

# Public Opinion and the Death Penalty\*

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In *Furman v. Georgia*<sup>1</sup> the United States Supreme Court, in a 5 to 4 per curiam decision, held that the death penalty as then administered violated the eighth amendment prohibition of "cruel and unusual" punishment. Justices Brennan and Marshall would have held that the death penalty was cruel and unusual per se, but Justices Douglas, Stewart, and White based their concurring decisions on the more limited grounds that the death penalty was unconstitutional because it was applied in a sporadic, capricious, arbitrary, or unfairly discriminatory way.<sup>2</sup> Thus, although the *Furman* decision effectively voided the death sentences of 631 persons on death row in 32 states,<sup>3</sup> it left open the possibility that capital punishment would be acceptable if its inequities and arbitrary application were corrected. Such an "equitable" capital punishment law would eliminate discretion in sentencing by making the death penalty mandatory for all persons convicted of capital crimes or would severely limit discretion by providing strict standards specifying the conditions under which the death penalty must or must not be imposed.<sup>4</sup> Since *Furman*, many states have enacted legislation aimed at restoring the death penalty in conformity with these criteria, two have reinstated it by judicial review,<sup>5</sup> and legislation is pending in a number of other legislatures, including Congress. As of March 15, 1974, there were already 72 persons awaiting execution on death rows in various states.<sup>6</sup> Future litigation on the death penalty seems assured and it

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1. 408 U.S. 238 (1972).

2. *Id.* at 256, 257 (Douglas, J., concurring); *id.* at 257, 305 (Brennan, J., concurring); *id.* at 306, 310 (Stewart, J., concurring); *id.* at 310, 311 (White, J., concurring); *id.* at 370, 371 (Marshall, J., concurring). See *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 77 (1972); Note, *Furman v. Georgia—Death Knell for Capital Punishment*, 47 ST. JOHN'S L. REV. 107 (1972). The applicability of this decision to the states comes through the due process clause of the 14th amendment.

3. M. MELTSNER, CRUEL AND UNUSUAL PUNISHMENT 292-93 (1973).

4. See *The Supreme Court, 1971 Term*, *supra* note 2, at 77, 85.

5. Wicker, *Death and Demagoguery*, N.Y. Times, Mar. 15, 1974, at 33c, col. 1.

6. *Id.* There were 31 persons in North Carolina, 17 in Florida, 8 in Georgia, 5 in Massachusetts, 3 in Texas, 2 in Montana, and 1 each in New Mexico, Utah, Virginia, Pennsylvania, Louisiana, and South Carolina.

may well involve the question of whether capital punishment per se constitutes "cruel and unusual" punishment.<sup>7</sup>

To some extent public opinion has always played a part in modern controversy about the death penalty;<sup>8</sup> both abolitionists and retentionists refer to it in ethical and philosophical writings, and legislators often defend their position on capital punishment by citing public opinion polls. Now, however, it appears that public opinion may assume a role of particular importance in judicial decisionmaking. Unlike many Constitutional issues, the meaning of the eighth amendment prohibition of cruel and unusual punishment appears to have been extended such that the purview of legal review includes a direct assessment of the values of society at large. In the leading case of *Weems v. United States*,<sup>9</sup> the Supreme Court rejected a static interpretation of the eighth amendment; rather, it recognized that "[t]ime . . . brings into existence new conditions and purposes," and the interpretation of what constitutes cruel and unusual punishment may change as "public opinion becomes enlightened by a human justice."<sup>10</sup> Later, in *Trop v. Dulles*,<sup>11</sup> the Court reaffirmed this position when it asserted that the eighth amendment derived its meaning from "the evolving standards of decency that mark the progress of a maturing society."<sup>12</sup> Throughout *Furman*, both concurring and dissenting Justices accepted these precedents.<sup>13</sup> They expressed sharp disagreement, however, on the questions of where the public stands on the issue of capital punishment, whether opinion polls are valid indicators of public sentiment about capital punishment, and the extent to which enlightened public opinion determines contemporary standards of decency.<sup>14</sup>

7. See, *The Supreme Court, 1971 Term*, *supra* note 2, at 80. For a discussion of other potential challenges to the death penalty, see M. MELTSNER, *supra* note 3, at 299-315.

8. See Bedau, *What Do Americans Think of the Death Penalty?*, in *THE DEATH PENALTY IN AMERICA* 231 (H. Bedau ed. 1967).

9. 217 U.S. 349 (1910). Weems, a minor official in the Philippines, was convicted of falsifying documents. Under the Filipino penal code he was sentenced to be confined in chains, imprisoned, and subjected to "painful as well as hard labor" for a minimum of 12 years. He was also denied all civil liberties. The Court held that such punishment was excessive for the crime and was, therefore, cruel and unusual.

10. *Id.* at 378.

11. 356 U.S. 86 (1958). The Court decided it was cruel and unusual punishment to deprive Trop of his American citizenship as a penalty for wartime desertion.

12. *Id.* at 101.

13. Six of the nine Justices explicitly accepted the notion of changing standards. See 408 U.S. at 242 (Douglas, J., concurring); *id.* at 264 (Brennan, J., concurring); *id.* at 329 (Marshall, J., concurring); *id.* at 382-83 (Burger, C.J., dissenting); *id.* at 409 (Blackmun, J., dissenting); *id.* at 429-30 (Powell, J., dissenting).

14. Justice Brennan, concurring, asserted that death as a method of punishment is almost totally rejected by contemporary society and noted its successive restriction in this country, the reluctance of juries to impose it, and the tendency of governors to commute death sentences. *Id.* at 295-97. Justice Marshall, concurring, argued that American citizens know almost nothing about capital punishment, but if they were informed about its purposes and liabilities, the majority of people would find it morally unacceptable. *Id.* at 362. Chief Justice Burger, dissenting, apparently accepting public opinion as a measure of standards of decency and morality, argued that it was the role of the legislatures, not the

The purpose of this Article is to assess public attitudes toward capital punishment by examining public opinion polls and other social science studies bearing on this issue. One goal is to provide legislative and judicial decisionmakers with a sounder social science base for evaluating public opinion about the death penalty. Another goal is to note the gaps in our knowledge of this subject, and to frame the sort of questions that need to be asked in future research.

The major thesis of the Article is that merely noting general levels of support for or against capital punishment will not necessarily give us the kind of information needed to judge what the public really wants with regard to the death penalty or whether those wants are based on constitutionally acceptable standards of morality. Rather, we must consider attitudes toward capital punishment as it is to be applied to specific types of criminals for specific crimes and under specific circumstances and conditions. Furthermore, we must consider these attitudes in the context of people's knowledge about capital punishment and in the context of other attitudes and values that they hold.

#### I. THE CONTEXT FOR EVALUATING OPINION POLL FINDINGS

Before reviewing the existing research on attitudes toward the death penalty, we should first discuss a number of considerations that are useful in evaluating the findings of public opinion polls and in deciding the extent to which findings of such polls should be used as a standard for determining whether the death penalty constitutes cruel and unusual punishment.

First, the *Furman* decision clearly prohibited discretionary application of the death penalty. If the public should favor capital punishment only in a form that would result in arbitrary imposition of death sentences, these views would be judicially unacceptable. The important question, then, is whether people favor "non-discretionary" death sentences for certain crimes, and if so, under what conditions.

A second possible criterion was raised by Justice Marshall in his *Furman* concurrence. He asserted that the law should be guided only by "informed"

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judiciary, to reflect changing social attitudes and moral values. He noted, moreover, that most legislatures have retained the death penalty, and that public opinion polls show support for it. *Id.* at 384-85. Justice Blackmun, dissenting, argued that there has been no decisive "progress in the human attitude" since the time of fairly recent Court decisions that viewed capital punishment as widely accepted by society. *Id.* at 410. Justice Powell, dissenting, stated that both legislative activity, including referenda, and the willingness of juries to recommend the death penalty in some cases refute the assertion that capital punishment offends society's moral values. *Id.* at 430-46. Furthermore, he rejected Justice Marshall's contention that the public would be against capital punishment if it were informed of the facts of its administration. *Id.* at 430-46.

The difficulties of assessing public attitudes on the issue of capital punishment have been recognized in previous cases. *See, e.g.,* *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir. 1952). *See also* *Ralph v. Warden*, 438 F.2d 786, 792 (4th Cir. 1970).

public opinion.<sup>15</sup> It is not possible to determine whether capital punishment as it actually functions offends a person's sense of decency if that person is ignorant or misinformed about capital punishment. For example, a person who favors the death penalty because he assumes it deters crime, involves low cost to society, and expedites the judicial process might change his mind if he discovered that there was good reason to doubt these assumptions. It is also possible that knowledge about the actual physical and psychological realities of executions<sup>16</sup> would be so offensive to some people that, regardless of any utilitarian considerations, they would find it offensive from a humanitarian standpoint.<sup>17</sup> Thus, only to the extent that the public is knowledgeable about both the utilitarian and humanitarian aspects of capital punishment would Marshall rely on their opinions to judge whether the death penalty is consistent with contemporary standards of morality.

