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The Death Penalty Experiment: The Facts behind the Conclusions

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THE DEATH PENALTY EXPERIMENT: THE FACTS BEHIND THE CONCLUSIONS

I. INTRODUCTION

The Eighth Amendment prohibits the government imposition of "cruel and unusual" punishment on the people.[1] Both this article and the symposium it addresses focus on the interaction of the death penalty and this constitutional prohibition of cruel and unusual punishment. The purpose of this article is to provide an objective summary of the death penalty as it currently stands in American law. It serves as a short survey of underlying facts relevant to death penalty jurisprudence and is not intended to be comprehensive. Rather, it is intended to provide each reader a context within which to frame the rest of the articles and essays in this issue.

Section II provides a brief summary of the background of the death penalty in America, taking the reader from the early stages of the death penalty, through the temporary moratorium and some procedural tweaking, and then ending with a summary of the major recent Supreme Court death penalty cases. Sections III and IV identify both the states that currently permit the death penalty and the states that do not, as well as the reasons in support of or in opposition to the death penalty, respectively. Section V identifies the current methods of imposing the death penalty in the various jurisdictions. Section VI outlines the factual background regarding the imposition of the death penalty on minorities, specifically addressing the statistics of death penalty imposition based on the race of the defendant, the race of the victim, as well as the impact of jury composition and prosecutorial misconduct. Finally, Section VII provides a brief look at the current status of the death penalty in the international arena, identifying the impact of government structure and economic prosperity on whether a country supports the death penalty.

II. GENERAL DEATH PENALTY BACKGROUND[2]

This section provides a general overview of the death penalty. More

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[1] U.S. Const. amend. VIII (stating "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). In 1962, the Supreme Court held that the Cruel and Unusual Punishments Clause applied to the states through the Fourteenth Amendment. *See generally Robinson v. Cal.*, 370 U.S. 660 (1962). However, a state is free to decide if its constitution provides greater protection than the federal Constitution.

[2] This section was written by Eugene Droder III, Articles Editor, 2003-04, University of Dayton Law Review; J.D. expected May 2004, University of Dayton School of Law; B.A. in Journalism and Political Science, May 2001, Miami University.

specifically, this section introduces major Supreme Court cases reconciling the death penalty and the Eighth Amendment.

The Court reconciles the two by analyzing the "evolving standards of decency that mark the progress of a maturing society."[3] As the cases below demonstrate, the Supreme Court frequently relies on "objective" indicators of these "evolving standards," such as public opinion, international law, and the laws passed by state legislatures.[4] The Court also often turns to some of the justifications of our criminal system, deterrence and retribution, when deciding the myriad constitutional issues surrounding the death penalty.[5] As the cases will also demonstrate, these "objective" factors can, and do, change, thus creating changes in the Supreme Court's ruling.

Section A of this overview discusses the early stages of the death penalty in America. Section B discusses the Court's cases in the 1970s, where the Court imposed and later removed a temporary moratorium on executions. Section C then discusses the Court's cases in the 1980s and 90s, which affected both procedural aspects of the death penalty and categories of people affected by the death penalty. Section D then discusses three recent Supreme Court cases involving the death penalty.

A. Early Stages of the Death Penalty and the Eighth Amendment

The ban on cruel and unusual punishment derives from the English Bill of Rights of 1689, which prevented certain barbaric punishments such as drawing and quartering and burning alive.[6] The methods of execution and the crimes for which death could be imposed have varied by location in America and throughout its history.[7] A conservative estimate states that over 18,000 legal executions have taken place in American history.[8] Thus,

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[3] *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion); *Atkins v. Va.*, 536 U.S. 304, 312 (2002).

[4] *See e.g. Coker v. Ga.*, 433 U.S. 584, 593 (1977) (comparing historical views of the death penalty to jury decisions and current legislation to decide whether the Eighth Amendment prohibited capital punishment for rape); *Atkins*, 536 U.S. at 347 (determining whether the Eighth Amendment prohibited execution of the mentally retarded by analyzing state legislation, international law, and public opinion polls).

[5] *See e.g. Enmund v. Fla.*, 458 U.S. 782, 798 (1982) (warning that unless the death penalty "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment").

[6] Barry Latzer, *Death Penalty Cases: Leading U.S. Supreme Court Cases on Capital Punishment* 2 (2d. ed., Butterworth-Heinemann 2002). However, branding, whipping, and the cropping of ears were still commonly used. *Id.*

[7] *See* John P. Rutledge, *The Definitive Inhumanity of Capital Punishment*, 20 Whittier L. Rev. 283, 288-90 (1998).

[8] *Id.* at 288.

despite prohibiting the imposition of "cruel and unusual" punishments in America, the Eighth Amendment was likely not intended to abolish capital punishment. This proposition is further supported by the fact that the Fifth Amendment to the Constitution refers to capital punishment.[9] The question then remains: how could the imposition of the death penalty violate the Eighth Amendment?

No criminal punishments were held unconstitutional by the Supreme Court until 1910, when the Court held the Eighth Amendment prevented a 12 year imprisonment in heavy chains at hard and painful labor for falsifying government documents.[10] The Court has used this reasoning – that the Eighth Amendment prohibits disproportionate punishment – in later cases. For example, in *Coker v. Georgia*,[11] the Court held a death sentence for the rape of an adult woman was an excessive punishment forbidden by the Eighth Amendment.[12] And since 1976, capital punishment has been applied only to "aggravated" murder in the first degree,[13] though other crimes such as treason and terrorism may still warrant the death penalty.[14]

B. The Temporary Moratorium: The 1970s

In 1972, for the first time in American history, the Supreme Court in *Furman v. Georgia*[15] declared the death penalty cruel and unusual punishment as it was then being applied.[16] However, the 5-4 per curiam

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[9] Latzer, *supra* n. 6, at 2. The Fifth Amendment states, among other things, "[n]o person shall be held to answer for a *capital*, or otherwise infamous crime . . . nor shall any person be subject for the same offence to be twice put in jeopardy of *life* or limb." U.S. Const. amend. V (emphasis added).

[10] *Weems v. U.S.*, 217 U.S. 349 (1910).

[11] 433 U.S. at 592; *see also Solem v. Helm*, 463 U.S. 277, 303 (1983) (holding that the Eighth Amendment prohibited a sentence of life without parole for writing a bad check, the defendant's sixth non-violent felony).

[12] *Coker*, 433 U.S. at 592.

[13] First degree murder is intentional killing, whereas second degree murder is murder with intent only to injure the victim. Reckless killing is second degree murder. Felony murder is also first degree murder, though intent to kill need not be proved, so long as the murder was committed with intention to commit a felony specified by statute, usually a dangerous felony. Latzer, *supra* n. 6, at 5-7.

In *Enmund*, the Court held that a participant in a felony murder who did not kill or intend to kill the victim could not be executed. 458 U.S. at 800. Five years later, in *Tison v. Arizona*, the Court held that a participant in a felony, combined with a reckless indifference to human life, was sufficiently culpable to be sentenced to death under *Enmund*. 481 U.S. 137, 158 (1987).

[14] Latzer, *supra* n. 6, at 4.

[15] 408 U.S. 238 (1972).

[16] *Id.* The opinion included the companion cases of *Jackson v. Georgia* and *Branch v. Texas*. In all three cases, death sentences were imposed: on Furman for murder and on Branch and Jackson for rape. In all three cases, the discretion to impose the death sentence was presented to the jury. *Id.* at 240.

majority disagreed as to why the death penalty violated the Eighth Amendment. Two Justices, Brennan and Marshall, concluded that the death penalty was per se unconstitutional.[17] In contrast, three Justices, Douglas, Stewart and White, left room to reform the death penalty, but held it unconstitutional as it was applied to these defendants.[18] For the most part, all three were concerned with the arbitrary and discriminatory application of the death penalty. For example, Justice Douglas stated:

> We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned.[19]

As the dissent noted, this was the first time the Court had declared a punishment "cruel and unusual" due to a change in societal values: that the death penalty contravened "evolving standards of decency."[20] Therefore, a temporary, unofficial moratorium was imposed on the death penalty.

Four years later, after nearly 35 states rewrote their death penalty statues,[21] the Court revisited the constitutionality of the death penalty. In *Gregg v. Georgia*,[22] the Supreme Court held that the death penalty was not per se unconstitutional.[23] Moreover, the Court concluded that executing

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[17] *Id.* at 305 (Brennan, J., concurring) ("Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as a punishment for crimes."); *id.* at 358-59 (Marshall, J., concurring) ("There is but one conclusion that can be drawn from all of this -- *i. e.*, the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment.").

[18] *Id.* at 254 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

[19] *Id.* at 253 (Douglas, J., concurring). *See also id.* at 310 (Stewart, J., concurring) ("I simply conclude that 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 so freakishly imposed."); *id.* at 313 (White, J., concurring) ("The short of it is that the policy of vesting sentencing authority primarily in juries . . . has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course.").

[20] *Id.* at 383 (Burger, Chief J., dissenting).

[21] Latzer, *supra* n. 6, at 47.

[22] 428 U.S. 153 (1976).

[23] *Id.* at 187. The defendant, Troy Gregg, was charged with committing two counts of armed robbery and murder. Evidence showed that Gregg was picked up while hitchhiking and that he robbed and killed the two who picked him up. The trial was held in two stages, a guilt stage and a sentencing stage. The same jury found Gregg guilty and sentenced him to death. *Id.* at 158-61.

Gregg under the revised statutory scheme did not violate the Constitution.[24] The statutory scheme mandated that the sentence of death could only be imposed after the jury found and specified certain statutory aggravating factors and did not find sufficient mitigating factors. The aggravating and mitigating factors had to be proven at a separate penalty proceeding, conducted only after the defendant was found guilty. The statute also provided for direct appeal of a capital conviction to the state's highest court.[25] The Court in *Gregg* was satisfied that the concerns of *Furman* were adequately addressed by this scheme and lifted the moratorium on the death penalty.[26]

C. Procedural Tweaking and Minor Substantive Changes: The 1980-90s

"[T]he Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty . . . ."[27] After establishing the procedural framework for death penalty cases in *Gregg*, the Supreme Court decided several cases tweaking the procedural aspects of the death penalty in the 1980s and 1990s. These procedures included habeas corpus petitions, the admissibility of victim and prosecutor statements at sentencing, and voir dire.

In contrast, major substantive changes – that is, decisions favoring categories of people – were few. The death penalty's effect on minorities, the mentally retarded, and some minors remained unchanged during this time. However, the Court decided cases favoring the insane and juveniles under the age of 16.

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[24] *Id.* at 207.

[25] *Id.* at 162-68. A few years after *Gregg*, the Supreme Court held that a defendant has an Eighth Amendment right to present any mitigating evidence at the penalty phase of a capital trial. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (reserving the right of a judge to exclude irrelevant evidence). The statute at issue violated the Eighth Amendment because it did not permit the sentencing judge to consider certain mitigating factors. *Id.* at 597.

[26] *Gregg*, 428 U.S. at 206-07. Following *Furman*, some states enacted mandatory death penalty statutes for certain types of crimes, apparently to address the problem of inconsistent application of death sentences. In *Woodson v. North Carolina*, decided on the same day as *Gregg*, the Supreme Court held that the Eighth Amendment forbade the mandatory imposition of death sentences. 428 U.S. 280, 304-05 (1976). Years later, in *Blystone v. Pennsylvania*, the Court upheld a statute providing a mandatory death penalty where the jury finds one aggravating circumstance and no mitigating circumstances. 494 U.S. 299, 308 (1990).

[27] *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

1. Refining the Procedural Requirements for Capital Punishment

In the 1980s the Court tightened the rules for federal court review of habeas corpus petitions[28] to prevent inmates from filing successive petitions.[29] However, it allowed successive petitions if it was necessary to avoid a miscarriage of justice.[30] In *Herrera v. Collins*,[31] the defendant claimed such necessity by asserting his actual innocence.[32] The Court held that the defendant's claim of innocence, essentially a question of fact, fell short of the constitutional claims for which habeas courts sit.[33] Instead, Herrera would have needed to couple his claim of innocence with a constitutional error.[34]

Three years later, Congress further closed the door on federal habeas petitions. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996,[35] which heightened many of the requirements for filing and granting federal habeas corpus petitions.[36] Specifically, the Act mandates that habeas claims must be denied unless the state court unreasonably applied federal law.[37] Therefore, the Act will likely decrease the number of overturned death sentences.[38]

In addition to clarifying the habeas corpus process, the Supreme Court addressed the issue of the admissibility of victim impact statements. In 1987, in *Booth v. Maryland*,[39] the Court held that the admission of a statement by the family of a victim, which included personal characteristics

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[28] A federal habeas corpus petition is a collateral attack on a state conviction, where a petitioner alleges a prisoner is being held in violation of federal law, and the lower federal courts are given appellate jurisdiction over state criminal judgments involving federal constitutional claims. Larry Yackle, *Federal Habeas Corpus in a Nutshell*, 28 Human Rights 7, 7 (Summer 2001). *See generally* 28 U.S.C. §§ 2241-2266 (2000). The states also provide habeas corpus remedies, but most are modeled after the federal statutes governing the process. Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* 1292 (3d. ed., West, Hornbook Series, 2000 & Supp. 2002).

