

# ISSUE

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## Is Capital Punishment Bad Policy?

YES: David Von Drehle, from "Miscarriage of Justice: Why the Death Penalty Doesn't Work," *The Washington Post Magazine* (February 5, 1995)

NO: Ernest van den Haag, from "The Ultimate Punishment: A Defense," *Harvard Law Review* (May 1986)

### ISSUE SUMMARY

YES: David Von Drehle, a writer and the arts editor for the *Washington Post*, examines specific capital punishment cases, statistics, and statements made by U.S. Supreme Court justices and prosecutors reversing their support of the death penalty and concludes that capital punishment is bad policy.

NO: Ernest van den Haag, a professor of jurisprudence and public policy (now retired), analyzes a number of objections to capital punishment, ranging from its unfair distribution to its excessive costs and its brutal nature. He rejects claims that capital punishment is unfair and barbaric, and he maintains that the death penalty does deter criminals and is just retribution for terrible crimes.

**I**n 1968 only 38 percent of all Americans supported the death penalty for certain crimes. In 1972, when the U.S. Supreme Court handed down its decision in *Furman v. Georgia* stating that capital punishment violated the Eighth Amendment, which prohibits cruel and unusual punishment, many Americans were convinced that capital punishment was permanently abolished. After all, even though there were 500 inmates on death row at the time, there had been a steady decline in the number of executions in the United States: In the 1930s there were on average 152 executions per year; in 1962 there were 47 executions; and in 1966 there was 1. Polls in the late 1960s showed that most Americans opposed the death penalty, and virtually every other Western industrial nation had long since eliminated the death sentence or severely modified its use.

Polls taken in the 1990s showed that 75–80 percent of all Americans support capital punishment. In 1990, 23 people were executed; in 1999, 98 were. Since 1976, when capital punishment was restored, over 600 people have been

executed. Currently, there are approximately 3,500 people on death row. Eighteen states allow executions of defendants who are as young as 16, and there are currently over 60 juveniles on death row. Texas leads the nation in executions: 36 percent of all executions in 1999 were held in that state. Of the 1999 executions, 94 were by lethal injection, and 3 were by electrocution.

What has happened since the 1960s? We will probably never know the full answer to this question, but there are some clues. To begin with, in *Furman v. Georgia*, the Supreme Court did not really ban capital punishment because it was cruel and unusual in itself. It simply argued that it was unconstitutional for juries to be given the right to decide arbitrarily and discriminatorily on capital punishment. Thus, if states can show that capital punishment is not arbitrary or discriminatory and that the sentencing process is performed in two separate stages—first guilt or innocence is established, and *then* the determination of the sentence occurs—then some offenses are legally punishable by death. This was the Supreme Court's ruling in 1976 in *Gregg v. Georgia*, which effectively restored the death penalty.

Since the late 1960s Americans have become more conservative. Fear of crime has greatly increased, although the number of crimes may not have changed. Moreover, many of the measures taken under the Omnibus Safe Streets Act to reduce crime, speed up judicial processes, and rehabilitate criminals are now viewed by professionals and laypeople alike as failures. The national mood is now solidly behind "getting tough" on criminals, especially drug dealers and murderers. Support and utilization of capital punishment make sense within the logic of the present cultural and political situation.

There is a movement among criminologists to reassess studies done before the 1960s that indicated that states in which capital punishment prevailed had homicide rates that were just as high as those in which it was not a penalty and that executions did not deter others from committing crimes. Isaac Ehrlich, for instance, in an extensive statistical analysis of executions between 1933 and 1967, reached very different conclusions. He contends not only that the executions reduced the murder rate but also that one additional execution per year between 1933 and 1967 would have resulted in seven or eight fewer murders per year!

Many scholars have bitterly attacked Ehrlich's empirical findings. Most attempt to fault his methods, but others assert that even if he is empirically correct, the trade-off is not worth it. The state should not have the right to extract such a primitive "justice" as the murder of a human being, even a convicted killer. Other scholars emphasize the fact that there have been a disproportionate number of blacks executed (between 1930 and 1967, 2,066 blacks were executed as opposed to 1,751 whites, even though blacks constituted only 10 percent of the total population then). Some counter that this simply indicates that more whites need to be executed as well!

Is capital punishment bad policy? If not, what crimes should it be reserved for? Murder? Rape? Espionage? Drug dealing? Kidnapping? How should it be carried out?

David Von Drehle



## Miscarriage of Justice: Why the Death Penalty Doesn't Work

**A**s a boy of 8, the son of good, poor parents, James Curtis "Doug" McCray had limitless dreams; he told everyone he met that someday he would be president of the United States. Soon enough, he realized that poor black children did not grow up to be president, but still he was a striver. At Dunbar High School in Fort Myers, Fla., he was an all-state receiver on the football team, an all-conference guard in basketball and the state champion in the 440-yard dash. He made the honor roll, and became the first and only of the eight McCray kids to attend college.

His was a success story, but for one flaw. McCray had a drinking problem. He washed out of college and joined the Army. A year and a half later, the Army gave him a medical discharge because he had been found to suffer from epilepsy. McCray married, fathered a son, tried college again; nothing took. He wound up back home, a tarnished golden boy.

On an October evening in 1973, an elderly woman named Margaret Mears was at home in her apartment, picking no trouble, harming no one, when someone burst in, stripped and raped her, then beat her to death. A bloody handprint was matched to Doug McCray's. He insisted that he had no memory of the night in question, and his jury unanimously recommended a life sentence. But McCray had the bad fortune to be tried by Judge William Lamar Rose.

... To him, the murder of Margaret Mears was precisely the type of savagery the law was intended to punish: committed in the course of another felony, and surely heinous, surely atrocious, surely cruel. Rose overruled the jury and banged the gavel on death.



When McCray arrived at Florida State Prison in 1974, nine men awaited execution and he made 10. His case entered the appeals process, and as the years went by, McCray wept for his best friend on death row, John Spenkelink, who became the first man in America executed against his will under modern death

From David Von Drehle, "Miscarriage of Justice: Why the Death Penalty Doesn't Work," *The Washington Post Magazine* (February 5, 1995). Copyright © 1995 by *The Washington Post*. Reprinted by permission.

penalty laws. He watched as a young man named Bob Graham became governor of Florida and led the nation in executing criminals. Eight years later, he watched Gov. Bob Martinez take Graham's place and sign 139 death warrants in four years. McCray saw the infamous serial killer Ted Bundy come to the row, and almost 10 years later saw him go quietly to Old Sparky.

