

STUCK IN THE DARK AGES Supreme Court Decision Making and Legal Developments

James R. P. Ogloff
Monash University and Forensicare

Sonia R. Chopra
Simon Fraser University

In the latter quarter of the 20th century, the United States Supreme Court has generally refused to narrow the procedural and substantive conditions under which adults may be sentenced to death for capital murder. The current status of social science evidence is briefly reviewed to evaluate the Court's treatment of 3 specific categories of evidence: the death-qualified jury, prejudicial capital sentencing, and juror comprehension of capital-sentencing instructions. The role of perceptions of public opinion in the perseverance of capital punishment statutes is considered. It appears that the Court, in general, does not place much weight on social science evidence. Suggestions are made for future areas of research and practice for social scientists interested in capital punishment.

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than to continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative.

—*Callins v. Collins*, 1994, Blackmun, dissenting

While some assert that the death penalty is cruel and unusual in all circumstances and is prohibited by the U.S. Constitution, others maintain that it is not repugnant to civilized standards. Somewhat surprisingly, perhaps, these are not the emotional outcries of lay people, but the opinions of Supreme Court justices (*Furman v. Georgia*, 1972). The former point of view was expressed by Justice Marshall and the latter by former Chief Justice Burger. In the quotation above, as he was leaving the bench after more than 25 years, Justice Blackmun expressed his concern that the criminal justice system in the United States cannot “accurately and consistently determine which defendants ‘deserve’ to die.” The quotation is all the more moving and powerful when one thinks of how many United

James R. P. Ogloff, School of Psychology, Psychiatry, and Psychological Medicine, Monash University, Victoria, Australia, and the Victorian Institute of Mental Health (Forensicare), Victoria, Australia; Sonia R. Chopra, Department of Psychology, Simon Fraser University, Burnaby, British Columbia, Canada.

Correspondence concerning this article should be addressed to James R. P. Ogloff, Thomas Embling Hospital, Locked Bag 10, Fairfield, Australia, 3078. E-mail: James.Ogloff@med.monash.edu.au

States Supreme Court cases in the 1970s and 1980s were decided in favor of the death penalty by narrow margins, with Mr. Justice Blackmun joining the majority. Were his change in heart—or reasoning—to have occurred near the beginning of his time on the Court rather than at the end, the jurisprudence concerning the death penalty in the United States might be very different today.

The annual number of people sentenced to death and executed in the United States has increased dramatically in the past 25 years. During the 1930s, there was an average of 167 annual executions (Bedau, 1997). This number began to decrease until it reached an all-time low of zero between 1968 and 1977 (Bedau, 1997). Since 1977, however, the number of people sentenced to death and the number of actual executions have continued to increase (Snell, 2000).

Figure 1 presents the annual number of executions since 1976. Between January 1, 1977, and December 31, 1999, a total of 598 executions took place in 30 states (Snell, 2000). In comparison with the 120 executions that took place between January 1977 and December 1989 (Snell, 2000), it is clear that the 1990s was a decade of death. Figure 2 shows that the annual number of people on death row has increased dramatically (by 2,600%) from a low of 134 in 1973 to a high of 3,527 in 1999 (Snell, 2000). The increase can be attributed both to the lengthy appeals process and to an increasing number of death sentences imposed each year since 1977. As we discuss below, until very recently, there has been little reason to believe that the number of executions will decrease in the very near future, based both on the number of individuals on death row and the current political climate in the United States.

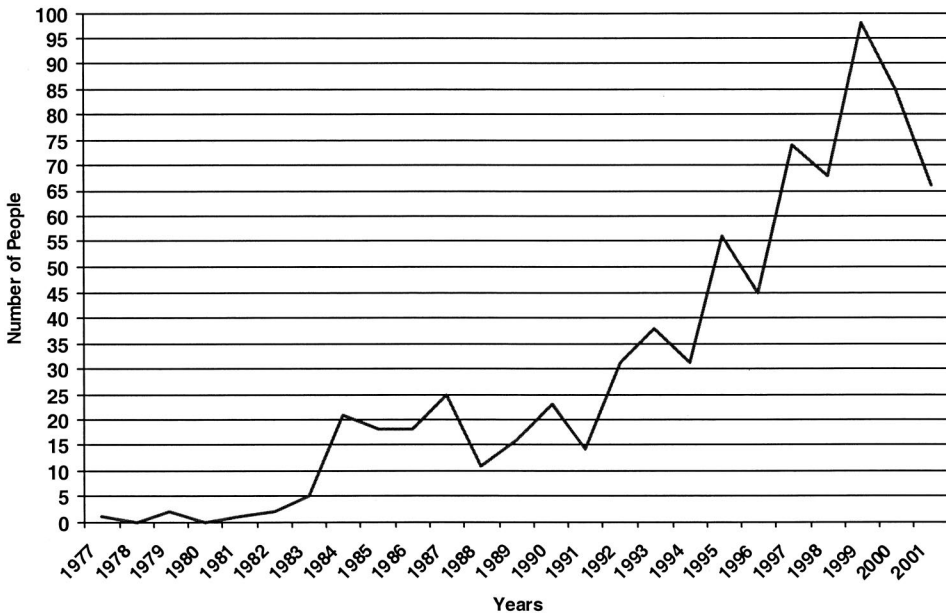


Figure 1. Number of people executed annually in the United States, 1977–1999. Data compiled from *Capital Punishment 1999* by T. Snell, 2000, Washington, DC: U.S. Department of Justice.

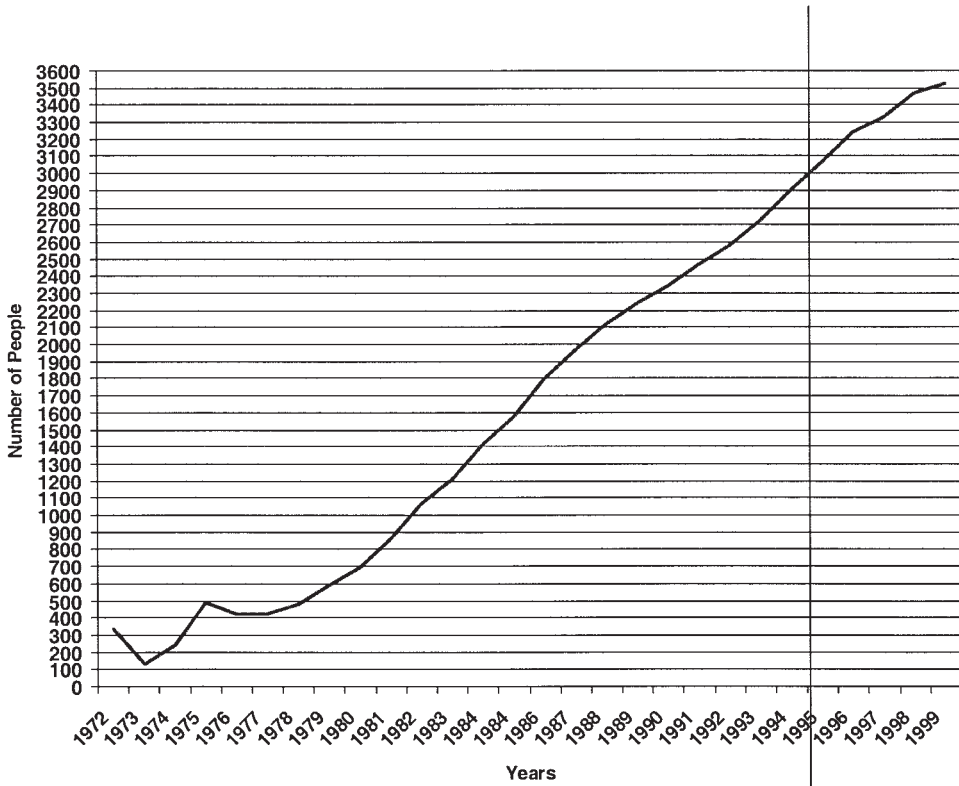


Figure 2. Number of people under a sentence of death in the United States, 1972–1999. Data compiled from *Capital Punishment 1999* by T. Snell, 2000, Washington, DC: U.S. Department of Justice.

As a result of due process requirements, up to 10 years or more may pass between sentence of death and actual execution (Snell, 2000). Because the number of persons under sentence of death has increased so dramatically, it is logical to assume that the number of executions will necessarily increase accordingly in the future. Therefore, while the number of executions in Figure 1 may appear relatively low, it is somewhat misleading because of the lag time between death sentence and execution. Assuming the Supreme Court does not dramatically restrict the use of the death sentence, and assuming states currently permitting capital punishment do not abolish the penalty, the annual number of people who will be executed within the next decade may reach an all-time high.

The 1997 call for a death penalty moratorium by the American Bar Association (ABA), discussed below, and consideration of abolition or moratorium at the state level, could slow the rate of executions in the coming decade, pending more research into the fairness of the process. Rather than being based on a moral argument against state-imposed death, the “new” abolitionist movement is focused on fairness and justice concerns with the current death penalty system (Bilionis, 1998).

While many factors contributed to the resurgence of the death penalty in the 1980s, the increase may be partly attributed to changing ideology that affected capital cases decided by the Supreme Court. A discussion of some key capital punishment cases, particularly those that have discussed social science evidence, is provided to emphasize how they helped to set the stage for an increase in executions. We begin this article with a brief overview of three of the major factors that have contributed to the dramatic increase in capital sentences and the concomitant increase in executions. These factors, of course, include the support for the death penalty by the public, the legislatures, and, ultimately, the courts, including the United States Supreme Court. We provide a brief discussion of the relatively recent background of capital punishment in the United States, beginning with *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976).

We turn to our in-depth analysis of the interplay between law and social science in capital jurisprudence with a discussion of some of the issues that have been addressed by the Court in the years following *Gregg*. Included in this discussion is the requirement for the “death qualification” of jurors in capital cases, the role of the race of the defendant and victim in capital cases, and the adequacy of the judicial instructions used in capital cases. Both the law and relevant social science research are considered for each of these topics. Despite the generally pessimistic tone of this article, the United States Supreme Court’s recent decision in *Atkins v. Virginia* (2002), in which the Court held that the execution of criminals who are mentally retarded is unconstitutional, presents some future hope. We conclude with a call to the Supreme Court to exercise its duty to ensure that the provisions of the Constitution, including the Bill of Rights, are satisfied by the current operation of the death penalty in the United States. Finally, we highlight the important role that social science can continue to play in investigating the operation of the death penalty in the United States.

Major Factors Contributing to the Death Penalty Renaissance

As noted earlier, there are three major factors to help explain the resurgence in the death penalty in the latter quarter of the last century: (a) perceived public support of the death penalty, (b) legislative support of the death penalty, and (c) judicial support of the death penalty. These factors are briefly addressed below.

Perceived Public Support of the Death Penalty

The United States is one of the few industrialized nations with a provision for imposing capital punishment.¹ According to Amnesty International, China, the

¹ The United Nations has passed resolutions restricting the use of the death penalty around the world. For example, the General Assembly passed the following resolution in 1971:

In order to guarantee fully the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries. (Resolution 2857 [XXVII]; see United Nations, 1980b)

Countries in Western Europe, South America, South America, Israel, and Canada have abolished the

Democratic Republic of the Congo, Iran, Saudi Arabia, and the United States alone were responsible for 85% of the more than 1,813 people executed in 1999 (*United States v. Burns*, 2001). In February 2001, the Supreme Court of Canada refused to allow extradition of two Canadian citizens accused of first-degree murder in Washington State because they could face the death penalty (*United States v. Burns*, 2001). The decision was partially based on the belief that capital punishment was cruel and unusual, arbitrary, and irreversible, and the fact that Canada, which has not executed anyone since 1962, is part of an international initiative to abolish the death penalty (*United States v. Burns*, 2001). The Government of Canada would only agree to extradite the defendants if the State of Washington guaranteed that, should the defendants be convicted, the State would not pursue the death penalty. As of the end of 1999, 38 states and the U.S. government had statutory provisions for the death penalty (Snell, 2000).

The overwhelming belief is that the American public supports the death penalty. For evidence that the people demand capital punishment, death penalty proponents and politicians point to public response to what has come to be known as the standard polling question (SPQ; Bowers, Vandiver, & Dugan, 1994): "Are you in favor of the death penalty for a person convicted of murder?" (Gallup Poll Topics, 2001). A February 2001 Gallup poll reported that 67% of the public favors the death penalty for persons convicted of murder (Gallup Poll Topics, 2001). This level of support, while high, is lower than previous results showing that from 1985 to 1999 between 70% and 80% of the people supported the death penalty (Gallup Poll Topics, 2001). Perceived public support may make it politically difficult for elected officials to publicly denounce the death penalty.

