THIRD EDITION

THE DEATH PENALTY

CONSTITUTIONAL ISSUES, COMMENTARIES, AND CASE BRIEFS

SCOTT VOLLUM // ROLANDO V. DEL CARMEN
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ROUTLEDGE

The Death Penalty

Constitutional Issues, Commentaries, and Case Briefs

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Third Edition

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We dedicate this edition to our co-author Kelly Cheeseman. We will remember her sense of humor, dedication to her students, and her passion for her profession. Kelly will be greatly missed.

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Preface to the Third Edition

Much has changed in the legal world of the death penalty since this book was first conceived in 2003. Over this span of 10 years there have been more than 500 executions and 1,175 new death sentences. During this period the United States hit and surpassed the 1,000-execution post-*Furman* milestone (1,347 executions as of October 1, 2013). But during that same time, the rates of death sentences and executions have declined precipitously. Six states have abolished the death penalty—five since the last edition of this book—and several others are considering doing so. There also have been 42 exonerations of individuals on death row who were found to be innocent, including six due to DNA testing.

By all measures, the popularity and use of the death penalty is on the decline. Increasing awareness of the flaws and failures of the death penalty system, as well as increasing concerns about the financial costs of the death penalty, seem to have played a role in this decline, as has the now virtually universal availability of true life sentences. That being said, we still remain one of the most prolific nations in terms of executions and the only Western nation to carry out executions at all. Furthermore, though it seems to be occurring in only a shrinking minority of jurisdictions, the death penalty continues in earnest in some states and localities. Texas surpassed 500 executions this year; states such as North Carolina, which has had no executions since 2006, are taking measures to revitalize and expand the death penalty and speed up executions. The death penalty remains a criminal sanction that presents us with many contradictions and controversies and increasingly evokes ambivalence among lawmakers and the public alike.

Violence in the United States has also declined significantly over the last decade, though it may be hard to tell given that we are presented with increasingly stark images of violence on a seemingly daily basis. Highly publicized cases of extreme and mass violence seem to have proliferated in the last few years, often drawing attention as capital or potentially capital cases. Just in the last two years, there has been a terrorist bombing at the Boston Marathon as well as twelve mass shootings, including a particularly horrific massacre of young children in a grade school in Newtown, Connecticut. Though many of these violent acts end with the offender's suicide, in cases in which the offenders live, such as the man who opened fire in a Colorado theater killing 12 people and injuring another 58, or one of the men who set off the bombs in Boston, the death penalty enters the public consciousness almost immediately. Both of these cases are still in progress at the time of this writing, so it is unknown whether they will result in death sentences. But there is no denying that cases such as these challenge us to think very hard about violence and killing and, by extension, the death penalty. When we are faced with horrors such as these, it is easy to understand why the death penalty persists. It is also easy to understand why the death penalty often evokes great emotion and conflict in our society.

The death penalty remains a hotly debated topic in the United States and a potent public policy in certain locations. In much of the United States, the public continues to support it and, in some cases, demand it. However, it also continues to be a lightning rod of sorts, drawing attention to many of the problems and controversies within criminal justice. Issues of cost, public safety, deterrence, retribution, justice, wrongful conviction, rehabilitation, redemption, race, and discrimination are illuminated through the magnifying glass that is the death penalty. As such, we believe that an understanding and analysis of the legal and constitutional issues surrounding the death penalty serve the broader objective of better understanding the criminal justice system. It is our hope that, throughout this book,

we have served this objective and that we have provided insight into the often complex and confusing world of the U.S. Supreme Court and its death penalty jurisprudence.

In this revised third edition, we have again maintained the overall structure and much of the content from the prior two editions. But there is also much that is new and improved. We present eight new case briefs and discuss many more new cases throughout the book, recalibrating our commentary on the major constitutional issues in line with the ever-evolving jurisprudence. We also added to the coverage of important peripheral legal and social issues, such as racial disparities in the criminal justice system, life sentences for juveniles, public opinion, wrongful convictions, and state trends in abolition of the death penalty.

