

THE U.S. CONSTITUTION, THE SUPREME COURT AND CAPITAL PUNISHMENT: SHOULD THE U.S.A. PUT THE DEATH PENALTY TO DEATH?

*Carol Daugherty Rasnic, Professor of Labor and Employment Law,
Virginia Commonwealth University, Richmond, Virginia, USA*

“The question of capital punishment has been the subject of endless discussion and will probably never be settled as long as men believe in punishment.... [Such questions] are not settled by reason...[but by] prejudices and sentiments or by emotion.”

Clarence Darrow, CRIME, ITS CAUSES AND TREATMENT 166 (1922)

INTRODUCTION

The United Kingdom Home Secretary, Mr Jack Straw, on 27 January 1999 signed the Sixth Protocol on the European Convention on Human Rights, a consequence of its inclusion in section 1(1)(c) of the Human Rights Act 1998. The Sixth Protocol provides for the abolition of the death penalty, other than with regard to any provision which might hereafter be made for it in time of war or imminent threat of war. The death penalty for murder has not been a part of domestic law for some time, and the Crime and Disorder Act 1998 abolished the death penalty for treason and for piracy throughout the United Kingdom. The practical effect of section 1(1)(c) of the Human Rights Act, therefore, is to render it impossible for Parliament to reintroduce the death penalty - and, therefore, also largely futile for it to debate the topic. This article therefore presents arguments both upholding and condemning capital punishment in the context of a markedly differently worded constitutional provision in another cultural setting (The United States of America).

The United States is the last bastion of its kind which still legitimizes the death penalty for heinous crimes. Although by early 1996, 93 countries and/or territories had capital punishment laws¹, this figure is deceptive. The vast majority are African, island, eastern European, Asian, or former Soviet Union Republics, rather than developed westernized ones, such as is the U.S.A.²

Thirty-eight of the fifty American states currently have capital punishment statutes.³ This number very nearly became thirty-nine in autumn, 1997, when the Massachusetts state legislature narrowly failed to pass a bill which would have instituted the death penalty. Shortly before the vote, one member of the legislature who had planned to vote in favour of the

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¹ Ariane M. Schreiber, “States That Kill: Discretion and the Death Penalty - a Worldwide Perspective”, 29 Cornell International Law Journal 262, at n. 5 (1996), citing Amnesty International, The Death Penalty: List of Abolitionist and Retention Countries 5 (Dec. 1995).

² Id. at 263 n. 30, again citing Amnesty International.

³ The remaining non-death penalty states are Alaska, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, North Dakota, South Dakota, Vermont, West Virginia and Washington.

bill, changed his mind and cast a “no” vote. This altered what would have been 81-79 to result in an 80-80 tie.⁴

Polls consistently indicate that a substantial majority of Americans advocate executions of felons convicted of egregious crimes. Results of a 1981 Gallup Poll indicated that two thirds of Americans approved the death penalty. In 1985, the approval rate rose to 72%; in 1991, to 76%; and in 1994, to 80%.⁵

The predominant American support of capital punishment was labelled as hypocritical by NEWSWEEK magazine, reporting on the public outrage in the U.S.A. over the Singapore government’s caning⁶ of an 18-year-old American visiting his father in 1994. He had been sentenced to six lashes with the cane (in addition to a \$2200 fine and four months in prison) for having participated in the vandalizing of 50 automobiles.⁷ Contrasting the virtual nationwide concern over a punishment deemed inhumane by a majority of those Americans polled with the solid approval for the death penalty, the article noted that “[m]ost Americans may balk at caning people, but from the president on down, they don’t mind killing them.”⁸

The 1991 Gallup poll also asked whether the alternative of life imprisonment without possibility of parole would temper the respondents’ approval of the death penalty, and, in such a case, found that the 76%-in-support figure decreased to 53%.⁹ Yet, while supranational organizations have ascribed to conventions and protocols denouncing its use,¹⁰ the U.S.A. adheres to its uncompromising and persistent stance retaining the use of capital punishment. In doing so, she finds herself in the company of “strange bedfellows” such as China, India, Iran, Iraq, and Japan, among

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⁴ Representative John Slattery cast this deciding vote, having changed his mind after a Massachusetts jury found English au pair Louise Woodward guilty of second degree murder in the death of her charge, 10-month old Matthew Eapin. Slattery felt this had been an erroneous conviction, and he reasoned that other juries might well err in convicting and sentencing to death defendants if the bill became law. See Au pair case altered vote, *Richmond Times-Dispatch*, Nov. 8, 1997, at A-3, col. 1-2.

⁵ See Michael L. Radelet and Ronald L. Akers, “Deterrence and the Death Penalty: the Views of the Experts”, 87 *The Journal of Criminal Law & Criminology* 1, n. 1, citing David W. Moore, Majority Advocates Death Penalty for Teenage Killers, *Gallup Poll Monthly*, Sept. 1994, at 5.

⁶ “Caning” is punishment by severe lashes on the buttocks with a reed or cane, inflicted so strongly that the subject’s skin is deeply pierced, he bleeds profusely, and scars remain for life.

⁷ Michael Elliott, *Crime and Punishment*, *Newsweek*, Apr. 18, 1994, at 18.

⁸ *Id.* at 22.

⁹ See Alec Gallup and Frank Newport, *Death Penalty Support Remains Strong*, *Gallup Poll Monthly*, June, 1991, at 40. At any rate, supporters constitute a clear majority among Americans.

¹⁰ See, e.g., European Convention on Human Rights of 1950, European Treaty Series (ETS) No. 5, articles 2 and 3 and Protocol 6; Universal Declaration of Human Rights (which limits, rather prohibits, use of the death penalty); United Nations Covenant on Civil and Political Rights of 1966, Annex to UN General Assembly Res. 2200 (XXII) of 16. Dec. 1966, in 6 *International Legal Materials (ILM)* 368 (1967), ratified as of 1991 by 93 parties, not including the U.S.A. See generally, Christoph Schreuer, *Capital Punishment and Human Rights, Recht Zwischen Umbruch Und Bewahrung; Volkerrecht, Europarecht, Staatsrecht: Festschrift fur Rudolf Bernhard* (1995) at 563-566.

those more powerful countries which retain capital punishment statutes. For example, the United Kingdom issued a 5-year moratorium on executions in 1965 and abolished capital punishment for murder by legislation in 1969.¹¹ The death penalty is constitutionally prohibited in Germany.¹² Indeed, in western Europe only Belgium has retained its death penalty statute, but it is de facto inoperative, since there have been no executions there for decades. With the exception of the U.S.A., worldwide trends continue to be the abolishment of the measure completely.¹³

This paper does not attempt to explain why the positions of the U.S.A. *vis a vis* the world at large are so diametrically opposite. Rather, it addresses the provisions of the American constitution and judicial interpretations which have justified the use of capital punishment by those states which have chosen to make it lawful.

The first section will explain the 1972-1976 division of Supreme Court decisions on the constitutionality of capital punishment per se, and the Court's post-1976 decisions on some of the more controversial issues. Secondly, a collateral constitutional issue is explored, that of whether a particular means of execution might be so slow and painful as arguably to violate the constitution. Thirdly, because this question is essentially about the people affected - both the prisoners involved and the victims of their crimes - it is significant to humanize the issue and to tell about some of the more publicized recent executions, with a primary focus on those in the author's state, Virginia. The final section is a commentary upon the most recurring underlying reasons for the respective positions of both advocates and abolitionists.

I. 1972, 1976 AND BEYOND

The U.S. Supreme Court announced opinions in two companion cases in 1972, holding unconstitutional the death penalty statute in both states involved, Georgia and Texas. Since all other state death penalty legislation was drafted in the same fashion as were the laws in these two states, this decision effectively invalidated all current capital punishment laws. The result was that death sentences for all 629 people then on death row nationwide were vacated.¹⁴

A. THE 1972 DECISIONS: *FURMAN V. GEORGIA*¹⁵

Furman involved three death row inmates, two in Georgia and one in Texas, all black men. The first Georgia defendant, Furman, while

¹¹ See also introductory note above.

¹² Article 102 Grundgesetz.

¹³ See Schreuer, *supra* note 10 at 575. Professor Schreuer is Professor of International Law at the University of Salzburg, Austria, and Edward B. Burling Professor of International Law and Organizations, The Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, Washington, D.C., U.S.A. He projects that in the near future there will be a rejection of capital punishment universally, comparable to the general prohibition of torture in the official administration of justice in civilized nations. *Id.* at 578.

¹⁴ Jack Greenberg, *Capital Punishment as a System*, 91 *Yale L.J.* 903, 915, n. 39 (1982).