Third, if public opinion is to be used as a gauge of the "evolving standards of decency that mark the progress of a maturing society,"<sup>18</sup> opinions about capital punishment that are based on beliefs and attitudes inconsistent with basic values safeguarded by the Constitution should arguably carry less weight than opinions that are founded on more "enlightened" attitudes. Support for the death penalty that is based on discrimination against class, race, or sex would, if this criterion is applied, undoubtedly be considered inappropriate as a standard by which to judge public morality. Likewise, motives of retribution or vengeance might be considered inappropriate as well.<sup>19</sup>

Fourth, it would also be useful to recognize that there may be different levels of attitudinal support for capital punishment. Support at the general abstract level should probably be given less consideration in the assessment of public opinion than support for the application of the death penalty in concrete situations.

Finally, it should be noted that the data on public opinion and the death penalty must be viewed in the context of other social science findings about

15. 408 U.S. at 362.

16. See generally Ehrmann, *For Whom the Chair Waits*, FED. PROBATION Q., Mar. 1962, at 14; Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 CRIME & DELINQUENCY 121, 127-29 (1969).

17. Although Justice Marshall focused most of his attention on the utilitarian aspects of capital punishment, 408 U.S. at 362-64, the humanitarian considerations seem implicit in his criterion that a punishment "may be invalid if popular sentiment abhors it." *Id.* at 332.

18. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

19. In *Williams v. New York*, 337 U.S. 241, 248 (1948), the Court concluded that "[r]etribution is no longer the dominant objective of the criminal law." In *Furman*, Justice Marshall reviewed other cases rejecting retribution. 408 U.S. at 342-45. Justice Stewart, however, argued that retribution is an acceptable goal in the administration of criminal justice, *id.* at 308, but he did not indicate how much consideration it should be given in weighing the merits of the death penalty. See S. GLEUCK, *LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE?* 147-48 (1962), which noted that at least four state constitutions (Indiana, Montana, Oregon, and Wyoming) asserted that the purpose of criminal sanctions shall be limited to reformation and prevention.

public opinion. Over the past three decades sociologists, political scientists, and psychologists have conducted extensive research on public opinion as it relates to a wide variety of social and political issues. Many of the findings from this broader body of research have direct relevance for interpreting or qualifying the results of opinion polls related to the death penalty. We shall make use of this information wherever it is appropriate.

## II. RESEARCH ON ATTITUDES TOWARD CAPITAL PUNISHMENT

Our literature review is divided into seven substantive areas: (1) general levels of support for the death penalty, (2) the types of crime and circumstances for which the death penalty is favored, (3) levels of support among various subpopulations, (4) reasons for favoring capital punishment, (5) social-psychological and other attitudinal correlates of death penalty attitudes, (6) knowledge and attitudes about capital punishment, and (7) various levels of attitudes toward the death penalty.

### A. General Support for Capital Punishment

Erskine has listed all of the available nationwide and statewide polls on the death penalty from 1936 to 1969.<sup>20</sup> The overwhelming majority of the polls have asked only general questions about the death penalty for murder. Basically, the data contained in her article indicate that until 1966 public support for the death penalty declined at a fairly consistent rate. According to the Gallup polls, support fell from 62 percent in favor of capital punishment in 1936 to 42 percent in 1966. After 1966, however, the trend reversed and Erskine's review indicates that by 1969 the Gallup poll showed that 51 percent of the American public supported the death penalty.<sup>21</sup> Nationwide polls conducted subsequent to 1969 show that this upward trend in support has continued, with the most recent poll showing 59 percent of the people supporting capital punishment.<sup>22</sup>

20. Erskine, *The Polls: Capital Punishment*, 34 PUB. OPINION Q. 290 (1970).

21. *Id.* at 290. The upward trend was most noticeable in the California poll which found 46% of the people supporting capital punishment in 1956, 51% supporting it in 1965 and 65% supporting it in 1969. *Id.* at 295.

22. The Gallup Poll showed that in 1971 49% of the American people favored the death penalty for murder. See Gallup Opinion Index, Report 78, Dec. 1971, at 14. In March 1972 it was favored by 50% of the people, and by December 1972 support had grown to 57%. 1 CURRENT OPINION, Apr. 1973, at 32. A nationwide survey conducted for Professor Milton Rokeach by the National Opinion Research Center in the spring of 1971 showed that 56% of the public endorsed capital punishment. See Rokeach and Vidmar, *Testimony Concerning Possible Jury Bias in a Black Panther Murder Trial*, 3 J. APP. SOC. PSYCHOL. 19, 23 (1973). A Harris survey conducted in June 1973 showed that 59% of the American people supported the death penalty for murder while 31% opposed it; the comparable figures in 1970 were 47% and 42%, while in 1969 they were 48% and 38%. The Harris Survey, Louis Harris and Associates, Inc., New York, N.Y., June 11 and 14, 1973 (Copyright, The Chicago Tribune, 1973). (Some of the data from the Harris Survey are reported in 1 CURRENT OPINION, Aug. 1973, at 80-81. Other data reported in this article were not contained in the public releases and are reported with permission of Louis Harris Associates, Inc.)

Some of the differences between the various surveys may be due to sampling fluctuations, to

Given the constraints imposed by *Furman*, however, the data from these polls are no longer very relevant, if at all relevant, to judicial and legislative decision-making. With the 1973 Harris Poll as an exception, the survey questions dealt only with capital punishment for murder, were broadly phrased, and did not ask about the circumstances under which capital punishment should be imposed.<sup>23</sup>

### B. Support for Capital Punishment Under Specific Circumstances

Most of the polls have asked only about the death penalty for murder or measured general sentiment for it. There are, however, some data, mostly very recent, that provide information concerning attitudes about the kinds of persons who should or should not be executed, the specific circumstances under which people should be given the death penalty and, most important, the issue of mandatory capital punishment.

#### 1. *Classes of persons to be executed.*

A February 1965 Gallup survey showed that 45 percent of the respondents supported capital punishment for murder, but only 23 percent favored it for persons under 21 years of age.<sup>24</sup> A 1953 Gallup poll indicated that while 68 percent of respondents favored capital punishment, only 65 percent favored it for women.<sup>25</sup> Despite the studies showing rather conclusively that blacks are more likely to receive capital punishment than whites<sup>26</sup> and other studies showing that people who favor capital punishment are somewhat more prejudiced,<sup>27</sup> no study in the literature we reviewed has attempted a direct assessment of whether capital punishment is favored more for blacks or other minority groups than for whites.<sup>28</sup>

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differences in the wording of questions, to actual fluctuation of attitudes from time period to time period, or to some combination of these factors. The important point, however, is that all the surveys show that the trend toward increased support for the death penalty has continued.

23. Similar criticisms may be levelled in cases of statewide voter referenda such as those in Colorado (1966), Massachusetts (1968), Illinois (1970), and California (1972), in which voters approved the death penalty, sometimes by a substantial margin. M. MELTSNER, *supra* note 3, at 306; Wilson, *The Death Penalty*, N.Y. Times, Oct. 28, 1973, § 6 (Magazine), at 48. See also H. Bedau, *The Death Penalty in America: Review and Forecast*, 35 FED. PROBATION 32 (1971). Generally, these referenda failed to limit the available options to those allowed by *Furman* so that their results cannot be taken as supportive of a non-discretionary death penalty.

In the California case, at least, there is also some evidence that intensive publicity campaigns by law enforcement organizations made the death penalty synonymous with crime control and may have heavily influenced voter behavior. There were charges made in California that the Attorney General, district attorneys, policemen, sheriffs, firemen, and other public employees illegally used public offices and employees to mount a publicity campaign in favor of the referendum. San Francisco Bay Guardian, Oct. 4, 1972, at 1, col. 1.

24. Erskine, *supra* note 20, at 297.

25. *Id.* at 298. Snortum & Ashear, *Prejudice, Punitiveness, and Personality*, 36 J. PERSONALITY ASSESSMENT 291 (1972), also found a tendency toward leniency for females, but their report does not allow us to separate preferences for the death penalty from preferences for prison sentences.

