



Capital Punishment IP 15C

As the number of executions has risen, greater attention has focused on the issue of capital punishment. Advocates contend that society has not only the right but the obligation to punish and that such punishment affirms the moral order by treating law-breakers as responsible moral agents. Opponents of capital punishment contend that the rightful (that is, the moral) purpose of correctional institutions and incarceration of law-breakers is reform and rehabilitation, not punishment or vengeance.

Detailed statistics on the number of death row inmates and the States where they are incarcerated are available in a publication entitled *Death Row, U.S.A.* This may be obtained from:

NAACP Legal Defense and Educational Fund, Inc.

99 Hudson Street, Suite 1600

New York, NY 10013

Telephone: (212) 219-1900

Members of Congress who want further information on this topic may contact CRS at 7-5700. Additional CRS reports may be identified by looking in the current *Guide to CRS Products* (for congressional use only) under "Crimes and Offenses" and in the latest *Update* under "Law, Crime and Justice."

Constituents may find additional information on this topic in a local library through the use of *Readers' Guide to Periodical Literature*, Public Affairs Information Service *Bulletin* (PAIS), and various newspaper indexes. Books on this subject may be identified through the library's catalog or the most recent edition of *Subject Guide to Books in Print*.

We hope this information will be helpful.

Congressional Reference
Division

Hugo Adam Bedau

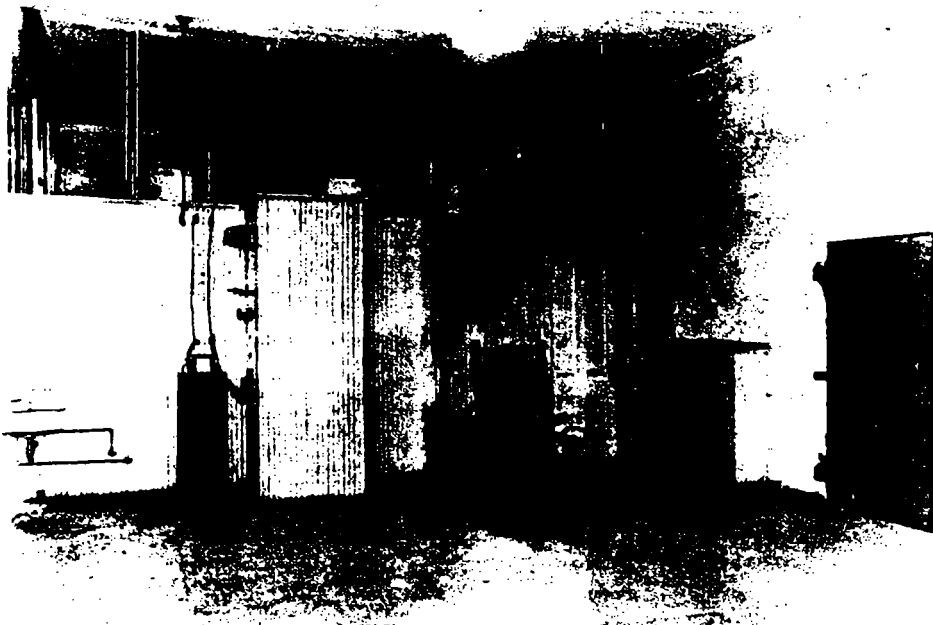
Capital Punishment

Capital punishment, the lawful infliction of death as a punishment, continues to be used in the United States despite controversy over its merits and effects. The number of jurisdictions that authorize the death penalty for at least one crime varies: in 1981, it was thirty-seven. Not all jurisdictions actually sentence anyone to death and then carry out that sentence; during 1981, thirty jurisdictions had one or more prisoners on "death row," but between 1967 and 1981, only four persons were executed (one each in Florida, Indiana, Nevada, and Utah). The number of offenses currently subject to the death penalty also varies among the jurisdictions, but is confined to a few crimes against the state (notably, treason) and against the person (first-degree murder, felony murder, aggravated sexual assault by an adult male of a female child). At present five lawful methods of inflicting this penalty exist. Most states use electrocution; a few still retain the gallows; many authorize death by lethal gas chamber; four by lethal injection; and one by firing squad.

Efforts to restrict and abolish the death penalty have a long history (beginning in 1787 with Dr. Benjamin Rush of Philadelphia, a signer of the Declaration of Independence), and have had a considerable impact on criminal jurisprudence. The distinction of degrees of murder, the practice of permitting the trial

I'll see thee hanged on Sunday first.

SHAKESPEARE



This 1915 photograph shows the "new electrocution chamber" at Sing Sing Prison in Ossining, N.Y.

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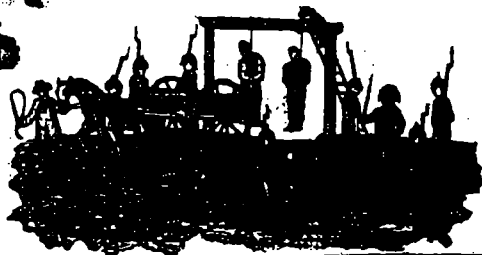
Source: *The Guide to American Law: Everyone's Legal Encyclopedia*, Volume 2, West Publishing Company, St. Paul, Minnesota, 1983.

GOD'S JUDGMENT UPON MURDER,

The solemn and affecting
occurrence which is THE

DAY to take place, at
the execution of SAMUEL

TULLY & JOHN DAL-
TON for the horrid crime



of PIRACY & MURDER.

has drawn from the pen of
one who feels for the eter-
nal interest of the unfortu-
nate of mankind, the follow-
ing serious reflections.

Boston, Dec. 10, 1819.

PRICE 6 CENTS.

PRINTED BY N. COVIELL.

"But then hast fulfilled the judgment of
the wicked; therefore judgment and jus-
tice take hold on thee. They die in youth
and their life is among the unclean."

WHEN society is called upon to per-
form the painful but necessary duty
of punishing with death the violated laws
of God and man, the mind is naturally
led into a train of unpleasant, though not
unprofitable reflections. We are thus daily
to witness a mournful scene; to behold
one of our fellow creatures launched into
the wide ocean of eternity, not by the
common course of nature; they are not
brought to the chambers of death, by wear-
ing sickness, and pain, and

"The thousand natural shocks,
Which flesh is heir to,"

led by the hand of the executioner! How
awful is the reflection! We behold
one cut off in the prime of manhood, and
behold a sacrifice on the altar of justice,
appears the statue of their murdered
sins, and make statement to society for
transgression of its military laws.

We are told in the sacred volume of
inspiration, that violence, which the
"Jehovah has given to a sinful world,"
guide to happiness both here and
that "whose blood is shed." The
murderer perpetrates his crime in the
face of mankind, though he facies
not secure from every eye; yet HE
is ever watchful; whose eye is never
slumber, and who can perceive the smallest
sin which stains in the immensity of
space, though covered with the blackness
of Egyptian darkness; Yea, HE beholds
and frowns upon the wretched of death,
and will sooner or later take just ven-
geance on the abandoned homicide.

In the catalogue of human frailty, the
crime of MURDER stands prominent.
Even the unenlightened savage, who is under
the dominion of no laws, except those which
the dim light of nature teaches, revolts
with horror from the commission of cool
and deliberate murder. A principle is in-
-

stantiated in his breast which forbids him
to embrace his hands in the blood of the
innocent. What then must we think of
him, who, having the light of re-
vealed religion for his guide, can wil-
lingly take that course which they cannot
venture to take the lamp of life extinguished,
who shall submit to?

"For, from the light the just spirit fled,
Returns no more to wake the silent
dead."

Unhappy men! but what you are now
exposed, that the commission of one
crime leads to that of another; you were
not content with robbing the property
which you and your family had thus hap-
pingly the confidence which was reposed in
you; but led on by the insidious demon
of guilt, you shed the blood of an innocent
man! In vain were all his tears and sup-
plications! With upturned hands he implor-
ed you not to stain your hands with so foul
a murder; a deed for which you were due to his
sorrow and estimation, and the fatal blow
was struck! You heard his dying groans,
but with unfeeling indifference, you com-
mitted his bleeding form to the ground; the
wave closed upon him forever, and more
successful than you it piouly covered his
remains. But from that "depth profound,"
his blood has called aloud for vengeance;
his awful voice has been heard; justice has
overtaken you; and your lives must pay
the forfeit.

When we reflect upon the awful re-
ward which awaits this "year of crimes,"
we are lost in astonishment, and are led to
wonder how man can be so base. From
MURDER all nature shrinks abhorrent.

"The sun frowns angry at the inhuman
night,"

"And stars, offended, reddens in the
night,"

"In cloudless skies, dread horrors gather
round,"

"And waking vengeance marmors under
ground."

O! from the unhappy and of TULLY and
DALTON, let all our youth take warning

let them shun the paths of vice, which
though for a time they may appear flowery
and pleasant, will most assuredly lead to the
dark and gloomy abyss of irretrievable ruin.

And you who have already commenced
your vicious career, turn from your wicked
plans and reflect! For heaven's sake! for
your own and family's sake! Go, view the
execution of TULLY and DALTON! they
stand the scaffold; the gazing crowd
on every side; the silence of death reigns
around! The awful moment arrives! The
scoutrophe is flashed! O! God! their
sins are yet "a little way above our
heads." They will soon appear before the
judgment seat of Christ! Almighty Father!
be more merciful to them than they have
been to themselves. Go then, ye votaries
of guilt,

"Be virtuous, tame and life be lost,
Go, purchase wisdom, cheaply, at their
cost."

With the unfortunate widow of TULLY,
whose tears must flow; her children
have lost a parent; but that parent deserves
his awful doom; O, may they profit by
their father's fall, and shun the rocks on
which his hapless has split; he will soon
be separated from them forever, and
his grave will receive him into its cold
and cheerless bosom. "Alas! poor wife,
her children, more shall him behold, nor
sighs, nor sweet home!"

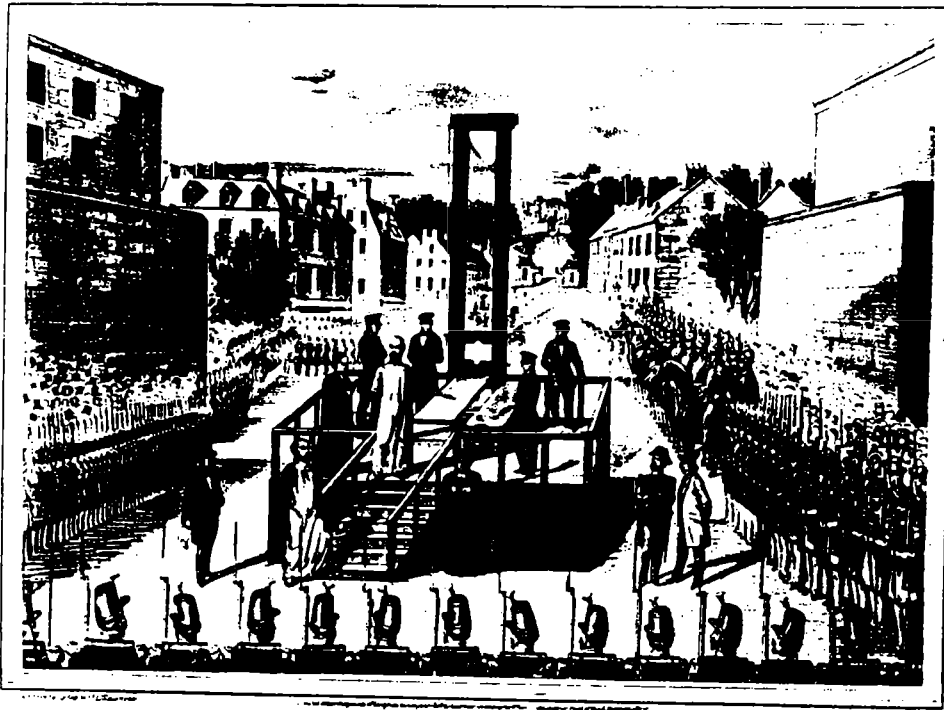
O, let the fate of these unhappy men be
a warning lesson to others. Venge-
ance belongs unto God, and he will cre-
ate it in his own time. He has no plea-
sure in the death of the wicked, but would
rather that he should turn from his wicked-
ness and live. Let us all consider well the
ed lesson which is this day taught us; and
so conduct in this visionary state, as to
secure a reception in the temple not made
with hands, as house eternal in the heavens,
his rolling years may pass away into
eternity's ocean, "our joys be fresh and
dawning," "fair as the new-born star which
glide the morn," and we may dwell in
Love, and Peace, and Light, and Life
eternal.

See at her feet her children kneel,
Their artless prattlings hear,
Alas! their hearts, too young to feel,
No future misery fear.
The mother views them o'er and o'er,
Her bosom swells with grief,
The bidding tears now force their way,
To give her soul relief.
Oh! what must a fond mother feel,
For her young children dear
Beset in such an awful way,
Of one to soon so dear.
May God in pity to her woes,
Send comfort to her heart,
And aid her in this fleeting life,
To choose the better part;
That when Death's messenger arrives,
To close her weary eyes,
On wings of love she'll mount on high,
To dwell above the skies.

A broadside of 1812
uses the occasion
of the execution of
two men for the
crime of murder to
exhort others,
especially youths,
to turn away from a
life of crime and
vice and to follow a
path of virtue.

"Farewell! farewell! ye wretched men
Your fate demands a tear:
Broom'd for your black and awful crimes,
To make statement here.
And O! may Heaven in mercy grant,
That this sad sacrifice,
May wash away your guilty stains,
And bring you back to skin.
Long in the paths of guilt and vice,
Secure you thought you trod,
And broke the just and holy laws
Of the Eternal God.
But ah! that power who reigns above,
Minds guilt in every way,
And though committed to the night,
Will blaze in open day.
Far from the great All-seeing eye,
No secret deed's conceal'd,
And to the just Eternal mind,
Each secret thought's reveal'd

before his throne the angels bow,
And sing aloud his praise,
And blessed souls by Christ redeem'd,
Repeat his saving grace.
But to secure in Heaven's high dome,
A lasting happy seat,
A well spent life, repentant death,
We know is surely meet.
O! may bright mercy now descend,
And shed her cheering ray,
Drop tears of pity on their souls,
And wash their sins away.
And may the accusing spirit now,
Withdraw his black account,
Verily before the Eternal throne,
Their horrid crimes' amount.
O, let us turn from this sad scene,
Let tears of anguish flow,
And Pity, heavenly maid appear,
To soothe the widow's woe.



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A stylized illustration of the execution of the Italian revolutionaries Felice Orsini and Joseph Pieri, by guillotine in Paris on March 13, 1858. They had attempted to assassinate the French emperor Napoleon III.

court in a capital case to decide whether to sentence a convicted offender to death or to life imprisonment, and automatic review of a death sentence by an appellate court are among the compromises in the criminal law that arose as a result of pressure to abolish the death penalty. Since the 1960s, anti-death-penalty litigation on behalf of nonwhite and indigent defendants has been carried on mainly by the NAACP Legal Defense and Educational Fund, Inc. The strongest lobby in favor of abolition has been the American Civil Liberties Union. Defense of the death penalty has not been comparably organized, although various groups have spoken and written in its favor, including the International Association of Chiefs of Police and the National District Attorneys Association. Efforts by abolitionists to secure a condemnation of capital punishment by the house of delegates of the American Bar Association have so far proved unsuccessful.

During the past century, the constitutionality of the death penalty and of various practices associated with it has been challenged in many courts. The litigation can be divided roughly into three historic stages. The first stage was marked by sporadic attempts to single out capital trial procedures and methods of execution for special scrutiny. Thus, *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890), sought unsuccessfully to challenge the constitutionality of electrocution, but not of executions themselves. Similarly, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), sought successfully to establish on "due process" grounds the right of the accused in a capital case to representation by counsel at trial, but raised no objection to criminal trials in which the accused's life was at stake.

The second stage began in the early 1960s, when public interest attorneys from the Legal Defense Fund secured class action stays of all executions in the na-

The state has no right to put to death, even for the sake of making an example, any one whom it can leave alive without danger.

JEAN JACQUES ROUSSEAU

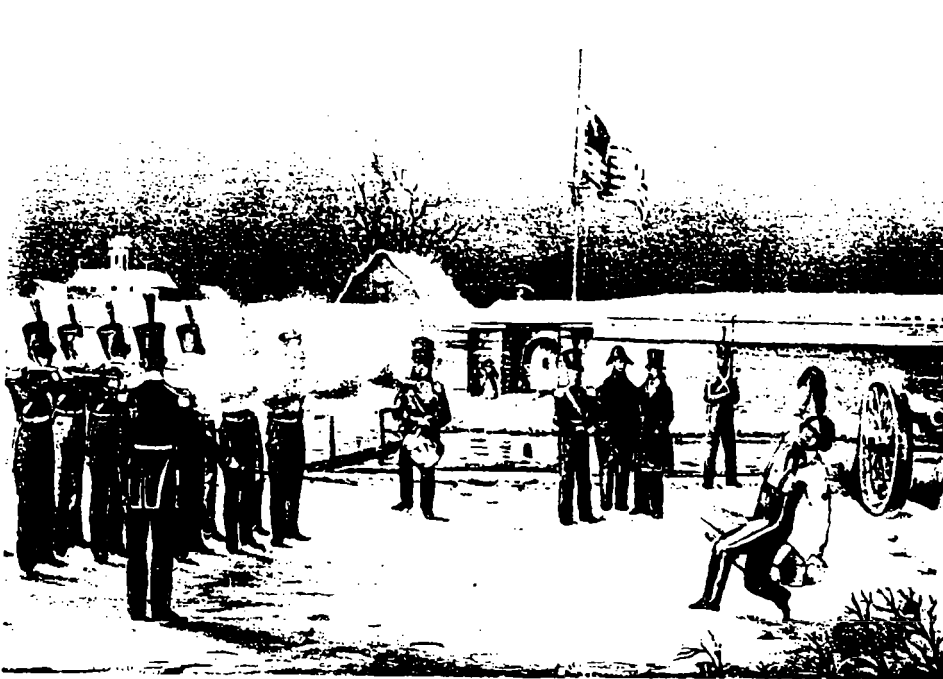
tion in a systematic effort to establish the unconstitutionality of the death penalty. They alleged that the practice of unguided, discretionary death sentencing was in violation of the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court turned back this challenge in *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). A year later, however, the Court did agree that the death penalty as defined and administered by statutes permitting complete sentencing discretion was unconstitutional under the Eighth and Fourteenth Amendments (*Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 [1972]). However, as the Court's ruling was silent on whether the death penalty was per se a "cruel and unusual punishment," legislatures were free to enact new death penalty statutes designed to remedy the traditional deficiencies. In 1976, three such new statutes were reviewed by the Supreme Court (*Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929). In these cases, the Court ruled that the death penalty was not per se unconstitutional: capital statutes could be designed that would eliminate "arbitrary" and "freakish" (as well as racially discriminatory) sentencing—the factors that had led the Court in *Furman* to condemn the older death penalty statutes. Characteristic features of post-*Furman* capital statutes include (a) a bifurcated or two-stage trial, in which trial on the issue of guilt is followed by trial on the type of sentence; (b) the requirement that the sentencer may decide on death rather than life only after establishing that certain "aggravating" factors in the case outweigh any "mitigating" factors; and (c) automatic review of the sentence by the state supreme court.

... we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes

POTTER STEWART

The ruling in *Gregg* and companion cases ushered in the third and current phase of litigation, in which the ostensibly constitutionally permissible procedures for convicting and sentencing a capital offender have been challenged by reference to the Court's own ruling in *Furman* and in related cases. On point after point, the Court has restricted the scope of the death penalty and retreated from the ground staked out in *Gregg*, *Proffitt*, and *Jurek*. Mandatory death penalties, at least for the crime of murder (and including the murder of a police officer), are inconsistent with the individualized sentencing required if the death penalty is to be retained (*Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 [1976]; *Roberts v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 [1977]). Death is a disproportionately severe punishment for rape where death of the victim is neither threatened nor a result of the crime (*Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 [1977]).

During the sentencing phase of a capital trial, defense counsel must be allowed to introduce any evidence that tends to mitigate the offense (*Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 978 [1978]). Conviction-minded juries in capital cases must be allowed to consider a verdict of guilt for any lesser (noncapital) included offense (*Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 [1980]). The prosecution is barred from seeking a death sentence a second time for any offender, who after conviction and a death sentence, wins a new trial and who is again convicted of a capital crime (*Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 [1981]). These and other rulings suggest that the Supreme Court will continue to give vigilant review of death sentences, on



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A nineteenth-century lithograph shows a deserter from the U.S. Army executed by a firing squad.

principle that “death is different”—different in its impact on the offender (once executed, the sentence cannot be modified, and there is no compensation for an erroneous execution) and different in its symbolic meaning.

Underlying the controversy over the constitutional limits to the death penalty are moral and empirical arguments. Traditionally, the death penalty has been defended on both retributive and utilitarian grounds. Retributors have insisted that the death penalty is a proper punishment given the principle that a punishment should fit a crime. Utilitarians have argued that putting convicted offenders to death not only incapacitates them from further crimes but also serves as society’s most effective deterrent, and is generally desirable on cost-benefit grounds. Critics have replied that the death penalty can be defended on retributive grounds only for the crime of murder; that it is not required by retributive principles (unless one accepts the crude doctrine of “an eye for an eye, a life for a life”); and that it cannot very easily be defended on these grounds even for murder as long as society tolerates the punishment of the vast majority of convicted murderers by long-term imprisonment rather than by death. Furthermore, statistics show that racial bias in the administration of the death penalty (persons who kill whites tend to be sentenced to death; persons who kill blacks do not) mocks the pretensions of those who defend the actual use of the death penalty on grounds of justice. Against the utilitarians, critics have argued that there is no convincing evidence that the death penalty is needed to incapacitate murderers from crimes (few incarcerated or released murderers kill again); and that there is no convincing evidence that the death penalty is a better deterrent than long-term imprisonment. In addition, the costs of trials and appeals make the effort to carry out capital sentences very expensive.

Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand . . .

THURGOOD MARSHALL

The future of the death penalty in this country remains uncertain. Appellate courts, with few exceptions, have followed the lead of the Supreme Court in holding that the death penalty is not per se unconstitutional. Chief executives infrequently commute death sentences. Trial juries continue to sentence offenders to death; during 1981, more than 800 persons were on "death row." Efforts in recent years to persuade legislatures to abolish the death penalty for murder have proved unsuccessful. Public attitudes consistently favor the death penalty for this crime by a substantial margin. Only once in the past two decades has a public referendum on the issue failed to restore or retain the death penalty (Oregon, 1964). Even so, the relative infrequency of executions and the paucity of capital statutes—despite the relatively large number of crimes against the person (over 21,000 criminal homicides were reported during 1979)—attest to a widespread reluctance to use this mode of punishment with any regularity. The hundreds of death sentences that were nullified by appellate court rulings during the 1970s, and the continuing infirmities uncovered in the review of capital trials and death sentences, are indications of the obstacles facing any effort to enlarge the role for capital punishment in the years ahead. See also, Craig R. Ducat's essays on Cruel and Unusual Punishment; and Equal Protection as well as Richard G. Singer's essay on *Powell v. Alabama*.

Bibliography: H. A. Bedau, *The Death Penalty in America: An Anthology* (1964); Stephen H. Gettinger, *Sentenced to Die: The People, the Crimes, and the Controversy* (1979); Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (1979).



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Moral Arguments For and Against Capital Punishment

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January 1, 1986

The moral arguments for and against the death penalty may be characterized as retributive, reformatory or rehabilitative, and deterrent. Appeal is often made to the authority of religious teaching as well as to principles of morality both by those who oppose and by those who support capital punishment. Sociological and psychological data are cited by both sides, although the case for or against the deterrent effect of the death penalty appears at present to be inconclusive and unresolved. Practical and theoretical arguments are presented by both sides in the controversy.

Opponents of capital punishment contend that the rightful (that is, the moral) purpose of correctional institutions and incarceration of law-breakers is reform and rehabilitation, not punishment or vengeance. They hold that revenge is an unworthy motive for society to pursue, and that the possibility of error (and the consequent execution of an innocent person) should preclude any attempt to impose a capital sentence. In the nature of things, the death penalty is irrevocable and final. Many argue that because each person has an intrinsic dignity and right to life, the death penalty compounds the original capital crime and violates the moral order of society and the religious order of the community. By treating criminals as objects to be disposed of, they assert, the death penalty degrades all who are involved in its enforcement as well as its victim. They further argue that there is no conclusive evidence for the deterrent effect of capital punishment, and that reliance on the death penalty neglects the larger societal factors that nourish crime: poverty, oppression, and injustice. Many religious opponents cite the ethic of love and reverence for life exemplified in the New Testament and in other religious teachings. Still others maintain that capital punishment is unconstitutional in that it is intrinsically "cruel and unusual" and has come to be so regarded over time, much as slavery was once accepted in the law of the land and later came to be viewed as inhumane and immoral. Finally, many object to the death penalty as inherently flawed by the inequities of the legal system and its alleged responsiveness to the power of money as well as to the influence of discrimination in numerous areas. Thus, they argue, the impact of the death sentence is likely to fall more heavily on the poor and on minorities.

Advocates of capital punishment contend that society has not only the right but the obligation to punish and that such punishment affirms the moral order by treating law-breakers as responsible moral agents. They argue further that the first priority of the state is to establish justice and protect the common good against threats to the well-being of the community. The death penalty, they assert, reinforces the moral order and authority of the community by giving expression to that sense of moral indignation that is aroused in society generally by the crime of murder. They hold that the demand for retribution is grounded in the moral order as well in necessities of state. Often they cite the failure of rehabilitation to effect lasting change. Many emphasize that, even if the sociological data are at present inconclusive, there is a "common sense" practical deterrence inherent in the death penalty. They maintain that while abuses or flaws in the legal system should be remedied, abuses and flaws do not affect the intrinsic right of the state to exact justice through capital punishment. They urge that due process in capital cases be made swifter and more just so that the law knows no partiality. Many religious proponents note that the death penalty is imposed for murder in the Old Testament (Gen. 9:6) and has general scriptural warrant in the explicit duty of the state to protect its citizens (see Romans 13:4). They cite the sanctity of life as demanding justice in the social order, including the imposition of the death penalty. Finally, many note that capital punishment is nowhere forbidden in the Constitution and was generally accepted throughout American history. They contend that abuses in the social or legal system do not diminish the obligation of the state to punish, where appropriate and necessary.

