

## ISSUE

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## Is Capital Punishment a Bad Public Policy?



**YES:** David Von Drehle, from "Miscarriage of Justice: Why the Death Penalty Doesn't Work," *The Washington Post* (1995)

**NO:** Dave Anderson, from "10 Reasons the Death Penalty Should Be Legal," *Listland* (2016)

### Learning Outcomes

After reading this issue, you will be able to:

- Discuss the U.S. Supreme Court's rulings in *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976).
- Present several reasonable arguments against capital punishment.
- Present several reasonable arguments supporting capital punishment.

### ISSUE SUMMARY

**YES:** David Von Drehle, a writer and the arts editor for *The Washington Post*, examines specific capital punishment cases and data and concludes that capital punishment is a bad social policy.

**NO:** Dave Anderson, in contrast, believes that the U.S. Constitution permits the death penalty and that it is "right and proper" that people are punished for the crimes that they commit and that the punishment should be proportionate to their offense.

In 1968, only 38 percent of all Americans supported the death penalty for certain crimes. In 1972, when the U.S. Supreme Court handed down its decision in *Furman v. Georgia* stating that capital punishment violated the Eighth Amendment, which prohibits cruel and unusual punishment, many Americans were convinced that capital punishment was permanently abolished. After all, even though there were 500 inmates on death row at the time, there had been a steady decline in the number of executions in the United States: in the 1930s, there were on average 152 executions per year; in 1962, there were 47 executions; and in 1966, there was one. Polls in the late 1960s showed that most Americans opposed the death penalty, and virtually every other Western industrial nation had long since eliminated the death sentence or severely modified its use.

Polls taken in the 1990s showed that 75–80 percent of all Americans supported capital punishment. In 1990, 23 people were executed, but in 1999, this number increased

to 98. Since 1976, when capital punishment was restored, over 600 people have been executed. Currently, there are approximately 3,500 people on death row. Eighteen states allow executions of defendants who are as young as 16, and there are currently over 60 juveniles on death row. Texas leads the nation in executions: 36 percent of all executions in 1999 were held in that state. Of the 1999 executions, 94 were by lethal injection and 3 were by electrocution.

What has happened since the 1960s? We will probably never know the full answer to this question, but there are some clues. To begin with, in *Furman v. Georgia*, the Supreme Court did not ban capital punishment because it was cruel and unusual in itself. It simply argued that it was unconstitutional for juries to be given the right to decide arbitrarily and discriminatorily on capital punishment. Thus, if states can show that capital punishment is not arbitrary or discriminatory and that the sentencing process is performed in two separate stages—first, guilt or innocence is established and *then* the determination of

the sentence occurs—then some offenses are legally punishable by death. This was the Supreme Court's ruling in 1976 in *Gregg v. Georgia*, which effectively restored the death penalty.

Since the late 1960s, Americans have become more conservative. Fear of crime has greatly increased, although the number of crimes may not have changed. Moreover, many of the measures taken under the Omnibus Safe Streets Act to reduce crime, speed up judicial processes, and rehabilitate criminals are now viewed by professionals and laypeople alike as failures. The national mood is now solidly behind "getting tough" on criminals, especially drug dealers and murderers. Support and utilization of capital punishment make sense within the logic of the present cultural and political situation.

There is a movement among criminologists to reassess studies done before the 1960s that indicated that states in which capital punishment prevailed had homicide rates that were just as high as those in which it was not a penalty and that executions did not deter others from committing crimes. Isaac Ehrlich, for instance, in an extensive statistical analysis of executions between 1933 and 1967 reached very different conclusions. He contends not only that the executions reduced the murder rate but also that one additional execution per year between 1933 and 1967 would have resulted in seven or eight fewer murders per year!

Many scholars have bitterly attacked the accuracy of Ehrlich's findings. Most attempt to fault his methods, but others assert that even if he is empirically correct, the

trade-off is not worth it. The state should not have the right to extract such a primitive "justice" as the murder of a human being, even a convicted killer. Other scholars emphasize the fact that there have been a disproportionate number of blacks executed (between 1930 and 1967, 2,066 blacks were executed as opposed to 1,751 whites, even though blacks constituted only 10 percent of the total population then). Some counter that this simply indicates that more whites need to be executed as well!

So, is capital punishment bad policy? The writers of the articles in this section would respond very differently to this question. David Von Drehle asserts that capital punishment is a bad social policy. He contends that while many people like the death penalty in theory, virtually no one familiar with it would support the slow, costly, and inefficient reality of capital punishment. Dave Anderson, in contrast, believes that the death penalty should continue to be legal because it is an important tool in the fight against crime and the perpetrators of those crimes.

While you read the articles in this section, if you support the death penalty, think about what crimes should it be reserved for: murder? rape? espionage? drug dealing? kidnapping? How should it be carried out? If you oppose the death penalty, which of the arguments supporting capital punishment is the strongest? Does the idea that the death penalty is society's justifiable response to a heinous crime that renders the perpetrator "no longer fit" to live among us, have any validity? Try to construct an argument that will counter this proposition.

YES



## Miscarriage of Justice: Why the Death Penalty Doesn't Work

David Von Drehle

As a boy of 8, the son of good, poor parents, James Curtis "Doug" McCray had limitless dreams; he told everyone he met that someday he would be president of the United States. Soon enough, he realized that poor black children did not grow up to be president, but still he was a striver. At Dunbar High School in Fort Myers, Fla., he was an all-state receiver on the football team, an all-conference guard in basketball and the state champion in the 440-yard dash. He made the honor roll, and became the first and only of the eight McCray kids to attend college.

His was a success story, but for one flaw. McCray had a drinking problem. He washed out of college and joined the Army. A year and a half later, the Army gave him a medical discharge because he had been found to suffer from epilepsy. McCray married, fathered a son, tried college again; nothing took. He wound up back home, a tarnished golden boy.

On an October evening in 1973, an elderly woman named Margaret Mears was at home in her apartment, picking no trouble, harming no one, when someone burst in, stripped and raped her, then beat her to death. A bloody handprint was matched to Doug McCray's. He insisted that he had no memory of the night in question, and his jury unanimously recommended a life sentence. But McCray had the bad fortune to be tried by Judge William Lamar Rose.

... To him, the murder of Margaret Mears was precisely the type of savagery the law was intended to punish: committed in the course of another felony, and surely heinous, surely atrocious, surely cruel. Rose overruled the jury and banged the gavel on death.

When McCray arrived at Florida State Prison in 1974, nine men awaited execution and he made 10. His case entered the appeals process, and as the years went by, McCray wept

for his best friend on death row, John Spenkelink, who became the first man in America executed against his will under modern death penalty laws. He watched as a young man named Bob Graham became governor of Florida and led the nation in executing criminals. Eight years later, he watched Gov. Bob Martinez take Graham's place and sign 139 death warrants in four years. McCray saw the infamous serial killer Ted Bundy come to the row, and almost 10 years later saw him go quietly to Old Sparky.

