Public Hearing

before

ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE

Assembly Concurrent Resolution No. 20

(Amends the State Constitution to provide that it is not cruel and unusual punishment to impose the death penalty on certain persons)

LOCATION: Legislative Office Building
Committee Room 10
Trenton, New Jersey

DATE: March 16, 1992
10:05 a.m.

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Gary W. Stuhltrager, Chairman
Assemblywoman Harriet Derman
Assemblyman Monroe Jay Lustbader
Assemblyman Byron M. Baer
Assemblyman Robert L. Brown

ALSO PRESENT:

Patricia K. Nagle
Office of Legislative Services
Aide, Assembly Judiciary,
Law and Public Safety Committee

Hearing Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, 162 W. State St., CN 068, Trenton, New Jersey 08625-0068

New Jersey State Legislature
ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE
STATE HOUSE ANNEX, CN-068
TRENTON, NEW JERSEY 08625-0068
(609) 292-5526

NOTICE OF PUBLIC HEARING

The Assembly Judiciary, Law and Public Safety Committee will hold a public hearing on the following bill:

ACR-20 Haytaian/ Stuhltrager	**Amends the State Constitution to provide that it is not cruel and unusual punishment to impose the death penalty on certain persons.**

The hearing will be held on Monday, March 16, 1992 at 10:00 a.m. in Committee Room 10, Legislative Office Building, 135 West Hanover Street, Trenton, New Jersey.

The public may address comments and questions to Patricia K. Nagle, Judiciary Section, Office of Legislative Services, (609) 292-5526. Those persons presenting written testimony should provide 15 copies to the committee on the day of the hearing.

Issued 3/5/92

ASSEMBLY CONCURRENT RESOLUTION 20

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 13, 1992

By Assemblymen HAYTAIAN, STUHLTRAGER
and Collins

A CONCURRENT RESOLUTION proposing to amend Article I, paragraph 12 of the Constitution of the State of New Jersey.

BE IT RESOLVED *by the General Assembly of the State of New Jersey (the Senate concurring):*

1. The following proposed amendment to the Constitution of the State of New Jersey is hereby agreed to:

PROPOSED AMENDMENT

Amend Article I, paragraph 12 to read as follows:

12. Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted. It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

(cf: Art. 1, para. 12)

2. When this proposed amendment to the Constitution is finally agreed to pursuant to Article IX, paragraph 1 of the Constitution, it shall be submitted to the people at the next general election occurring more than three months after the final agreement and shall be published at least once in at least one newspaper of each county designated by the President of the Senate, the Speaker of the General Assembly and the Secretary of State, not less than three months prior to the general election.

3. This proposed amendment to the Constitution shall be submitted to the people at that election in the following manner and form:

There shall be printed on each official ballot to be used at the general election, the following:

a. In every municipality in which voting machines are not used, a legend which shall immediately precede the question, as follows:

If you favor the proposition printed below make a cross (x), plus (+) or check (✓) in the square opposite the word "Yes." If you are opposed thereto make a cross (x), plus (+) or check (✓) in the square opposite the word "No."

b. In every municipality the following question:

EXPLANATION--Matter enclosed in bold-face :kets [thus] in the above bill is not enacted and is intended to ted in the law.

Matter underlined thus is new matter.

. . . .

PROVIDING IT IS NOT CRUEL AND UNUSUAL PUNISHMENT TO IMPOSE THE DEATH PENALTY ON PERSONS WHO PURPOSELY OR KNOWINGLY CAUSE DEATH OR PURPOSELY OR KNOWINGLY CAUSE SERIOUS BODILY INJURY RESULTING IN DEATH

YES. Shall the amendment to Article I, paragraph 12 of the Constitution providing that it is not cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value be approved?

. . . .

INTERPRETIVE STATEMENT

NO. This constitutional amendment would provide that it is not cruel and unusual punishment under our State Constitution to impose the death penalty on a person who is convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death if that defendant committed the act himself or paid for another to commit the act.

. . . .

STATEMENT

The proposed constitutional amendment provides that it is not cruel and unusual punishment to impose the death penalty on a person who has purposely or knowingly caused death or purposely or knowingly caused serious bodily injury resulting in death if he committed the act himself or paid another to do it. Presently the New Jersey murder statute, N.J.S.A.2C:11-3 provides that criminal homicide constitutes murder if:

(1) the actor purposely causes death or serious bodily injury resulting in death or (2) the actor knowingly causes death or serious bodily injury resulting in death or (3) the homicide was committed in the attempt or commission of enumerated crimes, the so-called "felony murder rule." Under the terms of the statute only a defendant who falls into categories (1) or (2) as listed who is convicted and who committed the act himself or paid another to do it may be eligible for the death penalty sentencing phase in which the judge or jury weighs aggravating and mitigating factors. This statutory scheme was called into question by the New Jersey Supreme Court in the decision of State v. Gerald, 113 N.J. 40 (1988) in which the court differentiated between "causing death" and "causing serious bodily injury resulting in death."

The court stated: "We hold, on state constitutional grounds, that a defendant who is convicted of purposely or knowingly causing 'serious bodily injury resulting in death' under N.J.S.A.2C:11-3(a)(1) and (2), or either of them - as opposed to one who is convicted of purposely or knowingly causing death under those same provisions - may not be subjected to the death penalty." 113 N.J. at 69.

This proposed constitutional amendment is intended to overturn this portion of the court's decision in the Gerald case and establish that it is not violative of the State Constitution to make these defendants eligible for the death penalty sentencing process.

Amends the State Constitution to provide that it is not cruel and unusual punishment to impose the death penalty on certain persons.

ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE

STATEMENT TO

ASSEMBLY CONCURRENT RESOLUTION No. 20

STATE OF NEW JERSEY

DATED: FEBRUARY 27, 1992

The Assembly Judiciary, Law and Public Safety Committee reports favorably Assembly Concurrent Resolution No. 20.

The proposed constitutional amendment provides that it is not cruel and unusual punishment to impose the death penalty on a person who has purposely or knowingly caused death or purposely or knowingly caused serious bodily injury resulting in death if he committed the act himself or paid another to do it. Presently the New Jersey murder statute, N.J.S.A.2C:11-3 provides that criminal homicide constitutes murder if:

(1) the actor purposely causes death or serious bodily injury resulting in death or (2) the actor knowingly causes death or serious bodily injury resulting in death or (3) the homicide was committed in the attempt or commission of enumerated crimes, the so-called "felony murder rule." Under the terms of the statute only a defendant who falls into categories (1) or (2) as listed who is convicted and who committed the act himself or paid another to do it may be eligible for the death penalty sentencing phase in which the judge or jury weighs aggravating and mitigating factors. This statutory scheme was called into question by the New Jersey Supreme Court in the decision of State v. Gerald, 113 N.J. 40 (1988) in which the court differentiated between "causing death" and "causing serious bodily injury resulting in death."

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This proposed constitutional amendment is intended to overturn this portion of the court's decision in the Gerald case and establish that it is not violative of the State Constitution to make these defendants eligible for the death penalty sentencing process.

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ASSEMBLYMAN GARY W. STUHLTRAGER (Chairman): I want to thank everybody for coming. This is the public hearing.

Are we recording? Are we ready? (affirmative response) Okay.

This is the public hearing conducted by the Assembly Judiciary, Law and Public Safety Committee concerning ACR-20, sponsored by Speaker, Assemblyman Haytaian, and myself, amending the State Constitution to provide that it is not cruel and unusual punishment to impose the death penalty on certain persons. This proposed constitutional amendment provides that it is not cruel and unusual punishment to impose the death penalty on a person who has purposely or knowingly caused death, or has purposely or knowingly caused serious bodily injury resulting in death, if he committed the act himself or paid another to do it.

This constitutional amendment is the result of the Supreme Court decision in State vs. Gerald, wherein the Court stated, "We hold on State constitutional grounds that a defendant who is convicted of purposely or knowingly causing serious bodily injury resulting in death under N.J.S.A.2C:11-3(a)(1) and (2), or either of them -- as opposed to one who is convicted of purposely or knowingly causing death under those same provisions -- may not be subjected to the death penalty."

We are intending to overturn that portion of the Court's decision in Gerald, by this constitutional amendment; to establish that it would not violate the State Constitution to make these defendants eligible for the death penalty sentencing process. With that, we are holding this public hearing pursuant to the requirements.

Previously, and we'll make it part of the record, we had a statement -- when this was heard and released as a bill, prior to this public hearing -- from Attorney General Robert J. Del Tufo. His statement will become part of the record, and

his statement was supportive of the constitutional amendment. We have testimony that was submitted by William Lamb, First Assistant Prosecutor from the Middlesex County Prosecutor's Office, and he, likewise, was supporting ACR-20.

We have some people who have signed up to testify and I will call them in-- There's not that many, so I don't really think it matters too much what order we call them in. Let me first call Adelle Bruni from the Woodrow Wilson School at Princeton University, and if you'd join us at the table. Now, we have received -- I know you're not going to read this into the record today--

A D E L L E K. B R U N I: No.

ASSEMBLYMAN STUHLTRAGER: --a policy conference final report entitled, "A Decade of Capital Punishment in New Jersey." It's kind of an ironic title. A decade of having capital punishment with none having taken place might describe it a little bit more clearly. Leigh Bienen is the Director, and Adelle is one of the Commissioners, correct?

MS. BRUNI: No, I'm not. I wrote one of the sections of the report.

ASSEMBLYMAN STUHLTRAGER: Okay. They have Senior Commissioners-- What is your role?

MS. BRUNI: I wrote the sections concerning the death penalty jurisprudence in the past 10 years, especially referring to Gerald in the post-Gerald rulings, and inconsistencies that seem to be apparent in the rulings after Gerald.

ASSEMBLYMAN STUHLTRAGER: Okay, I want to thank you for coming and giving us your testimony here today, and I turn it over to you.

MS. BRUNI: I just wanted to say, if there are any questions concerning anything having to do with the Supreme Court's Gerald ruling, the effects of that, I'm free to answer any questions.

ASSEMBLYMAN STUHLTRAGER: Well, let me ask you a more general question. Could you summarize your findings and conclusions with respect to the Gerald case and its application to subsequent cases, and does your report -- since I have just seen it this morning -- have any recommendations and position with respect to ACR-20?

MR. BRUNI: Speaking personally, in terms of my paper, I analyzed accusations that the Supreme Court may be legislating from the bench. And I went through the post-Gerald rulings in Pennington, Pitts, Long, Rose, Coyle -- all of those cases -- and I came to the conclusion that I felt what had happened is that the Supreme Court was applying the Gerald standard to substantively review cases instead of procedurally review them, such that when a case came before them, not only did they mandate that there had to be evidence that would have warranted a Gerald charge reversal but then they would go ahead and weigh that evidence as if they were a jury. So, I had a problem with the way the Court had been reviewing it.

In terms of the Gerald distinction itself, and in the intent distinction, I felt that they used the doctrine of independent State constitutional interpretation properly in that instance, to give criminal defendants greater rights under the New Jersey State Constitution than they do under the Federal Constitution, after the Federal Supreme Court restricted their protection for individual rights for criminal cases in the decision in Tyson, by the United States Supreme Court.

So, I think that the Gerald distinction was a relevant ruling and was appropriate in the sense that one of the three criteria they used to decide the constitutionality of a statute is the proportionality or gross disproportionality in punishment between capital offenses, and things that aren't in the way that the New Jersey statute is written. It was revised in 1979, before capital punishment was reinstituted, and

capital punishment was sort of fixed upon a statute that hadn't considered it beforehand. Therefore, the way they define aggravated assault, and aggravated manslaughter is very similar to the way SBI -- Severe Bodily Injury -- murder is defined. And to make SBI murder a capital offense when aggravated manslaughter has preempt of 20 years is grossly disproportionate. So, that's why the Supreme Court ruled the intent distinction to reduce that gross disproportionality in its sentencing.

In reviewing the legislative history, they interpreted your intent -- when you made the new code in '78 and then revised it in '79 -- in the code was to judge not the person's actions in and of themselves, but the intent of those actions, in the knowingly and purposely -- qualifications you put on things. They thought that you were concerned with intent, so that was another justification they used for the Gerald ruling.

My personal recommendation was that this amendment not be passed because I feel that the Court is struggling to define their death penalty jurisprudence. It's a very difficult issue because it's a matter of life and death. It's a crucial issue, and I think the Court needs a little more time to develop their own State constitutional death penalty jurisprudence that's different from the Federal penalty jurisprudence. It's a new idea, this doctrine. It's the first time that they've really started developing it, and I think they should have a little more time.

I also think that amending the Constitution on an issue that is very morally, ethically, and legally controversial sets a dangerous precedence because I think that the Constitution of the United States and within the states themselves is respected, and has a lot of integrity because it's rarely amended; because a lot of people can believe in everything about it. We should try not to desert the powers of a court through amending our Constitution if at all possible.

ASSEMBLYMAN STUHLTRAGER: So, you feel generally comfortable that the Supreme Court is simply undergoing an evolving process to define what the death will mean in the State of New Jersey, and you feel comfortable that they will ultimately reach an end point and the standards would have been established?

MS. BRUNI: Yes, I do.

ASSEMBLYMAN STUHLTRAGER: Now, I don't think anybody disagrees that the State Constitution deserves independent interpretation from the Federal Constitution, and that interpretation may mean greater rights in particular cases. If that's all Gerald did then we would maybe still be doing this, but I think the frustration with the Court from legislators and the general public is that Gerald itself-- After they had done it then they applied it in a seemingly erratic fashion. Do you agree with that perception?

MS. BRUNI: Yes, I do. In my paper I analyzed the rulings after Gerald and why they seem so erratic. Basically, the conclusion of my analysis is that there are three factions. Each are using a different system to weigh whether or not they're going to decide yes or no on a Gerald reversal, and these three factions happen to interact in such a way that in any given case, almost, that comes before them, two of the factions are going to agree and the other one isn't. So you're always going to end up with a majority that's going to reverse on a Gerald charge.

So, it appears on the surface that the Court is being very inconsistent when it's actually that there's just factionalism within the Court itself on how to apply the Gerald standard. The justices, themselves, are being very consistent, but those consistencies aren't working when they get together as a group. That's a matter of how the State Supreme Court is conducting its business. The rulings of a Supreme Court, be it the United States or a state Supreme Court, and the way they're

going to rule on things-- You know if they're going to decide substantive things or procedural things, it's pretty much beyond any checks and balances if that's what they've decided to do, and they're going to justify it in the Constitution.

You can amend the Constitution, but if your problem is with the intent distinction, in and of itself, then I would say you have to amend the Constitution. But if your problem is with the way they've decided to apply that distinction and not the distinction itself, then I don't think the answer lies in amending the Constitution.

ASSEMBLYMAN STUHLTRAGER: Well, I think if they were being consistent as a group, as opposed to-- Let's assume your point that they are individually consistent, but as a group the results end up being inconsistent. If that were just the case, then I could certainly agree that amending the Constitution-- It's a dramatic step. We don't lightly do it, and we could live with the situation. I don't think the issue would ever have arisen, in my mind or in many people's minds. Maybe we don't really care whether we extend the death penalty to intent to do serious bodily injury. We probably wouldn't have cared if they had been rational in determining what constituted an intent to kill.

To take the factual circumstances of some of those cases that you cited and to pervert logic to indicate that they did not intend to kill them, or to say that, "Well, maybe they only intended serious bodily injury," and that doesn't appear to be covered based on Gerald, well, that's kind of forced us to react, and this is the reaction.

So, I understand your intellectual position, and I would be much happier to not have to be here proposing a constitutional amendment, and we wouldn't have to do that if the Court would have taken the facts of those cases on their face, and said, "Look, it's clear here that this person intended to murder this person. They intended more than

serious bodily injury." So, that distinction in a closer case, maybe we'll have to make it, but in these cases it's not even an issue.

So, I appreciate your intellectual position, but I think they're forcing us to indicate the sentiment of the Legislature once again, and although a small part of me is a little concerned about an extension to the intent, the only thing that satisfies my problem there is the Supreme Court is not going to let anything get extended too far because they're going to continue their very narrow interpretation that would keep that extension from becoming overreaching, let's say.

Assemblyman Lustbader.

ASSEMBLYMAN LUSTBADER: Thank you, Mr. Chairman. Do you think that a review of Gerald, as you've indicated you've done, would disclose underlining philosophical opposition to the death penalty?

MS. BRUNI: In the justices themselves?

ASSEMBLYMAN LUSTBADER: Yes.

MS. BRUNI: I would say, for the most part, no. A few of them, possibly. I think the main problem that a lot of them have is with the New Jersey statute, in and of itself. I don't know if I can extend that to the death penalty as a whole -- if they just have a very narrow view of the death penalty, or if they don't believe in it -- but I think the feeling is that the New Jersey statute, with some of them, is too general. It was drafted before capital punishment was even being considered.

Again, many of the sentences for aggravated assault and aggravated manslaughter are grossly disproportionate to the sentencing for capital murder. So, I think that the problem is that they're trying to make it as uniform and, at the same time, individualistic as they can, according to the standards set forth by the Federal Supreme Court.

ASSEMBLYMAN LUSTBADER: Well, let me put it to you this way: If the Supreme Court affirmed our capital punishment

statute in Biegenwald and Ramseur and then proceeds to reverse 32 out of 34 rulings in the death penalty, doesn't that give you some kind of a sense that if they were legislators and not jurors that they would vote a different way?

MS. BRUNI: No, because of the Federal history at that time. In the time when Biegenwald and Ramseur were decided the Supreme Court, in a case of Enmund vs. Florida, had upheld the intent distinction as valid to distinguish between someone who can be sentenced to death and someone who can't. Between Ramseur and Gerald, the Supreme Court of the United States overturned the Enmund in Tyson saying, "The intent no longer mattered," and overturned the intent distinction.

In Ramseur the New Jersey Supreme Court specifically said, "We're not going to consider this issue, because of Enmund." They cited Enmund, and they said, "According to the doctrine of independent State constitutional interpretation we will rely on Federal jurisprudence when it fits our Constitution, and when we can we won't go off on our own. We'll stay in a uniform agreement with the Federal jurisprudence." Then when Gerald came along again, and the U.S. Supreme Court had started restricting its scope for individual criminal rights and had made the Tyson decision, the Supreme Court said, as we said in Ramseur, "When we don't agree with them we have to look at our own Constitution and it's obvious that with the Tyson ruling now, we have to look to our own Constitution and decide does the New Jersey Constitution Article I, Sec. 12 mandate a more restrictive scope for capital punishment in New Jersey than the Federal Constitution does? And they decided that yes, it did.

ASSEMBLYMAN LUSTBADER: So, as a omnibus question, you don't see any philosophical opposition to the Court in its totality against capital punishment? Am I correct?

MS. BRUNI: Yes. I don't think it's underlining philosophical disagreement.

ASSEMBLYMAN LUSTBADER: How about individual justices. Do you see any distinction there in meeting their dissents?

MS. BRUNI: I see a great deal of distinction in the way each individual justice goes about his job as a Supreme Court Justice, the way he decides how he's going to rule on a case, but I don't think that I could say that those reflect philosophical feelings of opposition or support for the death penalty.

ASSEMBLYMAN LUSTBADER: Thank you, Mr. Chairman.

ASSEMBLYMAN STUHLTRAGER: Assemblyman Baer.

ASSEMBLYMAN BAER: Thank you. Isn't it a fact that the problems that this amendment would seek to address, all has occured in cases that originated before the Gerald decision, and that there has been no case where the Supreme Court has, with these types of fact patterns, reversed when the trial was held after the Gerald decision? That is, the prosecutors and judges are aware now of the significance of the Gerald decision and that there must be a finding of intent. They seek that finding of intent, and where it has been appropriate, the finding of intent has always been forthcoming, post-Gerald?

MS. BRUNI: Yes.

ASSEMBLYMAN BAER: So, what we're considering amending the Constitution to accomplish here is no long a problem. Is that not correct?

MS. BRUNI: That is correct, in my opinion.

ASSEMBLYMAN BAER: And there is no evidence, whatsoever, of a continuation of these types of findings that appear to the ordinary citizen to defy common sense? So, we may be going through a great gesture that appears to the public that we're changing something, but in reality what we're changing is certainly not what is being talked about. I'm not sure what other significances might follow.

Is it not also a fact that these inconsistencies in the rulings that you've referred to are really not that inconsistent when one looks at the situation closer? The inconsistencies appear when one looks at what has happened factually in some of these cases, and compares that with whether or not the Court has reversed. But is it not also correct that the Court has no authority to make independent determinations? In fact they rule on the law? And if there has been a failure to make a finding of fact in the Court below, even though the facts warranted it, perhaps for whatever reason -- whether there was a failure in the prosecutor or the judge, or merely a lack of awareness because the Gerald case hadn't come down -- but at any rate, aren't these rulings fairly consistent, and that there has been reversal where there has been a failure to come up with a finding, regardless as to what the facts may appear from a common sense point of view, but there's a failure of the jury to arrive at a finding, and there has not been reversal where there has been some sort of finding?

MS. BRUNI: Yes. I think that what you're saying is correct. Inconsistencies that I'm referring to -- the inconsistent behavior -- is in a comparative sense between cases that seem to be relatively similar: someone who was shot at point blank range, or someone who broke into a store and shot a man; it's a comparative sense between cases. I agree with you about the Gerald intent distinction. They all are pre '88 -- pre-Gerald -- that were reversed. I think that's obviously going to stop as those reversals follow and as they start coming after the Gerald decision. So amending the Constitution is a pretty drastic measure for something that's going to work itself out, I think.

I think that the New Jersey Supreme Court is ruling a very narrow interpretation of your statute because of the prior code that established only the most culpable state of mind

would be sentences to death, which was first degree murder before 1978. They're looking at that. They're looking at the fact that your statute is much narrower, already, than the Federal statute, because it distinguishes between someone who kills of his own conduct or pays another to kill, as the only people that can be sentences to death, whereas the Federal statute also has death that results in addition to another felony, as eligible for the death penalty.

They're interpreting everything on a more narrow scale because of the statute that the Legislature originally passed and because of the legislative history and what they saw as the intent of the Legislature, which was to make a system that was not based on the result of someone's actions but the intention that they had in doing them. So, I think that their interpretation was a honest attempt to follow what they perceived as legislative wishes on this matter.

So, what I'm saying is that, if the intent distinction is something that you think would frustrate the effective implementation of the death penalty as the Legislature originally wanted it, and still want it to be implemented in the State of New Jersey, then maybe it's not drastic to try to amend the Constitution, although I would be very hesitant for supporting that. If it's not the intent distinction that's upsetting you, if it's the Court's behavior, then I'm not sure that amending the Constitution is what should be done, or the proper way to go about working out problems with the Supreme Court.

ASSEMBLYMAN BAER: All right. Thank you very much.

MS. BRUNI: Thank you.

ASSEMBLYMAN STUHLTRAGER: Assemblyman Lustbader.

ASSEMBLYMAN LUSTBADER: Mr. Chairman, through you, to Assemblyman Baer. If we were to enact this amendment wouldn't we be--

ASSEMBLYMAN STUHLTRAGER: Excuse me. We're not going to ask questions across, from Assemblyman to Assemblyman.

ASSEMBLYMAN LUSTBADER: I'm sorry. Actually, I'm making a statement really. It's not a question, but it just follows on what I'm saying.

ASSEMBLYMAN STUHLTRAGER: Okay. Well, go ahead.

ASSEMBLYMAN LUSTBADER: What I'm saying is, doesn't this advance the goal of standardizing and creating more objectivity in the application of the death penalty, which is what I understand the Court is wanting to have; in other words, trying to remove it from the willy-nilly subjective impressions that determine the results? So, it seems to me that with an important issue like this we would want to create some objectivity and define a standard that would be easily implemented.

ASSEMBLYMAN STUHLTRAGER: Adelle, thank you very much.

MS. BRUNI: Thank you.

ASSEMBLYMAN BAER: Could I just come back to ask one question and make one observation? Maybe I'll do them both by way of questions. First of all, relative to the question of standardization, isn't it quite likely that what we will achieve will be the opposite of standardization, because absent a requirement for a finding of intent to do serious bodily harm, the death penalty can be levied in situations where there was no such intent, it was nothing close to such an intent, a jury would not likely have found such an intent, and the penalty would have been far too severe, but lacking the mechanism of a finding you will have far less standardization because you find it applied in lesser situations, such as that, as well as the most serious situations?

MR. BRUNI: Yes. I would have to agree with that. I think the intent distinction achieves what has always been the objective of any Supreme Court's rulings on death penalty, be it Federal or State, in that they're trying to consistently

narrow the class of people who are death eligible. Also, when subjected to the death penalty, keeping the intent distinction and not passing the amendment would narrow the class of death eligibles to a state of mind that's more culpable than it would if they passed the amendment. I think that would help in standardizing it somewhat. It would at least help in maintaining the standards that have always been applied to death penalty cases.

ASSEMBLYMAN BAER: My final question is this: Although there have been, as you've stated, no reversals in any case tried after Gerald, one can argue that there hasn't been very much of a track record. So that might not be too conclusive. But isn't it a fact that the attention that a decision like this gets and the thoroughness that would normally occur in a capital case is such that it's inconceivable that a prosecutor or a judge would have such an oversight, and the circumstances in the future where there would be no such finding are merely circumstances where the jury, after considering the facts, decides not to come up with such a finding?

MS. BRUNI: Yes.

ASSEMBLYMAN BAER: But not through some accident or oversight?

MS. BRUNI: No.

ASSEMBLYMAN BAER: Capital cases are quite carefully undertaken.

MS. BRUNI: We hope so.

ASSEMBLYMAN BAER: Thank you.

ASSEMBLYMAN STUHLTRAGER: Thank you, Assemblyman. Thank you, Ms. Bruni.

MS. BRUNI: Thank you.

ASSEMBLYMAN STUHLTRAGER: Ed Martone.

E D W A R D M A R T O N E: Thank you, Mr. Chairman. First, if I may, let me run some errands. Julie Turner, the woman

sitting behind me from the Junior League, asked if you could call on her? She's shuttling between here and the Skillman hearing.

ASSEMBLYMAN STUHLTRAGER: Is she here?

MR. MARTONE: She just stepped out to go to the Skillman hearing. She'll come back later, because she wanted to be added to the list. This is the testimony from Karen Spinner, from the Association on Correction, who also had to run over to the Skillman hearing. (witness gives statement to Committee)

ASSEMBLYMAN STUHLTRAGER: Okay. We'll make that part of the record.

MR. MARTONE: That having been done--

ASSEMBLYMAN STUHLTRAGER: Thank you, Mr. Martone.

MR. MARTONE: Thank you. I'm not going to say anything you haven't heard from the ACLU before, but definitely, we are opposed to the death penalty, and therefore, we are opposed to any legislation which would extend or expand the use of the death penalty, such as ACR-20.

Our view, essentially, is that it is -- even though the courts don't agree with us on this, I must readily admit, unfortunately -- we believe it is a violation of someone's Eighth Amendment rights to slowly, painfully, put them to death in a premeditated fashion, whether it's me doing it to somebody, you doing it to somebody, or the State of New Jersey committing that murder. So, we would urge you to not support this legislation, simply because, as I say, it expands the use of something that we think is inherently unconstitutional.

You didn't ask me, but I'll offer my opinion in answer to the question you were asking the previous speaker: I think this is a pro death penalty Court. This Court has had the opportunity, in past cases, to come down with the determination that the death penalty is unconstitutional. In fact, they ruled a few years ago in a case, six to one, that is was not

cruel and unusual punishment for the State to put someone to death. So, given opportunities in the past, they haven't dismissed, if you will, the death penalty. It seems to me, as an outsider -- and I enjoy no insight on this case -- that they are recognizing quite rightly that putting someone to death is the ultimate in loss of liberty, and that they're not going to treat this like a property case, or even a speech case; that in fact they are going to exercise great scrutiny before they allow the State of New Jersey to take someone's life. I don't have a problem with that.

I would rather, as I say, that they had determined a long time ago by definition -- by its existence -- that the death penalty statute is unconstitutional, but they haven't done that. I'm not frustrated -- to use your word -- that they haven't put more people to death so far. I know that the Court is often the bogeyman when they take actions, whether it be Abbott vs. Burke, in the Mount Laurel cases, maybe even the redistricting case from 10 years ago when some people in the Legislature accused the Court of legislating from the bench.

Well, I think that this suggests, as has been suggested today, that the Legislature -- some of the Legislature -- is acting out of a sense of frustration and that is a reaction to the inaction of the Court. It really means that the Legislature is going to try to play judge and juror, and I would much rather the Legislature legislate and allow the judicial system to render findings in these case based on an individual set of circumstances. Thank you.

ASSEMBLYMAN STUHLTRAGER: Thank you, Mr. Martone. Any questions for him? (no response)

MR. MARTONE: Thank you.

ASSEMBLYMAN STUHLTRAGER: Is there anyone else here who desires to testify in this public hearing? (witness raises her hand) You hadn't signed up.

L E I G H B. B I E N E N, ESQ.: Yes, we were signed up.

ASSEMBLYMAN STUHLTRAGER: Oh, I thought people signed up saying, they'd answer questions. Ms. Bienen, is that your name?

MS. BIENEN: Yes.

ASSEMBLYMAN STUHLTRAGER: Why don't you come forward.

MS. BIENEN: Good morning. My name is Leigh Bienen, and I am from the Woodrow Wilson School of International and Public Affairs. This past fall, I directed, in conjunction with Doug Mills who is also in the audience, what's called a "Policy Conference on Capital Punishment in New Jersey." In that policy conference the members of the conference who are students of the Woodrow Wilson School -- both juniors and seniors -- wrote a series of individual papers which I have submitted to the Committee for their information. These papers are on a variety of subjects including: proportionality review, including the opinions of the New Jersey Supreme Court.

There are also individual papers on the question of public opinion: What public opinion on the death penalty is today, and what the survey showed, and what public opinion is on the death penalty in comparison to other penalties? There's also a paper on the costs of the death penalty in New Jersey. All of these papers include material based on individual interviews as well as scholarly or legal research based upon published opinions and the written record. So, I think the Committee will find the research done for this policy conference report informative and interesting.

Basically, 20 people spent a large part of this fall semester doing this background report on capital punishment in New Jersey and we offer that report for your information. The students came to their individual conclusions.

I, myself, have been working in the area of death penalty jurisprudence for a number of years and have been involved with proportionality review. I've worked for the Department of the Public Advocate as a public defender on the

death penalty. However, the students, when they came into the conference-- One of the first things we did was a public opinion poll of the students. Like most members of the public, the opinions of the students varied greatly, and at the opening of the class half of the students supported capital punishment and half of the students didn't. The results of that survey are also included in our report.

We also did an original survey of the New Jersey State Legislature. We had a very high return rate for that survey. We had 51 legislators responding, and the results of that survey are also included in the report. We ask legislators what they thought was important in capital punishment, why they supported it, if they did support, what they thought public opinion was in their district with regard to capital punishment. The results of that survey are also included in our report. So, we hope the report will be informative for you. We hope it will be helpful to you.

With regard to Assembly Concurrent Resolution No. 20: My own view is that, one thing that should be brought in mind, I think, with regard to any constitutional amendment, is that when a constitutional amendment reaches the New Jersey Supreme Court, which of course it must, it will be a new legal benchmark. It will be a new point from which the Court must once again start all over, because it will define a new constitutional standard.

So, you will have to, once again, go through the reassessment process so that if the Committee is considering whether or not this amendment will clarify the picture, it will certainly change the picture. It will be something the Court has to adjust to. It will be something from which everything else after it is different, and is that a desirable result. Is this really what you want?

My own personal view, again, is that amendments and changes to the capital statute should always include a fiscal

statement. I think one of the most important aspects of the death penalty which seems to be discussed very rarely is its costs. The fact that the cost of trials and appeals are enormously expensive; that the death penalty in New Jersey has already cost New Jersey taxpayers millions of dollars. What the New Jersey public has to show for this is really very little.

While I have a great deal of sympathy and support for victims of crime and victims of homicides, there are many homicides in New Jersey. When the proportionality review project put together the initial grouping of homicides which might have been eligible for the death penalty during the periods since 1982 through 1990, there were 3000 such cases they started with. They ended up with 1300 which might be, possibly, death cases before they narrowed that down to a subset of cases which actually had a factual basis for notice of factors being served.

I think as legislators-- I hope the Committee would consider what does the taxpayer get for capital punishment; a great deal of time and court effort is spent on capital punishment for what? While I am very sympathetic to the families of victims of homicide, what happens is an enormous amount of resources are spent seeking vengeance for a very small group of victims. I think as legislators that might be something you would wish to address. Aside from that, if you have any questions with regard to the report or what is included here, I'd be glad to answer those.

ASSEMBLYMAN STUHLTRAGER: Thank you. Assemblyman Lustbader.

ASSEMBLYMAN LUSTBADER: Thank you, Mr. Chairman.

If one is to weigh the cost of capital punishment to the State, I think we have a common duty to weigh the cost to society of 500 homicides a year. I just am somewhat concerned that the cost of seeking justice for capital punishment should

be a pivotal factor when clearly the cost to the victims and the fallout to the families is so enormous that I think one would have to stretch to believe that the cost to the State, unbalanced, would be more.

MS. BIENEN: I can't disagree with the statement, that the cost to the victims' families is, of course, enormous. I think it is pretty much beyond controversy that you can keep a convicted murder in jail for the rest of his life at a cheaper price than you can convict people of capital murder, and have those cases go through the court systems the way that they do. Another very important aspect of the cost question, which isn't really addressed I think, often both in the public discussion of the issue and also in the Legislature is the cost to the court system.

We're looking at a criminal justice system which is already so overburdened, and it gets overlaid with a capital justice system, which just adds a whole other series of burdens on a criminal justice system which is already struggling. I think this is a very serious issue.

ASSEMBLYMAN STUHLTRAGER: All right, thank you very much. Alexander Southwell.

A L E X A N D E R H. S O U T H W E L L: Good morning, members of the Committee. My name is Alex Southwell, and I'm a student at the Woodrow Wilson School at Princeton University.

I have recently completed research of current public opinion on capital punishment and its alternatives, and I have come today to briefly share some of my results. As elected representatives, it is important for the Committee to have full understanding of public sentiment when this proposed amendment to the State Constitution is discussed and acted upon.

Let me start by explaining that there have not been any surveys addressing capital punishment in New Jersey since the 1981 Eagleton Poll, which found 73 percent of State citizens favoring the death penalty. That level of support of

New Jersey residents was comparable to the national level, which currently runs 76 percent in favor, according to the Gallup Poll.

Generally, the national polls ask only one or two questions on capital punishment. The results of such a simplistic exploration into the complex issue necessarily fail to provide an accurate picture of public sentiment. There are some studies which probe deeply into citizen opinion towards the death penalty. The most recent were conducted in Nebraska and New York during May and April of 1991. These polls and 11 other in-depth surveys, taken in a total of 11 states, were included in my research of current public opinion.

I will summarize the results of these state polls, which indicate some surprising conclusions. Each survey reported that around three-quarters of respondents say they favor the death penalty. However, by probing beyond the surface, this support is revealed as superficial. Significant numbers of the people who favor capital punishment also believe the system is arbitrary and discriminates because of color or wealth.

Many people have moral doubts about the death penalty and are uncomfortable with the punishment. The poll results also indicate that most people are not strongly supportive of implementing the penalty and are dissatisfied with capital punishment as a solution to the crime problem, or as a way to prevent murders. In addition, when offered an alternative punishment, the apparently strong support for the death penalty drops considerably.

More importantly, between capital punishment and life without parole and restitution, there is substantial support for the nondeath alternative. A 1991 New York poll found a remarkable 73 percent expressing preference for life without parole and restitution as compared to only 19 percent continuing to support the death penalty. This stark preference

for an alternative to capital punishment, which is apparent in a number of the state polls, substantiates the finding that support for the death penalty is partly a result of inadequate survey research.

Following this close analysis of the state polls, support for capital punishment is revealed as only skin-deep and an imprecise understanding of the public sentiments.

This analysis of current public opinion on capital punishment is important in the consideration process for the proposed amendment to the State Constitution. Complete understanding of the public's views on the death penalty must be integral to any attempt to expand the scope of capital punishment or to amend the State Constitution.

My hope is that your understanding will be better informed by the conclusion of my analysis of public sentiment. The common portrayals of monolithic and deep support for capital punishment are superficial and inaccurate interpretations of public opinion.

Thank you.

ASSEMBLYMAN STUHLTRAGER: Are there any questions from the Committee? (no response) Thank you very much, Mr. Southwell for taking the time to be with us today. Derrick Milam.

D E R R I C K M I L A M: Hello, my name is Derrick Milam and I, too, worked on capital punishment and public opinion and its impact on the courts and the Legislature. Some of my findings were also stated by Mr. Southwell, and I would like to add that there are several things that we tend to overlook when we look at public opinion. The point of the cost of capital punishment and the implementation of such a program; restitution, as Mr. Southwell stated, and as you will see in my report, was heavily supported by the public.

Now, frequently, as legislators we say, "To support capital punishment our legitimacy is found in the support of

the public." You, the Chairman of this Committee said, yourself, that the general public is frustrated by the issue confronting this community and the implementation of capital punishment in an effective and efficient manner. From my report I discovered that public opinion, as we have just heard, is not as consistently in favor of capital punishment as we all tend to believe. What is our true perception of public opinion? Do we have an accurate measure of public opinion? If we base our belief on the polls and what they tend to say, we must know that the average poll only asked two or three questions on capital punishment, and those questions are not probing questions, but more questions of a skin type response of, "Do you favor or oppose a death penalty?" There is little analysis or end-up probing beyond that first initial question.

Also in the matter of question placement on a survey, we confront issues where the questions are placed right after an issue of, "How do you feel about crime? Do you support a candidate that has a strong, or tough position on crime?" Then it is followed by, "Do you favor or oppose the death penalty?" In that manner you develop a psychological response within the respondent towards the issue of crime, and it tends to lead them to respond that, "Yes, I do favor the death penalty in cases of homicide."

Furthermore, I would like to say something on the impact of public opinion on the Legislature once again. The Legislature, as I said, determines its legitimacy from the public, and generally says, "Yes, we support capital punishment, because the public" -- or, "We perceive the public as supporting that choice of punishment." Now, is that opinion truly that of the public, or is that what you perceive from your colleagues around you?

As was stated, the latest poll, or the last poll completed, was in 1981. Well, as we all know, that was a long time ago. Another issue is, "Why do you support capital

punishment?" As you will see in my report -- if you have been able to look through it -- it has an example of how, during the 1988 presidential campaign on the issue of capital punishment, 12 percent of those voters who initially supported Michael Dukakis switched their position to that of George Bush, because they felt his position on crime was legitimized by his stance on capital punishment. Why are we supporting capital punishment? We must ask ourselves that. Is it because we just choose to gain the support of additional voters, or do we honestly believe that this is the punishment the public so desires?

Finally, its impact on the courts: Who is being punished by capital punishment -- by the process of capital punishment? From my findings you will see that generally minorities and the poor are punished by capital punishment. What is the public sentiment in this case? In the case of the east, we find that generally public opinion is less in support of capital punishment than other areas throughout the nation. We find that studies in California conducted on capital punishment and public opinion see that the people view capital punishment as a less favorable punishment, depending on their demographic status.

There are a couple of points I would like to make in conclusion: On Assembly Concurrent Resolution 20, State of New Jersey, it is to be presented to the voters in this manner. I am sure you have all read this proposed bill. My point is this: If we are going to play something to the public and expect them to truly understand what they are voting for, how are they, as average voters, to interpret such complex legislation? I, myself, studied capital punishment for over a semester very in-depthly, and I found that I had to read it three to four times to at least understand what they were requiring in the first place, let alone to make an in-depth judgment as to whether or not this is the right legislation that this State needs.

I feel that if we are going to base our legitimacy on public opinion, if the public is going to vote on an issue, they should at least understand what the issue is they are voting for. If you can read this the first time and understand it without a legal background, then hopefully you are representative of the average voter. But in most cases, I don't think you are.

Are there any questions?

ASSEMBLYMAN BROWN: I have a question, Mr. Chairman.

ASSEMBLYMAN STUHLTRAGER: Go ahead.

ASSEMBLYMAN BROWN: You indicated that minorities suffer more in terms of capital punishment than others. We have had testimony before this Committee from representatives of the Attorney General's Office that they know of no instances of discrimination with respect to the capital punishment process. I found it a bit difficult to sit here with a straight face and listen to it, but I would like you to elaborate a little bit more about what you seemingly found that the Attorney General's Office couldn't.

MR. MILAM: I understand your point exactly, Assemblyman. In my report there is a section on capital punishment and who has been sentenced to death. First of all I will address the issue of perception. In the report there is a survey of African-Americans, and their point of view is, "Do you believe that African-Americans will receive--"

Let me explain the question exactly, if I can find it. (pause while witness refers to his report) Here's the question: "A black person is more likely than a white person to receive the death penalty for the same crime?" The response was -- this is on page 115 if you would like to look-- The response was: Agree, among whites, 41 percent. However, among blacks, the percentage was 73 percent.

Now, the reason for this may come from this example. For example, between 1930 and 1967, blacks constituted

two-thirds of the total number of legal executions, although blacks comprised a minority of the total population. Furthermore, in other areas you will see that blacks have been sentenced to death far more often by predominantly white juries than you will see in other cases.

Another example of just how the public feels about capital punishment and whether or not it is minorities who are facing -- or being discriminated against-- There is another question asking: How do you feel about people of diverse occupational levels-- Just a second. (witness peruses his report again) Okay, here is the question I was referring to: "A poor person is more likely than a person of average or above average income to receive the death penalty for the same crime?" Once again we find that whites, in 1991, said-- Fifty-nine percent of them agreed, whereas 37 percent of the white population disagreed. In comparison, blacks, at 72 percent, said that a poor person is more likely than a person of average or above average income to receive the death penalty for the same crime. And, as many of us well know, the majority of the lower socioeconomic status of the society is comprised of black or African-Americans and other minorities.

So, from this point, you can see from this document evidence of what has happened in the judicial system, as well as what public perceptions of the court proceedings are; that African-Americans are discriminated against, or feel that they are discriminated against in the process of capital punishment.

ASSEMBLYMAN STUHLTRAGER: May I ask you, why must we give any more credence to public perception with respect to the application of capital punishment to minorities -- any more credence to that public perception than we give to the public perception of capital punishment in general, when both of them are obviously complex issues and the facts may belie what the perception is?

MR. MILAM: Exactly what facts would you point to, though?

ASSEMBLYMAN STUHLTRAGER: Well, at this point, the facts are in contention. The Attorney General's Office, you know, would indicate that they don't believe there is a disparity. So, assuming the good faith of that Office, my point is: Why should we give more credence to the average citizen, you know, not a lawyer, not someone at the Woodrow Wilson School of Public Policy, not a legislator-- Why is their perception of a discriminatory impact to be valued so much more than the perception of capital punishment in general?

MR. MILAM: When you are dealing with an issue such as capital punishment, you are dealing with something that is final; that is, life or death -- when you tell the public, "Yes, we are going to have this punishment for criminals that says, if you commit a homicide and you are convicted, then you do have the possibility of receiving a death sentence." Yet, if within that system there is perceived, or there is an actual hint or tint of racism in the system, then you are exposing certain people within this population to a biased and discriminatory system. For African-Americans to perceive that they are discriminated against in this process, then there must be some element within the process that confirms this belief.

ASSEMBLYMAN STUHLTRAGER: There might be, but there is not an absolute connection between their belief and the reality, just like there is not an absolute connection between a general member of the public and blacks in the general public supporting the death penalty, too. So, if their perception is wrong with respect to supporting the death penalty, or superficial, then perhaps their perception is equally wrong with respect to its impact on minorities.

On the other hand, there might be a factual basis for that perception. My only point is, anecdotal evidence, and you who are doing the type of research and analysis at your school

I'm sure would agree -- not just you individually, but the entire process-- Anecdotal evidence is not necessarily going to get us to actuality. It is going to give us some indication in either case. It may be right; it may be wrong. That is my only point. You're using public perceptions sort of at cross purposes in your argument, though there might be good reason for that public perception, but we don't necessarily know that.

MR. MILAM: I think the point of cross purposes is very appropriate for understanding just how complex this issue is.

ASSEMBLYMAN STUHLTRAGER: Absolutely right.

MR. MILAM: Legislatures will frequently say -- or, legislators will frequently say that the legitimacy comes from the public's perception, or belief that we should have this punishment. Yet the public truly doesn't understand what they are enforcing. My example is, take the average juror. He will sit and say, "Yes, I believe in capital punishment." But you place him in a juror situation and he has a very different outlook on how he views capital punishment, and whether or not it is appropriate.

ASSEMBLYMAN STUHLTRAGER: Both sides, though, use the same-- Legislators may say, "I support capital punishment because that is what people want." Opponents may say, "I am against capital punishment because it strikes disproportionately at minorities." Right? Both sides use the same public perception on different sides to justify their positions from time to time. One or both may be wrong. It's possible.

MR. MILAM: I think that is a very good point. I think that if there is a perceived inconsistency with the system, and that people perceive that it is discriminating against a group, then you must make sure that this system is very clear, very exact, and very sure, because you are dealing with someone's life.

On the other issue of whether or not it is public opinion, I think that is very true. The Legislature must decide whether or not a bill should be enacted according to how the public feels. But, the Legislature must look at how that public is viewing an issue -- do they actually know what they are voting for? -- and then after they do this, after there is an in-depth analysis of public opinion, then decide the legislation. I look at this bill, and I don't understand it. I wonder just how the average voter is going to stand in an election booth and look at this and say, "Well, I understand that 'yes' means I should have this proposition and 'no' means I should have this proposition." I don't see that happening.

ASSEMBLYMAN STUHLTRAGER: No. Being an opponent to Initiative and Referendum for the very reason you are citing, I can appreciate what you're saying. And yet, the constitutional amendment process requires us to follow the procedure that we are.

Now, if it is a complex issue, and let's assume whether it be this issue or another one, we don't want to remove from constitutional amendment purposes anything that is too complex for the average person, perhaps, to understand, looking at it very cursorily. Now, if we are going to be specific, if within this ACR there is a better way of describing and defining what we are trying to do, certainly that is something that should be discussed. But if you are simply saying that inherently this issue is very complex, and consequently the average person is going to have a very difficult time understanding it, I don't have an answer for that, because I don't think that should take it off the table of discussion for amendment purposes. Do you follow me?

MR. MILAM: I agree with you completely on the constitutional aspect and that, yes, you have to take it to the voter. I mean, that is exactly why you are elected to be public officials, because the electorate places their trust in

your judgment. Yet, we can place a bill to the public that the public can understand. Our fear is, if we give the public something they truly won't understand what they are doing, so we develop this elaborate and very complex language so that they truly don't understand what they are doing.

ASSEMBLYMAN STUHLTRAGER: Well, then, if your point is, on the specifics of ACR-20--

MR. MILAM: Yes?

ASSEMBLYMAN STUHLTRAGER: --that it is not drafted in such a fashion as to be as understandable as even this overall complex issue could be made, then your input would be more than welcome to help us to make this a more understandable issue for the public. Even recognizing your opposition in general to what we are doing, I would hope that would not deter you from providing us with a way to make it more understandable to the public. Hopefully, by making it more understandable, from your perspective, that might make it more likely to be defeated, if, in fact, it were on the ballot.

But in any event, we want them to understand, as best we can, recognizing that it is a complex issue, no matter how we draft it.

MR. MILAM: First of all I would like to say on this issue, yes, I am in opposition to capital punishment because of the way it is implemented and because of continuous moral obligations and objections to the punishment. Yet, if legislators must place something to the public-- If we must place this to the public, or give the public an opportunity to vote on this, I think we owe the public the right to at least understand and know what they are voting on.

ASSEMBLYMAN STUHLTRAGER: I agree 100 percent.

MR. MILAM: And I think, just looking at the first part, yes, that is one long sentence, with a question mark at the end. I don't think the average voter will understand what

that is saying. I will be very honest. To this point, I still do not know if I vote "yes" what that means, and if I vote "no" what that means.

ASSEMBLYMAN STUHLTRAGER: Well, as we do with the bond issues, and with every question that is on the ballot, that is why we provide an interpretive statement, which may confuse things even more, in some cases. I don't know.

But, let me say this: I am more than open to input -- and I think I can speak for the prime sponsor, Mr. Haytaian -- to make it as understandable a question as possible. It is very difficult to reduce a complex issue to a ballot question, and every issue seems to be relatively complex.

I want to thank you for coming today.

ASSEMBLYMAN BROWN: Mr. Chairman, I had not finished when you commenced your questions.

ASSEMBLYMAN STUHLTRAGER: Oh, I'm sorry, Mr. Brown. I didn't realize that.

ASSEMBLYMAN BROWN: Let me get back to something with you. The question from the Chairman suggests that your statements about racism and discrimination in the capital punishment area are just mere anecdotes by you; that there has been no research, no data, to substantiate that.

Now, have you come across any research or data that shows that, in fact, blacks get differing sentences for the same offense than whites do and it changes hands sometimes, when a victim is white, as opposed to the victim being black?

MR. MILAM: Yes.

ASSEMBLYMAN BROWN: See, because I have a problem with this Committee. Apparently, we finally found utopia in the criminal justice system. See, when it comes to capital punishment, there is no racism or discrimination. It took me 44 years and being on this Committee to find that out for the first time, notwithstanding I have had the privilege and honor of sitting next to somebody they were trying to kill for six

months. The only reason he was sitting next to me charged with the death penalty, was because he was Hispanic and the victims, one of whom got shot, were white.

So, because I come here with this very unusual experience, I would like to find out if you know of any data that somewhat mirrors my experience in this area?

MR. MILAM: For those of you who have had the opportunity of reading my report, there are many cases where you see a clear-cut line of how African-Americans, when placed in a situation of the death penalty and facing a capital punishment trial, have received the death penalty in cases where the situation was the exact same as a white male, or some other ethnicity. What has occurred is that they have received different sentences. If they happened to have killed a black person, sometimes they don't receive the death penalty. If it is a black on white crime, they will receive the death penalty. In cases of rape, they will receive the death penalty far more frequently than a white American will.

One of the reports is the Baldus Report, which has highlighted many of these instances. I sit here and I look at this Committee, and the composition of the Committee, and I wonder just how we can say that these are anecdotes. I mean, we have evidence.

ASSEMBLYMAN BROWN: Well, that is my point.

MR. MILAM: People have stated that-- I mean, people have come up with proof from different jurisdictions. Louisiana was a state where all the blacks who had been sentenced to death, had all been sentenced by white juries. When you are deciding who should be prosecuted -- prosecutor discretion-- That means that a prosecutor, if he does not see the case as high publicity, can say: "Well, we won't go for death in this case," or, "We will go for death in another case." That is so arbitrary. What is that based on? Well, this is a criminal who is black and he happens to be this

ethnicity, or if this person killed this person, then the prosecutor is going to go for a specific punishment. I mean, here you have a classic case where there is discretion outside of legal confines. People can resort to their own biases, jury biases, things like that which can gravely influence whether or not an African-American will receive the death penalty, in comparison to a white American.

ASSEMBLYMAN BROWN: Well, my point, sir, is that the suggestion that when you make that statement about those facts, and doubt it, they are not anecdotes. The research shows hard numbers, real cases, real people died, while white counterparts charged with the same thing are still around to tell the story. Is that correct?

MR. MILAM: Exactly.

ASSEMBLYMAN BROWN: Now, are you familiar at all with the Drayer (phonetic spelling) case out of Morristown?

MR. MILAM: No, I'm not.

ASSEMBLYMAN BROWN: The rich, wealthy, white businessman who plotted and schemed--

MR. MILAM: Oh, yes, yes, yes. I'm sorry, yes.

ASSEMBLYMAN BROWN: --to kill his wife so he and the girlfriend could run off with the money.

MR. MILAM: Yes.

ASSEMBLYMAN BROWN: Now, that was a straight murder case. It had all the trappings of a capital punishment case, but for some reason this millionaire got treated just as in a normal murder case. Are you familiar with that case at all?

MR. MILAM: Yes.

ASSEMBLYMAN BROWN: Many of us who did capital punishment work always looked at that case and wondered, how in the heck could this rich guy go through this with not even a discussion of the capital punishment situation?

I just want to make it clear, your statements have nothing to do with anecdotes.

MR. MILAM: No.

ASSEMBLYMAN BROWN: They are about real bodies that are black, that are buried, versus white bodies that are still around, still breathing, who did similar things.

MR. MILAM: Exactly. Just a point to back you up on that: As I said, poor people and the way they perceive the death penalty-- Importantly, the majority of defendants in death eligible cases originate from lower socioeconomic status. A 1976 Amnesty International study showed that 62 percent of prisoners sentenced to death since 1972 were unskilled service or domestic workers, and only 3 percent were professional or technical workers. Why is that?

Yes, we can say a majority of the people who commit crimes may be of lower socioeconomic status, but why is it that they are condemned to death far more frequently than those who are wealthier? We have evidence. Frequently we will say, "Well, that is not true." Is that because our American public does not want to face up to the fact that, yes, racism is still a very live and real issue in this country today, and that poor people do face disparities when it comes to dealing with the system? Is it because Americans don't want to face up to that? Frequently you know that we will never hear discussions of class, but is this an issue? Is this an issue that legislators need to deal with as a response to their public, and as a response to the people who placed them in office?

We have to look at the facts. The facts are there. Is it that we are denying them because we just don't want to deal with racism, or we don't want to admit that America does have this problem?

ASSEMBLYMAN STUHLTRAGER: Thank you for your testimony.

I want to clear up something with the Assemblyman right now. Any references to the Committee's position-- For anyone who is listening -- and I am glad we have a tape here, because we can play it back if we have to-- The Committee's

position, with respect to anecdotal, and the use of that term, is, we were talking about public perception and what that means. That is not to suggest that there is not racism in the system. Maybe there is. But there is definitely divided opinion. We have had people before this Committee, on two different occasions-- We had this gentleman here today, and we had the Attorney General's Office at our last meeting, and the opinion is divided.

Now, you can agree with one side, and maybe I can agree with another, or maybe I don't have a position. I don't have one on that point. I have not read the studies. I don't know. I am not going to take a knee-jerk reaction and say yes or no. I don't know. But in terms of public perception, my point is very simple: The public can be wrong as often as they can be right, and if they are wrong on one issue, that doesn't make them right on the other one. That's anecdotal. Public perception, if it is a superficial understanding of the validity of the death penalty, well, it is probably an equally superficial understanding of racism in the system.

Now, that doesn't make them wrong necessarily. It just means that their understanding, as the general public, is superficial. We have to get to the facts to determine whether or not there is, in fact -- whether their perception is accurate in either case. Maybe this gentleman has the facts. Maybe the facts are all there and just need to be analyzed in the right fashion. We would all, perhaps, draw the same conclusions. But it appears that there is some conflict in terms of the conclusions to be drawn, based on what the Attorney General's Office has said. It doesn't make them right either, but they have drawn other conclusions.

ASSEMBLYMAN BROWN: Mr. Chairman, with all due respect, anybody who believes that there is not racism in the criminal justice system lives on the planet Mars. I am not here to talk about what I read about, or what somebody told

me. I happen to be a product of the system. I sat there when they were trying to execute somebody just because the guy was a Hispanic guy and he killed some white victim. So I don't need the studies and all that to tell me about racism.

ASSEMBLYMAN STUHLTRAGER: Okay. Well, you don't, but other people would like a more scientific analysis, and I am assuming that is what these students are going to school for. If we don't need those kinds of things, Assemblyman, then they might as well drop out of school today, and all the black people can say there is racism in the system, and we don't even have to-- You don't have to do your study, sir. Assemblyman Brown can basically tell you that, based on his experience -- and maybe you can too -- there is racism. Let's stop. Maybe we should just stop the whole criminal justice system, because we can't take opinion, we can't take personal bias, not necessarily in a bad way, personal discretion totally out of the system. It is there on the street with the police. It is there in the prosecutor's office. It is there in the jury box. It is there, to a certain degree, with respect to the judge.

That is always going to be there. There is nothing we can change about that. We can try to narrow it and make it better, but there is always going to be some discretion in the system. There is nothing more we can do.

ASSEMBLYMAN BROWN: Mr. Chairman, if we don't have the death penalty, we don't have to worry about people dying because of these prejudices and discriminations. That's the point.

ASSEMBLYMAN STUHLTRAGER: Okay. Assemblyman Lustbader?

ASSEMBLYMAN LUSTBADER: Mr. Chairman, to the speaker, assuming, for the purposes of discussion, that the public opinion on the issue is anecdotal, I don't think anyone would seriously argue that the opinions of the Supreme Court are anecdotal. Of the 32 reversals of the death penalty

convictions in this State by the Supreme Court, have you done any study to justify your conclusions through those reversals?

MR. MILAM: Studies as in why they reversed these, or--

ASSEMBLYMAN LUSTBADER: Yes. In other words, you made studies, and I am just taking it a step further, and using the framework of the 32 reversals. Since Ramseur and Biegenwald, have you done any studies that will either confirm or somehow refute your conclusions?

MR. MILAM: That there is racism in the system--

ASSEMBLYMAN LUSTBADER: Yes.

MR. MILAM: --or that public sentiment has changed? Exactly what--

ASSEMBLYMAN LUSTBADER: Well, either one; either one.

MR. MILAM: Either one? Well, that is just the point. There haven't been studies conducted on how public opinion feels towards that. In the case of whether or not there is an issue of racism in the system, that is another issue that needs to be investigated further.

We have evidence that has stated what has happened since 1982 -- 1981. That evidence is in the report. I think it needs to be looked at, because it is very influential and it is very important. Because of what it says, it may help you to better understand how you feel about the issue, or where the public stands on that issue.

In response to the issue of how you will have different perspectives given, I think because this issue is so volatile, because you have those who feel there is discrimination in the system, and because you have those who say there isn't-- There is proof out there that says there is, but the point is more of this: If you are going to have a decision that puts someone to death, which is so final, then you must understand that if there is dissension either way, you can't have a consensus on this decision to say, "Yes, we should put these people to death."

Now, if the decision were life imprisonment without parole, and the public said, "Well, there is discrimination," or the public says there is this, that is very different, because you are not terminating a life. You are not, as the State, saying, "This person will no longer exist." What you are saying is, "He will be confined." Then he can resort to whatever legal means he has to see if there was a problem in the way the trial was conducted, or anything else where he feels there was a problem in the system. But when you say someone is dead, or you put them to death, what more can they argue? They can never say, "Well, I felt, as I sat in that jury room, that there was a racist slant to why I was being prosecuted the way I was." You take that away from them. You are taking that right to appeal, or that right to say, "This was not a fair system. This was not a fair trial," away from them. The finality of life and death says that if you have this dissension either way, you shouldn't have such a punishment that is so violent.

ASSEMBLYMAN STUHLTRAGER: A good point. I want to thank you for coming in.

MR. MILAM: Thank you.

ASSEMBLYMAN STUHLTRAGER: Before I move on -- I think we have another person, or two -- I particularly want to thank the students from the school. It is nice to-- You all presented yourselves and your position very well, and I want to thank you for coming and doing that. It has added to the record of this proceeding. I can tell that you are all destined for advocating, in one form or another, down the road.

Julie Turner, is that you, ma'am?

J U L I E T U R N E R: That's me. I was here on the Skillman issue, not on this bill.

ASSEMBLYMAN STUHLTRAGER: Well, we are not doing Skillman today, so--

MS. TURNER: Well, okay. I had been told that you were, and I was asked to come down.

ASSEMBLYMAN STUHLTRAGER: No. We heard some testimony with respect to Skillman last time. That was the Senate Law and Public Safety Committee.

MS. TURNER: Okay, thank you.

ASSEMBLYMAN STUHLTRAGER: Okay. I hope you didn't miss it.

Is there anyone else here who wishes to testify at this public hearing? (no response) If not, this public hearing is closed for purposes of testimony. I will leave the record open for -- why don't we say 10 days, to allow any additional reports that may be received to be included and made part of the record.

Thank you very much.

(HEARING CONCLUDED)

APPENDIX

State of New Jersey
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ROBERT J. DEL TUFO
ATTORNEY GENERAL

ROBERT T. WINTER
DIRECTOR

STATEMENT OF

ATTORNEY GENERAL ROBERT J. DEL TUFO

ON ACR 20 (GERALD CONSTITUTIONAL AMENDMENT)

ASSEMBLY JUDICIARY, LAW & PUBLIC SAFETY COMMITTEE

FEBRUARY 27, 1992

ACR 20 proposes to amend the New Jersey Constitution to overrule State v. Gerald, 113 N.J. 40 (1988). I support this bill.

I.

In Gerald, the Supreme Court construed our State Constitution as prohibiting the imposition of a death sentence where an individual is convicted of purposely or knowingly causing serious bodily injury resulting in death, as opposed to being convicted of purposely or knowingly causing death (which would render a defendant death-eligible). The Court acknowledged, however, that our murder statute as presently written clearly provides that capital punishment may be imposed upon individuals convicted of purposeful or knowing infliction of serious bodily injury resulting in death.

Our current death penalty statute was passed in 1982 after lengthy debate. A reading of the law confirms the Supreme

Court's acknowledgement that this Legislature intended that those who purposely or knowingly cause serious bodily injury resulting in death ought to be subject to the death penalty provided that the other criteria of the capital statute are met. Thus, under the statute as enacted by this Legislature, an individual who, by his own hand, or through the hiring of another, purposely or knowingly causes serious bodily injury which results in the death of, for example, a law enforcement officer would be eligible for capital punishment. On the other hand, Gerald precludes such a result by finding that our State Constitution voids death-eligibility for the killer who did not, in fact, intend to cause death, even though the serious bodily injury inflicted results in death and an aggravating factor (murder of a public servant) is proven beyond a reasonable doubt.

ACR 20 eliminates this discrepancy. The bill would amend the State Constitution to provide that it is not cruel and unusual punishment to make eligible for the death penalty a defendant convicted of purposely or knowingly causing serious bodily injury resulting in death. In short, this legislation re-establishes that which this Legislature and the Executive Branch have always intended regarding the class of individuals eligible for the death penalty.

II.

I wish to emphasize that, as a matter of federal constitutional law, capital punishment may be imposed on one who commits a homicide without the purpose or knowledge that death will actually result. See Tison v. Arizona, 107 S.Ct. 1676 (1987). But in its Gerald opinion, the Supreme Court, relying upon our State Constitution, departed from the constitutitional parameters set in Tison. This result was premised upon the Court's belief that capital punishment should be exclusively reserved for those who intended that death result from their actions.

The fault in the New Jersey Supreme Court's logic is that there is a fine line between proving that an individual purposely or knowingly caused serious bodily injury resulting in death and that the individual intended to cause another's death. That is precisely why this Legislature drafted the Criminal Code's homicide statutes to provide that the offense of murder is committed regardless of whether the defendant caused serious bodily injury resulting in death or in fact intended death in the first instance. It is the consequence of the loss of a life which is dispositive.

Moreover, as a matter of public policy, and in contrast to Gerald, the United States Supreme Court's rationale in Tison is worthy of note in the context of the proposed amendment:

> "A narrow focus on the question of whether . . . a given defendant 'intended to kill,' however, is a highly unsatisfactory means of definitely distinguishing the most culpable and dangerous of murderers . . . [S]ome nonintentional murders may be among the most dangerous and inhumane of all - the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though not inevitable, lethal result."
>
> [Id., 107 S.Ct. at 1687-1688]

ACR 20 is consistent with the United States Supreme Court's rationale and presents a more realistic analysis of the appropriate criteria for death-eligibility.

III.

Gerald continues to be the New Jersey Supreme Court's most controversial decision regarding our current death penalty law. The Court's judgment on the relationship between a defendant's intent and death-eligibility was rendered in an adversarial

vacuum: Walter Gerald had not raised this point on appeal, nor did the Court seek legal argument on this issue from the parties despite the far-reaching consequences the subsequent ruling would engender.

The unexpected nature of the Supreme Court's approach is exacerbated when we consider the Court's casual dismissal of an identical issue upon first considering the constitutionality of the death penalty law in State v. Ramseur, 106 N.J. 123 (1987). Over a strong dissent by Justice Handler, who squarely addressed what he perceived as the need to separate intent to cause serious bodily injury from intent to cause death, id. at 388-389, the Ramseur majority found the lack of such a death-eligibility distinction to be "irrelevant," and ultimately concluded that our law satisfied the State Constitution. Id. at 187, 197. Yet, nineteen months later in Gerald, the Court surprised prosecutors and defense counsel alike with a contrary ruling which effectively nullified numerous death sentences imposed throughout the State.

Prosecutorial efforts have also been thwarted by the Supreme Court's inconsistent application of the rule fashioned in Gerald to other death penalty cases. The Court's analyses of whether jurys' failures to differentiate between intent to cause death and intent to cause serious bodily injury constituted "harmless error" in subsequent capital appeals have

been unrealistic, lacking in uniformity and have even caused divisiveness among the Court's members. Ultimately, rather than effectuating the Legislature's will and adding to the integrity of the capital process, the Gerald opinion has frustrated the enforcement of our capital punishment statute.

IV.

Since the citizens of our State have been most aggrieved by the Gerald ruling, it is only fitting that these citizens decide whether the State Constitution should recognize the distinctions made by the New Jersey Supreme Court. I urge this Committee to act favorably on ACR 20 and release this bill for consideration by the full Assembly.

William F. Lamb
First Assistant Prosecutor
Middlesex County Prosecutor's Office
Appearing on behalf of the County Prosecutors' Association of New Jersey in support of ACR 20

In September 1982, legislation restoring the death penalty was enacted in New Jersey. In March 1987 --- some 4 1/2 years later --- the New Jersey Supreme Court finally issued an opinion on the death penalty law. In that case, State v. Thomas Ramseur, the Court decided that the death penalty law itself was constitutional but that the manner in which it had been administered to Ramseur had been improper. The Court, therefore, affirmed Ramseur's murder conviction, vacated his death sentence, and remanded the matter to the trial court for imposition of a sentence of life imprisonment.

Following the March 1987 Ramseur decision and for about 18 months thereafter, the New Jersey Supreme Court vacated every death sentence to come before it on the basis of failure to anticipate and apply the Ramseur principles. As subsequent death penalty cases began to conform to Ramseur and that case began to lose its applicability, the Supreme Court began to overturn death sentences on other grounds. Among these new death penalty impediments was a never before discovered distinction between murders where the accused intended the death of his victim and murders where the accused only intended serious bodily injury to his victim but the victim died anyway. According to the October 1988 case [State v. Walter Gerald] that created this distinction, only murderers who actually intend the death of their victims commit a death penalty eligible form of murder.

Interestingly, this distinction between the two types of murders had gone undetected by the Court in its previous 10 or so death penalty cases. Nor had it been offered as an argument by the Public Defender --- and this notwithstanding a generously funded Public Defender task force dedicated to invalidation of the death penalty statute. Rather, the Gerald principle is entirely a product of the New Jersey Supreme Court's invention.

The Court, moreover, declined to base its new found Gerald principle on statutory construction of the death penalty murder law, although it well could have. But that, of course, would have rendered the Gerald principle vulnerable to quick legislative eradication. Rather, the Court grounded the Gerald principle in a reading of the New Jersey Constitution, thus necessitating the far more arduous process of constitutional amendment to overturn it.

As with the Ramseur principles before it, this Gerald

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principle immediately jeopardized a host of death penalty verdicts rendered before this Gerald principle was announced. In reviewing these cases, however, the Supreme Court did not apply Gerald across the board. Rather, it found that in some cases the manner in which the victim was killed so obviously demonstrated an intent to kill that no jury could have rationally concluded that the killer only intended serious bodily injury. In such cases, any violation of the Gerald principle was harmless [and the Court would then invalidate the death penalty on some still other ground].

To date, the Court has assayed its Gerald principle in 15 death penalty cases. As the following review demonstrates, the Court's application of its Gerald principle has been unpredictable, irrational and intellectually dishonest.

STATE V. GERALD AND ITS PROGENY

1. KILLER: WALTER GERALD (and accomplices)

VICTIM: PAUL MATUSZ, 55 year old man killed at home by intruders.

DATE OF DECISION: October 25, 1988

CIRCUMSTANCES OF CRIME: Victim beaten and stomped to death in own home by intruders. Sneaker prints still visible on face and forehead at time of autopsy. TV set dropped on head.

DOES GERALD APPLY: Yes, Gerald and accomplices may have only intended serious bodily injury.

2. KILLER: JAMES HUNT

VICTIM: EDWARD LAWSON, acquaintance of Hunt

DATE OF DECISION: June 9, 1989

CIRCUMSTANCES OF CRIME: Victim stabbed 24 times.

DOES GERALD APPLY: No, no rational jury could have concluded that Hunt intended anything less than Lawson's death.

3. KILLER: DARRYL PITTS

VICTIM: STACEY ELIZARDO, former paramour [Pitts also killed rival Paul Reynolds at same time he killed Elizardo, but Reynolds murder deemed a non-death penalty murder.]

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DATE OF DECISION: June 24, 1989

CIRCUMSTANCES OF CRIME: Pitts stabs Reynolds 7 times and stabs Elizardo 23 times, killing both. Asserts "Vietnam syndrome" defense at trial.

DOES GERALD APPLY: No, assault on Elizardo so violent that death was inevitable.

4. KILLER: STEVEN DAVIS

VICTIM: BARBARA BLOMBERG, the girlfriend of a friend of Davis.

DATE OF DECISION: August 3, 1989

CIRCUMSTANCES OF CRIME: Victim strangled to death with electrical cord. After victim died, Davis stabs and mutilates her body. Davis waives trial; pleads guilty to murder to Blomberg; sentenced to death by judge.

DOES GERALD APPLY: Yes, judge at guilty plea faulted for failure to establish that Davis intended to kill victim, rather than just inflict serious bodily injury on her.

5. KILLER: KEVIN JACKSON

VICTIM: Female but name unmentioned in Supreme Court opinion.

DATE OF DECISION: April 18, 1990

CIRCUMSTANCES OF CRIME: Sadistic murder. Victim stabbed 53 times including 18 stab wounds to the genital area. Jackson waives trial; pleads guilty to murder to victim; sentenced to death.

DOES GERALD APPLY: Yes, judge at guilty plea faulted for failure to establish that Jackson intended to kill victim, rather than just inflict serious bodily injury on her.

6. KILLER: BRYAN COYLE

VICTIM: SETH LEMBERG, husband of Coyle's paramour.

DATE OF DECISION: June 11, 1990

CIRCUMSTANCES OF CRIME: Victim demands wife return from Coyle house. Coyle chases victim firing handgun. Victim

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shot in leg on street, attempts to crawl away. Coyle shouts "Yahoo," follows crawling victim and shoots in back. Victim then killed by shot to back of head fired from point blank range.

DOES GERALD APPLY: Yes, if instructed on Gerald principles jury might have concluded Coyle intended less than death.

7. KILLER: FRANK PENNINGTON

VICTIM: ARLENE CONNORS, mother of barmaid who came to tavern to help daughter close up.

DATE OF DECISION: June 21, 1990

CIRCUMSTANCES OF CRIME: Victim shot in heart from close range. Pennington defense: did not mean to shoot [notwithstanding release of three separate safeties on handgun.]

DOES GERALD APPLY: Yes, jury could have concluded Pennington only intended serious bodily injury.

8. KILLER: RUSSELL LONG

VICTIM: ALBERT COMPTON, night manager of liquor store.

DATE OF DECISION: June 21, 1990

CIRCUMSTANCES OF CRIME: Compton shot in chest from close range by Long when no other customers in store. After arrest, Long tells fellow prison inmate that he "did not want to leave any witnesses behind."

DOES GERALD APPLY: Yes, jury could have concluded Long only intended serious bodily injury.

9. KILLER: TEDDY ROSE

VICTIM: PATROLMAN VINCENT GARAFFA, Irvington Police Department.

DATE OF DECISION: May 23, 1990

*DATE DECISION FILED: July 12, 1990

CIRCUMSTANCES OF CRIME: Patrolman Garaffa killed by single blast of shotgun pressed to stomach.

DOES GERALD APPLY: No, "It is inconceivable that defendant

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was not 'practically certain' that his action would kill the officer"[notwithstanding defense claim that Rose was in panic and did not intend weapon to go off.]

10. KILLER: JACINTO HIGHTOWER

VICTIM: CYNTHIA BARLIEB, convenience store clerk.

DATE OF DECISION: July 12, 1990

CIRCUMSTANCES OF CRIME: Convenience store clerk first shot in chest, falls but rises again. Then shot in neck and falls to floor again. When touches Hightower's leg as he rifles register, shot in left side of head.

DOES GERALD APPLY: No, "it is virtually inconceivable that defendant intended serious bodily injury but not death."

11. KILLER: ANTHONY McDOUGALD

VICTIM: WALTER BASS & MARIA BASS, parents of McDougald's teenage girlfriend.

DATE OF DECISION: July 12, 1990

CIRCUMSTANCES OF CRIME: Victims attacked while asleep at home. Walter slashed across throat and stabbed in chest with knife; then McDougald and 13 year old accomplice bashed Walter in head with baseball bat. McDougald dropped cinderblock on Maria's head; bashed with baseball bat; cut Maria's throat and then shoved bat up Maria's vagina.

DOES GERALD APPLY: No, virtually inconceivable that jury could have concluded that McDougald intended to cause serious bodily injury but not death.

12. KILLER: JAMES CLAUSELL

VICTIM: EDWARD ATWOOD filed a complaint against a drug dealer.

DATE OF DECISION: August 30, 1990

CIRCUMSTANCES OF CRIME: Contract killing. Clausell paid $2000 to kill Atwood. Fires two shots through door as Atwood tries to close it, killing Atwood.

DOES GERALD APPLY: Yes, jury could have concluded that "hit" paid for by drug dealer was only to have Atwood

seriously injured, not killed.

13. KILLER: NATHANIEL HARVEY

VICTIM: IRENE SCHNAPS, recently widowed secretary living alone.

DATE OF DECISION: October 18, 1990

CIRCUMSTANCES OF CRIME: Victim attacked by burglar entering her apartment. Victim's skull cleaved by hatchet leaving brain exposed. Suffered numerous skull fractures, fractures jaw, multiple lacerations and massive loss of blood. At least 15 blows to head from hatchet according to medical examiner.

DOES GERALD APPLY: Yes, jury could have concluded Harvey did not intend to kill victim, only to injure her.

14. KILLER: SAMUEL MOORE

VICTIM: MELVA MOORE and KORY MOORE, wife and 18 month old son of Samuel.

DATE OF DECISION: January 23, 1991

CIRCUMSTANCES OF CRIME: Melva killed by more than 20 hammer blows to head crushing skull splattering brain about apartment. Baby Kory hammered to death in process "by accident."

DOES GERALD APPLY: Yes, although improbable jury could conclude that Moore intended less than death for Melva and/or that Kory's death was an accident.

15. KILLER: SAMUEL ERAZO

VICTIM: LUCY ERAZO, estranged wife of Samuel

DATE OF DECISION: August 8, 1991

CIRCUMSTANCES OF CRIME: Wife stabbed to death during domestic violence dispute.

DOES GERALD APPLY: Yes, jury could have concluded that minimally adequate evidence exists that Erazo only intended to cause serious bodily injury.

* * * * * *

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Based upon the experience of the past three years, the County Prosecutors' Association of New Jersey strongly supports the passage of ACR 20 or any alternative legislation designed to overturn Gerald. In our view, the Gerald decision represents an absurd, never intended construction of our death penalty murder law. Moreover, even if Gerald's judicially-created distinction between killers who intend to kill and killers who only intend serious bodily injury had some moral or intellectual justification --- and it has none --- the Gerald principle is still unworkable. As the Gerald progeny attests, application of the Gerald principle has produced results which are wildly inconsistent and which defy coherent explanation or analysis.

Perhaps more than any of its other decisions frustrating the implementation of our death penalty law, the Gerald decision has demoralized prosecutors, bewildered the public, traumatized murder victim families, defeated legislative will and accorded a windfall to New Jersey's worst killers --- all of whom have been spared the death penalty imposed by a jury of their peers and some of whom may not be subject to successful reprosecution. Clearly, the time has come, indeed it is long overdue, to undo the effects of Gerald and restore the New Jersey death penalty law to something more than a hypothetical punishment.

Last but perhaps most important, we must be mindful of the fact that the death penalty law is not the exclusive property of death penalty lawyers and Supreme Court justices. It is the embodiment of public will. After the bitter experience of 5 years of death penalty jurisprudence, it is important and necessary to reengage the citizenry in the death penalty debate. The legitimacy of the New Jersey Constitution and all legislative enactments ultimately rest, in large measure, on the consent and acceptance of the people of this state. Passage of ACR 20 and the public debate on the death penalty law which it will stimulate is therefore greatly in the public interest.

Woodrow Wilson School of Public and International Affairs

Policy Conference Final Report

A Decade of Capital Punishment in New Jersey

Presented to the New Jersey Assembly Judiciary Committee at the Public Hearing on ACR No. 20, March 16, 1992

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Connie Chen
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Natasha Moore
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Joseph Sigelman
Alexander Southwell
Clinton Uhlir
Damon Watson
Jennifer Weller-Polley
Monica Youn

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A Decade of Capital Punishment in New Jersey: Final Report

Introduction

This Report is being presented to the Assembly Judiciary Committee of the New Jersey State Legislature at the Public Hearing on Assembly Concurrent Resolution ACR 20 (the Gerald Constitutional Amendment) held on March 16, 1992 at 135 Hanover Street, Trenton, New Jersey. In addition to containing several research papers which are directly relevant to proposed ACR 20, the Report also includes research reports relevant to other capital punishment legislation pending before the New Jersey Assembly, including A.50 and A. 55 (Death Penalty for Drug Kingpins); A-894 (Proportionality Review to be limited to death sentence cases); and A. 256 (Prohibiting the introduction of evidence concerning the method of execution in a capital case).

Issues directly relevant to ACR 20 are discussed in detail in the research reports in Part II of the Report, especially in the reports of Adelle Bruni, Joseph Sigelman and Damon Watson. Issues raised by proportionality review and the capital punishment decisions of the New Jersey Supreme Court are addressed in the reports of Alexis Doñé, Adelle Bruni and Natasha Moore. The history of different methods of execution are examined by Karen Demers and Clinton Uhlir.

Of particular relevance to the members of this committee and other members of the legislature are the research reports on public opinion and capital punishment, the legislative history of the reimposition of capital punishment in New Jersey, and the costs of the reinstitution of capital punishment in New Jersey and elsewhere. The Report also includes original data from a survey of the opinions of members of the New Jersey legislature with 51 members of the legislature responding, making this survey one of the most extensive ever conducted with state legislators on this topic

Jennifer Weller-Polley's report includes original data on the cost of the reimposition of capital punishment based upon interviews with state officials and others in New Jersey, as well as documentation on costs in other states. Connie Chen's report includes a detailed legislative history of the reenactment of capital punishment in New Jersey, based upon interviews and contemporaneous newspaper accounts. Nalini Pande raises an issue which is not currently before the legislature but might be an appropriate subject for legislation: a prohibition against the execution of the mentally retarded. Monica Youn points out that the appellate review of death sentences in the federal judicial system has been severely limited by recent holdings of the United States Supreme Court which grant great deference to state legislatures. Capital punishment legislation enacted by this legislature is unlikely to be set aside by the United States Supreme Court.

Polling data and public opinion surveys on capital punishment are analyzed in four separate reports in Part I. These reports summarize the most current public opinion data in New Jersey and nationally and analyze polling methodology.

Since the Woodrow Wilson School of Public and International Affairs was established in 1930, the Undergraduate Policy Conference has been its most distinctive feature. In this Conference

nineteen Woodrow Wilson School students, sixteen juniors, two seniors, and one graduate student came together with two faculty directors to address the issues before the New Jersey legislature and courts after a decade of capital punishment in New Jersey. In 1991 the issue of capital punishment was particularly timely. The state legislature had reenacted capital punishment in 1982, and although 37 persons had been sentenced to death, 27 death sentences had been overturned by the New Jersey Supreme Court since reenactment.

In sponsoring these Policy Conferences the School's purpose is to train students to apply social science research to current problems of public policy in preparation for a career in government service, law, journalism or academic research. The Conference normally deals with an ongoing and unfinished question of public policy. Experts and officials are invited to address the Conference during its deliberations. The first guests of this Conference were two experts on public opinion: Michael R. Kagay, News Survey Editor of the New York Times, and Janice Ballou, Director, Center for Public Interest Polling and the Star Ledger/Eagleton Poll. Other guests included attorneys actively involved in all aspects of capital punishment litigation at the state and federal level, including attorneys affiliated with the New Jersey Office of the Attorney General, the Department of the Public Advocate, Amnesty International, and other governmental and private organizations.

Part of the assignment to the students is to conduct interviews with public officials and others actively involved in the public policy issues which are the topic of the Conference. Another distinctive aspect of the Conference is its collective, interactive nature. Each research paper takes on one aspect of the larger problem, and the group as a whole develops the Final Report. Along with the Conference Directors the Senior Commissioners take special responsibility for articulating the issues within individual topics and for assisting the juniors in their research and writing.

The issue was especially timely because this fall the Proportionality Review Project, under the direction of Professor David C. Baldus presented to the New Jersey Supreme Court its Final Report and data on all homicides since reenactment in the state. It is this Report which is the subject of proposed A. 894. Several members of the Conference specifically addressed the issue of proportionality review. In January of 1991 the New Jersey Supreme Court had upheld its first death sentence in the case of Robert O. Marshall, while reserving decision on the issue of proportionality review. Members of the Conference attended the oral argument in that case in January of 1992. Indeed because of the possibility of conflict of interest during the pendency of this litigation, some of the attorneys and state officials who were invited to address the Conference were not able to participate.

During its deliberations the Conference was aware that every member of the New Jersey Senate and Assembly was up for election in November of 1991, and that the result of that election was likely to and did indeed change the character of the state legislature. The Conference anticipated the fact that the newly constituted state legislature would take up several issues concerning capital punishment soon after taking office in January of 1992. The changes in the composition of the state legislature were even more extensive than anticipated. In January of 1992 for the first time in twenty

years the New Jersey State Legislature was controlled by the Republican party, and a veto proof Republican majority in both houses ensured that the Democratic governor could not block the agenda of the new legislative majority.

At its first meeting an opinion poll was conducted of the members of the Conference. A second opinion poll of the Conference members was conducted at the end of the Conference. The results of these polls are reported in an Appendix to this Report. At the outset the participants in the Conference were evenly split between those who were opposed and those who were in favor of capital punishment. After doing their research, listening to the guest speakers, and looking at the issue in depth, some opinions changed.

This Report is submitted so that members of the New Jersey Assembly and Senate and other interested parties will have the benefit of the research conducted by the Conference during their deliberations on proposed capital punishment legislation. If members of the legislature have any questions about the Report, or wish additional information, please let us know.

Leigh Bienen
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1991 SURVEY OF NEW JERSEY LEGISLATORS' OPINIONS ON CAPITAL PUNISHMENT

by Adrienne K. Wheatley

Judgment Day quickly approaches for Robert O. Marshall--the first person in ten years to come this close to state mandated death. Pursuant to the New Jersey Supreme Court's ruling, Marshall will face either life in prison or death by electric chair, thereby concluding the ten year dormancy of New Jersey's capital punishment statute. In light of the controversy surrounding this case, especially with regard to proportionality review, one would suspect that the judiciary will not be the only branch of government with an opinion on the matter. To gauge the sentiments of New Jersey's legislative body, the Woodrow Wilson School Policy Conference on Capital Punishment conducted a survey of all state legislators. Our poll revealed state legislators' opinions on several issues related to capital punishment, including alternatives to the death penalty and proportionality review. As the largest known survey of New Jersey state legislators,[1] our findings should be of special interest to both constituents and newly elected state legislators. Major findings include the need for increased communication with constituents and greater commitment to the notion of representation.

The report begins by describing the survey methodology. The remainder of the report is classified into two main sections: Part One focuses on legislators' opinions on capital punishment issues. Part Two seeks to elucidate the nature of legislative-constituent relations with a discussion of the information received on the amount of communication between these elected officials and their constituents. We hope the findings presented will stimulate discussion in the policy community on these and other issues.

METHODOLOGY

Conference members developed questions for the survey, basing the questions on their individual research. Though several of the respondents expressed the belief that the survey had

[1] According to Janice Ballou of the Eagleton Institute at Rutgers University, this Conference's survey is the largest, and perhaps the only, poll of its kind (Telephone Interview, February 3, 1992).

20X

an anti-death penalty slant[2], no such intent was present. Indeed, most questions were taken from surveys conducted in other states. Conference members analyzed information on various alternatives to the death penalty and perceptions (and misperceptions) about the nature of capital punishment. In actuality, the views of conference members ranged across the political spectrum.

Conference members distributed two sets of surveys to 119 state legislators by regular mail in mid-November, and most legislators received the package on or about November 13, 1991.[3] The package included a cover letter from Leigh B. Bienen, Esq., the Conference leader, a survey, and a return envelope (numbered in the upper left corner for record-keeping purposes). Though all legislators were unequivocally promised anonymity in the Final Report, through the aggregate presentation of results, a few respondents removed the number to prevent any type of identification.

After an initial return of approximately 22 surveys (20.8%), the Conference consulted with Professor William G. Bowers of Northeastern University and Janice Ballou, Director of the Center for Public Interest Polling at the Eagleton Institute of Politics at Rutgers University, about how to boost the return rate. Bowers and Ballou agreed that, to ensure representative results, a second mailing was imperative. Bowers suggested that the second mailing be sent by certified mail, to give it heightened attention (since someone must sign for it). Ballou then set out a process through which we could use certified mail, guarantee one hundred percent anonymity, and still meet our record-keeping requirements.

The second mailing, sent by certified mail in mid-December, included in the survey package a cover letter from a senior commissioner, the survey itself, a return envelope, and a postcard. By sending back the postcard separately from the survey, legislators could indicate their participation without identifying themselves. To further encourage legislators'

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[2] In the space allotted for additional commentary, three respondents expressed the belief that the survey questions were biased.

[3] Though there are a total of 119 legislators, 80 members of the House and 39 Senators (one vacancy), Legislative Services did not have the correct addresses for 14 legislators, thereby reducing the sample size from 119 to 106. A copy of the survey and cover letters is included in the Appendix.

cooperation, Conference members made follow-up telephone calls to the legislators' offices immediately prior to the second mailing. This effort proved quite successful. The second mailing yielded 31 additional surveys (29.2%), an 8.4% increase in the response rate. The final return rate was 50.5 percent (N=105; number of returned surveys=53).

PART I: NEW JERSEY LEGISLATORS OPINIONS ON CAPITAL PUNISHMENT AND CAPITAL OFFENSES[4]

The majority of survey respondents had definite opinions on the capital punishment issue. Only one person claimed to be undecided. (See table 1.1 and corresponding graph.) The vast majority of state legislators, 72.5 percent, support the death penalty while 25.5 percent oppose capital punishment. These figures are in contradiction with another data set which illustrates legislators' 73.9 percent agreement with the statement that the death penalty is too arbitrary.[5] (See table 1.2 and corresponding graph.) Factors influencing legislators' opinions on capital punishment are depicted in table 1.3 and the corresponding graph.

Personal beliefs have a "heavy" influence on 80.4 percent of the legislators, while constituents' letters "heavily" influence only 15.4 percent of the respondents. Though 34.6 percent of the legislators indicated the moderate influence of constituent letters, 50 percent said that constituent letters had little or no influence on their opinion. This finding may be explained by examining the figures for the number of letters received from constituents per year. (See table 1.4 and corresponding graph.) The majority of legislators receive between one and five letters per year on this issue, which may not be enough to influence their beliefs. The same might be said of newspaper articles which, perhaps because of their propensity to

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[4] For an in-depth analysis of legislative opinion during the phases of capital punishment reenactment, please see "A Review and Analysis of the 1982 New Jersey Legislative Decision Making Process Reenacting Capital Punishment in New Jersey," by Connie Chen, and ""Newspapers, Crime, and the Public: The Role of the Media in the Reinstatement of the Death Penalty in New Jersey," by Tanya Minhas.

[5] Damon Watson examines the question of arbitrary sentencing in his research paper titled, "Death on a Whim: The Arbitrariness of the New Jersey Capital Punishment Statute." Kwanza Jones discusses artibrariness as it relates to African-Americans on death row with her research on "The Disproportionate Representation of Black Americans on Death Row as Facilitated by Biases within the Criminal Justice System."

sensationalize the issue, are identified as having slight to no influence on 92.4 percent of the respondents. Lobbying groups, on the other hand, were the least influential with 94.0 percent of the legislators indicating that presentations by lobbyists influenced their beliefs only slightly, if at all.

But even more systematic methods of gauging public opinion meant very little to the overwhelming majority of legislators. Opinion polls on the death penalty have slight to nil influence on 84.0 percent of the legislators responding and less than ten percent (9.6) of the respondents assessed their constituents' positions with their polls of their own. (See table 1.5 and corresponding graph.)

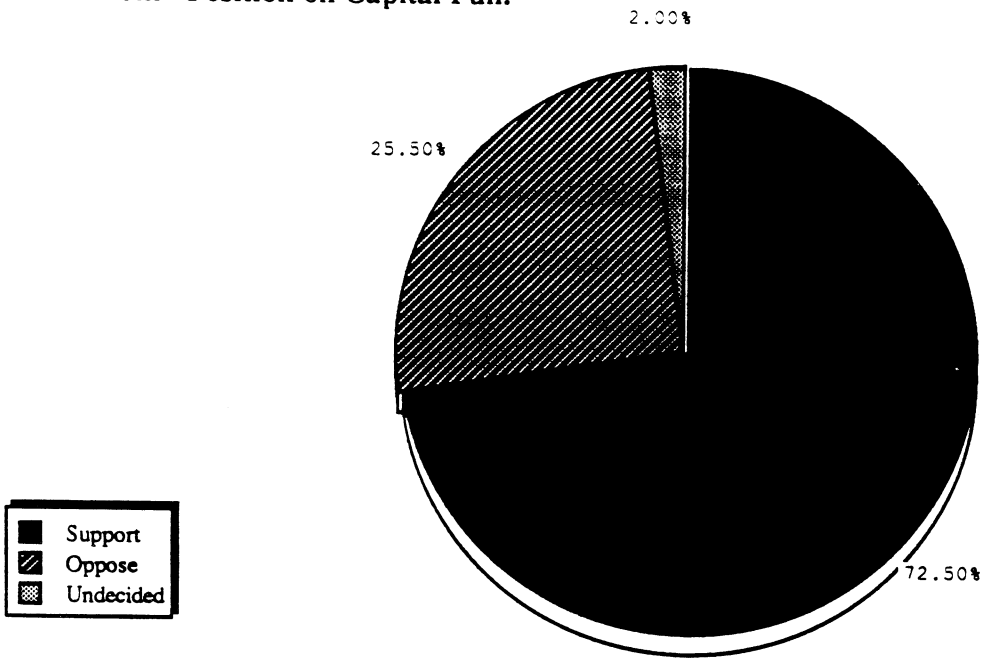
23X

TABLE 1.1. Position on Capital Punishment*

	I support capital punishment	I oppose capital punishment	I am undecided about my position
No. of respondents	37	13	1
% of respondents	**72.5**	25.5	2.0

* Total number of legislators responding to this question: 51
NOTE: The boldface type indicates the position with the highest percentage of responses.

Data from "Position on Capital Pun."



24X

Table 1.2. Agree/Disagree Statements*

	Agree	Disagree	Don't Know	Other
Statement I: Although I support the death penalty, I wish we had a better way of stopping murder and repeat offenders.	36 73.5%	1 2.0%	1 2.0%	(I don't support the death penalty) 11 22.5%
Statement II: The death penalty is too arbitrary; some people are executed, while others only serve prison time for similar crimes.**	34 73.9%	12 26.1%	0 0.0%	N/A
Statement III: The death penalty is important because it allows society to vent its anger and gain some revenge when heinous crimes are committed.	17 34.0%	33 66.0%	0 0.0%	N/A
Statement IV: If the death penalty were enforced more often, there would be fewer murders in this country.	29 59.2%	18 36.7%	2 4.1%	N/A

* The number of responses to each statement are as follows: Statement I: 49; Statement II: 46; Statement III: 50; Statement IV: 49

NOTE: Positions illustrating the majority of legislative support are occasionally highlighted for emphasis.

** This question was placed in the survey to assess legislative opinion on proportionality review. For additional information on this timely topic, please consult Alexis Doñé's paper on "An Analysis of Proportionality Review" and Natasha Moore's research on "Proportionality Review, Arbitrariness, and The Death Penalty: An Examination of Comparative Proportionality Review in State Supreme Courts Outside of New Jersey."

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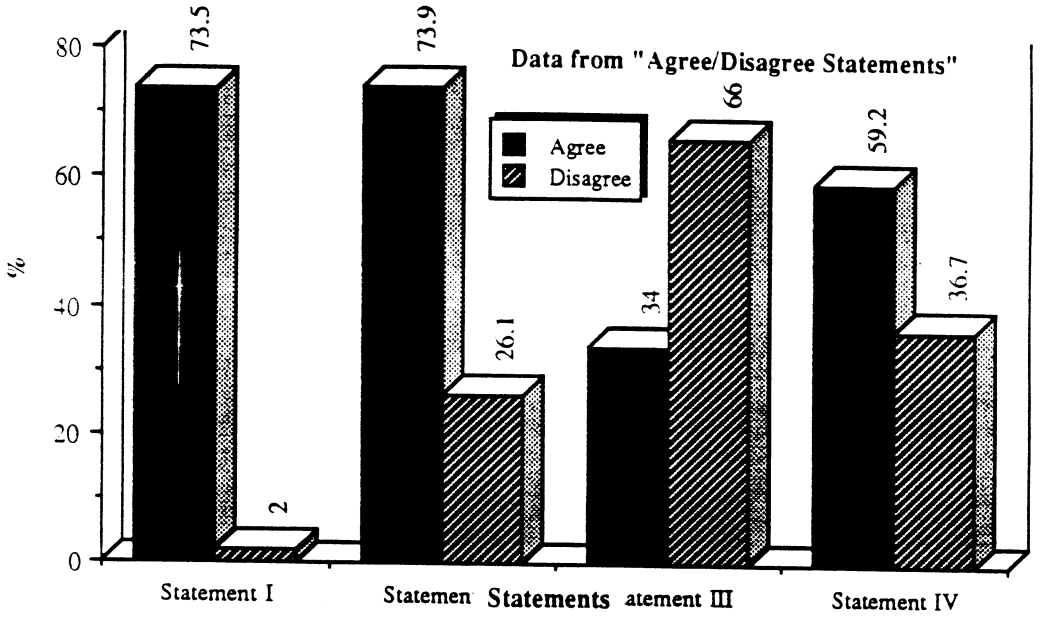
Data from "Agree/Disagree Statements"
Agree
Disagree
%
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60
40
20
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73.5
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73.9
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34
66
59.2
36.7
Statement I
Statemen
Statements
atement III
Statement IV

26 X

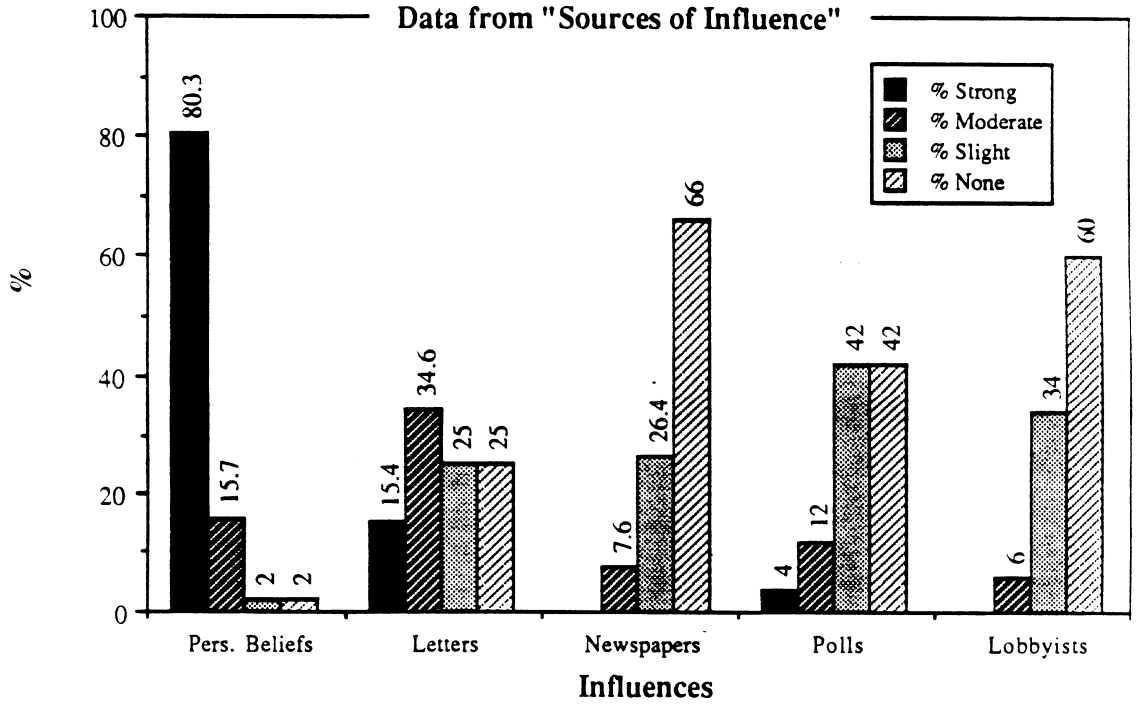
Table 1.3. Sources of Influence on Capital Punishment Position*

SOURCES	Level of Influence (in percentages)**			
	Heavy	Moderate	Slight	No Influence
Personal Beliefs	**80.3**	15.7	2.0	2.0
Voters' Letters	15.4	**34.6**	25.0	25.0
Newspapers	0.0	7.6	26.4	**66.0**
Opinion Polls	4.0	12.0	**42.0**	42.0
Lobbying Groups	0.0	6.0	34.0	**60.0**

* Total number of legislators responding to this question: 52. Please note that percentages have been rounded. Two respondents made special mention of other sources of influence: religion and knowledge of sociology and history.

** Since the total number of respondents varied for each source type (e.g., by choosing to rank personal beliefs, but not constituents' letters), responses are provided in percentages.

NOTE: The boldface type indicates the source of influence in each influence level with the highest percentage of responses.



27 X

TABLE 1.4. Number of letters received from constituents per year*

	0	1-5	6-10	More than 10
No. of respondents	17	27	4	4
% of respondents	32.7	51.9	7.7	7.7

* Total number of legislators responding to this question: 52

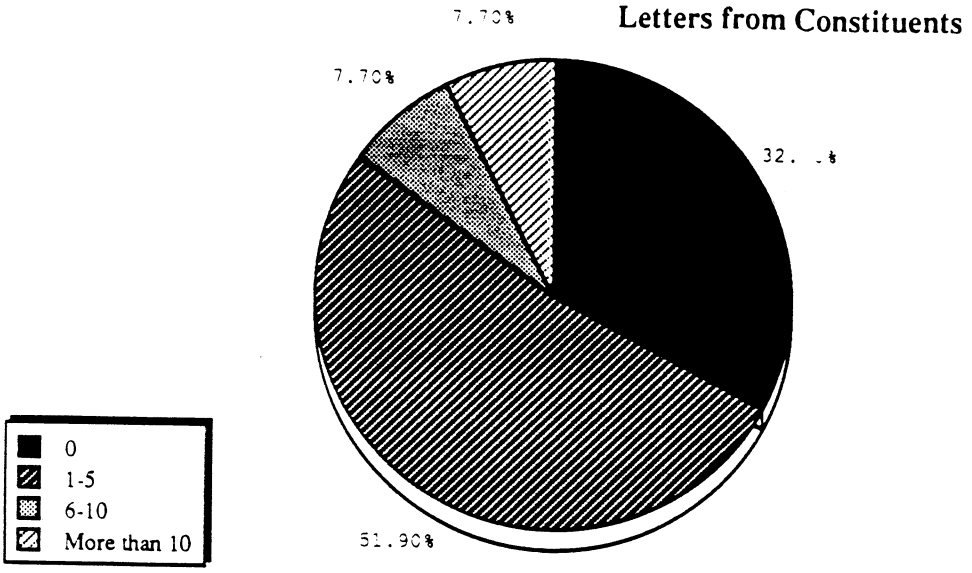
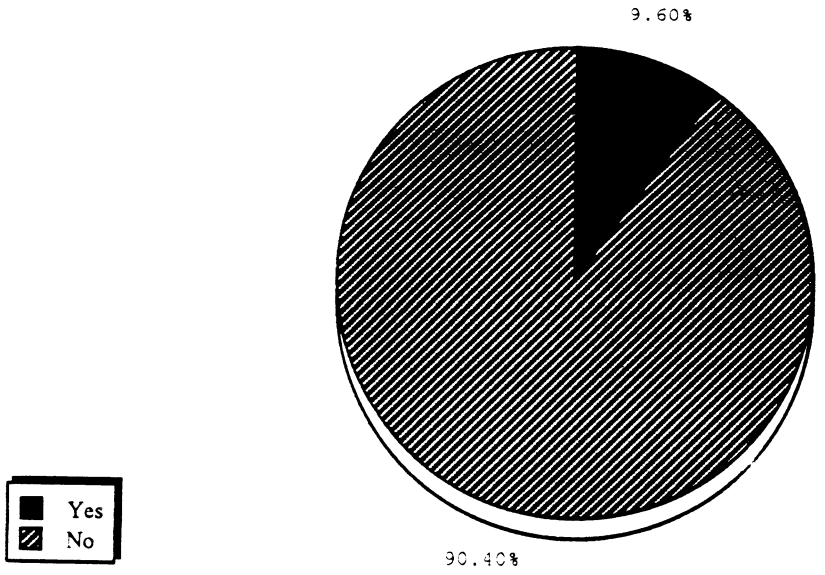


Table 1.5. Legislative knowledge of constituents' beliefs via polling*

	Yes	No
Does your staff conduct polls on capital punishment issues?	5 9.6%	47 90.4%

* The number and percent of total answers are respectively cited. A total of 52 legislators responded to this question.



28X

Part Two of this report presents data on legislators' knowledge of their constituents beliefs. The data indicate that solicitation of constituent opinions may have little or no influence on legislator's decisions to sponsor or support legislation.

PART II: LEGISLATORS AND CONSTITUENTS--A TENUOUS RELATIONSHIP

Answers to several survey questions revealed an absence of knowledge on the part of legislators about constituents' beliefs and opinions. When asked whether or not lethal injection is more humane than the electric chair, 71.2 percent of the respondents answered "yes." (See table 2.1 and corresponding graphs.) When asked whether or not their constituents believe lethal injection to be more humane than the death penalty, 73.6 percent responded "don't know."[6]

Similar results appeared in answer to the question asking which punishment constituents would prefer: the death penalty, life without parole, life without parole plus restitution, or life plus restitution and a chance for parole in 25 years. (See table 2.2 and corresponding graph.) Legislators answered that 67.4 percent of their constituents preferred the sentence of death (29 respondents). But if legislators put little credence into newspaper accounts, public opinion polls, lobbying groups, and additionally failed to solicit their own data on constituent preferences, how did the respondents know that constituents actually preferred the death penalty? Only nine legislators (20.9 percent) admitted that they don't know what their constituents would prefer. Although no current data exist on New Jersey voters'

[6] Whether or not lethal injection is more humane than electrocution is immaterial (in fact, substantial evidence suggests that it is not). The point to consider is that the overwhelming majority of respondents could not fairly represent their constituents if this ever developed into a legislative debate. For a detailed discussion of this issue, please refer to "The Medicalization of the Death Penalty," written by Karen Demers. Clinton Uhlir's research effort, "'Nor Cruel and Unusual Punishment Inflicted'--The Eighth Amendment and Methods of Inflicting Capital Punishment," also provides an interesting discussion of humaneness and capital punishment.

opinions, national survey results indicate that support for the death penalty drops when voters are provided with a choice of sentences.[7]

[7] For an in-depth analysis of alternatives to the death penalty, please refer to Alexander Southwell's research paper on "Life or Death? An Analysis of the Current Public Opinion and Justifications: the Death Penalty and its Alternatives." Derrick Milam's paper on "Capital Punishment and Perception: Public Opinion and its Influence," addresses similar issues.

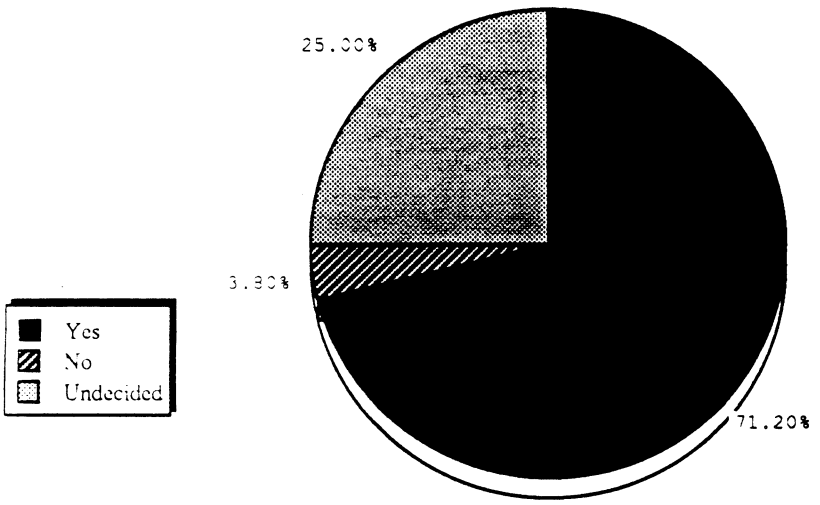
30X

Table 2.1. Lethal Injection versus the Electric Chair*

	Yes	No	Don't Know
Question I: Is lethal injection more humane than the electric chair?	37 **71.2%**	2 3.8%	13 25.0%
Question II: Do your constituents believe that lethal injection is more humane than the electric chair?	13 24.5%	1 1.9%	39 **73.6%**

* The number and percent of total answers are respectively cited. A total of 52 legislators responded to question I and 53 legislators responded to question II.
NOTE: The boldface type indicates the position with the highest percentage of responses.

Data from "Question I"



31 X

Data from "Question II"

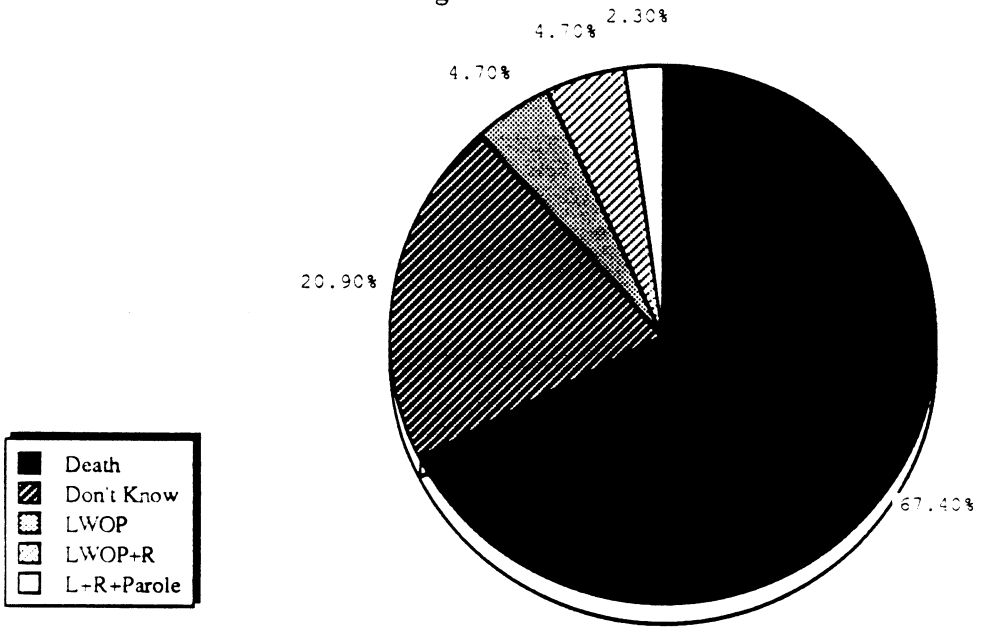
32 X

Table 2.2. Perceptions of constituents' sentencing preferences*

	Death Penalty	LWOP**	LWOP+R	L+R+Parole	Don't Know
Which punishment would your constituents prefer?	29 **67.4%**	2 4.7%	2 4.7%	1 2.3%	9 20.9%

* The number and percent of total answers are respectively cited. 43 legislators responded to this question.
** The punishment abbreviations may be decoded as follows:
LWOP = Life without the possibility of parole
LWOP+R = Life without the possibility of parole in addition to restitution for victims' families
L+R+Parole = Life sentence, in addition to restitution, but with a chance of parole in 25 years
NOTE: The boldface type indicates the answer with the highest percentage of responses.

Data from "Constit. Sentencing Prefs."



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When asked whether or not they would sponsor legislation for an alternative to the death penalty if that was what their constituents preferred, less than 20 percent of the legislators said that they would sponsor such legislation. One-third of the respondents said that they would not, and 47.9 percent marked the "don't know" response. (See table 2.3 and corresponding graphs.) When asked whether or not they would support an alternative to the death penalty if one of their colleagues sponsored it, the responses change somewhat. In addition to the 18.8 percent who would sponsor the bill, another 12.5 percent of the respondents would support such a bill if it were sponsored by another legislator. But 27.1 percent would not support such a bill, even if their constituents wanted it, and 41.7 percent were undecided. Knowledge of their constituents' opinions would positively influence only a minority of New Jersey legislators.

Table 2.3. Willingness to represent constituents' expressed interests*

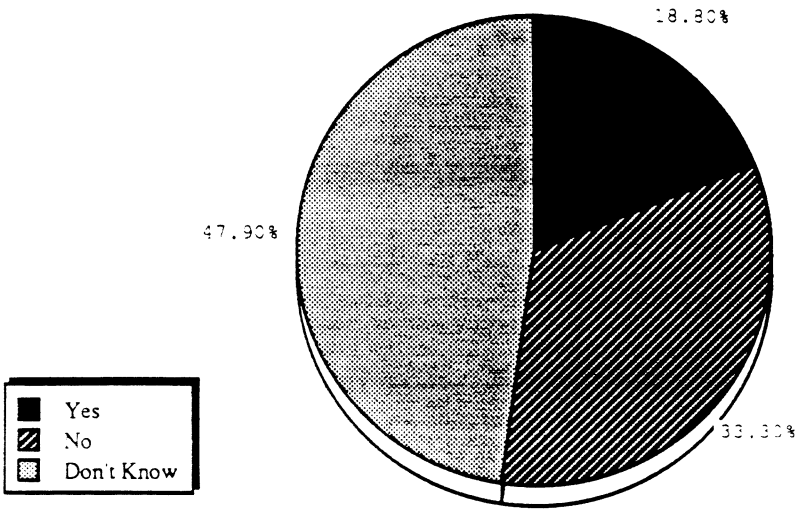
	Yes	No	Don't Know
Question I: If you were convinced that your constituents preferred to replace the death penalty with another alternative, would you sponsor legislation for that alternative?	9 18.8%	16 33.3%	23 **47.9%**
Question II: If another legislator sponsored the bill, would you support it?	15 31.3%	13 27.0%	20 **41.7%**

* The number and percent of total answers are respectively cited. 48 legislators responded to this set of questions.

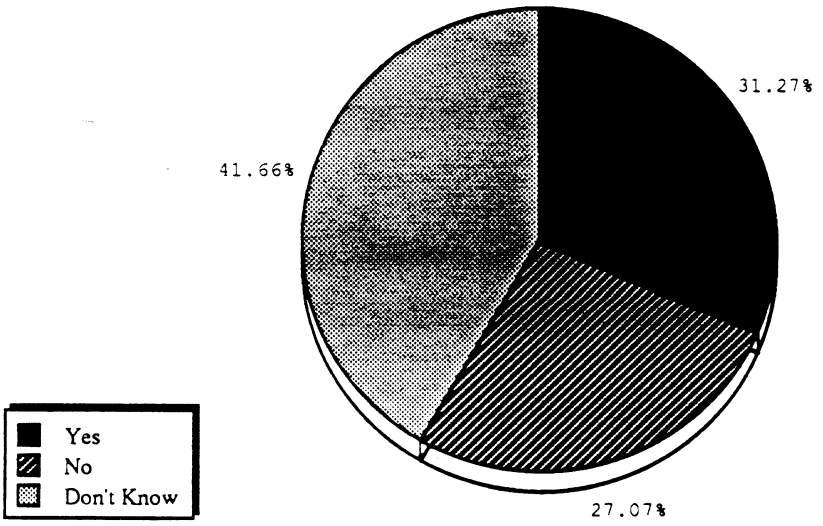
NOTE: Percentages have been rounded. The boldface type indicates the answer with the highest percentage of responses.

34 X

Data from "Question I"



Data from "Question II"



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Conclusion

The New Jersey Supreme Court's final decision in the Marshall case could focus a renewed interest in capital punishment issues among New Jersey legislators. The newly instituted legislature could address a variety of issues ranging from the undesirable length of mandatory prison sentences (see table 3.1 and corresponding graph), to the repeal or modification of the proportionality review statute, to a restructuring of the statute itself.[8] Before taking legislative action, however, legislators should certainly expand their knowledge of their constituents' preferences.

These important findings--the needs for increased legislator communication with constituent populations and adherence to the desires expressed by the electorate--were among the most surprising of our results. If legislators refuse to place credence in public opinion polls, newspapers, and lobbying groups, then they need to find alternative ways to seek constituent's opinions; how can New Jersey state legislators purport to represent if they have little, if any, knowledge of their constituent's beliefs? Representation should not be something legislators simply intuit, they should seek concrete information on their constituents' views and, if necessary, legislate in accordance with the desires of those who put them in office. Unless New Jersey legislators initiate dialogue with their constituents and actively represent the voters' interests, the state legislature will only approximate the representative democracy it purports to employ.

The argument that legislators be excused for not pursuing this issue since it has not surfaced for ten years is a poor excuse for one of the most undesirable tendencies of government. Simply because an issue is not at the fore of public thought does not mean that it should be ignored. The retroactive tendency of many governing bodies should be replaced with a proactive, or preventive, approach to problem-solving. If New Jersey and other state

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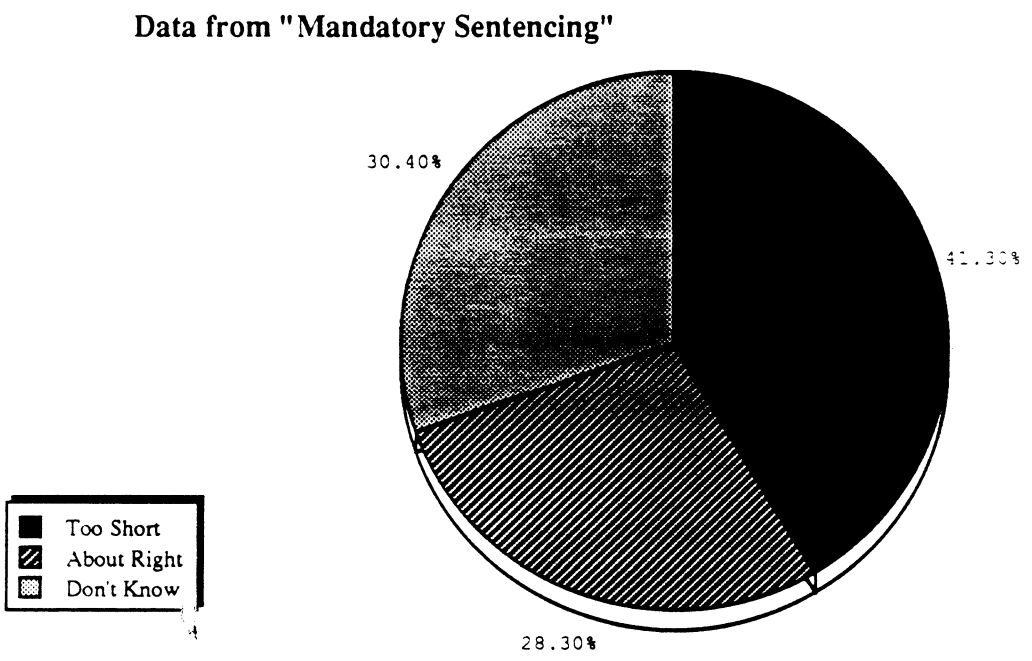
[8] Junior papers worthy of consultation on this issue include Natasha Moore's "Proportionality Review, Arbitrariness, and the Death Penalty: An Examination of Comparative Proportionality Review Outside of New Jersey," and Alexis Doñé's "The Future of Proportionality Review."

legislators refuse to look forward and pre-empt future problems, then political progress will elude this state's citizens.

Table 3.1. Legislators' Opinions on Mandatory Sentencing•

	Too Short	Too Long	About Right	Don't Know
What do you think of the mandatory sentence of 30 years in prison with restitution to the victim's family?	19 41.3%	0 0.0%	13 28.3%	14 30.4%

* A total of 46 legislators responded to this question.



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Appendix

Woodrow Wilson School
of Public and International Affairs
Robertson Hall
Undergraduate Program
Princeton, New Jersey 08544-1013
609-258-4824
FAX: 609-258-2809

November 5, 1991

Dear Senators and Assembly members:

Students in the Woodrow Wilson School of Public and International Affairs need your input for a study of New Jersey legislators' attitudes towards capital punishment. The class is studying public opinion polls in New Jersey and legislators' attitudes towards capital punishment in this state.

In order to assist their efforts, please complete the enclosed survey at your earliest convenience. You may return the questionnaire in our self-addressed stamped envelope, also enclosed. To guarantee the anonymity and confidentiality of your responses, survey results will be reported in an aggregate format. Survey findings, to be included in a Final Report summarizing all of the students' research, will be reported to the legislature early next year. Copies of the Final Report will be made available to you at that time.

Thanks in advance for assisting this academic endeavor. We appreciate the fact that you have taken the time to answer the questionnaire and we are eagerly awaiting your responses. We hope and expect that the information compiled in the Final Report will be useful to you and your staff.

Sincerely,

Leigh B. Bienen, Esq.

LBB: akw
Enclosures (3)

39 X

Thank you in advance for your time and cooperation.

1. Does your staff conduct polls on capital punishment?

   (1) yes (2) no

2. About how many letters do you receive from constituents on capital punishment issues?

   (1) 0 per year
   (2) 1-5 per year
   (3) 6-10 per year
   (4) More than 10 per year

3. What specific aspects of the capital punishment issue do these letters address?

4. Do you generally support or oppose capital punishment?

   (1) support (2) oppose (3) don't know

5. To what extent do the following sources influence your position on capital punishment? Please fill in the blanks according to the following scale:

   (1) Heavily influenced
   (2) Moderately influenced
   (3) Slightly influenced
   (4) No Influence

   Personal beliefs _____ Public opinion polls _____

   Letters from constituents _____ Lobbyist presentations _____

   Newspapers _____ Other (specify below) _____:

6. In your opinion, is lethal injection more humane than the electric chair?

   (1) yes (2) no (3) don't know

7. Do your constituents believe that lethal injection is more humane than the electric chair?

   (1) yes (2) no (3) don't know

(survey continues on the back of this page)

40 X

8. Which of the following **replacements** for the death penalty would you support? (Please check all appropriate answers)

Life in prison without possibility of parole _____

Life in prison without possibility of parole **in addition to** restitution _____

Life in prison with restitution and a chance for parole in 25 years _____

I would not support any replacement/substitute for the death penalty _____

Other (please specify):

9. Which of the following penalties is the harshest? (Provide only **one** answer, please)

The death penalty _____

Life in prison without possibility of parole _____

Life in prison without possibility of parole **in addition to** restitution _____

Life in prison with restitution and a chance for parole in 25 years _____

Other (please specify):

10. Which punishment does the greatest good for all concerned?(Only **one** answer)

The death penalty _____

Life in prison without possibility of parole _____

Life in prison without possibility of parole **in addition to** restitution _____

Life in prison with restitution and a chance for parole in 25 years _____

Other (please specify):

11. Which punishment would **your constituents** prefer? (Provide only **one** answer)

The death penalty _____

Life in prison without possibility of parole _____

Life in prison without possibility of parole **in addition to** restitution _____

Life in prison with restitution and a chance for parole in 25 years _____

Other (please specify):

12. Do you think a mandatory sentence of 30 years in prison with restitution to the victim's family is too short, too long, or about right? (After serving this sentence, the person would be eligible for parole)

(1) too short (2) too long (3) about right (4) don't know

13. If you were convinced that your constituents preferred to replace the death penalty with another alternative, would you sponsor legislation for that alternative?

(1) yes (2) no (3) don't know

14. If another legislator sponsored the bill, would you support it?

(1) yes (2) no (3) don't know

15. Do you **agree or disagree** with the following statements?

a. Although I support the death penalty, I wish we had a better way of stopping murder and repeat offenders

Agree_____ **Disagree**_____ I don't support the death penalty_____

b. The death penalty is too arbitrary; some people are executed, while others only serve prison time for similar crimes

Agree_____ **Disagree**_____

c. The death penalty is important because it allows society to vent its anger and gain some revenge when heinous crimes are committed

Agree_____ **Disagree**_____

d. If the death penalty were enforced more often, there would be fewer murders in this country

Agree_____ **Disagree**_____

Thank you very much for your assistance--we really appreciate your help! The aggregate survey results will be sent to you as part of our Final Report. If you have additional comments, please record them below.

Additional Comments (continue on an extra sheet, if necessary):

Thanks again!!

Woodrow Wilson School
of Public and International Affairs
Robertson Hall
Undergraduate Program
Princeton, New Jersey 08544-1013
609-258-4817
FAX 609-258-2809

December 17, 1991

Dear Senators and Assembly members:

Last month, students in the Woodrow Wilson School of Public and International Affairs requested your input in a study of New Jersey legislators' attitudes towards capital punishment. This month, we're **pleading** for it!! Our final report on New Jersey legislative and public opinion on capital punishment is due in *less than one month*!!

Thank you for taking the next few minutes to complete and return the enclosed survey. To guarantee the anonymity of your responses, there are no identifiable markings of any type on the questionnaire or envelope. When you return the survey, please remember to also return the self-addressed, stamped postcard so that we can cross your name off of our "call and remind to complete survey" list.

Thanks in advance for assisting this academic endeavor. Survey results will be reported in an aggregate format and will be included in a Final Report summarizing our findings. Copies of the Final Report will be made available to you early next year.

Please know that we appreciate your input and that we are eagerly awaiting your responses! We hope and expect that the information compiled in the Final Report will be useful to you and your staff. Happy Holidays!

Very truly yours,

Adrienne K. Wheatley
Class Commissioner

Enclosures (3)

43 X

A REVIEW AND ANALYSIS OF THE 1982 NEW JERSEY LEGISLATIVE DECISION MAKING PROCESS REENACTING CAPITAL PUNISHMENT IN NEW JERSEY by Connie Chen

INTRODUCTION

The year 1992 marks the tenth anniversary of capital punishment re-enactment in New Jersey. Since the New Jersey State Supreme Court has overturned 27 out of 30 death penalty sentences, apparently frustrating legislative intent, a review and critique of the "re-enactment era" is now appropriate. Using interviews and public statements made in newspaper articles and public hearings, this review conducts a three-pronged investigation of the 1982-1991 era of capital punishment.[1] Part One examines the factors precipitating re-enactment in 1982. This section will illustrate that, contrary to popular belief, changes in crime rates, public opinion, and legislative support were not the most significant factors in the re-enactment process; these factors actually remained relatively constant over the previous decade. The real catalyst was the election of a governor who would support the legislation. Part Two identifies legislative intentions in 1982. Most legislators hoped capital punishment would serve as a deterrent to murder, making New Jersey safer. Legislators favoring re-enactment were responding to the public's concern over high crime rates while making a politically popular decision. Part Three uses the legislators' 1992 retrospective view to show how the implementation period differed from their 1982 expectations. Because several implementation concerns were inadequately addressed in the 1982 re-enactment decision-making process, most legislative expectations, especially the occurrence of executions, have yet to materialize.

Capital punishment ended in New Jersey in 1972 when the U.S. Supreme Court ruled in *Furman v. Georgia*[2] that New Jersey and other state capital punishment laws were unconstitutional. In 1976 the United States Supreme Court delineated new guidelines for statutory implementation. The New Jersey legislature unsuccessfully attempted to re-enact capital punishment on three separate occasions. Legislators from 1977-1979 were unable to add a provision for restoring the death penalty because of then Governor Brendan

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1 I surveyed a small but representative sample of the entire legislative body: the leaders of both houses of government in 1982. Senate members: President, Carmen A. Orechio, (D); Majority Leader, Steven P. Perskie, (D); President Pro Tempore, Matthew Feldman, (D); Republican Minority Leader, Donald T. DiFrancesco (R); Republican Minority Whip, John H. Dorsey (R); Mrs. Wynona M. Lipman, (D); John F. Russo, (D). Assembly members: Speaker, Alan J. Karcher, (D); Assistant Democratic Majority Leader, Willie B. Brown, (D); Assistant Republican Minority Whip, Chuck Hardwick, (R). For a more complete explanation, see appendix 1.

2 408 U.S. 238 (1972)

Byrne's position against the death penalty. Byrne publicly stated that he would veto any code containing a capital punishment provision[3] and did so when the legislature attempted to revise the criminal code in 1978 and to reinstate capital punishment in 1977 and 1979. The 1982 legislation was the fourth capital punishment provision introduced since 1974.

The following examination illustrates that high crime rates, strong public support, and political elements supporting capital punishment supplied the underlying motivation for re-enactment in years leading to 1982. The only missing factor, gubernatorial support, came with Governor Kean's election in 1981.

FACTORS PRECIPITATING RE-ENACTMENT

Crime

Public concern for stemming crime growth is the basis for public support of the death penalty. No actual data, however, conclusively demonstrates any increase in crime or changes in public concerns from previous years in 1982. Legislators, nevertheless, were keenly aware of public concern for the high level of crime rates.

Statistical surveys do not provide a definitive picture of whether the public perceived crime as a worsening problem. A June 1981 poll conducted by the Eagleton Institute at Rutgers University, the only available source of statewide public opinion data, found that 41% of New Jersey citizens believed the amount of crime in their neighborhood had increased, 4% believed it had decreased, and 50% believed it had stayed the same.[4] Proponents of capital punishment would emphasize that 50% believed crime had stayed the same while opponents would emphasize that 41% crime it had increased. Emphasis on the 50% would illustrate that the public perceived crime as a urgent problem, but not more so than in previous years. Emphasis on the 41% statistic would support that the public was growing more concerned about crime. Moreover, the occurrence of two highly publicized "heinous" crimes in 1981, an assassination attempt on President Ronald Reagan and the murder of New Jersey State Trooper LaMonaco, did not seem to influence residents.[5]

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3 *Rutgers Law Review*, Volume 41:27.

4 Cliff Zukin, Director. Rutgers University, New Brunswick, N.J. Eagleton Institute of Politics Press Releases, Feb. 18, 1981-Nov. 3, 1985. New Brunswick, N.J.: 1982. June 1981.

5 Statement by Senator Wayne Dumont. New Jersey. Public Hearing before Senate Judiciary Committee on Senate, no. 112 (Death Penalty): held Trenton, N.J., February 26, 1982, State House. pg. 24

Data on crime trends in 1982 were also inconclusive. Actual crime rates in 1982 had levelled off, declining from a peak in 1980 when crime had reached its highest rate since the early 1970's.[6] In 1982, the crime rate per 1000 persons was 57%, down from 62.1% in 1981, and from 64.1% in 1980. Murder rates showed a similar downward trend. In 1982, 481 murders were committed, down from 540 in 1981 and 505 in 1980.[7] If, however, legislators only had access to '81 rates during their legislative debates, they would have seen an increase in the number of murders from 505 in 1980 to 540 in 1981.