¹⁵ 408 U.S. 238 (1972).

attempting to burgle a home, had shot and killed the owner. The gun had been fired through a door, killing the father of five. At the time of the crime, the defendant was 26-years old and had completed only the third grade in school. He was diagnosed as mild to moderately mentally deficient, and he suffered from psychotic episodes. His insanity defence had not been successful, and the jury returned a combined verdict of guilty and sentenced him to death after only 1 and a half hours deliberation.

The second Georgia defendant had robbed his victim's home together with an accomplice. He had raped her, while holding scissors to her throat.

The defendant in the Texas case was classified as "borderline mentally deficient." He had previously been convicted of felonious theft when he entered the home of a 65-year-old widow and raped her with his arm at her throat. He was sentenced to die for the latter crime.

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment,¹⁶ and it is this provision which traditionally provides the basic constitutional argument for death penalty abolitionists. However, the Court in *Furman* did not base its decision on whether the death penalty in principle violates the Eighth Amendment. Rather, it looked to the process through which these particular defendants had been sentenced to die in its voiding of the laws. Both the Georgia and Texas statutes vested in the judge or jury full discretion as to whether the death penalty would be imposed.

Furman is indeed a lawyer's nightmare, for each of the nine justices wrote a separate opinion, and the official reported decision is 230 pages long. One legal reporter referred to it as "not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias."¹⁷ It is germane that both Justices Stewart and White emphasized that retribution as a reason for imposing the penalty of death is not necessarily an illogical or unconstitutional reason.¹⁸

The constitutional difficulty with the Georgia and Texas laws was the capricious and arbitrary manner in which this ultimate sentence was meted out. There were no systematic guidelines or regulatory standards to determine in which instances and for what crimes a convicted defendant would be sentenced to die. Justice Stewart designated these sentences as "cruel and unusual in the same way that being struck by lightning is cruel and unusual." He noted that from among the many persons convicted of reprehensible crimes during 1967 and 1968 (the years of these three convictions) only a "capriciously selected random handful" had received the sentence of capital punishment. Ironically, both Stewart and White remarked that it was therefore "unusual" by reason of its having been so rarely imposed. This infers that the death penalty was more likely to meet constitutional muster if the execution sentence is meted out more regularly than had been the case in Texas and Georgia.

¹⁶ Constitution Of The United States Of America Amendment VIII.

¹⁷ Weisberg, *Deregulating Death*, 1983 Sup.Ct.Rev. 305, 315.

¹⁸ Justice Stewart wrote that he "cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment," and Justice White, that "...[although] the imposition of the death penalty [is] obviously cruel in the dictionary sense...[it] has not been considered cruel and unusual...in the constitutional sense because it was thought justified by the social ends it was deemed to serve."

Justice Brennan's opinion was predictive as to his probable stance on the death penalty in principle. He posed four standards which determined whether a particular punishment was contrary to the Eighth Amendment: (1) it must not be "so severe as to be degrading to the dignity of human beings," (2) the government must not inflict any severe punishment arbitrarily, (3) any severe punishment must not be "unacceptable to contemporary society,"¹⁹ and (4) a punishment which is severe must not be "excessive." It is difficult to imagine a punishment more "excessive" than the termination of the prisoner's life.

In contrast to Brennan's mere hint as to a basic unlawfulness of capital punishment in all cases, Justice Marshall made clear his position that the death sentence violates the Eighth Amendment in all cases as a matter of principle. He stated two reasons: (1) it is both excessive and serves no legislative purpose which is a valid one; and (2) it is "abhorrent to currently existing moral values."

There were four dissents (Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist). The common rationale among them was the preference for the courts to defer to the legislatures in the respective states to make the determinations of which punishments are appropriate for which crimes and that the majority had trodden on traditionally legislative turf by voiding these statutes.

B. 1976: RENEWED EFFORTS TO REVIVE THE DEATH PENALTY

Responses to *Furman* from state legislatures took either of two directions. Some states adopted statutes making capital punishment mandatory for designated crimes, and others took the route of listing crimes for which it might be imposed, but retaining some discretion in the jury, but a discretion which the revised laws refined by listing rules to guide the decision.²⁰ This guidance generally took the form of stated aggravating circumstances necessary for the imposition of the death sentence, as well as mitigating factors which must be considered which possibly might reduce the sentence.

1. Guided discretion

These two forms were tested by the Court in five opinions handed down on the same day in 1976. Three states' statutes - Georgia,²¹ Texas,²² and Florida²³ - had taken the second approach, and these efforts were held constitutional.

¹⁹ Justice Brennan's use of the word "contemporary" indicated that he would not be influenced by any argument which referred to punishments used in general in 1791 when the Eighth Amendment was adopted.

²⁰ Greenberg, *supra* note 14, at 908.

²¹ *Gregg v Georgia*, 428 U.S. 153 (1976), involving the robbery and murder of two men by the defendant.

²² *Jurek v Texas*, 428 U.S. 262 (1976), in which a 22-year old had been sentenced to die for the abduction, attempted rape, and strangulation of a 10-year-old girl, whose body he had subsequently thrown into a river.

²³ *Proffitt v Florida*, 428 U.S. 242 (1976), involving a defendant who had burgled the home of a couple during early morning hours, stabbed the man when he awoke and while his wife was watching, and beat the wife before he fled.

The new Georgia statute listed murder and five other crimes for which capital punishment might be imposed. Further, it listed ten aggravating circumstances, requiring that the jury find at least one before it might impose the death penalty. Moreover, the trial was bifurcated - that is, the verdict of guilty or not guilty was rendered first. If the former, the jury was to return to hear entirely different evidence in its determination of the appropriate punishment. Review by the Georgia Supreme Court of all death sentences was automatic.

The Texas law also permitted capital punishment in five categories of murders, and required the jury to respond affirmatively to all three of the following questions: (1) was the crime deliberately committed with the reasonable expectation that death would occur? (2) was it probable that the defendant posed a continuing threat to society? and (3) had he unreasonably responded to any possible provocation from his victim?

Florida's statute provided a bifurcated trial, and the jury's sentencing verdict was advisory only, with the judge making the ultimate decision.²⁴ All death sentences were automatically appealed to the state supreme court.

Notably, these decisions were by votes of 7-2, with Justices Marshall and Brennan dissenting on the ground that capital punishment always violates the Eighth Amendment.

2. Mandatory death sentences

The statutes which had mandated death for conviction of certain crimes were held unconstitutional. The states involved were North Carolina²⁵ and Louisiana.²⁶ The North Carolina law required the death penalty for convictions of first degree murder, permitting no consideration of the defendant's character or prior record or of the circumstances involved. Louisiana's statute was similar to that of North Carolina, except that it required the jury to be instructed on lesser charges, even if there was no evidence which would justify a conviction of a lesser charge.

These were 5-4 decisions, with Justices Stewart, Powell and Stevens joining the two now consistent opponents of capital punishment in general, Justices Brennan and Marshall. The majority more narrowly rejected mandatory death penalty sentences as "unduly harsh and unworkably rigid," without permitting particularized circumstances of each case to be regarded by the jury.

A synthesis of the 1976 decisions outlines the Court's requirements for constitutionality:

(1) a death sentence cannot be mandatory under any circumstances, but the judge or jury must be vested with some discretion; (2) in exercising this discretion, the judge or jury must be given sufficient guidance; and (3) review by the highest appellate court in the state must be assured.

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²⁴ Some years later, the Court held in a case from Florida that the Constitution does not forbid the judge from imposing the death penalty after a recommendation of life imprisonment from the jury. *Spaziano v Florida*, 104 S.Ct. 3154 (1984).

²⁵ *Woodson v North Carolina*, 428 U.S. 280 (1976).

²⁶ *Roberts v Louisiana*, 428 U.S. 325 (1976).

By the end of 1997, more than 3000 persons waited on America's death rows.²⁷ Texas, with 144 executions from 1976 to the end of 1997, is clearly the front runner. Virginia, with 46 state killings during that time, is second, and Florida, with 39, is third.²⁸

1997 also saw the largest annual number of executions nationwide (74) during any year since the 1976 decisions. Texas' 37 killings during 1997 made it the leader for that year.²⁹

C. THE COURT'S POSITION ON OTHER ISSUES:

1. For which crimes is the death penalty constitutional?

The seminal case on whether state killings should be reserved for convictions of murder is *Coker v Georgia*,³⁰ in which a defendant was sentenced to die for the crime of rape. He had earlier been convicted of motor vehicle theft, armed robbery, rape, kidnapping, and escape while he was serving time both for the rape and stabbing to death of a young woman, and for the kidnap, rape, and fatally beating of a 16-year old woman just eight months after the first murder. Subsequent to his escape and while still at large, he raped another 16-year-old in the presence of her husband, kidnapped her and threatened her with death. It was for the latter crime that the jury had issued the death sentence.

