Death Penalty

In contrast to the abolitionist trend in much of the rest of the world, the United States continues to expand its use of the death penalty. It has one of the highest death row populations in the world, and thirty-four of the fifty states allow for capital punishment.

Article 6 of the ICCPR favors but does not require the abolition of the death penalty. It also limits the circumstances in which the death penalty may be imposed: arbitrary deprivation of life is forbidden, as is the execution of juveniles; furthermore, the death penalty may be imposed "only for the most serious crimes." The U.S. entered a reservation to the ICCPR that allows it to use capital punishment to the extent permitted under the U.S. Constitution. Without this reservation, which the ACLU and HRW oppose, the United States would be in violation of all of the above requirements of Article 6.

In addition, both governmental and nongovernmental studies have shown that the death penalty in the U.S. is applied in a racially-discriminatory manner. This racism in application and the failure of the U.S. government to remedy it violate the anti-discrimination provisions of Articles 2 and 26.

Introduction

The provision in the International Covenant on Civil and Political Rights pertaining to capital punishment is found in Article 6, which states:

> 1) Every Human Being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2) In countries which have not abolished the death penalty, sentences of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

> 3) When deprivation of life constitutes the crime of Genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
>
> 4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
>
> 5) Sentence of death shall not be imposed for crimes committed by persons below the age of eighteen years of age and shall not be carried out on pregnant women.
>
> 6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Notwithstanding the reservations to the ICCPR by the United States, discussed below, the U.S. is currently in violation of subsection (1) prohibiting the arbitrary deprivation of life; and subsection (2) requiring that the death penalty be limited to only the most serious of offenses. In addition, the trend in the United States, particularly at the federal level, toward expansion of the death penalty violates the spirit of subsection (6) of Article 6.

Although international law does not require countries to immediately abolish the death penalty, a strong abolitionist trend has developed within the international community. In the past few years an increasing number of countries have done away with the death penalty. The trend has been particularly strong in western Europe, where no countries have a death penalty for ordinary crimes, and in South America, where only Suriname and Chile retain the use of the death penalty for ordinary crimes. Worldwide,[1] 18 countries have abolished the death penalty for all offenses since 1987, while Nepal abolished it for "ordinary crimes" in 1990 ("ordinary crimes" refers to peacetime offenses; the death penalty may still be imposed for "exceptional offenses," such as wartime crimes of treason or

[1] Figures come from "The Death Penalty: List of Abolitionist and Retentionist Countries (February 1993)," Amnesty International, London, February 1993.

espionage). As of February 1993, 48 countries had abolished the death penalty for all offenses, while 16 countries had abolished it for ordinary crimes. In addition, 20 countries still retain the death penalty for ordinary crimes, but have not executed anyone in the past 10 years. Although 106 countries retain and use the death penalty, this represents a decrease of 24 countries since 1985.

At the highest level in the international community,[2] the United Nations has steadily moved from a neutral position to an abolitionist one. In numerous documents, the United Nations has deemed the death penalty to be a violation of the fundamental right to life,[3] and to be "cruel, inhuman or degrading punishment."[4] In 1971, the UN General Assembly declared its desire that "this form of punishment [be abolished] in all countries."[5] By 1985, support for abolition within the United Nations was sufficiently strong that the Economic and Social Council authorized the appointment of a Special Rapporteur to draft a second optional protocol that would aim to abolish the death penalty.[6]

While the ICCPR does not prohibit capital punishment, it does seek to move signatories to it in the direction of abolition.[7] Article (6)6 of the Covenant

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[2] At a regional level, a number of bodies have expressed themselves against the death penalty. In December 1982, the Council of Europe's Committee of Ministers adopted Protocol No. 6 to the European Convention on Human Rights Concerning the Abolition of the Death Penalty. Article 1 of the Protocol abolished the death penalty. Council of Europe Doc. H(83)3. In addition, the General Assembly of the Organization of American States adopted by Resolution 1042 of June 8, 1990, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. The Protocol provides that the death penalty shall not be applied in the territory of any ratifying government.

