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Death Penalty

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**Moderator: James Q. Wilson, Professor of Government,
Harvard University**

**Guests: David Bruck, Coalition Against the Death Penalty
Ernest van den Haag, Fordham University**

Your discussion will be assisted by your understanding the major issues in the current capital punishment debate, and how those for and those against capital punishment face these issues.

Historical Context

Use of the death penalty has declined throughout the industrial Western world since the 19th century, and nearly every European nation has either formally abolished the death penalty for civil crimes or has abandoned it in practice.

Despite the current American revival of capital punishment, the United States has contributed to the trend toward abolition. Indeed, when Michigan joined the Union in 1847, it had already earned the distinction of being the first abolitionist jurisdiction in the Western world. The United States experience in the 20th century also parallels the long-term, worldwide decline in executions. Since the peak years of 1935 and 1936, when States conducted 199 executions, the number of yearly executions in this country decreased continuously, culminating in a de facto moratorium between 1967 and 1977. Abandonment of capital punishment appeared complete with the United States Supreme Court's decision in *Furman v. Georgia* in 1972. In *Furman*, the Court invalidated State death penalty statutes, as then administered, because death sentences were "freakishly" and arbitrarily imposed. The eighth amendment to the Constitution prohibits a criminal justice system that imposes death sentences with the same consistency as the likelihood of being "struck by lightning."

Contrary to the expectations of many observers, *Furman* did not resolve the death penalty controversy. In *Gregg v. Georgia*, decided 4 years after *Furman*, the Supreme Court revived capital punishment. The *Gregg* Court held that various State capital punishment laws enacted in response to *Furman* sufficiently reduced the randomness permitted by the previous statutes. The Court concluded that the "new" death penalty statutes complied with Constitution requirements, and thus it permitted States to resume executions. The State statutes approved by the Court differ from prior penal codes in permitting imposition of capital punishment only for murder, stating grounds to be considered by a trier-of-fact in making the death penalty decision, and specifying reasonably specific criteria that must be shown to apply if capital punishment is to be imposed.

The Current Situation

The United States is now in a transition between enacting the death penalty in the abstract and actually administering the punishment in a manner consistent with society's morals and with constitutional requirements. In the decade following *Gregg*, some States slowly began to implement a policy dormant for the previous 10 years and, with the Supreme Court's approval, hesitantly resumed executions. Indeed, the first prisoner executed in the post-*Gregg* era, Gary Gilmore, demanded that the Utah authorities execute him in 1977. Momentum, though negligible at first, eventually provided the impetus for resuming executions. There were no executions in 1978, followed by two in 1979, none in 1980, one in 1981, and two in 1982. The rate more than doubled in 1983 to five. Then in 1984, partially due to the Supreme Court's efforts to accelerate the appeals process and diminish Federal oversight, the number of executions increased to 21. The 1984 rate does not appear

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to be atypical of the future: by mid-year, States had executed 13 prisoners in 1985.

Just as the rate of executions presents an interesting pattern, so too does the distribution of States administering those sentences. Although 39 States currently authorize the death sentence, by mid-1985 only 12 have executed any prisoners. Moreover, of the 47 executions since 1976, 34 have been performed in four States, Florida (13), Texas (9), Louisiana (6), and Georgia (6). The concentration of executions in the South is also illustrated by the remaining executions: the South has conducted all of the last 43 executions, and the last execution outside of that region occurred in 1981. The South's domination of executions corresponds closely to the distribution of executions in the 1950's. The four States responsible for 72 percent of the post-*Gregg* executions were also among the top six executing States of the 1950's.

Though the South dominates execution statistics, its share of prisoners sentenced to death is somewhat more modest. Southern States accounted for 62 percent of the 1,540 prisoners under a death sentence as of August 1, 1985. Several other States maintain significant death row populations. For example, 173 prisoners have been sentenced to die in California's gas chamber, the third largest death row population in the country. Illinois and Pennsylvania, each with 77 prisoners on death row, are ranked sixth. Despite the large number of prisoners sentenced to death in these States, none have been executed.

Large death rows are apparently not closely connected to execution policy outside the South. Utah, one of the three non-Southern States to have carried out death penalties, has only five prisoners currently on death row. The other two non-Southern States that have executed, Indiana and Nevada, maintain relatively small death rows of 31 and 28 prisoners, respectively. Even in the South, a small death row population appears to be irrelevant to the State's execution policy. For example, Louisiana's six executions since 1976 rank it third among all States, but its death row population of 41 ranks 14th. By comparison, the neighboring State of Alabama has 72 prisoners awaiting execution—but has performed only two executions (1983 and 1984). Florida, by contrast, leads the Nation in both executions (13) since 1976 and the number of prisoners sentenced to death (221).

