Activity Overview

The Eighth Amendment to the U.S. Constitution prohibits “cruel and unusual punishment.” The Supreme Court has held consistently that the death penalty is not, in itself, a violation of the Eighth Amendment. However, the Court has ruled that the application of the death penalty under particular circumstances has violated the Eighth Amendment, and limited its use. Studying the death penalty with students provides opportunity to understand how a body of law about a Constitutional provision has evolved over time.

Students will take a stand on the death penalty, analyze the arguments made for and against it in Anton Chekhov’s short story “The Bet” and apply what they learn about death penalty jurisprudence to identify factors they believe ought to be considered when determining if the death penalty is cruel and unusual in particular circumstances.

Objectives

During this activity students will

- Identify arguments for and against the death penalty.
- Complete ballots on their views and describe their rationales.
- Interpret and summarize positions on the death penalty explored in the short story “The Bet” by Anton Chekhov.
- Compose writing exercises, selecting quotes from the story to explain a position.
- Summarize key points from excerpts of U.S. Supreme Court cases about evolving standards of decency with respect to cruel and unusual punishment and formulate ideas about objective indicators to determine evolving standards of decency.
- Compare factors that may have influenced a person’s view of the death penalty in 1921, when “The Bet” was first translated into English, as opposed to those that influence their own.

Estimated Time

- **Reading:** Two class periods or two nights as homework
- **Class Discussion:** Four class periods
- **Writing:** One to two class periods or one to two nights as homework

Materials and Preparation

- You will need to obtain a copy of the short story “The Bet” by Anton Chekhov and devise a way for students to read it. A copy is available online at http://www.online-literature.com/anton_chekhov/1255/
- Make three copies of Handout 1, Ballot: The Death Penalty, page 54
Background and Introduction to “The Bet.”

The death penalty has a long history in the United States. It was legal in colonial America, although laws regarding the death penalty varied from one colony to the other. After the Constitution was ratified, it was generally accepted that states had the right to punish crimes by death as they saw fit.

However, the Eighth Amendment to the Constitution, ratified as part of the Bill of Rights in 1791, prohibits “cruel and unusual punishment.” It is difficult to know precisely what “cruel and unusual” punishment meant when the Eighth Amendment was written, but we do know that it was intended to offer some guidance about the extent to which mental or physical distress is permissible as punishment for criminal acts. We know that another intention of the Eighth Amendment was to place some limits on the power of the legislatures to determine punishments for crime, in keeping with the system of checks and balances established in general by our structure of government.

The Supreme Court has held consistently that the death penalty is not, in itself, a violation of the Eighth Amendment. However, the Eighth Amendment has become a focal point of Supreme Court cases about the death penalty. In the 1972 case of *Furman v. Georgia*, 408 U.S. 238, two of the justices in the majority found capital punishment itself to be unconstitutionally cruel and unusual; the other three majority justices found that the death penalty was meted out in a random and capricious fashion, discriminating against blacks and the poor. That decision effectively voided death penalty laws in most states, and the death penalty was suspended for several years, until the Supreme Court approved revised state death penalty statutes in 1976. In 2003, the Supreme Court overturned the death penalty for the mentally retarded in the case of *Atkins v. Virginia*, 536 U.S. 304, on the basis that it was cruel and unusual punishment. In 2005, the Supreme Court found in the case of *Roper v. Simmons*, 543 U.S. 551, that laws permitting the execution of a person who was under 18 at the time he or she committed the crime were also unconstitutional under the Eighth Amendment.

Today, capital punishment is legally permissible in 38 of the 50 states and by the federal government.

Anton Chekhov was born in Russia in 1860. His first short story was published when he was only 19 years old, and he completed hundreds of stories in his lifetime. He worked extremely fast, sometimes writing an entire story in just an hour. Chekhov is most famous for his plays—including *The Seagull* and *The Cherry Orchard*—but his stories are celebrated for their psychological drama and concision. One of the rules he applied in his own writing has been called Chekhov’s dictum: “If you say in the first chapter that there is a rifle hanging on the wall, in the second or third chapter it absolutely must go off. If it’s not going to be fired, it shouldn’t be hanging there.” Chekhov wrote “The Bet” in 1889; the story was translated into English in 1921.