26. See, e.g., Wolfgang & Reidel, *Race, Judicial Discretion, and the Death Penalty*, 407 THE ANNALS, May 1973, at 119.

27. See text accompanying notes 65, 67, 72, and 77 *infra*.

28. Snortum & Ashear, *supra* note 25, did attempt to investigate the effects of race in their sur-

## 2. *Categories of crimes to be covered.*

One survey asked general questions that give information about the types of crime for which people feel the death penalty is appropriate. The 1970 Gallup poll asked respondents what the penalty should be for persons convicted of specified crimes.<sup>29</sup> Six percent felt that someone convicted of putting a bomb in a public building should be executed, 4 percent favored the death penalty for hijacking an airplane, and 2 percent favored it for someone starting a serious riot.<sup>30</sup> The same poll also showed that 4 percent favored death for a person who sells heroin, and 2 percent favored it for a person who sells marijuana.<sup>31</sup> The Gallup survey, however, posed the questions without reference to a mandatory death penalty and without allowing respondents who chose lesser penalties to indicate whether they would favor the death penalty only under some circumstances.<sup>32</sup>

## 3. *Mandatory death penalties.*

In the wake of the *Furman* decision two polls have asked about mandatory death penalties and about the specific kinds of crime for which respondents would favor a mandatory death penalty. A May 1973 poll in Minnesota asked whether the "death penalty should or should not be made automatic" for four types of crimes. Forty-nine percent favored "automatic" capital punishment for "murder of a law enforcement officer," 59 percent favored it "when a kidnapper or hijacker kills a person," 58 percent favored it in the case of "assassination of federal officials," and 39 percent favored it for "crimes against the federal government such as treason, sabotage and espionage."<sup>33</sup>

Although these data tend to show considerable support for mandatory death sentences, this poll suffers from a shortcoming of polling technique that belies its reliability; it did not offer the respondents a clear definition of "automatic" nor did it offer a range of alternative responses sufficient to gauge their attitudes with any specificity.<sup>34</sup> For example, they were not given the option of saying that they preferred each case to be decided on its

vey. They found no effects, but since the report did not separate death penalty preferences from prison sentence preferences, it is not directly informative about death penalty attitudes.

29. 3 G. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1935-1971*, at 2246-47 (1972).

30. *Id.* at 2246.

31. *Id.* at 2246-47.

32. The questions on the Gallup survey stated: "There has been a lot of discussion as to what jail terms, if any, should be given persons 18 years of age and older who are convicted of certain offenses. Would you please tell me in the case of each of the following offenses what, in general, you feel should be the jail term: For a person . . ." This was followed by a specific crime and a list of options (*e.g.*, no penalty, 1 year or less, 2-5 years, 6-9 years, 10 years or more, life, death, medical help). *Id.*

33. The Minnesota Poll, Minneapolis, Minn., May 27, 1973. The specific wording of the question was, "The death penalty is not permitted for any crime now. Do you think the death penalty should or should not be made automatic for the following crimes . . . ?"

34. Cf. M. ROSENBERG, S. VERBA, & P. CONVERSE, *VIETNAM AND THE SILENT MAJORITY* 20-24 (1970).

TABLE 1  
RESPONSES TO JUNE 1973 HARRIS SURVEY: QUESTION ON WHO SHOULD GET  
THE DEATH PENALTY

Crime	Response			
	All	No One	Depends	Not Sure
Killing policeman or prison guard	41%	17%	38%	4%
First degree murder	28	16	53	3
Skyjacking	27	27	41	5
Rape	19	27	50	4
Mugging	9	41	43	7
Bank robbery	8	43	43	6

Source: Harris Survey, *supra* note 35.

own merits, considering all of the circumstances before the death penalty is administered. Had the respondents understood "automatic" to mean that no exceptions regardless of circumstances were to be made, and had the poll brought to their attention certain extenuating circumstances, it is possible that the level of support for the "automatic" death penalty would have been substantially lower.

This possibility is reinforced by the June 1973 Harris survey that undertook the most comprehensive survey of public attitudes toward the death penalty that we found in our literature search.<sup>35</sup> The survey found that in response to the question, "Do you believe in capital punishment (the death penalty) or are you opposed to it?" 59 percent of the respondents gave support to capital punishment. However, in another series of questions, respondents were given a list of crimes and asked whether they felt that all persons convicted of the crime should get the death penalty, that no one should get the death penalty, or that it "should depend on the circumstances of the case and the character of the person." The crimes and the percentages of respondents endorsing each alternative are described in Table 1. It is clear that no more than 41 percent of the respondents favored a mandatory death sentence for any single type of the listed crimes. The other respondents were either opposed to capital punishment or felt it should be used in a discretionary way.<sup>36</sup> In contrast to the Minnesota survey, then, the

35. The Harris Survey, *supra* note 22.

36. It is noteworthy that 8% and 9% of the respondents supported mandatory capital punishment for the crimes of mugging and bank robbery respectively. Thus, of those persons who endorsed an automatic death penalty for killing a policeman, murder, skyjacking, or rape, more than one-fourth of them indicated they would apply it in circumstances where it clearly must be considered an excessive punishment for the crime committed. One is tempted to ask whether these persons have socio-legal attitudes that are out of step with contemporary values concerning criminal justice. *Id.*



Harris survey might lead to the tentative conclusion that there is not strong support for mandatory capital punishment; the persons opposed to the death penalty and the persons who wanted it administered in a way that depends on the circumstances of the case outnumbered those persons who supported mandatory capital punishment by a substantial majority.

More detailed research into specific attitudes about capital punishment is needed. In particular we need to know if the public understands what mandatory capital punishment means, whether there is support for it in the context of options that are available under *Furman*, and whether support for the death penalty diminishes as we move from general endorsement to the realities of applying it in specific circumstances. For example, do people understand that a mandatory death statute really means no exceptions are to be made for a certain class of criminals convicted of certain crimes and that all mitigating factors would be automatically ruled invalid in any appeal for leniency? Would they favor a mandatory death penalty under such circumstances? Would they favor the death penalty when faced with the choice of a mandatory death penalty (or some other form of non-discretionary death statute) or no death penalty at all? Only when the answers to these questions are known will we be able to draw reasonable conclusions about support for post-*Furman* death penalty statutes.

### C. Support for the Death Penalty Among Various Subpopulations

The assessment of support for the death penalty in different segments of the population is important for at least two reasons. First, knowing the characteristics of certain subpopulations may give insight into the dynamics behind death penalty attitudes and thus yield information bearing on standards of morality. Second, both legislative and judicial decisionmakers sometimes rely on the opinions of groups such as policemen, psychiatrists, or ministers who are presumed to be "expert" or "informed" with regard to questions about the deterrent efficacy of the death penalty or its morality.

Examination of the polls reported by Erskine, as well as other polls reviewed in this article, indicates that the demographic correlates of death penalty attitudes are rather consistent across polls.<sup>37</sup> Note again, however, that most of the data are based on attitudes for the crime of murder with no consideration for post-*Furman* restrictions. Generally, people who support the death penalty tend to be older, less educated, male, more wealthy, white, and from urban areas. A greater percentage of white collar workers, manual laborers, and farmers favor capital punishment than do professionals and businesspersons. Among Catholics there is more support for the death penalty than among Protestants, and Republicans tend to favor capi-

37. See generally Erskine, *supra* note 20.

tal punishment more than Democrats and independents.<sup>38</sup> While these demographic correlates are at best gross indicators that may be confounded with other variables and do not account for much variability in attitudes, they strongly suggest the need for more sophisticated research which can better examine people's understanding and underlying attitudes about the death penalty.

There are also a few studies, generally unsophisticated, and now somewhat out of date, that show differential support for capital punishment among occupational groups. A clear majority of policemen tend to support the death penalty,<sup>39</sup> as do most sheriffs, district attorneys, and prison guards.<sup>40</sup> On the other hand most psychiatrists, clergymen, and prisoners tend to oppose it.<sup>41</sup> More research should be devoted to the study of the attitudes of certain "expert" occupational groups in the population. For example, surveys of the attitudes of wardens and other prison officials who

38. The 1972 Gallup Poll, *see* Gallup Opinion Index, Mar. 1972, at 14, provides typical data on the percentage of persons favoring capital punishment, opposing capital punishment, or having no opinion on the subject.

By age: Among persons 18-20, 42% were for capital punishment, 50% were against, and 8% had no opinion. Among persons 21-29, 42% were for, 52% were against, and 6% had no opinion. Among persons 30-49, 52% were for, 40% were against, and 8% had no opinion. Among persons 50 and older, 54% were for, 34% were against, and 12% had no opinion.

By education: Among persons with a college education, 48% were for, 47% were against, and 5% had no opinion. Among persons with a high school education, 51% were for, 39% were against, and 10% had no opinion. Among persons with a grade school education, 50% were for, 40% were against, and 10% had no opinion.

By sex: Among males, 55% were for, 39% were against, and 6% had no opinion. Among females, 45% were for, 43% were against, and 12% had no opinion.

By income: Among persons making \$15,000 per year or over, 52% were for, 41% were against, and 7% had no opinion. Among persons making \$10,000-\$14,999, 54% were for, 40% were against, and 6% had no opinion. Among persons making \$7,000-\$9,999, 50% were for, 41% were against, and 9% had no opinion. Among persons making \$5,000-\$6,999, 51% were for, 39% were against, and 10% had no opinion. Among persons making \$3,000-\$4,999, 42% were for, 47% were against, and 11% had no opinion. Among persons making under \$3,000, 43% were for, 43% were against, and 14% had no opinion.

