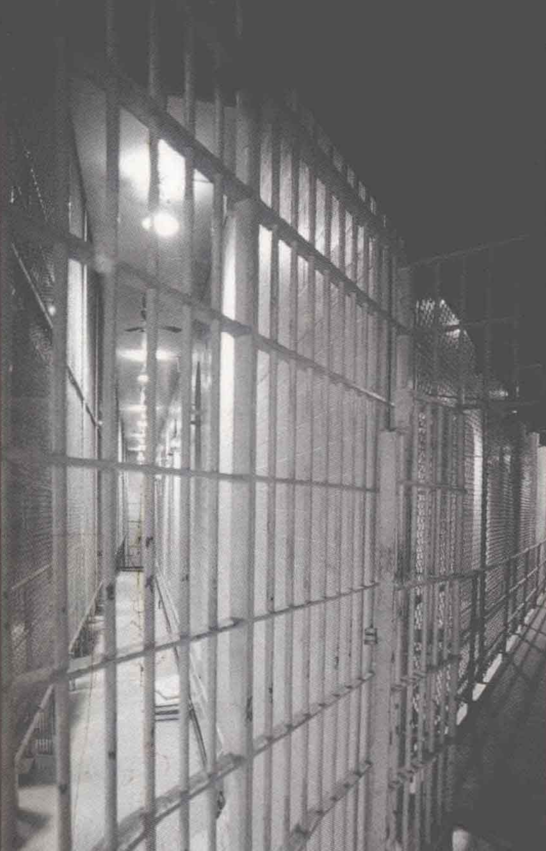
CQ's Vital Issues Series

Capital Punishment



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Capital Punishment

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Preface

CQ Press is pleased to present CQ's Vital Issues Series, a new reference collection that provides unparalleled, unbiased analyses of controversial topics debated at local, state, and federal levels. The series covers all sides of issues equally, delving into the topics that dominate the media, shape election-year politics, and confront the American public. Each book includes an issue from *The CQ Researcher* that introduces the subject; in-depth explanations of relevant politics, policy, and political actors; analyses of major for-profit and nonprofit business interests; and discussion of international reaction to how the United States handles the issue. In addition, each volume features extensive appendixes to aid in further research. Titles in the series include *Capital Punishment, Welfare Reform,* and *Immigration.* We believe CQ's Vital Issues Series is an exceptional research tool, and we would like your feedback. Please send your comments to aforman@cqpress.com.

Introduction

As I write this introduction barely three weeks after the tragedies of September 11, 2001, the political landscape of a year ago seems as different, and distant, as the moon's. In autumn 2000 domestic political issues were in the ascendancy. Only one presidential debate dealt with foreign policy in any detail, and "security" meant programs for the elderly rather than protection from terrorist attacks. The economy was showing signs of a slowdown, but times were still easy in America. When we sat transfixed by the news, it was the collapse of ballot boxes that caught our attention. Some comics wondered, as weeks went by without a decision from the November election, if we would be better off without a new president.

Today I write in a country where issues other than criminal investigation and economic downturn have all but vanished from the political agenda. Our grief over the deaths of thousands, admiration for heroic rescue workers, and anger at the perpetrators have pushed aside, for the moment, much partisan rhetoric and debate. Was it really only this spring when a "bill of rights" referred to patients and their HMOs? Were competing versions of education legislation, just months ago, the subjects of congressional compromise and recriminations?

Yet in some ways our national tragedy has confirmed the continuing relevance of the public policy issues with which we inaugurate CQ Press's new Vital Issues Series. Capital punishment, welfare reform, and immigration: all are issues at the core of our national sense of justice, our definition of who is part of our country, and our understanding of rights and responsibilities. As we try to understand the crimes that led to such a massive loss of life, will our evaluations of the death penalty change? As we see Muslims and Arab immigrants targeted indiscriminately, will we think about immigration policy differently? As we struggle through layoffs and economic retrenchment, hard times that hurt everyone but affect the poor the most, will our view of the legacy of welfare reform change?

