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William O. Jr. Hochkammer

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CRIMINAL LAW COMMENTS AND CASE NOTES

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THE CAPITAL PUNISHMENT CONTROVERSY

WILLIAM O. HOCHKAMMER, JR.

The death penalty has been the subject of heated debate in the United States for over 150 years.¹ During this period, both retentionists² and abolitionists³ have developed ritualistic arguments on the key issues of the controversy. Even though most arguments are based on opinion unsupported by facts, both groups have used statistical data and studies to prove the correctness of their respective positions. Confusion has resulted because the line between unsubstantiated opinion and fact has not been clear. This comment will consider some of the major areas of disagreement between retentionists and abolitionists and assess the use of the factual proof presented.

THE DETERRENCE ISSUE

A major element of the controversy is whether capital punishment, as claimed by retentionists, is a unique deterrent to crime.⁴ Their argument is that most people will not commit a crime if they know they may be executed as a result; this is an outgrowth of man's instinct for self-preservation.⁵

¹ For a discussion of the historical background of the controversy see BEDAU, *DEATH PENALTY IN AMERICA* 7-13 (1st ed. 1964).

² This term is used to designate those who favor the use of the death penalty.

³ This term is used to designate those opposed to the use of the death penalty. Of course many individuals involved in this controversy do not fit neatly into either the abolitionist or retentionist classification.

⁴ See, e.g., Sellin, *Capital Punishment*, 25 *FED. PROB.* 3 (Sept. 1961).

⁵ See Gerstein, *A Prosecutor Looks at Capital Punishment*, 51 *J. CRIM. L.C. & P.S.* 252 (1960).

Retentionists attempt to emphasize the logic of this argument by observing that people, when they are absolutely determined to get results, frequently resort to the threat of death.⁶ Abolitionists note that some people commit crimes for which they may be executed because of a conscious or subconscious desire to commit suicide, a motivation that offsets any deterrent effect the death penalty might have.⁷ The retentionists reply that few criminals, especially hardened criminals, want to and expect to be punished for their crimes.⁸

Some abolitionists believe that the death penalty increases the level of serious crime because those who have already committed a capital crime will not hesitate to commit others since they feel they have nothing to lose.⁹ Retentionists counter that if a life sentence is substituted for the death penalty, a man who has committed a crime for which he may be sentenced to life imprisonment would be just as likely to commit other serious crimes because he would also know he was already subject to the maximum penalty.¹⁰ Neither position is persuasive.

To the extent it is true that a criminal does not

⁶ *Id.* at 254.

⁷ See Comment, *In Defense of Capital Punishment*, 54 *KY. L.J.* 743 (1966).

⁸ See Schmideberg, *The Offender's Attitude Toward Punishment*, 51 *J. CRIM. L.C. & P.S.* 328, 332-33 (1960).

⁹ See, e.g., BEDAU, *supra* note 1, at 273.

¹⁰ See Comment, *In Defense of Capital Punishment*, *supra* note 7, at 744.

expect to be caught¹¹ or, if caught, to be convicted or, if convicted, to be the recipient of the maximum sentence, it is also true that the criminal will not be deterred by the most severe sentence the law may impose on him.

The few attempts which have been made to validate these arguments have failed to establish conclusively the existence of a deterrent effect. Consequently abolitionists have concluded either that such an effect does not exist or, if it does, that it is negligible.¹² Retentionists have, however, disputed the validity of these studies¹³ by noting that most were conducted by the opponents of capital punishment (apparently making them immediately suspect) and that these studies do not take into account the number of crimes which were actually deterred.¹⁴ The fact that two states, one with capital punishment and the other without, have similar rates of crime does not prove that there is no deterrent effect. It may be that the factors contributing to a high crime rate are so much stronger in the capital punishment state that they are not offset by the death penalty deterrent effect.

Since these studies contain potentially serious defects, they should be accepted only with reservations. They are suspect to the extent they are based on assumptions which, unfortunately, cannot satisfactorily be tested. For example, most studies assume that the rate of capital murder varies proportionally to the fluctuations in the homicide rate. The statistics are based on data for total homicides, rather than for capital murder rates, which are generally unavailable.¹⁵ Thus, when a study indicates that the homicide rate did not increase after the abolition of the death penalty, this does not eliminate the possibility of an increase in the rate of capital murders. An increase in the capital murder rate might simply have been offset by a decrease in the rate of non-negligent homicides.

¹¹ See Schmidelberg, *supra* note 8, at 332-33, and text accompanying note 8.

¹² See Sellin, *supra* note 4.

¹³ See Reichert, *Capital Punishment Reconsidered*, 47 Ky. L.J. 397 (1958).

