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# Does Capital Punishment Have a Future? : A Resource Guide for Teachers

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# Does Capital Punishment Have a Future?

A RESOURCE GUIDE FOR TEACHERS



Youth Summit  
.....ONLINE.....

**ABA**  
Defending Liberty  
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AMERICAN BAR ASSOCIATION

DIVISION FOR  
**PUBLIC  
EDUCATION**





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Office of Juvenile Justice and  
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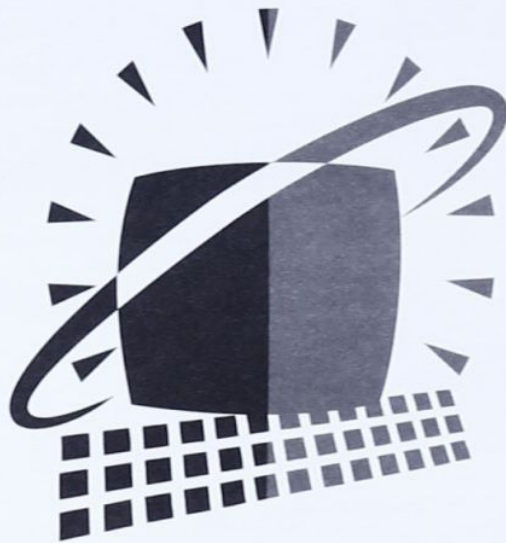
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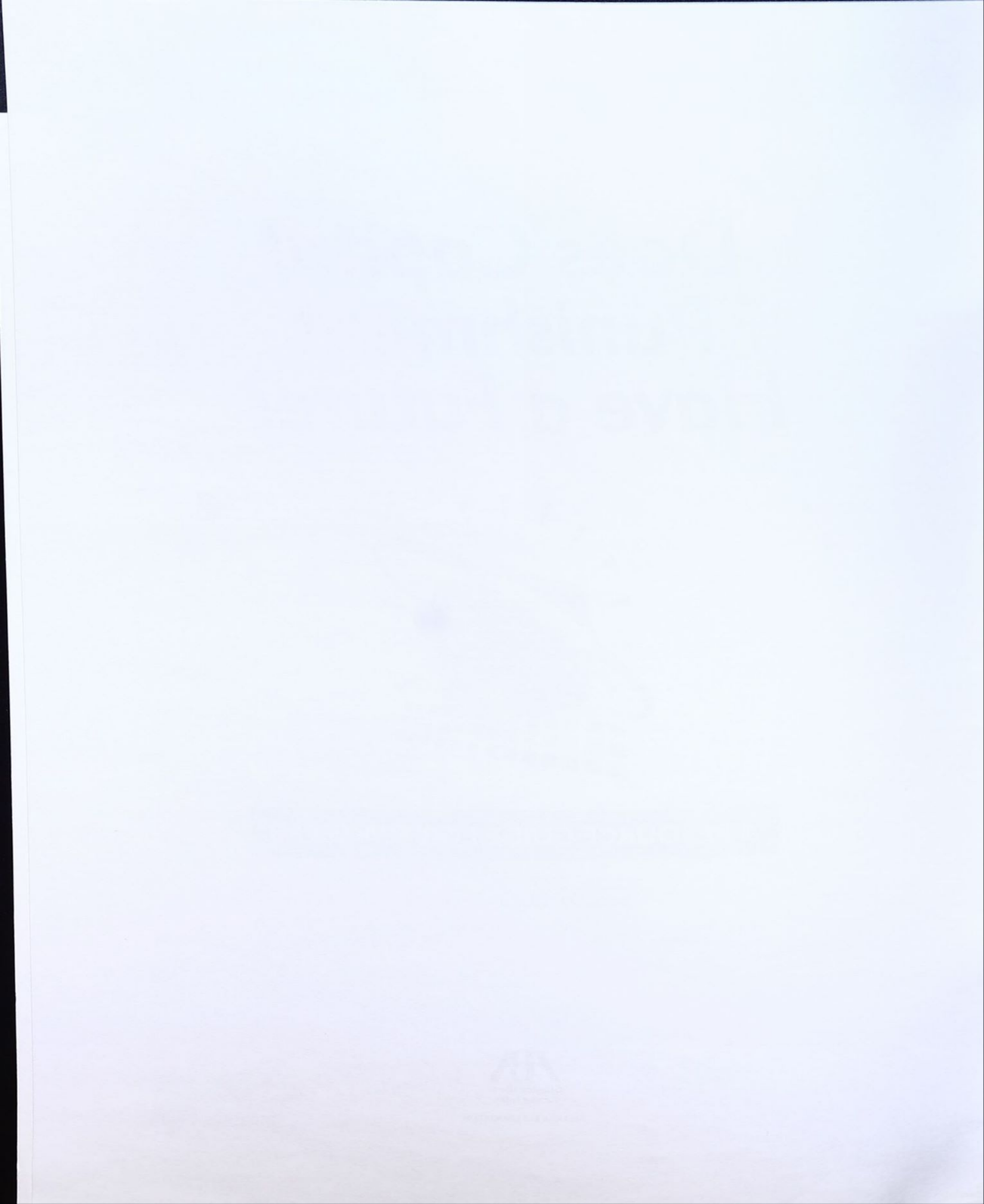


**A RESOURCE GUIDE FOR TEACHERS**

by David L. Hudson, Jr.



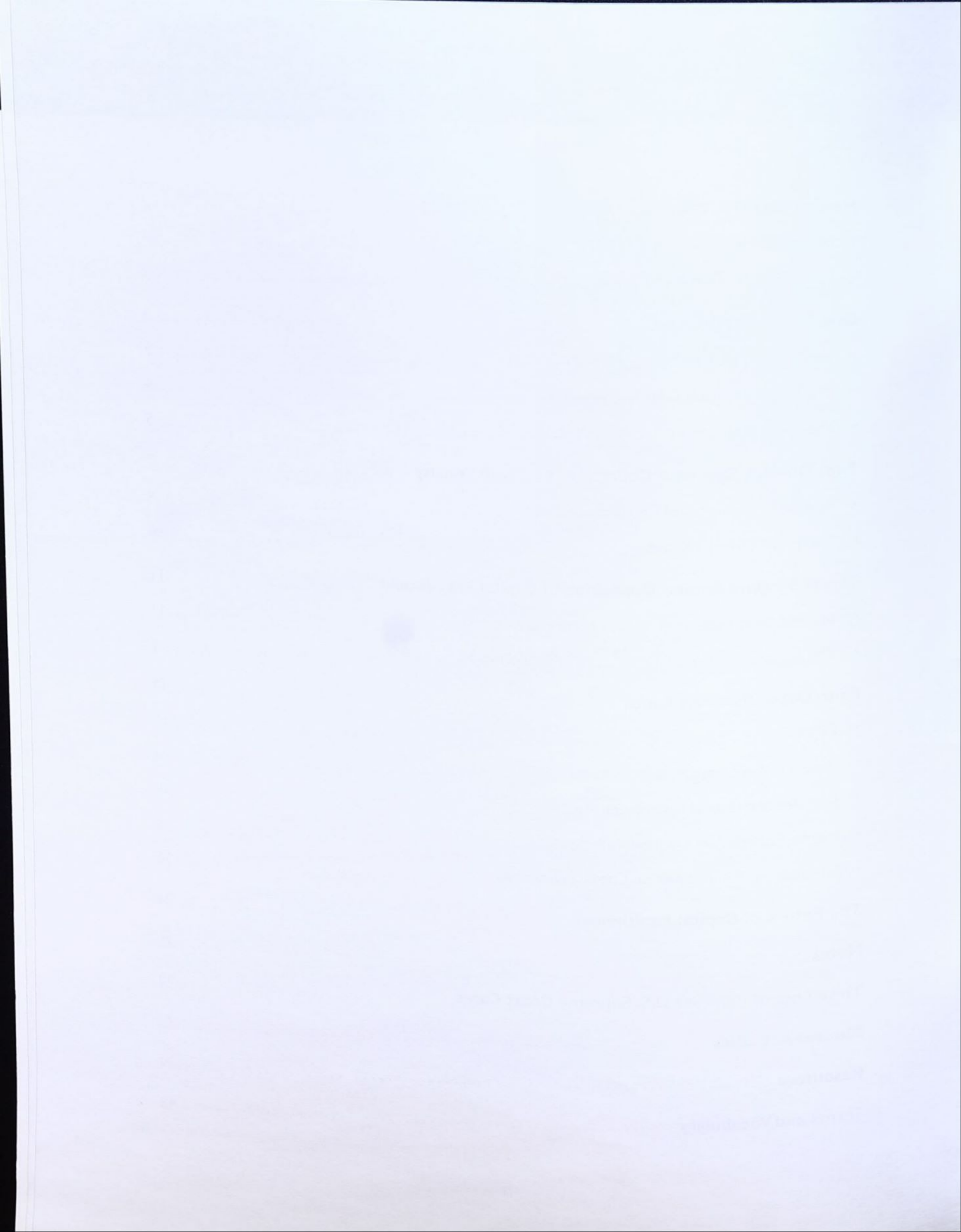
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# Table of Contents

<b>How to Use This Resource Guide</b> .....	1
• Introduction .....	1
• Organization of Resource Guide .....	2
<b>One: Historical Context</b> .....	3
• Colonial America and the Eighteenth Century .....	3
• The Nineteenth and Early Twentieth Centuries .....	4
• The Twentieth Century and Beyond .....	5
<b>Two: The U.S. Supreme Court and the Death Penalty</b> .....	7
• Redefining the Terms of Capital Punishment .....	8
• The New Terms Outlined .....	9
<b>Three: Support for and Opposition to Capital Punishment</b> .....	11
• Arguments in Support of Capital Punishment .....	11
• The Arguments of the Contemporary Moratorium Movement .....	11
<b>Four: Other Relevant Issues</b> .....	13
• DNA Testing .....	13
• Race and the Death Penalty .....	14
• Juveniles and Capital Punishment .....	16
• Mental Retardation and the Death Penalty .....	19
• International Perspectives on Capital Punishment .....	22
<b>The Future of Capital Punishment</b> .....	24
<b>Notes</b> .....	25
<b>Time Line of Relevant U.S. Supreme Court Cases</b> .....	28
<b>Student Activities</b> .....	32
<b>Resources</b> .....	39
<b>Terms and Vocabulary</b> .....	43





# How to Use This Resource Guide

## Introduction

Perhaps no issue creates more controversy in the United States than capital punishment. The U.S. Supreme Court said it best: "Death is different."<sup>1</sup> Some maintain that the death penalty rightfully punishes the worst murderers and vindicates victims' rights. They argue that the death penalty will deter future crimes and protect society from those who have forfeited their right to live peacefully with others. Others contend that the death penalty increases the cycle of violence, makes the state a murderer, does not deter crime, and weakens the moral fiber of the country. Still others say that, while they do not support the death penalty, they do not view it as unconstitutional and believe that states have the constitutional right to execute convicted murderers.

Public opinion polls routinely show that a majority of Americans support the death penalty. Many politicians and candidates publicly declare their support for capital punishment. According to scholar Austin Sarat, the country "remain[s] committed to state killing in the face of increasing doubts about the reliability and fairness of the criminal justice system, criticism in the international arena and long after almost all other democratic nations have abandoned it."<sup>2</sup> On the other hand, proponents argue that the death penalty is morally defensible. They point out that the long legal procedural process involved in a death sentence ensures due process and sufficient judicial review of convictions.

