

# *Questioning Capital Punishment: Law, Policy, and Practice*

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## PREFACE

### *The Death Penalty in America: A Brief Introduction and Overview*

However else it might be described—and the choices are many, covering the full spectrum that includes the ultimate form of justice and the ultimate injustice—the death penalty is controversial. It has been since the country’s beginning days. Capital punishment was authorized and practiced in all of the original states and under federal law. It has never been without both supporters and detractors. Several of the nation’s Founding Fathers were familiar with the recently translated treatise, *On Crimes and Punishments*, written in 1764 by the Italian philosopher and jurist, Cesare Beccaria. The first sentence in the chapter devoted to the death penalty in this provocative work left little doubt about where Beccaria stood on the issue: “This useless prodigality of torments, which has never made men better, has prompted me to examine whether death is really useful and just in a well-organized government.”<sup>i</sup> His resounding repudiation of capital punishment in favor of life imprisonment, which at least some of his contemporaries found persuasive, contains kernels of many of the essential arguments made against the death penalty today.<sup>ii</sup>

This is not to say that Beccaria’s arguments, or those advanced by other opponents of capital punishment, have carried the day in this country. In an October 2013 Gallup Poll, a declining yet still decisive majority (60%) of respondents replied affirmatively to the question, “Are you in favor of the death penalty for a person convicted of murder?”<sup>iii</sup> At the end of 2013, 32 states, the federal government, and the United States Military authorized the death penalty for aggravated murder<sup>iv</sup> and, less regularly, for treason or other crimes threatening sovereign authority.<sup>v</sup> Well in excess of 3,000 prisoners were under sentence of death nationwide.<sup>vi</sup> More than 1,350 executions had been carried out since 1977,<sup>vii</sup> when they resumed after the Supreme

Court affirmed the constitutionality of the “guided discretion” capital sentencing legislation<sup>viii</sup> enacted in the wake of *Furman v. Georgia* (1972).<sup>ix</sup> In that landmark case, a bare majority of the justices, each offering a different rationale, relied on the 8<sup>th</sup> Amendment’s prohibition against cruel and unusual punishments to invalidate all death sentences then in effect throughout the country.

Notwithstanding this showing of support for the death penalty, there is evidence that many Americans are ambivalent about capital punishment, if not opposed to it. As recently as 1994, four out of five (80%) Gallup Poll respondents reported favoring the death penalty for murder, a considerably higher rate than the 60% measure obtained in 2013.<sup>x</sup> When asked to choose whether death or life imprisonment without parole (LWOP) “is the better penalty for murder,” respondents in 2010 were almost evenly divided: 49% favored capital punishment, 46% favored LWOP, and 6% had no opinion.<sup>xi</sup>

The past decade has seen six states dispense with their capital-punishment laws. New Jersey lawmakers repealed the state death penalty statute in 2007 and legislative repeal soon followed in four additional states (New Mexico, in 2009; Illinois, in 2011; Connecticut, in 2012; and Maryland, in 2013).<sup>xii</sup> In New York, the legislature declined to revive its capital punishment law after the state’s highest court declared it unconstitutional in 2004.<sup>xiii</sup>

Newly imposed death sentences have dropped dramatically since the mid-1990s. In 1995, 311 offenders were sentenced to death across the country. By 2000, the number of new death sentences had fallen to 224. Annual totals dropped to 140 in 2005; 109 in 2010; and 77 in 2012.<sup>xiv</sup> Executions also have been in decline. From a modern era high of 98 in 1999, 60 or fewer executions have been carried out annually since 2004, with 43 occurring in both 2011 and 2012.<sup>xv</sup>

*My Purpose for Writing this Book, Disciplinary Perspectives, and the Intended Audience*

As even these basic facts and developments suggest, controversy surrounding the death penalty has long endured and it continues unabated. The materials in the following pages identify the principal fault lines and explore the dominant issues that help account for the widely divergent and often passionately held views about capital punishment. They are not presented to persuade or to promote the merits of different positions that might be taken, but rather to help stimulate more critical thought and discussion about them. The aim is to raise questions rather than purport to answer them, and to offer the footing needed to allow for more informed consideration and analysis of the key premises and points of disputation along the way.

