

INSIDE: DEATH PENALTY'S MORAL, LEGAL & SOCIAL DILEMMAS

DELAWARE LAWYER

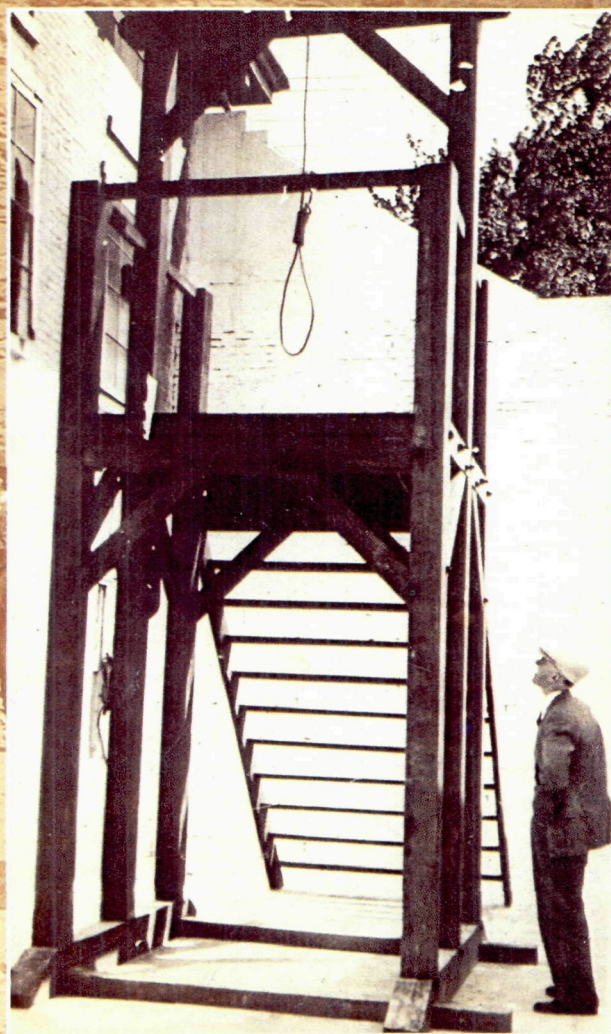
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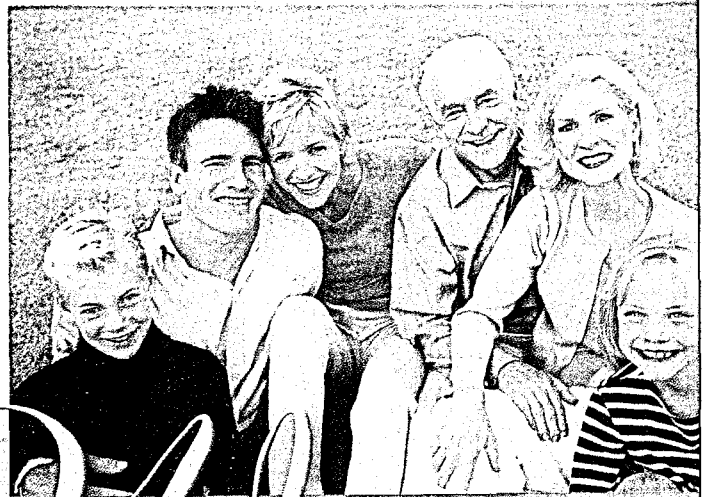
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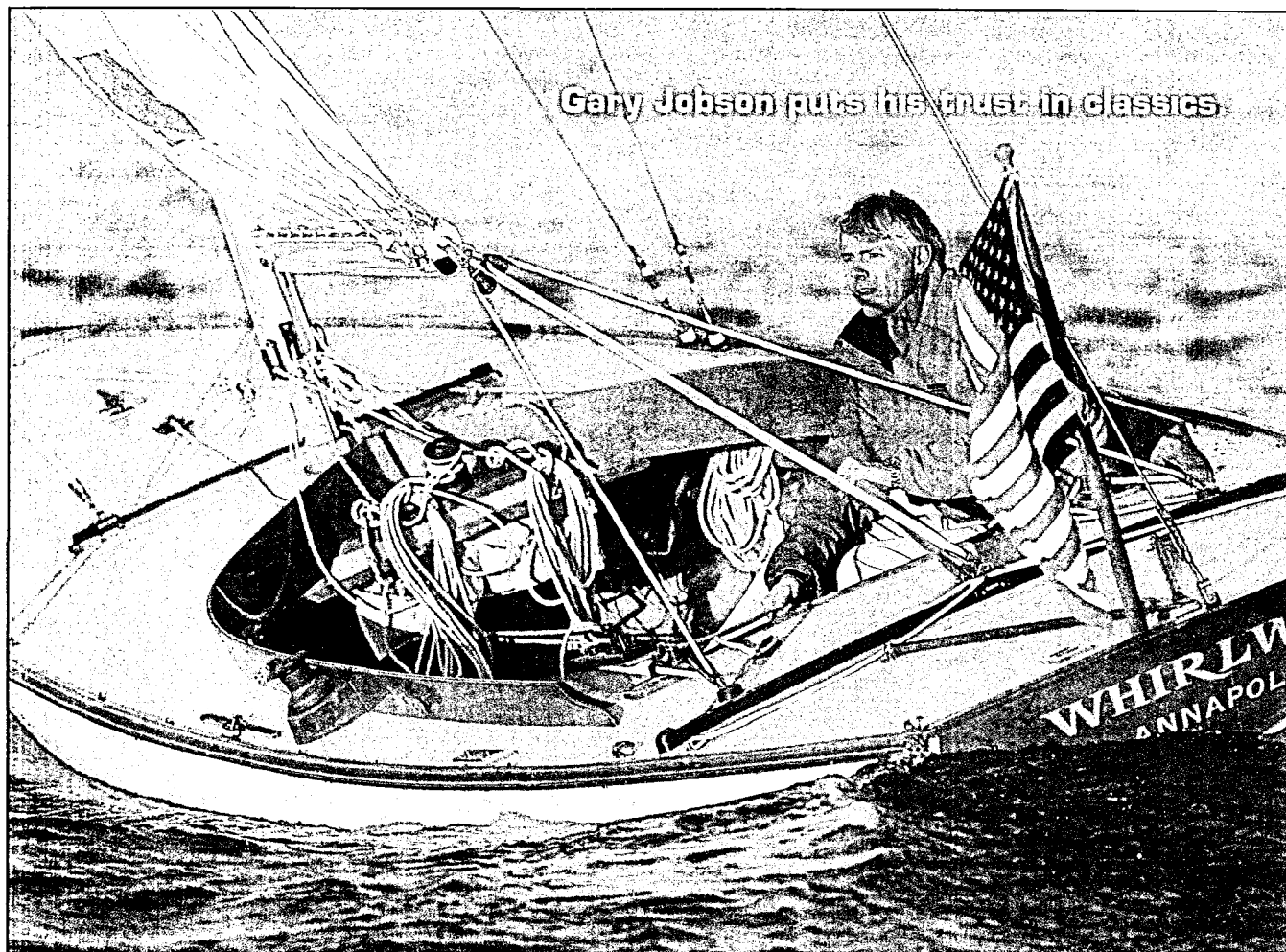
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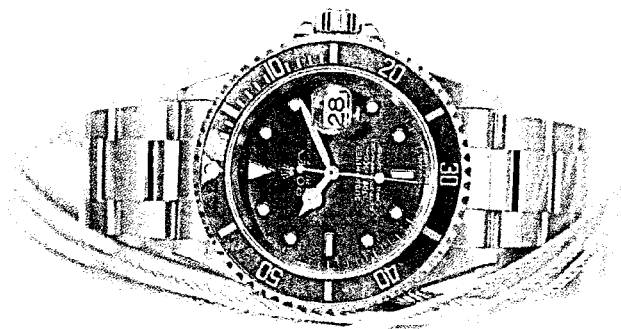
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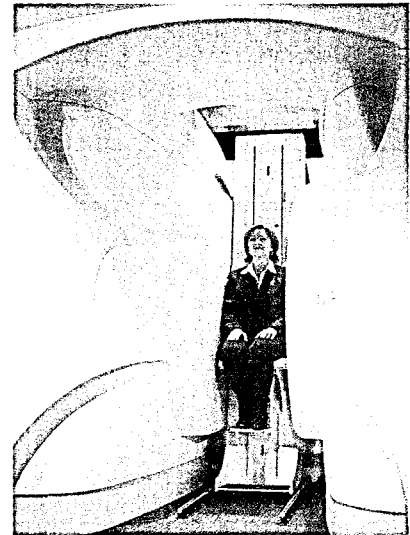
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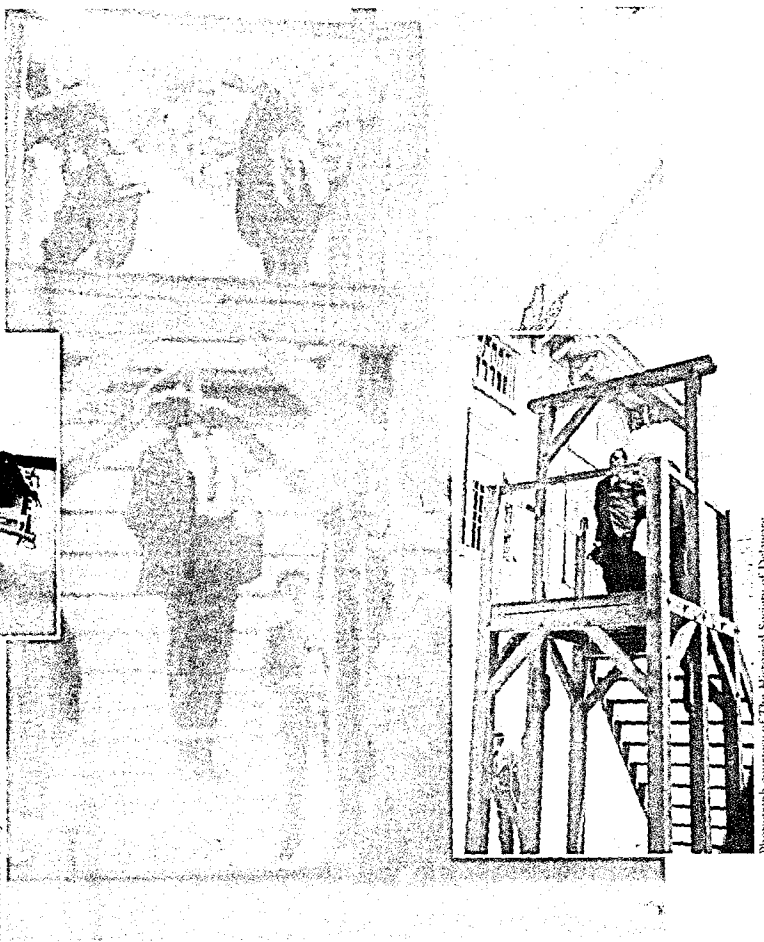
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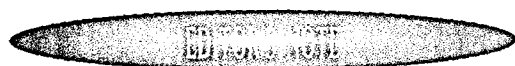
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LAW REVIEWS: Hollywood Capitalizes on Capital Punishment

Peter E. Hess & Maria F. Hess

Discussing criminal liability in his book, *The Common Law*, Oliver Wendell Holmes, Jr. concluded: "All acts are indifferent *per se*." For example, the act of moving one's finger a few millimeters, in itself, has no moral or legal import. But when the finger rests upon the trigger of a loaded gun that points towards a human being, that surrounding context may engender serious consequences. And if the outcome of that otherwise-indifferent finger movement is homicide, moral and legal issues of punishment arise immediately, including questions regarding the ultimate penalty of death.

Moral philosophers have debated the concept of capital punishment for centuries, and profound disagreement continues. Opponents label the practice barbaric – unsuited to a developed civilization with a modern culture. Proponents view the death penalty as a necessity – to deter serious crime and to encourage personal responsibility.

The contributors to this special issue of *Delaware Lawyer* cogently address several facets of this debate. Joe Bernstein's thorough analysis of the evolution of Delaware statutory and case law is a "must read" for any capital litigator in the First State. Justice Walsh contributes the judicial perspective in an insightful article about the problems of proportionality review in death penalty cases. While Professor Bookspan's thoughtful essay challenges the legitimacy of the juvenile death penalty, the article co-authored by Jane Brady and Paul Wallace carefully responds to many criticisms of capital punishment as administered in Delaware.

On the personal side, Kristin Froehlich's touching account of her experiences as a family member of a murder victim articulates vividly an aspect of this issue that is often neglected. As for my own article – which discusses constitutional and strategic questions relating to the post-conviction

stages of capital litigation – the facts, arguments, and even some of the dialogue come directly from my federal habeas caseload. Finally, Peter and Maria Hess appraise some treatments of the death penalty by the popular media.

Social enlightenment about difficult and far-reaching issues like capital punishment may indeed develop slowly, but rational discussion as found in these pages surely fuels its progress. As Holmes might have observed, by critically exploring the complex questions of responsibility and punishment, we may self-consciously realize that our underlying sentiments about these issues are not, after all, moral or legal in nature so much as they are political.

And in a democratic society, political debate should never cease.

David C. Glebe

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Joseph M. Bernstein

KEEPING THE DEATH PENALTY ALIVE

Having represented several capital defendants in my career as a Delaware lawyer, I am quite familiar with Delaware's experience in fashioning death penalty legislation that must conform to ever-changing federal constitutional requirements. In this article, I will explore this ongoing process, and my own experience with some key issues currently facing capital litigators.

The "modern era" of death penalty legislation in Delaware is best characterized as an effort to enact capital statutes that could withstand constitutional challenges. In *Furman v. Georgia*, 408 U.S. 238 (1972), the U.S. Supreme Court held that Georgia's statute violated the Eighth Amendment's prohibition against cruel and unusual punishments. Although the Court did not rule that capital punishment violated the Eighth Amendment *per se*, the Delaware Supreme Court was promptly asked to decide whether the state's then-existing death penalty scheme was constitutional under *Furman*.

