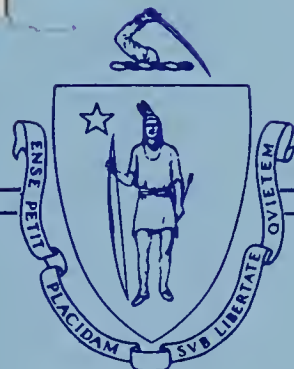


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A REVIEW OF THE LITERATURE ON
CAPITAL PUNISHMENT
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**A REVIEW OF THE LITERATURE ON
CAPITAL PUNISHMENT**

080885

By

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ISSUE DEFINITION

Capital Punishment is among the most controversial issues in America today. This Issue Profile will examine its history, notes of landmark decisions and a review of other literature it has produced. This study will concentrate on capital punishment from its near abolition to its retention, with an emphasis on the Massachusetts' experience.

The Capital Punishment issue has always had proponents and opponents, but it was not until the 1950's and into the 1960's that opponents gained momentum. The proportion of Americans favoring capital punishment, even for murder, declined--from 68 percent in 1953 to 51 percent in 1960 and to 42 percent in 1966.¹

BACKGROUND

In 1972, the Supreme Court became immersed in the issue. The court held in the landmark case of Furman V. Georgia, 408 U.S. 238 (1972) that unguided juries and judges were unconstitutional, thereby striking down virtually all existing state and federal statutes on procedural grounds. This was indeed a peculiar decision by the Supreme Court because of what it did and what it refrained from doing. It did not strike at the validity of capital punishment, but it did ban the death penalty in pending situations.

¹Criminal Justice Statistics, 1974-1975, p. 223, table 2-109

In 1976, the Supreme Court again deliberated on the death penalty. In the case of Gregg V. Georgia, 428 U.S. 153 (1976), the court clarified its position on capital punishment. The decision stated that the penalty of death may be imposed by a guided judge or a guided jury with standards for the exercise of discretion, including a means for considering aggravating and mitigating circumstances.

This 1976 decision upheld the death penalty and overcame the constitutional defects found in the landmark case of Furman V. Georgia.

The states responded by reinstating the death penalty under the new guidelines. According to the National Association for Advancement of Colored People (NAACP), 38 states currently have a death penalty statute. (See Table I)

ARGUMENTS IN FAVOR OF CAPITAL PUNISHMENT

Proponents of Capital Punishment argue that the first responsibility of the state is to protect its law abiding citizens. Capital Punishment is the only penalty appropriate for heinous forms of crime such as first degree murder. Retentionists believe the death penalty is an effective deterrent; simply the fear of being sentenced to death may prevent a death.

Section 1 of Chapter 488 of the 1979 Massachusetts Acts and Resolves states:

Section 1: It is hereby declared that the value of capital punishment as a deterrent for crime is a complex factual

issue the resolution of which properly rests with the General Court, which has evaluated the results of statistical studies in the terms of the local conditions with a flexibility of approach not available to the courts, and that the General Court has so found and defined those crimes and those criminals for which capital punishment is most probably an effective deterrent. It is hereby further declared that the value of capital punishment as retribution, although unappealing to many, is an expression of society's moral outrage at the commission of particularly heinous crimes and that capital punishment for the crime of murder cannot be viewed as invariably disproportionate to the severity of that crime. It is hereby further declared that in the past nine years the Congress and over thirty-five states have enacted new death penalty statutes by legislative measures adopted by the people's chosen representative. It is hereby further declared that the ability of the people of the Commonwealth to express their preference through their duly elected representatives must not be shut off by the intervention of the judicial department on the basis of a constitutional test intertwined with an assessment of contemporary standards and that the judgment of the General Court weighs heavily in ascertaining such standards in this Commonwealth.

Those in favor of Capital Punishment highlight the penalty's unique protection factor. Unlike imprisonment, the death penalty guarantees that criminals who have been convicted of certain heinous crimes will not be able to do so again. Retentionists maintain capital punishment satisfies society's demand for retribution.

On January 31, 1982, President Reagan stated the following in support of capital punishment:

I support the right of States and the Federal Government to impose Capital Punishment. It is a serious and difficult decision for government to take a person's life, and that decision must not be made unless the courts are convinced beyond any reasonable doubt that the defendant is guilty of a most grievous crime.

