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Beyond a Conceivable Doubt: The Quest for a Fair and Constitutional Standard of Proof in Death Penalty Cases

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> "[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event."[1]

I. INTRODUCTION

The death penalty remains the most contentious issue in criminal law jurisprudence, and continues to be challenged on both constitutional and moral grounds.[2] What is most remarkable about American death penalty jurisprudence is that it has traditionally focused on purely technical and procedural aspects of the imposition of the death penalty,[3] despite the fact that the most vulnerable plank in the arsenal of death penalty defenders is evidence that innocent people have been, and will continue to be,

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1. Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring).

2. *See, e.g.*, Sam Kamin & Jeffrey J. Pokorak, *Death Qualification and True Bifurcation: Building on the Massachusetts Governor's Council's Work*, 80 IND. L.J. 131 (2005); James S. Liebman, Jeffery Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000); Michael Mello, *Taking* Caldwell v. Mississippi *Seriously: The Unconstitutionality of Capital Sentences that Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283, 284 (1989); Thomas J. Walsh, *On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty*, 44 CLEV. ST. L. REV. 23, 24 (1996).

3. *See* Roper v. Simmons, 543 U.S. 551 (2005) (challenging the death penalty based upon age of the defendant); Atkins v. Virginia, 536 U.S. 304 (2002) (challenging the death penalty based upon the mental retardation of the defendant); Stanford v. Kentucky, 492 U.S. 361 (1989) (challenging the death penalty based upon status of defendants as juvenile offenders); Penry v. Lynaugh, 492 U.S. 302 (1989) (challenging death sentence based upon the mental illness or incapacity of the defendant); McCleskey v. Kemp, 481 U.S. 279 (1987) (challenging the death penalty based upon racial bias concerning the application of the death penalty); Ford v. Wainwright, 477 U.S. 399 (1986) (challenging the death penalty based upon insanity of the defendant); Coker v. Georgia, 433 U.S. 584 (1977) (challenging Georgia's death penalty statute as based on disproportionate sentencing as compared to severity of the crime committed); Woodson v. North Carolina, 428 U.S. 280 (1976) (challenging a mandatory sentencing scheme as unconstitutional because it eliminated all jury discretion); Gregg v. Georgia, 428 U.S. 153 (1976) (challenging the death penalty based upon the death penalty being "cruel and unusual punishment"); Furman v. Georgia, 408 U.S. 238 (1972) (challenging Georgia's death penalty statute as being arbitrary and capricious).

executed.[4]

Perhaps no legal principle is more difficult to explain to the layman or first-year law student than that of all the panoply of technical, procedural, constitutional, and other legal grounds that may be set forth in appeals of death penalty cases, actual innocence is not one of them. The U.S. Supreme Court confirmed this to be a bedrock principle of American death penalty jurisprudence in *Herrera v. Collins*, in which the Court held that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal *habeas corpus* relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[5]

Nevertheless, some commentators have found suggestions trending towards a new constitutional standard encompassing innocence in the concurring and dissenting opinions of five justices in *Herrera* who asserted that the execution of an innocent person did indeed raise constitutional issues.[6] This included the concurring opinion of Justice O'Connor with Justice Kennedy joining,[7] and the dissenting opinion of Justices Blackmun, Stevens, and Souter, who recognized an "Eighth Amendment challenge to [the death penalty] on the ground that he is actually innocent," and further held that "[e]xecution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment."[8]

Unfortunately, for those who see these opinions as portending such a trend, a closer analysis of the O'Connor and Kennedy concurrence reveals that the key to any future adoption of a constitutional standard encompassing an actual innocence component will lie in the definition of "actual innocence." In Herrera's case, for example, O'Connor cites with approval the majority's finding that "petitioner is not innocent in the eyes of the law because, in our system of justice, 'the trial is the paramount event for determining the guilt or innocence of the defendant.'"[9] O'Connor then concludes by stating that "the issue before us is not whether a state can execute the innocent. It is . . . whether a fairly convicted and therefore

4. *See* Eunyung Theresa Oh, *Innocence After "Guilt": Postconviction DNA Relief for Innocents Pled Guilty*, 55 SYRACUSE L. REV. 161 (2004) [hereinafter *Innocence After "Guilt"*]; Michael L. Radelet, William S. Lofquist & Hugo Adam Bedau, *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996); Richard A. Rosen, *Innocence and Death*, 82 N.C.L. REV. 61 (2003); Tara L. Swafford, *Responding to* Herrera v. Collins*: Ensuring that Innocents are Not Executed*, 45 CASE W. RES. L. REV. 603 (1995).

5. 506 U.S. at 400.

6. Elizabeth R. Jungman, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1070-71 (2003).

7. *See Herrera*, 506 U.S. at 419.

8. *Id.* at 435 (Blackmun, J., dissenting).

9. *Id.* at 419 (O'Connor, J., concurring) (quoting Rehnquist, CJ., majority at 416).

legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt . . . ."[10]

In other words, by equating "actual innocence" with "legal innocence," O'Connor implicitly rejects any finding of innocence made independently of the fact finders at the trial court. This view seems entirely in accord with the traditional view under which claims of innocence, independent of any technical or procedural errors, do not constitute a constitutional ground for appeal, or at least for *habeas corpus* review.

Thus, there appears to be very little basis upon which to predict whether any judicially-created constitutional standard will soon emerge addressing the most vulnerable aspect of the death penalty—namely, the danger that an innocent person may be convicted even in a trial devoid of technical, procedural, or constitutional errors.

Addressing that vulnerability has therefore been left to the legislative and executive branches of state and federal government. An example of the former may be found in the so-called "Romney Bill," which was pending in the Massachusetts legislature in 2007.[11] If passed, this bill would require that a jury in a death penalty case find that there is "no doubt" about a defendant's guilt of capital murder, and require that a jury find that there is "conclusive scientific physical or other associative evidence reaching a high level of scientific certainty."[12] In addition, the Model Penal Code has adopted a proposed provision that would permit imposition of the death penalty only if the evidence does not foreclose "all doubt" of the defendant's guilt.[13] Thus far, no state has adopted this provision,[14] nor has Massachusetts passed the Romney Bill.[15] Examples of the latter include: Illinois Governor George Ryan's moratorium on executions effective January 31, 2000, based on an executive finding that the procedures for

10. *Id.* at 420. The Court explains that a defendant who makes a proper showing of *actual innocence* may have his federal constitutional claim considered on the merits; however, "[t]his rule . . . is grounded in the 'equitable discretion' of the habeas courts to see that federal constitutional errors do not result in the incarceration of the innocent persons." *Id.* at 404 (citing McCleskey v. Zant, 499 U.S. 467, 502 (1991)). Thus, "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.*

11. H.R. 1511, 185th Leg. (Ma. 2007).

12. *Id.*

13. MODEL PENAL CODE § 210.6(f) (1962).

14. RICHARD C. DIETER, DEATH PENALTY INFO. CTR. INNOCENCE AND THE DEATH PENALTY: THE INCREASING DANGER OF EXECUTING THE INNOCENT (1997), http://www.deathpenaltyinfo.org/article.php?scid=45&did=292.

15. The Commonwealth of Massachusetts, the General Court, Legislative Tracking System (2007), http://www.mass.gov/legis/185 history/h01511.htm.

imposing the death penalty were fundamentally flawed in that state;[16] Virginia Governor Mark Warner's order of a complete audit of the crime laboratory in that state;[17] and the Massachusetts Governor's Council on Capital Punishment, which set forth a proposed burden of showing the absence of any "lingering or residual doubt" in death penalty cases.[18]

Meanwhile, there has been a flurry in recent years of scholarly articles and commission proposals advocating a heightened standard of proof in death penalty cases, ranging from Elizabeth Jungman's proposed "beyond all doubt,"[19] Judge Leonard Sand's "beyond all possible doubt,"[20] to the above mentioned Massachusetts Governor's Council on Capital Punishment.[21] That such proposals for enhanced burdens of proof in death penalty cases may indeed be serving to blunt the most virulent challenges to the death penalty itself on constitutional, moral, and ethical grounds is evidenced by recent heated, scholarly backlash to these proposals. This purports to show "the fallacy of a 'foolproof' system," contending that a "workable 'no doubt' or 'foolproof' system is an illusion . . . impossibly expensive and a hopeless burden on prosecutors."[22]

For example, Greta Proctor persuasively cites a number of cases in which supposedly irrefutable scientific evidence, including DNA evidence, was later shown to have lead to incorrect factual conclusions or defied the experts' opinions of an "adventitious (DNA) match as one in 3.5 billion."[23]

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16. Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases*, 10 PSYCHOL. PUB. POL'Y L. 577, 579 (2004).

17. Greta Proctor, *Reevaluating Capital Punishment: The Fallacy of a Foolproof System, the Focus on Reform, and the International Factor*, 42 GONZ. L. REV. 211, 248 (2007).

18. MASS. GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, FINAL REPORT 22 (2004), http://www.lawlib.state.ma.us/docs/5-3-04Governorsreportcapitalpunishment.pdf.

19. Jungman, *supra* note 6, at 1089-91.

20. Leonard B. Sand & Danielle L. Rose, *Reinvigorating the Jury: Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May be Death?*, 78 CHI.-KENT L. REV. 1359, 1373 (2003).

21. MASS. GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 18, at 22.

22. Greta Proctor, *Reevaluating Capital Punishment: The Fallacy of a Foolproof System, the Focus on Reform, and the International Factor*, 42 GONZ. L. REV. 211, 240-49 (2007).

23. *Id.* at 212 (showing that scientific evidence is "inescapably subject to error"; the author relates several remarkable stories). Brandon Mayfield, an Oregon attorney, was linked to a terrorist bombing in Madrid by an "absolutely incontrovertible" fingerprint match. *Id.* at 242. The FBI released him after two weeks, acknowledging its mistake in mis-identifying Mayfield's fingerprint. *Id.* at 243. In 2005, Texas executed Cameron Willingham for the arson-murder of his three young daughters. *Id.* Governor Perry authorized the execution over the objections of several arson experts who contended there was no arson

Proctor asserts that "[n]o evidence is foolproof. . . . [i]nevitably, even the most unfailing scientific evidence fails some of the time."[24] For that reason, Proctor concludes, that "perhaps we must simply give up on the death penalty experiment altogether" and "[t]he problems inherent in capital punishment are not resolvable through any reforms."[25]

While it is undoubtedly true, strictly speaking, that "no evidence is foolproof," it must also be true that disregarding all evidence on such grounds would inevitably paralyze the criminal system and set up an insuperable obstacle to any conviction. Capital cases are unique because the punishment in such cases is so severe and permanent; however, it is not so clear that if evidence in a capital case were subject to such a standard, it should not also be applied to other cases in which a defendant faces a severe punishment, such as life in prison. In this regard, it is instructive to take note of a petition signed in May 2007 by 310 "lifers" in the Italian prison system who preferred the penalty of death over life in prison and demanded that the death penalty be re-introduced as an alternative to what they considered to be the much more severe and cruel sentence of life in prison.[26]

Additionally, some who oppose a higher burden of proof in death penalty cases may have a hidden agenda of opposing the death penalty in any form. Presumably, such opposition rests on the theory that by supporting any attempt to enhance its fairness, they undermine their argument for total abolition. Alternatively, it may be reasonable to suspect that those who support a higher burden of proof have a hidden agenda of maintaining the death penalty by addressing its chief vulnerability and thereby making it more palatable.

Debate will continue to rage in this country over whether the death penalty should ever be imposed,[27] particularly in light of the fact that the European Union not only forbids its imposition in member states, but condemns the practice as unworthy of any civilized society.[28] Nevertheless, there has always been a large percentage of the American electorate who believe that the death penalty is the only just and appropriate punishment for the most heinous of crimes. The case of *State v.*

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involved in the tragedy at all. *Id.* at 234-44.

24. *Id.* at 242.

25. *Id.* at 255.

26. Christian Fraser, *Italy Inmates Seek Death Penalty*, BBC NEWS (ROME), May 31, 2007, http://news.bbc.co.uk/go/pf/fr/-/2/hi/europe/6707865.stm.

27. *See* Thomas J. Walsh, *On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty*, 44 CLEV. ST. L. REV. 23, 24 (1996).

28. Krista L. Patterson, *Acculturation and the Development of Death Penalty Doctrine in the United States*, 55 DUKE L.J. 1217, 1224 (2006).

Brogdon[29] illustrates this view. In that case, the defendants kidnapped a young girl and took her to a levee where they repeatedly raped her, forced her to perform oral sex, and continually beat her with their fists. The court characterized the crime as one "of unparalleled savagery and brutality."[30] The young girl had pleaded for her life and fought back repeatedly during the attack. Eventually the defendant hit the young girl in the head with a brick until he believed she was dead.[31] While there will always be those who believe that an appropriate punishment for such a crime is a "term of incarceration," there continues to be a body of opinion that justice requires something more in terms of vindication for a civilized society.[32]

It is the purpose of this article to maintain a neutral stance on whether the death penalty as presently imposed is ethical, moral, or even constitutional. Rather, it proceeds on the assumption that the death penalty is a fact in thirty-six states,[33] and that as long as it is being imposed, there is a moral imperative to make its imposition as fair as possible—regardless of whether making it more fair would affect any political agenda for maintenance or abolition. The body of death penalty jurisprudence is replete with consideration of such fairness factors as arbitrariness,[34] juvenile status,[35] mental illness and retardation,[36] discrimination,[37] proper consideration of mitigating and aggravating factors,[38] and jury impartiality.[39] However, the focus of this article is to analyze the proposed standards of proof in death penalty cases with a focus on finding the fairest

29. 426 So. 2d 158 (La. 1983).

30. *Id.* at 163.

31. *Id.*

32. *See* Robert Steinbuch, *Reforming Federal Death Penalty Procedures: Four Modest Proposals to Improve the Administration of the Ultimate Penalty*, 40 IND. L. REV. 97, 98-99 (citing Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005)).

33. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2008), http://www.deathpenaltyinfo.org/FactSheet.pdf [hereinafter FACTS ABOUT THE DEATH PENALTY].

34. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977); Furman v. Georgia, 408 U.S. 238 (1972).

35. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Stanford v. Kentucky, 492 U.S. 361 (1989).

36. *See, e.g.*, *Atkins*, 536 U.S. 304; Penry v. Lynaugh, 492 U.S. 302 (1989); Ford v. Wainwright, 477 U.S. 399, 403 (1986).

37. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987); Lockett v. Ohio, 438 U.S. 586 (1978).

38. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976); Coley v. State, 204 S.E.2d 612 (Ga. 1974).

39. *See, e.g.*, Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976).

and most workable standard.

After a comprehensive review of the history of the death penalty in Part II, the rationales for its imposition in Part III, a brief survey of its constitutional and legislative history in Parts IV and V, and a comparison of the myriad burdens of persuasion applied in U.S. courts in parts VI and VII, it is proposed that a standard of "beyond a conceivable doubt" provides the fairest and most workable standard of proof in death penalty cases.

Rejected as unworkable and impracticable are such proposed standards as "beyond any doubt,"[40] "beyond all doubt,"[41] "residual doubt,"[42] "beyond all possible doubt,"[43] "proof to a moral certainty,"[44] and their numerous proposed variations, on grounds that no decision ever reached by human beings can ever meet such a standard.

Brian Zuanich has set forth three reasons why the premise of jury certainty, upon which the "no-doubt" standard and its numerous proposed variations are based, is faulty:

> First, by design, jurors do not hear all the relevant evidence at trial. The Rules of Evidence, for example, exclude otherwise relevant evidence that the trial court deems unfairly prejudicial. Second, the evidence that juries do hear, particularly in capital cases, is not always reliable. False confessions are not uncommon and "perjury by prosecution witnesses is the leading cause of error" in death penalty cases. Third, people with

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40. *See* Margery Malkin Koosed, *Averting Mistaken Execution by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41 (2001) (citing Brian Zuanich, Note, *Good Intentions Are Not Enough: The Argument Against A Higher Standard of Proof in Capital Cases*, 11 SUFFOLK J. TRIAL & APP. ADVOC. 221, 229 n.49 (2006)) (proposing three verdicts: "not guilty, guilty beyond a reasonable doubt, and 'guilty by proof beyond all doubt'" the last being required for a sentence of death).

41. *See* Craig M. Bradley, *A (Genuinely) Modest Proposal Concerning the Death Penalty*, 72 IND. L.J. 25, 27-30 (1996) (citing Zuanich, *supra* note 40 at 230 n.59) (proposing the application of a no-doubt standard only when the defendant maintains his innocence. Reasonable doubt would be applied if the defendant maintained that he was only guilty of a lesser offense).

42. MASS. GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 18, at 22 (proposing that juries must have no "lingering or residual" doubts of a defendant's guilt before sentencing him to death).

43. *See generally* Leonard B. Sand & Danielle L. Rose, Symposium: IV, *Reinvigorating the Jury: Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May be Death?*, 78 CHI.-KENT L. REV. 1359 (2003) (proposing that the government must prove the defendant's guilt "beyond all possible doubt" in order to seek the death penalty).

44. *See* Jim Myers, *Keating: Standard is 'Too Low'*, TULSA WORLD, June 23, 2001, at 1 (proposing the ambiguous standard of moral certainty in all death penalty cases).

> first-hand knowledge of the facts, such as the defendant and eyewitnesses to the crime, can obviously not serve as jurors.[45]

Zuanich asserts that all such heightened standards of proof in death penalty cases are therefore ineffective, arguing that "[a] disturbingly large number of jurors do not even understand the prevailing reasonable doubt standard,"[46] and would be even more confused if presented with two different standards—one for guilt and another for punishment. He therefore concludes that "[u]ltimately the benefits of capital punishment outweigh the miniscule risk of executing an innocent person, which is why the death penalty should not be subject to a higher standard of proof."[47] While it is concluded herein that Zuanich's rejection of the heightened burdens previously considered are well founded, it is submitted that a standard of "proof beyond a conceivable doubt" would address all his grounds for rejection, while at the same time, all but eliminating the chance that an innocent person might be convicted.

Part VIII analyzes and charts a number of high-profile death penalty cases in order to illustrate how the various proposed burdens of proof might have affected the outcome in those cases. For example, the Susan Smith case is provided as an example of a case in which the evidence would have satisfied a burden not only of "beyond a reasonable doubt" but also of "beyond a conceivable doubt;" however, it would not have satisfied a burden of "beyond all doubt."

In that case, Susan Smith was charged with murdering her two young sons by locking them in her car and then sending the car into a lake where the sons died while strapped into their car seats. After an extensive investigation and search showed no signs of the car, Susan Smith finally confessed that she had committed the crime and directed the search to the exact location in the lake where the car sank. Only then were the police

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45. Zuanich, *supra* note 40, at 232-33 (citations omitted).

46. *Id.* at 235. A study at Michigan State University found that over 30% of jurors believed that "proof beyond a reasonable doubt" requires 100% certainty that the defendant is guilty. *Id.* (citing Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J. L. REFORM 401, 414 (1990)). A study from Wyoming found that over 15% of jurors believed that they should convict when there was a "better than 50-50 chance" of the defendant's guilt. *Id.* (citing Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 99 (1998)). Half of the subjects of a Florida study did not understand who had the burden of proof, believing defendant was required to prove his innocence. *Id.* (citing David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice?*, 59 JUDICATURE 478, 481 (1976)).

