

## HISTORY

The following is a brief summary of the history of capital punishment, with an emphasis on developments in the United States. The sources used in this summary are listed at the end to allow more in-depth research.

### **Early Death Penalty Laws**

The first established death penalty laws date as far back as the Eighteenth Century B.C. in the Code of King Hammurabi of Babylon, which codified the death penalty for 25 different crimes. The death penalty was also part of the Fourteenth Century B.C.'s Hittite Code, the Seventh Century B.C.'s Draconian Code of Athens, which made death the only punishment for all crimes, and the Fifth Century B.C.'s Roman Law of the Twelve Tablets. Death sentences were carried out by such means as crucifixion, drowning, beating to death, burning alive, and impalement.

In the Tenth Century A.D., hanging became the usual method of execution in Britain. In the following century, William the Conqueror would not allow persons to be hanged or otherwise executed for any crime, except in times of war. This trend would not last, for in the Sixteenth Century, under the reign of Henry VIII, as many as 72,000 people are estimated to have been executed. Some common methods of execution at that time were boiling, burning at the stake, hanging, beheading, and drawing and quartering. Executions were carried out for such capital offenses as marrying a Jew, not confessing to a crime, and treason.

The number of capital crimes in Britain continued to rise throughout the next two centuries. By the 1700s, 222 crimes were punishable by death in Britain, including stealing, cutting down a tree, and robbing a rabbit warren. Because of the severity of the punishment of death, many juries would not convict defendants if the offense was not serious. This led to reforms of Britain's death penalty. From 1823 to 1837, the death penalty was eliminated for over 100 of the 222 crimes punishable by death. (Randa, 1997)

### **The Death Penalty in America**

Britain influenced America's use of the death penalty more than any other country did. When European settlers came to the new world, they brought the practice of capital punishment. The first recorded execution in the new colonies was that of Captain George Kendall in the Jamestown colony of Virginia in 1608. Kendall was executed for being a spy for Spain. In 1612, Virginia Governor Sir Thomas Dale enacted the Divine, Moral and Martial Laws, which provided the death penalty for even minor offenses such as stealing grapes, killing chickens, and trading with Indians.

Laws regarding the death penalty varied from colony to colony. The Massachusetts Bay Colony held its first execution in 1630, even though the Capital Laws of New England did not go into effect until years later. The New York Colony instituted the Duke's Laws of 1665. Under these laws, offenses such as striking one's mother or father, or denying the "true God," were punishable by death. (Randa, 1997)

## EARLY QUESTIONS ABOUT THE DEATH PENALTY

### Colonial Times

Those who did not support the death penalty found support in the writings of European theorists Montesquieu, Voltaire and Bentham, and English Quakers John Bellers and John Howard. However, it was Cesare Beccaria's 1767 essay, *On Crimes and Punishment* that had an especially strong impact throughout the world. In the essay, Beccaria theorized that there was no justification for the state's taking of a life. The essay gave abolitionists an authoritative voice and renewed energy, one result of which was the abolition of the death penalty in Austria and Tuscany. (Schabas 1997)

American intellectuals as well were influenced by Beccaria. The first attempted reforms of the death penalty in the U.S. occurred when Thomas Jefferson introduced a bill to revise Virginia's death penalty laws. The bill proposed that capital punishment be used only for the crimes of murder and treason. It was defeated by only one vote.

Dr. Benjamin Rush, a signer of the Declaration of Independence and founder of the Pennsylvania Prison Society, challenged the belief that the death penalty served as a deterrent. In fact, Rush was an early believer in the "brutalization effect." He held that having a death penalty actually increased criminal conduct. Rush gained the support of Benjamin Franklin and Philadelphia Attorney General William Bradford. Bradford, who would later become the U.S. Attorney General, believed that the death penalty should be retained, but that it was not a deterrent to certain crimes. He subsequently led Pennsylvania to become the first state to consider degrees of murder based on culpability. In 1794, Pennsylvania repealed the death penalty for all offenses except first-degree murder. (Bohm, 1999; Randa, 1997; and Schabas, 1997)

## CHANGES IN DEATH PENALTY LAWS

### **Nineteenth Century**

In the early part of the nineteenth century, many states reduced the number of their capital crimes and built state penitentiaries. In 1834, Pennsylvania became the first state to move executions away from the public eye and carry them out in correctional facilities.