America is poised at the crossroads in the death penalty controversy. In the long term, it appears to be following the Western world trend toward abolition. This conclusion can be demonstrated by the relatively low execution rates and long-term decline in the penalty's use. On the other hand, the high numbers on death row and the short-term increase in executions may signal a return to the execution rates of the 1950's, if not the 1930's.

The Capital Punishment Debate

There are four major issues in the capital punishment debate.

1. **Deterrence.** A major purpose of criminal punishment is to deter future criminal conduct. The deterrence theory assumes that a rational person will avoid criminal behavior if the severity of the punishment for that behavior and the perceived certainty of receiving the punishment combine to outweigh the benefits of the illegal conduct. Although the accuracy of the many assumptions behind the deterrence approach is itself a matter of dispute, the deterrent value

of a particularly severe punishment, the death penalty, is important in the current controversy.

The deterrence achieved by using the death penalty must be examined in the context of the entire criminal justice system. For the death penalty to deter first-degree (or capital) murders, the killer must know of the penalty's application to the crime and must believe that the certainty of punishment is sufficient to create an unacceptable risk. Without such awareness, the killer will probably not be deterred. One further factor must be considered when assessing a penalty's deterrent impact. Any deterrent value must be judged in the context of alternatives: if a lesser penalty achieves the same or a greater level of deterrence, no deterrent justification supports the enhanced punishment.

Possibly because deterrence is ingrained in our lives—for example, children are punished for violating the family rules—a majority of the public supports the death penalty because they consider it an effective deterrent. Supporters contend that death sentences and executions heighten the risk of punishment in a potential killer's mind. By threatening to take the killer's life, society "ups the ante" of killing another.

Studies of the deterrent effect of the death penalty have been conducted for several years, with varying results. As opponents of the death penalty argue, most of these studies have failed to produce evidence that the death penalty deters murders more effectively than the threat of protracted imprisonment. Various reasons might explain this conclusion. First, the weight assigned to the enhanced severity is only marginal since the comparable punishment is, in most cases, life imprisonment without possibility of parole, or very long sentences. Second, the other key element in the deterrence theory, the perceived certainty of imposing the sentence, is rather low for most murders for a number of reasons: many crimes remain unsolved; the defendant may escape apprehension; evidence may be lacking or inadmissible; plea bargaining may enable the defendant to avoid capital punishment; the jury may acquit or not impose the penalty; and appeals and clemency petitions may delay or preclude execution. The actual probability that a murderer will receive a death sentence is quite low and the risk of being executed even smaller, about 1 per 1,000 killings in 1984. Even when the certainty of punishment is higher, many killers might refuse to believe they will be apprehended, let alone executed. Third, the assumption of rationality on which deterrence theories are based may not be valid for many killers.

Supporters of the death penalty make two principal arguments about deterrence: that common sense alone suggests that people fear death more than other punishments and that, when studies fail to resolve the issue, executions should continue on the assumption that a small saving of innocent lives will result.

The deterrence issue, important as it is, will not be resolved by statistical studies. Both supporters and opponents agree that the deterrent value of the death penalty is unproved. Furthermore, the limits on studies of this type, as well as the complexity of the problem, will probably prevent any definitive "scientific" resolution of the deterrence issue in the future.

2. **Retribution.** The central justification of capital punishment is the need for society to express sufficient condemnation for heinous murders. Supporters of the death penalty contend that the only proper societal response to the most vile murders is the most severe sanction possible. Thus,

society should literally interpret the "eye for an eye" principle: when an individual takes a life, society's moral balance will remain upset until the killer's life is also taken.

Although death penalty opponents agree that some punishment—even a harsh one, should be imposed on offenders of society's norms, they disagree with the assumption that society can express its outrage with a vile crime only by inflicting a mortal punishment. Opponents further claim that society's goal of greater morality, rather than being advanced, is actually defeated when its expression of outrage for the taking of one life is the taking of another life. Indeed, opponents argue that the State's act is, in some respects, more calculated and cold-blooded than that of many murderers.

Though individuals must judge for themselves the proper role of retribution in criminal justice, the question is the same for everyone: At what point do we stop trying to match horrible criminal actions with horrible government actions? Taken to the extreme, a retribution theory might require the State to kill the offender in the exact same manner in which the victim was killed. Of course, this position is morally unacceptable to most people: our sense of outrage may be sufficiently expressed by less horrible forms of punishment. The key issue is whether punishment short of killing offenders sufficiently expresses social condemnation of murder in modern America.