47. *Id.* at 239.

able to locate the car and the bodies of the two young boys.[48]

The evidence confirming her confession was the fact that only she knew the exact location of the car in the lake, which had already been extensively searched by police with no success. This clearly supported a finding of guilt beyond a reasonable doubt. It is submitted that such evidence would also have supported a finding of proof "beyond a conceivable doubt" inasmuch as, along with other confirmatory evidence, the location of the car was so difficult to find that only the perpetrator, or one complicit with a perpetrator, could know the exact location.

However, such evidence could not eliminate the one-in-a-billion chance that space aliens had sent Susan messages from outer space informing her of the location of the car, or that conspirators had constructed an exact replica of the car complete with clones of the dead boys and deposited them at that exact location in the lake in order to frame her. "Beyond *all* doubt" is simply an impossible standard to achieve.

The killing of Lee Harvey Oswald by Jack Ruby,[49] witnessed by millions of Americans on live television in 1963, is a situation in which, had the case gone to trial, the evidence would surely have satisfied a burden of both "beyond a reasonable doubt" and "beyond a conceivable doubt." Even in that case, however, the evidence could not have met a burden of "beyond *all* doubt" inasmuch as it could not preclude the possible though unlikely event that the video of the killing was in fact staged in order to frame Ruby, and that a vast conspiracy of Dallas police officers and government officials orchestrated the frame.

Indeed, those who might profess that at least this one case might meet a standard of "beyond all doubt" might consider the fact that a large number of Americans persist in believing that the video tapes of the moon landing were fakes, and that no one in fact landed on the moon.[50] By way of analogy, it might be said that it is "beyond a conceivable doubt" that Americans landed on the moon, but not beyond "all doubt."

Likewise, the case of Bruno Hauptmann,[51] the man charged with the kidnapping of aviator Charles Lindbergh's baby, is examined as an illustration of a case in which the standard of "beyond a reasonable doubt" was reasonably satisfied (though perhaps only barely), but where a standard

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48. *Lawyer Says Mother Will Face Death Penalty in Drowning of Sons*, N.Y. TIMES, Jan. 16, 1995, at 10.

49. Rubenstein v. State, 407 S.W.2d 793 (Tex. Ct. App. 1966).

50. *See, e.g.*, Bad Astronomy, Fox TV and the Apollo Moon Hoax, http://www.badastronomy.com/bad/tv/foxapollo.html (last modified Aug. 8, 2007); The Faked Apollo Landing, http://www.ufos-aliens.co.uk/ cosmicapollo.html (last updated Sept. 12, 2006); Was The Apollo Moon Landing Fake?, http://www.apfn.org/apfn/moon.htm (last updated May 13, 2007).

51. State v. Hauptmann, 180 A. 809 (N.J. 1935).

of "beyond a conceivable doubt" had it been applied, would almost surely have resulted in a life sentence rather than death.

Finally, Part VIII sets forth proposed standards and procedures for applying a standard of "beyond a conceivable doubt" in death penalty cases.

II. HISTORY OF THE DEATH PENALTY

A. Early References to the Death Penalty

The earliest recorded references to the death penalty are found in the Ancient Laws of China and as far back as the eighteenth century B.C. and the Code of King Hammurabi of Babylon. [52] The oldest recorded death sentence in Egypt is some 1500 years before Christ.[53] Also recorded is that instead of burying executed criminals the Egyptians gave their bodies to the beasts.[54] In the fifth century the Roman Republic recognized several crimes, pursuant to the Twelve Tablets, which warranted the death penalty. These crimes included perjury, knowingly or maliciously burning a house, and the willful murder of a free man.[55] The methods of inflicting death were often cruel – the methods included crucifixion, drowning criminals at sea, and burial alive, among other methods.[56]

B. The Death Penalty in America

The English primarily influenced early American criminal law.[57] At the end of the fourteenth century, the English law prescribed the death penalty for "eight major capital crimes [including] treason, petty treason (killing a person with malice), murder, larceny, robbery, burglary, rape, and

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52. *See generally* SOCIETY'S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY 1 (Laura E. Randa ed., 1997).

53. *Id.*

54. JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 2 (1963).

55. *Id.* at 3. In 451-450 B.C. the following were recognized as crimes to be punished by death: publishing libels and insulting songs, furtively cutting or causing to be grazed crops raised by plowing, theft by a slave who is taken in the act, cheating by a patron of his client, willful murder of a parent, and making disturbances in the city at night. *Id.* During the Republic, death was enacted for even more crimes. The death penalty was abolished for citizens in 299 B.C., only to be restored again later. *Id.*

56. SOCIETY'S FINAL SOLUTION, *supra* note 52, at 1. The most notorious death execution in this era occurred in 399 B.C. "when the Greek philosopher Socrates was required to drink poison for heresy and corruption of youth." *Id.* at 2.

57. HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 6 (Hugo Adam Bedau, 3d ed. 1982).

arson."[58] In this regard, "Britain influenced" America's use of the death penalty "more than any other country."[59] "In Britain, the number of capital offenses increased until the 1700s when two hundred and twenty-two crimes were punishable by death."[60] Early settlers brought the practice of capital punishment with them. However, death was only prescribed for "premeditated murder, sodomy, witchcraft, adultery, idolatry, blasphemy, assault in anger, rape, statutory rape, manstealing, perjury in a capital trial, rebellion, manslaughter, poisoning and bestiality."[61] "The first recorded execution in the . . . colonies" occurred in 1608.[62]

Traditionally, under English law, death penalties were mandatory.[63] The American colonies rejected the mandatory death penalty in favor of a new practice; dividing murder into degrees of seriousness and granting juries some sentencing discretion in capital cases.[64] In 1793, the division of murder was first proposed by the Attorney General of Pennsylvania, William Bradford, who stipulated that only first-degree murder should be punishable by death.[65] Thus, Pennsylvania not only introduced the notion of degrees of murder, but also went beyond the English definition of this term and included the category of "first-degree" murder.[66] First-degree murder was defined as including all homicides "committed in the perpetration or attempt to perpetuate arson, rape, robbery, or burglary . . . ."[67] By the twentieth century, most states followed the example of Pennsylvania and adopted "degrees" of murder, with the death penalty

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58. Furman v. Georgia, 408 U.S. 238, 334 (1972) (Marshall, J., concurring).

59. SOCIETY'S FINAL SOLUTION, *supra* note 52, at 2.

60. *Id.* at 3.

61. *Id.*

62. *Id.* ("Officials executed George Kendall of Virginia for supposedly plotting to betray the British to the Spanish.").

63. *Id.* at 10.

64. *Id.* Maryland introduced jury sentencing discretion in 1809 for treason, rape and arson, but not homicide. *Id.* From 1860 until 1890, twenty states and the federal government adopted similar practices. *Id.*

65. *Id.* at 4.

66. *Id.*

67. *Id.* This is known as the felony murder rule. William Bradford, the Attorney General of Pennsylvania, stated:

> All murder, which shall be perpetuated by means of poison, or by lying in wait, or by any other kinds of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetuate arson, rape, robbery or burglary shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree.

Id.

reserved only for murder of the first degree.[68]

The nineteenth century witnessed a growth in the anti-death penalty sentiment in the United States. From 1830-1840 a serious abolitionist campaign developed in parts of the North.[69] During this time, three states abolished the death penalty.[70] Michigan was the first English-speaking territory in the world to abolish the death penalty.[71] However, "[t]he greatest success of the movement . . . was not abolition, but rather the removal of executions from the public square to behind prison walls."[72] Pennsylvania was the first state to abolish public executions by hanging in 1834.[73] Eleven years later, every state in New England also abolished public executions.[74]

During the Civil War, the anti-death penalty movement weakened as focus shifted to the anti-slavery movement.[75] After the war, the death penalty advocates developed new methods of execution. Electrocution as a means of punishment emerged in the late 1800s.[76] It was first adopted by the state of New York in 1888.[77] Soon after, several other states adopted this method of execution.[78] The abolition of a state's death penalty was sporadic after the Civil War; however, it did occur.[79] Iowa abolished the death penalty for a six-year span from 1872-1878.[80] Maine abolished the

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68. *Id.*

69. *Id.* at 21.

70. SOCIETY'S FINAL SOLUTION, *supra* note 52, at 6. In 1852, Rhode Island abolished the death penalty and Massachusetts limited its death penalty as only applicable in cases of first-degree murder. Wisconsin abolished its death penalty in 1853, following an execution in which it took nearly twenty minutes for the condemned to die. *Id.*

71. *Id.* at 6 (stating that Michigan allowed the death penalty to be used for treason against the state, but has had no executions since 1830).

72. Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 159 (2000). "Public executions were attacked as cruel. Sometimes tens of thousands of eager viewers would show up to view hangings. Fighting and pushing would often break out. . . . Onlookers often cursed the widow or victim and would try to tear down the scaffold or the rope for keepsakes." SOCIETY'S FINAL SOLUTION, *supra* note 52, at 5-6.

73. Pa. Dept. of Corr., History, http://www.cor.state.pa.us/deathpenalty/site/default.asp (last visited Jan. 27, 2008).

74. SOCIETY'S FINAL SOLUTION, *supra* note 52, at 6.

75. *Id.*

76. *Id.* at 7.

77. LAURENCE, *supra* note 54, at 63-64. The decree to use electrocution was signed by the New York Governor on June 4, 1888 and became effective on Jan. 1, 1889. *Id.*

78. *Id.* at 65-66 (Ohio (1896), Massachusetts (1898), New Jersey (1906), and Virginia (1908)).

79. BEDAU, *supra* note 57, at 21.

80. *Id.* at 23 tbls.1 & 2.

death penalty in 1876, restored it in 1883, and abolished it again in 1887.[81]

C. The Progressive Period to the Pre-Modern Period

Although three states abolished the death penalty in the mid-nineteenth century, it was the first half of the twentieth century that marked the beginning of the Progressive Period of reform in the United States.[82] Between 1897 and 1917, ten states abolished the death penalty as a form of punishment.[83] Between 1906 and 1907, six states completely outlawed the death penalty and three states limited its use to treason and first-degree murder of law enforcement officials.[84] However, the tensions of the First World War led to five of the six states reinstating the death penalty by 1920.[85] Between 1917 and 1955 the death penalty abolition movement slowed.

Three states reinstated capital punishment from 1919 to 1920.[86] During this time there was a resurgence of the use of the death penalty. Americans were suffering through the Great Depression and Prohibition. At this time many criminologists believed the death penalty was a necessary social measure.[87] The federal law also made use of the death penalty. Under federal laws, the sentence of death was imposed for treason against the United States, for piracy, and for murder within the federal jurisdiction.[88] Between 1927 and 1963 the United States executed thirty-four people, including two women.[89] In 1963, Victor Feguers was hanged for kidnapping in Iowa.[90] Since 1963, only three federal executions have been

81. *Id.*

82. Death Penalty Info. Ctr., *History of the Death Penalty*, http://www.deathpenaltyinfo.org (follow "Facts" hyperlink; then follow "History of Death Penalty"; then follow "Part I" hyperlink) (last visited Mar. 10, 2008) [hereinafter *History of the Death Penalty*] ("In 1846 Michigan became the first state to abolish the death penalty" for all crimes except treason. In 1852, Rhode Island abolished the death penalty and in 1853 Wisconsin abolished the death penalty for all crimes).

83. John F. Galliher, et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 541 (1992) (discussing the ten states that abolished the death penalty: Colorado (1897), Kansas (1907), Minnesota (1911), Washington (1913), Oregon (1914), South Dakota (1915), North Dakota (1915), Tennessee (1915), Arizona (1916), Missouri (1917)).

84. *See* BEDAU, *supra* note 57, at 8-9.

85. *Id.*

86. *Id.* (stating that the three states that reinstated the death penalty: Washington, Arizona, and Oregon).

87. *History of the Death Penalty*, *supra* note 82.

88. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L. J. 347, at 362-63 (1999).

89. *Id.* at 170.

90. Kathleen Sween, *Dubuque Murder Led to Last Federal Execution*, TELEGRAPH-

carried out under the Federal Death Penalty Act.[91]

The frequency of the death penalty was greatest between 1930 and 1940;[92] indeed, 1935 saw a record number of executions with one hundred ninety-one.[93] During this year, there was an execution in the United States almost every other day.[94] After the 1930s, the death penalty was generally used for only five offenses: murder, rape, armed robbery, kidnapping, and burglary.[95] Although at this time the death penalty was not on most people's minds, the trial of "Ethel and Julius Rosenberg prompted [its] return . . . to the forefront of public attention."[96]

The Rosenberg trial and convictions prompted a resurgence of debate over the death penalty.[97] By 1967, executions in the United States plummeted; in fact, there were no executions between 1967 and 1972.[98] Petitions under *habeas corpus* were rare prior to World War II and became more common as the federal courts became more concerned with the federal rights of state criminals.[99]

These opponents of capital punishment shifted from religious and moral considerations to legal considerations, such as whether the courts imposed the death sentence fairly and in compliance with constitutional provisions.[100] The 1960s and 1970s saw several challenges to the imposition of the death penalty in America. These challenges included the disproportionality of the punishment to the crime; the defendants' state of

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HERALD (Dubuque), Jun. 11, 1997, at 3.

91. Joshua Herman, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1798 n.182 (2004) (stating that there have been three executions under the Federal Death Penalty Act: Timothy McVeigh executed on July 11, 2001; Juan Raul Garza executed on June 19, 2001; and Louis Jones, Jr., executed on March 18, 2003).

92. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2005, at 10 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf.

93. *Id.*

94. *Id.*

95. HUGO ADAM BEDAU, KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA 7 (2004).

96. *See* Andrea Shapiro, *Unequal Before the Law: Men, Women, and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427, 438 (2000).

97. *Id.*

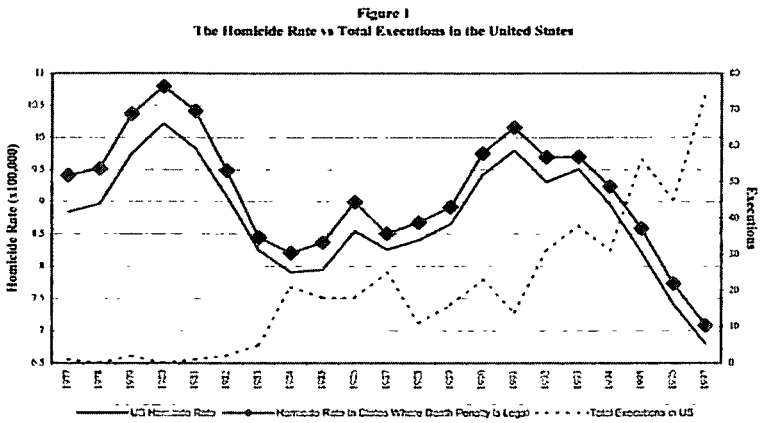
98. *See* Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811, 815 (1995).

99. *See* WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, 136 (1984) ("[T]his was the time when the United States Supreme Court became sensitive to defendant's rights in capital cases and retrospective to appeals under the due process clause of the 14th Amendment.").

100. *See* Gerald Gottlieb, Document 46: Testing the Death Penalty 1961, *in* CAPITAL PUNISHMENT IN THE UNITED STATES 120-23 (Bryan Vila and Cynthia Morris eds., 1997).

mind at the time of the crime; and the age, mental capacity, and race of the offender.[101]

FIGURE 1[102]



101. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (finding nothing to forbid the imposition of the death sentence on one who is sixteen or seventeen years old at the time of the murder); Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that a jury could consider the mental incapacity as a mitigating factor and that this was enough to protect the rights of a defendant who suffered from mental illness or incapacity); Thompson v. Oklahoma, 487 U.S. 815, 818-38 (1988) (considering a juvenile who was fifteen at the time of his offense was eligible for the death penalty); Ford v. Wainwright, 477 U.S. 399, 417-18 (1986) (remanding case to a lower court with instruction that if it found defendant to be insane, it should not sentence him to death); Enmund v. Florida, 458 U.S. 782, 800-01 (1982) (holding that states shall not impose the death penalty on one who does not possess the intent to kill); Coker v. Georgia, 433 U.S. 584, 600 (1977) (holding that the death sentence is disproportionate to the crime of rape).

102. H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. L. & ECON. 457 (2003) (noting that the chart "displays the murder rate in the United States per 100,000 people between 1977 and 1997, along with the number of executions during the same time period. Following the first post-Gregg execution in 1977, the number of executions increased to an average of about twenty per year around the mid-1980s. After remaining stable until the early 1990s, the number of executions started rising in 1993, reaching seventy-four executions in 1997. The homicide rate was 8.8 murders per 100,000 people in 1977. It reached 10.2 in 1980, and then started declining continuously until 1984. When the number of executions was relatively stable in the late 1980s, the murder rate rose again, reaching 9.8 murders per 100,000 people in 1991. It began declining after 1991 and went down to 6.8 in 1997.").

III. RATIONALE OF THE DEATH PENALTY

A. Deterrence

Deterrence has been one of the most prevailing arguments in favor of the death penalty.[103] Many proponents feel that "the death penalty, because of its finality, is more feared than imprisonment."[104] The punishment is meant to deter prospective murderers who are not deterred by the thought of life in prison. "Deterrence is achieved when the fear of punishment prevents [the] crime. According to this theory, a rational person, after considering the likelihood of apprehension, the severity of the punishment, . . . and the swiftness of imposing the ultimate penalty, will choose not to engage in the criminal behavior."[105]

There are two kinds of deterrence, general and specific. General deterrence is used to suggest that executing murderers will decrease the homicide rate by causing other potential murderers not to commit murder for fear of being executed themselves.[106] General deterrence is the regulating force that the threat of punishment has on all of society.[107] Its greatest value is in dissuading others from committing future crimes.[108] The death penalty may serve as a general deterrent to crime if a potential offender knows that the contemplated offense is a capital crime and, due to the certainty of execution, is unwilling to engage in that criminal activity.[109] Specific deterrence relates to the fact that the murderer who is executed cannot kill again.

Significantly, the Supreme Court has stated that capital punishment can be based on deterrence. In *Gregg v. Georgia*, the Supreme Court determined that the constitutionality of the death penalty largely relies on two objectives: the first is the Framers' intent, and the second is the public goals of retribution and deterrence.[110] Justice White has argued in dissent

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103. Ward A. Campell, *Death Penalty Information Center Innocence Critique: Critique of DPIC List ("Innocence: Freed from Death Row")*, http://www.prodeathpenalty.com/DPIC.htm (last visited Sep. 28, 2007).

104. JAMES E. WHITE, CONTEMPORARY MORAL PROBLEMS 234-35 (8th ed. 2005).

105. Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 189 (1998).

106. *See* Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 715 (1990); *see also* Mocan & Gittings, *supra* note 102, at 453 (examining the economic issues surrounding the death penalty and deterrence).

107. *See* Aarons, *supra* note 105, at 192.

108. *Id.*

109. *Id.* at 191.

110. 428 U.S. 153, 183 (1976).

that a mandatory death penalty is a readily effective way of achieving general deterrence.[111]

In contrast, Justice Stevens, dissenting in *Spaziano v. Florida* and in the plurality opinion of *Thompson v. Oklahoma*, maintained that deterrence considerations alone were not a sufficient basis for carrying out an execution.[112] He argued that the sentencer must consider whether there are mitigating circumstances in favor of a sentence less than death, and that the sentencer must find the defendant morally blameworthy before imposing a death sentence.[113] Justice Stevens seems to require that death sentences satisfy some measure of both deterrence and retribution.