In “The Bet,” the host of a dinner party, a banker, and his guest, a lawyer, argue about whether life imprisonment or a death sentence

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*THE BET*: THE DEATH PENALTY
is a greater punishment. The lawyer argues that life imprisonment is less difficult to endure because “To live anyhow is better than not at all.” They make a bet. The lawyer agrees to live without human contact in a lodge on the banker’s estate for 15 years. The banker bets that the lawyer won’t last. During the 15 years, the lawyer may request books, music, wine, and other material comforts, but he may only communicate through letters passed through a window. The story describes the changes wrought in the lawyer by his years of seclusion, but in the end, it remains ambiguous about the main question that gave rise to the bet. The story offers considerable room for interpretation and discussion.

Procedures

Prereading Exercise

Write the following statements on the board before the class starts:

- “The death penalty should be imposed on people who commit the most serious crimes, such as murder.”
- “Life imprisonment should be the penalty for the most serious crimes, such as murder.”

When class starts, ask the class to help you write definitions of “the death penalty” and “life imprisonment.” Then ask students to look at the statements on the board. Organize students into small groups to list arguments for and against each statement.

Ask each group to report back to the class, and write the arguments for and against each statement on the board. Keep them on the board. At the end of the class discussion, tell the class that you are going to take a vote on who agrees or disagrees with the statements. Students will be asked to vote on the questions a total of three times, so, ask them to complete the “ballot” form, (Handout 1, Ballot: Death Penalty) signing their name and dating it. Collect the ballots for return to students at a later date. For each statement, write down how many students agree, how many disagree, and how many are not sure. Keep a copy of the vote count to use later in this lesson.

Reading Exercise

Distribute copies of Handout 2, “The Bet”: Terms and Vocabulary, and discuss the vocabulary with students before they read the story.

Ask students to read the story. Check for understanding. After students have read the story, organize them into small groups. Ask students to discuss the following questions.

- Who are the main characters in the story?
- What is the main conflict?
- What is the banker’s opinion of the death penalty at the start of the story?
- What is the young man’s opinion of the death penalty at the start of the story?
- Was there anything in the story that was confusing? If so, what? Ask them to work through their confusion as a group.

After students have answered the questions, ask each group to share their answers and discuss them with the entire class.

Writing Exercise

Describe the writing assignment, and distribute the writing assignment questions. Set deadlines. Ask students to answer one of the following questions, beginning each paragraph of their exercise with a topic sentence:

- The banker in “The Bet” says, “[T]he death penalty is more moral and more humane than imprisonment for life. Capital punishment kills a man at once, but life imprisonment kills him slowly.” Do you agree or disagree with his statement? Give reasons for your answer. Refer to two quotes from the story to support your position.
- One of the guests in the story says, “Both [capital punishment and life imprisonment] are equally immoral … for they both have the same object—to take away life. The State is not God. It has not the right to take away what it cannot restore when it wants to.” Do you agree or disagree with this statement? Give reasons for your answer. Refer to two quotes from the story to support your position.
Alternatively, have students complete one of these writing exercises:

- Write a letter from the banker to the young lawyer explaining what he felt when he realized that the prisoner intended to renounce the two million and explaining whether he has changed his views on capital punishment. Refer to two quotes from the story to support your position.
- Write a diary entry that the young lawyer might have written during one of the years of his imprisonment explaining what he is thinking at that time and whether he has changed his views on life imprisonment. Refer to two quotes from the story to support your position.

Class Discussion
Part One
After students complete their writing exercises, hold a class discussion about the story and answer the questions as a class. Discuss the following questions:

- The banker in “The Bet” says, “[T]he death penalty is more moral and more humane than the imprisonment for life. Capital punishment kills a man at once, but life imprisonment kills him slowly.” Do you agree or disagree with his statement? Why?
- One of the guests in the story says, “Both (capital punishment and life imprisonment) are equally immoral ... for they both have the same object—to take away life. The State is not God. It has not the right to take away what it cannot restore when it wants to.” Do you agree or disagree with this statement? Why?
- Do you think the banker changed his opinions about the death penalty when he realized that the young lawyer intended to renounce the two million? Why?
- Do you think that the young lawyer changed his views on life imprisonment? Why?
- In what ways is life imprisonment similar to the solitary confinement the young man experiences in Chekhov’s story? In what ways is it different?

