



Death Penalty Information Packet

“The objective of criminal laws and the criminal justice system should be to promote fair and equitable dealings among individuals in the society, to prevent violence and destruction, and to be restorative...”

“We seek the abolition of the death penalty because it denies the sacredness of human life and violates our belief in the human capacity for change. This irreversible penalty cannot be applied equitably and without error. Use of the death penalty by the state powerfully reinforces the idea that killing can be a proper way of responding to those who have wronged us. We do not believe that reinforcement of that idea can lead to healthier and safer communities.”

FCNL Statement of Legislative Policy, 1994

Introduction

The Religious Society of Friends (Quakers) has, for many years, sought a system of justice that restores equity and repairs relationships and that is not oriented towards punishment and retribution.

Friends' interest in criminal justice and the treatment of prisoners extends back to the 17th century when Friends in England and the British colonies often suffered physical punishment for practicing their religion. One of the first persons legally executed in the colonies was a Quaker woman named Mary Dyer. She was hanged on Boston Common in 1660 for her religious beliefs. Her death actually led to a limited royal moratorium on executions in Boston.¹

The Religious Society of Friends has, throughout its history, consistently resisted use of the death penalty and has established a significant record of abolition work. For example, in the United States during the

19th century, Quakers sought to limit the use of the death penalty in murder cases. They did this by working for the adoption of criminal codes that distinguished among different types of murder according to aggravating and mitigating circumstances. Today, many Friends continue to work to end the death penalty and to encourage criminal justice practices that promote rehabilitation of offenders and that restore relationships shattered by violent crime.

This Death Penalty Information Packet is intended to serve both as a resource for activists working to abolish the death penalty and as an introduction to death penalty issues for those seeking to learn more. We have organized the information in this packet into four units which may be read either in sequence or independently of one another. The four units examine the history of the abolition movement, death penalty legislation and other legal issues, arguments for and against the death penalty, and religious perspectives on the death penalty. We have chosen to begin the sequence with the last topic (religious perspectives) because, for many, opposition to capital punishment is, at its core, a position that stems from religious and moral values.

For information on reproduction of this packet, please see page 2.

¹ A total of four Quakers were hanged on Boston Common, all for reasons of faith. In addition to Mary Dyer, William Robinson and Marmaduke Stevenson were hanged in 1659 and William Leddra in 1661. However, it was the hanging of a Mary Dyer that galvanized English Friends to action. In 1661, Quakers petitioned King Charles II (who had just been restored to the throne) to end the executions. He responded by issuing a decree to the governor of the Massachusetts colony, a decree which was swiftly delivered by a Quaker delegation.



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Contents

	page
The Death Penalty in Judeo-Christian Scriptures	3
Background to Abolition	5
Death Penalty Legislation and Legal Issues.....	9
Responding to Pro-Death Penalty Arguments	15
Questions for Discussion	28
Resources for Information and Activism	29

"The real security for human life is to be found in a reverence for it. If the law regarded it as inviolable, then the people would begin also so to regard it. A deep reverence for human life is worth more than a thousand executions in the prevention of murder; and is, in fact, the great security for human life. The law of capital punishment while pretending to support this reverence, does in fact tend to destroy it."

John Bright, 1868

John Bright (1811-1889) was a British Friend and the first Quaker cabinet minister.

The Death Penalty in Judeo-Christian Scriptures

Religious people line up on both sides of the death penalty debate. Both death penalty supporters and abolitionists may use scriptures to justify their positions. This section is intended to clarify the meaning of some of the most commonly used passages and to help religious people find common ground.¹

Contents of this section

How was the death penalty understood in the Hebrew scriptures?	3
Do the Christian scriptures record any words of Jesus about the death penalty?	3
Don't the Christian scriptures call for executing judgement on evil-doers?	4
Do the Christian scriptures provide other guidance on the subject of the death penalty?	4
Resources for further study	4

How was the death penalty understood in the Hebrew scriptures?

The Torah (the first five books of the Bible) contains the laws which God gave to the prophet Moses for governing the Hebrew community. These laws define how people should behave toward one another and in relation to God. The laws also specify penalties for those who transgress the law.

The Torah specifies that certain transgressions are punishable by death. These passages have been cited as evidence that God approves of the death penalty.

However, other passages from the Hebrew scriptures call into question such a blanket conclusion. For example, the prophet Ezekiel, declaring the word of the Lord, said "I have no pleasure in the death of the wicked, but that the wicked turn from his way and live" (Ezekiel 33:11). While this passage leaves open the possibility that non-repentant sinners might be put to death, it makes clear that God's real desire is to draw transgressors back to a relationship with the community. This passage may argue for restorative justice.²

Moreover, there is evidence that the Torah was accompanied from earliest times by an oral tradition

which interpreted the written law and prevented an overly rigid application. For example, while the Torah stipulates physical punishments for certain breaches of conduct, in reality, physical punishment was rarely meted out. Instead, the penalties were paid in the form of money or property. Similarly, while the death penalty is mandated for 36 offenses (including murder, kidnapping, adultery, idolatry, and desecration of the Sabbath), other punishment was often exacted to avoid the shedding of blood.³

Finally, some of the laws and punishments set forth in the Torah reflect a movement away from the endless cycle of bloody feuds between families and toward a more regulated approach to justice. Thus, Exodus 21:23-24 which states that "...you shall give life for life, eye for eye, tooth for tooth..." can be read as limiting vengeful retaliation (you may take *no more than one* life for a life) rather than establishing and mandating capital punishment.⁴

Do the Christian scriptures record any words of Jesus about the death penalty?

The case of the woman caught in adultery described in John 8:1-11 is a passage that is often used to answer this question. Jesus was teaching in the temple when the scribes and Pharisees brought before him a woman who had been caught in the act of adultery. They pointed out that the law of Moses commanded that she should be put to death⁵ and

¹ All scripture verses are from the Revised Standard Version.

² Restorative justice is an approach to crime and criminal justice that looks at crime as a violation of the victim and the community rather than as a violation of the state. As such, it focuses on setting right the relationships within the community that have been damaged by crime and actively engages the victim, offender and community in the restorative process.

³ Hanks, G., *Against the Death Penalty* (Scottsdale, PA: Herald Press, 1997) p. 34.

⁴ *Ibid.*



Resources for Further Study

Gardner C. Hanks, *Against the Death Penalty: Christian and Secular Arguments Against Capital Punishment* (Scottsdale, PA: Herald Press, 1997, ISBN 0-8361-9075-0).

“The Death Penalty: The Religious Community Calls for Abolition” available from the National Coalition to Abolish the Death Penalty. (Contact information is provided in the Resources section of this packet.)

asked Jesus for his opinion. Jesus responded by saying “Let him who is without sin among you be the first to throw a stone at her.”

The Gospels (the first four books of the Christian scriptures) cite many attempts by leaders of the Jewish religious establishment to trap Jesus. They asked him trick questions where one answer would put him in conflict with the Roman authorities while the other answer would make it appear that he did not respect Jewish law.⁶

In this case, the trap focused on the conflict between *Jewish law*, which called for or permitted the death penalty in certain circumstances, and *Roman law* which deprived the Jewish leaders of the authority to carry out capital punishment. How was Jesus to respond? Jesus knew that if he upheld Jewish law, he could be reported to the Roman authorities but that if he failed to uphold Jewish law, he could be discredited among the Jewish people. He resolved the dilemma by sidestepping the question and turning it back to his interrogators.

⁵ The law actually specifies that both parties should be put to death, not just the woman. See Leviticus 20:10 and Deuteronomy 22:22-29.

⁶ Another, better-known, example of such a trick question is found in Matthew 22: 16-22. In this passage, the Pharisees asked Jesus whether it was lawful to pay taxes to Caesar (i.e. the Roman government which occupied Israel). Jesus knew that if he said “yes,” he would be discredited among many Jews who sought to overthrow the Roman yoke. But if he said “no,” he could be reported to the Roman authorities. He responded by turning the problem back to those who would trap him. He asked whose face was depicted on the coin. When told that it was Caesar’s, Jesus said that they should “render therefore to Caesar the things that are Caesar’s, and to God the things that are God’s.”

In another sense, Jesus did respond to the question about the death penalty. He affirmed the provision of Jewish law that called for the death penalty, but then surrounded that provision with a virtually insurmountable wall so that it could not be used. Only someone who is sinless may put someone else to death (at least in the instance of adultery). Since no human being is without sin, then the death penalty cannot be used. Only God, who is perfect, can take someone’s life.

Don’t the Christian scriptures call for executing judgement on evil-doers?

Romans 13:4 has provoked much debate on the issue of the death penalty. It reads, “But if you do wrong, be afraid, for he [the ruler] does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer.” Does this mean that God has given the state the power of life and death over its subjects to maintain order? Some theologians claim that it does. Others argue that “execute” should not be taken to mean “put to death” but rather “to carry out.”

Those who make the latter argument point out that the Apostle Paul addressed these words to a group of Christians who felt that the new social order which Jesus introduced somehow meant that they did not have to obey the government in power. Paul was counseling these Christians to submit to the authorities, but not to participate in any activities of the government that were contrary to the way of Christ.

Do the Christian scriptures provide other guidance about the death penalty?

