Mark Tunick, "Capital Punishment," in Social Issues in America: An Encyclopedia (Sharpe Reference, 2006), v. 2: 270-86

CAPITAL PUNISHMENT

The death penalty is the most severe punishment the state can impose and is unlike any other punishment because it is irreversible. Much is said against it—that it is nothing but state-sanctioned murder, that it is carried out unfairly, and that the risk of killing innocent persons is too great a price to pay for the minimal protection it provides and the justice it is said to purchase. But much is also said in its favor—that it effectively deters criminals from committing the worst crimes, and that unlike murder it is carried out in the name of the law and is the only means of giving some criminals their just desserts. Debates over the death penalty involve philosophical disputes about the proper role of the state and what justice requires, legal disputes over whether the death penalty is constitutional, and disputes among social scientists as to its effectiveness in deterring crime and truly making society safer.

HISTORY OF THE DEATH PENALTY

The death penalty was prominent in early American history, in large part because prisons did not begin appearing until the late eighteenth century and there were few other ways of incapacitating dangerous criminals. In other countries, methods of execution have ranged from poisoning and crucifixion to extended exposure and starvation. Ravaillac, the assassin of France's King Henri IV in 1610, was crucified, burned alive, and tortured before his body was put on display to the public. Methods of execution in early American history, while perhaps not as calculatingly savage, were hardly humane. One technique to maximize the deterrent effect was to place the criminal's corpse in a gibbet, or cage, for all to see. Intentionally or not, many hangings were slow and extremely painful.

The death penalty in eighteenth- and early nineteenth-century America and Europe was a public spectacle. Some 50,000 people were said to witness the 1824 hanging of John Johnson in New York City. Public executions were an occasion for ministers to preach to large, typically well-behaved crowds. The death penalty was not limited to violent offenses; sodomy and other moral crimes were capital offenses, though offenders were rarely executed. There is one known case of hanging for adultery in America, in 1643.

The nineteenth century saw concerted efforts to reform penal institutions and abolish the death penalty. Some reformers, such as Robert Turnbull and Benjamin Rush, felt the death penalty was too mild and preferred that criminals suffer for life in prison. Others felt the state had no right to inflict death or that death was too harsh a penalty, at least for crimes short of murder. Cesare Beccaria, an Italian whose 1764 work *On Crimes and Punishments* appeared in English in 1767 and was widely read in America, argued that the death penalty was not an effective deterrent. He also argued that the state's authority was legitimate only insofar as its members consented to it, and no reasonable person would agree to live under the state's laws if the state had the authority to kill him or her.

Calls for abolition were not new—English radicals opposed the death penalty in Britain in the mid-1600s—but only with the invention of prisons were reforms practical. Beginning in the 1760s, several U.S. states limited the death penalty to murder cases. Pennsylvania, for example, abolished the death penalty for robbery, burglary, and sodomy in 1786, while retaining it for rape and arson. In the 1800s the trend toward abolition continued primarily in the North, fueled in part by the first nationally known case of an innocent man being executed, Charles Boyington of Alabama in 1835; the actual killer confessed a few months after Boyington was hanged. In 1846, Michigan became the first state to abolish the death penalty for murder. Although the South had some abolitionists, such as Edward Livingston, their arguments went largely unheard and the death pen-

CHRONOLOGY

18th century B.C.E. In Babylonia, the Code of Hammurabi establishes death as the punishment for a number of crimes.

399 B.C.E. Socrates is sentenced to death for impiety and corrupting the youth of Athens.

1622 Daniel Frank is executed in the colony of Virginia for theft, the earliest recorded lawful execution in America.

1665 York colony institutes the Duke's Laws, setting death as the penalty for a number of crimes, including denial of the true God.

1754 Russia abolishes the death penalty for ordinary crimes including murder.

1764 Cesare Beccaria writes *On Crimes and Punishment*, in which he is critical of the death penalty.

1785 The Virginia legislature fails by one vote to enact a law ending capital punishment.

1786 Pennsylvania abolishes the death penalty for many crimes. Tuscany abolishes the death penalty.

Benjamin Rush delivers the first call by a prominent American for total abolition of the death penalty.

1793 William Bradford, the attorney general of Pennsylvania, proposes "degrees" of murder to deal with the issues of premeditation and mitigating circumstances, such as heat of moment passions.

1824 An estimated 50,000 people witness the hanging of murderer John Johnson in New York City.

1846 Michigan becomes the first state to abolish the death penalty for murder.

1863 Colombia becomes the first nation in the Western hemisphere to abolish the death penalty for most crimes.

1878 Iowa reinstitutes the death penalty, having abolished it in 1872.

1890 William Kemmler becomes the first person to be executed in the electric chair, in Auburn, New York.

1907 Kansas abolishes the death penalty.

1918 Arizona reinstates the death penalty, having abolished it in 1916.

1921 Gas is used in an execution for the first time in Nevada.

1924 Defense attorney Clarence Darrow succeeds in saving convicted murderers Leopold and Loeb from a death sentence.

1935 Executions reach an annual peak of 199 in the United States.

The last widely attended public execution in the United States, the hanging of Rainey Bethea, takes place in Kentucky.

1937 Mexico eliminates the death penalty.

1954 Caryl Chessman, prisoner on death row, publishes *Cell 2455 Deathrow*, eliciting widespread anti-death penalty support.

1960 Chessman is executed by gas at San Quentin prison in California.

1967 Canada ends the death penalty.

Beginning of an 8-year hiatus in which there are no executions in the United States.

1972 In *Furman v. Georgia*, the U.S. Supreme Court rules that the death penalty is unconstitutional "cruel and unusual punishment."

1976 The U.S. Supreme Court rules in *Gregg v. Georgia* that modified death penalty statutes have corrected the concerns raised in *Furman* and executions may resume.

By request, Gary Gilmore is executed by firing squad in Utah, the first person in the United States to be executed since 1967. In Oklahoma, lethal injection is used for the first time.

1986	The U.S. Supreme Court prohibits execution of the insane in *Ford v. Wainwright*.
1996	The Antiterrorism and Effective Death Penalty Act of 1996 limits federal habeas appeals; prisoners have fewer opportunities for a federal court review of their conviction and sentence.
	The American Bar Association calls for a moratorium on the death penalty until courts across the country can ensure that such cases are administered fairly and impartially and with minimum risk of executing innocent people.
	Guatemala broadcasts the execution of Manuel Martinez Coronado live on television.
	Pope John Paul II, visiting St. Louis, Missouri, calls for abolition of the death penalty.
2002	The U.S. Supreme Court rules in *Ring v. Arizona* that all capital trials must involve jury participation. Illinois Governor George Ryan announces a moratorium for executions; Alton Coleman is executed in Ohio on closed circuit television.
	In *Wiggins v. Smith*, Supreme Court rules that defense lawyers in death penalty cases have a duty to offer at least some mitigating evidence that might lead the jury to impose a life sentence rather than the death penalty.

alty prevailed in southern states as a means of suppressing blacks. Virginia had as many as sixty-six capital crimes for blacks and one for whites. Slaves were often spared execution, but only to avoid the financial burden of compensating the slave owner and allow the state to sell and transport the sentenced man to help the public treasury.