By race: Among whites, 53% were for, 39% were against, and 8% had no opinion. Among non-whites, 24% were for, 64% were against, and 12% had no opinion.

By community size: Among people living in communities with 1 million people and over, 58% were for, 35% were against, and 7% had no opinion. Among people living in cities of 500,000 to 999,999 persons, 46% were for, 44% were against, and 10% had no opinion. Among people living in cities of size 50,000-499,999, 45% were for, 45% were against, and 10% had no opinion. Among people living in cities of size 2,500-49,999, 48% were for, 43% were against, and 9% had no opinion. Among people living in rural areas (2500 and under), 51% were for, 40% were against, and 9% had no opinion.

By occupation: Among professional and business persons, 51% were for, 44% were against, and 5% had no opinion. Among white collar workers, 48% were for, 40% were against, and 12% had no opinion. Among farmers, 46% were for, 40% were against, and 14% had no opinion. Among manual laborers, 48% were for, 43% were against, and 9% had no opinion.

By religion: Among Protestants, 49% were for, 42% were against, and 9% had no opinion. Among Catholics, 52% were for, 38% were against, and 10% had no opinion.

By politics: Among Republicans, 59% were for, 29% were against, and 12% had no opinion. Among Democrats, 49% were for, 44% were against, and 7% had no opinion. Among independents, 44% were for, 48% were against, and 8% had no opinion.

39. Campion, *Attitudes of State Police Toward the Death Penalty*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 8, at 252. *See also* M. Reidel, *Correlates of Capital Punishment*, Jan. 1966, at 6-8 (unpublished thesis in Bowling Green State University Library).

40. *See* H. Bedau, *supra* note 8, at 233.

41. *Id.*; Roche, *A Psychiatrist Looks at the Death Penalty*, 38 *PRISON J.* 46-47 (1958).

have had direct experience with administering the death penalty, and are therefore well-informed about certain aspects of its use, would yield useful information for judging whether capital punishment is cruel.<sup>42</sup> Ministers and clergymen are often considered moral leaders of the community and thus new and more comprehensive studies of their attitudes might also yield useful information about whether the death penalty is offensive to evolving standards of decency.<sup>43</sup>

#### D. *Expressed Reasons for Favoring the Death Penalty*

An examination of the justifications people give for their attitudes toward the death penalty can provide several important kinds of information. First, a knowledge of people's expressed reasons for supporting or opposing the death penalty can provide theoretical insights into the meaning of the overall percentages of support and opposition. Second, such an examination allows us to assess whether support for capital punishment is directed toward legislatively and judicially acceptable goals. Third, the analysis of people's justifications for favoring the death penalty provides some insight into whether support for it is founded on misinformation or lack of thought.

While a few polls have asked the public about the bases for their support or opposition, potentially important response alternatives have always been omitted and the questions asked have often been ambiguous. In most cases the respondent's initial justification has been accepted without further probing to determine whether his answers are sincere and complete. Nevertheless, some of the data raise important questions and merit further examination.

##### 1. *Expressed belief in deterrence.*

Belief in deterrent effectiveness is probably the most frequently assessed rationale for support of capital punishment. A 1960 Minnesota poll asked, "If all states did away with the death sentence, do you think the crime rate in the United States would go up, down, or wouldn't it make any difference?" Eighteen percent thought it would go up, 5 percent thought it would go down, 73 percent thought it would make no difference, and 4 percent had no opinion.<sup>44</sup> A February 1972 poll in Texas asked, "Do you think we would have fewer murders committed in Texas if those given the death penalty were actually executed?" Fifty-two percent of the sample said

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42. Ehrmann, *supra* note 16, at 14, suggests that prison officials and others who have witnessed executions are generally against capital punishment, presumably because it is an abhorrent experience. See also Rubin, *supra* note 16, at 127-29.

43. See also Note, *supra* note 2, at 120-21.

44. See Erskine, *supra* note 20, at 305.

yes and 36 percent said no, with 12 percent saying they did not know.<sup>45</sup> Of those persons in the 1973 Iowa poll who thought the death penalty should be restored, 44 percent felt it was a deterrent to crime while 23 percent indicated that things were too lenient now.<sup>46</sup> The Iowa Poll also asked those who opposed restoration of the death penalty why they were against it. Thirty-four percent merely indicated that they were "personally opposed" to it, 25 percent felt that the government should not decide life or death, 17 percent said it was not a deterrent to crime, 9 percent said prison was worse than death, and 5 percent said innocent persons sometimes die.<sup>47</sup>

The most detailed and comprehensive inquiry into various common justifications for support of the death penalty was made in the 1973 Harris Survey.<sup>48</sup> One question in that survey asked respondents whether they felt the death penalty was more effective as a deterrent than was a sentence of life imprisonment. Fifty-six percent of those interviewed indicated they felt it was more effective, while 32 percent felt that it was not. Among the proponents of capital punishment, 76 percent felt that it was more effective than a life sentence, but only 29 percent of capital punishment opponents felt that it was more effective. While this finding suggests the possibility that belief in the deterrent efficacy of capital punishment may be at least partially responsible for public support, there is one caveat that must be considered; expressed belief in deterrent efficacy may be seen by proponents as the most socially acceptable justification for favoring the death penalty, and thus may be used as a cover for other, less acceptable reasons.<sup>49</sup>

## 2. *Underlying belief in retribution.*

Additional questions on the Harris survey lend strong support to the hypothesis that for many respondents a belief in deterrence is not the most fundamental reason for favoring capital punishment.<sup>50</sup> In one question respondents were asked, "[s]uppose it could be proved to your satisfaction that the death penalty was not more effective than long prison sentences in

45. 1 CURRENT OPINION, Sept. 1972, at 11.

46. 1 CURRENT OPINION, Aug. 1973, at 78. Seven percent said it would relieve the tax burden, and 30% gave the ambiguous answer that it should be used only for severe crimes.

47. *Id.*

48. The Harris Survey, *supra* note 22.

49. The literature in social psychology is replete with examples showing that in interviews or other testing situations people will give answers that they think are compatible with the views of the interviewer or what they assume to be the generally accepted views of society, even if these answers conflict with their own personal opinion. Thus, even if a person really favors the death penalty for revenge, he is less likely to indicate his true feelings if he thinks this might make him look bad in the eyes of the interviewer or other persons who might see his answers. Sometimes more extensive questioning or indirect questions can reveal his true feelings. For a more extended discussion of this problem, see E. WEBB ET AL., UNOBTRUSIVE MEASURES 1-22 (1966); Cannel & Kahn, *Interviewing*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 526 (G. Lindzey & E. Aronson eds. 1968); Scott, *Attitude Measurement*, in *id.* at 234-36.

50. The Harris Survey, *supra* note 22.

keeping other people from committing crimes such as murder, would you be in favor of the death penalty or would you be opposed to it?"<sup>51</sup> Fifty-four percent of those who favored capital punishment said they would favor capital punishment even if it had no deterrent effect. This finding is very similar to that found in an earlier survey of attitudes toward the death penalty in a sample of English-speaking Canadian adults.<sup>52</sup>

The Harris Survey also gave respondents a list of reasons for supporting capital punishment and asked them to indicate the extent to which each reason reflected their own viewpoint.<sup>53</sup> While a majority of the respondents indicated that they felt capital punishment is an effective deterrent<sup>54</sup> or endorsed other reasons relating to deterrence,<sup>55</sup> about 40 percent of the sample endorsed the reason of Biblical retribution,<sup>56</sup> and 41 percent endorsed the reason of giving someone perceived to be an animal his just desert.<sup>57</sup>

Thus, these different ways of assessing reasons why people favor the death penalty yielded data that suggest that retribution may be an important motive in capital punishment attitudes. Taken by themselves, the data do not allow us to compare precisely the relative importance of retributive versus deterrence reasons for favoring the death penalty. However, additional data on the correlates of death penalty attitudes,<sup>58</sup> as well as more general observations that large segments of the population are more concerned with punishing criminals than rehabilitating them,<sup>59</sup> lend credence to the retribution hypothesis.

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51. *Id.*

52. See Neil Vidmar, *Retribution Motives and Other Correlates of Canadian Attitudes Toward the Death Penalty*, June 3, 1973 (paper delivered to the Canadian Psychological Association Meetings, Victoria, B.C.). Fifty-five percent of Canadian adults who favored capital punishment indicated they would favor the death penalty regardless of its deterrent value. While these findings might only be reflecting the fact that people support the death penalty as a symbol of law and order, Vidmar also found that persons who supported the death penalty were also more likely to score high on measures of retributiveness. It has been noted previously that Canadian attitudes on the death penalty closely parallel attitudes of Americans. See Bedau, *supra* note 8, at 239.