CRS Report for Congress

Present Civilian Federal Death Penalty Statutes

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May 30, 1989

Revised: March 14, 1991



PRESENT CIVILIAN FEDERAL DEATH PENALTY STATUTES

SUMMARY

The United States Code presently contains thirteen civilian federal capital punishment statutes. This report lists those statutes, indicates whether they have been constitutionally challenged, and notes possible outcomes of future constitutional challenges under *Furman v. Georgia*, 408 U.S. 238 (1972), and other Supreme Court cases on the death penalty.

PRESENT CIVILIAN FEDERAL DEATH PENALTY STATUTES

The following is a list of the civilian¹ federal capital punishment statutes presently included in the United States Code. Some of these have been challenged; where that has occurred, the case in which the challenge was made is indicated. Others do not appear to have been challenged as yet, but may have constitutional frailties which would render them invalid if they were to be questioned. In the latter situation, we have noted possible weaknesses in the statutes. These weaknesses in general stem from the statutes' failure to meet the constitutional parameters set by the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). There the Court held unconstitutional a capital sentencing scheme which gave the sentencing decision-maker unbridled discretion in determining whether to impose a death sentence. The statutes are presented in numerical order.

18 U.S.C. § 34 (willful destruction of aircraft, motor vehicles or their facilities where death results) -- not challenged, but may be invalid under *Furman v. Georgia*, 408 U.S. 238 (1972), because it gives the jury unfettered discretion in imposing the death penalty.

¹ One new military death penalty statute, enacted in the 99th Congress, is now codified at 10 U.S.C. § 906a. It created a capital offense for the commission of espionage in violation of the Uniform Code of Military Justice. The sentencing procedures set forth for the court-martial in this section specify aggravating and mitigating factors to be considered, require special findings regarding the existence of these factors, and direct that an accused may have broad latitude in presenting mitigating or extenuating evidence. This statute evidently was intended to conform to minimum constitutional standards, but the Supreme Court has not yet passed upon its constitutional validity. Other death penalty provisions in the Uniform Code of Military Justice include: 10 U.S.C. §§ 885 (desertion in time of war); 890 (assaulting or willfully disobeying a superior commissioned officer in time of war); 894 (mutiny, sedition, attempted mutiny, or failure to suppress or report a mutiny or sedition); 899 (misbehavior before the enemy); 900 (subordinate compelling surrender); 901 (improper use of countersign in time of war); 902 (forcing a safeguard); 904 (aiding the enemy); 906 (spying in time of war); 913 (misbehavior of a sentinel in time of war); and 918 (premeditated murder or murder in the course of burglary, sodomy, rape, robbery or aggravated arson). Prior to enactment of 10 U.S.C. § 906a, President Reagan issued an executive order which changed the sentencing procedures in the Manual of Courts Martial in an apparent attempt to conform to minimum constitutional standards. E.O. 12473, issued April 13, 1984. The Supreme Court has not yet addressed the constitutional sufficiency of these changes or the question of whether deficiencies under *Furman v. Georgia*, 408 U.S. 238 (1972), can be remedied by executive order rather than statutory action.

- 18 U.S.C. § 351 (Congressional, Cabinet, Supreme Court, and major Presidential or Vice Presidential candidate assassination, kidnapping and assault) -- Subsection (a), assassination, provides for punishment by reference to 18 U.S.C. §§ 1111 and 1112 which will be discussed *infra*. Subsections (b)(2), kidnapping where death results, and (d)(2), conspiracy to kill or kidnap where death results, provide for punishment by imprisonment for any term of years or by death, without providing any guidance as to how the punishment shall be determined. As such, they may run afoul of the *Furman* decision, although they have not been challenged.
- 18 U.S.C. § 794 (gathering or delivering defense information to aid a foreign government) - not challenged, but this statute provides no guidance in the exercise of sentencing discretion, and therefore may be found invalid under *Furman* should it be questioned.
- 18 U.S.C. § 844 (explosives offense where death results) -- not challenged, but may be invalid under *Furman* rationale because the statute provides no tailoring of the sentencing determination between the death penalty and other available sentencing options.
- 18 U.S.C. § 1111 (murder within the special maritime or territorial jurisdiction of the United States) -- held unconstitutional in *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977), because it permits the imposition of the death penalty without standards to guide sentencing.
- 18 U.S.C. § 1114 (killing of certain law enforcement officials) -- punishment by reference to 18 U.S.C. §§ 1111, 1112. The constitutional shortcomings of 18 U.S.C. § 1111 are discussed above. Section 1112 addresses manslaughter which is not a capital offense and therefore is not pertinent to this inquiry.
- 18 U.S.C. § 1716 (mailing injurious articles where death results) -- not challenged, but may have constitutional frailties under *Furman* as it affords the trier of fact no guidance in the exercise of its discretion in sentencing.
- 18 U.S.C. § 1751 (Presidential or Vice-Presidential assassination, kidnapping and assault) -- Subsection (a), which deals with assassination, provides for punishment by reference to 18 U.S.C. §§ 1111 and 1112, discussed *supra*, and is therefore subject to the constitutional shortcomings of Section 1111. Subsections (b)(2), kidnapping where death results, and (d)(2), conspiracy to kill or kidnap where death results, permit unfettered discretion in determining sentence, and as such may run afoul of the *Furman* decision if challenged.
- 18 U.S.C. § 1992 (willful train wrecking where death results) -- not challenged, but if it were to be questioned it may be found invalid under the *Furman* rationale, because it provides for unbridled discretion in the sentencing determination.

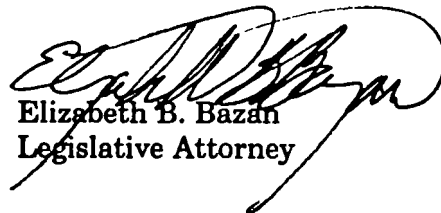
18 U.S.C. § 2113(e) (robbery of a federally insured bank where death results)- In *Pope v. United States*, 392 U.S. 651 (1968), the Supreme Court in a *per curiam* opinion acknowledged the Solicitor General's concession that the death penalty provision in 18 U.S.C. § 2113(e) "'suffers from the same constitutional infirmity' as that found in the Federal Kidnapping Act, 18 U.S.C. § 1201(a). *United States v. Jackson*, 390 U.S. 570." *Id.* The Court further acknowledged the Solicitor General's concession that the petitioner's sentence had to be vacated and the cause remanded for resentencing. Based on this concession, and on an independent examination of the record, the Court ordered the judgment vacated and the case remanded. In both statutes, the defendant could avoid the death penalty by waiving a jury trial because the statute gave the jury the power to impose the death penalty while withholding that power from the judge. The *Jackson* court held this an impermissible burden on the right to a jury trial. It was upon this that the *Pope* decision was based. The *Pope* opinion, while cryptic, has been interpreted as invalidating the death penalty in Section 2113(e). See, e.g., *United States v. McGhee*, 488 F.2d 781, 786 n. 9 (5th Cir. 1974), *cert. denied*, 417 U.S. 971, *cert. denied sub nom. Bunner v. United States*, 417 U.S. 949 (1974); *Albaugh v. United States*, 448 F.2d 760, 761-62 (10th Cir. 1971).

18 U.S.C. §§ 2381 (treason) -- not challenged, but, in light of *Furman* and its progeny, it might be found invalid, because it provides no standards or guidelines to be used in the exercise of sentencing discretion. Article III, Section 3 of the Constitution narrowly defines treason and provides that Congress shall have power to declare its punishment. Given this constitutional mandate, it is possible that Congress may enact the death penalty for treason even though it is an offense where death may not result. In *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Supreme Court, holding that the Eighth Amendment prohibits a punishment that is excessive with respect to the crime committed, struck down a state statute imposing the death penalty for rape when there was no taking of human life. Using the standard set forth in *Coker*, the death penalty for treason might be characterized as deterring others from committing, and justly exacting retribution for, an offense which may threaten the lives of many citizens as well as the continued security of the nation; thus under the Court's two-pronged test, the punishment might be held to make a measurable contribution to acceptable goals of punishment, without being disproportionate to the severity of the crime.

21 U.S.C. §§ 848(e), (g)-(r) (controlled substances offenses where intentional death results) -- Sentencing procedures provide for a separate sentencing hearing, specify mitigating and aggravating factors, detail means of proof, and require special findings concerning them, and supply instructions for the imposition, appeal, and execution of a sentence of death. The composition of the jury is specified, and the jury is required to return to the court a certificate signed by each juror indicating that discrimination played no part in his or her sentencing decision. Added by the Anti-Drug Abuse

Act of 1988, Pub. L. 100-690, this statute would be likely to meet minimum constitutional standards were it to be challenged.

- 49 U.S.C. § 1472(i), (n) (air piracy where death results)² -- Sentencing procedures are set forth in 49 U.S.C. § 1473(c). These procedures provide for a separate sentencing hearing, specify the mitigating and aggravating factors to be considered in determining sentence, and require a special verdict finding the existence or non-existence of each of the factors. These procedures, while providing guidance in the exercise of sentencing discretion, may still fall short of the constitutional minimum in light of the Supreme Court's decisions in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), and *Bell v. Ohio*, 438 U.S. 637, 642 (1978), citing *Lockett*, which held invalid Ohio's death penalty statute because it failed to permit consideration, in a capital case, of any aspects of the defendant's character or record or the circumstances of the offense as a mitigating factor. The federal air piracy sentencing provisions limit the mitigating factors which may be considered, and therefore might be subject to attack.



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² 49 U.S.C. § 1472(k)(1) extends federal criminal jurisdiction to certain offenses committed aboard an aircraft in flight. Among those offenses referenced by subsection (k)(1) is 18 U.S.C. § 1111, murder within the special maritime and territorial jurisdiction of the United States. As noted above, Section 1111's death penalty section has been held unconstitutional.

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CAPITAL PUNISHMENT

**Law Library of Congress
September 1989
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CAPITAL PUNISHMENT

Current as of September 1989

Abstract

The majority of the countries in the world impose the death penalty. Ironically, certain nations have capital punishment provisions in their criminal justice system but rarely ever impose them, while other states execute individuals in extra-judicial or extra-legal ways.

Capital punishment is generally imposed for either "exceptional" crimes, like treason and assassination, or for "ordinary" crimes, like murder and rape, or for both. Several countries provide for exceptions, especially in the cases of minors, pregnant women, etc. Neither these exceptions nor the various means of execution have been included here.

Contents

- Part I: Countries with no capital punishment
(includes date when capital punishment was abolished, with citation)
- Part II: Countries with capital punishment only for "exceptional" crimes
(includes legal source for such death penalties, as well as date when death penalty was abolished for ordinary crimes)
- Part III: Countries with capital punishment for "ordinary" and "exceptional" crimes

Sources

In addition to primary sources researched by the foreign legal specialists of the Law Library, this survey was also based on information taken from:

Amnesty International. The death penalty: Amnesty International report.
London, 1979. 209 p. LC call No. K5105.A74.

Moldrich, Donovan. *Hangman spare that noose: a historical and analytical survey of the death penalty with special reference to Sri Lanka.* Colombo, 1983. 192 p. HV8699.S72M65. 1983.

United Nations. *Economic and Social Council. Social development questions: capital punishment.* Report of the Secretary-General. [New York] 1985. 48 l. U.N. Doc. No. E/1985/43

--addendum, [New York] 1986. 18 l. E/1985/43/add.1.

1. Countries with no death penalties

2

<u>Country</u>	<u>Date of abolition</u>	<u>Citation</u>
Austria	1968 (abolished for ordinary crimes, 1950)	Const. art. 85
Bolivia	1961	Const. art. 17
Cape Verde	[date cannot be established]	Const. art. 31 (4)
Colombia	1910	Const. art. 29
Costa Rica	1882	Const. art. 21
Denmark	1978 (abolished for ordinary crimes, 1930)	Law of May 3, 1978
Dominican Republic	1966	Const. art. 8 (1)
Ecuador	1897 (abolished for "political crimes," 1852)	Const. art. 19 (1)
Finland	1972 (abolished for ordinary crimes in peace time, 1949)	Act No. 343 of May 5, 1972
France	1981	Law No. 81-908 of October 9, 1981
Germany, W.	1949	Const. art. 102
Haiti	1987 (with re-instatement of 1987 Constitution)	Const. art. 20
Honduras	1965	Const. art. 66
Iceland	1928	Law No. 51 of 1928
Kiribati	1965	Penal Code Ordinance, 1965
Luxemburg	1979	Law of June 20, 1979
Monaco	1964	Const. art. 20
Netherlands	1983 (abolished for ordinary crimes, 1870)	Const. art. 114
Nicaragua	Before 1900	Const. art. 23
Norway	1979 (abolished for ordinary crimes, 1905)	Law No. 43 of June 8, 1979
Panama	1903	Const. art. 30
Portugal	1976 (abolished for ordinary crimes 1867)	Const. art. 24
Solomon Islands	1966	Penal Code (Amendment) No. 1 Ordinance, 1966
Sweden	1973 (abolished for ordinary crimes in peacetime, 1921)	Law No. 20 of January 26, 1973
Tuvalu	1975	Const. art. 4
Uruguay	End 19th century	Const. art. 26

I. Countries with no death penalties

<u>Country</u>	<u>Date of abolition</u>	<u>Citation</u>
Vanuatu	1980	Const. art. 5
Vatican City State	1984	Concordat, February 18, 1984
Venezuela	1863 or 4 (abolished for political crimes 1857, Const. art. 97)	Const. art. 58

II. Countries with death penalty for exceptional crimes only

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Country	Year Death Penalty Abolished for Ordinary Crimes- with Citation	Exceptional Crimes Defined	Enactment of Death Penalty Exceptional Crimes
Argentina	1984 (Law 23, 077 amending art. 5 of Penal Code)*	Military crimes including treason	Code of Military Justice, arts. 528, 621, etc.
Australia	Commonwealth 1973 (Death Penalty Abolition Act 1973, No. 100). All states except New South Wales	Treason; piracy	Crimes (Amendment) Act 1955, No. 16 (N.S.W.)
Brazil	1946 (Const. art. 141 (31))	Military during war	Const. art. 5, XLVII(a), Second Code of Military Justice, arts. 55, 355, etc.
Canada	1976	Military during war	National Defence Act (RSC, ch.N-4, secs. 62-66, 1970)
Cyprus	1983 (Law No. 86, Dec. 19, 1983)	Treason; piracy; military during war	Const. art. 7 (2); Military Penal Code; Criminal Code
Ireland	1974	Treason; capital murder; piracy; military offenses	Treason Act 1939, No. 10; Criminal Justice Act, 1964 No. 5; Defence Act 1954, No. 18
Israel	1954 (Penal Law Revision (Abolition of the Death Penalty for Murder) Law, 5714-1953/54)	Treason; crimes against Jewish people, humanity, and war crimes; genocide	Penal Code secs. 97-99 & Military Justice Law, 5715-1955, sec. 43; Nazi and Nazi Collaborators (Punishment) Law, 5710-1950
Italy	1944 (Legislative Decree No. 224)	Military during war	Const. art. 27
Malta	1979	Military during war	N/A
Mexico	All states abolished death penalty between 1917 and 1982	Military crimes including treason	Code of Military Justice, arts. 142, 203, 206, 208, and 210
Nepal	1931 (suspended); 1945 (abolished)	Treason; military offenses	State (Crime & Punishment) Act 1962; Military Act 1959, sec. 27
New Zealand	1961	Treason	Crimes Act 1961, sec. 74
Papua New Guinea	N/A	Treason; piracy	Criminal Code secs. 18, 37, 81 (2) (1983) Const. art. 27
El Salvador	1983	Military offense during international war	

* The death penalty was abolished for ordinary crimes in 1921, but reestablished and abolished several times in intervening years.

II. Countries with death penalty for exceptional crimes only

5

Country	Year Death Penalty Abolished for Ordinary Crimes- with Citation	Exceptional Crimes Defined	Enactment of Death Penalty Exceptional Crimes
San Marino	1948	For ordinary crimes only (Information - 1984)	N/A
Seychelles	1966 (Murder (Abolition of Death Penalty) Ordinance No. 8 of 1966)	Treason	Penal Code secs. 39-40
Spain	1978	Military during war	Const. art. 15; Code of Military Justice (1945); Royal Decree Law No. 45 (1978); Criminal & criminal procedure law on air navigation) Law No. 209, 1964); Criminal & disciplinary law
Switzerland	1942 (Const. art. 65, Political crimes; Penal Code 336 (b))	Military during war	Military Penal Code, art. 27
United Kingdom	1945 (suspended); 1969 (permanent) Abolition of Death Penalty Act. 1965	Treason; piracy, military	Treason Act, 1814, sec.1

III. Countries with death penalty for ordinary and exceptional crimes

Afghanistan	Lebanon
Albania	Lesotho
Algeria	Liberia
Andorra	Libya
Angola	Liechtenstein
Antigua & Barbuda	Madagascar
Bahamas	Malawi
Bahrain	Malaysia
Bangladesh	Mali
Barbados	Maldives
Belgium	Mauritania
Belize	Mauritius
Benin	Mongolia
Bermuda	Morocco
Bhutan	Mozambique
Botswana	Nauru
Brunei	Niger
Bulgaria	Nigeria
Burkina Faso	Oman
Burma	Pakistan
Burundi	Paraguay
Cambodia	Peru
Cameroon	Philippines
Central African Republic	Poland
Chad	Qatar
Chile	Romania
China (PRC)	Rwanda
China (Taiwan)	St. Kitts-Nevis
Comoros	St. Lucia
Congo	St. Vincent and the Grenadines
Cuba	Sao Tome and Principe
Czechoslovakia	Saudi Arabia
Djibouti	Senegal
Dominica	Sierra Leone
Egypt	Singapore
Equatorial Guinea	Somalia
Ethiopia	South Africa
Fiji	Sri Lanka
Gabon	Sudan
Gambia	Suriname
Germany, E.	Swaziland
Ghana	Syria
Greece	Tanzania
Grenada	Thailand
Guatemala	Togo
Guinea	Tonga
Guyana	Trinidad & Tobago
Hong Kong	Tunisia
Hungary	Turkey
India	Uganda
Indonesia	United Arab Emirates
Iran	USSR
Iraq	Vietnam
Ivory Coast	Western Samoa
Jamaica	Yemen (YAR)
Japan	Yemen (PDR)
Jordan	Yugoslavia
Kenya	Zaire
Korea (DPR)	Zambia
Korea (Rep)	Zimbabwe
Kuwait	
Laos	

CRS Report for Congress

Capital Punishment: Selected References, 1990-1992

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Revised August 1992



CAPITAL PUNISHMENT: SELECTED REFERENCES, 1990-1992

SUMMARY

This annotated bibliography focuses on one of the most controversial issues of our times--capital punishment. The first section identifies general materials on capital punishment. The second section identifies materials that discuss philosophical, religious, and moral issues in the debate regarding capital punishment. The third section addresses legal and court issues and is divided into four subsections. Some of the authors in the third section debate the appropriateness of the death penalty; however, due to their substantive discussion of legal and court issues, they are not included in the debate section above. This section is divided into four subsections: A.--General; B.--Juveniles and Medical; C.--Racial; and D.--U.S. Supreme Court Opinions (October 1989-1991 Terms), which lists the opinions received by the Library Services Division for the period covered.

This bibliography is comprised of materials from scholarly journals, magazines, reports and Congressional publications. Books from the Library of Congress' general collection and CRS products are included also. The references were selected from the CRS database and from the Library of Congress' Computerized Catalog. References from the CRS database are provided with a document identification number at the right-hand margin. Congressional users should refer to these numbers when ordering (call 7-5700). Citations to items in the Library of Congress book collection are provided with the Library's classification number (call the Congressional Loan Section, 7-7451). Requests for full text may also be submitted through the SCORPIO system using the order command.

This bibliography is an update of Capital Punishment: Selected References, 1986-1991, by Tangela G. Roe (91-284 L).

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CAPITAL PUNISHMENT: SELECTED REFERENCES, 1986-1990

I. GENERAL

Cannon, A. Peter.

Capital punishment in Wisconsin and the nation. Madison, Wis., State of Wisconsin, Legislative Reference Bureau [1990] 15 p. (Informational bulletin, IB-90-1) HV8699.U5C26 1990

"This bulletin reviews significant studies and court cases central to the debate; provides background on the history of capital punishment in Wisconsin and the United States; and summarizes arguments for and against the death penalty."

Culver, John H.

Capital punishment, 1977-1990: characteristics of the 143 executed. Sociology and social research, v. 76, Jan. 1992: 59-62. LRS92-5402

"This paper reviews the characteristics of the 143 persons executed in the United States from 1977 to 1990. This was a period of increase in the use of capital sentences. Although most of these sentences were not actually carried out, enough were to merit analysis."

The Death penalty in America: current research. Edited by Robert M. Bohm. Highland Heights, Ky., Academy of Criminal Justice Sciences, Northern Kentucky University; Cincinnati, Anderson Pub. Co., Criminal Justice Division, 1991. 148 p. (ACJS/Anderson monograph series)

HV8699.U5D38 1991

Partial contents.--A summary analysis of *Executions in the United States, 1608-1987: the Espy File*, by Victoria Schneider and John Ortiz Smykla.--Prosecutorial discretion and capital sentencing in North and South Carolina, by Raymond Paternoster.--Psychological testimony and the decisions of prospective death-qualified jurors, by Frank P. Williams III and Marilyn D. McShane.--Return of the dead: an update on the status of *Furman*-commuted death row inmates, by Gennaro F. Vito, Pat Koester, and Deborah G. Wilson.--Comparison of the dead: attributes and outcomes of *Furman*-commuted death row inmates in Kentucky and Ohio, by Gennaro F. Vito, Deborah G. Wilson, and Edward J. Latessa.

Death row, U.S.A. Washington, NAACP Legal Defense and Educational Fund, 1992. 37, 9 p. LRS92-6183

Provides statistics and information regarding capital punishment in each State. Includes a list of each person who has been executed since 1977, containing the following information: name, State, date of execution, number of victims, race of the executed prisoner and of the victim(s), and sex of the victim(s). Also includes a State-by-State list of

each person currently on death row. Additionally, contains an addendum that summarizes the information in the main publication.

Drimmer, Frederick.

Until you are dead: the book of executions in America. Secaucus, N.J., Carol Pub. Group, 1990. 280 p. HV8699.U5D75 1990
Chronicles the history of capital punishment in the United States.

Gillespie, L. Kay.

The unforgiven: Utah's executed men. Salt Lake City, Signature Books, 1991. 199 p. HV8699.U5G55 1991
A history of capital punishment in Utah.

Greenfield, Lawrence A.

Capital punishment 1990. Bureau of Justice Statistics bulletin, Sept. 1991: whole issue (15 p.) LRS91-12197
"NCJ-131648"

"During 1990, 244 prisoners under sentence of death were received by State prisons from the courts. During the year 101 persons had their death sentences vacated or commuted and 7 died in prison while still under a death sentence. At year-end 34 States reported a total of 2,356 prisoners under sentence of death, a 5% increase over the number held at the end of 1989. All prisoners under sentence of death on December 31, 1990, had been convicted of murder. The median time since sentencing for the 2,356 prisoners was 4 years and 8 months."

Lehman, Susan.

A matter of engineering. Atlantic monthly, v. 265, Feb. 1990: 26-29. LRS90-211

Profiles "the nation's only supplier of execution equipment", Fred A. Leutcher, the president of Fred A. Leutcher Associates, Inc. He "designs and builds state-of-the-art electrocution systems, and he runs the only training program for execution technicians."

Rhodes, Susan L.

The responsiveness of prison population size to public policy preferences. American politics quarterly, v. 18, July 1990: 337-375. LRS90-8730

"This article tests a multivariate model describing the behavior of policy outputs in one substantive area over time. A simultaneous equation model of prison admissions, releases, and rated capacity is developed and its parameters estimated using time-series data from California for the period from 1946 through 1980. Two indicators of public preferences, the percentage of national poll respondents favoring capital punishment and the proportion of the vote for governor cast for the Republican party candidate, are found to exert significant effects on correctional policy outputs."

Schneider, Victoria. Smykla, John Oritz.

War and capital punishment. Journal of criminal justice, v. 18, 1990:
253-260. LRS90-6175

Article indicates "a drop in the number of executions during and after World Wars I and II and the Korean War when compared to pre-war periods of equal length It is suggested that the influence women and older persons had on U.S. society during war times may have affected executions. It is also suggested that wartime parole was a factor since the judicial system in United States required military service in lieu of incarceration and execution."

Weisberg, Jacob.

This is your death. New republic, v. 204, July 1, 1991: 23-24, 26-27.
LRS91-4618

"Thanks to the decision of a California district judge last week, the American public has been spared the spectacle of criminals being executed on television. But the lawsuit, filed by KQED, the public television station in San Francisco, still served a useful function. It reminded people not only that the United States remains the only advanced democracy that executes criminals, but that it is the only country in the world with a grotesque array of execution techniques worth televising." Describes the various ways that criminals convicted of capital offenses are put to death in the United States.

II. DEBATE

Berns, Walter.

For capital punishment: crime and the morality of the death penalty.
Lanham, Md., University Press of America, 1991. 214 p.

HV8694.B5 1991

Reprint. Originally published: New York, Basic Books, 1979.

"This is a book in support of capital punishment. It could be entitled 'the morality of capital punishment' because, as I see it, the argument about it does not turn on the answer to the utilitarian question of whether the death penalty is a deterrent; as I show in the third chapter, the evidence on this is unclear and, besides, as it is usually understood, deterrence is irrelevant. The real issue is whether justice permits or even requires the death penalty."

Bohm, Robert M. Clark, Louise J. Aveni, Adrian F.

Knowledge and death penalty opinion: a test of the Marshall hypotheses.
Journal of research in crime and delinquency, v. 28, Aug. 1991: 360-387.

LRS91-9279

"Three hypotheses about death penalty opinion derived from conjectures made by Justice Marshall in his Furman decision were tested. Findings of the study provide at least qualified support for all three hypotheses. Regarding the first and third hypotheses, subjects generally lacked knowledge about the death penalty and its effects prior to exposure to an experimental stimulus, and, to the degree that retribution provided the basis for support, knowledge had little effect on changing death penalty opinions. The second hypothesis, that an informed public would generally oppose the death penalty, was supported in some tests but not in others. Implications of the findings are discussed."

Bonnie, Richard J.

Healing-killing conflicts. Hastings Center report, v. 20, May-June 1990: 12-18.

