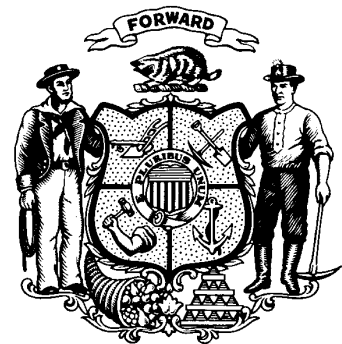


# Capital Punishment in Wisconsin and the Nation

State of Wisconsin  
Legislative Reference Bureau  
Informational Bulletin 95-1, April 1995



## Table of Contents

	<i>Page</i>
I. INTRODUCTION .....	1
II. HISTORY OF THE DEATH PENALTY .....	1
III. U.S. SUPREME COURT DECISIONS .....	3
<i>Furman v. Georgia</i> .....	3
Post- <i>Furman</i> Cases .....	4
Habeas Corpus .....	6
IV. WISCONSIN HISTORY .....	7
V. ARGUMENTS FOR THE DEATH PENALTY .....	10
Retribution .....	10
Deterrence .....	11
Incapacitation .....	12
VI. ARGUMENTS AGAINST THE DEATH PENALTY .....	13
Discrimination .....	13
Arbitrariness .....	14
Mistakes .....	15
Sanctity of Human Life .....	16
VII. OTHER ARGUMENTS .....	16
Costs Associated with Capital Punishment .....	16
Appellate Review .....	19
Minimum Age for Execution .....	21
Execution of the Mentally Ill or Retarded .....	22
Method of Execution .....	23
VIII. CURRENT LEGISLATIVE ACTIVITY .....	24
Wisconsin .....	24
Other States .....	25
IX. STATISTICS .....	25
X. SUMMARY .....	27
XI. SOURCES .....	27

# CAPITAL PUNISHMENT IN WISCONSIN AND THE NATION

## I. INTRODUCTION

In 1853, Wisconsin became one of the first states to abolish capital punishment. However, debate over the death penalty continues, as evidenced by the numerous proposals to reinstate capital punishment in Wisconsin. The first senate bill introduced in the 1995 Legislature related to the death penalty.

The U.S. Supreme Court in a landmark case, *Furman v. Georgia*, 408 U.S. 238 (1972), refused to hold that the death penalty was unconstitutional *per se*. This signaled the beginning of the current discussion in Wisconsin and around the nation. Proposals relating to the penalty have been introduced in every session of the Wisconsin Legislature since that decision.

Nationally, public interest in the death penalty appears to be driven by the perception that our personal safety is threatened in an increasingly violent society and by debates over whether those convicted of particularly heinous murders should be punished by execution. Questions continue to be raised: “Should there be a minimum age for the death penalty?” “Should there be a death penalty at all?” “To what crimes should it apply?”

This bulletin reviews significant studies and court cases central to the debate; provides background on the history of capital punishment in Wisconsin and the United States; and summarizes arguments for and against the death penalty.

## II. HISTORY OF THE DEATH PENALTY

The death penalty originated in individual blood feuds. Death was revenge for death, “an eye for an eye”. Gradually, with the rise of modern nation states, the sovereign ruler became responsible for the public peace, and injuries to individuals came to be defined as crimes against the state. Retribution replaced revenge. When the state assumed responsibility for public safety, theorists began to see an additional benefit to punishment. A severe penalty might deter people from committing a crime. As this idea became more popular, the death penalty was proposed for more and more crimes. In England, by 1800, it was prescribed for more than 200 offenses.

However, there already was a movement away from capital punishment. The most important early statement of the anti-death-penalty viewpoint was presented in Italian criminologist Cesare Beccaria’s *Essay on Crimes and Punishments*, published in 1764. Beccaria suggested that capital punishment provided only a momentary deterrence, compared to the lasting impression made by keeping a criminal in prison. He concluded that the state did not have a right to kill a person and suggested that the death penalty taught murder and violence.

The chief proponent of abolishing the death penalty in the United States was physician and statesman Benjamin Rush. In 1774, during a lecture at the home of Benjamin Franklin, he promoted establishment of a “house of reform” to take criminals off the street, and, in 1787, he published an address advocating the abolition of the death penalty. Together with Pennsylvania Attorney General William Bradford, Rush worked out a compromise that resulted in a significant decrease in the use of the death penalty in that state. By 1786, Pennsylvania had reduced the number of crimes to which the death penalty applied. In 1794, Rush and Bradford, who believed that the penalty for murder should be different from that for other crimes, persuaded the legislature to adopt a system with two degrees of murder. If the murderer had not exhibited malice or intent that gave evidence of a “depraved mind, regardless of human life”, the murder was considered a lesser offense of “second-degree”. Many of the new states, which joined the Union after enactment of the Pennsylvania law, copied it. Ohio established the degree system in 1824, Missouri in 1835, Michigan in 1846, and Texas in 1848. During the same period, many states also reduced their number of capital crimes to three or less. In New York, for example, only treason, murder, and first-degree arson called for the death penalty. These reforms placed American law at the forefront of the abolitionist movement, as compared, for instance, to England where in 1811 one could be hanged for stealing five shillings from a shop.

The next major wave of reform in the United States began with the work of Edward Livingston. Livingston, who had held many prestigious positions, including U.S. Senator and Secretary of State under Andrew Jackson, developed a penal code for Louisiana that was prefaced by a lengthy argument against the death penalty. While the code was not adopted, publication in 1833 of his “Introductory Report to the System of Penal Law Prepared for the State of Louisiana” stimulated a round of debates on the use of capital punishment in New York, Pennsylvania and Maine. Although bills to eliminate the New York death penalty were defeated in 1832 and 1834, the state did abolish public executions in 1835, following Pennsylvania’s action of the previous year. In Maine a compromise was reached whereby the state kept the death penalty, but anyone sentenced to death had to spend one year in the state prison and then could be executed only if the governor issued a written warrant. Many opponents of the death penalty assumed that no governor would sign a warrant to execute an inmate. Similar statutes were adopted in several other states, but they were not uniformly successful in reducing executions. Other state legislatures debated capital punishment, but none reached consensus to abolish the death penalty. In an 1844 referendum, the people of New Hampshire expressed their support for capital punishment by a 2-to-1 margin.

Finally, in 1846, the opponents of capital punishment achieved a success. Three years after a bill passed its House but was defeated in the Senate, the Michigan Legislature passed a bill

abolishing the death penalty. For crimes committed after March 1, 1847, the law substituted hard labor in solitary confinement for capital punishment. Rhode Island abolished the death penalty in 1852, and Wisconsin did so in 1853. When other states did not succeed in following the example of the first three, interest in the idea gradually waned and did not reappear until the 1870s.

The next burst of activity came between 1872 and 1897, with five states abolishing the death penalty. All, except Maine, restored it at a later date, however. Activity also increased around the time of World War I with nine states abolishing capital punishment between 1907 and 1917. Again, several of these states restored it after the war.

No state abolished the death penalty between 1917 and 1957, but the number of people executed gradually dropped throughout the period. In the five-year period of 1935 through 1939, a total of 178 people were executed. By comparison, in the period 1960 through 1964, only 36 executions occurred. Interest in the issue began to grow around the 1960s with nine states abolishing capital punishment between 1957 and 1969.

### III. U.S. SUPREME COURT DECISIONS

Perhaps more important than the increase in the number of states abolishing the death penalty was the change in the tactics of the penalty's opponents. They began to focus on federal courts rather than state legislatures. Led by the American Civil Liberties Union (ACLU) and the NAACP Legal Defense Fund, opponents of the death penalty increasingly challenged the constitutionality of capital punishment through federal court cases, and they focused on the Southern states where its use was the most extensive.

Only one Southern state, Tennessee in 1915, had abolished the death penalty, and that state restored it in 1917. Not only did the Southern states maintain the death penalty, they also executed far more inmates than most other states. Ten Southern states accounted for almost one-half of the 3,859 prisoners executed in the United States between 1930 and 1969.

The effect of the ACLU and NAACP cases in the federal courts was to attack the penalty, both directly and indirectly. The direct challenge was to the constitutionality of capital punishment, with opponents claiming that it violated the U.S. Constitution prohibition of "cruel and unusual punishment". The cases created indirect pressures as states found defending against the lengthy appeals was expensive and more inmates waiting on death row increased the cost of running the system.

