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Capital Punishment

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Capital Punishment

At one level, capital punishment, or the death penalty, is a minor issue. The media keep the public aware of all sorts of horrible crimes, but relatively few people are directly affected by those crimes, either as perpetrators or victims, or as family and friends of perpetrators and victims. Very few people are sentenced to die for their crimes, and still fewer people are ever executed.

At another level, capital punishment represents two profound concerns of nearly everyone: the value of human life and how best to protect it. For most people who support capital punishment, the execution of killers (and people who commit other horrible acts) makes sense. Death penalty supporters frequently state that executions do prevent those executed from committing heinous crimes again and that the example of executions probably prevents most people who might contemplate committing appalling crimes from doing so. In addition, many death penalty supporters simply believe that people who commit such crimes deserve to die, that they have earned their ignominious fate.

For opponents, capital punishment is about something else entirely. It is a benchmark of the “developing moral standards” of American civilization. As Winston Churchill once said, “The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.” Put somewhat differently, for many opponents, the level of death penalty support in the United States is a rough estimate of the level of maturity of the American people. The not-so-subtle implication is that a mature, civilized society would not employ capital punishment. Opponents maintain that perpetrators of horrible crimes can be dealt with effectively by other means and that it makes little sense to kill some people, however blameworthy they are, to teach other people not to kill. These opponents argue that although the perpetrators of terrible crimes may deserve severe punishment, that punishment need not be execution.

Capital punishment can be and has been addressed on many different levels. Only superficially is it a minor issue. Rather, it is a complex concern that encompasses fundamental questions of who a society is as a people and how some of its most vexing social problems are handled. This entry is divided into five sections. The first presents a concise history of capital punishment in the United States. The second addresses the Supreme Court's regulation of capital punishment. The third describes Congress's involvement. The fourth examines the practice of capital punishment under modern, or post-*Furman*, statutes, and the final section speculates on the future of capital punishment.

A Concise History of Capital Punishment in the United States

When the first European settlers arrived in America, they brought with them the legal systems from their native countries, which included the penalty of death for a variety of offenses. For example, the English Penal Code at the time, which was adopted by the British colonies, listed more than 50 capital offenses, but actual practice varied from colony to colony.

The earliest recorded lawful execution in America was in 1608 in the Virginia Colony. Captain George Kendall, a councilor for the colony, was executed for being a spy for Spain. Kendall's execution was atypical for two reasons. First, he was executed for a relatively unusual offense (spying/espionage), and second, he was shot instead of hanged. More than 20 years would pass before the first murderer, John Billington, would be executed in 1630 in the

Massachusetts Bay colony. Of the 162 colonists executed in the 17th century (for which the offense is known—85% of the total), nearly 40% were executed for murder, about 25% for witchcraft, and nearly 15% for piracy. No other crimes accounted for more than 8% of all executions. Most of the executed were hanged (88%), 10% were shot, an alleged witch was pressed to death, and a convicted arsonist was burned.

Since Kendall, about 20,000 legal executions have been performed in the United States under civil (as opposed to military) authority. The vast majority of those executed have been men; only about 3% of the total have been women. Most of the condemned women (87%) were executed before 1866. The first woman executed was Jane Champion in the Virginia Colony in 1632. She was hanged for murdering and concealing the death of her child, who was fathered by a man other than her husband. Since 1962, only 11 women have been executed in the United States (as of April 1, 2008) (Death Penalty Information Center, 2008).

In addition, about 2% of those executed in the United States since 1608 have been juveniles, those whose offenses were committed prior to their 18th birthdays. The first juvenile executed in America was Thomas Graunger in the Plymouth Colony in 1642, for the crime of bestiality. Between 1990 and 2005, the United States was 1 of only 7 countries that had executed anyone who was under 18 years of age at the time of the crime; the others were the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen. At this time, Yemen and the United States (as of March 1, 2005) no longer execute juveniles. The United States had executed 22 juveniles since 1976.

Among the first people in the United States to organize others against the death penalty was Dr. Benjamin Rush (1747–1813), a Philadelphia physician and signer of the Declaration of Independence. In the late 18th century, Dr. Rush attracted the support of such prominent Americans as Benjamin Franklin and William Bradford, who was the Pennsylvania and later U.S. Attorney General. It was at Franklin's home in Philadelphia that Rush became one of the first Americans to propose confinement in a "House of Reform" as an alternative to capital punishment. The houses of reform envisioned by Rush would be places where criminals could learn to be law-abiding citizens through moral education. At least in part because of the efforts of Rush and his colleagues, in 1790, the Walnut Street Jail in Philadelphia was converted into the world's first penitentiary—an institution devoted primarily to reform.