[29] Latzer, *supra* n. 6, 293.

[30] *Id.*

[31] 506 U.S. 390 (1993).

[32] *Id.* at 393. Herrera was convicted of capital murder and sentenced to death in 1982. He unsuccessfully challenged the conviction on direct appeal and state collateral proceedings in the Texas state courts, and in a federal habeas petition. Ten years after his conviction, he urged in a second federal habeas petition that he was "actually innocent." *Id.*

[33] *Id.* at 417-19.

[34] *Id.* at 404.

[35] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

[36] *See generally* Latzer, *supra* n. 6, at 12.

[37] 28 U.S.C. 2254(d)(1).

[38] Latzer, *supra* n. 6, at 12.

[39] 482 U.S. 496 (1987).

of the victim, the impact on the family, and the family's opinions, violated the Eighth Amendment.[40] Two years later, the Court extended the rule to statements made by a prosecutor to the sentencing judge about the personal qualities of the victim.[41] Finally, in *Payne v. Tennessee*,[42] the Court overruled the previous decisions and held there was no per se bar against admitting either victim impact evidence or similar statements by the prosecutor.[43] The Court equated the admissibility of such evidence with the right of the defendant to present evidence of mitigating factors.[44]

During this period, the Supreme Court also decided several voir dire-related cases. In *Lockhart v. McCree*,[45] the Supreme Court held that a prospective juror may be excused "for cause" if the juror's position on the death penalty would impair the juror's performance at sentencing.[46] The defendant argued that he did not receive an impartial jury at trial because a distinctive group – people who were opposed to the death penalty – was kept off the jury.[47] The Court held that McCree's jury satisfied the constitutional standard for an impartial jury.[48] Similarly, in the same year, the Court held that a defendant in an interracial murder has a right to question prospective jurors about racial prejudice.[49]

2. Decisions Affecting Categories of People

In the 1980s and 90s, several Supreme Court decisions both favored and disfavored particular classes of persons. For example, in *Ford v. Wainwright*,[50] the Court held the Eighth Amendment prohibited the execution of an insane defendant.[51] Criminal law has long recognized that

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[40] *Id.* at 507-09 (reasoning that such evidence was irrelevant to the circumstances of the crime and created a risk of an arbitrary sentence, yet admitting that sometimes such statements could be admissible if they were relevant to the circumstances of the crime).

[41] *S.C. v. Gathers*, 490 U.S. 805, 811-12 (1989).

[42] 501 U.S. 808 (1991).

[43] *Id.* at 827.

[44] *Id.* at 825-27.

[45] 476 U.S. 162 (1986).

[46] *Id.* at 182-84. McCree was convicted of robbing a combination gift shop and service station and killing its owner. *Id.* at 165-66.

[47] *Id.* at 167. The defendant's argument stems from an earlier Supreme Court ruling, *Witherspoon v. Illinois*, where the Supreme Court ruled that a prospective juror could not be removed "for cause" merely because the jury voiced conscientious or religious objections to the death penalty. 391 U.S. 510, 522 (1968).

[48] *McCree*, 476 U.S. at 184.

[49] *Turner v. Murray*, 476 U.S. 28, 36-37 (1986).

[50] 477 U.S. 399.

[51] *Id.* at 409-10.

insanity is a defense to criminal charges. However, the Court ruled it was unconstitutional to execute someone who, though competent when he committed the crime and competent when he was convicted, became insane while incarcerated.[52] The Court justified its opinion by looking to the common law, current state law, and general public opinion.[53]

The Court was not so favorable to the mentally retarded. Three years after *Ford*, in *Penry v. Lynaugh*,[54] the Court held the Eighth Amendment did not categorically prohibit the execution of a retarded person.[55] Although Penry proffered evidence of opinion polls disfavoring the death penalty for the mentally retarded, the Court contended such polls did not establish a societal consensus, absent some legislative reflection of the sentiment expressed therein.[56] The Court ruled that it was the jury's province to determine the mitigating nature of a person's mental culpability.[57] However, the Court reversed Penry's sentence because the jury was not properly instructed on the mitigating nature of Penry's retardation.[58]

Like the mentally infirm, the Supreme Court decisions affecting juveniles were both favorable and unfavorable during this period. In *Thompson v. Oklahoma*,[59] the Supreme Court held the Eighth Amendment prohibits the execution of an individual who was under 16 at the time of his or her offense.[60] In determining the unconstitutionality of such executions, the Court examined state and federal laws protecting children, the views of the international community, and the general detest juries have for executing juveniles.[61] The Court also noted there has been no execution of a person under the age of 16 since 1948.[62] Lastly, the Court was especially concerned that a 15-year-old would not effectively be deterred by a threat

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[52] *Id.* at 401-05, 409-10.

[53] *Id.* at 408-10.

[54] 492 U.S. 302 (1989).

[55] *Id.* at 340. Penry was convicted for brutally raping, beating, and murdering a woman in her home with a pair of scissors. Though he was 22 years old at the time of his crime, evidence showed he had the mental age of a six-year-old, the social maturity of a nine or ten-year-old, and an IQ of 54. *Id.* at 307-08.

[56] *Id.* at 335.

[57] *Id.* at 339-40.

[58] *Id.* at 328.

[59] 487 U.S. 815 (1988).

[60] *Id.* at 823. Thompson was 15 when he and three older persons, mutilated, shot, and killed Thompson's former brother-in-law. The victim had his throat slit, abdomen and chest cut, a broken leg, two gun shot wounds, and had been thrown in a river chained to a concrete block. All three were tried separately and convicted. *Id.* at 818-19.

[61] *See id.* at 824, 829, 831-32.

[62] *Id.*

of execution because of his or her decreased mental capacity and the unlikelihood that they would do a cost-benefit analysis.[63]

The Court in *Thompson* refused to consider the constitutionality of executing a 16 or 17-year-old. But in *Stanford v. Kentucky*,[64] the Court distinguished *Thompson* and held the Eighth Amendment did not prohibit executing a person who was 16 or 17 years old at the time of the offense.[65] The Court relied upon substantially the same types of evidence considered in *Thompson* and found a lack of a national consensus against such executions.[66] The Court also found the execution of 16 or 17-year-old minors achieved the goals of the death penalty, retribution and deterrence.[67] The Court recently reaffirmed its decision to allow the execution of these persons by refusing to hear a writ of habeas corpus in *In re Kevin Nigel Stanford*.[68]

In 1972, when the Supreme Court ruled in *Furman* that the death penalty was unconstitutional, one of the Court's major justifications was the racially biased application of the death penalty.[69] In *McClesky v. Kemp*,[70] the Court held that general evidence of discriminatory application of the death penalty violated neither the Eighth nor the Fourteenth Amendments. See *infra*, Section VI, for a more in-depth discussion of the death penalty and minorities.

D. The Supreme Court's Recent Cases

In *Atkins v. Virginia*,[71] the Supreme Court revisited the constitutionality of executing the mentally retarded and overruled its decision in *Penry*. In concluding such executions did not comport with "evolving standards of decency,"[72] the Court was especially moved by the number of states that

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[63] *Id.* at 836-38.

[64] 492 U.S. 361 (1989).

[65] *Id.* at 380. Stanford was 17 and his partner, Wilkins, was 16 at the time of their offenses. They robbed a gas station, kidnapped the attendant, repeatedly raped and sodomized the attendant, and shot her in the head. After being transferred from juvenile court, both were convicted at trial and sentenced to death. *Id.* at 365-67.

[66] *Id.* at 369-74.

[67] *Id.* at 377-78.

[68] 537 U.S. 968, 968 (2002).

[69] *See generally* 408 U.S. 238.

[70] 481 U.S. 279 (1987).

[71] 536 U.S. 304. Atkins was convicted of abduction, armed robbery, and capital murder. At the penalty phase, a forensic psychologist testified that Atkins was mildly mentally retarded and had an IQ of 59. The jury sentenced Atkins to death. *Id.* at 308-09.

[72] *Id.* at 312.

had prohibited the execution of the mentally retarded since its decision in *Penry*.[73] Moreover, additional evidence, including international views, opinion polls, and religious outlooks, established "a much broader social and professional consensus"[74] against the execution of the mentally retarded. The Court also held that neither the retributive nor the deterrent purpose of the death penalty was furthered by the execution of the mentally retarded.[75]

In the same year the Court decided *Ring v. Arizona*,[76] where it held that a jury, rather than a judge, must find the requisite aggravating circumstance to impose the death penalty.[77] Under the Arizona sentencing statute, the defendant could only be sentenced to death if the judge, not the jury, found certain aggravating factors.[78] The Court held that allowing a judge to make a factual determination necessary for the imposition of the death penalty violated the Sixth Amendment right to jury.[79] The Court relied in part on the majority of state legislatures' requirement that aggravating circumstances in capital cases be determined by juries.[80]

A year later, in *Wiggins v. Smith*,[81] the Supreme Court held that a counsel's failure to investigate, and subsequently introduce, "powerful" mitigating evidence at sentencing violated a defendant's Sixth Amendment right to counsel.[82] The Court stated that Wiggins suffered severe abuse during the first six years of his life with his "alcoholic, absentee mother," endured physical torment, sexual molestation, and repeated rape during his subsequent foster care, and further developed "diminished mental capacities" while homeless after foster care.[83] However, at sentencing, due to counsel's errors, the jury only heard one mitigating factor: that Wiggins

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[73] *Id.* at 314-17 (noting that 19 state legislatures prohibited executions of mentally retarded since *Penry*, and similar bills passed at least one house in two other states).

[74] *Id.* at 316 n. 21.

[75] *Id.* at 319-21.

[76] 536 U.S. 584 (2002).

[77] *Id.* at 618-19. Ring was convicted of murder, armed robbery, and related charges in connection with his involvement in the theft of an armored van and the point-blank shooting death of the van's driver. *Id.* at 589. The judge at sentencing found two aggravating factors: murder while in receipt of something of "pecuniary value" and murder "in an especially heinous, cruel or depraved manner." *Id.* at 594-95. The judge found one mitigating factor, Ring's "minimal" criminal record, insufficient for leniency, and sentenced him to death. *Id.* at 595.

[78] *Id.* at 592-93.

[79] *Id.* at 608-09.

[80] *Id.* at 607-08.

[81] 123 S. Ct. 2527 (2003).

[82] *Id.* at 2543-44. Wiggins was charged and convicted of first degree murder, robbery, and two counts of theft for drowning a 77- year-old woman and ransacking her apartment. *Id.* at 2531-32.

[83] *Id.* at 2542.

had no prior convictions.[84] Therefore, the Court concluded that counsel's failure to fully investigate and introduce Wiggins's "excruciating life history" prejudiced the defendant because there was a reasonable probability that at least one juror would not have imposed a death sentence.[85]

III. REASONS SUPPORTING THE DEATH PENALTY AND CORRESPONDING STATES[86]

This section will briefly discuss which states currently permit the death penalty. In addition, this section will give a short overview of the main arguments commonly made in support of the death penalty.

Today there are 32 states that statutorily permit and use the death penalty.[87] Seven more states have legislation that allows the use of the death penalty, but have not had an execution in at least 25 years.[88] Additionally, federal legislation permits utilization of the death penalty for the violation of specific federal criminal statutes.

Like all state sanctioned punishment, before a state employs the death penalty, the requisite crime must be proven. All 39 death penalty states allow the death penalty for the crime of homicide, the traditional crime for imposing death as a punishment.[89] In the case of homicide, the death

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[84] *Id.* at 2543.

[85] *Id.* at 2543-44.

[86] This section was written by Jeremy G. Cheung, Executive Editor for Notes and Comments, 2003-04, University of Dayton Law Review; J.D. expected May 2004, University of Dayton School of Law; Bachelor of Music, December 1999, University of Memphis.

[87] Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wyoming.

[88] Connecticut, Kansas, New Hampshire, New Jersey, New York, South Dakota and Vermont. Vermont has an old statute that permits the use of the death penalty. However, Vermont's statute has not been amended to meet constitutional muster pursuant to *Gregg*. *See infra* n. 110 (listing the 11 states that do not have a death penalty statute and citing Vermont's inactive and antiquated death penalty statute).

[89] However, states classify the type of murder warranting the death penalty as "first degree," "capital," or some other comparable label, to signify that the murder has aggravating circumstances associated with it. *See* Ohio Rev. Code Ann. § 2901.02(B) (Anderson 2004) (stating "aggravated murder" is "capital offense"); Mo. Rev. Stat. § 565.020 (1994 & Supp. 2003) (stating the requisite crime is "first-degree murder"); Ark. Code Ann. § 5-10-101 (1987 & Supp. 2003) (stating "capital murder"); Ala. Code § 13A-5-40(a)(1)-(18) (1975 & Supp. 2002) (stating "capital" murder with 1 of 18 aggravating factors). There are 13 states that apply the death penalty to non-homicidal crimes such as treason, kidnapping, and hijacking. *National Survey of State Laws*, 69-97 (Richard A. Leiter ed., 4th ed., The Gale Group 2003) (giving a state-by-state summary chart for all crimes punishable by death, including the circumstances that must accompany that crime).

penalty applies only when aggravating circumstances are present.[90] In other words, there must be circumstances that surround the crime to warrant the use of death as a punishment, as opposed to a murder that does not warrant the death penalty. Thus, the aggravated surrounding circumstances are the actual basis for imposing the death penalty.

