

# CAPITAL PUNISHMENT IN THE UNITED STATES AND BEYOND

PAUL MARCUS\*

*[This article explores the controversial topic of capital punishment, with a particular focus on its longstanding application in the United States. The use of the death penalty in the US has been the subject of much criticism both domestically and internationally. The numerous concerns addressed in this article relate to the morality of the punishment, its effectiveness, the uneven application of the penalty, and procedural problems. The US Supreme Court has confirmed the constitutionality of capital punishment while striking down particular uses of the death penalty. The US is not, however, alone in executing convicted defendants. Capital punishment is still being used by other jurisdictions, some with more prevalent use than the US, such as the People's Republic of China and Singapore. However, as more nations abolish the death penalty, the question remains, why is capital punishment so widespread in the world?]*

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\* AB, JD (UCLA); Haynes Professor of Law and Kelly Professor of Teaching Excellence, Marshall-Wythe School of Law, The College of William and Mary. A version of this article was presented as the inaugural Peter Brett Lecture at the Melbourne Law School on 20 February 2007. Professor Brett had a remarkable career both in the academic world and as a major force in achieving reform in the Australian criminal justice system. He was a vigorous and successful opponent of capital punishment in Australia. An overview of his most striking work can be found in a thoughtful essay by Peter Ryan, 'Ripe Justice' (2005) 49(5) *Quadrant* 95. See also Peter Brett, *The Beamish Case* (1966). This article benefited considerably from the incisive comments of Professor Jenny Morgan (The University of Melbourne), the Hon Tommy Miller (Norfolk, Virginia), Professor Nancy Combs (The College of William and Mary), Professor Corinna Lane (University of Richmond), Wayne Logan (Florida State University) and the staff and students of both the Melbourne Law School and the Universidad Rey Juan Carlos, Madrid.

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## I INTRODUCTION

The death penalty has been a well-established, though highly controversial, practice in the United States for almost 400 years. The first execution of a criminal in the American colonies occurred in Virginia in 1622.<sup>1</sup> During most of the 20<sup>th</sup> century, the vast majority of states in the country permitted execution of convicted criminals.<sup>2</sup>

The practice dates back to early English common law, where virtually any person convicted of a felony offence faced a mandatory death sentence,<sup>3</sup> but the practice has always been much more widespread in the US than in the United Kingdom, which abandoned capital punishment in 1973.<sup>4</sup> For much of US history, capital punishment was extended beyond the crime of murder to include, among other offences, arson, burglary, armed robbery, rape, kidnapping, and possession of certain firearms in connection with crimes of violence.<sup>5</sup> The

<sup>1</sup> Daniel Frank was executed in the Colony of Virginia in 1622 for the crime of theft: see Melissa S Green, *History of the Death Penalty and Recent Developments* (2 May 2005) University of Alaska Anchorage Justice Center <<http://justice.uaa.alaska.edu/death/history.html>>.

<sup>2</sup> Currently, 37 states have the death penalty and 12 states (as well as the District of Columbia) do not: see Death Penalty Information Center, *State by State Information* (2007) <<http://www.deathpenaltyinfo.org/state/>>.

<sup>3</sup> *Tennessee v Garner*, 471 US 1, 13 fn 11 (White J for Brennan, White, Marshall, Blackmun, Powell and Stevens JJ) (1985).

<sup>4</sup> *Murder (Abolition of Death Penalty) Act 1965* (UK) c 71 abolished the death penalty in murder cases. The Act did not apply to Northern Ireland. The death penalty was abolished in Northern Ireland by the *Northern Ireland (Emergency Provisions) Act 1973* (NI) c 53.

<sup>5</sup> The last execution of a person for a crime other than murder (or conspiracy to commit murder) occurred in 1964 when James Coburn received the death penalty for robbery in Alabama: see M Watt Espy and John Ortiz Smykla, *Executions in the United States, 1608-2002: The Espy File* (2004). As explained by Justice William J Brennan Jr in his seminal article, 'Constitutional Adjudication and the Death Penalty: A View from the Court' (1986) 100 *Harvard Law Review* 313, 327-8 (citations omitted):

Let us look at the crimes for which societies have seen fit to prescribe death by authority of law: false prophesy, witchcraft, the gathering of sticks on the Sabbath day, gluttony, adultery, incest, prostitution. Let us examine the historical record. In England, in the sixteenth century, a man was drown [sic] for stealing a lamb. Joan of Arc was burned at the stake in 1555 [she was actually killed in 1431]. In 1789, a woman named Christian Murphy was burned at the stake for 'coining.' In 1662, in New Haven, Connecticut, a sixty-year-old man was executed for committing bestiality. In eighteenth-century England, one could be executed for shooting a rabbit, forging a birth certificate, stealing a pocket handkerchief, adopting a disguise, or damaging a public building. In 1814, a generation after the Bill of Rights was ratified, a man was hanged for cutting down a tree. In 1750, a woman was executed for stripping a child; another woman was executed for forging a seaman's ticket; and still another for robbing her master. In 1810 in England, there were no fewer than 222 capital offenses. Public executions were not abolished in England until 1868. There is, indeed, much to learn from history.

Judge William W Wilkins recently discussed the history of capital punishment too, in 'The Legal, Political, and Social Implications of the Death Penalty' (2007) 41 *University of Richmond Law Review* 793, 795:

history of capital punishment in the US is centred almost entirely on state criminal justice systems, as opposed to the federal system. This is because virtually all major violent crimes which would give rise to a sentence of death occur within the states and not within the federal system.<sup>6</sup> An examination of the experience of the death penalty in the US is effectively one of male offenders, as female offenders account for a very small number of those who have been eligible for a capital punishment sentence.<sup>7</sup> Such an examination would also look to the various techniques involving the termination of an offender's life — from electrocution (started by New York in 1888) to hanging (the traditional form in most states in early US history), and from public shooting to the adoption of lethal gas and poisonous injections (beginning in 1924 when Nevada became the first state to use gas as an execution method).<sup>8</sup>

This article considers the US system of capital punishment. By also observing similar sentencing systems found elsewhere around the world, I ultimately hope

the number of crimes for which the death penalty may be given has been reduced significantly. The list of death-eligible crimes during the colonial era seems shockingly long to modern ears. You will not be surprised when I tell you that, in addition to murder, serious crimes like treason, rape, burglary, and arson were punishable by death. The list goes on, however. In Puritan New England, a sentence of death could be imposed for adultery, as well as blasphemy, at least until the late seventeenth century. At one time, in the South, minor property crimes were capital offenses. On the Western frontier, horse stealing was a capital offense. Today, only the crime of murder has remained a capital offense, and as we shall see, there are limitations on when even a cold-blooded murder could carry a sentence of death.

<sup>6</sup> Violent crimes are prosecuted in the states almost 99 per cent of the time, while less than seven per cent of felony convictions in 2000 were in a federal court: see Bureau of Justice Statistics, Department of Justice, United States, *Sourcebook of Criminal Justice Statistics, 2002*, NCJ Catalogue No 203301 (30<sup>th</sup> ed, 2002) 415–16, 421, 447. Death penalty cases are similar. Currently on death row, there are more than 3300 state prisoners and 55 federal prisoners: see Death Penalty Information Center, *Federal Death Row Prisoners* (15 November 2007) <<http://www.deathpenaltyinfo.org/article.php?scid=29&did=193>>. Of course, there are numerous federal statutes which authorise the death penalty, a summary of which can be found in Thomas P Bonczar and Tracy L Snell, Bureau of Justice Statistics, Department of Justice, United States, 'Capital Punishment, 2004' (November 2005) *Bureau of Justice Statistics Bulletin* 1, 13.

<sup>7</sup> Between 1.6 and 1.8 per cent of those currently on death row are women: see Victor L Streib, 'Death Penalty for Female Offenders' (1990) 58 *University of Cincinnati Law Review* 845; Deborah Fins, National Association for the Advancement of Colored People Legal Defense and Education Fund Inc, *Death Row USA — Winter 2006* (2006) 1, 8.

<sup>8</sup> For an overview of these capital punishment issues: see Steven D Stewart, *The Death Penalty — Capital Punishment Timeline* (2006) Office of the Clark County Prosecuting Attorney <<http://www.clarkprosecutor.org/html/death/timeline.htm>>. In some states, death row inmates are given a choice as to the form of execution: see, eg, Kristen Gelineau, *Va Killer Executed by Electric Chair* (21 July 2006) CBS News <<http://www.cbsnews.com/stories/2006/07/21/ap/national/mainD8J04TM81.shtml>> where, in Virginia, capital offenders have the option of choosing death by electrocution or injection. There is currently a serious debate as to whether particular forms of execution violate constitutional standards: see, eg, *Evans v Maryland*, 914 A 2d 25 (Md, 2006); *Walker v Johnson*, 448 F Supp 2d 719 (ED Va, 2006). See generally Henry Weinstein, *Judge Calls California's Lethal-Injection Procedure 'Intolerable'* (15 December 2006) *Death Row Speaks* <<http://www.deathrowspeaks.info/news/procedureintolerable.html>>; Adam Liptak and Terry Aguayo, 'After Problem Execution, Governor Bush Suspends the Death Penalty in Florida' (16 December 2006) *The New York Times* (New York) 11; John Gibbaut, 'It's All in the Execution' (2006) 92(8) *ABA Journal* 17; Adam Liptak, 'Court Rules for Kentucky on Executions', *The New York Times* (New York), 23 November 2006, 26. The problems were also widely reported in the Australian newspapers: see, eg, 'Outrage at "Botched" Half-Hour Execution' (16 December 2006) *The Australian* (Sydney) 16. The US Supreme Court has agreed to review a case raising the question of the constitutionality of lethal injections. The case should be decided in early 2008: see *Baze v Rees*, 128 S Ct 34 (Mem) (2007).

to shed some light on the question of why the US and so many other nations retain the death penalty.

## II JUDICIAL RULINGS ON THE DEATH PENALTY

In a five-year period in the mid-1970s, the US Supreme Court for the first time actively involved itself in determining the constitutionality of death penalty statutes. Prior to that time, the justices were (somewhat surprisingly) relatively silent on the basic questions.<sup>9</sup> In 1972, however, in *Furman v Georgia* ('*Furman*'), the Court held that the Georgia death penalty statute was unconstitutional because it gave the jury complete discretion to determine upon conviction of murder whether death or life imprisonment was appropriate.<sup>10</sup> A majority of the Court found that the death penalty there was applied in a 'freakish and wanton' manner because the jury's discretion was completely unbridled.<sup>11</sup> The Court, however, had a very difficult time agreeing on why that broad discretion rendered the statute unconstitutional. Indeed, while the decision itself is but one paragraph, a *per curiam* opinion, there were nine separate opinions (five concurring and four dissenting). With over 240 pages in print, the decision was, at least at that time, the longest ever rendered in the history of the US Supreme Court.<sup>12</sup>

The *Furman* case engendered much litigation with some state legislatures attempting to avoid the evil of 'unbridled discretion' for the jury by making a death sentence mandatory upon conviction of murder with particular aggravating circumstances. Such statutes, however, were soon struck down. The US Supreme Court in *Woodson v North Carolina*<sup>13</sup> was concerned that jurors were not allowed to consider the specific characteristics of the offender or the circumstances of the crime.<sup>14</sup> It also stated that:

It is now well established that the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.' ... [O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense. North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consis-

<sup>9</sup> See, eg, *McGautha v California*, 402 US 183 (1971) where the Court, just a year before *Furman v Georgia*, 408 US 238 (1972) rejected the broad claim that a lack of standards made the imposition of the death penalty unconstitutional as violative of due process.

<sup>10</sup> 408 US 238, 247–50 (Douglas J) (1972). See also Corinna Barrett Lain, 'Deciding Death' (2007) 57 *Duke Law Journal* 1; Corinna Barrett Lain, 'Furman Fundamentals' (2007) 82 *Washington Law Review* 1; Stephen F Smith, 'The Supreme Court and the Politics of Death' (2008) 94 *Virginia Law Review* (forthcoming); Scott W Howe, 'Furman's Mythical Mandate' (2007) 40 *University of Michigan Journal of Law Reform* 435.

<sup>11</sup> *Furman*, 408 US 238, 309–10 (Stewart J) (1972).

<sup>12</sup> Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (2006) 220.

<sup>13</sup> 428 US 280 (1976).

<sup>14</sup> See also *Roberts v Louisiana*, 428 US 325 (1976).

tently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.'<sup>15</sup>

In *Gregg v Georgia*,<sup>16</sup> a case of profound significance, the Court was asked to rule on the broad question of whether a death sentence is a violation of the *United States Constitution*. The Court determined that a death penalty would not violate the *United States Constitution* if a jury had been given adequate guidance as to the exercise of its discretion (including having sufficient regard to particular aggravating and mitigating circumstances such as the nature of the crime and the character of the offender).<sup>17</sup> While the Court was once again split on the rationale, its conclusion was clear. In the lead opinion, Stewart J wrote:

The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule imposed a mandatory death sentence on all convicted murderers. And the penalty continued to be used into the 20<sup>th</sup> century by most American States, although the breadth of the common-law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy.

It is apparent from the text of the *Constitution* itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes.<sup>18</sup>

Following this cluster of decisions, capital punishment litigation before the US Supreme Court slowed. Still, over the next 30 years, the Court has had numerous occasions to refine the jurisprudence in the area and to distinguish the salient legal issues. The *United States Constitution* imposes several important limitations with regard to the use of the death penalty.<sup>19</sup> There have been a tremendous number of cases exploring the particular procedural points that must be followed in capital cases.<sup>20</sup> Ultimately, the Court has expressed support for statutes which

<sup>15</sup> *Woodson v North Carolina*, 428 US 280, 301 (Stewart J for Stewart, Powell and Stevens JJ) (1976) (citations omitted). The Eighth Amendment to the *United States Constitution* prohibits excessive bail and fines. It also proscribes 'cruel and unusual punishments', thereby limiting a state's power to impose punishment on offenders. The meaning of the 'cruel and unusual' standard is understood to evolve with civilised society and serves to limit the application of capital punishment. The Supreme Court has held that capital punishment itself comports with the Eighth Amendment, provided its application is not cruel or unusual. The 14<sup>th</sup> Amendment was originally intended for the benefit of former slaves following the American Civil War. It most notably guarantees the rights to equal protection of the law and due process of the law. Equal protection and, to a greater extent, due process are frequently invoked in criminal cases.