Largely as a result of Bradford's efforts, Pennsylvania became the first state in legal proceedings to consider degrees of murder based on culpability. Before this change, the death penalty was mandated for anyone convicted of murder (and many other crimes), regardless of circumstance. Pressure from opponents also caused Pennsylvania in 1794 to repeal the death penalty for all crimes except first-degree murder.

In 1830, Connecticut became the first state to ban public executions. Pennsylvania became the second state to do so in 1834. In both states, only a few authorized officials and the relatives of the condemned were allowed to attend. By 1860, all northern states and Delaware and Georgia in the South had shifted the site of executions from the public square to an enclosed jail yard controlled by the sheriff and deputies. By 1890, some states had moved executions to inside the jail or a prison building. At least three reasons have been given for this change in execution venue. First, many northern-state social elites began to view those who attended executions as contemptible "rabble out for a good time" and concluded that any educational value public hangings once had was being lost on the less respectable crowd. Second, execution attendees were increasingly sympathizing with the condemned prisoners, weakening the position of the state. Indeed, some of those who met their fate on the gallows

became folk heroes. Third, increasingly being accepted was the belief that public executions were counterproductive because of the violence they caused. The last public execution was held in Galena, Missouri, in 1937.

In 1837, Tennessee became the first state to enact a discretionary death penalty statute for murder. All states before then had employed mandatory death penalty statutes that required anyone convicted of a designated capital crime to be sentenced to death. The reason for the change, at least at first and in the South, undoubtedly was to allow all-white juries to take race into account when deciding whether death was the appropriate penalty in a particular case. Between the Civil War and the end of the 19th century, at least 20 additional jurisdictions changed their death penalty laws from mandatory to discretionary ones. Illinois was the first northern state to do so in 1867; New York was the last state to make the change in 1963. The reason most northern states switched from mandatory to discretionary death penalty statutes, and another reason for southern states to do so, was to prevent jury nullification, which was becoming an increasing problem. *Jury nullification* refers to a jury's knowing and deliberate refusal to apply the law because, in this case, a mandatory death sentence was considered contrary to the jury's sense of justice, morality, or fairness. Discretionary death penalty statutes allowed juries the option of imposing a sentence of life in prison instead of death.

In 1846, the state of Michigan abolished the death penalty for all crimes, except treason, and replaced the penalty with life imprisonment. The law took effect the next year, making Michigan, for all intents and purposes, the first English-speaking jurisdiction in the world to abolish capital punishment. The first state to outlaw the death penalty for all crimes, including treason, was Rhode Island, in 1852; Wisconsin was the second state to do so a year later. Although no other states abolished the death penalty during this period, by 1860, no northern state punished by death any crime except murder and treason.

A major change took place in the legal jurisdiction of executions during the time of the Civil War. Before the war, all executions were conducted locally—generally in the jurisdiction in which the crime was committed—but on January 20, 1864, Sandy Kavanagh was executed at the Vermont State Prison. He was the first person executed under state, as opposed to local, authority. This shift in jurisdiction was not immediately adopted by other states. In the 1890s, about 90% of executions were imposed under local authority, but by the 1920s, about 90% were imposed under state authority. Today, all executions are imposed under state authority, except those conducted in Delaware and Montana and by the federal government and the military.

More capital offenders were executed during the 1930s than in any other decade in American history; the average was 167 executions per year. The most executions in any single year occurred in 1935 when 199 offenders were put to death. This was a dramatic reversal from earlier in the century when the number of executions fell from 161 in 1912 to 65 in 1919. The 65 executions in 1919 were the fewest in 50 years. No state abolished the death penalty between 1918 and 1957. In contrast, after World War II, most of the advanced Western European countries abolished the death penalty or severely restricted its use. Great Britain did not join them until 1969.