LRS90-4457

"Moral opposition by medical professionals to participation in the process of sentencing for capital crimes, including refusals to provide medical treatment, may compromise the integrity of the legal process."

Claggett, William J. M. Shafer, Byron E.

Life and death as public policy: capital punishment and abortion in American political opinion. International journal of public opinion research, v. 3, spring 1991: 32-52.

LRS91-2854

"This article considers the distribution of the available combinations of attitudes toward issues of the institutionalized taking (or preservation) of human life, both in the general American public and in subgroups with combine these opinions in distinctive fashion."

Congregation of the condemned: voices against the death penalty. Edited by Shirley Dicks. Buffalo, Prometheus Books, 1991. 290 p.

HV8698.C69 1991

Contents.--Part one: The men on the row, their families, and friends.--Part two: Victims.--Part three: Expert views.--Part four: Organizations against the death penalty.--Part five: Concerned citizens.

Crime, cops, and courts. American enterprise, v. 2, July-Aug. 1991: 74-82.

LRS91-6455

Presents in graphic and tabular form public opinion and survey data regarding crime, the police, the courts, the death penalty, victims, crime prevention, and the role of the Democratic and Republican Parties in crime control.

The Death penalty: opposing viewpoints. Carol Wekesser, book editor. 2nd ed., rev. San Diego, Calif., Greenhaven Press, 1991. 191 p. (Opposing viewpoints series)

HV8694.D385 1991

"Includes ideas drawn from the works of philosophers, judges, criminologists, attorneys, religious leaders, government officials, journalists, and human rights organizations. The viewpoints in this book focus on several of the most discussed issues in the capital punishment debate. Chapter titles include: Three Centuries of Debate on the Death Penalty, Is the Death Penalty Just? Is the Death Penalty an Effective Punishment? Does the Death Penalty Discriminate? Do Certain Crimes Deserve the Death Penalty?"

Dicks, Shirley.

Death Row: interviews with inmates, their families, and opponents of capital punishment. Jefferson, N.C., McFarland, 1990. 146 p.

HV8699.U5D43 1990

"This is a book about capital punishment. It is written in three parts. Part I deals with the people who fight against the death sentence. . . . Part II deals with the inmates themselves. . . . Part III deals with the families of the condemned inmates."

Heilbrun, Kirk. Radelet, Michael L. Dvoskin, Joel.

The debate on treating individuals incompetent for execution. American journal of psychiatry, v. 149, May 1992: 596-605.

LRS92-4255

"The question of whether to provide mental health treatment to prisoners under death sentence who have been judged incompetent for execution presents a powerful ethical dilemma for mental health professionals. Arguments that favor or oppose the provision of treatment are discussed in the context of the nature of the disorder to be treated, the type of treatment to be provided, the goals of treatment, and the relevant legal standard for determining competency for execution."

House, H. Wayne. Yoder, John Howard.

The death penalty debate. Dallas, Word Pub., 1991. 225 p. (Issues of Christian conscience) HV8694.H68 1991

House, in favor of the death penalty, and Yoder, against it, debate the death penalty from a Christian scriptural standpoint.

Ingle, Joseph B.

Last rights: 13 fatal encounters with the State's justice. Nashville, Abingdon Press, 1990. 300 p. HV8699.U5I53 1990

A minister, who had "visited prisoners on Death Row in all the states with [Southern Coalition on Jails and Prisons] projects," relates his experiences with 13 death row inmates. A strong proponent of abolishing the death penalty, he argues, that for him "capital punishment is a spiritual question . . . I cannot imagine that Jesus of Nazareth could condone or permit the killing of any child of God no matter how terrible the crimes he or she had committed."

Naldi, Gino J.

United Nations seeks to abolish the death penalty. International and comparative law quarterly, v. 40, Oct. 1991: 948-952. LRS91-10820

"In 1989 the UN General Assembly adopted by a narrow majority the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. This Protocol constitutes an elaboration of Article 6 of the International Covenant and is the first universal, as opposed to regional, instrument explicitly to seek the abolition of the death penalty."

Redekop, Vernon W.

A life for a life? Death penalty on trial. Scottdale, Pa., Herald Press, 1990. 104 p. (Peace and justice series; 9) HV8694.R42 1990

"Examines both the psychological mind-set and biblical justification that undergird so much of the support for state execution. What does the Hebraic law actually say about the death penalty? When and why was it used in biblical accounts? How does our theological understanding of the life and teachings of Jesus inform us on this issue? What do the writings of Paul mean? Going back to the original languages, the author does extensive translation and analysis to unlock the intention of biblical death penalty texts."

Shinn, Rinn-Sup.

Crime and crime control: national public opinion polls. Dec. 10, 1990. Washington, Congressional Research Service, 1990. 54 p. 90-583 GOV

This report presents selected national public opinion polls on crime and crime control conducted between January 1989 and September 1990. See chapter V (pages 35-39) for public opinion regarding the death penalty.

Simon, Seymour.

What price justice? The case against the death penalty. Chicago tribune magazine, Sept. 2, 1990: 19-21. LRS90-7847

An adaptation of an address given on June 30, 1990 before the Midwest Conference of the National Coalition Against the Death Penalty by a retired justice of the Illinois Supreme Court.

Steffen, Lloyd.

Casting the first stone. Christianity and crisis, v. 50, Feb. 5, 1990: 11-18. LRS90-1890

Argues that "capital punishment is still a moral problem." Includes articles, Churches and capital punishment, by Jim Gittings and Death penalty debates: US/USSR, by Arnd Henze.

Worsnop, Richard L.

Death penalty debate centers on retribution. Washington, Congressional Quarterly, 1990. 398-411 p. (Editorial research reports, 1990, v. 1, no. 26) LRS90-6672

Contents.--Retribution argument.--Public opinion.--Political angle.--Supreme Court rulings.--Retribution, deterrence.--Alternative sentences.

III. LEGAL AND COURT ISSUES

A. GENERAL

Bazan, Elizabeth B.

Present civilian Federal death penalty statutes. Revised Mar. 14, 1991.
Washington, Congressional Research Service, 1991. 4 p. 91-254 A

The United States Code presently contains thirteen civilian Federal capital punishment statutes. This report lists those statutes, indicates whether they have been constitutionally challenged, and notes possible outcomes of future constitutional challenges, under *Furman v. Georgia*, 408 U.S. 238 (1972), and other Supreme Court cases on the death penalty.

Bentele, Ursula.

Chief Justice Rehnquist, the Eighth Amendment, and the role of precedent. *American criminal law review*, v. 28, fall 1991: 267-321.

LRS91-10525

"Chief Justice Rehnquist has made clear his position that the eighth amendment prohibition against cruel and unusual punishment should be construed quite narrowly. He has voted to uphold a life sentence for a person convicted of three relatively minor non-violent felonies, to uphold capital punishment for murder, for rape of an adult woman, for a killing committed by a fifteen-year old and by a mentally retarded defendant This article does not debate the correctness of his decision in any given case. Rather, I examine the argumentation used by the Chief Justice to support his interpretation of the eighth amendment, particularly his treatment of precedent." Includes two appendices: Post-Gregg opinions in which the Supreme Court reversed death sentence on direct review or habeas corpus (39 cases) and Consequences of Teague retroactivity principles in the lower courts.

Berger, Vivian.

Justice delayed or justice denied?--A comment on recent proposals to reform death penalty habeas corpus. *Columbia law review*, v. 90, Oct. 1990: 1665-1714.

LRS90-12408

Article reviews and critiques "two major proposals for modifications in habeas legislation and practice in death cases issued from two prestigious groups, . . . the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (called the Powell Committee after its chair, retired Justice Lewis F. Powell, Jr.) [LRS89-14398] . . . [and] the American Bar Association (ABA) Criminal Justice Section's Task Force on Death Penalty Habeas Corpus." Concludes that "the ABA's approach to reforming this difficult field of law is preferable to the Powell Committee's."

Bilionis, Louis D.

Moral appropriateness, capital punishment, and the Lockett doctrine.
Journal of criminal law & criminology, v. 82, summer 1991: 283-333.

LRS91-12610

Article argues that "the doctrine of Lockett v. Ohio is clear, workable, and firmly grounded upon a coherent vision of what the decision to sentence a human being to death must entail. Lockett and its progeny affirm that we as a society do not kill in the name of punishment unless we are sincerely confident that our action is moral."

Blum, Steven A.

Public executions: understanding the "cruel and unusual punishments" clause. Hastings constitutional law quarterly, v. 19, winter 1992: 413-455.

LRS92-5075

"This Article analyzes public executions, which currently occur in certain states and which have been seriously proposed in others, including California."

Carter, Linda E.

A beyond a reasonable doubt standard in death penalty proceedings: a neglected element of fairness. Ohio State law journal, v. 52, no. 1, 1991: 195-221.

LRS91-8170

"This article first analyzes death penalty cases decided by the United States Supreme Court on eighth amendment grounds The next section turns to the Court's capital cases which have raised independent fourteenth amendment issues, establishing the applicability of the due process clause to death penalty proceedings. The article then reviews the Court's noncapital cases on appropriate standards of proof in civil and criminal cases pursuant to due process requirements."

Cavanagh, Suzanne.

Crime control: the Federal response; issue brief. Washington, Congressional Research Service. Updated regularly.

IB90078

Congress has passed three omnibus crime control bills in the last decade. Among crime control bills pending in the 102d Congress are a number which would (1) revise Federal criminal procedures pertaining to the death penalty, habeas corpus, and the exclusionary rule; (2) impose further restrictions on firearm commerce and possession; and (3) further revise and expand programs dealing with drug control.

Colloquy: death penalty. Case Western Reserve law review, v. 41, no. 4, 1991: 1047-1092.

LRS91-11596

Contents.--Juries and the death penalty, by Patrick E. Higginbotham.--"Black box decisions" on life or death--if they're arbitrary, don't blame the jury: a reply to Judge Patrick Higginbotham, by Vivian Berger.

Coyle, Marcia. Strasser, Fred. Lavelle, Marianne.

Fatal defense: trial and error in the nation's death belt. National law journal, v. 12, June 11, 1990: 30-38, 40-42, 44. LRS90-3840

Contents.--Comparison of compensation and methods of assigning counsel in capital cases.--State profiles: Mississippi, Texas, Georgia, Alabama, Louisiana, Florida.--Survey of death row trial lawyers.--Scrutinizing attorney performance since the Supreme Court's Strickland standard.--Attorney disciplinary rates.

Doyle, Charles.

Federal habeas corpus: background & issues. Revised Aug. 1, 1992. Washington, Congressional Research Service, 1992. 52 p. 92-615 A

Federal habeas corpus is the statutory procedure by which State and Federal prisoners may challenge their convictions or sentences after other appeals have been exhausted. Its reach has ebbed and flowed over the years. Some feel it should be streamlined, particularly in State capital punishment cases; others that it should be made more hospitable to prisoner claims.

Florida. Legislature. House of Representatives. Committee on Criminal Justice.

Death penalty and the post conviction process: interim project. Tallahassee, Fla., The Committee [1990] 1 v. (various pagings)

KFF565.C2A25 1990

Reviews capital punishment and post conviction remedies in the State of Florida. "Florida has 322 inmates on death row as of September 15, 1990. Each of these inmates, upon receiving a sentence of death, begin death penalty appeals in order to overturn that sentence. The average wait on death row from sentencing to actual execution is eight years because of the complexity of the death penalty direct appeals and post conviction process."

Gabriel, Trip.

Freedom fighter. New York times magazine, May 10, 1992: 24, 26, 28-29. LRS92-3063

Profiles "Centurion Ministries, a kind of charity-supported detective agency and advocacy group whose only clients are prisoners claiming they were wrongfully convicted. In the past 12 years . . . a handful of colleagues have conducted tenacious, shoestring investigations that have freed 12 men and a woman awaiting execution or serving life terms."

George, Tracey E. Epstein, Lee.

On the nature of Supreme Court decision making. American political science review, v. 86, June 1992: 323-337. LRS92-5072

"How does the U.S. Supreme Court reach decisions? Since the 1940s, scholars have focused on two distinct explanations. The legal model suggests that the rule of law (stare decisis) is the key determinant. The extralegal model posits that an array of sociological, psychological, and political factors produce judicial outcomes. To determine which model better accounted for judicial decisions, we used

Supreme Court cases involving the imposition of the death penalty since 1972 and estimated and evaluated the models' success in accounting for decisional outcomes."

Hall, Melinda Gann.

Electoral politics and strategic voting in State supreme courts. *Journal of politics*, v. 54, May 1992: 427-446. LRS92-5043

"This study suggests that state supreme court justices act strategically to minimize electoral opposition. In order to appease their constituencies, justices who have views contrary to those of the voters and the court majority, and who face competitive electoral conditions will vote with the court majority instead of casting unpopular dissents on politically volatile issues. Using probit, models were estimated of the effects of several types of electoral forces on death penalty votes from 1983 through 1988 in four southern state supreme courts [Texas, North Carolina, Louisiana, and Kentucky]. Results indicate that single-member districts, beginning at the end of a term, prior representational service, narrow vote margins and experience in seeking reelection encourage minority justices to be attentive to their constituencies by voting in accordance with constituent opinion. In essence, constituency influence in state supreme courts is enhanced by competitive electoral conditions and experience with electoral politics."

Hall, Melinda Gann. Brace, Paul.

Toward an integrated model of judicial voting behavior. *American politics quarterly*, v. 20, Apr. 1992: 147-168. LRS92-2455

"This article is an initial step toward the development of an integrated model of judicial decision making. The study synthesizes elements derived from contextual and attitudinal perspectives by application of a neo-institutional perspective. The neo-institutional approach emphasizes the interaction of environmental forces and individual preferences with institutional rules and structures. Judicial voting on death penalty cases from 1980 to 1988 in four states are examined employing pooled probit analysis. The results indicate that institutional rules are important influences on judicial choice."

Hartman, Rhonda G.

Critiquing Pennsylvania's comparative proportionality review in capital cases. *University of Pittsburgh law review*, v. 52, summer 1991: 871-907. LRS91-12450

"Since 1978, Pennsylvania has required the state supreme court to conduct a comparative proportionality review of every death sentence imposed by a jury to ensure that the sentence comports with federal and state protections against cruel and unusual punishment This Article critiques Pennsylvania's appellate review process in capital cases, considers why the current use of comparative proportionality review by the state supreme court is inconsistent with the principles of fairness and uniformity, and proposes methodologies for establishing an effective comparative proportionality review procedure."

Heald, Paul J.

Retroactivity, capital sentencing, and the jurisdictional contours of habeas corpus. *Alabama law review*, v. 42, spring 1991: 1273-1349.

LRS91-13011

Article argues that the Supreme Court's decision in *Teague v. Lane* "takes into account the context in which a habeas claim is raised, and substantially realizes the fundamental values underlying the Writ. Decisions subsequent to *Teague*, however, threaten to establish a categorical approach to habeas that will ignore factors relevant to the weight that should be given both the states' interest in finality and the petitioner's interest in 'basic justice.' To illustrate both the impact of the Court's decisions and the nature of the interests involved, this Article employs examples from the case of Aubrey Dennis Adams." Includes two appendices containing original materials related to the Adams case.

Hoffman, Lonny J.

The madness of the method: the use of electrocution and the death penalty. *Texas law review*, v. 70, Mar. 1992: 1039-1062. LRS92-4533

Note presents "three arguments challenging the validity of the early precedents [*In re Kemmler* and *Louisiana ex rel. Francis v. Resweber*]. The first two arguments demonstrate that if a court were to consider evidence of the effects of electrocution, then electrocution would either have to be abolished or a new boundary for what constitutes cruel and unusual punishment would have to be drawn. The third argument proposes that *Kemmler* and *Francis* can be rejected as invalid authority for defending electrocution because of the availability of clearly superior methods of execution, as alternatives to electrocution."

Horowitz, Andrea B.

Ross v. Oklahoma: a strike against peremptory challenges. *Wisconsin law review*, v. 1990, no. 1, 1990: 219-239. LRS90-7797

Case Note states that "in *Ross*, the Court held that a petitioner's sixth and fourteenth amendment rights to an impartial jury were not violated when he was required to exercise a peremptory challenge to remove a juror who should have been removed for cause The effect of the *Ross* decision is to blur the distinction between challenges for cause and peremptory challenges. By condoning Oklahoma's peremptory challenge scheme, the Court ignored the distinction between peremptory challenges and challenges for cause and the different functions that they fulfill. The *Ross* decision also places a burden on the defendant's right to an impartial jury."

Intoccia, Gregory F.

Constitutionality of the death penalty under the uniform code of military justice. *Air Force law review*, v. 32, 1990: 395-413.

LRS90-5445

"The military's death penalty procedure has never undergone constitutional scrutiny by the Supreme Court. This article evaluates that procedure in light of the Court's precedents. The article is a

polemic: It argues that the death penalty scheme under the Uniform Code of Military Justice (UCMJ) is constitutionally deficient on its face."

Marselas, Daphen.

Justice in the drug war: bringing the death penalty to life: H.R. 4589. Washington, Republican Study Committee, 1990. 7 p. LRS90-4787

"This fact sheet briefly outlines the provisions of H.R. 4589, a bill to establish constitutional procedures for making the death penalty a sentencing option for certain serious crimes in the District of Columbia. It includes a brief discussion of why we need a viable death penalty on the books."

McGill, Alice.

Murray v. Giarratano: right to counsel in postconviction proceedings in death penalty cases. Hastings constitutional law quarterly, v. 18, fall 1990: 211-236. LRS90-13030

"This Comment begins with a summary of Murray v. Giarratano. Part II discusses the standard of reliability as required by the Eighth Amendment. Part III describes the state postconviction proceeding and argues that it ensures the reliability of a death sentence. Part IV shows that the availability of postconviction relief is meaningless without the assistance of counsel."

Moohr, Geraldine Szott.

Murray v. Giarratano: a remedy reduced to a meaningless ritual. American University law review, v. 39, spring 1990: 765-809.

LRS90-9536

Note concludes that "the Supreme Court's failure to extend due process protection to state postconviction proceedings in Giarratano results in the denial of appointed counsel to indigent death-row inmates. The decision in Giarratano threatens the right to a constitutional trial and sentence because of its failure to apply a fourteenth amendment analysis to state postconviction proceedings."

1990 Omnibus Crime Bill: pros & cons. Congressional digest, v. 69, Nov. 1990: whole issue (p. 257-288). LRS90-10259

Presents arguments by Senators for and against passage of the assault weapon and death penalty provisions of S. 1970.

Paduano, Anthony. Smith, Clive A. Stafford.

The unconscionability of sub-minimum wages paid appointed counsel in capital cases. Rutgers law review, v. 43, winter 1991: 281-353.

LRS91-1454

"The purpose of this Article is to examine the problem of statutory limitations on the fees paid to appointed counsel primarily from the perspective of appointed counsel and secondarily the indigent client, with a focus on the recent Mississippi case of State v. Wilson. As recognized recently by the Mississippi Attorney General, the conclusion must be that if a state wishes to maintain a legal system which provides for the ultimate sanction of death, the state may not require a small class of

lawyers to shoulder the immense financial burden of representing the growing number of those charged with capital crimes."

Parker, Scott G. Hubbard, David P.

The evidence for death. California law review, v. 78, July 1990: 973-1026.

LRS90-12574

"The authors of this Comment . . . examine closely the first sixty death penalty appeals decided by the [California Supreme Court,] since its drastic personnel change in 1987, finding a number of errors. They suggest that the problem may well stem from the court's crushing workload, exacerbated by the calendar memorandum system and the justices' own predilections. The authors conclude with a discussion of proposals for reform of the court's treatment of death penalty cases in general and suggest a new approach to its treatment of evidentiary issues in particular."

Poulos, John W.

The Lucas court and the penalty phase of the capital trial: the original understanding. San Diego law review, v. 27, Sept.-Oct. 1990: 521-681.

LRS90-14078

"This article focuses on the development of the law applicable to the penalty phase of capital trials in California Article examines the work of the first year of the Lucas court with respect to the law of the penalty phase of the capital trial and compares the Lucas court's development of that doctrine with the doctrine developed by the Bird court."

Reinberg, Daniel S.

The constitutionality of the Illinois death penalty statute: the right to pretrial notice of the State's intention to seek the death penalty. Northwestern University law review, v. 85, fall 1990: 272-306.

LRS90-13435

"Article argues that the lack of pretrial notice 'renders the Illinois statute unconstitutional because it violates the fundamental rights of effective assistance of counsel and due process.'"

Robbins, Ira P.

Toward a more just and effective system of review in State death penalty cases. American University law review, v. 40, fall 1990: 1-296.

LRS90-12971

"This document contains the materials produced by the American Bar Association Criminal Justice Section Project to study Habeas Corpus Review of State Death Penalty Convictions The Task Force considered questions surrounding five major death penalty habeas corpus issues: (1) competent counsel; (2) procedural default; (3) exhaustion of state judicial remedies; (4) stays of execution, certificates of probable cause, and 'chaotic' litigation; and (5) delay, time limitations, successive petitions, and abuse of the writ."

Rosen, Richard A.

Felony murder and the Eighth Amendment jurisprudence of death.
Boston College law review, v. 31, Sept. 1990: 1103-1170. LRS90-11599

"This article examines the tension between two antithetical criminal law doctrines: the felony murder rule of ancient, though disputed, lineage, and the modern jurisprudence of capital punishment under the eighth amendment, which the Supreme Court has created over the past two decades."

Rosenberg, Yale L.

Kaddish for Federal habeas corpus. George Washington law review, v. 59, Jan. 1991: 362-378. LRS91-1787

Article discusses "a series of recent United States Supreme Court decisions concerning federal habeas corpus." Argues that "in the guise of retroactivity rulings, the Rehnquist Court has quietly eviscerated, if not interred, federal habeas corpus based on a glorification of its own twin deities, finality and federalism."

Spradling, Kevin K. Murphy, Michael D.

Capital punishment, the Constitution, and the Uniform Code of Military Justice. Air Force law review, v. 32, 1990: 415-430. LRS90-5169

"Traces the evolution of the current constitutional assessment of death penalty statutes and proceeds to review capital punishment procedures prescribed by the Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial (MCM)."

Sundby, Scott E.

The Lockett paradox: reconciling guided discretion and unguided mitigation in capital sentencing. UCLA law review, v. 38, June 1991: 1147-1208. LRS91-7648

"This Article will examine some of the changes taking place in the Court's eighth amendment jurisprudence by focusing on the Court's recent interpretations of Lockett v. Ohio's requirement that the sentencer must be allowed to consider all mitigating evidence calling for a sentence less than death."

Tao, Jerome T.

First Amendment analysis of State regulations prohibiting the filming of prisoner executions. George Washington law review, v. 60, Apr. 1992: 1042-1080. LRS92-4600

Comment "argues that prohibitions against the filming of executions should be analyzed as content-based restrictions on First Amendment freedoms, and that when they are so analyzed, these prohibitions are unconstitutional."

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Civil and Constitutional Rights.

Habeas corpus issues. Hearings, 102nd Congress, 1st session. May 22-July 17, 1991. Washington, G.P.O., 1992. 604 p. LRS92-4158

"Serial no. 39"

"Federal habeas corpus is the principal and longstanding way in which an individual convicted of State crimes may raise Bill of Rights and other Federal claims in the Federal courts. One of the central issues raised by all habeas corpus proposals is that of counsel in death penalty cases. Inadequate lawyers cause needless appeals, retrials, and sentencings. I believe that if we have competent lawyers at the beginning of a trial, we would ensure not only fairness, but also the elimination of one of the principal reasons for the delay in the processing of capital cases. This hearing is going to focus principally on that issue."

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Courts, Intellectual Property, and the Administration of Justice.

Habeas corpus legislation. Hearing, 101st Congress, 2nd session on H.R. 4737, H.R. 1090, H.R. 1953, and H.R. 3584. May 24-June 6, 1990. Washington, G.P.O., 1991. 1050 p. LRS91-4908

"Serial no. 145"

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Crime.

Federal death penalty legislation. Hearing, 101st Congress, 2nd session on H.R. 2102, Title II of H.R. 2709, Titles I and II of H.R. 3119, H.R. 3238, H.R. 3342, H.R. 3539, H.R. 3871, H.R. 3918, and H.R. 4002. Mar. 14-May 23, 1990. Washington, G.P.O., 1990. 671 p. KF27.J858 1990b

"Serial no. 95"

Hearings examine such issues as "whether there should be an expansion of capital punishment in the Federal system, and if so, the manner and extent of such expansion."

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Crime and Criminal Justice.

Selected crime issues: prevention and punishment. Hearings, 102nd Congress, 1st session. May 29-July 25, 1991. Washington, G.P.O., 1991. 927 p. LRS91-10553

"Serial no. 18"

Hearings on the firearms provision of H.R. 1400 (May 23, 1991); death penalty provision of H.R. 1400 (May 29); semi automatic assault weapons (June 12 and July 25); certainty of punishment (June 26); cop on the beat (July 10); and safe schools (July 17).

U.S. Congress. Senate. Committee on the Judiciary.

Death penalty. Hearings, 101st Congress, 1st session on S. 32 . . . S. 1225 . . . and on S. 1696. Sept. 19-Oct. 2, 1989. Washington, G.P.O., 1991. 1197 p. (Hearing, Senate, 101st Congress, 1st session, S. Hrg. 101-1256) KF26.J8 1989q

"Serial no. J-101-44"

Hearings focus on "S. 32, a bill to establish constitutional procedures for the imposition of the sentence of death, and for other purposes; and S. 1225, a bill entitled the Comprehensive Violent Crime Control Act of 1989; and on S. 1696, a bill to amend title 28 of the United States Code to prohibit racially discriminatory capital sentencing."

Habeas corpus reform. Hearings, 101st Congress, 1st and 2nd sessions on S. 88, S. 1757, and S. 1760. Nov. 8, 1989-Feb. 21, 1990. Washington, G.P.O., 1991. 948 p. (Hearing, Senate, 101st Congress, 1st and 2nd sessions, S. Hrg. 101-1253) KF26.J8 1989r

"Serial no. J-101-49"

Testimony focuses on the "report of the Special Committee on Habeas Corpus chaired by Justice Powell" that examined habeas corpus in capital cases and legislation that would make habeas corpus review faster.

Violent Crime Control Act of 1991. Hearing, 102nd Congress, 1st session S. 618 and S. 635. Apr. 18-May 15, 1991. Washington, G.P.O., 1992. 942 p. LRS92-3810

"Serial no. J-102-15"

Contents.--The Administration's view (Apr. 18, 1991).--The local perspective (Apr. 23).--Habeas corpus reform (May 7).--The law enforcement perspective (May 15).

