



Death Penalty Information Center

Limiting the Death Penalty

Limitations within the United States

Despite growing European abolition, the U.S. retained the death penalty, but established limitations on capital punishment.

In 1977, the United States Supreme Court held in *Coker v. Georgia* that use of the death penalty in rape cases when the victim was not killed is disproportionate to the crime, and therefore unconstitutional. Other limits to the death penalty followed in the next decade.

- Race

Statistics show that the death penalty is applied disproportionately to blacks who kill whites, compared to whites who kill blacks or each race killing one of its own.

Race was in the forefront when the Supreme Court decided the 1987 case *McCleskey v. Kemp*. McCleskey argued that there was racial discrimination in the application of Georgia's death penalty, by presenting a statistical analysis showing a pattern of racial disparities in death sentences, based on the race of the victim. The Supreme Court held, however, that racial disparities would not be recognized as a constitutional violation of "equal protection of the law" unless intentional racial discrimination against the defendant could be shown. Discretion in sentencing need not mean discrimination in sentencing.

- Mental Illness

In 1986, in *Ford v Wainwright*, the Supreme Court ruled that the execution of the insane violates the US Constitution's Eighth Amendment ban on "cruel and unusual punishment". However, the *Ford* majority neither defined competence for execution, nor did a majority mandate specific procedures that must be followed by the individual states to determine whether an inmate is legally insane. The result has been different standards in different states, judicial uncertainty, and minimal protection for seriously mentally ill inmates. The *Ford* decision left the determination of sanity up to each state.

Someone who is insane is defined as someone who does not understand the reason for, or the reality of, his or her punishment. The National Association of Mental Health estimates that 5-10% of those on death row have serious mental illness, though.

- Mental Retardation

Mental retardation is generally refers to subaverage intelligence or particular I.Q. scores, specifically someone having an I.Q. under 70, and experts believe that 10-15% of death row inmates are mentally retarded. At least 33 mentally retarded men have been executed in the US since 1976, and studies suggest that at least 250 such defendants are currently on death row. In 1989's *Penry v. Lynaugh*, the US Supreme Court held 5-4 that executing persons with mental retardation was not a violation of the Eighth Amendment.

In 2002 in *Atkins v. Virginia*, the Court ruled that executing the mentally retarded is unconstitutional as such a punishment violates the Eighth Amendment's ban on cruel and unusual punishment. The Court saw the changes in public attitudes since 1989, as then only two states – Georgia and Maryland – prohibited execution of the mentally retarded, but by 2002, the number of states exempting the mentally retarded had grown to 18, prompting the Court to remark, “it is fair to say that a national consensus has developed against it.”

The Court reasoned that mental retardation diminishes personal culpability, and renders the death penalty in the case of this category of offenders difficult to justify on deterrence and retribution grounds. The *Atkins* ruling overturned *Penry v. Lynaugh* by finding that "standards of decency" in the USA had evolved in the intervening years to the point at which a "national consensus" had emerged against such executions.

Justice Stevens, writing for the Supreme Court majority in *Atkins*, concluded that: "Mentally retarded persons... 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.”

- Juveniles

In the late 1980s, the Supreme Court decided three cases regarding the constitutionality of executing juvenile offenders. In 1988, in *Thompson v. Oklahoma*, four Justices held that the execution of offenders aged fifteen and younger at the time of their crimes was unconstitutional. The fifth vote was Justice O'Connor's concurrence, which restricted *Thompson* only to states without a specific minimum age limit in their death penalty law. The combined effect of the opinions by the four Justices and Justice O'Connor in *Thompson* is that no state without a minimum age in its death penalty law can execute someone who was under sixteen at the time of the crime.

The next year, in 1989, the Supreme Court held that the Eighth Amendment does not prohibit the death penalty for crimes committed at age sixteen or seventeen. (*Stanford v. Kentucky* and *Wilkins v. Missouri*). At present, 19 states with the death penalty bar the execution of anyone under 18 at the time of his or her crime.

In 1992, the United States ratified the *International Covenant on Civil and Political Rights*. Article 6(5) of this international human rights doctrine requires that the death penalty not be used on those who committed their crimes when they were below the age

of 18. However, in doing so but the U.S. reserved the right to execute juvenile offenders. The United States is the only country with an outstanding reservation to this Article. International reaction has been highly critical of this reservation, and ten countries have filed formal objections to the reservation of the U.S.

In a 5-4 decision in October 2002, the Supreme Court refused to reexamine whether executing killers who were under 18 when they committed their crimes is constitutional. The US was one of the last remaining countries in the world where it was legal to execute juveniles.