In 1846, Michigan became the first state to abolish the death penalty for all crimes except treason. Later, Rhode Island and Wisconsin abolished the death penalty for all crimes. By the end of the century, the world would see the countries of Venezuela, Portugal, Netherlands, Costa Rica, Brazil and Ecuador follow suit (Bohm, 1999 and Schabas, 1997).

Although some U.S. states began abolishing the death penalty, most states held onto capital punishment. Some states made more crimes capital offenses, especially for offenses committed by slaves. In 1838, in an effort to make the death penalty more palatable to the public, some states passed laws against mandatory death sentencing, instead enacting discretionary death penalty statutes. With the exception of a small number of rarely committed crimes in a few jurisdictions, all mandatory capital punishment laws had been abolished by 1963 (Bohm, 1999).

During the Civil War, opposition to the death penalty waned, as more attention was given to the anti-slavery movement. After the war, new developments in the means of executions emerged. The electric chair was introduced at the end of the century. New York built the first electric chair in 1888, and in 1890 executed William Kemmler. Soon, other states adopted this method of execution (Randa, 1997).

### **Early and Mid-Twentieth Century**

From 1907 to 1917, six states completely outlawed the death penalty and three limited it to the rarely committed crimes of treason and first-degree murder of a law enforcement official. However, this reform was short-lived. There was a frenzied atmosphere in the U.S., as citizens began to panic about the threat of revolution in the wake of the Russian Revolution. In addition, the U.S. had just entered World War I and there were intense class conflicts as socialists mounted the first serious challenge to capitalism. As a result, five of the six abolitionist states reinstated their death penalty by 1920. (Bedau, 1997 and Bohm, 1999)

In 1924, the use of cyanide gas was introduced, as Nevada sought a more humane way of executing its inmates. Gee Jon was the first person executed by lethal gas. The state tried to pump cyanide gas into Jon's cell while he slept, but this proved impossible, and the gas chamber was constructed. (Bohm, 1999)

From the 1920s to the 1940s, there was a resurgence in the use of the death penalty. This was due, in part, to the writings of criminologists, who argued that the death penalty was a necessary social measure. In the United States, Americans were suffering through Prohibition and the Great Depression. There were more executions in the 1930s than in any other decade in American history, an average of 167 per year. (Bohm, 1999 and Schabas, 1997)

In the 1950s, public sentiment began to turn away from capital punishment. Many allied nations either abolished or limited the death penalty, and in the U.S., the number of executions dropped dramatically. Whereas there were 1,289 executions in the 1940s, there were 715 in the 1950s, and the number fell even further, to only 191, from 1960 to 1976. In 1966, support for capital punishment reached an all-time low. A Gallup poll showed support for the death penalty at only 42%. (Bohm, 1999 and BJS, 1997)

## CONSTITUTIONALITY OF THE DEATH PENALTY IN AMERICA

The 1960s brought challenges to the fundamental legality of the death penalty. Before then, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution were interpreted as permitting the death penalty. However, in the early 1960s, it was suggested that the death penalty was a "cruel and unusual" punishment and therefore unconstitutional under the Eighth Amendment. In 1958, the Supreme Court decided in *Trop v. Dulles* (356 U.S. 86) that the interpretation of the Eighth Amendment contained an "evolving standard of decency that marked the progress of a maturing society." Although *Trop* was not a death penalty case, abolitionists applied the Court's logic to executions and maintained that the United States had, in fact, progressed to a point that its "standard of decency" should no longer tolerate the death penalty. (Bohm, 1999)

In the late 1960s, the Supreme Court began "fine tuning" the way the death penalty was administered. To this effect, the Court heard two cases in 1968 dealing with the discretion given to the prosecutor and the jury in capital cases. The first case was *U.S. v. Jackson* (390 U.S. 570), where the Supreme Court heard arguments regarding a provision of the federal kidnapping statute requiring that the death penalty be imposed only upon recommendation of a jury. The Court held that this practice was unconstitutional because it encouraged defendants to waive their right to a jury trial to ensure they would not receive a death sentence.