<sup>16</sup> 428 US 153 (1976).

<sup>17</sup> *Ibid* 189–95 (Stewart J for Stewart, Powell and Stevens JJ).

<sup>18</sup> *Ibid* 176–7 (Stewart J for Stewart, Powell and Stevens JJ) (citations omitted).

<sup>19</sup> As discussed more fully below, the Court would not allow execution for the commission of a rape (*Coker v Georgia*, 433 US 584, 600 (White J for Stewart, White, Blackmun and Stevens JJ) (1977)) or the use of capital punishment with either the intellectually disabled (*Atkins v Virginia*, 536 US 304, 321 (Stevens J for Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer JJ) (2002)) or people under the age of 18 years: *Roper v Simmons*, 543 US 551, 578 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (2005).

<sup>20</sup> See, eg, *Uttecht v Brown*, 127 S Ct 2218 (2007); *Smith v Texas*, 543 US 37 (2004); *Brewer v Quarterman*, 127 S Ct 1706 (2007); *Abdul-Kabir v Quarterman*, 127 S Ct 1654

allow for the execution of offenders so long as the statutes are limited to those offenders who commit ‘a narrow category of the most serious crimes’<sup>21</sup> and ‘whose extreme culpability makes them “the most deserving of execution.”’<sup>22</sup> In short, the US Supreme Court viewed its role as making sure that the process was fair and that the death penalty was reserved only for ‘the worst of the worst.’<sup>23</sup>

### III LEGISLATIVE RESPONSE

While the decisions of the Supreme Court may not have been unambiguous in the minds of readers, the legislative response to the declaration that death penalty statutes are not per se unconstitutional was crystal clear and dramatic. In the four years following the 1972 *Furman* decision, 35 states (as well as the federal government) had either reinstated or adopted death penalty statutes.<sup>24</sup> This legislative response was reflected in actual death sentences imposed: in the mid-1970s, just fewer than 300 sentences were ordered per year — some of the highest figures ever recorded.<sup>25</sup>

Most of the state and federal laws regarding the death penalty followed the lead of the US Supreme Court in attempting to limit, but not eliminate, the discretion of a jury by clearly listing the types of killings which would give rise to a capital prosecution. A typical example is the statutory scheme in the State of Indiana. There, the death penalty is available for murder only if the prosecution can prove the existence of at least one of the ‘aggravating circumstances’ imposed by the state legislature. If the defendant is convicted of murder at trial, a second procedure follows to determine the penalty. The jury hears evidence regarding the aggravating circumstances, as well as any mitigating circumstances which can be offered by the defence. Under the Indiana statute, the aggravating circumstances include the following:

- the victim was killed during the commission of a serious violent crime such as a criminal gang activity, kidnapping or rape;
- the victim was a law enforcement officer;
- the defendant had been convicted of another murder;
- the victim had been mutilated; and/or

(2007); *Ayers v Belmontes*, 127 S Ct 469 (2006); *Kansas v Marsh*, 548 US 548 (2006); *Ring v Arizona*, 536 US 584, 609 (Ginsburg J for Stevens, Scalia, Kennedy, Souter, Thomas and Ginsburg JJ) (2002); *Simmons v South Carolina*, 512 US 154, 171 (Blackmun J for Blackmun, Stevens, Souter and Ginsburg JJ) (1994); *McKoy v North Carolina*, 494 US 433, 444 (Marshall J for Brennan, White, Marshall, Blackmun and Stevens JJ) (1990); *Payne v Tennessee*, 501 US 808, 827 (Rehnquist CJ for Rehnquist CJ, White, O’Connor, Scalia, Kennedy and Souter JJ) (1991).

<sup>21</sup> *Atkins v Virginia*, 536 US 304, 319 (Stevens J for Stevens, O’Connor, Kennedy, Souter, Ginsburg and Breyer JJ) (2002).

<sup>22</sup> *Ibid*; *Roper v Simmons*, 543 US 551, 568 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (2005).

<sup>23</sup> *Gregg v Georgia*, 428 US 153, 179 (Stewart J for Stewart, Powell and Stevens JJ) (1976).

<sup>24</sup> Stuart Banner, *The Death Penalty: An American History* (2002) 268; Smith, above n 10, 4–5.

<sup>25</sup> Tracy L Snell, Bureau of Justice Statistics, Department of Justice, United States, ‘Capital Punishment 1995’ (December 1996) *Bureau of Justice Statistics Bulletin* 1, 13.

- the victim was a young child.<sup>26</sup>

The jurors then return a special verdict stating whether or not they unanimously find the existence of such an aggravating circumstance beyond reasonable doubt so as to allow for the death penalty. If the death penalty is imposed, the defendant can appeal directly to the state supreme court, can seek post-conviction relief within the state, and can ultimately end up in the federal courts on a habeas corpus review limited to federal constitutional and statutory issues. The final resort for the defendant would be a request for clemency from the state Governor.<sup>27</sup>

#### IV THE CURRENT SITUATION

Over the last few decades, criminal sentencing in the US has become harsh.<sup>28</sup> After a long period of relatively stable use of incarceration for those convicted of a crime, the past 30 years has seen a ‘get-tough’ approach which has led to remarkable increases in incarceration rates.<sup>29</sup> Indeed, despite the population not having grown tremendously in the US,<sup>30</sup> incarceration has increased at least sixfold.<sup>31</sup>

Three observations can be made about this change in rates of incarceration. First, the increase in incarceration has occurred simultaneously with a substantial decrease in violent crime rates in the US.<sup>32</sup> Secondly, the approach adopted by

<sup>26</sup> IND CODE § 35-50-2-9(b) (2004). Most states also include the ‘catch-all’ factor of a killing done in heinous fashion. Mitigating factors are not limited by statute. They typically include the youth of the offender, a defendant’s troubled background, participation in the killing (if relatively minor compared with that of others who organised the crime), and whether the defendant had limited capacity to appreciate the criminality of his or her behaviour (even if legally sane).

<sup>27</sup> See Indiana Public Defender Council, *Links: Death Penalty Information* (27 November 2007) <<http://www.in.gov/pdc/general/dpinfo.html>>. Some examples of the power to grant clemency by state governors can be found in: *New York Constitution* art 4, § 4; NY [EXEC] LAW (Consol) § 15 (2007); *Virginia Constitution* art 5, § 12; VA CODE ANN (Michie) § 53.1-229 (2007); *California Constitution* art 5, § 8; CAL [PENAL] CODE (Deering) § 4800 (2007).

<sup>28</sup> See generally Marc Mauer, ‘State Sentencing Reforms: Is the “Get Tough” Era Coming to a Close?’ (2002) 15 *Federal Sentencing Reporter* 50. For a good overview of the current US sentencing situation: see N C Aizenman, ‘Influx of US Inmates Slowing, Census Says’, *The Washington Post* (Washington DC), 27 September 2007, A12.

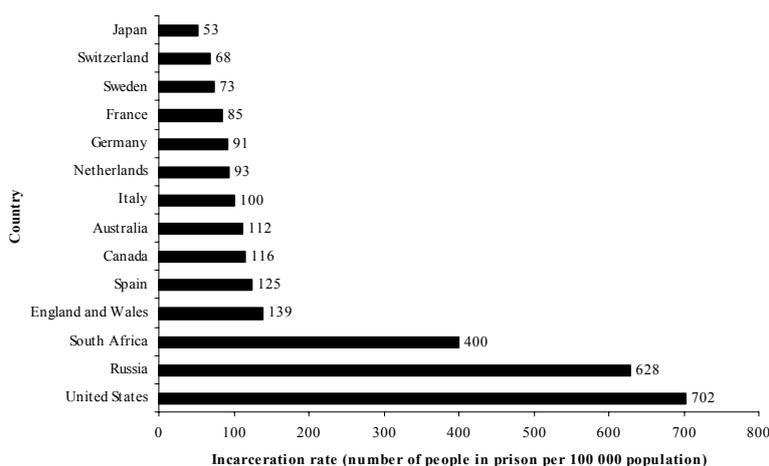
<sup>29</sup> See Marc Mauer, The Sentencing Project, ‘Comparative International Rates of Incarceration: An Examination of Causes and Trends’ (Paper presented to the US Commission on Human Rights, 20 June 2003). The Sentencing Project was created in the US in 1986 to promote alternatives to incarceration in the criminal justice system. It conducts research on a range of topics related to criminal justice reforms in sentencing. See generally The Sentencing Project <<http://www.sentencingproject.org>>.

<sup>30</sup> The population in the US has approximately doubled over the past 50 years, with a total population of 302 million (as at July 2007): *United States Census Bureau* (2007) <<http://www.census.gov>>.

<sup>31</sup> For a graph making clear the stark change: see Mauer, ‘Comparative International Rates of Incarceration’, above n 29, 1.

<sup>32</sup> The lowest level of violent crime ever recorded in the US was in 2005: Bureau of Justice Statistics, Department of Justice, United States, *National Crime Victimization Survey Violent Crime Trends, 1973–2005* (10 September 2006) <<http://www.ojp.usdoj.gov/bjs/glance/tables/viortrdtab.htm>>. As incarceration rates in the US have increased over the past 30 years, the rate of violent crime has decreased sharply. There is arguably a real connection between the two: see Joshua Marquis, ‘The Myth of Innocence’ (2005) 95 *Journal of Criminal Law and Criminology* 501, 505; William Spelman, ‘What Recent Studies Do (and Don’t) Tell Us about Imprisonment and Crime’ (2000) 27 *Crime and Justice* 419; Kent Scheidegger and Michael Rushford, ‘The

the US is contrary to that of most other industrialised nations: Americans are incarcerated at a rate of over 700 inmates per 100 000 of population, which is more than five times the rate found in England and Wales, more than six times that of Canada and Australia, and seven times higher than most countries in western Europe:<sup>33</sup>



Thirdly, and perhaps most surprisingly, the use of the death penalty in the US has not followed the upward trend of incarceration rates. The annual number of executions in the US is still far below that of the People's Republic of China ('PRC'), the world leader in that regard.<sup>34</sup> Moreover, while most states retain the death penalty,<sup>35</sup> the actual number of individuals sentenced to receive the death penalty — and those who have been executed — has fallen substantially to its lowest level in decades.

Since 1976, when the death penalty was reinstated by the US Supreme Court,<sup>36</sup> there have been just over 1000 executions in the US.<sup>37</sup> However, this number is

Social Benefits of Confining Habitual Criminals' (1999) 11 *Stanford Law and Policy Review* 59. Others, however, strongly dispute any such connection, pointing instead to levels of employment and poverty, and demographic trends: see Susan Turner et al, 'The Impact of Truth-In-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates' (1999) 11 *Stanford Law and Policy Review* 75; Thomas C Castellano, 'Limits of the Criminal Sanction in Controlling Crime: A Plea for Balanced Punishments' (1999) 23 *Southern Illinois University Law Journal* 427, 433; David Cole, 'As Freedom Advances: The Paradox of Severity in American Criminal Justice' (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 455, 461–2.

<sup>33</sup> Mauer, 'Comparative International Rates of Incarceration', above n 29, 2.

<sup>34</sup> See below Part VIII(B)(1).

<sup>35</sup> The strongest death penalty states — in terms of numbers of those prosecuted and executed — are clustered in the southern part of the US, but states with the death penalty can be found throughout the nation. See also Death Penalty Information Center, *State by State Information*, above n 2.

<sup>36</sup> *Gregg v Georgia*, 428 US 153 (1976).

<sup>37</sup> See Death Penalty Information Center, *Executions in the United States, 1608–1976, by State* (2007) <<http://www.deathpenaltyinfo.org/article.php?scid=8&did=1110>>.

not distributed equally throughout the country. Half of the total comes from just three states — Texas, Oklahoma and Virginia — with Texas itself accounting for more than a third of the total with just over 400 individuals executed.<sup>38</sup> What is striking about the state numbers is that while Texas is one of the larger states in terms of population, Virginia and Oklahoma are not. Together, the three states only represent about 11 per cent of the US population.<sup>39</sup>

In the US there are currently over 3300 inmates on death row, a figure which comes close to the all-time high of 3500 registered in 2000. Of course, these numbers may be deceiving since they include people who have been sentenced to death but whose appeals and legal petitions may have been pending for many years.<sup>40</sup> The number of executions per year has varied greatly throughout US history, but has dropped considerably in recent years. During the 1930s and 1940s, well over 100 individuals were executed each year.<sup>41</sup> In peak years since 1976, just over 300 people were sentenced to death each year.<sup>42</sup> In 2004, 59 individuals were executed; 60 were executed in 2005; and 53 were executed in 2006.<sup>43</sup> In 2007, there were 42 executions.<sup>44</sup> In recent years, the year in which the most individuals were executed was 1999, with 98 death sentences carried

<sup>38</sup> Death Penalty Information Center, *Number of Executions by State and Region since 1976* (28 September 2007) <<http://www.deathpenaltyinfo.org/article.php?scid=8&did=186>>. See generally Lain, 'Furman Fundamentals', above n 10.

<sup>39</sup> According to the US Census Bureau, the population of the three states together is approximately 34 million, out of a total US population of just over 300 million: see *United States Census Bureau* (2007) <<http://www.census.gov>>.

<sup>40</sup> The point is well made in Carol S Steiker and Jordan M Steiker, 'A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States' (2006) 84 *Texas Law Review* 1869, 1870 (citations omitted):

Today, in the United States, we no longer have simulated executions, and we rarely have pardons or commutations. But a vast percentage of those sentenced to death have not been executed and appear to face no realistic risk of execution in the near future. Pronouncements of death sentences far exceed real executions. ... the death penalty today operates as a symbol not as a result of deliberate, transparent decisions, but by a confluence of complicated, poorly understood forces that produce long-term delay and in some cases defeat of the imposition of the death penalty.

The international community views the United States as monolithic and anomalous in its retention of the death penalty. Whereas virtually all democracies — and certainly all Western industrialized ones — have repudiated the death penalty as unnecessary or even a violation of basic human rights, the United States continues to sentence offenders to death to punish ordinary (non-treasonous) crimes. Indeed, over the past forty years, as the international community has increasingly repudiated capital punishment, the size of the death-row population in this country has increased dramatically.