[3] Report of the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders, UN Doc. A/CONF.87/14/Rev. 1 (1981).

[4] UN Doc. A/CONF.87/9, para. 98 (1980).

[5] GA Res. 2857, 26 GAOR Supp. No. 29, at 94, UN Doc. A/8429 (1971).

[6] Second Optional Protocol Aimed at the Abolition of the Death Penalty (1990) G.A. Res. 44/128.

[7] Quigley, "Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights," 6 Harvard Human

states that "nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party." The unmistakable tilt in favor of abolition is consistent with the developing international sentiment on capital punishment.

In addition to making it clear that abolition is the ultimate goal, the Covenant specifically limits the death penalty to "only the most serious crimes"[8] and prohibits the execution of minors, individuals under the age of 18 at the time of the crime or pregnant women.[9]

The United States entered a reservation to the Covenant which reserved the prerogative to use capital punishment to the extent that it is permitted under the United States Constitution.[10] The U.S. did allow, however, that it would not seek to execute pregnant women as proscribed by the ICCPR.[11]

Background and status of the death penalty in the United States

The so−called "modern era" of capital punishment began in 1976 when the United States Supreme Court approved a Georgia death penalty statute in the case of *Gregg v. Georgia*.[12] The death penalty statute at issue was enacted in

Rights Journal 59, 72−77 (1993).

[8] *See id.*

[9] *Id.*

[10] The reservation reads: "[t]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person(other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."

[11] *Id.*

[12] 428 U.S. 153 (1976); *Jurek v. Texas*, 482 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

response to the Supreme Court decision of *Furman v. Georgia* in 1972.[13] In *Furman v. Georgia*, the Supreme Court held that the death penalty was unconstitutional because then-existing statutes failed to provide adequate guidance to the sentencer to prevent death sentences that were the result of arbitrary and discriminatory decision-making. In *Gregg v. Georgia*, the Court was asked to review a revised Georgia statute to determine whether it provided adequate protection against the risks of arbitrariness and discrimination that the Court identified in *Furman v. Georgia*. After first rejecting the claim that the death penalty was under all circumstances a violation of the Constitution, the Court concluded that the Georgia statute before it appeared to provide the protection necessary to permit the death penalty to be imposed. The court expressly left open the question of whether the statute was unconstitutional in its application. To date, 36 states authorize the death penalty for murder.[14] In addition, the U.S. government and the U.S. military have capital punishment statutes, and there is now a bill before Congress that would increase the number of capital offenses to more than fifty.[15]

Since the *Furman* decision in 1972, the American death row population has grown to one of the largest in the world. As of October 1993, there were 2,785 prisoners on death row. The three states with the largest death row populations accounted for 1,071 inmates, or 38 percent of the total death row population.[16]

The racial make-up of the American death row is: 50 percent white; 39 percent Black; 7 percent Latino/Latina; nearly 2 percent Native American; and 0.73

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[13] 408 U.S. 238 (1972).

[14] States with capital punishment statutes are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

[15] The Omnibus Crime Bill, passed by the Senate on November 19, 1993, contained the largest ever expansion of the federal death penalty, to over fifty crimes.

[16] These states were: Texas (365), California (375), and Florida (331). NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.* (Fall, 1993).

percent Asian.

The growth in the death row population has been accompanied by an accelerated rate of executions. As of September 14, 1993, 220 people have been executed since the first post-Furman execution in 1977. From 1984 through 1992, the rates of executions fluctuated, but never returned to their pre-1984, single-digit levels. The 31 executions carried out in 1992 represented the highest post-Furman yearly rate yet.

The racial breakdown of those who have been executed is as follows: 54 percent white; 39 percent Black; 6 percent Latino; .45 percent Native American. Eighty-four percent of the executions that have taken place have been for the murders of white victims.[17]

As with the accelerated growth of the death row population, the increasing rate of executions is attributable to a few states. The five states with the highest number of executions account for 157 or 71 percent of the 220 executions since 1977.[18] The top ten states account for 191 executions or 87% of all executions.

