

# Criminal Justice: Capital Punishment Focus

## Background

The formal execution of criminals has been used in nearly all societies since the beginning of recorded history. Before the beginning of humane capital punishment used in today's society, penalties included boiling to death, flaying, slow slicing, crucifixion, impalement, crushing, disembowelment, stoning, burning, decapitation, dismemberment and scaphism. In earlier times, the death penalty was used for a variety of reasons that today would seem barbaric. Some cultures used it as punishment for magic, violation of the Sabbath, blasphemy, a variety of sexual crimes including sodomy and murder. Today, execution in the US is used primarily for murder, espionage and treason. In China, human trafficking and serious cases of corruption are punishable by death, and several militaries around the world impose the death penalty for desertion, mutiny and even insubordination. In middle-eastern countries, rape, adultery, incest and sodomy carry the death penalty as does apostasy (the act of renouncing the state religion). While most industrialized countries utilize lethal injection or the electric chair for capital punishment, many others still use hanging, beheading or stoning. In some states in the US, death by firing squad is also still used.

- [Capital Punishment in US History](#) Describes how capital punishment has played a role in US history.
- [Capital Punishment in China](#) Provides a history of capital punishment in China.
- [Death Penalty in Iraq](#) Provides current information on the death penalty as used by the Iraqi government.
- [World History of the Death Penalty](#) Provides information on the death penalty throughout recorded history.

## The Death Debate

The fight between those who support capital punishment and those who oppose it is rather simple compared to many other debates. Those in support of capital punishment believe it deters crimes and, more often than not believe that certain crimes eliminate one's right to life. Those who oppose capital punishment believe, first and foremost, that any person, including the government, has no right to take a life for any reason. They often believe that living with one's crimes is a worse punishment than dying for them, and that the threat of capital punishment will not deter a person from committing a crime. They also believe that the risk of executing an innocent person is too high. The debate between these two sides is often heated, with both sides protesting outside court houses and

jails during high profile cases. However, a worldwide poll conducted in 2006 indicates that 52% of the world's population supports the death penalty. In the US, that number is 65%.

- [In Support of the Death Penalty](#) An article detailing the argument for the death penalty.
- [Three Good Reasons](#) Details the three main reasons why people support the death penalty.
- [Pro Death Penalty](#) Explains the reasoning behind the death penalty.
- [The Case Against the Death Penalty](#) A detailed article showing the reasons for opposition to the death penalty.
- [Abolish the Death Penalty](#) An organization dedicated to abolishing the death penalty in the US.
- [Anti Capital Punishment](#) A world organization working to eliminate the death penalty in every country.

### **Costs and Procedures**

On average, it costs \$620,932 per trial in federal death cases, which is eight times higher than that of a case where the death penalty is not sought. When including appeals, incarceration times and the actual execution in a death penalty case, the cost is closer to \$3 million per inmate. However, court costs, attorney fees and incarceration for life only totals a little over \$1 million. Recent studies have also found that the higher the cost of legal counsel in a death penalty case the less likely the defendant is to receive the death penalty, which calls the fairness of the process into question.

A capital punishment case begins with a trial in front of a grand jury (typically 23 people) where the prosecutor makes it known before the trial that they are seeking the death penalty. The first part of the trial is the guilt phase, where both sides of the case is presented and the jury determines whether the defendant is guilty of the crime they are charged with. Following a charge of guilty, the next phase of the trial is the penalty trial. Both sides again present their case for punishment in front of the jury, and the jury makes a recommendation and the judge pronounces the sentence. In some states, the judge does not have to follow jury recommendation, though in most he or she does. Following the sentencing, the decision must go through direct review and state review, which acts as an appeal process for the convict. If the sentence makes it past all of the reviews, the inmate sentence is set in stone barring involvement of the President. The prisoner typically stays on death row for many years before their sentence is carried out, and in many states less than half of those sentenced to death actually receive their punishment before dying of natural causes.

- [Freed from Death Row](#) An article discussing the lives of those released from death row.
- [Death Row Survivors](#) Includes personal stories of those who survived death row.
- [Wrongful Convictions](#) Provides statistics on wrongful convictions in the US.
- [Executing the Innocent](#) An article detailing what happens when an innocent person is executed.
- [Cases of Wrongful Execution](#) A list of cases that the defendant was wrongfully accused, convicted and executed.
- [Not Executing the Innocent](#) An article arguing against the claim that the US has a 68% failure rate in execution.

- [The Justice Project](#) An organization dedicated to ensuring no innocent person is executed.
- [How Many Innocent are Executed](#) Provides information on how many innocent people are executed.
- [Cost of the Death Penalty](#) Provides information on the financial cost of the death penalty.
- [Deterrent and Cost](#) Details how capital punishment deters crime and whether it is cost effective.
- [Cost Comparison](#) A cost comparison between [Texas](#) and [Connecticut](#) regarding the death penalty.
- [Maryland Death Penalty](#) Describes the cost of the death penalty in [Maryland](#).
- [Capital Punishment Process](#) Describes the process used to sentence someone to death.
- [The Death Penalty Appeals Process](#) Provides information on how to appeal a death penalty in Alabama.

<https://www.thoughtco.com/arguments-for-the-death-penalty-721136>

## 5 Arguments in Favor of the Death Penalty

by Tom Head

Updated January 20, 2020

Fifty-five percent of Americans support the death penalty, according to a [2017 Gallup poll](#). A survey the polling organization took two years later found that [56% of Americans support capital punishment](#) for convicted murderers, down 4% from a similar poll taken in 2016. While the exact number of poll respondents in favor of the death penalty has fluctuated over the years, a slight majority of those surveyed continue to back [capital punishment](#) based on arguments ranging from religious dogma to the cost of covering a life prison sentence. Depending on one's perspective, however, the death penalty may not actually represent justice for victims.

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### "The Death Penalty Is an Effective Deterrent"

This is probably the most common argument in favor of capital punishment, and there's actually [some evidence](#) that the death penalty may be a deterrent to homicide, but it's a [very expensive deterrent](#). As such, the question is not just whether the death penalty prevents crime but whether capital punishment is the most economically efficient deterrent. The death penalty, after all, requires considerable funds and resources, making it extremely costly to implement. Moreover, traditional law enforcement agencies and community violence prevention programs have a much stronger track record vis-a-vis deterrence, and they remain underfunded due, in part, to the expense of the death penalty.

## "The Death Penalty is Cheaper Than Feeding a Murderer for Life"

According to the Death Penalty Information Center, independent studies in several states, including Oklahoma, reveal that capital punishment is actually far more expensive to administer than life imprisonment. This is due in part to the lengthy appeals process, which still [sends innocent people to death row](#) on a fairly regular basis.

In 1972, citing the [Eighth](#) and [Fourteenth Amendments](#), the Supreme Court [abolished the death penalty](#) due to arbitrary sentencing. Justice Potter Stewart wrote for the majority:

"These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual ... [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

The Supreme Court reinstated the death penalty in 1976, but only after states reformed their legal statutes to better protect the rights of the accused. As of 2019, [29 states continue to use capital punishment](#), while 21 prohibit the death penalty.

## "Murderers Deserve to Die"

Many Americans share this view, while others oppose the death penalty no matter the crime committed. Death penalty opponents also note that the government is an imperfect human institution and not an instrument of divine retribution. Therefore, it lacks the power, the mandate, and the competence to make sure that good is always proportionally rewarded and evil always proportionally punished. In fact, organizations such as the Innocence Project exist solely to advocate for the wrongfully convicted, and some of the [convicted felons it has represented have been on death row](#).

## "The Bible Says 'An Eye for an Eye'"

Actually, there is little support in the Bible for the death penalty. Jesus, who himself was sentenced to death and legally executed, had this to say (Matthew 5:38-48):

"You have heard that it was said, 'Eye for eye, and tooth for tooth.' But I tell you, do not resist an evil person. If anyone slaps you on the right cheek, turn to them the other cheek also. And if anyone wants to sue you and take your shirt, hand over your coat as well. If anyone forces you to go one mile, go with them two miles. Give to the one who asks you, and do not turn away from the one who wants to borrow from you.

"You have heard that it was said, 'Love your neighbor and hate your enemy.' But I tell you, love your enemies and pray for those who persecute you, that you may be children of your Father in heaven. He causes his sun to rise on the evil and the good, and sends rain on the righteous and the unrighteous. If you love those who love you, what reward will you get? Are not even the tax collectors doing that? And if you greet only your own people, what are you doing more than others? Do not even pagans do that? Be perfect, therefore, as your heavenly Father is perfect."

What about the Hebrew Bible? Well, ancient Rabbinic courts almost never enforced the death penalty due to the high standard of evidence required. The Union for Reform Judaism (URJ), which represents the majority of American Jews, has called for the total abolition of the death penalty since 1959.