As commentators explain, however, while people support the death penalty in the abstract, they are willing to consider alternatives that effectively address concerns regarding early release and future dangerousness (Sandys & McGarrell, 1995; Steiner, Bowers, & Sarat, 1999) and satisfy the public desire for retribution (Bowers et al., 1994; Sandys & McGarrell, 1995). For example, surveys conducted in 12 states² by Amnesty International indicated that public support for the death penalty was reduced to less than 50% when respondents were given the alternative of choosing life in prison without the possibility of parole (LWOP) rather than the death penalty for those convicted of first-degree murder (Bowers et al., 1994; see also Haas & Inciardi, 1988). An alternative of LWOP before 25 years also reduced death penalty support, but a majority of respondents still

death penalty (United Nations, 1980a). In April 1999, the United Nations Commission on Human Rights voted in favor of a moratorium on the death penalty:

The Commission on Human Rights . . . urges all States that still maintain the death penalty: Not to impose it for crimes committed by a person below 18 years of age; not to impose the death penalty on a person suffering from any form of mental disorder, not to execute any person as long as any related legal procedure, at international or at national level is pending; progressively to restrict the number of offenses for which the death penalty may be imposed; to establish a moratorium on executions, with a view to completely abolishing the death penalty. (Resolution 1999/61, 58th Meeting, April 28, 1999 [see Dieter, 1999])

² Arkansas, California, Florida, Georgia, Indiana, Kansas, Kentucky, Massachusetts, Nebraska, New York, Oklahoma, and Virginia.

favored the death penalty when this alternative was given (Bowers et al., 1994). Most effective in reducing support for the death penalty is the addition of a requirement of restitution to the victim's family, along with no possibility of parole (Bowers et al., 1994). Gallup has become sensitive to the problems associated with the SPQ, and the poll now contains a question providing an alternative sentence of life imprisonment with absolutely no possibility of parole. In the February 2000 poll, for example, 52% of respondents still favored the death penalty in response to this question (down from 66% in favor on the SPQ for a similar time frame), and 37% preferred the punishment of LWOP (up from 28% who were not in favor of capital punishment; Gallup Poll Topics, 2001).

Fears of early release, however, are difficult to overcome. Using juror interview data from the Capital Jury Project, Steiner et al. (1999) concluded that the earlier jurors believed that the accused would be released if given a life sentence, the more likely they were to vote for a sentence of death—despite the fact that there was no possibility of parole in some of the states in which the study was conducted. Additionally, 78% of pro-death penalty respondents in a 1995 national survey indicated that having a life sentence without parole as an option would either increase their support for the death penalty or would not matter to their opinion (Longmire, 1996). For LWOP and other punishment alternatives to be effective, the public must have faith that life without parole really means life.

Some reluctance to impose a sentence of death can be evidenced in simulated jury decision making. Haas and Inciardi (1988) found that less than one third of mock jurors who favor the death penalty were willing to impose capital punishment in actual cases for heinous crimes such as killing a police officer or beating a woman to death. Specific types of cases may also make it more difficult for jurors to impose a sentence of death. Durham, Elrod, and Kinkade (1996) found considerable variability in willingness to impose a verdict of death. Offenders who were intoxicated, had no record of previous violence, had an abusive childhood, were young (age 14), committed the crime to feed a family, reacted to a threat to his life, or found their spouse in bed with another man were given lesser sentences. Similarly, while 76% of jury-eligible respondents to an Indiana survey were in favor of the death penalty in general, 74% agreed that the death penalty should not be imposed on a person who is mentally retarded, and 51% felt that it should not be imposed on youths under 18 at the time of the crime (Sandys & McGarrell, 1995).

Given the above information, it is apparent that the majority of Americans support the death penalty—at least in the abstract. Further, based on the public's fears, misperceptions, and distrust of the criminal justice system, there is little reason to believe that the pendulum of public support will unconditionally swing away from the death penalty in the near future.

Legislative Support of the Death Penalty

Although legislatures have the option of abolishing the death penalty, it is unlikely that politicians would be willing to jeopardize public support by abolishing the death penalty. Research has demonstrated that legislators are woefully unaware of the true beliefs of their constituents regarding the capital punishment

issue. Bowers et al. (1994) compared New Yorkers' responses to questions about the death penalty and punishment alternatives with what legislators thought the public wanted. While 73% of legislators believed that their constituents would prefer the punishment for first-degree murder to be the death penalty, as opposed to LWOP, LWOP plus restitution, or life with parole after 25–30 years and restitution, 73% of citizens statewide preferred LWOP plus restitution to the death penalty. Forty-two percent of legislators believed that voting against the death penalty would “definitely” hurt their chances of reelection, but 80% of New Yorkers indicated that they would be more likely to vote for a candidate who preferred the same punishment alternative as they did.

Similar studies have been conducted in other states. McGarrell and Sandys (1996) found that in Indiana, 62% of citizens were in favor of LWOP plus restitution, whereas the legislators estimated that only 40% of their constituents would prefer this punishment alternative (McGarrell & Sandys, 1996). Whitehead, Blankenship, and Wright (1999) found in Tennessee that only 18% of citizens preferred LWOP to the death penalty, but another 42% were in favor of having the option between LWOP and the death penalty as the sentence for first-degree murder. However, 72% of legislators and 68% of prosecutors thought that a vote against the death penalty would harm their chances of reelection (Whitehead et al., 1999).

Congress has recently limited the effectiveness of appellate review protections in capital cases (ABA, 1997; Bright, 1998; Yackle, 1998). The Anti-Terrorism and Effective Death Penalty Act of 1996 imposes limits on federal habeas corpus relief for those convicted of capital crimes and reduces the availability of appellate review. In the same year, Congress withdrew federal funding from public defender organizations providing postconviction services (ABA, 1997). In response to the Congressional legislation described above, along with evidence that many states were moving further away from following procedural safeguards in capital cases as recommended by ABA policies, in February 1997, the generally conservative organization called for a nationwide moratorium on the death penalty, pending investigation into the accordence of state policies and procedures with ABA standards of fairness, impartiality, and due process (ABA, 1997).

Specifically, the ABA was concerned with the quality of legal representation in death penalty cases, racial discrimination in sentencing, the execution of juvenile defendants, the execution of the mentally retarded, and limits/problems with state postconviction and federal habeas corpus proceedings (ABA, 1997). While the ABA takes no position on the morality or constitutionality of the death penalty, except in the case of mentally retarded and juvenile defendants, they have stated that

two decades after *Gregg* it is apparent that the efforts to forge a fair capital punishment jurisprudence have failed. Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency. (ABA, 1997, p. 3)

As of July 2001, a number of state and local bar associations had adopted resolutions calling for either a moratorium or a systemic review of death penalty

procedures in their states (ABA, 2001). These organizations include state bar associations in Pennsylvania, Connecticut, Louisiana, New Jersey, North Carolina, Colorado, New York, Ohio, Illinois, and Washington, along with local bar associations in Philadelphia, Charlottesville, Boulder County, Multnomah, and Atlanta (ABA, 2001). In addition, the Chicago Council of Lawyers, the New York County Lawyers' Association, the California Conference of Delegates, the Virginia College of Criminal Defense Attorneys, and the Virginia Trial Lawyers Association have passed moratorium resolutions (ABA, 2001).

Particularly disturbing in light of the Congressional movement toward limiting postconviction relief for capital defendants are the results of a recent large-scale study examining the 5,760 death sentences imposed in the United States between 1973 and 1995 (Liebman, Fagan, & West, 2000). Liebman et al. (2000) concluded that 68% of America's death sentences were overturned on appeal as a result of serious error, with state supreme courts accounting for 47% of the reversals. Of the 342 capital cases identified as having been reversed postconviction at the state level, ineffective assistance of counsel was the source of error in 107, or 37% of the cases, with unconstitutional jury instructions being the basis for relief in 57, or 20% of the reversals (Liebman et al., 2000). Prosecutorial misconduct, in particular the suppression of evidence supporting innocence, was the source of reversible error in 19% of the 342 reported cases (Liebman et al., 2000).

In November 1999, the *Chicago Tribune* reported that nearly half of the 285 death penalty cases in Illinois had been reversed on appeal, and that at least 12 innocent men had been sent to death row (Armstrong & Mills, 1999). While the majority of overturned cases in Illinois have involved judicial error, over 10% of the reversed cases involved prosecutorial misconduct (Armstrong & Mills, 1999). The American Civil Liberties Union (ACLU) of Washington recently reported that federal trial and appellate courts in that jurisdiction had overturned all but 1 of 8 cases brought before them, whereas the Washington Supreme Court only overturned 3 of 19 cases reviewed (Kaufman-Osborn, 2000). In 4 of the federal cases, reversal was in part because of the ineffective assistance of counsel, 3 cases involved prosecutorial or police misconduct, 2 convictions/sentences were overturned because of improper exclusion of evidence, and juror misconduct was at issue in 1 case (ACLU, 2001).

Media coverage of the ABA moratorium, the Liebman et al. (2000) study, and the mistaken convictions of innocent capital defendants has undoubtedly increased public awareness of the problems with capital punishment as it is currently imposed in the United States (see, e.g., ABA, 2000; Kirchmeier, 2002; Tabak, 2001). While it is difficult to point to a direct correlation between this increased awareness and governmental action, mounting concerns about the fairness of death penalty implementation have coincided with some state-level initiatives to cease executions while the issues are evaluated (see ABA, 1998, 2000, 2001).

For example, a few months after the ABA moratorium was issued, the Illinois House of Representatives introduced a bill to establish a Commission on the Death Penalty to study some of the same issues raised by the ABA (see ABA, 1998). Similarly, in May 1999 the Nebraska legislature approved a 2-year mor-

atorium on the death penalty and called for a study into the fairness of the punishment, citing concerns about racial and other demographic or geographic variables affecting the decisions to seek or to impose the death penalty (ABA, 2000). Although the Governor vetoed the initiative, part of the veto was unanimously overridden so the study could still be conducted (ABA, 2000). One year later, the New Hampshire legislature voted to abolish the death penalty—the first state to do so since the death penalty was reinstated in *Gregg v. Georgia* (1976)—again, the Governor vetoed the initiative (Kirchmeier, 2002). Bills to abolish the death penalty were also introduced in Connecticut, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, New Jersey, New Mexico, New York, Pennsylvania, and South Dakota.

Perhaps most significant to the moratorium movement was Illinois Governor George Ryan's January 31, 2000 declaration of a statewide moratorium on all executions (ABA, 2000; Greene et al., 2001; Kirchmeier, 2002; Tabak, 2001). Governor Ryan established a Commission on Capital Punishment to determine whether reforms could be enacted that would render capital punishment in Illinois fair (Commission on Capital Punishment, 2002). Upon completion of the investigation, in April 2002, a majority of the Commission favored abolition of the death penalty in Illinois (Commission on Capital Punishment, 2002). The Commission, however, acknowledged that public support of the death penalty may make abolition difficult and therefore suggested a number of reforms that would entail sweeping changes in the system of capital punishment, including the creation of a review panel to evaluate prosecutorial discretion in seeking the death penalty; banning the death sentence for those convicted on the basis of uncorroborated single eyewitness testimony, accomplice testimony, or the testimony of jailhouse informants; revision of jury instructions to make the decision-making task more clear and to provide alternative sentencing possibilities to the jurors; adding the existence of physical/emotional abuse and reduced mental capacity to the list of statutory mitigators; and allowing defendants to make statements during the sentencing phase absent of cross-examination (Commission on Capital Punishment, 2002).

Following Illinois' moratorium in January 2000, legislators in Alabama, Kentucky, New Jersey, and Ohio introduced moratorium bills, and commissions to investigate the fairness of capital punishment were established in Arizona, Connecticut, Nebraska, Nevada, and North Carolina (ABA, 2001). On May 9, 2002, Maryland Governor Parris Glendening ordered a moratorium on executions pending the results of a 2-year study being conducted at the University of Maryland, which is focusing on racial bias in death penalty implementation (Clines, 2002). While the majority of the public still supports the death penalty for murder, as described above, recent polls suggest that Americans are in favor of moratoriums pending investigation into the fairness of death penalty administration (Langer, 2001). An April 2001 ABCNEWS/*Washington Post* poll found that 51% of respondents would be in favor of a nationwide death penalty moratorium, and after being informed that Illinois had already instituted a moratorium, support for a national moratorium increased to 57% (Langer, 2001). There is some evidence that public awareness of mistaken convictions is behind the support for a moratorium. Sixty-eight percent of respondents to the ABCNEWS/*Washington*

Post poll agreed that the death penalty was unfair because of mistaken executions (Langer, 2001), and in a similar poll, 72% of respondents favored suspension of the death penalty pending investigation after being primed about death row defendants being released following the emergence of new evidence or DNA testing (Peter D. Hart Research Associates, Inc., 2001).