Living on death row, McCray saw men cut, saw men burned, even saw a man killed. He saw inmates carried from their cells after committing suicide, and others taken away after going insane. He saw wardens and presidents come and go. Death row got bigger and bigger. By the time Spenkelink was executed in May 1979, Jacksonville police officers printed T-shirts proclaiming "One down, 133 to go!" ...

Doug McCray watched as death row doubled in size, and grew still more until it was not a row but a small town, Death Town, home to more than 300 killers. Nationwide, the condemned population climbed toward 3,000. The seasons passed through a sliver of dirty glass beyond two sets of bars outside McCray's tiny cell on the row, which was very cold in the winter and very hot in the summer, noisy at all times and stinking with the odor of smoking, sweating, dirty, defecating men. Four seasons made a year, and the years piled up: 5, 10, 15, 16, 17 ...

All this time, Doug McCray was sentenced to death but he did not die. Which makes him the perfect symbol of the modern death penalty.

People talk a great deal these days about getting rid of government programs that cost too much and produce scant results. So it's curious that one of the least efficient government programs in America is also among the most popular. Capital punishment is favored by more than three-quarters of American voters. And yet, in 1994, the death row population nationwide exceeded 3,000 for the first time ever; out of all those condemned prisoners, only 31 were executed. There are hundreds of prisoners in America who have been on death row more than a decade, and at least one—Thomas Knight of Florida—has been awaiting execution for 20 years. Every cost study undertaken has found that it is far more expensive, because of added legal safeguards, to carry out a death sentence than it is to jail a killer for life. Capital punishment is the principal burden on the state and federal appellate courts in every jurisdiction where it is routinely practiced. The most efficient death penalty state, Texas, has a backlog of more than 300 people on its death row. It manages to execute only about one killer for every four newly sentenced to die—and the number of executions may drop now that the U.S. Supreme Court has ordered Texas to provide lawyers for death row inmate appeals. Overall, America has executed approximately one in every 20 inmates sentenced to die under modern death penalty laws.

This poor record of delivering the punishments authorized by legislatures and imposed by courts has persisted despite a broad shift to the right in the federal courts. It has resisted legislative and judicial efforts to streamline the process. It has outlasted William J. Brennan Jr. and Thurgood Marshall, the Supreme Court's strongest anti-death penalty justices. It has endured countless campaigns by state legislators and governors and U.S. representatives and senators and even presidents who have promised to get things moving. If New York reinstates the death penalty this year, as Gov. George Pataki has promised,

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there is no reason to believe things will change; New York is unlikely to see another execution in this century. Congress extended the death penalty to cover more than 50 new crimes last year, but that bill will be long forgotten before Uncle Sam executes more than a handful of prisoners.

Most people like the death penalty in theory; virtually no one familiar with it likes the slow, costly and inefficient reality. But after 20 years of trying to make the death penalty work, it is becoming clear that we are stuck with the reality, and not the ideal.



To understand why this is, you have to understand the basic mechanics of the modern death penalty. The story begins in 1972.

For most of American history, capital punishment was a state or even a local issue. Criminals were tried, convicted and sentenced according to local rules and customs, and their executions were generally carried out by town sheriffs in courthouse squares. Federal judges took almost no interest in the death penalty, and even state appeals courts tended to give the matter little consideration.

Not surprisingly, a disproportionate number of the people executed under these customs were black, and the execution rate was most dramatically skewed for the crime of rape. As sensibilities became more refined, however, decent folks began to object to the spectacle of local executions. In Florida in the 1920s, for example, a coalition of women's clubs lobbied the legislature to ban the practice, arguing that the sight of bodies swinging in town squares had a brutalizing effect on their communities. Similar efforts around the country led to the centralizing of executions at state prisons, where they took place outside the public view, often at midnight or dawn.

Still, the death penalty remained a state matter, with the federal government extremely reluctant to exert its authority. Washington kept its nose out of the death chambers, just as it steered clear of the schools, courtrooms, prisons and voting booths. All that changed, and changed dramatically, in the 1950s and '60s, when the Supreme Court, in the era of Chief Justice Earl Warren, asserted more vigorously than ever that the protections of the U.S. Constitution applied to actions in the states. For the first time, federal standards of equality were used to strike down such state and local practices as school segregation, segregation of buses and trains, poll taxes and voter tests. The lengthened arm of the federal government reached into police stations: For example, in *Miranda v. Arizona*, the Supreme Court required that suspects be advised of their constitutional rights when arrested. The long arm reached into the courtrooms: In *Gideon v. Wainwright*, the high court declared that the federal guarantee of due process required that felony defendants in state trials be provided with lawyers.

Opponents of capital punishment urged the courts to reach into death rows as well. Anthony Amsterdam, at the time a Stanford University law professor, crafted arguments to convince the federal courts that the death penalty violated the Eighth Amendment (which bars "cruel and unusual punishments") and the 14th Amendment (which guarantees "equal protection of the laws").

Amsterdam's arguments won serious consideration in the newly aggressive federal courts, and on January 17, 1972, the greatest of Amsterdam's lawsuits, *Furman v. Georgia*, was heard in the Supreme Court.

Amsterdam delivered a brilliant four-pronged attack on capital punishment. He began by presenting statistical proof that the death penalty in America was overwhelmingly used against the poor and minorities. Next, Amsterdam argued that the death penalty was imposed arbitrarily, almost randomly. Judges and juries meted out their sentences without clear standards to guide them, and as a result men were on death row for armed robbery, while nearby, murderers served life, or less. Discretion in death sentencing was virtually unfettered. Amsterdam's third point was his most audacious, but it turned out to be crucial: The death penalty was so rarely carried out in contemporary America that it could no longer be justified as a deterrent to crime. In the years leading up to Amsterdam's argument, use of the death penalty had steeply declined. What made this argument so daring was that the sharp drop in executions was partly a result of Amsterdam's own legal campaign to abolish the death penalty. He was, in effect, challenging a state of affairs he had helped to create.

In closing, Amsterdam argued that the death penalty had become "unacceptable in contemporary society," that the "evolving standards" of decent behavior had moved beyond the point of legal killing. This was the weakest of his arguments, because nearly 40 states still had death penalty laws on the books, but previous Supreme Court decisions suggested that the shortest route to abolishing the death penalty would be to convince a majority of the justices that "standards of decency" had changed. Amsterdam had to try.

Behind closed doors, the nine justices of the court revealed a wide range of reactions to Amsterdam's case—from Brennan and Marshall, the court's liberal stalwarts, who voted to abolish capital punishment outright, to Justice William H. Rehnquist, the new conservative beacon, who rejected all of the arguments. Justice William O. Douglas was unpersuaded by the notion that standards of decency had evolved to the point that capital punishment was cruel and unusual punishment, but he agreed the death penalty was unconstitutionally arbitrary. Chief Justice Warren E. Burger and Justice Harry A. Blackmun both expressed personal opposition to capital punishment—if they were legislators, they would vote against it—but they believed that the language of the Constitution clearly left the matter to the states. That made three votes to strike down the death penalty, and three to sustain it.

