

## Thirty Years After *Gregg*

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On July 2, 1976, the U.S. Supreme Court decided *Gregg v. Georgia*<sup>2</sup> and several companion cases,<sup>3</sup> thereby reinstating the death penalty in the United States. These decisions dashed the hopes of many Americans who, at the time, believed the United States had seen its last execution. The promise of permanent abolition seemed especially attainable just four years earlier, when, in *Furman v. Georgia*,<sup>4</sup> the Court had (in effect) abolished all existing death penalty statutes in the nation. By the time we observe the 30th anniversary of *Gregg* in July 2006, nearly 1,050 prisoners will have been put to death since *Gregg* by 33 states or the federal government.<sup>5</sup>

### Background

Executions in the U.S. began to decline about sixty years ago. The nation averaged 166 executions in the 1930s, 128 in the 1940s, and 72 in the 1950s. Public support for the death penalty also began to decline in the 1950s, in part because of three especially controversial executions: Ethel and Julius Rosenberg for espionage in New York (under federal authority) in June 1953,<sup>6</sup> and Caryl Chessman in California in May 1960.<sup>7</sup> Support for the death penalty was also eroded in the 1950s by what many thought was the unfair prosecution of Dr. Sam Sheppard in Ohio in 1954.<sup>8</sup> By 1966 only

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<sup>2</sup>*Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>3</sup>Death penalty statutes were also approved for Florida and Texas. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). At the same time, the Supreme Court struck down statutes that authorized a mandatory death penalty. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976).

<sup>4</sup>*Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>5</sup>By the end of calendar year 2005, there had been 1,004 post-*Gregg* executions in the U.S. In the five year period, 2001-2005, this total increased at an average annual rate of 64 executions.

<sup>6</sup>The Rosenbergs' guilt remains controversial. See, e.g., WALTER SCHNEIR & MIRIAM SCHNEIR, *INVITATION TO AN INQUEST* (1966).

<sup>7</sup>Chessman had attained worldwide notoriety for several well-received books that he wrote while on death row. In addition, he was executed for kidnapping for the purpose of robbery, which many felt should not have been a capital offense. See EDMUND (PAT) BROWN, *PUBLIC JUSTICE, PRIVATE MERCY* 20-52 (1989).

<sup>8</sup>This case later became the basis for a popular television show, "The Fugitive." The state sought the death

42 percent of the American public voiced support for the death penalty. Between 1960 and 1966 the average number of executions fell to 15, in part because of increasing challenges to their constitutionality. After two executions in 1967, American execution chambers began a ten-year period of inactivity.

At the same time, several states were moving in the direction of abolition, suggesting that more were seeing capital punishment as an affront to “evolving standards of decency.” Delaware completely abolished the death penalty in 1958, the abolitionist jurisdictions of Alaska and Hawaii became states in 1959, in 1964 a large majority of Oregon voters threw out the death penalty in a public referendum, and in 1965 New York and Vermont greatly restricted the availability of death sentences in their jurisdictions. Governors such as Edmund (“Pat”) Brown in California, Endicott Peabody in Massachusetts, Michael DiSalle in Ohio, Milton Shapp in Pennsylvania, and Winthrop Rockefeller in Arkansas lent their voices to the abolitionists’ chorus. Scholars began to outline strategies to abolish the death penalty,<sup>9</sup> and Supreme Court Justices William Brennan, William O. Douglas, Abe Fortas,<sup>10</sup> and Arthur Goldberg,<sup>11</sup> began to invite challenges to the constitutionality of the death penalty.

Meanwhile, in 1963 a young law professor at the University of Pennsylvania, Anthony Amsterdam, began to consult with the New York-based NAACP Legal Defense Fund (LDF) and develop strategies to fight death sentences in state and federal courts throughout the country. Some victories in the courts, as well as narrow losses that left room for revised challenges, energized these efforts. For example, in 1968 the Court ruled that only the most unyielding opponents of the death penalty could be automatically excluded from jury service in capital cases, a decision that added many

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penalty for Dr. Sheppard for the murder of his wife, but in a compromise verdict, he was convicted of second-degree murder and sentenced to life imprisonment. In 1966 a retrial was ordered on the grounds that massive, pervasive, and prejudicial publicity had attended his prosecution. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). At retrial he was acquitted when bloodstain evidence proved that he was not the killer.

<sup>9</sup>See, e.g., Gerald Gottlieb, *Testing the Death Penalty*, 34 SO. CALIF. L. REV. 268 (1961).

<sup>10</sup>Fortas later published his views in *The Case Against Capital Punishment*, THE NEW YORK TIMES MAGAZINE (Jan. 23, 1977), at 8.

<sup>11</sup>Justice Goldberg, joined by Justices William J. Brennan and William O. Douglas, invited a challenge to the death penalty for rape in his dissent in *Rudolph v. Alabama*, 375 U.S. 889 (1963). His clerk at the time was (now) Harvard Law Professor Alan Dershowitz. See Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARVARD L. REV. 1773 (1970).

citizens with general reservations against the death penalty to pools of eligible jurors.<sup>12</sup> At the time of that decision, many observers thought we would never again see an execution in the United States.<sup>13</sup> And, an increasing recognition of the role that race played in the administration of the death penalty, especially for those convicted of rape, gave rise to hopes that appellate courts would find this intolerable. Nonetheless, even after extensive research by University of Pennsylvania criminologist Marvin Wolfgang documented widespread racial bias in the death penalty for rape,<sup>14</sup> the Eighth Circuit Court of Appeals, in *Maxwell v. Bishop* (1968), refused to intervene.<sup>15</sup>

In addition to arguments related to evolving standards of decency and race, capital punishment was attacked because of pure arbitrariness in its application. *Maxwell* was appealed to the Supreme Court primarily on the grounds that jurors should be given standards to frame their life-and-death decisions in capital cases, and that there should be a bifurcated trial system where jurors could hear testimony relating to their penalty decision in a separate proceeding after their verdict of guilt. Given the very real hope that the Supreme Court would decide these issues, all executions in the nation were suspended pending the Court's decision. The decision was delayed by changes in Supreme Court membership, so it was not until 1970 that the Court finally rendered its ruling.<sup>16</sup> And this ruling disposed of the case on narrow grounds (pertaining to jury selection), sidestepping the questions that went to the heart of the constitutionality of the death penalty. Almost immediately, however, the Court announced that existing stays of execution would remain in effect until these broader issues could be addressed in

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<sup>12</sup>*Witherspoon v. Illinois*, 391 U.S. 510 (1968).

<sup>13</sup>MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973), at 123-24.