¹⁴ Gerstein, *supra* note 5 at 252-53. See also, Van Den Haag, for comment *On Deterrence and the Death Penalty*, 60 J. CRIM. L. C. & P. S. 141 (1969), a recent article, in which the author argues for the retention of the death penalty. The author notes that the actual number of persons deterred by the penalty is still unknown.

¹⁵ Most available statistics on cause of death include the category of homicide, but do not break this into sub-categories. See BEDAU, *supra* note 1, at 277.

Recent studies with improved methodology have to some extent quelled this uncertainty. For example, it may now be possible to ascertain more accurately the effect of capital punishment in a comparison of state crime rates. Abolitionists have, in the past, relied on unrefined statistics to show that the homicide rates in states without the death penalty do not differ substantially from rates in death penalty states.¹⁶ Retentionists have countered that factors other than the deterrent effect of the death penalty—race, heredity, regional lines, and standards of housing and education—have an effect on crime rates.¹⁷ Grouping the states according to similarities in the character of the population, urban and industrial development, and geographical proximity, a comparison was made between states in the group which have and those which do not have capital punishment. This study supported the conclusion that those states which fell into each group have similar homicide rates, whether or not they have the death penalty.¹⁸ Nevertheless, this study is inconclusive since it does not consider crimes actually deterred and it assumes there is a relationship between capital murder and homicide rates.

The information presently available does not provide an adequate basis for deciding whether there is a deterrent effect. When the inconclusive surveys are discounted, all that remains are statements of opinion which must be treated with scepticism.

THE DISCRIMINATION ISSUE

Some aspects of the controversy are susceptible to valid statistical analysis. An example is the abolitionist criticism that the death penalty has been discriminatorily applied since it is imposed more frequently on the poor, the ignorant, and minority group members than on other convicted criminals who do not fit into these categories.¹⁹ If capital punishment is not uniformly applied, some say, it should be abolished.

Studies indicate that such discrimination exists. For example, even though women commit about one of every seven murders,²⁰ of the 3,298 people executed for murder from 1930 through 1962, only 30 were women.²¹ There are also clear

¹⁶ *Id.* at 264.

¹⁷ See Gerstein, *supra* note 5, at 252.

¹⁸ Sellin, *supra* note 4, at 6.

¹⁹ See, e.g., Comment, *Capital Punishment*, 29 TENN. L. REV. 534, 542-45 (1962).

²⁰ *Id.* at 542.

²¹ BEDAU, *supra* note 1, table 6 at 116-117.

indications of discrimination on the basis of race. From 1932 through 1957, twice as many Negroes as whites were executed in the South.²² While crime rates for different races are not equal, the difference in the numbers of executions cannot be explained on this basis.²³ The factor of discrimination becomes especially clear when the numbers of whites and nonwhites who are executed for rape are compared. From 1930 through 1962, 446 people were executed under civil authority in the United States for rape. Of these, 45 were white, 399 Negro, and 2 American Indian. 436 of these executions were in the South—42 white, 392 Negro, and 2 American Indian.²⁴ This discrimination also appears in a comparison of the success with which Negroes and whites are able to obtain commutations. Between 1914 and 1958 in Pennsylvania, whites received commutations three times as often as Negroes.²⁵

Yet, even if the existence of discrimination can satisfactorily be proven, it would be a mistake to argue that capital punishment should be rejected because some discrimination exists. The proper approach is to remedy the defect, not abolish the system. Emphasis should be on insuring uniform application in the future.²⁶ If there is any justification at all for the death penalty it may well overcome the objection of unequal application which can be remedied by more conscientious administration.

PROTECTION OF SOCIETY ISSUE

Retentionists argue that only the death penalty can adequately protect society; the life sentence alternative does not provide adequate protection because criminals who are given a life sentence are often paroled and thus able to commit other

crimes.²⁷ Abolitionists counter that there is no indication that people who have committed capital crimes are more likely to commit other crimes than those who are guilty of lesser crimes.²⁸ Furthermore, many who commit repeated capital crimes are adjudged legally insane and are not executed, even in a capital punishment jurisdiction.²⁹ Besides this, parole boards do not release criminals unless they consider them unlikely to commit additional crimes.³⁰

To counter this, the retentionists claim that prison personnel and inmates are put in a position of danger when the life sentence is substituted for capital punishment. Criminals under a life sentence (especially those for whom the possibility of parole is remote) are likely to kill in an attempt to escape since they know their sentences cannot be increased if the attempt fails. Even though this has a surface plausibility, retentionists have been unable to offer proof in support of it. Some people experienced in the handling of prisoners have concluded that murderers, for example, are among the best behaved prisoners.³¹ In addition, this argument fails to recognize that nearly all prisoners, including those given a life sentence, will at some time be eligible for parole. It is likely that the loss of the possibility of parole would also be a deterrent against killing to escape from prison.