There is a two-step trial process for hearing capital cases when the death penalty is proposed as punishment for a person's crime.[91] The first part of the trial is the culpability portion, in which the judge or jury decides whether a person is guilty of committing the crime for which he or she is accused. The second portion of the trial is the sentencing phase, during which a jury will hear and weigh the aggravating and mitigating factors that surround the crime committed and then, based on their findings, will recommend whether to impose the death penalty.[92]

When the death penalty is imposed, courts validate its employment by turning to two traditional theories of punishment: deterrence and retribution.[93] The U.S. Supreme Court defines deterrence as "the interest in preventing capital crimes by prospective offenders."[94] The Court also recognizes the premise that "it seems likely 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,'" which includes the "'cold calculus that precedes the decision' of other potential murderers."[95] There is the notion in capital cases that the more severe the punishment, the more likely that potential

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All state statutes seem to be the same in terms of the general procedure for imposing the death penalty. Therefore, for example purposes, this section will use sections of the Ohio Revised Code to illustrate the overall statutory scheme of the death penalty.

[90] Ohio Rev. Code Ann. § 2929.04(A) (stating the aggravating circumstances that must accompany a homicide for Ohio to impose the death penalty). *See also* Ohio Rev. Code Ann. § 2901.02(B) (giving the definition of a "capital offense" which includes "aggravated murder"); Ohio Rev. Code Ann. § 2903.01 (giving the definition of "aggravated murder").

[91] *See* Ohio Rev. Code Ann. § 2929.03 (explaining the trial procedure for cases involving "capital offenses").

[92] *Ring*, 536 U.S. at 618-19 (stating that the finding that aggravating and mitigating factors exist, in a particular capital case, in the sentencing phase of a capital case is exclusively the territory for a jury and not a judge).

[93] *See Gregg*, 428 U.S. at 183 (stating that "general deterrence . . . [and] retribution are valid state objectives that the appropriate punishment ought to achieve."); *Enmund*, 458 U.S. at 798-99 (stating that deterrence and retribution are enough to justify the death penalty); *Thompson v. Okla.*, 487 U.S. 815, 836 (1988) (acknowledging that the death penalty effectuates the purposes of deterrence and retribution); *Atkins*, 536 U.S. at 318-19 (stating that the mentally retarded should be excluded from the death penalty based on the proposition that the purposes of the death penalty, deterrence and retribution, do not apply). All of the above cases have stated that deterrence and retribution are reasonable objectives for states to utilize the death penalty.

[94] *Atkins*, 536 U.S. at 319.

[95] *Id.* (citing *Enmund*, 458 U.S. at 799; *Gregg*, 428 U.S. at 186).

offenders will be dissuaded from a particular course of action.[96] However, though the rationale for using the death penalty to deter future crimes is logical, recent studies have shown an insignificant deterrent effect.[97] Five proposed premises for why the death penalty may not have the desired deterrent effect include:

> 1. A punishment can be an effective deterrent only if it is consistently and expeditiously undertaken. Capital punishment cannot be administered to meet these conditions unless a defendant is stripped of his or her constitutional rights.
>
> 2. The proportion of first-degree murderers under the sentence of death is relatively small. An even smaller subset of this group has actually been executed. According to law enforcement authorities, death sentences imposed for murder only account for approximately one percent of all known homicides.
>
> 3. Most capital crimes are not premeditated . . . . Thus, it is not plausible that the threat of punishment could deter a crime that usually occurs in the heat of the moment. In such cases, individuals often act without considering the consequences.
>
> 4. Terrorists often commit violent crime on behalf of strong religious, moral or political beliefs which tend to outweigh any concern for personal safety, and for which martyrdom is honorable.
>
> 5. Illegal drug traffickers are already involved in a dangerous and violent business in which the threat of death is a day-to-day reality whereas the remote threat of death as a criminal justice penalty is more illusive.[98]

Although deterrence is a desirable effect for any criminal statute

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[96] *Id.*

[97] *See* FBI Preliminary Uniform Crime Report 2002 (June 16, 2003) (available at http://www.fbi.gov/pressrel/pressrel03/12month2002.htm) (announcing the official findings of an investigation of the deterrent effect of the death penalty in states which actively utilize the death penalty); Jon Sorensen, Robert Wrinkle, Victoria Brewer & James Marquart, *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 Crime and Delinquency 481 (1999) (reporting on the findings of a study showing the deterrent effect of the death penalty in Texas); Margaret C. Jasper, *The Law of Capital Punishment* 21-22 (Oceana Publications, Inc. 1998); Rita J. Simon & Dagny A. Blaskovich, *A Comparative Analysis of Capital Punishment* (Lexington Books 2002) (giving an overview of not only the notion of deterrence in the United States, but on the global arena).

[98] Jasper, *supra* n. 97, at 21.

imposing a punishment for inappropriate social behavior, the debate continues as to the actual deterrent effect the death penalty has on potential offenders.

The second justification for the imposition of the death penalty is retribution, which has been defined by U.S Supreme Court as "the interest in seeing that the offender gets his 'just deserts.'"[99] The Court also states that the employment of the death penalty as punishment for a certain crime "depends on the culpability of the offender."[100]

Both the Court's definition of retribution and the legal premise of culpability constitutes the Court's means to explain a natural human emotion. Retribution is based on the innate human instinct to right a wrong when a wrong has been committed.[101] For example, although a murder can never be reversed because of its finality, state sanctioned executions seek not to rectify the murder, but to avenge the murder.[102] Put simply, society has a strong interest in seeing that a criminal is punished. Based on that societal interest, the death penalty seeks to right the most severe of wrongs committed in our society and expresses "society's moral outrage at particularly offensive conduct."[103]

Finally, while state sanctioned executions serve the purpose of rendering punishment to an offender on behalf of society, they also serve the purpose of providing private vindication for family members of the victim.[104] Some victim's family members, understandably angry or saddened, look forward to the day that the offender will die for his actions of victimizing their loved one.[105] The reason for such anticipation by the various family members can vary from vengeance to closure.[106] The effect of the execution for a particular family member can only be measured on an individual level. Some family members have ended the death penalty process with personal positions for or against the death penalty, in addition to closure, or non-closure.[107]

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[99] *Atkins*, 536 U.S. at 319.

[100] *Id.*; *Tison*, 481 U.S. at 149.

[101] Michael Kronenwetter, *Capital Punishment* 33 (ABC-CLIO, Inc. 1993).

[102] *Id.*

[103] *Gregg*, 428 U.S. at 183.

[104] Kronenwetter, *supra* n. 101, at 33-36.

[105] *Id.* at 33.

[106] *Id.* at 33-34.

[107] *Id.*; *see generally* Symposium, *Victims and the Death Penalty: Inside and Outside the Courtroom; Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 Cornell L. Rev. 257 (2003) (presenting an in depth discussion and analysis of the different impact of the family member of the victim).

IV. REASONS OPPOSING THE DEATH PENALTY AND CORRESPONDING STATES[108]

This section will briefly discuss which states currently prohibit the death penalty under any circumstances and some of the reasons leading to the states' abolishment.[109] In addition, it will give a short overview of other arguments commonly made in opposition to the death penalty.

A. Abolition of the Death Penalty Through State or Judicial Action

Currently in the United States, only 11 states and the District of Columbia prohibit the death penalty under any circumstances.[110] The majority of the states that have abolished capital punishment have done so legislatively, and two states have prohibited the death penalty through judicial action.

Michigan became the first government in the English-speaking world to abolish capital punishment, abolishing it by statute in 1846.[111] Michigan's constitution has expressly prohibited the death penalty since 1964.[112] Concerns over executing the innocent apparently had some significance in strengthening the movement for abolition in Michigan.[113]

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[108] This section was written by K. Lynn Preston, Executive Editor for Publication, 2003-04, University of Dayton Law Review; J.D. expected May 2004, University of Dayton School of Law; B.A. in Psychology, May 2001, University of Virginia.

[109] The history of death penalty abolishment in the numerous states that have abolished and subsequently restored capital punishment is beyond the scope of this section.

[110] The 11 states that presently prohibit the death penalty for all offenses are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, West Virginia, and Wisconsin. Louis J. Palmer, Jr., *Encyclopedia of Capital Punishment in the United States*, 16, 247, 278, 342, 351, 356, 360, 394, 450, 566, 576 (McFarland & Co., Inc. 2001). All of the sources that say the number of states that prohibit the death penalty under all circumstances claim that there are twelve states plus the District of Columbia. However, most of these sources cite the Death Penalty Information Center website, which incorrectly lists Vermont as a state that has abolished the death penalty under all circumstances. A death penalty statute still exists in Vermont. Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 462 n. 918 (1997); Vt. Stat. Ann. tit. 13, § 3401 (2003); Vt. Stat. Ann. tit. 13, § 3484 (2003).

[111] Eugene G. Wanger, *Michigan Constitutional History: Michigan Capital Punishment*, 81 Mich. Bar J. 38, 38 (2002). The statute, which provided for life imprisonment for all crimes except treason, became effective on March 1, 1847. *The Death Penalty in America* 21 (Hugo Adam Bedau ed., 3d ed., Oxford U. Press 1982). *See* Mich. Comp. Laws § 750.316 (2003) (no death penalty provided for first-degree murder).

[112] Wanger, *supra* n. 111, at 38; Mich. Const., art. IV, § 46 ("No law shall be enacted providing for the penalty of death.").

[113] Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 76 (1987). In 1840, Michigan citizens were shaken when a man named Maurice Sellars gave a deathbed confession to a crime for which Patrick Fitzpatrick was hanged in nearby

Another factor strongly contributing to the abolishment in Michigan was the fact that since statehood, the State had never used the death penalty although it was legal.[114] Thus, reformers in Michigan did not have to convince the legislature to end executions; they only had to encourage the legislature to bring the laws into conformity with the State's established practice.[115]

Rhode Island became the next state to abolish the death penalty statutorily for most crimes in 1852.[116] The 1844 trials of John and William Gordon, who were accused of killing Amasa Sprague, the brother of a U.S. senator, were among the factors that influenced Rhode Island to put an end to capital punishment.[117] In 1979, capital punishment in Rhode Island was abolished entirely when the Rhode Island Supreme Court ruled that the death penalty was unconstitutional.[118]

Shortly after Michigan and Rhode Island, Wisconsin abolished the death penalty in 1853.[119] The hanging of John McCaffary in 1851 spurred the state's abolishment of the punishment.[120] More than two thousand people witnessed the hanging, which took more than 18 minutes due to a faulty mechanism.[121] In Milwaukee, in 1852, William Radcliffe was found not guilty in his trial for murder, purportedly in part because jurors were reluctant to return a guilty verdict when they knew that the punishment would be execution.[122] Juries did not convict in two trials for murder in Waukesha County during the early 1850s reportedly due to antipathy to the

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Sandwich, Ontario, just across the Detroit River. *Id.*

[114] Nicholas Levi, Student Author, *Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws*, 55 Fed. Commun. L.J. 131, 138 (2002).

[115] *Id.* at 138 n. 56.

[116] Christopher E. Friel, Christopher H. Lordan & Sarah K. Heaslip, *Liberty and Justice: A History of Law and Lawyers in Rhode Island, 1636-1998*, 4 Roger Williams U. L. Rev. 591, 596 (1999). Capital punishment was abolished for all crimes except for murder committed while serving a life sentence. Elizabeth Gray, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 St. Louis L.J. 1443, 1447 (1998).

[117] Bedau & Radelet, *supra* n. 113, at 76. The evidence against the Gordons was flimsy and circumstantial, and many believed they were victims of anti-Irish prejudice; however, John was convicted and hanged in 1845. William was acquitted on identical evidence. Although no conclusive proof of John's innocence ever surfaced, doubts about his guilt flourished and bolstered the abolitionist sentiment. *Id.*

[118] *State v. Cline*, 121 R.I. 299, 304 (1979); *see also* R.I. Gen. Laws § 11-23-2 (2002) (providing that penalties for murder do not include death).

[119] 1853 Wis. Laws 103; *see also* Wis. Stat. §§ 939.50(3)(a), 940.01 (2002) (stating that first-degree murder is a Class A felony, and such felonies are punishable by life imprisonment).

[120] Denno, *supra* n. 110, at 464 n. 931.

[121] John Welsh, *State Senator Seeks Return of Executions*, Wis. St. J. (Madison, WI) 3A (June 15, 1997).