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These questions deserve careful thought and thorough knowledge. The volumes in CQ's Vital Issues Series seek to provide the answers. They gather together a clear summary of the various dimensions of each of these important issues; a comprehensive look at the politics and policy developments of the past decade; a discussion of the various business, nonprofit, and political actors who influence the debate; and a view of the international context of U.S. policy. For those new to the subject, a Vital Issues book provides the necessary background in a readable and accessible format. For readers already acquainted with the debates, a Vital Issues volume is a useful reference for facts on various aspects of the issues, for an analysis of how those aspects fit together, and for further sources of information.

Each book in the series follows a format designed to make research and understanding as easy as possible. The first chapter of each book, "Issues, Viewpoints, and Trends," is a lively, succinct, and balanced account of the current policy debate. Reprinted from *The CQ Researcher,* this section is a primer for the novice. The second chapter, "Politics and Policy," presents a thorough look at policymaking and implementation: What have been the major developments of the past decade? How have debates at the level of policy formulation been translated into policy on the ground? This section pays particular attention to variations at the state and local levels: a Vital Issues book gives readers the story not only from Washington, D.C., but also from around the country, with an account of innovations and a summary, where appropriate, of each state's experience.

The third chapter, "Agencies, Organizations, and Individuals," explains the specific role that business, nonprofit, and political actors play in shaping—and continuing to shape—policy developments. Sketches of important organizations and their contributions are included, along with contact information and Web addresses. The final chapter, "International Implications," draws attention to the international context of our policy debates. Americans tend to forget that policies affect and are affected by events and policies in other countries and ignore the experience of other nations in struggling with similar problems. One of the distinctive contributions of CQ's Vital Issues Series is that it summarizes this international context, reporting accurately—but simply—the major worldwide trends, comparisons, and reactions that Americans need to know to make good policy at home.

As debates over capital punishment, immigration, and welfare reform recur—and they loom just over the horizon—we may find ourselves, more self-consciously

than before, speaking both as interested individuals with differing points of view and as citizens with a responsibility to our common life. We hope that CQ's Vital Issues Series will provide readers with the information and perspective necessary to have these conversations. Whether you are a student, a journalist, an activist, or a concerned citizen, this series is for you. Let us know if we have been successful.

Ann Chih Lin
University of Michigan

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1 Issues, Viewpoints, and Trends

The CQ Researcher Death Penalty Update

A series of shocking murders in the past few years has focused public attention once again on the death penalty. The deaths caused by the Oklahoma City bombers, the "Unabomber," and others have lent support to advocates of capital punishment. They continue to argue that capital punishment not only deters crime but also helps the families of murder victims find "closure." But opponents call for reform, if not abolition, of the death penalty. They point to disturbing evidence that nonwhite offenders are more likely to be executed for their crimes than white offenders and that poor inmates often do not receive adequate legal counsel. As proof they cite the cases of ninety-four people released from death row since 1973 after courts reversed their convictions.

The Issues

It had been more than three years since Rolando Cruz was cleared of the charges that landed him on death row, but there was still bitterness in his voice. "I did twelve years, three months, and three days," he told a conference on capital punishment. "They did kill me. I am who I am now because this is who they made."[1]

Cruz and another man, Alejandro Hernandez, were sentenced to death for the 1983 abduction, rape, and murder of ten-year-old Jeanine Nicarico of Naperville, Illinois. It was the kind of high-profile crime that prompts communities to demand quick action by law enforcement officers. DuPage County authorities complied by charging Cruz and Hernandez with Jeanine's murder.

This article was written by Mary H. Cooper for *The CQ Researcher* (January 8, 1999): 3–23.

Both men were tried, convicted, and sentenced to death in 1985. Their convictions were based largely on the testimony of jailhouse informants and a deputy sheriff who said Cruz's description of a dream included details about the murder that only the killer would have known.