However, Justices Brennan and Marshall have consistently opposed capital punishment.[114] Justice Marshall believes that the death penalty is no more of a deterrent to crime than life imprisonment.[115] He argued that there is insufficient empirical evidence to prove that capital punishment is a better deterrent than other forms of punishment.[116]

Other Justices have argued that the deterrent value of capital punishment is diminished without a swift imposition of punishment.[117] Specifically, years of delay between sentencing and execution undermine the deterrent effect of capital punishment and reduce public confidence in the criminal justice system.[118] The Supreme Court has found that the deterrent value of any punishment depends on the speed with which the state administers a sentence.[119] Justice Stevens determined that the deterrent effect hinges on the promptness with which the state inflicts the punishment.[120] Delay in the final judgment of conviction, including appellate review, unquestionably erodes the efficacy of law enforcement.[121] However, the deterrent value of

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111. Sumner v. Shuman, 483 U.S. 66, 87-88 (1997).

112. Thompson v. Oklahoma, 487 U.S. 815, 837-38 (1988); Spaziano v. Florida, 468 U.S. 447, 479-80 (1984).

113. *Spaziano*, 468 U.S. at 479-81.

114. *See Gregg*, 428 U.S. at 227-31 (Brennan, J., dissenting); *id.* at 231-41 (Marshall, J., dissenting); Furman v. Georgia, 408 U.S. 238, 257-306 (1972) (Brennan, J., concurring); *id.* at 314-71 (Marshall, J., concurring). For an extensive consideration of Justices Brennan's and Marshall's death penalty jurisprudence and the role of vigorous dissents, *see* MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL (1996).

115. *Furman*, 408 U.S. at 342-59 (Marshall, J., concurring).

116. *Id.*

117. Coppedge v. United States, 369 U.S. 438, 449 (1962).

118. *See* Justice Lewis Powell, *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989).

119. Coleman v. Balkcon, 451 U.S. 949, 952 (1981).

120. *Coppedge*, 369 U.S. at 449.

121. *Id.*

even a speedily imposed death penalty is debatable.[122]

In *Harris v. Alabama*, the Court noted that research studies fail to show that the death penalty has a deterrent effect.[123] The Court further pointed out studies to show capital punishment actually increases levels of violence.[124] In fact, a fifty-six year controlled study conducted in New York revealed that an average of two additional homicides occurred in the month following an execution.[125] Many opponents propose the death penalty has no deterrent effect because it is imposed so "infrequently and so freakishly."[126]

The Supreme Court in *Gregg* emphasized that deterrence is an issue for legislatures rather than courts and juries:

> The value of capital punishment as a deterrent of crime is a complex factual issue, the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.[127]

Today, many proponents feel the death penalty is no longer a deterrent to crime, but rather a just punishment; "in recent years, the appeal of deterrence has been supplanted by a frank desire for what [society] sees as just vengeance." [128]

B. Retribution

The principle of retribution suggests that a murderer should be executed because he or she "deserves" or "has earned" the sentence of death.[129] For some, retribution is justice for the crimes that were not deterred:

> Retribution . . . is achieved when the offender receives punishment in proportion to the harm that they have caused. Adherents to the retributive theory of punishment contend that society has an interest in ensuring the punishment of offenders. The objective of retribution is to

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122. Harris v. Alabama, 513 U.S. 504, 523 n.9 (1995).

123. *Id.*

124. *Id.*

125. *See* William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIME DELINQ. 453, 481 (1980).

126. Alex Kozinsk & Seth Gallageheri, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 25 (1995).

127. Gregg v. Georgia, 428 U.S 153, 186 (1976) (citing Furman v. Georgia, 408 U.S. 238, 403-05 (1971)).

128. E.J. Dionne Jr., *Capital Punishment Gaining Favor As Public Seeks Retribution*, CORRECTIONS TODAY, Aug. 1990, 178, 178.

129. *See* M. Foley, *Confessions of a Retributist*, SOC. ACTION & THE LAW 9, 16-17 (1983).

> restore peace of mind to society and to eliminate private vengeance. . . . An additional rationale for the theory of retribution is that in killing another, the murderer has forfeited his right to continue living. The death penalty achieves its retributive function by imposing the ultimate punishment for the ultimate violation of a person.[130]

There are two categories of retribution: the first equates the crime with the punishment, the second has a punishment in direct proportion to the crime.[131] The first category has its base in such religious values as *lex talionis*, more commonly known as an "eye for an eye[.]"[132] Proponents of this theory feel it is "more tragic for the innocent to lose their life than for the state to take the life of a criminal convicted of a capital offense."[133] Both the Old Testament and the New Testament quote the Lord as saying, "Vengeance is mine, I will repay."[134] This could read as though the Lord will inflict the punishment, but the New Testament allows the state to execute criminals in the name of God, stating, "[I]f you do wrong be afraid, for [the authority] does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer."[135] According to the Bible, the authority to punish comes from God.[136] The second category, proportional retribution, requires that the severity of punishment be proportional to the severity of the crime.[137] This category looks at the criminal act and its accompanying punishment compared with that of other criminal offenses and their authorized punishments.[138]

The Supreme Court in *Gregg* found that while retribution is no longer the primary objective of the criminal law, it is not a forbidden objective.[139]

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130. Aarons, *supra* note 105, at 192-93.

131. One observer has suggested that there are nine philosophical justifications that are included within the concept of retribution. *See generally* John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979).

132. *See* STEPHEN NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH 74-75 (1987); *see also* Joseph M.P. Weiler, *Why Do We Punish? The Case for Retributive Justice*, 12 U. BRIT. COLUM. L. REV. 295, 310-16 (1978).

133. *See* BEDAU, *supra* note 57, at 308.

134. *Romans* 12:19; *see also Deuteronomy* 32:35 ("To me belongeth vengeance and recompence . . . .").

135. *Romans* 13:1-5.

136. *Id.*

137. *See* Aarons, *supra* note 105, at 193.

138. *See* Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1168-69 (1980). Margaret Jane Radin has similarly divided retribution into "protective retribution" and "assaultive retribution." *See id.* Protective retribution is most analogous to proportional retribution, while assaultive retribution emphasizes the *lex talionis* aspect of retribution. *See id.*

139. Gregg v. Georgia, 428 U.S. 153, 183 (1976).

The Court felt that capital punishment might be "the appropriate sanction in extreme cases because it is an expression of the community's belief that certain crimes are themselves so grievous that the only adequate response may be the penalty of death."[140] However, opponents argue that a lengthy and severe incarceration followed by execution of a death sentence may be overly retributive.[141] Although retribution is fulfilled, the deterrent factor raises some questions.

The Court found that any additional deterrent value of a seventeen-year delay followed by execution, as compared with a seventeen-year delay followed by life imprisonment, seemed minimal.[142] In contrast, the Court in *Furman* determined that the overwhelming number of criminals who commit capital crimes and go to prison does not mean that death serves the purpose of retribution more effectively than life imprisonment.[143]

Opposition to the theory of retribution is based on moral grounds.[144] Opponents "argue that life is sacred and killing is always wrong, whether it is done by [the] individual or by the state."[145] "It does something almost worse than lowering the state to the moral level of the criminal: it raises the criminal to moral equality with the social order."[146] The American Civil Liberties Union agrees, stating, "capital punishment is a barbaric remnant of uncivilized society. It is immoral in principle, and unfair, racist and discriminatory in practice. As a remedy for crime it has no purpose and no effect."[147]

C. Innocence and Mistake

The Supreme Court in *Herrera v. Collins* noted that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[148] This observation is confirmed by the data found in figure 2

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140. *Id.* at 184.

141. Lackey v. Texas, 514 U.S. 1045, 1045 n* (1995) (Stevens, J., respecting denial of certiorari) (citing People v. Anderson, 493 P.2d 880, 894 (Cal. 1972)).

142. *Id.*

143. Furman v. Georgia, 408 U.S. 238, 304 (1972).

144. Jennifer C. Honeyman & James R.P. Ogloff, *Capital Punishment: Arguments for Life and Death*, CANADIAN J. BEHAV. SCI., Jan. 1996, *available at* http://findarticles.com/p/articles/mi_qa3717/is_199601/ai_n8736435.

145. *Id.*

146. Hendrick Hertzberg, *Premeditated Execution*, TIME, May 18, 1992, at 49.

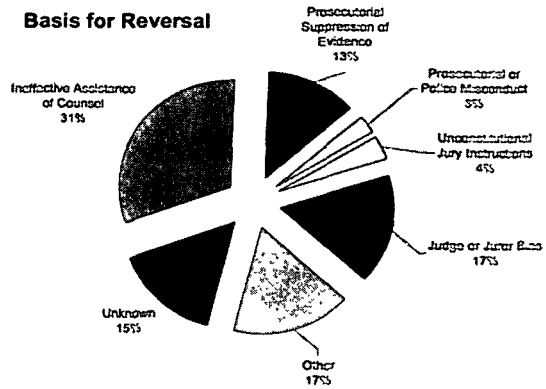
147. Press Release, American Civil Liberties Union, ACLU Speaks Out Against Scheduled Execution of Manuel Pina Babbitt (May 3, 1999), http://www.aclu-sc.org/News/Releases/1999/100267/.

148. Herrera v. Collins, 506 U.S. 390, 400 (1993).

below, which shows the most common bases for the reversal of death penalty cases.

The death penalty is an irrevocable sentence. There is some evidence that mistakes have been made when people have been sentenced to death.[149] According to the Death Penalty Information Center, forty-two people have been found innocent and released from death row since September 2000.[150] However, this number does not differentiate between those who are "actually innocent" and those who are "legally innocent."[151] Nor do these figures, even if valid, rebut the fact that the vast majority of death penalty cases that are retried result in guilty verdicts.

FIGURE 2[152]



Proponents argue that the claims of innocence by those who have been released from death row are based on legal technicalities, and not actual innocence.[153] They feel these hypothetical claims of innocence are merely delay tactics to put off execution as long as possible.[154] However, with the way our court system operates today, there are many safety nets in the form

149. Death Penalty Info. Ctr., *Executed But Possibly Innocent*, http://www.deathpenaltyinfo.org (follow "Issues" hyperlink; then follow "Innocence" hyperlink; then follow "Executed Despite Doubts About Guilt" hyperlink) (last visited Sept. 28, 2007).

150. Death Penalty Info. Ctr., *Innocence and the Death Penalty*, http://www.deathpenaltyinfo.org (follow "Issues" hyperlink; then follow "Innocence" hyperlink) (last visited Jan. 11, 2008).

151. *See id.*

152. *See* JAMES S. LIEBMAN, JEFFERY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at app. C-2, C-4 (The Justice Project 2000).

153. Mich. State Univ. and Death Penalty Info. Ctr., *Arguments for and Against the Death Penalty*, 2000, http://deathpenaltycurriculum.org/teacher/c/about/arguments/arguments.pdf.

154. *Id.*

of appeals (see chart below). As has been observed, "[i]mprisoning innocent people is also wrong, but we cannot empty the prisons because of this minimal risk."[155]

FIGURE 3[156]

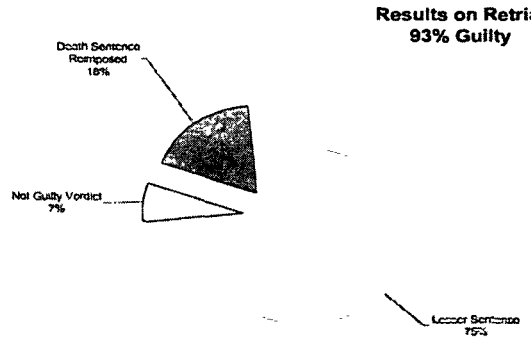
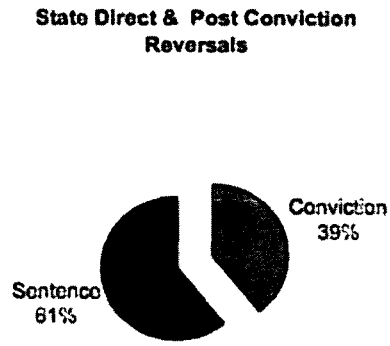


FIGURE 4[157]



D. The Safety of Society

The Supreme Court in *Furman v. Georgia* stated that the death penalty serves to manifest the community's outrage at the commission of the crime.[158] The death penalty exerts a widespread moralizing influence upon

155. *Id.*

156. *Id.* at app. C-4.

157. Barry Latzer & James N.G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE 64, 67 (2000).

158. Furman v. Georgia, 408 U.S. 238, 303 (1972).

community values.[159]

It is also seen as satisfying the popular demand for grievous condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands.[160] This feeling was again adopted in the *Gregg* decision.[161] The Court stated that capital punishment is an expression of society's moral outrage at particularly offensive conduct.[162] Although this function may be seen as unappealing, it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.[163] The state has the authority to defend its citizens from violence and crime. Its mission is to promote justice and the good of its people. It does this by punishing the criminal.

IV. U.S. CONSTITUTIONAL JURISPRUDENCE

A. Eighth Amendment

In 1791, Congress ratified the Eighth Amendment to the United States Constitution and thereby codified the prohibition against cruel and unusual punishment.[164] The idea behind this prohibition originated from the English Bill of Rights of 1689.[165] As originally conceived, the Cruel and Unusual Punishment Clause was interpreted differently than it is today. The Clause was originally intended to protect people from the most barbaric and excessive forms of punishment such as "disembowelment, public dissection, beheading and burning."[166] It also provided protection against all punishments which, by their length or severity, were greatly disproportionate to the offense charged.[167]

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159. *Id.*

160. *Id.*

161. Gregg v, Georgia, 428 U.S. 153, 183 (1976).

162. *Id.* at 177.

163. *Id.*

164. U.S. Const. amend VIII.

165. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840, 853 (1969). Historians believe that the adoption of cruel and unusual in the English Bill of Rights was in response to the "Bloody Assize," an English treason trial in 1685. *Id.* at 853-54. During this trial, hundreds of people were killed for their alleged treasons, including many who claimed they were not guilty. *Id.*

166. *See* Matthew J. Giacobbe, *Constitutional Law—Eighth Amendment—A Prisoner Must Prove That Prison Officials Acted With Deliberate Indifference to Confinement Conditions for Such to Constitute Cruel and Unusual Punishment*—Wilson v. Seiter, *111 S. Ct. 2321 (1991)*, 22 SETON HALL L. REV. 1505, 1505 (1992).

167. *See, e.g.*, Kristina E. Beard, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause*, 51 U. MIAMI L. REV. 445, 449-59 (1997) (citing

In 1811, the first judicial opinion in the United States on the Cruel and Unusual Punishment Clause was handed down by the Supreme Court of Error in Connecticut.[168] In that case, the court, following the defendant's contention that the accumulation of prison time was illegal and cruel, rejected his argument.[169] While there were only twenty other reported opinions dealing with this concept prior to 1870, the fact that they were scattered over fourteen different jurisdictions is evidence that the prohibition against cruel and unusual punishment was widely recognized.[170] In the 1870s, more courts began to deal with the subject and by 1910, thirty-eight states had rendered opinions on the Cruel and Unusual Punishment Clause.[171]

"From the very beginning, the United States Supreme Court held that the Bill of Rights was a restriction on the federal government and not on the states."[172] In a series of cases, the Court specifically ruled that the Eighth Amendment did not apply to the individual states.[173] The first United States Supreme Court decision to consider the relationship between the Eighth and Fourteenth Amendments was *In re Kemmler* decided in 1890.[174] The primary rationale was that the Fourteenth Amendment Privileges and Immunities Clause protected citizens against the infliction of cruel and unusual punishment.[175] However, the Court upheld its previous decisions and distinguished between the rights of states and the rights of federal citizenship.[176] The Court concluded that freedom from cruel and unusual punishment was not a national privilege. The Court stated that the Fourteenth Amendment "was not designed to interfere with the power of the State to protect the lives, liberties and property of citizens, and to promote their health, peace, morals, education, and good order."[177]

Weems v. United States, 217 U.S. 349 (1910) (discussing the origins and developments of Eighth Amendment jurisprudence regarding the death penalty)).

168. LARRY CHARLES BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 9 (D.C. Heath and Company 1975).

169. *Id.*; *see also* State v. Smith, 5 Day 175, 178 (Conn. 1811).

170. *Id.*

171. BERKSON, *supra* note 168, at 9.

172. *Id.* at 13 (citing Livingston v. Moore, 32 U.S. (7 Pet.) 469 (1833); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)).

173. *Id.* (citing Collins v. Johnston, 237 U.S. 502, 510-11 (1915); Ughbanks v. Armstrong, 208 U.S. 481, 487 (1908); O'Neil v. Vermont, 144 U.S. 323, 332 (1892); Eilenbecker v. Plymoth County, 134 U.S. 31, 31-35 (1890); Pervear v. Commonwealth, 72 U.S. 475, 479-80 (1867)).

174. 136 U.S. 436, 445-46 (1890).

175. *Id.* at 446.

176. *Id.* at 448.

177. *Id.* at 449.

Although there was a second argument in the *Kemmler* case based on the Due Process Clause, the Court did not give it much consideration.[178] The first major change in the Eighth Amendment concerning the states arose in 1947.[179] In this case, the argument did not rely on the Privileges and Immunities Clause, but on the Due Process Clause of the Fourteenth Amendment. Here, the defendant sought to prevent Louisiana from a second attempt to electrocute him, as the first attempt had been unsuccessful due to mechanical failure. Justice Reed, writing for the majority, stated that violations of Eighth Amendment "would be violative of the Due Process Clause of the Fourteenth Amendment."[180] Two years later, the Court of Appeals for the Third Circuit held that the Cruel and Unusual Punishment Clause was incorporated into the Due Process Clause.[181] The court stated, "[w]e are of the opinion that the right to be free from cruel and unusual punishment at the hands of a State is as 'basic' and 'fundamental' a one as the right of freedom of speech or freedom of religion."[182]

In 1952, Justice Douglas stated: "the infliction of 'cruel and unusual punishments' against the command of the Eighth Amendment is a violation of the Due Process Clause of the Fourteenth Amendment, whether that clause be construed as incorporating the entire Bill of Rights or only some of its guaranties[sic]."[183] Thus, it came as no shock in 1962 when the Supreme Court held in *Robinson v. California* that state statutes that inflict cruel and unusual punishments violate both the Eighth and Fourteenth Amendments.[184] The Court interpreted the Fourteenth Amendment to mean that the states had an obligation to apply the Bill of Rights to all persons equally.[185]

Gregg v. Georgia articulated two distinct criteria for courts to use when evaluating Eighth Amendment challenges: (1) evolving standards of decency and (2) proportionality.[186] Evolving standards of decency describes an inquiry into the accepted societal consensus surrounding a particular issue.[187] The punishment also has to respect human dignity and

178. *Kemmler*, 136 U.S. 436.

179. *See* Francis v. Resweber, 329 U.S. 459 (1947).

180. *Id.* at 462.

181. Johnson v. Dye, 175 F.2d 250, 255 (3d Cir. 1949).

182. *Id.* at 255.

183. Sweeney v. Woodall, 344 U.S. 86, 93 (1952) (Douglas, J., dissenting).

184. 370 U.S. 660, 667 (1962) (holding that the Eighth Amendment's Cruel and Unusual Punishment Clause applies to states through the Due Process Clause of the Fourteenth Amendment to prohibit punishing defendants for being addicted to narcotics).

185. *Id.* at 666.

186. 428 U.S. 153, 175-87 (1976).

