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## Challenging the Death Penalty Under State Constitutions

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## Challenging the Death Penalty Under State Constitutions

*James R. Acker\* and Elizabeth R. Walsh\*\**

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## I. INTRODUCTION

Death penalty litigation that reaches the Supreme Court now causes at least as much consternation as hope among opponents of capital punishment. Simply not losing rights that once were considered secure can be tantamount to victory in capital cases decided by the Court, and few defendants and opponents of capital punishment expect much more.<sup>1</sup> It was not always so. Hopes were once high that the Supreme Court, and the federal courts generally, would effectively bring an end to capital punishment in America.<sup>2</sup>

That prospect is now remote, at best. Death row populations are skyrocketing<sup>3</sup> and executions are on the rise.<sup>4</sup> Half of the federal judici-

1. For example, in *Enmund v. Florida*, 458 U.S. 782, 787 (1982), the Court ruled that the death penalty could not be imposed upon one convicted of felony murder "who neither took life, attempted to take life, nor intended to take life." Five years later, in *Tison v. Arizona*, 481 U.S. 137, 158 (1987), the *Enmund* rule was modified to allow the capital punishment of participants in a felony murder who neither killed, attempted to kill, nor intended to kill, but who were "major participants" in the felony and acted with "reckless indifference to human life."

When the Court resolved that the death penalty was not under all circumstances a "cruel and unusual" punishment and approved procedures for its administration, the Court identified as "an important additional safeguard against arbitrariness and caprice" that the Georgia Supreme Court determine whether any given death sentence "is disproportionate compared to those sentences imposed in similar cases." *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion). In 1984, however, the Justices ruled that state supreme court comparative proportionality review was not constitutionally required under all circumstances. *See Pulley v. Harris*, 465 U.S. 37 (1984).

The Court also imposed stringent standards for the exclusion of prospective jurors from sitting on capital juries because of their views about the death penalty. *See Witherspoon v. Illinois*, 391 U.S. 510 (1968). Yet the Court significantly relaxed these standards in *Wainwright v. Witt*, 469 U.S. 412 (1985). For a discussion of death qualification of jurors under *Witherspoon* and *Witt*, see *infra* notes 229-38 and accompanying text.

When the Court rejected a claim in *McCleskey v. Kemp*, 481 U.S. 279 (1987), that racial discrimination had infected the administration of Georgia's capital punishment system, it was widely perceived as ending "what death penalty opponents had called their last sweeping challenge to capital punishment." *See* N.Y. Times, Apr. 23, 1987, at A1, col. 6; *see also* Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1741 (1987) (stating that "[a]fter *McCleskey*, nothing appears left of the abolitionist campaign in the courts—nothing but the possibility of small-scale tinkering with the details of administration and, of course, persistent claims in lower courts of specific errors in the multitude of cases where the sentence is imposed").

2. *See generally* H. BEDAU, *THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT* 11-12 (1977); M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973). Some still forecast that the Supreme Court ultimately will take a position of leadership in the abolition of the death penalty, although not in the near future. F. ZIMRING & G. HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 154-58 (1986); Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 331 (1986).

3. As of March 1, 1989, there were approximately 2186 people on death rows across the country. NAACP LEGAL DEFENSE & EDUC. FUND, INC., *DEATH ROW, U.S.A. 1* (Mar. 1, 1989) [hereinafter *DEATH ROW U.S.A.*]. Just over six years earlier at the end of 1982, 1066 people were on death row, and 10 years earlier at the end of 1977, 423 people were awaiting execution. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CAPITAL PUNISHMENT 1984*, table 6, at 16 (1986) [hereinafter *CAPITAL PUNISHMENT 1984*].

4. Between 1976, when the Supreme Court upheld the constitutionality of capital punish-

ary has been appointed by a President who has largely fulfilled his promises to name law and order and strict constructionist judges to the bench.<sup>5</sup> A majority of the Justices on the Supreme Court have not chosen to give an expansive interpretation to the federal constitution in capital cases.<sup>6</sup> If even a small measure of the success that was enjoyed in the federal courts in the 1960s and early 1970s is to be regained, litigation against the death penalty must reflect different strategies and be pursued in different forums.

An alternative strategy has been unfolding quietly and without apparent organization over the past several years. Death penalty laws increasingly have been challenged under state constitutions, on a variety of grounds, in the several states that retain capital punishment. This trend has been part of a general and remarkable rediscovery of state courts and state constitutions<sup>7</sup> prompted in part by the perception that

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ment statutes in several states, *see infra* notes 31-35 and accompanying text, and 1982, a total of six people were executed in the United States. No more than two of these executions occurred during the same calendar year. In the ensuing years the numbers of people executed gradually increased: 5 in 1983; 21 in 1984; 18 in 1985; 18 in 1986; 25 in 1987; and 11 in 1988. DEATH ROW U.S.A., *supra* note 3, at 3. Two people have been executed between January 1, 1989, and March 1, 1989. *Id.*

5. With regard to the federal judiciary, the 1980 Republican Party Platform promised to "secure the appointment of women and men . . . whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens." REPUBLICAN PARTY, REPUBLICAN PARTY PLATFORM 11 (1980), *quoted in* Rowland, Senger & Carp, *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 LAW & SOC'Y REV. 191, 194 (1988). The 1984 party platform reaffirmed this policy, and in 1986 President Reagan warned that his efforts to appoint the right breed of federal judges would be undermined if Democrats took control of the Senate. *Id.* He stated: "We don't need a bunch of sociology majors on the bench. What we need are strong judges . . . who do not hesitate to put criminals where they belong, behind bars." *Id.* (quoting N.Y. Times, Oct. 9, 1986, at A3). By early 1988 President Reagan had named approximately 47% of the sitting judges to the federal bench, including 265 district court judges, 79 court of appeals judges, and 3 of the present members of the Supreme Court, in addition to naming William Rehnquist the Chief Justice. *The Judiciary: A Great Right Hope*, NAT'L L.J., Apr. 18, 1988, at 22. By most accounts the President succeeded in identifying and appointing to the federal courts individuals who espouse a conservative judicial philosophy. *See* Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313 (1985); Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324 (1987); Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48 (1986); Slotnick, *Federal Judicial Recruitment and Selection Research: A Review Essay*, 71 JUDICATURE 317, 321 (1988).

6. *See infra* notes 41-64 and accompanying text. The general premise is that "the decision as to who will make the decisions affects what decisions will be made." J. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 29 (1955); *see* Slotnick, *supra* note 5, at 317.

7. Since 1970 approximately 350 to 400 state supreme court decisions have interpreted state constitutional provisions to afford rights beyond those recognized in the United States Constitution. *See* Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317 (1986) [hereinafter Collins & Galie, *1985 Survey*]; Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 600-01 (1986); Kincaid, *State Constitutions in the Federal System*, 496 ANNALS 12, 22 (1988). For a re-

the Supreme Court has retreated from its position of leadership in protecting individual liberties under the Federal Bill of Rights.<sup>8</sup>

In this Article we describe recent death penalty litigation before the Supreme Court and numerous state courts, concentrating upon state court decisions founded upon state constitutional grounds. This discussion is necessarily an overview, but we hope to suggest the general avenues that may be explored in challenging capital punishment legislation in light of the unique constitutional provisions, history, traditions, and circumstances within the individual states. We conclude with brief observations about the necessity of developing both sound legal doctrine and a supporting empirical foundation in order to mount effective challenges to the death penalty on state constitutional grounds.

## II. FEDERAL AND STATE COURTS, CONSTITUTIONS, AND CAPITAL PUNISHMENT

### A. *The United States Supreme Court and Capital Punishment*

Death penalty cases have long progressed from state courts to the Supreme Court, and there served as ringing examples both of how the states were not to administer their criminal laws, and of what the states were bound to do in the future to comply with the commands of the federal constitution.<sup>9</sup> Until the 1960s, however, it was never questioned whether the death penalty was permissible under the United States Constitution. The Supreme Court assumed the legality of capital punishment as a criminal penalty in numerous cases.<sup>10</sup> The first signal that some members of the Court were concerned about the constitutionality of the death penalty appeared in Justice Goldberg's dissent from the

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cent, comprehensive listing of state cases that have relied upon state constitutional rights, as well as law review articles discussing this trend, see Collins & Galie, *State Constitutional Law*, NAT'L L.J., Sept. 29, 1986, at S-9 to S-19 [hereinafter Collins & Galie, *State Constitutional Law*].

8. Some disagreement exists about the extent to which the Burger Court actually has retreated from the Warren Court's major decisions concerning individual liberties. See, e.g., Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1153 n.42 (1985); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974). It seems safe to conclude that the Court's criminal procedure decisions have been more restrictive in the post-Warren Court era. See Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 547 (1986); Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371, 403 (1984).

9. E.g., *Brown v. Mississippi*, 297 U.S. 278 (1936) (coerced confessions); *Powell v. Alabama*, 287 U.S. 45 (1932) (right to counsel).

10. See, e.g., *Williams v. New York*, 337 U.S. 241 (1949); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878).

denial of certiorari in the 1963 capital case, *Rudolph v. Alabama*.<sup>11</sup> By 1967 mounting uncertainties about the legality of capital punishment under the federal constitution caused stays of execution across the country.<sup>12</sup>

Scores of death penalties were vacated, or convictions reversed, in a series of United States Supreme Court decisions in the mid- and late 1960s. Lawyers representing the NAACP Legal Defense Fund (LDF) brought many of the cases in an intensive, highly concentrated campaign to abolish the death penalty through federal court litigation.<sup>13</sup> The cases—*Witherspoon v. Illinois*,<sup>14</sup> *United States v. Jackson*,<sup>15</sup> *Boykin v. Alabama*,<sup>16</sup> and *Maxwell v. Bishop*<sup>17</sup>—represented gradual victories in the legal assault upon the death penalty and gave rise to

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11. 375 U.S. 889 (1963). Justices Douglas and Brennan joined Justice Goldberg's dissent. *Rudolph* and a companion case in which the Court also denied certiorari, *Snider v. Cunningham*, 375 U.S. 889 (1963), were rape convictions for which the death penalty had been imposed. See M. MELTSNER, *supra* note 2, at 28-34.

12. Luis Jose Monge, executed June 2, 1967, in Colorado, was the last to die prior to the judicial moratorium against capital punishment. M. MELTSNER, *supra* note 2, at 113. There were no further executions until 1977, when Gary Gilmore died before a firing squad in Utah. See CAPITAL PUNISHMENT 1984, *supra* note 3, table 6, at 16. See generally N. MAILER, *THE EXECUTIONER'S SONG* (1979) (chronicling the life and death of Gary Gilmore).

13. See M. MELTSNER, *supra* note 2 (presenting a detailed account of the Legal Defense Fund lawyers' strategy and campaign against the death penalty in the courts). For a critical review of this strategy, see Note, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158 (1985).

14. 391 U.S. 510 (1968) (vacating death sentence, but not conviction, on the ground that potential jurors with personal scruples against capital punishment had erroneously been excluded from service on capital jury); see *infra* notes 229-33 and accompanying text.

15. 390 U.S. 570 (1968). The Court declared that the death penalty provision of the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1956), was unconstitutional because only if the accused was convicted after trial by jury could the death penalty be imposed. The Court held that this imposition inevitably discouraged or penalized assertion of the rights to plead not guilty and to be tried by a jury. *Id.*

16. 395 U.S. 238 (1969) (invalidating guilty plea to robbery charges and resultant death penalty because there was no affirmative record made that the plea had been entered in a knowing, intelligent, and voluntary manner). It was urged in *Boykin* that the death penalty for the crime of robbery was a cruel and unusual punishment under the eighth and fourteenth amendments, although because of the Court's ruling on the guilty plea issue it did not reach the penalty question. See M. MELTSNER, *supra* note 2, at 168-85.

17. 398 U.S. 262 (1970) (vacating death sentence in rape case on the ground that potential trial jurors had erroneously been disqualified for cause under *Witherspoon*). *Maxwell* involved the conviction and death sentence of a black man convicted of raping a white woman in Arkansas. Research evidence suggested that the death penalty for rape was reserved almost exclusively for black defendant-white victim cases. See *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated*, 398 U.S. 262 (1970); Wolfgang & Reidel, *Race, Judicial Discretion and the Death Penalty*, 407 ANNALS 119 (1973). *Maxwell* was argued before the Supreme Court on the ground that the standardless exercise of sentencing discretion allowed racially disparate use of the death penalty and thus was unconstitutional. The Court declined to address this issue when it vacated *Maxwell's* death sentence on *Witherspoon* grounds. See M. MELTSNER, *supra* note 2, at 89-105, 149-67, 186-213.

cautious optimism about the campaign's chances for success. These and other cases pressed federal constitutional grounds and literally kept hundreds of people alive who awaited execution under the authority of state laws.<sup>18</sup> Time, however, soon began to catch up with the abolitionist movement in the federal courts.

By 1970, Warren Burger had replaced Earl Warren as the Chief Justice, Justice Blackmun had assumed Justice Fortas's seat on the Court,<sup>19</sup> and the war against crime had made huge political gains at the expense of the war against the death penalty. The Court dealt the abolitionists a serious blow in the 1971 case of *McGautha v. California*<sup>20</sup> when the Court concluded (with its two newest members joining a six to three majority) that existing state procedures for the administration of the death penalty were not inconsistent with the due process requirements of the fourteenth amendment. The *McGautha* Court specifically declined to invalidate death penalties imposed in the absence of legislative standards to guide sentencing discretion,<sup>21</sup> and further refused to require that a separate hearing be conducted subsequent to the guilt phase of a trial to help inform death penalty decisions.<sup>22</sup> Shortly thereafter the Court agreed to decide whether the death penalty, as administered, violated the eighth amendment's prohibition against cruel and

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18. By the end of 1971 approximately 640 persons were under sentence of death across the United States. CAPITAL PUNISHMENT 1984, *supra* note 3, table 6, at 16.

19. Justice Fortas resigned from the Court in May 1969, amidst allegations that he had improperly accepted money in a matter that created a conflict of interest with his duties as a justice. His departure disturbed the delicate balance on the Court which had given LDF lawyers cautious optimism that they might prevail on some of their major claims against the death penalty. *See* M. MELTSNER, *supra* note 2, at 186-88, 199.

20. 402 U.S. 183 (1971). Justice Harlan wrote the majority opinion, joined by Chief Justice Burger and Justices Stewart, White, and Blackmun. Justice Black concurred "in the Court's judgments and in substantially all of its opinion." *Id.* at 225 (Black, J., concurring). Justices Douglas, Brennan, and Marshall dissented.

21. In a famous passage, Justice Harlan explained: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." *McGautha*, 402 U.S. at 204. He concluded:

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. . . .

The infinite variety of cases and facets to each case would make general standards either meaningless "hoiler-plate" or a statement of the obvious that no jury would need. *Id.* at 207-08 (footnote omitted).

22. Two cases were joined for decision: *McGautha v. California* and *Crampton v. Ohio*. California used a bifurcated capital trial with separate guilt determination and sentencing hearings although it had no legislative standards to guide the exercise of sentencing discretion. Ohio procedures included neither a separate sentencing hearing nor capital sentencing standards; juries decided both guilt and the appropriate sentence at the conclusion of the trial on guilt or innocence. *McGautha*, 402 U.S. at 185, 208-20.

unusual punishments, as applied to the states through the fourteenth amendment.<sup>23</sup>

The Court accepted for review two rape cases and two murder convictions which had resulted in sentences of death to enable the Court to decide this issue.<sup>24</sup> The Court announced the decisions in 1972, under the now famous lead case of *Furman v. Georgia*.<sup>25</sup> By a vote of five to four, and through nine separate opinions,<sup>26</sup> the Justices ruled that the eighth amendment forbade imposition of the death penalty under the same procedures upheld on due process grounds in *McGautha*. This decision invalidated virtually all death sentences in the country,<sup>27</sup> and quickly overshadowed the California Supreme Court's prior decision striking down that state's death penalty on state constitutional grounds,<sup>28</sup> thus mooting a case originally accepted for Supreme Court review.<sup>29</sup>

*Furman* irretrievably involved the Supreme Court in arbitrating federal constitutional challenges to state death penalty legislation. Having once decided that state procedures for the administration of the death penalty were constitutionally inadequate, the Justices quickly were called upon to review the states' subsequent endeavors to enact

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23. The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Court made its prohibition against cruel and unusual punishments applicable to the states in *Robinson v. California*, 370 U.S. 660 (1962).

24. See *People v. Aikens*, 70 Cal. 2d 369, 450 P.2d 258, 74 Cal. Rptr. 882 (1969) (murder); *Furman v. State*, 225 Ga. 253, 167 S.E.2d 628 (1969), *rev'd*, 408 U.S. 238 (1972) (per curiam) (murder); *Jackson v. State*, 225 Ga. 790, 171 S.E.2d 501 (1969), *rev'd*, 408 U.S. 238 (1972) (rape); *Branch v. State*, 447 S.W.2d 932 (Tex. Crim. App. 1969), *rev'd*, 408 U.S. 238 (1972) (rape).

25. 408 U.S. 238 (1972) (per curiam).

26. The judgment in *Furman* was announced in a brief per curiam opinion: "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 [e]ighth and [f]ourteenth [a]mendments." *Furman*, 408 U.S. at 239-40. Justices Douglas, Brennan, Stewart, White, and Marshall concurred in the judgment. Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist dissented.

27. Rhode Island provided for mandatory capital punishment for murder by a life term inmate, and its death penalty statute thus was unaffected by *Furman*, which invalidated legislation that authorized capital punishment at the discretion of the sentencing authority. *Furman*, 408 U.S. at 417 n.2 (Powell, J., dissenting). However, *Furman* rendered invalid death penalty legislation in 39 states, the District of Columbia, and within federal jurisdiction, and resulted in approximately 600 death sentences being vacated across the country. *Id.* at 417-18 (Powell, J., dissenting). The Court subsequently declared mandatory death penalty statutes violative of the eighth and fourteenth amendments. *Sumner v. Shuman*, 483 U.S. 66 (1987); *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (per curiam); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976) (plurality decision); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality decision).

28. *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972); see *infra* note 147 and accompanying text.

29. *Aikens v. California*, 70 Cal. 2d 369, 450 P.2d 258, 74 Cal. Rptr. 882 (1969), *cert. dismissed*, 406 U.S. 813 (1972); see *supra* note 24 and accompanying text.



capital sentencing statutes that would pass constitutional muster.<sup>30</sup> In 1976, in *Gregg v. Georgia*<sup>31</sup> and four companion cases,<sup>32</sup> the Court affirmed that capital punishment was not per se violative of the eighth and fourteenth amendments.<sup>33</sup> It further ruled that while death sentences that followed mandatorily from conviction were unconstitutional,<sup>34</sup> legislation that narrowed the range of cases for which the death penalty was a possible sanction and provided standards to help guide capital sentencing discretion was facially constitutional.<sup>35</sup>

As procedures for implementing the death penalty were fine-tuned in<sup>36</sup> and the substantive boundaries of its lawful application were plumbed, a second generation of federal constitutional challenges followed.<sup>37</sup> In the post-*Gregg* epoch, through 1982, the Court vacated sentences or convictions in all but one of the capital cases accepted for review,<sup>38</sup> and the lower federal courts regularly struck capital sentences

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30. Between 1972 and 1976 at least 35 states re-enacted capital punishment legislation. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976) (plurality opinion). See generally F. ZIMRING & G. HAWKINS, *supra* note 2, at 41-45. The authors attributed the post-*Furman* legislative response in large part to the desire of state legislatures to affirm their authority in the face of contrary federal action, "[r]ather than a resurgent national perception of capital punishment as the solution to the problem of criminal homicide. . . ." *Id.* at 44.

31. 428 U.S. 153 (1976).

32. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson*, 428 U.S. at 280; *Roberts (Stanislaus)*, 428 U.S. at 325.

33. *Gregg*, 428 U.S. at 187 (holding that "the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it"). Only Justices Brennan and Marshall disagreed with the conclusion that the death penalty is not per se a cruel and unusual punishment. *Id.* at 230-31 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

34. *Woodson*, 428 U.S. at 280; *Roberts (Stanislaus)*, 428 U.S. at 325; see *supra* note 27.

35. *Gregg* approved capital legislation that broadly defined the crime of murder but required that the sentencing jury find one or more statutory aggravating circumstances beyond a reasonable doubt before deciding to impose the death penalty. 428 U.S. at 206-07. *Proffitt* upheld legislation that, unlike Georgia's, specified both aggravating and mitigating factors which it required the sentencing authority to consider before deciding upon a capital sentence. 428 U.S. at 250. *Jurek* approved a scheme that defined a narrow class of capital murders and required that a death sentence be imposed if the sentencing jury responded affirmatively to three questions. The most significant of the questions was "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." 428 U.S. at 269 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1976)). See generally Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974).

36. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion).

37. See *Enmund v. Florida*, 458 U.S. 782 (1982) (forbidding the death penalty for one convicted of felony murder who neither killed, attempted to kill, nor intended to kill the homicide victims); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (prohibiting the death penalty for the rape of an adult).

38. See *Enmund*, 458 U.S. at 811 n.23 (O'Connor, J., dissenting). The sole exception was *Dobbert v. Florida*, 432 U.S. 282 (1977), which upheld the death sentence against ex post facto and

in state cases.<sup>39</sup> While these were important victories, they were conspicuously incomplete and ultimately would prove fleeting. The Court denied certiorari in numerous capital cases, executions resumed,<sup>40</sup> and the tide was about to take a dramatic and ominous turn.

The year 1983 has been called a "dark year on death row,"<sup>41</sup> a time when the Supreme Court began to "deregulate"<sup>42</sup> the administration of state capital punishment laws under the federal constitution. Case names such as *Zant v. Stephens*,<sup>43</sup> *Barclay v. Florida*,<sup>44</sup> *California v. Ramos*,<sup>45</sup> and *Barefoot v. Estelle*<sup>46</sup> had significantly different connotations from the litany that characterized death penalty litigation in the 1960s. The latter decision went so far as to uphold procedures designed to expedite the federal courts' review of state death penalty cases, so as not to frustrate the states' interests in carrying out lawfully imposed death sentences.<sup>47</sup>

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other challenges.

39. See *Murray v. Giarratano*, 109 S. Ct. 2765 (1989) (Stevens, J., dissenting) (stating that in recent years the success rate for condemned state prisoners upon federal habeas corpus review in capital cases ranged from 60% to 70%); *Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) (stating that "[o]f the 34 capital cases decided on the merits by [c]ourts of [a]ppeals since 1976 in which a prisoner appealed from the denial of habeas relief, the prisoner has prevailed in no fewer than 23 cases, or approximately 70% of the time"); Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1671-72 (1986); Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 918 (1982); see also Culver & Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 86 (1986) (citing a 1985 newspaper survey that concluded that state supreme courts across the country have invalidated death sentences in approximately 43% of the capital cases they have decided and that federal courts have done so in about 60% of the capital cases in which they had considered such issue).

40. See *supra* note 4.

41. Note, *Dark Year on Death Row: Guiding Sentencer Discretion After Zant, Barclay, and Harris*, 17 U.C. DAVIS L. REV. 689 (1984).

42. See Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305; see also W. WHITE, *LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES* (1984); Geimer, *Death at any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U.L. REV. 737 (1985); Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129 (1984).

43. 462 U.S. 862 (1983) (upholding the death penalty under Georgia law, notwithstanding the invalidation of one of the aggravating circumstances found by the sentencing jury prior to its decision to impose punishment of death).

44. 463 U.S. 939 (1983) (approving the death sentence notwithstanding the sentencing judge's reliance on aggravating factors not authorized by Florida law).

45. 463 U.S. 992 (1983) (rejecting the claim that arbitrary factors were interjected into the capital sentencing decision by jury instructions that the governor of the state retained the authority to grant a reprieve, pardon, or commutation if a sentence of life imprisonment without parole were imposed instead of the death penalty).

46. 463 U.S. 880 (1983) (upholding the expedited procedures used by the federal court of appeals to review the district court's denial of relief in a state capital case, and allowing expert testimony about a capital defendant's likelihood of engaging in future acts of violence over claims that such predictions are inherently unreliable).

47. *Id.* at 888 (stating that "unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding").