In 1995, after more than ten years on death row, Cruz and Hernandez were released from prison after DNA testing proved that another man had raped Jeanine. At the time of the murder, Brian Dugan, a repeat sex offender and confessed murderer, had told authorities that he alone had committed the crime—a fact that the Cruz and Hernandez juries were not told. Three prosecutors and four law enforcement officers have since been charged with obstruction of justice for concealing evidence that would have exonerated the men a decade earlier.[2]

The Cruz and Hernandez cases may be dramatic, but they are hardly unique. More than seven hundred people have been executed in the United States since the Supreme Court reinstated the death penalty in 1976. Over that same period, ninety-four condemned inmates have been released since 1973 after evidence showed they had been wrongfully convicted. That equates to roughly one exoneration for every seven executions.

"If you had to go to a hospital for a life-and-death operation and found that hospital misdiagnosed [one out of every seven] cases, you'd run," said lawyer Barry Scheck, a member of O.J. Simpson's defense team. "It's an intolerable level of error, regardless of your views on the death penalty."[3]

Scheck spoke at a November 1998 national conference on wrongful conviction and the death penalty at Northwestern University Law School. "We don't have a position on the ultimate morality of the death penalty," says conference participant Richard C. Dieter, executive director of the Death Penalty Information Center in Washington, D.C. "It's how the death penalty is applied in the United States that we are critical of. We say that there's a lot of unfairness and that mistakes are made, and that at least we should attempt to change and correct those things."

Indeed, no one is predicting the death penalty will be abolished anytime soon in the United States. Capital punishment is on the books in thirty-eight states, plus the federal government and the military. There are now 3,726 prisoners around the country awaiting execution.

A large majority of Americans still support capital punishment, and that support seems unlikely to wane in the wake of several horrific crimes in the past few years. Few protested the death sentence meted out to an unrepentant Timothy J.

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McVeigh for his role in the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, which killed 168 people. And many Americans were angered when Susan Smith was sentenced in South Carolina to life in prison rather than death after drowning her two young children in 1994 and charging a mysterious black man with the crime. Similarly, many thought "Unabomber" Theodore Kaczynski deserved the death penalty for mailing letter bombs that left three people dead and twenty-two others injured.

Death penalty advocates say leniency in some of these cases shows that the system works by sparing mentally ill or mentally retarded criminals. But many legal experts point to flaws in the death penalty's application that open the criminal justice system to charges of pervasive unfairness. Recent studies have documented longstanding allegations of racial discrimination in capital cases. Statistics show that prisoners of all races are more likely to be executed if the victim was white than some other race. Although about half the homicide victims are people of color, more than 80 percent of the prisoners on death row were convicted of killing whites.[4] A 1999 study also suggests that blacks are the most likely to receive the death penalty, regardless of the victim's race.[5]

"These studies are trying to determine whether race discrimination accounts for the race disparities in sentencing," says Dieter, author of the latest such study. "The odds of getting the death penalty are much higher if you're black than if you're white."

Defenders of capital punishment counter that any racial discrimination that may exist in its application argues for expanding the use of capital punishment, not abolishing it. "If it is true that people who kill black victims are less likely to get sentenced to death, that doesn't show the death penalty is discriminatorily imposed," says Kent S. Scheidegger, legal director at the Criminal Justice Legal Foundation in Sacramento, California. "It shows the death penalty is discriminatorily withheld. And the answer to that is more death sentences, not fewer, for the same kinds of crime in black-victim cases."

Another area of concern has been the death penalty's application to mentally retarded or mentally ill prisoners. The U.S. Supreme Court ruled in 1986 that the Eighth Amendment prohibits the execution of insane prisoners, but the definition of insanity varies widely among jurisdictions. Although evidence of mental illness led courts to spare Kaczynski and Smith, many less notorious killers have been executed despite evidence that they were unable to discern the seriousness of their

crimes. In fact, thirty-five mentally retarded people have been executed since 1976; only fourteen states prohibit the death penalty for the mentally retarded.[6]

Much of the current criticism of capital punishment concerns recently implemented restrictions on habeas corpus, a procedure for challenging a state conviction or sentence in federal court on constitutional grounds after normal appeals have been exhausted. The Constitution enshrines this right in Article 1, Section 9, and forbids the suspension of habeas corpus except in cases involving rebellion or invasion that threaten the public safety.

