

Death Penalty Cases

Leading U.S. Supreme Court Cases on Capital Punishment

Second Edition

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Chapter 1

Capital Punishment: The Law and the Issues

Most of the cases in this book determine whether or not the procedures used to impose the death penalty violate the Eighth Amendment Cruel and Unusual Punishments Clause. In a minority of cases, some other provision of the United States Constitution is invoked, such as the Fourteenth Amendment (which guarantees due process of law and the equal protection of the laws), or the Fifth Amendment (which prohibits double jeopardy) or the Sixth Amendment (which establishes the right to an impartial jury and to the effective assistance of counsel). As will become readily apparent, the Supreme Court's treatment of these cases rarely is confined to arid discourse on legal abstractions. The death penalty cases before the Court frequently trigger quite lively debates among the Justices on the penological, philosophical, social, and social scientific issues implicated by capital punishment.

The aim of this introduction is to give the reader a guide to the legal and extralegal issues surrounding the death penalty controversy. There will be three focal points:

1. The history of the Eighth Amendment,
2. The laws and procedures governing the adjudication of current-day capital cases,
3. The extralegal (penological, philosophical, and social) debate over capital punishment.

A BRIEF HISTORY OF THE EIGHTH AMENDMENT

The Eighth Amendment to the United States Constitution was ratified in 1791, along with the rest of the Bill of Rights. It says:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Cruel and Unusual Punishments Clause derives from the English Bill of Rights of 1689. The English bill was a response to the cruelty of King James II, who savagely suppressed a revolution against him. Hundreds of rebels were captured, tried before special courts (the "Bloody Assizes"), and brutally executed by being hanged, cut down before death, disembowled, beheaded, and hacked to pieces. Use of the rack, drawing and quartering, and burning alive also were common in Europe prior to the 18th century.

When the United States Constitution was adopted in 1789, some of these barbaric punishments still were used abroad, and the framers of the Constitution apparently were determined to prohibit their imposition in America. However, branding, whipping, and the cropping of ears were commonly used in the United States before and after the adoption of the Eighth Amendment, until, by 1850, they were virtually abolished by the state legislatures.

It is clear that the Cruel and Unusual Punishments Clause was *not* intended to abolish capital punishment. Some proof of this is provided by other language in the Constitution; the Fifth Amendment in particular implies that the death penalty was constitutionally acceptable.^a It was intended (in part) to forbid the infliction of more pain than was necessary to extinguish life. Therefore, the focus of the few death penalty cases before the Supreme Court in the 19th century was not whether a death sentence could be imposed, but *how* it was to be carried out.^b

No punishments were held unconstitutional by the Supreme Court until 1910, when a noncapital punishment was struck down in *Weems v. United States*, 217 U.S. 349 (1910). In the *Weems* case, the Philippines, then under U.S. control, imposed 12 years' imprisonment in heavy chains at hard and painful labor for falsifying government documents. For the first time, the Court indicated that the Eighth Amendment does more than simply ban barbarous punishment; it also prohibits punishments that are disproportionate to the offense. This opened the door to arguments that the death penalty was disproportionate punishment, at least for some crimes—a view ultimately adopted by the Supreme Court in the 1970's.^c

^a The Fifth Amendment, which was adopted the same day as the Eighth, says, among other things, that "No person shall be held for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." It also states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Finally, it declares: "nor [shall any person] be deprived of life, liberty, or property, without due process of law." (Emphases added.)

^b The first Supreme Court case invoking the Cruel and Unusual Punishments Clause was *Wilkerson v. Utah*, 99 U.S. 130, 25 L. Ed. 345 (1879), in which the Court unanimously upheld a sentence of death by public shooting. (Although the Eighth Amendment was not then applicable to the states, it was enforceable in federal territory such as Utah at the time of *Wilkerson's* case. See footnote e.)

In *In re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890), the Court, again without dissent, approved New York's use of the electric chair, finding no violation of the Fourteenth Amendment. In a nonbinding dictum, the *Kemmler* Court said: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution." *Id.* 136 U.S. at 447, 10 S. Ct. at 933.

^c In *Coker v. Georgia*, 433 U.S. 584 (1977) (see Chapter 5), the Court held that imposing the death penalty for the rape of an adult woman violates the Eighth Amendment.

The disproportionate punishment theory of the Eighth Amendment recently has led courts to occasionally strike down prison sentences that are considered too long for the offense committed. In the leading case, *Solem v. Helm*, 463 U.S. 277 (1983), the Supreme Court overturned a sentence of life without parole for writing a bad \$100 check, the defendant's seventh felony. Even prison conditions, as opposed to sentences, have been successfully attacked on the ground that they amount to cruel and unusual punishment.^d

Recently, however, Supreme Court Justice Antonin Scalia and Chief Justice William Rehnquist wrote that according to their historical research, the Eighth Amendment was not intended to prohibit disproportionate punishments, but rather, was aimed at particular modes of punishment, *i.e.*, cruel methods of punishment that are not regularly or customarily employed. (See *Harmelin v. Michigan*, 501 U.S. 957 [1991].) The court does not accept Scalia's position, and continues to strike down death sentences that it considers "excessive" (see, for example, *Atkins v. Virginia*, Chapter 24).

In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court held that the Cruel and Unusual Punishments Clause restricts the states, not just the federal government.^e Consequently, the states must observe Eighth Amendment limitations established by the Supreme Court.^f This is significant because the overwhelming majority of murder prosecutions, and therefore of capital cases, take place at the state level.

