



The Death Penalty in Washington State: An Overview

Thursday, March 2, 2017

WASHINGTON STATE
BAR ASSOCIATION

DECODING THE LAW: THE DEATH PENALTY IN WASHINGTON STATE: AN OVERVIEW



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1. NO SINGLE PERSPECTIVE WORLDWIDE
2. EXECUTING THE INNOCENT
3. BOTCHED EXECUTIONS
4. DETERRENCE
5. DISCRIMINATION BASED ON RACE
6. FAIRNESS & PROPORTIONALITY
7. COST
8. CLOSURE FOR FAMILY MEMBERS
9. BARGAINING CHIP FOR THE STATE

SELECTED ISSUES CONCERNING THE DEATH PENALTY

- ▶ Only about half of Americans (49%) now favor the death penalty for people convicted of murder, while 42% oppose it. **Support has dropped 7 percentage points since March 2015, from 56%.** Public support for capital punishment peaked in the mid-1990s, when eight-in-ten Americans (80% in 1994) favored the death penalty and fewer than two-in-ten were opposed (16%).
- ▶ **Opposition to the death penalty is now the highest it has been since 1972.**

U.S. - PUBLIC PERCEPTION OF THE DEATH PENALTY

PEW RESEARCH
CENTER STATISTICS
2016

In April 1999, the United Nations Human Rights Commission passed the **Resolution Supporting Worldwide Moratorium On Executions**. The resolution calls on countries **THAT** have not abolished the death penalty to restrict its use of the death penalty, including not imposing it on juvenile offenders and limiting the number of offenses for which it can be imposed. Ten countries, including the United States, China, Pakistan, Rwanda and Sudan voted against the resolution. (New York Times, 4/29/99).

WORLDWIDE MORATORIUM



- ▶ Each year since 1997, the United Nations Commission on Human Rights has passed a resolution calling on countries that have not abolished the death penalty to establish a moratorium on executions. In April 2004, the resolution was co-sponsored by 76 UN member states.



- ▶ More than half of the countries in the international community have abolished the death penalty completely, *de facto*, or for ordinary crimes. However, 58 countries retain the death penalty, including China and the United States.