For further information regarding the size of the death row population: see Death Penalty Information Center, *Death Row Inmates by State and Size of Death Row by Year* (1 January 2007) <<http://www.deathpenaltyinfo.org/article.php?scid=9&did=188>>.

<sup>41</sup> See Walter C Reckless, 'The Use of the Death Penalty: A Factual Statement' in James A McCafferty (ed), *Capital Punishment* (1973) 38, 51.

<sup>42</sup> Death Penalty Information Center, *Death Sentences by Year: 1977–2007* (2007) <<http://www.deathpenaltyinfo.org/article.php?scid=9&did=873>>; Tracy L Snell, Bureau of Justice Statistics, Department of Justice, United States, 'Capital Punishment, 2005' (December 2006) *Bureau of Justice Statistics Bulletin* 1.

<sup>43</sup> Bureau of Justice Statistics, Department of Justice, United States, *Capital Punishment, 2006 — Statistical Tables* (17 December 2007) <<http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06st15.htm>>.

<sup>44</sup> Robert Barnes, 'Legal Challenges Put Brakes on Executions', *The Washington Post* (Washington DC), 19 December 2007, A10.

out. That number has been steadily declining since.<sup>45</sup> Whereas 317 people were sentenced to death in 1996 (representing something of a high water mark), in recent years, death sentences per year have only been about a third of that 1996 figure.<sup>46</sup>

## V ATTITUDES TOWARDS CAPITAL PUNISHMENT

Intuitively, support for the death penalty, both in the US and elsewhere, is based upon a notion that it functions as a mode of deterrence.<sup>47</sup> The debate over deterrence has been vigorous throughout the world. While some in the criminal justice field support such an argument,<sup>48</sup> most criminal justice professionals disagree. Indeed, in polls of both police chiefs and criminologists, few thought that the death penalty was effective in reducing violent crime.<sup>49</sup> Furthermore, the

<sup>45</sup> For a complete listing of the number of people sentenced to death, executed and under a sentence of death for the past 30 years: see Death Penalty Information Center, *Number of Executions by State and Region since 1976*, above n 38. Apart from a growing — but still limited — distaste for capital punishment, many reasons have been offered to explain the decline: see, eg, Scott E Sundby, 'The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor' (2006) 84 *Texas Law Review* 1929, laying out factors such as innocence projects, publicity, more cautious prosecutors, more effective defence counsel, and the growing use of statutes which allow for life imprisonment without possibility of parole; see also Smith, above n 10, 23; Richard C Dieter, *A Crisis of Confidence: Americans' Doubts about the Death Penalty* (2007); Death Penalty Information Center, *Number of Executions by State and Region since 1976*, above n 38; Snell, 'Capital Punishment 1995', above n 25; Deborah Fins, National Association for the Advancement of Colored People Legal Defense and Education Fund, Inc, *Death Row USA — Spring 2002* (2002); Editorial, 'The Year in Death', *The Washington Post* (Washington DC), 31 December 2006, B06. Even in Texas the decline has been striking. As noted in one recent article exploring the national trend: 'In 2006, only 15 Texas convicts were sentenced to death, down from 34 a decade earlier': Evan Thomas and Martha Brant, 'Injection of Reflection', *Newsweek* (New York), 19 November 2007, 40. A number of these factors will be explored below in Part VI.

<sup>46</sup> Death Penalty Information Center, *Number of Executions by State and Region since 1976*, above n 38; Neil A Lewis, 'Death Sentences Decline, and Experts Offer Reasons', *The New York Times* (New York), 15 December 2006, 28. Between 1964 and 1972, only 17 people were executed in the US. See also Espy and Smykla, above n 5.

<sup>47</sup> Deterrence is not, of course, the only basis seen for the death penalty. As the US Supreme Court itself noted in *Furman*, 408 US 238, 308 (Stewart J) (1976), retribution was (and remains today) a powerful argument used to support capital punishment:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law.

See also *Gregg v Georgia*, 428 US 153, 183 (Stewart J for Stewart, Powell and Stevens JJ) (1976) (citations omitted): "Retribution is no longer the dominant objective of the criminal law," but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men."

<sup>48</sup> See, eg, Marquis, above n 32, 505; William Tucker, *Deterring Homicides with the Death Penalty: The Case For Retaining Capital Punishment* (7 April 2003) Human Events <<http://www.humanevents.com/article.php?id=82>>. See generally Robert Tanner, 'Studies Claim Executions Deter Murder: Critics Say Numbers Don't Add Up' (17 June 2007) A9.

<sup>49</sup> In a 1995 research poll, only one per cent of police chiefs in the US believed the expansion of the death penalty would help reduce violent crime. Moreover, a polling of leading criminologists in the US revealed 'a wide consensus ... that the death penalty does, and can do, little to reduce rates of criminal violence': Michael L Radelet and Ronald L Akers, 'Deterrence and the Death Penalty: The Views of the Experts' (1996) 87 *Journal of Criminal Law and Criminology* 1, 10. See also Roger Hood, *The Death Penalty: A Worldwide Perspective* (3<sup>rd</sup> ed, 2002) 230: 'it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater

public clearly does not base its support of the death penalty on deterrence. In the most recent poll on point, 60 per cent of the US public stated that they did not believe the death penalty acts as a deterrent to the commission of crime.<sup>50</sup> Rather, as numerous able scholars have pointed out, support for the death penalty is more complex and multifaceted.<sup>51</sup>

Polling data in the US makes it clear that while support for the death penalty has dropped considerably in recent years, there remains a core and relatively stable level of such support. An all-time high level of support for the death penalty was recorded in a 1994 poll when 80 per cent of respondents indicated they were in favour of the death penalty for a person convicted of murder.<sup>52</sup> That number, in the most recent poll, has dropped to 65 per cent.<sup>53</sup> The number drops further still (to roughly 50 per cent) when citizens were given a choice between the death penalty and life imprisonment with no possibility of parole.<sup>54</sup> This drop

extent than does the threat and application of the supposedly lesser punishment of life imprisonment.' The most recent research appears to find no clear evidence of deterrence: see, eg, Jeffrey Fagan, Franklin E Zimring and Amanda Geller, 'Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty' (2006) 84 *Texas Law Review* 1803; John J Donohue and Justin Wolfers, 'Uses and Abuses of Empirical Evidence in the Death Penalty Debate' (2005) 58 *Stanford Law Review* 791. Cf Cass R Sunstein and Adrian Vermeule, 'Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs' (2005) 58 *Stanford Law Review* 703. In *New Jersey v Ramseur*, 106 NJ 123, 180 (Wilentz CJ for Pollock, Clifford, O'Hern, Garibaldi and Stein JJ) (NJ, 1987), the Supreme Court of New Jersey found that "'common-sense" explanations of the penalty's deterrent effect based on logic ... are neither persuasive nor important.' The Court's conclusions were recently said to be 'still valid today': New Jersey Death Penalty Study Commission, *New Jersey Death Penalty Study Commission Report* (2007) 28. As one judge has quipped: 'Who knows? Studies on this issue [the death penalty's deterrent effect], taken as a whole, will give support for any conclusion you wish to draw': Wilkins, above n 5, 807.

<sup>50</sup> Today, only 38 per cent of those polled think that the death penalty is an effective deterrent: see Dieter, *A Crisis of Confidence*, above n 45, 3. Twenty years ago, more than 60 per cent of the US public believed that the death penalty was an effective deterrent: see David W Moore, *Public Divided between Death Penalty and Life Imprisonment without Parole* (2 June 2004) Death Penalty Information Center <<http://www.deathpenaltyinfo.org/article.php?did=1029&scid=>>>.

<sup>51</sup> For an excellent treatment of the subject, along with a first-rate history of the development of capital punishment in the US: see Sundby, above n 45.

<sup>52</sup> *Ibid.*

<sup>53</sup> Polling Report Inc, *Crime/Law Enforcement* (2007) PollingReport.com <<http://www.pollingreport.com/crime.htm>>. Of course, one must be careful not to draw too many conclusions from numbers as reflected in the polling data. Numbers can shift rather dramatically, depending on the precise question asked of the individual, the alternatives that are placed before that person, and whether the question is linked to particular cases or is offered in the abstract. For an excellent discussion of this point: see National Public Radio, 'Death-Penalty Opinion Varies with the Question', *Weekend Edition Sunday*, 2 July 2006 <<http://www.npr.org/templates/story/story.php?storyID=5528030>>. Still, the USA Today/Gallup Poll cited in *Crime/Law Enforcement* shows how the drop has occurred fairly continuously over the last decade. When the question '[a]re you in favor of the death penalty for a person convicted of murder' was asked in 1999, those answering in favour constituted 71 per cent of the public. A year later it was 66 per cent; in 2001, it was 65 per cent; in 2002, the number went up to 72 per cent; and it remained there until the drop again occurred in 2004, when it went to 64 per cent. The latest polling numbers indicate that the supporters of the death penalty, and the supporters of life imprisonment are almost absolutely equal in number.

<sup>54</sup> Polling Report Inc, above n 53. Some observers have quite correctly pointed out that drops in death sentences and in public support for the death penalty are closely connected in some states to statutory enactments allowing for life imprisonment without possibility of parole: see John Blume, Theodore Eisenberg and Martin T Wells, 'Explaining Death Row's Population and Racial Composition' (2004) 1 *Journal of Empirical Legal Studies* 165. The public attitudes are explored in Dieter, *A Crisis of Confidence*, above n 45, 8. Yet that change cannot be the entire explanation; some states throughout this period had laws allowing for life imprisonment without

in general public support is also reflected in a number of governmental steps taken which are consistent with such a view. A moratorium on the death penalty has been declared in Illinois, and both New York and Massachusetts have chosen not to re-enact their death penalty statutes.<sup>55</sup> On 17 December 2007, the State of New Jersey became the first state to abolish the death penalty through the legislative process.<sup>56</sup> It is also clear, however, that a core of the US public continues to support the death penalty owing to, as one astute commentator noted, ‘an abiding belief that certain crimes, like those committed by Timothy McVeigh [the Oklahoma City bomber], deserve only the death penalty.’<sup>57</sup>

This support for the death penalty in the US should not come as a surprise. On this point, the US is hardly unique. Polls conducted throughout the world indicate that in many countries — even those without capital punishment systems — support for the death penalty is relatively high, sometimes even stronger than in the US. Japan, South Korea, the UK, Canada and Russia are good illustrations. In Japan, public support for capital punishment is above 80 per cent,<sup>58</sup> and in South Korea the figure is 65 per cent<sup>59</sup> — both countries have retained the death penalty. In both the UK<sup>60</sup> and Canada<sup>61</sup> (where capital

possibility of parole, and a similar decline has occurred there in the same period. See also: Sundby, above n 45, 1943–5; Wayne A Logan, ‘Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium’ (2002) 100 *Michigan Law Review* 1336, 1336–40. For the striking shift on this point in New York State: see Michael Cooper and Marjorie Connelly, ‘Poll Says Spitzer Is Leading Faso in GOP Areas’, *The New York Times* (New York), 29 September 2006, 1:

Attitudes toward the death penalty [in New York] have shifted significantly as well. In 1994, when voters were asked if people convicted of murder should face the death penalty or life in prison with no chance of parole, 48 percent said that they favored the death penalty, and 35 percent said that they favored life in prison without parole. When the same question was asked this week, 29 percent said that they favored the death penalty, while 50 percent said that they favored life in prison without parole.

For the experience in Florida: see Editorial, ‘Verdict on Death Penalty Also Applies to Florida’, *Palm Beach Post* (West Palm Beach), 17 January 2003, 16A: ‘Since 1994, when Florida allowed juries the option of choosing life without parole — previously, “life in prison” had meant a mandatory 25 years, then eligibility for parole — the annual number of death sentences state-wide has declined by more than 50 percent.’

<sup>55</sup> Sundby, above n 45, 1930–1. A majority of US citizens now favour a moratorium: Dieter, *A Crisis of Confidence*, above n 45, 11.

<sup>56</sup> NJ STAT ANN (West) § 2C:11-3 (2006). See Jeremy W Peters, ‘Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8’, *The New York Times* (New York), 18 December 2007, 3.

<sup>57</sup> Sundby, above n 45, 1972. A striking turnabout with the polls can be seen in another state. In 1999, New Jersey residents supported the death penalty over life imprisonment without parole, by a 44 to 37 per cent margin. Several years later the numbers were reversed with 36 per cent favouring the death penalty and 48 per cent in favour of life without parole: see Laura Mansnerus, ‘Panel Seeks End to Death Penalty for New Jersey’, *The New York Times* (New York), 3 January 2007, 1.

<sup>58</sup> See Charles Lane, ‘On Death Row in Japan’ (2005) 132 *Policy Review* 69. For an overview of the information on international polls: see Death Penalty Information Center, *International Polls and Studies* (2007) <<http://www.deathpenaltyinfo.org/article.php?did=2165>>.

<sup>59</sup> Death Penalty Information Center, *International Polls and Studies*, above n 58.

<sup>60</sup> Angus Reid Global Monitor, *Lukewarm Support for Death Penalty in Britain* (1 February 2006) <<http://www.angus-reid.com/polls/index.cfm/fuseaction/viewItem/itemID/10758>>. One rather remarkable development occurred in Italy. In spite of the request of over 300 prisoners incarcerated for life, Italy is showing no signs of backing down on its quest for a United Nations world-wide moratorium on the death penalty. In May 2007, 310 prisoners signed a letter, written by a convicted mobster, petitioning the President of Italy to re-establish the death penalty so that

punishment was abolished in the 1970s), half of those polled supported capital punishment. About two-thirds of the Russian public favour the death penalty,<sup>62</sup> which Russia retains but appears not to utilise.<sup>63</sup> There is strong support for capital punishment in a number of other nations too, such as South Africa (72 per cent),<sup>64</sup> Brazil (51 per cent),<sup>65</sup> Mexico (63 per cent),<sup>66</sup> the Dominican Republic (67 per cent)<sup>67</sup> and the Czech Republic (57 per cent).<sup>68</sup>

## VI CONCERNS ABOUT CAPITAL PUNISHMENT

Historically, many concerns regarding the death penalty have been raised in the US and elsewhere. They range from broad ethical questions to quite specific practical issues. Several of the more significant objections are canvassed in this Part.