Even though high crime rates dated back to the early '70's, and the 1982 crime situation did not clearly worsen or improve, legislators were definitely paying attention to and placing deliberate emphasis on the crime problem in 1982. At the February public hearing held by the Senate Judiciary Committee on the death penalty issue, Ed Stier of the Division of Criminal Justice suggested that "the rise in crime has brought on public support for the death penalty."[8] Advocating re-enactment, Stier elaborated: "We have seen a breakdown of society's ability to control antisocial behavior. Among the mechanisms that we have to begin to turn this trend around is the reinstitution of the death penalty."[9] Senator Lee Laskin said in an issue of the Criminal Justice Newsletter that New Jersey needed the death penalty to stem the growth of crime because it had "gotten so far out of hand,"[10] and Governor Kean's platform in 1981 included an anti-crime package with a provision for the death penalty. In fact, he credits the rising crime problem with his turn-around on capital punishment: "I had serious reservations about the death penalty in the past, but times were very different back then . . . as time went on and the crime rate increased, I reluctantly came to agree that we need a death penalty in New Jersey."[11]

If legislators had really examined public opinion on crime, or even examined statistical data on crime, they would have seen a far murkier picture. While 91% of New Jersey residents thought the crime situation was bad, there was no clear public consensus as to the best solution to the problem. Legislators, working with incomplete and

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6 State of New Jersey, Division of State Police, Uniform Crime Reporting Unit. Uniform Crime Reports, State of New Jersey 1982. Trenton, N.J.: State of New Jersey, Division of Police, 1983. The NJ Crime Division Bureau calculates the crime rate as the number of crime index offenses reported for each unit of population per 1,000, per year. p. 16. The Crime Index, in turn, is the "sum total of seven major offenses used to measure the extent, fluctuation and distribution of crime in a geographical area." These offenses include murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft.

7 Uniform Crime Reports, State of New Jersey 1982. p. 16.

8 "Prosecutor 'Agonizes' Over Death Penalty," *Star Ledger*. June 27, 1982, Sec. 1, p. 8.

9 Statement by Ed Stier. Public Hearing before Senate Judiciary Committee on Senate. pg. 2.

10 "New York-New Jersey Legislatures Push Death Penalty Bills," Criminal Justice Newsletter

11 "Senate Puts Off Death Penalty Vote to Address Constitutional Questions," *Star Ledger*. March 30, 1982, p. 1.

conflicting evidence that did not fall firmly on either side of the issue, took a convenient interpretation of the data that may have overstated the actual problem. The legislature, then, may have overemphasized the crime problem justifying a public mandate for capital punishment where no real mandate may have existed.

Public Opinion

As public support is vital to legislators' longevity, the effect of public opinion on legislative opinion was a crucial underlying factor in the 1982 re-enactment debates.

Public support was used by most legislators to defend their support for the death penalty, whether it buttressed the positions of legislators who had strong moral beliefs in favor of capital punishment or allowed legislators who were undecided or without strong moral views on the death penalty to "represent their constituents." In the sampled group of legislators, both those who supported and those who opposed the death penalty, emphasized this public support as the reason for their position. When asked why re-enactment occurred in 1982 most legislators replied, "public support was very high; the people wanted it." Former Public Advocate Stanley Van Ness' warnings that "this popular opinion may indeed change when we start to kill people," and others like it did not have much effect.[12]

Support for the death penalty in New Jersey was very strong in 1982, but not substantially different from its high level in the previous five years. Twice in the 1970's a majority of constituents voted in non-binding public referendums to reinstate the death penalty.[13] In a comprehensive poll on the death penalty question taken by Eagleton in 1977, 72% of New Jersey residents supported the death penalty, "cutting across the state's political and demographic lines."[14] In 1981, Eagleton conducted its last poll on the death penalty question prior to the re-enactment in a portion of a larger poll on the legislative agenda. The survey asked whether respondents favored or opposed "restoring the death penalty for murder."[15] 73% of the respondents favored the restoration of capital punishment while 17% of the respondents opposed the restoration.[16]

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12 Statement by Stanley Van Ness. Public Hearing before Senate Judiciary Committee on Senate. p. 32.

13 Thomas H. Kean. The Politics of Inclusion. New York: Free Press, 1988. pg. 180.

14 Zukin, February 1977. Approval was strongest among conservatives with 80% in favor, Republicans 78% in favor, two-thirds Democrats and liberals in favor, men favor it over women 77% to 66%, 75% of Catholics and Protestants also approve. The only exception to the strong support is support among non-whites. Non-whites opposed 47% and favored 43%.

15 Zukin, February 1981.

16 Zukin, February 1981.

Notwithstanding high levels of public support, re-enactment was not a priority on the public's agenda in 1982[17]; the economy and elections headed the list.[18] The re-enactment measure was introduced in the 1981 gubernatorial election. However, there was no controversy on the topic since front-runners Florio and Kean both supported re-enactment.[19] According to *New York Times* reporter Joseph Sullivan, "The death penalty issue wasn't on the front burner, but it's an issue that's always around."[20] The absence of public clamor for re-enactment supports the view that re-enactment was not a pressing public question in 1982: "It didn't seem public at all. People weren't knocking on doors or petitioning on the issue."[21] In the 1982 senate hearing Senator Joseph Hirkala said:

> After 14 years in the legislature, I might have gotten six letters in all that time that favor the death penalty. I am not getting any telephone calls. I don't think I have ever gotten one telephone call saying: 'Senator , I want you to vote for the death penalty.'[22]

Only President Pro Tempore Matthew Feldman received a substantial amount of mail and calls on the death penalty issue with supporters "greatly outnumbering" the opposition.[23] Senator John Dorsey, Assembly member Donald DiFrancesco, and Assembly member Alan Karcher also received some correspondence. Mail actually received by legislators rarely came from their constituents; the majority of mail and calls were from interest groups such as the ACLU and Right to Life organizations though the legislators dismissed these groups.[24] Senate Majority Leader Stephen Perskie was not surprised by the dearth of public response, "this was the kind of issue that doesn't attract a lot of correspondence."[25] Senator Wynona Lipman agreed, saying that her constituents

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17 The fact that re-enactment was not a priority on the agenda in '82 should be construed to mean that crime was not a priority in '82. Crime in New Jersey was actually a top five issue for residents in 1982. According to an October 1982 Eagleton Poll, 31% of registered voters felt the economy was the "most important problem facing the state that the new Governor will have to solve." 12% saw social services, 11% saw taxation, and 10% saw crime as the most important. 14% voters did not know.

18 Zukin, October 31, 1991.

19 Interview with Carmen Orechio. New Jersey State Senator, 30th District. November 1, 1991.

20 Interview with Joseph F. Staffwriter, *The New York Times*. November 5, 1991. "During his gubernatorial campaign, Kean stated that he favored the death penalty bill," said Sullivan.

21 Interview with Al Harris, Executive Director for New Jersey Legislative Black Caucus, legislative aide to Willie Brown, New Jersey State Assembly Member, 29th District. October 31, 1991.

22 Statement by Joseph Hirkala. Public Hearing before Senate Judiciary Committee on Senate

23 Interview with Matthew Feldman. New Jersey State Senator, 37th District. October 28, 1991.

24 Refer to the subsection title *Interest Groups and Legislators' Personal Beliefs* for a more complete discussion.

25 Interview with Stephen Perskie. Head, Casino Commission. Former New Jersey State Senator, 2nd District. October 28, 1991.

usually do not write or call, "I don't usually get mail from my district, the Newark district; instead I must always consider the mute needs in my district."[26]

Despite the absence of communication with constituents, legislators in 1982 emphasized high levels of public support for capital punishment. Many legislators revealed that they assessed public opinion without seeking or receiving input from their constituents; they simply "knew" support was high and acted on that basis. Most legislators did not bother to conduct polls or even read national polls on the death penalty question. "It has been my district for 24 years. I should know how the people feel; it's my business to know what they want," said Feldman.[27] Of the 11 legislators interviewed, only Dorsey conducted polls in his district.[28]

Accurate or not, legislators formed intentions in 1982 mostly based on incomplete information or assumptions of continuing strong public support for capital punishment. Since none of Eagleton's 10 polls conducted in 1982 asked about the death penalty issue, most legislators relied on public opinion data from previous years to gauge public sentiment.[29] That New Jersey's strong support for the death penalty as documented in the 1977 and 1981 Eagleton polls are good indicators of 1982 opinion is a valid assumption. But the fact that the overwhelming majority of legislators neither sought current information nor examined other polls discussing alternative solutions to the crime problem is telling.

This indifference to relevant data on public opinion caused both Public Defender Dale Jones and Alan Karcher to accuse the legislature of being out of tune with public opinion: "For all of the superficial sentiment that was reflected in the polls, when you get down to specifics that wasn't the case," said Karcher.[30] Legislators' perception of public support for the death penalty was probably more often projected onto the public than actually gathered from the public. Assessment of public opinion may have been colored more by what they thought their constituents wanted than by actual feedback. Legislators also did not attempt to gauge public opinion by examining related issues which touch upon public concern for crime, such as gun control. Most importantly, legislators did not consider or publicly evaluate the fact that support for capital punishment drops (78% to 50% nationally) when polling questions offer an alternative such as life in prison without

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26 Interview with Wynona M. Lipman. New Jersey State Assembly Member, 29th District. October 30, 1991.

27 Feldman, October 28, 1991.

28 Horan, Mariann. Head legislative aide to John H. Dorsey, New Jersey State Senator, 25th District. October 29, 1991.

29 Political watchers such as Director of the Eagleton Poll, Cliff Zukin, said taxes and elections were far more important in 1982: "We did not poll on the death penalty in 1982 because it wasn't an issue."

30 Interview with Alan J. Karcher. Former New Jersey State Assembly Member, 19th District. October, 30, 1991.

the possibility of parole (LWOP). In fact, statewide public opinion polls conducted in New York and California actually show a preference by the public for the life imprisonment option over the death penalty.[31]

In summary, legislators in 1982 assumed a high level of public support for capital punishment, paying specific attention to statistics that supported capital punishment without a complete investigation of conflicting data and the variables underlying support or opposition; they relied on broad single-question surveys. Ironically, legislators who did not consult public opinion data circumvented the problems of reliance on polling data. Actually, public support was not any stronger than in previous years, and possibly weaker than legislators assumed when the possibility of alternative solutions was offered.

Political Elements Favoring Re-Enactment

In May of 1982, the Senate passed Bill 112 to reinstate the death penalty in New Jersey by a vote of 31-6.[32] The Assembly vote passed the bill in June with a vote of 54-19.[33] After adding provisions to ensure constitutionality, such as proportionality review and a mandatory 30 year minimum sentence for convicted murders who did not receive the death sentence, the final Senate vote on June 28 was 29-6.[34] The sources of influence which precipitated this strong support for re-enactment include a bandwagon effect[35], growth of conservative ideology, political timeliness, and strong leaders. The political factors supporting the 1982 re-enactment of the death penalty are related to public opinion and again touch upon the relationship between constituents and legislators. Legislators added these political factors to perceptions of high crime concern and belief in strong public support for capital punishment in the decision-making matrix. With such a convergence of supporting elements, legislators realized they could look politically "good" by supporting capital punishment.

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31 Amnesty International USA. "New York Public Opinion Poll, 1989." and "Californians' Attitudes About the Death Penalty." For a more complete discussion of the preference for LWOP option, please see Alex Southwell's paper, "Life or Death." At least 11 states who have performed more extensive polls do not unanimously support the death penalty with 5 states actually preferring LWOP.

32 Journal of the Senate. May 6, 1982 and June 28, 1982.

33 Minutes of the General Assembly. June 21, 1982.

34 Journal of the Senate. May 6, 1982 and June 28, 1982. The loss of two votes on the proponents' side did not result from defections or abstentions. These two legislators were merely absent at the time of the vote.

35 This refers to the initial vote on the provision.

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I. Bandwagon Effect

A national trend in the passage of re-enactment legislation may have affected New Jersey state politics. According to the Gallup Poll, national support for the death penalty grew from 49% in 1971 to 66% in 1981.[36] By 1982, 36 other states had already re-enacted the death penalty. In fact, the New Jersey modeled its bill after Georgia's capital punishment statute.[37] In 1987, Attorney Farmer of the Team Defense Project characterized the move for capital punishment as, "The other states said, 'C'mon the waters are fine!' and NJ jumped in."[38] Most legislators, however, did not perceive national pressures as significant. Only Al Harris noted a spill-over effect in 1982, "Other states were enacting it, it was only natural for New Jersey to do it also."[39]

A bandwagon effect may have increased legislative support of re-enactment when legislators who were undecided realized the legislation would pass with a large majority of votes. If the legislation was successful, they would gain political benefits. If it was not, they could disperse the blame to other legislators. "Senator Dorsey wasn't a lone person supporting the death penalty. In that way he wasn't as accountable or vulnerable to those who disagreed with his decision to support the bill," said John Dorsey's head legislative assistant Mariann Horan.[40]

II. Conservative ideology

Conservative ideology, often associated with support for the death penalty, was growing in New Jersey. In 1982 New Jersey and the entire nation became more conservative, continuing the 1970's trend. A 1982 Gallup poll found 34% of the nation describing themselves as conservative and only 15% describing themselves as liberals.[41] Although strict empirical data on the ideological leanings of the 1982 New Jersey electorate is unavailable, newspaper articles on New Jersey events reflect the conservative sentiment. In a 1981 news article about the death penalty in New Jersey, UPI writer Pamela Brownstein wrote, "The country is moving to the right and is getting tougher on

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36 The Gallup Poll Monthly, June 1991.
37 Rutgers Law Review. Volume 41:27.
38 *New Jersey Law Journal*, 3/12/87, p.30.
39 Harris, October 31, 1991.
40 Horan, October 29, 1991.
41 The Gallup Poll 1982. 1981 was the first year Gallup polled on conservatism/liberalism since the poll began in 1935. In 1982, 41% people described themselves as on the center.

criminals."[42] According to O'Neill, "New Jersey shifted to the right with Ronald Reagan and dissatisfaction of the liberal reforms of the 1960's and '70's."[43] He also cites the rise in the drinking age and the decrease in the popularity of marijuana as markers of growing national conservatism. In New Jersey, a February 1981 Eagleton poll measured a decrease in the support for the legalization of marijuana and a strong support for capital punishment.[44]

New Jersey legislators recognized the conservative trend. In an April 1981, *New York Times* article, Senator John Russo said he hoped the legislators elected in the upcoming 1981 November election would "reflect the growing conservative mood among the electorate on the death penalty."[45] Similarly in a November 1981 UPI article, 1982 Assembly Speaker Alan Karcher, who voted against re-enactment, discussed the rise in support for capital punishment as a manifestation of the "conservative approach to crime that has been popular in recent years."[46]

Ideological leanings were more important than party affiliation on the death penalty issue.[47] With such a strong margin of victory, support for the death penalty in New Jersey was clearly bi-partisan. All the legislative leaders interviewed agreed that there was "no party line" on the death penalty issue and party unity was "cut" because of this.[48] Legislative leaders, usually able to command unity behind an issue, voted on opposing sides of the issue. Interestingly, many members of the minority group of dissenters were leaders of the majority party. Two of the five Democratic senators who opposed the bill in the Senate were Majority Leader Stephen Perskie and President Pro Tempore Matthew Feldman.[49] In the Assembly, four of the 19 dissenters were members of the leadership.[50] Out of the 19 dissenters, 3 were Republicans and 16 were Democrats.[51] Such strong support for capital punishment by members of the Democratic party is less paradoxical than it might appear. Democrat John Russo, Senate Judiciary Committee Chairman, sponsored

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42 Brownstein, Pamela. "The Onslaught of Anti-Crime Bills," United Press International. January 29, 1981.

43 Tom O'Neill, October 30, 1991.

44 Zukin, February 1981.

45 Barry, Michael. "Death Penalty: Its Prospects Have Improved; Trenton," The New York Times. April 5, 1981. Section 2, page 1, column 5.

46 United Press International. November 28, 1981.

47 Orechio, November 1, 1991.

48 United Press International. November 28, 1981.

49 Journal of the Senate. May 6, 1982 and June 28, 1982.

50 Speaker Alan Karcher, Assistant Democratic Majority Leader Willie Brown, Assistant Republican Minority Whip Chuck Hardwick, and Deputy Assistant Republican Minority Whip Karl Weidel.

51 Minutes of the General Assembly. June 21, 1982.

the legislation and managed to win a majority of votes the three times he introduced the bill in the '70's.[52]

III. Proponents of Capital Punishment Held Key Political Positions

The passage of any bill often depends on political support within the infrastructure of the state government. In 1982 this structure was very favorable to re-enactment.[53] Committees enjoy great powers over legislation through their capacity to report or not to report bills and through their prerogatives in the amendment and rewriting of proposed re-enactment measures.[54] Eight of the nine Senate Judiciary Committee members supported the legislation.[55] Perskie attributes the powerful push toward re-enactment in 1982 to the fact that "seasoned legislators" advocated the legislation.[56] According to Horan, if a strong opponent of the death penalty had been chairman, things would have been different: "Laws often are passed by chance, depending on who's sitting in the governor's seat, who's heading a committee, maybe a bill never gets past a committee chair. Everything was in favor of this bill."[57] Only Russo and Orechio discount the influence of the infrastructure, maintaining the measure would have passed whether or not Russo was committee chair.[58]

IV. Political Leaders

The support and influence of political leaders and personalities were crucial factors in the 1982 re-enactment. Russo was an important force as the sponsor of the death penalty bill. "In 1982 John Russo had emerged as a leader in the Senate, a rather dominant force," said Karcher, "it was sort of an obsession of Russo's to have a death penalty back on the books."[59] Since 1974, Russo had pushed 4 versions of death penalty legislation. "I have always historically supported the death penalty. Based on what I had seen as a county prosecutor in Ocean County for 10 years, I felt New Jersey needed a death

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52 Interview with Chuck Hardwick. New Jersey State Assembly Member, 21st District. October 31, 1991.

53 The political complexion of the legislature in 1982 was 22 Democrats and 18 Republicans in the Senate, and 43 Democrats, 37 Republicans in the House.

54 V. O. Key. Politics, Parties, and Pressure Groups. New York: Thomas Y. Crowell, 1947. p. 670.

55 Four of the nine members are Republican: Paolella, Gagliano, Vreeland, and Gallagher.

56 Perskie, October 28, 1991.

57 Horan, October 29, 1991.

58 Russo, October 29, 1991 and Orechio, November 1, 1991.

59 Karcher, October 30, 1991.

penalty," he said.[60] All of the legislators interviewed mentioned his influence in the legislature and his motivations for supporting capital punishment, including his background as a prosecutor and the murder of his father.[61] Russo's influence increased when he became Senate Majority Leader in August of 1982.[62]

The single most important leader, impelling the re-enactment of capital punishment in New Jersey, however, was newly-elected Governor Tom Kean. According to Russo, "Nothing happened in 1982 except we had a new Governor who favored it. I would have been done eight years ago, had that been the case then."[63] All the factors supporting re-enactment, including Russo's sponsorship, a majority of supporters in the legislature, and strong public support, existed previously during Governor Byrne's term in office. "One Assemblyman was prompted to declare the issue dead in New Jersey until 1982, when then-Governor Byrne would leave office," wrote the 1982 New Jersey Law Journal editorial board.[64] In short, re-enactment of capital punishment legislation did not occur before 1982 in New Jersey, because the governor during that time simply would not support the legislation.

In his new role as governor, Kean took advantage of his ability to set the legislative agenda. He began by spearheading capital punishment re-enactment. Legislators realized that with the support of the governor, re-enactment was now a realistic goal. "If the governor sets a policy so that the administration favors a certain stance, that will influence people in your party," said Lipman.[65] During the 1981 campaign, Kean promised a series of anti-crime bills to stop violent crimes in New Jersey, including a death penalty provision for the Criminal Code. "New Jersey will have a death penalty next year," he promised new State troopers in February of 1982.[66] Kean believed the death penalty would send a message to criminals of swift punishment and avenge the death of state trooper LaMonaco.[67] He was also involved in drafting the death penalty legislation, amending the bill to sentence those who did not receive death to include a mandatory minimum of 25 years for those who did not receive the death sentence.[68]

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60 Russo, October 29, 1991.

61 John Russo's father was killed resisting a robbery attempt on New Year's Eve in Asbury Park in 1970.

62 Perskie, October 28, 1991.

63 Statement by John Russo. Public Hearing before Senate Judiciary Committee on Senate. p. 13.

64 *New Jersey Law Journal*, 3/18/82

65 Lipman, October 30, 1991.

66 "Kean Assures State Troopers," *Star Ledger*. February 12, 1982, p. 17.

67 "Kean Assures State Troopers," *Star Ledger*. February 12, 1982, p. 17.

68 Statement by Ed Stier. Public Hearing before Senate Judiciary Committee on Senate. p. 5.

As subsection Public Opinion illustrates, the re-enactment of the death penalty was not a priority on the public's agenda in 1982. But New Jersey legislators' awareness of the chance to realize political gain, a result of their interpretation of strong public support coupled with the reality of passing death penalty legislation, served to put the issue on the legislative agenda.

Legislators Dismissed Compelling Arguments Against Re-Enactment

I. Interest Groups and Legislators' Personal Beliefs

Legislators placed great importance on public support for capital punishment, as they perceived it, while ignoring the vocal objections of interest groups. Interest groups had minimal influence with the legislators. As the evidence will show, most legislators had already made up their minds and the interest groups present were not powerful lobbies.

At the senate judiciary committee public hearing held in February of 1982 on the re-enactment issue, 20 of the 22 witnesses who spoke opposed death penalty restoration.[69] The speakers opposed to re-enactment included the ACLU, Amnesty International, NJ Council of Churches, and private citizens. Their arguments centered around the possibility of error, evidence of racial discrimination in capital punishment sentencing, lack of evidence supporting the death penalty as a deterrent for murder, the cruel and unusual nature of the punishment, and the overwhelming costs of implementation. Ray Kalainikas, a private citizen, introduced the most interesting attempt to sway the legislators: "I believe in an eye for an eye, if we kill we will be killed in the same way."[70]

The public advocate's office, a strong opponent of capital punishment, was notably absent from the roster of speakers at the hearing. According to Jones, "The Public Defender keeps out of legislation in case they have to come back and oppose it."[71] Jones

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69 Proponents present at public hearing: Edwin Stier, Director Division of Criminal Justice; Senator Wayne Dumont. Opponents present at public hearing: Stanley Van Ness, Former Public Advocate; Elmer Matthes, New Jersey Catholic Conference; Joseph Chuman, Coordinator Northern New Jersey Group, Amesty International; Dr. Howard Radest, Bergen County Committee for Religious Tolerance; Sarah Dike, National Council on Crime & Delinquency; Neil Cohen, Legislative Coordinator, Public Interest Lawyers of New Jersey; Frank Askin, General Counsel, ACLU; speaking on behalf of Public Interest Lawyers of New Jersey; Henry Schwartzchild, Director Capital Punishment Project ACLU; Isadore Zimmerman, private citizen, former death row inmate; Doris Havran, President Lutheran Church Women of New Jersey; Raymond Kalainikas, private citizen; Enrique Aroyo, head of the Puerto Rican Caucus; Ann Ricks; Edwin Kruse; Lucy MacKenzie.
Statements: Letter from Rabbi Eric B. Wisnia, Congregation Beth Chaim, West Windsor NJ; Statement from New Jersey Synod Executive Board Lutheran Church in America; NJCC Position.

70 Statement by Ray Kalainikas. Public Hearing before Senate Judiciary Committee on Senate.

71 Statement by Dale Jones. Panel Interview at Princeton University. October 9, 1991.

said that the public defender's office, instead, puts unofficial pressure on legislation: members from the office unofficially contact the ACLU or the Association of Criminal Defense Lawyers, which employs a lobbyist to work on defeating death penalty legislation. The public defender's liaison to the legislature, John Cannel, saw little point in even suggesting amendments to the bill. "I don't compromise with the devil. Whatever they decide to enact, I'm sure we'll find some constitutional ground on which to attack it."[72]

Each legislator gave different reasons for discounting the testimony of interest groups. According to Perskie, lobbyist groups had a minor impact because "there are so many they tend to cancel themselves out. Very few votes were cast or changed by public interest groups."[73] Legislators, moreover, were not going to consider rational arguments on an emotional issue.[74] "It would have been exactly the same 29-6 even if no interest groups showed up," said Perskie.[75]

Feldman, on the other hand, believes that opinions expressed by lobbyist groups had such a minimal effect because they "represented a small group, not numbers."[76] 1982 *New Jersey Reporter* President Tom O'Neill emphasized the small groups' lack of monetary power.

> [The re-enactment of the death penalty] was not a vote you would trade on, a vote that would be swayed by money interests. You would not win big political contributors with your vote because the lobbyist groups were not big players such as the education association, auto, contractor's league. While the ACLU is a very visible and vocal groups, it's not going to contribute $100 million to your campaign.[77]

Even moral arguments exemplified by a highly publicized letter from a Catholic bishop to Governor Kean asking him to be "politically courageous" seemed to have little effect.[78]

A further strike against interest groups, said legislators, was their lack of new information or arguments to present in 1982. The Senate held hearings on the death penalty question when it came up for vote in 1977 and 1979. Consequently, interest groups in 1982, many of whom had appeared previously, could not change the mind of a legislator they had not convinced before: "Everything had been said before; there were no

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72 "Death Penalty Expected to Clear Hurdle," Star Ledger. May 16, 1982, Sec. 1, p. 1.
73 Perskie, October 28, 1991.
74 Feldman, October 28, 1991.
75 Perskie, October 28, 1991.
76 Feldman, October 28, 1991.
77 Interview with Tom O'Neill. Former President of the New Jersey Reporter. October 30, 1991.
78 "Bishop Calls on Kean to Veto Death Penalty," *Star Ledger*. April 28, 1982, p. 30.

hidden explanations. Interest groups never came into play."[79] As Senate President Carmen Orechio pointed out, many minds were already made up: "We have considered identical bills in the past. Most people know where they stand now."[80] As the death penalty is usually an issue one considers throughout life, personal beliefs and "conscience" affected the decision-making process. "Most people, when they came to the legislature, already had a position," said Orechio.[81] For this reason, Russo curtailed the number of speakers at the public hearing:

> Basically, we hear, in different ways, arguments that those of use who have studied this issue over the years have considered, pro and con, and our difficulty is . . . two pages of witnesses. If any of you have written statements that you can just submit to us, unless they do incorporate something new, it would help if they could be made part of the record. Some of us here agree with you and some don't, but we have basically considered those particular issues.[82]

II. Implementation Concerns

Legislators ignored the problems of implementation costs and race discrimination in the imposition of death sentences, also failing to seriously consider or define proportionality review.[83] Anxious to put a death penalty provision in the New Jersey criminal code, they largely adopted Georgia's death penalty statute.[84]

The monetary burden placed on the judicial system in order to implement capital punishment had no influence on legislators. In May of 1982, the assembly defeated a bill introduced by Assemblyman Karcher which required a fiscal note to determine the cost of death penalty implementation. A death penalty trial requires certain resources: juries are sequestered from biasing influences, defendants are housed in special cells, double security is present at all court hearings, overnight transcripts are provided to counsel, and appeal is automatic to the New Jersey Supreme Court.[85] Special services and care are taken to provide every protection for the defendant. Nevertheless, "you can't equate life with

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79 DiFrancesco, October 28,1991.

80 Orechio, November 1, 1991.

81 Orechio, November 1, 1991.

82 Statement by John Russo. Public Hearing before Senate Judiciary Committee on Senate.

83 Public Hearing before Senate Judiciary Committee on Senate, no. 112 (Death Penalty): held Trenton, N.J., February 26, 1982, State House. When such issues were raised by lobbyist groups and other opponents of capital punishment at the February Senate Public Hearing, legislators either skimmed over or gave only superficial attention to them.

84 Rutgers Law Review. Volume 41:27.

85 "Defender Assails Death Penalty Price Tag," *Star Ledger*. May 3, 1982, p. 1. See Jennifer Weller-Polley's paper, "Dollars and Sentences", for a more complete discussion of the costs involved in a capital trial.

dollars and cents," says Russo.[86] "Cost arguments don't wash with the public since those who talk about costs the most [public defender] are the ones adding to the cost," said John Tumulty of Legislative Services, who was largely responsible for drafting the bill.[87] "Costs are irrelevant to how people think," said DiFrancesco.[88] Most legislators, moreover, thought execution was cheaper than life imprisonment. "A convicted criminal does not live on bread and water, the cost of keeping somebody alive in jail is expensive," said Horan.[89]

Several state studies have found that while the actual cost of execution is quite low, the process that condemns a defendant to death is very expensive. Comparisons of the life without possibility of parole option with capital punishment estimates that LWOP would cost the state around $800,000 at around $20.000[90] to feed and house a convicted killer in jail for forty years while New Jersey Public Defender Dale Jones estimates an average cost of $7.3[91] million per execution; Texas and Florida estimates $2 to 3 million per execution and California estimates $15 million.[92]

Part One demonstrates that underlying factors such as legislator's perception of public support and support within the legislature, combined with the igniting factor of gubernatorial support precipitated the re-enactment of capital punishment in 1982. Important elements of these factors provided the basis for legislative intentions.

LEGISLATIVE INTENTIONS

Legislators sought to address, with capital punishment, the "crucial crime problem" that underscored the strong public support for capital punishment. How the influence of crime, public opinion, and political factors translated into legislative intentions is the topic of analysis in the following section. In 1982, legislators wanted to simultaneously fight

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86 Russo, October 29, 1991.

87 Interview with John J. Tumulty. Judiciary Section Chief, State of New Jersey Office of Legislative Services Central Staff. October 17, 1991.

88 DiFrancesco, October 28,1991.

89 Horan, October 29, 1991.

90 Interview with Chris Dill. Executive Assistant to New Jersey Assistant Commissioner of Corrections, November 7, 1991. See Jennifer Weller-Polley's paper, "Dollars and Sentences", for a more complete discussion of the costs involved in a capital trial

91 Ronald J. Tabak and J. Mark Lane, "The Execution of Injustice: A Cost and Lack of Benefit Analysis of the Death Penalty." Loyola of Los Angeles Law Review 23 (Nov. 1989) p. 136. See Jennifer Weller-Polley's paper, "Dollars and Sentences", for a more complete discussion of the costs involved in a capital trial.

92 See Jennifer Weller-Polley's paper, "Dollars and Sentences", for a more complete discussion of the costs involved in a capital trial.

crime and improve their political image, acting in line with what they perceived as the public's growing conservatism and support for the death penalty. Tom O'Neill characterized a legislator's position on the death penalty either as a vote of "conscience" or "political calculation."[93]

Capital Punishment as a Deterrent to Murder

Many legislators said they sought to make New Jersey safer with capital punishment because they believed that the death penalty would serve as a deterrent to murder. "Society wanted some form of protection," stated Horan.[94] For Governor Kean, the death penalty went toward fulfilling the "most basic, fundamental obligation of any government—assuring the safety and protection of its citizens."[95] The move to re-enactment capital punishment represented the legislator's new method to stop crime.

Several legislators, including Russo and Hardwick, discounted the effectiveness of imprisonment and rehabilitation. As Senator Wayne Dumont put it, "certainly , what we have been doing the last 20 or 30 years has not in any way deterred crimes of violence. Therefore, it is time now to go to something and probably to go back to what we used to have. That is why I support it."[96] Horan argued that the need to protect all of society is more important than protecting one person:

> In terms of the error possible in death penalty cases, we feel it's better to protect all the people than one possibly innocent person. We never think about sending innocent young men into war because they are doing their duty, but we spend so much time thinking about potentially killing one innocent person. Here we are just protecting the guilty.[97]

If Horan's expression of Senator Dorsey's belief in a utilitarian public policy actually typified legislators, then beliefs and personal values certainly played a larger role in the decision-making process than can be detected by this analysis.

Legislators wanted to use the death penalty to make a "very strong statement" against murder. Although the revised State Penal Code, enacted in 1979, already addressed and intensified many of the penalties for crime, legislators felt they had not yet adequately addressed murder. "Legislators had already gotten very tough on crime in 1978

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93 O'Neill, October 30, 1991.
94 Horan, October 29, 1991.
95 Thomas H. Kean. The Politics of Inclusion. New York: Free Press, 1988. pg. 180.
96 Statement by Wayne Dumont. Public Hearing before Senate Judiciary Committee on Senate. p. 26.
97 Horan, October 29, 1991.

revising the crime code," said *Star Ledger* reporter Robert Schwaneberg, "but those who favored the death penalty believed that there are some murders so heinous, execution is the only just punishment."[98]

During the Senate debate and in public statements to the press, many supporters of reinstatement, including members of the legislature and Governor Kean, said they believed that the existence of a death penalty deterred murder, despite the lack of statistics to support their arguments.[99] Many legislators made statements similar to Senator Joseph Bubba, R-Union, who said he supported the measure because he is "*convinced* that the penalty will serve as a deterrent to murder. (emphasis added)"[100] Russo said his "private motivation" for the bill is the hope that is will save some lives and deter potential murderers. "I can't say the death penalty is a deterrent, but I feel it."[101] To Russo, uncertainty is always a factor, "there's never a way to be sure if it's the right solution, but we can't run away from it. We have to make judgments based on the best information available to us."[102]

Horan compared the perceived deterrent effect of the death penalty to the fact that, "you are very careful to obey the law when you know you automatically get your hand cut off or get executed for possessing drugs in some places of the world like Turkey."[103] In effect, she agreed with Assembly Member Thomas Shusted who said, "with the death penalty, he [the potential murderer] is going to think twice."[104] Shusted who had served as Camden County Prosecutor, was convinced the death penalty would save innocent victims.[105]

The majority of legislators also intended that capital punishment be imposed only for the most terrible crimes, although there was a minority of more punitive views. "The trouble with the death penalty is that it doesn't go far enough," said Senator Walter Shiel.[106] Laskin, who favored the bill, said, "whether the death penalty is a deterrent or not is irrelevant. If you really want to deter crime, have a public execution on television."[107] Most legislators, however, did not share those views. In reply to Laskin, Russo said he was outraged: "I'm fighting public thirst for mass execution—I won't have

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98 Interview with Robert Schwaneberg. Staff writer, *Newark Star Ledger*. October 30, 1991.

99 Conflicting studies support both sides of the deterrence question. In short, there is no conclusive evidence showing that capital punishment deters murder.

100 Brownstein, Pamela. United Press International. June 21, 1982.

101 Statement by John Russo. Public Hearing before Senate Judiciary Committee on Senate.

102 "Prosecutor 'Agonizes' Over Death Penalty," Star Ledger. June 27, 1982, Sec. 1, p. 8.

103 Horan, October 29, 1991.

104 "Death Penalty Expected to Clear Hurdle," *Star Ledger*. May 16, 1982, Sec. 1, p. 1.

105 "Death Penalty Expected to Clear Hurdle," Star Ledger. May 16, 1982, Sec. 1, p. 1.

106 Sullivan, November 5, 1991.

107 "New York-New Jersey Legislatures Push Death Penalty Bills," Criminal Justice Newsletter.

any part in mass execution. I wouldn't then and I wouldn't now."[108] Russo emphasized that his reasons for pushing for the re-enactment of the death penalty did not result from a need to avenge his father.[109] In fact, Russo has publicly stated that he would be "happy if they never executed anyone."[110] According to Sullivan, "The death penalty bill was there to be a deterrent, not to put someone to death."[111] Assembly member Thomas Paterniti sponsored a bill that would render a condemned murderer unconscious before execution. "The death penalty is not a proceeding for inflicting unnecessary pain, but rather a method of effectuating the most serious penalty possible under our criminal justice system."[112]

Political Self-Interest

Opponents of the re-enactment said political self-interest was the only legislative intention in 1982. Since the death penalty issue was more related to ideology than party affiliation, capital punishment was a conventionally safe political stance to support in the new reactionary era. "Democrats were taking the opportunity to shed their usual image and look tough on crime. It was a no-lose issue for a politician," said Hardwick.[113] 1991 *New Jersey Reporter* President Neil Upmeyer characterized the death penalty issue as being subject to demagoguery:

> The legislature uses the court's liberal stand to 'get their cake and eat it too'. They could be 'anti-crime' and wouldn't lose any sleep over it because they knew the liberal courts wouldn't allow it. It was an ideal situation akin to the abortion issue. It is an easy matter to say one way or the other--it's out of my hands, even though I really support your position.[114]

Referring to Byrne's term as governor, Karcher agreed: "My constituency was happy I voted for it, but being opposed to it I could still count on a Governor who would veto it."[115] You won't get re-elected when you are accused of being soft on crime noted Senator Lipman, who opposed the bill.[116] In a 1987 *New Jersey Law Journal* article, Assemblyman Willie Brown asserted, "Kean signed it for political reasons . . . because in

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108 Russo, October 29, 1991.
109 "Death Penalty Reinstated in Somber Bill-Signing," *Star Ledger*. August 7, 1982, p. 1.
110 Statement by John Russo. Public Hearing before Senate Judiciary Committee on Senate.
111 Interview with Joseph F. Sullivan. Staffwriter, *The New York Times*. November 5, 1991..
112 "Anesthesia Option for the Condemned," *Star Ledger*. May 18, 1982, p. 20. This bill, A1454, was never released from committee.
113 Hardwick, October 31, 1991.
114 Interview with Neil Upmeyer. President of the New Jersey Reporter. October 29, 1991.
115 Karcher, October 30, 1991.
116 Lipman, October 30, 1991.

'82 the crime problem was at its peak,[117] and the polls showed people wanted it."[118] Brown's statement illustrates the legislative interpretation of a urgent crime problem in 1982. Hardwick, who admits to being a longtime political adversary of Russo's, said sponsoring the legislation was a tremendous boost to Russo's political image. "He was elected as a fluke right after Watergate. Because he was a Democrat with a very conservative district, sponsoring the legislation helped him substantially. He could say to his constituents, 'Look, I'm just like you!'"[119]

From the perspective of those who opposed to the measure, the legislators favoring the death penalty were catering to the constituents' concerns by trying to both stop crime and look politically good. Characterizing her opposition Senator Lipman said, "'We are attempting to do what we could to stop crime.'"[120] Similarly Senator Feldman said he believed that majority had "good intentions," but that they acted "out of desperation" in response to the crime problem.[121] Karcher, agreeing with the ACLU, said that the legislators were only providing a false sense of security to the public. "My problem with it was that it was mere symbolism, not law enforcement."[122]

New Jersey legislators who favored the death penalty in 1982 hoped the threat of execution would make New Jersey safer and provide the public with a sense of justice and vindication. Even without substantive proof, most legislators believed that capital punishment would serve as a deterrent. This review now turns to the retrospective views of legislators on how expectations in 1982 about the future of capital punishment in New Jersey compares with actual implementation.

EXPECTATION VS. ACTUAL EVENTS

The series of 27 death penalty reversals since 1982 has frustrated many legislators who supported re-enactment. These unrealized expectations largely result from the lack of serious consideration given to implementation concerns by legislators in 1982.

After the re-enactment in 1982, the majority of legislators expected executions to occur relatively quickly; they are disappointed that the statute has not been implemented as planned. "I expected that capital punishment would be the law of the state and that there

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117 As shown in the above section on crime. This perception of a peak in crime rates in 1982 is false.
118 *New Jersey Law Journal*, 3/19/1987
119 Hardwick, October 31, 1991.
120 Lipman, October 30, 1991.
121 Feldman, October 28, 1991.
122 Karcher, October 30, 1991..

would be executions. I had no idea the Supreme Court would thwart the will of the people," said Hardwick.[123] The fault with the lack of complete implementation lies with a recalcitrant court, not with the legislators says Hardwick.[124] Other legislators expressed similar opinions. "I never imagined people would be languishing in jail while the courts fought it out," said Orechio.[125]

Most of the legislators who supported re-enactment expressed frustration at the "law in name only" that the death penalty statute has now become. According to Horan, Senator Dorsey thinks "it is a travesty that what the people want is not happening. It almost like it was a waste of time to pass it."[126] Dorsey would be bothered by the execution of another human being, but what has happened is "just opposite" from what he had expected.[127] He never realized the legislation would be such an "exercise in futility. Why vote for something if nothing's going to happen?" said Horan.[128] The string of reversals has subsequently caused several legislators to accuse the New Jersey Supreme court of legislating from the bench.

Those legislators who opposed the measure in 1982, though relieved that no one has been executed, are similarly surprised. "I'm sure nobody expected the number of people sitting on death row right now," said Lipman.[129] Feldman "hated to see it signed into law" and laments that the public "wants it even more now."[130] According to Harris, "Assemblyman Brown is happy that nobody has been executed, but sad that people still want it."[131]

Russo is neither surprised nor concerned about the 27 death sentence reversals: "I knew when I proposed the bill that the process [statutory implementation resulting in an execution] would take 10-15 years."[132] For him, "The bill is doing what it was intended to do, punish only the worst crimes." The cost concerns, which were irrelevant to him in 1982, remain unimportant: "You can't speed up a process to kill a human life to save money."[133] DiFrancesco, similarly discounting public concern over growing

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123 Hardwick, October 31, 1991.
124 Hardwick, October 31, 1991.
125 Orechio, November 1, 1991.
126 Horan October 29, 1991.
127 Horan October 29, 1991.
128 Horan October 29, 1991.
129 Lipman, October 30, 1991.
130 Feldman, October 28, 1991. According to recent national public opinion data, public support for capital punishment has only increased.
131 Harris, October 31, 1991.
132 Russo, October 29, 1991.
133 Russo, October 29, 1991.

implementation costs said, "costs should be looked at as an education tool. Now that we have experience with it, we have learned that we don't need that number of bureaucratic appeals that are in place."[134]

Karcher "feels vindicated"[135] that the costs of imposing capital punishment have proven to be so high. The 1982 bill he introduced requiring a fiscal note to be performed to determine the costs of implementing capital punishment failed in the Assembly. "It's a waste of money and it doesn't work," said Karcher.[136] He had hoped the figures calculated in the fiscal note would educate the public on the impracticality of the death penalty. Instead of capital punishment, he suggested, you should "take the $50 million dollars [the state has invested in implementation] and put it into the police force."[137] Karcher does not foresee an execution in New Jersey in the near future.

Ironically, most legislators who supported re-enactment expected executions to occur while disregarding implementation concerns. It seems more likely that a legislator who did not expect executions to occur, since the mere existence of the law would deter murders, could more easily ignore the problems of implementation than a legislator who expected executions to take place.

SUMMARY AND CONCLUSION

"There was nothing magic about 1982, no particular case in the spotlight or increase in the crime rate . . . the death penalty was debated all during the '70's. 1982 was somewhat anti-climactic," said Tumulty.[138] The re-enactment of capital punishment in 1982 was simply the convergence of several supportive factors, an end to the eight-year attempt to restore the death penalty to New Jersey law. As Horan puts it,

> It could fly in 1982 because the timing became internally and structurally special. The external interest groups had nothing to do with influencing the passing. Instead, the public wanted it, the 'players' had come to fruition, and the position was right.[139]

Among the many underlying factors which favored the re-enactment in 1982, the crucial catalyst was the election of a governor willing to sign the legislation. Favoring capital punishment was an easy political stand to take in 1982, but it had been a favorable position

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134 DiFrancesco, October 28,1991.
135 Karcher, October 30, 1991.
136 Karcher, October 30, 1991.
137 Karcher, October 30, 1991.
138 Tumulty, October 17, 1991.
139 Horan, October 29, 1991.

since the early '70's. Public concern for crime, Russo's forceful sponsorship, and strong general support had also existed throughout the 1970's. The key factor in 1982 was the support of Governor Kean.

Legislators' intentions for a death penalty law in 1982 reflected their perception of the factors motivating the need for re-enactment. Public concern for crime translated into legislator's desires to make New Jersey safer. Legislators also intended to look politically "good" while doing so.

The composition of the legislature in 1992 is very different from the one in 1982, but since capital punishment is not a party issue, the effect of the new makeup is unclear. In 1982 the Democrats held a majority in both the Senate, 23-17, and the Assembly, 43-37. In January of 1992, the legislature will convene with a Republican majority. Republicans now hold a 27-13 seats in the Senate and a 58-22 seats in the house, making the Republican voting bloc powerful enough to override any gubernatorial veto. Strong proponents of capital punishment such as Russo and Laskin will no longer hold seats in the legislature, but other proponent such as DiFrancesco and Dorsey will be Senate President and Majority Leader in 1992. Lipman and Feldman are two of the few Democrats who will remain in office in 1992. Although Republican legislators are generally more likely to favor capital punishment than Democratic legislators, the legislature's attitude toward capital punishment should change little, since re-enactment legislation was Democrat-sponsored and passed by a Democrat-controlled legislature. The new legislature may become slightly more inclined to favor legislation that would speed up appeal processes, expand the category of death eligible crimes, and limit the universe of cases used in proportionality review.

This review of the "re-enactment era" reveals several problems in the 1982 decision-making process. Many legislators based their vote on the re-enactment issue on assumptions, often projecting their own beliefs or perceptions onto the public. They tried to present the death penalty as a clear-cut issue, where crime was high and the death penalty would be the best solution for the problem, ignoring both the complexity of factors that affected the actual level of public opinion and the possibility of alternative measures. Legislators, therefore, need to re-examine more carefully the causes behind the apparent support for capital punishment. If strong public support for the death penalty results from a lack of public awareness about the actual costs of imposition as well as statistics documenting who actually receives the death penalty, legislators should discount the strength of public support in their decision-making equation.

Legislators ignored alternatives to capital punishment, not even considering data which shows that the public may actually prefer life without the possibility of parole option

to capital punishment. They failed to investigate an option which may have been preferred by the public over the death penalty, an option that has also been shown to be significantly less expensive. Again, it seems that the legislature had its own agenda which it imposed on the public's agenda.

Legislators, anxious to restore capital punishment, ignored real concerns that would occur with statutory imposition, many merely basing their decision on "feelings." Because these practical difficulties were dismissed by legislators in 1982, New Jersey in 1992 continues to wrestle with the cost concerns, the constitutional questions of the intent requirement and proportionality review not defined in the legislation, and the public frustrations over the reversals of 27 death sentences that have arisen in the process of implementation.

While it may be an important societal statement to condemn heinous crimes by passing a law which mandates the death penalty, legislators could have saved frustration over the failure of the statute to result in executions by not overlooking potential problems associated with statutory implementation. Legislators did not intend the death penalty to discriminate against defendants with low financial resources, or to burden the judicial system with appeal processes, but they virtually guaranteed these problems would surface since implementation problems were disregarded in the final decision to pass the statute.

It is conceivable that moral arguments presented by the ACLU and other groups at the public hearings had little influence on the legislators who held differing moral views, but legislators who refused to address practical implications of imposing the death penalty and failed to examine the entire field of research and statistics on capital punishment and its alternatives shirked their duties as public representatives. Legislators cannot base public policy merely on feeling.

APPENDIX 1

METHODOLOGY

I surveyed a small but representative sample of the entire legislative body — members of the 1982 legislative leadership:

Senate Members

President, Carmen A. Orechio, (D); Majority Leader, Steven P. Perskie, (D); President Pro Tempore, Matthew Feldman, (D); Republican Minority Leader, Donald T. DiFrancesco (R); Republican Minority Whip, John H. Dorsey (R); Mrs. Wynona M. Lipman, (D); John F. Russo, (D).

Assembly members

Speaker, Alan J. Karcher, (D); Assistant Democratic Majority Leader, Willie B. Brown, (D); Assistant Republican Minority Whip, Chuck Hardwick, (R).

Because the legislative leadership is usually comprised of legislators who hold great influence or seniority over the other party members, examining the views of the legislature's leadership in 1982 is an appropriate way to gauage the views of the entire legislature. The New Jersey Senate and Assembly leaders often set the agenda for the entire house, directing and creating the legislative sentiment. It is their function as leaders to be knowledgeable about a broad variety of issues, to keep in touch with the interactions and opinions of the legislative members, and to keep in touch with the wants of constituents. In fact, legislative leaders receive correspondence from constituents all over the state.

I recognize that the body of data gathered from these interviews in 1991 may be contaminated by errors in recall. It is impossible to perfectly ascertain how legislators perceived events or how certain factors influenced them in 1982, but these interviews, checked by newspapers and hearings documents, should allow a close approximation.

Newspaper articles that recorded statements made by legislators in 1982 were used as a check on the statements made by legislators in 1991. Because the two bodies of statements agree in most part, statements from both newspaper and interview sources are good indicators of a legislator's opinion.

LEGISLATIVE POLL QUESTIONS

1. Do you consult public opinion polls on the death penalty? Does your staff conduct its own polls?

2. Are you satisfied with how the law has been enacted? Do you think this is what the legislators in 1982 intended?

3. Do you receive many letters from consituents on this topic? Do they mostly express satisfaction or frustration with the statute?

4. Do you feel that you support or opposition to the death penalty is more influenced by public opinion or personal beliefs?

5. What are you criticisms and frustrations with the death penalty as it now stands?

6. What factors influence you most on this issue?

7. Do you see other areas within the statute that need amending? Have your constituents expressed the need for further amendments?

8. What would affect you more on the death penalty issue, public opinion polls or lobbyist presentations?

BIBLIOGRAPHY

Books

Dye, Thomas R. Politics in States and Communities. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1969.

Kean, Thomas H. The Politics of Inclusion. New York: Free Press, 1988.

Key, V. O. Politics, Parties, and Pressure Groups. New York: Thomas Y. Crowell, 1947.

Periodicals and Law Reviews

Miller, Warren E., and Donald E. Stokes. 1963. "Constituency Influence in Congress." *American Political Science Review* 57(March): 45-56.

"New York-New Jersey Legislatures Push Death Penalty Bills," Criminal Justice Newsletter, volume 13, number 10, May 24, 1982. Hackensack New Jersey: The National Council on Crime and Deliquency, 1982.

"Support Grows For the Death Penalty," Criminal Justice Newsletter, volume 14, number 19, Sept. 26, 1983. San Francisco, CA: The National Council on Crime and Deliquency, 1983.

"Death Penalty Revisited," (editorial) *New Jersey Law Journal*, v109, March 18, 1982.

"GOP Hopefuls Knock Court on Death Penalty; Say Justices Thwart Will of the People," *New Jersey Law Journal*, v123, March 9, 1989.

"Politicians Assess Fallout as Campaign Nears," *New Jersey Law Journal*, v119, March 12, 1987.

New Jersey Law Journal, v119, March 19, 1987.

"Summary of Death Penalty Law," *New Jersey Law Journal*, v110, August 19, 1982.

O'Neill, Thomas M., editor. *New Jersey Reporter*, volume 12. Princeton, New Jersey: Center for Analysis of Public Issues, 1982.

Rutgers Law Review, Volume 41:27.

Newspaper Articles

Barry, Michael. "Death Penalty: Its Prospects Have Improved; Trenton," *The New York Times*. April 5, 1981. Section 2, page 1, column 5.

Norman, Michael. "Discordant Voices On Jersey Death Penalty Bill," *The New York Times*. February 26, 1982. Section 2, page 26, column 1.

"Kean Assures State Troopers," *Star Ledger*. February 12, 1982, p. 17.

"Death Penalty Moves to Full Senate," *Star Ledger*. February 27, 1982, p. 5.

"Senate Is Expected to Vote Death Penalty," *Star Ledger*. March 29, 1982, p. 1.

"Senate Puts Off Death Penalty Vote to Address Constitutional Questions," *Star Ledger*. March 30, 1982, p. 1.

"'Irrational' Men Play a Deadly Game of Bluff," *Star Ledger*. April 15, 1982, p. 23.

"Bishop Calls on Kean to Veto Death Penalty," *Star Ledger*. April 28, 1982, p. 30.

"Defender Assails Death Penalty Price Tag," *Star Ledger*. May 3, 1982, p. 1.

"Costs Downplayed on the Death Penalty," *Star Ledger*. May 4, 1982, p. 25.

"Church Council Assails Reagan, Death Penalty," *Star Ledger*. May 5, 1982, p. 6.

"Senate Votes Death Penalty 'for unusually savage murders'," *Star Ledger*. May 7, 1982, p. 1.

"Death Penalty Expected to Clear Hurdle," *Star Ledger*. May 16, 1982, Sec. 1, p. 1.

"Act of Vengeance," (editorial) *Star Ledger*. May 18, 1982, p. 16.

"Anesthesia Option for the Condemned," *Star Ledger*. May 18, 1982, p. 20.

"Karcher Wants Tally of Death Penalty Cost," *Star Ledger*. May 20, 1982, p. 40.

"Death Penalty Advances," *Star Ledger*. May 21, 1982, p. 22.

"Critics Point to the Cost of the Death Penalty," *Star Ledger*. June 6, 1982, Sec. 3, p. 1.

"Death Penalty Bills Heading for Final Vote," *Star Ledger*. June 8, 1982, p. 19.

"Assembly Vote Death Penalty; Proposal Goes Back to Senate," *Star Ledger*. June 22, 1982, p. 1.

"Foes Ready Campaigns Against Death Penalty," *Star Ledger*. June 23, 1982, p. 14.

"How Legislatures Voted on Capital Punishment," *Star Ledger*. June 23, 1982, p. 14.

"Prosecutor 'Agonizes' Over Death Penalty," *Star Ledger*. June 27, 1982, Sec. 1, p. 8.

"Death Penalty voted and Sent to Governor," *Star Ledger*. June 29, 1982, p. 1.

"Kean Prepares Public Signing of Death Bill," *Star Ledger*. July 18, 1982, Sec. 1, p. 9.

"Private Signing Decided for Death Penalty Bill," *Star Ledger*. August 3, 1982, p. 17.

"Death Penalty Reinstated in Somber Bill-Signing," *Star Ledger*. August 7, 1982, p. 1.

"Law Won't Affect Most Murder Cases," *Star Ledger*. August 7, 1982, p. 1.

"Executions May Be Years Away Despite Re-Enacted Death Penalty," *Star Ledger*. August 8, 1982, p. 1.

Brownstein, Pamela. "The Onslaught of Anti-Crime Bills," UPI. January 29, 1981.

Brownstein, Pamela. UPI. June 21, 1982.

Landay, Jonathan S. UPI. May 6, 1982.

UPI. January 29, 1981.

Interviews

DiFrancesco, Donald T. New Jersey State Senator, 22th District. October 28,1991.

Feldman, Matthew. New Jersey State Senator, 37th District. October 28, 1991.

Ford, Marlene Lynch. New Jersey State Assembly Member, 10th District. October 28, 1991.

Hardwick, Chuck. New Jersey State Assembly Member, 21st District. October 31, 1991.

Harris, Al. Executive Director for New Jersey Legislative Black Caucus, legislative aide to Willie Brown, New Jersey State Assembly Member, 29th District. October 31, 1991.

Horan, Mariann. Head legislative aide to John H. Dorsey, New Jersey State Senator, 25th District. October 29, 1991.

Jones, Dale. Public Defender, Head of Capital Punishment Division. October 9, 1991.

Karcher, Alan J. Former New Jersey State Assembly Member, 19th District. October, 30, 1991.

Lipman, Wynona M. New Jersey State Assembly Member, 29th District. October 30, 1991.

O'Neill, Tom. Former President of the New Jersey Reporter. October 30, 1991.

Orechio, Carmen. New Jersey State Senator, 30th District. November 1, 1991.

Perskie, Stephen. Head, Casino Commission. Former New Jersey State Senator, 2nd District. October 28, 1991.

Russo, John. New Jersey State Senator, 10th District. October 29, 1991.

Salmore, Steve. Professor of Politics, Rutgers University, Former Director of Rutgers-Eagleton Poll. October 3, 1991.

Schwaneberg, Robert. Staff writer, *Newark Star Ledger*. October 30, 1991.

Sullivan, Joseph F. Staffwriter, *The New York Times*. November 5, 1991.

Tumulty, John J. Judiciary Section Chief, State of New Jersey Office of Legislative Services Central Staff. October 17, 1991.

Upmeyer, Neil. President of the New Jersey Reporter. October 29, 1991.

Zukin, Cliff. Former Director of Rutgers-Eagleton Poll. October 31, 1991.

Government Documents

Journal of the Senate. May 6, 1982 and June 28, 1982.

Minutes of the General Assembly. June 21, 1982.

Mullin, Edward J., Editor. Manual of the Legislature of New Jersey, Two Hundreth Legislature (First Session) 1982. Edward J. Mullin, Publisher: Trenton, N.J., 1982.

New Jersey. Public Hearing before Senate Judiciary Committee on Senate, no. 112 (Death Penalty): held Trenton, N.J., February 26, 1982, State House.

State of New Jersey, Division of State Police, Uniform Crime Reporting Unit. Uniform Crime Reports, State of New Jersey 1982. Trenton, N.J.: State of New Jersey, Division of Police, 1983.

United States Statistical Abstracts, 1984.

Others

Zukin, Cliff, Director. Rutgers University, New Brunswick, N.J. Eagleton Institute of Politics Press Releases, Feb. 18, 1981-Nov. 3, 1985. New Brunswick, N.J.: 1982.

Dollars and Sentences: The High Cost of Capital Punishment

by Jennifer Weller-Polley

The Supreme Court has determined that "death is different" because of the severity and finality of capital punishment.[1] *Therefore more procedural and substantive guidelines are required for capital trials than for non-capital trials. Beginning from the investigation and continuing until the last possible appeal is rejected, both the prosecution and the defense incur greater expenses in capital cases than in comparable non-capital cases. As a result, the costs of capital punishment are very high. Although many Americans believe that killing a convicted criminal costs less than imprisoning him for life, this and other research suggests that the opposite is true.*

This paper synthesizes much of the existing research about the costs associated with capital punishment. While more evidence is available on defense costs, information on the costs incurred by courts, correction departments, and prosecutors is included wherever available. Even though many of the cost estimates provided do not specifically refer to actual costs in New Jersey, the experience of other states is analogous. Social benefits such as deterrence, the effect on the crime rate, and retribution are relatively indeterminable and so have not been included, nor have social costs such as the appearance, if not the fact, of inequity and racial bias.

Part I of this paper examines the costs of a capital case and, wherever possible, compares them to those of a non-capital murder case. The appropriate comparison is between a case that goes to capital trial, and the death penalty is imposed and appealed, either to be followed by a reversal or an eventual execution, and a non-capital murder case which goes to trial and is appealed one level of appeal to the State Supreme Court. The correctional costs are then all the costs of keeping someone on death row followed by a reversal or execution and the costs of keeping someone in prison for life, assuming that it is 30 years on average.

While Part I examines the high costs associated with capital punishment, Part II evaluates the effectiveness of these expenditures in terms of efficient resource allocation. The New Jersey corrections department and the state courts spend disproportionate amounts of money on capital cases when compared to the overall caseload. Similarly, state-paid attorneys, for both the prosecution and the defense, expend countless hours on capital cases which almost always require more time than comparable non-capital murder trials. Despite the extensive resources allocated to maintain a capital punishment system, New Jersey has executed no one since reenactment. In fact, since 1982, only one death sentence has been upheld by the New Jersey Supreme Court.[2] In California in 1989, 213 prisoners were on death row, but the state had executed no one since 1967, even though the capital punishment statute had been legal for seventeen out of the twenty-two years.[3]

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1 See, e.g. Gardener v. Florida, 430 U.S. 349 (1977) in which the Court stated: "From the point of view of society, it [death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

2 See State v. Marshall, 123 NJ 1 (1991).

3 Dave Von Drehle, "Capital Punishment in Paralysis: Huge Caseload Bloats Lethargic, Costly System in Florida,

The experiences of New Jersey and California suggest not only that capital punishment is inefficient but also that it decreases the overall efficiency of the criminal justice system. Accordingly, Part III proposes a more efficient and less costly alternative to capital punishment. This paper suggests that substituting life-without-parole for the death penalty saves money and reduces the burden on the criminal justice system. Furthermore, surveys conducted in states with capital punishment statutes suggest that the public wants such an alternative.[4] The New Jersey Legislature should, therefore, consider substituting life-without-parole for the death penalty.

I. COST ANALYSIS OF CAPITAL PUNISHMENT

The constitutional safeguards designed to protect the defendant's rights in a capital case are commonly referred to as "super due process" guarantees. Such guarantees exceed the rights accorded a non-capital defendant because capital punishment is considered unique, due to its severity and finality. The costs of these additional safeguards are best understood by dividing the process into three stages: pre-trial, trial and post-conviction. Throughout the three stages, several basic assumptions prevail. Foremost among these is the defendant's right to the best possible representation. New Jersey currently assigns two state-paid public defenders per capital defendant at trial and every level of appeal. There are twelve levels in all, if every possible federal and state appeal is pursued.[5] Accordingly, states incur heavy attorney costs, both from the prosecution and the defense, in almost all capital cases.[6]

A second assumption is that capital defendants require greater security than non-capital defendants. From arrest until the conclusion of trial and throughout all appeals, additional security is assigned to a capital defendant. If the defendant is sentenced to death, he is moved to a special maximum security facility for condemned prisoners that is called the Capital Sentence Unit (CSU) in New Jersey, but is more commonly referred to as death row. The cost of maintaining a separate capital facility is great. In New Jersey, the Capital Sentence Unit is connected to a maximum security facility, part of which was remodeled to accommodate condemned prisoners. It costs between $18,000 and $21,000 each year to keep one defendant in New Jersey's maximum security prisons;[7] it costs approximately $26,000 to keep one condemned prisoner in the adjacent Capital Sentence Unit

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U.S.," *The Miami Herald* (10 July, 1988), p. A12.

4 Poll data available from the Woodrow Wilson School of Public and International Affairs at Princeton University: Bowers, William J. and Margaret Vandiver, "New Yorkers Want an Alternative to the Death Penalty," College of Criminal Justice, Northeastern University (14 May, 1991); Niller, Eric, "Death Penalty Support Broad But Not Deep," *Charleston Gazette* (25 Jan., 1990); Cambridge Survey Research, "An Analysis of Attitudes Toward Capital Punishment in Florida," (1985).

5 These include direct appeals from the state trial court, the state habeas proceeding, and the federal habeas corpus. This does not count the possibility of one or more trips up the appellate ladder for pre-trial interlocutory appeal prior to the imposition of the death sentence.

6 Helen Prejean, "The Death Penalty Costs More Than Life," *Newsday* (3 Feb. 1988), p. 62.

7 Chris Dill, Executive Assistant to New Jersey Assistant Commissioner of Corrections, Telephone interview, Trenton, NJ (7 Nov. 1991).

for one year.[8] Based on an average stay of eight years on death row,[9] capital incarceration in New Jersey costs, at a minimum, between $40,000 and $64,000 more than non-capital maximum security imprisonment.

The actual difference in incarceration costs is higher because non-condemned prisoners work to offset the cost of their confinement; condemned prisoners do not.[10] Maintaining a capital sentence unit in New Jersey substantially increases the amount of money needed to provide an adequate corrections system. In Kansas, the cost of maintaining a separate death row facility was estimated to be $922, 682 annually[11] and maintaining a separate facility has cost Californians more than a half billion dollars since 1976.[12] Former administrator of the California Youth and Adult Corrections Agency, Richard McGee, concluded: "Just on the basis of prison costs alone, it would be cheaper to do away with the death penalty."[13]

Capital punishment places a comparable burden on an already overloaded judicial system. Plea bargaining, an effective measure in reducing the court's workload, is almost never utilized in capital cases. The prosecution avoids making bargains with the defense in capital cases, because doing so would render the case non-capital. Similarly, a capital defendant would almost never admit his guilt because he would automatically lose the benefit of reasonable doubt.[14] In New Jersey, all capital cases go to trial, and over 90% go to trial with a death qualified jury. Eighty-five to ninety percent of non-capital homicide defendants, however, enter a plea of guilty at the arraignment and, in so doing, substantially reduce court time.[15] Accordingly, the likelihood that a jury trial will be necessary is ten times greater for a capital case.[16] Increased court costs due to more cases going to trial can be expected in states with active capital punishment statutes. Commenting on the financial burdens imposed on the courts by the death penalty, Chief Justice Dixon of the Louisiana Supreme Court noted: "The people have a constitutional right to the death penalty and we'll do our best to

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8 Jim Stabile, Public Information Officer for New Jersey Department of Corrections, Telephone interview, Trenton, NJ (7 Nov. 1991).

9 Robert L. Spangenberg and Elizabeth R. Walsh, "Capital Punishment or Life Imprisonment? Some Cost Considerations," *Loyola of Los Angeles Law Review* 23 (1989), p. 56.

10 Scott G. Parker and David P. Hubbard, "The Evidence for Death," *California Law Review* 78 (1990), p. 56.

11 Kansas Legislative Research Department, "Costs of Implementing the Death Penalty - H.B. 2062 as Amended by the House Committee of the Whole," (11 Feb. 1987), p. 6-7. This memorandum is available from the Kansas Legislative Research Department in Topeka, Kansas. The estimate was provided by the Department of Corrections and, is based on the costs of paying corrections officers, making renovations for use as death row, and the operating expenses of the facilities for seven months.

12 Ian Gray, "A Shameful - and Expensive - Logjam at Death's Door," *Los Angeles Times* (17 Dec. 1989), p. M3.

13 New York State Defenders Association, Inc., "*Capital Losses: The Price of the Death Penalty for New York State*" (1 April 1982), p. 23-24. Available from the New York State Defenders Association, Inc. located in Albany, NY.

14 Margot Garey, "The Cost of Taking A Life: Dollars and Sense of the Death Penalty," *University of California, Davis, Law Review* 18 (1985), p. 1247.

15 Spangenberg and Walsh, *op. cit.*, p. 50-51.

16 *Ibid*, p. 50-51.

make it work rationally. But you can see what it's doing. Capital punishment is destroying the system."[17]

During the pre-trial phase, the "super due process" accorded capital defendants generates a greater number of pre-trial motions, more extensive investigation, and much more time on jury selection which, in turn, generates additional expense. Capital cases require a number of special motions which not only question specifics of the case at hand but also challenge state and federal constitutional and procedural aspects of death penalty statutes, such as those covered by the Eighth Amendment, which addresses the issue of cruel and unusual punishment.[18]

Motions set forth by defense attorneys commonly include: change of venue; death eligibility of the defendant; fund requests for investigators and expert witnesses; and sequestration of jurors during the selection process.[19] Often the defense introduces motions that question the competency of a defendant to stand trial.[20] Inevitably then, psychiatrists and other mental health experts assume a central role in many capital trials, if not at guilt phase, then at penalty phase when evidence concerning mental mitigating factors is introduced. At a rate of approximately $700 per day, the state pays for examinations and evaluations not only for the defense but also for the prosecution and sometimes even for the court.[21] Experienced attorneys estimate that between ten and twenty-five trial pre-trial motions are required in a typical capital case.[22] This number of pre-trial motions is often double, and sometimes quadruple, the number filed in non-capital murder cases.[23] As the number of motions filed increases, so does the court time necessary to hear them and the attorney time, for both the defense and prosecution, necessary to prepare them and respond.

Other experts, such as medical examiners and polygraph experts, may play a more costly role in the pre-trial phase of a capital trial. No expense is spared in the investigation because the evidence presented will be scrutinized carefully by both sides. Margot Garey of the University of California, Davis, has developed a framework that approximates the use of such experts at this level:

> A medical examiner costs approximately $700 to $1000 per day; a polygraph expert costs approximately $200-300 per day for courtroom testimony and $150-250 for the polygraph examination; an expert witness concerning eyewitness identification costs approximately $500 per day for courtroom testimony and $100 per hour for consultation.[24]

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17 Michael Ross, "Executions Are Not Cheap," *Endeavor: Live Voices from Death Row Across the U.S.A.* 1.7 (1991), p. 7.

18 Ronald J. Tabak and J. Mark Lane, "The Execution of Injustice: A Cost and Lack of Benefit Analysis of the Death Penalty," *Loyola of Los Angeles Law Review* 23 (Nov. 1989), p. 134.

19 Margot Garey, *op. cit.*, p. 1249.

20 Spangenberg and Walsh, *op. cit.*, p. 49.

21 See Ake v. Oklahoma, 470 U.S. 68 (1985) (state must provide defendant access to competent psychiatrist when mental capacity is raised by either side).

22 New York State Defenders Association, Inc., *op. cit.*, p. 12.

23 Garey, *op. cit.*, p. 1248.

24 *Ibid*, p. 1253-1254.

Capital cases require longer and more expensive pre-trial preparation than non-capital murder cases. In New Jersey, an additional year of pretrial preparation, with both defense attorneys working full time on the preparation of the capital trial, is fairly standard.[25] In the investigation of a capital crime the prosecution must establish the evidence sufficient to prove the statutory aggravating factors necessary for imposition of the death penalty; the defense must discover mitigating evidence that will convince a jury not to impose the death penalty. The defense attorney's pre-trial investigation is approximately three to five times longer in a capital case than a non-capital case.[26]

Anything from the defendant's birth to the present can be considered as a mitigating factor during the penalty phase of a capital trial, according to federal constitutional standards.[27] Substantial investigation of the defendant's personal, social and medical history is, therefore, customary in most capital cases. The defendant's medical records, his army service record, and his institutional history must be documented. Defense attorneys use investigators to interview childhood friends, schoolteachers, co-workers, and neighbors in order to present a case for the worth of the defendant's life. Such extensive investigation proves costly as fees for experienced investigators typically range from $500 to $1500 per day.[28] Since the prosecution must respond to this evidence and conduct similar investigations, investigative costs of the defense will be matched by prosecution costs, at least to some extent.

In addition, the cost of jury selection, or *voir dire*, is greater in a capital case than a non-capital murder case. Typical of most states, New Jersey maintains that the same jurors should presumptively be utilized in both the guilt and penalty phases of a capital trial; if necessary, a new jury may be selected. Individual questioning of jurors is permitted to ensure a death-qualified jury.[29] The selection of a fair jury is further complicated by the pre-trial publicity which often surrounds a capital case. Accordingly, both sides are granted more preemptory challenges than in a non-capital case; consequently, a larger juror pool is needed.[30] Studies conducted by researchers in California[31] and Kansas[32] concur that jury selection in a capital trial lasts approximately five times as long as in a non-capital case. Selection of a death-qualified jury increases court costs by approximately $200,000 when additional juror fees, courtroom costs, and attorney fees are considered.[33]

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25 Dale Jones, Assistant Public Defender of New Jersey Office of the Public Advocate, Telephone interview, Trenton, NJ (7 Nov. 1991 and 5 Dec. 1991).

26 Garey, *op. cit.*, p. 1251.

27 See Woodson v. North Carolina, 428 U.S. (1976) and Lockett v. Ohio, 438 U.S. 586 (1978).

28 New York State Defenders Association, Inc., *op. cit.*, p. 13.

29 See Lockhart v. McCree, 476 U.S. 162 (1986); Wainwright v. Witt, 469 U.S. 412 (1985); Witherspoon v. Illinois, 391 U.S. 510 (1968) for a discussion of the legal standards for death qualification of capital jurors.

30 Spangenberg and Walsh, *op. cit.*, p. 52.

31 L. Saunders, B. Moore, and B. Gaal, "An Empirical Study Attempting to Compare the Trial Costs of Capital Cases with the Trial Costs of Non-Capital Cases." Unpublished Manuscript (Spring 1983) p. 17. Available from University of California, Davis, Law Review.

32 Kansas Legislative Research Department, *op. cit.*, p. 3.

33 Gray, *op. cit.*, p. M3.

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Once the trial begins, daily fees to operate the court must be considered. The cost to operate a court room for a day is approximately $2186.[34] Primarily because a capital trial lasts much longer than a non-capital trial, trial costs for a capital case far exceed those for a non-capital case on a day to day basis, in addition to the attorney costs. Trial and sentencing of a death penalty case costs, at a minimum, between $36,000 and $116,700 more than a non-capital murder trial, according to studies conducted in Maryland and Kansas.[35] A capital trial is comprised of both a guilt phase and a penalty phase , while a non-capital trial is composed only of a guilt phase, and the judge alone imposes sentence. During a multi-phase capital trial an average of forty-nine witnesses testify, compared to only twenty-six in a single-phase non-capital trial.[36] Whereas an average non-capital homicide trial lasts only twelve days, the average capital trial lasts approximately forty-two days.[37] A capital trial lasts approximately 3.5 times as long as a non-capital trial. In court fees alone, the financial differential between the two is almost $66,000. Moreover, an average of 850-1000 hours of attorney time are consumed in a typical capital trial, which results in large attorney fees.[38]

Many of the costs accumulated during the guilt phase may be duplicated in the penalty phase.[39] Evidence of statutory mitigating factors can only be introduced at penalty phase, but the preparation must be done before a guilt verdict is reached. If a case does not reach penalty phase, the evidence will never be presented, yet the preparation must be made. Frequently, expert witnesses and investigators are only employed after a defendant's guilt is established to introduce evidence of statutory aggravating or mitigating factors in the penalty phase. Both the prosecution and the defense utilize the best available resources to present an effective case during the second phase since this is the stage when the jury decides whether or not to impose the death penalty. For example, New Jersey spends an average of $42,000 per trial just to provide expert witnesses for the defense.[40] Most of these witnesses will prepare evidence for penalty phase, although many will never testify.

A study completed by the New York State Defenders Association determined the costs of a capital trial to be divided in the following manner:[41]

- $176,350 for investigators, expert witnesses and defense attorney fees
- $845,400 for prosecution costs
- $300,000 for court costs

The Public Defender's office in New Jersey budgets $102,000 in defense costs per capital case, not including appeals, but expects the final costs to be much higher, because there is no cap on the

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34 Garey, *op.cit.*, p. 1255. This amount does not include the cost of extra security or daily transcripts.

35 See Kansas Legislative Research Department, *op. cit.*, and Committee to Study the Death Penalty in Maryland, "Final Report: The Cost and Hours Associated with Processing a Sample of First degree Murder Cases for which the Death Penalty was Sought in Maryland between July 1979 and March 1984," (April 30, 1985).

36 L. Saunders, B. Moore and B. Gaal, *op. cit.*, p. 20.

37 *Ibid*, p. 17.

38 Spangenberg and Walsh, *op. cit.*, p. 53.

39 New York State Defenders Association, Inc., *op. cit.*, p. 11-19.

40 Tabak and Lane, *op. cit.*, p. 137-138.

41 New York State Defenders Association, *op. cit.*, p.18.

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amount of money allocated to the defense.[42] Since reenactment, out of pocket expenses for the defense, which pay for expert witnesses, transcripts, and other related expenditures, have exceeded $11 million in New Jersey.[43] Many of these costs are associated with the penalty phase, which is unique to capital trials.

In the post-conviction phase, capital trials consume even more resources, both human and financial. New Jersey's capital punishment statute, like that of thirty-three other states, requires automatic review of all death sentences by the state supreme court.[44] When a life is at stake, review is extremely thorough, and more evidentiary and legal issues are raised. To assist its research on the capital cases, the New Jersey Supreme Court hired two additional clerks to work almost full time on capital reviews.[45] Death penalty reviews currently represent almost twenty-five percent of the New Jersey Supreme Court's decisional work product.[46] In Florida, the state supreme court spends one-third of its time on death penalty cases, which comprise only twelve percent of its caseload.[47]

Substantial attorney fees are generated in this initial appellate review to the state supreme court. The number of hours required by defense attorneys per state-level capital appeal is between five hundred and one thousand.[48] In addition, the defense may spend upwards of $30,000 just to purchase the transcripts from the guilt and penalty phases of the trial.[49] Robert Spangenberg estimates that, on average, mandatory state supreme court review costs $34,740, in defense costs alone.[50] A study conducted by the New York State Defenders Association concludes that a direct appeal to the state court of appeals would cost, at minimum, $160,000, exclusive of court and correctional costs.[51]

If the state court affirms the death sentence, New Jersey's capital punishment statute requires that a proportionality review be conducted to examine the appropriateness of the death sentence in a particular case. The first proportionality review was recently completed in State v. Marshall, at an estimated initial cost of $300,000,[52] not counting attorney fees. If the state supreme court fails to reverse the judgment, the defense has nine other levels of appeal that they may pursue at the federal level.[53] One official estimates that "a 'clean case' - one in which every possible appeal is

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42 Alfonso A. Narvaez, "New Jersey Journal," *New York Times* (21 Aug. 1983) Section 11, p.3.

43 Interview with Dale Jones.

44 Lawrence A. Greenfeld, "Capital Punishment 1989," *Bureau of Justice Statistics Bulletin* (Oct. 1990) NCJ-124545. See also Gregg v. Georgia, 428 U.S. 153, 204 (1976) re automatic death sentence appeals to the state supreme court.

45 State v. Marshall, 123 NJ 1 (1991).

46 P. K. Chenoweth, "Proportionality Review Will Follow First Affirmance of Death Sentence," *New Jersey Law Journal* (31 Jan. 1991), p. 41.

47 Andrew H. Malcolm, "The Wait on Death Row: Legal Delays Thwart Death Penalty," *New York Times* (23 July 1990), p. A1.

48 Spangenberg and Walsh, *op. cit.*, p.52-53.

49 Narvaez, *op. cit.*, p. 3.

50 Dave Von Drehle, "Bottom Line: Life In Prison One-Sixth As Expensive," *Miami Herald* (10 July 1988), p. A12.

51 New York State Defenders Association, Inc., *op. cit.*, p. 21.

52 State v. Marshall, 123 NJ 1 (1991) p. 260. According to Dale Jones, this figure is the amount spent by the Administrative Office of the Courts for Baldus' report.

53 New York State Defenders Association, *op. cit.*, p. 7.

exhausted - would take at least eight years before a criminal could be executed."[54] The New York State Defenders Association study concluded that, exclusive of court and correctional costs, United States Supreme Court review of a capital case would total at least $170,000.[55]

The New Jersey Public Defender's Office guarantees two lawyers per case at all levels of the capital punishment appellate process. A capital case in New Jersey can consume the equivalent of sixteen years in attorney time. Approximately nine hundred attorney hours are required per appeal at the federal level.[56] In New Jersey, two appellate attorneys will typically spend two years preparing a single appeal. The prosecutors costs at this stage are also substantial. During all of this time, the defendant will wait on death row.

Increased expenses are apparent in every level of a capital case from the pre-trial investigation through the post-conviction appeals. The state pays the majority of these costs and fees, since it pays for both the prosecution and the defense. In anticipation of the increased costs of capital punishment, the New Jersey 1983-84 fiscal budget included a four million dollar line item for initial start up costs.[57]

Dave Von Drehle, an investigative reporter for the *Miami Herald*, compiled the following statistics on capital punishment costs in Florida, where capital punishment was reinstated in 1976:[58]

Trial and Sentencing:	$36,000-$116,700
Mandatory State Review:	$69,480-$160,000
Additional Appeals:	$274,820-$1 million plus
Jail Costs:	$37,600-$312,600
Execution Costs:	$845

The costs of a legal execution go far beyond the $845 needed for the last step, the actual execution. The constitutional safeguards designed to protect capital defendants result in lengthy and expensive trials and post-conviction appeals. A Maryland study concluded that "costs are higher for every justice component for death penalty cases."[59] The costs associated with a capital case far exceed the trial and appellate costs of a comparable non-capital murder case and place a heavier burden on the criminal justice system, both in capital and human resources.

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54 Todd Spangler, "Maryland Senate Aims to Shorten Death Row Appeals Procedures," *Washington Times* (29 Aug. 1991), p. B4.

55 New York State Defenders Association, Inc., *op. cit.*, p. 22.

56 Robert L. Spangenberg, Benjamin Keehn, Stephanie Girard and Patricia A. Smith, "Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989." (1989) p. 49. Available from the Spangenberg Group in Newton, Ma.

57 Joseph F. Sullivan, "$6.8 Billion Budget Gets Final Passage in Trenton." *New York Times* (28 June 1983) p. B1.

58 Dave Von Drehle, "Bottom Line: Life in Prison One-Sixth as Expensive," *op. cit.*, p. A12.

59 Tabak and Lane, p. 135, citing: Committee to Study the Death Penalty in Maryland, "Final Report: The Cost and Hours Associated with Processing a Sample of First Degree Murder Cases for which the Death Penalty was Sought in Maryland between July 1979 and March 1984," (April 30, 1985).

II. EFFICIENCY OF CAPITAL PUNISHMENT

When confronted with the high costs of prosecuting one capital case, many argue that we should reform the judicial process and eliminate the "super-due-process" guarantees established by the courts. In Furman v. Georgia,[60] the U.S Supreme Court struck down Georgia's capital punishment statute as unconstitutional. Only when Georgia revised its death penalty statute to include additional safeguards against arbitrary imposition of the death penalty did the Supreme Court uphold the constitutionality of the revised capital punishment statute.[61] The additional provisions included in Georgia's statute are: first, a capital trial is to be divided into two phases, one to establish guilt and the other to impose the sentence; second, throughout both phases, the discretion of the jury is to be carefully guided by the judge; third, during the penalty phase, mitigating and aggravating factors will be specified to guide the jury in making the most fair decision. After the Supreme Court's decision in Gregg, other states modeled their capital statutes after Georgia's to ensure federal constitutional approval. Abbreviating the appellate process, therefore, is not a practical solution. Doing so would violate the United States Supreme Court's standards for death penalty statutes.

Shortening the process is not only impractical but also undesirable. Bedau and Radelet's study, conducted in 1987, discovered 350 wrongful capital convictions in the United States since 1900.[62] Twenty-three of these innocent men were executed before the mistake could be remedied.[63] Additionally, from January 1987 to July 1989, "at least a dozen...men who had received death sentences [were] released as innocent."[64] Because a death sentence is irreversible, additional safeguards must be accorded capital defendants. The American justice system is based on the principle that the truth will prevail; but in a capital case, there is no second chance. Capital defendants must, therefore, be guaranteed every possible appeal, regardless of delay. Frequently, the long delays in appellate proceedings allow for discovery of innocence, which would usually not occur if proceedings were rushed.[65]

The expenditures for defense counsel should also not be limited, because adequate representation is a fundamental right guaranteed to all defendants by the criminal justice system.[66] A criminal justice system that allows capital punishment must provide the best possible defense, regardless of cost, so that innocent people are not killed. The cost of providing such a constitutional defense, when combined with the corresponding prosecution costs, is very high for most states. In New Jersey, the cost of reenacting the death penalty is estimated to be sixteen million dollars per

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60 Furman v. Georgia, 408 U.S. 238 (1972).

61 Gregg v. Georgia, 428 US (1977).

62 Peter Applebome, "Rise in Executions Widening Debate," *New York Times* (1 Nov. 1987), p. 30, citing Bedau and Radelet's study.

63 *Ibid.*, p. 30.

64 Tabak and Lane, *op. cit.*, p. 102.

65 *Ibid.*, p. 107.

66 See Harrison v. Zant, 88-1640 (Superior Court, Fulton County) and Ross v. Kemp, 393 S.E. 2d. 214 (Georgia Superior Court) as examples of death sentences that were overturned because of "bad lawyering."

year.[67] Kansas recently considered reenactment, but decided against it when research indicated that capital punishment would cost the state $10 million in the first year, and a total of $50 million before the first execution.[68]

If the high reversal rate for death sentences is considered, the expense required for one execution greatly exceeds the cost of one capital trial. As one reporter noted: "The public watches as another death sentence is handed down somewhere virtually every working day, while ignoring the quiet reality that one out of every three is eventually overturned."[69] Some attribute this high rate of reversal to a practical difference in capital cases: "Because life is at stake, trial judges provide more latitude and appeal judges search more carefully for reversible error."[70] Also in many states, to which New Jersey is a notable exception, because so little money is allocated for capital defense, the trials are often full of errors and little investigation is conducted on the defendant's behalf. In such areas, errors are often easy to find, and so reversal rates are frequently higher.

Thus far the New Jersey Supreme Court has reversed twenty-nine out of thirty death sentences since reenactment. Dale Jones, the death case coordinator for the New Jersey Public Defenders Office, estimates that it would cost $7.3 million dollars to sentence just one person to death in New Jersey.[71] Florida spent at least $57 million between 1973 and 1988 on death penalty cases, yet carried out only eighteen executions; on average then, a single execution cost over $3 million.[72] In California, a study by the *Sacramento Bee* set the price of one execution at $15 million.[73] The reality of capital punishment is that taxpayers usually pay for both a lengthy capital trial and then pay for life imprisonment, because the death sentence is reversed.

In his dissent in State v. Marshall, Justice Handler concluded that other areas of the criminal justice system suffer because of the huge costs related to capital punishment.[74] The public defender's office certainly suffers under the financial burden imposed by the necessity of defending all capital cases. For example, in 1983, Maryland's Public Defender Office ran out of money, in large part due to the fiscal strain imposed by handling thirty-one capital cases.[75] Similarly, Seminole County, Georgia went into severe debt to try three death penalty cases, two of which eventually

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67 Garey, *op. cit.*, p. 1261.

68 Prejean, *op. cit.*, p. 62.

69 Andrew H. Malcolm, "The Wait on Death Row: Legal Delays Thwart Death Penalty," *New York Times* (23 July 1990), p. A1.

70 *Ibid.*

71 Tabak and Lane, *op. cit.*, p. 136. A telephone interview with Dale Jones confirmed that this figure is adjusted for the high reversal rate in many capital cases.

72 Dave Von Drehle, "Capital Punishment in Paralysis," *op. cit.*, p. A12.

73 Tabak and Lane, *op. cit.*, p.136.

74 State v. Marshall, 123 NJ 1 (1991), p.258.

75 Sandra Saperstein and Tom Vesey, "Maryland Public Defender May Lay Off Employees," *Washington Post* (23 April 1983), p. B5.

resulted in life sentences.[76] Prosecutors' offices also suffer because they are forced to spend extraordinary amounts of money to prosecute relatively few cases. The corrections system suffers because it must provide a separate prison facility for condemned inmates. The courts suffer from a backlog of capital appeals which consume disproportionate amounts of judges' time. For example, capital appeals at the federal level consume about a third of all of the judges' time in the 11th Circuit Court of Appeals in Atlanta and the 5th Circuit Court in New Orleans.[77] The high costs of capital punishment divert resources from the federal and state criminal justice system and force states to cut services in other areas.

III. LIFE-WITHOUT-PAROLE AS A SUBSTITUTE FOR CAPITAL PUNISHMENT

> "The current system [capital punishment] affects a death penalty that is frequently imposed but rarely carried out -- a punishment that is hardly swift and certainly not sure. Life-without-parole for violent murderers often would eliminate both of those problems. Imposition of life-without-parole avoids costly appeals routinely invoked in death sentences. A life-without-parole sentence means exactly what it says in the charge to a jury, and except in the very unusual instance of an executive commutation, a criminal justice system can guarantee that LWOP will protect society from a violent murderer for the rest of that murderer's life."[78]

This comment by Supreme Court Justice Powell summarizes the arguments for substituting life-without-parole in place of the death penalty. The heavy burden placed on the criminal justice system by capital punishment takes its toll both in finances and human resources. Instituting life-without-parole would be less expensive in several ways. A non-capital murder trial consists of only one phase; court costs and attorney fees would almost certainly be lower. Less court time at all levels would be required; the backlog in the courts would be reduced. Additionally, the difference in the cost of capital punishment and life-without-parole could be reallocated to provide other services, such as increased prison space and more police officers.

The difference in dollars between capital punishment and life imprisonment is quite substantial. When Arkansas commuted fifteen death sentences to life imprisonment, the state saved approximately $1.5 million.[79] In Florida, life imprisonment costs less than one quarter of the money spent on court costs, attorney's fees and death row incarceration for one capital defendant.[80] In New York, life imprisonment would cost only a third as much.[81] A legislative study conducted in Indiana concluded that replacing the death penalty with life-without-parole would save the state $5 million per

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76 Tabak and Lane, *op. cit.*, p. 137 (see footnote #518).

77 Dave Von Drehle, "Capital Punishment in Paralysis," *op. cit.*, p. A12.

78 Julian H. Wright, Jr., "Life-Without-Parole: An Alternative to Death or Not Much of a Life At All," *Vanderbilt Law Review*, 43 (1990), p. 529.

79 Prejean, *op. cit.*, p. 62.

80 *Ibid*, p. 62.

81 Jonathon E. Gradess, "Execution Doesn't Pay: Barbarianism Aside, the Death Penalty Simply Isn't Cost efficient," *Washington Post* (28 Feb. 1988).

year.[82] Similarly, a study conducted by the *Sacramento Bee* estimated that California would save $90 million per year if the death penalty were abolished.[83] Additionally, "the extra costs of the capital punishment system are all incurred 'up front' or within a few years, as compared to the savings from capital punishment, which do not arise, in the few cases where executions do occur, for a great many years. Hence, the savings from not having to incarcerate people following their executions must be discounted back to the present."[84]

In sum, life imprisonment places less of a financial drain on the criminal justice system than capital punishment. Supreme Court Justice Marshall noted this fact in his opinion in Furman v. Georgia, 408 U.S. 238 (1972): "When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life."[85] Americans must realize that any possible gains from capital punishment are accompanied by burdensome costs and must, therefore, adopt life-without-parole as a more efficient, cost-saving alternative.

CONCLUSION

"The staggering financial cost of maintaining a capital-murder regime negates any practical benefit of our death-penalty statute. The cost of implementing the death penalty is potentially crippling to a state's criminal justice system."[86] In this comment, Justice Handler, of the New Jersey Supreme Court, elucidates a major flaw of the death penalty. "Super-due-process" preserves the defendant's right to a "fair trial"; but it does so at a high cost. From pre-trial to post-conviction, the cost of a capital case is substantially greater in each phase than that associated with a non-capital murder case. More importantly, the huge financial burden generated by capital cases reduces the overall efficiency of the criminal justice system. The capital caseload is only increasing,[87] so unless an alternative punishment is adopted, inordinate sums of money will continue to be wasted on capital prosecutions. As Dave Von Drehle noted in 1988: "With 300 new cases every year, the U.S. could execute one person every day, and it would take more than 30 years to empty all the death row cells." However, this is highly unlikely since at the heyday of executions, in 1938, only 199 people were executed. Today the rates are much lower.

As resources continue to dwindle across the country, it is more important that our funds are put to the best possible use. The death penalty is an inefficient and costly extravagance that detracts from other social and correctional programs. Legislators in Kansas and New York understood the trade-offs which would accompany reimposition of the death penalty, and wisely decided against such

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82 Tabak and Lane, *op. cit.*, p. 135.

83 *Ibid.*, p. 136.

84 *Ibid.*, p. 135.

85 New York State Defenders Association, *op. cit.* p.iii-iv.

86 State v. Marshall, 123 NJ 1 (1991), p.258.

87 Applebome, *op. cit.*, p.30.

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an action.[88] New Jersey legislators must similarly recognize the inordinate waste of financial and human resources that accompanies capital punishment. Capital punishment should be abolished and replaced by the more fiscally responsible alternative of life-without-parole.

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[88] Prejean, *op. cit.*, p. 62.

BIBLIOGRAPHY

Administrative Office of the United States Courts, Report on the Costs of Capital Punishment.

Applebome, Peter. "Rise in Executions Widening Debate." *New York Times*, 1 Nov. 1987, Section 1, Part 1, 30.

Bienen, Leigh. "No Savings in Lives or Money with the Death Penalty." *New York Times*, 7 Aug. 1988.

Chenoweth, P. K. "Proportionality Review Will Follow First Affirmance of Death Sentence." *New Jersey Law Journal*, 31 Jan. 1991, 41.

Coyle, Marcia, Marianne Lavelle and Fred Strasser, "Fatally Flawed." *The National Law Journal*, The New York Law Publishing Company, 19 Nov., 1990.

Dill, Chris, Executive Assistant to New Jersey Assistant Commissioner of Corrections. Telephone Interview. Trenton, NJ, 7 Nov. 1991.

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

Gardener v. Florida, 430 U.S. 349 (1977).

Garey, Margot. "The Cost of Taking a Life: Dollars and Sense of the Death Penalty." *University of California, Davis, Law Review* 18 (1985).

Gradess, Jonathon E. "Execution Doesn't Pay: Barbarianism Aside, the Death Penalty Simply Isn't Cost Efficient." *Washington Post*, 28 Feb. 1988.

Gray, Ian. "A Shameful - and Expensive - Logjam at Death's Door." *Los Angeles Times*, 17 Dec. 1989, M3.

Greenfeld, Lawrence A. "Capital Punishment 1989." *Bureau of Justice Statistics Bulletin*, Oct. 1990, NCJ-124545.

Gregg v. Georgia, 428 U.S. (1976).

Haney, Craig, and Aida Hurtado. "Californians' Attitudes about the Death Penalty." 1989.

Jones, Dale, Assistant Public Defender of New Jersey Office of the Public Advocate. Telephone Interview. Trenton, NJ, 7 Nov. 1991 and 5 Dec. 1991.

Kansas Legislative Research Department. "Costs of Implementing the Death Penalty - H.B. 2062 as Amended by the House Committee of the Whole." Memorandum. 11 Feb. 1987.

Malcolm, Andrew H. "The Wait on Death Row: Legal Delays Thwart Death Penalty." *New York Times*, 23 July 1990, A1.

86X

Moran, Richard and Joseph Ellis. "About Justice." *Newsday*, 14 June 1989, 60.

Moran, Richard, and Joseph Ellis. "Price of Executions Is Just Too High." *Wall Street Journal*, 15 Oct. 1986.

Narvaez, Alfonso A. "New Jersey Journal." *New York Times*, 21 Aug. 1983, Section 11, 3.

New York State Defenders Association, Inc. "Capital Losses - The Price of the Death Penalty for New York State." 1 April 1982.

Parker, Scott G. and David P. Hubbard. "The Evidence for Death." *California Law Review*, 78 (1990).

Prejean, Helen. "The Death Penalty Costs More Than Life." *Newsday*, 3 Feb. 1988, 62.

Ross, Michael. "Executions Are Not Cheap." *Endeavor: Live Voices from Death Row Across the U.S.A.* 1.7 (1991) 7.

Saperstein, Sandra and Tom Vesey. "Maryland Public Defender May Lay Off Employees." *Washington Post*, 23 April 1983, B5.

Saunders, L., B. Moore, and B. Gaal. "An Empirical Study Attmpting to Compare the Trial Costs of Capital Cases with the Trial Costs of Non-Capital Cases." Unpublished Manuscript, 1983.

Spangenberg, Robert L., Benjamin Keehn, Stephanie Girard, and Patricia A. Smith. "Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989." September 1987.

Spangenberg, Robert L. and Elizabeth R. Walsh. "Capital Punishment or Life Imprisonment? Some Cost Considerations." *Loyola of Los Angeles Law Review*, 23 (1989).

Spangler, Todd. "Maryland Senate Aims to Shorten Death Row Appeal Procedures." *Washington Times*, 29 Aug. 1991, B4.

Spangler, Todd. "Schaefer May Study Cost of Unused Death Penalty." *Washington Times*, 5 June 1991, B1.

Stabile, Jim, Public Information Officer for New Jersey Department of Corrections. Telephone Interview. Trenton, NJ, 7 Nov. 1991.

State v. Marshall, 123 NJ 1 (1991).

Sullivan, Joseph F. "$6.8 Billion Budget Gets Final Passage in Trenton." *New York Times*, 28 June 1983, B1.

Tabak, Ronald J., and Mark J. Lane. "The Execution of Injustice: A Cost and Lack of Benefit Analysis of the Death Penalty." *Loyola of Los Angeles Law Review*, 23:59 (1989).

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University of Maryland School of Law. "Tichnell v. State - Maryland's Death Penalty: The Need for Reform." *University of Maryland Law Review*, 42 (1983).

Van den Haag, Ernest. "The Ultimate Punishment: A Defense." *Harvard Law Review*, 99 (1986).

Von Drehle, Dave. "Bottom Line: Life in Prison One-Sixth As Expensive." *Miami Herald*, 10 July 1988, A12.

Von Drehle, Dave. "Capital Punishment in Paralysis: Huge Caseload Bloats Lethargic, Costly System in Florida, U.S." *Miami Herald*, 10 July 1988, A12.

Wright, Julian H., Jr. "Life-Without-Parole: An Alternative to Death or Not Much of a Life At All?" *Vanderbilt Law Review*, 43 (1990).

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NEWSPAPERS, CRIME AND THE PUBLIC: The Role of the Media in the Reinstatement of the Death Penalty in New Jersey by Tanya Minhas

INTRODUCTION

The U.S. Supreme Court's decision in *Furman v. Georgia*[1] in June 1972 declared the death penalty unconstitutional in all states across the U.S. The decision came at a time when public support for the death penalty was declining. Table 1,[2] which compiles survey data of American public opinion on the death penalty since 1936, shows a twenty percent increase in opposition to the death penalty over the time period from 1953 to 1966. Opposition declined in 1967, but then rose steadily right until 1972. After *Furman*, public opinion rose sharply in support of the death penalty. Figure 1, which is derived from the Harris Survey, illustrates the shift in public opinion before and after *Furman*..[3] The surge in support for capital punishment after the Furman decision was uniform in all states across the U.S.

In New Jersey, the New Jersey Supreme Court had declared capital punishment unconstitutional in January of 1972,[4] on the grounds that it killed the defendant's right to a jury trial.[5] This action was followed by immediate, but unsuccessful, attempts to reinstate the death penalty. On June 29, 1972, the U.S. Supreme Court's *Furman* decision found the death penalty random and unpredictable in its application and invalidated the existing capital punishment statutes of all the states. Between 1972 and 1982, when capital punishment was reenacted in the state, the New Jersey legislature voted twice, in 1977[6] and in 1979,[7] to reinstate capital punishment.[8] Both bills were vetoed by Governor Brendan T. Byrne, who had stated publicly than he would veto any code of criminal justice which contained a capital punishment provision.[9] It was not until August 6, 1982,

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[1]Furman v. Georgia, 408 U.S. 238, (1972).
[2]*The Gallup Poll Monthly*, June 1991, p. 43.
[3]Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (Cambridge[Cambridgeshire]; New York: Cambridge University Press, 1986), p. 40.
[4]State v. Funicello, 60 N.J. 60, 286 A. 2d55 (1972)
[5]The capital punishment statute, as it then existed in New Jersey, coerced murder defendants into pleading guilty to escape the risk of execution by the electric chair if they chose to stand trial before the jury for 1st degree murder.
[6]*S. 1477,* 197th Leg., 2d. Sess. (1977).
[7]*A .1550*, 198th Leg., 2nd Sess. (1979).
[8]*Rutgers Law Review* [Vol. 41: 27], 1988, pp. 63-67.
[9]*N.J. Public Hearing on S. 112 (Death Penalty) Before the Senate Comm. on the Judiciary,* 200th Leg., 1st Sess. 2 (1982), (introductory remarks of Senator John F. Russo, Chairman).

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that Governor Thomas Kean signed into law the New Jersey statute reenacting capital punishment. The death penalty returned after a decade of legal absence and after two decades of a moratorium on executions.[10]

EXECUTIONS IN THE US

The moratorium on executions[11] existed not only in New Jersey, but extended nationally as well. The last legal execution in the U.S. had taken place in 1967 and as Figure 2 shows, the preceding three decades had witnessed a decline in executions; from 199 in 1935 to 1 in 1966. Commenting on the symbolic use of the death penalty, Hugo Bedau, in 1964 had suggested that "the obvious inference is that the death penalty in our country is an anachronism, a vestigial survivor of an earlier era."[12] The United States was, in fact, a *de facto* abolitionist country for the decade beginning in 1967. However, its legal status as an abolitionist country lasted for only four years. The decision in *Furman*, seen as the culmination of a trend of many decades towards abolition, was reversed in 1976, after *Gregg v. Georgia*,[13] in which the U.S. Supreme Court held that "punishment of death does not invariably violate the constitution".

THE *GREGG* DECISION

The U.S. Supreme Court's virtual retreat from its *Furman* decision with the decision in *Gregg*[14] was at least partially based on the grounds that the legislative response to *Furman* had indicated very strong public support for the death sentence in murder cases. Chief Justice Burger, in his majority opinion, stated the following:

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[10]*Rutgers Law Review* (Vol. 41:27], 1988, p. 66. The last execution in New Jersey was on January 22, 1963. N.J. Dept. of Corrections.

[11]Executions were at their peak during the Depression of the 1930s, and almost disappeared during the boom years of the 1950s and early 1960s. The reemergence of the death penalty in the 1970s coincided with the advent of chronic inflation and recession, and with military defeat abroad and decline of the Civil Rights Movement.

[12]Zimring, *op. cit.*, p. 38.

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

[14]In Furman the U.S. Supreme Court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eight and Fourteenth Amendments." The constitutionality of the death penalty *per se* was not addressed. Gregg addressed the question which had been avoided in Furman; "the basic contention that the punishment of death for the crime of murder is, under all circumstances, 'cruel and unusual' in violation of the Eighth and Fourteenth amendments." The U.S. Supreme Court held that "the punishment of death does not invariably violate the constitution."

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> [I]t is now evident that a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction. The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. . . [A]ll of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.[15]

In Zimring's opinion, *Gregg* was a "judicial surrender to the perceived wishes of people (public)"[16] as expressed by the enactment of revised death penalty laws by thirty-five states by 1976. It is questionable as to whether the legislative reaction was in response to the public's hostile reaction to *Furman* or whether it was primarily a states' rights, anti-Supreme Court response which rode on a wave of surging public support for the death penalty. Zimring thinks that the legislative response corresponded to, but was not driven by, a parallel movement in public opinion.[17]

Table 3 classifies states by status of death penalty before and after the *Furman* decision. Of the nine states that were non-death penalty states by legislation, all except Oregon (eighty-nine percent) remained abolitionist. These states included Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, West Virginia, and Wisconsin. Of the thirty-five retentionist states, thirty-two (ninety-one percent) reenacted the death penalty. The District of Columbia, Kansas, and Massachusetts did not. Massachusetts is unusual because it became abolitionist despite a referendum that showed public support for the death penalty. A bill that enacted the death penalty was passed by the Massachusetts legislature but was vetoed by the Governor and struck down by the Massachusetts Supreme Court before a case came up for consideration. Additionally, both New Jersey and California, whose death penalty statutes had been invalidated by state court action prior to *Furman*, also reenacted the death penalty legislation. Support for the death penalty was uniformly high in all the states, but the legislative conduct of each state was highly contingent on each state's previous capital punishment policy. The states which reenacted were primarily those with pre-*Furman* capital punishment statutes.

The surge in public opinion[18] as well as the legislative backlash coincided with the timing of *Furman*. Though the U.S. Supreme Court saw the legislative response of the states as indicative of public opinion and used this as a basis for the decision in *Gregg*, political response to the *Furman* decision was distinct from changes in public opinion, both in 1976 and in 1982, when Senator Russo, in reference to a death penalty bill he had sponsored, remarked that "it isn't that this is as a result of some recent out-cry; it is as a result of the change in the Governor of the State."[19] The legislative response to the U.S. Supreme Court's invalidation of the death penalty across all states in *Gregg* and the public response

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[15]Zimring, *op. cit.*, p. xi.
[16]*Ibid.*, p. xi.
[17]*Ibid.*, pp. 38-39 and 42-43.
[18]Table 2 and Figure 1.
[19]N.J. Public Hearing before Senate Comm. on Judiciary, 1982, *op. cit.*

to this decision were both distinct reactions to different factors.[20] Whereas public opinion towards *Furman* was hostile all over the country, the pattern of legislative response varied amongst different states and depended heavily on the previous capital punishment policy of each state.

THE LEGISLATIVE RESPONSE

Legislative response, as Table 3 shows, was a function of previous legislative behavior. Capital punishment laws were enacted in thirty-two of the thirty-five jurisdictions that had such legislation prior to the *Furman* decision. It was also a result of the antipathy of the States to being overruled by the Supreme Court and losing the power to legislate the death sentence. In most basic terms, it was a "state response to a federal slight."[21] At a public hearing in New Jersey in 1982,[22] Senator Russo, the Chairman of the Senate Judiciary Committee, described the death penalty bill under consideration as the same bill that had been passed by the legislature twice and vetoed both times by Governor Byrne. He said that the bill had been drafted with the intent of reinstating a constitutional death penalty in New Jersey.

The Supreme Court in *Gregg* seriously considered legislative response to *Furman* . Chief Justice Burger made this clear when he spoke of legislators and "their essentially barometric role with respect to community values [which] provides a reliable index of what the community regards as appropriate. The role of the Supreme Court, . . . [is to] endorse the views of the majority."[23]

Rising public opinion in favor of the death penalty seems to have been a crucial factor in *Gregg*. It was also stated to be important in the debate on reenacting the death penalty that took place in New Jersey in 1982. Sarah Dikes, the representative of the National Council on Crime and Delinquency, said that "the bill would be adopted because members of the legislature read that to be the popular will--such a strong will they dare not defy or ignore it. . ." The General Counsel of ACLU (American Civil Liberties Union) spoke of the obligation of elected officials to respond to "public clamor."[24] In 1976, at another New Jersey public hearing on bills regarding the reinstitution of the death penalty, Senator Russo drew attention to the demand for the death penalty. He spoke of the attitudes expressed by the people and the importance of those attitudes, "This is a democracy and we are representatives."[25] At the same hearing, Justice Potter Stewart called capital punishment "an expression of society's moral outrage. . . ." Senator Strom Thurmond, Chairman of the Senate Judiciary Committee, thought that the

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[20]Zimring, *op. cit.*, p. 42.
[21]*Ibid.*, p. 14-15, 16 and 43.
[22]N.J. Public Hearing Before Senate Comm. on Judiciary, 1982, *op. cit.*, (remarks by Senator Russo, Chairman).
[23]Zimring, *op. cit.*, p. 46.
[24]N.J. Public Hearing Before Senate Comm. on Judiciary, 1982, *op. cit.*, pp 9A and 3A.
[25]*N.J. Public Hearing on S. 46, S.639, S. 1119, S. 1477 (reinstitution of death penalty) Before the Senate Comm. on the Judiciary*, 1976 (remarks by Senator John F. Russo, Acting Chairman.)

death penalty legislation "generally [is] not too far from public opinion which overwhelmingly supports capital punishment."[26]

THE PUBLIC'S RESPONSE

Tables 2 and 3 trace the change in public opinion in support of the death penalty before and after the U.S. Supreme Court decision in *Furman*. Public support for capital punishment, which was at a low of forty-eight percent (48%) in October 1971 rose to sixty percent (60%) by November 1972, a sharp increase of twenty-five percent (25%) in the space of a single year. The strongest increase during that year occurred between March 1972 and November 1972, immediately after the *Furman* decision in June 1972. What caused the sharp reversal in the trend of declining support for the death penalty after it was legally invalidated, considering that the U.S. since 1967 and New Jersey since 1963 had been *de facto* abolitionists?

Arthur L. Stinchcombe[27] hypothesized that the explanation lay in the effect of a perceived increase in violent crime on people who were not directly victimized. He suggested that people's reaction to high crime rates was to increase their support for the death penalty as a means of protecting their own interests. Despite the usefulness of surveys and opinion polls in allowing the observation of changing crime rates and their effect on public opinion towards crime and punishment, it is difficult to make causal inferences in the face of many changing factors. For example, support for the death penalty was higher in earlier low crime years than it was in the high crime years of the late 60s and early 70s. There must therefore be factors other than actual violent crime rates that affect public opinion on crime.[28] In the late 60s and early 70s, public opinion on crime was related to factors such as the post-civil rights movement, protests related to the Vietnam war, higher per capita income, greater youth unemployment and increased public support for liberal positions. All these, and possibly other factors, acted together to result in the feeling towards the death penalty that Gallup or other polls quantified numerically as a measure of public opinion.[29]

THE MEDIA'S RESPONSE

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[26]*Washington News*, Proprietary to the United Press International 1981, Monday, March 16, 1981

[27]Arthur L. Stinchcombe, Rebecca Adams, Carol A. Heimer, Kim Lane Scheppele, Tom W. Smith, and D. Garth Taylor, *Crime And Punishment--Changing Attitudes In America*, 1st. ed. (San Francisco: Jossey-Bass Publishers, 1980), p. 2.

[28]People's perception of crime or fear of crime may not reflect an actual increase in crime incidence. People's fears may be manipulated by the media or in response to a few sensational crimes.

[29]Stinchcombe, *op. cit.*, p. 2.

When the U.S. Supreme Court struck down the death penalty, related comments in the media[30] variously included "a triumph of reason and law over fear and anxiety,"[31] "a license for anarchy, rape and murder," "a red letter day for civilized man," and a "decision enhancing the dignity of man, particularly of the poor, who in the main have been victims of cruel and unusual punishment."[32] Governor Reagan of California was reported to be in support of an initiative measure to reinstate the penalty in California. In Pennsylvania, Comer promised to seek legislation imposing a mandatory life sentence for first degree murder. The official reaction was largely negative in the South. The Lt. Governor of Alabama said that "a majority of this nation's highest court has lost contact with the real world." The Tennessee Governor felt tremendous shock and disappointment," and Robert Lis, the Attorney General of Nevada, found the decision "an insult to Nevada, to its laws and to its people."[33] By 1973, all the newspapers[34] had started reporting increases in violent crimes since the repeal of the death penalty. The FBI acting director L.P. Gray was "unable to uncover any statistics that prove that the death penalty does not deter crime." An editorial noted the tide of conservatism sweeping the U.S. and cited the recent increase in public opinion for reinstitution of capital punishment. It was reported that legislators in more than half the states were considering the restoration of the death penalty. An article by Tom Wicker mentioned the "exploitation of fear of crime."

The New Jersey Gubernatorial candidate C. W. Sandman Jr. told the Assembly Judiciary Committee that he supported pending legislation to restore the death penalty in the state. Senator J. Azzolina drew attention to the crime situation by conceding that he would "favor public executions and death by hanging if it would stop crime." The death penalty became a key issue of the electoral campaign for both Sandman Jr. and B.T.Byrne.[35] In 1974, the FBI director was reported as saying that capital punishment was an effective crime deterrent.

The debate continued in the press as to whether or not the death penalty should be reinstated. The U.S. Supreme Court made its *Gregg* ruling, found the death penalty an acceptable form of punishment for murder, and gave the states the right to enact capital punishment statutes.

Front page coverage was given to Gary Gilmore, who eventually became the first person to be executed in the U.S. since 1967. Gilmore's lawyer suggested that his client be shot by a firing squad on prime-time TV as a deterrent to other criminals. The macabre death wish shared coverage with the 1976 reenactment debate in New Jersey. The warden of Gilmore's prison accused the press of turning Gary

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[30]I looked at articles related to crime and the reenactment of the death penalty in *The New Jersey Law Journal, The Trenton Times, The Star Ledger* and the *New York Times* for the time period 1972-1982.

[31]Pennsylvania Attorney-General J. Shane Creamer.
[32]Please see footnote no. 30.
[33]The New Jersey Law Journal, July 13, 1972.
[34]Please see footnote no. 30 for a list of newspapers that I used for my research.
[35]The New York Times, 1973.

Gilmore into a hero.[36]

New Jersey's Governor Byrne described capital punishment as "more (an) emotional response to deep fears of violence than a practical cure for crime." When the New Jersey Assembly approved the restoration of the death penalty and sent the measure to Byrne, an editorial[37] urged the Governor not to sign. At the same time, a survey of attitudes on four hundred campuses found that support for abolishing capital punishment dropped to 36% as opposed to 60% (in 1969) of undergraduates. On June 24, 1977, the veto of the death penalty was reported as second page news, whilst the murder of an eighteen year old girl was splashed across the front page.[38]

While this is an impression, I found crime reporting to have become much more graphic in 1977 as compared to earlier years.[39] Reporting of violent crimes increased in terms of quantity, descriptiveness and prominence of display. Any bizarre violent incident was front page news. "Coed Killer Convicted On Reduced Charge," "Student Found Slain in Cranford," "Shock And Grief Grip Slain Girl's School in Cranford," and "Voting On Bill On Death Penalty" were some of the headlines. The placing of the articles was antagonistic. "Bitter Tears Are Shed For Slain Girl" was adjacent to "Death Penalty Veto Affirmed". In the related article, the murdered girl's closest friend called for a return to the death penalty, saying, "no one deserves to be alive who could commit such a brutal murder--those of you who have sons and daughters, brothers or sisters, should write to Governor Byrne and to your congressmen demanding a return of the death penalty."[40]

In 1980, a letter published in the Star Ledger showed support for the death penalty. The exact words were "Override the veto--the penalty for cold blooded murder is death".

A poll reported by the Star Ledger in February 1981 showed that a "Majority Favor Death Penalty in Jersey Poll".

PRESS COVERAGE OF CRIME: IMPACT ON PUBLIC OPINION

My research, which entailed reading *The New York Times*, *The Trenton Times*, *The Star Ledger*, and *The New Jersey Law Journal*, to note the change, if any, in the coverage of crime over the ten years between 1972 and 1982. brought me to the same conclusion as Arthur L. Stinchombe, which is that "media attention to crime has been increasing."[41] Stinchcombe's suggestion is of the existence of a linear relationship between crime, media attention to crime, fear of crime and the desire to punish (which

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[36]The Star Ledger, 1976.
[37]In the New York Times, 1977.
[38]The Star Ledger, *op. cit.*, 1976.
[39]Please refer to footnote no. 30 for a list of the newspapers that I used for my research.
[40]The Star Ledger, *op. cit.*, June 28, 1978.
[41]Stinchcombe, *op. cit*, p. 9.

he terms punitiveness). According to him, as crime increases, media attention to crime increases. Media attention to crime together with perception of actual crime increases fear of crime which evokes increased punitiveness as an attempt to control crime. The causal order between true crime and fear of crime is indistinct. A higher personal fear of crime can lead to the increased perception that others are being victimized and vice versa. Both result in an increased desire to punish.

Stinchcombe looked at the violent crime rate in the U.S. from 1933 to 1975, compared it to the murder rate for the same time period, and concluded that the violent crime rate was a better measure of fear producing crime than was the murder[42] rate, which declined over the decade as a ratio to total violent crime.[43]

Table 4 shows the increase in the violent crime rate over the time period considered. There was a sharp fall around 1955 and an accelerating increase around 1960 which continued until 1976, when there was a slight decline. The murder rate was also at a peak in 1933. It fell to its lowest level in 1944, rose in 1946, then fell again and remained the same until 1963. In the 60s, the murder rate rose and continued to rise until 1976. Of the great surge in crime, approximately .01 percent was attributable to murder.

In 1975, only about 4.5 percent of the population were arrested for some offense other than a traffic violation. Of these, less than 1.1 percent were arrested for "serious offenses" that included murder and car theft, and roughly 0.2 percent were accused of violent crimes like murder, rape, robbery, and aggravated assault. Of these serious violent crimes, about one-twentieth involved murder or non-negligent manslaughter, hence the .01 percent murder rate.[44] Thus, though crime had shown dramatic increases over the time period 1933-1975, the number of people arrested for murder was very low. This study also showed that in the 30s, 40s, 50s and early 60s, the chances of a person being a victim of a crime were once in a hundred years. A surge in violent crimes (especially robbery), in the late 1960s and early 1970s, doubled the chances of victimization to once in fifty years.

Table 5 provides a guide to the trend in periodical coverage of crime. It measures the attention paid to crime by measuring the quantity of articles per month under the category of "Crime and Criminals" in the topical index of the *Readers' Guide to Periodical Literature*.[45] The data is very rough

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[42]The death penalty is applicable only in cases of first degree murder and for those who have hired someone else to commit a murder.

[43]Stinchcombe, *op. cit.*, p. 21. He ignores drug related crimes

[44]The .01 percent murder rate indicates the restricted scope of the application of the death penalty for serious violent crimes. Rape and aggravated assault are not death eligible in New Jersey.

[45]Stinchcombe's research required a quantitative measure of periodical literature on crime. He used the topical index of the *Readers' Guide to Periodical Literature* to count the number of articles each year in the category of "Crime and Criminals." This measure of total articles each year was then divided by the number of months covered to give the average number of articles per month. Stinchcombe thought that although editorial policy and titling articles could cause variations in the meaning of the "Crime and Criminals" category over time, the measure of articles per month would show the salience of crime in magazines.In Table 5, the months in which the article counts are made vary from June, April, and March

because it ignores the content of the articles but it is sufficient to indicate major shifts in media attention to crime and criminals.[46] When the frequency of articles is below two a month, this is taken as a low point in media attention. The high point is 2.5 articles and over. In the late sixties, there was a decline in media attention to crime despite rising crime rates (see Table 4). This inverse relationship between news coverage and actual crime continued until 1974, when news coverage of crime rose in correspondence with rising crime rates (see Table 4). A conclusive relationship cannot be established between actual crime rates and newspaper coverage because opposing conclusions can be drawn, depending on which time period is studied. "The length and timing of media peaks do not correlate closely with these crime rate fluctuations."[47] Yet Stinchombe shows that public support for capital punishment correlates with the trend in media coverage and not with the trend in violent crime rates.

Tables 1 and 2 show the trend in American public towards support of the death penalty. Support for capital punishment was low in 1966, rose sharply between 1966 and 1976, and then declined until 1972. These changes in support of the death penalty corresponded to changes in media coverage of crime. Violent crime rates and the trend in support of capital punishment did not correspond because when the crime level was at its highest in the late 60s and early 70s (see Table 4), support for capital punishment was at its lowest (see Table 2).

The increase in the desire to punish was measured by the responses to the survey question of whether or not courts dealt too harshly or not harshly enough with criminals. Table 6 shows the results. Comparing the trend in desire to punish with the change in public concern towards crime (Table 7) and the change in media attention (Table 5) led to the conclusion of a stronger association between the desire to punish and surges in media attention than in the desire to punish and public concern about crime.[48]

The pattern that emerged from Stinchcombe's study was that periods of high or increasing violent crimes tended to be associated with a surge of media attention to crime and to criminals. Either the crime rate or the media attention increased public awareness of a crime problem. Stinchombe's research found stronger support for media attention as the more important factor for shaping public perception of the

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to February. A telephone interview with the publishers of the Readers' Guide to Periodical Literature, H.W. Wilson, 950 University Ave, Bronx, NY 10452, on November 18, 1991 found that this practice had been followed without a specific reason and had continued until 1984 after which year, and to date, the index is published annually. According to the publishers, the selection of the periodicals included in the Reader's Guide depended on the American Library Association (ALA). Mr. Laird Klingler, librarian of the Woodrow Wilson School Library at Princeton University, Princeton, NJ, said that " ALA surveys librarians from time to time to collect selective and subjective information on the quality and circulation of periodicals," that may then be included in the Readers' Guide to Periodical Literature. He also said that ALA tries to choose magazines that are representative. They use popular magazines and "try not to be too right-wing or too left-wing." There is no specific time period for the surveys; they are conducted whenever ALA feels that there is a need for reviewing the pool of magazines it had chosen before.

[46]Stinchcombe, *op. cite.*, pp. 22-23.

[47]*Ibid.*, p. 23.

[48]*Ibid*, pp. 29-31.

crime rate than the actual danger to one's own self. His research did not provide a conclusive response to the relationship between the actual crime rate and public response, but it did show that increased perception of crime led to an increased desire to punish.[49] Media coverage of crime, the importance of crime (on an personal and social level), and attitudes towards capital punishment appeared to be related linearly. MacKuen and Coombs attempted to prove this mathematically in their research.

MacKuen and Coombs tried to quantitatively analyze the relationships Stinchcombe had shown. They ran regressions that measured the effect that news coverage, violent crime rates, and dramatic crime events had on public concern for crime. Like Stinchcombe, they used opinion polls as data to measure public opinion[50] and the *Readers' Guide to Periodical Literature* as a source of measuring national crime coverage.[51] The actual measure was a count of the number of articles presented each month from January 1960 to December 1977.[52]

The first regression, the results of which are shown in Table 8, tested the hypothesis that public consciousness about crime was shaped by the media. It was a very simple model which implied that each individual was directly and immediately affected by fluctuations in news coverage of crime. Figure 3 graphs the results of the regression, and the regression line is quite close to the actual trend line of public opinion except in 1968, when either the public reacted to something other than the news, or the measure of media coverage through the newsmagazine editor was not adequate.[53] Table 8 shows that 44% of public opinion on crime was shaped by media coverage of crime. The R-squared measures the fit of the data, and considering the rough measure of media content and the limited nature of the Gallup question,[54] this is a high fit.[55]

MacKuen and Coombs next ran a regression with media coverage and rate of violent crime. They

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[49]*Ibid.*, p. 67.

[50]Gallup (AIPO) opinion polls form one set of data for MacKuen and Coombs.

[51] Unlike Stinchcombe who used all articles under the index of Crime and Criminals, MacKuen and Coombs restricted themselves to the national newsmagazines *Times*, *Newsweek* and *U. S. News and World Report*. They were looking for a consistent indicator of the media content each person was likely to have encountered and used national media content in the hope that fluctuations in local, or source-specific coverage would cancel out. Their count was done in month-long splices of time. The shortcomings of the method were seen as the references being subject to the vagaries of the indexing staff and the editorial currents peculiar to the magazine format. A large weight of observations was needed to get a fix on the actual position of the coverage that any one individual is likely to digest. The count was seen as a good measure of salience because a higher count meant that editors had allocated more limited space and editorial staff to a subject, which was a reflection on it's salience. The number count reflected the editor's judgement of salience.

[52]Michael Bruce MacKuen and Steven Lane Coombs, *More Than News* (London: Sage; New York: Sage Publications, inc., 1981), pp. 59-63.

[53]*Ibid.*, p. 75.

[54]The Gallup Survey asked for a "yes" or "no" response to the question "Do your favor or oppose the death penalty for persons convicted of murder?"

[55]MacKuen, *op. cit.*, p. 68.

tested the hypothesis that individual citizens do form judgements based on their objective conditions and do not rely simply on the press. Figure 4 shows the result; real life violent crime rates have no effect on crime perceptions. National crime rates provide no predictive power in accounting for public sentiment. The study found the public more sensitive to the symbolic representations of public life than to any measure of the world they were actually feeling.[56]

In the third regression that they ran, MacKuen and Coombs included news shocks[57] as a third variable along with media coverage and violent crime rates. Figure 5 shows the drastic improvement in the fit of the regression line. The fit of the data improved to 87% as opposed to the earlier 44%, but the impact of media was reduced considerably. Contributions from news shocks dominated media coverage, which was not directly associated with spectacular events. Direct links between public response and each variable were measured, and though media coverage was keyed to dramatic events, the effect was attributed to the event and not to its coverage by the media.

The conclusion that MacKuen and Coombs reached was that media coverage still dominated real life violent crime rates in shaping public opinion. However, the impact on public opinion depended on the character and portrayal of events rather than on the simple amount of news coverage. The media was important because it transmitted the character and even the occurrence of public events to the citizens. People's own understanding of events formed their judgements, but the media was a significant factor in defining the nature and meaning of events.[58]

Analysis of Newspaper Coverage of Crime and Related News

According to Leo Bogart,[59] news, to be interesting, must arouse readers' emotions, and this can be accomplished by writing about events that are inherently dramatic or by creating excitement through style and imagery.[60] Doris Graber, in her criticism of crime news, called it "fiction, to a certain degree,"[61] and Roy Lotz stated that crime news had no beneficial effects. He cited Conklin's belief that because reporting of crime was immediate, dramatic, and free of historical perspective, it led to an exaggerated fear of crime.[62]

MacKuen and Coombs' research had shown that the content of crime news was more significant

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[56]*Ibid.*, p. 88.
[57]News shocks are items of such a dramatic quality that their occurrence might make ordinary citizens take notice and begin to evaluate the political scene.
[58]MacKuen, *op. cit.*, pp. 122-124.
[59]Leo Bogart, *Press And Public*(Hillsdale, New Jersey: Lawrence Erlbaum Associates, Inc., 1981), p. 204.
[60]Roy Lotz, *Crime And The American Press* (New York: Praeger, 1991), p. 15.
[61]Doris A. Graber, *Crime News And The Public* (New York: Praeger, 1980), p. vii.
[62]Lotz, *op. cit.*, p. 37.

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than the frequency of crime coverage. Doris Graber's research in 1976 on the frequency of crime and justice news coverage in relation to other news showed that crime coverage did indeed have the highest frequency. Each of the newspapers that she covered[63] devoted approximately twenty-six percent (26%) of its news content to crime. Nine percent (9%) of this crime coverage was of individual crime.[64]

If violent crimes were considered in proportion to their frequency in total crime, then Graber found the news coverage of violent crimes to be quite excessive. Her research on the comparative prominence of crime coverage concluded that crime-related subjects did not receive preference in display in 1976.[65] I found this to be true in my study of newspapers for the time period 1972-1982. I found that violent and dramatic crimes received more frequent mention and greater prominence from 1977 onwards. In 1976, newspaper coverage was devoted to the question of capital punishment reenactment.

Ninety-five percent (95%) of those Graber studied cited the media as their primary source of information about crime. According to Lotz, this did not imply that people relied on media in order to interpret crime and make judgements,[66] but MacKuen and Coombs' regression analysis had shown the strong significance of the media as the provider of information on which people base their opinions. Lotz mentioned that research studies had found that the masses were not compliant in the face of media messages. However, Stinchcombe's study, which has been addressed earlier, reached the opposite conclusion. Even though masses were not "compliant," the public was dependent on the media for information. The extent to which this information was used to form opinions is a subjective question that researchers have quantified in different ways, and have obtained varied results. It is difficult to state a conclusion with absolute surety since we are trying to measure the abstract notion of the thoughts and feelings of people.

Crime and the Death Penalty

Graber found that newspapers presented an exaggerated picture of the frequency of the most violent kinds of crime. Murder, which comprised 0.2 percent (0.2%) of all crimes in the police index, was given 26.2 percent (26.2%) of all crime coverage. Murder and robbery together formed 37 percent (37%) of all crime reporting. The image that newspapers presented of crime was distorted because murder, rape, and assault were over-represented in relation to robbery, burglary and theft[67] (See Figure 6).

Newspapers also carried frequent reports on crime and crime trends in general. This made up approximately 10.9 percent (10.9%) of all crime news under Graber's research. Only 4.3 percent (4.3%) of crime coverage was devoted to proposed reforms of the legal system and crime prevention measures.

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[63]The Tribune, Sun-Times and Daily News.
[64]Graber, *op. cit.*, p. 27.
[65]*Ibid.*, p. 29.
[66]Lotz, *op. cit.*, p. 48.
[67]Graber. *op. cit.*, p. 42

Newspapers, in fact, supplied very few analytical stories about the crime problem. People were able to make their own generalizations from specific data. Doris Graber concluded that though newspaper coverage of crime was exaggerated and leaned towards the sensational, "reporters rarely stray from what their police contacts supply."[68]

Whereas media attention to crime attracted public and political response, it did not inform the public well. News was shaped by what journalists thought would sell, stories were written as isolated events, and the need to select and condense inevitably led to distortions. The presentation of information to the public was imbalanced, but little was done to put crime news into perspective.[69]

The main causes of rampant crime, as depicted by the media, were deficiencies in the existing criminal justice system and personality defects in individuals.[70] Towards the late 70s, the situation changed in favor of increased attention to social problems, but emphasis on the judicial corrections remained the more dominant theme.

Of all the murder cases that Graber encountered during her research, twelve percent had the death penalty reported. In all the murder cases that I came across, the mention of the death penalty was very prominent. The need for the death penalty was an especially strong focus of attention and most stories on the criminal justice system and on criminal policy changes were devoted to it.[71]

Fifty-nine percent (59%) of the panel members that Graber interviewed felt that court performance had deteriorated between 1970 and 1986. Sixty-five percent (65%) gave overly light penalties as the cause of poor performance and suggested greater use of the death penalty.[72]

Roy Lotz found that despite the strong support columnists showed for punishment in general, columns devoted exclusively to the question of capital punishment usually opposed the practice. Lotz suggests that the columnists accepted American support for the death penalty and focused instead on its infrequent use. "Thus, Kohlmier complained that a person has a better chance of being put to death if he drives down the highway than if he commits a murder, and van den Haag said that the awful truth of death row is that most inmates die of old age, not electricity."[73]

My research showed a similar trend. In newspaper articles that reported public hearings on the death penalty, reporting was factual. I checked this by comparing the text of public hearings on the death penalty before the Senate Judiciary Committee with the text of newspaper reports. All editorials during the time period of 1972 till 1982 were against the death penalty. The editorial in the April 12, 1973 issue of the New Jersey Law Journal opposed the revival of the death penalty.