187. *Id.* at 179-82.

cannot be excessive.[188] Two further inquiries are needed to detect excessiveness. First, the punishment cannot involve an unnecessary infliction of pain, and second, the punishment cannot be grossly out of proportion to the severity of the crime committed.[189] This led to arguments that the Constitution guarantees the right to "human dignity."[190] This right, as protected by the Eighth Amendment, would prohibit the government from imposing any punishment that degrades one's basic humanity.[191]

From this perspective, the death penalty violates the Eighth Amendment because it is inherently dehumanizing.[192] However, originalists, those who adhere to the original intent of the Framers, reject any claim to a constitutional right to dignity.[193] "If there is no explicit mention of 'human dignity' within the Constitution, or within the extant documents of the Framers, one cannot pencil it in to arrive at one's political or social goals. Doing so, according to originalists, compromises the integrity of the document and renders it meaningless."[194] Justice Brennan argued that inhumane punishments "are unconstitutional because they are inconsistent with the fundamental premise of the Eighth Amendment that even the vilest criminal remains a human being possessed of common human dignity."[195]

Eighth Amendment challenges to the death penalty have not been exhausted. The practice of capital punishment has undergone numerous changes over the centuries. It has seen the struggle of those wishing to retain the death penalty for biblical, retributive, or other reasons, and those wanting to see it abolished on fundamental humanitarian grounds.[196] The

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188. *Id.* at 173.

189. *Id.*

190. *See* Michael J. Meyer, *Introduction* to THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 1 (Michael J. Meyer & William A. Parent eds., 1992); *see also* Margaret Jane Radin, *supra* note 138, at 1144-48 (arguing that the Eighth Amendment requires recognition of each citizens' inherent dignity).

191. Radin, *supra* note 138, at 1144.

192. *See* Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS HUMAN DIGNITY AND AMERICAN VALUES, at 145, 148 (Michael J. Meyer & William A. Parents eds., 1992). Some Supreme Court Justices, including Earl Warren and William Brennan, accepted the view that the Eighth Amendment contemplates some kind of basic human dignity. *Id.* at 145; *see also* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

193. Steven H. Jupiter, *Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty in American Democracy*, 23 FORDHAM URB. L. J. 437, 461 (1996).

194. *Id.*

195. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 329-30 (1986) (quoting Furman v. Georgia, 408 U.S. 238, 273 (1971)).

196. INT'L COMM'N OF JURISTS, ADMINISTRATION OF THE DEATH PENALTY IN THE

most significant changes, however, have occurred during this century.[197]

In 1972, the Supreme Court's landmark decision in *Furman v. Georgia* drastically impacted the development of the death penalty in the United States.[198] For the first time in American history, the Court held the death penalty, as then administered, was arbitrary and capricious, and in violation of the Eighth and Fourteenth Amendments.[199] The unrestrained discretion in administering the death sentences became unacceptable because of its arbitrariness. The Court considered a sentence of death to be cruel and unusual if: (1) it was too severe for the crime; (2) it was arbitrary, meaning that some criminals receive the punishment while others do not; (3) it offends society's sense of justice; or (4) it was not more effective than a less severe penalty.[200] In a five to four decision, the Court found the imposition of the death sentence to be unconstitutional.[201] The Court was sharply divided, and absence of agreement among the justices resulted in a per curiam opinion from the court with each justice writing a separate opinion.

Of the five justice majority, only Justices Brennan and Marshall believe the death penalty violates the Eighth Amendment in all circumstances.[202] In his opinion, Justice Brennan argued that, compared to all other forms of punishment, "[d]eath is a unique punishment in the United States."[203] However, because it has longstanding usage and acceptance in this country, Brennan turned on his second principle, that the state may not arbitrarily inflict unusually severe punishment. Brennan wrote, "when the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."[204]

The three most important opinions in *Furman* came from Justices Douglas, Stewart and White.[205] Their opinions express a common theme of

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UNITED STATES 73 (1996).

197. *Id.*

198. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

199. *Id.*

200. *Id.* at 305.

201. *Id.* at 239-40 (consolidating Furman v. Georgia (No. 69-5003), Jackson v. Georgia (No. 69-5030), and Branch v. Texas (No. 69-5031)).

202. *Id.* at 257-306 (Brennan, J., concurring); *Id.* at 314-74 (Marshall, J., concurring).

203. *Id.* at 286 (Brennan, J., concurring).

204. *Id.* at 293.

205. *See* Robert Wersberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315 (1983) (stating that the "important opinions" in *Furman* "are those of Justices Stewart, Douglas, and White, which conditionally suspend the death penalty, and which are the source of the Court's later efforts in doctrine-making").

arbitrariness and discrimination.[206] All three found fault with the death penalty as it was then administered.[207] Justice Douglas found that complete discretion allowed for discriminatory application of the death penalty.[208]

Justice Stewart felt that unrestrained discretion led to a random infliction of the death sentence, and the results of which are cruel and unusual "in the same way that being struck by lightning is cruel and unusual."[209] Stewart argued, as did White, that death is different from all other forms of punishment due to its deprivation and finality.[210] Justice White expressed concern with unbridled discretion because it enabled such infrequent imposition of the death penalty that "the threat of execution is too attenuated to be of substantial service to criminal justice."[211]

In 1977, the impact of *Furman* led North Carolina to enact a new statute that made the death penalty mandatory for certain types of first degree murder.[212] A number of state legislatures apparently believed that mandatory death sentences for certain types of offenses would avoid the problem of an inconsistent application of the ultimate punishment.[213]

In *Woodson v. North Carolina*, the Supreme Court ruled against North Carolina and declared that mandatory death sentences violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.[214] The Court found that North Carolina's mandatory death penalty statute failed under *Furman*, stating, "[it] provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die."[215] Additionally, the Court stated that mandatory sentences also do not allow the "judiciary to check arbitrary and capricious

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206. *Id.*

207. *Id.*

208. *Id.* at 255 (Douglas, J., concurring).

> The discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

Id.

209. *Id.* at 309.

210. *Id.* at 306 (stating also "it is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice").

211. *Id.* at 313 (White, J., concurring).

212. Woodson v. North Carolina, 428 U.S. 280, 286 (1976).

213. *Id.* at 302.

214. *Id.* at 305 ("This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long.").

215. *Furman*, 408 U.S. at 253 (Douglas, J., concurring).

exercise of that power through a review of death sentences."[216]

Under the Eighth Amendment, death eligible defendants are to be treated as unique individuals.[217] Mandatory death penalty schemes do not allow the "individualized" sentencing inquiry that the Eighth Amendment demands. These schemes treat defendants as "members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[218] Because of the qualitative difference between death and life imprisonment, the Court found a need for reliability in the determination that death is the appropriate punishment in a specific case. The Court held that one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common law practice of inexorably imposing a death sentence upon every person convicted of a specified offense.[219] The Court found that a jury wishing to show mercy towards a particular defendant would avoid imposing a death sentence by simply refusing to find the defendant guilty of the underlying offense.[220] The Court found North Carolina's mandatory death sentencing scheme departed from contemporary standards respecting the imposition of the death penalty; thus, it was not consistent with the Eighth and Fourteenth Amendments.[221] The Court concluded:

> While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill *Furman's* basic requirements by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.[222]

B. The Due Process Clause of the Fourteenth Amendment

In response to *Furman*, at least thirty-five states have enacted new death penalty statutes.[223] These states attempted to address *Furman*'s concerns by implementing one of two types of provisions: (1) guided discretion "by specifying the factors to be weighed and the procedures to be followed in

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216. *Woodson*, 428 U.S. at 303.

217. *Id.* at 304 (noting that "[c]onsideration of the character and record of the individual offender and the circumstances of the particular offense," is a "constitutionally indispensable part" of any capital punishment scheme).

218. *Id.* at 304.

219. *Id.* at 292-93.

220. *Id.* at 302-03 ("In view of the historic record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict.").

221. *Id.* at 303.

222. *Id.*

223. Gregg v. Georgia, 428 U.S. 153, 179-80 (1976).

deciding when to impose a capital sentence, or (2) making the death penalty mandatory only for specified crimes."[224] Twenty-one states enacted guided discretion, including Georgia.[225] The other fourteen death penalty states eliminated sentencing discretion by imposing a mandatory death sentence for specific offenses.[226]

In 1976, four years after *Furman* was decided, the Supreme Court faced the question of whether guided discretion was constitutionally permissible. In *Gregg v. Georgia*, the Court rejected the idea that the death penalty is per se unconstitutional.[227] In a seven to two decision, the Court held that the death penalty could be imposed provided certain procedural safeguards were implemented.[228] The plurality opinion by Justice Stewart, joined by Justices Powell and Stevens, held:

> [T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.[229]

The Court's opinion in *Gregg* is central to the constitutional validity of guided discretion statutes.[230] Since Georgia used aggravating factors to narrow the class of death-eligible offenders, "no longer can a Georgia jury do as *Furman's* jury did: reach a finding of the defendant's guilt and then, without guidance or discretion, decide whether he should live or die."[231] Georgia's new death penalty statute proved to be the model for most legislative reenactments of the death penalty.[232] Georgia provided for a bifurcated trial wherein the first phase determines the defendant's guilt or

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224. *Id.* at 180.

225. *Id.* at 179 n.23.

226. *Id.* at 180.

227. *Id.* at 177-78 ("For nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid per se."); *see also* Trop v. Dulles, 356 U.S. 86 (1958); Francis v. Resweber, 329 U.S. 459 (1947); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878).

228. *Gregg*, 428 U.S. at 188-89.

229. *Id.* at 195.

230. *See Gregg*, 428 U.S. 153.

231. *Id.* at 197 ("As a result . . . 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'" (quoting Coley v. State, 204 S.E. 2d 612, 615 (Ga. 1974))).

232. *Id.* at 195.

innocence.[233]

After a verdict, the second phase of the trial settles the question of sentencing.[234] During sentencing, Georgia's statute provided that the trial judge or jury must find, beyond a reasonable doubt, one of the ten aggravating circumstances specified in the statute.[235] Evidence of these aggravating circumstances includes the record of any prior criminal convictions and pleas of guilty, or the absence of any prior convictions and pleas. Every sentence of death and conviction is then automatically reviewed by the state's highest court.[236]

Although Georgia provided a model for other court systems, the Court found that those procedures would not be the only permissible procedures under *Furman*. Instead, the Court said that every sentencing system must be met on an individual basis.[237] As the Court stated, "we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman*'s constitutional concerns."[238]

In 1977, several state death penalty statutes were again effected when the Supreme Court ruled that a death sentence may only be imposed when a life has been taken.[239] In order to comply with *Furman,* Georgia, North Carolina, and Louisiana revised their death penalty statutes to include the death penalty for the rape of an adult woman.[240] The statutes in North Carolina and Louisiana provided a mandatory death penalty for those found guilty of rape, but *Woodson* invalidated those laws.[241] When Louisiana and North Carolina rewrote their statutes after the *Woodson* decision, they reenacted the death penalty for the crime of murder, but not for the crime of rape.[242]

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233. *Id.* at 163.

234. *Id.*

235. *Id.* at 164 (finding conversely, "[t]he defendant is accorded substantial latitude as to the types of evidence that he may introduce" (citing Brown v. State, 220 S.E. 2d 922, 925-26 (Ga. 1975))).

236. *Id.* at 167-68.

237. *Id.* at 195.

238. *Id.*

239. Coker v. Georgia, 433 U.S. 584 (1977).

240. *Id.* at 594.

241. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (holding death sentences imposed under North Carolina's mandatory death sentence statute unconstitutional as violative of the Eighth and Fourteenth Amendments).

242. *Coker*, 433 U.S. at 594

> [N]one of the seven other legislatures that to our knowledge have amended or replaced their death penalty statutes since July 2, 1976, including four States (in addition to Louisiana and North Carolina) that had authorized the death sentence

Georgia's statute retained the death penalty for the crime of rape.[243] However, in 1977, the Supreme Court, invalidated Georgia's death penalty law for rape in *Coker v. Georgia*.[244] The Court held that a sentence of death for the crime of rape of an adult woman is a grossly disproportionate and excessive punishment forbidden by the Eighth and Fourteenth Amendments.[245] The Court reasoned that rape does not compare in seriousness with murder.[246] "[I]n terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which does involve the unjustified taking of human life."[247]

In 1978, the Court extended the doctrine of individualized sentencing determined in *Woodson*.[248] In *Lockett v. Ohio*, the Court ruled that a defendant in a capital case has an Eighth Amendment right during the penalty phase to present any mitigating evidence relevant to his character or to the circumstances of the crime.[249]

The Ohio law at issue in *Lockett* required the sentencer to impose the death sentence unless it finds one of three specific categories of mitigating evidence.[250] The plurality opinion of the Court rejected the limits the statute put on mitigating evidence that a sentencer could consider.[251] Because the Eighth Amendment and earlier Court decisions required a

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for rape prior to 1972 and had reacted to *Furman* with mandatory statutes, included rape among the crimes for which death was an authorized punishment.

Id.

243. GA. CODE ANN. § 26-2001 (1972).

244. *Coker*, 433 U.S. at 600 (White, J., majority).

245. *Id.* at 592.

246. *Id.* at 598.

247. *Id.*

248. Lockett v. Ohio, 438 U.S. 586 (1978).

249. *Id.* at 606 (Burger, J., majority).

250. *Id.* at 607.

> Once a defendant is found guilty of aggravated murder with at least one of seven specified aggravating circumstances, the death penalty must be imposed unless, considering 'the nature and circumstances of the offense and the history, character, and condition of the offender,' the sentencing judge determines that at least one of the following mitigating circumstances is established by a preponderance of the evidence: '(1) [t]he victim of the offense induced or facilitated it. (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation. (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.'

Id. (quoting OHIO REV. CODE ANN. § 2929.04(B) (West 1975)).

251. *Id.* at 605.

death eligible defendant to receive individualized sentencing determinations, states may not restrain the sentencer's ability to consider as mitigating evidence "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."[252]

Thus, "the sentencer may constitutionally impose the death penalty . . . as an exercise of his unguided discretion after being presented with all circumstances which the defendant might believe to be conceivably relevant to the appropriateness of the penalty for the individual offender."[253] However Justice White's dissent argues, "the Court has now completed its about-face since *Furman* . . . . " to a time where the death penalty was imposed erratically and so infrequently that it is cruel and unusual.[254]

Justice Rehnquist also dissented, stating individualized sentencing:

> [W]ill not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a 'mitigating circumstance,' it will not guide sentencing discretion but will totally unleash it.[255]

Enmund v. Florida[256] held that the Eighth Amendment forbids "the imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[257] The Court's decision again recognizes that the death penalty is unique in its severity and its irrevocability.[258] Thus, before the state may impose a sentence of death, the state must focus on the personal intent and culpability of the defendant himself, and not merely that of an accomplice.[259]

The Court stated that the law "has long considered a defendant's intention – and therefore his moral guilt" to be fundamental in determining the extent of his culpability.[260] The plurality takes the position that the death penalty will serve as a deterrent "only when murder is the result of

252. *Id.* at 604.
253. Lockett v. Ohio, 438 U.S. 621, 621 (1978) (mem.).
254. *Id.* (citation omitted).
255. Lockett v. Ohio, 438 U.S. 586, 631 (1978) (Rehnquist, J., dissenting).
256. Enmund v. Florida, 458 U.S. 782 (1982).
257. *Id.* at 797 (White, J., majority).
258. *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 187 (1976)).
259. *Id.* at 798.
260. *Id.* at 800 (citing Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)).

premeditation and deliberation."[261] If a person does not intend to take a life, the possibility that the death penalty will be imposed as a punishment will not "enter into the cold calculus that precedes the decision to act."[262]

Justice O'Conner, joined by Justices Burger, Powell, and Rehnquist, dissented: "the Court should decide not only whether the petitioner's sentence of death offends contemporary standards as reflected in the responses of legislatures and juries, but also whether it is disproportionate to the harm that the petitioner caused and to the petitioner's involvement in the crime . . . ."[263] The lesson to be learned from *Coker* is that proportionality also requires that the degree of harm and the degree of the defendant's culpability should be related to the punishment imposed.[264] Courts should consider the "unique and complex mixture" of the defendant's motives, knowledge and participation in the felony.[265]

Five years later, the "intent to kill" requirement of *Enmund*[266] was modified by the case of *Tison v. Arizona.*[267] *Tison* upheld the death penalty for major participants in dangerous felonies regardless of the defendants' intent to commit murder.[268] Two key points arise out of *Tison*. The first is the concept of culpability, and the second concerns the defendant's involvement in the crime committed.[269] In *Tison,* the Court ruled that a death sentence is not disproportionate to the crime committed if the defendant participated heavily or substantially in a felony involving a homicide and acted with reckless indifference to the value of human life.[270]

The majority in *Tison* held that the standard applied in *Enmund* was erroneous.[271] The participation in a major felony with reckless indifference to human life is sufficient to satisfy the culpability requirement found in *Enmund.*[272] Justices Brennan, Marshall, Blackmun, and Stevens dissented from the majority and determined that Eighth Amendment jurisprudence deems the death penalty a disproportionate penalty for defendants who do not take a human life. This divergence from previous court decisions and

261. *Id.* at 799 (citing Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

262. *Id.* (citing *Gregg*, 428 U.S. at 186).

263. *Id.* at 816 (O'Connor, J., dissenting).

264. *Id.* at 814-15.

265. *Id.* at 826.

266. *Id.* at 782 (White, J., majority).

267. 481 U.S. 137 (1987).

268. *Id.* at 158 (Brennan, J., dissenting).

269. *See id.*

270. *Id.* at 138 (majority opinion).

271. *Id.*

272. *Id.* at 149. The intent requirement depends on whether or not at the time of the homicide the defendant was aware of the risk of death. *Id.*

the majority's conclusion demonstrates the "profound problems" that exist in capital sentencing cases.[273]

In 1988, the Supreme Court in *Thompson v. Oklahoma*[274] ruled that a defendant who was fifteen years or younger at the time of a murder could not be executed. The vote was five to three with Justice Kennedy not participating. The fifth, and determinative vote, was from Justice O'Connor who concurred with the opinion only because the Oklahoma capital punishment statute did not specify a minimum age requirement.[275] The plurality opinion focused on the fact that society regards juveniles as an age-based classification. The Court saw this as society's belief regarding the adolescent's level of responsibility.[276] Childhood characteristics include "less experience, less education," less perception, less responsibility for their actions, less aptitude to evaluate the consequences, and more susceptibility to peer pressure and emotional influences than adults.[277]

However, one year later, in *Stanford v. Kentucky*,[278] the Court ruled that the Eighth Amendment does not prohibit the death penalty for a defendant sixteen or seventeen years of age at the time the crime was committed. Justices O'Connor and Kennedy joined the plurality in support of the death penalty for these ages.[279] However, Justices Brennan, Marshall, Blackmun, and Stevens (the four Justices who participated in the plurality opinion in *Thompson*) dissented in *Stanford*.[280] The dissent argued two points. First, juveniles lack the degree of responsibility for their crimes that the Eighth Amendment requires.[281] Second, that the execution of juvenile offenders does not further the stated goal of capital punishment, deterrence.[282] This second argument stems from the culpability argument articulated in *Enmund*.[283] "[R]etribution as a justification for executing [offenders] very much depends on the degree of [their] culpability[.]"[284] The *Stanford* dissent believed that juveniles lack the culpability that makes a crime warrant the death penalty.[285]

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273. *Id.* at 164 (Brennan, J., dissenting).
274. 487 U.S. 815 (1988).
275. *Id.* at 857-58 (O'Connor, J., concurring).
276. *Id.* at 823-25 (plurality opinion).
277. *Id.* at 835.
278. 492 U.S. 361 (1989).
279. *Id.*
280. *Id.* at 382 (Brennan, J., dissenting).
281. *Id.* at 402-03.
282. *Id.* at 403.
283. 458 U.S. 782, 800 (1982).
284. *Id.*
285. *Stanford*, 492 U.S. at 403-04 (Brennan, J., dissenting).