### A *The Moral Argument*

Increasingly, the debate has shifted from the broad moral, spiritual and religious arguments regarding the death penalty towards other more particular points. Observers question whether the capital punishment system can make correct decisions, whether the procedures are fair, and whether it has a disproportionate impact on particular groups of people. Some view capital punishment in broader terms still, contending, for example, that the execution of dangerous criminals is highly moral and religiously based on the notion of 'an eye for an eye, a tooth for a tooth'.<sup>69</sup> Two such arguments were forcefully and succinctly put in letters to the editor of *Newsweek* published in response to a 2006 article opposing the death penalty by well-known columnist Anna Quindlen. The first, written by an American, bristles at Quindlen's argument:

they would not have to spend the rest of their lives in prison: see Christian Fraser, *Italy Inmates Seek Death Penalty* (31 May 2007) BBC News <<http://news.bbc.co.uk/1/hi/world/europe/6707865.stm>>; Brett Murphy, *Italy Prisoners Appeal for Death Penalty Reinstatement* (31 May 2007) Jurist Legal News and Research <<http://jurist.law.pitt.edu/paperchase/2007/05/italy-prisoners-appeal-for-death.php>>. However, according to a press release on 15 June 2007, this appeal has made no difference to Italy's stance on the death penalty. Italy is more determined than ever to pursue a universal moratorium on the death penalty, and has support from 93 of the UN member states for the moratorium: see Marco Pannella, 'Italy to Table Pro-Moratorium on Death Penalty' (Press Release, 15 June 2007) <<http://www.scoop.co.nz/stories/WO0706/S00287.htm>>.

<sup>61</sup> Canadian Press and Leger Marketing, *The Opinion of Canadians with Regards to the Death Penalty* (2001).

<sup>62</sup> Mikhail Margelov, 'The Specter of Capital Punishment in Russia' (2006) 4(1) *Russia in Global Affairs* 140.

<sup>63</sup> *Ibid.*

<sup>64</sup> Angus Reid Global Monitor, *South Africans Support Death Penalty* (14 May 2006) <<http://www.angus-reid.com/polls/view/11872>>.

<sup>65</sup> Angus Reid Global Monitor, *Many Brazilians Favour Death Penalty* (24 August 2006) <<http://www.angus-reid.com/polls/view/12893>>.

<sup>66</sup> Angus Reid Global Monitor, *Crime Has Mexicans Contemplating Death Penalty* (9 August 2005) <<http://www.angus-reid.com/polls/view/8445>>.

<sup>67</sup> Angus Reid Global Monitor, *Dominican Republic Ponders Death Penalty* (22 April 2006) <<http://www.angus-reid.com/polls/view/11639>>.

<sup>68</sup> Angus Reid Global Monitor, *Czechs Argue for Return of Capital Punishment* (24 November 2005) <<http://www.angus-reid.com/polls/view/9970>>.

<sup>69</sup> *Gospel of St Matthew* (King James version, 2003 ed) 5:38.

Quindlen also uses the tired cliché that the United States is one of the few countries ‘that kill people to make clear what a terrible thing killing people is.’ Murder and capital punishment are completely different animals. True, both ultimately result in a person’s losing his or her life, but one is a crime, and the other is the ultimate punishment for that crime. In putting a person to death, we are removing an individual from our society who has proved to be a dangerous person.<sup>70</sup>

The other letter, from a Canadian, talks about the moral imperative with respect to evildoers:

the death penalty [was not] intended as utopian social engineering. ... It need achieve no result other than the execution of the guilty. For some crimes, it is the only possible legitimate punishment, whether by moral or civic standards. It demands the one thing that must be demanded of a free citizen, the standard by which his freedom is earned and by which its existence is proved: full personal responsibility. To cite deprivation or root causes in mitigation is an insult in a democracy. The only cause of crime is the decision to commit it, and the maker of that decision should be accountable for it. For murder in particular, no other sentence meets that standard. Having capital punishment proves that the United States still actually respects its citizens’ choices in doling out justice. Would that other countries followed this example.<sup>71</sup>

The broad anti-death penalty view can be stated concisely: *it is morally wrong to kill*.<sup>72</sup> The most consistent, well-publicised and forceful institutional objection to the death penalty on moral grounds comes from the Roman Catholic Church. The Church has not wavered in its opposition to the death penalty. For instance, the US Catholic bishops have urged all Catholics to ‘join organizations that work to curtail [the death penalty] ... and those that call for its abolition.’<sup>73</sup> In 1989, Pope John Paul II called ‘for a consensus to end the death penalty, which is both

<sup>70</sup> *Newsweek Letters to the Magazine* (17 July 2006) Newsweek.com <<http://www.newsweek.com/id/45841/output/print>>.

<sup>71</sup> *Ibid.*

<sup>72</sup> David R Dow, ‘Death by Good Intentions’, *The Washington Post* (Washington DC), 15 October 2006, B07. The moral claims are vigorously debated in Daniel R Williams, ‘The Futile Debate over the Morality of the Death Penalty: A Critical Commentary on the Steiker and Sunstein-Vermeule Debate’ (2006) 10 *Lewis and Clark Law Review* 625; Sunstein and Vermeule, above n 49; Carol S Steiker, ‘No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty’ (2005) 58 *Stanford Law Review* 751. Consider this striking argument by Thomas Kleven, ‘Is Capital Punishment Immoral Even if It Deters Murder?’ (2006) 46 *Santa Clara Law Review* 599, 601:

capital punishment cannot be justified in the United States in the current historical context for moral reasons that trump consequentialist considerations. This is not an argument that capital punishment is absolutely immoral, since I believe it can be justified in a sufficiently just society. Rather, the argument is that the United States is not that society. Since capital punishment threatens to perpetuate existing social injustices that contribute to murder, substantial societal reform must first be undertaken before it could be considered justifiable.

Cf Claire Finkelstein, ‘A Contractarian Argument against the Death Penalty’ (2006) 81 *New York University Law Review* 1283.

<sup>73</sup> Catholic Bishops of the United States, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (15 November 2000) United States Conference of Catholic Bishops <<http://www.nccbuscc.org/sdwp/criminal.shtml>>.

cruel and unnecessary.<sup>74</sup> As stated in 2003 by the US Conference of Catholic Bishops:

Society has a right and duty to defend itself against violent crime and a duty to reach out to victims of crime. Yet our nation's increasing reliance on the death penalty cannot be justified. We do not teach that killing is wrong by killing those who kill others. Pope John Paul II has said the penalty of death is 'both cruel and unnecessary'. The antidote to violence is not more violence. In light of the Holy Father's insistence that this is part of our pro-life commitment, we encourage solutions to violent crime that reflect the dignity of the human person, urging our nation to abandon the use of capital punishment.<sup>75</sup>

### B *Guilt or Innocence?*

The concern that has garnered the most publicity in recent years regarding the death penalty relates to whether there are innocent individuals who have been executed or are currently on death row.<sup>76</sup> A number of organisations have undertaken studies of such cases, including the Northwestern University Center on Wrongful Convictions<sup>77</sup> and the well-known Innocence Project.<sup>78</sup> While some have expressed scepticism as to whether innocent individuals have in fact been executed,<sup>79</sup> it seems certain that many individuals have been wrongly convicted of capital offences and condemned.<sup>80</sup> DNA testing alone has exonerated more

<sup>74</sup> Pope John Paul II, *Statements on the Death Penalty by the Holy Father* (2003) United States Conference of Catholic Bishops <<http://www.usccb.org/sdwp/national/deathpenalty/holyfather.shtml>>.

<sup>75</sup> United States Conference of Catholic Bishops, *Faithful Citizenship: A Catholic Call to Political Responsibility* (2003) (citations omitted). Most recently, the Church called for mercy in connection with those convicted of the 2002 Bali bombings which killed 91 Australians: Barney Zwartz, 'Spare the Bali Bombers, Says Catholic Church', *The Age* (Melbourne), 3 January 2008, 1.

<sup>76</sup> Of course, these and other concerns exist as well in non-capital cases, but the stakes here make them especially troubling.

<sup>77</sup> See generally Center on Wrongful Convictions, Northwestern University School of Law Bluhm Legal Clinic, *Criteria for Cases Listed as Exonerations* (2007) <<http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations>>.

<sup>78</sup> See Innocence Project, Benjamin N Cardozo School of Law, Yeshiva University, *Facts on Post-Conviction DNA Exonerations* <[http://www.innocenceproject.org/docs/DNAExonerationFacts\\_WEB.pdf](http://www.innocenceproject.org/docs/DNAExonerationFacts_WEB.pdf)>.

<sup>79</sup> That appears to be the position of Scalia J, who goes to some length to cast doubt on the breadth of the problem in *Kansas v Marsh*, 126 S Ct 2516, 2529–39 (2006). But see Bob Braun, 'He Knows Firsthand Death Row's Fatal Flaw', *The Star-Ledger* (New Jersey), 6 November 2006, 13. There, the former District Attorney of San Antonio, Texas acknowledged that he was not the 'first or only prosecutor who presided over the execution of an innocent man'. He said:

'We thought we were doing the Lord's work' ... 'What we were really on was a fool's errand.' ... We have to be able to guarantee that there will be no mistakes in a capital case ... Because we are dealing with a system run by imperfect human beings, we can't make that guarantee. It's a system that cannot be fixed.

The case involved a misidentification. The defendant, Ruben Cantu, was executed in 1992. See generally, 'Symposium: The Faces of Wrongful Conviction' (2006) 37 *Golden Gate University Law Review* 1.

<sup>80</sup> Addressing the horrendous difficulties in one state, Souter J (for Stevens, Souter, Ginsburg and Breyer JJ) in *Kansas v Marsh*, 126 S Ct 2516, 2544–5 noted that 'Illinois had thus wrongly convicted and condemned even more capital defendants than it had executed'. The best recent work in the area is by Samuel R Gross et al, 'Exonerations in the United States: 1989 through 2003' (2005) 95 *Journal of Criminal Law and Criminology* 523. For a recent review of the problems by the founder of the Innocence Project: see Barry C Scheck, 'Barry Scheck Lectures

than 170 people convicted of serious crimes in the last decade, yet DNA testing of evidence is limited to a very small percentage of criminal investigations.<sup>81</sup>

The wide publicity regarding potentially innocent individuals being convicted of capital offences has triggered intense debates within the US. It has led to considerable rethinking on the part of legislators, executives and prosecutors as to the circumstances under which it is acceptable to charge capital offences and when to allow such cases to proceed.<sup>82</sup> The recent exonerations of two individuals who were on death row have typified the reasons for the intense concern regarding such convictions.

Joseph Nahume Green was sentenced to death in Florida for the murder of a local journalist. One of the key eyewitnesses was an individual with a below-normal intelligence quotient who had initially described the killer as a white man, despite Green being black. This witness identified Green in a one-person police line-up. The jury convicted Green chiefly on the basis of this single eyewitness. Seven years later, his conviction was overturned when the witness was found to have been incompetent to testify.<sup>83</sup>

Another compelling case is that of Verneal Jimerson, who spent 11 years on death row. A young couple was abducted from their suburban community and murdered. For the entire period of his trial and incarceration, Jimerson asserted his innocence and turned down opportunities to be released in exchange for testimony against other defendants. DNA evidence ultimately demonstrated that neither Jimerson nor the other defendants raped one of the victims before she was killed. The Illinois Supreme Court ruled that the prosecution's chief witness had given false testimony.<sup>84</sup> Although serious problems with the Jimerson

on Wrongful Convictions' (2006) 54 *Drake Law Review* 597. Exonerations were found primarily in cases involving mistaken identify, false confessions or poor scientific testing.

<sup>81</sup> Keith A Findley and Michael S Scott, 'The Multiple Dimensions of Tunnel Vision in Criminal Cases' [2006] *Wisconsin Law Review* 291. A recent study notes that '123 people have been freed from death row after significant questions were raised about their convictions — 14 of them through DNA testing': Robert Tanner, 'US Death Sentences Drop to 30-Year Low', *USA Today* (Washington DC), 4 January 2007, 6. See generally Peter A Joy, 'The Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System' [2006] *Wisconsin Law Review* 399.

<sup>82</sup> For a thoughtful discussion of the point: see Sundby, above n 45.

<sup>83</sup> Center on Wrongful Convictions, Northwestern University School of Law Bluhm Legal Clinic, *The Florida Exonerated: Joseph Nahume Green* (2007) <<http://www.law.northwestern.edu/wrongfulconvictions/exonerations/flGreenSummary.html>>.

<sup>84</sup> Associated Press, *Long Road from Death Row to Freedom Slayings: Verneal Jimerson Endured 11-Year Ordeal*, Joliet Prisons <<http://joliet.com/prisons/executed/williams.html>>. See also 'An Acquittal after 15 Years on Death Row', *The New York Times* (New York), 6 December 2007, 31. David Protess and Rob Warden, *A Promise of Justice* (1998), which describes in some detail what some have referred to as 'the worst travesty of American justice since the infamous Scottsboro trials in Alabama more than half a century earlier'. The defendants ultimately received millions of dollars to settle claims against the government: *Death Row Exonerations Inspire Debate over Death Penalty* (15 August 1999) CNN.com <<http://www.cnn.com/US/9908/15/death.row/index.html>>. One can readily find many other illustrations of innocent individuals being found guilty — in both capital and non-capital cases — and then being imprisoned for decades before their innocence was shown: see, eg, Andrew E Taslitz, 'Wrongly Accused: Is Race a Factor in Convicting the Innocent?' (2006) 4 *Ohio State Journal of Criminal Law* 121; Fernanda Santos, 'DNA Evidence Frees a Man Imprisoned for Half His Life', *The New York Times* (New York), 21 September 2006, 1; *Amrine v Roper*, 102 SW 3d 541 (Mo, 2003). See also John Grisham, *The Innocent Man: Murder and Injustice in a Small Town* (2006) which is about the miscarriage of justice following the arrest and trial of former professional baseball player

prosecution were raised in 1983, it took more than a decade to exonerate the men. This case was one of a number that led the Governor of Illinois to declare a moratorium on capital punishment in that state, resulting in a blue-ribbon commission's report on reforming the system.<sup>85</sup> Best-selling author Scott Turow, a practising lawyer and former federal prosecutor, was a member of the commission. The study ultimately persuaded Turow to change his mind on capital punishment, and he now opposes it:

I admit that I am still attracted to a death penalty that would be applied to horrendous crimes, or that would provide absolute certainty that the likes of Henry Brisbon [a convicted killer] would never again satisfy their cruel appetites. But if death is available as a punishment, the furious heat of grief and rage that these crimes inspire will inevitably short-circuit any capital system. Now and then, we will execute someone who is innocent, while the fundamental equality of each survivor's loss creates an inevitable emotional momentum to expand the categories for death-penalty eligibility. Like many others who have wrestled with capital punishment, I have changed my mind often, driven back and forth by the errors each position seems to invite. Yet after two years of deliberation, I seem to have finally come to rest. When [former US Senator] Paul Simon asked whether Illinois should have a death penalty, I voted no.<sup>86</sup>

### C Procedural Fairness

John J Curtain Jr, a former president of the American Bar Association, told a congressional committee in 1991 that '[w]hatever you think about the death penalty, a system that will take life must first give justice.'<sup>87</sup> Many concerns have been raised regarding the procedural fairness of the capital punishment process, ranging from prosecutorial determinations as to when to bring charges, to post-conviction reviews. Two of the most compelling arguments relate to the assistance of lawyers for indigent defendants, and those individuals serving as jurors in capital cases.