Over the last five years, Supreme Court activity in terms of death penalty cases did not take on the same pace or volume that it had in previous decades. However, the legal developments, issues, and challenges—many of which have stemmed from prior Supreme Court decisions—have flourished and will likely continue to spur further involvement by the Court for the foreseeable future.

Scott Vollum, Ph.D.
Duluth, MN
October 1, 2013

The case briefs added in the third edition are:

Chapter 4: The Mentally Impaired and the Death Penalty

Bobby v. Bies (2009): Reassessment of mental retardation for the determination of eligibility for the death penalty.

Ryan v. Gonzales/Tibbals v. Carter (2013): Competence to assist counsel during appellate processes.

Chapter 7: The Right to Effective Assistance of Counsel and the Death Penalty

Wood v. Allen (2010): Counsel's failure to present evidence of mental retardation in capital mitigation.

Maples v. Thomas (2012): Counsel's failure to meet a filing deadline and "cause" to excuse a consequent procedural default.

Chapter 8: Due Process and the Death Penalty

Cone v. Bell (2009): Procedural default of habeas corpus claim following a lack of proper review by a state court; application of the *Brady* rule when evidence was suppressed.

Connick v. Thompson (2011): Section 1983 lawsuit based on wrongful conviction and establishing liability of state agents.

Chapter 10: Appeals, Habeas Corpus, and the Death Penalty

Stewart v. Martinez-Villareal (1998): The AEDPA's successive petition restriction and the filing of successive habeas corpus petitions when previous petitions were dismissed as premature.

Skinner v. Switzer (2011): The use of Section 1983 lawsuits to compel DNA testing in claims of actual innocence.

Preface to the Second Edition

The death penalty, in the context of the United States Constitution and the Supreme Court, is constantly evolving. In this, the second edition of *The Death Penalty: Constitutional Issues, Commentaries, and Case Briefs*, we try to reflect this evolution by presenting the most recent Supreme Court cases and the issues inherent in them that have occurred in the years since we published the first edition of this book. As I write this preface, we have just come off the longest hiatus in executions since the death penalty was reinstated following the Supreme Court decision in *Gregg v. Georgia*. This informal moratorium resulted from the Court's decision to consider the constitutionality of the execution method of lethal injection. The case was *Baze v. Rees*, one of the most recent among the new cases analyzed and discussed in this book, and the Court held that lethal injection is a constitutionally permissible method of execution. The first execution since September 25, 2007, was carried out on May 6, 2008, when William Earl Lynd was executed in Georgia by lethal injection at 7:51 P.M. As I write this, Mark Schwab is scheduled to be executed by lethal injection in Florida for the rape and murder of an 11-year-old boy; it will be the tenth execution of the year. There are more than 20 executions scheduled to take place over the coming months.

Over the last several years executions have slowed, but the Supreme Court's consideration of constitutional issues pertaining to them certainly has not. During the four years since the first edition of this book was published, the Supreme Court has made significant decisions about, among other things, racial disparity in capital jury selection, mental impairment as a mitigating factor in capital sentencing, standards of effectiveness of legal representation for capital defendants, jury instructions pertaining to aggravating and mitigating evidence, evidence of actual innocence in habeas corpus petitions, and, most recently, the constitutionality of lethal injection as a method of execution and the constitutionality of the death penalty in cases of the rape of a child when the victim is not murdered. The makeup of the Court has also changed in the years since this book was first published. Chief Justice William H. Rehnquist has been succeeded by new Chief Justice John G. Roberts, and Justice Sandra Day O'Connor has been succeeded by Justice Samuel Anthony Alito Jr. Justice Alito's first death penalty opinion was in *Holmes v. South Carolina* (briefed in Chapter 8), and Chief Justice Roberts has written several opinions in death penalty cases and penned the plurality opinion in *Baze v. Rees* (briefed in Chapter 11).

