

**Winners and Losers in the Supreme Court of the United States:
The Death Penalty***

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According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices *during good behaviour*.... The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government.... The complete independence of the courts of justice is peculiarly essential in a limited constitution.... That inflexible and uniform adherence to the rights of the constitution and of individual, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission (Hamilton, *Federalist 78*).

Those who defended the proposed Constitution knew that, in the judiciary, they had created a unique governmental institution; unique in its functions, mode of appointment, and conditions of tenure. Hamilton candidly acknowledged that the courts-- the Supreme Court in particular-- would have the power of judicial review, the “duty” to “declare all acts contrary to the manifest tenor of the constitution void.” To give effect to this duty, he argued, the judiciary must be independent of political pressures. The constitutional solution was presidential nomination, senate confirmation, and life tenure for federal judges.¹ Indeed, Madison defended this scheme of judicial selection against the charge that it violated separation of powers in giving other branches agency over their appointment, in part, by reference to the necessary independence of the courts: “the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them” (*Federalist 51*).

The Framers felt this non-popular mode of judicial appointment necessary given the peculiar function of the courts, the fair and impartial administration of the law. The judiciary’s constituency was viewed as different from that of the other branches of the government. While the Congress and President would take account of the popular will, the courts would confine their attention to the law. In so doing, they would guarantee the constitutional goal of limited government; they would provide “a steady, upright, and impartial administration of the laws” (*Federalist 78*). Other branches would respond to popular pressures; the courts would stand above the political fray and enforce the law free of non-legal influences. By the nature of its function, and the scope and focus of its vision, the judiciary would truly be “the least dangerous” branch of

¹ This tenure, of course, was limited by the possibility of removal of judges by impeachment (House of Representatives) and conviction (Senate). *United States Constitution*, Article I §§ 2, 3.

the national government; it was to be independent of overt political forces and influence. Politics would be neither their guide nor measure.

We know, however, that this design no longer aptly describes the operation of the courts. A long line of scholarship demonstrates that political influences are abundantly present in the judiciary. Studies of judicial decision making (Schubert, 1965; 1974; Rohde and Spaeth, 1976) have shown that judges incorporate their political attitudes into their decisions, occasionally straying from rigid adherence to the law. Others have shown that certain social background characteristics are relevant to the decisions rendered by judges (Goldman, 1975; Ulmer, 1973; Tate, 1981). Beyond this, students of the courts also have demonstrated that the political environment-- e.g., party control of the government, public opinion and political setting (Cook, 1977; Marshall, 1989)-- are at least sometimes associated with judicial outcomes. Clearly, the judiciary is different from the other departments of the national government, but it is not as different as Madison and Hamilton suggested; political forces and influences do seep into its decisions, especially when it considers politically sensitive topics.

The claims and pressures brought to bear by interest groups form an important part of the political environment in which the courts work. Group influences on the judiciary were noted by Bentley (1908) and Truman (1951, 1971), but it was not until Vose published *Caucasians Only* (1959) that this phenomena was studied in depth. Subsequent works furthered this exploration of the group-based context of the judicial environment (see, for example, Cortner, 1964; 1968; 1970a; 1970b; 1975; 1980; 1988; Manwaring, 1962; Kluger, 1976; Cowan, 1976; O'Connor, 1980; Sorauf, 1976). By in large, these studies focused on political "underdogs" (Ulmer, 1978) that were "disadvantaged" (Cortner, 1968) in more traditional political forums and turned to the courts to advance their policy goals.

Although these analyses tell us a good deal about the successful litigation campaigns of a variety of groups, the picture they provide is less than complete. We know much about specific "winning" campaigns and the factors (e.g., longevity, expert staff, sharp issue focus, funds, technical data, publicity, coordination with other groups, and support from the Solicitor General)

that correspond with them, but we see little of the flip side of the litigation coin: group “losses” and the factors conditioning those “defeats.” Further, we have explored little of the adjudicating give and take-- the dynamics of group litigation-- in volatile issue areas. With group litigation an increasingly common occurrence (O’Connor and Epstein, 1982), it only makes sense that groups will sometimes lose cases. Additionally, given shifts in the law as pronounced by the courts, one time “winners” can readily become “losers,” and *vice versa*. In short, it is not sufficient to explore and explain only why groups win; we also need to understand why they lose. Only then will we begin to have a well developed picture of the dynamics of the system of group litigation.

Conceptualizing Group Successes and Failures: A Research Strategy

How can we develop a fuller understanding of group “wins” and “losses” as part and parcel of group litigation? Though several strategies may be viable, we suggest a return to the basic approach of Vose and Cortner-- the case study. This design has its inherent flaws, yet it allows for in-depth analysis of the sorts of contextual, legal, and environmental factors contributing to case outcomes. That kind of analysis allows for the creation of testable hypotheses, which in turn facilitate the development of richer theories to explain judicial resolution of group-backed litigation.

The sort of case study we propose, however, fundamentally differs from those undertaken in the past. Rather than focus exclusively on successful campaigns, we have selected three dyads and one triad of cases for comparative analysis.

1. *Furman v. Georgia* (1972)

Gregg v. Georgia (1976)

McCleskey v. Kemp (1987)

2. *National League of Cities v. Usery* (1976)

Garcia v. San Antonio Metro Transit Authority (1985)

3. *Lynch v. Donnelly* (1984)

Wallace v. Jaffree (1985)

WDAJ

→ County of Allegheny

4. *Roe v. Wade* (1973)

Webster v. Reproductive Health Services (1989)

The cases contained in each grouping are readily comparable on several dimensions. First, they presented remarkably similar stimuli to the Court. *National League of Cities* and *Garcia* asked

the Court to construe Congress' power over state and local governments under the commerce clause; *Lynch* and *Allegheny County* raised questions about the wall of separation between church and state as it applies to government-sponsored Christmas displays; and, *Roe* and *Webster* treated the constitutional basis of an abortion right; and, *Furman*, *Gregg*, and *McCleskey* all raised questions about Georgia's procedures for implementing the death penalty. Second, each case was supported by significant numbers of organized interests, participating as *amici curiae* and as sponsors. Indeed, the only outward difference between the cases was the Court's disposition of them. Despite the fact that they presented similar legal issues to the Court within a relatively constrained time frame, they were decided quite differently. Because of this, one time "winners" became "losers."

Our task is to determine those factors conditioning the "win-lose" or "lose-win" resolution of these case sequences. Based on previous studies of group litigation (*e.g.*, Vose, 1972) and Supreme Court decision making (*e.g.*, Rohde and Spaeth, 1976), we hypothesize that three sets of factors played some role in the ultimate success/failure of the groups' judicial claims.

Changes in the Groups

In conducting case studies of organizations and/or their involvement in specific legal areas, scholars have recognized that groups do, on occasion, lose cases; some analysts have even sought to explain those defeats, generally doing so in the context of intra-group decision-making processes and dynamics. From those studies we can infer a number of group-based explanations for the ultimate success/failure of their litigation campaigns.

The first is that the organization underwent some major internal alteration, which hampered/enhanced their litigation efforts. Vose's (1972) analysis of the National Consumers' League's (NCL) quest to obtain judicial validation of progressive legislation provides a prime example of the significance of such changes. After winning *Muller v. Oregon* (1908), in which the Court upheld maximum hour work laws, the NCL sought to secure minimum wage legislation. Indeed, *Muller* was such an astounding victory that the organization felt confident about its ability to reach this further objective. But such was not to be-- in *Adkins v. Children's Hospital* (1923) it

failed to convince the Court of the constitutionality of such laws.

Vose's analysis of the NCL's loss in *Adkins* considers a number of explanations for its defeat. Among the most important was the group's change in legal counsel. Louis Brandeis had conducted the litigation campaign leading to *Muller*. After he became a Supreme Court Justice, Felix Frankfurter replaced him as NCL counsel. Though Frankfurter was a more-than-competent attorney, he was preoccupied with his professorial responsibilities at Harvard and, thus, a less-than-committed NCL lawyer.

Neier's (1979) examination of the ACLU's involvement in *Skokie v. National Socialist Party* provides another example of how internal alterations can affect litigation. In this instance, the ACLU actually won the litigation battle-- the Court ruled that Skokie's attempts to bar the Nazis from marching violated the Constitution-- but it was scarred from the war. From the time the group agreed to represent the Nazis in 1977 through the Court's decision, it lost over 60,000 members, breaking a well-established trend of organizational growth. The resulting loss of membership dues caused the Union to restrict its activities, reevaluate priorities, and so forth.

From these and other studies of internal, organizational dynamics, we can conclude that those factors that enhance prospects for group success in litigation can also work to inhibit it. Thus, in examining why groups ultimately win/lose the cases contained in our pairs, we will focus quite heavily on the groups themselves.

A second group-based factor emerges from Kobylka's (1987) work on obscenity litigation. Here, he attempts to explain how a fundamental change in the law (in this instance the Court's ruling in *Miller v. California*, 1973) affected the behavior of organizational litigants (libertarian groups). What he found was that different kinds of groups (see Salisbury, 1969; Olson, 1965; Clark and Wilson, 1961; Wilson, 1973) reacted in varying ways to the policy shift: in general, political/purposive organizations-- the ACLU, in particular-- opted out of the area of obscenity; conversely, material organizations-- both professional and commercial-- "mobilized to become the preeminent litigators, filling the void" left by political groups. In the final analysis, this was an important shift in group representation of the libertarian position because material groups

framed their arguments quite differently than did political ones.

Kobylka's work, too, generates a number of propositions about the ability of groups to succeed in Court. For one thing, it suggests a consideration of the types of groups involved in litigation; for example, those possessing political interests are likely to present very different sorts of legal stimuli to the Court than those with material concerns, even though they may be litigating precisely the same legal issue. This may, in turn, affect the Court's response. So too we will need to explore the organizations' reaction to the first case in the context of how it dealt with the second. As Kobylka's work demonstrated, it is altogether possible that the resolution of Case 1, whether a success or failure, affected group litigation strategy for Case 2. To develop a fuller picture of group litigation, then, we must consider these as important explanations.

Changes on the Supreme Court

Changes in the litigation environment can also stem from changes on the Supreme Court. Two such behavioral or, as Vose (1981) would write, "internal" explanations come to mind. First, a turnover in court membership can redirect the policy judgments it tenders (Baum, 1985, p.142). Examples of this are bountiful and include the FDR/New Deal era and Nixon's success in constraining Warren Court criminal process doctrine. Additionally, sitting Justices can shift in their approach to the questions that come before the Court. For instance, Harry Blackmun's shift between *National League of Cities* (1976) and *Garcia* (1985) stymied, at least for the present, a renewal of judicially enforced federalism (Kobylka, 1985-86). Nor is Blackmun alone in this type of behavior; Ulmer (1979) found that the views of Justices Black and Douglas evolved substantially over the course of their careers on the bench. In short, by virtue of the Court's position in the political system, its posture must be considered in evaluating the outcomes it helps to generate.

Changes in the Legal and Political Environment

Hamilton and Madison's assurances to the side, the judicial system does not function as a wholly insulated unit. Scholars have explored a broad range of environmental factors relevant to judicial decision making. Marshall found that "the modern Supreme Court appears to reflect *public*

opinion as accurately as other policy makers” (1989, p.97).² Shifts in other political institutions can also affect the resolution of judicial cases. Epstein, Walker, and Dixon (1989) demonstrated that, in its criminal justice decisions, the Supreme Court was particularly sensitive to changes in the party of the President, supporting the defendants’ claims more frequently when a Democrat occupied the White House.

Other research has shown groups to be responsive to changes in the political environment. Literature on organizational use of the legal system (see Cortner, 1968; Kobylka, 1987,1989) suggests that groups contemplate their objectives vis-a-vis the existing social and political contexts, contexts defined by governmental institutions (especially the federal judiciary), organizations with related interests, and public opinion.

Their perceptions of these external contexts can affect group behavior in a number of ways. Consider, first, the posture of governmental institutions, and of the U.S. Supreme Court, in particular. As the Bork confirmation proceedings clearly demonstrate, groups are certainly cognizant of the fact that changes in personnel affect their ability to succeed. A Court composed largely of Nixon-Reagan appointees, while exceedingly attractive for conservative interests like the Pacific and Washington Legal Foundations, is a less-than-appealing forum for the ACLU, LDF, and so forth. Such perceptions will not only affect the way they frame their legal arguments, but may lead them to avoid the Supreme Court altogether and confine their activities to other courts. Indeed, under such circumstances, if they do end up in the Supreme Court, it may be because they are forced to defend lower court victories, rather than to etch policy into law. And, as Cortner (1968) argues, a world of difference exists between taking offensive versus defensive postures in Court: groups have far more difficulty defending, rather than challenging, lower court rulings. Moreover, since the Supreme Court generally takes cases to reverse (see Wasby, 1988), their probability of success is even further minimized.

Again, this might provide, in some measure, a reasonable explanation for the disparities

² This finding conforms to those of Cook (1972), Casper (1972), and Baum (1985).

between cases within our pairs. Consider *National League* and *Garcia*: In the first, groups arguing for the state's position were on the defense; in *Garcia* they were on the offense.

By the same token, groups also will be affected by other pressures populating the specific legal area. In today's legal system, groups have become all too aware of the fact that their arguments will be countered by groups with opposing interests. Such was not the case when the ACLU, LDF, and others first began resorting to the judiciary. This rise of ideological warfare has, in turn, affected group behavior in a number of ways. For one, groups know that they will face skilled opponents, opponents who have just as much expertise in particular legal areas as do they. Second, and relatedly, they will have to develop arguments to counter their organized opposition, and not just to push their causes.

All in all, then, it is clear that groups are just as influenced by the political environment, if not more so, than the Court. They have been forced to adapt their behavior to those changes, adaptations that may have ultimately affected their efficacy, one way or the other, in the judicial arena. Thus, they are certainly relevant to any calculus regarding "winners" and "losers."

Focus of this Paper: Capital Punishment

This paper examines these factors in the context of the litigation campaign surrounding the Supreme Court's death penalty decisions. This case study provides a unique opportunity to examine a legal area in which the Supreme Court reached clearly different results in a rather short period of time (four years) and in which there was heavy group involvement (NAACP Legal Defense Fund³ and ACLU). After years of mixed results in its efforts to end state-sponsored executions, the LDF found its goal achieved through the Court's 5-4 decision in *Furman v. Georgia* (1972). This victory was, however, short lived: in *Gregg v. Georgia* (1976), the Court, by a 7-2 vote, upheld the statute passed to replace that voided four years earlier. Eleven years later, in *McCleskey v. Kemp* (1987), the Justices added insult to injury by rejecting the LDF's claim-- one made early on in its judicial campaign against capital punishment⁴-- that the imposition

³ Hereafter referred to as LDF.

⁴ *Maxwell v. Bishop* (1968).

of death was constitutionally impermissible as a violation of the equal protection guaranteed by the Fourteenth Amendment.

How the LDF could “win” so big in 1972 and yet “lose” in 1976 is the question we explore here. As we shall see, addressing it requires us to contemplate a wide range of legal and political factors affecting Court outcomes well before 1972 and after 1976. Only by doing so can we fully understand and identify those factors explaining the discrepancy.

The Setting: Americans and the Death Penalty through the 1950s

The Death Penalty and the Constitution

In the course of our discussions with a range of people on the death penalty, one statement struck us for its simplicity and accuracy: “That issue has been kicking around for a long time.” Indeed, for more than 200 years, Americans have debated the viability, morality, and efficacy of punishment by death (see Davis, 1957; Filler, 1952; Spear, 1844; Mackey, 1973; Sellin, 1980).

That the death penalty has generated so much interest in the United States is hardly surprising. Virtually every society, country, and culture imposing capital punishment has witnessed equally heated arguments over similar issues: Does the death penalty deter murder? Can it be imposed in a fair manner? Is it just for a society to seek retribution through capital punishment? Is the death penalty compatible with various religious and moral tenets?⁵ Addressing these questions has generated something of a cottage industry, with capital punishment now the subject of voluminous philosophical, legal, empirical, scientific, and penological analyses.

Seen in this light, capital punishment is hardly an American issue, but one that has been played out throughout the civilized world (see Laurence, 1960; Levine, et al. 1986; Calvert, 1930). And, indeed, several scholars have even brought something of a global perspective to it, identifying trends and patterns in the usage of legal executions dating back to ancient times. They suggest that virtually all civilized societies codify and adopt death penalties at the time of their formation. As countries evolve, however, they evince trends toward reform and, eventually,

⁵Addressing these questions from a normative perspective is well beyond the scope of this chapter. For reviews of these debates, see Bedau, 1964; Sellin, 1980; Cohen, 1970.

abolition. Ancient Greece, for example, initially imposed death for almost any crime, including idleness and theft. As it advanced, not only did it reduce the number of capital crimes, but its leaders generally pardoned those upon whom it had been conferred. Ancient Rome and many parts of Europe followed similar trends (see Bowers, 1984, p.132).

At least through the mid-1970s America gave every indication of following that world-wide historical pattern. Quite clearly, the death penalty was very much a part of the traditional norms of criminal law and procedure in early America. Prior to the Revolution, every colony possessed death penalties, although some variation existed in the overall severity of their codes. At the more lenient end of the spectrum was Pennsylvania, where a largely Quaker population had pushed for limits on the number of capital offenses. In 1682 and again in 1794, it confined death to murder and treason (see Bedau, 1967a). More typical was Massachusetts: the Puritans there punished by death “cursing one’s parents or just being a ‘rebellious’ son.” They also counted among their capital offenses a laundry list of theocratic crimes, including blasphemy and idolatry, which they later used to “justify” the Salem witch hunts (Erikson, 1966).

Because of their “interest in preserving order in societies where black slaves outnumbered their masters...”, the Southern colonies had the harshest codes. Most had separate capital offenses for slaves and the rest of the citizenry; Virginia, for example, had 14 times more death crimes for blacks (see Schwed, 1983; Bowers, 1984), many of which-- such as the rape of a white woman-- carried mandatory death sentences.⁶ Additionally, some proscribed harsher modes of execution for blacks. As Teeters and Hedblom's (1967) records indicate it was not unusual to find errant slaves burnt at the stake.⁷

Death penalties remained in tact during the founding period; indeed, it is virtually incontrovertible that the framers of the Constitution had no intention of eradicating capital punishment for either federal or state crimes. A direct indicator of this comes from the text of the

⁶Concomitantly, these states proscribed death for whites who freed slaves or otherwise incited them to riot.

⁷After the Revolution and until 1846 when Michigan abolished, all states retained some form of capital crimes; in most, they numbered between 10 and 18, with an average of 12. Some states, of course, had far more: through the 1830s, Virginia for example, enumerated more than 70 capital offenses (see Davis, 1957).

document, itself. Today, the clause most closely associated with the death penalty is the “Cruel and Unusual” provision of the Eighth Amendment, which reads: “Excessive bail shall not be required, nor excessive fines imposed, or cruel and unusual punishments inflicted.”

Despite Justice William Brennan’s observation that “we cannot know exactly what the framers thought” (*Furman*, 1972, p. 263), we do know that they did not consider the death penalty to constitute cruel and unusual punishment.⁸ The wording of the clause itself probably originated with the English Bill of Rights of 1689 which too outlawed cruel and unusual punishment (e.g., drawing and quartering, cruxifixion, burning alive), but not the death penalty.⁹ At that time, in fact, Britain specified 50 crimes for which execution was permissible.¹⁰ Moreover, the most authoritative interpreter of British law -- Sir William Blackstone -- rejected elimination of the capital punishment some 100 years after the English Bill of Rights had been adopted (Berger, 1982).¹¹

It also is true that if the framers intended to outlaw the capital punishment in the Eighth

⁸The short debate over the wording of the Eighth Amendment also reinforces this perspective. When the House of Representatives was considering its support of 17 August 1789, William L. Smith of South Carolina objected to the words “nor cruel and unusual punishments;” the import of them being too indefinite. To this, Samuel Livermore responded:

No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it, but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind (excerpted in Farber and Sherry, 1990, p.238).

This response suggests that the Framers considered the death penalty to fall beyond the cruel and unusual proviso of the Eighth Amendment. Conversely, it seems reasonable to suppose that they were leaving open the possibility that the clause might someday preclude capital punishment if another alternative could be developed. This is an interpretation to which Justice Marshall subscribes in *Furman v. Georgia* (1972, p. 321).

⁹ In a widely cited article, Granucci (1969) claimed that both the American and English Bill of Rights prohibited “excessive,” “harsh,” or “arbitrary” punishment, which might include the death penalty. It is clear, though, that neither eliminated the practice from their respective jurisdictions (see Berger, 1982).

¹⁰ In fact, the trend toward abolition in Britain, which occurred in 1965, was something short of monotonic. By the end of the 15th century, only eight crimes were punishable by death. During the 1700s, that figure rose as high as 200 and included such offenses as stealing, counterfeiting, and impersonation. It was in the 1800s, that a reform movement of sorts arose, and the number of crimes (and executions) diminished (see Laurence, 1960; Bedau, 1964).

¹¹ See note 9. Blackstone suggested though, that in comparison to the rest of Europe, this was not an extreme number (see *Furman*, 1972, p.334).

Amendment, they contradicted themselves in the Fifth's Due Process Clause: "No person shall be...deprived of life, liberty, or property, without due process of law..." We could presume, then, that when persons are given "due process," they they may be "deprived of life,..."¹² Had the founders meant to outlaw executions, why would they provide for the taking of life?¹³

Trends toward Reform and Abolition: Lobbying the State Legislatures

That the framers supported the death penalty is not, however, meant to imply that it was uncontroversial or universally well-regarded and accepted. Quite the contrary: as early as 1787, rumblings for *reform* began what would be a long term, albeit slow-paced, movement to *abolish* capital punishment. In that year, Dr. Benjamin Rush, a Philadelphia physician of some repute, delivered a paper at Benjamin Franklin's home. Entitled "An Enquiry Into the Effect of Public Punishment Upon Criminals and Upon Society,"¹⁴ Rush called for an end to public hangings (see Campion, 1959) viewing them as degrading experiences.¹⁵ While that paper discussed capital punishment only in passing, Rush later (1788, 1792, 1798) expressed his disdain for the death penalty *per se*, calling it an "absurd and un-Christian practice," one more compatible with a monarchy than a democracy (see Rush, 1788; Weaver, 1976; Schwed, 1983, p.11).¹⁶

¹²This phrase was repeated in the Fourteenth Amendment. Also, two other clauses of the Fifth Amendment also lead to the same basic conclusion. The grand jury clause states that "No person shall be held to answer for a capital...crime, unless on presentment or indictment of a Grand Jury which states." The Double Jeopardy clause states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." If the framers meant to eradicate capital punishment, why provide for grand jury hearings in capital cases or prohibit double jeopardy of life?

¹³Other evidence supporting the view that the death penalty was a functioning part of early American history comes from the national legislature. The First Congress of the United States, on which sat many of those who wrote the Constitution, passed an Act of 1790 making murder, forgery of public securities, robbery, and rape punishable by death (Berger, 1982, p. 47). So too it had no qualms about legislating a punishment of 39 lashes for larceny and receiving stolen goods (*Furman*, 1972, p. 263).

That it is rather undisputable that the framers intended to retain capital punishment is not to suggest that this is an absolutely closed debate. After publication of Berger's (1982) book, in which he demonstrated the intent of the framers on the Eighth Amendment, the issue took on a new life. See, for example, Bedau's (1983) scathing review of Berger's work.

¹⁴Rush's paper itself rested heavily on Cesare Beccaria's (1764) essays *On Crimes and Punishments (Del Delitti e delle Pene)*, which called for an end to the barbaric treatment of the criminally accused. Though some have called Beccaria's writings "emotional" and "sentimental" they were widely read throughout the United States upon their reprinting in 1770s. Indeed, as Neier (1982, p.194) points out, John Adams invoked Beccaria's writing in his defense of British solidiers involved in the Boston Massacre.

¹⁵One writer described public executions back then as events that "sometimes attract[ed] thousands of spectators and often [were] accompanied by a carnival atmosphere" (Bowers, 1984, p. 43).

¹⁶In most histories of capital reform, Rush is credited as the "father" of the movement. But, he was "one of

Although Rush was "widely criticized" for opposing publicly capital punishment, he "intensified" the attack (Neier, 1982, p.194; Masur, 1989). With the help of Philadelphia Quakers, he formed an anti-gallow society-- an organization to oppose all public punishment.¹⁷ In Pennsylvania and in other areas where such societies sprung up, the idea took hold:¹⁸ by the mid-1800s, many states and localities moved their executions from the streets to the confines of jails and prisons.¹⁹

With public executions generally falling out of favor,²⁰ others reformers of the 1820s through 1840s began to call for the total abolition of the death penalty, with the efforts of legal theorist and future Secretary of State (under Jackson), Edward Livingston, among the most important of the day. During this period, Livingston formulated "a systematic set of arguments" against the death penalty, with particular emphasis on deterrence, which he incorporated into a model penal code for the Louisiana.

Though that state rejected his proposals, they were widely distributed and reprinted in the North, "where they proved to be an impetus for legislative action" (see Davis, pp. 31-32; Mackey, 1973; Filler, 1952). Some legislatures, for example, decreased significantly the number of crimes punishable by death. Although this trend dated as far back as Thomas Jefferson's attempt to redefine capital offenses in the Virginia Code,²¹ through the efforts of Livingston and others it

many essayists who, following the American Revolution, launched an unprecedented assault on the death penalty." Indeed, many notables of the day (John Jay, James Madison, Benjamin Franklin) supported reform (see Masur, 1989, p.50).

¹⁷The Quakers also were deeply concerned with prison reform. As early as 1776, they formed the Philadelphia Society for Relieving Distressed Prisoners (see Fuller, 1952).

¹⁸Another of the more influential reformers was Attorney General William Bradford of Pennsylvania. Rush and he lobbied successfully for reform legislation in Pennsylvania as early as 1794 (see Bradford, 1793). So too in 1796, New York reduced its number of capital offenses from 13 to 2 (see Schwed, 1983, p.11). For a full account of these efforts, see Masur, 1989.

¹⁹Some questions exist, however, as to why this occurred. Several scholars argue that it was, in fact, due to the efforts of these reformist groups; others suggest that local authorities could no longer deal with the "unruly mobs," which formed to watch executions.

²⁰Pennsylvania and New York were the first states to make this change. Although most others followed shortly thereafter, it was not until the 1930s that public executions were completely abolished in the United States.

²¹Actually it dates even further back to colonial times when Pennsylvania adopted the "Great Law" of 1682 in which capital punishment was retained only for first degree murder (Hartung, 1952, p. 9). In the 1780s, Jefferson proposed a penal code for Virginia, which sought to "do away with the widespread use of capital punishment." In it, he attempted to scale punishments to their crimes so that murder and treason would be punishable by death; rape and

gained momentum in the 1840s, when many states made further reductions.²² By the turn of the century executions for crimes less than murder or rape were rare (see Hartung, 1952, p.10).

Others passed so-called “compromise legislation” in response to lobbying pressures. Under these statutes -- enacted in Maine, New York, and Pennsylvania in the 1830s and 1840s -- individuals sentenced to death would remain in prison for one year; at that time, the state executive would have to issue an order of execution. Since governors reasoned that the legislatures did not really want them to sign death warrants, significant reductions in the number of executions resulted (see Davis, 1957).²³

This first wave of abolitionism reached its peak just prior to the 1850s; before then, anti-gallow societies had continued to form in a number of states (see Mackey, 1976); a national organization “convened” in Philadelphia in 1845; a number of the leading figures of the day joined the fold (see Post, 1944);²⁴ the subject was widely debated in newspapers, the populace, and state legislatures (see Masur, 1989; Mackey, 1976); and, most significantly, Michigan became the first state formally to abolish capital punishment in 1846.²⁵ The advent of the Civil War, however, quickly halted that movement as capital punishment reformers invariably turned their attention to abolition of slavery. Thus, pressure on other state legislatures to eliminate capital punishments quickly subsided.

A second abolitionist tide took shape during the 1910s within the “conducive atmosphere of the Populist and Progressive Eras” (Schwed, 1983, p.16).²⁶ This period witnessed the growth of

sodomy, by dismemberment, and so forth (see Jenkins, 1984, p. 158).

²² We should note, though, that 24 states added the crime of kidnapping after the Lindbergh baby case.

²³ As Governor Dann of Maine noted in an 1849 address, he had the “general impression” that capital punishment had implicitly been abolished and there might be an “impropriety of enforcing the death penalty while such an impression exists” (quoted in Filler, 1952, p. 128).

²⁴ Including editor of the prestigious *New York Tribune*, Horace Greeley, and then vice president of the United States, George M. Dallas.

²⁵ Mackey (1976, p.xxxvi), though, suggests that abolition here had little to do with the efforts of reformers; rather, as a frontier state, Michigan “had no long tradition of capital punishment.” We also should note that it retained the death penalty for treason until 1963.

²⁶ Between the Civil War and the Progressive Era, “the question of capital punishment recaptured a national audience, but in a manner that left opponents of the gallows on the defensive.” This reversal of fortunes reflected civil war executions, lynchings, and the assassination of two Presidents (Masur, 1989, p. 160).

organizations dedicated to the eradication of capital punishment (e.g., the Anti-Capital Punishment Society, Anti Death Penalty League) and attracted some notable adherents. As Mackey (1976, p.xxxiv) noted, “not since the 1840s, had so many prominent Americans campaigned for the cause,” had ordinary citizens engaged in debate, and had newspapers taken, for the most part, reformist stances.

Not surprisingly, this second wave scored some impressive victories. It convinced most states to abandon mandatory sentences of death by establishing degrees of murder or by making the decision discretionary (i.e., judges/juries could recommend life in prison or death).²⁷ Of greater importance was that several states eliminated death penalties altogether. As we indicate in Table 1-1, as many abolished during that decade than in all previous others combined. “1917, in particular, promis[ed] to be the wonder year of abolition” (Filler, 1952, p. 134). Such was not to be, however, as America entered the War and four states quickly repealed.²⁸

(Table 1-1 about here)

A third “trend” toward abolition arose in the late 1920s. During this period, Clarence Darrow and several others founded the National American League to Abolish Capital Punishment, which sought to “organize and coordinate abolitionist attempts in state legislatures (Mackey, 1976, p. xxxviii). Though it received a “boost” in membership with the executions of Sacco and Vanzetti in 1927, it faced a “basically unreceptive political environment” (Schwed, 1983, p.19) and, thus, achieved virtually no measurable success.

Despite the failure of Darrow and his colleagues to effectuate major changes, the reform movements had a significant cumulative impact on the status of capital punishment: by the 1950s America evinced that historical, world-wide trend toward reform to which we referred earlier. Consider Figure 1-1, which presents execution rates since the 1890s. Overall, the number of

²⁷ In the early 1900s, 12 states possessed mandatory laws; by 1930, that figure fell to five; and, by 1957, only Vermont had a mandatory sentencing structure.

²⁸ Consider the case of Pennsylvania. In 1917, it was supposed to pass easily an abolition law. But right before the vote was taken “there was an explosion in a munition factory near Chester, which was thought to be caused by spies or alien enemies.” The legislature voted down the bill.

Table 1-1
Status of Death Penalty, 1840s-1960s*

<u>Decade</u>	<u>States Abolishing the Death Penalty</u>	<u>States Restoring the Death Penalty</u>	<u>Countries Abolishing the Death Penalty (Europe)</u>
1840s	Michigan (1848) ^a		
1850s	Rhode Island (1852), ^b Wisconsin (1853)		
1860s			Portugal (1867)
1870s	Iowa (1872), Maine (1876)	Iowa (1878)	Netherlands (1870), Switzerland (1874)
1880s	Maine (1887)	Maine (1883)	
1890s	Colorado (1897)		
1900s	Kansas (1907)	Colorado (1901)	Norway (1905)
1910s	Minnesota (1911), Washington (1913), Oregon (1914), North Dakota (1915), South Dakota (1915), Tennessee (1915), Arizona (1916), Missouri (1917)	Tennessee (1917), Arizona (1918), Missouri (1919), Washington (1919)	
1920s		Oregon (1920)	Sweden (1921)
1930s		Kansas (1935), South Dakota (1939)	Denmark (1930)
1940s			Iceland (1940), Italy (1944), W. Germany (1949), Finland (1949)
1950s	Alaska (1957), Hawaii (1957), Delaware (1958)		
1960s (1961),	Oregon (1964), Iowa (1965), West Virginia (1965) ^c , Vermont (1965) ^c New York (1965) ^c , New Mexico (1969) ^c	Delaware (1961)	New Zealand United Kingdom (1965-66)

*Adapted from Zimring and Hawkins, 1986, p.29, p.31.

^aRetained for treason until 1963.

^bRestored in 1882 for a life term convict who commits murder.

^cRetained for certain extraordinary civil offenses.

people legally put to death declined consistently. Though the data prior to 1930 are somewhat suspect,²⁹ we can estimate that states executed tens of thousands before 1930, but only 2,892 through the 1950s. The 1940's, in particular, witnessed the onset of a precipitous decline in executions.

(Figure 1-1 about here)

Why the execution rate dropped so dramatically is a matter of some debate, with the efforts of the earlier abolitionists surely contributing. One of the reforms for which they fought-- a reduction in the number of capital offenses-- eventually led to an associated drop in executions. Gone were the days when "rebellious sons," "grape stealers," and "witches" were put to death. Also contributing was the virtual elimination of crimes carrying mandatory death sentences, another goal of earlier reform movements. According to one writer, "There is no doubt" that this movement reduced the number of executions because every year roughly 14 states have no executions even though they possess capital punishment. "One can thus say that every year states with capital punishment take advantage of their permissive clause so as to avoid execution" (Hartung, 1952, p.12).³⁰

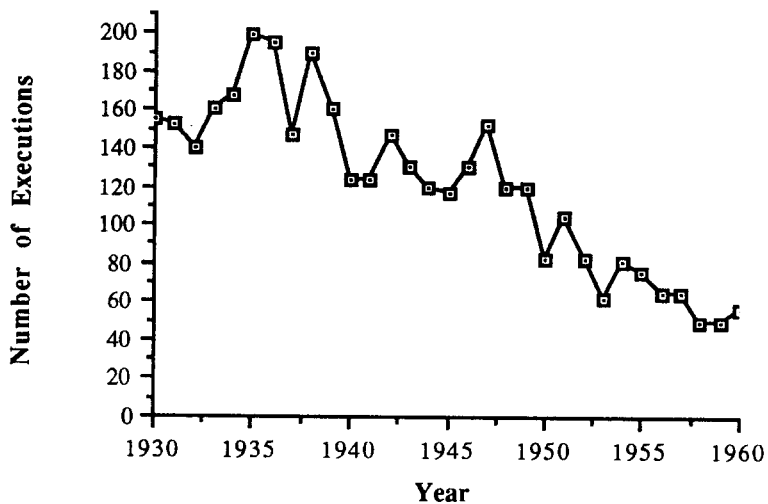
True enough; in fact, the aggregated data displayed in Figure 1-1 mask an important, non-random trend in state usage of capital punishment. As Zimring and Hawkins (1986, p. 30) point out, America was increasingly a divided nation. While most regions reduced steadily the number of executions, as Figure 1-2 shows the South, with its deeply-rooted tradition of capital punishment, continued to impose death at a rather steady, if somewhat declining, rate. By the 1950s, southern states were responsible for well over 50 percent of all executions occurring in the United States, with no end to or even reform in their usage in sight. Hence, the reduction in the number of

²⁹ Data prior to 1930 come from various sources, none of which specified their methodology nor did so in ways that are amenable to replication. Lawes (1924, p. 27), for example, simply stated that he secured data from prison "wardens." Moreover, sources provide varying estimates of the total number of executions. Some suggest the most accurate "counter" is Watt Espy, a death penalty historian. He claims that from colonial times through 1988, 15,759 legal executions occurred in the United States (Gray and Stanley, 1989, p. 48).

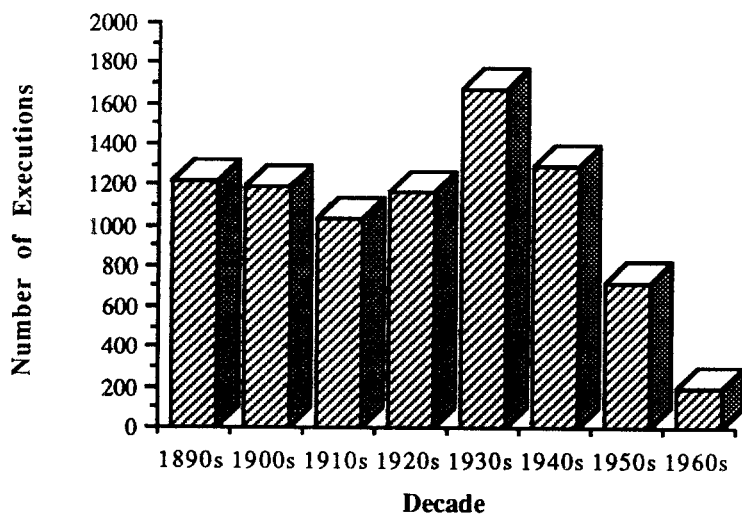
³⁰ Another explanation for the decline is the Holocaust. Schwed (1983, p.20), for example, suggests that it forced "Americans to think twice about their use of capital punishment, especially in reference to America's claims of moral superiority."

Figure 1-1
Executions in the United States, 1890s-1960s

By Year*



By Decade**



*Source: Statistical Abstracts of the United States

**Adapted from Teeters and Zibulka, 1968

executions would be even more dramatic had the Southern states followed the rest of the country. But because of their “dominant role in use of the death penalty, they largely determined that national pattern in executions” (Zimring and Hawkins, 1986, p. 32).

(Figure 1-2 about here)

The efforts of reformers helped to reduce the execution rate; yet, their overall success was far from complete. The trend toward reform they helped catalyze did not necessarily translate into abolition, as it did in other parts of the world. Consider again Table 1-1, which depicts the status of the death penalty in the various states through 1969. This information presents something of an erratic picture of abolition in the United States. Early interpretations would place America at the vanguard of a movement, which eventually would spread throughout the world. Writing in 1927, for example, Calvert classified the United States as an “abolitionist country,” an apt characterization given that Michigan, Rhode Island, and Wisconsin all abolished the death penalty prior to most European countries.

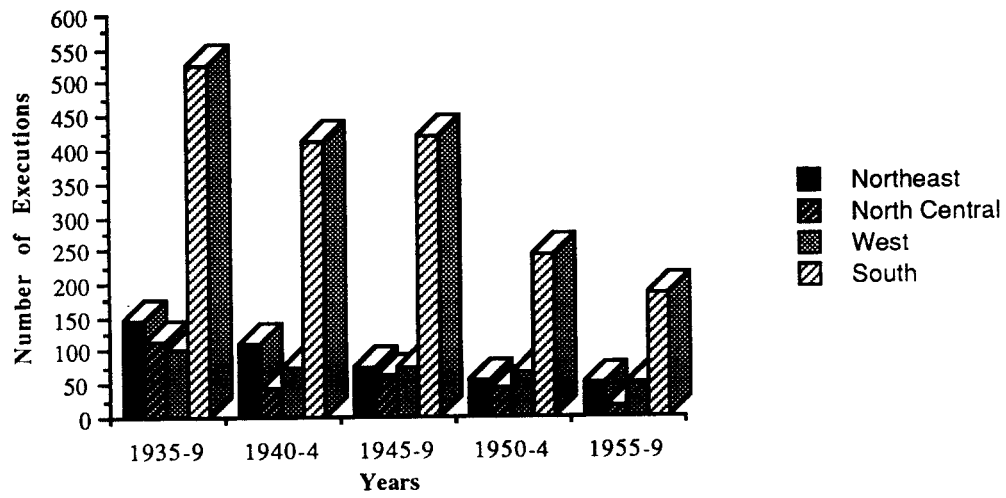
Later scholarship, though, would suggest that the movement to abolish capital punishment through state legislative action was, ultimately, a failure. Of those 15 states abolishing before the 1920s, nine restored the death penalty within the next two decades; some actually abolished and reinstated within a two-year period. Further, by the end of the 1950s, only six states imposed no death penalties.

Hence, the legislative picture is, at best, murky. On one hand, capital punishment came under increasing scrutiny during the first half of the 20th century; what started as an unquestioned part of our criminal justice system now found critics throughout the country. Trends toward reform, which began as early as the 1780s, were in full effect by the 1950s. On the other, during the first half of the 20th century, state legislators were not rushing to eradicate death penalties from their books.

The Futility of Legislative Efforts

The question, of course, is why: why was it so difficult to eliminate capital punishment through legislative action? One clue to its answer lies in present-day understandings of state

Figure 1-2
Executions in Four Regions of the United States, 1935-1959*



*Source: Hawkins and Zimring, 1986, p. 32.

politics, of the way in which legislatures operate, in particular. Today, we recognize, for example, that representatives often take action in response to interest group demands; yet, as our brief review reveals, the movements of the twentieth century were rather transient and unstable, generally unable to overcome political and social obstacles and remain as permanent fixtures on the American horizon.³¹ It is probably true, thus, that legislators never felt very compelled to eradicate.

We should not, however, place the blame solely on the reformists. If state legislators faced pressure from *constituents* to eliminate death penalties, then more action may have occurred. Such, though, was hardly the case; if anything, the citizenry attempted to persuade representatives to reinstate or simply retain it.

The sorts of pressures legislators faced varied on a state-by-state basis, but a number of universals existed. Many reinstatements occurred contemporaneously with periods of national and international turmoil (e.g., America's involvement in the Civil War, economic depressions).³² Such crises often lead to increases in crime rates, which in turn spur constituents to pressure representatives to stiffen penal codes. Likewise, when it comes to issues of crime, legislators and their constituents tend to be highly responsive to particularly gruesome and/or publicized murders occurring within their borders.³³ Washington apparently reinstated in 1917 after a convicted murderer "boasted that he would be sent to the pen for life to be fed and cared for" at public expense. Other abolitionist states returned to the death penalty as a result of increases in the

³¹Seen in this light, the movements to reform and abolish the death penalty lacked the ingredients so critical to the success of such causes as women's suffrage and prohibition. We would, in fact, be hard pressed to call these early efforts a social movement at all; rather, they were social trends, "a tendency merely the result of the aggregate effect of many individual actions..." (Nordskog, 1954, p. 4). Such "trends" are inevitably less successful than the more grandiose "social movement;" they lack leadership, resources, and commitment necessary to create social change on a widespread basis. Surely this is an apt description of the death penalty reform movement. Though a few committed individuals existed at one time or another, they lacked the organizational apparatus and the dedicated cadre of followers so important to the success of other movements.

³²As Hartung (1952, p.8) wrote, this proposition was "popularized" by Clarence Darrow and Lewis E. Lawes in their campaigns against the death penalty. Some systematic evidence of the restoration of the death penalty in other countries, however, purports precisely the opposite conclusion (see Deets, 1948).

³³On the other hand, in some states, particularly gruesome murders had precisely the opposite effect. For example, Wisconsin apparently abolished the death penalty when a jury was "reluctant to convict" a defendant in a highly publicized murder case because it did not want to impose death (see Sellin, 1980, p. 146).

numbers of lynchings. At the turn of the century in Colorado, a mob attacked and burned at the stake a black accused of raping a 12 year-old white girl. Shortly thereafter, the state reintroduced capital punishment (see, generally, Bedau, 1964, p. 334).

As we can see, certain events, political or otherwise, often led to the restoration of capital punishment. But, it also is true that most states never contemplated abolition, in the first place. In those areas (and, in fact, across the United States), legislatures merely reflected the will of the citizenry, which widely supported capital punishment through the 1950s. Consider too how stable these attitudes were: on 4 April 1936, when the Gallop organization took its first survey of public opinion on the subject, 62 percent responded that they were in favor of the death penalty for murder; by 30 November 1953, that figure actually increased slightly, to 68 percent (see Erskine, 1970). With that sort of sentiment found nationwide, surely legislators lacked the impetus to abolish.

Why do Americans evince such a strong and stable affinity for capital punishment? One answer, advanced a leading authority on capital punishment, Hugo Adam Bedau, involves the idiosyncratic culture of the United States. When researchers (Gray and Stanley, 1989, pp. 228-29) asked him why we trailed other democracies, he responded:

It is a difficult question. You could ask why is it that the crime rate in the United States is five times (per capita) what it is in any European country. Why is it that the average American household has one or more handguns, whereas the average European household has no handguns?

I think crime, the use of handguns, and the use of instruments of violence like the death penalty are part of a connected pattern of domestic violence in our lives that also connects with our terrible heritage of slavery, Jim Crow and the slaughter of Native Americans. We are quick to attack South Africa for the problem of apartheid, but we forget that we avoided the problem of apartheid by genocide.

Americans never lived through the Nazi era in the way that Europe did. We never saw the abuse of the death penalty by torturers and murderers and genocidal brutes the way the Danes, the French, the Germans, the Italians did under the Nazis. We never learned to see so clearly the abuses to which this punishment can be put. We have seen it only in the form of the normal instrument of criminal justice, rather than in the hands of obvious tyrants and murderers. I think this experience taught the Europeans, certainly of the World War II generation, a lesson that they will never forget. It is those who remember the war that are against the death penalty in Europe, because younger people who don't have that experience tend to support executions. Even in Europe, the public supports the death penalty. It's the politicians, the statesmen, the people with memories, the people who understand the progress of civilization in this century who have set their hand against the death penalty in Europe. It is not the general public.