The other 1968 case was *Witherspoon v. Illinois* (391 U.S. 510). The Supreme Court held that a potential juror's mere reservations about the death penalty were insufficient grounds to prevent that person from serving on the jury in a death penalty case. Jurors could be disqualified only if prosecutors could show that the juror's attitude toward capital punishment would prevent him or her from making an impartial decision about punishment.

### **Suspending the Death Penalty**

The issue of the arbitrariness of the death penalty was brought before the Supreme Court in 1972 in *Furman v. Georgia* (408 U.S. 238). *Furman*, bringing an Eighth Amendment challenge, argued that capital cases resulted in arbitrary and capricious sentencing.

In 9 separate opinions, and by a vote of 5 to 4, the Court held that Georgia's death penalty statute, which gave the jury complete sentencing discretion without any guidance as to how to exercise that discretion, could result in arbitrary sentencing. The Court held that the scheme of punishment under the statute was therefore "cruel and unusual" and violated the Eighth Amendment. Thus, on June 29, 1972, the Supreme Court effectively voided 40 death penalty statutes, thereby commuting the sentences of 629 death row inmates around the country and suspending the death penalty because existing statutes were no longer valid.

### **Reinstating the Death Penalty**

Although the separate opinions by Justices Brennan and Marshall stated that the death penalty itself was unconstitutional, the overall holding in *Furman* was that the specific death penalty statutes were unconstitutional. With that holding, the Court essentially opened the door to states to rewrite their death penalty statutes to eliminate the problems cited in *Furman*. Advocates of

capital punishment began proposing new statutes that they believed would end arbitrariness in capital sentencing. The states were led by Florida, which rewrote its death penalty statute only five months after *Furman*. Shortly after, 34 other states proceeded to enact new death penalty statutes. To address the unconstitutionality of unguided jury discretion, some states removed all of that discretion by mandating capital punishment for those convicted of capital crimes. However, this practice was held unconstitutional by the Supreme Court in *Woodson v. North Carolina* (428 U.S. 280 (1976)).

Other states sought to limit that discretion by providing sentencing guidelines for the judge and jury when deciding whether to impose death. The guidelines allowed for the introduction of aggravating and mitigating factors in determining sentencing. These guided discretion statutes were approved in 1976 by the Supreme Court in *Gregg v. Georgia* (428 U.S. 153), *Jurek v. Texas* (428 U.S. 262), and *Proffitt v. Florida* (428 U.S. 242), collectively referred to as the *Gregg* decision. This landmark decision held that the new death penalty statutes in Florida, Georgia, and Texas were constitutional, thus reinstating the death penalty in those states. The Court also held that the death penalty itself was constitutional under the Eighth Amendment.

In addition to sentencing guidelines, three other procedural reforms were approved by the Court in *Gregg*. The first was bifurcated trials, in which there are separate deliberations for the guilt and penalty phases of the trial. Only after the jury has determined that the defendant is guilty of capital murder does it decide in a second trial whether the defendant should be sentenced to death or given a lesser sentence of prison time. Another reform was the practice of automatic appellate review of convictions and sentence. The final procedural reform from *Gregg* was proportionality review, a practice that helps the state to identify and eliminate sentencing disparities. Through this process, the state appellate court can compare the sentence in the case being reviewed with other cases within the state, to see if it is disproportionate.

Because these reforms were accepted by the Supreme Court, some states wishing to reinstate the death penalty included them in their new death penalty statutes. The Court, however, did not require that each of the reforms be present in the new statutes. Therefore, some of the resulting new statutes include variations on the procedural reforms found in *Gregg*.

The ten-year moratorium on executions that had begun with the *Jackson* and *Witherspoon* decisions ended on January 17, 1977, with the execution of Gary Gilmore by firing squad in Utah. Gilmore did not challenge his death sentence. That same year, Oklahoma became the first state to adopt lethal injection as a means of execution, though it would be five more years until Charles Brooks became the first person executed by lethal injection in Texas on December 7, 1982.