In 2002, the death penalty debate centered around high-profile defendants such as Andrea Yates, convicted of killing her five children, and alleged Al Qaeda co-conspirator Zacarias Moussaoui. Also in 2002, the highest court in the United States, the U.S. Supreme Court, ruled that mentally retarded criminals could not be executed and that the U.S. Constitution requires that juries, not judges, make death penalty determination.<sup>3</sup>

The governors of Illinois and Maryland halted executions in their states, after the release of innocent men from death row and concerns over the role race plays in the ultimate punishment. Outgoing Governor George Ryan of Illinois took the unprecedented step in January 2003 of issuing a "blanket commutation"—removing all inmates in the state from death row. In addition, a federal judge in New York, Judge Jed S. Rakoff, ruled in *United States v. Quinones*, 205 F.Supp. 2d 256 (N.Y.S.D. 2002) that the Federal Death Penalty Act was unconstitutional. A federal appeals court reversed his ruling in December 2002.

As long as the United States continues to debate whether capital punishment should have a future in the American justice system, there exists a continued need to educate young people about the death penalty.



### ● **Organization of Resource Guide**

This resource guide is intended to help teachers lead students through an exploration of the application of capital punishment in the United States. It offers substantive information about landmark U.S. Supreme Court cases affirming the constitutionality of the death penalty, establishing limits for its imposition, and setting legal procedures for judicial review. It explores the philosophical arguments for and against the death penalty, the social context for the death penalty debate, and current international perspectives. Understanding capital punishment and the issues it raises for the American legal system is necessary for students to become fully functioning citizens in a constitutional democracy.

This guide includes the following topical sections:

- Historical Context
- The U.S. Supreme Court and the Death Penalty
- Support for and Opposition to Capital Punishment
- DNA Testing
- Race and the Death Penalty
- Juveniles and Capital Punishment
- Mental Retardation and the Death Penalty
- International Perspectives on Capital Punishment

The guide also features a section providing additional teaching resources, important terms and vocabulary, a Time Line of relevant U.S. Supreme Court cases, and discussion questions and teaching activities to spark students' interest in learning more about this provocative issue.



# One: Historical Context

## Historical Context

Capital punishment has a long history. The Hammurabi Code of ancient Babylon (located about 50 miles from present-day Baghdad, Iraq) in the eighteenth century B.C. provided for a variety of methods of death for crimes ranging from adultery to stealing slaves. In 621 B.C., the Athenian lawmaker Draco passed the harsh Draconian Code, which punished nearly all offenses with death. Ancient Roman law also included the death penalty.

Throughout the Middle Ages, executions were common events attended by large masses of people. England's criminal code in the eighteenth century was incredibly harsh by today's standards. One death penalty historian writes: "Over the course of the eighteenth century England's criminal code became the harshest in Europe."<sup>4</sup> For example, under English law certain property crimes were punishable by death.

## Colonial America and the Eighteenth Century

The early American colonies applied the death penalty more moderately than it was applied in England. Historian Lawrence Friedman writes: "In England, men and women hung from the gallows for theft, robbery, burglary; in the colonies this was exceptionally rare."<sup>5</sup>

The colonies did apply the death penalty, however, to many crimes that would seem out of proportion to the punishment today. Counterfeiting was punishable by death in Pennsylvania in the early part of the eighteenth century. Adultery was a capital crime in Connecticut, Massachusetts, and New Hampshire. Smuggling tobacco in Virginia was a capital offense, and slaves could be executed for administering medicine. Virginia defined 73 types of crimes punishable by death for slaves, but only one crime, murder, brought the same penalty to whites.<sup>6</sup>

In the eighteenth century, capital punishment was applied to many crimes other than first-degree murder. Legal historian Stuart Banner writes: "The death penalty circa 1700 was the equivalent of prison today—the standard punishment for a wide range of serious crimes."<sup>7</sup> Not only was the death penalty more common than in the present day, but executions in the 1700s and early 1800s were spectator events. Friedman refers to them as "box office hits."<sup>8</sup> Literally tens of thousands would gather to watch a condemned criminal hanged from the gallows. Many flocked not only to see the criminal hang but also to listen to the long religious sermons that accompanied the hanging. The religious sermons sought to teach the people about the dangers of sin and crime and the necessity of public order.

**"The death penalty circa 1700 was the equivalent of prison today—the standard punishment for a wide range of serious crimes."**

*Stuart Banner, **The Death Penalty: An American History***

## One: Historical Context (Continued)

During the eighteenth century, some philosophers and other people began to question the use of the death penalty. The most well-known Western opponent of the death penalty was an Italian philosopher named Cesare Beccaria. His 1764 treatise *Essay on Crimes and Punishments* was published in numerous countries, including the United States. Beccaria wrote that “the punishment of death is pernicious to society from the example of barbarity it affords.” He also argued that the death penalty did not deter crime and that imprisonment was the proper way to deal with criminals.

Beccaria was a product of a period of history known as the Enlightenment, or the Age of Enlightenment. This intellectual movement, which spread throughout Western Europe (and the colonies) from the late seventeenth century through the eighteenth century, emphasized the power of human reasoning to understand the world. Influenced by the progress made by scientists, Enlightenment philosophers such as Jean Jacques Rousseau and Voltaire sought to apply more scientific thinking to a range of social issues to bring about a greater understanding of society, politics, and people.

Thomas Jefferson and other leading Americans were persuaded by Beccaria’s writings on the death penalty. Jefferson advocated ending the death penalty for all crimes except murder and treason. Pennsylvanian Benjamin Rush, a doctor who signed the Declaration of Independence, argued for abolition of capital punishment in the late eighteenth century. Several states, beginning with Massachusetts, built their first prisons in the 1780s. In addition, between 1794 and 1798, five states abolished the death penalty for all crimes other than murder. However, the general understanding at the time of the founders was that the death penalty was not cruel and unusual punishment under the Eighth Amendment.

**The general understanding at the time of the founders was that the death penalty was not cruel and unusual punishment.**

Beginning in the 1790s, many American states began to reduce the number of capital offenses. Banner writes: “[T]he gradual abolition of the capital punishment for lesser crimes was increasingly understood as a mark of the new nation’s progress.”<sup>9</sup> It also coincided with another major development—the advent of prisons. Beccaria had argued that prison sentences would be a more effective deterrent to crime than capital punishment. “The new prisons, it was widely thought, would prevent crime more successfully than did capital punishment,” according to Banner.<sup>10</sup>

### The Nineteenth and Early Twentieth Centuries

In the middle of the nineteenth century, a few states abolished the death penalty. In 1846, Michigan became the first state to actually abolish it. Rhode Island followed suit in 1852 and Wisconsin in 1853. Tennessee governor John Sevier asked for the abolishment of the death penalty in Tennessee in 1807. Between 1907 and 1917, nine other states abolished it.<sup>11</sup>

Also during the nineteenth century, many northern states, beginning with Connecticut in 1830, began to move executions from the public square to the jail yard. There were several reasons for the movement away from the public execution. Some argued that public hangings could cause sympathy for criminals, particularly criminals who did not commit murder. Others argued that a public execution, a form of state-sponsored violence, desensitized the public to violence or made people more prone to commit violent acts. Furthermore, many states began to look for other ways to execute criminals. Hangings often resulted in a long, prolonged death or would lead to decapitation of the head from the body. Hangings were seen as anachronistic. Many wanted to find what authors Robert Lifton and Greg Mitchell called “the ultimate oxymoron—the humane killing.”<sup>12</sup> Many people came to believe that hanging was barbaric. They advocated a form of execution that would cause less pain for the prisoner and would be less troubling to those who witnessed the execution.<sup>13</sup>

In the 1880s, New York officials began to study a less painful execution method. The method studied was death by electric shock. A new term was coined—*electrocution*—by combining the words *electricity* and *execution*. In 1890, William Kemmler of New York became the first person to die in the electric chair. The U.S. Supreme Court had ruled earlier that year in *In Re Kemmler*, 136 U.S. 436 (1890), that death by electrocution was not cruel and unusual punishment. Years earlier the Court had ruled that death by shooting was not cruel and unusual punishment. Today, only the state of Utah implements execution by shooting. Nevada became the first state to adopt the gas chamber in 1921. The last state-sanctioned public hanging in the United States was held in Kentucky in 1936. Later in the twentieth century, lethal injection became a common method of execution, and today, most states use lethal injection.

### The Twentieth Century and Beyond

Prohibition, World War I, and the Great Depression led to a resurgence in the application of the death penalty in the 1920s and 1930s. The United States became concerned about politically motivated crime, particularly those crimes committed by individuals or ethnic groups popularly thought to be associated with fascist, anarchist, or communist political affiliations.

Perhaps the most well-known political death penalty case of the period involved the execution of two Italian anarchists, Nicola Sacco and Bartolomeo Vanzetti in 1927. The two men were immigrants who worked as a shoe worker and fish peddler, respectively. They were accused of murdering a paymaster and security guard during the theft of \$15,000 from a shoe factory in South Braintree, Massachusetts, in 1920. The evidence against them was very circumstantial, or nondirect. A jury convicted them in 1921, causing international outrage. Although another man later confessed to the crime, efforts to secure a new trial for Sacco and Vanzetti were unsuccessful.<sup>14</sup>

Also during the early twentieth century, concern about organized crime led many states to consider punishing armed robbers and burglars with death.<sup>15</sup> The kidnapping of the Lindbergh baby by Bruno Hauptmann led some states to make kidnapping a capital crime. Executions reached their peak in the twentieth century in America in 1935 with 199 reported executions.<sup>16</sup>

However, in the 1950s and 1960s, the pendulum swung the other way, as people began to question the use of the death penalty. Many believed that the execution of Julius and Ethel Rosenberg for espionage was unjust and influenced by anti-Semitism and that Ethel Rosenberg's guilt, in particular, was questionable. California inmate Caryl Chessman became an international celebrity, in part because he wrote four books during his 12 years on death row before his execution in 1960. His first book, an autobiography titled *Cell 2455, Death Row*, became an international hit.

**In 1966, for the first and only time, a national poll showed that death penalty opponents outnumbered the proponents 47 percent to 42 percent.**

In 1966, for the first and only time, a national poll showed that death penalty opponents outnumbered the proponents 47 percent to 42 percent.<sup>17</sup> In 1965, the U.S. Department of Justice called for the abolition of the death penalty.<sup>18</sup> The Attorney General at the time, Ramsey Clark, believed that the death penalty was not imposed fairly. His famous quote, cited by former U.S. Supreme Court Justice William Douglas, was: "It is the poor, the sick, the ignorant, the powerless and the hated who are executed."<sup>19</sup>

A number of countries began abolishing the death penalty during the twentieth century, including Canada in 1967 and Great Britain in 1969. Mexico's last execution was in 1937. Many countries stopped executing people after World War II.<sup>20</sup> Historian Banner writes: "By the late 1960s, the United States was one of the very few nations in North America or Western Europe that still practiced capital punishment."<sup>21</sup>

Thirty-eight states currently have capital punishment statutes. More than 3,600 inmates sit on death row. Several states have recently executed their first prisoner since the 1960s. On April 19, 2000, the state of Tennessee carried out its first execution in 40 years. On November 6, 2001, New Mexico carried out its first execution in more than 40 years. Banner summarizes: "By the end of the 20th century, capital punishment would be back with a vengeance."<sup>22</sup>



## Two: The U.S. Supreme Court and the Death Penalty

Death penalty proponents have criticized the protracted legal appeals process involved in capital punishment cases. The cases are often lengthy, winding their way through various trial and appellate courts in both the state and federal systems. The last hope in a judicial forum for a person convicted of a capital offense remains the court of last resort—the U.S. Supreme Court. The U.S. Supreme Court has issued many decisions over the years regarding the death penalty. In 2002, the Court continued its tradition of reviewing several constitutional claims made by death-row inmates. It ruled in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the state of Virginia could not execute a mentally retarded inmate. It also struck down the state of Arizona's procedure of having a judge—rather than a jury—impose a death sentence in *Ring v. Arizona*, 536 U.S. 584 (2002), on the grounds that the Sixth Amendment, which guarantees criminal defendants a right to a jury trial, requires a jury to determine if sufficient aggravating factors exist to warrant a death sentence.