[122] E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 Marq. L. Rev. 649, 705 (1996).

death penalty.[123] Construction of Wisconsin's first state prison was nearing completion, and with the rise of opposition to capital punishment, life imprisonment posed a preferable alternative.[124]

In Maine, the movement to abolish capital punishment was also founded on concerns about executing the innocent.[125] Maine severely limited the use of the death penalty in 1837, two years after the hanging of Joseph Sager, who created controversy by asserting his innocence to anyone who would listen as well as to the crowd of thousands who saw him die on the gallows. Thirty years later, several innocent men were suspected of a murder, to which Clifton Harris confessed and was hung in 1869. Harris accused Luther Verrill of being an accomplice and as a result, Verrill was convicted. However, the conviction was reversed after Harris admitted that Verrill was innocent.[126] Maine's legislature abolished capital punishment entirely in 1876.[127]

Another individual case sparked a movement to abolish the death penalty in Minnesota in 1906 because of the gruesomeness of the hanging.[128] When William Williams was hanged, he immediately hit the floor because the rope was six inches too long. Three deputies had to run to the platform and hold Williams's feet off the floor until he choked to death after fourteen and a half minutes.[129] The horrible, slow death started a movement in the Minnesota Legislature to abolish capital punishment, which ultimately succeeded in 1911.[130]

North Dakota partially abolished capital punishment in 1915[131] as a part of the "movement to abolish the death penalty by state legislative

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[123] *Id.*

[124] *Id.*

[125] Margery Malkin Koosed, *Defense Strategies in Death Penalty Litigation: Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41, 47 n. 15 (2001). In 1968, Governor Edmund Muskie said that the execution of an innocent man induced Maine to abolish capital punishment. Bedau & Radelet, *supra* n. 113, at 76.

[126] Bedau & Radelet, *supra* n. 113, at 76-77.

[127] 1887 Me. Laws 104; *see also* 17-A Me. Rev. Stat. Ann. §§ 1251, 1152 (2003) (authorized sentences for murder do not include capital punishment). The death penalty was briefly re-enacted in Maine from 1883 to 1887. Bedau & Radelet, *supra* n. 113, at 77.

[128] *See* Denno, *supra* n. 110, at 450 n. 836.

[129] John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 Fed. Commun. L.J. 355, 364 n. 42 (1993).

[130] Denno, *supra* n. 110, at 450 n. 836; 1911 Minn. Laws 387 § 1 (abolishing the death penalty); *see also* Minn. Stat. § 609.10 (2002) (providing that sentences available do not include capital punishment); Minn. Stat. § 609.185 (2002) (stating that first-degree murder is punishable by life imprisonment).

[131] 1915 N.D. Laws 63 § 1.

reform."[132] The bill did not abolish capital punishment for first degree murder that was committed by a prisoner serving a life sentence for first degree murder.[133] However, in 1973, North Dakota abolished the death penalty for all crimes.[134]

Following World War II, from the 1950s to the 1970s, the movement to abolish the death penalty was revitalized and achieved some of its most significant successes.[135] The movement was partly revived due to popular outrage over the Rosenburgs as Soviet spies and the California execution of Caryl Chessman, who had gained national attention for his writings.[136] Among the states that abolished the death penalty during this period were Iowa and West Virginia, outlawing the death penalty in 1965.[137] Popular opinion across the country turned against capital punishment at this time, and in 1966, more people were opposed to the death penalty than in favor of it.[138]

There are only two states that have never had the death penalty. Alaska's territorial legislature repealed statutory authorization for the death penalty in 1957.[139] Hawaii also abolished capital punishment in 1957.[140] The two jurisdictions both became states two years later in 1959.[141] Thus, no executions have been carried out in either Alaska or Hawaii since their entry into the United States.

Two jurisdictions have struck down the death penalty judicially. In 1973, in *United States v. Lee*,[142] the D.C. Circuit Court of Appeals found that the death penalty in the District of Columbia was unconstitutional in

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[132] *The Death Penalty in America: Current Controversies* 8 (Hugo Adam Bedau ed., Oxford U. Press 1997).

[133] 1915 N.D. Laws 63 § 1.

[134] 1973 N.D. Laws 300.

[135] Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. Colo. L. Rev. 1, 11 (2002).

[136] *Id.*

[137] 1965 Iowa Acts 827; *see also* Iowa Code § 902.1 (2003) (sentencing for Class A felonies does not include the death penalty); W. Va. Code § 61-11-2 (2003); *Campbell v. Wood*, 151 W. Va. 807, 809 (W. Va. 1967).

[138] Kirchmeier, *supra* n. 135, at 12.

[139] 1957 Alaska Sess. L. ch. 132; *Carman v. State*, 564 P.2d 361, 363 (Alas. 1977); *see also* Alaska Stat. Ann. § 12.55.015 (2003) ("authorized sentences" do not include capital punishment); *id.* § 12.55.125 ("sentences of imprisonment for felonies" do not include the death penalty).

[140] Territory of Hawaii, Regular Session Laws, 1957, Act 282, 28th Leg.; *Huihui v. Shimoda*, 64 Haw. 527, 540 (1982); *see also* Haw. Rev. Stat., § 706-656 (2003) (sentencing for murder does not include capital punishment).

[141] *See* Michael L. Radelet, *Capital Punishment in Colorado: 1859-1972*, 74 U. Colo. L. Rev. 885, 931-32 (2003).

[142] 489 F.2d 1242 (D.C. Cir. 1973).

light of *Furman*.[143] In 1984, the Supreme Judicial Court of Massachusetts held that the State's death penalty statute was unconstitutional in *Commonwealth v. Colon-Cruz*,[144] reasoning that defendants were discouraged from asserting their right to a jury trial because they could escape the death penalty by pleading guilty and avoiding a trial.[145]

B. Arguments Opposing the Imposition of the Death Penalty

In addition to the successful arguments concerning the risk of executing the innocent and the unconstitutionality of the death penalty discussed *supra*, there are numerous other arguments that are made in opposition to the death penalty. Many organizations and individuals use religion as a basis for opposing capital punishment, claiming that the death penalty is inconsistent with their understanding of religious thought. Opponents of the death penalty also argue against the punishment on philosophical grounds, taking the "natural right to life" principle developed by John Locke, Immanuel Kant, and Jean-Jacques Rousseau as a basis for opposing capital punishment. The utilitarian philosophy against capital punishment contends that punishment should be administered with the most efficient and socially beneficial sanction and that the death penalty is not the most efficient sanction nor does it benefit society—it actually degrades society.[146] Additionally, death penalty opponents contend that the state undermines its moral authority and ultimately denies the value of each life when it executes killers in an effort to decree that murder is wrong.[147]

Opponents of the death penalty further argue that numerous countries have abolished capital punishment and that there are several international agreements that call for the outright abolishment of the death penalty or limitations on its application.[148] Many assert that the mental anguish experienced by those who have been sentenced to the death penalty is a

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[143] *Id.* at 1247; *Thompson*, 487 U.S. at 829 (citing *Lee*, 489 F.2d at 122-23; *see also* D.C. Code § 22-2104 (2003) (penalty for first-degree murder does not include capital punishment). The D.C. Council also repealed the district's death penalty law in 1981. *Id.* at § 23-1701. In 1992, D.C. residents voted against the death penalty in a referendum that Congress ordered. Neely Tucker, *D.C. Killers Get Life As Jury Deadlocks; Sentence Reached by Default in Gang Case*, The Wash. Post B04 (Mar. 14, 2003).

[144] 393 Mass. 150 (1984).

[145] *Id.* at 163. The State legislature has not amended the statute to correct the problems identified in *Colon-Cruz*. Palmer, *supra* n. 110, at 351. *See also* Brian Hauck, Cara Hendrickson & Zena Yoslov, *The Death Penalty Debate: Capital Punishment Legislation in Massachusetts*, 36 Harv. J. on Legis. 479, 485-87 (1999).

[146] Palmer, *supra* n. 110, at 405.

[147] *Capital Punishment* 17 (Mary E. Williams ed., Greenhaven Press 2000).

[148] *Id.*; *infra* Sec. VII.

form of torture and that torture has been denounced by the internationally supported Universal Declaration of Human Rights.[149]

Furthermore, opponents argue that there is unfairness in the administration of the death penalty. The wrongly convicted are often racial minorities, nonconformists, the poor, and the mentally ill, who fail to receive equitable treatment in the criminal justice system.[150] Finally, death penalty critics argue that capital punishment is not a deterrent, and according to a 2000 *New York Times* survey, the murder rates in states without the death penalty is in fact below the national average.[151]

V. CURRENT METHODS OF IMPOSING THE DEATH PENALTY[152]

This section highlights each of the execution techniques available in the United States, providing some description of each methodology. When a statute authorizing a particular method provides instructive details, this section will draw attention to those specific texts. The final portion of this section will briefly examine some of the death penalty jurisdictions that provide for multiple means of execution and the choices, if any, that are available to the defendant.

A. The Different Means to the Same End

For the federal government, the military, and the states that currently have death penalty statutes, a considerable majority of the jurisdictions statutorily prescribe one particular form of execution. This *de facto* consensus, however, does not indicate that all death penalty jurisdictions only use that one method.[153] Examining the statutes of each death penalty jurisdiction, one or more of five different methods may be available to

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[149] Williams, *supra* n. 147, at 17; *see infra* Sec. VII.

[150] *Is the Death Penalty Fair?* 5 (Mary E. Williams ed., Greenhaven Press 2003).

[151] Mary E. Williams, *The Death Penalty: Opposing Viewpoints* 110 (Greenhaven Press 2002).

[152] This section was written by Tyler Starline, Research Editor, 2003-04, University of Dayton Law Review; J.D. expected May 2004, University of Dayton School of Law; B.A. in English and Philosophy, December 2000, University of Dayton.

[153] The Ninth Circuit has even noted that multiple methods of execution may not violate the "cruel and unusual punishment" proscription in the Eighth Amendment. *See Campbell v. Wood*, 18 F.3d 662, 711 n. 36 (9th Cir. 1994) ("This is not to say that only one method of execution will satisfy the Eighth Amendment at any given point in time. There may well be several methods of execution which are roughly equivalent from an Eighth Amendment perspective.") (Reinhardt, J., concurring in part and dissenting in part).

perform the executions: lethal injection, electrocution, lethal gas, hanging by the neck, or a firing squad.[154]

The primary form of execution is lethal injection, as 39 jurisdictions provide some authorization for the process.[155] Once inside the death chamber, the convict is usually strapped down to a gurney and connected to multiple heart monitor devices. Two usable veins are selected, and each vein has an IV needle inserted.[156] Attached to each needle are long tubes that run through the wall of the death chamber to an antechamber where the IV drips are administered. The IV lines are first given a harmless saline solution flow. At this point, the chamber is first exposed to the witness room. After a signal is given by the warden or the supervising official, each IV is switched to a dilute anesthetic solution, usually sodium thiopental or sodium pentothal. The otherwise harmless anesthetic only puts the convict to sleep. The introduction of a third substance, most likely pancuronium bromide, acts as a paralytic upon the entire muscle system, stopping the convict's breathing. Lastly, potassium chloride is administered to stop the convict's heart. Death occurs while the convict remains unconscious, resulting from "anesthetic overdose and respiratory and cardiac arrest."[157]

Some statutes only refer to the procedure by name without providing any particular details.[158] Other statutes provide some detail, stating that the lethal injection should involve "the intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted until such person is dead."[159] Another descriptive phrase is that the punishment should be inflicted by "the continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in

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[154] Steven D Stewart., *The Death Penalty: Methods of Execution*, http://www.clarkprosecutor.org/html/death/methods.htm (accessed Mar. 31, 2004).

[155] Those jurisdictions are: the federal government, the U.S. military branches, Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

[156] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm; Death Penalty Information Center, *Descriptions of Execution Methods*, http://deathpenaltyinfo.org/article.php?scid=8&did=479 (accessed Mar. 31, 2004). The use of two different veins each with an independent IV is a precautionary procedure, so that if one of the lines becomes blocked, the vein collapses, or some other malfunction occurs, the procedure may continue uninterrupted. *Id.*

[157] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm; Death Penalty Information Center, *supra* n. 156, at http://deathpenaltyinfo.org/article.php?scid=8&did=479.

[158] *E.g.* Ala. Code § 15-18-82(a) (2003) ("[T]he sentence shall be executed . . . by lethal injection . . . .").