Since 1976, 227 prisoners who were juveniles at the time of their crimes were sentenced to death row, and 22 of those prisoners were executed.

In March 2005, though, in *Roper v. Simmons*, the United States Supreme Court declared the practice of executing defendants whose crimes were committed as juveniles unconstitutional. Christopher Simmons was 17 when he and a friend robbed, bound, and gagged a woman in Missouri, then threw her from a bridge into a river where she drowned. He had been sentenced to death, but with this ruling, the death sentence was commuted.

Simmons's attorney, Seth Waxman, said the death penalty did not deter minors, since "they weigh risks differently" to adults. The court ruled that he could not be held to the same standard of accountability as an adult.

The Supreme Court, thus, banned the execution of people convicted of crimes they committed before turning 18. The court majority pointed out that only two nations in the world allowed such executions – the United States and Somalia. It also noted that although 19 states permitted executions of juveniles, only three states had carried them out in the last decade.

"Now the US can proudly remove its name from the embarrassing list of human rights violators - that includes China, Iran, Somalia, and Pakistan - that still execute juvenile offenders," said William Schulz, executive director of Amnesty International USA.

This decision thereby commuted 72 people's death sentences throughout the country.

Supreme Court Justice Anthony Kennedy said, "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."

- Child Rape

In April 2008, the US Supreme Court heard the case of *Kennedy v. Louisiana*. The Supreme Court weighed the constitutionality of the death penalty for child rape in the case of a Louisiana man, Patrick Kennedy, who was convicted in 2003 of raping his then 8-year-old stepdaughter.

Kennedy was sentenced to death in Louisiana under a 1995 state statute there that gave the possibility of the death penalty to anyone found guilty of aggravated rape of a child 12 or younger.

Kennedy claimed that the sentence violated the 8th Amendment's "cruel and unusual punishment" clause.

The Supreme Court ruled in *Coker v. Georgia* (1977) that the death penalty for the rape of an adult was "grossly disproportionate" and "excessive punishment" under the U.S. Constitution. But the ruling left open whether child rapists can be sentenced to death.

The last time someone in the U.S. was executed for something other than murder was in 1964, when a man went to the electric chair in Alabama for robbery. That same year, a man in Missouri went to the gas chamber in what was the last time someone in this country was put to death for rape.

Louisiana was the only state with someone on death row for rape of an adult or child. In fact, it had two people awaiting execution for child rape. The other man on death row in Louisiana for child rape was Richard Davis, convicted of repeatedly attacking a 5-year-old girl he looked after with his girlfriend in 2004 and 2005.

At least five other states — Georgia, Montana, Oklahoma, South Carolina and Texas — had similar laws.

"These are the only two men on any death row in any Western democracy for this offense," said Billy Sothorn, a lawyer with the Capital Appeals Project, a non-profit law firm.

"By authorizing the death penalty for non-homicide rape of a child, Louisiana joins the ranks of such countries as Saudi Arabia, Uganda, Kazakhstan and China," said attorney Jelpi Picou of the Capital Appeals Project in New Orleans.

Kennedy's lawyer counters that there are signs that society believes death is excessive for rape, including that no one in America has been executed for any rape in more than 43 years. "Although rape is a very serious crime," attorney Jeffrey Fisher says, "no rapist should be punished more severely than the average ... murderer, who by definition is not subject to capital punishment."

Besides murder, other state and federal crimes theoretically eligible for execution include treason, aggravated kidnapping, drug trafficking, aircraft hijacking and espionage. None of these crimes has been prosecuted as a capital offense in decades, if ever.

Among the groups who sided with Kennedy, who is African-American, was the American Civil Liberties Union, which emphasized the South's history of executing blacks for rape more often than whites.

Billy Sothern of the Capital Appeals Project cited Department of Justice statistics that all 14 rapists executed by Louisiana in the past 75 years or so were African-American. Nationwide from 1930 to 1964, nearly 90% of executed rapists were black, he said.

Another opposing group was the National Association of Social Workers. Social workers warn that if the court sanctions the penalty for child rape, it could further discourage reporting of the crime because in the majority of child sexual assaults, the attacker is a relative or friend of the victim.

Opponents also warn that the prospect of the death penalty could give child rapists a powerful incentive to kill their victims. They might figure they have nothing to lose by killing the lone witness.

"If they're going to face the death penalty for raping a child, why would they leave a living witness?" said Judy Benitez, executive director of the Louisiana Foundation against Sexual Assaults.

Benitez also says testifying in a death penalty case can be deeply traumatic for child. And the risk of wrongful prosecution may be higher in such cases since children might prove to be unreliable witnesses for the prosecution, because of their susceptibility to suggestive, leading questions.