Although the structure and much of the content in this second edition remains the same as in the original edition, there is much that is new and revised. There are 17 new cases briefed and many more new cases discussed throughout the book. The added case briefs are:

Chapter 3: Racial Discrimination and the Death Penalty

Miller El v. Dretke (2005): Racially disparate questioning in jury selection
Snyder v. Louisiana (2008): Exclusion of prospective black jurors without racially neutral explanations

Chapter 4: The Mentally Impaired and the Death Penalty

Singleton v. Norris (2003): Forcefully medicating an inmate for competency in order to be executed
Tennard v. Dretke (2004): Mental retardation as mitigating factor when unrelated to crime
Panetti v. Quarterman (2007): Mental competency to be executed

Chapter 6: Juries, Jurors, and the Death Penalty

Uttecht v. Brown (2007): Trial court judge's role in death qualification

Chapter 7: The Right to Effective Assistance of Counsel and the Death Penalty

Rompilla v. Beard (2005): Counsel's failure to make a reasonable effort to contest evidence supporting a death sentence

Schriro v. Landrigan (2007): Defendant's interference with counsel's strategy and the presentation of mitigating evidence

Chapter 8: Due Process and the Death Penalty

Deck v. Missouri (2005): Shackling of a capital defendant during sentencing phase of trial

Holmes v. South Carolina (2006): Introduction of third-party guilt evidence

Chapter 9: Aggravating and Mitigating Factors in Death Penalty Cases

Kansas v. Marsh (2006): Death sentence when aggravating and mitigating factors are equal in weight

Brewer v. Quarterman (2007): Statutory restrictions on jury instructions regarding the consideration of mitigating factors

Chapter 10: Appeals, Habeas Corpus, and the Death Penalty

Nelson v. Campbell (2004): Right to bring a lawsuit challenging the method of execution

House v. Bell (2007): Habeas corpus appeals on the grounds of actual innocence

Lawrence v. Florida (2007): Suspension of AEDPA's statute of limitations while awaiting habeas corpus decision

Chapter 11: Evolving Standards of Decency and the Eighth Amendment's Ban on Cruel and Unusual Punishment

Baze v. Rees (2008): Constitutionality of lethal injection as a method of execution

Kennedy v. Louisiana (2008): Constitutionality of the death penalty for nonhomicide cases of sexual assault against a child

Only one case brief has been removed (the 2003 case of *Miller-El v. Cockrell* has been replaced by the more recent 2005 case of *Miller-El v. Dretke*). Discussion surrounding past cases and the rich history and lineage of Supreme Court decisions in capital cases has been preserved but has been supplemented by numerous new decisions and updated information on the many related death penalty issues. In the end, we believe that the second edition of this book significantly strengthens and bolsters what was already a valuable and unique book and offers the reader the most comprehensive and up-to-date collection and consideration of constitutional issues and Supreme Court decisions pertaining to the death penalty.

Scott Vollum, Ph.D.
Harrisonburg, Virginia
July 1, 2008

Preface and Introduction to the First Edition

Death as a form of punishment was used in the United States even before the American colonies became a republic. For a long time, the death penalty was—and still is—an option available to the state when dealing with serious offenders, and the public accepted it as such without many legal or political challenges. In recent times, however, issues have arisen concerning the constitutionality and wisdom of this ultimate sanction. This has spawned numerous court cases, decided over several decades, that have sought to declare this form of punishment unconstitutional, or that attempted to refine and polish some of its features. These cases and what they say are the focus of this book.

Constitutionality and the wisdom of imposing the death penalty are two separate issues, although they tend to be treated as one in some quarters. Constitutionality is an issue addressed and resolved by the courts, while the wisdom of imposing it is a political question to be resolved by political decision-makers who represent the public. This book focuses on the constitutionality issue. Whether the death penalty is wise or desirable as a form of punishment is for political entities to eventually determine and resolve.