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## "Families Deserve Closure"

Families find closure in many different ways, and many never find closure at all. Regardless, "closure" is not a euphemism for vengeance, the desire for which is understandable from an emotional point of view but not from a legal perspective. Vengeance is not justice.

The friends and family of murder victims will live with that loss for the rest of their lives, with or without controversial policy objectives such as the death penalty. Providing and funding long-term mental health care and other services to the families of murder victims is one way to support them.

<https://www.aclu.org/other/case-against-death-penalty> (This one is very long)

## THE CASE AGAINST THE DEATH PENALTY

The American Civil Liberties Union believes the death penalty inherently violates the constitutional ban against cruel and unusual punishment and the guarantees of due process of law and of equal protection under the law. Furthermore, we believe that the state should not give itself the right to kill human beings – especially when it kills with premeditation and ceremony, in the name of the law or in the name of its people, and when it does so in an arbitrary and discriminatory fashion.

Capital punishment is an intolerable denial of civil liberties and is inconsistent with the fundamental values of our democratic system. The death penalty is uncivilized in theory and unfair and inequitable in practice. Through litigation, legislation, and advocacy against this barbaric and brutal institution, we strive to prevent executions and seek the abolition of capital punishment.

**The ACLU's opposition to capital punishment incorporates the following fundamental concerns:**

- The death penalty system in the US is applied in an unfair and unjust manner against people, largely dependent on how much money they have, the skill of their attorneys, race of the victim and where the crime took place. People of color are far more likely to be executed than white people, especially if the victim is white
- The death penalty is a waste of taxpayer funds and has no public safety benefit. The vast majority of law enforcement professionals surveyed agree that capital punishment does not deter violent crime; a survey of police chiefs nationwide found they rank the death penalty lowest among ways to reduce violent crime. They ranked increasing the number of police officers, reducing drug abuse, and creating a better economy with more jobs higher than the death penalty as the best

ways to reduce violence. The FBI has found the states with the death penalty have the highest murder rates.

- Innocent people are too often sentenced to death. Since 1973, over 156 people have been released from death rows in 26 states because of innocence. Nationally, at least one person is exonerated for every 10 that are executed.

## **INTRODUCTION TO THE “MODERN ERA” OF THE DEATH PENALTY IN THE UNITED STATES**

In 1972, the Supreme Court declared that under then-existing laws "the imposition and carrying out of the death penalty... constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." (*Furman v. Georgia*, 408 U.S. 238). The Court, concentrating its objections on the manner in which death penalty laws had been applied, found the result so "harsh, freakish, and arbitrary" as to be constitutionally unacceptable. Making the nationwide impact of its decision unmistakable, the Court summarily reversed death sentences in the many cases then before it, which involved a wide range of state statutes, crimes and factual situations.

But within four years after the Furman decision, several hundred persons had been sentenced to death under new state capital punishment statutes written to provide guidance to juries in sentencing. These statutes require a two-stage trial procedure, in which the jury first determines guilt or innocence and then chooses imprisonment or death in the light of aggravating or mitigating circumstances.

In 1976, the Supreme Court moved away from abolition, holding that "the punishment of death does not invariably violate the Constitution." The Court ruled that the new death penalty statutes contained "objective standards to guide, regularize, and make rationally reviewable the process for imposing the sentence of death." (*Gregg v. Georgia*, 428 U.S. 153). Subsequently 38 state legislatures and the Federal government enacted death penalty statutes patterned after those the Court upheld in Gregg. Congress also enacted and

expanded federal death penalty statutes for peacetime espionage by military personnel and for a vast range of categories of murder.

Executions resumed in 1977. In 2002, the Supreme Court held executions of mentally retarded criminals are “cruel and unusual punishments” prohibited by the Eighth Amendment to the Constitution. Since then, states have developed a range of processes to ensure that mentally retarded individuals are not executed. Many have elected to hold proceedings prior to the merits trial, many with juries, to determine whether an accused is mentally retarded. In 2005, the Supreme Court held that the Eighth and Fourteenth Amendments to the Constitution forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed, resulting in commutation of death sentences to life for dozens of individuals across the country. As of August 2012, [over 3,200 men and women are under a death sentence and more than 1,300 men, women and children \(at the time of the crime\) have been executed since 1976.](#)

## **ACLU OBJECTIONS TO THE DEATH PENALTY**

Despite the Supreme Court's 1976 ruling in *Gregg v. Georgia*, et al, the ACLU continues to oppose capital punishment on moral, practical, and constitutional grounds:

***Capital punishment is cruel and unusual.*** It is cruel because it is a relic of the earliest days of penology, when slavery, branding, and other corporal punishments were commonplace. Like those barbaric practices, executions have no place in a civilized society. It is unusual because only the United States of all the western industrialized nations engages in this punishment. It is also unusual because only a random sampling of convicted murderers in the United States receive a sentence of death.

***Capital punishment denies due process of law.*** Its imposition is often arbitrary, and always irrevocable – forever depriving an

individual of the opportunity to benefit from new evidence or new laws that might warrant the reversal of a conviction, or the setting aside of a death sentence.

***The death penalty violates the constitutional guarantee of equal protection.*** It is applied randomly – and discriminatorily. It is imposed disproportionately upon those whose victims are white, offenders who are people of color, and on those who are poor and uneducated and concentrated in certain geographic regions of the country.

***The death penalty is not a viable form of crime control.*** When police chiefs were asked to rank the factors that, in their judgment, reduce the rate of violent crime, they mentioned curbing drug use and putting more officers on the street, longer sentences and gun control. [They ranked the death penalty as least effective.](#) Politicians who preach the desirability of executions as a method of crime control deceive the public and mask their own failure to identify and confront the true causes of crime.

***Capital punishment wastes limited resources.*** It squanders the time and energy of courts, prosecuting attorneys, defense counsel, juries, and courtroom and law enforcement personnel. It unduly burdens the criminal justice system, and it is thus counterproductive as an instrument for society's control of violent crime. Limited funds that could be used to prevent and solve crime (and provide education and jobs) are spent on capital punishment.

***Opposing the death penalty does not indicate a lack of sympathy for murder victims.*** On the contrary, murder demonstrates a lack of respect for human life. Because life is precious and death irrevocable, murder is abhorrent, and a policy of state-authorized killings is immoral. It epitomizes the tragic inefficacy and brutality of violence, rather than reason, as the solution to difficult social problems. [Many murder victims do not support state-sponsored violence](#) to avenge the death of their loved one. Sadly, these victims have often been marginalized by politicians and prosecutors, who

would rather publicize the opinions of pro-death penalty family members.

***Changes in death sentencing have proved to be largely cosmetic.*** The defects in death-penalty laws, conceded by the Supreme Court in the early 1970s, have not been appreciably altered by the shift from unrestrained discretion to "guided discretion." Such so-called "reforms" in death sentencing merely mask the impermissible randomness of a process that results in an execution.

***A society that respects life does not deliberately kill human beings.*** An execution is a violent public spectacle of official homicide, and one that endorses killing to solve social problems – the worst possible example to set for the citizenry, and especially children. Governments worldwide have often attempted to justify their lethal fury by extolling the purported benefits that such killing would bring to the rest of society. The benefits of capital punishment are illusory, but the bloodshed and the resulting destruction of community decency are real.

## **CAPITAL PUNISHMENT IS NOT A DETERRENT TO CAPITAL CRIMES**

Deterrence is a function not only of a punishment's severity, but also of its certainty and frequency. The argument most often cited in support of capital punishment is that the threat of execution influences criminal behavior more effectively than imprisonment does. As plausible as this claim may sound, in actuality the death penalty fails as a deterrent for several reasons.

***A punishment can be an effective deterrent only if it is consistently and promptly employed. Capital punishment cannot be administered to meet these conditions.***

The proportion of first-degree murderers who are sentenced to death is small, and of this group, an even smaller proportion of people are

executed. Although death sentences in the mid-1990s increased to about 300 per year, this is still only about one percent of all homicides known to the police. Of all those convicted on a charge of criminal homicide, only 3 percent – about 1 in 33 – are eventually sentenced to death. Between 2001-2009, the average number of death sentences per year dropped to 137, reducing the percentage even more. This tiny fraction of convicted murderers do not represent the “worst of the worst”.

Mandatory death sentencing is unconstitutional. The possibility of increasing the number of convicted murderers sentenced to death and executed by enacting mandatory death penalty laws was ruled unconstitutional in 1976 (*Woodson v. North Carolina*, 428 U.S. 280).

A considerable time between the imposition of the death sentence and the actual execution is unavoidable, given the procedural safeguards required by the courts in capital cases. Starting with selecting the trial jury, murder trials take far longer when the ultimate penalty is involved. Furthermore, post-conviction appeals in death-penalty cases are far more frequent than in other cases. These factors increase the time and cost of administering criminal justice.

We can reduce delay and costs only by abandoning the procedural safeguards and constitutional rights of suspects, defendants, and convicts – with the attendant high risk of convicting the wrong person and executing the innocent. This is not a realistic prospect: our legal system will never reverse itself to deny defendants the right to counsel, or the right to an appeal.