In a 7-2 decision, the Court vacated the sentence, holding that capital punishment is a disproportionate punishment for the crime of rape. Writing for the majority, Justice White conceded that rape is a serious and reprehensible crime which deserves a serious punishment, but that to execute the defendant would be too severe a punishment because the victim had not lost her life. Interestingly, one of the seven voting with the majority concurred (Justice Powell) writing that he would not hold that capital punishment is always unconstitutional for the crime of rape. A more heinous factual situation than the one in *Coker* is difficult to imagine, and Powell's position is thus a curious one. Only Chief Justice Burger and Justice Rehnquist dissented. As usual, Justices Brennan and Marshall concurred with the majority, affirming again their position that capital punishment is unconstitutional under all circumstances.

If *Coker* implies that the U.S. sanctions the death penalty only for the crime of murder, it is relevant to analyze how a particular state defines murder. In *Tison v Arizona*,³¹ the death sentences of two brothers who had not actually participated in the robbery, abduction, and murder of a family of four, nonetheless were upheld by the Court. The state of Arizona had adopted a felony murder rule regarding a killing committed during a robbery or kidnapping which made each participant in the robbery or kidnapping guilty also of capital murder. The defendants had assisted their imprisoned father and another convict in their escape from prison, after which they all abducted and robbed the four victims. The brothers only watched, but made no attempt to stop, the others' murder of all four. Thereafter, the two convicts and the brothers fled together in the victims' car. Justice O'Connor wrote for a 5-4 Court that their involvement throughout the kidnapping and robbery, their physical

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²⁷ "Executions in USA at 42-year high; figure likely will rise", NW Florida Daily, Dec. 28, 1997, at F-A, col. 1-6.

²⁸ Id.

²⁹ Id.

³⁰ 433 U.S. 584 (1977).

³¹ 481 U.S. 137 (1987).

presence during the killings, and their immediate flight with the actual murderers were sufficient to implicate them also in the killings, even absent evidence of intent to kill.

The Court distinguished *Tison* on its facts from *Enmund v Florida*,³² decided only five years earlier. Another 5-4 decision, *Enmund* involved a defendant who had remained in a parked car while the co-defendants had entered a farmhouse to rob an elderly couple. His role had been to help them to escape after the robbery. When one of the victims resisted, a co-defendant killed both. Although Florida law rendered the defendant a principal in the murder because he had constructively aided and abetted the others, the Court reversed his death sentence. Justice White wrote for the majority that the Eighth Amendment forbids the death penalty for one who neither killed, intended to kill, nor to use lethal force. Justice O'Connor was among the dissenters, writing that the majority did not show that "contemporary standard" precluded capital punishment as a sentence for "accomplice murder."

Coker, then, clearly infers that in the U.S.A. capital punishment for crimes other than murder is unconstitutional. However, *Tison* is illustrative of the flexibility of this rule when the state's definition of murder is a broad one.

2. Execution of persons who were minors when the crime was committed: how young is "too young"?

a. In *Thompson v Oklahoma*³³ the Court considered the constitutionality of the death penalty for one who was under the age of 16 at the time of the crime for which he was convicted. The Court concluded 5-3³⁴ that "indicators of contemporary standards of human decency" clearly manifest that the "conscience of the community" regarded imposing the death penalty upon a 15-year-old offender as unconstitutionally "cruel and unusual."

The Court based the decision on three rationales. First, although statutes in twenty of the states in which capital punishment is authorized did not expressly address a minimum age, the remaining seventeen all established sixteen as the youngest age limit. Moreover, among the 1393 persons sentenced to death between 1982 and 1986, only five -including this defendant - had been under the age of 16 years at the time of their crimes. Moreover, the last execution of anyone under the age of 16 years when the crime had been committed had occurred in 1948.³⁵ Secondly, any deterrent effect is highly suspect, since an offender so young lacks the intellectual maturity to have analyzed the possibility of execution prior to committing a crime. Finally, the retribution factor fails, since the juvenile is generally regarded as being less culpable for his acts and as having the capacity for growth and change which society is obligated to provide him.

Among the five-member majority, Justice O'Connor's concurring opinion is particularly prophetic regarding her views on the issue. While she agreed with the national-consensus conclusion, she would not have gone so far as to hold execution of one aged 15 or younger to be constitutionally prohibited under all circumstances. It is important to recall that at that

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³² 458 U.S. 782 (1982).

³³ 108 S. Ct. 2687 (1988).

³⁴ Justice Kennedy did not participate.

³⁵ William B. Lockhart, Yale Kamisar, Jesse H. Choper, Steven H. Shiffrin, *Constitutional Law, The American Constitution, Constitutional Rights And Liberties* 153 (6th ed., 1989 Supp.), reporting on *Thompson*.

time the review of any capital punishment case would always result in at least two votes - those of Justices Brennan and Marshall - to reverse the sentence on grounds of principle.

The dissenting opinion by Justice Scalia³⁶ disputed the consensus argument, reasoning that using those states with minimum ages for execution was faulty, since each state is at liberty to determine the situations and minimum ages for which juvenile court jurisdiction might be waived and the juvenile be tried as an adult. Scalia further credited the “only-five-among-1393” argument with being proof only that executions of persons aged 15 and younger are - and should be - rare. He compared this with the relatively few number of women executed as contrasted with their male counterparts. A conclusion that state killing of women is consequently unconstitutional is clearly untenable. Scalia stressed that there was no distinction when the rarity of such sentences involves minor defendants.

b. Only one year later, the Court was asked to broaden the scope of applicability of the rule in *Thompson* in two companion cases, *Stanford v Kentucky*, and *Wilkins v Missouri*,³⁷ involving defendants who had been ages 17 years 4 months and 16 years 6 months, respectively at the time of the crimes for which they had been sentenced to die.

The Kentucky defendant had been convicted on counts of receiving stolen property, robbery, sodomy, rape, and murder of a 20-year-old gas station attendant. After he had raped and sodomized her, he drove her into nearby woods and killed her by shooting her in the face.

In the Missouri case, the defendant had pleaded guilty to the murder of a 26-year-old mother of two at the convenience store where she worked. While his companion held her, he stabbed her four times in the chest while she begged for her life. He responded by stabbing her four more times in the neck, opening her carotid artery, and leaving her to bleed to death.

This time Justice Kennedy was a part of the decision, and Justice O'Connor joined the five-member majority which held both sentences to be constitutional. Writing for the Court, Justice Scalia noted that in 1791 when the Eighth Amendment was adopted, executions indisputably were not regarded as “cruel and unusual.” Moreover, he stressed that the common law presumption of incapacity to commit a criminal act between the ages of seven and 14 is rebuttable. Using the statistics he had impugned only a year previously in *Thompson*, he emphasized that within the U.S.A. 281 persons under the age of 18 when they had committed the crimes - 126 of these being under 17 - had been executed. By that time, only 11 of the capital punishment states prohibited the death penalty for 17-year-olds, and only 15, for 16-year-olds.

Scalia refused to draw any analogy with the fact that age 18 is the legal age to vote and/or to drink alcoholic beverages. These laws, he reminded, operated in gross and not as a gauge of individual levels of maturity. On the other hand, a juvenile court views the circumstance of the particular minor charged with commission of a felony when opting whether to waive jurisdiction and try a juvenile as an adult. It is, he wrote, these particularized laws rather than the generalized ones which reflect any views of society at large. It was also germane to the Court that both the

³⁶ Scalia was joined by Chief Justice Rehnquist and Justice White.

³⁷ 492 U.S. 361 (1989).

Kentucky and Missouri statutes expressly listed age as a possible mitigating factor in the sentencing phase.

Neither *Thompson* nor *Stanford/Wilkins* has been overruled. Consequently, the current minimum constitutional age at the time of the crime in order for the death penalty to be imposed is 16 years.

3. Execution of the mentally unaware or mentally retarded

a. *Mentally unaware*

The Court held in *Ford v Wainwright*³⁸ that in order for one to be executed, he must at that time comprehend both the fact that he has been sentenced to die, and the reasons for that decision.

This issue was poignantly controversial in a 1991 Arkansas execution in which then-Governor Bill Clinton refused to intervene. The prisoner was Rickey Ray Rector, an obese black man who had been convicted of robbery and murder of one person, and murder of the policeman who had responded to his pleas for help when he decided to “give myself up.” The latter had become a helpmate of sorts to Rector, who had been in prior trouble with the authorities and who, according to Rector’s mother, was the “only one he would trust.”³⁹ When the policeman came to Rector’s home after the robbery-murder in order to befriend him, Rector suddenly killed the man whom he had always trusted, using the same gun he had used to kill the robbery victim. Immediately thereafter, Rector ran outside and shot himself in the temple. Although surgery saved his life, much of his frontal brain tissue had been destroyed. Nonetheless, he was tried, convicted, sentenced to death, and in later hearings held competent under the *Ford* rule.