#### ***Furman v. Georgia***

The constitutional challenges cumulated in the most momentous decision in the legal history of the death penalty, *Furman v. Georgia*, 408 U.S. 238 (1972). In this case the U.S. Supreme Court set aside two Georgia and one Texas death penalty sentences, ruling that "the imposi-

tion and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” *Furman*, in effect, overturned the death penalty statutes of virtually all states, since they resembled the Georgia and Texas statutes that were explicitly repudiated. The only exception was a Rhode Island statute requiring the death penalty in the case of a murder committed by a life-term prisoner.

The *Furman* decision was brief and decided on a 5-to-4 vote, with each justice writing a separate concurring or dissenting opinion. This unusual amount of commentary has made it very difficult to draw firm conclusions from the decision. Because only Justices William Brennan and Thurgood Marshall of the majority concluded that the death penalty was always “cruel and unusual” and therefore unconstitutional, the way was left open for states to revise their death penalty statutes so that they would be constitutional. In general, commentators have concluded that the Georgia and Texas statutes were constitutionally infirm because their lack of standards or guidelines allowed judges and juries to reach decisions that were inconsistent and discriminatory. (See Legislative Reference Bureau Research Bulletin 73-3, “Death Penalty: Legal Status Since *Furman*”, for a detailed discussion of that decision.)

### **Post-*Furman* Cases**

The next set of death penalty decisions came in 1976. In five separate decisions handed down at the same time, the U.S. Supreme Court established that the death penalty was not unconstitutional in and of itself. In three cases, the Court upheld the use of “guided discretion”, as embodied in statutes that Georgia, Florida and Texas had enacted in reaction to *Furman* (*Gregg v. Georgia*, 428 U.S. 153; *Profitt v. Florida*, 428 U.S. 242; and *Jurek v. Texas*, 428 U.S. 262). Guided discretion requires that the law provide guidance to juries to help them determine which murderers deserve death. To accomplish this, the law should include a list of “aggravating factors” that serve to distinguish a murder punishable by the death penalty from those murders that will receive a lesser penalty. Aggravating factors that appear in many death penalty statutes include circumstances such as: the defendant had previously committed a murder; the defendant knowingly created a great risk to many people; or the crime was especially cruel, heinous or depraved. Most state laws passed in reaction to *Gregg* and subsequent decisions require that, before the death penalty can be awarded, the jury must find beyond a reasonable doubt that at least one of the aggravating factors listed in the statute was present. The jury must then be provided an opportunity to consider any mitigating evidence the defendant wishes to present. In most states, the trial is “bifurcated”, or divided, so that the jury first considers guilt or innocence and then reviews aggravating or mitigating factors in a separate proceeding before recommending a sentence.

In two other 1976 cases, *Woodson v. North Carolina*, 428 U.S. 280, and *Roberts v. Louisiana*, 428 U.S. 325, the Court established that mandatory death sentence laws that did not allow any consideration of mitigating factors were constitutionally impermissible. Louisiana's law provided a mandatory death penalty for killing a police officer; North Carolina's provided a mandatory death sentence for set categories of murder.

In *Coker v. Georgia*, 433 U.S. 584 (1977), and *Eberheart v. Georgia*, 433 U.S. 917 (1977), the Court held that imposing a death sentence for rape or kidnapping where no murder was involved constituted cruel and unusual punishment, because the death penalty was held to be disproportionate to the crime. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court found that a jury must be given a chance to consider any mitigating circumstances and not be limited to the three specific questions that the Ohio law covered. The Court reaffirmed *Lockett* in *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

More recently, however, the U.S. Supreme Court appears, in the view of many commentators, to have backed away from the standards established in the cases cited above. In two cases decided in 1983, *Zant v. Stephens*, 462 U.S. 862, and *Barclay v. Florida*, 463 U.S. 939, the Court held that as long as at least one statutory aggravating circumstance was present, the death penalty could be imposed. In *Zant*, one aggravating circumstance was found to be unconstitutional, but another remained. In *Barclay*, an aggravating circumstance not listed in the Florida Statutes was used as part of the basis for imposing the sentence although a statutory circumstance was also present. The effect of these decisions is to allow greater discretion on the part of judges and juries. Some observers fear that misuse of discretion will lead to consideration of impermissible factors, such as race, and result in the capriciousness that characterized some death penalty judgments of the pre-*Furman* era.

One aspect of imposition of the death penalty in many states is "comparative proportionality review", whereby death sentences are compared to determine whether a particular sentence is excessive when measured against sentences given in similar cases. If the sentence appears to be out of line with other decisions, it may be reversed. Georgia and 30 other states require the use of proportionality review to guard against race or other impermissible factors becoming the basis for death penalty judgments. The Georgia Supreme Court, for example, has reversed at least seven cases since 1974. Proportionality review is usually conducted by a state's highest court. In *Pulley v. Harris*, 465 U.S. 37 (1984), however, the U.S. Supreme Court upheld a California law that did not require comparative proportionality review, concluding that such a review was not required by the U.S. Constitution.

## Habeas Corpus

Chief Justice William Rehnquist and others have expressed considerable discontent in recent years regarding the lengthy process of federal review of state action in death penalty cases. Years pass while various appellate courts review trial court decisions. Multiple requests are made for review — frequently through the writ of habeas corpus. Habeas corpus petitions are the mechanism by which federal courts review whether a prisoner is being held in custody in violation of the U.S. Constitution or federal law.

Many of the habeas corpus petitions are filed at the last minute. In a 1990 speech Justice Rehnquist noted that “at no point until a death sentence is actually carried out can it be said that litigation concerning the sentence has run its course.” He concluded that the “system at present verges on the chaotic”, and he appointed a committee to examine the appeals process (see Section VII of this bulletin).

Recent Supreme Court decisions have focused on speeding up the appeals process. In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court authorized faster appellate review of capital cases. In this Texas case, the U.S. Court of Appeals for the Fifth Circuit heard arguments on Barefoot’s application for habeas corpus the week before his execution, but refused to issue a stay of execution and issued no formal opinion. The Supreme Court held that the appellate court’s consideration of the merits of the appeal at the same time that it considered the request for a stay of execution was acceptable, as was the lack of a formal opinion. It also issued guidelines for expediting appellate review.

In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court decided, with two exceptions, that it would not grant habeas corpus petitions that required the Court to make a new constitutional rule. Prisoners could not retroactively challenge a verdict rendered years earlier on the basis of newly decided cases. Since many habeas corpus petitions would require a “new” constitutional rule as the Court seems to be defining the term, many observers feel that *Teague* represents another attempt by the Court to limit the use of habeas proceedings.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the Court established a guideline that a prisoner could not raise a new issue in a second or subsequent appeal unless “some objective factor external to the defense impeded counsel’s effort to comply with the state’s procedural rules.” Given that McCleskey’s appeal was rejected in spite of the fact that some of the evidence he brought forward was not discovered until after his first appeal, many experts think that the new guideline is a major barrier to multiple habeas corpus petitions.

In *Herrera v. Collins*, 113 S.Ct. 853 (1993), the Court held that new evidence of innocence is not enough to warrant habeas relief. Chief Justice Rehnquist wrote in the majority opinion that “claims of actual innocence based on newly discovered evidence have never been held to state a ground for Federal habeas relief absent an independent constitutional violation oc-

curing in the underlying state criminal proceedings.” He suggested that clemency proceedings were the correct forum for this type of appeal. He did, however, recognize that a “truly persuasive demonstration of ‘actual innocence’ made after trial could render the execution of a defendant unconstitutional and warrant Federal habeas relief if there were no state avenue open to process such a claim.” A more recent case, *Schlup v. Delo*, No. 93-901 (1995), may represent a softening of *Herrera*, however. Justice John Paul Stevens, writing for the majority, suggested that the appropriate standard for judging innocence was “more likely than not” rather than the more stringent “clear and convincing evidence” of innocence standard used by the appeals court in denying the petition.

Opponents express concern about the trend towards accelerated review because they feel that it may reduce the due process afforded those sentenced to death. They argue that the need for careful appellate review is indicated by the fact that appeals courts overturn about 40% of the cases they hear involving death penalty sentences. Generally, the rate for overturning other appeals is slightly under 5%. However, a study, published in 1994 by the National Center for State Courts, found that in 1990 only one of 12 petitions from inmates facing the death penalty was decided in the inmate’s favor. In 1992, it found seven of 45 final decisions favored the prisoner. This suggests that the 40% figure includes petitions decided in favor of a prisoner that were reversed by a higher court. For example, the U.S. Court of Appeals for the Ninth Circuit overruled state courts on death penalty petitions six times, but in five of the cases the U.S. Supreme Court agreed with the state court. The figures included in the Center’s study deal only with the final outcome of the cases reviewed.

