

A Fairness Opinion

DO YOU LIKE TO BE TREATED FAIRLY? Most people do, but let me pose another one. Suppose you needed to fly from Pittsburgh to Phoenix and were offered the last seat on the plane for a fare of \$298. If you knew that everyone else on that plane had paid \$448 per ticket, would you demand to pay the higher amount? Why not? Wouldn't that be fair?

Fairness, you see, can be a rather slippery concept.

Consider the remarks of the out-going governor of Illinois, George Ryan, who invoked the term "fairness" 25 times when he spoke about capital punishment at Northwestern University. Whether one agrees or disagrees with Governor Ryan's decision to commute the sentences of all 147 of Illinois' death-row inmates, his comments demonstrate how overuse of this seemingly simple term can lead to more confusion than clarity.

Governor Ryan first equates fairness with morality, citing the views of Nelson Mandela and the words of Reverend Desmond Tutu: "To take a life when a life has been lost is revenge. It's not justice."

One paragraph later, he equates fairness with equal treatment, quoting former California Governor Pat Brown that "no matter how fair the death penalty may seem in theory, in actual practice, it's primarily inflicted on the weak, the poor, the ignorant, and against racial minorities."

Ryan then proceeds to comment that "the capital system is haunted by the demon of error, error in determining guilt (and) error in determining who among the guilty should die." Here, fairness is defined as process accuracy, not equal treatment or morality.

Fairness, you see, is a word with an almost chameleon-like ability to take on various shades of meaning. But these nuances are important.

"Just" is a synonym of fairness that im-

plies an exact following of a standard of what is right and proper. Is capital punishment just? If one answers "no" on moral grounds (as have all member countries of the European Union), don't concerns about equitable treatment and process accuracy diminish? Does it make sense to call for the equitable application of an "unjust" principle?

Yet, these different issues are often confusingly linked. Editors of the political journal *Progressive* voice a clear and strong opinion against capital punishment: "We simply do not believe that pre-meditated, state sanctioned killing is justifiable under any circumstances." Yet, they feel compelled to add to their argument by declaring that "the death penalty is not applied consistently (and) it discriminates against minorities and the poor."

If one supports the death penalty as "just" (as do China, the Arab Middle East, much of Asia, and many Caribbean island nations), then the concept of fairness as equitable treatment is germane. Statistics reported by the General Accounting Office show that "African Americans who murder whites are 19 times more likely to be executed as whites who kill blacks." Yet, in the opinion of Ernst van de Haag, "unequal justice is still justice... and although often conflated and confused, equality and justice are different concepts."

As to statistical arguments about racial imbalance, mathematics provides an easy solution: Sentence more whites to death. But would this really satisfy those who speak out about an imbalance? Or are their positions tinged with self-interest?

Geographic imbalance also exists in this system and if the "simple mathematical solution" appears naïve, consider the recent actions of Attorney General Ashcroft, who

has specifically intervened in a dozen cases in New York and Connecticut (states currently under-represented on death row) to seek the death penalty where local prosecutors had decided otherwise.

Regarding process accuracy, Governor Ryan cites statistics that 12 death-row inmates were recently executed while 13 others were exonerated. Certainly, a 50/50 success rate is unacceptable by almost anyone's standards. But again, process accuracy and moral justice should not be confused. Just as genetic testing is invalidating some earlier decisions, more precise techniques may solidify evidence in future cases, making the process more accurate and the penalty more apt to be carried out.

The American public is ambivalent about capital punishment. Since 1980, the number of death-row inmates has quadrupled (to nearly 3,600) yet the number of executions actually carried out has remained low. At the current pace, it'll take 50 years to complete the "cycle of justice" for current inmates. Of the 800 people sentenced to death in California over the past four decades, only 10 have been executed.

Why such ambivalence? In part, I believe, because our failure to delineate questions of justice, equity, and accuracy forces us to adopt uncomfortable postures in the name of "fairness." For some, this means defending inequities and inaccuracies in the system in order to support a belief that the system is just. For others, this means scouring the system for hints of inequity and inaccuracy in order to prove the system is unjust.

As *New Republic* columnist Gregg Easterbrook notes, "there are two basic arguments against capital punishment: that it is inherently wrong and that it might be used against the wrong person." It's important to consider these questions separately. Only then, can you draw your own "fairness" opinion on this important subject. ●

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