- To what extent and how is the ending of the story ambiguous about which is a more severe punishment—capital punishment or life imprisonment?

In addition, you may decide to share some students’ writing with the rest of the class. If you choose to do this, then you can ask the class to practice constructive comments and open-ended questions. Open-ended questions are questions that elicit a descriptive or narrative response as an answer. Open-ended questions will elicit answers other than “yes” or “no.” Constructive comments are polite and positive.

Finally, take another class vote on the two statements from the Prereading Exercise. Ask students to look back on their previous ballots. Are the results the same? Have any students changed their minds? If so, why?

Part Two
If you have not yet discussed the U.S. Constitution with students, ask, What is the Bill of Rights? (After nine of the thirteen states ratified the U.S. Constitution (1788), ten Amendments were added or “amended” to it. They are referred to as “The Bill of Rights.” The purpose of the Bill of Rights was to reassure the states that the federal government would not become too powerful at the expense of the state governments or violate particular rights of individuals. The Bill of Rights was ratified in 1791.)

Ask students, can you recall any of the rights/provisions guaranteed by the Bill of Rights? (Answers may vary.)

Write the Eighth Amendment on the board or distribute a copy of the text to students. Read the amendment:

*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Give students some background about the founders and the intent of the Eighth Amendment. (See Handout 3, What Did the Framers Intend with the Eighth Amendment? on p. 56.)

Explain that in most cultures, deliberately causing harm to an individual in a way that causes mental or physical distress is morally
problematic. One question that cultures seek to answer is to what degree and to what extent is it permissible to impose mental or physical distress on an individual as a legal punishment or sanction? And, when does that mental or physical distress become torture?

Ask,

- What do you think the founders meant by “cruel and unusual punishment”? How do you interpret that phrase?
- What is another word that we sometimes think of when we think of deliberately causing harm to another individual? (Answers may vary but may include “torture.”)

Mention that today capital punishment is reserved for the most heinous crimes.

**Part Three**

Take a look at the original list of brainstormed reasons for the two statements you considered during the Prereading Exercise:

- “The death penalty should be imposed on people who commit the most serious crimes.”
- “Life imprisonment should be the penalty for the most serious crimes.”

Next, give students the excerpt from *Furman v. Georgia* and *Gregg v. Georgia* (Handout 4).

Ask students to read the excerpts and identify the purposes of punishment discussed in the excerpts that may be common to those they named. If they find none, ask them to identify the purposes of punishment as identified in these two excerpts. (Deterrence and retribution.)

As a class, define “deterrence” and “retribution.” Explain a bit about the two cases.

- *Furman v. Georgia* (1972): Ruled that death penalty statutes in several states were unconstitutional because they did not provide juries with sufficient guidance in determining whether to impose the death penalty, resulting in its arbitrary application.
- *Gregg v. Georgia* (1976): Found that some death penalty statutes were constitutional because they provided juries with guidance by establishing aggravating and mitigating factors for juries to consider and apply individually to each case during deliberation. (“Aggravating factors”—factors supporting imposition of a death sentence; “mitigating factors”—factors that favor imposition of a sentence other than death.)

Discuss the following questions:

- What are the main points of the two excerpts?
- Do they believe that the stated purpose of a punishment should remain static or change over time? Why?

**Part Four**

Distribute Handout 5, the excerpts from *Weems v. U.S.*, 217 U.S. 349 (1910), and *Furman v. Georgia*, 408 U.S. 238 (1972), from Justice Brennan. Ask students to read them.

