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### Capital Punishment in the United States and Japan: Constitutionality, Justification and Methods of Infliction

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Capital Punishment in the United States  
and Japan: Constitutionality,  
Justification and Methods  
of Infliction

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GARY D. GARCIA\*\*

I. INTRODUCTION

A perusal of the celebrated T'ang Chinese legal code of 653 A.D. reveals that there were 223 grounds for capital punishment.<sup>1</sup> The actual execution of the penalty was nominal, however, because the written penal rules were riddled with mitigating forces, refined review procedures, and humanitarian currents based on Confucian ethics.<sup>2</sup> The traditional Chinese approach to the death penalty has had a profound influence on neighboring Asian countries, including Japan.<sup>3</sup> Inspired by tolerant Buddhist and Confucian teachings, Japan officially banned capital punishment from 818 to 1156 A.D.<sup>4</sup>

The death penalty is a controversial contemporary issue through-

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1. C. KIM, *SELECTED WRITINGS ON ASIAN LAW* 341 (1982).

2. *Id.* at 342-57.

3. *Id.* at 454-58.

4. *NIHON KEIBATZU SHI NENPYO* (Chronology of Japanese History on Penology) 6-8 (Shigematsu ed. 1972). As to the historical treatment of abolishing the death penalty, see YAMAMOTO, *ÔCHÔ HÔSEI TO SHIKEI TEIHATSU ONSHA HOMEN NO KENKYÛ* (A Study on Imperial Judicial Administration, Abolishment of Death Penalty, Amnesty and Release) (1980).

out the world today.<sup>5</sup> A myriad of arguments advocate reasons for and against the maintenance of the death penalty. The reasons are sometimes charged with emotion, given to further grounds of retribution, crime deterrence, religion, morality, ethics and even opinion polls.<sup>6</sup> In this regard, the actions taken by the United Nations since the 1960's are highly significant. In 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights.<sup>7</sup> Article 6 of the Covenant reads:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.<sup>8</sup>

This resolution encourages member nations to adopt measures to reduce the instances of capital punishment. Subsequently, the United Nations General Assembly adopted the 1968 resolution which stresses specified procedural safety devices for criminals who have

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5. CAPITAL PUNISHMENT, CRUEL AND UNUSUAL? 2-79 (Siegal ed. 1988).

6. Various reasons are noted in *id.* at 59-64, 69-79.

7. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967).

8. *Id.* art. 6.

committed capital offenses.<sup>9</sup>

The primary objective of this writing is to put the issue of capital punishment within the context of comparative constitutional litigation in the United States and Japan by assessing current decisions on the death penalty by the United States and Japanese Supreme Courts.

On January 17, 1977, an era in United States history ended and a new one began. On that date, in Utah, Gary Mark Gilmore became the first person executed in the United States since Luis Jose Monge on June 2, 1967.<sup>10</sup> As of December 31, 1985, 1575 prisoners were on death row in various United States prisons and jails.<sup>11</sup> The number of death row prisoners increased by almost 1,000 since January 1, 1970.<sup>12</sup> Although no executions were carried out in the United States between June 1967 and January 1977, ninety-two executions were carried out from 1977 until November 15, 1987.<sup>13</sup> Thirty-seven states in the United States now authorize the use of capital punishment for certain offenses.<sup>14</sup>

In comparison, while Japan has not had a moratorium on capital punishment since 1156 A.D.,<sup>15</sup> its current usage is decreasing. In 1950, for example, sixty-one persons were sentenced to death in Japan, but by 1974, this figure had decreased to six persons.<sup>16</sup> More importantly, the number of people actually executed in Japan is decreasing significantly. In 1975, seventeen persons were executed in Japan, while in 1981 only one person was legally put to death.<sup>17</sup> In fact, crime in general in Japan has decreased an amazing sixty percent from 1955 to 1974.<sup>18</sup>

In view of the resurgence of capital punishment in the United States and its abatement in Japan, this Article will focus on Japan's and the United States' views on this form of criminal punishment. Specifically, this writing will examine the constitutionality of the

9. Capital Punishment, G.A. Res. 2393, 23 U.N. GAOR Supp. (No. 18) at 155, U.N. Doc. A/7303 (1968).

10. See H. BEDAU, *THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT* 121 (1977).

11. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1988, table no. 311 (1987).

12. *Id.* at table no. 312. On January 1, 1970, there were 595 prisoners under sentence of death in the United States. *Id.*

13. San Diego Union, Nov. 15, 1987, at A9, col. 1.

14. *THE WORLD ALMANAC AND BOOK OF FACTS* 823 (1988).

15. See AMNESTY INTERNATIONAL, *THE DEATH PENALTY IN JAPAN* 2 (1983).

16. D. HENDERSON & J. HALEY, *LAW AND THE LEGAL PROCESS IN JAPAN* 789 (1978).

17. AMNESTY INTERNATIONAL, *supra* note 15, at 9.

18. D. HENDERSON & J. HALEY, *supra* note 16, at 768.

death penalty as well as the justifications for its use and the methods employed by each country.

## II. CONSTITUTIONALITY

### A. *United States*

In the United States, the constitutionality of the death penalty has been contested by the Constitution's eighth amendment prohibition against cruel and unusual punishment<sup>19</sup> and the fourteenth amendment guarantee of due process under the Constitution.<sup>20</sup> In sentencing death penalty cases, the courts are required, under the fourteenth amendment, to individualize each case, taking into consideration all mitigating circumstances, including both statutory and non-statutory factors.<sup>21</sup>

While a de facto moratorium on capital punishment began in the United States in 1967,<sup>22</sup> it reached de jure status on June 29, 1972, with the United States Supreme Court decision in *Furman v. Georgia*.<sup>23</sup> The sole issue decided in *Furman* was:

Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?<sup>24</sup>

The issue was so controversial that each of the nine justices filed sepa-

19. As to the history of cruel and unusual punishment, see R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 29-58 (1982). The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

20. R. BERGER, *supra* note 19, at 15-28. The fourteenth amendment reads:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

21. For instance, in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the U.S. Supreme Court took the position that the death penalty is not properly imposed in state sentencing hearings where the judge bars consideration of nonstatutory mitigating factors. In *Sumner v. Shuman*, 483 U.S. 66 (1987), the Court struck down a Nevada statute which contained no provision for sentencing authorities to consider any mitigating circumstances.

22. H. BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 3 (1987).

23. 408 U.S. 238 (1972). As to background information leading to the *Furman* case, see Weissbrodt, *The Death Penalty Cases*, 56 CALIF. L. REV. 1270 (1968); W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* (1987).