Ron Williamson. See generally Rodney Uphoff, 'Convicting the Innocent: Aberration or Systemic Problem' [2006] *Wisconsin Law Review* 739. A Pennsylvania commission has been formed to study the causes of erroneous convictions: see Gabrielle Banks, 'Pennsylvania Panel to Study Wrongful Convictions', *Pittsburgh Post-Gazette* (Pittsburgh), 31 March 2007, A1.

<sup>85</sup> See also Illinois, *Report of the Governor's Commission on Capital Punishment* (2002). Illinois Governor George H Ryan declared the moratorium in 2000. In doing so, he stated that the Illinois death penalty system was 'arbitrary, capricious, and therefore immoral': Stewart, above n 8.

<sup>86</sup> See Scott Turow, 'To Kill or Not to Kill: Coming to Terms with Capital Punishment', *The New Yorker* (New York), 6 January 2003, 40. John Grisham's view is similar — in Grisham, above n 84, 356, he wrote:

The journey also exposed me to the world of wrongful convictions, something that I, even as a former lawyer, had never spent much time thinking about. This is not a problem peculiar to Oklahoma, far from it. Wrongful convictions occur every month in every state in this country, and the reasons are all varied and all the same — bad police work, junk science, faulty eyewitness identifications, bad defense lawyers, lazy prosecutors, arrogant prosecutors.

In the cities, the workloads of criminologists are staggering and often give rise to less than professional procedures and conduct. And in the small towns the police are often untrained and unchecked. Murders and rapes are still shocking events and people want justice, and quickly. They, citizens and jurors, trust their authorities to behave properly. When they don't, the result is Ron Williamson and Dennis Fritz [innocent people who were sentenced to death.]

<sup>87</sup> Alex J Hurder, 'Whatever You Think about the Death Penalty, a System that Will Take Life Must First Give Justice' (1997) 24(1) *Human Rights* 22, 24.

1 *Assistance of Counsel*

The US Supreme Court has, for more than 75 years, spoken in a single strong voice of the need to have competent lawyers representing poor defendants in serious criminal cases.<sup>88</sup> In 1963, the Court decided that all courts in the US, whether state or federal, had a constitutional obligation<sup>89</sup> to provide lawyers at trial to people accused of serious crimes, whether capital or non-capital, who could not afford to hire a lawyer:

reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. ... [L]awyers in criminal courts are necessities, not luxuries.<sup>90</sup>

For the past 20 years, many observers of the US criminal justice system have commented on the terrible difficulties of providing competent lawyers in serious criminal cases. There have been numerous instances documented of lawyers with overwhelming case loads, lawyers who were utterly unprepared for trial, and lawyers who had no or insufficient experience in handling complex matters.<sup>91</sup> In capital cases especially, the concerns have been intense, with numerous cases ultimately being overturned due to the gross incompetence of defence lawyers appointed to represent indigent defendants. Consider the remarks of three well-known legal commentators in the US. Justice Ruth Bader Ginsburg of the US Supreme Court once said that, '[p]eople who are well represented at trial do not get the death penalty.'<sup>92</sup> Similarly, Stephen B Bright, a well-known defence lawyer, has noted that:

Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. The process of sorting out who is most de-

<sup>88</sup> *Powell v Alabama*, 287 US 45, 68–9 (Sutherland J for Hughes CJ, Van Devanter, Brandeis, Sutherland, Stone, Roberts and Cardozo JJ) (1932).

<sup>89</sup> *United States Constitution* amendment VI provides, in part, that 'in all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.'

<sup>90</sup> *Gideon v Wainwright*, 372 US 335, 344 (Black J) (1963). The courts in the US have expanded this right to a lawyer beyond representation at trial. Once the defendant has been formally charged, he or she is entitled to have an attorney at identification confrontations with witnesses, interrogations by officers, and important pre-trial proceedings, such as preliminary hearings and arraignments. The right applies in all cases in which the defendant receives any length of imprisonment as a penalty, no matter how short, even if the sentence is suspended. And, the right continues after trial and includes sentencing proceedings and at least one automatic appeal.

<sup>91</sup> See, eg, Mary Sue Backus and Paul Marcus, 'The Right to Counsel in Criminal Cases: A National Crisis' (2006) 57 *Hastings Law Journal* 1031; Barbara Allen Babcock, 'The Duty to Defend' (2005) 114 *Yale Law Journal* 1489; Norman Lefstein, 'In Search of *Gideon's* Promise: Lessons from England and the Need for Federal Help' (2004) 55 *Hastings Law Journal* 835; Lawrence C Marshall, '*Gideon's* Paradox' (2004) 73 *Fordham Law Review* 955; Tracey L Meares, 'What's Wrong with *Gideon*' (2003) 70 *University of Chicago Law Review* 215. In Elizabeth Beck, Sarah Britto and Arlene Andrews, *In the Shadow of Death: Restorative Justice and Death Row Families* (2007) 61:

In a death penalty case there are usually two attorneys, the lead attorney and the second chair, and their skill levels range from excellent to appallingly incompetent. Examples of death penalty attorneys' abysmal behavior abound. Lawyers have been heard calling a client a racial epithet, observed sleeping during the trial, and even seen at the trial inebriated.

<sup>92</sup> Deborah T Fleischaker, 'Dead Men Pausing: The Continuing Need for a National Moratorium on Executions' (2004) 31(1) *Human Rights* 14.

serving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing. Essential guarantees of the Bill of Rights may be disregarded because counsel failed to assert them, and juries may be deprived of critical facts needed to make reliable determinations of guilt or punishment. The result is a process that lacks fairness and integrity.<sup>93</sup>

Professor Erwin Chemerinsky, a highly regarded academic, has made comments in the same vein:

The importance of adequate counsel in death penalty cases cannot be overstated. A study in Florida found that the single-largest variable that would predict whether a capital defendant would be sentenced to death is whether or not that person had a privately retained counsel or a court-appointed lawyer. ... Of 131 individuals executed during the Texas governorship of George W Bush, 43 had an attorney who had previously been disciplined by the bar for misconduct, and 40 of those who had been convicted had a lawyer who presented no evidence or, at most, one witness on their behalf. ... One thousand people across the country have now been executed since the death penalty was reinstated. Most never would have been sentenced to death if they had had competent lawyers.<sup>94</sup>

Much of the difficulty regarding the competence of lawyers has been a reluctance on the part of courts to forcefully intervene and carefully scrutinise the performance of lawyers. This hesitation can be traced to the US Supreme Court's ruling almost 25 years ago that a violation of the Sixth Amendment based on ineffective assistance of counsel can only be shown if that lawyer's performance was not reasonably competent — with considerable deference given to questionable judgement calls of lawyers — and there is a reasonable probability that the poor performance somehow affected the outcome at the trial.<sup>95</sup> While it is certainly true that the US Supreme Court has, on occasion, found that ineffective assistance of counsel resulted in improper death penalty verdicts,<sup>96</sup> it is extremely difficult for appellate attorneys to demonstrate poor performances (in constitutionally significant terms) by trial lawyers because they must demonstrate that there was a 'reasonable probability' that the trial would have been different but for the performance of the lawyer.<sup>97</sup> The sorry role of all too many

<sup>93</sup> Stephen B Bright, 'Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer' (1994) 103 *Yale Law Journal* 1835, 1837 (citations omitted).

<sup>94</sup> Erwin Chemerinsky, *Defenseless Defendants and the Death Penalty* (7 December 2005) The Seattle Times <[http://seattletimes.nwsource.com/html/opinion/2002668591\\_chemerinsky07.html](http://seattletimes.nwsource.com/html/opinion/2002668591_chemerinsky07.html)>.

<sup>95</sup> The case is *Strickland v Washington*, 466 US 668, 694 (O'Connor J for Burger CJ, White, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ) (1984) ('*Strickland*'), which required a demonstration that the lawyer's performance fell below a standard of objective reasonableness and that, but for the poor representation, the outcome of the proceedings would likely have been different. Some of the harshest criticism of the *Strickland* standard is found in Smith, above n 10, 51–2; Backus and Marcus, above n 91, 1087–90.

<sup>96</sup> See, eg, *Rompilla v Beard*, 545 US 374, 377 (Souter J for Stevens, O'Connor, Souter, Ginsburg and Breyer JJ) (2005); *Wiggins v Smith*, 539 US 510, 521 (O'Connor J for Rehnquist CJ, Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer JJ) (2003); *Williams v Taylor*, 529 US 362, 371 (Stevens J for Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer JJ) (2000).

<sup>97</sup> *Woodford v Visciotti*, 537 US 20, 22–3 (Rehnquist CJ, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer JJ) (2002).

trial lawyers in capital cases, at least historically, is one of the most significant bases for procedural fairness criticisms.

A recent case demonstrates in a stark and remarkable fashion the problems which can surface regarding the effective legal representation of indigent defendants in criminal cases.<sup>98</sup> Neither the defence lawyer nor the prosecution knew of the petitioner's actual identity until his case had been affirmed on appeal. The lawyer testified that he was an experienced death penalty lawyer at the time, having handled four capital cases. The real number was zero, the federal judge found, and the lawyer was later charged with perjury for his statement. The inmate, his client, was sent to death row as James Slaughter; his real name is Jeffrey Leonard. The case was not one of mistaken identity. There is good reason to believe that Leonard was guilty of murder. But his current lawyers say a competent investigation of his background would have resulted in considerable evidence that may well have persuaded the jury to spare his life. He endured a brutal childhood. He

has possible brain damage from an untreated childhood skull fracture, [his mother and stepfather] beat him so badly as a child that scars remain all over his body, [his stepfather] once fired a gun at him as he ran out of his home carrying his younger brother, and his mother, brothers, and grandparents (who did not know about the trial) would have testified on his behalf.<sup>99</sup>

Just last year, an appeals court agreed that his lawyer's performance violated the *United States Constitution*. But the defendant lost his appeal because the judges found 'that better legal work would not have caused the jury to sentence him to life in prison instead of death.'<sup>100</sup>

## 2 *The Involvement of Juries*

Much has been written regarding the difficulty in selecting citizens to serve as jurors in capital cases. Questions arise as to who is qualified to serve in death penalty cases,<sup>101</sup> what biases individuals may bring into the jury room,<sup>102</sup> and how much information can be shared with those who serve on capital cases.<sup>103</sup>

Of all the issues regarding juror involvement in capital cases, however, the one which resonates strongest with many relates to the ability of ordinary citizens to understand the often complex and arcane instructions given to them by judges.

<sup>98</sup> *Slaughter v Parker*, 450 F 3d 224 (6<sup>th</sup> Cir, 2006). See Adam Liptak, 'Despite Flawed Defense, a Death Sentence Stands', *The New York Times* (New York), 2 November 2006, 18.

<sup>99</sup> Liptak, above n 98.

<sup>100</sup> *Ibid*. See also Jack Fuller, *Not in the Name of Justice* (3 July 2006) Chicago Tribune <<http://www.chicagotribune.com/news/opinion/chi-0607030179jul03,0,3347868.story>>.

<sup>101</sup> Only those individuals who indicate they could — if the evidence warranted it — return a verdict of guilty and impose a death penalty sentence are permitted to serve on juries in capital cases. This 'death qualified' standard has been highly controversial. See generally Eric Schnapper, 'Taking *Witherspoon* Seriously: The Search for Death Qualified Jurors' (1984) 62 *Texas Law Review* 977; *Witherspoon v Illinois*, 391 US 510 (1968); *Lockhart v McCree*, 476 US 162 (1986). See also American Psychological Association, *The Death Penalty in the United States* (August 2001) APA Online <<http://www.apa.org/pi/deathpenalty.html>>.

<sup>102</sup> See William J Bowers, Marla Sandys and Benjamin D Steiner, 'Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making' (1997) 83 *Cornell Law Review* 1476.

<sup>103</sup> The issues are explored in the thoughtful report of the Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2006).

These instructions are intended to guide laypersons in deciding what their judgement should be as they apply important legal principles to the facts. They must first determine whether a person is guilty of a heinous murder, and then whether that person deserves to be executed for it. There is, however, considerable evidence that, in many cases, jurors do not understand those instructions.

A disturbing case on point is *Weeks v Angelone* ('Weeks').<sup>104</sup> In that case, little doubt was raised as to whether the defendant Lonnie Weeks had in fact been involved in the murder of a state trooper in Virginia. At trial, prosecutors asked that jurors sentence Weeks to be executed because the crime had been committed in a heinous fashion, or alternatively because Weeks constituted a continuing threat to society. Either of those findings would have been sufficient to warrant the death penalty. During their deliberations, however, jurors sent the judge a note asking whether they were *required* to sentence Weeks to death if they came to either conclusion. The answer clearly was *no*. Jurors could make that factual determination and still decide that, on balance, life in prison was a more appropriate sentence than death. Instead of answering the question, however, or otherwise making certain the jurors truly understood this essential point, the trial judge simply told them to reread the instruction, the same instruction that prompted their question in the first place. Soon thereafter, the jury sentenced Weeks to death.