White, Welsh S.

The death penalty in the nineties: an examination of the modern system of capital punishment. Ann Arbor, University of Michigan Press, 1991. 223 p. KF9227.C2W443 1991

Partial contents.--The Supreme Court's role in administering capital punishment.--An overview of the death penalty's application.--Plea bargaining and the death penalty.--The penalty trial.--Discrimination.--Defendants who elect execution.

B. JUVENILES AND MEDICAL

Bjorndal, Lee A.

The constitutionality of the death penalty for sixteen and seventeen year old offenders: *Stanford v. Kentucky*. *Hamline journal of public law and policy*, v. 11, spring 1990: 175-194. LRS90-13154

Note argues that "the death penalty for juveniles will continue to be upheld for many years, given the philosophical makeup of the Court. At this juncture, it can be overturned only by state legislatures. One day the Supreme Court will overturn state penalty statutes, but it will take a generation, or even longer. In the meantime, United States citizens

and state legislators should be informed that the United States has some of the harshest criminal penalties in the world for juvenile offenders."

Carmichael, J. Dwight.

Penry v. Lynaugh: Texas death penalty procedure unconstitutionally precludes jury consideration of mitigating evidence. Baylor law review, v. 42, spring 1990: 347-374. LRS90-4990

Note states that "the Supreme Court accepted the case to determine: (1) whether a mentally retarded person can be sentenced to death and (2) whether Texas's sentencing method, as applied to Penry, violated the eighth amendment by precluding the jury from showing mercy based on the mitigating circumstances. The Court held that capital punishment of a retarded person is not per se cruel and unusual but reversed and remanded as to Penry's sentence because the Texas capital sentencing procedure prevented the jury from considering Penry's mitigating evidence."

Esposito, Licia A.

The constitutionality of executing juvenile and mentally retarded offenders: a precedential analysis and proposal for reconsideration. Boston College law review, v. 31, July 1990: 901-966. LRS90-8261

This note interprets the Supreme Court's rulings in *Thompson v. Oklahoma*, *Stanford v. Kentucky*, and *Penry v. Lynaugh*. Concludes that "the United States Supreme Court should adopt a compelling state interest/least restrictive means approach when considering the constitutionality of executing juvenile and mentally retarded offenders. This approach, by placing the burden on the state to justify these executions, would allow the Court to refrain from the inherently subjective independent approaches to eighth amendment adjudication such as proportionality analysis This approach would preserve the Court's legitimacy as well as protect the constitutional rights of these individuals, whose obvious immaturity and lack of participation in the political process render them most in need of judicial protection."

Gewerth, Kenneth E. Dorne, Clifford K.

Imposing the death penalty on juvenile murderers: a constitutional assessment. Judicature, v. 75, June-July 1991: 6-15. LRS91-8168

Article comments that "the Supreme Court has long struggled to find an objective and logical answer to the question of whether juvenile offenders should be subject to capital punishment. A recent decision suggests that the primary test of constitutionality in the future may rest on acceptability to contemporary society rather than the Eighth Amendment."

Goldberg, Arthur J.

A kinder and gentler Supreme Court? Hastings constitutional law quarterly, v. 17, winter 1990: 287-291. LRS90-3374

Former Associate Justice of the Supreme Court assesses the decisions concerning abortion and capital punishment made by the Court

in its 1988 term. Includes discussion of *Penry v. Lynaugh* and *Stanford v. Kentucky*.

Landau, Elaine.

Teens and the death penalty. Hillside, N.J., Enslow Publishers, 1992.

112 p. (Issues in focus)

HV8699.U5L36 1992

A book for the young reader that chronicles the history of the death penalty in America, with an emphasis on its application to teenagers.

Miller, Edward.

Executing minors and the mentally retarded: the retribution and deterrence rationales. Rutgers law review, v. 43, fall 1990: 15-52.

LRS90-12790

"This note will examine these two Supreme Court cases [*Penry v. Lynaugh* and *Stanford v. Kentucky*]. Particular attention will be paid to the oft-cited justifications for capital punishment: deterrence and retribution."

Perfecky, Tanya M.

Children, the death penalty and the eighth amendment: an analysis of Stanford v. Kentucky. Villanova law review, v. 35, Aug. 1990: 641-673.

LRS90-12791

"This Note will discuss the cruel and unusual punishment clause of the eighth amendment and will trace the Supreme Court's scrutiny of the states' use of capital punishment in light of the two-prong test of *Gregg v. Georgia* and its applicability to juvenile offenders. It will also discuss the *Stanford* decision and its inquiry into the contours of the cruel and unusual punishment clause."

Small, Mark A. Otto, Randy K.

Evaluations of competency to be executed: legal contours and implications for assessment. Criminal justice and behavior, v. 18, June 1991: 146-158.

LRS91-7703

"With the Supreme Court's decision in *Ford v. Wainwright* (1986), and the increasing numbers of persons sentenced to death, mental health professionals working in criminal settings can anticipate increased involvement in proceedings examining a condemned prisoner's competency to be executed. This article explores the legal context and clinical aspects of such evaluations. First, the substantive legal test and legal procedures surrounding an assessment of competency to be executed are presented. Salient elements of the legal process of determining competency are discussed. Next, assessment techniques are reviewed."

Uy, Salvador C.

From the ashes of Penry v. Lynaugh: the diminished intent approach to the trial and sentencing of the mentally retarded offender. Columbia human rights law review, v. 21, spring 1990: 565-597.

LRS90-6643

In *Penry v. Lynaugh*, "the petitioner, Johnny Paul Penry, claimed that his mental retardation could not be considered as mitigating

evidence by a Texas jury because the statutory instructions were too restrictive. Because of this defect of the capital statute, Penry contended that the law violated the eighth amendment. Penry's second contention was that as a person with mental retardation, he was fully protected from execution by the eighth amendment, as the death penalty would be cruel and unusual if applied to him." This Note "analyzes the Court's decision and shows how the legal system's treatment of mental retardation must be changed to reflect the nature and effects of the disability."

Youth crime and juvenile justice. *World & I*, v. 5, Apr. 1990: 471-537.

LRS90-1646

"The World & I has assembled a team of social researchers and experts in the field of juvenile justice who give a penetrating analysis of the situation of our nation's youth and suggest what might be done."

Partial contents.--Correcting juvenile corrections, by Ira M. Schwartz.--The invisible delinquent, by Timothy D. Crowe.--An unjust punishment? The juvenile death penalty, by Victor L. Streib.--Young murderers, by Ernest van den Haag.

C. RACIAL

Aguirre, Adalberto, Jr. Baker, David V.

Race, racism, and the death penalty in the United States. Berrien Spring, Mich., Vande Vere Pub., 1991. 125 p. HV8699.U5A35 1991

Baldus, David C. Woodworth, George. Pulaski, Charles A., Jr.

Equal justice and the death penalty: a legal and empirical analysis. Boston, Northeastern University Press, 1990. 698 p.

KFG565.C2B35 1990

"This book is a study of equal justice in death sentencing during the fifteen-year period between two United States Supreme Court decisions from Georgia, *Furman v. Georgia* (1972) and *McCleskey v. Kemp* (1987). . . . The main theme of this book is that, although the levels of arbitrariness and racial discrimination in capital sentencing have declined in the post-Furman period, none of these promises has been fulfilled; moreover, given the Supreme Court's decision in *McCleskey v. Kemp*, little improvement in this regard appears likely."

Bowen, James S.

Peremptory challenge discrimination revisited: do Batson and McCleskey relieve or intensify the Swain paradox? *National Black law journal*, v. 11, fall 1990: 291-330. LRS90-3640

"Part I of this Article articulates the nature and extent of racial discrimination against minority defendants in the use of the peremptory challenge. It examines the development of Swain [*v. Alabama*] and the holding of Straudel [*v. State of West Virginia*] as essential background for understanding Batson [*v. Kentucky*]. Given that peremptories

traditionally have been used to keep minority venirepersons off of juries in cases against minority defendants, this section examines the impact of peremptory usage on the quality of justice for minorities in America's courtrooms Part II of this Article re-evaluates the various approaches available to minimize jury discrimination."

Patton, Veronica.

Rethinking equal protection doctrine in the wake of *McCleskey v. Kemp*. National Black law journal, v. 11, fall 1990: 348-360. LRS90-3641

"This Comment reevaluates equal protection doctrine in the aftermath of *McCleskey vs. Kemp*, a recent Supreme Court case in which stark racial disparities in the administration of a state capital sentencing scheme were challenged as an equal protection violation. . . . This Comment argues that the anti-discrimination principle used by the Court should be replaced with an anti-subjugation principle which is deeply rooted in the historic meaning of the equal protection clause."

Radelet, Michael L. Pierce, Glenn L.

Choosing those who will die: race and the death penalty in Florida. Florida law review, v. 43, Jan. 1991: 1-34. LRS91-11293

"After a brief historical overview, the article presents a review of the research that explores the possibility that racial bias affects the imposition of the death penalty under Florida's current statute, which took effect on December 8, 1972. The article then examines data on all Florida homicides and death sentences over a twelve-year period, 1976 through 1987, to determine whether race affects contemporary death sentences decisions in Florida."

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Civil and Constitutional Rights.

Death penalty legislation and the Racial Justice Act. Hearings, 101st Congress, 2nd session on H.R. 4618, Racial Justice Act of 1990 and H.R. 105, H.R. 380, H.R. 596, H.R. 1197, H.R. 1464, H.R. 1477, H.R. 2196, Title I of H.R. 2709, and Titles I and II of H.R. 3119 establishing procedures for a Federal death penalty. May 3 and 9, 1990. Washington, G.P.O., 1991. 574 p. KF27.J847 1990

"Serial no. 125"

"In a 1987 decision, *McCleskey* against *Kemp*, the Supreme Court held that evidence of disparate racial impact is not sufficient to reverse a death sentence on 8th or 14th amendment grounds in the absence of showing of specific intent. At the close of the majority opinion in *McCleskey*, Justice Powell suggested that the legislatures are the appropriate bodies to address the racial issue. In response to Justice Powell's statement, our colleague John Conyers introduced the Racial Justice Act, which is the focus of today's hearing."

Death sentencing issues. Hearings, 102nd Congress, 1st session. July 10 and 24, 1992. Washington, G.P.O., 1992. 271 p. LRS92-2887

"Serial no. 33"

Hearing into "the question of racial bias in capital sentencing. Imposition of the death penalty is supposed to be based on the nature of the crime and the prior record of the offender, but there is disturbing evidence that in some jurisdictions or in some types of crimes the race of the defendant and of the victim determines who gets the death penalty."

Race claims and Federal habeas corpus. Hearing, 102nd Congress, 1st session. July 11, 1991. Washington, G.P.O., 1992. 34 p. LRS92-640
 "Serial no. 25"

"This afternoon the subcommittee will hear testimony about race bias in capital cases and, in particular, about whether individuals convicted of a crime should be able to have one clear opportunity to petition the Federal courts for habeas corpus relief on the basis that they were sentenced to death because of race bias."

U.S. General Accounting Office.

Death penalty sentencing: research indicates pattern of racial disparities; report to Senate and House Committees on the Judiciary. Feb. 26, 1990. Washington, G.A.O., 1990. 13 p. LRS90-1273

"GAO/GGD-90-57, B236876"

Reports results of an evaluation of 28 studies of "death penalty sentencing after the Furman decision." Findings showed "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision."

**D. U.S. SUPREME COURT OPINIONS
 (OCTOBER 1989-1991 TERMS)**

U.S. Supreme Court (October 1989 Term).

Chandler Clemons, petitioner v. Mississippi. Docket no. 88-6873, decided Mar. 28, 1990. Washington, The Court, 1990. 38 p. (Citation 110 S. Ct. 1441) LRS90-1341

Death penalty, reweighing of factors by appellate court.

 Dock McKoy, Jr., petitioner v. North Carolina. Docket no. 88-5909, decided Mar. 5, 1990. Washington, The Court, 1990. 42 p. (Citation 110 S. Ct. 1227) LRS90-852

Death penalty, jury unanimity on mitigating factors.

 James Saffle, warden, et al., petitioners v. Robyn Leroy Parks. Docket no. 88-1264, decided Mar. 5, 1990. Washington, The Court, 1990. 33 p. (Citation 110 S. Ct. 1257) LRS90-850

Habeas corpus, "new rule" limitation.

Jeffrey Alan Walton, petitioner v. Arizona. Docket no. 88-7351, decided June 27, 1990. Washington, The Court, 1990. 84 p. (Citation 110 S. Ct. 3047) LRS90-4484

Death penalty, narrowing construction of statute.

Jonas H. Whitmore, individually as next friend of Ronald Gene Simmons, petitioner v. Arkansas et al. Docket no. 88-7146, decided Apr. 24, 1990. Washington, The Court, 1990. 35 p. (Citation 110 S. Ct. 1717) LRS90-2245

Death penalty, standing of "next friend" to contest.

Richard Boyde, petitioner v. California. Docket no. 88-6613, decided Mar. 5, 1990. Washington, The Court, 1990. 39 p. (Citation 110 S. Ct. 1190) LRS90-853

Death penalty, mandatory instruction.

Robert Sawyer, petitioner v. Larry Smith, Interim Warden. Docket no. 89-5809, decided June 21, 1990. Washington, The Court, 1990. 35 p. (Citation 110 S. Ct. 2822) LRS90-4374

Habeas corpus, new rule limitation (Louisiana).

Samuel A. Lewis, director, Arizona Department of Corrections, et al., petitioners v. Jimmie Wayne Jeffers. Docket no. 89-189, decided June 27, 1990. Washington, The Court, 1990. 42 p. (Citation 110 S. Ct. 3092) LRS90-4485

Death penalty, habeas review.

Scott Wayne Blystone, petitioner v. Pennsylvania. Docket no. 88-6222, decided Feb. 28, 1990. Washington, The Court, 1990. 27 p. (Citation 110 S. Ct. 1078) LRS90-768

Eighth Amendment, death penalty.

U.S. Supreme Court (October 1990 Term).

Arizona, petitioner v. Oreste C. Fulminante. Docket no. 89-839, decided Mar. 26, 1991. Washington, The Court, 1991. 37 p. (Citation 111 S. Ct. 1246) LRS91-1079

Coerced confession, harmless error analysis.

Bryan Stuart Lankford, petitioner v. Idaho. Docket no. 88-7247, decided May 20, 1991. Washington, The Court, 1991. 29 p. (Citation 111 S. Ct. 1723) LRS91-2864

Due process, capital sentencing.

Pervis Tyrone Payne, petitioner v. Tennessee. Docket no. 90-5721,
decided June 27, 1991. Washington, The Court, 1991. 36 p. (Citation
111 S. Ct. 2597) LRS91-4467
Victim impact, capital sentencing.

Robert Lacy Parker, petitioner v. Richard L. Dugger, Secretary, Florida
Department of Corrections, et al. Docket no. 89-5961, decided Jan. 22,
1991. Washington, The Court, 1991. 28 p. (Citation 111 S. Ct. 731)
LRS91-46
Death penalty, mitigating circumstances, appellate review.

Robert S. Minnick, petitioner v. Mississippi. Docket no. 89-6332, decided
Dec. 3, 1990. Washington, The Court, 1990. 24 p. (Citation 111 S. Ct.
486) LRS90-9978
Miranda warning, reinitiation of questioning.

Roger Keith Coleman, petitioner v. Charles E. Thompson, warden.
Docket no. 89-7662, decided June 24, 1991. Washington, The Court,
1991. 55 p. (Citation 111 S. Ct. 2546) LRS91-4459
Habeas corpus, procedural bar (Virginia).

Tommy Cage v. Louisiana. Docket no. 89-7302, decided Nov. 13, 1990.
Washington, The Court, 1990. 3 p. (Citation 111 S. Ct. 328)
LRS90-9114
Due process, jury instruction, reasonable doubt.

Warren McCleskey, petitioner v. Walter D. Zant, superintendent, Georgia
Diagnostic & Classification Center. Docket no. 89-7024, decided Apr. 16,
1991. Washington, The Court, 1991. 65 p. (Citation 111 S. Ct. 1454)
LRS91-1733
Habeas corpus, abuse of the writ.

U.S. Supreme Court (October 1991 Term).
David Dawson, petitioner v. Delaware. Docket no. 90-6704, decided
Mar. 9, 1992. Washington, The Court, 1992. 23 p. (Citation 112 S. Ct.
1093) LRS92-1090
First Amendment, capital sentencing.

David Riggins, petitioner v. Nevada. Docket no. 90-8466, decided
May 18, 1992. Washington, The Court, 1992. 32 p. LRS92-3385
Fair trial, forced use of antipsychotic drugs.

**Dennis Sochor, petitioner v. Florida. Docket no. 91-5843, decided
June 8, 1991. Washington, The Court, 1992. 30 p. LRS92-3884**
Capital punishment, aggravating factors, harmless error.

**Derrick Morgan, petitioner v. Illinois. Docket no. 91-5118, decided
June 15, 1992. Washington, The Court, 1992. 36 p. LRS92-4209**
Due process, juror impartiality on death penalty.

**James R. Stringer, petitioner v. Lee Roy Black, Commissioner,
Mississippi Department of Correction, et al. Docket no. 6616, decided
Mar. 9, 1992. Washington, The Court, 1992. 28 p. (Citation 112 S. Ct.
1130) LRS92-1089**
Habeas corpus, new rule.

**Joe Mario Trevino v. Texas. Docket no. 91-6751, decided Apr. 6, 1992.
Washington, The Court, 1992. 6 p. (Citation 112 S. Ct. 1547)
LRS92-1891**
Juries, peremptory challenges, racial discrimination.

**Robert Wayne Sawyer, petitioner v. John Whitley, warden. Docket no.
91-6382, decided June 22, 1992. Washington, The Court, 1992. 37 p.
LRS92-4547**
Habeas corpus, successive claims, "innocence" standard (Louisiana).

February 3, 1993

FROM: James X. Dempsey

RE: Recommended Changes to Death Penalty Provisions in the
Conference Report

Before the 1991-92 conference report is reintroduced or adopted by the Clinton Administration as its crime bill, two issues relating to the death penalty deserve careful consideration: (I) what crimes should be subject to the death penalty; and (II) what technical changes should be made in the conference report death sentencing procedures?

These are important issues affecting the fairness of the federal death penalty. However, they do not affect the essence of the conference report. Any Democratic crime bill will have certain core elements: general restoration of the federal death penalty, habeas reform, Brady, cops on the street. Our concern is that it is far easier to address issues of detail in the conference report's compromises before introduction of it as the Administration bill. (There are also habeas issues that should be reconsidered, but that is outside the scope of my expertise.)

I. Specific Offenses for which Death Penalty is Authorized

Three sections of the conference report extending the death penalty to new crimes should be deleted. Two of the sections deal with applying the death penalty to cases where there was no homicide; the third would burden the federal system with expensive capital trials in homicide cases that currently are handled locally.

1. Section 108 -- Death Penalty for Drug Kingpins

This section applies the death penalty to three separate offenses related to drug trafficking: (a) involvement in major drug trafficking where no death results; (b) attempted homicide in an effort to obstruct justice in a drug case; and (c) death from a drug overdose or an auto accident involving a drug dealer who was driving recklessly. (Despite the title of the section, the third offense is not limited to kingpins; it applies to any felony offender.)

The constitutionality of the death penalty for offenses not resulting in death under (a) and (b) is highly questionable at best. In 1977, the Supreme Court held that the death penalty for rape was unconstitutional, in a decision generally read as drawing the line at homicidal offenses. None of the 38 states with the death penalty now applies it to crimes where no death resulted; all of the 2600 people on state death rows are there for murder. No one has been executed in the U.S. for a non-homicidal crime in decades.

When the Bush Administration sent up its first death penalty bill, it did not seek the death penalty for non-homicidal cases; its witness testified that the death penalty for drug trafficking where no death resulted was of "questionable" constitutionality. As recently as June 1991, Chief Justice Rehnquist stated in dictum that the death penalty could not be applied to a crime where no death occurred.

In the first half of this century, there were executions for non-homicidal crimes, but most of those were confined to blacks convicted of raping white women in Southern states, a bleak pattern of arbitrariness and racial discrimination that the federal government should learn from rather than repeat.

Aside from the constitutional problems, a non-homicidal death penalty is a political nightmare. The Clinton Administration should not be put in the position of promoting worldwide a revived human rights policy while arguing for the U.S. government's power to execute people who did not themselves kill. All but a tiny number of nations have foresworn the death penalty for non-homicidal offenses; for the U.S. to move in the opposite direction would seriously undermine our claim to moral leadership.

Practically, the death penalty for non-homicidal offenses is a minefield. If it's there and you don't use it, you will be criticized. But if you try to use it, there's a tremendous arbitrariness problem. How are U.S. Attorneys and the DOJ going to decide which dope dealers should be tried capitally? Will the Justice Department offer plea bargains to some conspirators to get the death penalty for others? How much will it pay drug informants in death cases? (The Department was criticized for the money it paid to drug traffickers and the people it let go in order to get testimony to convict Noriega.) The Administration could spend a lot of time defending against charges of discrimination or reverse discrimination. All of the problems of drug conspiracy cases would be thrown into high relief whenever the death penalty was sought.

For these reasons, it is time to reexamine the question of death penalty for non-homicidal offenses. We could leave the death penalty for espionage and treason alone, on the theory that it is already on the books, but draw the line at extending the death penalty to new non-homicidal offenses.

The third part of §108, death from a drug overdose, of course does not suffer from the problem of imposing death where no death occurred. But the provision does stretch the concept of individual culpability beyond any rational limits -- making any member of a drug conspiracy responsible for any death that occurs in the course of the conspiracy -- and is also very likely unconstitutional for that reason. It also poses similar

practical problems of deciding which overdose cases and which members of a drug conspiracy to prosecute capitally.

In addition to the problem of culpability, the third part of §108 applies to every drug-related homicide, thereby bringing under federal jurisdiction and into the federal courts a huge number of both accidental and intentional homicides which until now have always been prosecuted in state courts.

2. Section 103(a)(9) -- Attempted Assassination of the President

This section would authorize the death penalty for attempted assassination of the President. It suffers from the same likely constitutional deficiency as the other non-homicidal death penalties. In addition, a mistake was made in drafting the provision, which fouled up the underlying statute, 18 U.S.C. §1751(c), on attempted murder or attempted kidnapping of the President and other protected officials. It would be best to delete 103(a)(9) and leave §1751(c) alone.

3. Section 114 -- Death Penalty for Gun Murders during Federal Crimes of Violence and Drug Trafficking Crimes

This section would federalize a large percentage of homicides that are currently not federal crimes, potentially swamping the federal courts with the most difficult homicide cases. While drug trafficking is a federal offense, most drug-related murders (a large percentage of all murders) are not federal crimes. (While there are 22,000 homicides annually in the U.S., the federal courts handle on average only 8 homicide cases per year serious enough to result in life sentences.) This provision should be deleted.

II. Procedures

Before the conference report is reintroduced or adopted as the Clinton Administration crime bill, several technical changes should be made to the death penalty procedures. Most of these fall in the "good government" category; some correct defects we noticed after the conference. Many of them merely conform the conference report to the 1988 drug kingpin death penalty procedures signed into law by Ronald Reagan. Most follow the majority rule among the states with the death penalty, so they cannot be said to be far-out or ultra-liberal.

1. Life without parole option

If the jury does not want to impose a death sentence but wants to ensure that the defendant will not be back out on the street in ten years, it should have the option of imposing a

sentence of life imprisonment without parole, guaranteeing the defendant will remain locked up forever.

However, unlike the existing federal death penalty statute (21 U.S.C. §848) and unlike the death sentencing laws of some 34 states, all of which allow the jury to choose between the death penalty and life imprisonment, the conference report requires the jury to vote for or against the death penalty without having any control over whether or for how long the defendant will be imprisoned if they do not impose the death sentence. If one is serious about ensuring that dangerous murderers not be allowed back on the streets, the jury should have the option of insisting that such a defendant spend the rest of his life in prison.

To remedy this defect, the conference report should be corrected by the following amendment to the proposed §3593(e):

. . . Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall ~~recommend~~ determine whether a sentence of the defendant should be sentenced to death shall be imposed rather than or to life imprisonment without parole or to a lesser sentence.

Section 3594 should be amended correspondingly as follows:

Upon a ~~finding determination~~ determination under section 3593(e) that the defendant should be sentenced to a sentence of death or to life imprisonment without parole is justified, the court shall sentence the defendant ~~to death~~ accordingly. Otherwise, the court shall impose any lesser sentence ~~other than death~~ that is authorized by law. Notwithstanding any other provision of law, if the maximum term of imprisonment for the offense is life imprisonment, the jury may specify and the court may impose a sentence of life imprisonment without parole.

The above changes remedy another defect in the conference report's §3594: the use of the formulation "a finding ... that a sentence of death is justified." As Senator Levin pointed out during floor debate on the 1988 death penalty statute, a jury could find that death is "justified," but still not be the most appropriate sentence. The 1988 law therefore refers to the jury's determination "that the sentence of death be imposed." The conference report should be changed to follow suit.

2. Intent requirement

The proposed §3591 in the conference report is designed to set out the various mental states, in descending order of culpability, which will be sufficient to support imposition of the death penalty. Subsection (D) is intended to state the minimum intent required under the Eighth Amendment, as spelled

out in Tison v. Arizona, 481 U.S. 137 (1987). The section omits, however, one of the two prongs of Tison, which is that the capital defendant's participation in the crime leading to the homicide must be "major."

This could be corrected, but rather than trying to split hairs about when unintentional murders should be punished by death, subsection (D) should be deleted entirely. Federal capital punishment statutes should focus on the most culpable offenders. Subsection (C) adequately covers any accomplice cases where the offender knew or should have known that lethal force would be used; going beyond that only invites endless litigation about marginal cases, and does not advance any valid federal law enforcement goal.

3. Add the "equally culpable" mitigator from §848

Add to the list of statutory mitigating factors the following, which is included in the 1988 drug death penalty, 21 U.S.C. §848(m)(8):

Another defendant or defendants, equally culpable in the crime, will not be punished by death.

The Supreme Court has recognized the validity of such mitigating factors, and there is no good reason why this language, which was signed into law by Ronald Reagan in the 1988 federal death penalty law, should be deleted. It addresses the very common situation in which an equally or more culpable defendant is given a lenient sentence. The jury should be able to take that into consideration.