Whether or not to commute Rector’s sentence to life imprisonment came at a politically inopportune time for Clinton. Then running for his party’s nomination for President, he had publicly apologized for his earlier pardons of 70 sentences during his first term as Arkansas governor. The timing of Rector’s scheduled execution also was a critical factor, since evidence of Clinton’s alleged extra-marital affair with Gennifer Flowers had just erupted, and he was rapidly dropping in the polls. Subsequent to the execution, Clinton was lauded for being “tough on crime,” since he “had someone put to death who had only part of a brain. You can’t find them any tougher than that.”⁴⁰

The Rector situation is illustrative of good judicial theory which, it is submitted, was badly applied. The extent of Rector’s comprehension was a question of fact, not provable by a mathematical formula. His testimony and appearance had simply not convinced the psychiatrist who testified for the prosecution that he failed to meet the *Ford* standard, and his political timing during his governor’s concerted effort to persuade the public of his tenacity on the issue of crime, in the words of one of his attorneys, “just happened to be real bad.”⁴¹

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³⁸ 477 U.S. 391 (1986).

³⁹ Marshall Frady, *Death in Arkansas*, Feb. 22, 1993, *New Yorker* 105, 109.

⁴⁰ *Id.* at 132, quoting New York politician David Garth.

⁴¹ *Id.* at 108.

b. Mentally retarded

In 1989, the Court held in *Penry v Lynaugh*⁴² that the Eighth Amendment does not categorically prohibit the execution of a mentally retarded person. The defendant in this seminal case out of Texas was a 22-year-old with an IQ between 50 and 63, described as mild to moderately retarded. Despite the testimony at trial of a psychologist that he had the mind of a six and a half year old and the social maturity and functional abilities of a 9-10 year old, the jury nonetheless found him competent to stand trial. This had necessitated their finding that he had realized the wrongness of his conduct and that he had had the capacity at the time to act in accordance with the law.

Justice O'Connor wrote for the 5-4 Court that his mental retardation was irrelevant, since he had been afforded constitutional protections through the availability of the modern insanity defence which abrogated the common law irrebuttable presumption that "idiots" could not be held responsible for their criminal acts. The opinion noted that only one state had forbidden the death penalty for the mentally retarded. Although the Court overturned the sentence on other grounds, holding that his mental retardation and background of childhood abuse had wrongly been withheld from the jury during the sentencing phase for possible mitigation purposes, the holding is a critical one in the development of U.S. death penalty law.

Note that *Ford* addressed the mental state of the defendant at the time of the scheduled execution, whereas *Penry* spoke to the defendant's mentality at the time of commission of the crime. The Court seemed to view the *Penry* defendant's appeal as an attempt to relitigate the jury's finding that he had been mentally competent when he acted unlawfully.

4. Disproportionate imposition on black defendants

Another 5-4 decision determined racial disparity in the imposition of the death penalty not to be contrary to the Eighth Amendment. In *McCleskey v Kemp*⁴³ the Court was asked to accept a 1983 statistical study⁴⁴ as a basis upon which to hold that the disproportionate number of blacks sentenced to death was constitutionally flawed.

The analysts in this report had used data from Georgia during the 1970s. Using facts from their research, they concluded that of the more than 2,000 murder convictions in the state during that decade, defendants charged with the murder of white people had been more than four times more likely to be sentenced to die than those charged with killing blacks. Further, this report reached the conclusion, based on past statistics, that black defendants in general were substantially more likely to receive the death penalty than were white defendants. These numbers became even more pronounced when black defendants had been convicted of the murder of whites.

The majority rejected these results as coincidental, holding that the procedural safeguards contained in the Georgia statute and the assurance of the fairness of each trial provided the requisite constitutional standards.

⁴² 109 S.Ct. 1934 (1989).

⁴³ 481 U.S. 279 (1987).

⁴⁴ Baldus, Pulaski, and Woodworth, "Comparative Review of Death Sentences: an Empirical Study of the Georgia Experience", 74 *Journal of Criminal Law & Criminology* 661 (1983).

Justice Powell's majority opinion stated that the Court "decline[d] to assume that what is unexplained is invidious."

McCleskey is essentially a general affirmation of the American jury system. The Court refused to draw inferences from an inexplicable ratio of blacks to whites in the issuance of the death penalty in the absence of a showing that there had been a denial of constitutional procedural or substantive rights on a class basis.

II. MIGHT A PARTICULAR METHOD OF EXECUTION BE "CRUEL AND UNUSUAL"?

American states currently sanction as means of execution five means: hanging; electrocution; firing squad; lethal gas (gas chamber); and lethal injection. Even some who do not challenge the constitutionality of capital punishment in principle have joined many abolitionists in arguing that one (or more) of these means violates the Eighth Amendment. Generally, this conclusion is based on the perception that the particular method is a painful and/or prolonged process.

A. HANGING

At present, three states - Delaware, Montana and Washington state - have statutes authorizing execution by hanging.⁴⁵ The last hangings prior to the 1972 hiatus of executions were those of two American soldiers in Kansas in 1965. Their convictions were for the murders of four family members in their rural home, randomly selected by the prisoners simply to experience the feeling of killing. These murders were the subject of Truman Capote's non-fiction work, *In Cold Blood*, later made into a motion picture. The most recent hangings in the U.S.A. were in Washington state (1993) and Delaware (1995).

Hanging, when correctly carried out, kills by asphyxiation. The argument opposing hanging arises from the possibility of decapitation if the length of the rope is not precisely calculated to conform with the prisoner's weight. Moreover, there are reported cases in which the prisoner hanged had survived for as long as ten minutes before dying. Witnesses report that before he or she is unconscious, the face turns purple, the eyes bulge, and the tongue hangs out.⁴⁶

The method was challenged in *Campbell v Wood*,⁴⁷ but was held not to be "cruel and unusual" despite the chance that the prisoner might be beheaded in the process. The court found that the risk of decapitation is minimized by prison protocol so as to be highly unlikely.

The *Campbell* appellant also argued that the small number of states which utilize hanging makes it "unusual", and therefore unconstitutional. The court did not accept this position, holding that "[w]e cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice."

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⁴⁵ The total number of various methods used is 55, although only 38 states are death penalty jurisdictions. This is because many states provide for more than one method of killing and permit the prisoner to choose from between (or among) them.

⁴⁶ Steven Trombley, *The Execution Protocol: Inside America's Capital Punishment Industry* 11 (Crown Publishers, Inc., 1992).

⁴⁷ U.S. Ct. of Appeals, 9th Cir., No. 89-35210, decided Feb. 8, 1994.

In this same case, the appellant had further contended that the state's requirement that he choose from between alternate means of death was contrary to his religious beliefs and thus in violation of the First Amendment freedom of religion. The court also rejected this argument.

B. ELECTRIC CHAIR

Thirteen states use the electrocution method.⁴⁸ The first state statute so providing was the 1888 New York law, and the first to be electrocuted was William Kemmler in 1890 in New York. Kemmler, who had been convicted of murdering his mistress with the blunt edge of an axe, challenged the constitutionality of this method.⁴⁹

After having competed with George Westinghouse, Thomas Edison was granted the contract with the state of New York to produce the system used to operate the electric chair. Edison himself testified for the state at Kemmler's trial that one electric current of 1,000 volts "should kill instantly and painlessly every time."⁵⁰ The state successfully defended the constitutional challenge.⁵¹

However, Kemmler's execution required two volts, his face bled, and the electrodes on his head and spine singed.⁵² Other cases have also been contrary to Edison's assurances: a Florida execution in 1979 (Spinkelink) required three jolts, and death did come until five minutes had passed;⁵³ for one in 1983 (Evans in Georgia), three jolts and 14 minutes;⁵⁴ one in 1985 (Vandiver in Indiana), five jolts and 17 minutes;⁵⁵ and for one in 1990 (Tafero in Florida), four surges.⁵⁶

One horrifying electrocution was that of 16-year-old Willie Francis, executed in 1946 in Louisiana for the murder of a druggist. The chair had malfunctioned during the first attempt, he was removed, and another date was set. Later it was learned that the two men connecting the cables had actually done so improperly because they had been drunk at the time.⁵⁷

An Alabama prisoner sentenced to die by electrocution in 1990 had requested a stay pending the installation of a new chair because the then-current one had twice malfunctioned in 1989. The court denied his plea,

⁴⁸ See Deann Glamsner, Opponents move to block Washington hanging, USA TODAY, international edition, Jan. 5, 1993, at 3A, col. 2-3, listing the various methods state-by-state.