Justice Lewis F. Powell Jr. also strongly objected to the court taking the question of the death penalty out of the hands of elected legislatures. This would be an egregious example of the sort of judicial activism he had always opposed. Though moved by Amsterdam's showing of racial discrimination, Powell believed this was a vestige of the past, and could be rectified without a sweeping decision in *Furman*. Powell's vote made four to sustain the death penalty. Justice Potter Stewart, painfully aware of the more than 600 prisoners whose lives were dangling on his vote, moved toward Douglas's view that the death penalty had become unconstitutionally arbitrary. Stewart's vote made four to strike down the death penalty as it existed.

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That left Justice Byron R. White, known to observers of the court as a strict law-and-order man. In his brusque opinions, White backed prosecutors and police at almost every turn. But he was deeply impressed by Amsterdam's presentation; he told his law clerks that it was "possibly the best" oral argument he had ever heard. The point that had won White was Amsterdam's boldest: that the death penalty was applied too infrequently to serve any purpose. White cast the deciding vote to strike down the death penalty not because he wanted to see an end to capital punishment, but because he wanted to see more of it.

The product of these deliberations was one of the most difficult decisions in the history of the U.S. Supreme Court. The broad impact of *Furman v. Georgia*, striking down hundreds of separate laws in nearly 40 separate jurisdictions, was unprecedented. Rambling and inchoate—nine separate opinions totaling some 50,000 words—it remains easily the longest decision ever published by the court. But for all its wordy impact, *Furman* was almost useless as a precedent for future cases. It set out no clear legal standards. As Powell noted in his stinging dissent:

"Mr. Justice Douglas concludes that capital punishment is incompatible with notions of 'equal protection' that he finds 'implicit' in the Eighth Amendment... Mr. Justice Brennan bases his judgment primarily on the thesis that the penalty 'does not comport with human dignity'... Mr. Justice Stewart concludes that the penalty is applied in a 'wanton' and 'freakish' manner... For Mr. Justice White it is the 'infrequency' with which the penalty is imposed that renders its use unconstitutional... Mr. Justice Marshall finds that capital punishment is an impermissible form of punishment because it is 'morally unacceptable' and 'excessive'...

"I [will not] attempt to predict what forms of capital statutes, if any, may avoid condemnation in the future under the variety of views expressed by the collective majority today."

In other words, totally missing from the longest Supreme Court decision in history was any clear notion of how the death penalty might be fixed.



That painfully splintered 5-to-4 vote turned out to be a high-water mark of the Supreme Court's willingness to intervene in the business of the states. In *Furman*, the justices were willing to abolish the death penalty as it existed. But the justices were not willing to forbid executions forever. They kicked the question of whether the death penalty was "cruel and unusual" back to the state legislatures. For nearly 20 years, the states—especially the Southern states—had felt pounded by the Supreme Court. Rarely did they get the chance to answer. The court did not ask what they thought about school desegregation, or voting rights, or the right to counsel. But *Furman v. Georgia* invited the states to respond to a hostile Supreme Court decision.

Florida was the first state to craft an answer, after calling its legislature into special session. Blue-ribbon panels appointed by the governor and legislature struggled to make sense of *Furman*—but how? On the governor's commission, legal advisers unanimously predicted that no capital punishment law would

ever satisfy the high court, but the membership turned instead to a nugget from Justice Douglas's opinion. Douglas wrote that the problem with the pre-Furman laws was that "under these laws no standards govern the selection of the penalty." Douglas seemed to be saying that judges and juries needed rules to guide their sentencing.

The legislative commission reached a different conclusion, simply by seizing on a different snippet from the Furman ruling. Figuring that Byron White was the most likely justice to change his position, commission members combed his opinion for clues. White had complained that "the legislature authorizes [but] does not mandate the penalty in any particular class or kind of case..." That phrase seemed crucial: "Authorizes but does not mandate." Apparently, White would prefer to see death made mandatory for certain crimes.

Furman was as cryptic as the Gnostic gospels. Robert Shevin, Florida's attorney general at the time, was just as confused. He summoned George Georgi-eff and Ray Marky, his two top death penalty aides, to explain the ruling. "I've been reading it since it came out," Marky told his boss, "and I still have no idea what it means."

Gov. Reubin Askew refused to go along with mandatory sentences—he considered them barbaric. And so it was that while rank-and-file lawmakers made interminable tough-on-crime speeches, in the last month of 1972 Florida's power brokers hashed out a deal behind closed doors. Their new law spelled out "aggravating" circumstances—such as a defendant's criminal record and the degree of violence involved in the crime—which, if proven, would make a guilty man eligible for the death penalty. The law also spelled out "mitigating" circumstances, such as a defendant's age or mental state, that might suggest a life sentence instead. After a defendant was found guilty of a capital offense, the jury would hear evidence of aggravating and mitigating factors. By majority vote, the jurors would recommend either life in prison or the death penalty. Then the judge would be required to reweigh the aggravating and mitigating factors and impose the sentence, justifying it in writing. As a final safeguard, the sentence would be reviewed by the state's highest court. In this way, perhaps, they could thread the Furman needle: setting standards, limiting discretion, erasing caprice—all while avoiding mandatory sentences.

They were a few men in a back room, trading power and guessing over an incoherent Supreme Court document. It was not a particularly promising effort. Nevertheless, their compromise passed overwhelmingly, giving America its first legislative answer to Furman. Immediately, officials from states across the country began calling Florida for advice and guidance. And very soon, lawyers and judges began to discover that the law drafted in confusion and passed in haste was going to be hell to administer.



The problem was that underneath the tidy, legalistic, polysyllabic, etched-in-marble tone of the new law was a lot of slippery mishmash. The aggravating and mitigating factors sounded specific and empirical, but many of them were



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matters of judgment rather than fact. A murderer was more deserving of the death penalty, for example, if his actions involved “a great risk of death to many persons”—but where one judge might feel that phrase applied to a drive-by killer who sprays a whole street with gunfire, another might apply it to a burglar who stabs a man to death while the victim’s wife slumbers nearby. How much risk makes a “great” risk, and what number of persons constitutes “many”?