***Persons who commit murder and other crimes of personal violence often do not premeditate their crimes.***

Most capital crimes are committed in the heat of the moment. Most capital crimes are committed during moments of great emotional stress or under the influence of drugs or alcohol, when logical thinking has been suspended. Many capital crimes are committed by the badly emotionally-damaged or mentally ill. In such cases, violence is

inflicted by persons unable to appreciate the consequences to themselves as well as to others.

Even when crime is planned, the criminal ordinarily concentrates on escaping detection, arrest, and conviction. The threat of even the severest punishment will not discourage those who expect to escape detection and arrest. It is impossible to imagine how the threat of any punishment could prevent a crime that is not premeditated. Furthermore, the death penalty is a futile threat for political terrorists, like Timothy McVeigh, because they usually act in the name of an ideology that honors its martyrs.

Capital punishment doesn't solve our society's crime problem. Threatening capital punishment leaves the underlying causes of crime unaddressed, and ignores the many political and diplomatic sanctions (such as treaties against asylum for international terrorists) that could appreciably lower the incidence of terrorism.

Capital punishment has been a useless weapon in the so-called "war on drugs." The attempt to reduce murders in the drug trade by threat of severe punishment ignores the fact that anyone trafficking in illegal drugs is already risking his life in violent competition with other dealers. It is irrational to think that the death penalty – a remote threat at best – will avert murders committed in drug turf wars or by street-level dealers.

***If, however, severe punishment can deter crime, then permanent imprisonment is severe enough to deter any rational person from committing a violent crime.***

The vast preponderance of the evidence shows that the death penalty is no more effective than imprisonment in deterring murder and that it may even be an incitement to criminal violence. Death-penalty states as a group do not have lower rates of criminal homicide than non-death-penalty states. Use of the death penalty in a given state may actually increase the subsequent rate of criminal homicide. Why? Perhaps because ["a return to the exercise of the death penalty weakens](#)

socially based inhibitions against the use of lethal force to settle disputes.... "

In adjacent states – one with the death penalty and the other without it – the state that practices the death penalty does not always show a consistently lower rate of criminal homicide. For example, between 1990 and 1994, the homicide rates in Wisconsin and Iowa (non-death-penalty states) were half the rates of their neighbor, Illinois – which restored the death penalty in 1973, and by 1994 had sentenced 223 persons to death and carried out two executions. Between 2000-2010, the murder rate in states with capital punishment was 25-46% higher than states without the death penalty.

On-duty police officers do not suffer a higher rate of criminal assault and homicide in abolitionist states than they do in death-penalty states. Between 1976 and 1989, for example, lethal assaults against police were not significantly more or less frequent in abolitionist states than in death-penalty states. Capital punishment did not appear to provide officers added protection during that time frame. In fact, the three leading states in law enforcement homicide in 1996 were also very active death penalty states: California (highest death row population), Texas (most executions since 1976), and Florida (third highest in executions and death row population). The South, which accounts for more than 80% of the country's executions, also has the highest murder rate of any region in the country. If anything, the death penalty incited violence rather than curbed it.

Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition states than they do in death-penalty states. Between 1992 and 1995, 176 inmates were murdered by other prisoners. The vast majority of those inmates (84%) were killed in death penalty jurisdictions. During the same period, about 2% of all inmate assaults on prison staff were committed in abolition jurisdictions. Evidently, the threat of the death penalty "does not even exert an incremental deterrent effect over the threat of a lesser punishment in the abolitionist states." Furthermore, multiple studies have shown that prisoners

sentenced to life without parole have equivalent rates of prison violence as compared to other inmates.

Actual experience thus establishes beyond a reasonable doubt that the death penalty does not deter murder. No comparable body of evidence contradicts that conclusion.

Furthermore, there are documented cases in which the death penalty actually incited the capital crimes it was supposed to deter. These include instances of the so-called suicide-by-execution syndrome – persons who wanted to die but feared taking their own lives, and committed murder so that the state would kill them. For example, in 1996, [Daniel Colwell](#), who suffered from mental illness, claimed that he killed a randomly-selected couple in a Georgia parking lot so that the state would kill him – he was sentenced to death and ultimately took his own life while on death row.

Although inflicting the death penalty guarantees that the condemned person will commit no further crimes, it does not have a demonstrable deterrent effect on other individuals. Further, it is a high price to pay when studies show that few convicted murderers commit further crimes of violence. Researchers examined the prison and post-release records of 533 prisoners on death row in 1972 whose sentences were reduced to incarceration for life by the Supreme Court's ruling in Furman. This research showed that seven had committed another murder. But the same study showed that in four other cases, an innocent man had been sentenced to death. (Marquart and Sorensen, in *Loyola of Los Angeles Law Review* 1989)

Recidivism among murderers does occasionally happen, but it occurs less frequently than most people believe; the media rarely distinguish between a convicted offender who murders while on parole, and a paroled murderer who murders again. [Government data show that about one in 12 death row prisoners had a prior homicide conviction.](#) But as there is no way to predict reliably which convicted murderers will try to kill again, the only way to prevent all such recidivism is to execute every convicted murderer – a policy no one seriously

advocates. Equally effective but far less inhumane is a policy of life imprisonment without the possibility of parole.

## **CAPITAL PUNISHMENT IS UNFAIR**

Constitutional due process and elementary justice both require that the judicial functions of trial and sentencing be conducted with fundamental fairness, especially where the irreversible sanction of the death penalty is involved. In murder cases (since 1930, 88 percent of all executions have been for this crime), there has been substantial evidence to show that courts have sentenced some persons to prison while putting others to death in a manner that has been arbitrary, racially biased, and unfair.

### ***Racial Bias in Death Sentencing***

Racial discrimination was one of the grounds on which the Supreme Court ruled the death penalty unconstitutional in *Furman*. Half a century ago, in his classic *American Dilemma* (1944), Gunnar Myrdal reported that "the South makes the widest application of the death penalty, and Negro criminals come in for much more than their share of the executions." [A study of the death penalty in Texas](#) shows that the current capital punishment system is an outgrowth of the racist "legacy of slavery." [Between 1930 and the end of 1996, 4,220 prisoners were executed in the United States; more than half \(53%\) were black.](#)

Our nation's death rows have always held a disproportionately large population of African Americans, relative to their percentage of the total population. Comparing black and white offenders over the past century, the former were often executed for what were considered less-than-capital offenses for whites, such as rape and burglary. (Between 1930 and 1976, 455 men were executed for rape, of whom 405 – 90 percent – were black.) A higher percentage of the blacks who were executed were juveniles; and the rate of execution without having one's conviction reviewed by any higher court was higher for blacks.

(Bowers, Legal Homicide 1984; Streib, Death Penalty for Juveniles 1987)

In recent years, it has been argued that such flagrant racial discrimination is a thing of the past. [However, since the revival of the death penalty in the mid-1970s, about half of those on death row at any given time have been black. More striking is the racial comparison of victims.](#) Although approximately 49% of all homicide victims are white, 77% of capital homicide cases since 1976 have involved a white victim.

[Between 1976 and 2005](#), 86% of white victims were killed by whites (14% by other races) while 94% of black victims were killed by blacks (6% by other races). Blacks and whites are murder victims in almost equal numbers of crimes – which is a very high percentage given that the general US population is 13% black. African-Americans are six times as likely as white Americans to die at the hands of a murderer, and roughly seven times as likely to murder someone. Young black men are fifteen times as likely to be murdered as young white men.

So given this information, when those under death sentence are examined more closely, it turns out that race is a decisive factor after all.

Further, [studies like that commissioned by the Governor of Maryland](#) found that “black offenders who kill white victims are at greater risk of a death sentence than others, primarily because they are substantially more likely to be charged by the state’s attorney with a capital offense.”

The classic statistical study of racial discrimination in capital cases in Georgia presented in the *McCleskey* case showed that "the average odds of receiving a death sentence among all indicted cases were 4.3 times higher in cases with white victims." (David C. Baldus et al., *Equal Justice and the Death Penalty* 1990) In 1987 these data were placed before the Supreme Court in *McCleskey v. Kemp* and while the Court did not dispute the statistical evidence, it held that evidence of an overall pattern of racial bias was not sufficient. Mr. McCleskey

would have to prove racial bias in his own case – a virtually impossible task. The Court also held that the evidence failed to show that there was "a constitutionally significant risk of racial bias...." (481 U.S. 279) Although the Supreme Court declared that the remedy sought by the plaintiff was "best presented to the legislative bodies," subsequent efforts to persuade Congress to remedy the problem by enacting the Racial Justice Act were not successful. (Don Edwards & John Conyers, Jr., The Racial Justice Act – A Simple Matter of Justice, in University of Dayton Law Review 1995)

In 1990, the U.S. General Accounting Office reported to the Congress the results of its review of empirical studies on racism and the death penalty. [The GAO concluded](#): "Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision" and that "race of victim influence was found at all stages of the criminal justice system process..."