In 1989, the Court faced the issue of whether a convict, who was found guilty at trial and who later became insane when the capital sentence was to be imposed, could be executed. The five to four decision in *Ford v. Wainwright* found that an insane convict may not be executed.[286] The Court used the historical credentials of Blackstone and Sir Edward Coke to determine the issue.[287] Blackstone argues that the insane are not accountable. "If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed[.]"[288] Sir Edward Coke expressed the same view. "By intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle both against law, and of [extreme] inhumanity and cruelty, and can be no example to others."[289]

The Court argues that if a defendant does not perceive a connection between the crime and the punishment, the retributive goal of the death penalty is not satisfied.[290] "For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."[291]

In a 5-4 decision, the Supreme Court in *Penry v. Lynaugh* ruled it does not violate the Eighth Amendment to execute someone who is mildly to moderately retarded.[292] The trial court found that the defendant was competent to stand trial, even though he had the reasoning of a six and a half year-old.[293] The jury rejected the defendant's insanity defense.[294] Of the thirty-eight states that allow the death penalty, twenty-seven bar the execution of the mentally retarded, including the United States Government for federal inmates.[295]

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286. Ford v. Wainwright, 477 U.S. 399, 417 (1986) (Marshall, J., majority) ("It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.").

287. *Id.* at 406-08.

288. *Id.* at 407.

289. *Id.* "Other recorders of the common law concurred." *Id.* (citation ommitted).

290. *Id.* at 409.

291. *Id.*

292. Penry v. Lynaugh, 492 U.S. 302, 340 (1989).

293. *Id.* at 308 (O'Connor, J., majority).

294. *Id.*

295. As of December 31, 2005, twenty-seven states excluded mentally retarded persons from capital sentencing: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, South Dakota,

In 1989, the Supreme Court ruled that while executing those with diminished mental capabilities does not violate the Constitutional ban on cruel and unusual punishment, a defendant's IQ and evidence of mental retardation are mitigating factors the trial jury is entitled to consider during post conviction deliberations prior to sentencing.[296] The Court was reluctant to use mental age to exculpate a defendant from responsibility.[297] The court stated, "reliance on mental age to measure the capabilities of a retarded person for purposes of the Eighth Amendment could have a disempowering effect if applied in other areas of the law."[298] A mentally retarded person could be denied any number of rights, such as marriage for example, because the person has a "mental age" of a young person.[299]

C. Equal Protection Clause

The Supreme Court has faced several challenging issues in the debate over the death penalty. In 1987, the Court was faced with the possibility that race influences the infliction of the death penalty. In *McCleskey v. Kemp* the Court ruled that a statistical study in Georgia, which revealed that black defendants who killed whites have the greatest likelihood of receiving the death penalty, does not prove discrimination in violation of the Eighth Amendment or the Equal Protection Clause.[300] The issue in *McCleskey* revolved around a complex statistical study that indicated a risk that racial consideration entered into capital sentence determinations.[301]

Tennessee, Utah, Virginia, and Washington. Mental retardation is a mitigating factor in South Carolina. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 2006 STATISTICAL TABLES tbls.1, 2 (2006), http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/cp06st.pdf.

296. *Penry*, 492 U.S. at 311-12 (O'Connor, J., majority).

297. *Id.* at 340.

298. *Id.*

299. *Id.*

300. McCleskey v. Kemp, 481 U.S. 279 (1987).

301. *Id.* at 286 (Powell, J., majority).

> In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth, and (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.

The statistical evidence consisted of the examination of over two thousand murder cases that occurred in Georgia during the 1970s.[302] The Court ruled that a mere racially disproportionate impact is not enough, but that there must be proof of purposeful or intentional discrimination.[303] The majority opinion stated four reasons "for shrinking from the implications" of the defendant's statistical evidence: (1) the desirability of discretion for actors in the criminal justice system; (2) the existence of statutory safeguards against abuse of that discretion; (3) the potential consequences for broader challenge to criminal sentences; and (4) an understanding of the contours of the judicial role.[304]

The majority determined that statistics "show only the likelihood that a particular factor entered into some decisions."[305] Jurors bring into deliberations "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[306] Jurors use their collective judgment based upon unique characteristics of a particular criminal defendant, which are difficult to explain.[307]

The dissent of Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens argue that the statistical evidence shows that there is a risk that a capital sentence may be influenced by racial considerations.[308] They argue that the majority does not take into account history and human experience.[309] "Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being."[310]

V. CURRENT LEGISLATION AND RULES

Currently, thirty-six states, the federal government, and the military have death penalty statutes.[311] Eleven of those states provide the death penalty for more crimes than just murder, including treason, train wrecking, aircraft piracy, and kidnapping.[312] Fourteen states and the District of Columbia do

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Id.

302. *Id.*

303. *Id.* at 294-97.

304. *Id.* at 335 (Brennen, J., dissenting).

305. *Id.* at 308 (Powell, J., majority).

306. *Id.* at 311 (quoting Peters v. Kiff, 407 U.S. 493, 503 (1972)).

307. *Id.*

308. *Id.* at 328 (Brennen, J., dissenting).

309. *Id.* at 335.

310. *Id.* at 336.

311. FACTS ABOUT THE DEATH PENALTY, *supra* note 33, at 1; *see also* Pub. L. 93-366, 88 Stat. 404, 411-13, *repealed by* Pub. L. 103-322, § 60003(b), 108 Stat. 1970 (1994).

312. SNELL, *supra* note 295, at tbls.1, 2.

not have capital punishment.[313]

In response to *Furman*, death penalty states have developed a variety of sentencing schemes. In one variety, the defendant's trial is bifurcated with a special post-conviction phase to address sentencing. Bifurcation is divided into two phases—the guilt stage and the penalty stage. The purpose is to allow the jury to consider mitigating and aggravating evidence at the appropriate times. The jury recommends whether the defendant should receive the death penalty based on evidence presented during the sentencing phase.[314]

In certain circumstances the judge and jury can disagree as to the appropriate sentence. In Ohio and Kentucky,[315] the judge can only reduce a jury's sentencing recommendation from death to life, but may not increase the sentence from life to death.[316] Arizona, Idaho, and Montana allow for a single judge to sentence the defendant to either life in prison or death.[317] Nebraska allows for sentencing by either a single judge or a three-judge panel.[318]

Much controversy has arisen between the states' differing sentencing schemes. Since the 1980s, courts are clearly deferring more to the jury for death penalty sentencing.[319] The reasoning behind this is that jurors are the voice of the community.[320] Judges view jurors as the "conscience of the community" and do not want to disturb jury verdicts.[321] The opposite side of the spectrum argues that in no other cases do juries sentence the defendant, so why let them decide important death penalty cases?[322]

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313. FACTS ABOUT THE DEATH PENALTY, *supra* note 33, at 1. The states with no death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.*

314. *See* BEDAU, *supra* note 57, at 334-35.

315. *See* Michael Mello, *Taking* Caldwell v. Mississippi *Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283, 284 n.3 (1989).

316. *Id.* at 284-85.

317. *See* ARIZ. REV. STAT. ANN. § 13-703(b) (2001); IDAHO CODE ANN. § 19-2515(c), § 19- 2515(3)(b) (2007); MONT. CODE ANN. § 46-18-301 (2007).

318. NEB. REV. STAT. § 29-2520 (1995).

319. Steve Mills, *In Death Cases, Jurors Don't Always Prevail*, CHI. TRIB., Dec. 28, 2000, at 1N.

320. Spaziano v. Florida, 468 U.S. 447, 462 (1984).

321. *See* Mills, *supra* note 319, at 1N.

322. *Id.*; *see also* Proffitt v. Florida, 428 U.S. 242, 252 (1976).

> [This Court] has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury and therefore is better able to impose sentences similar to those imposed in analogous cases.

Alabama, and other states, originally intended the judicial override to serve as a "check on runaway juries correcting verdicts by citizens inflamed by emotion . . . [or] bent on vengeance."[323]

In 1984, the Supreme Court was faced with its first direct challenge to a jury override sentencing scheme in *Spaziano v. Florida.*[324] Among other arguments, the defendant challenged the court's imposition of a death sentence over the recommendation of the jury that he be sentenced to life.[325] In the 6-3 decision, the Court found Florida's jury override scheme to be constitutionally valid.[326] After examining the nature and the purpose of the death penalty the majority concluded that there was no constitutional violation in a judicial death sentence.[327] In addition, the Court held a sentencing by jury was not required under the Sixth Amendment.[328] No court has held that the Sixth Amendment guarantees a right to a jury determination of sentencing.[329] Justice Stevens, joined by Justices Brennan and Marshall dissented to the opinion.[330] They argued that it is the jury and not the judge who most aptly represents a community's standards which play a crucial role in death penalty cases including the evolving standards under the Eighth Amendment.[331]

In 1992, the Supreme Court faced another challenge regarding jurors in capital cases. In *Morgan v. Illinois*, the Court ruled that a defendant shall be given the same opportunity as the State to dismiss for cause any juror who would automatically vote one way or the other in the punishment of death without regards to the evidence.[332] The Court held that a capital offender is entitled to question prospective jurors to ascertain if they believe in the automatic imposition of the death penalty upon conviction of

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Id.

323. *See* Mills, *supra* note 319, at 1N.

324. *See generally Spaziano*, 468 U.S. 447.

325. *Id.* at 449.

326. *Id.*

327. *Id.* at 464.

328. *Id.*

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Id.

329. *See id.* at 459. "The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Id.*

330. *Id.* at 467.

331. *Id.* at 489 (Stevens, J., dissenting).

332. Morgan v. Illinois, 504 U.S. 719 (1992).

capital murder.[333] In the 6-3 decision, it was held that the refusal by the trial court to inquire into whether potential jurors would vote one way or the other violated the Due Process Clause of the Fourteenth Amendment.[334] The Court found a juror who would automatically impose the sentence of death would fail to consider evidence of aggravating and mitigating factors as required by state statutes and the Court's instructions.[335]

A. The Appeals Process

If an innocent person is convicted, there is generally little time to collect and present new evidence. In Texas, the defendant only has thirty days after the conviction to present any new evidence.[336] Perhaps the state with the most restrictive rule in the United States is Virginia.[337] Defendants in Virginia are allowed twenty-one days following a death penalty verdict to present exculpatory evidence.[338] Sixteen other states also require a new trial motion based on new evidence, to be filed within sixty days of judgment.[339] Eighteen jurisdictions have time limits between one and three years.[340] There are nine states that have no time limit.[341]

Representation during the appeals process for a death row inmate is only assured during one direct appeal.[342] If that appeal is denied, representation is no longer assured.[343] Thus, the defendant's opportunity to uncover new evidence to prove his innocence is reduced. Many death penalty convictions and sentences are overturned on appeal, but too frequently the discovery of error is the result of finding expert appellate counsel, a sympathetic judge willing to waive procedural barriers, and a compelling set of facts which can overcome the presumption of guilt.

State prisoners may find relief at the federal level by the writ of habeas corpus.[344] However, in 1996, President Clinton signed into law the Anti-

333. *Id.* at 729.

334. *Id.* at 727.

335. *Id.* at 729.

336. TEX. R. APP. P. 31(a)(1) (1992).

337. Editorial, DAILY PRESS, Mar. 14, 2000, at 1.

338. VA. SUP. CT. R. 3A:15(b) (1992).

339. Herrera v. Collins, 506 U.S. 390, 410 (1993).

340. *Id.*

341. *Id.* at 411.

342. *See* Murray v. Giarratano, 492 U.S. 1, 6-7, 10 (1989) (holding that states are not required to provide counsel to indigent death row prisoners after direct appeal). However, federal law allows for the appointment of counsel, once a case moves into federal habeas litigation, but crucial issues may have been waived before then.

343. *See generally Giarratano*, 492 U.S. 1.

344. *E.g.*, 28 U.S.C. §§ 2241-2266.

Terrorism and Effective Death Penalty Act which sharply limits the availability of that writ.[345] This recent narrowing requires the federal court to reject all claims if the defendant did not follow the proper procedures in state court.[346] For example, if the claim is not raised on a defendant's first habeas petition, the claim, with rare exceptions, is automatically rejected even if the government withheld the evidence the defendant needed.[347]

Clemency is the "last avenue of relief" and is sought from the Executive Branch.[348] "Clemenc[y] in death penalty cases is extremely rare."[349] The procedures for clemency vary from state to state.[350] Every state has a pardon power vested either in their state governor or review board.[351] "In Nebraska, Nevada, and Florida, the chief state prosecutor sits on the clemency review board."[352] Texas requires a board appointed by the governor to review all clemency cases.[353] The board is not required to meet or hear testimony.[354] There have been no pardons granted in Texas to date.[355]

Investing the clemency power in the governor can be problematic. The governor is an elected official and there is rarely a review of his clemency decision.[356] Therefore, there is a danger of political motivation. Of the clemencies granted in favor of a defendant in the past twenty years, many were granted by governors as they were leaving office.[357]

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345. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18 U.S.C.).

346. Barry Latzer, DEATH PENALTY CASES: LEADING U.S. SUPREME COURT CASES ON CAPITAL PUNISHMENT 10-11 (1998). The Anti-Terrorism and Effective Death Penalty Act of 1996 imposes time limits for filing habeas petitions where previously there were no limits. Now a defendant must file the petition within one year of the last direct appeal. The Act also bars multiple habeas petitions except for a limited number of exceptions which must be authorized by the Federal Court of Appeals. *Id.*

347. *See* McCleskey v. Zant, 499 U.S. 467, 498 (1991).

348. STAFF OF HOUSE SUBCOMM. IN CIVIL AND CONSTITUTIONAL RIGHTS, COMMITTEE ON THE JUDICIARY, 103D CONG., 1ST SESS., (1993), INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKES EXECUTIONS, *available at* DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/article.php?scid=45&did=535.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

B. Federal Death Penalty Statute

The federal death penalty has been part of our national structure since our country's earliest origins.[358] In 1790, the First Congress of the United States enacted legislation providing the death penalty as a punishment for certain specified federal crimes.[359] The Constitution seems to allow for the death penalty: the Fifth Amendment, adopted in 1791, specifically acknowledges the continued existence of capital punishment, stating that:

> No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty or property, without due process of law . . . .[360]

Prior to *Furman*, federal juries were given "practically untrammeled discretion" in deciding whether a defendant would receive a sentence of life or death.[361] However, following the Supreme Court's ruling in *Furman*, Congress enacted a new procedure for aircraft piracy in 1974.[362] The Anti-Hijacking Act imposed a bifurcated sentencing hearing, a list of mitigating factors, and a list of aggravating factors.[363] In 1985, Congress passed its second post-*Furman* death penalty legislation and amended the Uniform Code of Military Justice to allow capital punishment for military personnel convicted of certain forms of aggravated espionage.[364] In 1988, Congress passed the Anti-Drug Abuse Act.[365] Under this statute, Congress authorized the use of the death penalty as a sanction for an offender who intentionally causes the death of a person while participating in a drug-related criminal enterprise or other major federal drug offense.[366] This Act

358. Furman v. Georgia, 408 U.S. 238, 304 (1972) (Brennan, J., concurring) ("[T]he first federal criminal statute provided a mandatory death penalty for that crime." (citing Act of April 30, 1790, § 14, 1, Stat. 115)).

359. Gregg v. Georgia, 428 U.S. 153, 177 (1976) (citing C. 9, 1 Stat. 112 (1790)).

360. U.S. CONST. amend. V.

361. *Furman*, 408 U.S. at 248 (Douglas, J., concurring).

362. Pub. L. 93-366, 88 Stat. 404, 411-413, *repealed by* Pub. L. 103-322, sec. 60003(b), 108 Stat. 1970 (1994).

363. Anti-Hijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409; *repealed by* Pub. L. 103-322, sec. 60003(b) (1994).

364. 10 U.S.C. § 852 (2000).

365. 21 U.S.C. § 848 (1988).

366. *Id.* § 848(c).

> A person engages in such enterprise if (1) the person violates a felony provision of the federal drug laws, and (2) the violation is part of a continuing series of violations of the federal drug laws undertaken by the person in concert with five or more other persons regarding whom the person serves as an organizer,

also provided for the sentence of death for an offender who intentionally caused the death of a law enforcement officer during a felony drug violation.[367]

A major change in the federal death penalty structure occurred in 1994 when Congress enacted the Federal Death Penalty Act (FDPA), which extended federal death penalty procedures to over forty offenses.[368] An additional four federal offenses were added to this list in 1996.[369] Federal law imposes the death penalty for both homicide crimes and non-homicide crimes.[370]

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supervisor or manager and from which that individual derives substantial income or resources.

Id.

367. *Id.* § 848(e) (stating "intentionally kills or counsels, commands, induces, procures or causes the intentional killing . . . of any Federal, State or local law enforcement officer engaged in, or on account of, the performance of such officers official duties and such killing results," if the person engaged in such conduct during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prior sentence for a federal felony drug violation).

368. 18 U.S.C. §§ 3591-3599 (2000).

369. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1286, 1292, 1296, 1330 (1996) (codified as amended in scattered sections of 28 U.S.C.).

370. *See* Bureau of Justice Statistics, Capital Offenses, 2006 – Statistical Table (Dec. 2007), http://www.ojp.usdoj.gov/bjs/cp/htm (follow "Capital Punishment - Statistical Table 2006" hyperlink; then follow "Table 3 Federal Capital Offenses, 2006" hyperlink). The Bureau of Justice Statistics lists, by state, the following as homicide-related capital crimes: destruction of aircraft, motor vehicles, or related facilities resulting in death (18 U.S.C. §§ 32-34); murder committed during a drug-related drive-by shooting (18 U.S.C. § 36); murder committed at an airport serving international civil aviation (18 U.S.C. § 37); retaliatory murder of a member of the immediate family of law enforcement officials (18 U.S.C. § 115(b)(3) [by cross reference to 18 U.S.C. § 1111]); civil rights offenses resulting in death (18 U.S.C. §§ 241, 242, 245, 247); murder of a member of Congress, an important executive official, or a Supreme Court Justice (18 U.S.C. § 351 [by cross reference to 18 U.S.C. § 1111]); death resulting from offenses involving transportation of explosives, destruction of government property, or destruction of property related to foreign or interstate commerce (18 U.S.C. § 844(d), (f), (i)); murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime (18 U.S.C. § 924(i)); murder committed in a Federal Government facility (18 U.S.C. § 930); genocide (18 U.S.C. § 1091); first-degree murder (18 U.S.C. § 1111); murder of a Federal judge or law enforcement official (18 U.S.C. § 1114); murder of a foreign official (18 U.S.C. § 1116); murder by a Federal prisoner (18 U.S.C. § 1118); murder of a U.S. national in a foreign country (18 U.S.C. § 1119); murder by an escaped Federal prisoner already sentenced to life imprisonment (18 U.S.C. § 1120); murder of a state or local law enforcement official or other person aiding in a federal investigation, murder of a State correctional officer (18 U.S.C. § 1121); murder during a kidnapping (18 U.S.C. § 1201); murder during a hostage taking (18 U.S.C. § 1203); murder related to the smuggling of aliens (18 U.S.C. § 1342); murder of a court officer or juror (18

In a federal death case, the opposing parties are litigating pursuant to different standards of proof. To understand the FDPA, one must be aware that the statute identifies aggravating and mitigating factors. Aggravating factors include evidence in support of the death penalty, while mitigating factors suggest against imposing the sentence of death.[371] The United States must prove its aggravating factors in support of the death penalty by proof beyond a reasonable doubt.