Recent activity at the federal legislative level also reflects a growing awareness of the problems associated with the death penalty, as explicated by the ABA moratorium resolution, the Liebman et al. (2000) study, and the exoneration of innocent death row inmates (see, e.g., ABA, 2001; Feingold, 2000; Tabak, 2001). In both 1999 and 2001, Senator Russ Feingold introduced legislation to abolish the death penalty at the federal level (Feingold, 2000). In his January 2001 Congressional testimony, Senator Feingold discussed the drop in public support for the death penalty when alternative sentences are provided, social science evidence refuting the deterrent effect of the death penalty and demonstrating racial bias in death penalty sentencing, and the cases of innocent individuals sentenced to death (Federal Death Penalty Abolition Act, 2001). Following Governor Ryan's lead in Illinois, Senator Feingold introduced the National Death Penalty Moratorium Act of 2000, calling for a moratorium at both the state and federal levels pending a national review of its administration (Feingold, 2001). The bill was reintroduced in 2001 (Feingold, 2001). Accompanying the 2001 introduction of the bill was testimony describing the Illinois moratorium and the report of the Commission on Capital Punishment (National Death Penalty Moratorium Act, 2001). In addition, Senator Feingold presented the results of the Liebman et al. (2000) study, while New Jersey Senator Jon Corzine discussed racial and geographic disparity in sentencing, the cases of innocent death row inmates, and the problems with ineffective assistance of counsel in death penalty cases (National Death Penalty Moratorium Act, 2001). Similar bills were introduced in the House (see Feingold, 2001). The Liebman et al. (2000) study has also been cited in Congressional testimony to support the Innocence Protection Act of 2001, which seeks to provide DNA testing to federal and state inmates and to improve the quality of counsel for indigent capital defendants (see *The Innocence Protection Act and Another Death Row Milestone*, 2002).

Thus, abolitionists may have some hope in knowing that appellate courts, legislatures, or government officials may find the death penalty unconstitutional or effectively eliminate its implementation. At the very least, executions may be halted while further inquiry into the fairness of capital jurisprudence can be completed. There is little hope, however, that the current Supreme Court will restrict capital punishment generally.

Judicial Support for the Death Penalty

While courts cannot impose capital punishment if the state does not provide for the death penalty, the courts—especially appellate level courts—have a great deal of latitude over the imposition of the death penalty. However, as this article shows, the United States Supreme Court has established a pattern of general, and arguably increased, support for capital punishment. While state appellate courts are able to use state constitutions to protect the liberties of their citizens to an

extent further than the federal constitution provides (Development in the Law, 1982; Haas, 1981; Haas & Inciardi, 1988; Porter & Tarr, 1982), state court justices who face reelection may be subjected to the same types of pressures as legislators who want to comply with what they perceive public opinion to be (see Bright, 1998).

In summary, the public has traditionally been perceived as supporting capital punishment, and therefore most legislators have been quite eager to support death penalty legislation. But the reality is that the public does not require capital punishment, they need to be sure that life in prison means life in prison, and the politicians should and are beginning to act according to public wishes. As discussed above, the usually conservative ABA has issued a moratorium against the death penalty, Canada has refused to extradite individuals where the penalty is a possibility, and state officials have begun taking matters into their own hands. As this article demonstrates, the United States Supreme Court is one of the greatest stumbling blocks in the path of death penalty abolition. Moreover, recent Court decisions have served to diminish rather than increase the chances that this most irreversible of punishments is meted out in a fair and just manner. As Bedau (1996) noted:

Instead of providing a moral reading of the Constitution and the Bill of Rights as they bear on the death penalty, the Supreme Court has taken refuge in other principles, using them as fig leaves to cover embarrassing nakedness. I refer to the familiar principles of federalism, judicial self-restraint, and legislative deference—procedural principles by means of which the life appointees of the Supreme Court deny to themselves any authority to play the role of philosopher-kings, even when the application of other principles is no less compelling. (p. 811)

The Background of Capital Punishment in the United States

Abolitionists initially devoted their efforts to legislative reform (Melstner, 1973). By the 1960s, however, the NAACP Legal Defense and Educational Fund began a major constitutional assault against the death penalty and developed a moratorium strategy by blocking all executions on every conceivable ground, creating a death row logjam (Melstner, 1973). As a result, the number of executions decreased to zero between 1967 and 1977 (Bedau, 1997). The Supreme Court made its monumental stand against the death penalty in *Furman v. Georgia* (1972). Each Justice wrote separate opinion, and many cited social science data that pertained to a number of separate issues. In the final analysis, a bare majority specifically held that as a result of unguided discretion, the penalty was being imposed so indiscriminately, wantonly, freakishly, and infrequently that any given death sentence was in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. While this case did not rule that capital punishment per se is unconstitutional, it greatly restricted the manner in which states could administer it.

The effect of *Furman* was profound, and a number of capital punishment statutes were rendered unconstitutional immediately following the decision. As would be revealed only 4 years later, however, the practical effect of *Furman* proved to be temporary. In 1976, a "post-*Furman*" death penalty statute was

upheld in *Gregg v. Georgia* (1976). Unlike the *Furman* statute, the one in *Gregg* required the use of *guided discretion* in deciding on an appropriate punishment. Guided discretion entails statutorily defined lists of aggravating and—less frequently—mitigating circumstances to help juries impose the death penalty in a consistent and fair manner. The Court held that the process used to impose death must comport with “the evolving standards of decency that mark the progress of a maturing society” (*Gregg v. Georgia*, 1976, p. 173, quoting *Trop v. Dulles*, 1958, p. 101). The Court further wrote that those standards of decency are appropriately reflected in the decisions of legislatures and juries.

The Resurgence in the Death Penalty: The Recent History of Capital Punishment

Like *Furman*, *Gregg* had a dramatic impact on death sentences, and there has been an increase in the annual number of executions since 1977 (Snell, 2000). *Gregg* established that it was possible for a state to impose the death penalty without infringing on one’s Eighth Amendment rights. Partly for this reason, *Gregg* may be considered the catalyst in the resurgence of the death penalty in the United States. However, *Gregg* also placed tremendous faith in the newly established set of procedures presumably designed to ensure the fair and reliable administration of the death penalty. Those procedures, and the Court’s faith in them, rested on a number of empirical assumptions. In subsequent years, social science research has critically evaluated many of the most important of those assumptions, and the Court has been called upon to consider the empirical evidence and its implications. This section reviews some of the landmark cases since *Gregg*, focusing on current social science evidence relevant to the issues discussed and assumptions held by the Court.

The Questionable Process of “Death-Qualifying” Jurors

Witherspoon *excludables*: *Trial by an impartial jury?* Among the rights guaranteed by the Sixth Amendment is the right to a speedy and public trial by an impartial jury and the right to have the jury composed of a fair cross-section of the community.

Until 1968, potential jurors who acknowledged having “scruples” against the death penalty were prohibited from jury duty in capital cases. However, the Court in *Witherspoon v. Illinois* (1968) raised the standard for excluding jurors from mere scruples to such unequivocal opposition to the death penalty that “they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them” (p. 522, note 21). This narrowed exclusion process is known as *death qualification*, and the persons who are excluded according to this procedure are known as *Witherspoon excludables* (WEs; Haney, 1984).

In a subsequent case, the Court significantly expanded the standard for excluding potential jurors (*Wainwright v. Witt*, 1985). The current standard for identifying prospective jurors who may be excluded is whether their views of capital punishment would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath” (*Witherspoon v.*

Illinois, 1968, pp. 516–517). Most notably, the Court dispensed from using *Witherspoon*'s reference to the potential jurors' "automatic" decision making. Therefore, one would expect that this standard would make it easier for potential jurors to be excluded. Research in this area, however, has provided mixed results.

A telephone survey of California residents indicated that the percentage of respondents who would be excluded as capital jurors on the basis of their death penalty beliefs was greater when using the *Witt* standard than when using *Witherspoon*, and this held true for those opposed to the death penalty as well as those who were in favor or would automatically vote for a penalty of death (Haney, Hurtado, & Vega, 1994). When the *Witherspoon* and *Witt* excludable groups were compared, however, they showed little difference in death penalty or criminal justice attitudes (Haney et al., 1994). Use of the *Witt* standard resulted in approximately equal percentages of people excluded at both end of the spectrum, as opposed to the use of the *Witherspoon* standard, which resulted in fewer exclusions of those who would always vote for death, or automatic death penalty (ADP) jurors (Haney et al., 1994). In contrast, Neises and Dillehay (1987) found that the *Witt* standard did not sufficiently identify ADP jurors—26 of 32 respondents who were classified as ADP jurors would not have been excluded under *Witt*. Research involving Missouri residents resulted in yet a different result; 31 respondents who would automatically vote against a death sentence were included under the *Witt* standard but excluded under *Witherspoon* (Warren, Rauch, Kadela, & Wiener, 2000). The overall difference in exclusion rates between the two standards, however, was small and statistically insignificant (Warren et al., 2000).

Regardless of the standard used, death qualification raises a constitutional question in those cases in which the same jury that determines whether the accused is guilty of murder has the added responsibility of sentencing. While WEs may be unwilling to impose the death penalty in the sentencing phase of the trial (and some research suggests that even this may not be true; see Lander & Baird, 2000; Robinson, 1993), they are not necessarily unable to rule impartially on the basic question of guilt or innocence. Indeed, the petitioner in *Witherspoon* contended that members of a death-qualified jury

must necessarily be biased in favor of conviction for the kind of juror who would be unperturbed by the prospect of sending a man to his death [is] the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilty. (pp. 516–517).

Therefore death-qualified juries may be more disposed toward guilty verdicts than juries that include WEs because jurors who are not opposed to the death penalty may be more generally conviction prone than WEs (Cowan, Thompson, & Ellsworth, 1984). If this is true, the death-qualification process is arguably unconstitutional insofar as it infringes on the defendant's Sixth Amendment rights. Indeed, this is the very argument that was made in *Witherspoon* 25 years ago, and it is the same argument that was used in *Lockhart v. McCree* (1986).

The petitioner in *Witherspoon* had used evidence from three social science studies to show that death-qualified juries are more disposed to guilty verdicts than WEs. The Court held that the data were too tentative and fragmentary to

support the petitioner's argument. The Court in *Witherspoon* further stated, "a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt" (p. 520, note 18).

It is rare for the Court to leave an issue like this open, and rarer to encourage social scientists to obtain evidence to help resolve a constitutional law question (Bersoff, 1987). When the Court decided *Lockhart*, the death-qualified juror "studies concluded, apparently unanimously that a death qualified jury is more disposed toward conviction than one that includes WEs. Psychology and other social sciences thus set the stage for the resolution of the question *Witherspoon* left open" (Bersoff, 1987, p. 53).

The *Lockhart* Court held, nonetheless, that the Constitution does not prohibit the removal for cause of WEs. Second, the Court held that excluding guilt-phase includables from the penalty phase does not create a jury that is unrepresentative and does not violate the Sixth Amendment's requirement that juries represent a fair cross-section of the community. According to the *Lockhart* Court, the

Constitution presupposes that a jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case. (*Lockhart v. McCree*, 1986, p. 1770)

The majority opinion in *Lockhart* was authored by then Justice Rehnquist, who was joined by Chief Justice Burger and Justices Powell, O'Connor, and White. Bersoff (1987) reviewed the *Lockhart* decision and the way in which the Court treated the social science evidence. The following discussion relies, to some extent, on Bersoff's article.

The *Lockhart* majority discussed the social science evidence presented and concluded that there were many flaws. First, the Court stated that only 6 of the 15 studies measured "the potential effects in the guilt-innocence determination of the removal from the jury of *Witherspoon*-excludables" (*Lockhart v. McCree*, 1986, p. 1762). Three of these 6 "relevant" studies were summarily dismissed because they were the same 3 studies that the *Witherspoon* Court found to be too tentative and fragmentary to prove anything. The Court dismissed the remaining 3 studies because 2 did not use actual jurors, and 2 did not have their participants deliberate. The Court concluded, "none of the 'new' studies was able to predict to what extent, if any, the presence of one or more '*Witherspoon*-excludables' on a guilt-phase jury would have altered the outcome of the guilt determination" (*Lockhart v. McCree*, 1986, p. 1764).

Finally, the Court considered the worst flaw to be that only one study attempted to identify and account for the presence of "nullifiers" who, because of their deep-seated opposition to the death penalty, would be unable to decide a capital defendant's guilt or innocence fairly and impartially. The Court said that nullifiers may be properly excluded from the guilt-phase jury, and, therefore, studies failing to take the presence of nullifiers into account are "fatally flawed" (*Lockhart v. McCree*, 1986, p. 1764).

Unlike *Witherspoon*, the *Lockhart* Court did not leave its decision open pending further data. Instead, the Court said:

We will assume . . . that the studies . . . are adequate to establish that ‘death qualification’ in fact produces juries somewhat more ‘conviction-prone’ than ‘non-death-qualified’ juries. We hold, nonetheless, that the Constitution does not prohibit the States from ‘death qualifying’ juries in capital cases. (*Lockhart v. McCree*, 1986, p. 1764)

It appears that the majority changed the rules mid-game. While the *Witherspoon* Court invited social scientists to develop studies to determine the effect of death qualification, the Court in *Lockhart* summarily dismissed not only the social science data presented but also the possibility that any future social science research might alter the Court’s ruling. Data, in effect, were held to be irrelevant.

Once again, Justice Marshall, in a dissent joined by Justices Brennan and Stevens, took a favorable view of social science evidence. The dissent indicated that “the essential unanimity of the results obtained by researchers using diverse subjects and varied methodologies” was impressive (*Lockhart v. McCree*, 1986, p. 1773). The dissenters carefully read the American Psychological Association’s (APA) amicus brief (APA, 1987) and were apparently convinced by the arguments presented therein, as indicated by their discussion of the social science evidence reported in the brief.