We believe that they do. Romans 5 asserts that Christ gave his life as a sacrifice so that sinners might be made whole and be reconciled to God.⁷ This is a precious gift. Can anyone who values this gift deny someone else the possibility of knowing God’s love? God may work for years to bring a sinner to repentance and reconciliation. Who are we and what is the state to thwart God’s good work? Yet, execution does precisely this. Execution takes a person who has transgressed God’s law of love and grievously hurt other people and it denies that person the opportunity to be made whole and reconciled to God.

⁷ John 3:16-17 also conveys this message.



Background to Abolition

Opposition to the death penalty is older than the Declaration of Independence. The movement to end capital punishment has always cut across religious boundaries. This section will provide some highlights of the abolition movement in the U.S. over the past 300 or so years to demonstrate both the duration of this movement and the breadth of support it enjoys. This information can help you to answer allegations that the current anti-death penalty movement is largely a product of “media hype” and can help people of many different religious convictions feel that they have a place in this movement.

Contents of this section

The death penalty in colonial America	5
The rise of the abolition movement	5
Abolition after the Civil War	6
Politics of the death penalty at the close of the Twentieth Century	6
Sidebars:	
The Death Penalty as an Election Issue	6
Another Governor’s View of a Death Penalty Moratorium.....	7
Ending State-Sponsored Killing: Legislation Introduced in the 106th Congress.....	8
Resources for Further Study	8

The death penalty in colonial America¹

Under English law, scores of crimes were considered capital offenses (i.e. crimes which could be punished by death). Juries were charged with determining guilt or innocence but were not able to exercise any discretion in sentencing. Thus, someone convicted of a capital crime would automatically receive a death sentence. However, while thousands were *formally* sentenced to death, *in practice*, a majority of those were granted clemency and banished. This clemency resulted in part from the practical desire to avoid the riotous public spectacles that characterized executions in England.

As colonists from England settled North America, they brought with them the basic principles of English law. Initially, laws in each of the thirteen colonies called for public hanging as the punishment for various crimes against the state, person and property. However, as the years passed, the colonies — and their laws — developed in unique ways. Quakers and other reformers were sometimes able to mitigate England’s severe approach to criminal justice. Death penalty laws, particularly, showed evidence of that reforming influence.

For example, the charter of colonial Pennsylvania — Quaker William Penn’s “Holy Experiment,” — made only two crimes eligible for the death penalty: murder and treason. And, during colonial Pennsylvania’s first thirty years, no executions actually took place. Pressure from England did, ultimately, force lawmakers in the colony to make more crimes death-eligible. However, these changes were largely reversed in the years following the Revolution. By 1794, Pennsylvania had eliminated the death penalty as a sentence for all but a few crimes.

The rise of the abolition movement²

Opposition to capital punishment in the colonies did not come only from within the religious community. Some opposed the death penalty on philosophic grounds. For example, Cesare Beccaria, in his essay *On Crimes and Punishment*, argued that the death penalty was immoral, ineffective as a deterrent, brutalizing, and a tool of tyrannical government. This volume, published in 1763, influenced such persons as Thomas Jefferson, Benjamin Franklin and Dr. Ben-

¹ Bedau, H.A., *The Death Penalty in America: Current Controversies* (New York: Oxford University Press, 1997) pp. 4-7.

² *Ibid.*



jamin Rush. Beccaria's influence continued into the nineteenth and twentieth centuries.

From the 1790s to the 1860s, death penalty opponents (primarily Quakers) worked to limit death penalty application through modifications in the criminal codes that recognized "degrees" of murder (according to the aggravating and mitigating circumstances) and adjusted penalties accordingly. Such changes in the criminal codes reflected compromises between supporters and opponents of the death penalty. Supporters saw this as a way of ensuring that those guilty of heinous crimes could be executed. Abolitionists accepted it as a step on the way to total elimination of the death penalty.

Abolition after the Civil War³

The death penalty abolition movement lost steam during the Civil War as the anti-slavery movement took center stage. However, the early years of the 20th century saw a renewal of interest in abolition. From 1907 to 1917, seven states entirely outlawed the death penalty and two limited its use to treason and first degree murder of a law enforcement official. Unfortunately, this death penalty reform was short-lived.

Five of the nine abolitionist or limited-use states reinstated the death penalty by 1920. Perceived threats from communism and socialism, as well as the strain of World War I, contributed to the desire for harsh responses to crime. Sensational cases, such as the kidnapping and murder of the Lindbergh baby, also made the death penalty an appealing response to crime anxiety. This pro-death penalty sentiment continued through the tense periods of Prohibition and the Great Depression. In the 1930s, executions in the U.S. reached a peak, with an average of 167 per year.

By the 1950s, public sentiment was again turning away from the death penalty. Internationally, many of the U.S.'s allies had abolished or limited the death penalty. In the U.S., the number of executions

dropped dramatically from 1,289 in the 1940s, to 715 in the 1950s. Between 1960 and 1976, only 191 executions took place.

Politics of the death penalty at the close of the Twentieth Century

In the final decades of the 20th Century, two opposing forces have influenced the death penalty debate. One is the heightened awareness of racial and economic inequities in the criminal justice system. The other is the war on crime. Both are political "hot buttons."

The civil rights movement of the 1960s and 70s drew the nation's attention to racial and economic inequities in the application of the death penalty. During this time, a series of cases brought by the NAACP Legal Defense and Education Fund (LDF) challenged the constitutionality of the death penalty. Ultimately, executions were suspended until the U.S.

The Death Penalty as an Election Issue

Reliance on the death penalty as a campaign tool is a fairly new development, but a significant one in electoral politics at every level. The death penalty barely appeared as an issue for candidates until 1968, when Richard Nixon used it as part of his presidential campaign. Since then it has been a particularly effective tool against Democrats seeking reelection in Congress. It has also factored into the last several presidential contests.

- In 1988, Michael Dukakis' campaign suffered from George Bush Sr.'s attack on his anti-death penalty position.
- In 1992, Bill Clinton anticipated the "Dukakis problem" by presiding over three executions during his presidential campaign.
- In 2000, presidential candidate and Texas governor George W. Bush Jr. cited the record number of executions that have taken place on his watch as evidence of his commitment to tough crime policy.

³ *Ibid.*, pp. 9-11.



Supreme Court issued a ruling that established standards for the use of the death penalty (*Furman v. Georgia*, 1972).

During the 1980s, the Reagan administration launched the “War on Drugs” to provide a federal focus for crime control. A host of efforts to control drugs through prosecution and imprisonment were initiated. Harsh punishment was approved in the name of deterrence and public safety. Support for the death penalty has become a shorthand message used by some politicians who wish to appear tough on crime. This has allowed them to take advantage of societal anxieties without necessarily addressing crime prevention.

But despite the popularity of the death penalty among some politicians as an indication of tough-on-crime policy, concerns about the application of the death penalty and about capital punishment itself are widespread. Religious groups that have traditionally opposed capital punishment have been joined by a broad spectrum of faiths and denominations calling for moratorium, abolition, or both. For example, in December 1999, the National Council of Synagogues and the U.S. Catholic bishops published a joint statement that called for an end to the death penalty.⁴ Many Protestant denominations have also passed policy statements calling for an end to the death penalty.

Equally important to the moratorium and abolition movements is the support of criminal justice professionals. Even law enforcement officers give the death penalty a low rating as a crime deterrent.⁵ And, in February 1997, the American Bar Association passed a resolution calling for a nationwide moratorium on all executions until due process can be guaranteed.⁶

⁴ “To End the Death Penalty.” A Report of the National Jewish/Catholic Consultation. Co-sponsored by the National Council of Synagogues and the Bishops’ Committee for Ecumenical and Interreligious Affairs of the National Conference of Catholic Bishops. Published by the United States Catholic Conference, December 1999. The statement declared that after a study of both traditions, “we found a growing conviction that the arguments offered in defense of the death penalty are less than persuasive in the face of the overwhelming mandate in both the Catholic and Jewish traditions to respect the sanctity of human life.”

Another Governor’s View of a Death Penalty Moratorium

When Texas Gov. George Bush was asked at a news conference about a death penalty moratorium he had this to say. “...No, I am not going to institute the moratorium here in Texas because I’m confident that everybody that has been put to death has been guilty of the crime charged. I’m also confident that everybody who has been put to death has had full access to both state and criminal courts...” (News conference, Austin TX, March 8, 2000, reported on <www.washingtonpost.com>).

Finally, the increasing use of sophisticated DNA testing methods has heightened the public’s awareness of wrongful convictions. Around the U.S., a number of states, cities, and communities have considered and/or passed resolutions calling for a moratorium on executions or abolition of the death penalty. In January 2000, Illinois Governor Ryan, a death penalty supporter, proclaimed a moratorium following the release of the 13th innocent person from death row since 1977. In June 2000, Maryland Governor Glendening, another death penalty supporter, commuted the sentence of a death row inmate because of concerns about this individual’s possible innocence. During the 106th Congress, moratorium legislation was introduced in both houses of Congress and a bill to abolish the federal death penalty was introduced in the Senate.

Efforts to limit or end the use of the death penalty are older than the United States, itself. Concerns about the fairness, accuracy, and morality of the death penalty are expressed by people of diverse religious viewpoints and by legal and criminal justice professionals.