The dissenters in the US Supreme Court had little doubt that the instructions given to the *Weeks* jury were ambiguous, at least as read by the jurors, and that the jurors ought to have been told clearly what the law was. The majority of the Court, however, disagreed and concluded that the defendant had, at best, 'demonstrated only that there exists a slight possibility that the jury considered itself precluded from considering mitigating evidence.'<sup>105</sup> In an empirical study conducted soon after by this author and two colleagues, a series of questions was put to more than 150 community members regarding their understanding of the underlying instruction and its impact on a trial. Contrary to the majority of the US Supreme Court, a significant number of respondents believed that the jury was required to order the death penalty when making the aforementioned findings, even though the law is to the contrary. However the question was posed, about 40 per cent of respondents simply got the law wrong.<sup>106</sup> These results were not unique to the pool of citizens responding to the question. The nationwide Capital Jury Project interviews found similar misunderstandings by significant numbers of those serving as jurors in capital cases.<sup>107</sup>

An analysis of the data revealed that many (though not a majority of) jurors did not understand the crucial instruction. As we concluded:

<sup>104</sup> 528 US 225 (2000).

<sup>105</sup> Ibid 236 (Rehnquist CJ for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ).

<sup>106</sup> Stephen P Garvey, Sheri Lynn Johnson and Paul Marcus, 'Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases' (2000) 85 *Cornell Law Review* 627, 635–6.

<sup>107</sup> Ibid 637. The Capital Jury Project is a continuing programme of university-based research in the US which seeks to learn whether jurors' exercise of capital sentencing discretion under modern capital statutes conforms to constitutional standards. See also School of Criminal Justice, University at Albany, State University of New York, *What Is the Capital Jury Project?* (15 August 2006) <<http://www.albany.edu/scj/CJPwhat.htm>>.

The jurors who sentenced Lonnie Weeks to death did not understand the law. They asked the trial judge for help. Based on our mock study, the answer he gave probably did precious little good. Consequently, when the jurors voted to condemn Weeks, some of them probably still didn't understand the law and continued to think that they *had* to vote for death. Yet no capital juror is ever required to vote for death. The Supreme Court upheld Weeks's death sentence nonetheless. But the Court's judgment is ultimately based on nothing more than instinct and conjecture. Sadly, the evidence presented here leads to one conclusion: The Court got this one wrong, both on the facts and on the law.<sup>108</sup>

#### D *Bias in the Process*

Whatever one's views concerning capital punishment, it is clear that there remain ongoing issues regarding fairness in the process. In a seminal study, a Columbia University law professor surveyed death penalty prosecutions in the US over a 15-year period and found that 'an astonishing two out of every three convictions or sentences is reconsidered.'<sup>109</sup> Certainty as to the fairness of the process is hardly present in contemporary US society, as demonstrated by a recent poll, which found that 80 per cent of respondents thought an innocent person had been executed in recent years.<sup>110</sup> Questions as to fairness are at the core of disturbed reactions by many to capital punishment. In one poll, less than half of those surveyed thought that the death penalty was applied fairly.<sup>111</sup>

Of all the points raised regarding fairness in the death penalty process, perhaps none is more alarming than fears that the system is applied in a discriminatory fashion. Sadly, there seems to be evidence to support that concern in at least two distinct areas — first, relating to the racial impact of the system, and secondly, relating to the location of the prosecution.

##### 1 *Race and the Death Penalty*

Today in the US there are just under 3400 inmates on death row. Of these, about 45 per cent are white and 42 per cent are black.<sup>112</sup> The population in the US at the last census showed that the African-American population in the nation was just over 12 per cent. Historically, the death row numbers with regard to race have been, without question, truly shocking. For instance, in Virginia, studies about the racial composition of prisoners executed prior to 1977 indicated that 86 per cent were black and only 14 per cent were white. Those numbers in recent years have moderated considerably so that the split in that state — and most others — is roughly equal between the two racial groups.<sup>113</sup> Moreover, there are

<sup>108</sup> Garvey, Johnson and Marcus, above n 106, 646. The questions continue. Most recently the US Supreme Court, in a 5:4 decision, concluded that jurors could understand broad language in an instruction regarding the manner in which they must determine the weight of mitigating evidence: see *Ayers v Belmontes*, 127 S Ct 469 (2006).

<sup>109</sup> ACLU of Virginia et al, *Broken Justice: The Death Penalty in Virginia* (2003) v.

<sup>110</sup> Richard C Dieter, Death Penalty Information Center, *The Death Penalty in 2000: Year End Report* (December 2000) <<http://www.deathpenaltyinfo.org/article.php?scid=45&did=488>>.

<sup>111</sup> Polling Report Inc, above n 53.

<sup>112</sup> Death Penalty Information Center, *Facts about the Death Penalty* (2007) <<http://www.deathpenaltyinfo.org/FactSheet.pdf>>.

<sup>113</sup> Joint Legislative Audit and Review Commission of the Virginia General Assembly, *Review of Virginia System of Capital Punishment* (2002) 14.

those who would argue, at least in recent times, that the racial breakdown regarding executions or those on death row is reasonably fair since black Americans commit roughly half of all murders in the US.<sup>114</sup>

Nevertheless, there is persuasive evidence that strongly suggests disparities in the prosecution and sentencing of killers, particularly when one focuses on the race of the victim. The most convincing study was done by Professor David Baldus and was relied upon heavily by the parties in the principal US Supreme Court decision addressing this issue, handed down 20 years ago.<sup>115</sup> The study showed that blacks who killed whites were sentenced to death far more often than whites who killed blacks. Still, the justices refused to find that the study made the use of the death penalty unconstitutional; the individuals involved had to prove that they had been personally discriminated against on the basis of race.<sup>116</sup> With these concerns about fairness in mind (and the US Supreme Court's decision still in force), recent evidence on the point is sobering. One study from North Carolina found that 'racial disparities continue to plague North Carolina's capital punishment system in the 1990s — especially discrimination against defendants (of whatever race) whose murder victims are white.'<sup>117</sup> A recent newspaper editorial in Florida pointed out that, in that state, 'minorities are more likely than whites to be sentenced to death, especially when the victim is white. African-Americans make up about 13 percent of the state population, but 36 percent of the Death Row population.'<sup>118</sup> Perhaps the most extensive survey

<sup>114</sup> Roger Clegg, *The Color of Death: Does the Death Penalty Discriminate?* (11 June 2001) National Review Online <<http://www.nationalreview.com/contributors/clegg061101.shtml>>.

<sup>115</sup> *McCleskey v Kemp*, 481 US 279, 286–7 (Powell J for Rehnquist CJ, White, Powell, O'Connor and Scalia JJ) (1987).

<sup>116</sup> See *ibid* 321 where Brennan J (for Brennan, Marshall, Blackmun and Stevens JJ) found the study on race most disturbing:

few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. ... Furthermore ... defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. ... it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black ...

Cf *ibid* 294–5, 297 (Powell J for Rehnquist CJ, White, Powell, O'Connor and Scalia JJ) (citations omitted) where the majority refused to focus on the broad statistics and instead required that impact on this petitioner be demonstrated:

But the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from [other cases using statistics] ... Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the *Constitution* requires that its decision rests on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to [other cases] ... Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study.

<sup>117</sup> Isaac Unah, *Race and the Death Penalty in North Carolina — An Empirical Analysis: 1993–1997* (16 April 2001) Death Penalty Information Center <<http://www.deathpenaltyinfo.org/article.php?did=246&scid=>>>.

<sup>118</sup> Editorial, 'Verdict on Death Penalty Also Applies to Florida', above n 54. The situation in South Carolina is similar: Michael J Songer and Issac Unah, 'The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina' (2006) 58 *South Caro-*

done in recent years occurred in the State of Maryland. There, a study raised grave questions about the impact of race on the capital punishment system and found that:

- the death penalty is sought considerably more often when the victim is white than when the victim is black;
- defendants who kill white victims are at much greater risk of actually receiving a death sentence;
- prosecutors are less likely to withdraw the decision to seek the death penalty when the victim is white;
- the most likely racial combination for a sentence of death occurs when a black defendant is accused of killing a white victim; and
- all of the dozen inmates on death row were convicted of killing white people.<sup>119</sup>

*lina Law Review* 161. See also Susan D Rozelle, 'The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation' (2006) 38 *Arizona State Law Journal* 769; Mustafa El-Farra, 'Race and the Jury: Racial Influences on Jury Decision-Making in Death Penalty Cases' (2006) 4 *Hastings Race and Poverty Law Journal* 219; Justin R Arnold, 'Race and the Death Penalty after *McCleskey*: A Case Study of Kentucky's Racial Justice Act' (2005) 12 *Washington and Lee Journal of Civil Rights and Social Justice* 93.

<sup>119</sup> Raymond Paternoster et al, *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction: Final Report* (2003). See also Michael Millemann and Gary W Christopher, 'Preferring White Lives: The Racial Administration of the Death Penalty in Maryland' (2005) 5 *University of Maryland Law Journal of Race, Religion, Gender and Class* 1, 9–10 (citations omitted):

it was more than twice as likely that a defendant would be sentenced to death when the victim was white than when the victim was black. In black defendant/white victim cases, it was 1.8 times more likely that prosecutors would give death notifications, and 2.6 times more likely that a death sentence would be imposed.

[In 2000] two judges of the Maryland Court of Appeals, including its Chief Judge, concluded that there is a 'strong argument' that 'there is little or no rationality underlying the actual imposition of the death penalty in Maryland, and that the penalty disproportionately falls on poor African-American males accused of murdering white victims.' This was based on over two decades of judicial experiences with the death penalty.

The judges added that, although in theory the Maryland Death Penalty Law is supposed to apply to 'the more heinous first degree murders,' there is 'a strong argument ... that, in practice, the statute has utterly failed to produce this result,' but rather 'that, in Maryland, 'this unique penalty' has been 'wantonly and ... freakishly imposed.'

The cited case is *Colvin-El v Maryland*, 359 Md 49, 55 (Eldridge J for Bell CJ and Eldridge J) (Md, 2000). The Maryland Court of Appeals recently rejected a claim that the death penalty was applied unconstitutionally in spite of the bias shown in these studies: *Evans v Maryland*, 396 Md 256 (Md, 2006). Compare the majority and dissenting opinions discussing the point: *Evans v Maryland*, 396 Md 256, 325–7 (Wilner J) (Md, 2006) (citations omitted):

Evans argues that the 2003 Paternoster study shows that the imposition of the death penalty throughout Maryland operates in a racially and geographically biased manner. ... [In recent years] no court has allowed a claim of this kind. The courts accept the reasoning in *McCleskey* concerning the failure of general statistics to establish a statewide Equal Protection or Cruel and Unusual Punishment violation and instead require a defendant to assert some specific discriminatory intent in their case. ... The result in Maryland should be no different than the consensus around the country. ... In *Calhoun v Maryland*, 297 Md 563 [(1983)] ... [t]he Court held:

Absent any specific evidence of indiscretion by prosecutors resulting in an irrational, inconsistent, or discriminatory application of the death penalty statute, [the] claim cannot stand. To the extent that there is a difference in the practice of the various State's attorney around the State, our proportionality review would be intended to assure that the death penalty is not imposed in a disproportionate manner.

The issue of race in the criminal justice system's use of the death penalty is real and significant. Yet concerns as to racial discrimination in criminal justice contexts, quite separate from the issue of capital punishment, are hardly limited to the US. Consider, for instance, these numbers from other common law jurisdictions:

- indigenous Australians were held in police custody 26 times more often than the rest of the Australian population;<sup>120</sup>
- 15 per cent of the total prison population in Australia is comprised of indigenous Australians, compared with under two per cent in the national community;<sup>121</sup>
- indigenous Australians were 10 times more likely to be stopped and searched than white Australians;<sup>122</sup>
- black English persons were almost eight times more likely to be stopped and searched than white English persons;<sup>123</sup>
- two per cent of the population in England is of black ethnic origin, but over 16 per cent of the prison population is of black ethnic origin;<sup>124</sup> and
- seven years ago, the Supreme Court of Canada criticised the number of Canadian aboriginal offenders in the prison system. In a nation in which only three per cent of the population is aboriginal, one half of all new inmates in several of the provinces are aboriginal.<sup>125</sup>

## 2 *Geography and the Death Penalty*

Perhaps one of the most surprising findings of recent studies which looked to unfairness in the capital punishment system in the US deals with geography. In a large number of states it has become clear that it is not necessarily 'the worst of the worst' that are prosecuted for, and convicted of, capital offences. Rather, the outcome may well depend on the region of the particular state where the crime was committed or the defendant arrested. For instance, in the Maryland study discussed above, the researchers concluded that murderers in a majority black

*Cf Evans v Maryland*, 396 Md 256, 400 (Bell CJ) (Md, 2006): 'The Paternoster study provides substantial evidence that the Baltimore County State's Attorney's Office singled out black defendants from similarly situated white defendants when choosing against whom to seek the death penalty.' The New Jersey Death Penalty Study Commission found that '[t]he available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey': New Jersey Death Penalty Study Commission, above n 49, 1.

<sup>120</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) [13.5.48].

<sup>121</sup> Chloe Hooper, *Island of Lost Souls* (23 July 2006) Guardian.co.uk <<http://www.guardian.co.uk/australia/story/0,,1824986,00.html>>.

<sup>122</sup> Human Rights Watch, *Racial Discrimination and Related Intolerance* (2002) Human Rights Watch: World Report 2002 <<http://www.hrw.org/wr2k2/racism.html>>.

<sup>123</sup> Scot Wortley and Julian Tanner, 'Data, Denials, and Confusion: The Racial Profiling Debate in Toronto' (2003) 45 *Canadian Journal of Criminology and Criminal Justice* 367.

<sup>124</sup> Gordon Barclay, Angie Munley and Tony Munton, *Criminal Justice System Race Unit, Race and the Criminal Justice System: An Overview to the Complete Statistics 2003–2004* (2005) v, 7.