Keep in mind just what the issue is in deciding whether to have capital punishment again.

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[68]*Ibid.*, pp. 47 and 51.
[69]*Ibid.*, pp. 124-125.
[70]*Ibid.*, pp. 71-78.
[71]Please see pages 12-13 for examples of stories.
[72]Graber, *op. cit.*, p. 81.
[73]Lotz. *op. cit.*, p. 98.

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> The question is not really whether capital punishment deters. The issue, rather, is whether the added or marginal deterrence it may provide outweighs its disadvantages and its alternatives. Its disadvantages are many. Capital punishment carries with it a real and significant expenditure of public money. It has a potential for increasing racial tensions and disharmonies. There is a question of what it does to us as a people and there is always the chance for error-whether in the guilt determining phase or in the decision as to who is a fit candidate for the death penalty. This is not an imaginary fear. The Government has in the last few years granted executive clemency to at least three former death row residents so that they might get release on parole. Alternatives may include jury discretion to impose life imprisonment with no possibility of parole or with limited parole eligibility.
>
> With all this, we should wait. Let some other states experiment. If after they have succeeded in having the Courts find a death penalty statute constitutional, and there is still a desire for the state(New Jersey)to back reenact, then we'll consider it. It is not yet worth the expense or turmoil.[74]

The same newspaper carried another editorial opposing the death penalty on January 6, 1977. This coincided with the trial of Gary Gilmore, and the editor felt that "the national movement to re-instate is being aided and abetted by a self-confessed murderer. . . who wants notoriety."

In June of 1978, the "Chase [Bergen Bar President] oppose[s]d death penalty." This column was very critical of state legislators attempting to re-institute capital punishment in New Jersey. Seymour Chase suggested that they be "publicly admonished for pandering to the worst in our society." He was sympathetic to the "growing public demand to subdue crime and criminals," but found the death penalty ineffective in controlling crime.

"Death Penalty Revisited," an editorial in March 1982, mentioned the reopening of the reenactment debate after the end of Governor Byrne's term and whilst the editor expressed his understanding for the public endorsement of the death penalty as a symptom of a high violent crime rate, fear of victimization and a sense of futility, he suggested that the death penalty was not the answer.

The New York Times had articles in January of 1971 calling for the abolition of the death penalty. The editorial in 1972 praised the U.S. Supreme Court's decision to abolish capital punishment, urged states to review the question, but instead of reviving the penalty, to abolish it once and for all. In 1973, Tom Wicker accused Nixon of exploiting fear of crime and using the death penalty as a splendid way to reap political profit.

In 1974, *The New York Times* conducted a poll of New Yorkers' attitudes towards crime. It appeared that seven out of ten residents favored the death penalty for some crimes. There were at least

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[74]Alfred C. Clapp (Chief Editor), Editorial: "Reviving the Death Penalty", *The New Jersey Law Journal*. April 12, 1973.

three articles opposing capital punishment in 1975.

The U.S. Supreme Court, in 1976, ruled that the death penalty was an acceptable punishment for some crimes. Tom Wicker's article on Gary Gilmore saw the majority of American people were in favor of capital punishment but "leery of actual execution."

In 1977, the "Issue of Capital Punishment face[s]d New Jersey legislature during the present session." There were reports of groups meeting in Trenton, New Jersey, to restate their arguments against the death penalty. The coverage of the reenactment debate in New Jersey continued in 1979. A New York Times-CBS poll showed that support for reinstating the death penalty was then 75 percent. Governor Byrne of New Jersey was still unwilling to sign the reinstatement bill, and editorials reiterated opposition to the death penalty.

The Star Ledger, whilst covering all debates on capital reenactment, gave the most graphic description of the 1976-77 trial of Gary Gilmore. Gary Gilmore was front page news every time there was a new development in his trial or in his personal life.

At the same time, Bergen County Prosecutor Woodcock said that he would be "forced to resign on moral grounds if the death penalty is enacted." Gilbert Athay, Gilmore's attorney, declared in 1977, "I think we are going to see the spilling of blood at sunrise." Senator Russo, sponsor of the bill restoring the death penalty in New Jersey, said that he did not see the death penalty as a panace. "There has to be some doubt about it. There is some in my mind." The murder of an 18 year old girl was front page news whilst the news of the veto of the death penalty was reported on the second page.

1977 seems to have been a be a very violent year, or a year with few but shocking, dramatic and newsworthy crimes. "Father Admits Beating to Death" concerned the death of two children, one aged four years and the other aged eighteen months. The Ronny Zamora trial of a teenager who shot an eighty-four year old woman to death and pleaded innocent on the claim that he was "sick from TV [violence]" was another example of the out of the ordinary, dramatic sort of violent crime.

On June 16, 1978, Senator Russo clarified his reason for supporting the death penalty, saying, "I am supportive of capital punishment. . . .In view of my beliefs, I have a simple obligation to support the death penalty and to override the governor's veto should that become necessary. That is what this constitutional democracy is all about."

In the months of June and July, there was more individual violent crime. The debate on the death penalty continued at the same time. Martin Herman(D-Salem) felt that while capital punishment may not deter murderers, "swiftly imposed punishment is a just response. It is the right of the people to be secure ı their homes and free from lethal and devastating attack."

The coverage of crime in 1976 and 1977 fits Fishman's description of a crime wave. According to Fishman, a crime wave is created when the media chooses a kind of crime and heavily and continuously reports it.[75] In the 1976 crime wave, the theme that the media chose to play up on was

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[75]Mark Fishman, *Manufacturing The News* (Austin:University of Texas Press, 1980), p. 5.

murder, and public fear of crime rose[76] even though the murder rate as a proportion of total violent crime fell.[77] As Fishman said, "news creates the environment it reports. The consequence of news is more news."[78]

THE OTHER SIDE: WHAT NEWSPAPER REPORTERS THINK

Mr Michael Booth[79] of the *Trenton Times* said that newspaper coverage of violent crime had increased because society had become a lot more violent. His interest as a journalist lay in covering newsworthy, interesting crimes that very often turned out to be capital crimes. He felt that the public was interested either in violent crimes or in civil suits that involved huge sums of money. The latest capital trial that he covered was the Watson trial, which received strong media attention.

Kathy Bird[80] of the The *New Jersey Law Journal* spoke of easier access to the office of the Public Defender of New Jersey than to the Attorney General's office. She found that the people at the Attorney General's office were reluctant to explain their position, and thought that they used the excuse of "ethical constraints" to get out of providing information. She said that the *Law Journal* was a newspaper primarily for lawyers and policy makers and its circulation was by subscription. The editorial board of the Journal existed separately and distinctly from the *Law Journal* and consisted of very prominent lawyers.

She stressed that as a journalist she kept personal opinion out of the stories she covered and concentrated instead on presentation and interpretation. Commenting on other newspapers she found the *Trenton Times* to be "sensational--everything is hyped" and the *Star Ledger* to be a paper of record.

Cathy Carter[81] of the *Star Ledger* thought that opinion polls conducted by newspapers affected public opinion on crime. Though the general public knows that executions may not have a significant impact on crime rates, the presence of the death penalty makes them feel more protected. One of the reasons that she gave for this misconception is the shift away from reading newspapers and depending on television news networks like CNN. She thought that newspapers gave the most detailed and informative views whereas TV misinformed because it gave sketchy information that created a strong, instantaneous response. She suggested that even legislators most probably depended on television more

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[76]James Garofalo, *Public Opinion About Crime: the attitudes of victims and nonvictims in selected cities(*Albany, New York: Criminal Justice Research Center, 1977), pp. 80-81 and p. 84.
[77]Zimring, *op. cit.*, p. 19.
[78]Fishman, *op. cit.*, p. 11.
[79]Mr. Michael Booth, Staff writer, *The Trenton Times*,Telephone interview on newspaper coverage of crime, November 6, 1991.
[80]Ms. Kathy Bird, Staff writer, *The New Jersey Law Journal*, Personal interview on crime reporting in newspapers, Princeton, New Jersey, October 29, 1991.
[81]Ms. Cathy Carter, Staff writer, *The Star Ledger*, Telephone interview on newspaper coverage of crime, October 29, 1991.

than newspapers for their views on what people want and felt that they should read the newspapers instead.

Mr. Robert Schwaneberg,[82] also of the *Star Ledger*, had a different theory. He suggested that the attention given to the death penalty by its being outlawed and then reinstated caused media reporting of the death penalty to increase. At the same time, there were more "thrill kills" and newspapers began to cover things that they had been "squeamish about covering earlier." People on Death Row were the "most gruesome people," and reading about them and their deeds made public sentiment for the death penalty increase. Crime rates also rose at the same time for reasons that were economic as well as social and served to reinforce the public's fear of crime.

Regarding the support for the death penalty as it exists now, Mr. Schwaneberg thought that if people were presented with facts and shown that the death penalty "can kill only the very worst" who commit a crime that forms the smallest proportion of total violent crime, they might change their minds. He remembered that when he took a look at death row around five years ago, he had been struck by how vicious the people there were. At the same time he had been struck by how pathetic they were.

Michael Kroll,[83] from the Death Penalty Information Center in Washington, D.C., said that the press looked at crime in a limited way. Giving the example of the movie *Silence of The Lambs*, he stated that "exceptional crime defines perception of crime". He said that people were irrational in their desire to support the death penalty and that the concept of "an eye for an eye, tooth for a tooth" formed a strong basis of support for their decision. People were unaware of how limited the selection process was for people eligible for the death penalty. The public also largely believed in the deterrent effect of the death penalty and thought that life imprisonment was more costly than execution. Both reasons for the support of the death penalty were untrue.

Mr. Kroll also mentioned the political use of the death penalty. Some politicians, he said, make statements such as "mad-dogs must be put to death" and "there are some crimes that are so horrible that the person committing them deserves to die." He thought that the entire death penalty issue was an issue for a political career. "A shell game in order to avoid spending time and money on an actual system that reduces crime" is how he described the political aspect of the death penalty issue.

As for media coverage, Mr. Kroll found the media responsible for "inflaming a situation needlessly and forming public policy." He noted the emphasis on particularly heinous individual crime and individual punishment in which the perpetrator was terrible and the victim flawless. The press "describes one little part very well" but does not deal with all the themes that link the cases. He also suggested a look at the international company that the United States keept in its decision to retain the death penalty--countries like the Soviet Union and Pakistan, which have very poor human rights records.

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[82]Mr. Robert Schwaneberg, Staff writer, *The Star Ledger*, Telephone interview on newspaper coverage of crime and its effect on public opinion, October 29, 1991.

[83]Mr. Michael Kroll, Death Penalty Information Center(DC), Telephone interview on public opinion and the media, November 7, 1991.

Shawn Renner,[84] a Nebraskan legislator who advocated abolishing the death penalty in Nebraska, said that regardless of the actual crime rate or the number of people killed, homicides always get favorable media attention. Journalists tend to link homicide with the death penalty, and the public remains clueless as to the limited aspect of the application of the death penalty bill. Mr. Renner said that there was no doubt in his mind that what newspapers said and how they said it was very important in shaping people's support for the death penalty. He worked on a campaign to abolish the death penalty in Nebraska and said that he worked very hard with legislators and with editors to get actual information regarding the death penalty to the public. He used the media to get information out and received very positive responses from legislators. The most difficult part of his media campaign was to provide information in small, usable pieces.

Mr . Renner was "willing to attribute some of the changing perception of the death penalty bill to the media." His comment on public opinion polls was that Gallup surveys that depend on the response to the question "do you favor the death penalty?" were not accurate measurements of public opinion. When people were offered alternatives to the death penalty such as a minimum of twenty-five years imprisonment, a minimum of thirty years imprisonment, life imprisonment without parole, and life imprisonment without parole and restitution, support of the death penalty declined substantially. In Nebraska, it fell from 64 percent to 29 percent.

Mr. Earl Bender[85] saw reenactment to be a policy decision. He described media coverage of crime around the time of reenactment as "absolutely sensational" and also mentioned the "hue and cry" that surrounded the death penalty. He thought that politicians used the death penalty as a "flashy symbol," and that most legislators were either unaware of or did not believe that the death penalty did not have a deterrent effect.

CONCLUSION

New Jersey reenacted its death penalty statute in 1982, after a two decade moratorium on executions. Reenactment was either a legislative response to the U.S. Supreme Court's *Furman* decision, delayed till 1982 because of Governor Byrne, who refused to sign a death penalty bill into law, or it was a legislative response to public opinion, which rose strongly in support of the death penalty after *Furman*. Alternatively, it could have been both factors at play simultaneously, one finding expression through the other. The legislature, observing the rising trend in public support, might have used it as a justification for regaining its federally withdrawn power to legislate the death penalty.

Hood supports this by saying that governments base their penal policy on political ideology and

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[84]Mr. Shawn Renner. Nebraska legislature, Telephone interview on use of press to change public attitudes, November 7, 1991.

[85]Mr. Earl Bender, professional media person with a special interest in the death penalty and lobbying, Telephone interview on media coverage and death penalty reenactment, November 5, 1991.

on sources from which they believe the authority of law should emanate. In the U.S., it is supposedly anti-democratic for legislators to ignore strong public sentiment[86] and in this case they did not. They used public sentiment but did not follow it as Zimring's study of pre and post-*Furman* legislative patterns show. Public opinion therefore was most important in the scheme of events that occurred.

This paper explores the impact of newspaper coverage of crime and of the death penalty on the swing in the trend of public opinion from declining to sharply rising support for capital punishment.

Press coverage of crime and related issues had a significant impact on public opinion. This claim may be supported by the studies mentioned in this report and by proof of a measurable change in public opinion towards the death penalty in response to information dissipated through the press in the state of Nebraska.[87] This relationship was not one in which public opinion blindly followed the path shown by the press but it is one in which the press was an important source of information that people used to form their judgements towards issues such as the level of crime and their feeling towards the death penalty.

The press is dangerous in that its supply of information is fragmented and biased towards the sensational. During the decade of 1972-1982, it is debatable as to whether the coverage given to the death penalty led to stronger media attention towards crime, which in turn increased people's fear of crime and made them more supportive of the death penalty as a protective measure. The alternative sequence is higher crime coverage as an initiating factor that caused rising sentiments towards the death penalty, which had been *de facto* nonexistent in New Jersey for the past decade. Whatever the true cause-effect factors were, the press coverage of crime and of capital punishment was and still is skewed. Members of the public have very limited knowledge of the actual process of capital punishment.[88] As Mr. Shawn Renner says, "people are unaware of the limited aspect of the bills application." They see it as a form of protection from the increasing level of total violent crime.[89]

Policy Recommendations

The legislature should make detailed information on the death penalty available to the public. It should present and discuss the factors that proponents and opponents of the death penalty put forward. It should prepare a report on each of these factors, presenting both views on the issue and make it available to the press in a form that is suitable for newspaper reporting (. . .in small usable pieces[90]). It should also make all official data on capital crimes and the death penalty available to citizens, perhaps by publishing it in the newspapers. Most important, it should educate the public on the working of the

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[86]Roger G. Hood, *The Death Penalty: A World-wide Perspective: A Report To The United Nations Committee On Crime Prevention And Control* (Oxford: Claredon Press; New York: Oxford University Press, 1991), pp. 149-158.
[87]Renner, *op. cit.*
[88]Hood, *op.cit.*, p. 15.
[89]Murder forms only 0.01 percent of serious violent offenses
[90]Renner, *op.cit.*

capital punishment statute. Opinions expressed by professional organizations involved in the criminal justice system may have a substantial impact on the public and should be tapped as a possible resource.

The press is a powerful medium that can be used or abused for political purposes. During 1972-1982, it fulfilled its function of providing its audience with interesting news. Yet the factors that it neglected to mention, specifically those regarding the death penalty statute, have led to a misinformed public perception of the issue of crime and the application of capital punishment. The finality of the death sentence makes it essential that the public be well informed of all aspects of its application.

BIBLIOGRAPHY

Bender, Earl. Telephone interview on media coverage and death penalty reenactment. November 5, 1991.

Bird, Kathy. Telephone interview on crime reporting in newspapers. *The New Jersey Law Journal*, October 29, 1991.

Bogart, Leo. *Press And Public*. Hillsdale, New Jersey: Lawrence Erlbaum Associates, Inc., 1981.

Booth, Michael. Telephone interview on newspaper coverage of crime. *The Trenton Times*, November 6, 1991.

Caddel, Patrick H. *New York Public Opinion Poll 1989*. New York: Amnesty International U.S.A, 1989.

Carter, Cathy. Telephone interview on newspaper coverage of crime. *The Star Ledger*, October 29, 1991.

Ericson, Richard V., Patricia M. Baranek and Janet B.L. Chan. *Representing Order: Crime, Law and Justice In The News Media*. Toronto: University of Toronto Press, 1991.

Fishman, Mark. *Manufacturing The News*. Austin: University of Texas Press, 1980.

Garofalo, James. *Public Opinion About Crime: The Attitudes Of Victims And NonVictims In Selected Cities*. Albany, New York: Criminal Justice Research Center, 1977.

Graber, Doris A. *Crime News And The Public*. New York: Praegger, 1980.

Hood, Roger G. *The Death Penalty: A World-Wide Perspective: A Report To The United Nations Committee On Crime Prevention And Control*. Oxford: Claredon Press; New York: Oxford University Press, 1991.

Kroll, Michael. Telephone interview on public opinion and the media. Death Penalty Information Center, DC, November 7, 1991.

Lotz, Roy. *Crime And The American Press*. New York: Praeger, 1991.

MacKuen, Michael Bruce, and Steven Lane Coombs. *More Than News*. London: Sage; New York: Sage Publications, Inc., 1981.

New Jersey. Legislature. Senate Judiciary Committee. *Public Hearing Before Senate Judiciary Committee On Senate, No. 112 (Death Penalty)*. Held Room 223, State House, Trenton, New Jersey, February 26, 1982.

_____. *Public Hearing Before Senate Judiciary Committee On Senate bills Nos. S-46, S-639, S-1119, S-1477(Bills Concerning Reinstitution Of The Death Penalty)*. Assembly Chamber, State House, Trenton, New Jersey, July 29, 1976.

Renner, Shawn. Telephone interview on use of press to change public attitudes. Nebraska legislature, November 7, 1991.

Schwaneberg, Robert. Telephone interview on newspaper coverage of crime and its effect on public opinion. *The Star Ledger*, October 29, 1991.

Stinchcombe, Arthur L., Rebecca Adams, Carol A. Heimer, Kim Lane Scheppele, Tom W. Smith, and D. Garth Taylor. *Crime And Punishment-Changing Attitudes In America*, 1st. ed. San Francisco: Jossey-Bass Pubishers, 1980.

Wicker, Tom. *On Press*. New York: Berkley Publishing Corporation, 1978.

Zimring, Franklin E. and Gordon Hawkins. *Capital Punishment And The American Agenda*. Cambridge[Cambridgeshire]; New York: Cambridge University Press, 1986.

Viewpoint on the Death Penalty

QUESTION: Are you in favor of the death penalty for persons convicted of murder?

	Yes	No	No opinion	No. of interviews
National	76%	18%	6%	990
Sex				
Male	81	14	5	477
Female	72	21	7	513
Age				
18-29 years	75	20	5	245
30-49 years	77	18	5	377
50 & older	75	17	8	357
Region				
East	73	19	8	254
Midwest	73	18	9	243
South	76	20	4	337
West	82	13	5	156
Race				
White	78	16	6	659
Black	59	31	10	303
Education				
College grads.	70	25	5	241
College inc.	78	17	5	211
High school grads.	78	15	7	397
Not H.S. grads.	75	17	8	136
Politics				
Republicans	83	13	4	280
Democrats	67	23	10	359
Independents	79	17	4	316
Ideology				
Liberal	71	24	5	365
Moderate	72	16	12	68
Conservative	82	13	5	394
Income				
$50,000 & over	73	23	4	165
$30,000-49,999	75	17	8	238
$20,000-29,999	86	12	2	188
Under $20,000	72	20	8	317
Religion				
Protestant	77	17	6	582
Catholic	77	16	7	216
None	76	17	7	80

Death Penalty for Murder — Trend

	Yes	No
1991	76%	18%
1988*	79	16
1986*	70	22
1985	72	20
1981	66	25
1978	62	27
1976	65	28
1972	57	32
1971	49	40
1969	51	40
1966	42	47
1965	45	43
1960	51	36
1953	68	25
1937	65	35
1936	61	39

* "Do you favor or oppose..."
Note: "No opinion" omitted

SOURCE: THE GALLUP POLL MONTHLY, June 1991.

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Table 6.8 Do You Favor the Death Penalty?--1936-1988

CAPPUN--Do you favor or oppose the death penalty for persons convicted of murder?

	FAVOR	OPPOSE	DK	N	
Apr 1936[a]	62	33	5	NA	AIPO
Dec 1936[a]	59	38	3	2201	AIPO59
Nov 1937[a]	61	33	7	2807	AIPO105
Oct 1953[b,c]	68	26	6	1496	AIPO522
Apr 1956[b]	53	34	13	1985	AIPO562
Sep 1957[b]	47	34	18	150	AIPO588
Mar 1960[b]	53	36	11	293	AIPO625
Jan 1965[b]	45	43	12	392	AIPO704
May 1966[b]	42	47	11	518	AIPO729
Jun 1967[b]	54	38	8	3383	AIPO746
Jan 1969[b]	51	40	9	1503	AIPO774
Oct 1971[b]	48	41	11	1558	APO839
Feb 1972[b]	51	41	8	1509	AIPO846
Nov 1972[b]	60	30	10	1462	AIPO860
Mar 1972[b]	53	39	8	1609	GSS
Mar 1973[b]	60	35	5	1492	GSS
Mar 1974	63	32	5	1480	GSS
Mar 1975	60	33	7	1483	GSS
Mar 1976	66	30	5	1496	GSS
Apr 1976[b]	67	27	7	1540	AIPO949
Mar 1977	67	26	6	1520	GSS
Mar 1978	62	26	11	1560	AIPO995
Mar 1978	66	28	6	1532	GSS
Jul 1979	65	27	8	1599	NBC
Mar 1980	67	27	6	1461	GSS
Jan 1981[b]	66	25	9	1609	AIPO168G
Mar 1982	74	21	6	1504	GSS
Jun 1982	71	20	9	1597	NBC
Mar 1983	73	22	5	1597	GSS
Mar 1984	70	24	6	1462	GSS
Mar 1985	76	19	5	1526	GSS
Jan 1985[b]	72	20	8	1523	AIPO
Nov 1985[b]	75	17	8	1008	AIPOTEL
Mar 1986	71	23	5	1466	GSS
Mar 1987	70	24	6	1454	GSS
Mar 1988	71	22	7	1475	GSS

[a]Are you in favor of the death penalty for murder?

[b]Are you in favor of the death penalty for persons convicted of murder?

[c]"Yes" includes qualified yes; "No" includes qualified no.

Do you favor or oppose the death penalty for persons convicted of murder?

	Favor	Oppose	DK/NA	N	
September 1988	79	16	5	1001	Gallup
January 1989	71	20	9	1533	NYT/CBS
March 1989	74	20	6	1537	NORC-GSS
March 1990	75	19	6	1372	NORC-GSS
March 1990	72	20	8	1515	NYT/CBS
August 1990	76	15	9	1422	NYT/CBS
June 1991 [b]	76	18	6	990	Gallup

[b] Are you in favor of the death penalty for persons convicted of murder?

SOURCE: Niemi, Richard G, John Mueller and Tom W. Smith. "Trends in Public Opinion- A Compendium of Survey Data", New York: Greenwood Press, 1989.

Table 2.8. *Current status of capital punishment by pre-*Furman *legislation, fifty states*

Pre-*Furman*		Post-*Furman* response: No death penalty	Post-*Furman* response: Death penalty
Non-death penalty states by legislation (9)	Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, Wisconsin	All, except Oregon (8)	Oregon
Non-death penalty states by judicial invalidation (2)	California, New Jersey	None	California, New Jersey
Restrictive death penalty states (5)	New Mexico, New York, North Dakota, Rhode Island, Vermont	New York,[a] North Dakota, Vermont[b]	New Mexico, Rhode Island
Death penalty states (35) (plus District of Columbia)	Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming	District of Columbia, Kansas, Massachusetts[c]	All others (32)

[a] Death penalty statute enacted in 1974; declared unconstitutional by state supreme court in 1977 and 1984.
[b] Death penalty statute remains unchanged, but constitutionally infirm.
[c] Death penalty statute enacted in 1979; declared unconstitutional by state supreme court in 1980.

SOURCE: Zimring, p. 43.

Table 1. Total Reported Murders, Rapes, Robberies, and Aggravated Assaults per 100,000 Population, 1933-1975

Year	Violent crime rate	Year	Violent crime rate
1933	177	1955	136
1934	151	1956	137
1935	134	1957	141
1936	122	1958	148
1937	124	1959	147
1938	120	1960	160
1939	118	1961	157
1940	115	1962	161
1941	112	1963	167
1942	113	1964	189
1943	109	1965	198
1944	114	1966	218
1945	132	1967	251
1946	142	1968	295
1947	140	1969	325
1948	136	1970	361
1949	138	1971	393
1950	133	1972	398
1951	128	1973	417
1952	139	1974	461
1953	146	1975	482
1954	147		

Source: Office of Management and Budget, 1973, Table 211; supplemental data from U.S. Bureau of the Census, 1976, Table 252. Figures are rounded to the nearest digit.

SOURCE: Stinchcombe, p.20.

Table 2. Trends in Periodical Literature on "Crime and Criminals"

Beginning Date of Reader's Guide to Periodical Literature Volume	*Average number of articles per month*[a]
June, 1932	4.3
June, 1935	2.8
June, 1937	1.8
June, 1939	1.7
June, 1941	1.1
June, 1943	1.0
April, 1945	2.2
April, 1947	2.4
April, 1949	3.7
March, 1951	4.1
March, 1953	3.0
February, 1955	2.3
February, 1957	1.9
February, 1959	2.5
February, 1961	1.4
February, 1963	2.0
February, 1965	3.9
February, 1966	3.7
February, 1967	4.6
February, 1968	3.3
February, 1969	2.6
February, 1970	1.9
February, 1971	2.2
February, 1972	2.0
February, 1973	1.8
February, 1974	3.0
February, 1975	3.3

Source: Reader's Guide to Periodical Literature, various issues.

[a]The count of articles under "Crime and Criminals" was divided by the number of months covered by the volume.

SOURCE: Stinchcombe, p. 23.

Table 7. Trends in Attitudes Toward the Courts

Survey	*Date*	*Percentage saying courts are "not harsh enough"*
Gallup	3/65	48.9
Gallup	9/65	59.3
Gallup	1/68	63.1
Gallup	1/69	74.4
GSS	3/72	74.4
Gallup	12/72	66.3
GSS	3/73	73.1
GSS	3/74	77.9
GSS	3/75	79.2
GSS	3/76	81.0
GSS	3/77	83.0
GSS	3/78	84.9

SOURCE: Stinchcombe, p. 31.

Table 3. Trends in Naming Crime as the Most Important Problem

Year	*Percent*
1946	0
1947	0
1948	0
1949	0
1950	0.5
1951	0
1954	0.9
1955	0
1956	.010
1957	.016
1958	.004
1959	.005
1960	.028
1962	.028
1963	0
1964	0
1965	.026
1966	.015
1967	.013
1968	.037
1969	.061
1970	.067
1971	.072
1972	.069
1973	.068

Source: Gallup Polls. When more than one study was available in a single year, the data from those studies were averaged.

SOURCE: Stinchcombe, p. 25.

TABLE 3.2 Dynamic Cross-Temporal Covariation Between Public Concern and Media Coverage

Issue	*Dynamic Model* R^2	*Absolute Improvement Over Simultaneous Model*
Race	0.84	0.25
Campus Unrest	0.86	0.12
Environment	0.29	1.74
Vietnam	0.89	0.24
Crime	0.44	0.59
Employment	0.65	0.73
Energy	0.58	0.16
Inflation	0.66	0.94

SOURCE: MacKuen and Coombs, p. 68.

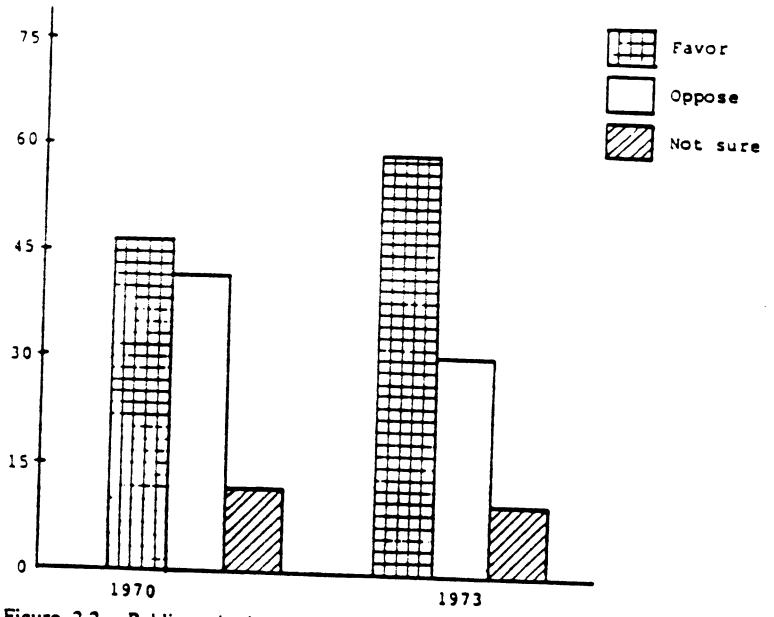


Figure 2.2. Public attitudes toward capital punishment, United States, 1970 and 1973. *Source:* adapted from U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics 1980*, at 199, Figure 2-7 (1981); constructed by *Sourcebook* staff on the basis of L. Harris, *The Harris Survey* 1 (1977).

SOURCE: Zimring, p.40

FIGURE 2

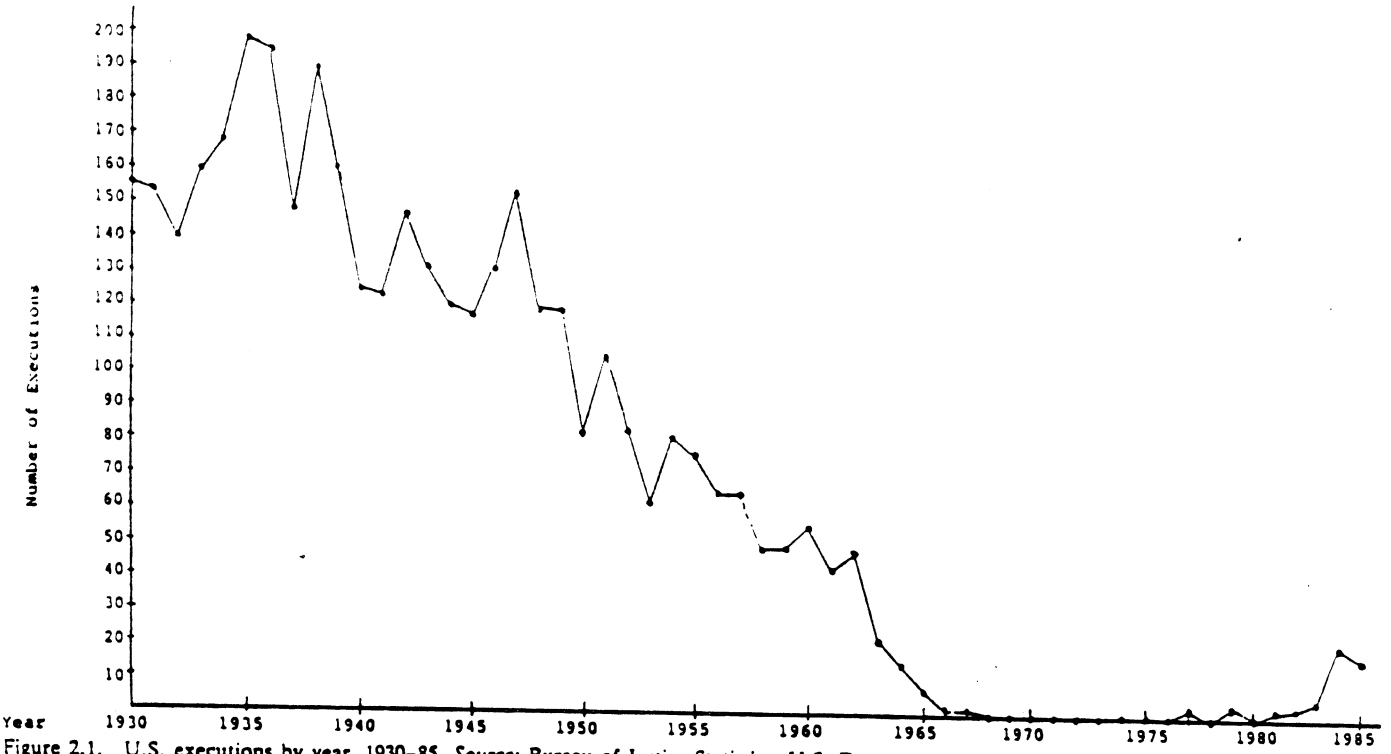


Figure 2.1. U.S. executions by year, 1930–85. *Source:* Bureau of Justice Statistics, U.S. Department of Justice, *Capital Punishment 1982*, at 15, Table 2 (1983); NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.* 2 (Aug. 1, 1986).

27

SOURCE: Zimring, p. 27.

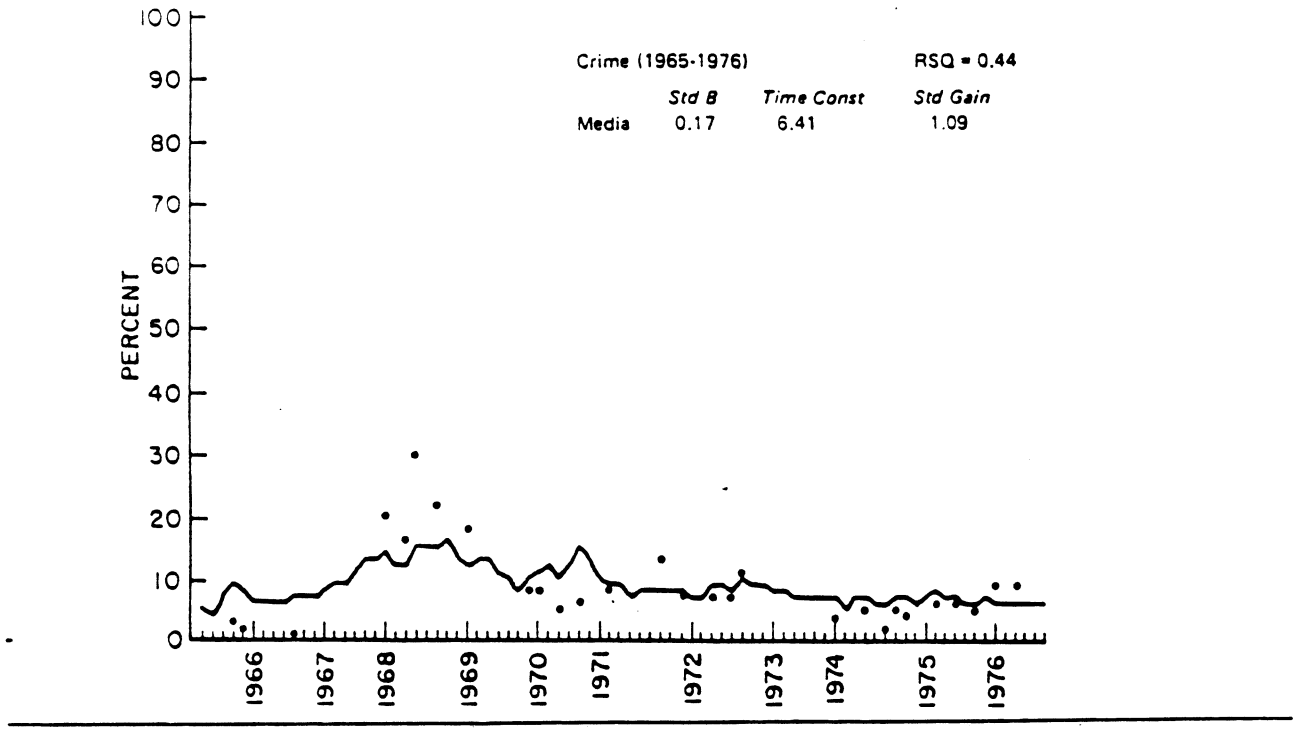


FIGURE 3.5 Crime (1965-1976): Media

SOURCE: MacKuen and Coombs, p. 74.

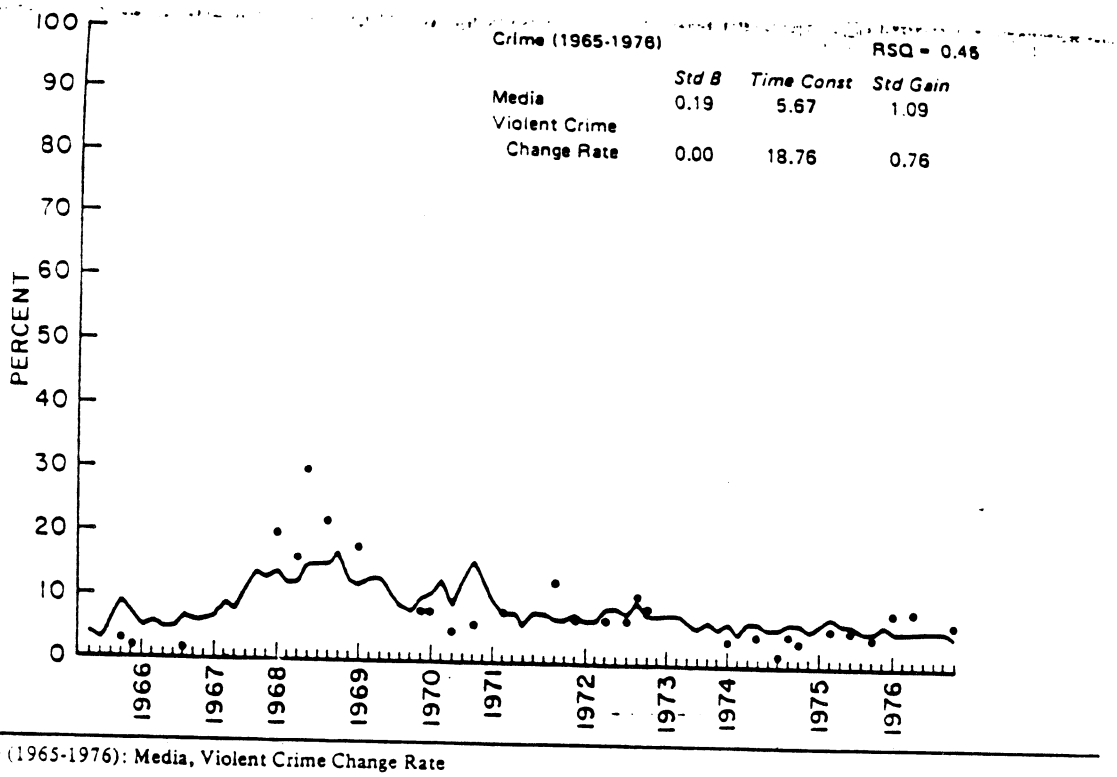


FIGURE 4.2 Crime (1965-1976): Media, Violent Crime Change Rate

SOURCE: MacKuen and Coombs, p. 89.

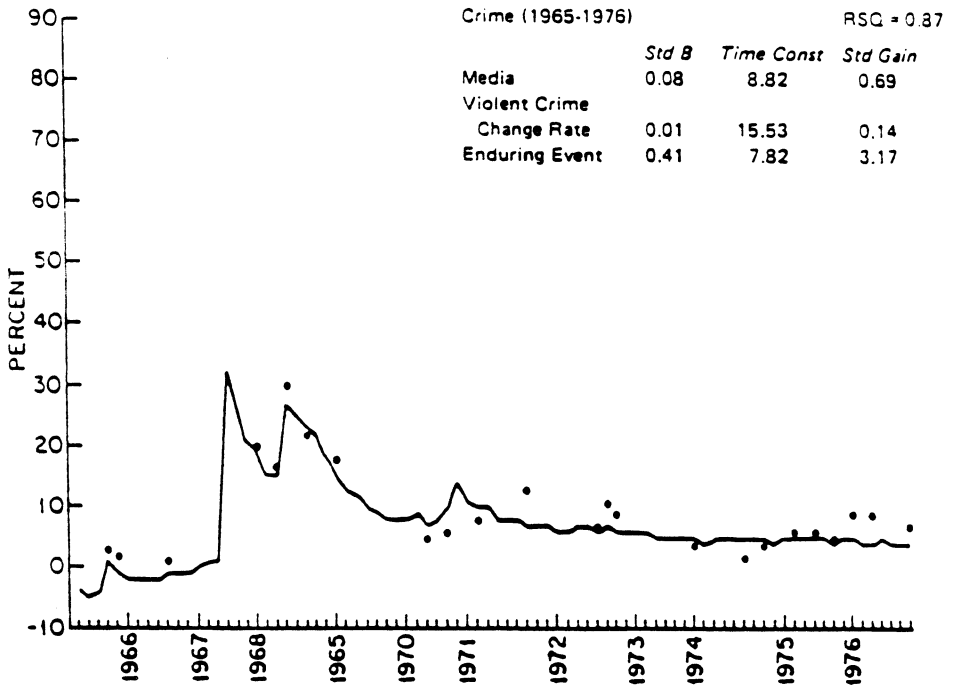
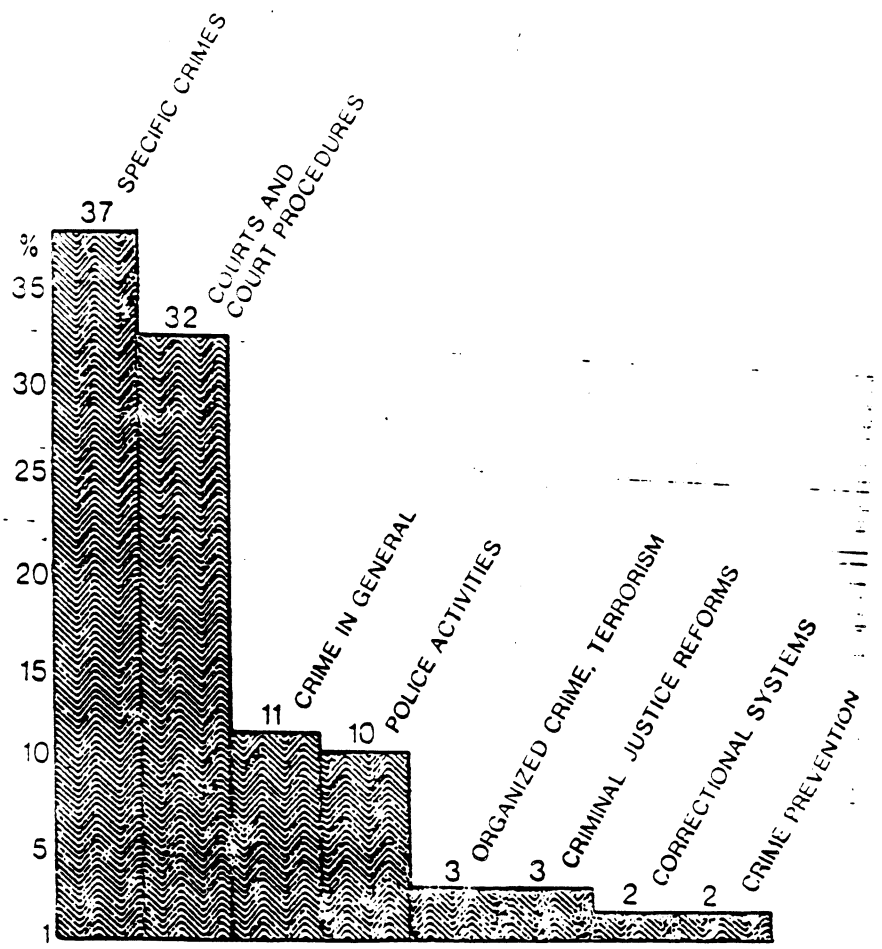


FIGURE 5.4 Crime (1965-1976): Media, Violent Crime Change Rate, Event Series

SOURCE: MacKuen and Coombs, p.116.

The Major Thrust of Crime Stories in the *Tribune* (in percent)
(N = 2,769)



Source: Original research.

SOURCE: Graber, p 46.

CAPITAL PUNISHMENT AND PERCEPTION: PUBLIC OPINION AND ITS INFLUENCE by Derrick Milam

INTRODUCTION

The existence or absence of the death penalty within any society indicates the predominate social norms of justice. Nowhere is the role of social norms expressed through public opinion more influential than in the process of adjudicating crime in a democracy. The past twenty years characterize American public support for capital punishment as increasing to a majority of more than two to one. Legislators throughout the United States point to these data as conclusive evidence confirming the public's desire for the death penalty as a means for punishing the most horrendous crime against humanity. The objectives of this analysis are threefold. First, to examine current public opinion concerning the death penalty, second, to determine whether or not public opinion polls accurately measure complete public opinion concerning the death penalty, and third, to attempt to describe the role and influence this opinion exercises in policy decisions concerning capital punishment related issues. This study will look at the recent progression of the volatile trend in public opinion on capital punishment by using empirical data on national opinion obtained from opinion polls. The empirical support for the analysis is the most recent report on public opinion concerning capital punishment Death Penalty Opinion in the Post-Furman Years by James Alan Fox, Michael L. Radelet, and Julie L. Bonsteel, the Gallup Polls of 1986 and 1991 (generally the preeminent source of data on national opinion and, in particular, capital punishment), The New York Times/CBS News Polls from 1988 to 1990, the California Poll on Capital Punishment and other supporting polls, and the expressed opinions of lawyers, pollsters, legislators, judges and New Jersey residents involved in implementing capital punishment[1].

HOW DOES THE AMERICAN PUBLIC FEEL ABOUT THE DEATH PENALTY

Today, public support for the death penalty approaches the highest point recorded in a half century of scientific polling. In 1991, 7 in 10 adult Americans expressed support for the execution of persons convicted of murder(*Gallup Poll 1991 1*). The lowest level was in 1966, when only 42 per cent approved. The highest level was in 1988 when 79 per cent approved.

Death Penalty for Murder Trend
Are you in favor of the death penalty for persons convicted of murder?*

Year	Yes	No
1991	76%	18%
1988*	79%	16%
1986*	70%	22%
1985	72%	20%
1981	66%	25%
1978	62%	27%
1976	65%	28%
1972	57%	32%
1971	49%	40%
1969	51%	40%
1966	42%	47%
1965	45%	43%
1960	51%	36%
1953	68%	25%
1937	65%	35%

* "Do you favor or oppose. . . "
Note: "No opinion" omitted
Number of subjects: 990

(*Gallup Poll 1991_1*).

This trend shows how support shifted over time, perhaps in response to national sentiment. During the 1960s, the push for civil rights, human rights and the backlash against the Vietnam war may explain the declining support during the period 1960-1969 of those in favor of the death penalty. The percentage supporting the death penalty fell from 51 per cent in 1960 to a low of 42 per cent in 1966. Then, support for the death penalty regains its original level of 51 per cent in 1969. The percentage of people opposed to the death penalty is at least as important as those in favor. Those opposed reached a high and plurality of 47 per cent in 1966, and a low of 16 per cent in 1988, again perhaps reflecting the national sentiments surrounding the Vietnam War. Today's high levels of support perhaps may be attributed to the public's perception of and disdain for increasing crime and lawlessness. Later, the analysis looks at the influence of the media and crime on public opinion concerning the death penalty. Nonetheless, the trend, in public attitudes towards capital punishment, frequently represents the national mood and attitudes towards other issues.

RACIAL DIFFERENCES AND ALTERNATIVES TO THE DEATH PENALTY

The impact of race and the presentation of alternatives provides interesting insights into the nature and concerns of subjects. The racial breakdown of subjects to the question of support for the death penalty is the following:

Are you in favor of the death penalty for persons convicted of murder?

	Total (990)	Whites (650)	Blacks (303)
Yes	76%	78%	59%
No	18%	16%	31%
No opinion	6%	6%	10%
	100%	100%	100%

Note: future use of the terms support or oppose during the analysis refers to this question (Gallup Poll 1991 1)

These data show high levels of support for the death penalty nationally at 76 per cent, among whites at 78 per cent and to a lesser degree among blacks at 59 per cent. However, overall public support "for the death penalty would decline dramatically from 76 per cent to 53 per cent if life imprisonment, with no possibility of parole, were a certainty for convicted murderers (Gallup Poll 199 11)". Blacks overwhelmingly support life imprisonment with absolutely no possibility of parole at 62 per cent in comparison to only 32 per cent among whites. Importantly, the lack of data on Latino and Asian attitudes concerning the death penalty shows opinion polls ignore a significant and growing proportion of the population when explaining public opinion concerning the death penalty. Furthermore, without data on Latino and Asian populations, reporting support for or opposition to the death penalty remains incomplete and unrepresentative.

A dramatic decline in support for the death penalty occurs when offering subjects an alternative to the death penalty. The 1986 Gallup Poll of 1,569 subjects presents in depth data on public opinion regarding the death penalty beyond the simple measure of do you favor or oppose the death penalty. Those who favor the death penalty are passionate in their beliefs. They favor it very strongly at 54 per cent as opposed to not too strongly at 16 per cent. Meanwhile, similarly intense sentiment exists among those who oppose, with 13 per cent very strongly opposed and 9 per cent not too strongly opposed (Gallup Poll 1986 10). Extremely polarized opinions persist for those who do support the death penalty. Those strongly favoring the death penalty desire its continuation, while those moderately supporting the penalty are split evenly in their preferences for execution or life imprisonment. Furthermore, both strong and moderate opponents of capital

punishment express overwhelming preference 85 per cent for life imprisonment without parole (Gallup Poll 1986 11).

On the question of why subjects favor the death penalty, the results show retribution is the most important reason for both blacks, at 48 per cent, and whites, at 50 per cent. Deterrence, frequently cited as a major reason for public support, declined in favor from 22 per cent of white support in 1985 to only 13 per cent of white support in 1991. In turn, deterrence received 16 per cent of the support of blacks when subjects are given the following options.

Why do you favor the death penalty for persons convicted of murder? (Asked only of those who favor, 700 respondents).

	1985	1991	1991 Whites (500)	1991 Blacks (173)
A life for a life	50%	50%	50%	48%
It is a deterrent	22%	13%	13%	16%
Keeps them from killing again	16%	19%	18%	23%
Costly to keep them in prison	10%	13%	14%	2%
Judicial system is too lenient	3%	3%	3%	2%
Other	9%	11%	10%	16%
No opinion	2%	2%	2%	2%

Note: totals add to more than 100 per cent due to multiple responses
(Gallup Poll 1991 2)

Those who favor capital punishment substantiate their position by declaring it would remove the murderer as a future threat, (19 per cent say that if dead, they can't kill again), to society. Apparently, the public's fear, of the criminals return to society, leads it to support the death penalty because of the public's belief in the criminals guaranteed imprisonment and impending execution. Although some death row criminals are not executed, the public senses the only guarantee against early parole develops from rendering a sentence for death. Furthermore, whites at 14 per cent, in contrast to blacks at merely 2 per cent, cite the cost of incarceration as their third most important reason for supporting the death penalty. In turn, blacks at 16 per cent cite "other" as a factor in determining their support for the death penalty. The various reasons for public support for the death penalty as represented by black support for some "other" reason indicates the necessity for improved, more extensive and effective polls to probe public opinion.

Opposition, to the death penalty, is equally important when assessing public opinion concerning the death penalty. Opposition to the death penalty finds subjects responding in the following manner:

Why do you oppose the death penalty for persons convicted of murder? (Asked only of those who oppose, 217 respondents.)

	1985	1991	1991 Whites(111)	1991 Blacks (99)
Wrong to take a life	40%	41%	40%	44%
Punishment should be left to God	15%	17%	17%	20%
Persons may be wrongly convicted	15%	11%	10%	**16%**
Does not deter	5%	7%	8%	7%
Possibility of rehabilitation	5%	6%	6%	4%
Unfair application of penalty	3%	6%	5%	5%
Other	7%	16%	**18%**	8%
No opinion	16%	6%	6%	7%

Note: Totals add to more than 100 per cent due to multiple answers (Gallup Poll 1991)

The single most important answer for both blacks and whites in opposition to the death penalty is it is wrong to take a life. Additionally, blacks feel the person may be wrongly convicted at 16 per cent as compared to only 10 per cent for whites. Perhaps the belief and perception that blacks face unfair sentencing discourages blacks from overwhelmingly supporting the death penalty. Whites, however, at 18 per cent cite "other" as their second most important reason for opposing the death penalty. The plethora of reasons for opposing and favoring the death penalty demonstrates the wavering opinion of society concerning such a difficult and critical decision. In the future, studies must address the public's acceptance and denial of the death penalty before public opinion is completely understood.

If the death penalty must be administered, 66 per cent of all the respondents support lethal injection, leaving the electric chair a distant second with 10 per cent in favor (Gallup Poll 1991 2). The results follow:

Apart from your opinion about the death penalty, what form of punishment do you consider to be the most humane- the electric chair, the gas chamber, lethal injection, firing squad or hanging?

	1985	1991	1991 Whites	1991 Blacks
Lethal injection	56%	66%	69%	44%
Electric Chair	16%	10%	9%	19%
Gas Chamber	8%	6%	6%	6%
Firing Squad	3%	3%	3%	3%
Hanging	1%	3%	3%	6%
None	7%	6%	5%	13%

No opinion	9%	6%	5%	9%
	100%	100%	100%	100%
Number of subjects 990			(Gallup Poll 1991 2)	

Blacks support the electric chair at 19 per cent while whites only support the electric chair at 9 per cent. Interestingly, blacks express the opinion that no form of punishment is humane. The public's support of lethal injection may indicate society's abhorrence of violent executions and thus makes the use of the death penalty more acceptable.

Concerning the question of the death penalty's effectiveness as a deterrent, a two to one majority of all Americans express the opinion that the death penalty discourages some people from committing murders [61 per cent favor 32 per cent oppose (Gallup Poll 1986 11)]. Moreover, almost three-fourths of those in favor of execution would continue their support even if the death penalty proved an ineffective deterrent to murder. The belief in the concept of deterrence declines in stages measuring from 82 per cent of persons who strongly favor the death penalty, to 61 percent among moderate supporters, to 26 per cent for those moderately opposed, and 18 per cent among those who strongly oppose (Gallup Poll 1986 11). Significantly, over all support for capital punishment would decline from 70 per cent to 56 per cent if new evidence proved the death penalty does not act as a deterrent to murder (Gallup Poll 1986 11). In addition, support among those who favor the death penalty drops to 43 per cent when possibility of life imprisonment without parole remains an option and proves not to be a deterrent (Gallup Poll 1986 11).

The previous data demonstrate the overall favorable support for the death penalty. However, the presentation of options and alternatives to the question of supporting or opposing the death penalty creates increased or reduced support for the death penalty. Furthermore, a different interpretation of fluctuating public sentiment emerges compared to the picture presented by newspapers, legislatures and others of a solid majority in favor of the death penalty. The presence of opposition forces and the wavering opinions of those favoring the death penalty shows public opinion concerning the death penalty remains elusive to current polling techniques and prevents the declaration of a definitive statement on the position of public opinion.

Demographic Analysis of Opinion Concerning the Death Penalty Male, Female and Race

In order to develop further understanding of the previous statistics on national opinion, an analysis of the demography and the factors influencing various demographic responses follows. The first condition studied finds there exists heavy support for the death penalty among males, with men slightly more inclined than women to favor the death penalty. No clear cut differences of opinion emerge on the basis of age, education, income or geographic region.

	Support	Oppose	Undecided
Nation	70%	28%	8%
Men	74%	19%	7%
Women	66%	24%	10%

(Gallup Poll 1986 10)

These data show high overall levels of support for the death penalty among males and females. Males support the death penalty at 74 per cent while, women, to a lesser extent, support the death penalty at 66 per cent. In contrast, blacks view the death penalty less favorably than whites. Blacks favor the death penalty at 59 per cent and oppose the death penalty at 31 per cent. These data are quite different from those of 1986, where blacks favored and opposed the death penalty at 47 and 43 per cent respectively (Gallup Poll 1991 2). The reason for the increase in black support presents an interesting problem that must be investigated by polls. Perhaps the increase in support among blacks develops from increased feelings of disdain for crime or possible increases in wealth among blacks. The growth in the black middle class marks an accumulation of wealth which, in turn, may change opinions of blacks in favor of a more conservative position. However, these examples are speculative and require future research. Meanwhile, overall, non-whites(Asians and others) favor the death penalty at 50 per cent, Hispanics at 60 per cent and both groups oppose at 41 and 31 per cent respectively according to the Gallup Poll of 1986. Unfortunately, there is no data on Hispanic, Asian or other nonwhite opinions for the 1991 study. Explanations for differences in levels of support or opposition between blacks and whites for the death penalty may lie in the response to the following question:

A black person is more likely than a white person to receive the death penalty for the same crime	1985	1991	1991 Whites	1991 Blacks
Agree	39%	45%	41%	73%
Disagree	53%	50%	54%	20%
No opinion	8%	5%	5%	7%
	100%	100%	100%	100%

(Gallup Poll 1991 10)

A dramatic increase occurs from 1985 to 1991 for those agreeing that a black person is more likely to receive the death penalty than a white person for the same crime. The increased agreement reinforces the growing opinion, as previously shown, within society of the unfair application of the death penalty. Black subjects apparently recognize the discrimination and injustice in the sentencing of defendants to death which, consequently, may explain their comparatively reduced support for the death penalty. For example, between 1930 and 1967, blacks constituted 2/3 of the total number of legal executions, although blacks comprised a minority of the total population[1]. These data show how black overepresentation in sentencing could adversely affect black public opinion pertaining to the death penalty. In addition, the high levels of Hispanic support for the death penalty may be related to other characteristics of that community, such as Catholicism. However, more detailed and specific studies are needed to begin to understand this phenomena.

Age

Opinion pertaining to the death penalty, when controlling for age, approximates the overall sentiment of the nation concerning the death penalty. The data on how age effects attitudes toward the death penalty finds those under age 30 having similar opinions as those of subjects 50 and older. The data are distributed in the following manner:

Age	Favor	Oppose	No opinion
Total under 30	70	24	6
18-24	71	21	8
25-29	68	28	4
30-49	72	21	7
Total 50 and older	69	20	11
50-64	73	18	9
55 and older	64	22	14

(Gallup Poll 1986 12)

Favorable opinion peaks during the age group 50-64 years but dramatically decreases in the group 65 and older. The baby boomers (people now 50 and under) provoke interest due to their reduced support of the death penalty at 69 per cent. More importantly, those age 25-29 show the largest level of opposition with 28 per cent opposing the death penalty. In contrast, the total 50

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[1] Caddell, Patrick H. "New York Public Opinion Poll, 1989". New York: Amnesty International USA, 1989.

and older population opposes the death penalty least at 20 per cent. Study cohorts, based on age, frequently reflect the national attitudes, mores and sentiments prevalent throughout the subject's formative years[2]. The reduced support among the baby boomers may indicate the impact of the abundant human rights movements occurring during their maturation. Data on age groups and their opinions concerning capital punishment remain imprecise or inconclusive unless data are controlled for race, income and the political affiliation of the subject. For these reasons, age, as measured by today's techniques, remains an inconclusive measure of opinion or trends. However, later in the paper, some inferences will be made based on an analysis of the data on age. (The previous data includes all subjects studied for the Gallup Poll of 1986).

Regional Differences

In 1986, regional support for the death penalty measured over 60 per cent: however, for the four regions East, Midwest, South and West variation occurs, with 64, 73, 69 and 76 per cent respectively. The most opposition and no opinions dominate the East and Midwest. Importantly, the East contains the highest level of opposition and thus the least favor for the death penalty.

	Do you favor or oppose the death penalty for murder			
	Favor	Oppose	No opinion	Number Interviewed
National	70%	22%	8%	1569
East	64%	26%	10%	404
Midwest	73%	17%	10%	393
South	69%	23%	8%	459
West	76%	20%	4%	313

(Gallup Poll 1986 4)

The high level of Western support may be a result of distinct Western cultural values or traditional electoral support of the Republican party in the West. Lower favorable percentages in the East and South at 64 per cent and 69 per cent respectively possibly develop from their larger proportion of blacks and democrats who traditionally oppose the death penalty. Although the South is the region with the most executions, the South's reduced statistical support for the death penalty develops from the larger percentage of blacks and poor.

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2 Kagay, Michael. "The New York Times/CBS News Poll Editor". New York: CBS News, November 5, 1991.

Education and Socio-Economic Status

Controlling for education of respondents presents insightful results. College graduates and non high school graduates are the least supportive at 67 and 63 per cent respectively while, in contrast, high school and incomplete college students favor the death penalty at 75 and 73 per cent respectively. When provided an alternative to the death penalty, college graduates and non high school graduates support life imprisonment without parole at 36 and 44 per cent respectively.

What do you think should be the punishment for murder, the death penalty or life imprisonment with no possibility of parole?

	Death penalty	Life imprisonment	Neither	No opinion	No. interviewed
College grad	48%	36%	6%	10%	311
College incomplete	61%	29%	3%	7%	386
High Sch. graduate	61%	31%	2%	6%	501
Non high sch. grad.	47%	44%	3%	6%	363

(Gallup Poll 1986 5)

Observation of these data point to the extensive study of liberalization of ideas and the access to facts on capital punishment gained through educational achievement as an explanation for these differences. Perhaps the acquisition of higher levels of education encourages the development in one's mind a greater understanding of life and its value when it comes specifically to the death penalty. The less favorable support among the non high school graduates may result from feelings of institutional and societal discrimination. Additionally, this group generally is composed of blacks who express less support for the death penalty. Once again, more detailed studies addressing the responses of diverse subjects must be initiated in order to develop a more complete understanding. Furthermore, in conjunction with education, unskilled workers favor the death penalty at a low of 61 per cent, while all other occupations favor at 69 per cent or more, achieving a high of 79 per cent among skilled workers. Explanations for reduced support among the unskilled and, as demonstrated later, the poor may be answered by observing responses to the following question and statistics:

	1985	1991	1991 Whites	1991 Blacks
A poor person is more likely than a person of average or of above				

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average income to receive the death penalty for the same crime

Agree	64%	60%	59%	72%
Disagree	31%	36%	37%	22%
No opinion	5%	4%	4%	6%
	100%	100%	100%	100% (Gallup Poll 1991 4)

Here, these data show people believe the poor are more likely to receive the death penalty with 60 per cent agreeing and 36 per cent disagreeing. Importantly, the majority of defendants in death eligible cases originate from lower socio-economic status. A 1976 Amnesty International study showed 62 per cent of the prisoners sentenced to death since 1972 were unskilled, service or domestic workers and only 3 per cent were professional or technical workers. Moreover, 60 per cent of those sentenced to death during that period were unemployed at the time of the offense[3]. The disproportionate sentencing of the unskilled and poor apparently develops sentiments among the poor of the death penalty's injustice and a resentment towards capital punishment.

Political Affiliation and Income Differences

Political affiliation finds Republicans favoring the death penalty at 83 per cent, while Democrats and Independents favor the death penalty only at 30 and 22 per cent respectively (Gallup Poll 1986 13). The low levels of support among Democrats and Independents results from questioning those subjects who identify themselves with a specific political party and support the death penalty.

Income differences find those earning under $25,000 less in favor of capital punishment at 67 per cent than those earning greater than $25,000 at 76 per cent with the highest favorable level at the income level of $35,000 and above at 78 per cent. When given the choice between the death penalty and life imprisonment with no possibility of parole the following occurs:

What do you think should be the punishment for murder: the death penalty or

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3 Caddell, Patrick H. "New York Public Opinion Poll, 1989". New York: Amnesty International USA, 1989.

life imprisonment with no possibility of parole?

	Death penalty	Life imprison. w/out p	Neither	No.opinion	No. studied
Occupation					
Professional	56%	33%	6%	5%	442
Clerical sales	64%	32%	1%	3%	102
Manual workers	55%	37%	3%	5%	617
Skilled workers	63%	29%	2%	6%	273
Unskilled workers	49%	44%	3%	4%	344
Household income					
50,000 & over	61%	30%	5%	4%	173
35,000-49,999	61%	27%	4%	8%	182
25,000-34,999	58%	32%	2%	8%	274
15,000-24,999	59%	34%	3%	4%	359
10,00014,999	54%	34%	5%	7%	228
Under 10,000	41%	48%	3%	8%	264
25,000 & over	60%	30%	3%	7%	629
Under 25,000	52%	39%	3%	6%	851

(Gallup 1986 4)

Those subjects with greater incomes favor the death penalty at much higher percentages than those of lower socio-economic status. There exist several possible explanations for these differences. The higher income brackets possibly are more supportive of the death penalty because of the reduced likelihood of the professional class to be in death eligible cases. Those of higher incomes may fear the lower classes propensity to commit criminal offenses and view capital punishment as a measure of deterrence. Furthermore, these results are not controlled for by race. Those of lower socio-economic status are usually black or non-white, possibly accounting for the reduced support for the death penalty. These data show that public opinion concerning the death penalty remains inconsistent across various groups when considering demography and presenting alternatives. Before proceeding to the problems of polling, an analysis of the impact of the media on public opinion follows.

MEDIA AND ITS INFLUENCE ON PUBLIC OPINION CONCERNING CAPITAL PUNISHMENT

Frequently, many hypothesize death penalty support has increased in response to increases in the rate of crime in general and homicide in particular. Rankin, in Changing Attitudes Toward Capital Punishment, found a strong nonlinear relationship between crime rates and death penalty opinion in the 1972 through 1976 National Opinion Research Center's surveys. He suggested that increased death penalty support is indicative of a general "law and order" syndrome- based on both

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retributive and deterrent desires[4]. However, these conclusions may have been slightly immature. Death penalty support continued to climb during the 1980s, despite an overall decline in the homicide rate[5]. Public perceptions of crime are not necessarily based on official statistics, however. In fact, most citizens do not internalize newspaper reports, if they read them at all, about a drop in the crime rate. Rather, as Fox, Radelet and Bonsteel emphasize, the public is far more influenced by nightly news stories they see on television about crime. Regardless of the crime rate's fluctuations, there are still a sufficient number of frightening crimes for news directors to place at the top of their newscasts.

Two recent changes in media coverage of crime may promote an increase in support for the death penalty. First, the advent of the live Mini-Cam, enabled a television station to have live access to the horrible aftermath of a violent occurrence. Technological advancements may dramatically strengthen the impact of crime stories on the average television viewer[6]. Second, the media has changed dramatically over the past two decades. In the early 1970s, a person's concept of a murderer may have been rather vague. In contrast, the 1980s and early 1990s present TV docudramas and other crime related shows such as "America's Most Wanted" in response to public demand. Consequently, viewers are aware of the names of celebrity criminals such as Ted Bundy, John Wayne Gacy, and Jeffrey Dahmer. Fox, Radelet and Bonsteel feel the widespread personification of murder may have altered the manner in which survey respondents reacted to a question about convicted murderers. They continue by suggesting that respondents in recent years may have been imagining specific well-known murderers when questioned about the appropriateness of the death penalty, and in turn, may have replied with an increased sense of retribution. Increased support for the death penalty, therefore, may be more of a reflection of a

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4 Rankin, Changing Attitudes Toward Capital Punishment. New York, 1979.

5 Roger Hood concludes that " there is a substantial body of non-ideologically committed opinion that can be affected in one direction or another by information about crime and the impact ofpunishment." R. Hood, The Death Penalty: A World-Wide Perspective. A Report to the United Nations Committee on Crime Prevention and Control. 1989.

6 Fox, James Alan, Michael Radelet and Julie Bonsteel. "Death Penalty Opinion in the Post-FurmanYears." in New York University Review of Law and Social Change, Volume XVIII number 2. New York: New York University Review of Law and Social Change, 1991.

desire for the execution of Ted Bundy and other celebrity criminals than for the execution of more typical and obscure condemned inmates[7].

In order to further understand the previous condition, results from a study conducted by James Fox follow. For example, in 1984, Fox surveyed a representative sample of 373 Boston area residents concerning the appropriateness of the death penalty in situations involving eleven types of crimes, including seven forms of homicide. The results show that, while there is only modest support for capital punishment in situations involving spousal homicide and felony murder, the overwhelming sentiment in favor of executing serial killers and massacrers is evident. These results further the opinion that specific types of homicide elicit public support for the death penalty. Furthermore, one suspects recent trends in survey data on death penalty opinion are largely a function of changes in the way respondents conceptualize a particular crime. Nevertheless, before proceeding to a specific look at New Jersey, a few problems of polling must be addressed and explained.

PROBLEMS WITH POLLING DATA AND METHODOLOGY

Students of public opinion have learned that Americans are highly opinionated; Americans hold opinions on almost every subject, whether they know anything about it or not, whether they feel passionately or are indifferent to it. Sometimes the seriousness and generosity of the public's judgments are startling. At other times the public's responses to public opinion polls seems mindless and irresponsible. Surely, the reader of public opinion polls must sometimes wonder, "Is this really the public's opinion?" The polls used for this study (Gallup Poll 1991, Gallup Poll 1986, New York Times and CBS News Polls 1988-1990 and the California Poll on the Death Penalty) select respondents in the United States who are 18 and over according to the equal probability of selection method. Equal probability of selection ensures that a sample will be representative of the population from which it is selected because all members of the population had an equal chance of being selected for the sample.

However, because these telephone polls use the most recent telephone listings for the sampling frame, in order to capture greater than 90 per cent of the population, possibly those who do not own phones, generally the poor and minorities, are excluded from such polls. Furthermore, the language barrier created by the influx of many recent immigrants may exclude them from the interviewing process. The Gallup Poll stratifies its study populations by race to

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7 See J. Levin and J. Fox, Mass Murder: America's Growing Menace 221 (1985).

increase the representativeness of the sample. This manipulation increased the errors for the black subjects to plus or minus six percentage points, in contrast to the measure for white respondents of plus or minus four (Gallup Poll 1991 2).

These polls furthermore, face two shortcomings. First, spurious conditions may develop whereby two variables appear to be associated but only appear so because of the influence of a third undetected influence. Second, the suppression of an association between variables develops because of the presence of another variable. For example, the reduced statistical support of the South for the death penalty may be an artifact of racial and class effects[8]. "Moreover, question wording and practical difficulties in conducting surveys can introduce error or bias into the findings of public opinion polls (Gallup Poll 1991 2)".

Problems with Question Placement

One example, of poor question placement, possibly creating biases in responses occurs in the 1988 New York Times/CBS News Poll Late October Survey. In the survey, a series of questions addressed first, George Bush's and Michael Dukakis' stands on crime, second the ideological positions of the judges each candidate would appoint, and third, the appointed judge's views on protecting the rights of people accused of crimes. These questions were followed by the question, "do you favor or oppose the death penalty for people convicted of controlling large drug dealing operations? The results illustrated 62 per cent of the probable electorate favored the death penalty. Importantly, the problem encountered arises from the ordering of the questions. The question ordering might lead the subjects to respond according to an impassioned psychological reaction against crime arising from attitudes provoked by the preceding questions. The subjects may have responded differently however, if the question, on the death penalty, had been asked separately from the proceeding questions. However, to keep the responses in their proper context, the favorable response only deviates slightly from the national percentages of those supporting the death penalty for people convicted of murder. Nonetheless, the potential effects of poor question placement can influence a subject's responses.

A few more problems encountered when polling for capital punishment occur with whether or not the opinion measured is snap judgement or carefully thought responses. Professor Daniel

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8 Fox, James Alan, Michael Radelet and Julie Bonsteel. "Death Penalty Opinion in the Post-Furman Years" in New York University Review of Law and Social Change, Volume XVIII number 2. New York: New York University Review of Law and Social Change, 1991.

Yankelovich claims,

> A good example of public opinion in which the people accept the consequences of their views is capital punishment. I am emphasizing the important fact that unlike public opinion on issues such as protectionism and constitutional amendments to balance the federal budget, the public is conscious here of the consequences of its views and is prepared to accept them[9].

In contrast, psychiatrist Louis Gold finds, of approximately 50 subjects interviewed, ". . . the average American appears to have only a limited concept of the issue, has done very little reading on the subject, and has not taken much time to think it through in an objective manner. More folks accept the idea in a traditional sense without an intelligent appraisal of its significance". Other findings suggest that public opinion is often directly shaped by actions and statements of politicians or other public figures[10]. Future polling efforts must establish as their goal the extraction of data from subjects based on educated opinions and probe responses possibly influenced by demographic factors. Many pollsters believe only educated opinion should be recorded. The accurate measure of public opinion is crucial because of the grave consequences of the death penalty. Today, Amnesty International uses surveys that initially ask the subject's opinion then educate the subject throughout the questioning process. In the end, the survey asks the subject to respond once again to his or her support for or opposition to the death penalty. By using this technique, the pollster attempts to measure an educated opinion expressed by subjects as opposed to pure, uneducated, emotional responses. Nonetheless, to deny the importance of today's polls in measuring trends would greatly belittle the significant data gained on public opinion concerning the death penalty.

DEMOGRAPHIC DATA ON NEW JERSEY AND THE DEATH PENALTY

Race

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9 Yankelovich, Daniel. Coming to Public Judgment: Making Democracy Work in a Complex World. New York: Syracuse University Press, 1991.

10 Adam-Bedau, Hugo. The Death Penalty In America. New York: AMS Press, 1989.

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Unfortunately, recent empirical data (after 1982) on the overall opinions of New Jersey citizens concerning the death penalty remains relatively scarce. However, these limitations do not prevent the development of an indirect analysis of New Jersey based upon national opinion, specific data on other states and predicted demographic changes in race, age and sex composition of the population for the year 2010. Currently, the state of New Jersey ranks ninth in total population size when compared to the other forty-nine states. As indicated earlier, support for the death penalty among whites nationwide was 78 per cent. However, in the state of New Jersey, the size of the white population will increase by only 17 per cent by the year 2010. In contrast, the black population of New Jersey will increase by 45 per cent by the year 2010, thus increasing the percentage and proportion of blacks in the total population of New Jersey. Overall population growth in the North East region will occur within the black population (58 per cent) between 1980-2010[11]. These demographic changes are significant.

Presently, blacks view the death penalty less favorably than whites for various reasons, one of which is their perception of it as an unjust sentence. The continued increase of blacks within the New Jersey population could dramatically alter statewide sentiment if the current trend of comparatively less support among blacks for the death penalty continues uninterrupted. Blacks, who are usually, democrats, of lower socioeconomic status and often a larger proportion of the unskilled, will experience an increase in representation in three categories traditionally less supportive of the death penalty. If feelings of injustice and exploitation of the poor and black continue unaltered, then public sentiment pertaining to the death penalty will become more complex and less supportive. Consequently, the influx of blacks and other non-whites who are less supportive of the death penalty, could result in electoral changes and demand's legislative review of the current policies.

Age

The projected impact of New Jersey demographic changes on capital punishment does not end with anticipated racial variation, but encompasses anticipated changes in the age of the population. Presently, support among the various age groups shows consistent levels above 68 per cent until considering those of age 65 and older. The Northeast by the year 2000, inclusive of New Jersey, will consist of the highest proportion of the population in the 65 and over category

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11 Wetrogan, Signe I. Current Population Reports and Population Estimates. Washington, D.C.: U.S. Department of Commerce, 1988.

and, New Jersey, now ranked ninth, will continue to maintain its high proportion of the elderly. But, subjects currently 65 and older will encompass a smaller percentage of the population due to the natural conclusion of life. The maturing of the Baby Boom generation, reared during the 1960s, will leave New Jersey with an increased median age of 40.3 by 2010, up from 34.5 in 1986[12]. As indicated previously, these baby boomers age 50 and under, show an unimpressive level of support for the death penalty at 69 per cent. Within the next twenty years, these individuals reared during the 1960s will enter policy making roles and power institutions in society. The increased influence of the less supportive baby boomers may significantly alter support for capital punishment legislation. Furthermore, by the year 2000, the percentages of Hispanics and nonwhites in the 65 and older category will increase dramatically due to fertility patterns in the population. The electoral importance of this change follows:

> In 1988, almost 20 million (19 per cent) of the 102 million Americans who reported voting in that year's election were 65 years or older. In addition, those 75 years and older are still more likely to vote than those younger that those 35[13].

If current trends of equally split opinion in favor of and opposition to the death penalty for minorities continue, then these changes could create in New Jersey a very different public attitude toward capital punishment. Furthermore, the increasing numbers of minorities and baby boomers in what will be the largest voting bloc could greatly impact future legislation on the death penalty. These data provoke interest in the necessity for future studies addressing the impact of race, religion, income and age before a complete understanding exist of public sentiment. As demonstrated by current data and future trends, drastic changes could occur in what is considered today's public sentiment concerning the death penalty.

OTHER STATES AND NEW JERSEY

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12 Wetrogan, Signe I. Current Population Reports and Population Estimates. Washington, D.C.: U.S. Department of Commerce, 1988.

13 United States Senate. "Aging America; Trends and Projections". Washington, D.C.: U.S. Government Printing Office, 1990.

In order to further our understanding of New Jersey and the death penalty, a look at data from other states in comparison to the beliefs of Jersey residents follows. In December 1989, a Field Institute poll asked a representative statewide sample of 498 Californians to choose between the following: the death penalty for convicted murderers, and a life sentence with no possibility of parole combined with a requirement that the murderers pay a part of their earnings in prison industries to the families of the victim. Most Californians (67 per cent) preferred life without parole plus restitution, only one in four (26 per cent) preferred capital punishment and few (7 per cent) were undecided. These figures exist for a Western state which traditionally generates high levels of support for the death penalty. Overall, by a slim margin, the public prefers the death penalty over a life sentence with the possibility of parole only after 25 years. However, the addition of restitution to life without parole, causes a dramatic shift in opinion. Approximately, two out of three people preferred restitution without parole when provided the alternative[14].

Hard core support for capital punishment measures overall support at 30 per cent, among males (34 Percent), Republicans (32 per cent), the affluent (31 per cent) and the middle aged (31 per cent). Following immediately behind were Californians (29 per cent) and whites (28 per cent). However, when controlling, for middle aged, well-to-do, Republican males, only a minority support the death penalty over life with restitution[15]. Evidently, fear underlies the question when determining sentiment toward capital punishment. The fear and belief that the convicted will not stay in prison leaves the concept of deterrence as a lesser influence when deciding one's position on capital punishment. Furthermore, the politically feasible restitution clause addresses the public's desire for punishment in addition to satisfying the public's hunger for a return to society in some way for the offenses committed.

SURVEY OF NEW JERSEY JURORS

One in depth survey of pretrial research of New Jersey capital trial jurors in Essex County provided very interesting comments concerning the death penalty. The following sentiments do not represent a representative sample of overall public opinion, but they give insight into some of the issues confronted while deciding one's support for or opposition to the death penalty.

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14 Bower, William J. "Californians Want an Alternative To The Death Penalty". Boston: Northeastern University, 1984.

15 Bower, William J. "Californians Want An Alternative To The Death Penalty". Boston: Northeastern University, 1984.

Additionally, these results must take into consideration the fact that they were compiled by defense attorneys investigating death penalty sentencing. The study characterized proponents of the death penalty as unambiguous and usually unemotional supporters of the death penalty. However, even these subjects were prone to change their position when offered alternatives and other options instead of death.

One juror expressed these sentiments: "I'm glad New Jersey has it [Death Penalty]. But, I'm troubled by the question of who decides who will be **exterminated**". She was later influenced by another group member's argument that: "God gave life and only God can take it away". The inability of the woman to express a solid opinion expresses the indecisiveness of subjects when confronting the death penalty. "It appears people are torn because their punitiveness and anger about crime leads them to support the death penalty while, their religion or moral background opposes the view". One respondent continued: " it is morally dishonest for people to advocate something they wouldn't actually do themselves. The intellectual decided: "the death penalty is not a deterrent and that, in any event, punishment is not a solution to a crime. If the state is permitted to interfere in human life through execution, it is only a small step toward state interference limiting the number of children peoples are permitted to have". Finally, one juror expressed that he and his fellow jurors had a general misunderstanding of life imprisonment[16].

The unstable position of the public as demonstrated from the polls and some reported comments of subjects shows opinion concerning the death penalty can be altered when either alternatives are presented or demographics of the subject questioned are considered. The apparent inability of current polling data to accurately and successfully measure the intricacies of public opinion thwarts efforts to understand the subtilties and complexities of public opinion. This predicament poses great problems for the legislature which uses polling data to develop legislation. Consequently, how should democratically elected legislators, governors and other policy makers use the evidence of public support for the death penalty in their deliberations over statutory changes in the laws affecting executions, or in the exercise of executive clemency?

THE ROLE OF PUBLIC OPINION AND THE LEGLISLATURE

Today, public opinion concerning the death penalty appears to be a response to the seriousness of violent crime in the USA as a social problem. Criminal homicides have averaged

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16 Krauss, Elissa, Rosalyn Lindner and Andrea Longpre. "Report on Pretrial Research: State of New Jersey v. Thomas Ramseur". Essex county, New Jersey: National Jury Project.

20,000 a year from 1979 to 1985[17]. In recent years, state governments indicate the rise in crime and strong public support for the death penalty, as grounds for retaining the death penalty. However, the previous data demonstrate public support for the death penalty remains unqualified and changes when given choices and is not directly related to the crime rate. But, how should the legislature consider public opinion?

A representative body, the legislature must respond to the sentiments of the American populace through legislation. But, because of its representative character, the legislature carries the added responsibility for determining whether a law represents a decent or acceptable measure in terms of community values. The severe consequences of the death penalty in turn, alter and redefine the relationship between the legislature and the public. The association of public opinion and penal policy by the legislature demands that the legislature confront the fact that such opinion is subject to drastic fluctuations. The principle aim of Western legal systems is the protection of offenders from public opinion or, more appropriately, reaction. To change codes with exclusive emphasis on public opinion reduces legal thought and poling to simple pollsterism. A legislator must decide whether or not public sentiment expresses well informed opinion or responses to the perceived increases in violent crime or some other variable not tested. Once legislators recognize these flaws in polling data, fluctuations in public opinion and the consequences of capital punishment legislation based on uneducated public opinion, then accurate and only accurate data on public opinion should be used to develop appropriate capital punishment legislation.

The impact of public opinion frequently affects the ideological position of political candidates concerning capital punishment. The position taken on capital punishment by a candidate provides an opportunity to capture or deter voters depending on the attitude of the electorate. The point remains clear that officials sometimes select positions on an issue as complex as capital punishment in order to gain additional votes. One example of this phenomena developed from the presidential election of 1988. The "CBS News Poll Survey After the Second Presidential Debate" shows the following responses when subjects were questioned:

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17 Caddell, Patrick H. "New York Public Opinion Poll, 1989." New York: Amnesty International USA, 1989.

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Our records show that when we called you last time, you said you were (for Bush or Dukakis/undecided). What was it that caused you to change your mind?

	ALL PANELW/LEAN	
	Shifters to Bush/Quayle	Shifters to Dukakis/Bentsen
Debate	37%	23%
Dukakis more specific		13%
Dukakis weak	3%	
Bush more qualified	4%	
Learned more	2%	7%
Want Change	3%	4%
Personal Qualities	2%	
Issues	2%	10%
Capital Punishment	12%	
Abortion	4%	
Economics with deficit	6%	8%
Political advertisements	2%	
Quayle		17%
Didn't shift	3%	
Undecided	5%	6%
Everything	10%	
Dk/Na	10%	11%

These results show that for all probable voters who shifted from Dukakis to Bush the second most powerful and influential issue was the death penalty at 12 per cent. The ability of Dukakis to attract a fare share of Bush supporters remains important, but Bush's support of the death penalty along with his advertised "tough" stand on crime indicates the critical role the public's perception of a candidate's stand on capital punishment and crime plays in an election. The use of capital punishment as a political tactic to promote a tough stand on crime becomes a method of politicians to gain votes. The legislature's development of capital punishment statutes however, must remain free of the desire to simply select a popular stand on capital punishment in order to gain votes. The legislature owes the public an honest assessment of the death penalty as to whether or not it is a proper punishment desired by society.

THE IMPACT OF PUBLIC OPINION AND ATTITUDES ON THE COURTS

The courts of America increasingly find themselves deciding death penalty cases which are further complicated by the influence of public opinion. Racist public sentiment can influence sentencing as demonstrated from the 1930s until the 1967 moratorium, whereby nearly 50 per cent of the offenders executed for murder nationwide were black. In the South the figure recorded 60 per cent. Moreover, black defendants consistently represented from 80-98 per cent of the men executed for rape nationwide[18]. To further explain the relevance of public opinion in judicial decisions, one must only look at the selection of jurors.

During the process of juror selection, either the prosecuting or defending attorney reacts to a peremptory challenge whereby a potential juror may be removed for no apparent reason. Public opinion polls show blacks support the death penalty less than whites. In addition, blacks feel blacks are more likely to receive the death penalty in comparison to whites. These two conditions can greatly impact the attorney's selection of jurors. The complaint follows that the prosecution uses the peremptory challenge to exclude blacks from sitting on capital-trial juries, especially when the defendant is black (Amnesty International 29). In Georgia, lawyers told Amnesty International "that 80 per cent of black perspective jurors in death penalty trials is routinely excluded from the initial jury pool under Witherspoon. The resulting jury may have no blacks even though they constitute 20-30 per cent of the state population"[19]. Similarly in Louisiana, all blacks executed, prior to Furman, were sentenced by all white juries.

The role of public opinion is debated throughout the history of capital punishment trials. Many proclaim the legislature must respond to public opinion, while the job of the courts is to enforce the decisions of the legislature. In contrast, many feel the misuse of public opinion polls by the legislature demands the court intercede on behalf of the interest of society. The impact of public opinion in the adjudication of death penalty cases led a dissenting Justice Burger to conclude in Furman v Georgia:

> One conceivable source of evidence that legislatures have abdicated their essentially barometric role with respect to community values would be public opinion polls. . .Without assessing the reliability of such polls, or intimating that any judicial reliance could ever be placed on them, it need only be noted that the reported results have shown nothing appreciating

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18 Baldus, David. Equal Justice and the Death Penalty: A Legal and Empirical Analysis. 1990.

19 Caddell, Patrick H. "The New York Public Opinion Poll, 1989." New York: Amnesty International USA, 1989.

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> the universal condemnation of capital punishment that might lead us to support that the legislature in general have lost touch with current social values[20].

Public opinion, under certain conditions, distorts sentencing because of jury selection and legislative statutes that the courts must enforce. Furthermore, Baldus emphasizes "complex legislative formulas and the 'language of legalism' often lead the jury to believe it has no choice but to impose a death sentence"[21]. More importantly, a good measure of the publics disdain for using the death penalty emerges from juries' reluctance to even implement the death penalty when given the opportunity. One Colorado study demonstrates this point.

Prosecutors maintain a position of dominance when deciding which cases meet or do not meet death eligible standards. In Colorado between 1980 and 1984, this traditionally high favor state only sentenced a total of four convictions to death out of 179 death eligible cases. The process developed as follows. The state filed 95 per cent of the cases on the charge of capital murder. Through attrition from plea bargaining there remained 67 who pleaded not guilty. Of these 67, 43 faced convictions but penalty trials opened in only 11 of these cases. Fewer than 1/3 of defendants tried and convicted actually underwent a penalty trial. The four previously described received the death sentence. The degree of attrition and the number of cases retained in the system at each step represents a fairly typical process. The reluctance of the juries to impose the death sentence in light of the numerous death eligible cases may be a direct result of growing public opposition to the death penalty. The role of prosecutor discretion is not ignored, however. Nonetheless, the few death sentences reveal reluctance on the part of juries to impose the death penalty. Furthermore, as some pollsters believe, the reduced number of death sentences imposed in New Jersey represents an expression of public opinion. The public is not so favorably disposed towards the death penalty when they actually sit as jurors, in comparison to when they answer polls.

Apparently, popular sentiment remains an integral part of the process leading to a death sentence. The consequences of legislative decisions as a result of the popularity of such decisions must come from a factual basis. If public opinion is not well thought opinion, then the decision to have a certain punishment must be a decision based on empirical data. Correcting injustices in

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20 Furman v. Georgia, 408 U.S. 385-386 (1972).

21 Baldus, David. Equal Justice and the Death Penalty: A Legal and Empirical Analysis. 1990.

death penalty sentencing could increase support among those who feel discriminated against by the system. However, not until the legislature addresses these issues will the burden of enforcing legislation based on incomplete public opinion data leave the courts.

CRIME AND CAPITAL PUNISHMENT

A complete study of public opinion concerning capital punishment must include a complementary analysis of public attitudes concerning crime. The issue of crime permeates the mass media, elections, campaigns, legislative debates and public opinion polls. Frequently, public responses concerning the death penalty express the frustration and anger felt with the perceived increase in the rate of crime committed each year. The occurrence of violent crime leads to over 32 per cent of fearful urban dwellers in Impact Cities (New York, Los Angeles, Chicago, Philadelphia and Detroit) to respond that in general they limit or change their activities because of crime. This belief remains equally strong for victims at 83 per cent, nonwhites at 81 per cent, males at 81 per cent, females at 82 per cent, for whites at 81 per cent and blacks at 83 per cent. Homogeneity of responses stabilizes across age, family unions, and education levels. Furthermore, an overwhelming majority at 82 per cent of the Impact Cities' residents believe in the national increase of crime. For residential neighborhoods, there exist less fear of crime, except for the night, where only 18 per cent of the respondents feel safe. Overall, for both Impact Cities and the residential neighborhood, women fear crime less at night at 9 per cent and 34 per cent respectively[22]. As previously established by the Fox study, the fear of crime can greatly alter an individual's feelings when deciding to advocate or oppose the death penalty.

Another example of the relationship between crime and public opinion concerning capital punishment emerges from the results of data on the 1988 Presidential campaign. The 1988 Presidential campaign highlights the role of public opinion on crime by showing the influence of crime in the development of contrasting levels of support for George Bush and Michael Dukakis. Crime, became a central issue in the campaign because of Willy Horton and other factors which influenced the electorate. Subjects responded to the following question, "Do you think George Bush (or Michael Dukakis) would be tough enough in dealing with crime and criminals, or don't you think so?

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22 Garofalo, James. Public Opinion About Crime: The Attitude of Victims and Nonvictims in Selected Cities. New York: Criminal Justice Research Center, 1977.

The data illustrate the electorate's support for candidates espousing law and order. His stance on crime undoubtedly aided George Bush in his successful efforts to win the election. Sixty-two per cent of the respondents felt George Bush was "tough enough" on crime while only 37 per cent thought Dukakis "tough enough" on crime . In addition, these same respondents answered the question "if the stand of the candidate on the death penalty mattered a great deal in how you vote; 16 per cent responded 'matters a great deal', while 63 per cent said 'other issues were more important' and 6 per cent said 'both' (The New York Times/CBS New Poll Late October Survey)". Only the economy and the budget deficit surpasses capital punishment in importance. Furthermore, over 43 per cent of the probable electorate claimed George Bush agreed with their position on capital punishment while only 23 per cent agreed with the position of Dukakis. There appears to be benefits gained from a tough stance on crime accomplished by simply uttering "I support the death penalty".

Recently, people are resorting to seeing crime as the growing drug trade inseparable from one another (Michael Kagay The New York Times/CBS News Poll Interview)". The association of controlled criminal activity through the support of the death penalty is a fundamental factor influencing the position of subjects when responding to questionnaires. The burgeoning public support for capital punishment is a consequence of both misinformation concerning the prevalence of crime in the United States and misguided distrust of our criminal justice system.

CONCLUSIONS

Public opinion exhibits great influence throughout the criminal justice system, particulary in enforcement of the death penalty. The analysis of current public opinion demonstrates the near futility of declaring a clear and definable opinion representative of the entire population. Today, trends show support for the death penalty increasing. However, it is obvious that the level of support for the death penalty varies considerably, according to the alternatives and options presented on questionnaires. Consequently, future surveys must address the variety of factors influencing opinion by probing subjects through more elaborate and explorative questioning. Improved questionnaires controlled for multiple variables would provide a truer, more reliable assessment of public sentiment. By designing questionnaires inclusive of sentencing alternatives, pollsters will elicit accurate responses and avoid perpetuating widespread misconceptions. These polling results would then provide substantial support in the development of appropriate death penalty legislation.

The future of New Jersey incorporates the disproportionate growth of groups (blacks, nonwhites, baby boomers, and women) traditionally less supportive of the death penalty. Increased representation of non-white groups traditionally discriminated against perhaps will change public opinion on the death penalty as these groups assert their growing political and social influence. Future polls on public opinion must account for the impact of demography on subjects by measuring the influence of such variables as race, age, income, and sex on public opinion. Furthermore, polling must confront the extraneous variables such as media influence on the responses of subjects. By educating subjects through the format of the questionnaire, the resulting data will represent well thought opinion as compared to highly emotional, snap judgement responses. Without fundamental improvements in polling techniques, the ability to accurately measure and predict public opinion will remain impossible.

Finally, the impact of public opinion on the legislature and the courts remains prominent in capital cases. Collecting accurate polling data is crucial, particularly since politicians, legislators, and judges are susceptible to the influence of opinion polls and use these polls to develop or validate their own political agendas. From tactics in the selection of juries to the opinions of jurors themselves, public opinion and attitudes play a fundamental role in determining the consequences of death penalty cases. For these reasons, accurate measures of public opinion along with institutional safeguards similar to proportionality review reduce the impact of public opinion or more appropriately; public reaction. This reaction, frequently a response to perceived increased crime, finds expression in popular support for the death penalty and political candidates because of the desire to stand "tough on crime". Furthermore, throughout this period of increasing crime, the death penalty appeals to the publics punitive and retributory desires. These feelings of helplessness in the face of the drug problem intensify the relationship between crime and the death penalty. Without future research on informed public opinion, legislators, courts and the public remain prone to the advantages and disadvantages of following a fluctuating trend of public opinion. The prospects of future demographic changes, improved polling and an evolutionary legal system throughout New Jersey and the nation will inevitably change what we consider today's public opinion.

BIBLIOGRAPHY

Books

Adam-Bedau, Hugo and Chester M. Pierce. Capital Punishment in the United States. New York: AMS Press, Inc., 1976.

Adam-Bedau, Hugo. The Death Penalty In America. New York: AMS Press, 1989.

Baldus, David. Equal Justice and the Death Penalty: A Legal and Empirical Analysis. 1990.

Bower, William J. "Californians Want An Alternative To The Death Penalty". Boston: Northeastern University, 1984.

Caddell, Patrick H. "New York Public Opinion Poll, 1989." New York: Amnesty International USA, 1989.

Federal Bureau of Investigation. "Uniform Crime Reports for the United States, 1990". Washington, D.C.: U.S. Government Printing Office, 1990.

Fox, James Alan, Michael Radelet and Julie Bonsteel. "Death Penalty Opinion in the Post-Furman Years" in New York University Review of Law and Social Change, Volume XVIII number 2. New York: New York University Review of Law and Social Change, 1991.

Furman v. Georgia, 408 U.S. 385-386 (1972).

Gallup, Alec and Dr. Frank Newport. "Gallup Poll News Service: Death Penalty Support Remains Strong, But Most Unfairly Applied". Princeton, New Jersey: The Gallup Poll News Service, 1991.

Gallup, George. "Gallup Poll News Service: The Death Penalty in America". Princeton, New Jersey: The Gallup Poll News Service, 1986.

Garofalo, James. Public Opinion About Crime: The Attitude of Victims and Nonvictims in Selected Cities. New York: Criminal Justice Research Center, 1977.

Gross, Samuel and Robert Mauro. Death and Discrimination: Racial Disparities in Capital Sentences. Boston: Northeastern University Press, 1989.

Hood, Roger. The Death Penalty: A World-Wide Perspective. A Report to the United Nations Committee on CrimePrevention and Control. 1989.

Kagay, Michael. "CBS News Poll: Survey After the Second Presidential Debate". New York: CBS News, 1988.

Kagay, Michael. "Interview Comments". New York: October, 24, 1991.

Kagay, Michael. "The New York Times/CBS News Poll Late October Survey". New York: CBS News, 1988.

Krauss, Elissa, Rosalyn Lindner and Andrea Longpre. "Report on Pretrial Research: State of New Jersey v. Thomas Ramseur". Essex county, New Jersey: National Jury Project.

Rankin. Changing Attitudes Toward Capital Punishment. New York, 1979

United States Senate. "Aging America; Trends and Projections". Washington, D.C.: U.S. Government Printing Office, 1990.

Ware, Mark and Mark Stafford. Journal of Research in Crime and Delinquency. Washington State University: Sage Publications, 1984.

Wetrogan, Signe I. Current Population Reports and Population Estimates. Washington, D.C.: U.S. Department of Commerce, 1988.

Yankelovich, Daniel. Coming to Public Judgment: Making Democracy Work in a Complex World. New York: Syracuse University Press, 1991.

Zimring, Franklin and Gordon Hawkins. Capital Punishment and the American Agenda. Cambridge: Cambridge University Press, 1986.

LIFE OR DEATH? An Analysis of the Current Public Opinion and Justifications: The Death Penalty and its Alternatives by Alexander Southwell

Introduction

New Jersey Governor Thomas Kean signed the state's capital punishment bill into law on August 6, 1982 amid much legislative debate and strong public support.[1] In the ten years since reenactment, New Jersey juries have handed down thirty seven death sentences, but the State Supreme Court has prevented the executions by overturning or vacating each sentence. However, in January of 1991, for the first time, the Supreme Court upheld a death sentence in the case of *State v. Robert Marshall*.[2] While one state review hearing and the federal appeal process remain, this affirmance sets up the possibility that New Jersey will administer its first execution in thirty years. The prospect of an execution in New Jersey after so long is bound to force the issue to the forefront of the state's consciousness and renew heated debate on the death penalty. In some states around the country, such as Louisiana and Nebraska, impending or actual executions have led to strong support for abolition with the result that fewer death sentences are imposed.[3] The idea that an imminent execution may decrease support for the death penalty is surprising considering the strength of public opinion in favor of capital punishment. This possibility however, cuts to the heart of a crucial issue in the current and future debate: What does the public really think about capital punishment?

Over the last ten years, national public opinion polls have reflected support for capital punishment as high as 79%.[4] In response to the apparently clear desire these poll results offered, politicians around the country quickly adopted pro-death penalty stances and used the issue in their political battles. However, broad national polls such as the ones conducted annually by the Gallup organization fail to observe the nuances of public feeling that are necessary to understand the depth of support, and so the results are often misleading. Recent in-depth attitudinal studies have revealed the superficial nature of public support for capital punishment. In fact some of these surveys suggest that a majority of people actually prefer the alternative of Life-without-Parole to the death penalty for convicted murderers. This paper will begin by analyzing the national poll results and the information from the in-depth studies in striving for a better understanding of public opinion on the death penalty. Because lawmakers are often influenced by and use public opinion results to legitimatize their support of capital punishment, the discussion continues with

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[1]Act of Aug. 6, 1982, ch. 111, 1982 N.J. Laws 555.
[2]State v. Robert Marshall, 123 N.J. 1 (1991).
[3]Jason DeParle, "Abstract Death Penalty Meets Real Execution." New York Times 30 June 1991, p. D4.; "Prospect of Execution Stirs Debate." New York Times 15 July 1991.
[4]Alec Gallup and Frank Newport, "Death Penalty Support Remains Strong But Most Feel Unfairly Applied," The Gallup Poll News Service. 56 (26 June 1991). [henceforth Gallup poll]

an examination of legislators' interpretation and employment of these poll results. And in light of the strength of public interest in alternatives to the death penalty and lack of legislative action or debate on this policy option, I will analyze comparatively the death penalty and an alternative, life imprisonment without the possibility of parole.

Critical Analysis of Current Public Opinion on the Death Penalty

When the New Jersey Assembly debated and ultimately passed the current capital punishment statute in 1982, 73% of New Jersey citizens favored the penalty.[5] Since that time, there have been no public opinion surveys specifically for New Jersey, but national support for the death penalty has remained strong. The Gallup organization conducted the most recent national poll on death penalty opinion in June, 1991. That study found three-quarters of the American public in favor of capital punishment for convicted murderers, with 18% opposed and 6% voicing no opinion Other recent surveys conducted by the National Opinion Research Center and the New York Times/CBS News and have found similar results.[6]

Generally, national polls ask only one or two questions on the death penalty, inquiring about approval or disapproval and reasons for that opinion. The results of such a simplistic inquiry into the complex issue necessarily fail to provide an accurate picture of public sentiment.[7] The polling data cannot offer an understanding of how well the public is informed about the matter, what social goals the public expects from the punishment, and whether there is desire for alternatives. An understanding of these concerns is essential to a clear understanding of the extent and limits of people's views. For instance, the current strong support for the death penalty would be judicially and legislatively unacceptable if the public desired the execution of blacks and not whites. This is only a hypothetical situation, but it illustrates the need for in-depth understanding of public support for the death penalty. Justice Thurgood Marshall, in the landmark *Furman v. Georgia*[8] ruling, recognized the inherent problem with using public opinion to determine community standards if the public was not knowledgeable about utilitarian and humanitarian issues.[9] In light of the failings of these national polls, more penetrating studies are necessary to understand what people actually mean when they take a position on the death penalty issue.

Thirteen Recent In-Depth Studies

The most recent studies to probe deeply into citizen opinions towards the death penalty were

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[5]Eagleton Poll, February 1981.

[6]An August 1990 NY Times/CBS poll found 76% in favor of the death penalty and 15% opposed; A March 1990 poll by NORC found 75% in favor and 19% opposed.

[7]Neil Vidmar and Phoebe Ellsworth, "Public Opinion and the Death Penalty," Stanford Law Review. 26 (June 1974) pp. 1245-1270.; Phoebe C. Ellsworth and Lee Ross, "Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists," Crime and Delinquency. 29 (Jan. 1983) p. 165.

[8]Furman v. Georgia, 408 U.S. 238 (1972).

[9]Vidmar and Ellsworth, p. 1248.

conducted in Nebraska[10] and New York[11] during May and April of 1991. Eleven additional polls, taken in nine states, will be included in my analysis: New Mexico (1991),[12] California (1989),[13] Kentucky (1989),[14] Maryland (1989),[15] New York (1989),[16] Virginia (1989),[17] West Virginia (1989),[18] Oklahoma (1988),[19] Nebraska (1987),[20] Florida (1986),[21] and Georgia (1986).[22] All of the studies were conducted by professional polling organizations using representative samples and the similar results corroborate all thirteen polls.[23] The support for capital punishment reflected in these studies also correlates closely with national findings, suggesting that these regional studies are fair indicators of national opinion. Due to the

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[10]William J. Bowers and Margaret Vandiver, "Nebraskans Want an Alternative to the Death Penalty," College of Criminal Justice, Northeastern University, 14 May 1991. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth Nebraska (1991) Poll]

[11]William J. Bowers and Margaret Vandiver, "New Yorkers Want an Alternative to the Death Penalty," College of Criminal Justice, Northeastern University, 5 April 1991. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth New York (1991) Poll]

[12]Susanne Burks, "N.M. Poll Shows Majority Backs Death Penalty," Albuquerque Journal. 23 March 1991, p. A1.

[13]Craig Haney and Aida Hurtado, "Californians' Attitudes About the Death Penalty," 1989. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth California Poll]

[14]Gennaro F. Vito and Thomas J. Deil, "Attitudes in the State of Kentucky on the Death Penalty," University of Louisville, Dec. 1989. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth Kentucky Poll]

[15]"Marylanders Evenly Divided on Death Penalty Repeal," Let Live. Jan. 1989. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth Maryland poll]

[16]Amnesty International USA, "New York Public Opinion Poll, 1989," 19 May 1989. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth New York (1989) Poll]

[17]Virginia Commonwealth University, "Commonwealth Poll Regarding Attitudes Toward the Death Penalty," May-June, 1989. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth Virginia poll]

[18]Niiler, Eric. "Death Penalty Support Broad but Not Deep." Charleston Gazette. 25 Jan., 1990. [henceforth West Virginia Poll]

[19]Grasmick, Harold G., and Robert Bursik, Jr. "Attitudes of Oklahomans Toward the Death Penalty." University of Oklahoma, Dec. 1988. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth Oklahoma Poll]

[20]Booth, "Majority Favor Alternatives to Death Penalty," University of Nebraska-Lincoln, 1987. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth Nebraska (1987) poll]

[21]Cambridge Survey Research, "An Analysis of Attitudes Toward Capital Punishment in Florida," 1985. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth Florida poll]

[22]Robert Thomas and John Hutcheson, Jr., "Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues," Dec. 1986. (unpublished manuscript, on file at the Woodrow Wilson School) [henceforth Georgia poll]

[23]All polls were conducted by professional polling organizations under the direction of respected academic experts. While funding of some of the polls was provided by Amnesty International and some individual citizens, the design of the surveys and analysis of the findings was the sole responsibility of the professors running the research. The number of respondents in each state poll ranged from 995 to 353 and all were representative samples with a margin of error no greater than 5%.

importance of the findings and the comparable levels of support, these state results are also relevant to an understanding of public opinion in New Jersey.

Superficial Death Penalty Opinion

Each of the state studies first asked the traditional favor/oppose question and the results are similar to the findings of national surveys: strong support for the abstract idea of capital punishment. Florida had the highest support for the death penalty (84%) and New Mexico had the lowest (63%), though even in New Mexico a large majority favored capital punishment. This range is in line with the national level of support, which is 76%.[24] [For full results from these polls, see Appendix] At the same time that a majority supported the practice, however, substantial portions of the population agreed that the death penalty is too capricious and is prejudicially applied, depending on the defendant's income and race. In the studies that addressed the issue, the percentages of respondents who believed that the death penalty is too arbitrary ranged from 74% to 84%. Between 42% and 50% of respondents believed that capital punishment is racially discriminatory and 47-72% considered the penalty biased because of income. Nationally, 45% of Americans believed that for the same crime, a black was more likely to receive a death sentence than a white and 60% felt that a poor person would be more likely to be sentenced to death than someone with average or above average income.[25] [See Appendix]

Two of the surveys also revealed that substantial percentages of respondents had ethical difficulties or were not comfortable with capital punishment: 44% of Nebraskans and 56% of New Yorkers had moral doubts about capital punishment while those uncomfortable with the penalty ranged from 42% to 57%.[26] [See Appendix]

Despite the high abstract support for the death penalty, these data suggest that many Americans have substantial misgivings about the punishment. Most people believe the death penalty system is arbitrary and many also think it discriminates because of color or wealth. Additionally many people have moral doubts and are uncomfortable with the punishment at the same time that they claim to favor it. These contradictions point out the inherent superficiality of public opinion regarding the death penalty. Monolithic and deep support for capital punishment cannot be inferred from this opinion data because while people may be supportive in the abstract, they have significant problems.

Reluctance to Implement

Further analysis of the surveys supports the possibility that the public may allow or desire the punishment on the books, but is much less likely to support its implementation. The state survey results indicated that when people were asked to picture themselves on a capital jury, making the actual decision to impose the death penalty, support waned considerably. When the defendant was

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[24]see notes 11-23 above.
[25]Ibid.
[26]Ibid.

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a juvenile, support dropped to between 26% and 50%.[27] And if the defendant was mentally retarded, support for a death sentence fell strikingly to as low as 8%.[28] [See Appendix] Research by Professors Ellsworth and Ross of Stanford University also illustrates the decline of desire for capital punishment when people were asked to pretend they were serving on a capital jury.[29] In their survey, over half of the sample responded that they required much more evidence to sentence a defendant to death or that they couldn't sentence at all, despite the fact that a large majority supported capital punishment in general.[30] This research and the state survey results illuminate the reluctance many people have in applying the death penalty. This finding exemplifies the abstract quality of the support for capital punishment: while many people claim to favor capital punishment, they actually are not strongly supportive of implementing the penalty.

Some may claim that this reluctance is only indicative of proper caution, saving the ultimate penalty for the worst crimes. However, further analysis reveals the ambivalence of the public support because even in cases where a criminal was sentenced to death by a jury, many people do not approve of the punishment. Ellsworth and Ross' work also inquired into what punishment the respondents desired for certain real-life murderers, where the defendant had been or was subsequently sentenced to death by a jury. In two-thirds of these cases, less than 15% of the respondents recommended death, even though the majority had previously stated they were in favor of capital punishment.[31]

The Florida survey provided a similar test, asking for a judgement on four convicted murderers who had been sentenced to death. The study found that in three of the cases, a majority or plurality opposed the death sentence for the criminal and opinion was evenly split for the remaining case.[32] These findings offer additional indication of the public's reluctance to impose the death sentence despite the majority professing to favor capital punishment. This wavering suggests that the public is less likely to support imposition of the sanction even though it may support capital punishment generally or as a theoretical issue. The support may be strong in the abstract, but it is clearly not deep enough to be translated into support for implementation of the death penalty.

Dissatisfaction With Ends

Looking at capital punishment in its larger societal role, many people are also not satisfied with

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[27] Ibid.
[28] Ibid.
[29] Ellsworth and Ross, p. 122.
[30] Ibid., p. 138.
[31] Ibid., p. 139.
[32] The convicted murderers inquired about and the results are: James Terry Roach, SC: 31% favored death penalty, 57% opposed; Timothy Baldwin, LA: 20%, 57%; James Henry Dupree, FL: 40%, 47%; John Spenkelink, FL: 40%, 38%. Florida Poll, p. 13.

how the death penalty achieves its goals: significant numbers of people consider it only a short-term solution to the crime problem and wish that they had a better way of stopping murders. In the 1989 New York survey 60% agreed with the statement: "At best, the death penalty is only a short term solution that doesn't address the bigger problems in the justice system"; 49% of the Florida respondents agreed with a similar statement. The desire for a better way to stop murders was overwhelming: 78% in New York (1989), 86% in Nebraska (1987), and 81% in Florida.[33] [See Appendix] The fact that the public sees the death penalty as merely a short term solution and that most desire a better way to stop murders, at the same time that they favor capital punishment is further evidence of the ambivalence of support. Thus, the high abstract support for capital punishment must be acknowledged as superficial, or at least ambivalent, because those who favor the death penalty do not like how the system's goals are achieved.

Problems With Inaccurate National Data

Beyond the fact that support for the death penalty is qualified by respondents' own stated misgivings and desire for a better policy, there are inherent problems with the broad national single-question surveys. The difficulty with using polls as an indication of public opinion is that people are woefully misinformed about the death penalty and the criminal justice system generally. Some scholars claim that misconceptions lead to higher support for capital punishment because the public underestimates the problems and costs and overestimates the benefits. This hypothesis was a central concern in Justice Marshall's *Furman* dissent and there have been substantial recent studies supporting this idea.

Ellsworth and Ross, in addressing the Marshall hypothesis, posed nine questions to their survey sample, testing what and how much they knew. [The questions are reprinted in their entirety in Footnote 35.] The most striking finding was that, of the respondents, one-quarter to one-half did not know the factual answers.[34] On only one question did a majority agree on the correct answer, twice a majority answered incorrectly and on the remaining six questions most people admitted that they were uncertain. Looking at the content of these questions, the one correct answer

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[33]see notes 11-23 above.

[34]The factual questions are: 1. The death penalty has been abolished by a majority of Western European nations.; 2. Over the years, states which have had the death penalty have shown lower murder rates than neighboring states which did not have the death penalty.; 3. Studies have not found that abolishing the death penalty has any significant effect on the murder rate in a state.; 4. Studies have shown that the rate of murder usually drops in the weeks following a well-publicized execution.; 5. The average term served by someone sentenced to life imprisonment is less than 10 years.; 6. Poor people who commit murder are more likely to be sentenced to death than rich people.; 7. After the Supreme Court struck down the death penalty in 1972, the murder rate in the United States showed a sharp upturn.; 8. In several cases people executed for murder in the United States were later proven innocent.; 9. On the average, the death penalty costs the taxpayer less than life imprisonment. Ellsworth and Ross, pp. 141-142.

involved common economic sense and in other questions there was a slight tendency to the correct answer on simple, well-publicized facts. However, the majority of respondents were uninformed about specific historical facts, such as whether any people who were later proven innocent have been executed in the US (some have). Most people were also unaware of recent criminological research, such as what effect the *Furman* decision effectively banning capital punishment or a well-publicized execution had on the murder rate (none proven). And the bulk of the sample was not familiar with current punishment procedures, such as whether Western European countries have the death penalty (most have abolished it).[35] These findings are additionally noteworthy because the sample was overrepresented by the highly educated: one-fifth of the respondents had a post-graduate education,[36] which is twice the national percentage of 10%.[37] Other similar studies corroborate the finding that the public is generally ignorant about capital punishment issues.[38] This public nescience coupled with the simplistic nature of national polls discussed above reveals the problems of relying on national poll results.

Misperceptions and ignorance are strong currents running through death penalty opinion. Poll results can be meaningful so long as the public's lack of knowledge is recognized. Legislators and judicial experts misinterpret public support, however, by uncritically using superficial public opinion. In sum, the pervasive ignorance in public opinion on the death penalty further reveals the superficiality of the abstract support and at the least illustrates that polls cannot be used without critical analysis.

Death Penalty Support Drops With Choice

When respondents are given the chance to consider an alternative to the death penalty the apparently strong support drops considerably. The alternative that is usually discussed is a sentence of life imprisonment, which some states currently utilize. 'Life imprisonment' can be defined as either actual incarceration for the rest of an inmate's life with no chance of parole or a life sentence with eligibility for parole only after a set term of years (usually 30). In addition, the option of restitution, where the inmate works in prison industries and his earnings go to the victim's family, has been considered as an addition to the life imprisonment.

Nationally, the Gallup poll shows a significant decline in support for the death penalty (from 78% to 50%) when respondents are presented with an alternative.[39] A 1990 New York Times poll substantiates this result, finding that support for the death penalty wanes dramatically when the

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[35]Ibid.

[36]Ibid., p. 144.

[37].US Bureau of the Census, Current Population Reports, Series P-20, No. 451, Educational Attainment in the US: March 1989 and 1988. US Government Printing Office, Washington DC, 1991.

[38]Austin Sarat and Neil Vidmar, "Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis," Wisconsin Law Review, 1976 (1976) pp. 171-197.; Robert M. Bohm, Timothy J. Flanagan, and Philip W. Harris, "Current Death Penalty Opinion in New York State," Albany Law Review. 54 (1990) pp. 819-843.

[39]Gallup poll.

option of Life-Without-Parole and Restitution is offered.[40] This important reduction suggests that the strong support for the death penalty may simply be a result of the context in which the question is asked.[41] The high level of opinion in favor of the death penalty is only apparent when no alternatives are offered. When a realistic and tough option is presented, the public is not as strongly in favor of the death penalty. Given the practicality of alternatives to the death penalty, such as Life-Without-Parole, it is evident that strong support for capital punishment cannot be inferred from the polls because it is partially an artifact of improper questioning. Further in-depth surveys also suggest that there is actually a preference for the alternative punishment Life-Without-Parole and Restitution (LWOP+R) rather than death for convicted murderers. Twelve state polls all show substantial support for alternative punishments, although some polls offer slightly different options. The 1991 New York poll found a remarkable 73% expressing a preference for LWOP+R as compared to only 19% continuing to support the death penalty.[42] Some might protest the relevance of this finding because New York is a non-capital punishment state, but evidence of similar results is apparent from states that do have the death penalty. The LWOP+R option was preferred by 67% in the California poll, compared to 26% choosing the death penalty; in Florida the results were 70% to 24% in favor of the alternative.[43] [See Appendix] This stark preference for an alternative to the death penalty further substantiates the finding that the current massive support for the death penalty is partly a result of incomplete inquiries: when offered an alternative, more people prefer this to the death penalty.

Three-quarters of Americans say that they favor the death penalty; however, by simply probing beyond the surface, this support is revealed as superficial. Significant numbers of the people who favor capital punishment also say the system is arbitrary and prejudicial. Many people have moral doubts about the death penalty system and say they would be less likely to impose the sentence, if the decision was theirs. In addition, the majority of people are not knowledgeable about the issues. When offered an alternative, many drop their support for the death penalty. More importantly, when the public is given the choice between the death penalty and Life-Without-Parole, their preference is for the non-death alternative.

This conclusion, that in reality public support of capital punishment is much weaker than the national polls indicate, is significant because of the ways opinion data is used. Legislators who advocate the death penalty often cite the apparent public support as justification. They feel that they are simply representing their constituents' desire to have the sanction and use it. Because of the finality and magnitude of the death penalty, it is essential that the lawmakers who favor the punishment base that decision on accurate measures of their constituents' views.

Legislators Strongly Support the Death Penalty

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[40]NY Times/CBS poll, August 1990.

[41]James Alan Fox, Michael Radelet, and Julie Bonsteel, "Death Penalty Opinion in the Post-*Furman* Years," NYU Review of Law and Social Change, 18 (1990-1991) p. 514.

[42]New York (1991) poll.

[43]see notes 11-23 above.

Many politicians are strong advocates of capital punishment despite the fact that only a few states actually carry out executions. Keeping pace with increased concern about crime and the rise in public support for the death penalty, most legislators have become strong supporters of capital punishment. New York legislators were recently asked about their support of capital punishment in connection with the 1991 public opinion survey and their responses reflected strong (62%) support for the death penalty.[44] A survey was also conducted of members of the New Jersey state legislature and the results are available in the appendix to this Conference report. That lawmakers strongly support capital punishment is obvious to astute observers, given the role that the issue plays in political campaigns. Advocating the death penalty is a salient political issue and many even see it as a necessary political maneuver. In Florida, Governor Martinez's campaign manager commented: "You cannot be against the death penalty and survive a campaign for major office in Florida."[45] A 1990 Time magazine article similarly noted, "It seems that a Democrat who does not affirm his affinity for snuffing murderers may as well concede before the campaign begins."[46] In recent elections, such as the 1988 Bush-Dukakis contest, and state campaigns in California, Texas, and Florida, capital punishment has played an integral role.[47]

Legislative Support is Based on Inaccurate Readings of Public Opinion

Most politicians justify their support for the death penalty by referring to strong public favor, although they usually do not conduct their own polls. The 75% favorable opinion is seen as a clear mandate to politicians that they should implement the ultimate sanction. However, the recent New York public opinion poll suggests that the mandate is not so clear. The poll showed that politicians maintained relatively constant support for the death penalty when offered alternatives, while constituents' support of the death penalty dropped considerably with the same alternatives.[48] The poll also pointed out that New York legislators significantly misinterpreted public support of capital punishment. 70% of legislators felt that their constituents would prefer the death penalty rather than an alternative, while only 17% of the constituents actually rejected all alternatives and supported the death penalty.[49]

My analysis of the in-depth polls further indicates that the high abstract support cannot be used to infer real strength in public opinion or public desire for its implementation. Yet politicians use this inaccurate view of the data to justify their support of the death penalty. This superficial understanding of public desires and blatant misperceptions illustrates how unresponsive and irresponsible legislators' support of the death penalty is. In fact, many politicians use the death

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[44]New York (1991) poll, p. 8.
[45]Michael Oreskes, "The Political Stampede on Execution." New York Times 4 Apr. 1990, p. A16.

[46]Michael Kramer, "Cuomo, The Last Holdout." Time 2 Apr. 1990, p. 20.
[47]Richard Lacayo, "The Politics of Life and Death." Time 2 Apr. 1990, p. 18.
[48]New York (1991) poll.
[49]Ibid., p. 9.

penalty issue simply as a political tool. The manipulation and perpetuation of the public's fears and misperceptions only hides genuine concerns and neglects real solutions.

Death Penalty is Used Symbolically

Advocating capital punishment is the perfect symbol to prove a politician's toughness on crime.[50] Time put it succinctly: "The death penalty is a useful issue for any politician who believes that voltage wins votes."[51] By advocating the death penalty, politicians paint themselves as making a significant effort to address the crime problem, and the public accepts this uncritically. The views of authority figures, such as legislators and law enforcement members, have been shown to hold great weight for the public.[52] Legislators use this influence to play on citizens' fear of crime for political gain. The exploitation of the issue, compounded by the sensationalist media, leads to a portrayal of "a more dangerous world than the world we actually live in" according to Kathleen Jamieson, dean of the Annenberg School of Communications.[53] The 1988 Willie Horton campaign ad is just one example of this common phenomenon. Utilizing fear of violence for political benefit is coupled with a portrayal of the death penalty as the adequate response to the problem. A 1990 Time article commented: "The new look in campaign commercials is to feature the candidate doing everything short of throwing a giant electrical switch."[54] While crime is a serious societal problem, politicians exploiting the issue for their personal gain only obscure civil discourse. Professor Hugo Bedau put this well: "It is much easier to advocate simplistic and illusionary solutions to the crime problem than to find real and effective solutions."[55]

Legislators Misguide the Public

Many lawmakers also misinform the public about the criminal justice system and alternatives to the death penalty. In their attempts to exploit the issues for political benefit, politicians attack the courts and parole boards as too lenient and suggest that life terms are ineffective. These attacks, however, are not based on a foundation of truth. Dianne Feinstein, in her campaign for California Governor, stated: "You can't expect somebody to be deterred from committing murder if they know they will only serve four or five years."[56] Her comment, similar to many others, serves to perpetuate the misconception that if convicted murderers are sentenced to a life term in

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[50]Helen Dewar, "Democrats Showing Tile Toward Death Penalty." The Washington Post 17 May 1990, p. A13.; Andrew Malcolm, "Capital Punishment is Popular, but so are its Alternatives." New York Times 10 Sept. 1989, p. D4.

[51]Richard Cohen, "Politicians, Voters, and Voltage." Time 13 Feb. 1989, p. 96.

[52]Franklin E. Zimring and Gordon Hawkins, Capital Punishment and the American Agenda. New York: Cambridge University Press, 1986, p. 22.

[53]Oreskes, p. A16.

[54]Lacayo, p. 18.

[55]Hugo Adam Bedau, The Death Penalty in America, New York: Oxford University Press, 1982, p. 353.

[56]John Cassidy, "Death Cry Harnesses Votes for Democrats." The Sunday Times 18 March 1990.

prison, they will be walking the streets in five years.

The reality of the situation now is that most life-term inmates serve around twenty years before parole.[57] In New Jersey, as in some other states, a life sentence carries a mandatory minimum of thirty years before a criminal even becomes eligible for parole. Perpetuating these misperceptions to score political points misinforms the public and leads people to support the death penalty simply because they do not understand the system.

The effect of this political opportunism is significant on the public opinion polls. The misinformation provided by the lawmakers perpetuates the public's ignorance about capital punishment and the criminal justice system. While this ignorance fosters the abstract support for the death penalty, most legislators fail to recognize that the support is not based on fact, and use the data uncritically. By using this superficial portrayal of constituent feelings, the lawmaker does not represent his or her constituents' desires. Ellsworth and Ross comment: "Legislatures, particularly in regard to a strongly emotional attitude like that toward the death penalty, may be acting in response to exactly the sort of simplistic poll that we have condemned, and there is evidence that they have been no more eager than the average citizen to seek information or enlightenment before rushing to pass new laws."[58] More importantly, politicians' symbolic stand on the death penalty is simply a short-term solution which neglects real criminal justice problems. In addition, as the next section will point out, this symbolic stance costs more, both financially and socially, and forfeits the benefits of an alternative. New York Governor Mario Cuomo explains that a politician's advocacy of capital punishment is "the ultimate political cop-out. It reflects the unwillingness of candidates to propose programs that might actually impact on crime, because that might mean spending money, and that can mean tax increases. It is easier to hold out a quick fix, the idea that all will be well if we just burn people."[59]

A Comparison of the Death Penalty and Life-Without-Parole

The most recent in-depth studies of capital punishment attitudes clearly show that the often-cited strong support for the death penalty is actually a misstatement and misinterpretation of public opinion. The abstract public support cannot be relied on because once questioning goes beyond the simplistic favor/oppose inquiries, the polls reflect the majority's preference for an alternative to the death penalty, if it can achieve the same desired ends. The studies indicate that Life-Without-Parole (LWOP), with or without Restitution (+R), is such an alternative. An LWOP sentence, which many see as the penultimate sanction, assures incarceration for the rest of a criminal's natural life, although there are some release valves through executive commutation or a set term of years. The restitution element of the penalty provides for the life-term inmate to work in prison industries and pay the victim's family from his or her earnings. The addition of

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[57]Note, "The Meaning of 'Life' for Virginia Jurors and its Effect on Reliability in Capital Sentencing." Virginia Law Review. 75 (Nov. 1989) p. 1606, 1626.
[58]Ellsworth and Ross, p. 167.
[59]Kramer, p. 20.

restitution to the LWOP alternative garners substantially increased favor for the alternative. This is due in part to society's concern for the victim's family: if the inmate is put to death, the victim's family will not receive the continual payments that the convicted murderer would make while serving a life sentence. Restitution is an important part of the LWOP alternative, but it is insignificant to the larger question of effectiveness. The dominant debate is between LWOP and capital punishment and this is where my analysis will focus.

LWOP is an established legal penalty and its constitutionality was upheld, though without thorough analysis, by the US Supreme Court in *Schick v. Reed*.[60] The penalty was reviewed comprehensively and its constitutionality established in the New Hampshire Supreme Court decision, *State v. Farrow*.[61] Thirty states currently have an LWOP option, either as a complement to the death penalty or as its replacement. But the sanction has not been commonly implemented in the past even though the penalty is universally considered attractive.[62] Those in favor of capital punishment support LWOP as a remedy for the problem of early parole for criminals; opponents to the death penalty view 'Life' as a harsh sentence but preferable to death.

As the polls analyzed above [see page 8] suggest, the public generally prefers the LWOP penalty to capital punishment as long as it achieves the same ends of preventing crime, protecting society from dangerous felons, and properly punishing the offender. Unfortunately, the results of a shift to LWOP have not been analyzed thoroughly. Use of the penalty is relatively recent and there has been little criminological study of this punishment. Notwithstanding the lack of substantial comprehensive studies, there is enough minor research on the LWOP alternative and plenty on the death penalty to make some comparisons. The second half of this paper will address the issue of effectiveness of the two punishments based on deterrence, economics, and retribution.

Comparison of Deterrence Value

Deterrence is an accepted penological purpose and has long been a rationale for supporting the death penalty. The intuitive perception is that executions serve notice to would be murderers: a criminal who fears death and knows that the death penalty awaits him if he murders someone will abstain. This is an acceptable proposition for most people but the fundamental flaw in this approach is that capital murderers are not "most people." Criminologists generally agree that murder is the least rational of all crimes; it is often committed hastily, in a fit of rage, and without any real logical benefits.[63] Indeed, 70% of all murders are what criminologists term "sudden."[64] The remaining class of killings, perpetrated often by "cold-blooded" murderers usually have more deeply-rooted irrational motivations.[65] However, we do not have to rely on

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[60]Schick v. Reed, 419 U.S. 256 (1974).
[61]State v. Farrow, 118 N.H. 296, 386 A.2d 808 (1978).
[62]Note, "Life-Without-Parole: An Alternative or Not Much of a Life at All?" Vanderbilt Law Review. 43 (1990) pp. 529-568.
[63]Ralph Ellis, Theories of Criminal Justice, Wolfeboro, NH: Longwood Academic, 1989, p. 185.
[64]Ibid., p. 185.
[65]Ibid.

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intuitive arguments to evaluate the efficacy of deterrence as there is a substantial body of scientific research on precisely this question.

Many opponents of the death penalty substantiate their arguments with rough empirical evidence of crime rates in states that have capital punishment. They reject the deterrent theory, by showing that the crime rates in states that actively use the death penalty are actually higher than in states that have no capital punishment. The factual basis of their argument is correct: the most recent murder rates in Texas and Louisiana, two active death penalty states, increased 20.5% and 18.7% in 1990 while the increase in New York, which does not have the death penalty was 9.6% and the increase in New Jersey, which did not execute anyone was 13.1%.[66] While this evidence is interesting to note, the causality, or lack thereof, is far from convincing or scientific because there are too many other variables at play.