In the late nineteenth century, the validity of capital punishment was not questioned. The high court focused on whether certain methods of execution constituted cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution, which prohibits cruel and unusual punishment. For example, in 1878, the Court ruled in *Wilkerson v. Utah*, 99 U.S. 130, that execution by shooting was constitutional. The high court contrasted shooting with other methods of execution that it likened to torture, such as disembowelment, beheading, public dissection, and burning, all of which would violate the Constitution.

In 1890, the Court rejected the claims of William Kemmler in *In Re Kemmler*, 136 U.S. 436, that death by electrocution violated his constitutional rights under the Eighth and Fourteenth Amendments. The state of New York had sought to devise a more humane way of executing prisoners, believing that hanging was too barbarous. The method they chose was electrocution. Kemmler argued that death by electrocution was unconstitutional, in part because death by this new method was unusual.

The high court rejected Kemmler's claim, noting that death by electrocution may be unusual but it was not cruel or unconstitutional. The Court wrote: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution."<sup>23</sup>

Beginning in the twentieth century, the Court reasoned that certain punishments could violate the Eighth Amendment if they were disproportionate to the committed offense. In *Weems v. United States*, 217 U.S. 349 (1910), the high court ruled that an American officer's sentence of 15 years hard labor for falsifying a government document was cruel and thus violated the Eighth Amendment.

**Beginning in the twentieth century, the Court reasoned that certain punishments could violate the Eighth Amendment if they were disproportionate to the committed offense.**

The Court expanded its interpretation in *Weems* of the Eighth Amendment in another nondeath penalty case—*Trop v. Dulles*, 356 U.S. 86 (1958). In this decision, the high court ruled that revoking a man's American citizenship for desertion during World War II was cruel and unusual. In oft-cited language that would prove important for later death penalty cases, the high court wrote that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>24</sup> The Court

has determined that it can consider "the work product of state legislatures and sentencing juries" in determining these "evolving standards of decency."<sup>25</sup> For example, if many states have prohibited through legislation the execution of the mentally retarded, then the Court may take such legislation into account in seeking to determine whether the execution of the mentally retarded is challenged by "evolving standards of decency."

### **R**edefining the Terms of Capital Punishment

The movement toward abolition of the death penalty achieved a high mark in American history with the U.S. Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), covering three consolidated cases originating in the states of Georgia and Texas. In a sharply divided Court, five justices ruled that the imposition of the death penalty in these cases violated the Eighth Amendment because insufficient guidance was provided to juries in its application as a sentence. In a rare moment in the history of the Court, all nine justices wrote separate opinions expressing their views. After the *Furman* decision, there were no executions in the United States for more than four years.

Three justices—William Douglas, William Brennan, and Thurgood Marshall—wrote opinions that broadly attacked capital punishment. Justice Douglas wrote that the discretionary nature of states' death penalty laws were "pregnant with discrimination."<sup>26</sup> Justice Douglas believed that race and class biases affected the implementation of the death penalty to the extent of constituting a constitutional violation. Justices Brennan and Marshall reasoned that capital punishment inherently constituted cruel and unusual punishment. Justice Brennan wrote that the death penalty was "condemned as fatally offensive to human dignity."<sup>27</sup> Brennan believed that, by and large, juries were becoming more reluctant to impose the death penalty.

Justice Marshall wrote the most comprehensive opinion of these three justices, tracing the history of the Court's jurisprudence on the death penalty. He cited studies and literature casting doubt on whether capital punishment actually deterred crime. He concluded that the death penalty was "morally unacceptable."<sup>28</sup>

The opinions of Justices Potter Stewart and Byron White were far more narrowly construed than those of Douglas, Brennan, and Marshall. Justice Stewart wrote that the death penalty was imposed too randomly, writing: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."<sup>29</sup> White reasoned similarly, writing: "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."<sup>30</sup> These two justices did not state that the death penalty in and of itself violated the Constitution. Their position was that the state laws at issue simply did not provide sufficient guidance to jurors in capital sentencing.

The effect of the *Furman* decision was immediate: 600 death-row inmates had their death sentences set aside. Their convictions remained, but new sentencing hearings would be required if the state wished to impose the death penalty in these cases. This meant that state legislatures would have to go back to the drawing board and draft new capital sentencing laws.

### The New Terms Outlined

The *Furman* decision "touched off the biggest flurry of capital punishment legislation the nation had ever seen."<sup>31</sup> By 1976, 35 states had passed new death penalty statutes.

Many of the new death penalty statutes were written to ensure that juries had guidelines about when the death penalty could be imposed. The majority of the Court in *Furman* had expressed concern in their opinions that the death penalty was administered too arbitrarily. The state of Georgia and other states, therefore, amended their statutes so that juries would have more guidance when imposing a death sentence. The new statutes sought to limit the death penalty to cases in which the jury found so-called "aggravating factors," such as whether the crime was committed in the course of another felony or whether it was committed upon a peace officer or judicial officer. The new statutes also provided juries with guidance about mitigating factors—aspects of a defendant's character or circumstances of a crime that might warrant a sentence other than death. (For further discussion of aggravating factors, see the Terms and Vocabulary section.)

In 1976, the Court examined the constitutionality of Georgia's new death penalty statute in *Gregg v. Georgia*, 428 U.S. 153 (1976). Justice Potter Stewart, who had voted against the state's death penalty law in *Furman*, ruled in the *Gregg* case that Georgia's new statute complied with the Constitution by focusing the jury's attention on the "particularized nature of the crime and the particularized characteristics of the individual defendant."<sup>32</sup> By focusing on aggravating and mitigating factors, Stewart wrote: "[n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."<sup>33</sup>

**Many of the new death penalty statutes were written to ensure that juries had guidelines about when the death penalty could be imposed.**

The *Gregg* decision provided a blueprint to legislators on how to draft death penalty laws that would survive constitutional review. Since the Court's decision in *Gregg*, capital punishment has remained intact in the vast majority of states.

Subsequently, the Court has ruled in numerous death penalty cases. In some cases, it has struck down the use of death sentences under particular circumstances. For instance, the high court ruled that the death penalty is an excessive punishment for the crime of rape in *Coker v. Georgia*, 433 U.S. 584 (1977). It ruled that trial court judges must allow death penalty defendants to submit mitigating evidence in *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Court has also prohibited states from executing insane inmates with its decision in *Ford v. Wainwright*, 477 U.S. 399 (1986).



## Two: The U.S. Supreme Court and the Death Penalty (Continued)

In other rulings, the Court has upheld death sentences and rejected constitutional challenges. For example, in *Tison v. Arizona*, 481 U.S. 137 (1987), the Court ruled that a defendant can be sentenced to death for participating in a felony that results in murder, even if he did not commit the murder. The Court has also ruled that a victim's family members may testify at death penalty sentencing proceedings in *Payne v. Tennessee*, 501 U.S. 808 (1991). Chief Justice William Rehnquist wrote in *Herrera v. Collins*, 506 U.S. 390 (1993), that "a claim of 'actual innocence' is not itself a constitutional claim." In that controversial ruling, Rehnquist, writing for the majority, reasoned that a claim of actual innocence would not entitle a death-row inmate to a new hearing "absent an independent constitutional violation occurring in the underlying state criminal proceeding."<sup>34</sup>

Since 1976, the Court has ruled that the death penalty is generally constitutional. However, some individual justices have expressed views that the death penalty is unconstitutional, most notably Justices William Brennan and Thurgood Marshall, who consistently dissented in every death penalty case subsequent to *Furman*. In addition, in 2002 the Court ruled that executions of mentally retarded individuals violate the Eighth Amendment.

Toward the end of his tenure, in 1994 Justice Harry Blackmun, who had ruled in favor of the state in *Gregg v. Georgia*, changed his position in *Callins v. Collins*.<sup>35</sup> While the rest of the Court voted to uphold a death sentence, Blackmun would have granted certiorari, or agreed to hear the case to review the death sentence, writing that capital punishment "remains fraught with arbitrariness, discrimination, caprice and mistake . . ." <sup>36</sup> (For further discussion of certiorari, see Terms and Vocabulary section.) "From this day forward, I no longer shall tinker with the machinery of death," Blackmun wrote in his dissent, adding, "I feel morally and intellectually obligated to concede that the death penalty experiment has failed."<sup>37</sup>

Blackmun's dissent provoked a response from Justice Antonin Scalia, who wrote to reaffirm his belief that the death penalty is constitutional under the "text and tradition of the Constitution."<sup>38</sup> Scalia pointed to the text of the Fifth Amendment, which provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment of a Grand Jury, . . . nor be deprived of life, . . . without due process of law."

In 2001, Justice Sandra Day O'Connor made front-page headlines across the country when, speaking to a women's group in Minneapolis, she said that there exist "serious questions" about the death penalty.<sup>39</sup> "If statistics are any indication, the system may well be allowing some innocent defendants to be executed," she added. These statements were made outside the courtroom and may not indicate any change in position. Legal commentators were surprised by the comments because Justice O'Connor has often voted to maintain the constitutionality of the death penalty.<sup>40</sup>



# Three: Support for and Opposition to Capital Punishment

## Arguments in Support of Capital Punishment

Public opinion polls consistently indicate that most Americans support the death penalty. A 2002 Gallup poll found that 72 percent of the respondents supported the death penalty. When asked to choose between the death penalty or life imprisonment without the possibility of parole for criminals, 52 percent of the respondents preferred the death penalty, while 43 percent chose life imprisonment without parole.<sup>41</sup>

Death penalty proponents make two primary arguments in support of the use of the death penalty. The arguments employ philosophical theories based on the concepts of deterrence or retribution. The argument that employs the deterrence theory posits that certain types of criminal conduct are so horrendous that society needs to deter people from committing such crimes. Supporters who employ the deterrence theory argue that if a would-be criminal knows he will be executed, he may be deterred from committing murder for fear of the punishment of death. In other words, the death penalty deters crime because would-be criminals do not want to be executed.

Philosopher Walter Berns expressed his support for the death penalty in this way: "The criminal law must be made awful, by which I mean, awe-inspiring, or commanding 'profound respect for reverential fear.' It must remind us of the moral order by which alone we can live as human beings, and in our day the only punishment that can do this is capital punishment."<sup>42</sup>

Proponents and opponents of the death penalty disagree on whether the death penalty actually deters crime. Proponents insist, as Berns does, that the death penalty is necessary to create fear of punishment. Opponents counter that some criminals will commit murders no matter what punishment may result. They argue that life imprisonment without the possibility of parole is a sufficient deterrent.

The other major philosophical argument in support of the death penalty is based on the concept of retribution. Under the theory of retribution, society has a right and even an obligation to punish the worst offenders who, by flagrantly violating the

rights of others, have forfeited their right to life, and the family members of the victim deserve justice for the grievous harm they have suffered. Some, but not all, segments of the victims' rights movement, which has gained momentum in recent years, believe that the criminal justice system owes victims' families a responsive, retributive type of justice and that the death penalty is the ultimate retribution.

**Public opinion polls consistently indicate that most Americans support the death penalty.**

## The Arguments of the Contemporary Moratorium Movement

Some people oppose capital punishment because they believe it is morally wrong for the state to sanction the killing of a human being—even a convicted murderer. However, others oppose capital punishment because they believe the current system is simply not fair. They argue that death sentences are disproportionately imposed on people of color and poor people. Some critics charge that the death penalty as imple-

mented in the United States violates the equal protection clause and is tainted by racial bias. Many contend that the system does not provide due process, or fundamental fairness, to certain defendants with limited resources. For this reason many opponents of the death penalty have argued for a moratorium—a legally authorized period of delay or an authorized waiting period—on executions in the country. The word *moratorium* comes from the Latin word *morari*, meaning “to delay.”

