

The Case Against The Death Penalty
by Hugo Adam Bedau

Preface

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The American Civil Liberties Union holds that the death penalty inherently violates the constitutional ban against cruel and unusual punishment and the guarantee of due process of law and the equal protection of the laws. The imposition of the death penalty is inconsistent with fundamental values of our democratic system. The state should not arrogate unto itself the right to kill human beings, especially when it kills with premeditation and ceremony, under color of law, in our names, and when it does so in an arbitrary and discriminatory fashion. In the judgment of the ACLU, capital punishment is an intolerable denial of civil liberties. We shall therefore continue to seek to prevent executions and to abolish capital punishment by litigation, legislation, commutation, or by the weight of a renewed public outcry against this brutal and brutalizing institution.

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Introduction

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

But within four years after the *Furman* decision, more than 600 persons had been sentenced to death under new capital-punishment statutes that provided guidance for the jury's sentencing discretion. These statutes typically require a bifurcated (two-stage) trial procedure, in which the

jury first determines guilt or innocence and then chooses imprisonment or death in the light of aggravating or mitigating circumstances.

In July 1976, the Supreme Court moved in the opposite direction, holding that "the punishment of death does not invariably violate the Constitution." The Court ruled that these new statutes contained "objective standards to guide, regularize, and make rationally reviewable the process for imposing the sentence of death." (Gregg v. Georgia, 428 U.S.153) Thus the states as well as Congress have had for some years constitutionally valid statutory models for death-penalty laws, and more than three dozen state legislatures have enacted death penalty statutes patterned after those the Court upheld in Gregg. In recent years, Congress has enacted death penalty statutes for peacetime espionage by military personnel and for drug-related murders.

Executions resumed in 1977, and by the early 1990s nearly three thousand persons were under sentence of death and more than 180 had been executed.

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

- * Capital punishment is cruel and unusual. It is a relic of the earliest days of penology, when slavery, branding, and other corporal punishments were commonplace. Like those other barbaric practices, executions have no place in a civilized society.

- * Opposition to the death penalty does not arise from misplaced sympathy for convicted murderers. On the contrary, murder demonstrates a lack of respect for human life. For this very reason, murder is abhorrent, and any policy of state-authorized killings is immoral.

- * Capital punishment denies due process of law. Its imposition is arbitrary and irrevocable. It forever deprives an individual of benefits of new evidence or new law that might warrant the reversal of a conviction or the setting aside of a death sentence.

- * The death penalty violates the constitutional guarantee of the equal protection of the laws. It is applied randomly at best and discriminatorily at worst. It is imposed disproportionately upon those whose victims are white, on offenders who are people of color, and on those who are themselves poor and uneducated.

- * The defects in death-penalty laws, conceded by the Supreme Court in the early 1970s, have not been appreciably altered by the shift from unfettered discretion to "guided discretion." These changes in death sentencing have proved to be largely cosmetic. They merely mask the impermissible arbitrariness of a process that results in an execution.

- * Executions give society the unmistakable message that human life no longer deserves respect when it is useful to take it and that homicide is legitimate when deemed justified by pragmatic concerns.

* Reliance on the death penalty obscures the true causes of crime and distracts attention from the social measures that effectively contribute to its control. Politicians who preach the desirability of executions as a weapon of crime control deceive the public and mask their own failure to support anti-crime measures that will really work.

* Capital punishment wastes resources. It squanders the time and energy of courts, prosecuting attorneys, defense counsel, juries, and courtroom and correctional personnel. It unduly burdens the system of criminal justice, and it is therefore counterproductive as an instrument for society's control of violent crime. It epitomizes the tragic inefficacy and brutality of the resort to violence rather than reason for the solution of difficult social problems.

* A decent and humane society does not deliberately kill human beings. An execution is a dramatic, public spectacle of official, violent homicide that teaches the permissibility of killing people to solve social problems -- the worst possible example to set for society. In this century, governments have too often attempted to justify their lethal fury by the benefits such killing would bring to the rest of society. The bloodshed is real and deeply destructive of the common decency of the community; the benefits are illusory.

Two conclusions buttress our entire case: Capital punishment does not deter crime, and the death penalty is uncivilized in theory and unfair and inequitable in practice.

Deterrence

The argument most often cited in support of capital punishment is that the threat of executions deters capital crimes more effectively than imprisonment. This claim is plausible, but the facts do not support it. The death penalty fails as a deterrent for several reasons.