Statistical information available is limited to that concerning the dangers of paroling life prisoners. Most prisoners sentenced to life imprisonment will at some time be eligible for parole,³² and statistics show that most such prisoners become successful parolees. Of 36 prisoners under life sentence who were paroled between 1943 and 1958 in New York, only two were returned to prison—one for a technical offense and the other for burglary. Most of these prisoners would have been executed if their sentences had not been commuted.³³ Some retentionists emphasize that a

²² Data indicating racial discrimination in the imposition of the death penalty is presented in Comment, *supra* note 19.

²³ See BEDAU, *supra* note 1, at 74-90 for an analysis of criminal homicide by Marvin E. Wolfgang. On the basis of all criminal homicides recorded by the Philadelphia Homicide Squad between January 1, 1948 and December 31, 1952, the rate per 100,000 by race and sex of offenders was: Negro males (41.7), Negro females (9.3), white males (3.4), and white females (.4). BEDAU, *supra* note 1, at 78.

²⁴ *Id.* at 116-117.

²⁵ Comment, *supra* note 19, at 543.

²⁶ Some steps which result in greater uniformity of application have already been taken. The indigent are appointed counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963). They are also notified of their right of counsel and having this counsel available before trial. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁷ See Gerstein, *supra* note 5 at 255.

²⁸ See Comment, *supra* note 19 at 550.

²⁹ See *In Defense of Capital Punishment*, *supra* note 7, at 246-47.

³⁰ Whether or not parole boards can make accurate decisions in this regard is open to question.

³¹ See Comment, *supra* note 19, at 548; and Sellin, *supra* note 4 at 6-7.

³² See Comment, *supra* note 19 at 549.

³³ *Id.* at 550. Paine also reports other examples of success in paroling convicted murderers. For example, in Ohio 94.1% of such paroles were successful as compared with a 74% success level for other paroles in that state. Of the 164 first-degree murderers paroled in Michigan between 1938 and 1961, only four were re-

parole board may make a mistake—it may release a person who is in fact very likely to commit other crimes. While this possibility cannot be denied, it does not provide a convincing reason for continued use of the death penalty. One would hardly argue that the right to a jury trial should be suspended in serious cases because the jury might make a mistake and allow a guilty person to go free.

OTHER ISSUES

One of the oldest and most popular arguments for abolition is that innocent people are convicted and may possibly be executed.³⁴ Retentionists respond that mistakes are unlikely; the presence of the judge at trial and the impartial review upon appeal provide adequate protection.³⁵ Furthermore, abolitionists have been unable to show many instances in which it has been established that an innocent person actually was executed, although they have pointed to numerous cases in which persons sentenced to prison were later to be found innocent.³⁶ Perhaps the reason executions of innocent persons seldom come to light is because there is little impetus for a continued investigation once a person has been executed for a crime. Also, where the innocence of an executed person is later established, the police are understandingly hesitant to publicize the fact. But since the death penalty is in fact imposed for only those capital crimes which shock the public and where guilt is clear,³⁷ and in light of the existing safeguards of appellate review and the possibility of commutation, execution of the innocent is unlikely.

Another argument is that continued use of the death penalty has resulted in the execution of the mentally disturbed.³⁸ Retentionists agree that the execution of such persons is undesirable, but argue that the mentally disturbed are adequately protected by the existing tests of legal insanity,³⁹ or

turned; just one of these four was returned for a new felony. See also Sellin, *supra* note 4 at 6-8.

³⁴ See *In Defense of Capital Punishment*, *supra* note 7 at 745.

³⁵ *Id.*

³⁶ See BEDAU, *supra* note 1, at 434-52.

³⁷ See *In Defense of Capital Punishment*, *supra* note 7 at 745.

³⁸ See, e.g., Gaetz, *Should Ohio Abolish Capital Punishment?*, 10 CLEVELAND MAR. L. REV. 365, 371-72 (1961).

³⁹ Most jurisdictions use either the M'Naughten or Durham rule to determine legal insanity. The M'Naughten rule provides that if the defendant did not know the nature of his act or that it was wrong, he will be declared insane. The Durham rule provides that one accused is not criminally responsible if his unlawful act was the product of a mental disease or defect.

alternatively, that if these tests are inadequate, the appropriate solution is to devise better tests, not to abolish the death penalty.