In 1997, the ABA passed a resolution urging states authorizing the death penalty to impose a moratorium to ensure that the system is fair and to reduce the risk that innocent persons might be executed.<sup>43</sup> In September 2001, the ABA launched its Death Penalty Moratorium Implementation Project to “obtain a nationwide moratorium on executions.”<sup>44</sup>

Some states considered moratorium proposals, particularly after revelations surfaced that many death-row inmates did not commit the crimes for which they were convicted. Perhaps the most dramatic step was taken by Illinois Governor George Ryan in January 2000. Ryan imposed a moratorium after the discovery that 13 inmates were wrongfully convicted and placed on death row after the state reinstated the death penalty in 1977. “I now favor a moratorium, because I have grave concerns about our state’s shameful record of convicting innocent people and putting them on death row,” Ryan said.<sup>45</sup> The governor appointed a state commission to examine the state’s capital punishment system. The commission’s report, issued in 2002, recommended more than 80 changes to the system.<sup>46</sup> These changes included: creating a statewide panel to review prosecutors’ decisions to seek the death penalty, videotaping interrogations of homicide suspects, expanding DNA testing, and monitoring the use of jailhouse informants’ testimony.

In May 2002, Maryland Governor Parris Glendening took a similar step, preventing all executions pending the release of a state study examining racial bias in capital cases. “It is imperative that I, as well as our citizens, have complete confidence that the legal process involved in capital cases is fair and impartial,” the governor said in announcing a grant of clemency (see Terms and Vocabulary) and the moratorium.<sup>47</sup>

Some federal legislators have also called for a moratorium on the death penalty. In January 2001, Senator Russell Feingold from Wisconsin introduced the National Death Penalty Moratorium Act of 2001. In March 2001, U.S. Representative Jesse L. Jackson, Jr. introduced companion legislation in the House.<sup>48</sup> “Documented unfairness in the Federal system requires Congress to act and suspend Federal executions,” the bills read. “The high rate of error throughout all death penalty jurisdictions suggests that there is a grave risk that innocent persons may have been, or will likely be, wrongfully executed.”

Outgoing Governor George Ryan of Illinois took the unprecedented step in January 2003 of issuing a “blanket commutation”—removing all inmates in the state from death row. Ryan announced his decision, stating: “Our capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die . . . Because of all of these reasons, today I am commuting the sentences of all death-row inmates.”<sup>49</sup>



## Four: Other Relevant Issues

### DNA Testing

Deoxyribonucleic acid (DNA) is material in the nuclei of human cells that determines our genetic code. Through DNA testing, forensic scientists can identify or eliminate suspects based on different biological material, such as tiny hair samples, blood, or semen. Some legislators have introduced DNA measures intended to ensure greater fairness in death penalty cases. In March 2001, Senator Patrick Leahy of Vermont introduced the Innocence Protection Act of 2001, which would have made DNA testing available to criminal defendants. "In more than 80 cases in the United States, DNA evidence has led to the exoneration of innocent men and women who were wrongfully convicted," the bill reads. "This number includes at least 10 individuals sentenced to death, some of whom came within days of being executed."<sup>50</sup>

**"In terms of exculpating men on death row, the yield has been quite modest. And in the long run the effect of the use of DNA evidence will be to shore up public perceptions of the fairness of the system."**

**John C. McAdams, from "It's Good, and We're Going to Keep It: A Response to Tabak,"  
33 Conn. L. Rev. 819 (2001)**

Criminal defense attorneys Barry Scheck and Peter Neufeld have used DNA testing to free many innocent persons from prison sentences, including death sentences. They write: "DNA testing is to justice what the telescope is for the stars: not a lesson in biochemistry, not a display of the wonders of magnifying optical glass, but a way to see things as they really are. It is a revelation machine."<sup>51</sup>

DNA testing, of course, can help to convict criminal defendants by showing a jury scientific evidence that the defendant actually committed the crime. Death penalty supporter and political science professor John C. McAdams writes: "In terms of exculpating men on death row, the yield has been quite modest. And in the long run the effect of the use of DNA evidence will be to shore up public perceptions of the fairness of the system."<sup>52</sup> He concludes that "widespread use of DNA testing will have the long-run effect of legitimizing, not delegitimizing, the death penalty."<sup>53</sup>

In May 2002, Senator Arlen Specter of Pennsylvania introduced two bills designed to ensure a certain level of fairness in death penalty cases. These included the Capital Defense Counsel Standards Act of 2002 and the Confidence in Criminal Justice Act of 2002.<sup>54</sup> These measures sought to ensure that poor death penalty defendants would receive adequate legal representation. The more comprehensive Confidence in Criminal Justice Act sought to provide death penalty defendants with the opportunity to present DNA evidence that might prove their innocence. The bills never made it out of committee in the 107th Congress. Further public concern about the execution of innocent persons caused New York federal Judge Jed Rakoff to declare the 1994 Federal Death Penalty Act unconstitutional in 2002. The judge noted that DNA testing had exonerated many death-row inmates on the verge of execution. He reasoned that numerous innocent people had been executed who might have been freed by DNA technology, other scientific techniques, or more attention focused on their cases. He concluded: "It follows that implementation of the Federal Death Penalty Act not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive due process."<sup>55</sup>

In December 2002, a federal appeals court reversed Judge Rakoff's ruling, noting that the U.S. Supreme Court has upheld the constitutionality of the death penalty regardless of the possibility that innocent people may be executed. "Supreme Court precedent," the federal appeals court wrote, "prevents us from finding capital punishment unconstitutional based solely on a statistical or theoretical possibility that a defendant might be innocent."<sup>56</sup>

The call for a moratorium from different sources resulted from many concerns. The desire to prevent the execution of possibly innocent people through DNA testing and other methods is one major concern; the effect of racial bias is another.

### Race and the Death Penalty

The United States has long been plagued by discrimination against members of various racial, ethnic, or class groups. Some commentators have charged that application of capital punishment in the United States is racially biased. They believe racial bias pervades all aspects of the criminal justice system, as illustrated by the controversy over racial profiling. Racial profiling is a process in which law enforcement officials target individuals suspected of certain crimes based on race. Racial profiling, for instance, has led police officers to pull over African American or Hispanic motorists even though there existed no reasonable suspicion to stop those individuals.

**A U.S. Department of Justice study released in September 2000 revealed that nearly 80 percent of federal death-row inmates were minorities.**

Statistics indicate that minorities, particularly African Americans, are disproportionately represented on death row. For example, according to statistics supplied by the U.S. Department of Justice, in the year 2000 there were 1,990 white inmates and 1,535 black inmates on death row.<sup>57</sup> Blacks represent only about 12 percent of the population of the United States but more than 35 percent of those on death row.

A U.S. Department of Justice study released in September 2000 revealed that nearly 80 percent of federal death-row inmates were minorities. Many studies indicate that those who kill white victims are far more likely to receive the death penalty than those who kill nonwhite victims.<sup>58</sup> Even death penalty proponents have acknowledged that those who kill white victims are far more likely to be sentenced to death.<sup>59</sup> Law professor and death penalty author David Dow reports: "Over seventeen thousand executions have occurred in the United States. Of that number, a total of thirty-five have involved a white murderer and a black victim. In Texas, considered by some commentators to be the death penalty capital of the Western world, there has never been a white man executed whose victim was black."<sup>60</sup>

Perhaps the most famous study about racial bias in the criminal justice system was the *Baldus* study, named after one of its authors, Professor David C. Baldus. This 1980 study examined more than 2,000 murder cases from the state of Georgia during the 1970s. Among its findings, the study showed that prosecutors sought the death penalty in 70 percent of murder cases involving black defendants and white victims; in 32 percent of cases involving white defendants and white victims; in 15 percent of cases involving black defen-

## Four: Other Relevant Issues (Continued)

dants and black victims; and in 19 percent of cases involving white defendants and black victims. In addition, defendants charged with killing a white victim were 4.3 times as likely to face the death penalty as defendants charged with killing a black victim.

Some death penalty proponents have criticized the *Baldus* study's finding about race-of-the-defendant discrimination. Writer Laurence Johnson wrote that death penalty opponents latched on to what he calls the "bizarre notion of victim-based discrimination" only after it was shown that there was no race-of-the-defendant discrimination.<sup>61</sup> But the *Baldus* study has proven to be one of the most influential and most cited death penalty studies in recent history. Many commentators have concluded from this study that Georgia prosecutors valued white life more than black life. Defendant Warren McCleskey, a black man convicted of murdering a white police officer, argued during his appeal process that the *Baldus* study proved that Georgia's capital punishment scheme violated the Constitution. He argued that the effect of race in the scheme violated the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment.

**"The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment."**

*McCleskey v. Kemp*, 481 U.S. 279 (1987).

The U.S. Supreme Court rejected these arguments by a 5-4 vote in its 1987 decision *McCleskey v. Kemp*.<sup>62</sup> The Court majority concluded that "the *Baldus* study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."<sup>63</sup> The majority said that the criminal justice system already protects against racial discrimination by preventing prosecutors from striking jurors based on race. They reasoned that McCleskey's claims, if taken to their logical conclusion, would call into question fundamental aspects of the criminal justice system, such as trial by jury and prosecutorial discretion in individual

cases. The Court concluded: "The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment."<sup>64</sup>

Justice William Brennan, who viewed the death penalty as unconstitutional, dissented. He wrote: "It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined."<sup>65</sup> Brennan reasoned that race should not play a role in determining who receives the death penalty and who does not. "Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being," Brennan wrote.<sup>66</sup>

Other studies have confirmed the findings of the *Baldus* study in other locales. Another study co-authored by David Baldus in 1997 found that black defendants had a 38 percent higher chance of receiving the death penalty in Philadelphia than white defendants. In April 2001, two professors from the University of North Carolina found that those who killed white victims in North Carolina were 3.5 times more likely to receive

the death penalty as those who killed nonwhites.<sup>67</sup> A University of Maryland study released in January 2003 concluded: "Offenders who kill white victims, especially if the offender is black, are significantly and substantially more likely to be charged with a capital crime."<sup>68</sup>

In 1998, Kentucky passed a Racial Justice Act, which provided in part that "no person shall be subject to or given a sentence of death that was sought on the basis of race." The act allows a defendant to introduce statistical evidence to show that race was a significant factor in the state's decision to seek the death penalty. Similar racial justice bills have twice passed in the U.S. House of Representatives but have failed to clear the U.S. Senate. David Dow writes: "Race is an issue in the capital punishment arena because it is an issue in America. Any truthful portrait of death row, to be truthful, must illuminate this inescapable fact, and any supporter of capital punishment must come to grips with it."<sup>69</sup>

Some death penalty supporters claim that charges of racial discrimination are overblown. They also argue that if an individual commits a horrific murder he or she should face the death penalty. Well-known death penalty supporter Ernest van den Haag writes: "Death is individual. If guilty whites or wealthy people escape the gallows and guilty poor people do not, the poor or black do not become less guilty because the others escaped their deserved punishment. ... Justice involves punishment according to what is deserved by the crime and the guilt of the criminal—regardless of whether others guilty of the same crime escape."<sup>70</sup>

### Juveniles and Capital Punishment

One of the most controversial aspects of the death penalty concerns its imposition on juveniles—those who commit crimes when they are under the age of 18. The United States executes more juveniles than any other country in the world.

In 2002, the state of Indiana amended its death penalty law to prohibit the execution of those under 18. Previously, the state limit was age 16. The measure reflects a legislative judgment that juveniles should be treated differently than adults with respect to capital punishment. Several other states—Arizona, Kentucky, Florida, and Missouri—considered similar legislation in 2002.<sup>71</sup>

Under early Roman law, juveniles received lighter sentences than adults for the same crime. The thinking was that younger persons were less mature and more prone to rehabilitation than adults. In the 1820s, efforts were made in New York, Boston, and Philadelphia to lessen the harsh punishment imposed on juveniles.<sup>72</sup> The first juvenile court was established in 1899 in Cook County, Illinois. Colorado adopted a juvenile court system in 1903.<sup>73</sup> Juvenile courts were established originally to protect the best interests of children. Prior to their establishment, children were arrested and sent to jail for small crimes. During the early part of the twentieth century, American lawmakers came to believe that children should be treated differently from adults and established juvenile courts in recognition of their special needs.