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

Only a small proportion of first-degree murderers is sentenced to death, and even fewer are executed. Although death sentences since 1980 have increased in number to about 250 per year,⁽¹⁾ this is still only 1 per cent of all homicides known to the police.⁽²⁾ Of all those convicted on a charge of criminal homicide, only 2 percent -- about 1 in 50 -- are eventually sentenced to death.⁽³⁾

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

Considerable delay in carrying out the death sentence is unavoidable, given the procedural

safeguards required by the courts in capital cases. Starting with empaneling the trial jury, murder trials take far longer when the death penalty is involved. Post-conviction appeals in death-penalty cases are far more frequent as well. All these factors increase the time and cost of administering criminal justice.

The sobering lesson is that we can reduce such delay and costs only by abandoning the procedural safeguards and constitutional rights of suspects, defendants, and convicts, with the attendant high risk of convicting the wrong person and executing the innocent.

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Persons who commit murder and other crimes of personal violence either premeditate them or they do not. If the crime is premeditated, the criminal ordinarily concentrates on escaping detection, arrest, and conviction. The threat of even the severest punishment will not deter those who expect to escape detection and arrest. If the crime is not premeditated, then it is impossible to imagine how the threat of any punishment could deter it. Most capital crimes are committed during moments of great emotional stress or under the influence of drugs or alcohol, when logical thinking has been suspended. Impulsive or expressive violence is inflicted by persons heedless of the consequences to themselves as well as to others.

Gangland killings, air piracy, drive-by shootings, and kidnapping for ransom are among the graver felonies that continue to be committed because some individuals think they are too clever to get caught. Political terrorism is usually committed in the name of an ideology that honors its martyrs; trying to cope with it by threatening death for terrorists is futile. Such threats leave untouched the underlying causes and ignore the many political and diplomatic sanctions (such as treaties against asylum for international terrorists) that could appreciably lower the incidence of terrorism.

The attempt to reduce murders in the illegal drug trade by the threat of severe punishment ignores this fact: Anyone trafficking in illegal drugs is already betting his life in violent competition with other dealers. It is irrational to think that the death penalty--a remote threat at best -- will deter murders committed in drug turf wars or by street-level dealers.

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If, however, severe punishment can deter crime, then long term imprisonment is severe enough to cause any rational person not to commit violent crimes. The vast preponderance of the evidence shows that the death penalty is no more effective than imprisonment in deterring murder and that it may even be an incitement to criminal violence in certain cases.

* (a) Death-penalty states as a group do not have lower rates of criminal homicide than non-death penalty states. During the 1980s, death-penalty states averaged an annual rate of 7.5 criminal homicides per 100,000 of population; abolition states averaged a rate of 7.4.(4)

* (b) Use of the death penalty in a given state may increase the subsequent rate of criminal

homicide in that state. In New York, for example, between 1907 and 1964, 692 executions were carried out. On the average, over this 57-year period, one or more executions in a given month aided a net increase of two homicides to the total committed in the next month.(5)

* (c) In neighboring states -- one with the death penalty and the others without it -- the one with the death penalty does not show a consistently lower rate of criminal homicide. For example, between 1972 and 1990, the homicide rate in Michigan (which has no death penalty) was generally as low as or lower than the neighboring state of Indiana, which restored the death penalty in 1973 and since then has sentenced 70 persons to death and carried out 2 executions.(6)

* (d) Police officers on duty do not suffer a higher rate of criminal assault and homicide in states that have abolished the death penalty than they do in death-penalty states. Between 1973 and 1984, for example, lethal assaults against police were not significantly more or less frequent in abolition states than in death-penalty states. There is "no support for the view that the death penalty provides a more effective deterrent to police homicides than alternative sanctions. Not for a single year was evidence found that police are safer in jurisdictions that provide for capital punishment."(7)

* (e) Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition states than they do in death-penalty states.(8) Between 1984 and 1989, seventeen prison staff were murdered by prisoners in ten states; of these murders, 88 percent (15 of 17) occurred in death penalty jurisdictions -- just as about 88 percent of all the prisoners in those ten states were in death penalty jurisdictions.(9) Evidently, the threat of the death penalty "does not even exert an incremental deterrent effect over the threat of a lesser punishment in the abolitionist state."(10)

Actual experience establishes these conclusions beyond a reasonable doubt. No comparable body of evidence contradicts them.