24. 408 U.S. at 239.

rate opinions. In a plurality decision, Justices Douglas, Brennan, Stewart, White, and Marshall found that the death penalty, as applied in the cases before them, was cruel and unusual, and therefore unconstitutional.<sup>25</sup> It is important to note that the holding in *Furman* was limited by the particular fact pattern presented. William Henry Furman, a black male, was convicted of murder by a jury and sentenced to death.<sup>26</sup> The Georgia statutes gave the jury virtually total discretion to decide whether a person convicted of murder should be put to death or sentenced to life imprisonment.<sup>27</sup> The plurality held that this discretion allowed for arbitrary discrimination in applying capital punishment, and was thus cruel and unusual in violation of the eighth amendment, and denied due process and equal protection in violation of the fourteenth amendment.<sup>28</sup>

In response to *Furman*, thirty-four states and the federal government passed new statutes regarding the infliction of capital punishment. The states set specific guidelines in their statutes to eradicate any potential discrimination by the jury or the judge. Georgia, for example, required that a death sentence not be imposed "unless the jury verdict included a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed."<sup>29</sup>

The United States Supreme Court addressed the new capital punishment statutes in *Gregg v. Georgia*.<sup>30</sup> The Court, in a reversal from *Furman*, found that the new statutes did not violate any portion of the United States Constitution,<sup>31</sup> and that capital punishment is "suitable to the most extreme of crimes."<sup>32</sup> Thus, the Court had come full circle in a few short years and paved the way to begin legal executions once again.

In *Gregg*, Troy Gregg, a black male, was convicted of two counts of robbery and two counts of murder by a jury applying Georgia's revised, post-*Furman* statutes.<sup>33</sup> The statutes called for a bifurcated trial in all capital cases; the first phase determining guilt or innocence,

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25. *Id.* at 240.

26. *Id.* at 239.

27. *Id.* at 256.

28. *Id.* at 256-57 (Douglas, J., concurring).

29. J. GORECKI, *CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION* 15 (1983).

30. 428 U.S. 153 (1976).

31. *Id.* at 207.

32. *Id.* at 187.

33. *Id.* at 160.

and the second phase the penalty to be imposed.<sup>34</sup> If a defendant was convicted of a capital offense, the judge or jury, as the trier of fact, was required to find beyond a reasonable doubt whether one of ten specific statutory aggravating circumstances accompanied the offense.<sup>35</sup> If an aggravating circumstance was found, the jury could recommend the death penalty, but was not required to do so.<sup>36</sup> In addition, the Georgia statute provided for special, expedited review by the Georgia Supreme Court of all cases in which the death penalty had been imposed.<sup>37</sup>

After finding the defendant guilty of the capital offenses, the jury found that at least two of the ten aggravating circumstances existed, and recommended that the defendant be sentenced to death on each count.<sup>38</sup> The Georgia Supreme Court upheld the sentences for each of the murder convictions.<sup>39</sup>

The opinion of the United States Supreme Court, as enunciated by Justice Stewart, is notable for several reasons. First, the death penalty for the crime of murder has been historically accepted as an appropriate punishment in this country.<sup>40</sup> Second, capital punishment is considered appropriate by the legislature since thirty-five jurisdictions enacted new capital punishment statutes in response to *Furman*.<sup>41</sup> Third, capital punishment is considered appropriate by the people, manifest by the fact that the electorate of California adopted a state constitutional amendment after the California Supreme Court held that the death penalty violated the California Constitution.<sup>42</sup> Fourth, the Court had never held that capital punishment per se violated the United States Constitution; only that it would violate the Constitution if capital punishment was imposed arbitrarily or capriciously, as in *Furman*.<sup>43</sup> Lastly, a punishment enacted by a freely elected body of representatives of the people enjoys a presumption of validity as long as the method of punishment is not cruel, inhuman, or disproportionate to the crime involved.<sup>44</sup>

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34. *Id.* at 163.

35. *Id.* at 164.

36. *Id.* at 166.

37. *Id.*

38. *Id.* at 161.

39. *Id.*

40. *Id.* at 176.

41. *Id.* at 179-80.

42. *Id.* at 181.

43. *Id.* at 168-69.

44. *Id.* at 175.

### B. Japan

One of the salient features of the 1947 Japanese Constitution is the adoption of the American type of judicial review.<sup>45</sup> Under the Constitution, the Supreme Court is "the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."<sup>46</sup>

The Japanese Supreme Court addressed the issue of the constitutionality of capital punishment under the 1947 Japanese Constitution in a decision on March 12, 1948.<sup>47</sup> In this case, the defendant was accused of murdering his mother and sister and disposing of their bodies by throwing them in a well. After World War II, there was little to eat in the home and violent arguments would erupt regarding the defendant's unwillingness to work in order to provide for the family. At some point, the mother and sister refused to provide for or feed the defendant as long as he refused to work and share responsibility. The defendant, apparently enraged, killed them. The court found the defendant guilty of murder and sentenced him to death.<sup>48</sup>

The following provisions of the Japanese Constitution of 1947 will assist the reader in understanding the defendant's appeal to the Japanese Supreme Court:

Article 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and other governmental affairs.<sup>49</sup>

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.<sup>50</sup>

Article 36. The infliction of torture by any public officer and cruel

45. As to historical study on Japanese judicial review, see Ishimine, *A Comparative Study of Judicial Review Under American and Japanese Constitutional Law* (1974) (Cornell University J.S.D. thesis).

46. KENPŌ (Constitution) art. 81 (Japan). For the English translation of the 1947 Constitution, see 2 KODANSHA ENCYCLOPEDIA OF JAPAN 9-13 (1983). As to an evaluation of the power of judicial review, see JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT 319-323 (J. Maki ed. 1980). As to a comprehensive study on current practices of the judicial review, see KEMPŌ SOSHO (Constitutional Litigation) (Ashibe ed. 1987).

