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MICHAEL TONRY

THE DEATH PENALTY IN THE UNITED STATES – 2002

Summary
The use of capital punishment in the U.S. has risen steadily since its constitutionality was upheld in 1976 by the U.S. Supreme Court. More than 3000 people are held in prison under sentence of death and approximately 100 are executed each year. Public support for capital punishment, as shown by opinion survey results, remains high though there have been modest declines since the late 1990s. U.S. policies and practices however are not uniform. Thirteen states, mostly in New England and the upper Midwest, do not allow capital punishment, and among states that do allow it nearly all executions occur in southern or south central states. In most years, more than half of all executions occur in Texas and Oklahoma.
Debate over capital punishment is deeply emotional because both sides believe the issues are primarily moral and ideological. To opponents, state taking of individuals' lives as punishment is deeply immoral and a human rights violation. For proponents, persons who have committed heinous murders deserve to die and there is a moral imperative that the state impose that morally deserved punishment. One result is that lesser but related procedural and policy issues--adequacy of counsel to defendants eligible for the death penalty, or racial disparities in its imposition--are argued over as if the real issue were the morality and desirability of capital punishment per se. Proponents see proposals to provide and pay for adequate counsel as indirect efforts to eliminate the death penalty because legislators might refuse to appropriate the necessary but massive funding required. Opponents may well wish to achieve this result.
A number of legal issues remain highly contested, in particular whether capital punishment may constitutionally be used for persons who were under 18 when they committed their crimes and for persons who are severely mentally handicapped. So far, the U.S. Supreme Court has answered both questions affirmatively, but both may be up for reconsideration.

Résumé
Le recours à la peine capitale aux Etats-Unis n'a cessé d'augmenter régulièrement depuis que sa constitutionnalité a été confirmée par la Cour suprême des Etats-Unis en 1976. Plus de 3000 personnes condamnées à mort sont détenues en prison et une centaine est exécutée chaque année. Le soutien public à la peine capitale, tel que révélé par les résultats de sondages d'opinion, reste élevé, bien que des baisses modestes aient été enregistrées depuis la fin des années 1990. Cependant, les politiques et les pratiques ne sont pas uniformes dans tous les Etats-Unis. Treize Etats,

essentiellement de Nouvelle-Angleterre et du nord du Midwest, ne connaissent pas la peine capitale et, parmi ceux qui la prévoient, la quasi-totalité des exécutions sont le fait des Etats du sud ou du centre-sud. La plupart du temps, plus de la moitié des exécutions ont lieu au Texas et dans l'Oklahoma.
Le débat sur la peine capitale est profondément émotionnel, car ses détracteurs comme ses défenseurs estiment que les questions en jeu sont avant tout d'ordre moral et idéologique. Pour les détracteurs, il est profondément immoral et contraire aux droits de l'Homme que l'Etat prenne la vie d'individus à titre de punition. Pour les défenseurs, ceux qui ont commis des meurtres odieux méritent de mourir, et il existe un impératif moral à ce que l'Etat impose ce châtiment moralement mérité. Une des conséquences de cela est que des questions de moindre importance mais liées à la procédure et à la politique générale – l'adéquation des personnes éligibles pour la défense des criminels passibles de la peine de mort ou les disparités raciales liées à son imposition – sont débattues comme si la véritable question était de savoir si la peine capitale est morale et souhaitable en tant que telle. Les tenants de la peine de mort estiment que les propositions visant à désigner et à rémunérer des avocats de la défense qualifiés constituent des efforts indirects visant à éliminer la peine de mort au sens où les législateurs pourraient refuser de débloquer les fonds considérables ainsi rendus nécessaires. Il se peut bien, en effet, que ce soit l'objectif poursuivi par les détracteurs de la peine de mort.
Un certain nombre de problèmes juridiques restent sérieusement controversés, en particulier la question de savoir si l'application de la peine capitale à des personnes qui avaient moins de 18 ans au moment de commettre leurs crimes et à celles qui sont atteintes d'un handicap mental grave est constitutionnelle. Jusqu'ici, la Cour suprême des Etats-Unis a répondu par l'affirmative à ces deux questions, mais elle pourrait être amenée à les reconsidérer l'une comme l'autre.

Zusammenfassung
Seit der oberste Gerichtshof der USA 1976 die Verfassungskonformität der Todesstrafe bestätigt hat, wird diese in Amerika immer häufiger angewandt. Mehr als 3000 Menschen warten in amerikanischen Gefängnissen auf die Vollstreckung ihres Todesurteils; jedes Jahr wird dieses bei etwa 100 Personen vollstreckt. Meinungsumfragen zeigen, dass eine grosse Mehrheit der amerikanischen Bevölkerung nach wie vor hinter der Todesstrafe steht, wobei diese Unterstützung in den späten Neunzigerjahren etwas zurückging. Politik und Praxis sind in den USA diesbezüglich jedoch nicht einheitlich. In dreizehn Staaten, vor allem in New England und den nördlichen Midwest-Staaten, ist die Todesstrafe verboten. Bei denjenigen Staaten, in denen die Todesstrafe existiert, werden fast alle Urteile in Südstaaten oder südlichen Zentralstaaten vollstreckt. Fast jedes Jahr entfällt mehr als die Hälfte aller vollstreckten Urteile auf Texas und Oklahoma.
Die Diskussion über die Todesstrafe ist immer sehr emotional, denn die Verfechter beider Seiten nehmen moralische und ideologische Argumente für sich in An-