[159] N.Y. Correctional L. § 658 (2003). *See e.g.* Ariz. Rev. Stat. § 13-704(A) (2003); Conn. Gen. Stat. § 54-100 (2003); Ind. Code § 35-38-6-1(a) (2003).

combination with a chemical paralytic agent . . . ."[160] Adding some more interesting instruction, New Jersey requires that the convict "be sedated . . . by either an oral tablet or capsule or an intramuscular injection of a narcotic or barbiturate such as morphine, cocaine, or demerol."[161]

Electrocution is the second most authorized form of execution, being found in the death penalty legislation of thirteen jurisdictions.[162] Once in the death chamber, the convict is strapped into the electric chair. Made out of oak, the chair sets atop rubber matting and is bolted to the floor. The straps are designed to restrain the arms, forearms, chest, and lap of the convict. Two electrodes are attached to the body. At the head, a metal skullcap conceals a copper wire mesh screen with the electrode brazened into the screen. A sponge moistened with a saline solution is placed atop the convict's scalp, and the skullcap is rested atop the sponge. The other electrode is attached to the shaven leg of the convict with a smaller saline-moistened sponge and electricity-conducive jelly. The convict's face is either covered by a large leather mask or by a blindfold.[163]

Once the electrodes are connected and the signal is given, a safety switch is closed and the electricity is engaged by a circuit breaker in an antechamber. A jolt of electricity, ranging from five hundred to two thousand volts and amps around four to ten, flows through the two electrodes into the convict's body. From the top electrode, the current passes through the head down into the torso, striking the brain and most of the internal organs. After the cycle, usually thirty seconds to one minute, the electric circuits are disconnected. The body is allowed to cool briefly and life signs are checked, particularly for a heartbeat. If death is not pronounced, the circuits are reconnected and the cycle is repeated.[164]

Two states authorize only electrocution. Nebraska expressly limits the method: "The mode of inflicting the punishment of death, *in all cases*, shall be by causing to pass through the body of the convicted person a current of electricity of sufficient intensity to cause death . . . . A crime punishable by death must be punished according to the provisions made herein *and not otherwise*."[165] Vermont is the other state that only authorizes electrocution,

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[160] *E.g.* Md. Correctional Services Code Ann. § 3-905(a) (2002); Miss. Code Ann. § 99-19-51 (2003).

[161] N.J. Stat. Ann. § 2C:49-2 (2003).

[162] Those jurisdictions are: Alabama, Arkansas, Florida, Illinois, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Vermont, and Virginia.

[163] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm; Death Penalty Information Center, *supra* n. 156, at http://deathpenaltyinfo.org/article.php?scid=8&did=479.

[164] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm; Death Penalty Information Center, *supra* n. 156, at http://deathpenaltyinfo.org/article.php?scid=8&did=479.

[165] Neb. Rev. Stat. § 29-2532 (2003) (emphasis added).

but does not so clearly and unambiguously limit the method as Nebraska.[166]

Four jurisdictions authorize lethal gas as an execution method.[167] The death chamber, also denominated as a gas chamber, must be able to remain airtight during the execution process to prevent the lethal gas from escaping before the convict dies.[168] Inside the chamber, the convict is strapped into a chair, restrained at the chest, waist, arms, and legs. A mask may also be used. A long stethoscope may also be attached to the convict, and the stethoscope runs into an antechamber—without breaching the airtight gas chamber—where the physician monitors the convict's heartbeat. Underneath the chair, a container filled with a sulfuric acid solution is on the floor. The chair also has a built-in container above the sulfuric acid container, which holds pieces of a cyanide compound.[169]

Once the convict is secured, a signal is given and the executioner or executioners activate a switch that causes the chair's built-in container to open, dropping the cyanide into the sulfuric acid compound. A chemical reaction occurs, releasing lethal hydrogen cyanide gas. After inhalation of the lethal gas, which may occur swiftly if the convict takes deep breaths or may occur slowly if the convict attempts to not breathe, the hydrogen cyanide gas chemically reacts with the convict's respiratory and cardiovascular systems, prohibiting the blood from oxygenating. The convict dies from hypoxia, the lack of oxygen supply to the brain. After the convict is determined to be dead from the antechamber's heart monitor, exhaust fans remove the hydrogen cyanide gas from the chamber and scrubbers neutralize the gas. The corpse is rinsed in ammonia to neutralize any remnants of the cyanide on the skin and in the hair.[170]

Each of the four states that provide for death by lethal gas mentions only the procedure by name in the statutes.[171] The type of lethal gas is not specified, which does slightly distinguish lethal gas from lethal injection.[172]

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[166] Vt. Stat. Ann. tit. 13, § 7106 (2003) ("The punishment of death shall be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of the current shall be continued until such convict is dead.").

[167] Those jurisdictions are: Arizona, California, Missouri, and Wyoming.

[168] The first attempted execution by use of lethal gas failed because the state attempted to pump the lethal gas into the convict's cell while he slept, but the cell has not been made airtight, so the gas leaked out. *See* Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm; Death Penalty Information Center, *supra* n. 156, at http://deathpenaltyinfo.org/article.php?scid=8&did=479.

[169] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm; Death Penalty Information Center, *supra* n. 156, at http://deathpenaltyinfo.org/article.php?scid=8&did=479.

[170] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm; Death Penalty Information Center, *supra* n. 156, at http://deathpenaltyinfo.org/article.php?scid=8&did=479.

[171] Ariz. Rev. Stat. § 13-704(A); Cal. Penal Code § 3604(a) (2004); Mo. Rev. Stat. § 546.720 (2003); Wyo. Stat. Ann. § 7-13-904(a) (2003).

[172] *See supra* nn. 155-61 and accompanying text (highlighting in the discussion of lethal injection methodology that some jurisdictions only refer to lethal injection by name when other jurisdictions

Hanging by the neck, a method of execution statutorily provided by three states,[173] basically requires a gallows[174] and a rope. The convict is weighed. The gallows is tested to insure proper operation and possibly to perform a rehearsal using a sandbag weighing the same as the convict. The rehearsal is intended to determine the optimal length of the rope. If the rope is the optimal length, the drop of the convict's body will cause the body weight to deliver enough force to the tightening noose that the neck is snapped at the third and fourth vertebrae.[175]

The rope itself, made of Manila hemp between three-quarters of an inch to an inch and a quarter in diameter, is prepared in a process of boiling, stretching, and drying. The preparation process considerably reduces the spring, stiffness, and recoil of the rope. The hangman's knot is lubricated with wax, soap, or oil to allow it to slide smoothly along the prepared rope, and the knot is tied in compliance with military regulations. The end of the rope opposite the noose is attached to a grommet in the ceiling of the gallows and then attached to a T-shaped bracket designed to absorb the force of the drop transmitted along the rope.[176]

For the execution, the restrained convict is escorted to the gallows and placed atop the trap door. The prisoner is secured, blindfolded or hooded, and the noose is placed around the neck. The hangman's knot is located closely behind the left ear. When the signal is given, the trap door is released and the convict drops. Death results when the neck is dislocated, the convict asphyxiates, or decapitation occurs.[177]

The last method, also provided by three states,[178] is the firing squad. The convict is restrained to a chair, strapped at the head, chest, arms, and legs. The convict is dressed in blue, and a physician, after locating the heart through a stethoscope, attaches a white circle at that location on the

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specify the use of a barbiturate and New Jersey mandates the use of a sedative, possibly cocaine or Demerol).

[173] Del. Code Ann. tit. 11, § 4209(f) (2003) (referring to hanging by the neck as a procedure only by name, without any particular details); N.H. Rev. Stat. Ann. § 630.5 ¶ XIV (2003); Wash. Rev. Code § 10.95.180(1) (2003).

[174] A "gallows" is defined as "[a] wooden frame consisting of two upright posts and a crossbeam, from which condemned criminals are hanged by a rope." *Black's Law Dictionary* 687 (Bryan A. Garner ed., 7th ed., West 2000).

[175] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm (specifying that the optimal length is determined, based on the body weight, by "using a standard military execution chart for hanging."); Death Penalty Information Center, *supra* n. 156, at http://deathpenaltyinfo.org/article.php?scid=8&did=479.

[176] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm; Death Penalty Information Center, *supra* n. 156, at http://deathpenaltyinfo.org/article.php?scid=8&did=479.

[177] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm; Death Penalty Information Center, *supra* n. 156, at http://deathpenaltyinfo.org/article.php?scid=8&did=479.

[178] Those jurisdictions are: Idaho, Oklahoma, and Utah.

convict's blue garment. Behind the chair are sandbags to absorb any splattered blood and missed volleys, preventing ricochets. Approximately twenty feet away, a wall faces the convict in the chair, and the members of the firing squad take their positions in the ports in the wall. Live thirty caliber rifle rounds are distributed to all but one of the firing squad; the other member unknowingly has blank rounds. The convict is hooded and the firing squad members, upon command, fire simultaneously at the convict. Death results from loss of blood, rupture of a large blood vessel or the heart, collapse of the lungs, or shock.[179]

The statutes provide varying detail regarding the members of the firing squad, but otherwise simply mention the method by name. In Idaho, the number of members is left to the discretion of the director of corrections.[180] In Oklahoma, no detail is provided.[181] In Utah, the most detail is provided, setting the number of members at five and textually restricting those members to peace officers.[182]

Each of the five methods that currently exist, at least in some form of alternative method, has been used at least once since 1976.[183] A particular method of execution, however, may not be statutorily available in a particular death penalty jurisdiction, even if the method is mentioned by name in the death penalty statute. The final determination of how death may be administered could depend on the conditions the statutes place on the use of the named method.

B. Choice or Constitutionality: How Death Penalty Jurisdictions Possibly Provide Multiple Ways to Execute a Death Sentence

When multiple means to the end are at least mentioned, the death penalty jurisdictions vary in how to determine which of the different execution procedures will be used. Nine death penalty jurisdictions clearly provide, at least for some convicts, their choice between two of the possible execution forms.[184] Two other jurisdictions do not expressly

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[179] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm; Death Penalty Information Center, *supra* n. 156, at http://deathpenaltyinfo.org/article.php?scid=8&did=479.

[180] Idaho Code § 19-2716 (2003) ("[T]he sentence of death may be carried out by firing squad, the number of members of which shall be determined by the director.").

[181] Okla. Stat. tit. 22, § 1014(C) (2002) ("[T]he sentence of death shall be carried out by firing squad.").

[182] Utah Code Ann. § 77-19-10(2) (2003) ("If the judgment of death is to be carried out by shooting, the executive director of the department or his designee shall select a five-person firing squad of peace officers.").

[183] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm.

[184] The nine states are: Alabama (Ala. Code § 15-18-82(a) (2004)), Arizona (Ariz. Rev. Stat. § 13-

provide that the convict may choose, but instead statutorily provide for multiple means without any specific authorization for the convict to choose.[185] Two other jurisdictions grant the discretion not to the convict to choose, but to the state—usually a director of corrections—who may choose the alternative method if the primary is "impractical."[186] Lastly, some jurisdictions do not provide a choice, but instead preference one method, and then identify an alternate method should the preferred method become unconstitutional.

Many death penalty jurisdictions have identified two of the five methods, and then statutorily provided the convict the ability to choose which method shall be used. Most statutes also provide a default method if the convict does not properly choose. In Arizona, if the crime was committed before November 23, 1992, the convict may choose between lethal injection and lethal gas.[187] California provides the same choices and default, but does not have the November 1992 limitation.[188] Florida and Kentucky provide some allowance for a convict's choice between lethal injection and electrocution.[189] The state of Washington sets the default as lethal injection, but allows the convict to choose hanging by the neck.[190]

704(A) (2004)), California (Cal. Penal Code § 3604 (2004)), Florida (Fla. Stat. § 922.105(1) (2003)), Kentucky (Ky. Rev. Stat. Ann. § 431.220(1)(a) (2003)), South Carolina (S.C. Code Ann. § 24-3-530 (2002)), Tennessee (Tenn. Code Ann. § 40-23-114(b) (2003)), Virginia (Va. Code Ann. § 53.1-234 (2003)), and Washington (Wash. Rev. Code § 10.95.180 (2004)).

[185] The two states are Missouri (Mo. Rev. Stat. § 546.720 (2003)) and Utah (Utah Code Ann. § 77-10-19(2)(2003)).

[186] The two states are Idaho (Idaho Code § 19-2716 (2003)) and New Hampshire (N.H. Rev. Stat. Ann. § 630.5 ¶ XIV (2003)).

[187] Ariz. Rev. Stat. § 13-704(A) ("A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date. If the defendant fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection.").

[188] Cal. Penal Code § 3604(b) ("Persons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection. This choice shall be made in writing and shall be submitted to the warden pursuant to regulations established by the Department of Corrections. If a person under sentence of death does not choose either lethal gas or lethal injection within 10 days after the warden's service upon the inmate of an execution warrant issued following the operative date of this subdivision, the penalty of death shall be imposed by lethal injection.").

[189] Fla. Stat. § 922.105(1) ("A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution."); Ky. Rev. Stat. Ann. § 431.220(1)(a) ("Prisoners who receive a death sentence prior to March 31, 1998, shall choose [lethal injection] or the method of execution known as electrocution, which shall consist of passing through the prisoner's body a current of electricity of sufficient intensity to cause death as quickly as possible. The application of the current shall continue until the prisoner is dead. If the prisoner refuses to make a choice at least twenty (20) days before the scheduled execution, the method shall be by lethal injection.").