47. The case is translated into English in J. MAKI, *COURT AND CONSTITUTION IN JAPAN* 156 (1964).

48. *Id.*

49. KENPŌ (Constitution) art. 13 (Japan). For the English translation, see KODANSHA, *supra* note 46, at 10.

50. *Id.* art. 31.



punishments are absolutely forbidden.<sup>51</sup>

The defendant argued that article 36 forbade the imposition of capital punishment because death is the most cruel punishment of all.<sup>52</sup> The Japanese Supreme Court agreed that the death penalty is "the grimmest of all punishments," but ruled that it was not forbidden by the 1947 Constitution.<sup>53</sup>

The Court also noted that while article 13 acknowledges respect for the individual and the right to life, it provides an inherent limitation that when an individual violates the very basic principle of the public welfare, even the right to life can be taken away.<sup>54</sup> Moreover, the Court said that article 31 makes it clear that an exception to the right to life is created by proper procedure of law.<sup>55</sup> The Court held that the Japanese Constitution, like that of many other modern civilized societies, recognized death as an appropriate type of punishment for certain crimes.<sup>56</sup>

In addressing the issue of cruelty, the Court pointed out that although capital punishment is the ultimate sanction, as well as the most grim, it is not considered cruel.<sup>57</sup> Cruelty, it held, was determined by the method used to bring death, not the act of death itself.<sup>58</sup> For example, if the death penalty were to be carried out by burning at the stake, crucifixion, or boiling, the method would be cruel and unconstitutional under article 36.<sup>59</sup>

The supplementary opinions of several of the justices provide additional insight on the issue of cruel punishment, as well as insight into the thinking of the members of the court. An important principle gleaned from the supplementary opinions is a different interpretation of article 31 that can be advanced to support the theory that the death penalty cannot be tantamount to cruel punishment. The argument is as follows:

The Constitution absolutely forbids cruel punishment. Accordingly, granting the death penalty is naturally a cruel punishment . . . . However, if one interprets Article 31 of the Constitution from

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51. *Id.* art. 36.

52. J. MAKI, *supra* note 47, at 157.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 157-58.

57. *Id.* at 158.

58. *Id.*

59. *Id.* at 158-59.

the reverse side, the Constitution does not directly prohibit the death penalty as a cruel punishment because the death penalty can be inflicted as punishment in accordance with the provisions of the law.<sup>60</sup>

Justice Shima, in a concurring opinion, noted that cruelty is a fluid concept which changes with time according to the feelings of the people. He noted that at the time the 1947 Constitution was adopted, the people approved of the death penalty.<sup>61</sup> Justice Inouye, in his concurring opinion, stated his personal belief that the Constitution of Japan would be changed when the people could "no longer tolerate" capital punishment or felt that it was no longer necessary.<sup>62</sup>

In 1956, the Japanese Ministry of Justice organized the Preparatory Commission for the revision of the Penal Code (Keiho Kaisei Jumbikai).<sup>63</sup> The ministry published the final work of the commission, "A Preparatory Draft for the Revised Penal Code of Japan," in 1964.<sup>64</sup> The capital punishment issue was addressed in two articles of the draft. While article 32 recommended six kinds of criminal punishment—death, imprisonment, confinement, fine, penal detention, and minor fine—article 34 recommended that the death penalty be imposed by hanging and that the offender be incarcerated in a penal institution until the penalty was imposed.<sup>65</sup>

In May of 1963, the Ministry of Justice began to supervise the Legal System Deliberation Council, a government subsidized organ, with the objective of investigating whether an overall revision of the Japanese penal code was needed and, if so, to draft any needed revisions and present them to the Justice Minister.<sup>66</sup> The Council established the Special Committee on Criminal Law which in turn created five subcommittees, one specifically dealing with punishment.<sup>67</sup> The first draft of each subcommittee was submitted to the Council by the end of 1969 and the second draft was submitted in March of 1971.<sup>68</sup>

60. *Id.* at 161.

61. *Id.*

62. *Id.* at 164.

63. C. KIM, *supra* note 1, at 458.

64. *Id.* For the English translation of the draft, see GEORGE, A PREPARATORY DRAFT FOR THE REVISED PENAL CODE OF JAPAN 1961 (1964).

65. C. KIM, *supra* note 1, at 474. As to criticism on articles dealing with capital punishment, see KAGAWA, KEIJIRIPO TO SONO HIHAN (Criminal Legislation and Criticism) 22-31 (1970).

66. C. KIM, *supra* note 1, at 458.

67. *Id.* at 458-59.

68. *Id.* at 459.

The second draft of the subcommittee on punishment recommended the following to achieve this goal:

- (1) Restrict the death penalty to the crime of murder;
- (2) Require a psychiatric examination in all death penalty cases;
- (3) Require a unanimous decision of the presiding judges in sentencing an offender to death;
- (4) Adoption of a system of postponed execution or suspended execution of the death penalty; and
- (5) Utilization of clemency in capital cases.<sup>69</sup>

The subcommittee proposed three measures to the Special Committee on Criminal Law to adopt the system of postponed or suspended executions of the death penalty. They were:

1. In sentencing the death penalty, the court can render a sentence with the postponed execution of death penalty for five years if it can recognize the circumstances which would warrant the reservation of the execution of its penalty, taking into consideration the objective of the general standard concerning the application of punishment. A person whose sentence of death penalty is postponed is to be detained in a penal institution to receive correctional treatments;
2. When the period of postponed execution of death penalty runs out, the court, upon receipt of opinions of the Deliberation Committee on Death Penalty can change the death penalty to life imprisonment or confinement unless there is a need for the execution of the death penalty; and
3. Any offender whose death penalty is reduced to life imprisonment is not entitled to ask for a parole until after the expiration of 20 years from the date of the sentence of the death penalty.<sup>70</sup>

The Special Committee on Criminal Law rejected the subcommittee's recommendations.<sup>71</sup> As of 1982, the Japanese Diet (Japanese Parliament) had not limited use of the death penalty.<sup>72</sup>

### III. JUSTIFICATIONS

#### A. *United States*

Many commentators note that justification for criminal punishment falls into four general categories: retribution, deterrence, inca-

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69. *Id.* at 475.

70. *Id.* at 475-76.

71. *Id.* at 476.

72. 1 KODANSHA ENCYCLOPEDIA OF JAPAN 243 (1983).

pacitation, and rehabilitation.<sup>73</sup> In *Gregg*, the United States Supreme Court noted that it was permissible for the states to impose capital punishment for the purposes of retribution and deterrence.<sup>74</sup>

The retribution theory, simply stated, posits that a state should inflict punishment on an offender because he or she deserves it as a response to the criminal offense committed.<sup>75</sup> The underlying rationale for retribution is that since man is a moral agent with the ability to choose between right and wrong, punishment is an appropriate response to a wrong choice.<sup>76</sup> Consequently, advocates of capital punishment often claim that a person who violates societal norms may be rightfully punished.<sup>77</sup>

Retribution in the form of capital punishment can provide highly polarized debates in its moral aspects. Advocates have claimed that offenders committing capital crimes deserve such punishment and that the punishment should fit the crime.<sup>78</sup> Thus, the death penalty is viewed as a legitimate punishment for crimes such as murder.<sup>79</sup> The retribution theory can be defined as the view that crime should be punished in such a way that the punishment inflicted upon the offender is proportionate to the crime committed.<sup>80</sup>

Justice Stewart, in *Furman*, approved of retribution as a proper justification and wrote:

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.<sup>81</sup>

Justice Marshall, however, equated retribution as an equivalent of vengeance and, therefore, an improper goal of a state.<sup>82</sup> "Retaliation, vengeance, and retribution have been roundly condemned as in-

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73. P. LOW, J. JEFFRIES & R. BONNIE, *CRIMINAL LAW: CASES AND MATERIALS* 1 (1982); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 45 (1976).

74. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

75. See P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 73, at 2.

76. *Id.*

77. *Id.*

78. For example, see H. BEDAU, *supra* note 22, at 13.

79. *Id.*

80. *Id.* at 38.

81. *Furman v. Georgia*, 408 U.S. 238, 308 (1972).

82. *Id.* at 343.

tolerable aspirations for government in a free society. Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance."<sup>83</sup>

The advocates of retribution won this battle as Justice Stewart's majority opinion in *Gregg* pointed out that, although retribution may not be the dominant objective of the law, it was not a forbidden objective of the law.<sup>84</sup>

Like the retribution theory, the deterrence value of capital punishment is often debated. Deterrence is usually divided into two sub-categories: specific deterrence and general deterrence. Specific deterrence is defined as "deterrence by intimidation."<sup>85</sup> The goal of specific deterrence is to prevent the offender from repeating the crime.<sup>86</sup> Unquestionably, capital punishment fulfills this goal.<sup>87</sup> General deterrence is the theory that the punishment of an offender deters others from similar criminal behavior. General deterrence, contrary to retribution, is forward-looking. Its goal is the reduction or prevention of further criminal acts by others.<sup>88</sup>

There has been much debate and research conducted in recent years on whether capital punishment does, in fact, deter others from capital crimes. For example, in 1976, the National Research Council concluded that "the available studies provide no useful evidence on the deterrent effect of capital punishment."<sup>89</sup> On the other hand, Isaac Ehrlich's studies suggest "that on the average the tradeoff between the execution of an offender and the lives of potential victims it might have saved was of the order of magnitude of 1 for 8 for the period 1933-67 in the United States."<sup>90</sup> The only logical conclusion which can be drawn is that no empirical study has authoritatively and conclusively determined capital punishment's deterrent effect.<sup>91</sup>

Justice Marshall, who believes capital punishment to be cruel and unusual, in violation of the eighth and fourteenth amendments, has noted that many studies have indicated no correlation between

83. *Id.*

84. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

85. P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 73, at 8.

86. *Id.*

87. *Id.*

88. *Id.* at 8-10.

89. H. BEDAU, *supra* note 22, at 141-42.

90. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 398 (1975).

91. See H. BEDAU, *supra* note 22, at 141-42.

capital punishment and the murder rate.<sup>92</sup> His conclusion, based upon the evidence presented and assembled, is that "capital punishment cannot be justified on the basis of its deterrent effect."<sup>93</sup> It is safe to assume that Justice Marshall would agree that life imprisonment is as much a deterrent as capital punishment.

Justice Stewart agrees that statistics on the deterrent effects of capital punishment are inconclusive, but feels that its value "rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."<sup>94</sup>

Incapacitation, like other justifications for capital punishment, is debated by both advocates and abolitionists. While it is true that capital punishment prevents an individual offender from recidivism, abolitionists argue that life imprisonment achieves the same goal.<sup>95</sup> Justice Marshall claims that incapacitation is not necessary because murderers are not likely to commit other crimes either in prison or upon their eventual release, but are generally first offenders and often become model citizens upon release from prison.<sup>96</sup>

Opponents of capital punishment had predicted that a resumption of executions, as occurred in the late 70's and 80's, would result in a backlash against capital punishment as the people became aware of how revolting an execution can be.<sup>97</sup> However, the opposite appears to be occurring. Some opinion polls suggest that ever increasing numbers of the population support the death penalty.<sup>98</sup> Moreover, at the sites of several executions, members of the public demonstrated and actually cheered the execution.<sup>99</sup>

### B. Japan

While punishments may differ from country to country, the justifications for punishing criminal offenders are finite. As noted, retribution and general deterrence appear to be the main justifications for the

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92. *Furman v. Georgia*, 408 U.S. 238, 350 (1972).

93. *Id.* at 354.

94. *Gregg v. Georgia*, 428 U.S. 153, 186 (1976).

95. See Thorn, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199, 199-200 (1983).

96. *Furman*, 408 U.S. at 355.

97. W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 16 (1987).

98. *Id.* at 16.

99. *Id.* at 17.

use of capital punishment in the United States.<sup>100</sup>

The Japanese penal code authorizes the imposition of capital punishment for crimes such as murder, sedition, arson, and bombing.<sup>101</sup> However, capital punishment is only an alternative form of punishment, as these crimes are also punishable by prison terms.<sup>102</sup> Only the crime of participating in armed foreign aggression against Japan carries a sentence of mandatory capital punishment.<sup>103</sup>

The Japanese and Americans continue to debate the necessity of capital punishment in a civilized society.<sup>104</sup> Japan, however, justifies its continued use as a necessity for the public welfare.<sup>105</sup> The Japanese Supreme Court has also justified capital punishment on the basis that it "may be a general preventative measure."<sup>106</sup> This statement means that because the goal is to prevent or inhibit similar conduct by others, the goal of capital punishment is general deterrence. The Japanese Supreme Court has also justified its usage as a means "of cutting off at [the] root special social evils."<sup>107</sup> This language implies that incapacitation or special deterrence may be a proper goal of inflicting the death penalty.