spruch. Für die Gegner der Todesstrafe verhält sich ein Staat, der entscheidet, dass jemand ein Verbrechen mit seinem Leben bezahlen muss, zutiefst unmoralisch und verletzt die Menschenrechte. Befürworter sind der Ansicht, dass jemand, der auf grausame Weise Menschen umgebracht hat, den Tod verdient und dass der Staat moralisch verpflichtet ist, diese moralisch verdiente Strafe zu verhängen. Auf Grund dieser Ausgangslage werden bestimmte Aspekte, die weniger bedeutend, aber trotzdem relevant sind (z.B. eine angemessene Verteidigung für Angeklagte, denen die Todesstrafe droht, oder unterschiedlich konsequentes Verhängen der Todesstrafe je nach Hautfarbe), in einer Art und Weise diskutiert, wie wenn es um die Frage der ethischen Vertretbarkeit und Wünschbarkeit der Todesstrafe selbst ginge. Die Befürworter der Todesstrafe sind der Ansicht, dass die Bestrebungen, eine angemessene Verteidigung der Angeklagten zu ermöglichen bzw. zu finanzieren, indirekt darauf abzielen, die Todesstrafe abzuschaffen, weil der Gesetzgeber die nötigen (jedoch hohen) Kosten möglicherweise nicht genehmigen würde. Die Gegner möchten unter Umständen genau dies erreichen.
Zudem sind einige juristische Punkte umstritten, insbesondere die Frage, ob die Todesstrafe gemäss Verfassung auch für Personen, welche zum Zeitpunkt ihres Verbrechen noch nicht 18 Jahre alt waren, sowie für geistig schwerbehinderte Täter angewandt werden darf. In der Vergangenheit hat der Oberste Gerichtshof der USA beide Fragen positiv beantwortet. Es ist jedoch möglich, dass diese Problematik neu diskutiert werden wird.

«During my nearly four years in France, no single issue evoked as much passion and as much protest as executions in the United States … Some three hundred million of our closest allies think capital punishment is cruel and unusual and it might be worthwhile to give it some further thought.»
(Felix G. Rohatyn 2001;
US Ambassador to France 1996–2000)

The United States is out-of-step with other Western democracies concerning capital punishment. None of the countries of the European Union, or the Council of Europe, or the other major Common Law Jurisdictions (England, Ireland, Northern Ireland, Australia, Canada, and New Zealand), retains or uses capital punishment. By contrast, capital punishment is an available criminal penalty in thir-

ty-eight American states and under the criminal and military codes of the United States federal government. Since 1976, 759 people had been executed (as of 31 January 2002). On 1 October 2001, 3,709 were residents of «death rows». In 2001, sixty-six people were executed.

This paper provides an overview of the use of capital punishment in the United States, and the principal legal issues that capital punishment raises and has raised, and traces the evolution of main arguments and issues that have been raised by opponents and proponents of capital punishment since the early nineteen-seventies. Accordingly, Section I provides an overview of data relating to the use of capital punishment. Section II reviews a number of the major arguments that have been proposed for and against the use of capital punishment in the United States. Section III provides an introduction to the principal constitutional litigation. Section IV discusses the prospects for change in the foreseeable future. First, however, a few introductory observations.

Probably most Europeans are less interested in the details of the administration of capital punishment (a fairly ghoulish subject) than in trying to understand why a country like the United States, which in many of its legal traditions celebrates due process, equal protection, and individual liberty, is so out-of-step with the rest of the Western world. This is particularly an interesting question for me in as much as I share the widespread European opinion (at least among elites) that the question of capital punishment is a human rights question and that there are no circumstances in which the state should be given power to deprive people of their lives. Nonetheless, though I now live and work in England, and for a number of years had a part-time appointment at Leiden University, most of my life has been spent in the United States and I do see a context that may be less evident to Europeans.

Capital punishment is, in an obvious and trite sense, a more severe punishment than any available in Europe, but it is important not to

overlook that criminal punishments in the United States in general are much more severe than in Europe. While most Scandinavian countries established a maximum lawful sentence for any crime of fourteen years, and the German courts have established fourteen years as the longest period an individual can be held without an opportunity of a genuine review of the need for continued imprisonment, every American state allows terms to life imprisonment and at least two-thirds authorise sentences of «life-without-possibility-of-parole». «Life-without ...» sentences are a relatively recent development and are meant to eliminate the executive branch's powers of commutation or pardon. In other words, they are designed to assure that no individual human being has discretion that might result in the release from prison of an offender while he or she remains alive.