The defendant must demonstrate mitigating factors suggesting that death is not appropriate by a preponderance of the evidence. If the government meets its threshold burden, the jury is required to consider mitigating factors. Once the jury has concluded its fact finding, it considers whether "the aggravating factor or factors found to exist sufficiently outweigh the factor found to exist that would justify a sentence of death or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death."[372]

Thus, the FDPA is a "weighing" statute. It is the weighing process that leads to the jury's ultimate decision as to whether the defendant should be sentenced to death.[373] The jury must unanimously recommend death or the court must impose a sentence of life without the possibility of release.[374]

U.S.C. § 1503); murder with intent of preventing testimony by a witness, victim, or informant (18 U.S.C. § 1512); retaliatory murder of a witness, victim or informant (18 U.S.C. § 1513); mailing of injurious articles with intent to kill or resulting in death (18 U.S.C. § 1716); assassination or kidnapping resulting in the death of the President or Vice-President (18 U.S.C. § 1751 [by cross-reference to 18 U.S.C. § 1111]); murder for hire (18 U.S.C. § 1958); murder involved in racketeering offense (18 U.S.C. § 1959); bank-robbery-related murder or kidnapping (18 U.S.C. § 1992); willful wrecking of a train resulting in death (18 U.S.C. § 2113); murder related to a carjacking (18 U.S.C. § 2119); murder related to rape or child molestation (18 U.S.C. § 2245); murder related to sexual exploitation of children (18 U.S.C. § 2251); murder committed during an offense against maritime navigation (18 U.S.C. § 2280); murder committed during an offense against a maritime fixed platform (18 U.S.C. § 2281); terrorist murder of a U.S. national in another country (18 U.S.C. § 2332); murder by the use of a weapon of mass destruction (18 U.S.C. § 2332(a)); murder involving torture (18 U.S.C. § 2340); murder related to a continuing criminal enterprise or related murder of a Federal, State, or local law enforcement officer (21 U.S.C. § 848(e)); death resulting from aircraft hijacking (49 U.S.C. §§ 1472-1473). Non-homicide capital crimes: espionage (18 U.S.C. § 794); treason (18 U.S.C. § 2381); trafficking in large quantities of drugs (18 U.S.C. § 3591(b)); attempting, authorizing, or advising the killing of any officer, juror, or witness in cases involving a continuing criminal enterprise, regardless of whether such killing actually occurs (18 U.S.C. § 3591(b)(2)).

371. 18 U.S.C. § 3593(e) (2005).

372. *Id.*

373. *Id.*

374. *Id.*

VI. THE EVOLVING BURDEN OF PERSUASION

It was not until after the Constitution was adopted that the rule requiring proof of crime beyond a reasonable doubt crystallized in this country.[375] The reasonable doubt standard arguably replaced a higher burden of persuasion – the any doubt standard.[376]

In the thirteenth century, the practice of trial by jury "developed as a substitute for the older methods of trial – trial by battle, by ordeal, and by wager of law."[377] Jurors were not necessarily limited to determining their verdict on the evidence presented at trial,[378] nor did the courts charge the jurors on the applicable burden of persuasion.[379] Rather, jurors were bound by their oath taken before "God that they would determine the truth of the

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375. U.S. CONST. amend. XIV, § 1. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*; *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *see* Apodaca v. Oregon, 406 U.S. 404, 412 n.6 (1972).

376. Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 508 (1975) (disputing the assumption that the adoption of the reasonable doubt rule established a higher standard of persuasion when, in reality, it reduced the prosecutor's burden of proof in criminal trials). Morano cites the increased burdens placed upon the prosecutors, for example, emerging rules of evidence limiting the prosecutor's ability to prove a defendant's guilt beyond any doubt, as well as the defendant's ability to present evidence on his behalf, for the reduction in degree of certainty necessary to justify a guilty verdict. *Id.* at 514-15.

377. *Id.* at 509 (citing 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 317-19, 323-27, 332-37 (7th ed. 1956) (discussing the development of the early jury system); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 106-38 (5th ed., Little, Brown and Co. 1956); 2 FREDERICK POLLACK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 619-30, 645-56 (2d ed., Cambridge University Press 1898); JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 69-74 (1898)).

378. *Id.* (citing 1 HOLDSWORTH, *supra* note 377, at 317-19, 332-34; 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 259-60 (1883)).

> The means by which the jury was to inform itself of the facts so as to be able to form an opinion on the guilt or innocence of the defendant is not clear. Some commentators suggest that verdicts were not, as a rule, based upon first-hand knowledge possessed by the jurors and that a variety of methods, including the calling of witnesses, could be used to inform the jury.

Id. at 510 n.29 (citing 1 HOLDSWORTH, *supra* note 377, at 333-34; 2 POLLACK & MAITLAND, *supra* note 377, at 619-26; THAYER, *supra* note 377, at 122-36).

379. *Id.* at 510 (explaining that the practice of charging the jury with the applicable burden of persuasion did not develop until the seventeenth century) (citing 1 HOLDSWORTH, *supra* note 377, at 334-36; 9 HOLDSWORTH, *supra* note 377, at 127; THAYER, *supra* note 377, at 112-13, 166-70).

matters presented to them"[380] and acquit if they had any doubt in the matter.[381] Because of the "emphasis upon the solemnity of the jurors' duty" during this time period, the oath requirement appears to indicate that the burden to be applied in criminal cases was very close to an "absolute certainty."[382]

Although the practice of jury summation existed as early as the fourteenth century,[383] it was not until the seventeenth century that trial court judges charged the jury with a consistent standard of persuasion to be applied to the evidence presented in court.[384] "The standard of persuasion that most frequently appears in reported jury charges during the seventeenth century is the satisfied conscience test. Under this test, jurors were to convict the accused only if they were satisfied in their consciences that he was guilty."[385] The writings of Sir Edward Coke during the seventeenth century suggest that the charges to the jury incorporating the satisfied conscience test reaffirmed the high burden of persuasion of the

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380. *Id.* (citing 1 JOEL P. BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 811 (1866); 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 405 (S. Thorne trans. 1968); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 551-52 (3d Am. ed. 1836)).

> Bracton, writing around 1250-1258, quotes the oath taken by jurors in criminal cases as: "Hear this, ye justices, that we will speak the truth about what is asked of us on the King's behalf, nor will we for any reason fail to tell the truth, so help us God etc." Chitty quotes the oath taken by jurors in early nineteenth century criminal cases as: "You shall well and truly try, and true deliverance make between our sovereign lord the king and the prisoners at the bar, whom you shall have in charge, and a true verdict give, according to the evidence, so help you God."

Id. at 510 n.33 (citations omitted).

381. *Id.* at 510 (citing FRANCIS M. NICHOLS, BRITTON – AN ENGLISH TRANSLATION AND NOTES 400-03 (1901)). "Britton states: 'And let no falsehood be ever knowingly practiced; for they cannot swear in a matter of greater moment, than in that of life and member.'" *Id.* at 510 n.34; *see also* 2 POLLACK & MAITLAND, *supra* note 377, at 652 (indicating that "'acquittals seem to have been much commoner than convictions in the last days of Henry III' [*ca* 1260]"). *But see* THAYER, *supra* note 377, at 157 ("indicating that early criminal procedure was weighted heavily in the King's favor").

382. Morano, *supra* note 376, at 511.

383. *Id.* (citing THAYER, *supra* note 377, at 112-13).

384. *Id.* (citing 1 HOLDSWORTH, *supra* note 377, at 334-36; 9 HOLDSWORTH, *supra* note 377, at 127; THAYER, *supra* note 378, at 166-70). Professor Thayer relied upon *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), to show the growing predominance of in-court testimony as the means of proof. During the seventeenth and eighteenth centuries, the English courts began to require that jurors who had personal knowledge of the facts of the case declare such evidence in open court as sworn witnesses.

Id. at 511 n.35 (citing THAYER, *supra* note 378, at 173-74) (citations omitted).

385. *Id.* at 511-12.

"any doubt" test.[386]

During the late seventeenth century, a group of English philosophers – including John Wilkins, Robert Boyle, Joseph Glanville, and John Locke – rejected the prevailing doctrine that equated moral certainty with absolute certainty. With this came the philosophical basis for the reasonable doubt standard.[387] This group argued that one could not be absolutely certain of anything and that the concept of moral certainty could not demand such a high degree of proof.[388] Rather, they asserted that moral certainty required only that no reasonable doubts exist about one's beliefs.[389] "Wilkins' redefinition of moral certainty and Gilbert's application of the new definition to the standard of persuasion in criminal trials substantially contributed to the formulation and acceptance of the reasonable doubt rule as a replacement for the any doubt standard."[390]

It is traditionally believed that the first judiciary applying the requirement of proof beyond a reasonable doubt was in Britain in the case of *Rex v. Finney*.[391] This was a high treason case tried in Dublin in 1798

386. *Id.* (citing Edward Coke, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 29, 137, 210 (London 1797)); Trial of Mr. John Udall, 1 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1271, 1281 (London 1809); Trial of Sir Nicholas Throckmorton, 1 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS at 884-85).

387. *Id.* at 513.

388. *Id.* (citing Theodore Waldman, *Origins of the Legal Doctrine of Reasonable Doubt*, 20 J. HIST. OF IDEAS 299 (1959)).

389. *Id.*

390. *Id.* at 513-14.

391. *Id.* at 515; Trial of Patrick Finney, 26 HOWELL'S COMPLETE COLLECTION OF STATE TRIALS at 1019 (Thomas Jones Howell ed., London 1819); *see* Morano, *supra* note 376, at 515-26 (discussing that in *Apodaca v. Oregon*, 406 U.S. 404, 412 n.6 (1972), the United States Supreme Court referred to Judge May's theory written in 1876 that the doctrine first appeared in Trial of Patrick Finney, 26 HOWELL'S COMPLETE COLLECTION OF STATE TRIALS 1019 and Trial of Oliver Bond, 27 HOWELL'S COMPLETE COLLECTION OF STATE TRIALS 523 (Thomas Jones Howell ed., London 1820)). Evidence suggests the *Finney* court was not the first to charge the jury with the standard. "In [the Trial of James Weldon, 26 HOWELL'S COMPLETE COLLECTION OF STATE TRIALS 225], decided three years before *Finney's Case*, the charges of two of the three presiding judges contain unmistakable reference to the reasonable doubt rule." *Id.* at 515. "Baron George charged the jurors that 'if you feel such a doubt as *reasonable men* may entertain, you are then bound to acquit him.'" *Id.* at 516 n.64 (quoting Trial of James Weldon at 289 (emphasis added)). Justice Chamberlain "charged the jurors that, 'if from the special circumstances any *rational doubt* rests upon your minds, it will be your duty to acquit the prisoner.'" *Id.* at 516 n.64 (quoting Trial of James Weldon at 286 (emphasis added)). In 1797, a Canadian judge instructed a "jury that, if it had 'any reasonable ground of doubt,' it was the 'invariable direction of an English court of justice to lean on the side of mercy.'" *Id.* at 516 (quoting Trial of David Maclane, 26 HOWELL'S COMPLETE COLLECTION OF STATE TRIALS 721). In 1793, an American court in the state of New Jersey "specifically instructed the jurors that, 'where reasonable doubts exist,' they

during the Irish Treason Trials. However, in the Boston Massacre Trials of 1770,[392] Colonial judges were charging juries with the reasonable doubt standard.[393] Despite its appearance in criminal cases during the late Eighteenth century,[394] the doctrine of beyond a reasonable doubt did not become the accepted burden of persuasion in criminal cases in the United States until the mid-Nineteenth century.[395] Its growth in America was "gradual and the rate of acceptance varied from state to state."[396]

The presumption of innocence in favor of the accused is firmly ingrained in American jurisprudence.[397] This fundamental principle has been traced to biblical origins and has been shown to be substantially embodied in Roman and Canon law.[398] Early English legal scholars, as well as esteemed members of the court, have acknowledged this principle in varied recitations of the maxim that it is better to acquit ten guilty people than to convict one innocent person.[399]

The presumption of innocence does not automatically establish the burden of proof required to determine an accused's guilt or innocence. The presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.[400] The degree

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should acquit." *Id.* (quoting State v. Wilson, 1 N.J.L. 439 (1793)).

392. Morano, *supra* note 376, at 516 (citing the account of the Boston Massacre Trials appears in 3 L. KINVIN WROTH & HILLER B. ZOBEL, LEGAL PAPERS OF JOHN ADAMS (1965)).

393. *Id.*

394. *Id.* at 519.

395. *See id.* (discussing the growth of the reasonable doubt rule in America and the adoption of the rule by the respective states).

396. *See id.* (summarizing the adoption of the rule by the states).

397. *See* Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); *see also* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

398. *See Coffin*, 156 U.S. at 432, 454 ("Greenleaf traces this presumption to Deuteronomy, and quotes Mascardius Do Probationibus to show that it was substantially embodied in the laws of Sparta and Athens.").

399. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *358; CHANCELLOR SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 94 (A. Amos trans. 1825); 1 MATTHEW HALE, PLEAS OF THE CROWN 24 (1st Am. ed. 1847). These works were written during the fifteenth, seventeenth, and eighteenth centuries, respectively. *See also In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

400. *See* Paul C. Smith, *The Process of Reasonable Doubt: A Proposed Instruction in Response to* Victor v. Nebraska, 41 WAYNE L. REV. 1811, 1834 (1995) (citing McCormick's

of proof required to overcome the presumption of innocence is defined by the prevailing burden of persuasion.[401] In the American criminal justice system, the accused must be proven guilty beyond a reasonable doubt.[402]

VII. DEFINING REASONABLE DOUBT

Commonwealth v. Webster[403] is representative of the time when American courts began applying the beyond a reasonable doubt standard "in its modern form in criminal cases."[404] Writing for the majority, Chief Justice Shaw defined reasonable doubt as:

> [N]ot a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge . . . but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it.[405]

Many courts adopted Justice Shaw's definition of reasonable doubt in the nineteenth century,[406] with one court characterizing the instruction as "probably the most satisfactory definition ever given to the words 'reasonable doubt' in any case known to criminal jurisprudence."[407] However, while the Supreme Court has held that proof beyond a reasonable

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Handbook of the Law of Evidence 794 (2d ed. 1972)). Standards of proof vary in civil to criminal cases. The lowest standard of proof for civil cases is a preponderance of the evidence (more likely than not). A heavier burden of clear and convincing evidence is used for civil or quasi criminal cases. Finally, a reasonable doubt standard is used for criminal cases.

401. *See generally id.*

402. *In re* Winship, 397 U.S. 358, 361 (1970); *see also* Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850) ("[T]he evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt . . . .").

403. *Webster*, 59 Mass. (5 Cush.) 295 (1850).

404. Apodaca v. Oregon, 406 U.S. 404, 412 n.6 (1972) (plurality opinion).

405. *Webster*, 59 Mass. (5 Cush.) at 320.

406. *E.g.*, Bone v. State, 30 S.E. 845, 847 (Ga. 1897); Carlton v. People, 37 N.E. 244, 247 (Ill. 1894); State v. Kline, 6 N.W. 184, 185-86 (Iowa 1880); Polin v. State, 16 N.W. 898, 901 (Neb. 1883); Donnelly v. State, 26 N.J.L. 601, 615 (N.J. 1857); Morgan v. State, 27 N.E. 710, 712 (Ohio 1891).

407. People v. Strong, 30 Cal. 151, 155 (1866).

doubt is a constitutional requirement in every criminal trial[408] and juries shall be instructed on the necessity of such proof,[409] the Constitution does not require a definition of reasonable doubt as part of this instruction.[410] The Supreme Court's lack of guidance on the instruction of the reasonable doubt standard[411] has given rise to confusion and a wide lack of uniformity in the treatment of its definition among federal and state courts. Not only does the definition of reasonable doubt vary between courts, but the jurisdictions also diverge on whether or not a jury is to be instructed on the definition.

The Constitution does not require the use of any specific language to convey the concept of reasonable doubt.[412] Rather, when reasonable doubt is defined, the instruction shall be "taken as a whole," and this instruction must "correctly convey[] the concept of reasonable doubt to the jury."[413] Further, it must be determined whether there is a reasonable likelihood that the jury applied the instruction in an unconstitutional manner.[414]

Only once, in *Cage v. Louisiana*, has the Supreme Court held the jury instruction defining reasonable doubt as unconstitutional.[415] The jury

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408. *See generally In re* Winship, 397 U.S. 358 (1970).

409. Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979) (explaining that "failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error"); Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) ("[T]he Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated . . . . [T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.").

410. Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("[T]he Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course."); *see also* Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 982-83 (1993); Henry A. Diamond, Note, *Reasonable Doubt: To Define or Not to Define*, 90 COLUM. L. REV. 1716 (1990).

411. Regardless of whether the Court endorsed a specific definition, it is without authority and cannot exercise supervisory powers over state courts to adopt the definition. *See Victor*, 511 U.S. at 15.

412. *Id.* at 5. *C.f.*, Hopt v. Utah, 120 U.S. 430, 440-41 (1887) ("[S]ome explanation or illustration of the rule may aid in its full and just comprehension . . . . The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them."); *In re* Winship, 397 U.S. 358, 369 (1970) (quoting 9 Wigmore on Evidence 325 (3d ed. 1940)) ("The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly . . . a sound method of self analysis for one's belief.").

413. Holland v. United States, 348 U.S. 121, 140 (1954).

414. Estelle v. McGuire, 502 U.S. 62, 72 (1991). The Court held that the proper inquiry is not whether the jury could have interpreted the instruction in an unconstitutional manner, but whether there is a reasonable likelihood that the jury applied it unconstitutionally. *Id.*

415. Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam).

instruction in *Cage* provided in relevant part:

> "[A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*."[416]

The *Cage* holding was unclear as to whether the three questionable phrases of life, liberty, or property, had to be presented in the *Cage* context for an instruction to violate the reasonable doubt standard, and whether all three phrases had to be present. However, many courts have held that all three *Cage* phrases are clearly required.[417]

The Supreme Court had the opportunity to clarify the confusion resulting from *Cage* when presented with two consolidated cases: *Victor v. Nebraska*, and *Sandoval v. California*.[418] Despite finding portions of the instructions "problematic,"[419] "archaic,"[420] and "quite indefensible,"[421] the

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416. *Id.* at 40 (emphasis in original) (quoting State v. Cage, 550 So. 2d 39 (La. 1989)). The Court has since held that a *Cage* error is plain error per se. *See* Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) (holding that the Fifth and Sixth Amendments are interrelated, and an instruction that violates the beyond a reasonable doubt standard also denies the defendant's Sixth Amendment right to a jury trial).

417. Matt Nichols, Victor v. Nebraska: *The "Reasonable Doubt" Dilemma*, 73 N.C. L. REV. 1709, 1720 n.96 (1995); *see, e.g.*, Coral v. State, 628 So. 2d 954, 984 (Ala. Crim. App. 1992) ("Obviously, it was not the use of any one of the terms in *Cage*, but rather the combination of all three that rendered the charge in *Cage* unconstitutional."), *cert. denied*, 511 U.S. 1012 (1994); Bradford v. State, 412 S.E.2d 534, 536 (Ga. 1992) ("In *Cage*, it is clear that it was both the definition of reasonable doubt, which impermissibly equated reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt,' coupled with the reference to 'moral and reasonable certainty' that invalidated the jury instruction." (quoting Starr v. State, 410 S.E.2d 180, 182 (Ga. App. 1991)).

418. Victor v. Nebraska, 511 U.S. 1 (1994) (consolidating State v. Victor, 494 N.W. 2d 565 (1993) and People v. Sandoval, 841 P.2d 862 (1992)).

419. *Id.* at 19. Justice O'Connor described the language allowing the jury to convict based on "the strong probabilities of the case" unless there was a "substantial doubt" based on the evidence as "problematic," but found the overall instruction did not violate the Constitution. David Stewart, *Uncertainty about Reasonable Doubt*, 80 A.B.A.J. 38, 38 (June 1994).

420. *Victor*, 511 U.S. at 23 (stating that the common meaning of "moral certainty" has changed since Justice Shaw's instruction in *Webster*, but that, in the context of the instructions as a whole, the Court cannot say that the use of the phrase rendered the instruction unconstitutional.).

421. *Id.* at 23 (Kennedy, J., concurring).

Court upheld the jury instructions of both cases and did little to clarify the reasonable doubt standard. In addition to confusion regarding the definition of reasonable doubt, courts have split on the propriety of instructing the jury with any such definition.[422]

In 1963, the American Law Institute (ALI) completed the Model Penal Code. It seemingly advocated the replacement of "reasonable doubt" for a standard of "beyond all doubt."[423] Concerning the imposition of the death penalty, it included the provision that:

> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:
>
> . . .

> California's use of "moral evidence" is the most troubling, and to me seems quite indefensible. . . . I agree that use of "moral evidence" in the California formulation is not fatal to the instruction here. I cannot understand, however, why such an unruly term should be used at all when jurors are asked to perform a task that can be of great difficulty even when instructions are altogether clear. The inclusion of words so malleable, because so obscure, might in other circumstances have put the whole instruction at risk.

Id. (internal quotation marks).

422. *See generally* Diamond, *supra* note 410. Diamond compiled a list of federal circuit courts and state courts which have required a judge upon request to give the jury instructions defining reasonable doubt, namely the Courts of Appeals for the Third Circuit, Eighth Circuit, Tenth Circuit, and District of Columbia Circuit and the highest courts of Florida, Idaho, Indiana, Maryland, New Jersey, North Carolina, Pennsylvania, Rhode Island, and Washington. *Id.* at 1718. Additionally, his survey concludes that California, Missouri, Nevada, and Ohio, have statutes which define reasonable doubt for use in jury instructions. *Id.* at 1719. In contrast federal jurisdictions where jury instructions defining reasonable doubt are not required include: the Courts of Appeals for the Fourth Circuit, Fifth Circuit, and Seventh Circuit, and at the state level, the highest courts of Illinois, Mississippi, Texas, and Wyoming have also held that they are not required. *Id.* at 1719-20. As further explained by Diamond, the reasoning used by these latter courts "revolves around the idea of reasonable doubt as a self-defining term." *Id.* at 1720. Diamond argues that the subjective meaning of reasonable doubt is:

> 'hardly susceptible to significant improvement by judicial efforts to define the term with unattainable precision' and that 'attempts to explain the term . . . do not usually result in making it any clearer to the minds of the jury.' Instead, these attempts lead to 'unnecessary confusion and a constitutionally impermissible lessening of the required standard of proof,' which may supply 'the grounds for unnecessary constitutional challenges.'

Id. at 1720 (alteration in original) (citations omitted).

423. Greta Proctor, *Reevaluating Capital Punishment: The Fallacy of a Foolproof System, the Focus on Reform, and the International Factor*, 42 GONZ. L. REV. 211, 238 (2007).

> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.[424]

However, this approach was soon under attack and subsequently became out of fashion in law reform circles.[425]

VIII. A PROPOSED HIGHER BURDEN: BEYOND A CONCEIVABLE DOUBT

The disagreement over definitions of a reasonable doubt revolves around the clarity of such definitions and their ability to positively educate a jury.[426] In many courts today, reasonable doubt is held to be a self-defining term that cannot or should not be distilled into a clear and concise statement.[427] The California Statute is representative of the states that have a statute requiring a definition of reasonable doubt; it states, in part:

> [Reasonable doubt] is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.[428]

The purpose of such a definition is to enable the jury to make an accurate decision based on the evidence presented.[429] Recently, a trend by

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424. MODEL PENAL CODE § 210.6(f) (1962).

425. *See* Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1397 (2005).

426. *See* State v. Holm, 478 P.2d 284, 288 (Idaho 1970); Commonwealth v. Young, 317 A.2d 258, 262 (Pa. 1974) (only by receiving an instruction defining reasonable doubt "can a jury fulfill its responsibility to decide the guilt or innocence of an accused"); *see also Glass*, 846 F.2d at 387; Zuanich, *supra* note 40, at 240-41 (deriding a "no-doubt" standard as impossible, misleading, ineffective, unnecessary, and harmful, Zuanich calls for clearer jury instructions regarding reasonable doubt and its application to a trial). *See generally* Craig Haney, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 GOLDEN GATE U. L. REV. 131, 160 (2006) ("[S]tandard penalty phase instructions are so difficult for average people to understand and apply that many jurors simply are unable to comprehend their most basic features."); Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45 (2005) (theorizing that because absolute certainty is an impossibility, proponents of the "no-doubt" standard are really seeking a "moral" certainty standard).

427. *See, e.g.*, United States v. Glass, 846 F.2d 386, 387 (7th Cir. 1988) ("'Reasonable doubt' must speak for itself."); Murphy v. Holland, 776 F.2d 470, 475 (4th Cir. 1985) ("The term reasonable doubt itself has a self-evident meaning comprehensible to the lay juror.").

428. CAL. PENAL CODE § 1096 (West 2004). This philosophical discussion of the human condition is repeated in several other state statutes. *See also* NEV. REV. STAT. § 175.211 (1986); OHIO REV. CODE ANN. § 2901.05(B), (D) (West 2006).

429. People v. Love, 350 P.2d 705, 709 (Cal. 1960) ("[I]t is the jury, not the court, that

state legislatures to codify a definition of reasonable doubt evidences a need to clarify the definition and require its use in jury instructions.[430] However, this confusion is not simply set aside by a definition that is no clearer than the idea itself; further, juries still make mistakes.[431] In order to eliminate those mistakes in the sentencing of a final judgment,[432] the current burden of proof cannot be simplified, restated, or codified; it must be changed.

In 2003, the new governor of Massachusetts, Mitt Romney,[433] formed a council[434] for the purpose of making recommendations[435] to allow the creation of a fair capital punishment statute[436] for the state of Massachusetts which was narrowly tailored, and as infallible, as humanly

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must be convinced of defendant's guilt beyond reasonable doubts.").

430. *See* CAL. PENAL CODE § 1096 (West 2004); MO. REV. STAT. § 546.070 (West 2002); NEV. REV. STAT. § 175.211 (2006); OHIO REV. CODE. ANN. § 2901.05 (West 2006). California, Missouri, Nevada, and Ohio have statutes requiring that juries are to be instructed with a specific definition of reasonable doubt in criminal courts. Diamond, *supra* note 410, at 1719. Additionally, "the highest courts of Florida, Idaho, Indiana, Maryland, New Jersey, North Carolina, Pennsylvania, Rhode Island, and Washington, have required that jury instructions be given defining reasonable doubt in certain circumstances." *Id.* at 1718.

431. *See* James S. Liebman, *A Broken System: Error Rates in Capital Cases*, 78 TEX. L. R. 1839, 1844 (2000); Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent.* 61 LAW & CONTEMP. PROBS. 105, 105 (1998).

432. Zuanich, *supra* note 40 (stating that juries may sentence a defendant to death even if they have "lingering doubts" as to his guilt); Haney, *supra* note 426, at 160 ("The errors are fundamental, they are made frequently, and there is no evidence that they are corrected in the course of jury deliberation.").

433. *See* Kamin & Pokorak, *supra* note 2, at 143. As a Republican Candidate, Romney promised, in his campaign, to bring back the death penalty to Massachusetts. *Id.* The formation of the council was a direct outcome of this promise.

434. MASS. GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 18, at 22. *Compare* Eric Felten, *Rule of Law*, THE WALL STREET JOURNAL, Jan. 24, 1996, at A15; Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, THE NEW YORK TIMES, Mar. 8, 1995 at A15 (discussing other reasons to question the death penalty, centered on its gender bias and economic impact).

435. Kamin & Pokorak, *supra* note 2, at 145 ("Several of the Council's proposals have received widespread press attention and positive support from academics and practitioners.").

436. *Id.* at 144. Among the other recommendations set out by the council were: 4) New Trial Procedures to Avoid the Problems Caused by the Use of The Same Jury for Both Stages of a Bifurcated Capital Trial; 5) Special Jury Instructions Concerning the Use of Human Evidence to Establish the Defendant's Guilt; 6) A Requirement of Scientific Evidence to Corroborate the Defendant's Guilt and 10) The Creation of a Death-Penalty Review Commission to Review Claims of Substantive error and Study the Causes of Such error. MASS. GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 18, at 2.

possible.[437] Among the ten specific recommendations[438] made by the committee was "(7) A Heightened Burden of Proof to Enhance the Accuracy of Jury Decision-Making."[439]

The council stated that at sentencing, after a defendant has been found guilty "of capital murder 'beyond a reasonable doubt'" a second, higher burden of proof should be applied in the case of a death sentence.[440] This second burden of proof would be "the absence of any 'residual' or 'lingering' doubts"[441] held by any one juror, or by the jurors collectively, as to the guilt of the defendant.[442] The purpose of this burden of proof would be to preclude any defendant from being sentenced to death unless there was a unanimous assent by the entire jury as to his absolute guilt.[443]

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437. MASS. GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 18, at 3.

438. *Compare* Kamin & Pokorak, *supra* note 2 at 144 (describing a similar commission in Illinois which made over 100 recommendations for the improvement of Illinois's capital punishment system). "Illinois had also, quite famously, been forced to release thirteen condemned inmates from its death row when evidence of their innocence was brought to light. Illinois's Governor George Ryan responded to these developments by imposing an execution moratorium in his state." *Id.* at 144.

439. MASS. GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 18, at 22. For a detailed examination of the rising danger of innocent people being put to death, including a list of over twenty cases in which charges were dropped or acquittals were granted see DIETER, *supra* note 14. *See also* Tara L. Swafford, *Responding to* Herrera v. Collins*: Ensuring That Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603, 627-39 (1995) (making two proposals for reducing the risk that innocents are executed); James S. Liebman, Jeffery Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000) ("Because 'serious error' is error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial, each instance of that error warrants public concern.").

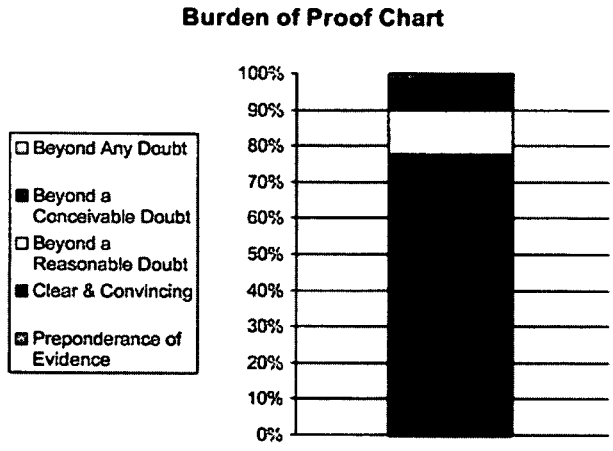
440. MASS. GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 18, at 22.

441. *Id.*; *see also* Zuanich, *supra* note 40, at 222.

442. MASS. GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 18, at 22.

443. *Id.* at 28. "Governor Romney stated that he was sufficiently confident of the safeguards recommended that he would bet his own life on the reliability of the proposed system." Kamin & Pokorak, *supra* note 2, at 145.

FIGURE 5[444]



Establishing the standard of an "absence of any 'residual' or 'lingering' doubts about the defendant's guilt"[445] sets the burden of proof, in the sentencing phase of the trial, as beyond a *conceivable* doubt; thus, a new level of the burden of proof in the sentencing phase of a death penalty case should be stated as beyond a conceivable doubt.[446]

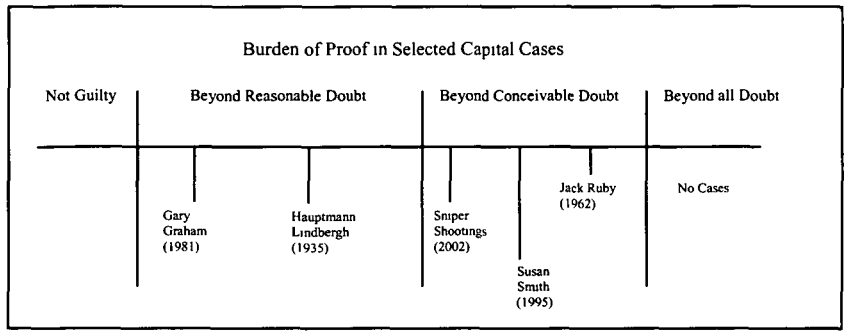
A sliding burden of proof in capital cases starts at the concept of "beyond any doubt" and moves downward through "beyond conceivable doubt" to "beyond reasonable doubt" and further on to "not guilty." Cases involving examples of these burdens of proof show how they can be used in an accurate determination of guilt.

444. This chart was created by the author for the purpose of giving a visual demonstration of the relationship between the conceivable doubt standard and other standards. It is not intended to quantify these abstract legal standards.

445. MASS. GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 18, at 22.

446. *See* Zuanich, *supra* note 40, at 232-40 (decrying a "no doubt" standard as impossible, misleading, ineffective, unnecessary, and harmful; thus a middle ground must be found between the unwieldy "no doubt" standard and the unclear "reasonable doubt" standard).

FIGURE 6



A. Cases in Which the Standard of Conceivable Doubt Would Be Satisfied

In 1963, Jack Ruby shot and killed Lee Harvey Oswald in the basement of the Dallas City Jailhouse.[447] In this case, unlike in most, there was no doubt that Jack Ruby was the killer. Not only were there several eyewitnesses present at the murder scene, but the murder was also caught on a television broadcast and seen by "[c]ountless thousands."[448] In fact, it has been pondered whether there was anywhere in the United States where jurors could be found who had not witnessed the murder.[449] Ruby confessed to the murder and eventually pled insanity as his defense.[450] It is beyond any conceivable doubt that Jack Ruby shot and killed Lee Harvey Oswald. However, even the evidence in that case would not preclude the outside possibility that the live television coverage of the killing of Lee Harvey Oswald was staged as part of a conspiracy to frame Ruby. Thus, as Brian Zuanich has observed: "The no-doubt argument is based on a faulty premise: that juries will always know for certain, after all the evidence has been presented, whether the defendant is guilty or innocent."[451] It would be unreasonable to expect this level of certainty in every capital case. The absence of any doubt is almost impossible to find.[452]

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447. Rubenstein v. State, 407 S.W.2d 793, 794 (Tex. Crim. App. 1966). Jack Ruby was one of several names used by Jacob (Jack) Rubenstein, the infamous nightclub owner responsible for the death of President John F. Kennedy's assassin. *See id.* at 796.

448. *Id.*

449. Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 135 (1998).

450. *Rubenstein*, 407 S.W.2d at 794.

451. Zuanich, *supra* note 40, at 232; *see supra* Part I.

452. Zuanich, *supra* note 40, at 224-25 ("[W]ithout first-hand knowledge of the facts [a jury] can never determine, with absolute certainty, whether a defendant is guilty or innocent."). Zuanich goes on to refute the need for a higher standard of proof; however, he limits his discussion to the "no-doubt" standard. *See id.* at 224.

In the case of the sniper shootings in Alabama, Louisiana, Maryland, Washington, D.C., and Virginia in 2002, in which sixteen people were shot over a forty-seven day period,[453] forensic evidence directly connected John Allen Muhammad to the killings.[454] At the time of his arrest, Muhammad was in a customized Chevy Caprice sedan[455] which contained a high velocity rifle, ammunition, maps, and items taken from earlier victims.[456]

The rifle was positively identified as the weapon used in fourteen of the sixteen shootings attributed to the sniper.[457] Muhammad's DNA was matched to samples found on the rifle[458] and at several of the shooting sites.[459] In addition to eyewitness testimony, a surveillance camera captured Muhammad near the vicinity of one of the shootings.[460] The Caprice had been modified to accommodate an individual using the trunk as a firing platform, and was also identified by several eye witnesses as being nearby when several of the shootings occurred.[461] As one area paper reported, the Virginia Supreme Court found that Muhammad "acted with 'breathless cruelty' in the shootings that killed 10 people in the Washington area in the fall of 2002."[462] It is clear, given the overwhelming amount of evidence, that Muhammad was guilty beyond a conceivable doubt.[463]

Another example is the kidnapping of Susan Smith's children on October 25, 1994.[464] Despite her initial deception, the case was solved when the young mother admitted her guilt in the disappearance and deaths

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453. Muhammad v. Commonwealth, 619 S.E.2d 16, 24 (Va. 2005).

454. *Id.* at 24-30.

455. *Id.* at 29.

456. *Id.* at 29-30.

457. *Id.* at 25-29.

458. *Id.* at 29 ("Inside the Caprice, police found a loaded .223 caliber Bushmaster rifle behind the rear seat. Tests determined that the DNA on the Bushmaster rifle matched the DNA of both Malvo and Muhammad. The only fingerprints found on the Bushmaster rifle were those of Malvo.").

459. *Id.* at 26-28.

460. *Id.* at 28.

461. *Id.* at 26-28.

462. Carol Morello, *Va. Court Upholds Muhammad Sentences: Sniper Could Be Sent To Another State*, WASHINGTON POST, Apr. 23, 2005, at B01 ("If society's ultimate penalty should be reserved for the most heinous offenses, accompanied by proof of vileness or future dangerousness, then surely, this case qualifies." (quoting Virginia Supreme Court Justice Donald W. Lemons)).

463. *Muhammad*, 619 S.E.2d at 35 ("[The] expert testimony, the evidence recovered from the Caprice, the evidence from the 16 shootings, and the additional evidence concerning Malvo and Muhammad's relationship and activities support the Commonwealth's theory of the case.").

464. Elizabeth Gleick, *It Did Happen Here: Amid New Revelations about Susan Smith, A Town Mourns Her Sons and Braces for the Trial*, TIME MAG., Dec. 19, 1994 at Crime.

of her children.[465] In a case that was both "sordid and . . . tragic"[466] Smith was convicted in the drowning death of her two small boys.[467] At first she claimed that she had been carjacked and her children abducted.[468] After nine days of investigation, Smith finally confessed to the murders.[469] She told police where they would find the children and that she was responsible for their deaths.[470] Once her guilt in committing the crime was proven, the question in that case became her mental state at the time the crime was committed.[471] Ultimately, Susan Smith was sentenced to life in prison by the South Carolina courts.[472]

B. Cases in Which the Standard of Reasonable Doubt Is Satisfied

In 1981 Bobby Lambert was robbed and killed outside of a Safeway in Houston, Texas.[473] In 2000, Gary Graham was executed by the State of Texas for Lambert's murder. There was no physical evidence linking Graham to the murder, thus the prosecution based its case on the testimony of one eyewitness, Bernadine Skillern.[474] She was the only witness to testify because "two other eyewitnesses, Wilma Amos and Daniel Grady, were unable to do so because they did not get a good enough look at, or did not sufficiently recall, the perpetrator's face."[475] Shortly before Ms. Skillern's testimony, a hearing was held without the jury to "determine whether her identification was 'tainted by [an] illegal line-up.'"[476] In addition, the defense counsel presented no evidence during the guilt-innocence phase, allowed Graham to be tried in the same clothes he was

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465. *Id.*

466. Dan M. Kahan & Martha C. Nussbaum, *Perspective on the Smith Trial: Emotions Weigh on the Scales of Justice*, L.A. TIMES, July 25, 1995, at B9.