One Japanese legal scholar, in justifying capital punishment for its general deterrent effect, said:

[b]ecause man is not by nature a moral creature, if the warning of punishment is lacking, there is the danger that crimes will be committed. When, as in our country today, the inhuman act of murder is so widespread as to be a common everyday occurrence, to revise the Constitution so as to abolish capital punishment would contain the danger of promoting that evil.<sup>108</sup>

While espousing capital punishment as deterrent and as incapacitation devices, in practice the Japanese goal of punishment actually appears to be rehabilitation. As will be seen, the number of offenders sentenced to death as well as the number of offenders executed in Japan have decreased dramatically. In support of rehabilitation, the preliminary draft of a revised penal code proposed reductions in the

100. P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 73, at 2-22.

101. KODANSHA, *supra* note 72, at 243.

102. *Id.*

103. *Id.*

104. C. KIM, *supra* note 1, at 24-27, 474-78.

105. KODANSHA, *supra* note 72, at 243. As to the public welfare standard, see C. KIM, *supra* note 1, at 74-78.

106. J. MAKI, *supra* note 47, at 158.

107. *Id.*

108. J. Maki, *supra* note 46, at 283 (quoting Commissioner Kamikawa's remarks).

usage of capital punishment, increased usage of suspension of sentences, and formally pronounced that the purpose of all punishment is the rehabilitation of all offenders.<sup>109</sup>

Rehabilitation as a goal is also reflected in the widespread usage of prosecutorial discretion.<sup>110</sup> In 1974, prosecutors declined to go forward with nine percent of all homicide suspects.<sup>111</sup> One commentator notes that suspended prosecution allows the offender to be rehabilitated and reintegrated within the society.<sup>112</sup>

Sentencing guidelines in the preliminary draft for a revised penal code suggests that the purpose of punishment is reformation and rehabilitation of offenders.<sup>113</sup> This appears to be the norm in current practice. In determining sentences, even for capital offenses, the primary consideration is rehabilitation of the offender rather than retribution.<sup>114</sup>

The advocates of postponed execution of the death penalty, as discussed earlier, made several arguments for its adoption. First, the global movement under way to abolish or limit the death penalty has humanitarian meaning and rehabilitation of offenders is one of the leading goals of punishment.<sup>115</sup> Second, in some cases the death penalty is unwarranted because of factors such as motive, the mental status of the offender, the likelihood of future criminal acts by the offender, etc.<sup>116</sup> Third, by retaining the death penalty as a punishment in the penal code and vesting its discretionary usage in the judiciary, the deterrent effect is maximized.<sup>117</sup> Fourth, since less than one percent of death penalty offenders are actually executed, the proposals would not decrease the deterrent effect of the death penalty.<sup>118</sup> Lastly, public opinion began to favor a system of postponed execution of the death penalty.<sup>119</sup>

Opponents of postponed executions countered the arguments

109. D. HENDERSON & J. HALEY, *supra* note 16, at 773.

110. *See id.* at 783.

111. *See* Abe, *The Accused and Society: Therapeutic and Preventive Aspects of Criminal Justice in Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 331-38 (A. von Mehren ed. 1963). *See also* Ishimura, *Legal Systems and Social Systems in Japan*, in *LEGAL SYSTEMS & SOCIAL SYSTEMS* 116, 120-23 (A. Podgorecki ed. 1985).

112. D. HENDERSON & J. HALEY, *supra* note 16, at 783-84.

113. *Id.* at 787.

114. *Id.* at 787-88.

115. C. KIM, *supra* note 1, at 476.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 477.



made by the advocates. First, the judiciary, based on sound reason, rendered discreet death sentences.<sup>120</sup> Second, any measure which calls for decreased usage of the death penalty, especially in cases which deserve it, decreases the deterrent effect.<sup>121</sup> Third, if special circumstances warrant a postponement of death for a capital offender, clemency to life imprisonment is preferred.<sup>122</sup> Fourth, opponents argue that it is cruel for an offender to have to wait several years before knowing what his or her fate will be.<sup>123</sup>

While the prevailing philosophy of rehabilitation dominates Japanese penology, there is still a feeling that offenders must "pay" for their crimes.<sup>124</sup>

#### IV. METHODS

As of 1965, there were seven methods of capital punishment used worldwide: hanging, shooting, beheading, electrocution, asphyxiation, strangulation, and stoning.<sup>125</sup> Hanging is the most predominant form of execution, followed by shooting and beheading.<sup>126</sup> Surprisingly, the Philippines is the only country to use electrocution besides several states of the United States.<sup>127</sup> Moreover, asphyxiation (lethal gas) is only administered in several states of the United States and no other countries.<sup>128</sup> Spain is the only country in the world which permits strangulation (*garrote vil*).<sup>129</sup> Beheading is the principal method used in Saudi Arabia, while stoning may be used to execute a woman guilty of adultery or other offenses against the Koran.<sup>130</sup>

While most countries now attempt to carry out executions in a quick, painless, and practical method, a few countries, such as Mali, permit torture and painful executions.<sup>131</sup> On the other hand, in the Philippines, electrocution is the method employed, but the con-

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. G. KOSHI, *THE JAPANESE LEGAL ADVISOR: CRIMES AND PUNISHMENTS* 92 (1970).

125. Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIMINOLOGY AND POLICE SCI. 397, 409-10 (1965).

126. *Id.*

127. *Id.* at 410.

128. *Id.* at 409.

129. *Id.* at 410.

130. *Id.*

131. *Id.* at 409 n.9.

demned person may be anesthetized if he or she desires.<sup>132</sup>

Public executions seem to be a thing of the past. A recent survey shows that eighty-one percent of the countries employing capital punishment carry it out in private.<sup>133</sup> As of 1965, only Cambodia, Cameroon, the Central African Republic, Ethiopia, Haiti, Iran, Laos, Nicaragua and Paraguay opened executions to the public.<sup>134</sup>

### A. *United States*

Capital punishment has existed in the United States since colonial times, although its legality was not seriously challenged until 1878.<sup>135</sup> In *Wilkerson v. Utah*,<sup>136</sup> the defendant was convicted of murder in the first degree and sentenced to be "publicly shot until . . . dead."<sup>137</sup> The defendant's appeal asserted that although the laws of the territory of Utah prescribed the death penalty for first degree murder, no method of execution was specified.<sup>138</sup> The defendant contended that since the territory's laws lacked a specific method of execution, the sentencing judge was without authority to specify the method of capital punishment to be inflicted.<sup>139</sup> The United States Supreme Court held that since the offense called for the death penalty, "without any statutory regulation specifically pointing out the mode of execut[ion]," the sentencing judge had the power and authority to determine the appropriate method of death.<sup>140</sup> The Court did note that although hanging was the normal method employed under common law, shooting was not cruel and unusual punishment as it had frequently been employed for capital offenses under military law.<sup>141</sup>

The death penalty next appeared before the United States Supreme Court in *In re Kemmler*.<sup>142</sup> The defendant in *Kemmler* was sentenced to die by "causing to pass through the body of him . . . a

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132. *Id.* at 409 n.10.

133. *Id.* at 410.

134. *Id.* at 411.