There have been numerous complex statistical studies done on this issue, attempting to establish a causal link between executions and murder rates. Every deterrence study, most notably those by renowned criminologist Thorsten Sellin, found no deterrent value to capital punishment until the ground-breaking econometric work done by Isaac Ehrlich in 1975.[67] Ehrlich used complex statistical methods to analyze execution and homicide rates and concluded that one additional execution had deterred six to seven murders over his period of study.[68] Following publication of his work, four additional studies found support for the deterrence hypothesis, but the results were far from similar. While Ehrlich found 6-7 murders deterred by each execution, a study using his model in England calculated four prevented homicides, and two studies in the US found 156 and 560 fewer murders per execution.[69]

The wide disparity of these findings does not lend persuasiveness to the deterrence hypothesis. In addition, an immense body of professional opinion criticizes Ehrlich's work, revealing problems with both his methodology and his data.[70] The vast majority of attempted replications of his work have concluded Ehrlich's deterrent effect to be the result of inadequate data and misapplication of statistical techniques.[71] In 1978 the National Academy of Sciences commissioned an authoritative study which, using the original data, found the same problems with contrived theory and methodology and concluded that the Ehrlich model did not prove a deterrent effect.[72] The obvious and abundant evidence against the deterrent effect led Zimring and Hawkins to conclude that "the real nature of the dispute between those who support and those who oppose the death penalty . . . is not now, and never had been, about the relationship between the

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[66]United States Department of Justice. Federal Bureau of Investigation. Uniform Crime Reports, 1990. Washington DC: Government Printing Office, 1990.

[67]Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," American Economic Review 65 (1975) p. 397.

[68]Ehrlich, p. 397.

[69]Waldo, Gordon P. "The Death Penalty and Deterrence: A Review of Recent Research." The Mad, The Bad, and The Different. Ed. Israel Barak-Glantz and C. Ronald Huff. Lexington, MA: DC Heath and Co., 1981, p. 171.

[70]Bailey and Peterson, p. 681.

[71]Waldo, p. 173.

[72]Ibid.

death penalty and homicide rates."[73]

Interestingly, some of the studies following Ehrlich's work found a significant positive correlation between the rate of executions and homicides. This negative deterrent effect, called the "brutalization effect" means that for each additional execution, more murders were committed. The assertion of a "brutalization effect," that executions actually cause more murderers, does not hold widespread attention currently, although the idea has historical roots. Cesare Beccaria wrote in his 1764 treatise On Crimes and Punishment: "The death penalty cannot be useful, because of the example of barbarity it gives men."[74] Contemporary opponents to the death penalty have argued along similar lines, that executions create an atmosphere of state-sanctioned killing. This devaluation of human life impacts on society's psyche, making it easier to kill people.[75] There is no conclusive evidence on this argument, but it certainly is plausible. If one accepts the contention that an execution will have an effect on the public, then the effect could be either positive or negative. There are no established mechanisms to prevent such a negative result, so its possibility cannot be ruled out.

On balance, there is no clear evidence of a deterrent effect for capital punishment; there is probably some deterrent effect and some brutalization effect. Moreover, the real question is whether there is a marginal deterrent value, whether the death penalty provides more of a deterrent than a lesser penalty. Although there have been no empirical studies done on the deterrent effect of Life-Without-Parole, some intuitive inferences can be made. LWOP sets an example of respect for human life and thus avoids a possible brutalization effect that might result from state-sponsored executions. It is conceivable that LWOP would pose less of a deterrent because criminals would not fear being killed, but given that LWOP revokes an inmate's freedom until he or she dies, a similar deterrent effect cannot be rejected completely. In sum, there is no proof of a deterrent effect for executions and there certainly is no marginal deterrent value over Life-Without-Parole to justify the death penalty.

Comparison of Costs

Turning to the issue of costs, the common perception is that capital punishment is much less expensive than Life-Without-Parole and therefore justified on an economic benefits level. On first glance, this makes sense because the cost of a lethal injection or the electric chair is nowhere near the amount spent to feed, house, and guard an inmate for his life. Looking beneath this superficial logic, however, the economic rationale for the death penalty is unfounded. It is true that the actual cost of the execution is not much, but the process that condemns an inmate to death is extraordinarily expensive. The capital punishment statute was affirmed by the US

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[73]Zimring and Hawkins, p. 185.

[74]Bedau, America, p. 98.

[75]Bedau, America, p. 98.; Ronald Tabak and J. Mark Lane, "The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty," Loyola of Los Angeles Law Review. 23 (Nov. 1989) p. 117.

Supreme Court in Gregg v. Georgia[76] on the grounds that the system would adequately safeguard against the unconstitutional discretion that resulted in the death penalty being "wantonly" and "freakishly imposed."[77] The Georgia statute upheld in *Gregg*, which has since been copied across the country, established what the Court called "Super Due Process." This system of administration requires an extreme dedication to due process because of the finality and magnitude of the punishment.[78] The recognition that "death is different" demands the great care taken, resulting in significant additional expenses at the pre-trial, trial, and post-trial levels.

Capital cases incur extra costs from the beginning because all are trial cases, whereas 85-90% of ordinary felony cases are resolved through plea-bargaining which avoids the expense of a trial.[79] Beyond this, there are unique aspects to a capital trial that demand more time and expense at each level. In the pre-trial period, investigation costs are higher because prosecutors generally use the best experts and preparations must be made for both the guilt and penalty phases. In addition, security is tighter for capital cases, resulting in higher detainment costs before and during the trial.[80] The capital trial itself is also more expensive because it is considerably longer than most other trials: some estimates put the length of capital trials at three to five times that of non-capital trials.[81] The juror selection process takes longer to conduct because there are greater numbers of peremptory challenges and more jurors are excluded because of their beliefs on capital punishment. Difficult issues, such as the insanity plea and intent to kill, usually arise in capital cases leading to longer trials and the need for more expert witnesses, both resulting in additional cost. Additionally, most of the costs of the trial are repeated in both the guilt and penalty phases because of the Court-mandated bifurcated system. The appeals process is also more expensive in capital cases, primarily because it is automatic. In most cases, an appeal must make its way through three levels of state hearings and then three federal appeal steps, accruing substantial expenses at each level.[82] Corrections costs for death sentenced inmates are also quite significant because of the special death row situation, with individual cells and extra security.[83] The average time spent on death row for sentenced criminals is eight years, so these expensive conditions are maintained for an extended period.[84] The actual cost of the death penalty including these extra pre-trial, trial and post-trial expenses has been estimated at $2-3 million per execution in Texas and Florida and around $15 million in California.[85] In New Jersey, Public Defender Dale Jones calculated the total cost for an execution in New Jersey, including the numerous convicts who go

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[76]Gregg v. Georgia, 428 U.S. 153, 179-80 & n.23 (1976).
[77]Furman v. Georgia, 408 U.S. 238 (1972), at 310.
[78]Robert Spangenberg and Elizabeth Walsh, "Capital Punishment or Life Imprisonment? Some Cost Considerations," Loyola of Los Angeles Law Review. 23 (Nov. 1989) p. 47.
[79]Bedau, America, p. 241.
[80]Spangenberg and Walsh, pp. 48-49.
[81]Ibid., p. 52-53.
[82]Bedau, America, p. 243.
[83]Spangenberg and Walsh, p. 56.
[84]Lawrence Greenfield, "Capital Punishment 1989," Bureau of Justice Statistics Bulletin, October 1990.
[85]Tabak, Loyola, p. 136.

through the capital punishment system but are not executed, to be $7.3 million.[86]
In comparison, the penalty of Life-Without-Parole is much less expensive because the sanction does not have the finality of death and the requisite "super due process." The pre-trial costs are lower because the same thorough investigations by the best experts are not always necessary. In addition, the trial costs are not out of the ordinary and there are fewer appeals, incurring less post-trial expense. In fact, the only significant cost consideration for LWOP inmates is the actual cost of housing, feeding, and guarding them.[87] That annual cost is estimated at $18,000 to $21,000 per inmate in a maximum security facility in New Jersey.[88] Multiplied by the time spent in prison (which averages 40 years because most inmates enter around 30 years old and die about 70) the incarceration cost is approximately $800,000. Compared to the $7.3 million for the execution of one criminal, LWOP is clearly a much more economical penalty.
The opportunity cost of the capital punishment system is another consideration that favors LWOP. The immense amounts of money spent on executing only a few people diverts much needed money from elsewhere in the criminal justice system. In New York, the $550 million that would be necessary to fund the death penalty over next five years could fund 250 more police officers for the Tactical Narcotics Team and build prison space for 6000 inmates.[89] In addition, the incredible cost of the death penalty can overwhelm the criminal justice system. For instance, Florida's Supreme Court devotes one-third of its time to capital cases.[90] And in regard to the resource drain, Chief Justice Dixon of the Louisiana Supreme Court commented: "Capital punishment is destroying the system."[91] Thus, the staggering expense to have and implement capital punishment diverts a disproportionate share of the money and is detrimental to the overall system. More importantly for this analysis, the death penalty clearly costs much more than LWOP.

Comparison of the Retribution Arguments

One of the rationales for capital punishment that continually receives significant levels of support is retribution. The recent Gallup poll found that half of those who supported the death penalty based their support on retribution.[92] The fact that retribution is crucial to death penalty support

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[86]Ibid., p. 136.
[87]Spangenberg and Walsh, p. 56.
[88]Telephone Interview with Chris Dill, Executive Assistant to New Jersey Assistant Commissioner of Corrections. (Trenton, NJ, 7 Nov. 1991).; Telephone Interview with Jim Stabile, Public Information Officer for New Jersey Department of Corrections. (Trenton, NJ, 7 Nov. 1991).
[89]Richard Moran and Joseph Ellis, "Death Penalty; Luxury Item." Newsday 14 June 1989, p. 60.; Tabak, Loyola, p. 137.
[90]Malcolm, p. 4.
[91]Michael Ross, "Executions Are Not Cheap." Endeavor: Live Voice from Death Row Across the USA. 1.7 (1991), p. 7.
[92]Gallup poll.

can also be seen strikingly in frequent letters to the editor around the country.[93] Part of the retribution argument of support is based on the desire to protect society by incapacitating the murderer. The death penalty serves the ultimate disabling purpose by killing the criminal. This value of incapacitation is important for particularly heinous murderers who are considered to be a future threat to society.

Another aspect of the retribution theory postulates that capital punishment is necessary for the public to maintain their faith in the justice system.[94] When citizens are so outraged by a murder, they demand the death penalty. If the criminal is not put to death, the reasoning goes, people would become disillusioned and frustrated with the justice system. In the landmark *Gregg* decision, the Court considered this idea, deciding that capital punishment was a justified channel for natural retributive instincts, which if not vented through legal institutions, would lead to anarchy.[95]

Perhaps the most common retributive reason for support of the death penalty is acceptance of the old biblical adage "an eye for an eye." This concept holds that someone who takes a life should have to pay with his own life. The death penalty is necessary in this respect because the "punishment must mirror the crime."[96]

In comparison however, the alternative punishment of Life-Without-Parole achieves the same retributive ends as the death penalty. A popular perception is that a "life" term will only result in keeping the criminal behind bars for a few years. However, the LWOP option incarcerates a murderer with absolutely no chance of parole, providing the same incapacitation effect.[97]

The LWOP alternative does not offer the same quenching of the public's thirst for execution that is the basis of the faith in the system argument. The fact that most people have this natural retributive inclination does not mean that the government should acquiesce in this respect, however. It is the government's responsibility to counter and properly channel such instincts which could prove harmful to society as a whole. Hugo Bedau commented that the argument that the death penalty is needed to prevent anarchy, is analogous to the idea "that the proper way to deal with a lynch mob is to string its victim up before the mob does."[98] So the humane punishment of LWOP does not satisfy this blood-thirst, but this weakness might actually be a benefit.

In regard to the "eye for an eye" reasoning, an equally fundamental principle is respect for human life. The societal use of executions is disrespectful to the unalienable value of human life, a violent act withdrawing a person's rights for acting violently. Using executions to achieve social ends simply stoops to the criminal's level. Hugo Bedau noted: "A plain message of the death

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[93]E.J. Dionne, Jr., "Capital Punishment Gaining Favor as Public Seeks Retribution," The Washington Post 17 May 1990, p. A12.

[94]Bedau, America, p. 353.

[95]Ibid., p. 316.

[96]Ernst Prelinger, Letter. New York Times 29 Oct 1990, p. A20.

[97]Derral Cheatwood, "The Life-Without-Parole Sanction: Its Current Status and a Research Agenda," Crime and Delinquency, 34 (Jan. 1988) p. 43.

[98]Bedau, America, p. 353.

penalty is that life ceases to be sacred whenever someone with the power to take it away decides that there is sufficiently compelling programmatic reason to do so."[99] This problem with capital punishment illuminates the superiority of LWOP, which achieves the same ends of retribution, incapacitation, and deterrence without this intrinsic problem. The editor of the Vanderbilt Law Review commented: "LWOP offers an alternative that clearly demonstrates commitment both to nonviolence and the basic sanctity of human life."[100]

Additional Problems and Benefits

The death penalty in theory and practice has additional problems that make it objectionable, three of which are especially noteworthy. First, the imposition of the death penalty continues to be arbitrary and capricious, despite the Court's decision in *Gregg* that the statute corrected this constitutional flaw. Certainly the bifurcated system and other precautions eliminated some arbitrariness, but not all. Prosecutorial discretion and bargains for testimony result in the sentence of death for some, while other, more dangerous, criminals often get lesser penalties.[101] This arbitrariness is contradictory to our justice system which prides itself on the even-handed application of the laws. Secondly, the death penalty continues to be discriminatorially applied to minorities and the poor. Recent case studies have concluded that the death penalty is more likely to be imposed in cases of a white victim, than a black victim. A recent preliminary study in New Jersey also suggested that the race of the offender is important, that black defendants are more likely to be sentenced to death than whites.[102] Wealth also becomes an important factor in capital trials because the poor are unable to afford quality lawyers and are stuck with court-appointed defense counsel. The court-paid lawyers are often deplorably ineffective and incompetent, almost to the point of constitutional unacceptability.[103] There are numerous cases of defendants going to trial with lawyers who have never tried a capital case or were later disbarred.[104] This continued capriciousness, that factors completely unrelated to the law or the crime, such as income or race, have an impact in death sentencing is simply intolerable. Lastly, the finality of capital punishment poses the risk of executing a wrongfully convicted person.[105] In our juror based judicial system, occasionally innocent people are convicted of crimes, even in capital cases. In the past four years, over a dozen people have been found to be innocent after long stays on

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[99]Ibid.
[100]Note, Vanderbilt Law Review, p. 558.
[101]Ronald Tabak, "Death Penalty Exacts High Toll, Yields No Benefits," New Jersey Law Journal 21 June 1990, p. 9.
[102]Joseph Sullivan, "Race Engulfs Study on Using Death Penalty," New York Times 26 Sept. 1991, p. B2.; Robert Schwanberg, "Study of State Death Penalty Finds 'Preliminary' Evidence of Race Bias," New Jersey Star-Ledger 26 Sept. 1991.
[103]Vivian Berger, "The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases." NYU Review of Law and Social Change. 18 (1990-1991) pp. 245-254.
[104]Berger.
[105]Bedau, America, p. 350.

death row.[106] The potential for those wrongfully convicted to be executed would be a grotesque miscarriage of justice and is an inherent problem with the death penalty.

The LWOP sanction may not solve all of these problems, but it would at least allow for some relief. LWOP is not an irrevocable consequence like the death penalty, so injustice and unfairness would not stand forever as a testimony to our justice system. Some innocent people probably will still be convicted and sentences might be handed down arbitrarily, but since the prisoner would be alive, these mistakes could be remedied somewhat.

In addition to tolerably handling the problems with the death penalty, the LWOP punishment has other comparative benefits beyond the deterrence, cost and retribution arguments. The penalty offers much more flexibility for prosecutors, providing an additional weapon for plea-bargaining and thus avoiding long trials and assuring that dangerous criminals are removed from society.[107] Another significant benefit of LWOP is that it is a "surer penalty": the elaborate, expensive and lengthy capital trial is avoided, resulting in a swifter and more dependable punishment.[108]

Proponents of the death penalty have pointed to potential problems with LWOP as justification of the superiority of capital punishment. They claim that by sentencing criminals to prison for their lives, the present overcrowding problem will reach catastrophic proportions and the prison population will grow old. An ever-aging prison population would certainly be more expensive and difficult to guard (because of the need to protect an elderly inmate from other convicts), but executive commutation is an accepted release valve for elderly prisoners who no longer pose a threat to society.[109] The overcrowding problem might be a significant consideration, however, as increasing numbers of LWOP inmates could reduce the number of beds available for other criminals. However, the numbers of LWOP inmates are not substantial and it is important to recognize that these criminals are precisely who should be in prison. If overcrowding gets worse, society will have to choose between freeing lessor offenders and building more jails.[110] Additionally, without the capital punishment system, there will be substantial savings which can go toward construction of more jails for the additional LWOP inmates.

The potential discipline problem of these life inmates with no hope of release is another point to consider. Without the "carrot" of parole to motivate these prisoners, they might become additional security risks, so-called "super inmates."[111] However, most professionals who have experience with these prisoners in the corrections systems disagree with this claim. The usual maximum security disciplinary tools, such as loss of privileges and isolation, have been found to work well.[112] Precisely because LWOP inmates are the most institutionalized, many corrections officials believe they are the best behaved prisoners.[113] Alabama Assistant Attorney General Ed

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[106]Tabak, New Jersey, p. 9.
[107]Note, Vanderbilt Law Review, p. 559.
[108]Ibid., p. 557.
[109]Ibid., p. 563.
[110]Ibid., p. 562.
[111]Cheatwood, p. 53.
[112]Ibid., p. 54.
[113]Note, Vanderbilt Law Review, p. 564.

Carnes put this issue into perspective: "It's a choice between them committing offenses on the street or giving prison officials a hard time. We're more concerned with how they behave out on the street."[114] Thus, the identified problems with the LWOP option, causing overcrowding and "super inmates," are not consequential.

Conclusion

This paper demonstrates that Life-Without-Parole is a better public policy than the death penalty and that there is real public desire for the alternative. In comparison, the death penalty is not more of a deterrent than LWOP, if such a value exists. The life term also achieves the same retributive and incapacitation value while maintaining respect for the sanctity of human life. LWOP also provides a more flexible, surer and more economical penalty than capital punishment and avoids the finality of executions that makes the arbitrary system more problematic. The editor of the Vanderbilt Law Review succinctly concluded: "The availability of LWOP as a punishment for the most heinous and violent murders displays both an implacable hardness against the wanton taking of human life and a sensitivity to the inherent value of all human life."[115] Despite the attractiveness of LWOP as a punishment, many legislators do not consider it a significant alternative. Lawmakers advocate capital punishment as a symbol of their tough stand against crime and in response to public opinion. When politicians base their support for the death penalty on perceived public desire, they assume it is intelligent, thoughtful, and coherent. The abstract support, however, should not be overestimated because the desire is superficial and there is a real preference for an alternative to the death penalty. Analyzing beyond the simplistic questions most surveys ask, it is clear that the public has real problems with the punishment and when offered an alternative, drops their support for the death penalty significantly. Hugo Bedau commented: "Public opinion for the death penalty is only skin deep and an artifact of inadequate survey research."[116] By accepting and using this opinion data uncritically, legislators fail to accept their responsibility for promoting enlightened public policy.
Life-Without-Parole is preferred by the public and justified comparatively, but is relatively ignored by lawmakers. It now remains for legislators to take a moral stand on the issue, engage in real civil discourse, and reject the superficial interpretations of their constituents' will, by abolishing the death penalty in favor of the punishment of Life-Without-Parole.

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[114]Cheatwood, p. 54.
[115]Note, Vanderbilt Law Review, p. 566.
[116]Hugo Adam Bedau, "The Decline of Executive Clemency in Capital Cases," NYU Review of Law and Social Change. 18 (1990-1991) pp. 255-272.

BIBLIOGRAPHY

Poll Sources

Most of these polls are in the form of News Releases based upon the polling results in individual states, individual reports are available from the Woodrow Wilson School, Princeton University.

Amnesty International USA. "New York Public Opinion Poll, 1989." 19 May 1989.

Booth. "Majority Favor Alternatives to Death Penalty," University of Nebraska-Lincoln, 1987.

Bowers, William J., and Margaret Vandiver. "New Yorkers Want an Alternative to the Death Penalty." College of Criminal Justice, Northeastern University, 5 April 1991.

Bowers, William J., and Margaret Vandiver. "Nebraskans Want an Alternative to the Death Penalty." College of Criminal Justice, Northeastern University, 14 May 1991.

Burks, Susanne. "N.M. Poll Shows Majority Backs Death Penalty." Albuquerque Journal. 23 March 1991, p. A1.

Cambridge Survey Research. "An Analysis of Attitudes Toward Capital Punishment in Florida." 1985.

Gallup, Alec, and Frank Newport. "Death Penalty Support Remains Strong But Most Feel Unfairly Applied." The Gallup Poll News Service. 56 (26 June 1991).

Grasmick, Harold G., and Robert Bursik, Jr. "Attitudes of Oklahomans Toward the Death Penalty." University of Oklahoma, Dec. 1988.

Haney, Craig and Aida Hurtado. "Californians' Attitudes About the Death Penalty." 1989.
"Marylanders Evenly Divided on Death Penalty Repeal." Let Live. Jan. 1989.

Niiler, Eric. "Death Penalty Support Broad but Not Deep." Charleston Gazette. 25 Jan. 1990.

Thomas, Robert, and John Hutcheson, Jr. "Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues." Dec. 1986.

Vito, Gennaro F., and Thomas J. Deil. "Attitudes in the State of Kentucky on the Death Penalty." University of Louisville, Dec. 1989.

Virginia Commonwealth University. "Commonwealth Poll Regarding Attitudes Toward the Death Penalty." May-June, 1989.

Books

Bedau, Hugo Adam. The Death Penalty in America. New York: Oxford University Press, 1982.

Bedau, Hugo Adam. Death is Different. Boston: Northeastern University Press, 1987.

Berns, Walter. For Capital Punishment. New York: Basic Books, 1979.

Bowers, William. Legal Homicide. Boston: Northeastern University Press, 1984.

Ellis, Ralph. Theories of Criminal Justice. Wolfeboro, NH: Longwood Academic, 1989.

Hood, Lester. The Death Penalty. Oxford: Clarendon Press, 1990.

Nathanson, Stephen. An Eye For An Eye? New Jersey: Rowman and Littlefield, 1987.

Otterbein, Keith. The Ultimate Coercive Sanction. New Haven: HRAF Press, 1986.

Sellin, Thorsten. The Penalty of Death. Beverly Hills: Sage Publications, 1980.

Sheleff, Leon. Ultimate Penalties. Columbus, OH: Ohio State University Press, 1987.

Stinchcombe, Arthur L., et. al. Crime and Punishment -- Changing Attitudes in America. San Francisco: Jossey-Bass Publishers, 1980.

White, Welsh S. The Death Penalty in the Eighties. Ann Arbor: University of Michigan Press, 1987.

Zimring, Franklin E., and Gordon Hawkins. Capital Punishment and the American Agenda. New York: Cambridge University Press, 1986.

Articles

Bedau, Hugo Adam. "Imprisonment vs. Death: Does Avoiding Schwarzchild's Paradox Lead to Sheleff's Dilemma?" Albany Law Review. 54 (1990) pp. 481-495.

Bedau, Hugo Adam. "The Decline of Executive Clemency in Capital Cases." NYU Review of Law and Social Change. 18 (1990-1991) pp. 255-272.

Bienen, Leigh, et. al. "The Reimposition of Capital Punishment in New Jersey: Felony Murder Cases." Albany Law Review. 54 (1990) pp. 709-817.

Berger, Vivian. "The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases." NYU Review of Law and Social Change. 18 (1990-1991) pp. 245-254.

Bohm, Robert M., Timothy J. Flanagan, and Philip W. Harris. "Current Death Penalty Opinion in New York State." Albany Law Review. 54 (1990) pp. 819-843.

Bohm, Robert M. "American Death Penalty Attitudes." Criminal Justice and Behavior. 14 (1987) pp. 360-396.

Brennan, William J., Jr. "Constitutional Adjudication and the Death Penalty: A View From the Court." Harvard Law Review. 100 (Dec. 1986) pp. 313-331.

Cassidy, John. "Death Cry Harnesses Votes for Democrats." The Sunday Times 18 March 1990.

Cheatwood, Derral. "The Life-Without-Parole Sanction: Its Current Status and a Research Agenda." Crime and Delinquency. 34 (Jan. 1988) pp. 43-59.

Cohen, Richard. "Politicians, Voters, and Voltage." Time 13 Feb. 1989, p. 96.

Culver, John. "The States and Capital Punishment: An Update." Comparative State Politics. 11 (Dec. 1990)

DeParle, Jason. "Abstract Death Penalty Meets Real Execution." New York Times 30 June 1991, p. D4.

Dewar, Helen. "Democrats Showing Tile Toward Death Penalty." The Washington Post 17 May 1990, p. A13.

Dionne, E.J., Jr. "Capital Punishment Gaining Favor as Public Seeks Retribution." The Washington Post 17 May 1990, p. A12.

Ehrlich, Isaac. "The Deterrent Effect of Capital Punishment: A Question of Life and Death." American Economic Review 65 (1975) p. 397.

Ellsworth, Phoebe C., and Lee Ross. "Public Opinion and Capital Punishment: A Close

Examination of the Views of Abolitionists and Retentionists." Crime and Delinquency. 29 (Jan. 1983) pp. 116-169.

Fox, James Alan, Michael Radelet, and Julie Bonsteel. "Death Penalty Opinion in the Post-*Furman* Years." NYU Review of Law and Social Change. 18 (1990-1991) pp. 499-529.

Geimer, William. "Law and Reality in the Capital Penalty Trial." NYU Review of Law and Social Change. 18 (1990-1991) pp. 273-295.

Greenfield, Lawrence. "Capital Punishment 1989," Bureau of Justice Statistics Bulletin. October 1990.

Gordon, Diana. "Executioner's Song." The Nation. 251 (8 Oct. 1990) p. 373.

Kramer, Michael. "Cuomo, The Last Holdout." Time 2 Apr. 1990, p. 20.

Lacayo, Richard. "The Politics of Life and Death." Time 2 Apr. 1990, p. 18.

Lotz, Roy, and Robert Regoli. "Public Support for the Death Penalty." Criminal Justice Review. 5 (1980) pp. 55-66.

Malcolm, Andrew. "Capital Punishment is Popular, but so are its Alternatives." New York Times 10 Sept. 1989, p. D4.

Marquart, James, and Jonathan Sorensen. "A National Study of *Furman*-Commuted Inmates: Assessing the Threat to Society From Capital Offenders." Loyola of Los Angeles Law Review. 23 (Nov. 1989) pp. 5-28.

Moran, Richard, and Joseph Ellis. "Death Penalty; Luxury Item." Newsday 14 June 1989, p. 60.

Note. "Life-Without-Parole: An Alternative or Not Much of a Life at All?" Vanderbilt Law Review. 43 (1990) pp. 529-568.

Note. "The Meaning of 'Life' for Virginia Jurors and its Effect on Reliability in Capital Sentencing." Virginia Law Review. 75 (Nov. 1989) pp. 1605-1638.

Oreskes, Michael. "The Political Stampede on Execution." New York Times 4 Apr. 1990, p. A16.

Paduano, Anthony, and Clive Stafford Smith. "Deathly Errors: Juror Misconceptions Concerning Parole in the Imposition of the Death Penalty." Columbia Human Rights Law Review. 18 (Spring 1987) pp. 211-257.

Prelinger, Ernst. Letter. New York Times 29 Oct 1990, p. A20.

"Prospect of Execution Stirs Debate." New York Times 15 July 1991.

Rankin, Joseph H. "Changing Attitudes Toward Capital Punishment." Social Forces. 58 (Sept. 1979) pp. 194-211.

Roberts, Julian. "Public Opinion and Capital Punishment: The Effects of Attitudes Upon Memory." Canadian Journal of Criminology. 26 (1984) p. 283.

Sarat, Austin, and Neil Vidmar. "Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis." Wisconsin Law Review. 1976 (1976) pp. 171-197.

Schwanberg, Robert. "Study of State Death Penalty Finds 'Preliminary' Evidence of Race Bias." New Jersey Star-Ledger 26 Sept. 1991.

Snellenburg, Sidney C. "Is There a Reasonable Alternative to the Death Penalty?" Judicature. 71 (June-July 1987) pp. 5-6.

Spangenberg, Robert, and Elizabeth Walsh. "Capital Punishment or Life Imprisonment? Some Cost Considerations." Loyola of Los Angeles Law Review. 23 (Nov. 1989) pp. 45-58.

Sullivan, Joseph. "Race Engulfs Study on Using Death Penalty." New York Times 26 Sept. 1991, p. B2.

Tabak, Ronald. "Death Penalty Exacts High Toll, Yields No Benefits." New Jersey Law Journal 21 June 1990, p. 9.

Tabak, Ronald, and J. Mark Lane. "The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty." Loyola of Los Angeles Law Review. 23 (Nov. 1989) pp. 59-146.

Thomas, Charles W. "Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion." Vanderbilt Law Review. 30 (Oct. 1977) pp. 1005-1032.

Tyler, Tom, and Renee Weber. "Support for the Death Penalty; Instrumental Responses to Crime Or Symbolic Attitude?" Law and Society Review. 17 (1982) pp. 21-45.

United States Department of Justice. Federal Bureau of Investigation. Uniform Crime Reports, 1990. Washington DC: Government Printing Office, 1990.

United States Bureau of the Census. Current Population Reports, Series P-20, No. 451,

Educational Attainment in the US: March 1989 and 1988. US Government Printing Office, Washington DC, 1991.

Vidmar, Neil, and Tony Dittenhoffer. "Informed Public Opinion and Death Penalty Attitudes." Canadian Journal of Criminology 23 (1981) p. 43.

Vidmar, Neil, and Phoebe Ellsworth. "Public Opinion and the Death Penalty." Stanford Law Review. 26 (June 1974) pp. 1245-1270.

Waldo, Gordon P. "The Death Penalty and Deterrence: A Review of Recent Research." The Mad, The Bad, and The Different. Ed. Israel Barak-Glantz and C. Ronald Huff. Lexington, MA: DC Heath and Co., 1981.

Wallace, Donald. "Bloodbath and Brutalization: Public Opinion and the Death Penalty." Journal of Crime and Justice. 12 (1989) p. 51.

Warr, Mark, and Mark Stafford. "Public Goals of Punishment and Support for Death Penalty." Journal of Research in Crime and Delinquency. 21 (1984) p. 95.

White, Welsh S. "The Role of Social Sciences in Determining the Constitutionality of Capital Punishment." Duquesne Law Review. 13 (Winter 1974) pp. 279-301.

Zeisel, Hans, and Alec Gallup. "Death Penalty Sentiment in the US." Journal of Quantitative Criminology. 5 (1989) p. 285.

APPENDIX

Table A: Abstract Support for the Death Penalty

Gallup	(1991)	76.0%
Nebraska	(1991)	80.4
New York	(1991)	71.0
New Mexico	(1991)	63.0
California	(1989)	79.5
Kentucky	(1989)	69.1
Maryland	(1989)	67.0
New York	(1989)	72.0
Virginia	(1989)	64.0
West Virginia	(1989)	69.0
Oklahoma	(1988)	80.2
Nebraska	(1987)	68.0
Florida	(1986)	84.0
Georgia	(1986)	75.0

Table B: Attitudes about the System

		too arbitrary	race bias	income bias	moral doubts	uncom-fortable	short-term solution	want better way
Gallup	(1991)	-	45.0	60.0	-	-	-	-
Nebraska	(1991)	83.8	46.8	72.3	43.9	41.5	-	77.3
New York	(1991)	83.0	42.0	-	56.0	57.0	-	-
New York	(1989)	69.0	42.0	56.0	-	-	60.0	78.0
Nebraska	(1987)	-	-	-	-	-	-	86.0 [2]
Florida	(1986)	74.0	47.0 [1]	47.0 [1]	-	-	49.0	81.0
Georgia	(1986)	-	50.0	49.0	-	-	-	-

[1] The Florida survey combined the issues of race and income bias into one question.

[2] Estimated support based on 14% expressed disagreement.

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Table C: Support for the Death Penalty if the Defendant is a Juvenile or Retarded

	juvenile	retarded
New Mexico (1991)	-	43.0 [1]
California (1989)	50.0	26.0
Kentucky (1989)	42.0	15.0
Maryland (1989)	-	8.0 [2]
New York (1989)	-	10.0
Virginia (1989)	-	10.0
Oklahoma (1988)	50.0	29.0
Florida (1986)	35.0	12.0
Georgia (1986)	26.0	17.0

[1] Estimated support based on 57% expressed opposition.
[2] Estimated support based on 82% expressed opposition.

Table D: Support for Alternatives to the Death Penalty

	LWOP+R		LWOP		LWP25+R	
	alt	dp	alt	dp	alt	dp
Gallup (1991)	-	-	35.0	53.0	-	-
Nebraska (1991) [1]	-	21.0	-	-	58.0	-
New York (1991)	73.0	19.4	54.6	35.8	58.6 [2]	-
New Mexico (1991)	-	-	-	-	-	49.0 [3]
California (1989)	67.3	25.9	-	-	-	-
Kentucky (1989)	-	-	46.0	35.9	-	-
Maryland (1989)	-	-	49.0	49.0	42.0	50.5 [4]
New York (1989)	62.0	32.0	-	-	54.0	41.0
Virginia (1989)	-	-	-	-	59.0	27.0
	-	-	-	-	39.0	45.0 [5]
West Virginia (1989)	-		-	73.0	19.0	-
Oklahoma (1988)	-	-	49.0	47.9	-	-
Florida (1986)	70.0	24.0	54.0 [6]	-	-	-
Georgia (1986)	51.0	43.0	44.0	46.0	52.0	42.0

[1] The Nebraska survey asked whether respondents preferred the death penalty to a host of alternatives. LWP25+R garnered the most support (58.0%) while the death penalty retained the support of only 21% against the range of alternatives.
[2] In the New York survey, 58.6% said that LWP25+R was acceptable.
[3] Estimated support is based on 49.0% expressed opposition to the death penalty when the alternative was LWP30+R.
[4] The Maryland poll offered the alternative of LWP25 without Restitution.
[5] These data correspond to the alternative of LWP25 without Restitution.
[6] The Florida survey found 54% of respondents less likely to favor the death penalty if LWOP was the alternative.

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STUDENT PERCEPTIONS TOWARDS THE DEATH PENALTY by Sonja McGill

FORWARD

This paper is an analysis of student opinion regarding the abolition of the death penalty. The major objective is to gauge how students, as entering freshmen, feel about the death penalty.[1] The freshmen class of 1971 was against the use of capital punishment in the United States. However, there occurred a tremendous rise in support for the death penalty in 1978, with ever increasing support for it up until the freshmen class of 1990. Many experts conclude that there has been a definite shift towards the conservative side in American politics in recent years.[2] Broh termed it as a "wave of ultra-conservatism." The environment surrounding young people definitely has an effect on student opinion. Thus, one would not be surprised to see a slant towards conservatism in student opinion concerning the death penalty. Also, the level of parental education, childhood development, race and gender are also important contributing factors in student opinion on various issues. For example, according to Taylor, "a general pattern that has been established in numerous surveys is that blacks are always more liberal than whites." He said that "even without controlling for any variables on any survey, this is an established fact in the General Social Survey, the American Political Science Review, and the American Sociological Review, and

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[1] The primary source used to gauge student opinion regarding the abolition of the death penalty was the survey entitled, "The American Freshman, National Norms for Fall...", which is performed annually by the Cooperative Institutional Research Program at the University of California at Los Angeles. For a comparative analysis of adults regarding the death penalty, two surveys were used: the 1986 Gallup Poll entitled, "The Death Penalty," and the 1991 Gallup Poll entitled, "Death Penalty Support Remains Strong, But Most Feel Unfairly Applied."

[2] To determine what factors shape student opinion, interviews were conducted with experts in the area of research studies: Anthony Broh, Registrar at Princeton University; Eric L. Dey, Associate Director of the Cooperative Institutional Research Program at the University of California at Los Angeles; Professor Thomas Espenshade, Professor at the Office of Population Research, Princeton University; and Professor Howard Taylor, Department of Sociology, Princeton University.

many other major research journals."[3] Thus, one would expect blacks to be more likely to oppose the death penalty than whites. This is found to be true for all the surveys used for this analysis: The American Freshman: National Norms for Fall..., the 1986 and 1991 Gallup Polls regarding the death penalty. The difference in opinion in men and women is a bit more difficult to determine. Taylor said that while it is true that women are generally more liberal than men, spouses have a much greater effect on women than on men. "If a woman has a husband who is liberal, then she will tend to be liberal; if, on the other hand, she has a husband who is conservative, then she will tend to be more conservative." "Education," he said, "has much more of an effect on women than men."[4]

The second objective of the analysis will be to predict how capital punishment statues will fare when the students of the freshmen classes of 1971, 1978, 1979, 1982, 1983, 1989, and 1990 become policy makers in the various states. Student opinion has changed drastically over the past twenty years. In 1971, students were extremely against the use of capital punishment in the United States. However, there occurred a significant rise in support for the death penalty in 1978, with ever increasing support for it up until the freshmen class of 1990. What does this mean for the future of death penalty statues? Is it possible to predict, by gauging student opinion both in the past and in the present, if capital punishment will continue to be a mainstay in the U.S. criminal justice system? Do changes in opinion of past students, who are now adults, act as indicators of how student opinion and capital punishment statues might develop say twenty to twenty-five years from now? According to Professor Taylor, when major research studies attempt to determine liberal/conservative attitudes in people, very political issues such as the death penalty, abortion, equal opportunity for women and minorities, and racial discrimination are asked of the interviewees. Thus, the methodology for determining how capital punishment statues will be dealt with in the future is to compare students' attitudes on the death penalty with

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[3] Interview Notes of Howard Taylor, Ph.D., sociologist at Princeton University, November 8, 1991.

[4] Ibid.

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other pertinent indicators of liberalism/conservatism.

BACKGROUND

"Each year the CIRP [Cooperative Institutional Research Program] surveys some 250,000 full-time students who constitute the entering freshman classes at a nationally representative sample of about 600 two- and four-year colleges and universities across the United States." [5] The poll, which began in the fall of 1966, surveys a representative number of freshmen across the nation on a broad range of issues, including economic and ethnic background, activities performed during high school, career goals, parents' educational background and many variables. According to Robin Bailey, a member of the program staff, after the survey is conducted and the responses are tabulated, then the results are weighted into the number of freshmen enrolled in institutions that year. [6] The statement about the death penalty, in recent years, has been phrased as follows: "Capital punishment should be abolished." The older version of the statement was: "The death penalty should be abolished."[7] The question is graded on a four-point scale, soliciting answers according to the following categories: disagree strongly, disagree somewhat, agree somewhat, and agree

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[5] Eric L. Dey, Alexander W. Astin, and William S. Korn, The American Freshman: Twenty-Five Year Trends (Los Angeles: Higher Education Research Institute, UCLA, 1991), p. 1.

[6] The percentages calculated were transformed into percentages so as to imply that every freshman across the country filled out the survey.

[7] "The wording of some questions in the survey instrument, the text and number of response options and the order of their presentation have changed over the years. We have found that even small changes can have a disproportionate effect on the results. While the trend data found in this report have been carefully examined to remove results which have clearly been contaminated by these considerations, some variations caused by order and context effects can still be observed." Ibid., p. 185.

strongly.[8] In reporting the percentages for the death penalty, CIRP groups together the results for the categories of agree strongly or agree somewhat and then averages those percentages.

The survey itself is divided into five categories: all freshmen, all men, all women, all four-year colleges, and all universities. Within the first three, there are several subdivisions between private and public institutions: two-year colleges, four-year colleges of sectarian and nonsectarian foundations, predominantly black colleges, and traditionally white universities. Within the last two categories, the institutions are divided by selectivity rates and gender, to determine how men and women at different kinds schools compare to one another. The years (1971-1990) selected for this analysis were chosen based on their significance with regard to the death penalty jurisprudence---except for the period of 1978 and 1979 since this was the year the statement was included again on the survey.

THE YEAR 1971

The year 1971 was part of a hard period for America. Cities were plagued with race riots. For example, "...after four days of Wilmington, N.C., racial violence in which two persons were shot to death, 600 National Guardsmen were ordered into the city February 8, 1971, to restore order."[9] "The conviction on March 29, 1971, of 1st Lt. William L. Calley, Jr., of premeditated murder of 22 Vietnamese men, women, and children...aroused public reaction on a mass scale...the verdict was denounced in Congress and state legislatures and resolutions were passed demanding his pardon, several draft boards resigned, mass marches

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[8] Although the survey began in 1966, the death penalty statement was not included until 1969; it was dropped beginning with the fall of 1972, and was picked up again in the fall of 1978. Eric Dey, Associate Director of the UCLA program, said the question was not dropped because of any significant connection to the benchmark case of Furman v. Georgia. It was probably dropped because of the whim of the survey's designer(s), and was picked again because of the same reason.

[9] Luman H. Long, ed., The World Almanac and Book of Facts 1972 (New York: Newspaper Enterprise Association, Inc., 1971), p. 946.

on Washington were planned, and some war veterans tried to give themselves up to the authorities, claiming they were just as guilty."[10] "Congress turned down end-the-war proposals as the Senate refused twice on June 16, 1971, to set a Vietnam troop withdrawal deadline and the House on June 17, 1971, also declined to set a pullout...However, antiwar forces, defeated twice during the week, made a surprising comeback June 22, 1971, when, after a bewildering series of parliamentary maneuvers, the Senate adopted a measure favoring a complete pullout by the spring of 1972 in a 57-to-42 vote...The proposal was rejected by the House by a vote of 219 to 176."[11] Events like these had a definite impact upon the opinion of college students which is evidenced by the numerous riots which took place across the nation in cities like Chicago, Newark, and Watts. Anthony Broh, registrar at Princeton University, who was at the time, a Ph.D. candidate at the University of Wisconsin at Madison, said that students at the time had a real feeling of power, pride, concern, and community which made them have more of an opinion on various issues, particularly due to the fact that they were becoming aware of political issues as a whole.[12] This high opinion of issues, particularly of government, is greatly reflected in the freshmen survey taken in the fall of 1971. When the statement "government is not controlling pollution" was offered, 90.5% (weighted national norm) of all freshmen in all institutions strongly agreed or somewhat with the statement. The statement, "government is not protecting the consumer," received a 76.6% agreement rate from all freshmen. The "government is not desegregating quickly" received a 51.7% agreement. "Women should get job equality" received a 87.8% agreement. "All should get college opportunities" received 68.5% from all freshmen. Remarkably, when the statement "barely communicate with

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[10] Ibid., p. 948.

[11] Ibid., p. 954.

[12] Interview Notes of Anthony Broh, Ph.D., registrar at Princeton University, October 30, 1991.

parents" was offered, only 18.6% of all freshmen agreed strongly or somewhat.[13] It might be fair to suggest that students in 1971 were generally quite "liberal" as opposed to being "conservative."

OPINION ON THE DEATH PENALTY IN 1971---FRESHMEN

When the statement, "the death penalty should be abolished," was put forth, there was an interesting response. Overall, 57.6% of freshmen agreed strongly or somewhat to the statement. A striking difference in opinion, however, occurred between students at public and private institutions. For example, students at public institutions agreed that the death penalty should be abolished at a rate of about 59% at both four-year colleges and universities; however, students at private four-year colleges and universities agreed at the death penalty should be abolished at a rate of about 65-66%.[14] The seven point difference in this comparison can be viewed in Appendix A.

Black vs. White

The comparison of predominantly black colleges versus traditionally white universities was performed in a separate survey done by the American Council of Education, Office of Research, entitled, "The Black College Freshman: Characteristics and Recent Trends." The same statement concerning the abolition of the death penalty was offered. This study

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[13] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1971 (Los Angeles: Higher Education Research Institute, 1971), p. 43.

[14] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1971 (Los Angeles: Higher Education Research Institute, UCLA, 1971), p. 43.

examines the opinions of black freshmen students against those of nonblack freshmen students (predominantly white students) at both predominantly black and white institutions. According to the thesis, if blacks are truly more liberal than whites, then there should be a huge disparity in the agreement rates regarding the abolition of the death penalty; there is indeed a huge disparity in the agreement rates on this issue. Black students at predominantly black colleges agreed at a percentage of 69.3% in favor of the abolition of capital punishment while nonblack students agreed at a rate of 60.9%.[15] The nine point difference in agreement rates falls right in line with the thesis that blacks are always more liberal than whites.

Gender

The differences in responses with regard to gender for 1971 also fall in line with the thesis that women tend to be a bit more liberal than men. The total agreement rate for freshmen men in all institutions was 53.2% while the agreement rate for women was 62.8%.[16] For a graphic depiction of the differences in opinion among freshmen men and women at various institutions, refer to Appendix A.

Another proof of the thesis regarding race is shown upon examining the difference in opinion between black and nonblack men and women at different institutions. For example, black men at predominantly black colleges agreed in the abolition of the death penalty at a rate of 69.3% while nonblack men at white universities agreed at a rate of 56.7%,[17] a thirteen point difference. For women, the difference was much smaller at three points (black women at predominantly black colleges agreed at 69.3% and nonblack women at

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[15] Alan E. Bayer, The Black College Freshman: Characteristics and Recent Trends 1971 (Washington D.C.: American Council on Education, 1971), p. 43.

[16] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1971 (Los Angeles: Higher Education Research Institute, UCLA, 1971), pp. 27, 35.

[17] Ibid., p. 27.

white universities agreed at 66.2%).[18] The higher liberalism of blacks is quite striking when compared to whites, even for students who were highly motivated by political issues during this time, as evidenced by the demonstrations at colleges like Kent State.

THE YEARS 1978 AND 1979

Jimmy Carter was elected president in November of 1976. High inflation was a constant, and energy prices, especially gas, were high---mostly because of the OPEC cartel. In the previous year of this period (1977), Carter pardoned all of the American draft dodgers of the Vietnam War who had mostly fled to Canada.[19] People were still generally concerned with racism and discrimination, but the tide of highest sentiment had died down. The feminist movement was growing with momentum collected with the 1973 Roe v. Wade decision which legalized abortion. The movement received an extra "push" with the extension of the deadline for ratification of the Equal Rights Amendment, which was originally scheduled for March 1979, but was extended for three years in 1978.[20]

Students during these two years were very interested in and aware of political issues as they had been in 1971. The statement, "government is not controlling pollution," received an agreement rate of 81.5% in 1978 and 80.8% in 1979 from all freshmen in all institutions. "Inflation is the biggest domestic problem," which was asked in 1979, received an agreement of 80.0%. "Energy shortage is causing or can cause a depression" received an agreement rate of 81.8% in 1978 and 87.4% in 1979. "Abortion should be legalized," which was asked for the first time in 1977, received 56.7% in 1978 and 53.3% in 1979. Overall, freshmen in

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[18] Ibid., p. 35.

[19] Colin McEvedy, The Century World History Factfinder (London: Century Publishing Co., Ltd., 1984), p. 195.

[20] Academic American Encyclopedia, Volume 19, 1987 ed., s.v. "The Equal Rights Amendment."

1978 agreed strongly or somewhat at a rate of 92.7% that "women should get job equality," and 92.4% of freshmen in 1979 felt the same way. The issue of busing and whether it was okay to be used as a tool to achieve "balance" in schools received 41.5% in 1978 and 44.1% in 1979.[21] Presumably, college students in 1978 and 1979 were about as cognizant of political issues and still quite "liberal" as they were in the 1971 survey. This being the case, how did the death penalty fare with students in 1978 and 1979?

OPINION ON THE DEATH PENALTY IN 1978 AND 1979---FRESHMEN

There was a significant drop in students' dislike for capital punishment in the falls of 1978 and 1979. Overall, all freshmen in all institutions agreed strongly or somewhat with the abolishment of the death penalty at a response rate of 32.6% in 1978 and 34.5% in 1979. This is a remarkable shift from the 57.6% response rate the statement received in 1971.[22] Howard Taylor said that this shift in support for the maintenance of the death penalty followed a general conservative trend of the country that sociological research studies have verified occurred in this time period.[23] Anthony Broh said that the shift could be attributed to what he termed a "wave of ultra-conservatism" that hugely affected people of

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[21] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1978 and 1979 (Los Angeles: Higher Education Research Institute, UCLA), pp. 57, 55.

[22] Ibid.

[23] Interview Notes of Howard Taylor, Ph.D., sociologist at Princeton University, November 8, 1991.

this generation.[24] Refer to Appendix A for a graphic portrayal of the shift.

Black vs. White

There was again a tremendous gap between opinion of students at predominantly black colleges compared to universities. For students at predominantly black colleges, the agreement rate of abolition was 55.1% while the agreement rate of students at predominantly white universities was 32.2% in 1978.[25] The difference for 1979 was even greater at 56.3% for predominantly black colleges to 25.8% for predominantly white universities.[26] This again marks a certain higher degree of liberalism in blacks compared to whites. Refer to Appendix A for a graphic portrayal of this difference.

Gender

The gap with regards to gender was still maintained despite the tremendous shift in opinion occurring in 1978. Overall, freshmen men in all institutions in 1978 dropped to a rate of 26.8% while freshmen women dropped to a rate of 38.2%. In 1979, both rose slightly---men rose to an agreement rate of 28.0% while women rose to an agreement rate of 40.7%. Examine Appendix A for a graphic depiction of the difference in opinion between men and women.

Selectivity

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[24] Interview Notes of Anthony Broh, registrar at Princeton University, October 30, 1991.

[25] Astin, A.W., Green, K.C., and Korn, W.S., The American Freshman: National Norms for Fall 1978 (Los Angeles: Higher Education Research Institute, UCLA, 1978), p. 57.

[26] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1979 (Los Angeles: Higher Education Research Institute, 1979), p. 55.

A unique category was created in the survey for the difference between four-year colleges and universities. This distinction is important for the analysis of freshmen student opinion, because this would presumably determine the type of influence a university with mature graduate students and research professors (who might have vast knowledge on many topics) might have on students, as opposed to colleges where the focus of attention is primarily on the undergraduates. This is not to suggest that colleges are inferior to universities; it is simply that one would presume that the availability of higher exposure to "deeper" knowledge acquired because of immense research, would tend to occur more at a university that was focused on high research than a college mostly dedicated to the undergraduates.

The reason this distinction is important for the survey, and its subsequent analysis, is to determine the degrees to which different institutions influence student opinion. The survey is broken down into four-year colleges and universities by rates of selectivity in the admission process. That is, the schools of low, medium, high, and sometimes very high selectivity are compared longitudinally. For example, within the private, nonsectarian four-year category, schools with very high selectivity reported an agreement rate of 43.2% from all freshmen in 1978 while freshman at schools with low selectivity agreed at 34.0%.[27] In 1979, the same gap in opinion existed, with 44.8% for very high selective schools versus 35.2% for low selective schools.[28]

Associate Director Eric Dey attributes this difference in opinion to class interests. That is, research shows that people from higher income families tend to be more liberal on political issues, meaning that the wealthier a person is, the less likely he/she is to hold conservative views. Since highly selective colleges admit a disproportionate number of wealthy students, then it might be expected that those students would tend to be less in favor

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[27] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1978 (Los Angeles: Higher Education Research Institute, UCLA, 1978), p. 89.

[28] Astin, A.W., Green, K.C., and & Korn, W.S., The American Freshman: National Norms for Fall 1979 (Los Angeles: Higher Education Research Institute, UCLA, 1979), p. 87.

of issues like the death penalty. When asked of the kind of influence a campus environment provides on the student body, Dey said that schools of very high selectivity tend to have less of an impact because its pool is usually the "best and brightest." Since most students at these institutions have definite high goals and plans when they enter school, they tend to be less willing to accepts views offered to them which violate their moral rules or codes. Supposedly, this is contrary to students of lower selective schools, who are usually more willing to accept views and such primarily because they tend, on the whole, to have a lesser sense of direction or career paths upon entering college.[29]

When asked on his thoughts of whether colleges and universities really had a major impact on students' opinion, Anthony Broh from Princeton said that formation of opinion is based more on political socialization than experiences in college. That is, parents, schooling, and churches have all influenced students greatly before they enter college; thus, by the time they enter college, the most important formation of opinion has already taken place. Consequently, colleges and universities do not have as much impact on students as many are led to believe.[30] Professors Taylor and stressed the importance of parents' educational background. They both agreed that education of the parents influences children more than any other variable, with regard to political identification. Both said that research shows that there is a directly proportional relationship between education and political attitudes: the more education a person has, the stronger their political ideas are.[31] Since more often than not, students in highly selective schools have professional parents who have had strong educational backgrounds, as opposed to children at lesser selective schools, then this explains why the gap is so significant between entering freshmen at highly selective

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[29] Interview Notes of Eric L. Dey, Ph.D., Associate Director of the Cooperative Institutional Research Program at the University of California at Los Angeles, October 29, 1991.

[30] Interview Notes of Anthony Broh, Ph.D., Registrar at Princeton University, October 30, 1991.

[31] Interview Notes of Thomas Espenshade, Ph.D., Office of Population Research, Princeton University, November 4, 1991.

schools and their counterparts at lower selective schools.[32]

THE YEARS 1982 AND 1983

The years 1982 and 1983 were practically the beginning of a new era for America because Ronald Reagan ushered in what was to be an eight-year reign of the White House for the Republic party. In 1982, America was still in the midst of a recession, evidenced by an increased jobless rate, a decrease in producers' prices and an increase in consumers' prices.[33] The Reagan Administration reported in December of 1981 that the U.S. deficit was projected to climb to $109 billion in 1982.[34] "By a vote of 57 to 37, the U.S. Senate passed a bill, March 2, 1982, that virtually eliminated school busing for the purpose of racial discrimination."[35] Capital punishment was proceeding steadily along.[36]

The "wave" of ultra-conservatism, as Dr. Broh characterized it, was beginning to show its impact even in the early years of the Reagan administration. In 1981, the Los Angeles Board of Education ended mandatory school busing to achieve racial integration in schools.

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[32] Interview Notes of Howard Taylor, Ph.D., Sociologist at Princeton University, November 8, 1991.

[33] Hana Umlauf Lane, ed., The World Almanac and Book of Facts 1983 (New York: Newspaper Enterprise Association, Inc., 1981), p. 929.

[34] Ibid., p. 920.

[35] Ibid., p. 928.

[36] One interesting point of information was the execution of convicted murderer Charles Brooks, Jr. Brooks was executed on December 7, 1982 at the state penitentiary in Huntsville, Tex., "...by an intravenous injection of sodium thiopental. He was the first person to be executed in this manner in the United States...Brooks was the sixth man and first black to be executed since the Supreme Court upheld capital punishment in 1976, and the second who fought his execution. Ibid., p. 874.

In 1983, the American forces invaded Grenada with the help of Caribbean forces.[37] Another possible indicator of the shift from the "left" to the "right" was the defeat of the Equal Rights Amendment on June 30, 1982, when ratification fell three states short of the thirty-eight needed to win a three-fourths vote and become an amendment to the Constitution.[38]

Student opinion, meanwhile, remained highly "liberal" on certain subjects. With increased military involvement in the early 1980s, the statement, "federal military spending increased," was added and received an agreement rate of 38.8% for 1982 and 36.9% in 1983. The legalization of abortion issue again received a high agreement rate: 54.8% in 1982 and 1983. Support for busing as a corrector of racial imbalance in education actually went up to 46.8% in 1982 and 50.7% in 1983 compared to the last response of 44.1% in 1979.[39]

Opinion on the Death Penalty in 1982 and 1983---Freshmen

The death penalty, remarkably, was received with less opposition even in the face of continued student "liberalism" on certain issues." An explanation for this could be that the effects of the Reagan era were beginning to take their toll on public opinion. Overall, freshmen agreed at a 28.4% rate that the death penalty should be abolished in 1982, and at 28.9% in 1983. When examining the difference in opinion of freshmen at public and private institutions, it appears that students were "of the same mind." In 1982, the agreement rate was around 30% (29.0% at public institutions and 30.8% at private

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[37] Colin McEvedy, The Century World History Factfinder (London: Century Publishing Co, Ltd.), p. 196.

[38] Academic American Encyclopedia, Volume 19, 1987 ed., s.v. "The Equal Rights Amendment."

[39] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1982 and 1983 (Los Angeles: Higher Education Research Institute, UCLA, 1982 & 1983) pp. 62, 56.

institutions).[40] In 1983, the results were basically the same (29.2% at public institutions and 32.2% at private institutions).[41] Thus, it appears that the shift towards "conservatism" with the regards to the death penalty is continuing the trend it began in 1978 and 1979. Refer to Appendix A for a graphic depiction of the difference in opinion of freshmen in 1982 and 1983.

Black vs. White

The disparity of opinion between freshmen students at predominantly black colleges and white universities continued with the freshmen classes of 1982 and 1983. In 1982, there existed approximately an eighteen point difference of opinion (a 45.5% agreement rate for predominantly black colleges and a 27.1% agreement rate for white universities).[42] In 1983, the gap was closed slightly with approximately a seventeen point difference (a 45.9% agreement rate for predominantly black colleges and a 28.4% agreement rate for white universities).[43]

Gender

With regards to gender, a gap in opinion remained as it had in the previous years of the analysis. For 1982, the gap was one of ten points: an agreement rate of 23.1% for

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[40] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1982 (Los Angeles: Higher Education Research Institute, UCLA, 1982), p. 62.

[41] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1983 (Los Angeles: Higher Education Research Institute, UCLA, 1983), p. 56.

[42] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1982 (Los Angeles: Higher Education Research Institute, UCLA, 1982), p. 62.

[43] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1983 (Los Angeles: Higher Education Research Institute, UCLA, 1983), p. 56.

freshmen men overall, and an agreement rate of 33.5% for freshmen women overall.[44] For 1983, the gap was also one of nine points: an agreement rate of 23.9% for freshmen men overall, and an agreement rate of 33.7% for freshmen women overall.[45] The disparities in opinion between men and women at predominantly black institutions continued as it had been established. For a graphic depiction of the disparity of opinion, refer to Appendix A.

Selectivity

With regards to selectivity, schools with low selectivity in 1982 reported an agreement rate of 28.7% compared to 39.3% in very high selective schools.[46] In 1983, the gap lessened a bit: 32.0% for low selective schools and 38.7% for very high selective schools.[47]

THE YEARS 1989 AND 1990

The year 1989 was filled with an interesting set of events. "George Herbert Walker

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[44] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1982 (Los Angeles: Higher Education Research Institute, UCLA, 1982), pp. 30, 46.

[45] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1983 (Los Angeles: Higher Education Research Institute, UCLA, 1983), pp. 24, 40.

[46] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1982 (Los Angeles: Higher Education Research Institute, UCLA, 1982), p. 94.

[47] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1983 (Los Angeles: Higher Education Research Institute, UCLA, 1983), p. 88.

Bush...was elected the forty-first president of the United States on November 8, 1988."[48] The Iran-Contra trial got under way February 21, 1989, with the trial of former National Security Council staff member Oliver North.[49] "The U.S. Supreme Court, in a sharply divided 5-4 decision, announced July 3, 1989, put new restraints on a woman's right to have an abortion. The ruling set the stage for conflicts across the nation in legislative arenas between supporters and opponents of abortion...In its new decision, Webster v. Reproductive Health Services, the court majority upheld a Missouri law prohibiting public employees from performing abortions unless the mother's life was endangered, barring abortions in public buildings, and requiring medical tests on any fetus more than 20 weeks old to determine if it could live outside the womb."[50] Internationally, "the [East German Communist] government lifted travel and emigration restrictions, November 9, 1989, and...within hours, thousands of Germans from East and West massed at the Berlin wall, many of them sitting atop the barrier that had separated the two Germanys since 1961."[51] The year 1990 was interesting in its own right, especially with the freeing of black nationalist leader Nelson Mandela and the lifting the ban on the African National Congress, the principal black organization opposing white minority rule in South Africa by President F.W. de Klerk.

The year 1990 was also very interesting. South Africa began, what many consider to be, its course towards the abolishment of apartheid with the appointment of Prime Minister de Klerk and also the recognition of the African National Congress.[52]

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[48] Mark S. Hoffman, ed., The World Almanac and Book of Facts 1990 (New York: Newspaper Enterprise Association, Inc., 1989), p. 41.

[49] Ibid., p. 48.

[50] Ibid., p. 59.

[51] Mark S. Hoffman, ed., The World Almanac and Book of Facts 1991 (New York: Newspaper Enterprise Association, Inc., 1990), p. 43.

[52] Ibid., p. 50.

Student opinion, amidst this relatively quiet "storm" continued to remain "liberal" with regards to major political issues of the day. The statement "government is not controlling pollution" received a 86.3% agreement rate from all freshmen in 1989, and 87.9% in 1990 to address increasing environmental concerns nationwide and internationally. To address Bush's campaign promise of not creating any new taxes, freshmen only agreed strongly or somewhat at 28.8% in 1989 and 28.6% in 1990 that taxes ought to be raised to reduce the federal deficit. People still believed that abortion should remain legalized at a high percentage (64.7% in 1989 and 64.9% in 1990). Freshmen also still believed, in a good majority, that busing was still a valid corrector of racial segregation in schools (56.0% in 1989 and 56.7% in 1990). A small hint of "conservatism" might be seen in response to a newly created statement on A.I.D.S.: "Controlling A.I.D.S. by mandatory testing." Freshmen agreed strongly or somewhat with this statement by a percentage of 67.2% in 1989 and 66.4% in 1990. The international statements asked of freshmen also marked certain degrees of "liberalism." Freshmen agreed at a rate of 68.1% in 1989 that the government was not promoting disarmament of nuclear weapons. The statement was varied somewhat in 1990 to, "Nuclear disarmament is attainable," to which freshmen responded at a rate of 60.9%, presumably due to the destruction of the "Iron Curtain." With regards to supporting apartheid in South Africa, freshmen in 1989 agreed that the U.S. should not endow investments to South Africa by 48.8%; the statement was not offered in 1990. A final statement concerning national relations was added in the 1990 survey when it was put forth that "racial discrimination was no longer a problem." The statement received an agreement rate of 20.6% from freshmen.[53]

OPINION ON THE DEATH PENALTY IN 1989 AND 1990---FRESHMEN

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[53] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1989 and 1990 (Los Angeles: Higher Education Research Institute, UCLA, 1989 & 1990), pp. 57, 56.

How did the statement concerning capital punishment do?[54] Did students return to a "liberal" position, or did student opinion continue to move to the conservative course which had begun when the statement was picked back up in 1978 and continuing throughout the years of 1979, 1982, and 1983---especially midst all of this political consciousness of young Americans? Student "liberalism" did not extend to the issue of capital punishment in 1989 and 1990. It even achieved an all-time low in 1989 of 21.3%, only to raise by two-tenths of a point to 21.5% in 1990 overall.[55]

Black vs. White

The disparity between students at predominantly black colleges and universities continued to persist just as it had done for all previous years of this analysis. In 1989, freshmen students at predominantly black colleges agreed strongly or somewhat with the abolition of capital punishment at a rate of 37.0% while their counterparts at predominantly white universities agreed strongly or somewhat at a rate of 24.7% (a thirteen point difference).[56] In 1990, the difference was again one of thirteen points (39.4% at predominantly black colleges and 26.4% at universities).[57] Refer to Appendix A for a

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[54] One interesting event with regards to the death penalty during the period was the execution of former law student Theodore Bundy on January 24, 1988, who was put to death by use of the electric chair at the Florida state prison in Starke. Mark S. Hoffman, ed., The World Almanac and Book of Facts 1990 (New York: Newspaper Enterprise Association, Inc., 1989), p. 41.

[55] Astin, A.W., Green, K.C. & Korn, W.S., The American Freshman: National Norms for Fall 1989 and 1990 (Los Angeles: Higher Education Research Institute, UCLA, 1989, 1990), pp. 57, 56.

[56] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1989 (Los Angeles: Higher Education Research Institute, UCLA, 1989) p. 57.

[57] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1990 (Los Angeles: Higher Education Research Institute, UCLA, 1990), p. 56.

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graphic portrayal of the gap between students at predominantly black colleges and universities.

Gender

The differences in opinion on the part of men and women maintained a gap during 1989 and 1990. In 1989, the gap was one of eight points (20.8% for freshmen men to 28.9% for freshmen women).[58] In 1990, the opinion gap was one of ten points (21.6% for freshmen men and 31.2% for freshmen women).[59] Refer to Appendix A for a graphic depiction of the gap in opinion between men and women.

Selectivity

Selectivity differences remained strong but following the pattern of strengthening support for the maintenance of the death penalty in the U.S. In 1989, schools of low selectivity reported agreement rates of 21.1% in support of maintaining capital punishment, while very highly selective schools reported 35.9%.[60] The picture was pretty much the same for 1990 when the agreement rates were 24.2% to 39.1% for colleges of low and very

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[58] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1989 (Los Angeles: Higher Education Research Institute, UCLA, 1989), pp. 35, 47.

[59] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1990 (Los Angeles: Higher Education Research Institute, UCLA, 1990) pp. 24, 40.

[60] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1989 (Los Angeles: Higher Education Research Institute, UCLA, 1989), p. 67.

high selectivity.[61]

PRINCETON AS AN EXAMPLE

The same survey has been used for over twenty years now by Princeton.[62] The shifts that occurred on with freshmen on Princeton's campus also paralleled those shifts which took place among freshmen on a nationwide basis. Generally, in 1971, Princeton freshmen thought that the death penalty should be abolished. However, with 1978, and continuing throughout 1990, there was increasing support for the maintenance of capital punishment in the United States. For a graphic portrayal of the Princeton experience, refer to Appendix A.

Race

With regards to racial difference, the disparities which existed between blacks and whites nationally also existed at Princeton. For example, in 1971, there was small difference of opinion between blacks and whites. Whites agreed strongly at a rate of 50.5% that the death penalty should be abolished, while blacks agreed strongly at a rate of 51.3%. The percentage for disagree strongly that the death penalty should be abolished was as follows: 6.5% for whites and 11.0% for blacks. However, in 1978, there occurred a tremendous shift towards maintenance of the death penalty like the one which occurred nationally. Whites agreed strongly that the death penalty should be abolished at a rate of 26.7% while blacks

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[61] Astin, A.W., Green, K.C., & Korn, W.S., The American Freshman: National Norms for Fall 1990 (Los Angeles: Higher Education Research Institute, UCLA, 1990), p. 88.

[62] The data used for this individual analysis was provided by the Office of the Registrar at Princeton University. Due to easy access of information, the study is calculated on the basis of the original categories of answers that is offered for the capital punishment statement. Those categories include: disagree strongly, disagree somewhat, agree somewhat, and agree strongly. To get a more accurate depiction of any possible shifts in opinion, the years selected for the analysis included: 1971, 1978, 1979, 1981, 1982, 1983, 1984, 1989, and 1990.

reported a rate of 35.8%. This is in line with the thesis that blacks are always more liberal than whites. For the category of disagree strongly, whites reported a rate of 21.4% while blacks disagreed strongly at a rate of 29.4% (an eight point difference). For 1990, the results are as follows: the category agree strongly received rates of 10.4% for whites to 12.5% for blacks; the category of disagree strongly received rates of 27.3% for whites and 32.1% for blacks.[63] For a graphic portrayal of the differences in opinion between blacks and whites at Princeton, refer to Appendix A.

Gender

With regards to gender, the differences for freshmen men and women was great in 1971. Freshmen men agreed strongly with the abolition of the death penalty at a rate of 46.1% while freshmen women agreed at a rate of 60.9%. The gender breakdown for the category of disagree strongly was 11.0% for men and 5.3% for women. In 1978, there occurred a shift in opinion: 23.2% of men and 35.7% of women agreed strongly in the abolition of the death penalty. The category disagree strongly received 32.4% from freshmen men and 20.8% from freshmen women. The trend towards "conservatism" continued for the year 1990. Freshmen men agreed strongly with the abolition of the death penalty at a rate of 14.3%, and freshmen women agreed strongly at a rate of 17.4%. Freshmen men and women disagreed strongly in the abolition of the death penalty at rates of 36.6% and 24.2%, respectively.[64]

A definite decline in opposition has been shown in various classes of freshmen. What factors lie behind this increase of support concerning the death penalty? Evidence has also

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[63] Office of the Registrar, Princeton University.

[64] Ibid.

shown that there exists a huge gap in opinion between men and women, and blacks and whites overall. What factors lie behind these differences? Are there indeed certain aspects which can be pointed out in men, women, whites, and blacks which explain these differences?

FUTURE PROJECTIONS FOR CAPITAL PUNISHMENT

The key to attempting to predict how people will feel and react to capital punishment in the future is based entirely on deciphering liberalism or conservatism in a group of people. In the interview with Professor Taylor on the possibility of predicting trends of opinion, several subjects were discussed. The analysis done presently is called a trend study. A trend study is one that analyzes different people at different times, but at the same point in the life cycles, such as entering freshmen in college. Trend studies are different longitudinal studies. Longitudinal studies measure the same people across different times in their life cycle (e.g., the same people would be polled at age twenty, thirty, forty, and so on). This is important because this means that this analysis is based on predictions on trends of a life cycle, rather than patterns of the life cycle. For example, if a freshman in 1971 on a collection of issues, expresses liberal attitudes, then research studies show that freshman twenty years later, will most probably retain the liberal attitudes that he/she showed in college. The reasoning behind this is that attitudes related to conservatism and liberalism will have already been set by parental influence, childhood environment and experience. Research also shows that in general liberal or conservative attitudes predict how people will feel on specific issues. Professor Taylor stated: "If data shows other kinds of attitudes on liberalism/conservatism, given the fact that studies show a correlation or association on attitudes at a given time, then if the data shows attitudes remain the same, then you can expect that the attitudes on the death penalty will stay the same." That is, there is a correlation or association between a person's attitude on abortion and the death penalty. If a person shows liberal attitudes, particularly by supporting the legalization of abortion, then research says that the expected attitude on the death penalty for the person is to be

against it. In the like manner, if a person shows conservative attitudes, and expressed opposition to the legalization of abortion, the pattern would suggest the person to be in favor of the death penalty.[65]

What does this mean for predicting attitudes towards capital punishment in the United States within the next five to ten or twenty years? The policy implication of this is that we should expect to see a major shift towards abolishing the death penalty when the baby boomers, who were among the freshmen class of 1971 and are presently begin to enter the political power structure, truly become a force within American politics. With this implication, you must take into account several things. "(1) The effect of crime in society today has not changed people's attitudes much. This is a very important issue because it means that even though crime has risen tremendously in the last decade or so, its effect has not been substantial enough to change the minds of the baby boomers significantly, with regards to the death penalty. (2) Studies have shown that young people are much more affected by their environment than older people are. This means that with age, a person's attitudes become more solidified. Because of the events that took place during the late 60s and early 70s, there was a huge impression on the baby boomers. As they got older, they became and continue to become more set in their attitudes on various subjects."[66] This implies that whatever opinions they had in college have become more solidified as they have matured and also have as they are about to enter the political strata. Thus, as the power structure changes, the "liberal" attitudes they had about the death penalty in the early 70s will most definitely have a tremendous effect on the way the capital punishment statues are handled within the various state legislatures.

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[65] Interview Notes of Professor Howard Taylor, Department of Sociology, Princeton University, November 8, 1991.

[66] Ibid.

Current Opinion vs. Future Shifts

National Gallup Poll data shows that the nation is in favor of the death penalty by a margin of 70% to 22%.[67] Why is this so significantly different from the opinion of the baby boomers, assuming that their opinion has not changed much over the past twenty years? The Gallup Poll statistic is an accumulation of all people in the United States. The reason it contrasts with the baby boomer opinion on the death penalty is that, according to Professor Taylor, the majority of the interviewees in that poll have not been to college. Remembering that opinion on the death penalty is directly proportional to a person's education, this would implicate that those interviewed for the Gallup poll should be more "conservative" or in favor of capital punishment. The numbers show exactly this. Of the 1,569 interviewees in the Gallup Poll, controlling for education, 31 were college graduates, 386 had some college experience, 501 were high school graduates, and 363 had not graduated from college. The in favor of/opposition to the death penalty percentages went as following: of the 31 college graduates interviewed, 67% favored the death penalty while 26% opposed it; of the 386 people who had gone to college but did not graduates, 73% favored death while 20% opposed it; of the 501 people who had only high school diplomas, 75% favored death while 19% opposed; finally, of the 363 who had not graduated from high school, 63% favored death while 23% opposed it.[68] What does this mean? This means that while the tide is strong in favor of the death penalty, when the baby boomers truly take power in the next five to ten years, there should be a major shift towards abolishing the death penalty in many states.

What effect does the five to ten point difference of opinion between blacks and whites, and males and females have upon this thesis? Since it has been proven that blacks are more liberal than whites, and women tend to be more liberal than men, there should be a sharp

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[67] George Gallup, Jr., ed. at., "The Death Penalty." (New York: The Gallup Poll News Service, Jan-Feb. 1986).

[68] Ibid.

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shift towards opposition of capital punishment in the next decade, especially with the increasing number of minorities and females in the various state legislatures. The heightened liberalism of these groups should give strength to the already present liberalism of the upcoming policy makers in the U.S.

Using the same criteria, how will capital punishment fare when the freshmen from today's classes become policy makers twenty to twenty-five years from now? The environment that these students were affected by was that of the Reagan era and the tide of conservatism in the 1980s that he brought with him when he took office. Studies show that there indeed exists a conservative trend of the country which began with the Reagan era. Taking into account that environment affects young people to a much greater effect than older people, then it would only be natural to see how students have become conservative with regards to issues like the death penalty, especially with the tremendous effect crime has had on the society in the last ten years.

Predictions

So, according to this data, we should expect to see a shift towards the abolition of the death penalty when the baby boomers take office, and a reversal back towards maintenance of the death penalty by the baby boomers' children. This would be true for the freshmen of today despite the conclusion that parents' education has a lot of influence on the formulation of children's political attitudes. The reason that America's younger generation is more conservative today, and that there was a major drop in opposition to the death penalty, is that the conservative societal changes have had a much greater influence on the children than on their parents. Thus, we should expect young people in college, beginning with the "wave" of ultra-conservatism in the late 70s and early 80s, to move towards reestablishing any death penalty statues their parents destroy, since their political attitudes of conservatism, will not change much and will in fact become more solidified when they enter the political spectrum of the United States.

A FINAL NOTE

What do students think about the death penalty? The data available shows that students are presently highly in support of using capital punishment as a means of punishment for convicted murderers. What factors shape their opinion? Is it the environment that they are placed in at college, or is it mainly due to parental influence and basic childhood development? Using major research methods, the analysis has concluded that political orientation in children is most definitely affected by parents, parental education, socio-economic status, education of the child himself/herself, and the surrounding environment. These factors shape one's liberalism or conservatism, thus acting as indicators of how the person will feel about highly political issues such as the death penalty. Thus, is it possible to predict, by gauging student opinion both now and in the past, if capital punishment will continue to be a mainstay in the U.S. criminal justice system? Yes, it is very possible to make predictions about the future of the death penalty in the U.S. using opinion obtained of freshmen students in college. Within the next five to ten years, there should be a major shift towards abolishing the death penalty; twenty to twenty-five years from now, there should be a major shift towards restoring any harm the baby boomers do to the capital punishment system established in the U.S. today.

BIBLIOGRAPHY

Academic American Encyclopedia, Volume 19. Danbury, Connecticut: Grolier Incorporated, 1987.

Astin, A.W.; Green, K.C.; and Korn, W.S. The American Freshman: National Norms for Fall 1971. Los Angeles: Higher Education Research Institute, UCLA, 1971.

Astin, A.W.; Green, K.C.; and Korn, W.S. The American Freshman: National Norms for Fall 1978. Los Angeles: Higher Education Research Institute, UCLA, 1978.

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Astin, A.W.; Green, K.C.; and Korn, W.S. The American Freshman: National Norms for Fall 1982. Los Angeles: Higher Education Research Institute, UCLA, 1982.

Astin, A.W.; Green, K.C.; and Korn, W.S. The American Freshman: National Norms for Fall 1983. Los Angeles: Higher Education Research Institute, UCLA, 1983.

Astin, A.W.; Green, K.C.; and Korn, W.S. The American Freshman: National Norms for Fall 1989. Los Angeles: Higher Education Research Institute, UCLA, 1989.

Astin, A.W.; Green, K.C.; and Korn, W.S. The American Freshman: National Norms for Fall 1990. Los Angeles: Higher Education Research Institute, UCLA, 1990.

Astin, Alexander. The American Freshman: Twenty Year Trends. Los Angeles: Higher Education Research Institute, UCLA, 1986.

Bayer, Alan E. The Black College Freshman: Characteristics and Recent Trends. Washington D.C: American Council on Education, 1971.

Dey, Eric L; Alexander W. Astin; and William S. Korn. The American Freshman: Twenty-Five Year Trends. Los Angeles: Higher Education Research Institute, UCLA, September 1991.

Freeman-Grenville, G.S.P. Chronology of World History. London: Rex Collings Limited, 1975.

Gallup, Alec and Frank Newport, Eds. "Death Penalty Support Remains Strong, But Most Feel Unfairly Applied. New York: The Gallup Poll News Service, June 1991.

Gallup, George, Jr., Ed. at. "The Death Penalty." New York: The Gallup Poll News Service, Jan.-Feb. 1986.

Hoffman, Mark S., Ed. The World Almanac and Book of Facts 1990. New York: Newspaper Enterprise Association, Inc., 1989.

Hoffman, Mark S., Ed. The World Almanac and Book of Facts 1991. New York: Newspaper Enterprise Association, Inc., 1990.

Lane, Hana Umlauf, Ed. The World Almanac and Book of Facts 1983. New York: Newspaper Enterprise Association, Inc., 1981.

Long, Luman H., Ed. The World Almanac and Book of Facts 1972. New York: Newspaper

Enterprise Association, Inc., 1971.

McEvedy, Colin. The Century World History Factfinder. London: Century Publishing Co., Ltd., 1984.

Princeton Survey Data, Office of the Registrar, Princeton University.

Interviews

Anthony B. Broh, Ph.D. Registrar, Princeton University.

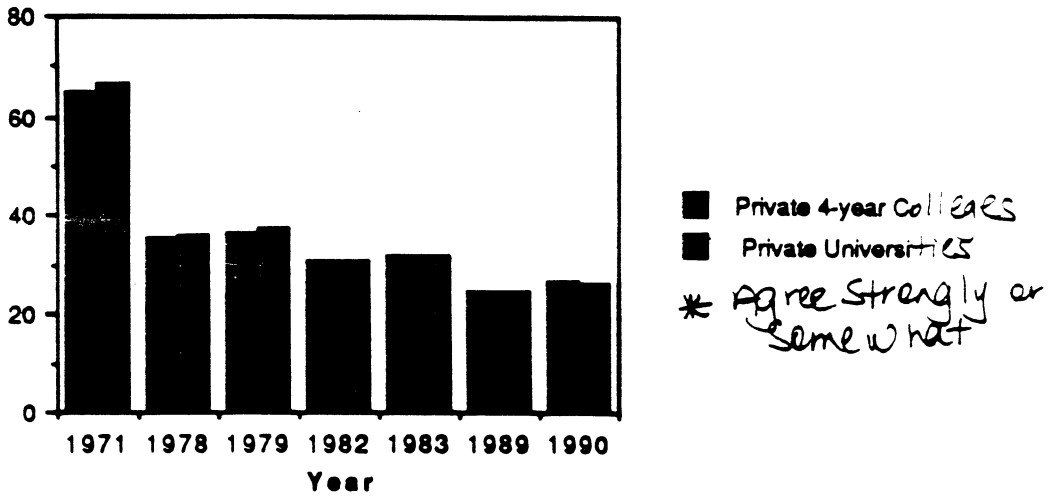
Eric L. Dey, Ph.D. Associate Director of Cooperative Institutional Research Program, University of California, Los Angeles.

Professor Thomas J. Espenshade, Office of Population Research, Princeton University.

Professor Howard Taylor, Department of Sociology, Princeton University.

Appendix A

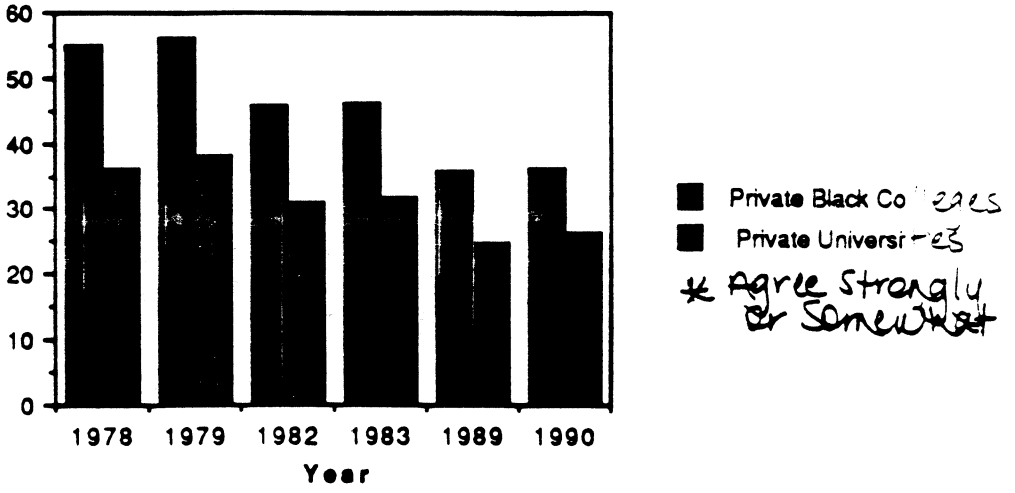
Freshman at private 4-year Colleges vs. Universities*



Source: The American Freshman: National Norms for Fall ... perfomed annually by the Cooperative Institutional Research Program at the University of California at Los Angeles.

The sample of respondents for the survey included some 250,000 "representative," full-time, freshmen students from about 600 two- and four-year colleges and universities across the United States.

Freshman at private Black Colleges vs. Universities*



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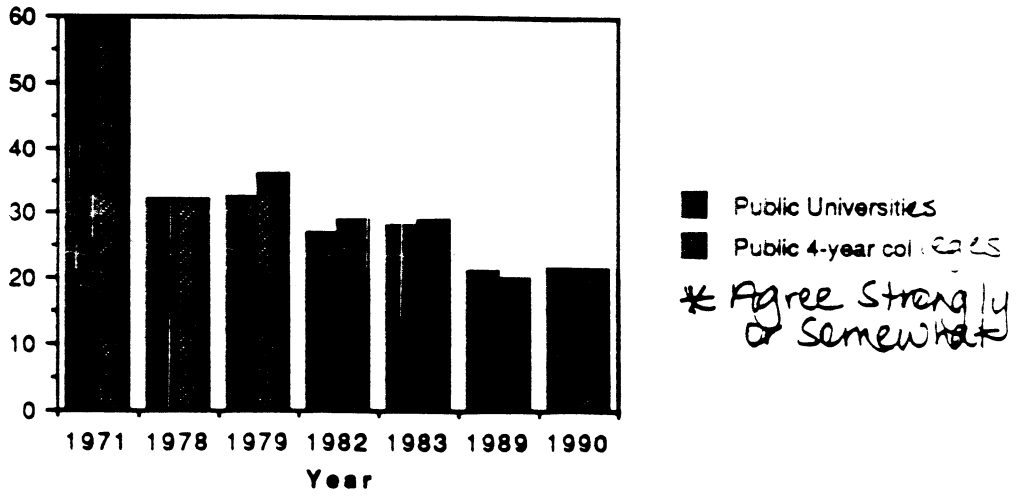
Freshman at public 4-year Colleges vs. Universities*



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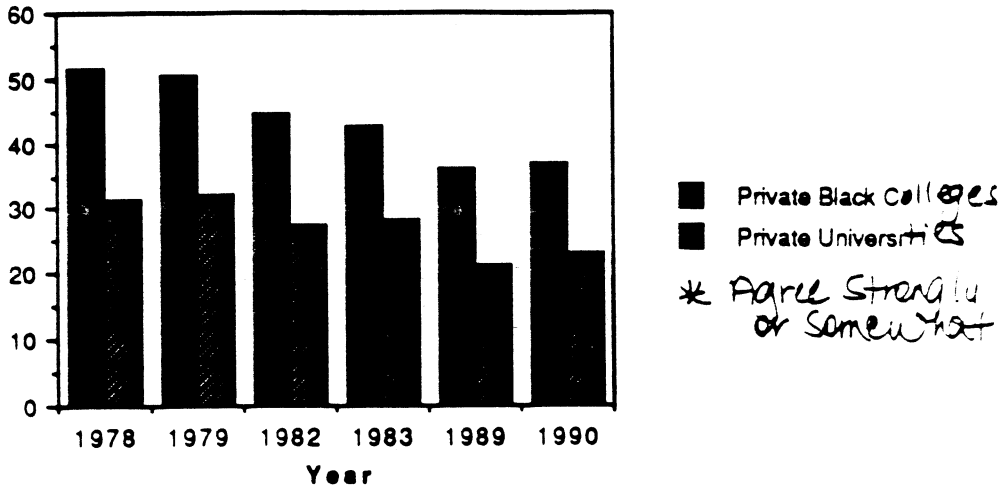
Men at private Black Colleges vs. Universities*



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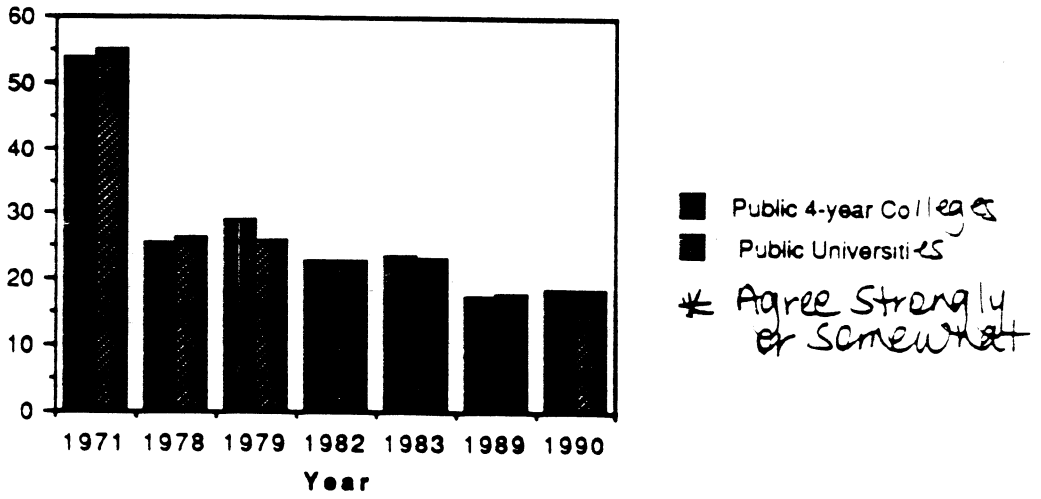

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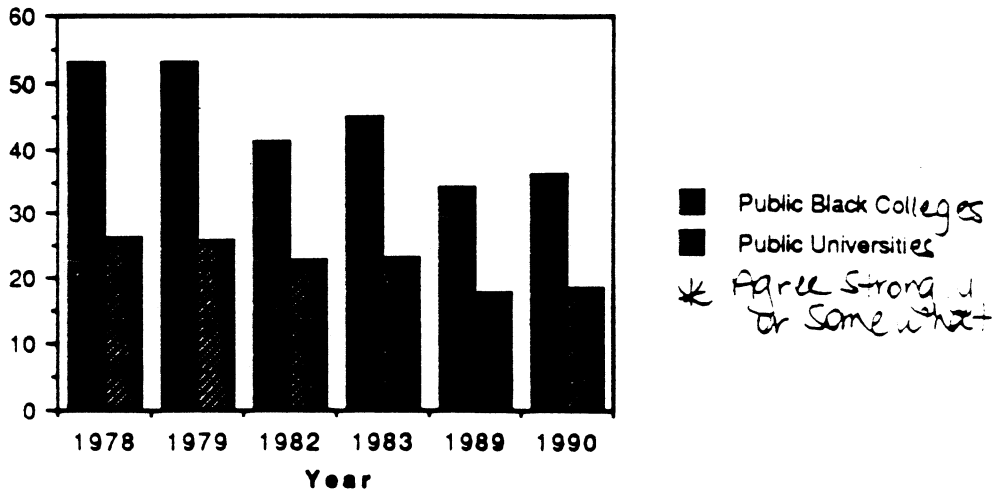

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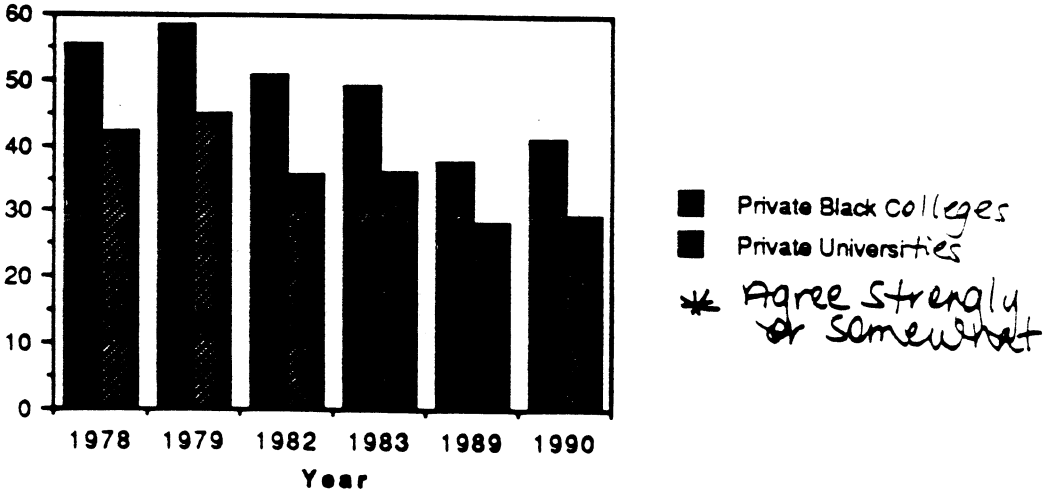
Women at private Black Colleges vs. Universities*



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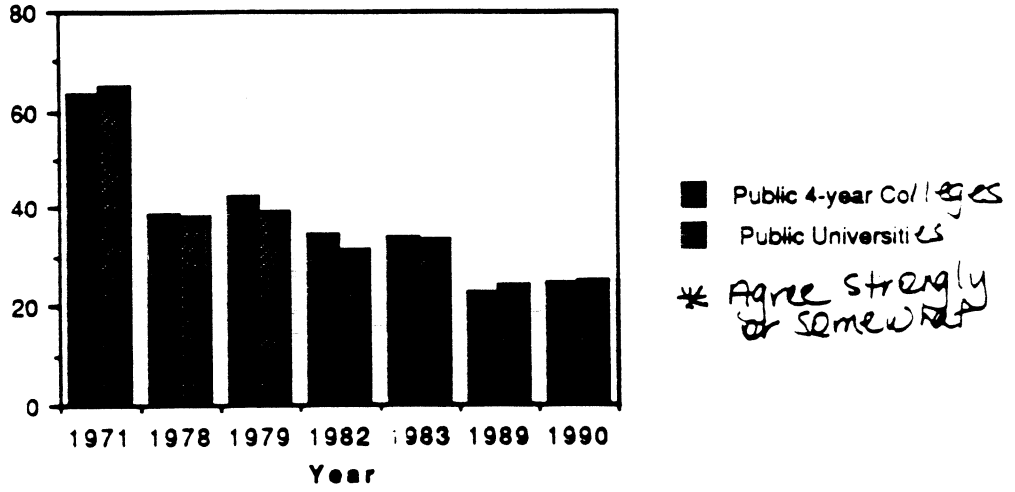

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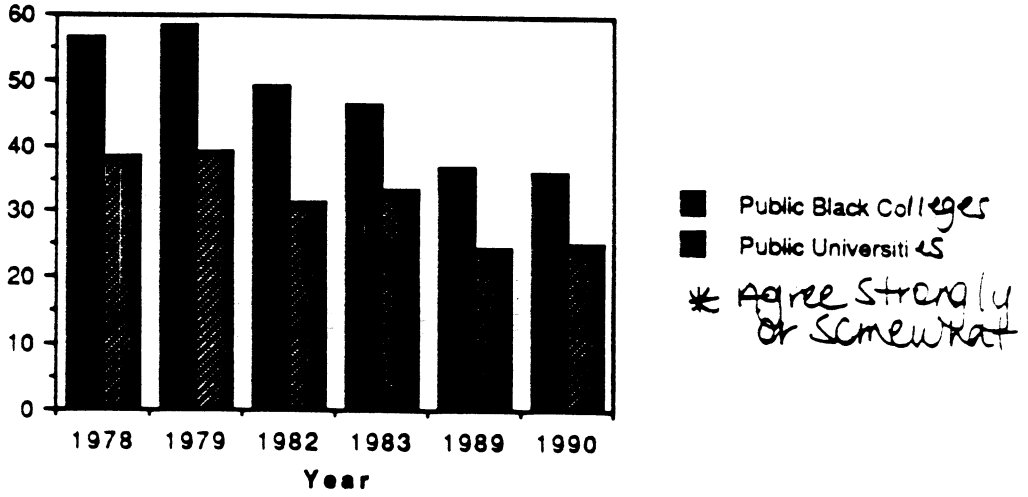

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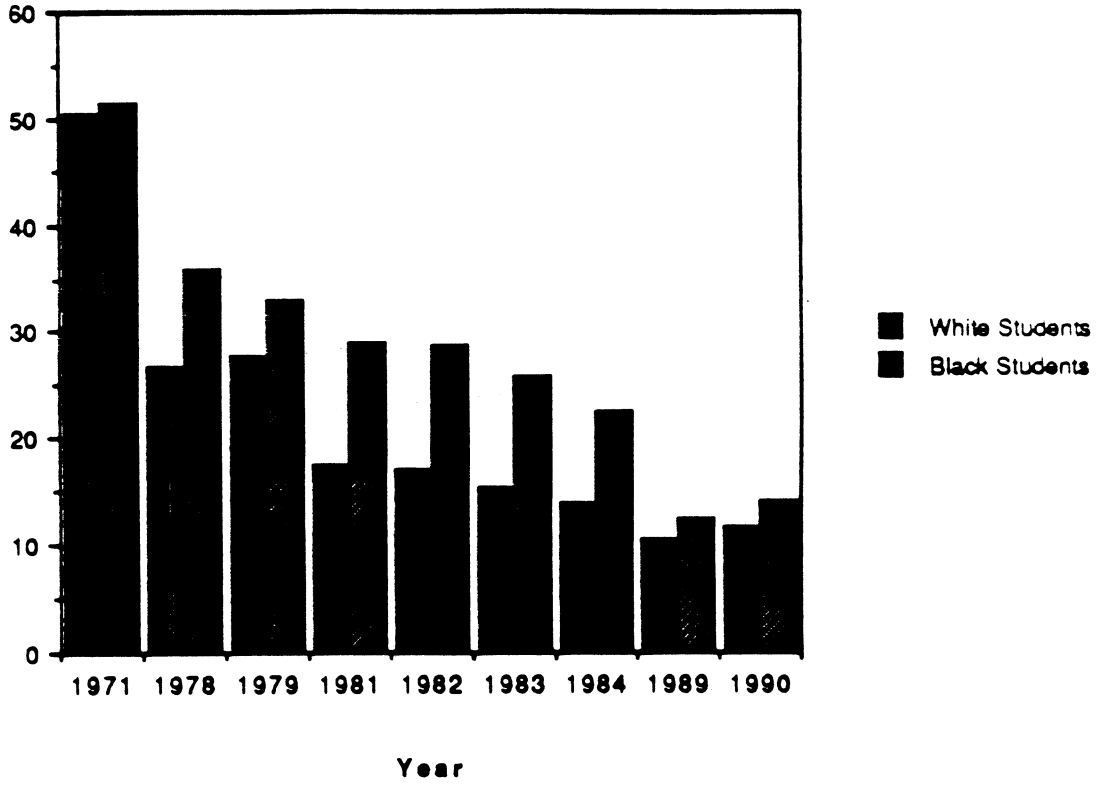
Princeton Freshmen who Agreed Strongly with the Abolition of the Death Penalty*



Source: Princeton Annual Freshmen Survey performed by the Office of the Registrar, Princeton University.

The number of respondents for the freshmen survey is as follows:
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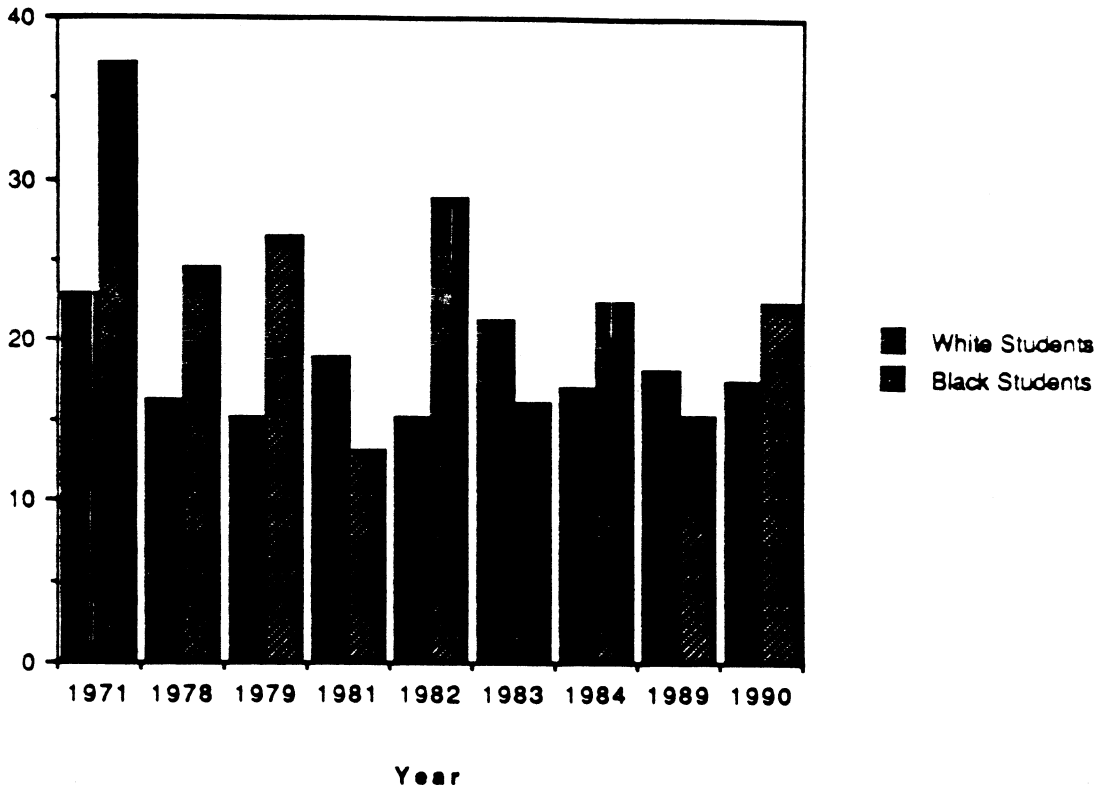
919 students for the freshmen class of 1982
991 students for the freshmen class of 1983
994 students for the freshmen class of 1984
1039 students for the freshmen class of '989
1083 students for the freshmen class of 1990

Princeton Freshmen who Agreed Somewhat with the Abolition of the Death Penalty*



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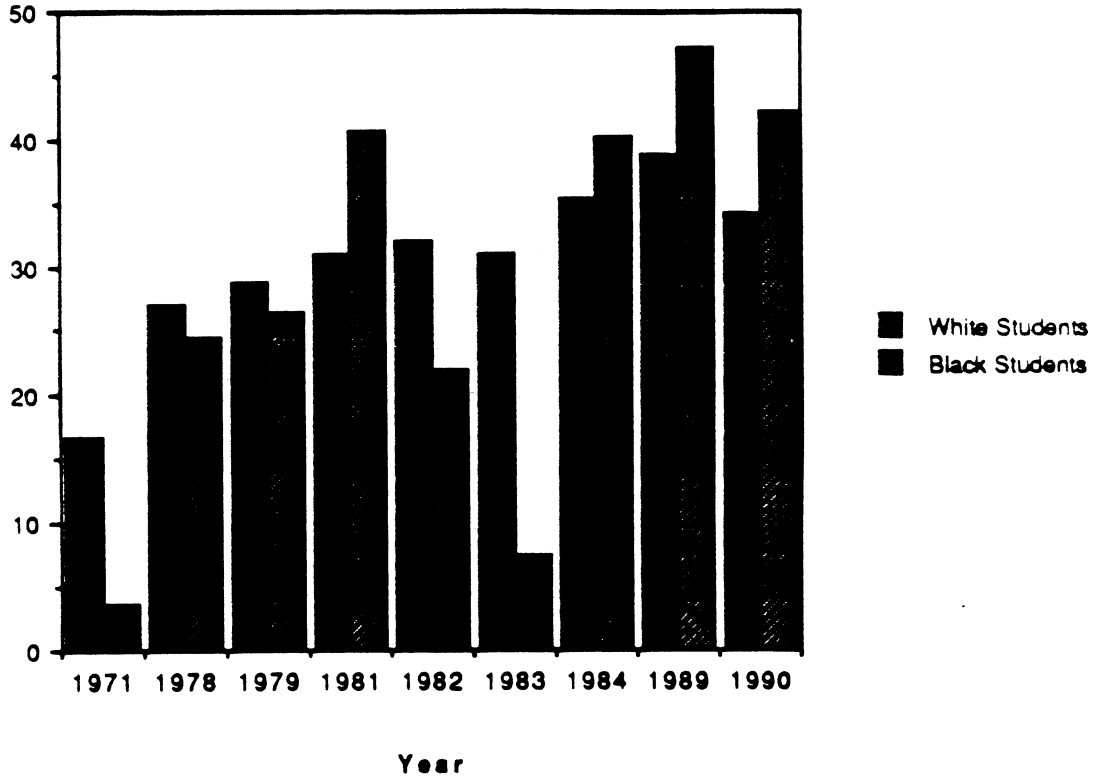
Princeton Freshmen who Disagreed Somewhat with the Abolition of the Death Penalty*



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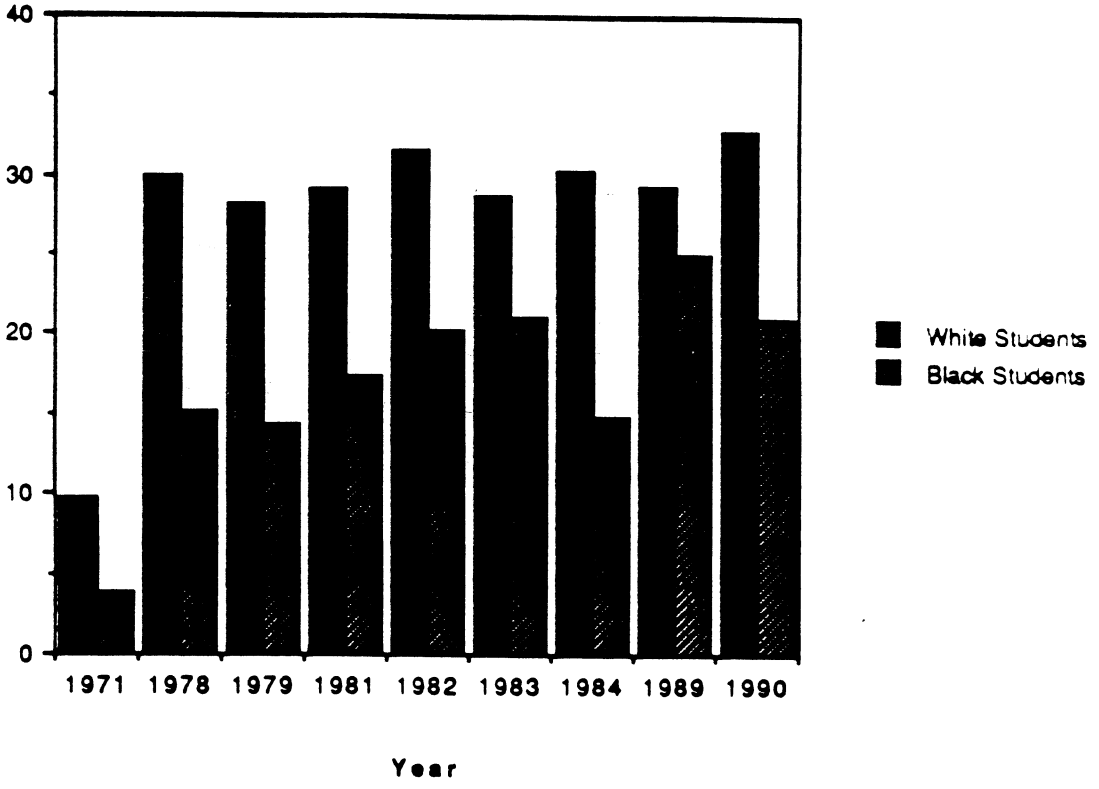
Princeton Freshmen who Disagree Strongly with the Abolition of the Death Penalty*



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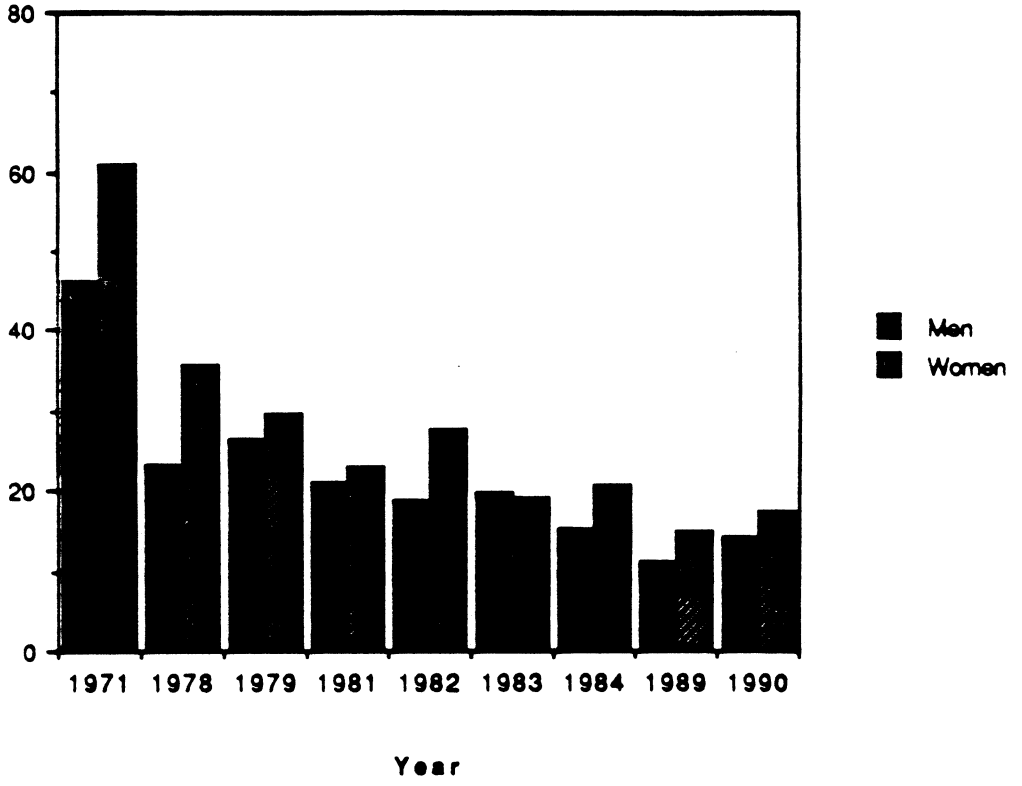
Princeton Men vs. Women who Agreed Strongly with the Abolition of the Death Penalty*



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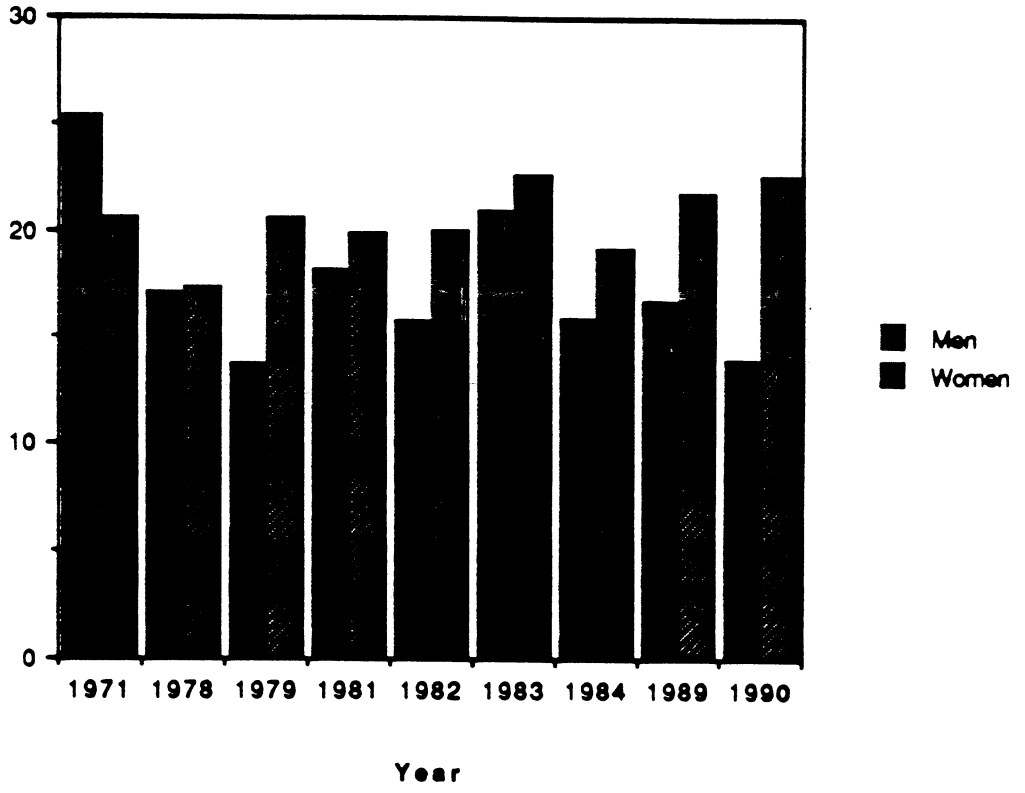

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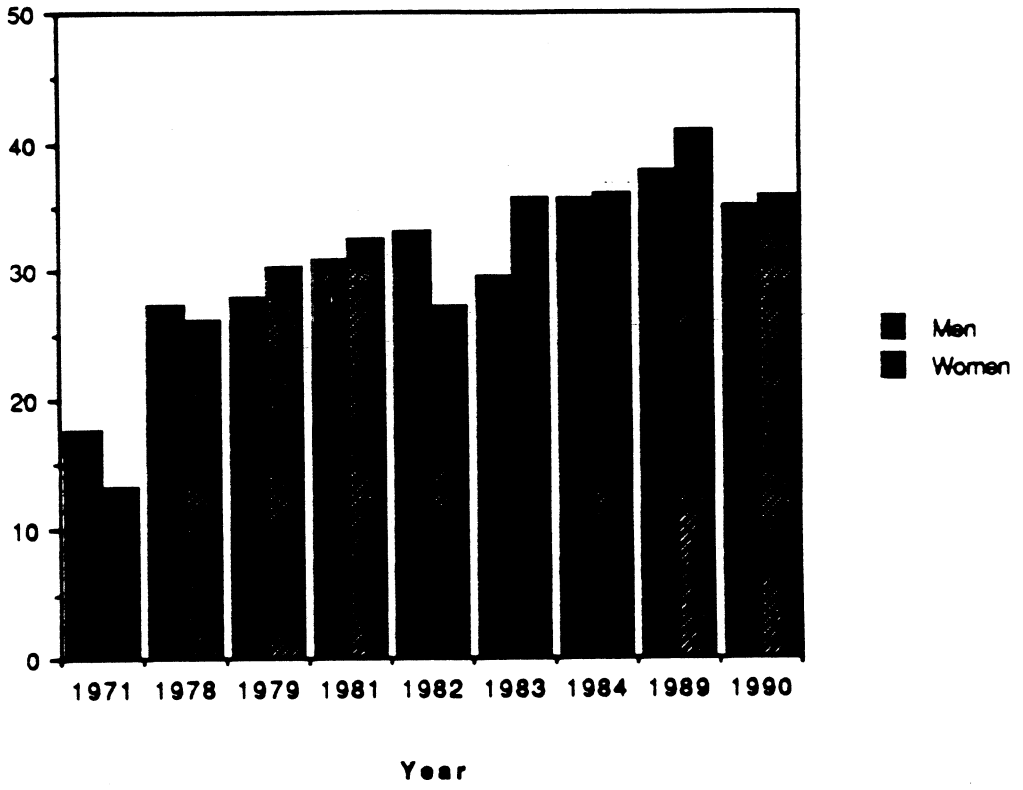

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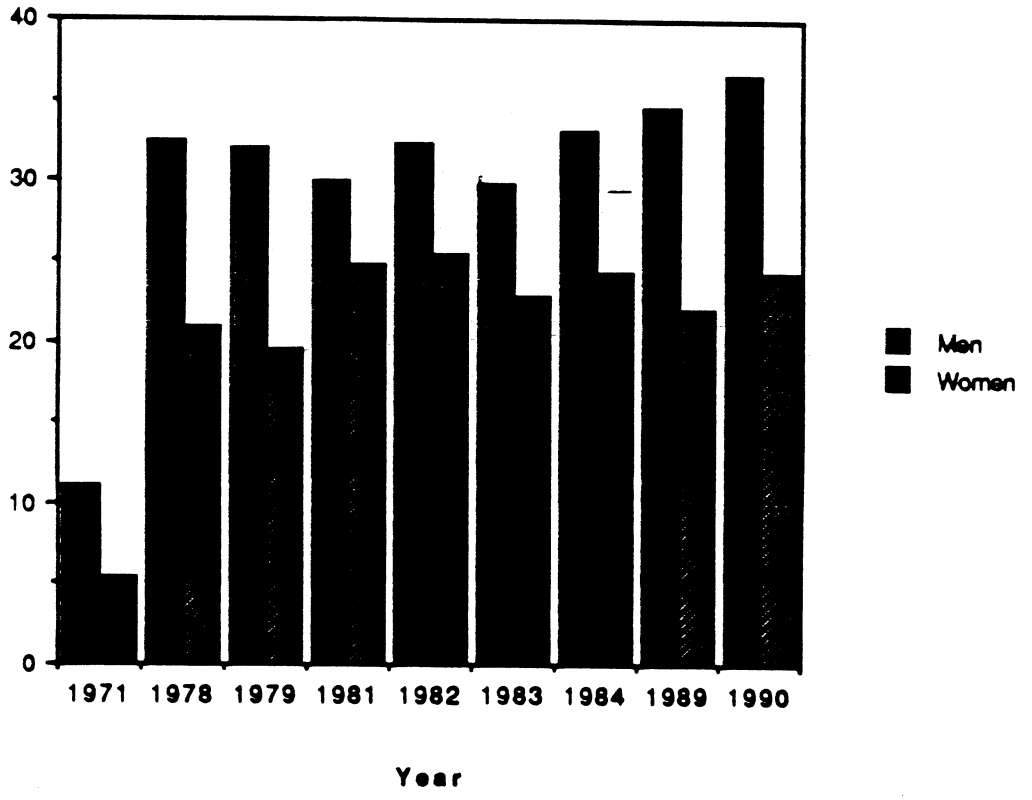

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A DECADE OF CAPITAL PUNISHMENT IN NEW JERSEY: The New Jersey Supreme Court Struggles to Define Death Penalty Jurisprudence by Adelle K. Bruni

I. THE CAPITAL PUNISHMENT CONTROVERSY: A BRIEF HISTORY

In 1982, the New Jersey Legislature amended the 1978 Criminal Code's homicide statute, N.J.S.A. 2C: 11-3, reinstituting capital punishment for defendants convicted of a murder caused by their "own conduct" or the actions of another to whom they had given or promised some payment. In 1988, the New Jersey Supreme Court added one more condition to this statute when they ruled in *State v. Gerald* [1] that only a defendant who intended the death of his victim, as opposed to one who had intended only serious bodily harm resulting in death, could be subject to the death penalty. Post-*Gerald* reversals caused frustration and controversy within the legislative and executive branches of the government; the claim is that the New Jersey Supreme Court is legislating from the bench.[2] State prosecutors, law enforcement officials, and legislators assert that the New Jersey Supreme Court has consciously attempted to make policy on capital punishment by inconsistently applying the *Gerald* standards to reverse capital sentences. The failure of their argument, however, results from a misunderstanding of what the court was really trying to accomplish and why that goal seems to contradict the legislature's intent.

In *State v. Ramseur* [3] and *State v. Gerald*,[4] the N.J. Court used a recently established doctrine of independent state constitutional interpretation[5] to develop a state death penalty jurisprudence separate from the U.S. Supreme Court's federal constitutional jurisprudence. The N.J. Supreme Court relied on the New Jersey State Constitution to expand individual rights and form its own state jurisprudence in other areas such as the right to privacy and search and seizure laws. However, there are unique and extremely difficult problems endemic to the development of

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1 State v. Gerald, 113 N.J. 40 (1988).

2 This argument is supported by many state prosecutors, law enforcement officials, legislators, and no doubt a host of others. A brief lecture by Dept. Att. Gen. Boris Mozcula revealed that the general sentiment within the State Attorney General's office is that the N.J. Court has inconsistently applied the Gerald standards in an attempt to eliminate the imposition of any capital sentences in New Jersey. See also: Kathleen Bird, "Florio Faults Supreme Court on Death Penalty: Governor Challenges Justices to Enforce the Law or Strike it Down," New Jersey Law Journal (Thurs. Dec. 20, 1990) and Tracy Schroth, "Gerald Nearly Fatal to Death Appeals," New Jersey Law Journal (Thurs. July 5, 1990).

3 State v. Ramseur, 106 N.J. 123 (1987).

4 State v. Gerald, 113 N.J. 40 (1988).

5 The use of this doctrine by state courts became prevalent when Justice Burger replaced Justice Brennan as the Chief Justice of the U.S. Supreme Court and has evolved significantly over the past twenty years. See the discussion under the section titled "New Federalism"; also see William J. Brennan, "State Constitutions and the Protection of Individual Rights," Harvard Law Review, vol. 90 (1977), pp. 489-504.

a death penalty jurisprudence. The death penalty is the most complex constitutional issue because the court must assure that laws which govern state action do not function arbitrarily or unfairly when taking away the life of an individual, leaving no room for error. Rather than choosing to legislate the death penalty out of any practical existence, the New Jersey Supreme Court adopted a very different, though equally controversial, substantive approach to capital appeals which virtually usurped the function of a jury. The nature of substantive review relies both on subjective decision-making and personal judgements. Consequently, factions among the Justices of the New Jersey Supreme Court emerged causing post-*Gerald* rulings to appear inconsistent, resulting in the misinterpretation that the court's desire is to legislate from the bench.

II. "NEW FEDERALISM"[6] AND THE DOCTRINE OF INDEPENDENT STATE CONSTITUTIONAL INTERPRETATION

The years during which the U.S. Supreme Court was headed by Chief Justice Burger marked the beginning of a new era. Burger's Court, characterized by a "conservative retreat" of federal constitutional interpretation, clearly reacted to the liberally activist approach to the Federal Constitution advocated under Chief Justice Warren. The more limited role in the protection of individual rights adopted by the Burger Supreme Court encouraged the development of what commentators described as a "new federalism" or "excessive bicentennial spirit."[7] This new federalist model recognizes the structural role of state constitutions as "double security" for citizens' rights.[8] The basic tenet of this model is that "for state constitutional law to assume a realistic role, state courts must acknowledge the dominance of federal law and focus directly on the gap-filling potential of state constitutions."[9] This "interstitial/supplementary role" of state constitutional law in the protection of individual rights is shaped by a balance that respects the importance of both state autonomy and federal supremacy.[10] The architectural metaphor for this

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6 "The New Federalism: Toward a Principled Interpretation of the State Constitution," Stanford Law Review, vol. 29, #2 (1977), pp. 297-321. The new federalism refers to the growth of state constitutional interpretation in recent years which has limited the power of federal constitutional law.

7 Ibid., pp. 297-298.

8 *Federalist no. 51* as cited in"Project Report: Toward an Activist Role for State Bills of Rights," Harvard Civil Rights and Civil Liberties Law Review, vol. 8, #2 (1973), pp. 284-287. Another important point made is the 14th Amendment's contemporary role as the first line of defense against state action which has made the state Bills of Rights expendable. State courts will establish identical bodies of federal and state law if they use a conservative approach to independent state constitutional interpretation which mimics federal interpretations. In effect, this will make their state Bills worthless. State courts can perform a service only if they expand state constitutional provisions to afford greater protections of individual liberty than federal law establishes.

9 "Developments in the Law - The Interpretation of State Constitutional Rights," Harvard Law Review, vol. 95, #6 (1982), p. 1357.

10 For three detailed discussions and evaluations of the role of state constitutional law, see Stewart G. Pollack, "State Constitutions as Separate Sources of Fundamental Rights," Rutgers Law Review, vol. 35, #4 (1983),

balance claims that federal law establishes both a "floor" and "ceiling" of individual rights between which state courts are free to develop their own state constitutional rights.[11]

In an article considered a milestone in the development of constitutional jurisprudence, U.S. Supreme Court Justice William Brennan defined the doctrine of independent state constitutional interpretation as a means for state courts to establish greater protections for individual rights within their own state constitutions:

> state courts cannot rest when they have afforded their citizens the full protection of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law - for without it, the full realization of our liberties cannot be guaranteed.[12]

Employing state constitutions to provide more expansive protection of individual rights necessitates the development of a body of state constitutional law and a state constitutional jurisprudence. State court decisions demonstrating independent and adequate state grounds to support their divergence from federal law are exempt from U.S. Supreme Court review.[13] This doctrine of independent state constitutional interpretation therefore enables state courts to fulfill the dream shared by Justices Brandeis, Harlan, Brennan, and Powell of a structural federalism model. According to this paradigm, a state court can "serve as laboratory; and try novel social and economic experiments" that may offer more expeditious or fairer alternatives to federal law.[14]

State courts generally attempt to follow one of two approaches to constitutional interpretation: the federally-oriented/reactive approach or the self-reliant/primacy approach.[15] At

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pp. 707-722; William J. Brennan, "State Constitutions and the Protection of Individual Rights," Harvard Law Review, vol. 90 (1977), pp. 489-504; and "Developments," pp. 1326-1344.

11 The "floor" is established by federal law and the federal Bill of Rights. States may never undermine or impinge upon these rights. The "ceiling" is a constraint upon how much the states can supplement and expand upon those federally established rights; in other words, states may not expand a state right at the expense of or infringement upon a federal right. Thus, demonstrating and supporting the interaction and reaction between the principles of state autonomy and federal supremacy. See "Developments," pp.1331-1336.

12 Brennan, "State Constitutions," p. 491. The federal Court's decision of California v. Ramos, which claimed capital punishment is a matter of particular state interest, also addressed the legitimate role of state constitutional interpretation.

13 Ibid., p. 501. Brennan writes of the U.S. Supreme Court, "We are utterly without jurisdiction to review state decisions" resting in whole or in part on state law. Brennan specifically cites the famous Mt. Laurel decision in New Jersey which invalidated a town's zoning ordinance. The U.S. Supreme Court declined to review the case, South Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151 (1975), because it was based on the New Jersey Constitution and state law.

14 "Project Report," pp. 292-293.

15 Most courts and scholars now disregard the self-reliant/primacy approach as "unrealistic" because it does not give any weight to federal law and works against the acknowledged goal of uniformity between federal and state law. State Constitutions are consulted first in the primacy approach. Those advocating this approach feel state constitutions should be elaborated on their own terms without any reliance upon federal doctrines. See Michael

the heart of these two approaches lies core philosophical differences over how to weigh the independence of state constitutions against the necessary deference to the Federal Constitution.

Most state courts claim initially to follow the federally-oriented, reactive approach in which they first consider any relevant federal constitutional law. The courts then use independent state constitutional interpretation to determine if state constitutional law will agree with or diverge from the federal standard. This approach acknowledges that "a considerable measure of cooperation must exist in a truly effective federalist system . . . to ensure order and freedom under what is publicly perceived as a single system of law."[16] State courts demonstrate their respect toward developments in federal law by identifying and explaining the criteria which determine when they will diverge from it and rely upon their own state constitutions.[17] This "collaborative interaction," which asks that "each judiciary must be responsive to the constitutional doctrine forged by the other and must seek to shape its own decisions in ways that respect the developments on the other side," has become the very foundation of the "new federalism."[18]

The doctrine of independent state constitutional interpretation has both influenced and been influenced by the emergence of a new federalism. The relationship between state and federal law requires collaborative judicial interaction to afford citizens the full complement of rights guaranteed by both levels of government. The function of state courts in this new federalist system permits them a great deal more latitude when developing their own state constitutional jurisprudence. State courts assume the burden of justifying their independent decisions to state governments and citizens who perceive the U.S. Supreme Court's interpretations as the only constitutional law. State courts need more time to fully develop and explore the objectives of their state constitutional jurisprudence so that they may clearly establish their positions:

> If the current trend continues and issues of constitutional dimension are remitted to the states, it will become increasingly important to develop rules and criteria to predict when, independent of federal decisions, a state court will construe its own constitution.[19]

Weinstein, "Exploring the Mystique of State Constitutional Analysis," Criminal Justice Quarterly, vol. 8, #4 (Division of Criminal Justice: Trenton, N.J., 1985), pp. 158-159. See also "Developments," pp. 1357-1369, 1493-1498; and Pollack, pp. 717-719. Pollack adds a third approach in which a state consults both constitutions in a decision; however, he dismisses this approach because the state law that results usually serves only to mimic the federal law, p. 718.

16 Henry M. Hart, Jr., "The Relations Between State and Federal Law," Columbia Law Review, vol. 54, #4 (1954), p. 489.

17 See example under the heading "The Evolution of a Framework for Independent State Constitutional Interpretation in New Jersey" of the privacy case (Right to Choose v. Byrne). N.J. Court relied specifically on the State Constitution when diverging from the U.S. Supreme Court's decision in Harris v. McRae; see also footnotes 15 & 16.

18 "Developments," p. 1367.

19 Pollack, p. 720.

As the role of the state courts is new to the last two decades, state legislators should be patient with the state courts as they "step into the breach"[20] left by the U.S. Supreme Court in the protection of individual rights.

III. THE EVOLUTION OF A FRAMEWORK FOR INDEPENDENT STATE CONSTITUTIONAL INTERPRETATION IN NEW JERSEY

The New Jersey Supreme Court uses a variety of approaches to the supplemental or interstitial model of state constitutional interpretation. Through the expansion of citizens' rights protection in areas such as privacy, free speech,[21] and search and seizure,[22] the court established three guiding principles for deciding when and why to rely on the state constitution rather than the Federal Constitution: (1) uniformity between state and federal law, (2) consideration of important federal precedents, and (3) adequate and independent state constitutional grounds.[23]

The New Jersey Supreme Court's use of independent state constitutional interpretation to limit governmental infringement upon the right to privacy typifies the restrictive nature of its state constitutional jurisprudence. In *Right to Choose v. Byrne*,[24] the New Jersey Supreme Court held that a state statute barring Medicaid abortion funding, unless the mother's life is in danger, violated the state constitution's equal protection clause. This case established a greater protection of New Jersey citizens' privacy than that established by the federal government, when the U.S. Supreme

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20 Brennan, "State Constitutions," pp. 502-503.