Three investigations since Furman, using methods pioneered by economists, reported findings in the opposite direction.(11) Subsequently, several qualified investigators have independently examined these claims, and all have rejected them.(12) The National Academy of Sciences, in its thorough report on the effects of criminal sanctions on crime rates, concluded: "It seems unthinkable to us to base decisions on the use of the death penalty" on such "fragile" and "uncertain" results. "We see too many plausible explanations for [these] findings ... other than the theory that capital punishment deters murder."(13)

Furthermore, cases have been clinically documented where the death penalty actually incited the capital crimes it was supposed to deter. These include instances of the so-called suicide-by-execution syndrome -- persons who wanted but feared to take their own life and committed murder so that society would kill them.(14)

It must, of course, be conceded that inflicting the death penalty guarantees that the condemned

person will commit no further crimes. This is an incapacitative, not a deterrent, effect of executions. Furthermore, it is too high a price to pay when studies show that very few convicted murderers ever commit another crime of violence.(15) A recent study examined the prison and post-release records of 533 prisoners on death row in 1972 whose sentences were reduced to life by the Supreme Court's ruling in Furman. The research showed that 6 had committed another murder. But the same study showed that in 4 other cases, an innocent man had been sentenced to death.(16)

Recidivism among murderers does occasionally happen. But it happens less frequently than most people believe; the media rarely distinguish between a paroled murderer who murders again and other murderers who have a previous criminal record but not for homicide.

There is no way to predict which convicted murderers will kill again. Repeat murders could be prevented only by executing all those convicted of criminal homicide. Such a policy is too inhumane and brutal to be taken seriously. Society would never tolerate dozens of executions daily, yet nothing less would suffice. Equally effective but far less inhumane is a policy of life imprisonment without the possibility of parole.

Unfairness

Constitutional due process as well as elementary justice require that the judicial functions of trial and sentencing be conducted with fundamental fairness, especially where the irreversible sanction of the death penalty is involved. In murder cases (since 1930, 99 percent of all executions have been for this crime), there has been substantial evidence to show that courts have been arbitrary, racially biased, and unfair in the way in which they have sentenced some persons to prison but others to death.

Racial discrimination was one of the grounds on which the Supreme Court relied in Furman in ruling the death penalty unconstitutional. Half a century ago, Gunnar Myrdal, in his classic *American Dilemma* (1944), reported that "the South makes the widest application of the death penalty, and Negro criminals come in for much more than their share of the executions." Statistics confirm this discrimination, only it is not confined to the South. Between 1930 and 1990, 4,016 persons were executed in the United States. Of these, 2,129 (or 53 percent) were black. For the crime of murder, 3,343 were executed; 1,693 (or 51 percent) were black.(17) During these years African-Americans were about 12 per cent of the nation's population.

The nation's death rows have always had a disproportionately large population of African-Americans, relative to their fraction of the total population. Over the past century, black offenders, as compared with white, were often executed for crimes less often receiving the death penalty, such as rape and burglary. (Between 1930 and 1976, 455 men were executed for rape, of whom 405 (or 90 percent) were black.) A higher percentage of the blacks who were executed were juveniles; and blacks were more often executed than were whites without having their conviction reviewed by any higher court.(18)

In recent years, it has been widely believed that such flagrant discrimination is a thing of the past. Since the revival of the death penalty in the mid-1970s, about half of those on death row at any given time have been black⁽¹⁹⁾ -- a disproportionately large fraction given the black/white ratio of the total population, but not so obviously unfair if judged by the fact that roughly 50 percent of all those arrested for murder were also black.⁽²⁰⁾ Nevertheless, when those under death sentence are examined more closely, it turns out that race is a decisive factor after all.

An exhaustive statistical study of racial discrimination in capital cases in Georgia, for example, showed that "the average odds of receiving a death sentence among all indicted cases were 4.3 times higher in cases with white victims."⁽²¹⁾ In 1987 these data were placed before the Supreme Court in *McCleskey v. Kemp* and the Court did not dispute the statistical evidence. The Court did hold, however, that the evidence failed to show that there was "a constitutionally significant risk of racial bias...." . (481 U.S. 279)

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

These results cannot be explained away by relevant non-racial factors (such as prior criminal record or type of crime), and they lead to a very unsavory conclusion: In the trial courts of this nation, even at the present time, the killing of a white is treated much more severely than the killing of a black. Of the 168 persons executed between January 1977 and April 1992, only 29 had been convicted of the killing of a non-white, and only one of these 29 was himself white.⁽²³⁾ Where the death penalty is involved, our criminal justice system essentially reserves the death penalty for murderers (regardless of their race) who kill white victims.