4. Delete underlying offense aggravating factor

Aggravating factors serve the constitutionally-required function of singling out from the many homicides that occur the most serious offenses for the death penalty. The conference report, however, in §3592(c)(1) counts the fact that there has been a murder under any one of 20 federal statutes as an aggravating factor in itself. This defeats the purpose of aggravators, if the murder itself is counted as one. Section 3592(c)(1) should be deleted.

5. Delete "firearm" aggravating factor

Unlike §848, the conference report makes the use of a firearm or a prior record for a firearms violation a statutory aggravating circumstance sufficient, without more, to warrant the death penalty. 18 U.S.C. §3592(c)(2). This is grossly overbroad. The majority of homicides in the U.S. involve a firearm, so this one circumstance by itself cannot serve the constitutionally-required function of an aggravating factor,

which is to single out the few murders uniquely worthy of the death penalty. Section 3592(c)(2) should be deleted.

6. "Unforseeability" as a mitigating factor

The proposed 18 U.S.C. §3592(a)(4) would make the unforseeability of the murder a mitigating factor. This is illogical, since unforseeability is an absolute bar to the death penalty under §3591. This mitigator would only confuse the jury and should be deleted. (This is a change that was also sought by the Bush Administration.)

7. Invalid limits on statutory mitigating factors

Delete "unusual and" from the statutory mitigating factor set forth in §3592(a)(2) and delete "severe" from the mitigating factor in §3592(a)(6). Thresholds like "unusual" and "severe" cannot be used to limit mitigating factors. Hitchcock v. Dugger, 481 U.S. 393 (1987).

8. Individualized sentencing hearings

Because many federal criminal trials involve complex conspiracies and CCEs and many co-defendants, the federal death penalty cases under §848 have been raising unprecedented issues regarding multi-defendant sentencing hearings. Such proceedings are virtually unknown in state capital sentencing systems. To avoid this tangle of litigation and potential constitutional error, §3593 of the conference report should be amended to add the following new subparagraph:

(g) Where more than one capital defendant is joined for trial and convicted of an offense punishable by death, the court, upon motion of such defendant or defendants, shall order separate sentencing hearings under this chapter, and shall not require the trial jury to consider the sentence of more than one defendant. Where such a motion for separate sentencing hearings is granted, the court may empanel such new sentencing juries as may be required, in conformity with section 3593(b)(2)(C).

9. Notice of aggravating factors

One of the most important elements of a fair and error-free death penalty proceeding is notice. Throughout the conference report, we tried to make the government's notice responsibility clear. One place we missed is §3593(c). The fifth sentence of the proposed §3593(c) should be amended to read as follows:

The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a).

This language is in §3593(d), and should appear in subsection (c) as a matter of consistency. Similar language appears in the comparable provision of the 1988 death penalty law, 21 U.S.C. §848(j).

10. Mental incapacity

The Conference Report only contains half of the ABA standard on mental health, even though the 1988 law incorporated the ABA standard in its entirety. §3596(c) should be amended as follows:

A sentence of death shall not be carried out upon a person who, as a result of mental disability, (1) lacks the capacity to understand the death penalty and why it was imposed on that person, or (2) lacks the capacity to recognize or understand or convey to counsel or the court facts that would make the punishment unjust or unlawful.

11. Jury never required to impose death

The conference report, like the 1988 law, makes it clear that the jury is never required to impose the death penalty. However, unlike the 1988 law, the conference report does not specify that "the jury shall be so instructed." Adding that phrase would clarify the law and aid the courts in developing their jury instructions.

February 24, 1993

FROM: James X. Dempsey
Assistant Counsel
Subcommittee on Civil
and Constitutional Rights
House Judiciary Committee

RE: Federal Death Penalty

Summary

Both Houses of Congress are overwhelmingly pro-death penalty. Any major crime bill would be a target for efforts to restore the federal death penalty. While general restoration of the federal death penalty would be an ineluctable element of any major crime bill, there are serious questions of fairness and scope in the design of a revived federal death penalty. The Conference Report from last Congress is a good starting point, but it includes some issues of substance and sentencing procedure that should be revisited.

It is quite realistic to expect to get through both Houses a reasonable and balanced set of sentencing procedures and to avoid an irrational extension of the crimes eligible for death. To do so would require active Administration involvement and, in the days before a floor vote, some Presidential involvement.

Current Status of the Death Penalty under Federal Law

In 1972, in Furman v. Georgia, the U.S. Supreme Court invalidated all death penalty laws then on the books, both state and federal. The Court did not hold the death penalty per se unconstitutional. Rather, it found that the statutes in use at the time left the death sentencing decision to the uncontrolled discretion of judges or juries, creating a substantial risk that the punishment would be imposed in an arbitrary and capricious manner. There was no meaningful basis, Justice White concluded, to distinguish the few murderers who received the death sentence from the many who did not. Several members of the Court pointed out that race seemed to be the key determinant.

A number of states responded by adopting new statutes intended to guide the discretion of the sentencer, whether judge or jury. In 1976, the Court approved death sentencing statutes that required the decisionmaker to consider and weigh aggravating and mitigating factors. Gregg v. Georgia. Thirty-six states now have post-Furman death penalty statutes.

Despite the green light from the Supreme Court, Congress did not adopt general procedures to reinstate the federal death penalty. In 1974, it had adopted procedures for imposing the death sentence for the crime of air piracy where death resulted.

49 U.S.C. App. §1473. Those procedures, although basically of the type later approved in Gregg, have a constitutionally fatal flaw; in any event, they have never been invoked. In the Anti-Drug Abuse Act of 1988, Congress adopted death sentencing procedures for certain drug related murders, which so far have resulted in four federal death sentences, described at greater length below. 21 U.S.C. §848(e) - (q). The death penalty has also been imposed under the Uniform Code of Military Justice, based on procedures promulgated by the President as Commander in Chief. There are five men on death row under the CMJ.

With these exceptions, there is no enforceable federal death penalty. About forty federal criminal statutes state that a person found guilty thereunder can be punished by death, but in the absence of legislated procedures the maximum penalty that can be imposed is life imprisonment.

About two years ago, the Bush Justice Department began to argue (contrary to the position it had previously taken) that the pre-Furman federal death statutes are really enforceable after all. This was so, DOJ began to argue at the same time it was complaining about Congress' failure to reinstate the death penalty, because any federal judge could adopt his or her own individualized death sentencing procedures. (Talk about judicial activism!) The Department has advanced this theory in four cases. In three of the cases, the district courts rejected the Administration's argument; in the fourth, the judge accepted it, but the case is on hold. The first case in line, U.S. v. Woolard, was argued before the 5th Circuit on November 3; the appellate court seems almost certain to reject the government's argument. If so, the Clinton Justice Department can simply not seek Supreme Court review, and let the issue die. In the other cases, it may have to inform the courts that it is no longer pursuing the death penalty. There are serious issues related to the federal death penalty, but this is not one of them; the Bush Justice Department position that there is an enforceable death penalty in the absence of legislated procedures is "off the charts" and should not be given any respect.

Federal Legislative Proposals

Both Houses of Congress are overwhelmingly pro-death penalty. It would be impossible to get any major crime bill out of either House without a broad restoration of the federal death penalty.

In 1990 and again in 1991, both Houses voted to adopt general death sentencing procedures for the federal death penalty. (In 1990, death, habeas, and gun control were stripped out at the last moment and a "non-controversial" crime bill was passed; the 1991 crime bill was never enacted.)

Should crime legislation to which the death penalty is germane reach the floor of either House, the debate will focus not on whether to restore the federal death penalty, but on three set of questions that were the focus of debate in 1990 and 1991: (1) which crimes should carry the death penalty; (2) procedures; and (3) how to address the racial bias apparent in death sentencing in some local jurisdictions.

(1) Offenses Punishable by Death

In 1991, both Houses not only adopted procedures applicable to the forty or so statutes that currently carry a dormant death penalty, but also voted to extend the death penalty to new offenses, some created in response to issues of immediate public concern.

For example, in 1991, both Houses voted to make indiscriminate shootings in furtherance of drug offenses a federal crime punishable by death. (This was characterized as a "drive-by shooting" provision but actually it was much broader.) The House added new capital offenses for anyone who commits murder while serving a life term in a federal prison, for acts of torture outside of the United States that result in death, and for the murder of a U.S. national abroad.

The most important amendment and the most objectionable, because it would have wreaked havoc with the federal courts system, was the so-called D'Amato amendment, adopted by the Senate in 1991, which made any murder committed with a gun a federal offense punishable by death. This amendment would have greatly expanded federal jurisdiction over the crime of homicide, since 60% of the 23,000 homicides committed in the U.S. are committed with a gun. The U.S. Judicial Conference strongly opposed the amendment, estimating it would cost the courts alone \$2.5 billion per year. A separate mini-D'Amato amendment, a version of which also passed the House and was included in the conference report, applied the death penalty to any murders with a gun during federal crimes of violence or drug trafficking.

There was a good deal of mindless bidding going on as Members introduced new death penalties and dared their colleagues to vote against them. For example, an amendment offered by Mr. Gekas in the House specifically applied the death penalty to murders occurring in the course of rape or child molestation in the federal maritime and territorial jurisdiction, even though such murders were already covered by the death penalty under the general federal murder statute.

A number of the new offenses added in both Houses were exotic crimes that would rarely if ever appear in U.S. courts, such as murder through the use of weapons of mass destruction.

In developing a death penalty statute it can endorse, the Clinton Administration should look for a compelling federal interest to exercise federal jurisdiction. The drive-by shooting provision and the mini-D'Amato drug-related gun murder provision in the conference report probably do not meet that test.

-- Non-homicidal offenses

The federal statutes on espionage and treason currently carry unenforceable death penalties.

In 1977, in Coker v. Georgia, the Supreme Court held that the death penalty was cruel and unusual punishment, and therefore unconstitutional, for the rape of an adult woman. The decision called into question the application of the death penalty for any offense that did not result in death. The Court in a footnote suggested, however, that the death penalty might be permissible for treason.

In 1991, the House Judiciary Committee reported death penalty provisions that covered five non-homicidal offenses:

1. Espionage: 18 U.S.C. 794 (a) and (b)
2. Treason: 18 U.S.C. 2381
3. Attempts to kill the President under certain circumstances: 18 U.S.C. 1751(c)
4. Attempts to kill witnesses and others in drug cases in certain circumstances
5. Drug dealers who handle certain large amounts of drugs or money: 21 U.S.C. 848

The fact that the House Judiciary Committee reported five non-homicidal death penalties in 1991 shows how far the pendulum had swung in terms of the federal debate on the death penalty. In actuality, no one has been executed in the U.S. for a non-homicidal offense in nearly a quarter century. None of the states with the death penalty have imposed it for a non-homicidal offense. When the Bush Administration sent up its first crime bill, it did not seek the death penalty for drug trafficking or attempted murder or kidnapping of the President; in 1989, its chief spokesperson on the death penalty testified that the death penalty for non-homicidal drug trafficking was of "questionable" constitutionality.

It is time for the pendulum to swing back. The Clinton Administration should try to restore some sanity to the death penalty debate, by limiting any death penalty proposal to homicidal offenses.

(2) Procedural Issues

Two good models for drafting a set of fair, constitutional death sentencing procedures are the procedures Senator Biden offered to the Senate in 1991 and procedures reported by the House Judiciary Committee in the same year. (Both have minor flaws that should be corrected before being endorsed by the Clinton Administration.)

Both the Biden and the House Judiciary procedures were based on the 1988 federal drug kingpin procedures. Both were consistent with the majority of state death penalty laws.

In contrast, the Bush Administration procedures rejected many of the provisions adopted by Congress in 1988 and signed into law by President Reagan. Instead, the Bush Justice Department took all of the most draconian provisions of state law upheld by the Supreme Court and combined them into a statute far more slanted to the prosecution than that of any state.

If the death penalty reaches the floor in the 103rd Congress, it is likely there will be similar attempts to push the procedures to the maximum of prosecutorial power allowed by the Supreme Court.

However, a key point is that the extremist Bush procedures, even with the backing of the Justice Department, carried in the House by only a narrow margin: 213 to 206. This means that 105 pro-death penalty Members (there were 101 anti-death penalty votes in the 206) concluded that the House Judiciary procedures were tough enough for them. These Members were willing to make the nuanced decision in favor of a set of balanced procedures that were characterized as pro-defendant. Undoubtedly, other Members who were privately repulsed by the over-reaching of the Bush procedures voted for them based on the political calculus. In 1991, we didn't even whip this issue. Under a pro-death penalty Democratic Administration, with Justice Department backing, the House could quite readily fend off extremist amendments.

In 1991 and 1992, there was considerable talk about the conference report procedures overruling many Supreme Court decisions on death sentencing. This wasn't true. The conference report left all Supreme Court cases on death penalty procedures intact. What the conference report did on many issues was to use approaches different from those the Supreme Court had found to be constitutionally permissible.

Among the procedural issues that were the focus of debate in 1991 and are likely to reemerge in any future debate:

-- Intent standard

The debate here revolves around the exact formulation and application of a standard covering cases where the defendant could not be shown to have intentionally killed the victim but acted with reckless disregard for human life. The Supreme Court in a 1987 case, Tison v. Arizona, held that a person who substantially participated in a series of actions that resulted in a murder could be sentenced to death under an imputed intent notion in certain egregious cases. The challenge is to cover the egregious cases without covering the drunk driving cases.

-- Cut-off age for defendants (16, 17 or 18)

The Supreme Court has held that the death penalty cannot be imposed on anyone who was less than 16 at the time the offense was committed. In 1991, President Bush's crime bill set the federal cut-off at 18, and that was adopted in the House without debate. The Senate voted to adopt 17 as the cut-off. The Conference Report went with 18. Several international human rights conventions to which the U.S. is a party specify 18 as the minimum age at time of offense for the death penalty. Amnesty International has found that only four other countries in the world carry out judicially sanctioned executions for crimes committed while less than 18.

-- Jury instructions

The conference report procedures, unlike §848 and the capital sentencing statutes currently in effect in some 34 states, did not give the jury the option of imposing a sentence of life imprisonment without parole. Instead, the conference report procedures required the jury to vote for or against death without knowing whether or for how long the defendant would be imprisoned if the jury did not recommend death.

On this crucial decision, the jury should be informed of the full range of options, and instructed that they must recommend either death or life without possibility of parole or some other term of years. In this way, the jury will not have to make its decision under the mistaken assumption that the defendant will someday be back out on the street if they do not sentence him to death.

There are other minor issues in the conference report procedures that should be reexamined, such as the list of aggravating circumstances. I have prepared a separate memo analyzing the section by section changes that would be appropriate.

On some other procedural issues, there is a consensus, but attention still needs to be paid to them in the drafting of a death penalty statute:

-- Application of the death penalty on Indian reservations

There has been a consensus in Congress, which the Bush Administration accepted, that any federal death penalty should apply to crimes within the federal Indian jurisdiction (i.e., crimes between Indians on an Indian reservation) only if the tribal governing body chooses to be covered. The assumption has always been that most tribes would not opt in.

-- Execution of the mentally retarded

Although the Supreme Court ruled in 1989 that the Constitution does not categorically prohibit the execution of mentally retarded killers, there has been a consensus at the federal level that any federal statute should bar the execution of the mentally retarded. The 1988 drug murder statute barred execution of the mentally retarded, as did President Bush's crime bill. The issue has never been a point of contention in the House; death penalty proponents have always introduced bills barring the execution of the mentally retarded. Senator Thurmond forced a vote on the issue in the Senate in 1991: the Senate voted against executing the mentally retarded.

There was an issue raised by Justice late in the process in 1992 about whether to allow execution of mentally retarded persons whose mental retardation was not recognized until after sentencing. Justice was concerned that allowing mental retardation to be raised after trial would result in delays, and there was some suggestion that mental retardation could be faked. Neither concern has any merit. The better course is to prohibit sentencing or executing a person who is retarded.

-- Counsel standards

In 1988, Congress included in §848 a provision that requires federal courts to appoint competent counsel and experts in federal capital cases and in federal habeas challenges to state death sentences. This provision has worked well. The Bush Administration sought to gut it, but neither House went along. The §848 counsel provisions should remain as is.

(3) Racial Justice

The Gregg Court that upheld the revised state death penalty statutes in 1976 assumed the new procedures would eliminate the racial bias that historically had characterized the imposition of the death penalty.

The Court's hopes were not realized. A substantial body of evidence, much of it reviewed and found valid by the General Accounting Office, now demonstrates that race still plays a dominant role in certain jurisdictions in determining who receives the death sentence.

However, in 1987, the Supreme Court held in McCleskey v. Kemp that federal courts could not, absent a legislative directive, consider evidence of a pattern of racially biased death sentencing in a given jurisdiction in deciding whether a particular defendant's sentence had been influenced by race. The Court held that outcomes in other comparable cases, no matter how consistently biased, were not relevant to any specific case.

This decision ran counter to established evidentiary principles in civil rights and criminal procedure cases, in which a pattern of racially biased outcomes is accepted as evidence of impermissible racial discrimination.

Members of Congress responded by introducing the Racial Justice Act. It narrowly passed the House in 1990. In 1991, it was narrowly defeated in the House by the Bush Administration's substitute, the Equal Justice Act, which outlawed racial bias in criminal proceedings but had no enforcement mechanism.

In addition to developing a meaningful response to racial bias in state death sentencing, the Clinton Justice Department will need to develop internal guidelines and standards on exercise of the capital charging discretion. Without objective guidelines, the charging phase is especially susceptible to the improper influence of racial bias and other arbitrary factors. The guidelines should focus on criteria justifying federal intervention. The Bush Justice Department has refused to disclose the basis for its decisions to seek the death penalty.

Federal Death Penalty Prosecutions, 1988-93

The federal death penalty statute adopted in 1988 covered two types of offenses: the killing of a law enforcement officer in the course of a drug enterprise and a killing by a so-called "drug kingpin." From 1988 through 1991, the statute was invoked in a total of five cases, involving seven defendants. From the beginning of 1992 until he left office, Attorney General Barr approved seven new capital cases involving 14 defendants.

Of these 21 defendants, four have been sentenced to death and 8 are in trial or awaiting trial; the other 9 did not receive the death penalty. The four on death row are: Ronald Chandler, a white Alabama marijuana grower. His case is currently on appeal before the Eleventh Circuit and was argued in January 1993. The other three are young black gang members from Richmond, Virginia, convicted of a series of cocaine-related murders.

-- Pending cases

Currently, there are five pending cases involving eight defendants in which the Justice Department has noticed its intent to seek the death penalty:

- one black Tampa drug distributor, for ordering a murder in retaliation for theft of drugs;
- one black Atlanta drug distributor for three murders;
- one white and two Hispanic defendants for the drug-related kidnapping and murder of a Muskogee, Oklahoma auto dealer employee;
- a Hispanic drug distributor in Brownsville, Texas, in connection with three murders of other drug traffickers;
- two black crack dealers in Macon, Georgia, in connection with the murders of two other crack dealers.

Annually, federal prosecutors obtain an average of 113 murder convictions, so the 21 defendants against whom the death penalty has been sought in the four years 1989 - January 1993 represent a small percentage federal murder defendants (most of whom were not eligible for death under 848).

The Justice Department has resisted defense requests for information on the federal death-eligible cases in which the death penalty was considered but not sought. DOJ is also resisting defense requests for information on how capital charging and plea bargaining decisions were made by the Bush Justice Department.

-- Race bias in federal cases

A very troubling racial pattern emerged in the Bush Administration's charging decisions. Five of the 7 defendants against whom the death penalty was sought in 1989-91 were black or Hispanic; in 1992-93, 13 of 14 capital defendants were black or Hispanic.

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Bureau of Justice Statistics Summary

December 1994, NCJ-151786

Capital Punishment 1993

By James Stephan
BJS Statistician
and Peter Brien
BJS Statistical Assistant

Ten States executed 38 prisoners during 1993. The number of persons executed was seven more than in 1992 and was the largest annual number since the U.S. Supreme Court reinstated capital punishment in 1976. The prisoners executed during 1993 had been under sentence of death an average of 9 years and 5 months, about 1 month less than the average for inmates executed the previous year.

For the 2,716 prisoners under sentence of death at yearend, 55% were held by States in the South. Western States had an additional 22%; Midwestern States, 16%; and the Northeastern States of Connecticut, New Jersey, and Pennsylvania, 7%. California held the largest number of death row inmates (363), followed by Texas (357), Florida (324), and Pennsylvania (169). Six prisoners were in Federal custody under a death sentence on December 31, 1993.

Between January 1 and December 31, 1993, 30 State prison systems and the Federal prison system received 282 prisoners under sentence of death. California (33 admissions), Florida (32), North Carolina (32), and Texas (27) accounted for 44% of the inmates entering prison under a death sentence in 1993.

Findings from the BJS Bulletin *Capital Punishment 1993*

- Ten States executed 38 persons in 1993 — 17 in Texas; 5 in Virginia; 4 in Missouri; 3 in Florida; 2 each in Arizona, Delaware, and Georgia; and 1 each in California, Louisiana, and Washington. All were men.

Highlights

Status of the death penalty, December 31, 1993

Executions during 1993		Number of prisoners under sentence of death		Jurisdictions without a death penalty
Texas	17	California	363	Alaska
Virginia	5	Texas	357	District of Columbia
Missouri	4	Florida	324	Hawaii
Florida	3	Pennsylvania	169	Iowa
Arizona	2	Illinois	152	Kansas
Delaware	2	Ohio	129	Maine
Georgia	2	Oklahoma	122	Massachusetts
California	1	Alabama	120	Michigan
Louisiana	1	Arizona	112	Minnesota
Washington	1	North Carolina	99	New York
		Tennessee	98	North Dakota
		Georgia	96	Rhode Island
		23 other jurisdictions	575	Vermont
				West Virginia
				Wisconsin
Total	38	Total	2,716	

- At yearend 1993, 34 States and the Federal prison system held 2,716 prisoners under sentence of death, 5.3% more than at yearend 1992. All had committed murder.

- During 1993, 38 men were executed:
 - 18 were non-Hispanic and white
 - 13 were non-Hispanic and black
 - 1 was Native American
 - 4 were white and Hispanic
 - 2 had an unknown Hispanic origin (1 white and 1 black).

- The average time between sentencing and yearend 1993 for the 2,716 inmates was 6 years and 1 month.

- During 1993, 282 prisoners under a sentence of death were received by State prison systems from the courts.

- Among inmates under sentence of death and with available criminal histories, 2 in 3 had a prior felony conviction; nearly 1 in 10 had a prior homicide conviction.

- About 2 in 5 inmates sentenced to death had a criminal justice status when they committed their capital offense: About half of these were on parole and half included persons with charges pending, on probation, in prison or escaped from prison, and others.

- Almost 1 in 7 persons sentenced to death between 1988 and 1993 had received two or more death sentences.

- Of persons under sentence of death — 1,566 (57.7%) were white
1,109 (40.8%) were black
22 (0.8%) were Native American
16 (0.6%) were Asian American
3 were classified as "other race."

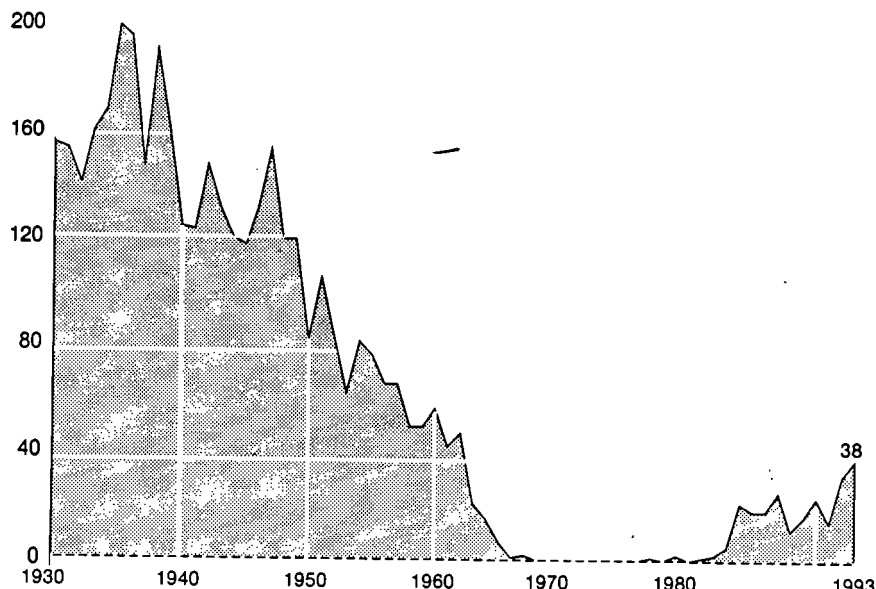
- The 206 Hispanic inmates under sentence of death accounted for 8.1% of inmates with a known ethnicity.

- Thirty-five (1.3%) of the persons under a death sentence were women.

- Half of the inmates sentenced to death had been sentenced at age 29 or older.

Persons executed, 1930-93

Number of executions



- Lethal injection was the predominant method of execution (25 States). Twelve States authorized electrocution; 8 States, lethal gas; 3 States, hanging; and 2 States, a firing squad. Federal executions, effective February 1993, were to be carried out by lethal injection.

- Eleven States and the Federal prison system required a minimum age of 18. Sixteen States indicated an age of eligibility between 14 and 17.

- Of the 36 States with capital punishment provisions, all but Arkansas provided for review of a death sentence regardless of the defendant's wishes.

- Among the 35 jurisdictions with prisoners under sentence of death at yearend 1993, 22 had more inmates than a year earlier; 7 had fewer inmates, and 6 had the same number.

- During 1993 the number of blacks under sentence of death rose by 78 (7.6%); the number of whites rose by 55 (3.6%); and the number of persons of other races (Native Americans and Asians or Pacific Islanders) rose by 3 (7.9%). The number of Hispanics sentenced to death rose from 199 to 206 during 1993.

- Thirty-five women in 14 States were under sentence of death.

- The median age for persons under sentence of death at yearend was 35 years. The youngest offender under sentence of death was age 18; the oldest was 78.

- All 282 prisoners who had been received under sentence of death had been convicted of murder. By sex and race, 141 were white men, 129 were black men, 2 were Native American men, 1 was an Asian man, 3 were Hispanic men classified as "Other race" in Pennsylvania, 5 were white women, and 1 was a black woman.

- Of 282 new admissions of any race, 15 were Hispanic men, and 1 was a Hispanic woman.