Texas was prepared to execute Duane Buck on September 15, 2011. Mr. Buck was condemned to death by a jury that had been told by an expert psychologist that he was more likely to be dangerous because he was African American. The Supreme Court stayed the case, but Mr. Buck has not yet received the new sentencing hearing justice requires.

These results cannot be explained away by relevant non-racial factors, such as prior criminal record or type of crime, as these were factored for in the Baldus and GAO studies referred to above. They lead to a very unsavory conclusion: In the trial courts of this nation, even at the present time, the killing of a white person is treated much more severely than the killing of a black person. [Of the 313 persons executed between January 1977 and the end of 1995, 36 had been convicted of killing a black person while 249 \(80%\) had killed a white person. Of the 178 white defendants executed, only three had been convicted of murdering people of color.](#) Our criminal justice system essentially reserves the death penalty for murderers (regardless of their race) who kill white victims.

Another recent Louisiana study found that defendants with white victims were 97% more likely to receive death sentences than defendants with black victims.[\[1\]](#)

Both gender and socio-economic class also determine who receives a death sentence and who is executed. [Women account for only two percent of all people sentenced to death](#), even though [females commit about 11 percent of all criminal homicides](#). [Many of the women under death sentence were guilty of killing men who had victimized them with years of violent abuse](#). [Since 1900, only 51 women have been executed in the United States](#) (15 of them black).

Discrimination against the poor (and in our society, racial minorities are disproportionately poor) is also well established. It is a prominent factor in the availability of counsel.

Fairness in capital cases requires, above all, competent counsel for the defendant. Yet "approximately 90 percent of those on death row could not afford to hire a lawyer when they were tried.") Common characteristics of death-row defendants are poverty, the lack of firm social roots in the community, and inadequate legal representation at trial or on appeal. As Justice William O. Douglas noted in *Furman*, "One searches our chronicles in vain for the execution of any member of the affluent strata in this society"(408 US 238).

### ***Failure of Safeguards***

The demonstrated inequities in the actual administration of capital punishment should tip the balance against it in the judgment of fair-minded and impartial observers. "Whatever else might be said for the use of death as a punishment, one lesson is clear from experience: this is a power that we cannot exercise fairly and without discrimination."(Gross and Mauro, *Death and Discrimination* 1989)

Justice John Marshall Harlan, writing for the Court in *Furman*, noted "... the history of capital punishment for homicides ... reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die.... Those who have come to grips with the hard task of actually attempting to draft means of

channeling capital sentencing discretion have confirmed the lesson taught by history.... To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." (402 U.S. 183 (1971))

Yet in the Gregg decision, the majority of the Supreme Court abandoned the wisdom of Justice Harlan and ruled as though the new guided-discretion statutes could accomplish the impossible. The truth is that death statutes approved by the Court ["do not effectively restrict the discretion of juries by any real standards, and they never will. No society is going to kill everybody who meets certain preset verbal requirements, put on the statute books without awareness of coverage of the infinity of special factors the real world can produce."](#)

[Evidence obtained by the Capital Jury Project](#) has shown that jurors in capital trials generally do not understand the judge's instructions about the laws that govern the choice between imposing the death penalty and a life sentence. Even when they do comprehend, jurors often refuse to be guided by the law. "Juror comprehension of the law... is mediocre. The effect [of this relative lack of comprehension of the law]... is to reduce the likelihood that capital defendants will benefit from the safeguards against arbitrariness built into the... law."

Even if the jury's sentencing decision were strictly governed by the relevant legal criteria, there remains a vast reservoir of unfettered discretion: the prosecutor's decision to prosecute for a capital or lesser crime, the court's willingness to accept or reject a guilty plea, the jury's decision to convict for second-degree murder or manslaughter rather than capital murder, the determination of the defendant's sanity, and the governor's final clemency decision, among others.

Discretion in the criminal justice system is unavoidable. The history of capital punishment in America clearly demonstrates the social desire to mitigate the harshness of the death penalty by narrowing the scope of its application. Whether or not explicitly authorized by statutes,

sentencing discretion has been the main vehicle to this end. But when sentencing discretion is used – as it too often has been – to doom the poor, the friendless, the uneducated, racial minorities, and the despised, it becomes injustice.

Mindful of such facts, [the House of Delegates of the American Bar Association \(including 20 out of 24 former presidents of the ABA\) called for a moratorium on all executions by a vote of 280 to 119 in February 1997.](#) The House judged the current system to be "a haphazard maze of unfair practices."

In its 1996 survey of the death penalty in the United States, the International Commission of Jurists reinforced this point. Despite the efforts made over the past two decades since Gregg to protect the administration of the death penalty from abuses, the actual "constitutional errors committed in state courts have gravely undermined the legitimacy of the death penalty as a punishment for crime." (International Commission of Jurists, Administration of the Death Penalty in the United States 1996)

In 2009, the American Law Institute (ALI), the leading independent organization in the U.S. producing scholarly work to clarify, modernize and improve the law, removed capital punishment from its Model Penal Code. The ALI, which created the modern legal framework for the death penalty in 1962, indicated that the punishment is so arbitrary, fraught with racial and economic disparities, and unable to assure quality legal representation for indigent capital defendants, that it can never be administered fairly.

Thoughtful citizens, who might possibly support the abstract notion of capital punishment, are obliged to condemn it in actual practice.

## **CAPITAL PUNISHMENT IS IRREVERSIBLE**

Unlike any other criminal punishments, the death penalty is irrevocable. Speaking to the French Chamber of Deputies in 1830, years after having witnessed the excesses of the French Revolution, the

Marquis de Lafayette said, "I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me." Although some proponents of capital punishment would argue that its merits are worth the occasional execution of innocent people, most would hasten to insist that there is little likelihood of the innocent being executed.

Since 1900, in this country, there have been on the average more than four cases each year in which an entirely innocent person was convicted of murder. Scores of these individuals were sentenced to death. In many cases, a reprieve or commutation arrived just hours, or even minutes, before the scheduled execution. These erroneous convictions have occurred in virtually every jurisdiction from one end of the nation to the other. Nor have they declined in recent years, despite the new death penalty statutes approved by the Supreme Court.

Disturbingly, and increasingly, a large body of evidence from the modern era shows that innocent people are often convicted of crimes – including capital crimes – and that some have been executed.

In 2012, a new report in the *Columbia Human Rights Law Review* chronicled the horrifying case of Carlos DeLuna, a man executed in Texas in 1989 for a murder that it was “common knowledge” had been committed by another man.<sup>[2]</sup> DeLuna’s story demonstrates so many of the factors that can go wrong in a capital case: faulty eyewitness identification, prosecutorial misconduct, police misconduct, a botched crime scene, destroyed DNA evidence, a poor person represented by ineffective by an ineffective inexperienced defense attorney overmatched by a professional prosecutor, and insufficient oversight from the bench.<sup>[3]</sup> In its case against DeLuna, the State presented no blood or DNA evidence, no crime scene fingerprints, and no proof of hair or fibers from the victim having been found on the defendant. He was convicted largely based on eyewitness testimony made from the back of a police car in a dimly lit lot near the crime scene. Meanwhile, a violent criminal named Carlos Hernandez—a man who not only shared DeLuna’s name, but also looked like him—repeatedly boasted about how he had committed the murder and

gotten away with it.[\[4\]](#) These disturbing facts about DeLuna's case, brought to light more than two decades after his execution, refute the claim, made by some proponents of capital punishment, that the United States has never executed an innocent person.[\[5\]](#)

**Consider this additional handful of cases of innocent people sentenced to die – some executed and some spared:**

- In 2011, the state of Georgia executed Troy Davis, a Black man who was almost certainly innocent of the murder of a white off-duty police officer. The circumstances of his execution raised an international outcry, for good reason. Davis was convicted based on eyewitness testimony, since there was no murder weapon or physical evidence presented by the prosecution. Seven of the nine eyewitnesses recanted or contradicted their trial testimony, many of them saying they were pressured or threatened by police at the time. Troy Davis came close to execution three previous times, because of the difficulty of getting any court to listen to new evidence casting doubt on his conviction. After passage of a federal law in 1996, petitioners are very limited in their ability to appeal death sentences, and courts routinely refuse to hear new testimony, even evidence of innocence. When Troy Davis finally did get a hearing on his evidence, the judge required “proof of innocence” – an impossibly high standard which he ruled that Mr. Davis did not meet. Despite the overwhelming call for clemency, supposed to be the “fail-safe” of the death penalty system, the Georgia Board of Pardons refused to commute the sentence to life and Mr. Davis was executed. Only one day after Troy Davis was executed, two men were freed by the special Innocence Commission of North Carolina after a decade apiece in prison. The two men had actually pled guilty to a crime they did not commit, because they were threatened with the death penalty.
- In Texas in 2004, Cameron Todd Willingham was executed for the arson-murder of his three children. Independent investigations by a newspaper, a nonprofit organization using top experts in the field of fire science, and an independent expert hired by the State of Texas all found that accident, not arson was the cause of the fire. There simply was no reliable evidence that the children were murdered. Yet even with these reports in hand, the state of Texas executed Mr.