So the death penalty is always going to be a threat to us, at least for the next couple of centuries in the West, and I suspect in the East and the Third World as well, the danger of the death penalty will never be very far away.

Others suggest that Americans need the death penalty as a “symbol,” something they want to invoke rarely but otherwise have available. This seems to explain why legislatures were so quick to reinstate after the commission of a particularly gruesome crime.

Whatever the reason, by the 1950s hope for total abolition through legislative action was quite small. As we can see, attempting to create major changes through these forums fared quite poorly: those in the south would not even contemplate reforming, much less abolishing; those elsewhere reformed, but would not abolish their laws permanently. Neither Americans nor their representatives, it seemed, wanted to take that ultimate plunge.

The Changing Scene: Elites and the Death Penalty in the 1950s

The Involvement of the Scholarly and Legal Communities

Although the movement to reform and, more pointedly, abolish the death penalty seemed hopelessly stagnated through the 1950s, the issue was attaining increased levels of interest from the scholarly and legal communities. The first sign of this came with the onset of the scientific study of the use and effect of capital punishment in the United States. Since the 1920s, observers of all ilks used “numbers” to reinforce their views. One of the more noted of these early efforts was conducted in 1924 by Lewis E. Lawes, the warden of Sing Sing Prison and President of the American Prison Association. In *Man's Judgment of Death*, he tried to demonstrate that the leading argument of the day in support of the death penalty -- that had a deterrent effect -- was inaccurate. To do so, he compared homicide rates in states that did and did not possess death penalties.

In retrospect, his study and those of his contemporaries (see Calvert, 1930; Dann, 1935; Bye, 1918) were marred by faulty data, designs, and analyses. Nonetheless, their innovative approach established what would be a long-term trend: virtually all those involved in either side of the debate would turn to statistical evidence to buttress their positions.

This trend took off in full force in the 1940s and 1950s, which saw an “impressive

accumulation” of social science research on two aspects of the death penalty (Bowers, 1984, p. 23). The first sought to explore with greater precision Lawes’ assertion that the death penalty had no deterrent effect. Using somewhat more sophisticated techniques and better data, many (see Sellin, 1955, 1959; Schuessler, 1952) confirmed Lawes’ analysis: there was no conclusive evidence to suggest that “abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction led to a fall” (Royal Commission, 1953, p. 23).

The other area of research involved the issue of race discrimination in capital sentencing. For many years observers suspected that blacks, particularly in the South, were the greater victims of death penalty statutes than whites, hardly a surprising conclusion given that Ante-Bellum states had codes "that explicitly discriminated against blacks by making some types of conduct punishable by death only if the defendant was black, or the victim was white, or both" (Gross and Mauro, 1989, p.27). Analyses conducted in the 1940s tended to confirm this suspicion, although the evidence was mostly circumstantial.³⁴ It was, nonetheless, true that virtually every study found some evidence of discrimination.³⁵

As the issue attracted the attention of researchers, the legal community followed suit. Most significant was the involvement of the American Law Institute (ALI) in the late 1950s. For several years, some highly visible members, including Justice Robert Jackson, urged ALI to recommend abolition on the grounds that it “completely bitches up criminal law” (Meltsner, 1973). Countering this was a proposal by Columbia Law School Professor Herbert Wechsler, which sought to reform two procedures used in most state capital cases. The first involved the trial itself. At the time, most used unitary proceedings wherein triers (jurors or judges) reached verdicts of guilt/innocence and sentences of life/death simultaneously. Wechsler’s proposal called for a “bifurcated trial” of the sort used in California. There, defendants were tried in two stages: a guilt phase and then, if

³⁴ It was not until the 1960s that scholars began to control for relevant factors (e.g. crime, age) other than race.

³⁵Magnum (1940), for example, observed that southern states were more likely to execute blacks on death row than they were whites; Johnson (1941) and Garfinkel (1949) demonstrated that blacks, again in the south, were disproportionately sentenced to death when their victims were white. For reviews of the early studies of race discrimination, see Bowers (1984); Mauro and Gross (1989).

necessary, a penalty phase to determine whether they “should be sentenced to life or death” (ALI, 1959, § 201.6).³⁶

The second section of the proposal involved the penalty phase of the trial. Again, at the time, most states had no particular standards juries were to follow in determining whether to sentence a defendant to life or death; in essence, they wielded virtually unlimited discretion. What ALI proposed was that their decisions should be guided by enumerated “aggravating” (those favoring a sentence of death) and mitigating (those favor a sentence of life) circumstances. It further suggested that triers should find at least one factor in aggravation³⁷ and none in mitigation³⁸ before they impose death.³⁹

Although an ALI advisory committee supported abolition, its Council voted against taking any policy position, believing that the Institute “cannot be influential on [the issue’s] resolution...either way” (ALI, 1959, p.65). Instead, it adopted a model code incorporating both proposals (see Bedau, 1974).

ALI was not the only interested member of legal community. In the early 1960s, “a number of legal scholars began to question seriously for the first time the constitutionality” of the death penalty and/or its procedures (Loh, 1984, p.198). Among the most influential of these early pieces was one written by Gerald Gottlieb, a volunteer attorney for the American Civil Liberties Union in Southern California. In its first incarnation, his “essay” was actually a memo to the ACLU affiliate, raising a “novel” suggestion: that a potential legal challenge, based on the cruel and unusual clause, could be mounted to capital punishment (reproduced in Schwed, 1983). After the “memo” was later published in the *California Law Review* (1961), it received widespread attention.

³⁶By 1963, Pennsylvania, Connecticut, and New York had adopted similar laws (see Glasscock, 1969).

³⁷The proposal listed eight aggravating circumstances, including: “the murder was committed for hire or pecuniary gain,” the murder was committed by a convict under sentence of imprisonment,” the defendant was previously convicted of another murder...,” and “the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity” [ALI, 1959, § 201.6 (3)].

³⁸The proposal enumerated eight mitigating circumstances, including: “the defendant has no history of prior criminal activity,” the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance,” the youth of the defendant at the time of the crime,” and the defendant was an accomplice in a murder committed by another person...” [ALI, 1959, § 201.6 (4)].

³⁹Also, judges could mandate life imprisonment after all the aggravating circumstances had been brought to light.

Around the same time, Walter Oberer, a University of Texas law professor, published an article in the *Texas Law Review*, explicating another potential legal avenue by which to challenge death penalties: death-qualified jury laws. Dating back to the 19th Century, these were enacted by many states after they eliminated mandatory sentencing to ensure that death would not be *de facto* abolished. In general, they permitted state prosecutors to challenge for cause members of the venire who expressed any “conscientious objections” to or “scruples” against capital punishment. Oberer suggested that the exclusion of such jurors might constitute a denial of fair trial guarantees because a “death qualified” jury not only would be biased in favor of a death sentence, but one of guilt, as well.

The Supreme Court

The trend toward reform found additional support from the U. S. Supreme Court. We have yet to mention the Court because through the 1950s, it was in no way inclined to find capital punishment violative of constitutional guarantees. This was so even though it had many, many opportunities to review cases in which death had been imposed. Some were minor cases of criminal law and procedure, which have been long forgotten in the annals of legal history. Others were quite celebrated. Consider the fate of the “Scottsboro Boys,” seven black youths who allegedly raped two white women on a train heading toward Alabama. When the “boys” alit in the town of Scottsboro, they were met by a lynch mob, no friendly faces, a town judge who appointed the entire bar of the city (and, thus, no one) to represent them, and a white jury ready to execute any black, regardless of the evidence (see Carter, 1979). Or, Ethel and Julius Rosenberg, who the government accused of spying for the Communist Party at the height of the Cold War.

The Scottsboro Boys and the Rosenbergs received sentences of death, but the Supreme Court decided their cases on issues quite apart from the constitutionality of the capital punishment.⁴⁰ For sure, in the opinion of most legal scholars of the day it would have been

⁴⁰ In neither of these cases was this point argued. In the Scottsboro boys case, *Powell v. Alabama* (1932), the Supreme Court dealt exclusively with the question of whether they were denied effective counsel. In *Rosenberg v. United States* (1953), after Justice Douglas denied a stay of execution, the Court dismissed claims that the Atomic Energy Act superseded the Espionage law under which the Rosenbergs had been convicted. Burt (1987, p.1743),

ludicrous to argue that the death penalty *per se* violated the Constitution, when it apparently did not.

In fact, the closest the Supreme Court came to even hearing arguments, much less ruling, on the constitutionality of the death penalty were several cases involving modes of execution or punishment. In *Wilkerson v. Utah* (1879), a unanimous Court upheld the use of public execution (by a firing squad) for premeditated murder. The majority opinion explained that it would be difficult “to define with exactness the extent of the constitutional provision which provides cruel and unusual punishments shall not be inflicted” (1879, p.135); however, it was “safe” to assume that it would forbid torture.

Eleven years later, in *In re Kemmler* (1890), the Court addressed the simple question of whether electrocution constituted cruel and unusual punishment.⁴¹ Writing for the Court, Chief Justice Fuller defined cruel and unusual punishments as those involving “torture or lingering death,” a category into which electrocution did not fall. And, even if it did, because the Eighth Amendment had yet to be incorporated (applied to the states),⁴² the Court would not interfere with the state’s legitimate exercise of police power.

Shortly after *Kemmler*, some 20 states erected electric chairs, but the issue did not receive full-dress Court treatment again until the rather odd case of *Louisiana ex rel. Francis v. Resweber* in 1947.⁴³ After a Louisiana jury convicted seventeen year old Willie Francis of murder, sentencing him to death, the state scheduled his for execution for 14 September 1945. On that date, Francis was strapped into an electric chair that had been used successfully on 23 previous

though, argues that “the origins of the Court’s death penalty reform” began with the Scottsboro Boys case because it recognized there that death was “different” and need to be treated with “special care.”

⁴¹In 1889, a New York court sentenced Kemmler (a/k/a John Hort) to death for committing an axe murder. His execution was scheduled for 24 June 1889, giving him the dubious honor of being the first person sentenced to die in “the chair.”

Ironically, both the state and defendant Kemmler’s attorney used the cruel and unusual clause to justify their positions. New York claimed that it was a humane way of executing criminals, that it was anything but cruel and unusual. Kemmler opposed it for precisely the same reason (see Friendly and Elliot, 1988, p. 163).

⁴²Another reason was that the Eighth Amendment had not been incorporated, that is, applied to the states. This occurred *Robinson v. California* (1962).

⁴³The Court, however, did decide a few cases involving the cruel and unusual provision of the Eighth Amendment. See Goldberg and Dershowitz (1970) for an interesting review.

occasions, but now malfunctioned.⁴⁴ The aborted execution received national press coverage, with many pleading with Louisiana to release Francis because it was “an act of God” that he survived. Francis’ attorneys argued that it would be “cruel and unusual” and violate the norms of due process to put him through it again.

The Justices, however, disagreed. In a plurality opinion for three members,⁴⁵ Reed held that due process would not be “breached” in a second attempt because the “cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish human life” (pp.463-464).⁴⁶

Just a decade later, however, the Justices reconsidered their approach to the Eighth Amendment. In *Trop v. Dulles* (1958), the Court addressed whether the government could strip Albert Trop of his citizenship for deserting the Army, a crime for which he was court martialled. Writing for a five-member majority,⁴⁷ Chief Justice Warren held that “denationalization” constituted cruel and unusual punishment in violation of the Eighth Amendment. Based on past Court decisions,⁴⁸ Warren reasoned that because “the words of the Amendment are not precise ... their scope [was] not static.” Thus, “the Amendment must draw its meaning from the *evolving standards of decency that mark the progress of a maturing society*” (emphasis added, 1958, p.

⁴⁴According to a sheriff who observed the scene, “Francis’ lips puffed out and he groaned and jumped so that the chair came off the floor.” He began shouting “take it off -- let me breathe.” (from Friendly and Elliot, 1988, p. 165).

⁴⁵The Justices, apparently, had a most difficult time with this case. In oral argument, one observer described them as “sullen,” looking “like brooding Rodin figures...almost resentful that this insoluble problem had been put before them” (Prettyman, 1961).

⁴⁶The dissenters, led by Justice Burton, agreed that to put Francis in the chair again would abridge Fuller’s definition of cruel and unusual punishment (for further analysis of these opinions, see Miller and Bowman, 1983). As a result, the state successfully executed Francis more than one year after its first attempt.

⁴⁷It is interesting to note that Warren’s majority opinion *Trop* went through several incarnations. After *Trop* was initially argued, Warren assigned the majority opinion to himself. His original draft, only 6 pages long, was not “impressive,” and as a result the case was set for reargument.

After the second round of orals, changes in votes occurred with the end-result being that Warren was no longer in the minority. He had one of his clerks “thoroughly” recast the opinion, though he “inserted” the key phrase of “evolving standards...” This draft, circulated as a dissent, prompted Whittaker to change his vote and, thus, Warren’s opinion once again became the majority’s (see Schwartz, 1983, pp.313-317).

⁴⁸ See, in particular, *Weems v. United States* (1910) in which the Court struck down as cruel and unusual *cadena temporal* for falsifying documents. It held that the Amendment was “not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a human justice” (p. 378).

101).

What Warren meant is not altogether clear: although he declared that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man” (1958, p. 100), he provided no specific examples (other than denationalization) of what would constitute cruel and unusual punishment. Scholarly analyses of this case, however, suggest that “the evolving standards” and “dignity of man” approaches held new hope for abolitionists. Even though his opinion explicitly rejected the death penalty as falling under that rubric,⁴⁹ it showed a tempering of the Court’s previous position: If the day was to come when the public rejected capital punishment, so too might the Court. Further, as Leisse (1970) noted, what could be more offensive to the dignity of man than death?

The Death Penalty During the Early 1960s

The NAACP and the NAACP Legal Defense and Education Fund

By the end of the 1950s, several diverse forces were driving the issue of capital punishment in the United States. On one hand, state legislators -- under virtually no pressure from reformist elements -- were relatively inactive. On the other, some key ingredients for change were in the wind: many states (outside of the south) were hesitant to invoke the death penalty; scholars were amassing an increasing amount of evidence against it; and, the Supreme Court had refined its approach to the cruel and unusual punishment clause. It was against this backdrop that the NAACP Legal Defense Fund (LDF) contemplated entering the fray, an entry that started somewhat apprehensively, but turned into a major mission by the end of the 1960s.

Prior to that time, one LDF attorney suggests that “capital punishment was not on the Fund’s agenda” (Meltsner, 1973). During the early 1960s the organization “simply had too much else to do.” Undoubtedly, this was so. As a group dedicated to creating legal change through law on behalf of the black community, it found itself right in the middle of the Civil Rights Movement

⁴⁹ He stated: “At the outset let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment... the death penalty has been employed throughout our history... it is still widely accepted...” (1958, p.100).

of the 1960s, a movement it helped spearhead through its litigation campaigns and one at which it stood in the vanguard.

How the LDF found itself in a position of preeminence is quite an intriguing story.⁵⁰ Its founding organization, the NAACP, was created in 1909 by a group of reformers from the many other social movements and organizations of the day to “uplift the Black men and women of this country by securing for them complete enjoyment of their rights as citizens” (St. James, 1980, p.25).⁵¹ In its early years, the organization resorted to traditional strategies of education and lobbying. Quite quickly, though, it entered the legal arena, with its most visible (though not its first) effort coming in the form of an *amicus curiae* brief filed in *Guinn v. United States* (1915), which challenged the constitutionality of an Oklahoma grandfather clause. After this case, the NAACP “was active in nearly every Supreme Court case concerning the constitutional rights of the Negro” (Vose, 1959).

Why the NAACP (and, later, the LDF) turned to litigation instead of traditional political avenues never has been easy to discern, with many factors contributing. For one, its first president (and other early leaders), Moorefield Storey, was a skilled and prosperous attorney, a former president of the American Bar Association. Hence, as some have argued (see Vose, 1959), it was only natural for the emerging organization to contemplate use of the courts. This tradition of litigation, established under Storey’s leadership, continued after his death in 1929, when the group committed \$100,000 to a legal program. Led by a succession of notable legal counsel, particularly Charles Houston and Thurgood Marshall, litigation became an integral part of the NAACP’s strategy, so much so that it formed the separate LDF in 1939.⁵²

⁵⁰ The history of the NAACP and (NAACP LDF) has been the subject of extensive scholarly treatment. For some interesting examinations, see Greenberg, 1974, 1977; Hahn, 1973; Wasby, 1983; Kellogg, 1967; Miller, 1966. For examination of particular litigation campaigns, see Vose, 1959; Kluger, 1975; Cortner, 1988; Tushnet, 1987.

⁵¹ Founding members of the NAACP included Florence Kelley of the National Consumers’ League; W.E.B. DuBois, founder of the Niagra Movement; Jane Addams of the Hull House; Moorefield Storey, president of the American Bar Association; William English Walling, a co-founder of the Women’s Trade Union League; and, Oswald Garrison Villard, president of the *New York Evening Post*. For a complete list, see St. James, 1980, p. 248.

⁵² The NAACP created the separate, fully incorporated LDF primarily for tax purposes. The two organizations

A second explanation is that it tried traditional lobbying routes, but failed miserably. During its early years, the organization spent considerable energies and funds, pressuring Congress to enact anti-lynching and anti-poll tax legislation, with no measurable results. To many scholars, its failure here was hardly surprising; it is often the case that groups representing minority interests find majoritarian institutions poor forums in which to pursue policy objectives (Cortner, 1968).

Richard Cortner's *A Mob Intent on Violence* offers yet another explanation. In his view, the NAACP took to the courts as a matter of happenstance or coincidence more than through any conscious decisions. During the early 1910s, it was involved in several legal battles; however, its first "complex and protracted" case came in the area of criminal law and procedure. As Cortner tells it, during its formative years the NAACP felt compelled to respond to the barbaric treatment of blacks by southern law enforcement officials. Since many complaints came from those already involved in the legal system as defendants, the NAACP was forced to take to litigation.⁵³

Regardless of the specific motivation for the NAACP's decision to resort to litigation, one fact is beyond dispute: it was good at it. By the 1960s, it had built a significant record of achievement. It may have initially used the courts to defend the criminally accused,⁵⁴ but its most prominent victories involved Court construction of the Civil War Amendments. Among these included the landmark *Brown v. Board of Education* (1954), in which the Court *sub silentio* overruled the doctrine of "separate but equal," and *Shelley v. Kramer* (1948), which provided new legal recourse for housing discrimination.

remained close during those early years, sharing offices and staff. Over the decades, though, relations between the two became more and more strained. In fact, in the early 1980s, the NAACP challenged the LDF's right to use the NAACP acronym. The LDF eventually won the suit.

⁵³ Cortner's explanation is quite compatible with other accounts. O'Connor and Epstein (1984) and Vose (1972) suggest that the first case "in which the NAACP realized that it would need to turn litigation involved a poor black farmer in South Carolina who had been charged with violating the state's peonage code. When he was sentenced to death for shooting in self defense the officer who attempted to serve the arrest warrant, the NAACP recognized the need for intervention" (1984, p. 20).

⁵⁴ Several of these early cases too produced some impressive wins, including *Powell v. Alabama* (1932) in which Court for the first time acknowledged the right to counsel in some forms of capital cases; *Brown v. Mississippi* (1936), which held that physical torture could not be used to invoke confessions; and, *Moore v. Dempsey*, (1923) which involved the right to a fair trial.

These victories, as significant as they were, hardly led to the sort of social change desired by the organization (see Rosenberg, 1990). After *Brown*, with the advent of the civil rights movement, the NAACP LDF had its hands full: as one attorney noted, they were simultaneously “challenging in the federal courts every form... of racial discrimination;” “protecting” workers in Dr. Martin Luther King’s campaigns, and counseling a multitude of other civil rights organizations, including Student Non-Violent Coordinating Committee, the Southern Poverty Law Center, and chapters of the NAACP.

Juggling these activities would be an arduous chore for any organization. Fortunately, the LDF had a solid and dedicated staff, personified by Jack Greenberg, head of its legal division. Appointed in 1961, Greenberg had the difficult task of replacing Thurgood Marshall, who left the organization after 26 years for a judgeship on the U.S. Court of Appeals for the District of Columbia. At the time of his departure, Marshall had an almost godlike reputation; he led the group to victory in many of the key civil rights decisions of the 1950s. He was, as current president of the LDF suggests, “the inspiration behind the Legal Defense Fund,” serving as “role model for a large number of lawyers, particularly minority lawyers” (Chambers, 1986, pp.205-6).

Greenberg, though, was well-poised to lead the group into the 1960s. After obtaining a law degree from Columbia University in 1948, he dedicated himself to the civil rights movement, authoring two books on the subject and serving as assistant counsel to the LDF. Moreover, Greenberg had inherited the Marshall legacy: a “litigation program regularly blessed by the Supreme Court, [a program] of surprising power, good will, and friendship...” and, a program that had attracted a fine in-house staff and a dedicated core of volunteer attorneys and consultants throughout the South.⁵⁵ Still, keeping up with the demands placed on during the drive for equality proved a difficult task, making any all-out attack on other issues, such as the death penalty, simply unfeasible.

⁵⁵Though Greenberg served ably under Marshall’s tutelage, Meltsner (1973) points to several significant differences between the two: Marshall was black, Greenberg -- white; both were “workaholics,” but Greenberg was more “businesslike” in approach than Marshall.

This is not to suggest that the LDF failed to consider the issue an important one. It had always expressed serious concern about race discrimination within the criminal justice system, a concern deeply rooted in its earliest litigation campaigns. As busy as its attorneys were during the 1950s, they found time to pursue this interest, supporting many defendants accused of criminal offenses, capital or otherwise. Why they did so becomes evident in this statement made by two LDF attorneys, Greenberg and Jack Himmelstein (1969):

Early cases in criminal law involving Negroes, such as the Scottsboro case, posed issues of the right to counsel, jury discrimination, forced confessions, among others. But lurking in the background of each case was the awareness that what was at stake was not merely justice, not just the legal standards that evolve out of new situations, not simply the number of individuals affected, but the irreversible fact of death.

They went on to discuss some of those early cases, most of which involved inter-racial southern rapes.⁵⁶ Among the most important was *Hamilton v. Alabama* (1961) in which the LDF defended a black man who was sentenced to death for burglary with intent to commit rape. Given the severity of the sentence in proportion to the crime, LDF attorneys planned to take a risk: at his new trial (the Supreme Court had set aside his original conviction on other grounds) they were to argue that his death constituted cruel and unusual punishment because “it was grossly unfair when imposed in a case where no life had been taken...” Because Hamilton received a life sentence, they never had the opportunity to make this claim.

Some LDF attorneys suggest that this case crystallized the need for serious litigation in this area. Others controvert, claiming that the LDF was not at all considering an all-out attack on capital punishment; rather, they set their sights on challenging the procedures and fairness of the criminal justice system, and not on a systematic campaign to abolish capital punishment.

Even if *Hamilton* served as the catalyst, it is nevertheless true that in the early 1960s, LDF attorneys lacked the time, monies and staff to pursue the issue with their usual degree of intensity. What they also lacked was any serious indication from the Court that it was interested in reformulating legal policy on the death penalty. Though there were musings within the legal

⁵⁶ E. G., *Shepherd v. State* (1951); *Jones v. State* (1953); and *Hampton v. Commonwealth* (1950).

community (e.g., Gottlieb, 1961; Oberer, 1961) about possible ways to attack capital punishment, it seemed almost foolhardy to pursue these angles given the state of the law.

A Sign from the Court

It is sometimes true that a seemingly trivial event can have a massive impact on the course of politics. How a single burglary could lead to President's resignation, an "oversight" on the part of the Secretary of State to deliver a commission -- to judicial review-- are just some of the intrigues of American life. Such was the case for the course of the death penalty -- a small act on the part of one U.S. Supreme Court Justice caused a chain reaction, which would permanently transform the issue.

The Justice was Arthur Goldberg, a 1962 Kennedy appointee known for his liberal postures, particularly in the area of criminal rights.⁵⁷ But no one, especially the majority of his colleagues, were prepared for his actions in the 1963 case of *Rudolph v. Alabama*.⁵⁸

In that year, the Supreme Court received for review at least six cases touching, in one way or another, the subject of capital punishment. None raised what many thought a foregone conclusion -- the constitutionality of the death penalty; rather, they hinged on some procedural question. *Rudolph*, for example, involved an inter-racial southern rape for which the defendant received death. The question before the Court, however, involved the voluntariness of his confession, and not his sentence, *per se*.

Prior to the Court's conference, at which it would decide whether to hear these and other cases, Goldberg circulated a memo, informing the Justices he would raise this question: "Whether and under what circumstances, the imposition of the death penalty is proscribed by the Eighth and Fourteenth Amendments to the U. S. Constitution?" He recognized that none of the attorneys briefed this issue; nonetheless, he felt the Court should consider the question because he was convinced that "the evolving standards of decency that mark the progress of [our] maturing

⁵⁷ During his three-term stint on the Court, Goldberg consistently ranked among the most liberal of his brethren on issues of law and order. In the 1962 term, for example, he supported the defendant in 84 percent of all cases raising a criminal rights issue.

⁵⁸ This material is drawn largely from Schwartz (1985).

society' now condemn as barbaric and inhumane the deliberate institutionalized taking of human life by the state." Goldberg reinforced this view with reports on the status of capital punishment in other countries, public opinion polls, statistical evidence, legal and scholarly analyses, and precedents⁵⁹ (for an in-depth analysis of this memo, see Marsel, 1985-86).

Should the Court be unpersuaded by the "evolving standards" justification, Goldberg provided other lines of argument it might find more convincing. For instance, he expressed "concern" over the possibility of executing an innocent person or one who had been denied due process of law. Citing a recent spate of studies, he also questioned whether the death penalty served "any uniquely deterrent effect upon potential criminals." Finally, and in no uncertain terms, he asserted that a "persuasive argument" could be made that death for crimes that "do not endanger life" (e.g., rape) might violate constitutional principles and controvert *stare decisis*.

Despite the time and care Goldberg put into this memo (and his strong abolitionist sentiment), some of the Justices were shocked by it, complaining that it went well beyond the Court's authority, that to implement Goldberg's plan, they would have to proceed *sua sponte*. Even one of his usual allies on the Court-- Justice Brennan-- later wrote that the memo had been "highly unusual:" it was extremely rare for an individual Justice "to write at length, prior to our conference, about cases which had neither been argued nor set for argument" (1986). In the end, the Court not only rejected Goldberg's motion, but refused to hear the case, as well.

To this denial of *certiorari* Goldberg-- joined by two of his colleagues, Douglas and

⁵⁹ What motivated Goldberg to write this memo has been the subject of some conjecture. Some suggest that he was heavily influenced by his clerk, Alan Dershowitz, currently a professor at Harvard Law School. This view receives support from two sources. First, even after Goldberg left the Court in 1965, he continued to espouse strong abolitionist views, co-authoring several articles with Dershowitz. Second, in a 1988 interview, Dershowitz reported the following:

I participated in the beginning of the judicial campaign against capital punishment. I was Justice [Arthur J.] Goldberg's law clerk in the summer of 1963. He had recently been appointed to the Supreme Court and we spent the month of August just talking about what it was he wanted to do during that year. I had just come off a clerkship with Judge David Bazelon, who was the great liberal reformer of his day, and we had thought about trying to mount an attack capital punishment on racial grounds, but we didn't really have the right case. Well, Justice Goldberg suggested it, but we were both thinking about it. We decided that we were going to try to open up the issue of the unconstitutionality of the death penalty. I spent the entire summer writing up a memo on why the death penalty is unconstitutional (Gray and Stanley, 1989, p. 330).

Brennan-- took the unusual step of writing a dissent. In it, they urged the Court to address three questions (*Rudolph*, p.889).

1. In light of the trend in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those states which retain it for rape violate 'evolving standards of decency that mark the progress of [our] maturing society,' or standards of decency more or less universally accepted?

2. Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against 'punishments which by their excessive...severity are greatly disproportioned to the offenses charged'?

3. Can the permissible aims of punishment (e.g., deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death-e.g., by life imprisonment; if so, does the imposition of the death penalty for rape constitute 'unnecessary cruelty'?

This short (albeit heavily footnoted) opinion, of course, did not represent the view of the Court-- just one third of its members. Nor, did it create legal precedent of any sort. What it did do, though, was send a signal-- a signal delivered loud and clear when Goldberg's law clerk, Alan Dershowitz, sent copies of the opinion "to every lawyer in America who [he] knew" (Gray and Stanley, 1989, p.331)-- to the legal community that at least some of the Justices were interested in the unthinkable, the constitutionality of the death penalty.

Given the composition of the Court and its rulings in other areas of criminal rights and procedure, this was not a message abolitionists could afford to take lightly. Under the leadership of Earl Warren, this Court was in the process of generating a constitutional revolution of some magnitude. Beginning with its 1954 decision in *Brown v. Board of Education*, it gave broad reading to the Equal Protection Clause of the Fourteenth Amendment, a reading that pointed to the eradication all forms of racially-based discrimination. Likewise it was beginning to reevaluate the "criminal" guarantees contained in the Constitution.⁶⁰ Especially important, from the LDF's perspective, were two cases that attracted little attention, but were highly applicable to death

⁶⁰ Two years before *Rudolph*, in *Mapp v. Ohio* (1961) it applied the exclusionary rule to the states, thereby forbidding the admission of illegally-gathered evidence into trial. Around the same time as *Rudolph*, it decided two more cases that have become virtually household names. In *Gideon v. Wainwright* (1963), it read the Sixth Amendment to guarantee indigents legal counsel; in *Escobedo v. Illinois* (1964) it began to scrutinize the Self-Incrimination Clause of the Fifth Amendment.

penalty litigation. The first, *Robinson v. California* (1962), incorporated the cruel and unusual provision of the Eighth Amendment, thus applying it to the states. In the second, *Fay v. Noia* (1963), the Court firmly established the right of state prisoners to raise “alleged denials” of their federal rights, through *habeas corpus* petitions, in federal courts.⁶¹ This gave those convicted of state crimes an entirely new set of recourses-- the federal judiciary.

That the Warren Court was giving expansive treatment to Equal Protection and Due Process guarantees is not to suggest that all the Justices were to the left of center, monolithically liberal. Though the Court, as a whole, was quite supportive of defendants’ rights, in particular, evincing support scores in the neighborhood of 70 percent during this era, some of its members were far less so. Consider the data presented in Table 1-2, which depicts voting alignments during the 1962-1964 Terms. As we can see, on issues of criminal justices, the Brethren formed three fairly cohesive blocs. On the liberal side were Justices 1)Warren, Brennan, and Goldberg and 2)Black and Douglas. Since these blocs were inter-cohesive, they chose often dominated Court outcomes. On the right were Justices Clark and Harlan, who voted together in 90 percent of the cases. And, the always-important center of the Court consisted of White and to a lesser extent Stewart, both of whom evinced high agreement scores with all members of the Court, except the the Black-Douglas pairing.

(Table 1-2 about here)

That Stewart was a moderate-to-conservative jurist on issues of criminal law constituted no great surprise to Court observers. As an Eisenhower appointee, Stewart was a “likeable” fellow, who served diligently on the U.S. Court of Appeals for the Fifth Circuit prior to his ascension to the Court. Then and since he “demonstrated a healthy respect for judicial restraint, yet he also indicated strong attachment to such libertarian commitments as freedom of expression and desegregation” (Abraham, 1985, p.268). In short, Stewart always was one to “chart” a moderate

⁶¹Actually, this right was initially established in another LDF case, *Moore v. Dempsey* (1923) (see Cortner, 1988). As Greenberg (1977, p.428) noted, though, it “had been hedged with serious procedural problems until *Fay v. Noia*” (1963).

Table 1-2
Voting in Criminal Justice Cases, 1962-1964 Terms

Support Scores

	For the Defendant (%)		
	1962 (n=15)	1963 (n=16)	1964 (n=13)
Black	86.4	73.7	81.8
Douglas	86.4	89.5	90.9
Goldberg	81.8	84.2	54.5
Warren	77.3	78.9	50.0
Brennan	72.7	78.9	45.5
White	55.0	63.2	36.4
Stewart	47.6	47.4	36.4
Harlan	36.4	42.1	36.4
Clark	31.8	36.8	45.5

Blocs^{a,b}

Left Blocs

Brennan, Warren, Goldberg (.96)
 Black and Douglas (.92)

Center Bloc

White and Stewart (.85)

Right Bloc

Clark and Harlan (.90)

^aN=54 (Justices may not have participated in all cases) across the three terms.

^bSprague Cohesion Score=.86

course, and, concomitantly avoid any great controversy.

As for White's decisional trends-- they were a bit more surprising. When President Kennedy nominated him to the Court in 1962, most suspected that he would toe the party line. After all, he was an "effective and staunch" supporter of JFK's bid for the presidency, as well as a close friend. But as one legal scholar wrote, "Almost at once it became clear that Justice White would embark on an independent and...utterly nondoctrinaire career" (Abraham, 1985, pp.275-76). It seemed he found more comfort in the moderate approach of Stewart than in the pointedly ideological ones of the conservatives or liberals.

From the LDF's perspective, this ideological configuration, coupled with the Goldberg dissent, held much promise. The dissent itself indicated the willingness on the part of some Justices to look at capital punishment from a constitutional perspective. And, though neither of the pivots (Stewart and White) nor even some of the liberals (Black and Warren) went along with it, abolitionists thought they may be able to pull together a majority coalition with the appropriate litigation vehicle.

What attorneys did not know at the time was that both Warren and Black strongly opposed the Goldberg opinion. One account suggests that Warren, in fact, was "furious" with the memo (Gray and Stanley, 1989). His liberalism in the areas of criminal law and race discrimination had never extended to the death penalty: as governor of California, he tried to reform capital procedures so as to eliminate the rush of last minute appeals (Warren, 1977), while simultaneously signing death warrants. So too, he argued on several occasions that "Of course the death penalty is constitutional, the framers intended it..."⁶²

In his letters, Justice Douglas suggests another explanation. As he tells it, the Chief said to Goldberg: "in view of the numerous attacks on the Court...it would be best to let the matter sleep for awhile" (Urofsky, 1987, p.189). Dershowitz (Goldberg's clerk at the time) confirms this a bit

⁶²At a press conference after his retirement, Warren told reporters that "Throughout my life there has always been something to me that was repulsive to have the government take a life when you are asking everyone else not to take a life." He went on to say, however, that abolition should be done in legislative, not judicial, arenas (Graham, 1968, p.1).

more pointedly. He recalls that the controversial *Brown v. Board of Education* (1954) decision was just beginning to take its course and “the idea that [the Court] would then allow blacks killing whites to be saved from the death penalty was too much for a politically sensitive Justice like Warren to accept” (Gray and Stanley, 1989, p.330).

Justice Hugo Black, as Douglas recalled, similarly “expressed the view that he was unalterably opposed to Goldberg’s” suggestion (Urofsky, 1987, p.189). In retrospect, Black’s disdain for the memo is rather unsurprising: the elements of his emerging jurisprudence would simply militate against his acceptance. For one, Black was an absolutist and a literal interpreter of the Constitution. At times, this jurisprudence took him to the defense of the most liberal causes; for example, he was a champion of virtually unlimited *speech*, believing that the First Amendment’s guarantee was absolute. On other occasions, it led him to a conservative posture; while he would uphold all verbal speech, he voted against symbolic expression (e.g., sit-ins) as this was not explicitly protected in the Constitution. Such was his position on the death penalty. Since the framers provided for the taking of life, the death penalty was surely constitutional.⁶³ As Black would later write, “In my view [the cruel and unusual clause] cannot be read to outlaw capital punishment because the penalty was in common use...at the time the Amendment was adopted” (*McGautha*, 1971, 402 U.S. at).

For another, Black’s view of the Due Process clause would deter him from adopting a fairness approach to capital punishment. That is, Black would be unlikely to reverse a state criminal conviction on Due Process ground, unless the government had denied an enumerated constitutional right.

Entering the Fray: Initial Strategies and Tactics

⁶³This is, of course, not to say that Black was conservative on all issues of criminal law; his support scores suggest otherwise as do his public statements. Consider this exchange with Eric Sevareid:

Sevareid: Mr. Justice...so much of the public clamor about the Court is based on this notion that is decisions...have aided criminals...

Black: Well, the Court didn’t do it.

Sevareid: The Court didn’t do it?

Black: No. The Constitution-makers did it (reprinted in Dunne, 1977, p.34).

Because the Court had yet to rule squarely on the issue of death, though, abolitionists could not have anticipated these postures. Like many, it viewed Warren and, perhaps Black, White or even Stewart, as “gettable” votes. So, *sometime* in the early to mid 1960s, it began to contemplate a full-blown litigation campaign in this area.⁶⁴

Surely, though, more important than the precise date of the LDF’s involvement is the question of why the organization decided to mount a full-scale attack on capital punishment, particularly in the 1960s, when the governmental agenda held so many other issues of civil rights.⁶⁵ The answer to this question remains murky. Perhaps this is so because a number of factors influenced the decision, a decision not just merely to get involved-- that was largely the result of the Goldberg memo-- nor to defend black rapists-- they had been doing that for years when they felt some injustice had occurred-- but the decision to devote tremendous time, energies, and resources to the issue.

⁶⁴We emphasize “sometime” because the exact date of the LDF’s involvement with death penalties is a matter of some dispute. In a 1976 speech before that National Legal Aid and Defenders Association, Greenberg (1976, p.55) said “in the mid-1960s, the Legal Defense Fund launched the attack on capital punishment...I say the mid 1960s, rather than any precise date because the effort was one that evolved...” Michael Meltsner, another LDF attorney intimately involved in the death penalty campaign, also wrote in imprecise terms (see 1973, pp.67-73), sometimes suggesting 1964; at other point, 1965; but, more usually the mid-1960s.

⁶⁵LDF attorneys disagree over the exact genesis of this campaign. In *Cruel and Unusual Punishment*, Michael Meltsner, a Fund consultant and staff attorney, tells this story:

One afternoon, several months after announcement of the Goldberg dissent, [two other LDF attorneys]...and I...bought sandwiches...and sprawled out on the thin Central Park grass to discuss the implications of the opinion for the Fund. We tossed...problems around for an hour until [one attorney] reminded us that the Fund received several requests each month to represent black defendants under sentence of death...’If we aren’t able to turn these cases away, we might as well focus on the real issue- capital punishment...’

A week later, we persuaded Greenberg that a staff attorney should be assigned to investigate the possibility of proving the existence of racial sentencing in rape cases...” (p.31)

In a 1985 interview (Muller, p.164), Jack Greenberg called this story “total nonsense.” As reported by Greenberg, the LDF had “debated the possibility of attacking the constitutionality of the death penalty” fifteen years prior to Meltsner’s lunch.” Greenberg, in fact, has argued elsewhere that *Hamilton v. Alabama* (1960) “triggered” their campaign (Greenberg and Himmelstein, 1969).

Based on our information, it is virtually impossible to say, with certainty, that either is correct. Clearly, *Hamilton* was an important case, perhaps catalyzing the LDF’s interest. Yet, a review of LDF material (e.g., its Civil Rights Law Institutes) prior to 1963, turned up no evidence of this interest; capital punishment was not mentioned.

In any event, both Meltsner and Greenberg underscore the importance of the Goldberg dissent. It indicated to them “that the arguments which they would have advanced on retrial in *Hamilton v. Alabama* were arguments worth making” (Muller, 1985).

One factor that clearly contributed was the “race” dimension. As Greenberg pointed out, the LDF is a civil rights organization, not a general legal-aid society;⁶⁶ in fact, in selecting cases for litigation attorneys ask two threshold questions: “Does the case involve a color discrimination” and “Is some fundamental right of citizenship involved?” Clearly, in the minds of LDF attorneys race was a big, if not the major, determinant of capital sentencing-- many studies demonstrated, and intuition and previous litigation experience told them that blacks faced discrimination.

The problem, though, was that the LDF was finding it difficult to convince courts of the merits of this claim. Consider its early (1964) involvement in the case of *Maxwell v. Bishop*. William L. Maxwell was a 22 year old living in Hot Springs, Arkansas when he was convicted for a 1961 rape of a white women, who lived with “her helpless 90 year old father” (Maxwell, 1968). According to the victim, Maxwell broke into her home at 3 am, by cutting through a screen. As he was entering, wearing a nylon over his head, she telephoned the police. But it was too late; before the call was complete, he had attacked her and her father. Hearing screams at the other end, the operator placed the call herself. Police found the victim two blocks from her home, raped and injured. They took her to a hospital, where they tried to get her to identify Maxwell; she could not, but was able to do so later from a “lighted living room.” Her recollection, plus other evidence (e.g., blood and semen stains, hair and fiber samples), convinced a a jury to convict Maxwell, sentencing him to death.

In his appeal to the Supreme Court of Arkansas, Maxwell’s attorney, Christopher Mercer, alleged that juries in the state engaged in racially-based sentencing. To support of this, he presented some “bare” statistical evidence of race discrimination: testimony from a prison superintendent on the racial composition of those executed.⁶⁷ The Arkansas Court, however, rejected this argument on the ground that the “statute for rape applies to all citizens of all races...we find no basis

⁶⁶As Mueller (1985) noted, when NAACP leader Arthur Springarn filed papers for incorporation of the LDF in 1939 he claimed that it would “handle only such cases which involve the rights of indigent blacks ‘and only in such instances where they were deprived of said rights solely by reason of the fact that they were Negroes’.”

⁶⁷The numbers, though, were somewhat startling. Of the 168 executions, 129 were on non-whites; 39 of whites.

whatever to declare [it] unconstitutional in...verbage or application” (1963, p. 118).

At this point, Maxwell’s hopes for retrial were all but dashed, that is, until the Supreme Court handed down *Fay v. Noia*. Recognizing that Maxwell could now safely bring his case into federal court, a state NAACP leader contacted LDF lawyer Frank Heffron. He, in turn, applied for a writ of *habeas corpus* to a U.S. District Court, in which he made a Fourteenth Amendment Equal Protection claim: Maxwell had been the subject of discrimination. Heffron tried too to reinforce this with statistical proof gleaned from interrogations with court clerks about rape cases in other Arkansas counties. As Meltsner (1973) reports, though, the judge was “not impressed” and rejected Maxwell’s case in 1964. Heffron refused to give up and appealed to the Court of Appeals of the Eighth Circuit.

As this case moved up the federal ladder, LDF staffers began to recognize that they would have a difficult time proving race discrimination; and, at the very least, that they would need far more sophisticated statistical evidence. Still the idea that race was a determinant of capital sentencing whetted the appetites of attorneys.

A second factor that led to the LDF’s involvement was the historical and present obstacles abolitionists faced in seeking change through state legislatures. No state had abolished the death penalty since 1958, when Delaware did only to restore it three years later. This was hardly surprising for once again, the public itself stood firmly behind capital punishment.

A final one was the lack of other groups involved in the issue. In a 1982 article, Greenberg suggested that only one group litigated death cases prior to the mid-1960s-- New Jersey Citizens Against the Death Penalty, which undertook appeals solely on behalf of indigent defendants (p.911).⁶⁸ Though a few others existed, Greenberg was correct in noting the void in a national interest group presence in the courts.⁶⁹

⁶⁸His recollection, however, is not precisely accurate. Since the late 1950s, the New York Committee to Abolish Capital Punishment, led by New York University Law professor Norman Redlich, had been trying to halt executions in that state (Newsweek, 1963). Granted, the group possessed no grand litigation strategy nor much in the way of resources, but it did have “passion” for its cause, playing an influential legal role in New York (see Neier, 1982).

⁶⁹There were, however, a handful of organizations, the American League to Abolish Capital Punishment in

Changes in the Political Arena

Both the lack of legislative action and of group representation gave cause for the LDF to launch a major death penalty initiative. It is somewhat ironic, then, that around the time it committed itself to the campaign, the legislative and group horizons turned. In 1964 Oregon voters decisively abolished the death penalty, a referendum that had failed in 1958. That was shortly followed by legislature abolition in five more states (see Table 1-1), which put more states in the abolitionist column in three years than over the past forty years combined.⁷⁰ And, by then, Governors Brown in California and Peabody in Massachusetts were fighting to ban, or at least temporarily bar, capital punishment in their states (New Republic, 1963, p.5).

Changes also were afoot on the federal level. During the 1950s and early 1960s, the most visible figure in the Justice Department, J. Edgar Hoover, was an "outspoken" proponent of capital punishment (see Bedau, 1964, pp.130-135). But, in 1965, some indication of change was in the wind when Attorney General Ramsey Clark wrote in a letter to Congress:

We favor abolition of the death penalty. Modern Penology, with its correctional and rehabilitative skills affords greater protection to society than the death penalty, which is inconsistent with its goals.⁷¹

This represented an alteration in Clark's thinking: just two years prior, in the wake of John F. Kennedy's assassination, he publicly supported the death penalty for the murder of a President (Newsweek, 1968, p.28).

These developments, of course, did not occur in a vacuum. Rather they echoed public opinion, which for the first time suggested that a majority of people favored eradication of the death penalty. Consider the data depicted in Figure 1-3. As we can see, a radical alteration occurred in Americans' views of capital punishment. Between November of 1953 and July of 1966, public

particular, involved in this issue. In general, they were committed to abolition through legislative action (see Bedau, 1967).

⁷⁰It is also true that many states legislatures, in the early and mid-1960s, debated the issue with some narrow outcomes. Indiana passed abolitionist legislation, but the Governor vetoed it after a state police officer had been fatally shot (U.S. News, 1965). We should note, though, that a 1966 referendum in Colorado failed by a wide margin (see Hochkammer, 1969).