The American Academy of Child & Adolescent Psychiatry (AACAP) "strongly opposes the imposition of the death penalty for crimes committed as juveniles."<sup>74</sup> The Academy notes that juveniles are treated dif-

ferently from adults with regard to decision making in many facets of life, such as voting, driving, drinking alcoholic beverages, consent to medical treatment, and others. According to an AACAP position paper, “[a]dolescents are cognitively and emotionally less mature than adults....They are less able than adults to consider the consequences of their behavior.”

Every state has a separate juvenile court for youthful offenders. However, most states allow particular juveniles to be treated as adult offenders if they are repeat offenders and commit serious crimes. In 1978, public outcry over the murder of subway passengers led to a New York law that provided that juveniles as young as 13 could be tried as adults for the crime of murder.<sup>75</sup> This established a trend, and many states began to allow juvenile offenders to be sentenced as adults for serious crimes such as murder.

Because the United States government is a federal system consisting of a central (federal) government and 50 state governments (see Terms and Vocabulary for discussion of federalism), each state enacts different death penalty laws. Twelve states, for example, do not have a death penalty law. Of the 38 states that allow the death penalty, 16 limit the death penalty to those who commit crimes when they are at least 18 years of age. The federal government similarly limits the death penalty for those offenders 18 years or older. Five other states limit the death penalty to those who commit crimes when they are 17 or older. The remaining states place the bar at age 16.<sup>76</sup>

**Under early Roman law, juveniles received lighter sentences than adults for the same crime. The thinking was that younger persons were less mature and more prone to rehabilitation than adults.**

It has been many years since the United States has executed young persons under the age of 15. However, in 1855, a 10-year-old African American youth was hanged in Louisiana. In 1885, a 10-year-old Cherokee Indian was hanged in Arkansas.<sup>77</sup> In the 1982 decision *Eddings v. Oklahoma*, 455 U.S. 104, the U.S. Supreme Court vacated the death sentence of a person who murdered when he was 16 years old because the trial court refused to allow his attorney to introduce mitigating factors, such as his turbulent family history, beatings by his father, and emotional problems. The decision affirmed that juries in death penalty cases must be allowed to consider the age of the defendant as a potentially mitigating factor.<sup>78</sup> (For a discussion of mitigating factors, please see the Terms and Vocabulary section.)

In its 1988 decision *Thompson v. Oklahoma*, 487 U.S. 815, the U.S. Supreme Court ruled 5-4 that executing those inmates who committed their crimes at age 15 constituted cruel and unusual punishment under the Eighth Amendment. “The road we have traveled during the past four decades—in which thousands of juries have tried murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.”<sup>79</sup> The Court reasoned that “[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”<sup>80</sup> The Court also noted that virtually all states treated 15-year-olds differently from adults in a variety of other circumstances, denying them the



## Four: Other Relevant Issues (Continued)

right to vote, to drive an automobile without parental consent, to marry without parental consent, or to serve on juries.

Although the Court struck down the death penalty for 15-year-olds, it refused to do so for 16- and 17-year-olds the next year in *Stanford v. Kentucky*, 492 U.S. 361 (1989), by a similar 5-4 vote.<sup>81</sup> Justice Antonin Scalia wrote in his plurality opinion: "It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards . . . We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at age 16 or 17."<sup>82</sup> Justice William Brennan dissented, writing that "within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved."

**"It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards . . ."**

Justice Antonin Scalia, *Stanford v. Kentucky*, 492 U.S. 361 (1989)

Those who oppose the execution of juvenile offenders focus on many factors, including the terrible backgrounds of many juvenile offenders. Many juvenile offenders have learning disabilities or other disorders that have gone either undiagnosed or untreated. Juveniles do not have the full cognitive capacity to appreciate the gravity of their conduct, and, they argue, there is a greater chance of rehabilitation of juveniles than adults. Furthermore, the racial disparities in the imposition of the death penalty generally are relevant for juveniles. One study reports that two-thirds of the juvenile offenders on death row are people of color.<sup>83</sup> According to reports

from the Death Penalty Information Center in 2002, 83 death-row inmates were juveniles when they committed their crimes.

Juveniles have been executed in only seven countries since 1990—Iran, Pakistan, Yemen, Nigeria, Saudi Arabia, Democratic Republic of Congo, and the United States.<sup>84</sup> Many international treaties and laws prohibit the execution of juveniles. The United Nations Convention, Article 37A, provides: "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age." The United States stands nearly alone in the international community in not ratifying this position.<sup>85</sup>

The International Covenant on Civil and Political Rights (ICCPR) prohibits the execution of persons who were below age 18 at the time of their crime. The United States is a party to this treaty and repeatedly violates it. Today, the American Convention on Human Rights (ACHR) provides: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . ." (Article 4(5)). Despite opposition to the death penalty for those who commit crimes as juveniles

by international treaties, medical groups, professional organizations, and others, the United States continues to execute criminals who were under 18 when they committed their crimes. In May 2002, Texas executed Napoleon Beazley, who was 17 when he committed his crime. In August 2002, Texas executed T.J. Jones, who was also 17 when he committed his crime.

Many believe that the death penalty should remain a viable option for juveniles who commit truly horrific murders. Death penalty supporter Ernest van den Haag notes that young males commit a disproportionate number of murders in the United States. He reasons that the death penalty will serve as a general deterrent. He explains: "Immunizing them against the death penalty means that they will be able to murder again in prison and out; further, the group most inclined to murder—male youths—would not be threatened with the most severe penalty. People mature earlier now than they did in the past; yet we hold them accountable for their actions later, if at all. This hardly makes sense."<sup>86</sup> In 2004, the U.S. Supreme Court likely will resolve this divisive issue. In January, the Court agreed to hear *Roper v. Simmons* (03-633), a case out of Missouri that examines the constitutionality of executing an inmate who murdered while still a juvenile.

### Mental Retardation and the Death Penalty

The state of Georgia became the first state to prohibit the execution of mentally retarded inmates in 1988. The next year, the American Bar Association advocated for a similar position. The ABA House of Delegates adopted Resolution 110, which "urges that no person with mental retardation, as now defined by the American Association on Mental Retardation, should be sentenced to death or executed."<sup>88</sup>

In June 2002, the U.S. Supreme Court ruled in *Atkins v. Virginia*, 536 U.S. 304, that the state of Virginia could not execute convicted death-row inmate Daryl Renard Atkins, who has an IQ of only 59. The Court reasoned that mentally retarded inmates, such as Atkins, do not have the same level of moral culpability as fully functioning adults.

Atkins did not graduate from high school and had never held a job or lived on his own. His attorneys argued before the U.S. Supreme Court and the Virginia Supreme Court that under the country's "evolving standards of decency" it would be cruel and unusual punishment to kill a mentally retarded inmate.

The Virginia Supreme Court was not persuaded: "We are not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score." The Virginia Supreme Court cited the U.S. Supreme Court's 1989 decision *Penry v. Lynaugh*, 492 U.S. 302. In that decision, the U.S. Supreme Court ruled it was not a per se violation of the Eighth Amendment to impose the death penalty on a mentally retarded inmate. In *Penry*, the U.S. Supreme Court had rejected the notion that there was an "emerging national consensus" against execution of the mentally retarded. The high court noted that only two states—Georgia and Maryland—had passed laws prohibiting the execution of mentally retarded inmates and that

**"Executing adults with the minds of children is nothing short of barbaric."<sup>87</sup>**

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## Four: Other Relevant Issues (Continued)

the vast majority of states did not prohibit the execution of mentally retarded inmates. "In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 states that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus," the Court wrote.<sup>89</sup>

Attorneys for inmate John Penry argued that public opinion polls showed a national consensus against executing retarded inmates. The high court rejected the argument, noting that the polls could not form the basis for a national consensus until they "find expression in legislation."<sup>90</sup> The attorneys for Daryl Atkins and many amicus groups, such as the American Bar Association, contended that much had changed in the 13 years since the *Penry* decision. According to the amicus groups, a national consensus had developed, forbidding the execution of the mentally retarded. Eighteen states prohibit the execution of such individuals. Attorneys for Atkins noted that when the Court decided *Penry*, only two states prohibited the execution of the mentally retarded. During the next 13 years, however, 16 additional states passed similar legislation. The passage of this legislation showed a trend toward a national consensus against executing the mentally retarded, according to Atkins' attorneys.

The U.S. Supreme Court decision supported the position of the advocates of Atkins by a vote of 6-3. "It is not so much the number of those States that is significant, but the consistency of the direction of the change," wrote Justice John Paul Stevens for the majority.<sup>91</sup> "Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon."<sup>92</sup>

In his majority opinion, Stevens reasoned that executing the mentally retarded did not further the two basic rationales for the death penalty—retribution and deterrence. With respect to retribution, Stevens wrote that the Court's death penalty jurisprudence was clear that the death penalty's retributive force should be applied only to the most culpable of inmates. In other words, he reasoned that the death penalty was only to be applied to the very worst murderers, the most morally culpable individuals in society. "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded inmate surely does not merit that form of retribution," Stevens wrote.<sup>93</sup>

Stevens and the majority also reasoned that the deterrence theory, commonly used to justify the death penalty, did not apply with nearly as much force when it came to mentally retarded offenders. The deterrence theory reasons that the death penalty will give would-be offenders pause before they deliberately with premeditation kill another person. Mentally retarded inmates lack the mental functioning to fully appreciate the gravity of their actions. Thus, the death penalty may not deter a mentally retarded person who likely has diminished cognitive functioning. Stevens added that "mentally retarded inmates may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."<sup>94</sup> In reaching its conclusion that executing Atkins would be "cruel and unusual punishment," the Court cited the views of other countries, public opinion polls, and the views of professional organizations and religious groups.

Chief Justice William Rehnquist wrote a dissenting opinion. He believed that Stevens and the majority erred in finding that there was a national consensus against the imposition of the death penalty. The Court erred,

according to Rehnquist, in relying on public opinion polls, the views of professional organizations, and international opinion. Rehnquist reasoned that the only important considerations for determining whether there was a "national consensus" against executing individuals like Daryl Atkins was "the work product of legislators" and "sentencing jury determinations." In other words, Rehnquist wrote that the Court should rely on state legislation and actual jury verdicts with respect to sentencing mentally retarded individuals to death. He wrote that "no across-the-board consensus had developed through the workings of normal democratic processes in the laboratories of the States."<sup>95</sup> Rehnquist reasoned that many states still allowed for the execution of mentally retarded inmates and that there simply was not a "national consensus" on the issue.

Justice Antonin Scalia wrote a dissent even more critical of the majority decision than Rehnquist's dissent. "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members," Scalia wrote.<sup>96</sup>

Commenting on the *Atkins* decision, former ABA President Robert Hirshon has said: "To the extent that mentally retarded individuals have some of the same attributes [as juveniles], some of the same arguments can be made. So the words of the court's opinion will be very important in providing lawyers with what it's thinking about juvenile executions."<sup>97</sup>

Furthermore, in footnote 18 of the *Atkins* decision, the Court noted that in 1989 it decided two death penalty cases on the same day: *Stanford v. Kentucky* (death penalty for juveniles) and *Penry v. Lynaugh* (death penalty for the mentally retarded). In the intervening years, 16 states passed laws prohibiting the execution of the mentally retarded, while only two states raised the age for death eligibility. The Court reasoned that this difference in state legislative activity shows that a consensus had developed against the execution of mentally retarded inmates. Some death penalty supporters likely will cite this footnote as evidence that the *Atkins* decision does not call into question the death penalty for juveniles.

However, the Court's decision in *Atkins* also relied on the climate of international opinion, the opinions of professional organizations, and public opinion polls. Juvenile death penalty opponents may seize on this part of the opinion in their fight to end the death penalty for juvenile offenders.

