

LAW AND SOCIETY

PUBLIC OPINION, THE DEATH PENALTY, AND THE EIGHTH AMENDMENT: TESTING THE MARSHALL HYPOTHESIS

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Justice Marshall's concurring opinion in Furman v. Georgia rested in part on a theory which evaluated the characteristics and importance of public opinion as an element in deciding the constitutionality of the death penalty. Unlike most constitutional arguments, Marshall's hypothesis is empirically testable, and the present article contains the findings of one such empirical test. The results of this test may help to clarify the proper role for public opinion and thereby refocus the issues in this evolving area of the law.

The eighth amendment to the Constitution forbids the imposition of punishments which are "cruel and unusual." This prohibition, like others in the Constitution, can hardly be said to have plain meaning. The words of the eighth amendment are part of the "open texture" of our law, a texture which has allowed the Constitution to be adapted to rapidly changing political and social conditions. The price we pay for such adaptability is a marked imprecision and ambiguity in the language within which Constitutional prohibitions and protections are framed. The phrase "cruel and unusual" is but one of many instances in which the language of the Constitution provides little guidance as to its proper interpretation.¹ The Supreme Court has, in a long series of eighth amendment cases, recognized this difficulty.²

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1. Perhaps the most ambiguous of all the language of the Constitution is the due process clause of the 5th and 14th amendments. For a discussion of the problem of interpreting the due process clause see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

2. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972).

In one of the first of those cases the Court admitted that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted."³ Nearly 100 years later Justice Brennan could still lament the difficulty of "formulating the 'legal principles to be applied by the courts' when a legislatively prescribed punishment is challenged as 'cruel and unusual.'"⁴ The Court has neither been able to give a precise definition of that phrase nor has it settled upon a procedure for determining whether any particular punishment violates the eighth amendment. Thus, litigation challenging the constitutionality of particular types of punishment typically urges the Court to articulate standards against which such a determination can be made.⁵ Nowhere has the search for standards been more apparent than in the Court's recent decision on the eighth amendment, *Furman v. Georgia*.⁶

In *Furman* a challenge was mounted to the constitutionality of capital punishment. Appellants argued that the death penalty violated the eighth amendment and thus should be invalidated. In so doing they again raised the question of the standards to be applied in eighth amendment cases.⁷ The response of the Justices was quite diverse; nine separate opinions were rendered. However, it is possible to discern in the opinions of the five majority justices, two general approaches to the problem of formulating standards in eighth amendment cases.⁸ Neither of these approaches is based on a search for a fixed meaning to the eighth amendment—both recognize that as social conditions and legal practices change, the meaning of "cruel and unusual punishment" may also change. Rather, the standards diverge in their view of the proper way to derive the principles that should govern eighth amendment cases.

The first, or analytic, approach suggests that the standards to be used in eighth amendment cases ought to be derived from other constitutional guarantees. Those who employ the analytic approach seek to identify standards articulated elsewhere in the Constitution which might be applicable in cases in which the constitutionality of a particular form of punishment is at issue. The tendency of those who use this approach is to "use the Eighth Amendment as a sort of collection point for other established constitutional theories

3. *Wilkerson v. Utah*, 99 U.S. 130 (1878).

4. *Furman v. Georgia*, 408 U.S. 238, 269 (1972) (concurring opinion).

5. See Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970); Wheeler, *supra* note 2.

6. 408 U.S. 238 (1972).

7. For a discussion of the history of *Furman* see M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).

8. For a discussion and elaboration of these standards see Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1.

. . . ."⁹ In *Furman*, the analytic approach is found in the opinions of Justices Douglas, Stewart, and White, each of whom argues that the constitutionality of capital punishment must be judged according to the manner in which it is applied and according to its social consequences.¹⁰ Douglas, for example, employs due process and equal protection as standards for judging the constitutionality of capital punishment. In his view, "[i]t would seem incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position or class or if it is imposed under a procedure that gives room for the play of such prejudices."¹¹ Douglas concludes that the death penalty has, in fact, been employed in such a discriminatory manner and therefore must be regarded as unconstitutional. The analytic approach, which forms Douglas' opinion, thus interprets the eighth amendment by finding its meaning in other provisions of the Constitution and seems to deprive that amendment of any "independent potency."¹²

The second, or normative, approach has an extended history in eighth amendment litigation. In a series of cases beginning with *Weems v. United States*,¹³ the Court has attempted to find the meaning of the eighth amendment not in other provisions of the Constitution but in the fundamental values which underlie the Constitution as a whole. Moreover, it has recognized that such values may have a dynamic character. In *Weems*, the Court suggested that the meaning of "cruel and unusual punishment" changes "as public opinion becomes enlightened by a humane justice."¹⁴ The Court reaffirmed this interpretation 48 years later in *Trop v. Dulles* when it tied the meaning of the eighth amendment to the "evolving standards of decency that mark the progress of a maturing society."¹⁵ This search for constitutional meaning in public morality also reappears in *Furman*. In that case, as in the others, the Justices acknowledged the importance of public opinion in death penalty litigation, but they were unable to agree on the extent to which that opinion should be determinative of the constitutionality of capital punishment.¹⁶

9. *Id.* at 10. Polsby attributes this tendency to the desire of some Justices to limit their search for the meaning of constitutional language to the words of the Constitution itself.

10. Each of these Justices found that the application of the death penalty rather than the penalty itself violated the eighth amendment. *See id.* at 11-15. *See also 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).

11. 408 U.S. at 242.

12. This criticism is discussed by Polsby, *supra* note 8, at 25.

13. 217 U.S. 349 (1910).

14. *Id.* at 378.

15. 365 U.S. 86 (1958).

16. *See* Vidmar and Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L.

The normative approach, employed by Justices Brennan and Marshall in *Furman*, requires an external orientation, an orientation to the customs, traditions, practices and beliefs of the citizens of a democratic society and is reminiscent of early 20th century attempts to formulate standards in due process cases. In those cases standards were found outside the written law in "principles so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁷ As in the due process cases, the problem for Justices employing a normative approach to the eighth amendment is to find external and "objective" evidence on which to rest conclusions about the values implicit in the Constitution and the principles of public morality.¹⁸ In *Furman*, three sources of evidence were most prominent—namely, the willingness of legislatures to authorize capital punishment, of juries to impose it, and of the general public to support it.¹⁹

The first source of evidence is found in statutes. Several Justices, including some of the dissenters, cited the actions of state legislatures in authorizing or abolishing capital punishment as evidence that the public accepts or rejects it. Justice Marshall, for example, noted that legislatures have in recent history tended to restrict the use of capital punishment, a finding he suggested indicated an evolutionary trend toward abolition.²⁰ Justice Powell and Chief Justice Burger,²¹ on the other hand, contended that legislative judgments embody and give form to the sentiments and beliefs of the citizens and that such judgments are reliable indicators of the current state of opinion about the death penalty; they interpreted the fact that legislatures still sanction capital punishment as evidence that society approves of it.

A second source of evidence is found in the decisions of juries in capital cases. Justice Brennan, for example, cited the infrequency with which juries impose the death penalty as evidence that that punishment is no longer compatible with fundamental social values. As

REV. 1245, 1246-47 (1974) for a documentation of this disagreement. See also *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).

17. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The similarity of eighth amendment litigation and due process cases such as *Palko* is noted by Goldberg and Dershowitz, *supra* note 5, at 1778.

18. Some students of the Supreme Court have argued that the problem of avoiding "subjectivism" is the major task of the Justices in all cases. See H. WECHSLER, *Toward Neutral Principles of Constitutional Adjudication*, 73 HARV. L. REV. 1 (1959).

19. See, e.g., 408 U.S. at 257-98 (Brennan, J., concurring). Goldberg and Dershowitz, *supra* note 5, and Wheeler, *supra* note 2, have suggested other approaches and sources of evidence upon which the Court might draw.

20. 408 U.S. at 341 (Marshall, J., concurring).

21. *Id.* at 438-39 (Powell, J., dissenting) and 384-85 (Burger, C.J., dissenting).

he put it, the fact that "juries, 'express[ing] the conscience of the community on the ultimate question of life and death,' . . . have been able to bring themselves to vote for death in a mere 100 or so cases among the thousands tried each year where the punishment is available . . . demonstrates that our society seriously questions the appropriateness of this punishment today."²² Other Justices argued that, to the contrary, the infrequency with which the penalty of death has been imposed reflects not a rejection of it, but instead particular care in applying it.²³ None of the Justices made it clear how infrequent the imposition of capital punishment had to become before such evidence could be taken as an indication of its rejection by the public.

The third and final source of evidence about the standing of capital punishment in public morality is supplied by surveys of public opinion. These surveys should provide, at least in theory, the most unambiguous measurements of public attitudes toward the death penalty, yet it is this source of evidence which in *Furman* turned out to be the most controversial and troublesome for the exponents of the normative approach.

What do surveys of public opinion indicate about attitudes toward the death penalty? Such attitudes have been periodically assessed in nationwide surveys for about 40 years.²⁴ For the first 30 of these years opinion moved steadily against the death penalty; from a high of 62 percent in 1936, support for the death penalty declined until 1966, when only 40 percent of the American people registered in favor of it. However, in the last 10 years, the downward trend has reversed dramatically; recent polls indicate that about 60 percent of the public now favors capital punishment.²⁵ Some attribute this shift to a general growth in law and order sentiment,²⁶ others to a fading from public consciousness of the reality of executions.²⁷ Whatever the cause of the reversal in public sentiment, and in spite of its impressive magnitude, there is some indication that support for capital punishment is not as deep as it is broad. A 1973 Harris poll, for example, found support for the death penalty to be significantly diminished when people were asked whether they favored its mand-

22. *Id.* at 299.