The most significant trend in the nineteenth century was a move away from public executions. In Britain and elsewhere, crowds had become unruly. Charles Dickens described the typical scene in a letter to the *Daily News* on February 28, 1846: "No sorrow, no salutary terror, no abhorrence, no seriousness; nothing but ribaldry, debauchery, levity, drunkenness, and flaunting vice in fifty other shapes." Partly as a response, executions were moved inside prison walls. Concealment of the death penalty prevailed in the twentieth century; the last public execution in the United States was the 1936 hanging of Rainey Bethea in Owensboro, Kentucky. From 1888 to 1913, fifteen states used the electric chair; by 1950 this number rose to twenty-seven. Gas was used for the first time in 1921. Ostensibly, electrocution or lethal injection is more humane than public hangings or shootings, but some opponents have contended that such methods only make a barbarous practice appear more humane. Execution by firing squad remains an option only in Utah, perhaps reflecting Mormon religious teachings about bloodletting sacrifices for the commission of murder.

Executions in the United States peaked at 199 in 1935, partly because of the fear of gangsters and the public outcry over the Lindbergh kidnapping of 1932. The numbers declined steadily beginning in 1935 and, even when administered, the delay between court sentencing and the execution increased. In 1930 the average delay was less than 2 months; in the late 1950s, one to 2 years was not unusual. In 2002, the U.S. Supreme Court considered the case of a prisoner who had been on death row for 27 years. (The court refused to rule on the question of whether so long a confinement on death row itself constituted "cruel and unusual punishment.")

In 1954, Caryl Chessman, a prisoner on death row in California, published a book titled *Cell 2455 Death Row*, in which he condemned social vengeance as manifested in the death penalty as "monumentally futile." Part of a wave of anti-death penalty sentiment, the book was a bestseller. Alaska and Hawaii abolished the death penalty in 1957; New York, Iowa, Vermont, and West Virginia followed in 1965. In 1966 the U.S. Department of Justice called for abolition, and by 1969 New Mexico became the fourteenth state to end capital punishment. In addition, executions declined as Supreme Court decisions in the 1950s and 1960s facilitated legal appeals. Petitions for a writ of habeas corpus, a legal device that requires a court to hear an appeal over illegal detention, nearly quadrupled in this period. From 1968 to 1976 there were no executions in the United States.

In 1972, the U.S. Supreme Court held in *Furman v. Georgia* that the death penalty as then practiced

Table 1. Number of Persons Executed in the United States, 1930–2004

Year	Executions	Year	Executions
1930	155	1967	2
1931	153	1968	0*
1932	140	1969	0*
1933	160	1970	0*
1934	168	1971	0*
1935	199	1972	0*
1936	195	1973	0*
1937	147	1974	0*
1938	190	1975	0*
1939	160	1976	0*
1940	124	1977	1
1941	123	1978	0
1942	147	1979	2
1943	131	1980	0
1944	120	1981	1
1945	117	1982	2
1946	131	1983	5
1947	153	1984	21
1948	119	1985	18
1949	119	1986	18
1950	82	1987	25
1951	105	1988	11
1952	83	1989	16
1953	62	1990	23
1954	81	1991	14
1955	76	1992	31
1956	65	1993	38
1957	65	1994	31
1958	49	1995	56
1959	49	1996	45
1960	56	1997	74
1961	42	1998	68
1962	47	1999	98
1963	21	2000	85
1964	15	2001	66
1965	7	2002	71
1966	1	2003	65
		2004	59

* Between 1967 and 1977, executions were temporarily suspended as unconstitutional by the U.S. Supreme Court.
Source: U.S. Department of Justice, Bureau of Justice Statistics.

was "cruel and unusual punishment" and therefore unconstitutional under the Eighth Amendment. Pointing to the arbitrary and discriminatory ways in which the death penalty was applied, the Court ruled that it is cruel and unusual to selectively and irregularly execute minorities "whose numbers are few, who are outcasts of society, and who are unpopular." In response, by 1976, thirty-five states and the federal government enacted new statutes addressing the Court's concerns by narrowing the discretion of juries in deciding what sentence to impose. Capital offenses were clearly defined, and jury discretion was limited by instituting a separate sentencing procedure in which aggravating and mitigating circumstances would be presented.

By 1975, there were 298 death sentences nationwide, and the Supreme Court was asked to rule on constitutionality once again. In *Gregg v. Georgia* (1976), the justices ruled that state statute modifications had corrected the concerns raised in *Furman* and executions for capital offenses could resume. Six months later, Gary Gilmore, a convicted murderer who had gained national attention by requesting a death sentence, was executed in Utah.

Efforts continue to abolish or limit the death penalty in the United States. In May 2000, the New Hampshire legislature became the first state legislative body in more than 20 years to repeal its death penalty statute, but the governor vetoed the bill. In 2002, acting in response to concerns that innocent people had been committed to death row, Illinois Governor George Ryan announced a moratorium on executions and established a statewide commission to review cases to ensure consistency; in January 2003, he announced he was commuting the sentences of all state inmates on death row. Governor Ryan's actions were driven in large part by the work of the Center on Wrongful Convictions at Northwestern University Law School, which had gathered evidence exonerating nine people sentenced to death and awaiting execution.

In May 2003, the North Carolina Senate passed a calling bill for a 2-year moratorium on executions; North Carolina had executed 23 persons since 1984. Maryland briefly banned executions in 2002. Following a series of U.S. Supreme Court cases, procedures were put in place to ensure "super due process" in capital cases. A person convicted of a capital offense is entitled to a separate penalty hearing to consider aggravating and mitigating circumstances, ensuring that death is reserved for the most serious crimes; there is also an automatic direct appeal to the state supreme court, followed by state habeas corpus appeals and then federal habeas corpus appeals for violations of constitutional rights.

