

THE DEATH PENALTY: QUESTIONS AND ANSWERS September 2011

Since our nation's founding, the government -- colonial, federal, and state -- has punished a varying percentage of arbitrarily-selected murders with the ultimate sanction: death.

More than 15,000 people have been legally executed since colonial times, most of them in the early 20th Century. By the 1930s, as many as 150 people were executed each year. However, public outrage and legal challenges caused the practice to wane. By 1967, capital punishment had virtually halted in the United States, pending the outcome of several court challenges.

In 1972, in *Furman v. Georgia*, the Supreme Court invalidated hundreds of death sentences, declaring that then-existing state capital punishment laws were applied in an "arbitrary and capricious" manner and, thus, violated the Eighth Amendment's prohibition against cruel and unusual punishment, and the Fourteenth Amendment's guarantees of equal protection of the laws and due process. But in 1976, in *Gregg v. Georgia*, the Court resuscitated the death penalty: It ruled that the penalty "does not invariably violate the Constitution" if administered in a manner designed to guard against arbitrariness and discrimination. Several states promptly passed or reenacted capital punishment laws and by 1976 states were executing people again.

Today, 34 states have laws authorizing the death penalty, as does the military and the federal government. Several states have recently abolished capital punishment – since 2004, New York (2004), New Jersey (2007), New Mexico (2009), and Illinois (2011) have abolished the death penalty. Alaska and Hawaii have never had the death penalty. The vast majority of post-*Furman* ("modern era") executions have taken place in 10 states from the South and over 37% have occurred in Texas.

Today, about 3251 people are on death row. Virtually all are poor, a significant number are mentally disabled, more than 40 percent are African American, and disproportionate numbers are Native American, Latino, and Asian.

The ACLU believes that, in all circumstances, the death penalty is unconstitutional under the Eighth Amendment. We also believe that the death penalty continues to be applied in an arbitrary and discriminatory manner in violation of the Fourteenth Amendment.

Frequently Asked Questions raised by the public about Capital Punishment

Q: Doesn't the Death Penalty deter crime, especially murder?

A: No, there is no credible evidence that the death penalty deters crime more effectively than long terms of imprisonment. States that have death penalty laws do not have lower crime rates or murder rates than states without such laws. And states that have abolished capital punishment show no significant changes in either crime or murder rates.

The death penalty has no deterrent effect. Former claims that each execution deters a certain number of murders have been thoroughly discredited by social science research. People commit murders largely in the heat of passion, under the influence of alcohol or drugs, or because they are mentally ill, giving little or no thought to the possible consequences of their acts. The few murderers who plan their crimes beforehand -- for example, professional executioners -- intend and expect to avoid punishment altogether by not getting caught. Some self-destructive individuals may even hope they will be caught and executed.

Death penalty laws falsely convince the public that government has taken effective measures to combat crime and homicide. In reality, such laws do nothing to protect us or our communities from the acts of dangerous criminals.

Q: Don't murderers deserve to die?

A: It is the ACLU's position that no one deserves to die at the hands of the state. When the government metes out vengeance disguised as justice, it becomes complicit with killers in devaluing human life and human dignity. In a civilized society, we reject the principle of literally doing to criminals what they do to their victims: The penalty for rape cannot be rape, or for arson, the burning down of the arsonist's house. The state should not stoop to the level of the violent criminal and behave as he did -- and in a conscious, deliberate manner paid for by our tax dollars.

Q: If execution is unacceptable, what is the alternative?

A: INCAPACITATION. Convicted murderers can be sentenced to life imprisonment, as they are in many countries and states that have abolished the death penalty. Most state laws allow life sentences for murder that severely limit or eliminate the possibility of parole. Today, all 34 states with the death penalty allow juries to sentence defendants to life imprisonment without the possibility of parole instead of the death penalty. 15 out of the 16 (excluding Alaska) of the non-capital states also allow juries to sentence individuals to life in prison without the possibility of parole.

Several recent studies of public attitudes about crime and punishment found that a majority of Americans support alternatives to capital punishment: When people were presented with the facts about several crimes for which death was a possible punishment, a majority chose life imprisonment without parole as an appropriate alternative to the death penalty.

Q: Isn't the Death Penalty necessary as just retribution for victims' families?