Both sex and socio-economic class are also factors that enter into determining who receives a death sentence and who is executed. During the 1980s and aerially 1990s, only about 1 percent of all those on death row were women,⁽²⁴⁾ even though women commit about 15 percent of all criminal homicides.⁽²⁵⁾ A third or more of the women under death sentence were guilty of killing men who had victimized them with years of violent abuse.⁽²⁶⁾ Since 1930, only 33 women (12 of them black) have been executed in the United States.⁽²⁷⁾

Discrimination against the poor (and in our society racial minorities are disproportionately poor) is also well established. "Approximately ninety percent of those on death row could not afford to hire a lawyer when they were tried."⁽²⁸⁾ A defendant's poverty, lack of firm social roots in the community, inadequate legal representation at trial or on appeal--all these have been common factors among death-row populations. As Justice William O. Douglas noted in *Furman*, "One searches our chronicles in vain for the execution of any member of the affluent strata in this society." (408 U.S. 238)

The demonstrated inequities in the actual administration of capital punishment should tip the balance against it in the judgment of fair-minded and impartial observers. "Whatever else might be said for the use of death as a punishment, one lesson is clear from experience: this is a power that we cannot exercise fairly and without discrimination."(29)

Justice John Marshall Harlan, writing for the Court, noted: "...the history of capital punishment for homicides...reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die.... Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by history.... To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appears to be tasks which are beyond present human ability." (McGautha v. California, 402 U.S. 183 (1971))

Yet in the Gregg decision, the majority of the Supreme Court abandoned the wisdom of Justice Harlan and ruled as though the new guided-discretion statutes could accomplish the impossible. The truth is that death statutes approved by the Court "do not effectively restrict the discretion of juries by any real standards. They never will. No society is going to kill everybody who meets certain preset verbal requirements, put on the statute books without awareness of coverage of the infinity of special factors the real world can produce."(30)

Even if these statutes were to succeed in guiding the jury's choice of sentence, a vast reservoir of unfettered discretion remains: the prosecutor's decision to prosecute for a capital or lesser crime, the court's willingness to accept or reject a guilty plea, the jury's decision to convict for second-degree murder or manslaughter rather than capital murder, the determination of the defendant's sanity, the final decision by the governor on clemency.

Discretion in the criminal-justice system is unavoidable. The history of capital punishment in American society clearly shows the desire to mitigate the harshness of this penalty by narrowing its scope. Discretion, whether authorized by statutes or by their silence, has been the main vehicle to this end. But when discretion is used, as it always has been, to mark for death the poor, the friendless, the uneducated, the members of racial minorities, and the despised, then discretion becomes injustice.

Thoughtful citizens, who in contemplating capital punishment in the abstract might support it, must condemn it in actual practice.

Inevitability of Error

Unlike all other criminal punishments, the death penalty is uniquely irrevocable. Speaking to the French Chamber of Deputies in 1830, years after the excesses of the French Revolution, which he had witnessed, the Marquis de Lafayette said, "I shall ask for the abolition of the punishment of

death until I have the infallibility of human judgment demonstrated to me."(31) Although some proponents of capital punishment would argue that its merits are worth the occasional execution of innocent people, most would also insist that there is little likelihood of the innocent being executed. Yet a large body of evidence shows that innocent people are often convicted of crimes, including capital crimes and that some of them have been executed.

Since 1900, in this country, there have been on the average more than four cases per year in which an entirely innocent person was convicted of murder. Scores of these persons were sentenced to death. In many cases, a reprieve or commutation arrived just hours, or even minutes, before the scheduled execution. These erroneous convictions have occurred in virtually every jurisdiction from one end of the nation to the other. Nor have they declined in recent years, despite the new death penalty statutes approved by the Supreme Court.(32) Consider this handful of representative cases:

* In 1975, only a year before the Supreme Court affirmed the constitutionality of capital punishment, two African-American men in Florida, Freddie Pitts and Wilbert Lee, were released from prison after twelve years awaiting execution for the murder of two white men. Their convictions were the result of coerced confessions, erroneous testimony of an alleged eyewitness, and incompetent defense counsel. Though a white man eventually admitted his guilt, a nine-year legal battle was required before the governor would grant Pitts and Lee a pardon.(33) Had their execution not been stayed while the constitutional status of the death penalty was argued in the courts, these two innocent men probably would not be alive today.