However, I believe that the death penalty is justified both as fair retribution for the most serious crimes, and as a deterrent to crime. Though we must fully uphold the rights of criminal defendants, we must never forget that our main charge is to protect the lives of potential victims. The ability of State and Federal courts to impose capital punishment is a necessary part of that protection.

ARGUMENTS AGAINST THE DEATH PENALTY

Opponents of Capital Punishment maintain it is morally wrong to kill. Abolitionists state that sanctity of human life is the central value of society and that even the state should not kill.

Opponents argue that the penalty is too extreme. Since we are all human, there is a chance someone may be sentenced in error; if so, the mistake can never be rectified.

Abolitionists state there is no conclusive evidence showing capital punishment as a deterrent to crime. On April 3, 1985

the Massachusetts Civil Liberties Union stated the following before the Joint Committee on Criminal Justice:

When the death penalty is used in a given state, there is no decrease in the subsequent rate of criminal homicide in that state;

Death penalty states, as a group, do not have lower rates of criminal homicide than non-death penalty states;

States that abolish the death penalty do not show an increased rate of criminal homicide after abolition;

States that have reinstated the death penalty after abolishing it have not shown a decreased rate of homicide;

Police officers on duty do not suffer a higher rate of criminal assault and homicide in states that have abolished the death penalty than they do in death penalty states; and

Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life term prisoners in abolition states than they do in each penalty state.

The following is an excerpt from Governor Michael Dukakis' testimony before the Joint Committee on Criminal Justice, April 3, 1985:

I wanted to come before this committee today, because you have a right to know--and all the members of the legislature have a right to know--how I would deal with death penalty legislation if it were to reach my desk.

Violent crime is a terrible threat to all of us. Whenever someone does violence to another, there must be swift and certain punishment.

This is the guiding principle behind my proposed presumptive sentencing legislation.

The penalty of death, however, is the wrong way to deal with our most violent crimes. It is one of those fake cures--like mandatory sentences--that offers the illusion of deterrence and crime control. But not the reality. The death penalty takes a life. But it has never been shown that it adds to the deterrence and the public protection provided by mandatory life in prison. Before we put Massachusetts in the killing business, shouldn't we have more than speculation to support it?

At worst, execution may take the life of someone later found innocent. We all know this is a real possibility. As recently as 1982, we saw two defendants who had been convicted of murder several years earlier set free because each turned out to be the wrong man. Lawyer Johnson and George Reissfelder both were innocent. But both would have been killed by the Commonwealth under the death penalty. If just one innocent man or woman dies as a result of capital punishment, that alone is too much for me.

This is why, as Governor, I will veto any bill that puts the Commonwealth in the position of making the irretrievable mistake of imposing the death penalty. This is why I hope this committee, under the leadership of its two chairmen, will recommend strongly that no death penalty law be passed.

MASSACHUSETTS EXPERIENCE

Massachusetts has tried unsuccessfully to reinstate its Capital Punishment statute. Massachusetts had its 1980 statute revoked (Chapter 488 of 1979) because it was in violation of Article 26 of the Massachusetts Constitution as being unconstitutionally "cruel" in light of contemporary standards.

To rectify this Constitutional defect, the General Court proposed and passed a constitutional amendment in two successive

joint sessions of the House of Representatives and Senate. On September 19, 1980, by a vote of 123-63, and on June 21, 1982, by a vote of 125-62, the Legislature approved a constitutional amendment to allow the death penalty in Massachusetts. This amendment had to be approved by a majority of the Massachusetts' voters. In the November election of 1982, the voters approved the proposed amendment that would provide that no provision of the state constitution may in the future be construed as prohibiting the imposition of the death penalty. The amendment won 1,131,668 yes to 748,549 no.

The Legislature responded to this mandate by enacting Chapter 554 of 1982, which provides for Capital Punishment in certain cases of First Degree Murder. In 1983, Massachusetts was among 38 states to enact a death penalty for first degree murder.

Massachusetts' problems were not rectified for long. In 1984, the State's Supreme Judicial Court again struck down the Massachusetts death penalty; not on the issue of cruelty as it did before, but because the law violated Article 12 of the Declaration of Rights.