21 In State v. Schmid, 84 N.J. 553 (1980), the New Jersey Supreme Court relied on a textual and legislative analysis similar to that used in Right to Choose v. Byrne, 91 N.J. 287 (1982), to support a broad state constitutional interpretation. In this case, it was unclear whether or not the asserted rights existed under the Federal Constitution. The court determined that the free speech clause of the state constitution did not require state action, unlike the federal constitution, and could restrict the actions of private, nongovernmental bodies if they infringed upon this fundamental right. As in Right to Choose, the court relied on independent state grounds to supplement its more expansive reading of a state constitutional clause that used more sweeping language than the similar federal provision.

22 The search and seizure cases establish an important precedent in the development of the New Jersey Court's approach to independent state constitutional interpretation. This case illustrates the willingness of the court to afford citizens greater constitutional protection in areas where virtually no textual difference between the two constitutions exists to encourage a broader state interpretation. The wording used in Article 1, para. 7 of the New Jersey State Constitution to restrict police conduct in search and seizure procedures is nearly identical to its federal analog, the Fourth Amendment. However, in State v. Johnson, 68 N.J. 349 (1975), and State v. Alston, 88 N.J. 211 (1981), the court held that identical language does not deny that "we [the court] have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning." Since these cases were decided during the first stage of the development of state constitutional interpretation, before Right to Choose or Schmid, the court claimed its decision stemmed from its authority to make rules of practice and procedure in the criminal justice system and did not clearly articulate any state criteria for divergence. The important precedental value of these cases is twofold: first, they demonstrate that the New Jersey Supreme Court was not hesitant to expansively use its state constitutional interpretive power when still in its infancy. Secondly, they suggest that the eventual development of a principled framework for state constitutional interpretation would only enhance the court's power.

23 Weinstein, pp. 169-176.

24 Right to Choose v. Byrne, 91 N.J. 287 (1982) as analyzed in Weinstein, pp. 160-162.

Court upheld under the Fifth Amendment the constitutionality of the Hyde Amendment, an analogous federal statute, in *Harris v. McRae* .[25]

The New Jersey Supreme Court based its more expansive reading of the state constitution's equal protection clause on the broader language in Article 1, paragraph 1 of the New Jersey Constitution than in the Fifth Amendment of the Federal Constitution. The court supported its decision by examining the legislative history of Article 1 which revealed its previous expansion to protect the right of privacy. The N.J. Court strengthened its constitutional holding by citing both dissenting opinions in federal cases concerning the right to privacy which had restricted federal constitutional guarantees and older federal cases which used a more expansive interpretation of the constitutional right to privacy.

The N.J. Court rendered its landmark decision of *State v. Hunt* [26] on the same day as *Right to Choose v. Byrne*.[27] If reviewed together, these two cases present a comprehensive framework for New Jersey constitutional interpretation.[28] These cases suggested three guiding principles for independent state constitutional analysis. First, the court acknowledged that the desire for uniformity of state and federal law would be given serious consideration before interpreting the state constitution. Secondly, the court assured that the decisions of the U.S. Supreme Court would be accorded considerable weight, encouraging only a very cautious path towards divergence. Finally, to offset the first two principles, the court would require that its decisions identify verifiable differences between the state and federal constitutional provisions to warrant a divergent interpretation.

Justice Handler's concurring opinion in *State v. Hunt* identified seven criteria that would assure a reasonable and rational basis for divergence between the federal constitutional standard and state constitutional standards:

(1) Textual language
(2) Legislative history
(3) Preexisting state law
(4) Structural differences
(5) Matters of particular state interest or local concern
(6) State traditions
(7) Distinctive public attitudes within the state.[29]

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25 Harris v. McRae, 448 U.S. 297 (1980). The version of the Hyde Amendment at issue in Harris v. McRae provided that: "federal funds are unavailable for abortions except where the life of the mother would be endangered if the fetus were carried to term."

26 State v. Hunt, 91 N.J. 338 (1982).

27 Right to Choose v. Byrne, 91 N.J. 287 (1982).

28 Ibid., pp. 169-176.

29 Justice Handler, concurring, in State v. Hunt, 91 N.J. 338 (1982).

Handler advised the court of the importance in using the aforementioned three guidelines established by *Hunt* and *Right to Choose* to assure the development of a principled and legitimate body of state constitutional law:

> There is a danger, however, in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere. The erosion or dilution of constitutional doctrine may be the eventual result of such an expedient approach.[30]

Subsequently, the New Jersey Court unanimously adopted Handler's criteria in its opinion of *State v. Williams*.[31]

These first three areas given more protection by the N.J. Supreme Court - privacy, free speech, and search and seizure restrictions - clearly enabled it to fully explore and develop how it would use the doctrine of independent state constitutional interpretation. However, simply establishing such a framework does not facilitate the court's determination of how it will ultimately choose to define and shape state constitutional jurisprudence in areas presenting new constitutional issues.

The State Supreme Court must refrain from using its expansive power of independent constitutional interpretation to hide substantive common law review which addresses legislative issues. Traditionally, the state judiciary has been an equal partner with the legislature in establishing general rules of law. The crucial difference between such common law decisions and constitutional decisions is that the court's common law decisions can be reversed by the legislature through new laws. Constitutional decisions, however, cannot be reversed by the legislature unless the state constitution is amended.[32] Thus, if the court attempts to make general rules, i.e. common law, and wants these rules to be virtually irreversible, it may claim to use the state constitution as the basis for these rules. As Handler noted in *Hunt*, this type of "falsely constitutional" common law review has provoked the California voters to adopt a referendum requiring that the state courts give the same meaning to their state constitutional provisions as the U.S. Supreme Court has given to parallel provisions. The ability of state courts to independently interpret their state constitutions and develop a body of state constitutional law is destroyed by such a referendum.[33]

Unfortunately, the New Jersey Supreme Court did not follow Handler's advice in its death penalty decisions. After the *Ramseur* and *Gerald* cases, the N.J. Court adopted a substantive approach in the application of the *Gerald* principles in capital appeals. A "substantive approach" by

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30 Ibid.

31 State v. Williams as discussed in Jose Fernandez, "The New Jersey Supreme Court's Interpretation and Application of the State Constitution," Rutgers Law Review, vol. 15, #2 (1984), pp. 491-511.

32 "Developments," pp. 1347-1354.

33 Justice Handler, concurring in State v. Hunt.

the court focuses on the facts and evidence in a case, rather than the procedures. The court judges the merits of the evidence and renders its decisions in an individualized case-by-case method instead of uniformly reversing cases on the sole basis of whether or not certain procedures or instructions were correctly followed by the trial court. This type of substantive review has led to the misguided perception that the New Jersey Court is trying to legislate from the bench.

IV. THE NEW JERSEY SUPREME COURT STRUGGLES TO DEVELOP A DEATH PENALTY JURISPRUDENCE UNDER STATE CONSTITUTIONAL PRINCIPLES

There is no more difficult constitutional issue, in a system that circumscribes state power to safeguard individual life, than the issue of capital punishment, for capital punishment is the exercise of ultimate state power against the individual, the denial of that life. In no other issue, moreover, does the gulf between arcane legalism and brute reality appear wider; it is futile to attempt to reconcile in one's mind the abstract justifications of death penalty jurisprudence with the pain and suffering of [a murder victim]. Law cheats morality.[34]

This section examines the New Jersey Supreme Court's struggle with death penalty jurisprudence in two critical cases, *State v. Ramseur* [35]and *State v. Gerald.*[36] The two case analyses focus on how the N.J. Court applied its framework for independent state constitutional interpretation within each decision. Specific attention is given to the dissenting opinions of Justice Handler due to his particular concern that the court establish procedural standards to guide capital trials and reviews. The discussion explores the validity of Handler's dissents in light of the subsequent substantive approach adopted by the court to *Gerald* reviews.

The New Jersey Court initially demonstrated a principled approach to state constitutional interpretation and the development of state death penalty jurisprudence. In *State v. Ramseur*, it first looked to the federal jurisprudence at that time and decided there was no need to assure greater protection from the imposition of "cruel and unusual punishments" under Article 1, par. 12 of the New Jersey Constitution.[37] However, the U.S. Supreme Court's retreat from its expansive role in protecting individual rights changed federal death penalty jurisprudence to such an extent that when the "intent" issue was directly raised in *State v. Gerald*, the New Jersey Supreme Court held that it would have to rely on its own state constitutional interpretation in reversing Gerald's death penalty. The *Gerald* intent distinction was supported by the court's interpretation of the legislative history, preexisting state law, and original legislative intent behind the 1982 Death Penalty Act. In this

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34 Justice Handler, dissenting, in State v. Ramseur, 106 N.J. 123 (1987).
35 State v. Ramseur, 106 N.J. 123 (1987).
36 State v. Gerald, 113 N.J. 40 (1988).
37 Chief Justice Wilentz writing for the majority in State v. Ramseur.

case, the court used its right to make such judgements, based on its interpretation of the state constitution.

After *Gerald*, the court was left to decide how it would review *Gerald* appeals and implement its new death penalty jurisprudence. Factionalism resulted from the Justices' fundamentally different theories on the role of the State Supreme Court in an appellate review. The shifting alliances within the court on *Gerald* charge reversals have resulted in the predominantly substantive approach in the N.J. Court's decisions. The apparent inconsistencies that some believe to exist in the post-*Gerald* decisions stem from court decisions based on qualitative judgements which should have been left to the jury. Legislators, prosecutors, and law enforcement officials have grown frustrated with the court, charging that: "[the court] is looking for ways to circumvent [the death penalty law] on a case-by-case basis, by splitting hairs . . . You can pass all the legislation in the world, but if the Court is going to move along this road, it doesn't mean anything"[38] and demanding the court "enforce the law or strike it down."[39]

State v. Ramseur: A Tentative, Federally-Based Beginning

Chief Justice Wilentz wrote the 6-1 majority[40] opinion in *State v. Ramseur* which directly addressed two issues on both federal and state constitutional levels: the constitutionality of the death penalty per se and the constitutionality of New Jersey's capital punishment statute, N.J.S.A. 2C:11-3. The N.J. Court acknowledged in the beginning of the opinion that capital punishment was recognized as a matter of particular state interest by both the U.S. Supreme Court and itself in *California v. Ramos* [41] and *State v. Hunt,*[42] respectively. Therefore, the State Supreme Court was not obliged to simply adopt federal constitutional death penalty decisions. However, the N.J. Court specifically referred to the principles established for independent constitutional interpretation in *Hunt* [43]and held:

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38 Former Senate President John Lynch, D-Middlesex as quoted by Tracy Schroth, "Gerald Nearly Fatal to Death Appeals," New Jersey Law Journal (Thurs. July 5, 1990).

39 Governor Florio as quoted by Kathleen Bird,"Florio Faults Supreme Court on Death Penalty: Governor Challenges Justices to Enforce the Law or Strike it Down," New Jersey Law Journal (Thurs. Dec. 20, 1990). Bird emphasizes the fact that this speech was given to the N.J. Association of Chiefs of Police and could have been an attempt to woo the public or the law enforcement community after Florio's recent drop-off in public support polls.

40 The New Jersey Supreme Court's seven members are the same in all of the death penalty cases discussed: Chief Justice Wilentz and Justices Pollock, Clifford, Stein, O'Hern, Garibaldi, and Handler.

41 California v. Ramos, 463 U.S. 992 (1983) as cited in Ramseur.

42 State v. Hunt, 91 N.J. 338 (1982) as cited in Ramseur.

43 Ibid.

> this Court recognizes its freedom -- indeed its duty -- to undertake a separate analysis under the cruel and unusual punishment clause of the New Jersey Constitution . . . That we are not required to follow the Supreme Court's analysis does not, however, mean that we are precluded from *following that analysis where we find it persuasive*, as we do often in this case (emphasis added).[44]

This assertion is indicative of the federally-oriented approach often used by the N.J. Court. It is a conscientious attempt to establish uniformity between state and federal laws by specifically relying upon federal law as a standard in decisions where the state court finds that federal law persuasive. In *Ramseur*, the issue was the constitutionality of the death penalty and the N.J. death penalty statute. The N.J. Court found the federal constitutional standards to be consistent with its interpretation of the state constitutional requirements and so stated its agreement.

Although most of the state constitutional analysis of death penalty principles in *Ramseur* followed this federally-oriented approach, the court clearly noted how "in recent years the United States Supreme Court has departed from the vigorous enforcement of these constitutional principles"[45] and conditioning its reliance on federal law by establishing that "[it was] not obliged to follow the reasoning of all these decisions in interpreting [its] own state constitutional protections, nor [did it] intend to."[46] This, too, is consistent with the federally-oriented approach to state constitutional interpretation which provides for state divergence from federal law in areas where state courts feel their state constitutions warrant greater protection of individual rights than that established by the U.S. Supreme Court. Thus, state courts will rely upon federal law if it gives adequate protection under state constitutional standards, respecting the goal of uniformity between the laws of both governments in our federalist system; however, state courts still retain their autonomy and the right to disregard federal law if they establish independent and adequate state grounds in their state constitutions to do so.

The *Ramseur* decision substantially relied upon the U.S. Supreme Court's decision in *Gregg v. Georgia* [47]to support the constitutionality of the death penalty. Applying the same three part constitutionality test used under the Federal Constitution, (1) contemporary standards of decency, (2) proportionality of punishment, and (3) legitimate penological objectives, the N.J. Court concluded that "capital punishment is not per se a violation of our state constitutional ban against cruel and unusual punishment."[48] It held that the contemporary standards of decency in New Jersey did not differ from those nationwide nor was the evidence of the disproportionality in

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44 Justice Wilentz writing the for the Court in State v. Ramseur, 106 N.J. 123 (1987).
45 Ibid.
46 Ibid.
47 Gregg v. Georgia, 428 U.S. 153 (1976) as cited in Ramseur.
48 Ibid.

capital punishment any greater in New Jersey than that discussed and held constitutional by a plurality of the U.S. Supreme Court in *Gregg*. Lastly, the N.J. Court denied any responsibility to weigh the "reasonableness" of penological objectives that certain legislation chooses to pursue. While noting its respect for those who argue on either side in the issue of a death penalty's penological purpose, the court chose to follow the reasoning of the previous New Jersey Supreme Court: "Ultimately, however, even when it comes to the death penalty, we agree with Chief Justice Weintraub that '[a]s to the question whether the death penalty serves a useful end, and its morality and fairness, these are matters which rest solely with the legislative branch of government." [49]

Addressing the constitutionality of New Jersey's particular death penalty statute, N.J.S.A. 2C:11-3, the court extensively examined the standards for judging capital punishment statutes under both the Federal and New Jersey State Constitutions. Citing *Furman v. Georgia*,[50] the N.J. Court asserted that a death penalty statute would be constitutional under federal standards only if it limited the application of capital punishment to a small and appropriate group and ensured that this group was chosen rationally and consistently. Furthermore, it noted the emergence since *Furman* of two principles which require a capital jury's discretion to be guided: decisions to impose the death penalty must be consistent (referring to other decisions to impose or not to impose death) and they must be reliable (the individual must be deserving of the punishment). The court demonstrated that the "Act" (N.J.S.A. 2C:11-3) contained all of the necessary features to fulfill these federal constitutional requirements: a narrowing of the class of death eligibles, a bifurcated trial, jury instruction as to the weighing of aggravating versus mitigating factors, a "catch-all" mitigating factor allowing individualization in sentencing considerations, no mandatory imposition for any offense, and a provision for appellate review. Its conclusion affirmed the constitutionality of the Act under the Eighth Amendment of the Federal Constitution.

Turning to a discussion of the New Jersey Constitution, the court began by asserting the Act's validity on the basis that it "read[s] Article 1, paragraph 12 of our Constitution as also mandating the goals of consistency and reliability."[51] It did not, however, suggest this federally-oriented conclusion was sufficient to fulfill a state constitutional analysis:

> We must arrive at an independent determination under our Constitution that the Act contains sufficient safeguards to prevent both arbitrary and nonindividualized infliction of the death penalty, whether or not the United States Supreme Court would require those safeguards under the federal Constitution.[52]

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49 State v. Forcella, 52 N.J. at 293 as cited in Ramseur.
50 Furman v. Georgia, 408 U.S. 238 (1972) as cited in Ramseur.
51 State v. Ramseur, 106 N.J. 123 (1987).
52 Ibid.

The court proceeded to analyze and refute the constitutional failures of the Act found by its one dissenting member, Justice Handler. The court briefly addressed and dismissed Handler's first three criticisms which concerned the vagueness of aggravating factors, the lack of a provision for reviewing prosecutorial discretion, and the need for a defendant's request to conduct a proportionality review. Greater focus was given to his two criticisms that the Act failed to sufficiently narrow the class of death-eligibles at the guilt phase (thereby limiting those who ever reach a capital sentencing phase) and used too broad a definition for capital murder. The majority held that some narrowing of the death-eligible class did occur through the "own conduct" and "murder for hire" provisions which prohibit the inclusion of accomplices to capital murders in the death-eligible class.[53] Finally, and extremely important to the later *Gerald* ruling, the court dismissed the need for a state constitutional review of the criticism that the statute failed to distinguish between the categories of first-degree and second-degree murder which had existed under the prior law. The court relied on its agreement with the recent federal decision of *Enmund v. Florida* which addressed the intent distinction and, thus, avoided a state constitutional interpretation:

> [W]hile intent to do serious bodily harm could not formerly support a first-degree murder charge, it may similarly be insufficient to support a capital sentence today because of the *constitutionally required culpability standards regarding a capital defendant's intent to kill* (emphasis added).[54]

In relying upon federal death penalty jurisprudence to set the standards for its state death penalty jurisprudence, the N.J. Court seemed hesitant to decide an issue that focused on the interpretation of textually similar provisions in both constitutions. Perhaps the court was tentative because it knew that the intent distinction would be a controversial issue since the New Jersey Constitution makes absolutely no reference to any such requirement. A court decision mandating this distinction would have to establish other legitimate state criteria to support its interpretation of the state constitution. Eventually, the N.J. Court was forced to decide the intent issue under the state constitution when the U.S. Supreme Court withdrew its pre-*Ramseur* support of the intent distinction in *Enmund*. The U.S. Court's subsequent holding in *Tison v. Arizona* [55]reversed the *Enmund* distinction, significantly limiting the protection of capital defendants' rights. Thus, in *State v. Gerald* the N.J. Court had to approach the development of a state death penalty

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53 In Ramseur, the majority argued that the Act did narrow some murderers from the death-eligible class during the guilt phase of the trial, namely, those who are accomplices to persons who kill during the commission of a felony. Section C of the Act permits death penalty imposition upon only those who commit murder 'by [their] own conduct' or who pay another to do so. See N.J.S.A. 2C: 11-3(c).

54 Enmund v. Florida, 458 U.S. 782 as cited in Ramseur.

55 Tison v. Arizona, 481 U.S. 95 (1987).

jurisprudence in a principled manner which clearly set forth independent and adequate grounds to justify its divergence from federal principles.

Justice Handler's dissent in *Ramseur* is important because his arguments discussed, advised, and even foreshadowed the fact that the court would eventually need to develop a state constitutional death penalty jurisprudence. He acknowledged the important new role of the state constitution as a result of the "strong tide of federal retrenchment from well-established protections of individual rights"[56] and stated that the *Ramseur* decision did not even attempt to develop a more protective state death penalty jurisprudence:

> With its decision today, the Court fails to meet the challenge to vindicate individual rights, and squanders the opportunity to deepen our understanding of the Constitution . . . the majority only halfheartedly consults our State Constitution and declines to require greater protections in this State than are afforded under federal death penalty jurisprudence.[57]

Handler claimed that federal death penalty jurisprudence had established two contradictory and virtually irreconcilable principles: uniformity and individualization. He disagreed with the majority's decision which rejected this idea when concluding that "doctrinal tension is not a basis for depriving society of the ability to ordain what it believes to be the appropriate sanction for murder."[58]

Regardless of whose judgement of the merits of federal death penalty jurisprudence was correct, Handler's ideas indicated that he recognized the importance of asserting individual rights under the state constitution in order to build a body of state constitutional law and a principled recourse to the state constitution:

> To the extent that the majority's decision today is inconsistent with the approach of our prior constitutional cases, we jeopardize our efforts to develop a principled recourse to the State Constitution. To the extent that the progeny of *Gregg* is contrary to the spirit of fundamental fairness underlying our State Constitution, we risk the integrity of our constitutional protections.[59]

Handler's focus on procedural standards presented a legitimate approach to analyzing death penalty appeals which the majority might have found beneficial to adopt.

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56 Justice Handler, dissenting in State v. Ramseur, 106 N.J. 123 (1987).
57 Ibid.
58 Majority holding in State v. Ramseur, 106 N.J. 123 (1987).
59 Justice Handler, dissenting in State v. Ramseur, 106 N.J. 123 (1987).

State v. Gerald: The Doctrine of Independent State Constitutional Interpretation

A unanimous opinion in *State v. Gerald* proved the New Jersey Supreme Court was willing to develop its own death penalty jurisprudence when the U.S. Supreme Court began to retreat from enforcing the narrow standards for death eligibility it had established in *Enmund v. Florida*. Shortly after the *Ramseur* decision, the U.S. Supreme Court substantially restricted the scope of *Enmund* in *Tison v. Arizona* [60] which held: "A narrow focus on the question of whether . . . a given defendant 'intended to kill,' however, is a highly unsatisfactory means of definitely distinguishing the most culpable and dangerous of murderers."

The N.J. Supreme Court recognized this decision required that the question of death penalty eligibility become a state constitutional matter which focused on the adequacy of the Act's definition of capital murder. The court showed how, because of the "own conduct" provision in N.J.'s Act, the defendant in *Tison* would not have even been eligible for the death penalty had he been tried in New Jersey.[61] The court concluded that New Jersey's Act was far narrower in its scope of possible capital murderers than was required under the Eighth Amendment of the Federal Constitution, warranting a more expansive interpretation of the New Jersey State Constitution's prohibition against "cruel and unusual punishments."

The court cited the state constitution, legislative history, preexisting state law, legislative intent, and state traditions to support its decision:

> we hold that when a defendant is convicted under N.J.S.A. 2C:11-3(a)(1) or (2) of purposely or knowingly causing serious bodily injury resulting in death, imposition of the death penalty is irrational and grossly disproportionate to the crime charged. Any person so convicted shall not be subjected to the penalty phase proceedings of N.J.S.A. 2C:11-3(c), but rather shall be sentenced to a term of imprisonment in accordance with N.J.S.A. 2C11-3(b).[62]

The court held that the intent distinction was crucial for punishment purposes, using evidence from the Code's definitions and punishments for aggravated assault and aggravated manslaughter[63] which supported the argument that punishing by death a defendant who intended

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60 Tison v. Arizona, 481 U.S. 95 (1987) as cited in State v. Gerald, 13 N.J. 40 (1988).

61 Under the Code's capital murder provision, those convicted of felony murder or those convicted on a theory of vicarious liability cannot be subjected to the death penalty. The Code restricts the death penalty in N.J.S.A. 2C: 11-3(c) to one "who committed the homocidal act by his own conduct" or "one who as an accomplice procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value." The Tison brothers were convicted of felony murder and accomplice-liability theories and sentenced to death under federal laws.

62 State v. Gerald, 113 N.J. 40 (1988).

63 As cited in State v. Gerald: in N.J.S.A. 2C: 12-1(b)(1), the Code defines aggravated assault to include the purposeful or knowing infliction of "serious bodily injury." The only difference between it and serious bodily injury (SBI) murder is that the victim happened to die. The legislature has made aggravated assault a second-degree crime that is punished with a term of imprisonment between 5-10 years, with a presumptive 7 years.

only to cause serious bodily harm which happened to result in death would be grossly disproportionate to the punishments for these other offenses:

> The failure to distinguish, for purposes of punishment, those who intend the death of their victim from those who do not does violence to the basic principle stated above that 'the more purposeful the conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished' . . . [this] failure creates a gross disproportionality...[and] as such, is a violation of our State Constitution's prohibition against cruel and unusual punishment.[64]

The court cited transcripts of the legislature's discussion prior to passing the Act in 1982 which distinctly refer to the capital punishment statute's narrow application to only "first-degree murderers." Although the Code had eliminated these "degree" categories of murder, the implication of such a statement is that the same standard of the actor's intent which was applied in the laws prior to 1978 should be used to analyze the current law:

> . . . under prior law only those defendants convicted of first-degree murder could be subjected to the death penalty. Distinguishing features of first-degree murder were...premeditation, deliberation, and willful execution of the plan . . . it is thus apparent that the actor's intention to cause the victim's death was a significant factor in determining whether a murderer would be executed.[65]

The decision suggested that "the Act was grafted onto a murder statute that did not contemplate capital punishment at the time it was drafted."[66] Rather than declaring the statute unconstitutional, however, the court felt it should "engage in 'judicial surgery'" which would save the statute by narrowing its construction without frustrating what the court perceived as the original legislative intent.[67]

Independent and adequate state grounds supported the ruling to distinguish between intent to kill and intent to cause serious bodily harm. The court used the doctrine of independent state constitutional interpretation to afford greater protections to murder defendants by narrowing the application of the legislature's capital punishment statute to only those who demonstrated the most culpable state of mind. The N.J. Court exercised its right to interpret the state constitution as it saw fit and cited that state legislative history, preexisting state law, and the original legislative intent of the death penalty all supported its reading of Article 1, para. 12 of the New Jersey Constitution. In recognizing and establishing the constitutionality of the procedure to inform the

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N.J.S.A. 2C: 11-4(a) states that "criminal homicide constitutes aggravated manslaughter when the actor recklessly causes death under circumstance manifesting extreme indifference to human life." The punishment is 10-30 years in prison, with a presumptive 20 years.

64 Ibid.

65 Ibid.

66 Ibid.

67 Right to Choose v. Byrne, 91 N.J. 287 (1982) as cited in Gerald opinion.

jury as to the intent distinction, the court took its first step towards the development of an independent state death penalty jurisprudence.

The court's *Gerald* decision received the partial concurrence and compliments of Justice Handler, who recognized its independent use of the state constitution to begin developing a unique state death penalty jurisprudence:

> this narrowing of the scope of the class of death-eligible murders is a significant step toward remedying the constitutional infirmities that burden the capital murder-death penalty statute. Of corollary significance, the Court, in departing as it does from the United States Supreme Court's decision in *Tison v. Arizona*, recognizes the unreliability and inadequacy of federal precedent in the development of capital murder jurisprudence.[68]

Handler did not, however, believe this narrowing of the death eligible class sufficed to make the Act constitutional either as enacted or applied. He firmly maintained that the problem of unguided prosecutorial discretion which he addressed in *Ramseur* continued to pose too great a risk of arbitrary application and disproportionate sentencing in capital trials. Furthermore, he asserted that the court should exclude "knowing" murder from the death eligible class because it does not require the premeditation, willfulness, or deliberation which have historically defined those demonstrating the most culpable state of mind to justify the ultimate sanction of death. Handler also claimed that the definition of "knowing" murder which requires the defendant must have been "practically certain" that his actions would cause death is too often indistinguishable from the definition of aggravated manslaughter which requires the defendant's "conscious disregard"[69] of any risk of death, illustrating an "indifference to human life." It seemed that Handler chose to reiterate the reasons for his dissent in the hope that his ideas would encourage the continued evolution of a more demanding death penalty jurisprudence: "I feel constrained to maintain and repeat this position [his dissent on constitutionality of the Act] because of the evolving and unsettled nature of the law governing the unique capital-murder prosecutions."[70]

Handler's dissent expanded upon the substantive infirmities in New Jersey's death penalty statute that he discussed in *Ramseur*. His solution to these infirmities lies in creating and implementing procedural standards which would strictly regulate capital trials and could serve as a

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68 Justice Handler, concurring in part and dissenting in part, in State v. Gerald, 113 N.J. 40 (1988).

69 Handler is referring to the description of aggravated manslaughter in its definition of "reckless." "Reckless" in aggravated manslaughter is defined by the New Jersey Supreme Court as "conscious disregard of a substantial risk of death that manifests extreme indifference to human life." Handler's argument is that this can, on a given state of facts, serve to make aggravated manslaughter the functional equivalent of the death-eligible "knowing" murder which is defined as demonstrating conduct "practically certain" to cause death. He feels it is too nebulous of a distinction to make "knowing" murder death-eligible without creating a risk that reckless murder will become capital murder, as well.

70 Ibid.

guideline in reviewing capital appeals. Handler's problems with the Death Penalty Act, however compelling, are irrelevant to the focus of this paper; his procedural approach to state constitutional review, on the other hand, presents the only method for reviewing the *Gerald* charge that does not depend upon qualitative determinations based on a weighing of evidence. A substantive review focuses on the quality, in terms of rationality and plausibility, of the evidence in a case. What this means is that the Justices will be judging and weighing evidence, making decisions that should be left to a jury. Handler's procedural approach, however, simply recognizes the presence of any evidence to warrant a reversal and leaves the jury to judge the merits of such evidence on retrial. The *Gerald* decision established as constitutional law the trial court procedure of instructing the jury on the intent distinction in capital murder. The problem is that the N.J. Supreme Court itself subsequently took a substantive approach to reviewing capital appeals based on this *Gerald* distinction .

V. THE DIVISIVE AND CONTROVERSIAL IMPACT OF *STATE V. GERALD:* DISAGREEMENT WITHIN THE COURT CAUSES INCONSISTENT RULINGS AND CHARGES OF LEGISLATION FROM THE BENCH

The impact of the *Gerald* ruling was more far-reaching and controversial than any New Jersey death penalty decision to date. No doubt exists concerning the New Jersey Supreme Court's use the doctrine of independent state constitutional interpretation to provide greater protections for criminal defendants specifically under Art.1, para.12 of the New Jersey Constitution. The court exercised its right to independently interpret the state constitution in the development of its own death penalty jurisprudence in *State v. Gerald.* However, the court failed to uphold that very same death penalty jurisprudence by adopting a substantive approach to the *Gerald* charge in capital appeals which meant that its decisions were not based upon simply whether or not that procedural requirement was fulfilled. As a result, three factions developed within the court, each using a different approach or interpretation to *Gerald* when reviewing cases. The two factions of Wilentz/Clifford/Pollack and Stein/Garibaldi used a substantive approach to appellate review which allowed the Justices' to weigh the evidence in a case when deciding whether or not to apply the "intent to kill" standard of *Gerald.* This substantive review resulted in the N.J. Supreme Court's adopting the role of a jury, deciding on a case-by-case basis which appeal presents enough convincing evidence to justify a *Gerald* charge.

Subsequently, the *Gerald* reversals appear inconsistent because the court does not uniformly reverse cases in which the jury was not instructed on the *Gerald* distinction. The individual, case-by-case method allows the court to render seemingly contradictory decisions in

similar cases on the basis of judgements on the quality of evidence in any one case. Critics of the court mistakenly interpret inconsistencies in the application of *Gerald* among the subsequent decisions in *State v. Pitts*, *State v. Rose*, *State v. Coyle*, *State v. Pennington*, and *State v. Long* as signifying its desire to legislate from the bench. The court's substantive review of *Gerald* charge cases illicits the continued criticism of Justice Handler, as well: "What the Court has done, simply, is to act as thirteenth juror, ***weighing the evidence with its own thumb on the scale***"[71](emphasis added).

State v. Pitts: The Court Endorses Substantive Review, 6-1

The N.J. Court's 6-1 opinion of *State v. Pitts* [72] established a two step approach when deciding if the trial court's omission of a *Gerald* charge required reversal of a defendant's murder conviction: first, a determination that the record demonstrates "minimally adequate" evidence to meet the "rational basis" standard defined in *State v. Crisantos*[73] which "imposes a low threshold for a lesser-included offense charge" and, secondly, whether the omission of such a *Gerald* charge was "clearly capable of affecting the verdict." The court stated that the evidence in this case met the "rational basis" requirement and proceeded to then "evaluate the evidence in the record to ascertain whether the jury's verdict constituted a determination that defendant purposely or knowingly caused the victim's death."[74] After it examined briefs submitted by both the Defense and the State concerning *Gerald*'s effect on the defendant's murder conviction, the court concluded:

> it would be virtually 'inconceivable' that a jury could have concluded
> that defendant intended to cause only serious bodily injury, but not death . . .
> we are fully satisfied that the trial court's omission of the charge
> required by Gerald was not capable of affecting the jury's verdict.[75]

The court supported this decision by citing the overwhelming evidence presented by the State which left "no doubt"[76] of defendant's intent to kill: previous death threats made to the victim, testimony concerning the excessive number (25-30) and depth (up to 6 in.) of the stab wounds on victim, and the defendant's testimony to taking the pulse of the victim after his attack.

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71 Justice Handler, dissenting in State v. Pitts, 116 N.J. 580 (1989).

72 State v. Pitts, 116 N.J. 580 (1989) was reversed 6-1 citing the trial court's failure to instruct jury according to the standard established in Biegenwald. The jury must find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt in order to impose the death penalty.

73 State v. Crisantos, 102 N.J. 265, 278 (1986) as cited in State v. Pitts, 116 N.J. 580 (1989).

74 State v. Pitts 116 N.J. 580 (1989).

75 Ibid.

76 Ibid.

In addition, the court found an "ample basis"[77] in the evidence for a jury to have rejected the defendant's claim that because of his "rage" he was unaware until too late of exactly what or who he was assaulting. The court held that "[it was] fully satisfied that the trial court's omission of the charge required by *Gerald* was not capable of affecting the jury's verdict"[78] because "the evidence consists almost entirely of testimony demonstrating either the defendant's purpose to kill or his knowledge that death was practically certain to occur."[79]

This disclaimer in the *Pitts* decision should not be interpreted as the court bowing to political pressure. The decision, rather, illustrates how the court uses its substantive approach. In *Pitts*, the court clearly decided that the evidence presented was so compelling that a jury would not have decided any differently had it been given the opportunity to convict the defendant of only intent to cause bodily harm.

In a strongly worded dissent to the *State v. Pitts* opinion, Justice Handler claimed that both the reasoning and conclusions of the court on the issue of the *Gerald* charge essentially ignored the very teachings of that decision:

> It hypothesizes *the weight a jury would have ascribed to the evidence* supporting purposeful or knowing murder. The Court's conclusion then is dictated by its own comparative assessment of the weight it ascribes respectively to the alternative offenses. Such an approach is not only contrary to our holding in *Gerald*, but *essentially usurps the function of the jury* (emphasis added).[80]

Handler's dissent scathingly criticized what he called an "unrealistic standard"[81] the majority imposed which required that to establish that a "rational basis" existed for charging the jury on the lesser offense, the defendant must demonstrate adequate evidence supporting a conviction on the lesser charge and then explain why the jury might have credited that evidence by attacking the strength of the evidence supporting the greater charge:

> The point is that the defendant is not obligated to disprove or overcome that evidence. Rather, it suffices to identify other evidence and to show that this evidence itself renders it 'possible' for the jury to have concluded that the defendant intended to inflict serious bodily injury, not death.[82]

Furthermore, Handler asserted that the majority's conclusion which claimed it would have been "inconceivable" for the jury to find that the defendant intended to cause only serious bodily injury was not the definition of the standard described in *Gerald*. *Gerald's* standard stated it need

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77 Ibid.
78 Ibid.
79 Ibid.
80 Justice Handler, dissenting in State v. Pitts, 116 N.J. 580 (1989).
81 Ibid.
82 Ibid.

only be "possible" that a jury could have found such a charge. The critical distinction between Handler's interpretation of *Gerald* and the court's interpretation of *Gerald* lies in the quantitative nature of Handler's definition of "possible" in contrast to the qualitative nature of the court's definition of "possible." That is to say, Handler bases his opinion of whether or not to reverse on *Gerald* solely on the existence of any amount of evidence in a case to warrant such a reversal, not on the quality of this existent evidence. The court ruled according to a standard of "possible" evidence that did not just acknowledge the existence of some evidence, but went on to assess the effect that the evidence might have had on the jury's verdict. Handler's closing comments addressed the court's inappropriate role dictated by this approach to defining the *Gerald* question in weighing the qualitative merits of the evidence:

> For purposes of appellate review, *the Court in effect defines the decisive question as a factual one*: whether the assault had as its objective serious bodily injury or death. That, I suggest, is the decisive question that the jury should consider and determine. It is not, however, the decisive question for this Court. Rather that question is whether there was a rational basis in the evidence to establish such an offense and whether it was possible for the jury to make such a determination (emphasis added).[83]

Handler's criticisms of the majority approach to this decision are also supported by evidence in the *Pitts* ruling on *Gerald* which reveals a fact-based judgement in the court's decision. The two step process the court used to reach its decision illustrates that the nature of the second question addressed requires that the court guess how the jury would have weighed the evidence and what might have been its ultimate affect on the jury's verdict:

> We are satisfied on this record that the evidence was minimally adequate to meet the "rational basis" standard established in *State v. Crisantos*, 102 N.J. 265, 278 (1986), which we characterized as imposing a low threshold for a lesser-included-offense charge...Because we conclude that the *Gerald* charge would have been appropriate, we consider whether its omission was clearly capable of affecting the verdict.[84]

The court's citation to the standard for assessing the effect of error in capital cases which was set forth in *State v. Bey* is a direct sanction of substantive review:

> in assessing the impact of error in either the guilt or penalty phase of a capital case, we shall continue to determine reversibility on the basis of a *qualitative determination* that considers, in the context of the entire case, whether the error was clearly capable of affecting either the verdict or the sentence. We are satisfied that its application in capital cases is sufficiently flexible to accommodate our heightened concerns and responsibilities in reviewing death-penalty prosecutions [85](emphasis added).

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83 Ibid.

84 State v. Pitts, 116 N.J. 580 (1989).

85 State v. Bey, 112 N.J. 45 (1988) as cited in Pitts.

It is this very "qualitative determination" made by the court that effectively usurps the function of a jury. Our legal system provides for trial by a jury which hears all of the factual evidence presented in a case and decides its verdict considering the circumstances of the case as a whole. It is the State Supreme Court's primary function to establish procedural standards in criminal litigation and enforce the application of those standards. The N.J. Supreme Court's job is not to interpret the qualitative difference between intent to kill and intent to cause serious bodily harm; that job belongs solely to the jury. The court, for all its wisdom and impartiality, cannot assess how any evidence would have affected a jury. Although the court often does make this kind of judgement, it is unacceptable for a capital case in which the very life or death of a defendant is being decided.

The unique nature of a jury composed of one's peers who work together towards deciding a fellow countryman's guilt or innocence is one of the fundamental principles in our justice system. The personalities of the individuals who form a jury and the dynamics which occur between jury members have an effect, be it negative or positive, on their verdict virtually impossible for the court to evaluate in its decisions. The inevitable inconsistencies which might result from the substantive decision-making process of juries can be limited by implementing clear procedural standards in trials and reviewing these standards if they might have been applied questionably. There is, however, no way to limit the substantive review procedure of the State Supreme Court and the inconsistencies which may result at that level are both irreversible and controversial.

Factionalism Within the N.J. Supreme Court and Post-Pitts Inconsistencies

After the *Pitts* decision, three distinct factions emerged within the court. Each faction is united by its members' agreement on what approach they feel complies with the *Gerald* standards for determining how to weigh evidence when deciding if there exists a "rational basis" to warrant a *Gerald* charge. Two of the factions adopted qualitatively different substantive approaches to capital reviews and the established dissenting member, Justice Handler, gained a new member in Justice O'Hern. The faction found in the majority of any opinion is comprised of Chief Justice Wilentz, and Justices Pollock and Clifford. This group seems to employ a case-by-case substantive approach when deciding a *Gerald* charge, using the *Pitts* method of weighing the evidence in each individual case.

The two other "voting blocks," or factions, have taken opposing sides in every decision to date, assuring that the Wilentz faction's *Gerald* charge decisions were supported by one of the other two factions and won a majority. Justices Handler and O'Hern stand behind the more uniform procedural approach to *Gerald* reversals which Handler continued to encourage up to and

directly in his *Pitts* dissent. They can be counted on to support all *Gerald* reversals because of their strong conviction that any decision reached by weighing the evidence in a case to determine the intent of a defendant should be left solely to the jury.

On the other hand, the third faction formed by Justices Stein and Garibaldi (since the *Coyle* decision) adopted a definition of the *Gerald* ruling which does not preclude from the death-eligible class those who intend to cause either serious bodily injury or death, either result being acceptable; only those who acted with a less culpable state of mind (i.e. an intent only to cause serious bodily injury, not death) would not be subject to the death penalty under *Gerald*. Enforcing this standard, the Stein/Garibaldi faction uses a qualified version of the Wilentz faction's substantive review and refuses to supported any *Gerald* reversals in cases where the defendant shot the victim at close range, asserting that the nature of such a shooting and an absence of any evidence of an intent only to wound poses a risk of death to the victim that is so great as to be irreconcilable with an intent to inflict only serious bodily harm with no intent that death result.

These fundamentally different *Gerald* applications within the court work to assure that the dominant court practice is substantive review. The foundation for the apparently inconsistent decisions concerning the significance of a *Gerald* charge omission in very similar cases is this substantive review which some mistakenly interpret as indicative of the court's desire to legislate from the bench. The consistent incompatibility between the Garibaldi/Stein approach to *Gerald* and the Handler/O'Hern approach coupled with the flexibility of the Wilentz/Pollock/Clifford approach creates a pendulum-like dynamic within the court as Wilentz, et. al. swing from a majority with Handler/O'Hern in one case to a majority with Stein/Garibaldi in the next.

The cases of *State v. Coyle* and *State v. Rose* illustrate how the dynamics between the three factions within the court worked to produce completely different decisions in similar cases which both seem to present evidence to warrant their procedural reversals, but were decided on a substantive basis that led to different results. The 6-1 (Garibaldi joined in Stein's dissents after this case)[86] support of a Gerald reversal in *Coyle* was based on the opinion that there existed sufficient evidence given concerning Coyle's intent only "to stop" his neighbor to establish a "rational basis" for the jury to have convicted Coyle of only serious bodily injury murder.

Stein's dissent reiterated his opinion that the *Gerald* intent standard is inapplicable because the risk of death is too great in a murder involving the victim's being shot at close range to constitute an intent to cause only serious bodily harm, with no intent that the victim die. Stein also cited the fact that the defendant's pursuit of his victim, who had crawled behind a bush after being

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86 Although the Justices all supported the reversal of Coyle on Gerald charges, except Justice Stein, Justice Handler filed a separate dissent. His dissent discussed the prejudicial nature in the hierarchical submission of instructions by the trial court to the jury which he feels forces the jury to acquit the defendant of a greater charge before even considering a lesser charge. Thus, State v. Coyle was actually decided 5-2.

shot in the leg, and shooting of the victim three more times at close range in the shoulder, back, and the back of the victim's head, could not be compatible with any rational finding of an intent to only cause bodily harm. Thus, the *Coyle* decision represents a case where the Wilentz faction, using their individualized, case-by-case approach, supported a *Gerald* ruling that swung them over onto the Handler/O'Hern territory, which consistently encourages *Gerald* reversals, and a majority prevailed.

State v. Rose illustrates a case similar to *Coyle* in which the Wilentz faction swung over to join Stein and Garibaldi in a 5-2 decision which affirmed the trial court's ruling that a *Gerald* charge reversal was inapplicable. The Wilentz faction felt that evidence such as Rose's immediate confession to shooting the police officer which he made to his Aunt and the police, in addition to his statements after the murder expressing his hope for the officer's survival, did not affect the fact that at the moment when the defendant chose to exert the 4 1/4 lbs. of pressure needed to pull the shotgun's trigger, "it [was] inconceivable that the defendant was not 'practically certain' that his action would kill the officer."[87] Stein willingly accepted the allegiance of the Wilentz faction in a case which fit his *Gerald* interpretation in that Rose shot the officer in the stomach at close range.

Handler and O'Hern, having been deserted by Wilentz, et.al., were left to condemn the very same "inherently fact-sensitive,"[88] substantive approach to *Rose* that the Wilentz faction used in *Coyle* and in every other case. Handler and O'Hern stood by their conviction that "in a capital-murder prosecution, that question -- the culpability of the defendant's state of mind -- is the critical jury distinction"[89] and, accordingly, dissented. On the other hand, the majority affirmed its intention to assess what the jury would have decided if presented with the evidence in their ruling that "it is inconceivable that defendant was not 'practically certain' that his action would kill the officer."[90]

VI. THE TRUE NATURE OF THE PROBLEM

The Stein/Garibaldi approach to the application of *Gerald* in capital appeals is no better than that used by Wilentz, et. al. In fact, its little more than a qualitatively conditioned version of the Wilentz faction's substantive approach. Both of these factions set up their own scales on which to weigh the evidence in a case and usurp what Handler has correctly defined as the function of the jury. The fact is that unless Justices Handler and O'Hern recruit some of the other Justices to adopt their procedural review of *Gerald* cases, the opinions of the New Jersey Supreme Court will

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87 State v. Rose, 120 N.J. 61 (1990).
88 Handler dissenting, joined by O'Hern, in State v. Rose.
89 Ibid.
90 State v. Rose, 120 N.J. 61 (1990).

continue to rest upon the perceptions of its Justices as to how a jury would have reacted to the evidence had they been privileged to it when they made their decision:

> The Court, from its appellate promontory, has effectively coopted the jury. Its recapitulation of the evidence reads like the prosecutor's summation; its conclusion, a jury verdict. What is missing from this exercise in judicial review is a genuine and cogent rebuttal to the irrefutable facts: there was a rational basis in the evidence for the jury to find non-capital murder, it was possible for the jury to credit that evidence, the *Gerald* charge was not given, and the jury had no opportunity to consider such evidence in terms of such a charge.[91]

It is the apparent inconsistency which seems to exist between these two cases, as well as many others, that has caused state prosecutors, law enforcement officials, and legislators to question both the reputation of the court and the constitutional legitimacy of its death penalty rulings. Many of these critics have cited these apparent inconsistencies to defend their contention that the court has liberally and expansively applied *Gerald* in an attempt to legislate from the bench.[92] They claim that the post-*Gerald* rulings have tried to eliminate the effective implementation of capital punishment in New Jersey. However, the court uses a principled approach to the doctrine of independent state constitutional interpretation that specifically cites independent and adequate state grounds to support its interpretation of the state constitution.

The true problem is understandably overlooked because it stems from within the New Jersey Supreme Court's substantive approach to reviewing cases based on the *Gerald* distinction which continues to turn out contradictory, fact-based decisions in what appear to be similar cases.[93] The methodology of the court's approach often goes unnoticed because it is virtually indiscernible on the surface of most cases. The factionalism in the court over how to approach reviewing capital cases is founded in the fact that death penalty jurisprudence requires, both in the value our society gives to life and the finality of capital punishment, that the court use the greatest protections possible to minimize the arbitrary or undeserved imposition of death. It is not surprising with the enormity of such a task that the court has failed to agree upon how to approach

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91 This argument is supported by many state prosecutors, law enforcement officials, legislators, and no doubt a host of others. A telephone interview with Dept. Att. Gen. Boris Mozcula revealed that there is some sentiment within the State Attorney General's office that the N.J. Supreme Court has inconsistently applied the Gerald standards in an attempt to eliminate the imposition of any capital sentences in New Jersey. See also: Bird, "Florio Faults Supreme Court..."; and Schroth, "Gerald Nearly Fatal..."

92 Following Coyle, there were two decisions of cases that involved a defendant's fatal shooting of the victim at close range: State v. Long, 119 N.J. 439 (1990) and State v. Pennington, 119 N.J. 547 (1990); these two cases were reversed 4-3 on a Gerald charge with both Stein and Garibaldi dissenting in full, and Handler concurring with the Gerald reversal but dissenting on the constitutionality of the N.J. Act. Thus, it would seem that the court's differences to approaching capital appeals based on Gerald are no closer to being resolved.

93 Justice Handler, dissenting, in State v. Ramseur.

94 Justice Clifford, writing the opinion in State v. Gerald.

a number of issues and that the development of a uniform approach to death penalty jurisprudence in the aftermath of *Gerald* still continues to be a struggle:

> This Court's capital murder-death penalty decisions will define, by the degree of arbitrariness tolerated, the enormity of the difference between the value the Constitution places upon individual life and the value the murderer placed upon the life of his victim. When the state takes life in an arbitrary manner, this difference begins to blur. We are all diminished by the violent taking of innocent life; an assurance that our constitutional values retain integrity, however, is our only abiding consolation.[94]

VII. RESOLUTIONS: THE PATIENCE VS. PERSISTENCE TRADE-OFF

The New Jersey Supreme Court is still struggling to overcome the disagreements between its Justices regarding the approach to reviewing *Gerald* appeals and develop a uniform state constitutional death penalty jurisprudence which will uphold the constitutional value placed in protecting the arbitrary, unnecessary taking of a life. The New Jersey Legislature should allow the continued evolution and clarification of the court's death penalty jurisprudence before it resorts to amending the state constitution and limiting the court's ability to develop its own body of state constitutional law. Resolving the problem with a constitutional amendment involves serious ramifications for the legitimacy of the state constitution as a fundamental government charter. If the New Jersey Legislature frequently amends the state constitution as a means of limiting the State Supreme Court's interpretive discretion, there is danger that the state constitution will become only "a document...[which] reflects recent popular attitudes and goals" and will lose its fundamental integrity.[95] Furthermore, amending the state constitution so that the State Supreme Court is stripped of its power to provide judicial relief to minority groups whose interests are not always pursued in a majority-dominated legislative body would create an imbalance in the fundamental structure of the government.

If the legislature feels that this impasse with the court could not be mended with either patience or time, then it can persist in attempting to effectively implement its Death Penalty Act by trying to amend the New Jersey State Constitution. The New Jersey Supreme Court clearly supported their independent constitutional interpretation in *State v. Gerald*, creating the intent distinction in the definition of capital murder, with what they perceived to be the original intent of the New Jersey Legislature when reenacting capital punishment:

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95 "The Legislative Process in New Jersey," pamphlet. No action is required by the Governor to pass an amendment.

96 "Developments," p. 1354-1355.

> We have no doubt that the legislature would prefer that the Act be subjected to a narrowing construction that would free it from constitutional defect, a construction that comport's with the legislature's stated intent in originally adopting the Act.[96]

If this is an incorrect interpretation by the court which the legislature feels has made the effective implementation of their legislation impossible, the one sure recourse to this problem lies in amending the state constitution itself. This resolution would require that the proposed amendment be passed by a vote of 3/5 of the members of each house (24 votes in the Senate and 48 votes in the Assembly) in one year or a majority vote of each house in two consecutive years before it is placed on the ballot for a public vote.[97] Such a concurrent resolution had been proposed (Assembly Concurrent Resolution No. 76) which would amend Article 1 paragraph 12 of the New Jersey Constitution by adding the following:

> It shall not be cruel and unusual to make eligible for the death penalty a defendant convicted of purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who has as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

The passage of such an amendment would nullify the distinction that the New Jersey Supreme Court made in *Gerald* by altering the very document they claimed had supported their decision. The end to any inconsistent or expansive reading of *Gerald* by the court that the legislature might perceive would be assured.

BIBLIOGRAPHY

Legal Documents

Assembly Concurrent Resolution No. 76, State of New Jersey.

Law Review Articles

Bird, Kathleen, "Florio Faults Supreme Court on Death Penalty: Governor Challenges Justices to Enforce the Law or Strike it Down," New Jersey Law Journal, Thurs. Dec., 20, 1990, p. 1.

Brennan, William, "State Constitutions and the Protection of Individual Rights," Harvard Law Review, vol. 90, #3, 1977, pp. 489-504.

Brennan, William, "Constitutional Adjudication And The Death Penalty: A View From The Court," Harvard Law Review, vol. 100, #3, 1986, pp. 313-331.

"Developments in the Law - The Interpretation of State Constitutional Rights," Harvard Law Review, vol. 95, #6, pp. 1326-1398, 1493-1498.

Fernandez, Jose, "The New Jersey Supreme Court's Interpretation and Application of the State Constitution," Rutgers Law Review, vol. 15, #2, pp. 491-511.

Hart, Henry M., Jr., "The Relations Between State and Federal Law," Columbia Law Review, vol. 54, #4, 1954, pp. 489-542.

"The New Federalism: Toward a Principled Interpretation of the State Constitution," Stanford Law Review, vol. 29, #2, 1977, pp. 297-321.

The New Jersey Constitution of 1947, esp. Articles I & IV.

Pollack, Stewart G., "State Constitutions as Separate Sources of Fundamental Rights," Rutgers Law Review, vol. 35, #4, 1983, pp. 707-722.

"Project Report: Toward an Activist Role for State Bills of Rights," Harvard Civil Law and Civil Liberties Law Review, vol. 8, #2, 1973, pp. 271-350.

Schroth, Tracy, "*Gerald* Nearly Fatal to Death Appeals," New Jersey Law Journal, Thurs. July 5, 1990, p. 1.

Court Cases

State v. Coyle, 119 N.J. 194 (1990).

State v. Gerald, 113 N.J. 40 (1988).

State v. Hunt, 91 N.J. 338 (1982).

State v. Long, 119 N.J. 439 (1990).

State v. Pennington, 119 N.J. 547 (1990).

State v. Pitts, 116 N.J. 580 (1989).

State v. Ramseur, 106 N.J. 123 (1984).

State v. Rose, 120 N.J. 61 (1990).

Books

Weinstein, Michael, "Exploring the Mystique of State Constitutional Analysis," Criminal Justice Quarterly, State of New Jersey, vol. 8, #4, 1985, pp. 155-176.

THE FUTURE OF PROPORTIONALITY REVIEW

by Alexis Doné

INTRODUCTION

One of the most difficult decisions that any person ever has to make, is one that involves the life of another human being. Ever since colonial times, the state of New Jersey has entrusted people with the responsibility of deciding the fate of individuals facing a death sentence. The list of crimes that have warranted a death sentence in New Jersey has been vast: ranging anywhere from witchcraft to treason. Nevertheless, as society has changed and evolved throughout the centuries, so has the criminal code of state. Even though it is important to question how and why the list of criminal offenses punishable by death has changed over time, what is of greater significance is to question how successful both the legislative and judicial branches of the state government have been in fairly and consistently imposing a death sentence.

The history of the death penalty in New Jersey provides the answer to this question. It is evident from the evidence available that the death penalty in New Jersey has had its share of problems and criticisms."Capital punishment in New Jersey [has] a history of confusion and contradiction. . . Historically, the death penalty has been more important as a symbol than as a punishment which was actually applied to a significant number of people eligible for its imposition."[1] The same article argues that historically, the state of New Jersey has failed to impose the death sentence in a fair and consistent manner.[2] The fact that New Jersey has a capital punishment system that has been plagued with inconsistencies should not come as a great shock. The United States has had a history of slavery and systematic biases against different groups of people. One should not be surprised to find that some of the societal biases that have been formed over time have found their way into the criminal justice system. The capital punishment system in New Jersey has been labeled as arbitrary, inconsistent, racist, wanton, and freakish; Because of the sensitive nature of the death penalty, this accusation merits an in-depth analysis. In this paper, I propose to examine those safeguards that exist within the capital punishment process to insure that the

1 Bienen,et al. "The Reimposition of Capital Punishment in New Jersey: Role of Prosecutorial Discretion." Rutgers Law Review 41 (1988-1989): 65

2 Id., at 65

257 X

imposition of the death penalty is not arbitrary, inconsistent, racist, wanton and freakish. In particular, I will focus on proportionality review and how this provision in the New Jersey death penalty statute[3] should be applied to reduce the risk of unfairly imposing a death penalty.

HISTORY OF PROPORTIONALITY REVIEW

The beginnings of proportionality review can be traced to 1972 and the United States Supreme Court case of Furman v. Georgia.[4] In Furman, although there was no majority opinion, the Supreme Court justices concluded that the death penalty was unconstitutional. Justice Douglas stated that the death penalty was not being imposed evenhandedly. He wrote: "Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes."[5] Furman held that the death penalty, as it stood in 1972, was being imposed inconsistently and arbitrarily by the states. Several justices stated that they did not believe that the death penalty itself was unconstitutional, but what was unconstitutional was the way in which it was being implemented throughout the individual states of the United States.

As a result of the Furman decision, many states were driven to restructure their death penalty laws to ensure that they would pass constitutional muster. Georgia was one of the first states to attempt to change its death penalty law, and in 1976 Georgia's death penalty statute was declared constitutional by the Supreme Court in Gregg v. Georgia.[6] Among the many important aspects within Georgia's death penalty law that resulted in it being declared constitutional, was the adoption of statutory aggravating and mitigating factors in structuring the decision to impose the death penalty and also the establishment of a bifurcated trial proceeding in which the guilt of the defendant and the sentence to be imposed would be established in two separate and distinct proceedings. Furthermore, one of the most important features of Georgia's death penalty statute that led the justices in Gregg to declare the statute constitutional was the inclusion of a proportionality review provision. In the opinion of Justice Stewart:

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3 N.J.S.A. 2C: 11-3e

4 408 U.S. 238 (1972)

5 408 U.S. 238, pp.256-257 (1972)

6 428 U.S. 153 (1976)

> the new procedures on their face satisfy the concerns of Furman, since before the death penalty can be imposed there must be specific jury findings as to the circumstances of the crime or the character of the defendant, and the State Supreme Court thereafter reviews the comparability of each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular cases is not disproportionate.[7]

Proportionality review was a very important factor in the Court's holding that Georgia's death penalty statute was constitutional. Once Georgia's death penalty law passed constitutional muster, over twenty states followed in the steps of Georgia and modeled their respective death penalty laws after the Georgia statute.[8]

PROPORTIONALITY REVIEW IN NEW JERSEY

New Jersey modelled their death penalty law after Georgia's law. In 1982, New Jersey state legislators, under the direction of Senator John F. Russo, passed a death penalty statute.[9] One of the provisions of New Jersey's death penalty law was the inclusion of proportionality review. The drafters of the statute realized that this was a very important provision within the Georgia statute. What is interesting, however, is that the legislators never tried to define proportionality review. Since 1982, when proportionality was first introduced in New Jersey, until 1988, the legislators of the state of New Jersey have never attempted to explicitly define proportionality review. It now seems, however, that the scope of proportionality review has become, in recent years, a hotly debated legislative issue in New Jersey and elsewhere.

One of the reasons why proportionality review has become a salient issue in the state of New Jersey is because of the 1988 New Jersey Supreme Court Order appointing Professor David C. Baldus to undertake a study that would make recommendations as to how to conduct proportionality review. The Court's decision to appoint someone the task of researching proportionality review was anticipated in State v. Ramseur[10]. In Ramseur, the court began to address the issues raised by proportionality review:

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7 Id., at 155

8 Baldus, David C. Final Report to the New Jersey Supreme Court, Death Penalty Proportionality Review Project, September 24, 1991 p.27

9 N.J.S.A. 2C: 11-3e

10 106 N.J. 123 (1987)

> The proportionality review provision in the Act is an important procedural mechanism to safeguard against the arbitrary and capricious imposition of the death penalty. Within the framework outlined we hope to develop an analysis that assures similar results in similar cases and will prevent discrimination on impermissible basis, including, but not limited to race and sex.[11]

The New Jersey Supreme Court took its task seriously. Once the Supreme Court announced the appointment of Baldus as Special Master, however, a major controversy erupted. The Attorney General of New Jersey objected to the appointment of David Baldus. Moreover, Robert J. Del Tufo, who became Attorney General in 1988, stated that, "this question of proportionality review is not of constitutional dimensions. It is a matter of legislative initiative and legislative definition of what it means and what the field is."[12]

The Attorney General was strictly opposed the appointment of the Special Master. On April 6, 1989, the Attorney General's Office filed a motion before the New Jersey Supreme in an attempt to get the Court to determine, before the Special Master's Final Report was filed, what should be the appropriate universe of cases for proportionality review. The Attorney General argued that the Court had to define the universe in order to outline the scope of the Special Master's project. Moreover, he also argued that no other state, which has defined their universe, has done so after a proportionality review project has been completed.[13] As a result, the Attorney General believed that the trend established by other states could not be ignored.

Another issue addressed in the motion concerned the direction the Special Master was taking in conducting his project. The Attorney General was aware that Baldus wanted to conduct a study that included all homicides since 1982 committed in New Jersey in order to determine their death-eligibility. The Attorney General objected to this approach and he stated that the approach of the Special Master is an anomaly in that it is largely inconsistent with nationwide judicial definition of the relevant proportionality review universe, and, therefore, must be subjected to close scrutiny and evaluation by this Court, with the input of all interested parties, before the project should proceed any further.[14]

In essence, the Attorney General wanted to get the New Jersey Supreme Court to state

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11 Id., p.325

12 To Conduct an Examination of Various Aspects of the Death Penalty Statute, N.J.S.A. 2C: 11-3. Public Hearing Before Assembly Judiciary, Law, and Public Saftey Committee. Jan 31 1991 p.2

13 Moczula, Boris. In Re: Proportinality Review Project . April 6, 1989., p.3

14 Id., p.6

its position on what should be the appropriate universe so that the scope of Baldus' project would be narrowly defined. The Attorney General hoped to convince the Court that pursuing such a broad interpretation as the one being researched by Baldus should be abandon since it was not appropriate. However, the Court denied the Attorney General's motion and decided to wait for the results from the Final Report.

Recently, the debate over how to conduct proportionality review has been intensified with bill A-4316, introduced on January 8, 1991.

The bill clarifies the parameters of proportionality review to be conducted under the death penalty statute. Specifically, this bill provides that the Supreme Court should compare the death sentence being reviewed by the Court only to other similar death sentences, and not to any cases in which a death sentence was not imposed.[15] The Attorney General's Office argues that a narrow interpretation for the universe of cases should be used in proportionality review. On the other hand, Baldus' Interim Report to the New Jersey Supreme Court had at that time argued that the most appropriate universe is one that is broadly defined.

In this paper, my goal is to analyze the issues raised in the controversy concerning proportionality review and from my analysis determine which position would be the most effective policy initiative for the state of New Jersey.

THE UNIVERSE ISSUE

N.J.S.A. 2C:11-3, which is the New Jersey criminal homicide statute, includes proportionality review as one of the final procedures in the capital punishment process. The section of the statute on proportionality review states that:

> Upon the request of the defendant, the Supreme court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[16]

The controversy that has erupted concerning proportionality review revolves around defining what should the appropriate universe of cases. The universe of cases to be used for proportionality review refers to a pool of cases from which the New Jersey Supreme

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15 Assembly, No. 4316. State of New Jersey. Introduced January 8, 1991

16 N.J.S.A. 2C: 11-3e

Court would draw the cases that were deemed to be similar to the case being reviewed. Those cases drawn from the universe would be used to determine if the sentence imposed in the case being reviewed was disproportionate to the sentence imposed in those cases taken from the pool.

The first question that needs to be answered in addressing the controversy is what is the best way to define the scope of the universe of cases for proportionality review? There are many interpretations of what is the appropriate scope of the universe; but for the sake of this analysis the only two interpretations that will be examined are the narrow interpretation put forward by the Attorney General and the County Prosecutors of the state of New Jersey, and a broader interpretation presented by Special Master David Baldus in his Final Report to the Supreme Court of New Jersey.

The Attorney General and County Prosecutors argue that a narrow interpretation of the universe of cases is the most appropriate interpretation. Robert Del Tufo, the Attorney General of the state of New Jersey, stated that, "[his] office and the county prosecutors have consistently urged that the appropriate universe of cases in proportionality review should be those cases in which a death penalty sentence has actually been imposed."[17] Del Tufo believes in this interpretation so strongly that he sponsored the bill proposed by Assemblywoman Marlene L. Ford which would restrict proportionality review to death-sentence cases only.

Those individuals and organizations that are opposed to the Attorney General's narrow interpretation, such as the public defenders office, and the American Civil Liberties Union, believe in a broad interpretation of the universe. Their definition of a broad interpretation is similar to Baldus' definition of a broad interpretation as he presented it in his Final Report to the New Jersey Supreme Court. The Final Report of the Proportionality Review Project recommends that New Jersey adopt a broad interpretation of the universe of cases for proportionality review that includes all penalty trial cases, regardless of their outcomes, and also death-eligible non-penalty-trial cases.[18]

The Final Report states that the purpose of proportionality review is to ensure that the death penalty is imposed fairly and consistently. The Report states that the problem with the death penalty is that in many stages of the process there is a great possibility that something may go wrong. As a result, Baldus argues in the Final Report that proportionality review

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17 To Conduct an Examination of Various Aspects of the Death Penalty Statute, N.J.S.A. 2C: 22-1. Public Hearing Before Assembly Judiciary, Law, and Public Safety Committee. Jan 31 1991 p.5

18 Baldus, David C. Final Report to the New Jersey Supreme Court, death Penalty Proportionality Review Project, September 24, 1991 p.48

would play a significant role in reducing the possibility of someone receiving the death penalty because of a mistake in the process. A great part of Baldus' belief that proportionality review is instrumental in reducing the arbitrariness that exist within the death penalty process comes from the Furman v. Georgia case. He argues that "proportionality review is a partial response to the concerns expressed in Furman v. Georgia, 408 U.S. 238 (1972), that the pre-Furman capital sentencing systems failed to deliver evenhanded justice."[19] Furthermore, in that same case one of the justices stated that he had difficulty distinguishing between those cases in which a death penalty was imposed and those cases in which a sentence other then death was handed down. Consequently, to protect against the inconsistencies found in Furman, Baldus recommends that the state of New Jersey adopt a broad interpretation of the scope of the universe proportionality review.

Specifically, Baldus measures the level of defendant culpability. The Final Report argues that the level of criminal culpability must be determined in order to decide which cases in the universe are similar to the case being reviewed. The level of culpability is determined by evaluating several factors in the case under review: (1) defendant's moral blameworthiness, (2)degree of suffering and terror inflicted, (3) character and prior record of the defendant, and (4) the characteristics of the offense.[20] Baldus evaluates these factors because these are the factors that a jury examines in determining the defendant's deathworthiness. Although many would argue that only the facts of the case under review should be used to determine similarity with cases in the universe, Baldus states:

> The number of factually similar cases is nearly always too small to permit a reliable judgment about the kinds of cases that usually result in death sentences. Furthermore, the reliance on factual comparability as the exclusive measure of defendant culpability totally deprives the appellate court of the ability to compare the case under review to factually different cases with comparable levels of criminal culpability.[21]

Baldus used the factors that determine criminal culpability and conducted a multiple regression analysis to determine how those characteristic were weighed by jurors in deciding to impose a death penalty. After concluding the analysis, he was able "to rank-

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19 Id., p.24

20 Id., pp. 72-74

21 Id., p.85

order the cases according to overall defendant culpability, as measured by the presence or absence in the cases of factors that appear to influence prosecutorial and jury decision-making."[22] This analysis is very important to death-eligible non-penalty trial cases because it would allow the New Jersey Supreme Court to effectively use these cases to determine whether a death sentence was warranted based on the characteristics of the case being reviewed.

In defining the scope of the universe of cases for proportionality review, examining the language of the death penalty statute is essential. The problem that immediately arises, however, when one looks at the statute is that it does not specifically define how proportionality review should be conducted. First, the statute does not define the scope of the universe of cases and it also does not demonstrate how the Court should go about implementing proportionality review. As a result, it is nearly impossible to state what should be the appropriate scope of proportionality review by just reading the statute.

One way to try to remedy this situation is by looking into the legislative history of the statute. The bill that included the proportionality review provision, bill No. S.112, called for the re-enactment of the death penalty. At that time many of the legislators believed that a proportionality review provision was constitutionally mandated. As a result, proportionality review became a small part of that bill which was introduced by Senator John F. Russo. Bill No. S.112, which passed into law on August 6, 1982, was modelled upon the Georgia death penalty statute upheld in Gregg v. Georgia . The New Jersey Legislature wanted to reinstate a death penalty which would withstand constitutional review. Consequently, they modelled the New Jersey death penalty bill after a death penalty statute that had passed constitutional muster, namely the Georgia death penalty statute. Senator John F. Russo, in the Senate hearing concerning the bill, stated explicitly that:

> basically, the bill [was] drafted in accordance with the United States Supreme Court guidelines that render capital punishment constitutional in the Supreme Court case that so declared. It follows somewhat the form of legislation that has been passed reinstating the death penalty in some 35 states."[23]

By modeling the bill after Gregg the legislators believed that they would have no problem with the United States Supreme Court, and they were correct. One of the stipulations found

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22 Id., p.97

23 Public Hearing before Senate Judiciary Committee on Senate No. 112 (Death Penalty). February 26, 1982 p.1

in Gregg, proportionality review, was meant to be an important part of the capital punishment system. It was included so that it would reduce the risk of arbitrarily imposing the death penalty and also to ensure the constitutionality of the bill.

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminate the possibility that a person will be sentenced to die by the action of an abberant jury. If time come when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.[24]

Despite the significance of proportionality review as expressed in Gregg, the New Jersey legislators did not initially want to include a provision within S. 112. Senator John A. Lynch, a member of the Senate Judiciary Committee in 1983, stated, "I can't vote for that amendment. You might as well abandon the jury system and have a computer."[25] Lynch was not the only one to be against the proportionality review provision. Many others also felt that it was not necessary and they were reluctant to vote for the bill if the provision was included. Senator Russo, nonetheless, was able to convince those senators who were against the proportionality review provision to vote for the bill by expressing his belief that the provision was "necessary under the court decisions,"[26] and by stating that the bill, if passed without proportionality review, would not pass constitutional muster. It was not until 1984, and the United States Supreme Court case of Pulley v. Harris[27], that the legislators thought otherwise of proportionality review.

Since the statute that includes the death penalty is vague in defining proportionality review, many people believe that there is no legislative history to proportionality review. John Tumulty, staff to the Senate Judiciary Committee at the time the death penalty statute was passed, expressed the view that "the legislative history of S.112 did not touch upon proportionality review. Proportionality review was considered to be more of a technical procedure than a main focus area in the death penalty process; and consequently, it was not addressed in-depth by the legislators."[28]The fact that proportionality review does not

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24 428 U.S. 153., at 296 (1976)

25 Public Hearing before Senate Judiciary Committee on Senate No. 112 (Death Penalty). February 26, 1982 p. 21

26 Id., p.21

27 104 S. Ct. 871 (1984)

28 Tumulty, John, Aid to Senate Judiciary Committee. Telephone interview 31 November 1991

have an extensive legislative history, if any, has implications for those trying to define the scope of the universe of cases. Those who are trying to put forward a particular interpretation of the universe issue can not argue that their interpretation is similar to what the legislators intended.

Even though the legislators did not explicitly state what they intended regarding the universe of cases, it is evident from the Senate Hearings of 1982 that the legislators fully understood the goal of proportionality review. They were aware that the purpose of proportionality review was to "guard against an imbalance, a disproportionate imposition of the death penalty in any one area, with respect to categories of defendants or particular types of crimes to avoid against arbitrariness, to avoid against a capricious action in one part of the state or another."[29]The fact that the legislators had an understanding of the goal of proportionality review is very significant and pertinent to the task of deciding what is the appropriate universe of cases. It is important because in evaluating the positions of those individuals who espouse either a narrow or a broad interpretation, one can determine whose interpretation of the universe comes closest to accomplishing the goal that the legislators had in mind.

CRITIQUE OF THE PROPOSED INTERPRETATIONS FOR THE SCOPE OF THE UNIVERSE OF PROPORTIONALITY REVIEW

Baldus develops a two-tier explanation of what he believes are the goals of proportionality review:

> The goals of proportionality review are (a) to insure that the cases in which death sentences are carried out can be meaningfully distinguished from those cases that in which lesser penalties are normally imposed and (b) to limit death sentencing to categories of death-eligible cases that are most aggravated and in which death sentences are the usual, routine result.[30]

Baldus' justification for including penalty trial cases that have resulted in both life and death sentences, is that a universe that included these cases would allow the Court to

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29 Public Hearing before Senate Judiciary Committee on Senate No. 112 (Death Penalty). February 26, 1982 p.20-21

30 Baldus, David C., p. 25

determine whether the case at hand is more similar to cases that have received life or cases in which the death penalty was imposed. "Without knowledge of the life-sentenced cases, the Court would be unable to determine whether there is a 'meaningful basis' for distinguishing the death sentences it reviews from the 'many cases' in which lesser sentences are imposed."[31]

Another reason which Baldus gives for supporting the inclusion of penalty-trial cases is the fact "that a considerable intercounty disparity may exist in the frequency with which similarly situated defendants are sentenced to death in penalty trials."[32] Baldus argues that if all penalty-trial cases are not included in the universe, a defendant who commits a capital crime in a county where death-sentencing rates are high, would be unfairly sentenced to death if his case was not compared with similar cases in a county where the death-sentencing rate was significantly lower.

In addition to recommending that all penalty trial cases be included in the universe, The Final Report suggests including some death-eligible cases which did not reach penalty phase. Baldus proposes to determine which cases to include by using a screening process on all homicide cases that have occurred in New Jersey since August 6, 1982. The first step in the screening process is to "eliminate all cases which, on the basis of the crimes charged or the procedural outcome of the case, were clearly not death eligible."[33] Then, those cases which survived the first test would be evaluated "in terms of the defendant's own conduct, mens rea, and the presence of a statutory aggravating circumstance."[34] In this step Baldus is looking for those cases that meet the criterion necessary for capital prosecution: defendants blameworthiness (defendant's level of guilt] and the presence of any factor, as listed in the death penalty statute, that warrants the death penalty. In essence, Baldus is trying to find those cases in which it would have been possible for the prosecutor to pursue death, but for some reason or another he chose not to.

The major reason that Baldus uses to justify the inclusion of death-eligible non-penalty-trial cases into the universe concerns the role that prosecutorial discretion has on a capital case. Prosecutors in the state of New Jersey, and elsewhere, exercise a great deal of discretion in deciding how to treat cases that appear to fulfill the requirements for capital

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31 Id., p.44

32 Id., p.44

33 Id., p.3

34 Id., p.4

prosecution. Moreover, they have the unilateral power to decide whether to pursue the death penalty or a life sentence. As a result, it is possible for inconsistencies to arise throughout the different counties. A prosecutor in one part of the state may decide to seek the death penalty in a particular case, and a prosecutor with a similar case in a different county may decide to seek a life sentence. "Even if a case could support a capital murder conviction, a prosecutor might reasonably determine that a death sentence was not a likely result and that a murder or felony murder plea would produce the same result as a penalty-trial life sentence or term of years, each with a minimum of 30 years."[35] Since it is apparent that prosecutors have virtually unrestrained authority in charging a case, Baldus believes that there should be a way of ensuring that a person does not receive the death penalty for a crime that another person in the same state received life. His answer to this concern is the inclusion of death-eligible non-penalty-trial cases within the universe.

The Attorney General's position, on the other hand, is that the goal of proportionality review "is to identify that rare abberant case where all of the of the other safeguards the Legislature and, after 27 cases, the Supreme Court have built into the capital punishment system has failed."[36]

The Attorney General argues that the appropriate universe of cases to use is one which includes only those cases in which the death penalty was actually imposed. His major argument is that the capital punishment system provides sufficient safeguards to discourage the implementation of a broad and all-encompassing proportionality review. He believes that the system is virtually mistake proof. Therefore, the role of proportionality review should be a limited one. He states that, "the Supreme Court in the Koedatich case acknowledged that the death penalty law in New Jersey, as interpreted by the court in its decisions, 'provides extensive safeguards against unfair and arbitrary imposition of the death penalty'."[37]

Another reason why the Attorney General supports a narrow interpretation of the universe of cases is because he believes that a broad interpretation, similar to the one suggested by the Proportionality Review Project Final Report, would stifle the use of the death penalty as a system of punishment. The Attorney General argues that a broad interpretation "will undermine the enforcement of the law; that it will lead to prosecutors not

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35 Id., p.47

36 To Conduct an Examination of Various Aspects of the Death Penalty Statute, N.J.S.A. 2C: 11-3" Public Hearing Before Assembly Judiciary, Law, and Public Safety Committee. Jan 31, 1991 p.8

37 Id,. p.8

seeking death penalties in appropriate cases or going into some speculative statistical guessing game as to what factors are going to move a court somewhere down the line, after you go through the first review as to whether the sentence should be upheld."[38] The Attorney General wants the death penalty upheld before too much time has elapsed. It can be inferred from his statement that he would like the death penalty to break away from its historical past and become more of a punishment than a symbol. The Attorney General believes that the best way to accomplish this is by using a universe of cases that is limited to those cases in which a death penalty was actually imposed.

In order to evaluate the arguments presented by David C. Baldus and Robert J. Del Tufo, a definition that explicitly states the purpose of proportionality review must be established. After analyzing the criminal homicide statute and the Public Hearing before the Senate Judiciary, I believe the appropriate definition to use as a benchmark in evaluating the broad and narrow interpretations of the universe of cases is the one found in the Public Hearing of 1982. In that document, the legislators stated that they considered the purpose of proportionality review to be

> to guard against an imbalance, a disproportionate imposition of the death penalty in any one are, with respect to categories of defendants or particular types of crimes to avoid arbitrariness, to avoid a capricious action in one part of the state or another.[39]

In the first part of his definition, Baldus states that the purpose of proportionality review is to ensure that there is a differentiation between those cases which receive the death penalty and those cases in which a life sentence is imposed.[40] This definition is very similar to the legislators belief that proportionality review should assure that the death penalty is imposed in those cases where there was a "particular" type of defendant and a "particular" type of of crime. In essence, what both Baldus and the legislators are implying is that they believe that proportionality review will lead to uniformity in imposing the death penalty. The second part of Baldus' explanation is analogous to the legislator's definition. Baldus also describes the purpose of proportionality as limiting the death penalty to those cases in which the imposition of the the death penalty is a "usual routine result."[41] He

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38 Id., p.9

39 Public Hearing before Senate Judiciary Committee. pp.20-21

40 Baldus, David C., p.25

41 Id., p.25

believes that the death penalty should not be applied arbitrarily and unevenly. Similarly, the legislators also state the proportionality review leads to the avoidance of "capricious action in one part of the State or another."

The Attorney General, however, argues that the purpose of proportionality review is limited since "proportionality review should only act as a limited check to ensure against a 'freakish' imposition of the death penalty."[42] On the other hand, the legislators imply in their definition that the role of proportionality in the death penalty process is significant. Furthermore, while the legislators believe that proportionality review will lead to uniformity in imposing the death penalty, the Attorney General argues that uniformity in the death penalty process has already been achieved

> by the promulgation of major systemic revisions designed to eliminate the arbitrariness identified under the old system. Implementation of safeguards such as a bifurcated (penalty/guilty) proceeding, the use in a sentencing proceeding of aggravating and mitigating factors, a sufficient statutory narrowing of the class of death-eligible defendants, a provision for direct appellate appeal, etc.[43]

Consequently, this view of the purpose of proportionality review puts the Attorney General of New Jersey at odds with the definition adopted by the legislators.

As stated above, Professor Baldus' recommends that the scope of the universe of cases include penalty-trial cases, regardless of whether a life or death sentence is imposed. The Final report argues that the reason why the Court must look at penalty-trial cases in which both life and death sentences were imposed is in order to determine if the decision rendered in the case before the Court is "truly" disproportionate to other similar cases. If the Court were only to consider cases in which the death penalty was imposed, then the Court would not be able to judge whether a life sentence is warranted. The reason why this is so important is because of the meaning of proportionality review. Proportionality review is designed to compare the instant case to other similar cases with respect to the "crime and the defendant." If penalty-trial cases in which a life sentence was imposed were not included, then it is argued that this is not a true comparison. If the case under review bears greater similarity to other cases in which life rather than death was imposed, then the death

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42 Moczula, Boris, Deputy attorney General of New Jersey. Lecture on the death penalty. Princeton University, October 15, 1991

43 Del Tufo, Robert J. "Re: Proportionality Review Project Docket No. 30,547" Public Hearing before Assembly Judiciary, Law and Public Safety Committee, Jan 31,1991 pp. 14x-15x

sentence should be set aside on grounds of disproportionality. If only death sentences are included, then this comparison can not be made. Furthermore, excluding life sentence cases from the universe would be a disservice to meaningful proportionality review, since it would prevent the Court from making a distinction between those cases that merit life and those that merit death. A major concern for several justices in Furman v. Georgia was "that the death penalty [was being] exacted with great infrequency even for the most atrocious of crimes and that there [was] no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not."[44]This concern in Furman substantiates the fact that life-sentenced cases are important to serving the purpose of proportionality review.

Baldus' second proposal for the universe of cases is that death-eligible non-penalty-trial cases should also be included in the universe. The main reason for including this type of cases is because of the role that prosecutorial discretion has in the death penalty process. The discretionary role that prosecutors play in the prosecution of potentially capital murder cases is so great, that if all similar cases are to be compared, including death-eligible non-penalty-trial cases is essential. In the majority opinion of State v. Ramseur, it was argued that there should be some sort of check imposed on prosecutors so as to prevent them from possibly abusing their power or employing it in an arbitrary fashion. In anticipating the decision to initiate proportionality review, Justice C.J. Wilentz states that, "here we may anticipate considering whether to address concerns about the possible misuse of prosecutorial discretion presented to the courts of this state, including in the review of all cases in which a prosecutor had the discretion to seek a death penalty."[45] Concern over the unrestricted power that prosecutors have in the state of New Jersey is not limited scholars and politicians. In an article written in the Rutgers Law Journal, the authors stated that there was "the possibility that prosecutors without standards, whose deliberations are neither discoverable, nor subject to proportionality review, could likewise inject impermissible arbitrariness into the conduct of capital cases."[46] Prosecutorial discretion is a very serious problem that exists within the death penalty process. It is not inconceivable to have two similar cases within the state of New Jersey in which the prosecutors arrive at different conclusions as to the decision to pursue a death sentence. Consequently, in order

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44 408 U.S. 238, p.312

45 106 N.J. 123, p.327 (Wilentz, C.J. writing for the majority)

46 Devine, Edward, et al. "Special Project: The Constitutionality of the Death Penalty in New Jersey." Rutgers Law Journal 15 (1984) 327

to prevent arbitrariness among the prosecutors of the 21 jurisdiction in New Jersey, death-eligible non-penalty-trial cases should be made part of the universe of cases for proportionality review.

Finally, one of the most important reasons for espousing a broad interpretation of the universe as defined by David Baldus in the Final Report, is because of the finality of death. After the Court has upheld the death penalty on appeal and the defendant has been executed, there is nothing that can be done if it is subsequently revealed that the person was unjustly sentenced to death. An execution can not be reversed in the same way that other court judgements can be. Therefore, it is imperative that the Court is certain that the death penalty is fully warranted every time someone is executed.

One of the arguments that has been made against the use of a broad interpretation is that since the case of Pulley v. Harris[47] states that proportionality review is no longer mandatory to uphold the federal constitutionality of the death penalty, then New Jersey should not invest the great amount of time and resources necessary to implement a broad interpretation of proportionality review. However, it is important to note that despite the fact that,

> the Supreme Court declared in 1984 that proportionality review was not mandated under the federal constitution, over twenty states continue to require some form of proportionality review of capital cases. Empirical evidence in a number of jurisdictions indicates that the risk of arbitrariness in the application of capital punishment schemes continues to exist.[48]

Despite the Pulley decision, the statement above shows that proportionality review is very important to many states that have a death penalty. What is essential to understand about Pulley is that the Court expressed its belief that proportionality was unnecessary because it believed that the other safeguards in the California death penalty statute were sufficient to reduce the risk of arbitrariness and unfairness. This does not imply, however, that the other procedural safeguards in the state of New Jersey are also sufficient in reducing the risk of arbitrariness and unfairness in the capital punishment process. Professor Baldus conducted an analysis of the frequency with which prosecutors throughout New Jersey sought the death sentence. In the analysis, Baldus examined differences in the rates in which prosecutors, from urban and nonurban areas, pursued the death penalty. The analysis

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47 104 S. Ct. 871 (1984)

48 Bienen, L. B., Esq. "Proportionality Review in Capital Cases: N.J. Assembly Bill No. 4316." Public Hearing before the Assembly Judiciary, Law and Public Safety Committee. 31 Jan. 1991. p. 47x

concluded "that the overall death-sentencing rate among death-eligible offenses is more than twice as high in nonurban areas than in urban areas -- .24(nonurban) v. .10 (urban)."[49] The role of prosecutorial discretion in New Jersey, consequently, undermines the United States Supreme Court's argument since it is possible for prosecutors in New Jersey to behave arbitrarily.

Another argument made in opposition to Professor Baldus' proposal of a broad interpretation is that Baldus' method of determining death-eligibility is highly speculative; and therefore it deserves no merit. The Attorney General argues that the "degree of speculation [in the Baldus project] is of a sufficient degree to irreparably infect the legitimacy of any final outcome produced by the Special Master's project in its current form."[50] Even though it may appear as if the Attorney General is making a valid point, I believe that an in-depth look into the process which Baldus uses to determine death-eligibility would lead one to believe otherwise. The screening process that Baldus uses to test cases for death-eligibility is a very lengthy one. "To qualify as death-eligible, the reported facts of those cases had to satisfy both a procedural and substantive test."[51] Moreover, he examines the crime committed and the presence of aggravating factors.[52] As a result of the rigorous tests which Baldus employs to determine death-eligibility, I am convinced that his study is not subjective and speculative.

Finally, one argument commonly used against Baldus' proposal is that it involves too much work. The Attorney General argues that,

> the process of identifying, were we to go in this direction, all homicide cases that could have been prosecuted as death penalty cases will, as I have said, be extremely expensive and time consuming, and will put a great burden upon the resources of law enforcement in the state.[53]

Although this may be true, it is important to point out that much of the work that would be involved in officially using a broad interpretation has already been finished by Professor Baldus. Not only has Baldus laid out the guidelines to be used, but he has also prepared the screening process and has created machine readable data files. As it now stands, if all

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49 Baldus, David C., p.23

50 Del Tufo, Robert J. "Re Proportionality Review Project." p. 22x

51 Baldus, David C., p.6

52 Id., p.7

53 Public Hearing before Assembly Judiciary, Law and Public Safety Committee. p.6

death-eligible cases are included in the universe of cases for proportionality review, there would be 227 cases in the universe.[54] Moreover, the Final Report estimates that approximately 250-300 non-penalty trial cases per year will result in a factual case screen for proportionality review purposes; (and), of the 250-300 cases screened for proportionality purposes, we predict that approximately 10-20 non-penalty-trial cases will be categorized as prima facie eligible for inclusion in the universe.[55] All this suggests that the worries and concerns that the Attorney General expresses above are for naught. If the state of New Jersey were to adopt Baldus' proposal today, all it would have to do is follow Baldus' guidelines in adding future cases into the universe.

In essence, I believe that all of the counter-arguments that have been used against Baldus have not proven to be substantial. As Assemblyman Joseph Charles, Jr. stated, in the Public Hearing on bill A-4316:

> I think the arguments that are being raised for limiting the universe by which we are to make our proportionality comparisons is an argument that suggests that to inconvenience us, or to embark upon a pursuit that may be difficult and may not admit an easy resolution, is not worth it in this case. My own feeling about this is that in light of the finality of a death sentence, of the death of somebody who has been found guilty under the criminal laws, extra effort, even if it is inconvenient effort, even if it is major effort, is not too much for us to expend.[56]

One of the reasons the Attorney General uses to justify the adoption of a narrowly defined universe is that it will enable the death penalty process to proceed more quickly to executions. The Attorney General argues that the death penalty process as it now stands takes too long; and consequently, he states that a benefit of adopting a narrow interpretation of proportionality review is that it will not create any further delays in the process. Although the Attorney General may be correct in stating that a broad interpretation of proportionality review will lengthen the death penalty process, this argument is unpersuasive. There are already many aspects of the death penalty process that make it very long. Because of the bifurcated trial proceedings, the right to an appeal, and general backlog in the court system, upholding or reversing a death penalty in the state of New Jersey takes a long time. As result, adding a broad interpretation of proportionality review

54 Baldus, David C., p.12

55 Id., p.110

56 Public Hearing before Assembly Judiciary, Law and Public Safety Committee. , p.19

will not severely lengthen an already slow process. Moreover, I do not believe that the Attorney General, or any else for that matter, can sacrifice the defendant's right to a fair sentence for the sake of expediency.

Another benefit of a narrow interpretation that the Attorney General points out is that his proposal will not be nearly as expensive as Baldus' proposal. Although there is no question that Del Tufo's proposal is not as demanding as Baldus' is on the state purse, I believe that ensuring that proportionality review accomplishes what it was designed to do is more important that worrying about how much it will cost to implement the system. Furthermore, I do not believe that the Attorney General can justify an interpretation of proportionality review that risks sending people, who do not deserve to go, to their death just for sake of saving state money. In essence, I believe that neither of the two arguments used to show the benefits of adopting a narrow interpretation are persuasive enough to warrant the adoption of a narrow interpretation over a broad one.

Another problem that I find with the Attorney General's proposal is that he claims that his interpretation of what is the appropriate universe is consistent with the legislators' intent. He states that it is "critical to note that the bill does point out that this is the intent of the Legislature from day one."[57] The bill to which Del Tufo is referring to is the one that was introduced earlier this year by Assemblywoman Ford stating that the universe of cases should only include those cases in which the death penalty was imposed. I believe it is clear from the evidence presented earlier that the Attorney General is mistaken. There is very little legislative history on the issue of proportionality review, and the little that there is does not even suggest that a narrow interpretation of the universe should be adopted.

Another principle problem with Del Tufo's proposal is that it does not guard against arbitrariness. The goal of proportionality review, as stated by the legislators in 1982, is to help reduce the arbitrariness that exists in the system. By espousing a narrow interpretation, Del Tufo is placing too much trust on the other safeguards that exist within the death penalty system. The fact that a narrow interpretation of the universe would not allow the Court to compare cases under review to similar cases in which a life sentence was imposed and also because it would not take the role of prosecutorial discretion into account, it is possible that the death penalty system may become more arbitrary and inconsistent if a narrow interpretation is adopted.

Finally, I think another problem with a narrow interpretation is that by limiting the

57 Id., p.16.

275 X

scope of the universe of proportionality review, the Attorney General is downplaying how important proportionality review is to the death penalty law in New Jersey. In Gregg, it is obvious that the justices saw proportionality review as a major reason for deciding in favor of declaring the death penalty constitutional. Moreover, after the Koedatich case, the New Jersey Supreme Court justices also stated how strongly they felt about proportionality by appointing Professor Baldus to under take a project to determine how proportionality review should be conducted in New Jersey. In essence, there is overwhelming evidence suggesting that proportionality should be an essential part of the appellate review of capital cases; and therefore, a narrow interpretation is not appropriate since it downplays the importance of proportionality review.

In analyzing the Attorney General's proposal, I think it is evident that a narrow interpretation fails to serve the purpose of proportionality review. As a result, I believe that a narrow interpretation of the universe is not appropriate for the state of New Jersey.

CONCLUSION

The death penalty is an issue that stirs up emotions in people. It is very difficult to find anyone who does not have an opinion on the death penalty, even if they do not know very much about how the system operates. Regardless of whether one personally believes in the death penalty or one believes that the death penalty is morally repulsive, the important fact to keep in mind is that in New Jersey we do have a death penalty law and it does not seem likely that it will be repealed in the near future. Consequently, I suggest to all those individuals, namely voters and politicians, who have an effect, either directly or indirectly, on the death penalty issue to focus their energy towards ensuring that the death penalty is imposed fairly and evenhandedly.

As this paper has attempted to show, it is evident that a broad interpretation of the universe of cases for proportionality review is the appropriate universe to employ. David C. Baldus' broad interpretation not only shares the same goal for proportionality review as the goal adopted by the legislators in 1982, but it also reduces the possibility of inconsistencies and arbitrariness having an effect on the death penalty process. Baldus' proposal considers all the weaknesses in the death penalty law that may lead to arbitrariness and by taking proportionality review as a very serious issue, Baldus is able to see the

problems that plague the process overall. From this analysis, he concludes that New Jersey should implement proportionality review in a thorough and complete manner. Because of the thoroughness and strength of Baldus' *"Death Penalty Proportionality Review Project,"* I suggest that New Jersey include in their universe of cases all penalty-trial cases, regardless of whether a life or death sentence was imposed, and also death-eligible non-penalty-trail cases, as is recommended by the Final Report. By adopting this universe, the New Jersey Supreme Court will not only insure to the best of its ability that defendants receive a fair trial, but it will also lead other states that presently have a proportionality review provision to reevaluate their death penalty statutes in order to asses the impact that adopting a similar universe of cases would have in reducing arbitrariness and inconsistencies.

BIBLIOGRAPHY

Periodicals and Law Review Articles

Baldus, David C. Final Report to the New Jersey Supreme Court, Death Penalty Proportionality Review Project, September 24, 1991

Bienen, L. B., Esq. "Proportionality Review In Capital Cases: N.J. Assembly Bill No. 4316." Public Hearing before the Assembly Judiciary, Law and Public Safety Committee. 31 Jan 1991

Bienen, et al. "The Reimposition of Capital Punishment in New Jersey: Role of Prosecutorial Discretion." Rutgers Law Review 41 (1988 -1989) 27 -372

Del Tufo, Robert J. "Re: Proportionality Review Project Docket No. 30,547" Public Hearing before Assembly Judiciary, Law and Public Safety Committee. Jan 31 1991: 13x-30x

Devine, Edward, et al. "Special Project: The Constitutionality of the Death Penalty in New Jersey." Rutgers Law Journal 15 1984: 261-398

Moczula, Boris. In Re: Proportionality Review Project. April 6, 1989.

Rodriguez, Perlin, Appicella. " Proportionality Review in New Jersey." Rutgers Law Journal 15 (1984): 399-442

Public hearing before Senate Judiciary Committee on Senate No. 112 (Death Penalty). 26 Feb 1982

"To Conduct an Examination of Various Aspects of the Death Penalty Statute, N.J.S.A. 2C: 11-3." Public Hearing Before Assembly Judiciary, Law, and Public Safety Committee. Jan 31 1991: State House Annex

Cases Cited

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

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

Pulley v. Harris, 104 S. Ct. 871 (1984)

State v. Ramseur, 106 N.J. 123 (1987)

The Wantonly Vile Factor and Gender Discrimination in Capital Punishment Sentencing in New Jersey by Joseph Sigelman

INTRODUCTION

When the New Jersey Legislature reinstituted capital punishment in 1982, it sought to construct in the redrawn statutes aggravating factors in the penalty stage which would narrow the number of homicide cases eligible for the death penalty. Most of these eight aggravating factors concern relatively specific circumstances, and have been interpreted in a somewhat lucid fashion by the New Jersey Supreme Court. One factor, though, again and again has emerged not only as the most frequently served and found, but also as the most amorphous. The "wantonly vile" factor represents the will of the community to include the most heinous homicides within the scope of the death penalty, but its inherent lack of definition too easily allows arbitrary discretion on the part of the prosecutor, jury, and judge to violate the necessary standardization of the court mandated in Gregg v. Georgia[1].

It has been said that nine-tenths of legal injustice stems from discretion and only one-tenth from the rules of law.[2] A vague law that bestows discretionary authority on any decision-maker fosters arbitrariness.[3] The potential danger of the broad nature of the "wantonly vile" factor manifests itself in the conclusions of two studies which suggest a pattern of racial bias in New Jersey capital verdicts arising from an overall plethora of discretion. The recent Baldus report reinforces the findings in the earlier study by Bienen et al.[4] relating the race of the murder victim to the defendant's likelihood of receiving the death penalty, meaning that death penalty sentencing still is little better perhaps than "being struck by lightning."[5] If such racial discrimination were to exist, then New Jersey capital cases could be infected with respect to gender as well. After reviewing the interpretation of the "wantonly vile" factor in several New Jersey Supreme Court decisions as an example of the subjectivity of the sentencing process, this paper will then briefly examine in a separate section the role of gender in death-eligible cases as well as the possibility of gender bias in capital sentencing in New Jersey.

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[1]Gregg v. Georgia, 428 U.S. 153 (1976).
[2]Davis, Discretionary Justice: A Preliminary Inquiry, p. 25.
[3]Kolender v. Lawson, 408 U.S. 104.
[4]Bienen, Weiner, Denno, Allison, and Mills, "The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion," 41 Rutgers L. Rev., 27, (p. 230), (1988). A homicide with a white victim goes to trial 3 times more often than a homicide involving a Hispanic victim or 5 times more often than a homicide with a black victim. Also cf. Baldus, Final Report to The New Jersey Supreme Court, pp. 102-4.
[5]Stewart, Furman v. Georgia, 408 U.S. at 309 (1972), the case declaring the death penalty unconstitutional, a decision designed to lead to more of a solidification of the states' aggravating and mitigating factors. In its vagueness, the "wanton" factor, then, seems to counter what the Furman decision stood for.

INTERPRETATIONS OF THE WANTONLY VILE FACTOR

Of the thirty-seven states which have a death penalty, twenty-four use some form of the "wantonly vile" factor[6], reflecting a nationwide desire to be able to apply the death penalty to the most particularly horrible cases. Most state legislatures, however, have not been able to define precisely what constitutes "wantonly vile," "depravity of mind," "heinousness," "torture," or the other terms frequently used in the definition of this factor. While the actual language varies[7] from state to state, a universal vagueness permeates all the factor's manifestations, troubling the United States Supreme Court since its decision in Gregg. In Godfrey v. Georgia[8], the Court effectively imposed a duty upon the individual state appellate courts to apply the "wanton" factor strictly within narrow, consistent, and discernible bounds. Further, in Profitt v. Florida[9], the Court warned about the potential unconstitutionality of overly broad aggravating statutes in not restraining arbitrariness. Where the state legislatures have failed to define this factor adequately, appellate courts are then compelled to perform "judicial surgery"[10] to construct a clear meaning from the original ambiguity.

The "wanton" factor, referred to as the "(c) factor"[11] in New Jersey, has undergone a series of partial clarifications by the New Jersey Supreme Court, with each successive interpretation of the statute establishing a somewhat narrower definition. The actual structure of c(4)(c) has become a pivotal concern in determining its validity in individual cases. The court in the first State v. Biegenwald [12] held that the introductory language of c(4)(c) acts as a modifier for the second part of the provision. Torture, assault, and depravity of mind must fit within a characterization of "wantonly vile, horrible, or inhuman." This construction, I believe, clouds any technical meaning of these three terms by adding such a qualitative sense to them. In an ironic way, this ambiguity might actually serve to narrow the class of cases subject to the (c) factor. In other words, no matter how the courts define assault, only assault wantonly vile warrants the imposition of the factor. In Gerald,[13] the court construed the introductory part to be an independent requirement for the second part. The New

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[6]Bienen et al., "Prosecutorial Discretion," p. 77.

[7]Much of it is derived from the Model Penal Code 210.6(c)(3)(h) drafted in 1962. New Jersey's statutory language comes directly from the version used by Georgia in 1976. Three other states use a "wantonly vile" factor very similar to New Jersey's: Missouri, South Dakota, and Virginia.

[8]446 U.S. 428

[9]428 U.S. 251.

[10]Right to Choose v. Byrne, 91 N.J. 311 (1982).

[11]Specifically, it is 2C:11-3c(4)(c). In its original form before 1985 it found an aggravating circumstance to exist when "the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In 1985, the Legislature substituted 'assault' for 'battery' (Chapter 178, June 10, 1985). Assault encompasses battery and includes "acts not limited to the infliction of serious physical pain." I think this was a crucial amendment to the statute since it recognizes potential psychological trauma that contributes to pain.

[12] 106 N.J. 13 (1987)

[13]113 N.J. 40 at 65-6 (1988).

Jersey Supreme Court in State v. Ramseur, the case which acknowledged "the obvious vagueness"[14] of c(4)(c) and carefully expounded on its role, supported a construction in which the first part exists neither as an independent clause nor as a qualifying modification of the second half. Effectively, then, the first provision ("the murder was outrageously or wantonly vile...") is subsumed under the prominence of the portion "in that it involved...." The State must only prove that torture, depravity of mind, or an aggravated battery exists to show that the murder is outrageously or wantonly vile, thus substantiating this aggravating factor. This interpretation was reinforced in Zola[15] as well. The state of Delaware also supported this interpretation, finding that the lack of a qualification of its "outrageously vile" factor would lead to an overly broad construction. So in 1984, Delaware supplemented its statute with a clause like New Jersey's "in that it involved..." that was to become the crux of the factor's meaning[16]. In other words, "wantonly vile" is so vague as to be rendered meaningless in New Jersey after Ramseur, as well as in at least one other state.

The consideration of depravity of mind in any individual case inevitably requires comparison and judgment on the part of the jury. Since few murders are not depraved to some extent, the New Jersey Supreme Court has tried to narrow the definition to minimize individual bias. In State v. Bass[17], Judge Stern wrote that depravity exists solely as the mental state before the homicide that leads to torture or aggravated battery. Bass, an early opinion from a trial court judge, also required serious physical abuse inflicted on the victim prior to death, but discounted intentional psychological trauma as evidence of depravity. For example, Thomas Ramseur's threat to kill his victim's grandchildren[18] as she was dying would not have qualified as satisfying the (c) aggravating factor under Bass[19], although the New Jersey Supreme Court three years later held that mental abuse and psychological terror before death could be depraved[20]. Torture and battery are taken together to suggest physical abuse in general[21]. Later psychological abuse was included in this interpretation, contradicting the trial court in Bass.

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[14]106 N.J. 123 at 198 (1987).

[15]State v. Zola, 112 N.J. 384 at 433 (1988). The defendant claimed c(4)(c) to be unconstitutional, but the Court refused to discuss the factor at any length, and seems to discourage its resubmission on remand, although the Court admitted that the scalding of the victim's body hints at suffering or mutilation.

[16]In Re State, per curiam after State v. Chaplin, 433, A. 2nd 1082 (Del. 1978). Del. Code Ann. tit. 11, @ 4209(e)(1)(Supp. 1984).

[17]189 N.J. Sup. 445 at 446.

[18]Ramseur, at 280.

[19]As usual, the courts bolster their claims with references to the landmark cases, like Gregg and Godfrey, but this masks the nebulous foundations for some of their decisions.

[20]In Ramseur at 205, Court majority wrote that it assumes N.J. Legislature intended c(4)(c) not just for murders preceded by physical pain.

[21]Ibid, at 450-3.

In Perry[22], a recent decision several years after Ramseur, the prerequisite for depravity includes not only abuse but also killing for no purpose other than pleasure[23]. The problem with this construction lies in the fact that most homicides, except perhaps for random, anonymous acts of violence like the mass murder at the Ridgewood, New Jersey Post Office, are committed for some discernible motive, no matter how illegitimate. So, this decision, I think, is nugatory. Effectively, if this decision were abided by, it would restrict most cases from having the (c) factor found, and this was not the intention. In reality, it will therefore serve no function, I think. Perry also focuses attention on the means of the murder, a clarification of the case of State v. Hunt[24] two years earlier. It also addresses part of Handler's dissent in Ramseur four years before to the effect that c(4)(c) should be based more on state of mind and "senselessness" than on the means of murder.

These interpretations become, I feel, almost farcical when in Hunt, the victim is stabbed twenty-four times, but the court could find no certain proof of actual intent to kill[25]. The means of the crime, in the court's perspective, should not be weighed as heavily. Otherwise, it thought, all murders might tend to telescope together since they are all violently performed. In other words, how the murder was executed became subordinate to the intended motive prior to its performance, the variable the court found to be crucial in determining the degree of the murder. In Perry, though, the court held that depravity exists when the defendant seeks torture or aggravated battery surpassing the "minimum force necessary" to kill. In this case, Perry strangled his victim to unconsciousness, and then strangled him again, once the victim had regained consciousness, all the way to death. Although the State argued that the double strangulation was depraved since it constituted physical torture, the court ruled that Perry had done no more than kill his victim, and had not sought to inflict extra pain. Practically, it is of course impossible especially after the fact to judge mental state, or even know

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[22]State v. Perry, 124 U.S. 128 (5-20-91) at 175. Jury found c(4)(c) as only factor in trial court.
[23]cf. State v. Matulewicz (115 N.J. 198), "crime bereft of recognizable human emotion," done for murderer's whim and pleasure. In Biegenwald, depravity can be found only in conjunction with purposelessness.
[24]115 N.J. 330 at 388-9 (1989). If means are counted, how is one murder practically different from any other?
[25]In State v. McDougald, (120 N.J. 523, 1990), jury was charged with inferring a purpose to inflict pain out of the circumstances. Defendant had repeatedly bludgeoned his victims before the murder, waking up a wife to see her husband's death and then her own fate coming. This is psychological as well as physical abuse. The c(4)(c) was upheld for resubmission on remand. Intent also was revealed in State v. Sam Moore (122 N.J. at 474-8, (1991)) in which autopsy had revealed numerous head blows with a hammer showing that hits were meant to induce suffering, not death, as well as in State v. Zola (112 N.J. 384 (1988)) where an elderly victim had been tied, beaten, and scalded severely and in State v. Davis (116 N.J. 341, 376 (1989)) where a defendant had stabbed, mutilated, and strangled his victim, and in Gerald where defendant had beaten and stomped on his victims.
On the other hand, in State v. Bey II (112 N.J. 123, (1988)) c(4)(c) was not found despite strangulation, sexual abuse, and stomping on chest for no proof of intent. Same for Matulewicz (115 N.J. at 200) where a baby was beaten to death, for Rose which involved shooting a police officer at point-blank range in the stomach, and for Biegenwald wherethe victim was shot point-blank in the head four times.

what a minimum force needed to kill really is. In Arizona, depravity also refers to the defendant's state of mind, but it has had a history of being applied to anything especially offensive[26]. The New Jersey Supreme Court proposed a relatively dubious standard[27] since intent is most of the time wholly unclassifiable.

The concept of killing for pleasure connotes the lack of a "traditional motive for murder" with a "complete indifference to human dignity and... disregard for human life."[28] Any motivation beyond revenge, jealousy, passion, greed could be depraved. So long as there is a "purpose," although completely unjustified, the age of the victim and even the cosmetics applied to his face in the Perry case, for example, do not warrant a finding of depraved[29]. The absence of c(4)(c) as a factor in the Marshall[30] case is based on the "normal" motivations in this crime: passion and greed. The defendant must, then, have knowingly or purposely[31] caused death with little or no reason[32] for the (c) factor to have been found.

In Ramseur, the essence of the majority's opinion involved determining the state of mind that could lead to premeditated torture or aggravated battery. The defendant's actual intention became more significant than his actions in this decision. If a victim is in pain before death, the murder is not necessarily depraved unless the defendant intended this added pain. I believe that intent is crucial to the interpretation of the (c) factor, but a substantial difficulty lies in consistently distinguishing the application of intent from the crime's result. If two premeditated crimes each involving intended pain lead to instant death in one case and a slow death, due to the consequences of bodily injury not intended to be fatal, in the other then two different sentences seem capricious based on result. Since one man receives murder in the first degree with c(4)(c) potentially used to justify the death penalty, and the other maybe just manslaughter, and both the victims are dead, I think too much emphasis is placed on intent, something difficult to measure reliably. How can a jury consistently find from

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[26]Rosen, 980-983 passim.

[27]Black, Capital Punishment 2nd Ed., New York: Norton, 1982, p. 77: Depravity of mind is "a pseudo-standard, a phrase having the look of a standard but possessed of no resolving power."

[28]Gerald, at 65-6.

[29]Perry, at 175. Court found jealousy, greed, revenge to be probable motives in this case, and overturned the trial court's verdict on the basis of "purpose" overriding c(4)(c). The make-up on the victim was not deemed mutilation, which actually may have been depraved.

[30]State v. Marshall, 123 N.J. 586 (1991). Death sentence upheld.

[31]For an exhaustive explanation of the distinction between 'knowingly' and 'purposely' cf. Gerald at 91-98. See also State v. Long (119 N.J. 439, 1990): jury must find that defendant had knowledge or purpose to kill, not merely to cause pain.

[32]"Own conduct" distinction made in Gerald allows for c(4)(c) even for defendants who were not exclusively involved. It does not matter who actually delivered the fatal blow, so long as the defendant could have been responsible beyond a reasonable doubt: "There is no requirement under either the statutory or common law that the actor's conduct be the *exclusive* cause of the result... A defendant may [not] be absolved from liability for murder simply because his or her actions were not the sole cause of death" (p. 96).

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complicated circumstances the defendant's intent? Perhaps the jury bears too great an onus of interpretation.

Another possible breakdown in interpreting c(4)(c) stems from potential confusion over whether depravity of mind could also, in certain cases, be a mitigating, rather than an aggravating, factor. The (c) factor could relate closely to the defendant's being under the influence of "extreme mental or emotional disturbance"[33] or to his or her "capacity to appreciate the wrongfulness of his conduct" that it might lead to an overturning of a death sentence rather than an affirmation of it. The possible conflation of an aggravating with a mitigating factor, although this has not yet been addressed explicitly by the New Jersey Supreme Court, is potentially very troublesome. Either more or fewer defendants may be subjected to the death penalty depending on the interpretation of "depravity of mind," Whether, for example, the (c) factor includes crimes committed under the influence of intoxication is still not resolved[34]. Again, how can state of mind be measured to insure that only the deservingly depraved are executed, and not those who warrant a less severe punishment? Importantly, though, a finding of insanity would likely bar the imposition of the (c) factor, no matter how depraved. In any case, the Legislature must more carefully define a boundary between the this statute and the mitigating factors for cases not as clear.

The decisions in Ramseur and Biegenwald suggest, I think, a disjunctive relationship between depravity of mind and either torture or aggravating assault. Only one part of this conjunction has to be affirmed to support c(4)(c), an effect leading to an expansion of the factor's scope because of its "or" quality. However, all three terms tend to converge at their blurred boundaries. While depravity of mind has evolved significantly in the courts, torture has also been redefined. The element of discrepancy has been whether torture can occur before or after death. Judicial interpretations in Georgia[35] and in Louisiana[36] required evidence of serious physical abuse prior to death to establish torture. Georgia also allows for physical harm after death to be rendered torture[37] and in Florida, the "conscienceless and pitiless" limitation means in part that pain after a fatality may or may not be "torture." In 1984, Judge Stern in Monturi[38] ruled that post-murder events are irrelevant for c(4)(c) in the penalty stage[39] to substantiate torture or battery, but can be used to show depravity of mind.

Torture extends beyond the victim's pain, no matter how horrible, to the defendant's state of mind prior to attack. In Rose, however, while upholding this definition, the potential evidence of

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[33]2C:11-3c(5)(a) and then (5)(d).

[34]The Florida court, as an example, has held that intoxication is not an excuse in terms of depravity of mind in one case, and reversed itself in another. (Sireci, 399 So. 2d 964, 971-2 (Fla. 1981) and Pope, 441 So. 2d. 1073, 1078 (Fla. 1983) respectively).

[35]Godfrey v. State, 243 Ga. (1979).

[36]State v. Sonnier, 379 So. 2nd 1336. 1361-2 (La. 1980).

[37]One case suggesting this is Gilreath v. State, 247 Ga. 814, 839 in which gasoline poured on victim prior to murder is grounds for mutilation and a torture designation.

[38]195 N.J. Super. 317 (1984) by Judge Stern. Since the jury has already been informed of the post-murder events, separating what they have heard from the material which they can consider is not fair.

[39]One point in Ramseur: no pain, no C factor, despite intent.

torture relied on "the manner in which the weapon was pointed at the officer's [abdomen], the type of weapon..., and number of pellets involved"[40]. First, the number of bullets, I think, ought not to matter, if torture is dependent only on mental state. If torture were determined by physical mutilation, then this would perhaps be different. Handler, in his dissent in Ramseur, had worried about this confusion, expressing concern that any crime with multiple stab wounds, for example, would automatically show depravity or torture if physical criteria override intent. Though the Rose victim, a law officer, lingered after the shooting, Rose shot him instantly with a large gun with the apparent, "rational" motive of fleeing from an officer, a separate aggravating factor[41] in itself. Is this torture? Could it be that c(4)(c) is employed here by the State as a means just to seek a greater penalty against a cop-killer, and if so, have the lines between the aggravating factors themselves then partly collapsed? Has c(4)(c) become a catch-all?[42] Can the State just charge the (c) factor, hoping the jury will be horrified? These issues were also addressed earlier in Bey II[43] in which a rape charge, normally covered by the felony factor, became grounds for the wantonly vile factor. The double counting was rooted in the limited scope of the felony factor, which does not include the defendant's state of mind. The boundaries between the factors become increasingly blurred.

The defendant must be aware in order for "torture" to be established that he or she is actually inflicting harm upon a living body solely for the sake of harm.[44] If this definition appears similar to that for depravity, it is because it seems that the distinction between torture and depravity of mind is fine at this point. Similarly, the boundary between battery and torture is not well established. Battery connotes bodily injury[45] that amputates or leaves little or no use of a member for a period afterward[46], but it does not necessarily contribute directly to death. Battery that leads to serious injury resulting in death has been confused with the abuse causing death directly[47]. The former may even be manslaughter and not murder, and may not warrant the serving of the (c) factor. If, however, the jury does not understand this distinction, which has happened, then the defendant might be deprived of the jury's consideration of possible lesser sentences, and face the death penalty unnecessarily. Battery is therefore dangerously ambiguous as well. Hence, the disjunction between

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[40]State v. Rose, 112 N.J. 454 (1988), see 528.

[41]c(4)(h). (Public servant=police officer).

[42]These conjectures are mine. After reading Rose, c(4)(c) seemed highly inappropriate for this case based on the facts presented by the Supreme Court. While the Court did not uphold the death penalty, a lower court had done so on this evidence. Although I am not a legal expert, the only motivation I could see for the (c) factor was to punish Rose for killing a cop, but there already is a factor for that. The State tried perhaps to combine the two, perhaps relying on emotionally swaying the jury through the radio tape made of the officer's suffering after the shooting and before his death.

[43]State v. Bey II, 112 N.J. 123.

[44]State v. Erazo, 126 N.J. 112 (1991), 116.

[45]Bodily injury is the serious risk of death or permanent disfigurement according to N.J. Supreme Court in Rose.

[46]As Black on p. 95 suggests, this definition is inadequate: "it can make little difference to a dead man whether he can lift his right leg."

[47]Handler, in Perry, 191.

parts of this aggravating factor, which give the jury the choice of finding either depravity or torture and battery, offers not a choice, but an expanded, nebulous area into which they can infer ad hoc, it seems, almost any of the circumstances of their present case as grounds for affirming the (c) factor. The danger of caprice is evident. Fortunately, the New Jersey Supreme Court has overturned several cases involving the (c) factor solely because the jury had not been instructed properly. This role for the highest court too tenuously depends on the wisdom of only a few.

THE ROLE OF THE WANTONLY VILE FACTOR

Aggravating circumstances are found by the jury in the penalty stage of the trial after guilt has already been established. They serve as a prerequisite for the imposition of the death penalty. Once found they are weighed against any of the eight mitigating factors[48], and if the jury finds that the preponderance of weight falls on the aggravating factors, even if there is a smaller number of them, then the defendant will be sentenced to death. Aggravating factors ought to narrow the class of cases that can become death-eligible. They were constructed to accomplish this narrowing and to be an objective standard to reduce prejudice. They were intended to objectify capital trials while fostering individual regard for the particular severity of each case. The mitigating factors allow for each defendant's circumstances to be considered individually. Only the worst cases should result in a death sentence in the penalty stage. Simultaneously, the balancing process serves to guide jury discretion in rendering its verdict. Hence, aggravating factors must objectify, guide, and narrow the jury's decision-making at the penalty phase. So, the drafting of and amendments to the aggravating factors are the most direct means for the State Legislature to have an influence on the actual sentencing process in capital punishment cases. The aggravating factors serve as the means by which society through its State Legislature can control who shall live, and who shall be sentenced to death for murder.

The wantonly vile factor, c(4)(c), is the aggravating factor sought most often in New Jersey and the one that becomes increasingly significant as the case progresses through capital trial[49]. As the United States Supreme Court implied in Godfrey[50], the (c) factor may be construed too broadly. With several of the terms merging together, it is possible that the "wantonly vile" factor, if it does not in fact narrow, may actually expand the cases eligible for death. If this happens, for Handler, the

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[48]Several states follow this practice, including Florida (cf. Barclay v. Florida).

[49]Bienen et al., supra. Her study determines that c(4)(c) is used in 36.8% of all the factors served, and "survived to capital trial 69.7% of the time when it was served." Even more revealing, of the 25 defendants on death row when this was published, 22 had the (c) factor presented in penalty stage. (p. 248-9). More still, the jury found the factor present 80% of the time!

[50]"Practically every murder can fit within its reach," as quoted in Ramseur, p. 357 for 428, 100 S. Ct. at 441.

penalty stage itself becomes "infected."[51] Capable of varying interpretations, the wantonly vile factor could fail to give the sentencer adequate guidance[52] for reaching a decision. In Georgia, for example, the State Supreme Court has laid down a "smokescreen of plenteous words [to] mask the fact that exactly the same old unbridled jury discretion is there."[53] It is this latitude allowed to the jury that has led to charges in New Jersey as well as in other states that the wantonly vile factor violates the Eighth and Fourteenth Amendments of the United States Constitution.

Under the assumption that "death is different" as expressed in Furman, that it is the ultimate and only irrevocable penalty, if the sentencing decision to impose the death penalty is not channeled properly then potentially the death penalty collapses into a cruel and unusual punishment under the Eighth Amendment because of inherent structural arbitrariness.

Those against the death penalty would argue that the New Jersey capital process initially fails to exempt any murderers from being subject to receiving the death penalty. The broad statutory definition of murder[54] then serves as the only check on homicides at first in the state before guilt phase. Unlike in Georgia, for example, where aggravating factors are examined before the guilt phase of the trial, in New Jersey, guilt must first be established. In other words, death selection tends to be merged with ("telescopes" into) death eligibility[55]. The advantage, though, is that evidence that might be relevant to an aggravating factor, but that is too sensitive or too incriminating, for example, for the guilt phase can be introduced in the penalty phase without adulterating the determination of guilt.

New Jersey's death penalty statute differs from other forms of sentencing at common law in that the decision-making power in the penalty stage is exercised by the jury, not the judge. When a potentially large class of first degree murders could be subsumed into c(4)(c) if the jury is not informed sufficiently, the danger of a factor which has been deemed "all-encompassing" is evident. During the penalty stage, c(4)(c) and perhaps other aggravating factors as well[56] have so much possible latitude of interpretation that they do not effectively limit the number of murders, according to Handler. This assertion, however, is strongly countered by the majority in Ramseur which found that the post-1982 statute actually does afford an adequate narrowing[57]. With the findings suggesting racial and perhaps gender discrimination in the capital sentencing in New Jersey, this dual-function

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[51]Ramseur, p. 402.
[52]Ramseur, p. 393 (Handler).
[53]Black, p. 74. Although this citation reflects the thoroughly anti-death penalty bias of this book, I think that Black here does highlight the problem of jury guidance, even if his tone is grandiloquent.
[54]N.J.S.A. 2C 11-3 a, 1 + 2.
[55]Handler regards this as the "structural vice" of (c) factor on p. 403.
[56]The c(4)(g), for example, includes all those murders involving arson, sexual assault, and felony - which is a very significant number of murders committed.
[57]Pages 192-5. The majority in dissenting with Handler makes its assertion of adequacy by claiming the new aggravating statutes are about as limiting as the previous statutes from the pre-Furman era (with the exception of a greater number who are no longer allowed to plea bargain out of a death sentence). My criticism is that those old statutes were unconstitional. A comparison to them, I think, does not seem especially valid.

penalty stage might well be a source of this. By having to narrow and then impose death or life sentences frequently using an aggravating factor that may neither narrow nor define what is or what is not capital murder very clearly, the structure of the trial, that is, what each stage is supposed to accomplish, might foster bias and lead to cruel and unusual punishment.

One of the other difficulties with sustaining the wantonly vile factor under the Eighth Amendment is the relatively small number in general who have been sentenced to death out of the total number of murderers, and the proportionately large number of those sentenced to death who have had the wantonly vile factor submitted and returned in their cases. The application to so few, no matter the slice of the population examined, of a factor almost univerally regarded as vague[58] risks violating the Eighth Amendment. Furthermore, the frequent presence of this factor and the rather strong correlation between submission and affirmation by the jury could indicate that c(4)(c) leads to prejudice in a jury's finding a case death-eligible. In that c(4)(c) is found more than any other factor, and is almost routinely applied by the State, it could be considered a somewhat egalitarian factor, perhaps without influence. The high incidence, though, of death-eligible cases with c(4)(c) returned, compared to the lower number of cases with it that do not become death-eligible[59], suggests that its very presence might negatively influence the jury's perception of the defendant's involvement.

Potential trouble with the Eighth Amendment is compounded by the relative similarity, I believe, between cases that have c(4)(c) returned, and those that have it rejected. The alleged circumstances of the rape and murder in State v. Koedatich[60] are horrifying, but c(4)(c) was not found by the jurors who could not determine any unusual depravity of mind. In Bey, the jury's finding of c(4)(c) was rejected, but only by the Supreme Court on technical grounds. There's simply no pattern of differences, from what I have observed, whether the case is "overwhelming" or "clearly defensible."[61] Of the cases which have had c(4)(c) rejected by the New Jersey Supreme Court, this factor mostly failed to be upheld because of procedural difficulties or insufficient evidence to establish clearly the state of mind needed for a depravity classification. The qualitative nature of the murder, if that could ever be determined reasonably, is not, and I cannot prove this, so much a criterion. The (c) factor, then, often appears to be introduced by the State regardless of the depravity of the crime (Rose is an example). Its submission, however, does escalate the chance that the defendant will receive death, and incidentally, that the prosecutor will have "won" a case.

Another problem arises, I think, in that the penalty stage jury knows the defendant is guilty and is involved with sentencing. Perhaps, and maybe this is incorrect, its decisions on the validity of particular factors could be biased more readily than it would be had the jury or a judge reviewed the factors before the determination of guilt. With guilt already established, the State might sound more convincing, so the jury might be inherently prejudiced, from the defendant's point of view.

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[58]Godfrey is just one example by the United States Supreme Court.
[59]Bienen et al., "Prosecutorial Discretion," p. 260; and pp. 280-283 for tables of percentage distributions based on phase and factor.
[60]112 N.J. 225 (1988).
[61]Baldus, Final Report, p. 10.

A fourth problem is that one factor may even merge with another, for the distinction between, say, the grave risk of death to others and depravity of mind could be small, as could the difference between a felony and torture. Another danger revolves around those cases in which the (c) factor is submitted as the sole factor, as it was in Perry. If this factor does indeed prejudice the outcome, whether because of its vagueness or its simple emotional appeal that satisfies the jury, and that is a consideration, then using it alone is particularly troublesome. Presumably without the grounds to reinforce death-eligibility with another factor, c(4)(c) used alone could jeopardize a defendant who might warrant a life prison sentence rather than death.

Under the due process principles of the Fourteenth Amendment[62], the "vagueness doctrine" has also been used to find the wantonly vile factor unconstitutional in other states. The first aspect of this, the "concept of fair notice," mandates that laws be presented clearly enough so that when explained "in language the common world can understand,"[63] a citizen can know what penalty will be meted out for a particular crime. This connotes the necessity for a reliable, recognizable standard for criminal behavior. The second aspect of the vagueness doctrine requires that laws must be drafted carefully enough to check potential arbitrariness or discrimination. Out from under the conflicting definitions of c(4)(c), there is a "unique opportunity"[64] for racial or gender prejudice to be expressed, if only subtly. Due process is also inhibited when the ambiguity and complexity of c(4)(c) renders the decision of the penalty stage jury inscrutable on appellate review.

If arbitrariness has stemmed from c(4)(c), then much of it has been derived from the confusion of juries in applying this factor. In Bey[65], in which the trial occured before the Supreme Court opinions of Ramseur and Biegenwald, the trial court judge instructed the jury that depravity of mind, torture, and battery must be characterized as being "wantonly vile..." This error by the court, linking the first and second parts of c(4)(c), was identified by the Supreme Court, but on remand in Bey II, the lower court failed to instruct the jury to heed the defendant's intent adequately. The instructions placed too great an emphasis on the "wanton" language of the statute. In Biegenwald, the Supreme Court deemed the reading of the actual text of c(4)(c) to the jury, rather than an interpretation, erroneous, since the jury could miscontrue the real nature of the language. This led in Ramseur to the Supreme Court's composition of the model instruction to the jury concerning the

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[62]"...nor shall any state deprive any pers n of life, liberty, or property, without due process of law."
[63]First conceived in McBoyle v. U.S. (283 U.S. 25) as cited in Rosen, p. 954.
[64]Turner v. Murphy, 106 S. Ct. 1683 at 1687, 1986) concerns discretion. The problem in proving discrimination relates to the reason why the New Jersey Supreme Court has not yet determined that racial bias is prevalent enough in capital sentencing to warrant action. Because of the relatively small sample size of death row cases, little conclusive evidence can be found.
[65]State v. Bey 112 N.J. 45 with Handler concurring!

meaning of c(4)(c)[66], which thus far has been applied without significant charges of unconstitutionality.

Another difficulty with juries has involved the question of the admissibility of photographs as used in Koedatich and other physical evidence like the tape recording used in the Rose case, which could be used to support a wantonly vile charge, delineating the horror of the crime. By emphasizing emotion over analytical thought, and by showing suffering and not intent, photographs were not allowed to support c(4)(c) after Ramseur. The significance is that sentiment too easily can infect the interpretation of c(4)(c).

The fallibility of juries is highlighted further, as Handler speculated in Bey, by their potential to consider the sheer number of aggravating and mitigating factors rather than their respective weights even without realizing it. The ready application of the (c) factor can lean a jury toward the death penalty just because it reinforces the other aggravating factors, even if it is later found to be invalid. This damaging prosecutorial discretion could have "upgraded some cases by alleging an aggravating felony circumstance."[67] If this felony factor can be used for this purpose, then doubtlessly the wantonly vile factor, which is relatively easy to submit at the penalty stage, can also serve the role of upgrading homicides to death eligibility. In Rose[68], for example, the defense charged that the "harmless error" of submitting c(4)(c), which very well may have been irrelevant for this defendant, actually made the decision to find the other two factors, c(4)(f) and c(4)(h), seem more like a "compromise." In other words, the submission of the (c) factor influenced the jury, even though it wasn't found or upheld. The wantonly vile factor, then, can be added to make the other factors look even stronger. In 1976, in State v. Christener[69], the Court held unconstitutional the prosecutor's practice of artificially inflating charges so that the jurors might believe the crime was more serious than it was, since it had more substantial charges than necessary. The possibility of prosecutorial misconduct in serving the wantonly vile factor can produce bias in the jury against the defendant.

CONCLUSIONS AND RECOMMENDATIONS FOR THE C FACTOR'S ROLE

In Furman, the Supreme Court required legislatures "to write penal laws that are evenhanded, nonselective, and nonarbitrary."[70] The evidence presented in this paper shows that the New Jersey State Legislature has not succeeded in producing an appropriately defined aggravating factor concerning wantonly vile homicides. The evolving definitions and the application of the factor have

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[66]Ramseur, p. 291. In Bey, also the jury was read c(4)(c) as it is written. The Supreme Court, however, decided that "...the court should charge this factor without reading the statute [to the jury]" (Bey, 112 N.J. 123, 173) and instead ought to read an interpretation like the one delivered to the Ramseur jury. For model declaration to jury, please see Appendix at end.
[67]Bowers, and Pierce, cited in Nakell and Hardy, p. 91.
[68]At pp. 528-9.
[69]71 N.J. 55 (1976).
[70]At 256-7.

been so ambiguous that arbitrariness is not only possible, but also likely. What has emerged is a pattern of piecemeal "judicial legislation"[71] to fill in the gaps that the State Legislature has not: so-called legislation from the bench. The Supreme Court decisions have led to some sort of modification of the death penalty statute, and especially of the wantonly vile factor. The common thread with c(4)(c) has been that in each case "something is wrong."[72] No case with this factor found has progressed smoothly. Since capital punishment is presumably the will of the people of New Jersey, it is they, indirectly through their Legislature, who ought to determine who receives this ultimate penalty. If the burden is left to the Supreme Court whose justices are not directly answerable to the voters, then the death penalty can become an arbitrary punishment indeed if this small group deviates. If the people want to expand the number of homicides that are death-eligible, then narrowing might not be a good idea afterall, but this decision ought to be the responsibility of the State Legislature.

