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Caprice and Mistake

THE FIRST TWO convicts to face execution at the hands of the federal government since the reinstatement of its death penalty may not seem to invite controversy. The case of Oklahoma City bomber Timothy McVeigh, who is scheduled to die today, is among the stronger arguments for the death penalty. And **Juan Raul Garza** -- who is due to be put to death on June 19 -- is a drug trafficker convicted of killing or ordering the deaths of three people. Prosecutors link him to five other murders. In neither case is the convict's guilt in question.

Yet even where the logic of capital punishment is at its strongest, the flaws and dangers of the death penalty shine through. Despite the strength of the cases, the federal executions this month will be a reminder of what the late constitutional scholar Charles Black Jr. called "the inevitability of caprice and mistake" in administering death. Even those who do not share our belief that the state on principle should refrain from taking life ought to be disturbed by that reality.

Mr. McVeigh, who last week halted all appeals, was prosecuted by the elite of the Justice Department, following an investigation by the nation's premier police force. He had a multimillion-dollar defense. The case against him was overwhelming, and the public scrutiny of the government's conduct was constant. Despite all of this, the FBI managed to withhold more than 4,000 pages of documents that should have been delivered to his defense lawyers before trial. If such a thing could happen in this case, can anyone really contend that such failures are not commonplace in those cases nobody follows carefully? Is it plausible that such errors are always discovered prior to execution or that they never involve information that would -- as this evidence does not -- cast the conviction or sentence in a different light? Mr. McVeigh's conviction, solid though it is, illustrates how mistakes are unavoidable.

Mr. Garza's case, meanwhile, highlights the caprice of the penalty. However horrific Mr. Garza's crimes may be, they are not worse than those of countless people serving non-capital sentences in federal prisons. Why kill him and not them? Racial and ethnic disparities are one particularly ugly component of this problem, but there are geographical disparities as well -- not to mention the simple truth that some prosecutors are more aggressive than others, and some juries less forgiving. It simply is not possible to envision a system that applies the death penalty evenly. To have capital punishment is to accept that its application will be conditioned by class, race and myriad other factors unrelated to justice -- including a healthy dose of randomness. This is something we should not accept. It would be far better to let Mr. McVeigh and Mr. Garza live out their lives in prison.