135. Gardner, *Execution and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 99 (1978).

136. 99 U.S. 130 (1878).

137. *Id.* at 131.

138. *Id.*

139. *Id.* at 137.

140. *Id.*

141. *Id.*

142. 136 U.S. 436 (1890).

current of electricity of sufficient intensity to cause death."<sup>143</sup> The issue presented to the Court was whether the sentencing court violated the fourteenth amendment by arbitrary deprivation of the defendant's life by electrocution.<sup>144</sup> The Court held that since the legislature of the state of New York determined that electrocution did not inflict cruel and unusual punishment, the defendant was not treated unequally nor deprived of due process.<sup>145</sup>

Perhaps the most unusual case came before the Court in *Louisiana ex rel. Francis v. Resweber*.<sup>146</sup> Defendant Willie Francis was convicted of murder and sentenced to be electrocuted.<sup>147</sup> On the appointed day, he was prepared, placed in the electric chair and the switch was thrown.<sup>148</sup> Several of the witnesses stated that the defendant's lips puffed out, he groaned and the chair rocked.<sup>149</sup> The defendant screamed "Take it off. Let me breathe."<sup>150</sup> It was apparent that a malfunction was occurring and the defendant would not die, although electricity was coursing through him. He was removed from the chair and a new death warrant was issued.<sup>151</sup>

The defendant's appeal to the United States Supreme Court contended that a second attempt to execute him would be a cruel and unusual punishment in violation of the eighth amendment and a violation of his due process rights under the fourteenth amendment.<sup>152</sup> In a plurality opinion, the Court stated that a second attempt at execution was not cruel and unusual, nor would it violate his due process rights.<sup>153</sup> The plurality stated for the first time that "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."<sup>154</sup>

There are currently five methods of execution employed in the United States.<sup>155</sup> Until the late 1800's, hanging was practically the

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143. *Id.* at 441.

144. *Id.* at 448-49.

145. *Id.* at 449.

146. 329 U.S. 459 (1947).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 480.

151. *Id.* at 461-62.

152. *Id.* at 462.

153. *Id.* at 464.

154. *Id.*

155. Gardner, *supra* note 135, at 119-129.

exclusive method of capital punishment used by the states.<sup>156</sup> As of 1978, electrocution was the most common form of capital punishment, followed by the gas chamber (asphyxiation).<sup>157</sup> Seven states permit hanging,<sup>158</sup> and Utah allows hanging or shooting.<sup>159</sup> Since the 1985 United States Supreme Court decision in *Heckler v. Chaney*<sup>160</sup> sanctioned the use of lethal injections, seventeen states<sup>161</sup> now use this method.

### 1. Electrocution

The authorities are divided on just how electrocution kills. The majority believe that the electrical current paralyzes the respiratory center, but some pathologists claim that the current paralyzes the heart muscle.<sup>162</sup>

While most authorities on capital punishment claim that electrocution is painless, it often takes two or three jolts of electricity before the condemned is pronounced dead.<sup>163</sup> Even if painless, this method often is violent. The body turns a bright red as the temperature rises, every muscle in the body contracts as the current passes through, and often the flesh burns at the the electrodes' contact points.<sup>164</sup> Moreover, there have been reported cases of the victims' eyeballs falling from their sockets and of the victims' tongues swelling.<sup>165</sup> Usually the victims urinate and defecate as the electricity neutralizes these muscles.<sup>166</sup>

Interestingly, Texas and Oklahoma stopped using electrocution in favor of lethal injection, and three other states switched from electrocution to gas because it was seen as more humane and less cruel.<sup>167</sup> On the other hand, no states have replaced the gas chamber or lethal injection with electrocution.<sup>168</sup>

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156. *Id.* at 119.

157. *Id.* at 125-28.

158. *Id.* at 122.

159. *Id.* at 122-23.

160. 470 U.S. 821 (1985).

161. CAPITAL PUNISHMENT, *supra* note 5, at 46.

162. Gardner, *supra* note 135, at 125 n.216.

163. *Id.* at 126.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 127.

168. *Id.*

## 2. The Gas Chamber

The use of the gas chamber was a response by several states to the perceived pain and cruelty involved in hanging, shooting and electrocution. While it is true that gassing does not mutilate or disfigure the body, it is unknown whether or not it is painless.<sup>169</sup> One witness to this type of capital punishment reported that the victim exhibits "evidence of horror, pain, and strangling. The victims' eyes pop, the victims turn purple, and they drool. It is a horrible sight."<sup>170</sup> Others report seeing the condemned struggling for several minutes before becoming unconscious from the lethal gas. This punishment is carried out in a sealed chamber with windows available for viewing.<sup>171</sup> Cyanide gas eggs are dropped into a solution of distilled water and sulfuric acid.<sup>172</sup> The resultant gas asphyxiates the offender.<sup>173</sup>

## 3. Hanging

Hanging is one of the oldest forms of capital punishment, dating to Biblical times. Prior to the late 19th century, death by hanging was usually a result of strangulation, a slow and painful death. By the late 1800's, executioners realized that death would come quickly and painlessly if the victim were dropped from a certain height in relation to his weight.<sup>174</sup> In this manner, a quick death is achieved by dislocating the vertebrae and crushing the spinal cord.<sup>175</sup>

Most authorities believe hanging to be painless if properly carried out, but there are many horror stories of grotesque hangings. When the drop is too long, decapitation may occur.<sup>176</sup> When the drop is too short, the subject dies a slow, painful death by strangulation.<sup>177</sup> There are reported instances of victims clutching at the nooses or tearing off their masks while strangulating for eight minutes or more.<sup>178</sup> There are other reports of torrents of blood pouring from the victim's neck as decapitation occurs while the body still gasps and shakes.<sup>179</sup>

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169. *Id.*

170. *Id.* at 128.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 119.

175. *Id.* at 113.

176. *Id.* at 120.

177. *Id.*

178. *Id.*

179. *Id.* at 113.