Methods of execution

The most widely use method of execution is lethal injection, which is the sole method of execution in 14 jurisdictions.[19] In addition, four jurisdictions are phasing in lethal injection and phasing out another method of execution.[20] Six jurisdictions provide for another method of execution in addition to lethal injection.[21] Electrocution remains the sole method of execution in 11

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[17] NAACP Legal Defense and Educational Fund, Inc., Execution Update (September 14, 1993).

[18] The states with the five highest number of executions are: Texas (68), Florida (32), Louisiana (21), Virginia (20), Georgia (16).

[19] These jurisdictions are: Colorado, Illinois, Louisiana, Missouri, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, U.S. Military and the U.S. Government.

[20] These jurisdictions are: Arizona, Arkansas, Delaware and Mississippi.

[21] These jurisdictions are: California, Idaho, Montana, North Carolina, Utah and

jurisdictions.[22]

Who may be punished by death

Under state and federal laws, participants in a felony that results in death may be executed even though they did not kill the victim. The only limitation is that the person must have been a major participant in a serious felony where there was a likelihood of the use of lethal force.[23] In fact, at least ten persons have been executed in instances where the defendant was not the "trigger man," and may not have been directly involved in the murder.[24]

At the federal level, the death penalty is available for murders committed in the course of illicit activity (drug dealing)[25] and for peacetime espionage.[26]

Race discrimination and the death penalty

Washington.

[22] These jurisdictions are: Alabama, Connecticut, Florida, Georgia, Indiana, Kentucky, Nebraska, Ohio, South Carolina, Tennessee and Virginia.

[23] *See Tison v. Arizona*, 481 U.S. 137 (1987). If a court finds that the defendant killed, intended to kill, attempted to kill or intended that lethal force be used against the victim or that the defendant was a major participant in a felony that results in murder, the death penalty may be imposed without violating the United States Constitution. For instance, in a gas station robbery an accomplice serving as the "lookout" outside of the service station may be responsible for a murder committed by his accomplice inside the service station.

[24] *Death Row U.S.A.*, NAACP Legal Defense and Educational Fund, Inc., Spring 1993, at 1.

[25] *See*, U.S.C. Section 848(e), (g)-(r).

[26] Due to the procedural requirements outlined by the United States Supreme Court in *Furman v. Georgia*, however, most federal statutes would fail to meet constitutional muster if challenged, *see*, Elizabeth B. Bazan, "Present Civilian Federal Death Penalty Statutes," CRS Report for Congress, May 30, 1989; revised March 14, 1991.

Article 26 of the ICCPR bars governments from discriminating on the basis of race.[27] It has been extensively shown that in the United States the death penalty is applied in a manner that is racially discriminatory.

Evidence of racial discrimination in the imposition of the death penalty played a key role in the 1972 *Furman* decision which invalidated virtually all death penalty statutes in 1972.[28] Even though post-*Furman* statutes were meant to eliminate discrimination in the application of the death penalty, studies show that race continues to be an important factor in the process of determining who will be sentenced to death in this country.

In 1990, the General Accounting Office analyzed 28 studies that investigated racial disparities in capital cases[29] and found that in 82 percent of the studies race of the victim was found to influence sentencing in capital cases. The GAO report noted that the studies it had reviewed had found racism at all stages of the criminal justice system in capital cases.

One study by Jim Henderson and Jack Taylor found that the killer of a white victim was three times more likely to be sentenced to death than the killer of a black.[30] The same study found that in certain states the likelihood was higher: in Maryland, killers of whites were 8 times more likely to be sentenced to death than killers of blacks; in Arkansas, killers of whites were six times more likely to be sentenced to death than killers of blacks; and in Texas, killers of whites were five times more likely to be sentenced to death than killers of blacks.

Professor David Baldus of the University of Iowa found the same race of the victim bias.[31] The Baldus study, one of the most statistically sophisticated of its

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[27] *See*, United Nations Charter, signed June 26, 1946, *entered into force* Oct. 24, 1945, 59 Stat. 1031, T.S. 993, Art. 55(c). *See also*, OAS Charter, signed April 30, 1948, *entered into force* Per. B., 1951, 2 U.S.T. 2394, T.I.A.S. 2361, Art. 3(j).