The Supreme Court Regulates Capital Punishment

For more than 150 years, the U.S. Supreme Court (hereafter, “the Court”) has exercised its responsibility to regulate capital punishment in the United States and its territories. Among the

principal issues the Supreme Court considered in relation to capital punishment before 1968 was the means of administering the death penalty. The Court upheld the constitutionality of shooting (*Wilkerson v. Utah*, 1878), electrocution (*In re Kemmler*, 1890), and a second electrocution after the first attempt had failed to kill the offender (*Louisiana ex rel. Francis v. Resweber*, 1947). Currently, there are five methods of execution authorized: lethal injection, electrocution, lethal gas, hanging, and firing squad. Lethal injection is the primary method of execution used by all executing jurisdictions in the United States.

Between 1968 and 1972, a series of lawsuits challenged various aspects of capital punishment as well as the constitutionality of the punishment itself. During this period, an informal moratorium on executions was observed, pending the outcome of the litigation, and no death row inmates were executed. Some of the suits were successful, and some of them were not. Finally, on June 29, 1972, the Supreme Court set aside death sentences for the first time in its history. In its decisions in *Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas* (hereafter referred to as the *Furman* decision), the Court held that the capital punishment statutes in those three cases were unconstitutional because they gave the jury complete discretion to decide whether to impose the death penalty or a lesser punishment in capital cases. Although nine separate opinions were written—a very rare occurrence—the majority of five justices (Douglas, Brennan, Stewart, White, and Marshall) pointed out that the death penalty had been imposed arbitrarily, infrequently, and often selectively against people of color. According to the majority, those statutes constituted “cruel and unusual punishment” in violation of the Eighth and Fourteenth Amendments. (The four dissenters were Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist.) It is important to emphasize that the Supreme Court did not rule that the death penalty itself was unconstitutional, only the way in which it was being administered.

The practical effect of the *Furman* decision was that the Supreme Court voided the death penalty laws of some 35 states, and more than 600 death row inmates had their death sentences vacated and commuted to a term of imprisonment. Although opponents of capital punishment were elated that the United States had finally joined other Western industrialized nations in abolishing capital punishment either in fact or in practice, the joy was shortlived. By the fall of 1974, a total of 30 states had enacted new death penalty statutes that were designed to address the Court's objections.

The new death penalty laws took two forms. Some states removed all discretion from the process by mandating capital punishment upon conviction for certain crimes (mandatory statutes). Other states provided specific guidelines that judges and juries were to use in deciding if death was the appropriate sentence in a particular case (guided discretion statutes).

The constitutionality of the new death penalty statutes was quickly challenged, and on July 2, 1976, the Supreme Court announced its rulings in five test cases. In *Woodson v. North Carolina* and *Roberts v. Louisiana*, the Court rejected “mandatory” statutes that automatically imposed death sentences for defined capital offenses. However, in *Gregg v. Georgia*, *Jurek v. Texas*, and *Proffitt v. Florida* (hereafter referred to together as the *Gregg* decision), the Court approved several different forms of guided-discretion statutes. Those statutes, the Court wrote, struck a reasonable balance between giving the jury some guidance and allowing it to consider the background and character of the defendant and the circumstances of the crime. The most dramatic effect of the *Gregg* decision was the resumption of executions on January 17, 1977, when the state of Utah executed Gary Gilmore (at his own request) by firing squad.

What the Court found especially appealing about the guided-discretion statutes approved in *Gregg* is that judges and juries are provided with standards that presumably restrict, but do not eliminate, their sentencing discretion. Specifically, judges and juries, in most states, are provided with lists of aggravating and, at least in some states, mitigating factors. Aggravating factors or circumstances are facts or situations that increase the blameworthiness for a criminal act. Mitigating factors or circumstances are facts or situations that do not justify or excuse a criminal act but reduce the degree of blameworthiness and thus may reduce the punishment. The Court has since ruled that judges and juries must consider any mitigating circumstance offered by the defense, whether it is listed in the statute or not.

Besides the guided-discretion statutes, the Court also was optimistic about two other procedural reforms: bifurcated trials and automatic appellate review. A bifurcated trial is a two-stage trial—unlike the one-stage trial in other felony cases—consisting of a guilt phase and a separate penalty phase. If, in the guilt phase, the defendant is found guilty as charged, then at the penalty phase, the jury must determine whether the sentence will be death or life in prison (There are no other choices except, in most death penalty states, life imprisonment without opportunity for parole.). All of the procedures of due process apply to both phases of the bifurcated trial.