Relying on APA’s (1987) conclusion, the dissent argued that a large subset of potential jurors is excluded from the guilt phase of the trial because of the death-qualification process. A disproportionate number of excluded jurors are Blacks and women, and the perspectives of the jurors who are excluded are systematically different from those of death-qualified jurors. Therefore, death qualification distorts the counterbalancing effect of diverse views that is critical in the effective functioning of juries.

The importance of the studies presented led the dissent to state that *Lockhart* had gone much farther than *Witherspoon* with regard to relevant social science evidence and has “laid a solid empirical basis to support his claim that the juries produced by death-qualification are substantially more likely to convict” (*Lockhart v. McCree*, 1986, p. 1777). Once again, however, the majority of the Court found the social science evidence suggesting limitations on the death penalty procedure to be irrelevant.

Social science and death-qualified juries. Perhaps the best evidence regarding the effects of sentencing decision by death-qualified juries is found in Volume 8 of *Law and Human Behavior* (1984), edited by Haney, which was devoted to the topic of death qualification. Unfortunately, these studies are among those criticized by the Court in *Lockhart*. One study passed the majority’s criticisms relatively unscathed (Cowan et al., 1984). Considering the Court’s relative approval of the study, it is useful to examine its implications. Cowan et al. (1984) classified 288 participants as death-qualified or excludable according to *Witherspoon*. After viewing a videotape of a simulated homicide trial and jury instructions, participants were asked to give an initial verdict. Results indicated that death-qualified participants were significantly more likely than excludable participants to vote guilty. The participants were then divided into 12-person juries and asked to deliberate and reach a verdict. Again, death-qualified participants were significantly more likely than excludable participants to vote guilty.

The researchers then formed 9 juries composed entirely of death-qualified participants (death-qualified juries) and 10 other juries that included 2–4 excludables (mixed juries). On postdeliberation measures, mixed-jury participants were generally more critical of the witnesses, less satisfied with their juries, and better able to remember the evidence than were participants from the death-qualified juries. The researchers concluded that juror diversity might improve the vigor, thoroughness, and accuracy of the juries' deliberations.

The Cowan et al. (1984) study adequately controlled for several of the problems of earlier death-qualification research. Indeed, even by Supreme Court standards, the Cowan et al. study “passes muster” (*Lockhart v. McCree*, 1986, p. 1764). The results of this study also support the finding of other studies suggesting that death-qualified juries are not impartial, nor do they represent a fair cross-section of the population (see, e.g., Fitzgerald & Ellsworth, 1984; Haney, 1984; Luginbuhl & Middendorf, 1988). In this regard, it is unfortunate that the majority in *Lockhart* chose to discount the weight of the social science evidence and to close the issue by holding that death-qualified juries are not constitutionally prohibited.

Luginbuhl and Middendorf (1988) reported that jurors who are opposed to the death penalty were more receptive to mitigating circumstances than other jurors. Similarly, jurors who could be excluded under the *Witherspoon* standard were not as receptive as other jurors regarding aggravating circumstances in capital cases. Therefore, as Luginbuhl and Middendorf concluded, these data show further that the death-qualification process in capital cases is laden with biases against the defendant throughout the trial process—during jury selection, guilt determination, and sentencing.

The Court has been criticized for failing to consider the overall consistent findings of death-qualification research—the convergent validity of research in this area—and instead focusing only on individual studies (e.g., Ellsworth, 1991; Sandys, 1998). A recent meta-analysis involving 14 articles, and a total of 20 studies involving different experimental methods, reached the conclusion that that death-qualified jurors are more conviction-prone than excludables, and that women and minorities are more likely to be excluded from capital juries (Filkins, Smith, & Tindale, 1998).

The Question of Race in the Application of the Death Penalty

There have been several challenges asserting that the death penalty is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment. These challenges culminated in *McCleskey v. Kemp* (1987), in which a Black man convicted of armed robbery and murder sought a writ of habeas corpus claiming that the Georgia capital-sentencing process was administered in a racially discriminatory manner that violates the Eighth and Fourteenth Amendments. The petitioner supported his claim with social science evidence showing that Black defendants who kill White victims, as in his case, have the greatest likelihood of receiving the death penalty.

The majority considered the impact of the statistical evidence in determining whether the capital sentence is unconstitutional. The data considered consisted of

evidence collected and analyzed by Baldus and colleagues (Baldus, Woodworth, & Pulaski, 1990). Baldus et al. (1990) investigated 2,484 homicide cases in Georgia from 1973 to 1979. The overall death-sentencing rate for defendants indicted for murder was 5% (Baldus et al., 1990). In 21% of the cases in which the defendant was Black and the victim was White, the defendant was sentenced to death. At the opposite extreme, when the victim of a White defendant was Black, the defendant was sentenced to death in only 3% of the cases (Baldus et al., 1990).

To control for the effect of variations in legitimate sentencing considerations present in each case, the cases were coded on over 230 variables related to characteristics of the crime, defendant, and victim. Defendant culpability was assessed in several ways. First, Baldus et al. (1990) controlled for whether the case involved felony circumstances and whether the defendant had a serious prior record. This analysis revealed that race-of-victim disparities in sentencing were related to level of aggravation. In the most aggravated cases involving felony circumstances, when the defendant had a prior record, the death-sentencing rate was .35 in cases involving White victims, compared with a rate of .08 when the victim was Black, a difference of .27. When the case did not involve felony circumstances, the death-sentencing rate was much lower, regardless of whether the defendant had a serious record, and the race of the victim appeared to be less influential. Defendants in this category with White victims were sentenced to death at a rate of .03–.05 (depending on whether they had a serious prior record), whereas defendants charged with killing Black victims received the death sentence at a rate of .01.

Next, a logistic regression was conducted controlling for 39 legitimate sentencing variables. From this analysis, the researchers ascertained a death-odds multiplier for each of the variables. The odds of receiving the death sentence were 4.3 times higher if the victim was White. The race of the victim was as important in predicting a death sentence as legitimate aggravating variables such as the defendant having a serious prior record (death-odds multiplier of 4.1), the victim suffering from multiple stab wounds (death-odds multiplier of 4.7), or committing the killing in the process of an armed robbery (death-odds multiplier of 4.3). Moreover, killing a White victim was more important in determining a death sentence than were aggravating circumstances such as killing a police officer (death-odds multiplier of 1.7) or killing a stranger (death-odds multiplier of 2.8).

Baldus et al. (1990) also conducted multiple regression analyses using these 39 variables to create a culpability index. They demonstrated that, in cases with moderate aggravation similar in severity to McClesky's case, defendants who were charged with killing a White victim were subjected to a death-sentencing rate of .34–.43, whereas defendants with Black victims faced a sentencing rate of between .14 and .23 (Baldus et al., 1990). Race-of-victim effects remained even when Baldus et al. (1990) controlled for over 230 background factors. This linear analysis estimated a race-of-victim partial regression coefficient of .06, significant at the .01 level, which is equivalent to a 6-percentage point disparity in sentencing between White victim and Black victim cases (Baldus et al., 1990). The importance of this difference is well illustrated by Baldus et al. (1990). When considering that the average death-sentencing rate in Black victim cases was .01, the

White victim sentencing rate of .06 is a 500% increase over the Black victim sentencing rate (Baldus et al., 1990).

The Court found the statistics insufficient to prove either unconstitutional discrimination prohibited by the Fourteenth Amendment or the irrationality, arbitrariness, and capriciousness prohibited by the Eighth Amendment (see *McCleskey v. Kemp*, 1987, pp. 1769, 1774). The Court held that, to succeed, the petitioner must prove that the decision makers in his specific case acted in a discriminatory manner. It also held that the evidence does not prove that the defendant's race entered into the capital-sentencing decision or that race was a factor in the petitioner's specific case. The Court concluded, consequently, that the evidence did not prove that Georgia's capital punishment system is irrational, arbitrary, and capricious.

Justice Powell emphasized specific difficulties with the Baldus, Woodworth, and Pulaski (1985) study. He wrote:

Statisticians use . . . an "r²" to measure what portion of the variance in the dependent variable (death sentencing rate . . .) is accounted for by the independent variables of the model. A perfectly predictive model would have an r² value of 1.0. A model with no predictive power would have an r² of 0. The r² value of Baldus' most complex model, the 230-variable model, was between .46 and .48. Thus, as the [lower] court explained, 'the 230-variable model does not predict the outcome in half of the cases.' (pp. 1764–1765, note 6)

It is apparent that the Supreme Court did not comprehend the concept of variance in statistics. The crucial error in the Court's misunderstanding comes from its belief that the variance accounted for by the independent variable, in this case the race of the defendant and the victim, somehow predicts the number of cases in which the phenomenon occurs. Therefore, at least to some extent, the opinion of the Court may have been founded on its misunderstanding of the statistical procedures and conclusions drawn from the Baldus et al. (1985) study.

Justice Brennan, in a dissent joined by Justices Marshall, Blackmun, and Stevens, vehemently rejected the Court's holding that *McCleskey* must prove the influence that race has on any particular sentencing decision. Instead, Brennan argued that "the death penalty 'may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner'" (p. 1783, quoting *Godfrey v. Georgia*, 1980). Therefore, according to Brennan, the fact that *McCleskey* presented evidence that showed there is a substantial risk that the death penalty is being imposed in a disparate manner in Georgia is enough to render the imposition of the death penalty unconstitutional in that state.

Justice Brennan placed much more weight on the social science evidence than the majority, arguing that empirical evidence calls into question the adequacy of the statutory safeguards necessary in a capital-sentencing system. Furthermore, Brennan questioned the validity of the Court's fear that *McCleskey*'s claim would lead to a "slippery slope," resulting in many claims based on contentions similar to those raised in *McCleskey*. Brennan argued that the qualitatively unique aspects of capital punishment and repugnance of racial discrimination should make Baldus's data particularly salient to the Court.

In a separate dissent, Justice Blackmun, joined by Justices Marshall, Stevens, and Brennan, also took strong issue with the way in which the Court handled the evidence presented by *McCleskey*. In Justice Blackmun's view, the Baldus data provided enough evidence to show that the Georgia capital punishment system violates the equal protection clause of the Fourteenth Amendment. Blackmun showed how the Baldus data helped *McCleskey* meet the test established in *Furman* to determine whether an equal protection clause violation existed. He asserted that, by the Court's own admission, the evidence supports a substantial disparity in sentencing. The most persuasive evidence, Blackmun noted, is the data suggesting that the race of the victim is even a more important variable than the defendant's race; he found the Court's "slippery slope" argument particularly disturbing, stating that

[i]f a grant of relief to him [*McCleskey*] were to lead to a closer examination of the effects of racial considerations throughout the criminal-justice system, the system, and hence society, might benefit. Where no such factors come into play, the integrity of the system is enhanced. Where such considerations are shown to be significant, efforts can be made to eradicate their impermissible influence and to ensure an evenhanded application of criminal sanction. (*McCleskey v. Kemp*, 1987, p. 1805)

The decision in *McCleskey* was a devastating defeat for the abolitionist movement. Indeed, if the conditions under which the death penalty will be allowed are to be limited, one might expect the Court to use a case like *McCleskey* as a basis for such a limitation. At the very least, *McCleskey* presents substantial evidence of procedural inequity in imposing the death penalty. It is interesting to note that since his retirement, Justice Powell, the author of the *McCleskey* majority, has come forward saying that he regrets his decision to uphold the constitutionality of the death penalty in that case more than anything else in his Supreme Court career, and that he could not interpret the findings of the Baldus study. He has also expressed doubts that the death penalty can ever be truly fair (Jeffries, 1994, as cited in Amnesty International, 1999).

Social Science and Prejudicial Capital Sentencing

Evidence of prejudicial sentencing in the United States has been studied since the 1940s, when Johnson (1941) found that murderers who killed White people were sentenced to death more frequently than those who killed Black people. Likewise, Garfinkel (1949) found that Blacks who killed Whites were more likely to be executed than Whites who killed Blacks. Although these early studies have been criticized because they failed to control for different categories of murder (Lester, 1987), subsequent studies that were more empirically sound produced similar findings. Paternoster (1984) examined data from 297 homicides in South Carolina to determine what factors influenced the prosecutor's decision to seek the death penalty. The race of the victim was significantly related to that decision even when several legally relevant factors were also taken into account. The data also revealed that Blacks who killed Whites were more likely than Blacks who killed Blacks to have the death penalty requested by the prosecution. Black victim

homicides resulted in a death request only when they crossed a threshold of aggravation that was significantly higher than that for White deaths. In Paternoster's view, these results indicate that the Court's model for eliminating racial discrimination in the death penalty is not working, perhaps because it does not take into account prosecutorial discretion.