"Pragmatic" arguments also enter the capital punishment controversy. Retentionists claim that it is less expensive to execute a criminal than to confine him for a long period. The abolitionists answer that if there is no possibility of a death sentence, more convictions with fewer delays will result; thus less money and effort will be expended on appeals designed only to delay and hinder.⁴⁰ Further, as an incidental effect, fewer guilty people will be freed because juries will no longer have the reluctance to bring in guilty verdicts when there is no possibility of execution. Thus each group claims the least expensive solution, but neither can produce factual support.

These arguments must be carried on at the level of opinion rather than fact, since proof is almost impossible to obtain. The adequacy of existing tests of insanity cannot be proven except by reference to some standard which is in essence nothing more than an opinion which is widely accepted.⁴¹ It might be possible to compare the costs of keeping a criminal in prison with the costs of bringing one to execution, but it would be difficult to test the accuracy of such a comparison. There are difficulties in comparing criminals in different states and in comparing those in the same state at different times. The cost of executing a criminal is increased by delays. The extent of such

⁴⁰ See McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROB. 11, 13 (June 1964). Some writers have suggested that effective use of prison labor power could be made and the cost to the public of imprisonment thus reduced. See, e.g., Sellin, *supra* note 4 at 3.

⁴¹ Both the M'Naughten and Durham rules have come under frequent criticism. The objection has often been made that many dangerous offenders are medically insane but do not qualify as legally insane under these tests. For example, in *Frigitana v. United States*, 307 F. 2d 665, 667 (D.C. Cir. 1962) the court noted:

"We submit that under a standard or test based upon the basic concepts of criminal responsibility—that is cognition and volition or capacity to control behavior—there might be some meaningful medical testimony. . . .

"As we see it the difficulty of the experts in this case arose in large part because they did not understand what 'product' means as stated in our rule, for the term 'product' has no special generally accepted meaning in medicine. And of course it has no special meaning in law."

For a discussion of the problems these rules present for the psychiatrist "expert witness" called on to testify as to insanity, see Halleck, *The Psychiatrist and the Legal Process*, *PSYCHOLOGY TODAY*, Vol. 2, No. 9 at 24 (Feb. 1969).

delays depends upon the skill of attorneys and at times the sympathy of public officials. Because of differences in the importance of these factors in individual cases, cost comparisons are nearly impossible. Such areas of the controversy are likely to remain at the level of conflicting opinions for lack of a factual basis on which they can be resolved.

PUBLIC OPINION

The death penalty has been abolished or severely restricted in only thirteen states.⁴² But the abolitionist movement has had an effect in those states which have retained it since, in spite of increases in population and crime rates, the number of annual executions has decreased.⁴³ From 1930 through 1964 there were 3,848 executions in the United States. A comparison of the average annual executions in selected five year periods shows considerable decrease. There was an average of approximately 110 executions each year during the period. But in the years 1930 through 1934, the average was 155.2; from 1940 through 1944, an average of 129; from 1950 through 1954, an average of 82.6; from 1960 through 1964, an average of 36.2.⁴⁴ Since 1964 the level of executions has decreased further.⁴⁵

It is upon state legislatures that primary responsibility for the decision to abolish or retain capital punishment finally rests. When abolition has been considered, the legislatures have generally voted to retain the death penalty. This might be explained either on the basis that legislators lag behind the opinion changes of their constituents, or that the public, as accurately reflected in the

legislatures, actually favors the death penalty. In the short run, however, it does not matter which of these reasons is correct; the fact remains that the death penalty has not been abolished in many jurisdictions.

Inconclusive evidence of public opinion is available from those states where a referendum to abolish the death penalty has been taken. A 1958 Oregon referendum was defeated by a close vote, but in 1964 the referendum was carried by a vote of 455,654 to 302,105 and the death penalty was abolished. But in 1966 capital punishment was retained in Colorado by a vote of 389,707 to 193,245.⁴⁶

Most opinion polls are inconclusive, although they do indicate that opposition to capital punishment is increasing. A Gallup Poll conducted in 1953 showed 68% favored the death penalty for persons convicted of murder, 25% opposed it, and 7% were undecided.⁴⁷ The same group conducted similar surveys posing the same question in 1960 and 1965. In 1960, 51% favored the death penalty, 36% opposed it, and 13% were undecided.⁴⁸ In 1965, 45% were in favor, 43% opposed, and 12% undecided.⁴⁹

These surveys are not as significant as they might appear. Since the question asked only for a reaction to the use of death as a penalty for murder, the results are suspect when used as an indication of support for the use of the penalty for other crimes. More people might have favored it if confronted with a specific gruesome crime. On the other hand, more people might have opposed it if the question used had been framed in terms of an opinion on capital punishment with regard to the broad spectrum of crimes for which this penalty can be imposed. A 1958 Roper Poll bears out this uncertainty. Asked whether the heaviest penalty given people convicted of the "worst" crimes should be death or life imprisonment, 42% favored the death penalty, 50% favored life imprisonment, and 8% were undecided.⁵⁰