<sup>14</sup>Some 405 of the 455 men executed for rape (89 percent) between 1930 and 1967 were African American. See Marvin E. Wolfgang & Marc Riedel, *Rape, Racial Discrimination, and the Death Penalty*, in *CAPITAL PUNISHMENT IN THE UNITED STATES* 99-121 (Hugo Adam Bedau & Chester M. Pierce eds., 1976).

<sup>15</sup>The decision was written by future Supreme Court Justice (and future death penalty opponent) Judge Harry Blackmun. *Maxwell v. Bishop*, 398 F.2d 138 (1968). In 1977 the Supreme Court did abolish the death penalty for those convicted of rape, although not on grounds of racial bias, but because "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Coker v. Georgia*, 433 U.S. 485 (1977).

<sup>16</sup>The case was first argued in March 1969, but it was scheduled for reargument after Justice Abe Fortas resigned from the Supreme Court. Difficulties replacing him delayed reargument until May, 1970. Anthony Amsterdam, by then at Stanford Law School, argued for the defense on both occasions. The decision was announced on June 1, 1970. *Maxwell v. Bishop*, 398 U.S. 262 (1970).

other cases.<sup>17</sup>

### The *Furman* Decision

In May 1971, by identical 6-3 votes, the Supreme Court dealt two setbacks to the abolitionist strategy by ruling that states were free to give juries unguided discretion in sentencing decisions,<sup>18</sup> and that nothing in the Constitution mandated that there be separate guilt and punishment proceedings in capital trials.<sup>19</sup> But despite these blows, the following month the Court announced that it would hear a series of cases to determine whether the death penalty itself constituted “cruel and unusual punishment” in violation of the Eighth and Fourteenth Amendments. With this, the stays of execution continued and the *Furman* case moved to center stage.

Throughout the summer of 1971, Amsterdam and his colleagues at LDF worked furiously to sharpen their arguments. Two new justices joined the Supreme Court that fall, William Rehnquist and Lewis Powell, delaying oral arguments and necessitating special thought on what type of reasoning might garner their votes.<sup>20</sup> Finally, on January 17, 1972, Amsterdam stood before the Supreme Court to argue the *Furman* case.

A month later, the California Supreme Court, by a 6-1 vote, abolished the death penalty in that state, finding that it violated the “cruel or unusual” clause in the California constitution. That ruling removed the death sentences for 105 men and 5 women.<sup>21</sup> And, because the decision was based on the state constitution, it could not be appealed to federal courts. Clearly the abolitionist position had gained strength.

The *Furman* decision was finally announced on June 29, 1972. It was a monumental victory for the foes of capital punishment. By a 5-4 vote, the Court found the death penalty statutes under

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<sup>17</sup>MELTSNER, *supra* note 13, at 227-28.

<sup>18</sup>*McGautha v. California*, 402 U.S. 183 (1971). This holding was opposite to what the Supreme Court was to hold the next year in *Furman*, although *McGautha* involved a Due Process challenge, whereas *Furman* challenged the death penalty under the Eighth Amendment.

<sup>19</sup>*Crampton v. Ohio*, 402 U.S. 183 (1971).

<sup>20</sup>“Given the composition of the new Court and the result in *McGautha-Crampton*, it was not overstating the matter to say that a victory [in *Furman*] would rank among the greatest surprises in American legal history.” MELTSNER, *supra* note 13, at 287.

<sup>21</sup>MELTSNER, *supra* note 13, at 282.

review -- and, by implication, all others in the country -- to be cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.<sup>22</sup> Justices Douglas, Marshall, Brennan, Stewart, and White voted with the majority; the four justices appointed by President Richard Nixon (Powell, Blackmun, Rehnquist, and Chief Justice Burger) all dissented. Ironically, in later years two of the dissenters, Powell and Blackmun, would announce their unequivocal opposition to the death penalty.<sup>23</sup>

In *Furman* each justice wrote a separate opinion. The five in the majority had decided the death penalty was cruel and unusual punishment, but, like the dissenters, each arrived at his decision by a slightly different path. While many ambiguities remained, it stands as one of the longest decisions ever written by the Court. At the time most observers agreed with Jack Greenberg, the Executive Director of the Legal Defense Fund, who stated, “There will no longer be any more capital punishment in the United States.”<sup>24</sup> Not open to debate was the fact that by *Furman* and its related cases, some 631 men and 2 women then on death rows in 32 states had their sentences commuted to prison terms.

In *Furman*, only two of the justices, Marshall and Brennan, concluded that the death penalty *per se* violated the Eighth Amendment, a position they continued to hold throughout the remainder of their lives. Brennan argued the death penalty was an affront to human dignity, while Marshall saw it as an unnecessarily harsh path to accomplishing legitimate penal goals, as well as morally unacceptable to those who were informed about capital punishment’s strengths and weaknesses (thereby distinguishing public opinion from *informed* public opinion). The three other justices in the majority condemned the death penalty not because of contemporary moral standards, but because of its arbitrary and capricious application. Justice Douglas worried that standardless discretion in sentencing by jurors would lead to

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<sup>22</sup>*Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>23</sup>In 1991, then-retired Justice Lewis Powell told his biographer, “I have come to think that capital punishment should be abolished ... [because] it serves no useful purpose.” JOHN C. JEFFRIES, JR. JUSTICE LEWIS F. POWELL, JR. (1994), at 451-52. In 1994, while still on the Court, Justice Blackmun (who, while a Federal Circuit judge, wrote the decision in *Maxwell v. Bishop*, denying the claim that the death penalty for rape was racially tainted) wrote: “From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored ... along with the majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved ... I feel morally and intellectually obligated to concede that the death penalty experiment has failed” (*Callins v. Collins*, 510 U.S. 1141, 1145 (1994)).

<sup>24</sup>MELTSNER, *supra* note 13, at 291.

race and class bias. Justice Stewart focused less on discrimination and more on randomness: “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual” -- they are capriciously, freakishly, and wantonly imposed.<sup>25</sup> Justice White echoed these concerns, finding that death sentences were so rarely imposed that they could not accomplish their deterrent or retributive goals.