Based on all four excerpts on Handouts 4 (*Furman v. Georgia* and *Gregg v. Georgia*) and 5 (*Weems v. U.S.* and *Furman v. Georgia*), ask students what approaches they think we might take when trying to determine if a punishment is appropriate or whether it is cruel and unusual? Answers may vary; however, you will want students to reflect on four key points:

- Capital punishment, for serious crimes at least, seems to have been contemplated by the founders.
- The meaning of the cruel and unusual clause, according to some jurists, may change and acquire new meaning as public opinion changes.
- A punishment must not be unacceptable to contemporary society.
- Standards of acceptability for punishment have evolved over time and have been reflected in the law.

Next, brainstorm possible “objective indicators” that might be considered to determine whether a contemporary society considers a severe punishment unacceptable. You might ask students to brainstorm in pairs. If so, bring the class together to go over answers. Answers might include:

- trends in legislative measures,
- How often it is used as a punishment or how unusual it is,
Comparisons across jurisdictions of a punishment for a particular offense,
• Public opinion polls,
• Implementation in other countries,
• Willingness of juries to impose it,
• Policies of other countries.

Ask students how much weight they would give to the factors they have identified and whether they believe any one of these indicators alone seems sufficient to determine whether a severe punishment is acceptable to the country. Ask students if they think that other factors ought to be considered when evaluating the death penalty. What might those be?

Remind students of these two quotes from “The Bet”:
• “[T]he death penalty is more moral and more humane than the imprisonment for life. Capital punishment kills a man at once, but life imprisonment kills him slowly.”
• “Both [capital punishment and life imprisonment] are equally immoral … for they both have the same object—to take away life. The State is not God. It has not the right to take away what it cannot restore when it wants to.”

Ask students to speculate on how they might view those two positions if they were contemporaries of Chekhov’s. What factors might influence their views in 1921 when the story was translated into English as opposed to today?

Conclude by asking, who should determine the purpose of punishment—the legislature or the courts, and why?

Assessment
Ask students to complete the ballot (Handout 1) again. Compare results. Ask them to write one paragraph explaining how or why this exercise made them change or retain their opinion as expressed in their ballot the second and third times they completed it.

Extended Assessment Option: Ask students to read the judgment for the majority by Justice Kennedy in the 2005 Supreme Court case of Roper v. Simmons, 543 U.S. 551, in which a majority decided that it is unconstitutional to impose the death penalty on people who were under 18 at the time they committed the crime. Ask students to write an essay explaining the reasons the Court gives for its decision. Which of the “objective indicators” originally brainstormed by your class (see Part Four above) for determining whether a contemporary society considers a severe punishment unacceptable are cited in the judgment written by Justice Kennedy? How does he seem to weight them? Ask students to explain their analysis, giving your reasons. Make sure students begin each paragraph with a topic sentence.

Extension Exercises
How is the death penalty used in your state? Ask students to conduct research to find out whether the death penalty is used in your state. What crimes are punishable by death? Can juries sentence offenders to life imprisonment without parole instead? If the death penalty is not used in your state, ask students to find out what crimes are punishable by life imprisonment. The Death Penalty Information
Center, http://www.deathpenaltyinfo.org/state/, is a good place to start, but students may want to conduct further research to ensure the information they've found is accurate.

Two recent views on the juvenile death penalty. Ask students to write an essay comparing and contrasting the judgment for the majority by Justice Kennedy with the dissent of Justice O’Connor in the U.S. Supreme Court case Roper v. Simmons, 543 U.S. 551 (2005). Ask them to identify and explain the major points of disagreement in each opinion. Have students conclude by explaining which opinion they agree with—Justice Kennedy’s or Justice O’Connor’s, and why.

Resources

Accuracy in Media
See www.aim.org/

This site, hosted by proponents of the death penalty, provides information about the death penalty.


This 47-page guide analyzes Supreme Court cases about conditions under which the death penalty is constitutional and under which it is considered cruel and unusual punishment, as well as charges of racial bias in the application of the death penalty, deterrence, cost, and wrongful conviction.


This book provides a thorough and readable discussion of the history of the death penalty in the United States up until 2002.

Death Penalty Information Center
See www.deathpenalty.org/

This anti death penalty advocacy center collects information and provides reports about the death penalty.