[190] Wash. Rev. Code § 10.95.180(1) ("The punishment of death . . . shall be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is

Missouri has provisions for lethal gas or lethal injection, but does not specify that the convict may choose nor does the statute indicate a preferred or default method.[191] Utah identifies the use of a firing squad in subsection (2) of the statute and the use of lethal injection in subsection (3), and while subsection (1) states that the method specified on the death warrant will be used, the statute does not appear in any of the subsections to give a priority by the legislature of one of the methods over the other nor does it expressly grant the convict the ability to choose.[192]

Between the convict's ability to choose and the jurisdiction's ability to provide a hierarchy in case one of the methods is found unconstitutional is a third possibility. Some jurisdictions prioritize a particular method but assign an alternative method if the primary method, while constitutional, is administratively impractical. Idaho favors lethal injection, but provides the firing squad as a "practical" alternative.[193] New Hampshire also prioritizes lethal injection; death by hanging is the alternative.[194]

Finally, some death penalty jurisdictions, avoiding the issue of choice, specifically identify one method as the primary method, but then identify other methods to be used if the primary method is found unconstitutional. For example, Arkansas prioritizes lethal injection, but identifies electrocution if lethal injection is invalidated.[195] Delaware prioritizes lethal injection, with hanging by the neck specified as the unconstitutionality

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dead.").

[191] Mo. Rev. Stat. § 546.720 ("The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection.").

[192] Utah Code Ann. § 77-19-10 ("(1) [T]he method of judgment of death specified in the warrant is [to be] carried out . . . (2) If the judgment of death is to be carried out by shooting, the executive director . . . shall select a five-person firing squad of peace officers. (3) If the judgment of death is to be carried out by lethal intravenous injection, the executive director . . . shall select two or more persons . . . who shall each administer a continuous intravenous injection, one of which shall be of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death.").

[193] Idaho Code § 19-2716 ("The punishment of death shall be inflicted by [lethal injection]; provided, however, that, in any case where the director finds it to be impractical to carry out the punishment of death by [lethal injection] for the reason that it is not reasonably possible to obtain expert technical assistance, should such be necessary to assure that infliction of death by [lethal injection] can be carried out in a manner which causes death without unnecessary suffering, the sentence of death may be carried out by firing squad, the number of members of which shall be determined by the director . . . .").

[194] N.H. Rev. Stat. Ann. § 630.5 (¶¶ XIII-XIV) (2003) ("The punishment of death shall be inflicted by [lethal injection] . . . . The commissioner of corrections or his designee shall determine the substance or substances to be used and the procedures to be used in any execution, provided, however, that if for any reason the commissioner finds it to be impractical to carry out the punishment of death by [lethal injection], the sentence of death may be carried out by hanging under the provisions of law for the death penalty by hanging in effect on December 31, 1986.").

[195] Ark. Code Ann. § 5-4-617(a) (2003) ("(a)(1) The punishment of death is to be administered by [lethal injection] . . . . (b) If the execution of the sentence of death as provided in subsection (a) of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by electrocution . . . .").

alternative.[196] Oklahoma, taking extra precaution, prioritizes lethal injection, then electrocution, then the firing squad.[197] Also, Wyoming identifies lethal gas as the alternative if lethal injection is found unconstitutional.[198]

In conclusion, while five different execution methods have some availability in at least a few death penalty jurisdictions, all of the jurisdictions, except two, utilize lethal injection either solely or along with other types. "No states provide for Lethal Gas, Hanging, or Firing Squad as the sole method of execution."[199] But those methods are available as alternatives, either as the convict's choice or as the legislature's constitutionality contingency plan.

VI. THE DEATH PENALTY AND MINORITIES[200]

This section will examine whether the race of the defendant, the race of the victim, the racial composition of the jury, and the unlimited discretion given to the prosecution influences the determination as to whether the individual convicted of a crime will be sentenced to death.

A. Minorities and the Supreme Court

In several previous decisions, the Supreme Court has addressed whether racial animus exists in the administration of the death penalty. In particular, the Court has reviewed cases involving the composition of the

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[196] Del. Code Ann. tit. 11, § 4209(f) ("Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead . . . . If the execution of the sentence of death as provided above is held unconstitutional by a court of competent jurisdiction, then punishment of death shall, in all cases, be inflicted by hanging by the neck.").

[197] Okla. Stat. tit. 22, § 1014 ("A. The punishment of death must be inflicted by [lethal injection]. B. If the execution of the sentence of death as provided in subsection A of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by electrocution. C. If the execution of the sentence of death as provided in subsections A and B of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by firing squad.").

[198] Wyo. Stat. Ann. § 7-13-904(b) (2003) ("If the execution of the sentence of death as provided [by lethal injection] is held unconstitutional, the sentence of death shall be executed by the administration of lethal gas . . . .").

[199] Stewart, *supra* n. 154, at http://www.clarkprosecutor.org/html/death/methods.htm.

[200] This section was written by Tami L. Hart, Executive Editor for Publication, 2003-04, University of Dayton Law Review; J.D. expected May 2004, University of Dayton School of Law; B.A. in English Literature, June 2001, University of Cincinnati.

jury, the discretion given to the prosecutorial authority in seeking the death penalty, and the proof necessary for a defendant to successfully prevail in a claim against the government for racial discrimination in the administration of capital punishment.

Beginning in 1880, the Court held in *Strauder v. West Virginia*[201] that it was unconstitutional to exclude African Americans from a jury venire.[202] In *Strauder*, a West Virginia statute was successfully challenged under the Fourteenth Amendment for stipulating that an African American was not eligible to be a member of a grand or petit jury.[203] In 1965, the Court reaffirmed the general principals of *Strauder* with regard to the formation of the jury, and started developing the requisite proof necessary to successfully challenge a claim of purposeful discrimination in the administration of the death penalty.[204] The Court stated that, "purposeful discrimination may not be assumed or merely asserted. It must be proven, the quantum of proof necessary being a matter of federal law."[205] Consequently, the Court found that the Alabama law requiring the jury roll to be composed of "all male citizens in the community over 21 who are reputed to be honest, intelligent men and are esteemed for their integrity, good character and sound judgment" did not invidiously discriminate against African American men under the Fourteenth Amendment.[206]

Although the Court did not find that the Alabama statute in *Swain* discriminated against African Americans, other cases noted the possibility of racial discrimination in the composition of a jury[207] and the discretion given to the prosecutorial authority in the administration of the death

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[201] 100 U.S. 303 (1880).

[202] *Id.* at 312.

[203] *Id.* (stating that "he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was").

[204] *Swain v. Ala.*, 380 U.S. 202 (1965), *overruled on other grounds*; *Batson v. Ky.*, 476 U.S. 79, 100 n. 25 (1986). In *Swain*, the defendant was indicted and convicted of rape. 380 U.S. at 203. He was sentenced to death row, and moved to quash the indictment, to strike the jury venire, and to declare void the petit jury chosen. *Id.* at 203. The Alabama Supreme Court affirmed his conviction, and the defendant filed a writ of certiorari to the United States Supreme Court. *Id.* at 203-04.

[205] *Id.* at 204 (citing *Ex. Parte Va.*, 100 U.S. 339 (1879); *Gibson v. Miss.*, 162 U.S. 565 (1896); *Carter v. Tex.*, 177 U.S. 442, 447 (1900)).

[206] *Id.* at 206. The Court provided that "'[f]or racial discrimination to result in the exclusion from jury service of otherwise qualified groups does not only violate[] our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.'" *Id.* at 204 (citing *Smith* v. *Tex.*, 311 U.S. 128, 130 (1940)).

[207] *Furman*, 408 U.S. at 299 (invalidating all of the states' death-sentencing statutes due to the fact that juries were imposing death sentences without sufficient guidelines, standards, and appellate oversight).

penalty.[208] Finally, in *McCleskey v. Kemp*,[209] the Court addressed the requisite proof necessary to successfully challenge a state's procedure for administering the death penalty on racial grounds. McCleskey filed a writ of habeas corpus in the United District Court for the Northern District of Georgia claiming that the Georgia death sentencing process was administered in a racially discriminatory manner.[210] McCleskey utilized the Baldus study, a statistical study evidencing racial discrimination in the administration of the death penalty in Georgia, to support his contention.[211] However, the Court rejected the Baldus study, finding that it did not prove purposeful discrimination in McCleskey's individual case.[212] Thus, the Court held that, to successfully challenge capital punishment as being racially discriminatory, the defendant must present evidence that he was individually discriminated against on the basis of his race.[213]

Since *McCleskey*, no courts have upheld a defendant's legal claim alleging racial discrimination in the administration of the death penalty. However, action has been instituted in the legislature. In an attempt to statutorily provide defendants the right to state claims of racial animus, The Racial Justice Act was introduced in Congress. The Racial Justice Act[214] successfully passed the House of Representatives, but failed in the Senate. Despite the bill's failure, one state has adopted a version of the bill to specifically provide murder defendants the right to advance claims of racial discrimination in the use of the death penalty.[215]

B. Evidence of Discrimination Based on the Race of the Defendant

In our history, the criminal justice system frequently separated crimes based on the race of the defendant.[216] Presently, a majority of laws are

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[208] *Gregg*, 428 U.S. at 225.

[209] 481 U.S. 279. In *McCleskey*, an African American man was convicted of killing a Caucasian police officer during the course of a robbery. *Id.* at 283. Under Georgia law, the jury recommended that McCleskey receive the death penalty. *Id.* The Court of Appeals and Supreme Court of Georgia affirmed. *Id.*

[210] *Id.* at 286-87.

[211] *Id.* at 286-88.

[212] *Id.* at 298.

[213] *Id.* The court stated that, "[f]or this claim to prevail, [McCleskey] would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect." *Id.* at 298-99.

[214] Sen. 1696, 101st Cong. (1989).

[215] In 1998, Kentucky passed legislation that permits a capital defendant to challenge a prosecutorial decision to seek a death sentence on the grounds that the decision was based on the perpetrator's race. Ky. Rev. Stat. Ann. §§ 532.300-532.358 (2003).

[216] Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and*

considered neutral, in which the race or ethnic origin of a defendant does not play a factor in charging the defendant with a crime. Still, several studies have researched whether the race of the defendant remains a factor in the criminal justice system's administration of the death penalty.[217]

Overall, the studies conducted appear to have mixed results. In a study on the city of Philadelphia, researchers found that on average an African American defendant's probability of receiving a death sentence is 1.6 times greater than a similarly situated non-African American defendant in the same city.[218] The results signify that, regardless of the circumstances surrounding the African American defendant and the non-African American defendant, the odds of receiving a death sentence are nearly four times higher if the defendant is African American.[219]

Comparatively, another study researched whether racial disparities exist in the administration of the death penalty among several states including California, Georgia, New York, Pennsylvania, and Virginia.[220] The research indicated that the state with the highest number of African-American executions fluctuated over time.[221] For instance, while Georgia executed the greatest number of African Americans in the 1990s, Virginia executed the greatest number of African-Americans before 1860. These results show the variance among the states in the executions of minorities.[222]

In Nebraska, a recent study indicates that there is "no significant evidence of purposeful 'disparate treatment' discrimination based on the race of the defendant . . ." in the use of the death penalty in that state.[223] Further, the federal government, through the Attorney General's Office,

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Wrongful Conviction in Maycomb, 45 Ala. L. Rev. 403, 437 (1994) (stating that "[c]onsidering the race of a defendant . . . in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being.").

[217] *See* Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 434-45 (1995); Sheri L. Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1616-51 (1985).

[218] David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, and Barbara Broffit, Symposium, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638, 1724 (1998) [hereinafter *Philadelphia Study*].

[219] *Id.*

[220] Keith Harries & Derral Cheatwood, *The Geography of Execution* 72-76 (Rowman & Littlefield 1997).

[221] *Id.*

[222] *Id.*

[223] David C. Baldus, George Woodworth, Catherine M. Grosso, Aaron M. Christ, *The Nebraska Death Penalty Study: An Interdisciplinary Symposium: Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 Neb. L. Rev. 486, 497 (2002) (finding that there exists arbitrariness in the administration of the Nebraska death penalty).

recently conducted a study of the federal death penalty in which the office did not find any evidence that minority defendants are subjected to bias or other disfavored treatment in the office's administration of capital punishment.[224] However, the same report also stated that eighty percent of the cases submitted by federal prosecutors for death penalty review in the last five years have involved racial minorities as defendants.[225]

While the studies remain divided on whether the race of the defendant remains a factor in administering the death penalty, several states have started conducting studies to determine if there exists any evidence of racial animus in the use of the death penalty in their state. States that have already completed the studies have begun taking measures to prevent racial animus in their administration of the death penalty.

C. Evidence of Discrimination Based on the Race of the Victim

In the United States, race of the victim discrimination is the most documented form of race discrimination in capital charging and sentencing systems. Race of the victim discrimination exists when the victim's race influences the determination as to whether the defendant will receive the death penalty. This form of discrimination raises an ethical concern that the state's failure to allocate resources equally in the prosecution of both African American and non-African American victim cases has denied the individual equitable access to the criminal justice system.[226] When race of the victim discrimination exists, it typically results in more punitive charging and sentencing outcomes in majority victim cases than in minority victim cases. The capital punishment records since 1976 indicate that, of the persons executed for interracial murders, a Caucasian defendant with an African American victim has represented thirteen of the individuals sentenced to death while an African American defendant with a Caucasian victim has constituted one hundred and eighty of the individuals sentenced to death.[227]

A majority of the studies conducted by independent researchers suggest that the odds of receiving the death penalty are enhanced if the victim is

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[224] United States Department of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review*, 14 Fed. Sent. R. 40, 2 (June 6, 2001) (stating that the data provides no evidence that minority defendants are subjected to bias or otherwise disfavored in decisions concerning capital punishment).