<sup>125</sup> *Too Many Aboriginals in Prison, Says Supreme Court* (10 November 2000) CBC News <[http://www.cbc.ca/canada/story/1999/04/23/scc\\_native990423.html](http://www.cbc.ca/canada/story/1999/04/23/scc_native990423.html)>.

county were 26 times more likely to be sentenced to death than those from another part of the state.<sup>126</sup>

The most extensive evidence regarding the role of geography can be found in the various research projects conducted in Virginia, a state which has quite profound separations between urban and rural communities. For instance, the northern area of Virginia is part of the densely populated Washington DC metropolitan area. The rural south-western Virginia, however, is sparsely populated and is hundreds of miles away from major metropolitan areas. In Virginia, as one study notes, prosecutors in certain counties 'routinely seek the death penalty, while prosecutors in other jurisdictions never or almost never ask for it ... records kept ... indicate significant disparities between jurisdictions.'<sup>127</sup> As pointed out in a legislative review of the Virginia system, prosecuting attorneys are far more likely to seek a capital murder indictment when the crime is committed in a non-urban jurisdiction.<sup>128</sup> The legislators wrote that 'location, more than any other factor, is most strongly associated with the decision by Commonwealth Attorneys to seek the death penalty.' The study concluded:

that prosecutors in high-density population (typically urban) localities are much less likely to seek the death penalty when confronted with a capital-eligible case than their counterparts in other localities. For example, the overall rate at which local prosecutors in high-density jurisdictions sought the death penalty in capital-eligible cases was 200 percent lower than was observed in medium-density localities ...<sup>129</sup>

## VII LIMITATIONS ON THE USE OF CAPITAL PUNISHMENT IN THE UNITED STATES

There are some individuals who cannot be executed for the commission of heinous crimes — only certain crimes are covered by the capital punishment scheme in the US, and not all individuals are deemed sufficiently culpable as to qualify for execution.<sup>130</sup>

<sup>126</sup> See above n 119 and accompanying text.

<sup>127</sup> ACLU of Virginia et al, above n 109, 9.

<sup>128</sup> Joint Legislative Audit and Review Commission of the Virginia General Assembly, *Review of Virginia's System of Capital Punishment* (2002) vi–ii.

<sup>129</sup> *Ibid* vii.

<sup>130</sup> Other restrictions on the use of the death penalty may yet be coming in the near future. One particularly significant debate concerns the manner in which an individual is executed. As noted above, many methods have been used, although today most states within the US look to lethal injection as the most humane form of capital punishment. This method itself, however, has been subject to intense debate and criticism: see Erik Schelzig, 'US Judge Rules Tennessee's Lethal Injection Procedure Is Cruel and Unusual Punishment', *International Herald Tribune* (Paris), 19 September 2007, 7; Mike Ward, 'Death Penalty's Drug Cocktail Rooted in Texas', *Austin American-Statesman* (Austin), 28 May 2006, A01. A recurring issue concerns the ability of states to execute convicted defendants who are mentally ill, but not legally insane. In *Panetti v Quarterman*, 127 S Ct 2842 (2007), the problem was that the defendant (severely mentally disturbed) had been limited in the opportunity to submit expert medical evidence about his mental health. This, the Court concluded, violated the *United States Constitution*. Broader questions involving the mental health of the defendant are being litigated throughout the US. Most recently, the Florida Supreme Court looked to the consideration of mental illness as a factor of mitigation in capital cases in *Offord v Florida*, 544 So 2d 308 (Fla, 2007).

### A *Only Homicides*

The US Supreme Court has held that only murders can be the basis for the death penalty. Even truly serious and awful crimes such as sexual assault cannot, constitutionally, be the basis for the application of the death penalty without the death of a victim. In the leading case, the Court recognised that rape is a heinous crime, but they still would not allow the death penalty to be used. They explained:

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the 'ultimate violation of self.' It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly as happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life.<sup>131</sup>

### B *The Mentally Retarded*

Continuing its concern with applying the death penalty only to the 'worst of the worst,' the US Supreme Court held that those who are mentally retarded cannot be executed, even for horrendous murders.<sup>132</sup> Finding that executions of

<sup>131</sup> *Coker v Georgia*, 433 US 584, 597–8 (White J for Stewart, White, Blackmun and Stevens JJ) (1977) (citations omitted). The holding has its critics: see, eg, Barbara C Morton, 'Freezing Society's Punishment Pendulum: *Coker v Georgia* Improperly Foreclosed the Possibility of Capital Punishment for Rape' (2007) 43 *Willamette Law Review* 1. The Louisiana Supreme Court recently allowed a death sentence for a defendant convicted of raping a young child. The Court distinguished *Coker v Georgia*, 433 US 584 (1977), in emphasising the public condemnation of child rape: *Louisiana v Kennedy*, 957 So 2d 757, 781 (Victory J) (La, 2007). The US Supreme Court has just decided to review the Louisiana ruling: see Robert Barnes, 'Justices to Consider Death Penalty Issue: Legality in Case of Child Rape at Stake', *The Washington Post* (Washington DC), 5 January 2008, A02.

<sup>132</sup> In many cases, it is not the principle of mentally retarded individuals being subject to capital punishment which is at issue, but rather whether the individual is mentally retarded. See, eg, *Atkins v Virginia*, 536 US 304, 317 (2002) where Stevens J (for Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer JJ) held:

To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.

mentally retarded criminals would be cruel and unusual punishment prohibited by the Eighth Amendment, the Court noted that, while punishment of the mentally retarded might not have been as viewed excessive judged 'by the standards that prevailed in 1685 ... or when the Bill of Rights was adopted,' it would be excessive today:

clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.<sup>133</sup>

### C Juveniles

Prosecution rates of individuals under the age of 18 for capital offences in the US have typically been very low. Over a 13-year period ending in 2002, 111 juveniles were sentenced to death, compared with over 3000 for the same time period who were over the age of 18.<sup>134</sup> Prosecutors are reluctant to bring forth such charges against juveniles, and juries are loath to impose the death sentence when they do. These views are consistent with the position ultimately taken by the US Supreme Court in 2005 in *Roper v Simmons*.<sup>135</sup> The case involved a 17-year old who, without apparent reason, participated in a vicious murder of the victim, kidnapping her from her home and drowning her in a river nearby. The Court determined that a murder conviction with a lengthy sentence (rather than execution) would be appropriate. For the Court, two facts were pivotal. The first was that a national consensus had developed against the execution of juvenile offenders, both because of the reluctance of prosecutors to bring charges and jurors to return death verdicts, and because fewer states than ever permitted such executions. In addition, the Court emphasised the lesser culpability of those who are young, even if they understood what they were doing and could properly be prosecuted as adults in the criminal justice setting. The Court explained:

<sup>133</sup> Ibid 318 (Stevens J for Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer JJ) (2002) (citations omitted). After the US Supreme Court's decision, there has been considerable litigation on the question of who is mentally retarded, and in attempting to establish proper procedures for answering that question: see, eg, *Holloday v Campbell*, 463 F Supp 2d 1324 (ND Ala, 2006); *Clark v Quarterman*, 457 F 3d 441 (5<sup>th</sup> Cir, 2006); *Louisiana v Turner*, 936 So 3d 89 (La, 2006).

<sup>134</sup> Jeffrey Fagan and Valerie West, 'The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms' (2005) 95 *Journal of Criminal Law and Criminology* 427, 456.

<sup>135</sup> 543 US 551 (2005).

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies ... tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' ...

The second area of differences is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. ... This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. ...

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. ...

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'<sup>136</sup>

#### VIII THE INTERNATIONAL EXPERIENCE

When US capital punishment is placed in an international context, one commonly encounters two misconceptions. The first is that the US is the world leader with regard to the death penalty. The second is that the number of people being executed in the US is increasing. This latter misconception has been perpetuated by many individuals, not the least of whom was Mary Robinson, the former United Nations High Commissioner for Human Rights, when she stated in 1998: 'The increasing use of the death penalty in the United States and in a number of other states is a matter of serious concern and runs counter to the international community's expressed desire for the abolition of the death penalty.'<sup>137</sup>

The evidence, however, demonstrates precisely the contrary. In fact, fewer individuals are being prosecuted for capital punishment in the US, there are fewer executions and there are more categories of individuals excluded from being eligible for the death penalty,<sup>138</sup> though — in fairness to Robinson — many of these changes have occurred over the past decade.

Moreover, it is inaccurate to describe the US as a leader in capital punishment. Dozens of nations throughout the world permit the execution of criminals for a variety of crimes,<sup>139</sup> and the nation with the largest death penalty apparatus is,

<sup>136</sup> Ibid 569–70 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (citations omitted). For a good discussion of these US Supreme Court imposed limitations: see Meghan J Ryan, 'Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?' (2007) 85 *North Carolina Law Review* 847.

<sup>137</sup> John L. Allen Jr, 'US Allies See Death Penalty as Fascist Relic — Brief Article', *National Catholic Reporter* (Kansas City), 19 January 2001, 4.

<sup>138</sup> See above Parts IV, VII.

<sup>139</sup> See *The Death Penalty Worldwide* (2007) Infoplease <<http://www.infoplease.com/ipa/A0777460.html>>. The list of nations with capital punishment includes Cuba, Egypt, India, Pakistan, Vietnam and Zimbabwe. See also Smith, above n 10. Still, it is true that some of these countries (as a practical matter) do not consider capital punishment as a viable justice option: see, eg, Kim Rahn, 'Korea to Retain Death Penalty System', *The Korea Times* (Seoul) 3 July

unquestionably, the PRC. Amnesty International estimates that during 2006 at least 1591 people were executed in 25 countries and at least 3861 people were sentenced to death in 55 countries.<sup>140</sup> The organisation also estimates that, in that year, at least 1010 people were executed in the PRC 'although the true figures were believed to be much higher. Credible sources suggest that between 7500 and 8000 people were executed in 2006. The official statistics remain a state secret, making monitoring and analysis problematic.'<sup>141</sup> In that year, there were 53 executions in the US.

In this Part, I will consider the international community's express desire for the abolition of the death penalty<sup>142</sup> in the form of international agreements calling for the abolition of the death penalty. The experiences of particular countries are also briefly canvassed.

#### A International Agreements

Several significant international pacts call for the abolition of the death penalty. Perhaps the most prominent of these is the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*,<sup>143</sup> which provides for the total abolition of the death penalty, but allows governments to retain it in wartime. It has been ratified by 27 countries, and seven other countries have signed it (indicating an intention to become parties to it at a later date). The language agreed upon in 1991 is directly on point, with parties '[b]elieving that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights'<sup>144</sup> and '[c]onvinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life'.<sup>145</sup> The signatories agreed that each 'shall take all necessary measures to abolish the death penalty within its jurisdiction.'<sup>146</sup>

2007, 1. Since 1997, no Korean citizen has been executed, although 63 people have been sentenced to death. If the trend continues through the end of the year, South Korea will become the 31<sup>st</sup> country listed by Amnesty International to have abolished capital punishment in practice.

<sup>140</sup> Amnesty International, *Facts and Figures on the Death Penalty* (2 October 2007) <<http://www.web.amnesty.org/pages/deathpenalty-facts-eng>>.

<sup>141</sup> *Ibid.* According to Amnesty International, Saudi Arabia executed over 100 people in the first six months of 2007: see Donna Abu-Nasr, 'Saudi Beheadings on the Rise Again', *The Guardian* (London), 14 July 2007, 7. As of 25 September 2007, there have been 42 executions in the US: Death Penalty Information Center, *Searchable Database of Executions* (2007) <<http://www.deathpenaltyinfo.org/executions.php>>. See also Rachel Saloom, 'Is Beheading Permissible under Islamic Law? Comparing Terrorist Jihad and the Saudi Arabian Death Penalty' (2005) 10 *UCLA Journal of International Law and Foreign Affairs* 221. In Iran, the government recently executed 21 people on the same day: *Iran Hangs 21 Convicted Criminals* (5 September 2007) BBC News <[http://news.bbc.co.uk/1/hi/world/middle\\_east/6979761.stm](http://news.bbc.co.uk/1/hi/world/middle_east/6979761.stm)>. The most recent abolition of capital punishment occurred in June 2006 in the Philippines: Sarah Toms, *Philippines Stops Death Penalty* (24 June 2006) BBC News <<http://news.bbc.co.uk/2/hi/asia-pacific/5112696.stm>>.

<sup>142</sup> Indeed, a number of prominent world leaders opposed the death penalty even for Saddam Hussein: see, eg, Hassan M Fattah, 'Many Oppose Death Penalty for Hussein', *The New York Times* (New York), 7 November 2006, 6.

<sup>143</sup> Opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

<sup>144</sup> *Ibid* preamble.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid* art 1(2).

Other notable international agreements to abolish the death penalty include the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* (ratified by eight nations),<sup>147</sup> *Protocol No 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty* (agreed upon by 46 state parties),<sup>148</sup> and *Protocol No 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (ratified by 40 state parties).<sup>149</sup>

### B Individual Nations

Here we will look at several important nations which utilise capital punishment and one which does not.

#### 1 People's Republic of China

The PRC executes more people than all the other nations in the world combined.<sup>150</sup> The current laws allow for executions in cases involving murder, rape and even robbery. Few exact details regarding capital punishment in the PRC are ever released officially, but it is clear that executions are used throughout the nation with many different sorts of criminals and offences included.<sup>151</sup> There is even some indication that, of the thousands of executions each year in the PRC, some are for non-violent crimes.<sup>152</sup> Executions historically have taken place

<sup>147</sup> Opened for signature 8 June 1990, OASTS 73 (entered into force 28 August 1991).

<sup>148</sup> Opened for signature 28 April 1983, ETS 114 (entered into force 1 March 1985).

<sup>149</sup> Opened for signature 3 May 2002, ETS 187 (entered into force 1 July 2003). See generally Amnesty International, *International Standards on the Death Penalty* (2006).

<sup>150</sup> Human rights groups estimate that 3400 or more people were executed in the PRC in the year 2004: David Lague, 'China Pressured on Death Penalty', *International Herald Tribune* (Paris), 15 August 2005, 3. Another estimate based on Communist Party of China documents concluded that 60 000 people were executed in the 1997–2001 period, an average of 15 000 per year: see Amnesty International, *People's Republic of China, Executed 'According to Law'? — The Death Penalty in China* (22 March 2004) <<http://web.amnesty.org/library/index/ENGASA170032004>>. While Amnesty International's conservative estimates put the number of executions in the PRC in 2005 at 1770 (although 'the total was believed to be much higher'), this, they claimed, nevertheless represented more than 80 per cent of executions occurring worldwide: see Audra Ang, 'China Alters Rule on Death Penalty', *The Washington Post* (Washington DC), 1 November 2006, A16; Mark Magnier and Alan Zarembo, 'China Admits Organs Come from Prisoners', *Los Angeles Times* (Los Angeles), 19 November 2006, A24. The problems in the PRC continue: see, eg, David Barboza, 'Ex-Chief of China Food and Drug Unit Sentenced to Death for Graft', *New York Times* (New York), 30 May 2007, 7; *China Quietly Executes Sect Leaders* (29 November 2006) CBS News <<http://www.cbsnews.com/stories/2006/11/29/world/main2213759.shtml>>.