Living on death row, McCray saw men cut, saw men burned, even saw a man killed. He saw inmates carried from their cells after committing suicide, and others taken away after going insane. He saw wardens and presidents come and go. Death row got bigger and bigger. By the time Spenkelink was executed in May 1979, Jacksonville police officers printed T-shirts proclaiming "One down, 133 to go!" ...

Doug McCray watched as death row doubled in size, and grew still more until it was not a row but a small town, Death Town, home to more than 300 killers. Nationwide, the condemned population climbed toward 3,000. The seasons passed through a sliver of dirty glass beyond two sets of bars outside McCray's tiny cell on the row, which was very cold in the winter and very hot in the summer, noisy at all times and stinking with the odor of smoking, sweating, dirty, defecating men. Four seasons made a year, and the years piled up: 5, 10, 15, 16, 17 ...

All this time, Doug McCray was sentenced to death but he did not die. Which makes him the perfect symbol of the modern death penalty.

People talk a great deal these days about getting rid of government programs that cost too much and produce scant results. So it's curious that one of the least efficient government programs in America is also among the most popular. Capital punishment is favored by more than three-quarters of American voters. And yet, in 1994, the death row population nationwide exceeded 3,000 for the first time ever; out of all those condemned prisoners,

only 31 were executed. There are hundreds of prisoners in America who have been on death row more than a decade, and at least one—Thomas Knight of Florida—has been awaiting execution for 20 years. Every cost study undertaken has found that it is far more expensive, because of added legal safeguards, to carry out a death sentence than it is to jail a killer for life. Capital punishment is the principal burden on the state and federal appellate courts in every jurisdiction where it is routinely practiced. The most efficient death penalty state, Texas, has a backlog of more than 300 people on its death row. It manages to execute only about one killer for every four newly sentenced to die—and the number of executions may drop now that the U.S. Supreme Court has ordered Texas to provide lawyers for death row inmate appeals. Overall, America has executed approximately one in every 20 inmates sentenced to die under modern death penalty laws.

This poor record of delivering the punishments authorized by legislatures and imposed by courts has persisted despite a broad shift to the right in the federal courts. It has resisted legislative and judicial efforts to streamline the process. It has outlasted William J. Brennan Jr. and Thurgood Marshall, the Supreme Court's strongest anti-death penalty justices. It has endured countless campaigns by state legislators and governors and U.S. representatives and senators and even presidents who have promised to get things moving. If New York reinstates the death penalty this year, as Gov. George Pataki has promised, there is no reason to believe things will change; New York is unlikely to see another execution in this century. Congress extended the death penalty to cover more than 50 new crimes last year, but that bill will be long forgotten before Uncle Sam executes more than a handful of prisoners.

Most people like the death penalty in theory; virtually no one familiar with it likes the slow, costly, and inefficient reality. But after 20 years of trying to make the death penalty work, it is becoming clear that we are stuck with the reality, and not the ideal.



To understand why this is, you have to understand the basic mechanics of the modern death penalty. The story begins in 1972.

For most of American history, capital punishment was a state or even a local issue. Criminals were tried, convicted, and sentenced according to local rules and customs, and their executions were generally carried out by town sheriffs in courthouse squares. Federal judges took almost

no interest in the death penalty, and even state appeals courts tended to give the matter little consideration.

Not surprisingly, a disproportionate number of the people executed under these customs were black, and the execution rate was most dramatically skewed for the crime of rape. As sensibilities became more refined, however, decent folks began to object to the spectacle of local executions. In Florida in the 1920s, for example, a coalition of women's clubs lobbied the legislature to ban the practice, arguing that the sight of bodies swinging in town squares had a brutalizing effect on their communities. Similar efforts around the country led to the centralizing of executions at state prisons, where they took place outside the public view, often at midnight or dawn.

Still, the death penalty remained a state matter, with the federal government extremely reluctant to exert its authority. Washington kept its nose out of the death chambers, just as it steered clear of the schools, courtrooms, prisons, and voting booths. All that changed, and changed dramatically, in the 1950s and '60s, when the Supreme Court, in the era of Chief Justice Earl Warren, asserted more vigorously than ever that the protections of the U.S. Constitution applied to actions in the states. For the first time, federal standards of equality were used to strike down such state and local practices as school segregation, segregation of buses and trains, poll taxes, and voter tests. The lengthened arm of the federal government reached into police stations: For example, in *Miranda v. Arizona*, the Supreme Court required that suspects be advised to their constitutional rights when arrested. The long arm reached into the courtrooms: In *Gideon v. Wainwright*, the high court declared that the federal guarantee of due process required that felony defendants in state trials be provided with lawyers.

Opponents of capital punishment urged the courts to reach into death rows as well. Anthony Amsterdam, at the time a Stanford University law professor, crafted arguments to convince the federal courts that the death penalty violated the Eighth Amendment (which bars "cruel and unusual punishments") and the 14th Amendment (which guarantees "equal protection of the laws"). Amsterdam's arguments won serious consideration in the newly aggressive federal courts, and on January 17, 1972, the greatest of Amsterdam's lawsuits, *Furman v. Georgia*, was heard in the Supreme Court.

Amsterdam delivered a brilliant four-pronged attack on capital punishment. He began by presenting statistical proof that the death penalty in America was overwhelmingly used against the poor and minorities. Next, Amsterdam argued that the death penalty was imposed arbitrarily, almost randomly. Judges and juries meted out

their sentences without clear standards to guide them, and as a result men were on death row for armed robbery, while nearby, murderers served life, or less. Discretion in death sentencing was virtually unfettered. Amsterdam's third point was his most audacious, but it turned out to be crucial: The death penalty was so rarely carried out in contemporary America that it could no longer be justified as a deterrent to crime. In the years leading up to Amsterdam's argument, use of the death penalty had steeply declined. What made this argument so daring was that the sharp drop in executions was partly a result of Amsterdam's own legal campaign to abolish the death penalty. He was, in effect, challenging a state of affairs he had helped to create.

In closing, Amsterdam argued that the death penalty had become "unacceptable in contemporary society," that the "evolving standards" of decent behavior had moved beyond the point of legal killing. This was the weakest of his arguments, because nearly 40 states still had death penalty laws on the books, but previous Supreme Court decisions suggested that the shortest route to abolishing the death penalty would be to convince a majority of the justices that "standards of decency" had changed. Amsterdam had to try.