Major setbacks ensued in the Court, sending death penalty foes reeling. *Pulley v. Harris*<sup>48</sup> upheld California's death penalty procedures, notwithstanding the absence of any comparative proportionality review of capital sentences by the state supreme court.<sup>49</sup> *Spaziano v. Florida*<sup>50</sup> definitively resolved that the federal constitution did not require that juries impose capital sentences.<sup>51</sup> *Strickland v. Washington*<sup>52</sup> set demanding requirements for demonstrating ineffective assistance of counsel in capital cases,<sup>53</sup> while *Wainwright v. Witt*<sup>54</sup> cut back on the *Witherspoon* test for "death-qualifying" jurors.<sup>55</sup> In *Lockhart v. McCre*<sup>56</sup> the Court rejected the important claim, which *Witherspoon* had not foreclosed, that capital defendants were entitled to have their guilt or innocence determined by juries from which nondeath qualified individuals had not been excluded.<sup>57</sup> The Court made capital punishment

48. 465 U.S. 37 (1984).

49. *But see* *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion). For a comparison of *Gregg* and *Pulley*, see *supra* note 1.

50. 468 U.S. 447 (1984).

51. *Spaziano* expressly affirmed the constitutionality of a judge imposing a sentence of death against the recommendation of an advisory jury that a sentence of life imprisonment be imposed. *Id.* at 449. The Supreme Court first approved Florida's capital sentencing scheme, and implicitly the provision for judicial sentencing, in *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion).

52. 466 U.S. 668 (1984).

53. The two part test for evaluating ineffective assistance of counsel claims under *Strickland* is as follows:

[A] "defendant's claim that counsel's assistance was so defective as to require reversal of a conviction of death sentence has two components." First, the defendant must show that counsel's errors were so serious that his performance as the "counsel" guaranteed under the [s]ixth [a]mendment was deficient. Second, the defendant must show that he suffered prejudice because of counsel's performance. In the context of a capital sentence, the defendant must demonstrate "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

*Burger v. Kemp*, 483 U.S. 776, 819 (1987) (Powell, J., dissenting) (citations omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 695 (1984)). Furthermore,

[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort he made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

*Strickland*, 466 U.S. at 689 (citation omitted). See generally Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573, 603-09 (1985); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983); Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 801-10 (1986).

54. 469 U.S. 412 (1985).

55. See *infra* notes 229-38 and accompanying text.

56. 476 U.S. 162 (1986).

57. See *infra* notes 239-44 and accompanying text.

available for a widened category of defendants convicted of felony murder in *Tison v. Arizona*.<sup>58</sup>

The *coup de grace* was delivered in 1987 in *McCleskey v. Kemp*,<sup>59</sup> described by some critics and commentators as the last remaining systemic challenge to the death penalty on federal constitutional grounds.<sup>60</sup> The Court, by a vote of five to four, ruled that absent a showing of invidious discrimination in a specific case, statistical evidence suggesting that racial discrimination generally influenced the administration of capital punishment did not establish a violation of a capital defendant's rights on either equal protection or cruel and unusual punishment grounds.<sup>61</sup> *McCleskey* thus rejected the critically important contention that the formal changes made in post-*Furman* capital punishment legislation had failed to correct the very defects in the administration of the death penalty that had concerned the Justices in *Furman*.<sup>62</sup>

There were, to be sure, intermittent successes in the capital cases decided by the Court in 1983 and subsequent years.<sup>63</sup> But opponents of

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58. 481 U.S. 137 (1987). *But see* *Enmund v. Florida*, 458 U.S. 782 (1982). For further analysis of these cases, see *supra* note 1; *infra* notes 269 & 271, and accompanying text.

59. 481 U.S. 279 (1987).

60. *See supra* note 1.

61. *McCleskey*, a black man, had been convicted of the capital murder of a white police officer, and sentenced to death. While challenging the legality of his death sentence, he introduced testimony and evidence about a complex statistical study completed by Professor David Baldus and his colleagues that suggested that the death penalty in Georgia was applied disproportionately in homicide cases that involved white victims and, to a lesser extent, that involved black defendants. *See* D. BALDUS & J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* §§ 8.43-8.433 (Supp. 1987); Acker, *Social Sciences and the Criminal Law: Capital Punishment by the Numbers—An Analysis of McCleskey v. Kemp*, 23 CRIM. L. BULL. 454 (1987) (reviewing *McCleskey* and the data on which it was premised).

62. One year after *McCleskey* was decided federal legislation was introduced in Congress that would have the effect of countermending much in the decision. The proposed Racial Justice Act of 1988, H.R. 4442, 100th Cong., 2d Sess. (1988), specifies that broad based evidence of racial discrimination, such as was at issue in *McCleskey*, *prima facie* establishes that capital punishment within a state is being administered unlawfully and prohibits executions unless the apparent racial disparities are explained on the basis of legally permissible factors.

63. *See, e.g.*, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (plurality opinion) (holding that absent affirmative indication in a statute that the state legislature intended to allow the death penalty for one who was only fifteen-years-old when he or she committed a capital crime, execution of such offender is cruel and unusual punishment under the federal constitution). *But see* *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989) (stating that no federal constitutional prohibition against executing sixteen- and seventeen-year-old offenders exists); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (asserting that a failure to consider evidence of potentially mitigating circumstances beyond those included in Florida's capital sentencing statute violates the federal constitution under the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion)); *Booth v. Maryland*, 482 U.S. 496 (1987) (finding that the admission of a victim impact statement at the capital sentencing proceeding invites consideration of evidence that is irrelevant, and interjects an element of arbitrariness into the sentencing decision, in violation of the eighth and fourteenth amendments); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (asserting that the improper exclusion of potentially

capital punishment were not optimistic about their prospects before the High Court and the lower federal courts which were bound to apply the evolving death penalty doctrine.<sup>64</sup> Coincidentally, as 1983 brought a significant turnabout in the results of capital cases decided by the Court, the year marked an important impetus for litigants to pursue death penalty challenges in alternative forums, the state courts, on nonfederal grounds.

### B. *Independent and Adequate State Grounds*

In *Michigan v. Long*<sup>65</sup> the Justices clarified existing doctrine to the effect that state court judgments are insulated from federal review if they are founded upon independent and adequate state law grounds. The Supreme Court had enunciated and relied upon the independent and adequate state ground rule as early as 1875,<sup>66</sup> premising the rule upon both the Court's jurisdictional obligation to refrain from rendering advisory opinions and its respect for the sovereignty and autonomy of state courts in nonfederal matters.<sup>67</sup> *Long* merely spelled out the circumstances in which a state court's reference to and ostensible reliance upon state decisional grounds foreclosed federal court review of a judgment.<sup>68</sup>

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mitigating evidence at the capital trial violates the rule of *Lockett*); *Ford v. Wainwright*, 477 U.S. 399 (1986) (ruling that it is cruel and unusual punishment under the federal constitution to execute one who lacks competence to be executed and that minimal procedures must be afforded to examine the competency issue once fairly presented).

64. See generally Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349 (1985).

65. 463 U.S. 1032 (1983).

66. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

67. *Long*, 463 U.S. at 1040-42; *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

68. The Court stated:

[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

*Long*, 463 U.S. at 1040-41 (1983). The effect of the rule is to create a presumption that federal law has been applied absent a "plain statement" to the contrary by a state court. See *id.* at 1042. In dissent, Justice Stevens argued that the presumption should be in the other direction, i.e., that state law governs a state court's decision absent some affirmative indication that federal grounds were assumed to be controlling. *Id.* at 1066 (Stevens, J., dissenting). See generally Abrahamson & Guttman, *The New Federalism: State Constitutions and State Courts*, 71 JUDICATURE 88, 96-98

*Long* accelerated an existing trend for state courts to resort to the constitutions and laws of their own states instead of to the federal constitution and federal precedent when deciding cases. This trend has been one of the most important and fascinating jurisprudential developments in recent years. State courts' reliance upon state law to resolve issues that also present federal questions is, in one sense, neither new nor innovative. It is a stratagem, however, that was all but forgotten by one generation of lawyers, and not learned by another, in the midst of the Warren Court's nationalization of Federal Bill of Rights protections during the 1960s.

From the time of the country's foundation until the ratification of the fourteenth amendment in 1868, the United States Constitution imposed few constraints upon the states' administration of criminal law.<sup>69</sup> The due process and equal protection guarantees of the fourteenth amendment, of course, apply directly to the states,<sup>70</sup> and the due process clause was significant in the Court's gradual assumption of control over state criminal procedure matters. Even as this process gradually began to develop, approximately from the early 1930s through the 1950s,<sup>71</sup> the state courts generally were the first and final arbiters of criminal prosecutions and appeals. The Warren Court, however, radically redefined the respective prominence of state and federal law. It did so as the Justices systematically declared that almost all of the rights relevant to criminal proceedings enumerated in the first eight amendments to the federal constitution are binding in state cases by operation of the fourteenth amendment's due process clause.<sup>72</sup>

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(1987); Pollock, *Adequate and Independent Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 980-82 (1985); Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118 (1984).

69. The Supreme Court declared, in *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833), that the Federal Bill of Rights imposed no limitations upon the states. The remainder of the federal constitution imposes only a few restraints on the states in criminal matters. See, e.g., U.S. CONST. art. I, § 10, cl. 1 (prohibiting the states from passing bills of attainder and ex post facto laws).

70. The fourteenth amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

71. See, e.g., *Betts v. Brady*, 316 U.S. 455 (1942), overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Powell v. Alabama*, 287 U.S. 45 (1932). See generally Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 281-90 (1982).

72. See *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *Malloy v. Hogan*, 378 U.S. 1 (1964) (compelled self-incrimination); *Ker v. California*, 374 U.S. 23 (1963) (search and seizure); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishments); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule). See generally Brennan, *supra* note 8, at 541-45. Israel,

State courts, which collectively lacked the reputation of being overly solicitous of criminal defendants' rights under state law,<sup>73</sup> consequently became either way stations to the federal courts or forums for the enforcement of federal constitutional rights. Reliance upon state constitutions, either by the litigants pressing claims or the courts deciding them, became a forgotten art.<sup>74</sup> In death penalty litigation and in other matters affecting individual liberties, federal constitutional law dominated the judicial arena. This situation generally remains true, given the profound and largely irreversible impact of the incorporation movement upon the relationship between the state and federal courts.<sup>75</sup> Many changes, however, have occurred.

The Burger Court took form in the early 1970s<sup>76</sup> and was widely perceived as curtailing the scope of the federal constitutional rights that had been recognized in the due process revolution of the 1960s. Few still considered the United States Supreme Court to be "the keeper of the nation's conscience."<sup>77</sup> After more than a decade of quies-

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*supra* note 71, at 296-97.

73. Galie, *State Supreme Courts, Judicial Federalism and the Other Constitutions*, 71 JUDICATURE 100, 100 (1987); Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1084 (1985). In a slightly different context, Professor Paulsen proclaimed in the early 1950s: "if our liberties are not protected in Des Moines the only hope is in Washington." Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 642 (1951).

74. According to one survey, state supreme courts recognized rights under state constitutions in only three cases from 1950 to 1959, and in only seven cases from 1960 to 1969. They did so in 124 cases during the 1970s, and in 177 cases from 1980 to 1986. See Collins, Galie & Kincaid, *supra* note 7, at 600-01 & table 1. The neglect of state constitutions during the heyday of the Warren Court has left a definite legacy. Few law schools offer instruction in state constitutional history or adjudication, and most casebooks in constitutional law ignore or give only superficial treatment to state constitutions. See Collins, *supra* note 8, at 386-87; Collins, Galie & Kincaid, *supra* note 7, at 616-17; Galie, *supra* note 73, at 110 n.19 (describing treatment given state constitutions in principal constitutional law casebooks); Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 227-28 (1983). State judges have complained that their law clerks typically are trained in federal constitutional jurisprudence but not in state constitutional law. *State v. Jewett*, 146 Vt. 221, 223, 500 A.2d 233, 235 (1985). They acknowledged that "[t]he fact that law clerks working for state judges have only been taught or are familiar with *federal* cases brings a federal bias to the various states as they fan out after graduation from 'federally' oriented law schools. The lack of treatises [or] textbooks developing the rich diversity of state constitutional law developments could be viewed as an attempt to 'nationalize' the law and denigrate the state bench." *Id.* (quoting Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1147 (1978)). See generally Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS 33 (1988).

75. See Galie, *supra* note 73, at 102 (pointing out that given the tremendous significance of the incorporation of Federal Bill of Rights protections to the states, there are no truly independent models of state constitutional analysis).

76. Warren Burger replaced Earl Warren as Chief Justice in 1969, and Justice Blackmun assumed Justice Fortas's seat in 1970. See *supra* note 19. In early 1972 Justices Powell and Rehnquist were sworn in to take the seats vacated by Justices Harlan and Black.

77. Mosk, *supra* note 73, at 1087 (footnote omitted); see Wilkes, *supra* note 8, at 421; see

cence that bordered on morbidity, the interest in state supreme courts and state constitutional law experienced a remarkable reawakening.<sup>78</sup>

A new relationship began to take shape between state and federal constitutions. No longer were their protections considered in isolation, as they had been in the distant past, nor were federal rights regarded as preemptive or exclusive, as during the Warren Court years. Instead, federal guarantees served as the floor beneath which the state courts could not fall in recognizing constitutional protections. In many jurisdictions, new plateaus of state constitutional rights were established beyond the federal minima.

The Supreme Court has repeatedly acknowledged the state courts' authority to recognize individual liberties under the aegis of state constitutional interpretation. These liberties may extend beyond the umbrella of federal constitutional protections.<sup>79</sup> State courts have extended them in approximately four hundred cases since 1970,<sup>80</sup> many of which have involved criminal law and criminal procedure issues.<sup>81</sup> This trend is likely to continue at an even faster pace as the doctrinal bases of state constitutional interpretation take root and begin to expand. Also, a reversal of the federal courts' increasing tendency toward conservative

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also *supra* note 8.

78. See Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 Miss. L.J. 223, 228 (1984). Justice Stanley Mosk of the California Supreme Court has noted that the interest in state court adjudication has undergone a " 'phoenix-like resurrection.' " *Id.* (quoting TIME, Apr. 4, 1977, at 46, col. 3). This interest began being exhibited around 1970, and in 1977 Justice Brennan delivered an important address on state constitutional adjudication, which further stimulated interest in the subject. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Hundreds of articles have been written on various aspects of state constitutional interpretation since then. See, e.g., Collins & Galie, *State Constitutional Law*, *supra* note 7, at S-9 to S-19.

79. See, e.g., *California v. Greenwood*, 486 U.S. 35, 50 (1988) (stating that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution"); *California v. Ramos*, 463 U.S. 992, 1013-14 (1983) (stating that "[i]t is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires"); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (asserting that federal constitutional precedent "does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own [c]onstitution individual liberties more expansive than those conferred by the Federal Constitution."); *Oregon v. Haas*, 420 U.S. 714, 719 (1975) (stating that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards" (emphasis in original)).

80. See *supra* note 7.

81. See Collins & Galie, *State Constitutional Law*, *supra* note 7, at S-9 to S-19 (collecting cases); see also Mosk, *The Emerging Agenda in State Constitutional Rights Law*, 496 ANNALS 54 (1988). See generally Abrahamson, *supra* note 8; Gruhl, *State Supreme Courts and the U. S. Supreme Court's Post-Miranda Rulings*, 72 J. CRIM. L. & CRIMINOLOGY 886 (1981); Comment, *Expansion of the Rights of Criminal Defendants Based on State Law*, 12 S. ILL. U.L.J. 459 (1988); Note, *United States v. Leon and Illinois v. Gates: A Call for State Courts to Develop State Constitutional Law*, 1987 U. ILL. L. REV. 311.



constitutional interpretation is not presently foreseeable.<sup>82</sup>

The state courts' increasing reliance on state constitutional grounds to decide cases that once would have been considered solely under the federal constitution and dictated by federal precedent has been described as "probably the most important development in constitutional jurisprudence of our time."<sup>83</sup> It has been hailed as "a new 'Constitutional Revolution.'"<sup>84</sup> Its rapid ascension to prominence, however, has outpaced the general capabilities of the legal community. State judges complain that lawyers fail to brief adequately state constitutional issues.<sup>85</sup> Law schools and casebooks are castigated for ignoring state con-

82. President Reagan, who appointed approximately half of the present federal court judges, and largely succeeded in appointing conservative judges, *see supra* note 5, also appointed relatively young judges, who are expected to have a long-term impact on federal court decision making. *The Judiciary: A Great Right Hope*, *supra* note 5, at 23.

83. The Fourteenth Amendment, Address by Justice William J. Brennan, Jr., American Bar Association Section on Individual Rights and Responsibilities, New York University Law School (Aug. 8, 1986), *quoted in* Utter & Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 *IND. L. REV.* 635, 638 (1987).

84. *See* Williams, *supra* note 74, at 171; *see also* Collins, Galie & Kincaid, *supra* note 7, at 622 (stating that it is premature to label the return to state constitutional adjudication a "revolution" but noting the clear trend toward increased reliance on state constitutional decision making); Pollock, *supra* note 68, at 979 (noting that "federal constitutional law has changed direction and, once again, state constitutions are emerging as guarantees of fundamental rights"); Wilkes, *supra* note 78, at 225 (identifying a "counterrevolution" in state courts' interpretation of constitutional criminal procedure rights).

85. *See, e.g.*, Abrahamson, *supra* note 8, at 1161 (noting that "all too frequently, counsel do not raise state constitutional issues in the trial or appellate courts, or make only a passing reference to the state constitution" (footnote omitted)); Durham, *Filling a Scholarly Void*, *NAT'L L.J.*, Sept. 29, 1986, at S-6 (asserting that "when attorneys neglect to brief a pertinent legal point, including a state constitutional one, they are flirting with malpractice"); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 *GA. L. REV.* 165, 177 (1984) (noting that attorneys often fail to brief state law issues); Utter & Pitler, *supra* note 83, at 653. Commentators note:

State courts often observe that even where parties squarely raise state constitutional issues, briefing frequently falls short of the mark, failing to make any substantive analysis or argument on the issue. . . . [L]awyers often view state issues as "throw-ins" most likely because they have not learned how to frame well thought out, persuasive state constitutional arguments.

*Id.* (footnote omitted); *see also* State v. Earl, 716 P.2d 803 (Utah 1986) (refusing to reach the state constitutional issue because the parties neither raised nor briefed it); State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985) (remanding case for supplemental briefs to be filed on state constitutional issue because the original briefs failed to address it adequately). The *Jewett* court took the rather extraordinary step of advising lawyers about how to proceed generally to research and develop an argument based upon state constitutional grounds. The opinion took an instructive and benevolent tone but noted that: "Oregon Justice Hans Linde has stated: 'A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice.'" *Id.* at 223, 500 A.2d at 234 (quoting Welsh & Collins, *Taking State Constitutions Seriously*, 14 *CENTER MAG.*, Sept./Oct. 1981, at 12. After *Jewett* was decided the Vermont Attorney General formed a special state constitutional law commission, specifically to research history and legal precedent relevant to the Vermont Constitution. *See* Collins & Galie, *supra* note 7, at 335.

stitutional law.<sup>86</sup> Commentators are quick to identify judicial opinions that give superficial treatment to state constitutional issues.<sup>87</sup> Commentators tend to agree that state constitutions are once again important jurisprudential documents and potential sources of rights, but there is much uncertainty about the precise means with which they are to be reckoned.<sup>88</sup>

### C. *Interpreting State Constitutions*

Death penalty litigation under state constitutions has particularly intriguing possibilities. The dynamic and troubled state of federal capital punishment jurisprudence invites the exploration of alternative doctrinal ground that is not dependent upon federal precedent.<sup>89</sup> Additionally, whether or not state supreme courts adopt the federal analytical framework, the historical and empirical underpinnings of state death penalty law must be specifically canvassed for individual states and not measured against national practice and standards.<sup>90</sup> The potential contributions that doctrinal innovations and empirical research can make to the evolution of state constitutional death penalty law are immeasurably greater than under federal constitutional law.

State supreme courts have adopted different approaches to state constitutional analysis, characterized by differing philosophies about

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86. See *supra* note 74.

87. See, e.g., Collins, *supra* note 8, at 375-76 (lamenting the frequency of selective, reactive, result-oriented reliance upon state constitutions); Collins & Galie, *1985 Survey*, *supra* note 7, at 320 (stating that "[a]lthough the state courts may one day get around to articulating coherent and more complete bodies of state constitutional law, current jurisprudence in the criminal justice field remains reactive and ad hoc"); Shapiro, *State Constitutional Doctrine and the Criminal Process*, 16 SETON HALL L. REV. 630, 647 (1986) (observing that one pattern of state constitutional decision making "has been judicial reliance upon state constitutional law as a result-oriented, evasive technique for avoiding undesirable federal results and insulating a decision from federal review" and that this approach is rightly criticized as unprincipled and lacking in normative legitimacy).

88. Linde, *supra* note 85, at 166 (noting that "[t]he question in the state courts no longer is whether to give independent attention to state constitutional issues, but how"); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1329 (1982) [hereinafter *Developments in the Law*] (noting that while it is apparent that state bill of right guarantees "may once again assume a prominent role, there is little consensus on what that role should be").

89. See *infra* notes 193-203 and accompanying text; cf. *Jewett*, 146 Vt. at 223, 500 A.2d at 235. In the course of directing that supplemental briefs be filed in an appeal presenting a search and seizure question, to address state constitutional argument, the court mused that "[o]ne longs to hear once again of legal concepts, their meaning and their origin. All too often legal argument consists of a litany of federal buzz words memorized like baseball cards." *Id.*

90. It sometimes is argued that in contexts such as search and seizure or compulsory self-incrimination law, state court adherence to federal doctrine is desirable to avoid a proliferation of rules that may be unduly confusing to law enforcement officers. There would seem to be no analogous need for uniformity in state capital punishment law in which diversification by the states may be particularly appropriate. Devine, Feldman, Giles-Klein, Ingram & Williams, *Special Project: The Constitutionality of the Death Penalty in New Jersey*, 15 RUTGERS L.J. 261, 323-24 (1984).

the respective centrality of the state and federal constitutions in their decision making. One style, essentially a "non-approach"<sup>91</sup> insofar as state constitutions are concerned, uses interpretations of the federal constitution to dictate the meaning of analogous state constitutional provisions. This style is called the lock-step, or equivalence, model of state constitutional interpretation.<sup>92</sup> A provision in the Florida Constitution explicitly requires such coincidence between the scope and meaning of state and federal rights.<sup>93</sup> State courts have expressly adopted the lock-step approach on occasion,<sup>94</sup> while many decisions do so de facto.<sup>95</sup>

At the opposite end of the relational spectrum is the primacy model, under which state constitutions routinely are consulted before the federal constitution and are considered exclusively if they adequately resolve the contested issue.<sup>96</sup> This approach, more than any

91. Utter & Pitler, *supra* note 83, at 645.

92. See Galie, *supra* note 73, at 102; Utter & Pitler, *supra* note 83, at 645-46. Under this approach,

U[nited] S[tates] Supreme Court decisions are automatically presumed to establish the contours and character of state constitutional law. In its most extreme form, this model dictates . . . that a particular state constitutional provision always be interpreted in the same way as the U[nited] S[tates] Supreme Court would interpret a parallel federal provision. . . .

Adherents of the equivalence model deny that state judges have any independent responsibility to be the caretakers of state law. Practically speaking, for them, state bills or declarations of rights have no functional significance . . . . Thus, the role of state judges in "interpreting" state law is to hypothesize how the U[nited] S[tates] Supreme Court might rule on a given question. In practice, under the equivalence model there is little, if any, difference between a state court's interpretations of either the federal or state constitution.

Collins & Galie, 1985 *Survey*, *supra* note 7, at 323-24 (footnotes omitted). For a defense of this approach to state constitutional interpretation, see Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS 98 (1988).

93. FLA. CONST. art. I, § 12. This section provides:

[The state constitution's search and seizure provision] shall be construed in conformity with the [fourth] [a]mendment to the United States Constitution as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the [fourth] [a]mendment to the United States Constitution.

*Id.* Former Chief Justice Burger applauded this provision by stating that "when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement. The people of Florida have now done so . . ." *Florida v. Casal*, 462 U.S. 637, 639 (1983) (per curiam) (Burger, C.J., concurring) (emphasis in original).

94. See, e.g., *State v. Jackson*, 206 Mont. 338, 672 P.2d 255 (1983); *Brown v. State*, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983). The Montana Supreme Court subsequently retreated from its position of conforming to United States Supreme Court doctrine. See *State v. Johnson*, 221 Mont. 503, 719 P.2d 1248 (1986); see also Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1137 (1985); Collins & Galie, *supra* note 7, at 323; Utter & Pitler, *supra* note 83, at 646.