* Just months after Pitts and Lee were released, authorities in New Mexico were forced to admit they had sentenced to death four white men -- motorcyclists from Los Angeles -- who were innocent. The accused offered a documented alibi at their trial, but the prosecution dismissed it as an elaborate ruse. The jury's verdict was based mainly on what was later revealed to be perjured testimony (encouraged by the police) from an alleged eyewitness. Thanks to persistent investigation by newspaper reporters and the confession of the real killer, the error was exposed and the defendants were released after eighteen months on death row.(34)

* In Georgia in 1975, Earl Charles was convicted of murder and sentenced to death. A surviving victim of the crime erroneously identified Charles as the gunman; her testimony was supported by a jail-house informant who claimed he had heard Charles confess. Incontrovertible alibi evidence, showing that Charles was in Florida at the very time of the crime, eventually established his innocence -- but not until he had spent more than three years under death sentence. His release was owing largely to his mother's unflagging efforts.(35)

* In 1989, Texas authorities decided not to retry Randall Dale Adams after the appellate court reversed his conviction for murder. Adams had spent more than three years on death row for the murder of a Dallas police officer. He was convicted on the perjured testimony of a 16-year-old youth who was the real killer. Adams's plight was vividly presented in the 1988 docudrama, *The Thin Blue Line*, which convincingly told the true story of the crime and exposed the errors that

resulted in his conviction.(36)

* Another case in Texas from the 1980s tells an even more sordid story. In 1980 a black high school janitor, Clarence Brandley, and his white co-worker found the body of a missing 15-year-old white schoolgirl. Interrogated by the police, they were told, " One of you two is going to hang for this." Looking at Brandley, the officer said, "Since you're the nigger, you're elected." In a classic case of rush to judgment, Brandley was tried, convicted, and sentenced to death. The circumstantial evidence against him was thin, other leads were ignored by the police, and the courtroom atmosphere reeked of racism. In 1986 Centurion Ministries -- a volunteer group devoted to freeing wrongly convicted prisoners -- came to Brandley's aid. Evidence had meanwhile emerged that another man had committed the murder for which Brandley was awaiting execution. Brandley was not released until 1990.(37)

Each of the five stories told above has a reassuring ending: The innocent prisoner is saved from execution and is released. But when prisoners are executed, no legal forum exists in which unanswered questions about their guilt can be resolved. In May 1992, Roger Keith Coleman was executed in Virginia despite widely publicized doubts surrounding his guilt and evidence that pointed to another person as the murderer -- evidence that was never submitted at his trial. Not until late in the appeal process did anyone take seriously the possibility that the state was about to kill an innocent man, and then efforts to delay or nullify his execution failed. Was Coleman really innocent? At the time of his execution, his case was marked with many of the features found in other cases where the defendant was eventually cleared. Were Coleman still in prison, his friends and attorneys would have a strong incentive to resolve these questions. But with Coleman dead, further inquiry into the facts of the crime for which h e was convicted is unlikely.

Overzealous prosecution, mistaken or perjured testimony, faulty police work, coerced confessions, the defendant's previous criminal record, inept defense counsel, seemingly conclusive circumstantial evidence, community pressure for a conviction -- such factors help explain why the judicial system cannot guarantee that justice will never miscarry. And when it does miscarry, volunteers outside the criminal justice system -- newspaper reporters, for example -- and not the police or prosecutors are the ones who rectify the errors. To retain the death penalty in the face of the demonstrable failures of the system is unacceptable, especially as there are no strong counterbalancing factors in favor of the death penalty.

Barbarity

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

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

Electrocution has been the most widely used form of execution in this country in this century. The condemned prisoner is led--or dragged--into the death chamber, strapped into the chair, and electrodes are fastened to head and legs. When the switch is thrown the body strains, jolting as the voltage is raised and lowered. Often smoke rises from the head. There is the awful odor of burning flesh. No one knows how long electrocuted individuals retain consciousness.

In 1983, the electrocution of John Evans in Alabama was described by an eyewitness as follows: "At 8:30 p.m. the first jolt of 1900 volts of electricity passed through Mr. Evans' body. It lasted thirty seconds. Sparks and flames erupted ... from the electrode tied to Mr. Evans' left leg. His body slammed against the straps holding him in the electric chair and his fist clenched permanently. The electrode apparently burst from the strap holding it in place. A large puff of grayish smoke and sparks poured out from under the hood that covered Mr. Evans' face. An overpowering stench of burnt flesh and clothing began pervading the witness room. Two doctors examined Mr. Evans and declared that he was not dead.