[225] *Id.*

[226] *See* Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1391-93 (1988).

[227] Death Penalty Information Center, *Race and the Death Penalty*, http://www.deathpenaltyinfo.org/article.php?scid=5&did=184 (accessed Oct. 1, 2003).

Caucasian as opposed to any other race.[228] Specifically, in eighty-two percent of the studies conducted by independent researchers, the race of the victim is found to influence the likelihood of being charged with capital murder or receiving a death sentence.[229] While African Americans constitute only twelve percent of the national population, they are victims of half of the murders committed in the United States.[230] Despite these statistics, eighty percent of the individuals on death row are there for committing crimes against Caucasian individuals.[231]

Additionally, research of several states indicates that race of the victim discrimination exists. A study conducted by Dr. Baldus found that minority defendants, with victims who were Caucasian, faced odds of receiving a death sentence in the state of Georgia 4.3 times higher than similarly situated defendants whose victims were African American.[232] Ultimately, Dr. Baldus determined that the race of the defendant was less important than the race of the victim. Specifically, he noted that while fewer than forty percent of the homicide victims in Georgia are Caucasian, eighty seven percent of the cases resulting in the death penalty involved Caucasian victims.[233] Among the states, the evidence overwhelmingly shows that the race of the victim plays a crucial part in whether the state seeks the death penalty.

D. Evidence of Discrimination Based on Jury Composition and Prosecutorial Discretion

Many opponents of the death penalty have stated that an individual of minority status cannot receive a fair trial due to the jury's racial animus. Specifically, the opponents argue that a jury will take their social and political views into the jury room, and will be consciously or unconsciously influenced by the race of the defendant or the race of the victim. However, the proponents of capital punishment state that a juror can set aside their

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[228] Baldus, *supra* n. 218, at 1659 (citing United States Attorney General's Office, *Death Penalty Sentencing: Research Indicating Pattern of Racial Disparities* (1990) (summarizing studies through 1989)).

[229] *Id.* at 1656.

[230] Bright, *supra* n. 217, at 13-14 (stating that African Americans are victims of half of the murders committed in the United States, but eighty percent of those on death row are there for crimes against white people); United States Department of Justice, *supra* n. 224, at 1 (stating that the proportion of minority defendants in federal capital cases exceeds the proportion of minority individuals in the general population).

[231] Bright, *supra* n. 217, at 13-14 (providing that "the discrepancy is even greater in the death belt states of the South").

[232] Baldus, *supra* n. 218, at 1659.

[233] *Id.*

personal feelings while serving on a jury. The jury represents only one of the facets in the administration of the death penalty that has been subjected to scrutiny. Others have suggested that prosecutors cannot disregard their own social and political views and consequently consider their racial biases concerning the race of the defendant and the race of the victim in determining whether to seek the death penalty.

Different authorities have argued that, in cases that advance to a death penalty trial, "the typical jury exercises virtually complete discretion on the life or death decision once it finds a statutory aggravating circumstance present in the case."[234] In the administration of the Federal Death Penalty, a recent study found that the jury returned a verdict for the death penalty in about half of the cases in which the prosecution sought it, and this proportion was the same for all racial classes.[235] In the Philadelphia Study, researchers found that the principal source of racial disparities in Philadelphia exists with the jury.[236] In this study, the researchers determined that juries were more willing to find statutory aggravation present in cases with African American defendants and Caucasian victims. In these cases, the juries were more likely to impose death sentences and failed to find any mitigating circumstance.[237] These results signify that a Caucasian jury is more likely to sympathize and find mitigating factors with a defendant of the same race.

Further, several studies have reported that the principal reason for disparate effects in the administration of the death penalty lies in the prosecutorial decision to seek or waive the death penalty in death-eligible cases.[238] In many states, the prosecutors are not subject to direct legal oversight or judicial review when determining whether to seek the death penalty. Further, in the thirty-nine states that have the death penalty, 97.5 percent of the chief prosecutors are Caucasian.[239] Yet, in the Federal system, prosecutors are prohibited from engaging in discrimination or favoritism based on invidious factors.[240] In this system, jurors are

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[234] *Id.* at 1644

[235] United States Department of Justice, *supra* n. 224.

[236] Baldus, *supra* n. 218, at 1715.

[237] *Id.*

[238] Bright, *supra* n. 217 (stating that the prosecutor makes two of the most important decisions in a case: whether to seek the death penalty, and whether to offer a sentence less than death in exchange for the defendant's guilty plea). *See generally*, John A. Horowitz, *Note, Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 Fordham L. Rev. 2571, 2578 (1997).

[239] Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 Cornell L. Rev. 1811, 1817 (1998) (finding that in eighteen of the states that have the death penalty all of the prosecutors are Caucasian).

[240] United States Department of Justice, *supra* n. 224, at 3. "The prosecutor is constitutionally

questioned voir dire concerning racial bias or ethnic bias against the defendant.[241] Additionally, the system has implemented a capital case review procedure that makes certain racial discrimination does not occur in the administration of the Federal Death Penalty.[242] However, few states have implemented the Federal procedural oversights to guarantee the neutral administration of capital punishment in the states.[243]

VII. THE DEATH PENALTY AND INTERNATIONAL LAW[244]

This section will address international views on the death penalty. It will examine the presence of the death penalty in nations of different government structures and economic development levels. It will show that neither a country's political structure nor economic status is either indicative or determinative as to whether a nation permits capital punishment.[245]

Article VI of the *United Nations International Covenant on Civil and Political Rights* recognizes an inherent right to life, and restricts imposition of the death penalty, in those states still permitting it, for "only . . . the most serious crimes in accordance with the law in force at the time of the commission of the crime . . . ."[246] This covenant, however, is only binding

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prohibited from engaging in discrimination or favoritism based on invidious factors, such as race or ethnicity, in deciding whether to seek a capital sentence, and is likewise prohibited from making any appeal to racial or ethnic prejudice in remarks to the jury." *Id.*

[241] *Id.*

[242] *Id.* at 4.

[243] Fair, *supra* n. 216, at 474 (voicing doubts that the death penalty can ever be applied without arbitrariness or racial discrimination in our criminal justice system).

[244] This section was written by Jennifer M. White, Executive Editor for Notes and Comments, 2003-04, University of Dayton Law Review; J.D. expected May 2004, University of Dayton School of Law; B.A. in Political Science and Spanish, May 2001, Furman University.

[245] This article deals with information that has been reported by individual countries to various sources. As one commentator noted, "[i]t will be impossible to present an accurate picture of capital punishment until all states in the world take seriously their obligations to collect systematically statistical data on this subject and to report their practice, as requested, to the United Nations." Roger Hood, *The Death Penalty A Worldwide Perspective* 3 (Oxford University Press 2002).

[246] Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights* Art. XI, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (Dec. 16, 1966). Moreover, Article VI prohibits the imposition of the death penalty on juveniles under the age of 18, as well as on pregnant women. *Id.* States that sign the treaty are only permitted to execute juveniles who committed crimes when they were under the age of 18 if the state has reserved this right, such as the United States has done. U.S. Reservation to Article 6 of the International Covenant on Civil and Political Rights, UN Doc. ST/LEG/SER.E/13, p. 175 (the reservation reads: "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, *including such punishment for crimes committed by persons below eighteen years of age*." (emphasis

on those countries that have signed it.[247] Therefore, each of the 200[248] nations worldwide is left to decide whether it will allow capital punishment for crimes committed or whether it will abolish this form of punishment.[249] Trends since the late 20th century indicate the world is moving away from utilizing the death penalty as punishment.[250] However, there are still many countries that permit capital punishment.[251]

A. Countries for and against the Death Penalty

There are approximately 90 countries worldwide that permit the death penalty.[252] Many allow capital punishment for ordinary crimes.[253] There are others that prohibit the death penalty as punishment for ordinary crimes, but do allow it for more serious crimes.[254] "The countries that do retain the

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added)).

[247] Simon & Blaskovich, *supra* n. 97, at 17-18 (also noting that "the United States, and other select few, continue to vote against any bill [in the United Nations] that would restrict [a country's] ability to carry out death sentences").

[248] Amnesty International, *Facts and Figures on the Death Penalty*, http://web.amnesty.org/pages/deathpenalty-facts-eng (accessed October 16, 2003).

[249] This article is concerned with countries that have either established or abolished the death penalty from their penal code either statutorily, constitutionally, or de facto. It is not concerned with countries enduring genocide and other forms of unrest. Genocide is "the attempt to destroy a nation or an ethnic group by depriving them of the ability to live and procreate or by killing them directly," such as Nazi Germany's attempt to wipe out the Jewish population between 1933 and 1945. Simon & Blaskovich, *supra* n. 97, at 55-56. This type of execution is not meant to punish for a crime, and therefore, is not the subject of this article. Moreover, this article will not address those countries that have abolished the death penalty, but where multitudes of citizens are killed by government factions or rampant terrorists. For example, Colombia does not retain the death penalty. *Id.* at 20. The government, however, "is guilty of forced disappearances, genocide, and massacres . . . [t]he country is plagued by violence and 'death squad'-style killings." *Id.* Thus, this article will address the prohibition of the death penalty as it is reported by each government rather than what is practiced in each country without government supervision.

[250] William A. Schabas, *The Abolition of the Death Penalty in International Law* 363 (Cambridge University Press 2002). "The abolitionist movement's origins can be traced to the eighteenth century, and several States had eliminated the death penalty by the nineteenth century. However, the spread of abolitionist legislation is generally a post-Second World War phenomenon . . . ." *Id.*

[251] *See infra* nn. 253-54 (providing a list of countries permitting capital punishment).

[252] Mark Hansen, *Holdouts in the Global Village*, 86 ABA J. 47 (June 2000). Most of these countries are in Africa, Asia, the Middle East, and the Caribbean. *Id.* For a list of the different countries permitting capital punishment for certain crimes, *see infra* nn. 253-54.

[253] Hood, *supra* n. 245, at app. 1, tbl. A1.4. Ordinary crimes are "crimes contrary to military law or committed in wartime or other exceptional circumstances." Schabas, *supra* n. 250, at 363. The states permitting the death penalty for ordinary crimes include Albania, Argentina, Bosnia-Hercegovina, Brazil, Chile, Cyprus, El Salvador, Fiji, Greece, Israel, Latvia, Mexico, Peru, and Yugoslavia. Hood, *supra* n. 245, at Appendix 1, Table A1.4.

[254] Hood, *supra* n. 245, at app. 1. The countries permitting the death penalty for serious crimes include: Afghanistan, Algeria, Bahamas, Bahrain, Bangladesh, Belarus, Botswana, Burundi, Cameroon, Chad, China, Comoros, Cuba, Democratic People's Republic of Korea, Democratic Republic of the

death penalty, for the most part [and excluding the United States], are third world or communist countries."[255]

Beginning in the latter third of the 20th century, a great number of countries began to reject the death penalty, either through constitutional amendment, statutory amendment, or by high court ruling.[256] Likewise, "[m]any additional countries simply stopped using the death penalty without formal legal action, making them *de facto* abolitionist countries."[257] These countries completely prohibit the imposition of the death penalty, as opposed to permitting the death penalty for ordinary and/or serious crimes.[258]

B. A Country's Government Structure is not Determinative

Government structure plays little role in whether a state does or does

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Congo, Egypt, Equatorial Guinea, Ethiopia, Ghana, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Labanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Malawi, Malaysia, Mongolia, Morocco, Nigeria, Oman, Pakistan, Palestine, Philippines, Qatar, Republic of Korea, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, Sudan, Syrian Arab Repulic, Taiwan Province of China, Tajikistan, Thailand, Trinidad and Tobago, Uganda, United Arab Emirates, United Republic of Tanzania, the United States (39 states and federal and military law), Uzbekistan, Vietnam, Yemen, Zambia, and Zimbabwe. *Id.*

[255] Simon & Blaskovich, *supra* n. 97, at 17. As we will see though, neither of these factors is conclusive as to whether or not a country permits or prohibits the death penalty.

[256] Victor L. Strieb, *Death Penalty In a Nutshell*, § 18.1 at 270 (West Group 2003) (noting that during this period, 46 countries totally abolished the death penalty and 12 did so for ordinary crimes).

[257] *Id.* at § 18.1 at 270 (emphasis added). De facto states are those "that have not conducted executions for ten years . . . ." Schabas, *supra* n. 250, at 363, n. 3. De facto abolitionist countries include Bhutan, Brunei Darussalam, Central African Republic, Congo, Cote d'Ivoire, Gambia, Grenada, Madagascar, Maldives, Mali, Nauru, Niger, Papua New Guinea, Samoa, Senegal, Sri Lanka, Suriname,l Togo, Tonga, Turkey. Simon & Blaskovich, *supra* n. 97, at 80, Table A.3.