Numerous books and articles have been written on the death penalty. This book seeks to add a legal dimension to existing literature by bringing together all the major cases decided by the United States Supreme Court on the death penalty. The first case decided by the Court on the death penalty was *Wilkerson v. Utah* in 1878. The cut-off date for the cases briefed in this book was July 1, 2013. A total of 72 cases are briefed here. As in any project in which choices are involved, subjectivity played a role in determining which cases from among the many decided by the Court are sufficiently important to justify inclusion among the briefed cases. That determination, including the "Top Ten Most Significant Death Penalty Cases," was made by the authors based on their familiarity over the years with death penalty cases.

THE BOOK'S PURPOSE AND AUDIENCE

This text is written to fill a need for a book that gathers and synthesizes all the legal issues related to the death penalty, bringing together both fundamental presentation and discussion of these issues with short case briefs of key Supreme Court cases. There is no such book available to the general public at present, except perhaps those used in law schools and in full case form. It classifies the death penalty cases according to legal issues, provides a commentary on the various subtopics, and then presents legal materials in an easy-to-digest and understandable form. The main audiences of the book are undergraduates and criminal justice practitioners. The book should also prove useful, however, for anyone who has an interest in the legal issues surrounding the death penalty.

THE BOOK'S CONTENT

The book consists of 12 chapters, subclassified into four parts.

Part I (Chapters 1 and 2) introduces the history of the death penalty and then discusses the foundation cases of *Furman v. Georgia* and *Gregg v. Georgia.*

Part II (Chapters 3, 4, and 5) focuses on constitutional issues and specific groups. These groups are those discriminated against because of race, mental impairment, or due to their having committed serious crimes at a young age. These offenders are treated differently by the Court.

Part III (Chapters 6, 7, 8, 9, 10, and 11) constitutes the major thrust of the book. It addresses constitutional issues such as the role of juries and jurors, the right to effective assistance of counsel, the right to due process, aggravating and mitigating circumstances, appeals, habeas corpus, and the concept of evolving standards of decency.

Part IV (Chapter 12) addresses the current death penalty issues and trends in the United States, including the flaws in its administration of which awareness and acknowledgment seem to be growing rapidly. The trends of declining use of the death penalty are discussed, asking what they might foretell about where things are headed in regard to this controversial criminal sanction. We end with a consideration of this possible future of the death penalty in the United States.

FORMAT

Every chapter starts with commentaries on the general case law on a subtopic, followed by a chart of the cases briefed in the chapter, and then the case briefs. The case brief approach to the study of law is deemed more effective for undergraduates and field practitioners who do not have the time or the inclination to go into a prolonged reading of United States Supreme Court cases. A case brief acquaints the reader with the case by summarizing its facts, issues, reasons, and holding. This is done in the interest of brevity, but hopefully not at the expense of accuracy.

A WORD ON LEGAL REFERENCING AND ACCESS TO ORIGINAL CASES

Every case briefed in this book contains a case citation. For those who may need some guidance in understanding case citations, the legal citation used in this book is similar to those used in law books and articles. To illustrate, let us use the following citation: *Gregg v. Georgia*, 428 U.S. 153 (1976). *Gregg v. Georgia* is the case title, 428 refers to the volume where the case starts, U.S. means the United States Reports (the official government publisher of United States Supreme Court cases), 153 refers to the page where the case starts, and 1976 refers to the year the case was decided.

Anyone who wants to read the case of *Gregg v. Georgia* as originally printed may therefore go to any law library, pull out Volume 428 of the United States Reports, then go to page 153, where the case starts. Some Supreme Court decisions are short, while others are very long.

The original decisions of the United States Supreme Court in these cases are readily available on the Internet. To find these cases, go to the Supreme Court's Website at www.supremecourtus.gov and click on "Opinions," then the year of the decision. If more research is desired on a case, perform an Internet search, then choose the U.S. Supreme Court decision from the many results. There will likely be many entries on that case, including the decisions of the lower courts that were appealed and commentaries on the case. Make sure the case is the U.S. Supreme Court decision and not that of the trial court, the court of appeals, or of a state supreme court.