Willingham. Earlier this year, the Texas Forensic Science Commission was poised to issue a report officially confirming these conclusions until Texas Governor Rick Perry replaced the Commission's chair and some of its members. Cameron Todd Willingham, who claimed innocence all along, was executed for a crime he almost certainly did not commit. As an example of the arbitrariness of the death penalty, another man, Ernest Willis, also convicted of arson-murder on the same sort of flimsy and unscientific testimony, was freed from Texas death row six months after Willingham was executed.

- In 1985, in Maryland, Kirk Bloodsworth was sentenced to death for rape and murder, despite the testimony of alibi witnesses. In 1986 his conviction was reversed on grounds of withheld evidence pointing to another suspect; he was retried, re-convicted, and sentenced to life in prison. In 1993, newly available DNA evidence proved he was not the rapist-killer, and he was released after the prosecution dismissed the case. A year later he was awarded \$300,000 for wrongful punishment. Years later the DNA was matched to the real killer.
- In Mississippi, in 1990, Sabrina Butler was sentenced to death for killing her baby boy. She claimed the child died after attempts at resuscitation failed. On technical grounds her conviction was reversed in 1992. At retrial, she was acquitted when a neighbor corroborated Butler's explanation of the child's cause of death and the physician who performed the autopsy admitted his work had not been thorough.
- In 1990, Jesse Tafero was executed in Florida. He had been convicted in 1976 along with his wife, Sonia Jacobs, for murdering a state trooper. In 1981 Jacobs' death sentence was reduced on appeal to life imprisonment, and 11 years later her conviction was vacated by a federal court. The evidence on which Tafero and Jacobs had been convicted and sentenced was identical; it consisted mainly of the perjured testimony of an ex-convict who turned state's witness in order to avoid a death sentence. Had Tafero been alive in 1992, he no doubt would have been released along with Jacobs. Tafero's execution went horribly wrong, and his head caught on fire during the electrocution.
- In Alabama, Walter McMillian was convicted of murdering a white woman in 1988. Despite the jury's recommendation of a life sentence, the judge sentenced him to death. The sole evidence leading the police to arrest McMillian was testimony of an ex-convict seeking favor with

the prosecution. A dozen alibi witnesses (all African Americans, like McMillian) testified on McMillian's behalf that they were together at a neighborhood gathering, to no avail. On appeal, after tireless efforts by his attorney Bryan Stevenson, McMillian's conviction was reversed by the Alabama Court of Appeals. Stevenson uncovered prosecutorial suppression of exculpatory evidence and perjury by prosecution witnesses, and the new district attorney joined the defense in seeking dismissal of the charges.

- In 1985, in Illinois, Rolando Cruz and Alejandro Hernandez were convicted of abduction, rape, and murder of a young girl and were sentenced to death. Shortly after, another man serving a life term in prison for similar crimes confessed that he alone was guilty; but his confession was inadmissible because he refused to repeat it in court unless the state waived the death penalty against him. Awarded a new trial in 1988, Cruz was again convicted and sentenced to death; Hernandez was also re-convicted, and sentenced to 80 years in prison. In 1992 the assistant attorney general assigned to prosecute the case on appeal resigned after becoming convinced of the defendants' innocence. The convictions were again overturned on appeal after DNA tests exonerated Cruz and implicated the prisoner who had earlier confessed. In 1995 the court ordered a directed verdict of acquittal, and sharply criticized the police for their unprofessional handling of the case. Hernandez was released on bail and the prosecution dropped all charges.
- In 1980 in Texas a black high school janitor, Clarence Brandley, and his white co-worker found the body of a missing 16-year-old white schoolgirl. Interrogated by the police, they were told, "One of you two is going to hang for this." Looking at Brandley, the officer said, "Since you're the nigger, you're elected." In a classic case of rush to judgment, Brandley was tried, convicted, and sentenced to death. The circumstantial evidence against him was thin, other leads were ignored by the police, and the courtroom atmosphere reeked of racism. In 1986, Centurion Ministries – a volunteer group devoted to freeing wrongly convicted prisoners – came to Brandley's aid. Evidence had meanwhile emerged that another man had committed the murder for which Brandley was awaiting execution. Brandley was not released until 1990. ([Davies, White Lies](#) 1991)

This sample of freakish and arbitrary innocence determinations also speaks directly to the unceasing concern that there are many more innocent people on death rows across the country – as well as who have been executed. Several factors seen in the above sample of cases help explain why the judicial system cannot guarantee that justice will never miscarry: overzealous prosecution, mistaken or perjured testimony, race, faulty police work, coerced confessions, the defendant's previous criminal record, inept and under-resourced defense counsel, seemingly conclusive circumstantial evidence, and community pressure for a conviction, among others. And when the system does go wrong, it is often volunteers from *outside* the criminal justice system – journalists, for example – who rectify the errors, not the police or prosecutors. To retain the death penalty in the face of the demonstrable failures of the system is unacceptable, especially since there are no strong overriding reasons to favor the death penalty.

## **CAPITAL PUNISHMENT IS BARBARIC**

Prisoners are executed in the United States by any one of five methods; in a few jurisdictions the prisoner is allowed to choose which one he or she prefers:

The traditional mode of execution, **hanging**, is an option still available in Delaware, New Hampshire and Washington. Death on the gallows is easily bungled: If the drop is too short, there will be a slow and agonizing death by strangulation. If the drop is too long, the head will be torn off.

Two states, Idaho and Utah, still authorize the **firing squad**. The prisoner is strapped into a chair and hooded. A target is pinned to the chest. Five marksmen, one with blanks, take aim and fire.

Throughout the twentieth century, **electrocution** has been the most widely used form of execution in this country, and is still utilized in eleven states, although lethal injection is the primary method of execution. The condemned prisoner is led – or dragged – into the

death chamber, strapped into the chair, and electrodes are fastened to head and legs. When the switch is thrown the body strains, jolting as the voltage is raised and lowered. Often smoke rises from the head. There is the awful odor of burning flesh. No one knows how long electrocuted individuals retain consciousness. In 1983, the electrocution of John Evans in Alabama was described by an eyewitness as follows:

"At 8:30 p.m. the first jolt of 1900 volts of electricity passed through Mr. Evans' body. It lasted thirty seconds. Sparks and flames erupted ... from the electrode tied to Mr. Evans' left leg. His body slammed against the straps holding him in the electric chair and his fist clenched permanently. The electrode apparently burst from the strap holding it in place. A large puff of grayish smoke and sparks poured out from under the hood that covered Mr. Evans' face. An overpowering stench of burnt flesh and clothing began pervading the witness room. Two doctors examined Mr. Evans and declared that he was not dead.

"The electrode on the left leg was re-fastened. ...Mr. Evans was administered a second thirty second jolt of electricity. The stench of burning flesh was nauseating. More smoke emanated from his leg and head. Again, the doctors examined Mr. Evans. [They] reported that his heart was still beating, and that he was still alive. At that time, I asked the prison commissioner, who was communicating on an open telephone line to Governor George Wallace, to grant clemency on the grounds that Mr. Evans was being subjected to cruel and unusual punishment. The request ...was denied.

"At 8:40 p.m., a third charge of electricity, thirty seconds in duration, was passed through Mr. Evans' body. At 8:44, the doctors pronounced him dead. The execution of John Evans took fourteen minutes." Afterwards, officials were embarrassed by what one observer called the "barbaric ritual." The prison spokesman remarked, "This was supposed to be a very clean manner of administering death."

The introduction of the **gas chamber** was an attempt to improve on electrocution. In this method of execution the prisoner is strapped into

a chair with a container of sulfuric acid underneath. The chamber is sealed, and cyanide is dropped into the acid to form a lethal gas. Execution by suffocation in the lethal gas chamber has not been abolished but lethal injection serves as the primary method in states which still authorize it. [In 1996 a panel of judges on the 9th Circuit Court of Appeals in California \(where the gas chamber has been used since 1933\) ruled that this method is a "cruel and unusual punishment."](#) Here is an account of the 1992 execution in Arizona of Don Harding, as reported in the dissent by U.S. Supreme Court Justice John Paul Stevens:

"When the fumes enveloped Don's head he took a quick breath. A few seconds later he again looked in my direction. His face was red and contorted as if he were attempting to fight through tremendous pain. His mouth was pursed shut and his jaw was clenched tight. Don then took several more quick gulps of the fumes.