Another aggravating circumstance was even harder to interpret—“especially heinous, atrocious or cruel.” The idea was to identify only the worst of the hundreds of murders each year in Florida. But wasn’t the act of murder itself “heinous, atrocious or cruel”? Again, this aggravating circumstance was very much in the eye of the beholder: To one judge, stabbing might seem more cruel than shooting, because it involved such close contact between killer and victim. Another judge, however, might think it crueler to place a cold gun barrel to a victim’s head before squeezing the trigger. One jury might find it especially heinous for a victim to be killed by a stranger, while the next set of jurors might find it more atrocious for a victim to die at the hands of a trusted friend. And so forth. It was an attempt to define the undefinable.

The imprecision was even more obvious on the side of mitigation, where it weighed in a defendant’s favor if he had no “significant history” of past criminal behavior. How much history was that? “The age of the defendant” was supposed to be considered under the new law—but where one judge might think 15 was old enough to face the death penalty, another might have qualms about executing a man who was “only” 20. What about elderly criminals? Was there an age beyond which a man should qualify for mercy—and if so, what was it?

Clearly, a lot of discretion was left to the judge and jury. Even more discretion was allowed in tallying the aggravating versus the mitigating circumstances, and still more in deciding what weight to give each factor. The jury was supposed to render an “advisory” opinion on the proper sentence, death or life in prison, but how much deference did the judge have to pay to that advice? The law said nothing. After the judge imposed a death sentence, the state supreme court was required to review it. But what standards was the court supposed to apply? The law said nothing.

These questions might have seemed tendentious and picayune, except for the fact that Doug McCray and dozens of others were quickly sent to death row, and these seemingly trivial questions became the cruxes of life-and-death litigation. The law, shot through with question marks, became a lawyer’s playground. After all, laws were supposed to be clear and fixed; they were supposed to mean the same thing from day to day, courtroom to courtroom, town to town. And given that their clients were going to be killed for breaking the law, it seemed only fair for defense lawyers to demand that simple degree of reliability.

In 1976, when the U.S. Supreme Court returned to the question of capital punishment, the justices agreed that the laws must be reliable. By then some 35 states had passed new death penalty laws, many of them modeled on Florida’s. In a string of rulings the high court outlawed mandatory death sentences and affirmed the complex systems for weighing specified factors in favor of and against a death sentence.

But in striking down mandatory sentences, the court made consistency a constitutional requirement for the death penalty; the law must treat “same” cases the same and “different” cases differently. The thousands of capital crimes committed each year in America raised a mountain of peculiarities—each criminal and crime was subtly unique. Somehow the law must penetrate this mountain to discern some conceptual key that would consistently identify cases that were the “same” and cull ones that were “different.” Furthermore, the court decided, the Constitution requires extraordinary consistency from capital punishment laws. “The penalty of death is qualitatively different from a sentence of imprisonment, however long,” Justice Potter Stewart wrote. “Because of that qualitative difference, there is a corresponding difference in the need for reliability . . .”

Each year, some 20,000 homicides are committed in America, and the swing justices expected the death penalty laws to steer precisely and consistently through this carnage to find the relatively few criminals deserving execution. Somehow, using the black-and-white of the criminal code, the system must determine the very nature of evil. King Solomon himself might demur.

“The main legal battle is over,” declared the New York Times in an editorial following the 1976 decisions. In fact, the battles were only beginning.



After Doug McCray was sentenced to die in 1974, his case went to the Florida Supreme Court for the required review. . . . In October 1980, the Florida Supreme Court agreed that Doug McCray should die. The following year the U.S. Supreme Court declined to review the state court’s decision.

Through all this, McCray continued to insist that he had no memory of murdering Margaret Mears. He passed a lie detector test, and though such tests are not admissible in court, there was another reason to believe what he said. It was possible that McCray’s epilepsy, which had first emerged in several powerful seizures during his Army basic training, was the type known as “temporal lobe seizure disorder.” This disease often emerges in late adolescence; it is known to cause violent blackouts; and it can be triggered by alcohol. The possibility had not come out at McCray’s trial, nor was it properly researched in preparation for his hearing on executive clemency. The hearing, held on December 16, 1981, went badly for McCray. An attorney, Jesse James Wolbert, had been appointed to represent him, but Wolbert did not bother to read the trial record, let alone prepare a compelling case for mercy. Perhaps he had other things on his mind: By the time McCray’s death warrant was signed three months later, Wolbert had drained another client’s trust fund and become a federal fugitive.

Wolbert’s disappearance turned out to be a blessing for McCray, because an anti-death penalty activist named Scharlette Holdman persuaded Bob Dillinger of St. Petersburg to take the case, and Dillinger was a damn good lawyer. He filed a hasty appeal in the Florida Supreme Court asking for a stay of execution. The result was amazing: Having affirmed McCray’s death sentence 18 months earlier, the justices now ordered a new trial. The sentence, they ruled, had been based on the theory that the murder had been committed

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in conjunction with a rape. "Felony murder," this is called—murder coupled with another felony. In 1982, the Florida Supreme Court, by a vote of 4 to 3, declared that the underlying felony, rape, had not been proven beyond a reasonable doubt. Eight years after the original sentence, Doug McCray was going back to trial.

Except that something even more amazing happened a few weeks later. The state supreme court granted the prosecution's request for a rehearing, and Justice Ray Ehrlich abruptly changed his mind. His vote made it 4 to 3 in favor of upholding McCray's death sentence. In the course of six months, Ehrlich had gone from believing McCray's sentence was so flawed that he should have a new trial to believing that his sentence was sound enough to warrant his death. The court contacted the company that publishes all its decisions and asked that the first half of this flip-flop—the order for a new trial—be erased from history.

Gov. Bob Graham signed a second death warrant on May 27, 1983. By this time, Bob Dillinger had located his client's ex-wife in California, where she lived with her son by Doug McCray. The son was what his father had once been: bright as a whip, interested in current events, a devourer of books, good at games. The ex-wife, Myra Starks, was mystified by the course her husband's life had taken. They had been high school sweethearts, and she had married him certain that he was upward bound. When McCray had left school to join the Army, Starks had clung to that vision, picturing a steady string of promotions leading to a comfortable pension. Then came the seizures and the medical discharge, and her husband's behavior changed horribly. He drank heavily, and sometimes when he was drunk he struck out at her violently—though after each of these outbursts, he insisted he remembered nothing. Myra Starks did not make a connection between the medical discharge and the change in her man; instead, she packed up their baby boy and moved out. Within a year, McCray was on trial for murder.

In addition to locating Starks, Bob Dillinger also arranged for a full-scale medical evaluation of his client, and the doctor concluded that McCray indeed suffered from temporal lobe seizure disorder. It all came together: the violent blackouts, triggered by drink. In prison, after a number of seizures, McCray was put on a drug regimen to control his disease: Dilantin, a standard epilepsy treatment, in the mornings, and phenobarbital, a sedative, at night. When Dillinger arranged for Myra Starks to see her ex-husband, after a decade apart, she exclaimed, "He's just like the old Doug!"