At the same time, however, attempts to remove legal obstructions to execution have been ongoing. A 1996 law restricts federal habeas appeals to a single comprehensive review within 6 months of the final state appeal and bars federal courts from reconsider-

Table 2. Executions by State Since 1976

State	Total since 1976	2002	2003	2004	State	Total since 1976	2002	2003	2004
Texas	313	33	24	23	**Ohio**	7	3	3	7
Virginia	89	4	2	5	**Mississippi**	6	2	0	0
Oklahoma	69	7	14	6	**Utah**	6	0	0	0
Missouri	61	6	2	0	**Washington**	4	0	0	0
Florida	57	3	3	2	**Maryland**	3	0	0	1
Georgia	34	4	3	2	**Nebraska**	3	0	0	0
North Carolina	36	2	7	4	**Pennsylvania**	3	0	0	0
Alabama	28	2	3	2	**Kentucky**	2	0	0	0
South Carolina	28	3	0	4	**Montana**	2	0	0	0
Louisiana	27	2	0	0	**Oregon**	2	0	0	0
Arkansas	25	0	1	1	**Colorado**	1	0	0	0
Arizona	22	0	0	0	**Idaho**	1	0	0	0
Delaware	13	0	0	0	**New Mexico**	1	0	0	0
Illinois	12	0	0	0	**Tennessee**	1	0	0	0
Indiana	11	0	2	0	**Wyoming**	1	0	0	0
California	10	1	0	0	**Federal**	3	0	1	0
Nevada	9	0	0	2	**Total**	**907**	**74**	**65**	**59**

Source: Death Penalty Information Center, "Number of Executions by State and Region since 1976." Death Penalty Information Center.

ing legal and factual issues in capital cases ruled on by state courts, in most instances. Federal habeas corpus is the means by which prisoners may petition federal courts to review whether there were adequate grounds to support the conviction and sentence; the 1996 legislation limits the opportunities for prisoners to have their sentences reduced or, if they are innocent, their convictions reversed. In addition, capital resource centers have been de-funded in many states, making it more difficult for poor defendants to present an effective defense.

TRADITIONAL PROS AND CONS

The two dominant theories of punishment are utilitarian and retributive. According to the utilitarian view, punishment is justified only insofar as its benefits to society—its "social utility"—outweigh its costs. In the words of liberal penal reformer Jeremy Bentham (1748–1832), punishment is justified only to the extent that it contributes to the "greatest happiness of the greatest number."

The potential benefits of punishment are deterring a particular person from committing additional crimes in the future (individual deterrence) or many others from committing crimes at all (general deterrence); physically preventing criminals from committing future crimes either by confining them to prison or extinguishing their life; or transforming the criminal into a law-abiding citizen (reform). Capital punishment is a perfectly effective incapacitator but obviously unsuited to reforming criminals. The costs of punishment include the pain inflicted on criminals and those who care about or depend on them as well as the costs to society as a whole of carrying out fair trials, building and running prisons, and otherwise administering punishment.

According to the retributivist view, by contrast, punishment is justified regardless of whether it augments or diminishes social utility. To the retributivist, punishment must be administered because justice demands it, the criminal deserves it, and it expresses society's condemnation of the crime. As Georg Wilhelm Friedrich Hegel (1770–1831) noted, if society does not administer punishment, the crime will be regarded as valid. Retributivism is often conflated with revenge, but the leading retributivists, such as Immanuel Kant (1724–1804) and Hegel, emphatically distinguish revenge, which is measured by the personal pain felt by the victim, from justice, which is impartial and objective.

Utilitarian and retributive arguments have been prominent in both historical and contemporary debates over the death penalty. In the 1924 case of Leopold and Loeb, young men of privilege convicted of killing 14-year-old Bobbie Franks in Chicago, the

celebrated defense attorney Clarence Darrow argued that the death penalty does not deter violent crime and serves only to feed "the basest passions of the mob." Moreover, he contended, it does not serve justice because it falsely assumes that humans are responsible for their behavior. "How a man will act depends upon the character of his human machine and the strength of the various stimuli that affect it," Darrow argued, and so we should not "sit in judgment, robed with self-righteousness." Robert Crowe, the prosecutor of Leopold and Loeb, defended the death penalty for its deterrent effect. When Cook County, Illinois, increased use of the death penalty, he claimed, crime fell 51 percent. Crowe rejected Darrow's view that some criminals do not deserve to die: human beings have free will and should be held responsible for their actions. (Darrow prevailed: Leopold and Loeb were sentenced to life in prison.)

Other defenders of the death penalty, such as the Rev. George Cheever, a prominent champion in the nineteenth century, argued that God demands death for murder, that retribution is grounded in absolute justice, and, assuming it is implemented with certainty, effective in deterring crime. Abolition, in contrast, sends the message "Murder, and you are saved."

THE CONTEMPORARY DEBATE

The current debate over capital punishment continues to focus on its effectiveness and whether it promotes or is required by justice. Empirical studies of the death penalty's effects have become more sophisticated, and emphasis is now on whether implementation is discriminatory or arbitrary and whether the state sometimes executes innocent people.

If homicide rates were consistently lower in jurisdictions using the death penalty than in abolitionist jurisdictions, one might conclude that the death penalty deters homicide and saves lives. In the 1970s, Professor Isaac Ehrlich concluded from such a comparison that every execution prevents seven to eight homicides. Before we can accept that conclusion, however, it is essential to determine whether any other factors might account for the lower homicide rates in death-penalty jurisdictions. The homicide rate in a jurisdiction allowing capital punishment might be just as low or even lower if the jurisdiction relied on some alternative punishment, such as life imprisonment without possibility of parole (LWOP). Several recent studies suggest there is no comparative deterrent benefit from capital punishment. One indicates that the threat of death does not result in fewer police killings. Another indicates deaths actually increase following an execution, due to a so-called "brutalization" effect (that the death penalty legitimizes violence and breeds imitators).

Recognizing the difficulty of establishing a deterrent effect, given the complex causes of homicides, some proponents of the death penalty rely on a common sense argument. Louis Pojman, for example, argues that people simply fear death more than prison, so the death penalty naturally deters more than a prison sentence. On the other hand, Hugo Bedau notes that only 2 percent of murderers actually receive the death penalty. How can it deter if its use is so uncertain? Moreover, he contends, it would not deter those already risking their lives in drug turf wars. Further, evidence primarily involving the assessment of risks of smoking indicates that young adults, to which group the vast majority of murderers belong, are not good at assessing future risks.