53. The Harris Survey, *supra* note 22.

54. Sixty-one percent of the sample indicated that the following statement represented their own view either "completely" or "fairly well": "Capital punishment is more effective than other penalties in keeping people from committing serious crimes." *Id.*

55. These reasons and the percentage of the sample endorsing each of them are as follows: "Crime is getting out of hand in this country and we need capital punishment to show that we really mean business about wiping out crime," 58%. "We need capital punishment to help protect the police," 54%. "We've had capital punishment all these years and we would be taking a chance getting rid of it—a new crime wave might spread across the country," 49%. *Id.*

56. The statement was as follows: "The Bible is right when it preaches an eye for an eye and a tooth for a tooth." *Id.*

57. The statement was as follows: "Someone who has committed a terrible crime like murder is an animal and deserves to be executed." *Id.*

58. See text accompanying notes 68, 69, 70, 71, and 78 *infra*.

59. See F. ALEXANDER & H. STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 209-23 (1931); H. WEIHOFEN, *THE URGE TO PUNISH* 130-70 (1956); Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 1-6 (1972).

*E. Additional Correlates of Attitudes Toward the Death Penalty*

A number of studies have shown that attitudes about the death penalty are related to other social and legal attitudes and to personality variables. These findings can provide insight into the perceptions, attitudes, and motives of survey respondents and thus give us a better understanding of their attitudes about capital punishment.

In a study of 839 respondents in Volusia County, Florida, Thomas and Foster administered a number of multi-item scales measuring support for capital punishment, perception of crime rates, fear of victimization, perception of the effectiveness of punishment as a deterrent to crime, and willingness to employ punishment as a reaction to crime.<sup>60</sup> All of the scales were positively and highly correlated with one another.<sup>61</sup> The authors interpreted their findings as supportive of a complex sociological model which assumes that support for the death penalty is a utilitarian response to rising crime rates. They argued that perception of an increasing rate of criminal behavior results in fears of victimization and willingness to employ punishment as a response to criminal behavior. Fear of victimization also causes people to perceive an increased effectiveness in the use of criminal punishment. Finally, perception of increasing crime rates, fear of victimization, and increased perceptions of the effectiveness of punishment all contribute to increased willingness to use punishment, including capital punishment, as a means of resolving the crime problem.<sup>62</sup>

The recent Harris survey studied people's attitudes about corporal punishment for criminals.<sup>63</sup> Specifically, respondents were asked, "Would you favor or oppose restoring the penalty of whipping for certain crimes?" Twenty-four percent of the supporters of capital punishment favored whipping, while only 14 percent of the opponents favored it.<sup>64</sup>

In a complex psychometric study, Comrey and Newmeyer examined the responses of 212 Los Angeles adults on a battery of psychological scales,

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60. Charles Thomas & Samuel Foster, A Sociological Perspective on Public Support for Capital Punishment, Apr. 18, 1974 (paper delivered to the Southern Sociological Society, Atlanta, Ga.).

61. *Id.* at 23.

62. *Id.* at 23, 27. Thomas and Foster also acknowledged that retribution may play a part in death penalty attitudes. *Id.* at 12, 26. Their study did contain an item measuring retribution but this was not adequate to statistically test the contribution of retribution in attitudes toward capital punishment.

Additional data from the survey which were not reported in the paper indicated that in comparison to people opposed to the death penalty, people who favored the death penalty tended to have greater trust in the fairness of the courts, the law, and the police, and tended to favor tough courts and laws. They also tended to place a lower value on civil liberties. Personal Communication from Charles Thomas, College of William and Mary Metropolitan Criminal Justice Center, Norfolk, Va., to Neil Vidmar, Oct. 30, 1973.

63. The Harris Survey, *supra* note 22.

64. *Id.* N. Vidmar, *supra* note 52, in his Canadian study found that 33% of those persons who supported capital punishment favored whipping, while only 15% of the opponents favored it.

including attitudes toward capital punishment.<sup>65</sup> Attitudes favorable toward capital punishment were positively related to factors of general conservatism, nationalism, religiousness, and racial intolerance.<sup>66</sup>

The national survey by Rokeach found that persons who favored capital punishment differed from persons who opposed capital punishment on 11 of Rokeach's 36 terminal and instrumental values.<sup>67</sup> Those favoring capital punishment cared more for the terminal values of a sense of accomplishment, family security, and national security and the instrumental values of being ambitious, logical, and responsible. They cared less for the terminal values of a world of peace, equality, and true friendship, and the instrumental values of being forgiving and loving.<sup>68</sup>

Blumenthal, Kahn, Andrews, and Head conducted a nationwide survey of American males between the ages of 16 and 64 during the summer of 1969.<sup>69</sup> The study was a major inquiry into attitudes and values regarding the use of violence to achieve social goals. The authors identified attitudes toward two types of violence: violence to maintain social control (*e.g.*, police violence to control ghetto riots, hoodlum gangs, and student disturbances) and violence used to effect social change (*e.g.*, protests in which people are hurt or property is destroyed). Sizeable percentages of the population endorsed one or the other of these two types of violence,<sup>70</sup> and the single best predictor of endorsement of either type of violence was belief in what the authors called "retributive justice." Retributive justice was

65. Comrey & Newmeyer, *Measurement of Radicalism-Conservatism*, 67 J. Soc. PSYCHOL. 357 (1965).

66. *Id.* at 365-66.

67. M. ROKEACH, *THE NATURE OF HUMAN VALUES* 28 (1973); Rokeach & Vidmar, *supra* note 22, at 23-24.

Terminal values are those concerned with desirable end-states of human existence and instrumental values as desirable modes of conduct. Values serve adjustive, ego-defensive, knowledge, and self-actualizing functions for the individual. Both terminal and instrumental values can be "separately organized into relatively enduring hierarchical organizations along a continuum of importance." M. ROKEACH, *supra*, at 3-25.

68. Rokeach & Vidmar, *supra* note 22, at 23-24.

Differences in these values have been shown to be related to many differences in attitudes and behaviors, *see generally* ROKEACH, *supra* note 67, but in particular, relatively lower regard among whites for the value of equality has been found to be associated with, among other things, prejudice toward blacks (especially regarding civil rights for blacks) and poor people. *Id.* at 97-105, 123-28. While a conclusion that people who favor capital punishment are more likely to be prejudiced against blacks and poor people requires two steps of inference (*i.e.*, people who favor the death penalty have lower regard for equality; people who have lower regard for equality are prejudiced against blacks and poor people), such a conclusion is consistent with other findings reported in this section.

69. *See* M. BLUMENTHAL ET AL., *JUSTIFYING VIOLENCE* (1972).

70. *Id.* at 19-40. Among other findings, 76-80% of the sample felt that clubs should be used in dealing with ghetto riots, hoodlum mobs, and student disturbances. Forty-eight of sixty-four percent indicated the police should shoot (but not to kill) "always" or "sometimes" in such situations, and 19-32% felt the police should shoot to kill. *Id.* at 39. Approximately 20% of the sample indicated that protests involving some property damage or personal injury were necessary to bring about sufficiently rapid social change, and 10% felt extensive property damage and some deaths were necessary to achieve such a goal. *Id.* at 39-40.

measured by an index consisting of five intercorrelated items, the major item being belief in capital punishment. Those persons who believed in retributive justice were most likely to endorse violence as a means of achieving social ends, whether it be social control or social change.<sup>71</sup>

Additional research relating support for the death penalty to other attitude and personality variables has been stimulated by *Witherspoon v. Illinois*,<sup>72</sup> in which a partially successful challenge was made to the use of a "death-qualified" jury (*i.e.*, a jury from which persons not in favor of the death penalty are excluded) in a capital case. Subsequent to *Witherspoon*, a number of studies have examined whether persons favoring the death penalty are different from persons opposed to it in terms of attitudes, values, and personality dispositions. Zeisel used data from both Gallup polls and California polls to compare supporters and opponents of capital punishment on five social attitudes.<sup>73</sup> He found that people who favored the death penalty were less likely to favor open housing legislation or to approve of gun registration laws, and more likely to indicate they would move if Negroes moved into their neighborhood, to approve of the John Birch Society, and to favor restrictive abortion laws. Research by Crosson,<sup>74</sup> Jurow,<sup>75</sup> Rokeach and McLellan,<sup>76</sup> and Snortum and Ashear<sup>77</sup> has shown that persons who favor the death penalty are more likely than opponents to score high on various psychological measures of authoritarianism, dogmatism, and conservatism in legal, social, and political views.<sup>78</sup>

71. *Id.* at 216-17, 230-31, and 240-41.