## LIMITATIONS ON THE DEATH PENALTY

### Limitations within the United States

After World War II, many European countries abandoned or restricted the death penalty after signing and ratifying the Universal Declaration of Human Rights and subsequent human rights treaties. The U.S. retained the death penalty, but established limitations on capital punishment.

In 1977, the United States Supreme Court held in *Coker v. Georgia* (433 U.S. 584) that the death penalty is an unconstitutional punishment for the rape of an adult woman when the victim was not killed. Other limits to the death penalty followed in the next decade.

### Mental Illness and Mental Retardation

In 1986, the Supreme Court banned the execution of insane persons in *Ford v. Wainwright* (477 U.S. 399). However, in 1989, the Court held that executing persons with mental retardation was not a violation of the Eighth Amendment in *Penry v. Lynaugh* (492 U.S. 584). Mental retardation would instead be a mitigating factor to be considered during sentencing.

On June 20, 2002, the Supreme Court issued a landmark ruling ending the execution of those with mental retardation. In *Atkins v. Virginia*, the Court held that it is a violation of the Eighth Amendment ban on cruel unusual punishment to execute death row inmates with mental retardation.

### Race

Race became the focus of the criminal justice debate when the Supreme Court held in *Batson v. Kentucky* (476 U.S. 79 (1986)) that a prosecutor who exercises his or her peremptory challenges to remove a disproportionate number of citizens of the same race in selecting a jury is required to show neutral reasons for the strikes.

Race was again in the forefront when the Supreme Court decided a 1987 case, *McCleskey v. Kemp* (481 U.S. 279). McCleskey argued that there was racial discrimination in the application of Georgia's death penalty by presenting a statistical analysis showing a pattern of racial disparities in death sentences, based on the race of the victim. The Supreme Court held, however, that racial disparities would not be recognized as a constitutional violation of "equal protection of the law" unless intentional racial discrimination against the defendant could be shown.

### Juveniles

In March 2005, the United States Supreme Court ruled in *Roper v. Simmons* that the death penalty for those who had committed their crimes at under 18 years of age was cruel and unusual punishment and hence barred by the Constitution.

The Court reaffirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. The Court reasoned that the rejection of the juvenile death penalty in the majority of states, the infrequent use of the punishment even where it remains on the books, and the consistent trend toward abolition of the juvenile death penalty demonstrated a national

consensus against the practice. The Court determined that today our society views juveniles as categorically less culpable than the average criminal.

In the late 1980s, the Supreme Court decided three cases regarding the constitutionality of executing juvenile offenders. In 1988, in *Thompson v. Oklahoma* (487 U.S. 815), four Justices held that the execution of offenders aged fifteen and younger at the time of their crimes was unconstitutional. The fifth vote was Justice O'Connor's concurrence, which restricted Thompson to states without a specific minimum age limit in their death penalty statute. The combined effect of the opinions by the four Justices and Justice O'Connor in *Thompson* is that no state without a minimum age in its death penalty statute can execute someone who was under sixteen at the time of the crime.

The following year, the Supreme Court held that the Eighth Amendment does not prohibit the death penalty for crimes committed at age sixteen or seventeen. (*Stanford v. Kentucky*, and *Wilkins v. Missouri* (collectively, 492 U.S. 361)).

In 1992, the United States ratified the International Covenant on Civil and Political Rights. Article 6(5) of this international human rights treaty requires that the death penalty not be used on those who committed their crimes when they were below the age of 18. However, although the U.S. ratified the treaty, they reserved the right to execute juvenile offenders.

## CURRENT ISSUES AND TOPICS

### Innocence

The Supreme Court addressed the constitutionality of executing someone who claimed actual innocence in *Herrera v. Collins* (506 U.S. 390 (1993)). Although the Court left open the possibility that the Constitution bars the execution of someone who conclusively demonstrates that he or she is actually innocent, the Court noted that such cases would be very rare. The Court held that, in the absence of other constitutional violations, new evidence of innocence is no reason for federal courts to order a new trial. The Court also held that an innocent inmate could seek to prevent his execution through the clemency process, which, historically, has been "the 'fail safe' in our justice system." Herrera was not granted clemency, and he was executed in 1993.

As of October 2007, 124 people have been freed from death row after their exoneration of all charges.