Other recent U.S. Supreme Court decisions have focused on the constitutionality of applying the death penalty to particular classes of individuals, such as the mentally ill and juveniles, and these will be discussed later in this bulletin.

It is difficult to identify any trend in the recent cases involving the death penalty. It should be noted that, beginning with *Furman*, most death penalty cases have been decided by a 5-to-4 margin, which suggests that a change of opinion on the part of one justice or the appointment of a new justice would either solidify or upset the current majority.

#### IV. WISCONSIN HISTORY

The first codified laws of the Territory of Wisconsin in 1839 provided for the death penalty:

Section 1. That every person who shall commit the crime of murder, shall suffer the punishment of death for the same.

Section 2. That every person who shall, by previous engagement or appointment, fight a duel within the jurisdiction of this Territory, and in so doing shall inflict a wound upon any person whereof the person injured shall die, shall be deemed guilty of murder.

The Territorial Statutes stated that the punishment for murder would be hanging.

Capital punishment was discussed at great length in the Constitutional Convention of 1846 (which failed to produce a constitution the voters would ratify). The outcome of that debate was that an article to abolish the death penalty was ultimately defeated on a 68-to-30 vote on November 25, 1846. A bill to abolish capital punishment was introduced in the Territorial Assembly in 1847. It passed the Assembly by a vote of 16-to-8, but was defeated by one vote in the Council (the upper house of the Territorial Legislature).

Although the current Wisconsin Constitution, ratified in 1848, contains no mention of the death penalty, capital punishment continued after Wisconsin became a state, because the territorial laws were adopted as the basis of the new state's statutes. Killing a person in a duel, however, was reduced to second-degree murder in the 1849 Wisconsin Statutes. Hanging continued to be the penalty for first-degree murder.

Prior to the creation of the Wisconsin Territory, there had been executions in Wisconsin under Indian tribal law, military law or previous territorial laws, and records show at least four people were hanged for murder under Wisconsin's own territorial and state laws: Edward Oliver at Lancaster on October 29, 1838; William Caffee at Mineral Point on November 1, 1842; Robert B. Brewer at Lancaster on May 16, 1846; and John McCaffary at Kenosha on August 21, 1851. The first three had shot their victims. McCaffary was convicted of drowning his wife in a hoghead of water. (The last person executed in Wisconsin may have been Jacob Powles, an Oneida Indian who shot another tribe member and was executed on November 13, 1868, under tribal law.)

The murder of Bridget McCaffary and subsequent execution of her husband in front of a crowd of over 1,000 people were the events that initiated the successful campaign to abolish the death penalty in Wisconsin. C. Latham Sholes, the editor of the *Kenosha Telegraph* and later inventor of the typewriter, was already an opponent of capital punishment, but McCaffary's execution spurred him to greater efforts. He was elected to the 1852 Legislature where he introduced a bill to abolish capital punishment. His bill failed to pass on a vote of 36-to-25. Another bill to abolish the death penalty was introduced in the 1853 Legislature by Edward Lees. 1853 Assembly Bill 67 was adopted by the assembly on March 9 on a vote of 36-to-28 and by the senate on July 8 by a vote of 14-to-9. Governor Leonard Farwell signed the bill as Chapter 103, Laws of 1853, on July 10.

Historian Richard Current suggests that establishment of a state prison at Waupun in 1851 aided passage of the bill to abolish capital punishment. Prior to this, prisoners were kept in county jails that did not really provide a suitable location for imprisoning a murderer for life.

Several lynchings and the murder of a Milwaukee banker in 1855 led to calls for reenactment of the death penalty. Bills to do so were introduced in each of the next five legislative sessions. After this, interest in the issue appears to have waned.

**Wisconsin Bills Proposing a Death Penalty or Joint Resolutions Calling for a Referendum  
1937 - 1995**

Session	Bill/ Resolution	Author	Disposition/Status
1937	AB-122	Martin B. Franzkowiak	Returned to author
1949	AJR-43	Ben Tremain	Rejected, 49-33
1955	AB-188	Arthur J. Balzer	Returned to author
1973	SB-186	Gordon Roseleip	Died in committee
	SJR-37	Gordon Roseleip and others	Died in committee
	AJR-33	George Klicka and others	Died in committee
1975	AB-640	Stanley Lato and others	Died in committee
	AJR-27	George Klicka and others	Refused to withdraw from committee, 37-59
1977	AB-268	Stanley Lato and others	Died in committee
	AB-315	James Lewis and others	Died in committee
	AJR-5	George Klicka and others	Died in committee
1979	SJR-11	Roger Murphy and others	Died in committee
	AJR-9	George Klicka and others	Died in committee
1981	AJR-28	George Klicka and others	Motion to withdraw tabled, 60-35
1983	AB-213	Richard Matty and others	Died in committee
	AJR-45	Richard Matty and others	Died in committee
1985	SB-65	Alan J. Lasee and others	Died in committee
	AB-18	Richard Matty and others	Died in committee
	AJR-61	Richard Matty and others	Died in committee
1987	SJR-21	Alan J. Lasee and others	Died in committee
	AJR-5	Richard Matty and others	Died in committee
	AB-995	Susan Vergeront and others	Died in committee
1989	SB-125	Marvin Roshell and others	Died in committee
	SB-132	Alan J. Lasee and others	Died in committee
	SJR-33	Marvin Roshell and others	Died in committee
	AB-222	Susan Vergeront and others	Died in committee
	AB-223	Susan Vergeront and others	Died in committee
1991	SB-44	Marvin Roshell and others	Died in committee
	SB-125	Alan J. Lasee and others	Died in committee, motion to withdraw and refer to another committee defeated, 10-23
	SJR-15	Marvin Roshell and others	Died in committee
	AB-588	Susan Vergeront and others	Died in committee
	AB-985	Martin Reynolds and others	Died in committee
1993	SB-23	Alan J. Lasee and others	Indefinitely postponed, 21-12
	SB-30	Michael Ellis and others	Died in committee
	SJR-42	Alan J. Lasee and others	Died in committee
	SJR-43	Joseph Andrea and others	Died in committee
	AB-123	Robert Welch and others	Died in committee
	AB-170	David Zien and others	Died in committee
	AB-358	Dean Kaufert and others	Died in committee
	AB-835	Martin Reynolds and others	Died in committee
AJR-96	Robert Welch and others	Died in committee	
1995	SB-1	Alan J. Lasee and others	In committee as of this date
	AJR-9	Sheila Harsdorf and others	In committee as of this date
	AJR-10	Bonnie Ladwig and others	In committee as of this date

The next attempt to restore the death penalty came in 1937 and was a direct response to the kidnap-killing of Charles Lindberg's baby. 1937 Assembly Bill 122 was introduced by Assemblyman Martin B. Franzkowiak of Milwaukee to establish the death penalty for kidnaping. It was later withdrawn by the author.

In 1949, Assemblyman Ben Tremain introduced Assembly Joint Resolution 43 proposing a referendum on establishment of the death penalty for first-degree murder. It was rejected by a vote of 49-to-33. A multiple murder in Milwaukee led Assemblyman Arthur J. Balzer to introduce 1955 Assembly Bill 188 to establish the death penalty for first-degree murder. The bill was returned to him at his request.

The current interest in creating a death penalty in Wisconsin began in 1973. It was precipitated by the killing of a law enforcement officer in Milwaukee six months after the *Furman* decision. As mentioned, *Furman*, although it overturned all then-existing state death penalty statutes, left the way open for the U.S. Congress and state legislatures to enact new legislation. Senator Gordon Roseleip introduced 1973 Senate Bill 186, patterned after an Indiana law providing a death penalty for nine types of murder in the first-degree. Two joint resolutions calling for advisory referenda on the topic were also introduced. These measures all died in committee. Bills to institute the death penalty or to hold an advisory referendum on the topic have been introduced in every session since 1973.

To date, legislators in the 1995 Legislature have introduced Senate Bill 1, which would provide for either death or life imprisonment for first-degree intentional homicide committed by a person age 16 years or older against a child who is younger than 16 years, and two assembly joint resolutions calling for advisory referenda on the death penalty. (See Section VIII of this bulletin for discussion of 1995 legislation.)

## V. ARGUMENTS FOR THE DEATH PENALTY

Four major arguments are generally proposed to support any kind of punishment for a criminal act: retribution, deterrence, incapacitation, and rehabilitation. All but rehabilitation have been used to justify capital punishment. Proponents of capital punishment give varying weight to each argument, and not all proponents accept all of them.