⁷¹In a 1966 speech Senator Philip Hart quoted these words and, as such, they were printed in the *Congressional Record* (25 July 1966, p.16181).

support for the death penalty plummeted 26 points.

(Figure 1-3 about here)

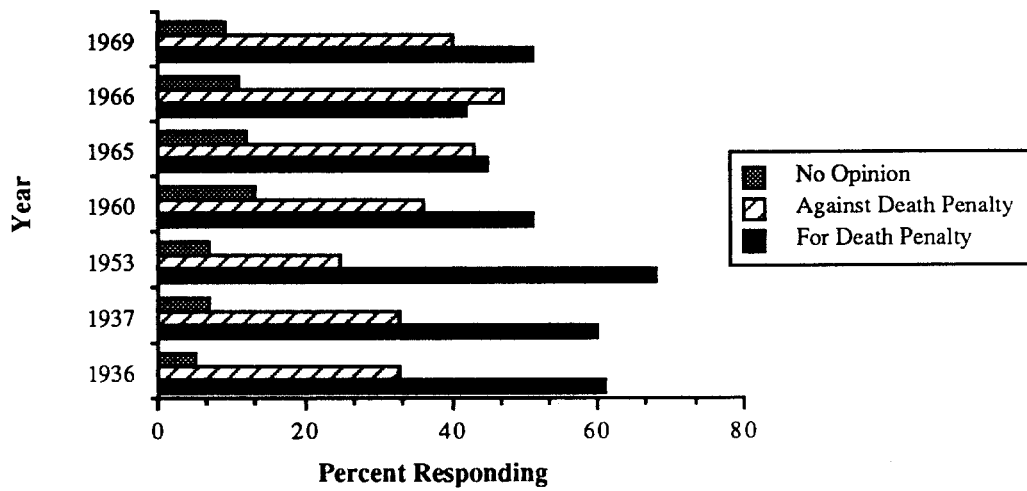
Why these changes came about in the mid-1960s is, naturally, open to interpretation, with many scholars arguing that Caryl Chessman's "struggle" catalyzed the movement. In 1948, California tried and convicted Chessman under a so-called "Little Lindbergh Law," which proscribed by death "kidnapping for the purpose of robbery." That charge and his trial generated a great deal of public attention, with some suggesting that the whole proceeding had been a great miscarriage of justice.⁷² As a result, Chessman's case became a *cause celebre*. After he authored several books on his saga, leaders and notables throughout the world all expressed their support. Debate over the Chessman case became even more heated as he sat on death row for twelve years, the longest in American history, before his execution in May of 1960.

Although this is a universally-accepted explanation for the radical alteration in the political environment, it contains two undeniable flaws. First, public opinion remained in favor of capital punishment through the 1960s; it was not until 1966 when a majority of Americans opposed it. Second, no states abolished during the early 1960s; again, this did not happen until the mid-1960s. Given the highly-charged nature of this issue, the lag between Chessman's execution and legislative changes seems a bit wide.

Rather, we think the movement toward reform in the 1960s was similar to that of the 1910s. During that earlier period, there existed an important and influential social movement--progressivism. That movement helped to create a political environment conducive toward abolitionism. The same is true of the 1960s, which witnessed the rise of a great many "rights" movements. As the Civil Rights Movement, in particular took hold, the public consciousness toward liberties and freedoms was "raised," in a sense. So too, as many indicate, came concomitant changes in the attitude to Americans toward criminal rights. Seen in this light, the

⁷²By way of example, consider the plight of Chessman's trial transcript. As Schwed (1983, p.76) tells it [see also, *Chessman v. Teets*, (1957)], the Court stenographer died before he finished transcribing his notes; another took over, but failed to do an accurate job. All told, the final transcript contained 2000 errors.

Figure 1-3
Public Opinion on Capital Punishment, 1936-1966*



*Source: Erskine, 1970. The question was: Are you in favor of the death penalty for murder? or Are you in favor of the death penalty for persons convicted of murder?

Chessman case, like that of Sacco and Vanzetti before it, was a “blip” in death penalty history: it created an explosive, but temporary, public fervor.

The Pressure Group Horizon

Public attitudes and governmental action were not the only things, as Meltsner wrote, “a-changing” in the 1960s. It was also the case that in 1965 the interest group environment was taking new shape. In that year several organizations, including the National District Attorneys Association, voted to support abolition (New York Times, 1965, 18 March). Perhaps even more important was an announcement by the American Civil Liberties Union (ACLU) in June that it too favored eradication of state death laws.

It may come as a surprise that the ACLU had taken no policy position on capital punishment prior to 1965. Many Americans consider the ACLU as one of the country’s foremost “liberal” organizations; yet, this label is inaccurate. Founded in 1920, the Union was and always has been “committed to a comprehensive defense of all constitutional and civil liberties guarantees in the Bill of Rights” (O’Connor and Epstein, 1989). While this position sometimes means that the ACLU will bring a liberal perspective to litigation, this is not always true. The death penalty provides a case in point.

Prior to the 1960s, the ACLU remained mute on the subject of capital punishment.⁷³ It seemed some of its attorneys agreed with previous doctrine that the death penalty *per se* was constitutional; others did not consider the death penalty to present a civil liberties issue (Dorsen, 1968). This is not to suggest that the Union never entered capital cases. It did so when it “believed that the defendant was innocent or denied a fair trial” (Neier, 1982, p.197). Moreover, as early as 1961, it expressed concern over juvenile executions (ACLU, 1961-62, p.75). Yet, like the LDF in the early 1960s, it had yet contemplate any litigation campaign or even take a direct stand, for that matter.

⁷³In an interview, Donohue (1985, p.266), asked then-Assistant Director Alan Reitman why the Union did not oppose death penalties during the 1950s. Reitman responded: “There is nothing to my knowledge concerning an organizational decision not to oppose capital punishment.”

Inklings of change within the ACLU came even before the Goldberg dissent. In the early 1960s, it seemed that several of its affiliates had taken their own initiative and began explorations of the issue,⁷⁴ despite the fact that the National ACLU had no policy. The execution of Chessman in 1960 led the Southern California affiliate to undertake an anti-death penalty campaign (Donohue, 1985, p.267). Under the auspices of the Georgia Civil Liberties Union, several faculty members and students produced a 47-page report detailing problems in the imposition of death in that state (e.g., that it discriminated against the poor). Likewise the Florida CLU expressed a deep interest in capital punishment. Led by Tobias Simon, that affiliate had served as “the principal advocate” for civil rights in Florida; its involvement in capital cases, was a “natural extension” of that interest (Neier, 1982, p.197).⁷⁵

It was not until 1963 that the National ACLU, apparently prodded by its affiliates, undertook what would be a “study of the highly emotional, morally complex issue” of capital punishment (see ACLU Annual Report, 1964-1965, p.59). In that year, it asked one of its attorneys, Norman Dorsen, to prepare a memorandum, “presenting both sides of the argument, along with a recommendation to the Union on the question of abolition” (Dorsen, 1968, p.269).

In the final analysis, Dorsen concluded that the death penalty may not “impair” individual liberty “in the constitutional sense,” but it “dehumanizes the society which employs it.” To wit, he suggested that the ACLU adopt a pro-abolitionist policy statement and implement that policy through legal action, raising “any substantial constitutional issue that could save the convicted person from execution” and by legislative repeals of capital punishment law (see Dorsen, 1968, p.277).

After what Dorsen described as “much internal debate,”⁷⁶ the ACLU’s Board adopted his

⁷⁴While the NAACP LDF is a tight-knit, elite-driven non-membership organization, the ACLU is a complex, national membership organization. It has about 200,000 members, a half-dozen special litigation projects, and 50 plus state and local affiliates. For most of the Union’s history, the affiliates were fairly independent entities. In the 1970s, however, the ACLU changed its policies to tighten national control. For more on ACLU affiliates, see Halperin, 1976.

⁷⁵The Florida affiliate became even more adamant after it conducted a study of possible race discrimination in rape cases, finding results quite compatible with those of the LDF (see ACLU Annual Report, 1964-1965, p.79).

⁷⁶One opponent was Emanuel Redfield, Counsel to the New York Civil Liberties Union. In a 1963 debate over the ACLU’s appropriate role in capital cases, Redfield argued that any punishments-- be they death or life imprisonment-- are problems “to be solved not by civil liberties, but with the tools of the sociologist, the social worker, the psychiatrist...” (see Dorsen, 1968).

recommendation. Leaving nothing to the imagination, it cited the range of arguments as contributing to its decision: that it violated norms of fairness (due process), that it discriminated against blacks (equal protection), and that it constituted cruel and unusual punishment (Eighth Amendment).⁷⁷ In announcing the policy change publicly, Union officials noted that they would seek, “as a matter of civil liberties concern the commutation of death sentences, until such time as the death penalty is eliminated as part of law and practice of the United States” (New York Times, 21 June 1965, p.23).

Hence, within two short years, the political environment surrounding the campaign for abolition had dramatically altered. In 1963 eradication of death penalties appeared to be a pipe dream; by 1965, the year the LDF committed fully to capital punishment, a major turnabout had occurred.

This, of course, is not to suggest that all indicators pointed toward an abolitionist trend. In fact, two states with the biggest death row populations, Florida and California, that same year replaced governors sympathetic to abolition with avid proponents of capital punishment. Claude Kirk (Florida) and Ronald Reagan (California) fully intended to live up to campaign promises to sign death warrants in their respective states.⁷⁸ Even before he took his oath of office, Reagan had appointed a pro-death penalty “clemency secretary”-- none other than Edwin Meese, 3rd (Turner, 1966, p.7). On the campaign trail, Kirk shook hands with death row inmates, while telling them that he would see to their executions, if elected (Waldron, 1967, p.37).

The First Round: Discrimination and the Death Penalty

Despite setbacks in Florida and California, the LDF and ACLU could not have picked a more auspicious time to have entered the debate over capital punishment: in no time before had the political environment been more favorable to the abolitionist view. The question, of course, was

⁷⁷Specifically, new Policy #233 held that “Capital punishment is so inconsistent with the underlying values of our democratic system...that the imposition of the death penalty for any crime is a denial of civil liberties. The Union believes that past decisions to the contrary are in error, and will seek the repeal of existing laws imposing the death penalty and reversal of convictions carrying a sentence of death” (ACLU, 1976, p. 200).

⁷⁸Governor Brown in California was an “outspoken foe of capital punishment” (Turner, 1966, p.7). Florida Governor Burns had refused to sign any death warrants until the question of capital punishment was resolved in Florida (*New York Times*, 5 April, 1967, p.35).

whether the legal environment would follow suit.

In recognition of this, ACLU and LDF records indicate that the two divvied up the primary lobbying arenas. The Union was to hit the state legislatures, a reasonable tack at the time since it lacked the resources necessary to undertake a major litigation effort: it was occupied with defending conscientious objectors to the Vietnam War. Conversely, given the LDF's tax-exempt status, it was unable to engage in legislative lobbying. And, even if it could, (unlike the ACLU) it lacked state affiliates or any grass-roots lobbying apparatus so crucial to successful legislative campaigns (see Schwed, 1983).

The LDF took the lead, as it would for the next decade, in developing and executing a litigation strategy (Neier, 1982). Overall, the plan of this campaign-- the "hows"-- are reasonably clear. The LDF (and the ACLU) had but one goal: to eradicate the death penalty. To accomplish that, organizational attorneys *initially* eschewed bombarding the courts with cases; this was not, after all, their usual *modus operandi*. What it did have to decide was what line of legal arguments it would employ. After all, by 1965 many alternatives existed: it could, for example, directly attack the constitutionality of capital punishment through *Trop's* "evolving standards of decency" approach. Alternatively, it could have mounted challenges to the procedures surrounding capital cases: death-qualified juries, unitary trials, the lack of sentencing standards, and so forth. Goldberg's dissent in *Rudolph*, an emerging body of scholarly literature, and the ALI's proposals made all these realistic possibilities.

In the end, though, LDF attorneys settled on the issue of the utmost concern to them and the one on which they had the greatest expertise: Southern racism in the capital sentencing of black men accused of raping white women. To defend such individuals, LDF attorneys felt they could revive the two arguments they would have made in *Hamilton* and that Heffron was developing in *Maxwell*. First, that death for rape constituted cruel and unusual punishment, that is was disproportionate to kill a man when he took no life. Second, that racially-biased jurors and judges in the South were far more likely to impose death on blacks than whites, that it constituted discrimination. Though this latter argument was "conspicuously" missing from the Goldberg

dissent-- with but one minor exception,⁷⁹ he was mute on the subject of race-- the LDF thought it a reasonable tack, particularly given the sensitive treatment the Warren Court had afforded blacks in other legal areas. After all, Rudolph was a black man accused of raping a white woman, a profile fitting 90 percent of those executed for rape since 1930 (Greenberg, 1977, p.431).⁸⁰

In essence, then, the “hows” had a good deal to do with the LDF’s past experiences in both the *Hamilton* and the still pending *Maxwell* case. Yet, by the same token, Heffron, Greenberg, and other group attorneys were not blind to the possible flaws in these arguments. While they believed that race discrimination was evident in capital sentencing, they also recognized that judges would not “buy” anecdotal evidence of the sort presented in *Maxwell* and in earlier litigation.⁸¹ What they needed was a full-blown, comprehensive statistical study definitively indicating the presence of race discrimination in sentencing, a study around which they could build legal arguments.

As virtually all accounts reveal, this research became a reality because of the “willingness of two men to join” hands with the LDF on the issue of capital punishment: Anthony Amsterdam and Marvin Wolfgang (see Meltsner, 1971,1973; Greenberg, 1976; Bedau, 1977). Amsterdam, a University of Pennsylvania Law Professor at the time, was not an unknown quantity to the LDF; he had served as a Fund “consultant” since ‘63, participating in several of its conferences; and, he had prepared materials on the First Amendment for its Civil Rights Law Institutes. LDF attorneys had been extremely impressed with him then, apparently with good reason. The son of a “well-to-do Philadelphia corporate lawyer,” he graduated *summa cum laude* from Haverford College. From there, he attended the University of Pennsylvania Law School, where he was editor in chief of the Law Review. He later served as a law clerk to Felix Frankfurter and as an Assistant U.S. Attorney

⁷⁹In a footnote discussing a previous Supreme Court case, Goldberg noted that the defendant was “indicted by a grand jury whose composition was determined by the drawing of lottery tickets whose colored differed with the race of the person named on the ticket.”

⁸⁰LDF attorneys recognized this omission, but according to one: “those who read [Goldberg’s] opinion carefully concluded that, if proved, racial discrimination was certainly as compelling a legal argument against capital punishment as could be found (Meltsner, 1974, p.4).

⁸¹ Paine (1962) reports that the LDF tried to use rather rudimentary statistics as early as 1950 in *Hampton v. Commonwealth*. In that case, it defended seven blacks accused of raping a white woman. One of the arguments it presented was that between 1900-1950, the state had executed 42 blacks and no whites.

“to learn something from the inside” before returning to Penn (see Mann, 1973).

Still more impressive than his credentials were his lawyering skills and work ethic. Over the years, stories of Amsterdam's legal expertise have taken on mythical proportions. In an article entitled “Anthony Amsterdam: Renaissance Man or Twentieth Century Computer,” the author reported this story.

Once, while prosecuting a case before the D.C. Circuit Court of Appeals in Washington, Amsterdam responded to a questions from the bench by citing a case, complete with the volume and page number of the law book in which it could be found.

The judge immediately called for the book, could not find the case in question, and informed the confident young attorney that his citation was incorrect. Amsterdam broke the hushed silence in the courtroom by quickly replying, ‘Your honor, your volume must be mis-bound.’ It was (Mann, 1973, p.34).

His drive too was the stuff of legends. He apparently required little sleep, existing mainly on coffee so strong as to be undrinkable for most. Meltsner even claimed that over the course of the 1965-1972 period Amsterdam devoted “no less than forty hours a week” representing the criminally accused.

Amsterdam’s earliest contribution, though, was not so much his legal expertise as it was his recruitment of Marvin Wolfgang into the LDF fold. As the Chair of the Department of Sociology at the University of Pennsylvania, Wolfgang was widely reputed as among the country’s leading scholars of of criminal justice systems.⁸² By 1965, when Amsterdam (on behalf of the LDF) contacted him, he already had conducted a major inquiry in to the death penalty (see Wolfgang et al., 1962).

In the Spring of 1965, Wolfgang and Amsterdam designed just the sort of study the LDF thought it required. The plan involved collecting data on rape cases occurring in 12 Southern states between 1945-1965. To mitigate some of the objections raised by the judge in the then-pending *Maxwell* case, race became just one of 29 variables the study would examine. Others included the offender’s characteristics (e.g., age, martial status, previous record), the victim’s characteristic’s

⁸²Wolfgang later served as the President of the American Academy of Political and Social Sciences and as Director of Research of the National Commission on the Causes and Prevention of Violence.

(age, dependent children), circumstances of the offense, and so forth (see Wolfgang and Reidel, 1973).

To implement this plan, Wolfgang first drew a sample of counties within these states, one meant to reflect a variety of demographic factors. Then, Amsterdam and Greenberg recruited volunteers (all third-year law students) from the Law Students Civil Rights Research Council to collect the necessary data. After a training session in June 1965, the students went to assigned areas and filled out 28-page “questionnaires” on the rape cases, gathering their information from trial transcripts, prison records, and so forth (U.S. Congress, 1972).

When the student-collected data began to pour in, Wolfgang started to code and analyze it in the fall of 1965. In the meantime, LDF attorneys sought to postponements in as many rape trials as possible, hoping that they could incorporate the results into their briefs and arguments. As it turned out, the awaiting paid off: the results of Wolfgang’s study seemed to confirm the suspicion of LDF lawyers, that racially-based sentencing was rampant in southern rape cases.

In Table 1-3 we reprint the key results of Wolfgang’s study, which indicate the existence a strong relationship between race and death. This association, as the table shows, remains even after he introduced controls for a range of relevant characteristics.

(Table 1-3 about here)

By contemporary standards, Wolfgang’s design and analysis is rather simplistic: his use of the Chi-Square (χ^2) statistic cannot show causality between race and sentencing;⁸³ his conceptualization of discrimination as a “function of societal or institutional forces,” rather than as an inherently individualistic product, may also confound problems of interpretation (Gibson, 1978).⁸⁴ Nonetheless, Wolfgang’s conclusion was clear: that “Negro defendants convicted of rape

⁸³ χ^2 is a simple measure of association, which is based on a calculation of observed versus expected values. A more sophisticated technique, some form of multivariate analysis such as Probit, might have been able to demonstrate the extent to which race and all other variables actually contribute to the sentencing decision. Apparently, these techniques were unavailable at the time Wolfgang conducted his analysis.

In recognition of this problem, Wolfgang and Reidel (1976) later reanalyzed the data, using a step-wise discriminate function approach, a better, albeit less-than-ideal tool. They once again found race to be the only statistically significant variable.

⁸⁴As Gibson (1978) suggests, Wolfgang and others probably should have used individual decisions as their units of analysis, instead of courts, because it is possible that some judges may have been more or less likely to

Table 1-3
Results of the Wolfgang Study*

Race of Defendant by Type of Sentence^a

	Death		Other		Total	
	N=	%	N=	%	N=	%
Black	110	13	713	87	823	100
White	9	2	433	98	442	100
Total	119		1146		1265	

^aStates included are Florida, Georgia, Louisiana, South Carolina, and Tennessee.
 $\chi^2 = 41.9924$. $p < .001$.

Racial Combinations of Defendant and Victim by Type of Sentence^b

	Death		Other		Total	
	N=	%	N=	%	N=	%
Black Defendant and White Victim	113	36	204	64	317	100
All Other Racial Combinations	19	2	902	98	921	100
Total	132		1106		1238	

^bStates included are Arkansas, Florida, Georgia, Louisiana, South Carolina, and Tennessee.
 $\chi^2 = 275.7192$. $p < .001$.

*Source: Wolfgang and Reidel (1973).

of white victims were...disproportionately frequently sentenced to death...In less than one time in a thousand could these associations have occurred by the operation of chance factors alone” (U.S. Congress, 1972).

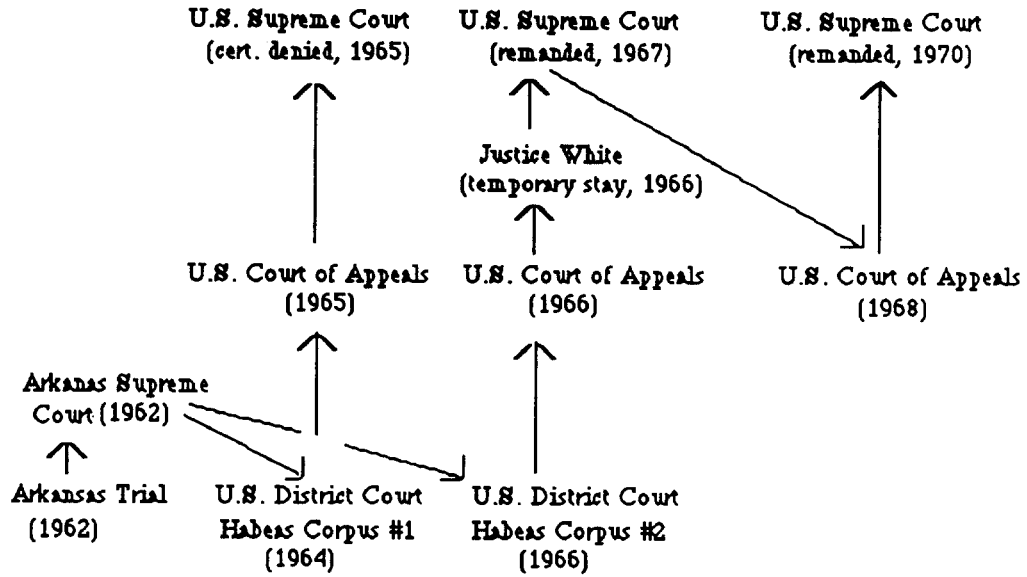
With these results in hand, the LDF thought it had the ammunition it needed to launch a full-blown litigation campaign. It could now begin to incorporate the Wolfgang data into its arguments, beginning with the still-pending *Maxwell* case. By this time, as we illustrate in Figure 1-4, *Maxwell* had worked its way up the federal ladder once, with the U.S. Supreme Court denying *certiorari* in 1965. Shortly thereafter, the state scheduled Maxwell’s execution date for 6 September 1966.

(Figure 1-4 about here)

That was sufficient to swing LDF attorneys into action: on 27 April 1966, they publicly announced the results of the Wolfgang study (Johnson, 1966, p.66); two months later, they filed a second habeas corpus petition, incorporating “every legal argument” they could find, including those raised by the ALI proposal of standardless jury sentencing and unitary trials. The brief, however, placed special and primary emphasis on race discrimination. Indeed, at the new proceeding, which began in August of 1966, Wolfgang served as their chief and star expert witness, explaining the design and results of his study. The state’s attorneys, “rather cavalierly,” did not challenge the “soundness of the data or analysis” (Loh, 1984).

But that failed to prevent U.S. District Court (Chief) Judge Henley from ruling against the LDF. Not only did he question specific aspects of the study (e.g., missing or unknown variables, sample size), but he took issue with this sort of analysis more generally. As he wrote: “Statistics are elusive things at best and it is a truism that almost anything can be proven by them” (1966). In short, this newly-fashioned, sophisticated study fared no better than did Heffron’s simplistic non-random sample of court clerks conducted for the first habeas corpus proceeding: neither district court judges, nor for that matter Arkansas triers, “bought” the statistical evidence.

Figure 1-4
Litigation History of *Maxwell v. Bishop*, 1962-1970



This rejection did not deter LDF lawyers from appealing to the U.S. Court of Appeals for the Eighth Circuit; after all they had lost many cases at trial only to win, and win big, in federal appellate courts. But, such was not to be the fate of *Maxwell*, as the 8th Circuit refused to stay his execution. The LDF, then, tried to convince Justice Byron White, who was in charge of the Circuit, to grant one. He did so, ordering postponement of the execution until all the Justices could hear oral arguments. This small victory, however, was short lived as the full Court remanded the case back to the 8th Circuit (see Figure 1-4), where it would sit for more than a year.⁸⁵

A Broader Plan of Attack

In 1967, as a result of the Supreme Court's inaction in *Maxwell*, LDF attorneys began to reconsider their emphasis on sentencing disparities in southern inter-racial rape cases. Surely, they were committed to seeing through *Maxwell* and others in which they had raised similar claims.⁸⁶ Yet, they could not help but face up to a number of lessons emerging from that litigation. First, and foremost, was that statistical demonstrations of race discrimination were having virtually no impact on judges; the group had gone to considerable expense and time with the Wolfgang study only to have its results dismissed by every court which had reviewed them. As Greenberg would later note (Civil Liberties Review, 1975, p.118), the studies "were unsuccessful in the sense that the courts didn't accept their validity...[that is] the nature of statistics..."⁸⁷

Why statistical arguments failed to make any impression is something of a mystery, one considerably darkened by the fact that they had been successfully used in other areas of the law before and since *Maxwell*. Six decades ago, Louis Brandeis incorporated statistics into his legal arguments in the *Muller v. Oregon* (1908); in fact, his 118-page brief contained but two pages of legal argument. This was sufficient to convince a rather conservative Court to ignore precedent and uphold maximum hour work laws. So too around the time of *Maxwell* courts were beginning to

⁸⁵For details on how and why this came about, see Meltsner, 1973.

⁸⁶As Greenberg noted (1976, p.442), the LDF introduced the results of the Wolfgang study into other like cases "without success." For a listing of these, see the LDF's brief in *Mathis v. New Jersey* (1971).

⁸⁷He went on to say, however, that he thought the Wolfgang studies "were successful in the sense that you had to concede that they were right and persuasive and informed the courts as to the role that racial discrimination played in the administration of capital punishment" (Civil Liberties Review, 1975, p.118).

contemplate the use of statistics in racially-based statutory employment litigation as a method of demonstrating a *prima facie* case of discrimination. This was an important advancement because it would shift the burden of proof to employers to provide a “legitimate” reason for their actions.⁸⁸

So why did statistical demonstrations of race discrimination in the capital sentencing of rapists fail so miserably? In the *Judicial Process and Social Change*, Greenberg offers a number of explanations, all of which seem reasonable. For one, he suggests that if courts accepted the LDF’s findings, “it might condemn [other] judges for having contended racially discriminatory sentences.” Second, it might cause the outcome of cases to turn “on the side which could marshal the most persuasive and perhaps expensive statisticians,” which in turn could lead to conflicts in parts of the country “where experts might not be readily available.” Finally, “it might open other parts of the criminal process with disparate racial [treatment] to similar attacks...”⁸⁹ In short, by 1967, LDF attorneys universally concluded that they “could never win unless the fact that a high proportion of blacks were subject to execution emerged as but one distasteful aspect of a far greater evil” (Time, 1973, p.94).

Another issue raised by *Maxwell* was one the LDF (and most other public interest law firms, for that matter) had debated repeatedly: to whom or to what does the organization owe its allegiance-- the cause or the client? In some areas of the law the answer was obviously “the cause;” for example, it was often true in abortion litigation that the mother already had the procedure or gave birth to the child well before the case reached the Supreme Court. Thus, concerns about the client per se were negligible compared with the greater goal.

Death penalty cases were far more complex. As the LDF recognized, by building legal arguments solely around race discrimination in southern rape cases, they necessarily excluded others that might have been more beneficial to their client. Again, in some legal areas, this would

⁸⁸The Supreme Court condoned this practice in *Griggs v. Duke Power* (1971).

⁸⁹We find this last assertion particularly persuasive, but not exclusively as it might apply to racial disparities. Consider a basic speeding violation: in our system of justice, it is entirely possible for two drivers stopped for going 70 in a 55 mile-per-hour zone, say, to receive fines varying as much as \$100. Though the difference between speeding violations and capital offenses is vast, from a judge’s standpoint it is reasonable to argue that they are not, that discrimination exists in all aspects of sentencing, with no possible alternatives in sight.

not necessarily provide cause for concern, but in capital punishment litigation a person's life was at stake. And, in fact, while the LDF poured its energies into racially-based rape cases, three men were executed in the United States. As Greenberg noted (1976, p.59), "we could not have in good conscience attacked capital punishment for rape on ground of race discrimination, without raising [one] which also might strike down the conviction or sentence" of other death row inmates. Another LDF attorney also suggested that its "legal arguments" were beginning to create "a lifeboat for these people. Everybody was in the lifeboat, so LDF had an obligation to help them all," not just southern rapists (Muller, 1985).

These concerns led the LDF's "war council of capital case lawyers" (e.g. Greenberg, Amsterdam, Meltsner) decided to change their strategy drastically in 1967. Rather than exclusively defend southern black rapists on racial discrimination grounds, they would now provide counsel to *all* death-row inmates and raise the spectrum of legal arguments: standardless juries, unitary proceedings, and death-qualified juries. Just about the only claims they would avoid were those resting on the cruel and unusual provision of the Eighth Amendment; LDF attorneys still perceived this as a most risky line of attack (Meltsner, 1973).

Why LDF attorneys made the consequential decision was not solely a response to the unsuccessful *Maxwell* litigation. Indeed, it was also based on a careful consideration of the political environment. Though they thought it conducive to a death penalty campaign, they knew that the issue lacked momentum; it was just one of many social problems with which the country was grappling in the 1960s. As such, it needed "a symbol, a threat of crisis." Defending all inmates, they reasoned, would provide that "crisis" by creating a log jam on death row. The logic was simple: if the LDF could provide legal assistance to all prisoners sentenced to death, their cases would be tied up in courts for years, and, as a result, no executions would occur. Then, as Meltsner (1973, p.106) explains, "for each year the United States went without executions the more hollow would ring claims that the American people could not do without them; the longer death-row inmates waited, the greater their numbers, the more difficult it would be for courts to permit the first execution" (Meltsner, 1973, p.106). This strategy, later called "moratorium," was

out and out psychological warfare. If the LDF could cause a pile-up on death row, it was betting that no governor, judge, or court would want responsibility for executing hundreds of people with a single decisions.

This is not to suggest that executions back then were a common occurrence; quite the contrary, as Bedau claims, the LDF's call for moratorium was "superimposed upon a trend that was already underway..." (1982, p.26). Undoubtedly, as Table 1-4 illustrates, this was the case: by the mid-1960s, executions had virtually ground to a halt. Still, given that states were sentencing an ever-increasing number of defendants to death, moratorium was an important, if symbolic, political statement.

(Table 1-4 about here)

Moratorium in Action⁹⁰

Once the LDF made this decision, the question became one of implementation: to carry out the proposed moratorium, the organization needed funding, attorneys, a coordinating unit, and so forth. Defending every death row inmate-- that is, involvement in hundreds of cases across the United States-- was an undertaking of massive proportions.

Luck and careful planning fortuitously combined in 1967 to make moratorium a reality. The funding came through when the Ford Foundation, a regular patron of public interest law, gave the LDF \$1 million to create a National Office for the Rights of Indigents (NORI). Ford thought the LDF would spend this money on providing legal care for the poor (and, thus "probably did not have capital punishment in mind..."); nevertheless, Greenberg approved its use for the death campaign. The LDF also hired Jack Himmelstein, a 26 year-old Harvard Law graduate, to serve as managing attorney for the drive. While his responsibilities included coordinating the effort, Amsterdam would remain as the key litigating force.

One of the first steps Himmelstein and Amsterdam took was to put together what LDF lawyers would later call a "Last Aid Kit," a package of materials (drafts of habeas corpus petitions,

⁹⁰Unless otherwise indicated, this section draws heavily from Meltsner, 1973.

Table 1-4
Status of Death-Row Inmates, 1961-1971*

Year	N of Prisoners Sentenced to Death	Executions
1961	219	42
1962	266	47
1963	268	21
1964	298	15
1965	332	7
1966	351	1
1967	415	2
1968	434	0
1969	479	0
1970	525	0
1971	620	0

*Source: *Furman* (1972).

applications for *in forma pauperis* motions and stays of executions, and papers for appeal) that would assist LDF-cooperating attorneys in defending death row inmates (Greenberg, 1977, p.444). Once they assembled these materials they wrote to sympathetic lawyers, scholars, and other groups to enlist their services for the campaign.

By the Spring of 1967 moratorium was slowly coming together; over 50 inmates had LDF-supported counsel. As impressive as this was, LDF attorneys surely foresaw problems. Would it ever be possible to provide legal representation to all death row prisoners? Should the organizations sacrifice control over the suits-- the detailed planning and timing of every case-- for the sake of coverage-- providing or finding attorneys for every inmate? Fortunately for the group, these questions became largely moot because of the "whim" of an ACLU attorney.

Up to this point, the Union had not been overwhelmingly successful on the legislative front.⁹¹ While its annual reports claimed that its affiliates were "actively lobbying state legislators" and "testifying against the death penalty" (ACLU, 1965-67, p.45), some suggest that the Union's concerns laid elsewhere (e.g., with civil liberties issues arising from the Viet Nam War effort), and thus, it was not pursuing this avenue with any real vigor.⁹² Aryeh Neier, executive director of the New York Civil Liberties Union during this period, said this of those early years:

If the ACLU...which possessed the nationwide structure to undertake a lobbying campaign, had taken the lead in 1965 in efforts to oppose capital punishment, the campaign might well have been as heavily legislative as litigative. And, if resources comparable to those the LDF invested in litigation had been made available for a state legislative campaign, a good many states might have been persuaded to repeal their death sentence laws (p.198).

What the ACLU failed to contribute by way of legislative actions, the head of its Florida affiliate, Tobias Simon, more than made up for in litigation strategy. Recall that Florida, which had one of the largest death row populations in the United States, in 1965 elected a governor bent on

⁹¹After 1965, only two states abolished-- New York and New Mexico (see Table 1-1). Neier (1982, p.198) noted that this occurred despite the lack of a national effort.

⁹²This view receives some measure of support, albeit an indirect one, from Walker's (1990) history of the ACLU. In what is arguably the most complete account of the Union's litigation to date, Walker mentions capital punishment only in passing (e.g., the ACLU's involvement in the Gilmore case, p.359). During the period from 1964-1974, he depicts an organization for more immersed in civil liberties issues arising out of the Civil Rights Movement, the Viet Nam War, and Watergate,

ingenuity paid off: based on the evidence they presented, McRae certified the class. With this decision, a moratorium, however temporary, was achieved in Florida.

In the meantime, trouble was brewing for abolitionist attorneys in California, another state with a huge death row population. While Simon and LDF attorneys were working on the Florida suit, Governor Reagan was preparing to make good on his campaign promise to revive capital punishment in that state.⁹⁴ The first in line for execution, convicted police-killer Aaron Mitchell, was scheduled to die on 13 April 1967; eleven more would be executed that summer (Greenberg, 1976).

As the Mitchell execution drew closer, ACLU attorney (with the Northern California affiliate) Paul Halvonik unwittingly came up with the same plan as his Florida counterpart: a class action habeas corpus petition on behalf of all California inmates. He took the idea to the chief counsel of the Northern California branch, but before they “could agree how to proceed,” Halvonik read about the Florida case, on which he remarked, “Imagine some hotshot lawyer has come up with my idea” (Meltsner, 1973, p.137).⁹⁵

Halvonik and other attorneys were ready to conduct the class action, but their efforts came too late to save Aaron Mitchell. Just one day before the Florida judge granted a temporary stay, the state executed him.⁹⁶

Usage of the death penalty in California turned the heads of LDF attorneys to the West. Right after the Mitchell execution, they called for a meeting in California to discuss options and alternatives. In attendance were Halvonik and others who had expressed interest in class action litigation. Not surprisingly, that was the strategy they selected.⁹⁷

⁹⁴ Due to Governor Brown’s reluctance to sign death warrants, it had been more than four years since California executed a prisoner. When he left office, a “backlog” of some 70 prisoners awaited their sentences (Greenberg, 1977, p.445).

⁹⁵ It may seem impossible that he did not know of Simon’s Florida effort; after all, they both worked for the same organization. But, this was not the first time that the right hand didn’t know what the left one was doing, so to speak. See O’Connor, 1980 for other examples.

⁹⁶ In 1967, a clemency hearing was held for Mitchell. Reagan, who could have spared him, refused to participate because he was “not an attorney;” he attended the Academy Awards instead (Bedau, 1987, p.150).

⁹⁷ This account is from Meltsner, 1973. Schwed (1983) paints something of a different picture. He suggests that the LDF devised the California suit and “was rebuffed” when it requested that the Northern California branch join as a co-sponsor (113-114). The case, in the end, though was a collaborative suit.

Though the attorneys modelled their effort (*Hill v. Nelson*) after the Florida case, it did not go as smoothly. A federal district court judge in San Francisco entered a temporary stay on 5 July 1967, but the Reagan administration went on the offensive, with the state Attorney General asking a circuit court to set aside the stay. Amsterdam and Halvonik responded with a 72-page brief in support of the district court judge's opinion, which convinced the upper court to turn down the Attorney General.

That effort was *almost* in vain: the district court refused to certify the class. What it did do, however, was nearly as good: it gave attorneys access to inmates and promised to provide them with notification of scheduled executions so that they could file habeas corpus petitions, albeit individual ones, immediately. Shortly thereafter, abolitionist attorneys did just that, filing petitions in the California Supreme Court on behalf of convicted felons Robert Anderson and Frederick Saterfield. In November of 1967, that Court stayed all executions until it could hear arguments on capital punishment. Though it later ruled against the LDF/ACLU position, it ordered new trial for both defendants.⁹⁸

As word of the class action strategy spread, attorneys innundated the LDF with requests to file multiparty suits in their respective states. For various reasons, however, Greenberg and Amsterdam "worked hard to discourage" their use elsewhere. Consider part of a letter Greenberg wrote to Melvin Wulf, an ACLU attorney, on 21 July 1967: "avoid, if possible, setting up the Florida and California victories, as tenuous as they are, as targets to shoot down. It may be premature...to do anything in other jurisdictions before the California and Florida cases jell" (quoted in Schwed, 1983, p.119). Or Amsterdam's 1967 letter to a Louisiana attorney in which he wrote that "the legal problems [with multi-party habeas petitions]...are staggering...take it from me. I have spend the past couple of months on virtually nothing else." He added that "some third lawsuit' might create a 'backwash,' particularly if it was heard by "some unsympathetic district court judge." Amsterdam concluded by noting: "death cases are not occasions for venturesomeness

⁹⁸This was not a particularly auspicious time to argue against the death penalty in California. Virtually every account of these proceedings centered around their potential effect on Sirhan-Sirhan, assassin of Robert Kennedy.

resorting capital punishment. When this threat became a reality,⁹³ Simon was up in arms at the “prospect of keeping tabs” on every death row inmate’s status, more than 50 in Florida-- as many as the LDF had taken on throughout the country. The small LDF staff, with which Simon was cooperating, also came to the conclusion that obtaining stays of execution for all was simply “unworkable” (Schwed, 1983, p.111). In desperation, Simon devised a “novel” plan: why not file a multi-party (i.e., class action) habeas corpus petition on behalf of all state death row inmates? After all, he reasoned, if Florida’s capital law denied constitutional rights to one prisoner, why did it not deny them to all, equally?

One of Simon’s ACLU associates apparently contacted the LDF to discuss this approach. The staff there was skeptical, with good reason-- a class action suit never had been successfully invoked in a criminal case-- and it had been rejected on several grounds. For starters, many thought class actions were applicable only in civil litigation in which uniform questions and facts were not uncommon (e.g., pregnant women in abortion litigation), whereas in criminal cases “variations in relevant facts” almost always emerge. Concomitantly, some authorities argued that writs of habeas corpus “must be individual because commitment to prison operates on each prisoner,” that the writ is “too personal” for group use (Harvard Law Review, 1968, pp.1489-98). In short, LDF staffers did not believe Simon would be able to get all Florida prisoners certified as one class.

Undeterred, Simon filed his petition (*Adderly v. Florida*) and on 13 April 1967 U.S. District Court Judge McRae issued a temporary stay of all executions while he contemplated the writ. Several months later, he requested a “full factual inquiry” before he would certify the class.

At this point, LDF and ACLU attorneys swung into action. Amsterdam, Greenberg, and Simon went to Harvard Law School to discuss the matter with an expert on class action suits. Following his advice, they proceeded to interview virtually all Florida death row prisoners to provide factual evidence of the existence of a common class. Their hard work and Simon’s

⁹³On 3 April 1967, Kirk ordered final clemency hearings “as a prelude to the resumption of capital punishment in Florida” (Waldron, 1967, p.37).

in litigation...” (Meltsner, 1973, pp.134-135).

Over the course of the entire death penalty campaign, this was a key decision, but was it the right one? Naturally, it is easier to second guess a litigation strategy with the benefit of a twenty-year perspective, than it is to formulate one in the midst of the campaign. Perhaps as the *Harvard Law Review* concluded that “It should be possible to structure the group and formulate the corresponding issues in a manner suitable to multiparty adjudication” (1968, p.1510). Perhaps not. In any event, the LDF successfully convinced attorneys elsewhere to forego the class action in favor of individual defense.

The victory in Florida (which temporarily stayed the executions of 54 inmates) and the de facto win in California (84 prisoners on death row) gave the LDF/ACLU “consortium” some much needed breathing room in 1967 to plot their next course of action. One of the steps they took was to plan a National Conference on the Death Penalty, inviting abolitionist lawyers and scholars to attend. This was a most necessary tack, at this point; since they were simultaneously discouraging class actions and encouraging pile ups and moratorium, it was inevitable that the LDF was “forced to delegate responsibility whenever possible.”

In terms of the ideal litigation campaign, such “delegation” is never a desirable thing. It is, of course, best for the lead organization-- in this instance, the LDF-- to retain control over all cases. Because this was just unfeasible in the death campaign, the organization thought a conference would be helpful. There, it could outline legal strategies so to “restrain uninformed or careless attorneys from going into court to save a client with ill-conceived frontal attacks on the constitutionality of the death penalty...” (Schwed, 1983, p.112). It also thought a conference would give the movement “a cohesion that it had lacked” (Meltsner, 1973, p.114). An admirable goal, at this point: Despite the LDF’s national leadership, many attorneys surely felt isolated, working alone in their states, without resources or support, to obtain stays of executions.

The Supreme Court and Moratorium

The LDF’s days of basking in the glory of the Florida and California cases and its “breathing room” were cut quite short. The U.S. Supreme Court announced its intention to hear

arguments (in December 1967) on two death penalty-related cases: *U.S. v. Jackson* and *Witherspoon v. Illinois*. At issue in *Jackson* was the 1934 “Linbergh Law” enacted by Congress to deter the rash of kidnappings, symbolized by the Law’s namesake, occurring back then. Under its provisions, individuals who pled guilty to a kidnapping charge *or* elected to have their case heard by a judge could receive life imprisonment as a maximum sentence. If they pled innocent *or* wanted their case heard by a jury, capital punishment could be imposed. Since the defendant, Charles Jackson, asserted his innocence against the charge of kidnapping of a truck driver, he was subject to a death sentence, which he did receive. His court-appointed attorney argued that the law amounted to coercion and deprived Jackson of his right to a jury trial under the Sixth Amendment.

Witherspoon was in many ways the more interesting and potentially important of the pair. It involved the constitutionality of death qualified juries, the subject of Oberer’s article (1961) six years before. An Illinois law, like many others, permitted prosecutors to remove for cause venirepersons who opposed or had any qualms or scruples against the death penalty (see Burt, 1987, p.1746). The resulting jury is death-qualified in the sense that it “consists of jurors who survive elimination based on their attitudes toward capital punishment” (Loh, 1984, p.271).

It was this sort of jury that tried William Witherspoon, accused of murdering a police officer. Before *voir dire* commenced, the judge commented “Let’s get these conscientious objectors out of the way without wasting any time on them.” The prosecutor proceeded to do just that, eliminating almost half the venire, only five of whom said they were unequivocally opposed to capital punishment (*Witherspoon*, 1968, p.514). The resulting jury convicted Witherspoon, putting him on death row where he sat for eight years and through fifteen postponed executions, while his attorney Albert Jenner carried his appeal to the U.S. Supreme Court.

In his briefs and at orals, Jenner made a claim, which could be rephrased into the following syllogism:

The Sixth Amendment right to an impartial jury means an unbiased jury; a death-qualified jury is biased because it is *more likely to convict*; therefore, death qualification violates the Sixth Amendment Right (Loh, 1984, p.214, emphasis added).

What this amounts to is a “prosecution-proneness” plea: that a death-qualified jury is slanted

toward the state's position, both in verdict and sentencing. In his petition for *certiorari*, Jenner reinforced this claim with two unpublished studies, examining "the attitudes of college students, rather than potential jurors..." (Meltsner, 1973, p.120). In his primary brief, he added a third, which was based on interviews with 1,248 jurors (see *Witherspoon*, 1968).

Though neither *Jackson* nor *Witherspoon* were LDF cases, the organization's counsel viewed them with something more than a passing interest. Since virtually every death-row inmate had been sentenced by a death-qualified jury, they saw *Witherspoon*, in particular, as raising a highly significant issue.⁹⁹ Indeed, if the U.S. Supreme Court would see its way to striking these laws, then the LDF reasoned that massive resentencing would necessarily follow.

LDF attorneys also were convinced that the generally liberal Warren Court might be prepared to take this step. The problem, in their view, was Jenner's prosecution-proneness argument. While they did not think it particularly bad, they did believe it rested on pretty shaky ground. Would the Court adopt a position that was reinforced by two "tentative" and unpublished studies?