In another study, Paternoster (1983) tested discrimination and arbitrariness hypotheses regarding the charges brought in 1,805 South Carolina homicide cases. Blacks who killed Whites were 40 times more likely than Blacks who killed other Blacks to have the death penalty requested in their cases. The proportion of death penalty requests varied widely across jurisdictions, and the probability of a death penalty request was significantly higher in rural rather than in urban areas, except for Whites who killed other Whites.

In 1990, the United States General Accounting Office (GAO) published results of a review of 28 racial discrimination studies conducted in the 1970s and 1980s. The researchers considered both race-of-defendant and race-of-victim instances of discrimination, and they determined that while the influence of the race of the defendant on death penalty sentencing was apparent, there were some interactions with other factors across studies. When considering the race of the victim, however, the GAO reported that in 82% of the studies, individuals who murdered Whites were more likely to be sentenced to death than those who had murdered Black victims, and that this form of discrimination began with the initial decision by the prosecutor to charge the defendant with a capital crime and persisted throughout the trial and sentencing process (GAO, 1990).

To assess the pervasiveness of racial discrimination in capital sentencing across geographic locations, Baldus and Woodworth (1998) examined available data for 28 death-sentencing states. Race-of-victim discriminatory effects were found in 25 of the 28 states, and race-of-defendant effects were evident in 10 of the 28 states (Baldus & Woodworth, 1998).

Findings of racial discrimination are not limited to the South. Baldus and colleagues reported that Black defendants in Pennsylvania were 3.9 times more likely to receive a death sentence than were other defendants who committed similar types of crimes (Dieter, 1998). The researchers examined different types of aggravating factors as predictive of receiving the death sentence and found that "in Philadelphia, the capital-sentencing statute has operated as though being black was not merely a physical attribute, but as if it were one of the most important aggravating factors actually justifying the death penalty" (Dieter, 1998, p. 10).

The United States Department of Justice (2000) released a report on the federal death penalty that focused on racial, ethnic, and geographical distribution of defendants and victims from 1988 to 2000. Between 1995 and 2000, 80% of the 682 cases submitted by U.S. attorneys for review by the Attorney General involved minority defendants, with 48% Black defendants, 29% Hispanic defendants, and 4% of defendants from other minority groups. Of the cases approved for the death penalty, 72% involved minority defendants (United States Department of Justice, 2000). Black defendants with White victims were almost twice as likely as Black defendants who killed other Blacks to receive a recommendation of death (36% of cases vs. 20%), and White defendants were slightly less likely to be eligible for death when they killed a Black victim compared with a White

victim (38% vs. 35%). Where a plea bargain resulting in a sentence other than death was allowed, only 25% of Black defendants, compared with 48% of White defendants, were successful in reaching a plea agreement. Minority defendants comprised 79% of those on federal death row at the time of the report.

Recent research suggests that the greater support of the death penalty by Whites than by Blacks may be linked to racial prejudice. Barkan and Cohn (1994) examined data from the 1990 General Social Survey and compared items measuring racial prejudice with support for the death penalty. Initial factor analysis produced two scales: Antipathy to Blacks (i.e., opposition to living in a neighborhood where half of your neighbors are Black) and Racial Stereotyping (i.e., Blacks are lazy, unintelligent; Barkan & Cohn, 1994). Other variables examined included political conservatism, fear of crime, membership in a fundamentalist church, Southern residence, and population size of residence. Results indicated that White support for the death penalty was significantly associated with antipathy toward Blacks, racial stereotyping, and political conservatism.

A comparison of overt racism with subtle racist attitudes and death penalty-sentencing decisions also revealed evidence of a racial component to sentencing. Dovidio, Smith, Donnella, and Gaertner (1997) selected participants from undergraduates who had previously completed a survey measuring, among other things, attitudes toward Blacks and support for capital punishment. Participants read a trial summary involving a murdered police officer in which the defendant's race (Black vs. White) was varied between participants. Participants then viewed videotaped segments of five individuals who had reportedly participated in the study at an earlier date. The composition of the jury was varied between participants and either consisted of all White individuals or included one Black juror. In each instance, the second juror (who was either a White or Black male) argued for capital punishment on the basis of a lack of self-defense evidence. Individuals who had scored high on the racism scale were more likely to recommend the death penalty for Black defendants than for White defendants, regardless of the jury composition. Those who scored lower on the racism scale were least likely to vote for a sentence of death in cases involving a Black defendant when confronted by an all-White jury but were most likely to recommend the death penalty when the defendant was Black and a Black juror advocated death.

Taken together, the studies reviewed here, as well as that by Baldus et al. (1990) presented in *McCleskey*, strongly indicate that the capital punishment system is prejudicial. The prejudice appears evident in the prosecutor's decision to request the death sentence, and, of course, the data regarding the actual imposition of the death penalty also show prejudicial trends. It appears that Black people, especially those who kill White people, are not receiving equal protection of the law. Despite the empirical evidence, the majority of the Court has not been convinced that the social science evidence presented over time was sufficient to prove discrimination and to show that the death penalty is unconstitutional.

Commentators have taken issue with the Court's inconsistent response to the requirements for showing discrimination in employment and voting rights cases as opposed to capital punishment (e.g., Cook & Kende, 1996; Rabe, 1998). "As a convicted murderer, *McCleskey* did not enjoy the same status of an 'oppressed minority' as would a blameless claimant seeking equal access to housing, em-

ployment, or schools” (Baldus & Woodworth, 1998, p. 408). Cook and Kende (1996) compared the Supreme Court’s rulings in *Shaw v. Reno* (1993) with *McCleskey*. In *Shaw*, White plaintiffs successfully challenged the manner in which North Carolina’s congressional district lines were drawn, claiming a violation of their equal protection rights. The Court was willing to assume discrimination was present in *Shaw*, in the absence of statistical evidence, but by the same token was unwilling to reach a finding of discrimination in *McCleskey*, in which statistical reports clearly indicated a disproportionate sentencing effect (Cook & Kende, 1996). Cook and Kende (1996) concluded that “the Court’s hostility to the discriminatory effects evidence in *McCleskey*, as compared to its liberal assumptions about discriminatory effects in *Shaw*, could not be clearer” (pp. 845–846).

Similarly, Rabe (1998) examined Supreme Court decision making in death penalty and employment discrimination cases. While the Court in *McCleskey* was unwilling to rely on the Baldus study, which used multiple regression analysis that suggested that other uncontrolled variables could not be accounting for the differences in sentencing, in *Bazemore v. Friday* (1986) the Court accepted a multiple regression analysis as evidence of employment discrimination in salaries on racial lines. The studies presented in *Bazemore* included only a handful of variables in the regression equations, but the Court held that the models were sufficient to account for most factors, and thus they were probative (Rabe, 1998). Rabe (1998) questioned why the Supreme Court rejected social science data in death penalty cases while accepting this type of evidence in employment discrimination cases. He concluded, “it could be that the justices are not unlike social scientists. We accept evidence that supports our perspective, yet find considerable flaws with evidence that goes against our theoretical or philosophical orientation” (p. 226).

The Adequacy of Judicial Instruction

Buchanan v. Angelone and Weeks v. Angelone

The constitutionality of Virginia’s pattern jury instructions was at issue in *Buchanan* and *Weeks*, in which the petitioners took issue with the ambiguity of the instructions concerning mitigation of a death sentence. In *Buchanan v. Angelone* (1998), the defendant sought habeas corpus relief based on an assertion that Virginia’s pattern capital-sentencing instruction, which was delivered at his trial, failed to provide the jury with guidance regarding mitigation.³ In fact, the

³ The contentious portion of the instructions reads:

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of [] was outrageously or wantonly vile, horrible, or inhumane, in that it involved torture, depravity of the mind or aggravated battery to the above four victims, or to any one of them. If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment. If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the Defendant at life imprisonment. (*Buchanan v. Angelone*, 1998, WL p. *2)

instruction fails to mention mitigation entirely. Additionally, the trial judge refused to instruct the jury about statutorily defined mitigating factors relevant to Buchanan's case. Although Buchanan had agreed to the pattern instruction at trial, he requested that additional instructions be given to the jury regarding four specific mitigating factors: absence of a significant criminal history, extreme mental or emotional disturbance, impaired capacity, and age. He further requested that the judge instruct the jury that if they found one of the mitigating factors to exist, they should consider whether to impose the death penalty or life imprisonment. The trial court refused. The Supreme Court upheld Buchanan's sentence and asserted that the State has the freedom to structure the way jurors are presented with mitigation instructions, provided that the instruction does not prevent the jury from considering evidence in mitigation of a death sentence.

Chief Justice Rehnquist, writing for the majority, concluded that "by directing the jury to base its decision on 'all of the evidence,' the instruction afforded jurors an opportunity to consider mitigating evidence" (*Buchanan v. Angelone*, 1998, WL p. 6). In the dissent, Justice Breyer took issue with the majority's belief that the instruction to consider all the evidence was not reasonably likely to result in juror confusion:

The majority believes that . . . the phrase 'or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.' I believe that these words, read in the context of the entire instruction, do the opposite. . . . To say this without more—and there was no more—is to tell the jury that evidence of mitigating circumstances . . . is not relevant to their sentencing decision. (*Buchanan v. Angelone*, 1998, WL p. 8)

More recently, the Court heard the case of Lonnie Weeks (*Weeks v. Angelone*, 2000). The jury in Mr. Weeks's trial was given the same instructions as the jury in *Buchanan*, with the addition of an instruction that provided a definition of mitigation evidence, gave examples of mitigating circumstances, and told the jury that they must consider mitigation evidence but that they were free to decide how much weight to give such evidence.⁴ While it might be expected that this additional information served to clarify the jury's sentencing task, evidence from the jurors themselves indicates that the instructions remained confusing. On the 2nd day of jury deliberations, the jury submitted the following question to the trial judge:

⁴ The full instruction reads:

Mitigation evidence is not evidence offered as an excuse for the crime of which you have found the defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. The law requires your consideration of more than the bare facts of the crime. Mitigating circumstances may include, but not be limited to, any facts relating to defendant's age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating or tend to reduce his moral culpability or make him less deserving of the extreme punishment of death. You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment. (*Weeks v. Angelone*, 2000, p. 732)

If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify? (*Weeks v. Angelone*, 2000, p. 730)

The judge responded by telling the jury to “see second paragraph of Instruction # 2 (Beginning with ‘If you find from’)” (*Weeks v. Angelone*, 2000, p. 730). This instruction reads,

If you find from the evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at imprisonment for life. . . . (*Weeks v. Angelone*, 2000, p. 730)

Two hours later, the jury returned a death sentence.

In a 5–4 decision, the Supreme Court upheld the sentence and constitutionality of the instruction, based on the previous finding in *Buchanan* involving the same pattern instructions. Justice Rehnquist, writing for the majority, suggested that the fact that the jury did not ask for further clarification was evidence of their understanding of the instructions, as “this particular jury demonstrated that it was not too shy to ask questions” (*Weeks v. Angelone*, 2000, p. 734).

The dissent questioned the trial judge’s unwillingness to give the jury a straight answer to their question and suggested that “the record in this case establishes, not just a ‘reasonable likelihood’ of jury confusion, but a virtual certainty that the jury did not realize that there were two distinct legal bases for concluding that a death sentence was not ‘justified’” (*Weeks v. Angelone*, 2000, p. 735). While the majority also cited the fact that the jury had been polled as evidence that a proper decision was reached, the minority notes that the trial transcript stated that a majority of the jurors were in tears during the polling process (*Weeks v. Angelone*, 2000, p. 740). Although no one would argue that the decision to take a life is easy, one might speculate that these were tears of frustration and uncertainty about the validity of the jury decision.

Social Science and Jury Instruction Comprehension

Even before the cases of *Buchanan* and *Weeks*, social scientists had amassed a large body of research, using differing methodologies, which suggested that capital jury instructions are poorly understood and that the direction of this misunderstanding tends to bias decision making against the defendant (see, e.g., Blankenship, Luginbuhl, Cullen, & Redick, 1997; Bowers, 1995; Costanzo & Costanzo, 1994; Diamond & Levi, 1996; Haney & Lynch, 1994, 1997; Haney, Sontag, & Costanzo, 1994; Luginbuhl & Howe, 1995; Wiener, Pritchard, & Weston, 1995).

More recent research has confirmed and expanded on the findings of earlier studies. Wiener et al. (1998) presented death-qualified participants with a written summary of one of two Missouri death penalty cases and a copy of the Missouri

Approved Jury Instructions used at the actual trial. After reading the case summary, participants read the instructions while hearing them read on a tape recording. Participants completed a Juror Comprehension Survey and a sentencing questionnaire. The Juror Comprehension Survey consisted of both declarative knowledge and procedural knowledge questions. The former measured comprehension of legal concepts and rules of law, whereas the latter tapped into understanding of how to apply the instructions to the case. Questions were designed for each of the two cases as well as for knowledge of constitutional law. A total of 35 questions on state law were constructed for one case, consisting of 21 declarative knowledge and 14 procedural knowledge questions, whereas 32 state law questions, including 21 declarative knowledge and 11 procedural knowledge questions, were created for the second case. In addition, 30 questions for each case were concerned with constitutional law; of these, 14 were declarative knowledge items and 16 reflected procedural knowledge questions. The concepts covered by these questions were broken down into five categories, in replication of previous research by Wiener and colleagues (Wiener et al., 1995) discussed below. The categories were labeled reasonable doubt, jury responsibility, sentencing process, mitigation agreement, and mitigation content. An additional category of questions not presented in the earlier Wiener et al. (1995) study was designed to test participant knowledge regarding parole eligibility. The sentencing questionnaire asked respondents to provide a punishment, along with a rating of their certainty in their decision. In addition, participants were asked to rate the strength of the aggravating and mitigating factors present in the case summary.