Behind closed doors, the nine justices of the court revealed a wide range of reactions to Amsterdam's case—from Brennan and Marshall, the court's liberal stalwarts, who voted to abolish capital punishment outright, to Justice William H. Rehnquist, the new conservative beacon, who rejected all of the arguments. Justice William O. Douglas was unpersuaded by the notion that standards of decency had evolved to the point that capital punishment was cruel and unusual punishment, but he agreed the death penalty was unconstitutionally arbitrary. Chief Justice Warren E. Burger and Justice Harry A. Blackmun both expressed personal opposition to capital punishment—if they were legislators, they would vote against it—but they believed that the language of the Constitution clearly left the matter to the states. That made three votes to strike down the death penalty, and three to sustain it.

Justice Lewis F. Powell Jr. also strongly objected to the court taking the question of the death penalty out of the hands of elected legislatures. This would be an egregious example of the sort of judicial activism he had always opposed. Though moved by Amsterdam's showing of racial discrimination, Powell believed this was a vestige of the past, and could be rectified without a sweeping decision in *Furman*. Powell's vote made four to sustain the death penalty. Justice Potter Stewart, painfully aware of the more than 600 prisoners whose lives were dangling on his vote,

moved toward Douglas's view that the death penalty had become unconstitutionally arbitrary. Stewart's vote made four to strike down the death penalty as it existed.

That left Justice Byron R. White, known to observers of the court as a strict law-and-order man. In his brusque opinions, White backed prosecutors and police at almost every turn. But he was deeply impressed by Amsterdam's presentation; he told his law clerks that it was "possibly the best" oral argument he had ever heard. The point that had won White was Amsterdam's boldest: that the death penalty was applied too infrequently to serve any purpose. White cast the deciding vote to strike down the death penalty not because he wanted to see an end to capital punishment, but because he wanted to see more of it.

The product of these deliberations was one of the most difficult decisions in the history of the U.S. Supreme Court. The broad impact of *Furman v. Georgia*, striking down hundreds of separate laws in nearly 40 separate jurisdictions, was unprecedented. Rambling and inchoate—nine separate opinions totaling some 50,000 words—it remains easily the longest decision ever published by the court. But for all its wordy impact, *Furman* was almost useless as a precedent for future cases. It set out no clear legal standards. As Powell noted in his stinging dissent:

"Mr. Justice Douglas concludes that capital punishment is incompatible with notions of 'equal protection' that he finds 'implicit' in the Eighth Amendment . . . Mr. Justice Brennan bases his judgment primarily on the thesis that the penalty 'does not comport with human dignity' . . . Mr. Justice Stewart concludes that the penalty is applied in a 'wanton' and 'freakish' manner . . . For Mr. Justice White it is the 'infrequency' with which the penalty is imposed that renders its use unconstitutional . . . Mr. Justice Marshall finds that capital punishment is an impermissible form of punishment because it is 'morally unacceptable' and 'excessive' . . .

"I [will not] attempt to predict what forms of capital statutes, if any, may avoid condemnation in the future under the variety of views expressed by the collective majority today."

In other words, totally missing from the longest Supreme Court decision in history was any clear notion of how the death penalty might be fixed.

That painfully splintered 5-to-4 vote turned out to be a high-water mark of the Supreme Court's willingness to intervene in the business of the states. In *Furman*, the justices were willing to abolish the death penalty

as it existed. But the justices were not willing to forbid executions forever. They kicked the question of whether the death penalty was "cruel and unusual" back to the state legislatures. For nearly 20 years, the states—especially the Southern states—had felt pounded by the Supreme Court. Rarely did they get the chance to answer. The court did not ask what they thought about school desegregation, or voting rights, or the right to counsel. But *Furman v. Georgia* invited the states to respond to a hostile Supreme Court decision.

Florida was the first state to craft an answer, after calling its legislature into special session. Blue-ribbon panels appointed by the governor and legislature struggled to make sense of *Furman*—but how? On the governor's commission, legal advisers unanimously predicted that no capital punishment law would ever satisfy the high court, but the membership turned instead to a nugget from Justice Douglas's opinion. Douglas wrote that the problem with the pre-*Furman* laws was that "under these laws no standards govern the selection of the penalty." Douglas seemed to be saying that judges and juries needed rules to guide their sentencing.

The legislative commission reached a different conclusion, simply by seizing on a different snippet from the *Furman* ruling. Figuring that Byron White was the most likely justice to change his position, commission members combed his opinion for clues. White had complained that "the legislature authorizes [but] does not mandate the penalty in any particular class or kind of case. . . ." That phrase seemed crucial: "Authorizes but does not mandate." Apparently, White would prefer to see death made mandatory for certain crimes.

*Furman* was as cryptic as the Gnostic gospels. Robert Shevin, Florida's attorney general at the time, was just as confused. He summoned George Georgieff and Ray Marky, his two top death penalty aides, to explain the ruling. "I've been reading it since it came out," Marky told his boss, "and I still have no idea what it means."

Gov. Reubin Askew refused to go along with mandatory sentences—he considered them barbaric. And so it was that while rank-and-file lawmakers made interminable tough-on-crime speeches, in the last month of 1972 Florida's power brokers hashed out a deal behind closed doors. Their new law spelled out "aggravating" circumstances—such as a defendant's criminal record and the degree of violence involved in the crime—which, if proven, would make a guilty man eligible for the death penalty. The law also spelled out "mitigating" circumstances, such as a defendant's age or mental state, that might suggest a life sentence instead. After a defendant was found guilty of a capital

offense, the jury would hear evidence of aggravating and mitigating factors. By majority vote, the jurors would recommend either life in prison or the death penalty. Then the judge would be required to reweigh the aggravating and mitigating factors and impose the sentence, justifying it in writing. As a final safeguard, the sentence would be reviewed by the state's highest court. In this way, perhaps, they could thread the *Furman* needle: setting standards, limiting discretion, erasing caprice—all while avoiding mandatory sentences.

They were a few men in a back room, trading power and guessing over an incoherent Supreme Court document. It was not a particularly promising effort. Nevertheless, their compromise passed overwhelmingly, giving America its first legislative answer to *Furman*. Immediately, officials from states across the country began calling Florida for advice and guidance. And very soon, lawyers and judges began to discover that the law drafted in confusion and passed in haste was going to be hell to administer.



The problem was that underneath the tidy, legalistic, polysyllabic, etched-in-marble tone of the new law was a lot of slippery mishmash. The aggravating and mitigating factors sounded specific and empirical, but many of them were matters of judgment rather than fact. A murderer was more deserving of the death penalty, for example, if his actions involved "a great risk of death to many persons"—but where one judge might feel that phrase applied to a drive-by killer who sprays a whole street with gunfire, another might apply it to a burglar who stabs a man to death while the victim's wife slumbers nearby. How much risk makes a "great" risk, and what number of persons constitutes "many"?