But lesser sentences also typically are much more severe in the United States than elsewhere. In 1997, more than half of offenders admitted to American state prisons were sentenced to terms of ten years or more. By contrast, in most European countries, sentences longer than one year are uncommon, longer than three years are very uncommon, and longer than ten years are exceedingly rare.

Many American states and the federal system have «three-strikes-and-you-are-out» laws that specify sentences of life imprisonment for persons convicted of a third felony, and every state has mandatory minimum sentence laws that require minimum prison sentences for certain offences, and sometimes these are as long as ten, twenty, or thirty year minimums.

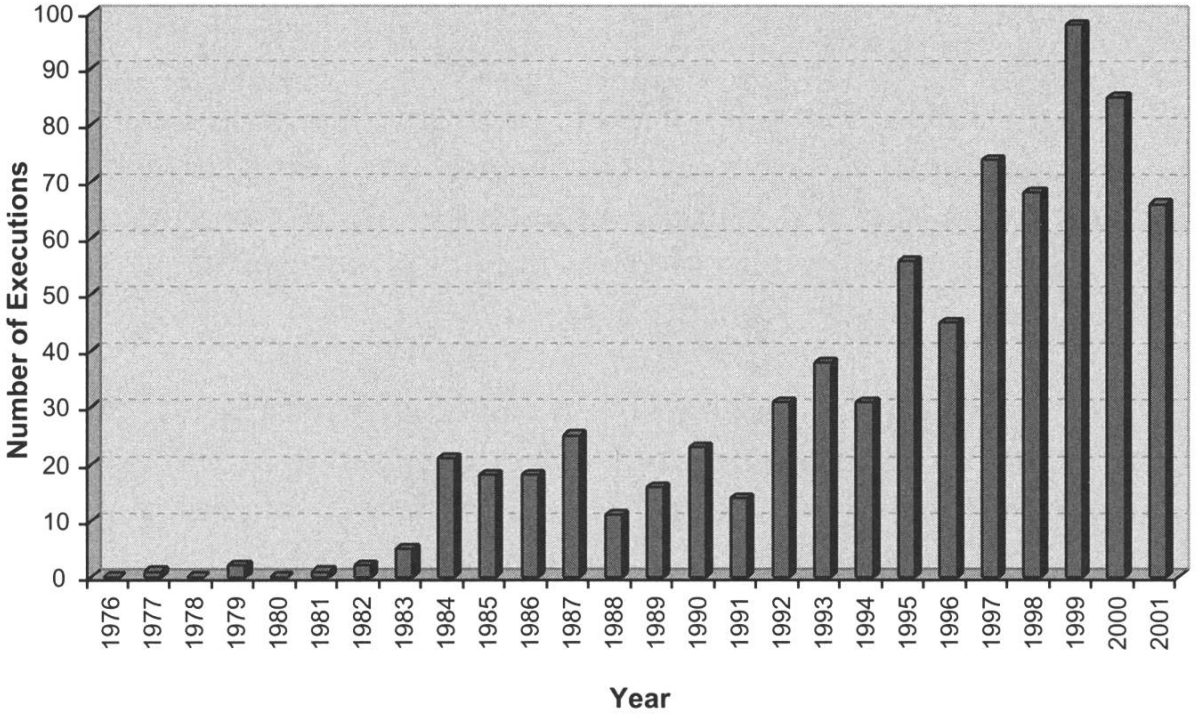
I point all of this out not because it justifies the American use of capital punishment but because the contrast between the severity of capital punishment and the severity of other sentences is much less in the United States than it would be in Europe.

Why might this be? That is too complicated a subject to discuss in any detail in this talk, but I want to make three points, to all of which

I return in the conclusion. First, sexually explicit movies and television programmes to the contrary notwithstanding, the US remains a highly moralistic country, and many of those who support the death penalty do so on the moral basis that a person who takes a life under extreme circumstances *deserves* to lose his or her life. Second, setting aside the question of why citizens support the death penalty, the fact is that they do and American political institutions are designed to make elected officials responsive to the beliefs and preferences of their constituents. For many American politicians, that is sufficient justification in itself for retention of capital punishment. Over the past thirty years, in every major poll, percentages varying between 65 and 85 percent of Americans have indicated that they support capital punishment.

The second preliminary point is this. There has in recent years been a slight reduction in the use of capital punishment and support for it. This has taken a number of forms. In 2001, for example, there were 66 executions compared with 85 in 2000 and 98 in 1999. That is the first time since 1973 that the number of executions has dropped for two successive years. *Figure 1* shows the number of executions in the United States since 1976. After capital punishment was resumed on a significant scale in 1984, the numbers executed in each year remained roughly stable for a decade but then began an almost continuous climb until 1998. The number of people on death rows has also declined slightly, from 3'726 on January 1 2001 to 3'709 on October 1 2001. The conservative Republican governor of Illinois created a moratorium on the use of capital punishment in 2000, following evidence of six exculpations of persons convicted of murder on grounds of innocence in 1997–1999, and a number of other states have considered such legislation, though none have passed it. Finally, while it remains true that 60–65 percent of respondents in recent representative national surveys indicate that they support retention of capital punishment, the percentage has been slowly declining since the mid 1990s and is well below its peak of 84–85 percent.

