

Does the Death Penalty Constitute Cruel and Unusual Punishment?

In 1972 three cases that involved the death penalty reached the Supreme Court. In each case the Court found the death sentence unconstitutional. At the time many Americans believed that the Supreme Court had abolished the death penalty as “cruel and unusual punishment” prohibited by the Eighth Amendment. The Court did not, however, rule the death penalty unconstitutional. Instead, in the 1972 cases the Court overturned the verdicts based on the way the death penalty was administered in the state courts. Once the states changed the way they imposed the death penalty, the Supreme Court approved the penalty in a series of cases. As a result, the death penalty remains a hotly debated topic.

Pro

Most people who object to the death penalty view it as cruel and unusual punishment and immoral. These issues were foremost in the mind of Justice Thurgood Marshall in 1972. He wrote,

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve “a major milestone in the long road from barbarism” and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

—JUSTICE THURGOOD MARSHALL,
FURMAN V. GEORGIA, 1972

Four years later, another case that dealt with capital punishment reached the Supreme Court. In *Gregg v. Georgia*, the death sentence was upheld. Justice William J. Brennan, who along with Justice Marshall argued that the death penalty was “cruel and unusual punishment,” dissented. He wrote,

My opinion in Furman v. Georgia concluded that our civilization and the law had progressed to the point that therefore the punishment of death, for whatever crime and under all circumstances is “cruel and unusual” in violation of the Eighth and Fourteenth Amendments of the Constitution. . . . I emphasize . . . that foremost among the “moral concepts” recognized in our cases . . . is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. . . . The fatal constitutional infirmity in the punishment of death is that it treats “members of the human race as nonhuman, as objects to be toyed with and discarded.” . . . I therefore would hold, on that ground alone, that death is today a cruel and unusual punishment prohibited by the [Constitution].

—JUSTICE WILLIAM J. BRENNAN, 1976

One of the people who opposes capital punishment on moral grounds is Donal E. J. MacNamara who argues, “The law of God is ‘Thou shall not kill,’ and every system of ethics and code of morals echoes this injunction. . . .” He continues,

Individuals in groups or societies are subject to the same moral and ethical codes which govern their conduct as individuals. The state, through its police agents, may take human life when such ultimate measure of force is necessary to protect its citizenry from the immi-

More About Issues to Debate

The Supreme Court’s 5 to 4 decision in *Furman v. Georgia* (1972), striking down Georgia’s death penalty, found the justices deeply divided on this issue. Of the majority, all holdovers from the liberal Warren Court, only Brennan and Marshall found the death penalty to be unconstitutional under all

circumstances. Justice William O. Douglas believed that because the death penalty was not applied uniformly—affecting mostly African Americans and poor people—it denied equal protection of the law. Stewart and White emphasized the cruelty of the rare and unpredictable circumstances in which it

... Once, however, the prisoner has been apprehended and either voluntarily submits to custody, or is effectively safeguarded against escape . . . the right of the state to take his life . . . does not exist in moral law.

—DONAL E. J. MACNAMARA, 1961

Con

Those who favor the death penalty often cite the need for the states to protect their citizens and to punish criminals for serious crimes. Justice Byron R. White's decision concurs.

*P*etitioner [defendant] has argued in effect that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws. . . . Neither can I agree with the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment.

—JUSTICE BYRON R. WHITE, *GREGG V. GEORGIA*, 1976

In a somewhat different vein, Justice Potter Stewart replied to those critics who condemned capital punishment on moral grounds. He wrote:

*I*n part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. . . . Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death. . . .

[T]he moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as punishment for murder is not without justification and thus is not unconstitutionally severe.

—JUSTICE POTTER STEWART, *GREGG V. GEORGIA*, 1976

Professor Walter Berns supports the death penalty, also.

*T*he abolitionists condemn it [the death penalty] because it springs from revenge, they say, and revenge is the ugliest passion in the human soul. They condemn it because it . . . serves no purpose beyond inflicting pain on its victims. Strictly speaking, they are opposed to punishment. . . . But, contrary to abolitionist hopes and expectations, the Court did not invalidate the death penalty. It upheld it. It upheld it on retributive grounds. In doing so, it recognized, at least implicitly, that the American people are entitled as a people to demand that criminals be paid back, and that the worst of them be made to pay back with their lives. In doing this, it gave them the means by which they might strengthen the law that makes them a people, and not a mere aggregation of selfish individuals.

—WALTER BERNS, *CAPITAL PUNISHMENT*, 1979

The Debate Continues

The topic of capital punishment continues to draw attention. Although opponents campaign for its abolition, they also admit their chances are not good. As one official of the American Civil Liberties Union (ACLU) admitted: "We have exhausted the major constitutional issues. We don't have any more in the oven." Further complicating the issue for the opponents of the death penalty is the fact that in a recent poll, approximately 75 percent of the people polled supported capital punishment. Whether this attitude will change in the future remains to be seen.

