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PENALTY
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The **DEATH PENALTY** *Opposing Viewpoints®*

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Paul A. Winters, *Book Editor*



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“Congress shall make no law . . .
abridging the freedom of speech,
or of the press.”

First Amendment to the U.S. Constitution

The basic foundation of our democracy is the First Amendment guarantee of freedom of expression. The Opposing Viewpoints Series is dedicated to the concept of this basic freedom and the idea that it is more important to practice it than to enshrine it.

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Why Consider Opposing Viewpoints?

"The only way in which a human being can make some approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variety of opinion and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this."

John Stuart Mill

In our media-intensive culture it is not difficult to find differing opinions. Thousands of newspapers and magazines and dozens of radio and television talk shows resound with differing points of view. The difficulty lies in deciding which opinion to agree with and which "experts" seem the most credible. The more inundated we become with differing opinions and claims, the more essential it is to hone critical reading and thinking skills to evaluate these ideas. Opposing Viewpoints books address this problem directly by presenting stimulating debates that can be used to enhance and teach these skills. The varied opinions contained in each book examine many different aspects of a single issue. While examining these conveniently edited opposing views, readers can develop critical thinking skills such as the ability to compare and contrast authors' credibility, facts, argumentation styles, use of persuasive techniques, and other stylistic tools. In short, the Opposing Viewpoints Series is an ideal way to attain the higher-level thinking and reading skills so essential in a culture of diverse and contradictory opinions.

In addition to providing a tool for critical thinking, *Opposing Viewpoints* books challenge readers to question their own strongly held opinions and assumptions. Most people form their opinions on the basis of upbringing, peer pressure, and personal, cultural, or professional bias. By reading carefully balanced opposing views, readers must directly confront new ideas as well as the opinions of those with whom they disagree. This is not to simplistically argue that everyone who reads opposing views will—or should—change his or her opinion. Instead, the series enhances readers' depth of understanding of their own views by encouraging confrontation with opposing ideas. Careful examination of others' views can lead to the readers' understanding of the logical inconsistencies in their own opinions, perspective on why they hold an opinion, and the consideration of the possibility that their opinion requires further evaluation.

Evaluating Other Opinions

To ensure that this type of examination occurs, *Opposing Viewpoints* books present all types of opinions. Prominent spokespeople on different sides of each issue as well as well-known professionals from many disciplines challenge the reader. An additional goal of the series is to provide a forum for other, less known, or even unpopular viewpoints. The opinion of an ordinary person who has had to make the decision to cut off life support from a terminally ill relative, for example, may be just as valuable and provide just as much insight as a medical ethicist's professional opinion. The editors have two additional purposes in including these less known views. One, the editors encourage readers to respect others' opinions—even when not enhanced by professional credibility. It is only by reading or listening to and objectively evaluating others' ideas that one can determine whether they are worthy of consideration. Two, the inclusion of such viewpoints encourages the important critical thinking skill of objectively evaluating an author's credentials and bias. This evaluation will illuminate an author's reasons for taking a particular stance on an issue and will aid in readers' evaluation of the author's ideas.

As series editors of the *Opposing Viewpoints* Series, it is our hope that these books will give readers a deeper understanding of the issues debated and an appreciation of the complexity of even seemingly simple issues when good and honest people disagree. This awareness is particularly important in a democratic society such as ours in which people enter into public debate to determine the common good. Those with whom one disagrees should not be regarded as enemies but rather as people whose views deserve careful examination and may shed light on one's own.

Thomas Jefferson once said that "difference of opinion leads to inquiry, and inquiry to truth." Jefferson, a broadly educated man, argued that "if a nation expects to be ignorant and free . . . it expects what never was and never will be." As individuals and as a nation, it is imperative that we consider the opinions of others and examine them with skill and discernment. The Opposing Viewpoints Series is intended to help readers achieve this goal.

David L. Bender & Bruno Leone,
Series Editors

Introduction

"I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."

Harry A. Blackmun

"The death penalty is not one of the 'cruel and unusual punishments' prohibited by the Eighth Amendment."

Antonin Scalia

In February 1994, two months before his retirement from the Supreme Court, Justice Harry A. Blackmun articulated his personal conviction that capital punishment in the United States is not applied fairly and consistently and is therefore unconstitutional. In response, Justice Antonin Scalia reproached Blackmun for interpreting the Constitution according to personal convictions. The disagreement between the justices revisited arguments presented in the 1972 Supreme Court decision in the case of *Furman v. Georgia*. That 5-4 ruling adjudged the death penalty to be unconstitutional as practiced at the time because its arbitrary application by juries violated the Eighth Amendment's ban on cruel and unusual punishment.

The *Furman v. Georgia* decision was a collection of three capital cases in which black defendants received death sentences for the murder or rape of white victims. In defense of the three convicted men, lawyers put forward two main arguments for the abolition of the death penalty, according to David Von Drehle, a *Washington Post* reporter and author of *Among the Lowest of the Dead: A Decade on Death Row*. First, the lawyers asserted that capital sentences were imposed arbitrarily. For example, they argued, two of the *Furman* defendants were sentenced to death for rape, whereas some murderers received sentences of life imprisonment or less. Second, they contended that sentences of death were carried out so infrequently that they did not serve as an effective deterrent.