There is a contradiction between advocating the death penalty as a deterrent and the general social consensus that criminals should be executed behind closed doors, out of the public eye. If Americans were really serious about the deterrent effect of the death penalty, executions would be held in large stadiums. Instead, the state hides executions from public view and prohibits their electronic broadcast. There are only two known photos of the electric chair in use, both taken by journalists with hidden miniature cameras. In 1991 a federal court held in *KQED v. Vasquez* that there is no right to televise executions, and in 1977 a federal court of appeals held in *Garrett v. Estelle* that an execution could be filmed for purposes of closed circuit viewing but not for public broadcast. In April 2002, Alton Coleman was executed for multiple murders on closed circuit television in Ohio, allowing the families of his victims to watch but not the general public.

The deterrence effect of capital punishment may be open to debate, but no one can dispute that it effectively incapacitates the criminal. From a utilitarian perspective, though, it is not sufficient merely to incapacitate: the benefits must exceed the costs more than those of the alternatives. Is it true that the death penalty prevents crimes that would otherwise be committed by murderers while in prison or after release? If murderers were sentenced to LWOP, the only risk they would pose (assuming they do not escape) would be to prisoners and guards. According to at least one study, inmates on death row are no

more dangerous than the general prison population; of 400 felonies and 7 homicides committed by 558 people spared execution by the *Furman* decision, some 6 out of every 7 took place in an institutional setting. According to another study, however, of 52,000 state prison inmates serving time for murder in 1984, 810 were convicted of prior murders and had killed 821 persons after the first conviction. In other words, the researchers argued, 821 lives might have been saved had the death penalty been carried out on the 810 convicted murderers. Dramatic anecdotal evidence also suggests that released murderers may kill again. Arthur Shawcross, who served 15 years for willful homicide in the infamous Rochester, New York, Genessee River murders, was released in 1987 and killed 11 women within the next 2 years. Of course, these deaths could have been just as easily avoided by keeping Shawcross in prison for the rest of his natural life as by executing him.

Those who argue for the LWOP alternative assume that it is more humane than, and inherently preferable, to death by execution, an assumption challenged by John Stuart Mill in a historic speech to the British Parliament in 1868: "What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviations or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?" More recently, the book *Life Sentences* (1992) conveyed the harshness of LWOP in first-hand accounts by "lifers" in Louisiana's Angola prison.

Whatever the benefits of the death penalty, utilitarians insist, they must be weighed against the costs. It is widely accepted that the death penalty is the more expensive alternative to LWOP, although estimates vary considerably and the cost of LWOP naturally depends on the lifespan of the prisoner. According to one survey, LWOP costs between $750,000 and $1.1 million per prisoner, while death penalty cases cost $1.6 million to $3.2 million. In Florida, each execution has been estimated to cost around $3.2 million, while a life term costs $500,000 per prisoner. The Associated Press reported that the cost to the state of Ohio of imprisoning, prosecuting, and executing murderer John W. Byrd, Jr., on February 19, 2002, was more than $786,000: $534,000 to defend, $64,000 to prosecute, $6,000 to execute, and $182,000 to imprison him since 1991. In 1999, it cost Ohio a total of $900,000 to try, imprison, and execute Wilford Berry, the first prisoner in the state to be executed in more than 30 years. By contrast, it costs $22,045 a year for Ohio to imprison a death-row inmate. One reason the death penalty is so costly, according to a recent study, is that criminal investigations take up to five times longer for capital offenses than for noncapital offenses. There are between two and six times as many motions to file; larger jury pools mean a longer jury selection process; the guilt phase takes ten to twenty times the billable attorney hours; and trials generally last three times as long.

The retributivist is not persuaded by arguments about cost or deterrence. Louis Pojman's retributive defense of capital punishment is that we prefer a world in which the virtuous are happy and the vicious are not. Those who kill forfeit their right to life, he maintains, and just desserts demand punishment. (If the society is secure, the state might in some cases afford to show mercy.) In response to the moral objection to the death penalty—that it amounts to state-sanctioned murder, bringing the state down to the level of the vicious killer—Pojman replies that not all human beings deserve to live. The murderer kills innocent victims, but the execution is not applied to innocents. People differ in their worth based on their character and contributions to society—Mother Theresa is worth more than Hitler, for example—and this distinction, for Pojman, supports the execution of those who commit heinous and atrocious acts of violence. Whereas some opponents of the death penalty argue that executions show a lack of respect for human life, proponents contend that, to the contrary, it attaches greater value to the victim, distinguishing worthy from unworthy human lives. Retribution is sometimes regarded as a morality of vengeance and brutality that is anathema to civilized society. Walter Berns, for one, rebuts this view, noting that anger is sometimes morally appropriate, revealing "a profound caring for others." To express righteous anger, he maintains, is to respect people as responsible moral agents.

Not all retributivists value the symmetry of death for death. Hegel, for example, recognizes that while retribution demands that we punish wrongdoers, the question of how much we punish them is a distinct issue depending on factors such as social custom and the stability of the society. Justice may demand our most severe punishment for certain murderers, but

opponents of the death penalty find it hard to see why justice inherently requires that punishment to be death. Justifying the taking of a life may require some other consideration, such as the need to incapacitate or deter. Alternatively, a retributivist may contend that it is never just for the state to take a human life. Retribution is not incompatible with the view that human life is precious and inviolable and that any form of killing, even that sanctioned by law, is wrong. Nor is retribution incompatible with a political theory that even if human life is not inviolable, because some humans can commit acts so atrocious they morally forfeit their right to live, the state exceeds its legitimate authority when it takes life. Some "classical liberal"political theorists believe we enter a state to preserve our life and property, and no one would have agreed to live under laws that were used to take their life away. This was Beccaria's argument in the 1760s.

The odds of a murderer being executed for the crime in the United States are, in the phrase of Zimring and Hawkins, like being "struck by lightning." With 20,000 homicides committed annually and only twenty to thirty executions, the odds are a tiny fraction of 1 percent that the perpetrator will receive a death sentence. While the statistics may merely reflect the fact that the death penalty is reserved for only the most serious murders and not crimes of passion, there is widespread concern that capital punishment is administered arbitrarily—or worse, that it is applied unequally to the poor and to blacks. It is increasingly argued that while the death penalty is not necessarily objectionable in principle, the current system for determining which criminals are executed and which are given life sentences is fallible and discriminatory. Since death is irreversible, the argument continues, society should place a moratorium on the death penalty until it is certain the penalty is exacted fairly and appropriately.

In its April 2003 report on the death penalty, Amnesty International noted that blacks were 12 percent of the U.S. population in 1997, but that 40 percent of prisoners on death row and one-third of those executed were black. The report noted that in Alabama between 1996 and 2001, only 11 percent of all murders involved blacks killing white victims, but 57 percent of blacks on death row had killed whites. Studies have found that if the victim is white, the criminal is 4.3 times more likely to receive the death penalty than if the victim is black.