23. *Id.* at 440-41 (Powell, J., dissenting).

24. For a review of research on public opinion and the death penalty, see Vidmar and Ellsworth, *supra* note 16.

25. *Id.* at 1249-50. See also Erskine, *The Polls: Capital Punishment*, 34 PUBLIC OPIN. Q. 290 (1970).

26. See, e.g., Thomas and Foster, *A Sociological Perspective on Public Support for Capital Punishment*, 45 AMER. J. ORTHOPSYCHIATRY 641 (1975).

27. Justice Marshall argues that the infrequency of the imposition of capital punishment allows people to become indifferent. 408 U.S. at 361 n.145. See also *Ralph v. Warden*, 438 F.2d 786, 792 (4th Cir. 1970).

atory application for specific crimes: 41 percent favored the death penalty for killing a policeman, and only 28 percent favored it for first degree murder.²⁸

Ultimately, the reasons why people support or reject capital punishment may be as important in judging whether public sentiment is an acceptable indicator of "evolving standards of decency" as is the magnitude of support or rejection. Several of the opinions in *Furman* suggest that some bases of support for the death penalty may be "illegitimate" and may disqualify public opinion from service as a constitutional standard.²⁹ Yet despite its importance, we know relatively little about the reasoning upon which attitudes toward the death penalty are based. What data we do have suggest that most people favor the death penalty because they believe it is an effective deterrent to crime.³⁰ A recent survey of Florida citizens links this "utilitarian" support for capital punishment to public perceptions of an increase in crime, and discounts the importance of nonutilitarian factors in explaining attitudes toward the death penalty. It indicates that support for the death penalty ". . . can be interpreted as an understandable consequence of the widely held beliefs that 1) crime rates are going up rapidly; 2) the average citizen is in danger of becoming the victim of a criminal offense; and 3) the deeply ingrained belief in this culture that punishment provides an effective means by which we can control deviant and criminal behavior."³¹

Other findings, however, indicate that a large proportion of the advocates of capital punishment would continue to support it even if it could be proven that it had no deterrent value.³² This suggests the importance of the kind of nonutilitarian reasoning which was dismissed as unimportant by the Florida study.³³ Most prominent among the nonutilitarian justifications for the death penalty is the public's belief in retribution, its belief that those who take a life should forfeit their own in return. Psychologists Lawrence Kohlberg and Donald Elfenbein argue that it is retribution which has

28. The Harris Survey, Louis Harris and Associates, Inc., New York, N.Y., June 11 and 14, 1973 (Copyright, The Chicago Tribune, 1973). These data are reported in full in Vidmar and Ellsworth, *supra* note 16, at 1251-52, along with other data which support the Harris findings.

29. See, e.g., 408 U.S. at 344-45 (Marshall, J., concurring).

30. See Vidmar and Ellsworth, *supra* note 16, at 1255-56.

31. Thomas and Foster, *supra* note 26, at 645.

32. The Harris Survey, *supra* note 28, found that 55% of the American people who supported the death penalty indicated they would support it even if it had no deterrent value. An identical result was found in a prior survey of Canadian adults. See Vidmar, *Retributive and Utilitarian Motives and Other Correlates of Canadian Attitudes Toward the Death Penalty*, 15 THE CANADIAN PSYCHOLOGIST 337 (1974). Supporting correlational data for these findings are discussed in Vidmar and Ellsworth, *supra* note 16, at 1256-62.

33. Thomas and Foster, *supra* note 26, at 654.

traditionally provided the major public justification for capital punishment and that only as the foundation of individual moral judgments shifts away from retribution will the death penalty be rejected as cruel and unusual.³⁴

I. THE MARSHALL HYPOTHESIS

Most of the Justices in *Furman* recognized that the general public presently supports the death penalty. Yet most agreed that that fact in itself could not be relied upon to indicate the current stage of society's "evolving standards of decency."³⁵ Some of the Justices, especially those who opposed capital punishment, implied that public support could be accepted as a basis for deciding on the constitutionality of capital punishment only if it could be established that public opinion satisfied two standards.³⁶ Both of these standards were elaborated in the opinion of Justice Marshall.

Marshall, as an exponent of the normative approach in eighth amendment cases, was especially troubled by the evidence of widespread public support for capital punishment. His strategy for dealing with that evidence was to elaborate standards for judging the "quality" and "reliability" of public opinion. He argued that in order for public opinion to be used to help establish the constitutional standard for judging the death penalty such opinion had to be subjected to rigorous scrutiny. In order to be considered worthy of consideration, Marshall indicated that first, attitudes toward the death penalty must reflect "informed" judgments about the application and effects of capital punishment.

While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends, not on whether its mere mention "shocks the conscience and sense of justice of the people," but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust and unacceptable.³⁷

Justice Marshall's second test of public opinion involves its moral basis. Opinion which derives from a desire for vengeance or a be-

34. Kohlberg and Elfenbein, *The Development of Moral Judgments Concerning Capital Punishment*, 45 AMER. J. ORTHOPSYCHIATRY 614 (1975).

35. As Judge Frank argued in *United States v. Rosenberg*, 195 F.2d 583, 608 (1952). "[The Court] before it reduces a sentence as 'cruel and unusual,' must have reasonably good assurances that the sentence offends the 'common conscience.' And, in any context, such a standard—the community's attitude—is usually an unknowable. It resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels."

36. 408 U.S. at 314-74.

37. *Id.* at 361.

lief in retribution is in his view unacceptable; it is unacceptable because retribution as a principle of justice is deemed by Marshall to be incompatible with decent and civilized conduct and the spirit of a humane justice.³⁸ Furthermore, Marshall contends that it is precisely the baseness and harshness of retribution that the eighth amendment was designed to restrict.³⁹

Justice Marshall does more than simply formulate standards for judging the quality of public opinion; he develops a rather complex hypothesis about what one might expect if both of his standards were to be fulfilled. His hypothesis begins by focusing on the informational content of American attitudes toward the death penalty. In his view, the American people know almost nothing about capital punishment.⁴⁰ Justice Marshall supports this contention by citing a decade-old study by psychiatrist Louis Gold.⁴¹ Gold interviewed about 50 people and concluded that ". . . the average American appears to have only a limited concept of the issue [of capital punishment], has done very little reading on the subject and has not taken much time to think about it in an objective manner."⁴² What was true more than a decade ago is, according to Justice Marshall, even truer today because the American people have even less of an incentive to pay attention to the issue of capital punishment. The incentive to do so is, in his view, a function of the frequency with which the punishment is actually carried out.⁴³ The fact that few people are executed means, if Marshall is correct, that most Americans do not find capital punishment to be a very salient issue. This speculation is necessary to Marshall's argument since it allows him to dismiss as unreliable poll findings showing that a majority of the American people support the death penalty.

Justice Marshall asserts that informed judgments about the death penalty are based on several different kinds of information. First, he himself subscribes to that body of opinion which questions the deterrent effect of capital punishment. In his opinion he cites a variety of evidence to support this position, evidence that indicates that the death penalty has no deterrent effect above and beyond that accomplished by a lengthy prison sentence.⁴⁴ Marshall also believes

38. *Id.* at 345.

39. *Id.*

40. *Id.* at 362-63.

41. Gold, *A Psychiatric Review of Capital Punishment*, 6 J. FORENSIC SCI. 465 (1961).

42. *Id.* at 466.

43. 408 U.S. at 362 n.145.

44. *Id.* at 348-52. See THE DEATH PENALTY IN AMERICA (H. Bedau ed. 1967), and CAPITAL PUNISHMENT (T. Sellin ed. 1967) for general references to the issue of deterrence. See also Andenaes, *General Prevention Revisited*, 66 J. CRIM. L. & CRIMINOLOGY 338 (1975); Passell, *The Deterrent Effect of the Death Penalty*, 28 STAN. L. REV. 61 (1975).

that the death penalty is discriminatory in its application and "inhuman" in its effects. Thus, when he speaks of "informed opinion" Marshall means opinion which is based on acquaintance with facts that show, "that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are rarely executed . . . that convicted murderers are usually model prisoners . . . that they almost always become law abiding citizens upon their release from prison [and] that . . . capital punishment is imposed discriminatorily against certain identifiable classes of people"⁴⁵

And what if the people knew these "facts"? To answer this question, Marshall reasons as the Court did in *Robinson v. California*.⁴⁶ In *Robinson*, the Court argued that criminal punishment ought not to be imposed on narcotics addicts because an informed public would reject such punishment as "cruel and unusual." In the Court's own words, "[In] light of contemporary human knowledge a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment."⁴⁷ In *Furman*, Marshall hypothesized that given information about the death penalty "the great mass of citizens would conclude . . . that the death penalty is immoral and therefore unconstitutional."⁴⁸ In his view informed public opinion would find capital punishment offensive; the current state of opinion is favorable to capital punishment only because the public is uninformed. Marshall assumes then, both that support for the death penalty flows from ignorance, and that attitudes toward the death penalty are manipulable, flexible and responsive to reasoned persuasion.⁴⁹

But there is an important qualification to this prediction that information would change levels of support for capital punishment. If the public was informed but the underlying basis of its support was really due to retribution, would it continue to endorse the death penalty? Marshall's answer seems to be that it would, although he re-

45. 408 U.S. at 364-65.

46. 370 U.S. 660 (1962).

47. *Id.* at 666.

48. 408 U.S. at 363.