⁴⁹ NOTE, "The Madness of the Method: the Use of Electrocution and the Death Penalty", 70 Texas Law Review 1039, 1042 (1992), hereinafter "Madness."

⁵⁰ Id. at 1043.

⁵¹ In re Kemmler, 136 U.S. 436, 449 (1890).

⁵² Madness, supra note 49, at n. 36.

⁵³ Id. at 1056.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id. at 1051.

⁵⁷ Arthur S. Miller & Jeffrey H. Bowman, *Death By Installments* 7, 9, and 10 (1988). See *Louisiana ex rel. Francis v Resweber*, 329 U.S. 459, 462-64 (1947) for the 5-4 decision that a second such effort to execute the prisoner would not be cruel and unusual, since there had been no "purpose to inflict unnecessary pain [in the first attempt] nor any unnecessary pain involved in the proposed execution."

the court holding that the possibility that it would recur a third time was too remote.⁵⁸

After having been strapped into a crude wooden chair with a curtain between the prisoner and the witnesses,⁵⁹ a hood is placed over his head, and the curtain is then opened. Witnesses have stated that the prisoner's skin turns bright red; smoke, sparks and flames sometimes leap out from the body; the first surge causes the body to surge forward against the straps; and some prisoners vomit blood before being pronounced dead. Because the smell of burning flesh is so sickening, all electrocution chambers are equipped with bags for witnesses who regurgitate.⁶⁰

C. FIRING SQUAD

Only five states - Alabama, Arizona, Arkansas, Idaho, and Utah - still authorize firing squads for state killings. The procedure is to use a five-member squad, each instructed to aim for the prisoner's heart so as to kill instantly. One of the five weapons contains a blank ammunition, so that none of the five can be certain that he/she is the one who fired the fatal shot. In the opinion of experts, the most expeditious method of killing is to fire at close range a single shot into the head, as is the sole method used in China.⁶¹ The first person executed subsequent to the 1976 decisions, Gary Gilmore in Utah, was by firing squad.⁶²

This method is not fool-proof. In 1951, a Utah prisoner (Mares), had been exceptionally well-liked by prison guards and personnel. Thus, none of the five members of the firing squad wanted to be the one who caused his death. Accordingly, all - although not in a conspiratory fashion - aimed away from his heart. The result was that none of the shots killed the prisoner, who then slowly bled to death.⁶³

D. LETHAL INJECTION

More than twenty of the 38 capital punishment states employ lethal injection as an execution method.⁶⁴ Texas was the first actually to kill by injection, in 1982, but Oklahoma had been the first officially to adopt it by statute in 1977.⁶⁵ The perception is that this means carries the least risk of inducing a slow and/or painful demise.

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⁵⁸ *Thomas v Jones*, 742 F.Supp. 598, 606 (S.D. Ala. 1990).

⁵⁹ Prison regulations in each state provide for a number of official witnesses for each execution, by whatever method. For example, in Virginia, there are usually 10-20 witnesses. See Nancy D. Joyner, "The Death Penalty in Virginia: Its History and Prospects", Vol. 50 No. 10 University of Virginia Newsletter 38 (June 15, 1974). The official required number is six. See Wynne Woolley, "Witnesses May Have Seen Last Death In Chair", Richmond Times-Dispatch, Mar. 4, 1994, at B-8, col. 5-6.

⁶⁰ See Robert Johnson, *Death Work: A Study Of The Modern Execution Process* 20 (1990).

⁶¹ See Trombley, *supra* note 46 at 10.

⁶² See Lockhart et al., *supra* note 35, at 576, and Franklin E. Zimring & Michael Laurence, *Death Penalty 1, Crime File*, National Institute of Justice, U.S. Department of Justice, 1988.

⁶³ Trombley, *supra* note 46 at 11.

⁶⁴ See Glamser, *USA Today*, *supra* note 48.

⁶⁵ Trombley, *supra* note 46 at 73.

A padded operating room gurney with arm rests, located in the same room as is the electric chair, is hidden from witnesses by the usual curtain. The inmate is led into the room, strapped onto the gurney behind the curtain, and is given the opportunity to speak for a final time to his lawyer and spiritual advisor. An intravenous strap is placed upon his arm, and he is strapped into the chair. Behind the curtains are a heart monitor and corrections workers, overseen by a physician. The curtain is opened, and the workers are signalled to introduce sodium pentathal for the brain, pavloon for the lungs, and potassium chloride for the heart. The physician confirms the death once it has occurred, and the prison warden announces time of death to witnesses.⁶⁶ The killing usually takes six to seven minutes.⁶⁷

However, carrying out a killing by lethal injection also can go awry. In a 1989 Texas case (McCoy), the lethal drugs had been incorrectly mixed, causing the prisoner to heave and choke from the time of the injection until his death.⁶⁸

Another Texas prisoner (White), executed in 1992, had been a former drug user. This created such difficulty for the phlebotomist to locate a vein, that it took 47 minutes for him to insert the needle, and that had required the help of the prisoner himself. After this, his actual death did not occur until nine minutes later.⁶⁹

The intravenous line in a 1988 Texas execution (Landry) sprang a leak, causing the poisonous drugs to spray over all the witnesses and attending physicians. This necessitated the room to be evacuated and quickly antiseptically cleaned and fumigated, although the prisoner was at this point half dead, half alive. When the tube was reinserted, the death process lasted another 24 minutes.⁷⁰

E. LETHAL GAS

This method was invented in 1924.⁷¹ Currently, only three states - Maryland, Mississippi, and North Carolina - have gas chambers.

The process is to place the prisoner in a small room or chamber, seated in a chair designed in the same manner as is the electric chair and strapped in similarly. After he is hooded, and the curtain separating the witnesses is removed, lethal pellets are dropped into the room. Experts have described these killings as first causing panic, followed by headache, chest pains, and inability to breathe. The eyes pop out, the tongue thickens, the victim drools, and the skin turns purple.⁷²

The prisoner in a 1983 gas chamber execution in Mississippi (Gray) convulsed for some eight minutes, gasped eleven times, and banged his head on the pole extending from the back of the chair after the pellets had been dropped.⁷³

⁶⁶ Frank Green, "Virginia prepares for execution by injection", *Richmond Times-Dispatch*, Dec. 26, 1994, at A-1, col. 2-5.

⁶⁷ Wes Allison, Frank Green, and John Hoke, "Execution altering tradition", *Richmond Times-Dispatch*, Jan. 24, 1995, at B-6, col. 5.

⁶⁸ Trombley, *supra* note 46, at 74.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 12.

⁷² *Id.*

⁷³ *Id.* at 13.

In 1996, this method was declared unconstitutional in the Ninth Circuit,⁷⁴ nullifying its legality in states within that geographical circuit. This rendered the gas chamber unlawful in the two Ninth Circuit states which had formerly used it, Arizona and California.

III. PERSONALIZING THE PROCESS: A LOOK AT THE APPEAL PROCEDURE AND SOME SELECTED RECENT CASES

Some comments upon the procedure involved in the appeal process are helpful in comprehending in part the day-to-day existence of one on death row. In particular, the focus will be on those in Virginia, the author's home state. Since executions resumed after the 1976 decisions, Virginia's total of 46 has been second only to Texas, which has had 144 executions. Florida is third, with a total of 39. Virginia's all-time high year was 1997, with nine executions. In 1996, Virginia actually led the nation, with eight.

Virginia employed hanging until 1908, when the electric chair replaced that method because it was deemed more humane. A black woman convicted of murder and executed in 1912 was the only woman ever put to death in Virginia. Both the youngest (age 16 when executed) and the oldest (age 83) persons who have been executed in the state died in 1916.⁷⁵

In general, the appellate procedure in a capital murder case consists of three basic levels: (1) direct automatic review through the state court system; (2) state court post-conviction relief, or collateral review (the state habeas corpus stage), when the defendant is permitted to raise issues not appropriate on direct appeal (such as inadequate or ineffective counsel, due process violations, or newly discovered evidence); and (3) habeas corpus review through the federal courts. In this third phase, the defendant can raise issues of violation of federal law and/or the U.S. Constitution which had already been presented to the state court in phase 2.⁷⁶ After these avenues have been exhausted, an execution date is scheduled. Last-minute petitions to the U.S. Supreme Court are typically filed, some alleging newly discovered evidence which might have influenced the jury's guilty verdict, and some again contending that there had been procedural error. The final possibility is reprieve by the state's governor, either in the form of clemency (granting complete freedom) or, more often, commutation (reducing the sentence from death to life imprisonment).