72. 391 U.S. 510 (1968). Witherspoon was convicted in a capital murder trial but he challenged the fairness of the "death-qualified" jury, arguing that such juries were conviction prone. The Court set aside Witherspoon's death sentence due to jury bias on the punishment issue but did not find that the existing data on proneness toward conviction compelled holding that the jury was biased on the question of guilt. Research in the post-*Witherspoon* era has attempted to provide additional scientific evidence on this problem. See Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on the Issue of Guilt?*, 39 TEX. L. REV. 545 (1961); White, *The Constitutional Invalidity of Convictions Imposed By Death-Qualified Juries*, 58 CORNELL L. REV. 1176 (1973), for detailed discussions of the rationale linking psychological concepts to the legal issue of the death-qualified jury. Jurow, *New Data on the Effect of a Death Qualified Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971), has reviewed the scientific evidence bearing on the problem. Some of the research has shown a direct link between expressed attitudes favorable to the death penalty and tendency to convict, while other research has attempted to investigate the underlying attitudinal and personality dispositions associated with death penalty attitudes so as to provide psychological understanding of proneness toward conviction. Although intended for a different purpose, these latter research findings are also useful in the context of the present article and are discussed in the text accompanying notes 73-78 *infra*.

73. H. ZEISEL, *SOME DATA ON JUROR ATTITUDES TOWARD CAPITAL PUNISHMENT* 19-24 (1968).

74. R. CROSSON, *An Investigation Into Certain Personality Variables Among Capital Trial Jurors*, Jan. 1966 (unpublished thesis in Western Reserve University Library).

75. Jurow, *supra* note 72, at 585-88.

76. Rokeach & McLellan, *Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Poll Data*, 8 DUQUESNE U. L. REV. 125 R.C.C.

77. Snortum & Ashear, *supra* note 25, at 293.

78. In the psychological literature the concepts of authoritarianism, dogmatism, and conservatism are broad theoretical concepts used to describe the functional relationships between an individual's beliefs about the world, relationships to authority systems, and personality functioning. Some theorists have tended to view these concepts in terms of clinical personality syndromes. Others have argued



Taken together, the studies reported in this section suggest that in comparison to people opposed to capital punishment, persons who favor capital punishment are more likely to be persons threatened by rising crime rates and to hold attitudes favoring general social and political conservatism.<sup>79</sup> They support the more direct poll results that suggest that at least for some people the death penalty may be favored more for retribution than deterrence.<sup>80</sup> They also point out that persons who say they favor the death penalty are more likely to be willing to endorse attitude statements supporting such things as discrimination against minority groups, restrictions on civil liberties, and violence for achieving social goals than are persons who say they are against the death penalty.<sup>81</sup> Whether these findings reflect

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that high scores on such measures are due, at least in part, to restricted breadth of perspective resulting from lack of cultural and environmental experience, which in turn causes intolerance toward different persons or different values. Still others have suggested that commonly used measures of these variables evoke response biases or measure the respondent's sophistication, awareness of social norms, and tendency to make stereotyped responses to social stimuli. See generally T. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950); J. KIRSCHT & R. DILLEHAY, *DIMENSIONS OF AUTHORITARIANISM* (1967); M. ROKEACH, *THE OPEN AND CLOSED MIND* (1960).

A large body of psychological literature has shown that people who score relatively high on the various measures of authoritarianism, dogmatism, and conservatism are more likely to endorse extreme or intolerant positions and to show prejudice against minority groups and low status groups than persons who score relatively low. See ADORNO, *supra*; KIRSCHT & DILLEHAY, *supra*; ROKEACH, *supra*; McCloskey, *Conservatism and Personality*, 52 AMER. POL. SCI. REV. 27 (1958). Recent research in settings examining attitudes toward criminal behavior has shown that people scoring higher on measures of authoritarianism are more likely to exhibit bias or prejudice than people scoring lower on authoritarianism. See, e.g., H. Mitchell and D. Byrne, *Minimizing the Influence of Irrelevant Factors in the Courtroom: The Defendant's Character, Judge's Instructions, and Authoritarianism*, May 5, 1972 (paper presented at the Midwestern Psychological Association Meetings, Cleveland, Ohio); Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734; Mitchell & Byrne, *The Defendant's Dilemma: Effects of Jurors Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PER. SOC. PSYCH. 123 (1973). Persons scoring higher on authoritarianism are also more likely to punish for retributive reasons, as opposed to deterrence or other utilitarian reasons, than less authoritarian persons. N. Vidmar & L. Crinklaw, *Retribution and Utility as Motives in Sanctioning Behavior*, May 10, 1973 (paper presented at Midwestern Psychological Association Meetings, Chicago, Ill.); Sherwood, *Authoritarianism, Moral Realism, and President Kennedy's Death*, 5 BRIT. J. SOC. & CLIN. PSYCHOL. 264 (1966).

We strongly caution against interpreting the psychological concepts of authoritarianism and dogmatism in laymen's terms or drawing the conclusion that all or even most people who favor capital punishment are extremists. (See W. HAYS, *STATISTICS* 323-33 (1963), for a discussion of the fact that although a statistically significant finding indicates that two variables are associated with each other in a way that is unlikely to be attributable to chance, it does not necessarily tell us the strength of the association, i.e., the extent to which knowing how a respondent scored on one variable will tell us how he scored on the other variable.) At the same time, however, we do note that there is a statistically significant association between death penalty attitudes and the psychological concept of the authoritarianism-dogmatism-conservatism syndrome, that there is an association between the syndrome and prejudice and retributiveness, and that literature reviewed in this article has shown a more direct association between death penalty attitudes and prejudice and retributiveness.

79. H. ZEISEL, *supra* note 73; Comrey & Newmeyer, *supra* note 65; and Jurow, *supra* note 72, at 585-88, 591-96, have drawn similar conclusions regarding an association between pro-death penalty attitudes and sociopolitical conservatism.

80. See text accompanying notes 50-59 *supra*.

81. Other social science research has shown that substantial segments of the population are willing to endorse extreme political positions. For example, studies have shown that many people indicate willingness to reject some of the fundamental guarantees in the Bill of Rights. McCloskey, *Consensus and Ideology in American Politics*, 58 AMER. POL. SCI. REV. 361 (1964); Prothro & Grigg, *Fundamental Principles of Democracy: Bases of Agreement and Disagreement*, 22 J. OF POLITICS 276 (1960). It may be that such findings are at least partially artifactual and not really valid indicators of public

true differences in underlying values and attitudes, a lack of knowledge on the part of respondents, stereotyped, careless, or thoughtless replies in interview situations, or a combination of these factors, they are a further admonishment to consider more than mere levels of general support for capital punishment as reflected in public opinion polls.

#### F. *Knowledge and Death Penalty Attitudes*

Information on the public's factual knowledge about the death penalty is critical for assessing whether support for capital punishment is based on "informed" opinion. In *Furman*, Justice Marshall set forth two empirically testable assertions which put the issue into focus. The first assertion was that the public is ill-informed about capital punishment.<sup>82</sup> The second assertion was that if the public were informed of its purposes and liabilities, the majority of people would be against capital punishment.<sup>83</sup> No systematic survey has investigated either of the hypotheses that follow from Marshall's assertions. There are, however, some informal studies that bear on them, and there are general social science studies that yield indirect evidence as well.

##### 1. *Public knowledge about the death penalty.*

Psychiatrist Louis H. Gold conducted informal interviews with approximately 50 persons, asking them what they felt and how much they knew about the issue of capital punishment.<sup>84</sup> From these interviews Gold concluded that ". . . the average American appears to have only a limited concept of the issue, has done very little reading on the subject, and has not taken much time to think it through in an objective manner. Most folks accept the idea in a traditional sense without an intelligent appraisal of its significance."<sup>85</sup>

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opinion. See, e.g., notes 49 & 78 *supra*. However, if that is so, we must also consider the possibility that most public opinion polls, including those showing general levels of support for the death penalty, are also not valid.

82. 408 U.S. 238, 362 (1972) (Marshall, J., concurring): "It has often been noted that American citizens know almost nothing about capital punishment."

83. *Id.* at 363: "Thus, I believe that the great mass of citizens would conclude on the basis of [existing empirical evidence] that the death penalty is immoral . . ."

84. See Gold, *A Psychiatric Review of Capital Punishment*, 6 J. FORENSIC SCI. 465 (1961). Gold did not describe the characteristics of his subject population, but presumably it was informally chosen. Gold only reported that some of his subjects were friends, relatives, or professional colleagues, that the various interviews took place in three states, and that his subjects included a school principal, a surgeon, and a grocery clerk. *Id.* at 466-68. The author also asserted that religious and political persuasion, social status, and economic status were not related to opinions on the death penalty. *Id.* at 466.