49. It is, we think, worthy of note that Marshall should take such an apparently undemocratic position in developing standards for judging the reliability of public opinion. Marshall reminds us that a constitutional view of public opinion differs from a democratic one; the latter weighs each opinion equally, the former must insure that opinion is not transitory and fleeting but is, instead, reflective of the fundamental principles upon which constitutional government is based. Yet, Marshall goes further. His argument suggests a disbelief in genuine ethical pluralism. Reasonable men do not differ, at least not in their attitudes toward the death penalty; informed judgment produces moral consensus. To adopt such a view is to go beyond the requisites for judging the value of public opinion; it is to express a profoundly elitist belief in the superiority of knowledge.

jects such opinion as unacceptable. It is unacceptable, he states, because retribution as a motive for punishment "has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance."⁵⁰ Thus, the opinion portrays a two-step process of attitude change. Informing people about the death penalty will, Marshall believes, convince them that it is "unwise."⁵¹ In this first step, information will influence beliefs about the application and effects of capital punishment without necessarily affecting judgments about its moral worth. The second step, in which people reject capital punishment, will not occur if the true reason for favoring it is retribution. Thus, Marshall recognizes that the creation of an informed public opinion may not lead to universal rejection and condemnation of the death penalty.

Marshall's opinion in *Furman* thus contains a complex but empirically testable hypothesis about the conditions under which public opinion might be acceptable as a reliable measure of "evolving standards of decency," an hypothesis which is important to his normative perspective and which has received little attention since the *Furman* decision. Marshall himself acknowledges the hypothetical nature of his analysis, but emphasizes that it is "imperative for constitutional purposes to attempt to discern the probable opinion of an informed electorate."⁵² In the remainder of this article we present an empirical test of Marshall's hypothesis.

II. TESTING THE MARSHALL HYPOTHESIS

Our research strategy for this test consisted of three parts. First, we surveyed opinions about the death penalty in a random sample of subjects; next, we introduced experimental manipulations designed to produce "informed" opinion about capital punishment; finally, we remeasured subjects' attitudes to determine whether informed opinions were different than uninformed opinions.

A. Design and Procedures

During the spring and summer of 1975 a randomly selected sample of 200 adult residents of Amherst, Massachusetts was interviewed by a trained research team. Nineteen of these interviews were not completed or were unsatisfactory for other reasons and are

50. 408 U.S. at 344. See also *Williams v. New York*, 337 U.S. 241, 248 (1948) in which the Court concluded that "[r]etribution is no longer the dominant objective of the criminal law."

51. 408 U.S. at 363.

52. *Id.* at 361 n.145.

excluded from our analysis. The final sample, therefore, consisted of 181 subjects.⁵³

Each interview began by presenting subjects with a questionnaire containing 18 statements designed to measure attitudes toward criminal punishment in general and toward various justifications for the death penalty. Three of these items measured the degree to which subjects endorsed retribution as a justification for criminal punishment and formed our "Retribution Scale."⁵⁴ A second questionnaire, discussed in greater detail below, measured knowledge about the death penalty.⁵⁵ A third questionnaire assessed support for or opposition to the death penalty by means of a 7-alternative scale ranging from "very strongly favor" to "very strongly oppose" the death penalty.⁵⁶ Finally, two additional series of questions asked subjects to evaluate various aspects of the application and effects of capital punishment.⁵⁷

53. The selection procedures were similar to those used in typical public opinion polling, though restricted to the locality of Amherst. Subjects were interviewed in their homes. The 19 persons whose responses were not analyzed fell approximately equally into the four experimental conditions described in Part II B *infra*.

54. The three items were as follows: it is only right that people who hurt others should be hurt themselves; it is simple justice that criminals should be punished for their crimes; the only proper justification for punishing criminals is that the punishment has a deterrent or rehabilitative purpose. Each item was accompanied by a 6-point Likert-type scale, anchored on one end by "I agree very much" and on the other by "I disagree very much." The last of the three items was "reverse" scored since it rejects retribution whereas the other two items endorse retribution. Some "construct validity" for such scales may be found in Vidmar, *supra* note 32. The additional 15 items on the questionnaire were intended to measure such things as general punitiveness toward criminals, mistrust of science, thought independence, authoritarianism, and dogmatism. These additional items were included for another purpose not directly relevant to the issues discussed in the present article. Except for a tangential reference in note 90 *infra*, they will be ignored in the remainder of this article.

55. See text accompanying notes 69-75 *infra*.

56. Table 1, *infra* at Part II B, reports each of the seven alternatives. Although traditional public opinion surveys have assessed death penalty attitudes in terms of two or three alternatives (*e.g.*, for, against, uncertain), the 7-point scale permits finer discrimination among attitudes. See Jurov, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567, 577-80, 590-99 (1971).

57. Like the questionnaire items discussed in note 54 *supra*, these two questionnaires were intended primarily for a purpose not relevant to the main thesis of this article. Nevertheless, some of the data derived from these latter two instruments are useful in explaining some of the results which will be discussed. See notes 84 and 90 *infra*.

The first series of questions, called the "Death Penalty Evaluation Scale," or "DPES," consisted of eight pairs of adjectives (fair-unfair, cruel-not cruel, useful-not useful, moral-immoral, valuable-worthless, humane-inhumane, necessary-unnecessary, good-bad) connected by 7-point "Semantic Differential Scales" (C. OSGOOD, G. SUCI & P. TANNENBAUM, *THE MEASUREMENT OF MEANING* [1957]) upon which the subject rated the concept "capital punishment."

The second series, the "Death Penalty Belief Questionnaire," or "DPBQ," consisted of 10 statements, each accompanied by a 6-point scale, which attempted to measure the degree to which people endorsed various reasons for favoring capital

In the second part of the interview the experimental manipulation was introduced. The heart of Justice Marshall's argument, one recalls, is not simply that people are relatively uninformed about capital punishment but rather, if they were informed, they would be inclined to reject it. We therefore wrote two 1500-word essays describing the kinds of scientific and other information which Marshall considers to be factual and which he thinks is important in making informed judgments about capital punishment.⁵⁸ The first essay was concerned with the "Utilitarian" aspects of capital punishment and consisted of summaries of statistical studies, reports of personal experience and arguments about the psychology of deterrence as well as data on the recidivism rate among released murderers. The second, or "Humanitarian," essay discussed, first, the way capital punishment has typically been applied and administered and, second, the psychological and physical aspects of execution. These essays constituted the substantive core of four information conditions: (1) utilitarian information only, (2) humanitarian information only, (3) utilitarian and humanitarian information combined, and (4) a control condition consisting of an essay about law which was entirely unrelated to death penalty issues. The survey respondents were as-

punishment. The items were as follows: (1) the death penalty is unfair because it is applied unequally to black people and white people; (2) the death penalty is an effective deterrent to murder; (3) convicted murderers are likely to repeat their crimes if given the chance; (4) it is cheaper for society to execute a murderer than to keep him in prison for the rest of his life; (5) the death penalty is a more effective deterrent to murder than long prison sentences; (6) it is more humane to execute a convicted murderer than to keep him in prison for the rest of his life; (7) most methods of executing criminals result in quick and painless deaths; (8) most people convicted of capital crimes (*i.e.*, those for which people can receive the death penalty) are executed; (9) regardless of whether it deters crime or not, the death penalty is the only moral and just way of punishing some kinds of criminals; (10) the death penalty may actually encourage crime by appealing to the suicide tendencies of some criminals.

58. 408 U.S. 348-52. The two essays are reproduced in Appendix A.

The interpretation and meaning of this information is, of course, arguable but our purpose here was only to report the information as objectively as possible in the essays and allow our subjects, as "reasonable" men and women, to make their own decisions upon the evidence.

For a discussion of the various Justices' opinions on these data see White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 45 AMER. J. ORTHOPSYCHIATRY 581 (1975); White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 13 DUQUESNE L. REV. 297 (1974). The *Furman* opinion and our study were completed before publication of the controversial paper by Ehrlich, *The Deterrent Effect of Capital Punishment*, 65 AMER. ECON. REV. 397 (1975), which purports to show that the death penalty has a deterrent effect. For a criticism of Ehrlich's findings, see Passell, *supra* note 44. A fascinating account of the fact that there was not one mention of the issue of deterrence in 90 minutes of oral debate before the Court in a case subsequent to *Furman* (*Fowler v. North Carolina*), is contained in Bedau, *Are Mandatory Capital Sentences Inherently Discriminatory?*, THE JEWISH ADVOCATE, May 22, 1975, section 2, at 1.

signed randomly to one of the four conditions. After an introduction that emphasized the interviewer's desire to familiarize the subject with the various issues involved, each subject was asked to read the materials in the essays carefully and thoughtfully.⁵⁹ After reading these materials subjects were again asked about their attitudes toward capital punishment and about their evaluation of its application and effects.⁶⁰

B. Results

1. SUPPORT FOR THE DEATH PENALTY

Table 1 shows that among the subjects of this study, support for the death penalty is initially about as high as it is among the American public as a whole. Although the 7-alternative item used in the study is different from the 2-alternative, for or against, item used in most national surveys, by collapsing some of the categories

TABLE 1

Pre-Experiment Attitudes Toward Capital Punishment*

Item	Alternative	Percent of Sample
a.	I am very strongly in favor of the death penalty	16%
b.	I am strongly in favor of the death penalty	21%
c.	I am somewhat in favor of the death penalty	17%
d.	I am uncertain about the death penalty	13%
e.	I am somewhat opposed to the death penalty	14%
f.	I am strongly opposed to the death penalty	11%
g.	I am very strongly opposed to the death penalty	8%

* Based on the answers of the 181 survey respondents.

in Table 1 we can see that 54 percent of our subjects favored the death penalty to some degree, 13 percent indicated that they were uncertain and 33 percent were opposed to it.⁶¹ The 1973 Harris survey found 59 percent of Americans favoring the death penalty, 10 percent uncertain or declining to answer, and 31 percent opposed.⁶² While we do not claim that our sample of Massachusetts residents is necessarily representative of the American public, there is a substantial resemblance between the attitudes of our subjects and the attitudes of a larger national sample.⁶³

59. Without question our information manipulations had limited potential for developing truly informed opinion about the death penalty—the issues are intricate and complex while the essays are short and simple; furthermore, exposure to the information took place in a brief interview session without time for reflection, discussion, or clarification. We give further attention to this matter in note 93 *infra*.