One recommendation would be to ask the Legislature to enumerate specifically the conditions that would prompt the submission of c(4)(c). With the information now being accrued by Professor Baldus for the Proportionality Review in the Marshall case, the Legislature might be able to identify common themes that have run through "depraved" cases and create a checklist concerning this aggravating factor based on, for example, the extent of mutilation, the age of the victim, and the intent demonstrated. This might be conducive to standardization. Although this might also tend toward a violation of the Eighth Amendment because of a more mechanical, deindividualized allotment of justice, is it any less fair, however, than the present system? Each case is now handled so individually that the defendant might receive death not because of his or her actions, but because of the whim of a prosecutor, a jury, a judge, or even a police officer regarding race, gender, budget, or time constraints.

Barring a proper definition of c(4)(c), another solution would be to leave the power of a life/death decision with its absolute finality outside the hands of a jury and with a judge, or panel of judges, well-versed in the nuances of this factor. As a percentage of total capital punishment expenditures, and as a means to avoid remands, this might even be economically feasible. Of course, again, this possibility does nothing to eliminate completely personal bias, but might provide a stronger check on possibly unconstitutional discretionary decisions by juries.

Another recommendation, which Handler himself proposed in Ramseur, is the narrowing of death-possible cases by determining aggravating factors before the guilt trial. In other words, this recommendation would restructure the penalty stage to take place before the trial court, a feature in Georgia. This might work in reducing jury prejudice as well, since guilt is still undecided, but would continue to leave the system open to biases introduced by prosecutorial discretion in deciding which factors to submit and in figuring out what is circumstancial in each case and what is not. Also, it might actually corrupt the guilt-phase because different arguments could be needed to address an

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[71]Ramseur, p. 395. Rosen, 99: "judiciary's usurpation of a legislative responsibility."
[72]Rosen, p. 989.

aggravating circumstance from a guilt charge. Are we faced, then, with "the futility of finding a purely objective standard"[73] beyond "human ability"?[74]

I think realistically that a more acute definition of c(4)(c) is certainly possible, especially based on the experience of the factor gathered in courts now available in Baldus's Proportionality Review Project Final Report. One suggestion is to eliminate the disjunctive nature of the statute, and necessitate the presence both of depravity of mind and of assault or torture simultaneously. A conjunction here would require not only depravity of mind, which is so difficult to find reliably, but also a physical demonstration of it through assault or torture. This should narrow the scope of the definition by having two requirements rather than just one under the present disjunctive interpretation. In addition, in some way, the Legislature should discourage the excessive as well as the sole use of c(4)(c) in establishing a homicide as death-eligibile, possibly by requiring the tandem use of another applicable factor. Maybe cases with the wantonly vile factor submitted alone should not go to the penalty stage. As the Court affirmed in Matulewicz, the risk of arbitrariness is heightened significantly when c(4)(c) is used alone.

Ironically, however, c(4)(c) is perhaps beneficial for those opposed to the death penalty. Marshall, one of the few major death cases in which it was not a factor, is the only case so far in which the death penalty has been affirmed. Maybe the complications that arise from c(4)(c) result in needed further checks on the trial process in death penalty decisions.

POSSIBILITIES OF GENDER BIAS IN THE APPLICATION OF NEW JERSEY CAPITAL STATUTES

Death row in New Jersey has held only one woman out of twenty-six other inmates since the reimposition of capital punishment in 1982. This trend is reflected nationally with approximately 98.5% of death row inmates being male[75], with few states sentencing more than two percent of their female offenders to death,[76] and only one having executed a woman since 1973. However, only 87.2% of homicides in the United States are committed by men[77] and 90.6% of those in New

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[73]Nakell, The Arbitrariness of the Death Penalty, Philadelphia, Temple University, 1987, p. 5.
[74]McGautha v. CA. 402 U.S. 183 (1971).
[75]Bienen, "The Death Penalty as a Symbol," p. 8. Also, Streib, "Characteristics of Death-Sentenced and Executed Female Offenders," p. 4, shows that 1.9% of total death sentences from 1973-November 2, 1991 (85 out of 4512) are for females. Of the 52 now on death row, the rest (39%) have had their sentences reversed or commuted to life. Feinman, in Women in the Criminal Justice System, p. 41 documents that 2% of executions from 1608 to 1984 were for females. In Streib, "Death Penalty for Female Offenders," p. 862, he claims that 9 out of 460 have been executed, or 2%, in N.J.'s history are female. On p. 867, one-half of states with the death penalty have sentenced a woman to death since Gregg.
[76]Streib, "Death Penalty for Female Offenders," 58 U. Cinncinati Law Review, 845 (1990).
[77]Extrapolated from data in the Uniform Crime Reports 1990: 9231 homicides had male offenders, and 1357 had female offenders. Women murdered 12.8% of the time.

Jersey[78] are committed by men, a fact which suggests that five or six times fewer female defendants arrive on death row than should wind up there statistically[79]. For many, mitigating circumstances overwhelmingly outweigh the death penalty, especially for battered women, for women with dependent children, or for the signficant number of female defendants involved in passion killings. Indeed, even of those sentenced to death, fourteen out of the present thirty-three women on death row in the nation are there for murdering husbands or lovers,[80] a higher number, I presume, than for male offenders. Even so, women still do not receive the death penalty in an equal proportion for similar crimes, even in New Jersey. Moreover, the farther a case progresses beyond the guilt stage, the less likely it is, compared to cases with male defendants, that a female case will survive without reversal or commutation of sentence. Only one woman, Velma Barfield, has been executed since 1973. Excessive discretion remains a primary explanation.

A series of common themes, I have found, runs through New Jersey female homicide cases that are deemed eligible for death. Primarily, the crimes are overwhelmingly heinous by any sense of the word. Marie Moore[81], the only woman on death row in New Jersey, over about a two year period committed thirty-two crimes against the five children and one older woman who lived at some point as prisoners in her house. The extent of the horror in this case is "shocking"[82]: from torture to sexual abuse to mental abuse to larceny, with all of the factors culminating in the death of a child. Jeanne Anne Wright[83] drowned her four children, including an infant, one by one in a river so that their father would not gain custody. Karen Allen stabbed her mother sixty times. Barbara Ann Jacoby-Irwin[84] stabbed her boarder forty times and caused eighty-four trauma wounds. Renee Nicely[85] brutally killed her three year old, ending the long-term abuse of the child by inflicting enough internal and external damage to occupy a full page in the court report including burning, broken bones, and brain damage. These crimes reveal such heinousness that they simply cannot be ignored.

Another unifying theme is that the wantonly vile factor was submitted in all five female defendant cases since 1982, even in the three which did not reach the penalty stage. Although this wantonly vile factor is submitted often in male defendant cases as well, every female case received it, although the sample is limited. This, I conjecture, probably reflects a national pattern, since it is the only factor into which many female defendant murders fit. According to Streib, women commit relatively few felony murders, although Karen Allen's crime was a felony murder, and they much less often have committed a prior murder. So c(4)(c) again appears as a catch-all aggravating factor.

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[78]Bienen et al., "Prosecutorial Discretion, " p. 158.
[79]Justice Marshall wrote in Furman, 408 U.S. at 365,154, that the death penalty discriminates against men.
[80]Autumn Newsletter 1991, Washington Coalition to Abolish the Death Penalty. V. 6, # 5.
[81]State v. M. Moore, 550 Atl 2nd, 117, Garibaldi - 1988.
[82]Both Handler and I.
[83]State v. Wright, 196 N.J. Super. 516, 1984.
[84]State v. Jacoby-Irwin, A-2756 88 T3, unpublished, from Detailed Narrative Summaries.
[85]State v. Nicely, A-799 83 T4, 1987, unpublished, from ditto.

Except for Renee Nicely, who had no mitigating factors[86], the rest all claimed no prior criminal history and mental impairment among other mitigating factors. Other trends I observed were that the defendants were poorly educated with only Karen Allen and possibly Marie Moore having completed high school. This New Jersey phenomenon is substantiated by Streib who concluded that execution-bound females are "very poor, uneducated, and of the lowest social class,"[87] lower on average than their male counterparts.[88] Also, all of these crimes involved victims known to the defendants, with four of the five killing family members. Their culture of poverty might lead to this breakdown of family.

One more common experience in each of these cases was that eventually the women all pleaded guilty, although Marie Moore pleaded diminished capacity because of her alleged multiple personality complex and brain damage[89]. Moore's guilty plea raises the issue of prosecutorial discretion. In Wright, the Superior Court allowed the defendant to plead guilty to avoid the death penalty, finding that this was not unconstitutional so long as it satisfied existing standards for mercy. To facilitate this plea, the prosecution was willing to withdraw the only aggravating factor, c(4)(c). The trial court found the withdrawl of the factor unconstitutional, since grounds for c(4)(c) were well-established in this case, but upheld the guilty plea anyway. Such a plea bargain, although beneficial for the defendant, might have been motivated by reluctance on the part of the prosecutor to pursue a death sentence against a woman. Prosecutors probably do not want to face negative publicity that might rise from a woman's execution[90] nor do they want to face the likely reversals from judge and jury. Women may be perceived as "more vulnerable and sympathetic victims" in the criminal justice system.[91]

Even though this is difficult to prove today, as early as 1973, New Jersey had and upheld a statute that provided for a shorter maximum prison term for male misdemeanor offenders (two years to five years for women). This statute was based on the assumption that women were more readily subject to rehabilitation, and would thrive through longer prison terms (even though women's prisons

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[86]Cf. State v. Nicely, A-799 83 T4, 1987, as cited above.
[87]Streib, p. 878.
[88]In an informal survey, in New Jersey several prominent death penalty cases involve defendants who are not poor, like Marshall or Rose, for example.
[89]The jury did not know that this could lessen a sentence to aggravated manslaughter. Since diminished capacity was eventually found, purposeful and knowing murder is not possible. Thus, she had to receive the benefit of the doubt. State v. Breakiron, 108 N.J. 617, 141: "we view the evidence and...inferences to be drawn therefrom in the light most favorable to defendant." Other flaws with the Moore trial were a mis-weighing of the agg. and mit. factors, a mix-up with an alternate juror, and finally, the decision that murder was not her "own conduct." The victim died accidentally from a fall, although she was unconscious before the accident.
[90]This sentiment has been cited by Amnesty International as a potential cause for arbitrariness, since prosecutors in 44 states are elected, although N.J.'s are appointed; still, not politically expedient.
[91]Hubbard, "Reasonable Arbitrariness," p. 1135.

have a notorious dearth of programs).[92] This relates to the idea that females are "less threatening" to society,[93] something that has led to the release of a number of women in Texas based on a question to the jury regarding the prospect for future violence.[94] In general, women do receive longer sentences for "masculine"-style crimes like felony murder, for example[95], since this "unsexes" them.[96] An additional problem that could motivate prosecutorial conduct is the absence of a death row for women in New Jersey, and in most states, equivalent to the men's. Charges of gender bias in California[97] because of the death row living conditions could be echoed in New Jersey since the special prison unit constructed in Trenton for Marie Moore[98] left her in isolation, giving her one hour a day outside her cell at one period. Discretion even for mercy can easily result in injustice.

CONCLUSIONS AND RECOMMENDATIONS FOR THE GENDER BIAS POSSIBILITY

The experience of women in capital punishment sentencing in New Jersey has underlined other examples of excessive discretion. The gender discrimination that used to be explicit within the laws now surfaces, I think, in a more subtle form. Women typically do not become candidates for death at all. Only five have in the last nine years, and these were for brutal murders by women without educations. At least a few of these women were pregnant as teen-agers, and all were encouraged to plead guilty for commutation of the death penalty to long prison terms. Marie Moore who was sentenced to death will serve a maximum of 224.5 years; Jeanne Wright was sentenced to four concurrent life terms; and the other three all received a minimum of thirty years, since under New Jersey law until recently as women, they are of course highly rehabilitatable. Nationally, female defendants must also combat the same suggestions of racial bias as men do, for fully one-third of the women on death row are black[99], a percentage higher than that in the general population. With this potential arbitrariness in these female defendant cases, should the system for proportionality review now being created by Professor Baldus include gender as a factor? If it does not, what if women's sentences in the future are harsher than now? If they progress to death, and if proportionality review

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[92]Deming, Women: The New Criminals, Nashville: Thomas Nelson, 1977, p. 171. In '71, N.J.S.C. upheld State v. Costello regarding this statute. See also Brady v. U.S. 397 U.S. 742, 90 in general about rehab.

[93]Streib, p. 875.

[94]Interview with Michelle Deitch, Public Defender's Office, Texas (November 3, 1991).

[95]Jones, Women Who Kill, New York: Holt, 1980, p. 9. I believe this is the case, especially based on the New Jersey law cited above, although the reliability of this work has been questioned.

[96]Rapaport, "Some Questions About Gender and the Death Penalty," 20 Golden Gate Law Review, p.3.

[97] Corwin, "Waiting in Isolation" L.A. Times, 1-25-91 (A13?) courtesy of Diann Rust-Tierney at the A.C.L.U.

[98]Feinman, p. 42.

[99]Death Row, U.S.A. 1990 published by the N.A.A.C.P.

includes gender, then there is an admission of unequal treatment by acknowledging that there is a need to view cases differently based on gender. I favor the inclusion of gender as a criterion for proportionality review at least until there is a large enough sample of unequivocally fair cases to be used to monitor future cases.

One recommendation stems from what I think is a latent source of gender discrimination within the very structure of the capital statutes. The aggravating factors, as they are now drafted, do not seem to be able to encompass the bulk of female defendant homicides. In other words, the usual characteristics of these female crimes do not fit within the realm of many of the factors. The history of previous murder, a felony murder, or the killing of a public servant apply far less often to female defendant homicides than they do for homicides by men. I do not believe that the present aggravating factors, then, adequately anticipate murders by women since the inherent construction of the statute may more generally reflect male crimes. In fact, the basis itself for the New Jersey capital statute, the Model Penal Code[100], was developed in the early 1960's by an all-male group of lawyers.

On a related note, the language of the statutes, I found, contributes to the perception that these laws were constructed by and perhaps for men. For example, the mitigating factor c(5)(d) includes the phrase, "the wrongfulness of his conduct" and the aggravating factor c(4)(h) belies an inherent stereotype by referring to public servants also by a masculine possessive adjective. This language alone, apart from its gender-exclusive content, might subtly tend to influence the perception of juries that women should not warrant the death penalty. These laws even as they stand are just not as applicable for women as they surely are for men. I urge the amendment of the capital statute at least to correct bias in the language itself.

Another recommendation concerns the relationship of these crimes to the family. An aggravating factor that would render the murder of a child, or anyone under a certain age, a capital crime might better address a primary characteristic of female defendant homicides. Further, if capital punishment has any value as a deterrent, this amendment may protect the likely victims, children, who themselves are the most defenseless. One disadvantage with this proposal, however, is that the killing of a child most probably is motivated by an underlying psychological pathology, a disease for which a mitigating factor ought to be applicable. An amendment like this one might jeopardize, if it is used without strict guidelines, those who should not warrant the death penalty based on insanity. To cover a case like Wright more closely, the Legislature might consider including a multiple murder within a single crime as inherent grounds for depravity of mind.

The omnipresence of the wantonly vile factor, again used, I think, as a catch-all, shows an inability of the aggravating statutes to deal with female murders. On the other hand, I think the mitigating factors do apply to these female crimes relatively well. Passion killings, or murders from continued abuse or even post-partum depression could be, and have been, represented under the

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[100]Model Penal Code, 1962, @ 210.6(c)(3)(h) is the wantonly vile factor, for instance.

mitigating factors c(5)(a), c(5)(d), c(5)(f), and the inclusive c(5)(h)[101]. With adequate mitigating factors and a dearth of applicable aggravating factors, female defendants are considered less often for the death penalty even aside from prosecutorial discretion. This sort of non-juridical statute is bound to promote a perversion of equality of justice. Only the most brutal murders, which cannot be ignored, are designated as capital crimes. With violence by women increasing substantially now, the issue of women in the capital punishment system needs to be addressed.[102] If society does want to institute a death penalty equal for all, and that certainly should not be moot, a thorough reexamination of the statutes within the context of female defendant homicide is now necessary.

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[101]The c(5)(a) refers to defendant's under the influence of "extreme mental or emotional disturbance." The c(5)(d) deals with the incapacity to appreciate "wrongfulness," c(5)(f) involves past criminal history, and c(5)(h) is the factor that includes anything relevant.

[102]Lee, Felicia, "For Gold Earrings and Protection, More Girls Take Road to Violence," The New York Times, p. A1, November 25, 1991. In New Jersey, arrests for violent crimes by girls rose by 67% in the last decade. 'Violent crimes' does not include homicide, though.

DEATH ON A WHIM: THE ARBITRARINESS OF THE NEW JERSEY CAPITAL PUNISHMENT STATUTE by Damon Watson

INTRODUCTION

The last decade of capital punishment in New Jersey has displayed an extraordinary pattern of events. After reinstatement of the death penalty, the state supreme court overturned 27 different sentences before upholding one in January of 1991. These reversals contain a common thread which manifests itself in a series of arbitrary applications of the death penalty. That any of the capital trials involved capricious sentencing is disturbing, considering the criteria that the New Jersey statute had to meet in order receive constitutional approval. The United States Supreme Court ruled that state capital punishment statutes satisfied constitutional standards if they contained mechanisms to eliminate arbitrary imposition of the death penalty. In this respect, the statute has behaved quite like a northeasterly wind blowing at zero miles per hour: It has an interesting direction, elimination of arbitrary sentencing, but no real movement toward that end.

Two characteristics of the statute, the extremely broad definitions of various terms within the statute and the tenuous provisions for trial procedure, have fostered arbitrariness in New Jersey death sentencing. A study of some of the court's reversals will demonstrate exactly how arbitrary applications of the law manifest themselves and highlight the ambiguities in the statute itself. Although the 27 overturned cases might indicate that the court has strong opinions on the arbitrariness issue, the most compelling analysis is offered by Handler in his dissents. Following the analysis of the statute, an examination of some of the major state Supreme Court reversals will highlight exactly what kinds of problems result from the implementation of a flawed capital statute. Five cases in particular, *Ramseur(106 N.J. 123, 1987)*, *Biegenwald(106 N.J. 13, 1987)*, *Koedatich(112 N.J. 225, 1988)*, *Zola(112 N.J. 454, 1988)*, and *Gerald(113 N.J. 393, 1988)*, best illustrate the types of capricious errors that produce random death sentences. Once the statutory deficiencies and the problems they

cause are identified and explained, it should become clear that, provided New Jersey keeps the death penalty, a revision of the statute is in order. To correct against the arbitrary application of the death penalty, it is absolutely necessary that the entire statute undergo a clarifying and narrowing process. There are obviously several arguments against this type of legislative action, but a demonstrated precedent and need for this policy outweighs the opposition.

STATUTORY PROBLEMS

The fundamental purpose of the New Jersey statute is to establish a comprehensive terminology to effectively guide jury discretion toward a decision based more on rules and less on preference or whim. The dominant barrier to fulfillment of the statute's intent is best illustrated by the constitutional attack in *Ramseur* (106 N.J. 123, 1987). According to the opinion, the attack asserted that the New Jersey statute "does not sufficiently guide jury discretion in imposing the death penalty, that it allows for death to strike arbitrarily, discriminatorily, and unpredictably..."[1] The underpinning of this observation is that many terms in the statute are too broad to sufficiently narrow the class of people who are eligible to receive the death penalty, while others lack the structural components necessary to sufficiently guide the trial proceedings. In practice, the lack of a definitive boundary grants the jury a significant grey area in which its discretion can meander. The relevant terms in the statute under scrutiny fall into two distinct categories: one is the group of terms that defines the death-eligible class, and the other is the set of terms that comprise the "heinous" aggravating factor. A detailed analysis and discussion of both groups will bring to light the arbitrary characteristics of the statute.

Defining the Death-Eligible Class

As a group, the three qualifications for the death-eligible class, purposeful killings, knowing killings, and all killings resulting from infliction of serious bodily harm, define a class that is overly

[1] State v. Ramseur, 106 N.J. 166 (1987).

broad and inclusive. Justice Handler, in his *Ramseur* dissent, observed that "in effect, the statute encompasses all murders."[2] A comparison of the two classes defined by the old and new statutes elucidates the extreme broadness of the newly defined group. "The former murder statute prescribed the death penalty option only for first degree murder,"[3] whereas the new statute makes eligible all those persons who essentially know that their actions might result in death of the victim, and even some who aren't quite that sure.

If the intended purpose of the new statute is to narrow the class of death-eligibles, then it makes little sense to include people who would not have received capital punishment before the death penalty was eliminated. The disparity between the conditions of the two statutes is so large that, according to Justice Handler, the "state's homicide provision, standing alone, subjects to a possible death sentence defendants who, under the prior statute, would not even have been given a life sentence."[4] Furthermore, "under [the] prior statute even most first degree murder defendants were not subject to a death sentence."[5] Though the *Ramseur* opinion stated that there is "no duty to limit the number of individuals who are eligible for the death penalty,"[6] a larger pool of eligibles increases the opportunity for capricious application.

By constructing the defining factors of death eligibility so broadly, New Jersey capital law has taken a substantial leap backwards. Because there are now so many more eligibles to choose from, jury behavior will become more erratic. It is true that the prosecutors select the capital cases, however, there is a clear lack of effective prosecutorial guidelines, discussed later in this report, that also contributes to the arbitrariness of the statute. It is very likely that one jury may decide to sentence an individual to death, while another may choose to give a life sentence in very similar circumstances. This result is possible simply because the constraining factors do not effectively limit the eligible class

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2 State v. Ramseur, 106 N.J. 387 (1987).

3 Ibid.

4 Ibid, 389.

5 Ibid.

6 Ibid, 187.

and juries have much more ground on which they can base decisions. Without a narrower construction, it is less likely that juries will arrive at consistent results and more likely that the application of the sanction will be arbitrary because of the broadened class.

Vagueness of the Class Limiting Factors

The terms that define the class of death-eligible defendants not only pose problems as a unit, but create their own categories of ambiguity as well. "Purposely" is the least controversial of the three factors for it is the only one that legitimately satisfies the constitutional requirement of an "intent to kill." The true problem is the broadness of the other two factors, knowingly causing death or serious bodily injury resulting in death. The central problem with "knowingly" is that the distinctions between it and other relevant terms, namely "recklessly" and "purposely," are becoming increasingly blurred.

Justice Handler, in his dissent in *Gerald*(113 N.J. 40, 1988), points out that by leaving "knowledge" in the capital murder statute the court "homogenizes different states of criminal culpability."[7] It would be wrong to say that knowledge has become equated with purpose, for the difference between the two definitions is quite lucid. "A person acts *purposely* with respect to attendant circumstances if he is aware of such circumstances or he believes or hopes they exist,"[8] but "a person acts *knowingly* with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result."[9]

The distinctions here are dangerously blurred. It does not necessarily follow that if a person is practically certain of a possible result of his actions that he or she always wants that result to occur. In one case, the person *desires* that his actions result in a killing; in the other, the person knows his actions could result in death of the victim, but she does not necessarily *intend* for death to be the final result. It is possible to commit an act such as beating a person in the he d, knowing that the action

[7] State v. Gerald, 113 N.J. 185 (1988).

[8] State v. Ramseur, 106 N.J. 187 (1987) italics added.

[9] Ibid.

has a possibility of resulting in death but only intending to seriously debilitate the person by knocking him unconscious. This is especially true considering that people who intend to debilitate very rarely have the ability to temper the force of their blows in order to insure success without death. Masters of martial arts have the uncanny ability to knock an individual unconscious by applying pressure to specific points on the body; the average murderer does not. In order for a clear and necessary intent to be proven, the action employed must empirically demonstrate almost one hundred percent efficiency in its ability to cause death, such as a forcible snapping of the neck by turning the head 180 degrees with both hands or shooting a person through the back of the head. The act must also be one that is generally used to cause death. It is clear then that the two conditions involve a different degree of criminal culpability, but the court has interpreted them to contain no meaningful difference. The reality of the situation is that, as they are defined in the statute, the terms indicate two degrees of culpability separated by a very minute difference. In order for the statute to be less arbitrary, the "knowing" term must be eliminated. This action will eliminate the blurred distinction between the two factors. Purposely should be the only factor potentially able to yield death so that only one degree of criminal culpability is recognized.

A major problem caused by the inclusion of "knowledge" in the capital statute, therefore, is that it becomes indistinguishable from "purpose." When there exists a "failure to distinguish, for purpose of punishment, those who intend the death of the victim from those who do not, [it] does violence to the basic principle [that] the more purposeful the conduct, the more serious is the offense, and, therefore the more seriously it ought to be punished."[10] Perhaps more severe, "knowledge" is already very close in meaning to the lesser condition of "recklessness." Blacks Law Dictionary 5th edition defines "recklessness" as "conduct evincing disregard or indifference to consequences under circumstances involving danger to life or safety of others." Handler observes that the "Court's rejection of any constitutional distinction between purpose and knowledge...thereby obliterates the distinction between knowledge and recklessness."[11] If it is determined that a particular actor

[10] State v. Gerald, 113 N.J. 70 (1988).
[11] Ibid.

recklessly caused the death of another, then he will most likely be charged with aggravated manslaughter, punishable by a ten to thirty year prison term. *Knowingly* causing a murder makes the actor eligible for death. The differences between the punishments for these two crimes are clearly very different, but the circumstances surrounding the two are nearly the same. Justice Handler points out that the only difference between the two circumstances "is a subtle one at best," for one entails "practical certainty of a result," and the other "conscious disregard of a substantial and unjustifiable risk of a result."[12] If an individual continues to beat on a victim with the practical certainty that the person will die, the attacker is, in a sense, acting with a conscious disregard of the risk of the person's death. The terms, "knowingly" and "recklessly," are essentially the same. The situation that will arise with respect to the continued inclusion of "knowledge" as a death-eligible factor is put best by Justice Handler in his dissent in *Gerald*:

> Hence, the inclusion of knowing murder as a capital offense creates a system that will of necessity function arbitrarily and irrationally because it cannot reliably or consistently exclude homicides that may constitute only aggravated manslaughter and, in terms of underlying criminal culpability, are not truly different from aggravated manslaughter.[13]

The problem here is that there is no real distinction between "reckless" and "knowing." The only way to correct this error is by eliminating the "knowing" factor from the death eligible class. The remaining term would therefor be "purposely," which is the only term that clearly satisfies beyond a reasonable doubt the "intent to kill" standard.

The other troublesome factor, the "injury resulting in death" clause, is identified and properly addressed in *Gerald*. The supreme court sufficiently narrowed the death-eligible class by explaining that "knowingly" causing injury resulting in death was insufficient cause for invoking the death penalty. There is essentially a large difference between intending to kill and intending to injure. As a

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[12] Ibid.

[13] Ibid, 189.

basis for its argument, the Court refers to Justice Handler's dissent in *Ramseur*, agreeing with the analysis that under the old statute, the capital class murders were very narrowly defined; under the new statute, however, the injury-type murder falls under the "'extraordinary breadth' of the class of murderers potentially subject to capital punishment."[14] If it cannot be proven beyond a reasonable doubt that the defendant intended to kill, then standards of constitutionality require that the defendant not receive the death sentence.

The underlying philosophy of the need to distinguish between factors is a simple hierarchy of responsibility. It is clear that the framers of the statute intended for there to be three degrees of death eligibility, all of which yielded a potential death sentence. "Purpose" occupies the position of highest culpability, while "injury resulting in death" indicates low culpability. Handler observes in *Ramseur*, however, that the policy of the state and of the court is that "capital punishment is an extreme sanction to be imposed in only the most egregious cases."[15] Accepting that this assertion is valid, allowing there to be three degrees of culpability resulting in possible execution goes against this philosophy. The fact that there are lesser degrees of culpability indicates that the death penalty is being imposed in cases that are clearly *not* the "most egregious"; it cannot be acceptable for a state to execute a criminal for an action that does not demonstrate the highest degree of culpability. Currently, the New Jersey statute implies that the three factors are essentially the same, but in reality, according to the definitions provided in the statute, they are remarkably different. A blurred distinction between the three degrees is dangerous to the fair and even-handed application of the death penalty, and cannot be tolerated or accepted.

The difficulties with the terms defining the death-eligible class indicate a need to reconsider what the constitutionality of the statute truly requires. It is noted in *Gerald* that there are "constitutionally required culpability standards regarding a capital defendant's intent to kill."[16] Under certain circumstances, "intent" standards might only allow "purpose" as an acceptable factor of death

[14] Ibid, 44.

[15] State v. Ramseur, 106 N.J. 390 (1987).

[16] State v. Gerald, 113 N.J. 46 (1988)

eligibility. However, the decision in *Gerald* indicates a strong trend toward the requisite constitutional standards. According to Justice Handler, "this narrowing of the scope [is] a significant step toward remedying the constitutional infirmities that burden the capital murder death penalty statute."[17] Notwithstanding the success in *Gerald*, however, there still remains a great need to narrow the class of death-eligibles even further in order to erect significant safeguards against arbitrary application of the death penalty. Capital punishment is the most severe sanction available and "should be reserved for actors exhibiting the most culpable mental states,"[18] but only the narrowest permissible scope of death-eligibles can guarantee this end.

Vagueness of Statutory Aggravating Factors

Another set of problems springs from the aggravating factors designed to narrow the death-eligible class down. Justice Handler once commented with regard to these factors by explaining that "once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty...[they are] then free to consider a myriad of factors to determine whether death is the appropriate punishment."[19] Among these factors are the terms delineated by the heinous factor, specifically, "depravity of mind, outrageously vile, wanton or inhuman, and aggravated assault." These terms, among others, have been designed to "narrow the broad definition [of murder]", but "are themselves so vague as to be either meaningless or all-inclusive."[20]

Herein lies the second internal problem of the capital punishment statute. The factors that are supposed to confine jury discretion during the penalty phase leave it virtually unbridled, increasing the possibility that the death penalty will be applied arbitrarily. If various juries have differing notions about what constitutes a wanton act or a depraved mind, then there is no guarantee that verdicts will be consistent regarding the "heinous" factor. In theory it may be acceptable for juries to think differently

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[17] Ibid.

[18] Ibid, 184.

[19] State v. Ramseur, 106 N.J. 359 (1987).

[20] Ibid, 384.

on certain issues. In death penalty practice, however,we must try to get as close as possible to absolute objective certainty. If a jury hands down a death sentence based on certain factors, most other juries should be able to look at the same factors and reach an identical conclusion. This is the guiding principle behind proportionality review, that punishments based on certain factors should be consistent across cases. If the statute cannot achieve this end, then the concepts of "guided jury discretion" and "proportionality" are effectively ignored.

The first and most obvious term that comes into question is "outrageously or wantonly vile, horrible or inhuman." The problem lies in the lack of a single, concrete definition for any of those words that will hold true in any or all situations. A style of killing that is wanton, vile, or inhuman in the eyes of one may seem rather tame in the mind of another. Only in the cases at the very extreme ends of the spectrum, such as murders involving mutilation of the body or excessive amounts of force prior to the victim's death, can most people come to an agreement on what is truly "heinous." Even when the circumstances of the case are very clear, and the evidence is well presented, the heinous factor is so vague that there is no guarantee that a juror will make an objective decision. Most likely, jurors will base their decisions on how "bad" they think the murder was and not on whether or not they think it fits the definitions in the heinous factor. The reason for this error is that our legal system assumes that presentation of evidence will make the ultimate verdict much clearer to the jurors. The problem with this assumption is that in capital trials the jury is asked to *apply* certain factors to the evidence and determine whether or not they are present, not solely to base their decision on the *existence* of the evidence. Because the factors have not been clearly defined, jurors are presented with an opportunity to apply their own discretion liberally, a procedure that violates an underlying principle of the New Jersey capital punishment statute: guided jury discretion. It is very true that the concept behind jury sentencing is to let jurors judge, but in cases where the death penalty is involved, the jurors must be guided in their discretion due to the finality of their decision. An obvious argument against this is that a system of appeals exists to correct against poor jury decisions. If we can eliminate

some of the need for appeals by perfecting the statute, however, then in the interests of a fairer process and unclogging the appeals system we should do so.

The aforementioned terms, "largely because they are so subjective and emotion laden, cannot, under the Eighth Amendment, limit the class of those eligible for the death penalty or provide a meaningful basis to distinguish the few who are to die from the many who are to live."[21] Although the design of the heinous factor is to separate the truly death-deserving crimes from those meriting long prison terms, it merely presents the penalty juries with an array of vexing questions. Because these terms expand and exploit the duty of the jury rather than constrain it, "they cannot...adequately define and limit the elements that the prosecution must prove...[or]...sufficiently channel the sentencer's discretion to eliminate, or at least to minimize, the possibility of arbitrariness, capriciousness, and discrimination."[22]

Also troublesome, though not quite as harmful in terms of arbitrary application, is the concept of "aggravated assault to the victim." Constitutional requirements of an intent to kill weigh heavily against the viability of aggravated assault as an aggravating factor. The most impressive analysis of the "intent" issue as it relates to aggravated assault comes from Justice Clifford's rendering of the court's opinion in *Gerald.* Clifford explains that aggravated assault, as defined by the legislature, is a second-degree offense punishable by five to ten years in prison. Interestingly enough, however, if an "actor commits an offense that is identical [to an aggravated assault] in all material respects except for the victim's unintended death,"[23] the actor becomes a prime candidate for capital punishment. Death as a possible consequence of aggravated assault is "grossly disproportionate," according to Clifford, "because the actor's conduct, mental state, and intended result in both instances are virtually identical."[24] The only difference between the two situations is "the victim's fortuitous survival in one case and unfortunate demise in the other [which] cannot provide an adequate basis for

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21 Ibid, 400.

22 Ibid.

23 State v. Gerald, 113 NJ. 73 (1988).

24 Ibid.

subjecting one actor to a term of imprisonment and executing the other."[25] The dilemma of aggravated assault is parallel to the problem created by the similarity between "knowing" and "reckless" homicide. In each case, the two situations are virtually identical, but in one the actor receives a punishment grossly disproportionate to the nature of the crime. The negative externalities resulting from the application of the "heinous factor," specifically from aggravated assault, are deep-seated in the wording of the Model Penal Code. In its attempt to create a graduated scale of culpability, the framers of the statute have allowed for the blurring of terms rather than for their clear distinction. The framer's intent to reduce the amount of arbitrary sentencing by carefully graduating the types of offenses are ineffective, for they only enhance the capriciousness of the statute.

Perhaps the most controversial and pernicious term in the heinous factor is "depravity of mind." "Depravity" invites arbitrariness through its amazing flexibility, its similarity to the mental mitigating factor, and inability to properly guide jury discretion. Many of the terms in the statute are flexible in that they can apply to various situations, but not to the same degree with which "depravity" can change across situations. Depravity seems to possess the unique characteristic of non-applicability due to the most miniscule episodic changes.

Justice Handler draws out an extensive analysis of this principle in his dissent in *Ramseur*. He reflects upon a case in which the defendant shot a store clerk in the back twice with a shotgun. The number of interpretations of the event with regard to depravity of mind that Justice Handler is able to formulate is astonishing. The court hearing the case determined that "the murder was depraved...because the defendant had killed the victim without warning or provocation."[26] Handler then manipulates the situation slightly in order to facilitate a change in the depravity standard. If threats were exchanged by both parties, the murder might not be considered depraved because it would have been committed "not out of enjoyment but out of concern for personal safety."[27] Handler then points out that the situation could still meet the standards of depravity if the gunman's threat is interpreted to

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25 Ibid.

26 State v. Ramseur, 106 N.J. 401 (1987).

27 Ibid.

inflict psychological pain. Fundamentally, whether or not a particular murder is committed with "depravity of mind" depends entirely on the motive of the killer. Motives, however, are, according to Handler, "both innumerable and, ultimately, inscrutable."[28] "Depravity of mind," in the context discussed here, is perhaps the most ambiguous of all the terms in question. It is extremely flexible and can either be seen as present or absent depending on individual interpretations of the situation at hand.

Another problem with "depravity" is that it can be seen as present or absent depending upon how many witnesses there were and the content of their testimonies. If a murder is taped or described in detail by a witness, depravity is far more likely to be found than if there were no witnesses to the murder. The danger in this area is that two murders could be virtually identical in terms of the act, but the jury could find depravity existing in one case and not in the other depending upon how much they are told. If two murders are carried out in the same way then they should be treated the same way and not based upon how many gory details a certain witness can give. A factor as far-reaching and malleable as "depravity" is therefore dangerous when placed in the medium of concepts designed to narrow the class of death-eligible defendants.

The second contention to "depravity of mind" is that it closely resembles emotional or mental disturbance and presents a great risk of negative externalities against mitigating factors a) and d), thereby blurring the distinction between certain aggravating and mitigating factors. Mitigating factor a) applies when "the defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution" Mitigating factor d) applies when "the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution."

To better understand the premise of this argument one need only employ simple deductive reasoning. The commonly- accepted definition of "depravity of mind" in capital trials is that the

[28] Ibid.

murder was "committed out of enjoyment."[29] In *Biegenwald*, Justice Wilentz explained "depravity of mind" as entailing "no other reason...than wanting to kill."[30] In other words the criminal committed the act for the "thrill" of killing. In our society, then, where people are generally brought up taught that killing is "bad," we must ask ourselves what kind of person kills for the sake of enjoyment. A great percentage of the time, the answer is going to be a person who is disturbed to the extent that they cannot tell the difference between right and wrong. This type of person is very much like the person described in mitigating factors a) and d). These factors have been specifically designed to protect those who are mentally disturbed or diseased and cannot appreciate the wrongness of their own actions. If the same characteristics can be attributed to one who is guilty of killing with "depravity of mind," then there is a good possibility that a person who is clinically disturbed could be dubbed "depraved" and made eligible for capital punishment. The danger in this case is of a much higher degree than in the cases of "knowledge" or "aggravated assault" because it removes the ability of the defendant to claim either of the two important mitigating factors. When a blurring of distinction occurs between two factors of different type, aggravating and mitigating, the danger of arbitrary application increases, for two mitigating factors are removed while an aggravating factor is strengthened.

In order to better understand the similarity between "depravity" and the mental mitigating factors it is necessary to look at some hypothetical situations. If an individual is suffering from paranoid delusions of persecution and kills because of it, then the person did kill for the sake of killing but only because they were mentally disturbed. Enjoyment also should not constitute an aggravating factor if the defendant were disturbed to the extent that he or she truly believed their victim was evil or threatening and should be killed. In either case, the result of the exchange between mitigating and aggravating factors based on "depravity" is that, as explained by Handler, "society, which seeks to safeguard its citizens against arbitrary treatment by the state, responds to its most disturbed citizens by executing the depraved while acquitting the insane."[31]

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[29] Ibid.

[30] State v. Biegenwald, 106 N.J. 50 (1987).

The two parts of the statute in question, that which defines the boundaries of the death-eligible class and that designed to shrink those boundaries, are ineffective in terms of achieving their established ends. Their main purpose is to sufficiently limit the death-eligible class to only the most deserving of the state's most severe sanction, but they have actually expanded the group to many who would never have received death under the older, unconstitutional statute. State Senator John Russo commented that the New Jersey statute was intended to be "not as broad" as the legislation in other states in that "[i]t does not cover as many people as some of the other legislation."[32] A current statement should explain that the statute encompasses a great many more actions than some of the other legislation and that the only way for it to fulfill its original intention is to be seriously reconsidered and redefined with regard to the errors delineated in this study.

PROCEDURAL ERRORS

The other significant feature of the statute that opens the door to arbitrary application is its lacking of a clear and uniform procedure for courts to follow in capital trials. This structural deficit inherent in the legislation has taken many forms and has led to a great many arbitrary situations in which a defendant was given the death sentence as a result of significant inconsistencies in procedure.

Jury Instruction

The most common and most dangerous error caused by the lack of trial procedure in the statute is the giving of misleading instructions to the jury. In three of the five cases mentioned at the beginning of this report, *Ramseur, Biegenwald,* and *Zola,* lack of a clear trial procedure created situations in which the jury was given misleading instructions that resulted in severe misapplications of

[31] State v. Ramseur, 106 N.J. 401 (1987).
[32] State v. Gerald, 113 N.J. 79 (1988)

the death penalty. The phrasing of each set of instructions causes the respective defendant to lose the benefit of the doubt resulting in a misapplication of the death penalty.

In the first of the cases, *Ramseur*, the jury encountered difficulty in reaching a decision during the penalty phase. These troubles were conveyed to the court in a note which explained that the jury was currently unable to reach a unanimous verdict. Although the New Jersey statute provides for a non-unanimous verdict, the trial court "repeatedly attempted to persuade the deadlocked jury to reach a unanimous decision."[33] The error committed in this case is that the court failed to "reinform the jury that in capital cases the law permits the issue of penalty to be finally resolved by a non-unanimous verdict, and that a non unanimous verdict would result in imprisonment."[34] By failing in this endeavor, the court committed a prejudicial error and robbed Ramseur of "the very real opportunity to have had the jury return with a life sentence."[35] If the statute provided constrictive procedures regarding a jury that cannot reach a unanimous verdict, similar problems would never occur. The main source of confusion is rooted in the general idea of juries under the law. In most cases, not including capital trials, a non-unanimous verdict would constitute a mistrial. In capital cases, however, the penalty phase jury may reach a non-unanimous verdict without a mistrial. There is absolutely no reason why, as the court told the jury in *Ramseur*, there needs to be a unanimous verdict in penalty phase. A unanimous verdict is *only required for a death sentence*. In these special situations, the jury is doing as good a job as any other if it does not reach an absolute consensus, and should not be led to believe that they would be doing otherwise by reaching a non-unanimous verdict.

The jury error that occurred in *Biegenwald* has less to do with the jury's actual decision and more to do with the process of weighing factors. At the time of the Biegenwald trial, the language in the statute regarding how aggravating and mitigating factors were to be weighed against each other was very unclear. The court in this case instructed the jury to weigh all mitigating factors against each aggravating factor to determine if the former outweighed the latter beyond a reasonable doubt. Under

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[33] State v. Ramseur, 106 N.J. 160 (1987).

[34] Ibid, 305.

[35] Ibid, 458-9.

these circumstances, in the case of a tie it would likely be determined that the mitigators do *not* outweigh the aggravators and the sentence would be death. The opinion of the court found it "difficult to believe that the legislature found it fundamentally fair that a defendant be executed except where the mitigating factors outweigh the aggravating factors."[36] The opinion continues to clarify the situation by explaining that "if anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors outweigh mitigating factors, and this balance be found beyond a reasonable doubt."[37]

In 1984, State Senator Russo introduced a bill , passed by the legislature, whose purpose was to "clarify that aggravating factors must outweigh any mitigating factors in order for a death sentence to be imposed."[38] As a result of the clarification bill, court and jury confusion on how to weigh these factors should never occur again. The success of the bill highlights the need for legislative clarification of the entire statute.

A similar call for clarification occurrs when the trial court simply reads the statute to the jury in order to instruct it on the procedure regarding weight of mitigating factors. The opinion of the court stated "that a court must do more than read the words of the capital punishment act when charging the jury on the mitigating factors indicated or implied by defendants evidence. Since most jurors are untrained in statutory interpretation, instructions that merely recite verbatim the language of the Act are generally inadequate."[39] In theory, the argument of the opinion is acceptable on the grounds that "the requirement that capital sentencing must not preclude consideration of relevant mitigating circumstances would be hollow without an explanation of how the evidence can mitigate the imposition of the death penalty."[40] In practice, however, the opinion of the court falls on its merits. It is true that the jury must be made to understand how the process of mitigation works, but it is unfair to shift that burden onto the trial court. Because the language of the statute is very unclear, the trial court is

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36 Ibid, 61-2.
37 Ibid.
38 Ibid, 64.
39 State v. Zola, 112 NJ. 75 (1988).
40 Ibid.

presented with the difficult duty of interpreting it for the jury. This duty should be passed to the legislature in the form of clarification of the actual statute. Most, if not all, judges who hear capital cases understand the language of the statute, but their individual interpretations of that language tend to differ. In order to combat this the legislature should add to the statute a uniform set of jury instructions. This process eliminates the problem of variety of interpretations among the trial courts which gives juries slightly different ideas about how the law should be applied.

Also problematic regarding aggravating and mitigating factors were the "trial court's instructions requiring that the jury unanimously agree on the existence of any mitigating factors."[41] The instructions in this case erred in the same way as the weighing procedure instructions, because they call into question the importance of mitigating factors. The opinion of the court in this matter explained that "it would contravene the logic of the Act for a jury to agree 'unanimously' on a sentence of death where even a sole dissenter believes there is at least one mitigating factor present not outweighed by the aggravating factors."[42] The benefit of the doubt in capital trial situations should be given to the mitigating factors. If preference is granted to aggravating factors then the entire purpose of the new statute, to limit the class of death eligibles, would be negated. To be certain that mitigating circumstances take precedence over aggravators, all parts of the statute concerning these factors must be clarified to this effect. The legislature must take care to produce a set of instructions for the jury that outlines its duties very clearly. There are several ways to approach this idea which will be discussed in the policy recommendation portion of this report.

Prosecutorial Guidelines

The problem of non-uniform prosecutorial guidelines rears itself in *Gerald* in the context of a concern raised by Justice Handler. Handler points out that the case is "further illustrative of the

[41] Ibid, 76.
[42] Ibid, 76-77.

propensity toward disproportionality that inheres in uncontrolled prosecutorial discretion."[43] Handler initiates this argument as a response to prosecutorial plea-bargaining with two of Gerald's accomplices, but continues it as an attack upon unbridled prosecutorial conduct throughout the state. He notes that there is a "clear differential in prosecutorial practices in [New Jersey's] various counties...[which] suggests that a 'death possible' case [is] much more likely to be prosecuted as death-eligible in certain counties than in others."[44] The indicated differences in prosecution across counties poses a potential threat to the safeguards against arbitrary application. Defendants who are relieved of death-eligibility as a result of plea-bargaining receive an unfair advantage that all other capital defendants can not attain. The arbitrariness in this case does not come from the trial procedure but from the way in which capital cases are selected. For various reasons, political, financial, or even social, prosecuting attorneys may or may not decide to prosecute individuals for capital murder. The possibility that a person might be prosecuted for a capital crime while an individual who committed a similar crime might not is tantamount to the problem of defendants in similar situations receiving different sentences from different juries and should be dealt with similarly.

In his attack on unchecked prosecutorial action, Handler refers to a study conducted by Leigh Bienen, Assistant Deputy Public defender, and Neil Alan Wiener, Senior Research Associate at the Sellin Center for Studies in Criminology and Criminal Law at the University of Pennsylvania. The study, "the Reimposition of Capital Punishment in New Jersey: Homicide Cases From 1982-1986," pointed to an inter-county disparity in the percentage of death-possible cases prosecuted as death-eligible. Differences exceeding 50% were discovered between certain counties. In terms of actual numbers, however, the study showed "273 cases in which the prosecutor had a factual basis for seeking the death penalty but declined to do so... [suggesting] that there are no uniform prosecutorial standards."[45] A lack of such standards necessarily leads to many cases where homicides are not "being prosecuted [on] the basis of the nature of the crime and the defendant."[46] In order for capital

[43] State v. Gerald, 113 N.J. 200 (1988).
[44] Ibid, 201.
[45] Ibid, 206.
[46] Ibid.

defendants to be treated on equal footing with defendants in other counties, a section governing prosecutorial conduct must be amended to the statute or else "unchecked discretion will continue to lead to unacceptable and anomalous results,"[47] an end that is counterproductive to all provisions of fairness in New Jersey capital law. It is true that certain guidelines were introduced after *Koedatich*, however even these guidelines are not specific enough to create an effective check on prosecutorial action and should be amended.[48]

POLICY RECOMMENDATION

The problems with the statute that have led to arbitrary applications of the death penalty are clearly manifold. They range from problems with defining the death-eligible class to instructing the juries and properly guiding their discretion. The solution to these problems, however, is not as straightforward. An obvious policy choice could be to eliminate the death penalty once and for all. If there is no death penalty in New Jersey, logic dictates that there could be no arbitrary application of it. Repeal of the statute is not, however, a solution that would be very palatable to the people of New Jersey or the legislature itself. Therefore, in order to prevent further capriciousness the statute itself must be revised rather than repealed.

Effective renovation of the statute must be taken in four steps. The first must entail a change in the death-eligibility standards. Currently these standards are so broad that they can include people who neither intended to kill nor would have been eligible under the previous statute. The defining terms must be narrowed to effect a less arbitrary system. The second step would include a change in the

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[47] Ibid, 201"

[48] "Prosecutorial Guidelines." Albany Law Review 792-3 Vol. 54, No. 3/4 (1990).
There are 7 guidelines. Each one gives more and more discretion to the prosecutor. 1) Prosecutor sets up committee to determine death-eligibility. 2) Prosecutor must be satisfied that defendant can be found guilty beyond reasonable doubt. 3) Prosecutor must be satisfied that defendant acted purposely or knowingly. 4) Prosecutor must be satisfied that there is proof beyond reasonable doubt of at least 1 aggravating factor. 5) Prosecutor must consider all possible mitigators. 6) Prosecutor must be satisfied that the state can find aggravators to outweigh mitigators. 7) Prosecutor may withdraw statutory notice at any time during the trial.

aggravating factors. Currently there is far too much subjectivity in the language of the factors. One of the main principles of death penalty constitutionality is "guided jury discretion." As they are now, the aggravating factors give the juries too much room to interpret the circumstances of the murder. Whereas the jurors is supposed to apply certain standards to see if they match up with the crime, they are given the opportunity to interpret these standards very broadly and to apply them in different ways. The jury's discretion is unbridled in this scenario. The third step would set up a uniform code of jury instruction. As long as the trial courts are forced to come up with various interpretations of the law and explain them to the individual juries, there can be no consistency in capital sentencing. The lack of consistency would lead directly to arbitrariness in capital punishment application because various juries could be led to apply the same law to similar crimes in vastly different ways. As long as judges are able to give different sounding interpretations of the law, the previous scenario is extremely possible. The final step should deal with amending the prosecutorial guidelines. If the guidelines remain as they are, then prosecutors will be able to use unchecked discretion when choosing capital cases. If this persists capital sentencing will grow to be very disproportionate because many people may not even be tried for a capital crime while others who commit similar or even lesser murders will be. This four plank plan may not solve the problem of capricious sentencing entirely, but it will definitely bring New Jersey closer to a fairer and less erratic death penalty system.

The first part of the proposal targets the ambiguities in the death-eligibility defining factors. The essential problem with these terms, as explained earlier in this report, is that there is too much blurring of the culpability degrees among the different crimes. The first blur occurs between "purpose" and "knowing," while the second lies between "knowing" and "reckless." The best way to eliminate the muddled distinction between the closely related factors is to narrow them down to one. In order to do this it is necessary to look to the constitutionality standards of state death penalty statutes. In order for a person to be eligible for a state death penalty the defendant must have had an "intent to kill." Therefore, the only standard that should be applied must be one that entails this

intent. "Purpose," as it is defined in the statute, comes very close to meeting this standard. If the definition is modified slightly to read that "a person acts *purposely* with respect to attendant circumstances if he is aware of such circumstances and intends for his or her actions to yield those circumstances, namely the death of the victim," then the intent standard can be effectively met. This definition would also prevent a blurring between "purpose" and "knowing" because if the person is convicted of knowing homicide then it will have been established that the defendant was "practically certain that his conduct will cause such a result." Intent, however, is not necessarily proven in this case because it is not certain that the actors motive was to cause death. All that is known is that the actions undertaken by the defendant were those which *can* cause death, but not that the defendant intended them to. The one eligibility factor will also nearly eliminate the chances for a person who committed reckless homicide of receiving capital punishment, which is extremely likely under the current system.

Plank two of the plan necessitates an extreme narrowing of the aggravating factors which will eliminate the existence of subjective and emotion laden terms. In his dissent in ***Ramseur***, Justice Handler explains that the "legislature must provide a standard of sufficient definiteness to limit the discretion of courts and juries. Experience demonstrates that the terms 'heinous, atrocious or cruel' 'depravity of mind,' and 'outrageously vile, wanton or inhuman' cannot perform this function."[49] Because these words exist in the aggravating factors, jurors are given the opportunity to define them for themselves and judge how "bad" they feel the murder really was. This type of scenario destroys the reason for having aggravating factors at all which is to apply straightforward standards to the act to see if the are present and whether or not they outweigh any mitigators that have been found. If jurors are allowed to come up with their own interpretations of these factors then there can never be actual unanimity in the decision because each of the jurors will be weighing different factors. Combating this problem requires a statute that features fewer and more objective aggravating factors. The list of aggravators should consist of only three: previous murder record, whether or not the victim was a

[49] State v. Ramseur, 106 N.J. 400 (1987).

public servant charged to enforce or protect the law, and whether or not the defendant paid for, or was paid to commit the murder. Previous murder record will help to establish the defendants propensity to kill again which is necessary in deciding upon life or death. The public servant factor is also necessary because it helps to explain that the murder was committed against someone who is paid to defend the law. Whether or not the defendant paid or was paid is likewise important because it strengthens the intent standard and demonstrates excessive contempt for human life. All of the other factors involved are either too subjective or lead the jury away from the idea of intent. The felony murder aggravator, for example, clearly denies the act as more wrong because it was committed during another crime, but it does not entail an intent to kill. Many times while committing a felony a criminal may kill out of surprise, anxiety, or fear, but using this as an aggravator leads the jury away from the idea that intent is a requisite factor.

Along with the change in the aggravators a single standard mitigating factor seems to be in order. In many cases it is possible for there to be no mitigating factors found by the jury. In these cases whether or not the defendant receives death is strictly mathematical. When this occurs, the jury may see its job as simply checking factors off on a list and then weighing them against no mitigators, leading them to an obvious verdict for capital punishment. There should be a mitigating factor that gives the defendant some benefit of the doubt in these cases as well as force the jury to realize the degree of its responsibility. A factor that explains that "the defendant, like the victim, is a human being and that a unanimous decision for death would be deciding that the defendant no longer deserves to live would achieve both of these ends. The jurors probably know this anyway, or have had it explained to them somewhere along the line, but it is something that needs to be in their minds during penalty phase in order to insure fairness to the defendant.

The third part of the plan will help to eliminate jury error with regard to instructions. Similar to the way in which jurors can come to different conclusions about various aggravating factors, judges may reach different conclusions about how the law should be explained to the juries. The problem, therefore, requires a similar solution. The legislature should develop a uniform code of jury

instructions, portions of which should be read to the juries at different points during the trial. Because there are many instances where the court may be required to read instructions to the jury, this report will not include a comprehensive set. However, several guiding principles can be employed to aid in the creation of the set. Essentially, the jury must be made aware of all the important distinctions between capital trials and other trials. The jury must always understand that in the penalty phase of the trial a non-unanimous verdict is acceptable. The jury must also be made aware of their high degree of responsibility and of the finality of their decision. These and any other factors elucidated by the legislature must be integrated into a uniform set of instructions in order to help eliminate jury error and clarify the jury's unique responsibility.

The final plank of the plan deals with an area of arbitrariness that has gone relatively undetected because it deals with events before the murder ever goes to trial. The prosecutorial guidelines governing the designation of trial procedures give the attorneys an opportunity to select capital trials on whims. It is true that the guidelines state that if the case has all the makings of a capital trial, then it shall be designated as such, but whether or not a case has those ingredients is to be determined by the prosecutor. This creates a scenario in which a prosecutor may reject a case outright or not even try it as capital even if it should be according to objective standards. The only way to solve this particular problem is to designate another body that will determine whether or not a case should be tried as capital. This body should be set up by the legislature to review murder cases in accordance with the prosecutorial guidelines. If a case is determined to have capital possibilities, then it should be advocated that it will be tried as capital by some prosecutor. In this way the legislature will be able to prevent against the disproportionality of cases that go to capital trial.

A second guideline that should be enacted is one that deals with accomplice plea-bargaining. In some cases, specifically *Gerald*, the prosecuting attorney arranged plea bargains with two of the accomplices in order that they testify against Gerald. The problem in this case is that it was not certain that one of the accomplices was not the murderer, however, because the prosecutor was allowed to plea bargain, the accomplices were partially relieved of culpability. Prosecutors should not be allowed

to strike bargains with accomplices, especially when the possibility exists that the accomplice might have committed the actual murder. All of the criminals involved should be tried for the murder and the jury should decide which, if not all, of the defendants perpetrated the act.

In light of this plan, there have been arguments raised highlighting a danger in giving the statute a more rigid construct. In *Ramseur*, the court opinion indicates this apprehension by referring to a United States Supreme Court decision. The opinion explains that the "[United States Supreme] Court made clear that there are also constitutional restraints on the degree to which a capital jury's discretion may be controlled."[50] In several cases the Court invalidated death penalty statutes because they "provided for a mandatory death sentence in certain circumstances upon the jury's return of a guilty verdict."[51] In the case of New Jersey, however, the extent of the clarification would be strictly definitional. Under no circumstances would the new statute require a death sentence in any case. The recommended narrowing construction would simply provide for a clearer and smaller death eligible class, and a considerably less vague heinous factor. Nor would the jury instructions or prosecutorial guidelines mandate a death sentence in any situation. If a legislative reconstruction and clarification of the capital statute does not eliminate all of the problems addressed in this report, it will, at the very least, provide for a fairer and significantly less arbitrary system of capital punishment.

FINAL THOUGHTS

When the United States Supreme Court upheld the constitutionality of the new New Jersey capital statute, it was unclear whether or not the new law could eliminate the arbitrariness of the old. It is now obvious that the purpose was never fulfilled. Aside from the fact that the new statute creates a broader class of death-eligibles than the old, the most serious deficiency within the law is that can

[50] Ibid, 83-4.
[51] Ibid.

potentially allow people to die who lack the intent to kill. This is not only unconstitutional, but also irrational, unfair, and arbitrary in all respects. Justice Handler explains it best in his *Ramseur* dissent when he writes:

> No court statute should replicate the irrationality that goes into the decision to murder a person. While it is irrational and arbitrary that one can murder another, it is also arbitrary that a legal system could allow the range of those to die to be so broad. The difference between the value that the Constitution places on life itself and the value that a murderer places on the life of his victim is blurred when the state allows people to be executed trough arbitrary proceedings.[52]

The only way to eliminate the vagueness, the unchecked prosecution, the broadness of the death-eligibles, and the arbitrariness of the application of the death penalty, without actually repealing the statute itself, is to narrow the entire statute down. Only by redefining the death-eligible class, taking more control of jury discretion, and setting up more procedural guidelines, will New Jersey have a chance to make its statute truly constitutional. New Jersey can no longer accept statutes that are able to be so broadly interpreted by jurors as well as judges. As long as there are allowances for individuals to receive death without having displayed an intent to kill, decisions will continue to be made by the unbridled discretion of the jury and there will be far to many cases of people receiving death on the whim of another. The original direction of the statute was to lead New Jersey out of the arbitrary capital punishment era. Up to this point, the statute has provided no impetus for the state to move toward that end. A surgical restructuring of the statute will provide the stimulus necessary for the winds of change to blow New Jersey out of the capricious rut in which it has been mired for far too long.

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52 Ibid, 468.

BIBLIOGRAPHY

Books and Articles

Lockhart, William B. Constitutional Law: Cases- Comments: Questions. St. Paul: West Publishing Co., 1980. 594-613

"Prosecutorial Guidelines." Albany Law Review 792-3 Vol. 54, No. 3/4 (1990).

Cases

State v. Gerald, 113 N.J. 393 (1988);

State v. Zola, 112 N.J. 454 (1988);

State v. Koedatich, 112 N.J. 225 (1988);

State v. Ramseur, 106 N.J. 123 (1987);

State v. Biegenwald, 106 N.J. 13 (1987);

The Death Penalty and the Mentally Retarded Defendant: Diminished Culpability and Inadequate Safeguards by Nalini K. Pande

INTRODUCTION

In 1989, the Supreme Court ruled in *Penry v. Lynaugh* that mental retardation alone in capital cases, does not categorically preclude execution under Eighth Amendment standards.[1] The Court's decision not to impose a ban on capital punishment for the mentally retarded without a clear national consensus effectively placed this issue on the agendas of all state legislatures.[2] The following analysis serves to guide state legislatures in their understanding of this issue. This paper first attempts to evaluate the applicability of the death penalty for the mentally retarded. A discussion of the constitutional limits of capital punishment will be used to demonstrate that under proportionality standards of the Eighth Amendment, capital punishment for the mentally retarded is unconstitutional. These proportionality standards dictate that only the most culpable are deserving of the death penalty.[3] Evidence from experts in the field of mental retardation will show that all mentally retarded defendants by definition, lack the requisite culpability for the death penalty because of their reduced mental capacities. Also, retribution and deterrence, the two penological goals of capital punishment which must be met for the application of the death penalty to be constitutional,[4] are not served by executing the mentally retarded.

Writing for the majority in *Penry*, Justice O'Connor held that the existing system of individualized determination of culpability was adequate protection for mentally retarded defendants who do not meet the requisite culpability for the death penalty.[5] This paper will discuss the inadequacy of the insanity defense and mental mitigating factors of capital statutes as safeguards for the mentally retarded. Finally, this paper will demonstrate that inherent difficulties in presenting mental retardation as mitigating evidence at the penalty phase, prevent system adjustments as a viable solution. Consequently, a statutory ban on the execution of the mentally retarded is the only solution. A change in policy is necessary now. Current inaction by state legislatures reflects an acceptance of existing safeguards as sufficient protection for the mentally retarded. Other states should not wait to follow Georgia's unfortunate experience. In that state, only after a mentally retarded defendant was executed did the Georgia state legislature realize that this issue needed to be addressed.[6] An amendment to the capital punishment statute prohibiting the execution of mentally retarded defendants must be implemented.

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[1] *Penry v. Lynaugh* 109 S. Ct. 2934 , 2958 (1989).
[2] Phone interview with Professor James Ellis, Professor of Law, University of Mexico and President of the American Association on Mental Retardation, October 31, 1991.
[3] *Penry*, 109 S.Ct. at 2947 (citing *Lockett v. Ohio* 438 U.S. 586 (1978))
[4] *Gregg v. Georgia* 428 U.S. 153, 592 (1977).
[5] *Penry* , 109 S. Ct. at 2957.
[6] "Georgia to Bar Executions of Retarded Killers," The New York Times, April 12, 1988, A26.

EIGHTH AMENDMENT PROPORTIONALITY STANDARDS

Since the judicial reaffirmation of the death penalty in 1976, *Lockett v. Ohio* has focused analysis of the constitutional limits of capital punishment on the consideration of proportionality standards under the Eighth Amendment.[7] Proportionality embodies the principle that "punishment should be directly related to the personal culpability of the criminal defendant."[8] A criminal is therefore less culpable when his crime is attributable to "a disadvantaged background, or to emotional or mental problems."[9] That the Court has recognized varying degrees of culpability has protected the insane and the very young. Both fall into the category of "less culpable" and therefore do not face capital punishment even when their crimes are severe.[10] In *Ford v. Wainwright*, the Supreme Court held that the death penalty could not be applied to the insane. The death of someone who can understand neither the difference between right and wrong, nor why his actions constitute the application of the death penalty, does not serve the goals of capital punishment.[11] In *Thompson v. Oklahoma*, juveniles under sixteen were found to be "less mature and responsible than adults, and therefore, less culpable." [12] This parallel is not to suggest that the insane and the very young were protected for the same reasons. Rather, the point of this argument is to show that in both these instances, the Supreme Court recognized the fact that not all killers were alike in their degree of culpability and that diminished levels of culpability prevented the application of the death penalty.

The Issue Of Diminished Culpability

In 1989, *Penry v. Lynaugh* became the first case in which the Supreme Court was given the opportunity to clearly define the applicability of the death penalty to the mentally retarded. Yet, no new safeguards for the mentally retarded were created.[13] Writing for the majority, Justice O'Connor declared that mental retardation alone did not establish sufficient proof that the defendant did not have the requisite culpability.[14] Citing administrative difficulties, the Court could not "justify protecting such a large and ill-defined group" because inevitably some individuals within the group who were blameworthy would escape otherwise deserved punishment.[15]

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[7]Philip C. Berg, "Youth, Mental Retardation, and Capital Punishment," Harvard Journal of Law and Public Policy 13 (Winter 1990): 426.
[8]*Penry*, 109 S.Ct. at 2947 (citing *Lockett v. Ohio* 438 U.S. 586 (1978))
[9]*Id.*
[10]Rebecca Dick-Hurwitz, "*Penry v. Lynaugh*: The Supreme Court Deals a Fatal Blow to Mentally Retarded Capital Defendants," The University of Pittsburgh Law Review 51 (Spring, 1990) : 699.
[11]Dick-Hurwitz, p. 705 (citing *Ford v. Wainwright* 477 U.S. 399 at 409 (1986))
[12]Dick-Hurwitz, p.706 (citing *Thompson v. Oklahoma* 108 S.Ct. 2687 at 2698 (1988))
[13]Robert P. Gritton, "Capital Punishment: New Weapons in the Sentencing Process," Georgia Law Review 24 (Winter, 1990): 438.
[14]*Penry*, 109 S.Ct. at 2958.
[15]*Id* at 2957.

The issue of whether the mentally retarded should be executed in capital cases is a complex one. Mental retardation is a mental health condition.[16] A clinical perspective must be utilized in evaluating many of the subtleties that involve mentally retarded defendants within the criminal justice system. In *Penry*, a group of professional and voluntary associations representing professional opinions within the field of mental retardation submitted an amicus brief to the court with arguments declaring the execution of the mentally retarded unconstitutional. This brief was a consensus of professional conclusions regarding the applicability of the death penalty to the mentally retarded. Yet, it is clear from Justice O'Connor's opinion that the Court failed to recognize "the realities of retardation."[17] The Court reasoned that the heterogeneity of the mentally retarded population precluded a ruling that would categorically safeguard the mentally retarded.[18] Against evidence cited within the professional field on mental retardation, the Court concluded that "the abilities and behavioral deficits [of the mentally retarded] can vary greatly depending on the degree of retardation," and that a person with a lesser degree of retardation could still meet the degree of culpability necessary to warrant the death penalty.[19]

The Amici acknowledged that there is substantial variation among people with mental retardation.[20] However, all defendants with mental retardation have serious deficiencies in intellectual and moral reasoning, impulse control and strategic thinking.[21] Any person who is classified as mentally retarded must have "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior."[22] These disabilities "that accompany mental retardation are directly relevant to the issue of criminal responsibility."[23] They impair a mentally retarded defendant's "understanding of causation and [his] ability to predict consequences ... [which are] essential ingredients of culpability."[24] Therefore, it was argued that any mentally retarded defendant, regardless of his degree of retardation, will always have diminished culpability. This conclusion does not mean that the mentally retarded should escape responsibility for their crimes. Experts are not trying to solicit forgiveness or compassion in their argument on this issue. The Eighth

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[16]Peter K.M. Chan, "Eighth Amendment–The Death Penalty and the Mentally Retarded Criminal: Fairness, Culpability and Death," Journal of Criminal Law and Criminology 80 (Winter 1990): 1231.
[17]Dick-Hurwitz p.708.
[18]*Penry*, 109 S.Ct. at 2957.
[19]*Id.*
[20]*Penry v. Lynaugh*, "Brief of American Association on Mental Retardation, American Psychological Association, Association for Retarded Citizens of the United States, et al.," No. 81-6177, October Term, 1988, September 9, 1988, p.50.
[21]Salvador C. Uy, "From the Ashes of *Penry v. Lynaugh*: The Diminished Intent Approach to the Trial and Sentencing of the Mentally Retarded Offender," Columbia Human Rights Law Review 21 (Spring, 1990) : p.569-70.
[22]*Penry v. Lynaugh*, "Brief of American Association on Mental Retardation, (citing American Association on Mental Deficiency [now Retardation], Classification in Mental Retardation 1 (H. Grossman ed. 1983)).
[23]*Penry v. Lynaugh*, "Brief of American Association on Mental Retardation, p.46.
[24]*Penry v. Lynaugh*, "Brief of American Association on Mental Retardation, p.47.

Amendment argument of diminished culpability is not an appeal to sympathy. Instead, it is an appeal for a recognition of the real and practical effects of mental retardation.[25] In the opinion of these experts, mentally retarded defendants cannot be held to a degree of culpability that would justify death.

The arguments of these Amici should not simply be seen as biased. These arguments are based on documented expert opinion and research in the field of mental retardation.[26] The American Bar Association, in February, 1989, adopted the American Association on Mental Retardation's Amici Brief conclusions as official ABA policy.[27] By focusing on the heterogeneity of the mentally retarded population, the Court failed to comprehend that the classification of mental retardation itself sets a clear upper limit on the moral and reasoning ability of all mentally retarded defendants, regardless of distinct subcategories within this group of individuals.

RETRIBUTION AND DETERRENCE IN THE CONTEXT OF THE EXECUTION OF MENTALLY RETARDED DEFENDANTS

In determining whether the application of the death penalty to this particular class of people violates the Eighth Amendment, it is necessary to analyze whether the goals of capital punishment are served by executing the mentally retarded. The death penalty for the mentally retarded would violate the Eighth Amendment under *Gregg*, if it "made no measurable contribution to the acceptable goals of punishment and hence was nothing more than the purposeless and needless imposition of pain and suffering."[28] It would also be unconstitutional if the proportionality standards under *Lockett* were not met.

The two principal goals of capital punishment are retribution and deterrence.[29] Retribution is directly linked to the defendant's personal culpability.[30] *Tison v. Arizona* concluded that "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[31] Justice Brennan, in his dissenting opinion in *Penry*, agreed with the arguments of professionals within the field of mental retardation. He cited socioscientific evidence that the Amici provided concerning the limited psychological and emotional development of

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[25]Phone interview with Ruth A. Luckasson, Assistant Professor and Presidential Lecturer in Special Education, University of New Mexico, and Counsel for Amici Curiae for *Penry v. Lynaugh*, "Brief of American Association on Mental Retardation, October 30, 1991.
[26]*Id.*
[27]Terence F. McCarthy and Clifford D. Stromberg, Report on Resolution of Official American Bar Association Policy : (February 7, 1989), p.1.
[28]*Gregg v. Georgia* 428 U.S. 153, 592 (1977).
[29]Berg, p.426.
[30]*Penry v. Lynaugh*, "Brief of American Association on Mental Retardation, p.54.
[31]*Id,* (citing *Tison v. Arizona*, 107 S. Ct. 1676,1683 (1987).

the mentally retarded as the basis for his conclusion that the mentally retarded lack the requisite culpability for the imposition of the death penalty and therefore, society gains no retributive value from their execution.[32]

The real issue behind retribution involves the importance of vengeance within the society. Are some murders so brutal that their aggravating factors override any mental mitigating factors?[33] In 1980, Horace Dunkins Jr., a mentally retarded defendant, was convicted and executed for rape and murder in Alabama. Ed Carnes, head of the Capital Punishment Division of the Alabama Attorney General's Office and the lead prosecutor in the case, justified Dunkins' execution with the rationale that the victim, a "mother of four, is just as dead with Dunkins' IQ being just below 70 as she would have been had his IQ been five points higher." [34] Yet, the same argument would have applied to an insane defendant. This type of argument draws merely on the emotional disgust raised by the brutality of the crime itself. It does not refer to the limitations placed on the application of the death penalty under the Eighth Amendment. The mentally retarded are within the lowest 2% of the population in intellectual functioning and adaptive behavior.[35] The real argument the sentencing body should be asking is not that posed by prosecutor Ed Carnes, but rather whether state legislatures envisioned capital punishment to be applied to defendants with "the highest understanding of their crimes, as well as those with the lowest."[36]

The second goal of capital punishment is deterrence. The general deterrence theory is based on the reasoning that the execution of a mentally retarded defendant will serve as a warning to others.[37] Yet, the mentally retarded are so limited in their intellectual functioning that they lack the ability to contemplate the future, [38] and they cannot therefore engage in the cost-benefit type of analysis that would weigh the death penalty as a potential consequence of their actions.[39]

While the realistic fear of execution would not deter the mentally retarded from committing crimes, their execution could deter others who are not mentally retarded. Yet, even if executing a mentally retarded defendant is a deterrent for others, it is necessary to recognize the implications of this execution on the integrity of the sentencing system. There are two main justifications for prohibiting the execution of the mentally retarded. The above discussion has focused on the point of view of the sentencer in which execution of the mentally retarded cannot be justified because it

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[32]Gritton, p. 443 (citing *Penry*, 109 S. Ct. at 2962).
[33]Gritton, p.443.
[34]Charles-Edward Anderson, "Low-IQ murderers: States Seek Executions of Mentally Retarded Convicts," American Bar Association Journal 75 (October, 1989): p.26.
[35]Phone interview with Deborah Spitalnik, Ph.D, Associate Professor of Clinical Pediatrics, Executive Director of University Affiliated Program of New Jersey in Mental Retardation and Developmental Disabilities, October 31, 1991.
[36]Phone interview with Professor James Ellis, October 31, 1991.
[37]Edward Miller, "Executing Minors and the Mentally Retarded: The Retribution and Deterrence Rationales," Rutgers Law Review 43 (Fall 1990): 48.
[38]Miller, p.49.
[39]Gritton, p.441.

violates Eighth Amendment standards. The second reason concerns the point of view of preserving the integrity of the criminal justice system. To impose a punishment of death on a person who has a limited understanding of his crime is irrational on the part of the sentencing system. The sentencing system must be "structured so that society will feel comfortable in relying on products of that system."[40] How can society rely on a criminal justice system that would execute a mentally retarded defendant who lacks a clear level of culpability? The deterrence theory simply cannot serve as a rationalization for an unfair system. For example, a racist sentencing system might still function as a deterrent to others. Yet, can deterrence be justified as an excuse for this type of system, especially "when there is no affirmative case whatever for the reality of the deterrence effect?"[41] The value that society places on a rational and just system far outweighs the deterrence value of executing the mentally retarded.

DETERMINING STANDARDS OF DECENCY: THE ROLE OF THE STATE LEGISLATURE

Under the Eighth Amendment standards set by *Lockett* and *Gregg*, capital punishment for the mentally retarded could have been held unconstitutional. However, in *Penry*, Justice Justice Scalia argued that "a punishment has never been invalidated on that basis alone." [42] Scalia focused on another component of Eighth Amendment analysis. This component originated with *Trop v. Dulles* which recognized that since the definition of cruel and unusual was imprecise, interpretations of the Eighth Amendment should reflect "evolving standards of decency marking the progress of a maturing society." [43] Taking a federalist approach, Justice Scalia maintained that the true role of the court was "to determine what societal standards of decency are and not to engage in analysis of what they should be." [44]

Certainly, the role of the Supreme Court is not to legislate from the bench. Justice Scalia insisted that the analysis of proportionality standards should be subordinated to a national consensus on this issue. Why, then were many opinion polls opposing the execution of the mentally retarded, that were cited by the Amici, not used by the court in determining this consensus. A national poll by Louis Harris and Associates in 1989 showed that 70% of all Americans opposed the execution of the mentally retarded.[45] Professional polls in Texas, Florida and Georgia reported similar results. A 1988 Texas poll found that although 86% were in favor of the death penalty, 73% opposed executing

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[40]Phone interview with Michael Mello, Professor, University of Vermont, November 25, 1991.
[41]Charles Black, Capital Punishment: The Inevitability of Caprice and Mistake, (New York: W.W. Norton and Company, Inc., 1974), p.28.
[42]Gritton, p.443 (citing *Penry*, 109 S. Ct. at 2962; *Stanford*, 109 S. Ct. at 2989-90).
[43]Gritton, p.427 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))
[44]Gritton, p.443 (quoting *Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989)).
[45]Washington Post, January 11, 1989, page A6 (reporting national poll by Louis Harris and Associates).

the retarded.[46] A recent Amnesty International survey found that in Florida, 71% were against executing a mentally retarded defendant, while only 12% were in favor. [47] Finally a recent poll in Georgia showed that 66% opposed the death penalty for the retarded with only 17% in favor.[48] What is most remarkable about these polling results is that a majority of those who support the death penalty, oppose it for the mentally retarded. Furthermore, polls have shown that more people oppose the death penalty for the mentally retarded than for persons under eighteen. [49]

These opinion polls indicate strong public opposition to executing the mentally retarded. Yet, the court failed to consider these polls as sufficient indication of a national consensus. Furthermore, neither the passage of the Federal Anti-Drug Abuse Act of 1988 nor Georgia's enactment of a statute banning the execution of the mentally retarded, convinced the court that legislative trends were emerging to create a national consensus. While the court could have justified a ban on the execution of mentally retarded by focusing on national polling statistics, the court instead ruled that only state statutes and actions of sentencing juries could be the basis for determining society's "evolving standards of decency."[50] Justice O'Connor inferred that the present inaction by state legislatures on this matter reflected the acceptance of existing safeguards as sufficient. However, most legislatures have not even considered a bill prohibiting the execution of the mentally retarded simply because the possibility of executing a mentally retarded person has not yet become an immediate reality, not because there is a general acceptance amongst states of existing safeguards.[51] In *Penry*, the court essentially shifted the responsibility for evaluating these "evolving standards" from the federal level to the state level, placing this issue on the agendas of all state legislatures.[52]

Existing Safeguards

What existing safeguards now exist for the mentally retarded defendant in a death penalty case and are these safeguards sufficient protection, given the disabilities of a mentally retarded defendant? If present safeguards do insure that standards under the Eight Amendment are met, then the current system achieves the same goal that a statutory or constitutional ban on the execution of the mentally retarded would have. The additional safeguard of a statutory or constitutional ban would therefore not be necessary. In *Penry*, Justice O'Connor held that the existing system of individualized

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[46]Gamino, "73% in Texas poll Oppose Executing Retarded Inmates," Austin American-Statesman, November 15, 1988.
[47]*Penry v. Lynaugh*, "Brief of Petitioner," No. 81-6177, October Term, 1988, September 9, 1988, p.33 (citing a recent Amnesty International poll).
[48]*Penry v. Lynaugh*, "Brief of Petitioner," No. 81-6177, October Term, 1988, September 9, 1988, p.33 (citing a recent poll by Center for Public and Urban Research, Georgia State University).
[49]U.S. Congress, Senate, Committee on the Judiciary, Testimony of James W. Ellis, President, American Association on Mental Retardation, September 27, 1989, p.3.
[50]Berg, p.424.
[51]*Penry v. Lynaugh*, "Brief of American Association on Mental Retardation, p.53.
[52]Phone interview with Professor James Ellis, October 31, 1991.

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determination of culpability on a case by case basis did provide adequate protection for mentally retarded defendants.[53]

The Insanity Defense and the Standards For Competency to Stand Trial

Justice O'Connor held that the insanity defense was one means of protecting the mentally retarded.[54] This conclusion, however, merely represented "her misunderstanding of mental retardation by confusing it with mental illness," which is the basis for the insanity plea. [55] In New Jersey the test for criminal insanity is set forth in N.J.S.A. 2C:4-1, which provides:

> "A person is not criminally responsible if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong." [56]

Only a severely retarded defendant would be protected by the insanity defense. A severely retarded defendant's inability to "understand his punishment and why he must suffer it" would be the basis for such protection.[57] Mild and moderate mentally retarded defendants do not have mental deficits that "manifest at the level that would qualify for the insanity defense." [58] Mental retardation does not fall under the category of mental illness. Mental retardation is "a learning deficiency, whereas mental illness is a thinking disorder."[59] The mentally retarded may exhibit some deficiencies in understanding moral concepts and impulse control. However, unless the defendant is severely mentally retarded, these deficits affect defendant's culpability by limiting his understanding of his crime, not his ability to plea the insanity defense. The insanity defense is simply too narrow to fully protect all mentally retarded defendants.[60]

Furthermore, only severely retarded defendants would be declared incompetent to stand trial. In New Jersey the standard for determination of competency to stand trial has been codified in N.J.S.A. 2C:4-4 and is defined by: whether the defendant "lacks [the] capacity to understand the proceedings against him or to assist in his own defense."[61] To be found competent to stand trial, the

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[53]*Penry*, 109 S.Ct. at 2957.
[54]Uy, p.576 (citing *Penry*, 109 S. Ct. at 2954).
[55]Uy, p.576.
[56]*State v. Worlock*, 569 A.2d 1314, 1317 (1990).
[57]Dick-Hurwitz, p.705.
[58]Uy, p.577.
[59]Uy, p.577 (citing Hermann, Sentencing the Mentally Retarded Criminal Defendant, 41 Ark. L. Rev. 765, 771 (1988)).
[60]Uy, p.577.
[61]*State v. Jasuilewicz*, 501 A.2d 583, 591 (N.J. Super. A.D. 1985).

defendant must understand court proceedings and be able to assist his attorney in preparing a defense.[62] Yet, people with mental retardation "do everything they can to pass as so-called normal, ... struggling to maintain self-esteem by hiding their incompetence."[63] This type of behavior prevents competency standards from functioning properly for the mentally retarded. Johnny Penry did not know the days of the week, months of the year, how many nickels were in a dime, nor who was President. But during his competency hearing, he:

> "looked and sounded knowledgeable. When someone asked him a tough question, he looked serious, like one in deep thought, then said, 'Would you run that one by again?'"[64]

Furthermore, general competency standards are so low that they cannot really test whether the defendant truly understands court proceedings.[65] Only the severely retarded are protected by the insanity defense and competency standards. With, 90% of the mentally retarded falling in the category of mildly retarded,[66] it is clear that the majority of mentally retarded defendants would not be safeguarded by either the insanity defense or the standards for competency to stand trial.

Mental Mitigating Evidence

Justice O'Connor cited the ability to present mitigating evidence at the penalty phase as a second safeguard for the mentally retarded. Does mitigating evidence allow the sentencing body to effectively treat a mentally retarded defendant as a "uniquely individual human being" and then impose a sentence which "reflects a reasoned moral response to the defendant's background, character, and crime?"[67] Mitigating circumstances can be defined to include any aspect of a defendant's character, background, record, offense, or other circumstances presented by the defendant that, "although not constituting an excuse or justification for the crime, might serve as a basis for a sentence less than death" by reducing the defendant's moral culpability.[68]

New Jersey has a guided discretion statute which essentially sets out the procedural instructions in a capital case. The court in *State v. Price* described the New Jersey statute as "a death penalty scheme ... [that allows] an informed, focused, guided inquiry into the question of whether

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[62]Robert Perske, Unequal Justice (Nashville: Abingdon Press, 1991), p.21.
[63]Perske, p.19.
[64]*Id.*
[65]Phone interview with Bob Obler, Criminal Defense Lawyer, previous Public Defender in New Jersey, October 30, 1991.
[66]Phone interview with Assistant Professor Ruth A. Luckasson, October 30, 1991.
[67]Chan, p.1217 (quoting *Woodson v. North Carolina,* 428 U.S. 280, 304, 305 (1976)).
[68]Joshua N. Sondheimer, "A Continuing Source of Aggravation: Improper Consideration of Mitigating Factors in Death Penalty Sentencing," Hastings Law Journal 41 (January 1990) :413-414.

[defendant] should be sentenced to death."[69] However, these statutory procedures, which seen effective on paper, do not adequately "serve to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." [70] Many courts including the United States Supreme Court "currently display 'a marked aversion to information about how the death penalty works in practice ... because the operational evidence continues to contradict the rosy future the court predicted for capital schemes." [71] However, flaws in the system must be addressed. The punishment of death, with "its severity and irreversibility,"[72] cannot be inflicted without serious examination of the sentencing process.

Improper Consideration of Mental Mitigating Evidence

The heart of the problem concerns the improper consideration of mitigating factors in death penalty sentencing. In theory, improper sentencing occurs when defendants are denied their constitutional right to have all mitigating factors considered as mitigating evidence.[73] One critique of the existing sentencing procedure involves the likelihood of a "perverse application" of mitigating factors.[74] The source of this problem stems from the erroneous "assumption that aggravating and mitigating circumstances are readily distinguishable and amenable to categorization." [75] It is argued that when evidence of mental mitigating factors is introduced to prove a defendant's reduced culpability, this evidence is not given independent weight, but instead viewed by jurors as non-statutory aggravating factors.[76] Evidence of mental retardation should be seen by the jury as a mental mitigating factor. However, characteristics of mental retardation which include intellectual rigidity—an impaired ability to learn from one's mistakes and a pattern of persisting behaviors that continues even when the behaviors are seen as counterproductive, only convince jurors that the defendant will kill again and is therefore a threat to society.[77] This transforms mental retardation as a deficiency in the defendant's mental capacity, a mitigating factor, into perceived dangerousness and inability to reform, an

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[69]*State v. Price*, 478 A.2d 1249, 1254 (1984).
[70]*Id.*
[71]Joshua N. Sondheimer, "A Continuing Source of Aggravation: Improper Consideration of Mitigating Factors in Death Penalty Sentencing," Hastings Law Journal 41 (January 1990) :430 (citing Geimer and Amsterdam, "Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 AM. J. Crim. L. 1 (1988)).
[72]Miller, p.30 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).
[73]Sondheimer, p.409.
[74]Interview with Judy Borman, Public Defender in New Jersey, Princeton, New Jersey, October 9, 1991.
[75]Sondheimer, p.410-411.
[76]*Penry v. Lynaugh*, "Brief of Petitioner," No. 81-6177, October Term, 1988, September 9, 1988, p.16.
[77]*Penry v. Lynaugh*, "Brief of American Association on Mental Retardation, p.47.

aggravating factor. The theory that this mental deficiency is a threat to society causes jurors to conclude that any defendant with mental retardation should be executed, not spared.[78]

It is not uncommon for the state to "twist mental retardation in an attempt to create a certain human distance between the juror and the defendant."[79] By presenting the mentally retarded defendant as some sort of "monster", the state attempts to scare jurors into evaluating the future dangerousness of the defendant as well as to dehumanize the defendant. [80] In *State v. Pennington*, the New Jersey Supreme Court addressed the prosecutor's misconduct in advocating that the jury sentence the defendant to death because the defendant was likely to kill again. [81] The court ruled that since future dangerousness was not an enumerated aggravating factor, the prosecutor should not have made remarks suggesting that "voting to kill the defendant could ... protect the public, prison officials and other inmates." [82] Focusing on the defendant's potential threat to society was not part of the established aggravating and mitigating factors that the Legislature intended jurors to consider for a capital case. Consequently, Pennington's sentence was reversed. That the New Jersey Supreme Court was able to prevent a miscarriage of justice when the State improperly referred to the future dangerousness of the defendant, might give credence to the theory that the system is working. Yet, this opinion is exceptional.

Nationally, statistics show that as of 1989, between 10% and 33% of those on death row are retarded. The mental health professional's definition of retardation was used in determining retarded defendants as those with I.Q.'s of 70 or below.[83] This estimate by criminal justice experts is only a rough approximation because many inmates have never been evaluated.[84] Nevertheless, with only 3% of the population mentally retarded, it is clear that these statistics draw the conclusion that the number of defendants on death row who are mentally retarded is far above population parity. [85] With the probability of criminality amongst the mentally retarded proven not to be any different than that amongst the general population,[86] it is apparent that mental mitigating factors are not being applied in a way to safeguard the mentally retarded. Clearly, the system is not working. A disproportionate number of mentally retarded defendants have ended up on death row.

Without improper arguments by prosecutors, jurors have their own preconceptions of mental retardation. They often stereotype a mentally retarded defendant as a threat to society because they

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[78]Phone interview with Dr. Deborah Spitalnik, October 31, 1991.
[79]Phone interview with Assistant Professor Ruth A. Luckasson, October 30, 1991.
[80]*Id.*
[81]*State v. Pennington*, 119 N.J. 552, 584 (1990).
[82] *Id.*
[83]Linda Greenhouse, "Court Says Young and the Retarded Can be Executed," New York Times, June 27, 1989, A1.
[84] Peter Applebome, "2 States Grapple with Issue of Executing Retarded Men," New York Times, July 13, 1989, A12.
[85]Phone interview with Professor James Ellis, October 31, 1991.
[86]Ellis and Luckasson, "Mentally Retarded Criminal Defendants," George Washington Law Review 53 (1985) :426.

believe his retardation will always be a source of criminal and immoral behavior.[87] This belief stems from the early alarmist literature on mental retardation that "proclaimed that mentally retarded people were naturally destined to become criminals." [88] Evidence has shown that the probability of criminality amongst the mentally retarded is no different than that amongst the general population. Yet, this myth is still very much alive in the minds of the public, who then become jurors. Many people are simply scared of the mentally retarded defendant they see before them in the courtroom, and they believe that sentencing him to death will help solve what they perceive as an already formidable crime problem in the United States. [89]

Ultimately, problems involved with a jury trial of a mentally retarded defendant cannot be discounted. While the New Jersey Supreme Court can monitor prosecutorial misconduct, no court can effectively check what prejudices exist in the minds of jurors. Jurors are simply untrained in dealing with the information they are given in a capital trial.[90] The complexities of mental retardation can easily be misunderstood by jurors because of prior stereotypes and inaccurate inferences concerning mental retardation. Most jurors expect a defendant to exhibit remorse for their crime. However, the complexity of legal jargon often induces a mentally retarded defendant to detach himself from the capital trial. It is not uncommon for the mentally retarded defendant to simply stare at the ceiling while jurors listen to the prosecutor elaborate on the violence of the defendant's crimes. [91] Furthermore, the mentally retarded are anxious for approval, and often smile to attain such approval. However, they lack the judgement to understand when to smile. [92] When a mentally retarded defendant shows no remorse at times that jurors think are appropriate during the trial, and instead smiles,the jurors label him as vindictive and heartless.

Can laws ever prevent juror misconceptions of defendants? Certainly stereotypes of inner city black defendants are widespread. Jurors simply assume they are guilty.[93] Yet, inherent differences between how black defendants and mentally retarded defendants are regarded remain. The mannerisms of the mentally retarded in the courtroom do not dissuade the jurors from their stereotypes of them. Black defendants can appear composed and professional, remorseful and penitent at the trial. These mannerisms and demeanor may provide the jurors with new impressions and information that aid in dispelling their initial, stereotypical views. The mannerisms and behavior of the mentally retarded, as discussed above, often reinforce stereotypes of criminality and heartlessness—driving home the message to the jurors that the defendant must be guilty and deserves to be executed.

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[87]Ellis and Luckasson, p.417.
[88]Ellis and Luckasson, p.426.
[89]Phone interview with Defense Attorney Bob Obler, October 30, 1991.
[90]Dick-Hurwitz, p.723.
[91]Phone interview with Professor James Ellis, October 31, 1991.
[92]Perske, p.19.
[93]Phone interview with Defense Attorney Bob Obler, October 30, 1991.

In addition to this perverse application of mitigating evidence, there is another critique of the system of introducing mental mitigating evidence. This concerns the failure of courts to adequately guide juries in identifying and understanding expert testimony on mental mitigating evidence. Like most capital punishment statutes, the New Jersey statute lists eight aggravating and eight mitigating factors that the jury must weigh. Yet, juror understanding of these factors cannot be achieved from a mere listing of them. Would further substantive guidance help the jury in its ability to interpret and weigh these mitigating and aggravating circumstances in the way the legislature intended? Does juror understanding of the implicit complexity of mental retardation as a mitigating factor hinge on such guidance?

A POSSIBLE SOLUTION: ADDITIONAL GUIDANCE BY THE COURT

The ruling in *Spivey v. Zant* required judges to instruct the jury on mitigating circumstances so that they may achieve a better understanding of this type of evidence.[94] Within the New Jersey scheme, "judges put up a fight" [95] with defense counsels over this issue of elaboration and explanation of mitigating evidence for the jury. Perhaps supplemental jury guidance regarding penological justifications of capital punishment could be amended to state statutes to improve the existing sentencing system.[96] Required jury instructions that would inform the jury on the penological justifications of capital punishment might insure that no violation of the Eighth Amendment's prohibition of cruel and unusual punishment would occur. It is the intent of the United States Supreme Court that death sentences are applied in accordance with the principles of retribution and deterrence.[97] Sentencers could be given instructions regarding these principles and how they relate to mitigating and aggravating factors. Would the end result allow sentencers to "evaluate the evidence in accordance with the death penalty's underlying penological rationales?" [98]

If this proposal were in effect, a subnormal mental or emotional condition might be judged with more understanding. The relation between mitigating evidence and diminishing levels of culpability would be more clearly defined, with mental retardation reducing the degree of a defendant's culpability. Instructions would explain how the need for vengeance must decrease with lesser degrees of culpability. Furthermore, the jury could be instructed on how the deterrence value of capital punishment should diminish with the defendant's increasing inability to conform or appreciate the consequences of his actions under *Gregg's* Eighth Amendment doctrine.

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[94]Sondheimer, p.432 (citing *Spivey v. Zant*, 661 F.2d 464, 471 (5th Cir. 1981)).
[95]Phone interview with Defense Attorney Bob Obler, October 30, 1991.
[96]Sondheimer, p.431.
[97]Sondheimer, p.442.
[98]*Id.*

Inherent problems with this proposal however, rest with the fact that jurors simply do not understand how the retardation of a defendant relates to his crime. [99] Diminished levels of culpability will not be understood by a jury who believes that the mentally retarded defendant in front of them has a normal intellectual functioning. Defense counsel may cite the legal arguments that the mentally retarded lack the requisite culpability in a death penalty case. He may cite medical and psychological research describing how mental retardation reduces the defendant's culpability and ability to understand the consequences of his actions. Yet, what the jury is hearing, is not confirmed by what they see.

Most mentally retarded defendants try very hard to appear as normal as possible to conceal their mental deficiencies. This type of demeanor completely contradicts the jury's stereotypical expectations of the defendant as a raving lunatic. Many jurors erroneously infer that since this retarded defendant is competent to stand trial, he is able to take full responsibility for his actions and should be tried and punished as a "normal" person. Combine these different characteristics of mental retardation, and it is easy to see how the jury is likely to believe that a mentally retarded defendant is a cold, callous criminal who is a threat to society, and who appears to have normal intellectual thinking. Imposition of the death penalty on this type of defendant is not viewed as "cruel or unusual" by the jury.[100] Further problems ensue because "overworked court appointed lawyers in capital cases seldom have the time, knowledge or resources to adequately document mental retardation" or even recognize their client's retardation.[101] Guidance concerning penological justifications of the death penalty will not act as an adequate safeguard if the jury cannot be educated about the defendant's mental deficiencies.

Additional guidance for jurors in understanding mitigating factors and on penological justifications is necessary for situations in which it is unclear whether defendants have diminished levels of culpability and reduced abilities to understand the consequences of their actions. In these cases, individualized determination on a case by case basis is an essential component of the capital punishment sentencing procedure. In an ideal sentencing process, individualized determination would prevent the execution of the mentally retarded. However, clear flaws within the system derive from the complexity of mental retardation as a mental health condition. Perhaps with serious and lengthy court instructed training sessions, jurors could grasp the legal and medical arguments concerning how retardation of a defendant relates to his crime. These training sessions would educate the jury on the normal behaviors of the mentally retarded to prevent a misreading of such behavior. Yet, the effectiveness of this proposal hinges on whether increased education can break stereotypes within the time allotted for such training. Therefore, even with additional guidance to the jury, whether the presentation of mental retardation as mitigating evidence is an adequate safeguard for the mentally retarded defendant remains questionable.

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[99]Dick-Hurwitz, p.723.
[100]Dick-Hurwitz, p.723.
[101]Applebome, p.A12.

It is important to understand that there is an alternative solution. Capital cases where the defendant is retarded do not constitute unclear situations of diminished levels of culpability. Professionals within the field of mental retardation have reached a definite consensus on this issue. Mental retardation significantly reduces the culpability of the defendant, as well as his ability to weigh the implications of his actions. It is therefore apparent that the only real safeguard for mentally retarded defendants would be to prohibit the execution of the mentally retarded.

Existing Legislation Banning the Execution of the Mentally Retarded

Five states have recognized the inadequacies of the existing sentencing system for mentally retarded defendants. These states have decided to "turn the death penalty decision of the judicial system over to mental health experts" [102] and use the conclusions of these experts as a justification to ban the death penalty for the mentally retarded. In 1988, Georgia became the first state to adopt such a measure.[103] What spurred this policy onto the state agenda was the enormous public opposition to the 1986 execution of Jeremy Bowden, a mentally retarded defendant. [104] The reasoning behind the bill embodied the sentiment that that the death penalty should be applied in cases of clear culpability, not for people at the lowest end of the culpability spectrum. Similar justifications were used for the enactment of amendments prohibiting the execution of mentally retarded defendants in Maryland,[105] Kentucky,[106] Tennessee[107] and New Mexico.[108] Furthermore, state legislatures in Florida, Pennsylvania, Colorado, Oregon, Washington and Missouri will be considering a statutory ban in January of 1992.[109]

The New Jersey Experience

In February 26, 1990, New Jersey Assemblyman Bennett Mazur (D,37) sponsored a bill, termed A3024, that would prohibit the execution of a mentally retarded defendant convicted of murder in New Jersey.[110] Mazur's reason for introducing this bill resembled that behind the 1985 amendment of the New Jersey murder statute which granted exemption of the death penalty for juvenile offenders. Within this current proposal, Mazur stressed that it was not the state legislature's

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[102]"Ban on Maryland Death Penalty for Retarded Voted," The Washington Post, March 15, 1989, C4.
[103]Georgia, Georgia Penal Code, (1990), c. 17-7-130.1.
[104]"Georgia to Bar Executions of Retarded Killers," The New York Times, April 12, 1988, A26.
[105]Maryland, Marylan[illegible] Cumulative Supplement Statutes: Crimes and Punishments (1991), Art. 27, 412f.
[106]Kentucky, Kentucky Penal Code, (1990), c. 532.140.
[107]Tennessee, Tennessee Code: Criminal Offenses, (1991), c.39-13-203.
[108]New Mexico, New Mexico Statutes Annotated, (1991), c.31-20A-2.1.
[109]Phone interview with Professor James Ellis, November 26, 1991.
[110]Phone interview with John Tumulty, New Jersey Legislative Services, October 31, 1991.

intention to include juveniles or the mentally retarded into the category of criminals for whom death is the most deserved punishment.[111] As Of October of 1991, the bill was stalled within the New Jersey Assembly Judiciary Committee.[112] How pervasive is the need for a ban in New Jersey? Does it warrant legislation? These questions will certainly be posed by the state legislature in January of 1992 in ultimately deciding the fate of A3024.

New Jersey's capital punishment statute was only recently enacted in 1982. The first capital trial after reenactment was in 1983. This explains why there are few New Jersey statistics on this issue.[113] With no mentally retarded defendants executed in New Jersey since reenactment of the death penalty, it is easy to point to the argument that the system is working in safeguarding defendants with deficient mental capacities. [114] However, the real argument should be that the New Jersey experience is now too limited to accurately infer that future mentally retarded defendants will be protected under current sentencing safeguards. Most legislatures in other states have not even considered a bill prohibiting the execution of the mentally retarded simply because the possibility has not yet become a reality—not because existing safeguards for the mentally retarded have been found sufficient. [115] New Jersey should not wait until a mentally retarded defendant is executed, to realize that this issue is relevant to New Jersey.

The New Jersey legislature should consider enacting a statutory provision prohibiting the execution of the mentally retarded when convicted of murder. By shifting the duty of evaluating society's "evolving standards of decency" from the federal level to the state level, the Supreme Court in *Penry*, implied that inaction by the New Jersey state legislature on this issue would not only reflect an acceptance of existing safeguards, but also impact the "national consensus" on this issue. The Supreme Court ruled that state legislation, not public opinion would be considered in determining whether "a national consensus against execution of the mentally retarded may someday emerge" [116] to constitute prohibition as a constitutional standard. Therefore, if the New Jersey legislature bans execution of the mentally retarded, this policy, along with the actions of other states, would serve to

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[111]New Jersey, Assembly, No. 3024, introduced February 26, 1990.
[112]Phone Interview with Dale Jones, New Jersey Public Defender, October 30, 1991.
[113]David C. Baldus, "The Death Penalty Proportionality Review Project, Final Report to the New Jersey Supreme Court." September 24, 1991. Although this comprehensive report does contain statistical analysis on issues relating to capital punishment in New Jersey and detailed narrative summaries of all New Jersey death eligible cases, it does not cite evidence specifically relating to the mentally retarded defendant in New Jersey
[114]*Lodato v. State* 107 N.J. 141 (1987). In *Lodato*, the New Jersey Supreme Court vacated the death sentence of a mentally retarded defendant. The court held that if the jury found that the mitigating factors were in equipoise with aggravating, then the defendant should be sentenced to life imprisonment following the ruling in *State v. Biegenwald* 106 N.J 13 (1987). Even though Lodato's death sentence was vacated, this decision was not based on his mental retardation per se. While Lodato was spared, another mentally retarded defendant might not be so fortunate.
[115]*Penry v. Lynaugh*, "Brief of American Association on Mental Retardation, p53.
[116]Uy, p.575 (quoting *Penry*, 109 S. Ct. at 2958).

influence and perhaps alter whether all states would be allowed to execute the mentally retarded under some future constitutional standard. [117]

Procedural Instructions

How, then, should New Jersey go about devising an amendment banning the execution of the mentally retarded? Presently, no means of legally defining the mentally retarded is written within the bill. However, the New Jersey bill should not be struck down because of implementation difficulties. The Supreme Court's conclusion in *Penry*, pointing to administrative difficulties in assessment and standardization of retardation, is incorrect. Constructing a legal definition of specific guidelines can be done in a consistent, principled and accurate manner. The American Association on Mental Retardation has provided specific criteria that define people who fit the parameters of retardation. [118]

The universally accepted definition of mental retardation established by the AAMR is that mental retardation refers to "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." [119] Significantly subaverage general intellectual functioning is defined as an IQ of 70 or below. Basically this definition states that a mentally retarded person must have an intelligence quotient of 70 or below, with his mental disability existing concurrently with behavioral difficulties. In addition, this deficiency must have developed before the age of eighteen.[120] Mental retardation is not a transitory mental deficiency. Defense attorneys will simply not get defendants off death row by being able to prove that they are suddenly mentally retarded. [121] Therefore, mental retardation will not become merely another means of adding to the already overburdened appeals process. With this in mind, the bill can be formulated to contain the following components. First, mental retardation would be defined using the provisions of N.J.S.A. 30:4-23 in which mental retardation is :

> A state of significant subnormal intellectual development with reduction of social competence in a minor or adult person; this state of subnormal intellectual development shall have existed prior to adolescence and is expected to be of life duration.[122]

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[117]Phone interview with Professor James Ellis, October 31, 1991.
[118]Dick-Hurwitz, p.714.
[119]Terence F. McCarthy and Clifford D. Stromberg, Report on Resolution of Official American Bar Association Policy : (February 7, 1989), p.2 (citing American Association on Mental Retardation [previously "Deficiency"], Classification in Mental Retardation 1 (H. Grossman ed. 1983).
[120]*Id.*
[121]Phone interview with Dr. Deborah Spitalnik, October 31, 1991.
[122]New Jersey, Code of Criminal Justice (1991), c. 30:4-23.

No defendant, exhibiting these characteristics would be sentenced to death for committing first degree murder.

Maryland State Attorney, Andrew Sonner, however, expressed his belief that the Maryland state law is "vague and inadequate" for those with an IQ in the low 70's. With the Maryland cutoff point at an IQ of 70, he shudders at the thought of a defendant with an IQ of 71. [123] In drawing the line in defining mental retardation, it is necessary to understand that there will be defendants who fall very close to the cut off point, but who are not found to be retarded. Complications arise in using any type of cut off point. A person who is seventeen and 364 days old is treated differently than one who is eighteen under New Jersey law. However, the defendant who is eighteen can still argue his relative youth as a mitigating factor, even though his youth does not categorically preclude execution.[124] The same argument could be made for defendants with mental deficiencies that do not constitute retardation. Although such deficiencies would not categorically preclude execution, they would qualify for presentation as mitigating evidence in the sentencing phase.

Accuracy of IQ and adaptive behavior tests depend on whether professionals have the training and experience to evaluate people with mental retardation. A psychiatrist with experience in treating mental illness and not mental retardation, is not qualified for such evaluations.[125] While Courts should not "operate under the illusion that the simple administration of any test will resolve all questions regarding a retarded person's status," systematic assessment can be achieved through a combination of observation and an analysis of data. [126] Since there are objective measured criteria for determining retardation, a "battle of the experts will not occur."[127]

In all of the five states that ban the execution of the mentally retarded, it is the defendant who bears the burden of demonstrating his mental retardation. After the defendant is found guilty in the penalty phase, the defense must request by motion that the court hold a hearing before conducting the sentencing proceeding to determine whether the defendant is mentally retarded. If the court finds that the defendant is mentally retarded, he will not be subject to the sentencing phase but instead would be sentenced to life imprisonment. [128] What complications would arise by requiring the defendant to prove his mental retardation? The argument that overworked public defenders would not have the time and funding to adequately prove their client's mental retardation can be countered. Compared with the resources that it would take to represent a mentally retarded defendant in trial and present medical testimony of his retardation, it would require less time and money for defense counsel to merely bear the burden of demonstrating his client's mental retardation.

In determining whether New Jersey should ban the execution of the mentally retarded, it is not only necessary to draw from expert findings, but also to maintain a certain distance from the

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[123]Anderson, p.26.
[124]Phone interview with Professor James Ellis, November 26, 1991.
[125]Ellis and Luckasson, p.487.
[126]*Id.*
[127]Phone interview with Professor James Ellis, November 26, 1991.
[128]New Mexico, New Mexico Statutes Annotated, (1991), c.31-20A-2.1.

emotional character of these arguments. Timing is crucial. If a mentally retarded defendant is sentenced to death in the near future, then pending legislation could be impeded by the focus upon the victim and the brutality of the crime. This type of emphasis might impede the bill's passage simply because the circumstances of that case would inflame emotions on the issue. [129]

Already, New Jersey prohibits the execution of juveniles and the insane because they fall into the category of "less culpable" regardless of how brutal their crimes are. The revulsion over a crime should not prevent the New Jersey state legislature from focusing on the appropriate use of the capital punishment laws. Only the most deserving criminals should receive the death penalty. New Jersey bill A3024 must be passed because mentally retarded defendants simply do not fit descriptions of clear culpability. Experts in the field have proven this to be true. From this paper's analysis of constitutional limits of the Eighth Amendment, it is clear that the reduced culpability of mentally retarded defendants precludes their execution. Furthermore, the mentally retarded defendant is not sufficiently protected by the presentation of mental retardation as a mental mitigating factor. Evidence has shown that even additional Court instructions in the form of penological guidance to the jury would still not serve as an adequate safeguard. The New Jersey state legislature now confronts the complexity of this issue and must weigh medical and legal conclusions. Ultimately, the fate of bill A3024 will be a testament to their understanding of the nature of mental retardation and its relation to the criminal justice system.

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[129]Phone interview with Dr. Deborah Spitalnik, October 31, 1991.

BIBLIOGRAPHY

Anderson, Charles Edward. "Low-IQ murderers: States Seek Executions of Mentally Retarded Convicts," 75 American Bar Association Journal 26 (October, 1989).

Applebome, Peter. "2 States Grapple with Issue of Executing Retarded Men,"New York Times, July 13, 1989, A12.

Baldus, David. "Death Penalty Proportionality Review Project, Final Report to the New Jersey Supreme Court." September 24, 1991.

"Ban on Maryland Death Penalty for Retarded Voted," The Washington Post, March 15, 1989, C4.

Berg, Philip. "Youth, Mental Retardation, and Capital Punishment," 13 Harvard Journal of Law and Public Policy 415 (Winter 1990).

Black, Charles. Capital Punishment: The Inevitability of Caprice and Mistake. New York: W.W. Norton and Company, Inc., 1974.

Borman, Judy. Public Defender in New Jersey, Princeton, New Jersey. Interview, October 9, 1991.

Chan, Peter. "Eighth Amendment–The Death Penalty and the Mentally Retarded Criminal: Fairness, Culpability and Death," 80 Journal of Criminal Law and Criminology 1211 (Winter 1990).

Dick-Hurwitz, Rebecca. "Penry v. Lynaugh: The Supreme Court Deals a Fatal Blow to Mentally Retarded Defendants," 51 University of Pittsburgh Law Review 699 (Spring 1990).

Ellis and Luckasson. "Mentally Retarded Criminal Defendants," 53 George Washington Law Review 414 (1985).

Ellis, James. Professor of Law, University of Mexico and President of the American Association on Mental Retardation, Interview, November 26, 1991.

Ellis, James. Professor of Law, University of Mexico and President of the American Association on Mental Retardation, Interview, October 31, 1991.

Ford v. Wainwright, 477 U.S. 399 (1986)

Gamino. "73% in Texas poll Oppose Executing Retarded Inmates," Austin American-Statesman, November 15, 1988.

Georgia. Georgia Penal Code. (1990), c.17-7-130.1.

"Georgia to Bar Executions of Retarded Killers," The New York Times, April 12, 1988, A26.

Greenhouse, Linda. "Court Says Young and the Retarded Can be Executed," New York Times, June 27, 1989, A1.

Gregg v. Georgia, 428 U.S. 153 (1977).

Gritton, Robert, "Capital Punishment: New Weapons in the Sentencing Process," 24 Georgia Law Review 423 (Winter, 1990).

Jones, Dale. New Jersey Public Defender, Interview October 30, 1991.

Kentucky. Kentucky Penal Code, (1991), c. 532.140.

Lockett v. Ohio, 438 U.S. 586 (1978).

Lodato v. State, 107 N.J. 141 (1987).

Luckasson, Ruth. Assistant Professor and Presidential Lecturer in Special Education, University of New Mexico, and Counsel for Amici Curiae for *Penry v. Lynaugh*, "Brief of American Association on Mental Retardation, Interview, October 30, 1991.

Maryland. Maryland Cumulative Supplement Statutes: Crimes and Punishments (1991), Art. 27, 412f.

McCarthy, Terrence and Clifford D. Stromberg. Report on Resolution of Official American Bar Association Policy : (February 7, 1989).

Miller, Edward. "Executing Minors and the Mentally Retarded: The Retribution and Deterrence Rationales," 43 Rutgers Law Review 15 (Fall 1990).

Mello, Michael. Professor of the University of Vermont, Interview, November 25, 1991.

New Jersey. Assembly, No. 3024, introduced February 26, 1990.

New Jersey. Code of Criminal Justice (1991), c. 2C:11-3.

New Mexico. New Mexico Statutes Annotated (1991), c.31-20A-2.1.

Obler, Bob. Criminal Defense Lawyer, previous Public Defender in New Jersey, Interview, October 30, 1991.

Penry v. Lynaugh. "Brief of American Association on Mental Retardation, American Psychological Association, Association for Retarded Citizens of the United States, et al.," No. 81-6177, October Term, 1988, September 9, 1988.

Penry v. Lynaugh. "Brief of Petitioner," No. 81-6177, October Term, 1988, September 9, 1988.

Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

Perske, Robert. Unequal Justice, Nashville: Abingdon Press, 1991.

Sondheimer, Joshua. "A Continuing Source of Aggravation: Improper Consideration of Mitigating Factors in Death Penalty Sentencing," 41 Hastings Law Journal 409 (January 1990).

Spitalnik, Deborah. Ph.D, Associate Professor of Clinical Pediatrics, Executive Director of University Affiliated Program of New Jersey in Mental Retardation and Developmental Disabilities, Interview, October 31, 1991.

Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981).

Stanford v. Kentucky, 109 S. Ct. 2969 (1989).

State v. Biegenwald, 106 N.J. 13 (1987).

State v. Jasuilewicz, 501 A.2d 583 (N.J. Super. A.D. 1985).

State v. Pennington, 119 N.J. 552 (1990).

State v. Price, 478 A.2d 1249 (1984).

State v. Warlock, 569 A.2d 1314 (1990).

Tennessee. Tennessee Code:Criminal Offenses, (1991), c.39-13-203.

Thompson v. Oklahoma, 108 S. Ct. 2687 (1988).

Tison v. Arizona, 107 S. Ct. 1676 (1987).

Tumulty, John. New Jersey Legislative Services, Interview, October 31, 1991.

U.S. Congress, Senate, Committee on the Judiciary, Testimony of James W. Ellis, President, American Association on Mental Retardation, September 27, 1989.

Uy, Salvador. "From the Ashes of *Penry v. Lynaugh*: The Diminished Intent Approach to the Trial and Sentencing of the Mentally Retarded Offender," 21 Columbia Human Rights Law Review 565 (Spring, 1990).

Washington Post, January 11, 1989, p. A6 (reporting national poll by Louis Harris and Associates).

Woodson v. North Carolina, 428 U.S. 280 (1976).

The Disproportionate Representation of Black Americans on Death Row as Facilitated by Biases within the Criminal Justice System by Kwanza M. Jones

INTRODUCTION

Since the reinstatement of the death penalty in 1976, evidence suggests that the death penalty continues to be applied in a way which systematically discriminates on racial grounds. The purpose of this paper is to determine if there is a significant overrepresentation of blacks on death row due to cultural biases or discrimination inherent in the criminal justice system. By examining various quantitative and empirical studies I hope to prove that blacks are overrepresented on death row due to the disproportionate application of the death penalty - due to biases within the criminal justice system - from prosecutor discretion to jury decisions.

The issue of race is always important whenever one speaks about the death penalty. Thus, this paper will be helpful as a reference in assisting legislators on issues of race and the death penalty. Ultimately this paper will be beneficial in addressing the legislators as to the disproportionate manner in which the death penalty is imposed and what types of policies can be implemented to change this.

RACISM IN THE CRIMINAL JUSTICE SYSTEM

The processes involved in capital sentencing are just one aspect of the criminal justice system in America. The formal requirements of the criminal justice system are not overtly racist. However, there is racial prejudice and discrimination in the application of criminal justice. It is manifested in the individuals who make decisions partially on the basis of race. This is due to the fact that the judicial system is primarily composed of white middle class males. In the appellate and trial courts alone, as of 1985, there were 12,093 white male judges.[1] For most Americans this system works reasonably well. That is, the written standards of conduct and the judicial system set up to enforce these standards work well for persons with interests and perspectives similar to the majority of white males that control the system. Thus, if you differ substantially in economic status or culture from the white middle-class norm, the system fails to work.[2] Not only are minorities, in particular black Americans, arrested and prosecuted under laws they had no hand in making, but they are also tried by judicial institutions which exclude them both from structural mechanisms and from personnel rolls.[3]

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[1] Fund for Modern Courts, The Success of Women and Minorities in Achieving Judicial Office. For further statistics on on the composition of the judicial system contact the National Center for State Courts and the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

[2] Reasons, Charles ann Kuykendall, Race, Crime, and Justice (California: Goodyear, 1972) 13.

[3] For further information on the race in the criminal justice system read Higginbotham, A. Leon, In the Matter of Color: Race and the American Legal Process. (New York: Oxford University Press 1978)

This is evident in the national figures for minority judges. This statistics from the National Center for State Courts indicate that as of 1985, in state appellate and trial courts, only 465 of 13,641 judges were black.[4] (See Table 1)

Race discrimination has been and continues to be a major focus in the constitutional controversy over the use of the death penalty in America. The major arguments include: (1) racial discrimination occurs at the point of charging, in that blacks are less likely to receive the benefit of deferred prosecution and are more likely to be charged with more serious offenses; (2) racial discrimination occurs in that blacks are less likely to have effective counsel, since they must rely largely on the public defender rather than a privately retained attorney; (3) racial discrimination occurs in the systematic exclusion of blacks from juries and the frequent conviction of blacks by all-white juries that are racially biased; (4) racial discrimination at the point of prosecution results in blacks being more likely to be processed to capital trial than whites; and (5) racial discrimination occurs in the imposition of the death penalty at penalty phase because primarily white juries are more likely to sentence defendants in white victim cases to death.[5] These charges have led to empirical studies on race in the various aspects of death penalty sentencing in the criminal justice system- from prosecutorial discretion to the findings of the jury.

Some of the well known quantitative studies were done by William Bowers and Glenn Pierce, Samuel Gross and Robert Mauro, and David Baldus. In the late 1970s Bowers and Pierce, from Northeastern University, compared statistics on all criminal homicides and death sentences imposed in Florida, Georgia, Texas and Ohio from the dates their respective post-Furman statutes came into effect (between 1973 and 1974) up to December 1977.[6] They found that 22.1 per cent of blacks accused of killing whites were sentenced to death, compared to 4.6 per cent of whites accused of killing whites, and only .06 per cent of blacks accused of killing blacks.[7] Gross and Mauro looked at figures for the race of victims in criminal homicide cases in eight states from 1976 to 1980.[8] They found that the probability of a death sentence varied depending on the victim's race: 6.3 per cent of

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[4] National Center for State Courts, State Court Caseload Statistics. For further statistics on race in the justice system, read The Success of Women and Minorities in Achieving Judicial Office: The Selection Process, published by the Fund for Modern Courts, 36 West 44th Street, New York, NY 10036-8181.

[5] Wilbanks, William, The Myth of a Racist Criminal Justice System (California: Wadsworth, 1987) 85.

[6] For further information on this study see Bowers, William, Legal Homicide: Death as a Punishment in America 1864-1982. Z (Boston: Northeastern University, 1984)

[7] Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman capital Statues*, 26 Crime & Delinq. 594.

[8] For further information on this study see Gross, S. and Mauro, R. Death and Discrimination: Racial Disparities in Capital Sentencing. (Boston: Northeastern University, 1989). This study covers all homicides that were reported to the FBI from Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia for the period from January 1, 1976, through December 31, 1980.

the white victim cases and .8 per cent of the black victim cases resulted in a death sentence. Further, if the victim was white, 13.7 per cent of the black defendants and only 5.2 per cent of the white defendants were condemned to death.[9] The Baldus- Georgia study is said to be the most detailed analysis of racial disparities in death sentencing. This study, on the operation of Georgia's capital sentencing system, was conducted in the early 1980s. Baldus aimed to discover why killers of whites in Georgia during the 1970s received the death penalty approximately 11 times more often than killers of blacks, taking into consideration the possibility that different levels of aggravation within potentially capital murders could explain the difference in sentencing.[10] Baldus found that the odds of a death sentence was 4.3 times higher for defendants who killed whites than for those who killed blacks.[11]

CULTURAL BIASES WITHIN THE CRIMINAL JUSTICE SYSTEM

Gross and Mauro assert in Death and Discrimination, that relatively few people hold overtly racist attitudes, but many show the effects of subtler prejudices.[12] For example, in 1978, 54 per cent of the whites questioned in one survey disapproved of marriage between blacks and whites, and in a 1981 survey, 31 per cent of white respondents preferred not to have blacks as neighbors.[13] Thus, these subtler prejudices could have serious effects on individuals' interpretations of the facts of a legal case, and their responses to the defendant, victim and crime.

The disadvantage of cultural biases leads to more arbitrariness and disproportion in sentencing black Americans to death row. This is evident in David Baldus's Final Report for the Proportionality Review Project for the New Jersey Supreme Court. He found that during penalty-trial sentencing decisions black offenders may be at a greater risk of receiving a death sentence than similarly situated white and Hispanic defendants. The Final Report also found that ". . . on average, after controlling for the aggravation level of the cases black defendants may have a 19-percentage point higher risk ($p = .0001$) of receiving a death sentence than do other defendants. . .the model we developed to explain which cases advanced to penalty trial shows no race of defendant effects. It did

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[9] Gross and Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 55- 56 (1984).

[10] For further information on this study see Baldus, Woodworth and Pulaski, Equal Justice and the Death Penalty, (Boston: Northeastern University, 1990). Baldus examined data on all homicide cases in Georgia from 1973 to 1979 from indictment to sentencing.

[11] Baldus, Woodworth and Pulaski, Equal Justice and the Death Penalty, (Boston: Northeastern University, 1990) 145.

[12] Gross, S. and Mauro, R. Death and Discrimination: Racial Disparities in Capital Sentencing, (Boston: Northeastern University, 1989) 110.

[13] Dovidio and Gaertner, *Prejudice, Discrimination, and Racism*: Historical Trends and Contemporary Approaches, in Prejudice, Discrimination, And Racism (J. Dovidio & S. Gaertner, eds. 1986).

suggest, however, that cases with white victims may be at greater risk of advancing to penalty trial than cases involving black or Hispanic victims...."[14]

DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

The history of the United States plays a major role in the current culture of the criminal justice system. Most of the people on death row committed vicious crimes. But, the reasons why blacks commit more vicious crimes cannot be understood unless we examine the history of racism in this country. Michael Radelet, Professor of Sociology at the University of Florida, insists that, "the idea of equal justice is a myth not only because our racist history means that blacks have a higher probability today of being raised in environments which might lead to violent behavior, but also, given similar violent behavior, blacks are treated more harshly by the criminal justice system than are other groups."[15] Furthermore, there is a belief by whites that blacks are more violent and inferior based on their color. This is based on the fact that racism has been an integral part of American law since the first slaves arrived. The most prevalent document that came out of that time was the Constitution. This document sanctioned human slavery based upon race and color, and decreed that persons of color who were held in bondage should be counted as three-fifths of a man. Thus, the belief that black people were inferior became imbedded in our national consciousness and became part of our country's fundamental law.[16]

Recent surveys reflect how racism is still imbedded in the national consciousness. For example one survey shows that many whites still believe that blacks are lazy (13%), ignorant (10%), and aggressive (19%).[17] Research has shown that black defendants are the objects of discrimination since they are seen as more violent and more aggressive than white defendants. For example, Birt Duncan has demonstrated that whites interpret ambiguous actions performed by blacks to be more violent than identical actions performed by whites. He also found that whites view these supposedly violent actions as indicative of an aggressive disproportion when they are performed by blacks, but as mere reflections of situational needs when they are performed by whites.[18] Other experimental research suggests that black victims may be seen as stronger and more threatening than equally passive white victims.[19]

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[14] David Baldus, Death Penalty Proportionality Review Project Final Report, presented to the New Jersey Supreme Court, September 24, 1991, pp. 100-101.

[15] Interview of Michael Radelet in Gray, I. and Stanley, M., A Punishment in Search of a Crime: Americans Speak Out Against the Death Penalty, (New York: Avon, 1989) 218.

[16] Reasons and Kuykendall 7.

[17] Dovido and Gaertner 10.

[18] Duncan, B. *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOLOGY 590 (1976).

[19] Sagar and Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOLOGY 590 (1980).

Considering the history of racism in America, there is no doubt that race plays a role in capital sentencing. Whites control the structures of justice - from the police to the supreme court justices. All too often blacks are in the white-controlled judicial system as violators of white social norms. A major reason for this is that blacks commit a disproportionate share of violent crimes in America. Therefore they will be overrepresented in prisons and on death row.[20] This is seen in the statistics on correctional populations in the United States. In 1989 out of 712,563 prisoners 343,550 were black.[21] (see table 2) That is, blacks comprised 47% of jail inmates in 1989.[22] (see table 3)

However, there appears to be a double standard of justice in that there is less rigorous enforcement of law when the defendant is black and strict enforcement when the defendant is white. In a study of race and death sentencing in Florida, Hans Ziesel of the University of Chicago found that among those prisoners condemned to death for killing whites during a felony, 47 per cent were black and 24 per cent were white.[23] Bruce Wright, a judge on the New York City Supreme Court, gives an example of the double standard of justice in his book Black Robes, White Justice. He tells of earlier years in his career on the federal bench. One of his fellow justices had been called upon to sentence two defendants, one white, one black.

> The white defendant was a former Wall Street broker. He had been convicted of illegally selling stocks. He had collected a commission of some $250,000, which he laundered through a secret Swiss bank account. He had perjured himself before the federal grand jury that investigated him. Judge Cooper remarked that the well-dressed defendant was not likely to repeat such an act. He fined him some $90,000 and placed him on probation for a year. Simple subtraction may reveal that, in that case at least, crime did pay. When Judge Cooper sentenced the black man, however, prison was on his mind. The black man, the sole supporter of a diabetic wife and daughter, was a truck driver. He had been convicted of stealing a television set from the truck he drove. It was a black-and-white set worth less than $100. The judge sent him to jail for a year.[24]

Experimental and archival studies have found evidence of racial discrimination in the administration of justice.[25] For example, one study, prepared for the National Institute of Corrections for the Department of Justice, found that even when controlling for other major factors that might influence sentencing and time served, minorities receive harsher sentences and serve longer

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[20] Van den Haag, E. and Conrad, John, The Death Penalty: A Debate, (New York: Plenium, 1983) 212.

[21] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Correctional Populations in the United States, 1989*, p69.

[22] Id. 9.

[23] Ziesel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 Harv. L. Rev. 456 (1981).

[24] Wright, Bruce, Black Robes, White Justice, (New Jersey: Lyle Stuart, 1987) 199.

[25] For more information on the problems faced by minorities within the scope of the Judiciary read the Interim Report of the New Jersey Supreme Court Task Force on Minority Concerns, August 1989.

in prison - other things being equal.[26] Another study conducted by Baldus on the homicides in Georgia observes that the proportion of white-victim murder cases rose sharply as the cases advanced through the system, from 39 per cent at indictment to 84 per cent at death sentencing. The proportion of black-offender/white-victim cases rose even faster from 9 per cent at indictment to 39 per cent at death sentencing. Baldus found that the two most significant points affecting the likelihood of an eventual death sentence were prosecutors' decisions on (1) whether or not to permit pleas to voluntary manslaughter, and (2) whether to seek a penalty hearing in cases where defendants were convicted of capital murder.[27] Thus racial disparities manifest themselves at every stage of the judicial process, from indictment to sentencing, with black-victim cases being more likely to result in pleas to manslaughter or life sentences on conviction of murder, than cases with white victims. Black defendants with white victims are less likely than others to have their charges reduced and more likely than others, on conviction of murder, to receive death sentences.[28]

Empirical Evidence for Systematic Discrimination

In the area of capital sentencing there has been empirical evidence for the double standard of justice of less rigorous sentencing when the victim is black and stricter enforcement when the victim is white.[29] Further experimental research findings suggest that the effects of racial biases are readily apparent throughout the criminal justice system, both in the determination of guilt and the setting of sentences. There have been many studies done on discrimination in capital sentencing.[30] The NAACP Legal Defense Fund has become the standard reference source for current data on death row inmates. Their regular census, Death Row USA, includes individual information on every death-sentenced inmate in the country.[31]

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[26] Petersilia, Joan, Racial Disparities in the Criminal Justice System, (California: Rand, 1983) ix.

[27] Baldus 267.

[28] Amnesty International, United States of America. The Death Penalty. (London: Amnesty International, 1987) 59.

[29] Amnesty International 54.

[30] For summaries of the studies that have been done on race and the death penalty read Radelet and Pierce, *Choosing those who will die: Race and the Death Penalty in Florida,* 43 Florida L. Rev. 1 (1991); and also, read the literature review section in Bienen, Weiner, Denno, Allison, and Mills, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion,* 41 Rutgers L. Rev. 100 (1988).

[31] The NAACP was founded in 1909 to promote equality and justice for blacks and minorities. The Legal Defense Fund (LDF), became a separate independent body in the mid-1950s. It is committed to the aims of the NAACP and litigates in the area of racial equality. The LDF has represented capital defendants of all races, and has litigated on general aspects of the death penalty, including conditions on death row. The LDF has been instrumental in the current research whose findings show racial discrimination, jury bias and unevenness in the application of the death penalty.

In the 1980 Bowers and Pierce published the first post-Furman study on the link between race and death sentencing statewide. They found that death sentences in Florida, Georgia, Texas, and Ohio accounted for 70 per cent of all death sentences imposed nationally from 1974 to December 1977. Bowers and Pierce found that a large majority of homicides were intra-racial. Although there was a high homicide rate among both whites and blacks in all four states examined, far more killers of whites than killers of blacks were sentenced to death. It was also found that although most killers of whites were white, blacks killing whites were disproportionately more likely to receive a death sentence.[32]

Furthermore, Bowers and Pierce found that in the most serious kinds of homicides, for those that involved another statutory felony, Florida, Georgia, and Texas juries were more likely to impose a death sentence against killers of white victims. Black killers of whites were particularly likely to receive a death sentence in felony-type murders, whereas blacks who killed other blacks were far less likely to receive a death sentence than any other offender/victim racial combination.[33] No white offender in Florida had ever been sentenced to death for killing a black person during the period studied.[34] The findings were similar in the other two states.