That the LDF even raised this issue is somewhat ironic. After all, this was the same organization which introduced the results of a similarly "shaky" study-- Kenneth Clark's "Doll Test"--¹⁰⁰ in *Brown v. Board of Education* (Loh, 1984, p.215). Why it had qualms about the prosecution-proneness research is hard to tell. But it did; so much so that Amsterdam "rushed into" Court with a 94-page *amicus curiae* brief, supporting *Witherspoon*'s position, but on different grounds-- a concurrence of sorts.

In part, Amsterdam asked the Court to avoid ruling on the prosecution-proneness argument (or, at maximum, to remand it back to the lower court) because it had yet to be factually developed in published, systematic research.¹⁰¹ He explained to the Justices that the LDF had "arranged to

⁹⁹To wit, the LDF filed a brief in *Witherspoon*, but not in *Jackson*.

¹⁰⁰This involved asking white and black elementary school children to discuss their views about the races, using dolls as surrogates (see Kluger, 1976).

¹⁰¹Meltsner wrote (1973, p.122) that "several of Jenner's younger associates were furious and dashed off angry letters after they read the Fund's brief..."

have Louis Harris and Associates...to conduct” a full-blown study, which would determine whether in fact it was a valid argument;¹⁰² and, he further implied the Court should “wait” for these results (Brief for the LDF and NORI,¹⁰³ no.1015, p.56).¹⁰⁴ In the meantime, Amsterdam suggested that the Justices could strike death-qualified juries, replacing Jenner’s argument with this one:

The Sixth Amendment right to an impartial jury requires that jurors represent cross-sections of the population with respect to death penalty attitudes; a death-qualified jury *does not represent cross sections because of the exclusion of those opposed to the death penalty*; therefore the death qualified jury violated the Sixth Amendment (Loh, 1984, p.215).

Amsterdam supported this with Harris and Gallop poll data indicating quite clearly that half the public had some doubts about capital punishment.

After orals in *Jackson* and *Witherspoon*, LDF attorneys continued their defense of death-row inmates while awaiting the results of the cases. They did not have to exercise any patience with *Jackson*. On 8 April 1968, the Court announced its decision, striking down the death penalty portion of the Linbergh law. In an opinion written by Justice Stewart for six members, the Court adopted fully Jackson’s argument that the jury/judge and guilty/non guilty dichotomies were coercive (violative of Fifth Amendment guarantees against self incrimination) and served to deprive defendants of their Sixth Amendment right to a jury trial. Justices White and Black wrote a short dissenting opinion, suggesting that while Jackson’s rights had been violated, the Court “needlessly” eradicated a statute, which was constitutionally valid if correctly interpreted.¹⁰⁵

The actual impact of *Jackson* seemed, at the time, quite negligible;¹⁰⁶ that is, the extent to

¹⁰²This study was conducted and issued by Lou Harris & Associates in 1971 (Study No, 2016). It, along with several others (e.g., Goldberg, 1970; Jurow, 1971; Cowan, et al., 1984) confirming the prosecution-proneness proposition were introduced in *Lockhart v. McCree* (1986). The Supreme Court rejected it, once again, because they did not provide “substantial support” for the proposition (see Table 1-16).

¹⁰³This was the unit funded by the Ford Foundation.

¹⁰⁴Amsterdam did say that he believed the LDF-commissioned research “will demonstrate for the first time in a scientific fashion what many have long believed and asserted: that the practice of death-qualification by exclusion of scrupled veniremen seriously distorts the representative composition of the jury and affects its fairness and fact-determining role” (Brief for the NAACP LDF and NORI, No.1015, p.68)

¹⁰⁵Justice Marshall did not participate in this case.

¹⁰⁶As we discuss, the New Jersey Supreme Court used *Jackson* to find that state’s death penalty provision unconstitutional.

which it would help those sitting on death row was minimal. Yet, from the LDF/ACLU perspective it was a clear win. It showed that the Court “was insisting on a very high standard of procedural fairness for capital trials”-- so much so as perhaps to make administration of the death penalty impractical (Meltzer, 1971, p.5). It also demonstrated an acknowledgment on the Court’s part that “death was a quantifiably different penalty than any form of imprisonment” (Schwed, 1983, p.121). Perhaps most important of all was that the Court ruled in favor of the abolitionist position, a victory per se as it kept alive the moratorium.

With *Jackson* in hand, a confident group of 100-plus abolitionists attended the LDF’s National Conference in May of 1968. In their addresses to the convenees, LDF attorneys continued to stress some basic aspects of their game plan. They stated in no uncertain terms that lawyers should avoid Eighth Amendment arguments, that approach was still too risky with precedent, history, and even the Constitution militating its success. Rather, they thought, as they had for more than year, the Court might be “receptive” to arguments constructed around the due process clause (e.g., death-qualified juries, single-verdict trials, and standardless sentencing) and even Fourteenth Amendment Equal Protection arguments (Schwed, 1983, pp.114-115). Indeed, though the LDF had almost no hope for success with discrimination claims, it continued to stress the inequity in capital sentencing, a fact on which the press actively reported (see *New York Times*, 4 May 1968, p.23). LDF staffers also emphasized that they would exclusively use litigation to achieve abolition, further reinforcing the ACLU’s role as the legislative lobbying agent on this issue (Schwed, 1983, p.113).

The confidence of abolitionist attorneys attending the conference received another boost just one month later. On 3 June 1968, the Warren Court handed them their biggest victory to date. In a 6-3 decision, the Court ruled that Illinois’ death-qualified jury procedure violated Witherspoon’s rights. Writing for the majority, Justice Stewart declared that the “state crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the state produced a jury uncommonly willing to condemn a man to die.”

The majority decision, which one observer called “vintage Warren Court” (Burt, 1987,

p.1749) adopted the LDF's rationale, while dismissing the prosecution-proneness argument, saying that it could only "speculate" on the "validity" of its generalizations because the evidence was too "tentative" and fragmentary" (1968, p.517). Whether it would have done so had the LDF not called attention to this is questionable; it is true, though, that Justice Stewart specifically pointed out that the LDF had raised this point.¹⁰⁷ In the end, though, it mattered not as Illinois had "stacked the deck against the petitioner."¹⁰⁸

Undoubtedly, LDF attorneys viewed *Witherspoon* as their biggest victory to date; they assumed that it would lead to the resentencing of virtually every death-row inmate and thus, a *de facto* abolition of capital punishment. As it turned out, state courts and legislatures found ways of "circumventing the Court's decision."¹⁰⁹ Still, *Witherspoon* demonstrated a continued sensitivity on the part of the Warren Court to their cause .

As luck and planning would have it, what was left of 1968 after *Witherspoon*, generally boded well for abolition. One month after the case, Attorney General Ramsey Clark, on behalf of the Johnson administration, formally asked Congress to abolish capital punishment for all federal crimes. Though he had previously expressed his disdain for capital punishment, this was the first time that the executive branch called for the abolition of the some fourteen federal crimes carrying penalties of death.¹¹⁰ Clark provided the Senate Judiciary Committee, before which he was testifying, with several explanations for the administration's request: A United Nations study indicating that the death penalty lacked deterrent value; examinations demonstrating widespread race discrimination in sentencing; and, the world-wide trend toward abolition.¹¹¹ In his words,

¹⁰⁷Interestingly, though, Black criticized the majority for using those studies to justify its view: "I must confess that the two or three so-called 'studies' cited by the Court...are not persuasive to me" (1968, p.538).

¹⁰⁸Justices Black, Harlan, and White dissented. Black, who thought Stewart's opinion was "terrible" (Black, 1986, 3 June 1968 entry), wrote the Court's holding was "ambiguous," an unwarranted "psychological foray into the human mind," and a destruction of the "concept of an impartial jury" (1968, pp.538-539).

¹⁰⁹As Loh notes, there emerged a gap "between principle and practice" when it came to death-qualified juries. Some states passed laws requiring judges, not juries to resentence; some state courts continued to allow exclusion of jurors without any determination of their views on capital punishment. Still, Greenberg estimated that the decision led to the judges to vacate "several dozen to perhaps more than 100 sentences" (Greenberg, 1982, p.915).

¹¹⁰For a complete listing, see New York Times, 3 July 1968, p.1. The last federal execution occurred on 15 March 1963, when Victor H. Figure was put to death for kidnapping.

¹¹¹At that point, 73 countries and 13 U.S. states had abolished (Time, 1968, p. 17).

“when the state kills, the mandate ‘Thou shalt not kill’ loses the force of the absolute...state inflicted death chiefly serves to remind us how close we remain to the jungle.”

One account suggested that “the soft-spoken Clark had seldom been so eloquent or persuasive” (Newsweek, 1968, p.28).¹¹² Yet, his message went largely ignored: Congress was about to take its July 4 recess and nobody expected his “appeal to bring speedy action.” Symbolic or not, his words represented a milestone in executive action on abolition.

So too the LDF/ACLU moratorium strategy could not be going any better. As we can see in Table 1-4, 1968 was the first year in American history in which nary an execution occurred. An article in the *New York Times* on the last day of that year credited the phenomenon to the “national courtroom campaigns against the death penalty” waged by the LDF and ACLU. The article also contained several quotes from group directors Greenberg and Wulf, testifying to the success of moratorium. Greenberg called it the “de facto national abolition of the death penalty;” After explaining how difficult it was for the ACLU to achieve success in the legislatures, Wulf agreed: “you might say that capital punishment has been de facto abolished-- by court stays” (Graham, 31 December 1968).

Not only had moratorium worked in in the most literal sense--no one had been executed-- but it also was primed to have the subtle, psychological effects for which abolitionist attorneys had hoped. Prisoners on death row numbered over 400, prompting Greenberg to remark “The longer this de facto abolition lasts the tougher it is going to be to just open the gas chambers again some day and march a thousand guys in there” (Graham, 31 December 1968).

The other hope, recall, was to show Americans that they could live without capital punishment and, thus, change their views. This too was becoming a reality, with the public more than ever divided on the issue of death. As Figure 1-3 indicates, Gallop Polls taken in 1960 revealed that 68 percent of the public favored the death penalty for murder; by 1966, that figure fell to 42 percent, the first time since the advent of polling that more American were against capital

¹¹²Clark, personally, harbored real doubts about capital punishment. In his book (1970), he devoted a chapter to the death penalty, expanding on some of the themes he presented to Congress (see pp,331-333, in particular).

punishment than were for its usage.¹¹³

For a shining moment, then, it looked as if abolition would become a reality. But like many shining moments, this one was quite brief. Indeed, despite all the victories abolitionists had won, in retrospect the year was probably a political turning point and one for the worse-- at least from the LDF/ACLU perspective.

The trouble started in the summer of 1968 with a series of political events, some anticipated, some not. On June 4, Sirhan-Sirhan assassinated presidential hopeful Robert Kennedy. From the abolitionist perspective, this presented two problems: In the short run, murders of visible figures always serve to ignite public views in favor of capital punishment; this was no exception. In the long run, it virtually eliminated whatever hopes the Democrats had for retaining the presidency.

Given the aims of the probable President-elect Richard Nixon, this was cause for some alarm on the part of the LDF. Though he did not speak directly to the issue of capital punishment during his campaign-- he would have a good deal to say of the subject while President-- his message to the American public was one of "restoring law and order." Nixon, along with the "silent majority" of Americans, thought the Viet Nam war protests, the Warren Court, and Attorney General Clark had all gone too far, that we had become a society run by criminals, who had the upper hand on the streets and in courts of law. Though it is easy to dismiss "law and order" as campaign rhetoric, it certainly touched the public. Not only did they "buy" it on a national level, but on a state one, as well. The message helped elect and reelect many pro-death penalty governors, including Ronald Reagan in California.

More trouble came from the federal judiciary. On 13 June 1968, Earl Warren submitted his resignation as Chief Justice; this did not particularly perturb civil libertarians as President Johnson quickly nominated the equally "sympathetic" Justice Fortas as Warren's replacement. But, in July

¹¹³Forty-seven percent said they were against it; 11 percent had no opinion. The year before, 45 percent said they were for it-- less than half of Americans polled. But only 43 percent were against it; the remaining 12 percent had no opinion.

of that year bad news did emerge from the Eighth Circuit: that court finally had resolved the *Maxwell* dispute, the first in which the LDF introduced the results of Wolfgang's study.

If LDF attorneys were harboring any doubts about their decision to expand the death penalty campaign to include all inmates, they vanished with this decision. Writing for the Circuit jurists, Judge Harry Blackmun completely dismissed the Wolfgang statistically-based argument.

As he stated:

We... reject the statistical argument in its attempted application to Maxwell's case. Whatever value that argument may have as an instrument of social concern, whatever suspicion it may arouse with respect to southern interracial rape trials as a group over a long period of time, and whatever it may disclose with respect to other localities, we feel the statistical argument does nothing to destroy the the integrity of Maxwell's trial. Although the investigation and study made by Professor Wolfgang...is interesting and provocative, we do not, on the basis of that study, upset Maxwell's conviction and, as a necessary consequence, cast serious doubt on every other rape conviction in state courts in Arkansas (1968, pp. 147-148).

With those words, Blackmun drove the final nail into the Wolfgang study's coffin; no court had (or would) ever accepted it as a foundation for legal arguments.

1969: A Transition

The inauguration of Richard Nixon in January of 1969 would prove to be a most ominous event for abolitionists. At the time, though, the damage seemed minimal: about the only major change ushered in by the new administration was a reversion to a pro-death penalty stance. Nixon himself refrained from commenting, but his new Attorney General, John Mitchell, emphatically proclaimed that he was "not opposed to capital punishment" (Graham, 1969, p.28).

From the LDF/ACLU perspective, though, its target of pressure activity-- the Court-- remained unscathed for the time being. Warren had resigned, but remained as Chief Justice. What's more, the six members of the *Jackson-Witherspoon* majorities (Schwartz, 1983, p.738) voted to hear oral arguments in two more death penalty cases: *Maxwell v. Bishop* and *Boykin v. Alabama*.

The LDF was delighted with the Court's selections. *Maxwell*, as we can see in Figure 1-4, had been up and down the legal system, culminating with Judge Blackmun's unfavorable opinion. Now the Supreme Court had agreed to review it (a good sign since the Court usually takes cases to

reverse), but on issues apart from race discrimination. It specifically asked attorneys to address two aspects of capital sentencing: standardless sentencing and unitary trials. Why it chose to confront these issues, and not the results of Wolfgang's study, puzzled some attorneys. Yet, the Court action did not trouble the LDF: all signs pointed to a favorable outcome. So too the effect of a positive ruling would be enormous: all but 5 of the 476 death row inmates could have their sentences vacated on the standards issue; 250-- on the single verdict question (Bigant, 1969, p.1).

Boykin was another winnable case, or so the LDF thought. An Alabama jury, with unbridled discretion (i.e., under no standards) sentenced the defendant to death for a robbery during which no murder occurred. Boykin's attorney raised two narrow points: the defendant was sentenced by a jury lacking any standards and he pled guilty to the offense unaware that his plea could subject him to execution (Greenberg, 1976, p.456). But, because this was a seemingly disproportionate punishment (even in the South more than 95 percent of those given death committed a murder or rape) he also made an Eighth Amendment argument: that death for robbery constituted cruel and unusual punishment.

Thus, *Boykin* constituted the first case challenging capital punishment under the Eighth Amendment, a line of argument the LDF had wanted to avoid. But, LDF counsel felt that this case was well-suited to such a claim and, in fact, viewed *Boykin* as a "golden opportunity to narrow the scope of the death penalty" (Meltsner, 1973, p.170).

As such, Amsterdam filed an *amicus curiae* brief, which adapted many of the points raised by Goldberg's dissent in *Rudolph*. Like the Justice, Amsterdam relied heavily on *Trop's* evolving standards approach, using public opinion polls and falling execution rates to show that there is a "distinction between what public conscience will allow the law to say and what it will allow the law to do-- between what public decency will permit a penal statute to threaten and what it will allow the law to carry out..." (Brief of the NAACP LDF and NORI, no.642, p.38).

All in all, it was a most confident Amsterdam that went before the U.S. Supreme Court on 4 March 1969, the day on which the Justices heard arguments both in *Boykin* and *Maxwell*. After four years and more than \$300,000 invested in the death penalty campaign, LDF attorneys

recognized that this moment presented a "critical plateau" (Zion, 1969, p.63). And, they were ready.

When Amsterdam stepped up to the podium to present the LDF's position in *Maxwell*, all seemed to proceed as planned. The Justices' questions were not unfamiliar or surprising; however, a point of some potential trouble was raised by a most unlikely source. In litigation of paramount importance, such as *Maxwell*, the Court sometimes allows, or even requests, third parties to present oral arguments as amici. Here they extended that opportunity to the state of California, whose attorney suggested that the Court remand the case on the basis of *Witherspoon* (*Maxwell* had been tried by a death-qualified jury) and avoid altogether the questions of jury standards and verdict procedures. Amsterdam was taken aback at this suggestion: the LDF's brief had not contemplated this tack since it wrote its petition for *certiorari*, on which its main arguments rested, two years prior to *Witherspoon* (Meltsner, 1973, p.163). To compound matters, Justice Stewart, a possible swing vote, "seized" upon this point, asking the California attorneys how the Court could adopt the *Witherspoon* rationale.

Fortunately for the LDF, not only had Amsterdam left some time for rebuttal, but he was exceedingly fast on his feet. He would have to be for at the very moment he knew he must deal with *Witherspoon* in such a way as to avoid damaging the LDF's arguments, while acting in the best interest of his client. This was a dilemma of some magnitude: the LDF wanted the case decided on the widest possible grounds; yet, the California attorney, however unwittingly, provided them with a way to save Maxwell's life. Once again, and in the middle of oral arguments before the Supreme Court no less, the LDF would have to confront that basic ethical issue: what happens when "obligations to individual clients clash with the interest of the whole class of condemned men" (Meltsner, 1973, p.166)?

How Amsterdam resolved it here was to "welcome" the Court to consider the *Witherspoon* claim, but to "emphasize" that an unconstitutional exclusion of jurors in *Maxwell's* case "did not justify the Court's avoidance of the standards and single verdict issues" (Meltsner, 1973, p.166). In short, he tried to protect both his client's and the LDF's broader interest simultaneously,

probably the best line of defense he could have taken.

After arguments, the LDF was less confident of complete victory, viewing the *Witherspoon* question as a tricky one. What it could not have known, however, was that at the Court's conference, just two days after orals, the Justices tentatively voted in favor of both LDF arguments-- that unitary trials and standardless sentencing were unconstitutional. What's more, the division was a wide 8-1, with only Justice Black siding with the state.¹¹⁴

Yet, the Justices expressed some disagreement over the issues and rationale. In a memo written after the first conference, Justice Douglas, in fact, labelled the "discussions of the case" as not "very cohesive or illuminating" (Schwartz, 1985, p.397). In his recollection, there were never "more than four votes to hold that standards for the impositions of the death penalty were constitutionally necessary. There was finally, however, a majority vote holding that a bifurcated trial was constitutionally required. But those who made up the majority included perhaps one who felt standards were not" (Urofsky, 1987, p.191).

The day after conference coalitions unraveled even further. Harlan wrote a letter to Warren, noting that he was "not at rest" with his vote yesterday "to reverse [*Maxwell*] on the basis of the 'split trial issue'" (Schwartz, 1983, p.739; see also Brennan, 1986). He asked the Chief to call for more discussion. Warren acceded, holding another conference some weeks later. The vote remained 8-1, but the Justices' views had crystallized a bit more. Warren, Brennan, and Douglas agreed the Court should reverse *Maxwell* on both grounds. Fortas and Marshall tentatively concurred, yet thought the unitary trial issue more persuasive. It was then that Stewart raised the pesky *Witherspoon* question, suggesting that the Court could dispose of the case solely on those grounds. Harlan continued to vacillate of the standards issue, but voted with the others on the unitary trial procedure.

Since Warren assigned the majority opinion to him, Douglas would have to navigate among

¹¹⁴The internal politics surrounding the *Maxwell* case have been reported, albeit differently, by Schwartz (1983,1985) and Woodward and Armstrong (1979) in *The Brethren*. Schwartz provides complete documentation for his version (memos, drafts of opinions). Also, his story is substantially compatible with the recollections of Brennan (1986) and Douglas (Urofsky, 1987). *The Brethren*, conversely provides no sources. Hence, our account relies exclusively on Schwartz.

these views. In his original draft, however, he took the uncompromising position that *Maxwell* ought be reversed on both grounds and proceeded to combine the claims. In an accompanying memo, Douglas justified his position: "As I got deeper into the two problems, they became inseparable to me" (Schwartz, 1985, p.397). Justice Brennan quickly persuaded Douglas to divide up the issues, addressing them as distinct questions.

The response to Justice Douglas' revised, two-part opinion was less than enthusiastic. Fortas wrote that he could not go along with the standards part because "if they are legislated, the results will be substantially to increase the number of cases of imposition of death penalties." His logic was simple: if standards exist, juries might feel more confident and comfortable about sentencing defendants to death. Marshall concurred with this view. Harlan explained that he could not join the standards part and, in fact, had doubts as to whether he could sign the unitary trial section either. Stewart (and White) circulated a separate opinion, prepared as a concurrence, disposing of the case on *Witherspoon* grounds.

Hoping to salvage at least part of his opinion, Douglas omitted the standards issue, focusing exclusively on unitary trials for which he knew he had 5 votes. Warren and Brennan were less than delighted with this tack; they wanted some discussion of standards and, thus, proceeded to write a concurrence, which Douglas planned to join. But for a separate concurrence by Harlan, *Maxwell* ready to go; the LDF had won a solid, if incomplete, victory.

As the Court was fighting over the *Maxwell* case, another battle, of far larger consequence, was brewing. Political and journalistic forces were putting Justice Fortas through the wringer. After Johnson withdrew his nomination for the Chief Justiceship, amid allegations that he received \$15,000 to teach a university course, *Life* magazine asserted that he had taken fees from a private foundation in return for legal favors (for complete accounts, see Shogan, 1972; Murphy, 1988). This and other claims led some to suggest the possibility of impeachment. When such speculation failed to vanish, Fortas tendered his resignation from the Court on 14 May 1969.¹¹⁵

¹¹⁵It is also interesting to note that Fortas lost an early supporter, Senator Dirksen of Illinois, because of his vote in *Witherspoon* (see Graham, 28 September 1968, p.1, 30).

The implications of Fortas's departure were enormous for anti-death penalty advocates. In terms of the LDF's long-range plans, it knew that Nixon would have the opportunity to appoint a Chief Justice (to replace Warren) and an Associate (to replace Fortas). It would be a safe bet that neither would be as supportive of abolition as were Fortas and Warren.¹¹⁶

The short term, vis-a-vis *Maxwell* and *Boykin*, also looked bleak. After Fortas resigned, Douglas only had four votes to support his *Maxwell* opinion. Harlan refused to "provide the fifth vote in such a crucial case;" indeed, he had only recently assigned one of his law clerks the task of drafting what would have been an inconsequential concurrence (Schwartz, 1983, p.748). Hence, Harlan "now decided that the best course of action would be to have the case reargued. Justice Stewart agreed, and having seen his majority disappear, Justice Douglas also finally pushed" to have the case rescheduled. It would hear rearguments on 26 May 1969 (Brennan, 1986, p.317).

Just one week later, the Court also announced its decision in *Boykin*. In a 6 to 2 vote the Justices struck down *Boykin*'s death sentence on the narrowest of grounds-- the guilty plea had been involuntary. Justice Harlan and Black dissented, claiming that the issue had not been raised in his appeal to the Alabama Supreme Court and that it contravened established precedent. Both coalitions, though, avoided the Eighth Amendment issue.

Reactions to *Boykin* were mixed. Many abolitionists were relieved that they won the case, albeit on a technicality. Some commentators, including former Justice Goldberg and his clerk Alan Dershowitz (1970), lambasted the Court, writing that its "failure to decide the constitutionality of the death penalty is not accidental" and that *Boykin* "is illustrative of a more general them in the Court's treatment of capital punishment cases-- and of criminal cases generally. It had been deeply concerned with the area of criminal law. But for the most part that concern has related largely to matters of fair procedure" (p.1798).

And, so the 1968 Term went out with a whimper, not the bang for which the LDF had hoped. The Court ignored its Eighth Amendment plea in *Boykin*. And, as for *Maxwell*-- what

¹¹⁶This was indeed a major blow. Less than a decade after his resignation, Fortas took a strong public stand against the death penalty (see Fortas, 1977).

began as an “absolutely critical case” (Bigart, 1969, p.1) turned into a 1968 Term “criminal landmark *manque*” (Schwartz, 1983, p.742). Only years later, would the LDF learn of how close it came to winning on all points.

The Return of “Law and Order”

The Justices originally called for rearguments in *Maxwell* on 13 October 1969. They later postponed them as the Court was not at full strength by the start of the 1969 Term.

It did, however, have a new Chief Justice-- Warren E. Burger. At the time of his appointment, Burger was a judge on the U.S. Court of Appeals for the District of Columbia. Appointed by Eisenhower¹¹⁷ to that “famously liberal court” in 1956, Burger became “the vocal dissenter whose law and order opinions made headlines” (Woodward and Armstrong, 1979, p.11). As one source put it, “The more the liberal majority [on the D.C. court] expanded the rights of criminal suspects, outdistancing even the Warren Court, the more resolute Burger became in defending a tough law and order positions” (Simon, 1973, pp.79-80). In the same vein, he was no fan of the abolitionist movement, rejecting claims against unitary trials some years back.

All of this, of course, worked in favor of his nomination. In the opinion of the Nixon administration, Burger was the ideal choice to lead the Court back to the straight and narrow, to begin a counter revolution of sorts against the Warren Court’s liberal precedents, especially in the area of criminal law.¹¹⁸ As one noted, although Burger and Nixon “were only acquaintances, the two might well have been close friends” (Simon, 1973, p.76).

Nixon announced his choice just days after Fortas withdrew. Some thought the confirmation battle might be “bloody,” but the Senate Judiciary Committee kept Burger less than two hours. The full Senate confirmed him by a 74 to 3 margin just 18 days after he was nominated.

¹¹⁷It is ironic that Eisenhower gave birth to the judicial careers of both Warren and Burger. Warren, then-Governor of California, helped Eisenhower achieve victory in that state. Burger, a committed Republican from Minnesota, played a key role in Eisenhower’s nomination.

¹¹⁸Interestingly, if the account in *The Brethren* (1979, pp.14-21) is accurate, Burger may not have been Nixon’s first choice. In late April, when it looked as if the Fortas nomination was dead, Nixon met with Potter Stewart at the Justice’s request. Stewart knew there had been a ground swell of support for him, but he wanted the president to know that he did not want the job.

What the Court lacked at the start of the 1969 Term was an 8th associate justice, as finding as replacement for Fortas proved far more difficult. After Nixon nominated Burger, “pressure had been building to name a southerner to the Court” (Simon, 1973, p. 104). After all, part of the reason Nixon made the Supreme Court “a central issue in the 1968 campaign...was an attempt to redraw the political landscape by pulling disaffected southern Democrats firmly into the Republican party” (Kobylka, 1989, p.3). This so-called “southern strategy” had helped get Nixon elected; now, he felt he owed it to the region to nominate someone from its ranks (see Kleindienst, 1985).

These considerations led him to Clement F. Haynsworth, Chief Judge of the the Court of Appeals for the Fourth Circuit. As a South Carolinian and a conservative, his appeal was obvious. But on 21 November 1969, almost two months after the start of the 1969 Term, the Senate voted against confirmation.¹¹⁹ Nixon’s second choice, G. Harrold Carswell, another southern appellate court judge, also went down in defeat amid opposition from civil rights groups and questions of “judicial competence” (Baum, 1989, p.51; see also, Simon, 1973; Grossman and Wasby, 1972).¹²⁰

Nixon’s third choice for the Fortas seat-- another appellate court judge and close friend of Warren Burger¹²¹-- Harry A. Blackmun, though, was a shoe-in for the position. He was not a southerner, but his jurisprudence reflected values important to the President. “His appellate record was moderate on civil rights issues and conservative-- opposed to judicial protection-- on criminal process and civil liberties questions... This restraintism and moral conservatism made Blackmun appear to to be Richard Nixon’s kind of Justice” (Kobylka, 1989, pp.3-4).

His moderate-to-conservative record, devoid of the ethical and moral questions that had

¹¹⁹Haynsworth faced opposition from labor and civil rights groups because of his voting record on the Court of Appeals. Ethical questions, too, arose when it was discovered that he heard cases involving “subsidiaries of companies in which he owned stock...” (Baum, 1989, p.51; see also, Grossman and Wasby, 1971).

¹²⁰One LDF attorney called Carswell “the most hostile judge I have ever appeared before” (Simon, 1973, p.118).

¹²¹The two virtually grew up together in Minnesota. “They met in their youth at Sunday school...” (Kobylka, 1989, p.4). And, though they “were separated as teenagers by different high schools” and attended different colleges, they “remained close friends” (Simon 1973, p. 141). “Blackmun was the best man at Burger’s wedding, and some believe that Burger was instrumental in securing Blackmun’s appointment to the Court of Appeals and the Supreme Court” (Kobylka, 1989, p.4).

plagued the previous candidates, also appealed to most of the country; most of the country, that is, except abolitionist attorneys. After all, this was the same Harry Blackmun who not two years earlier had dismissed the Wolfgang study in *Maxwell*; the same Harry Blackmun who claimed prior to his confirmation that he had personal disdain for the death penalty, but told the Senate that he would support it if legislatures so desired. A worse replacement for Fortas, in their view, probably could not have been found. But, for the time being, the LDF would not have to worry about Blackmun. A few days after he was nominated and confirmation looked assured,¹²² attorneys received word that the Court would hear rearguments on *Maxwell* on 31 April 1970. No reason existed to delay the proceedings since Blackmun, as the judge below, would be unable to participate, anyway.

That the LDF was apprehensive going into the 1970 orals is an understatement. With Fortas and Warren gone chances of a favorable outcome had dwindled considerably even under the best of circumstances. Those, however, did not hold as the political environment had changed dramatically over the course of the year. When the LDF first argued *Maxwell*, it had the public in its corner, favoring abolition (albeit by a small margin) and an administration supporting the same end. But within the new “law and order” climate, the situation could not have been more different. The latest Gallop Polls showed that the public again had moved from 42 percent in favor of the death penalty (47 percent opposed) in 1966 to 51 percent support (40 percent against) in late 1969 (see Figure 1-3). March of 1970 brought more bad news as Nixon asked Congress to reinstate federal death penalties for bombings if fatalities occurred (Naughton, 1970, p.1).

Just about the only thing the LDF had going in its favor was moratorium. Since 1968, no one had been executed in the United States; as a result, death row populations swelled to 500. The LDF hoped that this would weigh heavily on the minds of the Justices, as they would have to think quite carefully before ordering, what in essence could be mass executions. As it stood, 84 death penalty appeals to the U.S. Supreme Court were awaiting the outcome of *Maxwell*.

¹²²The Senate unanimously confirmed Blackmun on 12 May 1970.

LDF attorneys expected orals to be “rough;” they were not disappointed. The Justices “contained themselves through” Amsterdam’s opening remarks, but then let at him. The new Chief Justice was particularly unimpressed, questioning the compatibility of the LDF’s arguments with the Constitution, the practicality of creating standards for sentencing, and the use of statistics. Justice White, too, peppered Amsterdam with questions about the reasonableness of mandating standards for capital, but not in other kinds of cases (see Meltsner, 1973, pp.202-211).

On 1 June, 1970--15 months since the Court had first heard arguments-- the Justices issued a short *per curiam*. Despite the fact that Harlan, at conference following reargument stated that he could “not imagine a more flagrant violation of due process than the unitary trial” (Brennan, 1986, p.317), Stewart and White apparently convinced him otherwise. In a 7 to 1 vote the Court remanded *Maxwell* in light of *Witherspoon*.¹²³ Doing so was a let down for the LDF; it had worked on the case, in all its various incarnations since 1964, only to see it create no precedent -- favorable or not. The “absolutely critical” case was not to be.¹²⁴

Maxwell was not the worst news of 1 June, however. The Court granted *certiorari* in two new death penalty cases, *McGautha v. California* and *Crampton v. Ohio*, with the expressed hope of resolving the issues of standards and unitary trials, on which the fate of 500+ death row inmates now rested.

Even in the heyday of the Warren Court era, the LDF might have been less than “overjoyed” with the selection of this pair (Schwed, 1983, p.125); now it was downright nervous. The problem, as attorneys saw it, was that the ‘facts of the two cases did not augur’ well for a positive outcome” (Meltsner, 1973, p.228). Dennis McGautha had committed a “vicious” and “brutal” murder during the course of a robbery in California. After the trial stage, the jury sentenced him to death, a potentially “reasonable” course of action given the crime and the fact that he had a long list of prior convictions. What’s more, because the state was one of only a handful

¹²³Marshall did not participate; Black dissented on the ground that *Witherspoon* was “erroneously decided” (1970, p.267).

¹²⁴However, Justice Brennan later wrote that *Maxwell* “served the critical function of focusing and narrowing the arguments” (1986, p.317).

using the bifurcated trial procedure, the sole question raised was one of sentencing standards. Crampton was an equally disdainful character: a drug addict, who allegedly murdered his wife while she was on the toilet. Since Ohio used a single trial procedure and provided no sentencing guidelines, *Crampton* allowed the Court to address the twin issues.

Counsel for Crampton and McGautha forwarded virtually indistinguishable arguments: that the procedures surrounding their clients' trials were fundamentally unfair, violating norms of due process. Neither raised constitutional claims about the death penalty per se.

The LDF had not been substantially involved in either case but because of its interest (it was representing 200 of the 500 or so inmates), it filed an *amicus curiae* brief. In it, attorneys stressed the inherent inequities of the capital procedures, while reiterating the racial discrimination theme (even though Crampton was white). Citing their briefs in *Boykin* and *Maxwell*, they noted that "the long experience of LDF attorneys in handling death cases has convinced us that capital punishment in the United States is administered in a fashion that consistently makes racial minorities, the deprived and downtrodden, the peculiar objects of capital punishment" (LDF Brief, p.2). They did, however, make clear that their purpose was not "to rehash the argument [they] made recently in *Maxwell*, but to "explore" differences between Ohio and California sentencing schemes from those at issue in *Maxwell*.

Several other groups and individuals also filed *amicus curiae* briefs on behalf of the defendant. The ACLU¹²⁵ and an attorney representing death row inmates reinforced basic claims stressed by LDF and lead attorneys. The American Friends Service Committee and other organizations with religious constituencies¹²⁶ suggested that many "moral issues are at stake;" in particular, that "every step in the enforcement of [Sixth] Commandment ["Thou shalt not kill] by

¹²⁵For the Illinois CLU and the Illinois Committee to Abolish Capital Punishment.

¹²⁶The following organizations signed on to this brief: Board of Social Ministry (Lutheran Church of America), Church of the Brethren (General Board), Council of Christian Social Action of the United Church of Christ, Department of Church in Society of the Christian Church (Disciples of Christ), The Executive Council of the Episcopal Church in the United States, General Board of Christian Social Concerns of the United Methodist Church, Greek Orthodox Archdiocese of North and South America, the American Ethical Union, the United Presbyterian Church in the United States of America, and the Union of American Hebrew Congregations. The brief was written by the Religious Action Center.

society is fraught with great difficulties.” They questioned, for example, whether a moral juror could impose capital punishment without breaking the commandment (no. 203, p.10).

The states of Ohio and California, though, had a powerful ally of their own: the U.S. government. Given the potential importance of the cases, the Court invited Nixon’s Solicitor General Erwin Griswold to participate as an *amicus curiae* in oral arguments. Not surprisingly, Griswold took the side of the prosecution arguing that the “Constitution does not require that...legislatures...proscribe statutory standards to guide or govern the jury’s determination of sentences in capital cases.” He pointed out to the Justices, as did the state attorneys, that jury discretion is a legitimate party of the criminal justice system and, if it is to be changed, it is “something that should be done by the people.” Finally, Griswold could not hold but add a zinger at the LDF and company, calling these cases “diversionary tactics” of capital punishment reformers (New York Times, 10 November 1970).

On 17 November 1970, after attorneys had argued the cases, one LDF counsel (Meltsner, 1973, p.229) said it had been “a quiet day in court--too quiet.” He further noted that it was clear from the Justices questions that “the standards issue was a lost cause.” Realistically, that was true even before oral argument. Recall the Warren Court’s conference votes on *Maxwell*; only Brennan, Warren, and Douglas fully supported standards. Even with Warren’s lost vote the LDF’s prospects looked quite bleak.

A Turnabout (Again)

Despite their mounting problems, 1970 ended on an up note for abolitionists. About a month after orals in *Crampton* and *McGautha*, in December of 1970 a panel of judges of the Fourth Circuit became the first in American history to hold that the death penalty constituted cruel and unusual punishment under some circumstances.¹²⁷ The case, *Ralph v. Warden*, was a vintage LDF suit involving the conviction of a southern black man accused of raping a white woman, who was physically unharmed. Though the court rejected statistics indicating race discrimination in

¹²⁷Ironically, the panel included one of Nixon’s nominees for the Supreme Court, Clement Haynsworth.

sentencing, it ruled that the Eighth Amendment's cruel and unusual punishment clause prohibited Ralph's execution for rape since he did not take or endanger the life of his victim" (1970, p.793). It justified this conclusion on two grounds: that many states now considered death for rape "excessive" and that the infliction of death for a crime short of murder is "anomalous," random and infrequent (see Minnesota, 1971).

The LDF was delighted. In the judges' opinion it saw the further development of Goldberg's dissent, and of its arguments as an *amicus curiae* in *Boykin*. But most important, *Ralph* provided further fodder for its legal briefs.

Ralph was not the only pleasant surprise at the turn of the New Year. In December, the lame duck Governor of Arkansas, Winthrop Rockefeller, commuted all 15 death sentences in his state, with the hope that his action would "have an influence on other Governors" (Bedau, 1977, p.63). The following month, the Attorney General of Pennsylvania ordered the dismantling of all the state's electric chairs (see Schwed, 1983, p.127).

The best news of all came from the federal government. In January 1971, after three and one-half years of work, the 12-member Presidential Commission on Reform of Federal Laws made public its report. Among its many recommendations-- the total abolition of capital punishment.¹²⁸ That it came up with this, given Nixon's stance, may seem a bit odd. But the Commission had been composed during the Johnson administration, with the Chief Justice (Warren), the Vice President (Humphrey) and a Democratic Speaker of the House each appointing three members. Indeed, the Head of the Commission, former Governor Edmund Brown, had been a long-standing abolitionist. Still, the Commission's report made front-page headlines (e.g. Graham, 1971, p.1).

Though these developments gave abolitionists needed boosts, the LDF remained quite concerned about *McGautha* and *Crampton*, which had yet to come down. Rather than sit by idly, Amsterdam, Himmelstein and others met in February to plot their next course of action should the

¹²⁸Two of the 12 members dissented. Senators Sam Ervin (North Carolina) and John McClellan (Arkansas) though the death penalty should be maintained for treason and murder (Graham, 1971, p.1).

Court rule as they expected in the pending cases. They arrived at several plans: “focus attention on the plight of death-row inmates,” go back to the states and lobby for executive commutations, and begin to consider mounting a constitutional challenge to capital punishment in murder cases (Meltsner, 1973, p.238). They also decided to hold another conference on 15 May 1971 to explore these and other options with cooperating abolitionists.

The advanced planning was not in vain: on 3 May 1971 the Court announced its decisions in the Ohio/California pairing. In a 6-3 opinion, which the LDF later called “disheartening” but not “surprising,” (Schwed, 1983, p.127; Meltsner, 1973, p.241), the Court found no constitutional “infirmity” either in unitary trials or standardless sentencing. Writing for the majority, Justice Harlan-- the same Justice who not two years prior had announced that he could not “imagine a more flagrant violation of due process” rights than the unitary trial-- suggested now that “compassionate” justice would be no better served by a two-staged trial. As for sentencing standards, Justice Harlan was equally clear, holding that it would be virtually impossible for a Court “to attempt to catalog the appropriate factors...for no list of circumstances would ever be really complete.” In his view, “the infinite variety of cases and facets to each case would make general standards either a meaningless ‘boiler-plate’ or a statement of the obvious that no jury would need.”

Not surprisingly, three of the Warren Court holdovers, Douglas, Brennan, and Marshall, dissented. What startled LDF attorneys, though, was a concurrence written by Justice Black. Not only did he agree with the Harlan’s opinion, but he went one step further, addressing the Eighth Amendment issue that attorneys had worked hard to avoid. Point blankly, he claimed that the death penalty did not violate the cruel and unusual provision because it is “inconceivable...that the framers intended to end capital punishment by the Amendment” (1971, p.226).

To some, this concurrence, not to mention the majority opinion, was a “severe setback” (Meltsner, 1971, p.5), perhaps “the end of the road” (Schwed, 1983, p.129). Even Justice Brennan (1986, p.321), in retrospect, was dismayed, later writing: “In candor, I must admit that when *McGautha* was decided, I was convinced that it was not just a lost skirmish, but rather the

end of any hope that the Court would hold capital punishment to be unconstitutional.” Yet, the cases only strengthened the LDF’s resolve “to pledge all of [its] resources to the successful completion of [their effort]...to leave no stone unturned...” (Montgomery, 1971).

To this end the LDF held its conference just two week after *McGauthal Crampton*. Greenberg and Amsterdam explained to the 100 attendees that the cases produced an “extraordinary crisis” because 25-125 inmates could be executed immediately under the new precedents. To prevent this, LDF lawyers outlined a three-prong plan: they asked participants to support a Congressional bill, which would impose a two-year moratorium on executions; to work on state executives to grant clemencies; and, to continue litigating the 120+ outstanding cases. The LDF promised to “give the lawyers the legal equipment to prepare writs and briefs...and if necessary, to give them financial backing” (Montgomery, 1971).

Attacking the Death Penalty Head On

What the LDF could not have known at the time was that as it was formulating emergency plans and “hassl[ing] over last-ditch strategy” (Meltsner, 1973, p.246), the U.S. Supreme Court had ideas of its own. In a note to his clerks one month after the California/Ohio cases came down, Douglas summed up the capital punishment situation, noting that Burger, Blackmun, Stewart, Brennan, Marshall and he were disposing “of all capital cases” by “merely denying review.”¹²⁹ But now, “there has been a drive inside the Court to reach [an end] so that, to use the words of Justice Black, ‘it may be disposed of once and for all,’ as if that were possible.”¹³⁰ By way of compromise, the Court, Douglas explained, “decided to name a committee composed of Brennan and White to go through the some 185 capital [petitions]...and to pick cases from each of the three groups [rape, robberies, and “run of the mill murders”] with the view of recommending that they be argued October 1971” (Urofsky, 1987, pp.193-195).¹³¹

¹²⁹Justice Brennan (1986) suggests that it was his idea that the Court turn its back on these cases, a plan to which Marshall and Douglas readily agreed.

¹³⁰Douglas and Brennan (1986) both identified Black as the force behind this drive. *The Brethren* (1979, p.206) suggests that it was Stewart. Based on Douglas’ and Brennan’s separate recollections, though, Stewart was in no great hurry to see the issue resolved.

¹³¹Brennan’s recollection is just a bit different: he claims that it was he and Stewart who were “delegated the

Apparently the two-person committee performed their task admirably for on 28 June 1971, the Court entered an astonishing order: It said it would review four capital cases: *Aikens v. California*, *Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas*. But, it was limiting arguments and briefs in all four to a single question: “Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?”¹³²

LDF attorneys could waste no time puzzling over the Court’s order. Since three of the four cases (all but *Branch*) were “theirs” (indeed, they had raised the Eighth Amendment issue in their petition for *certiorari*),¹³³ they had only four short months to prepare arguments for orals, scheduled on 21 October 1971. And, given the cases chosen by the Court, this would be no easy task; their facts varied wildly.

The most troublesome of the quartet was surely *Aikens*, which one LDF attorney called an “absolute monster” (Muller, 1985). Even in the brief it later filed, LDF lawyers called Aiken’s crimes “unmitigated atrocities” and “indeed aggravated.” What prompted these reactions were the facts surrounding Aikens offense. He viciously raped, brutalized, robbed, and then murdered two women-- one in her sixties and the other, 25 years old and five months pregnant. There was no denying it: *Aikens* was a rough one.

The facts in the others were somewhat more favorable to the LDF’s concerns. *Furman* involved a killing, perhaps accidental, that occurred during the course of a robbery. The major “aggravating” factor, that the victim had been the father of five children. *Jackson* and *Branch* were vintage LDF-type cases, involving southern interracial rapists. In neither, were the victims substantially harmed.

As if the facts, particularly in *Aikens*, were not bad enough, the current Court looked no

job of finding clean cases” (1986, p.322).

¹³²On the same day, it acted in the nearly 120 other pending cases, vacating some; reversing others, and staying executions in the balance.

¹³³They justified doing so on the ground that the Court left the issue open in *Boykin*. Their petitions raised other issues, as well. In *Furman*, for example, they made due process and *Witherspoon* claims.

more hopeful. By 1971, the Court had ruled on six capital cases, with, as we depict in Table 1-5, certain patterns emerging. Clearly, the LDF could rely on the votes of Douglas, Brennan, and Marshall. Though none had ever declared capital punishment per se unconstitutional, they had supported the LDF's position in all six cases. Conversely, the chances of capturing Black, Burger, Blackmun, and even Harlan looked next to nil.