Figure 1 Executions per Year, 1976–2001



Third, discussions of capital punishment are especially complicated because they raise moral and ideological issues. Often what appear to be disagreements about issues – for example, about racial disparities or adequacy of legal counsel – are really moral or ideological disagreements. For example, opponents of capital punishment may want to set very high standards concerning evidence of non-discrimination not because they care about that issue (though most do) but because they know a high standard cannot be met and the death penalty will thereby in practice, though not in law, be abolished.

Conversely, death penalty proponents may oppose non-discrimination standards not because they want discrimination (most do not), but because on moral or ideological grounds they want capital punishment retained in law *and* practice. Any effort to understand capital punishment in the US must take these subtexts into account.

1 Patterns of Use of Capital Punishment

Until the last year or two, both the numbers of people on death rows in American states and the numbers of people executed have increased steadily since 1976 when capital punishment resumed following a 10-year pause from the mid 1960s through the mid 1970s while the US Supreme Court reconsidered questions of its constitutionality under the «Cruel and Unusual Punishment» provisions of the Eighth Amendment of the US Constitution.

A number of contentions had been raised against capital punishment in the 1960s and a number of Federal Circuit Courts of Appeals (the intermediate federal US court between the trial courts, US District Courts, and the highest court, the US Supreme Court). On a number of separate grounds Courts of Appeals had declared capital punishment unconstitutional in individual states. One ground was that its imposition and administration were arbitrary in as much as only a tiny fraction of people potentially eligible for capital punishment were sentenced to it, and only a tiny fraction of those were eventually executed. A second objection was that capital punishment was much more commonly carried out in relation to black defendants than in relation to whites and hence was, in its operation, racially discriminatory. A third objection was that juries and judges deciding whether to sentence to capital punishment were given no guidance by statutes or regulations concerning the criteria by which such a judgement should be made, and accordingly that the process was arbitrary. There were also, inevitably, many other more finely-grained legal issues raised in various cases.

In 1972, in *Furman v. Georgia,* 468 US 238 (1972), the US Supreme Court declared capital punishment as then carried out in Georgia unconstitutional. The rationale was not entirely clear in as much as various of the Justices offered differing explanations for their conclusions. Justices Brennan and Marshall argued that evolving standards of decency had made capital punishment *per se* unconstitutio-

nal and thus that no executions could constitutionally be imposed. Others of the judges, however, focused on questions of fair procedures and seemingly arbitrary patterns of imposition and left open the possibility that states could redesign their capital punishment statutes in ways that would satisfy minimum constitutional requirements.

Most analysts fixed on two aspects of the opinions in *Furman v. Georgia* as providing possible bases for establishing constitutional death penalty systems. The first was a belief that «bifurcated» proceedings in which a jury or judge would consider questions of guilt or innocence at trial and only thereafter, in a separate proceeding, consider whether capital punishment should be imposed, would satisfy the US Supreme Court. The second was that aggravating and mitigating criteria should be specified in legislation that would give guidance to judges and juries in choosing from among cases that were potentially eligible for the death penalty, that smaller number in which the sentence would be ordered.

Many states re-enacted their death penalty statutes to observe one or both of these expected criteria and many cases returned to the US Supreme Court on appeals of death sentences ordered under the revised statutes.

In *Gregg v. Georgia,* 428 US 153 (1976), the court upheld Georgia's revised death penalty statutes which provided both for bifurcated hearings and provision of illustrative aggravating and mitigating circumstances that jurors were to take into account in deciding whether, in a particular case, capital punishment was appropriate. After the decision in *Gregg,* capital punishment resumed. That is why most counts of the number of death penalties ordered and executions carried out date from 1976. *Table 1* shows the number of inmates housed in federal and state «death row» cell blocks from 1968 through 2001. The numbers, not surprisingly, declined in the late 1960s and early 1970s

when there was a *de facto* moratorium but from 1976 onwards increased every year.

Table 1 Death Row Inmates, by Year 1968–2001

Year	No of Inmates	Year	No of Inmates
1968	517	1985	1'591
1969	575	1986	1'781
1970	631	1987	1'984
1971	642	1988	2'124
1972	334	1989	2'250
1973	134	1990	2'356
1974	244	1991	2'482
1975	488	1992	2'575
1976	420	1993	2'716
1977	423	1994	2'890
1978	482	1995	3'054
1979	539	1996	3'219
1980	691	1997	3'335
1981	856	1998	3'452
1982	1'050	1999	3'527
1983	1'209	2000	3'593
1984	1'405	2001*	3'709

Sources:

1968–1998 figures reported in Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1999* (2000).

1999 & 2000 figures reported in Bureau of Justice Statistics *Capital Punishment 1999* (2000, 2001).

* 2001 figure reported in NAACP Legal Defense & Education Fund *Death Row USA* (October 1 2001).

The relative levelling off since 1998 does not necessarily signify reduced enthusiasm for capital punishment because the number of murders in the United States has declined steadily from 1991 through 2001, to a level only about half as high in the later year as in the earlier one, and one might therefore expect the number of new sentences to capital punishment to be decreasing and the death row population to be falling.