Another aggravating circumstance was even harder to interpret—"especially heinous, atrocious or cruel." The idea was to identify only the worst of the hundreds of murders each year in Florida. But wasn't the act of murder itself "heinous, atrocious or cruel"? Again, this aggravating circumstance was very much in the eye of the beholder: To one judge, stabbing might seem more cruel than shooting, because it involved such close contact between killer and victim. Another judge, however, might think it crueler to place a cold gun barrel to a victim's head before squeezing the trigger. One jury might find it especially heinous for a victim to be killed by a stranger, while the next set of jurors might find it more atrocious for a victim to die at the hands of a trusted friend. And so forth. It was an attempt to define the undefinable.

The imprecision was even more obvious on the side of mitigation, where it weighed in a defendant's favor if he had no "significant history" of past criminal behavior. How much history was that? "The age of the defendant" was supposed to be considered under the new law—but where one jury might think 15 was old enough to face the death penalty, another might have qualms about executing a man who was "only" 20. What about elderly criminals? Was there an age beyond which a man should qualify for mercy—and if so, what was it?

Clearly, a lot of discretion was left to the judge and jury. Even more discretion was allowed in tallying the aggravating versus the mitigating circumstances, and still more in deciding what weight to give each factor. The jury was supposed to render an "advisory" opinion on the proper sentence, death or life in prison, but how much deference did the judge have to pay to that advice? The law said nothing. After the judge imposed a death sentence, the state supreme court was required to review it. But what standards was the court supposed to apply? The law said nothing.

These questions might have seemed tendentious and picayune, except for the fact that Doug McCray and dozens of others were quickly sent to death row, and these seemingly trivial questions became the cruxes of life-and-death litigation. The law, shot through with question marks, became a lawyer's playground. After all, laws were supposed to be clear and fixed; they were supposed to mean the same thing from day to day, courtroom to courtroom, town to town. And given that their clients were going to be killed for breaking the law, it seemed only fair for defense lawyers to demand that simple degree of reliability.

In 1976, when the U.S. Supreme Court returned to the question of capital punishment, the justices agreed that the laws must be reliable. By then some 35 states had passed new death penalty laws, many of them modeled on Florida's. In a string of rulings the high court outlawed mandatory death sentences and affirmed the complex systems for weighing specified factors in favor of and against a death sentence.

But in striking down mandatory sentences, the court made consistency a constitutional requirement for the death penalty; the law must treat "same" cases the same and "different" cases differently. The thousands of capital crimes committed each year in America raised a mountain of peculiarities—each criminal and crime was subtly unique. Somehow the law must penetrate this mountain to discern some conceptual key that would consistently identify cases that were the "same" and cull ones that were

"different." Furthermore, the court decided, the Constitution requires extraordinary consistency from capital punishment laws. "The penalty of death is qualitatively different from a sentence of imprisonment, however long," Justice Potter Stewart wrote. "Because of that qualitative difference, there is a corresponding difference in the need for reliability. . . ."

Each year, some 20,000 homicides are committed in America, and the swing justices expected the death penalty laws to steer precisely and consistently through this carnage to find the relatively few criminals deserving execution. Somehow, using the black-and-white of the criminal code, the system must determine the very nature of evil. King Solomon himself might demur.

"The main legal battle is over," declared the *New York Times* in an editorial following the 1976 decisions. In fact, the battles were only beginning.

After Doug McCray was sentenced to die in 1974, his case went to the Florida Supreme Court for the required review. . . . In October 1980, the Florida Supreme Court agreed that Doug McCray should die. The following year the U.S. Supreme Court declined to review the state court's decision.

Through all this, McCray continued to insist that he had no memory of murdering Margaret Mears. He passed a lie detector test, and though such tests are not admissible in court, there was another reason to believe what he said. It was possible that McCray's epilepsy, which had first emerged in several powerful seizures during his Army basic training, was the type known as "temporal lobe seizure disorder." This disease often emerges in late adolescence; it is known to cause violent blackouts; and it can be triggered by alcohol. The possibility had not come out at McCray's trial, nor was it properly researched in preparation for his hearing on executive clemency. The hearing, held on December 16, 1981, went badly for McCray. An attorney, Jesse James Wolbert, had been appointed to represent him, but Wolbert did not bother to read the trial record, let alone prepare a compelling case for mercy. Perhaps he had other things on his mind: By the time McCray's death warrant was signed three months later, Wolbert had drained another client's trust fund and become a federal fugitive.

Wolbert's disappearance turned out to be a blessing for McCray, because an anti-death penalty activist named Scharlette Holdman persuaded Bob Dillinger

of St. Petersburg to take the case, and Dillinger was a damn good lawyer. He filed a hasty appeal in the Florida Supreme Court asking for a stay of execution. The result was amazing: Having affirmed McCray's death sentence 18 months earlier, the justices now ordered a new trial. The sentence, they ruled, had been based on the theory that the murder had been committed in conjunction with a rape. "Felony murder," this is called—murder coupled with another felony. In 1982, the Florida Supreme Court, by a vote of 4 to 3, declared that the underlying felony, rape, had not been proven beyond a reasonable doubt. Eight years after the original sentence, Doug McCray was going back to trial.

Except that something even more amazing happened a few weeks later. The state supreme court granted the prosecution's request for a rehearing, and Justice Ray Ehrlich abruptly changed his mind. His vote made it 4 to 3 in favor of upholding McCray's death sentence. In the course of six months, Ehrlich had gone from believing McCray's sentence was so flawed that he should have a new trial to believing that his sentence was sound enough to warrant his death. The court contacted the company that publishes all its decisions and asked that the first half of this flip-flop—the order for a new trial—be erased from history.

Gov. Bob Graham signed a second death warrant on May 27, 1983. By this time, Bob Dillinger had located his client's ex-wife in California, where she lived with her son by Doug McCray. The son was what his father had once been: bright as a whip, interested in current events, a devourer of books, good at games. The ex-wife, Myra Starks, was mystified by the course her husband's life had taken. They had been high school sweethearts, and she had married him certain that he was upward bound. When McCray had left school to join the Army, Starks had clung to that vision, picturing a steady string of promotions leading to a comfortable pension. Then came the seizures and the medical discharge, and her husband's behavior changed horribly. He drank heavily, and sometimes when he was drunk he struck out at her violently—though after each of these outbursts, he insisted he remembered nothing. Myra Starks did not make a connection between the medical discharge and the change in her man; instead, she packed up their baby boy and moved out. Within a year, McCray was on trial for murder.

In addition to locating Starks, Bob Dillinger also arranged for a full-scale medical evaluation of his client, and the doctor concluded that McCray indeed suffered from temporal lobe seizure disorder. It all came together: the violent blackouts, triggered by drink. In prison, after a number of seizures, McCray was put on a drug regimen

to control his disease: Dilantin, a standard epilepsy treatment, in the mornings, and phenobarbital, a sedative, at night. When Dillinger arranged for Myra Starks to see her ex-husband, after a decade apart, she exclaimed, "He's just like the old Doug!"