(Table 1-5 about here)

Indeed, the LDF had to pin its hopes on Stewart and White. From the looks of Table 1-5, Stewart was a most likely fourth vote in their camp. With the exception of the 1970 cases, he had opposed the death penalty, writing the Court's opinion in the all important *Witherspoon* case. Assuming his support, that left White as the "swing," the Justice who would break the 4-4 tie. Based on the data, it would be easy to discount White-- he had but twice evinced a pro-abolitionist stance. So too his overall behavior in cases involving criminal law did not bode well. Over the previous term (1970), the newly-emerging Burger Court supported the defendant in but six (35.3 percent) of the 17 cases involving criminal justice issues. And, as the continuum, displayed in Figure 1-5 shows, White was clearly a vote on which the conservative wing of the Court could count. The only possible point of optimism, from the LDF's vantage point, was that White usually voted with Stewart, agreeing in 94 percent (n=16) of the 17 cases. If Stewart decided to strike down the state laws, perhaps he could bring White along.

(Figure 1-5 about here)

Preparing for Oral Argument

With this somewhat unpromising, perhaps bleak, outlook that LDF started to prepare its briefs and arguments. On 23 July 1971, Amsterdam, who was coordinating the effort, issued a progress report, excerpted in Table 1-6. As we can see, he was taking a no-holds barred approach, attempting to marshal evidence from all corners to support his position.

(Table 1-6 about here)

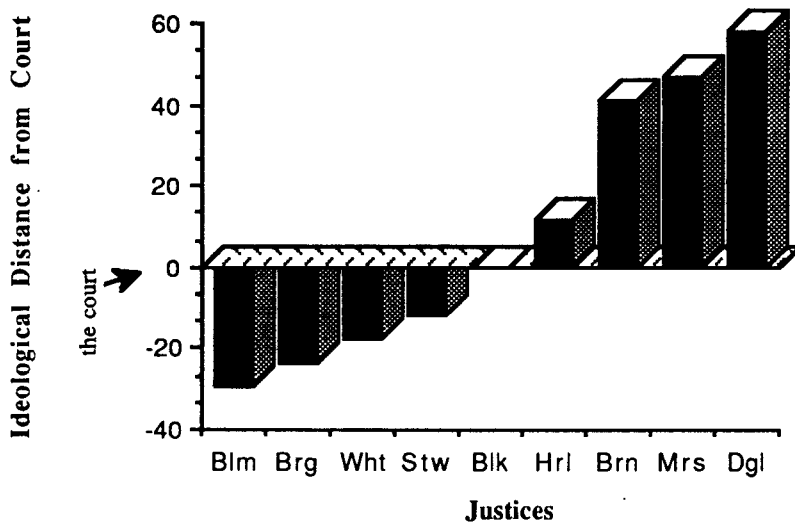
In essence, though, his briefs would boil down to the two claims emphasized in his memo. First and foremost, was that the Eighth Amendment now prohibited capital punishment because it

Table 1-5
Justices' Voting in Six Capital Cases, 1968-1970

	Blm	Brg	Wht	Stw	Mrs	Dgl	Bm
<i>Jackson</i>			C	L	NP	L	L
<i>Witherspoon</i>			C	L	L	L	L
<i>Boykin</i>			L	L	L	L	L
<i>Maxwell</i>		L	L	L	NP	L	L
<i>Crampton</i>	C	C	C	C	L	L	L
<i>McGautha</i>	C	C	C	C	L	L	L

Note: L=Liberal (Pro-Defendant)
C=Conservative (Pro-State)
NP=No Participation

Figure 1-5
Support for Defendant in Criminal Cases, 1970 Term*



*Based on 17 cases. Data represents ideological difference from the Court, which supported defendants' claim in 35.3 percent (n=6) of the 17 cases.

Table 1-6*
Amsterdam Memo

- (1) Hugo Bedau^a has agreed to send JH [Himmelstein] within 10 days:
 - (a) a 10-page review of the sociological literature on deterrence, with references..
 - (b) a 10-page memo on the world history of capital punishment, focusing on . . . the progressive abandonment of the death penalty . . .;
 - (c) a brief memo on the role of scientists and learned men in that history, stressing the enlightened character of abolitionists;
 - (d) some notes on humanistic literature . . .
- (2) [We must] . . . design an economic cost analysis of the administration of capital punishment.
- (3) As per my discussion with Doug Lyons^b on 7/22, DL is doing
 - (a) a memo on published descriptions of executions;
 - (b) some notes on humanistic literature to add his reflections to [Bedau's] in point (1) (d) *supra*.
- (4) The following memos will be assigned within the LDF office:
 - (a) ... the major conceptual approach to an argument that the Eighth Amendment is concerned with the psychiatric state of the man who undergoes a punishment...
 - (b) ... recent Eighth Amendment developments in non-capital cases in the lower courts...
 - (c) . . . An exhaustive review of [Supreme Court] Eighth Amendment decisions, involving two parts: (A) analyses of each case, including the issues; the holding; the language used to define the Eighth Amendment test, standard or approach employed to judge the constitutionality of penalties challenged as cruel and unusual; and any references made by the Court to interpretative aids (constitutional history, English history, world history, etc.); and (B) analyses of the support which the cases lend to [the following theories] (1) the Eighth Amendment standard is dynamic, not static; it evolves, and may condemn in 1971 what it permitted in 1791; (2) rarity of application of a penalty is a major (or at least a relevant) consideration in branding it cruel and unusual; (3) enlightened conceptions of "decency" and "human dignity" are the measure of the Amendment ; (4) judges look to enlightened contemporary moral standards, with some independence of legislative judgment, in applying the Eighth Amendment to test legislation; (5) punishment which is disproportionately severe is unconstitutional under the Eighth Amendment, so that a penalty which might be constitutional for crime A may be cruel and unusual for crime B; and, in particular, death is disproportionately severe for rape; (6) punishment which is "unnecessarily" harsh violates the Eighth Amendment, so that courts must consider whether lesser penalties would not equally serve the end supposed to justify a harsher one; (7) the psychiatric state of the person upon whom a punishment is imposed is relevant ...; and (8) mental suffering, as well as physical suffering, is relevant . . .
 - (d) . . . A history of the punishments in common use in the Colonies, England and other "civilized" nations in 1791, to show that banishment, dismemberment, flogging, stocking, branding, etc. were widespread, for the purpose of demonstrating that the death penalty cannot be sustained in 1971 upon the theory that it was commonly used at the time of adoption of the Eighth Amendment without also asserting that these horrors are all equally constitutional.

*Source: Meltsner, 1973.

^aProfessor of Philosophy, Tufts University

^bPresident of CALM

“affronts basic standards of decency,” an argument based directly on Warren’s opinion in *Trop* and the LDF brief in *Boykin*. To support this view, attorneys marshalled various sorts of evidence: that death penalties are not widely accepted or invoked nation- or world-wide as falling execution rates indicate; that they are infrequently imposed even in states which have not abolished them; that victims tend to be black, “poor and powerless, personally ugly, and socially unacceptable”; and, that Americans find it personally repugnant, making executions private, not public, affairs. Attorneys reinforced each of these points with citations to myriad studies and legal precedent, and mounds of statistical data.

Second, the brief emphasized one view of the Court’s institutional function: that it is a protector of minority interests and, as such, has a responsibility to strike down laws that impinge on rights. In making this claim, LDF attorneys tried to counter the competing argument that reform in capital punishment should be done by the people, through their legislators, not by the unelected judicial branch.

Though these constituted the gist of their arguments, the LDF briefs also contained several other case-specific points. In *Aikens*, attorneys stressed that capital punishment had no “particular efficacy, in achieving the legitimate aims of criminal law, that less harsh penalties do not have;” for example, studies have failed to indicate that they deter crime. In their brief on behalf of Furman, they added that the defendant had been mentally ill at the time of the crime and that to execute him would offend “the most basic human precepts.”

As the LDF strategy unfolded, a host of other organized interests also began to prepare legal arguments in the form of *amicus curiae* briefs. In Table 1-7, we provide summaries of the key points they raised in support of the LDF’s position. As we can see, *amici* generally reiterated and highlighted key points raised by lead counsel. Virtually all stressed the lack of deterrent value, (or, at the very least, that studies were inconclusive on this point) and the role of the Court in protecting minority interests. About the only new piece of information concerned the views of various religions. Briefs by the Synagogue Council, the West Virginia Council of Churches, and the National Council of Churches pointed out to the Justices that virtually all religions sects and

denominations oppose legal executions.

(Table 1-7 about here)

No organized interest groups aligned to challenge the abolitionist position. Rather, their legal opposition would consist of attorneys representing California, Georgia, and Texas. Briefs from these states made some arguments independent of the LDF's (e.g., a literal reading of the Fourteenth Amendment could not possibly outlaw capital punishment), but, overall, attorneys felt more compelled to refute defendants' claims, particularly that of "evolving standards." Georgia's briefs, in particular, raised myriad challenges to that view: if death was so offensive, 1) why did the citizenry not pressure their legislators to abolish it? and 2) why do public opinion polls indicate support for capital punishment? Likewise, most of the governmental litigators took a crack at the LDF, claiming that reductions in executions occurred, not because juries have failed to impose death, but because "the condemned have averted the carrying out of the penalty by pursuing a variety of appeals..."¹³⁴

Groups and states were not the only ones preparing for orals. Three weeks before the Court entered the order to hear the death penalty cases, Justice Douglas assigned his clerks their "summer research project." In a 7 June 1971 memo he wrote: "The question of the death penalty has been a hobby of mine for some years. I have always thought it was extremely unwise as public policy to enforce it. That of course is a far cry from saying that it is cruel and unusual punishment under the meaning of the Eighth Amendment." He then dictated how the clerks should proceed: "We need a solid piece of work this summer on the sociological, penological, psychiatric, and legislative aspects of this whole problem," adding the admonition that he was "not interested in a collection of cases to show what judges have decided on the matter because judges by and large are pretty ignorant people" (Urofsky, 1987, pp.194-195). So much for stare decisis!

If the account in *The Brethren* is to be believed Douglas, was not alone in advance

¹³⁴Supporting these views was an amicus curiae brief filed by the State of Indiana. It largely reiterated points made by the states: that capital punishment was not unconstitutional under the Eighth Amendment (including the *Trop* standard), that it might deter crime, and that it was largely a legislative, not judicial matter.

Table 1-7
Arguments of *Amici Curiae* in Support of the Defendants:
The Death Penalty Cases, 1972*

American Civil Liberties Union

1. Death penalty is not rationally related to legitimate objective.
2. Responsibility of the courts, not necessarily legislatures, to protect individual rights.
3. Shocks the conscience of "contemporary civilized men."

NAACP, National Urban League,
 Southern Christian Leadership,
 Mexican-American LDF, and the
 National Council of Negro Women

1. Constitutes race discrimination under the 14th Amendment
2. Constitutes cruel and unusual punishment because a disproportionate number of "non-white" persons are executed.

State of Alaska

1. Society can accomplish its objectives "with respect to capital criminals by life imprisonment..."
2. *Trop* standard, though subjective, suggests that capital punishment is cruel and unusual.

Synagogue Council of America (for
 its six constituent members) and the
 American Jewish Congress

1. No deterrent value
2. Function of poverty and race (i.e., same states that had segregationist policies have capital punishment)
3. Death penalty should be viewed through national and international standards of decency, not state or local ones.
4. Most major religions oppose capital punishment

West Virginia Council of Churches,
 Christian Church (Disciples) in West
 Virginia, United Methodist Church, West
 Virginia Conference

1. "infringes on prisoners' religious freedom under the 1st Amendment" (e.g., "cannot strive toward salvation")
2. Mental and Physical cruelty
3. No deterrence value

*Briefs *amicus curiae* were also filed by the National Council of Churches and a Committee of Psychiatrists for Evaluation of the Death Penalty.

planning: Justice Marshall was doing some counting and preparation of his own.¹³⁵ Privately, Marshall thought the odds of getting five votes to strike capital punishment were slim. But, like LDF attorneys, he viewed the situation as something short of hopeless, primarily because moratorium was still in effect. At that point, 704 men and women sat on death row, leading Marshall to surmise that the other Justices, perhaps even the Nixon appointees, would not “want that much blood on [their hands]” (Woodward and Armstrong, 1979, p.207). So, like Douglas, he put his clerks to work, gathering whatever they could to show that the death penalty was passe and, as such, should be adjudged unconstitutional under the “evolving standards of decency” rationale. Brennan also had decided that he would vote to strike down capital punishment. Interestingly, though, he thought he was alone on this point. As he later wrote (1986, p.322): “Before leaving for the summer vacation, I directed my law clerks to begin research for what I fully expected would be a lone dissent.”

The Nixon Court?

As the race to the death penalty cases was well underway, events of certain magnitude unfolded. On 17 September 1971, after 34 years on the Court, Justice Black announced his resignation, owing to poor health. His colleague of 16 years, Justice Harlan did the same just six days later.¹³⁶

The Nation prepared itself for new confirmation battles; abolitionist attorneys took stock of these developments. One thing was clear: the Court would postpone orals in *Aikens* et al. until it was back at full strength; the Justices would not decide cases of such importance without nine members. So too they recognized that while neither Harlan nor Black were votes in their camp, Nixon nominees could only be worse.

On this score, LDF attorneys were at least partially correct. Seeing the two vacancies as a golden opportunity to rebuild the Court, Nixon decided at least one would go to a man on whom

¹³⁵We have some reason to suspect that this account is, in fact, largely accurate. As we detail, Marshall had fully drafted his opinion prior to arguments in the cases.

¹³⁶Black passed away the day after Harlan announced his resignation; Harlan died of bone cancer shortly thereafter.

he could count: William H. Rehnquist. Though he had no prior judicial experience (and, thus no record that Nixon could assess), Rehnquist's conservatism (and loyalty to the Republican party) was firmly established. He had served as a law clerk to Justice Robert Jackson, urging him to take a segregationist stance in *Brown*; he had worked for Barry Goldwater in his unsuccessful bid for the presidency in 1964; and, most recently, he was an assistant attorney general in Nixon's Justice Department, where he had been an outspoken proponent of law and order interests, denouncing liberal Warren Court decisions. If that was not enough, Rehnquist was considered a great intellect by friends and foes alike. He had graduated first in his class at Stanford Law School, while serving as editor-in-chief of the law review. He was, in short, a force with which the LDF, however unhappily, would have to reckon.¹³⁷

Nixon's other nominee, Lewis Powell, was a less-known quantity. He too had no prior judicial experience; but, unlike Rehnquist, had not made known his ideological predilection. Hailing from Virginia, leaving only to attend Harvard Law School, Powell's legal career "blended political conservatism with conciliation..." (Simon, 1973, p.243). While chair of the Richmond School Board (1953-1961), Powell kept schools open in the wake of integration, despite demands from the white populace to close them down. Yet, his "moderate," go-slow approach did little to endear him to civil rights leaders, either. His stint as president of the American Bar Association was marked by similar moderation. Succinctly, in Powell many saw a Justice John Harlan incarnate; not a hopeful sign for abolitionists.

Despite some controversy over Rehnquist, the Senate confirmed both Nixon appointees in early December.¹³⁸ Just weeks later, they were initiated into the roller coaster ride of capital punishment, when a full court heard four hours of oral arguments in *Aikens* et al.

What the LDF could not have anticipated then was the changing tide on the Court. Brennan

¹³⁷Many civil rights and liberties organizations expressed their opposition to Rehnquist's nomination, calling him, among other things, a "racist" and "right wing zealot." The ACLU broke a 50-year policy to call for his defeat (see Abraham, 1985, pp.315-316).

¹³⁸Powell was confirmed on 6 December 1971 by a vote of 89-1; Rehnquist-- on 10 December-- by a 68-26 margin.

left that summer thinking he would be the sole vote to strike. But when he returned in the fall “there were signs that [he] might not be alone. Justice White remarked to [him] that he was not sure how he would come down,” an astonishing statement in Brennan's view given White's previous record. Even more startling was that right before arguments, Justice Marshall handed Brennan “a typed draft of an opinion concluding that the death penalty was unconstitutional” (Brennan, 1986, p.322). He gave a copy to Stewart, as well.

These developments did not make orals any easier, however. With the exceptions of Brennan and Powell who “seemed merely content to listen hour after hour” (Bedau, 1977, p. 80), the Justices incessantly interrupted counsel. Especially active questioners were Douglas, who continuously asked all counsel about the racial composition of those receiving death sentences, and Stewart, who obviously was concerned about the authority of the Court to rule in this area. Given the wildly divergent views of counsel, it is also not surprising that the Justices focused their inquiries on the language and history of the “cruel and unusual provision” and on the deterrent value of capital punishment. Overall, as Brennan recalls, the transcript “reveals a somewhat unfocused discussion between bar and bench” with the “difficult issue for everyone [being] how the Court could responsibly interpret the broadly-worded prohibition against cruel and unusual punishment” (1986, pp.322-323).

Though few unexpected questions arose, it undoubtedly was a rough day-- an “uphill battle”-- for Amsterdam, in particular (Brennan, 1986, p.322). Not only did he argue two of the cases, but, as transcripts of orals reveal, his positions were the ones most targeted by the Justices. They gave him some room to begin and complete his argument; otherwise they were unrelentless. So too state attorneys tried to poke holes in his claims, albeit in a generally decorous fashion. The proceedings did, however, take at least one nasty turn when a California attorney accused Amsterdam of “regarding himself as some self-appointed guardian of evolving standards of decency” (see Bedau, 1977, p.80).

Awaiting the Decision

On the day after the Court heard arguments on the most significant capital cases in

American history, one might have expected front page news coverage. Yet, the *New York Times* carried only a short synopsis of the proceedings on page 15, reporting that from the questions asked Marshall and Douglas appeared most sympathetic, Burger and Blackmun-- least sympathetic, and Stewart and White, "most troubled" and perplexed (Halloran, 1972, p.15).

Why the Court received only limited attention that day we can readily discern: While the Justices heard arguments in *Aikens et al.*, the New Jersey Supreme Court struck down the state's death penalty as being incompatible with *Jackson v. United States*, a position urged by Amsterdam and a public defender who had argued the case (Sullivan, 1972, p.1). The state court also took the opportunity to criticize the federal bench, stating that the Justices "handling of this important subject is not [its] idea of effective judicial administration..." (*State v. Funicello*, 1972, p.66).

If the action of the New Jersey Court was a pleasant surprise for abolitionists,¹³⁹ the ruling of the Supreme Court of California a month later was almost a *cause celebre*. In *People v. Anderson* (1972), one of the first LDF/ACLU cases stayed in California, the Court struck down the death penalty as a violation of the state's cruel *or* unusual punishment provision. As the Court wrote: the death penalty "degrades and dehumanizes all who participate in its processes...it is unnecessary to any legitimate goals of the state and it is incompatible with the dignity of man and the judicial process." In penning these words, the state Justices automatically commuted all death sentences to life imprisonment.

The reactions were predictable. Governor Ronald Reagan, whose death row population at 107 was the largest in the country and contained criminals of some notoriety (e.g., Sirhan-Sirhan, Charles Manson), was "deeply disappointed" (Caldwell, 1972, p.1). Indeed, he called it a "case of the courts setting themselves above the people and the legislature" and vowed revenge (Schwed, 1983, p.132).¹⁴⁰

¹³⁹Indeed, it most assuredly was. Not three years earlier, the chief justice of that court said it would not "abolish the death penalty...that the legislature was [sic] the only body of government that could do that (*New York Times*, 4 June 1968, p.34).

¹⁴⁰Several months later, Reagan with the help of his Attorney General, Evelle J. Younger, got a public

ACLU/LDF attorneys were ecstatic, not simply because a state court had struck down the death penalty, but because it was the California Supreme Court. Largely regarded as the most important and innovative judicial body in the country-- Amsterdam once said that it is to courts what "UCLA is to basketball" (Meltsner, 1973, p.266)-- it had set "an example, which was not easily ignored," particularly "in the face of a country increasingly inclined to social conservatism..." (Schwed, 1983, p.132). More important, as one LDF attorney put it, it was an example that "the Justices of the United States Supreme Court could not fail to be influenced by..." (Meltsner, 1973, p.285).

It apparently was the case, however, that all had made up their minds well before that decision came down;¹⁴¹ indeed, it was probably true that most knew how they would vote prior to conference discussions on 21 January. Burger started the proceedings, noting that if he was a legislator he would vote to abolish, but since he was a Justice, he would have to accede to the wishes of the states. The other three Nixon appointees followed suit. Douglas, Marshall, and Brennan voted to strike, leaving White and Stewart.

Stewart was, apparently tormented by the issue;¹⁴² *The Brethren* claims that "he had been staying up nights thinking about the issue, and particularly about those 700 individuals on death row" (1979, p.209). His questions at orals, though, suggested that he found compelling neither the discrimination argument nor the evolving standards of decency claim. Still, he acknowledged that parts of Amsterdam's presentation had been "seductive," especially those about the randomness and arbitrariness of the imposition of death. When it came time for him to cast his "tentative" vote, Stewart was anything but hesitant: he voted to strike. This left the Court deadlocked, with White's breaking the tie. Somewhat surprisingly, he also was inclined to strike the laws, but on different grounds. Because of the infrequency of its usage and the lack of empirical data to controvert, White thought the death penalty was not serving any deterrent value.

initiative on the ballot that would overturn *Anderson* (Bedau, 1987, p.150).

¹⁴¹But see Blackmun's dissent in *Furman*. He writes that "The Court, in my view, is somewhat propelled toward its result by the interim decision of the California Supreme Court..."

¹⁴²Some suggest, in fact, that capital punishment cases led him to resign from the Court in 1980.

Given the importance of the cases, coupled with the divergence of views, the Justices decided to write their own separate opinions and then circulate drafts. Though some of the conservatives tried, through the writings, to dissuade Stewart and White from voting with liberals, they were having limited success. By then, it was apparent that the Court would strike state death penalty laws by the slimmest of margins.

As the Justices labored over their opinions, LDF lawyers made what they thought would be a necessary last-ditch effort to salvage the cases. They asked the Court to dismiss *Aikens* because the California decision in *Anderson* had mooted out the case-- Aikens was in no danger of execution. On 7 June (406 U.S. 813), when the Court granted the motion, the LDF staff "heaved a collective sigh of relief...because some of the Justices...and the public at large probably would make a great deal of hay out of the heinousness of Aiken's crimes" (Muller, 1985). This step hardly mattered: the LDF had already won the case; the Justices were simply fine tuning their opinions in the series of cases that would now be known as *Furman v. Georgia*.

Finally, on 29 June 1972, the Supreme Court announced its decision, or more aptly its decisions, on the death penalty cases. On a most superficial level, the majority's joint opinion had to be one of the shortest, yet most significant in American history. Framed as a *per curiam* (but written by Justice Brennan, according to Woodward and Armstrong, 1979, p.220), it said:

The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments (1972, pp. 329-330).

Following this terse statement, however, were nine separate opinions (five "for" the LDF; four "against"), comprising 243 pages and 50,000 words-- the longest in Court history (Brennan, 1986).

The *Furman* "Splits"

In Table 1-8, we provide a brief synopsis of the key points raised in each. Let us first consider the views of the five-member majority. As we can see, they vary considerably, with the bottom line being that three (White, Stewart, and Douglas) viewed capital punishment, as currently imposed, as violative of the Constitution; two (Brennan and Marshall) adopted the LDF's general

position that it is unconstitutional under all circumstances. Yet, as the table indicates, even those in general agreement adopted different rationale and modes of analysis for reaching those conclusions.

(Table 1-8 about here)

Indeed, on the whole, we can find but one major point of jurisprudential agreement among these five: that those states using capital punishment do so in an arbitrary manner (see Bowers, 1984). Yet, they framed that concept in very divergent terms. To Douglas, arbitrariness led to discriminatory sentencing and thus, constituted a denial of Equal Protection guarantees. Brennan used arbitrariness as part of a four-prong test to measure the *Trop* standard; Marshall uses a similar approach, explaining that it was but one reason why capital punishment was unusual and “morally unacceptable.” To Stewart arbitrariness in sentencing meant that the death penalty was imposed in a “wanton” and “freak[ish] manner,” akin to being struck by lightning. And, finally, White reasoned that it led to the infrequency of imposition, which in turn made it an incredible deterrent.

Moving away from a strictly legal perspective, we see a few other points of commonality. As White (1976) noted, all made some use of “empirical data,” explicitly or not, to support their views. Given that most centered their arguments on the arbitrariness and infrequency of the imposition of death, this is hardly surprising.

What is interesting, though, is the extent to which the arguments raised by the LDF and some *amici* found their way into the Justices’ opinions. In the case of Douglas, Marshall, and Brennan this is probably the result of happenstance since they had already decided and perhaps drafted their opinions before briefs were filed. Yet, as we depict in Table 1-9, organized interests appear to have played a leading role in convincing White and Stewart, “the pivotal” bloc, to vote to strike. Both adapted parts of the LDF’s arguments, in particular and had clearly paid some attention to the oral presentation, as well; indeed, Justice White later remarked that Amsterdam’s had been the best he had ever heard (Mann, 1973).

(Table 1-9 about here)

Table 1-8
Summary of Justices' Opinions and Modes of Analysis,
Furman v. Georgia, 1972

Justice	Major Points	Modes of Analysis
Douglas	<ol style="list-style-type: none"> 1. Equal Protection: discriminates against poor and minorities 2. Arbitrary because of selective usage 	<ol style="list-style-type: none"> 1. Reliance on studies, qualitative and quantitative 2. Historical analysis of English Bill of Rights and U.S. Debates
Brennan	<ol style="list-style-type: none"> 1. Eighth Amendment: does not "comport with human dignity" <ol style="list-style-type: none"> a. Fails four-prong test of acceptable punishment (cannot be degrading, arbitrary, unacceptable to contemporary society, excessive) 2. Responsibility of courts to apply rights 	<ol style="list-style-type: none"> 1. Historical analysis of debates over capital punishment 2. Statistics on infrequency of use and national trends
Stewart	<ol style="list-style-type: none"> 1. Need not deal with Eighth Amendment question per se 2. cruel and unusual as current applied because it is "wantonly and so freakishly" and rarely imposed. 	<ol style="list-style-type: none"> 1. citations to statistical studies 2. citations to other Justices' opinions
White	<ol style="list-style-type: none"> 1. so infrequently imposed that it is not a "credible" deterrent 2. so infrequently imposed as to be of little service to the administration of criminal justice 3. no "discernible social or political purposes" 	<ol style="list-style-type: none"> 1. personal experience with state criminal cases
Marshall	<ol style="list-style-type: none"> 1. evolving standards of decency 2. Death penalties are cruel and unusual if they are physically intolerable, inhumane, have no valid legislative purpose, abhorred by "popular sentiment" 3. "morally unacceptable" 	<ol style="list-style-type: none"> 1. historical analysis of debates, history, and usage 2. analysis of precedent 3. Examination of bases for punishment 4. statistics on deterrence, usage

(Table 1-8 continued)

Burger	<ol style="list-style-type: none">1. not judicial terrain2. punishment does not offend Americans3. Suggests changes in existing laws to comply with court's opinions	<ol style="list-style-type: none">1. framers' intent2. public opinion polls, state laws and application3. analysis of other Justices' views
Blackmun	<ol style="list-style-type: none">1. expresses personal antipathy, but not judicial function2. inconsistent with past precedent3. inconsistent with Congressional intent	<ol style="list-style-type: none">1. analysis of precedent2. framers' intent
Powell	<ol style="list-style-type: none">1. encroachment of legislative function2. death penalty has not been "repudiated" by Americans3. Discrimination probably occurs in all areas of criminal sentencing4. deterrence value is unclear5. not disproportionate for rape	<ol style="list-style-type: none">1. analysis of precedent2. federal data, public opinion polls3. state court opinions4. deterrence studies
Rehnquist	<ol style="list-style-type: none">1. contradicts precedent2. defer to legislatures	<ol style="list-style-type: none">1. precedent

Table 1-9
Reaction of Justices Stewart and White
to LDF arguments in Furman et al.

	White	Stewart
<u>LDF arguments (Briefs)</u>		
1. Evolving Standards of Decency		
a. national/international trends	No	No
b. decreasing usage (execution rate)	No	Yes
c. infrequency of imposition	Yes	Yes
d. concealment of executions from public view	No	No
2. Discrimination in Sentencing	No	a
3. Rare Usage "Deprives" it of any penological value (e.g., deterrence)	Yes	Yes
4. Responsibility of Court to Protect Rights	Yes	Yes
5. Mental Illness (<i>Furman</i>)	No	No
<u>LDF arguments (Orals)</u>		
1. Eighth Amendment Guarantee as a Protection of Individual Rights	Yes	b
2. Pile-up on Death Rows	No	No
3. Discrimination on the Part of Juries	No	No

^aHe seems to concur with Douglas and Marshall on this point, but puts "it to one side" for now (1972, p.310)

^bIn that he concurs with others.

The dissenters, all four Nixon appointees, were more uniform in their critiques. To a lesser or greater extent, all expressed the view that the Court was encroaching on legislative turf and that Americans had not “repudiated” the death penalty. Blackmun, in particular, lambasted the brethren for expressing views wholly inconsistent with *McGautha* and *Crampton*, even though they raised due process, not Eighth Amendment, claims. As he suggested, in the 1970 cases *Stewart* and *White* agreed with Harlan’s majority opinion that it would be virtually impossible to create sentencing standards-- now they were striking laws in part because of the absence of such standards. So too Brennan and Marshall dissented in *Crampton*, arguing for standards, but now suggested that these would be virtually worthless, that ‘arbitrary’ sentencing would occur anyway (see Burt, 1987 for more on this point). In general, Blackmun’s point was that “*McGautha* sought...to require that juries...be given standards...In *Furman*, however, it is precisely this ‘untrammled’ discretion...that...is offensive” (Junker, 1972, p.101).¹⁴³

While Chief Justice Burger’s opinion was similar in tone, it did raise a unique issue: it pointed out to states that the plurality (Douglas, Stewart, and White) had not ruled that capital punishment under all circumstances was unconstitutional and that it may be possible for them to rewrite their legislation to meet their objections. As he asserted: “it is clear that if state legislatures and the Congress which to maintain the availability of capital punishment, significant statutory changes will have to be made...legislative bodies may seek to bring their laws into compliance with the Court’s ruling by providing standards for juries and judges to follow...or by more narrowly defining crimes for which the penalty is imposed” (1972, p. 400). Privately, though, Burger thought his suggestion futile, claiming later that “There will never be another execution in this country” (Woodward and Armstrong, 1979, p.219).¹⁴⁴

His view was shared echoed in many quarters. A University of Washington Professor of

¹⁴³Some members of the majority tried to square their opinions with *McGautha*, perhaps in recognition of the inconsistency. Douglas, however, turned *McGautha* “to his own advantage,” claiming that it was “the seeds of the present cases (1972, p.2731).

¹⁴⁴Even in his opinion, Burger noted that “There is little reason to believe that sentencing standards in any form will substantially alter the discretionary character of the prevailing system of sentencing in capital cases” (1972, p.401).

Law (Junker, 1972, p.109) wrote “My hunch is that *Furman* spells the complete end of capital punishment in this country...” Abolitionists attorneys were, predictably, ecstatic. Amsterdam called it “the biggest step forward criminal justice has taken in 1,000 years” (Mann, 1973, pp.31-32). Meltsner simply wrote that “fantasy had become reality.”

Such reactions hardly seemed misplaced; after all it appeared as if the Court’s decisions in *McGautha* and in *Furman* left virtually no room for state legislation despite Burger’s recommendation. In 1970, the Justices declared that it would be virtually impossible to impose sentencing standards on triers of capital cases; in 1972, the plurality held that unbridled jury discretion led to the “freakish” imposition of death. The tension between the two rulings left legislators with little recourse, so it seemed. The other option-- mandatory death penalties for certain crimes some thought, would comply with both *McGautha* and *Furman*. Yet, at least several of the Justices, implicitly or explicitly, had expressed their disdain for such automatic sentencing.

Thus, the future of abolition seemed rather secure. *Furman* was an all-out victory for which LDF attorneys unabashedly took credit. Some year later, when an interviewer (Civil Liberties Review, 1975, p.118) asked Greenberg to name the LDF’s most important victories, his first response was *Furman v. Georgia*. LDF attorney Meltsner undoubtedly agrees; in the preface to *Cruel and Unusual*, he wrote: “This book tells much about the operation of the Court and the law of capital punishment, but its primary purpose it to convey the craft and cunning of the lawyers who orchestrated a stunning legal victory...” (1973, p.xi).

There is some truth to these views. Unquestionably, without the LDF’s intervention, capital punishment would not have seen its way to the Court’s docket so quickly. By bringing appeals in such bulk, the LDF acted as an “agenda setter,” (Caldeira and Wright, 1988), forcing the Court to resolve an issue its attorneys had largely created. By the same token, it seems that the group’s arguments profoundly affected the two pivotal Justices-- White and Stewart-- to come its way. Neither had been especially committed to an abolitionist perspective, nor were they particularly sensitive to the rights of the accused. Yet, both their opinions reflect, if not in full, at least in part, important LDF themes. The eight-year campaign, false starts and all, had somehow

had worked; as Greenberg noted (1982, p.915), “*Furman* and *Pre-Furman* anti-death penalty litigation resulted in vacated sentences for about 860 defendants, including all 629 persons on death row at the time of *Furman*.” At least for the time being, a de facto abolition had occurred in the United States.

The Repercussions of *Furman*

While the Court was contemplating the 1972 capital cases, the LDF was formulating emergency plans should the Justices reach an adverse decision. It contacted Wolfgang about the possibility of a new study; it considered launching a line of arguments arising from *Witherspoon* and so forth (see Meltsner, 1973, p.288). What the LDF apparently never considered was what would happen if it won the case; it failed to anticipate (Muller, 1985) the tremendous backlash that would greet *Furman* and company.

Perhaps this was so because during moratorium most Americans were not very concerned about capital punishment. Sure, they held opinions on the subject-- mostly they approved of it. But so many other items occupied the political agenda, that the death penalty hardly had a place of eminence. What the Court's opinion and the attendant press coverage did was to catalyze the issue-- to move it way up on the agenda of the day. Before 1972, it was just one of many concerns; now, it dominated discussions among legislators, lawyers, scholars, and even average citizens. And, from what we can discern, they were indeed discussions, not debates: Virtually every political indicator pointed to massive disdain for *Furman*.

The Federal Government

The first of these came, not surprisingly, from the Nixon administration. On the day after the Court handed down *Furman*, the President held a press conference during the course of which he addressed the issue of capital punishment. While he said that he had not gotten “through all nine opinions,” he had read the Chief Justice's dissent. And, that based on Burger's opinion, he found “the holding of the Court must not be taken...to rule out capital punishment...” (New York Times, 30 June 1972, p.2). Though Nixon provided no details on the sorts of laws states and the federal government could pass to circumvent the Court's ruling, his statement was an important one: it

was the first major public acknowledgment that *Furman* did not abolish capital punishment.

More statements from the administration followed. In January of 1973, Attorney General Richard Kleindienst announced that the President would be asking Congress to enact mandatory death penalty legislation for certain federal crimes. He also reiterated Nixon's view that the Court had not abolished capital punishment, but rather had "come down with a decision that requires action by Congress and also by state legislatures" (Ripley, 1973, p.1).

Several months later, in a series of speeches and radio addresses, Nixon announced that he had asked the Justice Department to "draft a capital punishment law that would survive review by the Supreme Court." And, that more than ever he believed in the utility of death penalties: "Contrary to the views of social theorists, I am convinced that the death penalty can be an effective deterrent against specific crimes. The death penalty is not a deterrent so long as there is doubt whether it can be applied. The law I will propose would remove this doubt" (Weaver, 1 March 1973, p.1).

Finally, in mid-March 1973, Nixon issued a 6,000 word statement to Congress in which he introduced a 538-page bill aimed at revising the entire criminal penal code. He also said that he would be sending, under separate cover, a death penalty proposal.¹⁴⁵

The law he eventually proposed combined some novel ideas with those offered by the American Law Institute in the late 1950s. It specified several federal crimes (e.g., treason, kidnapping, hijacking) carrying penalties of death. If the government accused defendants of committing one of those, they would face a bifurcated proceeding: a guilt phase, then sentencing. The law went further, proscribing guidelines (standards) for sentencers: if they found no mitigating circumstances and one aggravating factor, the defendant automatically received death; if one circumstance in mitigation existed, the defendant would be spared.¹⁴⁶ All in all, the Justice Department reasoned that the law would garner the support of at least six members of the Court

¹⁴⁵He made the decision to send it separately "so that Congress [could] move more swiftly on this issue because there is an immediate need for this sanction" (Weaver, 1973, p.1).

¹⁴⁶The proposed legislation stipulated that youthfulness (age 18 and under) automatically created mitigation.

because it removed the “arbitrariness” to which some had objected (Weaver, 15 March 1973, p.24).

Reactions to Nixon’s proposal were predictable. His 1972 opponent for the presidency, George McGovern, found it abhorrent because no evidence existed to suggest that the death penalty was a deterrent. Besides, he was morally imposed to its imposition (New York Times, 12 March 1973, p.25). Aryeh Neier, director of the ACLU, called it “one of monumental brutality.” And, on the same day Nixon introduced the legislation, Representative Robert Drinan (D-Massachusetts) asked Congress to abolish formally capital punishment. Governors and other legislators, however, lauded Nixon. As the Chief Executive of California, Reagan, noted: the “President certainly is reflecting the concerns of a great many Californians” (New York Times, 12 March 1973, p.25).

After the package was formally introduced into Congress by Arkansas Senator John McClellan, some observers predicted that it was “liable to have a long and stormy course” (Weaver, 15 January 1973, p.17). This, however, misjudged the extent to which members of Congress supported capital punishment. Less than a year after Nixon proposed it, the bill received a favorable recommendation from the Senate’s Judiciary Committee, which found that capital punishment was a “valid and necessary social remedy against dangerous types of criminals offenders.”

This was not a conclusion to which the Committee came lightly. Its report suggests that the members gave serious considerations to the Court’s opinions in *Furman*, particularly to those of Stewart and White. Based on that reading, it concluded that two sorts of laws would meet their objections: the modified ALI proposal of the Nixon administration and strictly mandatory ones. Upon finding the latter “inhumane,” it approved of the President’s version.

Two weeks later, the full Senate held eight hours of “emotional,” but generally pointless debate on the bill: “Most members had made up their minds long ago...” The Senate easily approved what was hailed as a bi-partisan reinstatement of capital punishment by a vote of 54-33

(Weaver, 14 March 1974, p.1).¹⁴⁷

The State Legislatures

Some suggest Nixon's staunch support of the death penalty was quite real, that he genuinely believed it to be a deterrent; others argue that the President had ulterior motives. As one commentator wrote (Shawcross, 1973, p.367), Nixon knew "very well" that few federal crimes would be punishable by death. "What he presumably hopes is the legislation will encourage states to go further and reimpose the death penalty." If that was his intent, he was too late. Months before he formally submitted new death penalty legislation, the states were on the move. Indeed, prior to the Senate's vote, almost half the states had restored capital punishment.

As we indicate in Table 1-10, the return of death penalties came earlier in some and certainly varied in route. California was the site of the first public battle.¹⁴⁸ Recall that after that state's high court struck down capital punishment (months before *Furman*), Governor Reagan vowed revenge. He lived up to that threat by proposing a public initiative-- Proposition #17-- that would restore capital punishment, thereby overriding the state court's decision. Just four months after *Furman*, in November of 1972, California voters passed the proposal by a 2-1 margin. In September of the following year, Reagan signed a bill of formal reinstatement.

(Table 1-10 about here)

Florida was the first state to restore by legislation. Immediately after the Court handed down *Furman*, Governor Reubin Askew created a "Committee to Study Capital Punishment," which he asked to address the following question: Would a capital punishment statute be acceptable in light of the 1972 decision? After making a careful inquiry into all the possible alternatives, including the state's attorney general's suggestion of a mandatory law, the Committee concluded that Florida should not attempt to reinstate capital punishment until a comprehensive study could be

¹⁴⁷A month later, the bill went to the House, where it sat in a Judiciary Committee preoccupied with Nixon's impeachment (Weaver, 12 April 1974, p.6). It did, however, pass a provision of the law, that making skyjacking in which a fatality occurred punishable by death.

¹⁴⁸As early as 1 July 1972, battles were brewing in at least 5 states (Georgia, Oklahoma, North Carolina, and Kansas). And, some members of Congress had proposed a constitutional amendment to reinstate death penalties (see Phalon, 1972, p.10).

Table 1-10
State Legislation: Pre- and Post-Furman*

Pre-Furman	Post-Furman	
	<u>No Death Penalties</u>	<u>Death Penalty</u>
<u>Possessed no Death Penalties by Law</u>		
Alaska, Hawaii, Iowa, Maine, Minnesota, Oregon, West Virginia, Wisconsin	all except Oregon	Oregon (1978)
<u>Possessed no Death Penalties by Judiciary</u>		
California, New Jersey		California (1974), New Jersey (1982)
<u>Restrictive States</u>		
New Mexico, New York, North Dakota, Rhode Island, Vermont	New York (i, 1977) North Dakota Vermont	New Mexico (1973), Rhode Island (1973)
<u>Death Penalty States</u>		
Alabama, Arizona, Arkansas, Colorado, Connecticut, D.C., Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming	D.C., Kansas Massachusetts (i- 1975)	Alabama (1976), Arizona (1973), Arkansas (1973), Colorado (1975), Connecticut (1973), <u>Delaware</u> (1974), Florida (1972), Georgia (1973), Idaho (1973), Illinois (1974), Indiana (1973), Kentucky (1975), Louisiana (1973), Maryland (1975), Mississippi (1974), Missouri (1975), Montana (1974), Nebraska (1973), <u>Nevada</u> (1973), <u>New Hampshire</u> (1974), <u>North Carolina</u> (1974), Ohio (1974), <u>Oklahoma</u> (1973), Pennsylvania (1974), South Carolina (1974), South Dakota (1979), Tennessee (1974), Texas (1973), Utah (1973), Virginia (1973), Washington (1973), Wyoming (1973)

*Sources: Zimring and Hawkins, 1986, p.43 and Bowers, 1984, pp.525-531.

Note: i=invalidated by federal or state court.

States underlined had some form of mandatory capital punishment; the balance enacted "guided discretion"-type laws.

undertaken. In its final report of 20 October 1972, in fact, it suggested that no law-- ALI-type or mandatory-- would pass constitutional muster; it also asserted that the margin on the Court against such legislation would be even wider because some of the dissenters would change their votes “out of respect” for *Furman* (Ehrhardt, et al., 1973).

The state legislature, however, chose to ignore the Committee’s recommendation. In a four-day special session called by Governor Askew, the House (by a 116-2 vote) and the Senate (by a 36-1 margin) reinstated capital punishment on 8 December 1972. The law itself resembled the one proposed by Nixon, and thus, the ALI Code, as well. It called for a bifurcated trial for defendants charged with committing certain crimes (e.g., premeditated murder, rape of a child). If the jury reached a determination of guilt, it would issue an advisory sentence of life or death based on a consideration of codified mitigating (e.g., no history of criminal activity, emotional duress) and aggravating (e.g., committed while engaged in another felony, especially heinous, done for pecuniary gain) factors. The judge would then review the jury’s sentence of death and if s/he agreed, the defendant would have an automatic appeal to the state’s highest court.¹⁴⁹

Members of the Governor’s Committee harshly criticized the new law, calling it “seriously defective” and “an expedient response to election-time politics rather than a sound response to the constitutional and penological needs of the state” (Ehrhardt and Levinson, 1973, p.21). Likewise, the Florida State University Law Review called it “constitutionally deficient” because it did not “effectively eliminate...excessive discretion” and it was “regressive in view of the eighth amendment” (1974, p.150).

Nonetheless, as we depict in Table 1-10, many states followed Florida’s example enacting similar sorts of laws between 1973 and 1976, that is, laws providing “guided discretion” for sentencers with the power to impose death. Once again, most mandated a bifurcated trial and specified aggravating and (sometimes) mitigating circumstances.

In passing such laws, many states did seem concerned over constitutional questions,

¹⁴⁹For detailed histories of the Florida law, see Ehrhardt and Levinson, 1973 and Florida State University Law Review, 1974.

particularly the compatibility of their new statutes with *Furman* and *McGautha*. Yet, the voting margins were generally quite lopsided. In Georgia, for example, the state senate followed the house's lead, enacting death penalties by a vote of 47-7. Though Governor Jimmy Carter had "some questions of its constitutionality," he signed the bill into law (Flint, 1973, p.1).

Other states, as we also can see in Table 1-10, took the mandatory route, making the imposition of death automatic for certain crimes. That they believed these laws compatible with *Furman* seems to stem from two sources. In December of 1972, the National Association of Attorneys General approved by a 32-1 margin a resolution approving capital punishment. While it noted only that "each state would [have to] determine what the offense would be," it did suggest that mandatory laws would probably withstand a constitutional challenge (New York Times, 7 December 1972, p.30).