[28] *See* footnote 13 and accompanying text.

[29] *U.S. General Accounting Office, Death Penalty Sentencing, Research Indicates Pattern of Racial Disparities* (February 1990).

[30] Henderson, Jim, and Jack Taylor, "Killers of Dallas Blacks Escape the Death Penalty," *Dallas Times Herald*, Nov. 17, 1985, at 1.

[31] David Baldus, G. Woodworth, and C. Pulaski, *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990).

kind, found that killers of whites in Georgia were 4.3 times more likely to be sentenced to death than killers of blacks. This conclusion was drawn after considering 230 other non-racial variables leaving race as the sole explanation for the disparity.

The track record of the federal government in seeking and imposing death sentences raises similar concerns. Overall, the Reagan, Bush and now Clinton Administrations have sought the death penalty against a total of 30 defendants. Twenty-two (73 percent) of the federal death penalty prosecutions have been sought against African−American defendants. Half of the remaining eight federal prosecutions have been against Hispanic defendants. Four federal capital defendants have been white. The United States military now has a total of eight people on death row: six are African American, one is Filipino and one is white.

In 1987, the Supreme Court was asked in *McCleskey v. Kemp* to review compelling evidence that racial considerations influenced death sentences in Georgia. In that case, an African-American defendant, Warren McCleskey, claimed that his death sentence violated the 14th and 8th amendments of the constitution. He based his claim on substantial evidence that race, as much or more than any single legitimate sentencing factor, influenced the decision to sentence him to death. Although the Court did not challenge McCleskey's proof of a pattern of death of defendants whose victims were white more frequently than others, particularly African-American defendants, it refused to find a constitutional violation unless McCleskey could show that he had been the victim of intentional discrimination by individual decision-makers in his case. That difficult standard of proof virtually ensures that most death sentences that result from system-wide bias will not be remedied. Only in rare cases when the defendant can prove bias in the minds of a prosecutor, a judge or a juror would a capital defendant or his or her victim be protected against race discrimination. In light of the *McCleskey* decision, prospects for curbing one of the most egregious aspects of the death penalty in the United States are slim.

The death penalty and juveniles

Contrary to provisions of international human rights instruments that prohibit the execution of persons who were juveniles at the time the crime was committed,[32] juveniles continue to be sentenced to death and executed in the

[32] The International Covenant states in Article 6(5) that: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. . ." In addition, the

United States. Notwithstanding the reservation taken by the United States to the ICCPR prohibition against executing juveniles, the practice stands as a gross violation of human rights.[33]

As of May 1, 1993, 36 juveniles sat on death row in the United States.[34] Of these, 29 were 17 years old when the crime was committed; six were 16 years old; and one was 15 years old. Once again the United States is at odds with the international community: many countries that still sentence juveniles to death do not sentence anyone who is younger than 17 years old.

Since the beginning of the modern era of capital punishment, the United States has executed five juveniles through May 1, 1993.[35] All indicators are that juveniles will continue to be executed in the next few years as they exhaust their appeals. On November 8, 1993, the Senate tabled by a vote of 52 to 41 an amendment by Senator Simon that would have required those states that have capital punishment to limit the death penalty to those persons who were over 18 at the time of their crime.[36]

Mental illness and the death penalty

American Convention on Human Rights states in Article 4(5): "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age. . ."

[33] In *Thompson v. Oklahoma*, a plurality of the Court concluded that the Eighth Amendment bars the execution of a person who was under 16 at the time of his or her crime. Justice O'Connor did not accept that proposition, finding that there was insufficient evidence of an evolving consensus against executing juveniles. She concluded, however, that the absence of a minimum age in the Oklahoma death penalty statute renders the practice of imposing the death penalty unconstitutional under the circumstances. *See also*; *Stanford v. Kentucky*; 492 U.S.361 (1989) where the Court held that the death penalty may be applied to individuals who were 16 or 17 at the time of the crime.

[34] *See*, NAACP Legal Defense and Educational Fund, Inc., *supra* footnote 17.