The dissenting justices also took different routes to their ultimate conclusions. Justice Rehnquist’s position was based on judicial restraint, holding that the wisdom of the death penalty should be decided by legislators. Chief Justice Burger felt that the evidence showing the death penalty offended moral standards or that it failed to serve as a deterrent was not as strong as justices in the majority claimed. Justice Blackmun, like Justice Rehnquist, argued for deference to legislators.<sup>26</sup> He also pointed to several previous Supreme Court cases that had not found the death penalty to be violative of the Eighth or Fourteenth Amendments, and stated that he did not find any new or sudden change in moral standards that justified an Eighth Amendment prohibition. Justice Powell also discussed judicial precedent and emphasized the need to defer to the legislative branch of government, and argued that the death penalty did not offend contemporary standards of decency. He added that historical evidence of racial bias did not show that the same racial bias infected contemporary death sentencing.<sup>27</sup>

In the end, important questions remained undecided regarding the constitutionality of mandatory death sentences, where no sentencing discretion was possible, as well as regarding statutes that might guide the discretion of jurors by specifying aggravating and mitigating circumstances, and regarding capital statutes for non-homicidal crimes. With a one-vote majority, it was also a fragile victory for abolitionists. States quickly went back to their legislative drawing boards to see if they could devise capital punishment statutes that would meet the Supreme Court’s concerns.

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<sup>25</sup>*Furman*, at 309.

<sup>26</sup>Justice Blackmun’s dissent was personal and singular. All other dissenting opinions in *Furman* were joined by all the other dissenters, but no other Justice concurred with Blackmun’s opinion.

<sup>27</sup>In 1987, Justice Powell wrote the majority opinion in *McCleskey v. Kemp*, 481 U.S. 279 (1987), in which statistical evidence of racial disparities in the death penalty in Georgia (compiled by University of Iowa Law Professor David Baldus) was rejected in a 5-4 vote by the Court as insufficient to justify a constitutional challenge.

This backlash was led by Florida, where Governor Rubin Askew called the legislature into a special session, held in Tallahassee just after Thanksgiving, 1972. Soon Florida had the nation's first "post-*Furman*" death penalty statute.<sup>28</sup> Since it required that guilt and punishment decisions be held in separate proceedings, and specified factors that jurors must consider in deciding between a death and a prison sentence (e.g., the defendant's prior record; whether the murder is especially cruel), the Florida legislation is an example of what is called a "guided discretion" statute. Within two years after *Furman*, fourteen other states had reacted in a different way by enacting statutes that required mandatory death sentences upon conviction for assorted types of criminal homicide.<sup>29</sup>

By 1976, 35 states had passed new death penalty laws and more than 500 inmates were confined on America's death rows. Public support for the death penalty had also grown markedly since *Furman*; by then some two-thirds of Americans supported it. Clearly the Supreme Court's silence on the issue had to end. It was time to decide whether these new, post-*Furman* death penalty laws were constitutional.

### The 1976 Decisions

In 1975 the Supreme Court heard arguments in a series of cases. *Woodson v. North Carolina*<sup>30</sup> and *S. Roberts v. Louisiana*<sup>31</sup> raised the issue of whether mandatory death sentences were constitutionally permissible, or whether there must be some sort of individualized decisions in death penalty cases. In three other cases, *Gregg v. Georgia*,<sup>32</sup> *Proffitt v. Florida*,<sup>33</sup> and *Jurek v. Texas*,<sup>34</sup> the Court examined the constitutionality of states that had enacted "guided discretion" statutes -- where judges and jurors were given guidelines to decide between a prison and a death sentence for a defendant convicted of capital murder.

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<sup>28</sup>Charles W. Ehrhardt & L. Harold Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?* 64 J. OF CRIM. L. & CRIMINOLOGY 10 (1973).

<sup>29</sup>HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA*, 3d ed. 12 (1982).

<sup>30</sup>428 U.S. 280 (1976).

<sup>31</sup>*Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976).

<sup>32</sup>*Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>33</sup>428 U.S. 242 (1976).

<sup>34</sup>428 U.S. 262 (1976).

On July 2, 1976, just two days before the nation's bicentennial, the Court announced its decisions. By identical 5-4 votes in *Woodson* and *Roberts*, mandatory death penalty statutes were rejected. But by 7-2 votes in the other three cases, the guided discretion statutes were approved. Hence, the Court held that the punishment of death for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments. Only Justices Brennan and Marshall dissented, sticking to their position that the death penalty, in all circumstances, was excessively cruel punishment. In short, it was a monumental defeat for death penalty opponents.

The majority opinions in *Gregg* were not uniform; the plurality opinion was written by Justices Stewart, Powell and Stevens.<sup>35</sup> Overall, the opinion took the position that the death penalty did not offend “the evolving standards of decency which mark the progress of a maturing society.”<sup>36</sup> Although the justices pointed to opinion polls and the legislative support for the death penalty to justify this assertion, of primary importance was their argument that “the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.”<sup>37</sup> Those penological justifications, according to the plurality, were retribution and deterrence.

#### Which Decision Is Better: *Furman* or *Gregg*?

*Furman* condemned the arbitrary and capricious application of the death penalty; *Gregg* held that a properly written statute could bridle and guide the discretion used to make death penalty decisions. Anthony Amsterdam argued in his brief in *Gregg* that “the changes in the Georgia sentencing procedure are only cosmetic, that the arbitrariness and capriciousness condemned by *Furman* continue to exist in Georgia.”<sup>38</sup> A fair-minded observer might well argue that the four years between the two cases did not provide enough data to tell with any assurance whether the new statutes yielded only “cosmetic” changes or whether they really did improve things. Now, 30 years later, we are in a better position to judge. By briefly examining issues of evolving standards of human decency, the penological

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<sup>35</sup>Justices White, Blackmun, Burger, and Rehnquist concurred with this opinion.

<sup>36</sup>For an outstanding analysis of the decisions in *Gregg*, see HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 164-84 (1987).

<sup>37</sup>*Gregg*, at 183.

<sup>38</sup>*Gregg*, at 198.

justifications for death, and the issues of racial bias and arbitrariness in death sentencing, we can focus some of the debate over which of the two decisions was better.