Participants were significantly more accurate in answering the declarative knowledge questions compared with the procedural knowledge questions, and in responses to questions concerning constitutional as opposed to state laws (Wiener et al., 1998). The difference in comprehension of constitutional and state laws appeared to be a result of increased comprehension of procedural, rather than declarative, knowledge of constitutional law, and this difference was qualified by an interaction with which case the participants heard. For only one of the cases were participants significantly more accurate in answering constitutional versus state law questions.

Results further indicated that participants improperly considered aggravating and mitigating circumstances. According to the instructions, jurors need only consider mitigating circumstances when aggravation is strong. If aggravation is weak, then a verdict of life should be returned; likewise, when aggravation is strong but mitigation is also strong, a verdict of life would be predicted. When sentence certainty (a composite variable formed by combining sentence choice and certainty) was the dependent variable, there was no significant interaction between perceived aggravation and perceived mitigation strength, which led the researchers to conclude that instead of balancing aggravating and mitigating circumstances, respondents considered each component separately, in essence, summing the factors and returning a verdict on the basis of which side received a larger score (Wiener et al., 1998). Accuracy of participants' knowledge was also predictive of sentence certainty. Specifically, both procedural and declarative knowledge items related to mitigation agreement—the law which indicates that any mitigating circumstance can be considered, regardless of whether other jurors

find it to be mitigating—were predictive of punishment, accounting for 17% of the variance. The less understanding participants had of this concept, the more certain they were in a verdict of death. Procedural questions related to reasonable doubt were also predictive of certainty in punishment, with those participants who had a poorer understanding of this concept being more certain of their decision to impose the death sentence.

Frank and Applegate (1998) recruited members from a jury pool in Ohio to participate in their study on instruction comprehension. A videotape containing a summary of case facts and judicial instructions being read by an actual judge was presented to groups, who subsequently deliberated to a verdict and completed a questionnaire. Some of the groups were provided with written instructions, whereas others only heard oral instructions from the judge. Additionally, some of the groups received the standard pattern jury instructions, whereas other groups were given instructions that had been rewritten by a linguistics professor. Comprehension questions consisted of two types: application of the law by a hypothetical juror and statements of the law that participants were asked to judge as correct or incorrect (Frank & Applegate, 1998). The authors reported considerable variability in percentage of questions answered correctly, ranging from a low of 13% to a high of 96%, with an average of 57% correct.

Participants who received the revised instructions, regardless of the presence of a written copy, had significantly higher rates of comprehension (Frank & Applegate, 1998). The impact of having written instructions was dependent on type of instruction given. There was no significant difference in comprehension levels between groups with or without written instructions when the standard jury instruction was given; however, written instructions proved beneficial when the revised instructions were used (Frank & Applegate, 1998).

In keeping with prior research, these researchers found that participants had particular difficulty with the instructions involving mitigation evidence. The standard of proof required for mitigators, definitions of mitigating factors, and weight to give mitigation evidence during sentencing were all poorly understood. The authors noted that the questions with the nine lowest percentages of correct responses all pertained to mitigation, whereas the highest levels of comprehension were associated with aggravating factors (Frank & Applegate, 1998). The revised instructions were somewhat beneficial in correcting erroneous interpretations of mitigation evidence; the largest increase in comprehension between the groups was in response to the question about the weighing of aggravating and mitigating circumstances. Other concepts involving mitigation, however, were not clarified by the revision. The definition of a mitigating circumstance, for example, was poorly understood in both conditions (31% correct in the standard instruction group vs. 33.3% correct among those given the revision). Overall, the revised instructions seemed to increase juror understanding of the burden of proof, standards of proof, what can be considered an aggravator or a mitigating circumstance, when unanimity is required, and the weighing process to be used when considering aggravating and mitigating circumstances (Frank & Applegate, 1998).

Wiener and his colleagues have conducted a series of comprehension studies (that are reviewed in Wiener et al., 2004) that also raise a number of concerns

about the role of capital instructions in jury decision making. For example, Wiener et al. (1995) reported mixed success in improving comprehension with rewritten instructions, although the pattern of results differ somewhat from those of Frank and Applegate (1998). For one of the two Missouri capital case summaries given to juror-eligible participants, there were no significant improvements in comprehension across five different content scales when the rewritten instructions were used instead of the standard Missouri jury instructions. In the other, less heinous case, the rewritten instructions increased overall comprehension and understanding of Missouri death penalty law, as well as the understanding that unanimity was not required for identifying mitigating factors. Comprehension was not significantly increased, however, on the other scales measuring comprehension of reasonable doubt, the jurors' responsibility in assigning the death sentence, and mitigation content (knowledge that mitigating factors can be any aspect of the defendant's character or record or any circumstance of the offense; Wiener et al., 1995).

In an effort to address judicial criticism and dismissal of simulation studies that find poor juror comprehension of capital instructions, Wiener et al. (2004) conducted a large-scale study using a realistic videotaped stimulus covering both the guilt and penalty phase of a trial based on an actual case, community member jury-eligible and death-qualified participants, and jury deliberations. Moreover, Wiener and colleagues (2004) used jury-level, as opposed to juror-level analyses, a procedure that is arguably more applicable to real-life jury decision making, as jurors do not act alone in considering the evidence and instructions when reaching a final verdict.

Overall jury comprehension was low, particularly in terms of state procedural law. Results further indicated that juries receiving the boilerplate "approved" instructions in use in Missouri did no better than juries who were given instructions that did not include legal definitions of the key concepts. Their overall comprehension was no better, nor was their comprehension on each of the subscales for declarative state law, declarative constitutional law, procedural state law, or procedural constitutional law. However, when jurors were given simplified instructions, they demonstrated greater overall accuracy and accuracy on procedural constitutional law than the MAI instructions. In addition, juries in the simplified-instructions condition did better than those in the baseline-instructions condition on all four subscale measures of comprehension. Jurors who were given a "flowchart" version that led them through the decision-making process to be followed in the standard instructions increased comprehension over baseline levels for overall comprehension, as well as for questions of declarative and procedural state law. On the basis of these findings and those from a series of additional studies that are discussed in their article, Wiener et al. (2004) suggested that a jury with perfect understanding of the procedural state law would be 69 times more likely to return a verdict of life in prison than would juries who had comprehension levels equivalent to chance.

Of particular importance in light of the *Weeks* decision is research conducted by Garvey, Johnson, and Marcus (2000) that examined the assumption articulated by the majority that jurors could properly understand and apply the Virginia capital-sentencing instruction. Additionally, they addressed the minority's posi-

tion that, had the judge simply provided a clarifying instruction, the verdict may have been different. Participants read a one-page summary of the facts in the *Weeks* case and were told to assume Weeks had been convicted of capital murder. The jury instructions used at the actual trial were read, and then the participants were given a summary of the prosecution and defense closing arguments from the penalty phase. Copies of the instructions were handed out, along with separate verdict forms used in the case, which allowed for a verdict of death based on future dangerousness, death based on heinousness, death based on dangerousness plus heinousness, life imprisonment, or life imprisonment plus a fine.

Participants were divided into three groups: One group was told nothing more about what had happened at the trial; one group was informed that the jury had asked the judge a question, were read the question, and were given the trial judge's actual reply; and the final group was given the question and was provided with the answer suggested by the defense in *Weeks*: "Even if you find that the State has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison" (Garvey et al., 2000, p. 635). Jurors rendered a verdict, and then they answered demographic and instruction comprehension questions.⁵

Overall, 41% of mock jurors answered the first question, regarding a requirement for a death sentence if the defendant's conduct was heinous, vile, or depraved, incorrectly in the affirmative. Similarly, 38% of participants incorrectly answered the second question referring to a mandatory death sentence if Mr. Weeks was judged to be dangerous in the future (Garvey et al., 2000). Of the jurors who were not told about the actual jury's question and those who were told but were given the trial judge's response, 47% believed that the law required the death penalty when defendant's conduct had been proven to be heinous, vile, or depraved, and 46% also believed that the law required a death sentence if the evidence proved Mr. Weeks would be dangerous in the future. There was little difference in results between these two groups, with the participants receiving the question and being told to reread the instruction performing slightly worse on the comprehension measures (Garvey et al., 2000).

In comparison, 28% of the group that received the clarifying instruction answered the first question incorrectly, and only 24% maintained a belief that future dangerousness required a death sentence (Garvey et al., 2000). Perhaps most importantly, jurors who understood the instructions were more likely to vote for life than those who were confused—63% of participants who correctly understood that the death sentence was not mandatory for heinous behavior, and 62% of those who recognized that future dangerousness does not require the death penalty, returned a verdict of life in prison (Garvey et al., 2000). Clearly, these results call into question the wisdom of the Court's ruling in *Weeks*.

⁵ Comprehension questions were as follows: "After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that Mr. Week's conduct was heinous, vile, or depraved?" and "After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that Mr. Weeks would be dangerous in the future?" (Garvey et al., 2000, p. 635).

Conclusion and Recommendations

It is clear that the use of the death penalty in the United States has seen a dramatic resurgence over the past 25 years. There is little to suggest a reversal in this trend any time soon. Both the number of people sentenced to death and the number of executions have increased. When the major proportion of those currently on death row exhaust their appeals and are eventually executed, the annual rate of executions will likely exceed that of any other time in the history of the United States. This occurs at a time when all other Western democracies have long since abandoned the death penalty.

Although several factors have led to the dramatic increase in death penalty sentences and executions, the Supreme Court's capital decisions over the last quarter century have contributed significantly to the resurgence in the death penalty. While one can argue quite persuasively that the legislators make the laws, it is significant that so many capital cases have been decided at the Supreme Court of the United States by very narrow margins—often one vote. Not only does this point out the arbitrariness of the Court's decision making in this most significant matter, but it underplays the critical role the Court plays in interpreting the Constitution, including the Bill of Rights.

Indeed, almost 200 years have passed since Chief Justice John Marshall wrote the decision in *Marbury v. Madison* (1803) establishing the power of judicial review for the Court. In *Marbury*, Marshall wrote: "It is emphatically the province and duty of the Judicial Department to say what the law is" (p. 177). Where a law is found to be "repugnant to the Constitution" (p. 177), "the Constitution, and not such ordinary act, must govern the case" (p. 178). Surely, in consideration of the social science evidence discussed in this article, evidence that at the very least calls into question the operation of capital punishment in the United States, the Court could conclude that the death penalty is "repugnant to the Constitution."

It is clear that the Court's holding in *Gregg* has served as a catalyst in the recent onset of executions and death sentences. Since *Gregg*, the Court has continued to strike down many constitutional challenges to the death penalty, disregarding the social science evidence that supports these claims or failing to at least raise serious questions about them. Although it is true that social science does not have all the answers and that there are methodological constraints on many of the studies the Court has discussed, the prejudicial sentencing and death-qualification areas are examples of social science at, or certainly near, its best. Unfortunately, a majority of the Court has chosen not to be convinced by these findings. By contrast, members of the dissent frequently afford the social science data more weight in their opinions.

Despite the generally pessimistic tone of this article, we would be remiss if we did not acknowledge the United States Supreme Court's recent decision in *Atkins v. Virginia* (2002), in which the Court held that the execution of criminals who are mentally retarded is unconstitutional. It may provide a modicum of hope for the future. In the decision in *Atkins*, the Supreme Court focused heavily on the extent to which state legislatures had passed statutes prohibiting the execution of mentally retarded criminals. In its review, the Court indicated that 19 states and

the federal Congress had imposed such legislation. The Court's reasoning in this regard is summarized below:

It is not so much the number of these States that is significant, but the consistency of the direction of change [citation omitted] . . . the large number of States prohibiting the execution of mentally retarded persons . . . provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. . . . And it appears that even those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry* [citation omitted]. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it. (pp. 10–11)

However, it is interesting and important to emphasize that the decision in *Atkins* did *not* rely to any appreciable extent on psychological research concerning the impaired cognitive ability of offenders with mental retardation. While the Court did reflect somewhat on this matter—even citing the amicus curiae briefs submitted by the APA and the American Association of Mental Retardation—the information that carried the day was clearly the growing national opposition to executing criminals who are mentally retarded. Indeed, as the Court wrote, it was “the public reaction to the execution of a mentally retarded murderer in Georgia [citation omitted] [that] apparently led to the enactment of the first state statute prohibiting such executions” (pp. 8–9). Therefore, while the Court's decision in *Atkins* may be seen as a victory for the abolitionists—and for those criminals who are mentally retarded—there is no reason to believe that the research on mental retardation, including the limited cognitive functioning of those with mental retardation, carried the day. It is clear, once again, that social science or psychological research alone is insufficient to alter the Court's view on the constitutionality of the death penalty. Instead, the Court relied on the growing opposition in the public and state legislatures to the execution of people with mental retardation.