2005

About the Authors

Scott Vollum is an Assistant Professor in the Department of Sociology-Anthropology at the University of Minnesota, Duluth, where he primarily teaches classes on violence, the death penalty, restorative justice, criminological theory, and research methods. He conducts research and writes on a variety of topics related to the death penalty, including attitudes about the death penalty and experiences of those impacted by it (e.g., condemned death row inmates, co-victims of capital murder, and death row exonerees). He also conducts research on and writes about moral disengagement, restorative justice, violence against animals, and crime and justice in popular culture.

Rolando V. del Carmen retired in May 2011 as Distinguished Professor of Criminal Justice (Law) in the College of Criminal Justice, Sam Houston State University. He has authored numerous books and articles in various areas of law related to criminal justice. His book, *Criminal Procedure: Law and Practice*, has been translated into Japanese, Korean, and Chinese and is used extensively in the United States and some Asian countries. He has won all three major awards given by the Academy of Criminal Justice Sciences. He has taught numerous graduate and undergraduate classes in law and has been a mentor and friend to many of his students.

Durant Frantzen is Associate Professor of Criminology in the College of Arts and Sciences at Texas A&M University, San Antonio. His research focuses on offender reentry and recidivism, domestic violence policy, and the death penalty. He teaches courses on forensic psychology, statistics, victimology, and comparative systems in criminal justice.

Claudia San Miguel is an Associate Professor of Criminal Justice within the Department of Public Affairs and Social Research at Texas A&M International University in Laredo, Texas. Her research focuses on the trafficking of women and children, dating violence, domestic violence, and various policing issues. She recently traveled to England, Poland, Sweden, Austria, and Spain to help form collaborative relationships with their antitrafficking task forces. She has also taught courses for the Department of State in Roswell, New Mexico, on global human trafficking at the International Law Enforcement Academy.

Kelly Cheeseman Dial was Associate Professor and Chair of the Criminal Justice Program at Messiah College in Grantham, Pennsylvania. Until her untimely death during the production of this book, her research interests included female offenders, prison deviance, correctional officer stress and job satisfaction, institutional corrections, the death penalty, ethics, and sexually deviant behavior.

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The authors would like to thank their families, friends, colleagues, and students. The work required to bring this book to fruition quite simply would not have been possible if not for their support and encouragement. We also express gratitude to the staff at Elsevier Publishing, particularly Pam Chester and Ellen Boyne. Pam was an early advocate for the publication of this revised edition and worked with the authors through the early stages of its development. Ellen guided us and provided valuable feedback and assistance through the writing and revision process. We greatly appreciate their insight, guidance, and assistance, without which the third edition of this book would not have happened.

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Online Resources

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Top Ten Most Significant Death Penalty Cases

10. ***Lockett v. Ohio***, 438 U.S. 586 (1978). Death penalty statutes must allow for consideration of mitigating factors regarding the character or history of a defendant as well as the circumstances of the offense.
9. ***Payne v. Tennessee***, 495 U.S. 149 (1990). Victim impact statements pertaining to characteristics of the victim and the emotional impact of the crime on the victim's family do not violate the Eighth Amendment and are admissible in the sentencing phase of a trial.
8. ***Baze v. Rees***, 553 U.S. 35 (2008). Lethal injection does not violate the Eighth Amendment's prohibition of cruel and unusual punishment and is thus a constitutionally permissible method of execution.
7. ***Lockhart v. McCree***, 476 U.S. 162 (1986). Prospective jurors whose opposition to the death penalty is so strong as to prevent or impair the performance of their duties as jurors at the sentencing phase of a trial may be removed for cause from jury membership.
6. ***McCleskey v. Kemp***, 481 U.S. 279 (1987). A statistical study suggesting racial discrimination in the imposition of death sentences does not make the death penalty unconstitutional. What is needed is that "petitioner must prove that decision-makers in his case acted with discriminatory purpose."
5. ***Ring v. Arizona***, 536 U.S. 584 (2002). "The decision whether or not to execute a defendant must be made by a jury. A judge may not alone make a determination of aggravating circumstances and thus elevate a punishment to death. Such aggravating circumstances are 'the functional equivalent of an element of a greater offense' and therefore must be determined by a jury as required by the Sixth Amendment."
4. ***Atkins v. Virginia***, 536 U.S. 304 (2002). "The execution of mentally retarded defendants is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment."
3. ***Roper v. Simmons***, 543 U.S. 551 (2005). Imposing the death penalty on juveniles who commit crimes at age 16 or 17 constitutes cruel and unusual punishment prohibited by the Eighth Amendment.
2. ***Furman v. Georgia***, 408 U.S. 238 (1972). The death penalty is unconstitutional; it violates the Constitution's equal protection clause and the prohibition against cruel and unusual punishment.
1. ***Gregg v. Georgia***, 428 U.S. 153 (1976). Death penalty statutes that contain sufficient safeguards against arbitrary and capricious imposition are constitutional.