But there is strong support for the execution of child rapists, too.

The trend, asserts Juliet Clark, assistant Jefferson Parish district attorney, "strongly supports imposition of the death penalty for this exceedingly grave offense."

In June 2008, the US Supreme Court ruled in the case of *Kennedy v. Louisiana* 5-4 that struck down the Louisiana law that permitted capital punishment for raping a child, thus outlawing the death penalty for child rape. Justice Anthony Kennedy said that the Constitution bars a state from imposing the death penalty for the rape of a child when the crime did not result, and was not intended to result, in the victim's death. The ruling restricts the death penalty to cases of murder or treason.

Justice Kennedy, writing for the majority, warned about broader problems with the death penalty: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." He took into account the many dangers of the death penalty and concluded it should be restricted to homicides:

“Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, *for crimes that take the life of the victim.*”

Additional Death Penalty Issues

Innocence

Starting in 1982, DNA testing was first used as evidence in court to exonerate a condemned prisoner.

Kirk Bloodsworth was the first DNA death row exoneration in the U.S. in 1993. Bloodsworth was originally found guilty of the rape and murder of nine-year-old Dawn Hamilton in 1984 — a crime for which he was sentenced to death in Maryland in 1985. The principal evidence linking Bloodsworth to the crime was the testimony of five witnesses who placed him either with the victim or near the scene of the crime at the time it was believed to have occurred.

In 1992, however, Centurion Ministries of Princeton, New Jersey, helped Bloodsworth obtain court approval for testing of biological material preserved from the crime with DNA technology. The tests incontrovertibly established Bloodsworth's innocence. After the FBI confirmed the results, Bloodsworth was released June 28, 1993. He was the first U.S. death row prisoner to be exonerated by DNA. In December 1994, Maryland Governor William Donald Schaefer granted Bloodsworth a full pardon based on innocence.

The State of Maryland paid Bloodsworth \$300,000 for lost income, based on the rough calculation that he would have earned some \$30,000 a year for the years from his arrest to his release.

Nine years later, in the spring of 2003, a Maryland forensic biologist who was studying evidence from the case found stains on a sheet that had not been analyzed. Investigators ordered DNA testing and ran the results through the national DNA database, which linked Kimberly Shay Ruffner to the crime. Ruffner was formally charged with the crime on September 5, 2003.

In 1987, two university professors – Hugo Bedau and Michael Radelet – conducted the first major study of wrongful death penalty convictions in their report entitled “Miscarriages of Justice in Potentially Capital Cases.” They reviewed the death penalty cases throughout the 20th century and discovered that 350 prisoners who had been convicted of capital or potentially capital cases were later found innocent.

The Supreme Court addressed the constitutionality of executing someone who claimed actual innocence in *Herrera v. Collins* (1993). Although the Court left open the possibility that the Constitution bars the execution of someone who conclusively demonstrates that he or she is actually innocent, the Court noted that such cases would be very rare. The Court held that, in the absence of other constitutional violations, new evidence of innocence is no reason for federal courts to order a new trial. The Court also held that an innocent inmate could seek to prevent his execution through the clemency

process, which, historically, has been "the 'fail safe' in our justice system." Herrera was not granted clemency, and was executed in 1993.

Since *Herrera*, concern regarding the possibility of executing the innocent has grown. Currently, 139 people have been exonerated and released from death row because of innocence, many as a result of DNA evidence, since 1973.

As a result of a 5-4 Supreme Court ruling in June 2009, prisoners have no constitutional right to DNA testing that might prove their innocence. It is a state's right issue whether they wish to allow a prisoner the right to DNA testing. Forty-six states currently have laws that allow at least some prisoners to gain access to DNA evidence.

The case before the court concerned Alaska, which has no DNA testing law, and prisoner William G. Osborne, who was convicted in 1994 of kidnapping and sexually assaulting a prostitute in Anchorage.

The Supreme Court ruled that Osborne does not have a constitutional right to have access to DNA evidence in his case. "After conviction," Justice Alito said, "with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident — for example, degradation or contamination of the evidence — would provide the basis for seeking postconviction relief."

Only four states — Alabama, Alaska, Massachusetts and Oklahoma — do not have laws in place specifically dealing with postconviction DNA testing. Prosecutors often fight hard to deny access to DNA evidence even in states that nominally allow it, saying the prisoner in question had not met the statutory conditions.

In states that allow DNA evidence, it is sometimes limited. Some laws, for instance, do not allow prisoners who have confessed to seek DNA evidence, though false confessions have been common among exonerated inmates. Other states allow testing only if it was unavailable at the time of trial.