In a broader sense, however, although many of the actions of the Court may reflect perceptions of public and legislative support of the death penalty, we believe that the Court must look beyond these sources of support to the provisions of the Constitution. The social science evidence presented and discussed in this article lends support to the suggestion that capital punishment may infringe one's Eighth, Sixth, and Fourteenth Amendment rights. It is time the Court seriously consider the implications of the data presented. For example, in *McCleskey*, in which the data clearly show prejudice in the legal system, the Court appeared to sidestep the implications of the data that people are being disproportionately sentenced to death largely as a result of their race and the race of their victims. Where gross injustices such as this are occurring, the Court must be willing to protect the constitutional rights of citizens to help cease the travesty. Jurisprudence dating from *Marbury v. Madison* (1803) and its progeny would seem to demand it.

The information discussed throughout this article represents a somewhat dismal picture for social scientists and the attorneys who attempt to use their findings in arguments to courts. At first in death-qualification cases, for example,

the Court asked social scientists to provide certain types of evidence (e.g., *Witherspoon*). When social scientists responded, however, and made available scientifically rigorous data, the Court then completely discounted the evidence. Perhaps this phenomenon may be attributed to the change in the makeup of the *Witherspoon* Court as compared with the *Lockhart* Court. Indeed, six members of the *Witherspoon* Court were replaced by the time *Lockhart* was decided and, for the most part, they were replaced by far more conservative justices. Of the three who were still on the Court in *Lockhart*, two (Marshall and Brennan) dissented and one (White) concurred.

As might be expected, members of the Court use social science evidence when it supports their position. The “liberals” on the Court may place greater weight on such evidence than do the “conservative” members because social science tends to support the position that the death penalty is applied in a manner that is unconstitutional. Conversely, the conservative members of the Court reject social science evidence as far as possible; when the data become difficult or impossible to refute, they simply discount the conclusions forced by the data. That seems to be what happened in both *Lockhart*, in the case of death-qualified jurors, and *McCleskey v. Kemp* (1987), in the case of social science evidence and prejudicial capital sentencing. This type of ideological evaluation of social science data by an increasingly conservative Court has perhaps lowered the spirits of some social scientists and attorneys. More importantly, the Court’s continued reluctance to restrict the death penalty has contributed to the death sentences being handed down in an increasing number of cases.

In addition to the fact that the Court has been becoming more conservative since the Warren Court of the 1960s, there are other factors that may help to explain the justices’ reticence to accept social science evidence. First, as mentioned earlier in reference to the majority’s discussion of statistics in *McCleskey v. Kemp* (1987), the Court has demonstrated a limited ability to understand empirical data. Also, of course, the Court frequently finds itself as an arbiter of moral values that are not easily susceptible to empirical analysis (e.g., the extent to which its decisions upholding the death penalty are based on the retributive, as opposed to the deterrent, rationale). Second, the probabilistic nature of social science findings is not always directly applicable to law cases. Indeed, it is virtually impossible to assess the individual performances of parties in cases based on reference to group data (as with the jurors on death-qualified juries or the prosecutors and jurors in cases involving Black defendants and White victims).

It is unrealistic to believe that the courts, and the Supreme Court particularly, will suddenly awaken to realize the benefit of social science research. Instead, it will take a great deal of effort for social scientists to explain the nature of their findings in a way that is useful to attorneys and courts. Furthermore, social scientists must begin to increase their appreciation for the unique questions that arise in the law so that they may direct some of their research efforts toward legal questions. Perhaps progress can be made with continued efforts toward the education of attorneys and courts, and the appreciation of intricate legal questions by social scientists.

Although the situation does appear quite dismal, and large numbers of people will likely be executed, social scientists must not cease researching capital

punishment issues, and attorneys should not abandon their efforts to use social science findings to dissuade courts from imposing the death penalty. Specifically, researchers may continue to do research on the issues discussed in this article because they arise repeatedly in capital cases, and a variety of important issues have not yet been addressed. Also, as noted at the outset, some state courts have recently used their state constitutions to extend the rights supported by the federal constitution. These state courts may, therefore, be willing to consider the social science evidence available in a more positive light. Attorneys, researchers, and death penalty opponents may also find it worthwhile to make social science findings available to legislators who may be attempting to abolish the death penalty.

Beyond the courts, researchers must take steps to ensure that their findings make their way into the hands of the public and the legislators as well. As legislators are reluctant to advocate for the abolition of the death penalty because of their belief of the public's overwhelming support of this sentencing option, it also would be prudent to raise the public's awareness of some of the questions that surround the operation of the death penalty. Recent legislative activity at both the state and federal levels, as discussed in the beginning of this article, suggests that the issues that legislators are focusing on in suggesting moratoriums are those that can be informed by social science research. In particular, legislative attempts to restrict or eliminate capital punishment may be most effective when accompanied by research on racial or geographic disparity in death penalty implementation, the reasons for postconviction reversals of capital convictions, problems with juror comprehension of and application of instructions, and evidentiary problems associated with police investigative practices, eyewitness testimony, and prosecutorial conduct. Moreover, the growing opposition to the execution of offenders who are mentally retarded, as evidenced by the number of states that have passed legislation prohibiting such executions, effectively won the day in the recent case of *Atkins v. Virginia* (2002).

Given the recent focus on the mistaken convictions and executions, and the media attention drawn by the *Atkins* decision, the media may be receptive to social science and psychological research investigating various aspects of capital punishment. Finally, of course, social scientists could assist legislators in understanding the actual complexity of the public's thoughts about capital punishment and effective sentencing alternatives.

Attorneys and researchers must also continue to identify new avenues of research that help support the findings obtained in earlier studies. For example, Lynch and Haney (2000) combined two established areas of social science evidence into a single study. They were interested in determining the effects of ambiguity resulting from poor instruction comprehension on racially discriminatory sentencing. Jury-eligible and death-qualified California residents viewed one of four videotaped penalty phase trials in which race of the defendant and the victim (Black or White) were manipulated. Following the trial, jurors rendered verdicts, completed comprehension measures, and completed a demographic questionnaire that contained items tapping into attitudes of subtle racism. Jurors were asked to provide reasons for their decision; as a result, the researchers were

able to assess how mitigating and aggravating circumstances were used in the decision-making process.

The results indicated that jurors with low comprehension were more likely to sentence the Black defendant to death than the White defendant, but there was no race effect in sentencing when comprehension levels were high (Lynch & Haney, 2000). Additionally, 68% of the low-comprehension participants returned a verdict of death in the case involving a Black defendant and White victim, as opposed to only 36% of low-comprehension participants who favored the death penalty for the White defendant accused of killing the Black victim (Lynch & Haney, 2000). Race also played a role in how aggravating and mitigating circumstances were evaluated. Evidence of child abuse, a history of substance abuse, and psychiatric problems were considered less mitigating when the defendant was Black than when the defendant was White. Mitigating factors were also inappropriately used as aggravators twice as often when the defendant was Black (Lynch & Haney, 2000). As Lynch and Haney (2000) concluded regarding race and instruction comprehension in jury decision making, “neither variable has an acknowledged nor constitutionally permissible role in post-*Furman* capital jurisprudence, yet the two functioned together to influence our participants’ life and death verdicts and the bases on which they were rendered” (p. 353). Reported research such as this poses new or expanded grounds to challenge the constitutionality of the death penalty.

Finally, what will likely prove most effective overall in the movement toward death penalty abolition is evidence that innocent people are being sentenced to death row. Indeed, in dicta in *Atkins v. Virginia* (2002), the Court alluded to this fact: “Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated” (p. 16, footnote 25).

Because of cuts in funding for public defenders who handle postconviction cases, researchers may help attorneys identify cases in which mistaken convictions are likely by using social science research from other areas, such as the eyewitness and false confession literature. Educating the public about innocent executions may be the most persuasive way to change public opinion about the death penalty (see, e.g., Radelet & Bedau, 1998). This stems from the fact that the public has begun to justify their death penalty preference on retribution, and “considerations of the usual sort—deterrence, irregular application, racial bias, cost and delay, effective available alternative penalties—play little or no role in a retributive rationale for punishment” (Bedau, 1996, p. 802). The sentencing justification of *lex talionis*, or an eye for an eye, loses value if the person being sentenced to die is innocent of the murder in question.

References

- American Bar Association. (1997). Recommendation and report as approved by the ABA House of Delegates, February 3, 1997 (American Bar Association Report No. 107).
- American Bar Association. (1998). *Refocusing the death penalty discussion in America: Impact of the American Bar Association call for a moratorium on executions*. Retrieved June 14, 2002, from <http://www.abanet.org/irr/contents.html>
- American Bar Association. (2000). *A gathering momentum: Continuing impacts of the*

- American Bar Association call for a moratorium on executions*. Retrieved June 14, 2002, from http://www.abanet.org/ftp/pub/irr/final_report_1-24-00.pdf
- American Bar Association. (2001). *Toward greater awareness: The American Bar Association call for a moratorium on executions gains ground*. Retrieved June 14, 2002, from <http://www.abanet.org/irr/finalreport.doc>
- American Civil Liberties Union of Washington. (2001). *Sentenced to death: A report on Washington Supreme Court rulings in capital cases*. Retrieved June 13, 2002, from <http://www.aclu-wa.org/ISSUES/criminal/Death.Penalty.Report.8.00.html>
- American Psychological Association. (1987). *Amicus curiae brief of the American Psychological Association to the Supreme Court of the United States in Lockhart v. McCree*. Washington, DC: Author.
- Amnesty International. (1999). Killing with prejudice: Race and the death penalty in the USA. In *United States of America: Rights for all*. New York: Author.
- Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244–2266 (Supp. II 1996).
- Armstrong, K., & Mills, S. (1999, November 14). Death row justice derailed. *The Chicago Tribune*. Retrieved June 13, 2002, from <http://www.chicagotribune.com/news/local/showcase/chi-991114deathillinois1.story?coll=chi-news-hed>
- Atkins v. Virginia, 260 Va. 375, 534 S. E. 2d 312, (overturned) 536 U.S.____ (2002).
- Baldus, D. C., & Woodworth, G. A. (1998). Race discrimination and the death penalty: An empirical and legal overview. In J. R. Acker, R. M. Bohm, & C. S. Lanier (Eds.), *America's experiment with capital punishment: Reflections on the past, present, and future of the ultimate penal sanction* (pp. 385–415). Durham, NC: Carolina Academic Press.
- Baldus, D. C., Woodworth, G. A., & Pulaski, C. A. (1985). Monitoring and evaluating contemporary death sentencing systems: Lessons from Georgia. *University of California, Davis Law Review*, 18, 1375–1407.
- Baldus, D. C., Woodworth, G. A., & Pulaski, C. A. (1990). *Equal justice and the death penalty: A legal and empirical analysis*. Boston: Northeastern University Press.
- Barkan, S. E., & Cohn, S. F. (1994). Racial prejudice and support for the death penalty by Whites. *Journal of Research in Crime and Delinquency*, 31, 202–209.
- Bazemore v. Friday, 106 S. Ct. 3000 (1986).
- Bedau, H. A. (1996). Interpreting the Eighth Amendment: Principled vs. populist strategies. *Thomas M. Cooley Law Review*, 13, 789–813.
- Bedau, H. A. (1997). Background and developments. In H. A. Bedau (Ed.), *The death penalty in America: Current controversies* (pp. 3–25). New York: Oxford University Press.
- Bersoff, D. N. (1987). Social science data and the Supreme Court. *American Psychologist*, 42, 52–58.
- Bilionis, L. D. (1998). Eighth Amendment meanings from the ABA's moratorium resolution. *Law and Contemporary Problems*, 61, 29–54.
- Blankenship, M. B., Luginbuhl, J., Cullen, F. T., & Redick, W. (1997). Jurors' comprehension of sentencing instructions: A test of the death penalty process in Tennessee. *Justice Quarterly*, 14, 325–351.
- Bowers, W. J. (1995). The Capital Jury Project: Rationale, design, and preview of early findings. *Indiana Law Journal*, 70, 1043–1102.
- Bowers, W. J., Vandiver, M., & Dugan, P. H. (1994). A new look at public opinion on capital punishment: What citizens and legislators prefer. *American Journal of Criminal Law*, 22, 77–149.
- Bright, S. B. (1998). The politics of capital punishment: The sacrifices of fairness for executions. In J. R. Acker, R. M. Bohm, & C. S. Lanier (Eds.), *America's experiment*