Many international organizations have called on the United States and other nations that support the death penalty to end the practice.

### International Perspectives on Capital Punishment

The death penalty creates international controversy between nations. When the U.S. Department of Justice charged Zacarias Moussaoui for allegedly conspiring in the September 11, 2001, terrorist strikes, it placed the United States in opposition to its Western European allies France and Germany. While these allies condemned the terrorist acts, they disagreed with the decision to charge Moussaoui with death penalty crimes. These countries abolished the death penalty years ago.

In recent years, the United States has been criticized by many in the international community for executing foreign nationals. For example, the United States was condemned for executing a Paraguayan national, *Breard v. Greene*, 523 U.S. 371 (1998), and two German nationals, *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999). In each case, the U.S. Supreme Court ruled that a state did not have to halt an execution and obey an order issued by the International Court of Justice.<sup>98</sup>

Many international organizations have called on the United States and other nations that support the death penalty to end the practice. The European Union and the United Nations Commission on Human Rights have been critical of the United States. They want the United States to end a practice that more and more countries view as outdated.

According to Amnesty International, 76 nations prohibit the death penalty for all crimes, 15 prohibit the death penalty for ordinary crimes, and 21 other countries are "abolitionist in practice"—which means they may technically have a death penalty law but do not enforce it.<sup>99</sup>

Furthermore, a number of countries have abolished the death penalty since 1976—the year the U.S. Supreme Court reinstated the death penalty. It was abolished for all crimes by France in 1981, Australia in 1985, Italy in 1994, and Belgium in 1996. Chile abolished capital punishment in 2001 for ordinary crimes.

Not all countries have abolished the death penalty. More than 80 countries still retain it. In 2001, more than 3,048 persons were executed in the world, while 1,457 people were executed in 2000.<sup>100</sup> However, the figures are deceiving because the bulk of the known executions occur in China, Iran, Saudi Arabia, and the United States. According to Amnesty International, these countries accounted for 90 percent of the world's executions in 2001, with China by far the world leader at more than 2,500 executions.

Experts maintain that, despite the high number of executions in a few countries, such as China, more and more countries are abolishing the death penalty. Noted anti-death penalty writer Hugo Andrew Bedeau writes: "The unmistakable worldwide trend is toward the complete abolition of capital punishment."

## Four: Other Relevant Issues (Continued)

In recent years, the European Union (EU) has increasingly pressured the United States to end capital punishment. The EU wrote: "The EU is deeply concerned about the increasing number of executions in the United States of America (USA), all the more since the great majority of executions since reinstatement of the death penalty in 1976 have been carried out in the 1990s."<sup>101</sup>

**In *Atkins v. Virginia*, the majority of the U.S. Supreme Court relied in part on the views of other nations to support its decision that executing a mentally retarded individual violated the Constitution.**

An intriguing question is whether the international response to the death penalty will have further impact on future U.S. Supreme Court decisions about the death penalty. In *Atkins v. Virginia*, the majority of the U.S. Supreme Court relied in part on the views of other nations to support its decision that

executing a mentally retarded individual violated the Constitution. Justice John Paul Stevens wrote in a footnote that "within the world community the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."<sup>102</sup> As previously noted, this drew criticism from Justice Antonin Scalia. "Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our own people," Scalia wrote.

While the Constitution is unquestionably the defining blueprint for its constitutional democracy, some death penalty foes believe that, if the United States is to remain the "leader of the free world," it must consider international law when it considers its stance on the death penalty. For example, Amnesty International and the National Coalition Against the Death Penalty argue that the United States loses much of its moral force on international law issues when it ignores international law and trends with respect to the death penalty.

Others counter that the United States has every right to pursue its own policies. They point out that in many countries, the majority of the people actually support the death penalty. For instance, pro-death penalty political scientist John C. McAdams makes the point that, in many European countries that have abolished the death penalty, the majority of people support the death penalty for certain offenders. McAdams argues that the United States should not be punished for adhering to a policy position supported by most Americans. He explains: "In fact, European political systems are less open, less pluralistic, less egalitarian and less populist than the American political system, and thus political elites can impose policies on the masses in ways they cannot here."<sup>103</sup>

Legal historian Stuart Banner also makes the point that in America political leaders have been more responsive to citizens' support for the death penalty: "The difference between the United States and other wealthy democracies with respect to capital punishment may simply be that the United States is more democratic, in the sense that elected officials find it more necessary to implement policies supported by a majority of the people."<sup>104</sup>



# The Future of Capital Punishment

Discussion of capital punishment remains fraught with questions. The recent decision of the Court in *Atkins* and former Illinois Governor Ryan's blanket commutation illustrates that the United States still struggles to determine when and if the death penalty is a just punishment. Many people disagree over whether "evolving standards of decency" allow for capital punishment.

Questions of race, age, class, and DNA technology remain critical issues impacting the criminal justice system and its ultimate sanction. The debate remains not only of national but also of international interest. As the U.S. Supreme Court wrote years ago, "death is different." Capital punishment in the United States continues to present a different and most difficult quandary.



## Notes

### Introduction

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### One: Historical Context

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- 6 Banner, *The Death Penalty*, 9; and Randall Kennedy, *Race, Crime, and the Law* (New York: Vintage Books, 1997), 77.
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### Two: The U.S. Supreme Court and the Death Penalty

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- 35 *Callins v. Collins*, 114 S.Ct. 1127 (1994).
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# Time Line of Relevant U.S. Supreme Court Cases

**1878 *Wilkerson v. Utah*, 99 U.S. 130**

Determined that execution by shooting was not cruel and unusual punishment.

**1890 *In Re Kemmler*, 136 U.S. 436**

Established that death by electrocution was not cruel and unusual punishment.

**1910 *Weems v. United States*, 217 U.S. 349**

Determined that a 12-year sentence of hard labor and other punishments imposed on a military officer for falsifying a document was cruel and unusual punishment.

**1932 *Powell v. Alabama*, 287 U.S. 45**

Held that nine African American youths facing the death penalty were entitled to a new trial because they were denied due process when they were not given time to secure and adequately consult with counsel.

**1949 *Watts v. Indiana*, 338 U.S. 49**

Reversed the death penalty conviction of an individual who was held by law enforcement officials and repeatedly questioned without being informed of his rights or provided any legal counsel.

**1957 *Alcorta v. Texas*, 355 U.S. 28**

Decided that the constitutional rights of an individual sentenced to death for killing his wife were violated when the prosecutor told a witness to lie about his relationship with the defendant's wife.

**1958 *Trop v. Dulles*, 356 U.S. 86**

Found that stripping an individual's citizenship for wartime desertion was excessive punishment under the Eighth Amendment.

**1959 *Irvin v. Dowd*, 359 U.S. 394**

Reversed a conviction and death sentence because several jurors admitted during voir dire that they had opinions regarding the defendant's guilt, violating a defendant's right to be tried in an impartial atmosphere.

**1965 *Griffin v. California*, 380 U.S. 609**

Reversed a conviction and death sentence because the prosecutor had improperly commented to a jury that the refusal of a defendant to testify at trial was evidence of guilt, reinforcing the Fifth Amendment right to not bear testimony against oneself.

**1966 *Sheppard v. Maxwell*, 384 U.S. 333**

Reversed the conviction of an individual because the trial judge had failed to prevent the news media from influencing the trial proceedings.

**1968 *Witherspoon v. Illinois*, 391 U.S. 510**

Reversed the death sentence of an individual because the trial judge allowed prosecutors to strike all potential jurors who expressed any general objections to the death penalty.

**1969 *Boykin v. Alabama*, 395 U.S. 238**

Reversed the conviction and death sentence of an individual because the trial judge did not ensure that the defendant's guilty plea was truly voluntary.

**1972 *Furman v. Georgia*, 408 U.S. 238**

Ruled that death penalty statutes in several states were unconstitutional because they did not provide juries with sufficient guidance in determining whether to impose the death penalty.

**1976 *Gregg v. Georgia*, 428 U.S. 153**

Found that some death penalty statutes were constitutional because they provided sufficient guidance to the jury by establishing aggravating and mitigating factors for juries to consider during deliberations.

**1976 *Roberts v. Louisiana*, 428 U.S. 325**

Struck down a Louisiana statute that required the death penalty for defendants who killed police officers regardless of any mitigating factors, violating the constitutionally required chance for juries to consider mitigating factors.

**1976 *Gilmore v. Utah*, 429 U.S. 1012**

Rejected the constitutional claims of the mother of Gary Gilmore, who sought to prevent his execution. Gilmore was the first person executed in the United States after the *Furman* decision.

**1977 *Coker v. Georgia*, 433 U.S. 584**

Ruled that a sentence of death for rape was excessive punishment under the Eighth Amendment.

**1978 *Lockett v. Ohio*, 438 U.S. 586**

Invalidated Ohio's death penalty statute because it restricted the introduction of particular mitigating evidence during the sentencing phase.

**1982 *Eddings v. Oklahoma*, 455 U.S. 104**

Vacated the death sentence of a person who was 16 years old at the time of the murder because the trial court refused to allow his attorney to introduce mitigating factors, such as his turbulent family history, beatings by his father, and emotional problems.

**1982 *Enmund v. Florida*, 458 U.S. 782**

Determined that a defendant cannot be sentenced to death for participating in a felony that leads to murder if the defendant did not participate in the killing, attempt to kill, or intend for killing to take place.

**1984 *Strickland v. Washington*, 466 U.S. 668**

Established the standard for determining when a death sentence can be set aside due to ineffective assistance of counsel. According to the decision, there must be a "reasonable probability" that effective counsel would have resulted in a different outcome for a defendant.

**1985 *Caldwell v. Mississippi*, 472 U.S. 320**

Set aside a death sentence because the prosecutor told the jury that an appeals court would review its determination of life or death, establishing that it is "constitutionally impermissible" for a jury to be led to believe that it does not have the ultimate decision of life or death.

**1986 *Ford v. Wainwright*, 477 U.S. 399**

Ruled that the Eighth Amendment prohibits the execution of insane persons.

**1987 *Tison v. Arizona*, 481 U.S. 137**

Determined that the Eighth Amendment does not prohibit the imposition of the death penalty for a felony that leads to murder when the defendant heavily participates in commission of the crime and shows a reckless indifference to life. This ruling limited or partially overruled the 1982 decision in *Enmund v. Florida*.

**1987 *McCleskey v. Kemp*, 481 U.S. 279**

Rejected the claims of an individual who contended that Georgia's capital punishment scheme violated the Constitution because it was inherently racially discriminatory. The Court ruled that evidence of racial discrimination in the actual case in question is relevant to a claim of a due process violation rather than evidence of institutional bias.

**1988 *Thompson v. Oklahoma*, 487 U.S. 815**

Ruled that the Eighth Amendment prohibits the execution of young people who committed their crimes at the age of 15.

**1989 *Penry v. Lynaugh*, 492 U.S. 302**

Ruled that the Eighth Amendment does not prohibit the execution of mentally retarded individuals. The Court overruled this decision in *Atkins v. Virginia* (2002).

**1989 *Stanford v. Kentucky*, 492 U.S. 361**

Determined that the Eighth Amendment does not prohibit the execution of youth who committed a crime at age 16 or 17.

**1991 *Coleman v. Thompson*, 501 U.S. 722**

Dismissed a capital federal habeas corpus claim because the defendant's lawyer did not file the state habeas appeal within the necessary 30 days. The Court reasoned that a federal court could not review a death sentence from state court when the state's decision to deny appeal rested on a procedural error or, in this instance, because a lawyer missed a deadline.

**1991 *Payne v. Tennessee*, 501 U.S. 808**

Ruled that the Eighth Amendment does not prohibit a jury from hearing victim impact testimony, overruling the 1987 decision in *Booth v. Maryland*, 482 U.S. 497.