- Twenty-three States reported a total of 97 persons whose sentence of death was overturned or removed. Appeals courts upheld the convictions but vacated the sentences in 50 cases while overturning the convictions and vacating the sentences in 39 cases.

- Eleven persons died while under sentence of death in 1993; 8 from natural causes and 3 from suicide.

- From 1977, the year following the Supreme Court's reinstatement of the death penalty, to 1993, a total of 4,259 persons entered prison under sentence of death.

- From 1977 through 1993, 225 persons were executed; 1,789 had their death sentence removed as the result of appellate court decisions and higher court reviews, commutations, or death.

- Among inmates under a death sentence at yearend and with an available criminal history, 68% had a history of felony convictions, including 9% with at least one previous homicide conviction.

- Among those for whom legal status at the time of the capital offense was reported, 42.3% had an active criminal justice status.

- The average time between the imposition of a death sentence and yearend 1993 was 73 months.

	Elapsed time since sentencing	
	Mean	Median
Total	73 mos	67 mos
Male	73	67
Female	51	37
White	74	68
Black	72	63
Hispanic	69	64

- Based on Federal data collected since 1930, during the 64 years ending in 1993, a total of 4,085 persons were executed under civil authority.

- After the Supreme Court reinstated the death penalty in 1976, 21 States executed 226 prisoners:

1977	1	1986	18
1979	2	1987	25
1981	1	1988	11
1982	2	1989	16
1983	5	1990	23
1984	21	1991	14
1985	18	1992	31
		1993	38

- During this 17-year period, 5 States executed 163 prisoners: Texas (71), Florida (32), Virginia (22), Louisiana (21), and Georgia (17). These States accounted for 72% of all executions.

- Between 1977 and 1993, 106 white non-Hispanic men, 72 black non-Hispanic men, 15 white Hispanic men, 1 black Hispanic man, 14 white men with Hispanic origin unknown, 15 black men with Hispanic origin unknown, 2 Native American men, and 1 white non-Hispanic woman were executed.



Bureau of Justice Statistics Bulletin

December 1994, NCJ-150042

Capital Punishment 1993

By James Stephan
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Ten States executed 37 prisoners during 1993. The number of persons executed was six more than in 1992 and was the largest annual number since the U.S. Supreme Court upheld the constitutionality of revised State capital punishment laws in 1976. The prisoners executed during 1993 had been under sentence of death an average of 9 years and 5 months, about 1 month less than the average for inmates executed the previous year.

For the 2,716 prisoners under sentence of death at yearend, 55% were held by States in the South. Western States had an additional 22%; Midwestern States, 16%; and the Northeastern States of Connecticut, New Jersey, and Pennsylvania, 7%. California held the largest number of death row inmates (363), followed by Texas (357), Florida (324), and Pennsylvania (169). Six prisoners were in Federal custody under a death sentence on December 31, 1993.

Between January 1 and December 31, 1993, 30 State prison systems and the Federal prison system received 282 prisoners under sentence of death. California (33 admissions), Florida (32), North Carolina (32), and Texas (27) accounted for 44% of the inmates entering prison under a death sentence in 1993.

Ten States executed 37 persons in 1993 — 16 in Texas; 5 in Virginia; 4 in Missouri; 3 in Florida; 2 each in Arizona, Delaware, and Georgia; and 1 each in California, Louisiana, and Washington. All were men.

Highlights

Status of the death penalty, December 31, 1993

Executions during 1993	Number of prisoners under sentence of death	Jurisdictions without a death penalty
Texas 16	California 363	Alaska
Virginia 5	Texas 357	District of Columbia
Missouri 4	Florida 324	Hawaii
Florida 3	Pennsylvania 169	Iowa
Arizona 2	Illinois 152	Kansas
Delaware 2	Ohio 129	Maine
Georgia 2	Oklahoma 122	Massachusetts
California 1	Alabama 120	Michigan
Louisiana 1	Arizona 112	Minnesota
Washington 1	North Carolina 99	New York
	Tennessee 98	North Dakota
	Georgia 96	Rhode Island
	23 other jurisdictions 575	Vermont
		West Virginia
		Wisconsin
Total 37	Total 2,716	

- At yearend 1993, 34 States and the Federal prison system held 2,716 prisoners under sentence of death, 5.3% more than at yearend 1992. All had committed murder.

- During 1993, 37 men were executed:
 - 17 were non-Hispanic and white
 - 13 were non-Hispanic and black
 - 1 was Native American
 - 4 were white and Hispanic
 - 2 had an unknown Hispanic origin (1 white and 1 black).

- The median time between sentencing and yearend 1993 for the 2,716 inmates was 6 years and 1 month.

- During 1993, 282 prisoners under a sentence of death were received by State prison systems from the courts.

- Among inmates under sentence of death and with available criminal histories, 2 in 3 had a prior felony conviction; nearly 1 in 10 had a prior homicide conviction.

- About 2 in 5 inmates sentenced to death had a criminal justice status when they committed their capital offense: About half of these were on parole and half included persons with charges pending, on probation, in prison or escaped from prison, and others.

- Almost 1 in 7 persons sentenced to death between 1988 and 1993 had received two or more death sentences.

- Of persons under sentence of death —
 - 1,567 (57.7%) were white
 - 1,108 (40.8%) were black
 - 22 (0.8%) were Native American
 - 16 (0.6%) were Asian American
 - 3 were classified as "other race."

- The 206 Hispanic inmates under sentence of death accounted for 8.1% of inmates with a known ethnicity.

- Thirty-five (1.3%) of the persons under a death sentence were women.

- Half of the inmates sentenced to death had been sentenced at age 29 or older.

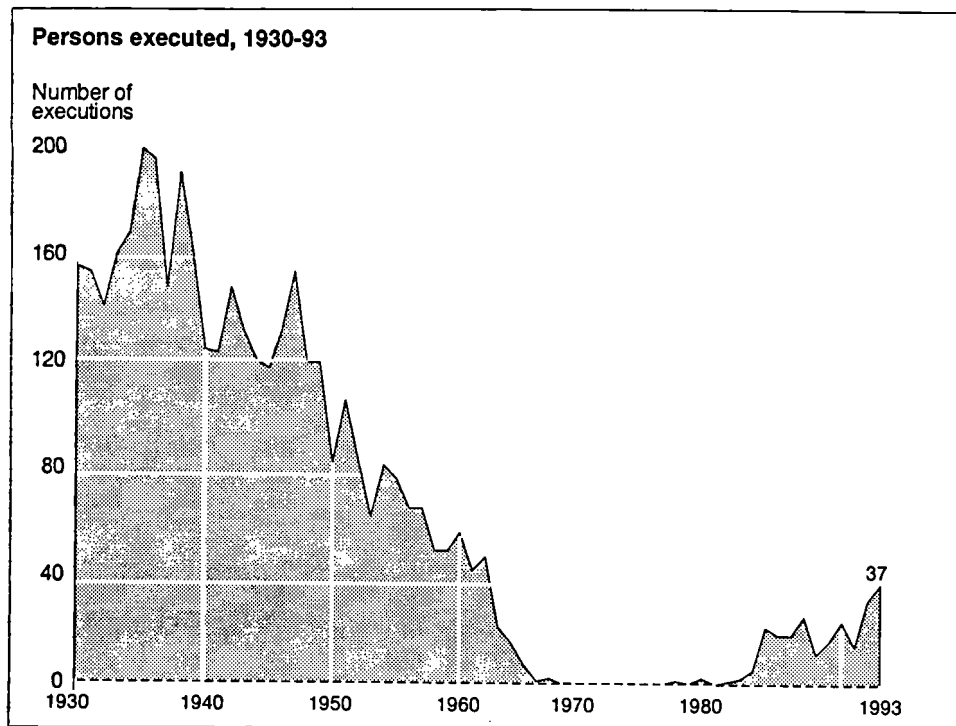


Figure 2

Seventeen of the executed prisoners were non-Hispanic whites; 13 were non-Hispanic blacks; 4, white Hispanics; 1, white with unknown Hispanic origin; 1, black with unknown Hispanic origin; and 1, Native American. Twenty-three of the executions were carried out by lethal injection, 10 by electrocution, 3 by lethal gas, and 1 by hanging.

From January 1, 1977, to December 31, 1993, a total of 225 executions took place in 21 States. Of these 120 (53.3%) were white, 87 (38.7%) were black, 16 (7.1%) were Hispanic, and 2 (0.9%) were Native American. During 1977-93, a total of 4,259 persons entered State prisons under sentences of death, among whom 2,468 (57.9%) were white, 1,724 (40.5%) were black, and 67 (1.6%) were of other races. Also during 1977-93, 1,790 removals from a death sentence occurred as a result of dispositions other than execution (resentencing, retrial, commutation, or death while awaiting execution). Of those removed from under a death sentence, 937 (52.3%) were white, 748 (41.8%) were black, 17 (1.0%) were Native American, 8 (0.4%) were Asian American, and 80 (4.5%) were Hispanic.

Capital punishment in the courts

Dobbs v. Zant, January 19, 1993 Without dissent, the Supreme Court held that the Court of Appeals for the Eleventh Circuit erred in refusing to consider a newly discovered transcript of the sentencing hearing which was unavailable during the original sentencing proceeding. The defendant sought habeas corpus relief, charging that he received ineffective assistance from his court-appointed counsel at sentencing. The High Court emphasized the importance of reviewing capital sentences on a complete record and remanded the case for further proceedings.

Graham v. Collins, January 25, 1993

This case involved a petitioner who claimed that Texas' sentencing instructions to the jury prevented the jury from adequately considering certain mitigating evidence. When the Court of Appeals of the Fifth Circuit affirmed the district court's denial of Federal habeas corpus relief, the Supreme Court agreed to consider the appeal. Because this case came before the Supreme Court on collateral review, the Court, consistent with the principles established in **Teague v. Lane (1990)**, had first to determine whether the relief sought by the petitioner would require the creation of a new rule of constitutional law. The Court held that petitioner's claim would require a new rule; therefore, his claim was barred.

After the petitioner was convicted of capital murder, a separate punishment phase was conducted to determine the sentence. For the death sentence to be imposed according to Texas' capital-sentencing statute then in effect, a jury had to answer affirmatively each of three questions: (1) Was the conduct of the defendant committed deliberately and with the reasonable expectation that death would result? (2) Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? and (3) Was the conduct of the defendant unreasonable in response to the provocation, if any, by the deceased? After being instructed to consider all of the evidence, the jury unanimously answered yes to all three special issues.

Upon appeal, the defendant claimed that the three special issues did not allow the jury to consider fully the mitigating circumstances of his youth, character, and otherwise crime-free background. The Supreme Court held that the defendant's claim would require a fourth special issue that would instruct the jury to consider any mitigating evidence, independent of its relevance to the three special issues. Because the ruling that the petitioner sought would have constituted a new rule under **Teague v. Lane**, the Court denied Federal habeas corpus relief.

Herrera v. Collins, January 25, 1993

This case dealt with the issue of whether a capital defendant can seek Federal habeas corpus relief by claiming that new evidence renders him actually innocent of the murder for which he was sentenced to death.

In 1982 the defendant was sentenced to death for the murder of a police officer. Following his conviction, he pleaded guilty to the murder of a second police officer. Ten years after his conviction, the defendant filed a second petition for Federal habeas corpus relief arguing that he was innocent of the murders of the police officers and that the defendant's now-dead brother had committed the murders. The defendant offered four new affidavits in his defense. The district court dismissed most of the claims but granted a request for a stay of execution so that another appeal could be made. The Texas Court of Criminal Appeals found no evidentiary basis for petitioner's claim and vacated the stay of execution.

Affirming the findings of the court of appeals in a five-to-three decision, the Supreme Court held that a claim of actual innocence based on newly discovered evidence is not ground for Federal habeas corpus relief. The Court defended as consistent with due process the Texas statute which requires that a new trial motion based on newly discovered evidence be made within 60 days of judgment.

Lockhart v. Fretwell, January 25, 1993

The defense counsel failed to object during the sentencing phase on a matter in which the objection would have been sustained. If the objection had been made, a sentence of death would have been precluded. After the proceeding, a Supreme Court decision in **Strickland v. Washington** (1984), removed the validity of such an objection. In this case the Supreme Court decided whether the defense counsel's failure to make an objection in a State criminal proceeding deprived the defendant of a fair trial.

The defendant was convicted of capital felony murder and sentenced to death by an Arkansas jury after the jury found one aggravating circumstance and no mitigating circumstances to exist. Defendant petitioned for collateral relief to the Arkansas Supreme Court on the basis that the death sentence was unconstitutional under the then-existing precedent of **Collins v. Lockhart** (1985). The Arkansas Supreme Court declined to consider whether to follow **Collins** because defense counsel had failed to raise the issue during the sentencing phase; the court affirmed both the conviction and the death sentence.

The defendant appealed to the District Court for the Eastern District of Arkansas, arguing that trial counsel was ineffective for failing to raise the **Collins** objection, and that this failure amounted to prejudice under **Strickland**. Under **Strickland**, a defendant demonstrates prejudice by showing that counsel's errors were so serious as to render an unfair or unreliable result. Unfairness or unreliability does not result unless counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him. The district court, in a ruling affirmed by the Court of Appeals for the Eighth Circuit, found prejudice, granted habeas corpus relief, and conditionally vacated the death sentence.

By seven to two, the Supreme Court held that the sentencing proceeding was neither unfair nor unreliable because the Court of Appeals for the Eighth Circuit overruled **Collins** in 1989. Reversing the court of appeals' decision to vacate the death sentence, the Court ruled that the defendant suffered no prejudice from counsel's deficient performance.

Delo v. Lashley, March 8, 1993 In this case the Court examined the adequacy of the trial court's instruction during the punishment phase. The defendant argued that the trial court: (1) violated the defendant's eighth amendment due process rights by refusing to instruct the jury as to the mitigating circumstance of "no significant history of prior criminal activity," and (2) failed to automatically instruct the jury that the defendant was to be presumed innocent.

Without dissent, the Supreme Court reversed the judgment of the Court of Appeals for the Eighth Circuit on both counts. On the first count, the High Court held that no evidence was offered by defense counsel to support the instruction of the mitigating circumstance. Applying a principle established in **Lockett v. Ohio** (1978), no eighth amendment violation occurred because nothing in the Constitution obligates State courts to give mitigating circumstance instructions when no evidence is offered to support them. On the second count, the Supreme Court ruled that the defendant in this case was convicted fairly in the guilt phase of the trial; therefore, the presumption of innocence disappears. The defendant was not automatically entitled to a "presumption of innocence" instruction.

Arave v. Creech, March 30, 1993 The Supreme Court considered whether Idaho's aggravating circumstance, that the defendant exhibited "utter disregard for human life," was unconstitutionally vague.

The petitioner in this case was an inmate serving life terms for several first-degree murders. He had admitted to killing or participating in the killing of at least 26 people. Bodies of 11 of his victims were recovered in 7 States. The defendant received the death penalty for the murder of a physically handicapped fellow inmate, whose skull the defendant smashed with a sock full of batteries and whom he repeatedly kicked about the throat and head.

The petitioner was sentenced to death, in part because of the aggravating circumstance that he exhibited "utter disregard for human life." Affirming the trial court's decision, the Idaho Supreme Court rejected petitioner's argument that the aggravating circumstance was unconstitutionally vague, holding that the validity of the aggravating circumstance stemmed from their finding that the petitioner was a "cold-blooded, pitiless" killer.

The Court of Appeals for the Ninth Circuit reversed the conviction in part because the aggravating circumstance was unconstitutionally vague. In a seven to two decision, the Supreme Court reversed the judgment of the court of appeals and held that the aggravating circumstance provides clear and objective standards and minimizes the risk of an arbitrary and capricious application of the death penalty.

Sullivan v. Louisiana, June 1, 1993 The Supreme Court reviewed a jury instruction that was essentially identical to an instruction held unconstitutional in **Cage v. Louisiana** (1990) to determine whether it was harmless error.

In the Louisiana trial of a defendant charged with first-degree murder in the course of committing armed robbery, the judge gave instructions to the jury that included a definition of reasonable doubt that was essentially identical to a definition previously ruled to be unconstitutional. The defendant was convicted and sentenced to death. Upon appeal, the Supreme Court of Louisiana upheld the conviction but remanded the case for a new sentencing hearing on grounds other than the erroneous jury instruction, which it ruled harmless.

In a unanimous opinion, the Supreme Court reversed the ruling of the Supreme Court of Louisiana. The Supreme Court held that in a criminal case, a jury instruction which is constitutionally deficient in the definition of reasonable doubt would always invalidate a conviction. The Court concluded that reliance on an unconstitutional definition of reasonable doubt violates the defendant's sixth amendment right to jury trial.

Godinez v. Moran, June 24, 1993 The Supreme Court considered whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial.

The petitioner was sentenced to death by a Nevada jury for using an automatic pistol to fatally shoot a bartender and patron four times each and his former wife five times. Two psychiatrists examined the defendant and concluded that he was competent to stand trial. Approximately 10 weeks after the evaluations, the defendant decided to discharge his attorneys and change his pleas to guilty. After review of the defendant's mental condition, the trial court accepted the waiver of counsel and guilty pleas. The defendant was then sentenced to death. The defendant appealed to the Court of Appeals for the Ninth Circuit, claiming that he had been mentally incompetent to represent himself. The court of appeals reversed the conviction, ruling that the conviction was based upon a legal standard for competency that was too low.

In a seven-to-two decision, the Supreme Court reversed the judgment of the court of appeals, holding that the decision to waive the right to counsel does not require a higher level of mental functioning than the decision to waive other constitutional rights. The Court held that the standard for measuring a criminal defendant's competency to plead guilty or to waive the right to counsel is not higher than the standard for standing trial.

Johnson v. Texas, June 24, 1993 In this case the High Court again examined the death penalty as applied in Texas. The Court upheld Texas' capital sentencing system as consistent with the 8th and 14th amendments. Because this case came to the Supreme Court on direct review of the petitioner's conviction and sentence, the restraints established in **Teague v. Lane** did not apply.

The case involved a 19 year-old drug abuser who robbed and murdered a convenience store clerk. After the jury determined that the defendant was guilty of capital murder, the separate punishment phase was conducted. Upon appeal, defense counsel argued that the special issues did not specifically instruct the jury to consider the defendant's age as a mitigating factor. In a five-to-four decision, the Supreme Court ruled that there was no reason to believe that the jury was precluded from considering the defendant's youth in its determinations.

Focusing on the special issue that the defendant would continue to threaten the community, the High Court concluded that the jury was able to make a determination on a defendant's future dangerousness by asking the extent to which youth influenced the defendant's conduct.

Statutory changes

During 1993, 12 States revised statutory provisions relating to the death penalty (table 1). Most of the changes involved additional aggravating circumstances, additional categories of victims permitting the application of the death penalty, and broadening of the law to allow a defendant to choose between two methods of execution. By State, these statutory changes were as follows:

Arizona — Added new sections to and revised an act relating to death sentences. These revisions became effective 7/21/93.

In specifying conditions of a sentence to life in prison without the possibility of release, the revision eliminates a previous stipulation of release. The stipulation was that the defendant could be released after 25 years if the victim was at least age 15 and after 35 years if the victim was less than 15 (13-703).

Arizona lawmakers also provided that persons sentenced to death shall not be executed if they are mentally ill or incompetent and cannot understand the nature of the punishment or the reasons for the execution (13-4021).

Arkansas — Added teachers and other school employees to its capital murder victims list that includes law enforcement officers, prison officials, probation and parole officers, fire fighters and court officials (5-10-101), effective 8/13/93.

California — Revised its penal code to allow persons sentenced to death to choose between lethal gas and lethal injection as the method of execution (paragraph 3604), effective 1/1/93.

Colorado — Revised a statute to prohibit sentencing mentally retarded persons to death (16- 9-403), effective 4/29/93.

Connecticut — Added to its penal code as an aggravating factor the defendant's use of an assault weapon in a capital felony (53a-46a), effective 10/1/93.

Illinois — Added paramedics, ambulance drivers, and other medical assistance or first aid personnel killed in the course of duty to its capital murder victims list (720-ILCS 5/9 1(b)(2)), effective 1/1/93.

Indiana — Added probation and parole officers, community corrections officers, and home detention officers to its capital murder victims list, and added carjacking murder as an aggravating circumstance (3-50-2-9), effective 7/1/93.

Louisiana — Amended its code of criminal procedure to provide for a 12 hour delay between the verdict and the sentencing hearing in a capital case (LA C. Cr. P. Art 905).

Nevada — Enacted a law expanding the number of aggravating circumstances under which the death penalty may be imposed to include conviction of more than one offense of murder in the first or second degree (AB-58), effective 10/1/93.

New Jersey — Added "leader of a narcotics-trafficking network" as an aggravating circumstance (NJS.A.2C:11-3(:)), effective 5/5/93; and amended the State's death penalty statute to state that the term "homicidal act" means conduct that causes death or serious bodily injury resulting in death (NJS.A.2C:11-3(c) and -3(c)(4)(i)), effective 1/26/93.

Ohio — Amended its penal code to permit persons sentenced to death to elect to be executed by means of a lethal injection instead of by electrocution (O.R.C. 2949.22), effective 10/1/93.

Texas — Added to its list of capital offenses the following: murder of more than one person during the same criminal transaction, murder of more than one during different criminal transactions but according to the same scheme or course of conduct, and murder of an individual under age 6 (19.03 (a)(z)), effective 9/1/93.

Table 1. Capital offenses, by State, 1993

Alabama. Murder during kidnaping, robbery, rape, sodomy, burglary, sexual assault, or arson; murder of a peace officer, correctional officer, or public official; murder while under a life sentence; murder for pecuniary gain or contract; aircraft piracy; murder by a defendant with a previous murder conviction; murder of a witness to a crime; murder when a victim is subpoenaed in a criminal proceeding, when the murder is related to the role of the victim as a witness; murder when a victim is less than 14 years old; murder in which a victim is killed while in a dwelling by a deadly weapon fired from outside the dwelling; murder in which a victim is killed while in a motor vehicle by a deadly weapon fired from outside that vehicle; murder in which a victim is killed by a deadly weapon fired from a motor vehicle (13A-5-40).

Arizona. First-degree murder accompanied by at least 1 of 10 aggravating factors.

Arkansas. Capital murder as defined by Arkansas statute (5-10-101). Felony murder; arson causing death; intentional murder of a law enforcement officer, teacher or school employee; murder of prison, jail, court, or correctional personnel or of military personnel acting in line of duty; multiple murders; intentional murder of a public officeholder or candidate; intentional murder while under life sentence; contract murder.

California. Treason; homicide by a prisoner serving a life term; first-degree murder with special circumstances; train wrecking; perjury causing execution.

Colorado. First-degree murder; kidnaping with death of victim; felony murder. Capital sentencing excludes persons determined to be mentally retarded.

Connecticut. Murder of a public safety or correctional officer; murder for pecuniary gain; murder in the course of a felony; murder by a defendant with a previous conviction for intentional murder; murder while under a life sentence; murder during a kidnaping; illegal sale of cocaine, methadone, or heroin to a person who dies from using these drugs; murder during first-degree sexual assault; multiple murders; the defendant committed the offense(s) with an assault weapon.

Delaware. First-degree murder with aggravating circumstances.

Federal prison system. See *Appendix II*.

Florida. First-degree murder; capital felonies (FS 921.141); capital drug trafficking felonies (FS 921.142).

Georgia. Murder; kidnaping with bodily injury when the victim dies; aircraft hijacking; treason; kidnaping for ransom when the victim dies.

Idaho. First-degree murder; aggravated kidnaping.

Illinois. First-degree murder accompanied by at least 1 of 12 aggravating factors.

Indiana. Murder with 13 aggravating circumstances.

Kentucky. Aggravated murder; kidnaping when victim is killed.

Louisiana. First-degree murder; treason (La. R.S. 14:30 and 14:113).

Maryland. First-degree murder, either premeditated or during the commission of a felony.

Mississippi. Capital murder includes murder of a peace officer or correctional officer, murder while under a life sentence, murder by bomb or explosive, contract murder, murder committed during specific felonies (rape, burglary, kidnaping, arson, robbery, sexual battery, unnatural intercourse with a child, nonconsensual unnatural intercourse), and murder of an elected official. Capital rape is the forcible rape of a child under 14 years old by a person 18 years or older. Aircraft piracy.

Missouri. First-degree murder (565.020 RSMO).

Montana. Deliberate homicide; aggravated kidnaping when victim or rescuer dies; attempted deliberate homicide, aggravated assault, or aggravated kidnaping by a State prison inmate who has a prior conviction for deliberate homicide or who has been previously declared a persistent felony offender (46-18-303,MCA).

Nebraska. First-degree murder.

Nevada. First-degree murder with 9 aggravating circumstances.

New Hampshire. Contract murder; murder of a law enforcement officer; murder of a kidnaping victim; killing another after being sentenced to life imprisonment without parole.

New Jersey. Purposeful or knowing murder; contract murder.

New Mexico. First-degree murder; felony murder with aggravating circumstances.

North Carolina. First-degree murder (N.C.G.S. 14-17).

Ohio. Assassination; contract murder; murder during escape; murder while in a correctional facility; murder after conviction for a prior purposeful killing or prior attempted murder; murder of a peace officer; murder arising from specified felonies (rape, kidnaping, arson, robbery, burglary); murder of a witness to prevent testimony in a criminal proceeding or in retaliation (O.R.C. secs. 2929.02, 2903.01, 2929.04).

Oklahoma. Murder with malice aforethought; murder arising from specified felonies (forcible rape, robbery with a dangerous weapon, kidnaping, escape from lawful custody, first-degree burglary, arson); murder when the victim is a child who has been injured, tortured, or maimed.

Oregon. Aggravated murder.

Pennsylvania. First-degree murder.

South Carolina. Murder with statutory aggravating circumstances.

South Dakota. First-degree murder; kidnaping with gross permanent physical injury inflicted on the victim; felony murder.

Tennessee. First-degree murder.

Texas. Murder of a public safety officer, fireman, or correctional employee; murder during the commission of specified felonies (kidnaping, burglary, robbery, aggravated rape, arson); murder for remuneration; multiple murders; murder during prison escape; murder by a State prison inmate; murder of an individual under 6 years of age.

Utah. Aggravated murder (76-5-202, Utah Code annotated).

Virginia. Murder during the commission or attempts to commit specified felonies (abduction, armed robbery, rape, sodomy); contract murder; murder by a prisoner while in custody; murder of a law enforcement officer; multiple murders; murder of a child under 12 years during an abduction; murder arising from drug violations (18.2-31, Virginia Code as amended).