85. *Id.* at 466. See also *id.* at 467. Gold also concluded that there was a strong "affective" component in the reasons expressed when respondents were asked to explain their position on the issue and that this may account for "the rigid stand taken by some who were in favor of the death sentence." *Id.* at 470. Gold attempted to explain this affective reaction: "Murder is imagined as a horrible deed of such great and thunderous violence that man instinctively recoils from this concept because it is too painful to bear. His immediate reaction is obviously emotionally conditioned and it is this type

Gold's conclusion is not surprising in the light of general findings about public opinion. A number of studies have shown that substantial segments of the public are ill-informed or completely ignorant about some of the most elementary and important political and social questions.<sup>86</sup> Furthermore, it has been found that survey respondents will often endorse positions or advocate actions even though they lack knowledge about the subject, have no commitment to what they are endorsing, or both.<sup>87</sup> Other findings suggest that public opinion is often directly shaped by actions and statements of politicians or other public figures.<sup>88</sup> Thus, from this broader social science perspective it seems quite plausible that people are ill-informed about the death penalty, and that their support for it is based, at least in part, on tradition, uncritical acceptance of assumptions about its deterrent effect, or the endorsement of political leaders, e.g., President Nixon or California's Governor Reagan. However, with specific reference to the death penalty, the evidence from these studies is far from conclusive.

2. *Knowledge and attitudes toward the death penalty.*

There are two ways to examine Justice Marshall's assertion that people who are informed about the death penalty will be opposed to it. The first way is to test the amount of knowledge people have about the death penalty, and then determine whether people who are better informed are more likely to be against the death penalty. No study to date has attempted such an examination;<sup>89</sup> when one does, it should be conducted in the context of all accumulated research knowledge about the death penalty. However, although such a study would provide useful information, an inherent difficulty with that type of analysis is that if Gold's conclusion is correct and the majority of the American people have generally low levels of information about capital punishment,<sup>90</sup> any relationship between information and death penalty attitudes would not be very meaningful.<sup>91</sup>

The most direct and appropriate way of testing the empirical validity of

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of affective imprint which does not lead itself readily to rational and logical confrontation by words of wisdom or statements of fact." *Id.* at 475-76.

86. See L. BOGART, *SILENT POLITICS* 100 (1972); C. ROLL & A. CANTRIL, *POLLS: THEIR USE AND MISUSE IN POLITICS*; S. STOFFER, *COMMUNISM, CONFORMITY AND CIVIL LIBERTIES* 233 (1955); SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS, U.S. SENATE COMMITTEE ON GOVERNMENT OPERATIONS, *CONFIDENCE AND CONCERN: CITIZENS VIEW AMERICAN GOVERNMENT* 72-78 (1973).

87. See L. BOGART, *supra* note 86, at 100-01, 129-39.

88. See *id.* at 45-54; C. ROLL & A. CANTRIL, *supra* note 86, at 145; S. STOFFER, *supra* note 86, at 233.

89. There are the findings that people opposed to the death penalty are better educated. See text accompanying note 40 *supra*. General education, however, does not tell us about specific knowledge about the death penalty, and, moreover, educational status is confounded with other variables, such as socioeconomic status, which could influence death penalty attitudes.

90. Gold, *supra* note 84, at 476.

91. Such a relationship would only be a relative one between poorly informed persons and even more poorly informed persons.

Justice Marshall's second assertion is to create an experimental situation where a randomly selected group of people is exposed to all relevant arguments that relate to all of the utilitarian, humanistic, and moral issues about the death penalty. The post-exposure death penalty attitudes of the people in this experimental control group could then be compared to their pre-exposure attitudes or to the attitudes of a comparable group of people not receiving the treatment.<sup>92</sup> Although economic cost and other problems of feasibility would necessarily require the research to be limited to a relatively small sample of people, the extremely important advantage of the study would accrue from the fact that we could be certain that the people were fully knowledgeable about the issues. Thus, there would be no question about whether their attitudes were based on "informed" opinion.<sup>93</sup> Such research would give the best possible information on whether the death penalty is inconsistent with contemporary standards of decency.

Despite their critical importance in assessing the validity of public attitudes toward the death penalty, the general extent of public knowledge about capital punishment and the relationship of the knowledge to capital punishment attitudes are the two most under-researched topics in the literature. Studies in this area are possible and deserve top research priority.

#### *G. Levels of Death Penalty Attitudes*

Responses to generally phrased questions asking about support for, or opposition to, the death penalty do not reveal whether the view is embraced solely in an abstract manner without regard to how the person would feel or behave in more concrete situations. A person who says he favors the death penalty may be unwilling to see it carried out when faced with an actual execution or threat of execution. Similarly, a person stating that he

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92. Smith, *Attitude Changes During a Course in Criminology*, 48 *SCHOOL AND SOC'Y* 698 (1938), in fact conducted such a study. The capital punishment attitudes of college students enrolled in a criminology course were assessed during the first week of the semester. The students were then exposed to lectures, discussions, readings, and field trips to penal institutions, and capital punishment attitudes were assessed again at the end of the course. *Id.* at 698-99. Smith found no statistically significant attitude change between the pre-test and the post-test. *Id.* at 699. However, while the study is illustrative of the kind of research that needs to be done, it is inappropriate to draw any conclusions from it. First, there was a major methodological flaw in the study. Pre-test scores show that almost all of the students were initially unfavorable toward capital punishment, *id.* at 699-700, and, therefore, there was a "ceiling" on the possible amount of change against capital punishment. In fact, death penalty attitudes became slightly more favorable at the end of the semester, but because of the initial distribution of scores, this shift was probably an artifact of "statistical regression." See D. CAMPBELL & J. STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* 5, 10-12 (1963). Second, most of the empirical research on capital punishment has been conducted since 1938, and, therefore, the empirical information base relevant to drawing conclusions about the issue has changed. Finally, public values and morality have probably changed in the 3½ decades since 1938.

93. The study sample might be randomly drawn from jury lists, and the people assigned to a number of 6-12-person "study groups" which would meet in a number of sessions over a period of days or weeks. The people could also be questioned about their comprehension of the issues and motives for their attitudes.

is generally opposed to the death penalty may favor it in specific cases. In brief, there may be varying levels of attitudes toward the death penalty.

There is some evidence which bears on this hypothesis. Jurow asked subjects about their general attitudes toward capital punishment and then asked how they would express these feelings when serving as jurors under circumstances where they could recommend the death penalty.<sup>94</sup> On the general question he found that 35 percent of his subjects were opposed to capital punishment, 20 percent indicated neutral feelings, and 45 percent were in favor of it. However, when he asked respondents about how they would behave on a jury when a defendant had been convicted of a very serious crime and the jury's options were death, life imprisonment, or some lesser penalty, many of the persons favoring capital punishment changed to the neutral category: 29 percent indicated they would probably not vote for the death penalty, 63 percent expressed neutral attitudes, and only 8 percent indicated they would probably vote for the death penalty.<sup>95</sup> Thus, some of the people initially opposed to the death penalty indicated they were at least willing to consider it as a member of a jury, and many of the people initially favoring the death penalty became more neutral when confronted with a more specific situation. Jurow concluded that "there is an important difference between how people generally feel about capital punishment and how they claim they will express those feelings when serving as a juror."<sup>96</sup>

The 1973 Harris survey also indicates that respondents' self-predicted behavior as jurors is different than what might be implied from their general abstract levels of support or opposition.<sup>97</sup> Respondents were asked to assume that they were being considered as possible jurors in a trial where the defendant, if found guilty, would automatically be sentenced to death. Although 59 percent of them had previously expressed approval of the death penalty for certain crimes (with 31 percent opposed and 10 percent not sure) only 39 percent felt they could always vote guilty if guilt were proven for a crime that mandated the death sentence, another 33 percent could not say whether they would vote guilty even if guilt were proven, 16 percent said they would never vote guilty, and 12 percent were not sure.<sup>98</sup> Thus, the basic findings

94. Jurow, *supra* note 72, at 577, 599.

95. *Id.* at 583 table II.

96. *Id.* at 591.

97. The Harris Survey, *supra* note 22.

98. *Id.* The specific question posed was as follows: "Suppose you were being considered as a possible juror for a trial where if the person were convicted of the crime he would automatically get the death penalty. If the job of the jury were just to decide whether or not the person was guilty, which statement on this card best describes how you would feel in advance of trial? (a) If guilt were proven, I could always vote guilty even though the defendant would automatically receive the death penalty; (b) I could not say in all cases, even if guilt were proven, that I would vote guilty, knowing the defendant would automatically receive the death penalty; (c) I could never vote guilty even if guilt were proven, knowing the defendant would automatically receive the death penalty; (d) Not sure."

are similar to those of Jurow. Although many people endorsed capital punishment at the general level, the degree of support for it dropped considerably when they were asked a more precise question about how they would behave if serving on a jury. Moreover, it also appears that although 31 percent of the people initially expressed opposition to capital punishment, some of them indicated willingness to vote guilty even though the death penalty would be given.