Bowers found the following results in felony murders in Florida, Georgia, and Texas from 1974-1977: blacks who had killed whites had a 32 per cent probability of receiving the death penalty (46 of 143 cases). Whites who had killed whites had a 22 per cent probability. Blacks who had killed blacks had a 4 per cent probability. And whites who had killed blacks had a 0 per cent probability (0 of 11 cases)[35]

In Gross and Mauro's study, Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia returned 379 death sentences between 1976 and 1980, this was more than one-third of the national total at the time. It was found that homicides with white victims resulted in death sentences from 2.3 to nearly nine times more often than in cases with black victims. The study compared race-of-victim/race-of-offender ratios in felony-murders only, in Texas, Florida and Georgia. They found that significant disparities in the rate of death sentencing based on the victim's race persisted. In Georgia, Florida and Illinois, blacks who killed whites were most likely to be sentenced to death and blacks who killed blacks were least likely. Moreover, in each state, blacks

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[32] In both Florida and Texas Blacks who killed Whites were, respectively, five and six times more likely to be sentenced to death than Whites who had killed Whites.

[33] Among Black offenders in Florida, those who had killed Whites were 40 times more likely to get the death penalty than those who had killed Blacks. Also, in Georgia, defendants who killed whites in felony-type murders were over five times more likely to receive a death sentence than were killers of blacks. (Bowers, William, Legal Homicide: Death as a Punishment in America 1864-1982, (Boston: Northeastern University, 1984)

[34] A white man sentenced to death in Florida in 1980 for killing a black woman was the first white person in the state's history to be sentenced to death for killing a black victim only.

[35] Bowers 230.

who killed whites were more likely to receive death sentences than whites who killed whites.[36] They also found that the effect of the victim/offender's race varied by the region in each state, with the racial effect substantially more pronounced in rural rather than urban areas. (see table 4)

Gross and Mauro also found that in Oklahoma, North Carolina, Mississippi, Virginia and Arkansas the white-victim homicides were more likely to result in death sentences than a black victim homicide. They assert that, "these racial effects cannot be explained by the other variables in our data: in each state we found large race-of-victim effects after controlling for the nonracial variables in our data."[37] However, in Virginia and Arkansas (the two states with the smallest number of death row sentences) the effect of race-of-victim on death sentencing, controlling for nonracial factors, do not meet conventional standards of statistical significance.

The findings of Gross and Mauro were consistent with the findings in Professor Radelet's Florida study. Professor Michael Radelet, Professor of Sociology at the University of Florida, Gainesville examined all homicide indictments in 20 Florida counties in 1976 and 1977. He focused only on the cases involving non-primary homicides (killings of strangers, usually felony-related): 326 cases. Of the non-primary homicides, 5.4 per cent of the cases with black victims resulted in death sentences, compared to 14 per cent of the cases with white victims. Radelet also found that 53.6 per cent of the cases with black victims resulted in first-degree murder indictments, compared to 85 per cent of cases with white victims.[38]

The Baldus - Georgia study, in an effort to assess whether race played an independent role in sentencing, subjected each case to a series of rigorous tests, matching the known facts against all possible factors which might play a role in determining the sentence. More than 230 control factors were identified, including statutory and non-statutory aggravating and mitigating circumstances, weight of evidence, the defendant's background and prior record, race of defendant and victim, geographical area, and chance.

Baldus categorizes cases into three ranges of aggravation - high, mid, and low. The high range includes the extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. The mid-range of cases was identified with intermediate levels of aggravation, in which death sentences were also imposed. The final category is the low range. In this range Baldus found that there were no race (victim or offender) effects.

Baldus identified four hundred, potentially capital aggravated homicide cases. Baldus found that no significant racial disparities in sentencing appeared in the most aggravated cases. Most of the victims in cases such as these are white, but the severity of the crime at this level of aggravation was

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[36] Gross and Mauro 53.

[37] Gross and Mauro 92.

[38] Radelet, Michael, "Racial Characteristics and the Imposition of the Death Penalty", 46 American Soc, Review 918 (1981).

more important than the victim's race. However, the mid-range of aggravation cases comprised the bulk of the 400 potentially capital cases. In these cases there is the most room for discretion. In this range of cases, Baldus found that offenders with white victims were 20 per cent more likely to receive death sentences than those with black victims, at similar levels of aggravation. The victim's race at this level was more important than several of Georgia's 10 statutory aggravating circumstances. The Baldus study also found at this level that black defendants were more likely to receive a death sentence than similar white defendants.[39]

Regardless of the empirical studies that have been conducted, there continue to be people and courts that deny the claim that there is discrimination in death penalty sentencing especially considering the race of the victim. The two major arguments have been in the area of missing data and omitted variables. Gross and Mauro assert that the problem of missing data is one of degree: That is, in any large data set, some cases will lack particular items of information and some cases will be missed altogether. In order for missing data to change the correlation between race and type of sentence, it would have to follow a pattern that significantly counteracts the pattern in the available data.

The problem of omitted variables involves the missing items being important to judicial processing and sentencing variable. It can be argued that the racial disparities can be explained by the operation of one or more of the omitted variables. In order for a missing variable to substantially effect the estimated size of the effect of race of victim on capital sentencing, the variable would have to meet the following criteria. "(1) It must be correlated with the victims' race; (2) it must be correlated with capital sentencing; and (3) its correlation with capital sentencing must not be explainable by the effects of the variables that are already y in our analysis."[40]

For both the issue of missing data and omitted variables, Gross and Mauro believe that it is unlikely that these items would have a major effect on substantially explaining why there is an observed pattern of discrimination. They conclude that, "in sum, we are aware of no plausible alternative hypothesis that might explain the observed racial patterns in capital sentencing in legitimate nondiscriminatory terms."[41] Furthermore, they assert that an important reason to trust their findings is because they are consistent with the findings of other researchers who have done research during the same time period.

Further arguments that propose there is no racial discrimination in capital sentencing include: the Circuit Court for the McCleskey v. Kemp, 107 S. Ct. 1756 (1987) assert that the 6% disparity found by Baldus shows only a "marginal difference." Also it is argued that discrimination cannot be proven with statistical evidence. William Wilbanks, author of The Myth of a Racist Criminal Justice

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[39] Baldus, Woodworth, and Pulaski, Equal Justice and the Death Penalty, (Boston: Northeastern University, 1990)

[40] Gross and Mauro 97.

[41] Id. 99.

System, asserts that several difficulties are encountered in studies that have attempted to "prove" the existence or nonexistence of racial discrimination at a particular decision point of the criminal justice system. The difficulties include the failure to control for legal variables that might indicate a spurious relationship between race and outcome, different interpretations of the black/white variation after controls, and reliance on tests of statistical significance rather than measures of association.[42] He concludes by saying that in the absence of direct proof six factual patterns should be present if racial discrimination is pervasive in the system.[43]

JURY BIAS AS A CONTRIBUTOR TO DISCRIMINATION IN CAPITAL SENTENCING

Juries are very crucial to the imposition of capital punishment. Thus, it is imperative that there is fairness and equality in jury selection and decision making. When examining the issue of race and juries it is necessary to distinguish between two aspects of jury bias. The first aspect is jury selection and the second is the jury's possible prejudice after selection.

Jury selection is often said to be discriminatory. Ideally, a jury is supposed to be composed of a representative cross section of the people who live in the community in which the trial is held. For example, if 10% of the population is black, so should be 10% of the jurors; if 50% of the population consists of blue-collar families, it would be similarly unrepresentative to have juries consisting 90% of the white-collar workers, etc.[44] Historically, the methods used for selecting those who serve have eliminated the theory of representativeness. (This includes legal exclusion of blacks or limiting the

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[42] Wilbanks 42-53.

[43] The following list of patterns would be expected if racial discrimination were pervasive in the system and if that discrimination were a direct result of racial prejudice: (1) In studies of the decisions of individuals we would expect to find that those who were the most prejudiced (as determined by objective measures) should be the most likely to treat blacks harshly. (2) In studies of the decisions of individuals we would expect black decision makers to be less harsh toward black offenders and white decision makers to be less harsh toward white offenders, since it would be assumed that each race is less prejudiced toward "its own." (3) If we agree that racial prejudice has declined over time, we would expect the greatest disparity in outcomes to have existed in periods when prejudice was greater. (4) In studies across jurisdictions we would expect greater gaps in outcome probabilities between blacks and whites in those jurisdictions that were presumed to be more prejudices. For example, racial disparities should be greater in southern states than in other states. (5) Racial disparities in outcome at various stages of the criminal justice system should be greatest in jurisdiction (and in the decision points of a particular jurisdiction) where there is the greatest disparity between the racial makeup of the decision makers and that of the "clients" of the system. Those cities with a largely white police force but a largely black offender population, for example, should have greater racial disparity in outcomes than those cities with a more racially balanced police force and offender population. (6) Since it is assumed that racial discrimination is pervasive and cumulative across the decision points of the system, the black/white disparity in outcome should increase from arrest to sentence and time served. (Wilbanks 53-54)

[44] Guinther, John, The Jury in America, (New York: The Roscoe Pound Foundation, 1988) 47.

jury lists to registered voters at a time when blacks weren't permitted to vote).

Recently, however, the argument has been that by the peremptory challenge and the challenge for cause prosecutors exclude blacks from juries and that the resulting all-white juries are more prone to convict black defendants especially if a white person is the victim. (There are two kinds of challenges: peremptory, for which a lawyer doesn't have to give a reason, and cause, for which a basis must be stated and approved by the judge) Prosecutors are eager to get rid of blacks on juries in all criminal and capital cases, because as a whole, blacks are more opposed to the death penalty than are whites. This results in the "death-qualified" juries being particularly unrepresentative of the community, veering toward a nearly exclusive white, middle-class composition.[45]

The issue of cultural biases has come up an been very evident in arguing about jury biases. Aside from the role of race in death penalty sentencing, cultural biases often exist in the cultural context system of the courtroom. Charles Reasons, author of Race, Crime and Justice, argues that "White lawyers, judges, and juries cannot deal with, and the judicial system makes no provision for, the cultural gulf between black and white Americans." The judicial system, which is based on the assumption of cultural homogeneity tries to alleviate the problem by having "representative juries." However, even when white participants are not overtly prejudices, socioeconomic class and racial or ethnic differences between them and the black defendant put the black at a disadvantage. When there is a marked cultural difference between the defendant and judge, prosecutor, defense counsel, and jurors, there is a consequent lack of articulation in testimony. This lack of articulation makes the cultural differences in speech, dress, and behavior increase in importance.[46]

Professor Michael Radelet argues that people are sentenced to death not so much for what they do but for who they are. "Who they are" becomes a function of social distance between the jurors and the defendant.

> . . .social distance in terms of race, in terms of poverty, in terms of whether or not the defendant is a local or an outsider, in terms of appearance, and in terms of whether or not you look right and look like on of their kids. In most cases if a juror thinks that the defendant is like them, he or she won't vote for death. If the defendant has killed people who are not like them, poor people or black people, the defendant won't be sentenced to death. But, if he kills people who could easily have been the juror's friends or neighbors, the defendant is in big trouble.[47]

The juror is not said to have biases towards the defendant but rather be influenced by the race of the victim. In order for a jury to condemn a murderer to death, they must feel personally threatened by the defendant, or what he represents, or they must be horrified by the defendant's acts. Thus, if

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[45] Mullin, Courtney, "the Jury System in Death Penalty Cases," *Law and Contemporary Problems*, Vol. 43, No. 4 (1980), 147.

[46] Reasons, and Kuykendall 19.

[47] Amnesty International Interview with Professor Michael Radelet, 1989.

jurors identify with the victim, or see the victim as similar to themselves, a friend or relative, an all white jury will be more horrified by the killing of whites than of blacks. This reaction is not an expression of racial hostility but rather it is a product of patterns of interracial relations in society.[48] Furthermore, jurors who are influenced by race are not aware of it because the cognitive and affective processes involved operate outside their consciousness.[49]

CONCLUSIONS

Data on those sentenced to death shows a disproportionate number of blacks. (see table 5 and graph 1) However, the reasons for this vary. One of the major reasons is that blacks commit a disproportionate number of violent crimes in the U.S.. Due to the number of violent crimes, more blacks appear as violators in the predominantly white, male, middle class system administering the criminal justice system. This system is composed of individuals who have many biases. Often unconscious cultural biases exist which affect not only juries but judges and attorneys. Ultimately these biases are influential in the disproportion of blacks on death row.

At first it seems that blacks have been more severely treated in the capital sentencing than whites. However, the recent studies, determine that there are many reasons for the disproportionality in capital sentencing. The decision making process in the criminal justice system, from indictment, seeking a death sentence, the verdict, sentencing and review by superior courts have all had an influence in these disparities. However, most of the studies on the race of the victim conclude that the prosecutors decision is the most relevant variable, even when other factors are taken into account.

It has been found that people are sentenced to death not because of the color of their skin but more so because of the color of their victims skin. A race of victim effect has been found in many of the studies that have been done. The findings of research conducted in a number of different US states since the early '70s are consistent in showing that homicides with white victims are far more likely to result in death sentences than those with black victims.[50] Although some of the disparity is explained by higher levels of aggravation in homicides committed against whites, researchers have found that an independent racial factor remains in cases that are otherwise similar. Differential treatment was found to occur throughout the judicial process, especially at the indictment stage.

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[48] Gross and Mauro 113.

[49] Wilder, C., *Social Categorization: Implications for Creation and Reduction of Intergroup Bias*, Advances in Experimental Social Psychology 53 - 85 (1980).

[50] For further information on race and death sentencing studies, the United States General Accounting Office (GAO) published a report in 1990 examining every post-Furman study in America that investigated the relationship between race and death sentencing. Gen. Gov't Div., U.S. Gen. Accounting Office Rep. GGD-90-57, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (Feb. 26, 1990).

Black defendants with white victims were found to be more likely to receive death sentences than white defendants in similar situations.

The evidence suggests that race-especially that of the victim- has an important bearing on the eventual likelihood of a death sentence. Fifty-three of 58 prisoners executed between January 1977 and May of 1986 had been convicted of killing whites.[51]

POLICY RECOMMENDATIONS

The evidence of racial discrimination in the application of the death penalty is a matter for serious and urgent concern. Detailed studies, and statistics relating to prisoners executed and those remaining on death row, suggest that disparities in death sentencing, based on racial factors, occur in states throughout the US. Should the findings of these studies be considered deficient, the executive or legislative branch of the federal government (as well as the state governments and U. S. Congress) should commission a serious inquiry into the question of racial discrimination and the death penalty. The inequity should use impartial specialists to evaluate all relevant data concerning the arrest, charging and sentencing of criminal homicide offenders in given jurisdictions over a period of time, information should be gathered from all those knowledgeable about the legal process, including judges, state prosecutors, defense attorneys, the police, boards of pardons and paroles, and state correctional departments.

The federal as well as state government should overcome problems of jury composition by having more incentives to participate in the judicial process. Such incentives should include more money for jurors time away from work. Hopefully this monetary incentive would enable more minorities to fulfill their civic duty by not having to turn down jury duty based on financial hardships.

Finally, the state and federal legislatures should increase representation of blacks and minorities on the Bench. This potentially would aid in diminishing cultural stereotypes and biases because more of the majority (white, middle class males) would see blacks in a position other than that of violators.

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[51] Bureau of Justice Statistics, U. S. department of Justice, *Capital Punishment , 1986.*

Graph 1. Black - White Graph of Death Row 1977 - 1990

(this graph corresponds with the figures in Table 5)

Table 4. Prisoners under sentence of death, by region, State, and race, yearend 1989 and 1990

Region and State	Prisoners under sentence of death 12/31/89			Received under sentence of death			Removed from death row (excluding executions)[a]			Executed			Prisoners under sentence of death 12/31/90		
	Total[b]	White	Black	Total[b]	White	Black	Total[b]	White	Black	Total[b]	White	Black	Total[b]	White	Black
U.S. total	2,243	1,308	898	244	147	94	108	64	42	23	16	7	2,356	1,375	943
Federal[c]	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
State	2,243	1,308	898	244	147	94	108	64	42	23	16	7	2,356	1,375	943
Northeast	134	52	81	13	6	7	14	6	8	0	0	0	133	52	80
Connecticut	2	2	0	0	0	0	0	0	0	0	0	0	2	2	0
New Hampshire	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
New Jersey	18	7	11	3	1	2	11	4	7	0	0	0	10	4	6
Pennsylvania	144	43	70	10	5	5	3	2	1	0	0	0	121	46	74
Midwest	348	167	179	34	15	19	13	5	8	5	4	1	364	173	189
Illinois	119	45	74	17	5	12	7	0	7	1	1	0	128	49	79
Indiana	47	30	17	3	3	0	2	1	1	0	0	0	48	32	16
Missouri	72	41	31	6	3	3	2	2	0	4	3	1	72	39	33
Nebraska	12	8	3	0	0	0	1	1	0	0	0	0	11	7	3
Ohio	96	43	54	8	4	4	1	1	0	0	0	0	105	46	58
South Dakota	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
South	1,298	759	516	144	88	56	56	34	20	17	11	6	1,369	802	546
Alabama	106	52	53	14	6	8	2	0	2	1	0	1	117	58	58
Arkansas	33	23	10	7	4	3	5	4	1	2	2	0	33	21	12
Delaware	7	2	5	0	0	0	1	0	1	0	0	0	6	2	4
Florida	285	187	98	31	21	10	13	12	1	4	3	1	299	193	106
Georgia	90	46	44	14	7	7	6	2	4	0	0	0	98	51	47
Kentucky	26	20	6	0	0	0	0	0	0	0	0	0	26	20	6
Louisiana	35	16	19	0	0	0	3	2	1	1	0	1	31	14	17
Maryland	15	3	12	4	0	4	0	0	0	0	0	0	19	3	16
Mississippi	40	18	22	10	2	8	3	2	1	0	0	0	47	18	29
North Carolina	83	41	37	14	9	5	13	5	7	0	0	0	84	45	35
Oklahoma	112	78	25	9	6	3	2	2	0	1	1	0	118	81	28
South Carolina	41	19	22	3	1	2	1	1	0	1	1	0	42	18	24
Tennessee	78	48	26	8	8	0	0	0	0	0	0	0	84	56	26
Texas	306	185	116	24	19	5	6	4	2	4	2	2	320	198	117
Virginia	43	21	21	6	5	1	1	0	0	3	2	1	45	24	21
West	463	330	122	53	38	12	25	19	6	1	1	0	490	348	128
Arizona	84	76	6	11	8	2	4	3	1	0	0	0	91	81	7
California	253	153	94	33	23	8	6	3	3	0	0	0	280	173	99
Colorado	3	3	0	0	0	0	0	0	0	0	0	0	3	3	0
Idaho	18	18	0	1	1	0	0	0	0	0	0	0	19	19	0
Montana	8	5	1	0	0	0	2	1	1	0	0	0	6	4	0
Nevada	53	39	14	5	3	2	0	0	0	1	1	0	57	11	16
New Mexico	1	1	0	0	0	0	0	0	0	0	0	0	1	1	0
Oregon	23	20	3	0	0	0	13	12	1	0	0	0	10	8	2
Utah	11	8	3	0	0	0	0	0	0	0	0	0	11	8	3
Washington	7	5	1	3	3	0	0	0	0	0	0	0	10	8	1
Wyoming	2	2	0	0	0	0	0	0	0	0	0	0	2	2	0

Note: States not listed and the District of Columbia did not authorize the death penalty as of 12/31/89. Some figures shown for yearend 1989 are revised from those reported in *Capital Punishment 1989*, NCJ-124545. The revised figures include 20 inmates who either were reported late to the National Prisoner Statistics Program or were not in the custody of State correctional authorities on 12/31/89 (4 in Illinois, 4 in Texas, 3 in Oklahoma, 3 in Pennsylvania, 2 in Georgia, and 1 each in Florida, Idaho, Nevada, and Tennessee) and exclude 27 inmates who were relieved of the death sentence on or before 12/31/89 (5 in Florida, 5 in North Carolina, 4 in Mississippi, 3 in Kentucky, 2 in Georgia, 2 in Texas, and 1 each in California, Idaho, Indiana, Maryland, Pennsylvania, and South Carolina).

[a]Includes 5 deaths due to natural causes (2 in California and 1 each in Pennsylvania, Nebraska, and Georgia), 1 suicide in Arkansas, and 1 murder by another inmate in Texas.

[b]Totals include persons of other races.

[c]Excludes 5 males held under Armed Forces jurisdiction with a military death sentence for murder.

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Execution Update, February 11, 1992

Total number of executions to date since the 1976 reinstatement of capital punishment (there were no executions in 1976): 161

'77	'78	'79	'80	'81	'82	'83	'84	'85	'86	'87	'88	'89	'90	'91	'92
1	0	2	0	1	2	5	21	18	18	25	11	16	23	14	4

Sex of Defendants Executed
Total number 161

Female.....1 (.62%)
Male.....160 (99.37%)

Sex of Victims
Total number 208

Female.....96 (46.15%)
Male.....112 (53.84%)

Race of Defendants Executed

White.....88 (54.65%)
Black.....64 (39.75%)
Hispanic.....9 (5.59%)

Race of Victims

White.....173 (83.17%)
Black.....29 (13.94%)
Hispanic.....4 (1.92%)
Asian.....2 (.96%)

Defendant-Victim Racial Combinations

White Defendant and
White Victim.....114 (54.80%)
Black Victim.....1 (.48%)

Black Defendant and
White Victim.....53 (25.48%)
Black Victim.....28 (13.46%)
Hispanic Victim.....1 (.48%)
Asian Victim.....1 (.48%)

Hispanic Defendant and
White Victim.....6 (2.88%)
Hispanic Victim.....3 (1.44%)
Asian Victim.....1 (.48%)

Executions By State

1. Texas.....44 (27.32%)*******
2. Florida....27 (16.77%)
3. Louisiana..20 (12.42%)
4. Georgia....15 (9.31%)
5. Virginia...13 (8.07)*
6. Alabama.....8 (4.96%)
7. Missouri....6 (3.72)**
8. Nevada.....5 (3.10%)*****
9. Mississippi.4 (2.48%)
10. S.Carolina..4 (2.48%)
11. N.Carolina..4 (2.48%)
12. Utah.....3 (1.86%)**
13. Arkansas....3 (1.86%)*
14. Indiana.....2 (1.24%)**
15. Oklahoma....1 (.62%)
16. Illinois....1 (.62%)*
17. Wyoming.....1 (.62%)

360X

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Winter 1991

DEATH ROW, U.S.A.

TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO LDF: 2,547

Race of Defendant:

White	1,306	(51.27%)
Black	986	(38.71%)
Hispanic	181	(7.10%)
Native American	47	(1.84%)
Asian	16	(.62%)
Unknown at this issue	11	(.43%)
Sex: Male	2,509	(98.50%)
Female	38	(1.49%)

DISPOSITIONS SINCE JANUARY 1, 1973:

Executions: 157
Suicides: 33
Commutations: 63 (including those by the Governor of Texas resulting from favorable court decisions)

Died of natural causes, or killed while under death sentence: 60
Convictions/Sentences reversed: 1145

JURISDICTIONS WITH CAPITAL PUNISHMENT STATUTES: 38

(Underlined jurisdictions have statutes but no sentences imposed)

Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, U.S. Government, U.S. Military.

JURISDICTIONS WITHOUT CAPITAL PUNISHMENT STATUTES: 15

Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin.

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Table 2. Number of persons executed by region 1977 - 1990
(statistics from US Department of Justice, Bureau of Justice Statistics)

Northeast	0
Connecticut	0
Massachusetts	0
New Hampshire	0
New Jersey	0
New York	0
Pennsylvania	0
Vermont	0

Northcentral	8
Illinois	1
Indiana	2
Missouri	5
Nebraska	0
Ohio	0
South Dakota	0

South	127
Alabama	8
Arkansas	2
Delaware	0
Florida	25
Georgia	14
Kentucky	0
Louisiana	19
Maryland	0
Mississippi	4
N. Carolina	3
Oklahoma	1
S. Carolina	3
Tennessee	0
Texas	37
Virginia	11

West	8
Arizona	0
Colorado	0
Montana	0
California	0
Idaho	0
Nevada	5
New Mexico	0
Washington	0
Utah	3
Wyoming	0

Table 3. Prisoners under State or Federal jurisdiction, by race 1989

(statistics from U.S. Department of Justice, Office of Justice Programs, Bureau of Statistics)

Table 5.6. Prisoners under State or Federal jurisdiction, by race, 1989

Regions and jurisdictions	Number of prisoners					
	Prisoner population 12/31/89	White	Black	American Indian or Alaska Native	Asian or Pacific Islander	Not known
U.S. total	712,563	343,550	334,952	5,984	2,480	25,587
Federal	58,171	39,483	18,092	1,065	464	67
State	653,392	304,067	316,860	4,929	2,016	25,520
Northeast	113,986	52,619	56,896	197	208	4,066
Connecticut[a,b]	9,301	2,661	4,458	8	9	2,165
Maine	1,455	1,423	17	15	0	0
Massachusetts[b]	7,524	4,091	2,770	12	34	617
New Hampshire	1,166	1,116	47	0	3	0
New Jersey	19,439	6,535	11,979	6	13	906
New York	51,227	25,368	25,249	137	124	349
Pennsylvania	20,469	8,897	11,525	14	15	18
Rhode Island[b]	2,479	1,823	643	5	8	0
Vermont[a,c]	905	905	/	/	/	/
Midwest	136,336	64,826	67,071	1,165	76	3,200
Illinois[b]	24,712	7,529	14,881	27	16	2,259
Indiana	12,341	7,612	4,704	24	1	0
Iowa[b]	3,584	2,722	777	42	6	37
Kansas[b]	5,616	3,396	1,856	69	21	274
Michigan[b]	31,639	12,669	18,319	112	16	523
Minnesota[b]	3,103	1,909	854	246	3	91
Missouri	13,921	7,433	6,453	26	7	2
Nebraska	2,393	1,527	769	83	0	14
North Dakota	451	378	4	68	1	0
Ohio[c]	30,536	14,764	15,774	0	0	0
South Dakota	1,252	898	34	320	0	0
Wisconsin	6,786	3,969	2,646	146	5	0
South	282,115	97,444	151,892	1,177	189	11,413
Alabama	13,907	5,324	8,575	4	3	1
Arkansas[c]	6,409	3,060	3,313	1	0	35
Delaware[b]	3,456	1,210	2,198	2	4	44
Dist. of Col.[a,c]	10,039	152	9,872	0	0	15
Florida[b]	39,999	16,909	22,270	11	16	793
Georgia	20,895	7,110	13,694	14	1	66
Kentucky	8,299	5,762	2,528	1	0	0
Louisiana	17,257	4,797	12,460	0	0	0
Maryland	16,514	4,276	12,211	7	0	20
Mississippi	7,911	2,393	5,481	10	10	17
North Carolina	17,454	6,721	10,129	416	13	175
Oklahoma[b]	11,606	6,742	3,961	691	0	314
South Carolina	15,720	5,669	9,996	9	2	34
Tennessee[d]	10,630	5,654	4,519	/	/	457
Texas[b]	44,022	14,220	20,314	4	117	9,367
Virginia	16,477	6,112	10,292	6	22	75
West Virginia	1,536	1,313	221	1	1	0
West	140,974	89,178	41,009	2,380	1,546	6,852
Alaska[b]	2,744	1,508	329	878	29	0
Arizona	13,251	10,616	2,197	421	13	4
California	87,297	50,897	32,241	/	/	4,159
Colorado[c]	6,908	5,028	1,612	69	22	177
Hawaii[b,c,e]	2,470	665	147	18	1,308	332
Idaho	1,850	1,659	26	93	10	62
Montana	1,328	1,059	25	242	2	0
Nevada[b]	5,112	2,737	1,510	52	45	768
New Mexico	2,932	2,487	328	108	5	6
Oregon[c]	6,744	5,224	962	155	18	385
Utah	2,394	2,055	208	54	26	51
Washington[b]	6,928	4,439	1,377	250	66	796
Wyoming[b]	1,016	804	57	52	1	102

Note: See the questionnaire for category definitions and the explanatory notes for State-by-State variations from definitions. All data for Arizona, California, the District of Columbia, Georgia, Illinois, Indiana, Iowa, Massachusetts, Michigan, North Carolina, Texas, West Virginia (men), and Wyoming are custody rather than jurisdiction counts; Florida's counts are based on custody data.

/Not reported.

[a]Figures include both jail and prison inmates; jails and prisons are combined in one system.

[b]The jurisdiction reported Hispanic prisoners under "unknown race"; see the relevant jurisdiction in the explanatory notes.

[c]The jurisdiction estimated racial group membership of the population; see the relevant jurisdiction in the explanatory notes.

[d]Tennessee reported persons whose race is neither black nor white under "other race," here reported under "unknown race."

Table 4. Demographic characteristics of jail inmates, 1989

(statistics from U.S. Department of Justice, Office of Justice Programs, Bureau of Statistics)

Table 2.3. Demographic characteristics of jail inmates, 1989

Characteristics	Percent of jail inmates
Total	100.0%
Sex	
Male	91.0%
Female	9.0
Race	
White	51.0%
Male	46.0
Female	5.0
Black	47.0%
Male	43.0
Female	4.0
Other*	2.0%
Male	1.0
Female	–
Ethnicity	
Hispanic	14.0%
Male	13.0
Female	1.0
Non-Hispanic	86.0%
Male	78.0
Female	8.0

Note: Data are for June 30, 1989. Sex of all inmates was reported in both years. Race was reported for 91% of the inmates in 1989. Percentages may not add to total because of rounding.
–Less than 0.5%.
*Native Americans, Aleuts, Asians, and Pacific Islanders.

Table 2.4. Annual jail admissions and releases, by legal status and sex, 1988-89

	Number of admissions/releases	
	National Jail Census 1988	Annual Survey of Jails 1989
Total admissions	9,669,954	9,774,066
Adults	9,604,691	9,720,102
Male	8,498,197	8,606,700
Female	1,106,494	1,113,402
Juveniles*	65,263	53,994
Male	54,087	45,294
Female	11,176	8,700
Total releases	9,560,369	9,494,814
Adults	9,495,883	9,442,773
Male	8,390,991	8,367,519
Female	1,094,892	1,075,254
Juveniles*	64,486	52,041
Male	53,375	43,569
Female	11,111	8,482

Note: Data are for each year ending June 30.
*Juveniles are persons defined by State statute as being under a certain age, usually 18, and subject initially to juvenile court authority even if tried as adults in criminal court.

Table 2.1. Jail population: One-day count and average daily population, by legal status and sex, 1988-89

	Number of jail inmates		
	National Jail Census 1988	Annual Survey of Jails 1989	Percent change, 1988-89
One-day count			
All inmates	343,569	395,553	15.0%
Adults	341,993	393,303	15.0
Male	311,584	358,050	15.0
Female	30,299	37,253	23.0
Juveniles*	1,676	2,250	34.0
Average daily population			
All inmates	338,017	388,845	15.0%
Adults	334,568	384,954	15.0
Male	308,379	349,180	14.0
Female	28,187	35,774	27.0
Juveniles*	1,461	1,891	30.0

Note: Data for 1-day counts are for June 30 of each year.
*Juveniles are persons defined by State statute as being under a certain age, usually 18, and subject initially to juvenile court authority even if tried as adults in criminal court. Because less than 1% of the jail population were juveniles, caution must be used in interpreting any changes over time.

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Table 5. Black - White Table of Minorities on Death Row 1977 - 1990
(statistics from US Department of Justice, Bureau of Justice Statistics)

	received under sentence		executed
YEAR	White Black	White Black	
1977 - 1983	n/a	n/a	92
1984	164	112	138
1985	160	111	117
1986	164	123	117
1987	190	106	1312
1988	196	91	65
1989	132	114	88
1990	147	94	167

BIBLIOGRAPHY

Amnesty International, United States of America, The Death Penalty, (London: Amnesty International, 1987).

Amnesty International Interview with Professor Michael Radelet, 1989.

Baldus, Woodworth, and Pulaski, Equal Justice and the Death Penalty, (Boston: Northeastern University, 1990).

Baldus, "Death Penalty Proportionality Review Project, Final Report to the New Jersey Supreme Court." Sept. 24, 1991.

Bowers, William, Legal Homicide: Death as a Punishment in America 1864-1982, (Boston: Northeastern University, 1984).

Dovidio and Gaertner, Prejudice, Discrimination, and Racism: *Historical Trends and Contemporary Approaches, in Prejudice, Discrimination, and Racism* (J. Dovidio & S. Gaertner, eds. 1986).

Duncan, B. *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. Personality and Social Psychology 590 (1976).

Gross, S. and Mauro, R. Death and Discrimination: Racial Disparities in Capital Sentencing, (Boston: Northeastern University, 1989).

Guinther, John, The Jury in America, (New York: The Roscoe Pound Foundation, 1988).

Interview of Michael Radelet in Gray, I. and Stanley, M., A Punishment in Search of a Crime: Americans Speak Out Against the Death Penalty, (New York: Avon, 1989).

Mullin, Courtney, "the Jury System in Death Penalty Cases," *Law and Contemporary Problems*, Vol. 43, No. 4 (1980).

NAACP Legal Defense and Educational Fund, Death Row USA.

Petersilia, Joan, Racial Disparities in the Criminal Justice System, (California: Rand, 1983).

Radelet, Michael, "Racial Characteristics and the Imposition of the Death Penalty", 46 American Soc, Review 918 (1981).

Reasons, Charles ann Kuykendall, Race, Crime, and Justice (California: Goodyear, 1972).

Sagar and Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. Personality and Social Psychology 590 (1980).

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1980.*

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1981.*

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1982.*

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1983.*

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1984.*

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1985.*

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1986.*

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1987.*

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1988.*

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1989.*

U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1990.*

Van den Haag, E. and Conrad, John, The Death Penalty: A Debate, (New York: Plenium, 1983).

Wilbanks, William, The Myth of a Racist Criminal Justice System (California: Wadsworth, 1987).

Wright, Bruce, Black Robes, White Justice, (New Jersey: Lyle Stuart, 1987).

Wilder, C., *Social Categorization: Implications for Creation and Reduction of Intergroup Bias,* Advances in Experimental Social Psychology 53 - 85 (1980).

The Medicalization of the Death Penalty

by **Karen Ross Demers**

"We plan to use a wheeled bed with a raisable mattress, like you use in a recovery room. It will encompass a maximum of five minutes from the time the IV is started. We'll start the IV at one minute after midnight. We'll probably put it into an arm, although we could use a leg. We'll insert a polyethylene tube into the vein. That will be hooked up to a rubber tube leading to an IV bottle. It's the same procedure used in pre-operative anesthesia. The patient can thrash around considerably and not move it. I've had people fall off the operating table and it didn't come out. Then we'll wheel him into the execution room. Once the neutral saline solution is flowing in the IV, we'll inject the lethal solutions. First comes sodium thiopental, an everyday anesthetic used in surgery. It has a nice smooth induction phase - he'll just fall asleep. The next syringe will have 50 milligrams of muscle relaxant to paralyze the muscles. Finally a third syringe will have potassium chloride to stop the heart. Otherwise it's possible the heart would keep beating for up to twenty minutes. That's it - the man's dead. And he hasn't involuntarily defecated or urinated, hasn't been burned or damaged. If I've ever seen a calm, pleasant death, it's an anesthetic death."[1]

Introduction and History

Despite substantial public support for the death penalty, many Americans still shudder at the thought of the gory disfigurement of hanging, the bloody efficiency of the firing squad, the frying flesh of the electric chair, and the suffocating fumes of the gas chamber. Both the execution method and the executioner have traditionally been perceived as brutal and terrifying. But with the use of lethal injection, the most recent innovation in execution methods, the image of a white-coated, medically-trained professional replaces that of the black-hooded executioner. After execution by lethal injection, the body of the prisoner appears uninjured to observers.[2] The recent move towards a seemingly more humane method of execution has had far-reaching political, legal, and social effects. Texas and Oklahoma were the first capital jurisdictions in the world to adopt lethal injection, but they were not the first to consider its use. In 1949, the British Royal Commission on Capital Punishment investigated lethal injection, but concluded that in order to be effective, the method would require administration by a qualified physician. Because of the ethical dilemmas this created for doctors, Great Britain decided not to implement lethal injection as a method of execution.[3] No country except the United States has ever used this method.[4]

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1 Gettinger, Stephen H. Sentenced to Die: The people, the crimes and the Controversy. New York: Macmillan, 1979, 86.

2 Thorburn, Kim M.D. "A Prison Physician in a Death Penalty State," Physicians for Human Rights Record, Spring 1991, 12.

3 Christianson, S. "Execution by Lethal Injection." Criminal Law Bulletin 15 (1979): 69.

4 Finks, Thomas O."Lethal Injection: An Uneasy Alliance of Law and Medicine." Journal of Legal Medicine 4 (1983): 383-403.

Hanging and shooting are the predominent methods of execution internationally. Other nations either see no need to decrease the cruelty of executions, or believe that newer methods are no less cruel.[5] The United States is one of the few nations that has implemented more modern methods, though the reasons for this unmatched zeal are unknown. Some suggest it is a true concern for more humane treatment of prisoners, while others speculate it is our culture's deep-seated guilt about putting people to death.

Why did the United States begin considering the use of lethal injection in the late 1970's? There had been no executions for almost ten years, but after the Supreme Court held, in Gregg v. Georgia, that "the punishment of death does not invariably violate the constitution,"[6] the search began for a constitutional method that the public would support. This ruling forced Americans, once again, to deal with the grim, concrete reality of execution. Capital punishment proponents have hailed death by intravenous injection as more civilized, less painful and less brutalizing than alternative methods, in order to encourage increased support for the death penalty. Public opinion polls illustrate the success of the public relations campaigns: 66% of the American public favors lethal injection as the most humane method of execution.[7] The electric chair is a distant second, favored by only ten percent. To date, nineteen of the thirty-eight jurisdictions of the United States which permit capital punishment, including New Jersey, have enacted statutes prescribing lethal injection as a method of execution. The prestige of the medical profession has been exploited to ease the return of capital punishment by making the execution seem more benign than it was in the past.[8] This position paper examines the politics leading to the adoption of lethal injection in the United States, the medical ethics debate which resulted, and the practical difficulties of implementation of lethal injection, and shows that medicalization of the death penalty is unacceptable.[9]

THE POLITICAL APPEAL OF LETHAL INJECTION

In the past, men strove to devise new methods of imposing cruel deaths: burning at the stake, drawing and quartering, or impaling on spikes. Over time, however, the survival of capital punishment has been accompanied by attempts to reduce the cruelty of its imposition and the public spectacles that once accompanied its infliction.[10] Proponents of the death penalty advanced their

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5 Ibid, p.387.

6 Gregg v. Georgia, 428 U.S. 153 (1976).

7 "Death Penalty Support Remains Strong," The Gallup Poll News Service, vol.56, no. 8a, June 26, 1991.

8 Bayer, Ronald. "Lethal Injections and Capital Punishment: Medicine in Service of the State." Journal of Prison and Jail Health 4 (1984): 7.

9 Research for this position paper included interviews with Dale Jones, public defender, on 10/9/91; with Richard Moran, Professor of Sociology at Mount Holyoke College, Massachusetts on 10/29/91, and with Henry Schwarzchild, former director of the Capital Punishment Project of the American Civil Liberties Union, on 11/20/91.

10 Van den Haag and Conrad, The Death Penalty, A Debate New York: Plenum Press, 1986, 210.

cause by reducing the public's repulsion by eliminating public access to executions. Now they seek to eliminate the brutal character of capital punishment by searching for more humane methods of execution. In this way, they hope to mollify the opposition.[11]

To proponents of the death penalty, lethal injection signifies the next step in the long progression of methods of capital punishment from deliberate brutality to attempted civility. New York contributed the electric chair to this progression in 1890, and Nevada contributed the gas chamber in 1924.[12] Both methods claimed to decrease the prisoner's suffering. All capital jurisdictions except Delaware, Montana, and Washington have decided that hanging poses too much risk of a slow, painful death. Electrocution and gassing were originally perceived as less cruel replacements. However, use of the gas chamber appealed less to the public after World War II, and after nearly a decade without an execution in the United States, even the electric chair appeared too barbaric. As one Florida legislator said, "one of the problems with electrocution is that [opponents] have been parading all these horribles about people who are just out there french-frying."[13]

The concept of lethal injection appealed to state legislators who supported the death penalty, not because they had a particular preference as to the method used, but because they had strong interests in reviving executions. Lethal injection facilitated that goal. Legislators expected the adoption of lethal injection to result in harsher punishment of criminals by reducing people's discomfort with capital punishment.[14] Several factors made the adoption of lethal injection politically attractive. First, lethal injection is significantly less expensive than other methods of execution. After death penalty reenactment in Oklahoma, a legislator called for a review of execution methods in order to determine the fate of their rusted electric chair, last used in 1966.[15] Repairs would cost $62,000, and building a gas chamber would cost about $300,000.[16] Lethal injection, however, could be administered for about $10 to $15 per use.[17] In the spring of 1977, just one year after Gregg v. Georgia,[18] Governor David Boren signed the bill making Oklahoma the first state to adopt lethal injection, and the economic argument was a critical factor in the debate.

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11 Telephone interview with Richard Moran, Professor of Sociology, Mt. Holyoke, 10/29/91.

12 Zimring, Franklin E. and Gordon Hawkins. Capital Punishment and the American Agenda. New York: Cambridge University Press, 1986, p.107.

13 Bayer, Ronald. "Lethal Injections and Capital Punishment: Medicine in Service of the State," p.15.

14 Finks, Thomas O., p.386.

15 Malone, Patrick. "Death Row and the Medical Model." Hastings Center Report 9 (October, 1979):5.

16 Curran, William J. and Ward Casscells. "The Ethics of Medical Participation in Capital Punishment by Intravenous Drug Injection." New England Journal of Medicine 302 (Jan. 24, 1980): 227. For additional information regarding the costs of capital punishment, see Jennifer Weller-Polley's report, "Dollars and Sentences," also included in the Final Conference Report.

17 Annas, George J. "Killing with Kindness: Why the FDA Need not Certify Drugs used for Execution Safe and Effective." American Journal of Public Health 75 (1985): 1096, and telephone interview with Richard Moran.

18 Gregg v. Georgia, 428 U.S. 153 (1976)

Another factor that made lethal injection attractive was the general consensus that utilizing lethal injection would make the individual states' statutes less likely to be struck down on constitutional grounds of cruel and unusual punishment. Since no single method of execution is specified in the Constitution, the states currently employ five different methods, and lethal injection is widely presumed to be less cruel than alternate methods. This was of monumental importance to staunch supporters of the capital punishment whose primary concern was to provide a death penalty that would avoid the risks of constitutional reversal.

The greatest appeal of lethal injection, however, was that it appeared more humane and less painful than the electric chair, the firing squad, or the gas chamber. One of the first publicized calls for the lethal injection in the United States was made by Ronald Reagan, then Governor of California. "Being a former horse raiser, I know what it's like to try to eliminate an injured horse by shooting him. Now you call the veterinarian, and the vet gives it a shot and the horse goes to sleep - that's it . . . maybe we should review and see if there aren't even more humane methods now - the simple shot or tranquilizer."[19] Indeed, as Reagan suggests, lethal injection is aesthetically more acceptable for the witnesses. It is clean, orderly, and undramatic if administered properly. This pleases proponents of capital punishment since making the death penalty more palatable is thought to increase the willingness of juries to sentence defendents to death.[20] Conversely, opponents of the death penalty often oppose introduction of any innovation capable of diminishing its horror, and so have resisted the introduction of lethal injection.[21]

As each state adopted lethal injection for capital offenses, proponents have stated that it was concern for the person to be executed which motivated the change to the "more humane" method.[22] A closer look at the reasons behind adoption of lethal injection by state legislators reveals that much more was actually involved. Rarely is the prisoners' comfort the single or even primary reason for the adoption of the method. While Oklahoma's legislators were swayed for the economic reasons cited above, Texas' legislators were persuaded by arguments that the electric chair was upsetting to witnesses because it resembled a medieval torture device.[23] The Texas legislation might not have been enacted save a federal district court decision to allow extensive media coverage of executions.[24]

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19 Schwarzchild, Henry. "Homocide by Injection." New York Times. Dec 23, 1982.

20 Curran, William J. and Ward Casscells. "The Ethics of Medical Participation in Capital Punishment by Intravenous Drug Injection." p.226.

21 Kevorkian, Jack. "Medicine, Ethics, and Execution by Lethal Injection." Medicine and Law 4 (1985): 411.

22 Bayer, Ronald. "Lethal Injections and Capital Punishment: Medicine in Service of the State." Journal of Prison and Jail Health 4 (1984): 10.

23 Christianson, Scott. "Execution by Lethal Injection." Criminal Law Bulletin 15 (1979): 73.

24 In Garrett v. Estelle, U.S. District Judge William Taylor Jr. wrote, "the news media is seeking to report on one of the most important and controversial public issues of the day: capital punishment. The carrying out of the death penalty is . . . the ultimate act of state . . . For thirteen years, no person in Texas has been subjected to the death penalty, and such a significant change in state policy should be accompanied in a democratic society by the widest possible public knowledge and information . . . The people, through these [press] representatives, must have access to . . . the

Senators expressed a desire to reduce sensationalism and protect the public from the grotesque details of electrocution, by presenting the more serene vision of the executee "drifting off to sleep."[25] Another Texas representative cited her desire to preserve the dignity of the state and to eliminate the "circus atmosphere that makes heroes out of criminals."[26]

In Nebraska, a senator argued that the state "needed to find a less objectionable way to impose [the death penalty]," and that lethal injection would accomplish this. He believed "death by lethal injection would be a relative (sic) peaceful way."[27] Washington proponents pushed for lethal injection because the state was having a difficult time finding a qualified hangman and keeping his identity secret. In New Mexico, a death penalty advocate, Senator Les Houston, pushed the provision for lethal injection through on the premise that it would "make it easier for people to swallow. You just take and stick it to 'em til they're dead."[28]

Concern for the condemned was not the strongest motivation in New Jersey either. In 1982, New Jersey enacted a death penalty but did not specify the method of execution. Governor Kean ordered a study of execution technology, and the result was a recommendation for an "intravenous injection of a lethal quantity of an ultra-short-acting barbitutate in combination with a chemical paralytic agent."[29] The assistant to the governor who recommended lethal injection did so based on his reading of a law journal article detailing botched executions, but his concern rested with the comfort of the juries rather than that of the prisoner. "The thought of some guy in that chair sizzling is going to bother them," he argued. "This way, with lethal injections, it might ease their conscience when they come up with a verdict."[30]

The attitudes and actions of Senator Houston and the other legislators reveal an underlying current of purpose behind the adoption of lethal injection. A decade of non-use had "rendered chambers and chairs the stuff of wax museum exhibits rather than the instruments of public policy."[31] The return to executions necessitated the adoption of a more socially acceptable means of killing. Legislators called for the use of anesthetic drugs rather than non-therapeutic poisons, an

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workings of their government . . . If there is any subject about which the people have a 'right to know,' surely it is this." However, due to pressure from prison authorities, Taylor was later reversed. See Garrett v. Estelle, 556 F. 2d 1274 (5th Cir. 1977), rehearing denied, 560 F. 2d 1023, cert. denied 438 U.S. 914 (1978).

25 Christianson, p.73.

26 Ibid, p.73.

27 From a transcript of testimony on LB 307 before the Judiciary Committee of the Nebraska State Legislature, Eighty-eighth Legislature, First Session, 1983. Transcript of testimony provided by Senator Ernest Chambers, Nebraska.

28 Malone, Patrick. "Death Row and the Medical Model." Hastings Center Report 9 (October, 1979):6.

29 Norman, Michael."Why New Jersey is Leaning to Executions by Injection," New York Times, May 18, 1983.

30 McCarthy, Colman. "Toward a more civilized barbarism," The Washington Post, may 24, 1983.

31 Zimring, Franklin E. and Gordon Hawkins. Capital Punishment and the American Agenda. New York: Cambridge University Press, 1986, 132.

ostensibly deliberate linking of the death penalty to the healing profession. The selection of therapeutic drugs "was not fortuitous; the need was to define the enterprise of executing people in a way that was consistent with scientfic progress and medical values."[32]

Once lethal injection provisions were passed, legislators never extensively investigated whether it was truly humane in practice. The issue simply vanished from discussion once the goal of adoption of the method was accomplished. When the first executions by lethal injection took place, no state which had passed or was considering legislation regarding lethal injection sent medical or scientific observers to investigate the method's practical use. Local authorities also made no attempt to assess the amount of pain and anxiety the prisoners suffered or to measure the speed at which the drug worked. This omission is the "equivalent of a space flight not being considered relevant by either supporters or opponents of the space program,"[33] and supports the hypothesis that the "humanity" of lethal injection was nothing more than a public relations tool devised to ease the re-instituiton of capital punishment.

The tool, however, was effective. Despite several botched executions, and visible pain in the prisoners even when the event proceeds properly, the public continues to perceive this method as "more humane" than other methods by a substantial margin. According to Henry Schwarzchild, director of the capital punishment project of the American Civil Liberties Union, lethal injection has been "merchandized - and successfully so - as being more efficient, more technological, more humane, safer, and less expensive, but the real purpose is to facilitate executions."[34] Neurosurgeon Dr. Kenneth Smith stated that although the public wants to have the death penalty, it wants to execute "quietly, in a kind and humane way and make it look like a surgical operation so nobody will complain."[35] However, legislators soon found that the medical community did complain.

THE MEDICAL PERSPECTIVE

The First Lethal Injection

On December 7, 1982, the first lethal injection in the United States took place when the State of Texas executed Charlie Brooks Jr., a convicted murderer, by injecting a lethal dose of sodium thiopental into his vein. Medicalization of the execution technique was so complete that Brooks' arm was swabbed with alcohol before he was injected.[36] It is ironic that although they are about to execute him, they remain cautious about his exposure to diseases such as hepatitis.

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32 Ibid, p.123.
33 Ibid, p.120.
34 Colburn, Don. "Ethical Executions?" San Francisco Chronicle Feb 24, 1991.
35 Colburn, Don. "Why Doctors are Uneasy about the Newest Method of Capital Punishment," Washington Post - Health, Dec 11, 1990.
36 Schwarzchild, Henry. "Homocide by Injection." New York Times, Dec 23, 1982.

According to four reporters who witnessed the execution, Mr. Brooks appeared to have suffered pain.[37] Medical Director Dr. Ralph Gray watched as technicians, none of whom was a physician, repeatedly tried to insert the needle, without success. Blood spattered on the sheet. "I could have hit those veins," claimed Gray, "but there was no way I was going to get involved."[38] Amnesty International charged that Gray had indeed been involved. They claimed that he acted unethically because he had examined the veins in Brooks' arms before the execution, and he monitored the prisoner's heartbeat throughout the execution, indicating at one point that additional infusion of drugs was necessary because Brooks was not dead. It was also later revealed that the drugs used came from Gray's own supply, and the technicians present were members of his staff. The local medical society considered a charge that Gray violated Texas Medical Association guidelines, but the charge was rejected since Gray did not actually insert the catheter or introduce the lethal agent.[39] David Rothman of Columbia University said that Dr. Gray's role provided social legitimation for the act of execution, and Ronald Bayer of the Hastings Institute agreed that Dr. Gray's actions conflicted with the healing role of the physician.[40]

Since Brooks' execution, physician participation in executions has been much more limited. Physicians only enter the death chamber to certify death. However, this has led to another problem: technicians have had great difficulty inserting the catheters. This creates a serious ethical dilemma for the physicians. Ethical standards prohibit physician participation, but without their participation the prisoner may suffer more by having less experienced personnel administer the drugs. According to Dr. Fred Rosner of Queens Hospital, "this must undermine still further the notion that lethal injection is an acceptable and humane alternative to other methods."[41]

Ethical Codes

The Brooks execution illustrates some of the complex medical ethical issues which arose as a result of the adoption of lethal injection. Physicians have traditionally been involved in the administration of the death penalty only to pronounce death. This rigidly limited participation is accepted by both individual physicians and the major medical societies. However, by its nature, lethal injection implied a more direct involvement of medicine in executions. Since requiring

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37 Reinhold, Robert. "Execution by Injection Stirs Fear and Sharpens Debate," New York Times, Dec 8, 1982.

38 Colburn, Don. "Why Doctors are Uneasy about the Newest Method of Capital Punishment."

39 "Involvement of Doctors and Other Heath Professionals in the Death Penalty," New York: Amnesty International, 1988.

40 Boffey, Philip, "Experts Debate Ethics of Doctor's Execution Role," New York Times, December 8, 1982.

41 Rosner, Fred M.D. et al Physician Involvement in Capital Punishment, (Draft) Queens Hospital Department of Medicine.

physicians to participate exploits their societal role as healers,[42] physicians have made it clear from the beginning that they would accept no direct role in lethal injection. As a result of the medical community's powerful influence, not one statute currently calls for physicians to insert the catheter or inject the drugs.

The foundation of the medical-ethical conflict physicians face is the Hippocratic Oath, sworn to by all physicians entering the field of medicine. In this oath, the physician pledges to maintain and not destroy human life, to use treatment to help the sick, never to inflict injury, never to administer a poison to anyone when asked to do so and never to suggest such a course.[43] It is generally agreed that a physician who inserts the lethal injection needle or pushed the plunger would be violating the Hippocratic Oath. But other situations are less clearly defined, such as whether it is ethical for the medical profession to loan its tools to the state for execution, and whether a physician can perform a supervisory role, or instruct technicians. Consequently, the degree of ethical difference between a physician who prescribes the drugs and a physician who injects them remains unresolved.

The most respected examination of the ethical and social issues was undertaken by William Curran and Ward Casscells of the Harvard Medical School, who argue that the participation of medical personnel in an execution and the use of medicine to kill gives the impression of moral sanction of execution by the healing professions. They concluded that unlike any other methods, lethal injection "requires the direct application of biomedical knowledge and skills in a corruption and exploitation of the healing profession's role in society."[44] Unlike those who sought only to prohibit direct physician involvement, they believe that the assumption of a supervisory role in injection administration is also ethically unacceptable, saying "the physician should not escape moral responsibility by ordering a subordinate to do what he or she may not properly do directly."[45] Curran and Casscells stated that even the monitoring of the prisoner during the execution and the declaration of death was inappropriate. Since the "continuous injection would come to an end only upon the physician's declaration of death, there is no other way of describing the doctor's role except as direct participant." They also express dismay that the public perceives lethal injection as less cruel than other methods, because this may lead to more extensive application of the death penalty.[46] Curran and Casscells called for the medical community to condemn all forms of physician participation in lethal injection. Their influential article was a plea against physician participation in lethal injection specifically, and against capital punishment in general.

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42 Annas, George J. "Killing with Kindness: Why the FDA Need not Certify Drugs used for Execution Safe and Effective." American Journal of Public Health 75 (1985): 1096.

43 "Oath of Hippocrates." In Reiser, Dyke, Curren, eds. Ethics in Medicine: Historical Perspectives and Contemporary Concerns. Cambridge, MA: MIT Press, 1977, p.5.

44 Curran, William J. and Ward Casscells. "The Ethics of Medical Participation in Capital Punishment by Intravenous Drug Injection." p.230.

45 Bayer, Ronald. "Lethal Injections and Capital Punishment: Medicine in Service of the State." Journal of Prison and Jail Health 4 (1984): 12.

46 Casscells, Ward, and William J. Curran. "Doctors, the Death Penalty, and Lethal Injection: Recent Developments." p.1533.

Following publication of Curran and Casscells' article, the American Medical Association and various state medical societies passed resolutions that physicians should not participate in injections including supervising them, but continued to permit physicians to declare death.[47]

Organizational Response at State, National, and International Levels

In the states that instituted lethal injection, state medical societies acted to protect their members from the legal obligation to violate the Hippocratic Oath. Each society fought for and received assurance from the state that executions would not require the participation of a physician to insert the needle. A doctor's prescription is no longer needed to obtain the drugs; a prison warden can sign for them. To further limit the role of medical practitioners, many state medical societies have issued policy statements clearly defining the nature of permissable participation. For example, the New York Medical Society prohibited physicians from determining mental and physical fitness for execution, giving technical advice during the execution, prescribing, preparing, administering, or supervising injection drugs, and performing medical examinations during the execution to determine whether the prisoner is dead. The society did, however, permit physicians to act as witnesses at all trials, to relieve the suffering of prisoners awaiting execution, to certify death after someone else has declared it, and to perform autopsies after death.[48]

In addition to organizational response on the state level, national and world medical organizations have also issued strong policy statements against physician participation. The Thirty-seventh Session of the United Nations General Assembly adopted a resolution on Principles of Medical Ethics which stated, "It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners, the purpose of which is not solely to evaluate, protect, or improve their physical and mental health."[49] Dr. Armond Start suggested the use of ex-IV drug users, veterinarians, or other non-medical personnel to administer the drugs, in order to preserve the prisoners' belief that the medical staff is committed and dedicated to the preservation of life.

The World Medical Association's 1975 Declaration of Geneva, considered by many to be the modern version of the Hippocratic Oath, includes a clause stating, "the utmost respect for human life is to be maintained even under threat, and no use made of any medical knowledge contrary to the laws of humanity."[50] This clause was added in response to atrocities committed by Nazi doctors during World War II. As Dr. Charles Steuart, Idaho's Corrections Department Medical Director remarked, "it's not a very large step from lethal injections to being part and parcel of Auschwitz or

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47 Rosner, Fred M.D. et al Physician Involvement in Capital Punishment, (Draft) Queens Hospital Department of Medicine.

48 Ibid, p.14.

49 Principles of Medical Ethics, Proceedings of the 37th Session of the United Nations General Assembly A/Res/37/194 (March 9, 1983).

50 Rosner, Fred M.D. et al, p.3.

torturing political prisoners."[51] Since the declaration was produced two years before lethal injection was legally sanctioned, the prohibition of physician participation was probably not a part of the declaration's original intent, but many interpret it as a source of argument against medical involvement in executions.

In 1980, the Judicial Council of the American Medical Association concluded that the fundamental concept of *primum non nocere*, "above all do no harm," bars medical participation in lethal injection regardless of the physician's personal views on the moral acceptability of capital punishment.[52] The policy statement that resulted said that physicians "as members of a profession dedicated to preserving life when there is hope of doing so, should not participate in a legally authorized execution."[53] However, the Council found no ethical objection to physicians declaring the prisoner's death after execution. The ambiguity of the AMA statement lies in its failure to define "participation," thus making the extent of acceptable behavior unclear. Although the AMA statement appears to denounce physician participation, its narrow focus disappointed those who hoped the AMA would take a more general stance against the "misappropriation of medicine's humane function" and "serious challenge to the social role of medicine."[54] The American Psychiatric Association took a stronger stance in their 1980 statement, saying that using medically-trained people serving the state as executioners represents a "perversion of medical ethics and of the healing role."[55]

Amnesty International's Medical Advisory Board urged doctors not to participate in executions and medical societies to support them in their refusal to collaborate. Amnesty International clearly defines "participation" as determining mental and physical fitness for execution, giving technical advice to executioners, prescribing, preparing, administering or supervising doses of drugs for execution, and making medical examinations during the execution so the execution can continue if the prisoner is not dead. Also, the American Public Health Association is the only major health professional organization in the United States to call for the abolition of the death penalty.[56] In September of 1981, the World Medical Association Secretary General Dr. Andre Wynen issued a press release stating that "acting as an executioner is not the practice of medicine and physician services are not required to carry out capital punishment even if the methodology utilizes pharmocologic agents or equipment that might otherwise be used in the practice of medicine. A physician's only role would be to certify death once the state had carried out the execution."[57]

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51 Malone, Patrick, p.6.

52 Rosner, Fred M.D. et al, p.10.

53 Capital Punishment. Proceedings of the House of Delegates of the American Medical Association 85,86 (Annual Convention, July 1980).

54 Bayer, Ronald. "Lethal Injections and Capital Punishment: Medicine in Service of the State." Journal of Prison and Jail Health 4 (1984): 12.

55 Ibid, p.13.

56 Thorburn, Kim M.D., p.14.

57 "Involvement of Doctors and Other Heath Professionals in the Death Penalty," New York: Amnesty International, 1988.

The medical profession's influence is great, and organizations such as the American Medical Association are powerful lobbies in terms of prestige, financial resources, and size. The sheer number of lethal injection policy statements issued by such organizations attests to the importance the medical community places on this issue. However, far from simply issuing passive condemnations of physician participation in execution, medical organizations also proved to be influential in effecting legislation.

In 1979, a proposal made by the Attorney General in Florida to replace electrocution with lethal injection was defeated largely due to pressure from the Florida Medical Association and, to date, the Association has been successful in preventing the changeover.[58] The Association's president, Dr. Richard Hodes, an anesthesiologist who uses the same drugs used for lethal injection daily in the operating room, says, "I feel very uncomfortable with a technique that is used routinely for healing purposes also [being] used to destroy human life."[59]

In Illinois, legislators introduced lethal injection provisions as early as 1977. Six bills were introduced and tabled before 1980. In 1981, Illinois House Bill 1971, which included a proposed change from the electric chair to lethal injection, passed the House and Senate. Governor James Thompson vetoed the bill, stating that opponents of capital punishment could not be appeased with a different method, and that supporters could rely on the effectiveness of the electric chair. He concluded, "We cannot make the death penalty palatable to those who are opposed to it and that is the goal of this legislation."[60] It has been suggested that the AMA and the Illinois Medical Society were instrumental in the governor's veto.[61] When Illinois eventually adopted lethal injection, the Illinois State Medical Society then took the strongest stance in the country regarding physician participation in executions. The Society prohibits all physician participation, including acting as a witness and the practice of declaring death.[62]

Though physicians who violate these requirements are subject to expulsion from the society, recent legislative initiatives will make the policy difficult to enforce. In July 1991, Illinois Governor Jim Edgar signed a bill specifying that the identities of all participants in executions must remain confidential. Critics charge that this provision allows physicians to participate in lethal injection to whatever extent they wish without detection or peer review. This law resulted from the events surrounding the September 1990 death of Charles Walker, the first person to be executed in Illinois in

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58 Hood, Roger. The Death Penalty, A World-wide Perspective: A Report to the United Nations Committee on Crime Prevention and Control. Oxford: Clarendon Press, 1989, p.78.

59 Malone, Patrick, p.6.

60 Illinois House Journal, 82d Ill. Gen. Assembly, 2d session., 23-24 (Nov 5, 1982).

61 Finks, Thomas O., p.399.

62 The Society draws a distinction between declaration and certification of death, prohibiting the former and permitting the latter. Thus, someone present at the execution, i.e. the executioner, looks for breathing or listens for a heartbeat. If none is found, the doctor may then enter to certify death. This eliminates the "participation" which results from a situation where a doctor checks the pulse or heartbeat and reports that the prisoner is still alive, thus ordering additional drugs or voltage, whether explicitly or implicitly.

twenty-six years. According to Department of Corrections representatives, licensed physicians were consulted concerning the types and amounts of drugs to be used. Three Illinois physicians assisted by administering a drug before the execution and inserting an IV line to transmit the lethal drugs. Doctors also monitored the prisoner's electrocardiogram in the next room during the execution.[63]

The AMA and the WMA ethical guidelines forbid this participation, but the physicians' identities were protected by a one-time judicial grant of anonymity.[64] Such anonymity became standard practice when the July bill was signed. New York Sociologist Eliot Freidson claims this will "protect physicians from the necessity of abiding by their professional code of ethics." Further, he believes that the decision "smacks of legal devices employed by totalitarian regimes to gain the services of physicians willing to serve their unethical ends in prisons, gulags, psychiatric hospitals, and concentration camps."[65] The American College of Physicians, the Institute of Medicine, the American Public Health Association, and the Illinois State Medical Society oppposed the law, and are now pushing for its repeal.

Dissenting Views

The participation of doctors in the Walker execution brings up a key issue in the debate. Although most doctors and medical societies oppose physician participation in capital punishment, some disagree. One doctor said that in refusing to give the injection, doctors are "breaching their responsibilities to the patient."[66] Others have argued that no matter what doctors' personal opinions on the death penalty are, they are morally obligated to help society provide a painless method of death for persons condemned to death under our legal code. The medical director of Texas' Department of Corrections makes the analogy that just as it is ethical for physicians to excise living flesh from patients for therapeutic reasons, so it is ethical for physicians to help society heal itself of crime by killing a criminal. Other authorities, however, have ridiculed this analogy.[67]

Dr. Jack Kevorkian argues that it is society as a whole that ends the life, not the legislature, the courts, the juries, or even the executioners. He feels that in the case of lethal injection, physicians are simply citizens called upon to act as state agents empowered to carry out the will of the majority. Kevorkian believes it is a mistake for physicians to subordinate society's laws to their professional codes, and charges that physicians are guilty of complicity in death in many other situations. For example, physician's courtroom testimony for the prosecution sometimes sends people to their death, yet doctors do not refuse to testify. Kevorkian speaks of those doctors who would agree to administer the injection as being aware of the "higher role of a citizen of integrity and

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63 Thorburn, Kim M.D., p.13.

64 Marz, Beverly "Illinois Execution Bill signed over Medical Groups' Protest," American Medical News, Sept 23-30, 1991.

65 Ibid.

66 Rosner, Fred M.D. et al, p.12.

67 Ibid, p.12.

conscious of his relation to the common good."[68] Although these dissenting opinions cannot be ignored if we wish to thoroughly analyze the ethical views of physicians on the lethal injection, the overwhelming opinion of doctors and medical asssociations is that physician participation in any way except in the declaration of death is not acceptable under the ethical codes of the medical profession.

Effects on Society

Much of the medical debate has centered on a rather tedious discussion of what constitutes a violation of the various medical societies' guidelines. Rather than face the moral issue of whether medicine as a social institution should tolerate lethal injection, the politically powerful organizations that could probably do most to effect change have instead spent countless hours trying to define the limits of the role physicians should play in an execution. The broader issue, however, is the way the authority of medical profession has been used to make more palatable a return to capital punishment. A few physicians have spoken out against physician participation in any form. One such physician, Louis J. West, expressed his regret that a larger percentage of physicians were not more vocal in their condemnation of the death penalty. West cites the respected position of American physicians, and postulates that they could inspire significant change if, as a group, they refused to be present at executions, even to declare death. George Annas echoes this sentiment.[69]

The presence of a doctor at an execution may fulfill society's desire for release from responsibility. Most Western nations have abolished the death penalty, but in the United States where we continue to use it, there is "evidence of some public discomfort about it... The public recognizes the medical profession's ethical duty of benificence; participation by an altruistic profession in the process leading to the execution conveys a sense of decency to state killing."[70] Even if injections are not administered by a physician, they still have a medicinal air about them and are reminescent of putting an animal to sleep. Another method might be "more directly [and] explicitly punitive, without being more painful."[71] To use the techniques of the healing professions to advance the cause of capital punishment is to "stretch the metaphor of medicine, extending it from cure and comfort to killing."[72]

Dr. Lonnie Bristow of San Pablo, California, believes that lethal injection upgrades capital punishment to a humane, acceptable act in the eyes of the public, since injections have traditionally been given only by physicians and nurses, groups "considered to have the highest developed quality of love for humanity."[73] Though Dr. Richard Keenan of the Medical College of Virginia is not

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68 Kevorkian, Jack. "Medicine, Ethics, and Execution by Lethal Injection." Medicine and Law 4 (1985): 409.

69 Annas, George J. "Nurses and the Death Penalty." Nursing Law and Ethics 1 (May, 1980): 3.

70 Start, Armand M.D., "Nor will I prescribe a Deadly Drug...", The National Prison Project Journal American Civil Liberties Union Foundation Inc., No.17, 1988, 3.

71 Van den Haag and Conrad, The Death Penalty, A Debate New York: Plenum Press, 1986, 196.

72 Bayer, Ronald. "No nice face for death," New York Times, August 21, 1983.

73 Malone, Patrick, p.5.

personally opposed to capital punishment, his profession moves him to argue that lethal injection is threatening to the public's confidence in doctors and sends the wrong messages to patients. He thinks a method other than lethal injection would be more appropriate because "nobody would ever confuse a guillotine with medical therapy, but I'm an anesthesiologist; these are my tools. The very drugs are the ones we use every day in the operating room."[74] He concludes that regardless of the elaborate procedures employed, such as one-way windows, triple IV lines, and anonymous technicians, we cannot hide the fact that we are killing a human being.

THE INHUMANITY OF LETHAL INJECTION'S PRACTICAL APPLICATION

The ethical problems of lethal injection have led to numerous difficulties for states considering its adoption. Some have carefully worded statutes to appease state medical associations and others have simply failed or had great difficulty passing their statutes.[75] A measure of skepticism is due the "humane" advantages claimed for lethal injection. Like many of the issues associated with the death penalty, there is contradicting scientific data put forth by both sides of the debate. Horrible things can occur during hanging, gassing, shooting, and electrocution. However, equally heinous episodes have been documented in an Amnesty International study of botched executions since 1979.[76]

James Autry, executed in 1984 in Texas by lethal injection, "took at least ten minutes to die and throughout much of that was conscious, moving about and complaining of pain."[77] A physician present at the execution suggested that the catheter needle may have become clogged. Former heroin addict Stephen Peter Morin was executed March 13, 1985 in Texas by lethal injection. Because his veins were severely damaged from past drug abuse, he suffered through forty minutes of repeated attempts at injection in his arms and legs before technicians could find a suitable vein. Once injected, he took eleven minutes to die. In 1986, Texas executed Randy Woolls. Due to past drug abuse, many of his veins had collapsed, and the technicians were unable to find a suitable vein. Woolls had to point out where the injection could be administered. In 1987, also in Texas, Elliot Roc Johnson's execution was delayed thirty-five minutes because past drug use made it difficult for technicians to insert the needle.[78]

During the execution of Raymond Landry in December 1988, a tube attached to the needle began to leak and the mixture spurted out towards the witnesses. According to the Texas Attorney

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74 Colburn, Don. "Why Doctors are Uneasy about the Newest Method of Capital Punishment," Washington Post - Health, Dec 11, 1990.

75 Finks, Thomas O., p.398.

76 Cases cited are taken from "Post-Furman Botched Executions," compiled by Michael L. Radelet, June 1990.

77 Fair, Kathy. "Witnesses to an execution," The Houston Chronicle May 27, 1989.

78 Freelander, Douglas. "Johnson executed for 1982 Murder at Beaumont Store," Houston Post, June 24, 1987.

General, this "blow-out" occurred because there was more pressure in the hose than his veins could bear. A curtain was drawn to block the witnesses' view, but they reported hearing moans. After the needle was reinserted, the curtain was opened. Landry groaned for twenty-four minutes before he was finally declared dead. In May 1989, when Stephen A. Mc Coy was executed, the scene was hardly serene. He gasped, choked, and heaved violently during the administration of the drug. Attorney General Jim Mattox attributed McCoy's "somewhat stronger reaction" than is normally expected during lethal injection to the possibility that the drugs might have been administered in a heavier than normal dose, or more rapidly than normal.

Although the possibility for technical failure exists with every method of execution, it seems particularly great for lethal injection. Lethal injection requires venous catheterization, accomplished either by puncturing the skin to insert a needle into a vein, or in the case of inaccessible veins, by performing a surgical cut-down where a small dissection is done in the area of the vein and the catheter is inserted directly into the vein. Both methods require technical skill, but because physicians and nurses have refused to administer lethal injections, many states have had to resort to employing volunteer execution technicians. When less skilled volunteers replace physicians in the administration of an injection since ethical principles also prohibit physicians from training volunteers to administer the injections, the potential for a painful death is increased. Injections by less skilled people are more likely to lead to complications. Extra-arterial injection causes extreme pain and tissue necrosis results from extravasation. Intravenous injections are described as "very difficult to accomplish and . . . very difficult to administer."[79] Frequently, when inexperienced people insert a needle, it slips out of the vein and into the surrounding tissue, which in addition to being painful, also slows down the drug absorption. The likelihood of this happening would increase greatly if the prisoner was uncooperative and struggled, and the technician was unskilled.

Even if volunteer training could be arranged, there are problems inherent in lethal injection even if the catheter is in skilled hands. Lethal injections may not work effectively on diabetic prisoners, drug users and people with heavily pigmented skin, since these groups' veins are hard to access. About twenty-five percent of prisoners are thought to have veins which are difficult to access due to drug abuse or being too flat, too deep, or covered by fat.[80] If the components of the lethal solution are not balanced or if they combine prematurely, the mixture may clog the IV line and lead to a protracted death. Finallt, extenuating factors such as drug abuse can alter prisoners' response to the drugs. These possible sources of error, plus the possibility of mechanical failure of the lethal injection machines used by some states, open up the nightmarish possibility that if insufficient pentothal but sufficient paralytic agent were injected, the prisoner could sense the pain of the execution, but would be totally paralyzed. The result would be a death which appeared humane but was actually extremely painful.[81]

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79 Stolls, Michelle. "Heckler v. Chaney: Judicial and Administrative Regulation of Capital Punishment by Lethal Injection." American Journal of Law and Medicine 11 (1985): 260.

80 Finks, Thomas O., p.397.

81 Glennon, Betsy. "Opposes Lethal Injections," Chapel Hill Newspaper April 26, 1983.

Dr. Edward A. Brunner, chairman of the anesthesia department at Northwestern University Medical School testified in an Illinois lawsuit that the $40,000 injection machine purchased from Fred A. Leuchter Associates of Boston, and now employed in several states such as Missouri and Illinois, would cause exactly the nightmare scenario described above. The prisoner would be rendered incapable of screaming in response to the extreme pain and burning sensation he would feel due to the potassium chloride. Fred Leuchter was, until recently, the nation's only specialist in manufacturing and repairing instruments of execution, including lethal-injection systems.[82] However, since Leuchter was sentenced to two years probation for practicing engineering without a license in Massachusetts, the Illinois Department of Corrections has terminated Leuchter's contract. The Alabama Attorney General's office has sent other states a memorandum raising questions about Leuchter's expertise and reliability. Leuchter denies, however, that his system causes pain.

Since there have been instances of botched executions with all methods of capital punishment, it is difficult to conclude which method is best, especially given the small number of executions actually performed by the relatively new method of lethal injection. It can be concluded, however, that the humanity of lethal injection is not all it was promoted to be. Dr. Keenan says that appearances aside, lethal injection is no more humane and certainly no quicker than electrocution, if done correctly. "Loss of consciousness is instantaneous in an electric chair, no matter how gruesome it looks - even if signs of life such a breathing and heartbeat continue for several minutes. With the first jolt of electricity, all the brain cells are depolarized. They just turn off, and the prisoner is completely unaware of anything after that first instant."[83] The Chief Deputy Medical Examiner of Dade County, Florida, Dr. Donald Wright, agrees. He says that the prisoner feels no pain when electrocuted, since the brain's pain receptors are short-circuited before the sensation of the electricity has reached them.[84] Perhaps the most compelling testimony on this subject was that of Dr. Walter Friedlander before the Nebraska State Legislature. Friedlander, a neurologist whose specialty is brain electrophysiology, stated that while lethal injection requires an absolute minimum of ten seconds to take effect,[85] electrocution destroys brain cells in a matter of thousandths of a second.

Electrocution is quick and painless if administered correctly. However, what happens after the prisoner's brain is dead is gruesome according to eyewitnesses. Thus, the brutality of the electrocution is experienced by the witnesses, but not by the prisoner. Electrocution seems the more beneficial option, as it can achieve a quick, nearly painless death, while not allowing the brutality of the state's act to be masked. What opinion do the people most affected by method choice, the

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82 Robinson, Herb. "Back to death penalty, 'humane' or not." Seattle Times, Aug 20, 1990.

83 Lion, Ed. "Two Doctors Condemn Injection Executions," Proprietary to the United Press International, Dec 9, 1982.

84 Malone, Patrick, p.6.

85 Taken from Nebraska State Legislature transcript. Friedlander says that beheading may be a more rapid method of death than lethal injection. Lethal injection requires that the drugs run a lengthy course through the body from the arm to the heart to the lungs back to the heart, through the arteries to the brain. Even after reaching the brain, it takes a few seconds for the drugs to act on the brain cells.

condemned themselves, generally prefer? Most say that it makes no difference to them. Says one death row inmate, "a man isn't afraid of the way he's going to die, he's afraid of dying."[86]

THE LEGAL PERSPECTIVE: NOT CRUEL AND UNUSUAL

Despite inmates' expressed indifference regarding method of execution, the institution of a new method of execution stimulated legal and judicial debate over its use. Such cases and appeals provide the inmates with additional time before their execution, if nothing else. Soon after the Texas lethal injection statute was enacted, it was challenged by Kenneth Granviel,[87] a convict nearing the end of his time on death row. He charged that lethal injection is a violation of the Eighth Amendment's prohibition against "cruel and unusual punishment." Granviel's attorney attempted to prove lethal injection was both cruel and unusual. However, based on the testimony of an experienced toxicologist, he was not able to show that the fatal injection of the drugs was inherently cruel by constitutional standards. His argument that complications from the injection might cause additional pain was rejected on the grounds that even if such complications came about, the additional pain could be "characterized as a possible discomfort or suffering necessary to a method of extinguishing life humanely." The court concluded that "what is cruel and unusual may acquire meaning as the public becomes enlightened . . . and must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[88] Presiding Judge Onion wrote the opinion of the court: lethal injection is no crueler than other methods of execution, and that simply because it is "new and innovative" does not make it "unusual."[89]

Heckler v. Chaney

The "New Drug" provision of the Food, Drug, and Cosmetics Act prohibits the introduction into state commerce of drugs used for purposes not approved by the FDA. Although the lethal injection drugs used to anesthesize and paralyze prisoners had been FDA-approved for their therapeutic purposes, they had not been approved for human executions. Ironically, though the FDA insists upon proof of the safety and efficacy of drugs used by veterinarians to kill animals, no such proof is required for the killing of humans. Thus, eight death row inmates from Oklahoma and Texas charged in Heckler v. Chaney[90] that if drugs for animals' death are required to be reliable,

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86 Gettinger, Stephen H. Sentenced to Die: The people, the crimes and the Controversy. New York: Macmillan, 1979.

87 see Ex parte Granviel 561 S.W. 2d 503, 509 (Tex. Crim. App. 1978). Also see Granviel v. State, 552 S.W. 2d 107 (Tex. Crim. App. 1976), *cert denied* 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed. 2d 250 (1977).

88 Christianson, Scott. "Execution by Lethal Injection." Criminal Law Bulletin 15 (1979): 76.

89 Ex parte Granviel, 561 S.W. 2d 503, 509 (TX Ct. Crim. App. 1978).

90 Heckler v. Chaney, 470 U.S. 821 (1985).

fast-acting, and to cause a minimum of pain, drugs for prisoners' death should be subject to the same criteria.

The suit began in December 1980, when the NAACP Legal Defense and Education Fund petitioned the Secretary of Health and Human Services to label drugs for lethal injection "not approved" and to investigate drugs for use in executions. When the FDA Commissioner rejected the petition, the inmates petitioned the United States District Court for the District of Columbia to consider the propriety of the FDA's refusal. United States District Court Judge Johnson supported the FDA decision. Upon appeal, however, the Circuit Court of Appeals reversed the decision, citing FDA's refusal to investigate the drugs under the Food, Drug, and Cosmetics Act as "arbitrary and capricious abuse of its enforcement discretion."[91] The FDA then appealed the Circuit Court decision to the US Supreme Court.

Lawyer Stephen Kristovich argued that the FDA has a legal responsibility to ensure drug executions are not cruel and unusually painful. The American Society of Law and Medicine and the American Society of Allied Health Professionals filed a brief which stated "In the absence of FDA inquiry into the safety and efficacy of these drugs and procedures . . . hundreds of people may be subjected to thoroughly amateur poisonings rather than the painless and dignified executions envisioned by the legislators."[92] In opposition, U.S. Attorney Kenneth Geller argued that federal agencies should have the power to decide when to dismiss a complaint, and that a ruling for the death row inmates would undermine the discretion of federal agencies.

The Supreme Court ruled against the inmates and Justice Rehnquist wrote the opinion for a unanimous reversal of the Circuit Court of Appeals. Rehnquist drew laughs from the galleries when he asked, "Does the electric chair go to the Consumer Products Safety Commission for approval?"[93] The issue is far from humorous. The Supreme Court decision means that the FDA is under no obligation to investigate lethal injection drugs. The ruling ignored the issue of whether the FDA has jurisdiction over lethal injection drugs, choosing instead to concentrate on the issue of whether decisions of the FDA not to exercise its enforcement authority can be judicially reviewed. The Court concluded that agency decisions not to enforce are generally committed to the agency's absolute discretion and are immune from judicial review, unless Congress indicates otherwise.

By declining to review the FDA's non-enforcement decision, the Supreme Court also declined an opportunity to reevaluate its standard for determining cruel and unusual punishment. Under its current state-of-the-art standard, unconstitutional cruelty is defined according to "evolving standards

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91 Annas, George J. "Killing with Kindness: Why the FDA Need not Certify Drugs used for Execution Safe and Effective." American Journal of Public Health 75 (1985): 1097.

92 Sherman, Spencer. "Injection Challenge," Proprietary to the United Press International, Dec 3, 1984.

93 Stolls, Michelle. "Heckler v. Chaney: Judicial and Administrative Regulation of Capital Punishment by Lethal Injection." American Journal of Law and Medicine 11 (1985): 251-77.

of decency"[94] in society, and therefore upholds any method of execution that is no more unusually cruel than existing or past methods.

In a subsequent article in the American Journal of Law and Medicine, Michelle Stolls protested that the FDA should not be allowed absolute discretion. Since the FDA has expended resources to regulate drugs used by veterinarians to kill animals, no sensible reason can exist for the FDA's refusal to regulate the drugs used for virtually the same purpose in humans. Capital punishment expert Franklin E. Zimring also commented, "The contradictory nature of a governmental system that simultaneously polices the pain levels involved in the destruction of laboratory animals, while it permits the execution of humans runs much deeper than the statutory construction of our food and drug laws."[95]

Lethal Injection and the Eighth Amendment

In Gregg v. Georgia,[96] the Supreme Court held that capital punishment is not necessarily cruel and unusual under the eighth amendment to the United States Constitution. This spurred states to find a method of execution which the Supreme Court would uphold as constitutional. Lethal injection, touted as the most humane method of execution available, was expected to be the answer to their search. However, the predictions of the legislators in this regard may not prove true. Even a small dosage error can leave a prisoner dying a painful death, conscious but paralyzed. The conflict over whether lethal injection is humane has led to the formation of opposing camps. On one side are those such as legislators who continue to support lethal injection as the most humane option. On the other are the Chaney litigants and others opposed to lethal injection due both to the medical-ethical issues it raises and to its potential to cause pain and suffering. The numerous botched executions cited above support the views of the latter group, yet lethal injection has not been ruled unconstitutional due to the manner in which the United States Supreme Court defines cruel punishment. It uses the "state-of-the-art standard," in which the court assumes the existence of some method of execution, and simply compares newly arisen ones with it. A given method of execution will be upheld under the federal constitution as long as it is no more cruel than existing methods. Hence, the Court approves lethal injection since it is no more cruel than electrocution, which was no more cruel than the firing squad, which was no more cruel than hanging. By dodging the issue in this way, the Court has never considered evidence of the actual pain caused by any one method of execution, or whether any or all of the methods violate the Eighth Amendment.[97]

However, the court did clarify the meaning of the clause in one case where they ruled: "Punishments are cruel and unusual when they involve torture or a lingering death; but the

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94 Ibid, p.277.

95 Zimring, Franklin E. and Gordon Hawkins. Capital Punishment and the American Agenda. New York: Cambridge University Press, 1986.

96 Gregg v. Georgia, 428 U.S. 153,169 (1976).

97 Stolls, Michelle, p.251.

punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."[98] Under these terms, when a form of capital punishment is imposed which presents the possibility of a lingering, painful death, there is nothing to distinguish it from torture; thus it seems it could be considered curel and unusual. Some have argued since the evidence shows that prolonged suffering is quite possible with lethal injection, it involves something more than the "mere extinguishment of life." Stolls concludes that the use of the state-of-the-art standard for cruel and unusual punishment prevents the Supreme Court from seriously addressing whether particular methods of execution violate the Eighth Amendment. She accuses the Court of hiding behind this standard and a policy of broad administrative discretion, citing Heckler v. Chaney[99] as a missed opportunity for the Court to re-evaluate its standard.

Lethal injection is supposed to be the most humane of the methods, yet it poses serious problems. This may indicate that the time has come for constitutional scrutiny of all five methods currently employed in the United States. Changing the standard might allow the court to determine which, if any, of the methods is most appropriate.

SUMMARY AND RECOMENDATIONS

Since Gregg v. Georgia,[100] the debate over the death penalty has changed from an examination of an abstraction to a discussion of the concrete reality of executions. Supporters of capital punishment have been trying to find a method of execution considered humane and acceptable to today's citizen, while opponents argue that there can be no humane way to execute someone. And, while lethal injection appeals to the public and legislative proponents of the death penalty alike as an inexpensive, "humane" means of execution, a closer look unearths the fundamental problems with this method. From the medical standpoint, it clearly defies the Hippocratic Oath if doctors use their medical expertise to end life. Accordingly, major medical associations condemned and prohibited physician participation in executions. Legislators then re-worked their proposals to allow for the injection to be given by "execution technicians," but overlooked the fact that unskilled hands can cause a long, painful death. Extenuating circumstances such as the prisoner's past drug use or diabetes can serve to aggravate problems caused by volunteer technicians. It is hardly clear that lethal injection is more humane than previous methods. In fact, testimony cited above suggests that lethal injection causes the prisoner at least as much pain as electrocution.

Cynics may argue that the Hippocratic Oath is not strictly adhered to by all physicians. For example some doctors find it within their ethical boundaries to perform abortions and assist in the

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98 Ibid, p.252-6.

99 Heckler v. Chaney, 470 U.S. 821 (1985).

100 Gregg v. Georgia, 428 U.S. 153,169 (1976).

planning of suicides, even though this does involve participation in the taking of life. State medical societies in Kansas and Illinois, however, have defended the Hippocratic Oath, and have said they will not participate in any aspect of the execution, even if such participation was required by law.[101] The threat of civil disobediance suggests that physicians do indeed feel strongly about this issue and about preserving their ethical codes. I urge the medical societies on all levels to harness the emotion and energy stirred up by this controversy and use it to work for the abolition of lethal injection. So far, the medical debate has centered on physician participation rather than broader ethical issues. Doctors should not be satisfied with the elimination of physician participation; their ultimate goal should be the end of the use of medical techniques in capital punishment. A group of professionals which places such a high value on the preservation of human life should not tolerate the use of their tools to kill. Physicians should not only abstain from participation, but should work for the abolition of lethal injection.

In addition to ethical objections, there are negative social effects which arise from lethal injection's use. By promoting the method of execution as more sanitized and palatable, we detract from the public's ability to effectively and critically analyze the concept of state-sanctioned killing. The replacement of the electric chair by lethal injection allows the public to replace images of "frying" with images of "drifting off to sleep." As one Texas Department of Corrections chaplain put it, "I hesitate to use the word pleasant, but it would be just like going in, laying down, and going to sleep." Professor Richard Moran warns against such a viewpoint. "Metaphors such as falling asleep are very seductive... (they) allow people to cloud what they are really doing."[102] Representative Jay Insless of Washington concurs, "People want the death penalty and I support that, but we shouldn't anesthetize it. It's not like putting a puppy to sleep. Society ought to see it for what it is."[103]

Examination of the two major legal cases regarding lethal injection, Granviel v. State and Heckler v. Chaney, show that according to the current federal constitutional standard, lethal injection is neither cruel nor unusual. An examination of the nature of the standard used, however, leads me to advocate a review of the standard and its usefulness for evaluating execution methods. Finally, since expert testimony suggests that the electric chair is physically no worse for the prisoner than lethal injection, yet is psychologically chilling for the public, it is a more appropriate method of execution than lethal injection. I do not support the death penalty, but acknowledging the public's general support for it, the electric chair is the best option currently available. Dr. Friedlander, the brain electrophysiologist mentioned above, states that lethal injection is no more humane than other methods, and that "if the most humane method is the one that produces loss of consciousness fastest without great pain, electrocution would be the one to choose."[104] If we choose as a society to utilize capital punishment, we must not attempt to ease our conscience with the false claim that we are

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101 Finks, Thomas O., p.395.

102 Telephone Interview with Richard Moran.

103 Simon, Jim. "House Panel Votes to keep Hanging for Executions," Seattle Times, February 15, 1991.

104 From the Nebraska Legislature LB 307 testimony, p.56.

allowing the prisoner to die painlessly or with dignity. I opppose medicalization of the death penalty by use of lethal injection, and as a short-term solution advocate a return to the electric chair. Ultimately, the most humane approach to capital punishment is not simply to use a different method, but to abolish the death penalty altogether. Until then, we must not resort to lethal injection drugs that anesthetize not only the prisoner, but the public's conscience.

BIBLIOGRAPHY

Amnesty International. Declaration on the Participation of Health Personnel in the Death Penalty, 1988.

Amnesty International. Medical Concern: Execution of Charles Walker, Sept 21, 1990.

Annas, George J. "Nurses and the Death Penalty." Nursing Law and Ethics 1 (May, 1980): 3.

Annas, George J. "Killing with Kindness: Why the FDA Need not Certify Drugs used for Execution Safe and Effective." American Journal of Public Health 75 (1985): 1096-9.

Bayer, Ronald. "Lethal Injections and Capital Punishment: Medicine in Service of the State." Journal of Prison and Jail Health 4 (1984): 7-15.

Bayer, Ronald. "No nice face for death," New York Times, August 21, 1983.

Boffey, Philip, "Experts Debate Ethics of Doctor's Execution Role," New York Times, December 8, 1982.

"Calm pleasant death." New York Times, August 1982, p.20.

Capital Punishment. Proceedings of the House of Delegates of the American Medical Association 85,86 (Annual Convention, July 1980).

Casscells, Ward, and William J. Curran. "Doctors, the Death Penalty, and Lethal Injection: Recent Developments." New England Journal of Medicine 307 (Dec. 9, 1982): 1532-3.

Chaney v. Heckler, 718 F. 2d 1174 (D.C. Cir. 1983).

Christianson, Scott. "Execution by Lethal Injection," Criminal Law Bulletin 15 (1979): 69-78.

Colburn, Don. "Ethical Executions?" San Francisco Chronicle, Feb 24, 1991.

Colburn, Don. "Why Doctors are Uneasy about the Newest Method of Capital Punishment," Washington Post - Health, Dec 11, 1990.

Curran, William J. and Ward Casscells. "The Ethics of Medical Participation in Capital Punishment by Intravenous Drug Injection," New England Journal of Medicine 302 (Jan. 24, 1980): 226-30.

"Death Penalty Support Remains Strong," The Gallup Poll News Service, vol.56, no.8a, June 26, 1991.

"Death Purified," The New York Times, Dec 8, 1982, p.30.

DiSalle, Michael V. "Comments on Capital Punishment and Clemency." Ohio State Law Journal 25 (1964): 71-83.

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Draper, Thomas (ed.). Capital Punishment. New York: W.H. Wilson, 1985 (The Reference Shelf, Vol.57, No.2.).

Ex parte Granviel, 561 S.W. 2d 503, 509 (Tex. Crim. App. 1978).

Fair, Kathy. "Witnesses to an execution," The Houston Chronicle May 27, 1989.

Finks, Thomas O."Lethal Injection: An Uneasy Alliance of Law and Medicine." Journal of Legal Medicine 4 (1983): 383-403.

Freelander, Douglas. "Johnson executed for 1982 Murder at Beaumont Store," Houston Post, June 24, 1987.

Gettinger, Stephen H. Sentenced to Die: The people, the Crimes and the Controversy. New York: Macmillan, 1979.

Glennon, Betsy. "Opposes Lethal Injections," Chapel Hill Newspaper, April 26, 1983.

Graczyk, Michael. "Convicted Killer in Texas Waits 45 Minutes Before Injection is Given," Gainesville Sun, March 14,1985.

Gregg v. Georgia, 428 U.S. 153,169 (1976).

Heckler v. Chaney, 470 U.S. 821 (1985).

Hinds, Micheal "Making Execution Humane (or can it be?)," New York Times, October 13, 1991.

Hood, Roger. The Death Penalty, A World-wide Perspective: A Report to the United Nations Committee on Crime Prevention and Control. Oxford: Clarendon Press, 1989.

Illinois House Journal, 82d Ill. Gen. Assembly, 2d session., 23-24 (Nov 5, 1982).

"Involvement of Doctors and Other Heath Professionals in the Death Penalty," New York: Amnesty International, 1988.

Kaplan, Stanley M. "Death, So say we all." Psychology Today 19(July 1985): 48-53.

Kevorkian, Jack. "Medicine, Ethics, and Execution by Lethal Injection." Medicine and Law 4 (1985): 407-13.

Kevorkian, Jack. "Opinions on Capital Punishment, Executions, and Medical Science." Medicine and Law 4 (1985): 515-33.

Landis, Tim. "Doctors and Capital Punishment," Gannett News Service, April 18, 1991.

Lion, Ed. "Two Doctors Condemn Injection Executions," Proprietary to the United Press International, Dec 9, 1982.

Malone, Patrick. "DeathRow and the Medical Model." Hastings Center Report 9 (October, 1979):5-6.

Marz, Beverly "Illinois Execution Bill signed over Medical Groups' Protest," American Medical News, Sept 23-30, 1991.

McCarthy, Colman. "Toward a more civilized barbarism," The Washington Post, May 24, 1983.

Norman, Michael."Why New Jersey is Leaning to Executions by Injection," New York Times, May 18, 1983.

"Oath of Hippocrates." In Reiser, Dyke, Curren, eds. Ethics in Medicine: historical perspectives and contemporary concerns. Cambridge, MA: MIT Press, 1977, p.5.

Oreskes, Micheal "The Political Stampede on Execution," New York Times, Wed April 4, 1990.

Principles of Medical Ethics, Proceedings of the 37th Session of the United Nations General Assembly A/Res/37/194 (March 9, 1983).

Radelet, Micheal L. and Vandiver, M. Capital Punishment in America: an Annotated Bibliography, 1988.

Reinhold, Robert. "Execution by Injection Stirs Fear and Sharpens Debate," New York Times, Dec 8, 1982.

Robinson, Herb. "Back to death penalty, 'humane' or not." Seattle Times, Aug 20, 1990.

Rosner, Fred M.D. et al Physician Involvement in Capital Punishment, (Draft) Queens Hospital Department of Medicine.

Schwarzchild, Henry. "Homocide by Injection." New York Times, Dec 23, 1982.

Sherman, Spencer. "Injection Challenge," Proprietary to the United Press International, Dec 3, 1984.

Simon, Jim. "House Panel Votes to keep Hanging for Executions," Seattle Times, February 15, 1991.

Start, Armand M.D., "Nor will I prescribe a Deadly Drug...", The National Prison Project Journal American Civil Liberties Union Foundation Inc., No.17, 1988.

Stolls, Michelle. "Heckler v. Chaney: Judicial and Administrative Regulation of Capital Punishment by Lethal Injection." American Journal of Law and Medicine 11 (1985): 251-77.

"Texas Executes Murderer," Las Vegas Sun, Aug 20, 1986.

Thorburn, Kim M.D. "A Prison Physician in a Death Penalty State," Physicians for Human Rights Record, Spring 1991.

Transcript of testimony before the Judiciary Committee of the Nebraska State Legislature, Senator Chris Butler, Chairman. Eighty-eighth Legislature, First Session, 1983. Transcript provided by Senator Ernest Chambers.

Van den Haag and Conrad, The Death Penalty, A Debate New York: Plenum Press, 1986.

Vidmar and Ellsworth, "Research on Attitudes toward Capital Punishment," in The Death Penalty in America, p.68.

Weyrich, Dawn. "Gruesome Blunders," Washington Times, June 7, 1990.

When the State Kills... New York: Amnesty International, 1989.

World Medical Association. Declaration of Geneva. World Medical Association Bulletin, 1949, 1:109-111.

Zimring, Franklin E. and Gordon Hawkins. Capital Punishment and the American Agenda. New York: Cambridge University Press, 1986.

NOR CRUEL AND UNUSUAL PUNISHMENTS INFLICTED" - The Eighth Amendment and Methods of Inflicting Capital Punishment by Clinton Uhlir

INTRODUCTION

The decision of the United States Supreme Court in Gregg v. Georgia[1] settled many legal questions surrounding the death penalty, and the harshest penal sanction is now legally employed[2]; however, there are still many issues raised concerning the administration of the death penalty. The constitutionality of the various means used to execute capital offenders - an issue neglected during the debate over the constitutionality of capital punishment itself - is particularly unclear. Legislatures have already initiated attempts to provide a more humane alternative to the traditional modes of execution - hanging, shooting, electrocuting, and gassing; as of 1989, twenty states had enacted statutes prescribing lethal injection of drugs as a method for carrying out the death penalty.[3]

The elimination of barbarity from the process of administering death concerns not only those advocating abolition of capital punishment[4] but also those who favor its retention.[5] "The death penalty, as it is imposed . . . is a disgusting butchery, an outrage inflicted on the spirit and body of man . . . Today, when this ignoble death is secretly administered, what meaning can such torture have? The truth is that in an atomic age we kill as we did in the age of steelyards . . . science, which

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[1] 428 U.S. 153 (1976)

[2] Lawrence A. Greenfeld. "Capital Punishment 1989," Bureau of Justice Statistics Bulletin. (Washington, D.C.: U.S. Department of Justice, October 1990), p. 5.

[3] Greenfeld, p. 5. Although several states (most notably Oklahoma) adopted lethal injection mostly because of cost, the vast majority of states mentioned humanitarian reasons in justifying the adoption of lethal injection.

[4] "If the French state is incapable of overcoming its worse impulses . . . and of furnishing Europe with one of the remedies it needs most [abolition of capital punishment], let it at least reform its means of administering capital punishment." Albert Camus. "Reflections on the Guillotine," The Penalty is Death. (B. Jones ed., 1968), p. 151.

[5] Says Immanuel Kant, "[T]he death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it." Immanuel Kant. "The Right to Punish," Punishment and Rehabilitation. (J. Murphy ed., 1973), pp. 35,37.

has taught us too much about killing, could at least teach us to kill decently."[6]

This paper assesses the present administration of the death penalty in light of the requirements of the cruel and unusual punishment clause of the eighth amendment. Traditional methods of capital punishment are extremely cruel and indecent, and are thus unconstitutional. The Supreme Court never directly confronts the issue of cruelty inherent in various methods of imposing capital punishment;[7] given doctrinal development of the cruel and unusual punishment clause and advances in medical science, the courts can now freely strike down most, if not all, of the traditional methods of inflicting death as unconstitutional. It is therefore critical that an alternative method of execution replace those currently employed.

I. ORIGINAL INTENT AND THE EIGHTH AMENDMENT

The idea that methods of execution be scrutinized in terms of the cruel and unusual punishment clause of the eighth amendment is not novel. Scholars widely agree that the clause was initially intended to apply to the cruelty of particular kinds of punishment, including modes of administering the death penalty.[8] In fact, early congressional debates concerning the cruel and unusual punishment clause reflect an awareness that particular methods of inflicting capital punishment might be proscribed by the clause.[9] Furthermore, following adoption, state and federal jurists accepted the view that the clause prohibited certain other methods of punishment.[10]

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[6] Camus, pp. 131, 151.

[7] Martin R. Gardner. "Executions and indignities - An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment," 39 Ohio State Law Journal (1978), p. 97.

[8] *Id.*, p. 98.

[9] In the early congressional debates, a Mr. Livermore of New Hampshire states, "[T]he clause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?" 1 Annals of Congress (1789) pp. 782-3.

[10] Granucci, Anthony W. "'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning," 57 California Law Review (1969), pp. 839, 847. Chief Justice Burger relates how "[t]he records of the debates in several of the state conventions called to ratify the 1789 draft Constitution submitted prior to the addition of the Bill of Rights show that the Framers' exclusive concern was the absence of any ban on tortures. The later inclusion of the "cruel and unusual punishments" clause was in response to these objections." Furman v. Georgia 408 U.S. 238, 377 (1972) (Burger, C.J.,

Using the original intention of the Constitutional framers to determine the true meaning of the cruel and unusual punishment clause is problematic, however. Constitutional fundamentalists typically link the role of paradigm cases of "cruel and unusual punishments" to the "original intentions" of the framers, founders, and ratifiers of the Constitution and the Bill of Rights. This linkage intends to force all contemporary interpretations of the "cruel and unusual punishments" clause into the framework of cruel and unusual punishments taken from English and American history of the sixteenth and seventeenth centuries. As Hugo Bedau explains, the underlying thesis, rarely formulated and never defended, is that: (a) the meaning or sense of constitutional words and phrases, such as "cruel and unusual punishments," derives from the original intention of those who introduced it into the Constitution; and (b) the sense of the term "cruel and unusual punishments," insofar as this clause applies to the death penalty, is entirely provided by the paradigm punishments that the framers intended the clause to prohibit.[11]

Yet one faces substantial obstacles in ascertaining the original intention in this instance. No text or document is available in which the framers state their shared intention (if they even had one) in including the clause in the eighth amendment, and the framers left no statement explaining what they understood the language of this clause to mean. They prepared neither a list specifying the properties a punishment must have to be prohibited under the clause nor an exhaustive catalogue of the punishments that the clause should prohibit.[12] Thus, since there is no explicit indication in any of these four ways of what the framers understood by the clause, any interpretation of their intention in using it must be based on very indirect evidence. Since scholars agree that the framers left no account of what they thought the standards, criteria, and principles were,[13] one simply cannot infer straightaway that all the actions and intentions of the framers, as well as their beliefs and their expectations, were in fact consistent with a specific set of principles; it is possible that they were not.

The term "cruel and unusual" is a general term. Its typical use in contemporary evaluation of punishments is to express moral condemnation, and there is at least one standard or principle is

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dissenting).

[11] Hugo Adam Bedau. "Thinking of the Death Penalty as Cruel and Unusual Punishment," 18 University of California-Davis Law Review. (1985), p. 892-3.

[12] *Id.*, p. 893.

[13] *Id.*, p. 895.

implicit in its meaning.[14] Disagreement may well arise regarding the properties common to punishments that clearly violate the clause and whether a particular punishment has enough of these properties to warrant being added to the list of proscribed methods. Borderline cases will be difficult to resolve even when detailed information is available. The principles that connect the abstract language of the clause with the concrete features of the several punishments deemed prohibited by it will also be controversial. But what is needed to resolve such disagreements is not "armchair archeology into the unarticulated and elusive intentions of the framers."[15] Successful resolution of disagreements over eighth amendment cruelty demands a rational reconstruction of the values to be protected by the Clause in light of the history, conditions, and aspirations of the United States. As Ronald Dworkin states, this task cannot be carried out primarily by history and social science; above all it requires moral theory.[16]

Historical study does however have its contribution to make. A study of the views of the eighteenth century liberal penal reformers (whether Continental or English) reveals that jurists such as Beccaria and Montesquieu and philosophers such as Voltaire and Bentham believed there was neither necessity nor justice in the time-honored practices of aggravated physical torture, maiming, and savage bodily abuse that are commonly part of the death penalty.[17] They concluded and persuasively advocated that these practices, cruel by any standard in their own time, must be stopped. This was the ideological context in which the clause barring "cruel and unusual punishments" was introduced into our Bill of Rights.[18] Thus, relatively recent cases in which eighth amendment analysis was used to find cruelty when punishment was excessive in degree[19] in no way indicate that the courts are moving away from a traditional application of the amendment to specific kinds of cruel treatment.

II. THE U.S. SUPREME COURT, THE EIGHTH AMENDMENT,

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[14] *Id.*, p. 896.

[15] *Id.*

[16] Ronald Dworkin, A Matter of Principle (1985), and Dworkin, Taking Rights Seriously (1977), pp. 128, 134-36, 147, 226.

[17] Bedau, p. 897.

[18] *Id.*

[19] Trop v. Dulles, 356 U.S. 86 (1958) and Coker v. Georgia, 433 U.S. 584 (1977), for example.

AND METHODS OF EXECUTION

The first serious Supreme Court challenge to administration of the death penalty did not occur until 1878. In Wilkerson v. Utah,[20] the defendant had been convicted of first degree murder in the Territory of Utah and sentenced to be publicly shot. The territorial statutes provided the death penalty for first degree murder but did not specify the method of execution. Wilkerson thus argued that the sentencing judge was without authority to specify the mode of execution. The Supreme Court rejected Wilkerson's argument, upholding the sentence and reasoning that without any statutory regulation specifying the mode of executing the command of the law, "it must be that the duty is devolved upon the court authorized to pass the sentence to determine the mode of execution and to impose the sentence proscribed."[21]

The issue in Wilkerson was not whether shooting was cruel and unusual punishment, but whether the sentencing court possessed authority to prescribe a particular method of capital punishment.[22] The Court noted that Wilkerson did not challenge the constitutionality of shooting.[23] *In dicta*, however, the Court discussed shooting in light of the eighth amendment, concluding that it was a constitutionally acceptable mode of capital punishment because it was the traditional method of carrying out executions under military law; it was thus neither cruel nor unusual.[24] Yet the Court did affirm that "punishments of torture," such as disemboweling while alive, drawing and quartering, public dissecting, beheading, burning alive, "and all others in the same line of unnecessary cruelty," are forbidden by the eighth amendment.[25]

The Court presumably saw such punishments as an affront to human dignity due to the gross

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[20] 99 U.S. 130 (1878)

[21] 99 U.S. at 137

[22] This interpretation of Wilkerson was suggested by Justice Brennan in Furman v. Georgia 408 U.S. 238, 284 n.30 (1972)(Brennan, J., concurring).

[23] Justice Clifford explains: "Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual, within the meaning of the eighth amendment to the Constitution, which is not pretended by the counsel." 99 U.S. at 136-137.

[24] *Id.* at 134-136

[25] *Id.* at 136

violence involved - "circumstances of terror, pain, or disgrace."[26] It implied that an offender is entitled to all possible dignity, and that human dignity embodies respect for bodily integrity. For example, by expressing revulsion toward the ancient practice of drawing and quartering, the Court recognized that unnecessary mutilation of the bodies of capital offenders affronts the principles of human dignity that underlie the cruel and unusual punishment clause.[27] Because such desecration of the body is undignified and indecent, any form of capital punishment that unnecessarily disfigures the body of the victim is constitutionally suspect.

In the view of the Wilkerson Court, shooting was not unconstitutionally cruel because it was unlike historical execution by torture. At the time, shooting was a common means of killing those convicted of capital offenses under military law and thus was not a completely unusual mode of execution; desertion, disobedience of orders, and other capital military offenses were usually punished by shooting.[28] This definition of present cruelty by comparison with past practices that were considered cruel and unusual when the Bill of Rights was adopted - the so-called "historical interpretation" of the eighth amendment[29] - was the primary mode of judicial analysis of the cruel and unusual punishment clause well into the twentieth century.[30]

The next significant challenge to administration of capital punishment, In re Kemmler,[31] came twelve years after Wilkerson. The Court denied an application for a writ of error seeking reversal of a New York State Supreme Court decision upholding the constitutionality of electrocution. The Court held that the eighth amendment did not apply to the states and could not be made applicable to the states through either the due process clause or the privileges or immunities clause of

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[26] *Id.* at 135

[27] Justice Clifford: "History confirms the truth of these [punishments of torture], but . . . the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgements as savored of torture or cruelty." 99 U.S. at 135.

[28] *Id.* at 134-135.

[29] Furman v. Georgia, 408 U.S. 238, 265 (1972) (Brennan, J., concurring).

[30] *Id.*, and also Granucci *supra* note 10, at 842-843.

[31] 136 U.S. 436 (1890)

the fourteenth amendment.[32] Accordingly, the only federal constitutional issue in question was whether the state had acted arbitrarily or applied the law unequally, thereby violating the fourteenth amendment. The Court noted that the state's decision to adopt electrocution occurred only after the New York legislature had studied the recommendations of a commission appointed to investigate and report "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases"[33]: "This act was passed in the effort to devise a more humane method [of execution]."[34] Therefore, legislation enacting the commission's recommendation of electrocution was not arbitrary, especially because the lower courts had considered evidence on the degree of pain involved and had found electrocution to be "painless."[35]

Even though the issue of whether electrocution violated the eighth amendment was not considered in Kemmler, the Court did discuss *in dicta* the cruel and unusual punishment clause. The Court noted that "burning at the stake, crucifixion, breaking on the wheel, or the like" were examples of "manifestly cruel and unusual" punishment, adding that "it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."[36] The Court further defined cruel and unusual methods of execution *in dicta*: "Punishments are cruel when they involve torture or a lingering death."[37] The meaning of the word "cruel" as used in the Constitution "implies there something inhuman and barbarous, something more than the mere extinguishing of life."[38] It is evident that the "historical interpretation" of the eighth amendment articulated in Wilkerson is reenforced here.

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[32] *Id.* at 446-449 Gardner notes that Kemmler was the first decision to hold that the eighth amendment was not applicable to the states. Hence, its discussion of the eighth amendment is dictum. Gardner, *supra* note 7, at 100.

[33] 136 U.S. at 444.

[34] *Id.*, at 447.

[35] *Id.*, at 443.

[36] *Id.*, at 446.

[37] *Id.* at 447

[38] *Id.*

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A landmark decision in eighth amendment interpretation is the majority opinion in Weems v. United States.[39] Weems broke with the earlier "historical interpretation" of the cruel and unusual punishment clause in Wilkerson and introduced a more dynamic analysis that defines cruelty in terms of evolving social mores. Under the Weems analysis the clause should "acquire meaning as public opinion becomes enlightened by a humane justice."[40] Interpretations of the clause should not be based solely on "what has been," but should take into account "what may be." As the Weems Court explained, "[t]ime works changes, brings into existence new conditions and purposes."[41]

Weems is also significant because it reversed on eighth amendment grounds a sentence of imprisonment and civil disability that was unnecessarily harsh, as evidenced by the fact that it differed significantly from sentences imposed by other jurisdictions for similar crimes.[42] Consequently, Weems suggests that an important indication of the unconstitutional cruelty of a given punishment or mode of punishment is its failure to be employed elsewhere.

The cruelty of electrocution was also questioned in Louisiana ex rel. Francis v. Resweber,[43] albeit indirectly. The issue in the case was whether the State of Louisiana could constitutionally execute the petitioner, Willie Francis, after the electric chair had accidentally malfunctioned during a previous execution attempt. "Francis had been prepared for execution, placed in the chair, and kept there for a period of time after which the switch was thrown. The victim, who experienced considerable discomfort, was removed from the chair when it became apparent that he would not die."[44] A new death warrant was subsequently issued.

Francis obtained a stay of execution and sought judicial approval for his claim that any further

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[39] 217 U.S. 349 (1910)

[40] *Id.* at 378.

[41] *Id.* at 373.

[42] *Id.* at 380.

[43] 329 U.S. 459 (1947)

[44] *Id.* at 459 Official Witness Harold Resweber states, "Then the executioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breathe.'" Affidavit of official witness Harold Resweber, dated May 23, 1946. *Id.*, at 480.

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attempt to execute him would be cruel and unusual punishment contrary to the eighth amendment and in violation of his fourteenth amendment due process rights. The Supreme Court denied relief. Although the Court was unwilling to overrule Kemmler specifically and hold that the eighth amendment applied to the states,[45] a plurality of four Justices took the position that subjecting Francis to the process of execution a second time would not violate the eighth amendment. The cruel and unusual punishment clause was interpreted by the plurality to prohibit only the "wanton infliction of pain" or the "infliction of unnecessary pain," not the suffering involved in "humane" executions.[46] Because the pain inflicted upon Francis was accidental and unintentional, the state would not be precluded from making a second attempt to execute him.

The four dissenting Justices would have issued a stay of execution and remanded the case to the Louisiana Supreme Court to determine the extent to which Francis had suffered pain in the bungled execution.[47] The dissent suggested that a second attempt to execute Francis might constitute a violation of his due process rights under the fourteenth amendment because it would constitute "torture culminating in death," a repugnant practice long disclaimed in American law.[48] The dissent suggested that "taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man" and should not be permitted under the constitutional procedure of a self-governing people.[49] Thus, the eight Justices who subscribed to the plurality and dissenting opinions favored an analysis of eighth amendment cruelty in terms of "unnecessary" suffering induced by the state. Significantly, both the plurality and dissenting opinions cited with approval the Kemmler *dicta*.[50]

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[45] Eight members of the Court seemed, however, to assume the applicability of the eighth amendment to the states. Four Justices took the position in a plurality opinion that even if the eighth amendment applied, it would not preclude a second attempt to execute Francis, but four dissenting Justices strongly suggested that the second execution process would be precluded. *Id.* at 463-64, 475-77 Only Mr. Justice Frankfurter, in his concurring opinion, specifically denied application of the eighth amendment to the states. *Id.* at 470.

[46] *Id.* 463-64.

[47] *Id.* at 472 (Burton, J., dissenting).

[48] *Id.* at 473.

[49] *Id.* at 473-74.

[50] *Id.* at 463 n.4, 476

The issue in Resweber was not whether electrocution per se was compatible with the eighth amendment, but whether the aborted initial execution attempt rendered subsequent attempts to take Francis' life cruel and unusual. In Resweber the Court assumed that successful electrocutions are not unconstitutionally cruel[51] because they do not inflict unnecessary cruelty or pain, yet the Resweber Court did not consider evidence of the actual pain suffered during death by electrocution. In fact, the Court has apparently never reviewed evidence of the actual pain inflicted by any method of execution.[52]

The relative concept of the eighth amendment that the Court had articulated in Weems was developed further in Trop v. Dulles.[53] Trop struck down expatriation as cruel and unusual punishment for the crime of military desertion. The Court found that "physical torture" was not a necessary element of unconstitutionally cruel punishment and that the psychological pain inflicted on the expatriate, who would be subjected to "a fate of ever-increasing fear and distress," was sufficient to render the punishment unconstitutional.[54] The Court perceived the essence of the eighth amendment as "nothing less than the dignity of man."[55] Although the words of the amendment are difficult to define, their meaning must be drawn "from the evolving standards of decency that mark the progress of a maturing society."[56] Constitutional provisions "are not time-worn adages or

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[51] As Gardner points out, even the dissent in Resweber assumed that the typical execution by electrocution involved instantaneous and painless death and thus would raise few constitutional problems. Gardner, p. 102.

[52] *Id.* The case *Glass v. Louisiana*, 471 U.S. 1080 (1985) presented the Court with a clear opportunity to consider evidence on the actual pain involved in electrocution (and thus the relative cruelty of electrocution under the eighth amendment), but the Court denied certiorari. As Justice Brennan states in his dissent, "Glass' petition presents an important and unsettling question that cuts to the very heart of the eighth amendment's cruel and unusual punishment clause - a question that demands measured judicial consideration." 471 U.S. 1080-1081 (Brennan, J., dissenting).

[53] 356 U.S. 86 (1958)

[54] *Id.* at 101-102.

[55] *Id.* at 100.

[56] *Id.* at 101.

hollow shibboleths" but are "vital, living principles."[57]

The plurality opinion in Trop gave content to the "evolving standards of decency" by examining, in the tradition of Weems, contemporary punishment practices of other jurisdictions. That expatriation was no longer authorized elsewhere[58] was taken as a significant indication that it had become an outdated anomaly.[59]

The standards articulated in Trop, although technically accepted by a plurality of only four Justices, were subsequently embraced by the full Court.[60] In the 1972 landmark decision of Furman v. Georgia,[61] the Court held that the eighth amendment, now clearly applicable to the states,[62] prohibited the infliction of capital punishment under virtually all state statutes because unrestrained discretion in imposing the penalty had resulted in its arbitrary infliction.[63] All nine Justices wrote separate opinions; seven Justices clearly embraced the Trop standards of eighth amendment analysis,

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[57] *Id.* at 103.

[58] Chief Justice Warren: "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for a crime." *Id.* at 102.

[59] *Id.* at 102-103. When the eighth amendment was adopted in 1790, banishment, a form of expatriation, was considered a reasonable and perfectly acceptable punishment for serious crime. Imprisonment beyond brief pre-trial detention or punishment for minor offenses was totally unknown. As modern prisons evolved, however, banishment became increasingly suspect. Bedau, "The Courts, the Constitution, and Capital Punishment," 1968 Utah Law Review, p. 232.

[60] Justices Douglas, Brennan, Marshall, Burger, Blackmun, Powell, and Rehnquist all cited the Trop standards as applicable in eighth amendment analysis in their various opinions in Furman v. Georgia, 408 U.S. 238 (1972) Justices Stewart and Stevens cited Trop with approval in Gregg v. Georgia, 428 U.S. 153,173 (1976) as did Justice White in his dissent in Roberts v. Louisiana, 428 U.S. 325, 351-2 (1976)(White, J., dissenting).

[61] 408 U.S. 238 (1972)

[62] In Robinson v. California 370 U.S. 660 (1962), the Court struck down a California statute criminalizing drug addiction as violative of the eighth amendment, made applicable to the states through the fourteenth amendment.

[63] Justice Blackmun: "[T]he capital punishment laws of 39 States and the District of Columbia [are] struck down [by Furman]." 408 U.S. at 411. (Blackmun, J., dissenting)

two Justices found capital punishment unconstitutional per se, and the other three concurring Justices considered its arbitrary application violative of the eighth amendment. Four Justices, dissenting, would not have interfered with the imposition of capital punishment.

In his concurring opinion, Justice Brennan further refined the idea of "human dignity" that underlies the Trop concept of cruel and unusual punishment. To Justice Brennan, "human dignity" as articulated in Trop entails respect for the "intrinsic worth" of people.[64] Punishment in effect honors the choice of the criminal because it completes the rational consequences of his act; to the extent that he chooses to commit his criminal act, the law respects his personal choice by punishing him. Yet at the same time, an offender never forfeits his right to be treated with dignity. As Justice Brennan states, "even the vilest criminal remains a human being possessed of common human dignity."[65]

Punishments are proscribed by the eighth amendment when they are so severe as to be "uncivilized and inhuman." Mental and physical pain, however, is only one indication of inhumane punishment.[66] Human dignity is also affronted by punishments that are arbitrarily inflicted[67] or unacceptable by contemporary standards. These standards are indicated by historical trends away from the use of a particular punishment or a high level of contemporary public distaste for its employment.[68] Finally, Justice Brennan identified unnecessary suffering as a characteristic of unconstitutionally cruel punishment:

> The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive.[69]

Other members of the Furman Court also subscribed to this analysis of unnecessary cruelty, comparing present punishment with less severe but equally effective alternatives. The four dissenting

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[64] *Id.* at 270 (Brennan, J., concurring).

[65] *Id.* at 273.

[66] *Id.* at 271-272.

[67] *Id.* at 274.

[68] *Id.* at 277-79.

[69] *Id.* at 279.

Justices in Furman joined in the view that "no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives."[70] Although they refused to find unconstitutional the institution of capital punishment itself, the dissenters left the door open for later attacks on modes of administering the death penalty under the "less cruel alternative" analysis.[71] In his concurring opinion, Justice Marshall also adopted this approach.[72] Lower courts, too, have applied an eighth amendment "less cruel alternative" standard.[73]

Furman reemphasized the relative nature of the cruel and unusual punishment clause; the Court indicated that contemporary standards of decency should be used for eighth amendment evaluation of punishment.[74] The dissent suggested, in the spirit of Weems and Trop, that society's attitudes about morally acceptable and humane punishment can be assessed objectively only if state legislative actions are taken as the reflector of public values. "[T]he first indicator of the public's attitude must always be found in the legislative judgements of the people's chosen representatives."[75] Legislative judgement was presumed by the Furman dissenters to embody the basic standards of decency prevailing in the society.[76] Because most states had death penalty statutes on their books, the dissenters considered the death penalty to be consistent with contemporary conceptions of humane punishment.

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[70] *Id.* at 430 (Powell, J., dissenting).

[71] The dissenters suggested that inquiry into the permissibility of any of the several methods employed in carrying out the death sentence would call for a "Discriminating evaluation of particular means." *Id.* Also: "And in making such a judgement in a case before it, a court may consider contemporary standards to the extent that they are relevant." *Id.* at 420.

[72] *Id.* at 342 (Marshall, J., concurring).

[73] In Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), the court used a less drastic means test.

[74] See 408 U.S. at 269-270 (Brennan, J., concurring); *Id.* at 329 (Marshall, J., concurring); *Id.* at 382-383 (Burger, C.J., dissenting). Justice Blackmun, Powell, and Rehnquist joined in the dissent.

[75] *Id.* at 437 (Powell, J., dissenting).

[76] *Id.* at 384 (Burger, C.J., dissenting).

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A majority of the Court reemphasized this analysis of decency in terms of legislative action or inaction in Gregg v. Georgia.[77] Gregg held for the first time that capital punishment did not necessarily violate the eighth amendment.[78] That many state legislatures had enacted new capital punishment statutes in the wake of Furman indicated to the Gregg Court that capital punishment was still a morally appropriate and necessary sanction.[79] The new statutes reflected legislative judgements that the death penalty had not become intolerable under contemporary moral standards. The legislative trend also indicated that capital punishment may be useful in the criminal law.[80]

As the discussion of these cases demonstrates, punishments violate the eighth amendment when they are "unnecessarily cruel." Wilkerson focuses specifically on "unnecessary punishment" and Kemmler speaks of "something more than the mere extinguishing of life" in testing undue cruelty. Unnecessarily harsh treatment undoubtedly represents the "something more" that the Kemmler Court contemplated. Eight Justices adopted the unnecessary cruelty analysis in Resweber, although the plurality suggested that the presence of governmental intent to cause unnecessary suffering indicates clear eighth amendment violation. Furthermore, Weems, Furman and Gregg[81] all include unnecessary cruelty as an aspect of the Court's developing eighth amendment standards.

The post-Weems cases all focus on the dynamic nature of the cruel and unusual punishment clause. The evolution of social mores as well as advances in technology and penology may contribute to invalidation of punishments that were constitutionally permissible in the past. Legislative trends away from a particular mode of punishment reliably indicate both its cruelty and its lack of necessity.

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[77] 428 U.S. 153 (1976). Justices Stewart, Powell, and Stevens joined in a plurality in Gregg. Justice White, joined by Chief Justice Burger and Justices Rehnquist and Blackmun, recognized legislative action as an *indicium* of decency in his dissent in a companion case Roberts v. Louisiana, 428 U.S. 325, 352-353 (1976)(White, J., dissenting).

[78] 428 U.S. at 176-87.

[79] *Id.* at 179-83; Roberts v. Louisiana, 428 U.S. at 351-54 (White, J., dissenting).

[80] The highly controversial question whether capital punishment has a greater deterrent effect than less severe punishments was perceived by the Court as an essentially legislative judgement. 428 U.S. at 185-87 (also Roberts v. Louisiana, 428 U.S. at 353-56 (White, J., dissenting)).

[81] The Court in Coker v. Georgia (433 U.S. 584 (1977)) asserted that Gregg stated the principle that "a punishment is 'excessive' and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." 433 U.S. at 592.

Similarly, a punishment may be viewed as unnecessarily cruel if jurisdictions that have never employed it are nevertheless able to operate well without it.[82] Furman offers another criterion for necessity; whether less cruel but equally effective alternatives to the punishment are available. If they are, the punishment may be unconstitutional.

III. CAPITAL OFFENDERS AND MORAL RIGHTS

It is now evident that punishments are "cruel and unusual" when they are excessively severe. The basis on which to judge the excessive severity of a given punishment is the impact of the punishment upon the person of the offender, insofar as the offender is a human being, quite apart from any other consideration. Even persons convicted of the gravest crimes retain their fundamental rights of "due process of law" and "equal protection of the laws." These rights are not forfeitable and cannot be waived, even by the culpable. If government officials violate them, "that is sufficient to nullify whatever legal burdens were placed on the person arising out of that violation and quite apart from whatever consequences may ensue."[83] Hence, our society already has in place, and fully acknowledges, the principle that the individual cannot do anything that utterly nullifies his or her "moral worth" and standing as a person.[84]

Those offenders actually condemned by law to die for their crimes are not merely biological members of the species *homo sapiens* but are also persons capable of the full range of moral action and passion characteristic of moral creatures. Humans are moral beings, not mere isolated information-processing creatures. However dangerous, irrational, self-centered, stupid, or beyond improvement a criminal may in fact be, his deficiencies do not overwhelm all capacity for moral agency - for responsible action, thought, and judgement, both in solitude and in relationships with other persons.[85] In particular, none of these capacities vanishes as a result of the person's being at fault for causing wilful, deliberate homicide. Moral capacities are not vulnerable to destruction by the agent's own acts that are deliberate, intentional, and responsible - the very qualities properly

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[82] This seems to be the Court's approach in Trop. 356 U.S. at 102-103.

[83] Bedau, *supra* note 11, at 920.

[84] *Id.*

[85] *Id.*, p. 921. Anyone who doubts these claims will be convinced after reading recent accounts of men on America's "death rows." In particular see Doug Magee, Slow Coming Dark: Interviews on Death Row. (New York: The Pilgrim Press, 1980).

deemed necessary in a person's conduct before the criminal law subjects a person's harmful conduct to judgement, condemnation, and punishment. Therefore, no plausible empirical argument can support an alleged loss of moral agency in a convicted murderer as a result of the act of murder.[86] So far as moral agency is concerned, there is no evidence to show that convicted murderers are different from other convicts.[87] Consequently, the doctrine that certain persons, who had basic human rights prior to any criminal acts, forfeit or relinquish all those rights by such acts and thereby cease to be moral persons, receives no support from experience.

IV. THE CONSTITUTIONALITY OF PRESENT METHODS OF EXECUTION

Four main methods of capital punishment have been used in the United States. Until the turn of the twentieth century, hanging was virtually the exclusive method. Shooting was authorized in Utah and briefly employed in Nevada but later abandoned. The advent of electricity at the turn of the century initiated a distinct trend away from hanging toward electrocution. Later, in the 1920's and 1930's, the movement away from hanging continued, with several states abandoning the gallows in favor of the gas chamber. Some that had previously switched from hanging to electrocution also moved on to the gas chamber. Then, in their post-Furman reenactments of capital punishment, Oklahoma and Texas selected lethal injection as the means of capital punishment. Currently, twenty states authorize lethal injection as a method of execution, fourteen states authorize electrocution, six states authorized lethal gas, three states authorized hanging, and two states, a firing squad.[88]

The discussion will now place the various methods on a continuum from most cruel to least cruel on the basis of the eighth amendment analysis developed above. In doing so, one must consider the requisites of the Royal Commission on Capital Punishment - humanity, certainty, and decency.[89] The requirements of humanity are twofold. One is that the preliminaries to the act of execution should be as quick and simple as possible, free from anything "that unnecessarily sharpens the

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[86] Bedau, *supra* note 11, pp. 921-923.

[87] *Id.*, p. 921.

[88] Greenfeld, *supra* note 2, p. 5

[89] Royal Commission on Capital Punishment. (London: Her Majesty's Stationery Office, Cmd. 8932),pp. 253-256. Justice Brennan refers to this in Glass v. Louisiana (471 U.S. 1080, at 1085) (Brennan, J., dissenting)

poignancy of the prisoner's apprehension."[90] The other is that the act of execution should produce immediate unconsciousness passing quickly into death.[91] The first requirement of humanity embodies the Trop proscription of excessive psychological pain, and the second gives substance to the phrases "unnecessary cruelty" and "something more than the mere extinguishing of life" and allows them to demarcate capital punishment.

The requisite of certainty involves the question of which method is most likely to avoid mishaps, due either to the complexity of the machinery or to an error of the executioner.[92] This is a measurement of the feasibility and practicality of methods of execution.

Lastly, there is the requisite of decency. The term decency includes two things. One is the obligation that rests on every civilized state to conduct its judicial executions with decorum. The other is the feeling that as much as possible judicial execution should be performed without brutality, that it should avoid gross physical violence, and should neither mutilate nor distort the body.[93] This includes the "respect for bodily integrity" of the Wilkerson Court.