In Commonwealth V. Colon-Cruz, 470 N.E. 2d 110 (MA 1984), the Massachusetts Supreme Judicial Court declared the statute unconstitutional. The Court found that because Chapter 554 required a trial by jury before the death penalty could be imposed and absent this condition the death penalty could not be imposed, a defendant who pleaded guilty or waived a trial by jury could

avoid the death penalty. The Court found this to be an unnecessary scheme that violated the Fifth Amendment (the right not to plead guilty) and the Sixth Amendment (right for trial by jury).

Massachusetts at present does not have a death penalty statute. There are several proposals before the 1985 General Court. The following is a listing of pending legislation before the General Court addressing the issue of Capital Punishment for the 1985 session. Also included are the current Federal Statutes and pending legislation before the Congress of the United States.

LEGISLATION PENDING BEFORE THE GENERAL COURT

<u>BILL</u>	<u>DESCRIPTION</u>	<u>DATE</u>	<u>STATUS</u>
S 818	Petition of Sen. Lewis that a provision be made for an investigation and study by a special commission relative to imposing the penalty of death.	4/24/85	Reported by Committee on Criminal Justice to Clerk's Office for processing, will accompany S 1479.
S 820	Petition of Sen. Locke, Sen. Parker and Rep. Switzler for legislation to provide for the imposition of the death penalty in certain cases where there has been no trial jury.	4/24/85	Reported by Committee on Criminal Justice to Clerk's Office for processing, will accompany S 1479.
S 1473	Petition of Sen. Doane for legislation to provide for the imposition of the death penalty in certain cases upon a plea of guilty.	4/24/85	Reported by Committee on Criminal Justice to Clerk's Office for processing, will accompany S 1479.
S 1479	Petition of Sen. Lewis and Sen. Kirby for legislation to establish a procedure for the imposition of the penalty of death for the conviction of murder in the first degree.	4/24/85	Reported favorably by committee on Criminal Justice to Clerk's Office for processing.
H 1879	Petition of Rep. Cohen and Rep. Gallagher for an investigation by a Special Commission relative to Capital Punishment.	5/18/85	Reported by Committee on Criminal Justice to Clerk's Office for processing, will accompany a study.
H 4216	Petition of Rep. Robinson relative to the Death Penalty.	4/24/85	Reported by Committee on Criminal Justice to Clerk's Office for processing, will accompany a study.

FEDERAL CAPITAL PUNISHMENT STATUTES

The United States Code has several sections that provide for the imposition of the death penalty for certain specific crimes. They are as follows:

18 USC Section 34

Destruction of aircraft, motor vehicles or facilities where death occurs.

18 USC Section 351

Congressional assassination, kidnapping or assault.

18 USC Section 794

Delivering or gathering defense information to aid a foreign government.

18 USC Section 844

Explosives offense where death results.

18 USC Section 1111

Murder within the special maritime or territorial jurisdiction of the United States.

18 USC Section 1114

Killing of certain law enforcement officials.

18 USC Section 1716

Mailing injurious articles where death results.

18 USC Section 1751

Assassination of the President or Vice-President, kidnapping and assault.

18 USC Section 1992

Willful train wrecking where death results.

18 USC Section 2031

Rape within the special maritime and territorial jurisdiction of the United States.

18 USC Section 2113 (e)

Robbery of a federally insured bank where death results.

18 USC Section 2381

Treason.

49 USC Section 1472 (i), (n)

Air piracy where death results; sentencing procedures set forth in 49 USC Section 1473 (c).

While these statutes remain in the United States Code Annotated, their constitutionality is suspect because they do not address mitigating and aggravating circumstances required by the Furman V. Georgia case.

Numerous pieces of Federal Legislation have been filed during the 99th Congress to rectify the current laws and also to expand on their scope.

They are:

S 239 Crime and criminal procedures--death penalty--criteria

By Thurmond, DeConcini, East, Grassley, Hatch, Simpson, Specter, Abdnor, Domenici, Helms, Long (R-La.), Tribble, Denton, D'Amato, Johnston and Boren.

To establish constitutional procedures for the imposition of the sentence of death. (To Judiciary)

S 1191 Crime and criminal procedures--death penalty--life prisoners, murder

By Specter

To provide capital punishment for murders committed by prisoners serving a life sentences. (To Judiciary)

H 343 Crime and criminal procedures--death penalty--criteria

By Gekas, Sensenbrenner, Lagomarsino, Burton (Ind.) Rudd and Dyson.