95. Galie, *supra* note 73, at 102; see also *infra* note 151 and accompanying text.

96. One commentator explained:

other, promotes the independent development of state constitutional doctrine without preordaining that state law will provide equivalent, greater, or fewer protections<sup>97</sup> than the federal constitution. State courts adhering to the primacy model interpret and apply federal law in the event that a case is not decided on state grounds.<sup>98</sup>

The interstitial, or supplemental, approach reverses the presumptions inherent in the primacy model. State courts normally rely on the federal constitution and federal precedent to resolve cases and resort to state constitutional analysis only if federal grounds are not dispositive. Parallel provisions in the federal and state constitutions typically are assumed to afford similar protections unless specific considerations mil-

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The primacy model focuses on the state constitution as an independent source of rights and relies on it as the fundamental law. Under the primacy model, federal law and analysis are not presumptively correct. In fact, they are no more persuasive than the decisions of sister state courts. Consequently, even when a developed body of federal doctrine is available, and the state and federal texts are similar, the primacy model urges that the court look first to the state provision and to state history, doctrine, and structure. Its examination of these state-specific concerns may lead it to a result that diverges from the preexisting federal interpretation. Only if the result grounded in state law falls below the standards of the federal constitution should the court decide the case under federal law. In short, the primacy model relegates federal law to a secondary position.

Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1028 (1985) (footnotes omitted); see also Pollock, *supra* note 68, at 983. "Under the primacy approach, a court looks first to its state constitution . . . Only if the alleged infringement is permissible under state constitutional standards would a court consult the federal constitution." *Id.*; Utter & Pitler, *supra* note 83, at 647; Comment, *The Primacy Method of State Constitutional Decision-making: Interpreting the Maine Constitution*, 38 ME. L. REV. 491 (1986). Oregon Supreme Court Justice Hans Linde has been a long time and influential proponent of the primacy approach to state constitutional interpretation. See Linde, *supra* note 85, at 178-79; Linde, *First Things First: Rediscovering States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). A few state courts have adopted the primacy approach in their state constitutional decision making. See *State v. Flick*, 495 A.2d 339, 343 n.2 (Me. 1985); *State v. Cadman*, 476 A.2d 1148 (Me. 1984); *State v. Ball*, 124 N.H. 226, 230-32, 471 A.2d 347, 350-52 (1983); *State v. Kennedy*, 295 Or. 260, 262-63, 666 P.2d 1316, 1318 (1983); *State v. Jackson*, 102 Wash. 2d 432, 688 P.2d 136 (1984).

97. For example, the Oregon Supreme Court has ruled in a plurality decision that the warnings required under *Miranda v. Arizona*, 384 U.S. 436 (1966), are not also required under the state constitution. See *State v. Smith*, 301 Or. 681, 725 P.2d 894 (1986) (plurality decision). Commentators have labeled state supreme courts' practice of interpreting state constitutions to provide fewer protections than analogous federal constitutional provisions an "equivalence minus" model of interpretation. See Collins & Galie, *1985 Survey*, *supra* note 7, at 327; Galie, *supra* note 73, at 102-03.

98. The major criticisms of this approach are that the law will lack uniformity and create confusion among law enforcement officers and others who must abide by judicial interpretations of constitutional protections, and that failing to recognize the dominance of federal constitutional law in the present era of federalism is unrealistic. See, e.g., Abrahamson, *supra* note 8, at 1177; Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1005 (1985); Utter & Pitler, *supra* note 83, at 648 n.108; *Developments in the Law*, *supra* note 88, at 1357; see also *State v. Ringer*, 100 Wash. 2d 688, 703, 674 P.2d 1240, 1250 (1983) (Dimmick, J., dissenting), *overruled by State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 436 (1986).

itate in favor of construing the state constitution differently.<sup>99</sup> This approach sometimes appears to be result oriented, or an ad hoc approach to state constitutional interpretation,<sup>100</sup> although it need not be.<sup>101</sup> In practice most state courts appear to utilize this technique when relying upon state constitutions.<sup>102</sup>

99. See Utter, *supra* note 96, at 1028-29. Utter states:

According to the interstitial model state courts recognize the federal doctrine as the floor and focus the inquiry on whether the state constitution offers a means of supplementing or amplifying federal rights . . . . Although the result reached under federal law is presumptively correct, a state could adopt an original interpretation of a state constitutional provision by examining textual differences, legislative history supporting a broader reading of the state provision, state law predating United States Supreme Court decisions, differences between federal and state judicial structures, subject matter of particular state or local interest, state tradition, and public attitudes in the state.

. . . The interstitial approach treats the federal rule as presumptively correct; the court will follow federal law if it finds federal law establishes the right in question. If the court finds no federal right, it will next determine if there are reasons, such as state-specific factors, to supplement the federal doctrine.

*Id.* (footnotes omitted). Three questions must be addressed sequentially by state courts that adopt the interstitial model of state constitutional interpretation:

First, do established principles of federal law dictate a result; that is, does the alleged unconstitutional action fall below a federal floor? If so, the case can be decided without the elaboration of state constitutional doctrine. If not, the second question asks what factors, if any, warrant a divergence from federal doctrine. If the court identifies reasons to diverge, the final question is how to proceed in elaborating the contours of the state constitutional doctrine; specifically, should the court employ a *reactive* approach, simply tinkering with the available federal doctrine, or should it employ a more *self-reliant* approach, building state constitutional doctrine for this area independently, without close reference to the federal doctrine?

*Developments in the Law, supra* note 88, at 1358 (emphasis in original) (footnotes omitted); see also Abrahamson, *supra* note 8, at 1171-73; Pollock, *supra* note 68, at 984-85; Utter & Pitler, *supra* note 83, at 648-51.

100. See Collins, *supra* note 8, at 375 n.15; Collins & Galie, 1985 Survey, *supra* note 7, at 320; Linde, *supra* note 85, at 196. A criticism of constitutional interpretation is that:

Text can confine a judicial interpretation when it cannot compel one. Judicial review can be not only interpretive or noninterpretive but misinterpretive. A long buried grub surprisingly metamorphoses into a butterfly and remains the same insect, and an underwater tadpole turns into an airbreathing frog; but some decisions have made butterflies grow from tadpoles, to the applause of theorists who prefer butterflies. There are limits to what can be explained as constitutional law before turning it into genetic engineering.

*Id.*; see Shapiro, *supra* note 87, at 647-49.

101. See *State v. Hunt*, 91 N.J. 338, 365-68, 450 A.2d 952, 965-67 (1982) (Handler, J., concurring). The court identified several considerations that may be relevant to the development of standards or criteria to justify divergent interpretations of analogous state and federal constitutional provisions: (1) differences in textual language, (2) legislative history of constitutional provisions, (3) reference to state law that existed prior to the state constitution, (4) structural differences between state and federal constitutions, (5) matters of particular state interest or local concern, (6) state traditions, and (7) distinctive public attitudes. *Id.*; see also *State v. Jewett*, 146 Vt. 221, 500 A.2d 233, 236-37 (1985) (identifying the considerations generally relevant to state constitutional interpretation); Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731 (1982); Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353, 385-88 (1984); *Developments in the Law, supra* note 88, at 1359-62.

102. Shapiro, *supra* note 87, at 647; see Collins & Galie, 1985 Survey, *supra* note 7, at 324-25

A few state courts use a dual sovereignty analysis, routinely considering claims under both state and federal constitutional provisions.<sup>103</sup> This approach recognizes the relevance of both state and federal constitutional law to state jurisprudence. The perceived virtue of the dual sovereignty approach is its acknowledgement of the basic federalistic structure of the American judicial system.<sup>104</sup> It has been criticized as inviting unnecessary work and confusion in both state and federal courts and for spawning advisory opinions that are not necessary to case decisions.<sup>105</sup>

Most state courts eclectically select their means for reaching issues under state constitutions and do not commit to any specific mode of analysis. Once they begin to consider state constitutional provisions, however, most state courts must be convinced that they should not follow analogous federal constitutional precedent even if they are not required to do so.<sup>106</sup> This attitude springs from habit, owing much to both postincorporation dominance of federal law and the reasoned expectation that the fundamental law of both the state and federal sovereigns has similar origins and purposes that will command similar results.<sup>107</sup>

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(referring to this approach as the "equivalence plus" model of state constitutional interpretation).

103. See Utter, *supra* note 96, at 1029 (noting that "[t]he dual sovereignty method . . . analyzes both the state and federal constitutional provisions"). State courts often use this approach even when a case may be resolved without it. *Id.* (finding that "[c]ourts applying the dual sovereignty model always evaluate both federal and state provisions in the course of their decisions, even when the decision rests firmly on state grounds"); see also Abrahamson, *supra* note 8, at 1170-71; Collins, *supra* note 8, at 393 n.68; Pollock, *supra* note 68, at 983. For cases using the dual sovereignty analysis, see *State v. von Bulow*, 475 A.2d 995 (R.I.), *cert. denied*, 469 U.S. 875 (1984); *Kearns-Tribune Corp. v. Lewis*, 685 P.2d 515 (Utah 1984); *State v. Badger*, 141 Vt. 430, 450 A.2d 336 (1982); *State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984).

104. For commentary in defense of the dual sovereignty model, see Utter, *supra* note 96, at 1030-45; Utter & Pitler, *supra* note 83, at 651-52.

105. See Utter, *supra* note 96, at 1029-30; Utter & Pitler, *supra* note 83, at 652. See generally *Massachusetts v. Upton*, 466 U.S. 727, 735-39 (1984) (per curiam) (Stevens, J., concurring in the judgment) (noting that the state court's failure to examine state grounds for the decision independently of federal grounds caused needless work for both the state supreme court and the United States Supreme Court).

106. This trend is not true of state courts that follow the primacy approach to state constitutional interpretation, which entails consulting the state constitution initially to determine claims and carries no presumption that federal constitutional precedent generally ought to control. See Linde, *supra* note 85, at 179. Under the primacy approach,

[t]he crucial step for counsel and for state courts . . . is to recognize that the Supreme Court's answer is not presumptively the right answer, to be followed unless the state court explains why not.

The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.

*Id.*; see also *supra* notes 96-98 and accompanying text.

107. See, e.g., *State v. Hunt*, 91 N.J. 338, 362-63, 450 A.2d 952, 964 (1982) (Handler, J., concurring). Judge Handler advised that:

our national judicial history and traditions closely wed federal and state constitutional doc-

Identifying textual differences between state and federal constitutions seems perhaps the easiest way to overcome such a presumption. There is absolutely no reason that compels even identically worded state and federal provisions to be interpreted the same.<sup>108</sup> Nonetheless, the legitimacy of state courts premising decisions upon state constitutions is most apparent and least often questioned when different substantive provisions,<sup>109</sup> or significantly different statements of rights,<sup>110</sup>

trine. It is not entirely realistic, sound or historically accurate to regard the separation between the federal and state systems as a schism . . . . [A] considerable measure of cooperation must exist in a truly effective federalist system . . . . [W]hile a natural [sic] monolithic legal system is not contemplated, some consistency and uniformity between the state and federal governments in certain areas of judicial administration is desirable.

*Id.*; see also Pollock, *supra* note 68, at 984; Shapiro, *supra* note 87, at 647; Williams, *supra* note 101, at 389-96; *Developments in the Law*, *supra* note 88, at 1357. See generally Maltz, *supra* note 92.

108. See Kaye, *Dual Constitutionalism in Practice and Principle*, 42 REC. A.B. CITY N.Y. 285, 299 (1987). In this address the author, a judge on the New York Court of Appeals, answered in the negative to the question, "Does the absence of textual difference in comparable provisions [of the federal and state constitutions] preclude principled independent analysis under the state Constitution?" *Id.* She continued:

As a juridical act . . . constitutional analysis by state courts cannot stop with a mechanical matching of texts; significant protections of a state constitution are otherwise relegated to redundancy.

In this State, in fact, there is a long tradition of reading the parallel clauses independently and affording broader protection, where appropriate, under the state Constitution.

*Id.* (footnote omitted); see also *Developments in the Law*, *supra* note 88, at 1348 (indicating that "even when confronted with identical federal and state constitutional language, a state court has a different, more expansive role to play in applying its version of the provision"). Other commentators argue that whether or not there are language similarities between federal and state constitutions, it is important to

overcome the notion that the divergence from the Supreme Court becomes more legitimate when the state constitution has different text. In either case, state courts have equal responsibility for independently interpreting their state constitutions; a textual difference simply makes it easier for a court to see its responsibility.

Utter & Pitler, *supra* note 83, at 656 (footnote omitted); see also Linde, *supra* note 85, at 182 (stating that state supreme courts must make independent analyses of state constitutional provisions whether or not federal provisions are worded identically).

109. *E.g.*, *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (relying upon the Alaska Constitution's right of privacy provision, ALASKA CONST. art. I, § 22, to recognize the right to possess a small quantity of marijuana in one's home). Many other state constitutions also explicitly recognize the right of privacy. See Galie, *supra* note 73, at 103; Mosk, *The Emerging Agenda in State Constitutional Rights Law*, 496 ANNALS 54, 55 (1988). The constitutions of several states prohibit discrimination based upon gender. See Galie, *supra* note 101, at 745-48; Tarr & Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919 (1982); Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985). Many also have special provisions for public school financing and education generally. See Galie, *supra* note 101, at 748-51; Maltz, *supra* note 98, at 1021; Mosk, *supra*, at 56-57; *Developments in the Law*, *supra* note 88, at 1444-59. *But see* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding and refusing to scrutinize strictly public education financing by local property taxes with resulting unequal distribution of financial assistance to public school systems across the state).

110. Compare Md. CONST. art. XXI (guaranteeing unanimous criminal trial jury) with John-

distinguish the state and federal documents. State and federal constitutional protections relevant to capital punishment sometimes exhibit such differences.

The eighth amendment to the United States Constitution provides simply that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>111</sup> The constitutions of fifteen of the thirty-six states that inflict capital punishment have virtually identical prohibitions against "cruel and unusual punishments."<sup>112</sup> An additional fourteen proscribe cruel "or" unusual punishments,<sup>113</sup> five bar only "cruel" punishments,<sup>114</sup> and two have no analogous textual provisions.<sup>115</sup>

It is disputable whether a disjunctive prohibition against cruel "or" unusual punishments deserves a different interpretation from the eighth amendment's conjunctive statement,<sup>116</sup> or whether "unusual"

son v. Louisiana, 406 U.S. 356 (1972) and *Apodaca v. Oregon*, 406 U.S. 404 (1972) (both announcing that the federal constitution does not prohibit the states from using nonunanimous criminal juries); CAL. CONST. art. I, § 16 and W. VA. CONST. art. III, § 14 (requiring 12-member criminal juries) with *Williams v. Florida*, 399 U.S. 78 (1970) (announcing that the federal constitution does not preclude states from utilizing six-member juries in criminal trials). The Oregon Constitution states that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." OR. CONST. art. I, § 8. The Oregon Supreme Court interpreted this provision to prohibit the regulation of "obscene" materials with respect to adults. See *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987). But see *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

111. U.S. CONST. amend. VIII.

112. ARIZ. CONST. art. 2, § 4; COLO. CONST. art. II, § 20; GA. CONST. art. I, § 1, para. 17; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; N.J. CONST. art. I, para. 12; N.M. CONST. art. II, § 13; OHIO CONST. art. I, § 9; OR. CONST. art. I, § 16; TENN. CONST. art. I, § 16; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9. But see OR. CONST. art. I, § 40; *infra* note 117 and accompanying text.

113. ALA. CONST. art. I, § 15; ARK. CONST. art. 2, § 9; CAL. CONST. art. 1, § 17; FLA. CONST. art. 1, § 17; LA. CONST. art. 1, § 20; MD. CONST. art. 25 (Declaration of Rights); *id.* art. 16 (Declaration of Rights) (stating that "no law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter"); MISS. CONST. art. 3, § 28; NEV. CONST. art. 1, § 6; N.H. CONST. pt. 1, art. 33; N.C. CONST. art. I, § 27; OKLA. CONST. art. 2, § 9; S.C. CONST. art. I, § 15 (specifying that neither "cruel, nor corporal, nor unusual punishment be inflicted (emphasis added)); TEX. CONST. art. 1, § 13; WYO. CONST. art. 1, § 14. But see CAL. CONST. art. 1, § 27; N.C. CONST. art. XI, § 2; *infra* note 118 and accompanying text.

114. DEL. CONST. art. I, § 11; KY. CONST. § 17 (Bill of Rights); PA. CONST. art. 1, § 13; S.D. CONST. art. VI, § 23; WASH. CONST. art. 1, § 14.

115. The constitutions of Connecticut and Illinois do not contain prohibitions against cruel and unusual punishments. But see ILL. CONST. art. 1, § 11; *infra* text accompanying note 124.

116. See *People v. Anderson*, 6 Cal. 3d 628, 634-39, 493 P.2d 880, 883-87, 100 Cal. Rptr. 152, 155-59, cert. denied, 406 U.S. 958 (1972) (attributing significance to the textual prohibition against cruel "or" unusual punishments in CAL. CONST. art. I, § 17 (formerly CAL. CONST. art. I, § 6) in finding the death penalty to be violative of the state constitution, although ultimately concluding that capital punishment was both cruel "and" unusual); Galie, *supra* note 101, at 761 (calling *Anderson* "one of the most striking, if not altogether convincing, decisions to use textual differences as grounds for differing with federal constitutional law"). See generally Barrett, Anderson



adds anything of meaning to the protection against "cruel" punishments.<sup>117</sup> These disputes illustrate the point that differently worded provisions may at least provide a logical point of departure in the quest to have different interpretations placed upon state and federal constitutions. This point is most obvious under the constitutions of the four states that affirmatively sanction capital punishment, or exempt it from prohibition under other constitutional provisions.<sup>118</sup> It would be fruit-

and the Judicial Function, 45 S. CAL. L. REV. 739 (1972); Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972).

117. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (Marshall, J., concurring). Justice Marshall stated:

[U]se of the word "unusual" in the English Bill of Rights of 1689 was inadvertent, and there is nothing in the history of the [e]ighth [a]mendment to give flesh to its intended meaning. In light of the meager history that does exist, one would suppose that an innovative punishment would probably be constitutional if no more cruel than that punishment which it superseded.

*Id.* at 331. Discussing precedent that has alluded to "unusual" punishments, Justice Brennan concluded that "[w]hether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear." The question, in any event, is of minor significance; this Court has never attempted to explicate the meaning of the [eighth amendment's cruel and unusual punishments] [c]lause simply by parsing its words." *Id.* at 277 n.20 (Brennan, J., concurring) (citation omitted); see also *Commonwealth v. Zettlemyer*, 500 Pa. 16, 73-75, 454 A.2d 937, 967-68 (1982) (holding "that the rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the [e]ighth and [f]ourteenth [a]mendments"), *cert. denied*, 461 U.S. 970 (1983); H. BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 96-98 (1987); Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

118. Article 1, Section 27 of the California Constitution states:

All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.

(Former article 1, § 6 now is article 1, § 17 of the California Constitution). The relevant provision in the Massachusetts Constitution states:

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. No provision of the Constitution, however, shall be construed as prohibiting the imposition of punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

MASS. CONST. pt. 1, art. 26. Massachusetts' death penalty legislation was declared violative of state constitutional rights against compelled self-incrimination and to trial by jury in *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 470 N.E.2d 116 (1984); see also N.C. CONST. art. XI, § 2 (stating that "[t]he objects of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact"); OR. CONST. art. I, § 40 (proclaiming that "[n]otwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law"). Prior to its revision in 1972, the Montana Constitution provided: "Laws for the punishment of crime shall be founded on

less to argue that the death penalty is per se invalid on state grounds in the face of such textual affirmations, even though other challenges might survive.<sup>119</sup>

Some states have constitutional protections that arguably are relevant to the death penalty and have no textual analogue in the federal constitution. For example, an Indiana provision states that "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice."<sup>120</sup> The Oregon Constitution contains a nearly identical clause,<sup>121</sup> although a 1984 amendment that resulted from a voters' initiative specifically excepted the death penalty from its terms.<sup>122</sup> Wyoming's constitution specifies that "[t]he penal code shall be framed on the humane principles of reformation and prevention."<sup>123</sup> The Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."<sup>124</sup>

Because capital punishment is patently incompatible with reformation and restoration, and to some observers has trappings of vindictiveness,<sup>125</sup> courts could interpret these provisions as outright prohibitions

the principles of reformation and prevention, but this shall not affect the power of the legislative assembly to provide for punishing offenses by death." MONT. CONST. art. III, § 24. The clause making reference to the death penalty subsequently was deleted. *See id.* art. II, § 28; *see also infra* note 124.

119. *See, e.g.,* *People v. Superior Court*, 31 Cal. 3d 797, 647 P.2d 76, 81, 183 Cal. Rptr. 800 (1982) (holding that article 1, § 27 of the California Constitution "does not, on its face, preclude review [of death penalty issues] on state due process grounds"). The court also concluded that one of the aggravating factors in the capital punishment legislation, CAL. PENAL CODE § 190.2(a)(14) (Deering 1985), was unconstitutionally vague and violative of state and federal due process provisions. *Id.*; *see also Colon-Cruz*, 393 Mass. at 150, 470 N.E.2d at 116; *State v. Avery*, 299 N.C. 126, 137-38, 261 S.E.2d 803, 811-12 (1980) (Exum, J., dissenting) (arguing that using a "death qualified" jury at the guilt determination stage of a capital trial violates the state constitutional right to trial by jury); *State v. Wagner*, 305 Or. 115, 752 P.2d 1136 (1988) (considering but rejecting the claim that a guilty plea in a capital case was impermissible under the state constitution), *vacated on other grounds*, 109 S. Ct. 3235 (1989).

120. IND. CONST. art. 1, § 18.

121. OR. CONST. art. I, § 15 (providing that "[l]aws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice"). The drafters of the Oregon Constitution drew heavily upon the Indiana Constitution. Utter & Pitler, *supra* note 83, at 635-36. *See generally* Kanter, *Dealing with Death: The Constitutionality of Capital Punishment in Oregon*, 16 WILLAMETTE L. REV. 1, 47-52 (1979).

122. OR. CONST. art. I, § 40; *see supra* note 118; *see also Wagner*, 305 Or. at 136-39, 752 P.2d at 1150-52; Waldo, *The 1984 Death Penalty Initiatives: A State Constitutional Analysis*, 22 WILLAMETTE L. REV. 285 (1986).

123. WYO. CONST. art. 1, § 15.

124. ILL. CONST. art. 1, § 11; *see also* MONT. CONST. art. II, § 28 (stating that "[l]aws for the punishment of crime shall be founded on the principles of prevention and reformation").

125. *See Adams v. State*, 259 Ind. 64, 76-77, 271 N.E.2d 425, 432 (1971) (DeBruler, J., dissenting in part) (vacating the death penalty), *rev'd in part on reh'g*, 259 Ind. 164, 284 N.E.2d 757 (1972); *Wagner*, 305 Or. at 212-13, 752 P.2d at 1196 (Linde, J., dissenting).

against the death penalty.<sup>126</sup> In the states in which such challenges have been made, however, literal textual readings have given way to other "interpretivist" techniques of constitutional construction.<sup>127</sup> Historical and other considerations have led state supreme courts to reject such attacks upon capital punishment.<sup>128</sup>

Death penalty challenges almost inevitably revolve around more than textual, historical, and other matters that shed light upon the intent of the constitutional framers. They require "noninterpretivist" analysis, through which courts attempt to assess and effectuate contemporary values in the promotion of important social policies, traditions, and attitudes.<sup>129</sup> The analytical framework surrounding the eighth

126. See *supra* notes 118 & 121. Circumstantial evidence in support of this proposition may be found in the provisions of the Oregon Constitution. Article I, § 15 requires that principles of reformation and not vindictive justice guide penal laws, and article I, § 16 prohibits cruel and unusual punishments. In 1984 the constitution was amended specifically to exempt the death penalty from these provisions. See OR. CONST. art. I, § 40; see also *Wagner*, 305 Or. at 136-39, 752 P.2d at 1150-52; *id.* at 212-14, 752 P.2d at 1195-96 (Linde, J., dissenting).

127. See *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 302-03, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907 (1986), *cert. denied*, 479 U.S. 1091 (1987). In *P.J. Video* the court asserted:

One basis for relying on the State Constitution arises from an *interpretive* review of its provisions. If the language of the State Constitution differs from that of its [f]ederal counterpart, then the court may conclude that there is a basis for a different interpretation of it. Such an analysis considers whether the textual language of the State Constitution specifically recognizes rights not enumerated in the Federal Constitution; whether language in the State Constitution is sufficiently unique to support a broader interpretation of the individual right under State law; whether the history of the adoption of the text reveals an intention to make the [s]tate provision coextensive with, or broader than, the parallel [f]ederal provision; and whether the very structure and purpose of the State Constitution serves to expressly affirm certain rights rather than merely restrain the sovereign power of the State.