<sup>151</sup> Almost 70 crimes are included in the list of those eligible for capital punishment: see Amnesty International, *People's Republic of China, Executed 'According to Law'?*, above n 150. As Hong Lu and Terance D Miethe note in *China's Death Penalty: History, Law, and Contemporary Practices* (2007) 73:

one major obstacle for studying the death penalty in China is the lack of systematic and comprehensive data. ... neither the Chinese domestic sources nor international sources provide the specific number of death sentences and executions in China, ... it is difficult to gauge the true extent and nature of the death sentence and execution in China ...

<sup>152</sup> See, eg, Clifford Coonan, 'Chinese Millionaire Found Guilty of Murder Executed', *The Irish Times* (Dublin), 20 March 2006, 11.

almost immediately after conviction and many are alleged to have been done through mobile ‘death vans’.<sup>153</sup>

## 2 Australia

Australia abolished capital punishment in its federal jurisdiction upon enactment of the *Death Penalty Abolition Act 1973* (Cth),<sup>154</sup> and is a signatory to the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*.<sup>155</sup> The history of the abolition of the death penalty in Australia is an interesting one.<sup>156</sup> Since 1901, 114 persons have been legally executed in Australia, with the last execution occurring in 1967. At the time of that last execution, only one of Australia’s 16 daily newspapers endorsed capital punishment; eight were against it and the other seven took no stand.<sup>157</sup> Queensland was the first state to abolish capital punishment, in 1922. Other states followed, with Western Australia the last to abolish the death penalty (in 1984). With the exception of the penalty being used for terrorists (where the numbers are much less definitive), public support for capital punishment in Australia — unlike in many of the nations discussed above — has remained consistently below one half of the population.<sup>158</sup>

Australian politicians have generally not promoted capital punishment as a principal campaign issue,<sup>159</sup> and there appears to be widespread support, among the political establishment, for the retention of the current system of abolition. The former Prime Minister, John Howard, recently noted that while he supported the execution of Saddam Hussein in Iraq under Iraqi law, that did not alter his own view that ‘insofar as the law of our country is concerned’, he opposed capital punishment ‘on the purely pragmatic grounds that the law can from time

<sup>153</sup> Calum MacLeod, ‘China Makes Ultimate Punishment Mobile’, *USA Today* (Washington DC), 15 July 2006, 8. In a change that may have a dramatic impact on its capital punishment process, the PRC recently ordered that only the nation’s high court, the Supreme People’s Court, could approve death sentences. The shift which took place in January 2007 eliminated provincial courts from final review: Audra Ang, *China Changes Death Penalty Law* (31 October 2006) ABC News <<http://abcnews.go.com/International/wireStory?id=2617697>>. Moreover, the Chief Justice of the Supreme People’s Court in late 2006 ‘urged the country’s judges to exercise caution when sentencing people to death’: Jim Yardley, ‘With New Law, China Reports a Decline in Executions’, *The New York Times* (New York), 9 June 2007, 3; Daniel Schearf, *China’s Chief Justice Urges New Care with Death Penalty* (9 November 2006) Voice of America <<http://www.voanews.com/english/archive/2006-11/2006-11-09-voa16.cfm>>.

<sup>154</sup> Only the states had ever executed criminal defendants: see Ivan Potas and John Walker, Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice — No 3: Capital Punishment* (1987).

<sup>155</sup> Opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

<sup>156</sup> For an overview of this history: see Potas and Walker, above n 154. A discussion of Peter Brett’s distinguished involvement in promoting the abolition of the death penalty in Australia can be found in Peter Ryan, ‘Ripe Justice’ (2005) 49(5) *Quadrant* 95.

<sup>157</sup> Editorial, ‘The Last Act’, *The Age* (Melbourne), 3 February 1967, 5.

<sup>158</sup> Michael Walton, ‘The Death Penalty in Australia and Overseas’ (Background Paper 2005/3, New South Wales Council for Civil Liberties, 2005) 4–5; Angus Reid Global Monitor, *Australians Reject Death Penalty for Murder Cases* (22 October 2007) <[http://www.angus-reid.com/polls/view/australians\\_reject\\_death\\_penalty\\_for\\_murder\\_cases/](http://www.angus-reid.com/polls/view/australians_reject_death_penalty_for_murder_cases/)>.

<sup>159</sup> This is unlike the situation in the US where politicians have historically capitalised on issues relating to the death penalty to garner support: see Lain, ‘*Furman* Fundamentals’, above n 10; Erwin Chemerinsky, ‘The Rehnquist Court and the Death Penalty’ (2006) 94 *Georgetown Law Journal* 1367, 1383. But see Ian Townsend, Interview with Pauline Hanson (Radio interview, 14 February 2001) <<http://www.abc.net.au/pm/stories/s246595.htm>>.

to time make mistakes.<sup>160</sup> Moreover, the Australian public seems reluctant to re-establish the death penalty. In the most recent poll, more than two-thirds of those asked indicated that the penalty for murder should be imprisonment rather than death.<sup>161</sup>

### 3 *Singapore*

Somewhat surprisingly, Singapore has the highest execution rate per capita in the world. Since 1991, more than 400 prisoners have been hanged in a nation of only four million people.<sup>162</sup> The execution policy there is quite broad. Many drug offences, firearms offences and murder all carry mandatory death sentences. Indeed, anyone who is found with even less than an ounce of heroin or 17 ounces of marijuana is presumed to be a drug trafficker and faces a mandatory death sentence.<sup>163</sup>

While the PRC has, as indicated above, the largest overall number of executions, Singapore's per capita figure is more than six times that of the PRC.<sup>164</sup> The ways in which the convictions are brought forth, and the wide range of crimes subject to the death sentence, have been widely criticised throughout the world.<sup>165</sup>

### 4 *Japan*

Capital punishment remains legal in Japan. Although it is not used widely, when the populations of Japan (127 million)<sup>166</sup> and the US (302 million)<sup>167</sup> are compared, Japan has recently been about as likely as Texas and Virginia combined to sentence killers to death.<sup>168</sup> Capital punishment in Japan appears to be extremely popular among the public with a clear and strong majority in support of the death penalty,<sup>169</sup> despite the fact that grave concerns regarding miscarriages of justice have been repeatedly expressed in connection with those on

<sup>160</sup> Mark Forbes, 'PM Supports Execution of Saddam', *The Age* (Melbourne), 3 July 2004, 8. See also Alan Cowell, 'Around the World, Unease And Criticism of Penalty', *The New York Times* (New York), 31 December 2006, 12.

<sup>161</sup> Angus Reid Global Monitor, *Australians Reject Death Penalty for Murder Cases*, above n 158. The only pause in connection with this widespread support regarding the abolition of the death penalty is a series of polls in Australia, and elsewhere, indicating majority support for the death penalty in connection with people guilty of acts of terrorism.

<sup>162</sup> Amnesty International, *Singapore: The Death Penalty — A Hidden Toll of Executions* (2004).

<sup>163</sup> *Ibid*; *Misuse of Drugs Act* (Sing) cap 185, sch 2.

<sup>164</sup> Amnesty International, *Singapore: The Death Penalty*, above n 162.

<sup>165</sup> See, eg, *Singapore Has Highest Death Penalty Rate* (14 January 2004) MSNBC <<http://www.msnbc.msn.com/id/3958717/>>; Amy Tan, *Singapore Death Penalty Shrouded in Silence* (12 April 2002) Singapore Window <<http://www.singapore-window.org/sw02/020412re.htm>>.

<sup>166</sup> Statistics Bureau and Statistical Research and Training Institute, Ministry of Internal Affairs and Communications, Japan, *Statistical Handbook of Japan 2007* (2007) 8.

<sup>167</sup> Population Division, Census Bureau, United States, *Table 1: Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2007 (NST-EST2007-01)* (27 December 2007) <<http://www.census.gov/popest/states/NST-ann-est.html>>.

<sup>168</sup> Charles Lane, 'Why Japan Still Has the Death Penalty', *The Washington Post* (Washington DC), 16 January 2005, B01.

<sup>169</sup> *Ibid*.

death row.<sup>170</sup> Executions in Japan are carried out in secret at detention centres. The names of the executed are not announced publicly and family members may not be informed of the executions until after death has occurred.<sup>171</sup>

On 25 December 2006, four Japanese inmates were hanged. One of the men was 77 years old and had been on death row for 20 years. Little public attention was paid to this event worldwide.<sup>172</sup> Japan now has 93 inmates on death row,<sup>173</sup> and serious questions have been raised regarding the guilt of at least some of those individuals.<sup>174</sup>

#### IX WHY DOES CAPITAL PUNISHMENT CONTINUE?

To answer the question with which I began this article — why do so many nations retain the death penalty — is an extraordinarily difficult task. The US is an enormous nation, with more than 300 million people scattered in urban and rural parts of a very large land mass. There are significant regional differences, as well as important distinctions based upon ethnic backgrounds and heritages. Moreover, unlike many countries, the US has a strong tradition of serious distrust of a powerful central government, a distrust which led to the development of a highly significant bill of rights, provisions of which limit the reach of government, especially in the application of criminal justice.<sup>175</sup> Does retention of the death penalty in most, but not all, states in the US signal the power of the government or control by the local communities which actually enforce the sanction? That is a question which is impossible to answer.

The systems of capital punishment in the US and many other nations continue, even though a wide range of serious problems has been identified and publicised, including (as noted above):

- The underlying rationale for the death penalty, deterrence, has been subject to much debate. While the discussion continues as to whether executions — as opposed to life imprisonment — really do prevent further violent crime, the matter is hardly certain.
- Many difficult questions as to the procedural fairness of the process, including (but not limited to) adequate representation by lawyers, have been raised across the nation. This has led to declarations of a moratorium

<sup>170</sup> Amnesty International, *Japan: Report 2005* (2005) <<http://www.web.amnesty.org/report2005/jpn-summary-eng>>.

<sup>171</sup> *Sing or Swing: Anti-Death Penalty Activists* (March 2002) Japanfile <<http://www.japanfile.com/modules/smartsection/item.php?itemid=334>>. See also *Japan Hanging on to Death Penalty* (23 April 2003) Human Rights Features <<http://www.hrdc.net/sahrdc/hrfeatures/HRF75.htm>>; Lane, *On Death Row in Japan*, above n 58.

<sup>172</sup> One of the few articles to take notice was Carl Freire, *Japan Executes 4 Prisoners by Hanging* (25 December 2006) FOXNews.com <<http://www.foxnews.com/wires/2006Dec25/0,4670,JapanExecution,00.html>>.

<sup>173</sup> *Ibid.*

<sup>174</sup> Lane, *On Death Row in Japan*, above n 58. See also Norimitsu Onishi, 'Pressed by Police, Even Innocent Confess in Japan', *The New York Times* (New York), 11 May 2007, 1.

<sup>175</sup> This is a point made repeatedly in contrasting the US criminal justice system with others in the common law world: see, eg, Paul Marcus and Vicki Waye, 'Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds' (2004) 12 *Tulane Journal of International and Comparative Law* 27.

in some US states, and the call for a national moratorium in many countries.<sup>176</sup>

- Many have concluded that capital punishment has been applied to individuals not sufficiently culpable to justify the ultimate sanction. This sense has led to the abolition of the death penalty in the US — and some other nations — for non-homicide offences, for juveniles, and for mentally retarded offenders.
- Ongoing calls continue to be heard for determinations of whether the death penalty is being applied in a discriminatory fashion. Here, of course, the fear is that race and gender — either of offenders or victims — play an improper role in the decisions regarding prosecuting defendants for capital offences, and sentencing them to death.
- Major issues have surfaced as to individuals being wrongfully convicted and sentenced to death. In the past decade, the work of various innocence projects has had tremendous impact on attitudes about capital punishment in the US and elsewhere.

Notwithstanding these troubling issues, the system of capital punishment continues in dozens of nations throughout the world and with strong support. How does one explain this situation? One obvious and traditionally offered explanation for the US situation is a historical one. With the expansion west in the early days of the nation, as settlers moved across the continent, with limited law enforcement, crimes of violence were punished seriously and expeditiously. This sense of ‘vigilantism’ has been explored by a number of scholars,<sup>177</sup> and some would view it as being at the core of the retention of the US capital punishment system.

In addition, one hears often that if the system is to be applied only to the worst of the worst killers, such individuals are truly deserving of execution. This idea is reflected in the broad criminal law concept of ‘just deserts’, in which ‘sanctions should be commensurate with the nature of the wrongfulness.’<sup>178</sup> One observer has referred to this as the ‘Timothy McVeigh factor’,<sup>179</sup> that is, some crimes (such as the Oklahoma City bombing in which more than 200 people were killed) are so awful and grotesque that the only punishment appropriate is the forfeiture of the perpetrator’s life.

The system of capital punishment remains in the US and in other countries with relatively strong support. Still, the number of executions continues to drop rather rapidly throughout the world, with only a few notable exceptions. One finds a segment of the US public — and the people of many other nations as well

<sup>176</sup> The points are well laid out in American Bar Association, *Building Momentum: The American Bar Association Call for a Moratorium on Executions Takes Hold* (2003).

<sup>177</sup> See especially Franklin E Zimring, *The Contradictions of American Capital Punishment* (2003).

<sup>178</sup> Australian Law Reform Commission, *Principled Regulation: Federal, Civil and Administrative Penalties in Australia*, Report No 95 (2002) [25.8]; Karen Yeung, ‘Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective’ (1999) 23 *Melbourne University Law Review* 440, 442.

<sup>179</sup> Sundry, above n 45, 1962. See also above n 57 and accompanying text.

— supporting the system, though with a hope for an improved process of guilt determination.