Examining the Issue

Recalling Facts

1. Describe why Donal E. J. MacNamara opposes the death penalty.

Critical Thinking Skills

2. Analyzing Information Why do you think the Supreme Court has been called on to rule on capital punishment?

3. Predicting Consequences What do you think would be the effect on the nation's crime rate if the Supreme Court abolished capital punishment?

Investigating Further

Research recent articles in periodicals regarding the death penalty. Try to determine if the attitude toward capital punishment in any way reflects a political ideology. Write a brief paragraph detailing your conclusion.

was inflicted—like being struck by lightning, Stewart said. The 4 Nixon appointees stood together in voting to uphold Georgia's law.

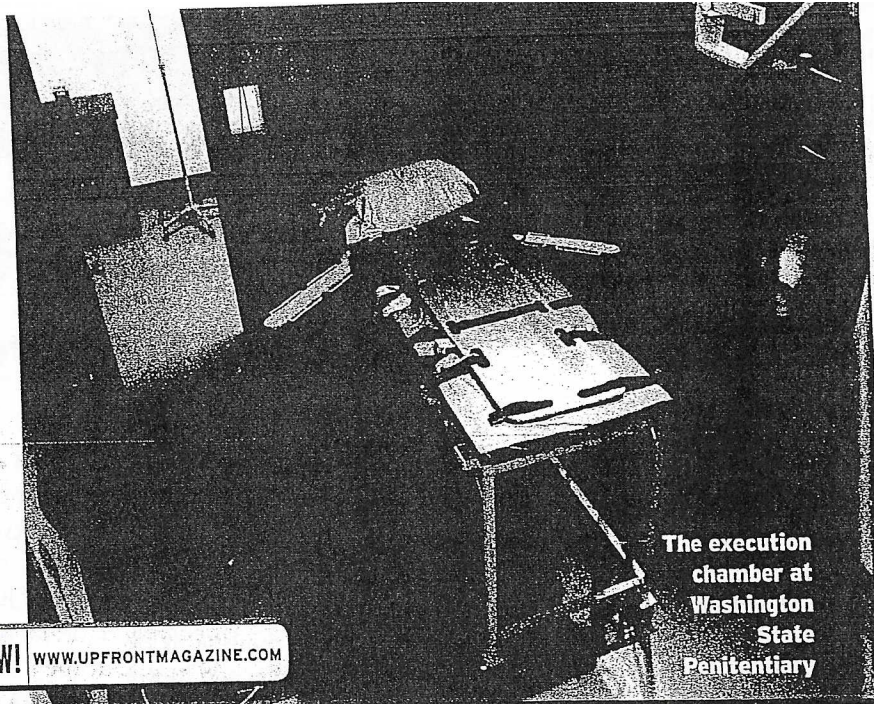
More than 30 states responded to the Court's ruling by passing new laws that automatically imposed the death penalty for certain crimes. In 1976, however, the Court returned to this issue. While

again upholding the principle of capital punishment, it struck down the principle of mandatory sentences. Instead, in *Gregg v. Georgia* the Court upheld procedures to consider circumstances of the crime and the criminal's past before passing sentence. Such procedures remain in use today in states that impose the death penalty.

Should The Death Penalty be Abolished?

The Supreme Court has increasingly restricted the use of capital punishment

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The execution chamber at Washington State Penitentiary

YES

When the United States was founded more than two centuries ago, capital punishment was commonplace in the 13 Colonies, as well as in England and across Europe.

Today, more than two thirds of the world's countries, including virtually all of Europe, have abolished the death penalty. It's time for the U.S. to follow this trend: The death penalty is a fundamentally flawed public policy that has outlived any usefulness it may once have had.

Since 1976, at least 142 people have been freed from death row after evidence of their innocence emerged, proving that the system is prone to human error.

Furthermore, the death penalty discriminates on the basis of race, income level, and geography. Death sentences are more likely to be handed down when the murder victim is white. People who can afford good lawyers generally don't receive death sentences. And because only some states use the death penalty, the same crime is punished differently depending on where it occurs.

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Because death penalty trials and appeals are so lengthy, it can take years before executions are carried out, burdening taxpayers with huge costs. Of the more than 3,100 people now on death row in the U.S., hundreds have been there more than 20 years—and many are not close to execution.

Alternative sentences are available to punish the guilty and keep our communities safe. Taxpayer dollars could be better spent on crime prevention and to support those harmed by violence. It's time for the U.S. to join the international community by abandoning this medieval form of punishment. •

—DIANN RUST-TIERNEY, Executive Director
National Coalition to Abolish the Death Penalty

NO

Capital punishment is an extreme sanction that is properly reserved for the worst of the worst: serial killers like Ted Bundy and terrorists like Oklahoma City bomber Timothy McVeigh.