The average time a Virginia death row inmate spends awaiting execution is 8.6 years, a shorter period than the national average of 9.5 years.⁷⁷ The longest in modern Virginia history, was 15 post-conviction years for Willie Lloyd Turner, convicted of robbery and murder of an unarmed jeweler. Turner finally was executed on May 25, 1995, for the crime he had committed on July 12, 1978. At the end of 1997, 47 persons were on

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⁷⁴ *Fierro v Gomez*, 865 F.Supp. 1387 (N.D. Cal. 1994), aff'd 77 F.3d 301 (9th Cir., 1996).

⁷⁵ Joyner, supra note 59, at 37.

⁷⁶ Mark Hansen, "From Death's Door", American Bar Association Journal June, 1996, at 58, 60.

⁷⁷ Frank Green, "Can death penalty survive?" Richmond Times-Dispatch, May 5, 1995, at A-1, col. 3.

Virginia's death row, a population which peaked in July, 1995, with 58 persons.⁷⁸

Indeed, the American Civil Liberties Union (ACLU) unabashedly implemented several additional and novel grounds for appeal, which some feel were for the purpose of intentionally prolonging the process. As the usual time therefore increased, the ACLU has adopted the position that a system which keeps one on death row so indefinitely is innately cruel and unusual. In the Willie Lloyd Turner case, the prisoner had been scheduled to die four times before he finally was executed. He had said at one point, "If they were going to kill me, they should have killed me right from the get-go," rather than "over and over tell me I'm going to die...and then say, 'wait a minute, we want you to suffer some more. We're going to kill you later on.' That's worse than death itself."⁷⁹ Kent Willis, executive director of the Virginia Branch of the ACLU then commented on the Turner case that the lengthy appeal process had created a "paradox, where in order to serve justice it takes so long that the sentence [a prisoner has already served between conviction and execution] becomes cruel and unusual."⁸⁰

For many reasons, death row tenure is becoming considerably shorter. First, the appeals process itself is accelerating in Virginia. A law effective from July 1, 1995, required state habeas corpus petitions to be filed with the Supreme Court of Virginia, no longer with the circuit (trial) court, from which appeal then was to the Supreme Court. Also, these petitions must now be filed within 60 days from the end of the direct appeal process. Circuit courts' crowded trial dockets often led to protracted scheduling, but the Supreme Court traditionally hears and determines these petitions relatively expeditiously. Virginia is generally accepted as "by far the most expeditious state" in putting its death row inmates to death. Indeed, the relatively high rate of execution is a "source of pride" to prosecution lawyers in the state's Capital Litigation Unit.⁸¹

Secondly, since a Virginia law providing for life sentences for crimes committed on or after January 1, 1995, to be "true life" - i.e., without possibility of parole - fewer juries are rendering the death penalty, opting instead for life imprisonment.

Finally, the federal appeal process itself has been shortened. The net result is the reduction of time consumed in the yet lengthy appeal proceedings.⁸²

There are some procedural rules designed to speed up this time which can indeed operate inequitably. For example, Texas' rule that no new evidence might be brought forward after the 30 days for appeal from the conviction preempted a death row inmate on at least one occasion from having a court hear and decide upon compelling evidence that his now deceased brother had actually committed the murder for which he had been convicted. This evidence did not emerge until several years after the trial, but the rule's preclusion of such proof left him without recourse⁸³

⁷⁸ Frank Green, "Virginia could see major drop in death row population", Richmond Times-Dispatch, Nov. 3, 1997, at A-1, col. 3-6.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Greg Weatherford, "Rule of Law", Style Weekly (Richmond, Virginia), Apr. 1, 1997, at 16, 17.

⁸² Id.

⁸³ "Don't make it easier to execute the innocent", USA Today, Jan. 27, 1993, at 5-A, col. 1-2.

and Virginia's 21-day rule⁸⁴ similarly prohibits consideration by any court of evidence discovered more than 21 days after conviction.⁸⁵

One highly publicized electric chair execution was that of Charles Stamper on January 19, 1993. Stamper had been convicted of the murder of three co-workers in a restaurant where he had worked. He had suffered spinal cord injuries in a prison brawl and had since been confined to a wheelchair. Stamper maintained that his dignity required that he be allowed to walk without assistance to the chair, with the use of crutches and a walker, but his request was denied. Instead, two prison guards held him by the shoulders and partially dragged him to the apparatus. The controversy generated by Stamper's case was led by arguments that he should be spared because his injury prevented his ever being a threat to society. Interestingly, disabled advocates disagreed, insisting that he should be afforded no special consideration because of this and should be made to "pay the price."⁸⁶

Timothy Spencer, executed on April 27, 1994, in Virginia's electric chair, was the first person in the U.S.A. to be convicted on DNA evidence.⁸⁷ Spencer, the so-called "Southside strangler", raped and strangled four Virginia women, three in the Southside area of Richmond, and was the inspiration for Virginian Patricia Cornwell's best-selling novel, *Postmortem*.⁸⁸

Dana Ray Edmonds became the first person to die by lethal injection in Virginia. Effective from January 1, 1995, the General Assembly had approved this as a method the prisoner might choose rather than the electric chair. Edmonds had been convicted of robbing a grocery store and murdering the 62-year-old owner by stabbing him in the neck after he had smashed his head with a brick. His last statement was, "No one can take me from this earth and I forgive everyone here."⁸⁹

Larry Allen Stout died in Virginia's lethal injection chamber on December 10, 1996. Ironically, his execution date was his mother's birthday, as well as International Human Rights Day.⁹⁰

Lem Tuggle, executed for rape and murder on December 12, 1996, was the last death of six Virginia death row escapers in late May-early June,

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⁸⁴ Rule 1.1 of the Supreme Court of Virginia.

⁸⁵ See Carrie Johnson, "Rethinking the Death Penalty", Richmond Times-Dispatch, Sept. 23, 1996, at B-1, col. 5. This article described the visit to Richmond of Sister Helen Prejean to argue for repeal of this rule. Sister Prejean was the spiritual counsellor to a young man executed by lethal injection in Louisiana, which became a topic of her book, later the subject of the motion picture, "Dead Man Walking."

⁸⁶ "Man lamed in jail fight executed for 3 murders", Stars & Stripes, Jan. 21, 1993, at 6A, col. 2-3, quoting Peggy Bendrick, a wheelchair-user and lobbyist on behalf of the disabled at the Virginia General Assembly.

⁸⁷ Frank Green, Mike Allen, and Bob Piazza, "Spencer, killer of four, is executed", Richmond Times-Dispatch, Apr. 28, 1994, at A-1, col. 5-6.

⁸⁸ Frank Green and Mike Allen, "Execution of Spencer set tonight", Richmond Times-Dispatch, Apr. 27, 1994, at A-1, col. 4-5.

⁸⁹ Frank Green and Bob Piazza, "Killer of grocer executed", Richmond Times-Dispatch, Jan. 25, 1996, at B-1, col. 6.

⁹⁰ Frank Green, "Stout executed for 1987 slaying", Richmond Times-Dispatch, Dec. 11, 1996, at B-1, col. 5-6.

1984. The six were found in Vermont after the largest death row escape in U.S. history.⁹¹

Thomas H. Beavers, convicted of larceny, rape, murder, and arson, died by lethal injection on December 11, 1997. His distinction lies in being the ninth person executed in Virginia in 1997, and he officially broke the state record for any one year.⁹²

Joseph Roger O'Dell had become a notable figure among Virginia's death row inmates at the time of his execution on July 25, 1997, for the rape and murder of a Virginia Beach woman. The substantive grounds for his appeal had been (a) the DNA test revealing that a jacket he had worn the night of the crime matched neither his own nor the victim's (blood from his shirt, however, matched both), and (b) he contended that a later Supreme Court ruling that a jury must be told at the sentencing phase if a defendant would not be eligible for parole must be retroactively applied. O'Dell's position was that his jury might well not have decided upon capital punishment had they been informed that his prior criminal record made him a recidivist ineligible for parole after this conviction. The Supreme Court issued a stay of execution while it determined the latter issue,⁹³ but ultimately determined that the decision would not have retroactive application. Prior to this, O'Dell had written the governor requesting that, if executed, his body be stuffed by a taxidermist and permanently exhibited for deterrent purposes.⁹⁴ His many press conferences garnered extraordinary support, and a contingent from the Italian legislature traveled to Washington, D.C. to meet with Governor Allen to plead for O'Dell's life. Others in Italy picketed the U.S. Embassy in Rome for the same purpose.⁹⁵ Pope John Paul II sent a request for mercy to President Clinton.⁹⁶ Six days after his execution, O'Dell's widow (whom he had married only a few hours prior to his death) and Sister Helen Prejean attended his burial in Italy at a Sicilian cemetery for victims of the Mafia.⁹⁷

On November 7, 1996, Joseph Patrick Payne became the first of only two death row prisoners for whom Virginia's then-Governor George Allen granted a commutation. A victim of Virginia's 21-day rule, new evidence cast strong doubts as to whether the main witness who had testified against him had been truthful, and four of the twelve jurors who convicted him expressed feelings that he had in fact not been guilty.⁹⁸ His death sentence had been for a prison murder while serving time for another murder, this time the splashing of a flammable liquid into the cell of another inmate

⁹¹ Frank Green, "Tuggle: Born to die", *Richmond Times-Dispatch*, Dec. 12, 1996, at A-1, col. 1-3, and "Tuggle is executed in '83 rape, slaying", *Richmond Times-Dispatch*, Dec. 13, 1996, at A-1, col. 4-5.