*Gregg* found that the death penalty did not offend “the evolving standards of decency which mark the progress of a maturing society.” The Court did so by looking at written statutes, not data on how the death penalty was actually applied. Today we have thirty years of experience with the death penalty that the *Gregg* Court lacked that allow us to make a better judgment about whether the death penalty *as applied* offends evolving standards of decency. Support for the death penalty in the abstract is a very different question from support for the death penalty as it is actually applied. There are several angles that we can use to view the death penalty and judge whether it offends evolving standards of decency:

1. *International Norms.* The death penalty clearly violates the evolving moral standards of most other countries with whom the United States shares its human rights commitments. Worldwide, more and more countries over the past 30 years have abolished the death penalty, to the point where today the majority of countries in the world have entirely banned the executioner. At the time of *Gregg*, only 16 countries from around the world had abolished the death penalty; by early 2006 that figure stood at 86 countries that have total abolition, and 123 countries that have abolished capital punishment in law or in practice.<sup>39</sup> Today, over half the countries in the world have abolished the death penalty in law or practice, including such diverse nations as Argentina, Australia, France, Hungary, and Mozambique. Indeed, over the past decade more than three countries a year on average have abolished the death penalty in law or, having abolished it for ordinary crimes, have gone on to abolish it for all crimes. In 1999 alone, Albania, Bermuda, Cyprus, East Timor, Latvia, Nepal, Turkmenistan, and Ukraine all effectively abolished the death penalty. In 2003, Protocol 13 to the European Convention on Human Rights went into effect – this is the first legally binding international treaty to

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<sup>39</sup> <<http://web.amnesty.org/pages/deathpenalty-index-eng>> (last visited Apr. 23, 2006).

abolish the death penalty in all circumstances with no exceptions. There has also been significant movement toward abolition in Africa, where in 2004 Senegal abolished the death penalty and Sierra Leone's Truth and Reconciliation Commission recommended doing away with the death penalty in its entirety. In 2005, Mexico and Liberia also abolished the death penalty for all crimes. On Easter Sunday, 2006, Philippine President Gloria Macapagal Arroyo commuted all death sentences in the Philippines (approximately 1,200) to prison terms.

It is not sheer coincidence that so many countries have abolished the death penalty as part of the transition to a more democratic form of government. In countries as diverse as Haiti, Paraguay, and Romania, the death penalty was abolished once dictatorships came to an end. And in South Africa back in 1990, the apartheid government declared a moratorium on the death penalty when it released Nelson Mandela and opened negotiations with the African National Congress. This process reached fruition in 1995 when capital punishment was abolished altogether in the new South African constitution. In each of these countries, the death penalty was understood to be the apparatus of the repressive machinery of a dictatorial state. Once a more democratic society could be established, there was a fundamental determination to do away with the most terrible prerogative that any government can exercise, the power of life or death over its own citizens.

Today virtually all western democracies, as well as our neighbors to the north and south, are abolitionist jurisdictions. In fact, in 2005, 94 percent of all known judicial executions (those imposed by courts under law) were carried out in just four countries: China, Iran, Saudi Arabia, and the United States.<sup>40</sup>

2. *Religious Norms.* While few formal religious denominations took a stand on capital punishment in 1976, today almost all the major denominations in America have found the death penalty

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<sup>40</sup> Amnesty International, Facts and Figures on the Death Penalty (1 January 2006),

to violate their evolving moral standards.<sup>41</sup> In the words of Father Robert Drinan, a Jesuit priest and former member of Congress, “The amazing convergence of opinion on the death penalty among America's religious organizations is probably stronger, deeper, and broader than the consensus on any other topic in the religious community in America.”<sup>42</sup> This increasing anti-death penalty activity has been fostered in part by the success of the book and movie, *DEAD MAN WALKING*, which presents the autobiographical “journey” of a Catholic nun, Sister Helen Prejean, who ministers to inmates on Louisiana's death row and the families of some of their victims.<sup>43</sup> Prejean's account has become one of the most popular death penalty books of the century.<sup>44</sup>

3. *Execution of Juveniles.* In a demonstration that Supreme Court decisions can be reflective of evolving standards of decency, albeit belatedly, in March 2005 the Court finally banned the death penalty for prisoners who committed their crimes prior to their eighteenth birthdays.<sup>45</sup> Prior to that decision (post-*Furman*), there were 22 juveniles who were executed in seven states (13 in Texas alone) who were 16 or 17 at the time of their offense.<sup>46</sup> Because of this decision, 72 inmates in a dozen states had their death sentences commuted to life imprisonment.<sup>47</sup> Between January 1990 and December 2005, Amnesty International documented 46 executions of child offenders in eight countries (the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, the USA, China and Yemen). With 19 executions of juveniles during that time period, the United States has executed more

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<http://web.amnesty.org/library/index/ENGACT500062006> (last visited Apr. 23, 2006).

<sup>41</sup> AMERICAN FRIENDS SERVICE COMMITTEE, *THE DEATH PENALTY: THE RELIGIOUS COMMUNITY CALLS FOR ABOLITION* (1998).

<sup>42</sup> ROBERT R. DRINAN, *THE FRACTURED DREAM: AMERICA'S DIVISIVE MORAL CHOICES* 107 (1991).

<sup>43</sup> HELEN PREJEAN, *DEAD MAN WALKING* (1993).

<sup>44</sup> Prejean's book was among the factors leading to the birth of “The Catholic Campaign to End the Use of the Death Penalty, sponsored by the U.S. Conference of Catholic Bishops. *See*

<http://www.usccb.org/sdwp/national/deathpenalty/> (last visited Apr. 23, 2006).

<sup>45</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>46</sup> For a list of these inmates, *see* <http://www.deathpenaltyinfo.org/article.php?scid=27&did=882> (last visited Apr. 23, 2006).

<sup>47</sup> *See* <http://www.deathpenaltyinfo.org/article.php?scid=38&did=885> (last visited Apr. 23, 2006).

juveniles since 1990 than any other country.<sup>48</sup>

4. *Miscarriages of Justice*. Since 1976 we have learned quite a bit about how fallible our criminal justice system can be when determining guilt or innocence in homicide cases. A 1992 study documented over 400 twentieth-century cases in which innocent defendants were convicted of homicide.<sup>49</sup> Since *Furman*, more than 120 inmates have been released from America's death rows because of doubts about their guilt.<sup>50</sup> A common thread in almost all these cases is that the defendant was exonerated not because the "system" was working -- the defendant was usually exonerated only because of *pure luck*. One can only speculate about how many equally innocent defendants were not so lucky and instead were wrongfully put to death. Does not this increasing recognition that the death penalty will occasionally claims the lives of innocent inmates suggest that the penalty offends evolving moral standards?

5. *Execution of those with Mental Retardation*. If the death penalty is supposed to be reserved for only the most culpable offenders, one would think that defendants with mental retardation would never end up on death row. Yet, it was not until June 2002, in *Atkins v. Virginia*, that the Supreme Court recognized that executing persons with mental retardation offended evolving standards of decency and they banned the practice.<sup>51</sup> As recently as 1989, the Supreme Court had found no fault with state statutes that permitted executing those with mental retardation.<sup>52</sup>

The main reason that the Supreme Court reversed itself in 2002 and banned the execution of those with mental retardation is because of the hard work done by human rights activists throughout the U.S. in protesting to state legislators and demanding an end to the practice. However, in the years since *Atkins* we have seen that it is a very fragile victory. In virtually every case involving defendants with

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<sup>48</sup> See <<http://web.amnesty.org/pages/deathpenalty-children-eng>> (last visited Apr. 23, 2006).