### Public Support

Support for the death penalty has fluctuated throughout the century. According to Gallup surveys, in 1936 61% of Americans favored the death penalty for persons convicted of murder. Support reached an all-time low of 42% in 1966. Throughout the 70s and 80s, the percentage of Americans in favor of the death penalty increased steadily, culminating in an 80% approval rating in 1994. Since 1994, support for the death penalty has declined. Today, 70% of Americans support the death penalty. However, research shows that public support for the death penalty drops when poll respondents are given the two choices a juror in the penalty phase of a typical capital trial would be given: death or "life imprisonment with absolutely no possibility of parole." Given that choice, support for the death penalty drops to around 50%.

### Religion and the Death Penalty

In the 1970s, the National Association of Evangelicals (NAE), representing more than 10 million conservative Christians and 47 denominations, and the Moral Majority, were among the Christian groups supporting the death penalty. NAE's successor, the Christian Coalition, also supports the death penalty. Today, Fundamentalist and Pentecostal churches, as well as the Church of Jesus Christ of Latter-day Saints (Mormons), support the death penalty — typically on biblical grounds, specifically citing the Old Testament (Bedau, 1997). Although formerly also a supporter of capital punishment, the Roman Catholic Church now opposes the death penalty. In addition, most Protestant denominations, including Baptists, Episcopalians, Lutherans, Methodists, Presbyterians, and the United Church of Christ, oppose the death penalty.

### Women and the Death Penalty

Women have, historically, not been subject to the death penalty at the same rate as men. From the first woman executed in the U.S., Jane Champion, who was hanged in James City, Virginia in 1632, to the 2005 execution of Frances Newton in Texas, women have constituted only 3% of

U.S. executions. In fact, only 11 women have been executed since the death penalty was reinstated. (O'Shea, 1999, with updates by DPIC).

### **The Federal Death Penalty**

In addition to the death penalty laws in many states, the federal government has also employed capital punishment for certain federal offenses, such as murder of a government official, kidnapping resulting in death, running of a large-scale drug enterprise, and treason. When the Supreme Court struck down state death penalty statutes in *Furman*, the federal death penalty statutes suffered from the same constitutional infirmities that the state statutes did. As a result, death sentences under the old federal death penalty statutes have not been upheld.

A new federal death penalty statute was enacted in 1988 for murder in the course of a drug-kidnaping conspiracy. The statute was modeled on the post-Gregg statutes that the Supreme Court has approved.

In 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act that expanded the federal death penalty to some 60 crimes, some of which do not involve murder. There have been three federal executions under these laws: Timothy McVeigh and Juan Garza in June of 2001, and Louis Jones in March 2003.

In response to the Oklahoma City Bombing, President Clinton signed the Anti-Terrorism and Effective Death Penalty Act of 1996. The Act, which affects both state and federal prisoners, restricts review in federal courts by establishing tighter filing deadlines, limiting the opportunity for evidentiary hearings, and ordinarily allowing only a single habeas corpus filing in federal court. Proponents of the death penalty argue that this streamlining will speed up the death penalty process and significantly reduce its cost, although others fear that quicker, more limited federal review may increase the risk of executing innocent defendants. (Bohm, 1999 and Schabas, 1997)

### **International Views**

In April 1999, the United Nations Human Rights Commission passed a resolution supporting a worldwide moratorium on executions. The resolution calls on countries which have not abolished the death penalty to restrict its use, including not imposing it on juvenile offenders and limiting the number of offenses for which it can be imposed.

As of January 2009, 138 countries are abolitionist in law or practice, leaving just 59 countries active in the use of the death penalty. Of the almost 1600 known executions to take place in 2006, 91% were carried out by the China, Iran, Pakistan, Iraq, Sudan and the USA. (Amnesty International, 2007)

Below are lists of countries with and without the death penalty, compiled and last updated by Amnesty International on January 27, 2009: (<http://tinyurl.com/52jxgf>).

