



Illustration by Howard Brodie

# CRUEL BUT USUAL: DEATH PENALTY UPDATE

by David Michael Bigeleisen



The death penalty is mentioned many times in the Bible.

The Sanhedrin was the high biblical court. It had 70 judges and heard capital cases. In approximately the year 100 a.d., the son of one of the judges on the Sanhedrin was accused of breaking the Sabbath. That was a capital offense.

To prove the offense of violating the Sabbath, the accused had to be warned of his conduct and its consequences by two independent witnesses. These same witnesses had each to independently see the accused do the sinful act of which he had been warned.

When called to testify, the witnesses were examined very closely and thoroughly about the warning and about the sinful conduct. They were also examined very closely about the surrounding circumstances: Where was the sun? How did the shadows lie? If at night how many stars were out, and so forth. In order to convict and issue the death penalty, all of the facts had to fit perfectly.

As it turns out, the Judge's son was convicted and executed. It also turned out that the prosecution had been political; the young man had been framed.

With this case came a change in the law. In order to issue the death penalty, all of the facts had to fit perfectly. But if all of the facts fit perfectly, then the evidence was clearly concocted. Thus the entire prosecution should be disallowed.

The death penalty had been effectively abolished.

## From Sanhedrin to *Furman*

The United States Supreme Court abolished the death penalty in 1972 in the case of *Furman v. Georgia*, 408 U.S. 238 (1972), stating that it was applied so freakishly that it was like being struck by lightning. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court said that new safeguards for the consideration of aggravating and mitigating factors in a new death penalty statute in Georgia were sufficient to

pass constitutional muster. As a result, 35 states now have the death penalty.

However, both New Jersey and New Mexico have abolished the death penalty by legislation and the Court of Appeals in New York, its highest court, struck down the death penalty statute in *People v. LaValle*, 3 N.Y.3d 88 (2004), citing inadequacy in the way in which aggravating and mitigating factors have been considered.

## Limitations on the Death Penalty since *Gregg*

Legislation has been introduced in eleven states to do away with the death penalty. In Connecticut, the legislature voted to eliminate the death penalty, but the bill was vetoed by the governor. In Montana a bill to eliminate the death penalty was passed by a Republican-controlled Senate. And, in Colorado, a bill to eliminate the death penalty has come close to being passed. Each of these legislative votes took place in 2009. The principal argument in each case was the cost.

Governor Ryan of Illinois ordered a moratorium on executions in 2000, noting: "The Illinois capital punishment system is so fraught with error and has come so close to the ultimate nightmare, the state's taking of innocent life." His principal reason was that thirteen people in Illinois had been sentenced to death but exonerated before they were executed.

Every Illinois governor since then has continued that moratorium. In Illinois, there have been 85 protocols recommended before executions can resume. These protocols include: procedures to improve the reliability of eyewitness identification, electronic recording of police interrogations and regulation on the use of jailhouse informants. While the Illinois governors have stated that they will stay all executions until those recommendations are implemented, people continue to be sentenced to death in Illinois.

There are more than thirteen hundred people on death row throughout the country. Almost seven hundred of these are in California.

In California, executions remain on hold due to Court decisions on the constitutionality of the use of lethal injection starting with a December 16, 2006 U.S. District Court decision that declared the California death penalty statute violated the Eighth Amendment. While these cases are being reviewed, the state has voluntarily stopped executions.

One of the issues there is a protocol, requiring that either a licensed physician participate in the process or a designated employee of the Department of Corrections

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inject the deadly liquid directly into the prisoner. However, the medical profession would have no part of it, while the Department of Corrections would not give the task to one person.

There is an additional challenge to the use of lethal injections in California because the Department of Corrections and Rehabilitation did not submit its procedures for the use of lethal injection for public comment as required by the California Administrative Procedures Act.

The death penalty continues to be used in federal courts against those charged under the federal criminal codes. There are 58 people on federal death row. In 2008, Texas accounted for 18 of the 37 executions carried out in nine states.

The United States Supreme Court narrowed the category of convicts eligible for the death penalty when it barred the execution of the mentally retarded (*Atkins v. Virginia*, 536 U.S. 304 (2002)), juveniles (*Roper v. Simmons*, 543 U.S. 551 (2005)), and those found guilty of crimes such as rape (*Kennedy v. Louisiana*, 554 U.S. \_\_\_ (2008)).

Worldwide, six countries, including the United States, account for ninety-five percent of all executions. No country is permitted to enter the European Union if it has the death penalty. Worldwide, one hundred and thirty-nine countries do not use the death penalty.

### The Economics of Death Penalty Defense

In the United States, death penalty procedural protections, despite *Gregg v. Georgia*, have proved no less trustworthy than the ancient Jewish law.

Since 1973 there have been one hundred thirty-eight death row inmates in the United States who have been completely exonerated. Only seventeen of those, or slightly more than ten percent, were exonerated due to DNA evidence.

But today's accused face situations as susceptible to a frame-up as in the days of the Sanhedrin, for both economic and political reasons.

Almost all of those facing the death penalty are indigent.

Availability of counsel is spotty, as is compensation for legal work. In some states, death penalty counsel are paid by the hour, but at rates much lower than customary for less important work. In other states, the pay is nominal.

A current problem is flat fee contracts, which pay a single sum for attorneys' fees, experts and investigation. This places the attorney in an impossible position, because the attorney must decide whether to spend the money on experts and investigators, or to spend it on office rent, staff salary and dinner for his family.

The appellate process is severely backlogged because of lack of competent counsel. In California, a death row inmate will wait four to six years from conviction until appellate counsel is appointed. The wait for counsel to begin the work on a petition for a writ of *habeas corpus* is eight to ten years (see the report of the California Commission on the Fair Administration of Justice). In California, approximately eighty cases await hearing before the California Supreme Court. But the Court only has the capacity to hear approximately twenty-five death penalty cases per year.

While, according to the California Department of Corrections, only thirteen people have been executed by the state since 1978, seventy people on death row have died of natural causes or suicide. Nationwide, the number of death sentences and the number of executions continues to decline.

### The Racial Factor

Racial factors remain. The race of the decedent is critical. When the deceased is White, the sentence of death is uttered three times more often than when the deceased is Black. When the decedent is White, the death penalty is granted four times more often than when the decedent is Latino or Hispanic. These are nationwide figures, and obtain regardless of the race of the accused.

A nationwide study by the NAACP Legal Defense Fund reflects that 44.7% of death row inmates are White, 41.58% Black, 11.34% Latino, 1.09% Native American and 1.21% Asian American. In other words, approximately fifty-five percent of all those on death row are people of color.

### Cruel, but Usual

Approximately one year ago, Judge Alex Kozinski of the Ninth Circuit offered his comments on the death penalty. In order for the death penalty to be found unconstitutional, it must be both cruel and unusual, he said. Cruel is a given. But, with the death penalty in force in a majority of states, it is, unfortunately, not unusual. This is one definition of the task ahead. Perhaps we are entering an era of the new Sanhedrin.

