

## Two Death Penalty Cases, One Dilemma

By David J. Garrow

*New York Times* (1857-Current file); Jun 17, 1997; ProQuest Historical Newspapers The New York Times (1851 - 2003)

pg. A21

# Two Death Penalty Cases, One Dilemma

---

By David J. Garrow

---

**T**he simultaneous death penalty trials of Jesse Timmendequas, who raped and murdered 7-year-old Megan Kanka, and Timothy McVeigh perfectly illustrate what Americans think about the death penalty: We think it is a just and valid punishment, even though it is not all that clear when it should be applied.

Since 1976, when the Supreme Court first upheld a new generation of capital punishment laws, 393 criminals have been put to death, and another 3,300 currently reside on "death row" in the 38 states that, like the Federal Government, now authorize capital punishment.

In recent years the pace of executions has quickened, and the newsworthiness of each additional death has slackened to the point where only an electrical malfunction can turn an execution into national news.

Even two-in-one-day executions, as happened in Texas earlier this month, rate only the smallest notice

---

*David J. Garrow is the author of "Liberty and Sexuality" and the Pulitzer Prize-winning "Bearing the Cross."*

in national newspapers.

A vast majority of Americans now believe that death is a just and valid punishment for some crimes, but the McVeigh trial gave the country an unprecedented opportunity to articulate and reaffirm that support. Listening to victims testify movingly about the effect of the Oklahoma City bombing on their lives seemed to help many Americans resolve any remaining qualms about the death penalty. Before last week, few Americans could have named a single death row prisoner, but now almost every American knows the name of a man who they believe merits speedy execution.

The Timmendequas case, on the other hand, highlights how our increasing national acceptance of capital punishment has gone hand-in-hand with a fuzzy and imprecise national dialogue over who deserves the death penalty and why.

Over the last two decades, the Supreme Court has established a two-part test for capital crimes. First, did a particular killing involve one or more "aggravating" factors? Second, were those factors counterbalanced by any "mitigating" circumstances on behalf of the defendant?

Seems clear. But neither courts nor commentators have brought any great clarity or specificity to just what are aggravating and mitigating circumstances.

When it comes to judging aggravating factors, the Supreme Court has held that murder statutes authorizing capital punishment must include "clear and objective standards that provide specific and detailed guidance" for the judge or jury.

---

## The imprecise art of imposing the ultimate punishment.

---

States have drafted language that meets the test — for example, Oklahoma allows for the death penalty if a murder was "especially heinous, atrocious or cruel."

In reality, however, these are characteristics that many of us would assign to most murders. Thus, it is no surprise that Mr. McVeigh and Mr. Timmendequas were both deemed to qualify for the death penalty.

The mitigating circumstances of a crime are only slightly clearer. The Supreme Court has instructed that courts must consider "any aspect of a defendant's character or record

and any of the circumstances of the offense" that might merit a sentence less than death. Thus, in the Timmendequas trial, defense counsel painted a horrific picture of how Mr. Timmendequas, at age 7, was regularly forced to perform sex acts with his father. Prosecutors and Mr. Timmendequas's father have challenged these claims, but even the uncontested aspects of Mr. Timmendequas's childhood — an uncaring mother and an ever-changing succession of substitute fathers — paint a powerful picture of a young life that was severely disadvantaged.

The list of mitigating factors for Jesse Timmendequas may vastly outdistance those of many capital defendants, but how should they be weighed against the cruelty of his crime? Here, the law is frustratingly murky and subjective. The jury, which will probably begin deliberations on the death penalty this week, must decide with little truly clear guidance.

These two cases illustrate the nation's dilemma: America believes in the death penalty no matter how subjective and imprecise our standards for imposing it actually are. But it seems that this paradox will not slow America from executing more and more murderers whose names will never make national news. □