# INTRODUCTION

**Stephen P. Garvey**



Few decisions are more profound than that of a state faced with the question of taking a life. The United States has been living with capital punishment now for more than twenty-five years. Capital punishment has, of course, been around for much longer, but the modern era in the United States dates back only to 1976, when the Supreme Court of the United States resolved the then-extant doubts about the death penalty's constitutionality. Death, the Court finally said, was not an unconstitutionally cruel and unusual punishment, provided that it was administered in a manner free from arbitrariness, caprice, and discrimination.

Thus began America's modern experiment with death. Much has changed between then and now. More states have added themselves to the roster of those that authorize death as a sanction for murder, even as more nations of the world have taken themselves off. We have, as of July 1, 2002, seen 784 men and women put to death in the United States. Texas and Virginia lead the way with 360 executions between them.[1] We have seen the electric chair and the gas chamber gradually give way to lethal injection; and we have seen the first execution under federal authority since 1963: on June 11, 2001, the United States executed Timothy McVeigh for the 168 deaths he caused with the 1995 bombing of the Murrah Federal Building in Oklahoma City. The second federal execution followed eight days later. Meanwhile, the Supreme Court has worked to keep the penalty of death functioning within the limits, as it sees them, of the rule of law.

But even as the numbers on death row continue to grow, the doubts that have long surrounded the death penalty continue to grow as well. Can we really

1. See Death Penalty Info. Ctr., "Executions," available at http://www.deathpenaltyinfo.org/facts.html.

administer a system of capital punishment fairly, without arbitrariness, without mistake, without regard to race, and consistent with evolving international norms?

Questions such as this are once again attracting serious public concern. A recent issue of *Newsweek* magazine carried the headline "Rethinking the Death Penalty" on its cover.[2] Within the last year and a half, two justices of the United States Supreme Court have publicly raised questions about the fairness of the death penalty's administration.[3] Indeed, the prospect of a national moratorium on executions is no longer just the wishful thinking of abolitionists. In Illinois, for example, Governor George Ryan put a halt to executions after the thirteenth innocent man walked off that state's death row; at the same time, he appointed a special commission to investigate the causes of these miscarriages and, if possible, to identify ways to prevent any more of them in the future.[4]

The essays collected here focus on a variety of recent developments, ranging from changes in the legal processes for administering the death penalty to new information about how those processes actually work and to the emerging international consensus against death as a punishment for crime. Each chapter provides the insight and analysis necessary for informed debate.

*Public opinion*. Since the mid-1980s public support for the death penalty has been surprisingly stable, hovering between 70 and 80 percent. But recent polls show signs of change. According to one of the latest, a Gallup poll conducted in February 2001, the percentage of respondents nationwide who expressed generalized support for the death penalty was down to 67 percent.[5] In Chapter 1, Professors Samuel Gross and Phoebe Ellsworth examine in detail the nature of public support for the death penalty today and the reasons behind the recent drop. They end with some thoughts on what this change means for the future. Is it a blip, or is it a harbinger of a larger and more enduring shift in public opinion?

*Habeas corpus*. Most of the men and women on the death rows across the United States arrived there under state authority. The courts of those states are

2. See Jonathan Alter, "The Death Penalty on Trial," *Newsweek*, June 2000, at 24; see also John Harwood, "Death Reconsidered," *Wall St. J.*, May 22, 2001, at A1.

3. See Ken Armstrong and Steve Mills, "O'Connor Questions Fairness of Death Penalty," *Chi. Trib.*, July 4, 2001 (Justice Sandra Day O'Connor); "Death Penalty Moratorium Backed," *Houston Chron.*, Apr. 10, 2001 (Justice Ruth Bader Ginsburg).

4. See Ken Armstrong and Steve Mills, "Ryan Suspends Death Penalty," *Chi. Trib.*, Jan. 31, 2000.

5. See Jeffrey M. Jones, "Two-Thirds of Americans Support the Death Penalty," available at http://www.gallup.com/poll/releases/pr010302.asp (reporting results of poll conducted on February 19–20, 2001).

obliged to guarantee that no death sentence is carried out unless it was obtained in accord not only with state law but also with the federal Constitution. However, every capital defendant sentenced to death under state authority is entitled to petition a *federal* court, through a process known as habeas corpus, to review the constitutional validity of his conviction and sentence. As a recent and widely reported study has shown,[6] federal habeas corpus is a vitally important part of the process by which the legal system detects and remedies unconstitutionally obtained death sentences. Yet, as Professor Larry Yackle documents and explains in Chapter 2, recent changes in the law of federal habeas corpus jeopardize its ability to perform this all-important function.

*Innocence*. Learned Hand, one of the nation's most respected federal judges, once called the prospect that an innocent man could be convicted of a crime, let alone a capital crime, little more than a "ghostly phantom," an "unreal" specter "haunt[ing]" the law.[7] But Hand's phantom is real. Thanks in no small part to DNA technology, Hand's phantom has acquired a human face—indeed, several human faces. Since 1973, 101 men have been set free from death row.[8] The faces of the wrongfully condemned have become the driving force behind the movement for a moratorium. But how do such mistakes happen? *Chicago Tribune* journalists Ken Armstrong and Steve Mills conducted an intensive investigation into the operation of the death penalty in Illinois. The resulting five-part series, "The Failure of the Death Penalty in Illinois," appeared in November 1999 and was instrumental in Governor Ryan's subsequent decision to impose a moratorium. In Chapter 3, Armstrong and Mills draw on the Illinois experience to explain how and why the criminal justice system fails in this most fundamental of ways and why mistakes are especially likely when the crime is murder and the potential punishment is death.