Of all forms of capital punishment in use in the United States, hanging is probably the most painful. The victim is usually dangled for eight to fourteen minutes before death is pronounced.<sup>180</sup> It is a violent form of death as the body is mutilated by the rope. It tears at the victim's face and the neck is elongated, distorted and discolored.<sup>181</sup>

#### 4. Shooting

Utah is the only state of the Union which authorizes execution by firing squad and the only state which allows its condemned to choose between shooting and hanging.<sup>182</sup> The method of shooting employs five volunteers, four given rifles with live rounds and the fifth a blank.<sup>183</sup> The condemned is hooded with a target placed over his heart, and strapped in a chair ten feet from the executioners.<sup>184</sup> At the signal, the four bullets are to enter the condemned's heart and kill him instantly.<sup>185</sup>

Like other methods of execution, shooting can be painful. There are reports of all bullets missing the mark and having the condemned die from excessive bleeding, after a long period of agony.<sup>186</sup> In fact, there are reports of marksmen hitting the victim in the ankle instead of the intended target.<sup>187</sup>

#### 5. Lethal Injection

As noted earlier, some states have employed lethal injection as a form of capital punishment.<sup>188</sup> Death is accomplished by an intravenous injection of fast-acting barbiturates combined with a paralytic agent.<sup>189</sup> Unconsciousness usually results in less than a minute, with

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180. *Id.* at 121.

181. *Id.*

182. *Id.* at 123.

183. According to Ken Stols of the Utah State Correction Department, their procedure manual is confidential. He described the procedure, however, as follows: "An independent correction person loads the rifles in a different room. The person is not on the shooting squad. He loads five rifles, four with live ammunition and one with a blank. Immediately before the scheduled execution (four to five minutes), he issues the rifles to the captain of the squad. The captain issues the rifles to the squad. The rifles are in a ready-to-fire mode, on safety. They are .30 caliber." Telephone conversation with Ken Stols.

184. Gardner, *supra* note 135, at 123.

185. *Id.*

186. *Id.*

187. *Id.* at 124.

188. *Id.* at 128-29.

189. *Id.*

death following quickly.<sup>190</sup> This may be the least painful form of capital punishment in the United States.<sup>191</sup>

### B. Japan

The death penalty in Japan dates back to its earliest known history. The first legal codes of Japan, the Taiho Ritsu-ryō and the Yoro Ritsu-ryō, provided five penalties for crimes including capital punishment.<sup>192</sup> Interestingly, in 724 A.D., the Emperor Shomu issued an edict forbidding all killings including capital punishment.<sup>193</sup> Buddhist teachings of the period stressed that life was invaluable.<sup>194</sup>

As discussed earlier, the death penalty was abolished from 810 to 1156 A.D.<sup>195</sup> The Japanese reinstated the death penalty in 1156 A.D. with different methods of execution prescribed for each of the different social classes of feudal Japan. For example, the samurai, or warrior class, was allowed to commit a form of suicide known as hara-kiri or seppuku, which was considered honorable, rather than face the shameful prospect of hanging or decapitation. "If a samurai chose suicide it was more honorable to *the extent of observing a strict samurai (bushi) ethic.*"<sup>196</sup> The chonin or peasant class, however, faced less honorable execution by decapitation, hanging, crucifixion, burning at the stake, or boiling to death.<sup>197</sup>

Hanging has been established as the sole method of inflicting capital punishment since the Meiji period.<sup>198</sup> The constitutionality of hanging as a method used for capital punishment was presented to the Supreme Court of Japan in *Ichikawa et al. v. Japan* in 1961.<sup>199</sup> In *Ichikawa*, the defendant, convicted of burglary and murder, con-

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190. *Id.*

191. *Id.*

192. NIHON KEIBATZU SHI NENPYO *supra* note 4, at 6.

193. AMNESTY INTERNATIONAL, *supra* note 15, at 2.

194. *Id.*

195. *Supra* note 15 and accompanying text.

196. See *Bushido* in KODANSHA, *supra* note 72, at 221-23. Samurai suicide (seppuku) is considered an altruistic type of honorable suicide. 7 ENCYCLOPEDIA OF JAPAN 262 (Kodansha ed. 1983).

197. See KODANSHA, *supra* note 72, at 221-23.

198. *Id.* Although hanging is the only method of capital punishment utilized in Japan today, the country has used various other forms of capital punishment in the past. As to the historical treatment of various forms of executing the death penalty, see J. HALL, JAPANESE FEUDAL LAW 145, 253-55 (1906).

199. The English translation of the *Ichikawa* case appears in THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS 1961-70, 161-64 (Itoh & Beer eds. 1978).

tended that while the Japanese Criminal Code, Code of Criminal Procedure, and Prison Law, all provide for capital punishment, none of them specified the manner. Accordingly, the defendant contended that hanging, the method prescribed in Cabinet Order No. 65 of 1873, was unconstitutional because it inflicted cruel punishment in violation of article 36 of the 1947 Constitution.<sup>200</sup> The Japanese Supreme Court held that the Cabinet Order of 1873 did not lose force after the adoption of the 1947 Constitution.<sup>201</sup> Moreover, the Court held that hanging was not a cruel punishment, in violation of article 36 of the Constitution.<sup>202</sup> In addition, the Court found that capital punishment, per se, was not unconstitutional.<sup>203</sup>

Currently, article 11 of the Japanese Penal Code prescribes that the death penalty must be executed by hanging at a prison.<sup>204</sup> A person who has been condemned to death must be confined in prison until the punishment is executed.<sup>205</sup> The execution must be attended by the public prosecutor, an assistant officer of the public prosecutor and the warden of the prison or his delegate. Executions are no longer open to the public.<sup>206</sup>

Several studies in Japan indicate that in twenty executions carried out between 1948 and 1951, it took an average of fourteen minutes and thirty-three seconds for the condemned person to die. Of the twenty executions, the minimum time to die was four minutes and thirty-five seconds, and the maximum was an incredible thirty-seven minutes.<sup>207</sup>

The Japanese government does not announce when an execution has been carried out. The Ministry of Justice claims that this protects the family of the condemned from further shame since the arrest, trial and conviction have already shamed the family.<sup>208</sup> Abolitionists, however, claim that secret executions hide the reality of capital punishment from the populace and that if capital punishment does have a deterrent effect it is nullified by keeping the executions secret.<sup>209</sup>

200. *Id.* at 161.