The contemporary Supreme Court does not feel bound by the original 18th-century understanding of the meaning of the word *cruel*. After all, we would no longer tolerate pillorying, branding, or cropping or nailing of the ears—acceptable punishments during the colonial era. The modern Supreme Court construes the Eighth Amendment by "evolving standards of decency."^g In other words, the Cruel and Unusual Punishments Clause is interpreted in accordance with con-

^d See, for example, *Hudson v. McMillian*, 503 U.S. 1, 9, 1000 (1992) ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated."). As will be shown, "contemporary standards of decency" is the modern yardstick for Eighth Amendment violations.

^e The Bill of Rights, standing alone, limits only the national government. By a process known as *incorporation*, the Supreme Court has gradually applied nearly all provisions of the Bill of Rights to the states. This was accomplished by interpreting the Fourteenth Amendment, which expressly restricts the states, as requiring most of the same rights as the Bill of Rights. See footnote b.

^f However, the state courts may go further than the Supreme Court and find that the punishment provisions in the state constitutions require even greater restrictions on state government. Indeed, in *People v. Anderson*, 493 P.2d 880 (Cal. 1972) the California Supreme Court, construing the California cruel or unusual punishments clause, became the first American tribunal to declare the death penalty *per se* unconstitutional. Opponents of the death penalty often seek to establish broader rights for capital defendants by couching their arguments in state constitutional terms.

Forty-one state constitutions prohibit cruel and unusual (or "cruel or unusual") punishments. Six bar only "cruel" punishments. Nine state constitutions require that punishments be proportionate to the offense, and three say that punishment must be based on the principle of "reformation"; that is, rehabilitation. At least three state constitutions expressly authorize the death penalty.

^g "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion). *Trop* held that it is cruel and unusual punishment to take away the citizenship of a wartime deserter.

temporary standards, not 18th-century standards. The Supreme Court has had difficulty determining how to measure contemporary standards of decency. It frequently relies on "objective" indicators, such as laws passed by state legislatures and Congress, and the decisions of juries. (See, for example, *Stanford v. Kentucky*, Chapter 22.)

In *Furman v. Georgia*, 408 U.S. 238 (1972) (Chapter 2), the Supreme Court, for the first time in American history, declared the death penalty to be cruel and unusual. But the judges were sharply divided in their reasoning, and an examination of their positions reveals that only a minority of the Court was categorically opposed to capital punishment. The rest of the *Furman* majority was concerned mainly with the arbitrariness of death sentences. Four years after *Furman*, in *Gregg v. Georgia*, 428 U.S. 153 (1976) (Chapter 3), the Court rejected the view that the death penalty is always (per se) cruel and unusual. *Gregg* upheld a Georgia capital punishment law that utilized certain trial procedures and appeals designed to prevent the penalty from being imposed arbitrarily. Although *Gregg* eliminated the most broad-gauged attack on capital punishment, many years of litigation followed in an effort to clarify the Court's procedural demands. By the late 1980s, the principal requirements for imposing the death penalty in the United States were fairly well settled. Those requirements are discussed on the pages that follow. The key Supreme Court cases are reprinted in this book.

CAPITAL LAWS AND PROCEDURES

Since 1976, when capital punishment was reinstated in the United States, it has been applied only to murder in the first degree. Other crimes, such as treason or certain terrorist acts, also may warrant the death penalty, but the Supreme Court has not yet made clear whether this would be constitutionally acceptable.

Currently, 38 states and the federal government authorize a death penalty; 12 states and the District of Columbia do not. (See Appendix A for details.) Once the police determine that a *homicide* (defined as the killing of a living human being by another human being) has occurred, it will be up to the prosecutor to decide whether or not the killing was a crime and, if so, whether or not to treat it as a capital offense. A great deal of discretion is lodged in American prosecutors; even within a capital punishment state, the same crime might be prosecuted capitally or not depending on the county in which it occurred (Rosenberg 1995).

Note as well that some homicides are not crimes at all and therefore cannot be punished. One example is *justifiable homicide*, which includes killings in self-defense and certain killings by law enforcement agents, such as to arrest a dangerous felon. Likewise, a homicide may be "excused" if the person who did it was not blameworthy. An insane defendant, for instance, may not be punished, although he may be committed to a mental institution. In most states, insanity means that the defendant, due to a mental disease or defect, did not know he was killing someone or thought that such conduct was acceptable by society's moral

(or legal) standards. Very few people can meet this definition, and very few defendants are found insane. In some cases, the prosecutor (and grand jury) may not believe that the killing was justified or excused. Consequently, the defendant must stand trial and offer justification or an excuse as a trial defense.

Where the apparent killer is suffering from mental disease at the time of trial, such that he cannot understand the proceedings or consult with his lawyer, he will be considered incompetent to stand trial and will be involuntarily committed. If his sanity is restored, the now-competent person may be required to stand trial.

A defendant who is mentally retarded may be considered sane, but, under Supreme Court rulings is ineligible for the death penalty. (See *Atkins v. Virginia*, Chapter 24.) Furthermore, all states must permit the defendant to offer evidence of mental problems or intoxication to persuade the sentencers not to impose the death penalty.

Finally, a defendant who is sentenced to death may not be executed if, despite his sanity during the trial, he had become insane at the time the sentence was to be imposed. (See *Ford v. Wainwright*, Chapter 23.)

Criminal homicides are defined by the legislatures of each state and, for federal offenses, by the United States Congress. Since each legislature may adopt whatever statutory scheme it wishes (subject to constitutional restrictions) significant variations are found in murder laws around the country. Generally speaking, criminal homicides fall into three categories: murder in the first degree, murder in the second degree, and manslaughter. The purpose of dividing murder into "degrees" is to establish punishments of different levels of severity depending on the reprehensibility of the crime. Only first degree murder may be punished by death, and this is true only for "aggravated" first degree murders, as will be explained later. Second degree murder and manslaughter are punishable by no more than a term of imprisonment. Manslaughter, the least reprehensible of the criminal homicides, carries the lightest sentence. Most criminal homicides will not be classified as murder in the first degree and therefore will not be eligible for the death penalty.