Washington. Aggravated first-degree premeditated murder.

Wyoming. First-degree murder, including both premeditated and felony murder.

Method of execution

As of December 31, 1993, lethal injection was the predominant method of execution (25 States) (table 2). Twelve States authorized electrocution; 8 States, lethal gas; 3 States, hanging; and 2 States, a firing squad.

Fourteen States authorized more than one method — lethal injection and an alternative method — generally at the election of the condemned prisoner; however, 3 of these 14 stipulated which method must be used, depending on the date of sentencing; 1 authorized hanging only if lethal injection could not be given; and 1 authorized lethal gas if lethal injection is ever ruled unconstitutional.

Federal executions, effective February 18, 1993, are to be carried out by lethal injection.

Automatic review

Of the 36 States with capital punishment statutes at yearend 1993, 35 provided for review of all death sentences regardless of the defendant's wishes. Arkansas had no specific provisions for automatic review, and the issue was in litigation in South Carolina. The Federal death penalty procedures did not provide for automatic review after a sentence of death had been imposed. While most of the 35 States authorized an automatic review of both the conviction and sentence, Idaho, Indiana, Montana, and Tennessee required review of the sentence only. In Idaho, review of the conviction had to be appealed or forfeited. In Indiana, a defendant could waive review of the conviction.

The review was usually conducted by the State's highest appellate court regardless of the defendant's wishes. (In Maryland the question of whether a defendant could waive the right to automatic review of the sentence had not been addressed; and in Wyoming neither the statute nor case law clearly precluded a waiver of an appeal.) If either the conviction or the sentence was vacated, the case could be remanded to the trial court for additional proceedings or for retrial. As a result of retrial or resentencing, the death sentence could be reimposed.

Table 2. Method of execution, by State, 1993

Lethal injection	Electrocution	Lethal gas	Hanging	Firing squad
Arizona ^{a,f}	Alabama	Arizona ^a	Montana ^a	Idaho ^a
Arkansas ^{a,b}	Arkansas ^{a,b}	California ^a	New Hampshire ^{a,d}	Utah ^a
California ^a	Connecticut	Colorado ^{a,c}	Washington ^a	
Colorado ^{a,c}	Florida	Maryland		
Delaware	Georgia	Mississippi ^{a,e}		
Idaho ^a	Indiana	Missouri ^a		
Illinois	Kentucky	North Carolina ^a		
Louisiana	Nebraska	Wyoming ^{a,f}		
Mississippi ^{a,e}	Ohio ^a			
Missouri ^a	South Carolina			
Montana ^a	Tennessee			
Nevada	Virginia			
New Hampshire ^{a,d}				
New Jersey				
New Mexico				
North Carolina ^a				
Ohio ^a				
Oklahoma				
Oregon				
Pennsylvania				
South Dakota				
Texas				
Utah ^a				
Washington ^a				
Wyoming ^{a,f}				

Note: Effective 2/18/93, Federal executions are to be carried out by lethal injection.

^aAuthorizes 2 methods of execution.

^bArkansas authorizes lethal injection for those whose capital offense occurred after 7/4/83; for those whose offense occurred before that date, the condemned prisoner may select lethal injection or electrocution.

^cColorado authorizes lethal gas for those whose crimes occurred before 7/1/88 and lethal injection for those whose crimes occurred on or after 7/1/88.

^dNew Hampshire authorizes hanging only if lethal injection cannot be given.

^eMississippi authorizes lethal injection for those convicted after 7/1/84; execution of those convicted prior to that date is to be carried out with lethal gas.

^fArizona authorizes lethal injection for persons whose capital sentence was received after 11/15/92; for those who were sentenced before that date, the condemned prisoner may select lethal injection or lethal gas.

^gWyoming authorizes lethal gas, if lethal injection is ever held unconstitutional.

Table 3. Minimum age authorized for capital punishment, 1993

Age less than 18	Age 18	None specified
Alabama (16)	California	Arizona
Arkansas (14) ^a	Colorado	Florida
Delaware (16)	Connecticut ^b	Idaho
Georgia (17)	Federal system	Montana
Indiana (16)	Illinois	Pennsylvania
Kentucky (16)	Maryland	South Carolina
Louisiana (15)	Nebraska	South Dakota ^a
Mississippi (16) ^c	New Jersey	Utah
Missouri (16)	New Mexico	Washington
Nevada (16)	Ohio	
New Hampshire (17)	Oregon	
North Carolina (17) ^d	Tennessee	
Oklahoma (16)		
Texas (17)		
Virginia (15)		
Wyoming (16)		

Note: Reporting by States reflects interpretations by State attorney general offices and may differ from previously reported ages.

^aSee Arkansas Code Ann. 9-27-318(b)(1)(Repl. 1991).

^bSee Conn. Gen. Stat. 53a-46a(g)(1).

^cMinimum age defined by statute is 13, but effective

age is 16 based on an interpretation of U.S. Supreme Court decisions by the State attorney general's office.

^dAge required is 17 unless the murderer was incarcerated for murder when a subsequent murder occurred; the age then may be 14.

^eJuveniles may be transferred to adult court. Age may be a mitigating circumstance.

Minimum age

According to State attorney general offices, in 1993 nine jurisdictions did not specify a minimum age for which the death penalty could be imposed (table 3). In some States the minimum age was set forth in

the statutory provisions that determine the age at which a juvenile may be transferred to criminal court for trial as an adult. Eleven States and the Federal prison system required a minimum age of 18. Sixteen States indicated an age of eligibility between 14 and 17.

Characteristics of prisoners under sentence of death at yearend 1993

Thirty-four States and the Federal prison system held a total of 2,716 prisoners under sentence of death on December 31, 1993, a gain of 137 or 5.3% more than at the end of 1992 (table 4). The Federal prison system count rose from 1 inmate at yearend 1992 to 6 at yearend 1993. Three States, which had 24% of the adult resident population reported 38% of the Nation's death row population: California (363), Texas (357), and Florida (324).

Of the 35 jurisdictions with statutes authorizing the death penalty, New Hampshire and Wyoming had no one under a capital sentence and South Dakota, New Mexico, and Colorado had 3 or fewer.

Fifty-five percent of all inmates under sentence of death were in Southern States — a region that contained 35% of the Nation's adults. For the West the percentages of all persons under sentence of death and of all adults in the residential population were about the same, whereas for the Northeast and Midwest the percent-

ages of the population sentenced to execution were smaller than the percentages of the total adult population.

	U.S. resident population age 18 or older	Population of persons under death sentence
U.S. total	100%	100%
Northeast*	20	7
Midwest*	24	16
South	35	55
West	21	22

*Four of the nine States in the Northeast and 6 of the 12 States in the Midwest do not authorize capital sentences.

Table 4. Prisoners under sentence of death, by region, State, and race, 1992 and 1993

Region and State	Prisoners under sentence of death, 12/31/92			Received under sentence of death			Removed from death row (excluding executions) ^a			Executed			Prisoners under sentence of death, 12/31/93		
	Total ^b	White ^c	Black ^c	Total ^b	White	Black	Total ^b	White	Black	Total ^b	White	Black	Total ^b	White	Black
U.S. total	2,579	1,511	1,030	282	146	130	108	68	38	37	22	14	2,716	1,567	1,108
Federal ^d	1	1	0	5	2	3	0	0	0	0	0	0	6	3	3
State	2,578	1,510	1,030	277	144	127	108	68	38	37	22	14	2,710	1,564	1,105
Northeast	160	60	98	22	10	9	1	1	0	0	0	0	181	69	107
Connecticut	4	2	2	1	1	0	0	0	0	0	0	0	5	3	2
New Hampshire	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
New Jersey	3	2	1	4	2	2	0	0	0	0	0	0	7	4	3
Pennsylvania	153	56	95	17	7	7	1	1	0	0	0	0	169	62	102
Midwest	410	202	206	32	18	14	17	10	7	4	1	3	421	209	210
Illinois	144	54	90	12	7	5	4	2	2	0	0	0	152	59	93
Indiana	49	34	15	2	0	2	4	3	1	0	0	0	47	31	16
Missouri	82	47	35	6	4	2	4	3	1	4	1	3	80	47	33
Nebraska	12	8	3	0	0	0	1	1	0	0	0	0	11	7	3
Ohio	122	58	63	11	6	5	4	1	3	0	0	0	129	63	65
South Dakota	1	1	0	1	1	0	0	0	0	0	0	0	2	2	0
South	1,443	853	569	165	81	82	79	46	31	29	17	11	1,500	871	609
Alabama	124	62	60	8	8	0	12	6	6	0	0	0	120	64	54
Arkansas	32	22	10	7	3	4	6	5	1	0	0	0	33	20	13
Delaware	11	2	8	6	5	1	0	0	0	2	0	1	15	7	8
Florida	313	201	112	32	16	16	18	9	9	3	3	0	324	205	119
Georgia	97	51	46	8	4	4	7	5	2	2	2	0	96	48	48
Kentucky	29	22	7	2	2	0	1	1	0	0	0	0	30	23	7
Louisiana	44	18	26	7	2	5	5	3	2	1	1	0	45	16	29
Maryland ^e	15	2	13	1	1	0	1	0	1	0	0	0	15	3	12
Mississippi	42	17	25	12	4	8	4	1	3	0	0	0	50	20	30
North Carolina	76	43	31	32	16	16	9	4	5	0	0	0	99	55	42
Oklahoma	120	78	33	8	4	2	6	2	2	0	0	0	122	80	33
South Carolina ^e	41	21	20	7	3	4	1	1	0	0	0	0	47	23	24
Tennessee	99	68	29	2	1	1	3	3	0	0	0	0	98	66	30
Texas	351	219	127	27	11	16	5	5	0	16	9	7	357	216	136
Virginia ^f	49	27	22	6	1	5	1	1	0	5	2	3	49	25	24
West	565	395	157	58	35	22	11	11	0	4	4	0	608	415	179
Arizona	103	90	10	13	10	3	2	2	0	2	2	0	112	96	13
California ^g	333	203	122	33	17	16	2	2	0	1	1	0	363	217	138
Colorado	3	3	0	0	0	0	0	0	0	0	0	0	3	3	0
Idaho	22	22	0	2	2	0	2	2	0	0	0	0	22	22	0
Montana	8	6	0	0	0	0	0	0	0	0	0	0	8	6	0
Nevada	63	42	21	3	1	2	1	1	0	0	0	0	65	42	23
New Mexico	1	1	0	0	0	0	0	0	0	0	0	0	1	1	0
Oregon	11	11	0	4	3	0	2	2	0	0	0	0	13	12	0
Utah ^h	10	8	2	1	1	0	0	0	0	0	0	0	11	9	2
Washington	11	9	2	2	1	1	2	2	0	1	1	0	10	7	3
Wyoming	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Note: States not listed and the District of Columbia did not authorize the death penalty as of 12/31/92. Some figures shown for yearend 1992 are revised from those reported in *Capital Punishment 1992* NCJ-145031. The revised figures include 17 inmates who were either reported late to the National Prisoner Statistics Program or were not in the custody of State correctional authorities on 12/31/92 (7 in Texas, 3 in Ohio, 3 in Florida, and 1 each in Nevada, Georgia, Tennessee,

and California), and exclude 13 inmates who were relieved of the death sentence on or before 12/31/92 (5 in Georgia, 2 each in Ohio and Florida, and 1 each in Idaho, Illinois, Indiana, and Tennessee).

^aIncludes 8 deaths due to natural causes (2 in Oklahoma, and 1 each in California, Georgia, Illinois, Missouri, Pennsylvania, and Texas), and 3 suicides (1 each in California, Ohio, and Virginia).

^bTotals include persons of other races.

^cThe accounting of race and Hispanic origin differs from that presented in tables 8, 9, and 11. In this table white and black inmates include Hispanics.

^dExcludes persons held under Armed Forces jurisdiction with a military death sentence for murder.

^ePreliminary numbers, subject to revision.

^fRace has been changed from that originally reported for 3 inmates: In California, 1 black to white; in Tennessee, 1 black to white; and in Virginia, 1 white to black.

Table 5. Hispanics and women under sentence of death, by State, 1992 and 1993

	Under sentence of death, 12/31/92		Received under sentence of death		Death sentence removed ^a		Under sentence of death, 12/31/93	
	Hispanics	Women	Hispanics	Women	Hispanics	Women	Hispanics	Women
U.S. total	199	34	16	6	9	5	206	35
Alabama	0	5	0	0	0	1	0	4
Arizona	21	1	0	0	1	0	20	1
Arkansas	1	0	0	0	0	0	1	0
California	46	3	5	1	0	0	51	4
Colorado	1	0	0	0	0	0	1	0
Florida	31	3	0	1	1	0	30	4
Georgia	1	0	0	0	0	0	1	0
Idaho	1	0	1	1	0	0	2	1
Illinois	9	3	1	1	1	0	9	4
Indiana	2	1	0	0	0	1	2	0
Kentucky	0	0	0	0	0	0	0	0
Mississippi	1	0	0	1	0	0	1	1
Missouri	1	3	0	0	1	1	0	2
Nevada	7	1	0	0	0	0	7	1
New Jersey	0	0	1	0	0	0	1	0
North Carolina	2	3	0	0	0	1	2	2
Ohio	5	1	0	0	0	1	5	0
Oklahoma	5	4	1	0	0	0	6	4
Oregon	1	0	0	0	0	0	1	0
Pennsylvania	3	2	4	1	0	0	7	3
South Carolina	0	0	0	0	0	0	0	0
Tennessee	1	1	0	0	0	0	1	1
Texas	57	3	2	0	5	0	54	3
Utah ^b	2	0	0	0	0	0	2	0
Virginia	1	0	1	0	0	0	2	0

^aNo women were executed during 1993. Four Hispanics were executed in Texas in 1993.

^bPreliminary numbers, subject to revision.

In all four regions of the country the number of prisoners under sentence of death increased during 1993. The number rose by 57, or 4.0%, in the South; by 21, or 13.1%, in the Northeast; by 43 or 7.6%, in the West; and by 11, or 2.7%, in the Midwest.

Among the 35 jurisdictions with prisoners under sentence of death at yearend 1993, 22 had more inmates than a year earlier; 7 had fewer inmates, and 6 had the same number. California had an increase of 30, followed by North Carolina (23), Pennsylvania (16), and Florida (11). Alabama had the largest decline (4).

During 1993 the number of blacks under sentence of death rose by 78 (7.6%); the number of whites rose by 56 (3.7%); and the number of persons of other races (Native Americans and Asians or Pacific Islanders) rose by 3 (7.9%).

The number of Hispanics sentenced to death rose from 199 to 206 during 1993 (table 5). Sixteen Hispanics were received under sentence of death, 9 were removed from death row, and 4 were executed. Three-fourths of the Hispanics were incarcerated in 4 States: Texas (54), California (51), Florida (30), and Arizona (20).

During 1993 the number of women sentenced to be executed increased from 34 to 35. Six women were received under sentence of death, 5 were removed from death row, and none was executed. Women were under sentence of death in 14 States, with Alabama, California, Florida, Illinois, and Oklahoma together holding over 57%.

State	Women under sentence of death 12/31/93		
	Total	White	Black
Total	35	24	11
Alabama	4	2	2
California	4	3	1
Florida	4	3	1
Illinois	4	2	2
Oklahoma	4	3	1
Pennsylvania	3	1	2
Texas	3	2	1
Missouri	2	2	0
North Carolina	2	2	0
Arizona	1	1	0
Idaho	1	1	0
Mississippi	1	1	0
Nevada	1	0	1
Tennessee	1	1	0

Men were 98.7% (2,681) of all prisoners under sentence of death (table 6). Whites predominated (57.7%); blacks comprised 40.8%; and other races (1.5%) included 22 Native Americans, 16 Asian Americans, and 3 self-identified Hispanics. Among those for whom ethnicity was known, 7.6% were Hispanic.

The race, sex, and Hispanic origin of those under sentence of death at yearend 1993 were as follows:

	White	Black	Other
Male	1,543	1,097	41
Hispanic	187	11	5
Female	24	11	0
Hispanic	2	1	0

Among inmates under sentence of death on December 31, 1993, for whom information on education was available, more than three-fourths had either completed high school (38.1%) or finished 9th, 10th, or 11th grade (38.1%). The percentage who had not gone beyond eighth grade (15.8%) was about twice as large as that of inmates who had attended some college (8.0%). The median level of education was the 11th grade.

Of inmates under a capital sentence and with reported marital status, nearly half had never married; somewhat more than a fourth were married when they were sentenced; and a fourth were divorced, separated, or widowed.

Among all inmates under sentence of death, 45.0% were age 30 to 39 on December 31, 1993, and 60.5% were age 25 to 39 (table 7). The median age was 35 years. Less than 1% were younger than 20 and about 3.5% were age 55 or older. The youngest offender under sentence of death was age 18 (born September 1975); the oldest was 78 (born September 1915). More than half of all inmates under sentence of death at yearend 1993 were age 20 to 29 at the time of their sentencing; about 1.3% were age 18 or younger; and 1.4% were age 55 or older.

Entries and removals of persons under sentence of death

Between January 1 and December 31, 1993, 30 State prison systems and the Federal prison system reported receiving 282 prisoners under sentence of death. Forty-four percent of the inmates were received in 4 States: California (33), Florida (32), North Carolina (32), and Texas (27).

All 282 prisoners who had been received under sentence of death had been convicted of murder. By sex and race, 141 were white men, 129 were black men, 2 were Native American men, 1 was an Asian man, 3 were Hispanic men classified as "Other race" in Pennsylvania, 5 were white women, and 1 was a black woman.

Of 282 new admissions, 15 were Hispanic men, and 1 was a Hispanic woman.

Twenty-three States reported a total of 97 persons whose sentence of death was overturned or removed. Appeals courts vacated 50 sentences while upholding the convictions and vacated 39 sentences while overturning the convictions. Florida (12 exits) had the largest number of vacated capital sentences. Indiana reported one removal by post-conviction relief. Ohio reported two, and Missouri, Georgia, and Texas each reported one commutation of a death sentence. Louisiana and Idaho each removed one inmate from under sentence of death as the result of amendments to capital statutes.

As of December 31, 1993, 49 of the 97 persons who were formerly under sentence of death were serving a reduced sentence (36 to life imprisonment, 12 to a sentence of more than 20 years, and 1 to 20 years or less), 23 were awaiting a new trial, 23 were awaiting resentencing, 1 had further prosecution dropped, and 1 was removed by an unspecified method.

In addition, 11 persons died while under sentence of death in 1993. Eight of these deaths were from natural causes — two in Oklahoma, and one each in California, Georgia, Illinois, Missouri, Pennsylvania, and Texas. Three suicides occurred — one each in California, Ohio, and Virginia.

From 1977, the year after the Supreme Court upheld the constitutionality of revised State capital punishment laws, to 1993, a total of 4,259 persons entered prison under sentence of death. During the 17 years, 225 persons were executed, and 1,790 were removed from under a death sentence by appellate court decisions and reviews, commutations, or death.¹

Among individuals who received a death sentence between 1977 and 1993, 2,468 (57.9%) were white, 937 (40.5%) were black, and 67 (1.6%) were of other races. The distribution by race and Hispanic origin of the 1,790 inmates who were removed from death row between 1977 and 1993 was as follows: whites 937 (52.3%), blacks 748 (41.8%), Native Americans 17 (1.0%), Asians 8 (0.4%), and Hispanics 80 (4.5%). Of the 225 who were executed, 120 (53.3%) were white, 87 (38.7%) were black, 16 (7.1%) were Hispanic, and 2 (0.9%) were Native American.

¹The same individual may have received and been relieved of the death penalty several times.

Table 6. Demographic characteristics of prisoners under sentence of death, 1993

Characteristic	Prisoners under sentence of death, 1993		
	Yearend	Admissions	Removals
Total number under sentence of death	2,716	282	145
Sex			
Male	98.7%	97.9%	96.6%
Female	1.3	2.1	3.4
Race			
White	57.7%	51.8%	62.1%
Black	40.8	46.1	35.9
Other*	1.5	2.2	2.1
Hispanic origin			
Hispanic	7.6%	6.9%	6.7%
Non-Hispanic	92.4	93.1	93.3
Education			
8th grade or less	15.8%	14.6%	19.7%
9th-11th	38.1	36.6	35.4
High school graduate/GED	38.1	42.1	37.8
Any college	8.0	6.7	7.1
Median	11th grade	12th grade	11th grade
Marital status			
Married	26.7%	18.3%	29.2%
Divorced/separated	21.9	21.4	24.8
Widowed	2.7	3.6	2.2
Never married	48.7	56.7	43.8

Note: Percentage and median calculations are based on those cases for which data were reported. Missing data by category were as follows:

	1993		
	Yearend	Admissions	Removals
Hispanic origin	182	50	10
Education	332	31	14
Marital status	208	30	8

*Consists of 22 American Indians, 16 Asians, and in Pennsylvania 3 self-identified Hispanics present at yearend 1992; 2 Native Americans and 1 Asian admitted during 1993, and 3 Native Americans removed during 1992.

Table 7. Age at time of capital sentencing and current age of prisoners under sentence of death, yearend 1993

Age	Prisoners under sentence of death			
	At time of sentencing		On December 31, 1993	
	Number	Percent	Number	Percent
Total under sentence of death on 12/31/93	2,716	100%	2,716	100.0%
17 or younger	7	.2	0	...
18-19	102	3.7	13	.5
20-24	684	25.2	211	7.7
25-29	706	26.0	420	15.5
30-34	510	18.8	646	23.8
35-39	343	12.6	576	21.2
40-44	198	7.3	370	13.7
45-49	87	3.1	269	9.9
50-54	41	1.5	115	4.3
55-59	24	.8	49	1.7
60 or older	14	.4	47	1.5
Mean age	30		36	
Median age	29		35	

Note: The youngest person under sentence of death was a white male in South Carolina born in September 1975 and sentenced to death in July 1993. The oldest person under sentence of death was a white male in

Arizona born in September 1915 and sentenced to death in June 1983.
...Not applicable.

Criminal history of inmates under sentence of death in 1993

Among inmates under death sentences on December 31, 1993, for whom criminal history information was available, 67.9% had a history of felony convictions, including 9.2% with at least one previous homicide conviction (table 8).

Among those for whom legal status at the time of the capital offense was reported, 42.3% had an active criminal justice status. Nearly half of these were on parole, while the others had charges pending, were on probation, were in prison or escapees, or had some other criminal justice status.

Excluding those who had charges pending, nearly 1 in 3 were already under sentence for another crime when their capital offense occurred. In a number of States, being under sentence for another crime is considered an aggravating factor in capital sentencing.

Criminal history patterns varied slightly by race and Hispanic origin. For example, 73.2% of blacks had prior felony conviction records compared to 64.8% of whites, and 60.9% of Hispanics. Relatively more Hispanics (16.1%) than whites (8.5%) or blacks (10.4%) had a prior homicide conviction; and a slightly higher proportion of whites (7.3%) and blacks (6.3%) than Hispanics (5.5%) had a charge pending at the time of their capital offense.

The median time between the imposition of a death sentence and yearend 1993 was 67 months, and the mean time was 73 months. Overall, the average time for women was 4.3 years — about 70% as long as for men (6.1 years). On average,

whites, blacks, and Hispanics had spent about the same amount of time under a sentence of death.

	Elapsed time since sentencing	
	Mean	Median
Total	73 mos	67 mos
Male	73	67
Female	51	37
White	74	68
Black	71	63
Hispanic	69	64

Since 1988 data have been collected on the number of death sentences imposed on each person entering prison under sentence of death. Among the 1,669 individuals received under sentence of death, about 1 in every 7 entered with 2 or more death sentences. Whites, blacks, and Hispanics had similar proportions of those with single or multiple death sentences.

Table 8. Criminal history profile of prisoners under sentence of death, by race, 1993

	Prisoners under sentence of death							
	Number				Percent ^a			
	All races ^b	White	Black	Hispanic	All races ^b	White	Black	Hispanic
U.S. total	2,716	1,567	1,108	206	100.0%	100.0%	100.0%	100.0%
Prior felony convictions								
Yes	1,739	963	759	120	67.9%	64.8%	73.2%	60.9%
No	823	523	278	77	32.1	35.2	26.8	39.1
Not reported	154	81	71	9				
Prior homicide convictions								
Yes	239	127	110	18	9.2%	8.5%	10.4%	16.1%
No	2,361	1,372	952	94	90.8	91.5	89.6	83.9
Not reported	116	68	46	94				
Legal status at time of capital offense								
Charges pending	167	101	61	10	6.9%	7.3%	6.3%	5.5%
Probation	230	130	98	16	9.5	9.2	10.1	8.8
Parole	490	255	231	51	20.3	18.1	23.7	28.0
Prison escapee	42	28	13	3	1.8	2.0	1.3	1.6
Prison inmate	60	33	27	4	2.5	2.3	2.8	2.2
Other status ^c	33	17	15	1	1.3	1.2	1.5	.6
None	1,396	842	529	97	57.7	59.9	54.3	53.3
Not reported	298	161	134	24	...	...	...	...

^aPercentages are based on those offenders for whom data were reported.

^bIncludes whites, blacks, Hispanics, and persons of other races.

^cIncludes 9 persons on work release, 4 persons on mandatory conditional release, 4 persons on bail, 1 person on temporary leave, 2 persons in a halfway house, 1 absconder from bail, 1 person on

accelerated rehabilitation, 1 person AWOL from the U.S. Army, 1 person on work furlough, 2 persons in jail, 1 person under house arrest, 1 person in a pre-release treatment center, 1 person in a community diversion program, 1 person in a supervised road gang, 2 persons in a community diversion program, and 1 person on conditional release.
...Not applicable.

Table 9. Number of death sentences received by those sentenced to death between January 1, 1988, and December 31, 1993, by race or Hispanic origin

Number of death sentences received	Race or Hispanic origin			
	Total ^a	White	Black	Hispanic
Total	100.0%	100.0%	100.0%	100.0%
1	86.3	86.4	86.0	87.1
2	9.4	9.7	9.0	9.1
3 or more	4.3	3.9	5.0	3.8
Number admitted under sentence of death 1988-93	1,669	836	676	132

Note: Totals may not add to 100% because of rounding.

All 1,669 received their death sentence for murder.

^aIncludes 25 persons of other races.

Executions

According to data collected by the Federal Government since 1930, during the 64 years ending in 1993, a total of 4,084 persons were executed under civil authority (table 10).²

²Military authorities carried out an additional 160 executions between 1930 and 1993.