60. See note 57 *supra*.

61. These percentages were obtained by aggregating alternatives a, b, and c and alternatives e, f, and g.

62. The Harris Survey, *supra* note 28.

63. See Vidmar and Ellsworth, *supra* note 16, at 1249-50 and 1253-54 for additional data with which to compare these percentages.

2. KNOWLEDGE ABOUT THE DEATH PENALTY

A recent review of research on public opinion and the death penalty found only one empirical study dealing with Marshall's contention that the public knows relatively little about the death penalty.⁶⁴ That study, which was cited by Marshall, is in line with other studies of public opinion which suggest that the public is usually uninformed about even the most important political and social issues.⁶⁵ However, its measurement of knowledge was rather unsystematic.⁶⁶

The problem in measuring information or knowledge about the death penalty is, first, to determine what it means operationally to be informed about this issue and, second, to develop a measure of knowledge which minimizes the possible distorting effects of preexisting death penalty attitudes.⁶⁷ With regard to the first of these problems, Marshall clearly indicates what he thinks it means to be informed about the death penalty; "informed opinion" is, according to him, based on an awareness of scientific findings about the deterrent effects of capital punishment as well as of facts and opinions about the way it is applied and about its physical and psychological effects on people sentenced to death.⁶⁸ In developing our measure of

64. *Id.* at 1262-64.

65. *See id.* at 1263 n.86. *See also* McIntyre, *Public Attitudes Toward Crime and Law Enforcement*, 374 ANNALS 34 (1967).

66. *See* Vidmar and Ellsworth, *supra* note 16, at 1262 n.84.

67. It is a well documented phenomenon that persons' attitudinal predispositions cause them to interpret information in such a way as to reinforce existing opinions. *See, e.g.,* McGuire, *The Nature of Attitudes and Attitude Change*, 3 HANDBOOK OF SOCIAL PSYCHOLOGY 136 (2d ed. G. Lindzey & I. Aronson eds. 1969); McIntyre, *supra* note 65.

In the present context simple reflection on the problem will indicate that it would be absurd to expect that most, or even a few, people would have read specific original studies on the death penalty and that at most one could only expect them to know about these studies second hand through reports in the mass media. In fact a very informal survey we conducted among social science colleagues and students at Yale Law School indicated that almost none of them, unless they had had specific reason to read on the capital punishment issue, had ever read original studies, though most expressed faith in the fact that such studies existed. Thus, in the strictest sense of the term "informed" there is almost intuitive proof for this part of Marshall's hypothesis. In a less strict sense, however, it is possible to ask more general questions, primarily in a multiple-choice format.

Two problems arise, however. The first is that attitudinal predispositions regarding the death penalty are likely to distort answers to factual questions about it. For example, a person who favors the death penalty, but who in fact knows nothing about it, is likely to say that scientific studies show capital punishment has a deterrent effect whereas an equally ignorant opponent of the death penalty will say that they show it has no deterrent effect. Both answers, equally uninformed, will be chosen to support existing attitudes. The second problem arises out of the nature of multiple-choice items. If there are, for example, two alternatives accompanying an item, the subject has a 50% chance of getting the right answer even if he has no idea of what the correct answer is.

But these considerable difficulties in measuring death penalty knowledge notwithstanding, the data we obtained are interesting and bear on Marshall's hypothesis.

68. *See* 408 U.S. at 364.

knowledge we attempted to follow Marshall's guidelines; we included questions about both the application and effects of the death penalty. We were unable, however, completely to resolve the distortion problem. It is impossible to determine whether knowledge about the death penalty is evaluated without reference to attitudinal predispositions. Thus, any attempt to measure such knowledge must be treated cautiously.

Table 2 shows that knowledge varies depending on what aspect of the death penalty is under consideration. For example, when we asked our subjects about the number of people currently awaiting

TABLE 2

Knowledge About The Death Penalty

<i>Item</i>	<i>Application</i>	<i>Percent Correct</i>
1.	Are there any people currently awaiting execution in the United States? Yes, no, don't know.	72%
2.	How many people were executed in the United States in the five years prior to the Furman decision?	29%
3.	Poor people who commit murder are more likely to be sentenced to death than rich people who commit a similar crime. Yes, no, don't know.	59%
4.	The punishment of death has typically been imposed in only a small fraction of the cases where it is an authorized punishment. Yes, no, don't know.	59%
<i>Effect</i>		
5.	Most scientific studies of the effects of the death penalty show that it is an effective deterrent to crime, do not show that it is an effective deterrent to crime, don't know.	36%
6.	Studies have shown that the rate of murder usually drops in the weeks following a well publicized execution. Yes, no, don't know.	22%

execution and the number actually executed in recent years, 72 percent indicated that they knew that there are people currently awaiting execution in the United States; 29 percent indicated they knew that no one had actually been executed in the five years preceeding the *Furman* decision. This difference may be partially attributable to the fact that the first of these questions required knowledge of the present, and the second knowledge of the past, and partially attributable to the fact that the first presented specific response options while the second was open ended.⁶⁹

Two other questions dealt with issues which were very much at the heart of the *Furman* decision. The first involved the issue

69. See note 67 *supra*.

of whether the imposition of the death penalty was "unusual." The Court in *Furman* recognized that capital punishment is rarely imposed in those cases in which it is an authorized punishment.⁷⁰ The second involves the issue of discrimination; here the Court found that in the relatively rare instances in which the death penalty is imposed it is imposed disproportionately against those who are poor.⁷¹ Almost 60 percent of the subjects of this study indicated that they also knew about these inequities in the application of the death penalty. Moreover, when responses to the knowledge items were disaggregated—when the responses of those who favored, opposed or were uncertain about capital punishment were compared—we found that 52 percent of those favoring it did so even though they indicated that they knew that it has been imposed infrequently and disproportionately against poor people.

Another important issue in *Furman* was the effectiveness of the death penalty as a deterrent to crime. Although there was some difference of opinion among the Justices, most agreed that the data do not show that the death penalty deters crime.⁷² Several went on to suggest that no definitive test of the deterrent effect of the death penalty could be obtained given its infrequent application.⁷³ We employed two items designed to test people's knowledge of the deterrent effect of the death penalty. One asked people about the weight of scientific evidence on deterrence and the other about the immediate effects of executions on the murder rate. Neither of these questions was fully satisfactory. Both called for a high level of awareness not only about the death penalty but also about scientific research on this subject. Furthermore both are open to the problem of distortion which we discussed earlier.⁷⁴ Despite these problems, the items afforded a rough test of public knowledge about the effects of the death penalty, knowledge which Marshall argues is essential if people are to make reasoned judgments about its place in a civilized community. Approximately one-third of our subjects indicated that they knew about the weight of evidence on the question of deterrence, and only 22 percent indicated that they knew that the murder rate does not generally fall in the weeks following a well publicized execution.⁷⁵ In sum, Marshall's suggestion that the pub-

70. See White, *supra* note 58, at 281-85.

71. *Id.*

72. *Id.* at 285-88.

73. *Id.*, especially at 288.

74. See note 67 *supra*.

75. These findings may well be evidence of the attitudinal distortion of responses discussed in note 67 *supra*. Although we would expect that by chance alone 50% of the subjects would get the correct answer, the data indicate they did substantially less well than that. But even if this is the case, the crucial point is that, for whatever reason, the large majority of our subjects gave responses that are contrary to what

lic is ill-informed about capital punishment needs some modification. People appear to know more about the way that capital punishment is applied, but are less well informed about its effects. In the strict sense that Justice Marshall meant when he used the term, however, few persons in our sample could be labelled "informed" about the death penalty.

3. INFORMATION AND ATTITUDE CHANGE

The heart of the Marshall hypothesis in *Furman* is that if the public were to be informed about the death penalty, they would find it unjust and immoral and reject it. Therefore, we have tried to test the extent to which death penalty attitudes and beliefs might be changed by the kind of information which Marshall considers essential.

Table 3 shows the frequency of responses both before and after exposure to the four information manipulations. The import of Ta-

TABLE 3

Pre- and Post-Experimental Distribution of Death Penalty Attitudes in Each Experimental Condition

I. Utilitarian		After							
		<—			—>			(for)	(against)
		1	2	3	4	5	6	7	%
(for)	↑	1		1					25%
		2		4	1	1			16%
		3			0	4			9%
	Before	4			3	3	3		20%
		5			1	2	2		11%
	(against)	6					4	2	14%
	↓	7						2	5%
		%	23%	9%	5%	20%	14%	20%	9%

II. Humanitarian		After							
		<—			—>			(for)	(against)
		1	2	3	4	5	6	7	%
(for)	↑	1							18%
		2		8					20%
		3			5	2			16%
	Before	4			3	1	1	1	14%
		5				3	1	1	11%
	(against)	6					4		9%
	↓	7						5	11%
		%	20%	18%	11%	11%	9%	14%	16%

empirical findings have shown to be true. See generally Bedau, *supra* note 44; Sellin, *supra* note 44.