In 1972, Delaware statutes generally mandated the death penalty for capital offenses. A sentence of death could be avoided, however, if the jury, "at the time of rendering [its guilty] verdict," recommended "mercy," thus allowing the court to impose a life sentence. See *State v. Dickerson*, 298 A.2d 761, 762 (Del. 1973). In *Dickerson*, the Court held that the Mercy Statute was unconstitutional under *Furman*, but that the Murder Statute, mandating a death sentence, was constitutional. *Id.*, at 764-767. Since invalidating the Mercy Statute eliminated the possibility of life imprisonment, the Court held that the Murder Statute, standing alone, could only apply prospectively. *Id.*, at 769. The Court also nullified all death sentences imposed under the Murder Statute, directing that the affected defendants be resentenced to life. *Id.*, at 771.

In response to *Furman* and *Dickerson*, the legislature enacted a new capital statute in 1974 (the "1974 Statute") that redefined first-degree murder, making death the mandatory punishment. The constitutionality of the statute was upheld in *State v. Sheppard*, 331 A.2d 142 (Del. 1974). During the following two years, nine cases resulted in death sentences under the new law.

In 1976, the U.S. Supreme Court decided the landmark cases of *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976), holding that "mandatory death statutes" in North Carolina and Louisiana violated *Furman* by failing to replace "arbitrary and wanton jury discretion with objective standards to guide . . . and make rationally reviewable" the sentencing process. *Woodson*, 428 U.S. at 303. Thus informed, the Delaware Supreme Court struck down the 1974 Statute in *State v.*

Spence, 367 A.2d 983 (Del. 1976).

The legislative response to *Spence* was a new statute (the "1977 Statute"), modeled after Georgia's law, which had been upheld in *Gregg v. Georgia*, 428 U.S. 153 (1976). The ruling in *Gregg* was based upon the view that Georgia sentencers would be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Id.*, 428 U.S. 191-192. In particular, the *Gregg* Court approved the bifurcated procedures for guilt-phase and penalty-phase determinations, and the requirement that the sentencer "find and identify at least one statutory aggravating factor before it may impose a penalty of death." *Id.*, 428 U.S. at 206-207. Both features were incorporated into the 1977 Statute.

Notably, a death sentence could be imposed under the 1977 Statute only upon the occurrence of two events. First, the jury had to find, unanimously and beyond a reasonable doubt, at least one "aggravating circumstance," as defined by the statute. Second, after weighing all aggravating factors against any "mitigating circumstances," the jury had to decide unanimously that the death sentence be imposed – a determination that was binding on the court. If the jury was not unanimous, the court was required to impose a life sentence, without the possibility of probation or parole. The following year, in *State v. White*, 395 A.2d 1082 (Del. 1978), the Delaware Supreme Court held the 1977 Statute to be constitutional under *Gregg*.

Death penalty procedures remained unchanged until 1991. Whether intended or not, under the 1977 Statute the number of death sentences decreased dramatically. In the thirteen years following *White*, 55 capital cases went to a penalty hearing. But death sentences were returned in only seven cases. See *Lawrie v. State*, 643 A.2d 1336, 1352 (Del. 1994) (Appendix).

In October of 1991, four defendants were convicted of robbing an armored car and killing two guards. By a vote of eleven to one, the jury failed to recommend sentences of death. See *Robertson v. State*, 630 A.2d 108, 1086-1087 (Del. 1993). The legislative response was swift:

The new law [herein, the "1991 Statute"] was enacted under a suspension of legislative rules on the day it was introduced. There was little debate in either house of the General Assembly. The catalyst for these rapid developments was the imposition of life sentences on defendants by a New Castle County jury in a much publicized capital murder case involving the execution style murders of two armored car guards.

State v. Cohen, 604 A.2d 846, 849 (Del. 1992).

The 1991 Statute effected sweeping revisions. The centerpiece of the law changed the roles of judge and jury during

capital sentencing proceedings. As noted, under the 1977 Statute a death sentence was imposed only upon the jury's unanimous decision. By contrast, the 1991 Statute required the jury to make an "advisory" recommendation to the judge, who then had final responsibility for determining the sentence. *Id.* In *Cohen*, the Court held that "designation of the trial judge as the sentencing authority does not violate the right to a jury trial," and observed that the "defendants concede that there is no federal right to the determination of punishment by a jury in a capital case." *Id.*, at 851.

This statutory reversal of the roles of judge and jury produced a significant increase in the number of death sentences. After the adoption of the 1991 Statute, 42 capital murder cases went to a penalty hearing, with death sentences imposed in 19 cases. See *Taylor v. State*, 822 A.2d 1052, 1060-1064 (Del. 2003) (Appendix "A"). The holding in *Cohen* went unchallenged until June 2000, when the U.S. Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In a five-to-four ruling, the *Apprendi* Court held that New Jersey's "hate crime" law violated the Sixth Amendment and the Due Process Clause. Apprendi pled guilty to possession of a firearm, which carried a penalty of five to ten years. But under the "hate crime" statute, an extended sentence was possible if the trial judge found, by a preponderance of evidence, that the defendant "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion. . ." *Id.*, at 486-487. The *Apprendi* Court stated:

It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt. *Id.*, 530 U.S. at 490. Whether the required finding was deemed an "element" of the offense or a "sentencing factor" did not matter. Rather, the only relevant inquiry was – "does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.*, 530 U.S. at 494 (emphasis added).

The *Apprendi* decision renewed a

debate among the justices regarding the validity of a sentencing judge's findings of "aggravating circumstances," under state capital sentencing schemes. The dissenters argued that the majority's position "expose[d] the defendant to a greater punishment than that authorized by the jury's guilty verdict," in direct conflict with *Walton v. Arizona*, 497 U.S. 639 (1990). In *Walton*, the Court upheld Arizona's capital statute, rejecting the defendant's argument that the federal constitution required the jury, not the judge, to determine the existence of statutory aggravating factors. See *Apprendi*, 530 U.S. at 538 (O'Connor, J., *dissenting*) (observing that majority opinion is "baffling to say the least" in light of *Walton*), and 530 U.S. at 522 (Thomas, J., *concurring*) (issue of *Walton's* viability remains "question for another day").

In Delaware, an *Apprendi*-based challenge to the 1991 Statute was rejected in *Capano v. State*, 781 A.2d 556 (Del. 2001). Referring to *Walton*, the Court in *Capano* stated that, "a majority of the [Supreme] Court concluded that the holding in *Apprendi* did not disturb the line of decisions approving of death penalty statutes like that in Delaware." *Id.*, 781 A.2d at 671.

However, in June of 2002, *Walton* was expressly overruled in *Ring v. Arizona*, 536 U.S. 584 (2002), thereby upsetting the *Capano* Court's expectation that *Apprendi* did not apply to capital sentencing laws like the 1991 Statute. In *Ring*, the Court held that the Sixth Amendment required that a jury must find, beyond a reasonable doubt, the statutory aggravating circumstances permitting the death penalty, because such factors operated as "the functional equivalent of an element of a greater offense." *Id.*, 536 U.S. at 609.

Clearly, the constitutional requirement in *Ring* that statutory aggravating circumstances be found by the jury rather than by the judge called into question the continuing validity of the prescribed process under the 1991 Statute. When *Ring* was issued, there were eight cases pending in the Delaware Supreme Court with judge-imposed death sentences. There were also several death penalty cases pending trial in the Superior Court.

The legislative response to *Ring* was a revision to the 1991 Statute, in July of 2002. See 11 Del.C. § 4209. The amendment provided that a death sen-

tence could not be imposed unless the jury found, unanimously and beyond a reasonable doubt, the existence of a least one statutory aggravating circumstance. The jury's role of giving "advisory opinions" – whether the aggravating factors outweighed the mitigating factors – was left intact. Also left intact was the judge's final decisionmaking power to impose the death penalty.

Despite *Ring*, the Delaware Supreme Court has consistently declined to hold the 1991 Statute unconstitutional. The Court has held, on a case-by-case basis, that *Ring* is satisfied by a jury's "finding during the guilt phase of the underlying facts that are necessary to establish a statutory aggravator beyond a reasonable doubt." *Reyes v. State*, 819 A.2d 305, 316 (Del. 2003). "When the very nature of a jury's guilty verdict simultaneously establishes the statutory aggravating circumstance. . . that jury verdict authorizes a maximum punishment of death" in a manner that comports with *Ring*. *Id.*, at 317.

It is difficult to predict the impact of Delaware's "Ring amendment" to the 1991 Statute upon the number or frequency of death sentences yet to be imposed. Having participated in one of the first capital cases to go to a penalty hearing under the "Ring amendment," my professional view is that juries will likely have a harder time reaching a unanimous verdict when the aggravating factor(s) themselves require additional findings of fact beyond the guilty verdict.

For example, in *Capano*, the jury unanimously found the defendant guilty of murdering Anne Marie Fahey, yet split eleven to one on the only statutory aggravator – whether the murder was the result of substantial planning and premeditation. *Id.*, 781 A.2d at 675. Similarly, in another capital case that I recently tried, the jury convicted the defendant of intentional murder, but also failed to reach a unanimous verdict, as required by the "Ring amendment," that the crime resulted from substantial planning and premeditation, or that the murder was committed for pecuniary gain. The defendant in that case was therefore ineligible for a death sentence.

In July of 2003, the legislature responded to the Delaware Supreme Court's interpretation of the jury's role in providing the judge with an "advisory opinion" whether aggravating factors outweighed mitigating circumstances. The previously prevailing notion was

that the judge should accord "great weight" to the jury's recommendation. *See, e.g., Capano*, 781 A.2d at 656, n.417. But that view was rejected by a Superior Court judge in *State v. Garden*, 792 A.2d 1025 (Del. Super. 2001) ("*Garden I*").

In *Garden I*, the defendant was convicted of two counts of capital murder for several armed robberies, one of which resulted in the death of a 36-year old mother of four children. *Id.*, 792 A.2d at 1031-1032. The jury determined that the aggravating factors *did not* outweigh the mitigating circumstances. *Id.*, at 1028. But the judge rejected the jury's finding, concluding that Garden should be sentenced to death. In declining to give the jury's non-binding recommendation "great weight," the trial judge rejected the notion that the jury represented the "conscience of the community." *Id.*, at 1029-1030.

The Delaware Supreme Court vacated the death sentence, remanding the case for further consideration of the penalty. *Garden v. State*, 815 A.2d 327 (Del. 2003) ("*Garden II*"). The Court recognized that the 1991 Statute was patterned on Florida's law, as articulated

in *Tedder v. State*, 322 So.2d 908 (Fla. 1975). The Court in *Garden II* wrote: [G]iven the legislative linkage between the 1991 [S]tatute and ... the *Tedder* standard . . . We thus hold that a trial judge must give a jury recommendation of life "great weight" and may override such a recommendation only if the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. *Garden II*, 815 A.2d at 343.

On remand, the trial judge again sentenced Garden to death, and sharply criticized the Delaware Supreme Court's adoption of the *Tedder* standard. *State v. Garden*, 2003 Del. Super. LEXIS 165 (Del. Super. 2003) ("*Garden III*"). Indeed, the trial court openly invited the legislature to overrule *Garden II*:

Where the Delaware Supreme Court has incorrectly interpreted a statute, it falls to the legislature to correct judicial misinterpretation and clarify legislative intent. If the Delaware General Assembly believes that the *Garden* decision does not express the will of the people, then it should adopt an amendment to the capital punish-

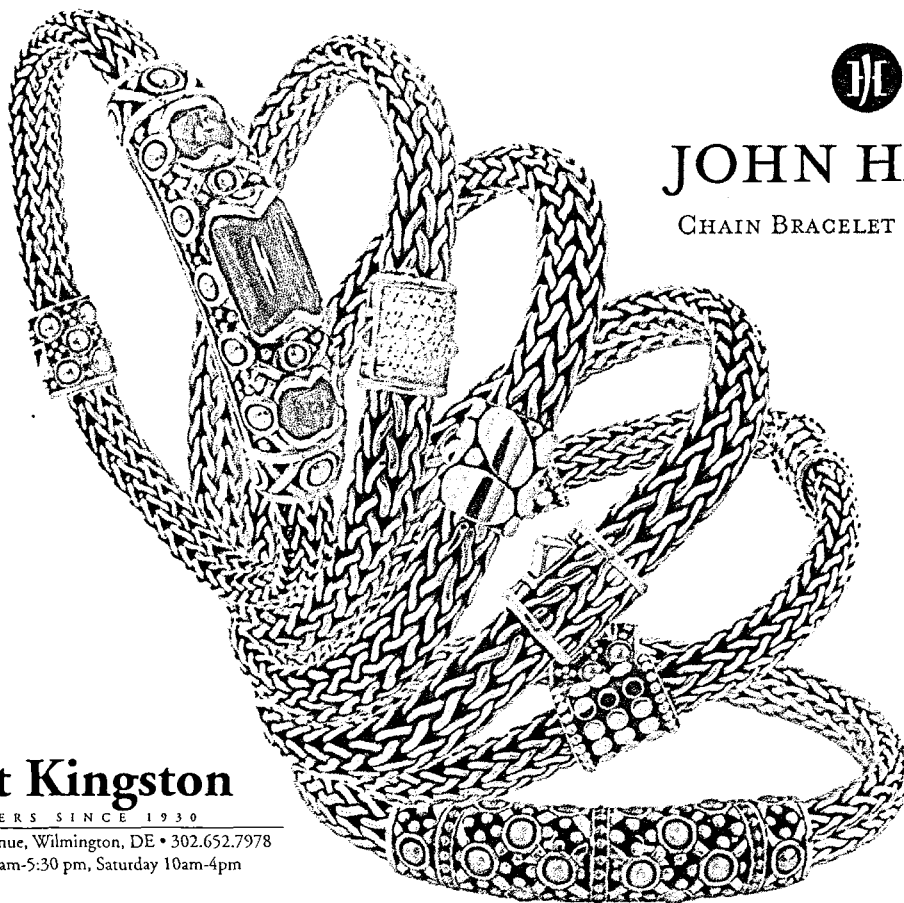
ment statute which rejects the *Garden* ruling. If it does not do so, then this Court will be satisfied that *Garden* is correct.