The mounting crime rates of the late 1980s prompted Congress to pass the 1996 Anti-Terrorism and Effective Death Penalty Act. Among other things, the sweeping measure not only set a one-year deadline for submitting a habeas corpus petition after state appeals are exhausted but also limited prisoners to one appeal in most cases. Supporters of the measure wanted to deter prisoners from launching repeated and groundless petitions to stall their executions.

Critics say the 1996 law fails to recognize the importance of the appeals process, compounding the unfairness of capital punishment. Most defendants in capital cases cannot afford experienced defense attorneys, and many do not receive adequate counsel, critics say, either at trial or during the appeals process.

In 1997, the American Bar Association (ABA) called for a moratorium on executions, citing "a haphazard maze of unfair practices with no internal consistency." But public support for the death penalty continues to run high, making the prospects doubtful for substantive reform in the near future.

As the debate over the fairness of the death penalty continues, these are some of the questions being asked:

Should recent restrictions on the right to appeal be rolled back?

One of the main complaints of death penalty advocates has been the growing delay between sentencing and execution. From 1977 to 1996, the average stay on death row increased from 51 months to 125 months, as prisoners appealed their sentences at the state level and, if those failed, at the federal level, all the way to the Supreme Court.[7] Critics claimed that most of the appeals were without merit and intended only to stall for time, and they called on Congress and the courts to do something.

Over the last decade the Supreme Court and Congress have responded, restricting men and women on death row from seeking habeas corpus review of their convictions. Chief Justice William Rehnquist has led the high court's efforts to stream-

line the handling of death row appeals. In 1991, for example, the Supreme Court ruled that an appeal filed three days late is not entitled to federal court review. In 1998, it made it harder for appeals court judges to delay executions, ruling that a federal court had committed a "grave abuse of discretion" when it halted the execution of convicted rapist and murderer Thomas Thompson in California.

Congress also ratcheted up the effort to curtail death row appeals. The 1996 Anti-Terrorism and Effective Death Penalty Act set a limit of one year for state prisoners to petition to the federal level after exhausting their appeals in state courts. But in states that meet the law's standards for providing adequate counsel to defendants, the limit is only six months. The law also made it difficult to file more than one habeas petition by requiring federal judges to defer to state court rulings on constitutional and other issues unless the state rulings were deemed "unreasonable."

"If a second or successive habeas petition raises the same claim that has been raised and decided adversely to the petitioner, then it must be dismissed," says Ira Robbins, a law professor at the American University's Washington College of Law and an expert on capital appeals. "There is no discretion there."