But he was scheduled to die. Following established procedure, Dillinger returned to the Florida Supreme Court. It was the fifth time the court had considered McCray's case. This time, the justices concluded that the new medical evidence might be important in weighing whether death was the appropriate sentence. They ordered the trial court to hold a hearing and stayed the execution while this was done.

Doug McCray had lived on death row nine years. . . .

In all that time, though, his case had not moved past the first level of appeals. The Florida Supreme Court had weighed and reweighed his case, and with each weighing the justices had reached a different conclusion.



McCray's case was far from unusual. Every death penalty case winds up on spongy ground, even the most outrageous. It took nearly a decade for Florida to execute serial killer Ted Bundy, and even longer for John Wayne Gacy to reach the end in Illinois. The courts routinely reverse themselves, then double back again. The same case can look different with each fresh examination or new group of judges. Defenders have learned to exploit every possible advantage from the tiniest detail to the loftiest constitutional principle. A conscientious defense attorney has no choice—especially if any question remains as to whether the condemned man actually committed the crime for which he was sentenced. The effort involves huge expenditures of time and resources, and results are notoriously uncertain. . . .



By the time Doug McCray's case returned to the trial court for a new sentence in 1986, the hanging judge, William Lamar Rose, was gone. So many years had passed. But in his place was another stern man who was no less outraged at the enormity of McCray's crime. . . .

McCray had, over the years, become a favorite of death penalty opponents, because he seemed so gentle and redeemable. Frequently, they argued that not all death row prisoners are "like Ted Bundy," and McCray was the sort of prisoner they were talking about. The harshest word in his vocabulary was "shucks." He read every book he could get his hands on. There was a poignant vulnerability to him.

But the new judge focused, as the old one had done, on the crime: A defenseless, innocent, helpless woman alone, terrorized, apparently raped, then killed. He sentenced McCray to death once more. And the case returned to the Florida Supreme Court for a sixth time. In June 1987, after a U.S. Supreme Court decision in favor of another Florida inmate, the justices sent McCray's case back because the judge had overruled the jury's advisory sentence. What was his justification? The judge's justification was an elderly woman savagely murdered. Once again, he imposed the death sentence.

So the case of Doug McCray returned for the seventh time to the Florida Supreme Court. Did he deserve to die? Four times, a trial judge insisted that he did. Twice, the state's high court agreed. And four times, the same court expressed doubts. A single case, considered and reconsidered, strained and restrained, weighed and reweighed. A prism, a kaleidoscope, a rune of unknown meaning. The life of a man, viewed through the lens of a complex, uncertain, demanding law. Should he live or die?

In May 1991, after weighing his case for the seventh time in 17 years, the Florida Supreme Court reversed McCray's death sentence and imposed a sentence of life in prison. For 17 years, two courts had debated—the trial court and the state supreme court. No liberal outsiders stalled the process, no bleeding hearts intervened. Even the lawyers added little to the essential conundrum, which was in the beginning as it was in the end: Doug McCray, bad guy, versus

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Doug McCray, not-quite-so-bad guy. The case was far from aberrant. It was one of hundreds of such cases.



Some politicians and pundits still talk as if the confusion over the death penalty can be eliminated by a healthy dose of conservative toughness, but among the people who know the system best that explanation is losing steam. More than 20 years have passed since *Furman v. Georgia*; courts and legislatures have gotten tougher and tougher on the issue—but the results have remained negligible. The execution rate hovers at around 25 or 30 per year, while America's death row population has swelled past 3,000. It makes no real difference who controls the courts, as California voters learned after they dumped their liberal chief justice in 1986. The court turned rightward, but 7½ years later, California had executed just two of the more than 300 prisoners on its death row. (One of the two had voluntarily surrendered his appeals.) No matter how strongly judges and politicians favor capital punishment, the law has remained a mishmash.

It is hard to see a way out. The idea that the death penalty should not be imposed arbitrarily—that each case should be analyzed by a rational set of standards—has been so deeply woven into so many federal and state court rulings that there is little chance of it being reversed. Courts have softened that requirement, but softening has not solved the problem. Proposals to limit access to appeals for death row inmates have become staples of America's political campaigns, and many limits have been set. But it can take up to a decade for a prisoner to complete just one trip through the courts, and no one has proposed denying condemned inmates one trip.

... [E]ven the most vicious killers... cannot be executed quickly. Gerald Stano, who in the early 1980s confessed to killing more than two dozen women, is alive. Thomas Knight, who in 1980 murdered a prison guard while awaiting execution for two other murders, is alive. Jesus Scull, who in 1983 robbed and murdered two victims and burned their house around them, is alive. Howard Douglas, who in 1973 forced his wife to have sex with her boyfriend as he watched, then smashed the man's head in, is alive. Robert Buford, who in 1977 raped and beat a 7-year-old girl to death, is alive. Eddie Lee Freeman, who in 1976 strangled a former nun and dumped her in a river to drown, is alive. Jesse Hall, who in 1975 raped and murdered a teenage girl and killed her boyfriend, is alive. James Rose, who in 1976 raped and murdered an 8-year-old girl in Fort Lauderdale, is alive. Larry Mann, who in 1980 cut a little girl's throat and clubbed her to death as she crawled away, is alive.

And that's just in Florida. The story is the same across the country.

In 1972, Justice Harry Blackmun cast one of the four votes in favor of preserving the death penalty in *Furman v. Georgia*, and he voted with the majority to approve the new laws four years later. For two decades, he stuck to the belief that the death penalty could meet the constitutional test of reliability. But last year Blackmun threw up his hands. "Twenty years have passed since this Court declared that the death penalty must be imposed fairly and with reasonable consistency or not all," he wrote. "... In the years following Furman,

serious efforts were made to comply with its mandate. State legislatures and appellate courts struggled to provide judges and juries with sensible and objective guidelines for determining who should live and who should die... Unfortunately, all this experimentation and ingenuity yielded little of what Furman demanded... It seems that the decision whether a human being should live or die is so inherently subjective, rife with all of life's understandings, experiences, prejudices and passions, that it inevitably defies the rationality and consistency required by the Constitution... I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."

Also last year, an admiring biography of retired Justice Lewis Powell was published. Powell was one of the architects of the modern death penalty. As a swing vote in 1976, he had helped to define the intricate weighing system that restored capital punishment in America. Later, as the deciding vote in a 1987 case, *McCleskey v. Kemp*, Powell had saved the death penalty from the assertion that racial disparities proved the system was still arbitrary. Now Powell was quoted as telling his biographer, "I have come to think that capital punishment should be abolished." The death penalty "brings discredit on the whole legal system," Powell said, because the vast majority of death sentences are never carried out. Biographer John C. Jeffries Jr. had asked Powell if he would like to undo any decisions from his long career. "Yes," the justice answered. "*McCleskey v. Kemp*."