III. Utilitarian plus humanitarian

		After						
		(for)						(against)
		\leftarrow 1 2 3 4 5 6 \rightarrow 7						
		1	2	3	4	5	6	7

Table 4 is derived from the same data but greatly simplifies the picture by (a) collapsing the three pro-death penalty alternatives

TABLE 4

Percentage Changes in Death Penalty
Attitudes in Each Information Condition

	<i>Utilitarian</i>		<i>Humanitarian</i>		<i>Combined</i>		<i>Control</i>	
	<i>Before</i>	<i>After</i>	<i>Before</i>	<i>After</i>	<i>Before</i>	<i>After</i>	<i>Before</i>	<i>After</i>
Favor	51%	38%	54%	49%	62%	42%	49%	49%
Uncertain	20%	20%	14%	11%	10%	21%	9%	7%
Oppose	29%	42%	31%	39%	27%	38%	42%	44%

and the three anti-death penalty alternatives into single categories and (b) representing the data in terms of percentages rather than frequencies. Table 5 simplifies the data even further. Death penalty scale responses were assigned a score from 1 (very strongly favor the death penalty) to 7 (very strongly oppose). Then a mean of the scores both before and after exposure to the information was calculated.

TABLE 5

Mean Changes in Death Penalty Attitudes
in Each Information Condition

	<i>Before</i>	<i>After</i>	<i>Change</i>
Utilitarian	3.36	3.93	.57
Humanitarian	3.52	3.75	.23
Combined	3.40	4.00	.60
Control	3.80	3.82	.02

Consider Table 5 first. It shows that, on the whole, attitudes changed from roughly halfway between the "somewhat opposed" and "uncertain" categories, to nearly the "uncertain" category—a shift toward the position of indecision (score 4) after exposure to the information manipulation. The greatest amount of change was in the combined utilitarian and humanitarian condition, but the utilitarian condition by itself evoked about the same magnitude of change. Change in the humanitarian condition was considerably less, and the control condition showed no change at all.⁷⁸ Table 4

most of the change occurred in persons who were only somewhat in favor, uncertain, or opposed to capital punishment; persons who very strongly or strongly favored it were less likely to change.

78. The statistical significance of these data, that is, the likelihood that the differences were not due to chance, was determined by a standard statistical technique called "analysis of variance." See generally W.L. HAYS, *STATISTICS* (1963); B. WINER, *STATISTICAL PRINCIPLES IN EXPERIMENTAL DESIGN* (1962).

The analysis of variance indicates that the main effect of "condition" was not

shows this effect more concretely. In the combined condition, 62 percent of the subjects indicated support for the death penalty prior to exposure, but afterwards only 42 percent were favorable. In the utilitarian condition, 51 percent were supporters before exposure and only 38 percent afterward.⁷⁹ Change in the humanitarian condition was minimal, from 54 percent to 49 percent in favor.

Thus, the presentation of utilitarian information, that is, studies and arguments bearing on the deterrent effect of capital punishment, did result in changes in attitudes toward the death penalty, at least among those respondents who were initially moderate in their support for it, were uncertain, or were already opposed. Interestingly, presentation of humanitarian information had minimal effects on death penalty support, either singly or in combination with utilitarian information.⁸⁰ Additional analysis of data regarding changes in the way subjects evaluated the application and effects of capital punishment (rather than simply their support) indicates that the humanitarian information did have some impact. For example, after reading the humanitarian essay, most subjects tended to evaluate the death penalty as more cruel and less humane, fair, necessary and good, than they had before exposure to such information.⁸¹ The hu-

significant but that the main effect of time (*i.e.* before and after exposure to the conditions) was significant beyond the .001 probability level ($F = 51.91$, 1/177 *df.*) and a similar result obtained for the condition by time interaction ($F = 7.80$, 3/177 *df.*, $P < .001$). We can thus conclude that the chances that the differences reported in Table 5 are merely due to random fluctuations rather than a "true" effect are less than one in one thousand.

79. Examination of the "before" scores in Table 4 indicates that in the combined condition a somewhat larger percentage of subjects favored the death penalty than in the other three conditions, *i.e.* 62% versus 51%, 54%, and 49%. Such an aberration between conditions is to be expected with the relatively small number of subjects in the experiment but, more important, the lack of a "condition" main effect in the analysis of variance reported suggests the aberration is not meaningful in a statistical sense. Moreover, comparison of that condition with the "utilitarian" only condition shows roughly parallel results. In short, the aberration is more apparent than real.

80. Only 7 of 44 persons changed. See note 76 *supra*.

Incidentally, this lack of significant change, taken in conjunction with the finding of no change in the control condition, has an important methodological implication. It indicates that changes in death penalty support in the other two conditions were likely not an artifact of what research psychologists have called "experimental demand characteristics." See, *e.g.*, Orne, *On the Social Psychology of the Psychological Experiment*, 17 *AMER. PSYCHOLOGIST* 776 (1962); Aronson and Carlsmith, *Experimentation in Social Psychology*, in 2 *HANDBOOK OF SOCIAL PSYCHOLOGY* 221 (2d ed. G. Lindzey & I. Aronson eds. 1968). Subjects taking part in social science research often modify their responses or behavior to conform with what they believe the researcher is looking for when in fact their true attitudes and motivations may not have been affected at all. If such conformity processes were operating in the present study, then changes equal or nearly equal to those produced in the two conditions with utilitarian information should have occurred in the Humanitarian condition. Since they did not, we are more confident in concluding that the utilitarian information truly changed subjects' opinions on the death penalty.

81. This conclusion is drawn from data derived from the questionnaires described

manitarian essay, therefore, did appear to cause evaluative and cognitive changes in views of the death penalty, but these changes did not translate into substantial changes in levels of support for it.

In sum, our results confirm Justice Marshall's expectation that the opinions of an informed public would differ significantly from a public unaware of the consequences and effects of the death penalty. The experiment indicates, furthermore, that it is information about the utilitarian aspects of capital punishment which is primarily responsible for bringing about these differences. But what of Marshall's concern with the effects of beliefs in retributive justice? In the next section we examine the complications which these beliefs introduced into the attitudes of our subjects.

4. RETRIBUTION AND DEATH PENALTY ATTITUDES

It was Justice Marshall's suspicion, as we have already noted,⁸² that the presence of retribution motives would significantly diminish the impact of information on attitudes toward the death penalty. His theory has recently received support from psychologists Lawrence Kohlberg and Donald Elfenbein who argue that:

[t]he moral standards of the majority of Americans are such that the facts about the deterrent effect and discriminatory administration of the death penalty do not affect the formation of their attitudes Thus, the growth of factual knowledge, in and of itself, will not necessarily bring about a change in public opinion; the impact that new facts will have upon the evolution of attitudes toward capital punishment is contingent upon the moral principles invoked by persons making judgments on the bases of such data.⁸³

But while they argue for the powerful effects of retribution in explaining attitudes toward the death penalty, they present no data

in note 57 *supra*. Analysis of the DPES data showed that all of the information conditions produced changes on each of the semantic-differential scales, while the control condition produced no change. It is especially important to note that on the "cruel," "humane," "fair," "necessary," and "good" scales the change produced by the humanitarian information was as large or even larger than that produced by the utilitarian information. Additionally, it should be noted, that humanitarian information showed statistically significant effects on two DPBQ items which are directly relevant to humanitarian issues, while the utilitarian information did not produce effects on these scales. As a result of information, they tended to express less faith in the beliefs that "it is more humane to execute a convicted murderer than to keep him in prison the rest of his life" and "most methods of executing criminals result in quick and painless deaths." Thus, we are inclined to conclude that it was not the case that the humanitarian essay was ineffective in producing cognitive and evaluative changes; rather, these changes were not translated into changes in support for capital punishment.

82. See text accompanying notes 50-51 *supra*.

83. Kohlberg and Elfenbein, *supra* note 34, at 616.

which compares the importance of this moral view with the impact of information in the formation of public opinion.

In this study, although exposure to information about capital punishment was associated with diminished support for it among approximately 40 percent of our subjects, the remaining 60 percent displayed no change in their death penalty attitudes. Some of those who did not change may have already been acquainted with the type of information which was presented in our manipulation; some may not have found the information credible; some may have been suspicious of and resistant to both the information and the interview setting in which it was presented.⁸⁴ And, of course, it may be that some, especially those who would justify support for the death penalty on retributive grounds, simply found the information irrelevant in judging the propriety of capital punishment. This last possibility was tested by examining the relationship of subjects' retribution scores, their death penalty attitudes, and the degree of attitude change associated with the information manipulations.

On the basis of their responses to the retribution items in the questionnaires, all subjects were classified as being high or low in terms of their endorsement of retribution.⁸⁵ Next, the mean death penalty attitudes⁸⁶ of persons high and low in retribution were compared both before and after exposure to information about the death penalty. These data are summarized in Table 6.⁸⁷

84. In designing our survey-experiment we anticipated the possibility of these alternative explanations and attempted to build in some procedures for assessing their impact. First, the initial questionnaire contained items attempting to measure "mistrust of science" and "thought independence." See note 54 *supra*. We assumed that persons who scored high on either or both of these measures might be resistant to the information contained in the essays but supplementary analyses showed that these measures were not related to attitude change regarding the death penalty. Second, at the end of the interview each subject was asked for his personal opinion about the interview, including opinions about whether the material presented in the interview was convincing. The data from these open-ended responses are difficult to code and interpret but there does not appear to be support for an interpretation that the information contained in the essays was not viewed as credible.

85. For each subject the scores on all three retribution items were summed. Next, a frequency distribution of the scores for all of the subjects in the survey was plotted. Finally, the distribution was split at the median; subjects falling above the median were classified as being high retribution and subjects falling below the median were classified as low retribution.

86. The means were calculated in precisely the same way as the means reported in Table 5. See text accompanying Table 5 and note 78 *supra*.

87. Analysis of variance was again used as a test to determine whether the results were statistically significant. See note 78 *supra*. The only difference was that there was a third factor in the design, namely retribution. The results of this analysis are best presented in a summary table as follows:

Factor	df	F ratio	Probability level
Condition (C)	3, 173	0.96	NOT significant (N.S.)
Retribution (R)	1, 173	216.97	
C x R	3, 173	0.86	
			.001
			N.S.