One response is that even if the death penalty is applied unequally, justice is served as long as whoever is executed committed a capital offense: "unequal justice is still justice." But the premise that the death penalty is applied unequally on the basis of race may need to be reevaluated in light of recent studies. In 2002, David Baldus and his colleagues published results of their examination of 185 prosecutions of death-eligible cases in Nebraska. When taking into account the aggravating and mitigating factors in each case, they found no "significant evidence of purposeful 'disparate treatment' discrimination based on the race of the defendant or the victim." In 1994 Rothman and Powers had argued that the reason more blacks who kill whites are on death row than blacks who kill blacks is that blacks who kill blacks usually know each other, whereas black-on-white and to a lesser extent white-on-white murder is more often committed during a felony and involves multiple offenders; the latter constitute aggravating conditions that call for harsher punishment in most state penal codes. When Baldus controlled for the severity of the crime—offender culpability—the only race effect that remained could be explained by geographical disparities: 90 percent of prosecutions against minorities occur in major urban counties, where prosecutors send cases to the penalty stage more often. The weak race disparity that exists is "a byproduct of the greater rate that cases advance to a penalty trial in the major urban counties."

Baldus did find a significant disparity in the socioeconomic status of the victim (but not of the defendant). Murderers of victims with a high socioeconomic status are 5.6 times more likely to receive a death sentence, and the disparity remains even when controlling for offender culpability. The importance of wealth in the criminal justice system is also evident from a finding reported by Amnesty International in 1987 that capital defendants with court-appointed attorneys are twice as likely to receive the death penalty as those with private attorneys.

Another concern with the death penalty is that innocent people may be executed, as the Northwestern University investigation referred to earlier found. Bedau and Radelet claim to have uncovered twenty-three such instances since 1900. Their approach was unsystematic—they stumbled on one case because it happened to be mentioned in an adjacent news column—and they admit that their method of determining whether a convicted person was in fact innocent is somewhat subjective. All but two of the twenty-three were executed prior to 1946, before due pro-

cess protections were increased, and only one case was post-*Furman*, that of James Adams. Markman and Cassell have criticized the inclusion of Adams among those falsely executed, pointing to the considerable evidence against him presented at trial, and compare the authors' study of cases going back to 1900, before due process protections existed, to "studying traffic deaths before the adoption of traffic signals." Bedau and Radelet identify a total of 350 "miscarriages of justice," including 151 cases of reversal by trial or appellate court, 64 cases of executive pardon, and 38 cases of acquittal by retrial or directed verdict. Critics argue that these cases are not miscarriages but vindications of the appeals system—examples of the system working properly—but for Bedau and Radelet they indicate the potential for juries condemning the wrong person.

Some argue that even one innocent person executed is one too many. Proponents of the death penalty insist, though, that we weigh the risk of false executions, which will be small as long as due process is ensured, against the lives saved by incapacitating those who might otherwise kill again. While the debate over whether the death penalty ultimately saves lives is controversial, some proposals to reduce the likelihood of false convictions are not. In a 2002 Pulitzer-winning series of editorials in the *Chicago Tribune* on the death penalty, Cornelia Grumman proposes various measures to decrease the likelihood of false confessions and erroneous eyewitness testimony such as videotaping interrogations and using sequential lineups. The convictions of half of the eighty-six eventually exonerated defendants in Illinois since 1977 depended partly on eyewitness testimony; for thirty-three, it was the only evidence used. "When the real perpetrator is not in the sequential lineup," Grumman notes, "witnesses tend not to pick anyone. In group lineups, witnesses are more likely to pick somebody in the interest of being helpful."

POLITICS AND PUBLIC OPINION

Clarence Darrow, in 1928, observed that governors are afraid to grant clemency for fear they would not be reelected, underscoring one way in which death penalty decisions are not autonomous from politics. More recently, some have argued that President Clinton and Attorney General Janet Reno used the death penalty as a political tool in the case of Oklahoma City bomber Timothy McVeigh, to appease a public wanting the government to get tough on terrorism. To some extent, the decision to use the death penalty is up to the discretion of prosecutors who are politically accountable. This may help explain Baldus's observation that prosecutors in urban counties of Nebraska, where crime rates are higher, are less likely to waive the death penalty as an option. Stephen Bright has suggested that popularly elected judges have political reasons to intentionally appoint inept counsel in capital cases. The death penalty has become politicized in that its implementation is affected by the desire of politically accountable officials to be reelected. It is one thing for legislatures to defer to public opinion by adopting capital punishment statutes—this can be understood as democratic responsiveness, in sharp contrast to abolition legislation in Europe despite widespread approval of the death penalty. It is quite another thing for prosecutors or judges to determine a particular individual's fate with an eye to future elections.

Prosecutors and legislators may feel pressure to adopt the death penalty—at least as a symbol if it is not actually carried out—in response to public opinion, which for a long time has been widely pro-capital punishment. A 2002 Gallup poll found 70 percent of Americans favored the death penalty for murder, and only 25 percent opposed it. Another poll found 68 percent in favor of the death penalty for women, 53 percent believed the death penalty is applied fairly, and only 19 percent favored the death penalty for the mentally ill. As with all polls, the results depend on how the question is phrased. When people are asked not simply whether they are for or against the death penalty, but whether they prefer the death penalty or LWOP, support for the death penalty drops significantly. A 2002 Gallup poll found that 52 percent of those surveyed preferred the death penalty, while 43 percent favored LWOP; a 2001 poll with a larger sample found that only 44 percent preferred the death penalty, while 52 percent preferred LWOP. Interestingly, being for or against the death penalty does not seem to depend on its effectiveness as a deterrent. One study found that proponents still favor the death penalty even if LWOP is as effective in reducing crime.

When weighing preferences for death or LWOP, it matters whether LWOP truly means life without parole. With no mandatory LWOP statute, the actual time served on a life sentence is rarely life. According to Bedau, the 1991 mean sentence for murder was less than 14 years, the mean actual time served was 8.7 years, and all but 15 percent served no more

than 10 years. Although mandatory LWOP statutes remain in force, skeptics believe the possibility of executive clemency or later legislation applied retroactively could undercut these statutes.

One of the most striking phenomena concerning public attitudes toward the death penalty is the flip-flopping of various states and the closeness of some referenda votes. Iowa abolished the death penalty for 6 years before restoring it in 1878. Maine abolished the death penalty in 1876, restored it in 1883, and abolished it again in 1887. One Oregon referendum on the death penalty resulted in 100,552 "for" and 100,345 "against"; in a later vote, Oregonians reversed their position. Arizona had a referendum that resulted in a vote of 18,936 "for" and "18,784" against; it, too, later reversed the outcome. While some believe the trend toward abolition is inexorable, others believe the death penalty has been and always will be deeply contested, an issue over which many of will waver.