The Supreme Court of North Carolina further reinforced the legitimacy of mandatory sentencing with a major ruling in January 1973. After *Furman* it was generally the case that state courts (and U.S. Courts of Appeal) struck down existing legislation as incompatible with the new precedent. Such opinions were what sent legislators back to the drawing board in Florida, Georgia, and so forth. In 1973, however, the North Carolina court took something of a unique position. In *State v. Waddell* it held that *Furman* made it unconstitutional for a jury to play any discretionary role in capital cases; thus, it could no longer recommend a life sentence (i.e., "show mercy") rather than execution. In doing so, though, it did not strike down the state's law in toto--just the mercy provision; the statute itself "survived" as a mandatory one. The legislature formalized *Waddell* in 1974, enacting automatic imposition of capital punishment for specified crimes.

Hence, by the time Nixon had proposed federal death penalty legislation, the states were, to say the least, way ahead of him. Six months prior to the Senate's approval, thirteen had restored, two others were awaiting gubernatorial action, and 16 others were debating the issue. By the end of 1974, as we depict in Figure 1-6, 231 people had been sentenced to death under these new laws. And, nobody even knew if they were, in fact, constitutional.

(Figure 1-6 about here)

Explaining the Backlash

That politicians responded negatively to *Furman* is an understatement. With but very few exceptions,¹⁵⁰ the push to reinstate was as intense as it has ever been in our Nation's history. As Schwed wrote (1983, pp.144-145), "The speed with which all this legislation was passed was a testimonial to the Nation's fervent desire to have capital punishment laws on the books."

Why this occurred remains open to speculation. As our description of early abolitionist efforts revealed it is often difficult to gauge the behavior of state legislatures. One thing we do recognize, though, is that they often succumb to the will of the people: this was true in the 1900s; it remained so in the 1970s.

Consider Figure 1-7 , which shows public opinion on capital punishment. Right around the time of the Court's decision we see that Americans were relatively divided on the issue, though generally supportive. By November 1972, those in favor jumped by 7 percentage points. And, by 1974, roughly two thirds of all Americans supported execution.

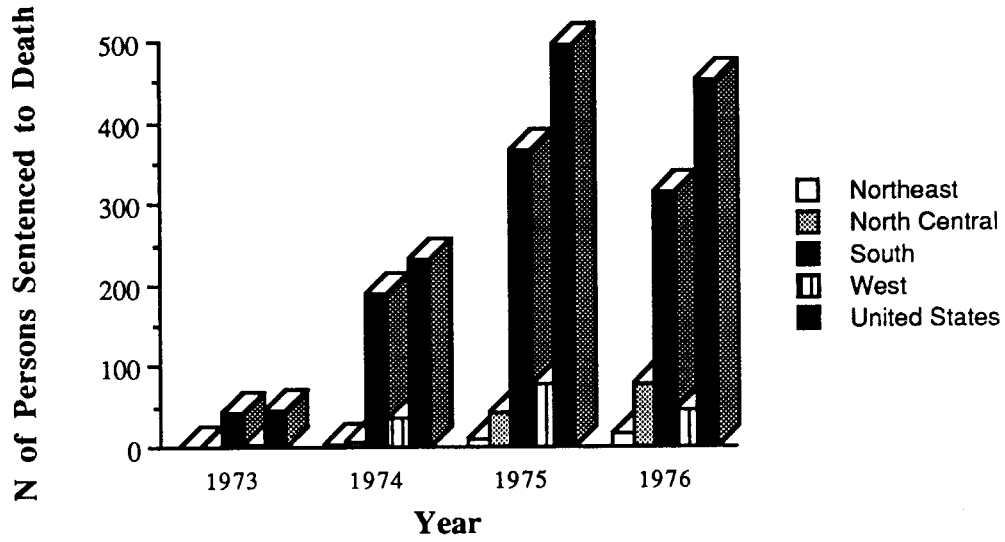
(Figure 1-7 about here)

Undoubtedly, legislators knew the views of their constituents and, in turn, pressured governors to introduce legislation or hold special sessions to contemplate the issue. That message was apparently delivered loud and clear. When Nevada's governor read his State address to the legislature in 1973, he "was interrupted by applause just once," when he called for a return to capital punishment. New York's Governor Rockefeller received "thunderous" applause when he made the same suggestion at a labor conference (Flint, 1973, p.1).

It was also true (as it has been throughout our Nation's history) that pro-abolitionists' views were not well represented in the states. The LDF, because of its tax-exempt status, could not engage in legislative lobbying. Other legal groups, such as the American Bar Association, delayed in taking any position because of the "unsettled" state of the law. In fact, the ACLU and its

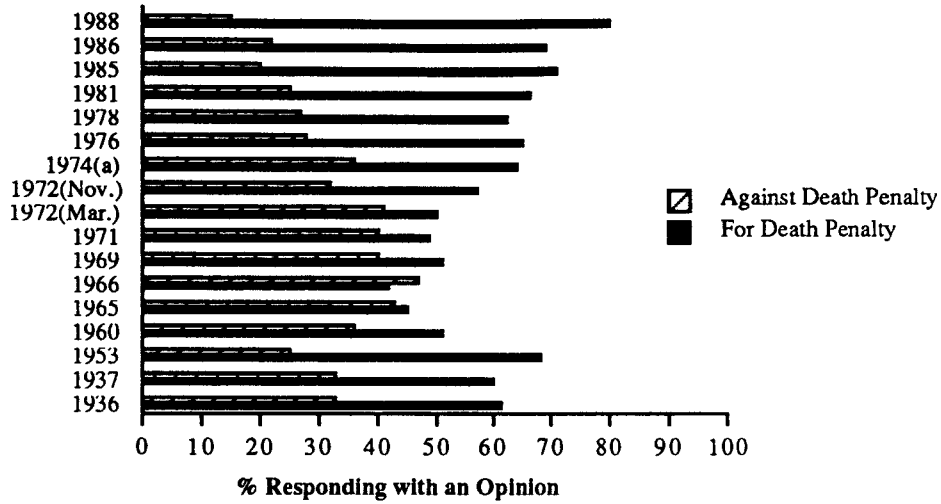
¹⁵⁰Governor Dukakis vetoed a Massachusetts' capital punishment law. His action was sustained by the narrowest of margins (see New York Times, 2 May 1975, p.23).

Figure 1-6
Number of Persons Sentenced to Death, 1973-1976*



*Adapted from: Bowers, 1984, pp.184-186

Figure 1-7
Public Opinion on Capital Punishment, 1953-1988*



*Data obtained from Gallop Polls. We exclude "no opinion" responses, which ranged from 5 to 13 percent. The figure for 1974 was obtained from a Gallop "referendum," which forced respondents to take a "for" or "against" position.

affiliates appear to be the only anti-capital punishment forces that attempted to pressure state legislators.¹⁵¹ After *Furman* came down, the ACLU noted that it was working to stop “efforts [that] quickly got underway in several state legislatures to pass new death penalty measures.” It was highly optimistic of victory: “While strenuous efforts may still be necessary to preserve the victory, it seems likely that these efforts will succeed” (ACLU, 7/71-6/72, p.23).

ACLU official Aryeh Neier, however, claims that the group did not enter the legislative arenas “in a significant way” until 1974, when it appointed a coordinator of state efforts.¹⁵² In retrospect, however, this was too little, too late: by 1974 “nearly a decade after public antipathy to the death penalty peaked in the 1960s, it was extremely difficult to prevail in state legislative battles” (Neier, 1982, p.206).

Some scholars, though, have suggested that the *Furman* “backlash” may have been less a response to constituent pressures (and the lack of organized interests on the other side) and more of a reassertion of the legislative function. In her study of the U.S. Congress, Stolz (1983, p.158) claims that:

Congressional interest in federal death penalty legislation might be explained by constituent pressure. It appears, however, that citizens do not actively express their views on the subject. Even those [MCs] identified as legislative activists on the issue indicate that they receive little mail on it, suggesting minimal immediate public interest.

Rather, based on examinations of public records and interviews with key staffers and MCs, she concluded that such legislation serves not a “tangible” function but several “symbolic” ones: it reassures the public by showing that something is being done about crime; it provides “moral education” by implicitly praising the law abiding citizen; it serves as a “model” for state legislatures; and, it provides a rationale for the justification of deterrence.¹⁵³

¹⁵¹This was by design, that is, as part of a three-prong plan devised by Amsterdam (see Caswell, 1974).

¹⁵²Before then Douglas Lyons was assisting the Union. Lyons had helped the LDF in the capital cases (see Table 1-6), serving as a researcher from 1970-1972. He then worked for the ACLU, but left to take for Hofstra Law School. The ACLU appointed a coordinator to replace him in 1974.

¹⁵³Zimring and Hawkins (1986) reached similar, though identifiable distinct, conclusions about the state legislative response. They too argue that the public, while united in its beliefs toward capital punishment, did not in and of itself lead to the backlash. Rather, they assert that it can be best understood in terms of two social-psychological theories. The first, “frustration-aggression,” generally suggests that “aggression is always a

Symbolic or not, the new state laws were having a real, tangible impact. Again, as we display in Figure 1-6, death row figures were climbing annually.

The Abolitionist Response

In the heady days immediately following *Furman*, abolitionists were confident of victory (Schwed, 1983). Most felt that the legislative attempts to circumvent *Furman*-- mandatory or discretionary-- would not pass constitutional muster.¹⁵⁴ What abolitionists did not anticipate was the magnitude of the backlash. In a 1985 interview with Greenberg, Muller (1985) reported that the attorney "asserted quite straightforwardly that the LDF did not worry about this backlash effect..." Another LDF attorney agreed: "We were surprised at the explosion...states returned so quickly and enthusiastically..." (Gray and Stanley, 1989, p.344). Legal scholars had much the same reaction. As one noted: "*Furman* was not greeted with surprise, but no one expected the legislative response to the decision" (Reidinger, 1987, p.50).

It is clear, though, that the LDF recognized the decisions did not firmly and finally abolish capital punishment in the United States. Prior to *Furman*, Amsterdam had planned a meeting of California abolitionists for 7 July 1972 with the intent of mounting a campaign against Proposition #17. After *Furman*, many participants called Amsterdam to see if the conference would be cancelled; to some it looked as if the Court's ruling nullified the referendum. Acknowledging that *Furman* left open the possibility, however small at this point, for new legislation, Amsterdam was definitive: The conference would be held as scheduled. And, in fact, despite the magnitude of the victory in *Furman*, the atmosphere at that meeting was one of pervasive pessimism: many attendees expressed the view that Proposition #17 would pass. Indeed, the conference was so

consequence of frustration." Applying this to capital punishment, Zimring and Hawkins argue that legislatures were frustrated by the judiciary for taking away their power to impose death. Concomitantly, a "psychological reluctance" reaction occurred in which their loss of independence "trigger[ed] a strong desire to reassert their legislative power to act" (see pp.41-42). In either event, it was the Court's 1972 decision that produced this "symbolic" backlash-- the desire to reclaim legislative prerogative in this area.

¹⁵⁴One exception was the New York Committee to Abolish Capital Punishment. Immediately after *Furman*, one member said: "The way has been left open for state legislatures to attempt to reenact the death penalty in conformance with criteria suggested by the Court's decision...While this will not be so easy a thing to do...it is unfortunately the kind of thin that will appeal to certain legislators..." (quoted in Schwed, 1983, p.143).

downbeat that Amsterdam quipped “This group has me seriously wondering whether winning *Furman* was a good thing after all” (see Meltsner, 1973, p.307).

“New” Strategies: The Scholarly Community

While the victory in *Furman* begin to look less-than-complete (particularly with passage of Proposition #17 a certainty), abolitionists at this point showed “no signs of panic,” still “calmly and flatly” predicting that America “will never have another execution” (Caswell, 1974, p.48). What they did recognize, though, was that the war might not be over, that they would have to contemplate counter attacks.

To this end, in October 1972, the LDF held a conference of “two dozen leading researchers and scholars” at Columbia University. During the meeting Amsterdam unveiled a “three-prong” post-*Furman* strategy. First, he explained that ACLU would undertake a lobbying campaign to stop restoration efforts. Second, he promised that the LDF would continue to litigate, challenging any new laws. Finally, and concomitantly, he told the gathering that that attorneys would need ammunition for new cases, ammunition in the form of social science evidence, which it then could incorporate into their legal briefs (Caswell, 1974)

As one in attendance noted, Amsterdam placed significant emphasis on the last point, making “clear the interests of courts in further objective social science research on all aspects of the death penalty (Bedau, 1977, p.92).” He thought that gathering such data was particularly important in light of the opinions of several Justices, most notably Burger and Powell, who suggested that the LDF failed to provide sufficient evidence to support its arguments. The Chief Justice, for example, claimed that there was no “clear indication” of arbitrariness in the continued imposition of the death penalty (1972, p.390); and, that LDF attorneys provided no “empirical findings to undermine the general premise that juries imposed the death penalty in the most extreme cases” (192, p.390, note 12). Both he and Powell also complained that the statistics used to show race discrimination were outdated and that “while no statistical survey could be expected to bring forth absolute and irrefutable proof of a discriminatory pattern of imposition, a strong showing would

have to be made, taking all relevant factors into account” (1972, p.391, note 12).¹⁵⁵ By the same token, LDF attorneys felt they needed more systematic evidence on deterrence and public opinion to hold the votes of Stewart and White.

At the meeting’s close, attendees understood the challenge Amsterdam had posed to them. And, they also agreed that the optimal way of implementing the LDF’s wishes would be through a coordinated project, “which would enlist investigators around the national and from all relevant disciplines...” (see Bedau, 1977, p.92.).

By all accounts (e.g., Caswell, 1974; Bedau, 1977; Pierce, 1975), Philosophy Professor Hugo Adam Bedau took the lead in developing this coordinated research enterprise. In February of 1973, he obtained a \$32,000 grant from the Russell Sage Foundation, “to identify and stimulate research that might be usable in future court cases.” Bedau took his mission quite seriously; he pursued research with vigor, going so far as taking out an ad in *Federal Probation*, soliciting work. What he spent the balance of his time (and money) doing, though, was organizing conferences of academics and lawyers at universities throughout the United States: at the University of Pennsylvania, Berkeley, University of Illinois, Yale Law School, UCLA Medical School, among others.

The purpose of these “by-invitation only” meetings was to explain to researchers the sorts of issues requiring investigation.¹⁵⁶ Ideally, Bedau thought “three kinds of empirical” evidence might have helped curtail the *Furman* backlash: data showing that innocent people were executed,

¹⁵⁵Burger and Powell used Blackmun’s opinion in *Maxwell* to justify this position (see White, 1975).

¹⁵⁶Bedau also had bear in mind the, at times, distinctly different objectives of lawyers and social scientists. He tried to do this by “anticipating exactly what the legal issues [were] going to be and then interesting the social scientists in doing research that they can see is going to be relevant.” In an interview, he gave this example:

[We held] a survey research conference...[in] August 1973 in New York City...We had some of the top people in the field...It’s 4 pm and one of the people said, “Well, we still don’t have a clear idea of how this research would be relevant to the needs of attorneys and judges.”

Jack Himmelstein...explained that the Eighth Amendment is partly determined by evolving standards of decency. Public opinion relates to that in a general way...How strong is the support for capital punishment? What we need is survey research which will help the courts to understand that public opinion on the death penalty is not simply a matter of “yes” or “no” answers to pollsters’ questions. Everyone was scribbling furiously and the meeting ended with a couple of people saying they were ready to write a research proposal for a study” (quoted in *Trial*, 1974, p.52).

that capital punishment had no deterrent value, and that all capital defendants were one-time offenders. Recognizing that these “extremes” never could be demonstrated, he conceived of a more realistic “research agenda,” one that would contemplate the administration and effect of capital punishment, the sorts of evidence that would be helpful to persuade legislators against enacting new laws, and of the kinds of sentencing schema (mandatory and guided discretion) that the Court did not explicitly reject.

Being pragmatic, though, Bedau also sought to devise and encourage research that would be funded either by private or public sources. Despite his efforts, such was not to be: between 1973 and 1974, he sought \$150,000 for a three-to-five year project, but failed to obtain the monies. Rather than give up, Bedau and others proposed seven (which eventually turned into 25) smaller projects, hoping that they could obtain individual funding and then integrate them (see Bedau, 1977).

As it turned out, only two received foundation support; with the result being that others were “shelved indefinitely.” But those that did go forward, with or without funding, made some significant contributions. In Table 1-11, we depict those efforts (as well as others undertaken between 1972 and 1976) and their major findings. As we can see, most of the work clustered around public opinion, deterrence, and to a lesser extent, race.

(Table 1-11 about here)

Why these areas attracted the balance of scholarly interest is rather easy to discern. Recall the LDF’s primary argument in *Furman*: that evolving standards of decency now made capital punishment an out-moded form of sentencing. By 1974, flaws with this arguments were evident. As we already discussed, the reaction of state legislatures, emerging public opinion, and mounting death row populations combined to it seem rather ridiculous. What the new wave of research tried to demonstrate was that aggregated public opinion polls may be masking nuances in public views toward death penalty. And, as such, the “evolving standards” argument may be more apt than it seemed.

The issue of deterrence also attracted scholarly interest for similar reasons. Recall that

Table 1-11
Post-Furman Research, 1972-1976

Deterrence^a

<u>Authors</u>	<u>Study</u>	<u>Findings</u>
Bedau (1972-73)	Response to RMN claim that capital punishment has a deterrent effect on crime.	Demonstrates that this may be a premature conclusion
Ehrlich (1975)	Econometric study of deterrence, using Uniform Crime Reports	Finds that death penalties deter murders.
Gibbs/Erickson (1975,1976)	Review of literature and previous results.	Suggest that it is up to advocates of capital punishment to demonstrate deterrent effect because it is virtually impossible to provide evidence to controvert.
Bailey (1975)	Examination of homicide rates based on data obtained from state bureaus of corrections.	Homicide rates are higher in states restoring capital punishment. Rejects deterrent theory.
Passell (1975)	Cross-sectional analysis of deterrence.	Finds no deterrent effect.
Bailey (1975,1976)	Examination of rape rates based Uniform Crime Reports and Teeters and Zibulka inventory.	Rape rates are higher in death states. Rejects deterrence theory for rape.
Passell/ Taylor (1975,1976)	Evaluation of Ehrlich	Finds flaws in Ehrlich's data/time period. Rejects his conclusions.
Bowers/Pierce (1975)	Evaluation of Ehrlich	Finds flaws in Ehrlich's analysis. Rejects his conclusions.
Baldus/Cole (1975)	Evaluation of Ehrlich	Finds flaws in Ehrlich's analysis. Rejects his conclusions.

Public Opinion

Vidmar/Ellsworth (1974)	Examination of public views based on Harris Survey data, 1973 where citizens stand.	Public opinion polls are normally too simplistic to capture. Need detailed, comprehensive studies.
Ellsworth/Ross (1975,1976)	Examination of public views based on surveys administered in California, 1974	Public opinion in favor of the death penalty reflects views at odds with the Court's opinion, that is, citizens want "selective application...on the basis of the criminal rather than the crime."
Thomas/Foster (1975)	Examination of public views based on	Support for the death penalty is

surveys administered in Florida, 1973

based largely on a fear of crime and that capital punishment is a means of reducing that fear.

Sarat/Vidmar (1976)

Examination of public views based on interviews of citizens in Massachusetts.

Test of Justice Marshall's theory that if people were informed about capital punishment, they would reject it. Confirms that theory.

Race Discrimination^b

Zimring et al. (1976)

Study of 204 homicides in Philadelphia

65% of blacks who killed whites received death; 25 percent of blacks who killed whites received capital punishment.

Reidel (1976)

Racial composition of death row, 1971, 1975.

87% of death sentences were given to those who killed white victims

Wolfgang/Reidel (1976)

Reexamination of Wolfgang data, using multivariate analyses.

Same results.

^aFor reviews of some of these studies, see Barnett (1981) and Wilson (1983)

^bFor a review of some of these studies, see Kleck (1981)

Justice White's opinion rested heavily on the infrequency of the usage of capital punishment; he questioned whether in fact it could serve as a credible deterrent when it was so rarely invoked. This was a reasonable claim to make at the time, since the evidence was so inconclusive (for a review, see Shin, 1978). After *Furman*, however, one scholar-- Isaac Ehrlich-- argued that White was wrong, that "contrary to all previous investigation-- each execution saved seven or eight innocent lives by deterring murders that would otherwise occur (Ehrlich, 1975, p.414; Bowers, 1984, pp.280-181).

Ehrlich's investigation was praised by pro-death penalty advocates; it was the first econometric study of deterrence, it received significant media attention (e.g., Time, 1974), and, it eventually was published in a highly visible journal. What it also did, though, was prompt a wave of critiques and research on deterrence. Indeed, much of the research displayed in Table 1-11 lambasted his study, concluding that he found only the "illusion of deterrence" not an actual effect.

There was also a spate of scholarship on discrimination and general arbitrariness in the application of capital punishment. Virtually all of this new work confirmed the basic finding of the Wolfgang study: that black defendants accused of murdering or raping white victims were far more likely to receive death sentences. As Riedel (1976, p.282) concluded, "there is no evidence to suggest that post-*Furman* statutes have been successful in reducing the discretion which leads to a disproportionate number of nonwhite offenders being sentenced to death."

While scholars continued their research, Bedau and others sought to disseminate it. In 1975, he and Dr. Chester Pierce (of the American Orthopsychiatric Association) published *Capital Punishment in the United States*, which provided excerpts of much of the research summarized in Table 1-11. Around the same time, the *American Journal of Orthopsychiatry* held a symposium on the death penalty. It did so at the "encouragement" of Bedau with the expressed hope that the articles "would serve both the general readership and legal scholarship about concerns which would help mount an enlightened revision of custom." The editor also suggested that "even as the United States Supreme Court deliberates capital punishment, these articles will stimulate still more pertinent research by an array of social scientists" (Pierce, 1975, p.580).

Back to the Courts

With the scholarly community in high gear, LDF attorneys could focus their attention elsewhere. For one thing, they were literally “watching” the situation as it unfolded in the states, compiling vast amounts of data on legislation, sentencing, and death row populations.¹⁵⁷ This information surely assisted the organization internally-- they would need it to launch later appeals. It also helped them “externally:” Virtually every newspaper account of capital punishment between 1972 and 1976 contained data obtained from LDF sources. The end-result: a convenient, symbiotic relationship between some newspapers (particularly the *New York Times*) and the LDF. Consider, for example, that on Christmas Eve (Wicker, 1973) and again on New Years of 1973, the *Times* ran two highly sympathetic stories on death row inmates with a specific focus on North Carolina. Both were chock full of statistics (many of which were obtained from LDF sources) about the numbers of inmates and their racial composition. One was so pro-abolitionist that it elicited a response (in the form of a letter to the editor) from Greenberg, who called it “moving and informative.”

In addition to compiling and publicizing the cause, the LDF began to execute the second prong of Amsterdam’s plan, moving back into legal arenas. As Bowers (1984, p.176) wrote the new state “laws and their application set in motion a renewed judicial assault on the death penalty led by members of the LDF.” Given the widespread reinstatement, though, the organization could not possibly have handled all the new cases ushered in by these laws. In fact, the LDF’s situation in 1974-75 was less than optimal. It had a budget of around 3.6 million, but given other areas of interest (e.g. employment discrimination, school desegregation), it devoted only 10 percent to capital punishment. Moreover, it could only afford to allow 2 of its 24 staff attorneys to work full time on death penalty cases (see Bedau, 1987).

Still many of the veterans of *Furman*, including Amsterdam (now a Professor at Stanford)-

¹⁵⁷The LDF continues to conduct a “regular census of death-sentenced inmates in the United States, Death Row, U.S.A.” (Gross and Mauro, 1989, p.36).

- were more than eager to toil.¹⁵⁸ As one attorney noted, Amsterdam was involved “in every case, planning, advising, identifying issues and trying to shape the way new statutes were interpreted by the state courts” (Gray and Sanders, 1989, p.344). So too, other groups (e.g. Team Defense, Southern Poverty Law Center) and attorneys pitched in, particularly at the state level. The LDF would often “assist” them there and then bring appeals into the federal arena.

In essence, then, the organization’s post-*Furman* strategy was not wholly different from moratorium: it attempted to provide legal representation to all prisoners sentenced under the new laws (see Greenberg, 1973, p.14; Meltsner, 1974, p.39). One staffer describes it in the following terms:

We sought to represent the first defendants sentenced under those post-*Furman* laws...I therefore did a lot of ambulance chasing to get cases...usually it was pretty easy to obtain these row clients because state lawyers were paid peanuts, and usually when we offered to do a brief on a legal memo they were delighted to have free help. In fact, the process was such a process that once we got into the business, people began throwing cases at us (Gray and Stanley, 1989, p.345).

Indeed, the LDF even revised and updated the pre-1972 “Last-Aid” kits.

As death row populations swelled (see Figure 1-6), though, organizational attorneys turned their sights to North Carolina, Georgia, and Florida, in particular. Why they did so surely had something to do with the numbers. Of the 147 inmates nation wide (as of 1974) 49 were in North Carolina, 29 in Georgia, and 18 in Florida, thereby accounting for 65 percent.¹⁵⁹ But it was also concerned with the varying sentencing schema used by these states.

North Carolina’s mandatory death penalty had garnered a great deal of public attention, in part because of the numbers sentenced under it; in part, because it was rather unique: few states had mandatory penalties. The state asserted that its scheme was constitutional because it removed capriciousness and arbitrariness; the LDF maintained that it did no such thing. To bolster this contention, its attorneys argued that North Carolina should have given every burglar (40,000 in

¹⁵⁸Jack Himmelstein left the LDF to take a teaching position at Columbia Law School. The LDF replaced him with David Kendall, a Yale Law School graduate, who had clerked for Justice White.

¹⁵⁹The remaining were in Louisiana (8), New Mexico (7), Oklahoma (6), California, Texas, Massachusetts (5), Wyoming (4), Ohio (3), Arizona, Virginia (2), and Mississippi, Tennessee, Utah, Pennsylvania (1) (Weaver, 30 October 1974, p.68).

1973), for example, the death penalty, but that only one received it. Why? Because of prosecutorial discretion: District Attorneys plea bargained cases, reducing offenses to non-capital crimes. What this proved, in their view, was that “discretion has not been eliminated, it has merely become less visible.” Moreover, they argued that the North Carolina system was still discriminatory: 33 of its 47 inmates were black (Meltsner, 1974, p.39).

The LDF targeted Georgia and Florida for another reason: their guided discretion laws were quite typical. And though these states (and the 30 some odd others that had passed similar laws) claimed that they were compatible with *Furman*, abolitionists suggested that “the new law works much like the old one...aggravation is vaguely defined and mitigation isn’t defined [in the Georgia code], that [it] still doesn’t help jurors decide who should be executed” (Meltsner, 1974, p.39). In briefs filed in Georgia cases, in particular, attorneys sought to demonstrate this by the numbers: only 18 individuals sat on death row, while 23,000 had committed capital offenses during the same time period (Weaver, 30 October 1974, p.68).

The Supreme Court

As the states continued to pass death penalty laws and the scholars to publish articles, abolitionists were appealing cases up to the Supreme Court. By the start of the October 1974 Term, the Justices has at least nine cases (two from Georgia, seven from North Carolina) from which they could select for full review.

LDF attorneys were certainly optimistic that the Court would grant *cert* in at least one; after all, executions would be simply delayed until they reviewed the new laws. They were almost as optimistic that the Court would strike down the laws in all their incarnations. They had every reason to be: the statues seemed incompatible with the catch-22 situation created by the gap between *Furman* and *McGautha*; the composition of the Court had not changed since the 1972 opinions; a wealth of scholarly and legal data seemed to confirm the continued arbitrariness and lack of deterrent value; and, another moratorium of sorts was in effect. No one had been executed since 1967; as the post-*Furman* death-row population mounted, the LDF felt confident that the Court would not order mass executions.

As it turned out, attorneys were correct on the first score: in October of 1974, the Justices agreed to hear arguments in one of the LDF's North Carolina cases, *Fowler v. North Carolina*, but none of those from Georgia. Defense attorneys remained unperturbed; they thought the North Carolina "law" was the weakest of all and, thus the least likely to pass constitutional muster. The only troublesome point might be the ugly facts surrounding *Fowler*. Apparently, Jessie Fowler fatally shot an acquaintance in a bar in front of several witnesses, including the victim's children. Nonetheless, the mandatory scheme under which he had been sentenced seemed so out-of-line with the underpinnings of *Furman* that the LDF thought it had a winner.

Though the Court had only agreed to hear the case, not yet docketing it for oral arguments, attorneys on both sides prepared. Undoubtedly, they thought this would be a major ruling if only because it would be the first one since 1972. The resolution itself probably would not have much impact: few states possessed mandatory laws. Yet, it would provide some indication of the future of capital punishment in the United States.

It was again Amsterdam who led the LDF into the legal battle, writing the brief and later arguing the case. In general, he saw *Fowler* as an opportunity to "consolidate and widen *Furman*..." (Bedau, 1977). To that extent, his legal arguments encompassed those made in 1972, especially that capital punishment was incompatible with evolving standards of decency. But, of course, they were geared toward the mandatory law at issue. In particular, he claimed that the North Carolina system was at its heart no different than pre-*Furman* schema-- that it allowed and even encouraged the same "arbitrary" and "selective" imposition by virtue of the fact that prosecutors exercised discretion in trying defendants. For example, had Fowler's prosecutor decided to offer a plea bargain or reduce the charge to second-degree murder, he would not have received death.¹⁶⁰

¹⁶⁰This argument follows closely that made by legal scholar Black (1975) in a highly regarded book, *Capital Punishment: The Inevitability of Caprice and Mistake*. In fact, in a review of the work, the *Yale Law Journal* (1975, p.1769) said: "This is a book...written to four men: those Justices who have expressed reservations about capital punishment, have yet held themselves unwilling to override with their own preferences those legislative choices which provide for the death penalty."

As LDF attorneys confidently worked on the *Fowler* case, they received some disturbing news: in early March 1975, U.S. Solicitor General Robert Bork filed a 78-page amicus curiae brief in support of capital punishment. This was troublesome to the extent that the Solicitor General's voice often carries great weight with the Justices (see Segal, 1984). But, it was perhaps more bizarre than anything else. For one thing, the federal government had stayed out of the 1972 cases, probably viewing them as matters of state concern only. Now, under Bork, it was asserting a "federal" interest in the matter. Doing so certainly was a reflection of the Justice Department's more adamant views on the subject.¹⁶¹ Just two months before Bork filed the brief, Attorney General-designate, Edward Levi, announced that the death penalty only can be a deterrent to crime if it is "quickly enforced and acceptable to the community" (Charlton, 1975, p.17). But it also reflected the personal wishes of Robert Bork, as well (see Bronner, 1989, p.82). In his way of thinking, state legislatures had acted and that it would be "inappropriate for [the] Court to substitute its judgment for [theirs]..." Bork also firmly believed that the death penalty had deterrent value. Indeed, in his brief he relied quite heavily on Ehrlich's as-of-yet published study.¹⁶²

The other rather unusual aspect of the brief was that it did not address the core issue of the case: North Carolina's mandatory law. Rather, Bork "chose to press the much broader question of whether a death penalty falls within cruel and unusual [punishment]" (Weaver, 1975, p.4). And, in making his plea for judicial restraint (and, concomitantly, that the Court should reconsider *Furman*) he wrote that the government was far more favorable toward the Georgia-type laws than to North Carolina's mandatory scheme because it had been devised de facto by a court- not a legislature. In essence, then, Bork's' brief supported capital punishment; yet, it did not necessarily condone North Carolina's practice.

¹⁶¹Griswold participated earlier as an *amicus curiae*, but did so at the Court's invitation.

¹⁶²Caplan (1987) tells an interesting story of how Ehrlich's study came to the attention of Solicitor General's Office. Apparently some lawyers thought that Bork needed to respond to the LDF's claim that the evidence on deterrence was inconclusive, at best. "[L]ate one night the deputy in charge was unwinding in front of his TV, and he caught the end of a debate about the death penalty on a talk show." Isaac Ehrlich was among the participants. The attorney then "tracked down Ehrlich and asked him if he could see the study...for possible use in the Solicitor General's brief" (pp.22-23).

If this wasn't trouble enough for the LDF, several days later Bork requested time to represent his views in oral argument. He told the Justices this was necessary because the government does not fully support "North Carolina's position," but did not want the Justices "to seize the occasion to broaden" the 1972 decisions.

Bork's approach and presence alone certainly complicated *Fowler*. In the past, death penalty litigation had been difficult enough for the LDF, what with constitutional history, public opinion, and so forth. But, at least it faced adversaries-- state attorneys-- with more or less parochial interests (i.e., upholding their state's laws) and of varied legal skills. Now, Bork upped the ante; the LDF would face a skilled opponent, one who approached litigation in much the same way it did: as a means to bring about broad policy change.

What LDF attorneys did have on their side was some time to respond to Bork. The Justices had yet to schedule the case for orals. The reason for the long delay became evident when the Court finally took some action (on 30 March), ordering orals for 21 April 1975. Apparently it was awaiting the return of Justice Douglas, who had been hospitalized with a stroke since New Year's eve (Weaver, 31 March 1975, p.13). One story, in fact, has it that the Justice, who was at Walter Reed Hospital, did not feel he was making sufficient progress there and decided to transfer to New York University Medical Center. "But he would not go until he finished one piece of business on the Court"-- the death penalty (Woodward and Armstrong, 1979, p.369).

With the return of Douglas, LDF staffers could breathe a sigh of relief: the fifth vote appeared in tact. Still they had to respond to Bork's brief; in particular, the claim that the "empirical judgment" about deterrence on which some of the *Furman* opinions rested should be reevaluated in light of Ehrlich's study. Recognizing that they could not afford to lose a single vote, five days before orals Amsterdam submitted a reply brief containing Pasell and Taylor's (1975) study, which seriously questioned the data, methods, and assumptions of Ehrlich's research.

Orals In *Fowler*

On 21 April 1975, the day of orals in *Fowler*, the scene in the courtroom was nothing short of dramatic. As three attorneys-- Amsterdam, Bork, and North Carolina's Deputy Attorney

General, Jean Benoy-- waited to make their presentations, Justice Douglas, “who had left the hospital to be there” entered in a wheel chair (Oelsner, 22 April 1975, p.21). The stakes were high: at this point 31 states had restored capital punishment and 253 sat on death row. And, while North Carolina's scheme was rather unique, it was clear that the Court’s decision would have a major, if symbolic, impact on the future of the death penalty.

The drama of the setting was apparently unmatched by the orals. As one observer wrote: “the argument was not quite so emotional as the issue” Perhaps this was so because Justice Douglas, an active participant in past cases, asked no questions during the entire 90-minute session; perhaps it was the case that the Justices had heard it all and had staked out their positions. Indeed, during orals, Stewart appeared unpersuaded that mandatory laws wiped out the “freakishness” with which he was so concerned in 1972. Even Bork seemed rather subdued. After enunciating his basic contention that “capital punishment is constitutional,” he not once mentioned the issue of deterrence or the Ehrlich study.¹⁶³ All in all the case looked like a winner for the LDF. The position of the Justices seemed unchanged from *Furman*.

What those attorneys did not know was that the morning after orals, Douglas checked into the New York hospital, missing conference discussion on *Fowler*. When the Justices deadlocked at 4-4, they decided to reschedule it for arguments the next term (Weaver, 24 June 1975, p.1). The Court’s decision, or more aptly non-decision, made front-page news. The effect, though, was far from newsworthy from the LDF’s perspective: states could continue to sentence to death persons accused of a wide array of offenses. Death row populations would continue to grow.

A Change on the Court

Because the Justices could not decisively rule on *Fowler*, the fate of the death penalty remained on certain. As a result, during the summer of 1975, petitions for review continued to pour into the Court.

¹⁶³The only moment of “drama” arose when Justice Marshall asked the North Carolina attorneys about the role of blacks in the state’s law enforcement apparatus. He wanted to know how many “negroes” were in the system, to which the attorney responded that there was a “negro woman [judge]-- a Negress.” “the Justice appeared to bristle” (Oelsner, 22 April 1975, p.21).

The brethren did not quite know how to handle these appeals. The four dissenters in *Furman* thought they lacked the votes to make any substantial inroads into the 1972 cases; the liberals seemed equally distraught in part because one of their own was becoming less and less a functioning member of the Court. From his hospital bed in late July, Douglas asked his clerks to: “Tell Justice Brennan to pass on to conference that I am unsettled as to what disposition to recommend in the capital cases. On the new capital cases that have come this term I am undecided whether to affirm or deny...” (Urofsky, 1987, p.195). The inference was clear to even his closest allies: Douglas’ days on the Court were numbered.

This became reality on 12 November 1975, when, after 36 years of service, Douglas resigned. The immediate question became one of his successor, a question of substantial interest to the LDF; after all, with Douglas gone, the Court was apparently deadlocked 4-4 on capital punishment.

The wait was not long; immediately after Douglas resigned the Ford administration asked the American Bar Association’s Committee on the Judiciary to review a list of 11 possible candidates, including several Members of Congress, sitting court of appeals judges, law professors, and Solicitor General Bork.¹⁶⁴ After the ABA “pronounced the list ‘a good one’,” Ford and Attorney General Levi made the final cut. Just 16 days after Douglas retired, John Paul Stevens was nominated to fill the position (see Abraham, 1985, p.323).

That they were able to agree on a candidate so quickly was a testament to Stevens’ impressive credentials. He had graduated first in his class at the University of Chicago, going on to co-edit the law review at Northwestern. From there, he served as a clerk to Supreme Court Justice Wiley B. Rutledge, “one of the most liberal Justices ever to sit on the Court” (Sickels, 1988, p.ix). Upon leaving Washington D.C. in 1948, Stevens joined a Chicago law firm and became a leading expert on anti-trust matters.

¹⁶⁴It was reported that several women were on the list, including sitting judges Cornelia Kennedy and Shirley Hufstедler. Apparently Betty Ford put some “pressure” on the President to nominate a woman (see Abraham, 1985, p.323).

Stevens continued to practice law, as well as teach part time at the University of Chicago and Northwestern Law Schools until Nixon nominated him for a position on the U.S. Court of Appeals for the Seventh Circuit.¹⁶⁵ From 1970-1975 he apparently served on the bench with distinction. The U.S. Attorney General “had read all of Stevens’ opinions and [was] very much impressed by their style and clarity;” the ABA gave him a rating of exceptionally well qualified (see Abraham, 1985, p.323). So too Stevens seemed ideologically compatible with President Ford. His opinions on the Court of Appeals indicated that he was no Douglas, but no Rehnquist, either. He was a centrist, a “judge’s judge,” as many have said. Indeed, at this hearings, he vowed to follow a philosophy of judicial restraint (for an in-depth view of Steven’s jurisprudence, see Sickels, 1988).

Apparently, the Senate liked what it heard for on 17 December 1975, it confirmed Ford’s nominee by a unanimous vote. Two days later, Justice Stevens took his seat on the Nation’s highest Court.

A New Court and New Cases: To *Gregg v. Georgia* et al.

LDF attorneys did not quite know what to make of Stevens. While some women's groups had opposed him because of his stance on the Equal Rights Amendment, the group had little to go on-- the new Justice had never ruled on a death penalty case. It did know that his vote, while not a sure thing (as was Douglas’), was necessary to keep *Furman* alive. They would not have to wait long, however, to find out where Stevens stood. When he arrived at the Court 50 appeals, most of which were brought by the LDF, were pending.

The Court Goes to Work

Because some of the Justices were anxious to resolve the capital punishment question, in mid-January of 1976 Burger called a “special Saturday session” to examine petitions for cert. At that time, the Justices agreed to try and clarify the Eighth Amendment issue as it applied to the

¹⁶⁵Though he never had been a particularly active partisan (he was a registered Republican) from 1951-1955 he assisted the party: first as a Republican counsel to a House Committee studying monopolies; then, as a member of an Eisenhower commission to examining anti-trust laws.

range of new laws. They also agreed that they would take only murder cases. Apparently, though, there was some disagreement over which petitions they should take. *The Brethren* suggests that Burger “wanted to hear the most brutal” murder cases, but he could not muster three supporting votes. Rather, “a consensus emerged that the Court should take only relatively straightforward cases where the facts were clear and presented no side issues, such as racial prejudice” (Woodward and Armstrong, 1979, p.431).

This appears to be precisely what the Justices did: on 22 January, Burger issued an order to review five capital murder cases from North Carolina, Louisiana, Texas, Florida, and Georgia, involving six defendants, three of whom were black-- three, white. Including *Fowler*, the Court would resolve six disputes.

As Table 1-12 indicates the facts of these cases and laws under which the defendants received their death sentences varied substantially. Two of the cases involved mandatory-type scheme, *Roberts* and *Woodson/Waxton*. The latter, out of North Carolina, was a duplicate of *Fowler* in that the state mandated death for murder and rape. The Louisiana law, at issue in *Roberts*, was a bit distinct because it contained a mercy provision under which a jury could reach a verdict of guilt on an offense lesser than murder.

(Table 1-12 about here)

The Florida, Georgia, and Texas cases involved variations of the ALI-type code, that is, they mandated bifurcated proceedings and stipulated guided discretion standards for sentencers. Florida’s law specified both mitigating and aggravating circumstances; Georgia’s-- only codified factors in aggravation. Texas’ was something of a mixed bag, as it mandated that the jury respond to statutorily defined questions posed by the judge, rather than to specified circumstances.

Formulation of Arguments Against Capital Punishment

By virtue of the wide array of laws and facts involved in the cases, it was invariably true that the Court was sending out a signal to abolitionists: it was intent on dealing with capital punishment in its totality. If this was so, the message was not lost on LDF attorneys, who had sponsored three of the five cases (*Jurek*, *Woodson*, *Roberts*) . Now the ball was back in their

Table 1-12
The 1976 Death Penalty Cases

<u>Case</u>	<u>Facts</u>	<u>State Law</u>
<i>Gregg v. Georgia</i> (428 U.S. 153)	Gregg was convicted of murdering and robbing two men who had picked him up while hitchhiking.	Bifurcated trial after which the jury weighs evidence in mitigation and aggravation. The Georgia law specifies 10 aggravating circumstances; factors in mitigation are not codified. Automatic appeal to state supreme court.
<i>Jurek v. Texas</i> (428 U.S. 262)	Jurek was convicted of murder (by strangulation and drowning), while committing a forcible rape.	Bifurcated trial after which attorneys may introduce any relevant evidence for/against a sentence of death. The judge, then, presents the jury with questions (2-3) that are defined by law. If a unanimous jury responds positively, judge must sentence defendant to death.
<i>Proffitt v. Florida</i> (428 U.S. 242)	Profitt was convicted of murder (by stabbing) during the course of a burglary.	Same as Georgia law, except specified 8 aggravating and 7 mitigating circumstances.
<i>Woodson and Waxton v. North Carolina</i> (428 U.S. 280)	Woodson and Waxton were convicted of murder while committing armed robbery.	Mandatory death sentence for first-degree murder.
<i>Roberts v. Louisiana</i> (428 U.S. 325)	Roberts was convicted of murder during the course of a robbery.	Mandatory death for first degree murder. But under a provision for "responsive verdicts" juries are to be instructed on second degree murder. They can reach a verdict of guilt on a lesser offense.

court: Could they duplicate the impressive victory in *Furman*?

On one level, achieving that goal seemed well within reach. Though they had lost Douglas, they seemed assured of at least four votes: most indicators of judicial voting suggested that White, Stewart, Marshall, and Brennan would stick by *Furman*. Since the stimuli (capital punishment) was the same, constrained-micro-level theories of judicial behavior would predict an identical response. Doctrinal analysis also led to the conclusion that the *Furman* plurality would remain intact. Our examination of law review articles published between 1972 and 1974 reveals a consensus that Stewart and White would reject new state efforts to restore.¹⁶⁶ As one (Butler, 1973, p.937) wrote: “if the Justices concurring in *Furman* hold to their opinions...it is likely that at least some...sections (of the Georgia law) will be struck as unconstitutional.”¹⁶⁷ Some even posited that one or two of the 1972 dissenters “would bend to the the precedent of *Furman* and vote against any new imposition of capital punishment” (Irvin and Rose, 1974, p.189; Ehrhart et al., 1973). As former Justice Goldberg wrote (1973, p.367) “In view of legislative reconsideration of the matter, it is pertinent that a decisive majority of the Court expressed personal abhorrence of the death penalty.”

At another level, though, things had changed since *Furman*, and not for the better for the LDF. For starters, attorneys would have to capture the vote of Stevens, or at least one of the dissenters, *while* keeping the plurality intact. They also would have to find some way of dealing with the hostile post-*Furman* environment, *while* retaining some semblance of the evolving standards argument. Finally, they would have to deal with a most skilled and policy-oriented adversary-- the Solicitor General, *while* maintaining a focus on the individual components of the state laws.

Navigating this course was the chief responsibility of Amsterdam and the LDF staff.

¹⁶⁶Our survey, on one hand, indicates that the decision did not end the debate over capital punishment; *Furman* was not “the final word” (Akron, p.149). Yet, those scholars who did venture a guess, seemed equally as convinced. Between 1972 and 1974, 28 law review articles were published on *Furman*. Of those 21 suggested that the Court would hear more cases on the subject and perhaps modify *Furman*. Seven asserted that *Furman* settled the issue.

¹⁶⁷So too academics were virtually unanimous in their view that the key Justices would not support the mandatory laws (e.g., Fordham).

Though other attorneys (public defenders) were involved, they were fully prepared to follow Amsterdam's lead. After all, this was the man who had pulled off *Furman* through what was "generally regarded as a masterpiece in advocacy" (Mann, 1984, p.62). No reason existed to abandon ship now and, in fact, none did: in the final analysis, all five briefs followed an identical approach. First, they sought to demonstrate that each element of the new laws retained some measure of discretion (and, thus, of arbitrariness) and second, they reiterated *Furmanesque* claims that the death penalties constituted cruel and unusual punishment.