**1993 *Herrera v. Collins*, 506 U.S. 390**

Ruled that a claim of actual innocence based on newly discovered evidence is not grounds for federal habeas relief unless an independent constitutional violation occurred during the original state court trial. "Actual innocence" is irrelevant in and of itself because it is not a constitutional claim. Federal habeas relief requires evidence of a constitutional violation in the original trial.

**2002 *Atkins v. Virginia*, 536 U.S. 304**

Determined that the Eighth Amendment prohibits the execution of mentally retarded individuals, overruling *Penry v. Lynaugh* (1989).

**2002 *Ring v. Arizona*, 536 U.S. 584**

Decided that a jury, not a trial judge, should make the factual determinations necessary in determining whether a defendant is sentenced to death or life in prison, overruling *Walter v. Arizona*, 497 U.S. 639, (1990).



## Student Activities

1. Ask students to watch one of the following movies: *Dead Man Walking*, *The Green Mile*, and *True Crime*. Ask students what point of view they believe the director holds with respect to the death penalty in the movie. Ask students if they agree or disagree with the perspective of the director. Why or why not? Ask students if the movie changed their perceptions or feelings about the death penalty. If so, how? If not, why not?
2. Ask students to research one of the death penalty cases below. For the selected case, ask students to consider whether they think the defendant had adequate counsel. Why or why not? Do students think the state adequately proved guilt? Why or why not? Did this case have an impact on public perception of the death penalty? If so, how? Cases to consider include:
  - The Nicola Sacco and Bartolomeo Vanzetti case
  - The Julius and Ethel Rosenberg case
  - The Sam Sheppard case
  - The Leo Frank case
  - The Scottsboro Boys case
  - The Gary Gilmore case
  - The John Wayne Gacy case
3. Ask students to conduct research about the death penalty in your state. Students might begin research by visiting the Web site of your state department of corrections. Information to research might include:
  - Does your state have a death penalty? If so, when was the law established? If not, was it abolished or has the state never had a death penalty law?
  - What kinds of crimes are punishable by death in your state?
  - What are the rates for the crimes punishable by death in your state?
  - Can juveniles be executed? If so, at what age?
  - How many prisoners are on death row?
  - What is the ratio of persons of color to white persons on death row?
  - What kind of legal representation does your state provide to people who face death sentences for their crimes?

Next, ask students to research the death penalty in a neighboring state. Compare and contrast the laws in both states. What conclusions do students draw about the death penalty based on their comparisons?

An alternate approach to this activity would be to ask each student in your class to research a particular state's death penalty statutes. Provide students with a list of the items they should all cover. Ask students to prepare a report bulleting their findings about the points of research to distribute to each student in the class. After students present their individual findings, as a class, create a chart detailing the different death penalty statutes of the various states. Hold a debriefing on what students conclude about the death penalty based on the chart.

4. Ask students to conduct research about the history of the death penalty in the United States beginning with the colonial period. Suggest that students work in groups. Each group should cover a different period. There are many ways to break students into study groups. Each study group might consider a century or a half-century. Alternatively, study groups might correspond to historical periods similar to those studied by students in their U.S. history classes, placing the research within the context of social, political, and international conditions and significant national historical events. The U.S. history textbooks used by your school will offer some guidance about how to think about possible time periods for research.

Possible questions for study groups to research for each period might include:

- What kinds of crimes were punishable by death during this period? Do historians have theories about why these crimes in particular were punishable by death and were considered to be more serious than others during this period? Did regional differences exist in the types of crimes punishable by death? How often, actually, were death penalty statutes enforced? Did enforcement vary by region? If so, how, and what accounts for the differences?
- What theories did people hold at the time about the causes of crime during the period? According to historians today, what were the causes of crime during that particular period? How do the theories differ? How are they the same?
- What was the purpose of capital punishment during the period, according to the people who lived during that time?
- Was there opposition to the death penalty during that time? If so, who opposed it (significant individuals and groups)? What was the reason for the opposition?
- Where did executions take place and what was the rationale, if any, for the location?
- What methods of execution were employed? If a rationale for that method existed, what was it?
- Did the general public primarily support or oppose the death penalty at the time?
- What kinds of significant historical events or social issues do historians believe influenced beliefs about the death penalty and its implementation during this period?
- Did capital trials of the period differ in substantial ways from contemporary capital trials? If so, how?
- Did the courts issue any particularly significant decisions that affected the implementation of the death penalty during the period? If so, do historians believe that particular social or cultural issues affected these decisions and, if so, how?

After the study groups complete their work, ask each group to create an annotated "Social and Cultural Time Line of the Death Penalty" for their period, noting significant aspects of their research. Distribute and review the time lines sequentially as an entire class to give students a complete picture of the social and cultural history of the death penalty in the United States. Hold a debriefing with students to identify significant social and cultural milestones in the history of the death penalty in the United States.



5. Discuss the major arguments in support of and in opposition to the death penalty with students, including the deterrence theory. Does the death penalty deter crime? Ask students to find one source that supports the deterrence theory and one source that reaches the opposite conclusion. Ask students to compare and contrast the sources. Which source, do students believe, makes a strong, logical argument, and why? Do students believe that the death penalty deters crime? Why or why not?
6. Ask students to examine in depth the case of *McCleskey v. Kemp* and the U.S. Supreme Court decision about it. After students review the Court's decision in the case, hold a brainstorming session with students, asking them what they believe can be done to prevent racial discrimination in the implementation of the death penalty, thinking about the Court's rationale in its decision.
7. Ask students to examine current bills in the U.S. Congress (House and Senate) that call for DNA testing in all capital cases. Examine the work of the Innocence Project at the Benjamin N. Cardozo School of Law, which has used DNA testing to bring about the release of several prisoners from death row. Why do many advocates argue that DNA testing is necessary in death penalty cases? Ask students if they think inmates should have the right to request DNA testing in all capital cases? Why or why not? Should judges be allowed to order it in capital cases? Why or why not? Does it matter who orders the testing? Why or why not?
8. In death penalty post-conviction proceedings, convicted individuals have often claimed that their convictions are not constitutionally sound because their attorneys did not perform their job adequately. This is called an ineffective assistance of counsel claim.

Ask students to find a newspaper article describing a case in which ineffective assistance of counsel has been claimed by someone who has been sentenced to death. Ask students to share their stories with the rest of the class. Discuss with students the qualifications that should be required of attorneys appointed to represent individuals in capital cases. Cover topics such as case load, training, funding and compensation, relationship with clients, investigation, and post-conviction duties. Do students believe a convicted individual should ever receive relief from a court due to the poor performance of the trial attorney? What do students believe may be done to ensure that individuals receive adequate counsel during death penalty cases?

See "ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" to prepare for this activity. See the ABA Death Penalty Representation Web pages ([www.abanet.org/deathpenalty/](http://www.abanet.org/deathpenalty/)) for the guidelines.

9. In an opinion in the landmark U.S. Supreme Court death penalty case *Furman v. Georgia* (408 U.S. 238 [1972]), Justice Marshall referred to the opinion of Chief Justice Warren in *Trop v. Dulles* (356 U.S. 86 [1958]) that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Hold a discussion with students about whether evolving standards of decency should be an important consideration in the law. Why might the idea of evolving standards of decency be relevant to a discussion about how we punish crimes? Can students think of legal concepts or standards that have evolved over time? Can they think of ways in which the Constitution has been amended to offer additional legal protections or rights to groups or individuals? What were the social circumstances that surrounded these changes? Do students think it is appropriate for the law to re-evaluate a constitutional provision and reinterpret it according to the standards of the time? If so, how should we determine that it's time for a re-evaluation, and why? If not, why not?

10. Discuss with students the four conditions that the U.S. Supreme Court identified in *Furman v. Georgia*, that make a punishment "cruel and unusual" under the law. How do these conditions relate to the legal concept of due process? Do students believe that any of these conditions still exist in the implementation of the death penalty today? Why or why not? Ask students to support their claims with facts.
11. Ask students to study some statistics relevant to a discussion of the role of race in the death penalty. Many good resources are now available on the Web. Statistics to review include statistics about the race of individuals who have been executed, those currently on death row, and the race of victims in relation to offenders. Students should also review statistics about general murder trends in the United States to determine if persons who belong to particular racial groups are more likely to become murder victims.

To conclude their study of statistics, students should take a look at U.S. Census Bureau figures about the breakdown of the general population of the United States by race. Ask students to review statistics about as many racial groups as possible, including those often overlooked in general discussions, such as Native Americans.

After studying the statistics, hold a classroom discussion with students. Ask them to identify two facts that surprised them from their research. What role does race play in the application of the death penalty? Ask students to support their positions.

Some online sources of information for this activity (although students should be urged to find others, as well) include:

Death Penalty Information Center: Race  
[www.deathpenaltyinfo.org/dpicrace.html](http://www.deathpenaltyinfo.org/dpicrace.html)

U.S. Department of Justice Bureau of Justice Statistics: Capital Punishment Statistics  
[www.ojp.usdoj.gov/bjs/cp.htm](http://www.ojp.usdoj.gov/bjs/cp.htm)

Provides various statistics on capital punishment.

U.S. Department of Justice Bureau of Justice Statistics: Homicide Trends in the U.S. by Race  
[www.ojp.usdoj.gov/bjs/homicide/race.htm](http://www.ojp.usdoj.gov/bjs/homicide/race.htm)

Provides statistics on homicide type by race for 1976–1999.

- 12.** Ask students to conduct interviews about the death penalty with both a criminal defense attorney and a prosecutor at the local district attorney's office (or a nearby United States attorney). Before students conduct their interviews, hold a brainstorming session as a class about questions to ask the attorneys. Students will want to ask questions about the legal process or the rationale behind their professional position when these attorneys face a death penalty case, as well as personal beliefs about the death penalty.

Process-oriented questions for prosecutors might include:

- Why is the death penalty trial and appeals process so lengthy?
- How do you determine if a death sentence will be sought in a particular case?
- What kinds of questions do you ask potential jury members during voir dire when you try a death penalty case and why?
- What are some of the challenges that prosecutors face when handling death penalty cases?
- What does a prosecuting attorney do to try to ensure that racial bias does not affect the trial?
- How does the sentencing phase of a capital trial differ from the phase to determine guilt or innocence? What kinds of evidence do you present to the jury in the sentencing phase of a capital trial as compared to the guilt-innocence phase of a trial?

Process-oriented questions for defense attorneys might include:

- What kinds of questions do you ask potential jury members during voir dire when you are involved in a death penalty case and why?
- What are some of the challenges that defense attorneys face when defending an individual facing a possible death sentence?
- What does a defense lawyer do to try to ensure that racial bias does not affect the trial?
- How does the sentencing phase of a capital trial differ from the phase to determine guilt or innocence? What kinds of evidence do you present to the jury in the sentencing phase of a capital trial as compared to the guilt-innocence phase of a trial?
- Are there specific things court-appointed lawyers would like to do in a capital case that they sometimes lack the resources to do to improve the quality of representation that indigent criminal defendants receive?

After students complete their interviews, ask them to type their notes. As a class, hold a discussion about the interviews. On the blackboard, create three columns. In one column, note concerns and issues mentioned by the prosecutors interviewed. In the second column, note concerns and issues mentioned by the defense attorneys interviewed. In the third column, note issues and concerns that both prosecutors and defense attorneys mentioned during their interviews.

What conclusions do students draw about the challenges faced by attorneys during capital cases?

Activities by David L. Hudson, Jr., and Michelle Parrini





## Resources

### Written Materials

Baird, Robert M., and Stuart E. Rosenbaum, ed. *Punishment and the Death Penalty: The Current Debate*. Amherst, N.Y.: Prometheus Books, 1995. This book features pro and con arguments regarding the death penalty. It is a good initial source for researchers.

Banner, Stuart. *The Death Penalty: An American History*. Cambridge, Mass.: Harvard University Press, 2002. This book provides a thorough and readable discussion of the history of the death penalty in the United States.