Table 2 shows the numbers of people held in death rows in each American jurisdiction, and by US federal government authorities, at

year-end 2001 and also shows the numbers executed in each state since capital punishment resumed in 1976, and in 2001. *Table 2* also identifies the twelve states, and the District of Columbia, that have neither authorised nor used capital punishment since 1976.

Table 2 Death Row Inmates by States (1 October 2001), Executions since 1976 and in 2001

State	Inmates	Executions Since 1976	Executions In 2001	State	Inmates	Executions Since 1976	Executions In 2001
California	602	10	1	Oregon	30	2	0
Texas	405	260	17	Virginia	29	83	2
Florida	385	51	1	U.S. Gov't	23	2	2
Penn.	244	3	0	Idaho	20	1	0
N. Carolina	235	21	5	New Jersey	18	0	0
Ohio	203	2	1	Delaware	17	13	2
Alabama	188	23	0	Maryland	15	3	0
Illinois	175	12	0	Washington	15	4	1
Georgia	131	28	4	Utah	11	6	0
Arizona	128	22	0	Connecticut	7	0	0
Oklahoma	120	50	18	U.S. Military	7	0	0
Tennessee	104	1	0	Colorado	6	1	0
Louisiana	93	26	0	Montana	6	2	0
Nevada	88	9	1	Nebraska	6	3	0
Missouri	75	55	7	New York	6	0	0
S. Carolina	73	25	0	New Mexico	5	1	1
Miss.	68	4	0	South Dakota	5	0	0
Kentucky	42	2	0	Kansas	4	0	0
Arkansas	39	24	1	Wyoming	2	0	0
Indiana	39	9	2	New Hamp.	0	0	0

Note: The District of Columbia and 12 states have not had or used capital punishment since 1976: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

Source: NAAP Legal Defense Fund *Death Row USA,* (October 1 2001)

Table 2 lists states in order of their number of death row inmates. From it, it should be apparent that the use of capital punishment is a highly regionalised phenomenon in the United States. Capital punishment, for example, is neither much authorised nor much used in

the New England states. Four of these, Maine, Massachusetts, Rhode Island, and Vermont, do not allow capital punishment; one, New Hampshire, allows it but has not used it or imposed it in the last twenty-five years. Contiguous, much more heavily populated states such as Connecticut, New York, and New Jersey, while authorising capital punishment and occasionally imposing it, have not carried out an execution since the *Gregg* case was decided in 1976.

The north-central states, likewise, are abolitionists. A continuous band across the northern-central region of the US including North Dakota, Minnesota, Wisconsin, and Michigan, do not authorise capital punishment, nor does the not-quite-contiguous north-central state of Iowa.

That is, however, all heavily outbalanced by the use of capital punishment in the southeastern states. Texas, by itself, has executed 260 people since 1976, which is more than a third of the total of 749 executed. Of the other states in which more than twenty people have been executed, most, including Florida (51), North Carolina (21), Alabama (23), Georgia (28), Oklahoma (50), South Caroline (25), Louisiana (26) and Arkansas (24) are in the southeast. The only other states that have used capital punishment to any substantial extent are Missouri (55) and Arizona (22).

The capital punishment pattern that New England and north-central states are largely abolitionist and the southern and south-western states are executionist, has not changed much in the last fifty years. FRANKLIN ZIMRING and GORDON HAWKINS in *Capital Punishment and the American Agenda,* (1986) have shown that the 38 states that had and used capital punishment prior to the *Furman* and *Gregg* decisions are the same thirty-eight states that enacted new laws in order to make capital punishment lawful after the *Gregg* decision.

2 Issues and Arguments

Arguments and discussions of the constitutionality of capital punishment and of its wisdom have changed significantly in the past quarter century.

In the 1970s, arguments hinged around claims that capital punishment was a more effective deterrent of homicide than life imprisonment. Opponents, to the contrary, argued that research evidence did not support the belief that capital punishment deterred homicides.

By the 1980s, the principal arguments in favour of capital punishment were moral and retributive: people committing heinous crimes *deserved* to be killed. Opponents disagreed about the morality of capital punishment but continued to insist that the evidence did not support a belief in the deterrent effects of the death penalty, and began to focus on the problems of racial disparities in the use of capital punishment, on the inadequacy of legal representation for many poor defendants, and on mistakes.

In the 1990s, the arguments were beginning to focus on the means (electrocution or lethal injection) by which capital punishment is carried out. Opponents, strengthened by irrefutable DNA evidence of wrongful convictions of some prisoners on death row, and by continuing evidence of racial disparities, continued to focus on those issues.

The following paragraphs set out a brief summary of the current state of knowledge and argument on most of the preceding points.

1 *Morality.* Not a great deal can be said about this. It appears that, on moral grounds, a clear majority of Americans believe there are no moral objections to execution of people who have committed heinous offences. A minority of Americans disagree.