Intentional Murder

First degree murder usually has two subcategories: intent-to-kill murder and felony murder. Intent-to-kill or intentional murder means simply that at the time of the homicide the actor had as his purpose the death of the victim. Intent must generally be inferred from all of the circumstances. For example, if the actor knowingly used a deadly weapon on the victim, aware of its capacity to cause harm, the inference that he intended the death of the victim will not be difficult to draw. This is sometimes called the *deadly weapon doctrine*: a jury may infer an intent to kill from such use of a deadly weapon.

If, on the other hand, evidence suggests that the defendant intended only to injure the victim, although the act actually caused the victim's death, he is not

guilty of intentional murder, but may be guilty of second degree murder. Likewise, reckless or extremely negligent killings are second degree murder, sometimes called *depraved heart* murder. Examples include: shooting into an occupied room or at passing vehicles, throwing heavy objects from a tall building to the street below, driving at high speeds on city streets, violently shaking an infant, or playing "Russian roulette" with another person. In these examples, the defendant, who does not intend to kill anyone, is not guilty of first degree murder and cannot get the death penalty.

For a conviction of first degree murder, most states require proof of premeditation and deliberation in addition to proof of an intent to kill. Premeditation and deliberation derive from the old English common law crime of murder with "malice aforethought," which was a capital offense. In such states, the prosecutor will have to prove, in addition to the intent to kill at the time of the murder, that the defendant reflected about the killing in a cool state of mind (*i.e.*, not uncontrollably excited) prior to the homicidal act. Some premeditation-deliberation states do not require proof of any significant time lapse between the premeditation and the fatal act. Other states require proof that the murder was actually planned in advance.

Finally, some states categorize as first degree murder certain specific types of intentional homicide. These include killings (1) by certain methods, such as by bombing; (2) of certain victims, such as on-duty police; (3) by particular actors, such as hired agents, or defendants with prior murder convictions; or (4) of more than one person in a single incident. If the death penalty is sought, some of these circumstances also may serve as aggravating factors, which (as explained later) must be proven in order to justify the ultimate punishment.

Felony Murder

The other type of first degree murder is felony murder, which is a murder for which intent to kill need not be proved. If the actor commits certain felonies and that felonious conduct causes the death of another person, he may be guilty of felony murder. The underlying ("predicate") felonies usually are dangerous to life and the danger is foreseeable (and usually foreseen); hence, the perpetrator is guilty of first degree murder even though he may not have intended to kill.

Statutes usually list the kinds of felonies to which felony murder applies; typically, rape, robbery, kidnapping, arson, and burglary. Felonies not specified in the felony murder statute, usually nonviolent crimes such as grand larceny, may not serve as the predicate for felony murder, but they may serve as the basis for second degree murder.

Under felony murder concepts a defendant may be guilty of murder without actually performing the homicidal act. For instance, crimes are often committed by coperpetrators, such as when A and B together rob C. If A purposely shoots and kills C, then both A and B may be guilty of murder. A is guilty of intent-to-kill murder, and B, although not the shooter, is guilty of felony murder. (B, of course, must be proven guilty of the underlying felony of robbery.) Likewise, if

A accidentally shoots C to death during the robbery, A and B are guilty of felony murder.

The logic behind finding B culpable of murder is that he is guilty of a dangerous felony (armed robbery) that foreseeably could, and indeed did, cause a death. But there may be moral problems with convicting of murder a person who did not have homicidal intent and may not personally have done the killing. This seems especially true where B's involvement in the felony was relatively minor (*e.g.*, he served as the lookout). Where capital punishment is the potential penalty, these moral problems are heightened. The Supreme Court addressed this issue from a constitutional perspective in *Enmund v. Florida* (Chapter 11) and *Tison v. Arizona* (Chapter 12). The effect of these cases was to restrict (but not eliminate) capital punishment for felony murder.

We now turn to a description of the various stages in contemporary death penalty prosecutions, emphasizing those proceedings that are different from non-capital cases. (See *Gregg v. Georgia*, Chapter 3, where the Supreme Court first endorsed what became the model for death penalty procedures.) We have divided the capital case into eight stages. The proceedings described are typical of death penalty cases in the United States, but there are, of course, variations from state-to-state.

Stage 1. Investigation and Filing of Charges

As previously noted, whether or not a homicide is treated as a capital case is largely a matter of prosecutorial discretion. Usually, a thorough investigation will be undertaken by both prosecutors and defense attorneys to determine whether or not aggravating or mitigating factors (discussed later) are likely to be proven. If mental condition is a potential issue, this will include an examination by psychologists or psychiatrists. Prosecutors usually have a fixed time period (*e.g.*, 120 days after the filing of formal charges) to notify the court and the defendant of their intent to seek the death penalty.

Stage 2. Jury Selection

After all of the usual pretrial proceedings are completed (*e.g.*, hearings to determine the admissibility of evidence), the jury must be selected. Prospective jurors will be questioned by both prosecutors and defense attorneys to determine their competence to serve, a process known as *voir dire*. In capital cases, the jurors must be "death qualified." That is, a prospective juror, whose views on the death penalty are determined to be so strong that they would interfere with the ability to render an impartial verdict or fairly determine the sentence, may be excused "for cause." Both the defense and prosecution have an unlimited number of challenges "for cause" and a limited number (*e.g.*, 20 per side) of "peremptory challenges," for which no explanation need be given (see *Witherspoon v. Illinois*, Chapter 13, and *Lockhart v. McCree*, Chapter 14). Interracial murders may

require special questions to potential jurors on race prejudice (see *Turner v. Murray*, Chapter 15).