"At this point Don's body started convulsing violently.... His face and body turned a deep red and the veins in his temple and neck began to bulge until I thought they might explode. After about a minute Don's face leaned partially forward, but he was still conscious. Every few seconds he continued to gulp in. He was shuddering uncontrollably and his body was racked with spasms. His head continued to snap back. His hands were clenched.

"After several more minutes, the most violent of the convulsions subsided. At this time the muscles along Don's left arm and back began twitching in a wavelike motion under his skin. Spittle drooled from his mouth.

"Don did not stop moving for approximately eight minutes, and after that he continued to twitch and jerk for another minute. Approximately two minutes later, we were told by a prison official that the execution was complete.

"Don Harding took ten minutes and thirty one seconds to die."  
(*Gomez v. U.S. District Court*, 112 S.Ct. 1652)

The latest mode of inflicting the death penalty, enacted into law by more than 30 states, is **lethal injection**, first used in 1982 in Texas. It is easy to overstate the humaneness and efficacy of this method; one cannot know whether lethal injection is really painless and there is evidence that it is not. As the U.S. Court of Appeals observed, there is "substantial and uncontroverted evidence... that execution by lethal injection poses a serious risk of cruel, protracted death.... Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own asphyxiation." (*Chaney v. Heckler*, 718 F.2d 1174, 1983).

Its veneer of decency and subtle analogy with life-saving medical practice no doubt makes killing by lethal injection more acceptable to the public. [Journalist Susan Blaustein, reacting to having witnessed an execution in Texas, comments:](#)

"The lethal injection method ... has turned dying into a still life, thereby enabling the state to kill without anyone involved feeling anything.... Any remaining glimmers of doubt – about whether the man received due process, about his guilt, about our right to take life – cause us to rationalize these deaths with such catchwords as ‘heinous,’ ‘deserved,’ ‘deterrent,’ ‘justice,’ and ‘painless.’ We have perfected the art of institutional killing to the degree that it has deadened our natural, quintessentially human response to death."

### ***Botched Lethal Injections***

Nor does execution by lethal injection always proceed smoothly as planned. [In 1985 "the authorities repeatedly jabbed needles into ... Stephen Morin, when they had trouble finding a usable vein because he had been a drug abuser."](#) In 1988, during the execution of Raymond Landry, "a tube attached to a needle inside the inmate's right arm began leaking, sending the lethal mixture shooting across the death chamber toward witnesses."

Although the U.S. Supreme Court has held that the current method of lethal injection used is constitutional, several people have suffered because of this form of execution. In Ohio, Rommel Broom was

subjected to 18 attempts at finding a vein so that he could be killed by lethal injection. The process to try to execute him took over two hours. Finally, the governor had to stop the execution and grant the inmate a one week reprieve. Mr. Broom has not been executed because he is challenging the state's right to hold a second execution attempt. Nor was he the only Ohio inmate so maltreated. During his 2006 execution Joseph Clark screamed, "it don't work" and requested to take something by mouth so the torture would end when his executioners took thirty minutes to find a vein. Christopher Newton's execution took over two hours – so long that he had to be given a bathroom break.

### ***Lethal Injection Protocol Issues***

Most lethal injections in the United States use a "cocktail" consisting of three drugs that sequentially render an inmate unconscious, cause paralysis and cease breathing, and stop an inmate's heart.[\[6\]](#) But in 2011, the sole American manufacturer of sodium thiopental, a vital part of the three-drug cocktail, decided to discontinue production, forcing states to adapt their lethal injection methodology.[\[7\]](#) Some states have replaced the three-drug cocktail with a single substance,[\[8\]](#) while others have replaced thiopental in the three-drug sequence with another anesthetic.[\[9\]](#) Both three-drug and single-drug executions raise vital concerns: the three-drug cocktail's paralyzing sedative may mask the inmate's pain and suffering, while the single-drug method takes about 25 minutes to end a life (if there are no complications), compared with the ten-minute three-drug process.[\[10\]](#)

Although the Supreme Court held in 2008 that Kentucky's three-drug lethal injection procedure did not violate the Constitution's ban on cruel and unusual punishment,[\[11\]](#) it is unclear whether states' adapted procedures pass muster. Indeed, in February 2012, a three-judge panel of the Ninth Circuit Court of Appeals admonished the Arizona Department of Corrections, stating that its approach to execution "cannot continue" and questioning the "regularity and reliability" of protocols that give complete discretion to the corrections director to determine which and how many drugs will be used for each execution.[\[12\]](#) In Georgia, the state Supreme Court stayed the

execution of Warren Hill hours before he was scheduled to die in July 2012 in order to review the Department of Corrections' new single-drug lethal injection procedure.[\[13\]](#) The Missouri Supreme Court imposed a temporary moratorium on executions in August 2012, declaring that it would be "premature" to set execution dates for death row inmates given a pending lawsuit about whether the state's lethal injection procedures are humane. The state had amended its injection protocol to use a single drug, propofol, which advocates say causes severe pain upon injection.[\[14\]](#)

Although similar suits are pending in other states,[\[15\]](#) not all protocol-based challenges have succeeded; in Texas and Oklahoma, executions have continued despite questions about the potential cruelty of lethal injection and the type or number of chemicals used.[\[16\]](#)

Regardless of whether states use one or three drugs for an execution, all of the major lethal injection drugs are in short supply due to manufacturers' efforts to prevent the use of their products for executions[\[17\]](#) and European Union restrictions on the exportation of drugs that may be used to kill.[\[18\]](#) As a result, some state executioners have pursued questionable means of obtaining the deadly chemicals from other states and foreign companies, including a pharmaceutical wholesaler operating out of the back of a London driving school.[\[19\]](#) These backroom deals—which, astoundingly, have been approved by the U.S. Food and Drug Administration (FDA)—are now the subject of federal litigation that could impact the legitimacy of the American death penalty system. In March 2012, six death row inmates argued that the FDA had shirked its duty to regulate lethal substances and raised concerns about the "very real risk that unapproved thiopental will not actually render a condemned prisoner unconscious."[\[20\]](#) A federal district judge agreed and ordered the FDA to confiscate the imported thiopental, but the agency has appealed.[\[21\]](#)

### ***Witnessing the Execution***

Most people who have observed an execution are horrified and disgusted. ["I was ashamed," writes sociologist Richard Moran, who](#)

[witnessed an execution in Texas in 1985.](#) "I was an intruder, the only member of the public who had trespassed on [the condemned man's] private moment of anguish. In my face he could see the horror of his own death."

Revulsion at the duty to supervise and witness executions is one reason why so many prison wardens – however unsentimental they are about crime and criminals – are opponents of capital punishment. Don Cabana, who supervised several executions in Missouri and Mississippi reflects on his mood just prior to witnessing an execution in the gas chamber:

"If [the condemned prisoner] was some awful monster deemed worthy of extermination, why did I feel so bad about it, I wondered. It has been said that men on death row are inhuman, cold-blooded killers. But as I stood and watched a grieving mother leave her son for the last time, I questioned how the sordid business of executions was supposed to be the great equalizer.... The 'last mile' seemed an eternity, every step a painful reminder of what waited at the end of the walk. Where was the cold-blooded murderer, I wondered, as we approached the door to the last-night cell. I had looked for that man before... and I still had not found him – I saw, in my grasp, only a frightened child. [Minutes after the execution and before] heading for the conference room and a waiting press corps, I... shook my head. 'No more. I don't want to do this anymore.'" (1996)

[Recently, Allen Ault, former executioner for the State of Georgia, wrote,](#) "The men and women who assist in executions are not psychopaths or sadists. They do their best to perform the impossible and inhumane job with which the state has charged them. Those of us who have participated in executions often suffer something very much like posttraumatic stress. Many turn to alcohol and drugs. For me, those nights that weren't sleepless were plagued by nightmares."

For some individuals, however, executions seem to appeal to strange, aberrant impulses and provide an outlet for sadistic urges. Warden Lewis Lawes of Sing Sing Prison in New York wrote of the many requests he received to watch electrocutions, and told that when the

job of executioner became vacant. "I received more than seven hundred applications for the position, many of them offering cut-rate prices." ([Life and Death in Sing Sing](#) 1928)

Public executions were common in this country during the 19th and early 20th centuries. One of the last ones occurred in 1936 in Kentucky, when 20,000 people gathered to watch the hanging of a young African American male. (Teeters, in *Journal of the Lancaster County Historical Society* 1960)

Delight in brutality, pain, violence and death may always be with us. But surely we must conclude that it is best for the law not to encourage such impulses. When the government sanctions, commands, and ceremoniously carries out the execution of a prisoner, it lends support to this destructive side of human nature.