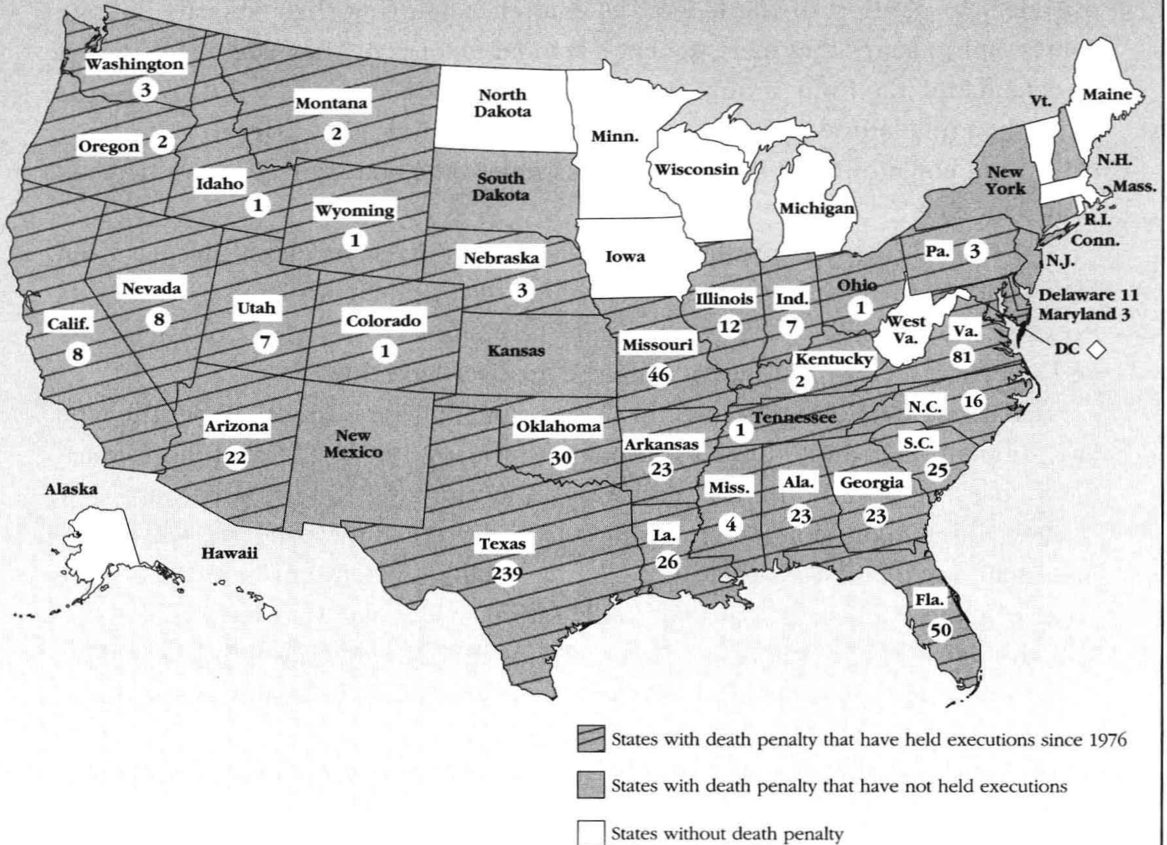
Even if a new claim is presented in a second or successive appeal, under the 1996 law the petition cannot be filed without authorization by a federal appeals court. Such courts have only limited discretion in authorizing the filing because they must examine a combination of reasons why the new claim was not presented earlier, including possible changes in the law, as well as evidence of innocence. "The court of appeals must look at that combination, which is a very hard test to satisfy," Robbins says. "So there has been a striking limitation on the ability to file second or successive petitions in the district court because of this gatekeeping provision that has to be ruled on by the court of appeals."

The other main restriction to death row appeals, the one-year statute of limitations on habeas petitions, marks a clear departure from previous law. "There was no statute of limitations prior to April 24, 1996, when the law was passed," Robbins says.

Critics say the new combination of restrictions could make it harder for innocent prisoners to make their case in time to avoid execution. "The restrictions impinge right at the point where these kinds of cases might run into trouble," Dieter says. "Some of the evidence of DNA doesn't show up until a number of years later. Not everybody needs twenty years to make their case, but there needs to be an exception for credible claims of innocence that allows that door to be open. These re-

Capital Punishment in the United States

Since the Supreme Court declared the death penalty constitutional in 1976, twenty-nine of the thirty-eight states with death penalty statutes have held executions. Texas, Virginia, and Florida conducted more than half of the 713 executions since 1976. Eighty-five people were executed nationwide in 2000.*



** Numbers on the map indicate the number of executions held in each state since 1976.*

Source: Death Penalty Information Center.

strictions make it more likely not only that innocent people will be sentenced to death but that some will be executed."