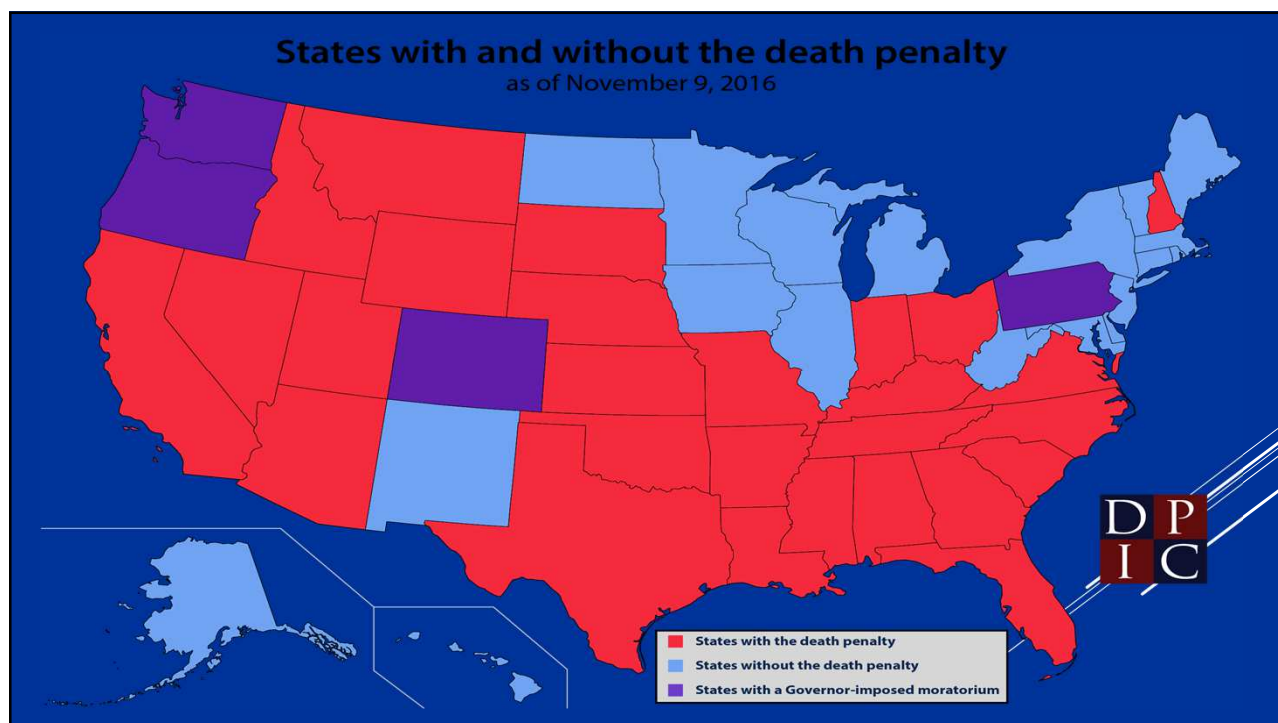
THE UN

| | |
|---------------|-----------|
| China | 1000s (?) |
| Iran | 977 + |
| Pakistan | 326 |
| Saudia Arabia | 158+ |
| United States | 28 |
| Iraq | 26+ |

COUNTRIES WITH THE MOST EXECUTIONS IN 2015

EXECUTIONS IN THE U.S. SINCE 1976

1446



CAPITAL PUNISHMENT AND MISTAKES

- ▶ Capital punishment is irrevocable in a way that other punishments are not
- ▶ The Trade-off:
 - ▶ How many executions of innocent persons are avoided?
 - ▶ How many actual murderers are not executed or punished?
- ▶ **The Innocence Project (157 exonerated):**

▶ SOURCES OF MISTAKES

- ▶ 2 DNA Inclusions at Time of Trial
- ▶ 6 Other Forensic Inclusions
- ▶ 15 False Confessions
- ▶ 16 Informants / Snitches
- ▶ 17 False Witness Testimony
- ▶ 21 Microscopic Hair Comparison Matches
- ▶ 23 Bad Lawyering
- ▶ 26 Defective or Fraudulent Science
- ▶ 34 Prosecutorial Misconduct
- ▶ 38 Police Misconduct
- ▶ 40 Serology Inclusion
- ▶ 61 Mistaken I.D.

<http://www.innocenceproject.org/>

THE INNOCENCE PROJECT STATISTICS

THE CASE OF THE RUNAWAY ACCELERANT

Cameron Todd Willingham insisted upon his innocence in the 1991 arson deaths of his children and refused an offer to plead guilty in return for a life sentence.

EXAMPLES OF MISTAKES

THE CASE OF THE WRONG CARLOS

Groundbreaking Columbia law school study sets out in detail the flaws that led to Carlos DeLuna's conviction and subsequent 1989 execution in Texas

EXAMPLES OF MISTAKES (CONT.)

METHODS NO. NO. OF STATES

| | | |
|--------------------|------|---------------------------------------|
| ▶ Lethal Injection | 1271 | 33 States + US Govt. & Military |
| ▶ Electrocution | 158 | 8 States(lethal injection – primary) |
| ▶ Gas Chamber | 11 | 5 States(lethal injection – primary) |
| ▶ Hanging | 3 | 3 States(lethal injection – primary)* |
| ▶ Firing Squad | 2 | 2 States (lethal injection—primary) |

* Including WASHINGTON STATE

METHODS OF EXECUTION USED SINCE 1976

- ▶ Executions by lethal injection using barbiturates such as pentobarbital typically take about 10 minutes. But the European and American manufacturers refuse to supply it for executions. With the drug unavailable for death penalties, Arizona became the latest of four states to turn to another sedative, midazolam, first used for execution less than a year ago.
- ▶ Arizona used it in combination with a narcotic, hydromorphone. Midazolam, by itself or with hydromorphone, has led to flawed, drawn-out executions in three other states.