More than two centuries ago the Italian jurist Cesare Beccaria, in his highly influential treatise *On Crimes and Punishment* (1764), asserted: "The death penalty cannot be useful, because of the example of barbarity it gives men." Beccaria's words still ring true – even if the death penalty were a "useful" deterrent, it would still be an "example of barbarity." No society can safely entrust the enforcement of its laws to torture, brutality, or killing. Such methods are inherently cruel and will always mock the attempt to cloak them in justice. As Supreme Court Justice Arthur J. Goldberg wrote, "The deliberate institutionalized taking of human life by the state is the greatest conceivable degradation to the dignity of the human personality." (*Boston Globe*, August 16, 1976)

### ***Death Row Syndrome***

Capital appeals are not only costly; they are also time-consuming. The average death row inmate waits 12 years between sentencing and execution, and some sit in anticipation of their executions on death row for up to 30 years.<sup>[22]</sup> For these prisoners, most of whom are housed in solitary confinement, this wait period may cause "Death Row Phenomenon" or "Death Row Syndrome." Although the terms are often used interchangeably, "Death Row Phenomenon" refers to

the destructive consequences of long-term solitary confinement[23] and the inevitable anxiety that results from awaiting one's own death, while "Death Row Syndrome" refers to the severe psychological illness that often results from Death Row Phenomenon.[24]

In solitary confinement, inmates are often isolated for 23 hours each day without access to training or educational programs, recreational activities, or regular visits. Such conditions have been demonstrated to provoke agitation, psychosis, delusions, paranoia, and self-destructive behavior.[25] To inflict this type of mental harm is inhumane, but it also may prove detrimental to public safety. When death row inmates successfully appeal their sentences, they are transferred into the general inmate population, and when death row inmates are exonerated, they are promptly released into the community.[26] Death Row Syndrome needlessly risks making these individuals dangerous to those around them.

Neither Death Row Syndrome nor Death Row Phenomenon has received formal recognition from the American Psychiatric Association or the American Psychological Association.[27] In 1995, however, Justices Stevens and Breyer, in a memorandum regarding the Supreme Court's denial of certiorari to death row inmate Clarence Lackey, highlighted the "importance and novelty" of the question "whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment." [28] Further, as some scholars and advocates have noted, the mental deterioration symptomatic of Death Row Syndrome may render an inmate incompetent to participate in their own post-conviction proceedings.[29]

Death Row Syndrome gained international recognition during the 1989 extradition proceedings of Jens Soering, a German citizen arrested in England and charged with committing murder on American soil.[30] Soering argued, and the European Court of Human Rights agreed, that extraditing him to the United States would violate Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[31] The Court explained

that, in the United States, “the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death” such that extraditing Soering would violate protections against “inhuman or degrading treatment or punishment.”<sup>[32]</sup> Similar conclusions have been reached by the United Kingdom’s Judicial Committee of the Privy Council, the United Nations Human Rights Committee, and the Canadian Supreme Court.<sup>[33]</sup>

## **CAPITAL PUNISHMENT IS UNJUSTIFIED RETRIBUTION**

Justice, it is often insisted, requires the death penalty as the only suitable retribution for heinous crimes. This claim does not bear scrutiny, however. By its nature, all punishment is retributive. Therefore, whatever legitimacy is to be found in punishment as just retribution can, in principle, be satisfied without recourse to executions.

Moreover, the death penalty could be defended on narrowly retributive grounds only for the crime of murder, and not for any of the many other crimes that have frequently been made subject to this mode of punishment (rape, kidnapping, espionage, treason, drug trafficking). Few defenders of the death penalty are willing to confine themselves consistently to the narrow scope afforded by retribution. In any case, execution is more than a punishment exacted in retribution for the taking of a life. As Nobel Laureate Albert Camus wrote, "For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life." (Reflections on the Guillotine, in *Resistance, Rebellion, and Death* 1960)

It is also often argued that death is what murderers deserve, and that those who oppose the death penalty violate the fundamental principle

that criminals should be punished according to their just desserts – "making the punishment fit the crime." If this rule means punishments are unjust unless they are like the crime itself, then the principle is unacceptable: It would require us to rape rapists, torture torturers, and inflict other horrible and degrading punishments on offenders. It would require us to betray traitors and kill multiple murderers again and again – punishments that are, of course, impossible to inflict. Since we cannot reasonably aim to punish all crimes according to this principle, it is arbitrary to invoke it as a requirement of justice in the punishment of murder.

If, however, the principle of just deserts means the severity of punishments must be proportional to the gravity of the crime – and since murder is the gravest crime, it deserves the severest punishment – then the principle is no doubt sound. Nevertheless, this premise does not compel support for the death penalty; what it does require is that other crimes be punished with terms of imprisonment or other deprivations less severe than those used in the punishment of murder.

Criminals no doubt deserve to be punished, and the severity of the punishment should be appropriate to their culpability and the harm they have caused the innocent. But severity of punishment has its limits – imposed by both justice and our common human dignity. Governments that respect these limits do not use premeditated, violent homicide as an instrument of social policy.

### ***Murder Victims Families Oppose the Death Penalty***

Some people who have lost a loved one to murder believe that they cannot rest until the murderer is executed. But this sentiment is by no means universal. Coretta Scott King has observed, "As one whose husband and mother-in-law have died the victims of murder and assassination, I stand firmly and unequivocally opposed to the death penalty for those convicted of capital offenses. An evil deed is not redeemed by an evil deed of retaliation. Justice is never advanced in the taking of a human life. Morality is never upheld by a legalized murder." (Speech to National Coalition to Abolish the Death Penalty, Washington, D.C., September 26, 1981)

Kerry Kennedy Cuomo, daughter of the slain Senator Robert Kennedy, has written:

"I was eight years old when my father was murdered. It is almost impossible to describe the pain of losing a parent to a senseless murder....But even as a child one thing was clear to me: I didn't want the killer, in turn, to be killed. I remember lying in bed and praying, 'Please, God. Please don't take his life too.' I saw nothing that could be accomplished in the loss of one life being answered with the loss of another. And I knew, far too vividly, the anguish that would spread through another family – another set of parents, children, brothers, and sisters thrown into grief."(Foreword to Gray and Stanley, *A Punishment in Search of A Crime* 1989)

Across the nation, many who have survived the murder of a loved one have joined Murder Victims' Families for Reconciliation or Murder Victims Families for Human Rights, in the effort to replace anger and hate toward the criminal with a restorative approach to both the offender and the bereaved survivors.

Groups of murder victims family members have supported campaigns for abolition of the death penalty in Illinois, Connecticut, Montana and Maryland most recently.

Barbara Anderson Young, the sister of James Anderson, who was allegedly run over by a white teenager in Mississippi in 2011, who reportedly wanted to hurt him because he was Black, wrote a letter to the local prosecutor on behalf of their family indicating the family's opposition to the death penalty, which is "deeply rooted in our religious faith, a faith that was central in James' life as well." The letter also eloquently asks that the defendant be spared execution because the death penalty "historically has been used in Mississippi and the South primarily against people of color for killing whites." It continues, "[e]xecuting James' killers will not help balance the scales. But sparing them may help to spark a dialogue that one day will lead to the elimination of capital punishment."

Lawrence Brewer, convicted of the notorious dragging death of James Byrd in Texas, was executed in 2011. Members of Mr. Byrd's family opposed the death penalty, despite the racist and vicious nature of the killing. Of Brewer's remorseless – he said he had no regrets the day he was executed – Byrd's sister, Betty Boatner, said, "If I could say something to him, I would let him know that I forgive him and then if he still has no remorse, I just feel sorry for him." Byrd's daughter shared that she didn't want Brewer to die because "it's easy . . . (a)ll he's going to do it go to sleep" rather than live every day with what he did and perhaps one day recognize the humanity of his victim. James Byrd's son, Ross, points out "You can't fight murder with murder . . . (l)ife in prison would have been fine. I know he can't hurt my daddy anymore. I wish the state would take in mind that this isn't what we want."

## **CAPITAL PUNISHMENT COSTS MORE THAN INCARCERATION**

It is sometimes suggested that abolishing capital punishment is unfair to the taxpayer, on the assumption that life imprisonment is more expensive than execution. If one takes into account all the relevant costs, however, just the reverse is true. "The death penalty is not now, nor has it ever been, a more economical alternative to life imprisonment.") A murder trial normally takes much longer when the death penalty is at issue than when it is not. Litigation costs – including the time of judges, prosecutors, public defenders, and court reporters, and the high costs of briefs – are mostly borne by the taxpayer. The extra costs of separate death row housing and additional security in court and elsewhere also add to the cost. A 1982 study showed that were the death penalty to be reintroduced in New York, the cost of the capital trial alone would be more than double the cost of a life term in prison. (N.Y. State Defenders Assn., "Capital Losses" 1982)

The death penalty was eventually reintroduced in New York and then found unconstitutional and not reintroduced again, in part because of cost.