### **Retribution**

As indicated above, retribution lies at the earliest foundations of capital punishment. Proponents still consider it a valid justification for the death penalty. Simply stated, the retributionist argument is that justice requires punishment for crimes. Justice Potter Stewart makes the case in *Furman*:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the

stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they “deserve,” then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law.

In *Gregg v. Georgia*, Justice Stewart noted that while retribution is no longer the dominant theme of criminal law, it is neither forbidden nor inconsistent with society’s respect for human dignity. He suggested that some crimes are themselves “so grievous an affront to humanity” that capital punishment is the only adequate response in the eyes of the community. He implied that this is the reason for the failure of popular efforts to repeal death penalty statutes.

Walter Berns, a major proponent of capital punishment, makes a similar argument in *For Capital Punishment*: “[I]t is right, morally right, to be angry with criminals and to express that anger publicly, officially, and in an appropriate manner, which may require the worst of them to be executed.”

Opponents of the death penalty agree that criminal acts must be denounced and that crimes must be punished. However, they argue that this does not require that killing be punished by killing. They contend that murder deserves the most severe penalty awarded by the criminal justice system, but, so long as the penalty is more severe than that awarded lesser crimes, justice is served. They argue that exact proportionality between crime and punishment is impossible. Is it appropriate to steal from the burglar or rape the rapist? Is death by lethal injection proportionate to torture followed by murder? Some contend that, in fact, the death penalty is much more cruel than any murder, because the victim is told the time and method of execution and then allowed to think about it for weeks or months.

### **Deterrence**

Another way to protect people from criminal activity is to deter the criminal. Punishment for a crime is expected to deter the punished individual from committing another crime and to set a negative example for the rest of society. Different crimes require different levels of deterrence. Perhaps a \$10 fine is enough to deter a motorist from ignoring a parking meter. More severe penalties are used to stop people from committing more dangerous offenses. For deterrence to work, the prescribed punishment must pose a realistic threat; it must be both severe and certain. If the punishment is not severe, it will not deter. If it is too severe, it may not be enforced and, thus, will have no deterrence value.

The effectiveness of capital punishment as a deterrent to would-be murderers is hotly debated. There are no data on those who seriously contemplate murder and decide against it (for whatever reason). Some researchers find a deterrent effect, others find none. At least one study found evidence of a reverse effect where execution seemed to increase the number of murders. The authors of the study theorize that, for some individuals, the message of capital

punishment is that vengeance is acceptable, and these individuals then proceed to extract their own vengeance. Steven Stack suggested another factor in a 1987 article in *American Sociological Review* in which he contended that the greater the number of executions, the smaller the deterrent effect, because as executions become more common, they receive less publicity. He admitted that there might be a deterrent effect where cases are widely publicized, but when only a few cases were widely reported, the supposed deterrence probably saved fewer lives than the total number of people executed.

Perhaps the major problem facing any scientific study of deterrence is the small number of executions that take place. A much larger number of observations would be necessary for the results of studies to be statistically significant. In 1978, a committee of the National Academy of Sciences determined that “available studies provide no useful evidence on the deterrent effect of capital punishment”.

If, in fact, capital punishment does not deter, perhaps the reason is the relatively small number of executions. Logically, for a deterrent effect to exist, a person must think that there is a strong probability that the penalty will be exacted. Only 38 people were executed in 1993, and that is the highest number since *Furman*. In 1994, there were 31 executions, bringing to 257 the total number executed between 1977 and 1994. By comparison, there were 5,898 murders in 1991, according to the most recent report from the U.S. Bureau of Justice Statistics. A second problem with the concept of deterrence is that it necessitates some level of contemplation on the part of the would-be murderer. Many of those who commit murders may be unable because of mental capacity, emotional state, or background to realistically assess the danger of being caught, convicted and executed.

Despite the lack of strong evidence of a deterrent effect, proponents generally believe it exists — at least for some people. Justice Stewart noted in *Gregg* that, “There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.” Opponents of the death penalty contend, however, that the prospect of life in prison is sufficient to deter those who can be deterred.

### **Incapacitation**

One of the aims of the criminal justice system is the protection of citizens, and one way to protect people is by incapacitating the criminal. Both prison sentences and capital punishment can accomplish this end. The jailed criminal can commit no other crimes that affect society at large, and, obviously, the punishment of death is the ultimate incapacitation since it precludes the possibility of future crimes. Opponents of the death penalty argue that life imprisonment accomplishes incapacitation, but individuals serving life sentences have com-

mitted other murders. Sixty of the people under sentence of death at the end of 1993 had been in prison when they committed the murder that brought them to death row. An additional 42 had committed murders after escaping from prison. Statistics do not record why these prisoners were originally incarcerated.

In addition, not all murderers are sentenced to spend the rest of their lives in prison. Some are paroled, and paroled murderers can commit other murders. There were 230 prisoners who had been on probation and 491 who had been on parole (not necessarily for murder) when they committed the murder for which they received a capital sentence. Of the 2,716 people under a sentence of death in 1993, a total of 240 (8.8%) had committed previous murders.

Opponents of the death penalty point out that, because of the inability of experts to predict who is likely to commit another crime, executing 100% of the people who were on death row at the end of 1993 would not be a very efficient way to ensure that 8.8% of those prisoners would not murder again.

## VI. ARGUMENTS AGAINST THE DEATH PENALTY

The major arguments against capital punishment contend that it is discriminatory, arbitrary, open to mistakes, and disregards the sanctity of human life.

### **Discrimination**

Researchers and observers have long argued that one of the problems with capital punishment is that, in practice, it discriminates against African-Americans. Studies from the earlier part of this century found substantial evidence that discrimination did, in fact, exist. In one of the most important studies, Marvin Wolfgang studied 3,000 rape convictions between 1945 and 1965. He found that Black men convicted of rape were sentenced to death 7 times more often than white men. Black men convicted of raping white women were 18 times more likely to be sentenced to death. The U.S. Supreme Court did invalidate the death penalty for rape on the grounds that the punishment was too severe for the crime, but it never used discrimination as a reason to overturn a death sentence conviction until *Furman*. Evidence of discrimination does appear to have been a factor influencing at least two of the justices in the majority in *Furman*. Research into the issue continues.

Recent research indicates that overt discrimination seems to have disappeared, but there are subtle differences. Blacks today do not appear more likely to receive the death penalty than whites, but David Baldus and his associates found evidence that in particular instances discrimination occurs. They divided murder cases into three categories: those in which guilt was obvious; those where the evidence was not clear-cut; and those where evidence was weak. They found no evidence of discrimination where guilt was obvious or where evidence was weak. However, where decisions could have gone either way, they found evidence that in

cases with white victims, the Black suspect was sentenced to death more often than the white suspect. One group of researchers suggests that as many as one-third of the death sentences imposed in Georgia may be the result of discrimination based on the race of the victim.

Proponents of the death penalty question the magnitude of the discrimination these researchers have discovered, or they suggest that it is the result of unstudied variables. They question how a researcher can determine that prejudice played a part in a particular judgment. They raise the point that, even if the research is accurate, discrimination represents a problem that can be remedied and not a fundamental flaw in the concept of capital punishment. In their view, rather than discard capital punishment, society should install additional procedural safeguards.

For now it appears unlikely that the racial discrimination argument will cause any significant change in death penalty jurisprudence. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the U.S. Supreme Court ruled that there was no evidence that the death penalty was inherently discriminatory and that, unless a defendant could demonstrate that there was discrimination in a specific case, sentences would stand.

### **Arbitrariness**

Opponents of capital punishment stress the arbitrary nature of the punishment. Although each year, 2,000 to 4,000 people in the United States commit acts which theoretically could lead to the death penalty, fewer than 300 are sentenced to be executed. There are many steps at which the accused may be filtered out. First, a person must commit a crime that can result in capital punishment. Capital crimes vary from state to state, so it is possible for someone to escape the death penalty because the particular crime committed is not punishable by death in the jurisdiction where it occurred.

Second, a prosecutor or grand jury must decide to prosecute. One prosecutor may indict for a capital offense, while another may charge a crime that does not carry the death penalty. There is wide variety in the extent to which prosecutors seek the death penalty. In 1991, Dallas, with 500 homicides that year, sought the death penalty in only three cases. Philadelphia, on the other hand, had 440 homicides but sought the death penalty 43 times. Houston recorded almost as many capital trials in 1993 and 1994 as Los Angeles, in spite of having 700,000 fewer residents.

