

A SHAMEFUL HUMAN RIGHTS...

Capital punishment in the USA

Peter Hodgkinson

"When in Gregg-v-Georgia the Supreme Court gave its seal of approval to capital punishment, this endorsement was premised on the promise that capital punishment would be administered with fairness and justice. Instead, the promise has become a cruel and empty mockery. If not remedied, the scandalous state of our present system of capital punishment will cast a pall of shame over our society for years to come. We cannot let it continue." (Justice Thurgood Marshall, 1990)¹

It is difficult, in so short a report, to convey the enormity of the human rights catastrophe that is the death penalty in the United States. Sadly the evidence is overwhelming that the words of Justice Marshall have not been heeded. Indeed America's enthusiasm for, and reliance on the death penalty continues unabated. It is probable that the effect of recent legislation will exacerbate the situation and lead to the conviction and execution of the innocent.²

There are over 3,122 people (48% white, 41% black; 8% Hispanic; 4% others) on death rows throughout the United States with 56 executions carried out in 1995 (30 to date in 1996), the highest number since executions resumed in 1977. Thirty eight of the fifty states have death penalty statutes. A number of the remaining 12 abolitionist states (Massachusetts, Iowa and Wisconsin) have fought off recent attempts to reinstate the penalty, whilst others anticipate that restoration amendments will be on the ballot at the November 1996 Presidential election. The past four to five years has also seen an increase in the number of states that are actually executing for the first time in decades.

Cruel and unusual

There have been considerable changes to death penalty practice during the past half-century when after a peak of executions nationally in the mid-1930s (199 in 1935), the number of executions

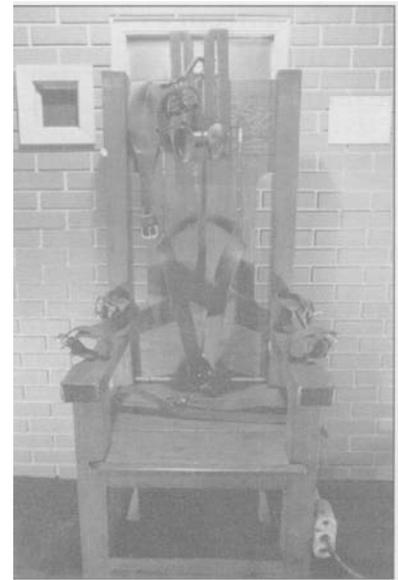
steadily declined and in the late 1960s ended altogether. This decline was largely a consequence of successful litigation in the federal courts that challenged capital punishment on several constitutional grounds culminating in the *Furman-v-Georgia* landmark decision in 1972 which in effect struck down the death penalty on the grounds that it violated the Eighth Amendment protection against 'cruel and unusual punishment'. In 1976 the Supreme Court ruled in three related cases (*Gregg-v-Georgia*, *Jurek-v-Texas*, *Proffitt-v-Florida*) that the death penalty was not *per se* a cruel and unusual punishment, and that the new death penalty statutes had addressed the issues of arbitrariness and discrimination.³

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Public opinion continues to be solidly in favour of the death penalty and Polls have also shown that deterrence and incapacitation are no longer the reasons for this support. Rather it is retribution, or even revenge that dominates the public thinking. Such is the strength of feeling for revenge that there is a move, in some sections of public and political life, to return to the more 'retributive' modes of execution, e.g. the electric chair and the gas chamber.

A context of violence

This climate of support for the death penalty is set against what is seen as an exponential rise in serious violent crime across the USA. The United States has the highest violent crime rate, highest homicide rate, and greatest use of guns in the commission of violent crimes of any western democracy. It also has more persons currently on death row and more persons in prison than any other western nation. These facts about crime and punishment are not unconnected, and have a bearing on the current status of



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the death penalty. So far in the 1990s, the Federal Bureau of Investigation has reported in its annual Uniform Crime Reports about 24,000 homicides each year, which is on average 9.5 per 100,000 of population. It is estimated that of this 24,000 homicides, some 2-4,000 are 'death eligible' of which maybe 250 receive the death penalty. Of this number, on average, two dozen or so are executed each year - approximately 1% of the total homicides. Among those executed are juveniles⁴ and those with mental illness and mental retardation⁵.