<sup>49</sup> MICHAEL L. RADELET, HUGO ADAM BEDAU, & CONSTANCE PUTNAM, IN SPITE OF INNOCENCE (1992).

<sup>50</sup>For descriptions of 68 of these cases, see Michael L. Radelet, William S. Lofquist, & Hugo Adam Bedau, *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 COOLEY L. REV. 907 (1996). The list of people released from death row because of innocence is regularly updated by the Death Penalty Information Center; see <<http://www.deathpenaltyinfo.org/article.php?did=412&scid=6>> (last visited Apr. 23, 2006).

<sup>51</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>52</sup> *Penry v. Lynaugh*, 492 U.S. 302 (1989).

mental retardation, prosecutors have argued that the inmate functions at a high level, often buttressing their arguments with opinions of atypical mental health professionals who render pro-prosecution diagnoses only after perfunctory evaluations. Virtually every successful effort to exclude an offender with mental retardation from the death penalty is won only after a long fight. Indeed, some courts have been so unbending in their determinations that some prisoners are ruled eligible for execution only because their score on a given I.Q. test is only a few points above some rather arbitrary minimum.

6. *Execution of the Severely Mentally Ill.*<sup>53</sup> A significant portion of those on America's death rows have long documented histories of mental illness. These problems may stem from early childhood abuse (physical, emotional, or sexual), or even pre-natal abuse (fetal alcohol syndrome). The National Association of Mental Health estimates that five to ten percent of those on death row are mentally ill,<sup>54</sup> although because so many death row inmates have never been given a thorough psychiatric or neurological exam, it is impossible to provide an accurate prevalence measure.<sup>55</sup>

Chief among the issues raised by the execution of the severely mentally ill is whether such inmates are capable of forming the premeditation and intent that is needed to classify them among the "worst of the worst" who are sent to death row. Should people be executed for distorted thinking or moods that are beyond their individual ability to control? If the death penalty is supposed to have a deterrent value, can executions deter people from becoming mentally ill or from acting on the impulses stemming from mental illness?

Seriously mentally ill defendants on trial face several obstacles. Some may not understand the charges against them, the seriousness of the harm they have caused, or how to assist their attorney in mounting a defense. Sometimes mentally ill inmates are medicated at trial to the point of sedation, with their consequent lack of affect often conveying an impression to the jury that they lack remorse.

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<sup>53</sup> AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: RIGHTS FOR ALL 112-15 (1998).

<sup>54</sup> National Association of Mental Health, *Death Penalty and People with Mental Illness*, available at [www.nmha.org/position/deathPenalty/index.cfm](http://www.nmha.org/position/deathPenalty/index.cfm) (last visited Apr. 23, 2006).

<sup>55</sup> Amnesty International, *USA: The Execution of Mentally Ill Offenders* (AI Index: AMR 51/003/2006, January 2006) is available at <<http://web.amnesty.org/library/Index/ENGAMR510032006>> (last visited Apr. 23, 2006). A brief version of this report is available at <<http://web.amnesty.org/library/index/ENGAMR510022006>> (last visited Apr. 23, 2006).

In 1986, the Supreme Court ruled that “insane” inmates could not be executed.<sup>56</sup> However, this exemption is all but meaningless. It applies only to a small proportion of the most psychotic inmates – those who do not even understand the nature or effect of the death penalty or why it is being imposed upon them. It is relatively easy for states to find mental health professionals who will rubber-stamp even the most floridly psychotic inmate as competent for execution. And even if a severely mentally ill prisoner is exempted from execution, that exemption is only temporary – in most states he is shipped to a mental hospital, where mental health professionals are asked to treat him and restore his competency. If the treatment is successful, the inmate is brought back to the prison and executed.<sup>57</sup>

7. *Public Opinion and Evolving Standards.* Further evidence indicating a change in evolving moral standards comes from public opinion polls. As recently as 1994, Gallup Polls found that 80 percent of Americans voiced support for the death penalty. By October 2005, this support had plummeted to 64 percent, the lowest level of support in 27 years. An NBC/Wall Street Journal poll taken in July 2000 found that 63 percent of the American public favored an immediate moratorium on executions.<sup>58</sup>

Given the choice between long imprisonment and death, support for the death penalty drops precipitously. A CBS Poll from May 2005 found that 39 percent of the respondents favored long prison terms and 39 percent favored the death penalty. Other polls taken over the past few years reveal a similar equal division of opinion.<sup>59</sup> Taken together these polls show a rapid decline in death penalty support over the past decade, and an increasing willingness among respondents to move away from supporting the death penalty as long as they know that the offender will still serve a long prison term.<sup>60</sup>

8. *Evolving Standards of Politicians.* Since the *Gregg* decision in 1976, several state

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<sup>56</sup> *Ford v. Wainwright*, 477 U.S. 699 (1986).

<sup>57</sup> KENT S. MILLER & MICHAEL L. RADELET, *EXECUTING THE MENTALLY ILL* (1992).

<sup>58</sup> This poll is described at <<http://pollingreport.com/crime.htm#Death>> (last visited Apr. 23, 2006).

<sup>59</sup> *Id.*; see also <<http://www.deathpenaltyinfo.org/article.php?did=209&scid=23>> (last visited Apr. 23, 2006).

<sup>60</sup> Amnesty International recognizes that there are a multitude of human rights issues raised by “life without parole” sentences. However, at the time of this writing, the organization has not taken a formal position either for or against life without parole sentences.

legislatures have voiced their displeasure with the operation of the death penalty. This trend was led by Nebraska, where the legislature in 1979 voted 26-22 to repeal the death penalty, only to see the legislation vetoed by Governor Charlie Thone. In 1999 the same legislature passed a bill calling for a moratorium on the death penalty, but this time it was Governor Mike Johanns (now Secretary of Agriculture) who vetoed the bill.<sup>61</sup> Shortly thereafter, the New Hampshire legislature voted to abolish the death penalty, but this legislation also was vetoed.<sup>62</sup> In January 2000, Illinois governor George Ryan imposed a moratorium on executions in his state,<sup>63</sup> and in 2003 he pardoned four death row inmates and commuted the death sentences of some 163 others. While some prisoners have been sentenced to death in Illinois since then, Governor Ryan's successor, Gov. Rod R. Blagojevich, has continued the moratorium on executions. In 2002 Governor Parris Glendening in Maryland also imposed a moratorium on executions,<sup>64</sup> but in 2003 this moratorium was lifted by his successor, Robert Ehrlich. Most recently, in January 2006 the New Jersey legislature voted for a moratorium on the death penalty,<sup>65</sup> and that legislation was signed by Governor Richard J. Codey.<sup>66</sup> In 2005 alone, 13 states considered moratoriums on the death penalty,<sup>67</sup> and 29 states have considered moratoriums on the death penalty since 1999.<sup>68</sup> Combined with the data from recent public opinion polls, the modest successes of moratorium bills in recent years may be additional evidence that support for the death penalty has peaked.