We should also note that the rather sharp difference in support for capital punishment at the general level and support for it in more specific circumstances is consistent with a hypothesis that some people may favor the *idea* of capital punishment either without realizing or without accepting its implications.<sup>99</sup> There is also a great deal of general social science literature which has documented major discrepancies between attitudes expressed in the abstract and attitudes and behaviors expressed in specific circumstances<sup>100</sup> as well as evidence that people sometimes express views on public policy that they know are unrealistic or that they do not actually want to see carried out.<sup>101</sup>

Until more research is completed, we cannot determine whether the discrepancy between the percentages of support on general questions about the death penalty and the percentages of support on questions about specific circumstances are due to an emotional attachment to the death penalty as a symbol of law and order without any real desire to see executions carried out,<sup>102</sup> to inconsistencies between general attitudes and specific attitudes,<sup>103</sup> to frivolous or uninformed responses to survey questions,<sup>104</sup> to a desire for "discretionary" and limited use of the death penalty,<sup>105</sup> or to some combination of these factors. Whichever is the case, the problem of determining the various levels of support for capital punishment on both the general and specific levels, and why any discrepancies exist, needs serious consideration and much additional empirical investigation. The answers would help to ascertain whether people who favor the death penalty are actually willing to see it carried out.<sup>106</sup>

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99. For discussions relevant to such an hypothesis, see M. MELTSNER, *supra* note 3, at 52-55; Bedau, *supra* note 24, at 38.

100. See, e.g., McCloskey, *supra* note 81, at 373-79; Prothro & Grigg, *supra* note 81, at 291; Wicker, *Attitudes Versus Actions: The Relationship of Verbal and Overt Behavioral Responses to Attitude Objects*, 25 J. SOCIAL ISSUES 41 (1969).

101. See L. BOGART, *supra* note 86, at 135-36.

102. See text accompanying note 99 *supra*.

103. See text accompanying note 100 *supra*.

104. See text accompanying notes 49 & 82-91 *supra*.

105. See text accompanying notes 34-36 *supra*.

106. Conversely, we should also determine whether people who say they are generally opposed to the death penalty are opposed in all cases.

## III. EVALUATIONS AND SUGGESTIONS

Much of the research on public opinion and capital punishment is not useful in the post-*Furman* era. Most of the polls have been superficial rather than comprehensive; generally, the questions have been asked with no attempt to discover why a respondent took a given position, how strongly he felt about his opinion, what kind of information he might use to justify his response, or whether he was really trying to substitute socially desirable answers for his own beliefs. Nevertheless, examination of the existing body of research does suggest a few tentative answers to the questions posed in Section I of this Article and some directions for improving future research.

A. *Tentative Conclusions*

First, despite the increasing approval for the death penalty reflected in opinion polls during the last decade, there is evidence that many people supporting the general idea of capital punishment want its administration to depend on the circumstances of the case, the character of the defendant, or both, rather than on the kind of nondiscretionary death penalty permissible under *Furman*.<sup>107</sup>

Second, there is evidence that at least some of the support for capital punishment may stem from motives that are inconsistent with contemporary legislative and judicial goals. Some people may support the death penalty primarily for motives of retribution; supporters of capital punishment, moreover, are more likely than opponents to endorse attitude statements supporting prejudice and discrimination, violence as a means for achieving social goals, and restrictions on civil liberties.<sup>108</sup> Eight or nine percent of the population are even willing to endorse the position that all robbers or muggers should be executed.<sup>109</sup> While these data need further corroboration, they seem to be relevant in view of the apparent position of the Court that the kind of public opinion that is relevant to an interpretation of the eighth amendment is that which is "enlightened by a human justice."<sup>110</sup>

Regarding the question of whether the public is informed about the issue of capital punishment, only the small informal survey by Gold has dealt directly with respondents' knowledge and information about the death penalty.<sup>111</sup> His observations and our general knowledge about the

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107. See text accompanying notes 34-36 *supra*.

108. See text accompanying notes 50-81 *supra*.

109. See text accompanying note 36 *supra*.

110. 408 U.S. at 242 (Douglas, J., concurring); see *id.* at 264 (Brennan, J., concurring); *id.* at 329 (Marshall, J., concurring); *id.* at 382-83, 400 (Burger, C.J., dissenting); *id.* at 429 (Powell, J., dissenting); *Weems v. United States*, 217 U.S. at 378 (1910).

111. Gold, *supra* note 84.

extent of public information on other issues<sup>112</sup> raise the strong possibility that people are largely ignorant about capital punishment and support it out of tradition, questionable assumptions, or conformity with the statements of public leaders.

While specific and qualified conclusions such as these are warranted by the existing survey data, broader conclusions about levels of community support for capital punishment are not. General social science findings indicate that the motives that come into play when people endorse attitudes in the abstract are often quite different from the motives that regulate responses to specific events or behavior. With particular reference to the death penalty, it appears that there may be varying levels of attitudes and that people respond quite differently to questions that ask about the use of capital punishment in specifically defined circumstances and questions that ask about support for capital punishment in the abstract.<sup>113</sup>

It should be emphasized that we are not condemning the public opinion poll as a method of discovery. We are only arguing that in most instances it has been used simplistically, and its capacity for providing detailed and comprehensive information has not been properly exploited.

#### B. *Directions for Future Research*

This Article's review of the literature suggests a number of improvements in the conduct and interpretation of future research on capital punishment attitudes. A few small scale surveys have introduced refinements, and the 1973 Harris survey<sup>114</sup> has demonstrated that improvements are feasible in large-scale surveys as well.

First, we need to explore the public's understanding and attitudes with regard to the specific forms of capital punishment that remain available after the *Furman* decision. There are almost no data on the public's understanding of the meaning of a nondiscretionary death penalty, nor is there data on whether the public would support capital punishment if faced with the choice of mandatory death sentences or no death sentence at all.

Second, people's reasons for favoring or opposing the death penalty have been studied only very superficially. Many more response alternatives are necessary, and perhaps surveys with open ended questions followed by probes to elicit specific attitudes should be conducted. It is possible to ask respondents if their opinion has been influenced by statements of public figures, how their attitudes would change if their expressed justification turned out to be false, or whether there could be any argument that would

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112. See text accompanying notes 86-88 *supra*.

113. See text accompanying notes 94-105 *supra*.

114. The Harris Survey, *supra* note 22.



convince them that their reasons for supporting the death penalty were invalid. Likewise, little is known, and much can be learned, about the strength of people's commitments to their positions. To date we have no idea whether or not capital punishment is an important issue in the respondents' minds. All "agree" responses have been weighted equally in the general polls, and no attempt has been made to determine whether the opinions represent passionate conviction or near indifference.

Third, it is extremely important to determine the extent to which the American people have knowledge about the facts relevant to capital punishment and the controversial issues involved. Furthermore, we must also determine whether information affects death penalty attitudes. Do people who favor capital punishment have more or less knowledge about the subject than people who are opposed to capital punishment, or is the public's level of knowledge uniformly very low? If people are not knowledgeable about the death penalty, will education about the facts pertinent to it change their attitudes?

Finally, we should note that no single type of measurement can ever provide complete information about a phenomenon.<sup>115</sup> Any measuring procedure is subject to error, and accurate and comprehensive knowledge about a phenomenon can only be obtained by combining information from different kinds of procedures that are subject to different kinds of error. It is essential that knowledge gained from large-scale opinion surveys be considered in conjunction with knowledge gained from different means of assessing community attitudes. Some of these means might include laboratory studies of attitudinal reactions to executions or changes in death penalty attitudes as a result of exposure to information about the death penalty. Other means might include psychological, sociological, and historical studies of death penalty legislation, jury nullification in capital trials, or commutations of death sentences.<sup>116</sup>

#### IV. CONCLUSION

In *Furman*, the U.S. Supreme Court ruled for the first time on the question of whether the death penalty constitutes "cruel and unusual punishment." With this precedent, the eighth amendment question is likely to be raised again when post-*Furman* capital punishment statutes come before the Court, and thus public attitudes toward capital punishment will eventually be considered in the decisionmaking process. Surveys of these public attitudes that are limited to an examination of general abstract statements of

115. See generally, E. WEBB ET AL., *supra* note 49, at 1-34; Campbell & Fiske, *Convergent and Discriminant Validation by the Multitrait-Multimethod Matrix*, 56 PSYCHOL. BULL. 81 (1959).

116. See, e.g., *Furman v. Georgia*, 408 U.S. at 257-98 (Brennan, J., concurring).

support for, or opposition to, capital punishment do not provide adequate information. Consequently, they may often create an impression that is quite misleading. Opinion polls can be helpful in assessing community attitudes and can provide other useful information to legislative and judicial decisionmakers, but their proper use requires more sophisticated research and more sophisticated interpretation of the research than has taken place in the past.