The major change in terms of innocence and wrongful convictions came in November 1998 when Northwestern University held the first-ever National Conference on Wrongful Convictions and the Death Penalty, in Chicago, Illinois. The Conference, which drew nationwide attention, brought together 30 of these wrongfully convicted inmates who were exonerated and released from death row. Many of these cases were discovered not as the result of the justice system, but instead as the result of new scientific techniques, investigations by journalism students, and the work of volunteer attorneys. These resources are not available to the typical death row inmate.

The conference was the brainchild of Northwestern Law Professor Lawrence C. Marshall, who had recently won the cases of three innocent men — Rolando Cruz, who had been under sentence of death for a 1983 murder; Willie Rainge, who had been wrongfully convicted of an infamous 1978 rape and double murder; and Gary Gauger, who had been sentenced to death for the murders of his parents. The conference made

headlines nationally and internationally, greatly raising the salience of the innocence issue, particularly in the context of capital punishment.

Then, two and a half months after the conference, there was another dramatic development — the exoneration of Illinois death row prisoner Anthony Porter, whose execution had been only two days away when a legal team, including Larry Marshall, won a reprieve from the Illinois Supreme Court. The reprieve made it possible for Northwestern Professor David Protes and several of his undergraduate students at the Medill School of Journalism to reinvestigate the case. Porter's innocence was established in February 1999 when Paul Ciolino, a private investigator working with the Protes group, obtained a video-recorded confession from the man who had committed the murder for which Porter had been condemned to die.

The events prompted Illinois Governor George H. Ryan to declare a moratorium on executions in January 2000, a politically dangerous step that triggered a nationwide re-examination of the capital punishment system. Governor Ryan then appointed a Commission on Capital Punishment to study the issue in the state.

In one specific case outside of Illinois of executing the innocent, Brian Baldwin went to his death in Alabama in 1999 for a murder his co-defendant claimed to have committed alone.

Brian Keith Baldwin, a 40-year-old African American, died in the Alabama electric chair in 1999 for the murder 22 years earlier of a white teenager, Naomi Rolon — a crime that Baldwin's co-defendant, Edward Dean Horsley, claimed to have committed without Baldwin's knowledge. Baldwin's conviction and death sentence rested on a confession that he claimed had been extracted by torture — beating and electroshock.

Although there was no question that Baldwin had been involved in Rolon's abduction and robbery, the only evidence linking him to the murder was his purported confession, which he testified he had given after being beaten and shocked with a cattle prod.

The confession was incorrect about material details, including how Rolon died and the instrument with which she had been bludgeoned. At the time of their arrest, there was blood on Horsley's clothes, but not on Baldwin's. Forensic evidence developed after Baldwin's trial indicated that Rolon had been beaten by a left-handed person — which Horsley was and Baldwin was not.

The trial lasted only two days — August 8 and 9, 1977. Baldwin's court-appointed attorneys conducted no investigation and presented no witnesses other than Baldwin himself, even though Baldwin had identified potential witnesses who might have corroborated his torture claim.

In addition, jurors did not learn that Rolon apparently had been beaten and stabbed by a left-handed person and that Baldwin was right-handed, that there was blood on Horsley's

— but not on Baldwin's — clothes, or that Baldwin's purported confession was wrong about important facts.

Most recently, in September 2008, the case of convicted murderer Troy Anthony Davis came to the forefront. He was sentenced to be executed in Georgia by lethal injection, but the US Supreme Court has granted a stay of execution while it reviews the case. Davis has been convicted of killing a Savannah, Georgia police officer in the parking lot of a fast food restaurant in 1989. The case, which drew national and international attention, was based solely on eyewitness evidence. Seven of the nine witnesses who initially testified that Davis was the killer have recanted. There was also no physical evidence presented at his trial, and no weapon was found. But Davis' petitions for a new trial have been denied.

Defense attorneys say that at the time of the high-profile crime, witnesses were afraid. They say police coerced them into blaming Davis, who was African-American, for the murder of off-duty Savannah Police officer Mark McPhail, who was white. The Southern regional director of Amnesty International, Jared Feuer, also says that to this day, no one has looked at whether the evidence points to Davis' innocence or to his guilt. He says the fact that seven witnesses recanted, combined with the absence of physical evidence, including a murder weapon and DNA, raised too much doubt about whether the state was executing an innocent man.

"This is bigger than Troy Anthony Davis. This is about a system of injustice we have to expose," Davis' sister, Martina Correia, said.

In the last 30 years, 135 people have been exonerated from death row in 25 states – since 1990, 26 were from Louisiana alone.