Currently, 35 of the 36 states with death penalty statutes provide for automatic appellate review of all death sentences, regardless of the defendant's wishes. South Carolina allows the defendant to waive sentence review if the court deems the defendant competent; also, the federal jurisdiction does not provide for automatic appellate review. Most of the 35 states automatically review both the conviction and the sentence. Generally, the automatic review is conducted by the state's highest appellate court. If either the conviction or the sentence is overturned, then the case is sent back to the trial court for additional proceedings or for retrial. It is possible that the death sentence may be reimposed as a result of this process.

Some states are very specific in defining the review function of the appellate courts, while other states are not. Although the Supreme Court does not require it (*Pulley v. Harris*, 1984), some states have provided a *proportionality review*, in which the appellate court compares the sentence in the case it is reviewing with penalties imposed in similar cases in the state. The object is to reduce, as much as possible, disparity in death penalty sentencing.

In addition to the automatic appellate review, there is a dual system of collateral review for capital defendants. In other words, capital defendants may appeal their convictions and sentences through both the state and the federal appellate systems.

Some death row inmates whose appeals have been denied by the U.S. Supreme Court may still try to have the Court review their cases on constitutional grounds by filing a *writ of habeas corpus*, which is a court order directing a law officer to produce a prisoner in court to determine whether the prisoner is being legally detained or imprisoned. Critics maintain that abuse of the writ has contributed to the long delays in executions (currently averaging more than 10 years after conviction) and to the high costs associated with capital punishment.

In decisions since *Gregg*, the Supreme Court has limited the crimes for which death is considered appropriate and has further refined death penalty jurisprudence. In 1977, in the cases of *Coker v. Georgia* and *Eberheart v. Georgia*, the Court held that rape of an adult female (in *Coker*) and kidnapping (in *Eberheart*), where the victim was not killed, do not warrant death. Those two decisions effectively limited the death penalty to those offenders convicted of capital, or aggravated, murder.

In 1986, in *Ford v. Wainwright*, the Court barred states from executing inmates who have developed mental illness while on death row, and in 2002, in *Atkins v. Virginia*, the Court held that it is cruel and unusual punishment to execute the mentally retarded. In the 2005 case of *Roper v. Simmons*, the Court effectively limited capital punishment to offenders who are 18 years of age or older at the time of their offenses. Another death penalty decision of the Supreme Court is the 1987 case of *McCleskey v. Kemp*, in which the Court held that state death penalty statutes are constitutional even when statistics indicate that they have been applied in racially biased ways. The Court ruled that racial discrimination must be shown in individual cases.

Congress Gets Involved

In 1994, Congress passed a federal crime bill (the Violent Crime Control and Law Enforcement Act), which expanded the number of federal crimes punishable by death to about 50. All but four of the federal crimes involve murder. The four exceptions are treason; espionage; drug trafficking in large quantities; and attempting, authorizing, or advising the killing of any public officer, juror, or witness in a case involving a continuing criminal enterprise—regardless of whether such a killing actually occurs. In addition, the bill reinstated the death penalty for federal crimes for which previous death penalty provisions could not pass constitutional muster. The new law brought the earlier statutes into compliance with guidelines established by the Supreme Court. The U.S. government executed Timothy McVeigh and Juan Raul Garza in 2001, and Louis Jones Jr. in 2003. They were the first federal executions in nearly 40 years. Prior to those three, the last execution by the U.S. government was on March 15, 1963, when Victor H. Feguer was hanged at Iowa State Penitentiary. The Antiterrorism and Effective Death Penalty Act was enacted in 1996, in part to speed up the process and reduce costs. The law requires that second or subsequent habeas petitions be dismissed when the claim had already been made in a previous petition. It also requires that new claims be dismissed, unless the Supreme Court hands down a new rule of constitutional law and makes it retroactive to cases on collateral review. Under the act, the only other way the Supreme Court will hear a claim made for the first time is when the claim is based on new evidence not previously available. Even then, the new evidence must be of sufficient weight, by a clear and convincing standard of proof, to convince a judge or jury that the capital defendant was not guilty of the crime or crimes for which he or she was convicted.

The act also made the federal appellate courts “gatekeepers” for second or subsequent habeas corpus petitions. Thus, to file a second or subsequent claim under the new law, a capital defendant must first file a motion in the appropriate appellate court announcing his or her intention. A panel of three judges must then hear the motion within 30 days. The judges must decide whether the petitioner has a legitimate claim under the new act. If the claim is denied, the new law prohibits any review of the panel's decision, either by a rehearing or writ of certiorari to the Supreme Court. A *writ of certiorari* is a written order, from the Supreme Court to a lower court whose decision is being appealed, to send the records of the case forward for review. So far, the Supreme Court has upheld the constitutionality of the law.