⁵ “On the Front Line: Law Enforcement Views on the Death Penalty,” Death Penalty Information Center web site <www.deathpenaltyinfo.org/dpic.r03.html>, February 1995, accessed August 2000

⁶ <www.abanet.org/media/feb97/death.html>, accessed August 2000



Ending State-Sponsored Killing: Legislation Introduced in the 106th Congress

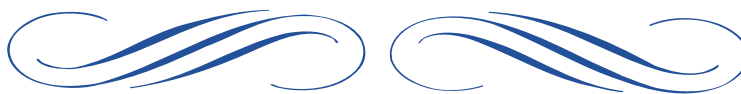
- The National Death Penalty Moratorium Act (S 2463), introduced by Sens. Feingold (WI) and Levin (MI), would immediately and indefinitely suspend executions in the United States while a national commission reviews the administration of the death penalty.
- The Accuracy in Judicial Administration Act (HR 3623), introduced by Rep. Jesse Jackson, Jr. (IL), would place a minimum 7 year moratorium on all executions so that death row inmates could access DNA and other exculpatory evidence.
- The Federal Death Penalty Abolition Act (S 1917), introduced by Sen. Feingold would prevent the federal government from imposing the death penalty for violations of federal law.

Resources for Further Study

Hugo Adam Bedau, *The Death Penalty in America: Current Controversies* (New York: Oxford University Press, 1997).

Gardner C. Hanks, *Against the Death Penalty: Christian and Secular Arguments Against Capital Punishment* (Scottsdale, PA: Herald Press, 1997).

Gallup Opinion Poll conducted February 24, 2000, <www.gallup.com/poll/releases/pr000224.asp>, accessed August 2000.



Death Penalty Legislation and Legal Issues

Much of the work to limit or end the death penalty takes place in legislatures and the courts. Citizens can play an important role in influencing legislation, particularly if they understand some of the history and issues involved in death penalty legislation and court rulings. This section will present some basic principles and key court cases that are frequently referred to in articles and discussions about the death penalty so that activists can participate effectively in the debate.

Contents of this section

Death penalty statutes in the U.S.: a legislative patchwork	9
Appealing death sentences.....	10
The death penalty: a question of constitutionality	12
Executive clemency	13
The use of DNA testing.....	13
Table I: U.S. Jurisdictions with and without the death penalty.....	10
Sidebars:	
Habeas corpus.....	11
Constitutionality of the death penalty	12
What constitutes “cruel and unusual punishment”?	12
Resources for further study	14

Death penalty statutes in the U.S.: a legislative patchwork

Every state plus the District of Columbia has a criminal code. So does the federal government, the U.S. military, and U.S. territories. Ending the death penalty in the U.S. — and keeping it that way — thus means working in more than fifty jurisdictions (Table I).

Congress has responsibility for the federal criminal code (including establishing death-eligible crimes or abolishing the death penalty). The federal criminal justice code permits the death penalty for certain offenses that transcend state jurisdiction. These offenses include murder of certain categories of government officials and kidnaping resulting in death. In recent years, Congress has expanded the list of federal crimes and the list of death-eligible crimes. For example, in 1988, Congress enacted a new federal death penalty statute for murder in the course of a drug kingpin conspiracy. In 1994, President Clinton signed the Violent Crime Control and Law Enforce-

ment Act that expanded the federal death penalty to some 60 crimes, including three which do not involve murder: espionage, treason, and drug trafficking in large amounts. At least seven bills introduced in the 106th Congress would expand the federal death penalty.

In addition to passing *federal* criminal legislation (including federal death penalty statutes), Congress also can help to shape criminal justice legislation (including death penalty laws) in the *states*. The major way that Congress does this is through funding. Congress can mandate that state criminal justice codes contain specific provisions by making such provisions a condition of eligibility for federal grants. For example, the Correctional Officer Protection Act (HR 282), introduced in the 106th Congress, would have reduced grant funding under the Omnibus Crime Control and Safe Streets Act of 1968 to any state that did not enact legislation that would require the death penalty for any convict who, while a convict, was found guilty of first-degree murder in the killing of a correctional officer. Such a law would automatically penalize



TABLE I: The death penalty across the U.S.

❖ ❖ ❖ Jurisdictions with death penalty statutes: ❖ ❖ ❖				
Alabama	Idaho	Montana	Oklahoma	Washington
Arizona	Illinois	Nebraska	Oregon	Wyoming
Arkansas	Indiana	Nevada	Pennsylvania	
California	<i>Kansas</i>	<i>New Hampshire</i>	South Carolina	<i>Federal (civilian)</i>
Colorado	Kentucky	<i>New Jersey</i>	South Dakota	<i>Federal (military)</i>
<i>Connecticut</i>	Louisiana	<i>New Mexico</i>	Tennessee	
Delaware	Maryland	<i>New York</i>	Texas	
Florida	Mississippi	North Carolina	Utah	
Georgia	Missouri	Ohio	Virginia	
❖ ❖ ❖ States without death penalty statutes: ❖ ❖ ❖				
Alaska	Maine	Minnesota	Vermont	
Hawaii	Massachusetts	North Dakota	West Virginia	District of Columbia
Iowa	Michigan	Rhode Island	Wisconsin	

Key:

Italics: States that have not carried out an execution since 1976. New Hampshire has not executed anyone since 1939. Illinois imposed a moratorium on executions in February 2000.

Bold: States that allow the execution of persons under 18 years of age.

Information drawn from the Death Penalty Information Center web site, <www.deathpenaltyinfo.org/DeathRowUSA1.html>, information as of July 1, 2000. Information on the execution of persons less than 18 years of age is drawn from "Death Sentences and Executions for Juvenile Crimes, January 1, 1973-June 30, 2000" by Victor L. Streib. The report is available at <www.law.onu.edu/faculty/streib/juvdeath.pdf>.

states whose citizens have, through their elected officials, chosen not to have death penalties. (This bill was not enacted into law.)

Appealing death sentences

Over the past ten years, dozens of wrongly-convicted persons, including some on death row, have been exonerated of crimes. These exonerations have helped to focus attention on the fallibility of the criminal justice system. In addition to the actually innocent people who have been wrongly convicted and sentenced to death, other people who are guilty of crimes have been wrongly sentenced to death through other failures of the criminal justice system.

Wrongful convictions and wrongful death sentences have resulted from police and prosecutorial miscon-

duct, perjured testimony, fraudulent forensic evidence, eye witness misidentification, incompetent legal representation, and the failure of judges to provide juries with clear sentencing instructions. Moreover, there is unequivocal evidence of racial disparities in sentencing decisions. [This is discussed in Unit IV.] For all these reasons, the appeals process is crucial for death row inmates. Unfortunately, the appeals process is crisscrossed with barriers that make it difficult for death row inmates to challenge their convictions.

For many death row inmates, the first (and often insurmountable) barrier is the inability to secure competent legal counsel. Indeed, problems with counsel may be why some of these individuals are on death row in the first place. The U.S. Supreme Court ruled nearly forty years ago that defendants

in criminal cases have a right to counsel.¹ But, for many poor defendants, this right translates into representation by inexperienced, overworked, uninterested, or even incompetent attorneys.² It is not surprising that death rows across the U.S. are populated by disproportionate numbers of poor people and disproportionate numbers of black and Hispanic persons.

The problems faced by indigent defendants were exacerbated by FY96 federal funding decisions. Congress sharply cut back funding for the Legal Services Corporation (which provides legal assistance in non-criminal cases for poor persons) and eliminated funding for death penalty resource centers which provide attorneys for death row inmates. For poor defendants, the constitutionally-guaranteed right to equal protection of the laws is bitter irony.

In 1996, Congress restricted federal death penalty appeals through the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Acting in response to complaints that some death row inmates were postponing their executions by filing petition after petition, the bill set a six-month limit on filing a federal habeas corpus (see box on habeas corpus) appeal in capital cases after exhausting the final state appeal. In setting these limits, legislators gave judicial expediency precedence over human life.

The AEDPA also narrowly restricted the nature of the review that could occur at the federal level. The law bars federal judges who are hearing death penalty appeals from taking a fresh look at constitutional issues *unless* the state court's ruling on constitutional issues were "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court." Now, the courts of all 50 states can interpret the U.S. Constitution as they will and the federal courts can rectify only egregious misinterpretations. The U.S. Supreme Court recently upheld this provision of the AEDPA.³

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² Only where there is blatant incompetence may there be legal recourse. In practical terms, however, a convicted person is only likely to have recourse if he or she can find an attorney willing to pursue this issue.

³ *Williams v. Taylor*, 119 U.S. 1353 (2000).

The U.S. Supreme Court had, prior to AEDPA, constrained its own role in death penalty cases. This occurred in a controversial 1993 case, *Herrera v. Collins*. The petitioner, Herrera, submitted a habeas motion to the Supreme Court. In this motion, Herrera claimed that he had new information (not available at his original trial, ten years earlier) that demonstrated that he was innocent of the crime for which he had received the death sentence. He did not raise any questions of constitutional errors in his original trial.

The majority opinion in *Herrera* asserted that the Supreme Court is *not* the place to bring a claim based new evidence *unless* the new evidence is accompanied by a claim that there was a constitutional error in the original trial. Chief Justice Rehnquist, who wrote the majority opinion, specifically noted that the petitioner's "claim of actual innocence does not entitle him to federal habeas relief." The Court, thus, refused to rule on the question of Herrera's guilt or innocence.