To establish rational criteria for the imposition of the sentence of death. (To Judiciary)

H 704 Crime and criminal procedures--death penalty--criteria

By Rudd

To amend Title 18 of the United States Code to establish rational criteria for the imposition of the sentence of death in cases of espionage and treason. (To Judiciary)

H 712 Crime and criminal procedures--death penalty--criteria

By Solomon

To establish constitutional procedures for the imposition of the sentence of death. (To Judiciary)

H 764 Crime and criminal procedures--death penalty--criteria

By Sundquist

To amend Title 18, United State Code regarding sentencing for capital offense. (To Judiciary)

H 922 Crime and criminal proceures--death penalty--life prisoner, murder

By Gray (Ill.)

To amend Title 18 of the United States Code to provide capital punishment for first degree murders committed by prisoners serving a life sentence. (To Judiciary)

H 1128 Crime and criminal procedures--death penalty--life prisoners, murder

By Lungren, Lagomarsino, Kindness, Taylor, McGrath, Robinson, DeWine, Dornan, Daub, Whitehurst and Lowery.

To amend Title 18 of the United States Code to provide the penalty of death for certain crimes committed by persons serving federal life sentences. (To Judiciary)

H 1129 Crime and criminal procedures --death penalty--Presidential assassination

By Lungren, Kindness, Hall (S.-Tex.) Sensenbrenner, Emerson, Smith (D-Ore.), McCollum, Hansen, Bradham, Carney, Shaw, Hartnett, Dornan, Shumway, DeWine, Lagomarsino, Lott and Fields.

To amend Title 18 of the United States Code to establish procedures for imposition of the death penalty for Presidential assassination. (To Judiciary)

H 1571 Crime and criminal procedures--death penalty--criteria

By Livingston

To amend Title 18 of the United States Code to establish rational criteria for the imposition of the sentence of death. (To Judiciary)

H 1907 Crime and criminal procedures--drug traffickers--death penalty

By Rudd

To amend the Controlled Substances Act to provide the penalty of death for continuing criminal enterprise and dangerous special drug offender offenses. (To Energy and Commerce: Judiciary)

H 2398 Crime and criminal procedures--death penalty--life prisoners, murder

By Petri

To amend Title 18 of the United States Code to provide capital punishment for first degree murders committed by prisoners serving life sentence. (To Judiciary)

H 2531 Crime and criminal procedures--death penalty--law enforcement officer murder

By Biaggi

To encourage the states to prescribe the death penalty for willfully killing a law enforcement officer (To Judiciary)

TABLE I**DEATH ROW CENSUS***

STATES WITH DEATH PENALTY	DEATH ROW INMATES** 1474	EXECUTIONS SINCE 1977*** 37
Alabama	70	1
Arizona	55	0
Arkansas	24	0
California	166	0
Colorado	2	0
Connecticut	0	0
Delaware	6	0
Florida	223	11
Georgia	118	4
Idaho	14	0
Illinois	68	0
Indiana	28	1
Kentucky	20	0
Louisiana	36	7
Maryland	20	0
Mississippi	45	1
Missouri	30	0
Montana	4	0
Nebraska	13	0
Nevada	27	1
New Hampshire	0	0
New Jersey	10	0
New Mexico	6	0
New York	1	0
North Carolina	39	2
Ohio	35	0
Oklahoma	45	0
Oregon	0	0
Pennsylvania	65	0
South Carolina	35	1
South Dakota	0	0
Tennessee	44	0
Texas	185	5
Utah	5	1
Vermont	0	0
Virginia	28	2
Washington	4	0
Wyoming	3	0

*As of December 20, 1984.

**Nine male inmates have multiple sentences. They are listed in respective state totals, but each is counted as only one inmate in the national total.

***As of January 31, 1985

Information provided by NAACP Legal Defense & Educational Fund, Inc.

An analysis of the information presented in Table I illustrates 38 states that have adopted capital punishment statutes.

It is interesting to note a total of the 1,511 inmates that have been placed on death row, there have only been 37 executions since 1977. This demonstrates a willingness to pass the law but caution in enforcing it.

The remaining 12 states have capital punishment legislation filed annually.

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