Garden III, 2003 Del. Super. LEXIS 165, at *16-*17.

The legislative response was House Bill 287, effective July 15, 2003. *See* 74 Del. Laws, c. 174. The stated purpose of the statute was to "reverse the Delaware Supreme Court's judicial misinterpretation of Delaware's death penalty statute by repealing the *Tedder* standard." Section 4209(d)(1) of Title 11 now provides that "[T]he jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court."

As the esteemed philosopher Yogi Berra observed: "It is difficult to make predictions, especially about the future." In the present context, the safest prediction is that the ongoing debate regarding the procedures by which the death penalty is implemented in Delaware will continue to generate more judicial decisions and additional legislation. Stay tuned. ♦

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Joseph T. Walsh

THE LIMITS OF PROPORTIONALITY REVIEW IN DEATH PENALTY CASES

It is now an accepted precept of federalism that there are few areas reserved exclusively to state jurisdiction in capital punishment adjudication. Over time, the Supreme Court of the United States, and to a lesser extent the federal courts of appeals, under the Eighth Amendment or related due process or equal protection standards, have defined the limits for the imposition of the death penalty under state law. To the extent that the current view assumes federal oversight insuring a minimum of individual rights – with the states free to experiment above the minimum – the question naturally arises as to what the states may do in their laboratories under the aegis of state constitutions or statutes regarding the formulation of non-federal standards.

Any discussion of the role of the states in the area of capital punishment must begin with the premise that whether capital punishment may be imposed for commission of an offense is a matter, in the first instance, for a state to determine. While the Supreme Court has restricted the imposition of the death penalty under due process standards, federal law obviously has not mandated its use. For the most part, the role of federal law, particularly at the level of judicial review, has been one of supervision of capital convictions imposed in state courts.

It is notable that state institutions responsible for implementing state law, whether in the area of capital punishment or otherwise, include more than just the judiciary. Legislators, who exercise the basic law-enacting function, will initially determine whether the organic or substantive law of the state authorizes the imposition of capital punishment. Furthermore, state legislatures, through statutory amendments, may limit or broaden the use of capital punishment and define the scope of appellate review. In certain states, the Governor, whether acting alone or in concert with executive agencies such as a board of pardons (or some analogous body) may, through the power of clemency, affect the frequency of the imposition of capital punishment. The involvement of the non-judicial branches of state governments has been most noticeable in the current debate over whether the death penalty is fairly imposed, as evidenced by recent moratoriums on the death penalty in Illinois and Maryland. For the most part, however, state courts of last resort, exercising final review under state constitutional provisions, continue to be the principal fora for testing the legality of death sentences.¹

One area in which state law controls exclusively is that of proportionality review, *i.e.*, whether the death penalty in a

particular case is appropriate given the nature of the offense and the character of the offender. Because the Supreme Court has refused to recognize a basis for the requirement of proportionality in federal constitutional law, this inquiry has become solely a state matter, almost by default.²

Proportionality Distinguished

At the outset, it is helpful to distinguish the types of proportionality review discussed in the case law and academic commentary. From one perspective, the principle of proportionality may determine whether the imposition of the statutorily authorized penalty for a designated offense is, *per se*, impermissible. When so applied, this general form of proportionality could conceivably extend beyond capital offenses, such that a long mandatory sentence for a trivial misdemeanor, for example, might well fall within its scope. Even if the focus is limited to examining whether the death penalty itself is justified for offenses not resulting in death of the victim, state courts rarely declare a statute unconstitutional because it mandates a death sentence for such offenses.³

The principle of proportionality, when applied by state courts in capital cases, arises most often in claims that the punishment was not proportionate to the defendant's culpability, when measured against similar crimes by other defendants. This type of proportionality analysis has become known as "comparative" review, and this article will discuss its use and effectiveness. The analysis may be conducted under state constitutional standards or, as in Delaware, where direct review of capital convictions is mandated by statute. At present, twenty of the thirty-eight death penalty states provide for some form of comparative proportionality review. Of local interest, Delaware and New Jersey require such review, while Pennsylvania and Maryland do not.⁴

While proportionality review offers state appellate courts a theoretical non-federal mechanism for determining whether the death penalty has been arbitrarily imposed, courts attempting to conduct comparative proportionality review have struggled to devise a workable methodology. The principal argument for such review is that it safeguards against the arbitrary and excessive imposition of the death penalty. It has been contended that juries, sitting only in single cases, lack the experience needed to evaluate the appropriateness of imposing capital sentences. Appellate judges, however, can measure the result in a specific case against similar cases. Moreover, because they are removed from the emotional trial setting, appellate judges can exercise this function in a more objective and systematic fashion.⁵

It is true that appellate judges, sitting *en banc* as required by statute, will frequently bring to the task of comparative proportionality review a cross-section of informed judgment and experience. The difficulty in application lies not in the ability of appellate judges to undertake such review, but in the formulation of the database of cases used for comparison, and in the weighing of factors for determining similar cases and defendants. Thus, devising a proper universe of cases remains the primary, and most challenging, task in proportionality review. Should the comparison be limited to those cases in which the defendant actually received the death sentence? Or should it include cases in which the defendant was charged with a capital offense but received life imprisonment by reason of a jury verdict, or as occurs more often, because of a negotiated guilty plea?

The Delaware Experience

While the Delaware statute mandates proportionality review as part of the direct appeal of a death sentence, it does so in general terms. The "automatic" review, set forth in 11 *Del. C.* § 4209(g), calls for the Delaware Supreme Court to determine:

Whether, considering the totality of evidence in aggravation and mitigation . . . the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.

Notably, this provision requires the Court to undertake a two-part analysis: (i) whether the death penalty was "arbitrarily or capriciously" imposed or recommended, and (ii) whether the penalty was "disproportionate" when compared to "similar cases." Since these exercises implicate consideration of both the circumstances of the offense and the character of the offender, their application is directed to the same context. But the arbitrariness analysis is a stand-alone form of review focusing upon the result in a particular case, without comparison to sentences in "similar" cases. Although the Delaware Supreme Court has not applied the arbitrariness test, *per se*, to invalidate a sentence, it could be viewed as implicitly requiring a due process analysis directed to claims of plain error in sentencing.

The comparative proportionality review required by Section 4209(g) has

been applied, however, in each case where the death penalty has been imposed. Like other courts engaging in such review, the Delaware Supreme Court has looked to the "universe" of capital cases, *i.e.*, where the defendant, convicted of murder in the first degree, proceeded to a death penalty hearing. The Court's task is to "look to the factual background of the relevant cases to determine the proportionality of the sentence imposed." *Clark v. State*, 672 A.2d 1004, 1010 (Del. 1996).

The Delaware Supreme Court has acknowledged that a "definitive com-



parison of the universe of cases is almost impossible." *Pennell v. State*, 604 A.2d 1368, 1376 (Del. 1992). The effort to compile a reliable universe was further complicated in 1991, when Delaware's capital statute was amended to eliminate the need for jury unanimity in the recommendation of the death penalty. Despite the change, the Court has continued to consider pre-1991 cases, while recognizing that cases governed by the 1991 amendment "are most persuasive." *Lawrie v. State*, 634 A.2d 1336, 1350 (Del. 1994). Even the "broadened" universe, however, does not provide an easily-applied test. Cases arising out of violent domestic confrontations may fall into the same broad category, but even in such cases relevant differences arise – such as where the defendant has stalked the victim as opposed to a killing that occurs in a single episode. Similarly, homicides occurring during another felony, such as robbery or rape, may be comparable, but a

death resulting from a burglary gone awry may present a different picture.

Even where the reviewing court is able to compile a pool of comparative cases, there remains the difficult task of applying the aggravating and mitigating factors which, in effect, render the defendant more, or less, culpable than the defendants in the comparison pool. This exercise replicates, to a significant degree, the weighing of aggravating and mitigating circumstances at the trial level, both by the jury in its recommendation and by the sentencing judge as the final arbiter of the penalty.

The New Jersey Experience

A troubling aspect of constructing a universe of cases lies in accounting for the element of prosecutorial discretion. The death penalty process begins with the charging step – a factor entirely within the prosecutor's control. Influences upon the prosecutor's discretion to charge, or not charge, may vary, and may never be publicly disclosed. The motivation for aggressive charging of capital crimes is also open to serious question.⁶ Judicial efforts by courts to include prosecutorial charging discretion in the calculus have met resistance and, as the New Jersey experience indicates, have created additional problems for courts attempting effective proportionality review.

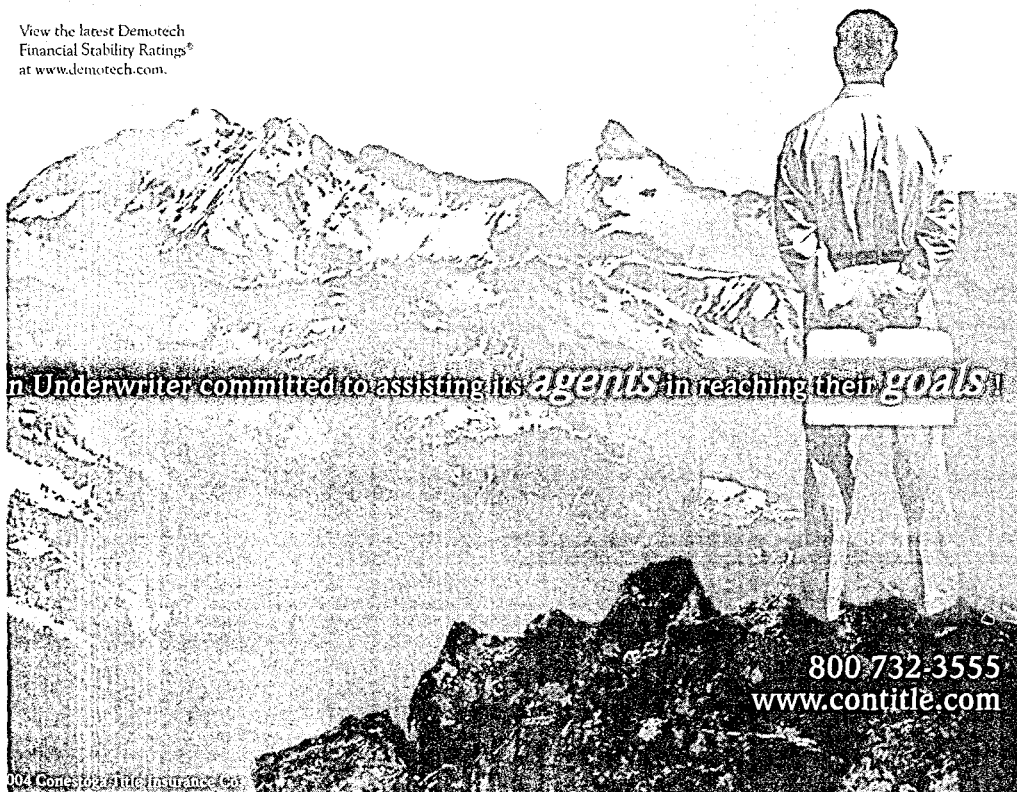
The Supreme Court of New Jersey has struggled to formulate a workable construct for proportionality review under state law, which has been complicated by the need to define, and redefine, the universe of cases. The Court's efforts resulted in the appointment of a Special Master to examine the current methodology underlying proportionality review and to test its assumptions.⁷ While the Court later accepted certain recommendations of the Special Master, it rejected others.⁸

The New Jersey Supreme Court, sensitive to the need to expand its universe of cases, determined that all cases that were "death-eligible" should be included in its comparison pool. The universe thus consisted not only of cases in which the death penalty was a sentencing option, but cases in which the offense permitted a death sentence but where the state had not sought the death penalty or the defendants had obtained non-capital pleas. Although the resulting data provided a broad array of "similar" cases, the Court ultimately determined that "the raw numbers failed to account for the qualitative

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Hence, although proportionality review is one area of capital punishment jurisprudence in which the states are free to experiment, the results to date are less than satisfactory as an assertion of state law standards under the new federalism. Indeed, many believe that the entire concept of comparing death

penalty comparison create unique problems. Because "death is different," and the penalty irrevocable once imposed, there is little room for experimentation.

Conclusion

In theory, comparative proportionality review permits state appellate courts to exercise a unique function in capital punishment jurisprudence – preventing the imposition of the death penalty in cases where it is excessive when compared with other cases where it has been

applied or rejected. In practice, however, the use of comparative proportionality review has been limited by the absence of a workable methodology for establishing a universe of cases and criteria for effective comparison. To date, as far as can be determined, no reviewing court has set aside a death sentence on the ground that it was disproportionately imposed, using comparative standards. This does not mean that the exercise has not been undertaken in good faith, but does suggest that much needs to be done if comparative proportionality review at the state level is to be meaningful. ♦

NOTES

See James S. Liebman, *et al.*, "Capital Punishment: Error Rates in Capital Cases, 1973-1995," 78 *Tex. L. Rev.* 1839, 1847 (2000) (collecting data showing that more than 40 percent of capital sentences reviewed by state high courts were overturned on basis of "serious error").

See, e.g., *Pulley v. Harris*, 465 U.S. 37 (1984) (proportionality review is not required exercise of federal oversight of capital sentencing).

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7. *State v. Loftin*, 724 A.2d 129, 135 (N.J. 1999).

8. *In Re Proportionality Rev. Project*, 735 A.2d 528 (N.J. 1999).