The Chief Justice's opinion went on to state that the appropriate place to present new evidence (including evidence of actual innocence) is the state criminal justice system (in Herrera's case, the Texas board of pardons). The Chief Justice then asked a hypo-

Habeas corpus

Habeas corpus petitions are usually filed by persons serving prison sentences as part of a process which allows them to object to their detention or imprisonment. The petitioner must show that the court ordering the detention or imprisonment made a legal or factual error. If the judge grants the petition, the prisoner receives a writ of habeas corpus, which orders the prison officials to bring the inmate before the court to determine whether or not that person is imprisoned lawfully and whether or not he/she should be released from custody.

The Supreme Court recognizes the writ of habeas corpus as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Brown v. Vasquez*, 952 F.2d 1164, 1166 (9th Cir. 1991), cert. denied, 112 S.Ct. 1778 (1992).



Constitutionality of the death penalty

Legal challenges to the constitutionality of the death penalty may focus on the Fifth Amendment which provides for “due process of law,” the Sixth Amendment which guarantees the right to defense counsel, the Eighth Amendment which prohibits “cruel and unusual punishments,” and the Fourteenth Amendment which provides for “equal protection of the laws.”

thetical question: Is there any situation in which the Supreme Court might consider a claim of actual innocence without there being an accompanying question of constitutional error? He answered his question by writing that *if* a state lacked the “fail-safe” of a clemency process, then *perhaps* federal review of the claim of innocence would be warranted, but only if the claim to innocence were *highly persuasive*. In a chilling statement, the Chief Justice explained why the bar on persuasiveness had to be raised in such situations. “That threshold [of persuasiveness] would necessarily be extraordinarily high because of the very disruptive effect that entertaining such claims would have on the need for finality in capital cases...”⁴

Habeas “reform” laws have reduced the time between conviction and execution and are expected to continue to decrease this time to an average of 4 years. However, studies of death row inmates who have been released show that it takes an average of 6.5 years to prove innocence in the courts. The need for achieving “finality in capital cases” more quickly can be expected to send innocent people to their deaths.

The death penalty: a question of constitutionality

Death penalty opponents have argued that capital punishment violates the U.S. Constitution (see boxes on constitutionality and cruel and unusual punishment). While the U.S. Supreme Court has not agreed that the death penalty *per se* is unconstitu-

tional, it has ruled that certain applications of the death penalty are unconstitutional.

For example, in 1972, the Supreme Court ruled that a punishment would be “cruel and unusual” if it

What constitutes “cruel and unusual punishment”?

When the Eighth Amendment was drafted, the prohibition against “cruel and unusual punishments” was understood to exclude execution by crucifixion and similar methods. Until 1888, hanging and the firing squad were used to execute prisoners. Then, in 1888, New York developed the electric chair as a more efficient method than hanging. Lethal gas was introduced as a more humane method than hanging or electrocution and first used in Nevada in 1923. Lethal injection was first used in Texas in 1982. However, in Utah, the firing squad is still frequently used for execution. Hanging remains a legal method in the U.S.

In late 1999, following a pair of particularly gruesome executions, Florida’s use of the electric chair was suspended so that the Supreme Court could review whether or not it qualified as “cruel and unusual punishment.” However, in January 2000, Florida Gov. Jeb Bush signed a bill that changed the state’s method of execution to lethal injection. This rendered moot the Supreme Court’s review and the question of whether the electric chair violates the Eighth Amendment remains undecided.

The electric chair is not the only torturous method of execution. Problems have been documented with both lethal injections and gassing.

The use of hoods and restraints distances the condemned person from witnesses to the executions. These devices also spare witnesses the full sight of a prisoner’s pain. Would executions meet with less public acceptability if more people were required to watch the spectacle and with fewer barriers between them and the condemned person?

⁴ *Herrera v. Collins*, 506 U.S. 390 (1993).



were too severe for the crime, if it were arbitrary, if it offended society's sense of justice, or if it were not more effective than a less severe penalty.⁵ This ruling changed hundreds of pre-1972 death sentences into sentences of life in prison and required state legislatures to fix the problems identified by the court if they wished to maintain use of the death penalty.

Georgia's response to the Supreme Court's ruling was the first to be tested by the high court. The newly overhauled death penalty statutes incorporated three important elements. First, the state employed a two-phase trial system in which the first phase determined the question of guilt and the second phase determined the sentence. Second, the jury making the sentencing decision (death vs. life in prison) would be guided by statutory lists of mitigating and aggravating circumstances. Third, the state supreme court would automatically review every death sentence and the underlying conviction. In 1976, the Supreme Court ruled that Georgia's new statutes were constitutional.⁶

In a series of three decisions between 1976 and 1987, the Supreme Court ruled that mandatory death penalty sentencing was unconstitutional.⁷ (These cases would seem to effectively preclude the law proposed by HR 282, the Correctional Officer Protection Act, cited above.)

Executive clemency

Those who argue for limiting the death penalty appeals process claim that executive clemency keeps the truly innocent from execution. But, because crime is such a hot political button, governors are wary of the possible political consequences of commuting a death sentence to life in prison without parole or even of granting a stay of execution. Since 1977, 42 clemencies have been granted (June 2000).⁸

⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁷ *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Sumner v. Shuman*, 483 U.S. 66 (1987).

⁸ Death Penalty Information Center web site <www.deathpenaltyinfo.org/clemency.html>, 7/11/00.

In contrast, during essentially this same period (1977 through July 2000), 652 persons were executed⁹ and 87 death row inmates were found innocent and released.¹⁰

Justice Blackmun has said, "Whatever procedures a State might adopt to hear actual innocence claims, one thing is certain: the possibility of executive clemency is not sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments."¹¹ Though clemency can save some lives, it does not provide a failsafe against executing innocent persons.

The use of DNA testing

Over the past ten years, dozens of wrongly-convicted persons (including several on death row) have been exonerated of crimes. DNA testing has played an important role in a number of exonerations. Now, the increasingly common use of pre-trial DNA testing of specimens from suspects has led police and prosecutors to exclude thousands of prime suspects before indictments were issued. For crimes where DNA testing is possible (i.e. cases in which the perpetrator left even a minute amount of a biological specimen such as hair or semen), the use of pre-trial testing should reduce the likelihood that innocent people will be convicted and sentenced to prison or death.

The demonstrated value of DNA testing has also led to a move to right the injustices inflicted on persons who were wrongly-convicted and whose innocence can be demonstrated with DNA testing. This is also an important effort.

⁹ Bureau of Justice Statistics (BJS) web site <www.ojp.usdoj.gov/bjs/glance/exe.txt> 7/11/00, and Death Penalty Information Center (DPIC) web site <www.deathpenaltyinfo.org/DRUSA-ExecUpdate.html>, 7/13/00. These two lists are in agreement about the numbers of persons executed each year except 1993 when the BJS lists 27 and the DPIC lists 38. The DPIC specifies the names and execution dates of the 38 persons <www.deathpenaltyinfo.org/dpicexec93.html>, 7/13/00. We have, therefore used the DPIC figure in calculating the total number of persons executed since 1977.

¹⁰ Death Penalty Information Center web site <www.deathpenaltyinfo.org/Innocentlist.html>, 7/13/00

¹¹ *Herrera v. Collins*, 506 U.S. 390 (1993), dissent.



There is, however, a potential dark side to DNA testing. The intense focus on innocence can distract people from seeing the myriad other problems in the criminal justice system. This may have serious consequences.

If there is less danger of wrongly convicting an innocent person of a capital crime, will more people accept the death penalty for those whose guilt is (or appears to be) incontrovertible and whose offenses are abominable? Might our nation focus more on killing “problem people” than on preventing crime, rehabilitating offenders, and restoring relationships?

Is the determination of guilt or innocence the only question of accuracy in the criminal justice system? When prosecutors and judges do not give juries clear sentencing instructions (e.g. how to weigh mitigating factors, or alternatives to the death penalty, such as life without parole), is that not also a problem with accuracy?

Do perpetrators of capital crimes forfeit a right to fairness in the judicial process? Is it fair that some poor defendants are represented by inexperienced public defenders or underpaid, uninterested, or incompetent court-appointed attorneys?

Are there ever mitigating circumstances for individuals who commit terrible crimes? Should mentally retarded individuals and persons with mental illnesses be sentenced as though they had a full grasp of the world around them?

Resources for Further Study

Hugo Adam Bedau, *The Death Penalty in America: Current Controversies* (New York: Oxford University Press, 1997).

Richard C. Dieter. “Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent.” Death Penalty Information Center. July 1997.

“Facts About Clemency,” Death Penalty Information Center, <www.deathpenaltyinfo.org/clemency.html>, updated June 2000, accessed August 2000.

“Federal Death Penalty,” Death Penalty Information Center, <www.deathpenaltyinfo.org/feddp.html>, updated August 4, 2000, accessed August 2000.

DNA testing is but one element of a comprehensive approach to reforming the U.S. criminal justice system. Taken alone, it is not a “fix.” The danger is that the widespread use of DNA testing may mislead some to think that the worst problems in the criminal justice system have been corrected and that justice is being served fairly. This would truly be a miscarriage of justice.