A: No. "Reconciliation means accepting you can't undo the murder; but you can decide how you want to live afterwards" (Murder Victims' Families for Reconciliation) Scores of families of murder victims have publicly stated their opposition to the death penalty for the murderer of their loved one.

Q: Have strict procedures eliminated arbitrariness and discrimination in death sentencing?

A: No. Study after study has found serious racial disparities in the charging, sentencing and imposition of the death penalty. People who kill whites are far more likely to receive a death sentence than those whose victims were not white, and blacks who kill whites have the greatest chance of receiving a death sentence.

People of color are death-sentenced disproportionate to their numbers in the population. This is not primarily because minorities commit more murders, but because they are more often sentenced to death when they do.

Furthermore, poor people are far more likely to be death sentenced than those who can afford the high costs of private investigators, psychiatrists, and expert criminal lawyers. Indeed, capital punishment is "a privilege of the poor," said Clinton Duffy, former warden at California's San Quentin Prison. Some observers have pointed out that the term "capital punishment" is ironic because "only those without capital get the punishment."

Q: Maybe it used to happen that innocent people were mistakenly executed, but hasn't that possibility been eliminated?

A: No. Since 1973, 138 people in 26 states have been released from death row because they were not guilty. In addition, at least eight people have been executed even though they were probably innocent. A study published in the Stanford Law Review documents 350 capital convictions in this century, in which it was later proven that the convict had not committed the crime. Of those, 25 convicts were executed while others spent decades of their lives in prison. Fifty-five of the 350 cases took place in the 1970s, and another 20 of them between 1980 and 1985.

In 2011, the execution of Troy Davis by the state of Georgia was the most recent case of execution of an innocent.

Our criminal justice system cannot be made fail-safe because it is run by human beings, who are fallible. Executions of innocent persons occur.

Q: Only the worst criminals get sentenced to death, right?

A: Wrong. Although it is commonly thought that the death penalty is reserved for those who commit the most heinous crimes, in reality only a small percentage of death-sentenced inmates were convicted of unusually vicious crimes. The vast majority of individuals facing execution were convicted of crimes that are indistinguishable from crimes committed by others who are serving prison sentences, crimes such as murder committed in the course of an armed robbery.

The death penalty is like a lottery, in which fairness always loses. Who gets the death penalty is largely determined, not by the severity of the crime, but by: the race, sex, and economic class of the prisoner and victim, and geography -- some states have the death penalty, others do not, within the states that do some counties employ it with great frequency and others do not; the quality of defense counsel and vagaries in the legal process.

Q: "Cruel and unusual punishment" -- those are strong words, but aren't executions relatively swift and painless?

A: No. Execution is not painless, whether botched or not, and all executions are certainly cruel. The history of capital punishment is replete with examples of botched executions. Lethal injection is the latest technique, first used in Texas in 1982, and now mandated by law in a large majority of states that retain capital punishment. Although this method is defended as more humane, efficient, and inexpensive than others, one federal judge observed that even "a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own asphyxiation." In Texas, there have been three botched injection executions since 1985. In other states, dozens of botched executions have occurred, leading to suspensions of executions in Florida, California, Ohio, and other states.

In 2006, it took the Florida Department of Corrections 34 minutes to execute inmate Angel Nieves Diaz by way of lethal injection, usually a 15 minute procedure. During the execution, Diaz appeared to be in pain and gasped for air for more than 11 minutes. He was given a rare second dose of lethal chemicals after the execution team observed that the first round did not kill him. A medical examiner reported the second dose was needed because the needles were incorrectly inserted through his veins and into the flesh in his arms. Not only did Diaz die a slow and excruciating death because the drugs were not delivered into his veins properly, his autopsy revealed that he suffered 12 inch chemical burns in his arms by the highly concentrated drugs flowing under his skin.

More recently, an Ohio inmate did not die when his injections were incorrectly administered. Minutes into the execution, he raised his head and said, "It don't work, it don't work."

Eyewitness accounts confirm that execution by lethal injection and other means is often an excruciatingly painful, and always degrading, process that ends in death. Condemned prisoners are told they are going to die at the hands of the state in view of often-hostile witnesses, but not when, leaving them to wait anxiously for months and even years.

Capital punishment is a barbaric remnant of uncivilized society. It is immoral in principle, and unfair and discriminatory in practice. It assures the execution of some innocent people. As a remedy for crime, it has no purpose and no effect. Capital punishment ought to be abolished now.