Stage 3. Bifurcated Trial

Capital trials are *bifurcated*; in other words, divided into two phases: the guilt stage and the penalty stage. Ordinarily, the same jury sits for both phases. (However, see *Spaziano v. Florida*, Chapter 19, on the legitimacy of capital sentencing by a judge.) The purpose of bifurcation is to permit the jury to consider evidence relevant to the sentence that would be inappropriate for the jury to consider when deciding guilt.

The guilt phase runs like an ordinary trial. Should the jury acquit or find the defendant guilty of a homicide ineligible for the death penalty, there will be no penalty hearing. If the verdict is that the defendant is guilty of a capital crime, the penalty phase is conducted. To get a death sentence, the prosecution must prove that the murder was committed under *aggravating circumstances*. The jury must unanimously find that at least one aggravating circumstance from a list established by statute was proven beyond a reasonable doubt.

In *Ring v. Arizona*, 122 S. Ct. 2428 (2002), the Supreme Court held that the Sixth Amendment right to a jury trial prohibits assigning to a judge the determination of the existence of aggravating factors. Aggravating factors generally fall into three categories: (1) the killing of certain victims, such as law enforcement officers or young children; (2) murders by certain defendants, such as prisoners serving life sentences or defendants with previous murder convictions; and (3) murders committed in a certain manner, such as contract killings, serial murders, murders accompanied by torture, or murders during the commission of a violent felony (see *Godfrey v. Georgia*, Chapter 8).

If an aggravating factor is not proven, the death penalty may not be imposed, and a term of imprisonment, usually life or life without parole, is mandated instead. However, even if an aggravator is proven, the sentencer must also consider any *mitigating evidence*—factors favoring leniency—presented by the defense. Relevant mitigating evidence may not be restricted by law; therefore the defense may present almost any evidence it wishes to convince the jury to spare the accused's life (see *Lockett v. Ohio*, Chapter 9). Mitigating evidence usually concerns either characteristics of the accused or circumstances surrounding the crime. In the former category are such factors as the mental or emotional impairment of the defendant (insufficient for a finding of insanity, which would have precluded a penalty phase), the influence of alcohol or drugs, youthfulness, or the lack of a criminal history. Mitigating crime circumstances include such things as the defendant's relative lack of responsibility for the victim's death, such as where he was dominated by another person or where someone else did the actual killing.

Assuming that the jurors find beyond a reasonable doubt that an aggravating circumstance existed, they must, in most states, balance the aggravator against

the mitigating circumstances, if any are found. The jury need not be unanimous with respect to mitigating factors; indeed, each juror can determine the existence of such evidence (see *McKoy v. North Carolina*, Chapter 10). Some states *require* the sentencing jury to impose the death penalty if the aggravating circumstances outweigh the mitigating circumstances. Other states *permit* a death sentence if the aggravators sufficiently outweigh the mitigators, but require a separate unanimous decision on the sentence (see *Blystone v. Pennsylvania*, Chapter 7).

Stage 4. Expedited Appeal

A defendant sentenced to death usually may appeal directly to the state court of last resort, bypassing the state intermediate appeals court. Nearly all states require review of a capital case by the state's highest court even if the convict does not wish to appeal. On appeal, the defendant—who is assigned state-paid counsel if indigent—may challenge the conviction or sentence on any number of grounds. Appeals courts do not ordinarily reconsider the guilt or sentence of the defendant. They review a transcript of the trial for procedural errors alleged by the defendant, such as violations of state rules of evidence or federal constitutional guarantees. If they conclude that such errors occurred and that they were serious enough to have resulted in an unfair trial or sentencing hearing, they will reverse the conviction or death sentence.

If there are no further appeals (see Stage 5, below), the case will then be *remanded* to the trial court so that the defective proceeding can be done over before a new jury. If, as often happens, the error occurred in the sentencing phase alone, only the punishment hearing will be repeated. (For double jeopardy considerations, see *Arizona v. Rumsey*, Chapter 21.)

Stage 5. Appeal to the United States Supreme Court

A defendant who claims that his federal constitutional rights were denied may petition the United States Supreme Court for a *writ of certiorari*. If the writ is granted the Supreme Court will review the case on appeal. Review is discretionary with the Justices of the Court (four of the nine must agree to take the case) and is conferred only in cases raising issues of national significance. About 1 percent (80 cases) of the nearly 8,000 annual certiorari petitions are successful, and even a death penalty case has a slim chance of being heard by the Supreme Court. If the Court denies certiorari the last lower court decision stands.

Stage 6. State Habeas Corpus

The direct appeal process ends when the United States Supreme Court denies certiorari or reviews the case on appeal. At this point, the capital defendant

usually will seek further review of the case through state habeas corpus (also known as *postconviction review* or *collateral attack*). Although state habeas corpus technically is a civil proceeding rather than a continuation of the criminal case, as a practical matter, it is akin to another appeal. While appeals or habeas petitions (state or federal) are pending, the convict may not be executed.

Although the postconviction process varies from state to state, the following generally are true. Generally, the prisoner must first seek the writ from the trial court judge. If denied, he may appeal the denial to (or seek a new writ from) the state intermediate appeals court and then the state court of last resort.

The defendant must raise claims that could not be (or at least were not) raised on direct appeal. These may include federal or state constitutional arguments. The most popular claim is "ineffective assistance of counsel," which means that the trial attorney did not provide an adequate defense. (See *Burger v. Kemp*, Chapter 18, for an example of an effective assistance claim.) If the writ is granted, the trial court judgment (conviction or sentence) is reversed and the case remanded. The defendant may then be retried or resentenced.