Hanging

Of all the conventional methods of execution, hanging is both the oldest and the most cruel. Hanging as a mode of execution is an ancient practice,[94] yet refinements have been made in an attempt to inflict death quickly and painlessly. Before the advent of the "long drop" in the late nineteenth century,[95] death by hanging was often a slow and painful process of strangulation. When the victim is dropped from a sufficient height, his vertebrae are dislocated and his spinal cord crushed; unconsciousness is immediate and death follows a short time later. If the drop is too long, however, decapitation may occur. Although hanging has become something of an art form in modern times and may actually be painless when properly performed, evidence of bungled hangings abounds:

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[90] *Id.*, p. 253.

[91] *Id.*

[92] *Id.*, p. 255.

[93] *Id.*, p. 255-256.

[94] Hanging is traceable to Biblical times. L. Berkson, The Concept of Cruel and Unusual Punishment, (1975).

[95] G. Scott, The History of Capital Punishment (1950), p. 211.

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inadvertent decapitation when victims are dropped too far, and strangulation when they are dropped too short a distance to break their necks.[96] In fact, strangulation may be the rule rather than the exception. Unconsciousness is supposedly instantaneous even when the neck is not broken, but it is not entirely certain that this is true, and if the victim is conscious, death by strangulation must be extremely painful.

Apart from the pain that may occur during strangulation and the horror of occasional decapitations, other indignities are involved in hanging. Clinton Duffy, an observer in over sixty executions, offers the following description of hanging:

Hanging, whether the prisoner is dropped through a trap after climbing a traditional 13 steps, or whether he is jerked from the floor after having been strapped, black-capped and noosed, is a very gruesome method of execution:

> The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurements, et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the

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[96] N. Teeters, Hang By the Neck. (1967), p. 176-178, 186. Teeters gives two particular graphic accounts of bungled hangings: "The two weights, of 206 and 120 pounds, fell . . . and Jefferson's body was raised about five feet in the air. It fell back limp when suddenly it began to writhe in agony. The movements at first were not violent, but presently the legs, which had not been pinioned, were drawn up toward the body, the knees reaching almost to the chin, while the arms were extended pleadingly towards the occupants of the balconies right and left. The man kicked furiously and moaned so piteously . . . Jefferson freed his hands sufficiently and clutched the noose, but, being unable to loosen the rope, he tore the black cap from his face and stretched out his hand imploringly toward the audience. The appearance of his face was terrible. After eight minutes of agony . . . the contortions began to lessen, and finally ceased." *Id.*, p. 174. ; "The rope allowed a fall of more than seven feet . . . As the body dropped to a standstill, a heavy gurgling sound was heard, and soon the blood in torrents commenced pouring on the stone floor below. The black cap was raised slightly and it was found that decapitation was almost complete, the head hanging to the body by a small piece of skin at the back of the neck. During the half minute or more that the heart beat, the blood was thrown against the platform above from the gash caused by the head being pulled back on the shoulder." *Id.*, p. 186.

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> hanged person and holds the body steady, because during the first few moments there is usually considerable struggling in an effort to breathe. The legal witnesses are dismissed after having signed the usual witness forms. However, the body of the condemned is left hanging below the gallows for an additional 15 to 20 minutes. This is to assure those in charge that ample time has elapsed before cutting the rope in order to make certain of death.[97]

Mutilation of the body is substantial; portions of the victim's face are ripped apart. The victim's neck elongates, distorts, and discolors. The powerful jerk when the weight of the body reaches the end of the rope makes hanging a particularly violent form of execution.

Hanging is cruel because of the strong possibility that it inflicts physical pain. The fear of physical pain as well as other indignities attendant to hanging generates psychological suffering and loss of self-respect in the victim as he anticipates his fate. The physical violence of hanging mutilates the body and offends the victim's right to bodily integrity. Hanging is thus unnecessarily cruel.

The unnecessary cruelty of hanging is further evidenced by the legislative trend away from its use. Electrocution and the gas chamber were initially developed to avoid the gross cruelties of hanging.[98] About a century ago, hanging was authorized in every American state. Today, although thirty- six states retain capital punishment, only three still permit hanging.[99] Under the analysis developed in this paper, hanging violates the eighth amendment.

The Firing Squad

Execution by shooting is also constitutionally suspect. Firing squads in Utah, one of two states to execute by shooting,[100] are composed of five citizen volunteers selected secretly by a

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[97] Proposed Repeal of the Death Penalty Under Federal Law: Hearings on S. 1760 Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, 90th Cong., 2nd Sess. (1968)(statement of Clinton Duffy), reprinted in Gardner, *supra* note 7, p. 120-121.

[98] New York adopted electrocution after the governor had urged that a "less barbarous" method of execution than hanging be found. In re Kemmler 136 U.S. 436, 444-445 (1890). Lethal gas was introduced in Nevada to replace hanging and shooting in order to "provide a method of inflicting the death penalty in the most humane manner known to modern science." State v. Gee Jon 46 Nev. 418, 437, 211 P. 676, 682 (1923). "Since the development of the supposedly more humane methods of electrocution late in the 19th century and lethal gas in the 20th . . . hanging and shooting have virtually ceased." Furman v. Georgia 408 U.S. 238, 296-297 (1972)(Brennan, J., concurring).

[99] The three are Montana, New Hampshire, and Washington. Greenfeld, *supra* note 2, p. 5.

[100] The two states are Utah and Idaho. *Id.*

presiding officer.[101] Four of the five are given weapons with live rounds; the rifle of the fifth contains a blank.[102] The victim is strapped to a chair less than ten feet from the firing squad. A hood is fitted over his head and a small target placed over his heart. Upon the signal to fire, four bullets are supposed to enter his heart and kill him instantly.

It is not certain whether death by firing squad causes physical pain. It is probable, however, that if the marksmen miss their target, pain will occur. In the 1951 execution of Eliseo Mares, for example, all four of the bullets of a Utah firing squad entered the wrong side of the victim's chest, and the condemned man bled to death.[103] It appears that the misses were intentional; whether the riflemen wished to torture the victim or feared to inflict the fatal shot in the heart is unknown. In another reported incident the victim was shot in the shoulder and screamed in pain for twenty minutes until more ammunition could be obtained.[104] He was finally shot in the head.[105] Victims have been shot in other parts of the body, sometimes as far from the ideal target as the ankle.[106]

The Royal Commission on Capital Punishment did not even consider the firing squad as a serious alternative to hanging: "The firing squad is open to obvious objections as a standard method of civil execution: it needs a multiplicity of executioners and does not possess even the first requisite of an efficient method, the certainty of causing immediate death."[107] The possibility of severe pain and the prisoners' apprehension of painful death bespeak the cruelty of shooting.

The involvement of ordinary citizens in the execution process allows the firing squad to be a vehicle of public vengeance, stripping the execution process of whatever dignity it might otherwise

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[101] G. Bishop, Executions: The Legal Ways of Death. (1965), p. 34.

[102] *Id.*

[103] *Id.*, pp. 34-35.

[104] 1968 Hearings, *supra* note 97, (statement of Clinton Duffy), p. 124 in Gardner.

[105] *Id.*

[106] *Id.*, (statement of Phillip Hansen), p. 124 in Gardner

[107] Royal Commission on Capital Punishment, p. 249

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have.[108] Many citizens volunteered for the firing squad in the execution of Gary Gilmore,[109] and the Mares incident reveals that the firing squad is potentially a source of torture at the hands of citizens seeking revenge. The Resweber Court pointed out, however, that an execution process motivated by an intent to unnecessarily harm the victim may be unconstitutional.[110] Hence, for a state to use the firing squad is probably unconstitutional.[111]

Death by firing squad significantly mutilates the body of the offender, an affront to his dignity; shooting with high-powered rifles at ten feet produces gross physical violence that indicates disrespect for the victim as a person. In addition, legislative rejection of shooting serves to confirm that it is cruel. Nevada, one of three states to ever permit the firing squad as a method of execution, replaced shooting with lethal gas in an attempt to "provide a method of inflicting the death penalty in the most humane manner known to modern science."[112] The cruelty of the firing squad is unnecessary in light of less cruel alternatives. Moreover, every jurisdiction in the nation except two operates without it.

Electrocution

Electrocution, introduced originally as a more humane alternative to hanging or shooting, is likewise cruel. Although some authorities argue that death by electrocution is painless, there is substantial disagreement. The French scientist L.G.V. Rota characterized execution by electrocution as a form of "torture" because the victim may be alive for several minutes after the current has passed

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[108] Says the Royal Commission on Capital Punishment, "[T]he ambition that prompts an average of 5 applications a week for the post of hangman . . . reveal[s] psychological qualities of a sort that no state would wish to foster in its citizens." P. 256. Arthur Koestler adds, "[T]he desire for vengeance has deep, unconscious roots, and is roused when we feel strong indignation or revulsion . . . [S]uch impulses should [not] be legally sanctioned by society." A. Koestler, Reflections on Hanging. (1957), p. 100.

[109] Gardner, p. 124. Gardner refers to N.Y. Times, Nov. 11, 1976, Section 1 at 14, column 1.

[110] 329 U.S. at 463-464.

[111] Utah and Idaho employ the firing squad in large part because of the belief of blood atonement; people must shed blood to atone for their sins in the Mormon religion. Although the motivation is understandable, such a justification based upon religious beliefs about a person's moral being is not acceptable with separation of church and state in this country.

[112] State v. Gee Jon, 46 Nev. 418, 437, 211 P. 676, 682 (1923).

through the body, and it is likely that certain persons have greater physical resistance to electric current than others.[113] Another scientist noted:

> The current flows along a restricted path into the body, and destroys all the tissue confronted in its path. In the meantime the vital organs may be preserved; and pain, too great for us to imagine, is induced. The brain has four parts. The current may touch only one of these parts; so that the individual retains consciousness and a keen sense of agony. For the sufferer, time stands still; and this excruciating torture seems to last for an eternity.[114]

It seems evident that if unconsciousness is not instantaneous, electrocution represents a brutal way to die, worse even than the torturous methods of the distant past. Yet even if most electrocutions are painless, Resweber illustrates that agonizing torture caused by malfunctions in the electric chair remains a possibility. Often two or three jolts are required before the victim is pronounced dead,[115] and there is always the potential for a grisly failure.

Apart from the issue of physical pain, electrocution, like hanging, requires preliminaries that sharpen the prisoner's apprehension of his fate and increase his psychological suffering.[116] Early in the morning of execution day, the top of the condemned person's head and the calf of one leg are shaved to afford direct contact with the electrodes. The prisoner then waits, sometimes for hours, until he is taken to the execution chamber, strapped into the chair, and connected to electrodes at his head and legs.[117]

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[113] N. Teeters, p. 447.

[114] *Id.*

[115] *Id.* at 449.

[116] This violates the requisite of humanity of the Royal Commission on Capital Punishment; one must keep the preliminaries to the act of execution as simple as possible. Royal Commission on Capital Punishment, p. 253.

[117] *Id.*, p. 251.

Electrocution is an extremely violent means of inflicting death and creates various indignities. Sometimes the victim's eyeballs fall from their sockets.[118] He urinates and defecates, and his tongue swells.[119] The body may catch on fire (during the application of the current the average body temperature rises to 140 F.),[120] and the smell of burning flesh usually permeates the chamber.[121] At the moment the switch is thrown all the muscles of the body contract, resulting in severe contortions of the limbs, fingers, toes and face.[122] The body turns bright red as its temperature rises.[123] Witnesses to electrocutions often become emotionally upset by the gruesome aspects of this method of death.[124]

Electrocution is cruel because it may inflict pain. It causes undue psychological suffering and offends human dignity because it is both violent and it disfigures the body of the victim. None of this cruelty is necessary since less cruel alternatives are available. In addition, there is evidence of a legislative trend away from electrocution. Texas and Oklahoma led the way by abandoning electrocution in favor of lethal injection because it was thought to be more humane.[125] Significantly, while many states have moved from electrocution to other more humane methods of

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[118] 1968 Hearings (statement of Clinton Duffy), p. 126 in Gardner.

[119] *Id.*

[120] Rubin, "The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty." 15 Crime and Delinquency (1969), p. 128.

[121] *Id.* Also, "[T]he smell of frying human flesh is sometimes bad enough to nauseate even the press representatives who are present." N. Teeters, p. 449.

[122] C. Duff, A New Handbook on Hanging. (1954), p. 118.

[123] G. Bishop, p. 27.

[124] Rubin, p. 129. See also the quote from note 118.

[125] Before adopting lethal injection, both Oklahoma and Texas employed the electric chair.

capital punishment, no state has moved from lethal injection or gassing to electrocution.[126] This legislative activity evidences the unnecessary cruelty and hence the probable unconstitutionality of the electric chair.

The Gas Chamber

As a response to the cruelties manifest in hanging, shooting, and electrocution, lethal gas was introduced as a method of execution. Capital punishment administered in a gas chamber has certain advantages over the other methods because it is much less violent and does not mutilate or disfigure the body. This is important; the absence of mutilation is a significant humanitarian concern. Referring to executions by lethal gas, Clinton Duffy states:

[T]he family of the condemned prisoner, his loved ones and the friends who claim the body do not go through as much of a harrowing experience when they claim a body that has not been mutilated. I have talked with many of these folks and, although they are grief-stricken, it is not quite so hard on them emotionally, when the body is not disfigured.[127]

In short, lethal gas respects the right to bodily integrity, which is critical in assessing the constitutionality of punishments.

It is questionable, however, whether traditional death by lethal gas (using cyanide gas) is painless. Clinton Duffy continues:

[T]he executioner presses the lever that allows the cyanide gas eggs to mix with the distilled water and sulfuric acid. In a matter of seconds the prisoner is unconscious. At first there is extreme evidence of horror, pain, strangling. The eyes pop, [victims] turn purple, they drool. It is a horrible sight. Witnesses faint.[128]

Additional accounts describe the prisoner struggling, apparently consciously, for a matter of minutes

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[126] William J. Bowers, Executions in America (1974), pp. 200-402.

[127] 1968 Hearings (statement of Clinton Duffy), p 127 in Gardner (note 236).

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[128] Id., p. 128 in Gardner.

before becoming unconscious.[129] The apparent suffering is sometimes said to be unconscious reflex,[130] but no one knows for certain whether the victim of gaseous asphyxiation suffers pain. J. Kervokian opines that cyanide causes convulsions and kills by cutting off the supply of oxygen to the cells. This amounts to suffocation, which is most likely an unpleasant way to die. Furthermore, death in a gas chamber involves intensely negative psychological associations with past practices that were often brutal and inhumane. Thus, it is possible that traditional death by lethal gas involves a high degree of both physical and psychological pain.

Lethal Injection

The adoption of lethal injection as a method of capital punishment by Oklahoma and Texas first indicated the legislative movement away from these traditional modes of execution. Death by intravenous injection has been hailed as the most painless, humane, and civilized method of capital punishment, and legislative proponents expected that because of this, increased support for the death penalty would be encouraged.[131] So far twenty states have enacted statutes prescribing lethal injection of drugs as a method for carrying out the death penalty.[132]

There are practical difficulties with lethal injection as a means of capital punishment, however. Injections commonly given in medical practice are of two kinds: intramuscular and intravenous. An intramuscular injection needs no special skill - anyone can learn to give one in a few minutes. An intravenous injection is a delicate and skilled operation.[133] A lethal dose can be given either way, but only if it is given intravenously can it be certain that death will be both quick and painless.[134] If it were practical, the intravenous injection of a lethal dose of a narcotic drug

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[129] See Rubin, p. 129.

[130] Michael V. DiSalle, The Power of Life or Death. (1965), p. 23.

[131] Michele Stolls, "Heckler v. Chaney: Judicial and Administrative Regulation of Capital Punishment by Lethal Injection, " 11 Am. J. L. and Med. (1985), p. 251. Stolls refers to Curran and Casscells, "The Ethics of Medical Participation in Capital Punishment by Lethal Injection," 302 New Eng. J. Med. 226 (1980).

[132] Greenfeld, p. 5.

[133] Royal Commission on Capital Punishment, p. 257.

[134] *Id.*

would be a speedy and merciful procedure. But the practical difficulties encountered in many cases when injection into a vein is attempted are such as to render the method quite unsuitable for the purpose of execution.

First, it is impossible to give an intravenous injection to anyone with certain physical abnormalities.[135] In some people the veins are so covered with layers of fat as to be invisible, and in others they are so flat that it is almost impossible to prevent a needle which has pierced one wall from going through the opposite one as well.[136] These conditions are rare: it is estimated that, with a willing subject, abnormal physical characteristics of this sort might make venepuncture difficult in one in five hundred cases and impossible in one in three thousand.[137] There is, however, the further difficulty that even normal veins may become flattened by cold or nervousness, a condition not improbable in the circumstances of an execution.[138] The usual way of restoring the veins is to immerse the arm in hot water until they become rounded, a process that may take ten to fifteen minutes, and even then several attempts may be necessary before an injection can be successfully given.[139]

Furthermore, intravenous injection is so delicate an operation that it cannot be done quickly and certainly unless the subject keeps absolutely still; it is never easy to give an intravenous injection except with the cooperation of the subject.[140] Even with the arm strapped to a splint, it may not be possible to secure an unwilling subject. The Royal Commission on Capital Punishment stated:

> A vein is not like an artery, which has a fairly thick wall. It has a very thin wall, and the moment you touch a vein with a needle the two sides tend to go together, and therefore any movement will tend to let your needle go through both walls, or one side or the other, and

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[135] *Id.*, p. 258.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

even the slightest movement will deflect your needle.[141]

Understanding that there is a high likelihood that the victims of executions will struggle, lethal injection seems extremely impractical and an ill-advised choice as the method of capital punishment.

Yet in addition to the fundamental impracticality of lethal injection, there is a greater problem. Individuals and groups in health care have mobilized resistance to this newest method of execution by refusing to administer lethal injections and by actively participating in litigation (Heckler v. Chaney). The American Medical Association, the British Medical Association, and the professional medical societies of the states with lethal injection statutes have all passed resolutions declaring that a physician should not participate in the process of lethal injection.[142] The American Nursing Association has taken the same position.[143] Because physicians and nurses have refused to administer lethal injections, states have resorted to employing volunteer execution technicians.[144] The potential abuse is great, however, when unskilled "volunteers" replace responsible medical professionals; as Martin Gardner says, "lethal injection, like the firing squad, is vulnerable to abuse by malevolent executioners."[145]

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[141] *Id.*

[142] Letter from Georgetown University Law Center to American Society of Law & Medicine (Aug. 31, 1984), p. 2. Reprinted in Stolls, "Heckler v. Chaney," p. 259. In 1980, the American Medical Association's House of Delegates adopted a policy statement saying that although an individual's opinion of capital punishment is a personal, moral decision, a "physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution." The American Psychiatric Association has a similar policy. Barbara Bolsen, "Strange Bedfellows: death penalty and medicine," 248 JAMA (August 6, 1982), p. 518. For many doctors, one of the first and most hallowed canons of the medical ethic is that doctors must not kill. Because of the Oath of Hippocrates, Western medicine has regarded the killing of patients as a profound violation of the foundation of the medical vocation. Willard Gaylin, MD, Leon R. Kass, MD, Edmund D. Pellegrino, MD, and Mark Siegler, MD. "Doctors must not kill," 259 JAMA (April 8, 1988) pp. 2139-2140.

[143] Georgetown letter, *supra* note 142, p. 2, reprinted in Stolls, p. 259.

[144] Texas and Oklahoma, for example, use volunteer medical technicians to administer the injection. Stolls, p. 259. Stolls refers to N.Y. Times, March 14, 1985, Section A, p. 22, and Curran and Casscells, *supra* note 131, p. 229.

[145] Gardner, "Executions and Indignities," p. 129.

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The absence of medical professionals from the administration of lethal injections has posed an additional practical problem. Ethical principles of the medical profession prohibit physicians from training volunteers to properly administer the drugs, and injections administered by a layperson are more likely to be fraught with complications.[146] "Intravenous injections are at the best of times difficult to accomplish [and] they can be very difficult to administer to individuals with certain abnormalities."[147] The likelihood of securing safe and painless executions decreases "without the direct application of biomedical knowledge and skills."[148] Frequently, when inexperienced persons insert an intravenous needle, the needle will slip out of the vein and into the tissue, considerably slowing down the absorption of drugs.[149]

Complications attend the administration of lethal injections even with trained medical participation. According to Dr. Ward Casscells of the Harvard Medical School, there is no comparative advantage to this method of capital punishment. Even with the cooperative prisoner, he contends, there is "no improvement over electrocution or even a bullet."[150] As stated previously, the main cause for difficulty, the inability to get the intravenous line within the vein, is aggravated by

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[146] Stolls, p. 260. Dr. Walter J. Friedlander testified before the Nebraska State Legislature, "The whole procedure of an intravenous administration of a lethal dose of medicine involves individuals trained in some health, mind you, health field . . . Several types of drugs have to be ordered. Someone has to do that and they have to be correctly identified. Then they have to be appropriately mixed and prepared for use. A catheter has to be properly inserted in the vein, held not just into the vein but held there so that during any movements of the individual these will not be withdrawn. It has to be properly inserted into the vein, and if a vein cannot be easily found, a quite likely situation for a patient in shock, and this is likely to be the case in a person who is about to be executed. A cut down has to be done. This is a surgical procedure, a minor surgical procedure, but no doubt about it being surgical. The intravenous injection of a lethal dose of medicine as a means of execution, at this point in our discussion has now gone beyond the acts of a common executioner or even a prison warden. It has become medicalized." Hearing before the Judiciary Committee, Nebraska State Legislature, Eighty-Eighth Legislature, First Session 1983, on LB 307. February 16, 1983 (statement of Dr. Walter J. Friedlander), p. 56-57 in the Committee Statement.

[147] Georgetown letter, *supra* note 142, p. 2, reprinted in Stolls, p. 260.

[148] *Id.*

[149] Stolls, p. 260. Stolls refers to Keerdoja, Witherspoon, Burgower & McDaniel, "A Civilized Way to Die," Newsweek, April 9, 1984, p. 106.

[150] Telephone Interview with Dr. Ward Casscells, Harvard Medical School, Cambridge, Massachusetts (Oct. 31, 1984), done by Michele Stolls. Printed in Stolls, p. 260.

three factors: the prisoner's physical condition, the inexperience of the executioner, and the prisoner's lack of cooperation. Any combination of these factors can result in an unduly long execution. Similarly, in the case of the elderly, drug addicted, or obese prisoner, the increased inability to locate a vein could cause unnecessarily long execution.[151]

The problems inherent in the administration of capital punishment by lethal injection have caused health care professionals to fear "the widespread use of thoroughly amateur poisonings as a method of execution."[152] In the context of the Chaney litigation, health care professionals demanded that a judicial or administrative forum be provided for the consideration of the efficacy of this method of capital punishment.[153] Lethal injections were expected to be the most humane of available methods for capital punishment, but legislative expectations for capital punishment may not be realized.[154] Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation.[155] The potential for abuse by untrained executioners and the presence of serious medical complications

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[151] *Id.* The problem in the execution of drug addicts is illustrated by the recent execution of Stephen Peter Morin. "On March 13, 1985, convicted murderer Morin took eleven minutes to die after unsuccessful attempts to insert a needle in both arms and one leg. Execution technicians had difficulty in finding a blood vessel free of scars or other damage into which to pass the needle. Morin, whose drug abuse had caused extensive damage to blood vessels, was forced to endure forty minutes of torture while technicians searched his limbs for a suitable vein and made repeated stabs at execution." Stolls, p. 260. Reference to N.Y. Times, March 14, 1985, Sect. A, at 22.

[152] Georgetown letter, p. 2, reprinted in Stolls, p. 261.

[153] *Id.*

[154] It is even possible that lethal injection may be painful when performed under ideal circumstances. Dr. Walter Friedlander testifies, "The facts are that there [is] no basis for contending that lethal injections are more humane or more humane than a number of other methods which are commonly used in executions. It is neither more rapid than other methods nor is it less painful. The intravenous injection of the most potent and fast acting anesthetic or legal agent still requires at least ten to fifteen seconds at an absolute minimum to take effect and that is an awful long time to wait to die . . . intravenous lethal injections have to go from the arm or the leg via the veins to the heart, from the heart to the lungs, circulate through the lungs, back to the heart, up through the arteries to the brain. Even then when it is at the level of the brain it takes a matter of time before these medicines can act on the brain cells to render a person unconscious." Hearing on Nebraska LB 307 (statement of Dr. Walter J. Friedlander), p. 55-56 in the Judiciary Committee Statement.

[155] Chaney, 718 F.2d at 1182-83, from Stolls, p. 270.

amount to unconstitutionally cruel and unusual punishment.

V. THE LETHAL GAS MASK AS A LESS CRUEL ALTERNATIVE

As I have shown, each of the currently employed methods of capital punishment has some sort of constitutional problem. There does exist an alternative, however, which is indeed "a significantly less severe punishment adequate to achieve the purposes for which the punishment in inflicted"[156]: the lethal gas mask. The administration of certain forms of lethal gas, and in particular carbon monoxide, is "perhaps the least violent method now available."[157] This idea is supported by the opinion of the British Medical Association that "a concentration of pure and odorless carbon monoxide would cause loss of consciousness instantaneously and painlessly, followed rapidly by death."[158]

Like the gas chamber, a lethal gas mask is minimally violent, and does not mutilate or disfigure the victim's body. But at the same time, a gas mask using carbon monoxide would avoid the potential for suffering which is a part of cyanide gas chambers. Furthermore, the use of a mask instead of the customary gas chamber would avoid the intensely negative psychological associations with past practices generated by gas chambers. The gas mask could be used in surroundings familiar to the prisoner; he would not be required to endure the additional anxiety of moving to a special death room. As a result, the leathal gas mask method would minimize both physical and psychological pain and suffering.

Possibly the strongest characteristic of the lethal gas mask method for capital punishment is its ease of administration. The method would be very cheap (requiring only a gas mask and a certain amount of carbon monoxide gas), and it is a quite simple process; anyone can put a gas mask onto a person's face, and activating the mechanism to release the gas would require only basic knowledge. This stands in stark contrast to the present methods of execution. Mishaps in executions are due either to the complexity of the machinery or to an error on the part of the executioner, and thus the traditional methods are susceptible to mishaps.[159] The lethal gas chamber is a complicated mechanism, "which prima facie one would suppose to give greater scope for mishap than the simpler

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[156] Royal Commission on Capital Punishment, p. 257.

[157] *Id.*

[158] *Id.*

[159] *Id.*, p. 255.

equipment of the other systems."[160] The electric chair is itself a simple aparatus, but its efficacy depends upon the supply of electricity, which is usually taken from commercial sources.[161] Lethal injection requires a great amount of skill from the executioner, and in the absence of the medical community, such skill is not readily available. Consequently, the lethal gas mask is far superior to the traditional methods in terms of practicality.

The one objection to the use of a lethal gas mask is that a brief period of physical restraint might be required to secure the mask to the face of a struggling prisoner.[162] Yet the force would be no greater that that required to administer the methods of execution now in use. In the case of hanging, the prisoner must be noosed; the victim must be strapped in a chair for electrocution, the firing squad, and the gas chamber. This argument applies to all methods of execution, and thus carries very little weight.

Administration of the death penalty through a lethal gas mask seems to pose few constitutional problems. Physical pain would be virtually eliminated and psychological suffering greatly reduced because the prisoner would fear neither a painful death nor the terrifying last walk to an unfamiliar death house. No bodily disfigurement would occur, and physical violence would be minimal. The lethal gas mask is also quite practical, both in terms of cost and simplicity. This method is clearly "less cruel" than the traditional modes of capital punishment, and its adoption would represent significant progress in the transition from a barbarous society to one that expresses principles of dignity and humanity. Human decency as embodied in the eighth amendment and defined by the courts demands at least that execution be imposed more humanely than it has been in the past.

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[160] *Id.*

[161] *Id.*

[162] This is the objection of the Royal Commission on Capital Punishment. Id., p. 257.

PROPORTIONALITY REVIEW, ARBITRARINESS, AND THE DEATH PENALTY: AN EXAMINATION OF COMPARATIVE PROPORTIONALITY REVIEW IN STATE SUPREME COURTS OUTSIDE OF NEW JERSEY BY NATASHA MOORE

I. HISTORICAL BACKGROUND

On June 29,1972, the United States Supreme Court in the benchmark case of *Furman v. Georgia* struck down the capital punishment procedures of Georgia and Texas as well as the rest of the states by implication. In this decision, the court did not declare capital punishment *per se* as unconstitutional. Rather, the court claimed that, due to the lack of guidelines and standards, the arbitrary and capricious manner in which the death penalty was being applied was a violation of the Eighth Amendment's prohibition of "cruel and unusual punishment."[1] Justice Stewart in his opinion even remarked : "This death penalty is cruel and unusual the same way that being struck by lightening is cruel and unusual."[2]

In response to the *Furman* decision, more than thirty state legislatures over the next four years revised their capital statutes in order to reduce the level of arbitrariness in death penalty sentencing.[3] On July 2, 1976, the United States Supreme Court struck down the North Carolina statute in *Woodson v. North Carolina*,[4] as well as the similar Louisiana statute in *Roberts v. Louisiana*,[5] since both laws called for the mandatory death penalty for all convicted first degree murderers.[6] The court contended that both statutes were far too inflexible because they did not allow for juries to consider "compassionate or mitigating factors" which derive from the "diverse frailties of humankind."[7] Moreover, the court was also concerned that juries would acquit certain defendants, even if they were fully convinced of their guilt, so as not to sentence them to death. Thus, in *Furman* the court objected to the lack of standards but also disapproved of the *Woodson* statute because of its rigidity.[8] The same day that *Woodson* was decided, however, the court upheld the revised capital sentencing procedures of Georgia (*Gregg v. Georgia*[9]), Florida (*Proffitt v. Florida*[10]), and Texas (*Jurek v.*

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1 *Furman v. Georgia*, 408 US 238 (1972).
2 Id. at 306-10.
3 Arnold Barnett, "Some Distributing Patterns of the Georgia Death Sentence : A Critique of Proportionality Review," 18 *U.C. Davis Law Review*, 1334-5 (1985).
4 *Woodson v. North Carolina*, 428 US 280 (1976).
5 *Roberts v. Louisiana*, 428 US 325 (1976).
6 Baldus, 26.
7 *Woodson v. North Carolina* at 206.
8 Barnett, 1335.
9 *Gregg v. Georgia*, 428 US 153 (1976).
10 *Proffitt v. Florida*, 428 US 242 (1976).

Texas[11]) since they represented intermediate statutes that the court considered to have adequate safeguards to protect against the condemnations in *Furman*. Although the three statutory schemes were different, the court believed that each sufficiently guided prosecutorial discretion in order to ensure evenhanded application of the death penalty while at the same time allowing for each defendant to have an individualized sentence determination. Among the aspects the court regarded to be beneficial were the bifurcation of the trial into a guilt phase and a penalty phase, the enumeration of mitigating and aggravating circumstances which guides the jury in the sentencing process, the requirement of at least one aggravator in order for the defendant to be death-eligible, and guaranteed appellate review.[12] In the *Gregg* case, Georgia received much attention from the court for its inclusion of comparative proportionality review in the appellate review process. Proportionality review was considered to be the ultimate protection against comparative excessiveness in capital sentencing if utilized effectively. Justice White commented in his concurring opinion that "if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed . . . wanton and freakishly . . . will be set aside."[13] Even though there was no empirical evidence to prove proportionality review's effectiveness, the court assumed, as it had with the provisions of *Jurek* and *Proffitt*, that the procedure would be adequate and that the Georgia Supreme Court would carry out the process properly.[14] However, Justice Rehnquist in *Woodson* commented that he believed proportionality review was not capable of being effective :

> All that such a review of death sentences can provide is a comparison of fact situations which must in their nature be highly particularized if not unique, and the only relief which it can afford is to single out the occasional death sentence which in the view of the reviewing court does not conform to the standards established by the legislature.[15]

Nevertheless, the *Gregg* statute served as a model for the majority of the states with capital punishment laws. State legislatures included proportionality review provisions almost identical to Georgia's in order to ensure that their statutes passed constitutional muster.[16] Some states did not directly adopt proportionality review into their statutes. Some of those which did not adopt the process legislatively, did so by judicial decree following *Gregg*. A few of the legislatures, such as that of Alabama, codified these judicial undertakings into law.[17] Meanwhile in other states, namely Florida and Arizona, proportionality review remained strictly an initiative taken on by the

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[11] *Jurek v. Texas*, 428 US 262 (1976).
[12] Baldus, 25-6.
[13] *Gregg v. Georgia* at 224 as cited in Steven M. Sprenger, "A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases," 73 *Iowa Law Review*, 8 (1988).
[14] Baldus, 27.
[15] *Woodson v. North Carolina* at 316.
[16] Sprenger, 12.
[17] Ibid., 12.

judicial branch.[18] In 1984, the U.S. Supreme Court ruled in *Pulley v. Harris* [19] that proportionality review is not constitutionally mandated. The California capital statute discussed in *Pulley* contained an automatic appeal to the state supreme court but had no provision for proportionality review. Yet the U.S. Supreme Court still considered the California law to have adequate protection against arbitrariness.[20] In its rationale the court contended :

> There is no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed, and the defendant requests it. Indeed, to so hold would effectively overrule *Jurek* and would substantially depart from the sense of *Gregg* and *Proffitt*. We are not persuaded that the Eighth Amendment requires us to take that course.[21]

In this ruling, the court did not make a complete departure from the spirit of *Gregg* as many legal commentators have suggested. Rather, the court was only suggesting in *Pulley* that proportionality review is not the only effective means of eliminating arbitrariness. As long as a state's statute has other safeguards, the law would be constitutional.[22] Thus, in a sense, the court did not want to sanction proportionality review as a mandatory part of each state's capital sentencing process. However, many critics, including Justice Brennan in his dissenting opinion, denounced the court's unconditional acceptance of the California statute. Specifically, Brennan commented that the court could not continue to "assume that the procedural protections mandated by the court's prior decisions eliminate the irrationality underlying the application of the death penalty." Brennan goes on to suggest that the court's assumptions on the efficacy of a statute primarily "on its face" is, in fact, ignoring the constitutional concerns in *Furman*.[23]
Since the *Pulley* decision, three states, Oklahoma, Tennessee, and Nevada, have repealed their proportionality review provisions. Other states, such as New Jersey, have made proportionality review the option of the defendant. In addition, the court of at least one state, Illinois, whose proportionality review requirement was incorporated into the appellate review process via judicial decree, reverted to its original practice of not requiring proportionality review in the wake of the *Pulley* decision.[24]

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[18] Robert M. Carney, "The Case for Comparative Proportionality Review," 59 *Notre Dame Law Review*, 6-7 (1984); see also *Wilson v. State*, 493 So. 2d 1019 (Fla. 1986).
[19] *Pulley v. Harris*, 465 US 37 (1984).
[20] Ellen Liebman, "Appellate Review of the Death Sentence : A Critique of Proportionality Review," 18 *U.C. Davis Law Review*, 1435 (1985).
[21] *Pulley v. Harris* at 876.
[22] Sprenger, 9.
[23] *Pulley v. Harris* at 885-7 as cited in Liebman, 1435.
[24] Sprenger, 12.

II. The Problems of Methodology

After the legislatures adopted proportionality review provisions into their death sentencing statutes, the state courts then had to determine the mechanics of conducting such a process. State legislatures intentionally drafted the statutes in vague language in order to leave the establishment of a framework for proportionality review up to the state supreme courts who are considered most able to do so. Thus, the issues surrounding the methodology of conducting proportionality review have been and still are areas of contention in state supreme courts.

The typical comparative proportionality review clause is much like the following : "The Court shall consider and determine whether the sentence of death is excessive or disproportionate to the penalty imposed in "similar" cases considering both the crime and the defendant."[25] In this clause, the appellate court is not given any detailed guidelines as to what constitutes a "similar" case or how to compare the sentence in question with those of other cases. Thus, determining the category of comparison as well as the method of comparison was left almost entirely to the reviewing court's discretion.

The Universe Issue

The problem of determining the category of comparison is also referred to as the "universe issue." In order to make a comparison with "similar" cases to ensure that a sentence is not comparatively excessive, the court must create a pool or "universe" of cases that must resemble the case up for review in some respect, such as the type of aggravating circumstances involved or the overall egregiousness of the crime. Because the method of determining what cases should fall into the comparison pool is not explicitly defined in most capital sentencing statutes, the courts are left with that decision.

In his research on proportionality review, Professor David C. Baldus has found two ways in which state appellate courts identify "similar" cases. The first and most pervasive is the "fact-specific" or "salient-feature matching" method in which the reviewing court will use certain statutory aggravating circumstances such as rape or murder for the purpose of monetary gain (in addition to other relevant facts) in order to create a universe of "similar" cases. Occasionally, mitigating circumstances are also considered.

The second method, which is not usually discussed explicitly in court opinions, is the selection of "similar" cases based on the overall assessment of case culpability (the "comparative culpability" method). More specifically, this means that cases are gathered for comparison in which the crimes match in the degree of cold-bloodedness or egregiousness to that of the case under review. These cases do not necessarily have to be factually similar. Overall, state appellate courts use these two

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[25] GA. Code Ann. at 1-10-30(c)(3)(1982) as cited in Sprenger, 1.

methods interchangeably and inconsistently, often without indicating in their opinions which they employed.[26]

Another area of dispute regarding the "universe issue" is whether state courts should limit their comparison pools to either (1) death-sentence cases only, (2) both life and death-sentence cases only if they advanced to the penalty phase, or (3) both life and death-sentence cases and only those life sentences which have been appealed (or some other category.) Many critics have argued that since most courts use these limits rather than extend their parameters to encompass all cases resulting in a conviction of first degree murder that many comparatively excessive sentences have been overlooked.[27]

At least six states, including South Carolina, Kentucky, and Mississippi, limit their comparison pools only to cases in which the death sentence was actually imposed.[28] Other states will occasionally use this approach but generally consider both life and death sentences.[29] One of the main rationales used by state courts for only using death-sentence cases is because extending the universe beyond that would result in "intolerable speculation and conjecture" on the part of the reviewing court in examining other cases. This is because it would be questionable whether the jury actually found a statutory aggravating factor to make the case death-eligible.[30]

Although the above concern may be well-intentioned, there are also many reasons why this limitation precludes fair sentencing. First of all, this approach excludes a significant portion of potentially "similar" cases that are equally important for conducting a proportionality review, especially when the number of death-sentence cases is so small that it is difficult to find cases remotely alike.[31] For example, between the enactment of Nebraska's post-*Furman* statute and 1988, thirteen homicides cases resulted in a death sentence while ninety-six resulted in a life sentence. Since there are so few cases on which to base a proportionality review with a death sentence only requirement, a court may be compelled to rule a death sentence as proportionate, correctly or not, mainly because it did not have any truly "similar" cases on which to base an adequate comparison.[32] Moreover, the court would be unable to determine whether the case in question is more "similar" to a life-sentence case than to a death-sentence case.[33] Another problem with the death sentence only approach is that it does not account for geographical disparities in the sentencing of the death penalty. In certain states defendants who committed "similar" crimes are more likely to receive the death penalty in some areas than in others. By imposing the death-sentence requirement on the universe of cases, a defendant who received the death penalty in a high death-sentencing jurisdiction is deprived of a fair

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[26] Baldus, 201-2.
[27] Sprenger, 14.
[28] Ibid., 15.
[29] Ibid., 16.
[30] *State v Palmer*, 224 Neb. 282, 330, 339 NW. 2d 106, 737 (1986) as cited in Sprenger, 16.
[31] Sprenger, 16.
[32] *State v Palmer* at 775-83 as cited in Sprenger, 18.
[33] David C. Baldus, "Death Penalty Proportionality Review Project : A Final Report to New Jersey Supreme Court," 44 (Sept. 1991).

proportionality review since her/his case will not be compared with "similar" life-sentence cases from low death-sentencing jurisdictions.[34] Finally, excluding life-sentence cases from the universe eliminates review of prosecutorial discretion. Proportionality review may serve as a check against "aberrant actions of the prosecutor" in which the death penalty was pursued in one case but not in a "similar" case. Without considering life-sentence cases, such anomalies go undetected.[35]

A second approach limits the universe to life or death-sentence cases that have advanced to a penalty trial. This is the system adopted by the state courts of Delaware, Maryland, Missouri, Washington, and North Carolina. Even though this approach is broader than the one previously discussed, it still significantly underrepresents potentially "similar" cases which resulted in a life sentence. An often used justification for this approach is that in a penalty trial the "sentencing authority has found and weighed aggravating and mitigating circumstances and/or pronounced a life or death judgement." Thus, the penalty trial lends validity to the existence or nonexistence of aggravating and mitigating factors. However, this approach does not account for the role of prosecutorial discretion.[36] Another justification is that it provides "a sufficient cross section of similar cases." Yet this is not necessarily the case.[37] For example, in Georgia, fifty-five percent of all death-eligible cases which advance to a penalty trial result in the death penalty, and forty-five percent result in a life sentence.[38] But in Georgia, as in other states, a significant portion of death-eligible cases do not proceed to a penalty trial. The percentage of death-eligible defendants who are sentenced to death is only eight percent with the rest (ninety-two percent) receiving life terms.[39] Therefore, if the potential universe parameters were extended to all death-eligible cases, it would be comprised of eight percent death-sentence cases as opposed to fifty-five percent and ninety-two percent life-sentence cases instead of forty-five percent. Thus, as shown in the example, unless the boundaries of the universe are widened to include all cases where the death penalty could have been sought, the pool does not represent an adequate cross section to ensure a fair comparative review.[40]

The third approach state courts such as Arizona and Louisiana have taken is to limit potentially "similar" cases to include only life and death cases which have been appealed whether or not they advanced to a penalty trial. Theoretically, this approach may also underrepresent life-sentence cases.[41] This is mainly because all cases which result in the death penalty have automatic appeal, while most defendants who receive a life sentence do not appeal either because they are satisfied just to have escaped the death penalty or they lack the funds.[42]

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34 Ibid, 44-45.

35 *Tichnell v. State*, 468 A. 2d 1, 23-5 (1983).

36 Baldus, 46.

37 Sprenger, 20.

38 David C. Baldus, Charles Pulaski, George Woodworth, "Arbitrariness and Discrimination in the Administration of the Death Penalty : A Challenge to the State Supreme Courts," 15 *Stetson Law Review*, 50 (1986) as cited in Sprenger, 21.

39 Ibid., 146 as cited in Sprenger, 21.

40 Sprenger, 21.

41 The extent to which this approach may underrepresent life-sentence cases has so far not been documented.

42 Ibid., 22-3.

The "universe issue" has remained a heavily debated topic because the state courts have not articulated a specific method of defining the universe of "similar" cases. In a few recent decisions, specifically from Maryland and Delaware, there has been some progress made by state courts towards addressing the universe issue.[43] However, in most states, the courts have not clearly defined narrower guidelines of how they will approach the universe issue. Reviewing case law will show that state supreme courts often change the way they define a pool of "similar" cases without any rationale and discussion. This lack of principles or consistent guidelines will inevitably lead to comparatively excessive death sentences going unnoticed.

Method of Comparison

After the category of comparison is determined, the appellate court must then also decide how it will compare these cases with the case in question. Professor Baldus identified three methodologies which are commonly used. The first is referred to as the "traditional," or "reasonableness," method. In this scheme the court makes a subjective assessment based on both the nature of the crime and the defendant's characteristics as to whether he deserves the death penalty. The case is not compared to other "similar" cases to guarantee that the sentence is not comparatively excessive. Rather, the crime and the defendant are compared to the sentence itself to see if they are proportionate to each other. In other words, this method entails determining whether the crime is heinous enough to reasonably warrant such a severe punishment. One of the major flaws of this method is that it is based almost entirely on the moral sentiments of the reviewing court. Moreover, this method is not effective in detecting comparative excessiveness since there is no inter-case comparison involved.[44]

A second method is the "precedent seeking" approach. In this form of review, the court will uphold a death sentence based on a few "similar" cases if they too imposed a death sentence. By the same token, if the court intuitively finds a sentence excessive, it will cite some "similar" cases to back its decision. The flaw in this method is that it is too "result-oriented." The court will usually first determine on its own intuitions as to the appropriateness of the sentence and then find and cite a pool of "similar" cases to validate its decision.[45]

A third proportionality review process, and the one which was envisioned by the *Gregg* court, is the "frequency" approach. This method focuses on the frequency of death sentencing among "similar"

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[43] David C. Baldus, Charles Pulaski, George Woodworth, *Equal Justice and the Death Penalty* , Northeastern University Press : Boston (1990) 287; see also *Flamer v. State*, 490 A. 2d 104, 138-145 (Del. 1983) and *Tichnell v. State*, 297 Md. 432, 457-66, 468 A. 2d 1, 13-18 (1983).

[44] Raymond Paternoster and AnnMarie Kazyaka, "An Examination of Comparative Excessive Death Sentences in South Carolina 1979-1987," 17 *NYU Review of Law and Social Change*, 438 (1990).

[45] Baldus, 206; see also State v. Plath, 281 S.C. 1, 20, 313 SE 2d 619, 630 (1984).

cases. In order to use this process, a court must make three determinations : (1) define a universe of "similar" cases, (2) determine the frequency that the defendants in these cases received the death penalty, and, finally, (3) decide whether or not death sentences were imposed so infrequently among the identified pool as to warrant declaring the sentence comparatively excessive. [46] According to Baldus, if a death sentence is imposed in less than thirty-five percent (.35) of the "similar" cases, then the sentence can be considered comparatively excessive. If a defendants receive the death penalty in more than eighty percent (.80) of the cases in the comparative pool than the sentence should be considered evenhanded and not comparatively excessive.[47]

Reviewing Justice Stewart's plurality opinion in *Gregg*, reveals that the "frequency" approach was what the court anticipated when discussing the importance of proportionality review as a safeguard against arbitrariness and comparative excessiveness.

> . . . [T]he proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death. [48]

It is clear that the U.S. Supreme Court envisioned a "frequency" approach to proportionality review which would be employed regularly and would adequately, if not completely, protect against the occurrence of unfair and excessive sentencing.

The "frequency" method is considered by most legal commentators to be the most effective means of conducting proportionality review. However, no state court has clearly articulated which approach it should adopt. Only four state courts, Louisiana, North Carolina, Pennsylvania, and Virginia, seem to have applied the "frequency" type of analysis. Among these states, not one provides in its opinions any percentages or quantifications of observed frequencies in its comparative pool. North Carolina's and Virginia's documentation of their analyses is so deprived of detail that one cannot calculate any frequencies with the information provided. Only Pennsylvania has been known to report the number of both life and death cases which were used for comparison.[49]

In many states, as in Georgia, the issue of how to conduct proportionality review is treated similarly to the universe issue. A basic approach is not clearly adopted and used consistently. Often, courts use the three different approaches interchangeably and without detailed explanation of how it reached

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[46] Ibid., 207.

[47] David C. Baldus, Charles Pulaski, George Woodworth. "Comparative Proportionality Review of Death Sentences : An Empirical Study of the Georgia Experience," 43 *Journal of Criminal Law and Criminology*, 698 (1983).

[48] *Gregg v. Georgia* at 206 as cited in Baldus, 207.

[49] David C. Baldus, Charles Pulaski, George Woodworth, *Equal Justice and the Death Penalty* , Northeastern University Press : Boston (1990) 282.

its conclusion. This lack of consistency and detail on the part of state courts as well as the use of flawed methodologies of defining a universe and conducting a review are the causes that critics have attributed to proportionality review's lack of effectiveness. The next section will look into the experience of proportionality review in specific states.

III. Case Studies on Specific States

Georgia

In the area of proportionality review, Georgia is one of the most discussed and analyzed states. One of the main reasons for this is that Georgia 's statute has served as a model for many states with capital punishment because of the U.S. Supreme Court's endorsement of the statute's comparative proportionality review process in *Gregg*. Along with having to determine if a death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant," the Georgia Supreme Court should also "include in its decision a reference to those similar cases which it took into consideration" for its comparative review. In addition, the statute also provides for the appointment of an "Assistant to the Supreme Court" who assists the court in its review process by compiling "all capital felony cases in which a sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate."[50]

Although the Georgia statute does not explicitly say what cases the court should consider to be included in the universe of "similar" cases, the above requirement on the collection of data, however, does imply that the universe should encompass all murder convictions in which a sentence was imposed. Yet, in reality, the Georgia Supreme Court limits its realm of cases to capital murder cases after 1969 in which there was a penalty trial and an appeal. As a result of this practice, potential cases that the court would consider "similar" include all the death-sentence cases (since they are automatically appealed) but excludes all life sentences in which there was no appeal or was a result of a negotiated guilty plea (no penalty trial).[51]

The Georgia court has not articulated or followed a uniform method to determine the pool of "similar" cases for a proportionality review. Throughout the Georgia opinions both the "fact-specific" method and the "culpability" method are used. The "culpability" method is not discussed explicitly in the opinions,[52] but certain phrases, such as "the [defendant's] brutality and depraved intent . . . is similar [to that of other defendants]," reveal its application.[53]

Professor Baldus conducted a study on sixty-eight of the first sixty-nine post-*Furman* death-sentence cases on which the Georgia Supreme Court conducted a review. According to his extensive analysis, Baldus' results suggest that between thirteen percent and twenty-five percent of the death sentences

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[50] GA. Code Ann. 27-2537 (a) as cited in Baldus, 199-200.

[51] Baldus, 200; see also *Ross v. State*, 233 Ga. 361, 366, 211 SE. 2d 356, 359 (1974).

[52] Ibid., 201-2.

[53] Stevens v. State, 245 Ga. 583, 586, 266 SE. 2d 194, 197 (1980) as cited in Baldus, 202.

affirmed were probably comparatively excessive. These cases were ones in which cases of "similar" culpability (as determined by Baldus) had a death-sentence rate below .35. Baldus also found that twenty to thirty percent of the affirmed death sentences could be considered evenhanded since the death-sentencing rates among "similar" cases were above .80. The remaining cases which make up nearly half lie in the middle ground between .35 and .80.[54]

Baldus also examined the appendices of the court's opinions of the same sixty-eight cases to examine the lists of cases the court deemed as "similar." His data indicates that ninety percent of the cases analyzed had comparative pools consisting only of cases that resulted in a death sentence. Baldus' method of selecting "similar cases" ("culpability" method) resulted in very different comparison pools. Baldus surmised that the discrepancy was caused by the court's tendency to overlook life sentences when selecting "similar" cases. As a result, sentences which Baldus' analysis consider to be excessive seem fair and non-excessive when compared to the pools of "similar" cases listed in the appendices of the Georgia Supreme Court opinions. Thus, if Baldus' method of selecting "similar" cases is reliable, then the court is systematically affirming comparatively excessive sentences mainly because the universe is limited almost entirely to death-sentence cases.[55]

Two other studies on Georgia have had the same results. William Bowers and Glenn Pierce analyzed the cases that the court cited as "similar" for the first thirty-six cases which underwent review.[56] Likewise, Ursula Bentele examined twenty death-sentence cases in 1981 that were also reviewed by the court.[57] These two studies plus Baldus' analysis have reached virtually the same conclusion which is that the Georgia Supreme Court consistently upholds death sentences since in its selection of a universe of comparable cases, the court generally overselects death-sentence cases and underselects life-sentence cases.[58]

After examining the results of the Baldus study, it is evident that the Georgia Supreme Court is not conducting proportionality review in the most effective manner. Although Georgia has progressed since the pre-*Furman* days in eliminating arbitrariness and excessiveness,[59] the court's exercise of proportionality review has not met the expectations in *Gregg*.

South Carolina

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[54] Baldus, 203.

[55] Ibid., 203-5.

[56] William J. Bowers and Glenn L. Pierce, "Arbitrariness and Discrimination under Post-*Furman* Capital Statutes," 26 *Crime and Delinquency*, 563-635 (1980).

[57] Ursula Bentele, "The Death Penalty in Georgia : Still Arbitrary," 62 *Washington University Law Quarterly*, 573-646 (1985).

[58] Baldus, 205-6.

[59] Ibid, 131.

South Carolina's proportionality review provision was modeled almost completely after Georgia's,[60] and many of the same problems have surfaced. The statute does not provide any real guidelines for conducting a review nor has the South Carolina Supreme Court established any.

Raymond Paternoster and AnnMarie Kazyaka did an extensive empirical study using three different types of review to evaluate the effectiveness of South Carolina's proportionality review system. Paternoster and Kazyaka looked primarily at twenty six affirmed death sentences between 1979 and 1987.[61] Utilizing Baldus' .35 standard for determining comparative excessiveness, their results came close to that of Baldus' study on Georgia.[62] For example, of the twenty-six cases they analyzed, all three empirical methods of comparative review consistently identified nine death-sentence cases, whose sentences were affirmed, as comparatively excessive.[63] This means that, according to Paternoster and Kazyaka, thirty-five percent of all death sentences imposed between 1979 and 1987 could be considered excessive and arbitrary yet passed unnoticed through the hands of the South Carolina Supreme Court.

Paternoster and Kazyaka also examined the court's opinions to analyze its practice in conducting reviews. They first noticed that the court only allows for cases which resulted in a death sentence as "similar" cases for comparison.[64] This practice, as discussed earlier, has much bearing on the overall effectiveness of proportionality review. Second, the court has also never vacated a death sentence on grounds of being disproportionate. This phenomenon is most likely the result of the excessive sentences not being recognized.[65] Paternoster and Kazyaka also pointed out the lack of analytical discussion in opinions without any insight as to why the defendant deserved the sentence he/she received.[66] Except for a few cases, discussions about proportionality review are at best three to five lines long. Moreover, the court has not once used any empirically based forms of review. Instead, it relied on three methods of review interchangeably. Their reviews break down to a "reasonableness" approach being employed in thirty-two percent of the cases, a "precedent-seeking fact-specific" method in sixteen percent of the cases, and a "precedent-seeking overall culpability" method in fifty-two percent of the cases. There is also no rationale given as to why one method was preferred over another,[67] and in some instances, individual judges will apply different methods on different cases.[68]

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[60] The Supreme Court must determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." S.C. Code Ann. 16-3-25(c)(3) as cited in Paternoster, 483.

[61] Paternoster, 481.

[62] Ibid., 492-3.

[63] Ibid., 522-3. *State v. Hyman*, *State v. Gilbert*, *State v. Thompson*, *State v. Yates*, *State v. Koon*, *State v. Patterson*, *State v. Gaskins*, *State v. Lukins*, and *State v. Plemmons*.

[64] Ibid., 526.

[65] Ibid., 495.

[66] Ibid., 511.

[67] Ibid., 517.

[68] Ibid., 519.

Thus, it is quite clear, considering Paternoster and Kazyaka's empirical results, that South Carolina's proportionality review, along with Georgia's, has not been effective in detecting and preventing comparative excessiveness in capital sentencing. The most likely causes behind South Carolina's failure is not only the lack of consistency in approach but also the absence of any attempt to do an exhaustive comparison of "similar" cases.

North Carolina

North Carolina's post-*Furman* capital sentencing statute, which was also modeled closely after Georgia, was adopted by the state legislature in 1977.[69] Yet, unlike Georgia, the North Carolina Supreme Court has explicitly recognized how it will limit its pool of "similar" cases. According to the court, it will consider only capital cases since June 1, 1977, in which the defendant received life or death[70] and then appealed the sentence to the North Carolina Supreme Court.[71] However, the court has not followed a uniform approach to selecting which cases will be used as "similar" cases for a specific comparative review. Nor has the court established a general framework for how it will compare "similar" cases.[72]

Carolyn Reed's non-empirical analysis of the North Carolina Supreme Court opinions from 1977 to 1985 has shown that the manner in which the court has conducted a proportionality review has not at all been consistent. In fact, the court fluctuates between in-depth comparative reviews and perfunctory comparative reviews. In the first cases in which there were proportionality reviews, the discussion was very brief, and there was virtually no indication of what factors made the cases "similar."[73] In *State v. Williams*, the reviewing court did not even cite "similar" cases.[74] Then in 1983 with *State v. McDougall*,[75] the court began engaging in more detailed discussions on how it conducted proportionality review and how it decided which cases are "similar".[76] But after *State v. Lawson*[77] in 1984, the court returned to its practice of cursory reviews with only a few exceptions.[78]

Despite these inconsistencies, the North Carolina Supreme Court, unlike South Carolina's, has managed to vacate four death sentences during this period on grounds of disproportionality.[79]

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[69] Carolyn Reed, "The Evolution of North Carolina's Comparative Proportionality Review in Capital Cases," 63 *North Carolina Law Review*, 4-5 (1985).

[70] *State v. Williams*, 308 N.C. 47, 79, 301 SE. 2d 335, 355 (1983) as cited in Reed, 5.

[71] *State v. Jackson*, 309 N.C. 26, 45, 305 SE. 2d 703, 717 (1983) as cited in Reed, 5.

[72] Reed, 6.

[73] Ibid., 8-9. See also *State v. Hutchins*, 303 N.C. 321, 279 SE. 2d 788 (1991) and *State v. Pinch*, 306 N.C. 1, 292 SE. 2d 203 (1982).

[74] *State v. Williams*, 308 N.C. 47, 301 SE. 2d 335 (1983).

[75] *State v. McDougall*, 308 N.C. 1, 301 SE. 2d 308 (1983).

[76] Reed, 10.

[77] *State v. Lawson*, 310 N.C. 632, 314 SE. 2d 493 (1984).

[78] Reed, 12.

[79] Ibid., 14.

Even though this shows that the court is taking steps to achieve more meaningful comparative reviews, it still needs to go further in order to avoid repeating the perfunctory and vague reviews of the past.[80] Detailed discussions of proportionality review by justices in their opinions are crucial to ensure that an exhaustive review has been done and also to convey the reasonings as well as methodologies used for their decision.

Washington

Washington's current capital punishment statute was adopted in 1981 and also closely resembles Georgia's in its appellate review clause.[81] While Washington's proportionality review process suffers from many of the same flaws as other states, the state supreme court also has to contend with the problem of too few cases to use for comparative pools. Despite this problem of scarcity, the court still has a tendency to limit potentially "similar" cases mostly to ones where the death sentence was imposed.

Having few "similar" cases with which to base a proportionality review only exacerbates the difficulty of detecting occurrences of excessive sentencing. "Not only does each case represent the fate of one individual, but errors occurring at the review stage increase the chances for further error; the system cannot work if erroneous decisions are used as a benchmark for further comparison."[82] Because of this scarcity, cases will arise where the are not any remotely "similar" cases. In this instance, the court is left with the predicament of comparing incomparables. The court is then compelled to resort to a "reasonableness" approach of conducting proportionality review rather than a "precedent-seeking" or "frequency" approach. This situation can be evidenced in *State v. Campbell*[83] in which the court affirmed the sentence because it deemed the crime heinous enough to warrant the death penalty not because it was a usual sentence for that crime. The problem with this type of review is that it gives the court too much discretion[84] which is, in fact, what had led to arbitrariness in the pre-*Furman* decisions to begin with.

In spite of this, the Washington Supreme Court has also chosen to limit its comparison pool almost only to cases which had a death sentence imposed. For example, in *State v. Jefferies*,[85] the court affirmed Jefferies' death sentence based on comparison with four other cases which resulted in a death sentence.[86] However, the court did not at all consider the case of *State v. Carothers*[87] as well as

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80 Ibid., 19-20.

81 W. Ward Morrison, "Washington Comparative Proportionality Review : Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution," 64 *Washington Law Review*, 7 (1989).

82 Ibid., 11.

83 *State v. Campbell*, 103 Wash. 2d 1, 691 P. 2d 929 (1984).

84 Morrison, 12-13.

85 *State v. Jefferies*, 105 Wash. 2d 398, 717 P. 2d 722 (1986).

86 *State v. Jefferies*, 105 Wash. 2d at 430, 717 P. 2d at 740 as cited in Morrison, 15.

87 *State v. Carothers*, 84 Wash. 2d 256, 525 P. 2d 731 (1974).

others which matched *Jefferies* very closely in respect to aggravating factors but had resulted in a life sentence.[88]

In light of the relative scarcity of "similar" cases, the limitation of the universe to exclude much of the life-sentence cases only further inhibits the review process from maximizing its effectiveness. For this reason, the Washington Supreme Court, as well as the supreme courts of other states, should consider expanding the parameters of its potentially "similar" cases to all first degree murder convictions which are death-eligible.

IV. Conclusions and Suggestions

By employing vague language in the capital sentencing statutes, particularly in the proportionality review clauses, the state legislatures entrusted the courts with the task of determining what guidelines they should use in order to conduct adequate comparisons. However, most of the courts did not establish a framework on which to base their proportionality reviews. The consequence has been the ineffectiveness of proportionality review to consistently detect excessive and arbitrary sentencing. For the most part, state supreme courts do not realize this ineffectiveness, since from their perspective, the process is working adequately even though empirical evidence from recent studies shows otherwise.

In light of these problems, many capital punishment scholars have offered suggestions on how proportionality review's effectiveness can be maximized. One such suggestion is to expand the parameters of the universe of potentially "similar" cases to encompass all death-eligible cases which resulted in a life (by penalty trial or by plea) or death sentence whether or not there was an appeal. Widening the boundaries to this extent only seems appropriate in order to engage in an exhaustive proportionality review.[89] Some critics have questioned the practicality of having to collect and keep such a large amount of cases. However, Pennsylvania's on-going comprehensive study, "Pennsylvania Death Penalty Study,"[90] managed by the Administrative Office of Pennsylvania Courts (AOPC) should serve as model. In this study, the President Judge of every county is required to fill out a questionnaire about every first degree murder conviction in his/her jurisdiction. According to this system, a justice can easily request all relevant cases for a proportionality review without any difficulty.[91] The information on each case kept by the AOPC includes facts about the crime, possible aggravating and mitigating circumstances, sex and race of the defendant and the victim as well as any other pertinent pieces of information.[92]

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[88] Morrison, 16.

[89] Baldus, 293.

[90] Established by the Pennsylvania Supreme Court in *Commonwealth v. Frey*, 504 Pa. 428, 475 A. 2d 700 (1984).

[91] *Commonwealth v. Whitney*, 511 Pa. 232, 512 A. 2d 1152 (1986).

[92] Sprenger, 26-7.

Another suggestion to improve the effectiveness of proportionality review is for the state courts to adopt and consistently employ an empirical method of case comparison, namely a "frequency" approach.[93] This method is the most effective means of detecting excessive or arbitrary sentences since it reveals what the most common form of punishment is for "similar" cases. A Pennsylvania-type system of data collection would also help facilitate the "frequency" approach since this method requires a comparison pool of all "similar" cases in order to make an accurate determination about the comparative excessiveness of the sentence.

A third suggestion is for state courts to document and clearly discuss and explain the results of their proportionality reviews in their opinions.[94] This would aid in the detection of *ad hoc* or haphazard proportionality reviews which did not involve an in-depth or complete analysis. Moreover, this practice would also help keep intact a court's established guidelines for proportionality review.

Finally, a last suggestion is to supplement the "fact-specific" method for determining "similar" cases with the "overall culpability" approach.[95] This way, the definition of a "similar" case will not be wholly based on factual or aggravating circumstances, but will also factor in an overall assessment of the culpability or egregiousness of the crime and the defendant.

Evidence has not shown that proportionality review is inherently incapable of addressing the issues of arbitrariness and comparative excessiveness in capital sentencing. Rather, the problem lies chiefly in the manner in which state supreme courts have executed the process. If utilized properly by the state courts, proportionality review has the most potential of eliminating the arbitrary imposition of the death penalty.

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[93] Baldus, 293.
[94] Ibid., 293.
[95] Ibid., 293.

BIBLIOGRAPHY

Baldus, David C., Charles Pulaski, George Woodworth. "Arbitrariness and Discrimination in the Administration of the Death Penalty : A Challenge to the State Supreme Courts." 15 *Stetson Law Review*. 50 (1986)

Baldus, David C., Charles Pulaski, George Woodworth. "Comparative Review of Death Sentences : An Empirical Study of the Georgia Experience." 43 *Journal of Criminal Law and Criminology*. (1983) 661-753.

Baldus, David C., Charles Pulaski, George Woodworth. *Equal Justice and the Death Penalty*. Northeastern University Press : Boston. 1990.

Baldus, David C. "Death Penalty Proportionality Review Project : Final Report to the New Jersey Supreme Court." September 24, 1991.

Baldus, David C., Charles Pulaski, George Woodworth, Fredrick D. Kyle. "Identifying Comparative Excessive Sentences of Death : A Quantitative Approach." 33 *Stanford Law Review*. (1980) 1-74.

Barnett, Arnold. "Some Disturbing Patterns of the Georgia Death Sentence." 8 *U.C. Davis Law Review*. (1985) 1327-1374.

Bentele, Ursula. "The Death Penalty in Georgia : Still Arbitrary." 62 *Washington University Law Quarterly*. (1985) 573-646.

Bowers, William J., Glenn L. Pierce. "Arbitrariness and Discrimination under Post-*Furman* Capital Statutes." 26 *Crime and Delinquency*. (1980) 563-635.

Carney, Robert M. "The Case for Comparative Proportionality Review." 59 *Notre Dame Law Review*. (1984) 1412-1421.

Commonwealth v. Frey, 504 Pa. 428, 475 A. 2d 700 (1984).

Commonwealth v. DeHart, 512 Pa. 235, 416 A. 2d 656 (1986).

Commonwealth v. Whitney, 511 Pa. 232, 512 A. 2d 1152 (1986).

Furman v. Georgia, 480 US 238 (1972).

Jurek v. Texas, 428 US 262 (1976).

Liebman, Ellen. "Appellate Review of the Death Sentence : A Critique of Proportionality Review." 18 *U.C. Davis Law Review*. (1985) 1433-1480.

McAuliffe, Robert. "A Procedural Due Process Argument for Proportionality Review in Capital Sentencing." 21 *Columbia Journal of Law and Social Problems*. (1988) 385-415.

440X

Morrison, W. Ward. "Washington Comparative Proportionality Review : Toward Effective Appellate Review of Death Penalty Cases under the Washington State Constitution." 64 *Washington Law Review*. (1989) 111-132.

Paternoster, Raymond, AnnMarie Kazyaka. "An Examination of Comparatively Excessive Death Sentences in North Carolina 1979- 1987." 17 *N.Y.U. Review of Law and Social Change*. (1989-1990) 475-531.

Proffitt v. Florida, 428 US 242 (1976).

Reed, Carolyn. "The Evolution of North Carolina's Comparative Proportionality Review in Capital Cases." 63 *North Carolina Law Review*. (1985) 1145-1165.

Roberts v. Louisiana, 428 US 235 (1976).

Sprenger, Steven M. "A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases." 73 *Iowa Law Review*. (1988). 719-741.

State v. Harris, 106 Wash. 2d 784, 725 P. 2d 975 (1983).

State v. Tichnell, 297 Md. 1, 464 A. 2d 1065 (1983).

State v. Williams, 308 N.C. 47, 301 SE. 2d 335 (1983).

Wilson v. State, 493 So. 2d 1019 (Fla. 1986).

Woodson v. North Carolina, 428 US 280 (1976).

RESTRICTING RIGHTS AND REMEDIES: Understanding the Supreme Court's Death Penalty Jurisprudence by Monica Youn

INTRODUCTION

In a series of seven cases: *Furman v. Georgia* (1972), *Gregg v. Georgia* (1976), *Pulley v. Harris* (1984), *McCleskey v. Kemp* (1987), *Arizona v. Fulminante* (1991), *Payne v. Tennessee* (1991), and *McCleskey v. Zant* (1991), the U.S. Supreme Court has shaped death penalty jurisprudence and has provided strong indications of its future path. I will not concern myself unduly with the specifics of each case, focusing instead upon the impact each decision has had on the body of death penalty jurisprudence. These impacts have primarily affected two major areas: the standard of a fair death penalty trial, and the structure of the state and federal appeals systems. These seven cases each represent a significant limitation on the rights and remedies of a defendant in a capital trial. The court has also taken a recognizable doctrinal agenda in its death penalty adjudication: societal rights, the separation of powers and the new federalism. These three complementary doctrines are apparent in the seven cases I am examining, leading to less strict protections of the rights of the accused, and increasing deference to state legislative enactments and state high court rulings.

I. THE EIGHTH AMENDMENT—A STARTING POINT

In *Furman v. Georgia*, 408 U.S. 238, 343 (1972), while the court struck down all existing state death penalty statutes, it did not conclusively rule that capital punishment inherently and necessarily violated the Eighth Amendment prohibition against "cruel and unusual punishment." The plurality holding, consisting of five separate concurring opinions, arrived at no clear consensus, leaving open the question of whether the states would be able to reenact the death penalty. "*[Furman]* is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias" (Weisburg 315). [The full citation to this and other sources is included in the bibliography to this paper.] The justices reached a majority only upon the determination that existing death penalty statutes were unconstitutional under the Eighth and Fourteenth Amendments because they did not provide instructions to guide the judge or jury's imposition or withholding of the death penalty, leading to arbitrary and capricious sentencing in capital trials. As Justice Stewart's concurring opinion stated, "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed" (supra at 309). In the wake of *Furman*, 35 states revised their capital punishment statutes to provide rational guidelines for the imposition of the death penalty.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Georgia death penalty statute, which

combined legislatively-determined aggravating and mitigating factors with an automatic appeals process including proportionality review, was the first capital punishment system to be deemed constitutional by the post-*Furman* court. The holding in *Gregg* interpreted *Furman* not as outlawing all death penalty statutes, but only those that did not meet certain standards of rationality and fairness. After *Gregg*, states rushed to model their capital punishment systems after the Georgia statute that had met the court's test of rationality and fairness. The *Gregg* decision, however, did not endorse any of the specific features of the Georgia death penalty statute; instead, it merely stated that the system was adequate to minimize the risk of arbitrary and capricious sentencing. "One can say little with certainty about *Gregg v. Georgia* except that it makes a great many things constitutionally significant, but makes nothing either constitutionally necessary or clearly constitutionally sufficient" (Weisburg 322).

The court's subsequent Eighth Amendment jurisprudence in death penalty decisions has focused on procedural guarantees of fairness and rationality, rather than continuing the debate over the inherent constitutionality of the death penalty. *Furman* established the death penalty as a qualitatively different form of punishment, requiring a higher degree of certainty and necessity than lesser punishments: "It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations" (supra at 285, (Brennan, J. concurring), quoting *Griffin v. Illinois*, 351 U.S. 12,28 (Burton and Minton, J.J., dissenting)). Until quite recently, federal and state courts have construed *Furman* as requiring a stricter level of judicial scrutiny in examining death penalty convictions and sentences: "[T]he qualitative difference of death from all other punishments requires a greater degree of scrutiny of the capital sentencing determination" (*Ramos v. California*, 463 U.S. 992, 998 (1983) (opinion of O'Connor, J.)).

Eighth Amendment considerations blanket death penalty jurisprudence with a strict scrutiny requirement, requiring the State to defend itself more vigorously against alleged violations of due process of law, equal protection of the laws, and the right to a fair trial. As Justice Marshall's concurring opinion in *Furman* reasoned:

> The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because the capital punishment deprives the individual of a fundamental right (i.e., the right to life),...the State needs a compelling interest to justify it. (supra at 359).

As Justice Brennan stated in his dissent to *McCleskey v. Kemp* , 481 U.S. 279 (1987), "The judiciary's role in this society counts for little if the use of governmental power to extinguish life does not elicit strict scrutiny" (supra at 342). In recent years, however, the court has seemingly relaxed its former heightened scrutiny of capital punishment proceedings, finding in favor of the prosecution in a clear majority of its death penalty cases. "The recent doctrinal history of the death penalty reveals a singular example of prolific generation of doctrine followed by its sudden and apparently drastic undoing" (Weisburg 383). The court, in the series of decisions from *Gregg* to *McCleskey II*, has

limited the rights and remedies of capital defendants in both the trial proceedings and in the structure of the appeals process. The court has determined that the presence of increasing amounts of risk that a conviction or sentence had been wrongly determined are acceptable in death penalty proceedings that formerly had had to meet higher standards of fairness.

II. Due Process Rights of the Defendant—the Death Penalty Trial

Most states that have reenacted the death penalty divide their trial proceedings into two separate stages: the trial phase that establishes the guilt or innocence of the defendant, and the penalty phase that determines whether a defendant guilty of a capital crime deserves the death penalty. Claims that arbitrariness and bias in the trial proceedings violate *Furman*'s Eighth Amendment standards have required the court to resolve constitutional questions about all stages of the death penalty trial. I focus on three of them: the sentencer's discretion in the penalty phase decision, equal protection claims, and the doctrine of "harmless error" in death penalty trials. In these recent cases, the court has given legislative death penalty enactments increasing amounts of deference—setting a required standard of reasonableness rather than correctness in death penalty proceedings. "In any event, the court has reduced the law of the penalty trial to almost a bare aesthetic exhortation that the states just do something—anything—to give the penalty trial a legal appearance" (Weisburg 306).

Sentencing Considerations—Aggravators and Mitigators

Almost all U.S. jurisdictions with death penalty statutes employ a system in which sentencers must weigh specific aggravating factors against specific mitigating factors in determining whether a defendant in the penalty phase of a trial deserves the death penalty. In *Gregg*, which upheld this general type of death penalty statute, the court did not require any specific aggravators and mitigators, leaving that determination to the state legislature. According to Stewart's widely-cited opinion in *Gregg*:

> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed so as to minimize the risk of wholly arbitrary and capricious action (supra at 189).

Legislators and judges must decide whether applying a death penalty statute's aggravating and mitigating factors to a particular case gives the sentencer a fair and rational standard for imposing or withholding the death penalty.

The general purpose for the use of aggravating and mitigating factors is to limit and guide the sentencer's discretion in the penalty phase of the trial. Certain factors were deemed relevant to the decision, while others were held to introduce impermissible amounts of arbitrariness and capriciousness into the proceedings, making such factors unconstitutional under the Eighth and Fourteenth Amendments. Until recently the court had held that the only relevant and permissible factors were those that were directly related to the defendant's character or to the individualized circumstances of the crime. This standard attempted to insure that the decision to impose or withhold the death penalty would be "tailored to the defendant's personal responsibility and moral guilt" (*Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

The court in *Woodson v. North Carolina*, 428 U.S. 280 (1976), decided in the same year as *Gregg*, held that a death penalty statute can place virtually no limitations on the introduction of relevant mitigating evidence in the penalty phase of a trial, for to exclude any relevant "compassionate or mitigating factors stemming from the diverse frailties of humankind" would fail to treat capital defendants as "uniquely individual human beings" (supra at 304). Since no similar protection of aggravating factors exists, the court, in recent years, has attacked this restriction which they claim has "unfairly weighted the scales in a capital trial" (*Payne v. Tennessee*, 111 S. Ct. 2597, *25, opinion of Rehnquist, J.) In order to counterbalance the perceived "injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence" (supra at *41, Scalia, J., concurring), the court, in recent decisions, has given the state legislatures increasing constitutional leeway in setting their own standards for the relevance of specific aggravating factors.

In *Payne*'s landmark decision, the court explicitly allowed the introduction of a consequentialist determination of societal benefit and harm into the penalty phase of a capital trial. In Justice Blackmun's dissent to *Furman*, he regretted the lack of consideration given to "the misery the petitioner's crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place" (supra at 413). *Payne* held that this type of evidence in the form of a "victim-impact statement" was admissible evidence in the penalty phase of a capital trial, overturning relatively recent holdings in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989). Unlike previous aggravating factors that had been deemed permissible, this type of evidence was unique in that it was relevant neither to the character nor the moral guilt of the defendant, nor to the aggravated nature of the specific offense. Victim impact statements concern only the post-crime suffering of the victim's friends and family and of the greater community.

Marshall and Stevens, in their respective dissents, argued that victim impact statements were inadmissible because they usually described consequences that the offender could not foresee at the time of the crime, and therefore did not bear on the individual's "blameworthiness" or "personal responsibility" for the crime. They also claimed that the admission of victim impact statements unduly prejudiced the jury against the defendant. As Stevens stated in his dissent, "Evidence that serves no purpose other than to appeal to the sympathies or emotions of the jurors has never been considered

admissible" (supra at *79).

The majority argued that societal consequences of a crime may be included in assessing the "blameworthiness" of an offender, although he or she may have been ignorant of all of the specific impacts of the crime. "Some murders are especially blameworthy for reasons beyond society's terror at the extinction of a life, because they cause or threaten a broader social or legal disruption," (Weisburg 330). The *Payne* decision implicitly validates the retributive function of the death penalty recognized in Powell's dissent in *Furman*: "While retribution alone may seem an unworthy justification in a moral sense, its utility in a system of criminal justice requiring public support has long been recognized" (*Furman*, supra at 453). Instead of looking solely at the extent of the moral guilt of the defendant, the sentencer is allowed to assess the consequential damage of his or her crime, irrespective of whether these effects were intended or foreseen.

Rehnquist's opinion attacks the unfairness of a sentencing system that allows the use of virtually all evidence that may help the defendant, but places constitutional restrictions on the evidence the prosecution may employ. The majority, however, acknowledges that victim-impact testimony may be so inflammatory as to unfairly prejudice a jury. The court, however, does not consider that this possibility of unfairness should preclude the admission of such testimony. Instead they suggest that "the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment" (supra at *39, O'Connor, J., concurring) by appealing the sentence. The court does not necessarily endorse the use of victim-impact statements; they merely state that such evidence is admissible:

> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, the Eighth Amendment erects no *per se* bar (supra at *38).

In *Payne*, the court relaxes its scrutiny of death penalty procedures, allowing a risk of injustice in order to uphold societal values of criminal justice.

Equal Protection Claims

The petitioners in *Furman* argued that existing death penalty statutes violated the Eighth and Fourteenth Amendments, but did not specifically mention equal protection. They presented evidence from a 1967 study by the President's Commission on Law Enforcement and Administration of Justice that concluded:

> Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups (*The Challenge of Crime in a Free Society* 143)

Justice Douglas, in his concurring opinion, incorporated this equal protection issue under the rubric of Eighth Amendment protections, reasoning:

> It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices (supra at 242).

In his dissent to *Furman*, Chief Justice Burger, however, attacked this presumption that Eighth Amendment provisions included equal protection: "It must be noted that any equal protection claim is totally distinct from the Eighth Amendment question....Evidence of a discriminatory pattern of enforcement does not imply that any use of a particular punishment is so morally repugnant as to violate the Eighth Amendment" (supra at 389). *Gregg* also addressed equal protection concerns obliquely, as included in Eighth Amendment "cruel and unusual punishment" jurisprudence. By seeking to minimize "arbitrary and capricious" application of the death penalty through the injection of rational standards into the sentencing process and by establishing a mandatory process of appellate review of death penalty sentences, the court sought to satisfy Eighth Amendment concerns and the Fourteenth Amendment issues they incorporated, including questions of equal protection.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the court reviewed and rejected a new and broad-based challenge to the constitutionality of the death penalty under the Equal Protection Clause. The court rejected evidence of a system-wide disparity in death penalty sentencing—a complex statistical study that fairly conclusively demonstrated that the Georgia capital punishment statute was being applied in a racially discriminatory manner. In adjudicating *McCleskey*, the court moved away from the standard of strict judicial scrutiny established in *Gregg*, and instead assumed that the sentencers in the petitioner's case and the Georgia legislature had acted without bias. As Powell's opinion stated:

> McCleskey challenges decisions at the heart of the criminal justice system....Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice system, we would demand exceptionally clear proof before we would infer that the discretion has been abused" (supra at 297)

Powell added, "it is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race and color prejudice'" (supra at 310, quoting *Strander v. West Virginia*, 100 U.S. 303, 309). He reasons that the jury represents the defendant's community. This argument, however, goes against the usual jurisprudence of equal protection by implying that the rights of "discrete and insular minorities" would be safest in the hands of the general populace.

Blackmun, dissenting in *McCleskey*, attacked the presumptive validity given to the system and the trial that the petitioner was attempting to challenge: "The court on numerous occasions during the

past century has recognized that an otherwise legitimate basis for a conviction does not outweigh an equal protection violation" (supra at 348). Since the court had refused to apply the customary strict scrutiny standard to the Georgia death penalty statute, the petitioners had to satisfy the full burden of proving an equal protection violation: "a defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination [and that].... the purposeful discrimination had a discriminatory effect on him" (supra at 292, opinion of Powell, J., internal citations omitted). The petitioners were unable to meet this fairly weighty burden of proof, and Warren McCleskey's sentence was affirmed.

Had the court accepted the petitioner's evidence in *McCleskey*, the entire death penalty system in Georgia, and by implication those of other states, would have been declared unconstitutional under the Eighth and Fourteenth Amendments on the grounds of systemic racial bias. The court also argues that the evidence of racial bias in *McCleskey*, if accepted, would go beyond the capital punishment system and would implicate all forms of criminal justice. Powell states in his decision, "McCleskey's claim, if taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system" (supra at 315). Through this argument, the court implicitly downplays the qualitative distinction between the death penalty and other forms of punishment. By assuming such far-ranging effects of the introduction of the evidence of racial bias, the court balances the good of the entire criminal justice system against the interests of the individual defendant. Seen in this light it seems hardly surprising that the claims of Warren McCleskey were rejected.

Powell's dissent to *Furman* had given the following hypothetical example:

> ...a different argument, premised on the Equal Protection Clause, might well be made. If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established (supra at 449).

When his abstract example materialized in *McCleskey*, however, Powell seems to have reneged on his earlier analysis. This disparity between these two opinions provides a point of reference from which to analyze the movement of the court from 1972 to 1987. The *Furman* court had been willing to overturn all then-existing state capital punishment statutes by judicial fiat until the systemic problems the court had identified were fixed according to their specifications. The *McCleskey* court, as well as the courts in *Ramos* and *Payne*, are not willing to go as far in their insistence that the death penalty be administered fairly. It may be true that "Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in *Furman*" (*Pulley v. Harris* (1984), 465 U.S. 37, 54, opinion of White, J.). It is fairly evident, however, that the court, while deciding more and more cases in favor of the government, has become more tolerant of errors throughout the entire framework of the death penalty process. The court takes for granted that mistakes will be made, but the court does not see the presence of errors as cause for reversal of the death penalty. I will further examine the causes and implications of this

non-interventionist approach later in this paper.

Harmless Error Analysis

Harmless-error analysis has been another significant means by which the court has sought to limit the impact of mistakes in the trial proceedings in capital trials. In times past, the presence of any one of a wide range of constitutional errors within a particular criminal proceeding would require reversal of the conviction or sentence. In more recent decisions, the court has increasingly extended the scope of harmless error analysis to prevent having to retry defendants. This tendency can be understood as an offshoot of the court's desire to expedite the execution of defendants convicted of the death penalty, by avoiding the necessity of retrying flawed capital trials. Others argue that the risk of allowing errors in capital trials to be deemed "harmless" outweighs any benefits to efficiency. "[T]he presumption that a legal error—at least a constitutional error—has tainted the trial decision should be even greater in the penalty trial, since the 'back-up' Eighth Amendment doctrine demands the greatest possible reliability when the defendant's life is at stake" (Weisburg 346). In its attempts to reduce the amount of time, money, and judicial resources spent upon each death penalty proceeding, the court has increasingly taken a stance that a trial need not be perfect in order to guarantee an acceptable result.

In *Chapman v. California*, 386 U.S. 18 (1967) the court established the doctrine of harmless error analysis, by which an appellate court may assess the impact of a constitutional violation, determining whether the error was "harmless" beyond a reasonable doubt, in the sense that it was not the determining factor in the outcome of the proceedings. If an error is found to be harmless, the results of the trial are allowed to stand. *Chapman* did not give the doctrine of harmless-error analysis sway over all trial errors: holding that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" (supra at 23 n8). The decision in *Chapman* held that harmless-error analysis is inapplicable to the following instances: (1) a coerced confession in a criminal trial; (2) deprivation of counsel; and (3) trial before a biased judge.

Arizona v. Fulminante, 111 S. Ct. 1246 (1991), overturned the first provision: the prohibition against applying harmless-error analysis to coerced confessions in a criminal trial. As Justice White argued in his dissent:

> The search for truth is indeed central to our system of justice, but certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial (supra at *29, quoting *Rose v. Clark*, 478 U.S. at 587, Stevens, J., concurring).

The dissenters in *Fulminante* considered coerced confessions to be "fundamentally different" from other constitutional errors for two main reasons. The first was that to apply harmless-error analysis to a coerced confession would violate the "strongly felt attitude of our society that important

human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his own will" (supra at *27, quoting *Blackburn v. Alabama*, 361 U.S. 199, 206). The dissenters reasoned that to call such an error "harmless," would be to sanction a gross violation of the most fundamental tenets of due process of law. They also argued that coerced confessions should be unconditionally inadmissible because "A defendant's confession is probably the most probative and damaging thing that can be admitted against him..., so damaging that...it is impossible to know what credit and weight the jury gave to the confession" (supra at *24, internal citation omitted). Thus, in the opinion of the dissenters, coerced confessions can never be harmless error, because it is impossible to assess their impact upon juries.

The court, however, attacked this distinction, holding that coerced confessions were simply another example of "trial error",—"error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt" (supra at *54). The court held that the prohibition against harmless-error analysis of coerced confessions was an unwarranted restriction upon the truth-seeking mission of a criminal trial. Rehnquist, writing for the court, explains:

> In applying harmless-error analysis..., the Court has been faithful to the belief that the harmless-error doctrine is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than *the virtually inevitable presence of immaterial error*" (supra at *55, quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, emphasis added).

The court argues that since it is practically impossible to guarantee a flawless trial, the focus of the proceedings should move away from specific due process considerations and to the more general consideration of the fundamental guilt or innocence of the defendant. Through this analysis, the court downplays the importance of the rights of the accused relative to what the majority apparently considers to be the primary purposes of the justice system: to determine the truth of guilt or innocence, and to promote respect for the law. The court, in the interests of "the underlying fairness of the trial," tries to expedite the trial proceedings at the expense of many of the procedural safeguards of the rights of the accused that do not support the truth-finding mission of the trial. The court also brings in societal questions that transcend the individualized circumstances of the offender's crime into the trial proceedings again: in this instance, concerns about public respect for the law are allowed to affect the structure of the trial.

Remedies—the State Appeals Process and Federal Habeas Corpus

Almost twenty years ago in *Furman*, even Justice Marshall, a strong advocate for the rights of

the accused, was moved to remark, "During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency" (supra at 358). Since that statement, the amount of time and resources used for capital punishment appeals—and the criticisms of the appeals process—have only increased.

According to a 1989 study by the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, the average length of death penalty judicial proceedings from conviction to execution is eight years and two months, with the shortest cases in recent years lasting two years and nine months and the longest dragging out for fourteen years and six months. Public opinion is reaching a consensus that this pace is far too slow. A 1989 American Bar Association study found that the primary cause for delay in the proceedings is the absence of adequate defense counsel. Despite this finding, there has been increasingly broad-based support for reforming the appeals process and for expediting the execution of death sentences. Chief Justice Rehnquist has become one of the leading figures in the effort to limit the availability of federal criminal appeals, especially in death penalty cases. According to Justice Marie Garibaldi of the New Jersey Supreme Court, "The Rehnquist court's view of the undue delay in capital punishment cases has led the court, particularly in its recent decisions, to alter the procedural framework...in order to expedite capital punishment cases" (9).

Trying to speed up the expedition of death sentences leads to some knotty problems when reformers try to balance the benefits of decreased time, effort, and costs against the risk of executing a person who does not deserve the death penalty—either by reason of innocence of the offense or because his or her crime does not warrant the ultimate punishment of death. "It should flout our sense of fairness that an individual could be executed when, but for fortuities in the timing and pace of litigation, the individual would otherwise benefit from decisions which might have the effect of sparing his life" (Goldstein 397). At some point, however, additional attempts to obtain leniency become futile:

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands....There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern, but merely anxiety and a desire for immobility (Bator 452).

People recognize that such a cutoff point exists, but the key question is how a legislature or court can identify and enforce the threshold at which efficiency outweighs any remaining risks to the rights of the accused. Trying to establish the extent to which proceedings can be expedited without compromising the fairness of the system has been one of the most challenging problems for death penalty policymakers. In recent years, the court has concentrated its decisions on limiting the availability of appeals, especially those that are made after the defendant's conviction and sentence have already been subjected to appellate review.

Proportionality Review

Responding to the court's concerns about "arbitrary and capricious" sentencing in *Furman*, the Georgia legislature framed a statute, upheld in *Gregg*, that contained provisions for a proceeding known as "proportionality review." Under Georgia's provisions, the Georgia Supreme Court, in an automatic appeals process, was required to review each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Despite the ambiguities of this definition, the court expressed approval for this provision:

> The provision for appellate review in the Georgia capital sentencing system serves as a check against the minimum or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury (supra at 206, opinion of Stewart, J.)

While sanctioning proportionality review in *Gregg*, the court did not specifically require it as necessary to the constitutionality of a death penalty statute. Nevertheless, most states reenacting the death penalty, encouraged by the court's approval of Georgia's capital punishment system, included proportionality review provisions in their death penalty statutes.

In *Pulley v. Harris*, 465 U.S. 37, the court held that the California death penalty statute, which provided a form of automatic appellate review but did not require any type of systematic proportionality review, was constitutional. White, in his opinion, upheld the usefulness of proportionality review as an additional procedural safeguard, but did not require its inclusion as a matter of constitutional law.

Brennan, dissenting, argued:

> ...this form of appellate review serves to eliminate some, if only a small part, of the irrationality that infects the current imposition of the death sentences throughout the various states. To this extent, I believe that comparative proportionality review is mandated by the Constitution (supra at 68).

The court, however, took a much stricter view of constitutional necessity, upholding only the statutory limiting factors on the discretion of a sentencer as required to satisfy Eighth Amendment "cruel and unusual punishment" prohibitions. Through this line of reasoning, the court implicitly defined the State's requirement "to minimize the risk of wholly arbitrary and capricious action" (*Gregg*, supra at 189) as merely requiring a State to lessen the possibility of such sentencing. Past a certain threshold of constitutional necessity, the *Pulley* decision gave the states a great deal of discretion in shaping their own appellate review of death penalty sentences.

Habeas Corpus, the "Great Writ"

In his *Commentaries on the Laws of England* Sir William Blackstone, the great English legal thinker, emphasizes the importance of the writ of habeas corpus, which he refers to in one instance as "the *bulwark* of the British constitution" (vol. 1, 136). Alexander Hamilton once referred to it as "the greatest personal liberty of all." Article I, Section 9 of the U.S. Constitution states, "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in times of rebellion or invasion, the public safety may require."

The court has refined and shaped this prohibition in its jurisprudence, arriving at the modern definition of 'the Great Writ': "The writ of federal habeas corpus generally provides an opportunity for those convicted in state court to challenge their conviction or sentence based upon any federal constitutional claim that has been properly preserved for federal court review" (Goldstein 357). By filing a writ of habeas corpus, a criminal defendant may challenge his or her conviction or sentence by alleging that the state court trial proceedings violated the federal Constitution. Habeas review is much more easily obtainable than other forms of federal review — any federal judge can assess the merits of a habeas petition. The writ of habeas corpus functions as a federal check on state courts: "The threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards" (*Teague v. Lane*, 489 U.S. 288, 306 (1988)).

Despite the long history of habeas corpus, recently the use of the writ has come under increasing attack and criticism from those who claim that current habeas regulations harm efficiency more than they help the constitutional rights of defendants. "The reasons for this hostility [to habeas corpus] include: the perceived waste of judicial resources on stale or frivolous claims; federal review of state court rulings is an affront to the state court system, and the lack of finality reducing the deterrent effect of conviction" (Mello and Duffy 454). These attacks generally do not try to suspend the writ entirely, but attempt to limit second and subsequent submissions of the writ as unnecessary and wasteful. In recent decisions, the court has also sought to limit habeas corpus, arguing that it represents undue federal interference in state court decisions.

"Starting in 1976, the Burger court began radically to restrict state prisoner access to federal habeas corpus" (Mello and Duffy 454). The Rehnquist majority has continued this movement to limit the privilege of the habeas writ, especially in death penalty cases, where habeas claims offer both the possibility for the greatest benefit—overturning an unconstitutional death penalty sentence or conviction—as well as potential for the greatest abuse—subverting the justice system by consciously delaying execution of a sentence for no legitimate reason.

Almost half of all death penalty sentences are reversed and remanded on the grounds of habeas corpus. Most judicial action regarding habeas corpus has not taken the form of court opinions with explicit justifications and reasoning. The judiciary has made its impact more subtly, through dicta and denials of certiorari petitions or stay applications. One case in which the court grapples directly with the problem of habeas reform is *McCleskey v. Zant*, 111 S. Ct. 1454 (1991)

The doctrine of the abuse of the writ attempts to define the circumstances in which federal

courts decline to entertain a claim presented for the first time in a second or subsequent habeas petition. In this situation, a federal habeas court must determine whether to hear a claim withheld from another federal habeas court. According to Habeas Corpus Rule 9(b), which codifies the abuse-of-the-writ doctrine:

> A second or successive petition may be dismissed if...new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This statute had established the fact that abuses of the writ did exist, but the rule did not explicitly define what constituted such abuse. Prior to *McCleskey II*, judges had interpreted this somewhat vague provision according to the court's decision in *Sanders v. United States*, 373 U.S. 1 (1963). *Sanders* established a "good faith" standard for determining abuse of the writ. Good faith means in this case that the court assumed that petitioners were making every attempt not to abuse the privilege of habeas corpus. Under this standard, a petitioner abused the writ if he or she deliberately withheld a claim in a habeas petition in order to submit that claim in a subsequent habeas petition.

In *McCleskey*, "[T]he Court radically redefines the content of the 'abuse of the writ' doctrine, substituting the strict-liability 'cause and prejudice' standard...for the good-faith 'deliberate abandonment' standard" (supra at *20, Marshall, J., dissenting). The court ruled that:

> Abuse of the writ is not confined to instances of deliberate abandonment...[A] petitioner may abuse the writ by failing to raise a claim through inexcusable neglect...[A] petitioner may abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice (supra at *11-12).

In his opinion, Justice Kennedy explained the "cause and prejudice" standard:

> ...the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court....Once the petitioner has established cause, he must show 'actual prejudice resulting from the errors of which he complains (supra at *14, internal citations omitted).

Marshall, dissenting, argues that "the cause and prejudice standard creates a near-irrebuttable presumption that omitted claims are permanently barred" (supra at *25). Previous to *McCleskey II*, the standard of proof for abuse of the writ had rested upon the court finding "deliberate abandonment" before rejecting the habeas petition. With the adoption of the "cause and prejudice" standard, the burden of proof shifted to the petitioner to prove that a habeas claim not included in an earlier state petition did not constitute abuse of the writ. Under this new standard, the petitioner must come forward with cause as to why the claim had not been presented earlier, and must additionally

establish that the claim proved that the trial proceedings had been unfair.

Stricter habeas provisions, while accomplishing the court's objective of expediting death penalty proceedings, have as one of their costs a lower level of scrutiny for criminal convictions and sentences. The writ of habeas corpus now has a threshold—petitioners must establish their proper use of the writ before judges will consider the substantive provisions of the claims involved. The decision in *McCleskey II* set a precedent that reduces the availability of this remedy to criminal defendants. For example in a subsequent 1991 decision, *Coleman v. Thompson*, 111 S. Ct. 2546, the court held that a prisoner sentenced to death was barred from presenting a writ of habeas corpus because his lawyer was three days late in filing a notice of appeal. In other words, because the petition did not establish cause for the omission of the claim, the petitioner was not allowed to bring forward evidence of prejudice.

III. The Court's Doctrinal Agenda

One can regard jurisprudence as one of the most direct interfaces between theory and practice, between abstract ideas and policy implications. Classical legal thought held that adjudication was essentially deductive in function—judges applied abstract legal principles to specific practical problems. Although this notion has fallen out of favor, from the court's line of cases limiting the rights and remedies of death penalty defendants, one can induce the general principles underlying the various decisions: doctrines of acceptable risk, separation of powers, and new federalism.

Two opinions out of *McCleskey v. Kemp* most directly demonstrate the difference between liberal and conservative ideas of acceptable risk. Brennan, dissenting, states:

> The effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether (supra at 319).

In the same case, Powell's opinion argues:

> The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not "place totally unrealistic conditions on its use" (supra at 319 citing *Gregg*, supra at 199).

The two justices, regarding the same body of fact and precedent, arrive at totally different conclusions because of varying notions of "at what point that risk [of unfair convictions and sentences] becomes constitutionally unacceptable" (*Turner v. Murray*, 476 U.S. 28, 36 n8). Reasoning from an individual rights perpective such as Marshall's leads one to the following

conclusion: that since the death penalty represents the ultimate violation of the individual defendant's most fundamental right, the State must show the most compelling level of interest in order to justify it. The risk of injustice cannot be tolerated under this strict judicial scrutiny, for the constitutional rights of all individuals would be implicated in an unjust decision: "The proponent before the court is not the petitioner but the Constitution of the United States" (*Chessman v. Teets*, 354 U.S. at 156 (1957), opinion of Harlan, J.)

The conservative view of acceptable risk does not privilege individual rights to this extent, arguing instead that equal or greater deference must be given to the societal standards embodied in the legislatures, the states, and the juries. Turning away from the rights-based jurisprudence of the *Furman* court has led the court to blur the crucial qualitative distinction between the death penalty and other forms of punishment. Garibaldi alleges, "[T]he Rehnquist majority rejects the notion that death is different from other sanctions, and consistently declines to afford special treatment to those sentenced to death" (9).

In contrast to the sweeping exercise of judicial power that struck down the nation's death penalty statutes in *Furman*, the justices now confine themselves to exercises in judicial review that are much smaller in scale on the increasingly infrequent occasions when they rule in favor of a death penalty defendant. "Unlike the broad, categorical attacks calling for an expansive reading of prior law on the notion that death is different, these arguments are grounded on specific instances of prosecutorial misconduct, blatant judicial error, or specific defects in portion of a state's capital sentencing scheme" (Garibaldi 9). The court has two doctrinal reasons for establishing more lenient levels of acceptable risk in death penalty cases: separation of powers and the new federalism.

Rather than focusing on the risk to the rights of the defendant, the risk with which the court's conservatives primarily concern themselves is that overzealous adjudication may subvert the democratic process:

> [A]n error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body....The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best (*Furman*, supra at 468, Rehnquist, J., dissenting).

Accordingly, the court has increasingly shown itself willing to defer to the popular will in matters concerning individual rights. This respect for the democratic process evidences itself in two related but distinct ways: the court's deference to legislative enactments, and its unwillingness to overturn state court decisions.

Accordingly, the court has given the legislature presumptive validity in enacting death penalty

statutes:

> Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe (*Gregg*, 428 U.S. 153, 186-87).

As Powell argued in his dissent to *Furman*, "The designation of punishment for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies" (supra at 431). Therefore, the court is increasingly reluctant to exercise judicial review in declaring death penalty statutes unconstitutional.

Complementary, but not identical, to the court's deference to the legislatures is its increasing emphasis on the validity of state court decisions. O'Connor's pronouncement in her opinion to *Ramos* defines the court's adherence to the doctrine of "new federalism": "It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires" (supra at 1013). New federalism delegates much of the responsibility for the protection of individual rights and liberties to state law and the state courts, and gives the state court rulings presumptive validity. According to this doctrine, federal constitutional interpretation does not necessarily take precedence over state constitutional interpretation. The court's new federalist policies thereby effectively makes the state supreme courts the courts of last resort in capital trials.

IV. State and National Implications

New Jersey finds itself in a somewhat unusual position, considering the court's policies combining separation of powers and the new federalism. With New Jersey's allegedly liberal and activist supreme court and its recently-elected Republican legislature, questions may arise that force the court to decide between the enactments of a state legislature and the rulings of a state supreme court. Faced with this choice, the court would most probably side with the legislature. An example of this situation occurred in *Ramos*, in which the California Supreme Court struck down the California death penalty statute. Stevens, dissenting, queried, "Why, I ask with all due respect, did not the Justices who voted to grant certiorari in this case allow the wisdom of the state judges to prevail in California?" (supra at 1031). The answer to Stevens' question lies in the fact that the court deemed protecting the enactment of the democratically-elected legislature to be more important that protecting the independent ruling of the state supreme court.

According to Garibaldi, the future implications of Rehnquist court death penalty jurisprudence are as follows: "the conservative's position of extreme deference to state legislatures, its belief that

unless there is a 'major systemic defect' in a death penalty statute, it should be upheld, and its narrow interpretation of the Constitution, I believe, will remain the underlying principles of the capital punishment jurisprudence of the Rehnquist Court" (9). The court is moving away from its role in the 1960s and 70s as a protector of individual liberties against State intervention. As Marshall argues in his dissent to Payne, "The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration." In all likelihood, the court will continue with its practice of privileging efficacy and popular will over the rights of the accused.

Along with the rest of Americans, New Jerseyans can expect that federal courts will be increasingly reluctant to reverse state supreme court decisions, so that convictions and sentences that are affirmed by the state high court can be expected to remain standing. As the court relaxes its constitutional demands upon state appellate review and restricts the scope of federal habeas review, lower court decisions are more likely to be upheld. This policy will probably expedite the death penalty process to a certain extent. This efficiency is accomplished, however, by placing a greater level of responsibility upon state courts to be fair in their capital punishment proceedings.

BIBLIOGRAPHY

Cases Cited

Arizona v. Fulminante, 111 S. Ct. 1246
Blackburn v. Alabama, 361 U.S. 199
Booth v. Maryland, 482 U.S. 496
California v. Ramos, 463 U.S. 992
Chapman v. California, 386 U.S. 18
Chessman v. Teets, 354 U.S. 156
Coleman v. Thomson, 111 S. Ct. 2546
Delaware v. Van Arsdall, 475 U.S. 673
Furman v. Georgia, 408 U.S. 238, 343
Gregg v. Georgia, 428 U.S. 153
Griffin v. Illinois, 351 U.S. 12
McCleskey v. Kemp, 481 U.S. 279
McCleskey v. Zant, 111 S. Ct 1454
Payne v. Tennessee, 111 S. Ct. 2597
Pulley v. Harris, 465 U.S. 37
Rose v. Clark, 478 U.S. 570
Sanders v. United States, 373 U.S. 1
South Carolina v. Gathers, 490 U.S. 805
Strander v. West Virginia, 100 U.S. 303
Teague v. Lane, 489 U.S. 288
Turner v. Murray, 476 U.S. 28
Woodson v. North Carolina, 428 U.S. 280

Law Review Articles

Bator, Paul. "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners." 76 *Harvard Law Review* 441, 463-499.

Garibaldi, The Honorable Marie. "The Rehnquist Court and the Death Penalty." *The New Jersey Law Journal*. New Jersey: American Lawyers Newspaper Group, Inc., 1990, Pg. 9

Goldstein, Steven M. "Chipping Away at the Great Writ." *New York University Review of*

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Law and Social Change. Volume XVIII, number 2. pp. 357-414.

Mello, Michael and Duffy, Donna. "Suspending Justice." *New York University Review of Law and Social Change*. Volume XVIII, number 2. pp. 451-498.

Weisburg, Robert. "Deregulating Death." *The Supreme Court Review*. Ed.Kurland, Philip B., Casper, Gerhard, and Hutchinson, Dennis J. Chicago: The University of Chicago Press, 1983. pp. 305-396.

Fall 1991 Woodrow Wilson School Conference: A Decade of Capital Punishment in New Jersey: A Report to the State Legislature

Poll of Class: September 19, 1991 and December 4, 1991

A poll was conducted within our policy conference on both September 19, prior to the actual commencement of the conference, and on December 4, after the presentation of individual findings. The purpose was to determine the range of views initially present in the conference and to ascertain the extent to which these views changed as a result of our research discoveries. Although it is possible that the survey results do not accurately represent the composition of attitudes of the general public, the results do depict the opinions of the subset of students at an elite university most interested in the capital punishment issue, and are therefore still inherently valuable.

Initially, there was a fairly clean split with regards to the death penalty: 42.9 percent of those polled were in favor of the death penalty for convicted murderers, while 52.4 percent were opposed. The second polling, however, indicated strong feeling against the death penalty. In contrast with the first poll, only 25 percent supported capital punishment, and 70 percent were opposed to it. Furthermore, **not a single person** thought the death penalty had any deterrent effect in the wake of the conference's findings (versus 19 percent on the entry poll). These are significant findings, since the debate over capital punishment is quite important for the members of the conference - the percentages of those seeing the death penalty as an important issue were 90.5 and 85, respectively.

In explaining these phenomena, it is essential to consider the composition of the policy conference: 38.1 percent of the members are male, while 61.9 percent are female. The racial breakdown is as follows: 23.8 percent black, 42.9 percent white, 14.3 percent hispanic, and 19.0 percent "Other," which is primarily oriental. In the conference 85.7 percent are under the age of 21, with 9.5 percent in the 22-31 age bracket and 4.8 percent over 31. Thirty percent identified themselves as Republican, one-half as Democrats, 5 percent as "Other," and 15 percent professed to

not identify themselves with any party. Interestingly, the Democratic Party picked up an additional member between the first and second surveys, much to the dismay of the Republican Party, the previously preferred party. Despite these relatively consistent party allegiances, the ideological spectrum of the conference underwent a large transformation, with 14.3 percent initially conservative, 47.6% "middle of the road," 19% liberal, 4.8% radical, and 14.3% "Other," in contrast to a final tally of 20% conservative, 30% moderate, 40% liberal, and 10% "Other."

The conference also contained a diverse group in terms of religious beliefs: 5% Jewish, 35% Catholic, 30% Protestant, 25% "Other," and 5 percent atheist. In terms of background, 26.32% live in an urban setting and 73.68% live in a suburban environment. Sixty percent described their families as upper middle class, 30% as middle class, and 10% lower middle class. The extremes were avoided, with no member considering his or her family wealthy or poor. Parents were as a group more liberal than their sons and daughters in the conference, and amazingly, 50% of the members of this conference reported on the second survey that there is disagreement within their families on the issue of the death penalty.

These differences effected members' preferences. Contrary to conventional beliefs, **women were more likely to support the death penalty on the first survey.** Almost two-thirds (62.5%) of the men opposed the death penalty, and only 37.5% favored it; in contrast, 46.15% of the women opposed the death penalty, and 46.15% favored it (with the remainder unsure). These sex differences disappeared on the second survey (75% of men and 66.67% of women oppose capital punishment), perhaps due to increased knowledge about capital punishment, but these initial differences are still notable. Strangely enough, male members chose the death penalty from a list of options as their preferred punishment for murder - 50% on the initial poll, 12.5% on the exit poll - much more often than female members (16.67% initially, 0% on the second survey). This indicates that women may approve of the death penalty in the abstract, but when given a list of potential punishments for

murder, they avoid capital punishment; fifty percent on the first poll and 66.67% on the second feel that the punishment which would do the greatest good for all involved is life in prison without parole, plus work for money which goes to the victims' families.

Unlike sex, race and party affiliation have very little effect on members' specific preferences. They do, however, seem to influence one's overall outlook on capital punishment. Even on the second survey, two-thirds of the Hispanics and 40% of blacks favor the death penalty. In contrast, whites are overwhelmingly against capital punishment (87.50% opposed). With charges of racial bias in the capital processing system often made, the higher percentage of minorities supporting the death penalty is perhaps surprising. The effects of party affiliation are not very surprising: 71.43% of the Republicans favor the death penalty on the first poll and 50% do on the second. In contrast, 55.56% of Democrats oppose the death penalty on the first and 80% do so on the second.

Analysis of Conference Participants' Attitudes Toward
Capital Punishment

A survey was distributed to all participants in the Policy Conference during the first meeting of the conference (n=21). The survey was anonymous and individuals could not be identified. The same survey was distributed at the last meeting of the conference (n=20). Because of the nature of the survey, no attempted was made to match the pre-conference and post-conference questionnaires. This method allows us to study broad attitudes toward the death penalty, but means that we can not conclude individual directional changes.

Results

Question #1: "Do you generally favor or oppose the death penalty for convicted murders?" There appears to be a shift in attitude with increased information about the death penalty. In the pre-conference survey, 9 of 21 (42.86%) responded that they favored the death penalty; in the post-conference survey, 5 of 20 (25.00%) said that they favored it (Table 1).

Table 1: "Do you generally favor or oppose the death penalty for convicted murders?"

Frequency Col Pct	Pre	Post
Favor	9 42.86	5 25.00
Oppose	11 52.38	14 70.00
Don't Know	1 4.76	1 5.00
Total	21	20

Question #2: Do you think that the death penalty is a deterrent to murder? Again there appears to be a shift in attitude with increased information about the death penalty. In the pre-conference survey, 4 of 21 (19.05%) responded that they thought that the death penalty is a deterrent; in the post-conference survey, 0 of 20 (0.00%) said that they thought that it was a deterrent (Table 2).

Table 2: "Do you think that the death penalty is a deterrent to murder?"

Frequency / Col Pct	Pre	Post
Yes	4	0
	19.05	0.00
No	15	19
	71.43	95.00
Don't Know	2	1
	9.52	5.00
Total	21	20

Question #3: "Which of these punishments do you prefer as a penalty for murder?" In the pre-conference survey, 6 of 21 (30.00%) favored the death penalty while 5 of 21 (23.81%) favored life without parole plus work for money which goes to the victims' families. In the post-conference survey, 1 of 20 (5.00%) favored the death penalty while 13 of 20 (65.00%) favored life without parole plus work for money which goes to the victims' families (Table 3).

Table 3: "Which of these punishments do you prefer as a penalty for murder?"

Frequency / Col Pct	Pre	Post
Life Without Parole	4	2
	20.00	10.00
Life Without Parole + Work	5	13
	25.00	65.00
Life With Parole	4	4
	20.00	20.00
Death Penalty	6	1
	30.00	5.00
Don't Know	2	0
	10.00	0.00
Total	21	20

Question #4: "If there is a death penalty, it should not be imposed upon persons under 18." There was strong agreement with this statement in both surveys. In the pre-conference survey, 16 of 21 (76.19%) agreed with the statement while in the post-conference survey, 17 of 20 (85.00%) agreed (Table 4).

Table 4: "If there is a death penalty it should not be imposed upon persons under 18."

Frequency| Col Pct	Pre	Post
Agree	16	17
	76.19	85.00
Disagree	5	3
	23.81	15.00
Total	21	20

Question #5: "If there is a death penalty it should not be imposed upon persons who are mentally retarded." The results are identical with those in Question 4. In the pre-conference survey, 16 of 21 (76.19%) agreed with the statement while in the post-conference survey, 17 of 20 (85.00%) agreed.

Table 5: "If there is a death penalty it should not be imposed upon persons who are mentally retarded."

Frequency| Col Pct	Pre	Post
Agree	16	17
	76.19	85.00
Disagree	5	3
	23.81	15.00
Total	21	20

Conclusions

Tests of significance were not appropriate because the pre-conference survey was not matched with the post-conference survey. The change in attitudes in these tables suggest that with increased information there is a drop in the depth of support for the death penalty. These changes further suggest that education programs of such groups as Amnesty International may eventually have an effect on public attitudes on this issue.

Fall 1991 Woodrow Wilson School Conference: A Decade of Capital Punishment in New Jersey: A Report to the State Legislature

Poll of class: September 19, 1991

Do you generally favor or oppose the death penalty for convicted murderers?

favor oppose don't Know, no answer

Do you think that the death penalty is a deterrent to murder?

Yes No don't know, no answer

How important is the death penalty issue to you?

one of the most important important not very important not important at all

How much information do you have about the death penalty issue?

All of the infortation

most of the information

some information

very little information

How firm are you about your opinion on the death penalty?

very likely to change

somewhat likely to change

somewhat unlikely to change

very unlikely to change

Please indicate the following about yourself:

Sex Male Female

Race Black White Hispanic Other

Age 18-21 21-31 over 31

Party Identification

Republican Democrat Other None

Fall 1991 Woodrow Wilson School Conference: A Decade of Capital Punishment in New Jersey: A Report to the State Legislature

Poll of class: September 19, 1991

Do you generally favor or oppose the death penalty for convicted murderers?

favor oppose don't Know, no answer

Do you think that the death penalty is a deterrent to murder?

Yes No don't know, no answer

How important is the death penalty issue to you?

one of the most important | important | not very important | not important at all

How much information do you have about the death penalty issue?

All of the infortation

most of the information

some information

very little information

How firm are you about your opinion on the death penalty?

very likely to change

somewhat likely to change

somewhat unlikely to change

very unlikely to change

Please indicate the following about yourself:

Sex Male Female

Race Black White Hispanic Other

Age 18-21 21-31 over 31

Party Identification

Republican Democrat Other None

Political Orientation

Conservative Middle of the Road Liberal Radical Other

Religion

Jewish Catholic Protestant Other None

Education

In College Post graduate other

Type of high school

Private (not parochial) Public Parochial Other Not in U.S.

Size of your high school graduating class

Over 1,000 500 - 1,000 200 - 500 under 200

Did you go to high school in a setting which was primarily

Urban Rural Suburban Farm other

Is your home in an area which is

Urban Rural Suburban Farm other

How would you describe your parents or family?

Wealthy upper middle class middle class lower middle class poor

How would you describe your parents' or family's political opinions?

Conservative middle of the road Liberal Radical Other

Would you say your parents or family are in favor of or opposed to the death penalty?

in favor opposed have no opinion don't know

Is the death penalty an issue on which there is disagreement in your family?

family members don't agree
family members agree
family members have no opinion
don't know

Does your home state have the death penalty now? (State)_____

Yes No Don't Know

Which criminal punishment do you think is the harshest?

1 Life in prison without parole

2 Life in prison without parole, plus work for money which goes to the victim's families

3 Life in prison plus work for money that goes to the victims' families with a chance for parole after 30 years if victims' families are paid in full

4 The death penalty

5 don't know, no answer

Which of these punishments do you prefer as a penalty for murder?

1 Life in prison without parole

2 Life in prison without parole, plus work for money which goes to the victims' families

3 Life in prison plus work for money that goes to the victims' families with a chance for parole after 30 years if victims' families are paid in full

4 The death penalty

5 don't know, no answer

Which of these punishments do you think does the greatest good for all involved?

1 Life in prison without parole

2 Life in prison without parole, plus work for money which goes to the victim's families

3 Life in prison plus work for money that goes to the victims' families with a chance for parole after 30 years, if victims' families are paid in full

4 The death penalty

5 don't know, no answer

Which of these punishments do you think your state legislator in your home state would favor?

1 Life in prison without parole

2 Life in prison without parole, plus work for money which goes to the victims' families

3 Life in prison plus work for money that goes to the victims' families with a chance for parole after 30 years, if victims' families are paid in full

4 The death penalty

5 don't know, no answer

If your state senator or representative in the assembly voted to replace the death penalty with a life sentence with no parole, how would this affect your vote the next time that representative ran for office?

1 make no difference in my vote

2 make me more likely to vote for that representative

3 make me less likely to vote for that representative

4 don't know, no answer

Please indicate how important you think the following reasons for the death penalty are:

To punish murderers for their crime

Very important somewhat important not very important

To protect society and others from dangerous murderers

Very important somewhat important not very important

To serve as a deterrent to others who might otherwise commit murder

Very important somewhat important not very important

To force murderers to pay back to society for their crime

Very important somewhat important not very important

To save the state money, rather than keep people in prison

Very important somewhat important not very important

If convicted murderers in your home state could be sentenced to life in prison with no chance of consideration for parole for 25 years, would you prefer this as an alternative to the death penalty?

Yes No Don't Know

If convicted murderers in your home state could be sentenced to life in prison with no chance of consideration for parole for 40 years, would you prefer this as an alternative to the death penalty?

Yes No Don't Know

If convicted murderers in your home state could be sentenced to life in prison with absolutely no chance of ever being considered for parole, would you prefer this as an alternative to the death penalty?

Yes No Don't Know

If convicted murderers in your home state could be sentenced to life in prison with absolutely no chance of ever being considered for parole, and also be required to work in prison industries for money that would go to the families of their victims; would you prefer this as an alternative to the death penalty?

Yes No Don't Know

Would you be more likely to vote for a state senator who came out in support of the punishment you would prefer?

Yes No Don't Know

Would you be more likely to vote for a member of the U.S. Congress or the U.S. Senate if they came out in support of the punishment you would prefer?

Yes No Don't Know

Please indicate whether you agree or disagree with the following statements:

The death penalty is necessary because crime has gotten out of hand in this country.

agree strongly agree disagree disagree strongly

The death penalty is too arbitrary because some people are executed while others serve prison terms for the same crimes.

agree strongly agree disagree disagree strongly

I wish we had a better way than the death penalty to stop murderers.

agree strongly agree disagree disagree strongly

If the death penalty were enforced more often, there would be fewer murders in this country.

agree strongly agree disagree disagree strongly

Defendants who can afford good lawyers never get a death sentence.

agree strongly agree disagree disagree strongly

The death penalty is more likely to be imposed when the defendant is black and when the victim is white.

agree strongly agree disagree disagree strongly

The death penalty is cheaper than life imprisonment.

agree strongly agree disagree disagree strongly

I have moral doubts about the death penalty as a punishment.

agree strongly agree disagree disagree strongly

I personally am not really comfortable with the death penalty.

agree strongly agree disagree disagree strongly

If there is a death penalty it should not be imposed upon persons under 18.

agree strongly agree disagree disagree strongly

If there is a death penalty it should not be imposed upon persons who are mentally retarded.

agree strongly agree disagree disagree strongly

Put yourself in the position of a judge or a juror who is deciding whether or not to impose the death sentence for some one who has been found guilty of first degree murder. How would each of the following factors affect your decision on whether or not to impose the death penalty?

Factor	Less Likely To Impose Death Penalty	More Likely To Impose Death Penalty	Would Not Affect Decision
This is the defendant's first violent offense.			
The defendant was under the influence of drugs or alcohol at the time of the crime and did not know what s/he was doing.			
The defendant has a history of mental illness.			
The defendant was involved in the crime, but it is not clear that he (or she) was the one who actually pulled the trigger.			
There were other people equally involved in the crime, but they were allowed to plead to lesser charges.			
The murder involved a sexual assault.			
The victim was elderly or physically handicapped.			
The defendant had no intention of committing a murder, but in the course of committing a robbery, panicked.			
The defendant is mentally retarded.			

Factor	Less Likely To Impose Death Penalty	More Likely To Impose Death Penalty	Would Not Affect Decision
The victim was a police officer.			
The defendant had been convicted of another murder.			
The defendant committed the murder for money.			
The defendant paid another to commit the murder.			
The murder occured during another serious crime.			
During the murder a second person was put in grave risk of injury or death.			
The defendant was under 25 years of age at the time of the offense.			
The defendant was over the age of 50 at the time of the offense.			
The defendant was under duress at the time of the offense.			
The defendant rendered assistance to the state in the prosecution of another.			
The murder involved a dispute over drugs.			
The victim and defendant were husband and wife, or lovers.			
The victim and defendant were members of the same family.			
The victim and defendant knew one another, were acquaintances.			

NEW JERSEY ASSOCIATION ON CORRECTION

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Testimony Before the Assembly Judiciary, Law and Public Safety Committee on ACR-20, Amending the State Constitution to Provide that it is not Cruel and Unusual Punishment to Impose the Death Penalty on Certain Persons
March 16, 1992

My name is Karen A. Spinner and I am Director of Public Education and Policy for the New Jersey Association on Correction. The Association is a state-wide citizens organization which is dedicated to improving the criminal justice and corrections systems in New Jersey.

We are opposed to ACR-20 because we believe the death penalty to be immoral and inappropriate in a society which purports to champion human rights. The United States is the only Western nation which still imposes the death penalty. It continues to do this in light of clear evidence that it does not deter the criminal behavior. It not only dehumanizes and degrades the entire society but permits those in authority to divert attention from other pressing issues of criminal justice reform. For far too long, political careers have been launched following successful prosecution of capital cases.

This particular piece of legislation is focused on righting what some consider to be a grievous wrong of the Gerald decision. The Supreme Court has decreed that in order to be death eligible a defendant must knowingly and purposefully intend to kill his victim. We agree with that position. A defendant who kills someone during the course of another crime is not in the same league as the individual whose sole intent in committing a crime is to commit murder.

While we can understand the desire of some victims for vengeance and the ultimate penalty, we would like to point out that their thirst for what they consider to be justice creates new victims. These victims are the families of the condemned who are also blameless in the crime.

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The convicted killer should be punished and New Jersey's statutes require a mandatory minimum sentence of thirty years without parole. Gone are the days when a murder conviction netted a convicted murderer only about eight years of incarceration. The punishment meted out under the current criminal code provides a lifetime of punishment.

There is no way to restore the life of the victim. Taking the life of the defendant cannot do that. Allowing the criminal justice system to proceed with the extremely costly capital Prosecution which could still result in a thirty year seems to be an inappropriate use of resources for a highly questionable criminal justice goal.

TESTIMONY OF LEIGH B. BIENEN

BEFORE THE ASSEMBLY JUDICIARY COMMITTEE

MARCH 16, 1992

On ACR 20, regarding capital punishment

Submitted with the Woodrow Wilson School Policy Conference Final Report to the State Legislature titled "A Decade of Capital Punishment in New Jersey"

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A Decade of Capital Punishment in New Jersey: Final Report

Introduction

This Report is being presented to the Assembly Judiciary Committee of the New Jersey State Legislature at the Public Hearing on Assembly Concurrent Resolution ACR 20 (the Gerald Constitutional Amendment) held on March 16, 1992 at 135 Hanover Street, Trenton, New Jersey. In addition to containing several research papers which are directly relevant to proposed ACR 20, the Report also includes research reports relevant to other capital punishment legislation pending before the New Jersey Assembly, including A.50 and A. 55 (Death Penalty for Drug Kingpins); A-894 (Proportionality Review to be limited to death sentence cases); and A. 256 (Prohibiting the introduction of evidence concerning the method of execution in a capital case).

This Committee and the New Jersey Legislature as a whole might well ask what is the purpose of capital punishment? The costs are enormous, taking tax dollars which are badly needed for police, schools, health care and other state responsibilities. The criminal justice system is already groaning under the burden of too many cases, and that situation is not helped by the addition of a cumbersome, lengthly, repetitive and wasteful death penalty system. Yes, people commit murder, and they should be punished and society needs to be protected. The number of people sentenced to death or executed in a tiny fraction of all murderers who are apprehended and prosecuted. About 500 homicides a year are committed in New Jersey. Since 1982 thirty seven people have been sentenced to death in New Jersey. The Proportionality Review Project began with over 3,000 homicides identified, and ended up with a data base of over 1300 homicides to screen for death eligibility. Proponents of capital punishment claim that they want vengeneance for victims, but a disproportionate amount of state resources are expended seeking vengeneance

for a very small number of victims. Proponents say that they support capital punishment because the public demands it, yet the data in this Report indicate that public opinion does not support a punishment which is perceived as arbitrary, unjust or having a discriminatory impact.

Issues directly relevant to ACR 20 are discussed in detail in the research reports in Part II of the Report, especially in the reports of Adelle Bruni, Joseph Sigelman and Damon Watson. Issues raised by proportionality review and the capital punishment decisions of the New Jersey Supreme Court are addressed in the reports of Alexis Doñé, Adelle Bruni and Natasha Moore. The history of different methods of execution are examined by Karen Demers and Clinton Uhlir.

Of particular relevance to the members of this committee and other members of the legislature are the research reports on public opinion and capital punishment, the legislative history of the reimposition of capital punishment in New Jersey, and the costs of the reinstitution of capital punishment in New Jersey and elsewhere. The Report also includes original data from a survey of the opinions of members of the New Jersey legislature with 51 members of the legislature responding, making this survey one of the most extensive ever conducted with state legislators on this topic

Jennifer Weller-Polley's report includes original data on the cost of the reimposition of capital punishment based upon interviews with state officials and others in New Jersey, as well as documentation on costs in other states. Connie Chen's report is a detailed legislative history of the reenactment of capital punishment in New Jersey, based upon interviews and contemporaneous newspaper accounts. Nalini Pande raises an issue which is not currently before the legislature but might be an appropriate subject for legislation: a prohibition against the execution of the mentally retarded. Monica Youn points out that the appellate review of death sentences in the federal judicial system has been severely limited by recent holdings of the United States Supreme Court which grant great deference to state legislatures. Capital punishment

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legislation enacted by this legislature is unlikely to be set aside by the United States Supreme Court.

Polling data and public opinion surveys on capital punishment are analyzed in four separate reports in Part I. These reports summarize the most current public opinion data in New Jersey and nationally and analyze polling methodology.

Since the Woodrow Wilson School of Public and International Affairs was established in 1930, the Undergraduate Policy Conference has been its most distinctive feature. In this Conference nineteen Woodrow Wilson School students, sixteen juniors, two seniors, and one graduate student, came together with two faculty directors to address the issues before the New Jersey legislature and courts after a decade of capital punishment in New Jersey. In 1991 the issue of capital punishment was particularly timely. The state legislature had reenacted capital punishment in 1982, and although 37 persons had been sentenced to death, 27 death sentences had been overturned by the New Jersey Supreme Court since reenactment.

In sponsoring these Policy Conferences the School's purpose is to train students to apply social science research to current problems of public policy in preparation for a career in government service, law, journalism or academic research. The Conference normally deals with an ongoing and unfinished question of public policy. Experts and officials are invited to address the Conference during its deliberations. The first guests of this Conference were two experts on public opinion: Michael R. Kagay, News Survey Editor of the New York Times, and Janice Ballou, Director, Center for Public Interest Polling and the Star Ledger/Eagleton Poll. Other guests included attorneys actively involved in all aspects of capital punishment litigation at the state and federal level, including attorneys affiliated with the New Jersey Office of the Attorney General, the Department of the Public Advocate, Amnesty International, and other governmental and private organizations.

Part of the assignment to the students is to conduct interviews with public officials and others actively involved in the public policy issues which are the topic of the Conference. Another distinctive aspect of the Conference is its collective, interactive nature. Each research paper takes on one aspect of the larger problem, and the group as a whole develops the Final Report. Along with the Conference Directors the Senior Commissioners take special responsibility for articulating the issues within individual topics and for assisting the juniors in their research and writing.

The issue was especially timely because this fall the Proportionality Review Project, under the direction of Professor David C. Baldus, presented to the New Jersey Supreme Court its Final Report and data on all homicides since reenactment in the state. It is this Report which is the subject of proposed A. 894. Several members of the Conference specifically addressed the issue of proportionality review. In January of 1991 the New Jersey Supreme Court had upheld its first death sentence in the case of Robert O. Marshall, while reserving decision on the issue of proportionality review. Members of the Conference attended the oral argument in that case in January of 1992. Indeed because of the possibility of conflict of interest during the pendency of this litigation, some of the attorneys and state officials who were invited to address the Conference were not able to participate.

During its deliberations the Conference was aware that every member of the New Jersey Senate and Assembly was up for election in November of 1991, and that the result of that election was likely to and did indeed change the character of the state legislature. The Conference anticipated the fact that the newly constituted state legislature would take up several issues concerning capital punishment soon after taking office in January of 1992. The changes in the composition of the state legislature were even more extensive than anticipated. In January of 1992 for the first time in twenty years the New Jersey State Legislature was controlled by the

Republican party, and a veto proof Republican majority in both houses ensured that the Democratic governor could not block the agenda of the new legislative majority.

At its first meeting an opinion poll was conducted of the members of the Conference. A second opinion poll of the Conference members was conducted at the end of the Conference. The results of these polls are reported in an Appendix to this Report. At the outset the participants in the Conference were evenly split between those who were opposed and those who were in favor of capital punishment. After doing their research, listening to the guest speakers, and looking at the issue in depth, some opinions changed.

This Report is submitted so that members of the New Jersey Assembly and Senate and other interested parties will have the benefit of the research conducted by the Conference during their deliberations on proposed capital punishment legislation. If members of the legislature have any questions about the Report, or wish additional information, please let us know.

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