In Table 1-13, we depict the basic outline followed by all attorneys. As we can see almost all the briefs devoted far more attention to the first major claim-- the discretionary nature of the laws. And, in doing so, they all raised the same objection: that each stage of the death penalty process is so fraught with discretion and judgment that it will inevitably lead to and perpetuate the same sort of arbitrariness condemned in *Furman*. Form followed substance: all attorneys went through their respective death procedures (from prosecutorial decision through executive clemency) to demonstrate just how discretion crept into the process.

(Table 1-13 about here)

But, as we also can see, attorneys marshalled different evidence to support this contention. The briefs filed in *Jurek* and those in *Profitt* provide perhaps the greatest juxtaposition. In the former, LDF attorneys tried to make the most universal, broad-based arguments. Though they cite case- and state-specific examples, the brief itself was full of statistics, of citations to law review articles and to social science research, and of far-reaching statements about capital punishment. In contrast, the *Profitt* brief is somewhat parochial. Rather than bring to the Court's attention social science evidence (and thus duplicate the LDF's efforts in *Jurek*), *Profitt's* counsel (public defenders) supported their claims with trial testimony, examples of other Florida cases, and the like. The remaining briefs fell somewhere in between, mixing data and social science evidence with case-specific information.

All in all, this was a rather sensible scheme. Because attorneys followed the same basic approach, they communicated a consistent message to the Justices. Yet, they also were sensitive to

Table 1-13
Arguments in 1976 Capital Punishment Cases

Defendants' Arguments/Support	Gregg	Jurek	Briefs		Profitt	Roberts
			Woodson			
I. Discretion inherent in all laws continues to perpetuate the arbitrary infliction of death sentences.						
a. Prosecutorial Discretion in Charging and Plea Bargaining						
Law Reviews	Yes	Yes				Yes
Other State Capital Cases		Yes	Yes	Yes	Yes	Yes
Precedent	Yes					
Other Attorney Briefs		Yes	Yes			Yes
b. Discretion of Trier at Guilt Phase						
Law Reviews		Yes				
Other State Capital Cases						Yes
Precedent		Yes		Yes		
Trial Transcripts				Yes		Yes
c. Discretion of Sentencer^a						
Law Reviews		Yes				
Other State Capital Cases					Yes	
Trial Transcript					Yes	
Data/Social Science Evidence		Yes				
d. Appellate Review						
Other State Capital Cases	Yes				Yes	
e. Executive Clemency						
Law Reviews	Yes	Yes	Yes			
Other State Capital Cases					Yes	
Data/Social Science Evidence		Yes				
II. Capital Punishment amounts to Excessive Cruelty						
Law Reviews		Yes				
Precedent		Yes				
Data/Social Science Evidence		Yes				
Other Attorneys' Briefs	Yes		Yes	Yes	Yes	Yes

(Table 1-13 continued)

State Attorneys' Arguments	GA	TX	NC	FL	LA ^b
Discretion is Meaningful, Not Arbitrary					
--limited to only the most abhorrent of crimes	Yes	Yes		Yes	Yes
--appellate review is effective	Yes				
--defendants fail to connect discretion to arbitrariness	Yes				
Death Penalty Serves a Legitimate Purpose	Yes			Yes	
Capital Punishment is not Cruel and Unusual	Yes	Yes	Yes	Yes	Yes ^c
--analysis of the Constitution, intent of framers		Yes	Yes		
Judicial Restraint			Yes	Yes	
Not Racially Discriminatory				Yes	

^aNot applicable in mandatory cases.

^bThis was a very short brief because "The State of Louisiana [did] not feel that it should take the time of the Court to again discuss the merits or demerits of capital punishment per se...This question has been thoroughly briefed and discussed by the United States...and the State of Louisiana adopts" its arguments.

^cThis argument was implied (see p.24).

the fact that some members might be more inclined to rule broadly on the issue, while others might wish to draw narrower conclusions. The subtle variation among the briefs might allow for either course of action.

Abolitionist attorneys handled the second part of their argument, that death penalties constituted cruel and unusual punishment, in a similar fashion. The *Jurek* brief set out the claim in its entirety; it was, in essence, an amalgamate of everything the LDF had put forth to date on the subject: that the death penalty is 1) “an absolute penological failure;” 2) “so abhorrent to contemporary American processes of justice that the discretionary operations of those processes has demonstrated its repudiation in the most eloquent manner, by saving from execution all but a ‘bare sample of the culprits whose conduct...[made] them eligible for [it]’”; and, 3) “the source of an always arbitrary and frequently discriminatory infliction of death than can be decently viewed only as an enduring cause of national shame.” The brief supported each of these assertions with massive amounts of data, citations to law reviews and social scientific studies, and precedents. It was, in short, a tour de force statement of abolition.

Rather than replicate the LDF’s efforts in *Jurek*, the other four briefs merely cited it and the *Fowler* brief. They all stated something to the effect of: “to avoid burdening this Court with repetitive matters, petitioner adopts and incorporates the argument put forth in [the *Jurek*] brief” (no. 74-6257, p.35).

Taken as a whole, then, the attorneys tried to accomplish those ends to which we alluded earlier. They attempted to demonstrate that Stewart’s and White’s observations about the arbitrariness of the pre-*Furman* statutes were relevant to those newly enacted. They also sought to meet Burger and Powell’s criticism that they lacked sufficient empirical evidence to demonstrate the validity of their arguments. And, they tried to avoid, as best they could, basing their arguments wholly around the “evolving standards” approach, without contradicting the position they took in *Furman*.¹⁶⁸

¹⁶⁸Several groups filed *amicus curiae* briefs in support of abolition. Amnesty International framed the issue as a “moral” one, involving world-wide human rights. It suggested that the Court “has a unique opportunity [to follow]

The Proponents of Capital Punishment

As was the case in 1972, the abolitionists adversaries consisted not of organized interests, but of state attorneys. Indeed, Georgia, Texas, and California (as an *amicus curiae*) again argued for capital punishment and now were joined by lawyers from North Carolina and Florida. However, the tone and emphasis of their briefs was far different than those tendered in *Furman*. Recall that in 1972 states mostly refuted LDF arguments. Here they altered their strategy: while they responded to LDF charges of arbitrariness, they presented new claims and approaches. In short, they added an offense to complement their defense.

Unlike their opponents, though, the states took the offense in distinguishable ways, pursuing various avenues of inquiry, with very little overlap among them (see bottom of Table 1-13). Some tried to refute point by point the argument that discretion necessarily leads to arbitrariness. Others returned to constitutionally-driven arguments about the intent of the framers and the plain words of the document. Still others maintained that the new laws served legitimate governmental purposes and urged the Justices to exercise judicial restraint. Yet, in all the detail and description of their own state's laws, attorneys did manage to find one major point of agreement: that the evolving standards prophecy of *Furman* had failed to emerge; to the contrary, the public and their representatives fully supported capital punishment, thus creating their own definition of "decency."

California and the U.S. Government filed *amicus curiae* briefs in support of the states. The first largely reiterated the claims brought to light by the parties, adding little new information. Bork's brief was a wholly different story. It was unusually long for a governmental *amicus*, 134 pages including Appendices. But its content was what counted most: If *Jurek* was the abolitionists' tour de force, Bork's was the proponents' counterpart.

At its core, the Solicitor General's brief consisted of a rather simple argument, that "death"

the lead of other human nations..." (p.9). The Colorado State Public Defender reinforced the LDF's point that guided discretion still leads to arbitrariness. To do so, it cited cases from that state, which had a similar scheme to Florida's.

The LDF filed *amicus* briefs in *Gregg* and *Proffitt*, the two cases that it did not sponsor. In general, attorneys reiterated points made in the major briefs.

is not “different” and, hence, should not be accorded an interpretation suggesting otherwise. To make this claim, though, Bork embarked on a long discourse, consisting of four inter-related parts. In the first, he canvassed familiar terrain-- the intent of the framers, the history of the Eighth Amendment, and precedent-- and concluded that all these factors reinforced the view that capital punishment *per se* is constitutional.

The second and third parts served to bridge that information with his broader conclusion. He began with the view that “it is inappropriate for this Court to substitute its judgment about the propriety of the death penalty for that of legislatures...,” particularly when those laws serve a legitimate function and are accepted by the community. To bolster this, Bork engaged in a fairly detailed discussion of deterrence, public opinion, and the like. Significantly, he cited many of the same studies as did the LDF; for example, to substantiate the claim that the public accepts capital punishment, he referred the Justices to Vidmar and Ellsworth’s research (see Table 1-11), which attempted to demonstrate just the reverse contention!

Bork’s purpose was surely to urge the exercise of judicial restraint. Recognizing that some already had rejected that broad position, he argued a bit more concretely that “several of the empirical observations by the Justices who concurred in *Furman* require reassessment in light” of the data he had presented (p.61). To wit, he pointed out that in 1972, White and Stewart both claimed that the “legislative will is not frustrated if the [death penalty] is never imposed;” but, in light of massive restoration, Bork argued that “the legislative will is frustrated unless the death penalty is imposed” (p.62). He also met head-on White’s concern that the capital punishment is an incredible deterrent because it is so seldom invoked. Here, Bork reiterated Ehrlich’s findings and included an Appendix (B), which described in some detail the scholarly debate over the issue. He also implied that while “moratorium” was in effect, homicide rates had skyrocketed.

So too Bork sought to demonstrate that capital sentencing was not racially-based. His review of the race led him to conclude that the data could be read to show that racially-based sentencing was not occurring and that even if it was in the aggregate, it was the micro-level (i.e., the case) on which the Justices should focus: “the possibility of racial discrimination in the

selection or imposition of a particular punishment depends strictly upon the facts and circumstances of the case.”¹⁶⁹

In the final section, Bork devoted substantial space to the LDF’s basic contention that arbitrariness still exists in the new capital laws. In doing so, he zeroed in on the argument’s key weakness: that discretion does not necessarily lead to arbitrary treatment. And, in fact, he asserted that “arbitrariness” and “freakishness” are not even apt terms to describe the criminal justice system because it is, inherently, a system based on disparities: “Is it freakish when an individual is sentenced to five years imprisonment rather than three, when the statutory maximum is life imprisonment?” To argue such, in Bork’s view, one would have to say that “death is different” and the only way one could make such an argument was through the Eighth Amendment. But, as he stated at the onset, the Amendment could not support such a conclusion.

A tidy brief, a clean and logical argument, the ingenuity of which did not escape the LDF. Surely, they recognized that this was the strongest argument ever made on behalf of pro-death forces. Indeed, they wasted no time in filing a reply brief, which largely addressed the middle portion of Bork’s argument. They lambasted the Solicitor General’s (and the state attorneys’) interpretation of the scholarly research. In particular, they asserted that “it was plainly irresponsible to suggest [that increases in homicide rates] are attributable to any ‘judicial moratorium’ ...” (p.6); that the U.S “government’s...citation [to Schuessler’s study on deterrence] is disturbing” because it ignored findings to the contrary within the research; that the U.S. was in error when it asserted that Ehrlich had “remedied” the defects of this unpublished study. Their point, of course, was to convey to the Justices that the government had used the social science studies selectively, ignoring the balance of their conclusions.

All in all, the briefs indicate the makings of a most hostile confrontation. With Bork calling the abolitionists’ arguments “strange,” full of “speculation,” and “begging of questions,” and the LDF responding that his claims were “disturbing,” “notably lax,” and “baseless,” the kid gloves

¹⁶⁹This was the only brief filed (on either side) that addressed the issue in such exacting and elongated terms; indeed, the LDF mentioned race only in passing, supported by a long footnote.

had come off. Whatever sense of decorum had characterized the *Furman* proceedings, seemed lost in *Gregg*. The stakes had gotten too high.

Orals in *Gregg et al.*

The emotion of the briefs crept into oral arguments held on 30-31 March 1976. The format itself was a bit unusual: because Amsterdam was arguing the first two cases (*Jurek* and *Roberts*) the Court gave him one hour with the states replying *seriatim* during the next. That hour may have been the longest in Amsterdam's career. Although the Justices gave him some leeway to explain how the laws worked in theory and in practice, they relentlessly attacked the core of his argument - that discretion led to arbitrary treatment. To make matters worse, the most vehement critic appeared to be Justice Stewart. Consider the following exchange:¹⁷⁰

Stewart: Mr. Amsterdam, doesn't your argument prove to much? In other words, in our system of adversary criminal justice, we have prosecutorial discretion; we have jury discretion...; we have the practice of submitting to the jury the option of returning verdicts of lesser included offenses; we have appellate review; and we have the possibility of executive clemency. And that is true throughout our adversary system of justice. And if a person is sentenced to anything as the end product of that system, under your argument, his sentence, be it life imprisonment or five years imprisonment, is cruel and unusual punishment because it is the product of this system. This is your argument, isn't it?

Amsterdam: No.

Stewart: And why not?

Amsterdam: It is not. Our argument is essentially that death is different. If you don't accept the view that for constitutional purposes death is different, we lose that case, let me make that very clear.

Apparently, by the time Amsterdam made that last point-- "Death is different"-- he was quite vehement, speaking "loudly" to the Court (see Oelsner, 31 March 1976, p.38).

The Justices also peppered the state attorneys with questions, but of a much more informational nature. Many, including Stevens, wanted to know how their codes worked and who was being sentenced under them. The one outburst of emotion came from the Texas Attorney

¹⁷⁰All excerpts of oral arguments were taken from Casper and Kurland (1977), which contains verbatim records in these cases.

General when he proclaimed, “This Court is not the keeper, any more than Amsterdam is, of the social values, the conscience, the moral standards of the people” of this country. In sum, the day did not go well for Amsterdam. As one observer summarized, “Some of the questions of the Justices indicated the challengers of capital punishment may face a more difficult task” than they did in 1972 (Oelsner, 31 March 1976, p.38).

If the first day of orals was tough for abolitionists, the second was far worse. On 31 March, the Court heard arguments from California and the United States as *amici curiae* in all four cases; from Amsterdam and North Carolina in *Woodson*; and, finally from the attorney in *Gregg*.¹⁷¹ The Justices continued to ask questions at non-stop pace. But it was Bork and Amsterdam who surely were the focus of their utmost attention. The Solicitor General was particularly eloquent and prepared, certainly as firm in his views as was Amsterdam. He wanted the Justices to see that his opponent’s position (“death is different”) made little sense under the Constitution and that, in fact, neither did the Justices’ opinions in *Furman*. In support of this, Bork cited study after study on the Constitution, juries, discretion, deterrence, and so forth.

More interesting, though, was that Bork’s presentation “brought unusually blunt questioning” from Burger, Blackmun and Powell, who made no bones about where they stood on the issue. Just as Bork was winding down his presentation (his time was up), Justice Powell said:

Mr. Solicitor General, you haven’t had an opportunity to address in your oral argument the issue of deterrence. I recognize, of course, that the statistical data can be construed in various ways, and I would agree that it is perhaps not controlling or conclusive. Yet I would invite your attention to some figure and then ask you a question.

At this point, Powell read a series of statistics from a 1973 FBI report, which pointed to a 43 percent increase in murder rates. Powell then suggested:

It is perfectly obvious from these figures that we need some way to deter the slaughter of Americans...Would you care to comment, elaborate, or state your views with respect to the deterrent effect, if any, of the death sentence?

In asking this question, or, more pointedly making this statement, Powell gave Bork an extra five

¹⁷¹It also allowed the North Carolina state attorney to complete the remaining 16 minutes of his argument from the previous day.

minutes. But, more important was that it opened the door for a discussion of the deterrence issue from the prosecutorial perspective. Bork (1990, p.275) later described the exchange in his autobiography:

My time expired and I was turning away from the lectern when Justice Powell said said he would like to ask me a question. Controlling his emotion over the incidence of murder with some difficulty, he recited the number of killings annually in America and then asked me to comment. It was a deliberately given license to make any additional points I wished in the form of a comment on his statement. I have never heard a question from the bench I liked more.

While the Justices handled Bork in a sympathetic way, they accorded Amsterdam precisely the opposite treatment. They attempted to punch holes in every one of his claims, letting nothing slide by. Quips from Burger (e.g., “Mr. Amsterdam, would you argue for abolishing the jury system” because of some “irrational acquittals?”), Blackmun, and Powell were not unexpected. More troublesome moments arose when Burger and Powell returned to the point raised by Stewart the previous day:

The Court: Your argument is that death is different. This is where you must end up, as yesterday when Mr. Justice Stewart asked you the question. And your answer has to be that death is different. And if it isn't you lose.

Amsterdam: This is absolutely correct. If death is not different, we lose on every argument we have got.

The Court: If one wanted to argue retribution, one could say that the victims whom you never mention have already lost.

Amsterdam: What did you say?

The Court: I say if one wanted to argue retribution, one could say that the victims, whom you never mention have already lost.

Amsterdam: If one wanted to argue that the system of killing [the defendants but not others] was retributive, yes, but there is no rational retributive justification for killing people who killed...

The Court: I guess you missed my point. I mentioned victims of the four defendants.

Amsterdam: Yes. Victims are unquestionably-

The Court: Dead.

So, it seemed, were the LDF's arguments.

The 1976 Decisions

The Court Prepares

Amsterdam, some say, had not been at his best; indeed, one account holds that the Justices were disturbed by his presentation and demeanor: “Brennan, Stewart, and White were all upset at Amsterdam’s self-righteousness. Amsterdam had lectured them, and at one point, had even bordered on being rude to Blackmun” (Woodward and Armstrong, 1979, p.434). Whether this effected White and Stewart we cannot know at present. What we do know is that on 2 April, the LDF lost the overall cause. In a 7-2 conference vote, the Justices agreed that capital punishment was not unconstitutional, *per se*. This was not unanticipated; after all only Justices Brennan and Marshall had take that position in *Furman*. What was also eminently clear was that the LDF would lose at least three of the other cases: the majority voted to uphold the guided discretion laws of Georgia, Texas, and Florida. Conference discussion on the mandatory schemes was somewhat less focused, with the outcomes uncertain as several Justices passed; yet a four-person majority had voted to strike at least North Carolina’s.

Evidently,¹⁷² Burger assigned Justice White the task of preparing majority opinions in all five cases, a matter of some perplexment since he had been in the minority in the North Carolina case; thus, Brennan should have made the assignment. By this point, though, Brennan and Marshall were so “discouraged” that they were paying little attention to vote counts. So, Stevens, Stewart, and Powell took it upon themselves to talk to Burger. When he was not “very responsive,” Stewart went to White, who in turn “formally submitted all five cases back to conference for reassignment.”

On 5 May, Burger called a new conference for that purpose. By this point, votes had solidified into the three coalitions we display in Table 1-14. One composed of Burger, Blackmun, Rehnquist, and White to uphold all the laws; one of Brennan and Marshall to strike all five; and a

¹⁷²The events occurring after the initial *Gregg et al.* conference have been the subject of some speculation. Though we lack substantial outside confirmation, *The Brethren’s* account probably is close to the mark: it seems to square with what we do know happened in the case and it has been partially corroborated by a 1986 address by Justice Brennan. Hence, we use that as our primary source in the paragraphs that follow.

third of Powell, Stewart, and Stevens held the Court at bay, wanting to eliminate mandatory death penalties, but uphold those with guided discretion. It was, of course, this triumvirate that prevailed, with the decision being made that they would write for the majority in all five cases; the others would concur and dissent where appropriate.

(Table 1-14 about here)

To draft these majority opinions, a somewhat daunting task, the trio divided up the work. Stevens would summarize the facts; Powell would use his dissent in *Furman* to demonstrate that the death penalty did not violate the Eighth Amendment; and, Stewart would have the difficult task of explaining the Court's decision; in particular, on why guided discretion was compatible with *Furman* and *McGautha*, but mandatory imposition was not.

The Wait

Naturally, the LDF could not have known the outcome of conference nor of the internal politicking among the Justices. As the Court labored, though, its attorneys were undeniably concerned.

In fact, it appears as if abolitionists made some attempts to "manipulate" the political environment in the hopes that it would affect the Justices' opinion. Four days after orals the *New York Times* carried an article under the headline "Death Penalty for Nonwhites Found More Likely Now than Previously." It contained a full-blown summary of Riedel's study (see Table 1-11) and his conclusion that "blacks and other nonwhites are now more likely [under the new laws] to receive the death penalty..." (New York Times, 4 April 1976). On the same day, columnist Tom Wicker (4 April 1976, p.15) commented on the results of Zimring et al.'s research (1976) on "murder in Philadelphia," concluding that since the study "showed no clear reason why some murders received mandatory life sentences and others got short prison terms, there probably could be 'no clear indication of special moral turpitude to warrant mandatory death' for some murders but not for others."

The success of these efforts was quite limited. A Gallop Poll taken at the end of April 1976 indicated that 65 percent of Americans favored capital punishment for murder; 28 percent were

Table 1-14
Coalitions in the 1976 Capital Cases

	Guided Discretion			Mandatory	
	Texas	Georgia	Florida	North Carolina	Louisiana
Justice					
Stewart	MU	MU	MU	MS	MS
Stevens	MU	MU	MU	MS	MS
Powell	MU	MU	MU	MS	MS
Burger	MU	MU	MU	DU	DU
White	MU	MU	MU	DU	DU
Rehnquist	MU	MU	MU	DU	DU
Blackmun	MU	MU	MU	DU	DU
Brennan	DS	DS	DS	MS	MS
Marshall	DS	DS	DS	MS	MS

NOTE: MU=majority to uphold law; MS=majority to strike law; DU=dissent to uphold; DS=dissent to strike.

opposed; 7 percent had no opinion (see Figure 1-7). This amounted to a near-record level of support, unparalleled since the 1950s, one made only more dramatic by the fact that just 10 years before, most Americans would have abolished capital punishment.

Given such levels of support, it also is not surprising to find that Democratic and Republican front-runners for the Presidency echoed the sentiment. In May 1976, Gerald Ford stated that “he strongly favors its use ‘in accordance with proper constitutional standards’.” Carter, who had signed Georgia’s death law, agreed that “it should be retained for a few aggravated crimes” (quoted in Sklar, 1976, p.47).

Hence, if the Justices were at all interested in the opinions of the populace, then there is no question as to where it stood. Despite the efforts of abolitionists groups and writers to relay information and data, Americans-- Democrats and Republicans, young and old, men and women-- strongly urged the retention of death penalties.

The Decision

On 2 July 1976, in what one reporter (Oelsner, 3 July 1976, p.1) described as a “somber and dramatic session” the Justices announced their opinions in *Gregg et al.* The occasion was probably anything but dramatic for abolitionists; by this time, some probably recognized that were going to lose. Now it was a question of degree: how damaging was the defeat?

Accounts in the popular press would suggest a loss of some magnitude. Virtually all started with something to the effect of: “the Supreme Court ruled by a vote of 7 to 2 that the death penalty is not inherently cruel or unusual...” (Oelsner, 3 July 1976, p.1). For most Americans, this was all they needed or wanted to know: the United States would not be joining the growing list of abolitionists nations. But the two-hundred some odd pages, amounting to 24 majority, dissenting, and concurring opinions, reveal a far more complex picture.

In Table 1-15, we depict how the Justices voted and the major rationale behind their decisions. Let us begin with the plurality of Stevens, Stewart, and Powell, whose votes swung the Court in favor of guided discretion and against mandatory imposition. In essence, their opinions in *Gregg, Profitt, and Jurek*, were virtually identical in that they were composed of two major

sections: the first-- a discourse on why capital punishment is not unconstitutional per se and the second-- on why the particular law in question was constitutional.

(Table 1-15 about here)

The broad Eighth Amendment issue was most fully explored in *Gregg*. Here, the Justices borrowed heavily from some of the dissents in *Furman* (most notably, Powell's) and from Bork's brief. As we can see in Table 1-15, they sought to demonstrate that precedent, history, and the intent of the framers all mitigated against Amsterdam's position. Using the Solicitor General's arguments (and some from the state attorneys) they also indicated that evolving standards of decency did not support an abolitionist's outcome, while judicial restraint did. Finally, they adopted the rather controversial position that death penalties serve the legitimate governmental functions of retribution and deterrence.

In exploring the validity of the state laws, it was no coincidence that the Court led off with *Gregg*; it was clear that they thought the Georgia law the better of the three because it allowed for the greatest consideration of the particularized circumstances of the case. Yet, this was not to the detriment of the others: the guided discretion schemes of Texas, Georgia and Florida eliminated the possibility for wanton and freakish discretion inherent in the *Furman* laws and thus, the possibility of arbitrary treatment. They saw nothing in the LDF's briefs and arguments to convince them otherwise.

In essence, then, the majority's views in *Gregg*, *Profitt*, and *Jurek* reflected the 1972 dissents, Bork's arguments (up to the point of overruling *Furman*), and the inherent weakness in Amsterdam's position. It all boiled down to a simple matter of logic for Stewart, Stevens, and Powell: the basic "constitutional infirmity" of the 1972 laws was that their "unbridled discretion" led to arbitrariness. Since the new plans called for guided discretion, for a consideration of the particularized circumstances of the case, and for appellate review, chances for arbitrary imposition had dissipated considerably.

As we also can see Justices White, Burger, Rehnquist, and Blackmun concurred. Writing for Burger and Rehnquist, Justice White again reiterated the hole in Amsterdam's argument: he had

Table 1-15
Summary of Decisions of the Justices in the 1976 Capital Cases

Guided Discretion Laws (*Gregg, Jurek, Proffitt*)

Major Points of...	Support
The Plurality (Stevens, Powell, Stewart)	
1. Capital Punishment is not Unconstitutional, <i>per se</i> --serves legitimate governmental functions --is consistent with evolving standards of decency --doctrine of judicial restraint	Precedent, history Retribution and deterrence theories Data
2. The laws of GA, TX, FLA are legitimate --guided discretion is compatible with previous decisions --guided discretion does not necessarily lead to arbitrariness	precedent
The Concurrers (White, Burger, Rehnquist)	
1. abolitionists have not proved their argument 2. death penalty may be more frequently imposed	laws, restoration attempts
The Concurrers (Blackmun)	
1. See his dissent in <i>Furman</i>	<i>Furman</i>
The Dissenters (Brennan)	
1. See his opinion in <i>Furman</i> 2. Capital Punishment is Unconstitutional	<i>Furman</i>
The Dissenters (Marshall)	
1. Capital Punishment serves no legitimate purposes 2. Capital Punishment is excessive and thus, unconstitutional	Rejects theories of deterrence and retribution

Mandatory Laws (*Woodson, Roberts*)

The Plurality (Stevens, Stewart, Powell)	
1. Mandatory Penalties are "Unduly harsh and ...rigid" --violate contemporary values	History of mandatory imposition
2. Inconsistent with <i>Furman</i> --enacted only to comply with <i>Furman</i> --do not replace discretion with objective criteria --do not allow for consideration of particularized circumstances	<i>Furman</i>
The Concurrers (Brennan, Marshall)	
1. Capital punishment violates the Constitution in any way, shape or form	

The Dissenters (White, Burger, Rehnquist)

1. Consistent with *Furman*
2. Judicial restraint

credible deterrent, not arbitrary

The Dissenters (Rehnquist)

1. History does not reject mandatory penalties
2. Consistent with *Furman*

History

The Concurrence (Blackmun)

1. See his dissent in *Furman*

Furman

“overstated” the view that the new laws necessarily produce arbitrary results. The Justice, in fact, called that a “naked assertion,” one “untenable”... “absent facts.” Given his opinion in *Furman*, White also felt some need to reconcile his position on the deterrent question. Recall that in 1972 he found death penalties to be incredible deterrents because they were so infrequently imposed. Here, he simply stated that “I cannot conclude at this juncture that the death penalty...will be imposed so seldom and arbitrarily as to serve no useful penological function.”

Brennan and Marshall filed dissents. Brennan’s was quite short, filled with quotes from his opinion in *Furman*. His conclusion was also the same: “I therefore hold...that death is today a cruel and unusual punishment prohibited” by the Constitution. Marshall’s was a longer discourse focused mainly on the purpose of capital punishment. He refuted the majority’s position that it serves legitimate governmental ends, scolding it for relying on the Ehrlich study; it “is of little, if any, assistance in assessing the impact of the death penalty.” This discussion led him to conclude that it is an “unnecessary” and “excessive penalty forbidden” by the Constitution.

Brennan and Marshall’s opinions smacked of resignation; they, like the LDF, had lost on the key points. And, as we can see at the bottom of Table 1-15, even in *Roberts* and *Woodson*--cases they “won”-- they merely reiterated their view that capital punishment is *per se* unconstitutional. The majority writers, Stewart, Powell, and Stevens,-- though, went to some length to justify their position that mandatory laws were invalid while those calling for guided discretion were not. In short, they approached the task in much the same way as they did in *Gregg*. They began with an examination of history, which revealed that Americans generally regarded mandatory penalties as “unduly harsh and unworkably rigid.” They then tried to demonstrate that they were also inconsistent with the spirit and letter of *Furman*: they do not reflect contemporary values, they do not replace “wanton” discretion with “objective standards,” and they do not permit for the consideration of case-specific circumstances.

White, Rehnquist, Burger, and Blackmun dissented, with the first two writing at length. In White’s view the mandatory schemes ridded capital punishment of the problems he outlined in *Furman*: no longer would it be seldom imposed, discretionary, or arbitrary. He also felt that

judicial restraint called for the Court to uphold the laws. Rehnquist lambasted the plurality's reading of American history, noting that it failed to demonstrate a rejection of mandatory sentencing. Moreover, he found that the scheme consistent with *Furman*, in part because it called for appellate review.¹⁷³

Reactions to Gregg

On one level, the Court's opinions in *Gregg et al.* were as confusing and varied as they were in *Furman*: there was no definitive majority opinion. But, we also could say that the signal sent out was far clearer: a plurality of five agreed that mandatory laws were "out" and guided discretion was "in." The states knew what they could and could not do, generally speaking. This was not so after *Furman*.

It is, thus, interesting to note that the reactions to *Gregg* were somewhat murkier than they were to the *Furman*. Recall that in 1972, most recognized that the Court's decisions did not outlaw capital punishment, but asserted with equal vigor that the Justices would strike future attempts to restore. After 1976, there were some who were willing to wager guesses at the effect of *Gregg*. The Secretary of State in California said that "in light of the...ruling 'we anticipate that the California death penalty statute will be held constitutional'." Philadelphia's Mayor called the decisions "a giant step in favor of the safety of our citizens" (Goldstein, 3 July 1976, p.1). Jimmy Carter supported "the direction in which the Supreme Court has gone." Even some scholars were now terming the decisions "inevitable." As one wrote, between 1972 and 1976, the Court "stepped to the sidelines...to observe without comment this new flurry of political activity." In *Gregg*, the Justices simply "respected these national trends" (Loh, 1984, pp.266-267).

Many, however, were more uncertain than ever before. As one scholar wrote: "The reactions of law review critics, editorial writers, political candidates, and leaders of various interest groups were confused and mixed" (Combs, 1980, p.14). Another commented: "no seamless web of logic united the Supreme Court's opinion on capital punishment...the decisions create a

¹⁷³*Fowler* was remanded in light of *Woodson v. North Carolina*.

nightmare for those seeking immutable principles to explain the Court's behavior and predict its future deliberations" (Murchison, 1978, p.535).

Abolitionist attorneys expressed the most puzzling views of all. One might have expected them to condemn the Court with much the same vigor they praised it in 1972. But this is not at all what occurred. Their predominate public response was one of achievement and pride. In 1976, Greenberg did not stress the loss (and, thus, the fact that the LDF failed to achieve its original objective), but the positive ends of the campaign to date: that as a result of LDF cases, thousands of "lives were spared" and that the number of crimes for which capital punishment was applicable had been reduced. He later (1977) stated that while "the prospects... of an across the board abolition of the death penalty are exceedingly dim," the campaign had been quite effective. Immediately after the decision, Amsterdam concurred, noting that "Death row seems to be cut in half. Exactly where that half falls is difficult to say." Indeed, only a handful of abolitionists would admit, as did the U.S. Catholic Conference, that the decision "can only mean a further erosion of the value of human life and an increased brutalization of our society" (Goldstein, 3 July 1976, p.1).

In short, many abolitionist attorneys tried to portray the 1976 decisions as ushering in a new stage of death penalty litigation, not as slamming the door shut. Greenberg asserted, "We intent to pursue a variety of other approaches to stop executions," because the decisions had "created a situation which possibly will allow further efforts, possibly over many years to eliminate capital punishment."¹⁷⁴

In the Aftermath of *Gregg*

Despite the musings of abolitionist attorneys, it is undeniable that they lost the battle in

¹⁷⁴Two weeks after *Gregg et al.*, on 17 July, the LDF petitioned the Court for a rehearing in *Gregg, Jurek, and Proffitt* so that the states would not consign "166 persons to death." Since the Court was in recess, Powell (as the circuit court judge) received the petition, which explicitly requested stays of execution (New York Times, 18 July 1976).

Despite an apparent threat by Burger (Woodward and Armstrong, 1979, p.441), Powell issued the stay until the full Court could consider the petition. His "unusual" action raised the hopes of abolitionists (see Onek, 1976). But they were quickly dashed on 4 October 1976 when the Court denied the request and lifted the stay (Oelsner, 5 October 1976, p.1).

Gregg and did so by a decisive 7-2 margin. The question remains, however: did they lose the war, as well?

On one level, the answer is obvious and affirmative. By upholding certain forms of capital punishment, the Court rejected the view that evolving standards of decency now condemn the death penalty. A majority of Justices continue to subscribe to this position. As a result, the United States remains as one of only a handful of civilized Nations still sanctioning legal executions.¹⁷⁵ It is also true that the politics of abolition have changed little over the past decade or so. Since 1976, we have not elected a President who has taken a position against capital punishment. To the converse, some suggest that one factor contributing to the overwhelming defeat of Michael Dukakis in 1988 was his support of abolition. Republican nominee George Bush indeed made capital punishment an “issue” by publicizing Dukakis’ veto of death penalty legislation in the 1970s. So too the majority of states continue to sanction death penalties; in many of those effected by *Gregg* (e.g., states with mandatory laws), legislators quickly amended them to conform to the decision (see Bowers, 1984). And, as we display in Figure 1-8, death row populations are surpassing all previous levels.

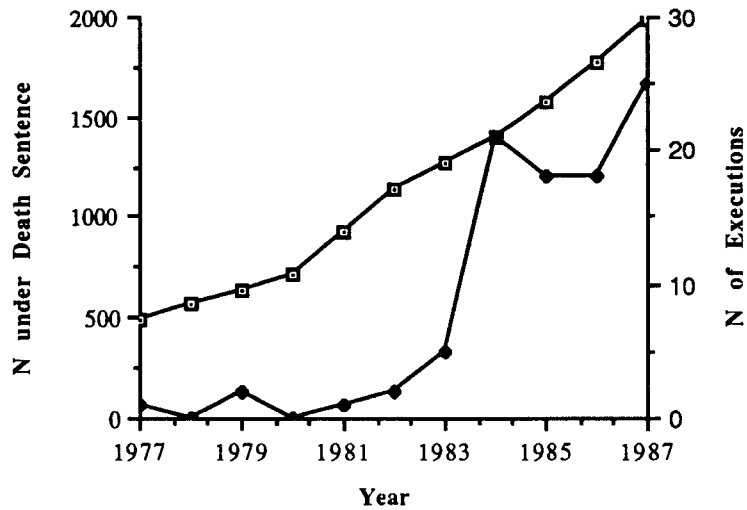
(Figure 1-8 about here)

Why Presidential candidates continue to support capital punishment and legislators, to restore and retain seems obvious: it is a popular thing to do. As summarized in Figure 1-7, public opinion has never been clearer. Americans continue to support capital punishment; indeed, today more citizens favor it than ever before. This creates a vicious cycle of sorts for abolitionists: “mindful of mounting concern about crime, of public opinion polls overwhelmingly supporting execution, and aware of the electoral fate of Governor... Dukakis... many politicians quickly embrace capital punishment” (Malcolm, 1989).

Hence, all these indicators point to the conclusion that the LDF not only lost the battle of

¹⁷⁵Every western industrial nation has stopped executing criminals, except the United States” (Zimring and Hawkins, 1986, p.3). Among the Nations and regions retaining capital punishment are: South Africa, parts of Latin America, the People’s Republic of China, the Soviet Union, and the Middle East.

Figure 1-8
Comparison of the Executions with Prisoners Under Sentence of Death*



Sources: Bowers (1984); U.S. Department of Commerce, 1989, No.324.

Note: Figures on the numbers of prisoners sentenced to death are adjusted yearly. We use the latest available figures (1989).

capital punishment, but the larger war of abolition, as well. All indicators that is to say, but one: the number of executions. After *Gregg* many anticipated massive use of the death penalty. Yet, as we can see in Figure 1-8, such was not to be. Since 1977, when Gary Gilmore died before a firing squad-- despite the efforts of the LDF and ACLU--¹⁷⁶ states have executed 120-plus individuals.¹⁷⁷ Such low numbers, in comparison to the burgeoning death row populations across the country, may reinforce Amsterdam's view: Americans seem to want capital punishment laws in theory, but not in practice.

This may be true, but it is an oversimplification, just the same. Low execution rates may indicate some level of disdain for legally-mandated death; yet, they also are a testament to the efforts of abolitionist attorneys across the country, who have labored diligently to prevent massive executions.

Pulling Out Victory from the Jaws of Defeat?

After *Gregg*, attorneys (from the LDF, ACLU, Public Defenders' offices, and volunteers) tried to keep moratorium alive by providing representation to as many of those on death row as they possibly could; they were, by necessity, reverting to a pre-*Furman* strategy. In Neier's words: "the major thing [we wanted] to try and do is block executions. If that means going to Court, to the legislature, or making a lot of fuss, we'll do that" (quoted in Schwed, 1983, p.153).¹⁷⁸ Thus, abolitionist attorneys persisted, bringing hundreds of cases after *Gregg*. If they

¹⁷⁶The circumstances surrounding Gary Gilmore's execution received tremendous attention (e.g., Nordheimer, 1977; Mailer, 1979) in part because it was the first since 1967 and in part because of his resistance to any legal assistance from the ACLU and the LDF, both of which fought to save him (see Schwed, 1983; Neier, 1982; Goldstein, 1977 for full accounts). Indeed, three weeks before his execution, Gilmore published the following letter in a Utah newspaper.

An open letter from Gary Gilmore to all and any who seek to oppose whatever means my death by legal execution. Particularly: ACLU, NAACP. I invite you to finally butt out of my life. Butt out of my death.

Shirley Pedler [director of the Utah ACLU], Gees, baby, lay off...Get out of my life Shirley. NAACP. I'm a white man. Don't want no uncle tom black buttin in. Your contention is that if I am executed than a whole bunch of black dudes will be executed. Well that's so apparently stupid I won't even argue with that kind of silly logic...(reprinted in Neier, 1982, pp.208-209.)

¹⁷⁷The statistics can be misleading. On one hand, since 1977, one in every 30 sentenced to death was executed by 1988. On the other, 10 in 30 left death row (see New York Times, 1 August 1988)

¹⁷⁸One effect of *Gregg* was to catalyze abolition groups into action. By the early 1980s, there were several dedicated to defending inmates (Southern Prisoners Defense Committee, Team Defense Project, Southern Poverty

could not keep moratorium alive, at least they could narrow the scope of capital punishment in application.

On what grounds were they appealing? If we look solely at the 41 U.S. Supreme Court cases decided with full opinion through the 1988 Term we see that attorneys were challenging procedural practices, emanating from *Gregg*. Indeed, as noted in Table 1-16, post-1976 cases generally centered on three questions involving the imposition of death by juries and judges:¹⁷⁹ upon whom can decision makers confer a sentence of death; who can make the decision between life and death; and, what factors should sentencers consider in their deliberations? Despite the increasingly conservative propensity of the Supreme Court in areas of criminal law generally (see Epstein, Walker, and Dixon, 1989), its answers to these questions had the effect of narrowing the scope of capital punishment, and, thus its application.

(Table 1-16 about here)

Consider the first, who is eligible for execution? By 1976, most states had eliminated the death penalty for all but convicted rapists and murders.¹⁸⁰ In a series of cases, the Court limited capital punishment to felony *murders* only (see Murchison, 1978). Among the most important was *Coker v. Georgia* (1977) in which it eliminated death for rapists. Given the LDF's long history and involvement with these sorts of cases, *Coker* was particularly satisfying.¹⁸¹

Law Center) in court. Further, all five of the organizations (dedicated solely to capital punishment) listed in the *Encyclopedia of Associations* (1990 edition), were founded in 1976 or later.

Ironically, though, one of the many problems facing abolitionists after *Gregg* was a shortage of volunteer attorneys: the pool failed to keep pace with burgeoning death row population. By the early 1980s, organizations throughout the country were expressing the view that "it's becoming almost impossible to find lawyers to do it, and to find people who are skilled in this area (Clendinen, 1982, p.1). One LDF attorney put it a bit more bluntly: "Ninety-nine of death row inmates are indigent and receive lousy legal representation" (Taylor, 1987, p.11).

Interestingly, though, the abolitionist cause now may be getting assistance from an unexpected source-- corporate law firms. As one report suggests "To an uncommon extent, many of the Nation's most prestigious corporate law firms are volunteering for duty in a difficult area of criminal law: capital punishment." This is, at least in part, due to the efforts of the LDF and American Bar Association, which "started vigorous campaigns to recruit lawyers" (New York Times, 8 July 1988).

¹⁷⁹We derive this discussion from George and Epstein, 1990.

¹⁸⁰And, even death for rape was rare. At the time *Furman* was decided, only 16 states (mostly in the South) retained capital punishment for rapists.

¹⁸¹It was also a victory for women's rights groups, several of which-- Women's Rights Project (of the ACLU), NOW, Women's Law Project, Women's Legal Defense Fund, and Equal Rights Advocates-- filed an *amicus curiae* brief on behalf of the defendant, Coker. They did so to educate "the Court to the realities of death sentences for rape-- that this prospect results in fewer convictions for that crime" (O'Connor, 1980, p.133).

**Table 1-16
Capital Punishment Cases, 1976 through 1988 Terms***

Who Can Impose the Death Penalty?

<u>S.Ct. Cite</u>	<u>Case Name</u>	<u>Issue</u>	<u>Outcome</u>
100/2382	<i>Adams v. Texas</i>	Scrupled Jurors	Defendant
105/844	<i>Wainwright v. Witt</i>	Exclusion of a Juror	State
105/2633	<i>Caldwell v. Mississippi</i>	Jury as "final" sentencer	Defendant
106/1758	<i>Lockhart v. McCree</i>	Absolutely Opposed Jurors	State
106/2464	<i>Darden v. Wainwright</i>	Absolutely Opposed Jurors	State
107/2045	<i>Gray v. Mississippi</i>	Scrupled/Absolute	Defendant
107/2906	<i>Buchanan v. Kentucky</i>	Death-Qualified for Co-Defendant	State
108/2273	<i>Ross v. Oklahoma</i>	Juror Challenge/Composition	State
109/1211	<i>Duggar v. Adams</i>	Jury as "final" sentencer	State

On Whom Can Death Be Imposed?

97/2861	<i>Coker v. Georgia</i>	Rapists	Defendant
100/2382	<i>Beck v. Alabama</i>	Lesser Included Offenses	Defendant
102/2049	<i>Hopper v. Evans</i>	Lesser Included Offenses	Defendant
102/3368	<i>Enmund v. Florida</i>	Robbers	Defendant
104/3154	<i>Spaziano v. Florida</i>	Lesser Included Offenses	State
106/689	<i>Cabana v. Bullock</i>	Application of <i>Enmund</i>	State
106/2595	<i>Ford v. Wainwright</i>	Insane Prisoners	Defendant
107/1676	<i>Tison v. Arizona</i>	Non-Killer with Reckless Mental State	State
107/2716	<i>Sumner v. Shuman</i>	Prison Inmate (Mandatory)	Defendant
108/2687	<i>Thompson v. Oklahoma</i>	Under the age of 15	Defendant
109/2934	<i>Penry v. Lynaugh</i>	Mentally Impaired/Retarded	Mixed
109/2969	<i>Sanford v. Kentucky</i>	Over the age of 16	State

What Factors Can be Considered?