Although five justices voted to strike down the death penalty as a violation of the Eighth Amendment, they cited very differ-

ent reasons for doing so, according to Von Drehle. Justices William J. Brennan and Thurgood Marshall believed that capital punishment was morally unacceptable and held that it should be banned. William O. Douglas and Potter Stewart asserted that death sentences were cruel and unusual because they were inflicted by juries in an arbitrary and capricious manner—being sentenced to death was as random as being struck by lightning, in Stewart's opinion. Without objective standards to limit the death penalty to the worst crimes, Stewart and Douglas reasoned, juries were free to apply it in a way that was biased and unfair. On the other hand, although he favored use of the death penalty, Justice Byron White maintained that it was cruel and unusual because the sentences were not handed out consistently. In his written opinion, he implied that too many murderers escaped the death penalty because juries were free not to impose it.

Furman effectively struck down all existing state and federal capital punishment statutes. In response, thirty-five states quickly wrote new capital punishment statutes that attempted to meet the requirements for fairness and consistency established by the Court. According to Wendy Kaminer, author of *It's All the Rage: Crime and Culture*, states had two alternatives: They could respond to the arguments of Douglas and Stewart or they could follow the advice contained in White's opinion. Some states wrote laws that attempted to guide the discretion of juries in the application of the death penalty; other states wrote laws that made the death penalty the mandatory punishment for murder. In 1976, these new laws came before the Supreme Court. In the decision of *Gregg v. Georgia*, the Court upheld the guided discretion sentencing statutes but struck down the mandatory death penalties. The justices held that although mandatory penalties provided consistency in sentencing, they were unconstitutional because they did not allow juries to take into consideration mitigating factors about the criminal or the crime. In effect, mandatory sentences were struck down because they prevented juries from extending mercy to individuals deemed worthy. The guided discretion statutes were upheld because they instructed juries to weigh aggravating and mitigating factors in a crime and to determine a fair punishment based on these considerations.

Since 1976, the Supreme Court has issued many decisions clarifying the role that mitigating and aggravating factors should play in capital cases. However, Justice Blackmun concluded in 1994 that despite this effort, the death penalty is still administered in an arbitrary manner in violation of the Eighth Amendment and therefore should be struck down once again. The power to extend mercy guaranteed to juries in the *Gregg* deci-

sion can be applied arbitrarily, he argues, and fundamentally contradicts the goal of consistency established by the *Furman* ruling. In order for the death penalty to be applied consistently, he reasons, the jury's power to extend mercy would have to be limited. The constitutional requirements of fairness and consistency are therefore "irreconcilable in the context of capital punishment," Blackmun concludes, since every "step toward consistency is a step away from fairness."

Although he agrees that the contradiction between fairness and consistency exists, Justice Antonin Scalia replies that the language of the Constitution "clearly permits the death penalty to be imposed" and that capital punishment therefore cannot be unconstitutional. He finds fault with the Court decisions that established contradictory goals rather than with the death penalty itself. In other cases, Scalia has maintained that the jury's power not to impose the death sentence can and should be limited. Justice Clarence Thomas, agreeing that capital punishment is constitutional, argues that states have been successful in balancing the requirements of fairness and consistency established in *Furman* and *Gregg*. He asserts that "if the death penalty is constitutional, states must surely be able to administer it pursuant to rational procedures that comport with the Eighth Amendment's most basic requirements."

The issues raised in the 1972 Supreme Court case *Furman v. Georgia*—whether execution is a "cruel and unusual punishment," whether death sentences are handed out fairly or discriminatorily, and whether capital punishment is an effective deterrent—have been debated for centuries. The first chapter of *Death Penalty: Opposing Viewpoints* examines historical writings on the subject. Following chapters explore contemporary views on these questions: Is the Death Penalty Just? Is the Death Penalty an Effective Punishment? Is the Death Penalty Applied Unfairly? In this anthology, authors examine and debate the persisting issues surrounding sentences of death.

1 CHAPTER

Three Centuries of Debate on the Death Penalty

The **DEATH
PENALTY**

Chapter Preface

Controversy over the death penalty is recent in the history of humankind. Most ancient societies accepted the idea that certain crimes deserved capital punishment. Ancient Roman and Mosaic law endorsed the notion of retaliation; they believed in the rule of "an eye for an eye." Similarly, the ancient Egyptians, Assyrians, and Greeks all executed citizens for a variety of offenses, ranging from perjury to murder.

Adherence to the death penalty continued into the Middle Ages, during which religious crimes such as sacrilege, heresy, and atheism were punishable by death. European settlers brought the death penalty to the American colonies, where idolatry, witchcraft, blasphemy, murder, sodomy, adultery, rape, perjury, and rebellion were all capital crimes in 1636. This continuing use of the death penalty reflected society's belief that severe crimes warranted severe punishments and that such punishments would deter others from committing such crimes.

This view was challenged during the Enlightenment of the eighteenth century, which dramatically altered European and American perceptions about political and social issues such as capital punishment. A movement to abolish or at least restrict the death penalty began to take shape in the writings of Cesare Beccaria, Montesquieu, Voltaire, and others. Their views were reflected in the words of American revolutionary Benjamin Rush in 1792: "The punishment of murder by death is contrary to reason, and to the order and happiness of society." Some European leaders banned the death penalty. One such leader, Catherine the Great of Russia, stated, "There can be no necessity for taking away the life of a citizen."

Other philosophers of this period, however, defended the death penalty. German philosopher Immanuel Kant asserted that the death penalty was the most equitable punishment for murder. Unremorseful murderers deserve to die, he believed, while remorseful, guilt-ridden murderers would welcome death as a relief from their emotional pain. The United States and most European nations continued to execute criminals, believing in its justness and in its deterrent effect.

Eighteenth-century philosophers such as Kant and Beccaria sparked a controversy that continued into the nineteenth and twentieth centuries. The following chapter presents a variety of historical arguments supporting and opposing the death penalty.