2 *Deterrence.* The deterrence argument, as a justification for capital punishment, is much less often invoked than formerly. Research in the 1970s by University of Chicago econometrician ISAAC EHRLICH had concluded, on the basis of a fifty-state econometric study of the use of capital punishment, that every execution deterred seven murders. A number of individual responses to this were published arguing that on various technical grounds the conclusions were not justified. The United States National Academy of Sciences created a Panel on Deterrent and Incapacitative Effects (BLUMSTEIN, COHEN, and NAGIN 1978) which reviewed the evidence and concluded, in particular, that Ehrlich's conclusions were not justifiable and could not be sustained, and, in general, that the evidence on deterrence was too incomplete and unpersuasive to justify basing policy on it. Though there has been a substantial body of additional research on deterrent effects generally, little of this has focused particularly on capital punishment and it is fair to say that the current weight of the evidence would not justify continuation of capital punishment, were there agreement that its proponents must bear the burden of proof. However, as indicated above, the argument in favour of capital punishment is now typically made on moral rather than deterrent grounds, and the research evidence, to that extent, is not material.

3 *Racial Disparities.* The US Supreme Court, in *McCleskey v. Kemp,* 481 US 279 (1987), squarely held that statistical evidence that demonstrates disparities in the imposition of capital punishment in relation to interactions between the race of the defendant and the race of the victim do not raise a constitutional bar to the use of capital punishment. In the majority opinion, written by Mr JUSTICE POWELL, the Court accepted the reliability of the findings of research by Professor DAVID BALDUS of the University of Iowa showing that the likelihood that a black man who killed a white victim would receive the death penalty was forty times higher than the likelihood of a black man who killed a black victim, with white-on-white, white-on-black probabilities falling in between.

However, noting that similar evidence might apply to decisions throughout the criminal justice process, POWELL, on behalf of the Court, concluded that the only racial disparity evidence that could raise constitutional objections to capital punishment would be evidence that the prosecutor or judge had acted on the basis of racial bias in the particular case. Evidence of this sort is almost impossible to obtain – few bigoted people in modern times will publicly declare that they are making decisions on the basis of race – and there the matter stands. McCleskey himself was eventually executed.

At a policy level, this issue has been raised repeatedly by liberals. Members of the Congressional Black Caucus have repeatedly proposed a «Racial Justice Act», under the terms of which no state in which reliable evidence of racial disparities in the use of capital punishment was available could execute minority defendants. The successive bills introduced into the US congress have seldom had much realistic opportunity of passage, and have not been enacted.

4 *Quality of Counsel.* Although American courts have consistently held that minimum constitutional due process requires adequate representation by counsel to defendants in felony cases, including cases in which capital punishment is a possible penalty, minimum constitutional standards are very low. The United States does not have a national system of Legal Aid and in many states funding for appointed counsel in capital cases is meagre. It is not uncommon, for example, in some states, for state law to establish a maximum fee of $1'000 for representation throughout an entire case or to set hourly rates that are a tiny fraction of those that defence lawyers can obtain in the open market. As a consequence, many offenders receiving capital punishment have suffered from inferior legal representation and, often times, appellate courts overturn convictions on that basis. Because, however, the minimum standards of representation are so low, many opponents of the death

penalty believe that many people now on death row did not receive adequate representation by counsel.

As a consequence, death penalty critics have repeatedly but unsuccessfully introduced legislation into the US Congress requiring, as a condition for use of capital punishment, that states provide adequate systems of appointed counsel in death penalty cases. So far such legislation has not been enacted.

5 *Delays and Uncertainties.* Both opponents and proponents of capital punishment object to the effects of extended delays that are common in death penalty cases. Many executed offenders will have served five to fifteen years in prison awaiting the completion of final appeals. Death penalty proponents object to this on a variety of grounds including that it undermines whatever deterrent effects capital punishment may have, that it is unacceptably expensive, and that it unacceptably delays actualisation of the moral imperative to execute people who have committed heinous crimes. Opponents of capital punishment allege that the delays are largely caused by inadequate representation of counsel, and so cannot be «blamed» on offenders but, moreover, that the delays have corrosive effects both for defendants and for the families of homicide victims. The delays, which death penalty opponents believe are inevitable given the enormous importance of making sure that only guilty people are executed, are said to do great damage to survivors of homicide victims by repeatedly refocusing their attention on their loss and preventing achievement of psychological closure.

Proponents of capital punishment see delays as undesirable and the solution to them in laws (of which a fair number have been passed) requiring expedited, consolidated appeals so that delays do not become lengthy. Opponents, to the contrary, see the delays as inevitable and the uncertainties and renewed grief of victims' survivors as avoidable, and thus on this basis, among others, argue that capital punishment should be stopped.

6 *Conviction of the Innocent.* Adding together many of the problems identified in earlier points, opponents of capital punishment argue that mistakes are inevitable and that so long as capital punishment continues inevitably innocent people will be convicted. Recent research carried out by Professors JAMES LIEBMAN and JEFFREY FAGAN of Columbia University Law School have shown that this problem is more real and more substantial than is commonly recognised. A study of all 5760 cases sentenced to capital punishment in the United States between 1973 and 1995 Liebman found that convictions were overturned in 68 percent of cases on grounds of «serious error» (errors that substantially undermine the reliability of the guilt finding or sentence). (LIEBMAN ET. AL. 2000, p1850).

