

Death penalty carries moral, fiscal burdens

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The Supreme Court's astonishing recent decision that federal courts lack the authority in most cases to halt an execution even if the defendant is innocent (*Herrera v. Texas*) gives Massachusetts residents new cause for concern about Gov. Weld's proposal to reinstate the death penalty here.

Herrera is but the latest in a string of judicial decisions slashing away at habeas corpus, the so-called "Great Writ," which protects us from the mistakes that can occur in any court. The combination of greater use of the death penalty and the dismantling of habeas corpus is truly ominous.

A case in point: In 1986 Bobby Joe Leaster was released after spending 15 years in a Massachusetts prison for a murder he did not commit. Without postconviction remedies, he would still be in prison. If Massachusetts had a death penalty, even habeas proceedings might not have saved him.

Another case: Nine years ago, Thomas Ward was convicted of killing his father-in-law in a family quarrel in New Orleans. Ward has been on death row in Louisiana since 1984, while my colleagues and I have argued his case in state and federal habeas hearings.

Ward is on death row for a number of reasons. His court-appointed trial lawyer did virtually no investigation of his case and mounted virtually no defense. And the prosecutor in his case withheld critical evidence establishing that there had been a family quarrel. These factors led to a conviction for murder rather than manslaughter, and a death sentence rather than imprisonment.

Our inability to make fair and rational distinctions between defendants who should be put to death and those who should be given life imprisonment without parole is one of the major reasons why so many lawyers, who watch the system work at close range, oppose reinstatement of the death penalty. Both the Massachusetts and Boston bar associations are on record against capital punishment. One of the concerns cited by the MBA report recommending this position is the well-documented pattern of racial discrimination in death sentencing.

Massachusetts lawyers are also concerned about whether capital punishment will ultimately lead to judicial gridlock in our overburdened courts. It was

only half a dozen years ago that the federal courts in Massachusetts were so swamped with criminal cases that a moratorium on the trial of civil cases was put into effect.

State courts will face a similar meltdown if capital cases begin to fill the dockets, because each one requires a separate sentencing trial and more elaborate jury selection and appeals. Indeed, several studies have shown that executing a criminal defendant is substantially more expensive than life imprisonment. How does Gov. Weld propose to pay for the additional court personnel?

Weld says capital punishment will deter crime. Yet the evidence does not support this seemingly common-sense view. States without the death penalty have a lower homicide rate than those that have it.

Are there some egregious cases that cry out for retribution, where there is no doubt about the identity of the accused? Perhaps. But how will we draw that line - the one that separates those who should die from those who should not? And who will draw it? Or pay the extra cost of drawing it?

I am not persuaded that we have the wisdom - no matter how fair and rational a system we devise - to draw that line in the right place each time. The line was not drawn fairly in Herrera's case in Texas or in Ward's case in Louisiana. Are we so much wiser in Massachusetts?

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