“BOTCHED” EXECUTIONS

- New England Journal of Medicine, January 24, 2008
- *Breach of Trust: Physician Participation in Executions in the United States*. This report, published jointly by Physicians for Human Rights, the American College of Physicians, the National Coalition to Abolish the Death Penalty, and Human Rights Watch in 1994, deals with the ethical issues involved with physician participation in capital punishment.



PHYSICIAN PARTICIPATION IN EXECUTIONS


Historical Context

- *Furman v. Georgia*, 408 U.S. 238 (1972)
 - Discriminatory (Douglas, J.)
 - Random (Stewart, J.)
 - Infrequent (White, J.)
 - *Per Se* Unconstitutional – evolving standards of decency (Brennan / Marshall, J.)
- *Woodson v. North Carolina*, 428 U.S. 280 (1976): - -
 - Mandatory Death Penalty is unconstitutional.
- *Zant v. Stephens*, 462 U.S. 862 (1983):
 - Must “narrow the class of death eligible persons”.
- *Lockett v. Ohio*, 438 U.S. 586 (1978):
 - Individualized sentencing based on mitigation evidence.

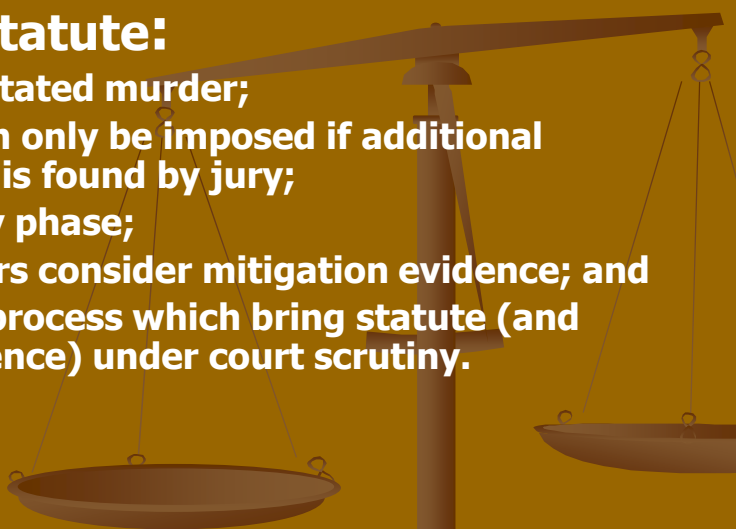
Gregg v. Georgia (1977)

- DP not unconstitutional per se
- Statute must have safeguards to prevent against *Furman* concerns:
 - Aggravated factors limit type of cases
 - Bi-furcated trials preferable
 - Mitigation evidence presented
 - Mandatory review (proportionality)

Washington's Death Penalty Statute RCW 10.95 – Enacted 1981

- **When is Death Eligible?**
 - **Who is Death Eligible?**
 - **When is Death Imposed?**
 - **Is Death Sentence Proportionate?**
- 

State v. Bartholomew, 101 Wn.2d 631 (1984)

- **Court Upholds Statute:**
 - Limited to premeditated murder;
 - Death sentence can only be imposed if additional aggravating factor is found by jury;
 - Bi-furcated penalty phase;
 - Penalty phase jurors consider mitigation evidence; and
 - Automatic review process which bring statute (and imposition of sentence) under court scrutiny.
- 

When is Death Eligible? (Narrow The Type of Offenses)

- **“Premeditated” Aggravated First Degree Murder**
 - Must be premeditated (9A.32.030(1)): Intent to cause the death of another) plus;
 - An aggravating factors (RCW 10.95.020) (14 factors):
 - Sentence Options: If convicted of Aggravated First Degree Murder sentence shall be life without possibility of parole (LWOP) or death. RCW 10.95.030(1).