But he was scheduled to die. Following established procedure, Dillinger returned to the Florida Supreme Court. It was the fifth time the court had considered McCray's case. This time, the justices concluded that the new medical evidence might be important in weighing whether death was the appropriate sentence. They ordered the trial court to hold a hearing and stayed the execution while this was done.

Doug McCray had lived on death row nine years. . . .

In all that time, though, his case had not moved past the first level of appeals. The Florida Supreme Court had weighed and reweighed his case, and with each weighing the justices had reached a different conclusion.

McCray's case was far from unusual. Every death penalty case winds up on spongy ground, even the most outrageous. It took nearly a decade for Florida to execute serial killer Ted Bundy, and even longer for John Wayne Gacy to reach the end in Illinois. The courts routinely reverse themselves, then double back again. The same case can look different with each fresh examination or new group of judges. Defenders have learned to exploit every possible advantage from the tiniest detail to the loftiest constitutional principle. A conscientious defense attorney has no choice—especially if any question remains as to whether the condemned man actually committed the crime for which he was sentenced. The effort involves huge expenditures of time and resources, and results are notoriously uncertain. . . .

By the time Doug McCray's case returned to the trial court for a new sentence in 1986, the hanging judge, William Lamar Rose, was gone. So many years had passed. But in his place was another stern man who was no less outraged at the enormity of McCray's crime. . . .

McCray had, over the years, become a favorite of death penalty opponents, because he seemed so gentle and redeemable. Frequently, they argued that not all death row prisoners are "like Ted Bundy," and McCray was the sort of prisoner they were talking about. The harshest

word in his vocabulary was "shucks." He read every book he could get his hands on. There was a poignant vulnerability to him.

But the new judge focused, as the old one had done, on the crime: A defenseless, innocent, helpless woman alone, terrorized, apparently raped, then killed. He sentenced McCray to death once more. And the case returned to the Florida Supreme Court for a sixth time. In June 1987, after a U.S. Supreme Court decision in favor of another Florida inmate, the justices sent McCray's case back because the judge had overruled the jury's advisory sentence. What was his justification? The judge's justification was an elderly woman savagely murdered. Once again, he imposed the death sentence.

So the case of Doug McCray returned for the seventh time to the Florida Supreme Court. Did he deserve to die? Four times, a trial judge insisted that he did. Twice, the state's high court agreed. And four times, the same court expressed doubts. A single case, considered and reconsidered, strained and restrained, weighed and reweighed. A life of a man, viewed through the lens of a complex, uncertain, demanding law. Should he live or die?

In May 1991, after weighing his case for the seventh time in 17 years, the Florida Supreme Court reversed McCray's death sentence and imposed a sentence of life in prison. For 17 years, two courts had debated—the trial court and the state supreme court. No liberal outsiders stalled the process, no bleeding hearts intervened. Even the lawyers added little to the essential conundrum, which was in the beginning as it was in the end: Doug McCray, bad guy, versus Doug McCray, not-quite-so-bad guy. The case was far from aberrant. It was one of hundreds of such cases.



Some politicians and pundits still talk as if the confusion over the death penalty can be eliminated by a healthy dose of conservative toughness, but among the people who know the system best that explanation is losing steam. More than 20 years have passed since *Furman v. Georgia*; courts and legislatures have gotten tougher and tougher on the issue—but the results have remained negligible. The execution rate hovers at around 25 or 30 per year, while America's death row population has swelled past 3,000. It makes no real difference who controls the courts, as California voters learned after they dumped their liberal chief justice in 1986. The court turned rightward, but 7½ years later, California had executed just two of the

more than 300 prisoners on its death row. (One of the two had voluntarily surrendered his appeals.) No matter how strongly judges and politicians favor capital punishment, the law has remained a mishmash.

It is hard to see a way out. The idea that the death penalty should not be imposed arbitrarily—that each case should be analyzed by a rational set of standards—has been so deeply woven into so many federal and state court rulings that there is little chance of it being reversed. Courts have softened that requirement, but softening has not solved the problem. Proposals to limit access to appeals for death row inmates have become staples of America's political campaigns, and many limits have been set. But it can take up to a decade for a prisoner to complete just one trip through the courts, and no one has proposed denying condemned inmates one trip.

. . . [E]ven the most vicious killers . . . cannot be executed quickly. Gerald Stano, who in the early 1980s confessed to killing more than two dozen women, is alive. Thomas Knight, who in 1980 murdered a prison guard while awaiting execution for two other murders, is alive. Jesus Scull, who in 1983 robbed and murdered two victims and burned their house around them, is alive. Howard Douglas, who in 1973 forced his wife to have sex with her boyfriend as he watched, then smashed the man's head in, is alive. Robert Buford, who in 1977 raped and beat a 7-year-old girl to death, is alive. Eddie Lee Freeman, who in 1976 strangled a former nun and dumped her in a river to drown, is alive. Jesse Hall, who in 1975 raped and murdered a teenage girl and killed her boyfriend, is alive. James Rose, who in 1976 raped and murdered an 8-year-old girl in Fort Lauderdale, is alive. Larry Mann, who in 1980 cut a little girl's throat and clubbed her to death as she crawled away, is alive.

And that's just in Florida. The story is the same across the country.

In 1972, Justice Harry Blackmun cast one of the four votes in favor of preserving the death penalty in *Furman v. Georgia*, and he voted with the majority to approve the new laws four years later. For two decades, he stuck to the belief that the death penalty could meet the constitutional test of reliability. But last year Blackmun threw up his hands. "Twenty years have passed since this Court declared that the death penalty must be imposed fairly and with reasonable consistency or not all," he wrote. ". . . In the years following *Furman*, serious efforts were made to comply with its mandate. State legislatures and appellate courts struggled to provide judges and juries with sensible and objective guidelines for determining who should live and who should die. . . . Unfortunately, all this experimentation and ingenuity yielded little of what *Furman*

demanded . . . It seems that the decision whether a human being should live or die is so inherently subjective, rife with all of life's understandings, experiences, prejudices and passions, that it inevitably defies the rationality and consistency required by the Constitution . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."

Also last year, an admiring biography of retired Justice Lewis Powell was published. Powell was one of the architects of the modern death penalty. As a swing vote in 1976, he had helped to define the intricate weighing system that restored capital punishment in America. Later, as the deciding vote in a 1987 case, *McCleskey v. Kemp*, Powell had saved the death penalty from the assertion that racial disparities proved the system was still arbitrary. Now Powell was quoted as telling his biographer, "I have come to think that capital punishment should be abolished." The death penalty "brings discredit on the whole legal system," Powell said, because the vast majority of death sentences are never carried out. Biographer John C. Jeffries Jr. had asked Powell if he would like to undo any decisions from his long career. "Yes," the justice answered. "*McCleskey v. Kemp*."