It is unlikely that most state legislators would continue to oppose abolition if a substantial ma-

⁴² These states are Michigan, Rhode Island (which permits capital punishment only for life term convicts who commit murder), Wisconsin, Maine, Minnesota, North Dakota (which retains the death penalty for murder by a prisoner serving a life term for murder), Alaska, Hawaii, Oregon, Iowa, West Virginia, Vermont, and New York (which retains the death penalty for murder of a police officer on duty, or of anyone by a prisoner under life sentence). For a discussion of the use of capital punishment in the United States and in foreign countries, see Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L.C. & P.S. 397 (1965).

⁴³ It has not been established whether this decrease is primarily due to the reluctance of juries to bring in a verdict which might result in an execution, the reluctance of judges (where they have discretion) to impose the death penalty, or the fact that more such sentences are reversed on appeal or commuted.

⁴⁴ Based on figures reported by the U.S. Bureau of Prisons in *National Prisoner Statistics*.

⁴⁵ For example, there were no executions in 1968, two in 1967, and one in 1966.

⁴⁶ BEDAU, *DEATH PENALTY IN AMERICA* 233 (rev. ed. 1967).

⁴⁷ *Id.* at 237. The question asked was: "Are you in favor of the death penalty for persons convicted of murder?"

⁴⁸ *Id.* at 239.

⁴⁹ BEDAU, *supra* note 46, at 238.

⁵⁰ BEDAU, *supra* note 1, at 234. This poll is of doubtful significance because of use of the word "worst." The individuals polled may have had widely divergent views on which crimes are worst.

majority of people were, in fact, strongly opposed to capital punishment. It is not illogical to conclude, then, that the public has not been convinced by existing studies and the abolitionists' criticism of the deterrence and protection of society arguments. It may be that the public feels a need for retribution which the death penalty satisfies and which serves to justify it in spite of its lack of benefits in other respects.

An important aspect of the capital punishment controversy is centered about the relative importance which should be attributed to the factors of rehabilitation and retribution.⁵¹ If retribution is its primary aim and the public feels that only the death penalty can achieve it, the likelihood that any specific criminal can be rehabilitated is irrelevant. For those who consider rehabilitation the primary aim of punishment and feel it is possible to rehabilitate even those criminals who committed capital crimes, the death penalty must appear harmful. Some criminals can be helped and others cannot. But the mere fact that the only effective way to handle some criminals may be life imprisonment without eligibility for parole does not provide justification for their execution. There is no proof that the level of support for the death penalty in the legislatures is due to an overriding concern for retribution. To the contrary, there is some indication that large segments of the population have repudiated vengeance as a primary aim of punishment. Most religious groups oppose capital punishment and have taken a stand against measures motivated by desire for revenge.⁵²

But it is not necessary to conclude that rehabilitation and suitable retribution are mutually exclusive. Confinement alone qualifies as punishment and society's demand that criminals be punished can certainly be met by imposition of prison terms.

⁵¹ Opinion on the issue of whether retribution is a proper aim of punishment splits three ways. One position is that it is never a proper aim and should be avoided in all cases. A second position is that punishment for the sole purpose of vengeance is undesirable, but that this is one of numerous permissible aims of punishment. The third position is that retribution is a proper aim for all punishment and may become the primary concern in appropriate cases, e.g., a person who has committed a crime particularly shocking to the public.

⁵² See, e.g., Milligan, *A Protestant's View of the Death Penalty*, reprinted in BEDAU, *supra* note 1, at 175, and Kazis, *Judaism and the Death Penalty*, reprinted in BEDAU, *supra* note 1, at 171. Whether the official position of such groups is a reflection of its members' opinions or is an attempt to "lead" these opinions is open to question.

An argument has been made that society demands the death penalty for certain criminals and that if they are not executed, private action will result. But experience in states which abolished capital punishment has shown no increase in lynchings or similar action has resulted. The South, which has the greatest incidence of private action, is characterized by a high execution level.⁵³

RECENT LEGAL ISSUES

Although the battle over the death penalty has been carried out primarily in the legislatures, the controversy has recently been brought to the courts with greater frequency. The argument that execution is cruel and unusual punishment prohibited by the Eighth Amendment has been unsuccessful.⁵⁴ Historically the Eighth Amendment has been used to prohibit punishment which is inherently cruel⁵⁵ or cruelly excessive.⁵⁶ But punishment by death—at least where it does not add unnecessary pain—has consistently been held outside of the Eighth Amendment prohibition.⁵⁷ Courts have also rejected the contention that capital punishment is *per se* a denial of due process. For example, the Washington Supreme Court recently held that:

