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Killing costs

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"First, to be honest, if I were a member of the legislative branch of government, I would probably vote to abolish the death penalty". These words, published on 6 February, were not those of an Amnesty International activist, but of a judge on the Maryland Court of Appeals. Judge Dale R. Cathell was venting his frustration at the majority's decision to stay the execution of Steven Oken, a prisoner he described as a "poster man for the death penalty".

Judge Cathell explained his surprising abolitionist leaning: "I would not vote in that fashion because of any constitutional or moral principle. I would so vote because it is clear to me that because of the way the death penalty system works, it simply is not worth the aggravation it costs throughout the body politic". He then went on to note the financial cost of the capital justice system: "Governments throughout our country, by permitting the imposition of the death penalty, collectively obligate themselves for an expenditure of a hundred million dollars each year above what they would ordinarily expend if such defendants had been sentenced to life imprisonment... A relevant question, it seems to me, is whether the country would be better served by using the money for education, or for other aspects of need in this country than it is now being served by the process we put ourselves through putting a few murderers to death?"

A relevant question, indeed. Yet even if the opposite were true – that it cost less money to kill than to incarcerate – the death penalty would remain an abhorrent policy offering no constructive contribution to society's efforts to combat crime. For its costs go beyond mere dollars and cents – the price paid in human terms is immense. This is a punishment that fosters division, hatred and vengeance. It encourages blind faith in simplistic responses to complex social problems. It generates more pain and suffering. Relatives of murder victims have their emotional wounds kept raw over the years of judicial scrutiny necessary in capital cases. The family of the condemned shares in the prisoner's cycle of hope and despair, and is subjected to the daily cruelty of being forced to anticipate the killing of their loved one. Prosecutors, defence lawyers, jurors, prison staff, and the executioners themselves, will to varying degrees be left scarred by their involvement in this dehumanizing state policy.

And those condemned for crimes they did not commit – what is the cost to them and their families? Juan Melendez, freed last month after 18 years on Florida's death row, put it

thus: “They can give me a billion dollars and they cannot pay for what they did to me. The only way they can compensate me is to give me my 18 years back”. Juan Melendez was the 99th death row prisoner to be exonerated in the United States since 1973. The 99 spent a combined total of 800 years between conviction and exoneration, most of that time under a state-sanctioned death threat. One would hope that a single such case would be all that is needed to convince the authorities that they are on the wrong track. Perhaps when the 100th comes – as it will any time now – it will jolt them into abolitionist action.

On 22 February 1994, US Supreme Court Justice Harry A. Blackmun announced that he had been stirred into just such action, promising that he would “no longer tinker with the machinery of death.” His dissent made clear that the human cost of the death penalty was too great, that despite all efforts, the capital justice system remained “fraught with arbitrariness, discrimination, caprice, and mistake”. Specifically referring to racism, Justice Blackmun wrote that “where a morally irrelevant – indeed, a repugnant – consideration plays a major role in the determination of who shall live and who shall die, it suggests that the continued enforcement of the death penalty in light of its clear and admitted defects is deserving of a sober second thought”.

Thomas Miller-El is scheduled to be killed by the State of Texas next week, on the eve of the eighth anniversary of Justice Blackmun’s dissent. His is a case that screams out for an official second thought. Thomas Miller-El is an African American convicted of killing a white man. He was tried in Dallas County in 1986 at a time when the county’s prosecutors were engaging in racist jury selection tactics to exclude around 90 percent of prospective minority jurors in order to obtain all-white or almost all-white juries. True to form, at Miller-El’s trial the prosecutors peremptorily dismissed 10 of the 11 African Americans qualified to serve. The sole black allowed onto the jury was a man who during questioning advocated that convicted murderers should be slowly tortured to death because execution is “too quick”. It seems the prosecutors were still following methods detailed in a training manual in circulation in Dallas County into the 1980s which warned against selecting jurors from minority races, people with “physical afflictions” and Jews, on the grounds that they “usually empathize with the accused”. The manual echoed an earlier jury selection treatise, circulated in Dallas County in the 1960s, which instructed prosecutors: “Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury”.

The price for killing Thomas Miller-El goes beyond the two or three million dollars it will likely have cost the state to get him to the death chamber. There are the enduring effects of the discrimination against prospective black jurors and the consequent loss of public confidence in the administration of justice. One of the African Americans struck from Miller-El’s jury has recently described her anger that the prosecutors did “not look at me as a person, as an individual, but as a colour... It really upsets me that they think like that, that they think they can’t trust me...”. There is the fact that the execution will compound the grief already caused in this case. It will leave a widow, Dorothy Miller-El, who herself faced racist proceedings in the same case. Her conviction was overturned after it was established that one of the same prosecutors from her husband’s trial had engaged in intentional racial discrimination during selection of her jury. No such remedy has been forthcoming for Thomas Miller-El – another sign of arbitrariness in the administration of justice. Finally, there is the damage the case will have inflicted on the reputation of Dallas County, the State of Texas, and the United States as a whole, suggesting a leadership that is not serious about eradicating racism in the justice system. Amnesty International recalls President Bush’s State of the Union address of 29 January, in which he said that “America will always stand firm for the non-negotiable demands of human dignity”. The President listed “equal justice” among

these non-negotiable issues. The execution of Thomas Miller-El would make a mockery of these words.

Judge Cathell in Maryland has approached abolition from an unusual angle – frustration at his colleagues' decision to delay an execution. He asserted that "there comes a point, even in death penalty cases, when judges should say enough is enough". He is right, although for the wrong reason. Officials at all levels of government must say enough is enough. They should call a halt to executions. Because the human cost of the death penalty can never be justified.