[35] *Id.*

[36] *See* Cong. Rec. S15277-80 (November 8, 1993).

International human rights law prohibits the execution of anyone who is mentally ill.[37] In addition, countries that retain the use of the death penalty have generally created this exemption for the insane.[38] In *Ford v. Wainwright*, the Supreme Court held that the constitution forbids the execution of a person whose mental illness prevents him or her from comprehending the reasons for the penalty or its implications. The Court ruled further that states that seek to impose the death penalty must provide adequate procedures to reliably determine whether a condemned prisoner is so disabled that his or her execution would violate the constitution.[39]

Notwithstanding the well-established norm against executing people who are mentally ill, severely mentally disabled people have been executed in the United States. For example, Arthur Goode was executed on April 5, 1984, for the rape and murder of a boy. Goode had a history of mental illness from the age of three, and had taken medication for years. When Goode committed the murder, he had escaped from a mental hospital.[40]

Before his trial, a psychiatrist found Goode to be incompetent. However, three court-appointed psychiatrists declared him competent. During his trial,

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[37] Resolution 1984/50 on Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted in ECOSOC resolution 1984/50, states in *Annex* (3): ". . .nor shall the death sentence be carried out . . . on persons who have become insane." In 1988, the Economic and Social Council strengthened these protections by passing a resolution specifically prohibiting the execution of the mentally handicapped. E.S.C. Resolution 1989/64.

[38] Report of the Secretary-General of the United Nations on Capital Punishment, First Regular Session of 1985, at 14.

[39] *See Ford v. Wainwright, 477 U.S. 399 (1986)*; *United States of America: The Death Penalty*, Amnesty International, London (1987), at 76. Note that the U.S. Constitution does not prohibit the execution of a person who is mental retarded. *See Penry v. Lynaugh*, 492 U. S. 302 (1989). The Court ruled in *Penry* that, while the constitution did not bar the execution of Johnny Paul Penry, a person with an IQ of 54 and the abilities of a 6 1/2 year old, mental retardation is a mitigating factor that the sentencer must be given an opportunity to consider as a justification for not imposing the death penalty.

[40] Amnesty International, *supra* footnote 39, at 81.

Goode represented himself and did everything possible to ensure that he would be sentenced to death.[41]

On June 26, 1985, Morris Odell Mason was executed in Virginia for the murder of an elderly white woman. Mason had a long history of mental illness, and had spent time at three separate mental institutions. Mason had been diagnosed as having paranoid schizophrenia and mental retardation. At his trial, the judge denied him a psychiatrist for an evaluation, and his counsel did not have sufficient funds to hire one. Mason was found to be competent to stand trial, and was subsequently sentenced to death.[42]

In January 1992, at the height of the presidential election campaign, the state of Arkansas executed Ricky Ray Rector. Mr. Rector had tried to commit suicide by shooting himself in the head after committing his crime. To save his life, doctors removed massive amounts of tissue from the front of his brain, leaving Mr. Rector with little if any memory of the crime and no capacity to appreciate the punishment that was ultimately imposed on him. One of the most telling examples of the true state of Mr. Rector's mind was that he saved the pie that came as dessert for his last meal, to be eaten when he return from the execution chamber.

Adequacy of legal representation

There is a representation crisis with respect to death penalty cases; this crisis leads to "arbitrary" deprivations of life, prohibited by Article 6 of the ICCPR. In addition, according to paragraph 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty:

> (c)apital punishment may only be carried out pursuant to a final judgement by a competent court after legal process *which gives all possible safeguards to ensure a fair trial* . . . including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed *to adequate legal assistance at all stages of the*

[41] *Id*.