Two questions immediately spring to mind from these figures: do they represent the successful identification of the worst of the homicides or are they nothing more than confirmation that the death penalty is a lottery? They also beg the question about the purpose of the death penalty - deterrence, retribution or incapacitation? The homicide rates in those states that have carried out executions since 1977 are higher than in those states that have the death penalty, but have not executed anyone, which in turn are higher than those states that do not have the death penalty. The figures for 1993 expressed as homicide rates per 100,000 population are 99.35, 5.72 and 5.22 respectively.⁶

The cost of death

Given the mounting costs of the death penalty system, at the expense of other essential public services, one wonders how the above can satisfy the public



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desire for revenge. This exposure becomes especially significant when you consider the findings of more detailed opinion surveys that show that support for the death penalty plummets when life without parole coupled with restoration is offered as an alternative. Additionally, the 'cost of death' is five to ten times more than a forty year prison sentence.⁷

The death penalty has become deeply embedded in the American psyche and is inextricably linked to the political process, so much so, that it is widely accepted that no candidate in the United States can hope to run for president, governor, or other high elective office if he or she can successfully be targeted as 'soft on

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crime': the candidate's position on the death penalty has become the litmus test.

The families of murder victims have become a very powerful lobby in support of the death penalty and they are a constituency ripe for exploitation by the media and the politicians. In fact victims' needs are reflected in legislation such

as, *Payne-v-Tennessee* (1991)⁸ which permits victim impact evidence showing the pain and suffering of surviving relatives and friends of murder victims to be submitted as part of the prosecution's argument at the penalty phase of a capital trial. Another 'right' that has been afforded these secondary victims is the right (in 7 states) to witness the execution of their family member's murderer.

New legislation, new discrimination

In September of 1994, President Clinton signed into law legislation, part of which - the *Federal Death Penalty Act* - created a whole range of new federal death penalties. The new capital offences this legislation introduced are; espionage, treason, trafficking in large quantities of drugs, attempts to kill anyone involved in the prosecution of an ongoing criminal trial. Following the Oklahoma bombing Congress promptly responded with the *Comprehensive Terrorism Prevention Act* and the *Effective Death Penalty Act* both of which are now enacted into law. One immediate effect on the death penalty has been a radical revision and reduction in habeas corpus remedies, both state and federal, which is likely to lead to more miscarriages of justice.⁹ This politically expedient legislation follows the defunding of all the resource

centres that specialise in capital post-conviction litigation disadvantaging further those already denied adequate counsel at trial.

Whatever the effect the 'guided discretion' since *Gregg-v-Georgia* (1976) intended it remains the case that the death penalty continues to be imposed in an arbitrary and discriminatory manner. The poor minority male defendant whose

victim is a white female is at an inordinately greater risk of being sentenced to death than a white male with financial means.

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1. From a speech at the Annual Dinner in honour of the Judiciary, American Bar Association, 1990, quoted in the National Law Journal, Feb 8th, 1993.
2. Radelet, M, Bedau H A & Putnam C (1995) 'In Spite of Innocence: Erroneous convictions in capital cases'. Revised Edition. Northeastern University Press: Boston
3. For a fuller account see Chapter Four in 'Capital Punishment in the United States of America - a review of the issues'. Peter Hodgkinson, Hugo Adam Bedau, Michael Radelet, Gaynor Dunmall & Kim Massey. A report for the United Kingdom Parliamentary Human Rights Group. 1996
4. Streib, V L (1988) 'Imposing the death penalty on children: Challenging Capital Punishment'. Legal and Social Science Approaches, Sage Press: California
5. See Radelet, M 'Physician Participation' in *Capital Punishment: Global Issues and Prospects* edited by Hodgkinson, P & Rutherford, A. Waterside Press: Winchester 1996
6. Compiled by the National Coalition to Abolish the Death Penalty. 918 FNW, Suite 601, Washington DC 20004. Source: 'Crime in the US' Uniform Crime Reports Division. Federal Bureau of Investigation. US Department of Justice (1993).
7. Dieter, RC 'Millions misspent: what politicians don't say about the high costs of the death penalty'. Washington DC Death Penalty Information Center, 1994. rev.ed.
8. *Payne-v-Tennessee* 111 S.Ct. 2597 (1991)
9. Bedau, H A (1996) 'The Death Penalty in the United States' in *Capital Punishment: Global Issues and Prospects*. Edited by Peter Hodgkinson & Andrew Rutherford. Waterside Press: Winchester.



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