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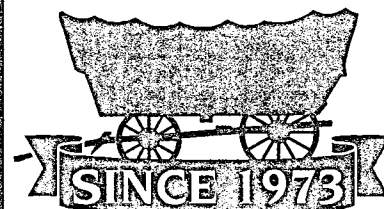
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included in its comparison pool. The universe thus consisted not only of cases in which the death penalty was a sentencing option, but cases in which the offense permitted a death sentence but where the state had not sought the death penalty or the defendants had obtained non-capital pleas. Although the resulting data provided a broad array of "similar" cases, the Court ultimately determined that "the raw numbers failed to account for the qualitative

nature of aggravating and mitigating factors," and the test was abandoned.⁹ Further complicating New Jersey's effort to provide meaningful comparative proportionality review was a 1992 legislative enactment that limited the universe of cases to those in which the death penalty had been imposed.¹⁰

The effort of the New Jersey Supreme Court to improve comparative proportionality review by enlarging the comparison pool as broadly as possible is laudable but, to date, has not yielded a workable methodology. In theory, taking into account death penalty eligible cases, which are not prosecuted as such, seems to have merit. Unless, however, one is prepared to construct a supplementary framework of the factors influencing prosecutorial discretion in capital case charging, the universe remains incomplete.

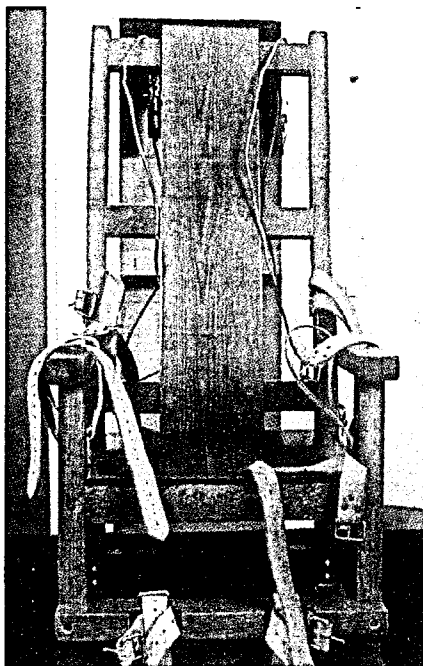
The Prospect for Meaningful Review

While the Delaware approach necessarily excludes certain death eligible cases – which are not prosecuted as such, and to that extent limit the pool – it has the advantage of a readily-defined group of cases, since the trial judge must file a post-trial report outlining the nature of the offense, as well as the aggravating and mitigating factors, in each case submitted for a capital sentencing hearing. Moreover, because of the relatively small number of first-degree murder cases actually prosecuted, compared to the number in larger states, Delaware offers the opportunity to compile a case pattern to which certain criteria could be applied. At present, the Delaware universe permits rough analysis based on such general categories as nature of the offense and relationship between offender and victim, but the empirical results remain undeveloped. Whether issues of comparative disproportion in capital punishment can ever be subject to precise statistical analysis is open to question. Factors such as the nature of the killing or the relationship of the actors might find comparison, but evaluation of the defendant in terms of future dangerousness or rehabilitation will continue to be highly subjective and speculative.

Hence, although proportionality review is one area of capital punishment jurisprudence in which the states are free to experiment, the results to date are less than satisfactory as an assertion of state law standards under the new federalism. Indeed, many believe that the entire concept of comparing death

sentences is beset with so many problems that the exercise is incapable of meaningful application.¹¹

Comparative sentence analysis is not a new concept in the criminal justice system. The use of sentencing guidelines at both the federal and state levels has increased in recent years, reflecting efforts to develop norms or standards against which individual sentences may be compared. Such guidelines also attempt to apply a mix of sentencing principles and empirical results in an effort to guide the sentencer, usually a judge, in the determination of an



appropriate penalty. The difference, however, is that sentencing guidelines provide an *ex ante* analysis while comparative proportionality review of death sentences is an *ex post* exercise. The role of the appellate court in death penalty review is not to determine an appropriate sentence in the first instance by applying known standards, but to test for the aberrational result. Thus, while sentencing guidelines might offer a useful analogy, the many variables included in any universe of cases used for death penalty comparison create unique problems. Because "death is different," and the penalty irrevocable once imposed, there is little room for experimentation.

Conclusion

In theory, comparative proportionality review permits state appellate courts to exercise a unique function in capital punishment jurisprudence – preventing the imposition of the death penalty in cases where it is excessive when compared with other cases where it has been

applied or rejected. In practice, however, the use of comparative proportionality review has been limited by the absence of a workable methodology for establishing a universe of cases and criteria for effective comparison. To date, as far as can be determined, no reviewing court has set aside a death sentence on the ground that it was disproportionately imposed, using comparative standards. This does not mean that the exercise has not been undertaken in good faith, but does suggest that much needs to be done if comparative proportionality review at the state level is to be meaningful. ♦

FOOTNOTES

1. See James S. Liebman, *et al.*, "Capital Attrition: Error Rates in Capital Cases, 1973-1995," 78 *Tex. L. Rev.* 1839, 1847 (2000) (collecting data showing that more than 40 percent of capital sentences reviewed by state high courts were overturned on basis of "serious error").

2. See, *e.g.*, *Pulley v. Harris*, 465 U.S. 37 (1984) (proportionality review is not required exercise in federal oversight of capital sentencing).

3. But see *State v. Gardner*, 947 P.2d 630 (Ut. 1997) (statute authorizing death penalty for aggravated assault by prisoner violated state constitutional prohibition against cruel and unusual punishment); compare *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty is impermissible for crime of rape).

4. See 11 *Del. C.* § 4209(g) (requiring proportionality review of capital sentences).

5. See Penny J. White, "Can Lightning Strike Twice?: Obligation of State Courts After *Pulley v. Harris*," 70 *U. Colo. L. Rev.* 813, 816 (1999).

6. See Herman J. Hoying, "A Positive First Step: The Joint Legislative Audit and Review Commission's Review of Virginia's System of Capital Punishment," 14 *Cap. Def. J.* 349 (2002) (reporting results of study concluding, *inter alia*, that prosecutors sought death penalty more aggressively in high density population areas rather than low or medium density areas). It would seem that the risk of disparate prosecutorial discretion based on location of the offense would not be a significant factor in smaller states such as Delaware, where the decision to seek the death penalty is, presumably, vested in central authority at the state level.

7. *State v. Loftin*, 724 A.2d 129, 135 (N.J. 1999).

8. *In Re Proportionality Rev. Project*, 735 A.2d 528 (N.J. 1999).

9. *Id.*, at 531.

10. N.J.S.A. 2C-11-3c, L. 1992 c. 5.

11. See Barry Latzer, "The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey)," 64 *Alb. L. Rev.* 1161 (2001) (comparative proportionality review is methodologically unsound and theoretically incoherent).


M. Jane Brady & Paul R. Wallace

THE DEATH PENALTY: Delaware's Experience

For all but four years of this country's history, capital punishment has been a part of the sentencing structure of the vast majority of states, with the approval of the nation's highest court.¹ Consistently, opinion polls evidence overwhelming support for the death penalty in serious murder cases.² Over time, however, concerns about capital punishment have been raised, usually relating to: (1) the integrity of convictions, (2) a perceived disproportionate application of the penalty to minority defendants, (3) the competency of capital defense counsel, (4) claims that the death penalty does not deter serious crime, and (5) the costs of prosecution.

Although death penalty opponents typically voice disturbing questions, many times such concerns are demonstrably inaccurate. In addition, there is often an imbalance in what is written about the death penalty, in part because many in the media itself, including the major print media outlet in Delaware, consistently oppose the sanction.³

Nevertheless, the decision that capital punishment may be an appropriate sanction in some cases represents "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."⁴ Moreover, the proponents of capital punishment fully recognize its gravity, and the fact that it can result only from a horrible crime that took the life of an innocent victim. Thus, proponents do not necessarily advocate *more* executions, but rather, maintain that the option must be available in appropriate cases.

The concerns of death penalty critics should not be ignored, of course. Every jurisdiction should guard against problems that may affect public confidence in our justice process. But such problems are neither rampant nor universal, and many jurisdictions take special care to address these concerns. Delaware has such a justice system.

This article is not meant to change the minds of those opposed to the death penalty on religious or moral grounds, nor to advocate that the use of capital punishment should increase. This article seeks instead to identify the criticisms often leveled by opponents of the death penalty, and to examine Delaware's experience relating to those concerns. Such a review shows that despite the experience in other jurisdictions, the death penalty is fairly and effectively administered in Delaware.

"Actual Guilt" – The Integrity of Delaware Convictions

Death penalty opponents regularly claim that numerous innocent people have been sentenced to death, only to be exonerated later. The Death Penalty Information Center (DPIC) Innocence List forms the basis for most of these

claims. The DPIC and those who rely upon it uncritically accept that 102 innocent prisoners have been released from death rows across the country.⁵ But a careful examination demonstrates convincingly that these numbers are not an accurate reflection of reality.⁶

The problems experienced in some jurisdictions have been unfairly generalized by death penalty abolitionists. In Illinois, for instance, where a moratorium on executions was imposed in 2000 due to a series of reviews that permitted the release of 13 death-row inmates, public confidence in that state's system was shattered. Attempts to restore confidence in Illinois' justice system have included legislation regarding the videotaping of interrogations and confessions in murder cases, and new laws allowing murder defendants greater access to DNA testing.⁷ Furthermore, the Illinois police community has been urged to end resistance to initiatives calling for the decertification of officers who have engaged in dishonest conduct in the investigation of criminal cases.

Notably, these "innovations" in Illinois are practices that have a long institutional history in Delaware. Consequently, there is no evidence that any "actually innocent" person has ever been sentenced to death in this state. As the U.S. Supreme Court has held: "Actual innocence means factual innocence, not mere legal insufficiency."⁸ Accordingly, determining "actual innocence" must include consideration of evidence of "actual guilt" that was either excluded or unavailable at trial.⁹ Put simply, no Delaware prisoner convicted of capital murder has ever been shown to be "actually innocent," and thus wrongly sentenced to death.

There are several good reasons for Delaware's record of excellence in the investigation and prosecution of capital murder cases. It begins with the quality and professionalism of the state's police departments. The criminal justice community in Delaware is relatively small and does not tolerate ineptitude, much less deceit, from its law enforcement officers. Delaware juries are also of the highest quality – they will not convict when any reasonable doubt of guilt is present. Lastly, Delaware prosecutors have long supported those investigative and trial practices that foster the greatest degree of confidence in the identification and prosecution of criminal offenders.

Such a record has led to strong votes of confidence in the integrity of our capital convictions. For example, although Senator Joseph R. Biden has recently called for a nation-wide delay in federal executions pending a study of the fairness and uniformity of sentences, he made no such request of Delaware. As stated by his spokesperson, Margaret Aiken, Senator Biden "believes Delaware has a very good system, and he would like to see Delaware's system replicated nationally."¹⁰

Racial Composition of Delaware's Death Row

Many opponents allege that capital punishment is applied in a discriminatory manner because the population of many states' death rows does not reflect the racial composition of the general population. Because the death penalty is an individual sentence for individual acts, however, comparison between these two statistics is flawed. Instead, the proper analysis must focus on whether there is disparate treatment on racial grounds of those whose conduct meet the objective criteria for application of the death penalty. This claim of racial disparity has never even been credibly advanced in Delaware, much less supported by evidence, even with the analysis urged by death penalty opponents.¹¹

Based on the Year 2000 census, Delaware's population was 796,165, consisting of 74.6% Caucasian, 19.2% African-American, 4.8% of Latin American origin, 2.1% Asian, and 2.0% identified as some "other" race.¹² Currently, of the 14 inmates sentenced to death in Delaware, 71.4% are identified as white and 28.6% are African-American.¹³ To the extent that there is a slightly greater percentage of African-Americans on death row than in Delaware's general population, one must recognize that the racial makeup of the murders which led to these death sentences is consistent with that of most homicides and other violent crime – murder is usually intra-racial.¹⁴ Consequently, to refrain from seeking the death penalty for the minority defendant who commits a capital murder in Delaware would almost always mean that the slaying of a minority victim is treated less seriously.

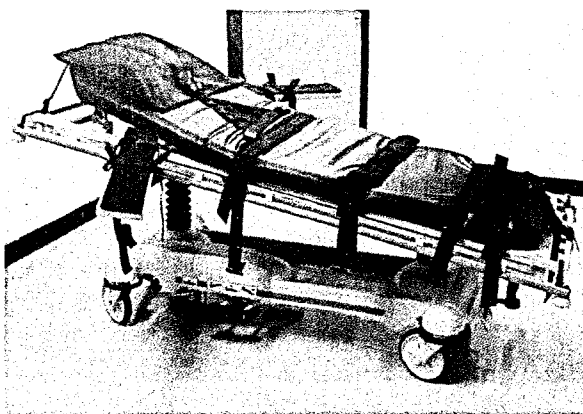
Each case should be and is evaluated on its own merits, without regard for the race of the killer or the victim. There simply is no evidence that a minority defendant is more likely to receive the death penalty in Delaware than an equally culpable white murderer.

The Quality of Representation of Capital Defendants

One of the most common criticisms raised by death penalty opponents finds its least support in Delaware. The quality of representation that capital defendants receive in our state is outstanding. This is true whether capital defendants are represented by private attorneys or appointed counsel.

A comparison of the ABA guidelines for defense counsel in capital cases¹⁵ with longstanding Delaware practice speaks extremely well for the quality of representation provided in this state. From the initial structure of defense teams to advocacy in post-conviction litigation, Delaware has long met or exceeded the ABA's guidelines.

This favorable history is clear in Delaware's death penalty jurisprudence. Only one reversal of a Delaware death penalty case – overturning the sentence only – has been based on a finding that the defendant received inadequate representation by his trial lawyer.¹⁶ In that case the attorney was held not to have adequately investigated or argued available mitigating evidence at the penalty phase of the trial. Significantly, the same defendant, with a new lawyer and a new penalty hearing, was again sentenced to



death. It is also noteworthy that the initial attorney was privately-retained, and to date no publicly-appointed lawyer in a Delaware capital case has ever been found ineffective.

As stated by Judge Morton I. Greenberg of the Third Circuit Court of Appeals:

[w]hatever may be true in other areas of the country with respect to the defense of persons charged in a capital case, defendants are certainly getting first-rate defenses . . . in Delaware.¹⁷

Capital Punishment as a Deterrent

Death penalty opponents wholly discount its possible deterrent effects, due to the claimed irrationality of murder itself as well as the perceived mental or psychological limitations of the perpetrators. Even proponents of the death penalty have eschewed the deterrence argument to some degree. However, recent studies call into question the "accepted" hypothesis that executions do not deter further homicides.