No one has done more than Ray Marky to make a success of the death penalty. As a top aide in the Florida attorney general's office, he worked himself into an early heart attack prosecuting capital appeals. Eventually, he took a less stressful job at the local prosecutor's office, where he watched, dispirited, as the modern death penalty—the law he had helped write and had struggled to enforce—reached its convoluted maturity. One day a potential death penalty case came across his new desk, and instead of pushing as he had in the old days, he advised the victim's mother to accept a life sentence for her son's killer. "Ma'am, bury your son and get on with your life, or over the next dozen years, this defendant will destroy you, as well as your son," Marky told her. Why put the woman through all the waiting, the hearings and the stays, when the odds were heavy that the death sentence would never be carried out? "I never would have said that 15 years ago," Marky reflected. "But now I will, because I'm not going to put someone through the nightmare. If we had deliberately set out to create a chaotic system, we couldn't have come up with anything worse. It's a merry-go-round, it's ridiculous; it's so clogged up only an arbitrary few ever get it.

"I don't get any damn pleasure out of the death penalty and I never have," the prosecutor said. "And frankly, if they abolished it tomorrow, I'd go get drunk in celebration."

Ernest van den Haag



## The Ultimate Punishment: A Defense

**I**n an average year about 20,000 homicides occur in the United States. Fewer than 300 convicted murders are sentenced to death. But because no more than thirty murderers have been executed in any recent year, most convicts sentenced to death are likely to die of old age.<sup>1</sup> Nonetheless, the death penalty looms large in discussions: it raises important moral questions independent of the number of executions.

The death penalty is our harshest punishment. It is irrevocable: it ends the existence of those punished, instead of temporarily imprisoning them. Further, although not intended to cause physical pain, execution is the only corporal punishment still applied to adults. These singular characteristics contribute to the perennial, impassioned controversy about capital punishment.

### I. Distribution

Consideration of the justice, morality, or usefulness, of capital punishment is often conflated with objections to its alleged discriminatory or capricious distribution among the guilty. Wrongly so. If capital punishment is immoral *in se*, no distribution among the guilty could make it moral. If capital punishment is moral, no distribution would make it immoral. Improper distribution cannot affect the quality of what is distributed, be it punishments or rewards. Discriminatory or capricious distribution thus could not justify abolition of the death penalty. Further, maldistribution inheres no more in capital punishment than in any other punishment.

Maldistribution between the guilty and the innocent is, by definition, unjust. But the injustice does not lie in the nature of the punishment. Because of the finality of the death penalty, the most grievous maldistribution occurs when it is imposed upon the innocent. However, the frequent allegations of discrimination and capriciousness refer to maldistribution among the guilty and not to the punishment of the innocent.

Maldistribution of any punishment among those who deserve it is irrelevant to its justice or morality. Even if poor or black convicts guilty of capital offenses suffer capital punishment, and other convicts equally guilty of the

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same crimes do not, a more equal distribution, however desirable, would merely be more equal. It would not be more just to the convicts under sentence of death.

Punishments are imposed on persons, not on racial or economic groups. Guilt is personal. The only relevant question is: does the person to be executed deserve the punishment? Whether or not others who deserved the same punishment, whatever their economic or racial group, have avoided execution is irrelevant. If they have, the guilt of the executed convicts would not be diminished, nor would their punishment be less deserved. To put the issue starkly, if the death penalty were imposed on guilty blacks, but not on guilty whites, or, if it were imposed by a lottery among the guilty, this irrationally discriminatory or capricious distribution would neither make the penalty unjust, nor cause anyone to be unjustly punished, despite the undue impunity bestowed on others.

Equality, in short, seems morally less important than justice. And justice is independent of distributional inequalities. The ideal of equal justice demands that justice be equally distributed, not that it be replaced by equality. Justice requires that as many of the guilty as possible be punished, regardless of whether others have avoided punishment. To let these others escape the deserved punishment does not do justice to them, or to society. But it is not unjust to those who could not escape.

These moral considerations are not meant to deny that irrational discrimination, or capriciousness, would be inconsistent with constitutional requirements. But I am satisfied that the Supreme Court has in fact provided for adherence to the constitutional requirement of equality as much as possible. Some inequality is indeed unavoidable as a practical matter in any system.<sup>2</sup> But, *ultra posse neo obligatur*. (Nobody is bound beyond ability.)

Recent data reveal little direct racial discrimination in the sentencing of those arrested and convicted of murder. The abrogation of the death penalty for rape has eliminated a major source of racial discrimination. Concededly, some discrimination based on the race of murder victims may exist; yet, this discrimination affects criminal victimizers in an unexpected way. Murderers of whites are thought more likely to be executed than murderers of blacks. Black victims, then, are less fully vindicated than white ones. However, because most black murderers kill blacks, black murderers are spared the death penalty more often than are white murderers. They fare better than most white murderers. The motivation behind unequal distribution of the death penalty may well have been to discriminate against blacks, but the result has favored them. Maldistribution is thus a straw man for empirical as well as analytical reasons.

## II. Miscarriages of Justice

In a recent survey Professors Hugo Adam Bedau and Michael Radelet found that 7000 persons were executed in the United States between 1900 and 1985 and that 25 were innocent of capital crimes. Among the innocents they list Sacco and Vanzetti as well as Ethel and Julius Rosenberg. Although their data may be



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questionable, I do not doubt that, over a long enough period, miscarriages of justice will occur even in capital cases.

Despite precautions, nearly all human activities, such as trucking, lighting, or construction, cost the lives of some innocent bystanders. We do not give up these activities, because the advantages, moral or material, outweigh the unintended losses. Analogously, for those who think the death penalty just, miscarriages of justice are offset by the moral benefits and the usefulness of doing justice. For those who think the death penalty unjust even when it does not miscarry, miscarriages can hardly be decisive.

### III. Deterrence

Despite much recent work, there has been no conclusive statistical demonstration that the death penalty is a better deterrent than are alternative punishments. However, deterrence is less than decisive for either side. Most abolitionists acknowledge that they would continue to favor abolition even if the death penalty were shown to deter more murders than alternatives could deter. Abolitionists appear to value the life of a convicted murderer or, at least, his nonexecution, more highly than they value the lives of the innocent victims who might be spared by deterring prospective murderers.