### **Retentionist Countries**

AFGHANISTAN, ANTIGUA AND BARBUDA, BAHAMAS, BAHRAIN, BANGLADESH, BARBADOS, BELARUS, BELIZE, BOTSWANA, BURUNDI, CAMEROON, CHAD, CHINA, COMOROS, CONGO (Democratic Republic), CUBA, DOMINICA, EGYPT, EQUATORIAL GUINEA, ERITREA, ETHIOPIA, GUATEMALA, GUINEA, GUYANA, INDIA, INDONESIA, IRAN, IRAQ, JAMAICA, JAPAN, JORDAN, KAZAKSTAN, KOREA (North), KOREA (South), KUWAIT, LAOS, LEBANON, LESOTHO, LIBYA, MALAYSIA, MONGOLIA, NIGERIA, OMAN, PAKISTAN, PALESTINIAN AUTHORITY, QATAR, RWANDA, SAINT CHRISTOPHER & NEVIS, SAINT LUCIA, SAINT VINCENT & GRENADINES, SAUDI ARABIA, SIERRA LEONE, SINGAPORE, SOMALIA, SUDAN, SYRIA, TAIWAN, TAJIKISTAN, TANZANIA, THAILAND, TRINIDAD AND TOBAGO, UGANDA, UNITED ARAB EMIRATES, UNITED STATES OF AMERICA, VIET NAM, YEMEN, ZIMBABWE

### **Countries that are abolitionist in practice**

ALGERIA, BENIN, BRUNEI DARUSSALAM, BURKINA FASO, CENTRAL AFRICAN REPUBLIC, CONGO (Republic), GABON, GAMBIA, GHANA, GRENADA, KENYA, KYRGYZSTAN, MADAGASCAR, MALAWI, MALDIVES, MALI, MAURITANIA, MOROCCO, MYANMAR, NAURU, NIGER, PAPUA NEW GUINEA, RUSSIAN FEDERATION, SRI LANKA, SURINAME, SWAZILAND, TOGO, TONGA, TUNISIA, ZAMBIA

### **Countries that are retentionist only for exceptional crimes**

BOLIVIA, BRAZIL, COOK ISLANDS, EL SALVADOR, FIJI, ISRAEL, LATVIA, PERU

### **Countries that are abolitionist for all crimes**

ALBANIA, ANDORRA, ANGOLA, ARGENTINA, ARMENIA, AUSTRALIA, AUSTRIA, AZERBAIJAN, BELGIUM, BHUTAN, BOSNIA-HERZEGOVINA, BULGARIA, CAMBODIA, CANADA, CAPE VERDE, CHILE, COLOMBIA, COSTA RICA, COTE D'IVOIRE, CROATIA, CYPRUS, CZECH REPUBLIC, DENMARK, DJIBOUTI, DOMINICAN REPUBLIC, ECUADOR, ESTONIA, FINLAND, FRANCE, GEORGIA, GERMANY, GREECE, GUINEA-BISSAU, HAITI, HONDURAS, HUNGARY, ICELAND, IRELAND, ITALY, KIRIBATI, LIBERIA, LIECHTENSTEIN, LITHUANIA, LUXEMBOURG, MACEDONIA (former Yugoslav Republic), MALTA, MARSHALL ISLANDS, MAURITIUS, MEXICO, MICRONESIA (Federated States), MOLDOVA, MONACO, MONTENEGRO, MOZAMBIQUE, NAMIBIA, NEPAL, NETHERLANDS, NEW ZEALAND, NICARAGUA, NIUE, NORWAY, PALAU, PANAMA, PARAGUAY, PHILIPPINES, POLAND, PORTUGAL, ROMANIA, SAMOA, SAN MARINO, SAO TOME AND PRINCIPE, SENEGAL, SERBIA, SEYCHELLES, SLOVAKIA, SLOVENIA, SOLOMON ISLANDS, SOUTH AFRICA, SPAIN, SWEDEN, SWITZERLAND, TIMOR-LESTE, TURKEY, TURKMENISTAN, TUVALU, UKRAINE, UNITED KINGDOM, URUGUAY, UZBEKISTAN, VANUATU, VATICAN CITY STATE, VENEZUELA



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### **Additional sources**

New resources, books, and law review and journal articles links on the Death Penalty Information Center's Web site at <http://www.deathpenaltyinfo.org/>.