*** The Fifth Amendment refers specifically to "capital cases", and also states . . . that a person may not be deprived of his life without due process. The Fifth Amendment also provides that a person may not be twice put in jeopardy of his life. Implicit in these are their corollaries—that the state may deprive an individual of his life if the proceedings are in accord with the requirements of due process and may place him in jeopardy once for a given offense. Certainly, if the state can call upon the most responsible and law abiding of its young men to sacrifice their lives in battle, it has the power, under the constitution, to execute one who, in a proceeding in which the requirements of due process have been strictly observed, has been found by a jury of his peers to have committed a crime so heinous that, in

⁵³ Comment, *supra* note 19, at 538-39.

⁵⁴ See *Bell v. Patterson*, 279 F.Supp. 760 (D.Colo. 1968).

⁵⁵ See, e.g., *Rosenberg v. Carral*, 99 F.Supp. 630 (S.D.N.Y. 1951) (confinement in death row awaiting execution is not inherently cruel).

⁵⁶ See, e.g., *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952).

⁵⁷ See, e.g., *In re Storti*, 178 Mass. 549 60 N.E. 210 (1901).

its opinion, his life should be exacted as a penalty.⁵⁸

While the United States Supreme Court has not recently considered whether capital punishment is *per se* unconstitutional, recent decisions have restricted the use of the death penalty by holding unconstitutional some of the procedures by which its imposition was determined.

In *United States v. Jackson*,⁵⁹ a six-Justice majority held the death penalty provision of the Federal Kidnapping Act,⁶⁰ which limited the death penalty to cases where the jury recommended it, violated the Fifth and Sixth Amendments. Since the death penalty could be imposed only on defendants who asserted their right to a jury trial, the provision needlessly discouraged defendants from pleading innocent and demanding a jury trial. The majority did not rest its decision upon the assumption that the only *purpose* of this provision was to limit the assertion of basic constitutional rights. The majority was concerned with the effect rather than the purpose of the provision. To them, it was irrelevant whether the chilling effect of these rights was incidental or intentional; the question was whether the chilling effect was unnecessary and thus excessive.⁶¹

In spite of the fact that some states have provisions similar to the one held unconstitutional in *Jackson*, the effect of this decision has been limited. The highest courts of some states have distinguished *Jackson*. In *State v. Laws*⁶² the New Jersey Supreme Court reasoned that the *Jackson* holding was not relevant where the power to reverse and nullify a death sentence is vested in an appellate court. Thus it held that a death sentence resulting from the failure of the jury to recommend mercy in a first degree murder conviction was not unconstitutional since it had the power to reduce such a sentence.⁶³ In *State v. Peele*⁶⁴ the North Carolina

Supreme Court held that a provision making the death penalty mandatory upon a rape conviction unless the jury specifically ruled otherwise was constitutional. This court distinguished *Jackson*. The Federal Kidnapping Act allowed an accused kidnapper to escape the possibility of a death sentence either by pleading guilty or by requesting a bench trial. The North Carolina provision allowed the avoidance of a possible death sentence only by a guilty plea; if the plea was accepted by the state with the approval of the court, it had the effect of a guilty verdict with a life recommendation. The court characterized this provision as benefitting the defendant.⁶⁵

In *Witherspoon v. Illinois*⁶⁶ the Supreme Court held that putting the power to impose the death penalty in the hands of a jury from which there had been excluded all persons expressing general objections to or religious scruples against capital punishment was violative of the Sixth and Fourteenth Amendments. Unless a venireman states unambiguously that he would vote against the death penalty regardless of what the trial might reveal, he cannot be excluded. If veniremen are excluded on any basis broader than this absolute refusal to impose the death penalty under any circumstances, the imposition of the death penalty is unconstitutional and the sentence cannot be carried out.⁶⁷

If it is true that persons with conscientious or religious scruples against the death penalty will seldom if ever vote to impose it (as Justice Black suggests in his dissent to *Witherspoon*⁶⁸), this decision will undoubtedly decrease the number of such sentences returned. Since the decision is retroactive, it will require resentencing of some defendants now awaiting execution. But Justice

⁵⁸ Even if the North Carolina court was correct in characterizing this provision as for the benefit of the defendant, it is still objectionable under the *Jackson* reasoning. Since under this provision the possibility of a death sentence could be avoided only by a guilty plea, it has an even stronger chilling effect on basic constitutional rights than the *Jackson* situation. To avoid the possibility of the death penalty, a defendant need not only waive his right to jury trial but must also plead guilty.