The New York Times Learning Network
See www.nytimes.com/learning

This resource offers a variety of lessons on topical issues for different grades, making use of news reports, including “Compassion on Death Row? Analyzing Clemency and Capital Punishment in the Social Studies Classroom,” and “Dead Man Walking: Considering the Fate of Juvenile Offenders in the Face of Capital Punishment.

U.S. Department of Justice Bureau of Justice Statistics
See www.ojp.usdoj.gov/bjs/

This site offers a wealth of statistics and reports about the justice system, including information about the death penalty and its application.
Ballot: The Death Penalty

Name: Date:

The death penalty should be imposed on people who commit the most serious crimes, such as murder.

☐ Agree ☐ Disagree ☐ Don’t Know

Give two reasons:

Life imprisonment should be the penalty for the most serious crimes, such as murder.

☐ Agree ☐ Disagree ☐ Don’t Know

Give two reasons:
“The Bet,” Terms and Vocabulary

**A priori:** This is a Latin term that can be translated as “from cause to effect.” The term is used today as an adjective to describe a statement that is based on a theory, rather than on actual experience or observation. It is also used to describe a fact that is deduced from known principles.

**Assets:** An asset is any item of economic value. A person’s assets might include his car, home, and stocks and shares, and any other property that can be sold.

**Capital crime:** A capital crime is a crime that is punishable by death.

**Capital punishment:** Capital punishment is punishment by death, also called the death penalty.

**Caprice:** A caprice is a sudden desire or impulse.

**Character:** The character of a thing is the combination of qualities or features that distinguish it from other things.

**Comely:** Comely is an adjective meaning attractive and pleasing to the eye. It can also be used to describe behavior that is proper and appropriate.

**Compulsory:** Something is compulsory if it is required by a rule.

**Emaciated:** Emaciated is an adjective that means very thin and weak.

**Ethereal:** Ethereal is an adjective meaning light and insubstantial.

**Humane:** Humane means compassionate or kind. An action can be described as humane if it is motivated by a desire to reduce human suffering.

**Illusory:** Something is illusory if it is based on, or has the nature of, an illusion (or something that deceives or misleads).

**Procure:** Procure is a verb meaning to get or obtain.

**Protagonist:** A protagonist is the chief character in a story, play, film, or song.

**Treatise:** A treatise is a written composition in which principles are discussed or explained.

**Solitary confinement:** Solitary confinement is imprisonment of a person in isolation from other prisoners.
What Did the Framers Intend with the Eighth Amendment?

- To protect people from punishments that were disproportionate to a crime
- To place some limits on the power of the legislatures to determine punishments for crime, in keeping with the system of checks and balances established in general by our structure of government.
- To protect people from disproportionate punishments. At the time of the writing of the Constitution, many punishments for crimes under English law were considered to be disproportionate to the crime. In some colonies, the death penalty could be imposed for such offenses as counterfeiting and smuggling tobacco. In England, people could be executed for stealing things. That was rare in the American colonies.
- Historians say that the framers believed that the death penalty was not cruel and unusual and often cite the Due Process Clause of the Fifth Amendment, which says that no person shall be deprived of life without due process of law, and the Grand Jury Clause of the Fifth Amendment that requires an indictment by a grand jury before a person is tried for a capital crime (a crime that is punishable by death).
Excerpts, *Furman v. Georgia* and *Gregg v. Georgia*

If we were reviewing death sentences imposed under these or similar laws, we would be faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. We would need to decide whether a legislature—state or federal—could constitutionally determine that certain criminal conduct is so atrocious that society’s interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, only the automatic penalty of death will provide maximum deterrence.

On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. 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.

*Furman v. Georgia*, 408 U.S. 238 (1972), Justice Stewart, Concurrence

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

In part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

*Gregg v. Georgia*, 428 U.S. 153 (1976), Justice Stewart, Opinion of the Court
Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.

... The \(\textit{cruel and unusual}\) clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.


A third principle inherent in the Clause \(\textit{cruel and unusual clause}\) is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity. In applying this principle, however, we must make certain that the judicial determination is as objective as possible ... The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable.