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Charles W. Thomas

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I. INTRODUCTION

American legal history is replete with challenges to the soundness and application of statutes providing for the imposition of the death penalty. Although many challenges are based on the contention that the particular method of punishment is violative of eighth amendment guarantees,[1] the Supreme Court has dealt only recently with the more troublesome claim that capital punishment constitutes cruel and unusual punishment per se.[2] For example, in *Furman v. Georgia*[3] the Court struck down two capital punishment statutes, holding that the potential for discriminatory imposition of the death penalty rendered them violative of the eighth and fourteenth amendments. Many assumed prematurely that *Furman* sig-

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*Associate Professor of Sociology, Bowling Green State University. B.S., McMurry College, 1966; M.A., 1969, Ph.D., 1971, University of Kentucky.

1. *See, e.g.*, Louisiana v. Resweber, 329 U.S. 459 (1947); *In re* Kemmler, 136 U.S. 436 (1889); Wilkerson v. Utah, 99 U.S. 130 (1878).

2. The number of opportunities that the Supreme Court has had to confront directly the issue whether capital punishment is unconstitutional per se is difficult to determine. The issue was avoided effectively until Furman v. Georgia, 408 U.S. 238 (1972), but even in that case only Justices Brennan and Marshall addressed the argument that capital punishment is a violation of the eighth and fourteenth amendments in and of itself. Justices Douglas, Stewart, and White concurred with the conclusions of Justices Brennan and Marshall, but they carefully avoided suggesting that the death penalty could not be imposed under any circumstances by focusing upon the manner in which the statutes under consideration were applied, rather than upon the broader concerns addressed by Justices Brennan and Marshall.

3. *Id.*

naled the abolition of capital punishment, but subsequent opinions in *Gregg v. Georgia*,[4] *Profitt v. Florida*,[5] and *Jurek v. Texas*[6] upheld the constitutionality of post-*Furman* death penalty statutes, making clear the Court's unwillingness to view capital punishment as an inherent affront to eighth amendment protections.

In the aftermath of *Gregg* and a controversial execution in Utah, the future of capital punishment in the United States is uncertain. The confusion is in part a product of a lack of clarity in the opinions of individual Supreme Court members and the aversion of some of the Justices to assuming or limiting legislative prerogatives.[7] Furthermore, the ultimate determination of the constitutionality of the death penalty will not turn necessarily on its compatibility with contemporary understandings of the eighth amendment.[8] Notwithstanding this uncertainty, no one would question the contention that challenges to particular statutes will continue to flow

4. 428 U.S. 153 (1976).

5. 428 U.S. 242 (1976).

6. 428 U.S. 262 (1976).

7. As will be further detailed in subsequent sections of this analysis, the strain between attempting to guarantee fundamental rights and avoiding any improper intrusion on the presumed powers of the legislative and executive branches remains considerable. Capital punishment cases often bring this strain into particularly sharp relief, frequently in a very personal manner. Justice Blackmun, dissenting in *Furman*, provided an eloquent illustration when he observed:

> Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. . . . It is antagonistic to any sense of "reverence for life."
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> . . . .
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> Were I a legislator, I would do all I could to sponsor and vote for legislation abolishing the death penalty. And were I the chief executive of a sovereign State, I would be sorely tempted to exercise executive clemency . . . . [But these powers] *should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue.*

Id. at 405-06, 410 (emphasis added).

8. Although *Furman* and *Gregg* have stimulated interest in eighth amendment challenges, and while the protection against cruel and unusual punishment formed the basis of early capital punishment cases, *see* note 1 *supra*, other contemporary cases have taken radically different approaches. For example, in Crampton v. Ohio, 402 U.S. 183 (1971), the Court rejected the contention that the absence of a bifurcated trial procedure was unsound; *but see* note 32 *infra* and accompanying text; in McGautha v. California, 402 U.S. 183 (1971), the Court rejected the related argument that the standardless discretion permitted juries in capital cases violated due process rights; *but see* note 32 *infra* and accompanying text; in Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court reversed the lower court decision because of the improper method of jury selection that resulted in the systematic exclusion of veniremen "who shall, on being examined, state that [they have] conscientious scruples against capital punishment, or that [they are] opposed to the same." *Id.* at 512.

from the deceptively simple premise, grounded on the landmark decisions in *Weems v. United States*[9] and *Trop v. Dulles*,[10] that any death penalty statute, however carefully constructed and applied, violates the eighth and fourteenth amendments.

In light of the Court's recent holding in *Gregg v. Georgia*, future death penalty challenges almost certainly will focus upon the type and quality of evidence available to serve as "objective indicia that reflect the public attitude toward a given sanction."[11] Unfortunately, the "objective indicia" that can be relied upon and the manner in which they are to be weighted is not altogether clear. In *Gregg*, for example, the Court emphasized such traditional considerations as legislative enactments, decisions rendered by juries, and the single post-*Furman* referendum on the death penalty.[12] Additionally, evidence pertaining to the determinants of public support for capital punishment, as opposed to simpler assessments of the amount of support existing at any point in time, also was viewed as relevant.[13]

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9. 217 U.S. 349 (1910). In *Weems* the Court found that a 15 year jail term imposed upon a public official convicted of falsifying public documents was a cruel and unusual punishment. In reaching his decision, Justice McKenna reviewed punishments imposed for other crimes and determined that the severity of the sentence under attack was not justified by the crime that had been committed. As the court stated,

> [T]his contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.

Id. at 381.

10. 356 U.S. 86 (1958). In *Trop* petitioner sought reversal of his expatriation imposed following his conviction by court-martial for wartime desertion. Finding that the existence of the death penalty as a potential sanction for wartime desertion did not automatically warrant the imposition of any lesser penalty, the Court determined that expatriation violated the safeguards imposed by the eighth amendment. In so holding, the Court stated that:

> While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.

Id. at 100.

11. 428 U.S. at 173.

12. *Id.* at 179-83.

13. For example, Justice Stewart observed in the plurality opinion in *Gregg* that:

> 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 absense of more convincing evidence*, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

The willingness of those concerned with eighth amendment capital punishment challenges to consider behavioral scientific research on determinants of public support for the death penalty provides the stimulus for the analysis presented in this Article. The thesis to be advanced may be summarized simply: there is ample reason to believe that public support for capital punishment is associated with two pervasive beliefs. The first is a belief that some kinds of behavior are sufficiently offensive to fundamental moral standards that death is an appropriate punishment, regardless of whether it serves any other end. Although philosophers make finer distinctions, this justification for capital punishment essentially is retributive. The second justification, which places less emphasis on whether a sanction is just or unjust in some abstract sense, reflects a belief that the death penalty serves to deter potential offenders from engaging in criminal behavior. This perspective on punishment can be viewed as utilitarian.

Although the question has never been posed directly,[14] prior research suggests that the utilitarian and retributive perspectives might be linked to one another. In other words, those who subscribe to utilitarian beliefs regarding punishment also are prone to hold retributive sentiments.[15] If this premise is tenable, properly conducted research should yield two sets of relationships. First, those who are *either* most retributive *or* most utilitarian in their attitudes toward punishment also should be supportive of capital punishment. Second, those who hold *both* strongly retributive *and* strongly utilitarian attitudes should be more likely to support the death penalty. To the extent that there is objective, empirical support for these implications, serious questions arise concerning the constitutionality of capital punishment under the current standards for evaluating eighth amendment challenges. Although the Supreme

Id. at 186-87 (emphasis added). As is noted throughout the discussion, there is no clear standard by which the Court presently evaluates exactly what evidence it might view as convincing. Nevertheless, for reasons detailed more thoroughly in the text of this analysis, there is substantial reason to believe that measures of public opinion and the foundations for that opinion are of direct relevance.

14. The general issue, however, has been dealt with elsewhere. *See, e.g.*, C. THOMAS & A. MASON, CORRELATES OF PUBLIC SUPPORT FOR CAPITAL PUNISHMENT (1978); Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment*, 976 WIS. L. REV. 171; Thomas, *A Sociological Perspective on Public Support for Capital Punishment*, 45 AM. J. ORTHOPSYCHIATRY 641 (1975); Thomas & Howard, *Public Attitudes Toward Capital Punishment*, J. BEHAVIORAL ECON. (Summer 1977).

15. *See, e.g.*, Sarat & Vidmar, *supra* note 14; Thomas, Perceptions of Crime, Punishment, and Legal Sanctions (1976)(unpublished paper presented to American Society of Criminology, Tuscon, Arizona).

Court has recognized that retribution is a legitimate rationale for punishment,[16] it also has held that retribution is neither a sufficient nor a dominant justification.[17] Similarly, while deterrence is both an obvious and a proper goal of any legal sanction, the deterrent effect of capital punishment upon homicide, the only offense the Court has viewed or appears likely to view as deserving of a death sentence,[18] remains undetermined. The preponderance of the evidence reveals no deterrent impact whatsoever, and none of the evidence indicates any effect that could not be obtained by a less severe sanction.[19] Thus, even if one assumes that private citizens are familiar with this very technical body of research, he would have to conclude that their sentiments are neither consistent with the findings of that literature nor a product of fully or even adequately informed opinion.

The analysis to be presented in this Article focuses upon data obtained from a randomly selected sample of the heads of more than three thousand households in a Virginia metropolitan area. The goal of that analysis is to determine the extent to which retributive and utilitarian sentiments are interrelated and, more important, to evaluate the role these sentiments play in determining support for capital punishment. Before presenting this analysis, however, an overview of the issues this kind of research raises will be presented in order to highlight distinct differences in the Supreme Court's past interpretations of the role of the eighth amendment.

II. The Supreme Court and the Eighth Amendment

Challenges to the death penalty that are based upon the contention that capital punishment is unconstitutional per se are of

16. Gregg v. Georgia, 428 U.S. at 183.

17. The impact of previous cases may reasonably be interpreted in this manner. The implication is stated clearly, for example, in Williams v. New York, 337 U.S. 241, 248 (1949): "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

18. *See* note 32 *infra* and accompanying text.

19. Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 170 (1975); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187 (1975); Schuessler, *The Deterrent Effect of the Death Penalty*, 284 Annals 54 (1952). *Contra*, Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 Am. Econ. Rev. 397 (1975). Although the notion that the death penalty may serve both the goals of retribution and deterrence runs through *Gregg* and other contemporary cases, the Court has not gone so far as to hold that an obligation exists to employ less severe punishments when they would be equally effective. Thus, as the Court stated in *Gregg*, "We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." 428 U.S. at 175.

recent vintage. The issue was posed in *Furman,* however, and although the Court did not treat the issue definitively, two very different perspectives were brought into sharp relief. These perspectives have been referred to elsewhere as the "analytic" and the "normative" views of the eighth amendment.[20] Although these views are not at odds with each other on every point, they vary sufficiently to warrant separate treatment.

The first viewpoint, which the Supreme Court finds more attractive, "interprets the eighth amendment by finding its meaning in other provisions of the Constitution and seems to deprive that Amendment of any 'independent potency.'"[21] This approach formed the basis for the opinions of Justices Douglas, Stewart, and White in *Furman v. Georgia,*[22] and led Justice Douglas to observe that "these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[23] Thus, in striking down the particular statutes under review, these Justices interpreted the eighth amendment by looking to due process and equal protection considerations.

The alternative perspective attributes a far more independent status to the eighth amendment. This normative method, which takes *Weems v. United States*[24] and *Trop v. Dulles*[25] as its primary

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20. Sarat & Vidmar, *supra* note 14.

21. *Id.* at 173.

22. 408 U.S. at 240-57, 306-10, 310-14.

23. *Id.* at 256-57.

24. *Weems* contains particularly clear language regarding the need for avoiding a static interpretation of constitutional protections. In that case, Justice McKenna noted that:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions . . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

217 U.S. at 373.

25. *Trop* provides a similarly clear statement of the position advanced in *Weems.* Chief Justice Warren argued that:

> The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. *If we do not, the words of the Constitution become little more than good advice.*

356 U.S. at 103-04. (emphasis added).

antecedents, considers whether a punishment is offensive to contemporary public sentiments and standards of decency. For example, Justice Brennan, concurring in *Furman,* stated, "A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity."[26] Justice Brennan further noted that, "Indeed, the likelihood is great that [the statutory availability of] the punishment is tolerated only because of its disuse. The objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals."[27] Similarly, Justice Marshall argued in his concurring opinion that "where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it . . . . There are no prior cases in this Court striking down a penalty on this ground, but the very notion of changing values requires that we recognize its existence."[28] On this basis he later concludes that "even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history."[29] Unlike the other members of the majority, Justices Brennan and Marshall attached independent significance to eighth amendment guarantees and concluded that a punishment that is "cruel and unusual" in the eyes of society should be deemed unconstitutional.

In short, clear differences arise in the standards and kinds of evidence that are likely to play a determinative role when one compares opinions representative of the analytic and normative positions on the eighth amendment.[30] To the extent that the analytic method, which is reflected in the concurring opinions of no less than three members of the *Furman* Court, relies heavily on notions of equal protection and due process in attributing meaning to the eighth amendment, any constitutional infirmities in death penalty statutes can be remedied by legislation. Indeed, by the time *Gregg* was decided in July 1976, at least thirty-five state legislatures and

26. 408 U.S. at 277.
27. *Id.* at 300.
28. *Id.* at 332.
29. *Id.* at 360.
30. Sarat & Vidmar, *supra* note 14; White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment,* 13 DUQ. L. REV. 279 (1974).

Congress had responded to *Furman* with revised death penalty statutes. Although many of these newly-enacted statutes will be challenged, the current Supreme Court likely will rule favorably on the constitutionality of nonmandatory[31] capital punishment for some degrees of homicides if the statutes, at a minimum, provide for (1) a bifurcated trial on the issues of guilt and punishment; (2) a precise statutory specification of aggravating circumstances; (3) the admission during the determination of the appropriate sentence of far less precise information on possible mitigating circumstances; and (4) an automatic review of all death sentences.[32]

In contrast, proponents of the normative position will not be influenced by procedural adjustments. Justice Brennan, dissenting in *Gregg,* argued that:

> This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society.
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> . . . .
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> . . . I would set aside the death sentences imposed . . . as violative of the Eighth and Fourteenth Amendments.[33]

Consequently, those whose opposition to capital punishment is based on a normative analysis will not be satisfied by legislative adjustments designed to meet the objections of the *Furman* plurality.

Recent capital punishment decisions present a dilemma to sociologists of law who have examined the issues posed by the analytic and normative interpretations of the role of the eighth amendment. The issues presented by decisions such as *Furman* and *Gregg* provide ample support for the belief that scientific behavioral research has a direct bearing on many of the questions placed before the Supreme Court. For example, the determination whether capital punishment serves a legitimate state interest through deterring potential offenders is a question properly resolved through empirical

31. See Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), for recent discussions of the status of mandatory statutes.

32. Although one or more of these requirements are contrary to some relatively recent decisions of the Supreme Court, each seems consistent with the views expressed in *Gregg. See, e.g., McGautha v. California* and *Crampton v. Ohio.* For a more thorough discussion of the standards now employed by the Court, see Davis, *Constitutional Issues Involved in Post-Gregg Capital Litigation* (1976)(unpublished address at the NLADA Convention).

33. 428 U.S. at 229, 231.

research rather than through traditional legal scholarship. Similarly, the issue whether the "dynamic" character of the eighth amendment described in *Weems* and *Trop* supports challenges to the death penalty because that sanction constitutes an affront to contemporary standards of morality also requires empirical data rather than legal precedent. The opinions delivered by the Supreme Court provide very few guidelines for measuring public sentiment toward capital punishment, however, and those the Court does present are ambiguous. Two responses to this dilemma are possible. The obvious response is to deal separately with the analytic and normative perspectives. Through this framework, one line of empirical research might address the manner in which capital punishment statutes are applied. In this vein, the *Furman* holding, as interpreted in *Gregg*, is particularly relevant: "In order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."[34] This approach directs attention to the actual operation of the criminal justice system, rather than to the apparent intent or structure of legislative enactments or judicially imposed procedural constraints. The opinions in *Furman* and *Gregg* clearly suggest that any law having the effect in actual practice of depriving defendants of their right to due process and equal protection through the arbitrary, capricious, or discriminatory imposition of the death sentence violates the eighth and fourteenth amendments.[35]

A second line of research would consider various facets of "evolving standards of decency that mark the progress of a maturing society."[36] Rather than focusing upon procedural matters, this line of analysis assesses public sentiment toward the death penalty and, following the so-called "Marshall Hypothesis,"[37] draws a distinction between public preferences and informed public opinion.[38] Hard empirical evidence on actual effects might be determinative to those adopting the analytic position on the eighth amendment, while data

34. *Id.* at 199.

35. For example, in *Gregg* Justice Stewart argued that, "Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Id.* at 188.

36. Trop v. Dulles, 356 U.S. at 101.

37. Sarat & Vidmar, *supra* note 14, at 194-96.

38. *See also* Furman v. Georgia, 408 U.S. at 314, 371; Gregg v. Georgia, 428 U.S. at 232, 240.

concerning public opinion would be no less important to those advocating the normative position.

Although devoting separate attention to the analytic and normative positions on the eighth amendment has obvious advantages, two potentially damaging flaws emerge. First, discrete analysis might result in research that has little influence on the opinion of the majority of the Court because it focuses narrowly on the special concerns of particular Justices. A recent and important study reported by Sarat and Vidmar,[39] for example, provides a rather sophisticated empirical test of the position advanced by Justice Marshall in *Furman.*[40] This study considered not only whether the subjects of the sample supported capital punishment, but went beyond that general assessment to evaluate the extent to which such opinions were based on objective information and the effect of exposure to additional information about capital punishment on those opinions.[41] The study was cited by Justice Marshall in his dissenting opinion in *Gregg,*[42] but the other members of the Court did not consider crucial Justice Marshall's contention that fully informed citizens would share his feeling that the death penalty is inherently violative of the eighth amendment. Thus, the Sarat and Vidmar study, while contributing to scholarly research in this area, apparently was framed in such a way that it appealed only to the concerns of Justice Marshall and, perhaps, Justice Brennan.

A second, more general problem with a separate focus is its implication that no common thread runs through the opinions of a majority of the Court. While this may be true, a review of *Furman, Gregg,* and their respective companion cases suggests a possible common denominator. In the course of reaching contrary conclusions in *Gregg,* those Justices employing either the analytic or normative views examined essentially similar evidence, with particular emphasis on the relevance of public sentiment. The former group found that Florida, Georgia, and Texas had remedied the defects

39. Sarat & Vidmar, *supra* note 14.

40. 408 U.S. at 314-16.

41. The "Marshall Hypothesis" posits that if citizens were fully informed about the application and utility of the death penalty they would not support it. Thus, after determining levels of support among those in their sample, Sarat and Vidmar exposed them to various kinds of information about capital punishment. Although the results of their analysis are too complex to outline fully, the study does show that attitudes toward the death penalty are influenced, among other considerations, by information regarding the utility of that punishment. This, in turn, provides a basis for Justice Marshall's contention that support for the death penalty would be far less pronounced if the public fully understood its effects.

42. 428 U.S. at 232.

found objectionable in *Furman,* while the latter held to the view that "the American people, fully informed as to the purposes of the death penalty and its liabilities, would . . . reject it as morally unacceptable."[43] The consideration contributing most heavily to the division of the Court is the majority's unwillingness to contradict the trend of post-*Furman* legislative enactments and the apparent willingness of juries to support the death penalty on the basis of the available evidence. This hesistancy is expressed clearly in the plurality opinion in *Gregg:*

> A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience.[44]

Those adhering to the normative view, on the other hand, arrive at a contrary conclusion: "[T]he punishment of death, for whatever crime and under all circumstances, is 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments to the Constitution."[45] In so holding, this group does not ignore the relevance of traditional evidence of public opinion such as legislative enactments. Rather, this group attributes its findings both to the continuing strain between the eighth amendment and legislative decisions of the sort emphasized in *Trop v. Dulles*[46] and to the greater weight it is willing to assign to less traditional measures of public opinion such as contemporary empirical research.

Consequently, a majority of the Court, all of whom personally are opposed to capital punishment,[47] shares the conviction that supportive public opinion is a necessary, but not sufficient, condition for holding the death penalty constitutionally sound. A plurality finds no compelling evidence for challenging the prerogatives of legislative bodies or the outcomes of other "democratic processes." In the absence of such evidence and in light of the statutory and procedural remedies enacted following *Furman,* the plurality apparently feels bound to uphold the constitutionality of limited impositions of capital punishment. This reluctance, however, does not

43. *Id.*
44. *Id.* at 176.
45. *Id.* at 229.
46. *See, e.g.,* the remarks by Chief Justice Warren quoted in note 24 *supra.*
47. The personal sentiments of the individual Justices were most clearly revealed in *Furman* because each Justice prepared a separate opinion discussing his views of the case and the larger issues. *See* note 7 *supra.*

establish that the Court would find unpersuasive an accumulation of new evidence regarding public sentiment.

The data presented in this Article is relevant to the extent that this assessment of the underlying logic of the *Gregg* decision is valid. Moreover, if support for capital punishment is found to be the product of either an unreasonable perception of its efficacy or an undue emphasis on retribution, and if those with a more realistic assessment of the deterrent impact and those with less retributive motives are found to be unwilling to support so extreme a penalty, then the conclusion that capital punishment violates the eighth and fourteenth amendments must be addressed. Whether these considerations do provide the basis of current public support for capital punishment is an empirical question. The important issues cannot be resolved through speculation, examination of legislative enactments, or evaluation of public opinion poll data that focus narrowly on the relatively simple determination of the proportion of the public that favors some kind of death penalty. The balance of this Article is devoted to presenting the results of survey research conducted after the *Furman* decision, but in advance of *Gregg*, that sought to identify the determinants of public support for capital punishment.

III. Research Design and Methodology

The data presented in this Article were obtained during the winter of 1973-1974 as part of a larger survey research project conducted in the Norfolk, Virginia, Standard Metropolitan Statistical Area. The heads of the households in the four cities comprising the bulk of the metropolitan area (Chesapeake, Portsmouth, Norfolk, and Virginia Beach, Virginia) were the "targets" of a systematic random sample drawn from the current telephone directory. As often occurs in research of this variety, many of those in the sample no longer resided at the listed addresses, but 7,229 households were contacted.[48] Properly completed questionnaires were returned by 3,334 citizens, 46.12 percent of those contacted. This rate of return is well within the acceptable range for surveys of this type, but the

48. Every reasonable effort was made to maximize the return rate in the survey. Each respondent received a contact letter in which the goals of the study were outlined briefly and the cooperation of each potential respondent was encouraged. Shortly thereafter, each received both a blank questionnaire and a business return envelope. If the questionnaire was not returned promptly, each respondent received a reminder letter. If there was still no response, a fourth mailing, which included another questionnaire and a business return envelope, was sent.

unavoidable problems that accompany mail surveys must be considered in interpreting the results of this analysis. Furthermore, the social and demographic characteristics of this sample indicate that those residents who were older, white, better-educated, and more affluent more frequently completed and returned questionnaires than did other individuals. This must be viewed as a systematic bias. This sampling distortion may have some advantages, however, because it over-represents those whose attitudes and values are of special relevance to the issues posed herein. The over-represented groups in this sample, for example, also are likely to be more politically active, to have more influence on legislative decisions, to occupy relatively influential positions in their communities, and to serve on juries.

A brief examination of the manner in which the major variables were measured is provided below:

Retributive Sentiments. Supreme Court opinions often do not reflect a satisfactory understanding of alternative justifications for punishment, and their perspective on retribution typically is the most glaring illustration of the problem. For example, both *Furman* and *Gregg* defined retribution as a constitutionally sound purpose for punishment, but based this determination on reasons having little relation to that purpose. The most obvious misconception is the apparent belief that "vigilante justice" and "lynch law" will emerge unless the "instinct for retribution" plays a role in the criminal justice system.[49] This argument comes very close to equating retribution with vengeance and has the "forward looking" character of the utilitarian perspective. It justifies the imposition of sanctions, not because they are just, but because their imposition has the desired effect of lessening the likelihood that citizens dissatisfied with legal methods will seek extra-legal methods of punishing offenders.[50] Defined in this fashion, retribution is really no more than another deterrence argument; legally putting offenders to death deters private citizens from doing so illegally.[51]

49. Gregg v. Georgia, 428 U.S. at 183.

50. As might be expected, not all of the members of the Court are responsive to this view. *See, e.g.,* Justice Marsball's dissent in *Gregg. Id.* at 237-39.

51. The preponderance of the available evidence demonstrates that the general deterrent efficacy of capital punishment is unsubstantiated. *See* note 19 *supra* and accompanying text. Similarly, there exists no persuasive documentation that either the availability or the imposition of capital punishment deters private citizens from exacting illegal vengeance. "Lynch law" clearly bas not become common during this century even though a progressive abandonment of the death penalty has occurred. *See also* Justice Marshall's dissent in *Gregg.* 428 U.S. at 231-41.

For purposes of this analysis, retributive sentiments reflect the belief that punishment of a guilty offender is a moral imperative—justice requires that the guilty be punished. A series of attitude scale items were designed to measure the degree to which the sample held these sentiments. To ensure that each item in the scale measured the same underlying attitudinal dimension, the initial pool of items was factor analyzed. Only items having a factor loading of at least .30 on the first factor of the unrotated factor matrix warranted inclusion in the final scale.[52] This method yielded a four-item scale having a mean of 16.22 and a standard deviation of 2.26. Higher scores on the scale thus reflect the presence of more retributive sentiments.[53]

Utilitarian Sentiments. Both prior research and common sense suggest that individuals are willing to impose sanctions because they believe that some useful purpose will result. No reasonable person would argue that human behavior is unresponsive to rewards and punishments. The issue, rather, is whether a particular punishment, the death penalty, will deter persons other than the offender from committing the specific conduct sought to be deterred. Herein lies the real problem, one that was handled in a most peculiar fashion in *Gregg.* Writing for the majority, Justice Stewart contended that, "We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent."[54] Although the preponderance of available research clearly supports the initial observation, no study either addresses or supports the second position. Thus the observation that the utility "of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures" is most ineffective.[55] If the decisions of reasonable people turn on the available evidence, only two decisions

52. The statistical method is quite complex, but no detailed discussion is necessary in this Article. Suffice it to say that factor analysis is one of several techniques that commonly are employed in the construction of attitude scales, and each reflects a concern with ensuring that the items included in an attitudinal measure reflect a single underlying variable.

53. In each of the attitude scales employed herein, respondents were asked to indicate their agreement or disagreement with a series of attitude items by means of a five-point continuum: strongly agree, agree, uncertain, disagree, and strongly disagree. Examples of the items employed in the retributive sentiments scale include the following: "We have a moral obligation to punish people who break the law;" "There are certain kinds of behavior that are morally wrong and which must always be made illegal."

54. 428 U.S. at 185-86.

55. *Id.* at 186.

seem possible: either (1) the death penalty does not deter; or (2) the evidence does not warrant tolerating so extreme a sanction at this time if our willingness to do so hinges on the presumption that it deters offenders.

Public sentiment, of course, may or may not coincide with the preponderance of available objective evidence. Thus people may believe that the death penalty deters without regard to its actual effect. Previous research has demonstrated the thesis that those who believe that capital punishment does deter also will favor the death penalty even though the evidence supporting their belief is sparse.[56] These utilitarian sentiments are measured by a six-item attitude scale constructed in the same manner as the retribution variable. The final scale has a mean of 22.40 and a standard deviation of 4.33.[57] High scale scores reflect increasingly utilitarian sentiments.

Support for Capital Punishment. Regardless of how retributive or utilitarian those in the sample might be, many likely will stop short of endorsing capital punishment. They may, for example, view less extreme sanctions as adequately serving either or both goals. The present concern, however, is with assessing possible links between retributive sentiments, utilitarian beliefs, and support for capital punishment. Thus a separate measure of the sample members' support for retention and imposition of capital punishment was constructed in the fashion employed for the other two scales. The final scale includes five items, and the measure has a mean of 19.71 and a standard deviation of 4.90.[58] High scale scores on this measure reflect support for continued imposition of the death penalty.

IV. Analysis and Findings

Considerable care must be exercised in analyzing and interpreting this data. Previous research shows that retributive and utilitarian sentiments are unusual variables because they are pervasive themes in our culture and, as a result, constitute beliefs common

56. *See, e.g.,* the studies cited in notes 14 & 15 *supra.*

57. Examples of the items that comprise this scale include: "If judges would give longer sentences to criminals fewer of them would break the law again;" "A firm response to those who violate the law would soon reduce the crime rate in our society;" and "The more seriously we punish someone for a crime the less likely he will be to break the law again."

58. The items included in this scale include: "It's a good idea to use the death penalty once in a while just to remind people that we will not tolerate some kinds of behavior;" "I think we should have a mandatory death penalty for some types of very serious criminal offenses;" and "No offense is so serious that it deserves to be punished by death."

in virtually every segment of society.[59] Stated differently, the phenomenon is not one commonly encountered only by blacks or whites, males or females, and the less affluent or the more affluent. Consequently, neither these beliefs nor their consequences can be explained by reference to traditional sociological variables such as ethnicity, age, sex, or socioeconomic status. Moreover, these variables are not strictly antithetical sentiments; retributive individuals also are likely to be utilitarian.[60] Thus the present analysis requires three steps. The first is to examine how closely related these sentiments are among those in the sample. Attention then can be focused on the strength of the relationship between each belief and support for capital punishment. Finally, the most important question is which of the two beliefs is more significantly associated with support for capital punishment when the influence of the other belief is removed.

The third issue may be particularly difficult for those who are unfamiliar with multivariate analysis. The purpose of the multivariate analysis is to determine how closely retributive beliefs are linked to support for the death penalty when the influence of utilitarian beliefs is held constant, and conversely, how important utilitarian beliefs are in determining support for capital punishment when the effect of retributive beliefs is held constant. The outcome of this controlled analysis is of special importance in light of the Supreme Court's decisions since *Furman.* Recent Court opinions seem consistent with the notion that a desire for retribution may play a role, but not the dominant role, in the construction of a constitutional basis for the death penalty. If, however, retributive sentiments are found to be closely associated with, and possibly determined by, the belief that punishment serves as a deterrent, then a portion of the retributive motives necessarily would be the product of other attitudes that are inconsistent with the preponderance of the available evidence on deterrence.[61] Furthermore, to the extent that utilitarian sentiments play a major role, independent of retributive motives, in determining public support for the death penalty, support for capital punishment is partially the product of beliefs that are inconsistent with presently available objective evidence. In other words, the above findings would lead to the conclu-

59. *See, e.g.,* Thomas & Cage, *Correlates of Public Attitudes Toward Legal Sanctions,* 4 INT'L J. CRIM. & PEN. 239; Thomas & Mason, *supra* note 14.

60. Thomas, *supra* note 15.

61. *See* note 19 *supra* and accompanying text.

sion that some portion of those in the sample are willing to support capital punishment for reasons that are not based upon adequately informed opinions.

Table 1 provides statistical information relevant to the association between retributive and utilitarian sentiments. As expected, the two variables are rather strongly related to one another (gamma = .417). Even a superficial inspection of the percentages presented in the table attests to this fact. For example, 51.5 percent of those in the sample who fall into the least utilitarian quartile of the sample are also in the least retributive group, and only 13.4 percent of those who are least utilitarian had high scale scores on the retribution measure. Similarly, 53.4 percent of those in the most utilitarian group also fall within the most retributive segments of the sample, and only 13.1 percent of those in the highly utilitarian group had low scale scores on the retribution variable. Thus there is a strong tendency, which is statistically significant, for retributive persons also to embrace utilitarian sentiments. The converse also is true. Indeed, those who feel that punishment has a pronounced deterrent effect are over four times as likely to be highly retributive than those who feel that punishment is not a deterrent (53.4 percent versus 13.4 percent).

Table 1

The Relationship Between Retributive and Utilitarian Beliefs

		Utilitarian Beliefs			
		Weak →			Strong
Retributive Beliefs	Weak	51.5 (N=385)	34.3 (N=280)	23.3 (N=222)	13.1 (N=107)
		21.4 (N=160)	29.8 (N=243)	31.8 (N=303)	13.4 (N=109)
		13.8 (N=103)	17.9 (N=146)	20.4 (N=195)	20.1 (N=164)
	Strong	13.4 (N=100)	18.0 (N=147)	24.5 (N=234)	53.4 (N=436)
	Totals	100.1 (N=748)	100.0 (N=816)	100.0 (N=954)	100.0 (N=816)

Gamma = .417, X^2 = 583.41, α = .001

A more important issue, of course, is the influence of retributive and utilitarian sentiments upon support for capital punishment. This information is contained in Tables 2 and 3. Table 2 reveals a moderate association between retributive sentiments and support for capital punishment (gamma = .340) while Table 3 shows a much stronger relationship between utilitarian beliefs and support for the death penalty (gamma = .520). The pattern of the relationships is similar in both tables: as the magnitude of either retributive or utilitarian sentiments becomes stronger, support for capital punishment also increases. In Table 2, for example, we see that only 12.2 percent of those in the least retributive category strongly support the death penalty, but 42.7 percent of their most retributive counterparts voice strong support.

Table 2

The Relationship Between Utilitarian Beliefs and Support for the Death Penalty

		Retributive Beliefs			
		Weak →			Strong
Support for the Death Penalty	Weak	32.0 (N=318)	20.9 (N=170)	19.1 (N=116)	13.7 (N=126)
		28.7 (N=285)	33.4 (N=272)	22.5 (N=137)	13.0 (N=119)
		27.2 (N=270)	31.2 (N=254)	35.9 (N=218)	30.5 (N=280)
	Strong	12.2 (N=121)	14.6 (N=119)	22.5 (N=137)	42.7 (N=392)
	Totals	100.1 (N=994)	100.1 (N=815)	100.0 (N=608)	99.9 (N=917)

Gamma = .340, $X^2 = 400.96$, $\alpha = .001$

This trend is even more dramatically revealed in Table 3. That data shows that only 7.8 percent of those with low utilitarian scores strongly support capital punishment and that more than one-half (52.6 percent) of those with high scale scores also strongly support the death penalty.

Table 3

The Relationship Between Retributive Beliefs and Support for the Death Penalty

		Utilitarian Beliefs: Weak → Strong			
Support for the Death Penalty: Weak		45.6 (N=341)	23.9 (N=195)	14.6 (N=139)	6.7 (N=55)
		26.2 (N=196)	34.9 (N=285)	26.9 (N=257)	9.2 (N=75)
		20.5 (N=153)	30.0 (N=245)	38.5 (N=367)	31.5 (N=257)
Strong		7.8 (N=58)	11.2 (N=91)	20.0 (N=191)	52.6 (N=429)
Totals		100.1 (N=748)	100.0 (N=816)	100.0 (N=954)	100.0 (N=769)

Gamma = .520, X^2 = 903.04, α = .001

When examined together, the tables indicate that the public is willing to impose the death penalty because they believe that it is morally just and that it serves a useful purpose. Apparently, perceptions of utility play a more important role than retributive sentiments. Nevertheless, because these beliefs are fairly strongly related to one another, that conclusion would be premature without a more carefully controlled analysis. The reason for this caution is that, when the effect of either retributive or utilitarian beliefs is assessed while holding the other constant, the result is separate tables similar to Table 2 or Table 3 for each of the four categories of the controlled variable. Thus, in the case of the linkage between retributive sentiments and support for capital punishment, four "conditional tables," one for each level of the utilitarian beliefs scale, are constructed. The first table examines the association between retributive beliefs and support for capital punishment among those who are least utilitarian. The fourth assesses the same basic linkage, but this table includes only those persons with the highest utilitarian scale scores. A "conditional" measure of association, that is, the association between the independent and dependent variables, is computed under each condition of the variable being held

constant. If the independent variable under consideration has an influence on support for capital punishment independent of the variable being held constant, then the conditional associations should be very close to the original associations presented in Tables 2 and 3. To the extent that the conditional associations are weaker than the original association, the original relationship must have been a product of the relatively strong association between retributive and utilitarian beliefs. In addition, a single summary measure of the relationship between the independent and dependent variables can be obtained after removing the potentially confounding influence of the third variable. As with the conditional measures of association, this single summary measure, a partial correlation, will be roughly the same as the original correlation if the original relationship is not partly the product of the influence of the third variable. Although presentation of each of the eight conditional tables is not feasible here,[62] Table 4 provides each of the relevant conditional and partial correlations.

An inspection of Table 4 and the several contingency tables it summarizes provides clear support for one important conclusion. The moderate original relationship between retributive beliefs and support for capital punishment (gamma = .340) becomes weak (partial gamma = .182) when the influence of utilitarian sentiments is absent, but the strong initial linkage between utilitarian sentiments (gamma = .520) is not affected greatly when retributive beliefs are held constant (partial gamma = .470). Stated more simply, although the independent impact of retributive beliefs on support for capital punishment is relatively weak, the independent effect of utilitarian beliefs is substantial. Thus apparently those in the sample subscribing to retributive beliefs about punishment are not willing to support capital punishment unless they also believe that it serves some useful purpose—deterrence.

The separate conditional tables exemplify this result, the best example being a comparison of Table 2 and the conditional table relating retribution to capital punishment among those in the sample with the lowest scale scores on the utilitarian sentiments measure. Table 2 demonstrates that a majority of those who are most retributive, 51.0 percent, are quite willing to endorse capital punishment. Among those who are least utilitarian, however, only 20.0 percent of those who are most retributive remain willing to provide

62. A complete set of the tables on which this analysis is based, however, is available from the author upon request.

Table 4

Statistical Summary of the Controlled Analysis

Independent Variable	Dependent Variable	Original Gamma	Category of Control Variable With Conditional and Partial Gammas*
Retributive Beliefs	Capital Punishment	.340	1 = .271 2 = .119 3 = .190 4 = .168 Partial = .182
Utilitarian Beliefs	Capital Punishment	.520	1 = .521 2 = .421 3 = .492 4 = .437 Partial = .470

*In each segment of the table the first category and conditional measure of association refer to the least utilitarian and least retributive segments of the sample, the second category to those with somewhat higher levels of those sentiments, and so on.

similarly strong support for the death penalty. At the other end of the spectrum, the association between retributive beliefs and capital punishment among those who are most utilitarian dramatically increases: 59.2 percent of the most retributive sample members support capital punishment strongly.

The ultimate message of the relationships examined in the various tables is that retributive beliefs do correlate with a willingness to support the death penalty, but only when these notions of just punishment are bolstered by the complementary belief that the imposition of the death penalty will serve what they view as a useful purpose. Consequently, a clear majority of those who both subscribe to retributive beliefs and endorse utilitarian sentiments also support capital punishment, but their similarly retributive counterparts who do not view the punishment as a significant deterrent to crime exhibit far less support for the death penalty. The reverse, however, is not true. Subscription to utilitarian beliefs, with or without support from retributive sentiments, apparently is sufficient to produce support for capital punishment. Thus among the least retributive, but most utilitarian, in the sample, 45.8 percent remain highly supportive of the death penalty. Among those who are both most retributive and most utilitarian, 59.2 percent display strong support. In neither of these contexts does support for the death penalty among those who strongly endorse utilitarian beliefs become strikingly different from the original relationship shown in Table 3, where 52.6 percent of those with high utilitarian scale scores also supported capital punishment strongly.

V. Summary and Conclusion

The question remains whether these findings are of special relevance to those who are concerned, regardless of their personal predispositions on the topic, with the very real relationship existing between public opinion, the eighth amendment, and the constitutionality of the death penalty. With an issue as polemical as capital punishment, the common tendency is to select facts and to frame positions in a manner that precludes objective consideration of contrary evidence. Moreover, both proponents and detractors often make tautological assertions that are subject to neither confirmation nor refutation. Justice Marshall, for example, approached this pitfall in *Furman* and *Gregg* when he stated, in effect, that no reasonable, fully informed person would be willing to support the death penalty and that anyone voicing support must be either un-

reasonable or inadequately informed.[63] Subjective assessments of this nature are irrelevant to the analysis presented in this study. Presently, at least a majority of the Supreme Court and many with particular concern for the dilemma posed by the death penalty believe that existing evidence does not encourage the view that capital punishment is, at this point in history, inherently violative of the eighth and fourteenth amendments. Although Justices Brennan and Marshall steadfastly have rejected that conclusion, a majority of the Court, in the absence of any systematic evidence to the contrary, argued in *Gregg* that popular support for capital punishment is manifest in post-*Furman* legislation, jury decisions, and other "objective indicia that reflect the public attitude."[64] A proper analysis of the public's attitudes and the bases for them demands empirical research so that the Court may base its determinations upon more than mere speculation.

Unfortunately, no adequately precise statement can be found of the manner in which eighth amendment attacks on the constitutionality of the death penalty are to be evaluated. Thus, regardless of the approach adopted in any particular piece of research, the likelihood of error is great because researchers cannot be sure that they are examining the correct variables. Notwithstanding this obvious problem, the results of this analysis warrant careful consideration because those who adopt either the analytic or normative view of the eighth amendment need hard empirical evidence that explains why substantial numbers of citizens remain willing to support and impose the death penalty. If the obviously high levels of support are based upon a reasonable, adequately informed public opinion, those holding an analytic view would almost certainly have no alternative to viewing at least some kinds of post-*Furman* and post-*Gregg* statutes and procedures as justifiable. Indeed, such evidence clearly would undermine the positions of both Justice Bren-

63. On a purely personal level, the author is no less tempted to wonder how any logical person superficially familiar with the existing evidence, whether drawn from legal scholarship or empirical research, could ever reach the conclusion that the death penalty is either morally just or likely to serve any useful purpose. More persuasive, for example, is the opinion of those who, in their Brief for Petitioner, at 6, Aikens v. California, 406 U.S. 813 (1972), contended that the worldwide movement away from reliance on the death penalty

> marks an overwhelming repudiation of the death penalty as an atavistic barbarism. The penalty remains on the statute books only to be—and because it is—rarely and unusually inflicted. So inflicted, it is not a part of the regular machinery of the state for the control of crime and punishment of criminals. It is an extreme and mindless act of savagery, practiced upon an outcast few. This is exactly the evil against which the Eighth Amendment stands.

64. *See* note 11 *supra*.

nan and Justice Marshall. On the other hand, if the results of the research call into question the quality of public support and, therefore, the viability of the kinds of objective indicia relied upon in *Gregg,* those holding either of the two perspectives would be compelled to reexamine the basis for their beliefs that public sentiment does indeed provide constitutional support for the death penalty. Although such results could lead advocates of the normative position to observe that they had been correct all along, proponents of the analytic view necessarily would find themselves in something of a bind.

This analysis demonstrates that a substantial proportion of a large, randomly selected sample of the heads of households residing in a Virginia metropolitan area support the retention of the death penalty for some kinds of criminal offenses. Such a finding is neither particularly surprising nor especially relevant to the issues posed in this Article. As a variety of widely publicized public opinion polls recently have suggested, as many as two-thirds of American citizens remain willing to support at least the availability of capital punishment as a potential sanction.[65] The more important function of the analysis is to pose a series of questions regarding why so many people support so extreme a penalty. The findings reveal that two of the motives for punishment emphasized in *Gregg* provide a foundation for much of this support. Many of those sampled believe that society has a moral obligation to punish criminal offenders, and these retributive views correlate significantly with support for the death penalty. Similarly, those who posit that the punishment is an effective deterrent were even more likely to endorse capital punishment.

Other findings, whose importance is considerable, are not so easily summarized. The positive correlation between retributive

65. A very important distinction, which far too frequently is overlooked, must be drawn between opinions toward capital punishment and an actual willingness to support or tolerate its imposition. This point is made very effectively in Brief for Petitioner at 20, 39, Aikens v. California, 406 U.S. 813 (1972):

> When a man such as Earnest Aikens comes before the Court claiming that the law under which he was sentenced provides for an unconstitutional cruel and unusual punishment, the question is not: will contemporary standards of decency allow the existence of such a general law on the books? The question is, rather: will contemporary standards of decency allow the general application of the law's penalty *in fact*? . . . the citizen who deals with the poll taker-like the legislator who puts or maintains a capital statute on the books-can have his cake and eat it too. He can afford to approve the principle of killing because in practice the persons selected to die will be so few as to go unnoticed. The real measure of American moral attitudes about the death penalty is reflected in what this Nation of 200 million people *does.*

and utilitarian sentiments indicates that these two perspectives, rather than dividing the sample group into two separate categories, actually were complementary in the minds of those who support capital punishment. Thus those most strongly agreeing with attitude items indicating retributive beliefs also most strongly agree with those items expressing utilitarian beliefs. This positive correlation in turn necessitates a determination of which set of beliefs has the greater impact on support for capital punishment when the influence of the other is held constant. The controlled analysis conducted in this study suggests that public support of capital punishment stems largely from the conviction of many citizens that this and other kinds of punishment serve the utilitarian goal of deterrence. Conversely, those in the sample who are less confident that deterrence is a consequence of punishment are far less supportive of the death penalty. Thus the utilitarian justification for capital punishment has a much stronger independent effect than does the retributive rationale. The impact of the utilitarian variable inevitably leads to the question whether capital punishment does indeed serve a deterrent function. Modern research on deterrence has demonstrated that the death penalty has no significant effect on the frequency of crimes for which death may be imposed.[66] The lack of an actual deterrent effect leads to the conclusion that much of the support for the death penalty is not based upon a reasonable, informed assessment of the best available contemporary evidence. The strong support appears instead to be the consequence of an uninformed and far too generous assessment of the deterrent effect of the death penalty.

Obviously, neither this nor any other single piece of empirical research should be taken as definitive proof of anything. The issues are too complex and the state of our objective knowledge in this area far too feeble. The findings presented in this Article, however, cannot be dismissed easily. Public support for any aspect of the criminal justice system is far more a reflection of attitudes, values, and beliefs than of a detailed factual understanding of precisely what those systems are, how they actually function, and what their real consequences may be. Nevertheless, the question whether a particular punishment is sound in light of evolving interpretations of the eighth amendment demands a determination whether the requisite level of public support exists and, if it does, whether the reasons

66. *See* note 19 *supra* and accompanying text.

underlying that support are generally consistent with the preponderance of available evidence. A punishment that is fundamentally inconsistent with evolving standards of morality and public sentiment is not likely to be viewed as constitutionally sound under current eighth amendment standards. The results of this empirical study, however, pose a much more perplexing dilemma. Although capital punishment has received the strong support of contemporary standards, public approval may be grounded upon deterrence, a rationale that is demonstrably inconsistent with all but a fraction of existing scientific evidence. If, as contemporary research indicates, the death penalty serves no appreciable deterrent function, then the question arises whether those members of the Court adopting either the analytic or normative approaches may justifiably base their approval of death penalty statutes upon their readings of public opinion. The Court has not yet had the opportunity to introduce this basic issue into its analysis of eighth amendment challenges to capital punishment, but if public sentiment is to continue to serve as an influential determinant in the Court's decision making, then it inevitably must address the issues presented by this study.