THE COURTS

After *Gregg v. Georgia* in 1976, the moratorium on the death penalty created by *Furman* was lifted. Since *Gregg*, the Supreme Court has considered a number of challenges to capital punishment. In 2002, the Court held in *Atkins v. Virginia* that executing mentally retarded persons is cruel and unusual punishment in violation of the Eighth Amendment. In 2004 it agreed to decide whether executing a person who was under the age of 18 at the time the capital offense was committed is permissible (*Roper v. Simmons*). In 2002, the Court held in *Ring v. Arizona* that all capital trials must involve jury participation, but it left the scope of that participation unsettled. (Many contend that sentencing decisions by judges are less arbitrary.) One case of particular concern to abolitionists is *Herrera v. Collins*. Herrera was convicted of murdering two police officers and sentenced to death, but 10 years later he filed a second federal habeas petition claiming he was "actually innocent" based on affidavits stating that his now-deceased brother had actually committed the killings. Chief Justice William Rehnquist's lead opinion held that since Texas state law allows for retrial only when filed for within 30 days after imposition of the sentence, a new trial was not available; habeas corpus proceedings are to correct constitutional violations, not determine guilt or correct errors of fact. To grant federal habeas review of freestanding claims of actual innocence, he argued, would disrupt the federal system. The idea that an innocent man can be executed because of a restricted notion of federal habeas review sparked outrage, but Chief Justice Rehnquist includes a section in his opinion where, "for the sake of argument," he assumes that with a clear-cut case of innocence a new trial would be warranted to uphold due process requirements. Nevertheless, he argued, the evidence against Herrera was compelling and the new affidavits did not warrant a new trial. The majority of justices did not support the proposition that actual cases of innocence could never warrant a new trial after the limits set by state law.

INTERNATIONAL TRENDS

One argument abolitionists repeatedly make is that the United States is in the minority in retaining the death penalty. Already in the late 1700s, the nations of Europe were ceasing executions. Tuscany abolished the death penalty in 1786 and the Austrian empire shortly thereafter; Prussia, Russia, and France drastically limited its application in the 1790s. Mexico ended the death penalty in 1937; Germany, Austria, and Italy after World War II; Canada in 1967; and Great Britain in 1969. By 1995, no Western European nation used the death penalty, and most Eastern European nations had also abolished it. A draft constitution for the European Union prohibits the death penalty. Today, the death penalty flourishes only in the Middle East, Asia, parts of sub-Saharan Africa, and the United States. Many of these countries impose the death penalty for drug-trafficking: in 1995 this included fifteen countries in Asia, ten in the Middle East and North Africa, and the United States. In 1989, Iran imposed a mandatory death penalty for possession of as little as 30 grams of heroin, codeine, methadone, or morphine. In several Islamic countries adultery, rape, and sodomy are capital offenses. In Iran, incest, repeat offenses of homosexual conduct, and a fourth conviction for drinking liquor can bring a death sentence. China leads in the number of executions. From 1989 to 1994, China executed an estimated 1,000 people per year, compared to Iran's 600 per year; given the population difference, the latter rate was more than ten times higher than the former. According to reports, both China and Iran have executed pregnant women.

The United States thus opens itself up to criticism for being the only advanced industrial democracy to

execute criminals. According to Amnesty International, it has been responsible for 19 of the 33 executions worldwide since 1990 in which the defendant was under 18 at the time of their crime. The United States has also executed foreign nationals in contravention of international treaties—Angel Breard of Paraguay was executed by Virginia in 1998, and Walter La Grand of Germany was executed in Arizona the following year—fueling charges of hypocrisy when the government criticizes other nations for violating human rights.

CONCLUSION

In February 2005 the U.S. Supreme Court ruled 5–4 that it was a violation of the Constitutional ban on "cruel and unusual punishment" to execute offenders who had committed capital crimes as juveniles (defined as persons under the age of 18). In so doing, approximately 70 persons were moved off death row. Writing for the majority, Justice Anthony Kennedy cited that both international opinion and the majority of states in this country outlawed the practice. This was a decided change from the late 1980s when the court last ruled on the issue of executing minors and had decided that 16- and 17-year olds were eligible for execution. Opponents of the death penalty pointed out that American attitudes toward the death penalty were indeed becoming more liberal, a result in part of several highly publicized incidents in which modern forensic techniques—most notably DNA testing—had absolved persons sentenced to death. Whether this liberalization process will continue and result in the outlawing of the death penalty for all offenders remains uncertain, as a majority of Americans continue to support the death penalty.

Mark Tunick

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Cornell Death Penalty Project: www.lawschool.cornell.edu/lawlibrary/death/cjp_publ.htm
Death Penalty Information Center: www.deathpenaltyinfo.org

GLOSSARY

Abolitionist. Someone who seeks to end capital punishment.
Aggravating circumstances. Factors surrounding a crime that make it more serious and the criminal more deserving of a death sentence. Typical examples include multiple killings, torturing the victims before killing them, and murdering a law enforcement officer.
Appeal. Contesting a court decision by seeking a further review by a higher court.
Brutalization theory. The theory that the death penalty leads to more, not fewer, crimes by legitimizing violence and encouraging imitators.
Capital offense. A crime that can be punished with death.
Certiorari, writ of. An order to bring the record of a legal proceeding to a higher court. Denial of a writ means refusing to review the case, leaving the lower court decision standing.
Clemency. A governor's or president's power to reduce a criminal's sentence from death to a lesser punishment.
Culpability. The blameworthiness of a criminal defendant. Those who are not accountable for their actions, perhaps due to insanity or lack of intent, may not be culpable, or deserving of punishment.
Death row. The place in prisons, typically separate from the general prison population, where criminals sentenced to death await their execution.
Deterrence, general. The effect that punishment of an individual has in deterring other individuals—the general population—from committing crimes.
Deterrence, individual. The effect that punishment of an individual has in deterring that individual from committing another crime in the future.
Eighth Amendment. Part of the U.S. Constitution's Bill of Rights, holding that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment has been invoked with limited success as a reason for holding the death penalty unconstitutional.
First-degree murder. The most serious form of murder, usually defined as premeditated, deliberate murder, as distinct from manslaughter.
Furman v. Georgia. The 1972 U.S. Supreme Court decision ruling that the death penalty as then practiced was unconstitutional "cruel and unusual punishment."
Gregg v. Georgia. The 1976 U.S. Supreme Court decision upholding the death penalty statute of Georgia, which had been revised to minimize arbitrariness after it was struck down in *Furman v. Georgia*.
Group lineup. When a suspect in a crime is placed in a line with other people and an eyewitness to the crime is asked to pick the criminal out of this group; as distinct from a sequential lineup.
Habeas corpus (writ of). Latin for "you have the body";

a court order for the authorities to produce the detainee and justify his or her detention.

Incapacitation. The purpose that punishment has of preventing criminals from committing crimes against society by physically isolating them. The death penalty is the most effective incapacitator, as it ensures that the executed person cannot commit crimes in the future.

LWOP. Life imprisonment without the possibility of parole; receiving this sentence means there is no possibility that the prisoner will be released.

Manslaughter. A less severe form of killing, distinguished from murder by being non-premeditated. Examples include killing someone with an automobile while intoxicated, or killing someone in the heat of passion.

Mitigating circumstances. Factors indicating that the crime one committed is not as serious as the charge indicates, or that one deserves leniency; examples are the coercive influence of others, having no prior criminal record, or being unable at the time of the crime to appreciate the wrongfulness of one's conduct.

Moratorium. As distinguished from abolition, a temporary cessation of capital punishment, usually until procedures are implemented to ensure the punishment is implemented fairly and properly.

Penalty phase. In trials of capital offenses, the second stage, following a determination of guilt, in which it is decided whether a convicted criminal should receive the death penalty.

Retentionist. One who favors keeping the death penalty.

Retributive theory. The theory that the essential purpose of punishment is not to reduce future crime and protect society, but to give criminals what they deserve; most retributivists see punishment not as vengeance, but as upholding justice.

Ring v. Arizona. The 2002 U.S. Supreme Court decision holding that juries must play a role in cases involving a possible death penalty.

Sequential lineup. As distinct from a group lineup, the suspect of a crime is brought before an eyewitness, who is asked to answer yes or no to the question, was this the perpetrator?

Super due process. The special procedural protections used in capital cases to ensure that the rights of defendants are protected and innocent people are not executed.

Utilitarianism. The moral theory that an action is right insofar as it augments the utility, or happiness, of the community. Applied to punishment, the theory holds that we ought to punish only insofar as doing so increases the happiness of, or is beneficial to, society.

DOCUMENTS

Document 1. European Union Commission on Human Rights Resolution 2002/77

The European Union (EU), known until 1993 as the European Community, is an organization of twenty-five nations bound by treaties and institutions for political, economic, defense, and legal integration. The EU opposes the death penalty and advocates universal abolition. The following document, adopted in an April 2002 meeting, explains the EU position.

The Commission on Human Rights, Recalling article 3 of the Universal Declaration of Human Rights, which affirms the right of everyone to life, article 6 of the International Covenant on Civil and Political Rights and articles 6 and 37 (a) of the Convention on the Rights of the Child,

Recalling also General Assembly resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977 on capital punishment, as well as resolution 44/128 of 15 December 1989, in which the Assembly adopted and opened for signature, ratification and accession the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,

[R]ecalling its resolutions 1997/12 of 3 April 1997, 1998/8 of 3 April 1998, 1999/61 of 28 April 1999, 2000/65 of 26 April 2000 and 2001/68 of 25 April 2001, in which it expressed its conviction that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights,

Noting that, in some countries, the death penalty is often imposed after trials which do not conform to international standards of fairness and that persons belonging to national or ethnic, religious and linguistic minorities appear to be disproportionately subject to the death penalty,

Welcoming [t]he fact that many countries, while still keeping the death penalty in their penal legislation, are applying a moratorium on executions,

[D]eeply concerned that several countries impose the death penalty in disregard of the limitations set out in the Covenant and the Convention on the Rights of the Child,

Concerned that several countries, in imposing the death penalty, do not take into account the Safeguards guaranteeing protection of the rights of those facing the death penalty,

1. Recalls the sixth quinquennial report of the Secretary-General on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, submitted in accordance with Economic and Social Council resolution 1995/57 of 28 July 1995 (E/2000/3) and looks forward to receiving the yearly supplement on changes in law and practice concerning the death penalty worldwide as requested in Commission resolution 2001/68;

2. Reaffirms resolution 2000/17 of 17 August 2000 of the Sub-Commission on the Promotion and Protection of Human Rights on international law and the imposition of the death penalty on those aged under 18 at the time of the commission of the offence;

3. Calls upon all States parties to the International Covenant on Civil and Political Rights that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty;

4. Urges all States that still maintain the death penalty:

(a) To comply fully with their obligations under the Covenant and the Convention on the Rights of the Child, notably not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgement rendered by an independent and impartial competent court, not to impose it for crimes committed by persons below 18 years of age, to exclude pregnant women from capital punishment and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;

(b) To ensure that all legal proceedings, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in article 14 of the International Covenant on Civil and Political Rights, including the right to a fair and public hearing by a competent, independent and impartial tribunal, the presumption of innocence, the right to adequate legal assistance and the right to review by a higher tribunal;

(c) To ensure that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, non-violent religious practice or expression of conscience and sexual relations between consenting adults;

(d) Not to enter any new reservations under article 6 of the Covenant which may be contrary to the object and the purpose of the Covenant and to withdraw any such existing reservations, given that article 6 enshrines the minimum rules for the protection of the right to life and the generally accepted standards in this area;

(e) To observe the safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under article 36 of the 1963 Vienna Convention on Consular Relations, particularly the right to receive information on consular assistance within the context of a legal procedure;

(f) Not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person;

(g) Not to execute any person as long as any related legal procedure, at the international or at the national level, is pending;

5. Calls upon all States that still maintain the death penalty:

(a) Progressively to restrict the number of offences for which the death penalty may be imposed;

(b) To establish a moratorium on executions, with a view to completely abolishing the death penalty;

(c) To make available to the public information with regard to the imposition of the death penalty;

(d) To provide to the Secretary-General and relevant United Nations bodies information relating to the use of capital punishment and the observance of the safeguards guaranteeing protection of the rights of those facing the death penalty as contained in Economic and Social Council resolution 1984/50;

6. Calls upon States which no longer apply the death penalty but maintain it in their legislation to abolish it;

7. Requests States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out;

8. Requests the Secretary-General to continue to submit to the Commission, at its fifty-ninth session, in consultation with Governments, specialized agencies and intergovernmental and non-governmental organizations, a yearly supplement on changes in law and practice concerning the death penalty worldwide to his quinquennial report on capital punishment and implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty, paying special attention to the imposition of the death penalty against persons younger than 18 years of age at the time of the offence;

9. Decides to continue consideration of the matter at its fifty-ninth session under the same agenda item.

Source: European Union Commission. Human Rights Resolution 2002/77.

Document 2. Nebraska Death Penalty Statute

Following the U.S. Supreme Court ruling in Furman v. Georgia *(1972), individual states began revising their death penalty statutes to make executions less arbitrary, providing guidelines that specify which criminals deserve death. Death penalty cases require a separate penalty phase in which the defendant may present mitigating circumstances explaining why death is not deserved and the prosecution may present circumstances that emphasize the unusual severity of the crime and support the harshest punishment. The Nebraska statute offers a typical example.*

§ 29–2519. Statement of intent

(1) The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death; that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28–303 fails to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Legislature therefore determines that the death penalty should be imposed only for the crimes set forth in section 28–303 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances. . . .

(2) The Legislature hereby finds and declares that:

(a) The decision of the United States Supreme Court in *Ring v. Arizona* (2002) requires that Nebraska revise its sentencing process in order to ensure that rights of persons accused of murder in the first degree, as required under the Sixth and Fourteenth Amendments of the United States Constitution, are protected; . . .

§ 28–303. Murder in the first degree; penalty

A person commits murder in the first degree if he or she kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he or she purposely procures the conviction and execution of any innocent person.

§ 29–2523. Aggravating and mitigating circumstances, defined . . .

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a public servant having lawful custody of the offender or another in the lawful performance of his or her official duties and the offender knew or should have known that the victim was a public servant performing his or her official duties;

(h) The murder was committed knowingly to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws; or

(i) The victim was a law enforcement officer engaged in the lawful performance of his or her official duties as a law enforcement officer and the offender knew or reasonably should have known that the victim was a law enforcement officer.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his or her participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Source: Nebraska Criminal Code, § 29–2519, § 28–303, § 29–2523.

Document 3. *Charles Kenneth Foster v. Florida, et al.* (2002)

The Eighth Amendment of the U.S. Constitution prohibits "cruel and unusual punishment." Some Supreme Court justices have argued that any form of execution is cruel and unusual, but this view has never prevailed. In 2002, Justice Stephen Breyer, dissenting from the Court's decision not to review an appeal by a prisoner who had been on death row for more than 27 years, argued that subjecting a person to death row for such a long time violates the Eighth Amendment. Justice Clarence Thomas, defending the decision not to review the case, disagreed.

U.S. Supreme Court, No. 01–10868. Decided October 21, 2002
[Footnotes and citations deleted]

JUSTICE BREYER, dissenting from denial of certiorari.

Petitioner Charles Foster has spent more than 27 years in prison since his initial sentence of death. He was sentenced to death on October 4, 1975. In 1981, five days before his scheduled execution, a Federal District Court issued a stay to permit consideration of his first federal habeas petition. This petition was temporarily successful. The Court of Appeals held that Foster's sentence was constitutionally defective because the trial court had failed to state required findings regarding mitigating factors. But four months later the court withdrew relief, saying that it had wrongly raised the question *sua sponte*.

In 1984, a second death warrant issued. The courts again stayed the execution. From 1987 to 1992, the Florida courts twice vacated Foster's sentence because the trial court had failed properly to consider certain mitigating factors. New sentencing proceedings followed. Each time Foster was again sentenced to death. Foster's latest resentencing took place in 1993, 18 years after his initial sentence and 10 years after the Court of Appeals first found error.

Foster now asks this Court to consider his claim that his execution, following these lengthy proceedings, would violate the Constitution's prohibition of cruel and unusual punishments. JUSTICE STEVENS and I have previously argued that the Court should hear this kind of claim. And I believe the present case presents circumstances particularly fitting for this Court's review.

For one thing, 27 years awaiting execution is unusual by any standard, even that of current practice in the United States, where the average executed prisoner spends between 11 and 12 years under sentence of death. A little over two years ago, there were only eight prisoners in the United States who had been under sentence of death for 24 years or more, and none who had been on death row for 27 years. Now we know there is at least one.

For another thing, as JUSTICE STEVENS and I have previously pointed out, the combination of uncertainty of execution and long delay is arguably cruel. This Court has recognized that such a combination can inflict "horrible feelings and an immense mental anxiety amounting to a great increase of the offender's punishment." "[T]he prospect of pending execution exacts a frightful toll." Courts of other nations have found that delays of 15 years or less can render capital punishment degrading, shocking, or cruel. Consistent with these determinations, the Supreme Court of Canada recently held that the potential for lengthy incarceration before execution is "a relevant consideration" when determining whether extradition to the United States violates principles of "fundamental justice." Just as "attention to the judgment of other nations" can help Congress determine "the justice and propriety of [America's] measures," The Federalist No. 63, so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment.

Foster has endured an extraordinarily long confinement under sentence of death, a confinement that extends from late youth to later middle age. The length of this confinement has resulted partly from the State's repeated procedural errors. Death row's inevitable anxieties and uncertainties have been sharpened by the issuance of two death warrants and three judicial reprieves. If executed, Foster, now 55, will have been punished both by death and also by more than a generation spent in death row's twilight. It is fairly asked whether such punishment is both unusual and cruel.

I would grant the petition for certiorari in this case.

JUSTICE THOMAS, concurring in denial of certiorari.

In the three years since we last debated this meritless claim in *Knight v. Florida*, 528 U. S. 990 (1999) (THOMAS, J., concurring), nothing has changed in our constitutional jurisprudence. I therefore have little to add to my previous assessment of JUSTICE BREYER's musings. ("Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence.") This Court's vacatur of a death sentence because of constitutional error does not bar new sentencing proceedings resulting in a reimposition of the death penalty. Petitioner seeks what we would not grant to a death-row inmate who had suffered the most egregious of constitutional errors in his sentencing proceedings—a permanent bar to execution. Murderers such as petitioner who are not apprehended and tried suffer from the fear and anxiety that they will one day be caught and punished for their crimes—perhaps even sentenced to death. Will JUSTICE BREYER next have us consider the constitutionality of capital murder trials that occur long after the commission of the crime simply because the criminal defendants,

who have evaded capture, have been so long suffering? Petitioner could long ago have ended his "anxieties and uncertainties," by submitting to what the people of Florida have deemed him to deserve: execution. Moreover, this judgment would not have been made had petitioner not slit Julian Lanier's throat, dragged him into bushes, and then, when petitioner realized that he could hear Lanier breathing, cut his spine. 369 So. 2d 928, 929 (Fla. 1979).

Source: 516 U.S. 920.