Plea bargains may be conducted. As an example of the type of arbitrariness introduced by plea bargaining, author Charles Black, writing in *Capital Punishment: The Inevitability of Caprice and Mistake*, cites *Lockett v. Ohio*, 438 U.S. 586 (1978). In the case, the person who fired the gun that killed a robbery victim received life imprisonment in a plea bargain, but the driver of the getaway car, Sandra Lockett, received the death penalty. Although the U.S. Supreme

Court overturned Lockett's death sentence, it did so not due to the arbitrary outcome but because the Ohio death penalty statute did not permit individualized consideration of mitigating factors.

The next step in the process requires that a trial be held regarding the guilt or innocence of the accused. Most jurisdictions also require a separate penalty trial, which may be conducted before the same jury or a separate jury, to decide if the punishment will be death. While recent U.S. Supreme Court decisions have caused the states to revise the capital punishment process, opponents of the death penalty argue that there is still ample room for juries to make arbitrary decisions.

Finally, at the last step, whether a particular case moves through the appeals courts and withstands appellate scrutiny can be a matter of chance.

Researchers have found some evidence of arbitrariness in any of these steps. There are always defendants who escape from the process who do not appear to be much different from those who are finally executed. Thus, the researchers argue, being sentenced to death is due more to bad luck than the inescapable punishment for a crime committed.

On the contrary, proponents of capital punishment argue that the small number of people sentenced to death is a mark of success. The system does filter people out. They contend most of the people who eventually are executed are clearly guilty of particularly serious murders — murders committed in the course of other crimes, multiple murders, or particularly heinous murders. They suggest that procedural changes can be made to correct remaining areas of arbitrariness. If the procedural flaws can be remedied, then they should not bar the use of capital punishment.

### **Mistakes**

A major objection to the death penalty centers around the possibility of mistakes. Opponents of the death penalty find it difficult to accept that the state should execute anyone, but the possibility of executing an innocent person they find intolerable. They argue that, since human systems are inherently fallible, society must end up executing the innocent, at least occasionally, if it executes at all. In an exhaustive study, Hugh Adam Bedau and Michael L. Radelet examined murder convictions in the United States since 1900 and found 350 cases where they thought that an innocent person was convicted. Of these, 139 were sentenced to death and 23 were actually executed. In the other cases, the person could have been sentenced to death but either received an alternative sentence or was tried in a jurisdiction without the death penalty.

Five of the 350 cases listed in the study occurred in Wisconsin: John Johnson (1911); Eli J. Long (1918); Frank B. LeFevre (1942); Edward Kanieski (1952); and Kenny Ray Reichhoff

(1975). Johnson was convicted of murder and confessed because he feared he would be lynched. Eleven years later it was determined that his father had committed the crime. Long was convicted, but released almost immediately because of newly-discovered evidence. LeFevre was convicted, but his sentence was reversed on appeal because the evidence was insufficient to sustain conviction. Kanieski served 20 years in prison before the Wisconsin Supreme Court overturned the conviction on the grounds that there was not sufficient evidence to sustain it. Reichhoff was convicted of two murders, and, after the convictions were overturned on technical grounds, he was acquitted in a second trial.

In a major attack on Bedau and Radelet, Stephen Markman and Paul Cassell investigated 12 of the cases in which Bedau and Radelet claimed that individuals had been mistakenly executed. Markman and Cassell decided that these 12 individuals were clearly guilty. They determined that Bedau and Radelet “employed an unacceptable standard for determining innocence” and “consistently presented incomplete and misleading accounts of the evidence”. They found no evidence that anyone had been wrongly executed between 1960 and 1985, and, instead, concluded that Bedau and Radelet actually demonstrated that the system works well enough to justify the death penalty.

Although the vast majority of the sentences in the Bedau and Radelet study, including those of Kanieski, LeFevre and Reichhoff in Wisconsin, were eventually corrected in the normal course of appellate review, they offer important examples in the current discussion of the capital punishment appellate procedures. Death penalty opponents argue that the mistakes made in their cases might not have been discovered if fewer opportunities for appeal were available.

### **Sanctity of Human Life**

A final argument of the opponents of capital punishment centers around the importance of human life. Opponents argue that when society executes people, it is, in fact, sending the signal that murder is acceptable in certain circumstances. They think that human life is so important that even a murderer’s life should not be taken. This is perhaps the crux of the entire argument between the two sides, because proponents reply that the value of human life can only be upheld by exacting the most severe possible punishment for taking it. In their view, capital punishment serves to validate the sanctity of life.

## **VII. OTHER ARGUMENTS**

### **Costs Associated with Capital Punishment**

One of the latest arguments to be advanced against capital punishment is that it is not cost effective. Almost every aspect of a capital offense prosecution costs more than a comparable

noncapital prosecution. In the first place, capital prosecutions almost always involve a jury trial, which is more expensive than a bargained settlement or a trial before a judge. (A plea bargain normally results in a noncapital charge, because there obviously would be no point in bargaining for a judgment that involved capital punishment.) In addition, the New York State Defenders Association found that the number of pretrial motions in capital cases ranged from two to four times the number filed in noncapital cases.

Investigation costs are higher in capital cases. This is due, in part, to the higher stakes involved, calling for what some have termed “super due process”, and partially because it is necessary for the defense attorney to prepare evidence for a mitigation hearing. Gathering mitigating evidence may be especially expensive because it may involve psychiatrists’ examinations and other expert testimony. The legal defense costs may also account for the disproportionate number of poor people on death row.

Jury selection in capital cases is usually much more time consuming than in noncapital cases. Again, the higher stakes mean that more questions will be asked, and there are usually more peremptory challenges (challenges to excuse a prospective juror without cause). For example, California offers each attorney in a noncapital case 10 peremptory challenges, but in capital cases each attorney has 26.

A 1984 study estimated that jury selection in capital punishment trials took about five times longer than the average for noncapital cases. Given that it costs an estimated \$2,186 a day to run a California courtroom, for example, jury selection for a capital case was a significant expense, adding perhaps as much as \$80,000 to trial costs in that state. Added to that, capital punishment trials also took about 3.5 times longer than other trials, about an extra month overall. Juries in capital cases are also more frequently sequestered than in noncapital cases, which inflates the trial cost.

Various states have estimated the cost of a death penalty by reviewing the expenses for public prosecutors and public defenders. In 1982, New Jersey estimated that prosecuting its death penalty cases would cost \$16 million a year. In 1983, that state’s public defenders were budgeting \$102,000 for each of the 52 pending capital punishment cases, for an estimated total of over \$5.3 million that year.

Appeals also add to the expense of capital trials. Most guilty verdicts are appealed automatically, and appeals are usually made on any and all possible grounds. The New York City law firm of Paul, Weiss, Rifkin, Warton and Garrison estimated its costs for federal appeals of four murders appealed in 1985 at between \$140,000 and \$400,000 each.

A 1985 California study estimated that the process of determining the death penalty and carrying it out, from the time a charge is brought to the point of execution, cost about \$600,000.

A study by the New York State Defenders Association in 1982 estimated the cost of a capital punishment case at \$1.8 million. A major portion of that amount appears to be the above average costs incurred in the trial and appeal of a capital charge.

While comparable figures for noncapital trials and appeals are not easy to compute, estimates of the cost of capital punishment have been compared to the cost of keeping a convicted murderer in prison for life. The California study estimated that sentencing a murderer to life in prison would cost \$438,746. (This is based on Florida's estimate of almost 31 years as the average life expectancy of a prisoner and 1985 California prison costs of \$14,245 per prisoner per year.) The New York study estimated the cost of life imprisonment for 40 years at \$602,000. These cost estimates obviously relate to a state's incarceration costs. More recently, Wisconsin spent an average of \$22,256 per inmate to keep a prisoner in one of the four adult male maximum security institutions during the 1993-1994 fiscal year.

In 1993, Philip Cook and Donna Slawson of Duke University's Terry Sanford Institute of Public Policy conducted a study of the costs of processing murder cases in North Carolina for the administrative office of the North Carolina Courts. In their sample, they totaled the cost of all trials in which the prosecution sought the death penalty since the costs related to the trial are the same regardless of whether the prosecution wins or loses. When the cost of capital trials in which the death penalty is not imposed were included, they estimated that the average cost of adjudicating capital cases was \$216,461 per death penalty imposed. They also calculated that a bifurcated capital trial cost about \$55,000 more than a noncapital murder trial. Since they found that only about one capital case in 10 actually resulted in an execution, the average cost per execution was more than \$2.16 million. Because many capital punishment cases proceed to the appellate courts, the trial costs are only a portion of the judicial expenses. Cook and Slawson examined two capital cases that were fully litigated and found that the average postconviction cost to the state was \$255,000 each.