Deterrence is not altogether decisive for me either. I would favor retention of the death penalty as retribution even if it were shown that the threat of execution could not deter prospective murderers not already deterred by the threat of imprisonment.<sup>3</sup> Still, I believe the death penalty, because of its finality, is more feared than imprisonment, and deters some prospective murderers not deterred by the threat of imprisonment. Sparing the lives of even a few prospective victims by deterring their murderers is more important than preserving the lives of convicted murderers because of the possibility, or even the probability, that executing them would not deter others. Whereas the lives of the victims who might be saved are valuable, that of the murderer has only negative value, because of his crime. Surely the criminal law is meant to protect the lives of potential victims in preference to those of actual murderers.

Murder rates are determined by many factors; neither the severity nor the probability of the threatened sanction is always decisive. However, for the long run, I share the view of Sir James Fitzjames Stephen: "Some men, probably, abstain from murder because they fear that if they committed murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged." Penal sanctions are useful in the long run for the formation of the internal restraints so necessary to control crime. The severity and finality of the death penalty is appropriate to the seriousness and the finality of murder.

### IV. Incidental Issues: Cost, Relative Suffering, Brutalization

Many nondecisive issues are associated with capital punishment. Some believe that the monetary cost of appealing a capital sentence is excessive. Yet most

comparisons of the cost of life imprisonment with the cost of execution, apart from their dubious relevance, are flawed at least by the implied assumption that life prisoners will generate no judicial costs during their imprisonment. At any rate, the actual monetary costs are trumped by the importance of doing justice.

Others insist that a person sentenced to death suffers more than his victim suffered, and that this (excess) suffering is undue according to the *lex talionis* (rule of retaliation). We cannot know whether the murderer on death row suffers more than his victim suffered; however, unlike the murderer, the victim deserved none of the suffering inflicted. Further, the limitations of the *lex talionis* were meant to restrain private vengeance, not the social retribution that has taken its place. Punishment—regardless of the motivation—is not intended to revenge, offset, or compensate for the victim’s suffering, or to be measured by it. Punishment is to vindicate the law and the social order undermined by the crime. This is why a kidnapper’s penal confinement is not limited to the period for which he imprisoned his victim; nor is a burglar’s confinement meant merely to offset the suffering or the harm he caused his victim; nor is it meant only to offset the advantage he gained.<sup>4</sup>

Another argument heard at least since Beccaria is that, by killing a murderer, we encourage, endorse, or legitimize unlawful killing. Yet, although all punishments are meant to be unpleasant, it is seldom argued that they legitimize the unlawful imposition of identical unpleasantness. Imprisonment is not thought to legitimize kidnapping; neither are fines thought to legitimize robbery. The difference between murder and execution, or between kidnapping and imprisonment, is that the first is unlawful and undeserved, the second a lawful and deserved punishment for an unlawful act. The physical similarities of the punishment to the crime are irrelevant. The relevant difference is not physical, but social.<sup>5</sup>

## V. Justice, Excess, Degradation

We threaten punishments in order to deter crime. We impose them not only to make the threats credible but also as retribution (justice) for the crimes that were not deterred. Threats and punishments are necessary to deter and deterrence is a sufficient practical justification for them. Retribution is an independent moral justification. Although penalties can be unwise, repulsive, or inappropriate, and those punished can be pitiable, in a sense the infliction of legal punishment on a guilty person cannot be unjust. By committing the crime, the criminal volunteered to assume the risk of receiving a legal punishment that he could have avoided by not committing the crime. The punishment he suffers is the punishment he voluntarily risked suffering and, therefore, it is no more unjust to him than any other event for which one knowingly volunteers to assume the risk. Thus, the death penalty cannot be unjust to the guilty criminal.

There remain, however, two moral objections. The penalty may be regarded as always excessive as retribution and always morally degrading. To regard the death penalty as always excessive, one must believe that no crime

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—no matter how heinous—could possibly justify capital punishment. Such a belief can be neither corroborated nor refuted; it is an article of faith.

Alternatively, or concurrently, one may believe that everybody, the murderer no less than the victim, has an imprescriptible (natural?) right to life. The law therefore should not deprive anyone of life. I share Jeremy Bentham's view that any such "natural and imprescriptible rights" are "nonsense upon stilts."

Justice Brennan has insisted that the death penalty is "uncivilized," "inhuman," inconsistent with "human dignity" and with "the sanctity of life," that it "treats members of the human race as nonhumans, as objects to be toyed with and discarded," that it is "uniquely degrading to human dignity" and "by its very nature, [involves] a denial of the executed person's humanity." Justice Brennan does not say why he thinks execution "uncivilized." Hitherto most civilizations have had the death penalty, although it has been discarded in Western Europe, where it is currently unfashionable probably because of its abuse by totalitarian regimes.

By "degrading," Justice Brennan seems to mean that execution degrades the executed convicts. Yet philosophers, such as Immanuel Kant and G. F. W. Hegel, have insisted that, when deserved, execution, far from degrading the executed convict, affirms his humanity by affirming his rationality and his responsibility for his actions. They thought that execution, when deserved, is required for the sake of the convict's dignity. (Does not life imprisonment violate human dignity more than execution, by keeping alive a prisoner deprived of all autonomy?)

Common sense indicates that it cannot be death—or common fate—that is inhuman. Therefore, Justice Brennan must mean that death degrades when it comes not as a natural or accidental event, but as a deliberate social imposition. The murderer learns through his punishment that his fellow men have found him unworthy of living; that because he has murdered, he is being expelled from the community of the living. This degradation is self-inflicted. By murdering, the murderer has so dehumanized himself that he cannot remain among the living. The social recognition of his self-degradation is the punitive essence of execution. To believe, as Justice Brennan appears to, that the degradation is inflicted by the execution reverses the direction of causality.

Execution of those who have committed heinous murders may deter only one murder per year. If it does, it seems quite warranted. It is also the only fitting retribution for murder I can think of.

## Notes

1. Death row as a semipermanent residence is cruel, because convicts are denied the normal amenities of prison life. Thus, unless death row residents are integrated into the prison population, the continuing accumulation of convicts on death row should lead us to accelerate either the rate of executions or the rate of commutations. I find little objection to integration.
2. The ideal of equality, unlike the ideal of retributive justice (which can be approximated separately in each instance), is clearly unattainable unless all guilty persons are apprehended, and thereafter tried, convicted and sentenced by the same court,

at the same time. Unequal justice is the best we can do; it is still better than the injustice, equal or unequal, which occurs if, for the sake of equality, we deliberately allow some who could be punished to escape.