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

"At 8:40 p.m., a third charge of electricity, thirty seconds in duration, was passed through Mr. Evans' body. At 8:44, the doctors pronounced him dead. The execution of John Evans took fourteen minutes."(38) Afterwards, officials were embarrassed by what one observer called the "barbaric ritual." The prison spokesman remarked, "This was supposed to be a very clean manner of administering death."(39)

An attempt to improve on electrocution was the gas chamber. The prisoner is strapped into a chair, a container of sulfuric acid underneath. The chamber is sealed, and cyanide is dropped into the acid to form lethal gas. Here is an account of the 1992 execution in Arizona of Don Harding, as reported in the dissent by U. S. Supreme Court Justice John Paul Stevens:

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

"At this point Don's body started convulsing violently....His face and body fumed a deep red and the veins in his temple and neck began to bulge until I thought they might explode.

"After about a minute Don's face leaned partially forward, but he was still conscious. Every few

seconds he continued to gulp in. He was shuddering uncontrollably and his body was racked with spasms. His head continued to snap back. His hands were clenched.

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

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

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

The latest mode of inflicting the death penalty, enacted into law by nearly two dozen states, is lethal injection, first used in Texas in 1982. It is easy to overstate the humaneness and efficacy of this method. There is no way of knowing that it is really painless. As the U.S. Court of Appeals observed, there is "substantial and uncontroverted evidence ... that execution by lethal injection poses a serious risk of cruel, protracted death.... Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own asphyxiation." (Chaney v. Heckler, 718 F.2d 1174 [1983])

Nor does the execution always proceed smoothly as planned. In 1985 "the authorities repeatedly jabbed needles into ... Stephen Morin, when they had trouble finding a usable vein because he had been a drug abuser."(40) In 1988, during the execution of Raymond Landry, "a tube attached to a needle inside the inmate's right arm began leaking, sending the lethal mixture shooting across the death chamber toward witnesses."(41)

Indeed, by its veneer of decency and by subtle analogy with life-saving medical practice, death by lethal injection makes killing as punishment more acceptable to the public. Even when it prevents the struggles of the condemned person and avoids maiming the body, it is no different from hanging or shooting as an expression of the absolute power of the state over the helpless individual.

Most people observing an execution are horrified and disgusted. "I was ashamed," writes sociologist Richard Moran, who witnessed an execution in Texas in 1985. "I was an intruder, the only member of the public who had trespassed on [the condemned man's] private moment of anguish. In my face he could see the horror of his own death."(42) Revulsion at the duty to supervise and witness executions is one reason why so many prison wardens -- however unsentimental they are about crime and criminals -- are opponents of capital punishment.

In some people, however, executions seem to appeal to strange, aberrant impulses and give an outlet to sadistic urges. Warden Lewis Lawes wrote of the many requests he received to watch

electrocutions, and told that when the job of executioner became vacant, "I received more than seven hundred applications for the position, many of them offering cut-rate prices." (43)

Public executions were common in this country during the 19th century; one of the last was in 1936 in Kentucky, when 20,000 people gathered to watch a young African-American male hanged. (44) Delight in brutality, pain, violence, and death may always be with us. But surely we must conclude that it is best for the law not to encourage these impulses. When the government sanctions, commands, and ceremoniously carries out the execution of a prisoner, it lends support to this destructive side of human nature.

More than two centuries ago, the Italian jurist Cesare Beccaria, in his highly influential treatise *On Crimes and Punishments* (1764), asserted: "The death penalty cannot be useful, because of the example of barbarity it gives men." True, and even if the death penalty were a "useful" deterrent, it would still be an "example of barbarity." No society can safely entrust the enforcement of its laws to torture, brutality, or killing. Such methods are inherently cruel and will always mock the attempt to cloak them in justice. As Supreme Court Justice Arthur J. Goldberg wrote, "The deliberate institutionalized taking of human life by the state is the greatest conceivable degradation to the dignity of the human personality." (45)

Retribution

Justice, it is often insisted, requires the death penalty as the only suitable retribution for heinous crimes. This claim will not bear scrutiny. All punishment by its nature is retributive, not only the death penalty. Whatever legitimacy, therefore, is to be found in punishment as just retribution can in principle be satisfied without recourse to executions.

It is also obvious that the death penalty could be defended on narrowly retributive grounds only for the crime of murder, and not for any of the many other crimes that have frequently been made subject to this mode of punishment (rape, kidnapping, espionage, treason, drug kingpins). Few defenders of the death penalty are willing to confine themselves consistently to the narrow scope afforded by retribution. In any case, execution is more than a punishment exacted in retribution for the taking of a life.

As Camus wrote, "For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life." (46)

It is also often argued that death is what murderers deserve, and that those who oppose the death penalty violate the fundamental principle that criminals should be punished according to their deserts--"making the punishment fit the crime."