⁵⁹ 391 U.S. 510 (1968).

⁶⁰ This decision does not prevent the exclusion from the jury of veniremen who make "unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. at 522-523 n.21. But a high standard for permissible exclusion of veniremen has obviously been set.

⁶¹ 391 U.S. at 532.

⁵⁸ *State v. Smith*, 446 P.2d 571, 589 (Wash. 1968).

⁵⁹ 390 U.S. 570 (1968).

⁶⁰ 18 U.S.C. §1201 (a).

⁶¹ *United States v. Jackson*, 390 U.S. 570, 581-583 (1968).

⁶² 51 N.J. 494 242 A.2d 333 (1968).

⁶³ But it does not appear from *Jackson* that the constitutionality of the death penalty provision of the Federal Kidnapping Act would have been saved by the power in an appellate court to reverse or reduce the penalty. In *Jackson*, the Court was concerned with a *needless* chilling effect on the exercise of the right to a jury trial. This objection is not eliminated by such a power in an appellate court. A death penalty is still possible only when the right to a jury trial has been asserted. Thus the objectionable needless chilling effect is still present.

⁶⁴ 274 N.C. 106, 161 S.E.2d 568 (1968).

White, dissenting in *Witherspoon*,⁶⁹ has suggested that the future effect of this decision could easily be avoided by the legislature in any state where the jury now has the power to impose the death penalty by requiring only majority agreement rather than unanimity by the jury on the question of the sentence.

The majority in *Witherspoon* did not go as far as the Fourth Circuit did in *Crawford v. Bounds*.⁷⁰ That court held the exclusion of prospective jurors on the basis of their capital punishment views voided both the sentence and the conviction. The majority in *Crawford* was unable to agree on a rationale for this decision. Two judges felt that the systematic exclusion of any identifiable group within the community from which the jury venire is drawn violates the equal protection clause, irrespective of a showing of prejudice.⁷¹ Two other judges felt it was wrong to rely so heavily on the equal protection ground. They reasoned that due process was violated simply because the issue of guilt was submitted to a jury from which every juror with scruples against the death penalty was excluded without inquiring whether these beliefs would preclude a fair consideration of the guilt issue. Three judges apparently based their decision flatly on the essential unfairness of excluding every juror professing an "unexplained scruple" against capital punishment while seating every juror who professed a belief in it.

Jackson and *Witherspoon* are significant not only because of their effect on the imposition of the death penalty, but also because they show the United States Supreme Court is now willing to take a constitutional stand in the capital punishment controversy. Perhaps as a result of these decisions, death penalty provisions have since come under increased attack in the state courts; the bases for these attacks have not been limited to the arguments which were successful in *Jackson* and *Witherspoon*. While these attacks have generally not been successful, they may signal a new era: The capital punishment controversy is increasingly being carried on in the courts.

Some state death sentence provisions have

recently been attacked as lacking standards for imposition of the death penalty, thus resulting in a denial of due process and equal protection. This contention was raised before and rejected by at least two state supreme courts. The Washington Supreme Court reasoned that it was permissible for a jury to decide whether a particular punishment should be imposed as long as it did not, in so doing, determine the nature of the offense.⁷² But a minority of the California Supreme Court argued that statutes without standards for imposition of the death penalty violate due process because, without standards, no meaningful review is possible. It also considered such statutes to be a denial of equal protection since they allow a jury to practice invidious discrimination—persons who commit the same crime and who cannot be classified differently on any reasonable basis can be given fundamentally different sentences.⁷³

With these increasing statements by the courts, it is probable that the United States Supreme Court will eventually have to face the question of the *per se* constitutionality of the death penalty. The contention that capital punishment is unconstitutional under the Eighth Amendment is frequently raised.

It has long been recognized that the Eighth Amendment was not designed to eliminate merely physical brutalities.⁷⁴ The Supreme Court of the United States has, by reference to "standards of decency more or less universally accepted"⁷⁵ and "the evolving standards of decency that mark the process of a maturing society,"⁷⁶ recognized that the definition of inherently cruel and cruelly excessive punishment is not static. Since the Court apparently believes that the purview of this Amendment changes with the societal standard for acceptable punishment, the courts may be expected

⁶⁹ 391 U.S. at 540.

⁷⁰ 395 F.2d 297 (4th Cir. 1968).

⁷¹ Apparently this is also the position taken by Justice Douglas in his separate opinion in *Witherspoon*. 391 U.S. 510, 523 (1968). He would not require a showing of prejudice with respect to guilt since he is willing to assume than in many, if not most, cases of class exclusion some prejudice does result.

⁷² *State v. Smith*, 446 P.2d 571 (Wash. 1968).