During the first decade of the 21st century, there were 26 percent more executions in the U.S. than in the last decade of the 20th century. During the same time period, the U.S. murder rate decreased by 24 percent. Several academic studies show a clear deterrent effect from judicious use of the death penalty.

Opponents claim that there are innocent people on death row. While that may be true, the number of innocent people who have been executed is zero. The reason is that in every state with capital punishment, convicted murderers automatically go through a series of appeals that result in an average 12-year delay between sentence and execution. Beyond that, DNA testing can now establish with virtual certainty in many cases whether an individual is, in fact, the killer.

DNA testing can now establish with virtual certainty if someone is guilty.

On the other hand, there are hundreds of innocent victims who died because we allowed convicted murderers to get out of prison.

Some claim life without parole is an appropriate alternative to the death penalty. But a key reason many killers agree to accept sentences of life without parole in plea deals is the specter of a death sentence.

If we can establish that a killer is absolutely guilty and has a track record that suggests he will seriously hurt or kill again, what do we say to his future victims if we allow him to live? We need capital punishment for those rare cases in which a killer is beyond redemption. •

—JOSHUA MARQUIS, District Attorney
Clatsop County, Oregon

More than 20 years—and many are not close to execution. Alternative sentences are available to punish the guilty and keep our communities safe. Taxpayer dollars could be better spent on crime prevention and to support those harmed by violence. It's time for the U.S. to join the international community by abandoning this medieval form of punishment. •

Law Around the World

The Death Penalty

In 2006, 26 countries, including the United States, carried out executions. This feature describes how the death penalty is imposed in three of those countries.

Iran The laws of Iran allow capital punishment through public hanging. Crimes punishable by the death penalty include robbery, child molestation, murder, and “acts incompatible with chastity.” The family of a murder victim has the right to pardon the killer. Iran also allows the death penalty when a person leaves the Islamic religion and joins another religion. Iran performed 177 executions in 2006. In 2004 a girl was executed for “acts incompatible with chastity,” and in 2005 two boys were publicly hanged for having homosexual relations.

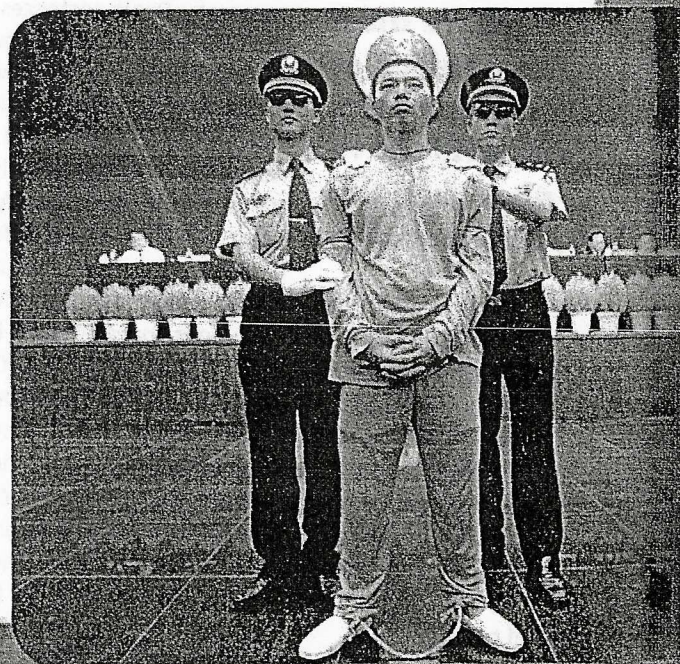
China In China, the death penalty has existed for thousands of years. Today a person convicted of such crimes as tax evasion, corruption, robbery, fraud, and murder can be executed either by firing squad or by lethal injection. However, before 1905, a method known as “Slow Slicing” or “death by a thousand cuts” was sometimes used. Currently, there are 1,000 to 8,000 people executed each year, with the government providing the low figure and human right groups the higher one.

South Africa At one time South Africa had one of the highest rates of capital punishment in the world. Between 1910 and 1989, 4,200 people were hanged. Nearly half of them were executed between 1978 and 1988 during the last years of the apartheid system. In 1990 a moratorium on the death penalty took place due to international pressure against apartheid. A new South African Constitution was adopted in 1994 that provided for the “right to life” and prohibited

“cruel and inhumane punishment” but did not specifically outlaw capital punishment. In 1995 the new Constitutional Court ruled that the death penalty violates the constitution. The Chief Justice said, “Everyone, including the most abominable of human beings, has the right to life.” The court did this despite the high rate of violent crime in South Africa and the fact that a majority of South Africans favored the death penalty. One conservative party leader who opposed the court decision said, “The rights of murderers and rapists are being held in higher regard than their victims.”

Problem 15.4

- Compare the history of capital punishment in the three countries. How are they different? How are they similar?
- If you lived in South Africa, would you agree with the Constitutional Court Justice or the conservative party leader quoted above?



A Chinese Prisoner