[42] Amnesty International, *supra* footnote 39, at 82.

proceedings (emphasis added).[43]

The disparity in resources available to the prosecution and to the defense for capital cases in the United States ensure that capital trials are unfair, in direct violation of paragraph 5 of the Safeguards. A study prepared by the American Bar Association on the resources available to prosecution as compared to resources available to defense concluded:

> . . .there is an imbalance nationwide favoring prosecution over defense at all stages of capital litigation. While this imbalance appears to exist at all stages of capital litigation, it appears to be greatest at the state post conviction level followed by the trial level, direct appeal and federal habeas corpus.[44]

National figures show that expenditures for prosecution far outpaced expenditures for defense: $4.3 billion to $1.4 billion.[45] In addition, while public defenders must use their limited budgets to cover administrative costs, investigative services, etc., prosecutors rely on the services of other official agencies that provide labs, data banks, investigative equipment, etc.

This problem was not addressed by the United States Supreme Court

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[43] Resolution 1984/50 on Safeguards Guaranteeing Protections of the Rights of Those Facing the Death Penalty, states in *Annex* (3):

> ". . .nor shall the death sentence be carried out . . . on persons who have become insane."

The resolution was adopted in ECOSOC resolution 1984/50 of May 1984.

[44] "A Comparison of Prosecution and Defense Resources For Capital Litigation," a study prepared by the American Bar Association for the Subcommittee on Civil and Constitutional Rights, Committee of the Judiciary, U.S. House of Representatives (September 1991), at 2.

[45] *Id.*, at 5.

decision in *Murray v. Giarratano*,[46] in which defendants in capital cases were denied the constitutional right to counsel in state post-conviction proceedings. The effect of *Murray v. Giarratano* has been a greater reliance on services provided by volunteer counsel, who are minimally compensated, if they are compensated at all.

In an attempt to meet the needs of indigent death row prisoners who lacked counsel to challenge constitutional violations in their cases, Congress created over a dozen Resource Centers to recruit and train volunteer attorneys and to provide direct representation when necessary. In addition, federal law allows for the appointment of counsel under the Criminal Justice Act (CJA). Twenty-one death penalty states do not have Resource Centers and largely rely on CJA and/or pro bono work. Furthermore, there is no consistent compensation scheme for attorneys under CJA.[47]

Due largely to the lack of funding received by capital defense teams, financial disincentives practically ensure capital defendants will receive incompetent and inexperienced counsel.[48] At least six states have maximum caps for appointed counsel of $1,500 per case; Mississippi had a maximum cap of $1,000.[49]

The quality of expertise that $1,000 or $1,500 will buy is shown by a recent survey of death penalty defense attorneys in the South: over fifty percent were dealing with their first death penalty case.[50] The same survey showed that in Alabama, Georgia, Florida, Mississippi, Texas and Louisiana capital defense counsel have been disbarred or otherwise disciplined at a rate of three to 46 times higher than the state average.[51]

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[46] 492 U.S. 1 (1989).

[47] *See* American Bar Association, *supra* footnote 44, at 9-10.

[48] Remarks of Justice Thurgood Marshall at Judicial Conference of Second District in Hershey, Pennsylvania (Friday, September 6, 1985) at 2.

[49] Marcia Coyle, Fred Strasser, and Marianne Lavelle, "Fatal Defense: Trial and Error in the Nation's Death Belt," *The National Law Journal* (Monday June 11, 1990), at 2.

[50] *Id.* at 2.

[51] *Id.* at 2.

Many attorneys are wholly unfamiliar with the special procedures of capital punishment cases, to the extent that some have not even read the states' capital punishment statutes.[52] In many instances, attorneys are unaware that a capital punishment trial is bifurcated into an initial proceeding to establish guilt and a subsequent proceeding to determine the penalty. The result is that attorneys fail to prepare for the crucial

sentencing phase of the trial, where it will be determined whether the defendant will receive a life sentence without parole or be sentenced to death.

In certain southern states the sentencing phase lasts an average of 3.1 hours, with no introduction of witnesses, no cross-examination, and little or no mitigating circumstances introduced against the imposition of the death penalty.[53] Furthermore, lack of preparation for the sentencing phase means that defense counsel may fail to present crucial evidence and arguments that could save a client's life.