Responding to Pro-Death Penalty Arguments

For most death penalty opponents, abolition is a matter of deep religious or moral conviction. This conviction has a power that transcends arguments. Nonetheless, effective dialog with legislators and with proponents of capital punishment requires that death penalty opponents be prepared to address an array of arguments and to respond thoughtfully and knowledgeably. This unit will examine pro-death penalty arguments and will also present arguments against the use of capital punishment. This information will help activists participate in legislative debates and to speak to the principalities, powers, and rulers of this age.¹

Contents of this section

Arguments commonly used to support the death penalty	15
The death penalty deters violent crime more effectively than does imprisonment	15
Families of crime victims support the death penalty	17
The death penalty protects society	17
Murderers deserve to die	19
Keeping murderers alive costs society more than executing them	19
Arguments for ending the death penalty.....	20
The criminal justice system has sent innocent people to death row. Some may have been executed.....	20
The death penalty is applied in a racially-disparate fashion.....	21
The death penalty is applied to some of society's most vulnerable people	22
In relying on the death penalty, the U.S. is out of step with much of the world.....	24
Tables	
I: Murder rates per 100,000 population in states with and without death penalty.....	16
II: Murder rates and executions in 21 states with murder rates at or above the national average.....	18
III: Countries and territories which do not apply the death penalty for any crimes	25
IV: Countries that reserve the death penalty only for crimes committed under exceptional circumstances	25
V: Countries with death penalty statutes that have not executed anyone since 1990 or earlier.....	25
VI: Countries that still use the death penalty	26
Sidebars:	
The Wheels of Justice Do Not Turn At All for Some Wrongly-Convicted Persons.....	20
The Ultimate Miscarriage of Justice	21
Police and Prosecutorial Misconduct	22
Legal Representation	22
Resources for further study	27

Arguments commonly used to support the death penalty

Argument 1: The death penalty deters violent crime more effectively than does imprisonment.

There are several kinds of data that are useful in evaluating the deterrence claim. First, how do homicide rates compare in states with and without the death penalty? This kind of comparison is complicated by the many other factors that impact on homicide rates. However, by comparing neighboring states, we can reduce some of the geographic factors.

¹ Religious arguments for and against the death penalty are presented in the unit on the death penalty in Judeo-Christian scriptures.



In general, states without the death penalty do not have consistently higher homicide rates than states which have death penalty statutes on the books. By

and large, the opposite is true. Homicide rates are lower in non-death penalty states. This is illustrated in Table I.

TABLE I: Murder rates per 100,000 population in states with and without death penalty

Each of the following five sets of states consists of a non-death penalty state plus all states (death penalty and non-death penalty) that border the selected state. The five selected states, West Virginia, Iowa, Massachusetts, Michigan, and North Dakota are shown in bold; neighboring states in plain font. Non-death penalty states are indicated by an asterisk (*). Among the neighbor states are four additional non-death penalty states. The three non-death penalty states which are not included in this study are ones which do not permit easy comparison with other states. They are Alaska, and Hawaii (neither of which borders any other state) and Maine (which shares a border only with New Hampshire).

STATE	1995	1996	1997	1998	AVERAGE
*West Virginia	4.9	3.8	4.1	4.3	4.3
Pennsylvania	6.3	5.7	5.9	5.3	5.8
Virginia	7.6	7.5	7.2	6.2	7.1
Kentucky	7.2	5.9	5.8	4.6	5.9
Ohio	5.4	4.8	4.7	4.0	4.7
*Iowa	1.8	1.9	0.8	1.9	1.6
*Minnesota	3.9	3.6	2.8	2.6	3.2
*Wisconsin	5.1	4.2	4.0	3.6	4.2
Illinois	10.3	10.0	9.2	8.4	9.5
Missouri	8.8	8.1	7.9	7.3	8.0
Nebraska	2.9	2.9	3.0	3.1	3.0
South Dakota	1.8	1.2	1.4	1.4	1.4
*Massachusetts	3.6	2.6	1.9	2.0	2.5
*Vermont	2.2	1.9	1.5	2.6	2.0
New Hampshire	1.8	1.7	1.4	1.5	1.6
*Rhode Island	3.3	2.5	2.5	2.4	2.7
Connecticut	4.6	4.8	3.8	4.1	4.3
New York	8.5	7.4	6.0	5.1	6.8
*Michigan	8.5	7.5	7.8	7.3	7.8
Ohio	5.4	4.8	4.7	4.0	4.7
Indiana	8.0	7.2	7.3	7.7	7.6
*Wisconsin	5.1	4.2	4.0	3.6	4.2
*North Dakota	0.9	2.2	0.9	1.1	1.3
*Minnesota	3.9	3.6	2.8	2.6	3.2
South Dakota	1.8	1.2	1.4	1.4	1.4
Montana	3.0	3.9	4.8	4.1	4.0

Data taken from "FBI Uniform Crime Reports : Murder Rates per 100,000 population" as posted on the Death Penalty Information Center web site, <www.deathpenaltyinfo.org/murderrates.html>, July 2000.

In four of the five sets of states shown in Table I, the selected non-death penalty state has an average murder rate that is well below the average murder rate for several neighboring states. Noteworthy are the differences in murder rates between (1) two agricultural states, Iowa (non death penalty) and Nebraska (death penalty) (2) two Appalachian states, West Virginia (non-death penalty) and Kentucky (death penalty), and (3) two northern plains states, North Dakota (non-death penalty) and Montana (death penalty).

A second way to evaluate the deterrence claim is to look specifically at states with murder rates that are above the national average and to ask whether high murder rates are correlated with the absence of the death penalty. No such correlation is evident.

Twenty-one states had murder rates that were consistently above the national averages during 1995-1998. (We consider a state in this category if either (1) the state's murder rate was at or above the national average in at least three of the four years or (2) the state's four-year average murder rate was above the national average.) Of these 21 states, 19 have death penalty statutes. These include Texas, which leads the nation in executions, and Florida, which is number three in executing prisoners.

Table II lists each of the 21 states and shows their murder rates (1995-98 and four-year average) and the total number of persons executed between 1976 and July 2000. Together, the 19 death penalty states in this group accounted for 540 (83%) of the 652 executions in the U.S. between 1976 and July 2000.

A third important question relating to deterrence is whether imposing the death penalty for the murder of a police officer acting in the line of duty deters such murders. If such deterrence were demonstrated, it would be more difficult to argue against a limited use of capital punishment to protect those who place their lives at risk for the well-being of society. However, several studies that have looked for evidence of deterrence within this setting have failed to find that capital punishment protects police officers.²

The Death Penalty Information Center web site summarizes several additional studies which debunk the myth of deterrence.³

Argument 2: Families of crime victims support the death penalty.

Crime victims' families respond to the death penalty in a variety of ways. Some families of crime victims argue for the death penalty as an appropriate way of achieving vengeance or atonement. Other families argue against the death penalty and seek an end to the cycle of violence. Dennis Shepard — whose son Matthew was brutally murdered allegedly because he was gay — exemplifies the latter: he pleaded publicly for life imprisonment rather than death for his son's murderers.⁴ Sometimes crime victims' families do not take a philosophical position against the death penalty, but seek sentences of life without the possibility of parole because such sentences bring closure more quickly than death sentences which can include lengthy appeals.

Murder Victims Families for Reconciliation (MVFR) is a national organization of victim family members who oppose the death penalty and would prefer to see the money currently spent on executions redirected towards victim-assistance programs. Other groups seek actual reconciliation between murderers and victim families. *Restitution Incorporated* helps death row inmates sell their artwork in order to raise funds for the families of their victims or for programs that support crime prevention.

Argument 3: The death penalty protects society

Death penalty supporters point out that heinous killers, even if sentenced to life in prison without

² These studies are reviewed by William C. Bailey and Ruth D. Peterson in the chapter "Murder, Capital Punishment and Deterrence: A Review of the Literature" in *The Death Penalty in America: Current Controversies*. (New York: Oxford University Press, 1997). Bailey and Peterson, themselves, have conducted two such studies.

³ <www.deathpenaltyinfo.org/deter.html>, accessed August 2000.

⁴ Michael Janofsky. "Wyoming Man Gets Life Term in Gay's Death." *New York Times*, November 5, 1999.



Table II: Murder rates and executions in 21 states with murder rates at or above the national average.