A memorandum, "Cost Considerations of Implementing the Death Penalty", prepared by the Kansas Legislative Research Department in connection with the death penalty bill adopted in 1994, estimated the total cost per death sentence at \$1,006,474 and the total cost per execution at \$2,733,336. Per case costs were estimated at \$546,332, with \$102,222 of that total being local government costs.

In the fiscal estimates for 1995 Senate Bill 1, the Wisconsin Department of Justice projects a minimum cost of \$96,667 just for attorney salaries for each case in which the death penalty was sought. They also expect unspecified cost increases related to services provided by the State Crime Laboratory and the Division of Criminal Investigation and training for local district attorney staff. The Wisconsin Department of Corrections estimates that Wisconsin would

need to build and staff 12 cells on its “death row” at construction costs of just over \$2 million and annual staffing and maintenance costs at \$458,000.

This quick review of the estimates shows that it is very difficult to estimate the cost of the death penalty. The most important factor in determining cost is the number of crimes subject to the penalty. 1995 SB-1, for example, includes only one crime, less than either the Kansas or North Carolina statutes. Other factors that vary from state to state include prevailing wage rates, the nature of the court system, and the resources devoted to the cases by various parties involved in the prosecution and defense of the charges. However, there is little disagreement that death penalty cases are significantly more expensive than noncapital trials.

### **Appellate Review**

In addition to being costly, the capital cases are extremely time consuming. The U.S. Court of Appeals for the 11th Circuit, which includes several states that impose the death penalty, estimates that more than 30% of its docket encompasses death penalty appeals. The U.S. Supreme Court has also noted the amount of court time devoted to this class of cases. In 1988, Chief Justice Rehnquist established an ad hoc committee to examine the problem for the Judicial Conference of the United States, the policymaking group for the court system. The committee was chaired by retired Justice Lewis Powell and composed of judges from the two circuit courts of appeals that hear the largest number of death penalty appeals.

The committee found, in examining the 116 executions that have taken place since *Furman*, that the average length of time from commission of the crime to execution of the sentence was 8 years, 2 months. The shortest case took almost 3 years and the longest over 14 years. They determined that the delay and the small number of executions “make clear that the present system of collateral review operates to frustrate the law of 37 States”. (Collateral cases are filed after all direct appeals have been taken and a sentence has been finally upheld by the state’s highest court.)

The committee noted that there was also a serious problem with the level of counsel provided for collateral review. They found that capital inmates “almost uniformly are indigent and often illiterate or uneducated” and that the appeals were difficult and complex. Counsel with specialized experience in death penalty appeals often join cases only when execution is imminent, at which point it may be too late to do an effective job. The committee was also disturbed by the number of last minute appeals and considered some to be meritless, deliberate attempts to delay execution.

The committee proposed allowing federal habeas corpus petitions to be filed for only a six-month period following conviction. To be eligible for the new system, states would have to guarantee to provide counsel. The six-month period would begin on the date counsel is

appointed or the defendant refuses counsel and would not include days when state court proceedings were pending. The time limit could be extended, if appropriate. An automatic stay of execution would begin with the filing of the federal petition and run until proceedings were completed.

The committee noted that, while its appeals period was considerably less than the current unlimited system, it provided more time than allowed for appeals for other categories of cases. The committee argued that its proposal would provide better representation because counsel would be appointed at the beginning of the appeals process. The committee believed that the proposal would “go far to rectify the current chaos in capital litigation — periodic inactivity and last-minute frenzied activity, the scheduling and rescheduling of execution dates — which diminishes public confidence in the criminal justice system.” The proposal was submitted to the U.S. Senate Judiciary Committee by Justice Rehnquist on September 22, 1989. His action came after the Judicial Conference had deferred consideration of the report until March 1990, and 14 of the 27 judges of the Judicial Conference protested submission of the report to Congress before the Conference had considered it.

In October 1989, the Task Force on Death Penalty Habeas Corpus of the American Bar Association (ABA) issued a report, and it was adopted as ABA policy in February 1990. The report also noted the delay and chaotic nature of death penalty appeals and recommended a one-year time limit on filing appeals, rather than the six months proposed by the Powell committee. The ABA report focused more on the lack of resources devoted to those accused of capital crimes, however. The ABA report recommended more and better access to attorneys as a solution.

Billsto enact reforms have been considered in the U.S. Congress in every session since the Powell report. They have failed to pass because of fundamental disagreement on where to strike a balance between the necessity to ensure that no mistakes are made and the need to have the system function efficiently.

States have shown similar concern with the delays occasioned by appellate review. To speed up the process, Florida established an agency called the Capital Collateral Representative with a budget of more than \$1 million each year. The agency, paradoxically, is designed to expedite executions by providing competent attorneys early in the appeals process so that appeals are handled quickly. In theory, the sooner the appeals are completed, the sooner an execution or release can take place. Oklahoma created a unit in the public defender’s office that specializes in death penalty cases. After creation of the special unit, convictions dropped dramatically. The filing of fewer capital cases results in a smaller number of the marginal cases that are most apt to require lengthy appeals. Fourteen states also have federally funded death penalty resource centers. While the federal money can only be spent on federal appeals, most

of the centers also work on state appeals. The future of this approach is in doubt, in part because in *Murray v. Giarratano*, 492 U.S. 1 (1989), the U.S. Supreme Court ruled that a state had no obligation to provide legal counsel after a state supreme court upheld a death penalty conviction and also because some of the agencies have been criticized as being “too successful” in assisting appeals.

### **Minimum Age for Execution**

In addition to the question of whether anyone should be put to death, there are the individual questions as to whether certain classes of individuals should receive capital punishment. One case of this type is *Thompson v. Oklahoma*, 487 U.S. 815 (1988). It involved the death penalty conviction of a boy who was 15 when he murdered his brother-in-law. He was waived from juvenile to adult court, convicted of murder and sentenced to death. The U.S. Supreme Court overturned the sentence on a 5-to-4 vote, although only four of the majority (Justices Stevens, Brennan, Marshall and Harry Blackmun) found that the execution of anyone under the age of 16 was against contemporary standards and, therefore, cruel and unusual punishment. Writing for these justices, Justice Stevens noted that “the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile” and that, because juveniles are less experienced, less educated and more emotional, “their irresponsible conduct is not as morally reprehensible as that of an adult”. Justice Stevens found that, in making a cold-blooded calculation about murder, a person might be deterred by the prospect of a death penalty. However, he thought that kind of calculation was unlikely in a 15-year-old and, given the extremely small number of juveniles executed, the execution of one more juvenile would be unlikely to have a deterrent effect. The majority opinion noted that no state that specified a minimum age for execution allowed the execution of those who were under the age of 16 at the time they committed a murder. When those 17 states are added to the 14 that prohibit execution, the majority of states can be said to be against the execution of those under 16. Also, the federal government recently has limited the death penalty for drug dealers to those 18 and over and has signed an international treaty that specifies 18 as the minimum age for capital punishment.

Justice Sandra Day O’Connor joined the other justices in reversing the sentence, but did not go so far as to say that any sentence of death for minors under the age of 16 was unconstitutional. She was concerned by the fact that there was no clear indication that the State of Oklahoma had intended that the statute allowing waiver of juveniles into adult court should also allow the juvenile to face the death penalty. She was unconvinced that there was a clear national consensus forbidding execution before age 16 and concluded that the Court should not finalize the consensus without clearer evidence.

Writing for the minority, Justice Antonin Scalia found no evidence of a consensus on a minimum age for execution. He argued that some individuals under the age of 16 might be responsible. The purpose of the sentencing process was to consider the circumstances of the individual crime and decide what level of responsibility was involved. The question of whether and under what circumstances juveniles should be executed should be left to the discretion of individual states.

In *Stanford v. Kentucky* and *Wilkins v. Missouri*, 492 U.S. 361 (1989), which were joined for hearing and decision, Justice Scalia, writing for the 5-justice majority, ruled that the Eighth Amendment would not bar execution of two different minors, one who was 17 at the time of the murder and the other 16. Justice O'Connor joined Scalia and the minority from *Thompson* to make the majority in these cases. The result of the three cases is that, barring a marked change in the Court's reading of the national consensus on the issue, execution is unconstitutional for minors under 16, but not for those between 16 and 18.