If this principle is understood to require that punishments are unjust unless they are like the

crime itself, then the principle is unacceptable. It would require us to rape rapists, torture torturers, and inflict other horrible and degrading punishments on offenders. It would require us to betray traitors and kill multiple murderers again and again, punishments impossible to inflict. Since we cannot reasonably aim to punish all crimes according to this principle, it is arbitrary to invoke it as a requirement of justice in the punishment of murderers.

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

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

Some whose loved one was a murder victim believe that they cannot rest until the murderer is executed. But the feeling is by no means universal. Coretta Scott King has observed, "As one whose husband and mother-in-law have died the victims of murder assassination, I stand firmly and unequivocally opposed to the death penalty for those convicted of capital offenses. An evil deed is not redeemed by an evil deed of retaliation. Justice is never advanced in the tacking of a human life. Morality is never upheld by a legalized murder."(47)

Kerry Kennedy, daughter of the slain Senator Robert Kennedy, has written: "I was eight years old when my father was murdered. It is almost impossible to describe the pain of losing a parent to a senseless murder.... But even as a child one thing was clear to me: I didn't want the killer, in turn, to be killed. I remember lying in bed and praying, 'Please, God. Please don't take his life, too.' I saw nothing that could be accomplished in the loss of one life being answered with the loss of another. And I knew, far too vividly, the anguish that would spread through another family -- another set of parents, children, brothers, and sisters thrown into grief."(48)

Financial Costs

It is sometimes suggested that abolishing capital punishment is unfair to the taxpayer, as though life imprisonment were obviously more expensive than executions. If one takes into account all the relevant costs, the reverse is true. "The death penalty is not now, nor has it ever been, a more economical alternative to life imprisonment."(49)

A murder trial normally takes much longer when the death penalty is at issue than when it is not. Litigation costs - including the time of judges, prosecutors, public defenders, and court reporters, and the high costs of briefs -- are all borne by the taxpayer.

A 1982 study showed that were the death penalty to be reintroduced in New York, the cost of the capital trial alone would be more than double the cost of a life term in prison.(50)

In Maryland, a comparison of capital trial costs with and without the death penalty for the years 1979-1984 concluded that a death penalty case costs "approximately 42 percent more than a case resulting in a non-death sentence."(51) In 1988 and 1989 the Kansas legislature voted against reinstating the death penalty after it was informed that reintroduction would involve a first-year cost of "more than \$ 11 million."(52) Florida, with one of the nation's largest death rows, has estimated that the true cost of each execution is approximately \$3.2 million, or approximately six times the cost of a life-imprisonment sentence.(53)

The only way to make the death penalty a "better buy" than imprisonment is to weaken due process and curtail appellate review, which are the defendant's (and society's) only protections against the grossest miscarriages of justice. The savings in dollars would be at the cost of justice: In nearly half of the death-penalty cases given review under federal habeas corpus, the conviction is overturned.(54)

Public Opinion

The media commonly report that the American public overwhelmingly supports the death penalty. More careful analysis of public attitudes, however, reveals that most Americans would oppose the death penalty if convicted murderers were sentenced to life without parole and were required to make some form of financial restitution. In California, for example, a Field Institute survey showed that in 1990, 82 percent approved in principle of the death penalty. But when asked to choose between the death penalty and life imprisonment plus restitution, only a small minority--26 percent--continued to favor executions.(55)

A comparable change in attitude toward the death penalty has been verified in many other states and contradicted in none.

Abolition Trends

The death penalty in the United States needs to be put into international perspective. In 1962, it was reported to the Council of Europe that "the facts clearly show that the death penalty is regarded in Europe as something of an anachronism...."(56)

Today, 28 European countries have abolished the death penalty either in law or in practice. In Great Britain, it was abolished (except for treason) in 1971; France abolished it in 1981. Canada abolished it in 1976. The United Nations General Assembly affirmed in a formal resolution that, throughout the world, it is desirable to "progressively restrict the number of offenses for which the death penalty might be imposed, with a view to the desirability of abolishing this punishment."(57)

Conspicuous by their indifference to these recommendations are nations generally known for their disregard for the human rights of their citizens: China, Iraq, Iran, South Africa, and the former Soviet Union.(58) Americans ought to be embarrassed to find themselves linked with the governments of such nations in retaining execution as a method of crime control.

Opposition to the death penalty in the United States is widespread and diverse. Catholic, Jewish, and Protestant religious groups, national organizations representing people of color, and public-interest law groups are among the more than fifty national organizations that constitute the National Coalition to Abolish the Death Penalty.

Once in use everywhere and for a wide variety of crimes, the death penalty today is generally forbidden by law and widely abandoned in practice. The unmistakable worldwide trend is toward the complete abolition of capital punishment.