467. *U.S. News Year in Review – Susan Smith Trial*, CNN, Dec. 28, 1995, http://www.cnn.com/EVENTS/year_in_review/us/smith.html [hereinafter *Year in Review*].

468. *Lawyer Says Mother Will Face Death Penalty in Drowning of Sons*, N.Y. TIMES, Jan. 16, 1995, at 10.

469. *Id.*

470. *See id.*

471. *Year in Review*, *supra* note 467.

472. *Id.*

473. Graham v. Johnson, 168 F.3d 762, 764-65 (5th Cir. 1999).

474. *Id.* at 765. The murder weapon did not match the gun that was found on Graham at the time of his arrest. *Id.* at 771.

475. *Id.* at 764.

476. *Id.* at 764-65 (quoting Gilbert v. California, 388 U.S. 263, 272 (1967)). "Skillern described in some detail how she had picked Graham out of a May 26, 1981 photographic display and a May 27, 1981 police station lineup, and defense counsel raised many of the same issues regarding suggestive identification procedures that Graham's current counsel now brings before us." *Id.* at 765.

wearing when arrested, refused to call four alibi witnesses, and refused to allow Graham to speak in his own defense.[477] While the appellate courts in *Graham* affirmed that the reasonable doubt standard had been met, a jury required to meet a standard of beyond a conceivable doubt would almost certainly not have imposed the death penalty.

In a similar case, Ruben Cantu was executed following a murder conviction that was based on the testimony of the only eyewitness.[478] The witness originally gave the police a very general and vague description of the individual that shot his friend to death in front of him.[479] After failing to identify Cantu in the first photographic line-up presented, the witness was subjected to two more over the course of several months.[480] Today, Juan Moreno, the man who identified Cantu, believes that he identified the wrong man: "I'm sure it wasn't him."[481] Also, in a similar set of circumstances, witnesses who could have provided an alibi for Cantu were never interviewed, no physical evidence linked Cantu to the crime, and the police reports had unexplained omissions and irregularities.[482]

Another example of a case proven beyond a reasonable doubt, but almost certainly not proved beyond a conceivable doubt, is the conviction of Bruno Richard Hauptmann.[483] In one of the most sensationalized cases of the twentieth century, Hauptmann was tried for the kidnapping and murder of Charles A. Lindbergh, Jr.[484] Hauptmann became a suspect in the murder when he was found in possession of money used to pay the ransom for the kidnapped boy.[485] In order to establish a link between Hauptmann and the crime scene, a "wood expert" was brought in to examine the ladder used to reach the young boy's bedroom window.[486] The expert testified

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477. *Id.* at 765-66.

478. Cantu v. State, 738 S.W.2d 249 (Tex. Ct. App. 1987).

479. *Id.* at 253. Juan Moreno described his assailant as "a Latin male between 18-20 years of age" wearing blue jeans. *Id.*

480. *Id.* at 251. Moreno changed his statements to the police officers, at times stating the defendant's name but refusing to identify his picture and later identifing his picture, but stating that he did not know the man's name. *Id.*

481. Lise Olsen, *The Cantu Case: Death And Doubt, Did Texas Execute An Innocent Man?*, HOUS. CHRON., Nov. 20, 2005, at A1.

482. *Id.*

483. State v. Hauptmann, 180 A. 809 (N.J. 1935). One of the many issues appealed by Hauptmann's attorneys was the burden of proof. "The court by its charge impaired a free verdict and impressed upon the jury his conclusions as to the evidence and imposed upon the defendant an unauthorized rule as to reasonable doubt." *Id.* at 820.

484. *Id.* at 813.

485. *Id.* at 826. In fact, $14,600 was found at Hauptmann's residence. *Id.* His story that it had been left by his ex-business partner before he left for Germany was never given any credence by the police. *Id.*

486. *Id.* The ladder was homemade and it was believed that the kidnapper built the

that scraps of wood found at Hauptmann's home matched exactly the ladder found at the Lindbergh home.[487] Other evidence included Hauptmann's limp for several days after the kidnapping;[488] a tool found at the crime scene matching a tool that was missing from Hauptmann's tool chest;[489] and the fact that Hauptmann's handwriting matched the ransom note.[490] Hauptmann was sentenced to death on a charge of guilty beyond a reasonable doubt,[491] even though no evidence conclusively placed him at the crime scene.[492]

The case of Roger Keith Coleman is an example of a case where a man was sentenced to death beyond a reasonable doubt.[493] After his sentencing, and until the time of his death, Coleman protested his innocence.[494] A movement was launched to prove his innocence and obtain his release, which culminated with his picture on the cover of Time magazine.[495] In 1982, Coleman was convicted of raping and murdering his sister-in-law.[496] The evidence weighed heavily against him; however, it was not conclusive.[497] While Coleman's hair was found on the victim's body, and

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ladder at home. *Id.*

487. *Id.* The wood used to make the ladder was traced back to a lumberyard in Hauptmann's neighborhood. *Id.*

488. *Id.* The ladder was broken, and it was conjectured by the prosecution that the kidnapper had been injured and the baby killed when the ladder broke as he was making his exit. There was no forensic evidence to support this hypothesis. *Id.* at 816.

489. *Id.*

490. *Id.* Other "exact" matches to Hauptmann's handwriting, including an incriminating phone number, were later proven to be forgeries. *Id.*

491. *Id.* at 826-27.

492. In affirming the conviction, the Court relied on the testimony regarding the ransom money, handwriting, and ladder, but not on evidence actually placing Hauptmann at the Lindbergh home. *See id.* at 826.

493. *See* Coleman v. Commonwealth, 307 S.E.2d 864, 876 (Va. 1983). The capital murder statute of Virginia does not permit a relaxed evidentiary standard applicable to the penalty phase of a capital murder trial; rather, the statute expressly provides that the "Commonwealth must prove the existence of one or both aggravating factors beyond a reasonable doubt." Powell v. Commonwealth, 590 S.E.2d 537, 555 (Va. 2004) (citing VA. CODE ANN. § 19.2-264.4(B) (2003)).

494. Maria Glod & Michael D. Shear, *DNA Tests Confirm Guilt of Executed Man by Va.*, WASH. POST, Jan. 13, 2006 at A01 [hereinafter *DNA Tests*] (noting that Coleman proclaimed his innocence even as he was strapped into the electric chair).

495. Maria Glod & Michael D. Shear, *Warner Orders DNA Testing In Case of Man Executed in '92*, WASH. POST, Jan. 6, 2006 at A01.

496. *Coleman*, 307 S.E.2d at 865-77 (stating that although the evidence against Coleman was entirely circumstantial, the court nonetheless found that the decision was not reversible error).

497. Jill Smolowe, *Must This Man Die?*, TIME, May 18, 1992 at 40. "The evidence – or lack of it – raised doubts about [Coleman's] guilt." *Id.*

blood of the same type of the victim's was found on his clothing, DNA tests of semen implicated more than one person.[498]

In 1990, new DNA tests seemed to prove Coleman's guilt, placing him in the two percent of the population who could have committed the crime.[499] After his execution in May, 1992, advocates continued to lobby for more extensive and new DNA testing in order to prove Coleman's innocence.[500] After being rebuffed by the Virginia Supreme Court, the advocates' wishes were finally granted by the governor in January 2006.[501] These new tests determined that there was only a one-in-nineteen-million chance that the semen found at the crime scene was not Coleman's,[502] thus certainly meeting a standard of beyond a conceivable doubt.

C. Cases in Which the Standard of Reasonable Doubt Was Satisfied, and the Innocent Were Nearly Put To Death[503]

In September 1995, Judge Frank H. Seay, after reviewing the case of death row inmate Ron Williamson, reversed the conviction and granted him a new trial.[504] At the end of his opinion he wrote the following:

> While considering my decision in this case, I told a friend, a layman, I believed the facts and the law dictated that I must grant a new trial to a man who had been convicted and sentenced to death. My friend asked, "Is he a murderer?" I replied simply, "We won't know until he receives a fair trial." God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case.[505]

The nearly complete lack of physical evidence,[506] the new technology of

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498. *Coleman*, 307 S.E.2d at 867-68.

499. *DNA Tests*, *supra* note 494, at A01.

500. Glod & Shear, *supra* note 495, at A01.

501. Richard Willing, *DNA Tests Could Show if Va. Executed an Innocent Man*, USA TODAY, Dec. 23, 2005, at 3A.

502. *DNA Tests*, *supra* note 494, at A01.

503. *See generally*, *Innocence After "Guilt,"* *supra* note 4 ("Punishment of the innocent may be the worst of all injustices." (quoting Jenner v. Dooley, 590 N.W.2d 463, 472 (S.D. 1999)). *See also* Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org (last visited Jan. 30, 2008).

504. Williamson v. Reynolds, 904 F. Supp. 1529 (D. Okla. 1995).

505. *Id.* at 1576-77. This excerpt is taken from the epilogue Judge Seay wrote following the conclusion to his decision. The inclusion of an epilogue, especially one so colloquial, is highly unusual.

506. *Id.* at 1552-53. The physical evidence was limited to hair evidence taken at the scene that was microscopically consistent with a sample given by Williamson. *Id.* Hair analysis is unreliable at best, and though experts can not even agree on a consistent error rate, studies have shown such rates as high as sixty-seven percent. *Id* at 1556 (citing Edward

DNA testing,[507] and the introduction of new evidence[508] eventually led to the exoneration of Ron Williamson for the rape and murder of Debra Sue Carter.[509] He was released in 1999, having been on death row, for a crime he did not commit, for over ten years.[510] Williamson came within two weeks of execution before a stay was granted.[511] Perhaps the most shocking aspect of Williamson's case, however, is not his complete innocence or how close he came to the death chamber; rather, it is how often this same set of circumstances has and continues to happen. In the past thirty-three years, over 120 people have been released from death row upon the introduction of evidence of their innocence.[512]

In 1985, John Thompson was convicted of murder and sentenced to death.[513] Fourteen years later, just five weeks before his scheduled execution, Thompson's lawyer uncovered new evidence that later led to a new trial at which he was acquitted of all charges.[514] Initially, Thompson's

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J. Imwinkelried, *Forensic Hair Analysis: The Case Against the Underemployment of Scientific Evidence*, 39 WASH. & LEE L. REV. 41, 41-44 (1982)).

507. Death Penalty Info. Ctr., The Innocence List, Cases of Innocence 1973-Present, http://www.deathpenaltyinfo.org [hereinafter The Innocence List] (follow "Innocence" hyperlink; then follow "Description of Each Innocence Case" hyperlink; then follow "1994-2003" hyperlink) (last updated Dec. 6, 2007); *see also Innocence After "Guilt," supra* note 4, at 162 (stating that "[i]n more than one hundred cases over the past twelve years, DNA evidence has been utilized in the postconviction [sic] stage to prove 'beyond any doubt' that the convicted individual never committed the crime.").

508. *Williamson*, 904 F. Supp. at 1549-52. Such evidence included the felony convictions and subsequent plea bargains offered to Glen Gore, a key witness; the fact that Teri Holland, a "witness" to the confession of Williamson, also heard the "confession" of another man convicted of murder, and had received a plea bargain of charges against her in exchange for her testimony in both cases; and that another person, Ricky Joe Simmons, had since confessed to the murder. *Id.*

509. The Innocence List, *supra* note 507. In total, Williamson asserted seventeen grounds for relief. *Williamson*, 904 F. Supp. at 1535. The one treated at most length was the issue of his competency to stand trial. Williamson had a long history of mental illness, and the fact that this was never brought up during his trial, by either the prosecution or the defense, was an important factor in the decision to review his trial. *Id.* at 1529.

510. The Innocence List, *supra* note 507.

511. *Frontline: Burden of Innocence* (PBS television broadcast May 1, 2003) (transcript), http://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/script/html.

512. FACTS ABOUT THE DEATH PENALTY, *supra* note 33, at 2 (providing statistics for only those people exonerate from death row); *cf. Innocence after "Guilt," supra* note 4, at 162 (stating that over one-hundred exonerations have been granted in the last twelve years simply on DNA evidence).

513. Louisiana v. Thompson, 825 So. 2d 552, 553 (La. 2002).

514. *Id.* An investigator discovered microfilmed records that showed that the State had withheld blood identification evidence in an armed robbery case in which Thompson had been convicted of attempted armed robbery. *Id.* The evidence conclusively proved that

death sentence was vacated and a life sentence was imposed.[515] New evidence was produced with allowed a retrial to be granted for Thompson. During this retrial he was able to take the stand in his own defense and was acquitted of all charges.[516]

Anthony Porter was convicted of a double murder in 1983 which was finally reversed in March of 1999.[517] He received a stay in 1998, just days before his scheduled execution, so that the Supreme Court could determine his mental competency.[518] The conviction was reversed after another man confessed to the murders.[519]

In a truly close call, Joseph Green Brown received a stay of execution thirteen hours before he was scheduled to be executed.[520] His original

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Thompson was not guilty of that crime. *Id.* The State had used the attempted armed robbery conviction as an aggravating circumstance to support Thompson's death sentence. *Id.*

515. *Id.* In late 1999:

> [Thompson] filed . . . an application for post conviction relief . . . raising five claims: (1) he was denied his right to testify at trial because of the existence of the prior attempted armed robbery conviction, which had been the product of misconduct by the State; (2) he was denied his right to present a defense because he could not testify due to the existence of the attempted armed robbery conviction; (3) the State withheld exculpatory evidence; (4) his due process rights had been violated due to the egregious conduct of the State; and (5) at a minimum, his death sentence should be vacated because it was based upon his attempted armed robbery conviction, which had been set aside. The court heard the matter on October 26, 2000, and on May 26, 2001 the court denied the application as to the first degree murder conviction but vacated the death sentence and imposed a sentence of life imprisonment.

Id.

516. Press Release, Brenda Bowser, Death Penalty Info. Ctr., La. Man is Nation's 108th Death Row Exoneree (May 9, 2003), http://www.deathpenaltyinfo.org/PR-DPIC 108.pdf.

517. Richard A. Rosen, *Innocence and Death*, 82 N.C.L. REV. 61, 79 n.61 (2004).

518. *Id.* at 95.

> The courts allowed him to live only because there was evidence he had a low mental capacity, low enough to raise questions about whether he was even eligible to be executed. On this basis, and this basis alone, an Illinois court was willing to grant a last minute stay, and then only to explore mental capacity.

Id.

519. *Id.* "After a court granted Porter's stay of execution, some college students and a private investigator took on his case and ended their investigation by videotaping the real killer confessing to the crime." *Id.*; *see also* Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 245-46 (2006) (discussing the effect of the Miranda decision on confessions obtained under police interrogation, Rosen states "interrogations are still secret, carried on away from the eyes and ears of everyone but those asking and those answering police questions").

520. The Innocence List, *supra* note 507 (follow "1984-1993" hyperlink).

conviction of murder, rape and robbery was later overturned because it was found that the state "knowingly allowed material false testimony to be introduced at trial."[521] The state also knowingly exploited that testimony in its closing arguments.[522] Because of the lack of physical evidence linking Brown to the scene of the crime the case against Brown hinged on the testimony of one Ronald Floyd, who stated that he was with Brown shortly before and after the crimes were committed.[523] As was later revealed, Floyd was given immunity in exchange for his testimony against Brown, a fact about which he lied during the trial.[524] This lie was further compounded when the prosecuting attorney, in his closing arguments, recited the fact that Floyd had received no promises or incentives for his testimony, even though the prosecutor knew that statement to be false.[525]

Although not all death penalty cases are as close as Brown's, the lack of

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521. Brown v. Wainwright, 785 F.2d 1457, 1458 (11th Cir. 1986).

> We need not develop the facts concerning the plea agreement with Floyd relating to the motel robbery. There is evidence that an agreement was reached on this offense in October 1973, eight months before the Barksdale trial and before negotiations began for an agreement concerning the Barksdale case. At the time of the Barksdale trial Floyd had not been sentenced in the motel robbery case. As set out in the testimony . . . Floyd denied any knowledge of why he had not been sentenced. After the Barksdale trial, on pleas of guilty, Floyd and Brown were sentenced for the motel robbery. Floyd was given probation. Brown got 20 years . . . . But we do not base our decision upon the testimony concerning the agreement relating to the motel case, since the false testimony relating to the Barksdale case agreement, and the prosecutions misrepresentation of it, require granting the writ.

Id. at 1461.

522. *Id.* at 1458, 1460 ("In his closing argument to the jury the prosecutor used Floyd's denial of any promises to bolster Floyd's testimony.").

523. *Id.* at 1458-59.

> According to Floyd's testimony. . . . Floyd waited in the car . . . while the other two entered the store. . . . About 15 minutes later Floyd went to the door of the shop to look in, heard a shot, entered the store and saw the foot of a body lying on the floor. . . . Floyd also testified that the next day he, Brown, and Raymond Vinson were together and heard a radio broadcast concerning the . . . murder. Floyd said something like "People will do anything these days." Brown responded, "Yes, she never should have done what she did." Vinson's testimony corroborated this conversation. Later that day, Floyd testified, he asked Brown outright whether he had killed "the woman". . . . Brown responded "Yes," and followed the answer with a crude sexual remark to the effect that he had had intercourse with her."

Id.

524. *Id.* at 1460, 1464.

525. *Id.* at 1460.

evidence in his case and many others brings clearly into focus a need for a higher burden of proof in death penalty sentences. If Brown could be convicted beyond a reasonable doubt, even though he was in fact framed, it should be obvious that changes need to be made. And even though Brown's conviction was overturned in 1987,[526] this problem is still relevant today. The charges against Ron Williamson and Anthony Porter were dismissed in 1999,[527] and John Thompson was acquitted in 2003.[528] In the most recent case, John Ballard was convicted of a double murder in 2003 and sentenced to death.[529] His conviction was overturned in 2006 for a lack of evidence.[530] In its opinion, the Florida Supreme Court stated that the State could never meet its burden of proof at trial.[531] With these kinds of convictions being handed down as recently as 2003, it is apparent that concerns over questionable convictions are a continuing concern.

IX. CONCLUSION

In order to more accurately and aptly apply capital punishment, a bifurcated system including a higher burden of proof in the sentencing phase is needed. A burden of proof in a death penalty case requiring that guilt be proved "beyond any doubt" is an impossible and impractical burden, tantamount to abolishing the death penalty in its entirety. The standard of proof of "beyond a reasonable doubt," now adopted in all states with a death penalty, and in the federal courts, is too low a standard in that it leaves open the possibility of an innocent person being put to death by the state. Indeed, there is persuasive evidence that this has already occurred. A standard of "beyond a conceivable doubt" is the standard best suited to ensure that no innocent person is ever executed, while at the same time not imposing an impossible burden of proof that would be tantamount to abolishing the death penalty.

526. The Innocence List, *supra* note 507.
527. *Id.* (follow "1994-2003" hyperlink).
528. *Id.* (follow "1994-2003" hyperlink).
529. *Id.* (follow "2004-Present" hyperlink).
530. *Id.* (follow "2004-Present" hyperlink).
531. Ballard v. State, 923 So. 2d. 475, 485 (Fla. 2006).