Some people argue that the appellate reviews are unnecessary delaying tactics (at least those beyond the automatic review). However, the outcomes of the reviews suggest otherwise. Nationally, between 1973 and 2006, a total of 35% of the initial convictions or sentences in capital cases were overturned on appeal, and, contrary to popular belief, those reversals were generally not the result of so-called legal technicalities. They were the product of such fundamental constitutional errors as denial of the right to an impartial jury, problems of tainted

evidence and coerced confessions, ineffective assistance of counsel, and prosecutors' references to defendants who refuse to testify. The percentage of death penalty cases overturned by the appellate courts since the reestablishment of capital punishment has far exceeded the percentage of appellate reversals of all other noncapital felony cases, which, in most states, probably does not exceed 1%.

The Practice of Capital Punishment under Post-*Furman* Statutes

Currently (as of April 1, 2008), 38 jurisdictions in the United States have capital punishment statutes; 15 jurisdictions do not have capital punishment statutes. Jurisdictions with capital punishment statutes are the following: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, the U.S. Government, and the U.S. military. Kansas, New Hampshire, and the U.S. military have not executed anyone under their post-*Furman* statutes. Jurisdictions without capital punishment statutes are these: Alaska, Hawaii, Iowa, Massachusetts, Maine, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Columbia. In December 2007, New Jersey became the latest jurisdiction to abolish its death penalty.

Since Gilmore's execution in 1977, a total of 1,099 people have been executed in 34 states and by the federal government, which, as noted, has executed 3 (as of April 1, 2008).

Nearly all of the offenders executed since Gilmore have been male, while the gender of the victims is divided nearly evenly between males and females. As for race, 57% of all people executed under post-*Furman* statutes have been white; about 34% have been black. Thus, the percentage of blacks who have been executed far exceeds their proportion of the general population (about 13%). Particularly interesting is that nearly 80% of the victims of those executed have been white. What makes this finding interesting is that murders, including capital murders (all post-*Furman* executions have been for capital murders), tend to be intraracial crimes. However, the death penalty is imposed primarily on the killers of white people, regardless of the race or ethnicity of the offender. The figures on defendant-victim racial or ethnic combinations further support this conclusion. Approximately 54% of executions have involved white killers of white victims, and about 21% have involved black killers of white victims. On the other hand, only about 11% of executions have been of black killers of black victims, and there have been only 14 executions of white killers of black persons (less than 2%) (Death Penalty Information Center, 2008).

The number of persons currently on death row in the United States is 3,350 (as of January 1, 2007). California has by far the largest death row population at 669; Florida is second with 388 death row inmates. About 98% of death row inmates are male, 45% are white, 42% are black, 11% are Latina/Latino, and the remainder are of other races or ethnicities. The size of the death row population in the United States does not fluctuate very much from year to year, despite the relatively few executions each year. (The largest number since 1977 was 98, in 1999.) One reason is that the number of new death sentences has been declining in recent years. In 1995, a total of 326 people were sentenced to death—the highest number since 1977; in 2002, the number was about half as many at 169; there were 153 in 2003, 138 in 2004, 128 in 2005, 115 in 2006, and 110 in 2007. Another reason for the lack of much fluctuation in the death row population is that since January 1, 1973, approximately 2,700 of the nearly 7,700 defendants sentenced to death (35%) have been removed from death row by

having their convictions or sentences reversed. In addition, since January 1, 1973, a total of 341 death row inmates have received commutations (reductions in sentences, granted by a state's governor), and 327 have died of natural causes or have been killed (Death Penalty Information Center, 2008).

What Does the Future Hold?

Worldwide, the death penalty is trending toward abolition. At the beginning of the 20th century, only three countries—Costa Rica, San Marino, and Venezuela—had abolished the death penalty for all crimes. By 1977, only 14 countries had abolished the death penalty for all crimes. Another 2 countries had abolished it for all but exceptional capital crimes such as those committed during wartime. As of January 11, 2008, a total of 91 countries had abolished the death penalty for all crimes; another 11 countries had abolished it for all but exceptional capital crimes; and 33 countries had abolished it in practice—that is, they retain the death penalty but have not carried out an execution for at least 10 years and are believed to have a policy or established practice of not using the death penalty.