While opponents have argued that murder rates actually rise in states with capital punishment,¹⁸ research at Emory University and the University of Colorado has concluded that the death penalty has *saved lives* in capital jurisdictions that actually carry out executions.¹⁹ After reviewing thousands of capital cases, each group concluded that the actual application of the death penalty correlated with a significant reduction in homicides, suggesting that capital punishment had a strong deterrent effect.²⁰

Delaware's experience regarding possible deterrent effects is similar. The first post-*Gregg* execution in Delaware occurred in 1992, and there have been 13 since then. As of April of 2002, the state had the nation's highest execution rate (0.166/10,000 pop.). During that period, however, Delaware's murder rate dropped approximately 20%, and is currently about one-half the national average.

The debate on deterrent effects will continue, but it is indisputable that the death penalty prevents future harm from the dangerous individuals who have already committed capital crimes. Imprisonment alone does not prevent escapes, nor the murder of guards, visitors, or other inmates. Killings by escapees or inmates – both of which Delaware has experienced

– speak to the extreme continuing dangerousness of certain criminals who cannot be deterred otherwise. Execution is sometimes the only responsible way to prevent these offenders from future killings.

The Costs Associated With Death Penalty Cases

Although some studies purport to show the excessive costs associated with capital cases,²¹ estimates are widely divergent, and the findings inconsistent. Hence, in formulating policy regarding the justice system's response to homicide, cost considerations should be questioned carefully.

The decision to prosecute a capital case should not be based on cost. If a seven-year-old child is abducted, and found nude and murdered, should we ask how much it will cost to find the killer before we decide if it is worth our while to do so? *Absolutely not!* The decision to prosecute must be based upon considerations of public safety, punishment, and deterrence – not cost. To

argue otherwise suggests the absurd notion that we prosecute misdemeanors vigorously but neglect major felony cases.

The reality is that the prosecution of serious offenses, which involves forensic examinations and other complex investigative procedures, will be relatively expensive and time consuming. In capital cases, special court provisions are utilized to assure the guilt of the offender, the integrity of the conviction on appeal, and the quality of the defender's representation.²² Undoubtedly, trials including these additional safeguards are more expensive, but any "cost analysis" based on such factors will be flawed.

Death penalty opponents have misleadingly inflated estimates of costs to dissuade legislatures and prosecutors from pursuing capital cases.²³ Seizing upon this illusory claim, some murderers have offered to "save taxpayers millions of dollars" by pleading guilty in exchange for non-capital treatment.²⁴ However, any attempt to balance the true costs in this context cannot focus solely upon the financial outlay associated with the prosecution, but must also account for the inestimable value of the victim's life to both family and society, the costs of persistent litigation by those serving life sentences, and the continued safety of the community when a proven dangerous criminal is incarcerated. There is no formula that can adequately render such an accounting.

Conclusion

While on escape status, Billie Bailey robbed a liquor store clerk at gunpoint, then forcibly entered the home of Gilbert and Clara Lambertson, aged 80 and 73 years, where he shot them both several times. As he fled the Lambertsons' farmhouse, Bailey also attempted to shoot the arresting police officer.²⁵

David Dawson escaped from the Delaware Correctional Center with three others and stole a car. Separating from his cohorts, Dawson entered the home of Madeline Kisner, bound and gagged her, and viciously stabbed her 12 times. Mrs. Kisner's young son found her lifeless body upon his return from school.²⁶

William Flamer and Andre Deputy illegally entered the house of Bayard and Alberta Smith, an elderly couple. Flamer stabbed Mr. Smith 79 times and Mrs. Smith 66 times, ransacked their home, and robbed them.²⁷

James A. Red Dog was convicted of

robbery, had previously escaped from prison, and had committed two homicides in another state. While on federal release to Delaware, Red Dog murdered Hugh Pennington in the home he shared with his mother, binding his hands and feet and repeatedly slashing his throat.²⁸

The realities of these crimes illustrate why the Delaware public supports the death penalty. These were dangerous criminals who presented a serious risk to whomever crossed their paths. Their victims did not choose lifestyles that put them in harm's way – many were brutally murdered in their own homes. There is no guarantee that someone who is merely incarcerated for murder will not kill again – indeed, two of the killers mentioned above murdered again after their escapes.

The public will support a justice system that includes capital punishment when it has confidence in the system's integrity, as well as its effectiveness in securing convictions, incarcerating the guilty, and imposing sentences commensurate with the crimes. We continue to achieve those goals in Delaware. A carefully-crafted statute, a professional and conscientious law enforcement community, competent counsel, fair and consistent administration without bias, and measured and appropriate sanctions all serve to provide Delaware with a system of capital punishment that is effective and just. ♦

FOOTNOTES

1. See *Furman v. Georgia*, 408 U.S. 153 (1972) (wide-ranging discretion under state death penalty statute is unconstitutional). Following *Furman*, many states adopted more narrowly-tailored capital statutes, which were upheld in 1976. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976). See also *State v. White*, 395 A.2d 1082 (Del. 1978).
2. A Gallup survey in May of 2003 revealed almost three-quarters of those polled in favor of capital punishment. See www.clarkprosecutor.org/html/links/dplinks.htm for an excellent tracking of public opinion polling data.
3. See Local Opinion, *The News Journal*, Jan. 21, 2003, p. A6.
4. *Gregg*, 428 U.S. at 184.
5. See "Innocence: Freed from Death Row" at www.deathpenaltyinfo.org.
6. See W. Campbell, "Critique of DPIC List (Innocence: Freed from Death Row)" (2002), at www.prodeathpenalty.org.
7. Eric Ferkenhoff, "Illinois Preparing Broad Reforms on Capital Punishment," *Boston Globe*, June 15, 2003, p. A4.
8. *Bousley v. United States*, 523 U.S. 614, 623 (1998).

9. *Schlup v. Delo*, 513 U.S. 298 (1995).
10. Todd Eldred, "Stay of Execution Lifted," *Delaware State News*, Nov. 16, 2000.
11. Compare R. Paternoster and R. Brame, "An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction" (May 2003), at www.urhome.umd.edu/newsdesk/pdf/exec.pdf.
12. See <http://quickfacts.census.gov/qfd/states/10000.html>.
13. See www.state.de.us/correc/Data/DeathRow.htm.
14. In all but two cases, the murderer and victim were of the same race. In one of those two, the killer was black and the victim white. *State v. Garden*, 815 A.2d 327 (Del. 2003). In the other, a white man murdered an African-American victim. *State v. Zebroski*, 1997 WL 528287 (Del. Super. 1997).
15. See American Bar Association, "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" (2003).
16. *State v. Wright*, 653 A.2d 288 (Del. Super. 1994).
17. Transcript of oral argument in *Hameen v. Delaware*, No. 96-9007 (3d Cir. Feb. 22, 2000), at p. 73.
18. See "States With Death Penalty v. States Without," at www.deathpenaltyinfo.org.
19. H. Dezhbakhsh, P. Rubin, and J. Sheperd, "Does Capital Punishment Have a Deterrent Effect? New Evidence from a Post-moratorium Panel Data" (Jan. 2002), at www.service.emory.edu/~cozden/dezhbakhsh_01_01paper.pdf; H. Mocan and R. Gittings, "Pardons, Executions and Homicide" (Oct. 2001), at <http://econ.cudenver.edu/mocan/papers/deathpenalty1007.pdf>.
20. Both studies suggested that actual executions in capital murder cases resulted in 5 to 18 fewer homicides. The Colorado study also suggested that an increase of pardons was associated with an increase in homicides.
21. Compare P. Cook and D. Slawson, "The Costs of Processing Murder Cases in North Carolina" (May 1993), at www.aas.duke.edu/people/faculty/cook/commc.pdf; K. Buehler, "The Economics of Capital Punishment" (March 1998), at www.cybervillage.com/ocs/penalty.htm; G. Beatty, "The Next Time Someone Says That the Death Penalty Costs More Than a Life in Prison, Show Them This Article" (2001), at www.fedsoc.org/Publications/practicegroupnewsletters/criminallaw/cl010303.htm.
22. A minimum of two attorneys represent each capital defendant; there are also additional bail (11 Del.C. § 2103(b)) and jury selection requirements (11 Del.C. § 3301; Super Ct. Crim. R. 24), and a unique sentencing process (11 Del.C. § 4209(c)).
23. See Beatty, *supra*; and D. Sharp, "Death Penalty Paper" (Oct. 1997), at www.prodeathpenalty.com/DP.html.
24. Liz Rocca, "Ridgway to Ask for Plea Bargain" (July 21, 2003), at www.komotv.com/news/story.asp?ID=26170.
25. *Bailey v. State*, 503 A.2d 1210 (Del. 1984).
26. *Dawson v. State*, 673 A.2d 1186 (Del. Super. 1996).
27. *Flamer v. State*, 63 F.3d 710 (3d Cir. 1995).
28. *Red Dog v. State*, 616 A.2d 290 (Del. 1992).

Professor Phyllis T. Bookspan

TOO YOUNG TO DIE? Evolving Standards of Decency and the Juvenile Death Penalty in America

In addition to sub-average intellectual functioning, they may have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."¹ Given those deficiencies, the Supreme Court questioned whether the goals of retribution and deterrence could be met by imposing death sentences on mentally retarded persons convicted of capital crimes. Unable to determine that the death penalty measurably contributed to either of these goals, the Supreme Court concluded that the execution of the mentally retarded violated the Eighth Amendment's prohibition against cruel and unusual punishments.

The *Atkins* Court just as easily could have been describing the typical adolescent, particularly the profile of the biopsychosocial characteristics of juvenile offenders sentenced to death in America.² But in the decades since the Court mandated, in *Furman v. Georgia*, 408 U.S. 238 (1972), that the death penalty must meet the dual goals of retribution and deterrence, the Court has refused to rule that executing persons who were adolescents at the time of their crimes is unconstitutional. Indeed, the Court was presented with two opportunities in the 2002-2003 term to revisit its holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), that the execution of persons as young as 16 at the time of their crimes was permissible. But despite the Court's holding in *Atkins*, such efforts to re-examine *Stanford* failed by the slim majority of justices.³

Thus, the juvenile death penalty remains constitutional. Nevertheless, current scientific literature on adolescent brain development, as well as trends in the application of the juvenile death penalty, suggest that evolving standards of decency require the abolition of capital punishment for juvenile offenders, in the same way that the Court abolished death sentences for mentally retarded offenders.

New Research on Adolescent Brain Development Undermines the Juvenile Death Penalty

Retribution is based upon the idea that punishment is justified when it is deserved. It is deserved when the wrongdoer freely chooses to violate society's rules. By contrast, deterrence is not based upon the wrongdoer, but rather uses the wrongdoer as a means to an end, *viz.*, by punishing the wrongdoer, society sends a message to others to avoid similar bad acts. In the context of the juvenile death penalty, the problem lies in applying these notions to a brain that is not fully formed.

Under English common law, a child under seven was conclusively presumed incapable of forming the criminal intent to commit a crime. From ages seven to fourteen, the presumption of incapacity was rebuttable. A child over fourteen was deemed capable of criminal intent. Common law rules of infancy became less significant with the development in America of a juvenile court system focused on the concept of rehabilitation.

In recent years, however, greater emphasis has been placed upon criminalizing juvenile conduct, as evidenced by the willingness to try juveniles as adults, and to commingle them with adult prison populations. Unfortunately, in the haste to "get tough on juvenile crime," insufficient attention has been paid to research in the field of brain development, and little if any critical thought has been given to the historical presumption that the adolescent brain is fully formed at age fourteen.

Due to advances in magnetic resonance imaging (MRI) technology, researchers have been able to track brain development from childhood through late adolescence, and map differences between adult and adolescent brains. Recent studies of the teenage brain by Jay Giedd, a neuroscientist with the National Institute of Mental Health, and Paul Thompson, a neurologist with the UCLA School of Medicine, unexpectedly indicated that a massive loss of brain tissue occurs in the adolescent years.⁴

Specifically, while the brain reaches about 95% of its full size by age six, the gray matter continues to grow until age 11 in girls and age 12 in boys. But in adolescence, or roughly after puberty, there is a selective pruning of gray matter as excess connections are eliminated. The researchers found the loss from the frontal lobes or the prefrontal cortex at an annual rate of one to two percent, reporting that "[T]he loss was like a wildfire, and you could see it in every teenager."⁵ These areas of the brain control impulses, subdue emotions, provide understanding of the consequences of behavior, and allow reasoned, logical and rational decision making.⁶

Other researchers have found that adolescents are primarily using the amygdala, a lower portion of their brains, for thought processing while their prefrontal cortex is developing. The amygdala is associated with emotional or "gut responses."⁷ While their brains are still being built, teens lack the same levels of organizational skill and decision-making ability as adults. These developmental studies suggest that teenagers are not fully capable of thinking through the consequences of their conduct.⁸ In addition, scientists have found that the corpus callosum – the cable of nerves that

connects the two sides of the brain, and which is involved in creativity and problem solving – also appears to grow and change significantly through adolescence.” “The lack of a properly formed prefrontal cortex and corpus callosum indicates an impairment of the rational decision and thought making process . . . placing heavy reliance upon the emotional and gut response area.”¹⁰

Anyone who lives with adolescents might readily agree that they suffer from an inability to regulate emotions, and often act with little regard for consequences. Yet, does this adequately explain why some juveniles become homicidal? The problem is further complicated by the trauma and shocking life experiences commonly found in the backgrounds of juvenile offenders.