Despite these promising signs, there are still regular setbacks for opponents of the death penalty. For example, in May 2005 Connecticut executed Michael Ross, a seriously mentally impaired inmate who had waived his appeals and asked for death, marking the first execution in New England in forty-

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<sup>61</sup> R. Tysyer, *Death Penalty Study OK'd*, OMAHA WORLD HERALD, May 28, 1999, at 1.

<sup>62</sup> John Kifner, *A State Votes to End Its Death Penalty*, N.Y. TIMES, May 19, 2000, at 16; John DiStaso, *Shaheen Vetoes Death Penalty in New Hampshire*, THE UNION LEADER (Manchester N.H.), May 20, 2000, at 1.

<sup>63</sup> Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Jan. 31, 2000, at 1.

<sup>64</sup> Francis X. Clines, *Death Penalty is Suspended in Maryland*, N.Y. TIMES, May 10, 2002, at 20.

<sup>65</sup> David W. Chen, *Suspension of the Death Penalty Is All but Assured in New Jersey*, N.Y. TIMES, Jan. 6, 2006, at B2; Leonard Post, *More States Review Death Penalty Laws*, NATIONAL LAW JOURNAL, Jan. 16, 2006, at P4.

<sup>66</sup> *Codey Leaves Office With a Flair, Signing Bevy of Bills Into Law On His Desk*, N.J. L.J., Jan. 16, 2006.

<sup>67</sup> Leonard Post, *More States Review Death Penalty Laws*, NATIONAL LAW JOURNAL, Jan. 16, 2006, at P4.

<sup>68</sup> These figures are compiled by Equal Justice USA. See <<http://www.quixote.org/ej/>> (last visited Apr. 23, 2006).

five years. The federal government is pursuing death sentences with increasing vigor, even in states such as Vermont and Michigan that historically have remained abolitionist under state laws. We have also seen governors, such as Arnold Schwarzenegger in California, give the green light to state executioners even when inmates have had excellent arguments for executive clemency.<sup>69</sup>

9. *Arbitrariness*. The statutes approved in the *Gregg* decision, in effect, permitted the death penalty for only a small proportion of those convicted of homicide. In the past 30 years, only about two percent of those convicted of homicide have been sentenced to death.<sup>70</sup> If the laws operated as they should, only the very worst of those convicted killers, and only those convicted of the most aggravated murders, would end up on death row. But a close inspection of who our courts actually sentence to death reveals that the promise of *Gregg* to apply death sentences equitably and fairly has not been fulfilled.

Arbitrariness occurs when there is no reliable basis for distinguishing between those who are sentenced to death and those who are not. This issue was raised by Justice Stewart in *Furman*, who argued that death sentences were then being imposed in a way as capricious as being struck by lightning. Today we have a death penalty system where many scholars have found that the capriciousness condemned in *Furman* still exists.<sup>71</sup> It is easy to find cases where those accused of many murders are offered prison terms in exchange for guilty pleas (e.g., Ted Bundy or Gary Ridgeway<sup>72</sup>), or where only one of two equally culpable codefendants was sentenced to death, or where an inmate was spared execution only because she or he had an attorney who thought to raise an objection during the trial to what at the time seemed to be a minor point. With such a large role for Lady Luck to play, it is preposterous to claim that the death penalty is reserved for “the worst of the

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<sup>69</sup> For a list of inmates whose death sentences have been commuted to prison terms since 1972, see <<http://www.deathpenaltyinfo.org/article.php?did=126&scid=13>> (last visited Apr. 23, 2006).

<sup>70</sup> James R. Acker & David R. Karp, *Introduction*, in *WOUNDS THAT DO NOT BIND: VICTIM-BASES PERSPECTIVES ON THE DEATH PENALTY* 4 (James R. Acker & David R. Karp eds. 2006).

<sup>71</sup> See, e.g., DAVID C. BALDUS, GEORGE G. WOODWORTH, & CHARLES A. PULASKI, JR. *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

<sup>72</sup> Bundy declined the plea bargain and was executed in 1989. Ridgeway, Washington State’s so-called “Green River Killer,” was sentenced to life imprisonment in 2003 after confessing and pleading guilty to 48 counts of first-degree murder.

worst.”

One problem that is increasingly being recognized is that in many cases, whether one lives or dies seems more a function of the quality of the defendant’s legal counsel than of any of relevant characteristics of the crime or the offender’s prior record. Numerous cases can be cited where defendants who were sentenced to death were defended by attorneys who had drinking or drug problems or who, for a vast array of other problems, mounted little or no defense.<sup>73</sup>

For example, Calvin Burdine was sentenced to death in Texas in 1983 after his attorney fell asleep several times during his trial. In 2000, an appellate court affirmed the conviction with a finding that it had not been demonstrated that the parts of the trial during which the lawyer slept were important. Finally, after spending 18 years on death row and once coming within minutes of being executed, Burdine was resentenced to a prison term.<sup>74</sup>

Even the best death penalty attorneys occasionally have clients who are sentenced to death or even executed. Although the list of incompetent or ineffective defense attorneys is long, a larger problem is the lack of resources available to defense attorneys so that they can mount a credible defense. For example, defense attorneys often lack funds that are needed for investigators, and experts who testify in death penalty cases (psychiatrists, serologists, etc.) often charge several hundred dollars per case.

Another reason why death sentences are not always reserved for the worst crimes or criminals is the high rate of error in death penalty cases. A comprehensive study that examined error rates in 4,578 capital cases, 1973-1995, found that 68 percent contained such serious error that appellate courts reversed the decisions.<sup>75</sup> This is particularly remarkable given a political climate in most appellate courts that does not look with favor on motions from capital defendants. At retrials that removed the

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<sup>73</sup>Stephen B. Bright, *Counsel For the Poor: The Death Sentence Not For the Worst Crime But For the Worst Lawyer*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 275-309 (Hugo Adam Bedau ed., 1997).