STATE	MURDER RATES/100,000 POPULATION					NO. EXEC.
	1995	1996	1997	1998	4-YR AV.	
Louisiana	17.0	17.5	15.7	12.8	15.8	26
Mississippi	12.9	11.1	13.1	11.4	12.1	4
Nevada	10.7	13.7	11.2	9.7	11.3	8
Maryland	11.8	11.6	9.9	10.0	10.8	3
Alabama	11.2	10.4	9.9	8.1	9.9	23
New Mexico	8.8	11.5	7.7	10.9	9.7	0
Tennessee	10.6	9.5	9.5	8.5	9.5	1
Illinois	10.3	10.0	9.2	8.4	9.5	12
Arkansas	10.4	8.7	9.0	8.9	9.2	22
Georgia	10.0	9.5	7.5	8.4	8.9	23
Arizona	10.4	8.5	8.2	8.1	8.8	21
California	11.2	9.1	8.0	6.6	8.7	8
N. Carolina	9.4	8.5	8.3	8.1	8.6	15
S. Carolina	7.9	9.0	8.4	8.0	8.3	24
Missouri	8.8	8.1	7.9	7.3	8.0	43
*Alaska	9.1	7.4	8.9	6.7	8.0	0
Oklahoma	12.2	6.8	6.9	6.1	8.0	28
*Michigan	8.5	7.5	7.8	7.3	7.8	0
Texas	9.0	7.7	6.8	6.8	7.6	224
Indiana	8.0	7.2	7.3	7.7	7.6	7
Florida	7.3	7.5	6.9	6.5	7.0	48
NATIONAL	8.2	7.4	6.8	6.3	7.2	652

* States without death penalty statutes

Data taken from "FBI Uniform Crime Reports : Murder Rates per 100,000 population" as posted on the Death Penalty Information Center web site, <www.deathpenaltyinfo.org/murderrates.html>, July 2000.

any chance of parole, still present a threat to society. They argue that these are depraved individuals. Without a death penalty, these individuals would have nothing to lose by trying to escape from prison since, without a death penalty, their sentence could not become any worse than it already is, viz. life without parole. Thus, the argument goes, the lives of prison guards, prison workers, other inmates, or visitors are of no account. Moreover, death penalty supporters argue, some of these prisoners continue

to rule criminal empires or to influence followers while in prison. In the process, they may even order the deaths of people outside the prison.

To respond to the argument that the death penalty protects society, we need to ask two questions. (1) Do some convicts pose significant threats to the safety of prison personnel, inmates, visitors, or persons outside the prison? (2) If so, is there any way to address these threats without executing the convict?

The threat of violence to prison staff does not appear to be higher in states without the death penalty than it is in death penalty states. Some studies suggest that it is actually lower. One study looked at the killing of prison staff by inmates between 1984 and 1989. Of 21 prison staff deaths, 19 occurred in jurisdictions which had a death penalty.⁵

Modern penal institutions offer opportunities for controlling the movement of unpredictable and violent prisoners in ways that older prisons did not. Some such individuals may respond more positively if treated with respect and humanity within a carefully controlled environment.

Argument 4: Murderers deserve to die.

Some death penalty supporters argue that execution is the only reasonable punishment for truly horrific crimes. Among the proponents of this view are some law enforcement persons who may claim special authority because of their contact with both the perpetrators and the victims of crime.

Some people who believe that murderers deserve to die are expressing a desire for revenge. While vengeance may be an understandable emotion, particularly in those who have suffered, furthering vengeance is not a proper role for the state.

We hold that prisoners, regardless of anything they may have done, are still human beings, made in the image and likeness of God. We do not, either as individuals or as a society (the state) have the authority to kill another person or to deny that person the possibility of rehabilitation, regardless of how terrible the crime they may have committed.

Argument 5: Keeping murderers alive costs society more than executing them.

Under a vigilante system of “justice” (catch ‘em and hang ‘em), this argument is almost certainly true. However, in a society based on laws, in a society

concerned with fairness, accuracy, equity, and justice, this argument is false. Numerous studies have shown that the criminal justice system would be *less* costly if there were no death penalty.

The criminal justice system involves a number of expenses. Many of these are substantially higher when capital punishment may be involved than in non-capital cases. For example, a trial in a capital case is more complex, at all stages, than a trial for the same offense where the maximum punishment is life in prison without possible parole.

The higher costs of capital trials are incurred in *all* capital trials, regardless of outcome. Consider what happens if a prosecutor chooses to apply death-eligible charges in ten trials but only one of these trials results in a defendant being sentenced to death, while the other nine defendants are found guilty but sentenced to life imprisonment (without parole). The state will have to pay the high costs of ten capital trials and will *still* have to pay the costs of imprisoning nine persons for, perhaps, forty or more years.

The costs to the state will not end there. The one person who *does* receive the death sentence is permitted some appeals. (The existence of an appeals process enables death penalty proponents to argue that innocent people are not executed.) The state must pay (1) the cost of imprisonment for the years between sentencing and execution (or for life in prison, if the person successfully appeals the death sentence) and (2) the costs involved in responding to appeals filed by the person on death row.

A far less expensive option would be to try all ten defendants on non-capital charges (life without possible parole). The state would save substantially on trial costs for all ten defendants and would not have to pay for the death row appeals. There would be no increased costs for the nine persons convicted and sentenced to life in prison.⁶

⁵ Sourcebook of Criminal Justice Statistics 1990, p. 402, reported in Bedau, *The Death Penalty in America*, p. 177.

⁶ A number of studies which demonstrate the higher costs of execution over non-capital punishment are cited in “Millions Misspent: What Politicians Don’t Say About the High Costs of the Death Penalty” in Bedau, *The Death Penalty in America*.



Some death penalty supporters argue for limiting death row appeals. In fact, the Anti-Terrorism and Effective Death Penalty Act (AEDPA, see the unit on legislation and legal issues), passed in 1996, did just that. However, while limits on appeals may prevent some frivolous legal actions, such limits will also increase the error rate. Are we willing to save money at the cost of innocent lives?

Arguments for ending the death penalty

Argument 1: The criminal justice system has sent innocent people to death row. Some may have been executed.

Between 1973 and 2000, 87 death row inmates have been exonerated and released. In 69 cases, the conviction occurred in 1976 or later.⁷ Death sentences handed down from 1976 onward should reflect the “fixes” which state legislatures made to their capital punishment statutes in the light of the U.S. Supreme Court decision in *Furman v. Georgia*. (See the unit on legislation and legal issues.) While these fixes addressed the high court’s concerns about constitutionality, they clearly have not come close to eliminating other problems with death penalty sentencing.

Some releases have occurred with the advent of highly sophisticated DNA testing.⁸ This has been possible only in crimes where there has been a biological specimen available for testing. For many death-eligible crimes, such evidence is lacking and defendants do not have this opportunity to demonstrate their innocence. Other releases have come about through the diligent efforts of journalism students, *not* through the workings of the criminal justice system. (See the Wheels of Justice sidebar.) Thus, the criminal justice system, even with the safeguards put in place as a result of the *Furman* decision, provides no guarantee that actually innocent people will not be executed. (See the sidebar on The Ultimate Miscarriage of Justice.)

The Wheels of Justice Do Not Turn at All For Some Wrongly-Convicted Persons

Death penalty proponents argue that the criminal justice system successfully exonerates wrongly convicted persons and that only the guilty are executed. Here is a case in which the criminal justice system failed an innocent person.

Anthony Porter was convicted in 1983 of the murders of two people on Chicago’s South Side. He came within two days of execution and had already been measured for a body bag when his execution was stayed to determine whether he was mentally competent to be executed. During this stay, the students in a journalism class at Northwestern University in Chicago (under the supervision of professor David Protess and with assistance from private investigator Paul Ciolino) began investigating the case. Their diligent inquiries revealed discrepancies in the court records and contradictory testimony and ultimately uncovered the real murderer. Without their efforts, Anthony Porter would likely have been executed.

In addition to the people whose innocence has been clearly demonstrated, others have been wrongfully sent to death row on the basis of perjured evidence, incompetent or fraudulent forensic evidence, eye witness misidentification, or police or prosecutorial misconduct. (See the sidebar on Police and Prosecutorial Misconduct.) Poor defendants frequently have inadequate or incompetent legal representation. (See the sidebar on Legal Representation.)

⁷ Death Penalty Information Center web site, <www.death-penaltyinfo.org/Innocentlist.html>.

⁸ The Death Penalty Information Center web site lists eight releases for which DNA testing “played a substantial factor in establishing the innocence of the inmate” (<www.death-penaltyinfo.org/innocentlist.html>, accessed August 2000)



The Ultimate Miscarriage of Justice

It is likely that innocent people have been executed. Here are two cases.

James Beathard was convicted in the 1984 murder of a couple and their 14-year old son in their mobile home in Texas. No physical evidence linked Beathard to the crime. He did admit to having been at the mobile home on the night of the murder in the company of the murdered family's older son, Gene Hathorn, Jr., for what he said he thought was a drug deal. Beathard claimed that it was Hathorn who murdered the family and that when the shooting started, he (Beathard) ran into the woods and hid. Beathard was known as a quiet man who worked at the state mental hospital. He smoked marijuana but had no record of violence or experience with guns. He was convicted on the testimony of Hathorn who, allegedly, wanted his family killed in order to inherit and who was seeking to escape the death penalty. In contrast to Beathard, Hathorn did have experience with guns and had a history of violence. Hathorn was also found guilty and sentenced to death. A year after the trial, Hathorn recanted the testimony against Beathard and substantiated Beathard's account of the night's events. Beathard's request for a new trial was denied because Texas limits the presentation of new evidence to 30 days after the final appeal. James Beathard was executed on December 9, 1999.

Gary Graham (aka Shaka Sankofa) was convicted of the 1981 murder of a man with alleged drug connections and a con game history. Graham was 17 at the time. No physical evidence linked Graham to the crime. The gun found on him was not the murder weapon. Only one witness identified Graham as the gunman and she based her identification on about a 1 second glimpse, through a car windshield, at night, from a distance of about 30 feet. Other witnesses failed to pick Graham out of a photo line up and even gave descriptions that did not fit Graham. Appeals cited the conflicting evidence, the fact that Gary Graham was a juvenile at the time of the crime, and the incompetence of the original defense attorney. The Texas Board of Pardons and Paroles refused to recommend clemency. After 19 years on death row, Gary Graham was executed on June 22, 2000.