If unsuccessful in the state courts (and if his habeas claim includes federal constitutional issues), the prisoner may (for the second time) seek United States Supreme Court review by writ of certiorari. Depending on state rules, the defendant may be able to file successive state habeas petitions, provided he raises different claims each time. The indigent prisoner has no federal constitutional right to free counsel for the preparation of state habeas petitions; the right to counsel, if any, is a matter of state law.

Stage 7. Federal Habeas Corpus

Once a state prisoner has "exhausted" all of his state remedies (direct appeals, which includes appeals to the U.S. Supreme Court, and state habeas petitions), he may seek federal habeas corpus review. (One consequence of the "exhaustion" requirement is that given the time needed for completing state post-conviction review, only inmates under long prison or death sentences will be eligible for federal habeas.)

Federal habeas corpus is a civil action brought by an inmate against the prison authorities to challenge the legality of his incarceration. The purpose is to ensure that those accused of crimes are not convicted and punished in violation of the United States Constitution or other federal law. Federal habeas corpus is governed by federal statutes (28 U.S.C. §§ 2241–2266) and some rather complex Supreme Court decisions interpreting these acts. The writ may be issued by federal judges to state prisoners "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). (State criminal cases rarely are affected by federal laws or treaties. Thus, habeas claims almost always involve alleged violations of constitutional rights.) If the writ issues, the prisoner must be released, retried, or resentenced, depending on the legal defect.

Federal habeas petitions must be filed with the United States District Court (single-judge federal courts) in the district in which the prisoner is incarcerated. The claims raised on federal habeas must have already been reviewed (and rejected) by the state courts during the direct appeals or state habeas process. This redundancy is intended to permit state courts to correct their own constitutional errors and to minimize federal court interference in state criminal prosecutions. Although there is no federal constitutional right to counsel for collateral review, federal statutes authorize U.S. district courts to appoint counsel at public expense for indigent habeas applicants under a death sentence.

If the application for the writ is denied, the prisoner may appeal the denial to the appropriate United States Court of Appeals and if unsuccessful there, may seek review of the denial of the writ by the United States Supreme Court. (This is likely to be a death row inmate's third Supreme Court certiorari petition, including the petitions on direct appeal and on state habeas.)

In recent years, federal district courts have received from state inmates approximately 21,000 habeas petitions annually. Fewer than 300 of these are filed by state prisoners under sentence of death. The overall success rate for all habeas petitioners (writ granted) has been very low—around 2 percent—but the rate is much higher for capital defendants. How high is a matter of dispute. A study by the National Center for State Courts (1994) found a 17 percent success rate for capital petitioners, and a one-year survey by the Justice Department (for 1995) produced a 12 percent rate, but some experts say that if one counts appeals of initially unsuccessful petitions, death row inmates ultimately obtain 40 percent of the writs they seek.^b

Even unsuccessful petitions are helpful to death-sentenced inmates, however, as they delay the execution. Until the recent reform of habeas law (see below for discussion of the Antiterrorism and Effective Death Penalty Act of 1996), prisoners could file as many petitions as they or their lawyers could formulate, subject only to the rather ineffectual limitations of the Supreme Court's "abuse of the writ" doctrine. There were no time limits on filings and no bars to successive petitions, including eleventh hour applications just before scheduled executions. To many, federal habeas corpus had become a major source of inefficiency and lack of finality in the administration of criminal justice.ⁱ

^b U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoner Petitions in the Federal Courts, 1980–96* at 9 (1997) (12 percent of petitions that were not dismissed were concluded favorably to death row inmates by U.S. district courts); James S. Liebman, Jeffrey Fagan & Valerie West, "A Broken System: Error Rates in Capital Cases, 1973–1995," at http://www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (June 2000) at App. A-8 (40 percent of death row petitions finally decided by U.S. district courts, U.S. courts of appeals or the Supreme Court between 1973 and 1995 were successful).

ⁱ See the report of the special committee created by Chief Justice Rehnquist and headed by then-retired Supreme Court Justice Lewis F. Powell, Jr. "Committee Report and Proposal from the Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases," Aug. 23, 1989, reprinted in 135 Cong. Rec. S13482 (October 16, 1989).

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

Despite strenuous opposition by death penalty abolitionists, Congress approved and President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

AEDPA was intended to expedite the federal habeas corpus process by shortening the time allowed for submitting applications, narrowing the legal grounds for issuing petitions, and discouraging appeals and successive petitions. If it proves effective, this legislation should speed up executions and decrease the number of overturned death sentences.

The act survived its first significant court challenge almost immediately after it went into effect. In *Felker v. Turpin*, 518 U.S. 1051 (1996), the Supreme Court held that modifying the requirements for habeas corpus did not amount to a suspension of the writ in violation of Article I, § 9 of the Constitution. (Article I, § 9 says, "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.")

Whether AEDPA will be successful remains an open question.¹ There are also unresolved legal issues involving the interpretation and constitutionality of AEDPA's complex provisions. (See Chapter 26, *Herrera v. Collins*.)

Highlights of the Antiterrorism and Effective Death Penalty Act

- *Imposes time limits for filing habeas petitions.* Previously no time limits existed. Prisoners now must file within one year of the conclusion of direct appeals.
- *Mandates deference by the federal habeas judges to state court rulings.* Habeas claims must be denied unless the state court made an unreasonable application of federal law or an unreasonable determination of the facts. Factual determinations by the state courts must be presumed correct.
- *Discourages appeals by unsuccessful habeas petitioners.* The petitioner may only appeal when an appeals court judge or a Supreme Court Justice issues a "certificate of appealability" indicating that the applicant made a substantial showing of the denial of a constitutional right.
- *Bars, with a few narrow exceptions, multiple habeas petitions.* Second or successive petitions must be authorized by a federal court of appeals and only for newly discovered facts sufficient to undercut guilt or new rules of constitutional law made retroactive by the Supreme Court.