- with capital punishment: *Reflections on the past, present, and future of the ultimate penal sanction* (pp. 117–135). Durham, NC: Carolina Academic Press.
- Buchanan v. Angelone 118 S. Ct. 757 (1998), 1998 WL 17109 (U.S. Va.).
- Callins v. Collins, 510 U.S. 1141 (1994).
- Clines, F. X. (2002, May 10). Death penalty is suspended in Maryland. *The New York Times*. Retrieved June 14, 2002, from <http://www.nytimes.com/2002/05/10/national/10DEAT.html>
- Commission on Capital Punishment. (2002). *Report of the governor's commission on capital punishment April 2002*. Retrieved June 5, 2002, from http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html
- Cook, J. A., Jr., & Kende, M. (1996). Color-blindness in the Rehnquist court: Comparing the Court's treatment of discrimination claims by a Black death row inmate and White voting rights plaintiffs. *Thomas M. Cooley Law Review*, 13, 815–852.
- Costanzo, S., & Costanzo, M. (1994). Life or death decisions: An analysis of capital jury decision making under the special issues sentencing framework. *Law and Human Behavior*, 18, 151–170.
- Cowan, C. L., Thompson, W. C., & Ellsworth, P. (1984). The effects of death qualification on jurors' predisposition to convict and on the quality of deliberation. *Law and Human Behavior*, 8, 53–79.
- Developments in the Law. (1982). The interpretation of state constitutional rights. *Harvard Law Review*, 95, 1324–1502.
- Diamond, S. S., & Levi, J. N. (1996). Improving decisions on death by revising and testing jury instructions. *Judicature*, 79, 224–232.
- Dieter, R. C. (1998). *The death penalty in Black and White: Who lives, who dies, who decides—New studies on racism in capital punishment*. Washington, DC: Death Penalty Information Center.
- Dieter, R. C. (1999). *International perspectives on the death penalty: A costly isolation for the U.S.* Washington, DC: Death Penalty Information Center.
- Dovidio, J. F., Smith, J. K., Donnella, A. G., & Gaertner, S. L. (1997). Racial attitudes and the death penalty. *Journal of Applied Social Psychology*, 27, 1468–1487.
- Durham, A. M., Elrod, H. P., & Kinkade, P. T. (1996). Public support for the death penalty: Beyond Gallup. *Justice Quarterly*, 13, 705–736.
- Ellsworth, P. C. (1991). To tell what we know or wait for Godot? *Law and Human Behavior*, 15, 77–90.
- Federal Death Penalty Abolition Act, S. 191, 107th Cong., 1st Sess. (2001).
- Feingold, R. (2000). The death penalty under attack. *Criminal Justice*, 16, 18–23.
- Filkins, J. W., Smith, C. M., & Tindale, R. S. (1998). An evaluation of the biasing effects of death qualification: A meta-analytic/computer simulation approach. In R. S. Tindale (Ed.), *Theory and research on small groups* (pp. 153–175). New York: Plenum Press.
- Fitzgerald, R., & Ellsworth, P. C. (1984). Due process vs. crime control: Death qualification and jury attitudes. *Law and Human Behavior*, 8, 31–51.
- Frank, J., & Applegate, B. K. (1998). Assessing juror understanding of capital-sentencing instructions. *Crime & Delinquency*, 44, 412–433.
- Furman v. Georgia, 408 U.S. 238 (1972).
- Gallup poll topics: A–Z. (2001). *Gallup Poll News Service*. Retrieved April 2, 2001, from http://www.gallup.com/poll/indicators/indeath_pen.asp
- Garfinkel, H. (1949). Research note on inter- and intra-racial homicides. *Social Forces*, 27, 369–381.
- Garvey, S. P., Johnson, S. L., & Marcus, P. (2000). Correcting deadly confusion: Responding to jury inquiries in capital cases. *Cornell Law Review*, 85, 627–655.

- Godfrey v. Georgia, 446 U.S. 420 (1980).
- Godfrey, M. J., & Schiraldi, V. (1995). *How have homicide rates been affected by California's death penalty?* (Center on Juvenile and Criminal Justice Report No. 95 00423). San Francisco: Author.
- Greene, N. L., Ryan, G. H., Cabana, D., Dwyer, J., Barnett, M., & Davis, E. (2001). Governor Ryan's capital punishment moratorium and the executioner's confession: Views from the governor's mansion to death row. *Saint John's Law Review*, 75, 401–425.
- Gregg v. Georgia, 428 U.S. 153 (1976).
- Haas, K. C. (1981). The "new federalism" and prisoners' rights: State supreme courts in comparative perspective. *Western Political Quarterly*, 34, 553–571.
- Haas, K. C., & Inciardi, J. A. (1988). Lingering doubts about a popular punishment. In K. C. Haas & J. A. Inciardi (Eds.), *Challenging capital punishment: Legal and social science approaches* (pp. 11–28) Newbury Park, CA: Sage.
- Haney, C. (1984). Editor's introduction, Special issue: Death qualification. *Law and Human Behavior*, 8, 1–6.
- Haney, C., Hurtado, A., & Vega, L. (1994). "Modern" death qualification: New data on its biasing effects. *Law and Human Behavior*, 18, 619–633.
- Haney, C., & Lynch, M. (1994). Comprehending life and death matters: A preliminary study of California's capital penalty instructions. *Law and Human Behavior*, 18, 411–436.
- Haney, C., & Lynch, M. (1997). Clarifying life and death matters. An analysis of instructional comprehension and penalty phase arguments. *Law and Human Behavior*, 20, 575–595.
- Haney, C., Sontag, L., & Costanzo, S. (1994). Deciding to take a life: Capital juries, sentencing instructions, and the jurisprudence of death. *Journal of Social Issues*, 50, 149–176.
- The Innocence Protection Act and Another Death Row Milestone, Senate, 107th Cong., 2d Sess. S889 (2002).
- Johnson, G. (1941). The Negro and crime. *Annual Academy of Political Social Science*, 217, 93–104.
- Kaufman-Osborn, T. (2000). State's death penalty system fails. *ACLU Press Releases*. Retrieved May 3, 2001, from <http://www.acluwa.org/ISSUES/criminal/Death.Penalty.Editorial.9.29.00.html>
- Kirchmeier, J. L. (2002). Another place beyond here: The death penalty moratorium movement in the United States. *University of Colorado Law Review*, 73, 1–116.
- Lander, T., & Baird, R. (2000, March). *Jury research: The "unwilling" speak out includable vs. excludable jurors*. Poster presented at the biennial conference of the American Psychology-Law Society, New Orleans, LA.
- Langer, G. (2001, May 2). Death penalty ambivalence: Poll points to support for execution moratorium in U.S. *ABCNEWS.com*. Retrieved June 14, 2002, from http://abcnews.go.com/sections/us/DailyNews/poll010504_deathpenalty.html
- Lester, D. (1987). *The death penalty: Issues and answers*. Springfield, IL: Charles C Thomas.
- Liebman, J. S., Fagan, J., & West, V. (2000). *A broken system: Error rates in capital cases, 1973–1995*. Retrieved May 3, 2001, from <http://justice.policy.net/jpreport>
- Lockhart v. McCree, 106 S. Ct. 1758 (1986).
- Longmire, D. R. (1996). Americans' attitudes about the ultimate weapon: Capital punishment. In T. J. Flanagan & D. R. Longmire (Eds.), *Americans view crime and justice: A national public opinion survey* (pp. 93–108). Thousand Oaks, CA: Sage.

- Luginbuhl, J., & Howe, J. (1995). Discretion in capital sentencing instructions: Guided or misguided? *Indiana Law Journal*, 70, 1161–1182.
- Luginbuhl, J., & Middendorf, K. (1988). Death penalty beliefs and jurors' responses to aggravating and mitigating circumstances in capital trials. *Law and Human Behavior*, 12, 263–268.
- Lynch, M., & Haney, C. (2000). Discrimination and instructional comprehension: Guided discretion, racial bias, and the death penalty. *Law and Human Behavior*, 24, 337–358.
- Marbury v. Madison, 1 Cranch 137 (1803).
- McCleskey v. Kemp, 107 S. Ct. 1756 (1987).
- McFarland, S. G. (1983). Is capital punishment a short-term deterrent to homicide? A study of the effect of four recent American executions. *Journal of Criminal Law and Criminology*, 74, 1014–1031.
- McGarrell, E. F., & Sandys, M. (1996). The misperception of public opinion toward capital punishment. *American Behavioral Scientist*, 39, 500–513.
- Melstner, M. (1973). *Cruel and unusual—The Supreme Court and capital punishment*. New York: Random House.
- National Death Penalty Moratorium Act, S. 233, 107th Cong., 1st Sess. (2001).
- Neises, M. L., & Dillehay, R. C. (1987). Death qualification and conviction proneness: Witt and Witherspoon compared. *Behavioral Sciences and the Law*, 5, 479–494.
- Paternoster, R. (1983). Race of victim and location of crime: The decision to seek the death penalty in South Carolina. *Journal of Criminology and Criminal Law*, 74, 754–785.
- Paternoster, R. (1984). Prosecutorial discretion in requesting the death penalty: A case of victim-based racial discrimination. *Law and Society Review*, 18, 437–478.
- Peter D. Hart Research Associates, Inc. (2001). *Study #6292: Death penalty update*. Retrieved June 13, 2002, from <http://justice.policy.net/relatives/17760.pdf>
- Porter, M. C., & Tarr, G. A. (1982). *State supreme courts: Policymakers in the federal system*. Westport, CT: Greenwood Press.
- Rabe, G. A. (1998). The Supreme Court and evidence of discrimination: A comparison of death penalty and employment discrimination cases. *Criminal Justice Policy Review*, 9, 209–231.
- Radelet, M. L., & Bedau, H. A. (1998). The execution of the innocent. *Law and Contemporary Problems*, 61, 105–124.
- Robinson, R. J. (1993). What does “unwilling” to impose the death penalty mean anyway? Another look at excludable jurors. *Law and Human Behavior*, 17, 471–477.
- Sandys, M. (1998). Stacking the deck for guilt and death: The failure of death qualification to ensure impartiality. In J. R. Acker, R. M. Bohm, & C. S. Lanier (Eds.), *America's experiment with capital punishment: Reflections on the past, present, and future of the ultimate penal sanction* (pp. 285–307). Durham, NC: Carolina Academic Press.
- Sandys, M., & McGarrell, E. F. (1995). Attitudes toward capital punishment: Preference for the penalty or mere acceptance? *Journal of Research in Crime and Delinquency*, 32, 191–213.
- Shaw v. Reno, 113 S. Ct. 2816 (1993).
- Snell, T. L. (2000). *Capital punishment 1999* (U.S. Department of Justice, NCJ Publication No. 184795). Washington, DC: U.S. Department of Justice. Retrieved April 4, 2001, from <http://www.ojp.usdoj.gov/bjs/>
- Steiner, B. D., Bowers, W. J., & Sarat, A. (1999). Folk knowledge as legal action: Death penalty judgments and the tenet of early release in a culture of mistrust and punitiveness. *Law & Society Review*, 33, 461–505.
- Tabak, R. J. (2001). Finality without fairness: Why we are moving towards moratoria on

- executions, and the potential abolition of capital punishment. *Connecticut Law Review*, 33, 733–763.
- Trop v. Dulles, 356 U.S. 86 (1958).
- United Nations. (1980a). *Human rights questions: Capital punishment*. New York: Author.
- United Nations. (1980b). *UN norms and guidelines in criminal justice 6*. New York: Author.
- United States Department of Justice. (2000). *The federal death penalty system: A statistical survey (1988–2000)*. Washington, DC: Author.
- United States General Accounting Office. (1990). *Death penalty sentencing: Research indicates pattern of racial disparities*. Washington, DC: Author.
- United States v. Burns, 2001 SCC 7. File No.: 2629 (2001). Retrieved April 2, 2001, from <http://www.lexum.umontreal.ca/csc-scc/en/rec/html/burns1.en.html>
- Wainwright v. Witt, 469 U.S. 410 (1985).
- Warren, L. D., Rauch, S. M., Kadela, K. R., & Wiener, R. L. (2000, March). Assessing death qualification standards: *Witt v. Witherspoon*. Poster presented at the biennial conference of the American Psychology-Law Society, New Orleans, LA.
- Weeks v. Angelone, 120 S. Ct. 727 (2000).
- Whitehead, J. T., Blankenship, M. B., & Wright, J. P. (1999). Elite versus citizen attitudes on capital punishment: Incongruity between the public and policymakers. *Journal of Criminal Justice*, 27, 249–258.
- Wiener, R. L., Hurt, L. E., Thomas, S. L., Sadler, M. S., Bauer, C. A., & Sargent, T. M. (1998). The role of declarative and procedural knowledge in capital murder sentencing. *Journal of Applied Social Psychology*, 28, 124–144.
- Wiener, R. L., Pritchard, C. C., & Weston, M. (1995). Comprehensibility of approved jury instructions in capital murder cases. *Journal of Applied Psychology*, 80, 455–467.
- Wiener, R. L., Rogers, M., Winter, R., Hurt, L., Hackney, A., Kadela, K., et al. (2004). Guided jury discretion in capital murder cases: The role of declarative and procedural knowledge. *Psychology, Public Policy, and Law*, 10, 516–576.
- Witherspoon v. Illinois, 391 U.S. 510 (1968).
- Yackle, L. W. (1998). The American Bar Association and federal habeas corpus. *Law and Contemporary Problems*, 61, 171–192.