*Id.* (emphasis added) (citation omitted); see also *Kaye, supra* note 108, at 317 n.57; *Maltz, supra* note 98, at 1000; *Utter & Pitler, supra* note 83, at 658; *Note, supra* note 81, at 344, 346.

128. See *Lowery v. State*, 478 N.E.2d 1214, 1219-20 (Ind. 1985), *cert. denied*, 475 U.S. 1098 (1986); *Adams*, 259 Ind. at 72-74, 271 N.E.2d at 429-30; see also *Wagner*, 305 Or. at 136-39, 752 P.2d at 150-52 (construing OR. CONST. art. I, § 40 to supersede the constitutional prohibition requiring reformation and against vindictive justice); *Hopkinson v. State*, 664 P.2d 43, 63-64 (Wyo.), *cert. denied*, 464 U.S. 908 (1983), *appeal after remand*, 679 P.2d 1008 (Wyo. 1984), *denial of sentence modification aff'd*, 704 P.2d 1323 (Wyo. 1988). There apparently have been no direct challenges to the death penalty under the Illinois constitutional provision, see text accompanying note 124, perhaps in part because the commentary accompanying this section reflects that several legislators, prior to its introduction, affirmed in statements that it was not intended to abolish the death penalty.

129. See *P.J. Video*, 68 N.Y.2d at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911 (1986). The court contended:

[*Noninterpretive* review proceeds from a judicial perception of sound policy, justice and fundamental fairness. A noninterpretive analysis attempts to discover, for example, any preexisting [s]tate statutory or common law defining the scope of the individual right in question; the history and traditions of the [s]tate in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar [s]tate or local concern; and any distinctive attitudes of the [s]tate citizenry toward the definition, scope or protection of the individual right.

*Id.* (emphasis added) (citation omitted); see also *Kaye, supra* note 108, at 317 n.57; *Maltz, supra*

amendment's cruel and unusual punishment clause is heavily dependent upon such analysis, given the central place that "evolving standards of decency" occupy in the Court's death penalty jurisprudence.<sup>130</sup> This concept has been given partial content through a number of measures that reflect public attitudes about capital punishment—most importantly, legislation, death penalty decisions made by juries and judges, the regularity of executions, and historical data.<sup>131</sup>

The Supreme Court has drawn upon national data in attempting to assess public attitudes about capital punishment. This practice immediately distinguishes death penalty decisions based upon the eighth amendment from those premised on state constitutional grounds. Even if state courts are guided by the doctrinal analysis now associated with the eighth amendment, their frame of reference for measuring "evolving standards of decency" must be within state borders instead of the country as a whole. Public attitudes about capital punishment and the historical use of the death penalty may be significantly different in Massachusetts, for example, than in Georgia.<sup>132</sup>

note 98, at 1001; Utter & Pitler, *supra* note 83, at 658-60; Note, *supra* note 81, at 346.

130. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976) (plurality opinion) (stating that "the [e]ighth [a]mendment has not been regarded as a static concept"). "As Mr. Chief Justice Warren said, in an oft-quoted phrase, '[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

131. *Id.* at 179-82; see *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988); *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584, 592-97 (1977) (plurality opinion).

132. Georgia has conducted more lawful executions since 1930, when national statistics began being maintained, than any other state: approximately 366 persons from 1930 to 1967, and an additional 13 since 1977, when executions resumed, or a total of 379. DEATH ROW, U.S.A., *supra* note 3, at 3; U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1977, table 6.100, at 705 (1978) [hereinafter SOURCEBOOK]. Georgia's early history of capital punishment included explicit statutory discriminations based upon race. See *McCleskey v. Kemp*, 481 U.S. 279, 328-30 (1987) (Brennan, J., dissenting). As Justice Brennan noted:

This historical review of Georgia criminal law is not intended as a bill of indictment calling the State to account for past transgressions . . . . But it would be unrealistic to ignore the influence of history in assessing the plausible implications of *McCleskey's* evidence [concerning racial influences in Georgia's capital punishment system].

*Id.* at 332. In contrast, Massachusetts had executed only 27 people between 1930 and 1967. SOURCEBOOK, *supra*, table 6.100, at 705. No one had been executed in Massachusetts between 1948 and 1972, when *Furman v. Georgia*, 408 U.S. 238 (1972) invalidated almost all death penalty legislation in the country. This fact was seized upon as a critical fact in the Massachusetts Supreme Judicial Court's subsequent conclusion that capital punishment was "cruel or unusual" under the state constitution:

From the beginning of 1948 until the end of 1972 . . . no person was executed in this [c]ommonwealth. The death sentences of forty-three persons were commuted or reduced by executive action. The complete absence of executions in the [c]ommonwealth through these many years indicates that in the opinion of those several Governors and others who bore the responsibility for administering the death penalty provisions and who had the most immediate appreciation of the death sentence, it was unacceptable.

Factual issues are relevant to much of death penalty jurisprudence,<sup>133</sup> ranging from the deterrent efficacy of the capital sanction,<sup>134</sup>

District Attorney v. Watson, 381 Mass. 648, 662, 411 N.E.2d 1274, 1282 (1980) (citation omitted); see also Commonwealth v. O'Neal, 369 Mass. 242, 275, 339 N.E.2d 676, 694 (1975) (Hennessey, J., concurring). Members of other supreme courts who have opined that capital punishment was per se violative of state constitutional provisions have focused on state specific data concerning the frequency of the administration of the death penalty. See People v. Anderson, 6 Cal. 3d 628, 652-53, 493 P.2d 880, 896-98, 100 Cal. Rptr. 152, 168-69, cert. denied, 406 U.S. 958 (1972); Adams, 259 Ind. at 87, 271 N.E.2d at 437-38 (DeBruler J., dissenting in part); State v. Dicks, 615 S.W.2d 126, 135-36 (Tenn.) (Brock, C.J., dissenting), cert. denied, 454 U.S. 933 (1981); Hopkinson v. State, 632 P.2d 79, 207-09 (Wyo. 1981) (Rose, C.J., dissenting in part), cert. denied, 455 U.S. 922 (1982).

133. See, e.g., W. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at xxiii (1984). The author asks:

[I]s death an acceptable punishment? People passionately disagree over the death penalty and advance their arguments as self-evident and morally compelling . . . . Yet the death penalty's acceptability is very much an empirical question. This is so because the [e]ighth [a]mendment to our Constitution prohibits "cruel and unusual" punishment, and because the courts have translated this general standard into three specific tests: its fairness of application, its utility as a deterrent, and its compatibility with contemporary values—all tests that lend themselves to empirical evaluation.

*Id.* But see Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in LAW IN A CHANGING AMERICA 56, 66 (G. Hazard ed. 1968). Kalven asserted:

Belief about the death penalty in the end will rest not on oblique evidence as to its capacity to deter, nor on public opinion polls of community conscience, nor on proof of the difficulties it creates in selecting a representative jury, nor finally in the awkwardness of selecting from among those the legislature has made eligible for the death penalty the few who are in fact to die. Conviction will turn on something harder to reach with prosaic facts—the ugliness and cruelty of the cool, deliberate killing of another human being.

*Id.*

134. See *Gregg*, 428 U.S. at 184-86. The *Gregg* plurality cited Professor Ehrlich's famous study, which concluded that each execution in this country prevented, on the average, seven or eight criminal homicides from being committed. *Id.* at 184-85 n.31 (citing Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975)). Ehrlich's research was based on national homicide and execution rates and other national data rather than being specific to any single state. See, e.g., *Gregg*, 428 U.S. at 234-35 (Marshall, J., dissenting); Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Evidence*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 336 (A. Blumstein, J. Cohen & D. Nagin eds. 1978); Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faith*, 1973 SUP. CT. REV. 317. Some studies have focused on the efficacy of capital punishment to deter criminal homicides within specific states, and have found no significant deterrent effects. See, e.g., Bailey, *An Analysis of the Deterrent Effect of the Death Penalty in North Carolina*, 10 N.C. CENT. L.J. 29 (1979); Bailey, *Deterrence and the Death Penalty for Murder in Oregon*, 16 WILLAMETTE L. REV. 67 (1979); Bailey, *The Deterrent Effect of the Death Penalty for Murder in Ohio: A Time-Series Analysis*, 28 CLEV. ST. L. REV. 51 (1979); Bailey, *The Deterrent Effect of the Death Penalty for Murder in California*, 52 S. CAL. L. REV. 743 (1979); Bailey, *Deterrence and the Death Penalty for Murder in Utah: A Time-Series Analysis*, 5 J. CONTEMP. L. 1 (1978). Of further interest is Bowers' and Pierce's study of capital punishment in New York from 1907 through 1964 (one year after the last lawful execution in the state). Instead of finding evidence that executions deterred homicide in New York, they found evidence of a "brutalization" effect or that executions actually inspired the commission of criminal homicides. On the average the presence of one or more executions in a given month was found to add two homicides to the number committed in the next month. See Bowers & Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980).

to its allegedly discriminatory application,<sup>135</sup> to whether death qualification procedures are likely to exclude significant portions of a population from jury service in capital trials.<sup>136</sup> When they arise in conjunction with state constitutional challenges to the death penalty, factual issues must be investigated with specific reference to the state in question. It would be hazardous to assume that information compiled and aggregated from a country as richly diverse as the United States accurately describes the administration and impact of capital punishment in any single state.<sup>137</sup>

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135. See *McCleskey v. Kemp*, 481 U.S. 279 (1987); see also Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981); Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

136. See *Lockhart v. McCree*, 476 U.S. 162, (1986); *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). In *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), the case that began the litigation that culminated with *Lockhart*, the court noted that approximately 14% of the Arkansas jury-eligible population was excludable for cause from capital jury service under *Witherspoon*. *Id.* at 1294, 1308. In *Witherspoon* the trial judge, applying a standard disapproved by the Supreme Court, excused for cause 47 prospective jurors, or nearly half of the venire, because of their views about capital punishment. See *Witherspoon v. Illinois*, 391 U.S. 510, 513-14 (1968). See generally Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31 (1984).

137. See generally *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986). The court rejected on state constitutional grounds the test for evaluating probable cause as adopted in *Illinois v. Gates*, 462 U.S. 213 (1983), in a case in which a search warrant issued for seizure of allegedly obscene material. The New York Court of Appeals observed:

[O]bscenity cases differ from other crimes because, by definition, they are predicated on contemporary community standards . . . . But the work is not criminally obscene unless so judged when applying contemporary community standards. The parameters of the "community" whose standard is to be applied are not only nonnational, but also are to be defined according to [s]tate law. Thus, New York law requires the magistrate, or the finder of fact at trial, to determine the average New Yorker's evaluation of, and reaction to, the challenged material. This perception of "the average New Yorker" involves a mix of factors peculiar to this [s]tate, including our legal traditions and our cultural and historical position as a leader in the educational, scientific and artistic life of our country, as well as a recognition that New York is a [s]tate where freedom of expression and experimentation has not only been tolerated, but encouraged.

*Id.* at 308-09, 501 N.E.2d at 564, 508 N.Y.S.2d at 915-16. The parallel between obscenity and death penalty cases and the use of "contemporary community standards" in each certainly is not precise, although it has been suggested. See Kanter, *supra* note 121, at 54 n.216. The more general point is that assessment of the death penalty under state constitutions may depend upon facts, circumstances, and traditions specific to a state rather than to national data. *Id.* at 54. See generally

Resolution of claims under the federal constitution differs in other significant respects from state constitutional analysis. United States Supreme Court decisions become the fundamental law in all fifty states and historically have been difficult to countermand by constitutional amendment.<sup>138</sup> These decisions must be framed appropriately to allow for such general and lasting application.<sup>139</sup>

State court decisions based on state constitutional grounds bind only persons within the state's jurisdiction, and such decisions do not inhibit related experimentation by other states.<sup>140</sup> Unlike the United

Maltz, *supra* note 98, at 1019-20; *Developments in the Law, supra* note 88, at 1349-50, 1361-62 & n.148.

138. There have been only 26 amendments to the federal constitution in its 200 years of existence. A few of the amendments have come in response to unpopular Supreme Court decisions. The eleventh amendment followed the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (granting federal court jurisdiction over a citizen's suit filed against another state); the sixteenth amendment overrode *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (assessing the constitutionality of the federal income tax); the twenty-sixth amendment gave eighteen-year-olds the power to vote, after the Supreme Court had invalidated a federal statute to that same effect in *Oregon v. Mitchell*, 400 U.S. 112 (1970). Also the twenty-first amendment repealed the eighteenth amendment (prohibition). State constitutions are much more frequently amended than the federal constitution. See *infra* notes 143, 144, and accompanying text.

139. Kaye, *supra* note 108, at 303. The record states:

[T]he Supreme Court's role is to establish only the minimal level, the lowest common denominator, of individual rights applicable throughout the nation, while it is the role of state courts, in discharging their additional responsibility to uphold their own constitutions, to safeguard and supplement those rights where necessary. Sound policy considerations have therefore been cited as the basis for different interpretations of common provisions—such considerations as statutes or common law, traditions of the state, and distinctive public attitudes toward the scope, definition and protection of the right in question.

*Id.*; see Brennan, *supra* note 8, at 549; Devine, *supra* note 90, at 310-11; Williams, *supra* note 101, at 389.

140. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Brandeis acknowledged:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment . . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

*Id.* (footnote omitted); see *Johnson v. Louisiana*, 406 U.S. 356, 376 (1972) (Powell, J., concurring). Here the Court stated:

In an age in which empirical study is increasingly relied upon as a foundation for decision-making, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a "laboratory" and to experiment with a range of trial and procedural alternatives. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists as to the adequacy of our criminal justice system. The same diversity of local legislative responsiveness that marked the development of economic and social reforms in this country, if not barred by an unduly restrictive application of the [d]ue [p]rocess [c]lause, might well lead to valuable innovations with respect to determining—fairly and more expeditiously—the guilt or innocence of the accused.

States Supreme Court, state courts need not be concerned with considerations of federalism.<sup>141</sup> State supreme courts are familiar with the unique traditions and conditions within their states and can interpret and apply their state constitutions accordingly, rather than comports with the conditions that prevail in the nation generally.<sup>142</sup> State constitutions also are more easily amended than the federal constitution,<sup>143</sup> and have been amended in capital punishment and other cases in response to specific unpopular state court decisions.<sup>144</sup> For better or

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*Id.* (footnote omitted); see also Abrahamson, *supra* note 8, at 1141-44; Utter, *supra* note 96, at 1043-44; Utter & Pitler, *supra* note 83, at 643; Williams, *supra* note 101, at 398-99.

141. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 302 (1987). The Court reiterated an earlier opinion:

Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

*Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976) (plurality opinion)); see also *State v. Ramseur*, 106 N.J. 123, 167, 524 A.2d 188, 209 (1987) (contending that application of state constitutional analysis to capital punishment issues "is particularly appropriate in view of the '[c]onsiderations of federalism' that have constrained the United States Supreme Court in this area") (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (plurality opinion)); *P.J. Video, Inc.*, 68 N.Y.2d at 307, 501 N.E.2d at 563, 508 N.Y.S.2d at 914-15; Galie, *supra* note 73, at 105; Galie, *supra* note 101, at 788-91; Kaye, *supra* note 108, at 308; Utter, *supra* note 96, at 1042-43.

142. See *supra* note 137 and accompanying text. State supreme courts also operate under different institutional constraints than the United States Supreme Court, and often are said to occupy a different role in the structure of state government. Justice Brennan observed:

The institutional position of the national Supreme Court may cause it to "underenforce" constitutional rules. The national court must remain highly sensitive to concerns of state and local autonomy, obviously less of a problem for state courts, which are local, accountable decisionmakers. It must further be remembered that the Federal Bill was enacted to place limits on the federal government while state bills are widely perceived as granting affirmative rights to citizens.

Brennan, *supra* note 8, at 549; see also Galie, *supra* note 73, at 104-05; Galie, *supra* note 101, at 787; Linde, *supra* note 85, at 188-89; Maltz, *supra* note 98, at 1016-21; Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Shapiro, *supra* note 87, at 644-46; Williams, *supra* note 101, at 389-96.

143. Since 1775 the states have written and ratified approximately 146 constitutions. Only 20 states are governed by their original constitutions. The present constitutions of the 50 states have been amended collectively in excess of 5300 times. From 1984 to 1985 approximately 238 proposed state constitutional amendments were submitted to voters in 45 states. Kincaid, *supra* note 7, at 13-14. Louisiana leads the states in the number of constitutions adopted with 11. Massachusetts has the oldest state constitution, dating back to 1780, but it has been amended 116 times. Friedman, *supra* note 74, at 35. There is no doubt that state constitutions are not perceived as being as stable and relatively immutable as the federal constitution or that voters are hesitant to amend them. This practice has been dubbed "amendomania." See Wilkes, *supra* note 78; Note, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279 (1949). In the 1970s state constitutions were amended approximately 976 times. Galie, *supra* note 73, at 108. See generally *Developments in the Law*, *supra* note 88, at 1353-54.

144. In November 1972 California voters approved an amendment to the state constitution that restored capital punishment after the California Supreme Court had ruled the death penalty violative of the state constitution in *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr.



worse, rulings premised on state constitutional grounds are not as insulated from majoritarian review and are not imbued with the same air of permanency as United States Supreme Court decisions that rest upon the federal constitution.<sup>145</sup>

State supreme courts are not bound by the death penalty jurisprudence of the United States Supreme Court, and for a number of doctrinal, empirical, and institutional reasons, they may choose to embrace neither the rationale nor the results of Supreme Court decisions. What they decide to do may depend upon the legal and factual groundwork that is laid in preparation for state constitutional litigation.<sup>146</sup> A review follows of state constitutional challenges that have been made against different aspects of the death penalty. It is presented in part to describe

152, *cert. denied*, 406 U.S. 958 (1972). See CAL. CONST. art. 1, § 27; *supra* note 118; see also *People v. Frierson*, 25 Cal. 3d 142, 173-75, 599 P.2d 587, 605-06, 158 Cal. Rptr. 281, 299-300 (1979), *appeal after remand*, 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985). Similarly the Massachusetts electorate approved an amendment to the state constitution in November 1982 which affirmed that the death penalty was not violative of the state constitution shortly after the Massachusetts Supreme Judicial Court declared to the contrary in *District Attorney v. Watson*, 381 Mass. 648, 411 N.E.2d 1274 (1980). See MASS. CONST. pt. 1, art. 26; *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 152, 470 N.E.2d 116, 117-18 (1984); see also *supra* note 118. See generally *Jensen v. Southern Pac. Ry.*, 215 N.Y. 514, 109 N.E. 600 (1914); Abrahamson, *supra* note 8, at 1154-55; Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43 (1983); Galie, *supra* note 73, at 108-10; Williams, *supra* note 101, at 382 (asserting that "[a]mendments to state constitutions overruling judicial interpretations are nothing new"). In fact, "[o]ne of the most famous is the New York constitutional amendment overruling, almost immediately, the New York Court of Appeals' 1911 decision declaring workmen's compensation unconstitutional." *Id.* (citing *Ives v. Southern Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911)).

145. See Abrahamson, *supra* note 8, at 1155; Brennan, *supra* note 8, at 551. Justice Brennan contends:

state court judges are often more immediately "subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts." Federal judges are guaranteed a salary and lifetime tenure; in contrast, state judges often are elected, or, at the least, must succeed in retention elections. The relatively greater degree of political accountability of state courts militates in favor of continued absolute deference to their interpretations of their own constitutions. Moreover, state constitutions are relatively easy to amend; in many states the process is open to citizen initiative.

*Id.* (quoting Note, *Michigan v. Long: Presumptive Federal Appellate Review over State Cases Containing Ambiguous Grounds of Decision*, 69 IOWA L. REV. 1081, 1096-97 (1984) (footnote omitted)); see also Fischer, *supra* note 144; *Developments in the Law*, *supra* note 88, at 1351-52. In November 1986 California voters refused to return Chief Justice Bird and two of her colleagues to the California Supreme Court in a judicial retention election, an outcome largely attributable to their voting record in death penalty cases and their perceived leniency in criminal cases generally. Wold & Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987). Through May 1986 the California Supreme Court had vacated death sentences in all but 3 of the 56 capital cases it had decided, and no one on death row had been executed. Chief Justice Bird, in fact, had voted to overturn either the sentence or the conviction in every capital case decided by the court during her tenure. Culver & Wold, *supra* note 39, at 86. In April 1985, a poll reflected that approximately 83% of California voters reported that they favored the death penalty. Wold & Culver, *supra*, at 354.

146. See *supra* note 85 and accompanying text.

what has been decided and in part to suggest what might still lie ahead.

### III. STATE CONSTITUTIONAL CHALLENGES TO CAPITAL PUNISHMENT

#### A. *Per Se* Challenges

State supreme courts in California<sup>147</sup> and Massachusetts<sup>148</sup> have declared the death penalty *per se* invalid on state constitutional grounds. Voters in each state responded by swiftly approving constitutional amendments that negated these rulings, and affirmed the constitutionality of capital punishment.<sup>149</sup> While judges on other state supreme courts have opined that the death penalty is *per se* violative of their state constitutions,<sup>150</sup> no other state tribunals have come to such a conclusion.<sup>151</sup>

147. *Anderson*, 6 Cal. 3d at 628, 493 P.2d at 880, 100 Cal. Rptr. at 152.

148. *Watson*, 381 Mass. at 648, 411 N.E.2d at 1274.

149. CAL. CONST. art. 1, § 27; MASS. CONST. pt. 1, art. 26; *see supra* notes 118, 144.

150. *Adams v. State*, 259 Ind. 64, 74-96, 271 N.E.2d 425, 431-42 (1971) (DeBruler, J., dissenting), *rev'd in part on reh'g and death penalty vacated*, 259 Ind. 164, 284 N.E.2d 757 (1972); *State v. Dicks*, 615 S.W.2d 126, 132-42 (Tenn.) (Brock, C.J., dissenting), *cert. denied*, 454 U.S. 933 (1981); *State v. Pierre*, 572 P.2d 1338, 1357-59 (Utah 1977) (Maughn, J., dissenting in part), *cert. denied*, 439 U.S. 882 (1978); *State v. Rupe*, 101 Wash. 2d 664, 711-13, 683 P.2d 571, 598-99 (1984) (Dolliver, J., concurring), *appeal after remand*, 108 Wash. 2d 734, 743 P.2d 210 (1987), *cert. denied*, 108 S. Ct. 2834 (1988); *Hopkinson v. State*, 632 P.2d 79, 199-216 (Wyo. 1981) (Rose, C.J., dissenting), *cert. denied*, 455 U.S. 922 (1982).