3. **Arbitrariness.** The major reason the Supreme Court invalidated the Nation's death penalty laws in *Furman v. Georgia* was that death sentences were imposed in an arbitrary and capricious manner. Death penalty opponents claim that the "new" death penalty statutes have failed to reduce the randomness inherent in selecting who shall die. Armed with a decade of experience with the revised statutes, opponents point to continuing inconsistent application. For example, of the 1,540 death row inmates, 42 percent are black, though blacks constitute only 12 percent of the population at large. Moreover, those convicted of killing white victims are more than four times as likely to receive death sentences as are those convicted of killing blacks. An even greater apparent disparity exists between the genders of death row inmates: though women constitute 16 percent of those who commit murder, they make up only 1.3 percent of the death row population. (This disparity may be less stark than appears when the types of murders committed by men and by women are taken into account: murders by men are much more likely to involve predatory crime.)

Supporters of the penalty reply that murder is not evenly committed by both sexes and both races, and that overrepresentation in one death sentence group may simply mean that other killers are being improperly spared. Opponents respond that a punishment unjustly administered cannot foster the community's sense of retributive justice or notions of equality. Supporters of the penalty suggest these problems call for greater efforts toward evenhanded administration of the death penalty, not abolition of the penalty. Opponents deny that evenhanded execution is possible in any criminal justice system.

4. **Danger of mistake.** The death penalty's unique character is its finality and irrevocability. Unlike a prison term, which can be commuted at any time, the death penalty, once executed, cannot be recalled. Thus, the irrevocability of the punishment heightens the dangers involved with wrongful convictions.

Opponents of the death penalty argue that the possibility of executing an innocent person requires abolishing the penalty. They contend that the likelihood of executing someone who does not deserve to die—that is, one whose crime does not fall within the definition of capital murder—is quite high. And though the person might be guilty of a serious crime, imposing the death penalty in this case is wrong. The less probable though more morally unacceptable scenario is that a State will execute someone who did not commit the crime. Opponents cite studies concluding that there have been more than 100 cases of an innocent person wrongly convicted of murder; in at least 31 of these, a death sentence was imposed. More important, it is claimed that at least eight innocent individuals have been executed. Opponents argue that the likelihood of executing even one innocent person warrants rejecting the penalty.

Supporters, for the most part, argue that the current administration of the death penalty contains adequate safeguards to protect against miscarriages of justice. They cite the numerous levels of review and the scrutiny given to each death sentence. In addition, some supporters claim that the slight possibility of executing an innocent person must be accepted as the price of maintaining a credible criminal justice system.

Minor Issues in the Capital Punishment Debate

Three other issues frequently encountered in the death penalty debate seem of lesser import. These are questions of comparative cost, whether capital punishment plays a crucial role in reducing crime by incapacitating offenders, and the impact of capital punishment on the rate of violent crime.

The debate about cost has curious origins. Some popular sentiment supports the death penalty on the impression that it is less costly to execute prisoners than to maintain them in prison for life terms. Abolitionists, by contrast, have sought to demonstrate that executions in the modern United States are more costly than long prison terms, chiefly because of the cost of special legal processing. The argument is unimportant because the small number of executions or life sentences involved is an insubstantial part of the criminal justice budget.

That the alternative to the death penalty is secure confinement for long periods, in many States for life without parole, makes it unlikely that capital punishment decreases crime through incapacitation. Whether or not executed, the offender's dangerousness will not be inflicted on the community.

Furthermore, the small number of candidates for execution under any conceivable regime of capital punishment means that executions cannot be regarded as a way of reducing the incidence of violent crimes in the United States. Violent crimes number in the millions, prison populations in the hundreds of thousands. Executions, even at their 20th century peak, were under 200 a year. The issue of the death penalty is thus largely a symbolic one in the crime control debate, but fundamentally important nonetheless.

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Discussion Questions

1. Does the legitimacy of capital punishment depend on whether it deters criminal conduct?
2. Do most Americans subscribe to the "eye for an eye" principle—that when an individual takes a life his life should be taken?
3. Should capital punishment be abolished? Why—or why not?
4. How do you explain the concentration of executions in the South?
5. Are the recently enacted death penalty statutes likely to have eliminated arbitrariness and the risk of discrimination in the imposition of the death penalty?

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