201. C. KIM, *supra* note 1, at 24.

202. THE CONSTITUTIONAL CASE LAW OF JAPAN *supra* note 199, at 161-62.

203. *Id.*

204. S. DANDO, JAPANESE CRIMINAL PROCEDURE 472 (1965).

205. For the English translation of the article, see 2 EHS LAW BULLETIN SERIES, THE PENAL CODE OF JAPAN (1984).

206. S. DANDO, *supra* note 204, at 472.

207. AMNESTY INTERNATIONAL, *supra* note 15, at 13.

208. *Id.*

209. *Id.*



Current practice in Japan is to tell the condemned one or two days in advance of the date of execution. In some cases the prisoner is not told at all.<sup>210</sup> One official claimed that the decision is made on a case-by-case basis.<sup>211</sup> If the officials thought the condemned could cope with the news, he would be told one day in advance.<sup>212</sup> If not, the prisoner would not be notified.<sup>213</sup> Critics claim that families often are not told until after an execution has taken place.<sup>214</sup> The critics contend that lack of advance notice is cruel because the condemned and his or her family do not know from day to day whether the condemned will live to see tomorrow.<sup>215</sup>

In practice, capital punishment is rarely used in Japan. In 1979, 1980 and 1981, only one execution was carried out in each year.<sup>216</sup>

After judgment has been rendered and is made binding, the Minister of Justice must impose the death penalty within six months.<sup>217</sup> The theory behind this quick execution is that anticipation of death causes the condemned to suffer for a prolonged period.<sup>218</sup> There are exceptions to this rule, however. For example, if the condemned is appealing the order or there are co-defendants, the six month period is waived.<sup>219</sup>

Once the Minister of Justice orders the judgment to be enforced, the execution must occur within five days.<sup>220</sup> However, if the offender becomes mentally incompetent or if the offender is a pregnant female, the Minister of Justice must order a stay.<sup>221</sup> After a stay is issued, the death penalty cannot be carried out until the prisoner's sanity is restored or childbirth occurs.<sup>222</sup> The Minister of Justice usually orders the execution within six months of the restoration of sanity or childbirth.<sup>223</sup> Surprisingly, offenders are not held in prison but in one of eight detention houses for persons awaiting trials.<sup>224</sup> The theory be-

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210. *Id.* at 12-13.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 12.

216. *Id.* at 9.

217. S. DANDO, *supra* note 204, at 471-72.

218. *Id.* at 472.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. G. KOSHI, *supra* note 124, at 93.

hind this practice is that they are merely awaiting execution, not serving time for a criminal sentence.<sup>225</sup>

The majority of executions in Japan have been inflicted upon those offenders who commit the crime of murder in the course of a robbery.<sup>226</sup> Homicide or "satsujin" means the intentional killing of another human being.<sup>227</sup> "Homicide" within the meaning of the Japanese Penal Code does not include deaths caused by other criminal offenses such as rape or robbery, assisting a person in the act of suicide or arson.<sup>228</sup> While the Penal Code treats these offenses as separate categories, there are at least eleven offenses that may call for capital punishment.<sup>229</sup>

## V. CONCLUSION

While capital punishment is constitutional in the United States and Japan, there are more differences than similarities in how each country deals with this controversial issue. Both countries justify the imposition of death on theories of general deterrence and incapacitation. Both also claim that the death penalty would be cruel<sup>230</sup> and therefore unconstitutional if the method inflicted unnecessary pain or prolonged suffering.<sup>231</sup>

In the United States, however, capital punishment has become a more common occurrence since the *Gregg* decision of 1976. Most authorities think that more legal executions will take place as the courts and people approve of its usage.<sup>232</sup> While in Japan, less offenders are being sentenced to death and even less are being executed by the state.

In the United States, the Supreme Court has approved of retribution as a legitimate goal of the states in justifying capital punishment. The authors of this Article have been unable to find any Japanese authority approving of retribution or vengeance. The Japanese appear to be moving towards rehabilitation and reformation of the of-

225. *Id.*

226. *Id.*

227. *Id.* at 138.

228. *Id.*

229. Koshi lists 12 offenses under capital punishment categories. G. KOSHI, *supra* note 124, at 93. Capital punishment for killing one's or his spouse's lineal ascendants was found, however, to be unconstitutional by the Japanese Supreme Court in 1973. As to the discussion of this issue, see THE JAPANESE LEGAL SYSTEM 725-29 (Tanaka ed. 1976).

230. The Japanese Constitution omits wording of "unusual punishment." See *supra* text accompanying note 51.

231. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976); J. MAKI, *supra* note 47 at 158-59.

232. H. BEDAU, *supra* note 22 at 2-3.

fender as the goal of all criminal punishment. While inconsistent with the current usage of capital punishment, the theories of rehabilitation and reformation are a step along the way to abolition of the death penalty and may explain why capital punishment is rarely inflicted in Japan.

The Japanese Supreme Court, like the United States Supreme Court, has indicated that it will consider evolving societal attitudes and standards in considering the validity of capital punishment in the future. On this issue, however, the two Courts have differed in their approaches. The Japanese Supreme Court tends to act as the guardian of the public welfare in cases involving the death penalty. Further, the Court generally holds the rights of society before those of the individual. The Japanese Supreme Court is not averse to using its own perception of evolving societal standards, rather than that of the legislature or the general public. The obviously onerous defect in the application of the public welfare test is the absence of any articulated rationale by the Court dictating the appropriate setting in which it is to be invoked. The logical result of such a clause, pregnant with caprice, is that the Japanese Supreme Court can deem any action as inconsonant with the preservation of the public welfare. There is no discernible constraint to abrogate the Court's power of unbridled interpretation.

In contrast to the Japanese, the United States Supreme Court is primarily concerned with the rights of the individual. Concern for the rights of the individual is indicated by the Court's focus, in both *Furman* and *Gregg*, on the dangers of allowing the death penalty to be arbitrarily imposed by juries who may selectively impose the death sentence. United States legislatures and courts have not specifically focused on the concept of postponed execution of the death penalty. However, the delays inherent in the American appeals process make immediate execution of convicted individuals impossible.

As discussed earlier, there is an assertion that Japanese procurators are lenient in dealing with capital crime cases. At the same time, there is a similar assertion that in sentencing the death penalty cases, the Japanese judges are also lenient. It is difficult to assess these assertions in order to establish a clear-cut thesis, since there are no comprehensive empirical studies.<sup>233</sup>

Various methods of extinguishing life are used by the various states in the United States which impose capital punishment, the most

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233. Ishimura, *supra* note 111, at 122 notes a small scale survey conducted in 1941.

common being electrocution and asphyxiation by lethal gas. In contrast, Japan utilizes only hanging.

In the United States, legal executions are often widely publicized, especially against infamous offenders such as Gary Gilmore, and Julius and Ethel Rosenberg. In Japan, legal executions are usually kept secret. Often the Japanese refuse to inform the condemned person until shortly before the execution takes place. Moreover, the news of the execution is often kept from family members until after the offender has died.

It can be seen that the trends indicate that capital punishment will continue to be used in the United States, while it appears to be on the wane in Japan. Each country has, however, seen periods where it was used as a punishment frequently, and other periods when its usage was non-existent. It is difficult to predict what the future will bring for the death penalty.

