestly at what we're doing. This lottery of death both comes from and encourages an attitude toward human life that is not reverent, but reckless. 15

And that is why the mayor is dead wrong when he confuses such fury with justice. He suggests that we trivialize murder unless we kill murderers. By that logic, we also trivialize rape unless we sodomize rapists. The sin of Kitty Genovese's neighbors wasn't that they failed to stab her attacker to death. Justice does demand that murders be punished. And common sense demands that society be protected from them. But neither justice nor self-preservation demands that we kill men whom we have already imprisoned. 16

The electric chair in which J. C. Shaw died earlier this year was built in 1912 at the suggestion of South Carolina's governor at the time, Cole Blease. Governor Blease's other criminal justice initiative was an impassioned crusade in favor of lynch law. Any lesser response, the governor insisted, trivialized the loathsome crimes of interracial rape and murder. In 1912 a lot of people agreed with Governor Blease that a proper regard for justice required both lynching and the electric chair. Eventually we are going to learn that justice requires neither. 17