For example, in a 1987 study of 14 juvenile males awaiting execution for offenses committed between the ages of 15 years, 10 months and 17 years, 10 months, researchers found that 12 of the 14 had been brutally physically abused, five had been sodomized by relatives, and only two had IQ scores above 90.¹¹ Alcoholism, drug abuse, and psychiatric hospitalization were prevalent in their parents’ histories.¹² Such traumas most often occurred for these offenders during prepuberty – in the pre-sculpting, brain-building period. The psychological consequences arising from exposure to violence, abuse, neglect, and childhood trauma have generally been acknowledged, but “now it has been found that these experiences may cause physical changes in the brain and fundamentally alter brain development.”¹³

While researchers previously believed that the effects of trauma were most pronounced during the developing years, more current understanding of the adolescent brain’s “pruning process” suggests that such early-occurring events cause a state of fear-related activation in the brain, resulting in hypervigilance, anxiety, and impulsivity.¹⁴ The abuse essentially becomes an ingrained part of the teen’s physical and biological makeup, and therefore determines behavior and responses.¹⁵

Does Capital Punishment Provide Just Retribution and a Reasonable Deterrent?

While juveniles convicted of homicide may know the difference between right and wrong, scientific findings about the incomplete formation of the adolescent brain raise questions about whether these children are freely choosing to violate society’s rules. Such research directly challenges the justification of the death penalty on retributive grounds. Furthermore, the findings of impairment of rational decision making, the impulsive nature of adolescent actions, plus the physiological and emo-

that the Court reconsider the constitutionality of executing persons under age 18 at the time of their offenses.

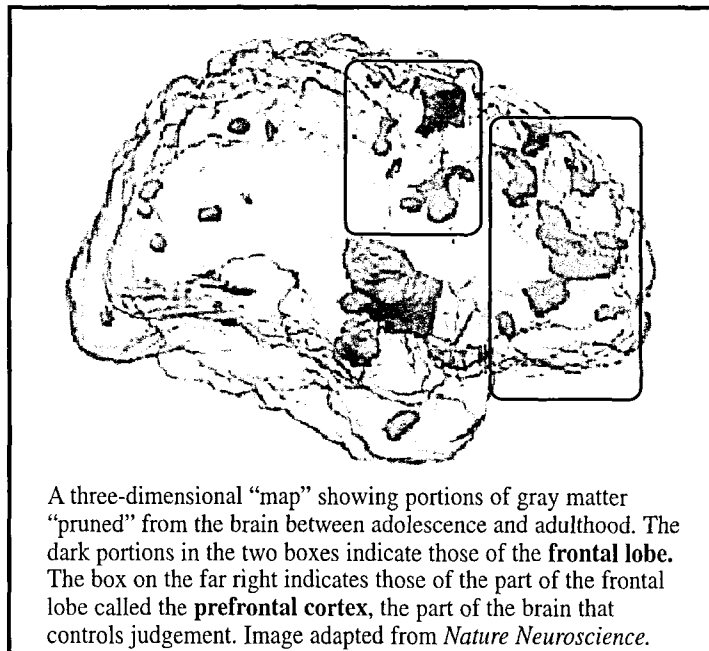
Moreover, the same reasons that the *Atkins* Court articulated to conclude that both retribution and deterrence failed to pass constitutional muster with respect to mentally retarded defendants should apply as well to juvenile offenders. Retribution must be commensurate with the offender’s personal culpability. Just as a mentally impaired person cannot be held to the same moral standard as a non-impaired adult, the lesser culpability of an incomplete teenage brain provides an insufficient warrant for the

sanction of death. That is, the cognitive and behavioral impairments that make mentally retarded defendants less morally culpable also make teenage defendants less morally culpable. As for deterrence, those same impairments, viz., diminished capacities to comprehend and process information, to learn from experience, to engage in logical reasoning, or to control impulses, make it less likely that teenagers can fully control their conduct.

Executing Juveniles Is Inconsistent With Evolving Standards of Decency

The petitioners in *Stanford* contended that the death penalty did not serve the legitimate goals of penology under the Eighth Amendment, but the Supreme Court rejected that argument, and defined its evaluative role more narrowly. The Court stated: “[t]he punishment is either cruel and unusual (i.e. society has set its face against it) or it is not . . . [O]ur job is to identify the ‘evolving standards of decency’; to determine, not what they *should* be, but what they *are* . . .”¹⁷ A four-justice plurality found no clear signal that an evolved standard of decency rejected the practice of executing 16- or 17-year-old offenders, and essentially left this decision to state legislators.¹⁸ Notably, although *Stanford* was understood as permitting the execution of juvenile offenders as young as 16, no state lowered its statutory minimum age from 17 or 18 to 16 after *Stanford* was decided in 1989.

In the ensuing years, 22 juvenile offenders have been executed in the



tional impact of the traumas that most juvenile offenders have endured, all suggest no rational basis for deterrence as a sentencing theory for capital punishment for juvenile offenders.

Fourteen years ago, the majority of justices in *Stanford* refused to credit the scientific studies then submitted to conclude there was no reasonable ground for the juvenile death penalty. Finding the research unpersuasive, the Court stated that “[i]f such evidence could conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishments Clause would be unnecessary; the Equal Protection Clause of the Fourteenth Amendment would invalidate these laws for lack of rational basis.”¹⁶ The explosion of scientific studies in the ensuing years, which consistently finds that the brains of 16 and 17 year olds are not fully formed, especially in the cognitive areas, strongly suggests

United States. Except for one – Sean Sellers, executed in Oklahoma in 1999 – all were 17 at the time of their crimes. All of the executions took place in southern states, with more than half in Texas alone. (See chart.) Moreover, during 2001 and 2002, Texas was the only jurisdiction to carry out juvenile executions.

By contrast, other states have moved in precisely the opposite direction. Last August, relying upon *Atkins*, the Missouri Supreme Court in *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), set aside a defendant's death sentence, concluding that the U.S. Supreme Court would rule that juvenile executions are barred by the Eighth and Fourteenth Amendments. On June 18, 2003, Governor Paul Patton of Kentucky commuted the death sentence of Kevin Stanford (now 39), the only juvenile offender on Kentucky's death row.¹⁹ In April of 2003, the Nevada State Assembly voted to bar executions of persons who commit crimes before reaching 18 years of age. The law awaits passage by the Nevada Senate.²⁰ Indiana raised its statutory minimum age from 16 to 18, effective in July of 2002.²¹ Montana did the same in 1997.²² Kansas did so in 1995.²³ When New York returned to the death penalty by statute in 1991, a minimum age of 18 was set for the death penalty. The State of Washington accomplished this result by supreme court ruling in *State v. Furman*, 858 P.2d 1092 (Wash. 1993). Florida also raised its minimum age from 16 to 17 by court action, in *Brennan v. State*, 754 So.2d 1 (Fla. 1999). Other states considering legislation to raise the statutory minimum age for the death penalty to 18 are Arizona, Arkansas, Delaware, Florida, Kentucky, Mississippi, Missouri, Pennsylvania, South Carolina, and Texas.

Juvenile Executions Violate International Human Rights Norms

In *Atkins*, Chief Justice Rehnquist wrote in dissent: "I fail to see . . . how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."²⁴ In a separate dissent, Justice Scalia stated, "[E]qually irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people."²⁵ While a minority of the Supreme Court may find the practices of the world community irrelevant to

Juveniles Executed in the U.S.

January 1, 1973 through the present

Name	Date of Execution	Place of Execution	Race	Age at Crime	Age at Execution
Charles Rumbaugh	9/11/85	Texas	White	17	28
J. Terry Roach	1/10/86	S. Carolina	White	17	25
Jay Pinkerton	5/15/86	Texas	White	17	24
Dalton Prejean	5/18/90	Louisiana	Black	17	30
Johnny Garrett	2/11/92	Texas	White	17	28
Curtis Harris	7/1/93	Texas	Black	17	31
Frederick Lashley	7/28/93	Missouri	Black	17	29
Ruben Cantu	8/24/93	Texas	Latino	17	26
Chris Burger	12/7/93	Georgia	White	17	33
Joseph Cannon	4/22/98	Texas	White	17	33
Robert Carter	5/18/98	Texas	Black	17	34
Dwayne Allen Wright	10/14/98	Virginia	Black	17	24
Sean Sellers	2/4/99	Oklahoma	White	16	29
Douglas Christopher Thomas	1/10/00	Virginia	White	17	26
Steven Roach	1/13/00	Virginia	White	17	23
Glen McGinnis	1/25/00	Texas	Black	17	27
Shaka Sankofa (Gary Graham)	6/22/00	Texas	Black	17	36
Gerald Mitchell	10/22/01	Texas	Black	17	33
Napoleon Beazley	5/28/02	Texas	Black	17	25
T.J. Jones	8/8/02	Texas	Black	17	25
Toronto Patterson	8/28/02	Texas	Black	17	24
Scott Allen Hain	4/3/03	Oklahoma	White	17	32

Adapted from www.deathpenaltyinfo.org

American constitutional jurisprudence, international law in this critical area should not be ignored.

In 2003, the United States is the only Western nation, and one of only two countries in the world, that imposes capital punishment on juvenile offenders. The other nation is Iran. The practice of juvenile execution isolates the United States from the world community, and violates several international human rights instruments.

For example, Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR) states: "[T]he sentence of death shall not be imposed for crimes committed by persons below eighteen years of age." Although the U.S. ratified this treaty in 1992, praising it as the most complete and authoritative articulation of international human rights law since World War II, the government nevertheless reserved the right to impose capital punishment on those below 18. The United Nations Human Rights Committee declared the American reservation "incompatible with the object and purpose" of the ICCPR.²⁶ And at least one scholarly commentator has argued that the U.S. reservation is invalid, because the ICCPR prohibition against the death penalty for juvenile offenders is so well-established under international law that it is non-derogable.²⁷ If the

reservation is void as a violation of customary international law, then it may be the Supreme Court's task to decide whether the United States is fully bound by Article 6(5) of the ICCPR.

The evolving standards of decency marking social progress require that law not remain static. In the 14 years since *Stanford v. Kentucky* was decided, scientific research revealing incomplete adolescent brain formation has undermined the legitimacy of the juvenile death penalty. Similar to the national consensus opposing the execution of the mentally retarded, public opinion has developed against the execution of juveniles. Eighteen states have barred juvenile executions completely; five states have raised or established the minimum age at 18; and the imposition of the juvenile death penalty is rarely imposed in the majority of states. The time is ripe for the Supreme Court to reconsider its ruling on the execution of juvenile offenders. ♦

FOOTNOTES

1. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).
2. Dorothy Otnow Lewis, M.D., et al., "Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States," 145 *Am. J. Psychiatry* 5, 584 May 1988.

(Continued on page 27)



David Curtis Glebe

A CAPITAL DISCUSSION: Habeas Litigators Face Off on the Death Penalty

Prior to their oral argument in the Third Circuit Court of Appeals, two attorneys who litigate capital habeas cases are having lunch. One of them, the Defender, seeks a new sentencing hearing for his death-row client, alleging that constitutional errors occurred during the penalty phase of the first-degree murder trial. The other lawyer, the Prosecutor, contends that the inmate's death sentence is valid.

"What truly amazes me," the Prosecutor remarks before biting into her turkey sandwich, "is how you can represent that monster. Your client broke into that old lady's house, tied her up, and brutally raped her. Then he tortured her by sticking her own sewing needles into her feet, and finally slashed her with a kitchen knife until she died. Doesn't that bother you?"

The Defender replies, "You don't understand my job. I'm not in this appeal to represent a monster. I'm here to defend the Constitution, and I'm very proud of that."

"Sounds to me like a rationalization – so you can sleep at night," the Prosecutor rejoins. "What if that elderly woman had been your own mother? Would you still be so concerned about the rights of her killer?"

"Look," the Defender says, "I admit the crime was horrendous, but we're not contesting guilt. What matters in this habeas appeal is that the jury reached its death verdict in an unconstitutional way." Lowering his voice, the Defender delivers a more personal jab. "You prosecutors claim you're more concerned about 'doing justice' than winning – but you're implying that my client's murder conviction resolves every other issue, and negates his right to a fair sentence. Isn't that what you really think?"

"Of course not," the Prosecutor responds emphatically, "but how can you blame the jury for voting to execute him, given what he did? Your client deserves that sentence. And that's why 'doing justice' *is* to execute him."

"I honestly don't think so," the Defender muses as the Prosecutor rolls her eyes. "I've been practicing law for 20 years, and whenever I read the jury's sentencing instructions in this case, even I get confused. How could those instructions be clear to a bunch of average people?"

"Because it was the standard sentencing charge for all capital cases back then. Nothing confusing about it," the Prosecutor answers. "The jury was instructed to weigh the aggravating and mitigating evidence. They did that. They were told that a death verdict could only result if they decided, unanimously, that the scale tipped towards the aggravators. They did that. Case closed."

"No, case not closed," the Defender appeals. "If that 'standard sentencing charge' was so unambiguous, then why was it revised a few years after my client's trial? It's obvious that the jury could have misunderstood those instructions."

The Prosecutor sips her bottle of Dasani. "So what? The jury could have misunderstood. What a red herring. Is it theoretically possible that the jurors were confused? Sure, anything is possible. But just because you claim the jury was possibly confused, you can't infer they were probably confused, much less actually confused. It's possible I'm home in bed right now dreaming. Claiming that something is possible means very little."

The Defender smiles. "But that's not what the federal courts think, especially in capital cases."

"Maybe some courts do," the Prosecutor responds, "but they're wrong. The Supreme Court has clarified that exact point – the mere possibility of juror confusion does *not* violate the Constitution."¹

"Let me put it another way," the Defender continues. "You asked how I would feel if my client had murdered my mother. But turn that around – suppose your son were my client, convicted of first-degree murder and sitting on death row."

"Make it my husband instead," the Prosecutor reflects. "My son would never be in that situation. He would have to get off the couch first."

"Fine," replies the Defender, "suppose your husband were on death row, and there was a possibility that the jurors only decided on that penalty because they misunderstood their sentencing instructions. Wouldn't you want me to argue that there should be a high level of assurance that the jury wasn't confused? It's life or death, right?"

"I know," the Prosecutor groans, "in capital litigation the courts routinely declare that 'death is different' – and then some of them use that catchphrase to dissect these cases with such microscopic precision that finding error is almost guaranteed.² But the Constitution doesn't require perfect trials, even in capital cases."

The Defender rejoins, "Well, maybe it should. Death sentences *are* different from other penalties. Shouldn't the courts try to uncover every possible error? Isn't that what you would want if your husband's habeas case were on appeal?"