TABLE 6

Mean Death Penalty Attitudes by Information
Condition and Retribution

Condition	High Retribution		Low Retribution	
	Before	After	Before	After
Utilitarian	1.8	2.1	4.5	5.2
Humanitarian	1.9	1.9	4.8	5.2
Combined	2.1	2.3	4.5	5.4
Control	2.3	2.3	5.6	5.6

An interesting and important pattern is apparent in the data presented in Table 6. First, persons classified as low on retribution are initially much less favorable to capital punishment than are persons classified as high on retribution. In fact, comparing the means reported in Table 5⁸⁸ with those reported in Table 6, it appears that retributiveness is more important in differentiating among supporters and opponents of capital punishment than is any of the kinds of information contained in the three experimental conditions.⁸⁹ Furthermore, as Table 6 indicates, retributive motives are highly correlated with the extent of change in death penalty support produced by those conditions. In each of the conditions, persons low in retribution, persons whose level of support for the death penalty was initially quite low, nevertheless showed a further alteration in their positions. The effect of information among respondents scoring high on the measure of retribution was, in contrast, uniformly

Factor	df	F ratio	Probability level
Subjects (S)	173		
Time (T)	1, 173	51.39	.001
C x T	3, 173	7.77	.001
T x R	1, 173	10.97	.01
C x T x R	3, 173	1.76	N.S.
S x T	173		

This table shows that the Retribution factor yielded the largest statistical effect: while the Time factor (before versus after) yielded the second largest effect. The Condition factor by itself was not statistically significant but, as would be expected, it did interact with Time, as did Retribution. The Condition by Time interaction was expected from the previous analysis at note 78 *supra*: the Humanitarian condition showed relatively small effects of the manipulation and the control condition no effects while the Utilitarian and combined conditions yielded relatively large effects (see Table 6). The significant Retribution by Time interaction reflects the finding, also apparent in Table 6, that high retribution persons were less influenced by any of the kinds of information than were low retribution persons.

88. See also text accompanying Table 5.

89. Consider, for example, the means for the combined condition in Table 5. The amount of change resulting from the information presentation was .6 on the 7-point death penalty scale. Now examine Table 6. It may be seen that before the information manipulation the difference between high and low retribution persons was 2.4 points (4.5 minus 2.1) on the 7-point scale and after the information the difference separating high and low retribution persons was 3.1 scale points (5.4 minus 2.3). In brief, the magnitude of the differences separating high and low retribution

quite minimal.⁹⁰ In terms of Marshall's theory, this latter change was clearly not of the magnitude which would be required if information about the death penalty is to be regarded as significant in altering the attitudes of those whose commitment to capital punishment results from an equal commitment to retribution as justification for such punishment. The broad pattern of results thus appears to confirm Marshall's suspicion that even an informed public opinion might not reject the death penalty to the extent that initial support for it is grounded in a desire for vengeance and retribution against those who commit capital crimes.⁹¹

5. SUMMARY AND DISCUSSION

This study was designed to test Justice Marshall's complex hypothesis about informed public opinion and support for the death

persons, whether before or after the information presentation, is substantially greater than the magnitude of actual change produced by that information.

90. We must digress here to place a qualification on our inferences about the role of retribution. These inferences are based on the high correlation of retribution with death penalty support in this study and with findings from other research, *e.g.*, Harris, *supra* note 28; Vidmar, *supra* note 32; Vidmar and Ellsworth, *supra* note 16, at 1256-62, but the fact of extremely high correlations does not allow us to be certain in making causal inferences. For example, supplementary data analyses which we conducted on the other measures contained in the questionnaire from which the Retribution Scale was derived, see note 54 *supra*, show that death penalty support and retribution are also highly correlated with measures of general punitiveness toward criminals, authoritarianism, and dogmatism. Even more important, analysis of items on the DPBQ, see note 57 *supra*, shows that death penalty support and retribution are also highly correlated with beliefs that the death penalty is an effective deterrent to crime. Thus, it could be that these other factors, or factors which were not even measured, were responsible, in whole or in part, for the fact that subjects who strongly support the death penalty are resistant to the information contained in the experimental manipulations. For general discussions on the topic of making causal inferences from data see F. KERLINGER, FOUNDATIONS OF BEHAVIORAL RESEARCH (1964); P. RUNKEL & H. MCGRATH, RESEARCH ON HUMAN BEHAVIOR (1972).

There are, however, some additional data to support our inference that retribution is a core element in changes in death penalty support. In the two conditions with utilitarian information, high retribution persons showed changes in beliefs about the deterrent effects of the death penalty, as measured by responses to several items on the DPBQ scale. See note 57 *supra*. They were less inclined to believe that "the death penalty is an effective deterrent to murder," that "convicted murderers are likely to repeat their crimes," and that "the death penalty is a more effective deterrent to murder than long prison sentences." While the magnitude of change on these items was greater for low retribution subjects, the changes for high retribution subjects were, nevertheless, substantial. Because death penalty support remained firm even when beliefs about deterrence changed, we are thus inclined to infer that retribution is probably a causal factor working against movement of death penalty opinion.

91. See text accompanying notes 50-51 *supra*. While Justice Marshall equates retribution and vengeance, they are not necessarily synonymous. However, in the present study our measure of retribution is global; it may tap, to varying extents, the desire for symbolic denunciation of criminal behavior; a desire for "justice;" and a desire for vengeance.

penalty. It was found that our subjects knew little about the death penalty, particularly its effectiveness. It was also found that when exposed to information about capital punishment, especially information regarding its utilitarian aspects, a substantial proportion of the subjects altered their opinions toward it. While individual changes were not dramatic, if the data are reported as simple percentages, as is done in almost all public opinion polls, the overall changes are striking. As indicated in Table 4, in each of the conditions containing utilitarian information, the percentage of subjects favoring the death penalty was reduced to less than a majority.⁹² Additional analyses indicate that retributive beliefs about criminal punishment are strongly and significantly related to capital punishment support. They were positively related to initial attitudes toward capital punishment and negatively related to the amount of change in those attitudes.

It must be recognized that the information conditions in our study provided only the most minimal opportunity for creating "informed" public opinion. In the context of a survey interview, our subjects were presented with one or two brief essays regarding the death penalty. Without time to reflect on or discuss in any depth the issues raised in the essays, the subjects could hardly be called "informed" in the fullest meaning of that term.⁹³ As a result, the findings must be dealt with cautiously. Nevertheless, even a cautious reading of our results leads to the conclusions that an informed public opinion about the death penalty may differ substantially from one that is uninformed and that these differences in support may be

92. In fact in the Utilitarian condition more people were opposed to the death penalty than favored it after being "informed" (i.e., 42% opposed and 39% favored). In the combined condition persons favoring capital punishment outnumbered those opposed to it by only four percentage points (42% versus 38%), compared to the "uninformed" difference of 35% (i.e., 62% favoring versus 27% opposed).

93. See note 59 *supra*. It is certainly reasonable to speculate that a condition which permitted truly informed opinion would produce even greater changes among low retribution subjects, though its effect on high retribution persons is much less clear.

The long-term effects of the information manipulations are also difficult to predict. It could be that a later remeasurement of subjects' support for capital punishment would show that persons who changed their opinions during the interview had reverted to their original attitudes. On the other hand, there is a substantial body of psychological literature which shows that sometimes the long-term effects of attitude change are more profound than the short-term effects. If such a "sleeping effect" took place in the present experiment we could expect that over the long term the percentage of subjects opposed to the death penalty would be even greater than the present results indicate. The fact that the information manipulations did produce substantial evaluative and cognitive changes regarding the death penalty, see notes 81 and 90 *supra*, lends support to speculation favoring the "sleeping effect" hypothesis. The authors are currently in the process of collecting follow-up data to test these two competing predictions. For a general review of the literature on short-term versus long-term attitude change see McGuire, *supra* note 67.

almost totally accounted for by persons who do not consider retribution as a legitimate, or at least important, justification for capital punishment.

III. CONCLUSION

The normative approach in eighth amendment litigation requires the Justices to identify values implicit in the vague wording of the prohibition of "cruel and unusual punishment." In *Furman v. Georgia*,⁹⁴ the attempt to identify such values led at least three of the Justices, Brennan,⁹⁵ Marshall,⁹⁶ and Burger,⁹⁷ to consider public opinion polls which show that a majority of the American population favored capital punishment. Justice Marshall, in particular, found such sentiment disturbing. He argued that in order for it to be accorded constitutional weight public opinion must be "informed" and, at the same time, not based on motives of retributive justice.

In formulating his argument Marshall set forth a complex but testable hypothesis: (1) the public is ill-informed about capital punishment, (2) if it were informed it would tend to reject the death penalty, but (3) to the extent that retribution provides the basis of death penalty support, information will have no effect on public opinion. The present study provides substantial empirical support for all of these propositions.

Our findings about the level and effects of information on death penalty attitudes suggest that the results of general population surveys which do not measure and analyze the impact of information on those attitudes must be treated with extreme caution. The fact that deep-seated beliefs about retributive justice may underlie support for capital punishment in a substantial proportion of the population is less clear cut in its implications. As was noted earlier, Justice Marshall rejects retribution as a legitimate basis for supporting the death penalty.⁹⁸ On the other hand, other Justices, including some who voted against the death penalty, disagree with Marshall about the legitimacy of retribution. Justice Stewart, for example, believes that retributive motives are "natural" and must be dealt with if society is to remain orderly.⁹⁹ Although it is beyond the scope of this

94. 408 U.S. 238 (1972).

95. *Id.* at 295.

96. *Id.* at 362.