*Race*. Any effort to understand the death penalty in the United States without attending to the influence of race would be incomplete. Those who defend the current system often admit that race once mattered, but they insist that times have changed and that it matters no longer. Yet, as Professor Sheri Lynn Johnson

6. See James S. Liebman et al., "Capital Attrition: Error Rates in Capital Cases, 1973–1995," 78 *Tex. L. Rev.* 1839, 1849 (2000) (finding that federal courts overturned due to serious error 40 percent of the death sentences subject to federal court review during the twenty-three-year study period).

7. See, for example, Di Carolo v. United States, 6 F.2d 364, 368 (2d Cir. 1925) (Hand, J.); United States v. Garsson, 291 F.646, 649 (S.D.N.Y. 1923) (Hand, J.).

8. Death Penalty Info. Ctr., "Innocence: Freed from Death Row," available at http://www.deathpenaltyinfo.org/Innocentlist.html (current as of July 1, 2002).

explains in Chapter 4, the influence of race persists. All too often the difference between life and death cannot be explained without at some point taking account of race, whether it be the race of the defendant or the race of the victim (or both) or the race of the jurors. The challenge of creating a capital sentencing system free from the pernicious power of race remains unmet. Professor Johnson explains why and assesses the prospects for meeting that challenge.

*Capital juries*. Sentencing in capital cases is different in many ways. One significant difference is the fact that, while judges do most of the sentencing in noncapital cases, in most capital cases jurors—the conscience of the community—decide the defendant's fate. But how do jurors decide between life and death? In Chapter 5, Professors John Blume and Theodore Eisenberg and I describe some of the most recent empirical investigations into the behavior of capital sentencing juries. The results are disquieting. Far too many unqualified jurors end up serving; many capital jurors fail to understand the basic constitutional principles on which their deliberations should proceed; unfounded anxieties about the defendant's future dangerousness distort their decision making; and a defendant's fate can turn not just on the facts and circumstances of his case but also on the race of the jurors who sit in judgment of him.

*International law*. We live in an increasingly global world, and the international community increasingly insists that every nation of the world respect human rights. Most of the countries with which the United States prefers to keep company have abolished the death penalty. Indeed, most of them now see capital punishment as a human rights violation. In this respect, we are left in the company of nations whose records on human rights we regard with contempt. But what exactly does existing international law say about the status and legitimacy of the death penalty? In Chapter 7, Professor William Schabas surveys contemporary international law. He analyzes the variety of legal instruments, from treaties and conventions to declarations and resolutions, that constitute the international law of the death penalty. He then assesses how those instruments might affect the future course of law and politics here at home.

As capital cases go, *Callins v. Collins*[9] was fairly typical. Callins, the defendant in the case, was convicted and sentenced to death in Texas. He appealed his conviction and sentence on various grounds through the state courts of Texas and then through the federal courts. His next step was to petition the United States Supreme Court to hear his case. The Court declined, as it does in most of the cases that come before it, and Callins was eventually executed in the spring

9. 510 U.S. 1141 (1994).

of 1997. This otherwise common case nonetheless provided the occasion for an uncommon exchange between two of the Court's members, an exchange that frames the debate over the future of capital punishment.

Dissenting from the full Court's decision not to hear Callins's appeal, Justice Harry Blackmun examined the Court's long struggle to make good on the promise it made many years before that the death penalty had to be administered fairly or not at all.[10] For Justice Blackmun, that promise remained unfulfilled, not for want of trying, but because the promise itself was impossible to keep. Convinced that mere mortals could never come up with a system of capital punishment capable of being both just and even-handed, Justice Blackmun made the following pronouncement: "From this day forward, I no longer shall tinker with the machinery of death."[11] Accordingly, he voted, until his retirement three years later, to reverse every capital sentence that came before the Court for review.

Justice Antonin Scalia, concurring in the Court's decision not to hear Callins's appeal, took a different view.[12] According to Justice Scalia, the notion that capital punishment and the Constitution were on a collision course rested on a misunderstanding of the Constitution itself. The Constitution does not, he said, require the impossible. On the contrary, its text clearly countenances the punishment of death; consequently, any reading of the Constitution that foreclosed death was a mistaken reading. The Constitution demanded no further tinkering with the machinery of death. Indeed, according to Justice Scalia, the Court had tinkered too much already.

Is America's death penalty beyond repair? My hope is that the chapters to follow will help readers decide for themselves.

[Editor's note: All chapters in this volume were substantially complete by early summer 2001. Several important developments have taken place since then: the terrorist attacks of September 11, 2001; the decisions of the U.S. Supreme Court proscribing the execution of the mentally retarded and requiring that a jury, not a judge, find any fact necessary to render a defendant eligible for the death penalty; the decision of a New York federal district judge declaring the federal death penalty unconstitutional; a moratorium on executions imposed by the governor of Maryland; and the exoneration of at least three more innocent men sentenced to death.]

10. See id. at 1144 (Blackmun, J., dissenting from the denial of certiorari).

11. Id. at 1145.

12. See id. at 1141–43 (Scalia, J., concurring in the denial of certiorari).