<sup>74</sup>Lisa Teachey, *Convicted Killer Avoids Death Row: Notorious ‘Sleeping Lawyer’ Case Ends in Plea Agreement*, *HOUSTON CHRONICLE*, June 20, 2003, at A29.

<sup>75</sup>See James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at <http://ccjr.policy.net/cjedfund/jpreport/> (June 2000) (last visited Apr. 23, 2006).

errors, more than 80 percent of these defendants were resentenced to prison terms. Clearly these errors are not “small” or “harmless;” they lead to a system that hands out death sentences in an arbitrariness consistent with what Justice Stewart called in *Furman* “being struck by lightning.”

10. *Racial Bias*. A problem related to arbitrariness is that distinctions can indeed be made between those sentenced to death and others sentenced to prison terms, but on the basis of legally irrelevant factors. Chief among them is race.

Clearly, a step in the right direction in the past three decades was the Supreme Court’s 1977 decision in *Coker*, in which death penalty was prohibited for those convicted of rape.<sup>76</sup> But aside from that, there has been virtually no progress in reducing the racial disparities of death row populations. Compare, for example, the racial characteristics of those executed for murder from 1930 to 1967 to the racial characteristics of those on death row today:

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<sup>76</sup> *Coker v. Georgia*, 433 U.S. 584 (1977).

	Executed for Murder, 1930-67 <sup>77</sup>	On Death Row 1/1/06 <sup>78</sup>
White	1,664 (.499)	1,531 (.454)
Black or Other	1,670 (.501)	1,842 (.546)
Total	3,334	3,373

These data show that the proportion of non-whites among those executed for murder between 1930 and 1967 was 50 percent. Today the non-white population of those on death row *has risen* to 54.6 percent.<sup>79</sup> In short, if we focus attention on death sentences for murder, we can see that the racial disparities in today's death sentencing are even worse than in the years before *Furman*.<sup>80</sup>

By any measure, the most sophisticated study of race and death sentencing was published in 1990 by University of Iowa Law Professor David Baldus and his colleagues.<sup>81</sup> That study focused on Georgia, and found that even after statistically controlling for a wide array of factors, the odds of a death sentence for those who killed whites were over four times higher than the odds of a death sentence for those who killed blacks. Nonetheless, when this study was reviewed by the Supreme Court in 1987,

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<sup>77</sup>U.S. DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT, 1976. National Prisoner Statistics Bulletin SD-NPS-CP-5, at 13.

<sup>78</sup>NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Jan. 1, 2006). Available at <[http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Winter\\_2006.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2006.pdf)> (last visited Apr. 23, 2006).

<sup>79</sup>In contrast, as of July 1, 2004, about 1/3 of the general population in the U.S. was non-white. See U.S. Census Bureau, *Hispanic Population Passes 40 Million* (June 9, 2005), available at <<http://www.census.gov/Press-Release/www/releases/archives/population/005164.html>> (last visited Apr. 23, 2006).

<sup>80</sup>The above chart focuses on race of defendant (and implicitly assumes that homicides for which people were executed pre-*Furman* are comparable to those that send people to death row today). Some recent work has found widespread race-of-defendant effects in predicting who is sentenced to death. See, e.g., David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638 (1998). However, most post-*Furman* research has found that race of victim is a stronger predictor of who is sentenced to death than race of defendant.

<sup>81</sup>DAVID C. BALDUS, GEORGE G. WOODWORTH, & CHARLES A. PULASKI, JR. EQUAL JUSTICE AND THE DEATH

the 5-4 ruling held that statistical studies such as the Baldus work cannot be used by a defendant to show that there was racial bias in his or her individual case.<sup>82</sup>

Dozens of additional studies conducted since *Gregg* have also found widespread racial disparities in the administration of the death penalty. The disparities associated with victim's race are usually found to be much larger than disparities correlated with the race of the defendant. In 1990, the United States General Accounting Office (GAO) published an overview of 28 relevant studies.<sup>83</sup> They found that the 28 studies, taken as a whole, supplied strong evidence that the victim's race was correlated with contemporary death sentencing:

In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.<sup>84</sup>

Since the GAO study was released, several additional studies have continued to document widespread racial disparities in who is sentenced to death.<sup>85</sup>

Clearly, we know much more today than we did at the time of *Gregg* about our abilities (or lack thereof) to administer the death penalty in a fair and racially-neutral fashion.

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PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

<sup>82</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>83</sup> See Gen. Gov't Div., U.S. Gen. Accounting Office Rep. GGD-90-57, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (Feb. 26, 1990).

<sup>84</sup> *Id.* at 5.

<sup>85</sup> See Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 OREGON L. REV. 39 (2002); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA L. REV. 1 (2005). In a report released in 2006, the American Bar Association concluded that the racial bias in Georgia documented by Professor Baldus has continued. The report also documented several other problems with the administration of the death penalty in Georgia. See AMERICAN BAR ASSOCIATION, *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY*

### Penological Justifications: Retribution and Deterrence

While the above points give plenty of fodder to those who would argue that the death penalty offends evolving standards of decency, we are left to weigh these liabilities against the two goals (or “benefits”) that the Court in *Gregg* believed the death penalty could achieve: deterrence and retribution.

Justice Stewart’s plurality opinion in *Gregg* justified the death penalty on deterrent grounds. Here the concurring justices characterized the evidence of deterrence as “inconclusive,”<sup>86</sup> but then suggested that “[t]here are carefully contemplated murders ... where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.”<sup>87</sup> Since 1976 scores of projects have examined the deterrence issue.<sup>88</sup> A 1996 survey of America’s top criminologists found that some 85 percent of the experts agreed that the empirical research on deterrence has shown that the death penalty never has been, is not, and never could be superior to long prison sentences as a deterrent to criminal violence.<sup>89</sup> A detailed study by the New York Times in 2000 compared homicides rates in 36 states that enacted death penalty statutes within ten years of *Furman* with rates in 12 abolitionist jurisdictions, and concluded that states’ death penalty policies had virtually no effect on homicide rates.<sup>90</sup> If anything, the fact that today’s offenders who are convicted of capital crimes and not sentenced to death are now sentenced to life imprisonment without parole (as opposed to shorter prison terms for offenders convicted thirty years ago) means that support for any deterrent effect has declined

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SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT, available at <<http://www.abanet.org/moratorium/assessmentproject/georgia.html#press>> (last visited Apr. 23, 2006).

<sup>86</sup>*Gregg*, at 135.

<sup>87</sup>*Gregg*, at 136.