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CHAPTER

The Death Penalty: Past and Present 1

CHAPTER OUTLINE

I INTRODUCTION

The history of the death penalty in the United States may be divided into two historical periods: the period prior to the 1976 seminal decision in *Gregg v. Georgia* (1976)[1] and the period after *Gregg*. This chronological division, based on the two historical periods of the death penalty, reflects the most significant change made by the Supreme Court regarding the constitutionality of the death penalty. However, to fully appreciate the profoundness of the Court's decision in *Gregg* and to understand why *Gregg* is the point at which to differentiate between the two periods, an analysis of the historical roots of the death penalty must be undertaken.

[1] *Gregg v. Georgia*, 428 U.S. 153 (1976).

This chapter first presents a brief overview of the history of the death penalty from colonial times to 1971. Specifically, it first explores the virtual importation of the death penalty from England to the colonies and examines the early justifications for the death penalty. It also discusses early movements to abolish the death penalty that were inherently influenced by the Age of Enlightenment. Parts of this chapter examine the constitutional issues that were important prior to *Gregg*. Additionally, because of the Court's repeated use of the Eighth Amendment's proscription against cruel and unusual punishment in determining the constitutionality of state death penalty sentences, this chapter discusses the high court's early interpretation of the Eighth Amendment. The chapter also briefly explores the Court's decision to use the Eighth Amendment despite the fact that it was not made applicable to the states until 1962.[2] Finally, the chapter also explores the current state of the death penalty. Although it will be covered in more depth later in the book, this chapter provides an overview of recent state decisions to abolish or repeal the death penalty as well as recent Court and circuit court decisions.

II A RETROSPECTIVE ANALYSIS OF THE DEATH PENALTY

A The Colonial Period

The first recorded execution in America occurred in 1608,[3] but the death penalty's formal and legal foundations were not firmly established until later in the seventeenth century, when European settlers formed permanent colonies in the New World after the 1620 s. In colonial America, the penalty of death was typically imposed on those who engaged in crimes such as murder, adultery, bestiality, witchcraft, and blasphemy. Although the colonies' codifications of laws and accompanying penalties differed, most state codes were reflective of religious beliefs, and thus the death penalty was justified on religious grounds. For instance, biblical arguments in favor of the death penalty were evident in the capital laws of the Massachusetts Bay Colony. Strongly influenced by the Mosaic Code of the Old Testament, known for the retributionist doctrine "an eye for an eye," the Bay Colony's 1641 *Body of Liberties* (the penal code) prescribed the penalty of death for violation of 13 laws: idolatry, witchcraft, blasphemy, murder, manslaughter, poisoning, bestiality, sodomy, adultery, man-stealing,[4] false witness in capital cases, conspiracy, and rebellion. Interestingly, the crimes listed in the Body of Liberties were accompanied by their biblical references in the Old Testament.[5]

The harshness that characterized the penal code of the Massachusetts Bay Colony was relatively lenient in comparison to the many crimes (more than 50) punishable by death in England during the same period. In addition, compared to the other colonies such as Virginia, Maryland, Georgia, and Carolina, which imposed the death penalty for crimes committed only by indentured slaves, the Bay Colony's capital laws were quite lax. However, by the eighteenth century, support for the death penalty in all of the colonies grew as immigration to the New World increased substantially and public order was threatened. The death penalty grew almost by necessity because the colonies lacked adequate