In Dieter's view the federal restrictions on death row appeals are especially onerous in light of obstacles that already block appeals at the state level. In most states, a death row appeal goes from the trial court straight to the state supreme court. "These cases are reviewed at the state level, and that's where the mistakes should be found," Dieter says. "But what you find on the state level are comparable or even worse restrictions on appeals. The standard to get a review in some states is almost insurmountable. A lot of states have passed measures to limit the state part of the appeal, and when you tack on the federal limitations, you have a very difficult situation for anybody who has evidence of their innocence to get anywhere."

But other legal experts say the appeals process needs more, not fewer, restrictions. "Successive petitions," Scheidegger says, "are almost always without merit." He cites the 1997 *Lindh v. Murphy* case, in which the Supreme Court held that the 1996 law's provisions could not apply to petitions that were pending before the law was passed. "This was a quite wrong decision, in my opinion, that has postponed most of the law's benefits by eliminating a very large class," he says.

With 591 prisoners on death row and only eight executions since 1976, California has the biggest backlog of death penalty cases in the country. "As far as the existing backlog goes," Scheidegger says, "the new law is doing us no good at all."

Critics say the anti-terrorism act has failed to streamline the appeals process in large part because it gave federal judges the authority to decide whether states qualify for the six-month deadline by providing competent legal counsel to indigent prisoners. In 1998, Andrew Peyton Thomas, a former assistant attorney general for Arizona, wrote:

> Congress gave this critical responsibility to the very federal judges whom the act was meant to control. Not surprisingly, they have been in no hurry to declare the states in compliance. To date, not a single state has been permitted to opt in to the [anti-terrorism act's] system of expedited capital appeals. Two years after passage of the [law], death penalty appeals in the federal courts remain as protracted as ever.[8]

Critics of the anti-terrorism act cite studies suggesting that innocent people have already been executed in the United States and predict that the law makes such mistakes more likely to occur. A landmark 1987 study concluded that twenty-

three innocent prisoners were executed from 1900 to 1987.[9] But some supporters of streamlining the appeals process for death row inmates question the findings and even suggest that executing the occasional innocent may be an acceptable price to pay.

"There is no proof that an innocent has been executed since 1900," affirms Justice for All, a Houston-based victims'-rights group. "In the context that hundreds of thousands of innocents have been murdered or seriously injured, since 1900, by criminals improperly released by the U.S. criminal justice system (or not incarcerated at all!), the relevant question is: Is the risk of executing the innocent, however slight, worth the justifications for the death penalty—those being retribution, rehabilitation, incapacitation, required punishment, deterrence, escalating punishments, religious mandates, cost savings, the moral imperative, just punishment and the saving of innocent lives?" [10]

Should behavior in prison be considered in decisions to carry out executions?

In 1983, Karla Faye Tucker and a male companion broke into a Houston apartment to steal some motorcycle parts. But they encountered two occupants and brutally killed them with a pickax. Both were convicted and sentenced to death. Tucker's codefendant died in prison of natural causes, but as Tucker's date with the executioner neared, Pope John Paul II and other religious leaders urged then-governor George W. Bush to spare her life.

"She is not the same person who committed those heinous ax murders," said televangelist Pat Robertson on *The 700 Club*. "She is totally transformed, and I think to execute her is more of an act of vengeance than it is appropriate justice." [11]

To Tucker's supporters, she had earned clemency throughout her fourteen years of incarceration. Soon after arriving on death row, she became a born-again Christian. Prison guards attested to her exemplary behavior over the years, including her efforts to help other prisoners learn from her experience. By all accounts, Tucker appeared to have been completely rehabilitated.

Governors in Texas, which leads the country in executions—239 since 1976—have offered clemency to about a fifth of the prisoners scheduled for execution. Despite the appeals and the protesters outside the Huntsville prison complex calling for mercy, Bush allowed the thirty-eight-year-old Tucker to be executed by lethal injection on February 3, 1998. But the controversy over what role postcon-

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