<sup>88</sup>For recent reviews of this body of scholarship, see ROGER HOOD, *THE DEATH PENALTY: A WORLD WIDE PERSPECTIVE* 208-32 (3d ed. 2002); Ruth D. Peterson & William C. Bailey, *Is Capital Punishment An Effective Deterrent For Murder? An Examination of Social Science Research*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 2<sup>nd</sup> ed. 251-82 (James R. Acker, Robert M. Bohm, & Charles S. Lanier eds. 2003).

<sup>89</sup>Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 *J. CRIM. L. & CRIMINOLOGY* 1 (1996).

<sup>90</sup>Raymond Bonner & Ford Fessenden, *Absence of Executions, A Special Report: States with No Death Penalty Share Lower Homicide Rates*, *N.Y. TIMES*, Sept. 22, 2000, at 1.

over the past three decades. That is, if the death penalty was a deterrent, we would need to identify a group of offenders who would have committed their crimes if the “only” punishment was life without parole, but who would not if the punishment was death. Does the death penalty add any significant deterrent effects over life without parole? Virtually all criminologists who have conducted research on this issue would say that if you want to deter people from sitting on a stove, medium heat works just as well as high heat.

What is left for the friends of the executioner is the retribution claim: those who commit heinous murders deserve the most severe punishment, and life imprisonment without parole is simply too lenient. This justification contains a “proportionality argument” that holds that we should have the most severe punishments for the most severe crimes and that only the worst of all murders and murderers are punished by death. To the degree that the administration of the death penalty is characterized by the arbitrariness and racial bias noted above, its retributive justification diminishes.

The retribution argument is also weakened by evidence that long imprisonment may be an even more retributive punishment than death. Of the 1,004 inmates put to death between *Gregg* and the end of 2004, 118 (11.75 percent) dropped their appeals and actually asked to be executed, preferring death to the pains of imprisonment.<sup>91</sup> These inmates include Oklahoma City bomber Timothy McVeigh, who volunteered for execution rather than face the agony of long imprisonment.

Retributive arguments are often made in the names of families of homicide victims. This challenges opponents of the death penalty to study what our communities can do to assist such families, and whether there are better ways to use our limited resources to render such assistance. We will conclude our examination of capital punishment by addressing this question.

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<sup>91</sup> These figures can be generated at the web site of the Death Penalty Information Center; *see* <<http://www.deathpenaltyinfo.org/getexecdata.php>>.

Each execution costs millions of dollars more than alternative punishment of life imprisonment. Trial costs in death penalty cases are high, and appellate costs continue to build in the 12-15 years that the average inmate spends on death row before being executed. In the majority of cases in which a death sentence is imposed, a new trial or new sentencing is ordered by appellate courts, and so the death penalty costs millions even in cases that do not result in an execution.<sup>92</sup> A fair examination of the costs of the death penalty would also necessarily include some concerns for the family of the inmate, often including his parents and/or children, who are forced to deal with their own helplessness in preventing the execution and a wide range of emotions in the execution's aftermath.<sup>93</sup>

As we have seen, these costs are devoted to a small number of homicides -- the death penalty is imposed in only one or two percent of all homicides, and with the large number of death sentences that are vacated by appellate courts, executions are even more rare. Even if executions offer solace to families of the victims -- an assumption that is not supported by any systematic empirical data -- that alleged benefit is never offered to all but a small proportion of the families of homicide victims. In addition, the death penalty diverts resources from genuine crime control measures. If we had no death penalty, we would have many more resources available to increase services for crime prevention (e.g., drug treatment programs and mental health services), education and rehabilitation programs for prisoners that can reduce rates of recidivism, and meaningful victims' services. We might also imagine using the resources now wasted on expensive death penalty prosecutions to increase funding for prosecutions for drug crimes, domestic violence, and child abuse.

Even if one concedes (only for the sake of argument) that executing the killer might help the family of the victim, is it wise policy to spend millions of dollars on these few cases, leaving fewer

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<sup>92</sup> The Death Penalty Information Center regularly updates its collection on studies of the cost of the death penalty. See <<http://www.deathpenaltyinfo.org/article.php?did=108&scid=7>> (last visited Apr. 23, 2006).

<sup>93</sup> RACHEL KING, CAPITAL CONSEQUENCES: FAMILIES OF THE CONDEMNED TELL THEIR STORIES (2005).

resources to assist families of homicide victims in cases where the death penalty is not sought or imposed? Arguably the best way that communities can help families of homicide victims *as a group* is to increase the number of convictions. Approximately 35 percent of all homicides are not solved,<sup>94</sup> and we know that better training of law enforcement personnel and prosecutors could substantially decrease this figure.<sup>95</sup> Certainly most families of homicide victims would contend that using scarce financial resources to apprehend and incarcerate killers is more important than sentencing an arbitrary few to death.

### Conclusion

The 30th anniversary of the *Gregg* decision presents us with an invitation to reexamine it, compare it to the *Furman* decision, and evaluate which has withstood the test of time and practice. Since 1976 we have seen mounting evidence of the injustice of capital punishment, and mounting evidence that justifications for the death penalty used by the Court in its 1976 decisions do not hold water. Amnesty International believes that it is time for the U.S. Supreme Court to revisit its decision in *Gregg v. Georgia* and to recognize that the changes it introduced were indeed cosmetic. The only way to ensure that the death penalty is not arbitrary and capricious is to eliminate it in its entirety.

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<sup>94</sup> Bureau of Justice Statistics, *Homicide Trends in the U.S.: Clearances (2002)*, available at <<http://www.ojp.usdoj.gov/bjs/homicide/cleared.htm>> (last visited Apr. 23, 2006). One example of a group of families of homicide victims that is demanding that the murders of their loved ones be re-investigated is called "Families of Homicide Victims and Missing Persons," <[www.unresolvedhomicides.org](http://www.unresolvedhomicides.org)> (last visited Apr. 23, 2006). For a description of a university-based effort to assist with this organization, see Michael L. Radelet & Dawn Stanley, *Learning from Homicide Co-Victims: A University-Based Project*, in WOUNDS THAT DO NOT BIND: VICTIM-BASES PERSPECTIVES ON THE DEATH PENALTY 397-410 (James R. Acker & David R. Karp eds. 2006).

<sup>95</sup> Charles Wellford & James Cronin, *Clearing Up Homicide Clearance Rates*, NATIONAL INSTITUTE OF JUSTICE JOURNAL (April 2000): 3-7; available at <<http://ncjrs.org/pdffiles1/jr000243b.pdf>> (last visited Apr. 23, 2006).