Argument 2: The death penalty is applied in a racially-disparate fashion.

Charges of racism in death penalty sentencing have been made for years. Often these charges have relied on statistics about the race of death-row inmates or the proportion of racial minorities prosecuted under federal death penalty statutes. Unfortunately, these types of statistics fail to provide rigorous proof of racial disparities because they fail to consider the entire pool of death-eligible prisoners, to analyze the nature of the crime, or to consider mitigating and aggravating circumstances.

However, David Baldus and colleagues recently published a well-designed study of death penalty sentencing in the city of Philadelphia between 1983 and 1993.⁹ Baldus *et al.* found that *both* the race of the defendant *and* the race of victim mattered when

it came to death sentences. With respect to the race of the defendant, in jury penalty-trial decisions, black defendants even at *low* culpability levels (where substantial mitigating factors were present) received death penalty sentences, whereas non-black defendants were sentenced to death only at very *high* culpability levels (where aggravating factors far outweighed mitigating factors). Moreover, at high culpability levels, black defendants were *more* likely to be sentenced to death than were non-black defendants. Overall, black defendants were nearly three times as likely to receive a death sentence than were non-black defendants.

⁹ Baldus, Woodworth, Zuckerman, Weiner, and Broffitt, "Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia." Published in the *Cornell Law Review*, vol. 83, 1998.



With respect to the race of the victim, a sentence of death was more likely to be imposed in cases where the victim was non-black than in cases with black victims, regardless of culpability level. Overall, a jury was one and a half times more likely to sen-

tence a defendant to death when the victim was non-black than when the victim was black.

The results of the Philadelphia study may not apply to all jurisdictions in the U.S. However, it is likely that many cities and states have similar or worse records.

Police and Prosecutorial Misconduct

Walter McMillian was released from Alabama's death row on March 3, 1993. He had been convicted in 1987 of the shooting death of a storekeeper. No physical evidence connected McMillian to the crime and many friends and relatives testified to his presence at a fish fry that day. However, three witnesses at the trial linked him to the murder. McMillian was saved by sheer luck. A volunteer lawyer who had been listening to the tape of a key witness' testimony flipped the tape to see if there was anything on the other side. There was. It was the voice of the same witness complaining that he was being pressured to frame McMillian. With that break, the case against McMillian fell apart. All three witnesses recanted, leading to the release of an entirely innocent Walter McMillian.

Gary Gauger was convicted of slashing the throats of his parents while they slept on their farm in 1993. Gauger admitted to being in the house when the crime was committed but said that he was asleep. There was no sign of either forced entry or robbery. There was also neither physical evidence nor eye witness testimony to link Gauger to the crime. The police obtained a "confession" from Gauger after they questioned him for 16 hours non-stop, without food or a lawyer. Gauger had not signed the "confession," but it was introduced at his trial and was essentially the only evidence against him. Gary Gauger was released on appeal when a skilled defense attorney took on his case. Subsequently, the real murderers were identified when FBI agents, listening to wiretapped conversations as part of an FBI investigation of a motorcycle gang, heard the killers describe murdering the elder Gaugers.

Argument 3: The death penalty is applied to some of society's most vulnerable people.

Mentally retarded persons. Between 1976 and 1999, at least 34 mentally retarded offenders were executed. Moreover, mentally retarded persons are disproportionately represented on death row. (While only three percent of the U.S. population is consid-

Legal Representation

Federico Macias was convicted of murder in Texas in 1984. Macias "was granted a federal writ of habeas corpus because of ineffective assistance of counsel and possible innocence. A grand jury refused to reindict because of lack of evidence." From a report prepared by the majority staff for the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee 103rd Congress, 1st Session, October 21, 1993, and reprinted in Bedau, *The Death Penalty in America*.

Troy Lee Jones was convicted of the 1981 murder of a woman in California. His defense attorney failed to conduct an adequate pretrial investigation, speak with possible witnesses, obtain a relevant police report, or seek pretrial investigative funds. Moreover, the attorney elicited damaging testimony against Jones during cross-examination of a witness. The California Supreme Court ruled that Jones should have a new trial because he was not adequately defended at the original trial. The prosecution dropped all charges against Jones in November 1996. Troy Lee Jones had spent 14 years on death row.



ered mentally retarded, ten percent of death row inmates are mentally retarded.)

Should we accept these figures as evidence that mentally retarded persons pose a greater risk of violent crime than do persons of normal intelligence? Or should these figures raise questions about whether mentally retarded defendants are treated fairly and appropriately by the criminal justice system?

Professionals who work with mentally retarded individuals point out problems with confessions. They note that some mentally retarded individuals are eager to please and thus will say what they think authorities want them to say, rather than what is true. Mentally retarded individuals may not be able to participate effectively in their own defense.

Despite these obvious problems, the U.S. Supreme Court has ruled that it is constitutional to execute a mentally retarded person, with the stipulation that mental retardation must be considered as a mitigating factor during sentencing.¹⁰ In contrast, the ARC of the United States, a national advocacy group for people with mental retardation and their families, declares, "The presence of mental retardation by definition raises so many possibilities of miscommunication, misinformation, and an inadequate defense that the imposition of the death penalty is unacceptable."¹¹

Mentally ill persons. Our centuries-old English and American common law heritage prohibits the execution of the insane. The barrier was held to apply whether the individual committing the capital offense was insane at the time of the crime or became insane subsequently. In 1986, the U.S. Supreme Court reaffirmed this tradition in a ruling that concluded that there is also a *constitutional* bar (the Eighth Amendment prohibition of cruel and unusual punishment) to the execution of insane persons.¹²

¹⁰ *Perry v. Lynaugh*, 492 U.S. 302 (1989).

¹¹ Adopted by ARC delegate body, October 1998, <www.TheArc.org/posits/justice.html>, accessed August 2000.

¹² *Ford v. Wainwright*, 477 U.S. 399 (1986).

However, many debilitating mental illnesses may not be diagnosed and legally recognized as "insanity." Moreover, despite indications of mental illness and even appeals for help, mental health care remains unavailable to many people who need it. In February 1999, the state of Ohio executed Wilford Berry, a man diagnosed with schizophrenia who actively sought the death penalty from the time of his arrest throughout his trial and sentencing. Wilford was sexually and physically abused as a child, and had spoken of suicidal intentions since he was nine years old. He was diagnosed with various mental illnesses in Texas and Ohio, but was never treated.¹³ Wilford's case points out many problems with the ways our criminal justice system and our society handle mental illness.

Persons who have committed crimes while they were still juveniles (youthful offenders). Many jurisdictions in the U.S. permit children under 18 to be prosecuted as adults and to be sentenced to death. At least eight youthful offenders were put to death in the 1990s, and over seventy remained on death row in 2000. Only five other countries executed juvenile offenders in the 1990s. They are Iran, Nigeria, Pakistan, Saudi Arabia and Yemen.¹⁴

Why does the U.S. permit youthful offenders to be treated as adults and executed? In the 1980s and 1990s, politicians, the media, and the public responded to a perceived increase in serious juvenile crime. Rather than funding prevention programs, legislatures have responded with harsh penalties. In addition, there have been changes in juvenile crime legislation that permit juveniles to be tried in adult courts and subject to adult penalties, including death. This movement is reversing decades of progress in the way society responds to the problem of deeply-troubled youths.

The separation of adult and juvenile court systems began at the end of the nineteenth century as one of the earliest social welfare reforms of the Progressive Era. Reformers recognized that children are not simply smaller, younger adults. Children do not have the developmental maturity of most adults. Nonetheless, by the end of the twentieth century, 46



states had changed their laws to allow juveniles to be tried as adults with the approval of a judge. Fourteen states mandate that juveniles be transferred to adult courts for certain offenses. The trend toward harsher treatment has disproportionately affected black and Latino children.

Individuals under age 18 should be held accountable, especially when their actions result in the deaths of other persons. However, youths are more open to the influence of others, are more likely to act on impulse, and have less understanding of the consequences of their actions than do adults. These issues must be taken into account in treating youthful offenders. Moreover, because children are more open to influence, the potential for rehabilitation may be greater.

(The international view of executing youthful offenders is discussed in the next argument.)

Argument 4: In relying on the death penalty, the U.S. is out of step with much of the world.

While the pace of executions in the United States increases, most other countries are limiting the death penalty and placing moratoria on executions.

- Seventy-four countries and territories do not apply the death penalty for any crimes (Table III).
- Twelve countries reserve the death penalty only for crimes committed under exceptional circumstances (such as those committed should the country ever be under military law or at war, Table IV).
- Twenty-two countries that have death penalty statutes have not executed anyone since 1990 or earlier (Table V).

Thus, a total of 108 countries and territories have reduced or eliminated their use of the death penalty. Only 87 countries, including the United States, still use the death penalty (Table VI).

The United States stands almost alone in the practice of executing people for crimes they committed as children. The U.N. Convention on the Rights of the Child explicitly prohibits execution for crimes “committed by persons below eighteen years of age.”

Although 191 nations have signed and ratified this treaty, the U.S. has not ratified the treaty. The only other UN member state which has not ratified the treaty is Somalia which lacks a legal government.