Bedau, Hugo Adam, ed. *The Death Penalty in America: Current Controversies*. New York: Oxford University Press, 1997. This comprehensive work, edited by one of the leading scholars in the field, contains works by many leading death penalty scholars on a gamut of issues.

Berns, Walter. *For Capital Punishment: Crime and the Morality of the Death Penalty*. New York: Basic Books, Inc., 1979. This work discusses arguments in support of the death penalty.

Bowers, William J. *Legal Homicide: Death as Punishment in America, 1864–1982*. Boston: Northeastern University Press, 1984. This work offers a comprehensive overview history of the death penalty in the United States.

Dow, David R., and Mark Dow, ed. *Machinery of Death: The Reality of America's Death Penalty Regime*. New York: Routledge, 2002. This book contains numerous articles that advocate against the death penalty. An article by Professor David R. Dow on "How the Death Penalty Really Works" is particularly informative.

Friedman, Lawrence M. *Crime and Punishment in American History*. New York: Basic Books, 1993. This detailed work describes the history of crime and punishment in American society. It includes a great deal of information about the death penalty.

Lifton, Robert Jay, and Greg Mitchell. *Who Owns Death?: Capital Punishment, the American Conscience, and the End of Executions*. 2nd ed. New York: HarperCollins, 2002. This recent work presents a compelling case against the death penalty.

Palmer, Louis J., Jr. *Encyclopedia of Capital Punishment in the United States*. Jefferson, N.C.: McFarland & Company, Inc., 2001. This encyclopedia of capital punishment is an excellent research tool for anyone interested in learning more about the subject.

Pojman, Louis P., and Jeffrey Reiman. *The Death Penalty: For and Against*. Lanham, Md.: Rowman & Littlefield Publishers, Inc., 1998. This book features an essay arguing in favor of the death penalty by Pojman and an essay arguing against the death penalty by Reiman, followed by shorter replies by each writer to the other author.

Sarat, Austin. *When the State Kills: Capital Punishment and the American Condition*. Princeton, N.J.: Princeton University Press, 2001. This book discusses many of the philosophical arguments against the death penalty.

Scalia, Anton. "A Theory of Constitutional Interpretation." Speech at Catholic University of America, 1996. [courttv-web3.courttv.com/archive/legaldocs/rights/scalia.html](http://courttv-web3.courttv.com/archive/legaldocs/rights/scalia.html). This speech by the U.S. Supreme Court Justice Antonin Scalia describes some of his views on how the Eighth Amendment should be interpreted.

Scheck, Barry, Peter Neufeld, and Jim Dwyer. *Actual Innocence*. New York: Signet Books, 2001. This book tells the stories of several cases in which DNA testing proved that people on death row did not commit the crimes for which they were convicted.

Yant, Martin. *Presumed Guilty: When Innocent People Are Wrongly Convicted*. Amherst, N.Y.: Prometheus Books, 1991. This book discusses the phenomenon of innocent people wrongly convicted of crimes, including capital crimes.

### Web Sites

#### **Sites Hosted by Opponents of Capital Punishment**

American Civil Liberties Union Death Penalty Page, [www.aclu.org/DeathPenalty/](http://www.aclu.org/DeathPenalty/)

Amnesty International, [www.amnesty.org/campaign/index.html#dp](http://www.amnesty.org/campaign/index.html#dp)

Citizens United for Alternatives to the Death Penalty, [www.cuadp.org/](http://www.cuadp.org/)

Death Penalty Information Center, [www.deathpenaltyinfo.org/](http://www.deathpenaltyinfo.org/)

National Coalition to Abolish the Death Penalty, [www.ncadp.org/](http://www.ncadp.org/)

#### **Sites Hosted by Proponents of Capital Punishment**

Accuracy in Media Report: The Death Penalty Saves Lives, [www.aim.org/publications/aim\\_report/2000/08a.html](http://www.aim.org/publications/aim_report/2000/08a.html)

The Death Penalty – A Defense, [w1.l55.telia.com/~u15525046/ny\\_sida\\_1.htm](http://w1.l55.telia.com/~u15525046/ny_sida_1.htm)

Justice for All, [www.jfa.net/deathpenalty.html](http://www.jfa.net/deathpenalty.html)

Pro-Death Penalty.com, [www.prodeathpenalty.com/](http://www.prodeathpenalty.com/)

### Lessons

American Bar Association Division for Public Education

2004 National Online Youth Summit "The Future of Capital Punishment: Current Policies and New Debates." These Web pages feature student activities developed for this annual, project-based learning program, including an activity based on the Anton Chekhov short story "The Bet." See the downloadable "Guide to Student Activities," available on the site.

Death Penalty Information Center Educational Curriculum

[www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)

This online curriculum includes separate sites for teachers and students. The content of the sites includes the history of the death penalty, arguments for and against the death penalty, stages in a capital case, and state data, to name a few.

The New York Times Learning Network

[www.nytimes.com/learning](http://www.nytimes.com/learning)

This resource offers a variety of lessons on topical issues for different grade levels, including "Compassion on Death Row? Analyzing Clemency and Capital Punishment in the Social Studies Classroom," and "Dead 'Man' Walking Considering the Fate of Juvenile Offenders in the Face of Capital Punishment."

Yale-New Haven Teacher's Institute

[www.yale.edu/ynhti/](http://www.yale.edu/ynhti/)

A companion Web site for the Yale-New Haven Teacher's Institute that offers curricular units developed by participating teachers including, "The Death Sentence Remains a Question," by Carolyn S. Williams, Curriculum Unit 95.03.09.







# Terms and Vocabulary

## **Aggravating circumstances**

Factors that a jury considers in the sentencing phase of a death penalty case, and which support the imposition of capital punishment. In many states, a jury must find at least two aggravating factors before imposing the death penalty. Examples include murder committed in conjunction with rape, murder committed for monetary gain, and murder committed by someone who has previously been convicted of murder.

## **Certiorari (writ of)**

Literally translated as "to be informed," certiorari is shorthand for a writ of certiorari, which is the procedural mechanism by which the U.S. Supreme Court agrees to review a case. To obtain a writ of certiorari, the petitioner (the litigant who is seeking review by the Court) must file a petition that persuades the Court that the case warrants its attention.

## **Clemency**

An act of mercy by which a government official commutes an inmate's death sentence to life in prison. Oftentimes, the last resort for a death-row inmate facing execution is to seek clemency from the governor of the particular state.

## **Concurring opinion**

A concurring opinion is an opinion by a judge or justice that agrees with the result, but not necessarily the reasoning, of the majority court opinion. Usually, a judge writes a concurring opinion to put forth his or her own special emphasis on certain points.

## **Cruel and unusual punishments**

This language refers to certain types of punishment forbidden by the Eighth Amendment of the U.S. Constitution. The U.S. Supreme Court has said that punishment can be deemed cruel and unusual when it is excessive in relation to the offense. The Court has also said that certain forms of punishment, such as torture or burning at the stake, are simply too barbaric to be constitutional under the Eighth Amendment.

## **Death row**

The location in a prison where inmates sentenced to be executed are housed. Usually, these prisoners reside in a separate location, or wing, of the prison and are subject to more restrictions regarding outside access.

### **Deterrence**

The theory that fear of the death penalty can prevent, or deter, persons from committing murder.

### **Dissenting opinion**

An opinion by a judge or justice that disagrees with the decision reached by the majority of justices on a court.

### **DNA testing**

A testing of deoxyribonucleic acid (DNA), which is the material in the nuclei of human cells that determines the human genetic code. Through DNA testing, forensic scientists can identify or eliminate suspects based on different biological material, such as tiny hair samples, blood, or semen.

### **Due process**

Guaranteed by clauses in the Fifth and Fourteenth Amendments of the U.S. Constitution, due process guarantees two types of fairness under the law. *Procedural due process* is the right of people to enjoy certain constitutionally guaranteed procedures in the course of the law. For example, if a person is accused of a crime, he or she must be (1) formally charged, (2) given a chance to defend him/herself, and (3) judged in a court of law. *Substantive due process* rights are the actual rights a person has that are spelled out in the Constitution, such as the rights to life, liberty, property, speech, press, religion, assembly, and the right to petition government, as well as some additional rights not spelled out in the Constitution but through the courts, such as the right to privacy when making decisions.

### **Electrocution**

A method of execution by which an electric current is sent through the body to cause death. The term comes from combining the words *electricity* and *execution*. First used in the late nineteenth century, some states still use an electric chair to conduct executions.

### **Equal protection clause**

The clause in the Fourteenth Amendment of the U.S. Constitution that guarantees similarly situated individuals the same basic personal rights and the same redress of wrongs.

### **Exhaustion**

A legal term for the requirement that an issue be litigated in state court before a criminal defendant can raise it in a federal habeas case. When a federal court rules that a defendant has failed to meet the exhaustion requirement, the court is stating that the defendant did not raise the issue in state court.

### **Exoneration**

The process by which a person is cleared from blame for a crime.

### **Federalism**

This term refers to the distribution of power between a central (federal) governing body and various local governing bodies. The U.S. government divides power between the federal (U.S.) government and the 50 state governments. When reviewing the case of a defendant who has been sentenced to death in state court, the federal courts must determine how much deference they owe the state's rules and state procedures.

### **Gas chamber**

A small room created for the purpose of causing death by exposure to poisonous gas, such as hydrocyanic acid. Nevada became the first state to adopt execution by gas in the early 1920s.

### **Guilt-innocence phase**

The first portion of a criminal trial, in which a jury determines whether a defendant is guilty or not guilty of the charged crime. This phase precedes the sentencing or punishment phase of a trial.

### **Habeas corpus**

A Latin word meaning "you have the body." It is a written document directing prison officials to produce an inmate before a court. The primary function of habeas corpus, known as "the great writ," is to release an inmate from unlawful imprisonment. The term often refers to a federal court action in which an inmate is alleging that his conviction in state court violated his or her federal constitutional rights.

### **Lethal injection**

A method of execution by which an injection of poisonous chemicals causes death. First used by two states in 1977, this has become the most common method of execution in the United States.

### **Majority opinion**

A majority opinion is an opinion that garners the support of a majority of the judges or justices of a court. For example, a majority opinion from the nine-member U.S. Supreme Court means that the opinion is endorsed by at least five justices. Majority opinions of a court constitute legal precedent, or legal authority, that binds later decisions.

### **Mitigating circumstances**

These are factors that a jury considers in the sentencing phase of a death penalty case that favor the criminal defendant receiving a punishment other than death. They have the opposite effect of aggravating factors. Examples include finding that the defendant had little or no prior criminal record, was emotionally disturbed, or was of a young age at the time of the crime.

### **Moratorium**

A legally authorized pause in conducting executions. The word *moratorium* comes from the Latin word *morari* meaning "to delay." Because of concerns about the possibility of innocent people being on death row, the governors of Illinois and Maryland have called moratoriums on the imposition of the death penalty.

### **Peremptory challenges**

Challenges by which attorneys can object to having someone serve on the jury in their case without giving a specific reason for their objection. Unlike a for-cause challenge, attorneys can use peremptory challenges to strike jurors simply because they do not think the person would vote in favor of their client. The U.S. Supreme Court prohibited attorneys from using peremptory challenges to strike jurors based on their race in *Batson v. Kentucky*, 476 U.S. 79 (1986).

### **Plurality opinion**

A plurality opinion is an opinion that earned the votes of more judges or justices on a court than any other opinion in the case but still did not garner a majority of the justices' votes. For instance, a plurality opinion in a case from the U.S. Supreme Court might be an opinion that was endorsed by four justices when no other opinion was endorsed by more than three justices.

**Retribution**

A theory cited by death penalty supporters that reasons that a defendant deserves to be punished for his or her crimes.

**Vacate**

A legal term that means "to declare null and void." When an appellate court vacates the decision of a lower court, it is ruling that the lower court decision is no longer valid and has no legal authority.



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