151. Many state supreme courts have rejected the contention that capital punishment is *per se* unconstitutional under their state constitutions. *See, e.g., Harris v. State*, 352 So. 2d 460 (Ala. Crim. App. 1976), *aff'd*, 352 So. 2d 479 (1977), *denial of petition for writ of error coram nobis aff'd*, 367 So. 2d 524 (Ala. Crim. App. 1978), *writ denied*, 367 So. 2d 534 (Ala.), *denial of motion for prelim. injunc. aff'd sub nom. Harris v. Wilters*, 596 F.2d 678 (5th Cir. 1979); *State v. Gillies*, 135 Ariz. 500, 507-08, 662 P.2d 1007, 1014-15 (1983), *appeal after remand*, 142 Ariz. 564, 691 P.2d 655 (1984), *cert. denied*, 470 U.S. 1059 (1985); *Graham v. State*, 253 Ark. 462, 463, 486 S.W.2d 678, 679 (1972), *appeal after remand*, 254 Ark. 741, 495 S.W.2d 864 (1973); *People v. Frierson*, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979), *appeal after remand*, 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985); *State v. Dickerson*, 298 A.2d 761, 767-78 (Del. 1972); *Raulerson v. State*, 358 So. 2d 826, 828-29 (Fla.), *cert. denied*, 439 U.S. 959 (1978); *Gilreath v. State*, 247 Ga. 814, 840, 279 S.E.2d 650, 673 (1981), *cert. denied*, 456 U.S. 984 (1982); *Lowery v. State*, 478 N.E.2d 1214, 1219-20 (Ind. 1985), *cert. denied*, 475 U.S. 1098 (1986); *Brewer v. State*, 417 N.E.2d 889, 894, 900 (Ind. 1981), *cert. denied*, 458 U.S. 1122 (1982); *Ice v. Commonwealth*, 667 S.W.2d 671, 679 (Ky.), *cert. denied*, 469 U.S. 860 (1984); *State v. Edwards*, 419 So. 2d 881, 889 (La. 1982); *Colvin v. State*, 299 Md. 88, 124-26, 472 A.2d 953, 971-72, *cert. denied*, 469 U.S. 873 (1984); *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 158 n.10, 470 N.E.2d 116, 121 n.10 (1984); *State v. Mallett*, 732 S.W.2d 527, 539 (Mo.), *cert. denied*, 108 S. Ct. 309 (1987); *State v. Anderson*, 207 Neb. 51, 71-72, 296 N.W.2d 440, 453 (1980), *cert. denied*, 450 U.S. 1025 (1981); *Shuman v. State*, 94 Nev. 265, 269-71, 578 P.2d 1183, 1186 (1978), *rev'd on other grounds sub nom. Summer v. Shuman*, 483 U.S. 66 (1987); *State v. Ramseur*, 106 N.J. 123, 168-82, 524 A.2d 188, 210-16 (1987); *State v. Garcia*, 99 N.M. 771, 777, 664 P.2d 969, 975, *cert. denied*, 462 U.S. 1112 (1983); *State v. Jenkins*, 15 Ohio St. 3d 164, 167-79, 473 N.E.2d 264, 272-81 (1984), *cert. denied*, 472 U.S. 1032 (1985); *Glidewell v. State*, 663 P.2d 738, 743 (Okla. Crim. App. 1983); *State v. Wagner*, 305 Or. 115, 136-39, 752 P.2d 1136, 1150-52 (1988), *vacated on other grounds*, 109 S. Ct. 3235 (1989); *Commonwealth v. Zetlemoyer*, 500 Pa. 16, 76, 454 A.2d 937, 968-69 (1982), *cert. denied*, 461 U.S. 970 (1983); *State v. McDowell*, 266 S.C. 508, 516, 224 S.E.2d 889, 893 (1976); *State v. Austin*, 618 S.W.2d 738, 741

Different arguments can be used to urge state courts to rule that capital punishment is per se violative of state constitutional provisions. These include suggesting variations of the analysis adopted by a plurality of the Supreme Court in *Gregg v. Georgia*,<sup>152</sup> which declined to conclude that the death penalty per se constitutes cruel and unusual punishment under the eighth amendment.<sup>153</sup> One possibility is to accept *Gregg's* "evolving standards of decency" framework and argue that the measures reflecting these standards within a given state compel capital punishment to be declared unconstitutional. The courts and individual judges that have voted to invalidate the death penalty on state constitutional grounds have emphasized, for example, the infrequency of executions in their states<sup>154</sup> or the infrequent imposition of death sentences in state homicide cases<sup>155</sup> as evidence that the citizens of their jurisdictions have rejected the capital sanction.<sup>156</sup>

A second variation using *Gregg's* basic framework requires incorpo-

(Tenn.), *cert. denied*, 454 U.S. 1128 (1981); *Smith v. State*, 683 S.W.2d 393, 409 (Tex. Crim. App. 1984); *Gray v. Commonwealth*, 233 Va. 313, 320, 356 S.E.2d 157, 160 (1987), *cert. denied*, 108 S. Ct. 207 (1987); *State v. Campbell*, 103 Wash. 2d 1, 31-35, 691 P.2d 929, 946-48 (1984), *cert. denied*, 471 U.S. 1094 (1985); *Hopkinson v. State*, 664 P.2d 43, 63-64 (Wyo.), *cert. denied*, 464 U.S. 908 (1983), *appeal after remand*, 679 P.2d 1008 (Wyo. 1984), *denial of sentence modification aff'd*, 704 P.2d 1323 (Wyo. 1988).

With few exceptions, state supreme courts' conclusions that the death penalty is not per se violative of state constitutional provisions are by simple fiat, reliance upon precedent which ultimately is by fiat, or are supported by a simple citation to federal precedent. *But see Ramsey*, 106 N.J. at 123, 524 A.2d at 188; *Campbell*, 103 Wash. 2d at 1, 691 P.2d at 929; *Hopkinson*, 664 P.2d at 43. They tend to be almost exclusively without reasoned analysis or consideration of specific state historical factors, public attitudes, or analogous information. While these decisions may have some precedential value, they should not be unimpeachable in the face of a comprehensive, well-reasoned state constitutional challenge to capital punishment.

152. 428 U.S. 153 (1976) (plurality decision).

153. It should be recalled that several state constitutions have provisions that are textually dissimilar to the eighth amendment's cruel and unusual punishments clause, one possible point of departure from federal precedent. *See supra* notes 112-24 and accompanying text.

154. *See Anderson*, 6 Cal. 3d at 654, 493 P.2d at 898, 100 Cal. Rptr. at 170; *Adams*, 259 Ind. at 87-88, 271 N.E.2d at 437-38 (DeBruler, J., dissenting in part); *Watson*, 381 Mass. at 662, 411 N.E.2d at 1282; *O'Neal*, 369 Mass. at 275, 339 N.E.2d at 694 (Hennessey, J., concurring); *Ramsey*, 106 N.J. at 371-73, 524 A.2d at 315-16 (Handler, J., dissenting); *Dicks*, 615 S.W.2d at 135-36 (Brock, C.J., dissenting); *Hopkinson*, 632 P.2d at 208-09 (Rose, C.J., dissenting).

155. *See Anderson*, 6 Cal. 3d at 654, 493 P.2d at 897, 100 Cal. Rptr. at 169; *Adams*, 259 Ind. at 88, 271 N.E.2d at 438 (DeBruler, J., dissenting in part); *O'Neal*, 369 Mass. at 253-56, 339 N.E.2d at 682-84; *Ramsey*, 106 N.J. at 373, 524 A.2d at 316 (Handler, J., dissenting).

156. Other facts pertinent to the administration of capital punishment within a state also may be relevant. It might be offered, for example, that there is no evidence that the death penalty deters the commission of criminal homicide within a state. *See supra* note 134. For at least one state there even is evidence that executions may inspire killings. *See Bowers & Pierce, supra* note 133. It further may be relevant to suggest that states have risked executing or actually have executed innocent persons. *See Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987). *See generally id.* at 91-171 (cataloguing the defendants wrongfully convicted, sentenced, or executed in potentially capital cases).

rating different assumptions within the decision's premises and pressing for the conclusions that logically follow. If public attitudes and opinions are relevant to conclusions about society's contemporary acceptance or rejection of the death penalty,<sup>157</sup> the determination of precisely how such attitudes are measured<sup>158</sup> and whether they are to be taken at face value is quite significant. Justice Marshall refuses to place much stock in public attitudes about capital punishment on the assumption that they do not reflect informed public opinion.<sup>159</sup> If this view is substantiated, and if it were further demonstrated that the predominant opinion of an informed public would be condemnation of the death penalty,<sup>160</sup>

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157. Public attitudes figured prominently in the Court's rejecting the challenge to state death penalty laws under the eighth amendment in *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality decision). See *id.* at 173, 179-82.

158. See, e.g., *Anderson*, 6 Cal. 3d at 647-49, 493 P.2d at 893-94, 100 Cal. Rptr. at 165-66. The *Anderson* court contended:

[P]ublic acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants. Nor are public opinion polls about a process which is far removed from the experience of those responding helpful in determining whether capital punishment would be acceptable to an informed public were it evenhandedly applied to a substantial proportion of the persons potentially subject to execution. Although death penalty statutes do remain on the books of many jurisdictions, and public opinion polls show opinion to be divided as to capital punishment as an abstract proposition, the infrequency of its actual application suggests that among those persons called upon to actually impose or carry out the death penalty it is being repudiated with ever increasing frequency. . . .

What our society *does* in actuality belies what it *says* with regard to its acceptance of capital punishment.

*Id.* (emphasis added); see *Watson*, 381 Mass. at 662, 411 N.E.2d at 1282 (stating that "we think that what our society does in actuality is a much more compelling indicator of the acceptability of the death penalty than the responses citizens may give upon questioning"); *id.* at 1289-91 (Liacos, J., concurring); *Hopkinson*, 632 P.2d at 207-08 (Rose, C.J., dissenting); see also *supra* notes 154, 155 and accompanying text. See generally *Zimring & Hawkins*, *supra* note 2, at 15-19.

159. See *Furman v. Georgia*, 408 U.S. 238, 361-69 (1972) (Marshall, J., concurring in the judgment). Justice Marshall suggested that "the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available." *Id.* at 362. He remarked that "[i]t has often been noted that American citizens know almost nothing about capital punishment." *Id.* He then noted a host of factors about the death penalty, such as that it is not a more effective deterrent to murder than imprisonment, that it is applied in an invidiously discriminatory fashion, that it has been inflicted against innocent persons, that it is more expensive to administer than the alternative of life imprisonment, that convicted murderers often are model prisoners and parolees, and so forth. *Id.* at 362-69. Justice Marshall concluded: "Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand." *Id.* at 369 (footnote omitted).

160. The so-called "Marshall hypothesis" has been tested with varying degrees of support reported. See *Sarat & Vidmar, Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171; *Vidmar & Dittenhoffer, Informed Public Opinion and Death Penalty Attitudes*, 23 CAN. J. CRIMINOLOGY 43 (1981). See generally AMNESTY INT'L, UNITED STATES OF AMERICA: THE DEATH PENALTY 174-77 (1987); Ellsworth & Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Reten-*

Gregg's own premises logically would dictate quite a different conclusion about the constitutionality of capital punishment.

Another possibility is to argue that the Court overlooked relevant components of "cruelty" in *Gregg* and left its constitutional analysis incomplete. The condemned's stay on death row, for instance, and the psychological impact of lengthy waits for execution<sup>161</sup> have been cited by some courts as unacceptably cruel under state constitutions.<sup>162</sup> The *Gregg* Court did not consider this aspect of capital punishment in its interpretation of the eighth amendment, although not all state courts may choose to ignore it.

Justice Brennan's concurrence in *Furman* has been approved of and relied upon in some state court opinions that have rejected capital punishment on state constitutional grounds.<sup>163</sup> It serves as an exemplary alternative model for assessing whether the death penalty is a cruel and unusual punishment and makes use of four interrelated arguments. First, capital punishment is an unusually severe sanction because of its finality and the pain it causes. It reduces human beings to objects and treats them inconsistently with the "primary principle . . . that a punishment must not be so severe as to be degrading to the dignity of human beings."<sup>164</sup> Second, strong evidence exists to show that the death penalty is inflicted irregularly, arbitrarily, and unfairly, which is of special concern in light of its severity.<sup>165</sup> Third, despite its theoretical availability, capital punishment is rarely used. This relative scarcity of executions suggests that society has effectively rejected death as an acceptable punishment.<sup>166</sup> Fourth and finally, the death penalty is an excessive punishment that is inflicted unnecessarily. Imprisonment, a significantly less severe sanction, adequately accomplishes the legitimate penological objectives of capital punishment.<sup>167</sup>

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*tionists*, 29 CRIME & DELINQ. 116 (1983); Tyler & Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC'Y REV. 21 (1982).

161. See generally R. JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH (1981); Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHOLOGY 393 (1962); Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH 155-56 (1960); Gallenore & Pantan, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167 (1972).

162. *Anderson*, 6 Cal. 3d at 649-50, 493 P.2d at 894-95, 100 Cal. Rptr. at 166-67; *Watson*, 381 Mass. at 663-65, 411 N.E.2d at 1282-83; *id.* at 1287 (Braucher, J., concurring); *id.* at 1289-95 (Liacos, J., concurring); *O'Neal*, 369 Mass. at 249-50, 339 N.E.2d at 680-81 (Tauro, C.J., concurring); *Adams*, 259 Ind. at 93, 271 N.E.2d at 440-41 (DeBruler, J., dissenting in part); *Dicks*, 615 S.W.2d at 136-37 (Brock, C.J., dissenting); *Hopkinson*, 632 P.2d at 209-10 (Rose, C.J., dissenting).

163. See, e.g., *Watson*, 381 Mass. at 660-65, 411 N.E.2d at 1281-83; *Dicks*, 615 S.W.2d at 136-40 (Brock, C.J., dissenting).

164. *Furman*, 408 U.S. at 271 (Brennan, J., concurring in the judgment); see *id.* at 270-74.

165. *Id.* at 274-77.

166. *Id.* at 277-79.

167. *Id.* at 279-81.

In combination, these four attributes of the death penalty led Justice Brennan to conclude that it is a cruel and unusual punishment and per se violative of the eighth amendment. Brennan wrote:

The test . . . will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the [cruel and unusual punishments] [c]lause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.<sup>168</sup>

This analysis, which Justice Brennan rather tiredly incorporated by reference in his brief dissent in *Gregg*,<sup>169</sup> is one step removed from even more fundamental rejections of *Gregg*'s "evolving standards of decency" framework. Other judges have forsaken cruel and unusual punishment principles altogether. They instead contend that the death penalty denies the fundamental right of life, and does so absent a demonstration that it is necessary to accomplish a compelling state interest or that the state's interests cannot be achieved through less drastic and intrusive means.<sup>170</sup> This argument is based upon substantive due process grounds and persuaded a plurality of the Massachusetts Supreme Judicial Court in *Commonwealth v. O'Neal*.<sup>171</sup>

168. *Id.* at 282. He stressed that these principles are "interrelated," *id.*, and that none should be expected in pure form in any civilized state, *id.* at 281-82. Rather, it is "the application of the principles in combination," and in the degree to which they are exhibited that is determinative. *Id.* at 282.

169. *Gregg*, 428 U.S. at 228-31 (Brennan, J., dissenting). Justice Marshall also dissented in *Gregg*, see *id.* at 231, and concurred in the judgment in *Furman* on the ground that the death penalty is under all circumstances a cruel and unusual punishment. See *Furman*, 408 U.S. at 314 (Marshall, J., concurring in the judgment). Since the time of their opinions in *Furman* Justices Brennan and Marshall have each consistently maintained that capital punishment is per se unconstitutional under the eighth and fourteenth amendments.

170. Commentators who have made this argument include Devine, *supra* note 90, at 388-93; Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. Rev. 989, 1030-57 (1978); Smith, *The Death Penalty as an Unconstitutional Deprivation of Life and the Right to Privacy*, 25 B.C.L. Rev. 743 (1984).

171. 369 Mass. 242, 339 N.E.2d 676 (1975) (per curiam); see *id.* at 244-45, 339 N.E.2d at 677 (Tauro, C.J., concurring); *id.* at 274, 339 N.E.2d at 693 (Hennessey, J., concurring). The *O'Neal* Court declared Massachusetts legislation unconstitutional which had provided for a mandatory death penalty upon conviction for murder committed during a rape or attempted rape. At least one other state supreme court judge has accepted the argument that death penalty legislation serves no compelling interest that cannot be achieved through less intrusive means, and that application of capital punishment thus violates substantive due process rights. See *State v. Pierre*, 572 P.2d 1338, 1357-59 (Utah 1977) (Maughan, J., concurring in part and dissenting in part), *cert. denied*, 439 U.S. 882 (1978). Other state courts have rejected state constitutional challenges to capital punishment on substantive due process grounds. See *State v. Ramseur*, 106 N.J. 123, 176-77, 524 A.2d 188, 213 n.12 (1987) (rejecting a challenge under N.J. CONST. art. I, para. 1, which provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying life and liberty . . . and of pursuing and obtaining safety and happiness"); *Johnson v. State*, 731 P.2d 993, 1006 (Okla. Crim. App.), *cert. denied*, 108

The *Gregg* plurality implicitly rejected one of the principal premises of the substantive due process approach when Justice Stewart, Justice Powell, and Justice Stevens agreed that the Court "cannot 'invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology.'"<sup>172</sup> Capital punishment is nearly impossible to justify on grounds that it is necessary to accomplish legitimate penological objectives that cannot be served by life imprisonment. The strongest argument to the contrary can be made on retributive grounds.<sup>173</sup> The empirical evidence concerning whether the death penalty is a superior deterrent to incarceration is sufficiently dubious<sup>174</sup> and the argument that capital punishment is necessary to incapacitate offenders sufficiently weak<sup>175</sup> to make it unlikely that a state could affirmatively justify the death penalty on either ground.

If a state court cannot be convinced to consider a substantive due process challenge to capital punishment, it may be willing to apply other guarantees within the state constitution. As we have already pointed out, a few state constitutions have provisions in addition to "cruel and unusual punishments" clauses that limit or regulate the states' authority to punish. These include clauses that prohibit "vindictive justice,"<sup>176</sup> and that promote premising state penal codes upon principles of reformation or restoration.<sup>177</sup> In addition, many affirma-

S. Ct. 35 (1987); *Glidewell v. State*, 663 P.2d 738, 743 (Okla. Crim. App. 1983); *Burrows v. State*, 640 P.2d 533, 545 (Okla. Crim. App. 1982), *cert. denied*, 460 U.S. 1011 (1983); *State v. Jenkins*, 15 Ohio St. 3d 164, 167-68, 473 N.E.2d 264, 272-73 (1984), *cert. denied*, 472 U.S. 1032 (1985); *Pierre*, 572 P.2d at 1346.

172. *Gregg*, 428 U.S. at 182 (plurality opinion) (quoting *Furman*, 408 U.S. at 451 (Powell, J., dissenting)). The plurality instead exhibited deference to the legislative choice of punishments, indicating that the Constitution required only that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Id.* at 183.

173. See generally W. BERNIS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 153-76 (1979); E. VAN DEN HAAG & J. CONRAD, THE DEATH PENALTY: A DEBATE 28-35, 43-45 (1983); van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1667-69 (1986); van den Haag, *In Defense of the Death Penalty: A Legal-Practical-Moral Analysis*, 14 CRIM. L. BULL. 51 (1978).

174. See *supra* note 134; see also Archer, Gartner & Beittel, *Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis*, 74 J. CRIM. L. & CRIMINOLOGY 991 (1983); Forst, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 J. CRIM. L. & CRIMINOLOGY 927 (1983); Lempert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 CRIME & DELINQ. 88 (1983).

175. See Acker, *Mandatory Capital Punishment for the Life Term Inmate Who Commits Murder: Judgments of Fact and Value in Law and Social Science*, 11 NEW ENG. J. CRIM. & CIV. CONFINEMENT 267, 301-04 (1985); Marquart & Sorensen, *Institutional and Postrelease Behavior of Furman-Commuted Inmates in Texas*, 26 CRIMINOLOGY 677 (1988); Wolfson, *The Deterrent Effect of the Death Penalty upon Prison Murder*, in THE DEATH PENALTY IN AMERICA 159 (H. Bedau 3d ed. 1982); see also *Spaziano v. Florida*, 468 U.S. 447, 472 (1984) (Stevens, J., dissenting) (suggesting that "incapacitation alone could not justify the imposition of capital punishment").

176. See *supra* notes 120, 121, and accompanying text.

177. See *supra* notes 120-24 and accompanying text.

tively declare<sup>178</sup> life to be an "inalienable," "natural," or "inherent" right.<sup>179</sup> Challenges to the death penalty under such provisions have not been successful,<sup>180</sup> which perhaps is not surprising given their level of generality. It may be urged, however, that in combination with other more specific guarantees such declarations help establish the fundamental respect that human life is owed within a jurisdiction. They suggest the corresponding measure of the state's interest that must be demonstrated if the deliberate taking of life is to be sanctioned as a legitimate use of governmental power.<sup>181</sup>

### B. "As Applied" Challenges and Discrimination

The prevailing Justices in *Furman* assumed that capital punishment was being administered unevenly. In *Gregg* the majority assumed that statutory reforms were adequate to correct the assumed irregularities. Both Courts made decisions in the relative absence of reliable data.<sup>182</sup> In *McCleskey* the majority assumed the statistical validity<sup>183</sup> of

178. The federal constitution's Bill of Rights consists primarily of prohibitions and restraints against governmental action. One distinguishing characteristic of state constitutions is that they often affirmatively guarantee individual rights instead of simply limiting the power of government. See Galie, *supra* note 73, at 105; Maltz, *supra* note 98, at 1012-13; Williams, *supra* note 101, at 401.

179. See, e.g., COLO. CONST. art. II, § 3; IDAHO CONST. art. 1, § 1; IND. CONST. art. 1, § 1; KY. CONST. art. 1, § 1; MONT. CONST. art. II, § 3; N.H. CONST. pt. I, art. 2; N.J. CONST. art. 1, para. 1; N.M. CONST. art. II, § 4; OKLA. CONST. art. 2, § 2; PA. CONST. art. 1, § 1; S.D. CONST. art. VI, § 1; UTAH CONST. art. I, § 1; VA. CONST. art. I, § 1. Other state constitutions have provisions prohibiting sanguinary laws. See, e.g., ME. CONST. art. 1, § 9; MD. CONST. art. 16 (Declaration of Rights); N.H. CONST. pt. I, art. 18. South Carolina's constitution provides, "nor shall cruel, nor corporal, nor unusual punishment be inflicted. . . ." S.C. CONST. art. I, § 15 (emphasis added). The South Carolina Supreme Court has rejected the contention that the death penalty is a form of corporal punishment prohibited by this provision. See *State v. Plath*, 277 S.C. 126, 132, 284 S.E.2d 221, 224 (1981), *appeal after remand*, 281 S.C. 1, 313 S.E.2d 619, *cert. denied*, 467 U.S. 1265 (1984); *State v. Allen*, 266 S.C. 175, 186-87, 222 S.E.2d 287, 292 (1976), *vacated on other grounds*, 432 U.S. 902 (1977).

180. See *Ford v. State*, 374 So. 2d 496, 498 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980); *State v. Newlon*, 627 S.W.2d 606, 612-13 (Mo.), *cert. denied*, 459 U.S. 884 (1982); *Ramseur*, 106 N.J. at 174-82, 524 A.2d at 213-16; *State v. Buell*, 22 Ohio St. 3d 124, 135-36, 489 N.E.2d 795, 806 (1986).

181. See *Ramseur*, 106 N.J. at 369-71, 524 A.2d at 314-15 (Handler, J., dissenting); *State v. Wagner*, 305 Or. 115, 195-97, 752 P.2d 1136, 1185-86 (1988) (Linde, J., dissenting), *vacated on other grounds*, 109 S. Ct. 3235 (1989).

182. In *Furman* Justice Douglas asserted that the death penalty was being applied arbitrarily and discriminatorily, citing some supporting data. 408 U.S. at 249-52 (Douglas, J., concurring in the judgment). Justice Brennan also maintained that capital punishment was applied arbitrarily, inferring as much from the infrequency of its use. *Id.* at 274-77, 291-95 (Brennan, J., concurring in the judgment). Justice Stewart argued that the death penalty was applied rarely and capriciously and was a cruel and unusual punishment "in the same way that being struck by lightning is cruel and unusual." *Id.* at 309 (Stewart, J., concurring). He provided no supporting evidence, however. Justice White criticized the extreme infrequency and uneven application of the death penalty, conceding:



systematic research results that suggested racial discrimination had infected the administration of Georgia's death penalty, yet concluded that such evidence did not establish a violation of the federal constitution.<sup>184</sup> *Gregg* and *McCleskey* have effectively insulated most post-*Furman* capital punishment statutes from federal review against claims that, although facially constitutional, the statutes have been or risk being applied in an arbitrary, capricious, or invidiously discriminatory manner.<sup>185</sup> In principle, such claims remain viable under most state constitutions.

State courts may remain receptive to "as applied" challenges to death penalty legislation on state constitutional grounds for at least two reasons. The first is dissatisfaction with the conceptual framework of federal precedent which spawns lingering suspicions that *Gregg* and its progeny have sanctioned capital punishment systems which have

Nor can I "prove" my conclusion from these data . . . I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty.

*Id.* at 313 (White, J., concurring). Justice Marshall maintained that the death penalty was applied discriminatorily against blacks and men, citing supporting studies. *Id.* at 364-66 (Marshall, J., concurring). See generally White, *The Role of Social Sciences in Determining the Constitutionality of Capital Punishment*, in CAPITAL PUNISHMENT IN THE UNITED STATES 3 (H. Bedau & C. Pierce eds. 1976). In *Gregg* the plurality upheld the facial constitutionality of Georgia's revised capital punishment procedures on the assumption that they rectified the potential for arbitrary administration that had been of concern to the *Furman* Court. See *Furman*, 428 U.S. at 198-207; see also *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality decision); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality decision). No data were available to test this assumption. In a concurring opinion Justice White also rejected the contention that the revised capital punishment procedures did not correct the infirmities perceived in *Furman*. He addressed one aspect of this claim specifically:

Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.

*Gregg*, 428 U.S. at 225 (White, J., concurring).

183. *McCleskey v. Kemp*, 481 U.S. 279, 291 n.7 (1987). Referring to the research evidence at issue, Justice Powell noted for the majority, "we assume the study is valid statistically . . . Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia." *Id.* For a review of the study and the *McCleskey* decision, see Acker, *supra* note 61; Baldus & Cole, *supra* note 61.