A second form of evidence, smaller in scale but possibly more riveting in effect, comes from the recent proliferation of complete exonerations of convicted offenders on the basis of DNA evidence. Across the United States, more than one hundred persons convicted of murder and rape have now been completely exonerated on the basis of DNA evidence conclusively demonstrating to the satisfaction of the courts and the relevant prosecutors that the persons convicted of those crimes could not possibly have committed them. In 2001, alone, five inmates were freed from death rows on the basis of conclusions of their complete innocence. They had, respectively, served eighteen, thirty-three, six, four, and four years' imprisonment for their alleged crimes.

Responses to evidence concerning «substantial errors» and the DNA exonerations are diverse. Opponents of the death penalty, inevitably, argue that this evidence creates an almost irrefutable inference that factually innocent people have been executed in the United States in the past 25 years and, inevitably, in future will be. Death penalty proponents typically argue that we should be reassured that so many errors have been found, that there is no reason to think that other errors have been overlooked, and that, somewhat perversely, LIEBMAN

ET. AL.'S evidence should give us confidence rather than scepticism about capital punishment.

The problem with all of these arguments, except for that concerning whether on moral grounds capital punishment can be justified, is that both opponents and proponents of capital punishment make their arguments strategically. That is, opponents of capital punishment whose ultimate goal is its abolition are generally, and rightly, seen by proponents to be raising particular issues not only for their own sake but to undermine capital punishment generally. For example, death penalty opponents who argue about racial disparities in its imposition and execution, and urge adoption of rules forbidding capital punishment except when it is clear that disparities do not exist, are seen by death penalty proponents as making those arguments in order to eliminate capital punishment altogether. If it is true, as it probably is, that for the foreseeable future there will always be evidence of unaccountable disparities in the imposition of capital punishment that correlate with race, then an «Equal Justice Act» will in practice, although not in form, eliminate the use of capital punishment.

Similarly arguments about the need to provide full and adequately compensated legal counsel in every case in which a death sentence is a possibility are put forward by death penalty opponents as a matter of fundamental fairness. Death penalty proponents, recognising the very substantial costs that would be required to provide full and adequate legal counsel in every case in which capital punishment is a possibility, believe that adopting that principle, and accepting the validity of the claims about ineffective legal assistance, would as a practical matter eliminate capital punishment. If individual states were required to spend hundreds of millions of dollars per year on appointed legal counsel, the widely held view is that few legislatures would do so.

3 Legal Issues

A number of important legal issues concerning capital punishment have been decided and others remain up in the air. There is not space here to discuss these in full but I identify the major outstanding questions.

1 *Resolved Questions.* Since the decision in *Gregg,* the US Supreme Court has consistently held that the death penalty is not unconstitutional *per se* and may be imposed so long as essential constitutional safeguards are observed. At a minimum, these include the requirement that proceedings be bifurcated – that the trial stage and the penalty stage be entirely separate – and that decisions be guided by aggravated and mitigating circumstance tests that are set out in relevant legislation. A number of subsidiary points have been settled.

a *Offences for which Capital Punishment May be Imposed.* In *Coker v. Georgia,* 433 US 584 (1977), the US Supreme Court held that the Eighth Amendment of the US Constitution forbade imposition of the death penalty on a person convicted of rape. This has generally been construed to limit the use of capital punishment to more serious crimes, which is generally understood to mean only homicide. Because no capital punishment in relation to treason has come before courts for nearly half a century, it is unknown whether the Supreme Court would hold that acts of treason could justify imposition of the death penalty. Thus, as a practical matter, in relation to criminal courts' everyday jurisdiction, capital punishment in the United States is limited to murder.

b *Age of Defendant.* In *Stanford v Kentucky,* 492 US 361 (1989), the US Supreme Court held that capital punishment could constitutionally be carried out on an offender who was 16 or 17 years old at the time of the offence. International human

rights conventions which allow capital punishment at all limit it to persons who are age eighteen or over at the time of their offence and thus, to that extent, US constitutional law is inconsistent with those conventions. However, the United States government has never accepted the applicability of United Nations or other international conventions except to the extent that they are consistent with decisions made from time to time by the US Supreme Court on related questions and thus, as a technical matter, the United States is not in violation of the convention.

c *Execution of the Mentally Ill.* Although the issue is now up for reconsideration, in the case of *Penry v Lynaugh,* 492 US 584 (1989), the United States Supreme Court held that mentally disabled and retarded people can constitutionally be executed. American criminal law, like that of most countries, distinguishes between the «competency to stand trial» standard and the «insanity defence» standard. Generally, so long as the defendant is mentally competent to understand the nature of the proceedings against him, and to assist in his own defence, he or she is deemed competent, even if otherwise affected by mental illness, defect, or retardation. Since Penry was decided, 18 states and the federal government have forbidden the execution of mentally retarded defendants and, combined with the twelve states that do not permit capital punishment at all, that means that a majority of American states no longer authorise capital punishment in such cases. In the case of *Commonwealth v. Atkins,* (pending), the US Supreme Court has agreed to review a case raising the issue of whether it is «cruel and unusual» under the Eighth Amendment to execute mentally retarded inmates.