More than 40 countries have abolished the death penalty since 1990. Since 1985, only 4 of those countries have reintroduced the death penalty. Two of those countries, Nepal and the Philippines, have since abolished it again, and the two other countries, Gambia and Papua New Guinea, have not executed anyone since reintroducing the penalty. Currently, nearly 70% of the countries in the world—135 of them—have abolished the death penalty in law or practice. Only 62 countries have retained the death penalty. Among Western, industrialized nations, the United States stands alone as the only nation to employ capital punishment. All major allies of the United States except Japan have abolished the death penalty.

Furthermore, the number of countries that actually execute anyone in a given year is much smaller. In 2006, there were 1,591 executions around the world, down more than 25% from the 2,148 in 2005. Of all known executions that took place in 2006, approximately 91% were carried out in six countries: China, Iran, Pakistan, Iraq, Sudan, and the United States. Of the 1,452 executions that took place in those six countries, approximately 70% were carried out in China; 12% in Iran; 6% in Pakistan, and 4% each in Iraq, Sudan, and the United States.

In the United States, as noted, 38 jurisdictions have a death penalty and 15 jurisdictions do not, and as of April 1, 2008, there have been 1,099 executions since the practice resumed in 1977. There were 60 executions in 2005; a total of 53 executions in 2006; another 41 executions in 2007; and, as of this writing, no executions so far in 2008.

Of the 1,099 executions since 1977, about 82% of them have been carried out in the South, 11.5% in the Midwest, 6% in the West, and .4% in the Northeast. Thus, for all intents and purposes, executions in the United States are a mostly southern phenomenon (including border states).

Of the 34 death penalty states that have carried out at least one execution since 1977, half of them have executed fewer than 10 people. Only five of the executing states account for 65% of the 1,099 executions: Texas, Virginia, Oklahoma, Missouri, and Florida. Three of those states—Texas, Virginia, and Oklahoma—account for more than half of the 1,099 executions (53.5%). Texas and Virginia account for approximately 46% of the total, and Texas, alone, accounts for approximately 37%. Texas has executed more than 4 times as many offenders as any other state. Texas accounted for about 45% of the 2006 U.S. executions and 63% of the 2007 U.S. executions. In short, except for a handful of non-Western countries in the world and

a handful of mostly southern or border states to the United States, the death penalty is a dwindling practice. This is an important point because it raises the question of why those death penalty—or more precisely, executing—jurisdictions in the world need the death penalty, while all other jurisdictions—the vast majority—do not.

There are several other reasons to believe that the death penalty in the United States may be a waning institution. First, although abstract support for the death penalty remains relatively high—it was 69%, according to a 2007 Gallup poll—when respondents are provided an alternative, such as life imprisonment with absolutely no possibility of parole (LWOP), support for the death penalty falls to about 50%.

Second, the American public continues to express some concern about the way the death penalty is being administered. For example, a 2005 Gallup poll found that 35% of the American public did not believe that the death penalty is applied fairly. However, the 73% of Americans in 2003 that believed an innocent person had been executed in the last 5 years dropped to 63% in 2006. Most people believe that the execution of innocent people is a rare occurrence. For example, in the 2005 Gallup poll, 57% of respondents believed that the execution of an innocent person happened no more than 5% of the time. Only about 11% of respondents believed that more than 20% of executions involved innocent people. Although concern about the death penalty's administration has decreased somewhat from the level of concern expressed in 2000, it remains higher than it was prior to revelations about the quality of justice in capital murder trials, the overturning of several convictions as a result of DNA tests, and the resulting moratorium on executions in Illinois and elsewhere.

A third factor involves the positions taken by respected organizations within the United States, such as the American Bar Association (ABA) and organized religions. In 1997, the ABA adopted a resolution that requested death penalty jurisdictions to refrain from using the sanction until greater fairness and due process could be assured. The leaders of most organized religions in the United States—including Catholic, Protestant, and Jewish—openly oppose capital punishment. A recent survey found that of the 126 religious organizations that responded, 61% (77) officially oppose capital punishment, 17% (22) officially support it, and 21% (27) leave it up to individual congregations or individual religious leaders to determine their own position on capital punishment.

A fourth factor is world opinion. As noted previously, all major allies of the United States except Japan have abolished the death penalty. In Europe, the death penalty is viewed as a violation of human rights. A condition for admittance into the European Union (EU) and the Council of Europe is the abolition of the death penalty. The United Nations Commission on Human Rights has repeatedly condemned the death penalty in the United States, urging the U.S. government to stop all executions until it brings states into compliance with international standards and laws.