"Sure, but only within the law. Like it or not, capital punishment is the law in this state. If the courts required that every capital defendant should receive a trial free of every possible error – so that we had to be certain the jury wasn't confused – that would undermine the law itself. Courts that mandate certainty or perfection in capital cases are really advancing a legislative agenda – trying to abolish the death penalty by making it impossible to enforce."

"So? Capital punishment is dehumanizing and immoral, downright uncivilized."

"I honestly don't think so," the Prosecutor muses as the Defender rolls his eyes. "If you assume that people know that the death penalty is permitted for first-degree murder under this state's law, then if a citizen chooses to remain in this state, he tacitly agrees to be bound by that law. So if he chooses to commit murder, there's nothing wrong with enforcing that law against him."

The Defender shakes his head, indicating, "No, no, no," but the Prosecutor continues, "In effect, the capital defendant authorizes his own death sentence by choosing to live in a state that has such a law, and by choosing to commit a horrendous murder. What is immoral or uncivilized about that?"

Before the Defender can respond, the Prosecutor throws one more jab. "You want to abolish capital punishment? Tell your clients to stop murdering people."

"But that's all just theory," the Defender implores in a louder voice. "Real people don't act that way – supposedly 'choosing' to do this or that. People are products of their genes and their environment. They have personality disorders, organic brain impairments, parents who molest them, whatever. Even the Supreme Court endorses that view – look at the *Atkins* ruling last year. . . ."

"But," the Prosecutor interrupts, "*Atkins* only bars the execution of mentally retarded persons, which doesn't apply to the vast majority of capital defendants. And certainly not to your client. He was running his own landscaping business. He's not mentally impaired."

"Don't be so sure," the Defender grins. "We recently had him re-tested, and his IQ score is well within the range for mental retardation. In fact, we'll soon be filing a new habeas petition claiming that under *Atkins* he can't be executed. So even if you win this appeal on the jury instruction issue, *Atkins* means we're starting over."

"When I first read *Atkins*, I knew this would happen," the Prosecutor remarks acidly, tapping her fingernails on the table. "You put an IQ test in front of a death-row inmate and tell him: 'If you pass this test, you'll be executed, but if you fail this test, they won't execute you.' What a shock when he fails the test."

The Defender swirls his coffee. "Well, even if the courts eventually reject our *Atkins* claim, the litigation itself will take years. We'll file for discovery, we'll ask

for evidentiary hearings, and we'll take every possible appeal."

The Prosecutor sighs. "Any delay is a victory, right? The longer things drag out, the longer your client avoids the executioner's needle. Isn't there some ethical rule against that?"

"Not for capital cases," snaps the Defender. "The ethics code doesn't bar delay when it's consistent with the client's interests, and obviously my client has no interest in having the courts promptly uphold his death sentence."

"Which is typical of capital litigation," vents the Prosecutor. "The whole process has this bizarre, *Alice in Wonderland* quality. Only the worst-of-the-worst murderers get the death penalty, but once they're sentenced, the law seems to bend over backwards for them – as if they've earned special treatment."

"Haven't you heard? Death is different," the Defender chants.

"Never heard that. But I have heard that some capital defenders will argue, or at least imply, that the heinousness of the murder itself, especially where torture occurs, should be counted in the defendant's favor – as a mitigating factor – to show how mentally deranged he was. Now that's truly upside-down logic." The Prosecutor's irritation is apparent.

"But nobody advanced that claim here," the Defender quickly clarifies. "And for the record, I find that particular argument to be distasteful."

"Good – at least we agree on something. I think the jury would have been insulted if trial counsel argued that your client deserved extra leniency because he tortured that woman before killing her."

"Well, now that the Supreme Court has issued *Wiggins*," says the Defender, "we don't need that 'torture argument' anyway.⁴ *Wiggins* gives us loads of ammunition to attack counsel's effectiveness during the sentencing phase of these capital cases. Whatever case in mitigation the defense attorney presented at trial, we'll use *Wiggins* to argue that a better effort should have been made."

"*Wiggins* – what a headache," the Prosecutor murmurs.

"You got that right," the Defender beams, like the proud father of a newborn. "From now on, it's going to be all *Wiggins*, baby.⁵ At the very least, our *Wiggins* claims will extend the post-conviction process even further."

The Prosecutor spies her watch. "We'd better leave. The Third Circuit demands punctuality for oral arguments, although I'm sure they will waive our

time limits. After all, this is a capital case."

"We could shorten the argument if you would simply concede," the Defender jokes. "Face it – even if we don't overturn this death sentence on the jury instruction issue, or on an *Atkins* claim, or on a *Wiggins* claim, or on some other ground, you'll probably retire before my client is actually executed."

Partially serious, the Defender whispers, "Why not drop this appeal and agree to a life sentence? He was drunk when he attacked that woman. Never meant to kill her. And he's a model inmate now. Teaches Bible classes at the prison."

"So we should stop victimizing him, eh?" The Prosecutor stands up. "You didn't mention that executing him won't bring the old woman back."

"Exactly right," the Defender replies.

Both lawyers exit the restaurant. "Have you ever thought," the Prosecutor asks, "that your tactics often seem to dehumanize your own client? By claiming that he shouldn't take responsibility for what he did, don't you imply that he's not really a human being, but rather, some kind of unthinking robot?"

"I guess that means you won't concede," says the Defender. "Good luck with your argument anyway."

"Same to you," the Prosecutor replies, as they head towards the courthouse.

Nine years later, the Prosecutor retired from practice, and handed over the same capital case to a younger federal habeas lawyer. As of the summer of 2013, the matter was still pending in the courts. ♦

FOOTNOTES

1. See *Boyd v. California*, 494 U.S. 370 (1990) (proper standard for evaluation of jury instructions is whether confusion by entire jury was reasonably likely); compare *Mills v. Maryland*, 486 U.S. 387 (1988) (possibility of juror confusion in capital case was reversible error).

2. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("death is different" because "execution is the most irremediable and unfathomable of penalties").

3. *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of mentally retarded criminals violates Eighth Amendment prohibition against "cruel and unusual punishments"), abrogating *Penry v. Lynaugh*, 492 U.S. 302 (1989) (executing mentally retarded criminals is not prohibited by Eighth Amendment).

4. *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) (strategic decisions of trial counsel regarding presentation of mitigating evidence prejudiced capital defendant).

5. Direct quote from capital defense counsel, following the ruling in *Wiggins*.

Kristin M. Froehlich, M.S.W.

A SURVIVOR'S JOURNEY

I am a survivor of murder. In 1995, my youngest brother David, then 22, was murdered in a small town in Connecticut. Losing a loved one to murder is the worst thing I can imagine happening to anyone. However, the journey following this loss has ultimately enriched me, unexpectedly adding meaning to my life. In this article, I would like to describe that journey, and the way it has shaped and continues to shape my life and beliefs.

My brother shared an apartment with two friends, also in their early twenties. Their landlord had been harassing them about the rent. He finally and brutally killed all three of them, along with two of their friends. Then he burned down the house – his own house – to erase the evidence. He was caught and charged within a few days.

It was April 18, 1995, the day before the Oklahoma City bombing. As I watched television with my family for news of David's murder and the search for his killer, we were faced with images of horror from Oklahoma. It felt like the whole world was getting killed.

When our funeral leaves were over, most of us left the refuge of family and returned to our lives. As the shock started to wear off, my feelings overwhelmed me. Sadness and despair were constant companions. I cried every day for a year. My trust in the world was shattered. I began to see evil everywhere – literal, tangible black clouds of evil. I felt hopeless and powerless against it.

After about six months, I was ready to begin the long journey towards healing. I found a support group in Philadelphia called Families of Murder Victims. Not a group that anyone would want to join. It took me several months of attending before I could even begin to tell my story. Even longer before I felt like I wasn't sucking all the positive feeling out of the room every time I spoke. After a while, my feelings of isolation decreased, and I was able to tell my story without sobbing through it.

Counseling helped with my clinical depression, allowing me to take steps toward regaining hope and power. Battling the demons of evil and despair was hard, and my therapist often told me that I looked exhausted at the end of each session. After several months, she suggested that I travel to the site where David was killed and plant a flower, a symbolic gesture of hope and life and growth.

The idea struck fear into my heart. Go to that place where evil was so powerful? I wasn't nearly strong enough. But after time and thought, the idea took root. My youngest sister, Meg, agreed to go with me. When we arrived on a sunny fall day, we found only a concrete slab where the house had been. The property was surrounded by trees covered with bright colorful leaves. We planted a hyacinth. That experience was a turning point for me. I saw that evil did not reside on that

property. I was able to take a positive step for life. I had some power after all.

Meanwhile, the legal wheels turned slowly. After many months, we learned that the prosecution would pursue a death verdict, but to my knowledge, none of the victims' families was involved in that decision. I know that several would have opposed it. I know that some survivors want the death penalty, but I surely was not one of them, and it later struck me as strange that the death penalty was sometimes defended as being "for the victims." But how does anyone know what survivors want if they don't ask?

To their credit, the Assistant District Attorney and Victim's Assistance representative did a great job of keeping my parents and the families of the other victims informed. They provided information on the legal process, as well as counseling services. Unfortunately, I didn't have access to the Victim's Assistance representative because I lived outside of Connecticut. I felt out of the loop, and without any say about the proceedings. Struggling with my confusion and anger about the legal process, I contacted the Assistant District Attorney directly. She listened to my questions and answered them in detail. I don't remember everything she said, but I remember that I felt heard and respected.

By this time, I was attending a new support group in Delaware called Survivors of Accident and Murder. With the trial increasingly on my mind, I began to pin my hopes on it to resolve some of my feelings. But there were so many delays, so much political game playing, so little progress. My friend Linda, who also attended the group, had witnessed the death of a friend by a drunk driver and had participated in the subsequent trial. Because she was ordered not to discuss the case with anyone, she held in all her feelings and fears in the service of convicting her friend's killer. Years later, she was still having trouble coping with her feelings. She explained that the legal system was designed to address a law that has been broken, but not to address broken hearts or shattered lives.

Linda's insight into the legal system was a revelation to me. Understanding that my needs were not the priorities of the legal process liberated me from false hope. I was free to redirect my energies in more promising directions.

With this new understanding, I decided not to attend the trial. Although my parents attended every single day, being present at the trial wasn't right for me. Unlike my friend Linda, I was able to concentrate on grieving and healing without sacrificing myself to the demands of the legal system. I gained some control over my life when I allowed myself to make that important decision. I could honor David's life in other ways.

The legal system should respond to the needs of victims in a more respectful and helpful way. We deserve compassion,

time to grieve, tolerance, and hope. Ultimately, we want to regain the feelings of trust, power, and control that were stolen from us. Victims and survivors want accountability too – that a murderer accepts responsibility for what he or she did. We want our families and communities to be safe, *and* we don't want to sacrifice ourselves and our needs to make that happen.

There are other ways that the legal system can help survivors of violent crimes. First of all, be honest with us. Do not pretend that the legal system or the death penalty can be the primary source of hope and healing. Survivors should never be falsely persuaded into believing that the outcome of a murder trial or the fate of a murderer will somehow diminish the long process of grieving and healing. Instead, those in the legal system should guide us to resources that can help us on our journey.

Second, become sensitive to your own language. You may notice that I say "legal system," rather than "criminal justice system." Given my personal experience, the latter phrase feels false and insincere to me because individuals use "justice" as if it means "right" or "fair," when it really only means "according to law." How could any punishment, including the death penalty, be considered doing "justice" without returning my brother and his friends to their families? I have learned to leave justice to God, God's time, God's way.

I also can't imagine a time when I will have "closure," and I hope that society itself is starting to understand the absurdity of applying the word "closure" to anything to do with murder. What is closed? The processes of grieving and healing cannot be given time limits. Will I ever be finished grieving? Unlikely. Will I ever be finished healing? I hope not.

Another demeaning term is "victim" – as applied to family members and friends of murdered persons. Although "victim" is accurate in that we have suffered severe harm, it is not all we are. Being treated only as "victims" dooms us to remain in the state of powerlessness that is so painful to us, and it impedes our healing process. Although the term "victim" has been adopted in the political, legal, social, and economic arenas as a term by which we receive attention, respect, and practical assistance, I would prefer the term "survivor."

Another way the legal system can help is by allowing survivors to speak for themselves. The victim impact statement

at sentencing is one of the few times that my voice felt honored and relevant, becoming a powerful tool in the process of my healing. In researching this article, I found copies of my family's victim impact statements, and our words amazingly showed both vulnerability and strength. Addressing David's killer in open court, I declared: "We are stronger than you and your evil. We are stronger in the love we feel, the memories we carry, the friendships we share. We are stronger in the power we have to do good in the world."

My younger sister, Rosemary, stood at the podium with me. She too had written a victim impact statement, but was so shaken that we had a hard time getting her even to enter the courtroom. She felt more frightened as the time came to speak. But when my sister started reading, a miracle happened. Her voice rang out strong and clear. She spoke her truth. The power of speaking our feelings publicly helped us feel acknowledged and respected. It helped us regain some power and hope that we had lost.

David's murderer was convicted and sentenced to life in prison without the possibility of parole. I was satisfied with the penalty. And in a difficult twist, several months ago the killer took his own life in prison. Some survivors were relieved. Although I was relieved that he would never harm another person, I also felt deep sadness. I thought of yet another life taken unnecessarily. I thought of his wife and daughter and the pain they must endure by another life cut short.

After the trial, I looked for other ways of healing and regaining power – by choosing life over death, and good over evil. I went back to school for social work. I volunteered at my church. Ideally, criminals would be responsible for working to make amends for the evil they bring into the world. But it is up to the rest of us to work for good. I know that I have more power if I take action for positive change. It is another way that I am free, and not at the mercy of the offender.

I started studying death penalty issues more closely. I attended lectures and read articles. I recognized that the death penalty did not fit with my values of choosing life over death and good over evil. It did exactly the opposite. It chose death, and in so doing, brought another quantity of evil into the world.