[2]The Eighth Amendment was incorporated to the states in the 1962 case of *Robinson v. California*, 370 U.S. 666 (1962).
[3]This was the execution of George Kendall, a European colonist who was hanged for the crime of "spying for the Spanish." In Hugo Bedau and Paul Cassell (eds.), DEBATING THE DEATH PENALTY (Oxford: Oxford University Press, Inc., 2004).
[4]Man-stealing is akin to kidnapping.
[5]Bryan Vila and Cynthia Morris (eds.), CAPITAL PUNISHMENT IN THE UNITED STATES (1997), pp. 8–9.

long-term facilities to incarcerate offenders.[6] Despite such issues, the number of capital crimes increased because of the demands of the English Crown, which had renewed its control over the colonies during this time. The English Crown insisted that the colonies follow its example and revise their penal codes to include 200 crimes punishable by death.

B The Age of Enlightenment and the Early Movement to Abolish the Death Penalty

1 From Europe to the Colonies: The Impact of Enlightenment

While the colonists were struggling to control the massive immigration movement to the New World during the eighteenth century, Europe was at the height of a philosophical and intellectual movement known as the Enlightenment. The Age of Enlightenment, which began a century before, was spurred by the writings of naturalistic philosophers who were instrumental in dispelling spiritualistic or religious notions that human beings were born with fixed or innate personality traits.[7] For example, John Locke, one of the most influential philosophers of the time, articulated the notion of sensationalism, which claimed that humans were shaped not by the spiritual world but rather by their sensory reactions to the external environment. In his book *Two Treatises on Government* (1690), Locke also rejected the idea that government was the creation of God and instead supported the principle that the government derived its authority from the people.[8]

Locke's writings, and those of other philosophers such as Montesquieu and Voltaire, generated great changes in intellectual and philosophical thinking in Europe by introducing the notion that humans had the mental capacity, or the *rationality*, to create a form of government that protected the rights of the people. The writings of these Enlightenment philosophers eventually generated changes in the administration of justice, particularly with regard to the death penalty. Their writings influenced Italian philosopher Cesare Beccaria to advocate for the abolition of the death penalty.[9] Beccaria, who wrote *An Essay On Crimes and Punishment* (1764), believed that a punishment should be proportionate to the crime committed or to the harm that was inflicted on society. He also believed that too severe a penalty, such as death, may provoke an individual to engage in lesser forms of crime simply to avoid capital punishment. Thus, rather than deterring crime, the death penalty, according to Beccaria, may encourage lesser forms of crimes. In addition, he argued that "the death penalty served as an example of barbarity rather than a deterrent to it, because it sanctioned the taking of human life—the very act it was intended to deter."[10] As alternatives to the death penalty, Beccaria proposed incarceration among several humane and proportionate forms of punishment.

In the colonies, the Age of Enlightenment served as an impetus for revolution and independence. Influenced greatly by Locke's notion that a government should be altered or abolished by the people if it was not fulfilling its duty to protect natural rights such as life, liberty, and property, the colonists expressed their displeasure with the English Crown in the Declaration of Independence and subsequently declared war. However, with much concern about the beginning of the Revolutionary War,

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[6] *Id.*

[7] Mark Lanier and Stuart Henry, ESSENTIAL CRIMINOLOGY (2d ed. 2004).

[8] J.W. Peltason and Sue Davis, UNDERSTANDING THE CONSTITUTION (15th ed. 2000).

[9] Beccaria did believe that the death penalty was useful in some situations, such as when there was a need to protect the security of a nation or government. In Piers Beirne, *Inventing Criminology: The "Science of Man" in Cesare Beccaria's Dei delitti e delle pene*. CRIMINOLOGY, Vol. 29(4):777–820, 1991.

[10] Bryan Vila and Cynthia Morris (eds.), CAPITAL PUNISHMENT IN THE UNITED STATES (1997), p. 16.