For Further Information & Reference

Additional copies of this pamphlet, as well as resource materials such as newsletters, books, legal and legislative information, death-row census, reprinted articles, bibliographies, and referrals to other national and state-wide anti-death penalty groups may be obtained from the Capital Punishment Project, American Civil Liberties Union, 122 Maryland Avenue N.E., Washington, D.C., 20002. Diann Y. Rust-Tierney, Esq., is the project's director. The National Coalition to Abolish the Death Penalty, which coordinates the work of a wide variety of organizations opposed to capital punishment, is located at 1325 G St. N.W. Lower Level B, Washington, D.C., 20005.

No one volume on the death penalty currently serves as an up-to-date source book on all aspects of the subject. The *Death Penalty in America*, 3rd ed., ed. Hugo Adam Bedau, Oxford University Press, 1982, is still useful, and a new edition is in preparation. Many other recent volumes contain valuable information and argument, including: Welsh S. White, *The Death Penalty in the Nineties*, University of Michigan Press, 1991; Samuel R. Gross and Robert Mauro, *Death and Discrimination*, Northeastern University Press, 1989; Michael L. Radelet, ed., *Facing the Death Penalty*, Temple University Press, 1989; Kenneth C. Haas and James A. Inciardi, eds., *Challenging Capital Punishment*, Sage Publications, 1988; United States of America -- *The Death Penalty*, Amnesty International Publications, 1987; Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda*, Cambridge University Press, 1986; William J. Bowers, *Legal Homicide: Death as Punishment in America, 1864-1982*, Northeastern University Press, 1984; Charles L. Black, Jr., *Capital Punishment*, 2nd ed., W. W. Norton, 1981. The wealth of scholarly literature up through 1988 can be traced with the help of *Capital Punishment in America: An Annotated Bibliography*, Garland Publishing, 1988, edited by Michael L. Radelet and Margaret Vandiver.

Four more specialized volumes deserve mention as well: Michael L. Radelet, Hugo Adam Bedau,

and Constance E. Putnam, *In Spite of Innocence: Erroneous Convictions in Capital Cases*, Northeastern University Press, 1992; Robert M. Bohm, ed., *The Death Penalty in America: Current Research*. Anderson Publishing Co., 1991; Victor T. Streib, *Death Penalty for Juveniles*, Indiana University Press, 1987; and Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*, Oxford University Press, 1989.

Several scholarly and legal journals have devoted whole issues to various legal, sociological, and historical aspects of the problem of the death penalty, notably *Dickinson Law Review*, vol. 95, no. 4, Summer 1991; *New York University Review of Law & Social Change*, vol. 18, nos. 2 and 3, 1990-1991; *Albany Law Review*, vol. 54, nos. 3/4, 1990; *Loyola of Los Angeles Law Review*, vol. 23, no. 1, November 1989; *Journal of Contemporary Criminal Justice*, vol. 5, no. 4, December 1989; *Law and Human Behavior*, vol. 8, nos. 1/2, June 1984; *U.C. Davis Law Review*, vol. 18, no. 4, summer 1985; *Journal of Criminal Law and Criminology*, vol. 74, no. 3, fall 1983.

Among the recent U.S. government publications containing information of general interest are: "The Federal Death Penalty Act of 1989," Report of the Senate Committee on the Judiciary, 101st Congress, 1st Session, October 1989; "Death Penalty," Hearings Before Committee on the Judiciary, U.S. Senate, 101st Congress, 1st Session, September-October 1989; "Establishing Constitutional Procedures for the Imposition of Capital Punishment," Report of the Senate Committee on the Judiciary, 99th Congress, 2d Session, April 1986; "Capital Punishment," Hearings Before Subcommittee on Criminal Justice, U.S. House of Representatives, 99th Congress, 1st and 2d Sessions, November 1985-July 1986; "Death Penalty Legislation," hearing Before the Committee on the Judiciary, U.S. Senate, 99th Congress, 1st Session, September 1985. For earlier federal government publications, see the bibliography by Radelet and Vandiver, pp. 219-20.

Statistical information on death sentences and executions since 1930 may be obtained in the U.S. Bureau of Justice Statistics Bulletin, *Capital Punishment*, an annual report appearing under various titles since the 1950s. The NAACP Legal Defense and Educational Fund publishes "Death Row, U.S.A.," issued since the 1970s several times a year; it reports current demographic information on executions and the death row population.

Notes

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2. See *Uniform Crime Reports*, annually, 1980 et seq.
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