The fact is that society really doesn't know how to respond to a crime as

heinous as murder. Instead of admitting the feelings of fear and powerlessness, we react to the first rush of emotion: "*If we can crush the offender, we'll be safe.*" This is a foolish and weak response. Focusing on the death penalty disconnects us from our own grief and ignores the questions of how we heal ourselves and our society.

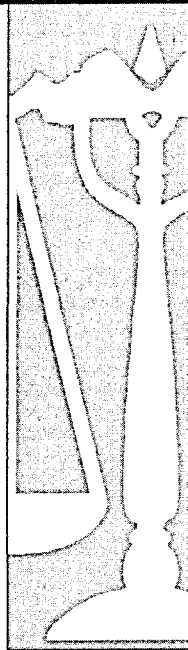
Murder Victims' Families for Reconciliation – a national organization whose members oppose the death penalty – helped me find answers. Its members include friends and family members of both homicide victims and state executions. In June of 2001, I attended a conference sponsored by MVFR, and met other family members of murder victims, as well as many who were connected with the perpetrators. I also met individuals who had been wrongfully charged or convicted of murder, and later exonerated. I felt a sense of belonging in every group. We were grieving. We were trying to heal. We were trying to support and honor our loved ones. We were trying to make a difference in our own lives and in society. I looked around and saw people – whom the legal system puts in an adversarial relationship – talking and sharing and laughing and crying together. Those people weren't "the other," they were me, and I recall thinking, "Heaven must be like this." Joining with all of those people made me feel much better and stronger than the state-sanctioned death of David's killer would have.

Three years ago, I joined Delaware Citizens Opposed to the Death Penalty, an organization devoted to ending capital punishment in Delaware. I started learning about the costs of the death penalty: financial, emotional, social, and moral. I learned about racial discrimination and the execution of the innocent. I learned that Delaware had the highest rate of executions per capita of any state. Nowadays, whenever I read the Delaware motto, "It's good to be first," that is what I think of. I do not feel proud.

Shortly after the MVFR conference, I began to share my story in public. It was another opportunity to honor my experience, to use my voice, to regain power over my life and my future, and to influence the future of society. As I think back on my healing journey so far, the times I felt most powerful were planting the flower, reading my victim impact statement, joining with members of MVFR, and sharing my story.

Each time I speak out, I take one more step. ♦

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Opinion (Continued from page 28)

murder. The film compellingly portrays the last minute legal maneuvers prior to execution and their attendant emotional vicissitudes as hopes of reprieve appear, are dashed and yet still seem to flicker ever so faintly.

Another recurrent theme in the pantheon of capital punishment movies is the road one follows from law-abiding citizen to condemned prisoner. The Coen Brothers' quirky *The Man Who Wasn't There* stars Billy Bob Thornton as a small town barber whose higher ambitions lead to murder, the unjust conviction of his wife for the killing, and ultimately, through some bizarre twists, his downward spiral to ironic justice for his own misdeeds. First achieving critical acclaim and audience popularity with James Cagney's unforgettable performance in *Public Enemy*, this storyline took the protagonist in a sociopathic descent from petty criminal to, inevitably, the hangman's noose.

But the more enduring of this genre of death penalty film follows the lead character from virginal innocence to death row. It was first rendered effectively in *A Place in the Sun*, where a lovelorn Montgomery Clift kills his working class fiancé, Shelly Winters, after he has fallen hard for the wealthy and enticing Elizabeth Taylor. From heir apparent to the electric chair, it is a sobering morality talk replete with economic caste undertones.

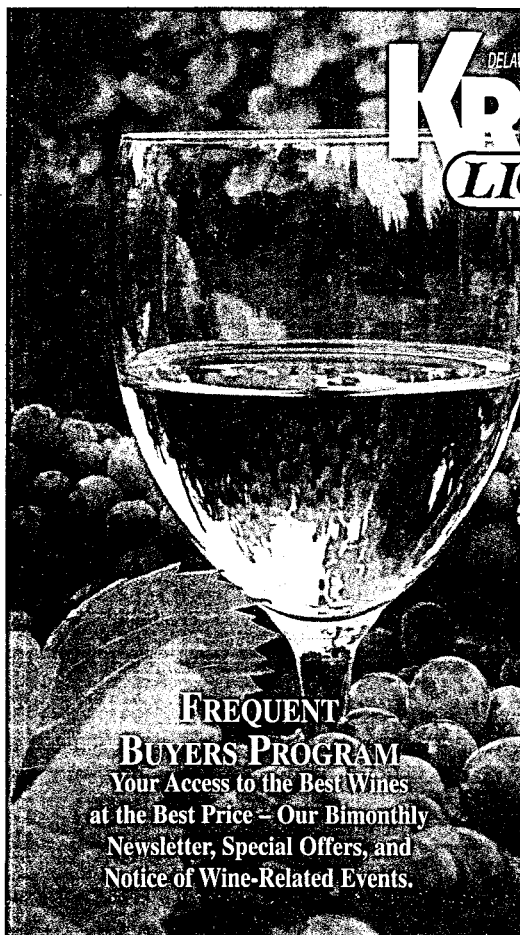
The British film *Let Him Have It!* tells a similar tale of a developmentally challenged youth falling in among the wrong crowd, discovering self worth through increasingly serious, yet minor criminal acts, only to be branded the scapegoat for felony murder. The ambiguity and inherent inequity of a death sentence is underscored in the words of the film's title: did our convicted protagonist mean to incite his colleague to kill the night watchman, or was it simply a plea to turn over the firearm as demanded by the victim as he catches the burglars in the act?

Let Him Have It!, a little-known film in the United States, effectively weaves several strands of cinematic death penalty themes together — the innocent condemned, the inequitable punishment, and the irreversibility of execution — leaving the viewer questioning both the justice and the morality of the state's imposition of the ultimate sanction. ♦

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TOO YOUNG TO DIE?

Evolving Standards of Decency and the Juvenile Death Penalty in America

(Continued from page 21)

3. *In re Stanford*, 123 S.Ct. 472 (2002) (habeas corpus petition denied) (Stevens, Souter, Ginsberg, and Breyer dissenting); *Patterson v. Texas*, 123 S.Ct. 24 (2002) (petition for certiorari and stay of execution denied) (Stevens, Ginsberg, and Breyer dissenting).

4. Paul Thompson, M.D., "Brain Research Shows 'A Child Is Not a Man,'" *Newsday*, May 23, 2001, p. A33.

5. *Id.*

6. "Brain Development, Culpability and the Death Penalty," *The International Justice Project*, at <http://www.internationaljusticeproject.org/pdfs/juvBrainDev.pdf>.

7. "Inside the Teenage Brain: Interview of Deborah Yurgelun-Todd," *Frontline*, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html>.

8. *Id.*

9. "Brain Development," *supra*.

10. *Id.*

11. Otnow Lewis, *supra*, at 584, 587.

12. *Id.*

13. "Inside the Teenage Brain," *supra*.

14. Bruce Perry, M.D., "The Impact of Abuse and Neglect on the Developing Brain," at http://teacher.scholastic.com/professional/bruceperry/abuse_neglect.htm6/22/2003.

15. *Id.*

16. 492 U.S. at 378.

17. *Id.* (emphasis in original).

18. *Id.*, at 381. Justice O'Connor, who cast the pivotal fifth vote, found the execution could proceed because there was no national consensus forbidding the practice.

19. In October of 2002, the Supreme Court refused to consider Stanford's petition for writ of habeas corpus.

20. "Adolescent Brain Development Argues Against Teen Executions," *Psychiatric News*, May 18, 2003, p. 8.

21. Ind. Cod. Ann. 35-50-2-3(b)(1)(A) (2002).

22. Mont. Code Ann. Sec. 45-5-102 (1997).

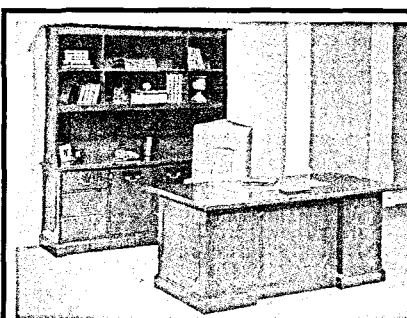
23. Kan. Stat. Ann. 21-4622 (1995).

24. 536 U.S. at 325.

25. *Id.*, at 348.

26. "Consideration of the reports submitted by state parties under Article 40 of the Covenant, Comments of the Human Rights Committee, United States - Initial Report," ¶ 14, *U.N. Doc. CCPR/C/79/Add.50* (1995).

27. Connie de la Vega, "Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case," 42 *Santa Clara L.R.* 1041 (2002).



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LAW REVIEWS: Hollywood Capitalizes on Capital Punishment



One need not support or condemn capital punishment to enjoy the many films dealing with the death penalty. It's about adrenaline: death by execution – society's ultimate retribution – can make irresistible entertainment. Perhaps it's the long, slow walk to the chair. Or those moments of intense tension while waiting for the chamber's phone to ring before an irreversible switch is thrown. Whatever the appeal that the death penalty holds, its venerable place in cinematic history is evidence of broad audience interest. Public executions have, through the centuries, provided crowds with gruesome public spectacle. It is hardly surprising then, that crime and punishment, murder and the ultimate sanction, death, are the props of great film drama. Morbid undoubtedly, yet nevertheless absolutely riveting cinematic entertainment.

Not all films that feature the electric chair in a supporting role are worth watching. Plot matters. We must be as interested in the facts of the underlying legal case as we are in the stark eventuality of the noose. *Dead Man Walking*, for example, takes its audience through a heart-wrenching journey where nun Susan Sarandon counsels condemned killer Sean Penn in his quest for spiritual redemption before his lethal injection. But any such salvation is clouded by the unsalved pain of the victims' families. Based on the real-life story of Sister Mary Prejean, *Dead Man Walking* suggests that execution isn't necessarily the end of the story: closure is ephemeral. When the nun has finally prevailed upon the condemned man the worth of expressing true remorse, the viewer virtually stands in his shoes. We can almost feel his nausea as the last meal is eaten. It is an artful film that can grow our empathy toward this criminal, even one guilty of the loathsome rape and murder for which he walks to his execution.

But it's not always about the prisoner. *Monster's Ball* explores the impact that an execution has upon those closest to the condemned: the family left burdened with a killer's sor-


did legacy and the prison guards whose duty it is to carry out the execution. Hallie Berry won an Oscar® for her portrayal of the embittered widow whose life, through a strange twist of fate, intersects with Billy Bob Thornton, the guard captain in charge of meting out the sentence of death. *Monster's Ball* vividly illustrates the indelible repercussions of the death penalty, and the emotional baggage borne by all those associated with the administration of the ultimate sanction.

Kevin Spacey ably portrays another aspect of the death penalty: the potential for unredeemable error when the state takes the life of one wrongly convicted of a capital crime. In *The Life of David Gale*, Spacey plays an anti-capital punishment crusader who, in the seemingly cruelest of ironies, finds himself condemned for the brutally depraved murder of his colleague. Seemingly resigned to his fate, he seeks only to underscore the irreversibility of execution. The film forcefully asserts that there can never be adequate redress: the state's imposition of death is final.

The execution of an innocent is a proven formula in death penalty movies. In the fable-like *The Green Mile*, prison guard Tom Hanks undergoes a philosophical metamorphosis as he comes to realize, among other startling revelations, that his most prominent death row inmate is not guilty of the murders for which he has been convicted. In a similar vein, in *Someone's Got to Shoot the Pictures*, Roy Scheider plays a photographer hired by the condemned man to document his execution. Scheider grows from bored disinterest to zealous advocate for the accused as it gradually dawns upon him that the man slated for electrocution has been framed for a homicide he did not commit.

Susan Hayward won the first death penalty Oscar® in 1958's *I Want to Live!* She plays a death row inmate whose brazen and confrontational character makes her the fall gal for a brutal

(Continued on page 26)



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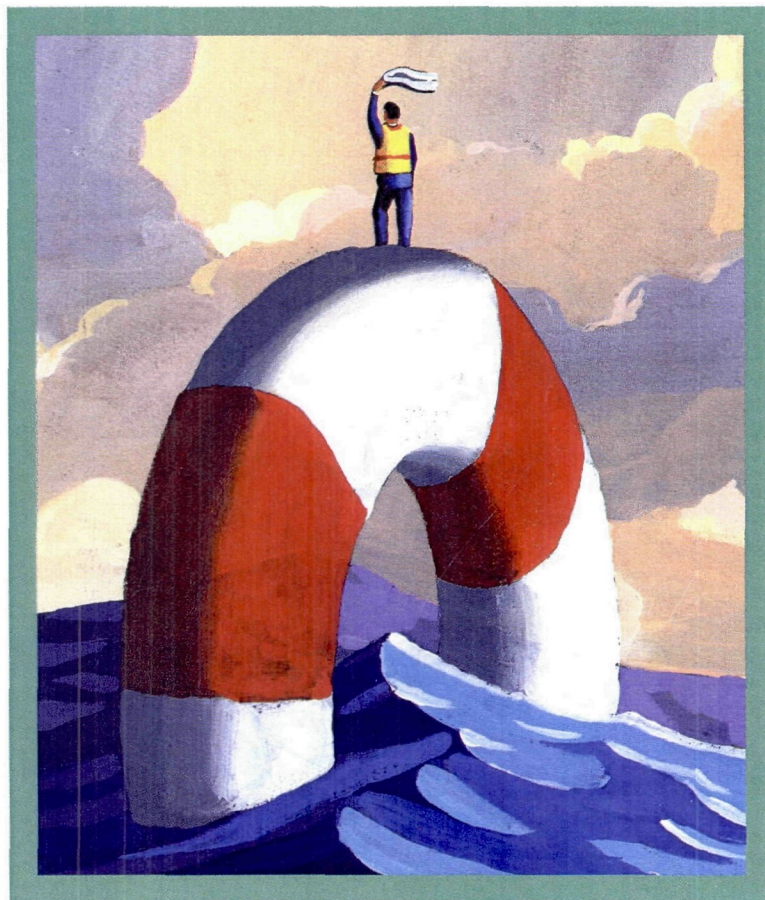
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