184. See *supra* notes 61, 62, and accompanying text.

185. "Arbitrariness" connotes a lack of conformity with legal criteria. One type of arbitrariness is "capriciousness," indicating a haphazard, unprincipled deviation from legal norms. "Discrimination" suggests a systematic and purposeful departure from legally permissible considerations, such as reliance upon the race of the victim or the race of the defendant. See B. NAKELL & K. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 16-17 (1987); Bowers & Pierce, *supra* note 135, at 572-75; Gross & Maruo, *supra* note 135, at 35-36.

merely "papered over"<sup>186</sup> and not corrected the problems that plagued the pre-*Furman* administration of the death penalty. The second is that even if a state court finds the logic of *Gregg* and *McCleskey* persuasive, it may be sufficiently moved by the evidentiary predicate of an "as applied" challenge to be convinced that a state constitutional violation has been established.

*Furman v. Georgia* has been interpreted by the Supreme Court to "mandate[] that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."<sup>187</sup> Statutory schemes that incorporated standards to narrow and guide the exercise of sentencing discretion were approved in *Gregg* and its companion cases.<sup>188</sup> Such schemes were expected to promote the functioning of capital sentencing systems "in a consistent and rational manner."<sup>189</sup> Two years after the post-*Furman* guided discretion schemes were upheld, *Lockett v. Ohio*<sup>190</sup> made clear that another imperative must be met if capital punishment legislation was to withstand scrutiny under the federal constitution. "[T]he [e]ighth and [f]ourteenth [a]mendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."<sup>191</sup> *Lockett* and subsequent decisions affirm that individualization of sentences "is essential in capital cases."<sup>192</sup>

*Gregg* and *Lockett*, respectively, require consistency or reliability in capital sentencing schemes and individualized sentencing that responds to the unique characteristics and circumstances of capital offenders and offenses. The cases pull in different directions. In theory the twin objectives of consistency and individualization are reconcila-

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186. *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976) (plurality opinion) (discussing mandatory capital punishment legislation).

187. *Gregg*, 428 U.S. at 189 (plurality opinion); see also *McCleskey*, 481 U.S. at 302; *Pulley v. Harris*, 465 U.S. 37, 45 (1984); *Zant v. Stephens*, 462 U.S. 862, 874 (1983).

188. *Proffitt*, 428 U.S. at 242; *Jurek*, 428 U.S. at 262.

189. *Gregg*, 428 U.S. at 189 (plurality opinion) (quoting AMERICAN BAR ASSOCIATION PROJECTS ON STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES § 4.1(a), Commentary, p. 201 (Approved Draft 1968)).

190. 438 U.S. 586 (1978) (plurality decision).

191. *Id.* at 604 (plurality opinion) (emphasis in original). The attached footnote provided the sole limitation to this rule: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not hearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604 n.12.

192. *Id.* at 605; see also *Sumner v. Shuman*, 483 U.S. 66, 75-76 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 8, (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

ble. They can be reconciled if consistency takes precedence at the "definition" stage of capital proceedings when the class of offenders eligible for the death penalty is defined. Individualization is effective at the "selection" stage when the handful among those eligible for death actually are sentenced to die.<sup>193</sup> In practice, however, these distinctions blur.

Justice O'Connor has acknowledged "the tension that has long existed between the two central principles of [the Court's] [e]ighth [a]mendment jurisprudence,"<sup>194</sup> a modest concession compared to others' views. Justice White charged in his dissent in *Lockett* that the plurality had completed an "about-face since *Furman*,"<sup>195</sup> and that "requiring . . . that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances . . . invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration."<sup>196</sup> Justice Rehnquist was even less restrained in stating that:

If a defendant as a matter of constitutional law is to be permitted to offer as evidence in the sentencing hearing any fact, however bizarre, which [the defendant] wishes, . . . the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. . . . [I]t will not guide sentencing discretion but will totally unleash it.<sup>197</sup>

These, of course, are the sentiments of the moderate to conserva-

193. See Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 23-37 (1980). The Supreme Court has adopted this basic distinction between the "definition" and "selection" stages of capital proceedings. See *McCleskey*, 481 U.S. at 305. The Court indicated:

[O]ur decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold . . . . Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

*Id.* at 305-06; see also *Zant*, 462 U.S. at 878-79. In *Zant* the Court averred:

statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty . . . . What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

*Id.* (emphasis in original).

194. *California v. Brown*, 479 U.S. 538, 544 (1987). Justice O'Connor stated that discretion in capital sentencing "must be 'controlled by clear and objective standards so as to produce non-discriminatory application.' On the other hand, this Court has also held that a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense." *Id.* at 544 (citations omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion)).

195. *Lockett v. Ohio*, 438 U.S. 586, 622 (1978) (White, J., concurring in part, dissenting in part).

196. *Id.* at 623.

197. *Id.* at 631 (Rehnquist, J., concurring in part and dissenting in part).

tive wing of the Court. Justice Marshall and Justice Brennan, who share the view that the death penalty is per se violative of the eighth amendment's cruel and unusual punishments clause,<sup>198</sup> both have denounced the procedural legacy of *Gregg* and subsequent decisions. Justice Marshall has opined that "[t]he task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system—and perhaps any criminal justice system—is unable to perform."<sup>199</sup> In Justice Brennan's view, "the Court is simply deluding itself, and also the American public, when it insists that those defendants who have already been executed or are today condemned to death have been selected on a basis that is neither arbitrary nor capricious, under any meaningful definition of those terms."<sup>200</sup>

Basic dissatisfaction with the Supreme Court's procedural doctrine, especially the manifest tension between the requirements of evenhandedness or reliability in capital sentencing on the one hand and individualization on the other, has led at least a few state supreme court judges to conclude that the framework ought to be rejected as unworkable.<sup>201</sup> It also invites de novo analysis under state constitutions of the

198. See *supra* note 168.

199. *Godfrey v. Georgia*, 446 U.S. 420, 440 (1980) (Marshall, J., concurring). Justice Marshall continued:

The Georgia court's inability to administer its capital punishment statute in an evenhanded fashion is not necessarily attributable to any bad faith on its part; it is, I believe, symptomatic of a deeper problem that is proving to be genuinely intractable. Just five years before *Gregg*, Mr. Justice Harlan stated for the Court that the tasks of identifying "before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and [of] express[ing] these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be . . . beyond present human ability."

*Id.* at 441-42 (quoting *McGautha v. California*, 402 U.S. 183, 204 (1971)). His conclusion was that "the enterprise on which the Court embarked in *Gregg v. Georgia* . . . increasingly appears to be doomed to failure." *Id.* at 434.

200. *Pulley v. Harris*, 465 U.S. 37, 60 (1984) (Brennan, J., dissenting); see also *McCleskey*, 481 U.S. at 320 (Brennan, J., dissenting); *Tison v. Arizona*, 481 U.S. 137, 159 (1987) (Brennan, J., dissenting).

201. *State v. Ramsey*, 106 N.J. 123, 367-69, 524 A.2d 188, 313-14 (1987) (Handler, J., dissenting) (accusing federal death penalty doctrine of "fundamental incoherence"). Justice Handler also argued:

The Supreme Court, unable to harness the contending forces of individualization and consistency, has allowed death penalty prosecutions to run out of control. It has sanctioned arbitrary sentencing, and sacrificed the principle underlying *Furman* and *Gregg* that death is different in kind from other forms of punishment and thus demands heightened procedural safeguards in sentencing. Instead of balancing individualization and consistency, it has permitted these indispensable principles to cancel out one another . . . [W]hen the Court has exalted individualization, it has crippled uniformity; when it has tried to rescue uniformity, it has become incoherent. The result is "legal doctrine-making in a state of nervous breakdown," "almost a hare aesthetic exhortation that the state just do something—anything—to give the death penalty a legal appearance." . . . The federal precedent sets a poor example of constitutional jurisprudence and should not be considered as an interpretative model in giving meaning to our own Constitution or followed to set the outer limits of individual protec-

procedures that ought to be required for the administration of the death penalty. In a recent dissent from a New Jersey Supreme Court decision upholding the state's capital punishment statute against challenges brought under both the federal and state constitutions, Justice Handler declared: "Because I believe that the federal decisional law has lost coherence and pursues fundamentally contradictory—perhaps unattainable—goals, I have no confidence in federal precedent as a guide in interpreting [the New Jersey] Constitution."<sup>202</sup> He proceeded to conclude that New Jersey's death penalty as applied violated implicit state constitutional prohibitions against arbitrary capital decision making.<sup>203</sup>

State courts that choose to adhere to the major tenets of federal doctrine concerning "as applied" challenges to the death penalty may not accept all of its aspects. Regulation of prosecutorial decision making in capital cases may be of more concern to state courts than to the Supreme Court, for example. The Justices have all but exempted district attorneys' charging and plea bargaining decisions from review and require only that the discretion exercised by capital sentencing authorities be subjected to legislative guidance and judicial review.

In *Gregg* the prospects that district attorneys would abuse their charging and plea bargaining discretion were dismissed as speculative and remote.<sup>204</sup> In *McCleskey* statewide evidence offered in substantiation of these same claims was dismissed as irrelevant to an equal protection challenge<sup>205</sup> and insufficient to establish the claim that Georgia's capital punishment statutes as applied violated the federal cruel and

tion in this [S]tate.

*Id.* at 368-69, 524 A.2d at 313-14 (citation omitted); see *State v. Creech*, 105 Idaho 362, 670 P.2d 463, 470 (1983) (acknowledging that "an almost unavoidable conflict presents itself to a legislature attempting to design a sentencing process that is both a consistent and principled system of punishment and one that is flexibly humane and cognizant of the uniqueness of each individual defendant"), *cert. denied*, 465 U.S. 1051 (1984); *Ramseur*, 106 N.J. at 190, 524 A.2d at 221 (acknowledging that "the Supreme Court has faltered in its pursuit of consistency and reliability," but rejecting the contention that "the goals themselves are 'fundamentally contradictory—perhaps unattainable'"); *State v. Dicks*, 615 S.W.2d 126, 133-34 (Tenn.) (Brock, C.J., dissenting) (stating that "[i]n my opinion it is impossible to reconcile this tension between consistency (sought to be achieved by guiding the jury's discretion) and individual justice (attempted by allowing the jury to exercise discretion)"), *cert. denied*, 454 U.S. 933 (1981). See generally Devine, *supra* note 90, at 276-309.

202. *Ramseur*, 106 N.J. at 347, 524 A.2d at 302 (Handeer, J., dissenting); see *supra* note 200.

203. *Ramseur*, 106 N.J. at 369-71, 524 A.2d at 314-15 (applying the principles reflected in the state constitution's provisions guaranteeing the right to life, protecting against discrimination, and prohibiting cruel and unusual punishments). Justice Handler declined to go so far as to conclude that the death penalty was per se violative of the New Jersey Constitution. *Id.* at 382, 524 A.2d at 321.

204. See *supra* note 182 and accompanying text.

205. *McCleskey*, 481 U.S. at 306-07. The majority concluded that the statewide data were inadequate to raise the inference that purposeful discrimination had been a factor in any individual case. *Id.* at 298-99.

unusual punishments clause.<sup>206</sup> Four dissenting Justices in *McCleskey* pointed out that these conclusions are debatable on both doctrinal and empirical grounds.<sup>207</sup> State courts should be urged to scrutinize prosecutorial capital decision making closely under state constitutions.

Studies completed in several states have suggested that both the race of victims<sup>208</sup> and the geographical location of crimes<sup>209</sup> may influence prosecutors' decisions to seek the death penalty. It has been postulated that white victim homicides, especially those committed by blacks, are more likely to elicit the wrath of predominantly white communities than homicides that victimize blacks.<sup>210</sup> Similarly, the residents of less populous, relatively homogeneous rural communities may collectively experience and express more outrage<sup>211</sup> at killings within

206. *Id.* at 312-13. The Court stated:

Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

*Id.* at 313.

207. Justices Blackmun, Brennan, Marshall, and Stevens dissented from the Court's opinion. *See id.* at 320 (Brennan, J., dissenting); *id.* at 345 (Blackmun, J., dissenting); *id.* at 366 (Stevens, J., dissenting). *See generally* Acker, *supra* note 61, at 468-80. Note that Justice Stevens was among the *Gregg* plurality and Justice Blackmun concurred in *Gregg* on the issue of the facial constitutionality of Georgia's capital punishment legislation. Each was persuaded in *McCleskey*, however, that the manner in which the statute had been applied violated the federal constitution.

208. *See, e.g.,* Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 709-10 (1983); Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1071-74 (1983); Bowers & Pierce, *supra* note 135, at 607-16; Gross & Mauro, *supra* note 135, at 54-92; Paternoster, *Prosecutor Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984); Paternoster & Jacoby, *Sentencing Discretion and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982); Radelet, *supra* note 135, at 922-26; Radelet & Pierce, *supra* note 135, at 591-92; Zeisel, *supra* note 135.

209. *See, e.g.,* Bowers, *supra* note 208, at 1072-75; Bowers & Pierce, *supra* note 135, at 601-07, 616-19; Gross & Mauro, *supra* note 135, at 64-66; Paternoster, *supra* note 135.

210. *See, e.g., McCleskey*, 481 U.S. at 361 n.13 (1987) (Blackmun, J., dissenting) Justice Blackmun counselled:

[T]here are many ways in which racial factors can enter indirectly into prosecutorial decisions. For example, the authors of a study similar to that of Baldus explained: "Since death penalty prosecutions require large allocations of scarce prosecutorial resources, prosecutors must choose a small number of cases to receive this expensive treatment. In making these choices they may favor homicides that are visible and disturbing to the majority of the community, and these will tend to be white-victim homicides."

*Id.* (quoting Gross & Mauro, *supra* note 135, at 106-07); *see* Bowers & Pierce, *supra* note 134, at 467-78. *See generally* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

211. *See generally* W. BERNIS, *supra* note 173, at 153-76 (discussing the "morality of anger" in the context of capital punishment).

their borders than the inhabitants of larger, more anonymous urban communities.<sup>212</sup> District attorneys are elected officials in most jurisdictions and may respond either consciously or subconsciously to perceived community sentiments when making charging decisions.<sup>213</sup> Capital prosecutions may be commenced only sparingly because of their unusual expense and consumption of time, making it particularly important that prosecutors get the maximum "return" on the homicide cases in which they seek the death penalty.<sup>214</sup>

While a majority of the Supreme Court has turned a blind eye to these problems, state courts may not if presented with the proper supporting evidence. Some state court judges have joined the *McCleskey* dissenters in decrying the absence of guidelines to help regulate the exercise of prosecutorial discretion in capital cases.<sup>215</sup> For the most part, however, state constitutional challenges on related grounds have proceeded without solid empirical foundation.<sup>216</sup> This absence has allowed

212. See Bowers & Pierce, *supra* note 135, at 632; Paternoster, *supra* note 135.

213. See Bowers, *supra* note 208, at 1069; see also *supra* note 210 and accompanying text.

214. See *supra* note 210; see also *State v. Wagner*, 305 Or. 115, 214-15, 752 P.2d 1136, 1197 n.7 (1988) (Linde, J., dissenting). Justice Linde reasoned:

In our decentralized system of criminal justice, a particular prosecutor's decision to seek the death penalty may be unequally affected by its extraordinary costs in addition to plea bargaining considerations such as a defendant's willingness to plead guilty or to testify against accomplices, even intangibles like the relationship of the victim or the defendant to the community, not to mention turnover in the offices of prosecutor and of governor.

*Id.* See generally N.Y. STATE DEFENDERS ASS'N, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (1982); Gross & Mauro, *supra* note 135, at 106-07; Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69 (1978); Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985).

215. See *State v. Koedatich*, 112 N.J. 225, 258, 548 A.2d 939, 955-56 (1988), *cert. denied*, 109 S. Ct. 813 (1989); *id.* at 372-79, 548 A.2d at 1016-20 (Handler, J., dissenting in part); *Ramseur*, 106 N.J. at 404-06, 524 A.2d at 332-33 (Handler, J., dissenting); *Dicks*, 615 S.W.2d at 140 (Brock, C.J., dissenting); *State v. Campbell*, 103 Wash. 2d 1, 41-50, 691 P.2d 929, 953-56 (1984) (Utter, J., concurring in part and dissenting in part), *cert. denied*, 471 U.S. 1094 (1985). These state judges have been joined by the four dissenters in *McCleskey*, all of whom authored or joined opinions calling for greater strictures to be placed on prosecutors' capital charging decisions. See *McCleskey*, 481 U.S. at 320 (Brennan, J., dissenting); *Id.* at 345 (Blackmun, J., dissenting).

216. See *State v. Carriger*, 143 Ariz. 142, 160, 692 P.2d 991, 1009 (1984), *cert. denied*, 471 U.S. 1111 (1985) (criticizing the adequacy of the data offered in support of a claim that the race of the victim influenced capital sentencing, but not indicating, however, that the challenge was made on state constitutional grounds); *Calhoun v. State*, 297 Md. 563, 605, 468 A.2d 45, 64 (1983), *cert. denied*, 466 U.S. 993 (1987) (noting that absent evidence that prosecutors have exercised charging discretion arbitrarily, defendant's state constitutional claim will be rejected); *State v. Mallett*, 732 S.W.2d 527, 538-39 (Mo.), *cert. denied*, 108 S. Ct. 309 (1987). The *Mallett* Court stated: "Compared to the statistics introduced by the defendant in *McCleskey*, the statistics offered by the defendant here are superficial. Therefore, given that the *McCleskey* statistics were insufficient to establish an equal protection claim, the statistics offered here also are insufficient to establish such a claim." *Id.* at 539; see also *Ramseur*, 106 N.J. at 192-93, 524 A.2d at 222 (expressing concern about unregulated prosecutorial charging discretion in a capital case, but refusing to invalidate a death sentence absent a showing of abuse of discretion); *id.* at 332, 524 A.2d at 295 (O'Hern, J., concurring in the result) (citing a lack of evidence, to date, that New Jersey's death penalty had

state supreme courts the comparatively easy route of dismissing the sufficiency of the data underlying these claims without seriously having to confront whether *McCleskey's* reasoning should be rejected.<sup>217</sup>

Social science researchers and attorneys within the individual states should engage in collaborative efforts to prepare and litigate claims that death penalty statutes are being applied in violation of state constitutional principles. Lawyers urging the doctrinal weaknesses of *McCleskey* and related cases will present much more compelling cases if empirical evidence substantiates that capital punishment in their states<sup>218</sup> continues to be administered in an arbitrary, capricious, or discriminatory fashion, notwithstanding legislative reforms that regulate sentencing discretion. State supreme courts should be urged, and may be convinced, to part ways with federal precedent on both doctrinal and empirical grounds.

### C. Challenges to Capital Juries

Four states rely exclusively on judges to preside at the penalty phase of capital trials and determine whether death is the appropriate punishment for defendants convicted of capital murder.<sup>219</sup> Three additional states enlist juries only to render nonbinding, advisory opinions about capital sentencing with trial judges retaining ultimate sentencing

been applied disproportionately); *State v. Zuern*, 32 Ohio St. 3d 56, 64-66, 512 N.E.2d 585, 593-94 (1987) (citing the inadequacy of the defendant's data concerning the claim that the death penalty is imposed disproportionately in white victim homicide convictions), *cert. denied*, 108 S. Ct. 786 (1988). The one state supreme court that has been sufficiently disturbed by the claim that capital punishment has been administered in an arbitrary or racially discriminatory manner to use this as a basis for invalidating the death penalty on state constitutional grounds has, in turn, been criticized for making indefensible use of the available data. See *District Attorney v. Watson*, 381 Mass. 648, 665-71, 411 N.E.2d 1274, 1283-86 (1980); see also Dorin, *A Case Study of the Misuse of Social Science in Capital Punishment Cases: The Massachusetts Supreme Judicial Court's Finding of Racial Discrimination in Watson*, in *CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES* 213 (K. Haas & J. Inciardi, eds. 1988).

217. See *supra* note 216; see also *Raulerson v. State*, 358 So. 2d 826, 828-29 (Fla.), *cert. denied*, 439 U.S. 959 (1978); *People v. Guest*, 115 Ill. 2d 72, 108-09, 503 N.E.2d 255, 272 (1986), *cert. denied*, 483 U.S. 1010 (1987); *Fitzpatrick v. State*, 638 P.2d 1002, 1009-10 (Mont. 1981), *appeal after remand*, 206 Mont. 205, 684 P.2d 1112 (1984); *Stato v. Lawson*, 310 N.C. 632, 643-44, 314 S.E.2d 493, 500-01 (1984), *cert. denied*, 471 U.S. 1120 (1985); *State v. Jenkins*, 15 Ohio St. 3d 164, 169-70, 473 N.E.2d 264, 273-74 (1984), *cert. denied*, 472 U.S. 1032 (1985).

218. The fact dependence of much of death penalty jurisprudence, and the need for litigants to focus on intrastate rather than national data are discussed *supra* at notes 129-37 and accompanying text.

219. The states are Arizona, Idaho, Montana, and Nebraska. See ARIZ. REV. STAT. ANN. § 13-703(B) (1978); IDAHO CODE § 19-2515(b) (1979); MONT. CODE ANN. § 46-18-301 (1985); NEB. REV. STAT. § 29-2520 (1985). Additionally, in Nevada a three judge panel is authorized to make capital sentencing decisions when trial juries, which normally impose sentence, are unable to reach a unanimous verdict on whether the death penalty or life imprisonment is in order. See NEV. REV. STAT. §§ 175.554, 175.556 (1985).



authority.<sup>220</sup> Most states have long required jury sentencing in capital trials,<sup>221</sup> a function which the Supreme Court once lauded as vital "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"<sup>222</sup>

Notwithstanding the historical and functionally significant involvement of juries in capital sentencing decisions, the Supreme Court has upheld the states' authority to permit a single judge to impose a death sentence over a jury's recommendation that the defendant be sentenced to life imprisonment.<sup>223</sup> In doing so it rejected federal constitutional claims brought under double jeopardy, cruel and unusual punishment, trial by jury, and due process grounds.<sup>224</sup> Similar arguments have been made under state constitutions and rejected in nearly all of the states authorizing judicial sentencing in capital trials.<sup>225</sup> Two members of the

220. Alabama, Florida, and Indiana use such a procedure. See ALA. CODE §§ 13A-5-46(a), 13A-5-47(a), (e) (1982); FLA. STAT. ANN. § 921.141(2), (3) (West 1985); IND. CODE ANN. § 35-50-2-9(e) (Burns 1985).

221. See *Spaziano v. Florida*, 468 U.S. 447, 472 (1984) (Stevens, J., dissenting); Gillers, *supra* note 193, at 13-19.

222. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

223. *Spaziano*, 468 U.S. at 447. Justice Stevens, joined by Justices Brennan and Marshall, dissented in *Spaziano*. See *id.* at 467 (Stevens, J., dissenting).

224. *Id.* at 457-58.

225. See *Crowe v. State*, 485 So. 2d 351, 363-64 (Ala. Crim. App. 1984), *rev'd on other grounds*, 485 So. 2d 373 (Ala.), *on remand*, 485 So.2d 378 (Ala.), *cert. denied*, 477 U.S. 909 (1986); *State v. Carriger*, 143 Ariz. 142, 159, 692 P.2d 991, 1008 (1984), *cert. denied*, 471 U.S. 1011 (1985); *State v. Lankford*, 113 Idaho 688, 697, 747 P.2d 710, 719 (1987), *vacated*, 108 S. Ct. 2815 (1988); *Fitzpatrick v. State*, 638 P.2d 1002, 1012 (Mont. 1981) (rejecting a claim for jury sentencing on federal rather than state constitutional grounds), *cert. denied*, 449 U.S. 891 (1980), *appeal after remand*, 684 P.2d 1112 (Mont. 1984); *State v. Anderson*, 207 Neb. 51, 71-72, 296 N.W.2d 440, 453 (1980), *cert. denied*, 450 U.S. 1025 (1981). A related claim succeeded in the Oregon Supreme Court. See *State v. Quinn*, 290 Or. 383, 623 P.2d 630 (1981). The death penalty was reinstated in Oregon in 1978 by an initiative in the general election. Murder was defined as the "intentional" killing of another by one not under the influence of extreme emotional disturbance. See *Quinn*, 290 Or. at 401-02, 623 P.2d at 640-41; OR. REV. STAT. § 163.115 (1971). Before capital punishment could be imposed for murder, the sentencing authority, then the judge, had to answer three questions in the affirmative, one of which was whether the defendant had acted "deliberately" and with the reasonable expectation that death would ensue. See *Quinn*, 290 Or. at 403, 623 P.2d at 642; OR. REV. STAT. § 163.116(2)(a) (1978). The Oregon Supreme Court ruled in *Quinn* that the "deliberation" finding required before a capital sentence could be imposed was functionally an element of the crime, and that to allow the sentencing judge alone to make this finding denied the accused his state constitutional right to trial by jury.