97. *Id.* at 384.

98. See text accompanying notes 38-39 and 50-51 *supra*.

99. As he states it:

I would only say that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. 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

study to evaluate the legitimacy of retribution as an element in constitutional construction, the data show that resolving that question is now the proper focus of the debate over the acceptability of public opinion as an indicator of "evolving standards of decency." The findings thus have narrowed the field of reasonable argument for those who subscribe to the normative approach in death penalty litigation.

organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy 408 U.S. at 309. *But see Williams v. New York*, 337 U.S. 241, 248 (1948) in which the Court concluded that "[r]etribution is no longer the dominant objective of the criminal law."

For discussions concerning the role of retribution as a standard for judging the legitimacy of punishment see *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* (G. Ezorsky ed. 1972); H. L. A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968); E. VON DEN HAAG, *PUNISHING CRIMINALS* (1975); Griffiths, *Philosophical Perspectives on Punishment*, 48 N.Y.U.L. REV. 817 (1973) (book review).

APPENDIX*

INFORMATION MANIPULATIONS

(UTILITARIAN INFORMATION)

DETERRENCE

The argument most often urged in support of capital punishment is that it deters capital crimes more effectively than do penalties of imprisonment. Three main kinds of argument are heard on the question of deterrence—statistical arguments from comparative crimes rates, arguments from individual incidents and personal experience, and arguments based on assumptions as to the responses of potential murderers.

A. Statistical Evidence

Studies of crime rates show no higher homicide rates in states with capital punishment than in those without. In the best known of these studies, Professor Thorsten Sellin compared homicide rates between 1920 and 1963 in abolition states with the rates in neighboring and similar retention states. He found that the murder rate was no higher in states which had abolished the death penalty. For example, Michigan became the first state to abolish capital punishment in 1846, and it has never restored the death penalty. Comparisons between Michigan and the bordering retention states of Ohio and Indiana—states with comparable demographic characteristics—have shown no significant differences in homicide rates.¹

Students of capital punishment have also studied the effect of abolition and reintroduction of the death penalty upon the homicide rate in a single state. If the death penalty has a significant deterrent effect, abolition should produce a rise in homicides apart from the general trend, and reintroduction should produce a decline. After examining statistics from 11 states, Professor Sellin concluded that "there is no evidence that the abolition [of capital punishment] generally causes an increase in criminal homicides, or that its reintroduction is followed by a decline."² In Delaware, the most recent state to abolish and then restore capital punishment, the homicide rate was actually lower during the period of abolition than before or after.³

* [Ed. note: The appendix is reprinted just as it was given to subjects.]

1. Thorsten Sellin, "Death and Imprisonment as Deterrents to Murder," in The Death Penalty in America, ed. Hugo Bedau, p. 279.

2. Thorsten Sellin, Capital Punishment, p. 24.

3. Samuelson, "The Effect of the Abolition and Retention of the Death Penalty

Other criminologists have examined the short term deterrent effects of capital punishment. One study compared the number of homicides during short periods before and after several well-publicized executions during the Twenties and Thirties in Philadelphia. It was found that there were significantly more homicides in the period after the executions than before—the opposite of what the deterrence theory would suggest.⁴ Another short term study in Philadelphia tested the hypothesis that the pronouncing of the death sentence, with its attendant publicity, would deter homicides. It found no significant difference in homicide rates for equal periods before and after sentence of death was pronounced in four widely publicized trials during the 1940's.⁵

Whether or not the death penalty deters murder in general, does it discourage the killing of policemen? Several studies have examined this question. Another study by Professor Sellin found that the rate of police homicides during the period 1919-1954 was not significantly different for 182 cities in retentionist states (1.3 per 100,000 population) than in 82 comparable cities in states which did not have capital punishment (1.2 per 100,000). During the years 1961-63, 140 police officers were killed by criminals or suspects, 131 in states with the death penalty, 9 in states without the death penalty. In abolition states, 1.31 officers per 10,000 officers were killed, and 1.32 in the retention states bordering on them. Analysis of the data in the above studies fail to show any added protection for police in the death penalty states.

In contrast to the studies described above, there is no published study that gives any support to the theory that the use of the death penalty reduces the number of murders. In this area, the weight of the evidence is against the claim of deterrent effect.

B. Personal Experience

In addition to statistical studies there is some evidence based on personal experience. For example, the Los Angeles Police Department reported to a California Senate Committee considering the abolition of the death penalty that during the course of one year, 13 robbery suspects had told police that they used unloaded or simulated guns "rather than take a chance on killing someone and getting the gas chamber". And in 1959, newspapers reported that an

in Delaware", presented at hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, 90th Congress.

4. Dann, The Deterrent Effect of Capital Punishment.

5. Savitz, "The Deterrent Effect of Capital Punishment in Philadelphia," in The Death Penalty in America, ed. Hugo Bedau, p. 315.

escaped convict had released hostages at the state line because he feared the death penalty for kidnapping in the neighboring state. In other instances, law enforcement officials have argued that the death penalty has a unique deterrent value, based on their general experience with criminals.

Other law enforcement officials have taken an opposite position. Clinton Duffy, former Warden of San Quentin Prison and a correctional officer for over 30 years, asked thousands of prisoners convicted of homicide or armed robbery whether they had thought of the death penalty before their act. Not one had. Robbers who used unloaded or toy pistols told him they had done so not out of fear of execution, but because they did not want to hurt anyone and only wanted money. When he asked why they told police officers that fear of the death penalty motivated them, they typically responded that it seemed like a good thing to say at the time.⁶

In short, reports of individual incidents can be collected to support each thesis concerning the death penalty—that it deters and that it has no deterrent effect. Similarly, men with long experience in dealing with criminals have found support for each of these theses in the totality of that experience. Arguments and claims of this sort tend to neutralize each other.

C. The Psychology of Deterrence

It has been argued that the deterrent effect of the death penalty is a matter of common-sense psychology—men fear death above all else, hence the threat of death must deter. The ordinary citizen knows he is less likely to exceed the speed limit where the penalty is loss of license than where it is a ten-dollar fine. By the same common sense reasoning, should not some potential murderers be deterred by a possible death penalty?

Studies indicate that a large percentage of homicides are within families, or result from emotional entanglements, and occur in circumstances suggesting that the killers have been driven beyond their breaking point by hatred or frustration. Another large group of homicides occur between acquaintances as a result of arguments, most of them on the public street—again circumstances which do not suggest deliberation or a weighing of consequences. Alcohol was found to be associated with nearly two-thirds of criminal homicides in one study. Killings of this kind make up the bulk of our criminal homicides.⁷ But in none of them does it seem plausible that the mur-

6. Testimony before the Subcommittee on Criminal Law and Procedures

7. Wolfgang, "A Sociological Analysis of Criminal Homicide," in The Death Penalty in America, ed. Hugo Bedau, pp. 74-89.

derer has made any meaningful decision to kill at all, much less one which turned on his consideration of the likelihood of being executed after capture, trial and sentence.

In the case of what might be called the "rational killer" the effect of the death penalty is not at all certain, since for some people the prospect of spending life in prison may be as frightening as the prospect of death. For these kind of people the deterrent effect of the death penalty would be no greater than the effect of life sentences.

Finally, it has sometimes been argued that the death penalty might have deterrent effects for special crimes like skyjacking. Opponents of this position have argued that most skyjackers are either political terrorists or deranged persons who are willing to die anyway. Those persons not falling into this category (e.g., those doing it for ransom money) are still willing to run such extremely high risks of death (e.g. the high chance of being killed by a skymarshall, policeman, or FBI sharpshooter while the plane is on the runway or in the air) that it is unlikely that the threat of the death penalty would deter most of them anyway.

WOULD MURDERERS REPEAT THEIR CRIME IF GIVEN THE OPPORTUNITY

One of the recognized purposes of criminal punishment is the restraint of the individual offender. Some have argued that only the death penalty can sufficiently protect the public against further crimes by convicted murderers. Numerous studies have examined this argument. They have tried to determine whether murderers would commit crimes if paroled or released from prison. For example, between 1930 and 1961 in New York, 63 first degree murderers were released on parole. Sixty-one of them had been sentenced to death, but had had their sentences commuted. By the end of 1962, only one had committed another crime (burglary). In the same study, the rate of violation for all parolees was 41 per cent.⁸

In California, 342 first degree murderers were paroled between 1945 and 1954. About ten per cent of them violated parole, but only 2.6 per cent committed new felonies—the lowest rate for any class of parolees. According to the same study, comparable rates of felony recidivism for parolees convicted of some other crimes were: auto theft—31.2 per cent; forgery—30.2 per cent; burglary—25.6 per cent; robbery—20.8 per cent.⁹

8. Stanton, "Murderers on Parole," *Crime and Delinquency*, 15 (1969), p. 149.

9. California Assembly, Interim Committee Reports, Vol. 20, No. 3, "Problems of the Death Penalty and its Administration in California", (1957), p. 12.

Similar studies in other states have produced the same results.¹⁰ In Massachusetts the rate of parole violations for released murderers was only one-sixth the overall violation rate. A legislative report in Ohio concluded that "the 169 first-degree life-sentence prisoners paroled since 1945 have compiled the highest parole success rate of any offense group. Of 370 released life prisoners in Wisconsin, only 18 committed parole violations. In Michigan, of 164 paroled first degree murderers between 1930 and 1959, only four violated parole and only one committed another felony. When studies in nine different states were grouped, it was found that of 1293 first degree murder parolees, only 71 violated their paroles. Only nine of them were convicted of a second felony, and only one of a second murder."¹¹

The reason advanced to explain the excellent parole record and low recidivism rate established by murderers is that murderers are not usually professional or habitual criminals, but rather people driven to kill by exceptional situations of stress.