97/1197	<i>Gardner v. Florida</i>	Non-Refuted Pre-Sentence Report	Defendant
98/2954	<i>Lockett v. Ohio</i>	Limit on Mitigating Factors	Defendant
98/2977	<i>Bell v. Ohio</i>	Limit on Mitigating Factors	Defendant
100/1759	<i>Godfrey v. Georgia</i>	Overly broad Aggravating Factor	Defendant
102/869	<i>Eddings v. Oklahoma</i>	Limit on Mitigating Factors	Defendant
102/1856	<i>Zant v. Stephens</i>	Invalidated Aggravating Factor	State
103/2733	<i>Zant v. Stephens</i>	Invalidated Aggravating Factor	State
103/3418	<i>Barclay v. Florida</i>	Aggravating Factor	State
104/871	<i>Pulley v. Harris</i>	Comparative Proportionality Review	State
105/2727	<i>Baldwin v. Alabama</i>	Limit on Discretion	State
106/1669	<i>Skipper v. South Carolina</i>	Limit on Mitigating Testimony	Defendant
106/1749	<i>Poland v. Arizona</i>	Aggravating Factor	State
107/837	<i>California v. Brown</i>	Jury Charge (no "sentiment")	State
107/1821	<i>Hitchcock v. Dugger</i>	Limit on Mitigating Factors	Defendant
107/2529	<i>Booth v. Maryland</i>	Victim Impact Statement	Defendant
108/546	<i>Lowenfield v. Phelps</i>	Jury Instructions/Aggravating Factor	State
108/1853	<i>Maynard v. Cartwright</i>	Overly broad Aggravating Factor	Defendant
108/1860	<i>Mills v. Maryland</i>	Consideration of Mitigating Factors	Defendant
108/1981	<i>Johnson v. Mississippi</i>	Invalidated Aggravating Factor	Defendant
108/2320	<i>Franklin v. Lynaugh</i>	Mitigating Factor	State

Other

97/2290
103/3383

Dobbert v. Florida
Barefoot v. Estelle

Sentencing Under Old Law
Stays/ Psychiatric Testimony

State
State

107/1756
109/2207
109/2765

McCleskey v. Kemp
South Carolina v. Gathers
Murray v. Giarrantano

Blacks (who killed whites)
Prosecutorial Statement
Counsel for Indigents

State
Defendant
State

Likewise, on the issue of who can impose death, the Court has generally clung to its decision in *Witherspoon*. While the Court has limited this ruling (e.g., *Lockhart v. McCree*, 1986), it is still true that “the death penalty may not be imposed if the jury that assesses it was selected so as to exclude anyone who expressed general objections to capital punishment or religious or conscientious scruples against it” (Whitebread and Slogobin, 1968, p.637).

Finally, through 1989, the Court took a very serious look at aggravating and mitigating circumstances, narrowing and broadening their scope in ways suited to abolitionists outcomes. As we already know, the death penalty cannot be made mandatory or applied in a randomized fashion. But, over the years, the Court has struck down factors in aggravation that are overly broad or vague and it has scolded trial court judges for excluding consideration of certain circumstances in mitigation (see Table 1-16).

On the whole, then, Court has been quite willing to limit the application of *Gregg* to a very narrowly defined set of circumstances. We see this at a doctrinal level (in Table 1-16) as well as at a more aggregated one.¹⁸² In Table 1-17, we compare how the Justices voted in criminal cases (excluding capital punishment) with those dealing directly with the death penalty; in Figure 1-9, we summarize those differences for the 1977-1989 period (terms 1976 through 1988).

(Table 1-17 and Figure 1-9 about here)

As we can see, over the past decade or so, most Justices were far more willing to find for the defendant in capital cases than in general criminal disputes. The extreme liberals (Brennan and Marshall) never voted with the prosecution in death penalty litigation, though they did so on a few occasions in the “run-of-the-mill” cases. Most important, though, was the voting of the *Gregg* plurality. Powell, Stewart, and Stevens showed a rather strong propensity to support defendants in capital cases; since 1986, Stevens has not voted against such a claim. As such, their votes (coupled

¹⁸²We also see it at a more pragmatic level. Many rulings in favor of defendants have had the effect of raising questions about others on death row. For example, after the Court decided *Lockett v. Ohio* (1978), in which it struck down a state law that limited mitigating factors, an LDF attorney estimated the decision would “free more than 100 prisoners on death row” The Court itself remanded 24 Ohio cases back to the Supreme Court for reconsideration in light of *Lockett* (New York Times, 4 July 1978).

Table 1-17
Comparison of Justices' Voting in Capital and Non-Capital Cases involving
Criminal Justice Issues, 1976-1988: Support for Defendants

Terms

Justice	1976-1980 ^a		1981-1985 ^b		1986 ^c		1987-1988 ^d	
	%Capital	%Non-Capital	%Capital	%Non-Capital	%Capital	%Non-Capital	%Capital	%Non-Capital
Stewart	88	54	---	---	---	---	---	---
Burger	63	33	11	15	---	---	---	---
Powell	88	49	29	22	50	14	---	---
Brennan	100	89	100	79	100	97	100	84
White	63	48	17	24	13	07	33	21
Marshall	100	92	100	83	100	93	100	88
Blackmu	88	37	56	40	88	52	83	59
Rehnqui	00	19	11	08	13	00	17	15
Stevens	100	62	61	63	100	59	100	53
O'Conno	---	---	22	17	25	07	25	27
Scalia	---	---	---	---	13	10	17	29
Court	88	43	33	25	50	14	42	18

^aN of capital cases=8; N of non-capital cases=90

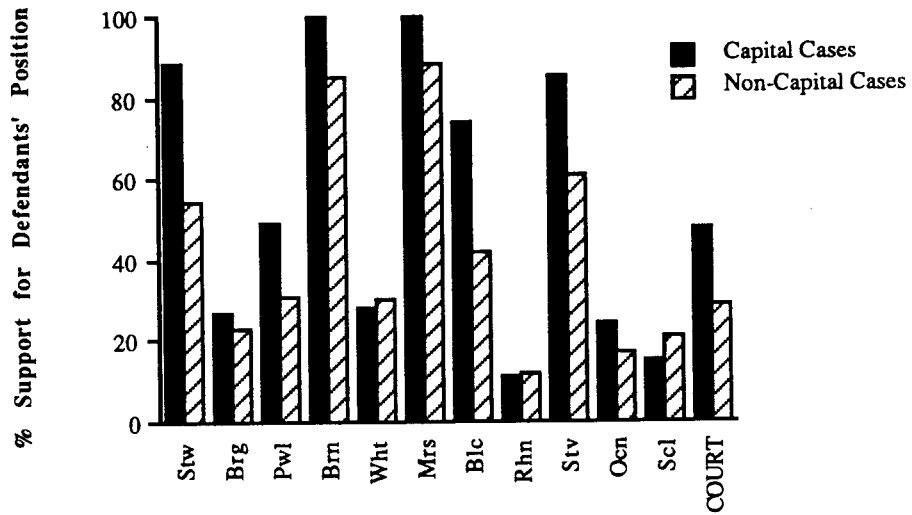
^bN of capital cases=18; N of non-capital cases=108

^cN of capital cases=8; N of non-capital cases=29

^dN of capital cases=12; N of non-capital cases=34

Note: Justices may not have participated in all cases.

Figure 1-9
Comparison of Voting in Capital and Non-Capital Criminal Cases,
1976-1988 Terms*



*N of capital cases=46; N of non-capital cases=261. Justices may not have participated in all cases (see Table 1-17).

with Brennan's and Marshall's) led the 1976-1980 Court to take a markedly more liberal position in capital cases than in all others (75 percent versus 43 percent). This gap narrowed during the 1981-1985 period largely due to Stewart's resignation (and the ascension of O'Connor) and Blackmun's continued conservatism. By 1986, though, the margin widened again: Blackmun shifted way over to the left; Stevens, Marshall, and Brennan continued to support defendants. When they were joined by Powell, a slim majority emerged. All in all, over the decade, the Court supported capital defendants in nearly half of the 41 cases compared to only a third (n=265) in all other criminal cases. Hence, the majority of the Justices have adapted, de facto, a watered-down version of Amsterdam's position: "death is (somewhat) different."

The "Downside:" *McCleskey v. Kemp*

The discussion above, however, should not suggest that the LDF and its allies won every post-*Gregg* battle. Though capital cases fared better than the average criminal dispute, abolitionists lost about 50 percent of their cases. Some of these involved fairly narrow procedural issues (see Table 1-16), but others-- particularly those decided in 1987-1989-- were quite devastating. Perhaps the one with the most far-reaching implications was the LDF-sponsored *McCleskey v. Kemp* (1987).

On a surface level, *McCleskey* does not seem a very significant case; if anything, it appears more akin to *Maxwell v. Bishop* and other, older LDF cases involving claims of racially-based discrimination on behalf of Southern rapists. In fact, but for the crime (murder, not rape), the parallels are quite striking: the state of Georgia convicted Warren McCleskey, a black man, of murdering a white police officer and sentenced him to death. In defending McCleskey, the LDF argued that he had been the victim of race discrimination, and thus, of "arbitrary" treatment. To bolster this contention, it introduced the results of study indicating clear sentencing disparities in capital cases when a black was accused of murdering a white.

Since this sounds eerily familiar, perhaps even a reversion to an old, unsuccessful strategy, why was the 1987 case of *McCleskey v. Kemp* hailed as the "most important capital case in a decade," a "landmark decision" (see Kaplan, 1988; Lauter, 1986)? Put in different terms, what

differentiated *McCleskey* from the older LDF race-based cases?

One factor was the increasing attention members of the U.S. Supreme Court were giving to the issue around the time of *McCleskey*. In recent years Justices have been speaking publicly about a range of issues in the mid-1980s and many addressed the question of capital punishment. Ironically, it was the “media-shy” Chief Justice Burger who initiated the public dialogue with a 1985 comment, suggesting that the capital appeals process was too elongated, making executions virtually impossible to implement.¹⁸³ This statement was followed by refutations from Justice Marshall. In September of 1985 and again in March of 1986, he chastised his colleagues for their “bizarre willingness to ignore standards procedures as [they] please in order to bring about speedy executions” (Taylor, 1985; New York Times, 20 March 1986, p.18). Others complained not of the procedure, but of the “strain” of capital litigation. In a 1986 address, Blackmun and Powell spoke of the “excruciating agony” of last minute appeals that had “haunted and debilitated the Court” during the previous term. In fact, Blackmun called the 1985-1986 years “perhaps the most difficult” of his tenure (New York Times, 13 May 1986).

Given this, *McCleskey* arrived at a critical juncture. Some members of the Court’s center, in particular, were expressing concern over capital cases; perhaps now they would consider the issue in a different light.

Another factor was the race dimension, *per se*. After *Gregg*, a spate of sophisticated, multivariate analyses purported to show clear race discrimination in sentences imposed under the “new” (i.e., post-*Furman*) statutes. Two years after publication of Reidel’s (1976) study, Bowers asserted that blacks were “grossly overrepresented” on death row (King, 1987, p.11), a conclusion for which he later provided a good deal of statistical evidence (Bowers, 1984; Bowers and Pierce, 1980). After reviewing 17,000 murder cases in eight states, Gross and Mauro (1984) found rather dramatic differences between sentences meted to those accused of killing whites versus blacks. These and other studies conducted (e.g., Radelet, 1981; Zeisel, 1981) received a

¹⁸³Rehnquist later echoed these concerns.

good deal of media attention (e.g., Joyce, 1984; New York Times, 3 January 1978; King, 1978). One journalist (Greenhouse, 1985, p.3), in fact, claimed that “any statistical overview of capital punishment inevitably leads to race.”

As important as those analyses were, it was one piece of research that moved to center stage, that conducted by David Baldus,¹⁸⁴ George Woodworth,¹⁸⁵ and Charles Polaski.¹⁸⁶ Their research started simple enough: In 1979, Baldus “dispatched” students to the state of Georgia to code attributes of all cases in which a “person [had been] convicted of murder at a guilt trial” between 1973 and 1978 (*McCleskey*, 1984, p.353; White 1987, p.128). Like many others, he and his colleagues were interested in the relationship between such things as the victims’ race, defendants’ race and the sentencing decision.

After Baldus analyzed the data for this first phase (“The Procedural Reform Study”), the LDF “learned [of the project] and retained him” to conduct a second one. Entitled “Charging and Sentencing Study,” it was a much-expanded version of the first. By the time it was completed, the database consisted of 2,484 Georgia (1973-1979) murder and non-negligent homicide cases coded along some 230 variables. To analyze this mammoth amount of data, Baldus employed a reasonably sophisticated technique: multiple regression, which allows researchers to demonstrate the effects of independent variables (e.g., race of the defendant, victim) on outcomes (e.g., decision to sentence to death).¹⁸⁷ It was, as one noted, “the most exhaustive study of racial discrimination in capital sentencing that has ever been conducted” (White, 1987, p.126).

Baldus’ conclusions were as dramatic. Among the most noteworthy:

1. The chances of receiving a death sentence were 4.3 times greater for defendants whose victims were white, not black.
2. Of the 128 cases in which death was imposed, 87 percent (n=108) involved white victims.
3. Prosecutors sought the death penalty in 70 percent of cases involving black defendants

¹⁸⁴A Law professor at the University of Iowa.

¹⁸⁵A Statistics professor at the University of Iowa.

¹⁸⁶A Criminal Law professor at Arizona State.

¹⁸⁷For a full description see Baldus et al., 1983, 1985, 1986.

and white victims, but in only 32 percent in which the both the defendant and victim was white.

4. Black defendants were 1.1 times more likely than whites to receive death sentences.

Given the sophistication of the study, these findings were not readily accessible to the average person. Yet, as Greenberg wrote (1988, p.74) “no matter how one looked at the numbers the unavoidable conclusion emerged that blacks who murder whites are sentenced significantly more frequently than defendants involved in cases of any other racial combination.”

From the LDF’s perspective, then, it was the Baldus study *per se* that differentiated *McCleskey’s* case from previous ones (e.g., *Maxwell*). Here, they had the most sophisticated, most exhaustive proof-positive that the laws condoned in *Gregg* were resulting in discriminatory sentencing.¹⁸⁸ In the abolitionists’ mindset this was precisely why the Court had struck down the old systems at issue in *Furman*: that they *might* be resulting in arbitrary sentencing.¹⁸⁹ Now they possessed evidence that the prophecy of *Furman* had concretely manifested itself in the *Gregg* procedures. This was something, they thought, even the *Furman* dissenters could not ignore.¹⁹⁰

With these results in hand, the LDF took the plunge: it filed a *habeas corpus* petition, on behalf of McCleskey, based almost exclusively on the Baldus study.¹⁹¹ A team of LDF attorneys (including Amsterdam) argued that he had been the subject of race discrimination, as borne out by the research and, as such, the death penalty was “administered arbitrarily, capriciously, and whimsically in the state of Georgia...” In essence, then, attorneys asked the court to strike capital punishment both on Fourteenth and Eighth Amendment grounds.¹⁹²

It was this risk, albeit a calculated one, that also transformed *McCleskey* into “the” capital

¹⁸⁸It was also true that courts were making greater use of statistics, that is, accepting their validity, in other areas of the law. For an interesting review of this and its importance to *McCleskey*, see Lauler, 1984.

¹⁸⁹As Greenberg noted (1988, p.74): aberrations of this sort were the basis of the Court’s decision in *Furman*...and the reason why in that case the death penalty was held unconstitutional.

¹⁹⁰Recall that Burger wrote in 1972: “while no statistical survey could be expected to bring forth absolute...proof of a discriminatory pattern, a strong showing would have to be made, taking all relevant factors into account.”

¹⁹¹*McCleskey* was just one of several cases in which the Baldus study had been introduced. For a description of others, see Gross and Mauro, 1989, p.136.

¹⁹²In addition, attorneys also raised claims involving the jury charge, ineffective counsel, and the admission of evidence. But, these were clearly secondary to the race issue.

case of the decade. After *Gregg*, virtually every previous suit attacked some procedural aspect of the post-*Furman* laws. Now, the LDF struck at their core, raising (or more aptly, re-raising) the big constitutional issues-- discrimination and arbitrariness. Seen in this light, a favorable decision could upset “the death sentences of all 105 convicted on Georgia’s death row, and could affect the 36 other states with death penalty laws” (Moss, 1987, p.51). That is, if the Court found race discrimination rampant in the Georgia system, massive resentencing might follow. But, even more important, should the Court concur with the LDF, it might find capital punishment an inherently arbitrary form of sentencing, one that could never be imposed fairly.¹⁹³ On the flipside, the possibility of disaster loomed large. As observers noted, this case could present the “last remaining generic” challenge to capital punishment (Greenhouse, 1983, p.3). In one fell swoop, the Court could make it “virtually impossible” for defendants to win cases “based on statistical evidence of race discrimination.”

As it turned out, things did not go well for the LDF in the lower courts. In an incredibly elongated and detailed analysis of the methods, data, and assumptions of the Baldus study,¹⁹⁴ the district court concluded that “the database for the study is substantially flawed, and the method utilized is incapable of showing the result of racial variables in cases similarly situated” (1984, p.37). Hence, it firmly rejected all LDF claims emanating from the study.

Sitting *en banc*, the Eleventh Circuit also held that the study failed to support the claim of discrimination, but did so on somewhat different grounds. For one, it did not completely reject the Baldus study as poor social science; to the contrary, it accepted the findings, albeit in a manner adverse to the LDF’s position. As it wrote,

Viewed broadly, it would seem that the statistical evidence presented here...confirms

¹⁹³Most assuredly, the state recognized these implications. As its attorney general noted “allowing a new racial challenge to Georgia’s capital punishment law would give...all death row inmates a new lease on life” (Cotterell, 1983).

¹⁹⁴The district court’s opinion has been the subject of substantial criticism. Some (e.g., Gross and Mauro, 1989, p.153) called it “unfair” and plainly “wrong” in spots. Our reading of the opinion would lend some support to the view that the court was, at minimum, confused about certain aspects of the analytic enterprise (e.g., its discussion of multicollinearity). Others point to the fact that the Baldus study has received much praise from other social scientists. For example, it won an award from the Law and Society Association.

rather than condemns the system. In a state where past discrimination is well documented, the study showed no discrimination as to the race of the defendant. The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which *Furman* condemned (1985, p.899).

More significant (and more troublesome for defense attorneys) was its broader interpretation of the utility of statistical evidence. It suggested that even if the data were valid, they are insufficient to "support a conclusion that the race of *McCleskey's* victim in any way motivated the jury to impose the death sentence in *his* case (emphasis added, 1985, p.899). Put in different terms, a state-wide showing of discrimination was not applicable to the defendant's specific case; it must be based on the record of his trial.

Not to be deterred by the adverse lower court reactions (had they not lost *Furman* in courts below?), LDF attorneys filed a *cert.* petition in May 1985. It was not until over a year later, in July of 1986, that the Court granted the writ, a sign that the case was "uncommonly troublesome;" in only very rare circumstances does the Court "withhold action for so long and then grant a hearing" (Gross and Mauro, 1989, p.159)

With the case scheduled for 16 October oral arguments, attorneys on both sides had the summer to prepare. The LDF's brief¹⁹⁵ read like a social science journal article. After a concise review of the facts, attorneys launched into a full-blown discussion of the Baldus study and of race discrimination more generally. They attempted to counter the 11th Circuit's view of the utility of statistics,¹⁹⁶ while simultaneously hammering home the extent of discrimination. One tact it took was to compare the use of data in capital cases with those involving other issues: "Evidence of racial discrimination that would amply suffice if the stakes were a job promotion or the selection of a jury, should not be disregarded when the stakes are life and death."

The state of Georgia developed an interesting counter attack. While it reviewed the district

¹⁹⁵The brief was prepared by some *Furman-Gregg* veterans (e.g., Amsterdam) and some relative new comers, including John Boger (an LDF attorney) who had been arguing the "Baldus" cases in the lower courts.

¹⁹⁶For example, it stated: "Focusing directly on the petitioner's case, Baldus and his colleagues estimated that for homicide cases at Mr. McCleskey's level of aggravation, the average white victim [case] has approximately a 20% higher risk of receiving a death sentence than a similarly situated black victim case."

court's finding, it did not criticize the study per se;¹⁹⁷ indeed, it suggested that "statistics are a useful tool in many contexts..." What it did instead was to reinforce the logic of the 11th Circuit, arguing that there "is no evidence to show that Petitioner's sentence in the instant case was arbitrary or capricious and no evidence to show that either the prosecutor or the jury based their decision on race..." and "that there are simply too many unique factors relevant to each case to allow statistics to be an effective tool in proving discrimination."

Two briefs *amicus curiae* were filed in support of this position.¹⁹⁸ California suggested that LDF attorneys had "used statistics 'as a drunk man uses a lamp post-- for support and not illumination'." The other, written by the Washington Legal Foundation-- a conservative public interest law firm--¹⁹⁹ constituted one of the first times an organized interest group had opposed abolitionist efforts in a major legal battle. In it, WLF attorney Dan Popeo raised two major points. He suggested that if the Court adopted the LDF position, its decision would become the "source of disastrous upheaval for the entire criminal sentencing process." He also stressed that the LDF was "evad[ing]" the facts of the cases (and even some of the study's results) to try and "salvage" it.²⁰⁰

Oral arguments reflected these varying themes.²⁰¹ LDF attorney Jack Boger placed the greatest emphasis on the Baldus study, asserting that "this is not some kind of statistical aberration.

¹⁹⁷Doing so, of course, constituted an indirect attack on the study. The one point it did reinforce was that "because there were only ten cases involving police officer victims...statistical analyses could not be utilized effectively. Baldus conceded that it was difficult to draw any inference concerning the overall race effect in these cases because there had been only one death sentence. He concluded that based on the data there was only a possibility that a racial factor existed in McCleskey's."

¹⁹⁸Four briefs were filed in support of the LDF: the International Human Rights Law Group, the Congressional Black Caucus, two professors, and another by the Congressional Black Caucus for the NAACP and Lawyers' Committee for Civil Rights Under Law.

¹⁹⁹This brief was co-signed by the Allied Educational Foundation.

²⁰⁰In doing so, he took a clear swing at the abolitionist cause, one he repeated many times to the press. As he told the *New York Times*, *McCleskey* represented "a concocted effort on the part of the anti-death penalty lobby to block the enforcement of the law" (Noble, 1987).

Refusing to allow Popeo to go on unchecked, the LDF filed a reply brief, which (in part) specifically responded to his claims. As it wrote: the Washington Legal Foundation has "contended that it would be 'repugnant to any decent sense of law and justice' for a capital inmate to 'escape an otherwise valid death sentence by invoking the race of his victim.' That's not what this case is about. The real issue is whether petitioner and other Georgia inmates have received their death sentences in part because of the race of their victims. Decency, law, and justice are properly invoked to guard against such a possibility, not condone it."

²⁰¹It is interesting to note that by the time this case was argued, the two lead attorneys-- Jack Boger (LDF) and Mary Westmoreland (Georgia) had opposed each other in court over six times (see Thompson, 1984).

We have a century-old pattern in the state of Georgia...” His opponent simply countered that “statistical analysis is not appropriate...[because] you cannot come up with two similar cases...each is unique.”

One observer (Taylor, 1986) noted that the Justices expressed varying degrees of skepticism of both arguments. The LDF was hardest pressed by Rehnquist, White and Powell, who all seemed to take the position that race discrimination could only be proved by looking at “McCleskey’s particular jury.” Conversely, Stevens, Scalia, and Marshall, in questioning the state attorney, were apparently unconvinced “that it would be virtually impossible to show race discrimination in death sentences through any kind of statistical evidence.” O’Connor evidently was perplexed, “twice” calling the case “curious.” She did, however, appear quite concerned with whether a Court holding in favor of the LDF would de facto abolish capital punishment. On the whole, then, the day had been an uneven one. Unlike the *Gregg* orals, in which the outcome seemed quite clear, the Justices did not give all that much away.

Neither side had to wait long, though, to find out where it was the Court stood: On 22 April 1987, it ruled against the LDF position. Writing for a five member majority (Rehnquist, O’Connor, White, Scalia), Justice Powell acknowledged that the Court “has accepted statistics as proof of intent to discriminate,” but only “in certain limited contexts” (1987, p.1767); capital punishment did not fall into any of those “contexts,” at least at an aggregated level, that is, the Court could not “infer” discrimination in this specific case based on state level data. In short, the majority echoed the reasoning of the 11th Circuit.

But, Powell went a bit further, addressing the core of the LDF’s thesis, that the Baldus study provided the evidence to demonstrate the prophecy of *Furman*: freakish and wanton sentencing was now a reality. In doing so Powell expanded on his general theme, noting that: “At most the Baldus study indicates a discrepancy that appears to correlate with race. Apparent discrepancies are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is a far cry from the major systematic defects identified in *Furman*.”

Justices Brennan, Marshall, Stevens, and Blackmun dissented, adopting various parts of

the LDF's arguments. That the first three did so was not at all surprising: Brennan and Marshall were firmly committed to eradicating capital punishment; Stevens, albeit less extreme in his views, had sided with the two liberals more often than not (see Table 1-17). Blackmun was something of a surprise. Undoubtedly he had moved further and further away from the conservative wing of the Court on capital cases, in particular. Yet, recall that this was the same Harry Blackmun who had adamantly rejected the Wolfgang study in *Maxwell*. Here, however, emerged a new Blackmun, one apparently "sensitized to the vagaries of death penalty litigation." His departure from *Maxwell* was dramatic; indeed, as he asserted in 1987: "The Court sanctions the execution of a man despite his presentation of evidence that establishes a constitutionally intolerable level of racially based discrimination leading to the imposition of his death sentence" (1987, p.1794) (for more on this point, see Kobylka, 1989).

McCleskey may have been the "biggest" capital case of the decade; surely it was a major loss for abolitionists, re-reinforcing the futility of pursuing racially-based claims.²⁰² Despite predictions to the contrary, however, it was not the "end of line."²⁰³ As we can see in Table 1-16, attorneys had kept a few cards in their hand, which they continue to deal to the Court.²⁰⁴ And, indeed, they remain hopeful. As one LDF attorney recently responded when asked whether she could "offer any optimistic look for the future," "Absolutely, it's hard to do this work without one." An ACLU lawyer echoed the sentiment: "Ultimately, a generation down the pike we will abolish this lingering throwback, this ghastly reminder of unenlightened times" (Gray and Stanley, 1989, p.297).²⁰⁵

²⁰²Some readers might be interested in Baldus et al.'s response. They attributed it to the fact that a "ruling in *McCleskey*'s favor could have seriously disrupted the U.S. death sentencing system" and fifteen years of the Court's work. Concomitantly, they asserted that "uncertainty about the validity of the empirical research does not...appear to offer a plausible explanation..." (Monahan and Walker, 1990, pp. 244-245).

²⁰³We write this in a broad sense, as well as a more specific one. After the Supreme Court decision, a district court ordered a new trial for *McCleskey*-- not on racial ground, but on Sixth Amendment ones. The case continues as a court of appeals overturned the lower court's ruling (see Mansnerus, 1988; Kaplan, 1988).

²⁰⁴Interestingly, right after *McCleskey* was announced, abolitionists simultaneously "condemned the ruling as a capitulation to racism and public hysteria" and "vowed not to be deterred" from bringing even more appeals (see Taylor, 24 April 1987, p.11).

²⁰⁵Attorneys even managed to find some positive words for *McCleskey*. One noted that "the case came a lot closer than I thought." Another said, "I am utterly convinced that in ten, fifteen, or fifty years we will look back on

Analysis: What Happened?

Were we, like the attorneys, inclined to paint a rosy picture of the abolitionist movement, we would indeed have adequate justification: but for the last several years, the Court has been a most hesitant advocate of capital punishment. Its willingness to review even the smallest procedural questions has led to something only short of a de facto moratorium.

Conversely, the death penalty is a legitimate form of sentencing in the United States. If the LDF's goal was complete eradication, that has eluded the organization. Perhaps, one day, the LDF might win the war. As Justice Brennan (1986, p.331) wrote: "I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the victim and transgresses the prohibition against cruel and unusual punishment. That will be a great day for our country for it will be a great day for our Constitution." But for now it seems that the war did in fact end in *Gregg*. Losing that case dimmed the hopes of any abolition within the near future.

The question we are left with then is why, why did forces fail to eradicate capital punishment? Put into the context of our investigation, what happened between *Furman* and *Gregg*? Let us consider a number of interrelated explanations.

The Court

In our quest to explain the "discrepancy" between *Furman* and *Gregg*, we obviously need to consider the Court. And, just as obviously, without the Court, the change in death penalty policy would not have occurred. But, our interest lies a bit deeper, that is, the relevant question is not whether the Court "explains" the failure of abolitionism-- it, undoubtedly, must-- but whether attorneys could have extended their victory in *Furman*, given the composition of the 1976 Court.

On one hand, we know that a personnel change occurred, and that it was not a positive one from the LDF and company's vantage point. In Douglas they had a clear vote for abolition; in Stevens-- something way short of a sure thing. Hence, they lost a key player in a game in which all

the *McCleskey* litigation and see it in the same sort of light that we now recognize *Maxwell v. Bishop*.

were needed.

On the other hand, this is not a wholly satisfactory explanation. Were it, *Gregg* should have been decided by a slim majority of five, with Stevens holding the swing position. As we know, though, seven voted against the LDF et al, two of whom-- White and Stewart-- shifted from their *Furman* postures.

Had abolitionists been able to “hold” White and Stewart, would they have won *Gregg*? Mathematically speaking, no: the vote would have been 5-4 against their position. Yet, as we hope our discussion has made clear, logic and math seem to have little place in capital litigation. Along the way we saw 8-1 anti-death penalty majorities suddenly become 6-3 pro-capital punishment coalitions, and so forth. In short, this seems to have been an area of the law in which *some* Justices were open to persuasion from their colleagues and attorneys.

We emphasize “some” because, indeed, there were a few Justices who were both more flexible in their views and, in essence, more significant than were others. It is clear, for instance, that Rehnquist was a lost cause for abolitionists, just as Brennan was for state attorneys. Conversely, White and, especially, Stewart were key players before and after *Furman*. Not only were their votes critical to any successful litigation campaign (on either side), but their views seemed to carry a great deal of weight with the others, as well. Recall, for example, the original votes in *Maxwell*: eight Justices voted to reverse on both grounds of standardless juries and unitary trials. In response to a strongly-worded Douglas opinion, however, Stewart and White wrote a concurrence, disposing of the case on *Witherspoon* grounds. Two years later, this “concurring” opinion became the majority’s position.

In our view, then, the course of *Maxwell* and so many other cases depended on the votes *and* postures of Stewart and White. Put simply, with them the LDF et al. won their cases; without them-- they failed. Extending that logic to *Gregg*, we believe that had abolitionists been able to hold White and Stewart, as they had in *Furman*, the 1976 cases would have had a very different ending.

We could, in fact, imagine several different scenarios, with the most likely one involving

Stevens. It would be almost foolhardy, in retrospect, to believe that Stevens would not have been a “gettable” vote, if Stewart and/or White had “pushed” him in that direction. Surely, given his death penalty record since *Gregg*, we have every reason to suspect that the Ford appointee was (and is) sympathetic to the abolitionist cause. With a little lobbying from his senior colleagues, he might have been a fifth vote to strike the capital laws, not a seventh to uphold.

We recognize that this is conjecture, but conjecture based on an analysis of virtually every legal development occurring before and since *Furman*. And, if we follow the logic of that examination we are inevitably led to the follow conclusions: 1) based on their positions in *Furman*, White and Stewart were possible (if not probable) votes to strike the capital laws at issue in *Gregg*; 2) if they had been inclined to cast their votes in that direction, they might have been able to persuade others (most likely, Stevens) to follow their lead; 3) thus, in a 5-4 vote the Court would have overtured the new capital laws.

If this is correct, then we are still left with the fundamental question of why the discrepancy exists between *Furman* and *Gregg*. Only now we can phrase it a bit more pointedly: why did Stewart and White alter their views on capital punishment, and concomitantly, were they ever “gettable” abolitionists votes in *Gregg*?

Political Environment

The great bulk of the LDF’s campaign against the death penalty was waged, except for a period in the mid 1960s, in a general climate of political hostility to its goal of ending state sanctioned executions. Indeed, as its litigation reached the Supreme Court in the late 1960s, many environmental indicators pointed away from favorable-- from its perspective-- judicial resolution of the issue. Public opinion was swinging away from its abolitionist high point of 1966. Murders of public figures (e.g., King and Kennedy) reinforced legislation already on the books and prompted new efforts at its extension. The Nixon administration came out, foursquare, in favor of the appropriateness of capital punishment. In fact, the Supreme Court, once a promising port for LDF arguments, was transformed by four early Nixon appointees. It was in this politically inhospitable environment, where myriad factors pointed against their goals, that the LDF brought its most

important capital cases before the Supreme Court.

Against this tide, however, the LDF continued its campaign. Fortified by its successes in the later Warren years-- *U.S. v. Jackson* (1968), *Witherspoon v. Illinois* (1968), *Boykin v. Alabama* (1969)-- and undeterred by its early Burger period losses-- *McGautha v. California* (1971) and *Crampton v. Ohio* (1971)-- it continued to press its unpopular position through the federal courts. Then, with its stunning victory in *Furman v. Georgia* (1972), it seemed to have climbed to the top of the judicial mountain: for the first time in its history, the Supreme Court struck death penalty legislation on grounds sufficiently broad to suggest its ultimate legal demise. Again, it is critical to note that the LDF's accomplishment came in spite of a generally unfavorable political environment. The organization, the quintessential underdog working in an area of extreme disadvantage, had used the courts to secure its policy goal. Or so it thought. The Court's dramatic shift in *Gregg v. Georgia* (1976) demonstrated otherwise. Despite the LDF's procedural victories in a host of post-*Gregg* cases, the *McCleskey v. Kemp* (1987) decision made clear that, from a legal perspective, the organization had "lost" the war.²⁰⁶

Just as it is tempting to cede responsibility for this turn of events to the change in the Supreme Court's membership wrought by Douglas' departure, so too it is tempting to explain the the LDF's loss in terms of the unfavorable political environment in which it brought its cases to the Court. And, clearly no question exists that this environment was unrelentingly hostile to the organization's goals. The *Furman* backlash was loud, quick, and broad-based. Public opinion, generally supportive of capital punishment before June of 1972, became even more so in the immediate aftermath of the decision. State legislatures across the country, and not just in the south, could barely wait to reconvene and pass new laws which, given the *Furman* majority and informed commentary on it, were of dubious constitutionality.

Even the national government, hardly the primary definer and enforcer of criminal law in

²⁰⁶ This is not to say, that the legal battle over the death penalty has ended; it has not, as the above text makes clear. It is to suggest, however, that the larger questions that would provide vehicles for broad-based attacks on capital punishment have, for the time being, been addressed and addressed in a way profoundly unfavorable to the LDF perspective.

America, got into the act. The day after *Furman* came down, President Nixon seized on Burger's dissent in noting that the Court had not completely ruled out capital punishment. He subsequently sent to Congress a bill calling for the death penalty for certain federal crimes, a law modelled on the American Law Institute proposal of the late 1950s. After careful deliberation, the Senate approved the legislation and sent it to the House, where a segment of it was passed in 1974.

More significant, however, was the new aggressiveness shown by the Justice Department on this issue. Though Nixon's first Solicitor General, Erwin Griswold, argued for the constitutional permissibility of capital punishment in *McGautha* and *Crampton* as *amicus curiae* (at the invitation of the Court), the administration was not involved in *Furman*. Robert Bork, Nixon's last Solicitor General and the man who held that office during the Ford Presidency, took on the abolitionists with a vengeance, with a characteristically well-developed and biting critique in *Fowler v. North Carolina* (1976) and *Gregg, et al.*. Instead of meeting state attorneys general with minimal experience before the Supreme Court, the LDF now had to deal with a crafty and skillful advocate of the position they assailed.

Thus, it is tempting to explain the *Gregg* shift as the Court's reaction to a political environment clearly hostile to pushing ahead with the abolitionist implications of *Furman*. But such an explanation, at least on its own, proves both *too much* and *too little*. If environmental factors caused the Court to shift here, why did they not cause it to change its approach to other controversial issues of the day (e.g., abortion, church-state relations, racial discrimination)? Indeed, why was the environment at the time of *Gregg* perceived to be more relevant than that four years earlier when *Furman* was decided? Politically, the contexts of *Furman* and *Gregg* were really not that different. In 1972, as in 1976, public opinion, state legislation, and the national administration clearly supported capital punishment. Yet, the Court did strike the imposition of death *even in that context*. While the political environment probably contributed to the resolution of *Gregg*, it cannot be treated as determinative of it; it alone cannot explain the Court's about face on the question of death.

Group Strategy

If neither the replacement of Douglas with Stevens nor the political environment in which that decision was rendered can fully explain the LDF's loss in 1976, perhaps the organization itself set the stage for its own defeat. If it did so, this was not the result of a change in its staff, for Anthony Amsterdam guided the LDF litigation throughout this period. Nor was it a function of a transfer of organizational resources away from the capital punishment campaign: while never receiving a majority share of the organization's budget, the funding of this litigation did not decrease after the victory in *Furman*. Nor was the *Gregg* defeat the result of insufficient legislative lobbying. Though the ACLU clearly did not, as it had pledged to do, carry the ball in this area, the *Furman* win was not predicated on legislative lobbying. Something other than these group-specific factors contributed to squelching the promise of *Furman*. This was the strategy the LDF used in its effort to capitalize on its 1972 victory.

The strategic deficiencies start with the LDF attorney's understanding of the *Furman* majority. Simply put, they over read the degree of their victory, treating the majority vote as if were something of a monolith. It clearly was not. Although Brennan, Marshall, and Douglas (before his resignation) were solid votes to strike any capital law, White and Stewart were not. This fact was not completely lost on Amsterdam and his cohorts. Indeed, the research they commissioned on the application and deterrence of the death penalty was, in part, designed to reinforce the concerns these two justices expressed in their concurring opinions in *Furman*.

LDF attorneys, however, assumed that the presence of White and Stewart in the majority meant that their difficulties with the *Furman* statute-- infrequency of application eliminating its deterrent value and arbitrariness in application, respectively-- were rooted in the same basic concern as the more abolitionist justices-- that "death was different" and, as a result, statutes imposing it had to be held to a higher than normal standard of review. In this, the LDF attorneys were not alone. As we noted above, the brunt of the scholarly legal community felt this way as well. Indeed, nowhere is Amsterdam's assumption more obvious than in his oral presentation in *Jurek and Roberts* when, in response to questioning from Stewart, he said: "Our argument is essentially that death is different. If you don't accept the view that for constitutional purposes

death is different, we lose that case, let me make that very clear.” The kicker is that Amsterdam apparently thought that this was *exactly what White and Stewart thought*; this is how he made sense of their 1972 opinions. He was, as *Gregg, et al.* demonstrated, wrong in this assumption. White and Stewart were concerned with the procedures and processes used in assessing the death penalty, but their concern was more one of due process than of cruel and unusual punishment. If their votes were to be gotten, Amsterdam had to capture them on the former rather than the latter grounds. By blasting the discretion inherent in the capital process, and by explicitly linking it to cruel and unusual punishment concerns grounded in notion that “death is different,” he lost the two justices he needed the most. Once he lost on the due process argument-- *and, amazingly, he told the justices that this was precisely the case--* the only arrow he had left in his quiver was the “evolving standards of decency.” This could get the votes of Brennan and Marshall, but not those of Stewart and White. Statistical data and social science studies could be used to play to their due process concerns, but they could not be used to convince them that “death was different.”

Bork seemed to understand this, or least his arguments-- both oral and briefed-- read as if he understood it. His argument was as brilliant as it was simple. First, death is not different, or at least not constitutionally so. It is explicitly and implicitly endorsed in the text of the Constitution and the body of constitutional history and practice. Only an act of supreme judicial activism could make death constitutionally different. Second, he emphasized that public opinion, in the aggregate, supported the death penalty. And, even though the social scientific studies went on to explain that, when disaggregated, the data ultimately told a different story, Bork urged on the justices the “common sense” of the matter, that general public opinion and legislative action gave lie to the conclusions wrought by sophisticated statistical techniques. Finally, Bork leaned on the Ehrlich study to argue that the death penalty did have a deterrent effect or, at a minimum, it could be plausibly understood by legislators to have such an effect. Even if only the latter were true, judicial restraint would counsel deference to the states.

Bork’s argument, and Amsterdam’s inability to counter it beyond the assertion that “death is different,” brought Stewart and White over in support of the general concept of capital

punishment. Does this suggest that Amsterdam's position was inherently a losing one? Not necessarily. His mistake seems to be that he thought *Furman* itself held that "death was different,"²⁰⁷ and he framed the LDF's post-*Furman* strategy on that assumption. Although Amsterdam did not believe that *Furman* ended the war, he clearly thought it won it. What remained was a legislative and judicial clean-up campaign to stave off the onslaught of new legislation and maintain the moratorium begun in the late 1960s; success here would allow the death penalty to die of its own weight. He announced the LDF's three-fold strategy-- lobbying (by the ACLU), litigation, and scholarship on the effect of the death penalty-- at the 1972 LDF Conference at Columbia University. What this post-*Furman* approach lacked was a clearly articulated *legal* strategy beyond challenging new legislation on *Furman*. This begged an important question, though one Amsterdam had apparently resolved in his own mind: what did *Furman* mean?

Had Amsterdam been more critical of the LDF's success in *Furman*, had he been less assured of his optimistic or maximalist interpretation of that decision's meaning, had he been more open to the real concerns and worries of others,²⁰⁸ he might have developed a multi-leveled litigation strategy more diversified than the "death is different"/"evolving standards of decency" argument he took to the Supreme Court in 1975. Such a layered judicial strategy, while continuing to employ the "death is different" line of argument, would not have treated it as the sole basis of the organization's legal appeal. Indeed, had more stress been placed on the kinds of practical, due

²⁰⁷Indeed, recall his response to the gloom felt by some at the California conference on Proposition 17, shortly after *Furman* came down: "This groups has me seriously wondering whether winning *Furman* was a good thing after all."

²⁰⁸It is interesting to note, for example, the differences between Amsterdam's use of LDF conferences and that of Thurgood Marshall in the period leading up to *Brown*. Under Marshall these events were more like open forums where various strategies were bandied about and different argumentational tactics were discussed and debated. This was not the case for Amsterdam. He used conferences to deploy his forces in light of his understanding of the strategic needs of the organization. In a sense, he saw their utility to be more instrumental than creative. At the Columbia conference, for example, he simply arranged for systemic social science research; he did not canvass the participants as to the *kinds of legal arguments* that might fly in the post-*Furman* context to advance LDF policy goals in future litigation. Indeed, he ignored the concerns of those in the trenches in California at the Proposition 17 conference, treating them as irrelevant given *Furman*. A more open leadership style, similar to the one employed by Marshall in the 1940s and 1950s, might have led him to foresee prospective legal difficulties and develop a litigation strategy-- and not just a general political strategy-- to deal with them.

process-based arguments that characterized the LDF's pre-*Furman* litigation, it is conceivable that Stewart and White would have been less inclined to jump ship in *Gregg, et al.*. Had the underlying principles of moratorium been maintained as a plausible line of judicial attack-- had the bodies on death row been allowed to continue to mount-- these justices, and perhaps others like Stevens, Powell, and Blackmun-- who time and further litigation showed to be sympathetic to some LDF concerns-- would have been less inclined to replug the electric chair that had been unplugged, de facto, since 1967 and by law since *Furman*.

Such a layered litigation strategy, a strategy that did not place primary or near exclusive emphasis on the absolute and immediate eradication of the death penalty, would have left LDF attorneys with more argumentational room before the Supreme Court. It would have allowed them to offer the justices, especially those committed to the constitutionality of the death penalty but leery of its actual operation, a way to strike laws or their application without confronting their essential acceptance of the punishment as, *per se*, constitutional. It would also have given the LDF a way to avoid the problem that all organizations using the courts to advance general policy concerns must face-- the tension between the cause and the client.²⁰⁹ In the realm of the death penalty, this tension-- given the nature of the punishment-- is especially acute. A litigation strategy that made use of a broadly based constitutional argument (the Eighth Amendment), but which also strongly urged less grand grounds of reversal has the added utility of protecting, as best they can in the group litigation context, the interests of both the organization and the client.

Use of such a strategy might elongate the time frame required to achieve organizational goals (and, not inconsequentially, increase the costs of the group in the pursuit of those goals), but it would provide a more varied pallet to offer the justices and minimize the effects of adverse decisions. Given the badly splintered majority in *Furman*, such a strategy-- by giving the middle

²⁰⁹ Recall the conundrum faced by Amsterdam when he argued *Maxwell v. Bishop*: does he urge the Court to remand the case in light of *Witherspoon* (thus saving the life of Maxwell but sacrificing, after much organizational expense, the broader goals of the group), or does he ask it to avoid remand to deal with the still unresolved, and from the LDF perspective crucial, questions of standardless sentencing and unitary trials (thus putting Maxwell at a capital risk he need not face, but potentially furthering the organization's policy concerns).

justices something less global than complete abolition on which to grab-- might have furthered LDF goals more readily than the "all or nothing" approach which Amsterdam presented the Court in *Gregg, et al.*. At a minimum, it seems that such a strategy merits discussion among group leaders. Because Amsterdam and his colleagues over read *Furman*, though, this is a strategy that they did not even seem to ponder. This may well have proved a fatal flaw in their effort to end capital punishment once and for all.

There is, of course, no guarantee that a layered argumentational strategy would have won *Gregg, et al.* for the LDF. The *Furman* backlash was immense; the *Furman* majority was tenuous; and the Court had undergone an important change in personnel. However, given a political environment supportive of capital punishment at the time *Furman* was handed down, given the fact that Stewart and White were sufficiently leery of the death penalty to oppose it in 1972, and given that Stevens, though no Douglas, was no Rehnquist, either, *Gregg, et al.* were not lost causes from the start. These are cases that *could have been won*.

Winning these cases, however, would have required the LDF to mount an adroit post-*Furman* litigation strategy that made use of carefully constructed and layered arguments that could have spoken to all members of a favorable majority. This it did not do. Its loss in *Gregg, et al.* paved the way for a further extended litigation campaign, one that time, the resumption of executions, and subsequent personnel changes on the federal courts rendered more arduous and problematic. In the end, it led to *McCleskey*, the frustration of the LDF's policy goals, and a revitalization of the death penalty as a constitutionally permissible punishment.

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* We include lower court citations if we referred to the case in text.