No one has done more than Ray Marky to make a success of the death penalty. As a top aide in the Florida attorney general's office, he worked himself into an early heart attack prosecuting capital appeals. Eventually, he took a

less stressful job at the local prosecutor's office, where he watched, dispirited, as the modern death penalty—the law he had helped write and had struggled to enforce—reached its convoluted maturity. One day a potential death penalty case came across his new desk, and instead of pushing as he had in the old days, he advised the victim's mother to accept a life sentence for her son's killer. "Ma'am, bury your son and get on with your life, or over the next dozen years, this defendant will destroy you, as well as your son," Marky told her. Why put the woman through all the waiting, the hearings and the stays, when the odds were heavy that the death sentence would never be carried out? "I never would have said that 15 years ago," Marky reflected. "But now I will, because I'm not going to put someone through the nightmare. If we had deliberately set out to create a chaotic system, we couldn't have come up with anything worse. It's a merry-go-round, it's ridiculous; it's so clogged up only an arbitrary few ever get it.

"I don't get any damn pleasure out of the death penalty and I never have," the prosecutor said. "And frankly, if they abolished it tomorrow, I'd go get drunk in celebration."

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Dave Anderson

 **NO**

## 10 Reasons the Death Penalty Should Be Legal

Should the death penalty be legal? To listen to some people in favor of the abolition of the death penalty or organizations such as Amnesty International, the United States, by executing criminals, stands alongside such countries as China and Saudi Arabia in its barbarity.

Many countries in the world, including most of Europe, have rescinded their death penalties. The decision to do so is often lauded as the choice of a rational, modern, mature, and humane society. There was a time, in living memory, when there was a moratorium on executions in the United States (see below), but the death penalty was reinstated in 36 states.

Recent problems with botched executions including a 2014 execution by lethal injection that took 1 hour and 40 minutes to take effect, the prisoner in pain all the while, have reopened the debate as to whether the United States should continue to execute prisoners for certain crimes.

We believe that the death penalty should continue to be legal, and that it plays an important role in our fight against crime and punishment of the perpetrators of those crimes. Here are our top 10 reasons why the death penalty should remain legal.

### 10. The Constitution Allows for the Application of the Death Penalty

The Constitution of the United States, more specifically through the application of the Fifth, Eighth, and Fourteenth Amendments, permits the use of the death penalty in appropriate cases.

There were, most notably in the 1960s, several attempts made to declare the use of the death penalty unconstitutional based on the fact that it was "cruel and unusual" and therefore contrary to the Eighth Amendment. The 1958 Supreme Court case of *Trop v. Dulles* while not a death penalty case interpreted the Eighth Amendment as containing an "evolving standard of decency that

marked the progress of a maturing society." This statement was used as a basis for the abolitionist campaign. Ten years later in 1968 in *United States v. Jackson*, the Supreme Court started to consider the practical application of the death penalty ruling that the death penalty could be imposed even when not recommended by a jury. The same year, the court ruled that a juror's reservations to the death penalty were not enough to bar them from serving in and of themselves unless they were so strong as to prevent the juror from making an impartial decision.

By 1972, Eighth Amendment challenges resulted in State Death Penalty Statutes being suspended for unconstitutionality as they could, as drafted, result in arbitrary sentencing. The states immediately started to fight back, redrafting their statutes to address the problems highlighted by the Supreme Court. The death penalty was effectively reinstated by 1977 when the first execution in years took place in Utah.

The death penalty has therefore been challenged, found wanting, redrafted, and found to be legal and constitutional. There is no reason, therefore, for the death penalty to be suspended.

### 9. The Death Penalty Acts as a Deterrent

The death penalty is no longer fashionable. Ruled illegal in much of Europe and most of the developed world America is unusual among equivalent nations in its adherence to the practice. Liberal abolitionists have argued that the flaws in the legal system including the potential for the execution of innocents and the societal disparities in sentencing (see below) are of sufficient concern as to make the practice unethical.

The once deeply held public and professional opinion that the death penalty acts as a deterrent to crime is widely dismissed, but there is more truth in it than the liberals and abolitionists want to acknowledge.

Studies undertaken over a number of years show unequivocally that between 3 and 18 lives could be saved by each execution of a guilty killer. Results from the University of Colorado in Denver show that an execution **saves five lives** while the commuting of a death sentence results in about five more. The reasoning is simple, if the costs of doing something become too high, people will change their behavior to avoid those costs. If the cost reduces, people will indulge in that behavior once more.

Yet more research has shown that when the state of Illinois suspended executions in 2000, there were an **extra 150 homicides** over the following four years. More research needs to be undertaken to ensure the quality and accuracy of the methodology and data, but the results seem incontrovertible—the death penalty acts as a deterrent and as a result saves lives.

## 8. The Death Penalty Allows the State to Exact Appropriate Retribution, Criminals Must Face the Consequences of Their Actions

We are taught (or at least we should be) from our earliest years that actions have consequences: touching a hot stove burns your hand, annoying your parent causes them to punish you, and so on. Every parent knows that failing to link actions to consequences leads to children who do what they want when they want. The same holds true for adults. We pay our taxes because we don't want to face the consequences of not doing so. Consequences bring order to our society.

The same holds true for violent and dangerous crimes, where someone acts in such a way as to take the life of another they have to be punished, they have to expect retribution, they have to pay the price of their actions, and it should be in equal measure.

Abolitionists often confuse **retribution** (the payment of debt to society) with revenge which is a hot-blooded reaction to the loss by those who have suffered it. We have a police and subsequently legal process precisely to prevent hot-blooded revenge from taking over and to ensure a rational, logical, and fair response to a crime. This is why the death penalty is a reasonable and proportionate response to a killing but not to a rape, no matter how violent, where the victim does not lose their life.

If there is no retribution (or no reasonable level of retribution) exacted, then there is no reasonable deterrent (see above) to prevent homicide.

## 7. Life Sentences for Criminals Who Should Expect the Death Penalty Are an Unfair Financial Burden on the State

Those who are opposed to the death penalty often like to claim that it is extremely expensive citing figures of up to \$2 million per individual in death row. The equivalent costs of detaining a prisoner for life without parole come in, they claim, at \$1 million per individual.

A quick analysis of the cost of detention for life without parole show that detention will cost approximately \$34,000 per year for an average of 50 years. The cost of trial and appeals will come in at about \$75,000. Assuming a cost increase of a conservative 2 percent per annum, the costs come in at over \$3 million for 50 years detention, rising to \$5.5 million if a 4 percent cost increase is assumed.