¹ See U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends, 1980-2000 at 1, 5 (2001) (finding that AEDPA caused an increase in the number of habeas petitions filed by state inmates).

Stage 8. Executive Clemency

Once all judicial options have been unsuccessfully pursued, the death row inmate may apply for executive clemency. Traditionally in English law, the King had the authority to grant clemency: full or conditional pardon, commutation (shortening) of sentence, remissions of fines, and reprieves. In America, Article II, § 2 of the Constitution bestows upon the President the "Power to grant Reprieves and Pardons for Offences against the United States." (For a discussion, see Chapter 26, *Herrera v. Collins*.) Similarly, state constitutions vest the governors with sole clemency authority or final authority to act upon the recommendations of a clemency board. This authority is rarely subject to judicial review or legislative control, although the Supreme Court recently held that minimal due process must be accorded capital inmates in clemency proceedings. (*Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 [1998].) From 1976 to the end of 2000, there were 105 commutations of death sentences (during which time 6,441 death sentences were imposed and 683 were executed).^k

THE EXTRALEGAL DEBATE

Much of the legal debate over the death penalty is intertwined with extralegal matters: penological, philosophical, and social. The aim of this section is to describe, as impartially as possible, the contours of this debate. We will note throughout the contributions of social scientists who have attempted to shed light on those aspects of the controversy that are amenable to empirical analysis.

Five key issues are discussed, in the following order: deterrence, retribution, incapacitation, mistake, and race.

Deterrence

A fundamental assumption of the criminal law is that punishing criminals discourages other potential offenders from committing crime. This is known as *general deterrence*. A key question is whether the death penalty is more effective as a crime preventative than less harsh punishments (such as life in prison)—what may be called the marginal deterrence benefit.

Proponents of capital punishment contend that deterrence is based on fear and that, since death is feared the most (among constitutionally permissible punishments—torture unto death being prohibited), it will deter the best. Opponents counter that murder often is an impulsive act and that killers do not think about punishment before committing their crimes. Consequently, they argue, those who engage in murder are singularly unlikely to be deterred by the threat of execu-

^k See U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment 2000 at 13 (2001).

tion. Proponents respond that perhaps *some* killers cannot be deterred but other would-be murderers can (e.g., those who plan the murder), and that justifies the most effective deterrence. Abolitionists question the assumption that death sentences are better deterrents than, say, life without parole. Their adversaries point out that although there is scant proof that longer prison sentences deter more than shorter ones, a fundamental premise of the criminal justice system is that harsher sentences deter more, and this same assumption supports the ultimate penalty (van den Haag and Conrad 1983).

Last, those opposed to the death penalty doubt that much deterrence is possible when so few executions actually take place. Death penalty advocates agree that more executions would be better, but add that, like the lottery, selecting only a few is enough so long as the target audience believes that they too might be chosen.

The major social science studies of deterrence were done by Isaac Ehrlich (1975a, 1975b) and Thorsten Sellin (1980). Sellin, who compared murder rates in states with and without a death penalty, concluded that there was no deterrent effect, but his work did not take account of the many factors other than the death penalty (e.g., drug-related killings) that could affect murder rates. Ehrlich, using multiple regression analysis, was able to isolate the effect of executions on murder rates. He found that each execution in the United States, from 1933 to 1967, deterred eight murders. But Ehrlich's complex statistical methods have been sharply criticized, for, among other things, relying on national data even though many states had no death penalty.

Most empirical analyses of the death penalty have found no deterrent effect, heartening capital punishment opponents. (For a summary of the leading studies of deterrence, including Sellin's and Ehrlich's, see Bailey and Peterson 1994.) But those who favor the death penalty argue that the empirical evidence is contradictory and that if ultimate proof of deterrence (or nondeterrence) is unattainable, it is better to err in favor of capital punishment. After all, they reason, if the death penalty deters (though we cannot prove it), then employing it will save lives. If it doesn't deter, then justice still is served by the execution of murderers. One response to this is that society values present lives (even the lives of murderers) more than hypothetical future lives (those who might be saved because of deterrence). Furthermore, if there is no deterrence, then the advantage of the death penalty in terms of justice for murderers must be weighed against all of its disadvantages, including the risk of executing innocents.

There are those who claim not only that the death penalty does not deter, but that it actually *encourages* murder. At least two social scientists have contended that the death penalty has a reverse-deterrent, or "brutalization" effect; that is, that the number of murders actually increases after each execution (Bowers and Pierce 1980). Critics respond that only the long-term (e.g., annual) effect on murder rates is significant. Moreover, conceding that some people are stimulated to violence by seeing it, they doubt that contemporary executions serve as that kind of stimulus. Executions no longer are public spectacles. They

are held behind closed doors before a small number of selected observers and (so far, at least) are not televised.

Closely related to deterrence is the question of whether the death penalty provides marginal (i.e., greater than imprisonment) reinforcement of moral inhibitions against murder. That is, do executions prevent murder—not by engendering fear (deterrence), but by strengthening the norms that restrain law-abiding citizens?