Partly as a result of incompetent and inexperienced counsel at the trial level, one-third to one-half of the death penalty convictions are overturned by the state courts. In addition, about forty percent of capital cases are overturned by the federal courts upon habeas corpus proceedings.[54]

The case of Earl Washington illustrates this high vulnerability to error and the tragic consequences that result. A mentally retarded man from Virginia, Washington was initially arrested for breaking in and assaulting his brother.[55] Washington was interrogated about a rape, to which he confessed. Charges were dropped later as he did not meet the description of the rapist. But a confession was extracted from Mr. Washington on a murder rape of a woman he described as black, short, and that he had stabbed one or two times. In fact, the woman was white, 5 feet 8 inches, and had 38 stab wounds. No physical evidence tied

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[52] Vivian Berger, "The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases," *New York University Review of Law and Social Change* (1990-1991), at 247.

[53] Coyle, Strasser and Lavelle, *supra* footnote 49, at 3.

[54] *Id.* at 2.

[55] Clare Regan, "Justicia: On Extracting a Pound of Flesh" (May 1993), at 2.

Washington to the scene of the crime, and there was no incriminating evidence. The semen and hair found at the scene of the crime did not match Washington's. However, his court appointed counsel failed to bring any of these facts up on trial, and now Washington now awaits execution.[56]

Habeas corpus

Here, as in the representation crisis, U.S. practice violates both Article 6 of the ICCPR and Paragraph 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which states that "[c]apital punishment may only be carried out . . . after legal process which gives all possible safeguards to ensure a fair trial." However, in recent years, the United States Supreme Court has acted to limit the right to appeal a conviction at the federal level after a trial and post-conviction appeal(s) at the state level, thereby eroding a fundamental safeguard in ensuring a fair trial.

The overriding concern of the United States Supreme Court has been to make the trial level the primary area where federal constitutional questions are litigated and where defendants' rights are protected. The Court's position is particularly disturbing in light of the fact that the trial court has never been the "main event." The lack of adequate counsel at the state level ensures that defendants' constitutional rights will not be thoroughly litigated at the state trial level, and it is an undue burden on defendants to make a unreformed and flawed state trial the "main event."

The Supreme Court has limited access to federal habeas corpus review by creating a number of exemptions. One of the most pernicious of these is the increased deference federal courts have shown to state courts when defendant failed to bring up a question at the state level in the manner or at the time required under state law.[57]

In *Coleman v. Thompson*,[58] the Supreme Court overruled a previous case

[56] *Id.* at 2.

[57] Ira P. Robbins, "Recent Supreme Court Restrictions on Habeas Corpus" (February 23, 1993), at 3-4.

[58] 111 S.Ct. 2546 (1991).

and established that "(i)n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate *cause for the default* and *actual prejudice* as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice" (emphasis added). Coleman was denied an opportunity for federal review of his claims because he missed by three days a filing deadline in state court. He was executed in May 1992 despite widely publicized doubts surrounding his guilt.

Arguments for cause focus on ineffective counsel assistance which is difficult to satisfy.[59] Arguments for actual prejudice are analyzed by looking at a combination of actual innocence, plain error, and non-harmless constitutional error—a procedural test that is extremely difficult to overcome.[60]

The writ of habeas corpus has also been limited according to the constitutional rights the Supreme Court feels are protected by habeas corpus proceedings. This creates a hierarchy of constitutional rights with certain rights receiving more protection than others.[61] In *Stone v. Powell*,[62] the Supreme Court held that a federal court need not grant a writ of habeas corpus for a Fourth Amendment search and seizure claim without a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review.

A further limitation on the right to appeal at the federal habeas corpus

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[59] The Supreme Court ruled in *Burger v. Kemp*, 483 (U.S. 776 (1987) that it was not ineffective assistance of counsel when lawyers for Christopher Burger did not present *one word* of evidence regarding mitigation, for example, evidence that Christopher Burger was 17 years old at the time of his crime and that he had an extensive history of extraordinary abuse. Christopher Burger was executed in December 1993. The court's reluctance to "second guess" the decisions of lawyers in this and other cases demonstrates that the "ineffective assistance of counsel" standard is nearly impossible to satisfy.

[60] Ira P. Robbins, "Recent Supreme Court Restrictions on Habeas Corpus" (February 23, 1993), at 4.