While the costs of death row are higher coming in at almost double the cost of life incarceration or about \$60,000, these costs are not typically borne for anywhere near as long, an average of just six years. Trials and appeals will also be more costly coming in at approximately \$1.5 million giving a total of \$1.

Eighty-eight million assuming 2 percent per annum cost increases and \$1.91 million with a 4 percent costs increase. This analysis shows that the overall costs of the death penalty where called for are **much lower** than a lengthy incarceration without parole and that is even before adjustment to life costs has been made to cover the costs of treating the diseases and suffering of old age which typically are complex and expensive to treat.

## 6. The Death Penalty Can Promote Happiness and Well-being among Nonoffenders

This may seem like a rather illogical argument, but it is one that is often deployed by prodeath penalty campaigners in Japan.

Crime is not rampant in Japan which experiences on average 1,200 or fewer murders a year, approximately equivalent to the number of homicides in France which has half the Japanese population. Japanese executions are carried out by hanging and 76 of the 102 inmates on death row were executed between 1993 and 2008.

Because the death penalty is used relatively sparingly in Japan (although with increasing frequency since the turn of the century), there was thought at one point that the penalty would be abolished, and under one Minister

of Justice, there was a de facto moratorium on the death penalty as he refused to authorize executions.

Nevertheless, the death penalty remains for the reason that it has an important **psychological impact** on Japanese society. Like Americans, the Japanese work hard, and they get relatively few days off and are expected to put their employer's needs before their own. The death penalty shows the hardworking ordinary Japanese that bad things happen to bad people. The necessary concomitant of this is the belief that good things happen to good people. Therefore, psychologists in Japan believe when people see the bad punished, they think they will receive rewards for being good.

Of course Japanese people are psychologically very different from Americans, but the argument is interesting and could be of application in the United States. After all who does not believe that people should get what is coming to them!

## 5. Race Should Not Be, and Is Not an Issue in the Application of the Death Penalty

Read any argument for the abolition of the death penalty and you will almost certainly be told that the death penalty is an unfair burden on racial minority Americans, more specifically black Americans with the death penalty being, in effect, a reflection of a middle-class "*desire*" to **strike at racial minorities**. If this were true, it would be a good reason to suspend the death penalty to ensure that its application was even and fair, but the claims are simply so much rubbish. The death penalty in America is color blind!

Abolitionists claim that white lives are accorded more value than black because the vast majority (82 percent) of all death penalty murder victims are white and only 13 percent black. black deaths, so the argument goes, are simply not deserving of the death penalty. However, this imbalance may simply be due to the fact that more white Americans are victims of killings the circumstances of which attract the death penalty.

When it comes to actual executions, the statistics are reversed. Fifty-six percent of all those executed for death penalty crimes are white and only 38 percent black, this is despite the fact that black criminals committed 47 percent of all murders with whites responsible for only 38 percent. The conclusions are **startling**; white Americans who kill other whites are more likely to end up on death row than black Americans who kill whites, white killers of black victims are more likely to receive the death penalty than

black killers of white victims, and white killers are executed **15 months faster** than black killers on death row.

Despite these statistics, no one claims the system is biased against white killers. They don't make the claim because the system is not inherently racist. Those who murder receive the death penalty if, and only if, they meet all the necessary criteria for it to be handed down not simply because of the color of their skin.

## 4. The Death Penalty Is Not Inherently Unfair on the Poor

Much like the arguments pertaining to race (see above), those in favor of abolishing the death penalty claim that it is unfairly burdensome on the poorer members of society. Those unable to afford a decent lawyer, so the claim goes, will have to make do with a **public defender**. These public lawyers are, in the eyes of abolitionists, incompetent, unprepared, and woefully underpaid. They are often incapable of mounting an effective defense and are often nothing more than a figurehead, a sop to the American ideal of free legal representation that no longer exists in reality.

This paints a pretty picture, everyone loves an underdog and the idea that people are being denied due process, and adequate representation seems inherently un-American. The pretty picture is, however, nothing more than a myth built on shaky foundations. It may have been true in the past, but the reality today is very different. Over recent decades, many states have **overhauled** their previously inadequate public defender systems and provide extensive funding for the expert witnesses required to mount an effective defense. Many law firms, looking for good publicity, will take on a capital case on a pro-bono basis and may even offer partnership to lawyers who work in capital defense cases.

## 3. Advances in Process and Science Help to Eliminate the Possibility of Mistakes in Convictions

One of the reasons people claim that the death penalty should be abolished is the danger of an erroneous conviction. The death penalty is final, there is no coming back from it, whereas a mistaken conviction leading to a life sentence can result in the individual being released and granted compensation.

The key thing to bear in mind is that while mistakes can occur in any judicial system (and they do), the likelihood of mistakes in any one case can be protected

against. The standard of proof required in death penalty cases is very high, and death penalty juries take their responsibilities very seriously indeed. Any person convicted of a death penalty crime has the automatic right to a funded appeal to a higher court. The checks and balances designed into the system ensure that the chances of a mistake are very low indeed. Indeed, prisoners are six times more likely to be released from death row on appeal than walk the route to the execution chamber.

Reviews have shown that 23 potentially innocent people were executed in the United States since 1900. Commentary on the review shows that there is no proof as to the innocence of those 23 individuals. What the study has shown is not that mistaken executions are common, but that they are almost vanishingly rare. No person subsequently proved to be innocent has been executed since the reinstatement of the death penalty in 1977.

Add to this the advances in forensic science and technology. DNA evidence can now be obtained from almost vanishingly small samples allowing for the innocent to be exonerated relatively easily. There is a danger that juries become conditioned by television programs and media reporting to believe that DNA holds all the answers. As a result, it is vital that judges give the juries adequate directions to enable them to interpret the evidence before them.

It is also why, in spite of what seems to be an almost god-like ability to determine whether or not someone was present in the room or handled a weapon, we still require juries to analyze whether or not the evidence is believable. This combination of cutting edge technology and human analysis of credibility is one of the true strengths of the legal system and a defense against wrongful conviction.

## 2. The Death Penalty Need Not Be a Cruel and Painful End

Thirty-six states in the United States conduct their executions through the use of lethal injection. To many laypeople, this might seem a calm and peaceful, painless end. After all when a much loved pet is in pain, we take them to the vet for an injection and hold them as they breathe their last, we know they feel no pain, only a gentle slide into oblivion.

The protocol for human lethal injection is slightly different. Thirty of the 36 states use a combination of an anesthetic, a paralytic, and a drug to stop the heart. In recent years, supplies of the barbiturate of choice have run low leading to the need to source the drug elsewhere. Some experts claim that execution by lethal injection

causes needless pain and suffering particularly since the anesthetic barbiturate which is meant to render the convict unconscious and unable to feel the effects of the second two drugs does not always act as intended as doses are not strictly calculated. If a sufficiently powerful dose is not administered, they will feel excruciating pain.