Table 10. Number of persons executed, by jurisdiction in rank order, 1930-93

State	Number executed	
	Since 1930	Since 1977
U.S. total	4,084	225
Georgia	383	17
Texas	367	70
New York	329	
California	294	2
North Carolina	268	5
Florida	202	32
Ohio	172	
South Carolina	166	4
Mississippi	158	4
Louisiana	154	21
Pennsylvania	152	
Alabama	145	10
Arkansas	122	4
Virginia	114	22
Kentucky	103	
Tennessee	93	
Illinois	91	1
New Jersey	74	
Missouri	73	11
Maryland	68	
Oklahoma	63	3
Washington	48	1
Colorado	47	
Indiana	43	2
Arizona	41	3
West Virginia	40	
District of Columbia	40	
Nevada	34	5
Federal system	33	
Massachusetts	27	
Connecticut	21	
Oregon	19	
Iowa	18	
Utah	17	4
Kansas	15	
Delaware	15	3
New Mexico	8	
Wyoming	8	1
Montana	6	
Vermont	4	
Nebraska	4	
Idaho	3	
South Dakota	1	
New Hampshire	1	
Wisconsin	0	
Rhode Island	0	
North Dakota	0	
Minnesota	0	
Michigan	0	
Maine	0	
Hawaii	0	
Alaska	0	

After the Supreme Court reinstated the death penalty in 1976, 21 States executed 225 prisoners:

1977	1	1986	18
1979	2	1987	25
1981	1	1988	11
1982	2	1989	16
1983	5	1990	23
1984	21	1991	14
1985	18	1992	31
		1993	37

During this 17-year period, 5 States executed 162 prisoners: Texas (70), Florida (32), Virginia (22), Louisiana (21), and Georgia (17). These States accounted for 72% of all executions.

Between 1977 and 1993, 105 white non-Hispanic men, 72 black non-Hispanic men, 15 white Hispanic men, 1 black Hispanic man, 14 white men with Hispanic origin unknown, 15 black men with Hispanic origin unknown, 2 Native American men, and 1 white non-Hispanic woman were executed.

During 1993 Texas carried out 16 executions; Virginia executed 5 persons; Missouri 4; Florida 3; Arizona, Delaware, and Georgia, 2 each; and California, Louisiana, and Washington State, 1 each. All persons executed in 1993 were male. Seventeen were non-Hispanic whites; 13 were non-Hispanic blacks; 4 were white Hispanics; 1 was white with Hispanic origin unknown; 1 was black with Hispanic origin unknown; and 1 was Native American.

From 1977 to 1993 4,641 prisoners were under death sentences for varying lengths of time (table 11). The 225 executions accounted for 4.8% of all exits from sentences of death during the period. A total of 1,700 prisoners, or 36.6% of those at risk, received other dispositions. Relatively more whites (5.0%) and Hispanics (5.3%) than blacks (4.6%) were executed. However, a slightly larger proportion of blacks (37.4%) and whites (37.2%) than Hispanics (26.5%) were

Table 11. Prisoners under sentence of death who were executed or who received other dispositions, by race and Hispanic origin, 1977-93

Race and Hispanic origin ^b	Total under sentence of death, 1977-93 ^c	Prisoners executed		Prisoners who received other dispositions ^a	
		Number	Percent of total	Number	Percent of total
All races or ethnic groups	4,641	225	4.8%	1,700	36.6%
White	2,387	120	5.0	889	37.2
Black	1,890	87	4.6	707	37.4
Hispanic	302	16	5.3	80	26.5
Other ^d	62	2	3.2	24	38.7

^aIncludes persons removed from a sentence of death because of statutes struck down on appeal, sentences or convictions vacated, commutations, or death other than by execution.

^bWhite, black, and other categories exclude Hispanics.

^cIncludes those persons sentenced to death prior to 1977 who were still under sentence of death on

12/31/93 (19), those persons sentenced to death prior to 1977 whose death sentence was removed between 1977 and 12/31/93 (363), and those persons sentenced to death between 1977 and 12/31/93 (4,259).

^dIncludes Native Americans, Alaska Natives, Asians, and Pacific Islanders.

Table 12. Time between imposition of death sentence and execution, by race, 1977-93

Year of execution	Number executed			Average elapsed time from sentence to execution for:		
	All races	White	Black	All races	White	Black
Total	225	135	88	94 mo.	88 mo.	103 mo.
1977-83	11	9	2	51 mo.	49 mo.	58 mo.
1984	21	13	8	74	76	71
1985	18	11	7	71	65	80
1986	18	11	7	87	78	102
1987	25	13	12	86	78	96
1988	11	6	5	80	72	89
1989	16	8	8	95	78	112
1990	23	16	7	95	97	91
1991	14	7	7	116	124	107
1992	31	19	11	114	104	135
1993	37	22	14	113	111	123

Note: Average time was calculated from the most recent sentencing date. The range for elapsed time for the 225 executions was from 3 months to 212

months. Some numbers have been revised from those previously reported.

removed from under a death sentence by means other than execution.

Among prisoners executed between 1977 and 1993, the average time spent between the imposition of the most recent sentence received and execution was 7 years and 10 months (table 12). White prisoners had spent an average of 7 years and 4 months, and black prisoners, 8 years and 7 months. The 37 prisoners executed in 1993 were under sentence of death an average of 9 years and 5 months.

Among the 225 prisoners executed between 1977 and 1993, the largest number (108) were electrocuted. Other methods were lethal injection (107), lethal gas (8), hanging (1), and a firing squad (1).

	Executions, 1977-93				
	White	Black	Hispanic	American Indian	Asian
Total	120	87	16	2	0
Lethal injection	56	34	15	2	0
Electrocution	57	50	1	0	0
Lethal gas	5	3	0	0	0
Hanging	1	0	0	0	0
Firing squad	1	0	0	0	0

Appendix I. Current status of inmates under sentence of death, 1973-93

Between 1973 and 1993 a total of 4,984 persons were sentenced to death

Persons under sentence of death, 1953-93

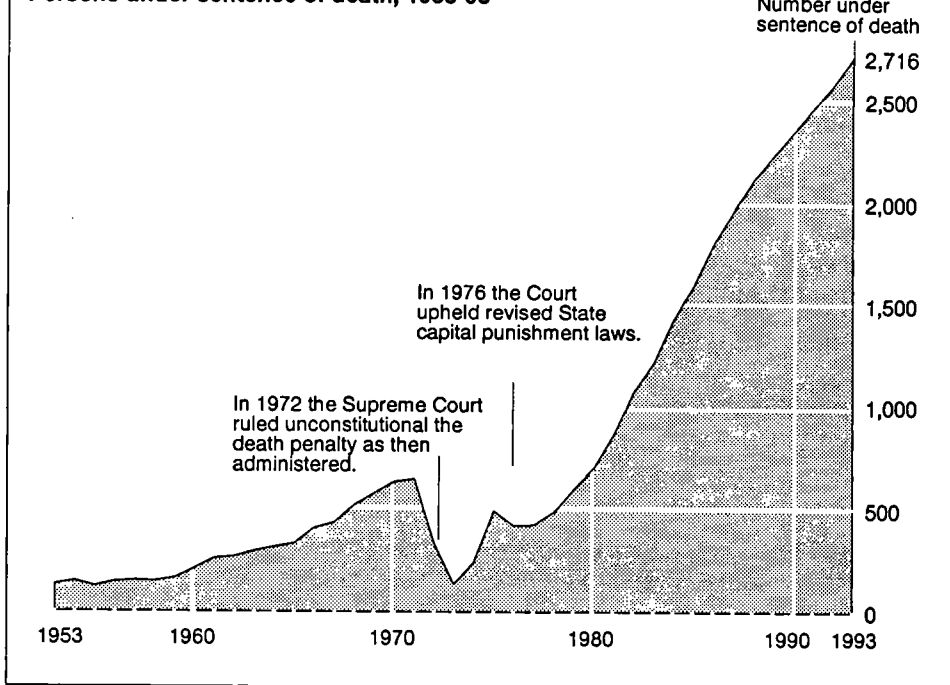


Figure 3

(appendix table 1). For inmates received in each year, the table shows what occurred with respect to their sentence before December 31, 1993.

For example, of the 254 persons who were sentenced to death in 1983, 23 had been executed, 10 had died while in confine-

ment, 1 had been relieved of the death sentence because courts struck down wholly or in part the statutes under which they were sentenced, 20 had their conviction overturned on appeal, 48 had their sentence overturned on appeal, 4 had their sentence commuted, 2 were removed from under sentence of death for other

Appendix table 1. Prisoners sentenced to death and the outcome of their sentence, by year of sentencing, 1973-93

Year of sentence	Number sentenced to death	Number of prisoners removed from under sentence of death							Under sentence of death, 12/31/93
		Execution	Other death	Appeal or higher courts overturned			Sentence commuted	Other or unknown reasons	
				Death penalty statute	Conviction	Sentence			
1973	42	2	0	14	9	8	9	0	0
1974	150	9	4	65	16	29	22	1	4
1975	299	5	4	171	24	65	20	3	7
1976	234	11	5	137	16	42	15	0	8
1977	138	16	2	40	26	32	7	0	15
1978	187	27	3	21	35	60	8	0	33
1979	157	14	8	2	29	57	6	1	40
1980	184	18	11	3	33	46	6	0	67
1981	235	24	9	0	41	65	4	1	91
1982	272	29	11	0	26	61	6	0	139
1983	254	23	10	1	20	48	4	2	146
1984	284	19	10	2	33	55	4	4	157
1985	279	5	3	1	29	64	3	0	174
1986	308	8	10	0	38	49	4	5	194
1987	292	2	4	2	32	47	1	6	198
1988	298	5	6	0	25	37	1	0	224
1989	266	3	4	0	19	46	2	0	192
1990	263	2	2	0	24	16	0	0	219
1991	279	1	3	0	12	9	0	0	254
1992	281	2	0	0	2	2	0	0	275
1993	282	0	3	0	0	0	0	0	279
Total, 1973-93	4,984	225	112	459	489	838	122	23	2,716

Note: Table based upon most recent death sentence received.

Appendix table 2. Prisoners under sentence of death on December 31, 1993, by State and year of sentencing

State	Year of death sentence													Under sentence of death 12/31/93	Average number of years under sentence of death as of 12/31/93
	1974-75	1976-77	1978-79	1980-81	1982-83	1984-85	1986-87	1988	1989	1990	1991	1992	1993		
Total sentenced to and remaining on death row, 12/31/93															
Florida	4	7	17	16	30	36	35	26	21	25	45	30	32	324	6.3
Georgia	3	5	3	4	9	7	19	4	9	11	6	8	8	96	6.9
Texas	2	6	11	22	31	40	64	31	29	27	29	38	27	357	6.3
Montana	1				1		1	2	1			2		8	**
Nebraska	1		4	2		2	1	1						11	12.4
Arizona		2	6	11	12	11	8	10	6	11	14	8	13	112	6.4
Arkansas		1	1	4	1		6	2	4	3	1	3	7	33	5.6
Mississippi		1		5	5	2	4	3		8	6	4	12	50	5.1
Oklahoma		1	2	3	9	18	25	18	12	9	12	5	8	122	6.1
California*			11	21	55	39	49	31	30	33	24	38	32	363	6.2
Tennessee*			6	10	10	17	19	5	3	8	10	8	2	98	7.4
Illinois			3	19	17	16	21	12	9	19	8	16	12	152	6.5
Nevada			2	4	10	9	8	6	9	7	4	3	3	65	6.7
North Carolina			2	5	6	7	1	2		7	16	21	32	99	3.5
South Carolina*			2	4	5	8	6	2	3	1	7	2	7	47	6.3
Alabama			1	6	22	15	18	7	15	10	4	14	8	120	6.4
Indiana			1	6	6	11	6	6		3	2	4	2	47	7.4
Kentucky			1	2	8	3	4	2	1	1	3	3	2	30	7.2
Virginia						5	14	3	3	6	6	6	6	49	4.4
Missouri				4	4	14	16	12	2	4	11	7	6	80	5.7
Pennsylvania				6	17	21	27	21	16	10	19	16	16	169	5.6
Delaware				2	2			1				4	6	15	4.2
Idaho				1	4	5	1	3	2	1	1	2	2	22	6.7
Louisiana					5	11	9	1		1	4	7	7	45	5.4
Maryland				1	1	2	1	1	3	2	1	2	1	15	5.5
Ohio					11	29	22	10	9	9	13	16	10	129	5.5
Washington					3	1	1			1	1	1	2	10	5.6
Utah*					1	2	1	2	3		1		1	11	5.5
Colorado							2				1			3	**
Connecticut							1		1		2		1	5	**
New Jersey							1			2			4	7	**
New Mexico							1							1	**
Oregon									1		2	6	4	13	1.6
South Dakota												1	1	2	**
Federal											1		5	6	**
Total	11	23	73	158	285	331	392	224	192	219	254	275	279	2,716	6.1

*Preliminary numbers, subject to revision.

** Averages not calculated on fewer than 10 inmates.

reasons, and 146 were still under a death sentence at yearend 1993. Of the 2,716 persons under sentence of death on December 31, 1993, 107 or 3.9% were sentenced prior to 1980.

Of the 2,716 prisoners under sentence of death at yearend 1993, Indiana, Kentucky, Nebraska, and Tennessee had the inmates who had served the longest among all condemned inmates (appendix table 2). By contrast, Oregon had no inmates sentenced prior to 1989, the Federal prison system prior to 1991, and South Dakota prior to 1992. The average time from sentence to December 31, 1993, for the 2,716 condemned inmates was 6 years and 1 month.

Appendix II. Federal laws providing for the death penalty

Between 1972, when the Supreme Court in *Furman v Georgia* struck down the death penalty as then applied, and yearend 1993, Congress enacted four death penalty statutes:

- (A) Any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) or section 960(b)(1) who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life

imprisonment, or may be sentenced to death; and (B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death (21 U.S.C. 848(e)).

- Espionage by a member of the Armed Forces: communication of information to

a foreign government relating to nuclear weaponry, military spacecraft or satellites, early warning systems, war plans, communications intelligence or cryptographic information, or any other major weapons or defense strategy (10 U.S.C. 906(a)).

- Witness tampering where death results (18 U.S.C. 1512).

- Death resulting from aircraft hijacking (49 U.S.C. 1472 and 1473).

The following capital punishment provisions, which were enacted prior to the Furman decision, remain in the United States Code:

- Murder while a member of the Armed Forces (10 U.S.C. 918).

- Destruction of aircraft, motor vehicles, or related facilities resulting in death (18 U.S.C. 32-34).

- Retaliatory murder of a member of the immediate family of law enforcement officials (18 U.S.C. 115(b)(3) [by cross-reference to 18 U.S.C. 1111]).

- Murder of a member of Congress, an important executive official, or a Supreme Court Justice (18 U.S.C. 351 [by cross-reference to 18 U.S.C. 1111]).

- Espionage (18 U.S.C. 794).

- Destruction of government property resulting in death (18 U.S.C. 844(f)(d)(i)).

- First-degree murder (18 U.S.C. 1111).

- Mailing of injurious articles with the intent to kill or resulting in death (18 U.S.C. 1716).

- Assassination or kidnaping resulting in the death of the President or Vice President (18 U.S.C. 1751 [by cross-reference to 18 U.S.C. 1111]).

- Willful wrecking of a train resulting in death (18 U.S.C. 1992).

- Bank-robbery-related murder or kidnaping (18 U.S.C. 2113).

- Treason (18 U.S.C. 2381).

- Murder of Federal judges and officers (18 U.S.C. 1114).

Methodological note

The statistics reported in this Bulletin may differ from data collected by other organizations for a variety of reasons: (1) National Prisoner Statistics (NPS) adds inmates to the number under sentence of death not at sentencing but at the time they are admitted to a State or Federal correctional facility. (2) If in one year inmates entered prison under a death sentence or were reported as being relieved of a death sentence but the court had acted in the previous year, the counts are adjusted to reflect the dates of court decisions. (See the note on table 4 for the affected jurisdictions.) (3) NPS counts for capital punishment are always for the last day of the calendar year and will differ from counts for more recent periods.

1993 Supreme Court decisions cited

Dobbs v. Zant, 113 S.Ct. 835 (1993).
Decided January 19, 1993.

Graham v. Collins, 113 S.Ct. 892 (1993).
Decided January 25, 1993.

Herrera v. Collins, 113 S.Ct. 853 (1993).
Decided January 25, 1993.

Lockhart v. Fretwell, 113 S.Ct. 838 (1993).
Decided January 25, 1993.

Delo v. Lashley, 113 S.Ct. 1222 (1993).
Decided March 8, 1993.

Arave v. Creech, 113 S.Ct. 1534 (1993).
Decided March 30, 1993.

Sullivan v. Louisiana, 113 S.Ct. 2078 (1993).
Decided June 1, 1993.

Godinez v. Moran, 113 S.Ct. 2680 (1993).
Decided June 24, 1993.

Johnson v. Texas, 113 S.Ct. 2658 (1993).
Decided June 24, 1993.

Other cases cited

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

Collins v. Lockhart, 754 F.2d 258 (CA8), cert. denied, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985).

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Appendix table 3. Executions, by State and method, 1977-93

State	Number executed	Method of execution				
		Lethal injection	Electro-cution	Lethal gas	Firing squad	Hanging
Total	225	107	108	8	1	1
Texas	70	70				
Florida	32		32			
Virginia	22		22			
Louisiana	21	1	20			
Georgia	17		17			
Missouri	11	11				
Alabama	10		10			
Nevada	5	4		1		
North Carolina	5	5				
Mississippi	4			4		
South Carolina	4		4			
Utah	4	3			1	
Arkansas	4	3	1			
Oklahoma	3	3				
Arizona	3	2		1		
Delaware	3	3				
California	2			2		
Indiana	2		2			
Illinois	1	1				
Wyoming	1	1				
Washington	1					1

Note: This table shows the distribution of execution methods used since 1977. Electro-cution and lethal injection were each used in about 48% of the execu-

tions carried out. Five States — Arizona, Arkansas, Louisiana, Nevada, and Utah — have employed two methods.

Appendix table 4. Number sentenced to death and number of removals, by jurisdiction and reason for removal, 1973-93

State	Total sentenced to death, 1973-93	Number of removals, 1973-93					Under sentence of death, 12/31/93
		Executed	Died	Sentence or conviction overturned	Sentence commuted	Other removals	
U.S. total	4,984	225	112	1,786	122	23	2,716
Federal	7	0	0	1	0	0	6
Alabama	206	10	3	72	1	0	120
Arizona	176	3	3	56	1	1	112
Arkansas	67	4	1	29	0	0	33
California*	512	2	18	113	15	1	363
Colorado	14	0	1	9	1	0	3
Connecticut	5	0	0	0	0	0	5
Delaware	31	3	0	13	0	0	15
Florida	664	32	14	274	18	2	324
Georgia	240	17	7	116	4	0	96
Idaho	32	0	1	9	0	0	22
Illinois	211	1	4	47	0	7	152
Indiana	78	2	1	26	0	2	47
Kentucky	54	0	1	22	1	0	30
Louisiana	137	21	3	61	6	1	45
Maryland*	37	0	1	19	2	0	15
Massachusetts	4	0	0	2	2	0	0
Mississippi	127	4	1	69	0	3	50
Missouri	110	11	4	14	1	0	80
Montana	13	0	0	4	1	0	8
Nebraska	20	0	2	5	0	2	11
Nevada	87	5	3	12	2	0	65
New Jersey	37	0	1	28	0	1	7
New Mexico	22	0	0	16	5	0	1
New York	3	0	0	3	0	0	0
North Carolina	343	5	4	231	4	0	99
Ohio	267	0	5	125	8	0	129
Oklahoma	224	3	4	95	0	0	122
Oregon	31	0	0	18	0	0	13
Pennsylvania	223	0	6	47	1	0	169
Rhode Island	2	0	0	2	0	0	0
South Carolina*	122	4	3	68	0	0	47
South Dakota	2	0	0	0	0	0	2
Tennessee	159	0	4	55	0	2	98
Texas	576	70	12	94	43	0	357
Utah*	23	4	0	7	1	0	11
Virginia	86	22	3	6	5	1	49
Washington	23	1	1	11	0	0	10
Wyoming	9	1	1	7	0	0	0
Percent	100%	4.5	2.2	35.8	2.4	.5	54.5

*Preliminary numbers, subject to revision.

This BJS Bulletin was written by James Stephan, BJS Statistician, and Peter Brien, Statistical Assistant, who also provided statistical review. Tom Hester edited the report, Priscilla Middleton assisted with graphs, and Betty Sherman did the page layout. Marilyn Marbrook supervised production, assisted by Jodi Brown, Yvonne Boston, and Jayne Robinson. At the Census Bureau, Rhonda Carney collected the data under the supervision of Gertrude Odom.

December 1994, NCJ-150042

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

LRM NO: 1334

FILE NO: 865

5/16/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 5

TO: Legislative Liaison Officer - See Distribution below:
FROM: James JUKES (for)
Assistant Director for Legislative Reference
OMB CONTACT: Ingrid SCHROEDER 395-3883
Legislative Assistant's line (for simple responses): 395-3454
SUBJECT: JUSTICE Proposed Report RE: HR147, Drug Kingpin Death Penalty Act

DEADLINE: 12:00 Noon Wednesday, May 17, 1995

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS:

DISTRIBUTION LIST:

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EOP:

Clarissa Cerda
Jose Cerda
Jim Duke
Bob Damus

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FILE NO: 865

☐ Concur
☐ No Objection
☐ No Comment
☐ See proposed edits on pages _____
☐ Other: _____
☐ FAX RETURN of _____ pages, attached to this response sheet



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Bill McCollum
Chairman
Subcommittee on Crime
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice concerning H.R. 147, the "Drug Kingpin Death Penalty Act." This bill is framed as an amendment to the drug offense death penalty under 18 U.S.C. § 3591(b)(1) which was enacted as part of the Federal Death Penalty Act of 1994.

While we strongly support efforts to advance our federal attack on crime, we prefer the present penalty provision of Section 3591(b) that requires extraordinarily high drug quantity requirements. Since the constitutionality of the death penalty as a punishment for non-homicidal narcotics offenses remains an open question, we are concerned that, if the triggering quantities are lowered as provided in H.R. 147, the chances of prevailing on this admittedly unsettled and difficult constitutional question could be reduced. Although the Eighth Amendment prohibits the infliction of "cruel and unusual punishments," this does not require the legislature to select the least severe penalty possible, as long as the penalty selected is not grossly disproportionate and excessive in relation to the severity of the crime. Gregg v. Georgia, 428 U.S. 153, 175 (1976) (plurality opinion).

However, until the constitutionality of the substantive provisions of the Section 3591(b)(1) offense under the recently-enacted Federal Death Penalty Act of 1994 has been assessed, amendment would be premature. Therefore, we recommend waiting until the courts have ruled on the current provision before lowering the drug and proceeds quantities as proposed.

Section 3591(b)(1) of Title 18 now authorizes the death penalty for defendants who are principal administrators, organizers, or leaders of continuing criminal enterprises that involve at least twice the amount of controlled substances or gross receipts which are punishable by mandatory life imprisonment under 21 U.S.C. § 848(b). H.R. 147 seeks to toughen

this provision by striking the requirement for "twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B)."

The quantity of controlled substance required for mandatory life imprisonment as described in 21 U.S.C. § 848(b)(2)(A) is 300 times the quantity of controlled substance described in Section 841(b)(1)(B). Thus, Section 3591(b)(1), in its present form, requires not less than 600 times the quantity of controlled substance specified in Section 841(b)(1)(B) (i.e., 3 kilograms of cocaine base, 300 kilograms of cocaine powder, 60 kilograms of heroin, 60,000 kilograms of marijuana, or 60,000 marijuana plants). H.R. 147 would reduce these amounts to 1.5 kilograms of cocaine base, 150 kilograms of cocaine powder, 30 kilograms of heroin, 30,000 kilograms of marijuana, or 30,000 marijuana plants.

The amount of gross receipts required for mandatory life imprisonment as described in 21 U.S.C. 848(b)(2)(B) is \$10 million dollars in gross receipts during any twelve-month period of the enterprise's existence. Thus, Section 3591(b)(1), in its present form, requires not less than \$20 million dollars in gross receipts during any twelve month period. H.R. 147 would reduce this amount to \$10 million dollars.

In Coker v. Georgia, 433 U.S. 584, 593-94, 598 (1977) (plurality opinion), the Supreme Court held that the death penalty was cruel and unusual punishment for raping an adult female because the victim was not killed and because there was no national consensus in favor of death as a punishment for this particular crime. In Edmund v. Florida, 458 U.S. 782, 790-91 (1982), the Court held that the death penalty was cruel and unusual punishment for the crime of felony murder where the defendant was a minor participant who did not kill, attempt to kill, or intend to kill. However, the Court later expanded the scope of capital liability (in a felony-murder case) to include reckless disregard for human life by knowingly engaging in criminal acts known to create a grave risk of death. Tison v. Arizona, 481 U.S. 137, 157 (1987).

In enacting Section 3591(b)(1), Congress has determined that illegal drugs pose a sufficient threat of grave harm to our country to support imposition of the death penalty for this non-homicidal offense. Examples of other non-homicidal death penalty offenses include numerous crimes which involve a serious threat to the security of the nation. See 18 U.S.C. 794 (espionage); 2381 (treason); and 3591(b)(2) (Continuing Criminal Enterprise-related attempted murder). See also Uniform Code of Military Justice, 10 U.S.C. 885 (desertion in time of war); 890 (assaulting or willfully disobeying a superior commissioned officer in time of war); 894 (mutiny or sedition); 899 (misbehavior before the enemy); 900 (subordinate compelling surrender); 901 (improper use of a countersign); 902 (forcing a

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safeguard); 904 (aiding the enemy); 906 (spying); 906(a) (espionage); 910 (hazarding a vessel); 913 (misbehavior of a sentinel in time of war).

However, the constitutionality of capital punishment for these non-homicidal crimes has not been tested since the Supreme Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976) upholding the death penalty for certain aggravated first-degree murders. Therefore, we believe that the proposed amendment is at best premature. Should we prevail in defending the statute as it now exists, Congress could then reconsider H.R. 147. We look forward to continuing to work with the Congress to address the country's serious crime problems.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this report to the Congress.

Sincerely,

Kent Markus
Acting Assistant Attorney General