In Maryland, a comparison of capital trial costs with and without the death penalty for the years concluded that a death penalty case costs ["approximately 42 percent more than a case resulting in a non-death sentence."](#) In 1988 and 1989 the Kansas legislature voted against reinstating the death penalty after it was informed that reintroduction would involve a first-year cost of more than \$11 million.<sup>59</sup> Florida, with one of the nation's most populous death rows, has estimated that the true cost of each execution is approximately \$3.2 million, or approximately six times the cost of a life-imprisonment sentence." (David von Drehle, "Capital Punishment in Paralysis," Miami Herald, July 10, 1988)

[A 1993 study of the costs of North Carolina's capital punishment system](#) revealed that litigating a murder case from start to finish adds an extra \$163,000 to what it would cost the state to keep the convicted offender in prison for 20 years. The extra cost goes up to \$216,000 per case when all first-degree murder trials and their appeals are considered, many of which do not end with a death sentence and an execution.

In 2011 in California, a broad coalition of organizations called Taxpayers for Justice put repeal of the death penalty on the ballot for 2012 in part because of the high cost documented by a recent study that found the state has already spent \$4 billion on capital punishment resulting in 13 executions. The group includes over 100 law enforcement leaders, in addition to crime-victim advocates and exonerated individuals. Among them is former Los Angeles County District Attorney Gil Garcetti, whose office pursued dozens of capital cases during his 32 years as a prosecutor. He said, "My frustration is more about the fact that the death penalty does not serve any useful purpose and it's very expensive." Don Heller, a Republican and former prosecutor, wrote "I am convinced that at least one innocent person may have been executed under the current death penalty law. It was not my intent nor do I believe that of the voters who

overwhelmingly enacted the death penalty law in 1978. We did not consider that horrific possibility." Heller emphasized that he is not "soft on crime," but that "life without parole protects public safety better than a death sentence." Additionally, he said the money spent on the death penalty could be better used elsewhere, as California cuts funding for police officers and prosecutors. "Paradoxically, the cost of capital punishment takes away funds that could be used to enhance public safety."[\[34\]](#)

From one end of the country to the other public officials decry the additional cost of capital cases even when they support the death penalty system. ["Wherever the death penalty is in place, it siphons off resources which could be going to the front line in the war against crime.... Politicians could address this crisis, but, for the most part they either endorse executions or remain silent."](#) The only way to make the death penalty more "cost effective" than imprisonment is to weaken due process and curtail appellate review, which are the defendant's (and society's) only protection against the most aberrant miscarriages of justice. Any savings in dollars would, of course, be at the cost of justice: [In nearly half of the death-penalty cases given review under federal habeas corpus provisions, the murder conviction or death sentence was overturned.](#)

In 1996, in response to public clamor for accelerating executions, Congress imposed severe restrictions on access to federal habeas corpus and also ended all funding of the regional death penalty "resource centers" charged with providing counsel on appeal in the federal courts. (Carol Castenada, "Death Penalty Centers Losing Support Funds," USA Today, Oct. 24, 1995) These restrictions virtually guarantee that the number and variety of wrongful murder convictions and death sentences will increase. The savings in time and money will prove to be illusory.

## **CAPITAL PUNISHMENT IS LESS POPULAR THAN THE ALTERNATIVES**

It is commonly reported that the American public overwhelmingly approves of the death penalty. More careful analysis of public attitudes, however, reveals that most Americans prefer an alternative; they would oppose the death penalty if convicted murderers were sentenced to life without parole and were required to make some form of financial restitution. In 2010, when California voters were asked which sentence they preferred for a first-degree murderer, 42% of registered voters said they preferred life without parole and 41% said they preferred the death penalty. In 2000, when voters were asked the same question, 37% chose life without parole while 44% chose the death penalty. A 1993 nationwide survey revealed that although 77% of the public approves of the death penalty, support drops to 56% if the alternative is punishment with no parole eligibility until 25 years in prison. Support drops even further, to 49%, if the alternative is no parole under any conditions. And if the alternative is no parole plus restitution, it drops still further, to 41%. Only a minority of the American public would favor the death penalty if offered such alternatives.

## **INTERNATIONALLY, CAPITAL PUNISHMENT IS WIDELY VIEWED AS INHUMANE AND ANACHRONISTIC**

An international perspective on the death penalty helps us understand the peculiarity of its use in the United States. As long ago as 1962, it was reported to the Council of Europe that "the facts clearly show that the death penalty is regarded in Europe as something of an anachronism...." 1962)

Today, either by law or in practice, all of Western Europe has abolished the death penalty. In Great Britain, it was abolished (except for cases of treason) in 1971; France abolished it in 1981. Canada abolished it in 1976. The United Nations General Assembly affirmed in a formal resolution that throughout the world, it is desirable to "progressively restrict the number of offenses for which the death penalty might be imposed, with a view to the desirability of abolishing

this punishment." By mid-1995, eighteen countries had ratified the Sixth Protocol to the European Convention on Human Rights, outlawing the death penalty in peacetime.

Underscoring worldwide support for abolition was the action of the South African constitutional court in 1995, barring the death penalty as an "inhumane" punishment. Between 1989 and 1995, two dozen other countries abolished the death penalty for all crimes. Since 1995, 43 more abolished it. [All told, 71% of the world's nation's have abolished the death penalty in law or practice; only 58 of 197 retain it.](#)

### ***International Law***

A look at international trends and agreements sheds light on the peculiarity of the United States' continued imposition of capital punishment. Today, over 140 nations have abolished the death penalty either by law or in practice and, of the 58 countries that have retained the death penalty, only 21 carried out known executions in 2011.<sup>[35]</sup> Furthermore, capital punishment has compelled the United States to abstain from signing or ratifying several major international treaties and perhaps to violate international agreements to which it is a party:

In 1989, the General Assembly adopted the Second Optional Protocol to the [International Covenant on Civil and Political Rights](#) (ICCPR), one of the UN's primary human rights treaties.<sup>[36]</sup> Parties to the Protocol must take all necessary measures to abolish the death penalty and protect their citizens' right not to be executed, although signatories may reserve the right to apply the death penalty for serious military criminals during wartime.<sup>[37]</sup> The United States has yet to join the 35 signatories or 75 parties to the Protocol, trailing behind the world's leading democracies in the protection of human rights.

Although the Second Protocol to the ICCPR is the only worldwide instrument calling for death penalty abolition, there are three such instruments with regional emphases. Adopted by the Council of Europe in 1982 and ratified by eighteen nations by mid-1995, the Sixth Protocol of the European Convention on Human Rights (ECHR)

provides for the abolition of capital punishment during peacetime. In 2002, the Council adopted the Thirteenth Protocol to the ECHR, which provides for the abolition of the death penalty in *all* circumstances, including times of war or imminent threat of war. In 1990, the Organization of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, which provides for total abolition but allows states to reserve the right to apply the death penalty during wartime.[\[38\]](#)

The United States has ratified the Vienna Convention on Consular Relations (VCCR), an international treaty setting forth a framework for consular relations among independent countries. Under Article 36 of the VCCR, local authorities are obligated to inform all detained foreigners “without delay” of their right to request consular notification of their detention and their right to demand and access opportunities to communicate with their consular representatives.[\[39\]](#) Local authorities have repeatedly disregarded this obligation, resulting in the International Court of Justice holding in 2004 that states had violated the VCCR by failing to inform 51 named Mexican nationals of their rights. All 51 were sentenced to death. When the State of Texas refused to honor this judgment and provide relief for the 15 death-row inmates whose VCCR rights it had violated, President George W. Bush sought to intervene on the prisoners’ behalf, taking the case to the United States Supreme Court. The Court denied the President’s appeal, and Texas has gone on to execute inmates whose VCCR rights it had failed to honor.

In 1994, the United States signed the United Nations (UN) [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (CAT).[\[40\]](#) The treaty, which has now been ratified or signed by 176 nations, outlaws the imposition of physical or psychological abuse on people in detention. While it does not explicitly prohibit capital punishment, the treaty does forbid the intentional infliction of pain. Since 1976, however, more than 20 executions in the United States have involved prolonged, painful, or shocking errors, such as an inmate’s head catching fire or a lengthy and torturous search for a vein suitable for lethal injection. Additionally, accidents aside, our methods of execution—lethal injection, electrocution, firing

squad, gas chamber, and hanging—may be inherently painful. The CAT also forbids the infliction of pain and suffering “based on discrimination of any kind,” [41] yet racial inequality is [endemic to our death rows](#).

Also in 1994, the United States ratified the [International Convention on the Elimination of all forms of Racial Discrimination](#) (ICERD), a treaty intended to protect against racial discrimination, whether intentional or resulting from seemingly neutral state policies. To meet its obligations as a party to ICERD, the United States must take steps to review and amend policies and procedures that create or perpetuate racial discrimination, including capital punishment.[42]

Once in use everywhere and for a wide variety of crimes, the death penalty today is generally forbidden by law and widely abandoned in practice, in most countries outside the United States. Indeed, the unmistakable worldwide trend is toward the complete abolition of capital punishment. In the United States, opposition to the death penalty is widespread and diverse. Catholic, Jewish, and Protestant religious groups are among the more than 50 national organizations that constitute the National Coalition to Abolish the Death Penalty.