[258] Hood, *supra* n. 245, at app. 1 tbl. A1.3. The countries abolishing the death penalty and the dates they abolished it are as follows: Andorra, 1990; Angola, 1992; Australia, 1985; Austria, 1968; Azerbaijan, 1998; Belgium, 1996; Bolivia, 1995; Bulgaria, 1998; Cambodia, 1989; Canada, 1998; Cape Verde, 1981; Colombia, 1910; Costa Rica, 1877; Cote D'Ivoire, 2000; Croatia, 1990; Czech Republic, 1990; Denmark, 1978; Djibouti, 1995; Dominican Republic, 1966; East Timor, 1999; Ecuador, 1906; Estonia, 1998; Finland, 1972; France, 1981; Georgia, 1997; Germany, 1949; Guinea Bissau, 1993; Haiti, 1987; Honduras, 1956; Hungary, 1990; Iceland, 1928; Ireland, 1990; Italy, 1994; Kiribati, 1979; Liechtenstein, 1987; Lithuania, 1998; Luxembourg, 1979; Macedonia, 1991; Malta, 2000; Marshall Islands, 1986; Mauritius, 1995; Micronesia, 1986; Monaco, 1962; Mozambique, 1990; Namibia, 1990; Nepal, 1997; Netherlands, 1982; New Zealand, 1989; Nicaragua, 1979; Norway, 1979; Palau, 1994; Panama, 1922; Paraguay, 1992; Poland, 1997; Portugal, 1976; Republic of Moldova, 1995; Romania, 1989; San Marino, 1865; Sao Tome and Principe, 1990; Seychelles, 1993; Slovakia, 1990; Slovenia, 1989; Solomon Islands, 1978; South Africa, 1997; Spain, 1995; Sweden, 1972; Switzerland, 1992; Turkmenistan, 1999; Tuvalu, 1978; Ukraine, 1999; United Kingdom of Great Britain and Northern Ireland, 1998; Uruguay, 1907; Vanuatu, 1980; Vatican City State, 1969; Venezuela, 1863. *Id.*

not permit capital punishment.[259] There are representative and religious governments on both sides of the issue. With the exception of communist regimes, the type of government of a country does not, for the most part, define whether the country permits or prohibits the death penalty.

First, there are some representative countries that prohibit the death penalty and others that lead the world in executions.[260] For example, France, a republic,[261] has prohibited the death penalty since 1981.[262] France's last execution occurred in 1977. While France was once a country where capital punishment was commonplace, it has now "joined the battle for universal abolishment of the death penalty."[263]

On the other hand, the United States is probably the most well-known democracy in the world.[264] The U.S., however, is also one of the leading executionist countries in the world. In 1998, the United States ranked third in the world for executions.[265] Only the United States has refused to sign the *International Covenant on Civil and Political Rights*, which prohibits the execution of juvenile offenders.[266] Moreover, in 1999, the U.S. was one of only four countries to vote against a worldwide moratorium on capital punishment proposed by the U.N. Commission on Human Rights.[267] Thus, there are representative governments that prohibit capital punishment and those that permit it.

Second, there are many countries where the government is actually controlled by or intertwined with religion.[268] This fact is also not definitive

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[259] This article is concerned with three types of government: representative, religious, and communist. This article will not address governments that are in either a state of anarchy or that are ruled by a dictator.

[260] By representative government, this article is referring to those nations wherein the government is based on the concept that the people of the country elect representatives to represent their views in creating the laws of the land. Democracy is defined as "[g]overnment by the people, either directly or through representatives." Garner, *supra* n. 174, at 444. Similarly, republic is defined as "[a] system of government in which the people hold sovereign power and elect representatives who exercise that power." *Id.* at 1306. For purposes of this article, both democracies and republics will be considered representative governments.

[261] Central Intelligence Agency, *The World Factbook: France*, http://www.cia.gov/cia/publications/factbook/geos/fr.html#Govt (last updated Dec. 18, 2003).

[262] Simon & Blaskovich, *supra* n. 97, at 21.

[263] *Id.* (noting that "[t]he birth of the guillotine and the reign of terror are significant parts of French history.").

[264] Central Intelligence Agency, *The World Factbook: the United States*, http://www.cia.gov/cia/publications/factbook/geos/us.html (last updated Dec. 18, 2003).

[265] Hansen, *supra* n. 252, at 47. The U.S., Iran, China, and the Congo "accounted for 80 percent of the 1,625 documented executions" in 1998. *Id.*

[266] *Id.*

[267] *Id.* The other three countries voting against the proposed moratorium were China, Rwanda, and Sudan. *Id.*

[268] Simon & Blaskovich, *supra* n. 97, at 24. For example, many Middle Eastern governments are

of whether a state permits or prohibits capital punishment. For example, in the predominantly Islamic countries of the Middle East, the line between religion and the law is often blurred.[269] Ultimately, "[t]he primary religion in each [Middle Eastern] country is different and ultimately molds the individual country's ideology regarding the death penalty.[270] Islamic law "clearly supports the death penalty," and therefore, countries such as Iran and Saudi Arabia execute persons for both political and religious offenses.[271]

On the other hand, Israel, whose penal system is influenced by Christian, Muslim and Jewish systems, permits a death sentence for only two crimes: "offenses against humanity and against the Jewish People committed by the Nazis and their abettors; and treason, in wartime."[272] Although there is currently much political strife in Israel, there has been only one formal execution since the state's founding in 1948.[273]

Finally, there are five communist states in the world: China, Laos, Cuba, North Korea, and Vietnam.[274] Interestingly enough, all of these states retain the death penalty.[275] China, for instance, "has taken the idea of deterrence and crime prevention to a new level and has implemented the death penalty as the method for controlling its crime rate."[276] There are more people executed in China than in the entire rest of the world combined.[277] China's penal system is brutal and may be unfair to the unknowing defendant, as "[d]efendants can be tried without warning, and therefore are not always given the time or option to contact a lawyer. Executions are carried out as quickly as the trial, as soon as the higher court has signed off on the judgment."[278] Thus, China is the ultimate

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highly influenced by their religion. Iran and Saudi Arabia are both influenced by Islam, with Iran being controlled by a faction of the religion. *Id.* at 24-26.

[269] *Id.* at 10. There is no separation between religious and secular offenses, "creating a predominantly religious atmosphere surrounding the criminal justice system." *Id.*

[270] *Id.* at 25. This source deals with Israel, Saudi Arabia, and Iran, all of which support the death penalty. *Id.*

[271] *Id.* at 10, 26. Both of the Holy Books of Islam support various forms of capital punishment for certain offenses. *Id.* One commentator noted "Islamic law is regularly cited as an insurmountable obstacle to abolition of the death penalty . . . ." Schabas, *supra* n. 250, at 365-66.

[272] Simon & Blaskovich, *supra* n. 97, at 25.

[273] *Id.* at 25.

[274] Aneki.com, *Communist Countries*, http://www.aneki.com/communist.html (accessed Mar. 27, 2004).

[275] *See* Hood, *supra* n. 245, at app. 1.

[276] Simon & Blaskovich, *supra* n. 97, at 28.

[277] *Id.* In 1998, out of the 1,625 documented executions worldwide in 1998, China led the world with 1,067 executions. Hansen, *supra* n. 252, at 47.

[278] Simon & Blaskovich, *supra* n. 97, at 28. For example, "[r]epeat offenders, escaped prisoners, and members of gangs may be eligible for the death penalty because of their past actions, not because they have committed a crime in the present." *Id.*

example of a communist government giving its full support of the death penalty.

C. *A Country's Level of Economic Development is not Determinative*

Although the countries that retain the death penalty are mainly third world countries, there are also industrialized countries that permit the death penalty.[279] This factor is also not determinative of whether a state will permit the death penalty.[280] For instance, the United States and China, both of which lead the world economically,[281] also lead the world in death penalty executions.[282] There are, however, wealthy nations that prohibit the death penalty, such as the United Kingdom,[283] Switzerland,[284] and Canada.[285]

On the other hand, a third world, or underdeveloped, country is not necessarily a death penalty State. While many countries, such as Rwanda[286] and the Democratic Republic of the Congo[287] are underdeveloped and

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[279] *Id.* at 17. Third world countries are "the group of 'underdeveloped' countries . . . [m]any of [which] are located in Africa, Latin America, and Asia. They are often nations that were colonized by another nation in the past. The populations of third world countries are generally very poor but with high birth rates. In general they are not as industrialized or technologically advanced as the first world." Wikipedia, *Third World*, http://en.wikipedia.org/wiki/Third_World (last modified Mar. 22, 2004).

[280] This article is concerned with the overall economy of the countries rather than the Gross National Income.

[281] *The World Factbook: The United States*, *supra* n. 264, at http://www.cia.gov/cia/publications/factbook/geos/us.html#Econ ("The US has the largest and most technologically powerful economy in the world, with a per capita GDP of $37,600."); Central Intelligence Agency, *The World Factbook: China*, http://www.cia.gov/cia/publications/factbook/geos/ch.html#Econ (last updated Dec. 18, 2003) ("In 2003, with its 1.3 billion people but a GDP of just $5,000 per capita, China stood as the second-largest economy in the world after the US . . . .").

[282] Simon & Blaskovich, *supra* n. 97, at 18 (noting that "[t]he United States of America is unique because it is one of the only industrialized democratic nations to retain the death penalty.").

[283] Central Intelligence Agency, *The World Factbook: United Kingdom*, http://www.cia.gov/cia/publications/factbook/geos/uk.html#Econ (last updated Aug. 1, 2003) (stating that "[t]he UK, a leading trading power and financial center, is one of the quartet of trillion dollar economies of Western Europe").

[284] Central Intelligence Agency, *The World Factbook: Switzerland*, http://www.cia.gov/cia/publications/factbook/geos/sz.html#Econ (last updated Dec. 18, 2003) ("Switzerland is a prosperous and stable modern market economy with low unemployment, a highly skilled labor force, and a per capita GDP larger than that of the big western European economies.").

[285] Central Intelligence Agency, *The World Factbook: Canada*, http://www.cia.gov/cia/publications/factbook/geos/ca.html#Econ (last updated Dec. 18, 2003) ("As an affluent, high-tech industrial society, Canada today closely resembles the US in its market-oriented economic system, pattern of production, and high living standards.").

[286] *See supra* n. 254.

[287] *Id.*

permit the death penalty, other underdeveloped countries, such as Djibouti and Guinea Bissau are opposed to the death penalty.[288]

For example, in 1998 the Congo joined China and Iran to round out the top three executionist countries.[289] In 2002, the World Bank estimated that "80 percent of the population live[d] on less than U.S. $0.20 per day."[290] Likewise, Rwanda permits the death penalty,[291] and it has been approved for IMF-World Bank Heavily Indebted Poor Country Relief.[292] In 2002, with 24 executions, Rwanda ranked 11th in the world for executions.[293]

However, not all impoverished countries permit the death penalty. Guinea Bissau is one of the 10 poorest countries in the world.[294] Its last execution occurred in 1986, and capital punishment was outlawed completely in 1993.[295] Likewise, countries such as Cambodia,[296] Kiribati,[297] and Tuvalu[298] are also in the top 20 poorest countries, and all of them have outlawed the death penalty.[299]

Thus, it appears as though capital punishment permeates all types of government and all levels of economic development across the world.

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[288] *See supra* n. 258.

[289] Hansen, *supra* n. 252, at 47.

[290] *Democratic Republic of the Congo: Decision Point Document for the Enhanced Heavily Indebted Poor Countries (HPIC) Initiative* 6, http://www.worldbank.org/hipc/DRC_DP.pdf (July 14, 2003).

[291] *See supra* n. 254.

[292] Central Intelligence Agency, *The World Factbook: Rwanda*, http://www.cia.gov/cia/publications/factbook/geos/rw.html#Econ (last updated Dec. 18, 2003). Rwanda is described as a "poor rural country . . . ." *Id.*

[293] Death Penalty Information Center, *The Death Penalty, An International Perspective*, http://www.deathpenaltyinfo.org/article.php?scid=45&did=536 (accessed Mar. 30, 2004).

[294] Central Intelligence Agency, *The World Factbook: Guinea Bissau*, http://www.cia.gov/cia/publications/factbook/geos/pu.html#Econ (last updated Dec. 18, 2003). Another source, Aneki.com ranks Guinea Bissau 18th in The World's Poorest Countries list. Aneki.com, *Poorest Countries in the World*, http://www.aneki.com/poorest.html (accessed Mar. 27, 2004). Whether the country is in the top 10 or top 20 poorest countries is of little significance in this article, as either position is that of a very poor country.

[295] Nationmaster.com, *Africa: Guinea-Bissau: Crime*, http://www.nationmaster.com/country/pu/Crime (accessed Mar. 27, 2004).

[296] Aneki.com, *supra* n. 294, at http://www.aneki.com/poorest.html.

[297] *Id.* Aneki.com ranked Kiribati the 16th poorest country in the world. *Id.*

[298] *Id.* Tuvalu was ranked the 13th poorest country in the world. *Id.*

[299] *See supra* n. 258.