Because the Court in deciding whether a practice is «cruel and unusual», often looks to see what the standard practice is in American states, many observers predict that the Court will

declare execution of mentally retarded offenders unconstitutional because a majority of states now forbid such executions.

d *Racial Disparities.* As previously discussed, the US Supreme Court in *McCleskey v. Kemp,* 481 US 279(1987), held that racial disparities are a bar to execution only in cases in which there is individualised proof of racially biased motive on the part of officials involved in the court proceedings.

2 *Contentious Issues.* There are a number of issues now under litigation as to which it is difficult to predict the results.

a *DNA Evidence.* Federal courts of appeals are reaching diverse decisions on the question whether defendants are entitled, where forensic specimens have been maintained, to have access to them given to DNA laboratories to see whether the evidence would exonerate the offender. The reason this is an issue is that the sensitivity of DNA analyses has become steadily greater with the passage of time meaning that evidence from cases decided in, say 1988 or 1992, in which the then current state-of-the-art of DNA analysis did not conclusively exonerate a defendant, may be cases in which DNA evidence at the current state-of-the-art would be exonerating. Courts in some jurisdictions have held that convicted offenders are as a routine matter, as a matter of due process, entitled to have subsequent DNA analyses undertaken. In a recent decision, in the US Federal Circuit Court of Appeals for the Fourth Circuit forbade such access. Its rationale was that all legal systems must observe a finality principle and that to allow open-ended entitlement to repeated DNA analyses of evidence would prevent finality ever being achieved and, as a result, such access was not constitutionally required.

b *Effectiveness of Counsel.* This point has been raised above, and involves the question of the minimum acceptable level of

> counsel in capital cases. In general, the federal courts have established a very low minimum standard of effective assistance. In effect, the defendant on appeal must show that the assistance was below minimum acceptable standards in the community and that the defence counsel's failure is likely to have affected the outcome of the trial.

Death penalty critics argue that «death is different» and that defendants vulnerable to death penalty sentences should be entitled to a very high level minimum quality of representation and, accordingly, that the general minimum legal competency required to meet constitutional standards should not be applied. So far, the US Supreme Court has been unsympathetic to such arguments.

4 Conclusion

Capital punishment in the United States is caught up in ideological and partisan politics. Death penalty critics raise issues on their own merits but, oftentimes, with the additional goal of creating an insuperable practical impediment to the use of capital punishment. Death penalty proponents resist most reform proposals, often not on their individual merits but because they see the proposals as a first step towards abolition. Thus motives are commonly distrusted and capital punishment proponents tend to resist every change to laws affecting capital punishment that they believe will in any way undermine the extent of its use.

I have kept for last what seems to me the hardest problem – the extent to which in democratic countries the will of the people should be observed in respect to capital punishment. This is, at the end of the day, the fundamental question in the United States. It is likely that US elites, like elites in many countries, are predominantly opposed to the use of capital punishment. It is clear, however, and has be-

en clear for many years, that a majority of the public, when asked, indicates that it supports capital punishment in principle and practice.

It is possible, when capital punishment opinion research is examined closely, to show that support for capital punishment falls when respondents are aware that life without possibility of parole is an alternative sentence and that dangerous people will not ever be released, and it falls when respondents consider the facts of individual cases and the personal biographies of offenders (CULLEN ET. AL. 2000). Nonetheless, even once refinements like these are made, it appears that a majority of Americans support capital punishment.

Capital punishment proponents vigorously argue that in a democratic society the will of the majority of the electorate should prevail even on a question as important as capital punishment. Responsible adherents to this view do not disagree that procedures should be fair, that all possible reasonable measures should be taken to assure that innocent people are neither convicted nor executed, that adequate legal counsel be provided, and so on, but believe that it is appropriate to respect the people's will. They also believe it is inappropriate for capital punishment to be forbidden because a minority of the population, often better educated than average and economically better off, who might be referred to as «elites», oppose capital punishment.

I do not know what, in general, public opinion surveys in Europe show about public support for capital punishment. In Britain, surveys in recent years have shown that a majority of British citizens would favour its use. Since its abolition in the 1960s, however, British elites have been steady in their opposition to capital punishment and on the several occasions when it has come to a vote before parliament, the vote in favour of abolition has been strong.

For myself, I do not believe that the use of capital punishment can be justified, as a sub-proposition to the more general claim that the

state should never be given authority to take a citizen's life, and so, at the end of the day, I am not troubled by the anti-democratic dimensions of that view. I recognise, however, that many thoughtful people do firmly believe that in democracies the will of the majority should be respected and, accordingly, that whether elites like it or not, if the people want capital punishment subject to constitutional requirements of observance of fair procedures in its use, then they should have it.

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Full, up-to-date information and much historical material is available at http://www.deathpenaltyinfo.org.

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