⁹² Frank Green, "Beavers executed for 1990 rape, murder of widow", *Richmond Times-Dispatch*, Dec. 12, 1997, at B-1, col. 1-2.

⁹³ Frank Green, "Supreme Court spares O'Dell", *Richmond Times-Dispatch*, Dec. 18, 1996, at A-1, col. 1.

⁹⁴ Frank Green, "Two on death row offer organs", *Richmond Times-Dispatch*, Apr. 1, 1994, at B-1, col. 2-5.

⁹⁵ *Id.*

⁹⁶ "Clinton gets Pope's plea", *Richmond Times-Dispatch* (Associated Press), Dec. 15, 1996, at A-12, col. 3.

⁹⁷ "Palermo officials confirm O'Dell will be buried there tomorrow", *Richmond Times-Dispatch*, July 30, 1997, at B-3, col. 1-2.

⁹⁸ Frank Green, "Law gives Allen latitude on clemency", *Richmond Times-Dispatch*, Nov. 7, 1996, at B-1, col. 2-5.

and tossing in a lighted match. Allen's phone call came just three hours prior to the scheduled execution, and was a commutation to life without parole. The governor's action was a Pyrrhic victory of sorts for Payne, since had the second conviction not occurred, he would have been eligible for parole shortly after the date scheduled for his execution.⁹⁹

Allen commuted one more sentence during his four-year term, that of William Ira Saunders. This was not due to any doubt as to Saunders' guilt of the crime of which he had been convicted, but rather Allen's deference to the clemency requests from those involved in the trial. The commonwealth attorney, the investigating policeman, and the trial judge all had asked the governor to commute. Each felt the death sentence too harsh, one which had been imposed by the jury after a delay between the guilty verdict and the sentencing phase. During the interim, Saunders had been involved in a prison brawl with two other inmates which plausibly had affected the jury's assessment that he could not be rehabilitated.¹⁰⁰

A few non-Virginians merit mentioning because of some distinctive features of the cases. Larry Lonchar petitioned the U.S. Supreme Court to defer his scheduled execution in Georgia in order to determine whether he might die by lethal injection and donate his organs, specifically his kidney, to the policeman who had been the primary investigator in his case.¹⁰¹ The state of Georgia objected, but the Court stayed the execution to determine the question.¹⁰²

Arguably the most publicized defendant sentenced to death in the U.S.A. is Timothy McVeigh, ordered to die on June 13, 1997, for having bombed a federal building in Oklahoma City, Oklahoma in May, 1995, killing 168 people.¹⁰³ McVeigh's appeals are as of yet in the early stages.

Finally, there is Karla Faye Tucker, the Texas born-again Christian who had been convicted of the brutal axe murder of a man and a woman during a drug-spree with an acquaintance. Her callousness at the time of the murders was reflected in her statement to the jury that every time she had swung the axe, she experienced an orgasm.¹⁰⁴ Opposition to Tucker's death voiced two reasons: (1) her Christianity had made her a different person, and she had attempted to use her conversion constructively to persuade others not to follow her course; and (2) she is a woman, and capital punishment rarely is imposed upon women.¹⁰⁵

It is submitted that Tucker would have had a much more tenable and plausible constitutional argument had she been not only a non-Christian

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⁹⁹ Frank Green, "Clemency came with promises", *Richmond Times-Dispatch*, Nov. 9, 1996, at B-1, col. 1-4.

¹⁰⁰ Frank Green, "Death Sentence Commuted", *Richmond Times-Dispatch*, Sept. 16, 1997, at B-1, col. 4-5.

¹⁰¹ Mark Curriden, "Inmate's Last Wish is to Donate Kidney", *American Bar Association Journal*, June, 1996, at 26.

¹⁰² *Lonchar v Thomas*, 116 S.Ct. 1293 (1996).

¹⁰³ Hermi Amerger, 3000 warten in Todeszellen (translation from the German: 3000 wait on death row), *Innsbruck (Austria) Kurier*, June 25, 1997, at 4, col. 1-5.

¹⁰⁴ Joanna Coles, "A few hours to live", *The Guardian*, Feb. 3, 1998, at 2.

¹⁰⁵ Prior to Tucker, the last woman executed in the U.S.A. was Velma Barfield, who died by lethal injection in North Carolina in 1984 for having poisoned her lover. In Texas, no woman had been executed since the Civil War, which ended in 1865. *Id.*

(or at least a person who had not made known her religion, if any), but also a man. The former point relates to the First Amendment which prohibits the federal government from respecting the establishment of religion. Any preference given her because of her Christianity would patently violate the Constitution.¹⁰⁶

Moreover, the Fourteenth Amendment's Equal Protection Clause assures that no state shall deny any person the equal protection of the laws. Although such statistics have not been effective in arguments by black defendants that they are disproportionately represented on death row, the mere fact that the death sentence is so rare for women convicted of capital crimes at least arguably might indicate inequality contrary to the Fourteenth Amendment. The gender argument would be a plea denouncing such unequal treatment.¹⁰⁷ At any rate, Texas Governor, George Bush did not grant clemency or commute her sentence, and she died on February 3, 1998.¹⁰⁸

IV. ARGUMENTS PRO AND CON

Interpretations of the U.S. Constitution are generally arcane and neither fully comprehensible nor germane to most lay people. Reasons given by both advocates for and opponents of capital punishment usually are founded not on legal principles, but rather on grounds which are pragmatic, economic, sociological, moral and/or spiritual.

The best selling book of all time - The Bible - offers resourceful guidance for those on both sides. Advocates look to Leviticus 24:20, 21b: "Breach for breach, eye for eye, tooth for tooth... and he that killeth a man he shall be put to death."¹⁰⁹

Opponents also find Biblical support for their position. For example, Exodus 20: 13 is among the listing of the Ten Commandments: "Thou shalt not kill."¹¹⁰ In the New Testament is found "Love your enemies, bless them that curse you, do good to them that hate you and pray for them which despitefully use you, and persecute you," Matthew 5:44, and the

¹⁰⁶ Syndicated political columnist William F. Buckley, Jr., asked what the American Civil Liberties Union (ACLU), an activist group which litigates on First Amendment issues and is vocally opposed to capital punishment, would do if her sentence were commuted. His assessment was that it would do nothing. However, Buckley's response to his following query as to what the ACLU would think pointed out the First Amendment violation. See William F. Buckley, Jr., "Hottest of Potatoes in Texas: Do We Put Women to Death?", *Richmond Times-Dispatch* (Universal Press Syndicate), Dec. 25, 1997, at A-15, col. 1-4.

¹⁰⁷ But see Justice Scalia's dissenting opinion in *Thompson* supra note 33.

¹⁰⁸ On March 30, 1998, another woman was executed in the U.S.A., this time in Florida's electric chair. Judy Buenoano had been dubbed the "Black Widow" since, similar to the infamous spider which kills her mate, she had been convicted of causing her husband's death through poisoning. In addition, she had been convicted of attempting to kill her fiance by explosion and of having drowned her paralyzed son. Poignantly, Buenoano's execution was on the birthday of the son she had murdered 'Black widow' executed, *Belfast News Letter* Mar. 31, 1998, at 6, col. 2.

¹⁰⁹ The Bible, King James Version.

¹¹⁰ *Id.*

words of Our Lord on the cross, "Father, forgive them, for they know not what they do." Luke 23:34a.¹¹¹

None of the foregoing bears any probative weight in an American courtroom, however. The First Amendment to the U.S. Constitution contains not only the free exercise (of religion) clause, but also the establishment clause, which prohibits the government from recognizing any establishment of religion. The judiciary has interpreted the scope of what constitutes an establishment of religion fairly broadly. For example, the Supreme Court held in 1992 that a traditional invocation and benediction at a public high school graduation violated the establishment clause.¹¹² Consequently, a judge who instructs the jury to adhere to Biblical extracts or permitted such to be admitted as evidence would clearly be preferring Judaeo-Christian concepts, which is constitutionally forbidden.