Proponents are fond of quoting the 19th-century English jurist Sir James Fitzjames Stephen: "Some men, probably, abstain from murder because they fear that if they committed murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged" (Stephen 1863, vol. 2, p. 99). That is, deterrence holds some in check, internal moral constraints (conscience) restrain most of us, and punishment fortifies or reinforces these moral constraints. But would our strong revulsion against murder diminish if there were no death penalty? Opponents doubt it, whereas proponents believe that it could happen over time and that the size of the morally inhibited population could be reduced. In other words, the question is whether, in the absence of the death penalty, there would be an increase in the number of people who would not regard murder "with horror" and therefore would engage in it.

Retribution

Retribution, or "just deserts," is a normative (nonempirical) justification of punishment and therefore is impervious to social science findings. In essence, the retributivist argument for the death penalty states that some crimes are so heinous, so profoundly reprehensible, that only the severest constitutionally acceptable penalty is appropriate for the perpetrator. Such an assertion can be neither proven nor disproven, but for death penalty opponents, life without parole is more than sufficient to the task. Justice, abolitionists argue, is amply served by condemning such criminals to a life of confinement, with its accompanying regimentation, degradation, boredom, abuse, assault, and fear.

All of us have, at one time or other, been horrified by newspaper or television accounts of especially shocking murders—the blowing up of buildings or airplanes with scores of occupants, savage rape-murders or torture-killings of young children, the assassination of a beloved national figure, and the like. Death penalty advocates believe that only the harshest penalty can provide justice for such horrific crimes. Opponents contend that most capital murderers (i.e., murderers eligible for the death penalty), while properly condemned, are not nearly as blameworthy as those who commit the kinds of acts just described; they are more likely to be jittery armed robbers who shoot on impulse. Even if they concede (and they usually do not) that *some* criminals deserve to die, abolitionists doubt that the death penalty can be limited to the most reprehensible crimes.

They would rather lock up the most contemptible offenders for life than risk executing the less blameworthy.

A related—but strictly speaking, not a retributivist—argument is that the public's sense of justice demands a death penalty for the vilest crimes. This is not a retributivist claim because retribution theory asks only whether the punishment fits the crime and not whether it satisfies public sentiment or, for that matter, has any other instrumental effect. Nonetheless, perhaps because of the impossibility of proving that a punishment is “just,” the public demand may serve as the measure of justice. One might also argue that in a democratic system, the punishments provided by the criminal law ought to reflect public sentiment, at least within constitutional boundaries.

To the abolitionists, any argument that the criminal law should gratify the public clamor for death is barbaric; it is vengeance in disguise—a catering to the darkest of human instincts. But retentionists are apt to share the view that “it is morally right to hate criminals” and that satisfying the public's “healthy natural sentiment” is “advantageous to the community” (Stephen 1883, vol. 2, pp. 81–82). As Émile Durkheim put it, punishing criminals “maintain[s] social cohesion intact” and conserves the “moral conscience” (Durkheim 1964, pp. 108–109). This is similar to the argument, considered earlier, that the death penalty provides reinforcement of moral inhibitions against murder.

A related advantage to the community of assuaging the public demand for justice is said to be the prevention of vigilantism, for if people come to feel that the authorities are incapable of providing justice, they may decide to provide it themselves. Death penalty opponents consider these arguments greatly overdrawn. They think that the realities of life in prison are harsh enough to satisfy the public, maintain community norms against murder, and prevent any widespread resort to “street justice.”

Incapacitation

Whereas retributivism looks to punish people for their completed misdeeds, incapacitation justifies punishment on the grounds of public protection from *future* crimes. Incapacitation, in other words, looks ahead to the likelihood of recidivism by the offender. Clearly, death is the ultimate incapacitator, but is execution necessary if the offender is locked up for life, especially life without parole? Retentionists point out that even lifers pose a threat to fellow inmates and prison personnel, and there is always the possibility of the commutation of a sentence by a governor, retroactive liberalization of the parole laws, and (however remote) an escape from confinement. The opposition considers these events too unlikely to warrant executions and adds two other arguments.

First, they contend, murderers do not recidivate as often as most other offenders. Hugo A. Bedau (1982, p. 176) reports that of a sample of 2,646 released murderers (released from 12 states from 1900 to 1976), 16 were subsequently convicted of another homicide. Bedau considers this number very small, but at the

standardized rate it comes to 605 per 100,000, a rate roughly 23 times higher than the recidivism rate for 18- to 24-year-olds, the most homicidal age group (see Appendix A).

Second, abolitionists reason that, since the death penalty applies to only a small percentage of murderers, the incapacitation benefit will likewise be small.

Mistake

For many, the possibility that an innocent person could be executed is sufficient in itself to warrant an end to capital punishment. While there is no compelling evidence that an innocent person has been executed since 1976, when the Supreme Court reinstated the death penalty, there have been numerous cases of death row inmates obtaining conviction reversals.¹ Some of these cases—the precise number is difficult to determine—appear to be true miscarriages of justice. In January 2000, following the thirteenth reversal of a death penalty conviction in Illinois, the Governor announced a death penalty moratorium in that state.

There are significantly more reversals on appeal in capital than noncapital cases. It is estimated that nationwide, noncapital convictions are overturned 15 percent of the time, whereas for death penalty cases the reversal rate may be as high as 48%.^m Some see this as an indicator of a high risk of mistaken executions. However, most of the reversals are sentence-reversals due to errors in the penalty phase of the capital trial—errors which have no bearing upon guilt. The guilt portions of capital trials are overturned at a 20 percent rate, only five points higher than the reversal rate for non-capital prosecutions.

More significantly, reversal on appeal rarely connotes innocence. Appeals courts do not ordinarily re-examine the evidence or take new testimony; they review trial transcripts for procedural errors. If a conviction is reversed on appeal, a retrial is usually permitted. Even a failure to re prosecute, however, may not be a sign of factual innocence; it may simply reflect weakness in the state's case due to the passage of time. A reversal of the death sentence alone (due to procedural error in the penalty phase of the trial) is even more equivocal, as it leaves the murder conviction intact.

¹ Data from the Death Penalty Information Center, an anti-death penalty organization, indicate 93 such cases from 1976 to year-end 2001. See <http://www.deathpenaltyinfo.org>.

^m A study of death penalty appeals found a 68 percent capital reversal rate. James S. Liebman, Jeffrey Fagan & Valerie West, “A Broken System: Error Rates in Capital Cases, 1973–1995,” at http://www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (June 2000). However, that figure may have been inflated. On recalculation using the same data, the rate was shown to be 52 percent. Barry Latzer & James N.G. Cauthen, “Another Recount: Appeals in Capital Cases,” *The Prosecutor* 35: 25–28 (2001).

In exceptional cases there may be evidence uncovered after trial that strongly suggests innocence. (See Chapter 26, *Herrera v. Collins*, where several Supreme Court Justices expressed skepticism about defendant's innocence claim.) These unusual but disturbing cases are proof that despite all of the safeguards employed in contemporary capital cases—bifurcated trials, vigilant and numerous appeals—the risk that an innocent may be executed cannot be eliminated.

Death penalty retentionists are not without a response (see van den Haag and Conrad 1983). Many public policies—from war to space exploration—entail risks of innocent deaths. Whether the policy is worth pursuing requires a cost-benefit analysis, a weighing of the risk of harm against the benefits. The same analysis should apply to capital punishment. Is the remote risk of wrongful execution worth the advantages gained in innocent lives saved through deterrence and in justice for the truly blameworthy? The answer, of course, depends in part on one's views on the retributive and deterrent effects of the death penalty (see above).

In one of the few serious empirical studies of innocence and capital punishment, Bedau and Radelet (1987) concluded that 350 persons were wrongly convicted of capital or "potentially capital" crimes in the United States from 1900 to 1985 and that 23 of these cases resulted in the execution of an innocent person (before 1976). But their method of determining "innocence" was vigorously challenged in a rebuttal by Markman and Cassell (1988). The latter also observed that over 7,000 executions occurred during the time period studied, and even accepting that 23 persons were wrongfully executed, the rate of error is only one-third of one percent. Markman and Cassell consider this rate quite low, especially when balanced against the benefits of the death penalty in terms of incapacitation, deterrence, just punishment, and the fulfillment of society's duty to the victims.

Race

The data on executions show that blacks have constituted 52 percent of those put to death since 1930, 37 percent since 1976 (see Appendix A). These figures are way out of proportion to the black population, which is approximately 12 percent of the nation. The disparity is not necessarily due to race discrimination, however; rates of murder by blacks are seven to eight times those of whites, and roughly half of all murderers in the United States have been black (see Appendix A). It is possible that these figures may be slightly inflated by race prejudice on the part of the police or juries; it is not likely, however, that racism could explain much of the high incidence of murder by blacks.

Studies on the administration of the death penalty prior to the 1960's show that in the Southern states, blacks were much more likely than whites to be executed for rape, especially for raping white women (Wolfgang and Riedel 1973). The inference that racism influenced the imposition of the death penalty—at least

during this period, for this crime, and in these states—is difficult to resist. Analyses of capital punishment for *murder*—even in the South, and especially after the 1950's—show that whites are *more* likely than blacks to be given the death penalty for the same offense (Rothman and Powers 1994). This remains true today. But—and this has been the focal point of the recent controversy—these studies also show that killers of whites are sentenced to death more often than killers of blacks, especially if the killer was black (U.S. GAO 1990). The best-known study, by David C. Baldus, Charles Pulaski, and George Woodworth, was the basis for the *McCleskey* case, in which the Supreme Court held that the research offered insufficient proof of a constitutional defect (see Chapter 25).

Opponents of capital punishment say that the studies prove that racist prosecutors or juries undervalue the lives of black murder victims. Defenders of the death penalty respond as follows. First, they say, these studies, which are based on sophisticated statistical techniques, are methodologically flawed. In *McCleskey's* case, the lower federal court relied on such a critique of the Baldus-Pulaski-Woodworth research in denying the writ of habeas corpus. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984).

Second, critics claim, there may be a nonracial explanation for the disparity: murders of blacks are less often "aggravated," therefore they lack one of the legal requirements (the aggravating factor) for the death penalty. Murders are overwhelmingly intraracial; that is, blacks are usually killed by blacks, whites by whites (see Appendix A). Many of the killings of blacks, it is contended, are a result of quarrels among acquaintances, and these are less likely to be aggravated. By contrast, the victims of the most commonplace aggravated murders—robbery-murders of strangers and killings of police officers—are more likely to be white (Rothman and Powers 1994). Defenders of the studies deny that aggravating factors explain the racial differential, insisting that racial disparities remain even after controlling for such factors.

Finally, critics of the studies find it odd that allegedly racist juries discriminate against dead black victims but not against the black defendants (or in favor of the white defendants) sitting before them. That is, juries—the racial makeup of which is not taken into account in most studies—are more likely to impose death sentences on white defendants than black defendants, belying charges of racism. Critics also add that since murders are overwhelmingly intraracial, efforts to increase the number of death sentences imposed on killers of blacks would, ironically, result in the execution of more black defendants.

The response to these objections is that the studies prove that there *is* discrimination against black defendants—black defendants charged with killing whites. For many, this is reason enough to abolish capital punishment. As a fallback position, some anti-death penalty activists favor the development of prosecutorial guidelines restricting capital prosecutions to the most aggravated murders, as the studies show that these are least affected by racial motivations. However, proposals to limit the discretion of American prosecutors have not gotten much support.

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