Because ORS 163.116 authorizes an enhanced penalty to be imposed based upon a determination by the court of the existence of the requisite culpable mental state with which the crime was committed, a mental state different and greater than that found by the jury, imposition of a greater penalty under the statute denies to the defendant his right to trial by jury embodied in Oregon Constitution Article I, section 11 of all the facts constituting the crime for which he is in jeopardy.

Idaho Supreme Court<sup>226</sup> have registered the most spirited disagreement with the prevailing view by consistently maintaining that the Idaho Constitution requires jury sentencing in death penalty cases. They base their argument on state historical events<sup>227</sup> and the respective capabilities of juries and judges to perform the unique duty of imposing capital sentences.<sup>228</sup>

In the majority of death penalty states that rely upon jury sentencing, the principal issues to be explored under state constitutions relate to the death qualification of prospective jurors. The Supreme Court first spoke to the death qualification process in *Witherspoon v. Illinois*.<sup>229</sup> The Justices recognized that states legitimately may exclude individuals with strong scruples against capital punishment from serving on juries that make death penalty decisions<sup>230</sup> but set forth stringent standards governing their disqualification. Prospective jurors in capital trials could be excluded only if they

made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.<sup>231</sup>

The *Witherspoon* Court also rejected the defendant's contention

*Quinn*, 290 Or. at 407, 623 P.2d at 644. See generally Kanter, *Brief Against Death: More on the Constitutionality of Capital Punishment in Oregon*, 17 WILLAMETTE L. REV. 629, 629-31 (1981). In response to *Quinn* Oregon's death penalty statute was amended to require jury sentencing, rather than judicial sentencing. See OR. REV. STAT. § 163.150 (1985); see also *State v. Wagner*, 305 Or. 115, 752 P.2d 1136 (1988), *vacated on other grounds*, 109 S. Ct. 3235 (1989).

226. *Lankford*, 113 Idaho at 704, 747 P.2d at 726 (Huntley, J., concurring); *id.* at 718, 747 P.2d at 740 (Bristline, J., concurring in part and dissenting in part); *State v. Creech*, 105 Idaho 362, 375, 670 P.2d 463, 476 (1983) (Huntley, J., dissenting), *cert. denied*, 465 U.S. 1051 (1984); *id.* at 386, 670 P.2d at 487 (Bristline, J., dissenting); *State v. Sivak*, 105 Idaho 900, 908, 674 P.2d 396, 404 (1983) (Bristline, J., dissenting), *cert. denied*, 468 U.S. 1220 (1984); *id.* at 921, 674 P.2d at 417 (Huntley, J., dissenting).

227. See *Creech*, 105 Idaho at 376, 670 P.2d at 477 (Huntley, J., dissenting) (noting that jury participation in capital sentencing was required by statute in 1890, and arguing that the constitution should be construed as having adopted this practice).

228. See *id.* at 383-86, 670 P.2d at 484-87 (Huntley, J., dissenting) (incorporating the defendant's brief, which provides an excellent exposition of the differences between jury sentencing and judge sentencing, with supporting authorities).

229. 391 U.S. 510 (1968).

230. *Id.* at 513-14. *But see id.* at 523-32 (opinion of Douglas, J.). Writing for the Court, Justice Douglas asserted:

[There is] no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.

*Id.* at 528.

231. *Id.* at 522 n.21 (emphasis in original).

that the death qualification process produced juries prone to convict. It dismissed as "too tentative and fragmentary"<sup>232</sup> evidence suggesting that death qualified juries were more likely than other juries to find the accused guilty as charged. "In light of the presently available information, [the Justices were] not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction"<sup>233</sup> produced by a death qualified jury.

Since *Witherspoon* the Supreme Court has taken two steps backward in the area of death qualification, making this area an especially important one for state constitutional decision making. In *Wainwright v. Witt*<sup>234</sup> the Court took the step of making less rigorous the test for the death qualification of jurors. The Court ruled that

the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would "prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath."<sup>235</sup>

Perhaps more significantly, the Court replaced *Witherspoon's* mandate that an individual's views about the death penalty be "unmistakably clear"<sup>236</sup> prior to the disqualification of that individual from jury service. Under *Witt*, a trial judge only need be "left with a definite impression"<sup>237</sup> that the prospective juror is properly excludable. This judgment is entitled to substantial deference when reviewed by a federal court.<sup>238</sup>

232. *Id.* at 517.

233. *Id.* at 518.

234. 469 U.S. 412 (1985).

235. *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)) (elaborating that "in addition to dispensing with *Witherspoon's* reference to 'automatic' decisionmaking, this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity'").

236. *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968); *see supra* text accompanying note 231.

237. *Witt*, 469 U.S. at 426.

238. *See id.* at 426, 431-35. The *Witt* majority stated that "the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *Id.* at 434. The Court continued:

The trial court's finding of bias was made under the proper standard, was subject to [28 U.S.C.] § 2254(d), and was fairly supported by the record. Since respondent has not adduced "clear and convincing evidence that the factual determination by the State court was erroneous," we reverse the judgment of the Court of Appeals.

*Id.* at 435. As Justice Brennan noted in dissent:

The Court today establishes an entirely new standard significantly more lenient than that of *Witherspoon*. The difference does not lie in the freedom of the [s]tate to depart from the precise inquiry of *Witherspoon's* footnote 21 . . . . The crucial departure is the decision to discard *Witherspoon's* stringent standards of proof. The Court no longer prohibits exclusion of uncertain, vacillating, or ambiguous prospective jurors. It no longer requires an unmistakably clear showing that a prospective juror will be prevented or substantially impaired from following instructions and abiding by an oath.

The Court took its other significant step in *Lockhart v. McCree*<sup>239</sup> when it reconsidered the claim made in *Witherspoon* that the death qualification of jurors denied the accused the right to a fair trial at the guilt determination stage of a capital proceeding. The *Lockhart* majority found unpersuasive new evidence offered in support of the claim that death qualified juries were conviction prone.<sup>240</sup> It went beyond this rejection to conclude as a matter of law that death qualified juries were not less than "impartial" under the sixth and fourteenth amendments.<sup>241</sup> Nor, the Court ruled, do persons whose views about the death penalty disqualify them from service on a capital jury constitute a "distinctive group"<sup>242</sup> for purposes of the constitutional requirement that criminal trial juries be selected from a fair cross-section of the community.<sup>243</sup> This ruling sweepingly rejected a claim that, if successful, would have required the states to alter substantially their capital jury selection procedures.<sup>244</sup>

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*Id.* at 452 (Brennan, J., dissenting).

239. 476 U.S. 162 (1986).

240. *Id.* at 168-73.

241. After disparaging the research evidence offered in support of McCree's claims, the Court went on to "assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries." *Id.* at 173. It concluded that death qualified juries cannot be "impartial" in the sense contemplated by the federal constitution because "an impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'" *Id.* at 178 (emphasis in original) (quoting *Witt*, 469 U.S. at 423). It further argued:

McCree admits that exactly the same 12 individuals could have ended up on his jury through the "luck of the draw," without in any way violating the constitutional guarantee of impartiality. Even accepting McCree's position that we should focus on the jury rather than the individual jurors, it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state-ordained process, yet impartial when exactly the same jury results from mere chance.

*Id.* For Justice Marshall's response to the latter point, see *id.* at 194 (Marshall, J., dissenting).

242. *Id.* at 174. The Court stated:

The essence of a "fair-cross-section" claim is the systematic exclusion of "a 'distinctive' group in the community." In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "*Witherspoon*-excludables" at issue here, are not "distinctive groups" for fair-cross-section purposes.

*Id.* (citation omitted).

243. For good measure the majority also concluded that the "fair-cross-section" requirement implicit in the federal constitution applied only to the composition of the jury venire, and not to the trial jury proper. See *id.* at 173-74.

244. Actually, states would be left with a number of alternatives that could be used to accommodate both the accused's interest in having a nondeath qualified jury determine guilt or innocence, and the state's interest in having jurors at the penalty phase who would abide by the law and impose the death penalty under appropriate circumstances. These range from impanelling two separate juries, one for guilt and one for punishment in the event of a capital conviction, to simply impanelling an adequate number of alternate jurors to ensure that death qualified individuals would be available for sentencing if a penalty trial were necessary. See *Grigsby v. Mabry*, 758 F.2d 226, 242-43 (8th Cir. 1985) (en banc), *rev'd sub nom. Lockhart v. McCree*, 476 U.S. 162 (1986).

Issues of this type may be resolved differently under state constitutions if state courts can be convinced on either empirical or analytical grounds that the death qualification process unnecessarily compromises a capital defendant's right to an impartial jury, or a jury selected from a representative cross-section of the community. If such concerns are triggered at all, they may be heightened as *Witt*-like standards for death qualification replace *Witherspoon*'s more stringent requirements and the size of the excluded class increases with the relaxation of the test for exclusion. Dissenting judges on at least two state supreme courts have interpreted their respective state constitutions to prohibit the exclusion for cause of nondeath qualified jurors from the guilt determination stage of capital trials.<sup>245</sup> More state judges may do so if persuaded that the interplay of *Witt* and *Lockhart* cuts too deeply into the jury rights of capital defendants under state constitutional provisions.

Evidence presented at the trial stage of the cases that wound their way to the Supreme Court and resulted in the *Lockhart* decision<sup>246</sup> led the United States District Court to conclude that about fourteen percent of Arkansas' adult population would be excludable under *Witherspoon* from serving as jurors at the guilt phase of capital trials.<sup>247</sup>

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These procedures would have to be implemented only in trials that resulted in capital convictions, of course, and might even result in net administrative savings to the state, as the time and complexities of capital jury selection diminished accordingly. See *Lockhart*, 476 U.S. at 204-05 (Marshall, J., dissenting). See generally Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984); Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984) (suggesting that the questions posed during voir dire in the selection of death qualified jurors can predispose potential jurors to assume that the accused is guilty of the charged offense, and that the principal trial issue is whether the death penalty should be imposed).

245. *State v. Ramseur*, 106 N.J. 123, 429-34, 524 A.2d 188, 345-48 (1987) (Handler, J., dissenting); see also *id.* at 295-300 (O'Hern, J., concurring) (relying not on the state constitution, but on the supervisory powers of the New Jersey Supreme Court, to maintain that capital juries should not be death qualified at the guilt determination stage of a trial); *State v. Avery*, 299 N.C. 126, 139-41, 261 S.E.2d 803, 811-12 (1980) (Exum, J., dissenting). State supreme courts considering this claim have rejected it. See *Ramseur*, 106 N.J. at 248-54, 524 A.2d at 250-54 (1987); *State v. Woods*, 316 N.C. 344, 348, 341 S.E.2d 545, 547 (1986); *Marquez v. State*, 725 S.W.2d 217, 241-43 (Tex. Crim. App. 1987), cert. denied, 108 S. Ct. 201 (1987).

246. See *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd as modified*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom. Lockhart v. McCree*, 476 U.S. 162 (1986). Three claimants joined the challenge to Arkansas' death qualification procedures: Grigsby, who died while the litigation was pending, Hulsey, whose claim was forfeited because of a procedural error, and McCree, whose claim eventually was resolved by the Supreme Court. See *id.* at 1276, 1277 n.2; see also *Lockhart*, 476 U.S. at 168 n.2. The district court held an evidentiary hearing on the allegations, and its opinion includes an extensive summary of the evidence along with its findings.

247. See *Grigsby*, 569 F. Supp. at 1294, 1308. This figure is the percentage whose views about the death penalty would prevent service on a capital sentencing jury, but would not prevent impartiality at the guilt phase of a capital trial—i.e., "*Witherspoon*-excludables," who are "guilt-phase includable," as opposed to "nullifiers." See *id.* at 1288-91. The court noted that available evidence

Blacks in the state were much more likely than whites to fail *Witherspoon's* death qualification test,<sup>248</sup> and women were more likely than men to be excludable.<sup>249</sup> The Supreme Court ignored the evidence specific to Arkansas in *Lockhart* and addressed social science findings that dealt with death qualified juries generally.

Both the absolute size of the class of "*Witherspoon* excludables" and the relative proportions of racial and gender groups who would not be death qualified may vary from state to state.<sup>250</sup> The relevant data should be collected for each jurisdiction in which a *Lockhart*-type chal-

suggested that between 11% and 17% of the population in Arkansas and in the country as a whole were excludable under *Witherspoon* from serving on a capital sentencing jury yet qualified to determine guilt or innocence at a capital trial. *See id.* at 1285.

248. *Id.* at 1294. A survey indicated that 45% of blacks and 10% of whites in Arkansas were "strongly opposed" to the death penalty and that "even after excluding 'nullifiers' 29% of the blacks would never impose the death penalty compared to 9% of the whites." *Id.*

249. *Id.* The survey indicated that 21% of the women in Arkansas were "strongly opposed" to capital punishment, compared to 8% of the men, and that "whereas only 8% of Arkansas men would be *Witherspoon* excludables (after removing 'nullifiers'), 13% of Arkansas women would fall into that classification." *Id.*

250. In 1986, in response to the question, "Do you favor or oppose the death penalty for persons convicted of murder?", 71% of a sample representing the country as a whole reported that they "favored" the death penalty, 23% "opposed" it, and 5% responded "don't know." Differences were exhibited between racial groups, between men and women, and among different regions of the country, as reported below:

TABLE 1: VIEWS ON THE DEATH PENALTY

	FAVOR	OPPOSE	DO NOT KNOW
<b>RACE</b>			
Caucasian	75%	20%	5%
Black/Other	49%	43%	8%
<b>SEX</b>			
Male	79%	17%	4%
Female	66%	28%	6%
<b>REGION</b>			
Northeast	70%	26%	4%
Midwest	69%	26%	5%
South	67%	26%	7%
West	83%	13%	4%

*See* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1986 table 2.23, at 100-01 (K. Jamieson & T. Flanagan eds., 1987). The intrastate variation in responses is no doubt greater than the regional differences displayed. Of course, opinion poll responses correspond imperfectly to the death qualification of actual trial jurors. *See generally supra* note 158 and accompanying text.

lenge is raised under the state constitution. Both the "impartiality" and "representativeness" of death qualified juries may be affected by the size and attributes of the excluded class<sup>251</sup> provided state courts can be persuaded to reject the crabbed interpretation given such concepts by the majority opinion in *Lockhart*.<sup>252</sup>

This end may be accomplished if it can be demonstrated in any state that the right to an impartial jury selected through procedures not systematically excluding significant segments of the community is esteemed as particularly valuable, especially when human life is at stake. By statute or constitution many states require that capital juries may not be waived, or must be comprised of twelve members, and must return unanimous verdicts. Juries in noncapital trials in these same states may be waivable, include only six members, or decide cases by nonunanimous vote.<sup>253</sup> These distinctions may be evidence that certain states are particularly solicitous of jury rights in capital trials and are willing to require special procedures to protect them.

The irony is that death qualification itself is a "special procedure" invoked only in capital trials. As Justice Marshall observed in his dissent in *Lockhart*, all the accused in a capital trial "asks is the chance to have his guilt or innocence determined by a jury like those that sit in noncapital cases . . ." <sup>254</sup> State courts may be less restrained than the Supreme Court about requiring that the guilt phase of capital trials be conducted before juries that have not been death qualified.<sup>255</sup> This ten-

251. The class of persons properly excludable from capital jury service is no doubt larger under *Witt* than under *Witherspoon*, and the *Witherspoon* standard has been used in most studies to date. See *supra* notes 229-38 and accompanying text; see also *Lockhart v. McCree*, 476 U.S. 162, 191-92 (1986) (Marshall, J., dissenting); Finch & Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21, 63 (1986).

252. See, e.g., W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* 162-94 (1987); Bersoff, *Social Science Data and the Supreme Court: Lockhart as a Case in Point*, 42 AM. PSYCHOLOGIST 52 (1987).

253. See, e.g., FLA. STAT. ANN. § 913.10 (West 1985) (asserting that "[t]welve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases"); LA. CODE CRIM. PROC. ANN. art. 782 (West 1981) (requiring unanimous, 12-person jury verdict in capital cases; allowing for waiver of right to trial by jury in all but capital cases; allowing verdicts at the concurrence of 10 of 12 jurors in cases requiring imprisonment; and allowing verdicts by unanimous, 6-person juries in criminal trials that may result in imprisonment); OR. CONST. art. I, § 11 (prohibiting a waiver of a jury trial in capital cases and allowing verdicts upon the concurrence of 10 members of a jury in all criminal cases except upon first degree murder charges, for which juries must return unanimous verdicts); OR. REV. STAT. § 136.450 (1987) (generally allowing criminal trial juries to return verdicts upon the concurrence of 10 of the 12 members). See generally *infra* note 291.

254. *Lockhart*, 476 U.S. at 185 (Marshall, J., dissenting).

255. State courts have fewer concerns relating to federalism than does the Supreme Court, or about inhibiting experimentation throughout the entire country as a result of constitutional adjudication. See *supra* notes 140-41 and accompanying text. The *Lockhart* Court understandably was sensitive to such concerns: "[W]e are 'unwilling to say that there is any one right way for a [s]tate

dency would be especially likely if it is shown that the procedures necessary to implement such a requirement are not unduly burdensome,<sup>256</sup> or that the state's interests in the death qualification of jurors before the sentencing stage of a capital trial appear to be insubstantial or unsubstantiated.<sup>257</sup>

A final issue that may assume significance under state constitutions concerns the prosecutor's use of peremptory challenges to exclude purposefully individuals with strong scruples against the death penalty from serving on capital juries. Death qualification under *Witherspoon* and *Witt* involves challenges for cause. In *Batson v. Kentucky*<sup>258</sup> the Supreme Court rejected an important aspect of *Swain v. Alabama*<sup>259</sup> and ruled that a prosecutor's purposeful exclusion of black prospective criminal trial jurors in a given case<sup>260</sup> because of their presumed affinity with a black defendant violated the accused's equal protection rights under the fourteenth amendment.<sup>261</sup> In a subsequent case the Court split on whether *Batson* may be applied beyond racial characteristics to prohibit prosecutors from exercising their peremptory challenges to exclude systematically potential capital jurors who have strong scruples against the death penalty.<sup>262</sup>

Using state constitutional grounds, state supreme courts led the way in rejecting *Swain*, condemning the racially discriminatory exercise of peremptory challenges, and adopting prohibitions analogous to those

to set up its capital sentencing scheme.'" *Lockhart*, 476 U.S. at 180 (quoting *Spaziano v. Florida*, 468 U.S. 447, 464 (1984)).

256. See *supra* note 244.

257. See generally *Lockhart*, 476 U.S. at 203-06 (Marshall, J., dissenting) (criticizing state interests offered in support of a unitary capital jury).

258. 476 U.S. 79 (1986).

259. 380 U.S. 202 (1965).

260. This point is the crucial aspect of *Swain v. Alabama*, 380 U.S. 202 (1965), that the *Batson* Court rejected. See *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986) (concluding that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial" (emphasis added)).

261. The Court explicitly refrained from reaching the claim that the sixth and fourteenth amendment rights to an impartial jury and one drawn from a fair cross-section of the community were violated by the prosecutor's discriminatory use of peremptory challenges to remove prospective black jurors from service upon a criminal trial jury. See *id.* at 82 n.1, 84 n.4. But see *Teague v. Lane*, 109 S. Ct. 1060 (1989) (granting certiorari to address the above issue, but then declining to resolve the issue).

262. See *Gray v. Mississippi*, 481 U.S. 648 (1987); see *id.* at 650 (plurality opinion) (dictum); *id.* at 669 (Powell, J., concurring); *id.* at 672 (Scalia, J., dissenting); see also *Brown v. North Carolina*, 479 U.S. 940, 940 (1986) (O'Connor, J., concurring in the denial of certiorari); *id.* at 941 (Brennan, J., dissenting from the denial of certiorari). A federal district court recently ruled that a state prosecutor's systematic exercise of peremptory challenges to strike jurors with misgivings about the death penalty violated the accused's sixth and fourteenth amendment rights to an impartial jury for purposes of capital sentencing. See *Brown v. Rice*, 693 F. Supp. 381 (W.D.N.C. 1988).



announced by the Supreme Court in *Batson*.<sup>263</sup> Many did so on broader grounds than relied upon by the *Batson* Court by invoking the right to a jury that is both impartial and representative of a fair cross-section of the community instead of invoking equal protection principles.<sup>264</sup> Research evidence suggests that prosecutors often exercise their peremptory challenges to remove prospective jurors who have scruples against imposing the death penalty if they are not excluded for cause under *Witherspoon* or *Witt*.<sup>265</sup> This practice naturally exacerbates the impartiality and fair cross-section difficulties already occasioned by those cases. State supreme courts might well be sympathetic to such claims because of their leadership and rationale in enforcing rights related to the exercise of peremptory challenges.

#### D. Other State Constitutional Claims

##### 1. Proportionality

State constitutional provisions in at least four death penalty states specifically require that criminal punishments be "proportioned to the nature of the offense," or words to that effect.<sup>266</sup> These provisions may

263. See, e.g., *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979). See generally *McCray v. New York*, 461 U.S. 961, 963 (1983) (Marshall, J., dissenting from denial of certiorari).

264. The two leading state court cases took such an approach. See *Wheeler*, 22 Cal. 3d at 258, 583 P.2d at 748, 148 Cal. Rptr. at 890; *Soares*, 377 Mass. at 461, 387 N.E.2d at 499. This approach may be a significantly broader one because it would presumably apply in areas besides racial discrimination and would not require that the accused and the excluded jurors be of the same race. *Batson's* equal protection analysis stipulated such limitations. See *Batson*, 476 U.S. at 96. See generally Acker, *Exercising Peremptory Challenges After Batson*, 24 CRIM. L. BULL. 187, 194 n.35 (1988).

265. See Lindsay, *Prosecutorial Abuse of Peremptory Challenges in Death Penalty Litigation: Some Constitutional and Ethical Considerations*, 88 CAMPBELL L. REV. 71 (1985); Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982).

266. See ILL. CONST. art. I, § 11 (stating that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship"); IND. CONST. art. I, § 16 (declaring that "[a]ll penalties shall be proportioned to the nature of the offense"); N.H. CONST. pt. I, art. 18. Under New Hampshire law,

All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.

*Id.*; see also OR. CONST. art I, § 16 (stating that "all penalties shall be proportioned to offense"). But see *id.* art. I, § 40 (exempting capital punishment for aggravated murder from the prior provision); *supra* notes 118, 121-22, and accompanying text; see also LA. CONST. art. 1, § 20 (prohibiting "cruel, excessive, or unusual punishment" (emphasis added)). At least two noncapital punishment

be cited effectively in presenting the argument that capital punishment may not be imposed constitutionally for certain crimes or upon certain offenders. This argument can be made upon cruel and unusual punishment grounds as well. Under the federal constitution, for example, proportionality principles preclude imposing death as punishment for rape,<sup>267</sup> kidnapping,<sup>268</sup> felony murder under limited circumstances,<sup>269</sup> and imposing it on fifteen-year-old offenders absent clearly expressed legislative intent to the contrary.<sup>270</sup>

State supreme courts may be more willing than the United States Supreme Court has been to limit the range of offenses and the class of offenders that may be punished with death. This tendency may be especially important with respect to felony murder,<sup>271</sup> young offenders,<sup>272</sup> and perhaps in other areas.<sup>273</sup> Unlike the Supreme Court,<sup>274</sup> they may

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jurisdictions also have state constitutional provisions requiring that punishment be proportioned to the offense. See ME. CONST. art. I, § 9; R.I. CONST. art. I, § 8. The limitation in these provisions that punishment be proportioned to the nature of the "offense" incidentally raises an interesting but speculative issue concerning the propriety of including offender characteristics such as prior record, or inmate status among statutory aggravating factors for capital sentencing.

267. *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality decision) (finding that the death penalty was cruel and unusual punishment for the rape of an adult).

268. *Eberheart v. Georgia*, 433 U.S. 917 (1977) (summary disposition).

269. The Supreme Court initially prohibited the death penalty from being administered against one convicted of felony murder who neither killed, attempted to kill, nor intended to kill. See *Enmund v. Florida*, 458 U.S. 782 (1982). Subsequently, the Court ruled in *Tison v. Arizona*, 481 U.S. 137 (1987), that a broader class of participants in a felony murder was eligible for the death penalty, although *Enmund* was not overruled. See *supra* note 1; see also *Acker, supra* note 61, at 475-76.