A potential anomaly which the author has observed is that a great many Americans who staunchly approve of abortion on demand also denounce capital punishment. The converse is also true: many who oppose abortion without restriction are strong advocates for the death penalty.¹¹³ The rationale usually offered by the pro-capital punishment, anti-abortion camp is that the former is punishing the guilty criminal, whereas the latter is the killing of an innocent infant. Nonetheless, if the basic contention of abolitionists of capital punishment is the sanctity of human life, it seems paradoxical that they have no such pangs of conscience when the life of an unborn child is terminated. Similarly, the inviolability-of-life basis for opposing unrestricted abortions appears clearly at odds with the strong support for capital punishment from the same persons.

Generally, there are four arguments in favour of retention of the death penalty, and four arguments for abolition. Each side presents one position that must be conceded. To clarify, these two will be preceded by an asterisk.

PROPONENTS OF CAPITAL PUNISHMENT:

Advocates cite the following: (1) cost of life imprisonment (i.e., housing, feeding, and provision of security for a lifetime criminal, which would be the alternative to state killing); *(2) preventive measure (i.e., prohibiting this particular criminal from committing the same, or any other, crime in the future); (3) deterrent effect (instilling the fear of death in others, which, it is argued, will preclude many from committing heinous crimes); and (4) retribution, deserved punishment for an atrocious crime.

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¹¹¹ Id.

¹¹² *Lee v Weisman*, 112 S.Ct. 2649 (1992).

¹¹³ See, e.g., editorial position of Richmond (Virginia) Times-Dispatch on (1) abortions: the "prudent middle class backs abortion only for the most powerful reasons.... [T]rends are running against widespread use of abortion...[which should be used] only [in cases of] incest, rape, or possibility of serious harm to the mother." Ross MacKenzie (editorial page editor), "Are We Arrived at 'the Abortion Middle?'" Jan. 22, 1998, at A-15, col. 1-3; and (2) death penalty, in an editorial by the same author, published shortly after the execution of Karla Faye Tucker, praising Texas Governor George Bush's refusal to commute, and concluding, "[j]ustice was served." *Conversion*, Feb. 8, 1998, at F-6, col. 1.

With regard to any deterrence, most studies have concluded that the death penalty has no deterring effect.¹¹⁴

Nonetheless, one nationally acclaimed economist, Isaac Ehrlich, authored a persuasive article in 1975, which reasoned that the possibility of being put to death for one's criminal activity was a powerful deterrent.¹¹⁵ At this point, the "jury is still out" on the question of whether capital punishment has in fact any deterring qualities.

OPPONENTS OF CAPITAL PUNISHMENT:

The following four reasons are most commonly offered for abolitionists: (1) the cost of the protracted appeal process for every prisoner on death row (i.e., lawyers' fees, court time, etc.);¹¹⁶ (2) the possibility of error is irreversible;¹¹⁷ (3) disproportionality of blacks, poor, and ignorant among those who receive death sentences;¹¹⁸ and (4) it is morally and spiritually wrong to purposely take the life of another.

The disproportionality argument in particular is frequently raised, despite the Court's holding that statistics have not proven racial bias.¹¹⁹ Objectors point out that racial disparity is reflected both with respect to the defendant himself and also the victim. Recently, a British journalist maligned the American system in this regard, noting that past decisions reveal that a killer of a white victim has been anywhere from four to eleven times (depending upon which state is used as a base) more likely to be given a death sentence than was one convicted of killing a black person.¹²⁰ Even U.S. Department of Justice publications have commented upon these racial imbalances.¹²¹

¹¹⁴ See, e.g., Zeisel, "The Deterrent Effect of the Death Penalty: Facts and Faith", 1976 Sup. Ct. Rev. 327.

¹¹⁵ Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: a Question of Life and Death", 65 American Economics Review 397 (1975).

¹¹⁶ See supra Part III, notes 76-82 and accompanying text. Interestingly, both sides cite cost as a factor.

¹¹⁷ It is submitted that there is a miniscule number of cases where a prisoner has been proven innocent while on death row. (This is assumed to distinguish between innocent [i.e., one who actually did not commit the crime for which he was convicted] and not guilty [i.e., not proven guilty under the applicable rules of evidence].) Some projections of persons currently awaiting executions who actually did not commit the crime are indeed opinion, rather than fact. For a statement to this effect, see Terry Carter, "Numbers tell the Story", American Bar Association Journal, Oct., 1997, at 20, quoting Richard Deeter, executive director of Death Penalty Information Center.

It is perhaps the lengthy and thorough American appeal process and meticulous judicial scrutiny in capital punishment litigation which virtually insures against such errors. See also Innocent Dead Men Walking, National Law Journal, May 20, 1996, at A-1, expressing the view that some on death row actually did not commit the crimes for which they had been convicted.

¹¹⁸ See McCleskey, supra note 43, and *Perry v Lyngaugh*, supra note 42, respectively, for the Supreme Court's rejection of this argument.

¹¹⁹ Id.

¹²⁰ Bill Bryson, "Notes from a Big Country", 'Night and Day' section, The Mail N Sunday Review, Mar. 22, 1998, at 3.

¹²¹ See Zimring & Laurence, supra note 62, at 3, where the authors note that in 1988, blacks constituted only 12% of the population of the U.S.A. as a whole,

This author submits that those on each side are ultimately committed to their positions by reason of only one of these listed factors. It is not reasonable to believe that the cost element is significant when dealing with a human life.

The author's personal experience from speaking with perceptive and clear-thinking persons on both sides has indicated that proponents of state killing are essentially persuaded by the retribution aspect - i.e., one "gets what he or she deserves," and "you do the deed, you pay the price." Karla Faye Tucker's attorney, David Botsford, stated only one week before her execution, in emphasizing her remorse and embrace of Christianity since the double murder of which she had been convicted, "She may be the same physical person she was when the case was tried, but she is certainly not the same person. She is totally rehabilitated, and her prison record supports that. Her death would not serve any purpose other than pure capital vengeance."¹²² Mr. Botsford has concluded the obvious. The essential purpose of capital punishment is vengeance and retribution.

Opponents, it is submitted, are fundamentally motivated by feelings that such killing is simply morally wrong. The author is reminded of a friend's story from her childhood. At about eight years of age, in Ohio, where she was reared, she recalled hearing the words, "...was pronounced dead at five minutes before midnight" on the radio. Thereupon, she asked her father, "Daddy, who died?"⁵ to which he replied, "Oh, just somebody the state put to death." Her reaction was a shock, and she asked, "On purpose?" She remembered her dad replying, almost apologetically, "Yes, child - on purpose."

The plea for vengeance, on the other hand, is a realistic one. People will not be dissuaded from a principle which is an innately moral one. This position is founded on the belief that the only proper response to a vile and heinous murder is the most severe possible punishment. The Biblical "eye-for-an-eye" mandate, according to this view, requires that a killer's life be the price he pays for his killing of another, in order to maintain a societal moral balance.¹²³

Mr. Darrow's remarks quoted at the beginning of this paper will likely stand the test of time.

CONCLUSION

The U.S.A. is curiously isolated among the world's developed westernized nations in its enduring sanction of capital punishment. Those who advocate discontinuation of executions deem them barbaric, macabre, cruel, and morally indefensible. However, the U.S. Supreme Court has repeatedly held that such state killings are not in principle "cruel and unusual punishment" which is forbidden under the constitution, and public

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but made up about 42% of death row inmates. It is germane, however, that they did not note the percentage of blacks convicted of, or even charged with, capital felonies. If blacks constitute a great portion of those tried for, and thus convicted of, such crimes, the greater percentage of blacks on death row would be understandable. The percentage of blacks as compared with whites in the population at large would be irrelevant, since this figure would include also law-abiding persons.

¹²² Coles, *supra* note 104, at 2.

¹²³ See Zimring & Laurance, *supra* note 62 at 2.

support for retention of states' death penalty laws has remained consistently strong.

Absent a dramatic reversal of public opinion, a metamorphosis of the Supreme Court's construction of the Eighth Amendment, or a constitutional amendment, the status quo is not expected to change. Amending the constitution in order to outlaw capital punishment is highly unlikely, since any alteration of the U.S. Constitution requires first, a two-thirds vote in both the Senate and House of Representatives, and second, the ratification by the legislatures of three-quarters of the states.¹²⁴ The three-quarters requirement numerically is 38 states, precisely the number in which executions are currently lawful. These same bodies would not ratify an amendment which essentially would repeal their own enacted statutes.

America's death penalty appears to be live and well, with the prognosis for a long life expectancy.

¹²⁴ Constitution Of The United States Article V.