3. If executions were shown to increase the murder rate in the long run, I would favor abolition. Sparing the innocent victims who would be spared, *ex hypothesi*, by the nonexecution of murderers would be more important to me than the execution, however just, of murderers. But although there is a lively discussion of the subject, no serious evidence exists to support the hypothesis that executions produce a higher murder rate. Cf. Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, 86 AM. J. Soc. 139 (1980) (arguing that murder rates drop immediately after executions of criminals).
4. Thus restitution (a civil liability) cannot satisfy the punitive purpose of penal sanctions, whether the purpose be retributive or deterrent.
5. Some abolitionists challenge: if the death penalty is just and serves as a deterrent, why not televise executions? The answer is simple. The death even of a murderer, however well-deserved, should not serve as public entertainment. It so served in earlier centuries. But in this respect our sensibility has changed for the better, I believe. Further, television unavoidably would trivialize executions, wedged in, as they would be, between game shows, situation comedies and the like. Finally, because televised executions would focus on the physical aspects of the punishment, rather than the nature of the crime and the suffering of the victim, a televised execution would present the murderer as the victim of the state. Far from communicating the moral significance of the execution, television would shift the focus to the pitiable fear of the murderer. We no longer place in cages those sentenced to imprisonment to expose them to public view. Why should we so expose those sentenced to execution?





## POSTSCRIPT

### Is Capital Punishment Bad Policy?

One of the most striking elements about the issue of capital punishment is that most of the public, the politicians, and even many criminological scholars do not seem to be fazed by empirical evidence. Each side marshalls empirical evidence to support its respective position. Opponents of capital punishment often draw from Thorsten Sellin's classic study *The Penalty of Death* (Sage Publications) to "prove" that the number of capital offenses is no lower in states that have the death penalty as compared to states that have abolished executions.

Almost all of the major presidential candidates in early 2000 support the death penalty. In fact, most political candidates seem to support capital punishment nowadays. Supporters of capital punishment draw from numerous studies, including I. Ehrlich's "The Deterrent Effect of Capital Punishment," *American Economic Review* (vol. 65, 1975), pp. 397-417, and his "Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence," *Journal of Political Economy* (vol. 85, 1977), pp. 741-788. They also draw from W. Berns's *For Capital Punishment: Crime and the Morality of the Death Penalty* (Basic Books, 1979).

Generally, the empirical research indicates that the death penalty cannot conclusively be proven to deter others from committing homicides and other serious crimes. Entire scientific commissions have been charged with the responsibility of determining the deterrent effects of the death penalty (for example, the National Academy of Sciences in 1975). The gist of their conclusions was that the value of the death penalty as a deterrent "is not a settled matter."

As is typical with most aspects of human behavior, including crime and crime control, the issue is filled with much irony, paradox, and contradiction. First, clashing views over capital punishment rely largely on emotion. The public's attitudes, politicians' attitudes, and even scholarly attitudes are frequently shaped more by sentiment and preconceived notions than by rational discourse. As F. Zimring and G. Hawkins indicate in *Capital Punishment and the American Agenda* (Cambridge University Press, 1986), very few scholars have ever changed their opinions about capital punishment.

However, a remarkable transformation occurred in February 2000: Governor George Ryan (R-Illinois) stopped executions in his state after 13 condemned criminals were exonerated while on death row. Twelve inmates had been executed in Illinois since 1976. Ryan and others now wonder if perhaps some of them had been innocent as well.

As we enter the twenty-first century, capital punishment remains a divisive issue. And despite dramatic opposition, such as Governor Ryan's, it probably has growing support. One useful, recent work in strong opposition to the practice is A. Sarat, ed., *The Killing State: Capital Punishment in Law, Politics,*

*and Culture* (Oxford University Press, 1998). Also see "The Cruel and Ever More Unusual Punishment," *The Economist* (May 15, 1999).

An interesting book that looks at both sides of the issue is *The Death Penalty: For and Against* (Rowman & Littlefield, 1997), with J. Reiman attacking and coauthor L. Pojman defending executions as retribution. An empirical study of a neglected aspect of the issue is "An Empirical Examination of Commutations and Executions in Post-Furman Capital Cases," by W. Pridemore, *Justice Quarterly* (March 2000). Another series of research articles can be found in the issue of *Criminal Justice Policy Review* entitled "Special Issue on the Death Penalty" (vol. 10, no. 1, 1999). A recent work by a longtime critic of capital punishment is R. M. Bohn's *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States* (Anderson, 1999).

For a take on Hollywood's many films on executions, see "Death Row, Aisle Seat," by A. Sarat, *The American Prospect* (February 14, 2000). A good overview dealing with women and the death penalty is K. A. O'Shea's *Women and the Death Penalty in the United States, 1900-1998* (Greenwood, 1999). In addition to the many studies by Victor Streib on executing children, see *A Review of Juvenile Executions in America* by R. L. Hale (Edwin Mellen Press, 1997). A concise overview of relevant statistics through December 1999 is *Capital Punishment 1998*, a Bureau of Justice Statistics Bulletin (December 1999).

Two studies of the deterrence issue are "Capital Punishment and the Deterrence of Violent Crime in Comparable Countries," by D. Cheatwood, *Criminal Justice Review* (August 1993) and "Deterrence or Brutalization?" by J. Cochran et al., *Criminology* (February 1994). For a survey of the attitudes toward capital punishment among politicians, see M. Sandys and E. McGarrell, "Attitudes Toward Capital Punishment Among Indiana Legislators," *Justice Quarterly* (December 1994). A popular media account of a death penalty sentence given to a mentally impaired individual is "Untrue Confessions," by J. Smolowe, *Time* (May 22, 1995). An interesting comparison of the effects of publicized executions on whites and blacks is "The Impact of Publicized Executions on Homicide," by S. Stack, *Criminal Justice and Behavior* (June 1995). The *Bureau of Justice Statistics Bulletin* routinely updates death penalty statistics. For an outstanding description of death row, see Von Drehle's *Among the Lowest of the Dead: The Culture of Death Row* (Times Books, 1995).

L. K. Gillespie's *Dancehall Ladies: The Crimes and Executions of America's Condemned Women* (University Press of America, 1997) is a solid historical discussion. D. A. Cabana's *Death at Midnight: The Confessions of an Executioner* (Northeast University Press, 1996) is an insightful insider's account. A helpful legal overview is *Death Penalty Cases: Leading U.S. Supreme Court Cases on Capital Punishment* by B. Latzer (Butterworth-Heinemann, 1998). Finally, two outstanding articles that provide both historical and theoretical background for understanding violence and capital punishment as an extension of inequalities maintenance are Roberta Senechal de la Roche, "Collective Violence As Social Control," *Sociological Forum* (March 1996) and "The Sociogenesis of Lynching," in W. F. Brundage, ed., *Under Penalty of Death: Essays on Lynching in the South* (University of North Carolina Press, 1997).