### **Execution of the Mentally Ill or Retarded**

The U.S. Supreme Court has ruled in *Ford v. Wainwright*, 477 U.S. 399 (1986), that the Eighth Amendment prohibits execution of the insane because this category of defendant is incapable of intentionally committing a murder. The role of less serious mental illness or retardation in capital sentencing decisions is less clear.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court ruled that a murderer with a mental age of six and one-half years could be executed. Justice O'Connor, writing for the majority, concluded that "there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment". Colorado, Georgia, New York and Tennessee appear to be the only states that prohibit execution of the retarded, although many states specifically allow consideration of retardation as a mitigating factor. As Justice O'Connor noted, however, "Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."

Justice O'Connor noted that the most severely retarded offenders would be protected under the insanity defense and found the definition of "mental age" too imprecise to establish at what point the retarded should not be executed. The case was remanded because the majority found that the Texas law did not clearly allow the jury to consider Penry's retardation as a mitigating factor.

Much the same argument can be made in the case of the mentally ill. At least 20 states list the inability to understand the crime as a mitigating factor, but the possibility exists that it

might also be considered an aggravating factor as well. There is no clear guidance from the U.S. Supreme Court on mental illness.

There is some evidence that significant numbers of those convicted of murder suffer from some degree of mental illness or retardation. One study of 15 death row prisoners found that all showed some evidence of head injuries. Another study of juveniles found that seven of 14 juveniles on death row were psychotic and all but two had IQs under 90.

### **Method of Execution**

One of the factors to be considered in determining whether the death penalty is “cruel” is the exact method by which it is carried out. Hanging was the general penalty in the 19th century in Wisconsin and in other states. Gradually a consensus developed that this method of execution was unnecessarily cruel and other methods were substituted.

Electrocution was first authorized by New York in 1889 and first used in 1890. Part of the impetus for authorizing the new method of execution came from New York legislators who had witnessed a bungled hanging. A commission appointed by the legislature reported electrocution the most humane and practical method of carrying out the death penalty. Four more states had authorized execution by electrocution by 1908. There is some disagreement about the humaneness of electrocution. Many experts hold that it is painless, while others argue that the individual being executed may remain conscious long enough to feel extreme pain. It is grotesque to observe and is gradually becoming less common.

In the first half of this century, the gas chamber was developed as another alternative to hanging. Nevada first used this method of execution in 1924. While it does less obvious violence to the body than electrocution, it is not clear how painless it is. If the condemned prisoner breathes deeply, death may be quick and painless; otherwise, it may take longer and be painful. Gas chambers are also expensive to build and operate. In 1977, Oklahoma determined that building one would cost \$250,000.

The most recent addition to the list of methods of execution is lethal injection. Oklahoma and Texas authorized this method in 1977, but the first such execution did not take place until December 1982 in Texas. If properly conducted, this method appears to be the least painful. Once a needle is inserted in a vein, the criminal is rendered unconscious by a barbiturate and then killed by a paralytic agent. One problem with this method is that some doctors consider acting as an executioner to be a violation of their professional oath.

At the end of 1993, lethal injection was authorized in 25 states (five more than in 1988), 12 authorized electrocution, eight lethal gas, three hanging and two firing squads. Fourteen states authorized more than one form of execution (usually at the election of the convicted), but in three of them choice is based on date of conviction with recently convicted persons given

lethal injection. California and Ohio added a choice of lethal injection in 1993. Both Kansas and New York chose lethal injection in their recently created laws. The table at the end of this bulletin summarizes the methods used in each state.

There has been a steady movement in the direction of choosing the most humane method of execution available. Almost invariably, the legislative rationale for changing a method of execution is that the new means is justified as being less painful.

## VIII. CURRENT LEGISLATIVE ACTIVITY

### Wisconsin

The Wisconsin Legislature is currently considering one bill and two joint resolutions relating to capital punishment. 1995 Senate Bill 1 was introduced by Senators Lasee, Zien, Huelsman, Drzewiecki, Cowles and Buettner and cosponsored by Representatives Kaufert, Ladwig, Underheim, Foti, Dobyns, Musser, Vander Loop, Owens, Kreibich, Brandemuehl, Vrakas, Ainsworth and Ott. According to the analysis by the Legislative Reference Bureau, the bill "provides for either a death penalty (by lethal injection) or life imprisonment (with or without parole eligibility) for any first-degree intentional homicide committed by a person who is 16 years old or older against a child who is younger than 16 years old."

The LRB analysis reads:

Under current law, no state crime is punishable by the death penalty. This bill provides for either a death penalty (by lethal injection) or life imprisonment (with or without parole eligibility restrictions) for any first-degree intentional homicide committed by a person who is 16 years old or older against a child who is younger than 16 years old. Other first-degree homicides remain punishable by life imprisonment.

The procedure for determining whether or not the death penalty would be imposed is the subject of a proceeding that is separate from the regular trial. After a conviction finding that a first-degree homicide of a child younger than 16 years old had occurred, the court reconvenes the trial jury, or, if there was no jury trial or the trial jury is unable to continue, a new jury is summoned. The defendant may waive the right to a jury. Evidence is then presented regarding various aggravating or mitigating circumstances relating to the crime and the defendant.

The jury hears the evidence, and then gives an advisory sentence, to the court, of either life imprisonment or death. If the jury recommends life imprisonment, it may further recommend a complete or substantial restriction of the defendant's parole eligibility. The court, not bound by the advisory sentence, then weighs the aggravating and mitigating circumstances and enters the sentence of either life imprisonment or death. If life imprisonment is imposed, the court may completely or substantially restrict the defendant's parole eligibility. If the court chooses the death sentence it must set forth its findings in writing. Any death sentence is subject to automatic appellate review by the supreme court.

The court that imposes the death sentence sets the execution date. The secretary of corrections designates the executioner. One physician and 12 citizen witnesses must be present at the execution.

This bill applies only to those offenses committed on or after its effective date (the day after publication).

1995 Assembly Joint Resolution 9, introduced by Representatives Harsdorf, Brandemuehl, Otte, Vrakas, Ziegelbauer, Musser, Ladwig, Underheim, Grobschmidt, Ainsworth, Seratti and Kaufert and cosponsored by Senators Zien, Drzewiecki and Buettner, would put an advisory referendum on the November 1996 ballot. The ballot question would be: "Shall the death penalty be enacted in the State of Wisconsin for certain types of homicide, as the legislature may prescribe by law, committed by persons who act with the intent to kill?"

1995 Assembly Joint Resolution 10, introduced by Representatives Ladwig, Dobyms, Kaufert, Brandemuehl, Handrick, Ainsworth, Vrakas, Seratti, Skindrud, Musser, Foti, Freese, Ott, Otte, Harsdorf, Silbaugh and Ziegelbauer and cosponsored by Senators Petak and Buettner, would put an advisory referendum on the ballot. The ballot question would be: "Shall the death penalty be enacted in the State of Wisconsin for certain types of first-degree intentional homicide as the legislature may prescribe by law?"

### **Other States**

No state enacted a death penalty between 1984 (the date of Oregon's capital punishment law) and 1993. Kansas enacted a death penalty by lethal injection in 1994 when the governor allowed a bill to become law without her signature. New York enacted a death penalty by lethal injection in March 1995 for the killing of a police officer, judge, or other criminal justice officials; contract and serial killings; torture killings; or an intentional murder during another felony. Murder by a person serving a life sentence, whether in prison or while on escape, would also justify a capital sentence. The mentally retarded or persons under the age of 18 could not be executed. Most of the 12 states that do not have the death penalty are expected to debate it during the current legislative sessions.

States that have death penalty statutes have made a number of changes in the last several years. Several have set or changed the minimum age for capital punishment. Others have changed the method of execution, usually to lethal injection. Colorado prohibited execution of the mentally retarded in 1993, and Arizona provided that persons sentenced to death should not be executed if they could not understand the nature of the punishment or the reasons for execution because of mental illness or incompetence. Several states have added categories of victims for which the death penalty may be sought.

## **IX. STATISTICS**

The following table provides basic statistics on death penalty statutes and murder rates in the various states. Minimum age of execution is either a specific age stated by statute or the

minimum age at which a juvenile may be transferred to adult jurisdiction. States that do not specify any age are listed as “none”.