On the other hand, capital punishment in some states has proven stubbornly resilient. There are reasons to believe that in those states, the death penalty will remain a legal sanction for the foreseeable future. One reason is that death penalty support among the American public, at least according to the major opinion polls, remains relatively strong. It is unlikely that the practice of capital punishment could be sustained if a majority of American citizens were to oppose it. However, in no year for which polls are available has a majority of Americans opposed the death penalty. (The first national death penalty opinion poll was conducted in December 1936.)

Although life imprisonment without opportunity for parole seems to be a popular alternative to

the death penalty in polls, a problem with the LWOP alternative is that many people are very skeptical about the ability of correctional authorities to keep capital murderers imprisoned for life. Thus, although more than half of the public may say that it prefers LWOP to capital punishment, in practice, people may be reluctant to make the substitution because they fear that the alternative might not adequately protect them from the future actions of convicted capital offenders.

The abiding faith of death penalty proponents in the ability of legislatures and courts to fix any problems with the administration of capital punishment is another reason for its continued use in some places. However, the more than three-decade record of “fine-tuning” the death penalty process remains ongoing. Legislatures and courts are having a difficult time “getting it right,” despite spending inordinate amounts of their resources trying. Former Supreme Court Justice Harry A. Blackmun, who for more than 20 years supported the administration of capital punishment in the United States, finally gave up. On February 22, 1994, in a dissent from the Court's refusal to hear the appeal of a Texas inmate scheduled to be executed the next day, Blackmun asserted that he had come to the conclusion that “the death penalty experiment has failed” and that it was time for the Court to abandon the “delusion” that capital punishment could be administered in a way that was consistent with the Constitution. He noted that “from this day forward, I no longer shall tinker with the machinery of death” (*Callins v. Collins*, 1994).

As for the positions against capital punishment taken by respected organizations in the United States, “true believers” in the death penalty couldn't care less what others think, especially in the case of organizations such as the American Bar Association. This holds true for world opinion as well. In the case of organized religions, the situation is probably more complex. Although most people who consider themselves religious and are affiliated with religions whose leadership opposes capital punishment probably respect the views of their leaders, they obviously live their daily lives and hold beliefs about capital punishment (and other issues such as abortion) based on other values.

Some death penalty opponents believe that a principal reason for the continuing support of capital punishment is that most people know very little about the subject, and what they think they know is based almost entirely on myth. It is assumed that if people were educated about capital punishment, most of them would oppose it. Unfortunately, research suggests that educating the public about the death penalty may not have the effect that opponents of the practice desire. Although accurate information about the death penalty can reduce support for the sanction—sometimes significantly—rarely is the support reduced to less than a majority, and any reduction in support may be only temporary.

What else, then, sustains the public's death penalty support? At least two other factors appear to play a major role: the desire for vindictive revenge and the symbolic value capital punishment has for politicians and law enforcement officials. In a recent Gallup poll, 50% of all respondents who favored the death penalty selected “An eye for an eye/Convicted deserve to be executed” as a reason. The reasons selected second-most often (by only 11%) were “Save taxpayers money/Cost associated with prison” and deterrence. No other reasons were selected by more than 10% of the death penalty proponents. The choice of “An eye for an eye/Convicted deserve to be executed” indicates support of the penal purpose of retribution. Those who chose this reason wanted to repay the offender for what he or she has done. This response, at least the “eye for an eye” part, has a strong emotional component and thus has been called “vindictive revenge.”

The other factor that probably sustains death penalty support is the symbolic value it has for politicians and criminal justice officials. Politicians use support for the death penalty as a symbol of their toughness on crime. Opposition to capital punishment is invariably interpreted as symbolic of softness on crime. Criminal justice officials and much of the public often equate support for capital punishment with support for law enforcement in general. It is ironic that although capital punishment has virtually no proven effect on crime, the death penalty continues to be a favored political “silver bullet”—a simplistic solution to the crime problem used by aspiring politicians and law enforcement officials. Together with the movement to replace indeterminate sentencing with determinate sentencing and to abolish parole, the death penalty is part of the “law and order” agenda popular in the United States since the mid-1970s. Whether this direction in criminal justice has run its course is anyone's guess. However, it appears that the effort to “get tough” with criminals has not produced the results desired by its advocates.

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