(HUMANITARIAN INFORMATION)

CAPITAL PUNISHMENT AS A CRIMINAL PENALTY

It has been argued that the use of the death penalty is characterized by arbitrariness, sporadic application and socio-economic and racial discrimination. It was primarily on this basis that the Supreme Court declared the death penalty "cruel and unusual" as currently applied and, therefore, unconstitutional.

Scientific evidence relevant to this argument suggests that whether a criminal is executed depends, in part, on where he committed his crime. Prior to the recent Supreme Court decision 36 of the 50 states had the death penalty for first degree murder; 16 had it for rape. Some of the states which retained capital punishment almost never used it. Additionally, even in states which had and used the death penalty great differences existed in what was defined as a capital crime.¹

Furthermore, even within states which had and used capital punishment only a very small proportion of capital crimes resulted in executions. Since 1930, when adequate statistics began to be compiled, there have been over 350,000 reported criminal homi-

10. See for example, Massachusetts Department of Correction, *An Analysis of Convicted Murderers in Massachusetts: 1943-1966* (1968) and Ohio Legislative Service Commission, "Capital Punishment," (1961).

11. Testimony before the Subcommittee on Criminal Laws and Procedures.

1. See, e.g. J. Michael and H. Wechsler, *Criminal law and its administration*, 1940.

cides. But, since 1930 there have been only 3334 executions for murder.

Moreover, those who are in fact executed are not representative of the population of convicted murderers. Warden Clinton Duffy of San Quentin Prison has suggested that capital punishment is "a privilege of the poor". Several studies seem to confirm this conclusion. For example, an examination of sentencing decisions by California juries in first degree murder cases over an eight year period found that 42% of blue collar workers convicted of murder received death sentences, while the comparable figure for white collar workers was 5%.² This study concluded, after taking account of other factors such as previous criminal record, that low socio-economic status made it far more likely that a defendant would be sentenced to death, a fact which may reflect their inability to obtain good legal assistance.

Other studies indicate that the death penalty is applied disproportionately to black defendants. Of 455 men executed for rape in this country since 1930, 405 or nearly 95% have been black. With respect to other capital crimes, there are other indications of racial discrimination. Blacks constitute 76% of those executed for robbery, 83% of those executed for assault by a life prisoner, and 100% of those executed for burglary in the same period. Of all persons executed since 1930, 53.5% have been black.³ Furthermore, when the death penalty was declared unconstitutional in 1972, 58% of the persons on death row were non-whites.

The rate of execution of blacks far exceeds the proportion of capital crimes committed by black defendants. This has been most clearly documented with respect to executions for rape. A study of rape cases in Florida between 1940 and 1964 revealed that only 5% of whites who raped white victims were executed. No white man was sentenced to die for raping a black woman. However, 54% of blacks convicted of raping white victims were sentenced to death. Another study in Arkansas showed similar disparities in death sentences for rape between black and white defendants.⁴

With respect to crimes other than rape, a study of all capital cases in New Jersey between 1930 and 1961 revealed that just under a half of the blacks convicted of capital crimes were sentenced to die. In the same period, less than 1/3 of the whites convicted of

2. "A study of the California penalty jury in first degree murder cases", Stanford Law Review, 1969.

3. National Prisoner Statistics.

4. See ACLU of Florida, Rape: Selective execution based on race, 1964, and M. Wolfgang. Testimony in Maxwell v. Bishop, 1966.

the same crimes received death sentences.⁵ A study of homicide cases in ten North Carolina counties over a ten year period found that of blacks convicted of killing whites, 37% were sentenced to death. No white defendant received death sentences for killing blacks.

With respect to who is actually executed, a study in Pennsylvania between 1914 and 1958 found blacks who were sentenced to death were twice as likely to be executed as were whites sentenced to death. A similar study in New Jersey found the same pattern. In Ohio, over a ten year period, 78% of blacks sentenced to death were actually executed, while only 51% of whites were.⁶

Psychological Aspects

Aside from the question of whether or not the death penalty is administered fairly, it has been argued that it is an uncivilized and cruel way to deal with even the most serious of crimes. In most jurisdictions, condemned men are confined to maximum security units which they never leave and in which they have minimal companionship. "Death Row" was designed to hold prisoners for only a short period of time, however, many inmates have spent over 10 years there awaiting execution.

On Death Row prisoners are constantly confronted with the fact of their imminent death. They watch fellow prisoners on their way to die and sometimes are able to see the death chamber. One psychiatrist has described Death Row as a "grisly laboratory—the ultimate in experimental stress in which the condemned prisoner's personality is incredibly brutalized." There are occasional suicides, despite very strict precautions, and "the strain of existence on Death Row is very likely to produce . . . acute psychotic breaks."⁷

When Death Row inmates do fall into psychosis, they come under a doctrine of the law which says that an insane man cannot be executed. As one Mississippi court explained it, the insane man has "lost awareness of his precarious situation . . . amid the darkened mists of mental collapse, there is no light against which the shadows

5. Wolf ". . . Jury sentencing in capital cases in New Jersey", *Rutgers Law Review*, 1964. And, F. Garfinkel, "Research note on inter- and intra- racial homicides. *Social Forces*, 1949.

6. M. Wolfgang, Kelly, and Nolde, "Executions and commutations in Pennsylvania" in *The Death Penalty in America*; and H. Bedau. "Death Sentences in New Jersey", *Rutgers Law Review*, 1964; Ohio Legislative Service Commission: *Capital Punishment*, 1961.

7. West. "Medicine and Capital Punishment". U.S. Senate Hearings, 1968, and Bluestone. "Reactions to extreme stress: impending death by execution." *American Journal of Psychiatry*, 1962.

of death may be cast. It is revealed that if he were taken to the electric chair, he would not quail. . . ."⁸

Under this doctrine, the execution of one Henry McCracken, a condemned sex murderer, was stayed when he fell into a "self induced hypnotic condition caused by fear of his impending execution. . . ." He was given shock treatments and showed improvement. The successful treatment meant that the stay of execution could be removed; McCracken was sane and ready to be executed.⁹

Albert Camus summarized the psychological effect of capital punishment: "Execution is not simply death. It adds to death a rule, a public premeditation known to the future victim, an organization, in short which is in itself a source of moral sufferings more terrible than death. . . . For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward had confined him at his mercy for months."¹⁰

Methods of Execution

The classic form of execution, used in several states, is hanging. Warden Duffy, a frequent witness described hanging as follows:

"The day before an execution the prisoner is weighed, measured for length of drop to assure the breaking of the neck . . . et cetera. When the trap door springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken and the rope many time takes large portions of skin and flesh from the side of the face. . . . He urinates, he defecates and droppings fall on the floor . . . and at almost all executions one or more witnesses faint and have to be taken from the witness room. The prisoner remains dangling from the end of a rope for 8 to 14 minutes before the doctor . . . pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few minutes there is usually considerable struggling in an effort to breathe."¹¹

If the drop is too short, there will be death by strangulation. On the other hand, if the drop is too long, the head will be torn off.

A major alternative to hanging is electrocution. The prisoner's hair is cropped short and a pant leg is slit. He or she is led into

8. *Musselwhite v. State of Mississippi*, 1952.

9. R. Ehrenzweig, "A psychoanalysis of the insanity plea", *Criminal Law Bulletin*, 1965.

10. A. Camus, "Reflections on the guillotine," 1960.

11. C. Duffy. Testimony at U.S. Senate hearings, 1963.

the death chamber, strapped in the chair and electrodes are fastened to the leg and head. Then as Warden Lewis Lawes of Sing Sing describes it:

"As the switch is thrown into its sockets there is a sputtering drone, and the body leaps as if to break the strong leather straps that hold it. Sometimes a thin gray wisp of smoke pushes itself out from under the helmet that holds the head electrode, followed by the faint odor of burning flesh. The hands turn red, then white, and the cords of the neck stand out . . . The initial voltage of 2,000 to 2,200 and the amperage of 7 to 12 are lowered and reapplied at various intervals."¹²

The length of time it takes to die in the electric chair is open to question. Often several shocks are required over a period of several minutes. The prison doctors who pronounced Julius Rosenberg dead after two minutes and three shocks, found that his wife Ethel was still alive after three applications of the current. They pronounced her dead after two more shocks and a total of over four minutes.¹³

The third major method of execution used in the United States is the application of lethal gas. Warden Duffy reports that the condemned prisoner is strapped in a chair, the gas chamber is sealed and the cyanide gas is dropped into sulphuric acid. When the gas reaches the prisoner "at first there is evidence of pain and strangling. The eyes pop, they turn purple, they drool. It is a horrible sight. Witnesses faint. It is finally as though he has gone to sleep."¹⁴ Some medical experts believe that cyanide poisoning amounts to slow agonizing strangulation.¹⁵ It was reported that Caryl Chessman gave a prearranged signal six minutes after the gas reached him. Finally, the last execution in the United States, the gassing of Luis Jose Monge in Colorado in June 1967, produced this eyewitness account:

"According to the official execution log unconsciousness came more than five minutes after the cyanide splashed down into the sulphuric acid. Even after unconsciousness is declared officially, the prisoner's body continues to fight for life. He coughs and groans. The lips make little pouting motions resembling the motions made by a goldfish in a bowl. The head strains back and then slowly sinks down to the chest. And in Monge's case, the arms, though tightly bound to the chair, strained through the straps and the hands clawed torturously as if the prisoner were struggling for air."¹⁶

12. L. Lawes, Life and death in Sing Sing, 1928.

13. New York Times, June 20, 1953.

14. C. Duffy. Testimony at U.S. Senate hearings, 1968.

15. J. Kevorkian. Medical Research and the Death Penalty, 1960.

16. Time, June 23, 1967.