The readings draw on diverse disciplines and methodologies, as is necessary to do justice to the rich mix of issues that nestle at the core of the death penalty and its several dimensions. Capital punishment is an instrument of law. It is imposed pursuant to procedures that have been shaped in significant part by the constitutional rulings of the United States Supreme Court. Accordingly, a number of prominent Supreme Court decisions pertaining to the death penalty are presented in the pages that follow. The decisions have been edited substantially because of their length, although I have tried my best to preserve the essential arguments and reasoning employed by the justices. Occasional excerpts from oral arguments before the Supreme Court also are included, as are provisions from select death-penalty statutes and the views of legal scholars as expressed in law review articles and legal treatises.

Also included are discussions of research studies that have addressed important empirical dimensions of capital punishment—for example, its effectiveness as a deterrent to murder, its financial costs relative to life imprisonment, evidence of racial disparities or other arbitrariness in charging and sentencing decisions, whether “death qualifying” capital trial juries affects trial

outcomes, and many others. Additional readings focus on the ethics and morality of the death penalty, on its history, and on the politics of capital punishment. The variety and complexity of the foundational questions and issues pertaining to the death penalty invite and make relevant a broad array of disciplinary perspectives.

This volume is intended for anyone who is interested in exploring the history and current status of capital punishment in this country, including its legal foundations, its justifications, and its empirical and policy dimensions. It is suitable for use in academic classes in criminal justice, political science, history, sociology, and related disciplines which either focus specifically on the death penalty, or else devote attention to issues of punishment and the administration of justice more generally. The readings are appropriate for undergraduate students and can serve as well in graduate seminars. The materials are designed to stimulate critical thinking and analysis and, hopefully, correspondingly lively discussion.

The book is divided into three sections. The initial part examines the primary justifications offered in support of capital punishment as well as the principal objections raised against them. The focus then shifts to substantive (threshold eligibility) and procedural (selection) aspects of capital sentencing, including the performance of key actors who figure into punishment decisions. The last section covers post-conviction issues, including appeals, life under sentence of death, clemency, and executions. Entire volumes could easily be devoted to any and all of the individual topics addressed within the book's main sections. What can be presented here nevertheless is intended to help illuminate the undercurrents of the many important controversies surrounding the death penalty and, hopefully, also help inspire further reflection about them.

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- <sup>i</sup> Cesare Beccaria, *On Crimes and Punishments* 45 (Indianapolis: Bobbs-Merrill Co. 1963/1764, Henry Paolucci, trans.).
- <sup>ii</sup> John D. Bessler, *Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment* (Boston: Northeastern University Press 2012).
- <sup>iii</sup> Gallup, "Death Penalty," retrieved November 15, 2013 from <http://www.gallup.com/poll/1606/death-penalty.aspx>.
- <sup>iv</sup> Death Penalty Information Center, "States With and Without the Death Penalty," retrieved November 15, 2013, from <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.
- <sup>v</sup> U.S. Dept. of Justice, Bureau of Justice Statistics, *Capital Punishment, 2011—Statistical Tables 5*, Table 1 (July 2013), retrieved August 15, 2013 from <http://www.deathpenaltyinfo.org/documents/cpl11st.pdf>.
- <sup>vi</sup> Death Penalty Information Center, "Death Row Inmates by State," retrieved November 15, 2013 from <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#state>.
- <sup>vii</sup> Death Penalty Information Center, "Executions by Year," retrieved December 6, 2013 from <http://www.deathpenaltyinfo.org/executions-year>.
- <sup>viii</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).
- <sup>ix</sup> 408 U.S. 238 (1972).
- <sup>x</sup> Gallup, *supra* note 3.
- <sup>xi</sup> Frank Newport, "In U.S., 64% Support Death Penalty in Cases of Murder," (Nov. 8, 2010), retrieved August 15, 2013 from <http://www.gallup.com/poll/144284/support-death-penalty-cases-murder.aspx>.
- <sup>xii</sup> Death Penalty Information Center, *supra* note 4; Rob Warden, "How and Why Illinois Abolished the Death Penalty," 30 *Law & Inequality* 245, 284-285 (2012).
- <sup>xiii</sup> *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004); *People v. Taylor*, 878 N.E.2d 969 (N.Y. 2007); James R. Acker, "Be Careful What You Ask For: Lessons from New York's Recent Experiment With Capital Punishment," 32 *Vermont Law Review* 683 (2008).
- <sup>xiv</sup> U.S. Dept. of Justice, *supra* note 5, at 19 (Table 16); Death Penalty Information Center, *The Death Penalty in 2012: Year End Report* 1 (Dec. 2012), retrieved November 15, 2013 from <http://deathpenaltyinfo.org/documents/2012YearEnd.pdf>.
- <sup>xv</sup> Death Penalty Information Center, "Executions by Year," *supra* note 7.