Three international treaties call for abolition of the death penalty (but allow for possible use during wartime). The United States has not signed any of them. These are

- the Second Optional Protocol to the International Covenant on Civil and Political Rights (adopted by the UN General Assembly in 1989),
- Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms [“European Convention on Human Rights”] (adopted by the Council of Europe in 1982), and
- the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, (adopted by the General Assembly of the Organization of American States in 1990)

In addition, the U.N. Commission on Human Rights has repeatedly called for a moratorium on all executions. The European Union is expected to introduce a resolution in the U.N. General Assembly that would place a moratorium on the use of the death penalty.

¹³ From THE STOPPIT - February 1999, Volume IX - No. 1. Published by Ohioans to Stop the Death Penalty.

¹⁴ National Coalition Against the Death Penalty web site, <<http://www.ncadp.org/SKK-Background.html>>, accessed July 2000.



TABLE III: Countries and territories which do not apply the death penalty for any crimes

Andorra	Marshall Islands
Angola	Mauritius
Australia	Micronesia (Federated States)
Austria	Moldova
Azerbaijan	Monaco
Belgium	Mozambique
Bulgaria	Namibia
Cambodia	Nepal
Canada	Netherlands
Cape Verde	New Zealand
Colombia	Nicaragua
Costa Rica	Norway
Croatia	Palau
Czech Republic	Panama
Denmark	Paraguay
Djibouti	Poland
Dominican Republic	Portugal
East Timor	Romania
Ecuador	San Marino
Estonia	Sao Tome and Principe
Finland	Seychelles
France	Slovak Republic
Georgia	Slovenia
Germany	Solomon Islands
Greece	South Africa
Guinea-Bissau	Spain
Haiti	Sweden
Honduras	Switzerland
Hungary	Turkmenistan
Iceland	Tuvalu
Ireland	Ukraine
Italy	United Kingdom
Kiribati	Uruguay
Liechtenstein	Vanuatu
Lithuania	Vatican City State
Luxembourg	Venezuela
Macedonia (Former Yugoslav Republic)	
Malta	

“The Death Penalty List of Abolitionist And Retentionist Countries” Revised 3 August 2000, Amnesty International web site, <www.web.amnesty.org/rmp/dplibrary.nsf/current?openview>

TABLE IV: Countries that reserve the death penalty only for crimes committed under exceptional circumstances

Argentina	El Salvador
Bolivia	Fiji
Bosnia-Herzegovina	Israel
Brazil	Latvia
Cook Islands	Mexico
Cyprus	Peru

“The Death Penalty List of Abolitionist And Retentionist Countries” Revised 3 August 2000, Amnesty International web site, <www.web.amnesty.org/rmp/dplibrary.nsf/current?openview>

TABLE V: Countries with death penalty statutes that have not executed anyone since 1990 or earlier

Albania	Mali
Bhutan	Nauru
Brunei Darussalam	Niger
Burkina Faso	Papua New Guinea
Central African Republic	Samoa
Congo (Republic)	Senegal
Cote d’Ivoire	Sri Lanka
Gambia	Suriname
Grenada	Togo
Madagascar	Tonga
Maldives	Turkey

“The Death Penalty List of Abolitionist And Retentionist Countries” Revised 3 August 2000, Amnesty International web site, <www.web.amnesty.org/rmp/dplibrary.nsf/current?openview>



TABLE VI: Countries that still use the death penalty

Afghanistan	Equatorial Guinea	Libya	Singapore
Algeria	Eritrea	Malawi	Somalia
Antigua and Barbuda	Ethiopia	Malaysia	South Korea
Armenia	Gabon	Mauritania	Sudan
Bahamas	Ghana	Mongolia	Swaziland
Bahrain	Guatemala	Morocco	Syria
Bangladesh	Guinea	Myanmar	Taiwan
Barbados	Guyana	Nigeria	Tajikistan
Belarus	India	North Korea	Tanzania
Belize	Indonesia	Oman	Thailand
Benin	Iran	Pakistan	Trinidad and Tobago
Botswana	Iraq	Palestinian Authority	Tunisia
Burundi	Jamaica	Philippines	Uganda
Cameroon	Japan	Qatar	United Arab Emirates
Chad	Jordan	Russian Federation	United States of America
Chile	Kazakstan	Rwanda	Uzbekistan
China	Kenya	Saint Christopher & Nevis	Viet Nam
Comoros	Kuwait	Saint Lucia	Yemen
Congo (Democratic Republic)	Kyrgyzstan	Saint Vincent & Grenadines	Yugoslavia (Federal Republic)
Cuba	Laos	Saudi Arabia	Zambia
Dominica	Lebanon	Sierra Leone	Zimbabwe
Egypt	Lesotho		
	Liberia		

"The Death Penalty List of Abolitionist And Retentionist Countries" Revised 3 August 2000, Amnesty International web site, <www.web.amnesty.org/rmp/dplibrary.nsf/current?openview>



Resources for Further Study

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Questions for Discussion

1. The families of some crime victims seek revenge against the one who has caused them so much pain. How can we respond compassionately to their suffering while still rejecting their call for execution?
2. Some crimes are truly heinous. Some perpetrators seem unwilling or unable to accept responsibility for their acts or to repent. Faced with heinous crimes and unrepentant perpetrators, how can we promote a system of justice that is restorative rather than punitive?
3. Within our communities and even our congregations, we may encounter widespread support for the death penalty that may leave death penalty opponents feeling isolated. How can we promote networking among death penalty opponents in our community so as to encourage effective action against the death penalty? What steps might we take within our community and/or congregation to promote discussion of the death penalty and consideration of alternatives to capital punishment?
4. What role does the religious community have in addressing the death penalty? Consider the steps that your specific congregation might undertake to end the death penalty in your state.
5. Should youths (under-18) who commit callous, cold-blooded murders be charged as adults or as juveniles? Why? How can we promote the healing and rehabilitation of violent and emotionally-disturbed youths while still ensuring the safety of our communities?
6. The United States government has sought to establish itself as arbiter of human rights around the world. Yet, here at home, the U.S. violates human rights (guaranteed in international treaties) by executing prisoners. What steps can we take to open legislators' eyes to the human rights abuses committed by the U.S.?



Resources for Information and Activism

Amnesty International

The Program to Abolish the Death Penalty
600 Pennsylvania Avenue, SE, 5th Floor
Washington, DC 20003
phone: 202-544-0200
fax: 202-546-7142
email: dpprogram@aiusa.org
www.web.amnesty.org/rmp/dplibrary.nsf/index?openview

The ARC of the United States, National Office

1010 Wayne Ave, Suite 650
Silver Spring, MD 20910
phone: 301-565-3842
fax: 301-565-5342
email: info@tharc.org
www.thearc.org

Bureau of Justice Statistics (in the Office of Justice Programs, U.S. Department of Justice)

810 Seventh Street, NW
Washington, DC 20531
phone: 202-307-0765
email: askbjs@ojp.usdoj.gov
www.ojp.usdoj.gov/bjs

Capital Punishment Project of the NAACP Legal Defense and Education Fund

99 Hudson St, 16th Floor
New York, NY 10013
phone: 212-219-1900

Citizens United for Alternatives to the Death Penalty (CUADP)

PMB 297; 177 U.S. Hwy #1
Tequesta, FL 33469
phone: 800-973-6548
email: cuadp@cuadp.org
www.cuadp.org

Death Penalty Focus of California

phone: 888-2ABOLISH (888-222-6547)
email: info@deathpenalty.org
www.deathpenalty.org

Death Penalty Information Center (DPIC)

1320 18th Street, NW, 5th floor
Washington, DC 20036
phone: 202-293-6970
www.deathpenaltyinfo.org

Friends Committee on National Legislation (FCNL)

245 Second Street, NE
Washington, DC 20002
phone: 202-547-6000; 800-630-1330
fax: 202-547-6019
email: fcnl@fcnl.org
www.fcnl.org

Friends Committee to Abolish the Death Penalty (FCADP)

1501 Cherry Street
Philadelphia, PA 19102
phone: 215-241-7137
email: fcadp@aol.com
www.quaker.org/fcadp/

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Anchorage, AK 99521-0390
phone: 877-924-4483
email: bill@journeyofhope.org
www.journeyofhope.org

(continued on next page)



Resources for Information and Activism

(continued)

Moratorium 2000

P.O. Box 13727
New Orleans, LA 70185-3727
phone: 504-864-1071
fax: 504-864-1654
email: info@moratorium2000.org
www.moratorium2000.org

Murder Victims Families for Reconciliation (MVFR)

2161 Massachusetts Ave
Cambridge, MA 02140
phone: 617-868-0007
www.mvfr.org

National Coalition to Abolish the Death Penalty (NCADP)

1436 U Street, NW, Suite 104
Washington, DC 20009
phone: 202-387-3890
email: info@ncadp.org
www.ncadp.org

People of Faith Against the Death Penalty (PFADP)

157 1/2 E. Franklin Street
Chapel Hill, NC 27514
phone: 919-933-7567

Religious Organizing Against the Death Penalty (ROADP)

c/o American Friends Service Committee (AFSC)
1501 Cherry Street
Philadelphia, PA 19102
phone: 215-241-7000
fax: 215-241-7275
e-mail: afscinfo@afsc.org
www.afsc.org

Restitution Incorporated

106-E Melrose Place
Chapel Hill, NC 27516
phone: 919-932-7680
www.restitutioninc.org/



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