Who is Not Death Eligible? Categorical Exclusion

- **Juveniles: A person under the age of 18.**
 - *State v. Furman*, 122 Wn.2d 440 (1993)
 - *Roper v. Simmons*, 543 U.S. 551 (2005)
- **Intellectual Disability:**
 - RCW 10.95.030(2);
 - *Atkins v. Virginia*, 536 U.S. 304 (2002)


Death Notice

- **RCW 10.95.040(1):** Prosecutor's decision "*When there is no reason to believe that there are not sufficient mitigating circumstances to merit leniency.*"
- **RCW 10.95.040(1):** Prosecutor must file and serve written notice of intent to seek a special sentencing proceeding.

Special Sentencing Proceeding:

- **When Held:** If defendant is convicted of Aggravated First Degree Murder.
- **Who Decides:** Unless waived, the same jury that considered guilt decides. Under some circumstances, a new jury may be convened.
- **Jury Selection:**
 - prolonged process
 - "For Cause" Challenges
 - Peremptory challenges

Sentencing Proceeding – Another Trial

- Opening/closing/jury instructions
 - Evidence
 - About Crime:
 - Victim Impact Evidence
 - Prior Criminal Conviction
 - Mitigation Evidence: (anything about defendant or the crime that supports life sentence).
- 

Question Posed to Jury – RCW 10.95.060(4)

- After conclusion of evidence and argument, the jury must deliberate upon the following question:
- 

“Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?”

Is Death Sentence Proportionate? (The Automatic "Review")

■ Mandatory Review

- Sufficient evidence to justify sentence;
- Sentence of *death excessive or disproportionate* to penalty imposed in similar cases, considering both crime and defendant;
 - "Similar case" are trial reports filed and cases from Jan. 1, 1965.
 - Trial Reports: Upon a conviction of aggravated first degree murder, the trial court within 30 days after J & S must submit a trial report with the WA Supreme Court.
- Whether Sentence was brought on by passion and prejudice;
- Evidence of Intellectual Disability

***Furman* Issues Revisited -
40 years later**

Is it discriminatory?

- Race?
- Geographic?
- Economic?

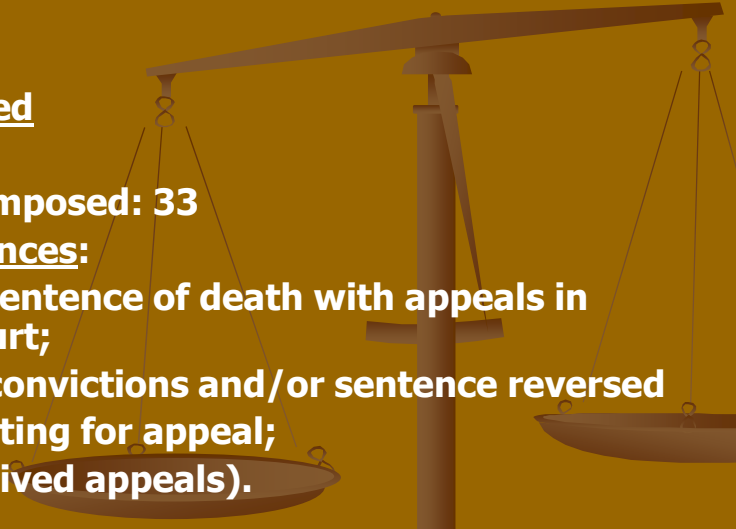


Randomly and Arbitrarily Applied ?

- Struck by lightning?
- Flipping a coin?
- What factors determine outcome?



Infrequent / Deterrent?

- Trial Reports;
 - Filed: 340
 - Death eligible:
 - Death Notices/Imposed
 - Death notices: 85
 - Death Sentences Imposed: 33
 - Status of Death Sentences:
 - 9 currently under sentence of death with appeals in state or federal court;
 - 18 have had their convictions and/or sentence reversed
 - 1 suicide while waiting for appeal;
 - 5 executions (3 waived appeals).
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QUESTIONS?





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