⁷³ *In re Anderson*, 73 Cal. Rptr. 21, 447 P.2d 117 (1968).

The majority set aside the defendant's death sentence on the basis of *Witherspoon*, but held that the death penalty statutes themselves were not unconstitutional. It felt that absolute discretion as to sentence could be left to the trier of fact and, since the statute did this, the appellate courts could not substitute their judgment on penalty for that of the trier of fact. The majority felt there was adequate protection against arbitrary abuses since the trial judge could review and reduce a sentence on a motion for a new trial and the governor could grant a pardon or commutation.

⁷⁴ *Weems v. United States*, 217 U.S. 349 (1910).

⁷⁵ *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 469 (1947).

⁷⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1957).

to look to data relevant to that standard.⁷⁷ The standard used will probably be based, either directly or tacitly, on public opinion. At least some justices of the Supreme Court have shown an acute awareness of public opinion on the capital punishment issue.⁷⁸

But a court may invalidate a particular punishment only when there is an obvious societal standard which has been violated.⁷⁹ Existing public opinion surveys⁸⁰ do not provide an adequate indication of a societal standard with regard to use of the death penalty. Thus, unless polls which convincingly show the existence of a societal standard rejecting capital punishment can be offered, such legal attacks must fail and the resolution of the controversy must, by necessity, be left to the legislatures. The legislatures are presumably more responsive to public opinion than the courts. Consequently, if the controversy is to be decided on the basis of what the public thinks is appropriate, the courts should defer to the legislative judgment unless public opinion is obvious.

Some members of the Supreme Court of the United States have indicated a willingness to use, as evidence of a societal standard, the results of polls. In *Rudolph v. Alabama*⁸¹ the Court refused to grant certiorari to consider whether the imposition of the death penalty for rape was prohibited by the Eighth Amendment. Justice Goldberg, joined by Justices Douglas and Brennan, dissented from the refusal. One of the questions the minority would have considered was whether the punishment by death for rape was violative of societal standards, and in doing so, would have considered the results of a survey of sixty-five countries.⁸²

At this time, the Goldberg dissent in *Rudolph* has not been used as precedent for a decision on the merits. For example, while the court in *Bell v. Patterson*⁸³ noted that the scope of the Eighth Amendment was not static, it concluded that it was not broad enough to proscribe the death penalty as cruel and unusual punishment. Interestingly, the basis for this court's holding is somewhat

contradictory to the idea that the scope of this amendment changes with societal standards—an idea which this court purports to accept. The court remarked that “[T]he decisions upholding the validity of the death penalty have not been overruled or even determined. Hence the law of the land as of the present moment is that the death penalty does not violate the Constitution of the United States.”⁸⁴ It would seem that if the scope of the Eighth Amendment is not considered static, earlier decisions on its scope are significant only to the extent that societal standards have not changed.

CONCLUSION

The 150 year old controversy over the death penalty is in need of settlement. But it is unlikely that such settlement will be reached through another “logical” analysis of the arguments which are as old as the controversy. Nor will settlement be likely to come through the development of new arguments.

Whether the controversy is ultimately settled in the legislatures or in the courts, the resolution will depend upon public opinion. Thus the approach to the controversy of rephrasing the old arguments, changing the emphasis to those currently in vogue, and adding emotional appeals in current fashion must be abandoned, and more emphasis placed on determining what the public actually thinks about capital punishment.

But this does not mean that other issues such as the existence of a deterrent effect, existence of discrimination in application, and the necessity of protecting society can be ignored. Both retentionists and abolitionists can contribute to the resolution of the controversy by presenting empirical evidence to sustain their position on each of these issues. It is by presenting such evidence that public opinion can be changed.

Recent experience may indicate that the death penalty is fast becoming a thing of the past. In spite of the fact that attempts to abolish capital punishment in the legislatures have generally failed, that attempts to have it declared unconstitutional are unsuccessful, and that many death sentences are still being returned, very few criminals have been executed in recent years. But it is unlikely that the controversy over capital punishment will so easily disappear.

⁸⁴ 279 F.Supp. at 765.

⁷⁷ See Note, *Constitutional Law—Cruel and Unusual—Capital Punishment*, 42 N.C. L. REV. 909 (1964).

⁷⁸ See notes 81–82 *infra* and accompanying text.

⁷⁹ See Note, *supra* note 77.

⁸⁰ See notes 46–50 *supra* and accompanying text.

⁸¹ 375 U.S. 889 (1963).

⁸² The Goldberg dissent in *Rudolph* was critically analyzed in Parker, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964).

⁸³ 279 F.Supp. 760 (D.Colo. 1968).