[61] *Id.* at 1.

[62] 428 U.S. 465 (1976).

level is the nonretroactivity principle, which refuses to apply federal habeas corpus remedy to newly developed rules of constitutional criminal law or procedure to the petitioner's case after his or her conviction becomes final.[63] The exceptions to the rule are so narrow that very few appeals for habeas corpus may be brought up under this rule.

Substantial evidence exists to show the importance of the writ of habeas corpus. Most significant is the fact that approximately forty percent of death penalty cases granted habeas corpus review are overturned by the federal courts.[64] In one case, Walter McMillan was sentenced by a jury to life in prison.[65] Though no credible physical evidence linked McMillan to the crime, the trial judge overrode the jury and sentenced McMillan to death. After sitting on Alabama's death row for six years, McMillan received habeas corpus relief from the federal courts and is now free.

Another case involved the death sentence imposed on William Riley Jent and Earnest Lee Miller for the murder of a woman.[66] The two came very close to execution, but were granted a stay of execution. Responding to evidence that emerged in the years following the stay of execution, a federal judge said that the evidence showed a "`callous and deliberate disregard for the fundamental principles of truth and fairness' by police and prosecutors."

The U.S. Court of Appeals for Eleventh Circuit granted a new trial, and the grand jury testimony of witnesses was opened. Serious inconsistencies in the evidence emerged. One key witness had told the police that she might have dreamt seeing the murder. The names of six witnesses who would have helped the defendants came to light. After extensive evidence emerged showing inadequate

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[63] Robbins, *supra* footnote 57, at 2.

[64] Coyle, Strasser, and Lavelle, *supra* footnote 49, at 2.

[65] Statement of Walter McMillan to the Congress of the United States House Subcommittee on Civil and Constitutional Rights (July 23, 1993).

[66] The information on this case was gathered from Kathleen A. Behan, Michele J. Brace, Leigh McAfee, and Ronni Fuchs, "Why We Need the Great Writ: The Role of Federal Habeas Corpus in Protecting Life and Liberty." This pamphlet contains a number of anecdotes of cases where habeas corpus has been used to reverse wrong convictions (unpublished).

police procedures and further undermining the state's case, the district court granted the writ of habeas corpus, and the two defendants were freed after agreeing to a plea bargain.

Any step to limit the right to the writ of habeas corpus implicates Article 6 of the ICCPR and jeopardizes the ability of the criminal justice system to uncover the type of mistakes that led to the unjust sentencing to death of Walter McMillan, William Riley Jent, Earnest Lee Miller and many other innocent persons. It is also a violation of the Article 14 right to all the possible safeguards to ensure a fair trial.

Conclusion

Despite attempts to insulate itself from the scrutiny of international human rights law regarding capital punishment, the United States is one of a dwindling number of nations that clings to the use of the death penalty. There are particular problems with racial bias and the execution of juveniles and those with significant mental disabilities. Moreover, the current administration of the punishment violates basic international standards of fairness.

Recommendations

1) Abolish the death penalty in the United States at both the federal and state levels.

Short of such abolishment, steps should be taken to:

2) Support state and federal legislation to bar the execution of persons under the age of 18 at the time of the crime, persons with mental retardation and other mental disabilities.

3) Support legislation that provides a meaningful remedy for race discrimination in capital cases.

4) Support legislation to require states that continue to maintain capital punishment to provide competent counsel and adequate resources to provide for an effective defense in capital cases at every state of the process.

5) Support legislation that restores and preserves the full complement of rights of condemned prisoners to challenge their death sentences and executions by

writ of habeas corpus.

6) Appoint a national commission to study the death penalty in the United States and the degree to which civil and human rights abuses, evaluated by international standards, are inherent in the practice of capital punishment in the United States. Propose and support legislation that imposes a moratorium on federal death sentences and executions, pending the commission's report. Support efforts to encourage states to impose their own moratoriums on executions, pending the commission's report.

7) Repeal the reservations regarding capital punishment in the International Covenant of Civil and Political Rights.