**Capital Punishment Laws and Statistics**

State	1987 Murders per 100,000	1992 Murders per 100,000	Number Under Sentence in 1988	Number Under Sentence in 1993	Executions During 1993	Executions Since 1976	Form of Execution	Minimum Age
Alabama	9.3	11.0	97	120	0	10	Electrocution	16
Alaska	10.1	7.5	---	---	---	---	<b>NO DEATH PENALTY</b>	---
Arizona	7.5	8.1	82	112	2	3	Lethal injection	None
Arkansas	7.6	10.8	27	33	0	4	Lethal injection	14
California	10.6	12.7	229	363	1	2	Lethal gas, lethal injection	18
Colorado	5.8	6.2	3	3	0	0	Lethal injection	18
Connecticut	4.5	5.1	1	5	0	0	Electrocution	18
Delaware	5.1	4.6	7	15	2	3	Lethal injection	16
Florida	11.4	9.0	295	324	3	32	Electrocution	None
Georgia	11.8	11.0	91	96	2	17	Electrocution	17
Hawaii	4.8	3.6	---	---	---	---	<b>NO DEATH PENALTY</b>	---
Idaho	3.1	3.5	15	22	0	0	Lethal injection, firing squad	None
Illinois	8.3	11.4	118	152	0	1	Lethal injection	18
Indiana	5.6	8.2	51	47	0	2	Electrocution	16
Iowa	2.1	1.6	---	---	---	---	<b>NO DEATH PENALTY</b>	---
Kansas	4.4	6.0	---	---	---	---	Lethal injection	18
Kentucky	7.5	5.8	32	30	0	0	Electrocution	16
Louisiana	11.1	17.4	40	45	1	21	Lethal Injection	15
Maine	2.5	1.7	---	---	---	---	<b>NO DEATH PENALTY</b>	---
Maryland	9.6	12.1	14	15	0	0	Lethal gas	18
Massachusetts	3.0	3.6	---	---	---	---	<b>NO DEATH PENALTY</b>	---
Michigan	12.2	9.9	---	---	---	---	<b>NO DEATH PENALTY</b>	---
Minnesota	2.6	3.3	---	---	---	---	<b>NO DEATH PENALTY</b>	---
Mississippi	10.2	12.2	48	50	0	4	Lethal injection	16
Missouri	8.3	10.5	68	80	4	11	Lethal gas, lethal injection	16
Montana	4.1	2.9	7	8	0	0	Lethal injection, hanging	None
Nebraska	3.5	4.2	13	11	0	0	Electrocution	18
Nevada	8.4	10.9	44	65	0	5	Lethal injection	16
New Hampshire	3.0	1.6	0	0	0	0	Lethal injection, hanging	17
New Jersey	4.6	5.1	21	7	0	0	Lethal injection	18
New Mexico	10.1	8.9	2	1	0	0	Lethal injection	18
New York	11.3	13.2	---	---	---	---	Lethal injection	18
North Carolina	8.1	10.6	80	99	0	5	Lethal injection, lethal gas	17
North Dakota	1.5	1.9	---	---	---	---	<b>NO DEATH PENALTY</b>	---
Ohio	5.8	6.6	88	129	0	0	Electrocution, lethal injection	18
Oklahoma	7.5	6.5	92	122	0	3	Lethal injection	16
Oregon	5.6	4.7	15	13	0	0	Lethal injection	18
Pennsylvania	5.4	6.2	98	169	0	0	Lethal injection	None
Rhode Island	3.5	3.6	---	---	---	---	<b>NO DEATH PENALTY</b>	---
South Carolina	9.3	10.4	36	47	0	4	Electrocution	None
South Dakota	1.8	0.6	0	2	0	0	Lethal injection	None
Tennessee	9.1	10.4	70	98	0	0	Electrocution	18
Texas	11.7	12.7	284	357	17	71	Lethal injection	17
Utah	3.3	3.0	8	11	0	4	Lethal injection, firing squad	None
Vermont	2.7	2.1	0	0	0	0	<b>NO DEATH PENALTY</b>	---

Virginia	7.4	8.8	39	49	5	22	Electrocution	15
Washington	5.6	5.0	7	10	1	1	Lethal injection, hanging	None
West Virginia	4.8	6.3	---	---	---	---	<b>NO DEATH PENALTY</b>	---
Wisconsin	3.5	4.4	---	---	---	---	<b>NO DEATH PENALTY</b>	---
Wyoming	2.0	3.6	2	0	0	0	Lethal injection	16

Sources: U.S. Department of Justice, Bureau of Justice Statistics, "Bulletin: Capital Punishment, 1993"; U.S. Bureau of the Census, *Statistical Abstract of the United States*, 1994, p. 199; and newspaper clippings.

## X. SUMMARY

Given the intensity of the feelings of proponents and opponents of the death penalty it appears unlikely that the controversy surrounding the issue will disappear. Regardless of the eventual outcome of the debate, there remains a wide range of discussion over application and means, and there is more variety than uniformity in the categories of crimes punishable by death and the method of execution selected. Discussion will continue on these issues, as well as the quantity and quality of legal assistance appropriate for defendants accused of murder.

## XI. SOURCES

American Bar Association. *Toward a More Just and Effective System of Review in State Death Penalty Cases*. August 1990 (365.48/Am3)

Bedau, Hugo Adam, ed. *The Death Penalty in America*. 3rd ed. New York: Oxford University Press, 1982. (365.48/B39)

Bedau, Hugo Adam, and Michael L. Radelet. "Miscarriages of Justice in Potentially Capital Cases." *Stanford Law Review*. 40 (November 1987) 21-178. (365.48/St2/pt.1)

-----, "The Myth of Infallibility: A Reply to Markman and Cassell." *Stanford Law Review*. 41 (November 1988) 161-170. (365.48/St2/pt.3)

Berns, Walter. *For Capital Punishment: Crime and the Morality of the Death Penalty*. New York: Basic Books, 1979.

Black, Charles L., Jr. *Capital Punishment: The Inevitability Caprice and Mistake*. 2nd ed. New York: W.W. Norton and Company, Inc., 1981.

Council of State Governments. "Juvenile Capital Punishment." October 1987. (365.48/C83b)

Cook, Philip J., and Donna B. Slawson. *The Costs of Processing Murder Cases in North Carolina*. Terry Sanford Institute of Public Policy. Durham, NC: Duke University, May 1993. (365.48/N8)

Cropley, Carrie. "The Case of John McCaffary." *Wisconsin Magazine of History*. (Summer 1952) 281-86. (365.48/C88)

Davis, David Brion. "The Movement to Abolish Capital Punishment in America, 1787-1861." *American Historical Review*. (October 1957) 23-46. (365.48/D28)

- Flango, Victor E. *Habeas Corpus in State and Federal Courts*. Williamsburg, VA: National Center for State Courts, State Justice Institute, 1994.
- Garey, Margot "Comment: The Cost of Taking a Life: Dollars and Sense of the Death Penalty." *U.C. Davis Law Review*. 18 (Summer 1985) 1221-1273. (365.48/G171)
- Gottlieb, David J. "The Death Penalty in the Legislature: Some Thoughts About Money, Myth, and Morality." *University of Kansas Law Review*. 37 (Spring 1989) 443-470. (365.48/G71)
- Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases. "Committee Report and Proposal," August 23, 1989. (365.48/X3)
- Kansas Legislative Research Department. "Cost Considerations of Implementing the Death Penalty, 1994 H.B. 2578 and S.B. 473." February 23, 1994. (365.48/K1)
- Markman, Stephen J., and Paul G. Cassell. "Comments: Protecting the Innocent: A Response to the Bedau-Radelet Study." *Stanford Law Review*. 41 (November 1988) 121-160. (365.48/St2/pt.2)
- McIntyre, Elwood R. "A Farmer Halts the Hangman: The Story of Marvin Bovee." *Wisconsin Magazine of History*. 42 (Autumn 1958) 3-12. (365.48/M18)
- National Council on Crime and Delinquency. "Capital Punishment in the United States." *Crime and Delinquency*. 26 (October 1980). (365.48/N21)
- New York State Defenders Association, Inc. "Capital Losses: The Price of the Death Penalty for New York State." Albany: New York State Defenders Association, Inc., April 1982. (365.48/N48)
- Stack, Steven. "Publicized Executions and Homicide, 1950-1980." *American Sociological Review*. 52 (August 1987) 532-540. (365.48/St1)
- U.S. Department of Justice, Bureau of Justice Statistics. "Capital Punishment, 1993," December 1994. (365.48/X/1993)
- Wisconsin Legislative Fiscal Bureau. "Senate Substitute Amendment 1 to 1993 Senate Bill 23: Creating a Penalty of Death for Certain First-Degree Intentional Homicides." October 13, 1993. (365.48/W7d)
- Wisconsin Then and Now*. "Executions Stained Area's History." June 1979, 2-6.
- Zimring, Franklin E., and Gordon Hawkins. *Capital Punishment and the American Agenda*. Cambridge: Cambridge University Press, 1986.

---

Note: Numbers in parentheses are catalogue numbers for materials in the H. Rupert Theobald Legislative Library at the Legislative Reference Bureau.