270. See *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (plurality decision); *id.* at 2706 (O'Connor, J., concurring); see also *supra* note 63.

271. See *supra* notes 1, 269, and accompanying text.

272. In *Stanford v. Kentucky*, the Court ruled that the eighth amendment does not prohibit the states from executing offenders who were 16 or 17 years old at the time of their crimes. See 109 S. Ct. 2968 (1989). One year earlier the Court held that the federal constitution barred the states from executing 15-year-old offenders, at least absent express legislative declaration that offenders of this age are eligible for the death penalty. See *Thompson*, 108 S. Ct. at 2687; *id.* at 2706 (O'Connor, J., concurring).

273. *E.g.*, *State v. Gerald*, 113 N.J. 40, 549 A.2d 792 (1988). The New Jersey Supreme Court struck down the death penalty as excessive and violative of the implicit proportionality requirement in the state constitution's cruel and unusual punishments clause when imposed for murder by causing "serious bodily injury resulting in death," absent proof of the specific intent to kill. See *id.* at 85, 549 A.2d at 818 (quoting N.J. STAT. ANN. § 2C:11-3(a)(1), (2) (West 1987)). The state court explicitly noted that the state constitution afforded greater protection than the Supreme Court had interpreted the eighth amendment's cruel and unusual punishments clause to provide in *Tison v. Arizona*, 481 U.S. 137 (1987). See *Gerald*, 113 N.J. at 75, 549 A.2d at 810. In an unrelated type of disproportionality claim, the Supreme Court ruled that there is no federal constitutional prohibition against executing mildly mentally retarded offenders. See *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989). A similar claim was rejected on state and federal constitutional grounds in *Goodman v. State*, 701 S.W.2d 850, 867 (Tex. Crim. App. 1985). But see *Woods v. State*, 531 So. 2d 79, 83-84 (Fla. 1988) (Shaw, J. and Barkett, J., dissenting) (arguing that the state constitution prohibits execution of the mentally retarded).

also require that comparative proportionality review be undertaken on state constitutional grounds<sup>275</sup> to ensure that death sentences have not been imposed aberrationally in individual cases. Comparative proportionality review can be conducted with varying rigor and under premises that make it more or less likely to be efficacious.<sup>276</sup> State courts should be urged to oversee strictly such review under the terms of state constitutions.<sup>277</sup>

## 2. Separation of Powers

Capital punishment statutes in several states have been upheld against claims suggesting that separation of powers principles are in-

274. The Court ruled that California's death penalty legislation had sufficient other checks against the threat of arbitrariness that the federal constitution did not require that the state supreme court engage in comparative proportionality review of capital sentences imposed. See *Pulley v. Harris*, 465 U.S. 37 (1984).

275. As the Supreme Court explained in *Pulley*:

Traditionally, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime. Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime . . . .

The proportionality review sought [in this case] . . . is of a different sort. This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime. The issue in this case, therefore, is whether the [e]ighth [a]mendment, applicable to the [s]tates through the [f]ourteenth [a]mendment, requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. *Id.* at 42-44 (footnotes omitted). See generally H. BÉDAU, *supra* note 117, at 114-16 (calling this a "frequency-relative" type of severity, and contrasting it to other ways in which the death penalty may be considered excessively severe).

276. See generally F. ZIMRING & G. HAWKINS, *supra* note 2, at 71-72; Baldus, Pulaski & Woodworth, *supra* note 208; Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979); Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C. DAVIS L. REV. 1433 (1985); Waldo, *supra* note 122, at 340-47. The pool of cases to which a conviction resulting in a capital sentence is compared can make a significant difference, e.g., to all other convictions actually resulting in capital sentences as opposed to all cases that could have been prosecuted as capital crimes and could have resulted in capital convictions and sentences. There are other differences that may be significant as well. While most states engage in statewide comparative proportionality review, Louisiana courts look first to the judicial district as the region for comparison. See *State v. Brogdon*, 457 So. 2d 616, 631-32 (La. 1984), *cert. denied*, 471 U.S. 1111 (1985). But see *State v. Ramseur*, 106 N.J. 123, 325-30, 524 A.2d 188, 291-94 (1987).

277. Ironically, state constitutional challenges to appellate court proportionality review of capital sentences have tended to concern the courts' constitutional authority to undertake such review, rather than the procedures or implementation of the comparative review. See, e.g., *State v. Lawson*, 310 N.C. 632, 644-46, 314 S.E.2d 493, 501-02 (1984); *Hopkinson v. State*, 664 P.2d 43, 55-56 (Wyo.), *cert. denied*, 464 U.S. 908 (1983), *appeal after remand*, 679 P.2d 1008 (Wyo. 1984), *denial of sentence modification aff'd*, 704 P.2d 1323 (Wyo. 1988).

consistent with the legislation or its administration. Over dissent, the Illinois Supreme Court has rejected the contention that the prosecutor's decision to seek the death penalty after obtaining a capital conviction represents an unwarranted exercise of judicial power by an executive official.<sup>278</sup> By contrast, in Indiana the district attorney's discretion to prosecute a homicide as a capital crime has been upheld against a separation of powers challenge precisely because in that state the prosecutor is considered a judicial official instead of a member of the executive branch.<sup>279</sup>

In Florida,<sup>280</sup> Pennsylvania,<sup>281</sup> and Wyoming,<sup>282</sup> courts have upheld death penalty statutes against claims that the legislative imposition of standards to guide the exercise of sentencing discretion unconstitutionally usurped the power of the state supreme courts to promulgate rules of trial procedure. The Texas Court of Criminal Appeals has rejected the argument that allowing the Director of the Texas Department of Corrections to select the substance to be used to cause death by lethal injection was an unconstitutional delegation of legislative authority to an executive official.<sup>283</sup> State constitutional challenges to the death penalty premised upon separation of powers violations have been innovative although not persuasive when presented to the state courts.<sup>284</sup>

### 3. Miscellaneous Grounds

A number of other issues relevant to the administration of the death penalty can be litigated on state constitutional grounds. Some of these simply mirror analogous federal claims, but others may be unique to particular state constitutional provisions. Examples of the former in-

278. See *People v. Guest*, 115 Ill. 2d 72, 109-10, 503 N.E.2d 255, 272 (1986), *cert. denied*, 483 U.S. 1010 (1987); *People v. King*, 109 Ill. 2d 514, 488 N.E.2d 949, *cert. denied*, 479 U.S. 872 (1986); *People v. Lewis*, 88 Ill. 2d 129, 185-86, 430 N.E.2d 1346, 1373 (1981) (Simon, J., dissenting), *appeal after remand*, 105 Ill. 2d 226, 473 N.E.2d 901 (1984), *cert. denied*, 474 U.S. 865 (1985). Illinois employs the atypical practice of allowing prosecutors to decide whether or not to seek the death penalty after a capital conviction has been obtained rather than at an earlier stage in the process. A federal district court, disagreeing with the Illinois Supreme Court on federal constitutional grounds, recently ruled that the practice is unconstitutional. See *United States v. Silagy*, 713 F. Supp. 1246 (C.D. Ill. 1989).

279. *Williams v. State*, 430 N.E.2d 759, 765-66 (Ind.), *appeal dismissed*, 459 U.S. 808 (1982).

280. *Morgan v. State*, 415 So. 2d 6, 11 (Fla.), *cert. denied*, 459 U.S. 1055 (1982).

281. *Commonwealth v. DeHart*, 512 Pa. 235, 263, 516 A.2d 656, 670-71 (1986), *cert. denied*, 483 U.S. 1010 (1987).

282. *Hopkinson*, 664 P.2d at 50-53.

283. *Ex parte Granviel*, 561 S.W.2d 503, 514-15 (Tex. Crim. App. 1978).

284. A less orthodox issue was raised by Justice Linde in dissent in *State v. Wagner*, 305 Or. 115, 188, 752 P.2d 1136, 1181 (1988) (Linde, J., dissenting). He questioned whether the initiative that resulted in Oregon's death penalty legislation was consistent with the state's obligation to maintain a republican form of government under the United States and Oregon Constitutions. *Id.* at 1197 n.8; see U.S. CONST. art. IV, § 4; OR. CONST. art. IV, § 1.

clude arguments that statutory aggravating factors are unconstitutionally vague<sup>285</sup> or that indigent defendants are entitled to expert assistance at capital trials.<sup>286</sup> Sentencing instructions may be challenged on the ground that they deflect the jury's attention from legally relevant considerations and infuse the capital punishment decision with an

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285. A related claim is that because statutory aggravating factors are impermissibly vague they operate, de facto, to violate ex post facto principles. Vagueness and ex post facto claims have been raised with varying degrees of success in several state cases. See *People v. Superior Court* 31 Cal. 3d 797, 801, 647 P.2d 76, 77, 183 Cal. Rptr. 800, 801 (1982) (invalidating on federal and state due process grounds the statutory aggravating circumstance that "[t]he murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim" (quoting CAL. PENAL CODE § 190.2(a)(14) (Deering 1978))); *Hance v. State*, 245 Ga. 856, 860-67, 268 S.E.2d 339, 344-49 (1980) (stating that the definition of statutory aggravating circumstance as "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim," was not unconstitutionally vague, as applied, under the state and federal constitutions (quoting GA. CODE ANN. § 17-10-30(b)(7) (1984))), *cert. denied*, 449 U.S. 1067 (1980); *Calhoun v. State*, 297 Md. 563, 617-23, 468 A.2d 45, 70-74 (1983) (holding that propensity for future dangerousness was not so speculative that its use as a capital sentencing factor violated article 25 of the Declaration of Rights of Maryland's constitution), *cert. denied*, 466 U.S. 993 (1984); *State v. Newlon*, 627 S.W.2d 606, 621 (Mo.) (rejecting the claim that aggravating circumstance that murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, or depravity of mind" was unconstitutionally vague under state or federal constitution (quoting MO. ANN. STAT. § 565.032.2(7) (Vernon Supp. 1988) (emphasis added))), *cert. denied*, 459 U.S. 884 (1982)); *State v. Ramseur*, 106 N.J. 123, 197-211, 524 A.2d 188, 224-32 (1987) (rejecting the claim that the aggravating circumstance that "[t]he murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," is unconstitutionally vague under state and federal constitutions (quoting N.J. STAT. ANN. § 2C:11-3c(4)(c) (1982))). After *Ramseur* was decided, the legislature substituted "assault" for "battery" in the statutory provision. See N.J. STAT. ANN. § 2C:11-3c(4)(c) (Supp. 1986); see also *State v. Wagner*, 305 Or. 115, 150-55, 752 P.2d 1136, 1158-61 (1988) (rejecting state constitutional claims that the Oregon death penalty scheme is unconstitutionally vague or violative of ex post facto principles by asking the jury to assess the accused's propensity for future dangerousness), *vacated on other grounds*, 109 S. Ct. 3235 (1989). But see *Godfrey v. Georgia*, 446 U.S. 420 (1980) (holding that, as applied, Georgia's "outrageously or wantonly vile, horrible. . ." aggravating circumstance, violated the eighth and fourteenth amendments because it failed to guide and narrow the jury's sentencing discretion adequately (quoting GA. CODE ANN. § 17-10-30(b)(7) (1984))). See generally *Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. Rev. 941 (1986); *Waldo, supra* note 122, at 313-26.

286. See *State v. Jenkins*, 15 Ohio St. 3d 164, 193-94, 473 N.E.2d 264, 291-92 (1984) (rejecting a claim under state and federal constitutions that the indigent capital defendant receive services of court-appointed social scientists to assist in jury selection, in evaluating pretrial publicity in conjunction with change of venue motion, and to assist in challenge to death qualified jury), *cert. denied*, 472 U.S. 1032 (1985); cf. *Adams v. State*, 259 Ind. 64, 95-96, 271 N.E.2d 425, 442 (1971) (DeBruler, J., concurring in part and dissenting in part) (vacating the death penalty) (arguing that impoverished defendants do not get equal representation in capital cases), *rev'd in part on reh'g*, 259 Ind. 164, 284 N.E.2d 757 (1972). But see *Ake v. Oklahoma*, 470 U.S. 68 (1985) (recognizing a federal due process right to psychiatric assistance at guilt determination and sentencing phase for indigent capital defendant). See generally *Culver & Wold, supra* note 39, at 86 (noting some of the assistance provided capital defendants in California by virtue of California Supreme Court rulings).

impermissible measure of arbitrariness.<sup>287</sup> Right to counsel claims, specifically that a capital defendant has rights to constitutionally effective counsel<sup>288</sup> and to counsel to pursue postappeal challenges to capital convictions and sentences,<sup>289</sup> also may be pursued under both state and federal constitutions.

Some state constitutions prescribe precisely how legislation must be introduced and enacted in state legislatures to become effective. Challenges have been pressed in a few states on grounds that capital punishment statutes have been adopted in violation of these provisions. State supreme courts have rejected these claims on their facts,<sup>290</sup> although in theory they remain viable upon a proper foundation. Oregon's constitutional prohibition against waiving trial by jury in capital cases<sup>291</sup> is another example of a state claim without a close federal con-

287. *But see, e.g.,* *California v. Ramos*, 463 U.S. 992 (1983) (rejecting the claim that capital jury instruction concerning the governor's authority to commute a sentence of "life imprisonment without parole" to a prison sentence with parole eligibility violated the eighth and fourteenth amendments); *People v. Ramos*, 37 Cal. 2d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984) (holding on remand that the same instruction violated the state constitution on due process grounds); *see also Jenkins*, 15 Ohio St. 3d at 201-03, 473 N.E.2d at 297-99 (following *California v. Ramos* on similar issue raised under the state constitution).

288. The Supreme Court has required no more stringent standards for effective assistance of counsel in capital cases than in noncapital cases under the federal constitution, and has applied such standards in rather lax fashion. *See Burger v. Kemp*, 483 U.S. 776 (1987); *Strickland v. Washington*, 466 U.S. 668 (1984). Adequate representation for capital defendants is a particularly acute problem. *See supra* notes 52-53 and accompanying text.

289. The Supreme Court has refused to recognize a federal constitutional right to court appointed counsel for the representation of state death row inmates who challenge their capital sentences or convictions in state habeas corpus proceedings. *See Murray v. Giarratano*, 109 S. Ct. 2765 (1989). There is generally no federal constitutional right to counsel beyond the defendant's direct appeal in the state courts. *Ross v. Moffitt*, 417 U.S. 600 (1974). *See generally* Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U.L. Rev. 513 (1988).

290. *See, e.g., Hatch v. State*, 662 P.2d 1377, 1383-84 (Okla. Crim. App. 1983) (rejecting the claim that the capital punishment act violated a state constitutional provision requiring that "[e]very act of the [l]egislature shall embrace but one subject, which shall be clearly expressed in its title" (quoting OKLA. CONST. art. 5, § 57)), *appeal after remand*, 701 P.2d 1039 (Okla. Crim. App. 1985), *cert. denied*, 474 U.S. 1073 (1986); *State v. Pritchett*, 621 S.W.2d 127, 136-37 (Tenn. 1981) (rejecting state constitutional challenge that death penalty legislation was not read and passed by each house of Tennessee legislature on three separate days); *Marquez v. State*, 725 S.W.2d 217, 234-35 (Tex. Crim. App. 1987) (rejecting the claim that the state constitution was violated in that the caption upon proposed capital punishment legislation failed to give fair notice of the contents of the bill).

291. The Oregon Constitution provides:

In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury . . . ; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise . . . .

OR. CONST. art. I, § 11.

stitutional analogue. This provision gave rise to a heated dispute in the Oregon Supreme Court about whether judgment could properly be entered upon a defendant's plea of guilty to a capital crime, a practice ultimately approved by the state tribunal.<sup>292</sup>

Allegations that state death penalty statutes, or their administration, violate the provisions of particular state constitutions are too diverse and complex to consider specifically for the thirty-six states that presently authorize capital punishment.<sup>293</sup> We can do little more than suggest the general types of challenges that might be developed under the unique textual provisions, historical circumstances, and policy considerations relevant to state constitutional interpretation within current death penalty jurisdictions. The specifics of such challenges must be left to lawyers who are willing to explore state constitutional issues exhaustively and to social science researchers who will collaborate in generating or uncovering relevant empirical data.

#### IV. CONCLUSION

The renaissance of state constitutions as important sources of personal liberties and related procedural protections corresponds with the Supreme Court's landmark federal constitutional capital punishment decisions of the early and mid-1970s. In a series of cases the Justices alternatively invalidated standardless capital sentencing legislation across the land<sup>294</sup> and upheld schemes that narrowed the range of capital crimes and provided standards to guide the exercise of sentencing discretion.<sup>295</sup> The doctrinal legacy of the High Court's approval of such "guided discretion" legislation is strained,<sup>296</sup> perhaps to the breaking

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292. *Wagner*, 305 Or. at 115, 752 P.2d at 1136.

293. One state case, however, deserves special mention. The Massachusetts Supreme Judicial Court invalidated capital punishment legislation on the ground that the procedures impermissibly burdened the accused's right to trial by jury and against compelled self-incrimination under part 1, article 12 of the Massachusetts Constitution. *See Commonwealth v. Colon-Cruz*, 393 Mass. 150, 470 N.E.2d 116 (1984). The legislation was interpreted to allow the death penalty only after trial by jury, and not after conviction upon a guilty plea. The result was to discourage capital defendants from pleading not guilty and exercising their jury trial rights, according to the court, analogously to the procedures condemned on federal constitutional grounds in *United States v. Jackson*, 390 U.S. 570 (1968). Massachusetts thus does not have valid death penalty legislation, notwithstanding a 1982 amendment to the state constitution that declared capital punishment to be not inconsistent with that document's provisions. *See MASS. CONST.* pt.1, art. 26; *see also supra* note 118.

294. *See Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); *see also supra* notes 25-27 and accompanying text.

295. *See Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality decision); *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality decision); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality decision); *see also supra* notes 31-35.

296. *See supra* notes 187-93 and accompanying text.

point, and fundamentally unworkable.<sup>297</sup> In 1987 the Court came within a single vote of dismantling the very system it had upheld in principle over a decade earlier as four Justices were convinced that post-*Furman* statutory reforms had failed to eradicate serious problems of discrimination and arbitrariness in the administration of the death penalty.<sup>298</sup>

State supreme courts may not be as willing to tolerate the structural and procedural deficiencies in capital punishment legislation as has a majority of the United States Supreme Court. They may be persuaded for a number of reasons that state constitutions permit or require them to diverge from the judicial gloss Supreme Court precedent attaches to the eighth amendment. The Supreme Court is constrained by principles of federalism, its duty of fixing minimum constitutional standards for fifty individual states with tremendously varied histories and cultures, and by the inhibiting effect that federal constitutional adjudication has upon the states' abilities to adapt criminal laws and procedures to their unique needs.<sup>299</sup> State supreme courts can be responsive to the values and traditions reflected in state constitutional provisions<sup>300</sup> and to contemporary notions of fairness and decency in their states.<sup>301</sup> Further, their decisions are not so wide reaching and typically not so immutable as the decisions of the Supreme Court.<sup>302</sup>

Even if state courts choose not to deviate from federal doctrine,<sup>303</sup> much of capital punishment jurisprudence's dependence on facts and the consequent need to examine relevant empirical issues within state borders instead of national boundaries may cause them to resolve cases differently than would be suggested by federal precedent. Effective state constitutional litigation will demand that supporting information be compiled and brought to the attention of state court judges:<sup>304</sup> Does the death penalty appear to deter, or inspire, homicides within a state?<sup>305</sup> What is the likelihood that racial,<sup>306</sup> geographic,<sup>307</sup> or other legally irrelevant and impermissible factors within a jurisdiction influence capital prosecutions and sentences? What are public attitudes about

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297. See *supra* notes 194-203 and accompanying text.

298. See *McCleskey v. Kemp*, 481 U.S. 279 (1987); see also *supra* notes 59-62, 183-85, 204-18, and accompanying text.

299. See *supra* notes 138-41 and accompanying text.

300. See *supra* note 142 and accompanying text.

301. See *supra* notes 132-37 and accompanying text.

302. See *supra* notes 143-45 and accompanying text.

303. See generally *supra* notes 157-81 and accompanying text.

304. See *supra* note 85 and accompanying text.

305. See *supra* note 134 and accompanying text; see also Bowers, *The Effect of Executions is Brutalization, Not Deterrence*, in *CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES* 49 (K. Haas & J. Inciardi eds. 1988).

306. See *supra* notes 135, 208-210, and accompanying text.

307. See *supra* notes 209, 211, and accompanying text.



the death penalty within a state, and how are these attitudes most appropriately measured?<sup>308</sup> What proportion of the population eligible for jury duty will be excluded from capital jury service based upon opinions about the death penalty, and to what extent will the death qualification of jurors exclude minorities or women from capital juries?<sup>309</sup> How frequently have innocent persons been placed at risk of execution within a state?<sup>310</sup> These and other social fact issues<sup>311</sup> will require individual investigation and analysis within the several states and may lead to different conclusions than when national attitudinal and other data are aggregated and averaged to produce a federal norm.

Lawyers who commence death penalty litigation must shift from a jurisprudence dominated by "vertical federalism" to one of "horizontal federalism." The former represents the traditional federal constitutional model with the United States Supreme Court at the top of the judicial hierarchy and its decision binding the state courts in matters within its jurisdiction.<sup>312</sup> Horizontal federalism, as the term implies, describes a process by which the several state courts seek guidance from federal decisions and the case law of other states but are not bound to follow the reasoning or precedent of other jurisdictions.<sup>313</sup> State constitutional analysis is within this paradigm. It assumes the essential independence of jurists, litigants, and researchers in the respective states but also requires their intercommunication.<sup>314</sup>

State constitutions are remarkably diverse in their textual provisions, traditions and histories, and in the values that they reflect. Capital punishment is similarly complex in the variety of statutes used in its implementation, its history and objectives, and the numerous details of its administration. Related empirical issues are compound and variable across jurisdictions. No single writing can do more than scratch the surface of the topic of state constitutions and capital punishment, and we

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308. See *supra* notes 132, 154-60, and accompanying text.

309. See *supra* notes 136, 246-52, and accompanying text.

310. See *supra* note 156 and accompanying text.

311. Additional social fact issues that bear on the imposition of the death penalty include the adequacy of the capital defense bar, the representation and assistance provided indigents, and perhaps the cost of administering the death penalty. See *supra* notes 53, 214, 286, 288, 289, and accompanying text.

312. See G. TARR & C. PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 5-27 (1988); Porter & Tarr, *Introduction*, in *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* at xi, xix-xx (M. Porter & G. Tarr eds. 1982).

313. See G. TARR & C. PORTER, *supra* note 312, at 27-40; Porter & Tarr, *supra* note 312, at xxi-xxii.

314. See generally Collins, *supra* note 8, at 408-13; *id.* at 413 (contending that "[h]orizontal influence, or inter-state communication, is likely to become the reality of the 1980's"); Pollock, *supra* note 68, at 992 (asserting that "[h]orizontal federalism, a federalism in which states look to each other for guidance, may be the hallmark of the rest of the century").

do not purport to have done so here.<sup>315</sup> Our examination is merely preliminary if for no other reasons than the accelerating pace at which state constitutional doctrine and analysis is likely to advance in the immediate future and the empirical questions that await answer within jurisdictions as the death penalty moves from abstract legislation to actual application. It is our hope that this review will at least be useful in stimulating the legal debate and systematic research that must precede informed state constitutional interpretation, and in encouraging judges, lawyers, and social scientists to undertake and follow through upon such endeavors in developing state capital punishment jurisprudence.

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315. We note, however, exhortations to prepare and pursue state constitutional claims generally. See, e.g., *State v. Jewett*, 146 Vt. 221, 223-24, 500 A.2d 233, 235 (1985). The court challenged that: "This generation of . . . lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and flow." *Id.* At the same time the opinion cautioned against resorting to the state constitution simply to evade Supreme Court precedent: "Our decisions must be principled, not result-oriented." *Id.*; see Abrahamson, *supra* note 8, at 1144. One commentator contends that "[s]tate courts' reliance on state constitutional criminal law is one of the most dynamic and interesting phenomena to occur in state law in years. It presents a challenge to lawyers and judges because a new major field of law is being staked out." *Id.* Arguing in support of state constitutional law, another scholar stated:

The subject of state constitutional law demands the best legal thinking because "what state courts produce is at least partially a function of what commentators and litigants expect them to produce." The bar, the bench, and legal scholars must give state constitutional law, both comparative and state-specific, the attention it merits. Williams, *supra* note 74, at 227-28 (footnotes omitted) (quoting Project Report, *Toward an Activist Role for State Bills of Rights*, 7 HARV. C.R.-C.L. L. REV. 271, 320 (1973)).