Nevertheless the Supreme Court ruled in the 2008 decision of *BAZE v. REES* that the triple cocktail lethal injection method did not constitute cruel and unreasonable punishment.

It is not just lethal injections that can go wrong, several executions by electric chair have also been botched requiring second jolts. Analysis shows that at least 47 executions have been botched since 1977, in some cases, the convict took nearly 2 hr to die. Executions do not have to be that way. Utah allows execution by firing squad, it might seem backward but is possibly more humane than lethal injection. The United Kingdom no longer executes prisoners, but when it did the executions were done by hanging. This has been abandoned as a method of execution in most United States (it remains as a potential secondary method in New Hampshire, Delaware, and Washington in the event a lethal injection cannot be carried out). Concerns with hanging include a potential lengthy suffocation process if a short drop is used or beheading if a violent long drop is used. The United Kingdom developed a system which included the use of a device to dislocate the neck which together with a drop length calculated against the bodyweight of the criminal would result in an almost instantaneous and almost painless death.

Given the concerns that exist with the preferred American execution methods of lethal injection and electrocution, it would seem better to adopt (or allow prisoners to request) a firing squad or British-style measured drop hanging. This would remove all potential to claim that the punishment was cruel or unusual.

## 1. The Death Penalty Is the Only Rational and Moral Response to Some Crimes

We are told, by those in favor of abolition of the death penalty, that human life is sacred, that man should not play God. The truth is, however, that those people who have committed the type of crimes for which the death penalty is applicable have put themselves beyond the pale of humanity. They have chosen to act in a manner that is directly at odds with the morals of society at large and as such they must expect to be sanctioned.

Should Ted Bundy have been allowed to live? Should John Wayne Gacy?

Does the imposition of the death penalty result in man putting themselves in God's shoes? Many Christian theologians think not. St. Augustine in chapter 21 of his book *THE CITY OF GOD* argues that the executioner in a legally sanctioned death is but a "sword in the hand." Going even deeper into the core of Christian teaching, St. Paul mandates the use of capital punishment in appropriate circumstances in Romans 13:4 "If thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil." Meanwhile Matthew reports that Jesus instructed that "all they that take the sword shall **perish with the sword**." Human life is, indeed, sacred which is why it behoves us to punish those who take it.

The argument that it is morally superior not to execute prisoners is as seductive as it is misleading. It is easy to feel sorry for someone in an orange suit who says they repent of their crime, but at the end of the day, they did commit a crime. Furthermore, the crime they committed, in order to find themselves on death row, was no ordinary

crime. It was cruel, it was violent, and it ended the life of another person, an innocent victim.

It is only right and proper that people are punished for the crimes they commit. It is also right that that punishment be proportionate. What possible punishment other than death could possibly go toward expiating the guilt of the accused, allowing for appropriate retribution and act as a deterrent to others who might wish to commit such crimes.

Most of the arguments against the death penalty; those of inherent unfairness and bias toward the poor or racial minorities or the devastating potential for mistaken execution are both fallacious and misleading.

While we do believe that America could improve its method of executions to ensure that they are as swift and painless as possible, we also believe that the death penalty is necessary and important and should remain at the present time.

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# EXPLORING THE ISSUE

## Is Capital Punishment a Bad Public Policy?

### Critical Thinking and Reflection

1. What did the U.S. Supreme Court hold in *Furman v. Georgia* (1972)?
2. How did the U.S. Supreme Court's decision in *Gregg v. Georgia* differ from the *Furman* case?
3. Present several reasonable arguments against capital punishment.
4. Present several reasonable arguments supporting capital punishment.
5. Is capital punishment an "efficient" penal sanction?
6. Is the death penalty an "uncivilized" form of punishment?

### Is There Common Ground?

One of the most striking elements about the issue of capital punishment is that most of the public, the politicians, and even many criminological scholars do not seem to be fazed by empirical evidence. Each side presents empirical evidence to support its respective position. Opponents of capital punishment often draw from Thorsten Sellin's classic study *The Penalty of Death* (Sage Publications) to "prove" that the number of capital offenses is no lower in states that have the death penalty as compared to states that have abolished executions.

Most political candidates have seemed to support capital punishment in recent years. Supporters of capital punishment draw from numerous studies, including I. Ehrlich's "The Deterrent Effect of Capital Punishment," *American Economic Review* (vol. 65, 1975, pp. 397-417), and his "Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence," *Journal of Political Economy* (vol. 85, 1977, pp. 741-788). They also draw from W. Berns's *For Capital Punishment: Crime and the Morality of the Death Penalty* (Basic Books, 1979).

Generally, the empirical research indicates that the death penalty cannot conclusively be proven to deter others from committing homicides and other serious crimes. Entire scientific commissions have been charged with the responsibility of determining the deterrent effects of the death penalty (e.g., the National Academy of Sciences in 1975). The gist of their conclusions was that the value of the death penalty as a deterrent "is not a settled matter."

As is typical with most aspects of human behavior, including crime and crime control, the issue is filled with much irony, paradox, and contradiction. First, clashing views over capital punishment often rely largely on

emotion. The public's attitudes, politicians' attitudes, and even scholarly attitudes are frequently shaped more by sentiment and preconceived notions than by rational discourse. As F. Zimring and G. Hawkins indicate in *Capital Punishment and the American Agenda* (Cambridge University Press, 1986), very few scholars have ever changed their opinions about capital punishment.

However, a remarkable transformation occurred in February 2000: Governor George Ryan (R-Illinois) stopped executions in his state after 13 condemned criminals were exonerated while on death row. It had become clear that mistakes were being made. Twelve inmates had been executed in Illinois since 1976. Ryan and others now wonder if perhaps some of them had been innocent as well.

Even today, capital punishment remains a divisive issue. And despite dramatic opposition, such as Governor Ryan's, it probably has growing support. One useful, recent work in strong opposition to the practice is A. Sarat, ed., *The Killing State: Capital Punishment in Law, Politics, and Culture* (Oxford University Press, 1998). Also see "The Cruel and Ever More Unusual Punishment," *The Economist* (May 15, 1999).

### Additional Resources

- Jordan M. Steiker and Carol S. Steiker, *Courting Death: The Supreme Court and Capital Punishment*. The Belknap Press of Harvard University Press, 2016.
- The American Bar Association, "The Death Penalty: How Far Have We Come?" Vol. 42, No. 2, 2016-2017.
- Seth Miller and Misty Thomas, "A Forty-Year Retrospective of the Death Penalty." American Bar Association, Human Rights, 2016-2017.